6. OBSERVATIONS AND SUBMISSIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON THE PRELIMINARY OBJECTIONS OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BULGARIA *

(Objection to Jurisdiction)

I. INTRODUCTION

Proceedings in the present case were instituted by the filing in the Registry of the International Court of Justice on October 28, 1957 of an Application by the Government of the United States of America against the People's Republic of Bulgaria. Pursuant to orders of the Court, the Memorial of the United States was filed on December 2, 1958. Subsequently, within time limits fixed by the Court, the Government of Bulgaria filed a statement of preliminary objections to the jurisdiction of the Court in this case (dated September 3, 1959). The Government of the United States now files this statement in answer to the preliminary objections raised by Bulgaria.

A. Facts of the Aerial Incident

Early on the morning of July 27, 1955, a civil aircraft of the El Al Israel Airlines Limited (a Constellation bearing the identifying number 4X-AKC) was flying, non-stop, from Vienna, Austria, to Tel Aviv, Israel. Some time after the aircraft left Vienna it departed from the intended corridor of flight and flew over Bulgarian territory.

The Government of Bulgaria made the following statement concerning the incident in a diplomatic note dated August 4, 1955 [1]:

> "On July 27, 1955 at 7 : 10 local time the aircraft of the Israeli Airline El-Al entered Bulgarian air space in the area of the town of Trn without any warning. After having penetrated a distance of 40 kilometers, the aircraft overflew the towns of Breznik, Radomir, Stanke Dimitrov, Blagoevgrad, and continued on its course in a southerly direction. It flew over Bulgarian territory for approximately 200 kilometers.

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* See Part IV, *Correspondence*, Section B, No. 78.

[1] This note of the Bulgarian Ministry of Foreign Affairs, bearing the number 42803, is given as Annex 2 to the Application in the present case. It is to be emphasized that the above is the statement of the Bulgarian Government, and that with regard to such matters as the alleged warning it is not substantiated by any evidence in the possession of the United States and is therefore not accepted by the United States.

"South of the town of Stanke Dimitrov the aircraft was intercepted by two Bulgarian fighter planes which received orders to force it to land at a Bulgarian airport.

"The fighter planes warned the aircraft, in accordance with international regulations, to land. In spite of this, it did not obey but continued to fly in a southerly direction in an attempt to escape across the Bulgarian-Greek frontier.

"In these circumstances, the two fighter planes of the Bulgarian anti-aircraft defense of this area, astonished by the behavior of the aircraft, opened fire, as a result of which it caught fire shortly thereafter and crashed in the area of the town of Petric.

"Adopting the conclusions of the special governmental commission responsible for the investigation of the case, the Bulgarian Government admits that the causes of the unfortunate accident suffered by the El-Al aircraft may be summarized as follows:

"1. The aircraft departed from its route, violated the frontier of the Bulgarian State and without any warning penetrated deeply into the interior of Bulgarian air space. Equipped with the most modern aerial navigating instruments, it could not have failed to be aware of the fact that it had violated Bulgarian air space. Even after having been warned, it did not obey but continued to fly towards the south in the direction of the Bulgarian-Greek frontier;

"2. The Bulgarian anti-aircraft defense units manifested a certain haste and did not take all the steps required to force the aircraft to obey and to land."

When the El Al Airlines Constellation aircraft was fired upon by Bulgarian pilots, it caught fire, burst into flames over the town of Petric (close to the Greek frontier), and crashed in pieces near the village of Sherbanovo, Bulgaria. All passengers and members of the crew aboard the plane were killed. Among the persons on board were nine individuals who possessed American nationality and whose next of kin are of American nationality.

The facts with respect to the incident of July 27, 1955 as developed by the investigation of the United States are more fully set forth in the Memorial. For present purposes, when the case is before the Court on jurisdictional issues, the United States believes that the statement of facts set forth in the Memorial should be accepted.

B. Negotiations between the United States and Bulgaria

The United States Government on August 2, 1955, through the Swiss Legation in Sofia, presented to the Government of Bulgaria an aide-mémoire protesting the Bulgarian actions of July 27, and asking that the Bulgarian Government

"(1) take all appropriate measures to prevent a recurrence of incidents of this nature and inform the United States Government concerning these measures; (2) punish all persons responsible for

this incident; and (3) provide prompt and adequate compensation to the United States Government for the families of the United States citizens killed in this attack."[2]

On August 4, 1955, the Bulgarian Ministry of Foreign Affairs replied in the diplomatic note which has been referred to above. This note concluded as follows:

"The Bulgarian Government and people express once again their profond regret for this great disaster which has caused the death of completely innocent people. The Bulgarian Government ardently desires that such incidents should never happen again. It will cause to be identified and punished those guilty of causing the catastrophe to the Israeli plane and will take all the necessary steps to insure that such catastrophes are not repeated on Bulgarian territory.

"The Bulgarian Government sympathizes deeply with the relatives of the victims and is prepared to assume responsibility for compensation due to their families, as well as its share of compensation for material damage incurred."

On December 14, 1955, Bulgaria was admitted to membership in the United Nations after having made a series of applications for admission.

On August 22, 1956, the United States Government, again through the Swiss Legation in Sofia, communicated to the Bulgarian Government a detailed claim totaling $257,875.[3]

On August 8, 1957, the Swiss Federal Political Department communicated to the United States Embassy in Bern a statement made by the Second Vice Minister of Foreign Affairs of Bulgaria.[4] The Swiss communication read, in part, as follows:

"Mr. Anghelov stated that the Bulgarian Government, as the latter has always repeated, is not responsible for this catastrophe. The responsibility lies with the Israeli company. However, wishing to make a gesture with regard to the families of the victims, the Bulgarian authorities have decided to grant to each of them and to deposit in their favor at the National Bank of Bulgaria the amount of 56,000 levas. This sum would be transferable and convertible in currency. It seems that an identical proposal was submitted to the diplomatic representatives of Austria, Great Britain and Israel."[5]

The United States Government replied to the statement of the Bulgarian Foreign Ministry in a note of October 11, 1957, delivered to the Bulgarian Government through the Swiss Legation in Sofia.[6]

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[2] This aide-mémoire is given in Annex 1 to the United States Application.

[3] The note embodying this claim is given in Annex 3 to the United States Application.

[4] The Swiss communication is given in Annex 4 of the United States Application.

[5] At the official rate of exchange the sum of 56,000 levas would have been approximately equivalent to 8,300 dollars in United States currency.

[6] This note is given as Annex 5 to the United States Application.

The note rejected the Bulgarian proposal of an *ex gratia* payment, and repeated the request for payment of the sum of $257,875. The note asserted that the Bulgarian Government was legally responsible for the consequences of the aerial incident of July 27, 1955, and that the United States Government could not accept "any conditions making payment a matter of grace or arbitrarily limited in amount without regard to actual damage inflicted and suffered."

C. Proceedings in the International Court of Justice

As indicated earlier in the present statement, the United States Government filed an application in this Court on October 28, 1957. The United States embarked upon this course for two reasons. In the first place, the United States wished to pursue remedies available to it on account of injuries to American nationals. The course of the diplomatic correspondence between the United States Government and the Government of Bulgaria compelled the United States to conclude that no just settlement of the United States claims was attainable through negotiation, the 1955 Bulgarian undertakings to the United States having been repudiated by Bulgaria in 1957.

There was a further reason for commencing these proceedings when the negotiations with the Bulgarian Government proved fruitless. The United States Government in its aide-mémoire of August 2, 1955, had asked that the Bulgarian Government take all appropriate measures to prevent a recurrence of incidents of this nature and punish all persons responsible for this incident. The Bulgarian Government in its note of August 4, 1955, admitted that its anti-aircraft defenses had acted in haste and stated that measures would be taken to ensure against recurrence of such action.

Upon Bulgaria's denying legal responsibility, it appeared that the Government of Bulgaria had reversed its position and was now denying that its action in shooting down the aircraft was wrongful. This reversal raised crucial issues affecting the lives and safety of large numbers of persons on board civil aircraft as passengers or crew members and affecting the conduct of civil aircraft operations throughout the world. The United States Government considered these issues so important that they should be impartially adjudicated by the International Court of Justice. Impartial adjudication would settle, by the orderly and peaceful means of law, any doubts which might exist concerning the rights and duties of a State when overflown by civil aircraft.

As stated earlier, the contentions of the United States regarding the facts and the law in the present case are set forth in the Memorial filed by the United States Government on December 2, 1958.

II. ISSUES NOW BEFORE THE COURT (RELATING TO JURISDICTION)

Four objections to the jurisdiction of the Court have been made. The essence of these objections, and the United States conclusions concerning each of them, are as follows:

A. The Bulgarian Declaration of 1921

The Government of Bulgaria contends that its acceptance of compulsory jurisdiction had expired and was not in force on the date when the present proceedings were instituted, with the result that the International Court of Justice has no jurisdiction to consider this case. The United States believes that the Bulgarian acceptance of jurisdiction had not then expired, since Article 36, paragraph 5 of the Statute of the Court, read in conjunction with the Bulgarian declaration of 1921, does apply to this case; and the United States believes that the Court has jurisdiction to hear and determine it.

B. A United States reservation in its Declaration of 1946

The Government of Bulgaria contends that, if the United States relies upon its declaration of August 26, 1946, as an indispensable part of the basis for this Court's jurisdiction, Bulgaria is entitled to invoke on the basis of reciprocity a reservation made by the United States in its declaration. The Government of Bulgaria asserts, accordingly, that the matters in controversy in the present case are essentially within the domestic jurisdiction of the People's Republic of Bulgaria, as determined by the People's Republic of Bulgaria. The United States maintains that the reservation in question does not permit the Government of the United States, or any other government seeking to rely on this reservation reciprocally, arbitrarily to characterize the subject matter of a suit as "essentially within the domestic jurisdiction". Where a subject matter is quite evidently one of international concern, and has so been treated by the parties to the suit, it is not open to either of them to determine that the matter lies essentially within domestic jurisdiction. In the view of the United States, the nature of the aerial incident of July 27, 1955, and the course of negotiations subsequently between the United States and Bulgaria preclude a determination that this matter is one of domestic jurisdiction beyond the competence of the International Court of Justice.

C. Terms of the United States Application

Alternatively, the Bulgarian Government contends that, if the United States in filing its Application has relied not upon the declaration of August 26, 1946, but upon statements contained in the Application in the present case, the International Court of Justice possesses no compulsory jurisdiction over Bulgaria. The United States Government agrees that apart from the United States declaration of August 26, 1946, there is not a basis for compulsory jurisdiction.

D. Exhaustion of local remedies

The Bulgarian Government contends that the United States Application in the present case is inadmissible because the American nationals on behalf of whom claims are presented have not exhausted local remedies under Bulgarian law. The United States does not consider that any requirement for exhausting local remedies is applicable to the United States Government claim in the present case; moreover, the United States does not consider that there are adequate remedies under Bulgarian law available to the American nationals in question.

III. SUMMARY OF ARGUMENT

A. The Bulgarian acceptance of compulsory jurisdiction had not expired and was still in force when the present proceedings were begun, thus giving the International Court of Justice jurisdiction in this case by virtue of Article 36, paragraph 5 of the Statute of the Court.

1. The Judgment of this Court on May 26, 1959 in the case between Israel and Bulgaria does not conclude the Parties in the present case. This is made clear by Article 59 of the Statute of the Court. Particularly where the interpretation of a constitutional text (Article 36, paragraph 5) is in question, no doctrine of *stare decisis* precludes reexamination of the holding in a previous case in this Court.

2. The Bulgarian acceptance of compulsory jurisdiction had not expired and was still in force when the present proceedings were instituted.

a. The consent of the two Parties in this case to the Court's jurisdiction was given, on the part of the United States, in its declaration of August 26, 1946 and, on the part of Bulgaria, in Article 36, paragraph 5 of the Statute, read in conjunction with the Bulgarian declaration of 1921.

b. Article 36, paragraph 5, was not limited in its operation to "signatories" of the United Nations Charter or "original Members" of the Organization. This is apparent from the provisions of Article 37 of the Statute and from the fact that the terms "signatories" and "original Members" were used by the drafters at San Francisco when these meanings were intended. The negotiating history of the Charter does not lead to a contrary conclusion. Article 36, paragraph 5 applies "as between the parties to the present Statute" whenever they stand in that relation to one another. There are no *classes* of "parties", depending on date of admission to the Organization or of becoming a party to the Statute. It is evident from the Charter that States other than signatories at San Francisco were expected to become United Nations Members and, therefore, parties to the Statute of the Court long after the Organization came into being; indeed, provision was even made for non-Members to become parties to the Statute (Article 93). Thailand, which did not become a United Nations Member until December 1946, considered during the years 1947-49 that its declaration of 1940 (accepting the compulsory jurisdiction of the Permanent Court of International Justice) was covered by Article 36, paragraph 5 of the new Statute.

c. The liquidation of the Permanent Court of International Justice before Bulgaria's admission to the United Nations did not avoid

the application of Article 36, paragraph 5 to the Bulgarian declaration of 1921. Article 36, paragraph 5 did not become operative upon the liquidation of the Permanent Court but upon a declaring State (under Article 36 of the old Statute) becoming a party to the new Statute. Bulgaria did not, in any event, become bound by the dissolution of the Permanent Court until after Bulgaria had filed an application for admission to the United Nations stating Bulgaria's acceptance of all obligations devolving from membership, including, of course, the obligations of Article 36, paragraph 5 of the Statute of the Court. The Bulgarian declaration of 1921 was without limit of time; it had no expiration date reached before Bulgaria became a party to the Statute of the Court, in contrast to certain other States whose declarations under the old Statute expired before they became parties to the new Statute.

B. The Government of Bulgaria is not entitled to determine that its dispute with the United States concerning the aerial incident of July 27, 1955, is a matter essentially within domestic jurisdiction and, hence, not subject to the compulsory jurisdiction of the International Court of Justice.

1. While Bulgaria is entitled to invoke, reciprocally, any of the reservations contained in the United States declaration of 1946, Bulgaria cannot exceed their proper scope in making its defense. Bulgaria cannot determine that the United States claim based on the incident of 1955 is essentially within Bulgaria's domestic jurisdiction, since any such determination would fly in the face of actuality and would ignore the international character accorded the claim by the parties in their previous negotiations. United States reservation (b) does not permit the United States or any other State to make an arbitrary determination, in bad faith.

2. In the view of the United States, Bulgaria has failed to make a showing of any valid considerations of security which would form the basis for a conclusion that the present claim lies "essentially within the domestic jurisdiction of the People's Republic of Bulgaria". The United States is prepared to show, by evidence and argument on the merits, that the facts of the incident belie any threat to Bulgarian national security.

3. With respect to Bulgaria's third preliminary objection, the United States does not rely upon any statement contained in the application in the present case as a basis for compulsory jurisdiction in these proceedings.

C. There are no probable, effective, and adequate remedies available to American nationals under Bulgarian law which must be exhausted before the United States presses a diplomatic or legal claim with respect to the aerial incident of July 27, 1955.

1. No rule on exhaustion of local remedies by American nationals is applicable to the United States Government claim in the present case. The United States instituted these proceedings in its own right, and on the basis of undertakings made to this Government by Bulgaria.

2. No adequate local remedies are available in any event. Contrary to the assertions made in the fourth preliminary objection, Bulgarian law does not guarantee to aliens free and unrestricted access to the courts. Furthermore, the Bulgarian courts do not enjoy the independence requisite for impartial discharge of judicial functions. The role of the Communist Party in Bulgaria, of the executive branch of government, and of the government attorney in judicial proceedings, combine to make the courts a mere instrument of the political will of the Communist Party and the government executive.

IV. ARGUMENT

A. THE BULGARIAN ACCEPTANCE OF COMPULSORY JURISDICTION HAD NOT EXPIRED AND WAS STILL IN FORCE WHEN THE PRESENT PROCEEDINGS WERE BEGUN, THUS GIVING THE INTERNATIONAL COURT OF JUSTICE JURISDICTION IN THIS CASE BY VIRTUE OF ARTICLE 36, PARAGRAPH 5, OF THE STATUTE OF THE COURT

1. *The Judgment of this Court on May 26, 1959, in the case between Israel and Bulgaria does not conclude the Parties in the present case.*

The Bulgarian Government in its preliminary objections has relied on the Court's Judgment of May 26, 1959, in the case of Israel against Bulgaria as being dispositive of the issue of jurisdiction in the present case. The United States considers that the Court's Judgment there does not govern the present proceedings.

a. This proposition is clearly set forth in Article 59 of the Statute of the Court, which provides:

> "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Thus, any decision in the Israel case would have no binding force between the United States and Bulgaria in respect of separate proceedings instituted by the United States Government.

b. No doctrine of *stare decisis et non quieta movere* requires that the jurisdictional decision reached in the Israeli case should be imposed on the Parties in the present proceedings. The Judgment in the Israeli case is a recent one. The jurisdictional result arrived at there does not represent a precedent and rule of long standing upon which governments have come to rely in their international relations.

c. It may be recalled that, although in certain continental countries the binding force of precedent is recognized to a limited extent, courts in civil-law countries are ordinarily not bound by their own decisions. Lipstein, *The Doctrine of Precedent in Continental Law with Special Reference to French and German Law*, 28 J. COMP. LEG. & INT'L. L. (3rd ser.), Parts III and IV, 34, 38 (1946). The judgments of courts in civil-law countries normally have no binding force except with respect to the cases in which they are actually rendered. This principle is enunciated in the codes of various civil-law countries. E.g., *Civil Code of Chile*, 1855, Preliminary Title Section 1, Article 3; *Civil Code of Colombia* (3rd ed. 1955), Preliminary Title, Article 17; *Civil Code of Ecuador* (1957 ed.), Preliminary Title, Article 3; *Civil Code of Uruguay*, 1868, Title 1, Article 12.

It is to be observed that even in jurisdictions where the doctrine of *stare decisis* and reliance on precedent are more influential forces

in the jurisprudence of courts, there is no principle or practice standing in the way of overruling a judicial decision when it is believed to be erroneous. That this is true in the case of the United States Supreme Court has been demonstrated by a jurist of that Court in recent years. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949). In the interval since the publication of that article, there have been further and striking instances in the United States Supreme Court of the overruling of decisions, particularly its earlier decisions in the field of constitutional law. E.g., *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954). In fact, the Supreme Court has not infrequently reversed its decision in a rehearing of the same case. E.g., *Reid* v. *Covert*, 354 U.S. 1 (1956). In Canada a recent decision contains similar views about overruling previous decisions. Rand J. in Reference re Farm Products Marketing Act, 7 D.L.R. (2d) 257 (1957); see also Joanes, *Stare decisis in the Supreme Court of Canada*, 36 CAN. B. REV. No. 2, 175 (1958).

d. In the present case, the provision in question which has been the subject of earlier construction in the case of Israel against Bulgaria is a provision in a constitutional text—Article 36, paragraph 5, of the Statute of the International Court of Justice. Unlike legislative enactments of national governments, such a constitutional text is not subject to legislative revision for the purpose of altering the effect of a judicial decision construing the text. Article 36, paragraph 5 being more analogous to a provision in a national constitutional document than to a provision of national legislation, it seems particularly appropriate for the Court to undertake the reexamination of an interpretation of this provision when reexamination is requested by a party in litigation.

The case is different from that where a court may conclude that if change in the law is to be sought it ought to be sought from the legislature. Legislative revision in this sense is not available with respect to the Charter of the United Nations and the Statute of the Court. These constitutional instruments can be amended only in accordance with the provisions set forth in Chapter 18 of the Charter. The difficulty and relative unavailability of the amendment process, for all practical purposes, is attested by the experience of the United Nations.

e. In view of the considerations set forth above, the Government of the United States appeals to the Court to consider *de novo* the jurisdictional issue raised by the first Bulgarian preliminary objection in the present case.

2. *The Bulgarian acceptance of compulsory jurisdiction had not expired and was still in force when the present proceedings were instituted.*

a. The argument of the United States to the effect that the International Court of Justice has jurisdiction in this case rests upon the consent of the Parties concerned, namely, the United

States and Bulgaria. In the case of the United States, that consent was given in the declaration by which the United States accepted the compulsory jurisdiction of the Court on August 26, 1946. In the case of Bulgaria, consent rests on Article 36, paragraph 5 of the Statute of the Court, read in conjunction with the Bulgarian declaration of July 29, 1921.

The text of the Bulgarian declaration is as follows:

> "On behalf of the Government of the Kingdom of Bulgaria, I recognize in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, unconditionally." 6 L.N.T.S. 413.

This declaration was made under the optional clause of the Statute of the Permanent Court of International Justice. It was ratified and came into force on August 12, 1921. *Ibid.* As appears from the text of the Bulgarian declaration, Bulgaria's acceptance of compulsory jurisdiction was without limit of time. It was to remain in force indefinitely. No action has been taken by Bulgaria at any time to withdraw or modify this declaration.

The Bulgarian declaration made in respect of the jurisdiction of the Permanent Court of International Justice is relevant and decisive in determining the jurisdiction of the present International Court of Justice by reason of the provisions of Article 36, paragraph 5 of the Statute of this Court. That provision reads as follows:

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

The United States regards this provision as a treaty commitment between the United States and Bulgaria, as Members of the United Nations and parties to the Statute of the International Court of Justice. The United States was an original Member of the United Nations, and thereby became a party to the Statute of the Court on October 24, 1945. Bulgaria became a Member of the United Nations, and at the same time a party to the Statute of the Court, on December 14, 1955.

The commitment of Article 36, paragraph 5 became binding as between these two countries on the date of Bulgaria's admission to the United Nations. At that time, both countries were parties to the Statute, and as between them a declaration made under Article 36 of the Statute of the Permanent Court of International Justice for a period not yet expired is to be deemed an acceptance of the compulsory jurisdiction of the International Court of Justice for the period which such declaration still has to run and in accordance with its terms. As pointed out, the Bulgarian declaration

of 1921 has no terminal date. In the view of the United States, that declaration was covered by Article 36, paragraph 5 of the Statute of this Court, and, accordingly, furnishes a proper basis for compulsory jurisdiction by this Court in the present case. Neither before nor after Bulgaria became a Member of the United Nations did the Government of Bulgaria act to withdraw or modify the 1921 declaration. Bulgaria has been free to do so at all times since the conclusion of the Treaty of Peace with Bulgaria following World War II.

b. The argument has been made that Article 36, paragraph 5 applies only to declarations made by States which were signatories of the United Nations Charter. Bulgaria, it has been reasoned, was not represented at the San Francisco Conference in 1945 and was not a signatory of the Charter, with the consequence that the Bulgarian declaration of 1921 could not be covered by Article 36, paragraph 5 of the Statute of the Court.

It is submitted that this conclusion is erroneous. Article 36, paragraph 5 does not refer to signatory States. The provision refers to "the parties to the present Statute". The same term is used in Article 93 of the Charter. That Article provides:

> "1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.
>
> "2. A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

It is perfectly clear from this provision that the expression "parties to the Statute" is not limited to signatory States, and indeed is not even limited to Members of the United Nations. Article 93, paragraph 2, lays down a procedure by which a State that is not a United Nations Member may become a party to the Statute of the Court.

Where the drafters of the Charter intended to refer to signatory States, they used this very term. Examples are contained in paragraphs 1, 2, 3, and 4 of Article 110. Where, as in Article 36, paragraph 5 of the Statute of the Court, the drafters employed the term "parties to the present Statute", they should not be held to have intended the quite different meaning carried by the term "signatory States".

For a further reason the expression appearing in Article 36, paragraph 5 could not mean "signatory States" rather than "parties to the present Statute". The signatory States were those represented at the San Francisco conference which signed the Charter. The Charter could have and had no legal effect as between its signatories. They could and did become bound by it only in accordance with the provisions set forth in Article 110 concerning ratification and entry into force.

Nor does the expression "parties to the present Statute" appearing in Article 36, paragraph 5 mean "original Members of the United Nations". This is not what the provision says. When the drafters of the Charter meant "original Members", they so stated, as in Article 3. Article 3 of the Charter reads as follows:

> "The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110."

It was anticipated when the Charter and the Statute of the Court were drafted that there would be United Nations Members other than original Members. This is made clear by the provisions of Article 4, which states:

> "1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
>
> "2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

From Article 93, paragraph 1, it is clear that United Nations Members other than the original Members are automatically parties to the Statute of the International Court of Justice. The expression "parties to the present Statute" appearing in Article 36, paragraph 5 of the Statute, cannot properly be held to be limited to those parties which were original Members of the United Nations.

The point has been made that to construe Article 36, paragraph 5 as applying to States not represented at the San Francisco conference would be to impose treaty obligations on such States without their consent. The United States does not contend for any such proposition, and does not consider that the construction of Article 36, paragraph 5 which it espouses involves any such proposition. We do not contend that Article 36, paragraph 5 operated to bind Bulgaria when the provision was written, when the Charter was signed, or when the Charter came into force. We contend that it operated to bind Bulgaria when Bulgaria upon its own application became a Member of the United Nations and a party to the Statue of the Court. It was the act of becoming a United Nations Member and a party to the Statute that imposed the obligation of Article 36, paragraph 5, not anything done at San Francisco or afterward, prior to Bulgaria's admission to the United Nations.

Arguments based on the negotiating history of the United Nations Charter have been made in support of the conclusion that Article 36, paragraph 5 cannot cover the 1921 declaration of Bulgaria. For example, the Australian representative in Committee IV/1 at the San Francisco conference called attention "to the fact that

not 40 but about 20 States would be automatically bound as a result of the compromise" (contained in Article 36, paragraph 5). 13 U.N.C.I.O. Doc. S 250 (1945). This Australian statement, correcting an earlier United Kingdom statement in the Committee, should not be interpreted as indicating that only about 20 States would *ever* be bound by Article 36, paragraph 5, but rather as referring to the situation which would automatically exist upon the coming into force of the Charter. The Australian statement pointed out that certain States not represented at the Conference had made declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice. The Australian representative did not say that these States would remain for all time unaffected by the provisions of Article 36, paragraph 5. He merely indicated that they would not automatically become subject to the compulsory jurisdiction of the new Court upon the entry into force of the Charter and Statute.

Another element in the legislative history of the Charter which has been cited in support of a limited construction of Article 36, paragraph 5, was a passage in the report of Committee IV/1, approved June 11, 1945. This passage read:

> "(c) Acceptances of the jurisdiction of the old Court over disputes arising between parties to the new Statute and other States, or between other States, should also be covered in some way and it seems desirable that negotiations should be initiated with a view to agreement that such acceptances will apply to the jurisdiction of the new Court. This matter cannot be dealt with in the Charter or the Statute, but it may later be possible for the General Assembly to facilitate such negotiations." 13 U.N.C.I.O. Doc. S 384-85 (1945).

The passage has been read as implying that a country such as Bulgaria could not and would not be covered by the provisions of Article 36, paragraph 5. Actually, the San Francisco Committee was only speaking of the necessity of dealing outside the Charter and the Statute with States other than parties to the new Statute. The Committee's conclusion, therefore, would apply to Bulgaria so long as it was not a Member of the United Nations or a party to the Statute of the Court; it would not apply to the situation when Bulgaria had become a party.

In considering the proper interpretation and application of Article 36, paragraph 5 of the Statute, it may be helpful to consider the situation of certain States other than Bulgaria whose acceptances of the compulsory jurisdiction of the Permanent Court of International Justice were still in force at the time of the establishment of the United Nations and which did not become Members of the United Nations until later, if at all. These countries include Finland, Ireland, Portugal, Sweden, Switzerland, and Thailand. It is of interest in this connection to note a statement made by Professor Manley O. Hudson in commenting during 1946 on the operation of Article 36, paragraph 5. He said at that time:

> "On the other hand, declarations made by the following States under Article 36, which were also in force on October 24, 1945, will not be covered by the provision unless these States become parties to the new Statute: Bulgaria, Finland, Ireland, Portugal, Siam, Sweden, and Switzerland". Hudson, *The Twenty-Fourth Year of the World Court*, 40 A.J.I.L. 1, 34 (1946).

A declaration by Finland accepting the compulsory jurisdiction of the Permanent Court of International Justice expired by its terms April 7, 1947. Finland was not admitted to the United Nations until more than eight years later. Hence Article 36, paragraph 5 has no application in its case.

Ireland on July 11, 1930 deposited a declaration accepting jurisdiction for a period of 20 years. The expiration date of this declaration was thus July 11, 1950. Ireland did not become a United Nations Member until 1955. Hence Article 36, paragraph 5 has had no application to Ireland.

Portugal deposited on October 8, 1921, a declaration accepting the compulsory jurisdiction of the Permanent Court without limit of time. When Portugal became a Member of the United Nations in December 1955, Article 36, paragraph 5 operated with respect to the Portuguese declaration for a short period of time until that declaration was replaced by a new one dated December 19, 1955.

A Swedish declaration accepting compulsory jurisdiction expired by its terms August 19, 1946. Since Sweden had not by that time become a Member of the United Nations, Article 36, paragraph 5 did not operate with respect to the Swedish declaration. After becoming a United Nations Member on November 19, 1946, Sweden deposited a fresh declaration on April 5, 1947.

In the case of Switzerland a declaration accepting compulsory jurisdiction expired by its terms April 17, 1947. Switzerland became a party to the Statute of the Court only on July 28, 1948. Accordingly Article 36, paragraph 5 did not operate. After becoming a party to the Statute, Switzerland deposited a fresh declaration.

Thailand originally deposited a declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice on September 20, 1929. This declaration was renewed May 3, 1940 for a period of ten years as from May 7, 1940. It was renewed again on May 20, 1950 for a period of ten years as from May 3, 1950. At least during the period between Thailand's admission to the United Nations (December 16, 1946) and May 3, 1950, Article 36, paragraph 5 of the Statute of this Court operated with respect to the Thai declaration.

In construing Article 36, paragraph 5, the provisions of Article 37 of the Statute of the Court may be of assistance. That Article reads as follows:

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the

matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

It seems clear from the drafting history of this provision that the intention of the San Francisco conference was to give the Article a broad scope. The effect of Article 37 was not to be limited to treaties between parties to the Statute—it was to cover any treaties insofar as obligations under them between parties to the Statute should be concerned. It would be anomalous indeed if Article 37 should be held to apply only as between parties to the present Statute which were signatories of the Charter or original Members of the United Nations. It has not been suggested that Article 37 has so narrow a coverage. Similarly, it would defeat, in part, the purposes of the drafters to conclude that Article 36, paragraph 5, does not operate with respect to the declarations of any and all parties to the present Statute. The Charter provides no warrant for different classes of parties to the Statute. They are all on an equal footing, once they have become parties. It would be contrary to the Charter to hold otherwise in the construction of Article 36, paragraph 5.

c. The first preliminary objection of the Government of Bulgaria is based in part also upon the contention that the Bulgarian declaration of 1921 expired with the liquidation of the Permanent Court of International Justice on April 18, 1946. Hence, the argument runs, when Bulgaria became a party to the Statute of the Court on December 14, 1955, there was no longer a Bulgarian declaration in force which could be subject to the operation of Article 36, paragraph 5 of the Statute. This argument asserts that liquidation of the Permanent Court had the effect of terminating the Bulgarian declaration of 1921—although that declaration was unlimited in time—unless Bulgaria had before April 18, 1946 become a party to the Statute of the International Court of Justice. The United States considers the above analysis unsound for several reasons.

The argument advanced by Bulgaria assigns a crucial importance to the date of the liquidation of the Permanent Court—April 18, 1946—and the Bulgarian preliminary objection speaks of declarations accepting the compulsory jurisdiction of the Permanent Court as being "transferred to the new International Court of Justice". The concept of "transfer", particularly in relation to the date of April 18, 1946, does not seem accurate. In the case of original Members of the United Nations, their declarations with respect to the Permanent Court did not become operative upon the liquidation of the Permanent Court, but rather upon the date when the United Nations Member in question became a party to the Statute of the new Court: either October 24, 1945, or such subsequent date as the State in question became a Member of the United Nations and therefore a party to the Statute of the new Court. In the interim between that time and April 18, 1946, the State's acceptance of the

jurisdiction of the Permanent Court had not been terminated. Instead, the State had accepted a new and additional obligation under Article 36, paragraph 5 of the new Statute in relation to other parties to the Statute. The obligation was independent of the liquidation of the League of Nations and the Permanent Court.

The dissolution of the Permanent Court was effective on April 18, 1946 as between those parties to its Statute who could and did agree to its dissolution at that time. Bulgaria was not among those parties. On April 18, 1946, Bulgaria was a defeated enemy country under military occupation. Its treaties of a political character were in a state of suspension. Bulgaria was not in a position to act internationally except through the powers which occupied it. These powers did not purport to agree on behalf of Bulgaria to liquidation of the League of Nations and the Permanent Court in April 1946. Bulgaria did not give its assent to these actions, and did not become bound by them, until the entry into force of the Treaty of Peace with Bulgaria on September 15, 1947. Article 7 of the Treaty of Peace required Bulgaria to accept the arrangements already made for the liquidation of the Permanent Court of International Justice. 41 U.N.T.S. 21, 56.

Prior to September 15, 1947, the Council of Ministers of the Bulgarian Government had sent to the United Nations Secretary-General, on August 5, 1947, a letter applying for Bulgarian membership in the United Nations. That letter stated, in part:

> "In the name of the Bulgarian Government and in conformity with Article 4 of the United Nations Charter, we have the honor to submit the request of the People's Republic of Bulgaria for admission to Membership in the United Nations.
>
> "The Bulgarian Government accepts the fundamental principles contained in the United Nations Charter as well as all the obligations which will devolve upon the People's Republic of Bulgaria by reason of its admission to Membership in the United Nations." U.N. Doc. No. S/467 (1947).

This application was filed in the light of a provision in the Peace Treaty which had been signed and was soon to enter into force. That provision, contained in the preamble of the treaty, read as follows:

> "Whereas the Allied and Associated Powers and Bulgaria are desirous of concluding a treaty of peace, which, conforming to the principles of justice, will settle questions still outstanding as a result of the events hereinbefore recited and form the basis of friendly relations between them, thereby enabling the Allied and Associated Powers to support Bulgaria's application to become a Member of the United Nations and also to adhere to any Convention concluded under the auspices of the United Nations." 41 U.N.T.S. 21, 50-52.

There was nothing in the peace treaty nor in the Bulgarian application for membership in the United Nations to suggest that

Bulgaria was seeking to be relieved of any obligation of the United Nations Charter or the Statute of the International Court of Justice when Bulgaria should become a Member of the United Nations. On the contrary, Bulgaria stressed in its application that it accepted "all the obligations which will devolve upon the People's Republic of Bulgaria by reason of its admission to Membership in the United Nations". One of those obligations was set forth in Article 36, paragraph 5 of the Statute of the International Court of Justice.

The fact that Bulgaria became bound by the earlier liquidation of the Permanent Court of International Justice when the Treaty of Peace entered into force on September 15, 1947, should not be held to remove the Bulgarian declaration of 1921 from the operation of Article 36, paragraph 5 upon Bulgaria's admission to the United Nations. The first preliminary objection of the Bulgarian Government acknowledges that the Bulgarian declaration was in force "up to the dissolution of the old Court, that is, until 18 April 1946". *As shown above, the declaration was also in force until* September 15, 1947. In the view of the United States Government, the entry into force of the Treaty of Peace with Bulgaria did not have the effect of extinguishing the 1921 declaration.

The argument has been made that Article 36, paragraph 5 of the Statute of the Court, in employing the words "still in force", speaks as of the time when a particular declaring State becomes a party to the Statute of the Court. It is then contended that under Article 36, paragraph 5 the Bulgarian declaration of 1921 must have been in force on December 14, 1955—the date upon which Bulgaria was admitted to Membership in the United Nations. The argument continues that the declaration could not have been in force in December 1955 because the Permanent Court of International Justice, to which the declaration related, had been effectively liquidated several years earlier.

The United States Government believes that this is not the proper meaning to be accorded to the text of Article 36, paragraph 5. The intended and effective meaning of the words "still in force" is to be seen in the French text of the provision: "pour une durée qui n'est pas encore expirée". The declarations referred to in Article 36, paragraph 5 were those made for a duration not yet expired. As applied to the Bulgarian declaration of 1921, the import of Article 36, paragraph 5 is clear: when Bulgaria became a party to the Statute of the Court, no period had come to an end within which the Bulgarian declaration was limited; for, as we have seen, the declaration of 1921 was without limit of time.

This construction is confirmed by the negotiating history at San Francisco. The Rapporteur of Committee IV/1, who submitted his report in English, had the following to say concerning Article 36, paragraph 5:

> "A new paragraph 4 [now paragraph 5] was inserted to preserve declarations made under Article 36 of the old Statute for periods

of time which have not expired and to make these declarations applicable to the jurisdiction of the new Court."

The words "still in force" and "pour une durée qui n'est pas encore expirée" were used in Article 36, paragraph 5 to distinguish declarations made for periods of time not yet expired from declarations which, according to their own terms, had come to an end. By the time of the San Francisco conference some declarations were known already to have expired: for example those of China, Egypt, Ethiopia, France, Greece, Peru, Turkey, and Yugoslavia. See *Case concerning the Aerial Incident of July 27th, 1955* (Israel *v.* Bulgaria), *I.C.J. Reports 1959*, 127, at p. 161 (Joint Dissenting Opinion).

Reference has been made earlier to the situation of Thailand. Although Thailand had not become a United Nations Member and party to the Statute of the Court until a number of months after April 18, 1946, Thailand considered that its declaration accepting the jurisdiction of the Permanent Court was carried over to the new Court upon Thailand's becoming a party to the present Statute.

3. *In construing Article 36, paragraph 5 of the Statute of the Court —which is the nub of the issue raised by the first Bulgarian preliminary objection—attention should be kept focussed on the fundamental objective and purpose of the provision in question.*

Article 36, paragraph 5 was included in the Statute of the Court in order to prevent retrogression with respect to international judicial jurisdiction simply because a new International Court of Justice was taking the place of the old Permanent Court. In drafting the new Statute, it was decided not to include a provision conferring automatic compulsory jurisdiction. In order not to lose the effectiveness of declarations made under the optional clause of the old Statute, Article 36, paragraph 5 was inserted. To hold, in construing this paragraph, that the Bulgarian declaration of 1921 is not covered, on technical and conceptual grounds, would be to defeat the constructive purposes of the provision in the new Statute. To deprive the provision of vigor it was intended to have would not be the right choice in a decision interpreting and applying Article 36, paragraph 5.

This interpretation of the provision does not impose any undue burden on a State admitted to membership in the United Nations. It is to be noted that Bulgaria, both before and after its admission to membership, was fully at liberty to modify or withdraw its acceptance of compulsory jurisdiction. Bulgaria had merely to say the word, and its acceptance of jurisdiction would have been terminated or limited. Bulgaria never took such a step. Instead, Bulgaria reiterated its applications for Membership in the United Nations, repeating its undertakings regarding the obligations arising from the United Nations Charter. For example, on September 22, 1948, the Foreign Minister of Bulgaria sent a telegram to the United Nations Secretary-General in which he said:

> "I hereby renew Bulgarian Government's request for admission of the People's Republic of Bulgaria to membership in United Nations...During year which has passed since coming into force of Peace Treaty, Bulgaria has concluded with several countries treaties of friendship, collaboration and mutual assistance, which are based on fundamental principles of United Nations and in virtue of which Bulgaria has undertaken to observe statutes of that Organization..." U.N. Doc. No. S/1012 (1948).

In October 1948 the Vice President of the Council of Ministers and Minister of Foreign Affairs of Bulgaria made a statement during the third session of the General Assembly in Paris which read:

> "In the name of the People's Republic of Bulgaria, I, the undersigned, Vassil Kolarov, Vice-President of the Council of Ministers and Minister of Foreign Affairs, duly authorized under the full powers given for the purpose by the Presidium of the Grand National Assembly, declare that the People's Republic of Bulgaria hereby accepts without reserve the obligations arising from the United Nations Charter and promises to observe them as inviolable from the date of its accession to the United Nations." U.N. Doc. No. S/1012/add. 1 (1948).

In a cablegram to the United Nations General Assembly dated September 23, 1954, the following was stated:

> "The Bulgarian Government, moved by the desire to make its contribution to international cooperation and understanding, reiterates its request for the admission of the People's Republic of Bulgaria to membership in the United Nations... The Government of Bulgarian Republic has frequently stated and now states again that it unreservedly accepts the obligations arising from the United Nations Charter and that it fulfils all the conditions required by Article 4 of the Charter.

During all this time, the Government of Bulgaria made no move to change or terminate its declaration accepting compulsory jurisdiction of the Court. It was against the background of these repeated and unqualified representations that Bulgaria was elected to United Nations membership.

4. *The important and indeed the central consideration is that Article 36, paragraph 5 applies as between parties to the Statute whenever they have that relationship one to another.*

Bulgaria became a Member of the United Nations and a party to the Statute of the International Court of Justice within the transitional period after World War II when the defeated enemy states were again taking their place in the community of nations. That transitional period, during which the membership of the United Nations was increased, may have been longer than was anticipated at the time of the founding of the United Nations. But the period was not longer for Bulgaria than for other defeated enemy States. When Bulgaria entered the United Nations and became a party to

the Statute of the Court, the duration for which the Bulgarian declaration of 1921 was made had still not expired. That declaration was sweeping and unlimited as to duration. The normal and intended consequence of Article 36, paragraph 5 was that the Bulgarian declaration should from that time onward be treated just as the other unexpired declarations, as between the parties to the Statute.

B. THE GOVERNMENT OF BULGARIA IS NOT ENTITLED TO DETERMINE THAT ITS DISPUTE WITH THE UNITED STATES CONCERNING THE AERIAL INCIDENT OF JULY 27, 1955, IS A MATTER ESSENTIALLY WITHIN THE DOMESTIC JURISDICTION OF THE PEOPLE'S REPUBLIC OF BULGARIA AND, HENCE, NOT SUBJECT TO THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE.

1. *The third preliminary objection need not be considered.*

The second and third preliminary objections advanced by the Bulgarian Government relate to the United States submission to the jurisdiction of the Court in relation to the present case. In the third objection, the Bulgarian Government maintains that the United States has not, by virtue of any statement contained in its application in this case, effectively accepted compulsory jurisdiction under Article 36, paragraph 2 of the Statute of the Court so as to provide a basis for compulsory jurisdiction by the Court in the present case.

In this connection, the third Bulgarian preliminary objection refers to the following statement contained in the Application:

> "The United States Government, in filing this application with the Court, submits to the Court's jurisdiction for the purposes of this case."

The United States does not contend that this statement constituted a declaration under Article 36, paragraph 2 of the Statute, providing a basis for compulsory jurisdiction. For this reason it is not necessary to consider further the third Bulgarian preliminary objection.

2. *The second preliminary objection is not well taken.*

The second preliminary objection of the Bulgarian Government is based on a reservation contained in the United States declaration accepting the compulsory jurisdiction of the International Court of Justice. That reservation is contained in the declaration filed by the United States on August 26, 1946. The reservation in question is as follows:

> "*Providing*, that this declaration shall not apply to
>
> * * *
>
> "(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America;..."

The United States agrees that Bulgaria is entitled to avail itself in the present case of this reservation on the basis of the principle of reciprocity. It is now necessary to consider the scope of the reservation in deciding whether Bulgaria can defeat the jurisdiction of the Court in the present case by characterizing the matter in dispute as "essentially within the domestic jurisdiction".

a. Bulgaria by its second preliminary objection asserts that it is entitled to declare the subject matter of the present case to be essentially within the domestic jurisdiction of Bulgaria. Bulgaria contends that, once it has made this declaration, the Court is ousted of jurisdiction by virtue of Bulgaria's reciprocal invocation of the United States reservation quoted above. This contention is apparently premised on the proposition that there are no limits upon the right and ability of a State to determine, under the reservation in question, that a matter lies essentially within domestic jurisdiction.

The United States Government, which was the author of the reservation now sought to be invoked by Bulgaria, is unable to agree with this view. The United States does not consider that reservation *(b)* authorizes or empowers this Government, or any other government on a basis of reciprocity, to make an arbitrary determination that a particular matter is domestic, when it is evidently one of international concern and has been so treated by the parties.

When reservation *(b)* was being debated on the floor of the United States Senate in August 1946, the author of the reservation here considered made the following statement:

> "Several Senators have argued that by this amendment the United States would put itself in the position of corruptly and improperly claiming that a question is domestic in nature when it is not, thereby taking advantage of an international dispute and saying that since the question is domestic, we will not abide by the decision of the Court. Mr. President, I have more faith in my Government than that. I do not believe the United States would adopt a subterfuge, a pretext, or a pretense in order to block the judgment of the Court on any such grounds." 92 CONG. REC. 10695 (1946).

In fact, the United States has given a practical construction to reservation *(b)* which is altogether consistent with the statement just quoted. For example, in the *Interhandel* case, the United States invoked reservation *(b)* with respect to the issue of title to shares of stock in an American corporation, while agreeing that the issue of its liability to compensate certain aliens for a taking of these shares was not essentially a matter of domestic jurisdiction. The United States considers that the practice followed by a State with respect to its own reservation is entitled to great weight in the construction of that reservation when it is invoked by another State.

b. It is the view of the United States that reservation *(b)* does not confer a power to nullify the jurisdiction of this Court through arbitrary determination that a particular subject matter of dispute is essentially domestic. In the present case it is perfectly clear that the subject matter of litigation is one of international concern and is not essentially within the domestic jurisdiction of Bulgaria. A civil aircraft of an Israeli company strayed over Bulgarian territory and was shot down by the armed forces of Bulgaria, causing the death of all persons on board including nine United States nationals survived by next of kin having American nationality. The question of liability for these deaths and the question of fixing compensation to be paid to the next of kin are plainly matters of international concern affecting both the United States and Bulgaria, as well as other countries. Bulgaria is not entitled to declare these questions to be essentially within its domestic jurisdiction.

Moreover, the Government of Bulgaria by its conduct and statements has characterized the subject matter of the present dispute as international. As indicated in the facts set forth earlier in the present statement, the Government of Bulgaria engaged in diplomatic correspondence with the United States Government concerning the aerial incident of July 27, 1955, for a period of more than two years. The contents of that correspondence have been summarized in the statement of facts. For example, in its note dated August 4, 1955, the Bulgarian Foreign Ministry included the following statements:

> "The Bulgarian Government and people express once again their profound regret for this great disaster which has caused the death of completely innocent people. The Bulgarian Government ardently desires that such incidents should never happen again. It will cause to be identified and punished those guilty of causing the catastrophe to the Israeli plane and will take all the necessary steps to insure that such catastrophes are not repeated on Bulgarian territory.
>
> "The Bulgarian Government sympathizes deeply with the relatives of the victims and is prepared to assume responsibility for compensation due to their families, as well as its share of compensation for material damage incurred."

Thus, the Government of Bulgaria entered into diplomatic correspondence with the United States Government concerning the subject matter of the present proceedings, and made international undertakings to the United States. These undertakings were to *(a)* "cause to be identified and punished those guilty of causing the catastrophe to the Israeli plane"; *(b)* "take all the necessary steps to insure that such catastrophes are not repeated on Bulgarian territory"; and *(c)* "assume responsibility for compensation due to ...families, as well as its share of compensation for material damage incurred."

After taking these steps and entering into the international engagements referred to above, the Government of Bulgaria is not

entitled now to determine that these matters are "essentially within the domestic jurisdiction of the People's Republic of Bulgaria".

c. Nor can it be validly asserted that security considerations alleged to be involved in this incident bring the matter within those subject to the domestic jurisdiction of Bulgaria. Security considerations would have to be based on facts establishing the proposition that overflight of the unarmed Israeli civil aircraft in question threatened Bulgarian security to the point that it was necessary to shoot the aircraft down without warning. No such facts have been adduced.

Furthermore, even if it could be established that Bulgarian security was involved, it does not automatically follow that this would cause the matter to lie essentially within the domestic jurisdiction of Bulgaria. The question whether a particular matter is or is not essentially within the domestic jurisdiction of a State is a relative question; it depends on the development of international relations. Case of the Tunis-Morocco Nationality Decrees, P.C.I.J., ser. B, No. 4 (1923). The United States considers that, in all the circumstances of the 1955 incident, the present claim based upon it could not properly be characterized as lying essentially within Bulgaria's domestic jurisdiction.

If the Court should consider that this conclusion is less clear than the United States believes, and that the point requires evidentiary material and fuller argument to be presented, the United States would wish to make an extended presentation in connection with hearing of the case on the merits.

C. THERE HAVE BEEN NO PROBABLE, EFFECTIVE, AND ADEQUATE REMEDIES AVAILABLE TO AMERICAN NATIONALS UNDER BULGARIAN LAW WHICH MUST BE EXHAUSTED BEFORE THE UNITED STATES PRESSES A DIPLOMATIC OR LEGAL CLAIM WITH RESPECT TO THE AERIAL INCIDENT OF JULY 27, 1955.

1. *No rule on exhaustion of local remedies by American nationals is applicable to the United States Government claim in the present case.*

In its fourth preliminary objection the Bulgarian Government has quoted a rule formulated as follows by the Institute of International Law in 1954:

> "When a State alleges that injury to the person or to the property of one of its nationals has been caused in breach of international law, any diplomatic or legal claim which it may be entitled to put forward on this ground is inadmissible if, within the municipal legal system of the State, there exist remedies available to the injured person which are probable, effective and adequate and so long as normal resort to these remedies has not been exhausted."

The Bulgarian Government alleges that American next of kin of the United States nationals killed on July 27, 1955 have not pursued

remedies available to them under Bulgarian law. Accordingly, the Bulgarian Government argues, "the Application in the present case is inadmissible". The fourth preliminary objection then contains the following statement:

> "In resorting, by its Application, directly to the International Court, without the slightest attempt having been made by the interested persons to obtain satisfaction from the Bulgarian Courts, the Government of the United States has completely ignored the existence of the rule relating to the exhaustion of local remedies, and the practice to which that rule has given rise."

The United States Government is unable to concur in the argumentation put forward in the fourth Bulgarian preliminary objection. If there were any local remedies available in Bulgaria to the next of kin of Americans killed in the shooting down of the El Al Airlines Constellation on July 27, 1955, the Bulgarian Government never adverted to them nor to the desirability or necessity of their being exhausted when the United States presented its diplomatic claim to the Government of Bulgaria in 1955 and 1957. Instead, the Bulgarian Government entertained the diplomatic claim and undertook to discharge it, as has been noted earlier in the present statement. In view of these facts, Bulgaria is not entitled now to raise, for the first time, the assertion of a requirement that local remedies be exhausted.

The United States Government also wishes to point out that, in the present case, the United States has instituted proceedings against Bulgaria both on account of injuries to American nationals and on the basis of undertakings made to the United States by the Bulgarian Government in 1955. In these circumstances a defense to the effect that private parties have failed to exhaust local remedies is not properly interposed against the government instituting the case.

2. *No adequate local remedies have been available in any event.*

The United States Government does not wish to leave the fourth preliminary objection without commenting on the Bulgarian Government's assertion that probable, effective, and adequate remedies are available in Bulgaria. In the view of the United States, any attempted recourse in Bulgaria against the Bulgarian State, on account of the wrongful death of nine Americans killed on July 27, 1955, would have been entirely futile.

a. The action of the Bulgarian armed forces in shooting down the El Al Constellation on which the nine Americans were passengers was the deliberate action of governmental authorities. This was not a case of negligent conduct on the part of public officials or instrumentalities. No Bulgarian law authorizing legal actions against the State to recover damages for wrongs such as those involved in the aerial incident of July 27, 1955, has been cited in the Bulgarian

fourth preliminary objection. The two cases referred to in that objection and in the annexes to that document filed by Bulgaria are quite evidently two isolated cases of *negligent* conduct. They are not in point with respect to the facts underlying the present proceedings.

b. Moreover, American nationals who are next of kin of the nine Americans killed have not been guaranteed free and unrestricted access to Bulgarian courts, under the same conditions as would obtain for Bulgarian citizens—contrary to the allegation made in the Bulgarian fourth preliminary objection. That objection, and annexes 3 and 4 of the objection, cited Section 4 of the Law on the Organization of the Courts of November 7, 1952 for the proposition that free and unrestricted access to the courts is open to "all persons". The objection and annexes employ the French term "toutes les personnes". But when one consults the Bulgarian original text of the law, one finds that the Bulgarian term given this translation in French is "grazhdani", meaning *citizens* [7]. It is further to be noted that the Bulgarian Constitutional provision underlying Section 4 of the Law on the Organization of the Courts proclaims equality before the law for "all citizens of the People's Republic of Bulgaria".[8] Neither the Constitution nor the Law speaks of equality before the law for "all persons".

c. Failure of next of kin to bring suit in the Bulgarian courts cannot bar a claim before an international tribunal when it is clear that the judicial authorities of the People's Republic of Bulgaria are under the control of the very executive agencies whose acts led to the claim now pressed by the United States. In considering the status of the courts in Bulgaria, the following factors are relevant: constitutional structure and organization of the State; the relationship among agencies of the government; the role of the government attorney; the manner in which the judiciary is administered in Bulgaria; and the tenure of judges.

It is evident from the laws, from officially sanctioned statements, and from other comments that the courts in Bulgaria do not enjoy judicial independence. In the first place, the Bulgarian Communist Party is the supreme directing force in the State. As was stated in an article in the official Bulgarian legal periodical *Socialist Law:*

> "The Bulgarian Communist Party is the 'directive force' in the system of the people's democratic state and it cannot be controlled by the State, which is one of the 'transmission belts' in the system of dictatorship of the proletariat."[9]

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[7] Law on the Organization of the Courts § 4, para. 1, [1952] Izvestiia na Prezidiuma na Narodnoto Subranie [hereinafter cited as IPNS] No. 92 (People's Republic of Bulgaria).

[8] CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BULGARIA, § 71, para. 1, (1947). Durzhaven vestnik, No. 284, December 6, 1947.

[9] Buzov, *Za niakoiko poniatiia v Nakazatelniia zakon (On Certain Notions of the Criminal Code)*. SOTSIALISTICHESKO PRAVO (SOCIALIST LAW) No. 2. 34, 39 (1953).

In similar vein, the secretary general of the Communist Party in Bulgaria stated in his report to the Party's Central Committee in January 1950:

> "... No institution, organization, or person in our country could or should stand above the Central Committee, above its Politbureau. No decision of importance to the country, no action affecting our country and the workers should be made without the Central Committee of the Bulgarian Communist Party, without its consent and approval. This must become the iron law for all."[10]

Another article in *Socialist Law* points out that the Communist Party directs the adoption of all legislation in Bulgaria and can change statutory law at will:

> "... in the people's democratic state, the Communist Party is the directive force of the entire economic, political, social and cultural life. The decisions of its higher agencies must form the basis of all legislation and all activities of the agents of the state power."[11]

A 1951 work published in Bulgaria had the following to say concerning the status of judges:

> "The independence of judges, however, must not be understood as independence from the people's government. Our courts, as we have already seen, are an agency of the government and cannot be independent from it or serve some other purpose except that of people's democracy or some other policy except that of the Communist Party and the Fatherland Front. The independence of the court discussed here does not signify a position above the classes, party and politics. True court impartiality...is predicated on the proletarian class character of the court and its conversion into an agent of the proletarian dictatorship and instrument for implementation of the interests of the working masses."[12]

It is also to be observed that sections 46-48 of the Bulgarian Law on the Organization of the Courts of November 7, 1952, provide for the recall of judges at any time if their attitude endangers the authority of the administration of justice or the public interest, or if they have "fascist or restorationist attitudes".

Another feature of the judicial system in Bulgaria is the institution of the "government attorney". Under section 2(*d*) of the Law on the Government Attorney's Office of November 7, 1952,[13] the government attorney is entitled to participate in civil suits when this is necessary to defend governments and public interests. Under

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[10] Otechestven Front, No. 1678, February 5, 1950, p. 4, col. 2.

[11] Dimitrov, *Pravo i Politika (Law and Politics)*, SOTSIALISTICHESKO PRAVO, No. 10. 9, 12 (1952).

[12] *Pavlov Nakazatelno pravosudie na Narodna Republika Bulgariia; klasova sushtnost, zadachi, osnovni nachala (Administration of Criminal Justice in the People's Republic of Bulgaria; Class Nature, Purposes and Fundamental Principles)*. 67-68 (1951).

[13] Law on the Government Attorney's Office of the People's Republic of Bulgaria § 2, para. (d) [1952] IPNS No. 92 (People's Republic of Bulgaria).

section 27 of the Code of Civil Procedure of February 8, 1952, the government attorney may intervene in a civil suit on his own initiative at any stage.[14] He may also appeal even without having participated in the trial.[15] One authority has commented as follows on the role of the government attorney:

> "... this requires every government attorney of the People's Republic of Bulgaria to develop himself through his work to the high level of a statesman of Leninist-Stalinist style...strongly party minded, irreconcilable as a Bolshevik, possessing higher Marxist-Leninist culture..."[16]

Another authority, in discussing the manner in which the speech of the government attorney should be prepared and pronounced in the court room, has stated that:

> "the government attorney must present himself in the court as a highly cultured citizen educated in the great Marxist-Leninist teachings..."[17]

The participation of the government attorney in civil disputes, as is stressed by one authority, is of "political importance".[18] The political significance of civil disputes is clearly set forth in the following statement of the same authority:

> "In our new type of civil procedure the dispute between parties is not their purely personal matter, but such that directly or indirectly affects the interests of the state and the public at large, the toiling masses, whose representative in this procedure, in any given concrete lawsuit, is, namely, the government attorney."[19]

On the basis of the material set forth above, no impartial justice is to be expected in a judicial proceeding in Bulgaria in which American plaintiffs should seek damages from the Bulgarian State for wrongful death of relatives killed in the deliberate shooting down of a civil aircraft by Bulgarian armed forces—the Bulgarian Government having subsequently denied legal liability.

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[14] PEOPLE'S REPUBLIC OF BULGARIA, CODE OF CIVIL PROCEDURE § 27, para. 1 (1952). IPNS No. 12.

[15] Section 30 of the Code of Civil Procedure.

[16] Dionisiev, *Obshtiiat nadzor na prokuraturata (General Supervision* [exercised] *by the Government Attorney's Office)*, SOTSIALISTICHESKO PRAVO, No. 3, 29 (1953).

[17] Petrov, *Rechta na prokurora v sudebno zasedanie (The speech of the government attorney at the trial)*, SOTSIALISTICHESKO PRAVO, No. 1. 56, 61 (1954).

[18] Tsvetkov, *Prokuraturata v grazhdanskiia protsess (Government Attorney's Office in the Civil Suit)*, SOTSIALISTICHESKO PRAVO, No. 12. 34, 37 (1952).

[19] *Ibid.*

V. SUBMISSIONS

The Government of the United States of America makes the following submissions, in view of the considerations which have been advanced in the present written observations:

MAY IT PLEASE THE COURT

TO ADJUDGE AND DECLARE

1. That the Court has jurisdiction in the present case concerning the Aerial Incident of July 27, 1955;

2. That the first, second, and fourth preliminary objections of the Government of the People's Republic of Bulgaria are overruled, and that the third preliminary objection, stated as an alternative to the second preliminary objection, need not be considered; or

3. That, as an alternative to the foregoing, the consideration of such preliminary objections as are not now disposed of be joined to the hearing of the present case upon the merits, in case the Court considers there are issues with respect to jurisdiction which require trial and hearing.

February 1960.

Respectfully submitted,

(Signed) Eric H. HAGER,

Agent of the United States of America.