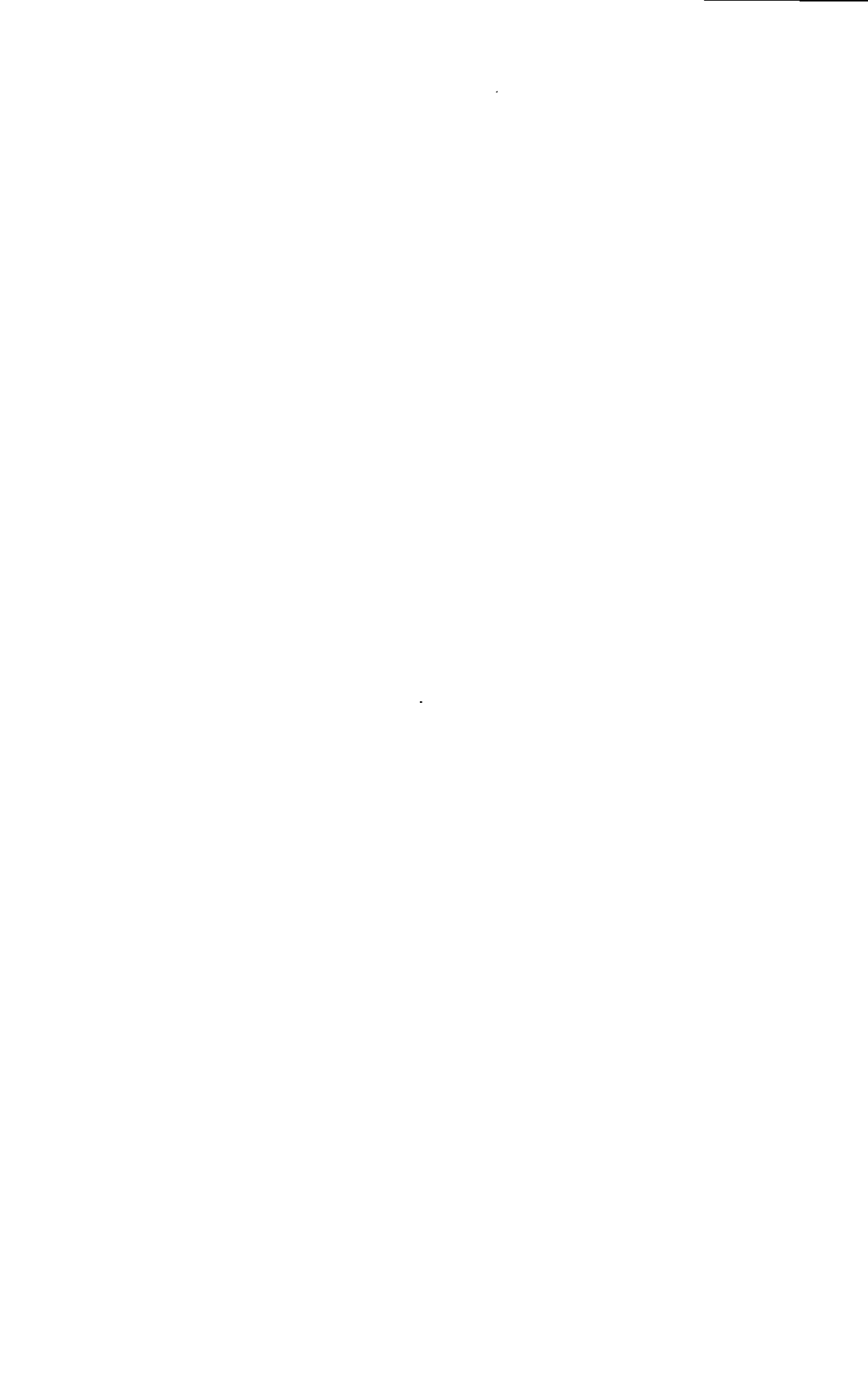


SECTION B.—PLEADINGS



SECTION B. — MÉMOIRES



## I. MEMORIAL OF THE GOVERNMENT OF ISRAEL<sup>1</sup>

### Introduction

1. The Government of Israel has the honour to submit this Memorial, filed pursuant to the Order made by the International Court of Justice on 26 November 1957; and in accordance with Articles 32 (2) and 41 of the Rules of Court it develops the facts and grounds on which the claim is based.

2. The Court has jurisdiction to determine the dispute submitted to it by the Government of Israel on the basis of Article 36 of the Statute of the Court and the Declarations made by both parties accepting the compulsory jurisdiction of the Court. The Declaration of Israel, dated 3 October 1956, is in the following terms:

“On behalf of the Government of Israel I declare that Israel recognizes as compulsory *ipso facto* and without special agreement, in relation to all other Members of the United Nations and to any non-member State which becomes a party to the Statute of the International Court of Justice pursuant to Article 93, paragraph 2, of the Charter, and subject to reciprocity, the jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2, of the Statute of the Court in all legal disputes concerning situations or facts which may arise subsequent to 25 October 1951 provided that such dispute does not involve a legal title created or conferred by a Government or authority other than the Government of Israel or an authority under the jurisdiction of that Government.

This Declaration does not apply to:

(a) Any dispute in respect to which the Parties have agreed or shall agree to have recourse to another means of peaceful settlement;

(b) Any dispute relating to matters which are essentially within the domestic jurisdiction of the State of Israel;

(c) Any dispute between the State of Israel and any other State whether or not a member of the United Nations which does not recognize Israel or which refuses to establish or to maintain normal diplomatic relations with Israel and the absence or breach of normal relations precedes the dispute and exists independently of that dispute;

(d) Disputes arising out of events occurring between 15 May 1948 and 20 July 1949;

(e) Without prejudice to the operation of sub-paragraph (d) above, disputes arising out of, or having reference to, any hostilities, war, state of war, breach of the peace, breach of armistice agreement

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<sup>1</sup> See Part IV, *Correspondence*, Section A, No. 46.

or belligerent or military occupation (whether such war shall have been declared or not, and whether any state of belligerency shall have been recognized or not) in which the Government of Israel are or have been or may be involved at any time.

The validity of the present Declaration is from 25 October 1956 and it remains in force for disputes arising after 25 October 1951 until such time as notice may be given to terminate it.

IN WITNESS WHEREOF I, Golda Meir, Minister for Foreign Affairs, have hereunto caused the Seal of the Ministry for Foreign Affairs to be affixed, and have subscribed my signature at Jerusalem this Twenty-Eighth day of Tishri, Five Thousand Seven Hundred and Seventeen, which corresponds to the Third day of October, One Thousand Nine Hundred and Fifty-Six.

*(Signed)* Golda MEIR."

The Declaration by Bulgaria, dated 12 August 1921, is in the following terms:

*"Au nom du gouvernement du Royaume de Bulgarie, je déclare reconnaître comme obligatoire de tout autre Membre ou État acceptant la même obligation, la juridiction de la Cour permanente de Justice internationale, purement et simplement.*

*(Signé)* S. POMENOV."

Bulgaria became a member of the United Nations on 14 December 1955, following Resolution 995 (X) adopted by the General Assembly on 14 December 1955, when that country's Declaration became applicable to the jurisdiction of the International Court of Justice.

3. The facts out of which the dispute brought before the Court by Israel arose are succinctly stated in paragraph 2 of the Application instituting Proceedings. On 27 July 1955 a civil passenger aircraft, registered in Israel under No. 4X-AKC, type Constellation (hereinafter referred to as "4X-AKC"), wearing the Israel colours and belonging to El Al Israel Airlines Ltd. (hereinafter referred to as "the Company"), a company incorporated in Israel, while on a scheduled commercial flight from London to Lod (Lydda), came down in flames in the region of Petritch, Bulgaria (near the point where the frontiers of Bulgaria, Greece and Yugoslavia meet). The aircraft was completely destroyed. Not one of the occupants of this aircraft—fifty-one passengers and seven members of its crew, fifty-eight persons of varying nationalities—survived the disaster: all were killed. The Bulgarian Government, on 28 July, officially, publicly and spontaneously announced how this had come about. That Government's armed forces had shot down and destroyed the aircraft, killing all its occupants. This was amplified and repeated on 4 August when the Bulgarian Government, in the light of the conclusions of a special Commission which it had set up to investigate what had occurred, again gave out that its armed forces had destroyed the aircraft, those armed forces having acted in haste and

without taking all the necessary measures. Moreover, in reply to emphatic protests by a number of Governments, including the Government of Israel, the Bulgarian Government gave certain public assurances of its intention to prevent a repetition of such a catastrophe and undertakings regarding the identification and punishment of those guilty of causing it, as well as regarding the eventual payment of compensation. Following those admissions, assurances and undertakings the formal diplomatic claim for the compensation due was presented by Israel on 14 February 1956, since when protracted efforts have been made by the Government of Israel to settle the claim. The negotiations with the Government of Bulgaria reached a deadlock in October 1957 after the Bulgarian Government had made a completely unacceptable, and indeed derisory, offer to settle the claim while intimating that it did not regard itself as being under any legal obligation arising out of the incident itself or out of the assurances, undertakings and admissions it had spontaneously, voluntarily and deliberately given to the Government of Israel, and the world, in July and August 1955. The Court is now being asked to resolve the dispute between the two Governments, by formally declaring that Bulgaria is responsible under international law for the destruction of the aircraft and by determining the amount of compensation due.

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## Part One

### THE STATEMENT OF THE RELEVANT FACTS

#### Section I.—*The shooting-down of 4X-AKC on 27 July 1955 and the subsequent investigation*

4. 4X-AKC left London at 2013Z hours<sup>1</sup> on 26 July 1955 on the Company's scheduled commercial flight No. 402/26 from London to Lod. According to the Company's timetable in force between 15 May and 15 October 1955 as amended (Annex 1), this flight was scheduled to take off at 0900Z and to make stops at Paris and Vienna. Owing to the late arrival of 4X-AKC into London (because of other operational requirements of the Company), the time of departure from London was re-scheduled to 2000Z, and the scheduled and actual timetables for this flight were as follows:

	Arrive		Depart	
	Schedule	Actual	Schedule	Actual
London	—	—	2000	2013
Paris	2130	2122	2230	2246
Vienna	0130	0139	0230	0253
Lod	0925	—	—	—

5. Particulars regarding the passengers are contained in the passenger manifests out of London, Paris and Vienna (Annex 2). Four of the passengers who boarded 4X-AKC at London disembarked at Vienna, while others boarded the aircraft at Paris and Vienna with destination Lod. A consolidated list of all passengers who were on board 4X-AKC when it left Vienna, together with indication of their nationality, is contained in Annex 3.

6. The crew of 4X-AKC consisted of the Captain, First Officer, Flight Engineer and Wireless Operator as aircrew, together with Cabin Personnel consisting of the Senior Purser, Trainee Purser and Hostess. Particulars regarding the crew are contained in the Crew Manifest (Annex 4).

7. 4X-AKC was transporting approximately 1120 kgs. of freight covered by consignment notes and approximately 1090 kgs. of passengers' baggage. Particulars of the freight, as contained in the cargo manifest, are annexed (Annex 5). In addition, approximately

<sup>1</sup> In this Memorial times are normally given in GMT (marked "Z"), but where relevant, an indication of the local time is also given. 1200Z (GMT) is the equivalent to 1300A (Central European Time) in force in Yugoslavia, to 1400B (Central European Summer Time) in force in Turkey, Greece and Bulgaria, and to 1500C Israel Summer Time.

75 kgs. of mail, according to the particulars contained in Annex 6, were on board.

8. As stated in paragraph 4 above, 4X-AKC departed from London and arrived at and departed from Paris at the times mentioned. It also duly arrived at Schwechat airport, Vienna, at 0139Z on 27 July 1955.

(a) In accordance with the Company's normal procedure in regard to flights through Vienna, Mr. Hans Weissbrod, the Station Manager and the duly qualified despatcher of the Company at Vienna (hereinafter referred to as "the despatcher") had, before the arrival of 4X-AKC, obtained from the Austrian Meteorological Service at that airport the relevant meteorological information required for the landing at and take-off from Schwechat, and for the flight from Vienna to Lod. On the basis of the information thus obtained, and after inspection of the information available in the NOTAM Office<sup>1</sup>, he had prepared the Company's Short-Range Flight Plan (hereinafter referred to as the "Flight Plan") (Annex 7). The despatcher then met 4X-AKC when it came to a stop on the tarmac, and was informed by the Flight Engineer of 4X-AKC that no repair or maintenance work was required, as is confirmed by an extract from 4X-AKC's flight log book, copy of which was left with the despatcher (Annex 8). The Captain and First Officer of 4X-AKC, accompanied by the despatcher, proceeded directly after landing to the Meteorological Office, where they received from the Forecaster on duty a flight forecast. This forecast was explained by the Forecaster in the presence of the despatcher to the Captain and the First Officer and was discussed in general and in detail, after which it was signed by the Captain. After a visit to the NOTAM office and the briefing by the NOTAM Officer (at which the Captain, the First Officer and the despatcher were present) and after the Flight Plan had been checked by the Captain and the First Officer, it was duly signed by the latter. 4X-AKC thereupon departed from Vienna at 0253Z when the Air Traffic Control<sup>2</sup> (ATC) Flight Plan, prepared by ATC Vienna and signed by the First Officer was completed by ATC. This document is the official clearance of an aircraft for ATC purposes. The ATC Flight Plan and the Flight Forecast are annexed (Annex 9).

(b) The handling of passengers, baggage, mail and freight, both in transit and joining at Vienna (other than baggage, mail and freight which arrived on 4X-AKC and which was not removed from it), was undertaken by an Austrian concern known as Flughafen Wien Betriebsgesellschaft m.b.H., Wien-Schwechat, under contract with the Company.

<sup>1</sup> The NOTAM Office receives and makes available to aircrew current information relevant to aircraft navigation questions such as changes in radio navigational facilities, airways, advisory routes, prohibited and danger areas, serviceability of aerodromes and other similar matters.

<sup>2</sup> See paragraph 9.

9. Under the system of air traffic control operated in accordance with the arrangements established by the International Civil Aviation Organisation, created by the Convention on International Civil Aviation signed at Chicago on 7 December 1944 (Annex 10)<sup>1</sup>, certain air space used by commercial aircraft is divided into control areas each under the control of a centre (known as ATC—Air Traffic Control Centre). The basis of the system is that an aircraft flying in or through a control area reports to and is under the control of a single ATC for the given portion of the journey, that centre being responsible exclusively for the provision of air traffic control services within its area, particularly in regard to the avoidance of mid-air collisions, provided the aircraft Captain has filed a flight plan under instrument flying rules. (See in particular Annex 11 to the Chicago Convention, on Air Traffic Services, Air Traffic Control Service, Flight Information Service and Alerting Service.) The lanes through which civilian aircraft are advised or required to fly are control areas and are conveniently known as airways or advisory routes, and are given an appropriate identification. The flight from Vienna to Lod was routed to follow advisory route 287, route 12, and airway Amber 10 as far as Athens, and advisory routes 372 and 373 to Lod. The relevant part of this route for the purposes of this case is the portion of airway Amber 10 between Belgrade and Saloniki, which is indicated on the AERAD map annexed (Annex 11). This portion of the airway is controlled by ATC Belgrade over Yugoslav territory to Gevgelia on the border, and by ATC Athens over Greek territory thereafter.

10. It was in accordance with this standard practice that 4X-AKC proceeded on its flight from Vienna. It was in regular and routine communication with the appropriate ATC centres. The first and only indication of any untoward occurrence was the receipt at approximately 0537Z by ATC Athens of abruptly discontinued S.O.S. messages originating with 4X-AKC, and within some ten minutes the information was relayed to Lod. In that way the Israel Government and the owners of 4X-AKC first became aware of some mishap to 4X-AKC. At 0842Z ATC Athens originated a further message to the effect that 4X-AKC had come down in flames at Tsirbanovo, a place in Bulgarian territory near the Greek-Bulgarian border. Similar information was being disseminated in the course of the day by different news agencies and was being reported by the Israel diplomatic and consular offices in Europe to the Israel Ministry for Foreign Affairs. At 1200Z the Israel Minister

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<sup>1</sup> This Convention is a published document (see 15 United Nations Treaty Series, p. 295). It is annexed to this Memorial for the convenience of the Members of the Court. Having regard to Article 43 (1) of the Rules of Court, it is submitted that strictly speaking it is not necessary to annex it to this Memorial: and in the light of that Rule the Annexes to the Convention referred to herein (being also published documents) have not been formally annexed to this Memorial.



of Communications, acting in exercise of his various statutory powers, appointed a Commission of Inquiry to enquire into the circumstances of the bringing down of the Constellation aircraft 4X-AKC of the Company, within Bulgarian territory, on 27 July 1955. The members of this Commission were: the Director of Aeronautical Services of the Department of Civil Aviation, as Chairman; together with the Chief Inspector of Airworthiness of the same department, an officer (captain) of the Israel Defence Forces/Air Force, the Deputy Director-General of the Company, the Assistant Director of the Maintenance Department of the Company, and a captain (pilot) of the Company.

11. Immediately after the appointment of this Commission of Inquiry the Bulgarian Legation in Israel was officially requested to issue the necessary entry visas to the Commission's members. Greek entry visas were obtained, and at 2359Z on 27 July the Commission departed by air for Greece. Bulgarian visas had not yet been obtained: however the Bulgarian Legation gave to understand that all assistance would be forthcoming and that the visas would be furnished by the Bulgarian representatives in Athens. During the course of the 27th, the Company's commercial representative in Athens together with a member of the staff of the Israel Diplomatic Representative in Athens tried to obtain permission to enter Bulgaria from Greece for the purpose of reaching the scene. No such permission was granted. The most these people could do was, in the region of the Greek frontier itself, to observe from a distance the area in which the wreckage was strewn.

12. In Sofia the Israel Legation first received intimation of the disaster at 1200Z (1400B) on the 27th in a telephone message from the Israel Consulate-General in Vienna. Shortly afterwards Mr. Avner Benbassat, Secretary-Archivist at the Israel Legation in Sofia, was received at the Foreign Ministry by the Deputy Chief of Protocol, who seemed to know nothing of the incident. Mr. Benbassat at once requested permission to proceed to the site of the disaster, but in the afternoon, no reply to this request having been received, was informed by the Chief of Protocol that the competent authorities were dealing with the matter. During the course of the evening, the Bulgarian Ministry for Foreign Affairs was twice contacted in connection with the application for visas for the members of the Commission of Inquiry.

13. By the morning of the 28th, no reliable information had yet been received by the Government of Israel, other than the news of the S.O.S., and the general news agency reports that the aircraft had come down in flames on Bulgarian territory. In these circumstances, the Government of Israel was still concentrating its efforts on obtaining reliable news of what had occurred, and regarding the

fate of the persons on board, for which purpose enquiries were made of the Bulgarian representatives; and more specifically on securing the necessary Bulgarian entry visas for the Inquiry Commission. Initially, reliance was placed on the Bulgarian Legation's undertaking that the visas would be forthcoming. However, later in the morning a Note Verbale (Annex 12) was transmitted to the Bulgarian Legation complaining of the absence of accurate information concerning the cause and extent of the disaster. Surprise was expressed that although more than 24 hours had elapsed since the disaster, which had occurred over Bulgarian territory, the Bulgarian authorities had furnished no information whatsoever to the Israel Government. It was placed on record in that Note Verbale that "eight hours after the Israel Chargé d'Affaires *a.i.* in Sofia approached the Bulgarian Minister for Foreign Affairs, permission had still not been granted to him to proceed to the scene of the accident and to perform the duties incumbent upon him in these circumstances". It was also requested that immediate instructions be given for the necessary facilities to be furnished to the Inquiry Commission to enter Bulgarian territory and pursue its investigations in accordance with the normal procedure.

14. In the course of 28 July 1955, the Bulgarian Telegraphic Agency issued an official Communiqué which was published in the Bulgarian Press of the 29th (Annex 13). That Communiqué gave the following account of what had happened:

"Le 27 juillet, à 7 h. 35, heure bulgare, comme il a été appris par la suite, un avion de voyageurs israélien s'est dévié de sa direction et dans la région de la ville de Trn a pénétré sans préavis dans l'espace aérien bulgare, il a survolé les villes de Stanké Dimitrov et de Blagoevgrad et il s'est dirigé vers le sud dans la direction de la ville de Pétritch.

La Défense anti-aérienne bulgare n'a pas pu reconnaître l'avion et après plusieurs avertissements a ouvert le feu à la suite de quoi l'avion a été atteint et il est tombé au nord de la ville de Pétritch."

It went on to announce the appointment by the Council of Ministers of a Governmental Commission composed of the Ministers for Foreign Affairs, Interior, National Defence and Public Health, and the Chief Prosecutor of the Republic, "chargés d'établir les circonstances dans lesquelles a eu lieu l'accident". During that morning there had taken place two conversations between members of the Israel Legation in Sofia and members of the Bulgarian Foreign Ministry. In the first of these the Deputy Chief of Protocol had informed the Israel Legation by telephone that all the occupants of the plane had been killed. In the second, Mr. Baruch, Attaché, and the Chargé d'Affaires *ad interim*, was received by the Foreign Minister, M. Mintcho Neitchev, who, after commenting that the catastrophe

was all the greater because of the time at which it had occurred, reviewed briefly a Bulgarian Note Verbale of 28 July (Annex 14) which was thereafter handed over. That Note Verbale, after stating in terms substantially, but not absolutely, similar to the Communiqué of the same day that Bulgarian armed forces had shot the aircraft down, announced the appointment of the Governmental Commission "chargée de faire l'enquête de cet accident déplorable et d'établir les circonstances dans lesquelles il a eu lieu". It went on to indicate the readiness of the Bulgarian Government "à prendre à sa charge la part respective des dommages matériels qui ont été causés après qu'ils auront été dûment établis". The Israel representative thereupon requested (a) immediate permission to visit the site of the wreckage; (b) the mounting of a guard over the bodies and over the wreckage pending the arrival of the Israel Commission of Inquiry; (c) the immediate grant of entry visas for the Israel Commission of Inquiry; (d) remission to the Israel authorities of all documents, mail and baggage on board. The Foreign Minister replied that instructions had already been given regarding Mr. Baruch's visit to the site, and he suggested that Mr. Baruch be accompanied by Mr. Molerov, an official of the Bulgarian Foreign Ministry. All the bodies had already been transferred to the Pathological Institute in Sofia. A military guard had been mounted over the aircraft. Following the appointment of the Bulgarian Commission, the Bulgarian Government saw no necessity for or possibility of a visit by a foreign Inquiry Commission. The documents, mail and baggage would be transferred as requested<sup>1</sup>. Mr. Baruch proceeded to the site, as arranged, later that morning.

15. The contents of the Communiqué, being transmitted by the news agencies, were known in Israel before details were received of the Note Verbale. It was by now quite clear that what was involved was not a mere aircraft accident in the accepted sense, and that since the Bulgarian Government was not concealing the fact that its armed forces had opened fire and shot the aircraft down, the international responsibility of Bulgaria was deeply involved. Accordingly, in the afternoon of the 28th, the Bulgarian Chargé d'Affaires in Israel was handed the second Note Verbale of 28 July (Annex 15). In this Note Verbale the Israel Government registered its "vehement protest at this shocking recklessness", and considered that the action of the Bulgarian forces derived from a "wanton disregard of human life and of the elementary obligations of humanity which should have governed their conduct". The Government of Israel was therefore demanding full satisfaction from the Bulgarian Government which it held responsible for what

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<sup>1</sup> In fact, the items were transferred to the officials of the Israel Legation only on 2 August, a couple of hours before the funeral train left for Istanbul. (See paragraph 25 below.)

must be regarded as a "grave international delict", and reserved its right to take all steps necessary to that end. The Note Verbale protested strongly at the refusal of entry visas for the members of the Commission of Inquiry and insisted that full facilities be afforded them by the Bulgarian authorities.

16. Meanwhile, at Sofia, Mr. Nall, the Israel Chargé d'Affaires *en pied* in Bulgaria (who had been away on leave), returned and was received by the Foreign Minister. The Foreign Minister repeated his Government's point of view on the question of the Israel Inquiry Commission's visit to Bulgaria. The common international practice to which Israel representatives had made reference was not known to him, and the Israel Government's demand ran contrary to all conceptions of the sovereignty of independent States. Without justifying the action of the Bulgarian armed forces, since an accident had occurred on Bulgarian territory, only Bulgaria was entitled to investigate it and no other Government was entitled to send a Commission of Inquiry to function in Bulgarian territory.

17. In the morning of the 29th another meeting took place between the Chargé d'Affaires and the Foreign Minister at which a copy of the Israel Government's second Note Verbale of 28 July (Annex 15) was handed over. The Israel representative stated that if an unauthorized crossing of the Bulgarian frontier had taken place, the proper course would have been for the Bulgarian Government to have taken diplomatic steps to prevent a repetition and not to have caused a terrible catastrophe, unprecedented in time of peace between two friendly nations. In reply to his request for an explanation of the penultimate paragraph of the Bulgarian Note Verbale of 28 July (Annex 14), the Foreign Minister stated that the Bulgarian Government's Commission was at work, and there was the possibility that this aspect would be further modified; and the question of the visit of the Israel Commission of Inquiry would be discussed at a meeting of the Cabinet to be held shortly.

18. At a further meeting during the afternoon of the same day, the Foreign Minister finally announced the refusal of the Bulgarian Government to permit the Israel Commission of Inquiry to enter Bulgaria: on the other hand three experts, at Israel's choice, could visit the site, examine the wreckage, and take photographs, but could not interrogate any person. These persons could remain in Bulgaria during the hours of daylight of one day only, including transportation to and from the site.

19. In the afternoon of the 29th, the Bulgarian Chargé d'Affaires requested an interview with Mr. Eytan, the Director-General of the Israel Ministry for Foreign Affairs, and in reply to paragraph 2 of the first Israel Note Verbale of the 28th (Annex 12) simply repeated the official Bulgarian description of the incident as

contained in the Communiqué of the Bulgarian Telegraphic Agency (Annex 13). Mr. Eytan stressed that: (a) the Israel Inquiry Commission must be permitted to enter Bulgaria; (b) even if the aircraft had been off its course, this would not have given the Bulgarian authorities any right to shoot it down; (c) it was a matter of amazement that the Bulgarian armed forces had not recognized a well-known type of civil aircraft. He also made the following oral declaration in the name of the Prime Minister and Minister for Foreign Affairs:

“The Government of Israel has noted that the Government of Bulgaria has admitted responsibility for the incident and formally notifies the Government of Bulgaria that it demands full compensation for the aircraft and the victims of the disaster. Details of Israel's claim will be submitted to the Bulgarian Government through the diplomatic channels. The Government of Israel is confident that the Government of Bulgaria will take all the necessary steps to ascertain the persons responsible and to punish them<sup>1</sup>.”

20. In the early hours of the 30th, Mr. Nall proceeded to the site of the wreckage near the village of Petritch and there, on the border between Greece and Bulgaria, he met with three members of the Israel Commission of Inquiry, who reached the Greek frontier at about 0930B, and who entered Bulgaria only about two hours later. At the site were also present Mr. Baruch, Mr. Molerov of the Bulgarian Foreign Ministry, and Lt. Col. Stephenson, the British Military Attaché. Mr. Nall informed the members of the Commission of the Bulgarian Government's conditions for their entry into Bulgaria. Owing to various difficulties on the Bulgarian side of the frontier, the three members of the Commission did not reach the scene until about midday, and they had about seven hours in which to complete their work and return to Greece before sundown. Apart from this, their work was conducted without interference by the Bulgarian authorities; but the refusal of the Bulgarian Government to allow all the members to visit the site seriously reduced the scope and thoroughness of the investigation. The Court is accordingly invited to take note of the fact that the Israel Commission was not permitted to make a proper examination on Bulgarian territory, and that the conditions under which three members of the Commission only were permitted to enter Bulgarian territory and proceed to the site of the wreckage were unsatisfactory from all points of view, and constituted a major interference in the Commission's work.

21. On the morning of 2 August, a meeting took place between the Chargé d'Affaires and the Deputy Minister for Foreign Affairs, the Minister being engaged in the Bulgarian Governmental

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<sup>1</sup> Translation from the Hebrew. The statement was made in Hebrew and was translated into Russian by an interpreter.

Commission. Besides discussing funeral arrangements, Mr. Nall stated that the three members of the Israel Commission of Inquiry were not satisfied with their investigation of the wreckage only, and wished to examine also the persons responsible for the disaster. The Deputy Minister promised to lay this request before the Government, but did not undertake to give a quick reply. The necessary permission was never granted.

22. On the evening of that day, the funeral cortège left on its journey. The bodies of the victims were transferred by rail from Sofia to Istanbul, and thence by air to Israel, where the mass funeral was held on 4 August. The Government of Israel would wish to take this opportunity to place on record its appreciation of the assistance rendered by the Turkish authorities in this connection, and also of the facilities granted by the Greek and Yugoslav authorities to the members of the Commission of Inquiry.

23. During the afternoon of 3 August, a further meeting took place between the Chargé d'Affaires and the Foreign Minister, who stated that the Bulgarian Governmental Commission had completed its work and that its Report, publication of which was awaiting approval by the Government, could be anticipated in the near future. The Foreign Minister explained that the Bulgarian authorities had proof that at 0503Z (0703B) an anti-aerial defence unit in the vicinity of Trn had reported that an aircraft, unidentified by it, was approaching the Bulgarian frontier from Yugoslav territory; at 0510Z the aircraft had crossed the Bulgarian frontier and at 0513Z Bulgarian fighters took off, pursued the aircraft and ordered it to follow them. But the aircraft did not obey their instruction and continued in the direction of the Greek frontier, upon which event fire was opened on the aircraft and it was brought down in the vicinity of Petritch. He added that the Commission had reached the conclusion that the Security Forces had been too hasty, and that those responsible should be identified and punished. In reply to a question whether the Bulgarian Government was recognizing that it must accept full and unreserved responsibility for the disaster, the Foreign Minister indicated that while there would be a change in their attitude, they were unable to accept responsibility for all the damages. He could give no further details until the report of the Commission was finally approved: in particular he was unable to indicate whether the Bulgarian Government would admit full responsibility for the disaster and only reserve its position regarding the quantum of damages. An announcement of the conclusions of the Bulgarian Governmental Commission would be made the next day, after which a reply would be given to the Israel Government's Note Verbale of 28 July.

24. On 3 August 1955 the Bulgarian Telegraphic Agency issued a Communiqué (Annex 16), the text of which appeared in the Bulgarian press of the next day. This Communiqué in part stated:

"1. Le 27 juillet a. c., à 7 h. 10, heure bulgare, un avion de voyageurs quadrimoteur, type "Constellation", appartenant à la Compagnie de navigation aérienne israélienne "El Al", s'est dévié à 130 klm. environ de sa direction et il a pénétré sans préavis dans l'espace aérien bulgare dans la région de la ville de Trn.

Après avoir pénétré à 40 klm. à l'intérieur du pays à l'est de la ville de Trn, l'avion a pris la direction du sud, il a survolé les villes de Breznik, Radomir, Stanké Dimitrov et Blagoevgrad et il a suivi la ligne au sud vers la frontière bulgare-grecque. L'avion a survolé le territoire bulgare au total environ de 200 klm.

2. Le poste respectif de commandement de la défense anti-aérienne, après qu'il a été prévenu qu'un avion étranger, d'origine inconnue, a pénétré dans l'espace aérien bulgare, a donné l'ordre à deux avions de chasse de la défense anti-aérienne de poursuivre l'avion étranger et de l'obliger à atterrir sur l'un quelconque de nos aérodromes.

3. L'avion a été découvert par les avions de chasse au sud de la ville de Stanké Dimitrov et il a été prévenu par les signes établis par le Code international à suivre les avions de chasse pour atterrir sur l'aérodrome qu'ils lui indiqueront. L'avion ne s'est pas soumis à cette invitation et il a continué son vol au sud vers la ville de Pétritch. Les avions de chasse voyant que l'avion perturbateur fait un essai de s'enfuir par la frontière, ont ouvert le feu, à la suite de quoi l'avion a pris feu et il est tombé dans la région de la ville de Pétritch. A cause de l'explosion qui s'est produite en l'air, l'avion est complètement détruit et tous les 51 passagers et 7 personnes de l'équipage ont péri.

4. Dans les circonstances sus-mentionnées il est évident que les causes du malheureux accident avec l'avion israélien sont les suivantes:

a) L'avion s'est dévié de sa direction, a violé la frontière de la Bulgarie et sans préavis a pénétré à une grande profondeur dans l'espace aérien bulgare. Étant muni d'un équipement de navigation de perfection il n'a pas pu ne pas s'apercevoir qu'il a violé la frontière d'État. Même après qu'il a été prévenu, il n'a pas obéi, mais il a continué son vol au sud dans la direction de la frontière bulgare-grecque.

b) Les organes de la défense anti-aérienne ont manifesté de la hâte. Ils n'ont pas pris toutes les mesures nécessaires pour obliger l'avion d'atterrir."

The Communiqué then went on to make some general remarks about previous violations of the Bulgarian airspace. It expressed the sincere desire of the Bulgarian Government that there should be no repetition of such an event and its intention to identify and punish "les coupables de l'accident". The final paragraph of that Communiqué stated as follows:

"Le Gouvernement bulgare exprime ses sympathies aux proches des innocentes victimes qui ont péri à la suite de cet accident. et,

dans sa Note au Gouvernement de l'État d'Israël, a déclaré qu'il est prêt de prendre à sa charge le dû des dommages-intérêts aux familles des victimes ainsi que sa part des dommages-intérêts des pertes matérielles."

25. Several times in the course of the meetings between 28 July 1955 and 3 August 1955, the Israel representatives had requested the transfer to them of all the papers, documents, identity papers, passports and "toute autre chose" relating to the persons on board and to the aircraft, mail, luggage, cargo and all other things normally on board the aircraft, and on more than one occasion they complained to the Bulgarian officials of their tardiness in handing these items over. The attention of the Court is particularly called to the fact, as stated in paragraph 14 above, that the Government of Bulgaria was specifically requested to post guards over the wreckage pending the arrival of the Israel Commission of Inquiry which would be desirous of examining the wreckage as it was. On 2 August 1955 there was handed to the Israel representatives in Sofia a miscellaneous selection of items said to have been recovered from the wreckage. These included a few personal identity papers, some unimportant personal effects, and some mail (a part of the mail had been handed over already on 29 July). This handing over took place on 2 August 1955, two hours prior to the departure of the funeral cortège from Sofia. The items thus handed over were recorded in a series of Protocols drawn up by the Bulgarian officials in the Bulgarian language. These officials informed the representatives of the Israel Legation that these were all the items recovered from the wreckage. Several days later there were delivered by the Bulgarian authorities to the representatives of the Israel Legation some documents relating to the cargo. The details of this handing over were not recorded in any Protocol. No other aircraft papers, including the various operational documents and log-books, nor the instruments and removable fittings carried on 4X-AKC, have ever been handed over.

26. At a further meeting with the Foreign Minister on the 4th, the Foreign Minister stated, in reply to a request for a copy of the Bulgarian Commission's Report, that the Communiqué which had just been published (Annex 16) was certainly already known to the Israel Government and it could be taken that there was nothing more. When Mr. Nall objected that even assuming this to be the case, a public Communiqué was not equivalent to the official communication of the Report of the Commission to his Government, the Foreign Minister stated that in fact the Commission had enquired into self-evident matters and that the question of writing reports had not arisen. The Commission had simply recorded its conclusions and these had now been endorsed by the Government and published in the Communiqué. While promising to bring the Israel request before the Government, the Foreign Minister



repeatedly insisted that there was nothing to be added to the Communiqué, as would undoubtedly be mentioned in a Note then under preparation. The Court is accordingly invited to take note of the fact that according to this statement no report was compiled by the Bulgarian Governmental Commission; and in any event that no copy of any such report was ever communicated to the Government of Israel. As for the pending request for a further visit by the members of the Israel Commission of Inquiry (see paragraph 21 above), the Foreign Minister reiterated the previous argument that Bulgaria, as a sovereign State, could not permit a foreign State to carry out an investigation on her territory. Mr. Nall thereupon enquired whether two members of the Commission might not be permitted to return to Bulgaria. The Foreign Minister, while asking for a precise definition of the purpose of the visit, did not move from his position.

27. Later on the same day, the Legation of Israel in Sofia received from the Bulgarian Ministry for Foreign Affairs a Note Verbale bearing that day's date—4 August 1955 (Annex 17). Here the following account is given of what had occurred:

“Le 27 juillet a. c., à 7 h. 10 temps local, l'avion de la Compagnie de navigation aérienne d'Israël “El Al” a pénétré dans l'espace aérien bulgare dans la région de la ville de Trn, sans aucun préavis. Après avoir pénétré à 40 km. en profondeur, l'avion a survolé les villes de Breznik, Radomir, Stanké-Dimitrov, Blagoevgrad et il a continué au sud. Il a volé au-dessus du territoire bulgare environ 200 km.

Au sud de la ville de Stanké-Dimitrov, l'avion a été intercepté par deux chasseurs bulgares qui ont reçu l'ordre de le contraindre à atterrir dans quelque aéroport bulgare.

Les chasseurs ont averti l'avion, conformément aux règlements internationaux établis, d'atterrir. Malgré ce fait, il ne s'est pas soumis, mais a continué à voler vers le sud, essayant de s'enfuir à travers la frontière bulgare-grecque.

Dans ces circonstances, les deux chasseurs des forces de la défense anti-aérienne bulgare dans cette région, étonnés par la conduite de l'avion, ont ouvert le feu, en raison de quoi un peu plus tard il a pris feu et est tombé dans la région de la ville de Pétritch.”

The fourth paragraph, to which the Government of Israel draws particular attention, includes the following:

“Adoptant la conclusion de la Commission gouvernementale spéciale, chargée d'enquêter le cas, le Gouvernement bulgare admet que les causes du malheureux accident avec l'avion de “El Al” se résument dans ce qui suit:

I. L'avion s'est écarté de son itinéraire, il a violé la frontière d'État de Bulgarie et, sans aucun préavis, a pénétré profondément à l'intérieur de l'espace aérien bulgare. Muni d'outillages de navigation aérienne parfaits, il n'a pas pu ne pas voir qu'il avait violé

la frontière d'État bulgare. Même après avoir été averti, il ne s'est pas soumis, mais a continué à voler vers le sud dans la direction de la frontière bulgaro-grecque;

2. Les forces de la défense anti-aérienne bulgare ont fait preuve d'une certaine hâte et n'ont pas pris toutes les mesures nécessaires pour contraindre l'avion à se soumettre et à atterrir."

The Note Verbale concluded with the following two paragraphs:

"Le Gouvernement et le peuple bulgare expriment une fois de plus leurs profonds regrets pour ce grand malheur qui a causé la mort de personnes complètement innocentes. Le Gouvernement bulgare désire ardemment que de pareils malheurs ne se répètent plus jamais. Il fera établir et punir les personnes coupables de la catastrophe survenue avec l'avion israélien et il prendra toute les mesures nécessaires pour que de pareilles catastrophes ne se répètent plus en territoire bulgare.

Le Gouvernement bulgare compatit profondément aux parents des victimes et il est prêt à assumer le dédommagement dû à leurs familles, ainsi que sa part de l'indemnité des dégâts matériels."

28. The Court is invited to take note that this communication by the Bulgarian Foreign Ministry, upon the instruction of the Bulgarian Government, admits that Bulgarian armed forces shot down 4X-AKC and that the unfortunate accident to 4X-AKC was caused by "une certaine hâte" displayed by the Bulgarian armed forces and by the fact that those armed forces "n'ont pas pris toutes les mesures nécessaires pour contraindre l'avion à se soumettre et à atterrir", those armed forces being at the same time in a state of "astonishment". Although the point may not be material to the case brought before the Court by the Government of Israel, the attention of the Court is also invited to the fact that official communications were made by the Bulgarian Government, in terms identical with those of this Note Verbale, to the Governments of other countries, nationals of which were among the victims. See, for instance, the Note to the Government of the United States of America dated 4 August 1955 and included as Annex 2 to the Application instituting Proceedings filed by the United States on 28 October 1957, and the Note Verbale of the same date to the Government of the United Kingdom of Great Britain and Northern Ireland and included as Annex 2 to the Application instituting Proceedings filed by the United Kingdom on 22 November 1957.

29. There are a number of inconsistencies in these various Bulgarian accounts of the catastrophe, some of which may be mentioned:

(a) In the Communiqué of 28 July 1955 (Annex 13) and in the Note Verbale of the same date (Annex 14) the time of the alleged penetration of the Bulgarian airspace by 4X-AKC is given as 0535Z and about 0530Z respectively. In the Communiqué of 3 August

(Annex 16) and in the Note Verbale of 4 August (Annex 17) the time is given as 0510Z, a difference of 20 to 25 minutes.

(b) Paragraph 2 of the Communiqué of 3 August 1955 (Annex 16) states that a foreign aircraft of unknown origin was noticed in the Bulgarian airspace; it contains no indication that this foreign aircraft was the El Al aircraft to which the first and third paragraphs thereof refer. No such ambiguity appears in the Note Verbale of 4 August 1955 (Annex 17) which, to the contrary, asserts that the aircraft intercepted south of Stanke-Dimitrov was 4X-AKC. Neither of these accounts is consistent with the Communiqué and Note Verbale of 28 July 1955 (Annexes 13 and 14), both of which, nevertheless, in mentioning the town Stanke-Dimitrov, state that there the interception took place.

(c) The Communiqué of 3 August 1955 (Annex 16) states that it had been drawn up "à la base des données exposées dans le protocole final de la Commission Gouvernementale Spéciale". On the other hand the Note Verbale of 4 August 1955 (Annex 17) omits this phrase and states: "De l'enquête effectuée par la Commission Gouvernementale Spéciale il a été établi d'une manière incontestable ce qui suit." That Note Verbale was also expressly written "by order of" the Bulgarian Government.

30. On 15 August, at a meeting between Mr. Baruch and the Chief of Protocol, the latter enquired whether the Report of the Israel Commission of Inquiry had been received. He hoped that this Report would be objective and that its publication would not aggravate the situation. On 15 September another conversation took place at a diplomatic reception in Jerusalem between the Prime Minister and Minister for Foreign Affairs (Mr. Sharett) and the Minister of Bulgaria to Israel. The latter spoke freely of the dismay and regret of himself and his Government for the incident and expressed the hope that relations between the two countries would not suffer in consequence. In subsequent conversations the Bulgarian Minister further expressed the hope that the incident would not affect the favourable attitude traditionally held by Israel regarding Bulgaria's admission to the United Nations, at the forthcoming Tenth Session of the General Assembly then about to convene.

31. The Israel Commission of Inquiry completed its Report on 18 August 1955. An abbreviated version was issued to the press in Jerusalem on 25 August 1955, copies being transmitted by the Ministry for Foreign Affairs to foreign diplomatic representatives in Israel, including that of Bulgaria. The full text of the Report was published by the Israel Government Printer on 21 September 1955 (Annex 18). Copies of it were formally transmitted to the Bulgarian Legation on 27 September (Annex 19). The document was placed on sale. The Commission's conclusions, which appear in Section XI of its Report, are:

## "CONCLUSIONS

1. On the 27th of July 1955, at approximately 0540 GMT., a Constellation aircraft of Israel civil registration (4X-AKC), en route from Vienna to Lod, was fired upon in three phases by two Bulgarian jet fighters and in the last attack was destroyed over Bulgarian territory.

The first firing took place in the area of the Yugoslav-Bulgarian border at an altitude of approximately 18,000 feet. The Commission is satisfied that the aircraft did not receive any warning prior to this firing.

Several minutes later the second firing took place over Bulgarian territory at an altitude of approximately 8000 feet. The aircraft was then evidently in process of descent seeking a place to land and was showing signs of fire. Nevertheless it continued in controlled flight. At the time of this attack it had covered some 17 nautical miles within Bulgarian air space.

After approximately five minutes the third attack took place at an altitude of about 2000 feet. The aircraft was still under control, heading northward deeper into Bulgaria and making for a forced landing. As a result of this last attack, the aircraft broke up in mid-air.

2. The aircraft entered Bulgarian airspace being approximately 35 nautical miles off track on a course which would have brought it to the Bulgarian-Greek border after traversing approximately 26 nautical miles (6 to 7 minutes flying) of the south-western corner of Bulgaria. The Bulgarian statement as to the course and track of the aircraft is inconsistent with the facts as proved.

3. In the circumstances of wind and weather on this flight, the crew could not have been aware of the aircraft's drift from track (see para. 2 hereof). In any event, the cause of the disaster was not this deviation but the action of the Bulgarian fighters in shooting down the aircraft.

4. There were no survivors."

32. As appears from the Warrant of Appointment which is printed as the introduction to the Report, the Commission operated as an independent and quasi-judicial body, and its Report was submitted to the Minister of Transport. The Government of Israel has not, since its publication, ceased to make investigations and enquiries (and opportunity was taken to inform the Bulgarian Government of this, as is explained in paragraphs 41 and 42 below), and it is now able to present the following observations and additional information, as follows:

- (i) Copies of the Certificates of Registration, Airworthiness and Safety, referred to in Section III of the Report, are annexed (Annexes 20, 21, 22), together with a certificate regarding the aircraft type (Annex 23).
- (ii) The Company's standing instructions in force in 1955 for flying in thundery conditions and for uncontrollable decompression are annexed (Annexes 24 and 25).

(iii) An appreciation of the actual weather conditions by the Israel Meteorological Service is contained in Annex 26. The Government is satisfied with the findings of the Commission of Inquiry, that along Amber 10 after Belgrade 4X-AKC encountered bad weather conditions and winds of a significantly higher velocity than had been forecast.

(iv) Additional information regarding the aircrew (see Section V of the Report):

(a) The Captain, Mr. Hinks, was an aviator of considerable experience. Between 21 June 1954 and 18 July 1955 he had flown over airway Amber 10 eight times: he had flown this route once in May 1955 and twice in July 1955 before 27 July.

(b) The First Officer, Mr. Ben Porat, had flown over airway Amber 10 twice in June 1955 and once in July 1955 before 27 July.

(c) The Wireless Operator, Mr. R. Goldman, had flown over airway Amber 10 eight times between 26 July 1954 and 21 June 1955: he had flown the route once in May 1955 and once in June 1955.

The Government of Israel considers that in addition to being fully qualified, this was a highly experienced crew.

(v) In amplification of Sections IX and IXa of the Report, which contain the communications to and from the aircraft and logged at Belgrade and Athens, particulars regarding all the communications to and from the aircraft after its departure from Vienna are annexed (Annex 27). In preparing this Annex and in checking the material it was noticed (a) that not all the messages logged at Belgrade and Athens are included in Section IX of the Inquiry Commission's Report, and (b) that not all the translations of the messages into ordinary language are sufficiently clear. The differences, however, are of no material importance. Annex 27 also includes messages between various ground stations in connection with the flight. These are the only known communications about this flight with 4X-AKC or between ground stations. The Government of Israel considers that all the messages taken together clearly indicate that the aircraft intended to fly and believed it was flying according to the Flight Plan (Annexes 7 and 9), and particularly along airway Amber 10; and that until the S.O.S. nothing unusual or untoward was apparent to the crew.

(vi) The standard international procedure for emergency communications lays down that the distress call and distress message should contain the following:

(a) Distress call.

SOS SOS SOS

This is

Aircraft call-sign (3 times).

(b) Distress message.

Repeat distress call, as above

Position and time established

True heading

Indicated airspeed

Altitude

Type of aircraft

Nature of distress and kind of assistance required

Intentions of captain

Any other relevant information

Two ten-second dashes

Aircraft call-sign

Over.

The S.O.S. message as recorded by ATC Athens was:

"SOS DE [this is] 4X-AKC."

This message is recorded three times, at 0537Z, 0538Z and 0539Z (see Annex 27, messages Nos. 25, 26 and 27).

It is not possible to say whether these S.O.S. messages were sent when the aircraft was first hit, or at some time between the first attack and the final explosion. It is also impossible to say whether the 0537Z message was the first despatched. Again, it is not possible to say whether the radio officer, who most probably sent the message, was previously ordered by the captain to investigate the reason for a loss of pressurization or the location of possible fire, or to help the cabin personnel and was thus not free before 0537Z to transmit the message (see the Company's instructions for uncontrollable decompression (Annex 25)).

33. In the preceding paragraphs of this Memorial, the two contemporary accounts of the flight and destruction of 4X-AKC are set forth, that given by the Bulgarian Government in paragraphs 14, 24 and 27 above, and that reconstructed by the Israel Commission of Inquiry in paragraph 31 above. The additional material submitted to the Court in paragraph 32 and Annexes 20 to 27 inclusive does not add substantially to what is known of what happened to 4X-AKC: on the whole it gives greater precision to some of the data already assembled by the Israel Commission of Inquiry, and to that extent it may be found to constitute support for the general account advanced by the Commission—that 4X-AKC intended to fly and was purporting to fly along airway Amber 10 in accordance with the Flight Plan. The submission of the Government of Israel is that after 4X-AKC had crashed in flames on Bulgarian territory, the Bulgarian Government was obliged to give to the

Government of Israel information of the circumstances, as known to the Government of Bulgaria, in which that event occurred. In the Bulgarian Notes Verbales and Communiqués of July and August 1955 certain information was given to the Government of Israel and to the world. While on the one hand the Government of Israel does not admit any one of the allegations regarding the flight path and actions of 4X-AKC contained therein, on the other hand it considers that the information given to it by the Bulgarian Government—that units of its armed forces intercepted 4X-AKC, failed to identify it, opened fire on it, shot it down, destroyed it and all its occupants, were in a state of astonishment, acted in haste, did not take all the necessary measures to compel it to land, that the guilty persons would be identified and punished and that compensation would be paid—is unambiguous in describing actions which directly engage Bulgarian responsibility and entitle Israel to judgment in her favour. Consequently, and subject to further pleadings, the Government of Israel will not at this stage offer any further observations or criticism upon either of the two contemporary accounts which exist.

34. In reviewing the facts in this case, the Government of Israel finds the following aspects of particular significance:

(a) Both Governments had appointed Commissions to investigate the catastrophe and to try and establish its causes. The Bulgarian Commission consisted of certain members of the Bulgarian Government itself: the Israel Commission was a quasi-judicial body composed of a number of experts qualified in their respective fields.

(b) The two Commissions operated in complete isolation from each other. As far as is known the Bulgarian Commission made no request for, and did not obtain, any assistance of a factual or other nature from the Israel Government or from the owners of the aircraft. On the other hand, the Israel Government made every effort to obtain from the Bulgarian Government the necessary facilities to enable the Israel Commission successfully to carry out the task imposed upon it, including (i) the facility to carry out fully and with the necessary leisure a detailed examination of the instruments and of the wreckage in general; (ii) the facility to seek out and interview possible eye-witnesses, and (iii) the facility to interview the members of the Bulgarian armed forces involved. All this was repeatedly and deliberately refused. The Government of Bulgaria made a meagre concession, subject to severely restrictive conditions, that three of the members of the Commission could examine the wreckage only during an extremely limited period of time (less than one working day) and could not seek for and interview witnesses and other persons. This was inadequate and seriously hampered the work of the Commission. It is difficult to resist the

conclusion that the true purpose of these restrictions was to prevent the Government of Israel from ever learning the true facts.

(c) The Report of the Israel Commission (Annex 18) has been published and copies of it communicated to the Bulgarian Government (Annex 19). It contains both factual information of the kind commonly included in reports on aircraft accidents, and the reasoned deductions which led the Commission to its conclusions. No report by the Bulgarian Commission has been published or communicated to the Israel Government, and it has been stated by Bulgarian representatives that no detailed report was composed, and that the Commission contented itself with recording conclusions.

(d) The Bulgarian Government, in the Note Verbale of 4 August 1955 (Annex 17), adopted the conclusions of the Bulgarian Commission.

(e) The two Commissions are in full agreement on the cause of the destruction of 4X-AKC, namely, that it was destroyed after fire had been opened upon it by units of the Bulgarian armed forces. On this there is, and can be, no room for argument. The two Commissions do not concur in their account of the circumstances which preceded the opening of fire by the Bulgarian aircraft.

(f) The Bulgarian Government has admitted that in shooting down 4X-AKC its forces: (i) "ont fait preuve d'une certaine hâte"; (ii) did not take "toutes les mesures nécessaires". In addition: (i) the actions of the Bulgarian armed forces were punishable, because the Bulgarian Government undertook that it "fera établir et punir les coupables"; (ii) the actions of the Bulgarian armed forces were reprehensible, because the Bulgarian Government sincerely hoped that there would be no repetition of "pareils malheurs" and would take "toutes les mesures nécessaires" to assure this; (iii) the liability of Bulgaria to pay compensation was recognized; and (iv) the Bulgarian Government expressed its sincere regrets—and those of the Bulgarian people—"pour ce grand malheur qui a causé la mort de personnes complètement innocentes". According to the Bulgarian Government, all these facts have been established "d'une manière incontestable".

(g) The Bulgarian Government has never made available to the Government of Israel the following (*inter alia*): (i) the log-books and flight deck papers of 4X-AKC; (ii) the various items of flight deck equipment, such as radio, instruments and electrical panels which had been removed and were not available to the Israel Commission; (iii) the evidence which formed the basis for the assertions regarding the alleged course of 4X-AKC over Bulgarian territory contained in the Notes Verbales of 28 July (Annex 14) and 4 August 1955 (Annex 17), or the basis for the difference in the assertions appearing in the two Notes Verbales: (iv) the names of the pilots of the Bulgarian fighter planes, as well as of the other persons, whether military personnel or civilians, who gave them



their orders, and details of their identification and punishment; (v) information and details regarding the warnings allegedly given to 4X-AKC.

## Section II

### *The Israel Claim and Ensuing Negotiations*

35. In August 1955 the Government of Israel established an inter-ministerial committee, presided over by the Attorney-General, to receive information regarding their losses from persons other than foreign nationals and prepare the claim for submission to the Bulgarian Government. These losses included claims for monetary compensation due to dependants arising from the deaths of persons on board (passengers and crew members), loss of or damage to cargo on board, the losses incurred by the Company, and all other legitimate claims arising out of the shooting down of the aircraft. Basing itself on the Bulgarian Note Verbale of 4 August (Annex 17), the Government of Israel informed other Governments whose nationals were among the victims, of the arrangements made for the preparation of this claim (Annex 28). In that way co-ordination between the potential claimant Governments in the preparation of the international claims was initiated.

36. (i) In order to enable the necessary steps to be taken to establish for all legal purposes the facts of the deaths of all persons on board, the Commission of Inquiry was, by Order published on 12 August 1955, given the powers of a Coroner's Court under the appropriate domestic legislation of Israel. In pursuance of the powers thus conferred upon it, and acting as a Coroner's Court, the Commission of Inquiry held a special session on 22 August 1955. At that session the Attorney-General requested the Commission, in its said capacity, to issue a separate verdict in respect of each person on board 4X-AKC. A duly authorized official of the Company submitted under oath the list of passengers and crew-members compiled on the basis of the relevant manifests, and swore that to the best of his knowledge and belief that list contained the names of all the persons on board. The list thus submitted is identical with the lists contained in Annexes 3 and 4 of this Memorial. On the basis of the findings contained in its Report (Annex 18), and more specifically on the basis of its conclusive presumption that there were no survivors, the Commission returned 58 verdicts to the effect that the deaths occurred on 27 July 1955 "as result of injuries caused by shots, fire, explosion or crushing". These verdicts were subsequently transmitted to the appropriate Department of the Ministry of the Interior, which issued death certificates of which a specimen is contained in Annex 29.

(ii) On 10 November 1955 the Bulgarian Government caused to be delivered to the Israel Legation in Sofia 58 death certificates issued by the appropriate Bulgarian authority in respect of each

of the said 58 persons. According to these documents the deaths took place on 27 July 1955 at the village of Karnalovo, in the *arrondissement* of Petritch, "par la suite d'un accident aérien". The Israel Ministry for Foreign Affairs subsequently transmitted those of the Bulgarian certificates that related to foreign nationals to the Governments concerned. A specimen of the duly authenticated translation of the Bulgarian certificate is contained in Annex 30.

37. On 14 February 1956 the Israel Legation in Sofia transmitted to the Bulgarian Foreign Ministry a Note Verbale of that date, putting forward the claim being made against Bulgaria (Annex 31). After referring to the Bulgarian Note Verbale of 4 August 1955 (Annex 17), and to the Report of the Israel Commission of Inquiry (Annex 18), that Note Verbale placed on record the fact that the Israel Commission of Inquiry had not been able to make as complete an investigation of the wreckage as it would have liked and that the three members of the Commission who had been permitted to enter Bulgaria had not been able to carry out sufficient investigations. The Government of Israel then took note of the fact that in the Note Verbale of 4 August 1955 the Government of Bulgaria had adopted the conclusions of the Bulgarian Committee regarding the manner in which 4X-AKC had been destroyed. The Note Verbale included the following paragraphs:

"6. Par contre, les assurances spontanément données par le Gouvernement bulgare d'identifier les coupables pour les punir et de prendre toutes les dispositions nécessaires pour prévenir la répétition de semblables catastrophes en territoire bulgare, montrent que les défaillances — dûment admises — des forces de la défense anti-aérienne bulgare étaient la cause de l'anéantissement de l'appareil avec les cruelles pertes qui s'ensuivirent.

7. Le Gouvernement israélien se plaît à prendre acte des regrets formellement exprimés par le Gouvernement bulgare dans sa Note verbale du 4 août 1955, ainsi que des susdites assurances et apprécierait hautement de recevoir des informations sur les poursuites entreprises par le Gouvernement bulgare contre les coupables.

8. A la lumière des admissions aussi spontanées que nettes du Gouvernement bulgare, qui à cet égard a fait siennes les conclusions de la Commission gouvernementale spéciale, le Gouvernement israélien est amené à déclarer que la Bulgarie porte la responsabilité exclusive de la destruction de l'avion 4X-AKC au-dessus du territoire bulgare, à la date du 27 juillet 1955, et des pertes humaines et dommages qui en sont suivis."

The Note Verbale concluded by demanding reparation in the sum of U.S. Dollars 2,656,858 according to the details then given to the Bulgarian Government. This claim related exclusively to losses and damage suffered by a number of individuals, including relatives of the victims, owners of cargo and the Company; the Government of Israel added that in the interests of a speedy settlement it was

prepared to waive the claim which it was entitled to put forward on account of losses and damage suffered by it. Transmitting that Note Verbale the Israel representative explained that various adjustments might have to be made after the Israel claim had been compared with those submitted or to be submitted by other Governments, especially with the view of ensuring that the Bulgarian Government would not be asked to pay the same damage twice over. The first of such adjustments was transmitted to the Bulgarian Government by the Israel Legation in a Note Verbale of 10 August 1956 (Annex 32). Further adjustments have since come to light and they are incorporated in the details contained in Section II of Part Two of this Memorial.

38. Between 6 March and the end of June 1956 Mr. Nall had several meetings with various Bulgarian officials, at which explanations regarding the details of the Israel claim were requested. The basis upon which the claims had been calculated, as indicated in paragraph 10 of the Note Verbale of 14 February (Annex 31), was therefore amplified in these conversations. The Bulgarian officials sought to maintain some distinction between that portion of the Israel Government's claim which related to the losses suffered by the relatives of the victims, and that portion which related to the losses suffered by the Company. Basing themselves on the last paragraph of the Bulgarian Note Verbale of 4 August 1955 (Annex 17), they argued that the determination of Bulgaria's part of the compensation for material damages would have to be left to Bulgarian experts, and that but for the aircraft's entry into Bulgarian airspace the catastrophe would never have occurred.

39. At a meeting on 10 May, the Bulgarian officials indicated that the claims in respect to individual losses appeared reasonable and minimal: on the other hand, the Bulgarian experts considered the claim in respect of the Company's losses to be exaggerated. It was subsequently explained (on 27 May) that, while the Bulgarian experts were still engaged in the examination of the Israel claim, they would not be in a position to finalize their conclusions as long as the claim of the United States of America had not been submitted. They were trying to establish a common denominator, on the basis of which the Bulgarian Government could offer a fixed sum of compensation for every claim. Regarding the value of the aircraft, the Bulgarian experts did not find that account had been taken of any depreciation as a result of its use. Furthermore, the fact that the aircraft had violated Bulgarian airspace ought also to be reflected in the claim. For these reasons the Company's losses appeared to be exaggerated. The Israel representative could not see any necessary connection between the claims which had been submitted and the United States' claim. The claim for the aircraft was based on the cost of its replacement, and the argument

that the financial claim for the aircraft could be affected by the alleged intrusion into Bulgarian airspace was rejected.

40. In the light of the detailed and technical nature of some of the questions which had been raised in this series of meetings, and in an effort to reach a speedy settlement of the claim on a mutually satisfactory basis, the Government of Israel then proposed the holding of direct talks in Sofia between duly authorized representatives of the two Governments, hoping that all outstanding questions and differences between them could be clarified. On 3 July 1956 this proposal was conveyed to the Bulgarian Foreign Ministry, and on 4 July 1956, Mrs. Golda Meir, the Minister for Foreign Affairs, recalling the approaching anniversary of the disaster which might well excite public opinion, suggested that the Legal Adviser of the Israel Ministry for Foreign Affairs (Mr. Rosenne), accompanied by the necessary advisers, should proceed to Sofia immediately in order to clarify with the Bulgarian authorities all outstanding problems and to speed up the settlement of the claim. After further discussion the Bulgarian Foreign Ministry, on 25 July 1956, agreed to informal discussions with Mr. Nall and Mr. Rosenne. Mr. Rosenne, accompanied by Mr. G. Wangenheim, Manager of the Company's Insurance and Claims Department, was in Sofia from 31 July to 7 August 1956.

41. The first meeting took place on 2 August 1956 with Mr. K. Strezov, Director of the Legal Division of the Bulgarian Foreign Ministry. Noting earlier statements that Bulgaria's reply to the Israel Note Verbale of 14 February 1956 (Annex 31) would be ready within a short time, possibly even in August, and that this reply might differ from the Israel claim, the Israel representatives explained that their Government was exercised by the possibility of a wide gap between the claim and Bulgaria's reply, a development which might cause undesirable political misunderstandings. The manner in which the Israel claim had been prepared was described in some detail<sup>1</sup>. The claim itself was minimal and reflected only the actual losses suffered. The Israel Government was willing—as indeed it stated in the third paragraph of the Note Verbale of 14 February 1956—to forego a discussion of the facts of the disaster, so as to avoid any possibility of mutual recrimination. However, should this prove necessary, Israel would be prepared to enter into such a discussion, whether through the diplomatic channel, or through some judicial tribunal. The Israel Government was not basing itself exclusively on the Report of the Israel Commission of Inquiry (Annex 18) and had since made a complete re-examination of the incident in the light of additional material which had

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<sup>1</sup> This description was in fact similar to that which appears in Section II of Part Two of this Memorial.

not been available to the Commission. After this further study the Israel Government remained fully satisfied that its claim was firmly based in fact and in law. The Israel representatives requested particulars regarding the identification and prosecution of those responsible for the disaster and of the punishment awarded them. Mr. Strezov said that it was clear that no change had occurred in the position of the Government of Israel and that he would transmit the explanations received to his superiors. He added that the Bulgarian reply to the Israel claim had been delayed by the fact that the United States claim had not yet been submitted. Throughout this interview, which lasted two and a half hours, Mr. Strezov did not enter into any general or detailed discussion in regard to the points made by the Israel representatives.

42. On 6 August the Israel representatives, at a meeting with Mr. Milco Tarabanov, the Deputy Foreign Minister, stated that since Mr. Strezov had not requested any explanations in addition to those offered at the meeting on 2 August, they were assuming that the Bulgarian authorities did not dispute what had been said then. However, since allusion had been made to the possibility of a gap between the Israel claim and the Bulgarian proposal for its settlement, the Government of Israel, unable to understand how, in the light of the Bulgarian communications of August 1955, such a difference was at all possible, wished them to clarify the understanding of the Bulgarian Government on the subject. The Government of Israel had carefully re-examined the known facts relating to the disaster, especially in the light of additional information which it had been able to collect since the Israel Inquiry Commission completed its work. Without doubt, the cause of the disaster lay in the admitted actions and omissions of the Bulgarian authorities; and the fact that 4X-AKC may have entered the Bulgarian airspace without authorization was completely irrelevant, since it had done nothing to invite or impel the Bulgarian forces to fire at it and shoot it down, and even less to act in haste and without taking all the necessary precautions. The shooting down of 4X-AKC was not the necessary consequence of this intrusion, and there was no necessary and compelling connection between the acts of 4X-AKC and the acts and omissions of the Bulgarian forces. Even more important than these considerations was the duty of the Bulgarian forces to comport themselves in accordance with the necessary obligations of humanity and with due regard for the safety of the passengers on board. Moreover, it was certain that the crew of 4X-AKC did not know, and could not have known, that 4X-AKC might have entered Bulgarian airspace; and in any event the crew could not have foreseen the possibility of fire being opened on it should it cross the border. That opening of fire was the exclusive cause of the catastrophe, as had been determined by the Bulgarian authorities themselves. Without derogating from the importance of

considerations of this character, it had to be borne in mind that the disaster also had come to constitute an important element in the general political situation. On this aspect, Mrs. Meir had *instructed them to state that the Israel Government did not wish its relations with Bulgaria, which had hitherto been most friendly, to be subjected to strain and serious tension.* The Israel Government had used all its influence in order to prevent the possibility of hostile public opinion being aroused by the incident. Assuming that the position of the Bulgarian Government was similar, and in the light of all that had been said at the interviews, the Government of Israel hoped that *compensation for the losses suffered as a result of the disaster, as set forth in the Note Verbale of 14 February 1956—in so far as such pecuniary compensation was able to “compensate” the persons who suffered as a result of the catastrophe—would be paid in full and promptly.* Mr. Tarabanov confirmed that his Government was not interested in, and did not see any reason for, a deterioration of its relations with Israel. He did not know whether there would be a *difference between the Israel claim and the Bulgarian reply.* All that had been said in the two meetings in the Bulgarian Foreign Ministry would be taken into account in the determination of the Bulgarian attitude. Without giving a firm promise, Mr. Tarabanov hoped to be able to meet a request that if in fact a difference between the claim and the reply should appear, the Bulgarian Government would inform the Israel Government before *putting its views in a final written form, so as to enable the Israel officials to give additional explanations.*

43. Between 27 August and 30 September 1956, further interviews took place in Sofia with various officials of the Bulgarian Government, who intimated that the reply to the claim could be anticipated in two or three weeks. (In the meantime the final claim of the claimant Governments, that of the United States, had been communicated to the Bulgarian Government on 22 August.) It was implied that some further explanations might still be requested, and Mr. Nall stated that should this be the case, the Israel authorities were always prepared to give such additional explanations. Indeed, for that very purpose a series of meetings had taken place in which the Legal Adviser of the Israel Ministry for Foreign Affairs had participated, and it was *not clear why the Bulgarian authorities had not availed themselves of the opportunity to clarify all outstanding questions.*

44. The Bulgarian reply was conveyed to the Israel Legation in Sofia in a Note Verbale dated 1 October 1956 (Annex 33). While the Note enunciated the position of the Bulgarian Government regarding the responsibility of that Government, which should be shared with the Company, it also stated that the Bulgarian Government did not consider the amount claimed to correspond to the

“dommages réellement causés”. A further exchange of views through the diplomatic channel was proposed and the hope was expressed that the Government of Israel “se chargera du règlement de la question des dédommagements dus aux autres pays”. The Government of Israel understands that no such suggestion was made to other countries which had submitted claims to the Bulgarian Government.

45. On receipt of this Note Mr. Nall was recalled to Jerusalem for consultations, following which, at the end of October, he returned to Sofia and the Israel Government's reply of 9 November 1956 was delivered (Annex 34). The invitation to enter into negotiations to settle the claim was accepted. At the same time the Note Verbale placed on record the views of the Government of Israel regarding the legal responsibility of Bulgaria and the calculation of the damages:

“2. At the same time the Israel Government places on record that it does not agree with what is stated in the third paragraph of the Note Verbale of 1 October 1956. It is satisfied that the aircraft 4X-AKC crossed the Bulgarian frontier completely unknowingly, unwillingly, and without premeditation and did not penetrate deeply into the Bulgarian airspace. It holds this view in the light of the Report of the Israel Commission of Inquiry which was transmitted to the Bulgarian Legation in Israel under cover of the Foreign Ministry's Note Verbale No. Z/6799 dated 27 September 1955, and in particular in view of the meteorological conditions on and in the vicinity of Airway Amber 10 at the time in question, which establish that the crew of the aircraft could not have been aware of their immediate location at the relevant time. Furthermore, despite the repeated declarations of the Bulgarian Government that the aircraft was warned, the Israel Government maintains its position that the aircraft was not warned; that even if some warning was given it was not adequate; and that in any event the question of the warning is irrelevant to the main issue.

3. Having regard to the above and to the various admissions made by the Bulgarian Government and in particular those contained in the Note Verbale of 4 August 1955, the Israel Government considers that the Bulgarian Government bears exclusive responsibility for this regrettable incident and for all loss of life and material damage which ensued.

4. The Government of Israel holds to its view that the amount claimed corresponds to the real damage caused. The method of calculation of the claim has been fully explained to the representatives of the Bulgarian Government through the diplomatic channel since the transmission of the Legation's Note of 14 February 1956.”

The suggestion that the Israel Government should represent all the claimants was described as “premature”.

46. Between 23 November and 26 December 1956 further meetings took place, mainly devoted to the question of the meeting which had been proposed in the Bulgarian Note Verbale of 1 October (Annex 33). In the course of these meetings, and particularly in one of 11 December 1956, the Bulgarian representatives began to insist on the recognition of the Bulgarian position by the Government of Israel as the prior condition for the opening of negotiations, whereas the Israel position was that no prior conditions of that or any other nature ought to be established for negotiations, the purpose of which was to reach a mutually satisfactory settlement of the case. On 26 December 1956 the Foreign Minister, Mr. Lukanov, explained the position of his Government in some detail. Since a serious difference of opinion existed with respect to the question of responsibility, the Bulgarian authorities were reconsidering the problem, both from the humanitarian and from the legal aspects. It was doubtful if the Bulgarian Government could accept the Israel argument regarding the exclusive responsibility of Bulgaria. It was likely that the Bulgarian Government would desire to fix a maximum sum which, in its view, should constitute its share of the compensation. The reply would probably not be ready before the end of January or the beginning of February.

47. At a meeting on 1 February 1957 between Mr. Nall and the Director of the West European and Middle East Department of the Bulgarian Foreign Ministry, the latter said that the delay in the Bulgarian reply had not been caused by the need to re-examine the facts, for the claim had been most carefully examined, but by the Israel position of maintaining the exclusive responsibility of Bulgaria for the disaster. The contention that the unauthorized presence of the aircraft in the Bulgarian airspace was a factor which had contributed to the disaster and that, therefore, the Company was not free of responsibility, was repeated. Since the Israel Note Verbale of 9 November 1956 (Annex 34) rejected this position, the Bulgarian Government was compelled to re-examine the whole question. Mr. Nall recalled that the Israel position regarding responsibility had been known to the Bulgarian authorities for a long time. Having regard to the fact that a year and a half had passed since the disaster, and more than three months had passed since the Israel Government had accepted the Bulgarian proposal of 1 October 1956 (Annex 33) concerning a meeting with Bulgarian representatives, and since no new factors had arisen in the meantime, the Israel Government regarded Bulgaria's procrastination in replying to the Israel Note as utterly unjustifiable. The Israel Government might take the view that this procrastination amounted to a cancellation of the invitation for a meeting.

48. At a meeting between Mr. Nall and Mr. Tarabanov, the Deputy Foreign Minister, on 20 March 1957, Mr. Nall enquired the reason for the subsequent silence of the Bulgarian authorities.



Mr. Tarabanov stated that a foreign plane was not permitted to enter Bulgarian airspace and if it had nevertheless done so, the responsibility for the consequences was to be borne by the trespasser, regardless of whether the trespass occurred in time of peace or not. He referred to previous violations of Bulgarian airspace by planes which performed hostile activities against Bulgaria. In the view of the Bulgarian Government and of expert international lawyers, the Company shared a substantial part of the responsibility for the catastrophe. Therefore, the Israel reply of 9 November 1956 (Annex 34) put the Bulgarian Government in a difficult position and compelled it to reconsider the whole problem. Mr. Nall recalled that this problem had already been considered exhaustively in the numerous meetings between Israel and Bulgarian representatives. The Israel Government was unable to accept the argument that a civil aircraft, in time of peace, acting innocently and peacefully and without any intention to violate the sovereignty of Bulgaria, was doing anything to justify its being shot down without consideration for the elementary obligations of humanity and for the fate of all persons on board. These were the circumstances in which the catastrophe had occurred; and this despite the existing friendly relations between Bulgaria and Israel and despite the fact that no Israel aircraft had ever been accused of having violated Bulgarian airspace. Considering that a year and eight months had passed since the catastrophe, and that all questions had been many times carefully considered, there existed two possibilities: the Bulgarian Government could either—relying on the constant necessity of giving the claim further consideration—continue its procrastination for ever, in which event the parties would arrive at a complete deadlock, or it could adopt a practical approach and negotiate a settlement of the claim as it had proposed in its Note Verbale of 1 October 1956 (Annex 33) and as had been accepted by Israel in the Note Verbale of 9 November 1956 (Annex 34). In this connection Mr. Nall stressed that throughout the conversations which had taken place in the Bulgarian Foreign Ministry since the disaster, the Bulgarian officials had continuously pleaded the necessity to refer the issues discussed to “higher authorities”. While the Director of the Second Department explained that the problem was considered by the Minister, the latter said that he had to bring it to the consideration of the Government. When Mr. Nall wished to see the Minister again, he was once more referred to the Director of the Second Department. Such a process had been repeated several times. Mr. Nall enquired specifically:

(1) Was the Bulgarian Government still willing to honour its promise contained in the Note Verbale of 4 August 1955 (Annex 17);

(2) Was the Bulgarian Government still maintaining its proposal—contained in the Note Verbale of 1 October 1956 (Annex 33)—regarding the settlement of the claim through the diplomatic channels;

(3) Was it the intention of the Bulgarian Government to settle the claim promptly, having regard to the fact that a year and eight months had already passed since the tragic disaster?

When Mr. Tarabanov objected that the Israel Government was ignoring that paragraph in the Bulgarian Note Verbale of 4 August 1955 (Annex 17), which stated that the aircraft had entered Bulgarian airspace without authorization and without any warning, Mr. Nall observed that in three sub-paragraphs of that Note Verbale the Government of Bulgaria had expressed its regrets for the catastrophe, apologized for the haste displayed by its forces, and had explained the circumstances in which the catastrophe had occurred; and in the operative paragraph had expressed its willingness to pay compensation. Mr. Tarabanov then confirmed that the Government of Bulgaria still recognized its responsibility, but it had come to the conclusion that the Company bore a substantial part of the responsibility. Although the Bulgarian Government did not insist on prior conditions for the holding of direct talks, Israel would have to await the Bulgarian reply before such talks could be held. Furthermore, since the Israel Government had rejected the Bulgarian suggestion that it should represent all the claimants, regardless of their nationality, the Government of Bulgaria had to decide with whom the talks should be held.

49. On 12 April 1957 a meeting took place between Mr. Nall and Mr. Lukanov, the Foreign Minister, and an exhaustive discussion of the position of both parties took place.

(i) Since the meeting of 26 December 1956 (paragraph 46 above) almost four months had elapsed, with no progress. Asked for the reason for this procrastination, Mr. Lukanov made the following points:

- (a) The Bulgarian Governmental Commission had found that the behaviour of the Israel aircraft indicated an intentional deviation, and therefore the Government of Bulgaria had reached the conclusion that 4X-AKC bore responsibility.
- (b) The fact that the Government of Bulgaria considered the conduct of the Bulgarian Defence Forces as negligent, involved the responsibility of the persons concerned towards the Government of Bulgaria. However, this responsibility of the servants of the Government of Bulgaria towards their own Government did not involve an automatic and unqualified responsibility of the Government of Bulgaria towards a third party. A third party could not rely on the responsibility of the persons concerned, since that was an internal matter of Bulgaria.
- (c) Moreover, also because of political considerations the Government of Bulgaria could not recognize its exclusive responsibility for the catastrophe. Should the Government of Bulgaria accept the view of the Government of Israel on this matter, the result

would follow that countries hostile to Bulgaria would find a legal justification for their illegal activities against Bulgaria, such as border violations, the dropping of leaflets, and similar activities.

(d) The Government of Bulgaria was offended by the "frontal attack" of the claimant Governments on Bulgaria. Such an attack was unjustifiable also from the humanitarian aspect, since the claimant Governments could compensate the claimants through insurance companies.

For all these reasons the Government of Bulgaria could not agree to hold a meeting between representatives of Bulgaria and Israel before the latter became convinced of the responsibility of the Company for the incident. The rigid position taken by the Government of Israel was an additional reason for the delay. As long as Israel was not convinced that it must bear a substantial part of the responsibility, the Government of Bulgaria would have difficulty in replying to the Note Verbale of 9 November 1956 (Annex 34).

(ii) In the discussion, Mr. Nall made the following points:

- (a) The Government of Israel was not in a position to make any observations on the findings of the Bulgarian Governmental Commission, since no copy of its report had been furnished it and the members of the Israel Commission of Inquiry were neither allowed to co-operate with the Bulgarian Governmental Commission, nor to observe the latter's activities. The Government of Israel understood the three sub-paragraphs of the Bulgarian Note Verbale of 4 August 1955 (Annex 17) as an explanation of the conduct of the Bulgarian Defence Forces, but not as an attempt to justify that conduct. Those paragraphs appeared as an expression—on the part of a nation again applying to be admitted to the United Nations—of sincere regret and as an explanation of the circumstances of the catastrophe, but not as an attempt to evade responsibility for it. Furthermore, in that Note Verbale, the Government of Bulgaria had undertaken to identify and punish the persons responsible for the disaster and to take the necessary steps to prevent the recurrence of similar catastrophes, and to pay compensation for the losses suffered.
- (b) The present attitude of the Bulgarian Government amounted to a complete reversal of its position as stated in the Note Verbale of 4 August 1955. To regard the negligence of the subordinates as involving solely the latter's responsibility towards their own Government, and as a purely internal matter distinct from the responsibility of the Government of Bulgaria vis-à-vis a third party, was a refusal to stand by the promise made on 4 August 1955.
- (c) The argument based upon arrangements with insurance companies was incomprehensible and completely irrelevant. Such

arrangements, if any, existed between the Company or any other assured and insurers on a purely contractual basis, and none of the Governments concerned was a party to any such arrangements. In reply to a question by Mr. Lukanov, Mr. Nall explained that there was no automatic insurance of the passengers.

- (d) Regardless of how the Bulgarian officials might have defined their conditions for the holding of talks between the parties, their latest attitude requesting prior recognition by Israel of the responsibility of 4X-AKC constituted, in fact, a prior condition to the holding of the talks.

Referring to the Bulgarian Note Verbale of 1 October 1956 (Annex 33), Mr. Nall regretted that the Bulgarian Government, by expressing the view that the talks then proposed by it could be held only after recognition by Israel of responsibility, and by justifying its attitude on political grounds, had thought it proper to turn a legal claim into a political argument. If 4X-AKC had violated the Bulgarian airspace, such violation did not have any political implications. He enquired whether he was to inform his Government that the Government of Bulgaria was still willing to keep the promise of 4 August 1955 (Annex 17) and to convene a meeting of the two parties as proposed on 1 October 1956 (Annex 33). This was understood as a meeting in which all outstanding questions could be discussed, without prejudice to the rights or position of either party. Mr. Lukanov replied in the affirmative, stressing that the Bulgarian answer to the Israel Note Verbale of 9 November 1956 (Annex 34) had been delayed, and might be further delayed, until the Israel Government was convinced that it must recognize its responsibility for the catastrophe.

50. No reply having been received to the Note Verbale of 9 November 1956 (Annex 34), on 23 May 1957 another meeting was requested by Mr. Nall with the Deputy Foreign Minister. Mr. Tarabanov repeated that the Company, and not the Government of Bulgaria, was responsible for the catastrophe. Israel's interpretation of the Bulgarian Note Verbale of 4 August 1955 (Annex 17) was erroneous. That Note did not deal at all with the question of the responsibility of Bulgaria, and certainly not with her exclusive responsibility. As long as Israel insisted on her position, as expressed in the Note Verbale of 9 November 1956 (Annex 34), there was no common basis for the meeting between the two States and, therefore, the proposal for a meeting between the parties, contained in the Note Verbale of 1 October 1956 (Annex 33), was no longer relevant. Bulgaria was not going back on her offer to compensate the families of the victims, but that was an offer to make an *ex gratia* payment and not legal compensation.

51. On 19 July Mr. Nall was received by Mr. Angelov, the Deputy Foreign Minister, at the latter's invitation. Mr. Angelov

made the following proposals in the name of the Government of Bulgaria:

- (a) Without recognizing any responsibility on its part, the Bulgarian Government was offering compensation in the sum of 56,000 transferable levas<sup>1</sup> for the death of each victim of the disaster. In this way Bulgaria proposed to settle the case and to resume her traditionally friendly relations with Israel.
- (b) If both Israel claimants and claimants of other nationalities were injured by the death of the same person, they must make the necessary arrangements for the distribution between themselves of the above sum.
- (c) Since Bulgaria did not recognize any responsibility on her part, and considered the Company to be exclusively responsible for the disaster, the latter's claim was rejected *in toto*.

The Bulgarian Government was making these proposals despite its previous basic view that Israel must recognize her responsibility. Similar proposals were being made to other interested Governments. Asked by Mr. Nall whether, in view of the great difference between the sum of the Israel claim and the Bulgarian offer, the Bulgarian Government would agree to hold a meeting between the two parties, Mr. Angelov replied that he could not go beyond his instructions. He explained the difference between the sum claimed and the sum offered on the ground that Bulgaria could not accept the various particulars of the claims, since principles of international law were not applicable to the case, and the responsibility of the Government of Bulgaria was not involved. The offer of the Bulgarian Government was not a withdrawal of the assurances contained in the Note Verbale of 4 August 1955 (Annex 17). The undertaking to pay compensation for the material damages, contained in that Note Verbale, could not be construed as acceptance of an obligation to pay compensation for the loss of the aircraft; the expression "material damages" referred to damages for the loss of baggage and freight, and this had been taken into account in the sum offered. The position of the Government of Bulgaria being that it was not responsible for the catastrophe, it had insisted, in the previous discussions, on Israel's prior recognition of the responsibility of 4X-AKC as a condition to Bulgaria's agreeing to any settlement of the claim. But since it was the desire of Bulgaria to make a contribution towards the settlement of the case, the Bulgarian Government would no longer insist absolutely on such prior recognition. In view of the present offer, Mr. Angelov could not go beyond his instructions and discuss the possibility of holding the meeting proposed in the Note Verbale of 1 October 1956 (Annex 33). Mr. Nall thereupon informed Mr. Angelov that

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<sup>1</sup> This sum amounts to \$8284 at the rate of 6.76 levas per dollar, the rate which it was understood was contemplated by the Government of Bulgaria.

although he could not reply to the Bulgarian proposal without instructions from Jerusalem, it seemed to him extremely doubtful whether the offer could be considered seriously by the Government of Israel.

52. On 27 August 1957 the Israel Legation in Sofia delivered the Israel Note Verbale of that date (Annex 35), reiterating the request for negotiations as soon as possible between the delegations of the two States with a view to settling the case. Mr. Nall explained that although the latest Bulgarian offer was a step forward in comparison with the complete deadlock which had existed previously, the Government of Israel could not regard that offer as satisfactory, and thought further negotiations, without any prior conditions, essential for the settlement of the case. In reply, Mr. Zivkov, a Deputy Foreign Minister, reiterated the Bulgarian position regarding the responsibility of the Company. He asked for the addresses of the families of the 58 victims of the disaster in order to enable the Bulgarian Government to contact these families with a view to settling their claims directly with them. This was refused by Mr. Nall, who said that the interests of Israel nationals would, as in the past, continue to be represented by the Government of Israel.

53. On 6 September, Mr. Nall was invited to a further interview with Mr. Tarabanov. Referring to the Israel Note Verbale of 27 August 1957 (Annex 35), Mr. Tarabanov stated that the Bulgarian Government could not appoint a delegation, as requested in that Note, but that it would be willing to hear—through diplomatic channels—the “grievances” of the Government of Israel. In this way the Bulgarian Government was reiterating “as always” its proposal of 1 October 1956. The Government of Bulgaria was agreeable that the talks should take place immediately with Mr. Nall, and should the Government of Israel wish to send some experts to assist Mr. Nall, he did not think that the Government of Bulgaria would raise any objection. In order to reach understanding, it was necessary that a common agreed basis for discussion should exist, and he intimated that the Government of Israel must accept the Bulgarian view regarding responsibility of the Company for the disaster. Mr. Tarabanov expressed his regret that the Government of Israel was not willing to represent all the claimants, regardless of their nationality.

54. The Israel Government's reply to this suggestion was conveyed orally by Mr. Nall to Mr. Zivkov, on 13 September 1957. The Government of Israel was not interested in expressing “grievances”—as proposed by Mr. Tarabanov—but was agreeable to a meeting between representatives of the two States. Such meeting could take place in any form whatsoever, provided that its object was exclusively to reach a reasonable compromise between the parties and thus to settle the case. Mr. Zivkov said that the position

of the Government of Bulgaria was that since, in its view, it was not responsible for the catastrophe, and since there was no reason why this position should be changed, its humanitarian approach remained the only basis for a solution. The sum offered was calculated in the light of "certain treaties"<sup>1</sup>. There was no reason for a meeting of delegations, whether formal or informal. The Government of Bulgaria was prepared to consider, through diplomatic channels, certain technical questions, e.g. what State was entitled to represent a given claimant. The claim of the Company could not be considered a technical question and the Government of Bulgaria was not prepared to meet it. The Government of Bulgaria disputed the Israel interpretation of the Bulgarian Note Verbale of 4 August 1955 (Annex 17). In its view, that Note Verbale did not constitute any acceptance of responsibility. Its last paragraph referred to a sum which, in the absence of any accord between Bulgaria and Israel, would be determined solely by the Bulgarian Government. Compensation for material damages meant compensation for the luggage of the passengers. By crossing the Bulgarian frontier the aircraft became responsible for the consequences. The haste displayed by Bulgarian Security Forces explained regrettable circumstances, and was the basis for the humanitarian approach of the Bulgarian Government to the settlement of the claim, but not of its legal responsibility. Mr. Nall replied maintaining his position on that Note Verbale. Having regard to the present position of the Government of Bulgaria, which differed from that maintained in August 1955, he would have to advise his Government that there was no chance of holding a meeting in order to settle the case.

55. On 23 September 1957 Mr. Nall reported a further conversation, in which a Bulgarian official had indicated that there could be no change in the Bulgarian position regarding the proposed meeting. The Bulgarian Government would not reconsider its offer of compensation and would not accept the claim of the Company since, in its view, the Company was responsible for the catastrophe. Although not prepared to consider the whole case, it was prepared to examine with the Government of Israel various technical questions, such as: whether all the individual claimants were properly represented; and questions regarding the currency, the period of time, and form, of the compensation. Mr. Nall replied by referring to a statement which had been issued by a spokesman of the Foreign Ministry in Jerusalem on 5 August 1957, intimating that the latest Bulgarian offer regarding compensation was completely unreasonable and unacceptable to the Government of

<sup>1</sup> This reference to "certain treaties" is not clear, but the Government of Israel assumes that what the Government of Bulgaria had in mind was the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (137 League of Nations Treaty Series, p. 12). As explained in para. 100 below, this Convention is completely irrelevant in the present case.

Israel since it was obviously aimed at relieving Bulgaria of all responsibility. The technical questions could only be discussed after a general agreement in principle had been reached, and the latest Bulgarian attitude was, so to speak, putting the cart before the horse.

56. The course of the diplomatic correspondence and the lengthy and to a large extent repetitive discussions described in this Section of this Part of this Memorial, show a continuous and progressive retreat on the part of the Bulgarian Government from a willingness to accept the consequences of its actions, which characterizes its Notes Verbales and Communiqués of July and August 1955, to an absolute refusal to recognize any consequence therefor, as became apparent by the middle of 1957. This progressive change in the attitude of the Bulgarian Government has found expression in procrastination, and in attempts to interpret away the plain language of its own communications. The facts show that Bulgaria is responsible for the disaster. The consequences of that responsibility cannot be determined by any unilateral interpretation given by the Bulgarian Government to its own communications. That Government's extraordinarily unyielding and unjustified manner of dealing with the claim put forward in the Note Verbale of 14 February 1956 (Annex 31) has led to a deadlock in the negotiations between the two Governments. In these circumstances, it appearing that there was no alternative but to regard further diplomatic negotiations as useless, and that nothing beyond additional procrastination could be anticipated from the Bulgarian Government, the Government of Israel, on 16 October 1957, filed in the Registry of the Court its Application instituting Proceedings against Bulgaria in this case. On that date a copy of the Application was also handed to the representative of the Bulgarian Legation in Israel. Announcing this step, the spokesman of the Ministry for Foreign Affairs indicated that the institution of the proceedings should not be regarded as an obstacle to a settlement out of Court, through diplomatic negotiations, should the Bulgarian Government be willing for such a settlement. This was repeated by the Minister for Foreign Affairs in the Knesset (the Israel Parliament) on 10 December 1957. However, no response whatsoever has been received from the Respondent Government.

57. In concluding this Part of this Memorial, the attention of the Court is invited to the fact that nothing in the diplomatic negotiations following the presentation of the Israel claim in February 1956 throws any additional light on the destruction of 4X-AKC or, therefore, affects the question raised in this case, namely, that of Bulgarian responsibility therefor. The circumstances in which 4X-AKC was destroyed are explained in the Bulgarian statements of July and August 1955 sufficiently to engage Bulgarian responsibility.



**Part II. THE REASONS IN LAW**Section I.—*The Responsibility of Bulgaria*(a) *Introduction. The Applicable Law*

58. The first, and principal, petition of the Application instituting Proceedings requests the Court to adjudge and declare “that the People’s Republic of Bulgaria is responsible under international law for the destruction of the Israel aircraft 4X-AKC on 27 July 1955 and for the loss of life and property and all other damage that resulted therefrom”. Since units of the Bulgarian armed forces opened fire on 4X-AKC and completely destroyed it and every human being on board, and in the light of the admissions made by the Bulgarian Government, the Government of Israel is requesting and by this petition requests the Court to make a general declaration that under international law Bulgaria bears the responsibility for the destruction of the aircraft and for the consequent loss of life and other damage. The consequences of such responsibility are not limited only to Israel: they are a matter for individual appreciation by the Government of any other State which suffered injury as a result of the Bulgarian action. In so far as concerns Israel, the question of the reparation claimable by Israel—not limited only to pecuniary reparation—is raised in the second petition of the Application instituting Proceedings and is discussed in Section II of this Part of this Memorial.

59. The Government of Israel accepts the position that, since Bulgaria is not a party to the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (Annex 10), that country is not contractually bound by the provisions of that Convention or by the various international Standards and Practices which have been elaborated by the International Civil Aviation Organization in the 15 Annexes which have been promulgated and published by that Organization<sup>1</sup>. From this it follows that the legal position of the parties *inter se* is determined by the rules of general international law. At the same time the Government of Israel will contend that, to the extent that the Chicago Convention restates the rules of general international law, that Convention may be relied upon in the present case; and inasmuch as the Convention and its Annexes contain recommendations regarding standard international practices, the failure of the Bulgarian Government to observe those standard international practices, or alternatively (as is stipulated in the Convention itself) to ensure that its own different practices are adequately conveyed to all foreign Governments (including the Government of Israel), must be

<sup>1</sup> See footnote on page 50 above.

taken into consideration in determining the compatibility of Bulgarian actions with general international law. The Chicago Convention and its Annexes are, therefore, to the extent that they restate the general law, employed to illustrate the appropriate rules of international law and as a means for the determination of the international standards to be observed in matters concerning international civil aviation and especially in matters concerning the physical safety of civil aircraft and their occupants. As stated in paragraph 29 (b) above, the Bulgarian authorities at least knew that the aircraft, even when unidentified by them, was a foreign one of unknown origin, and for that reason they were *ab initio* obliged to comport themselves, in their relations with that aircraft, in accordance with the general rules of international law and standard international practices.

(b) *The Basis of Bulgarian Responsibility*

60. In this petition the Government of Israel is asking the Court to hold that in the circumstances the opening of fire on 4X-AKC on 27 July 1955 by units of the Bulgarian armed forces, resulting in the complete destruction of 4X-AKC, constitutes a violation of international law. The degree of violence used was quite out of proportion to any possible threat to Bulgaria which 4X-AKC may have presented, even according to the Bulgarian account set forth in the Note Verbale of 4 August 1955 (Annex 17). An excess of force is reprehensible in itself and would be so even without the admission by the Bulgarian Government that in so acting its armed forces had manifested haste (and what that haste was is unimportant) and had not taken all measures necessary to constrain the aircraft to land (and it is unimportant precisely what necessary measure was omitted). That being so, the opening of fire on 4X-AKC was in breach of international law, and Bulgaria is accordingly obliged to make reparation therefor.

61. The basis of this contention is the rule that when measures of force are employed to protect territorial sovereignty, whether on land, on sea or in the air, their employment is subject to the duty to take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and the gravity of the threat (if any). In all systems of law, including international law, this is *the test for measuring the degree of violence which may justifiably be used to protect rights recognized by the law, and particularly the degree of violence used when performing acts by their very nature dangerous*. In the *Corfu Channel* case the Court relied on this principle as a basis for the international responsibility of Albania when minefields laid in Albanian territorial waters constituting an international strait caused damage to units of the Royal Navy and death to members of its military personnel. The Court

was merely applying an already existing principle of international law to the particular circumstances of that case.

62. The Government of Israel is now contending that the same principle is fully applicable to the present case, where fighter aircraft, with their modern powerful armament, opened fire on and destroyed a defenceless civilian aircraft, in time of peace and of manifest relaxation of international tension, that civilian aircraft openly displaying its owners' name and the colours and identification letters of a friendly State and flying in a perfectly normal manner. The circumstances of this case may well be almost (but not entirely) unprecedented—and fortunately so. That does not mean that international law is so lacking in underlying general principles as not to be able to meet the situation thus presented to it. Flying has inherent dangers of which every intelligent person, and certainly the pilots of fighter aircraft and those who give them their orders, are or ought to be fully aware. It is, therefore, the duty of any person who seeks to interfere with the normal flying of a civil aircraft—whether by ordering it to land at a designated airfield or by ordering it to depart from an area prohibited to it—not deliberately and unreasonably to increase those inherent risks, and certainly not to provoke completely new and unanticipated hazards inevitable when modern armaments are intentionally brought into play. The Bulgarian admissions clearly disclose that this duty was not discharged.

63. The heart of the present case is that fire was opened on 4X-AKC which, in the space of a few minutes, was callously clawed out of the sky and destroyed, with the death of fifty-eight innocent human beings. The contention of the Government of Israel is that no rule of law, and not the most stringent interpretation of any provision of the Chicago Convention (Annex 10) or of the rules of general international law to which it gives expression, permits such a degree of violence. The Government of Israel seeks from the Court a clear decision on this basic issue which goes to the root of the whole of the contemporary law of the air and the security of air travel. Moreover, in the light of the circumstances of this case the Government of Israel contends that this can easily be decided without the necessity for entanglement in matters of detail which can only obscure, and unnecessarily so, the real issue. In the circumstances of this case there is seen to be no relevance whatsoever in such questions as where, when or how 4X-AKC came to enter Bulgarian airspace, or in what respect the action of the Bulgarian armed forces in opening fire on it was precipitate, ill-considered and punishable, as the Bulgarian Government has said was the case. The careless opening of fire on this aircraft was by its very nature so dangerous an act that a basic principle of international law was thereby infringed. Bulgaria, the State the organs of which so acted,

bears exclusive international responsibility for the damage which ensued.

64. In putting forward these contentions the Government of Israel wishes to emphasize that the responsibility of Bulgaria derives from the very act of the Bulgarian armed forces. That act speaks for itself, and having regard to the admissions made by the Government of Bulgaria, the Government of Israel is contending that this responsibility is established and can be sustained without assertions or assumptions or findings of a pejorative character about the individual members of the Bulgarian armed forces and their conduct. At the same time, the undertaking given by the Bulgarian Government that it would identify and punish those responsible indicates that in the view of the Bulgarian Government an element of culpability attaches to the behaviour of those individuals. The Government of Israel shares this view.

65. In advancing the argument contained in the preceding paragraphs, it is not being contended that if a violation of Bulgarian airspace had occurred, the Bulgarian Government was not entitled to take steps, provided they would not offend the principle maintained in the preceding paragraphs, to protect its sovereignty. This is fully recognized in the general principles of international law governing the territorial airspace and is repeated in the Convention on International Civil Aviation (Annex 10). Article 1 of that Convention postulates the rule, which underlies the whole of the modern international public law of the air, that every State has complete and exclusive sovereignty over the airspace above its territory. This obviously means that that "complete and exclusive sovereignty" may be protected by appropriate means. Article 6 of the Convention states that no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization. *A fortiori* this rule applies in the case of Bulgaria, which was not a party to the Convention. It is recognized that neither the Company nor any other Israel airline was entitled to operate a scheduled international air service over or into Bulgarian territory save with the special permission or other authorization of Bulgaria; and no such special permission or other authorization had been granted. But that is not the end of the matter. There is obviously considerable difference between operating a scheduled international air service over or into Bulgaria, and innocently overflying a stretch of Bulgarian territory. This type of infringement of territorial airspace is not uncommon, and at times may be unavoidable. It ought never to be opposed by such a disproportionate degree of violence as was employed in this case.

66. When a State party to the Chicago Convention in time of peace encounters instances of an infringement of its airspace, such

as the intrusion of international scheduled air services contrary to Article 6, or intrusion of any aircraft into a duly established prohibited area contrary to Article 9 of the Convention, it normally reacts in one or both of two ways. In the first place, if this is physically possible, it indicates to the aircraft in the appropriate manner, and without causing an undue degree of physical danger to the aircraft and its occupants, that it is performing some unauthorized act. In taking this action that State may also, always exercising due care, require the intruder either to bring the intrusion to an end (i.e. to return to its authorized position, within or without the airspace of the State in question), or to submit itself to examination after landing, at a place, in the territory of the State in question, duly, properly and effectively indicated to it in the appropriate manner. In the second place, and subsequently, it may deal with the infringement of its sovereignty by making the appropriate *démarche* through the diplomatic channel. This practice has always been recognized by Bulgaria, as is mentioned in the Note Verbale of 4 August 1955 (Annex 17) and as is discussed more fully in paragraphs 84 to 86 below. This common practice is the only one which can reconcile the right of a State to protect its sovereignty when this is being unintentionally infringed with the undoubted duty of every State not unnecessarily to endanger the lives of persons who, in the words of the Bulgarian Note Verbale of 4 August 1955, are, in the nature of things, "complètement innocentes". The opening of fire upon an unarmed civil aircraft in the circumstances of this case, whether or not the aircraft was warned, or was warned adequately, and whether or not it is true that, as alleged by the Bulgarian Government, it was thought to be attempting to escape over the border, is an action which itself calls for the most energetic protest: and when that opening of fire results in the outright destruction of the aircraft and the deaths of fifty-eight innocent persons, a clear case of international responsibility exists.

67. From the outset the Bulgarian Government has made great play of the fact that its sovereignty was violated by the penetration of 4X-AKC into Bulgarian airspace. The Government of Israel does not contest that if Bulgarian sovereignty was violated, then the Bulgarian Government was entitled to take appropriate action (such as is described in the previous paragraph) and if damage and loss were caused to it by that infraction of its sovereignty, then the Bulgarian Government is entitled to prefer an appropriate claim for satisfaction or reparation. Although the aircraft was not an organ of the State of Israel, the Government of Israel would have thought that paragraph 5 of the Note Verbale of 14 February 1956 (Annex 31) constituted adequate satisfaction to the Bulgarian Government, which has made no claim whatsoever for pecuniary reparation. However, if the Bulgarian Government has another opinion, the Statute and Rules of Court contain sufficient provisions to enable it to put its claim to judicial test, in the present proceed-

ings or otherwise. The Government of Israel emphatically denies the right of the Government of Bulgaria itself to determine arbitrarily that because Bulgarian sovereignty may have been infringed by 4X-AKC, the Company, as owners of the aircraft, and not the Bulgarian Government, has to bear the responsibility for the losses caused by the destruction of 4X-AKC, and that in consequence the Bulgarian Government is under no international duties whatsoever in the matter but is free to act on an *ex gratia* basis exclusively. Such a view has no justification.

68. The various Bulgarian statements of July and August 1955 taken together have another consequence. They place in correct perspective the fact of the interception of 4X-AKC by the Bulgarian fighters. The Bulgarian Government has given no information whatsoever as to the precise moment at which the Bulgarian authorities, whether from the ground or from the air, came into direct contact, visual or aural, with 4X-AKC. However, they do disclose that such contact, in their view at least (and the allegations in that regard are not admitted), took place, and that it was not a *momentary or instantaneous contact, but one which lasted for quite a long time*. The moment of such contact (whenever it occurred) is, therefore, the moment at which 4X-AKC was intercepted. Bulgarian responsibility began to be engaged from that moment. After interception the organs of the Bulgarian State which were concerned with the interception were under the legal duty of comporting themselves in such a manner as would not cause unnecessary danger to 4X-AKC and its occupants. It is stating the obvious to say that opening fire, before the foreign aircraft had been identified, whether or not in haste, and whether or not without taking necessary measures, makes it impossible to say that the organs of the Bulgarian State, which so acted, were, or could have been, comporting themselves properly and with that degree of care and skill which is required of them and for which they are or ought to have been trained, and which any intercepted aircraft, whether or not it was aware that it had been intercepted, was therefore entitled to expect. Keeping in mind the general legal requirements for reasonableness, whenever armed force is being used to protect sovereignty in circumstances of this character, the Government of Israel is urging the Court to hold that there can be no justification whatsoever for the fact that after the Bulgarian authorities had intercepted 4X-AKC (and according to one variant of the story of the Bulgarian Government, 4X-AKC flew over no less than 200 kms. of Bulgarian territory in the hours of daylight), they failed to identify<sup>1</sup> it as a well-known and distinctive type of civil aircraft

<sup>1</sup> It may be noted that identification need not necessarily have been visual or obtained by radio contact with the aircraft itself. There is nothing to have prevented the Bulgarian authorities from having enquired of the appropriate Air Traffic Control whether a civilian aircraft was flying or was intending to fly between Belgrade and Saloniki at that time.

belonging to a friendly State. The Government of Israel will go further and argue that in normal times there can be no legal justification for haste and inadequate measures *after* interception of, and for the opening of fire on, a foreign civil aircraft, clearly marked as such.

69. Considered in this light there can be little legal interest in the precise circumstances in which the organs of the Bulgarian State intercepted 4X-AKC. The Bulgarian Government has been arguing that 4X-AKC did not obey instructions given to it. However, this is no more than the interpretation placed by the Bulgarian Government on what it thinks was the reaction of 4X-AKC after it had been intercepted.

70. In attempted justification of its action the Bulgarian Government has asserted, in the Note Verbale of 4 August 1955 (Annex 17), that 4X-AKC was equipped with the most modern aerial navigating instruments and could not have failed to be aware of the fact that it had violated Bulgarian airspace. The Israel Government has no reason for disagreeing with the assertion that 4X-AKC was fitted with the (then) most modern aerial navigating instruments, as indeed are specified more closely in Sections III and VIII of the Report of the Israel Commission of Inquiry. It goes further and admits that when 4X-AKC left Vienna, those instruments are to be assumed to have been serviceable. It does not follow, however, that they were serviceable at any later period, and this is, therefore, not admitted. There is no evidence on this point and if any did exist, it has been withheld by the Bulgarian Government. The removal by the Bulgarian authorities of parts of the aircraft wreckage before the arrival of the three members of the Israel Commission of Inquiry, as is reported in Section VIII and Appendix D of the Report of the Commission of Inquiry on the one hand, and on the other (1) the failure of the Bulgarian authorities to permit the Israel Commission of Inquiry as a whole to pursue its examination of the wreckage of 4X-AKC, (2) the refusal of the Bulgarian authorities to permit even the most minimal amount of co-operation between the Israel Commission of Inquiry and the Bulgarian Governmental Commission, and (3) the failure of the Bulgarian Government to make available more than the mere conclusions of its Commission, and to return to Israel any part of the wreckage of 4X-AKC, have deprived the Israel Government of any evidence whatsoever which might have been obtained from the wreckage as to the state of the aerial navigation instruments at the crucial time. The Government of Israel also does not admit the allegation that the crew of the aircraft could not have failed to be aware of the fact that they had penetrated the Bulgarian airspace. On the basis of what is known regarding the weather conditions along airway Amber 10, and the difference between the forecast and actual winds on the one hand, and taking full account of the radio communi-

cations from 4X-AKC (Annex 27) on the other, the Government of Israel is satisfied that the crew of 4X-AKC believed that they were on airway Amber 10, had no reason to believe that they had departed from airway Amber 10 and could not have known of their immediate location at the critical period of time, and that there is nothing abnormal about this. In this connection it has to be repeated that 4X-AKC was not shot down merely because it entered Bulgarian airspace without previous authorization but, as appears in this Memorial, for different reasons.

71. As has already been mentioned in another connection (in paragraph 67 above), in the process of interpreting away the admissions and undertakings given in July and August 1955, the representatives of the Bulgarian Government have since put forward the proposition that the very fact that 4X-AKC crossed into Bulgarian airspace without previous authorization exonerates Bulgaria from legal responsibility and, leaving her free to act on a basis of humanity and *ex gratia*, transfers that responsibility to the Company. A clear example of this is seen in the meeting in Sofia of 19 July 1957 described in paragraph 51 above. The circumstances in which the Bulgarian representatives thrust this argument into a fairly prominent position, and the consequences which they drew from it, suggest that it is an attempt to buttress a political decision by the Bulgarian Government not to abide by the admissions and keep the undertakings which it gave in July and August 1955.

72. This attitude stands in open contradiction to the views of the Bulgarian Government expressed at that time both in diplomatic communications to the Government of Israel and in various public announcements. Furthermore, it fails to pay any attention to or account for the categorical admission by the Bulgarian Government that its armed forces opened fire on 4X-AKC in haste and without taking the necessary measures. On this ground alone the argument is clearly unsustainable.

73. A close reading of the documents (Annexes 13, 14, 16 and 17) clearly discloses that in 1955 the Bulgarian Government never looked upon the alleged presence of 4X-AKC in the Bulgarian airspace as having led to its destruction. In the Note Verbale of 28 July, it is stated that after an unidentified aircraft had been sighted by the anti-aerial defence, it was several times warned to land, in conformity with the international regulations. (The details of those international regulations have nowhere been specified.) Only after it had not responded to those warnings, the anti-aircraft defence opened fire, and as a consequence of that action it was destroyed. In the Communiqué of 28 July, somewhat different reasons are given, but again the distinction between the two stages is clearly indicated. In that Communiqué the statement that the aircraft had several times been warned to land in conformity with the international regulations does not appear, but instead it is stated that



the Bulgarian anti-aircraft defence could not identify it and, after several warnings, opened fire as a result of which it was destroyed. In the Communiqué of 3 August which, as indicated in paragraph 26 above, is apparently identical with the conclusions reached by the Bulgarian Governmental Commission, it is stated, in the third conclusion:

« Les avions de chasse voyant que l'avion perturbateur fait un essai de s'enfuir par la frontière, ont ouvert le feu, à la suite de quoi l'avion a pris feu et il est tombé dans la région de la ville de Pétritch. »

Another, different, version is contained in the Note Verbale of 4 August 1955:

« Les chasseurs ont averti l'avion, conformément aux règlements internationaux établis, d'atterrir. Malgré ce fait, il ne s'est pas soumis, mais a continué à voler vers le sud, essayant de s'enfuir à travers la frontière bulgare-grecque.

Dans ces circonstances, les deux chasseurs des forces de la défense anti-aérienne bulgare dans cette région, étonnés par la conduite de l'avion, ont ouvert le feu, en raison de quoi, un peu plus tard, il a pris feu et est tombé dans la région de la ville de Pétritch. »

74. Unlike the Communiqué of 3 August, the Note Verbale of 4 August introduces a new element, the state of mind of the pilots of the Bulgarian fighter aircraft. The documents indicate that these persons, being in a state of astonishment, gave a certain interpretation to the actions of what to them was an unidentified aircraft (though the actions themselves are not well specified), and they go on to state that the Bulgarian anti-aircraft defence units then manifested a certain haste and did not take all the steps required to compel that unidentified aircraft to obey them and land. The implications are that had the Bulgarian fighter pilots and other authorities not been in that state of mind, had they not acted in haste, and had they not omitted the necessary measures (whatever they might have been), they would not have destroyed 4X-AKC. Such a state of mind, leading to such action on the part of the Bulgarian authorities and armed forces, could not reasonably have been foreseen.

75. In fact the Bulgarian Government has gone much further in demonstrating that there is no causal connection between the actions of 4X-AKC and the actions of the Bulgarian armed forces; and that nothing done or left undone by the owners or crew of 4X-AKC led to the catastrophe. The action of opening fire was accompanied, according to the statement contained in the Note Verbale of 4 August 1955 (Annex 17), with two other features, namely, the "certaine hâte" of which the Bulgarian armed forces "ont fait preuve" and the non-taking of "toutes les mesures nécessaires pour contraindre l'avion à se soumettre et à atterrir". The action of opening fire was thus accompanied by at least one act of commission and at least one act of omission, neither of which

was provoked by any action whatsoever of 4X-AKC, but by the fact that the unidentified aircraft appeared to the persons who performed such acts of commission or of omission to be doing, or about to do, something which they had express or implied orders to prevent. This is fully supported by other statements made in 1955 by the Bulgarian authorities. For instance, the undertaking to identify and punish the culpable persons—with its use of the suggestive words “punir” and “coupables”—given in response to demands to that effect (see paragraph 19 above) establishes (a) the element of punishability in the actions of individual members of the Bulgarian armed forces, and (b) the recognition of a legitimate international interest in the question of the identity, and eventual punishment, of the persons concerned. In this connection, the Government of Israel considers it desirable to state that this element of punishability does not necessarily have to be identified with criminality in the sense of municipal criminal law. It is conceivable that the actions were punishable under a code of military discipline in a manner not involving the criminal responsibility of the individuals concerned as normally understood. This, however, is a matter of detail which is not relevant to the question here being discussed. The point is that there was no abstract requirement on the part of the Bulgarian Government specifically to discuss the aspect of punishability, and the recognition in an international document that the action was punishable has obvious implications for the questions of causality and of international responsibility.

76. Somewhat similar considerations apply to two other aspects of the Note Verbale of 4 August 1955 (Annex 17). The first is the undertaking of the Bulgarian Government to take “*toutes les mesures nécessaires*” (an interesting repetition!) to prevent like catastrophes in the future. If the “catastrophe” or “grand malheur” (as it is also denominated) which befell 4X-AKC was caused by a legitimate act of sovereignty, justifiable under international law, then this statement would not only be unnecessary, but it would be misleading and possibly prejudicial to the maintenance of Bulgarian sovereignty, which the Bulgarian Government had shown itself so zealous to uphold. But such an undertaking is fully consistent—indeed only consistent—with the view that the impugned actions did constitute a violation of the rights of other States and were therefore contrary to international law. The second aspect is the undertaking to pay compensation. Without here entering upon a detailed examination of that aspect, which appears also in the Note Verbale of 28 July 1955 (Annex 14), it is sufficient to state that any undertaking to pay compensation “due” implies recognition of liability to pay that compensation: and recognition of that liability in turn is consistent only with the view that the impugned actions constituted a violation of international law.

77. In this way the conclusion is irresistible that neither the alleged presence of 4X-AKC within Bulgarian airspace without previous authorization or notification, nor its alleged failure to obey warnings allegedly given it to land on some Bulgarian airfield, nor its alleged attempt to escape over the border, caused its destruction by the Bulgarian armed forces. Those features, if they are correct (which is not admitted), may explain the interception of 4X-AKC by the Bulgarian armed forces. But they did not cause or justify (a) the degree of the violence used by these armed forces, (b) the precipitate use of that violence, i.e. the haste, (c) the insufficiency of the measures (none of which could have been reasonably foreseen); nor do they accord with the undertakings of the Bulgarian Government to identify and punish the culpable persons nor with its undertaking to pay compensation, nor with its further undertaking to prevent any repetition of such a catastrophe.

78. To recapitulate, the essence of the legal argument advanced in paragraphs 60 to 77 hereof as applied to the relevant facts is that, in the light of those facts—and the most prominent of them is that Bulgarian armed forces opened fire on 4X-AKC in haste and without taking necessary measures—the Bulgarian State and its organs failed to discharge the duties imposed upon them by international law. Accordingly the conclusion is reached, and it is so submitted by the Government of Israel, that the responsibility of Bulgaria under international law for the destruction of 4X-AKC and for the loss of life and property and all other damage that resulted therefrom, is established. If the Court upholds this argument it would become unnecessary for it to consider technical and complex questions relating to such matters as the precise direction of the flight of 4X-AKC from Belgrade onwards (concerning which see paragraph 33 above).

79. In the course of the diplomatic phase of this case a number of questions were raised such as (i) the existence and nature of the warning allegedly given to 4X-AKC; (ii) the relevance of previous violations (not by Israel aircraft) of Bulgarian airspace; and (iii) matters of proof and evidence. Since mention of these aspects appears on the record (although not always with the requisite degree of clarity), the Government of Israel believes that it will assist the Court for it at this stage summarily to state its views on them. At the same time the order in which these questions are discussed is not intended to suggest that they stand in any particular order of precedence as “principal” and “subsidiary” or “alternative” contentions and submissions. At the present stage of the proceedings it is premature to attempt to arrange the various issues—if they should be relevant to the decision in this case—in any such order. Furthermore, pending a more adequate formulation of the Bulgarian contentions and submissions, both on the relevance

of these matters and on their substance, such discussion can only be of a provisional character.

(c) *The Question of Warning*

80. The various Bulgarian statements make the point that 4X-AKC was warned to land in accordance with the "règlements internationaux" (Notes Verbales of 28 July 1955 and 4 August 1955) or "les signes établis par le Code International" (Communiqué of 3 August 1955), and failed to obey that warning. Nothing to support this allegation has ever been put forward by Bulgaria and the allegation is denied. No indication has ever been given by the Bulgarian authorities as to the time or nature of the alleged warnings, or regarding the manner in which they were supposed to have been given. The Government of Israel has no knowledge of the "Règlements internationaux" or the "Code International" which have been cited. In document AN-WP/1614 issued by the International Civil Aviation Organization on 27 February 1957, being Working Paper on Item Number 306, signals to be used in respect of airspace restrictions, for the Air Navigation Commission (Annex 36), particulars are given of a Bulgarian comment on the signals applied when an aircraft is intercepted violating Bulgarian airspace. Perusal of that document as a whole shows two things: first, that there is no internationally established practice for dealing with this eventuality; and second, that the Bulgarian practice therein described is apparently unique. The only possible standard international practice which may exist on the matter is that contained in the Rules of the Air, being Annex 2 to the Convention on International Civil Aviation, as follows:

"By day and by night, a series of projectiles discharged at intervals of 10 seconds, each showing, on bursting, red and green lights or stars will indicate to an aircraft that it is flying in the vicinity of a restricted, prohibited or danger area, and that the aircraft is to take such remedial action as may be necessary.

*Note:* These signals can be emitted either from the ground or from another aircraft."

The existence of a particular Bulgarian practice in this regard was first brought to the notice of the Israel Government with the publication of document AN-WP/1614 nearly two years after the alleged warnings were given to 4X-AKC.

81. In order to constitute a warning, the signs or the instructions emanating from the Bulgarian authorities must be (a) adequate and (b) intelligible and unmistakably convey to those intended to be their recipients what was the "remedial" action necessary. For instance, a warning may have been merely conveying to the pilot that he was in or near a prohibited area, and then he would have been fully justified in interpreting the signs made to him as indicat-

ing that he was off his proper position and must return to it as quickly as possible. An entirely different warning may have conveyed that the pilot must land at a designated airport. But it is not only a question of signs and indications. There are established international frequencies for radio contact between ground and air, and these could have been used by the Bulgarian authorities quite apart from any possibility of their contacting the Yugoslav authorities and particularly ATC Belgrade with the object of having messages conveyed to the aircraft. The Government of Israel has been unable to establish that any type of radio communication was held between the Bulgarian authorities and 4X-AKC, nor has the Bulgarian Government ever alleged that any such communications were held.

82. The various Bulgarian statements contain an interesting discrepancy concerning the content of the alleged warning, and this endorses the argument regarding the inadequacy of the warning. The Note Verbale of 28 July 1955 (Annex 14) states that the unidentified aircraft was warned to land. The Communiqué of the same date (Annex 13) merely states that the aircraft was given several warnings, without making any indication of the contents of those warnings. The Communiqué of 3 August 1955 (Annex 16) states that the aircraft was warned to follow the fighters and land at the aerodrome which they would indicate to it. The words "at the aerodrome which they would indicate to it" are omitted from the Note Verbale of 4 August 1955 (Annex 17), which contents itself with stating that the fighters had orders to force the aircraft to land "at some [dans quelque] Bulgarian airport". Such reticence on the part of the Bulgarian Government regarding a very material aspect of the question of the warning may be taken to cast doubts upon the whole story of the warning.

83. The Government of Israel accordingly maintains its position that 4X-AKC was not warned; that even if some warning was given it was not adequate; and that in any event the question of the warning is irrelevant to the main issue of Bulgarian responsibility. The Bulgarian Government has freely and publicly recognized that the action of its armed forces was precipitate and that those armed forces did not take all the necessary measures before they opened fire. This recognition deprives of interest the various Bulgarian allegations regarding warnings supposedly given to 4X-AKC. The Government of Israel considers these allegations to be gratuitous and irrelevant.

*(d) Previous Violations (not by Israel aircraft) of Bulgarian Airspace*

84. In the Note Verbale of 4 August 1955 (Annex 17), as well as in various diplomatic conversations, general remarks have been made to the effect that over a period of years Bulgaria had been the victim of numerous illegal flights of foreign aircraft into its airspace.

The Note Verbale went on to state that the Government of Bulgaria had protested on several occasions to the Secretariat of the United Nations Organization, but without result. Clearly this has no bearing on Bulgarian responsibility for shooting down 4X-AKC. At the same time the Government of Israel wishes to make certain observations on this statement:

(i) In the first place the Bulgarian Government has never suggested that Israel planes were involved in any of these incidents and, in fact, no instance is known to the Government of Israel of any actual or alleged violation of Bulgarian airspace by any Israel aircraft.

(ii) Secondly, regarding the statement that several protests had been made by the Bulgarian Government to the Secretariat of the United Nations Organization, it is correct that the Secretariat of the United Nations has distributed, on several occasions, circular letters, originating with the Bulgarian Government, which referred to violations of Bulgarian airspace. Copies of such circular letters have been received by the Government of Israel (Annex 37). The latest of these dates from 1953. In addition to these unpublished Notes transmitted to the Secretariat of the United Nations for circulation to all Member States, some notifications of violation of Bulgarian airspace were made by the Bulgarian Government to the Balkans Sub-Commission of the Peace Observation Commission of the United Nations and are recorded in United Nations documents A/CN.7/SC.I/4 and A/CN.7/SC.I/6. Some of these Notes contain protests and warnings to Greece by the Bulgarian Government but there is no demand for any specific action beyond a request for their circulation to Member States.

(iii) In addition to enquiring of the United Nations Secretariat regarding the nature of the protests made to it by the Government of Bulgaria, the Government of Israel thought it desirable to enquire if the Secretariat of the International Civil Aviation Organization had been advised of these, or other, violations of Bulgarian airspace. A negative answer has been received from that Organization (Annex 38).

85. The Government of Israel contends that in the context of the Note Verbale of 4 August 1955, these references to these violations of the Bulgarian airspace are open to the criticism that they are tendentious and lack candour. All the incidents of which complaint was made had occurred many years before the incident of 27 July 1955, and the last of them was not later than 1953. By far the overwhelming majority of those complaints related to violations of the Bulgarian airspace by Greek aircraft, entering Bulgarian airspace from the Greek side of the frontier to the south. Except for one instance of complaint of violation of Bulgarian airspace by two multi-engined bombers, all the other complaints in which the type of intruding aircraft was specified, spoke of single

or twin-engined planes, or fighter planes, or "reconnaissance" or "pursuit" planes. It may also be observed that most of the violations complained of concerned low-altitude flights, which took place generally lower than 1000 metres (3000 ft.). None of the flights complained of exceeded the altitude of 3000 metres (9000 ft.), and only one flight reached that altitude. In several instances the complaints stressed that the purpose of the intruding aircraft was to reconnoitre Bulgarian territory, and explained that this was the reason why the intruding aircraft flew at low altitudes. But as regards 4X-AKC, according to the Bulgarian versions, 4X-AKC entered the Bulgarian airspace from the west or from the north-west and, in fact, flew southwards. Furthermore, it is a fact that since 1953 the tension which had undoubtedly existed earlier along the western and southern frontiers of Bulgaria was being gradually diminished. The Israel Legation in Belgrade has reported in a Despatch of August 1955, that the tension on the Yugoslav-Bulgarian frontier had so diminished that in 1954 the frontier was jointly demarcated, since when no incidents had occurred. A similar report was received in October 1955 from the Israel Diplomatic Representative in Athens regarding the Bulgaro-Greek frontier. According to that report, in October 1953 the frontier was demarcated: later, in 1954, diplomatic relations between Greece and Bulgaria were renewed after a break of thirteen years. On 27 July 1955, so shortly after the Heads of Government Conference at Geneva, there was every reason to suppose that this relaxation of political tension would continue.

86. At the same time, it is observed that these documents have quite another importance, for they disclose that at a period of tension along Bulgaria's own borders the Bulgarian authorities were careful not to employ an undue degree of force *even against aircraft which they had reason to suspect were hostile*. Assuming they were Greek, or that at all events the Greek Government was internationally responsible for permitting infringements of Bulgarian airspace to be undertaken from Greek territory, the Bulgarian Government, which then was not in diplomatic relations with Greece, employed the only diplomatic machinery available to it, and despatched its protests to the Secretariat of the United Nations. In the circumstances this appears to be fully consonant with the requirements of international law and the prevailing international practice, as is mentioned in paragraph 66 above. The last of these protests had been sent to the Secretary-General of the United Nations over two years before 27 July 1955, and so far as is known to the Government of Israel, no international incident regarding the infringement of Bulgarian airspace has been brought by the Bulgarian Government to the notice of international organs in that interval. The existence of these earlier infringements of Bulgarian airspace does not supply any excuse for the manner in

which Bulgaria reacted to the alleged presence of 4X-AKC within its airspace. Rather to the contrary; the failure of Bulgaria to announce, in July 1955, that she would no longer be following her own earlier practice aggravates her own responsibility.

(e) *Matters of Proof and Evidence*

87. The refusal of the Bulgarian Government to make available all information in its possession in regard to the incident, despite the repeated requests of the Israel Government made since the first Note Verbale of 28 July 1955 (Annex 12), is all the more significant in the light of the fact that as a direct consequence of the Bulgarian action, all the persons who could give first-hand evidence about the actions of 4X-AKC, and about how the activities of the Bulgarian fighter aircraft appeared to 4X-AKC, are dead. The only reply which the Bulgarian Government has given to the Israel Government's request for full information concerning the circumstances leading to the loss of the aircraft (first Note Verbale of 28 July 1955) consists of the inconsistent generalizations, unsupported by any evidence, of the Bulgarian Notes Verbales and Communiqués of July and August 1955 (see paragraph 29 above). Having regard to the manner in which the Bulgarian Government has responded to these requests for information, the Israel Government is contending that the Bulgarian Government must now accept all the legal consequences deriving from the deliberate withholding of knowledge of material facts. The Government of Israel is accordingly reserving all its rights in the matter of evidence, including the right to make appropriate applications to the Court under Article 49 of the Statute and under any other relevant provision or rule of law, should this become necessary.

88. It is to be emphasized that the present dispute between the two Governments is not, in essence, in the words of Article 36 (2) (c) of the Statute of the Court, a dispute concerning "the existence of any fact which, if established, would constitute a breach of an international obligation". This case can, therefore, be clearly distinguished in this respect from the *Corfu Channel* case. In this case the manner in which the Bulgarian armed forces destroyed 4X-AKC is incontestably established, and the Court is being asked to hold that those established facts constitute a breach of an international obligation. In the opinion of the Government of Israel, any lacunae in the evidence are inherent in the nature of the case, and their presence or absence can have no effect whatsoever on the issues upon which the Court is being asked to determine. In so far as the death of all the occupants of the aircraft deprives the parties and the Court of the assistance of first-hand witnesses, the Bulgarian Government cannot take any advantage of that; and in so far as the Notes Verbales and Communiqués of July and August 1955 contain official statements of what the units of the Bulgarian armed



forces did or did not do, those statements, being in the nature of admissions, are binding upon the Bulgarian Government. In so far as the Bulgarian Government has refused, even before as well as after the diplomatic claim was put forward and even before the present case was instituted before the Court, to make certain material information available or has withheld such material information, it is now precluded from producing such information in Court, and from making new allegations based thereon. Inasmuch as the Bulgarian Government hampered the activities of the Israel Commission of Inquiry, it cannot now make complaint of anything contained in or omitted from its Report (Annex 18). The Government of Israel is not putting this view forward on the basis of any particular attitude at present regarding the position of the onus of proof in this case. It considers that the published documents contain all the elements of fact necessary to enable the Court to decide in its favour on the principal petition of the Application instituting Proceedings.

89. Regarding the peremptory and final character of the admissions concerning the state of mind and behaviour of the units of the Bulgarian armed forces, contained in the Bulgarian Notes Verbales of July and August 1955, it is submitted that the position is clear. International law has long recognized the conclusiveness of admissions of this character. The general principle was clearly stated as far back as 1856 in the well-known arbitration in the *Croft* case between Great Britain and Portugal, by the Senate of Hamburg. The arbitral award contains the following significant passage:

“If what was contained in the statement of the 17th November, 1851, had been expressed in a note or other diplomatic communication, addressed to the British Government by the Portuguese Government as its view of the case, it might then have been justly said that the one Government had thereby of itself made an acknowledgment and an admission to the other by which the latter was now altogether exonerated from the task of proving that the case really stood as it was represented there.” *British and Foreign State Papers*, vol. 50, 1288 at p. 1291.

This principle, which is consonant with the general principle of good faith as one of the bases of orderly international intercourse, is now firmly established in international law, and has been applied on many occasions by international tribunals. For decisions of the International Court of Justice in which it was applied, reference may be made to the views of the Court regarding declarations made by the Albanian Delegate in the Security Council in the *Corfu Channel* case (merits), *I.C.J. Reports 1949*, at p. 19; to the Court's attitude regarding various official memoranda by the Union of South Africa in the *Status of South-West Africa* case, *I.C.J. Reports 1950*, at pp. 134-136; and to the Court's attitude towards certain

admissions made by France to the United Kingdom in diplomatic correspondence during the 19th century, in the *Minquiers and Ecrehos* case, *I.C.J. Reports 1953*, at p. 71.

90. The Government of Israel wishes to stress this point in the light of the tendency which has appeared in the later stages of the diplomatic discussions, and particularly in the meeting of 13 September 1957 (paragraph 54 above), for the Bulgarian Government to argue that the Note Verbale of 4 August 1955 (Annex 17) did not constitute acceptance by it of responsibility, any contrary interpretation being erroneous. In the view of the Government of Israel, in this respect the Note Verbale is clear enough and does not call for any sophisticated "interpretation". Acceptance of such a view as the Bulgarian officials have been putting forward would imply that a government would be entitled to blow hot and cold at the same time: for purely political purposes to make statements which, for their impact upon the rights of others, would be of possibly far-reaching implications (as in the present case), and then to be free of all legal consequences when those whose rights are affected seek to implement those very rights apparently once recognized.

91. The Government of Israel is not advancing this contention out of purely theoretical considerations, although it believes that the principle of good faith in international relations is of sufficient general importance to warrant emphatic conclusions on that ground alone. In the present case the issue is of considerable practical importance. The unequivocal admissions by the Government of Bulgaria, which the Government of Israel is in no position to question, prove that it was the action of the Bulgarian armed forces, and the precipitate and inept manner in which it was carried out, which caused the destruction of 4X-AKC and the death of all its occupants. The failure of the Bulgarian Government to make available the evidence upon which it based its own conclusions, may also have the legal consequence of creating an estoppel and preclusion (in so far as these notions are distinct). Furthermore, the inclusion of the admissions in the Note Verbale makes unnecessary any discussion of the problem of the imputability to the Bulgarian State of the actions of the various members of the armed forces of that country. In this connection care must be taken to distinguish between the admissions contained in the Notes Verbales, which are valid and binding inasmuch as they relate to the actions of the Bulgarian Government or of members of the Bulgarian armed forces, and mere assertions—unsubstantiated allegations about the actions of 4X-AKC—which at best are nothing more than their authors' interpretations of those actions. The admissions are subject to the general principle of indivisibility and are binding and conclusive in themselves. The allegations must be established in all their particulars.

92. The fact that the incident occurred on Bulgarian territory has other consequences as regards the availability of evidence to the applicant party. This problem also arose before the Court in the merits of the *Corfu Channel* case, and the Government of Israel is invoking the principle there established in the following terms:

"It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." *I.C.J. Reports 1949*, 4 at p. 18.

93. It is on the basis of this rule that Bulgaria was immediately called upon to give an explanation. The Government of Israel does not contend that the Government of Bulgaria was legally obliged to permit the Israel Inquiry Commission to conduct any activities on Bulgarian territory. Article 26 of the Convention on International Civil Aviation (Annex 10) goes no further than to require that the State in which the aircraft is registered should be given the opportunity to appoint observers to be present at an inquiry held in the State in which an aircraft accident occurred, and that the State holding the inquiry shall communicate the report and findings in the matter to the State in which the aircraft is registered. In fact, however, there is a common international practice providing for international co-operation in this matter, consolidated in the Standards and Recommended Practices on Aircraft Accident Inquiry which forms Annex 13 to the Convention on Civil Aviation. But the Government of Israel is contending that the exercise by the Bulgarian Government of its sovereign right not to co-operate with the Israel Commission of Inquiry, in so far as the rights and

position of the Government of Israel have been prejudiced thereby, cannot entitle the Bulgarian Government to rely on any possible insufficiency in the evidence brought by the applicant party.

94. Reference has been made in the course of the preceding discussion to a number of technical rules of law and evidence. This notwithstanding, the case of the Government of Israel is that under the circumstances, the opening of fire on 4X-AKC on 27 July 1955 cannot be justified under international law. It accordingly submits, and asks the Court so to hold, that the elements of fact and of law to support a decision on this contention in its favour are sufficiently established, and to determine that Bulgaria is responsible under international law for the destruction of the Israel aircraft 4X-AKC on 27 July 1955 and for the loss of life and property and all other damage that resulted therefrom.

## Section II.— *The Reparation Due*

### (a) *General*

95. The second petition of the Application instituting Proceedings requests the Court "to determine the amount of compensation due from Bulgaria to Israel". It follows from the conclusion regarding Bulgarian responsibility contained in the preceding Section that Bulgaria is under the obligation to make satisfaction and to pay compensation to Israel for the damage caused to Israel as a result of the action which has engaged the international responsibility of Bulgaria. This consequence of an illegal act is well recognized in the jurisprudence of international tribunals and in particular in the following classic statement by the Permanent Court of International Justice in the *Chorzów Factory* case, where that Court said:

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." P.C.I.J., Series A, No. 17, at p. 47.

As the present Court stated in the *Corfu Channel* case (merits): "It follows from the establishment of responsibility that compensation is due." *I.C.J. Reports 1949*, at p. 23.

96. This position has been fully recognized by the Bulgarian Government. Already in the Note Verbale of 28 July 1955 (Annex 14), which was despatched to and received by the Israel Legation

in Sofia before the second Israel Note Verbale of the same date (Annex 15) was handed to the Bulgarian Chargé d'Affaires in Israel (see paragraphs 14 and 15 above), the Bulgarian Government declared its readiness "à prendre à sa charge la part respective des dommages matériels qui ont été causés après qu'ils auront été dûment établis". Furthermore, between 28 July and 4 August 1955 the question of compensation had been discussed both in Israel and more particularly in Sofia (see paragraphs 17, 19 and 23 above). The attention of the Court is particularly invited to the meeting between Mr. Nall and Dr. Neitchev of 3 August 1955 (paragraph 23 above), when the Bulgarian Foreign Minister stated that in the light of the completion of the work of the Bulgarian Governmental Commission, there would be a change in the attitude of the Government of Bulgaria towards the question of the consequences of its responsibility. The Bulgarian Note Verbale of 4 August 1955 (Annex 17) repeats the undertaking of that Government to assume responsibility for the compensation due to the families of the victims as well as its share of compensation for material damage incurred. It also states that the Bulgarian Government would cause to be identified and punished those guilty of causing the catastrophe to the Israel plane.

97. It is observed that in this respect, as in others, the Note Verbale of 4 August differs from that of 28 July. The Note Verbale of 28 July (Annex 14) refers in general terms to compensation for the material damage incurred after it had been duly established, whereas the Note Verbale of 4 August clearly attempts to differentiate between the compensation due to the victims' families and the compensation due in respect of material damage incurred. If this distinction relates to the general duty to make compensation in a case of international responsibility, it is not one known to international law. If the international responsibility of Bulgaria exists, as is the submission of the Government of Israel, then the Government of Bulgaria is legally bound to compensate for *all* the losses incurred and cannot itself decide either to whom compensation should be paid, or for what losses. In the *Right of Passage* case (Preliminary Objections), the Court recently stressed that "it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it". *I.C.J. Reports 1957*, at p. 142. The Government of Israel has always regarded the Bulgarian Government's undertaking to pay compensation, contained in its Notes Verbales of 28 July and 4 August 1955, in that light, and has never considered any other interpretation to be possible. The Government of Israel also wishes to point out that according to its information all the ten Governments whose nationals incurred loss and damage as a result of the destruction of the aircraft have prepared and submitted

claims on the same basis and have all, with one exception, rejected the offer made to them on or about 19 July 1957, as is described in paragraph 51 above and in Annex 4 to the Application instituting Proceedings filed in Court by the Government of the United States of America <sup>1</sup>.

**98.** The destruction of the aircraft and all its occupants, together with everything on board, caused loss or damage of a pecuniary character under the following heads:

- (a) Financial loss suffered by dependants of the victims (hereinafter called the Individual Claims). Included in these individual claims are also claims for personal belongings carried on the passengers or as part of their free baggage allowance (up to 20 kgs.) or as accompanied excess baggage paid for at the excess baggage rate.
- (b) Financial loss suffered by owners of cargo (hereinafter called the Cargo Claims).
- (c) The loss and damage suffered by the Company (hereinafter called the Company's Claim).
- (d) Damages or loss suffered directly by the Government of Israel (hereinafter called the Government's Claim).
- (e) Loss of Mails, for which no claim is being made.

**99.** The Claim submitted to the Bulgarian Government on 14 February 1956 (Annex 31), as subsequently adjusted, was made up of all these components. Together with that Note Verbale there was handed to the Bulgarian Government a printed booklet (Annex 39) prepared by the Israel Ministry of Justice giving particulars of the total claim, which then amounted to U.S. \$2,656,858. (Part of the sum represents losses calculated in Israel Pounds and converted into Dollars at the official rate of exchange of \$1.00 = IL 1.800. The balance of the claim was calculated in U.S. Dollars.) Since the claim was submitted to the Bulgarian Government, adjustments have been notified in writing (Annex 32); further adjustments have become necessary and these are incorporated in the revised and annotated particulars of claim contained in Annex 40 (Individual Claims), Annex 41 (Cargo Claims) and Annex 42 (the Company's Claim). The Bulgarian Government has never requested any details regarding the calculation of any particular item included in the claim. As appears from paragraphs 38-43 above, it has, at the most, asked for a number of general explanations. In the following paragraphs and the relevant annexes a description will be given of the general manner in which the different components were calculated. This description is substantially identical with that given to the representatives of the Bulgarian

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<sup>1</sup> The one exception is the Government of Sweden which, without admitting the validity in law of the approach which was adopted by the Government of Bulgaria in 1957, nevertheless, for reasons of its own, and without prejudice to the legal position, decided to accept that offer.

Government in the course of the meetings between 2-6 August, 1956, described in paragraphs 41-2 above.

100. The Government of Israel feels that it would be useful at this stage to explain the reasons why the International Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (*137 League of Nations Treaty Series*, p. 12) is irrelevant to this case. This Convention governs the relations between an air carrier and its passengers or cargo owners, and basically it establishes a limitation of the liability of the carrier as against release of the plaintiff from a certain burden of proof. The Convention is not concerned with the financial liability of any person, including a State, not a party to the contract of carriage, even if such other person should become liable to pay compensation following some action by that person which resulted in damage to a passenger or cargo owner. It does not limit the liability of a State which is under the duty of paying compensation because that State's failure to observe the requirements of customary international law has placed it under the duty, according to international law, of paying compensation. The Bulgarian Government cannot claim the benefits of a limitation of liability which is an express term of a contract to which it itself was not a party, direct or indirect.

101. In calculating the damages due, no account has been taken of any sums which might have become payable to the claimant by virtue of life or accident insurance policies, or by virtue of a national insurance scheme such as is in force in Israel, or by virtue of provident and pensions funds schemes of which the deceased was a member and from which the claimant may have benefited. The relations between the deceased (or any other beneficiary) and the assurers, or between a member of a provident fund and the fund itself, are based exclusively on contractual provisions to which neither the Government of Israel nor that of Bulgaria is party and with which neither of these Governments is concerned. As far as concerns the insurance of baggage or freight, the claim has been put forward either in the name of the owner or in that of the insurance company as the case may be. In the course of the diplomatic negotiations the Bulgarian Government at one time suggested that it was incumbent upon the insurers to indemnify the victims (see paragraph 49 (i) above). By implying that the pecuniary loss should be borne not by the Government which caused the damage, but by completely extrinsic third parties who happened to be in some contractual relationship (unknown to the Bulgarian Government) with the victims of the Bulgarian Government's illegal action, that Government is adopting a position which has no basis either in law or in morals.

102. All the claimants in respect of whom a claim has been submitted by the Government of Israel are nationals of Israel, except

where indicated in Annex 40. None of the persons in respect to whom a claim has been submitted by the Government of Israel is the national of a foreign country. So far as is known, none of the persons for whom the Government of Israel has submitted claims is the national of Israel and of some foreign country: alternatively, if any such person does possess dual nationality, his effective nationality, which has been taken to be the nationality of the State in which he ordinarily exercises civil and political rights, is Israel (following Article 3 (2) of the Statute of the Court and the *Nottebohm* case, *I.C.J. Reports 1955*, at p. 4). The Government of Israel considers that it is justified in this case in putting forward claims in respect of losses incurred by persons who are stateless. It may be observed that neither in the Note Verbale of 28 July 1955 (Annex 14) nor in that of 4 August 1955 (Annex 17), did the Government of Bulgaria purport to limit in any way by reference to nationality the persons to whom compensation would be payable. Furthermore, in the Note Verbale of 1 October 1956 (Annex 33) and in subsequent diplomatic conversations (see paragraphs 48 and 52 above) the Bulgarian Government actually requested the Israel Government to take upon itself the representation of all the individual claimants. The Government of Israel submits that it is entitled to adopt the cause of persons, whose cause is not otherwise adopted, when the damage which those persons suffered was incurred when the victims of the illegal action were flying in a commercial airliner on a scheduled international flight under the Israel flag. In the *Reparation for Injuries Suffered* case, the Court stated, regarding the "traditional rule" that diplomatic protection is exercised by the national State, that "even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality". *I.C.J. Reports 1949*, at p. 181.

103. The co-ordination of the preparation of the claim on the inter-Governmental level has been briefly described in paragraph 35 above, and, of course, the Bulgarian Government is fully aware that co-ordination of this kind existed. One of the primary reasons for establishing co-ordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages. It is a well-known rule of law that the defendant State cannot be asked or compelled to pay reparation due in respect of damage twice over. As the Court stated in the *Reparation for Injuries Suffered* case: "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case." *I.C.J. Reports 1949*, at p. 186. It is partly as the result of co-ordination of this character that adjustments have already been made in the Israel claim.



(b) *Individual Claims*

104. The Bulgarian Note Verbale of 4 August 1955 (Annex 17) purports to limit the persons on whose behalf any claim may be made, to relatives of the deceased. The degrees of relationship are not there specified. In some systems of municipal law—among them the civil law in Israel—the relatives who may claim compensation on the death of any person are limited to specified degrees. In the view of the Government of Israel, the determination of the compensation which may be claimed under international law for pecuniary loss cannot be solely based on the degree of relationship of the claimant to the victim, or upon the individual rules of municipal law relating thereto. The proper test is to be found in the extent to which the claimant was dependent financially on the victim and the extent to which the deceased was under a legal duty of supporting the claimant in whole or in part. The principles are discussed in the Opinion, dated 1 November 1923, of Umpire Parker, with whom the American and German Commissioners of the U.S.-Germany Mixed Claims Commission concurred, in the *Lusitania* case. Umpire Parker stated:

“In death cases the right of action is for the loss sustained by the *claimants*, not by the estate. The basis of damages is, not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The enquiry then is: What amount will compensate claimants for such losses?”

Bearing in mind that we are not concerned with any problems involving the punishment of a wrongdoer but only with the naked question of fixing the amount which will compensate for the wrong done, our formula expressed in general terms for reaching that end is: Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.

In making such estimates there will be considered, among other factors, the following:

(*a*) The age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him;

(*b*) The probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered;

(*c*) The reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased;

(d) The age, sex, health, condition and station in life, and probable life-expectancy of each of the claimants;

(e) The extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits;

(f) In reducing to their present cash value contributions which would probably have been made from time to time to claimants by deceased, a 5% interest rate and standard present-value tables will be used;

(g) Neither the physical pain nor the mental anguish which the *deceased* may have suffered will be considered as elements of damage;

(h) The amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover;

(i) No exemplary, punitive, or vindictive damages can be assessed.

The foregoing statement of the rules for measuring damages in death cases will be applied by the American Agent and the German Agent and their respective counsel in the preparation and submission of all such cases. The enumeration of factors to be taken into account in assessing damages will not be considered as exclusive of all others. When either party conceives that other factors should be considered, having a tendency either to increase or decrease the *quantum* of damages, such factors will be called to the attention of the Commission in the presentation of the particular case." *Reports of International Arbitral Awards*, vol. 7, at pp. 35-36.

105. In assessing the individual claims (Annex 40) the Government of Israel was guided by these principles, and by the practice of the Israel Courts. It is only in one important respect that a departure from the *dictum* of Umpire Parker has been introduced, in that no "reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death", has been assessed or claimed. This was prompted by three considerations: firstly, that mental suffering and anguish, caused by the violent death of a near relative, were common to all claimants; secondly, that such suffering did not easily allow of reasonable assessment in terms of money; and thirdly and mainly, that any scaling for such compensation would, in the nature of things, have to depend to *some extent on the measure of love and affection* between the deceased and the claimant, any inquiry into which might work hardship and injustice; and the result of any scaling would certainly give the appearance of unwarranted discrimination. It has, therefore, been considered proper, and the Government of Israel submits that it is just and equitable, to substitute amounts of compensation determined beforehand according to a fixed scale, for amounts to be arrived at after an inquiry into whether mental anguish was suffered, what was the measure of the mental anguish

suffered, and what the adequate compensation therefor would be in terms of money. These claims have been styled "personal claims", and the scale according to which they have been assessed is as follows:

Spouses	IL 10,000 each
Minor children	IL 7,500 each
Parents, where no other claimants were admitted	IL 5,000 each
where other claimants were admitted	IL 2,500 each
Children of age and independent means	IL 2,500 each
Brothers and sisters, where the deceased left neither spouse, nor children, nor parents	IL 2,500 each

In determining these figures account was taken of the fact that it appeared just to provide for a larger amount of compensation to the surviving spouse than would normally fall to his or her share as heir to the estate, bearing in mind that the mental anguish caused to him or her would be considerably greater than that caused to other more distant relatives. These "personal claims" differ, on the one hand, from claims for loss of maintenance and education and, on the other hand, from compensation payable to the estate, no compensation being claimed where the claimants were not very near relatives of the deceased.

106. Apart from these "personal claims" which are, as above stated, not in addition to the claims allowed by Umpire Parker in the *Lusitania* case, but in substitution for claims allowed by him and not otherwise included in the claims, the compensation claimed by the Government of Israel was calculated on the basis of the principles laid down by Umpire Parker as aforesaid. In calculating the amounts which a deceased would probably have contributed to a claimant, the following principles have in general been adopted:

- (a) In cases where the deceased was the sole bread-winner in the family and expended the whole of his income for household and personal expenses, one third of the prospective income of the deceased has been deducted as being income referable to the personal expenditure of the deceased;
- (b) In cases where both the deceased and the surviving spouse expended the whole of the joint earnings for household and personal expenses, one half of the prospective income of the deceased has been deducted as being income referable to the personal expenditure of the deceased;
- (c) Sums paid by the deceased by way of contribution to the support of claimants not being members of the deceased's household, have been deducted from that part of the prospective income of the deceased which would, but for the said deduction, have accrued to the benefit of other claimants;

- (d) Sums paid by the deceased by way of contribution to the support of parents-in-law were not deducted from that part of his prospective income which would have accrued to the benefit of other claimants, and the claims of such parents-in-law for compensation were not admitted;
- (e) In cases where no actual pecuniary contribution has in the past been made by the deceased to the claimant, the test adopted has been whether or not there has been a reasonable expectation of pecuniary advantage: thus, claims of aged parents of the deceased have been allowed in cases where the deceased, on arrival in Israel, would have been legally liable or could have reasonably and properly been expected to contribute towards the maintenance of his or her parents;
- (f) No claim has been included which was based on expectations resting on facts and circumstances additional to and other than the arrival and establishment of the deceased in Israel: thus, claims of parents based on expectations contingent on the deceased reaching majority or the parents reaching old age, have not been included;
- (g) In assessing compensation to be claimed for widows below the age of 45, one quarter of the amount of compensation otherwise to be claimed has been deducted on account of their prospect of remarrying: no such deduction has been made in cases of widows above the age of 45 or in cases where there was no reasonable prospect of a remarriage;
- (h) In assessing compensation to be claimed for a widower who was wholly or partly dependent on his deceased wife and below the age of 45, three quarters of the amount of compensation otherwise to be claimed have been deducted on account of his prospect of remarrying: in the case of widowers above the age of 45 and below the age of 65, one half of the amount has been deducted on account of his prospect of remarrying: no deduction has been made in cases of widowers above the age of 65;
- (i) Compensation payable to minor children has been assessed for the period up to their attaining the age of 18 years;
- (j) In addition to claims for maintenance, a fixed amount of IL 1,000 is being claimed to compensate a minor child for the loss of the deceased's contribution to the costs of his or her education even after attaining the age of 18.

107. In calculating losses of future earnings the following principles have been adopted:

- (a) In cases where the deceased was a civil servant or an employee of the Company or in similar permanent employment, there has been taken into account, where appropriate, the fact that the deceased had reasonable expectation of normal promotion resulting in increased earning capacity: in cases where the deceased

had already attained his highest salary grade, calculations have been made on the footing of a decrease in earning power;

- (b) In cases where the deceased was self-employed, calculations have been based on his average income during the two years immediately preceding death, and prospects of any increase or decrease have been disregarded;
- (c) It has been assumed that the earning capacity of a healthy man would normally end with his 65th year, and that of a healthy woman with her 60th year (but claims by aged parents have been calculated on the basis of their own life expectancies without regard to the age of the deceased).

**108.** In capitalizing the contributions which would have been made by the deceased to the claimant from time to time, the four per cent interest rate and standard present-value tables, as compiled by the Israel National Insurance Authority, were used in lieu of the equivalent five per cent tables used in the *Lusitania* cases. The individual claims were calculated, of course, in January 1956, but the Government of Israel is not proposing at present to revalorize any sums in the light of changes which may have taken place since the sums were originally calculated. It reserves, however, the right at a later stage to adjust these claims in the light of the then prevailing official cost of living indices, should this become necessary.

**109.** The Government of Israel submits that in a case of this nature, where the compensation is ultimately determined by international law, the method which it has adopted for the calculation of damages is that required and recognized under international law. This claim has been prepared in strict adherence to principles of law from which the Government of Israel has no intention to depart and in a faithful attempt to reach what the International Court has described in other circumstances as the "true measure of compensation and the reasonable figure of such compensation". *Corfu Channel* case (compensation), *I.C.J. Reports 1949*, at p. 249; *Administrative Tribunal of ILO* case, *I.C.J. Reports 1956*, at p. 100.

**110.** The total amount of the individual claims thus calculated, incorporating all the requisite adjustments (see paragraph 99 above), is IL 1,064,444, corresponding to U.S. Dollars 591,357.77 at the official rate of exchange. Particulars are contained in Annex 40.

### (c) *Cargo Claims*

**111.** The amounts claimed in respect of the destruction and non-delivery of cargo were calculated on the basis of evidence by the claimant of the loss actually incurred. Details regarding the cargo claims are contained in Annex 41.

**112.** The total amount of the cargo claims thus calculated, incorporating all the requisite adjustments (see paragraph 99 above)

is IL 20,059 corresponding to U.S. Dollars 11,143.88 at the official rate of exchange.

(d) *The Company's Claim*

113. In the Particulars of Claim (Annex 30) submitted to the Bulgarian Government together with the Note Verbale of 14 February 1956 (Annex 31), the Company's claim was summarized under five principal headings: (1) loss of aircraft; (2) administration and miscellaneous; (3) cancelled sales; (4) training expenses; (5) general damages. The total of this claim amounted to U.S. Dollars 2,055,491.

114. Some items included in this claim were based on an estimate of certain losses and expenses. Since the claim was first presented it has become possible to replace some of these with particulars of the actual losses and expenses incurred by the Company. The total amount of the Company's claim thus recalculated is U.S. Dollars 1,957,187 made up as follows: (1) loss of aircraft—1,333,418; (2) administrative expenses—13,020; (3) cancelled sales—89,087; (4) training expenses—21,662; (5) general loss of business—500,000. The details of this claim, together with explanatory notes, are annexed (Annex 42).

(e) *The Government's Claim*

115. The Government of Israel has incurred direct loss as a result of the incident. This includes the costs of the Commission of Inquiry, the cost of the transport of the bodies from Istanbul to Israel and their burial; transport of near relatives of the victims to the burial service; and sundry other costs of which the most important is that of accelerated pensions payable by the Israel National Insurance Institute, and related matters. In the Note Verbale of 14 February 1956 (Annex 31) the Government of Israel, referring to this head of damage, intimated that in its desire for a speedy and amicable settlement of the incident, it was envisaging the possibility of a waiver of this head of damage. In paragraph 3 of the Application instituting Proceedings, the right to re-instate this head of damages was reserved since the conditions in which the waiver had been contemplated were not fulfilled. Nevertheless, the Government of Israel has decided not to press this head of damages, and requests the Court to place the foregoing on record.

116. However, the satisfaction claimable by the Government of Israel is not limited only to pecuniary reparation. This was recognized by the Government of Bulgaria in the formal expression of regret and in the undertaking to identify and punish those guilty contained in the Note Verbale of 4 August 1955 (Annex 17). In the Note Verbale of 14 February 1956 (Annex 31) the Government of Israel took note of that expression of regret and indicated that it

would appreciate receiving information regarding the action taken against the guilty persons. No such information has ever been given to the Government of Israel despite repeated requests (see paragraphs 41 and 49 (ii) above). The Bulgarian Government now appears to be taking the attitude that the prosecution of the guilty persons is not a matter of concern to the Government of Israel at all. This is the only possible interpretation of the Bulgarian statement of 12 April 1957, reported in paragraph 49 (i) above. Apart from any other conclusions which may be drawn, the Government of Israel accordingly asks the Court to take note of the failure of the Government of Bulgaria to implement its undertaking to identify and punish those guilty, but it is not pressing for any other kind of moral reparation for the injury done to its flag. A declaration by the Court that Bulgaria is responsible under international law for the destruction of the aircraft would constitute quite sufficient satisfaction for this claim of the Government of Israel, and the Government of Israel formally requests the Court to place the foregoing on record.

**117.** The Government of Israel will also request that, having regard for the evasiveness and dilatoriness displayed by the Bulgarian Government in the diplomatic negotiations, the sums determined by the Court as being due to Israel, shall bear interest at the rate of six per cent per annum from 27 July 1955 until the date of payment; and that payment shall be effected in Israel.

### Section III.—*Costs and Expenses*

**118.** The third petition of the Application instituting Proceedings is that it may please the Court to decide that all costs and expenses incurred by the Government of Israel be borne by the Government of Bulgaria. The Government of Israel intends by this request to distinguish between the expenses which it incurred in the preparation of the claim during the period 27 July 1955 to the filing of the Application in Court on 16 October 1957 (other than the direct claim for damages referred to in paragraph 115 above), and legal costs incurred in prosecuting this case in Court during the period commencing 16 October 1957 and terminating on the date of final judgment of the Court in this case.

**119.** With regard to the claim for expenses, the Government of Israel claims that in view of the fact that the Bulgarian Government has gone back on the promises which it made in July and August 1955, and has displayed no genuine attempt or interest in reaching a fair settlement of the dispute (which the Government of Israel is convinced could easily have been done but for the rigid attitude adopted by the Government of Bulgaria), it is entitled that all unnecessary expenses which it has incurred, in vain, should be recouped from the Government of Bulgaria. In the nature of things,

many of these expenses can only be estimated. However, having regard to the general complexities of the case and to the fact that it has fully occupied responsible officials of the Ministries for Foreign Affairs and of Justice for nearly three years, and required several lengthy journeys which were undertaken above all for the purpose of co-ordinating the claims with other Governments and preparing them in a fit and proper form, the Government of Israel believes that the sum of IL 25,000 is a proper estimate for these expenses. The Court is accordingly requested to award the sum of IL 25,000 on account of the expenses incurred in the preparation and submission of the diplomatic claim.

**120.** With regard to the claim for costs, this is a matter exclusively within the discretion of the Court in accordance with Article 64 of the Statute of the Court. In the absence of any jurisprudence by the Permanent Court of International Justice or the International Court of Justice regarding the principles upon which costs can be awarded in the International Court of Justice, the Government of Israel will content itself at this stage with submitting that in an appropriate case an award of costs may properly be included in a judgment, and that this is an appropriate case. The experience of municipal tribunals indicates that questions of costs can only be properly argued after the written and oral pleadings have been terminated, and indeed in some respects only after final judgment is given. Subject therefore to such directions as may be given by the Court at the appropriate stage in the proceedings, the Government of Israel finds itself under the necessity of reserving, for the time being, the presentation of its reasons in fact and in law which it will wish to adduce in support of this request.

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**Part III. THE SUBMISSIONS***(a) Summary of Case*

**121.** The principal facts and arguments advanced in this Memorial may now be summarized.

*(a)* On 27 July 1955 Bulgarian armed forces opened fire on and shot down and destroyed 4X-AKC and killed all its occupants—passengers and crew. This occurred on Bulgarian territory and in explanation the Bulgarian Government freely and publicly admitted that it has been incontestably established that its armed forces acted in a certain haste, and failed to take all the necessary measures before they destroyed 4X-AKC, and were culpable.

*(b)* 4X-AKC was a well-known commercial type of aircraft (Constellation) openly flying its national colours and registration marks and displaying its owners' name, and the incident occurred at a time of completely normal peaceful relations between Israel and Bulgaria and of a general relaxation of international tension.

*(c)* As stated in the second Israel Note Verbale of 28 July 1955 (Annex 15), the armed forces of the Bulgarian Government displayed "shocking recklessness" and a "wanton disregard of human life and of the elementary obligations of humanity which should have governed their conduct". The Bulgarian action in shooting down 4X-AKC, a civil passenger aircraft, was unjustified and displayed a degree of violence in no way commensurate with the reality and the gravity of any possible or potential threat.

*(d)* Accordingly, the Bulgarian Government is internationally responsible for the actions of its armed forces in shooting down 4X-AKC on 27 July 1955.

*(e)* The Bulgarian Government has failed to implement its undertakings to the Government of Israel, and to other Governments, to identify and punish the culpable persons, and to pay the compensation due.

*(f)* The Israel and the Bulgarian Governments appear to hold different opinions concerning certain circumstances preceding and following the interception of 4X-AKC by the Bulgarian forces, including, in particular, the route alleged to have been followed by 4X-AKC, the state of knowledge of the crew, and the existence, nature and adequacy of any warning which the Bulgarian Government has alleged was given to it. However, none of these disputed, uncertain or unknown facts, the resolution of which may depend upon evidence which the Bulgarian Government has withheld, has any effect whatsoever upon the issue of Bulgarian responsibility for the destruction of 4X-AKC.

(g) The financial loss suffered by Israel nationals and persons on whose behalf this claim is preferred, is established at U.S. Dollars 2,559,688.65. The Government of Israel is making no claim in respect of its own direct losses, and is claiming IL 25,000 towards the expenses incurred in the prosecution of the claim, together with costs.

(b) *The Submissions*

122. On the basis of all the foregoing, the submissions of the Government of Israel are:

- I On the first petition of the Application instituting Proceedings:  
*Whereas* units of the armed forces of Bulgaria opened fire on 4X-AKC and shot it down and destroyed it, killing all its occupants, as has been admitted by the Government of Bulgaria;  
*And whereas* the Government of Bulgaria has furthermore admitted that in so doing its armed forces displayed a certain haste and did not take all the necessary measures to compel the aircraft to land, and has stated that it would identify and punish the culpable persons and pay compensation;  
*And whereas* such action was in violation of international law;

MAY IT PLEASE THE COURT,  
 TO JUDGE AND DECLARE.

That Bulgaria is responsible under international law for the destruction of Israel aircraft 4X-AKC, on 27 July 1955, and for the loss of life and property and all other damage that resulted therefrom.

- On the second petition of the Application instituting Proceedings:  
 II (a) *Whereas* the Government of Israel has established that the financial loss incurred by the persons whose cause is being adopted by it amounts to the sum of U.S. Dollars 2,559,688.65;

MAY IT PLEASE THE COURT

To give judgment in favour of the claim of the Government of Israel and fix the amount of compensation due from Bulgaria to Israel at U.S. Dollars 2,559,688.65.

- (b) *Whereas* the Government of Israel has stated that a declaration by the Court regarding the international responsibility of Bulgaria, as contained in Submission No. I, would be sufficient satisfaction and that it was waiving any further claim to reparation;

*And whereas*, nevertheless, the Government of Israel has asked the Court to take note of the failure of the Government of Bulgaria to implement its undertaking to identify and punish the culpable persons;

MAY IT PLEASE THE COURT

To place the foregoing on record.

III On the third petition of the Application instituting Proceedings:

MAY IT PLEASE THE COURT

- (a) To judge and declare,  
that the expenses incurred by the Government of Israel in preparing this claim, assessed at IL 25,000, be borne by the Government of Bulgaria.
- (b) To decide,  
that the costs of the Government of Israel in this case shall be borne by the Government of Bulgaria.

IV And further to judge and declare that the sum awarded under Submission No. II (a), with interest at six per cent per annum from 27 July 1955 until the date of payment, together with the expenses and costs incurred in this case, shall be paid by the Government of Bulgaria to the Government of Israel in Israel.

Dated this second day of June 1958.

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

Ministry for Foreign Affairs  
Jerusalem, Israel.

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**Annexes to the Memorial of the  
Government of Israel**

*Annex 1*

THE COMPANY'S TIME-TABLE (SUMMER 1955)

*[Not reproduced]*

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*Annex 2*

PASSENGER MANIFESTS FOR FLIGHT 402/26

*[Not reproduced]*

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*Annex 3*

CONSOLIDATED LIST OF PASSENGERS ON BOARD 4X-AKC  
OUT OF VIENNA ON FLIGHT 402/26

*[Not reproduced]*

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*Annex 4*

CREW MANIFESTS FOR FLIGHT 402/26

*[Not reproduced]*

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*Annex 5*

CARGO MANIFESTS FOR FLIGHT 402/26

*[Not reproduced]*

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*Annex 6*

PARTICULARS OF MAIL CARRIED ON FLIGHT 402/26

*[Not reproduced]*

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*Annex 7*

EL AL SHORT RANGE FLIGHT PLAN  
FOR FLIGHT 402/26 OUT OF VIENNA

*[Not reproduced]*

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*Annex 8*

FOLIO NUMBER 002647A FROM FLIGHT LOG BOOK  
OF 4X-AKC, 26 JULY 1955

*[Not reproduced]*

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*Annex 9*

FLIGHT FORECAST AND ATC VIENNA  
FLIGHT PLAN FOR FLIGHT 402/26

*[Not reproduced]*

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*Annex 10*

CONVENTION  
ON INTERNATIONAL CIVIL AVIATION  
SIGNED AT CHICAGO ON 7 DECEMBER 1944

*[Not reproduced. See United Nations Treaty Series, Vol. 15, pp. 296-363]*

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*Annex 11*

AERAD MAP INDICATING AIRWAY AMBER 10 FROM  
BELGRADE TO SALONIKI

*[Not reproduced]*

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*Annex 12*

NOTE VERBALE, DATED 28 JULY 1955, FROM THE ISRAEL  
MINISTRY FOR FOREIGN AFFAIRS TO THE  
BULGARIAN LEGATION, WITH CORRECTION  
DATED 29 JULY 1955

*[See Annex 1 to Israel Application, pp. 9-11]*

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*Annex 13*

COMMUNIQUÉ ISSUED BY THE BULGARIAN TELEGRAPHIC  
AGENCY ON 28 JULY 1955

*[Not reproduced]*

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*Annex 14*

NOTE VERBALE, DATED 28 JULY 1955, FROM THE BULGARIAN FOREIGN MINISTRY TO THE ISRAEL LEGATION IN SOFIA

*[See Annex 3 to Israel Application, p. 12]*

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*Annex 15*

SECOND NOTE VERBALE, DATED 28 JULY 1955, FROM THE ISRAEL MINISTRY FOR FOREIGN AFFAIRS TO THE BULGARIAN LEGATION

*[See Annex 2 to Israel Application, pp. 11-12]*

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*Annex 16*

COMMUNIQUE ISSUED BY THE BULGARIAN TELEGRAPHIC AGENCY ON 3 AUGUST 1955

*[Not reproduced]*

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*Annex 17*

NOTE VERBALE, DATED 4 AUGUST 1955, FROM THE BULGARIAN FOREIGN MINISTRY TO THE ISRAEL LEGATION IN SOFIA

*[See Annex 4 to Israel Application, pp. 13-14]*

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*Annex 18*

REPORT, DATED 18 AUGUST 1955,  
OF THE ISRAEL COMMISSION OF INQUIRY

*[Not reproduced]*

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*Annex 19*

NOTE, DATED 27 SEPTEMBER 1955, FROM THE ISRAEL MINISTRY FOR FOREIGN AFFAIRS TO THE BULGARIAN LEGATION

*[Not reproduced]*

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*Annex 20*

## CERTIFICATE OF REGISTRATION OF 4X-AKC

*[Not reproduced]*

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*Annex 21*

## CERTIFICATE OF AIRWORTHINESS OF 4X-AKC

*[Not reproduced]*

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*Annex 22*

## CERTIFICATE OF SAFETY OF 4X-AKC

*[Not reproduced]*

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*Annex 23*

## CERTIFICATE OF AIRCRAFT TYPE

*[Not reproduced]*

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*Annex 24*

THUNDERSTORM FLYING: EXTRACT FROM PART 3,  
SECTION 25, PAGE 1 OF EL AL'S OPERATION MANUAL,  
VOL. I, DATED 15 SEPTEMBER 1952

*[Not reproduced]*

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*Annex 25*

UNCONTROLLABLE DECOMPRESSION: EXTRACT FROM  
PART 4, SECTION 14, PAGE 9 OF EL AL'S OPERATION MANUAL,  
VOL. I, DATED 24 JUNE 1953

*[Not reproduced]*

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*Annex 26*

WEATHER CONDITIONS, BELGRADE TO SALONIKA,  
ON 27 JULY 1955, 0500Z TO 0600Z

*[Not reproduced]*

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*Annex 27*

## AIR TRAFFIC CONTROL COMMUNICATIONS

*[Not reproduced]*

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*Annex 28*AIDE-MÉMOIRE, DATED 10 AUGUST 1955, FROM THE ISRAEL  
MINISTRY FOR FOREIGN AFFAIRS TO THE GOVERNMENTS  
OF THE COUNTRIES WHOSE NATIONALS WERE  
AMONG THE VICTIMS*[Not reproduced]*

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*Annex 29*SPECIMEN OF DEATH CERTIFICATE ISSUED BY  
ISRAEL AUTHORITIES*[Not reproduced]*

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*Annex 30*SPECIMEN OF DEATH CERTIFICATE ISSUED BY  
BULGARIAN AUTHORITIES*[Not reproduced]*

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*Annex 31*NOTE VERBALE, DATED 14 FEBRUARY 1956, FROM  
THE ISRAEL LEGATION IN SOFIA TO THE  
BULGARIAN FOREIGN MINISTRY*[See Annex 5 to Israel Application, pp. 14-17]*

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*Annex 32*NOTE VERBALE, DATED 10 AUGUST 1956, FROM THE ISRAEL  
LEGATION IN SOFIA TO THE BULGARIAN FOREIGN MINISTRY*[See Annex 6 to Israel Application, pp. 17-18]*

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*Annex 33*NOTE VERBALE, DATED 1 OCTOBER 1956, FROM THE  
BULGARIAN FOREIGN MINISTRY TO THE ISRAEL  
LEGATION IN SOFIA*[See Annex 7 to Israel Application, pp. 18-19]*

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*Annex 34*

NOTE VERBALE, DATED 9 NOVEMBER 1956, FROM THE  
ISRAEL LEGATION IN SOFIA TO THE BULGARIAN  
FOREIGN MINISTRY

*[See Annex 8 to Israel Application, pp. 19-21]*

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*Annex 35*

NOTE VERBALE, DATED 27 AUGUST 1957, FROM THE  
ISRAEL LEGATION IN SOFIA TO THE BULGARIAN  
FOREIGN MINISTRY

*[See Annex 9 to Israel Application, p. 21]*

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*Annex 36*

INTERNATIONAL CIVIL AVIATION ORGANIZATION,  
AIR NAVIGATION COMMISSION, DOCUMENT AN-WP/1614,  
DATED 27 FEBRUARY 1957

*[Not reproduced]*

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*Annex 37*

EIGHT CIRCULAR LETTERS FROM THE SECRETARIAT  
OF THE UNITED NATIONS AND ORIGINATING WITH THE  
BULGARIAN GOVERNMENT

No. 1,	reference	SCA 264/4/04 (2)	DP	— 20 March 1950
„ 2,	„	SCA 264/4/04 (2)		— 7 March 1951
„ 3,	„	„	„	— 25 April 1951
„ 4,	„	„	„	— 9 May 1951
„ 5,	„	„	„	— 23 May 1951
„ 6,	„	„	„	— 5 June 1951
„ 7,	„	„	„	— 21 November 1952
„ 8,	„	„	„	— 5 June 1953

*[Not reproduced]*

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*Annex 38*

LETTER, DATED 1 SEPTEMBER 1955, FROM THE ACTING  
SECRETARY-GENERAL OF THE INTERNATIONAL CIVIL  
AVIATION ORGANIZATION TO THE ISRAEL CONSUL-GENERAL  
IN MONTREAL

*[Not reproduced]*

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*Annex 39*

PARTICULARS OF CLAIMS, SUBMITTED TO  
THE BULGARIAN GOVERNMENT TOGETHER  
WITH THE NOTE VERBALE  
OF 14 FEBRUARY 1956

*[Not reproduced]*

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*Annex 40*

PARTICULARS OF INDIVIDUAL CLAIMS, TOGETHER WITH  
EXPLANATORY NOTES

*[Not reproduced]*

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*Annex 41*

PARTICULARS OF CARGO CLAIMS, TOGETHER WITH  
EXPLANATORY NOTES

*[Not reproduced]*

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*Annex 42*

PARTICULARS OF THE COMPANY'S CLAIM, TOGETHER WITH  
EXPLANATORY NOTES

*[Not reproduced]*

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