SEPARATE OPINION OF JUDGE MORELLI

[Translation]

I consider that it would have been preferable to concentrate the grounds for the Judgment on the essential point in the contention of Thailand as presented in the Preliminary Objections.

1. That contention was that the declaration of 20 May 1950, purporting to renew for a further period of ten years the declaration of 20 September 1929, "was wholly ineffective, because the declaration of 20 September 1929 lapsed on the dissolution of the Permanent Court on 19 April 1946 and thereafter was incapable of renewal". In consequence Cambodia was not entitled to invoke against Thailand "the jurisdiction of the Court under Article 36, paragraph 2, of the Statute" (Preliminary Objections, paragraph 5). The reference was, of course, to the jurisdiction of the International Court and to Article 36, paragraph 2, of the Statute of this Court. Indeed, paragraph 12 of the Preliminary Objections says: "It is only by her declaration of 20 May 1950 that Thailand can be alleged to have accepted the compulsory jurisdiction of the International Court subsequently."

According to Thailand (Preliminary Objections, paragraph 13), the document of 20 May 1950 did not contain an original declaration. All that Thailand professed to do by that document was to "renew" the declaration of 20 September 1929. The document was so worded as to preserve an existing obligation. It could not restore life to an undertaking which had expired years before. The declaration of 20 September 1929, having lapsed on 19 April 1946, could be neither renewed nor preserved. Hence, according to Thailand, the document of 20 May 1950 was devoid of legal effect.

Thailand (Preliminary Objections, paragraph 14) denies that the document of 20 May 1950 can be regarded as a new and original declaration, because it is one thing to renew a supposedly existing declaration, but quite another to make a new declaration.

In paragraph 15 of the Preliminary Objections it is pointed out that, since Thailand had never been under an obligation to recognize the compulsory jurisdiction of the International Court, to recognize that jurisdiction would have been for Thailand to accept a new obligation:

> "The document of 20 May 1950 cannot, in the submission of the Government of Thailand, be interpreted as an acceptance of a new obligation, as opposed to an attempted renewal of an obligation believed already to exist."

Here again it is a question of a renewal of submission to the jurisdiction of the International Court.

In this way Thailand posed the problem of the validity of the declaration of 20 May 1950 as a declaration made on the basis of Article 36, paragraph 2, of the Statute of the International Court and purporting directly to accept the jurisdiction of that Court.

2. The contention advanced in the oral proceedings was quite different. According to that contention, which was developed more particularly at the hearing of 14 April, Thailand, by her declaration of 20 May 1950, purported to maintain in force the obligation contained in her declarations of 1929 and 1940, that is, an obligation to submit to the jurisdiction of the Permanent Court; this was in order to achieve, in application of Article 36, paragraph 5, of the Statute of the present Court, her subsequent purpose of submission to the jurisdiction of this Court.

As will be seen, the difference between this contention and the original contention lies in the completely different presentation given to the intention which Thailand is said to have expressed in her declaration of 20 May 1950.

3. The latter contention of Thailand is *ictu oculi* unfounded for the following reasons:

(a) In conformity with the interpretation given it by Thailand itself in the Preliminary Objections, the declaration of 1950 is quite clearly a declaration made on the basis of Article 36 of the present Statute, to which Article the declaration expressly referred. Express reference, it is true, is made only to paragraph 4. That reference however is sufficient to prove that the declaration is made on the basis of the present paragraph 2, with which paragraph 4 is closely linked. It is inconceivable that Thailand, while expressly referring to the present paragraph 4, should have intended to make a declaration based upon paragraph 2 of Article 36 of the Statute of the Permanent Court.

(b) We cannot ascribe to Thailand the absurd idea of making a declaration in 1950 on the basis of a text (the Statute of the Permanent Court) which was no longer in force, a declaration purporting to accept the jurisdiction of a Court which had ceased to exist—and all this in order indirectly to achieve a purpose (submission to the jurisdiction of the present Court) which could be directly achieved by a declaration based upon the Statute now in force.

(c) The aim pursued by Thailand could not possibly be achieved by the indirect method suggested by Counsel for Thailand in

his address to the Court. Paragraph 5 of the present Article 36 has reference to declarations made earlier, as is shown by the phrase "which are still in force". That paragraph does not contemplate the somewhat fanciful case of a declaration made after the entry into force of the present Statute and after dissolution of the Permanent Court, for the purpose of accepting the latter's jurisdiction.

4. I shall now examine the original Thai argument set forth in the Preliminary Objections concerning the validity of the 1950 declaration as a declaration made on the basis of Article 36, paragraph 2, of the present Statute.

If the argument of Thailand were a sound one, the declaration of 1950 would have to be considered as an act invalid because devoid of object. In my opinion, such invalidity could reside only in a genuine nullity, a nullity absolute and *ipso jure*. In any case, this is quite clearly not a question of form although the Parties introduced such a notion in the course of the oral proceedings.

According to Thailand, the inability of the declaration of 20 May 1950 to renew the declaration of 20 September 1929 follows from the fact that the latter declaration, which embodied acceptance of the compulsory jurisdiction of the Permanent Court and which lapsed upon the dissolution of that Court on 19 April 1946, had not been converted into an acceptance of the compulsory jurisdiction of the International Court through the effect of paragraph 5 of Article 36 of the present Statute (Preliminary Objections, paragraph 12). This last assertion rests upon the Judgment of the Court in the *Israel* v. *Bulgaria* case.

5. Whilst expressly reserving my opinion concerning the interpretation of Article 36, paragraph 5, I would first observe that, if we accept the interpretation given by the Court, we are bound to deny that that clause was operative in respect of the Thai declaration. For that reason I consider the position of Thailand to be perfectly analogous to that of Bulgaria so far as concerns the particular question of whether Article 36, paragraph 5, was or was not operative.

In this context Cambodia, in paragraph 12 of her Observations and in the oral proceedings, advanced certain differences of fact between the case of Bulgaria and that of Thailand (period that elapsed between the declaration and admission to the United Nations; time that elapsed between the dissolution of the Permanent Court and admission to the United Nations). But these differences do not in any way affect the application of the principle laid down in the Judgment of the Court. The Court states in its 1959 Judgment that consent to the transfer of a declaration from one Court to the other can be deemed to have been given only by a State signatory of the Charter. The reference made by the Court

(*Reports 1959*, p. 142) to the case of a State which, like Bulgaria, has for many years remained a stranger to the Statute does not in any way restrict the purport of the preceding statement, in the sense that consent to the transfer must be deemed to be non-existent only when a fairly long time has passed before admission to the United Nations.

6. Cambodia further claims, both in her Observations and in her oral pleadings, that consent by Thailand to the transfer of her declaration from the Permanent Court to the International Court can be inferred from the attitude maintained by Thailand herself in that Thailand held the transfer to have taken place through the effect of Article 36, paragraph 5.

This argument raises a question other than that of interpretation of Article 36, paragraph 5. Once this provision is interpreted in conformity with the Court's opinion as meaning that it expresses consent to transfer only on the part of States which signed the Charter, we have to consider whether and how such transfer might be effected, in the case of a non-signatory State, otherwise than through the effect of Article 36, paragraph 5. The question could only be settled on the basis of Article 36, paragraph 2. It would have to be seen, in particular, whether the declaration referred to in that clause might be replaced by a tacit manifestation of intention. The answer to that could only be in the negative. The decisions in the cases cited by Cambodia to show that acceptance of the Court's jurisdiction is not dependent upon observance of any specific forms are irrelevant. Those decisions related to acceptance of the Court's jurisdiction in a particular case. But, on the contrary, for the acceptance of what is called the compulsory jurisdiction of the Court by means of the declaration mentioned in paragraph 2 of Article 36, the requirements stated in that provision must be observed—and quite independently of the legal character possessed by the declaration (unilateral act or part of an agreement).

In any event, it is not possible to see in Thailand's attitude, as indicated in the Cambodian Observations and in the pleadings of the Cambodian Counsel, any manifestation of an intention to accept the compulsory jurisdiction of the International Court. An intention to accept compulsory jurisdiction is one thing; quite another is the belief, whether correct or mistaken, of being already subject to that jurisdiction.

7. We must therefore examine the Thailand argument according to which the fact that Thailand's submission to the compulsory jurisdiction of the Permanent Court had come to an end on 19 April 1946, combined with the fact that, according to the decision of the Court, that submission had not been replaced by submission to the compulsory jurisdiction of the International Court through the effect

of Article 36, paragraph 5, prevented the declaration of 20 May 1950 from having any effects.

To this end we must first define what is meant by "renewing" an earlier declaration and, in particular, what Thailand meant to do when she declared on 20 May 1950 that she was renewing the declaration of 20 September 1929.

The question I have just raised relates to the case of a declaration renewing an earlier declaration. What is known as a "tacit renewal" is an altogether different case, one where there is no new declaration at all. In such a case, too, there can be no question of the automatic renewal of the earlier submission to the jurisdiction of the Court, since this is the case of an earlier submission which, unless denounced, will continue to produce its effects.

8. So far as concerns the present case (and, in general, the case of a declaration renewing an earlier declaration), we have to determine the relationship between a declaration renewing an earlier declaration and the declaration that is renewed.

That relationship does not concern the effects of the renewed declaration. In other words, the new declaration does not purport to modify the effects of the earlier declaration in the sense of prolonging or extending those effects.

The relationship concerns rather the content of the new declaration. Just because it is a new declaration, it is an altogether independent one even though its content is determined by reference to an earlier declaration. Such reference may be more or less comprehensive. The reference by one declaration to the other need not effect an absolute identity of content between the two declarations.

In the first place, the very idea of renewal implies some difference between the two declarations in the matter of their time factors.

In connection with those factors it has also to be observed that the moment from which the new declaration begins to produce its effects does not need to coincide with the moment when the effects of the earlier declaration cease. On the contrary, it is quite possible for a declaration which states the intention to "renew" an earlier declaration to date the beginning of its effects from a moment subsequent to that at which the effects of the renewed declaration terminated; the consequence of this is to break the continuity of the periods covered by the two declarations. In the same way, the effects of the new declaration may begin before the moment stated in the earlier declaration as the moment at which its effects are to terminate; in other words, the new declaration may replace the declaration that it is renewing for a portion of the latter's duration.

This is the situation in the present case. The declaration of 3 May 1940, renewing the declaration of 20 September 1929 for a ten-year period as from 7 May 1940, expired on 6 May 1950. Yet the declaration of 20 May 1950 renewed the declaration of 1929 for a further period of ten years as from 3 May 1950.

Apart from the time factors, a declaration purporting to renew an earlier one, while determining its content by reference to the renewed declaration, may depart from it to a greater or lesser extent. That does not prevent it from being rightly termed the renewal of an earlier declaration.

With regard to the declarations by Thailand made on 20 September 1929 and 20 May 1950, the two declarations are found to be identical so far as concerns certain conditions accompanying each of them, through the fact that the declaration of 1950 renews that of 1929 "with the limits and subject to the same conditions and reservations" as set forth in the latter. On the other hand, there is a fundamental difference in the very object of the two declarations: the 1929 declaration relates to the jurisdiction of the Permanent Court, whereas the declaration of 1950 relates to the jurisdiction of the International Court. Their object could only be called identical if the object of the 1929 declaration (renewed in 1940) were regarded as already transformed by the supposed effect of Article 36, paragraph 5. There is however no mention of such transformation in the declaration of 1950.

9. Accordingly, a declaration that renews an earlier declaration is an independent declaration, although it refers to the renewed declaration for the purpose of determining its content. It is not a declaration purporting to prolong the effects of the declaration it renews. It purports to produce effects which, in themselves, are independent of the effects produced by the declaration renewed.

It follows in the first place that renewal does not presuppose the initial validity of the declaration renewed. It is therefore quite possible to renew a declaration which, because it is void, has never produced any effects.

In the second place, it is possible to renew a declaration which is no longer in force at the time of renewal.

This last possibility is proved by Thailand's own attitude both on the occasion of the declaration of 3 May 1940 and on the occasion of that of 20 May 1950.

The declaration of 20 September 1929, made subject to ratification, achieved fulfilment and came into force on 7 May 1930, when its ratification was deposited with the Secretary-General of the League of Nations. As that declaration had been made for a period of ten years, that period expired on 6 May 1940. The declaration renewing the declaration of 20 September 1929, although

it was dated 3 May 1940, did not achieve fulfilment until 9 May 1940 by its deposit with the Secretary-General of the League of Nations. (It should be mentioned in this connection that the declaration of 3 May 1940 contained no reservation about ratification, for the reference to the limits, conditions and reservations set forth in the declaration of 20 September 1929 cannot be deemed to include the reservation concerning ratification.) It is true that the declaration of 1940, although it achieved fulfilment on 9 May, produced its effects, in a retroactive manner, as from 7 May. Nevertheless, at the moment when the renewal took place by deposit of the declaration, the declaration it renewed was no longer in force.

The declaration of 1940, having been made for a period of ten years beginning on 7 May 1940, would have remained in force until 6 May 1950 if, as Thailand believed, Article 36, paragraph 5, of the Statute had operated in regard to it. But the last renewal was made by a declaration bearing the date of 20 May 1950 and achieved fulfilment by deposit with the Secretary-General of the United Nations on 13 June 1950 (this declaration, like the previous one, was not accompanied by any reservation about ratification). Both the dates mentioned (20 May and 13 June 1950) are subsequent to the time at which the 1929 declaration, renewed in 1940, would have lapsed even if Article 36, paragraph 5, had been operative in respect of it (it is of no importance that the 1950 declaration was made retroactive as from 3 May, that is to say, as from a date that is even earlier than that of the supposed expiry of the renewed declaration). Thailand may have been convinced that, pursuant to Article 36, paragraph 5, her declaration had continued to exercise its effects even after the dissolution of the Permanent Court; but it is in any case quite certain that, when she renewed her declaration by the declaration of 20 May 1950, deposited on 13 June 1950, Thailand knew very well that at that time the declaration which she professed a wish to renew had ceased to be in force.

Thailand's attitude at the time of the two declarations of 1940 and 1950 proves that her argument based on the impossibility of renewing a declaration that is no longer in force is without foundation. The attitude of Thailand as evinced by the declaration of 1950 is especially decisive on this point. If, at the time when that declaration was made, the declaration which was to be renewed was beyond all doubt no longer in force, no importance can attach to the fact that the renewed declaration had lapsed on 19 April 1946 or rather (as Thailand herself believed) on 6 May 1950.

10. In reality, the declaration of 20 May 1950 is an independent declaration, although, for determination of its content, it refers to

the earlier declarations. It is only this reference which the formula of renewal is intended to indicate. By that formula Thailand expressed her intention to accept the jurisdiction of the International Court on certain conditions, some of which were determined by a reference to the earlier declarations. Thailand did not express her intention of prolonging her submission to the jurisdiction of the Court in so far as such submission could be deemed to exist in fact. No such effect was in any case possible because, as Thailand very well knew, the declaration which it was sought to renew was no longer in force at the time when the new declaration was made.

(Signed) Gaetano MORELLI.