3. OBSERVATIONS AND SUBMISSIONS OF THE GOVERNMENT OF ISRAEL ON THE PRELIMINARY OBJECTIONS OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BULGARIA *

Introduction

1. The Government of Israel has the honour to submit these Written Observations, pursuant to the Order made by the President of the International Court of Justice on 17 December 1958. Following the Orders made by the Court on 26 November 1957 and by the President on 27 January 1958, and after the Memorial of the Government of Israel filed on 2 June 1958, the Government of Bulgaria raised certain challenges to the jurisdiction of the Court to determine the issues raised by the Government of Israel in this case. While recognizing that the respondent Government was within its rights in so doing, the Government of Israel regrets that the Government of Bulgaria has not made any concrete response to the suggestion of the Government of Israel, expressed in paragraph 56 of the Memorial, to continue to seek a solution of the dispute by means of diplomatic negotiations, and has interrupted the proceedings on the merits.

2. The present Written Observations will reply to the Bulgarian Communication dated 3 December 1958 and the Bulgarian telegram dated 8 December 1958. The first of these documents set forth two Preliminary Objections. The telegram intimated that Bulgaria wished to raise three alternative additional Objections, regarding which appropriate additions were also made to the formal Submissions of the Communication of 3 December. By a letter of 11 December 1958 the Bulgarian Agent forwarded to the Registry a "single text", itself dated 8 December 1958, purporting to consolidate the preliminary objections. According to that letter, this text was one "réunissant toutes les exceptions préliminaires présentées jusqu'à présent par la Bulgarie dans le délai fixé par la Cour et contenues dans l'exposé écrit, déposé au Greffe le 6 décembre et dans le télégramme du 8 décembre a. c.". However this single text † (received in the Registry after the expiration of the time-limit fixed by the Order of 27 January 1958) is not identical with the two documents previously filed, several modifications having been made. Nevertheless, wherever appropriate reference will be made in these Written Observations to the text of 8 December 1958 although that is not the formal pleading setting out the preliminary objections.

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* See Part IV, *Correspondence*, Section A, No. 87.
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3. These Written Observations are divided into this Introduction . nd four parts. Part I deals with the objections set forth in the Communication of 3 December 1958. Part II deals with the objections set forth in the telegram of 8 December 1958. Part III contains the Submission of these Written Observations. Part IV contains the list of annexes which, for general convenience, have been numbered consecutively to the annexes of the Memorial.

4. The Government of Israel considers that the Preliminary Objections do not fully comply with Article 62 of the Rules of Court which requires that the preliminary objection should set out the facts and the law on which it is based. Neither the Communication of 3 December nor the telegram of 8 December, in the view of the Government of Israel, sets out in due form what is required by Article 62. This reticence is placing the Government of Israel under certain handicaps which adequate observance of Article 62 would have avoided. The Government of Israel, therefore, wishes to reserve all its rights and position under Article 62 and generally.

5. It is appropriate here to recall the principal events connected with the membership of Bulgaria in the League of Nations and the United Nations:

(a) Bulgaria became a member of the League of Nations on 16 December 1920. On the same day Bulgaria signed the Protocol of Signature of the Statute of the Permanent Court of International Justice, ratifying it on 29 July 1921. The instrument of ratification was deposited on 12 August 1921, upon which date the declaration accepting the compulsory jurisdiction, set forth in paragraph 2 of the Israel Memorial, entered into effect.

(b) In March 1941 Bulgaria entered the Second World War on the side of the Axis Powers. On 28 October 1944 the formal armistice was signed. 123 U.N.T.S., p. 223. The Peace Treaty with Bulgaria was concluded on 10 February 1947 and entered into force on 15 September 1947. 41 U.N.T.S., p. 21. The Preamble to that Treaty refers to the basis on which the Allied and Associated Powers could support Bulgaria's application to become a member of the United Nations.

(c) Bulgaria's application for membership in the United Nations was contained in a letter of 26 July 1947, in which the Bulgarian Government stated that it accepted the fundamental principles contained in the United Nations Charter as well as the obligations which would devolve upon the country by reason of its admission to membership in the United Nations [1]. On 22 September 1948 the request for admission was renewed with special reference to the situation created by the coming into force of the Peace Treaty. The letter referred to the respect which the Bulgarian Government

[1] Doc. S/467 in Security Council Official Records (hereinafter S.C.O.R.), Second Year, Supplement No. 18, p. 155.

always has towards its own undertakings and rules of international law, and re-emphasized Bulgaria's desire to conduct itself fully in accordance with the principles of the Charter and the obligations arising from participation in the United Nations [2]. This was followed on 9 October 1948 by the formal Declaration of Acceptance of the obligations contained in the Charter (Annex 43) required by the appropriate Rules of Procedure [3]. On 23 September 1954 the Bulgarian Government reiterated its request for admission to membership of the United Nations. It repeated what it had frequently stated in the past, that "it unreservedly accepts the obligations arising from the United Nations Charter" and fulfils all the conditions required by Article 4 [4].

(d) Bulgaria's application was discussed in the Security Council [5] on various occasions commencing with the 190th meeting on 21 August 1947 but, for reasons which are not relevant to this case, it was not until the 705th meeting of the Security Council on 14 December 1955 that a Resolution was adopted by that organ, recommending to the General Assembly the admission to the United Nations of a number of countries, including Bulgaria.

(e) On various occasions, commencing with the 252nd Plenary Meeting on 22 November 1949, the General Assembly had under consideration the question of the admission of Bulgaria (apart from the more general question of the admission of new members to the United Nations), but in the absence of a recommendation from the Security Council could not itself effectuate that admission. The General Assembly finally decided to admit Bulgaria into the Organization on 14 December 1955, immediately after the Security Council had made the recommendation previously mentioned. Israel voted in favour of that decision, which was adopted as Resolution 995 (X) [6].

(f) The declaration of acceptance by Bulgaria of the obligations contained in the Charter of the United Nations (Annex 43), which is dated 9 October 1948, states explicitly that these obligations are

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[2] Doc. S/1012 in S.C.O.R., Third Year, Supplement for September 1948, at p. 7.

[3] Doc. S/1012/Add. 1 in S.C.O.R., Fourth Year, Supplement for June 1949, at p. 1.

[4] Doc. A/AC.76/4 in General Assembly Official Records (hereinafter G.A.O.R.), Ninth Session, Annexes, Agenda Item 21, at p. 5.

[5] Israel, which became a member of the United Nations on 11 May 1949, was not a member of the Security Council during the period under review.

[6] In the course of those discussions the delegation of Israel had always expressed itself in favour of the admission of Bulgaria even when, owing to the form in which the Resolution was put, it found itself under the necessity of abstaining in the vote. See for instance the explanation of vote in the Seventh Session, G.A.O.R., Plenary Meetings, p. 475, and at the Tenth Session, prior to the previously mentioned recommendation of the Security Council, in G.A.O.R., Plenary Meetings, pp. 414-415. This was in accordance with the request made by the Bulgarian Government after 27 July 1955. See paragraph 30 of the Memorial.

accepted without reserve [7]. By virtue of Article 4 of the Charter the formal expression of the will of Bulgaria to join the United Nations could not produce immediate effects in terms of membership in the United Nations. The date upon which that result would be achieved depended exclusively, by virtue of Article 4 of the Charter (as interpreted by the Court), upon political events occurring in the Security Council and the General Assembly, over which Bulgaria exercised no direct control and in which the will of Bulgaria was not a factor of significance. By filing the formal instrument (Annex 43), completely without reservation as to its terms, Bulgaria completed all the action required of her to become a Member of the United Nations and thus *ipso facto* a party to the Statute of the Court, including Article 36, paragraph 5, thereof.

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[7] 223 U.N.T.S., p. 31. Originally circulated as Doc. S/1012/Add. 1 of 11 October 1948. At the time this instrument was made the Rules of Procedure of the Security Council and of the General Assembly had been amended in comparison with their original form and required that the application for membership should contain a declaration made in a formal instrument, that the applicant accepts the obligations contained in the Charter. See, on this aspect, the statement, dated 20 January 1950, of the Secretary-General of the United Nations in the case concerning the *Competence of the General Assembly for the Admission of a State to the United Nations* in the volume of Pleadings in that case, especially at pp. 55 ff. For the current rules (unchanged since 1947), see Rule 58 of the Provisional Rules of Procedure of the Security Council (S/96/Rev. 4) and Rule 135 of the Rules of Procedure of the General Assembly (A/3660).

Since the establishment of the United Nations, 32 States have been admitted to the Organization. Regarding the terms of such Declarations, the practice of these States varies. For instance, the statement that the acceptance of the obligations of the Charter is made without reservations appears in a number of them (including those of Israel and Bulgaria), although the majority do not include such a statement. Having regard to the language of Rule 58 of the Provisional Rules of Procedure of the Security Council and Rule 135 of the Rules of Procedure of the General Assembly, there is no need for any reference to this aspect to appear in the formal instruments accepting the obligations contained in the Charter. *The inclusion of this statement therefore serves to emphasize the intentions of* the government making the formal instrument, that formal instrument being one of the documents before the members of the United Nations when they come to make the decisions required of them by virtue of Article 4, paragraph 2, of the Charter.

Part I

THE COMMUNICATION OF 3 DECEMBER 1958

A. The First Objection

6. The first Preliminary Objection is couched in the following terms: "Article 36, paragraph 5, of the Statute of the International Court of Justice is inapplicable in regard to the People's Republic of Bulgaria." This appears to be based essentially on the view that Article 36, paragraph 5, of the Statute contains an implied reservation which excepts from its application a State like Bulgaria which did not become a party to the Statute of the International Court of Justice until after the dissolution of the Permanent Court of International Justice, said to have taken place on 18 April 1946. The Government of Israel will argue that this view is without foundation, basing itself *inter alia* upon Article 36, paragraph 5, of the Statute, and the relation between that provision and the dissolution of the Permanent Court.

7. The English and French texts of Article 36, paragraph 5, of the Statute of the International Court are as follows:

"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

« Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre les parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes. »

The purpose and implications of this provision are established by reference to its natural and plain meaning, its function, its place in the context of the Charter of the United Nations and the Statute of the Court, and (if necessary) its legislative history.

8. The Government of Israel contends that the natural and plain meaning of Article 36, paragraph 5, is that, as between

parties to thepresent Statute, declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice which were in force when the Charter was drawn up remain in force thereafter in accordance with their own terms, as declarations accepting the compulsory jurisdiction of the International Court of Justice. Declarations accepting the compulsory jurisdiction of the Permanent Court which have not been withdrawn or which have not expired by effluxion of time are accordingly in full force and effect, in accordance with their own terms, *whenever* the States which made them are parties to the present Statute. No such reservation as the Bulgarian Government is seeking to introduce into the Article is either implicit or necessary. Consequently it is contended that Article 36, paragraph 5, answers all the arguments advanced by the Government of Bulgaria in the Communication of 3 December 1958.

9. Article 36, paragraph 5, was drawn up with the objective of assuring continuity in the administration of international justice, and in full knowledge that certain States, including Bulgaria, did not participate in the San Francisco Conference. That is its function. Bearing in mind the principle of equality of States maintained in the Charter of the United Nations and in the Statute of this Court, there is no relevance in the time at which a given State becomes a party to the present Statute. In the present case there is relevance only in the categorically unreserved manner (see paragraph 5 above) in which Bulgaria became a member of the United Nations and *ipso facto* party to the present Statute. The Bulgarian declaration of 1921 has never been withdrawn. Subject only to reciprocity, it was completely unconditional and by its terms in force on 24 October 1945, the date upon which the Charter entered into force, on 14 December 1955, the date upon which Bulgaria became a member of the United Nations, and on 16 October 1957, the date upon which the present proceedings were instituted. Since both parties to the present dispute have accepted the compulsory jurisdiction, the jurisdiction of the Court is established.

10. The question of the meaning of Article 36, paragraph 5, of the Statute has not been specifically considered by the Court, although in several cases—one of the most notable being the *Anglo-Iranian Oil Company* case—the Article has been applied automatically, and without giving rise to any discussion either on the part of the parties or on the part of the Court. However, support for the contention of the Government of Israel can be found in the treatment of the analogous Article 37 of the Statute by the Court. That Article refers to treaties or conventions "in force", and stipulates that, as between the parties to the present Statute, treaties or conventions in force providing for reference of a matter *inter alia* to the Permanent Court of International Justice shall henceforth, as between the parties to the present Statute, be read as providing for the reference of that matter to the International Court of

Justice. This also is a provision designed to assure continuity in the administration of international justice. For instance, in interpreting the Mandate for South-West Africa the Court simply provided for adjustment of the Mandate, in accordance with Article 37, by substituting the International Court of Justice for the Permanent Court of International Justice. The Court made no attempt to relate this adjustment to any extrinsic facts or to introduce any extraneous criterion. *I.C.J. Reports 1950*, p. 128. In the *Ambatielos* case (Preliminary Objection), the Court stated categorically that Article 37 of the Statute "in effect provides that all references in treaties to the Permanent Court of International Justice must now be construed as references to the International Court of Justice". *I.C.J. Reports 1952*, 28 at p. 39.

11. It is not necessary in this case to enter into a discussion, as does the Bulgarian pleading, of the connection between the system of compulsory jurisdiction and the existence of the Permanent Court, or of the States between which the possibility existed then of assuming obligations under the so-called "optional clause", or of the usual manner in which States then accepted the compulsory jurisdiction (French text, pp. 126, 127), because the position in the days of the Permanent Court is not now under discussion and it is not disputed that Bulgaria did accept the compulsory jurisdiction. That argument ignores all that has happened since. What is of importance is the distinction which underlay the constitution of the Permanent Court (and which is maintained in the present Statute) between participation in the institution as such, i.e. membership in the community of States parties to the Statute as the constitution of an international organ (such participation including acknowledgement of the function of the Court to render, in accordance with the Statute, decisions in legal disputes between States) on the one hand, and on the other the bilateral arrangements, themselves dependent upon the institution and its constitution, existing only between those States which come to be mutually bound by virtue of the clause of the compulsory jurisdiction. States members of the community are competent to make such institutional and constitutional dispositions as might be mutually agreed, including changes which affect the bilateral arrangements which depend upon the constitution. It is not open to a State which later becomes a member of the community to exclude the operation *vis-à-vis* itself of those constitutional and institutional arrangements, and to do so only by way of interpretation. The San Francisco Conference was accordingly fully competent to make such provisions as were considered necessary in order to ensure certainty and continuity in the execution of various international functions common to both the League of Nations and the United Nations, including the administration of international justice. Article 36, paragraph 5, and the analogous and complementary Article 37 of the Statute, which are

the link between the jurisdiction of the Permanent Court and that of the present Court, are only two of a number of such arrangements: others dealing with different international functions are incorporated in other articles of the Charter of the United Nations, in various resolutions of the Assembly of the League of Nations and of competent organs of the United Nations, and in provisions contained in other international instruments. In no case have they been given an interpretation so restricted as that for which the Government of Bulgaria is contending. These various transitional arrangements, where they relate to the functioning of an international organization or other organs, all have an objective character and operate independently of the will of individual States. This objective character of international instruments relating to the operation of international organizations and organs has been recognized several times in earlier decisions of this Court, and notably in the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 174, and the Advisory Opinion on the *International Status of South-West Africa, I.C.J. Reports 1950*, p. 128.

12. This substitution of the jurisdiction of the present Court for that of the Permanent Court, whether by operation of Article 36, paragraph 5, or by operation of Article 37, is also fully consonant with the automatic quality of the status of being a party to the Statute, maintained by the words "*ipso facto*" in Article 93, paragraph 1, of the Charter, and the consequent automatic imposition of legal obligations deriving from the Statute of the Court—including Article 36 thereof—by the mere fact of membership in the United Nations. This aspect has recently been stressed by the Court in an interpretation of Article 36, paragraph 2, of the Statute, where the Court emphasized, in connection with that paragraph (in which the expression "*ipso facto*" also appears), that the contractual relation between the parties and the compulsory jurisdiction of the Court resulting therefrom are established by the mere fact of the making of the declaration, and that as from the moment at which any State makes a declaration it may find itself subject to the compulsory jurisdiction in respect to a concrete case. See *Right of Passage* case (Preliminary Objections), *I.C.J. Reports 1957*, 125 at p. 146. The significance of this doctrine for the present case is all the greater when it is recalled that there the Applicant Government had been admitted to membership in the United Nations also by Resolution 995 (X) of 14 December 1955, and had made its new declaration accepting the compulsory jurisdiction of the International Court of Justice very shortly thereafter. The Government of Israel contends that Article 36, paragraph 5, of the Statute operates in precisely the same manner and that every State which applies for admission and is admitted into the United Nations must be deemed to take into account that as the immediate consequence of its ad-

mission any unexpired or unwithdrawn declaration which it made earlier will automatically become applicable to the jurisdiction of the present Court. Specifically, on the day upon which Bulgaria became a Member of the United Nations and a party to the Statute of the Court, 14 December 1955, the consensual bond which is the basis upon which the clause of the compulsory jurisdiction and any declaration under Article 36 of the Statute can take their effect, came into being between Israel and Bulgaria. Had the Bulgarian Government intended or desired otherwise it should not have repeatedly held itself out, over a period of some eight years, as willing to assume without reservation (see paragraph 5 above) all the obligations of the Charter (with which the Statute is integrated); at the very least it should have taken steps to withdraw its declaration after becoming a Member of the United Nations, and not left the world in the belief that it was subject to the compulsory jurisdiction. Particularly as regards Israel it should have made its position clear when soliciting Israel's continued support for Bulgaria's admission—support which was willingly given—despite the events of 27 July 1955 (see Memorial, paragraph 30).

13. Neither the language of Article 36, paragraph 5, nor the approach and intent of those who drafted it, therefore present any justification for the conclusion reached by the Bulgarian Government. The Bulgarian Government is arguing that when Article 36, paragraph 5, says "the parties to the present Statute" it means "the parties (being original Members of the United Nations), etc.", or that when it says "are still in force" it means "are still in force and the Permanent Court is still in existence". There is nothing to justify this contention. To read the Article that way would be to defeat its whole purpose and reduce it to nothing. Furthermore, to do so would be an impossibility, because at the time when Article 36, paragraph 5, was drawn up it was not known when the Charter would come into force or when any given State would be a party to the Statute, nor when or how the Permanent Court would cease to exist. Any addition of that character would be a revision of that provision, and go beyond interpretation. The Court has in the past refused to make radical changes and additions to a treaty or convention in the guise of interpretation. *Peace Treaties* case (second phase), *I.C.J. Reports 1950*, 221 at p. 229; *U.S. Nationals in Morocco* case, *ibid.*, 1952, 176 at p. 196. As has been shown, the text of Article 36, paragraph 5, makes it clear that it is only to the terms of the declaration itself, and not to any outside instrument or extraneous event, that regard has to be paid when considering whether a given declaration is in force and the obligation of compulsory jurisdiction is established in a concrete case. Applied to any concrete case, this means that the critical date for determining whether the declaration is still in force is the date when the Charter came into force, i.e. 24 October 1945. If on that date there was still in force

a declaration (whenever made) by the respondent State, then, as from that date (and following upon Article 36, paragraph 5, of the Statute and its objective character which makes its operation independent of the will of any given State), the conditions exist for the exercise of the compulsory jurisdiction on the basis of that declaration; and only when the respondent State was at that date or thereafter not a party to the Statute of the International Court of Justice would a temporary obstacle, for the time being only, bar the *exercise* of that jurisdiction and the effective seisin of the Court in a concrete case. It further follows that there is no substance or merit in the Bulgarian argument (French text, p. 128) that to hold that Bulgaria is to-day bound by a declaration made in 1921 would be tantamount to contending that for more than ten years there had continued to be incumbent on Bulgaria an international obligation resting on no legal basis whatsoever. The declaration of 1921 by Bulgaria, absolutely unconditional as to time and only incorporating the condition of reciprocity, and never withdrawn (neither before 24 October 1945 nor since), has remained in force ever since it was first made. As these proceedings have been instituted in reliance upon the declarations of Israel and Bulgaria, both parties to the Statute when the Application was filed, the seisin of the Court is effective and the Court is competent to decide the dispute.

14. The Communication of 3 December 1958 seems to imply that the authors of Article 36, paragraph 5, only had in contemplation States which became members of the United Nations before the date of the formal resolution of the Assembly of the League of Nations relating to the dissolution of the Permanent Court. The date of that Resolution is 18 April 1946. This implication is completely contradicted by the record of the San Francisco Conference (so far as is necessary to refer thereto), and particularly by the following passage from the Report of Sub-Committee IV/1/A:

"*(c)* Of the 48 existing States which are parties to the Statute of the Permanent Court of International Justice, 17 are not Members of the United Nations, 8 of them having been enemies and 5 neutral during the present war. In addition, 13 present Members of the United Nations are not parties to the Statute of the Permanent Court of International Justice.

(d) If the old Court is continued, all the present parties to the Statute would, according to the established rules of international law, have the right to adopt the modifications now proposed by the United Nations, and thereby to remain parties to the Statute. In the case of enemy States, it would be possible as part of the conditions of peace to terminate their rights under the Statute; in the case of other States, this would not be possible unless they were to agree to it." U.N.C.I.O., Vol. 13, 524 at p. 525.

Indeed, of the 17 States parties to the Protocol of Signature therein referred to (which included Bulgaria), no less than 10—Bulgaria, Estonia, Finland, Ireland, Latvia, Luxemburg, Portugal,

Sweden, Switzerland and Thailand—then had declarations accepting the compulsory jurisdiction of the Permanent Court still in force. It cannot seriously be contended, in the face of the explicit statement appearing in the Report of Sub-Committee IV/1/A, that Article 36, paragraph 5, of the Statute was drawn up without regard for States in that position, or that it was or could have been assumed at the San Francisco Conference that all or any of those States would become Members of the United Nations before the dissolution of the League of Nations and the Permanent Court, of which even the anticipated date was unknown at San Francisco. To hold otherwise would mean to deprive Article 36, paragraph 5, of its objective character and make its operation depend upon the chances of international political events. That, however, would be in direct contradiction both with the plain meaning of the Article, and with its function.

15. The natural and ordinary meaning of Article 36, paragraph 5, is thus clear and there is no difficulty in giving effect to it. However, in this case the *travaux préparatoires* give full confirmation to the results already obtained. The problem of the future of the declarations then in force accepting the compulsory jurisdiction of the Permanent Court of International Justice, in view of the possible establishment of the new Court, was first raised by Governments in connection with the Dumbarton Oaks proposals (1944) and the Washington Committee of Jurists. For instance, the following paragraph from the comments of the British Government clearly sets forth thesis and antithesis, and is thus of considerable importance as demonstrating the problem which the drafters of Article 36, paragraph 5, sought to solve:

> "One question which will arise in connection with Article 36, is what action should be taken concerning the existing acceptances of the optional clause, by which a number of countries have, subject to certain reservations, bound themselves to accept the jurisdiction of the Court as obligatory. Should these acceptances be regarded as having *automatically* come to an end or should some provision be made for *continuing* them in force with perhaps a provision by which those concerned could revise or denounce them." U.N.C.I.O., Vol. 14, 314 at p. 318. *(Italics supplied.)*

At San Francisco the question was discussed in Sub-Committee IV/1/D, which included the following in its report:

"The new paragraph which follows (new paragraph 4) has been inserted after paragraph 3:

'Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed as between the parties to the present Statute

« Le nouvel alinéa ci-après a été inséré entre l'alinéa (3) et l'alinéa (4):

« Les déclarations encore en vigueur, faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale seront considérées, en ce qui concerne les rapports réci-

to have been made under this Article and shall continue to apply, in accordance with their terms.' " U.N.C.I.O., Vol. 13, 557 at p. 558.

proques des parties au présent Statut, comme ayant été faites en application du présent article, et continueront à s'appliquer *conformément aux conditions* qu'elles stipulent. »» U.N.C.I.O., vol. 13, 562 at p. 564.

After a brief discussion this was approved subject to corrections of style at the 17th meeting of Committee IV/1 on 1 June 1945 [8]. The present version of Article 36, paragraph 5, was proposed by *the French delegation at the 19th meeting* of the Committee on 7 June [9]. The Report of the Committee explains the provision as follows:

"A new paragraph 4 was inserted to preserve declarations made under Article 36 of the old Statute for periods of time which have not expired, and to make these declarations applicable to the jurisdiction of the new Court." *Ibid.* 381, at p. 391.

« Un nouveau paragraphe 4 fut ensuite inséré en vue de sauvegarder les déclarations non expirées faites en application de l'article 36 de l'ancien Statut et pour les considérer comme se rapportant à la nouvelle Cour. » *Ibid.* 416, at p. 426.

These texts clearly show that the intention of the drafters of Article 36, paragraph 5, was to preserve declarations made before 1945 and then still in force, so that thereafter they would take effect automatically as acceptances of the compulsory jurisdiction of the International Court of Justice. Reverting to the previously cited comment of the British Government, it is clear that the Conference did not base its approach on any idea, as the Bulgarian pleading alleges at page 127, that declarations in force would lose all legal validity with the dissolution of the Permanent Court [10].

16. The Communication of 3 December 1958 argues that the dissolution of the Permanent Court of International Justice affects the operation of Article 36, paragraph 5, of the Statute of the International Court of Justice *inter alia* because it signified the abrogation of the Statute of the Permanent Court of International Justice with the consequence that all declarations made previously, and accepting the compulsory jurisdiction of that Court, lost their force

[8] *Ibid.* 246 at p. 251 (English text), 256 at p. 261 (French text).

[9] *Ibid.* 282 at pp. 284, 485 (English text), 288 at pp. 290, 486 (French text).

[10] It should be noted that in these discussions what is now sub-paragraph 5 of Article 36 was then sub-paragraph 4. The existing sub-paragraph 4 was added at a later stage of the Conference. The text of Article 36, paragraph 5, was further slightly amended by the Advisory Committee of Jurists and was finally approved by that Committee at its 19th meeting on 20 June, and by the Co-ordination Committee at its 39th meeting on 22 June 1945. U.N.C.I.O., Vol. 17, pp. 411 at p. 413, 444 at p. 446 (Advisory Committee of Jurists) and 336 (Co-ordination Committee).

For the views of the San Francisco Conference on the authoritative character of the Reports of the Committees of that Conference, see the discussion in U.N.C.I.O., Vol. 7, pp. 265-266.

on 18 April 1946, the date upon which the Assembly of the League of Nations adopted the Report of the First Committee and Resolution on the Dissolution of the Permanent Court of International Justice (Annex 44). In connection with this, relying upon what is termed "un caractère transitoire" of the provisions of Article 36, paragraph 5, the Communication reaches a conclusion about superimposed or immediately following periods of time within which the Article is said to be effective (French text, pp. 127, 128). These contentions are refuted both by Article 36, paragraph 5, and by the nature of the transaction comprehended within the expression "dissolution of the Permanent Court", including the nature of the problems with which it was concerned.

17. The question of the dissolution of the Permanent Court of International Justice was not directly discussed at the San Francisco Conference although it is clear from the published records of that Conference that the participating States (which included neither Israel nor Bulgaria) were aware of the nature of the juridical problems posed by the creation of the International Court of Justice as a principal organ and the principal judicial organ of the United Nations, and predicated their actions upon the assumption that ultimately the Permanent Court would be dissolved. This is implicit in Articles 36 and 37 of the Statute. For instance, a fundamental question at San Francisco was whether to reconstitute the Permanent Court or whether to establish a new Court in its stead, and the solution actually reached, and embodied in Articles 7 and 92 of the Charter and Article 1 of the Statute, is a compromise between two somewhat divergent approaches. This is borne out by the Report of Sub-Committee IV/1/A of the San Francisco Conference[11]. In this connection the citation from that Report in paragraph 14 above is relevant. On the other hand, while Sub-committee IV/1/A discussed in general terms the question of the future of declarations accepting the compulsory jurisdiction, it reached no conclusion thereon having regard to the fact that this aspect was being discussed by Sub-Committee IV/1/D, as has already been described[12]. This, too, emphasizes that the decision to include in the Charter Article 36, paragraph 5, dealt with one matter and that the decision to dissolve the Permanent Court dealt with quite a different and distinct matter. The question of the dissolution of the Permanent Court was discussed in the Preparatory Commission of the United Nations as a marginal issue in connection with the Commission's task of convening the new Court. The Commission adopted a resolution indicating that it would welcome the taking of appropriate steps by the League of Nations for dissolving the Permanent Court[13].

[11] U.N.C.I.O., Vol. 13 at p. 524.

[12] *Ibid.*, p. 527.

[13] The Commission proceeded on the basis of an indication by certain of its members who were also members of the League of Nations of their intention to move in the forthcoming meeting of the League's Assembly a resolution for the

The formal steps of the dissolution of the Permanent Court were undertaken in the final (21st) Ordinary Session of the Assembly of the League of Nations [14]. The item was referred to the First Committee, the Report of which (Annex 44) stresses the formal character of the resolution proposed as well as "the close continuity that will exist between the Permanent Court and the International Court of Justice". Introducing the Report of the First Committee to the Sixth Plenary Meeting on 18 April 1946, the Rapporteur, Professor (now Sir Kenneth) Bailey of Australia emphasized the fact of the substitution of the International Court of Justice for the Permanent Court [15]. The Resolution adopted stresses that the Permanent Court, which *de facto* was not in existence, was to be "regarded as dissolved".

18. The circumstances in which the Assembly of the League of Nations adopted the Report of the First Committee and the Resolution of 18 April 1946 (Annex 44) show clearly that it was concerned with the material aspects of that operation and not with any question of intertemporal law, nor with the Statute of the Permanent Court as such. Furthermore it was made abundantly clear in the discussions that the whole operation *proceeded on the basis that continuity in the administration of international justice was assured.* The Resolution was purely declaratory of an existing state of affairs, and in so far as there was substance in its operative provision, that was limited to the giving of advance approval to arrangements *to be made* for the disposal of the material assets and liabilities of the Permanent Court. Consequently the Report and Resolution have nothing to do with the objective legal situation regarding the jurisdiction of the International Court of Justice, a matter which is governed *exclusively* by Articles 36 and 37 of the Statute of the International Court of Justice.

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purpose of effecting the dissolution of the Permanent Court, and of the intention of the powers concerned to require, under the terms of the peace treaties made with them or in some other appropriate form, the assent of those States parties to the Protocol of Signature of the Statute of the Permanent Court which had been or still were at war with certain members of the United Nations (this included Bulgaria), to any measures taken to bring the Permanent Court to an end. The draft resolution put forward by the Executive Committee proposed recording the assent to the dissolution of the Court of those members of the Preparatory Commission which were parties to the Protocol of Signature, whether members of the League of Nations or not. *Report by the Executive Committee to the Preparatory Commission of the United Nations,* doc. PC/EX/113/Rev. 1, pp. 8, 67. For the discussion in Committee Five of the Preparatory Commission, see PC/LEG/31 in *Summary Record of Meetings,* at p. 11. For the text of the resolution as finally adopted, see *Report of the Preparatory Commission,* doc. PC/20, at p. 57.

[14] League of Nations, *Official Journal,* Special Supplement No. 194.

[15] *Ibid.*, p. 55. See also *ibid.*, pp. 73-75 and 85-86 for the brief discussion in the First Committee. This continuity is graphically illustrated by the fact that the International Court of Justice held its inaugural session also on 18 April 1946. No hiatus between the two Courts left the world for one moment without an international court.

19. The Government of Bulgaria makes some play of the fact that no mention of the declaration of 1921 appears in the *Yearbooks* of the International Court of Justice which have been issued since Bulgaria became a Member of the United Nations. It sees in this corroboration of its thesis. The Government of Israel regrets the introduction into the case of this argument which relates to the Registry of the Court (to which the Government of Israel wishes to pay its tribute). At the same time it is pointed out that the Bulgarian Government overlooks several aspects, of which the most important may be mentioned. One is, as each issue of the *Yearbook* states in its Preface, that the *Yearbook* is prepared by the Registry and in no way involves the responsibility of the Court. Another is that the Registrar was never the depository of the declarations accepting the compulsory jurisdiction of the Permanent Court, but the Secretary-General of the League of Nations. The responsibilities of the Secretary-General as depository of an international instrument have been analysed by the Court particularly in the Advisory Opinion on *Reservations to the Convention on Genocide, I.C.J. Reports 1951*, p. 15, and in its cited Judgment in the case concerning *Right of Passage over Indian Territory* (Preliminary Objections). The pronouncements of the Court make it clear that the actions—or inactions—of the depository authority even as regards duties specifically imposed upon him by the instrument in question do not affect the objective legal situation thereunder existing between two States. This is all the more true of material included in the Court's *Yearbook*, the issuance of which is not a duty imposed upon the Registrar by the instruments in question. In the submission of the Government of Israel the *Yearbook* of the International Court of Justice is not evidence for the validity or even the existence of instruments conferring or purporting to confer jurisdiction on the Court.

20. The contentions of the Government of Israel may now be summarized.

(a) The decision of the San Francisco Conference to establish the International Court of Justice as a principal organ and the principal judicial organ of the United Nations rather than to continue the Permanent Court of International Justice gave rise to two sets of problems, the first jurisdictional—being problems of intertemporal law—and the second administrative and organizational—being concerned with the material liquidation of the Permanent Court. The jurisdictional questions were dealt with exclusively at San Francisco, the solution being embodied within Article 36, paragraph 5, and Article 37 of the Statute of the International Court of Justice. With the function and objective of maintaining certainty and continuity in the administration of international justice, those Articles provide for the automatic and continued application, as instruments conferring jurisdiction on the International Court of Justice, of all

instruments in force conferring jurisdiction on the Permanent Court of International Justice. That transfer of application operates objectively, being effective whenever the States concerned are parties to the Statute of the International Court of Justice.

(b) It is clear from the relevant discussions that the underlying *objective in 1945 was to maintain and assure certainty and* continuity in the administration of international justice and to avoid, so far as was possible, the creation of any jurisdictional hiatus between the two judicial organs of the international community.

(c) The second category of questions related to the disposal of the various assets and liabilities of the Permanent Court of International Justice considered as an organ which was ceasing to exist as an organ of the international community. These questions were dealt with by the Assembly of the League of Nations, under the auspices of which the Permanent Court had been established. The Report and Resolution of 18 April 1946 (Annex 44) related only to measures of material liquidation of the Permanent Court, and the Assembly proceeded on the assumption, as a matter of fact, that the Permanent Court had ceased to exist and that its existing jurisdiction was transferred without any hiatus to the International Court of Justice.

(d) The contention of the Bulgarian Government to the effect that the application of Article 36, paragraph 5, of the Statute of the International Court of Justice is linked to the continued existence of the Permanent Court, so that the Article is not applicable to Bulgaria which became a Member of the United Nations after the dissolution of the Permanent Court, is not a correct interpretation of that Article or of the Resolution adopted by the Assembly of the League of Nations on 18 April 1946.

(e) Accordingly the Government of Israel submits that the first Preliminary Objection be rejected.

B. The Second Objection

21. The second Preliminary Objection argues that the Court is without jurisdiction since Israel is submitting to the Court "a dispute which relates to situations and facts arising prior to the alleged acceptance of the compulsory jurisdiction of the International Court of Justice" by Bulgaria. This Objection purports to be based upon an *interpretation of the Israel declaration* of 3 October 1956 according to which, by virtue of an alleged principle of reciprocity, the date therein appearing, namely 25 October 1951, may be read by Bulgaria as though it was 14 December 1955. Furthermore, this implies that the admission of Bulgaria into the United Nations on 14 December 1955 was in law equivalent to the adherence of Bulgaria to the compulsory jurisdiction. The Government of Israel contests the view that the principle of reciprocity operates in the manner suggested by the Government of Bulgaria,

and urges that nothing in Article 36 of the Statute prevents the Court from exercising jurisdiction in this case. Because of the close connection which this Objection, in the form in which it has been pleaded, draws between Article 36, paragraph 5, of the Statute and the operation of the Bulgarian declaration of 1921 (on the assumption that the first Objection is dismissed), it follows that the arguments already advanced to refute the first Objection are relevant to refute the second.

22. Fundamental to the approach of the Bulgarian Government is the view that if its first Objection is dismissed, then in considering the reciprocal inter-action of the two declarations the Bulgarian declaration is to be regarded as though it had been made only on 14 December 1955. In the words of the Preliminary Objection (at p. 130 of the French text): "This [the Bulgarian] acceptance [of the compulsory jurisdiction] could be regarded as effective by virtue of Article 36, paragraph 5, only after the entry of Bulgaria into the United Nations, that is to say, after December 14th, 1955." But this contention fails to take into account the automatic nature of the consequences of admission to the United Nations—the fact that a State which is admitted becomes *ipso facto* a party to the Statute, with the further consequence that Article 36, paragraph 5, of the Statute then operates *ipso facto* to transfer automatically to the jurisdiction of the new Court the jurisdiction conferred on the Permanent Court by a declaration still in force on 24 October 1945. The automatic consequences of the fact of a State becoming a party to the Statute of the Court have been explained in paragraph 12 above, and the remarks there made are as equally applicable to the second Preliminary Objection as they are to the first. From Article 93, paragraph 1, of the Charter it follows that on the admission of Bulgaria into the United Nations any obstacle which might previously have operated as a temporary bar to the effective seisin of the Court and the exercise of jurisdiction by the Court has been automatically removed, with the further consequence that on 14 December 1955 the declaration of 1921 automatically resumed its full operative effect. A striking demonstration of this automatic quality of the operation of the Article lies in the fact that, as has recently been stated: "As Members of the United Nations are *ipso facto* parties to the Statute of the Court, it is unnecessary for applicants for membership in the United Nations to make any special acceptance of the Statute." *Repertory of Practice of United Nations Organs*, Vol. V at p. 14. The Declaration of Acceptance by Bulgaria of the obligations of the Charter (Annex 43), completely without reservation as it was, when accepted by the General Assembly in the form of an affirmative resolution on admission after a recommendation by the Security Council, operates automatically as an instrument of adherence to the Charter and Statute of the Court and, as has been demonstrated, as unreserved acceptance of all the

obligations—including the obligations arising under the whole of Article 36—of the Statute of the International Court of Justice.

23. Consequently it is erroneous to construe the Bulgarian declaration of 1921 as if it constituted, in the words of the Preliminary Objection, acceptance of the compulsory jurisdiction only as from 14 December 1955. To achieve this result would mean to omit from consideration Article 93, paragraph 1, of the Charter, and then to rewrite the Bulgarian declaration. But Article 36, paragraph 5, of the Statute does not provide for rewriting the earlier declarations: on the contrary, they are in force in accordance with their own terms. Furthermore, such rewriting would also go beyond what is included in the process of interpreting a declaration. The relevant date of the Bulgarian declaration for the purpose of establishing jurisdiction *ratione temporis* can only be that contained in or derived from the declaration itself—12 August 1921. If the Israel declaration contained no exception of the kind relied upon by the Bulgarian Government, or if it contained a date before 12 August 1921, then it is probable that by virtue of the principle of reciprocity, maintained in both declarations and in the constant jurisprudence of the Court, the date 12 August 1921 would be the material date. Since the Israel declaration contains a later date—25 October 1951—then by operation of the same principle of reciprocity that is the material date. This is the principle which has been applied in the jurisprudence of the Permanent Court of International Justice in cases relevant to this question, and notably in the *Phosphates in Morocco* case, Series A/B, No. 74. The operation of this principle in relation to the jurisdiction of the Court *ratione temporis* is not affected by the fact that the basis for applying the Bulgarian declaration in the present case is Article 93, paragraph 1, of the Charter and Article 36, paragraph 5, of the Statute. Rather is it strengthened thereby. The Bulgarian declaration is in force today—as in the period of the Permanent Court—for the period which it still has to run (i.e. *sine die*) and in accordance with *its* terms, i.e. unconditionally subject only to reciprocity, always with effect from 12 August 1921.

24. The Government of Israel contests the view that the principle of reciprocity as applied to the present dispute entitles the Bulgarian Government to change any of the dates which may affect the jurisdiction of the Court *ratione temporis* appearing in the Israel declaration of 1956. That declaration contains two temporal exceptions to the jurisdiction of the Court, and there is significance in the different wording employed to express them. The first, which is of general nature, limits the jurisdiction of the Court to all legal disputes concerning situations or facts which may arise subsequent to 25 October 1951. The second excludes disputes arising out of events occurring between two defined dates. The first exception is therefore partially retroactive. The date 25 October 1951 is the

date upon which the instrument of ratification of an earlier declaration by Israel accepting the compulsory jurisdiction, dated 4 September 1950, was deposited with the Secretary-General of the United Nations. That declaration, which alone of the two was subject to ratification, accepted the compulsory jurisdiction of the Court *inter alia* for all legal disputes concerning situations or facts which might arise after the date of deposit of the instrument of ratification. Furthermore that declaration contained a specific stipulation in the following terms: "The present declaration has been made for five years as from the date of deposit of the instrument of ratification."[16] The second exception of the declaration of 1956 is categorical and relates to disputes arising out of events occurring between 15 May 1948 and 20 July 1949, namely, the date of the independence of Israel and the date upon which the last of the four General Armistice Agreements with Israel's neighbours was concluded and entered into force. There is nothing in the declaration of 1956 to connect it with the declaration of 1950, which declaration, in accordance with its terms, expired on 24 October 1956. The declaration of 1956 was deposited with the Secretary-General of the United Nations on 17 October 1956, but entered into force on 25 October 1956, upon which date only was it registered *ex officio* by the Secretary-General of the United Nations. A comparison of the two declarations shows that a number of modifications—including that of language—were made on the occasion of the second declaration. For instance, some of the interpretative statements appearing in the instrument of ratification of the 1950 declaration, the text of which was circulated by the Secretary-General of the United Nations under cover of his letter No. C.N.131.1951. TREATIES dated 7 November 1951, were incorporated into the declaration of 1956, and a number of new conditions were inserted. It is perfectly correct that the declaration of 1956 came in place of the declaration of 1950, which had expired by effluxion of time in accordance with its very terms, a fact to which reference is made in paragraph 4 of the Application instituting Proceedings in this case. That does not mean that there exists any legal connection between the two declarations, or that the second is to be interpreted by reference to the first. No such intention appears in the second declaration. Accordingly, whatever might have been the earlier significance of the date 25 October 1951, it is not possible to read it in the declaration of 1956 as meaning anything else than what it says, namely the specific date 25 October 1951, nor does anything in the principle of reciprocity require it to be read in any other manner. In litigation between Bulgaria and Israel, Bulgaria is entitled to exclude all disputes concerning situations or facts arising prior to 25 October 1951, and all disputes arising out of events occurring between

[16] The original text of the declaration of 1950 was in French. 108 U.N.T.S. p. 239. The original text of the declaration of 1956 was in English. 252 U.N.T.S. p. 301.

15 May 1948 and 20 July 1949, but is not entitled to find entirely different dates and justify that on the basis of reciprocity and incidents of the history of Bulgaria.

25. The Preliminary Objection argues (French text, pp. 130 and 131) that the Bulgarian State cannot be answerable to the Court in respect of situations and facts that occurred before Bulgaria's alleged acceptance of the compulsory jurisdiction of the Court. In this connection the Bulgarian Government, not citing any authority whatsoever, makes general reference to the "thorough analyses" by the Permanent Court and the International Court of Justice on the problem of reciprocity. The Government of Israel finds this passage in the Communication of 3 December 1958 to be particularly nebulous and, beyond stating that in its view there is no jurisprudence of relevance to that argument, is unable at present to make any comment on the precedents which the Government of Bulgaria might have had in mind. The Government of Israel contends that the correct position is established by the distinction between the substantive content of the obligation to accept the jurisdiction of the Court (based here upon a declaration made in 1921 and remaining in force) and the procedural or adjectival aspects effective only after 14 December 1955 (see paragraph 13 above). As from that date the Court is competent, following on the admission of Bulgaria into the United Nations, to decide a dispute of which it is seised after the admission notwithstanding that the facts out of which that dispute arose occurred before the admission.

26. To recapitulate:

(a) The admission of Bulgaria into the United Nations is not the adherence of Bulgaria to the system of the compulsory jurisdiction, which took place in 1921.

(b) The admission of Bulgaria into the United Nations removed all obstacles to the seisin of the Court and the exercise of jurisdiction on the basis of the declaration of 1921.

(c) By operation of the principle of reciprocity Bulgaria is entitled, in a dispute referred to the Court by Israel, to exclude disputes relating to situations or facts which arose before 25 October 1951 and is not entitled to alter the temporal conditions of the Israel declaration of 1956. Since the present dispute concerns situations or facts which arose after 25 October 1951, it is not excluded from the jurisdiction of the Court.

(d) There is no applicable rule of law which excludes from the jurisdiction of the Court any dispute solely on the ground that it relates to situations or facts which arose before Bulgaria became a party to the Statute of the Court.

(e) Accordingly the Government of Israel submits that the second Preliminary Objection be rejected.

Part II

THE TELEGRAM OF 8 DECEMBER 1958

27. In the ultimate paragraph of the Communication of 3 December 1958 and immediately preceding the Submissions (French text, p. 131) the respondent Government referred to the possibility that it might wish to set forth additional objections and develop them later, to which reference also appears in the Order made by the President of the Court on 17 December 1958. In the Submissions of the Communication of 3 December 1958, the third preambular paragraph mentions vaguely the reasons developed in the Communication itself and all other reasons which may be presented or which the Court should consider it appropriate to add thereto or to substitute therefor. This is repeated in the fourth preambular paragraph of the Submissions contained in the telegram of 8 December 1958, on p. 133 of the printed French text. This, too, is maintained in the single consolidating text forwarded by the Bulgarian Agent to the Registrar under cover of his letter of 11 December 1958.

28. The Government of Israel objects to this Submission which in its view is contrary to Article 62 of the Rules of Court. It refers to two quite distinct aspects, namely: *(a)* the presentation of additional objections by the respondent Government after the time-limit fixed therefor by the Order of 27 January 1958; and *(b)* the addition or substitution of objections by the Court itself. Regarding the first aspect, the Government of Israel does not agree that a cascade of additional objections may be presented by the respondent Government at any time convenient to itself and after the time-limit duly fixed. Had a request been made in due form it would certainly have agreed to a reasonable extension of that time-limit. But since that time-limit has passed the Government requests that the future proceedings take place as laid down by the Statute and Rules of Court. Regarding the second aspect, the Government of Israel cannot accept the implication of the Bulgarian pleading to the effect that the Court may substitute itself for one or other of the parties in raising preliminary objections.

29. Apparently in reliance upon this general statement of reservation of rights, the telegram of 8 December 1958 purported to submit three further and alternative Objections based on the exceptions therein specified and leading to the alleged inadmissibility of the Israel Application. However, no statement whatsoever of the facts which could justify these exceptions was included in that telegram or has been received in the Registry of the Court within the time-limit fixed by the Order of 27 January 1958. Having regard to Article 62 of the Rules of Court, and more particularly to

the requirement that the Preliminary Objection set out the facts and the law on which it is based, the Government of Israel observes that these exceptions having been presented in a way which is devoid of any explanation, they are therefore deficient. This is indeed recognized in the so-called "single text" already mentioned. In that text the Bulgarian Government apparently again sought to reserve the right later to develop these three Objections. The Government of Israel contends that this is not in conformity with the Statute and Rules of Court and accordingly, objecting expressly to the admissibility of these additional Objections, submits that they should be rejected.

30. Alternatively, and without prejudice to the previous contention, the Government of Israel makes the following observations regarding the substance of these three Objections in the form in which they have been presented. Considering that these three Objections are themselves all stated to be alternative to the two Objections set out in the Communication of 3 December 1958, it follows that the contentions advanced in this Part of these Written Observations are equally alternative and subsidiary to those contained in Part One hereof. Furthermore, the Government of Israel is of the opinion that it would be more appropriate to consider these three Objections in the following order: *(a)* the exception of domestic jurisdiction (additional Objection No. 2); *(b)* the exception of non-exhaustion of local remedies (additional Objection No. 3); *(c)* the exception based upon the allegation that the damage was for the most part suffered by insurance companies not of Israel nationality (additional Objection No. 1).

31. These three Objections appear to the Government of Israel to have several aspects in common. They all enter upon the merits of the dispute. They each fail to give due weight to the fact that 4X-AKC was registered in Israel and was wearing the Israel colours (Memorial, paragraphs 3, 32 *(i)* and Annex 20) and that this suit has been brought by the Government of Israel in the exercise of its right and duty to protect its colours and all persons on board an aircraft registered in Israel as well as with the object of obtaining the satisfaction and reparation due to it from the Government of Bulgaria for the breach of international law by Bulgaria which directly and primarily injured Israel in its quality as a State. Again, in some respects, as is evident from paragraphs 37-56 of the Memorial, these Objections, which purport to be objections to the admissibility of the claim, may be found to raise in a new context various issues which had occupied the Parties in the course of the negotiations which followed the presentation of the claim in the Note Verbale of 14 February 1956 (Annex 31). But the Government of Israel finds it significant that none of these Objections to the admissibility of the claim was, in the course of those negotiations, ever put forward as barring the international claim which the Bulgarian

Government had voluntarily and spontaneously undertaken to meet in its Note Verbale of 4 August 1955 (Annex 17), on the basis of which undertaking the Note Verbale of 14 February 1956 had been drawn up. The conduct of those negotiations by the Bulgarian Government is, in the view of the Government of Israel, sufficient to preclude the Bulgarian Government from raising them now and alternatively constitutes a waiver of them by the Bulgarian Government. Furthermore, the Government of Israel emphasizes that the first and third Objections, in their terms, are not relevant to the case as a whole and in no circumstances are a bar to the admissibility of the claim as a whole. To the extent that, contrary to the contention of the Government of Israel, they may be found to be of relevance, that relevance is limited to Submission No. II *(a)* of the Memorial in whole or in part.

32. Accordingly, although it might ultimately be considered that these Objections are not genuinely preliminary in character or cannot adequately be considered except in relation to the merits of the case, the Government of Israel submits that they are all unfounded and should be dismissed as preliminary objections. This is a general submission applicable to all these Objections. It does not, however, exhaust the individual contentions which the Government of Israel wishes to present in summary form and dealing more particularly with the special features of each Objection.

33. With regard to the contention that this dispute is subject to the exclusive jurisdiction of Bulgaria or falls essentially within the domestic jurisdiction of Bulgaria, the following observations are made:

(a) The Government of Israel observes that hitherto the Government of Bulgaria has always recognized and admitted the international character of the issues that have presented themselves. In so far as the legal dispute arises out of the direct injury caused to Israel by Bulgaria, or out of breach of the various undertakings given to Israel by Bulgaria, it obviously is not a domestic matter. Again, among the points repeatedly made by the Bulgarian Government are that certain action of its armed forces was in conformity with unspecified "règlements internationaux" (Note Verbale of 4 August 1955, Annex 17), or that 4X-AKC violated "les conventions internationales de navigation aérienne" (Note Verbale of 1 October 1956, Annex 33).

(b) In this connection the Government of Israel recalls the clear jurisprudence of the Court establishing the relativity of the concept of the exception of domestic jurisdiction, e.g. in the *Tunis and Moroccan Nationality Decrees* case, P.C.I.J. Series B, No. 4, and the doctrine advanced in the *Nottebohm* case (second phase), *I.C.J. Reports 1955*, 4 at p. 21, to the effect that it is to the consequences of the impugned act, as being an act leading to a breach of conventional or customary international law, rather than exclusively to

the act itself, that regard is to be paid in considering whether the exception is applicable.

(c) Leaving aside the implications of Bulgaria's international undertaking to pay compensation, clearly and *ex hypothesi* any discussion between two or more governments concerning the inadvertent (and *a fortiori* the deliberate) crossing of a frontier by an aircraft is a discussion concerning a matter which cannot fall within the exclusive jurisdiction of a State. In the nature of things such a question is an international matter. The present case is between the State which, by reason of its being the State of registration of the aircraft, is responsible for the security of the flight and the State which alleges unauthorized entry into its airspace. There is no dispute that 4X-AKC did enter the Bulgarian airspace, or that Bulgaria had the right to take measures to protect its sovereignty, within the limits allowed by international law (see Memorial, paragraphs 60-79). The present dispute relates exclusively to the manner in which the Bulgarian armed forces acted and to the subsequent attitude of the Bulgarian Government.

(d) In general support of this argument reference may be made to such international instruments as *(inter alia)* the Paris Convention of 1919 on Air Navigation (of which Bulgaria was a party), 11 L.N.T.S., p. 174, the Convention of 1944 on International Civil Aviation (Annex 10), and the fact that the International Civil Aviation Organization is duly established as a specialized agency of the United Nations by virtue of the agreement of 13 May 1947, 8 U.N.T.S., p. 324. More particularly on the question of the innocent overflying of foreign territory by foreign aircraft without permission, the attention of the Court is called to the Resolution adopted by the Tenth Session of the General Assembly on the question of the safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers, Resolution 927 (X) of 14 December 1955 (Annex 45). The question of domestic jurisdiction was not raised by any delegation in connection with that Resolution.

34. With regard to the contention that the Government of Israel has not exhausted the remedies available in the Bulgarian courts before applying to this Court, the following observations are made:

(a) This contention is in contradiction to the undertaking contained in the Note Verbale of 4 August 1955 (Annex 17) and is incompatible with the request in the Note Verbale of 1 October 1956 (Annex 33) that the Government of Israel represent all claimants regardless of nationality.

(b) The contention fails to appreciate the nature of the present case. From the fact that 4X-AKC was registered in Israel (Annex 20) and was wearing the Israel colours it is the State of Israel which is directly and primarily injured by the improper actions of the military forces of the Bulgarian State acting *jure imperii*. Local remedies are therefore irrelevant, and the particulars of claims

contained in Annexes 40, 41 and 42 of the Memorial are also not relevant except in connection with the calculation of pecuniary damages the duty to pay which is one of the consequences of the breach of international law on the part of Bulgaria.

35. With regard to the contention that the Government of Israel is barred from bringing this suit because "for the most part" the damage was suffered by insurance companies not of Israel nationality, the following observations are made:

(a) This Preliminary Objection is directly contradictory to the terms of the Note Verbale of 4 August 1955 (Annex 17, and see paragraphs 96, 97 and 104 of the Memorial) and to the whole manner in which the Bulgarian Government approached the diplomatic negotiations which followed the presentation of the Israel claim. It is incompatible with the suggestion contained in the Note Verbale of 1 October 1956 (Annex 33) that the Government of Israel assume the general representation of all claimants; and it is equally incompatible with the request made by the Bulgarian representative on 27 August 1957, mentioned in paragraph 52 of the Memorial, that the Israel Government make arrangements for direct contact between the Bulgarian Government and some of the claimants for the purpose of explaining to them the *ex gratia* payment it proposed making. Reference is also made to paragraphs 49, 100, 101 and 102 of the Memorial.

(b) The Government of Israel again emphasizes that this exception is presented without any indication whatsoever of the facts on which it is based.

(c) Insurance is based on contracts and arrangements between individuals and entities subject to private law. Consequently, as between the States parties to the present dispute such contracts and arrangements are *res inter alios acta*. In accordance with the general principles of international law, the Government of Israel contends that they have no relevance for the claim contained in the Application instituting Proceedings, and do not affect the international obligations upon Bulgaria to make to Israel satisfaction and reparation for the damage caused to Israel by the destruction of 4X-AKC, an aircraft registered in Israel, at the hands of the Bulgarian armed forces acting *jure imperii*.

Part III

THE SUBMISSION

36. Having regard to all the foregoing arguments and contentions jointly and severally the brief and comprehensive Submission of these Written Observations is:

MAY IT PLEASE THE COURT,

Rejecting all Submissions to the contrary,
To dismiss the Preliminary Objections, and
To resume the Proceedings on the merits.

Dated this 3rd of February 1959.

(Signed) Shabtai ROSENNE,
Agent for the Government of Israel.

Annexes to the Observations and Submissions of the Government of Israel

[Annexes 1 to 42: see Annexes to Memorial, pp. 118-124]

Annex 43

BULGARIA: DECLARATION OF ACCEPTANCE OF THE OBLIGATIONS CONTAINED IN THE CHARTER OF THE UNITED NATIONS

Paris, 9 October 1948. Official text: French

Au nom de la République populaire de Bulgarie, le soussigné Vassil Kolarov, Vice-Président du Conseil des Ministres et ministre des Affaires étrangères, dûment autorisé en vertu des pleins pouvoirs donnés à cette fin par le Presidium de la Grande Assemblée nationale, déclare que la République populaire de Bulgarie accepte par la présente, sans réserve aucune, les obligations découlant de la Charte des Nations Unies et qu'elle fait promesse de les observer, en tant qu'inviolables, du jour où elle deviendra membre des Nations Unies.

(Signé) V. KOLAROFF.

Annex 44

League of Nations

REPORT AND DRAFT RESOLUTION OF THE FIRST COMMITTEE ON THE DISSOLUTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

A. 35. 1946.

Geneva, April 17th, 1946.

Rapporteur: Professor K. H. Bailey (Australia).

Just as the dissolution of the League of Nations follows upon the establishment of the United Nations, so the dissolution of the Permanent Court of International Justice follows upon the establishment by the United Nations of a new international Court of Justice. The new Court has already commenced to exercise its functions. Accordingly, the Assembly directed the First Committee to prepare the necessary resolution for formally terminating the existence of the Permanent Court.

The First Committee does not think it appropriate to review in detail the work accomplished by the Permanent Court during the past twenty-four years. The record of the judgments and opinions of the Court finds its place in all standard works on the law of nations and enriches the law libraries of the world. The First Committee does wish, however, to emphasize, first, the close continuity that will exist between the Permanent Court and the International Court of Justice and, secondly, the

significance for the world community of what the Permanent Court has accomplished.

Men, conscious that they are, after all, mortal, may, when they hear the word "dissolution", think that the Permanent Court is dead. In substance, the contrary is the truth. The Statute of the new Court has been modelled closely upon the Statute of the Permanent Court. The Members of the International Court of Justice have symbolized the relation between the new Court and the old by electing as their first President the distinguished Judge Dr. J. Gustavo Guerrero, who, since 1937, has held the office of President of the Permanent Court.

In the opinion of the First Committee, there can be no two views as to the success of the work done in the realm of international law by the Permanent Court of International Justice. Its judgments have not only contributed to the development of the doctrines of international law but—more fundamentally—to the extension of the rule of law in international affairs. The League may take pride in having inaugurated the first successful experiment, after many attempts in this field had failed in the past, to establish a regular world tribunal for determining disputes between States. The First Committee expresses the conviction that the International Court of Justice will maintain the high traditions of its predecessor.

On the present occasion, the First Committee recalls the distinguished judges and officers of the Permanent Court, whose work built up its traditions. The Committee pays tribute to the devotion to duty which enabled the Court to be maintained throughout the war, in the face of great difficulties.

The First Committee records its gratitude for the message sent to the Assembly by Dr. Guerrero, as the last President of the Permanent Court, in contemplation of this solemn occasion.

The First Committee unanimously recommends that the Assembly should adopt the following resolution:

"THE ASSEMBLY OF THE LEAGUE OF NATIONS,

Considering that, by Article 92 of the Charter of the United Nations, provision is made for an International Court of Justice which is to be the principal judicial organ of the United Nations and which is to be open to States not members of the United Nations on terms to be determined by the United Nations;

Considering that the establishment of this Court and the impending dissolution of the League of Nations render it desirable that measures for the formal dissolution of the Permanent Court of International Justice shall be taken;

Considering that the Preparatory Commission of the United Nations, in a resolution of December 18th, 1945, declared that it would welcome the taking of appropriate steps by the League of Nations for the purpose of dissolving the Permanent Court, and that this resolution records the assent to the dissolution of the Permanent Court of all the Members of the United Nations which are parties to the Protocol of Signature of the Statute of the Permanent Court, whether Members of the League of Nations or not;

Considering that all the Judges of the Permanent Court have resigned and that on the dissolution of the League no machinery will exist for the appointment of new Judges:

RESOLVES:

That the Permanent Court of International Justice is for all purposes to be regarded as dissolved with effect from the day following the close of the present session of the Assembly, but without prejudice to such subsequent measures of liquidation as may be necessary."

Annex 45

OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, TENTH SESSION. ANNEXES. AGENDA ITEM 61

Document A/2940

Israel: request for the inclusion of a supplementary item in the agenda of the tenth session

[Original text: English]
[22 August 1955]

LETTER DATED 21 AUGUST 1955 ADDRESSED TO THE SECRETARY-GENERAL BY THE REPRESENTATIVE OF ISRAEL

New York, 21 August 1955.

On instructions from the Government of Israel, I have the honour to request the inclusion of the following item in the provisional agenda of the tenth regular session of the United Nations General Assembly:

"The question of the safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers."

An explanatory memorandum is enclosed in accordance with rule 20 of the rules of procedure of the General Assembly.

(Signed) M. R. KIDRON,
for Permanent Representative of Israel to the United Nations.

EXPLANATORY MEMORANDUM

In recent years a number of tragic incidents of shooting down of commercial aircraft innocently deviating from fixed flight plans in the vicinity of or across international frontiers have occurred resulting in serious loss of life and causing grave international friction. It appears clear that existing international rules and practices in this field fail to provide the necessary protection for aircraft and their passengers in the circumstances indicated.

In inscribing this item on the agenda of the tenth regular session of the General Assembly the Government of Israel is concerned exclusively to propose that the General Assembly request the Secretary-General to

undertake a study of this question in consultation with the specialized agencies concerned and any other body he may deem appropriate and report to the General Assembly at its eleventh regular session his findings and any recommendations he may wish to make for the prevention of such incidents and to provide greater safety for air passengers.

Document A/C.3/L.501

Israel: draft resolution

[Original text: English]
[2 December 1955]

The General Assembly,

Mindful of a number of incidents which have occurred in recent years involving attacks on civilian aircraft innocently deviating from fixed plans in the vicinity of, or across international frontiers,

Noting that such incidents cause loss of human life and affect relations between States, and that the problem is therefore a matter of general international concern,

1. *Calls* upon all States to take the necessary measures to avoid the recurrence of such incidents in the future;

2. *Invites* the attention of the appropriate international organizations to this resolution and to the debate on this item held in the General Assembly at its tenth session.

Document A/3080

Report of the Third Committee

[Original text: English]
[8 December 1955]

1. The General Assembly, at its 530th meeting on 30 September 1955, decided to allocate item 61 of the agenda of its tenth session, entitled "Question of the safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers", to the Third Committee for consideration and report.

2. The Third Committee discussed the item at its 682nd and 683rd meetings held on 5 and 6 December 1955. It had before it the letter dated 21 August 1955 addressed to the Secretary-General by the representative of Israel (A/2940) requesting the inclusion of the item in the agenda.

3. The basis of the Committee's discussion was a draft resolution submitted by Israel (A/C.3/L.501) by which the General Assembly, mindful of a number of incidents which had occurred in recent years involving attacks on civilian aircraft innocently deviating from fixed plans in the vicinity of, or across international frontiers, would (1) call upon all States to take the necessary measures to avoid the recurrence

of such incidents in the future; (2) invite the attention of the appropriate international organizations to this resolution and to the debate on this item held in the General Assembly at its tenth session.

4. Several representatives supported the draft resolution before the Committee. Some, however, expressed surprise that the problem had been introduced as a humanitarian matter.

5. Afghanistan proposed the following amendments (A/C.3/L.502) to the Israeli draft resolution (A/C.3/L.501):

1. First paragraph of preamble. Delete the following: "a number of" and "which have occurred in recent years".

2. Operative paragraph 1. Delete the following: "the recurrence of" and "in the future".

The representative of Israel accepted the amendments proposed by Afghanistan.

6. Czechoslovakia submitted an amendment (A/C.3/L.503) to the Israel draft resolution in accordance with which the first paragraph of the preamble would be replaced by the following:

> "Mindful of a number of incidents which have occurred in recent years involving commercial aircraft deviating from fixed plans in the vicinity of, or across, international frontiers;".

7. The Committee rejected the Czechoslovak amendment by 23 votes to 6, with 18 abstentions.

8. The Israel draft resolution (A/C.3/L.501), as amended by Afghanistan (A/C.3/L.502), was adopted by 35 votes to none, with 13 abstentions.

Recommendation of the Third Committee

9. The Third Committee therefore recommends to the General Assembly the adoption of the following draft resolution:

[Text adopted without change by the General Assembly. See "Action taken by the General Assembly" below.]

Action taken by the General Assembly

At its 554th plenary meeting, on 14 December 1955, the General Assembly adopted the draft resolution submitted by the Third Committee. For the final text, see resolution 927 (X) below.

Resolution 927 (X)

[Document A/RES/362]

QUESTION OF THE SAFETY OF COMMERCIAL AIRCRAFT FLYING IN THE VICINITY OF, OR INADVERTENTLY CROSSING, INTERNATIONAL FRONTIERS

The General Assembly,

Mindful of incidents involving attacks on civilian aircraft innocently deviating from fixed plans in the vicinity of, or across, international frontiers,

Noting that such incidents cause loss of human life and affect relations between States, and that the problem is therefore a matter of general international concern,

1. *Calls upon* all States to take the necessary measures to avoid such incidents;

2. *Invites* the attention of the appropriate international organizations to the present resolution and to the debate on the matter held in the General Assembly at its tenth session.

Other documents pertaining to Agenda Item 61

Document No.	*Title*	*Observations and references*
A/C.3/L.502	Afghanistan: amendments to document A/C.3/L.501	Incorporated in A/3080, para. 5
A/C.3/L.501	Czechoslovakia: amendment to document A/C.3/L.501	*Ibid.*, para. 6
A/RES/362	Resolution adopted by the General Assembly at its 554th plenary meeting on 14 December 1955	See above "Action taken by the General Assembly". The text of the resolution also appears in the *Official Records of the General Assembly, Tenth Session, Supplement No. 19*, as resolution 927 (X)
	MEETINGS AT WHICH AGENDA ITEM 61 WAS DISCUSSED	
A/C.3/SR.682 and 683	Summary records of the 682nd and 683rd meetings of the Third Committee	
A/PV.554	Verbatim record of the 554th plenary meeting of the General Assembly	