

**CASE CONCERNING THE AERIAL INCIDENT OF 27 JULY 1955  
(ISRAEL v. BULGARIA) (PRELIMINARY OBJECTIONS)**

**Judgment of 26 May 1959**

The case concerning the aerial incident of July 27th, 1955 (Israel v. Bulgaria), was submitted to the Court by an Application of the Government of Israel, on October 16th, 1957, relating to a dispute which had arisen with regard to the destruction, on July 27th, 1955, by the Bulgarian anti-aircraft defence forces, of an aircraft belonging to El Al Israel Airlines Ltd. The Application invoked Article 36 of the Statute of the Court and the acceptance of the compulsory jurisdiction of the Court by Israel, on the one hand, in its Declaration of 1956 replacing that of 1950, and by Bulgaria, on the other hand, in 1921. The Bulgarian Government had filed Preliminary Objections to the jurisdiction of the Court.

The Court upheld the first of these objections, according to which the Declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice made by Bulgaria in 1921 cannot be regarded as constituting an acceptance of the compulsory jurisdiction of the International Court of Justice. It therefore declared itself to be without jurisdiction.

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In its Judgment, the Court first considered the First Preliminary Objection by Bulgaria.

In order to find the basis for the jurisdiction of the Court, the Government of Israel invoked the Declaration of acceptance of compulsory jurisdiction signed by Bulgaria in 1921, at the same time as Protocol of Signature of the Statute of the Permanent Court of International Justice, and Article 36, paragraph 5, of the Statute of the International Court of Justice, which reads 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.”

To justify the application of the latter provision to the Bulgarian Declaration of 1921, the Government of Israel relied on the fact that Bulgaria became a party to the Statute of the International Court of Justice on December 14th, 1955, as the result of its admission to the United Nations. The Bulgarian Government denied that Article 36, paragraph 5, transferred the effect of its Declaration to the jurisdiction of the International Court of Justice.

The Court had to determine whether Article 36, paragraph 5, is applicable to the Bulgarian Declaration. That it should apply in respect of declarations made by States which were represented at the San Francisco Conference and were signatories of the Charter and of the Statute can easily be understood. But is this provision meant also to cover declarations made by other States, including Bulgaria? The text does not say so explicitly.

The Court observes that at the time of the adoption of the Statute a fundamental difference existed between the position of the signatory States and of the other States which might subsequently be admitted to the United Nations. This difference derived from the situation which Article 36, paragraph 5, was meant to regulate, namely, the transfer to the International Court of Justice of declarations relating to the Permanent Court, which was on the point of disappearing. The question which the signatory States were easily able to resolve as between themselves at that time would arise in a quite different form in the future as regards the other States.

Article 36, paragraph 5, considered in its application to States signatories of the Statute, effected a simple operation. The position would have been quite different in respect of declarations by non-signatory States. For the latter, such a transfer must necessarily involve two distinct operations, which might be separated by a considerable interval of time. On the one hand, old declarations would have had to have been preserved with immediate effect; on the other hand, they would have had to be transferred to the jurisdiction of

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the new Court. In addition to this fundamental difference in respect of the factors of the problem, there were special difficulties in resolving it in respect of acceptances by non-signatory States. In the case of signatory States, Article 36, paragraph 5, maintained an existing obligation while modifying its subject-matter. So far as non-signatory States were concerned, the Statute, in the absence of their consent, could neither maintain nor transform their original obligation. Shortly after the entry into force of the Statute, the dissolution of the Permanent Court freed them from that obligation. Accordingly, the question of a transformation of an existing obligation could no longer arise so far as they were concerned; all that could be envisaged in their case was the creation of a new obligation binding upon them. To extend Article 36, paragraph 5, to those States would be to allow that provision to do in their case something quite different from what it did in the case of signatory States. It is true that the States represented at San Francisco could have made an offer addressed to other States, for instance, an offer to consider their acceptance of the compulsory jurisdiction of the Permanent Court as an acceptance of the jurisdiction of the new Court, but there is nothing of this kind in Article 36, paragraph 5.

To restrict the application of this provision to the signatory States is to take into account the purpose for which it was adopted. At the time of its adoption, the impending dissolution of the Permanent Court and, in consequence, the lapsing of acceptances of its compulsory jurisdiction were in contemplation. Rather than expecting that the signatory States of the new Statute would deposit new declarations of acceptance, it was sought to provide for this transitory situation by a transitional provision. The situation is entirely different when, the old Court and the acceptance of its compulsory jurisdiction having long since disappeared, a State becomes party to the Statute of the new Court. To the extent that the records of the San Francisco Conference provide any indication as to the scope of the application of Article 36, paragraph 5, they confirm that this paragraph was intended to deal with declarations of signatory States only and not with a State in the situation of Bulgaria.

However, the Government of Israel construed Article 36, paragraph 5, as covering a declaration made by a State which had not participated in the San Francisco Conference and which only became a party to the Statute of the International Court of Justice much later.

The Court, considering the matter from this angle also, found that Article 36, paragraph 5, could not in any event be operative as regards Bulgaria until the date of its admission to the United Nations, namely, December 14th, 1955. At that date, however, the Declaration of 1921 was no longer in

force in consequence of the dissolution of the Permanent Court in 1946. The acceptance set out in that Declaration of the compulsory jurisdiction of the Permanent Court was devoid of object, since that Court was no longer in existence. And there is nothing in Article 36, paragraph 5, to reveal any intention of preserving all the declarations which were in existence at the time of the signature or entry into force of the Charter, regardless of the moment when a State having made a declaration became a party to the Statute. The provision determines, in respect of a State to which it applies, the birth of the compulsory jurisdiction of the new Court. It makes it subject to two conditions: (1) that the State having made the declaration should be a party to the Statute; (2) that the declaration of that State should still be in force. Since the Bulgarian Declaration had lapsed before Bulgaria was admitted to the United Nations, it cannot be said that at that time that Declaration was still in force. The second condition is therefore not satisfied in the present case.

Thus the Court finds that Article 36, paragraph 5, is not applicable to the Bulgarian Declaration of 1921. This view is confirmed by the fact that it was the clear intention inspiring Article 36, paragraph 5, to preserve existing acceptances and not to restore legal force to undertakings which had expired. On the other hand, in seeking and obtaining admission to the United Nations, Bulgaria accepted all the provisions of the Statute, including Article 36. But Bulgaria's acceptance of Article 36, paragraph 5, does not constitute consent to the compulsory jurisdiction of the Court; such consent can validly be given only in accordance with Article 36, paragraph 2.

Article 36, paragraph 5, cannot therefore lead the Court to find that the Bulgarian Declaration of 1921 provides a basis for its jurisdiction to deal with the case. In these circumstances it is unnecessary for the Court to proceed to consideration of the other Bulgarian Preliminary Objections.

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Consequently, the Court finds, by twelve votes to four, that it is without jurisdiction to adjudicate upon the dispute brought before it by the Application of the Government of Israel.

Vice-President Zafrulla Khan has appended a Declaration to the Judgment. Judges Badawi and Armand-Ugon have appended statements of their Separate Opinions. Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender have appended to the Judgment a statement of their Joint Dissenting Opinion. Judge *ad hoc* Goitein has appended to the Judgment a statement of his Dissenting Opinion.