

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)
ICAO COUNCIL

AUSTRALIA AND THE KINGDOM OF THE NETHERLANDS

v.

THE RUSSIAN FEDERATION
(2022)

PRELIMINARY OBJECTIONS
OF THE RUSSIAN FEDERATION

relating to the Application of Australia and the Kingdom of the Netherlands
of 14 March 2022,
referred to as
“Disagreement on the interpretation and application of the Convention on International Civil
Aviation pursuant to Article 84”

(Signed)

Agent for the Russian Federation
G. S. KIRICHENKO

28 July 2022

CONTENTS

KEY POINTS3

1. PROCEDURAL INFORMATION6

2. INTRODUCTION AND STATEMENT OF FACTS9

3. LACK OF COMPETENCE BY ICAO COUNCIL.....19

 b) The ICAO Council has no competence to resolve the issue raised by the Applicants because the ICAO Council is not a court, including one of a criminal nature27

 c) The application by Australia and the Kingdom of the Netherlands cannot be considered because of the absence in the proceedings of States whose direct interests are affected by the Application (the “*Monetary Gold*” or “indispensable party” principle) – Ukraine is not a party to these proceedings.....34

 d) Applicants have not complied with the requirement to negotiate.....35

 e) The actions of the ICAO Council sought by the Applicants are inconsistent with the Council’s existing authority under the Chicago Convention42

4. REQUEST TO THE ICAO COUNCIL48

Attachments49

KEY POINTS

On 17 July 2014, a Malaysian Airlines aircraft, performing flight MH17 from Amsterdam's Schiphol Airport to Kuala Lumpur, was destroyed in the skies over eastern Ukraine during an armed conflict. The plane crashed in Ukrainian airspace, which was open to civil aviation despite active hostilities affecting a large part of that State's territory, in which the Ukrainian armed forces were an active participant. Nationals of the Netherlands, Malaysia, Australia, Indonesia, the United Kingdom, Germany, Belgium, the Philippines, Canada and New Zealand were on board.¹

At that time, Russia, which has also experienced painful tragedies resulting from the loss of civil aircraft, shared the grief of those affected by the disaster. Condolences were expressed by the President of the Russian Federation,² the Prime Minister of the Russian Federation,³ and other officials.

From the very outset, Russia has called for a thorough and objective investigation of all the circumstances of the plane crash; it has urged that everything be done to ensure the safety of international experts working at the site of the tragedy and has called for the involvement of everyone who is willing and able to help establish the truth. Russia was an active participant in the drafting and supported the adoption of United Nations Security Council resolution 2166 (2014) of 21 July 2014, which called for "a full, thorough and independent investigation into the incident".⁴ No investigation meeting those criteria has ever been organized, however.

On 23 July 2014, Ukraine decided to delegate the technical investigation of the air incident to the Netherlands Safety Board (NBH).⁵ Russia has repeatedly drawn attention to serious shortcomings in the organization and conduct of the technical investigation. In any event, this investigation dealt only with technical aspects of the incident and did not address issues of responsibility for the tragedy or identify the persons involved.

On 7 August 2014, some of the affected States – Australia, Belgium, the Netherlands, Ukraine – decided, without waiting for the conclusion of the technical investigation, to set up a closed Joint Investigation Team (JIT) to investigate the tragedy (Malaysia joined the team later). Russia was not invited to participate in this group. Our request to include Russian representatives was turned down in 2015. The composition of the team and its working methods raise serious questions about its independence and impartiality. In particular, Ukraine – a State with a direct interest in avoiding responsibility for the loss of an aircraft over its territory – has the power to

¹ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, p. 27, para. 2.2 [Attachment 32].

² See, for example, condolences to Malaysian Prime Minister Najib Razak, 17 July 2014, official website of the President of the Russian Federation, <http://kremlin.ru/events/president/news/46242>. See, for example, condolences to the Prime Minister of the Netherlands, Mark Rutte, 18 July 2014, official website of the President of the Russian Federation, <http://kremlin.ru/events/president/news/46244>.

³ The Prime Minister of the Russian Federation offered condolences in connection with the Malaysian airliner crash, 17 July 2014, Interfax news agency, <https://www.interfax.ru/amp/386455>.

⁴ Resolution 2166 (2014), adopted by the Security Council at its 7221st meeting on 21 July 2014, S/RES/2166 (2014), para. 3 [Attachment 36].

⁵ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, p. 14, para. 1.1 [Attachment 32].

block the group's decisions. To date, the JIT's investigation has still not been concluded.⁶ In March 2020, national legal proceedings were launched in the Netherlands against a group of individuals who, in the view of the Netherlands prosecutors, may have been involved in the crash of Boeing MH17. This trial has also still not been concluded.

In order to assist in establishing the truth, Russia has invariably provided both the Dutch Safety Board, responsible for the technical investigation, and the Joint Investigation Team, responsible for the still inconclusive criminal investigation, with the data available, and has even conducted a number of technical tests and has declassified military documents. All this important material has been ignored without any justification.

Thus, neither the technical investigation, much less the criminal investigation by a group of interested States, meets the standards set out in Security Council resolution 2166 (2014).

Eight years after the tragedy, two of the twelve States concerned⁷ – Australia and the Kingdom of the Netherlands (the Applicants), without awaiting the outcome of the criminal investigation and the trial, submitted to the ICAO Council an Application and a Memorial seeking to hold the Russian Federation (the Respondent) responsible for the crash and for breach of Article 3 bis of the 1944 Convention on International Civil Aviation (Chicago Convention).

Shortly before, in July 2020, one of the Applicants, the Netherlands, filed an application against the Russian Federation with the European Court of Human Rights (ECHR), in which it formulated its claims in relation to the plane crash as a violation of the right to life, a violation of the prohibition of torture, and a violation of the right to an effective remedy.⁸ At the same time, Ukraine, which is not participating in the present proceedings, is endeavouring, through the International Court of Justice, to hold Russia responsible for the crash of the plane in its own airspace, defining the tragic event as an act of terrorism.⁹

On 22 July 2021, the Russian Federation independently lodged an inter-State application with the ECHR against Ukraine. One of the violations giving rise to this application was “the crash of Malaysian Airlines flight MH17 on 17 July 2014 due to the Ukrainian authorities’ failure to close its airspace over the war zone and the death of 298 people – all passengers and crew members”.¹⁰ Russia considers it important that the issue of Ukraine’s behaviour in choosing not to close its airspace to civil aircraft, despite the active involvement of its armed forces in the armed conflict on its territory, including the use of military aircraft and surface-to-air missiles, should be

⁶ Memorial of Australia and the Kingdom of the Netherlands, para. 2.78.

⁷ Ten States whose nationals were killed in the crash, including Malaysia as the State of registration of the aircraft, and also the USA – the State of the aircraft manufacturer – and Ukraine, in whose airspace the crash occurred.

⁸ *Kingdom of the Netherlands v. Russian Federation*, ECHR, 2020 application No. 28525/20.

⁹ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, International Court of Justice, 2017.

¹⁰ Application of the General Prosecutor’s Office of the Russian Federation of 22 July 2021 – “The Russian Federation has filed an inter-State application against Ukraine with the European Court of Human Rights” // Official website of the General Prosecutor’s Office of the Russian Federation, <https://epp.epp.genproc.gov.ru> (accessed on June 1, 2022). [Attachment 19].

judicially assessed. This, however, is precisely what Ukraine and also the Applicants are trying to avoid.

The ICAO Council is not competent to rule on the merits of the case on the following grounds.

All of the Applicants' claims, including their judgments about the alleged need to inform the Ukrainian authorities of the risk to civil aviation and to close the Russian Federation's own airspace,¹¹ are based on Article 3 bis of the Chicago Convention.

1. Article 3 bis of the Chicago Convention, adopted by a separate Protocol amending the 1944 Convention on International Civil Aviation (the Protocol), regulates the situation in peacetime and does not apply to the loss of civil aircraft during an armed conflict, as was the case with the Malaysian Airlines aircraft. This is also confirmed by the history of its emergence and the practice of the organization – at no time has the ICAO Council ever considered the issue of State responsibility for the loss of an aircraft during an armed conflict.

2. In the form of the Application and Memorial, the Applicants have, in essence, provided the Council with a sample of documents of an inconclusively investigated criminal case which is being conducted by the national authorities of a State and are endeavouring to impute to the Council the function of a criminal court which is not inherent to the Council, nor provided for in Article 84 of the Chicago Convention: to identify those responsible for this tragedy and to conduct expert examinations of evidence not relevant to civil aviation matters.

3. Two of the Applicant States out of the twelve affected States are demanding a decision of the ICAO Council that would define the rights and obligations of all States affected by the disaster, and in this process are prejudging the issue of Ukraine's lack of responsibility for the loss of the aircraft in its own airspace. Ukraine is not participating in this process, nor are the nine other States affected by the tragedy. Furthermore, not all the affected States are even parties to the Protocol.

4. The Applicants have not complied with the requirements to conduct negotiations. The consultations between Russia, the Netherlands and Australia referred to by the Applicants were not in any way concerned with the interpretation and application of Article 3 bis, either theoretically or, still less, in practical application to the Malaysia Airlines crash. In any event, those consultations were interrupted by a unilateral decision by the Netherlands to refer the issue to the European Court of Human Rights.

5. The action by the ICAO Council sought by the Applicants is inconsistent with the Council's existing powers under the Chicago Convention.

Investigating the loss of an aircraft during an armed conflict and identifying those responsible is a legal process that must take place strictly within the law and be conducted by competent authorities. The ICAO Council is not the competent authority in this case, which does not concern civil aviation matters but lies within the realm of international humanitarian law and related criminal law and procedure. Agreeing to consider the merits of the case submitted by the Applicants would fundamentally alter the competence of the Council, as articulated in the Chicago

¹¹ See, for example, para. 4.35 of the Australia-United Kingdom of the Netherlands Memorial.

Convention, and turn ICAO into an organization dedicated to establishing responsibility for aircraft deaths, including during armed conflicts.

This would, among other things, significantly undermine the entire current ICAO system of technically oriented investigations which are not aimed at establishing a share of blame or liability, with a direct impact on the effectiveness of future investigations and, consequently, flight safety. This would not be in the interests of ICAO and international civil aviation as a whole.

It must be stressed that the ICAO Council has never, at any time in its history, considered the responsibility of States for the loss of aircraft, much less invoked Article 84 of the Chicago Convention for this purpose. ICAO's consideration of incidents (outside the context of armed conflict) has always been confined to technical aspects relevant to civil aviation .¹²

Russia's participation in this case and the preliminary objections by the Russian Federation presented below do not in any way affect the issue of Russia's non-involvement in the tragedy that occurred.

1. PROCEDURAL INFORMATION

By a letter dated 17 March 2022, ref. SG 2613/22, Mr. J. C. Salazar, Secretary General of ICAO, informed ICAO Member States that, by a note verbale dated 14 March 2022, the delegations of Australia and the Netherlands to ICAO had submitted to the Organization a joint Application and associated Memorial for the settlement of differences. The letter clarified that the application was being made under the terms of "Article 84 of the Convention on International Civil Aviation (Chicago Convention), related Annexes, and the Rules for the Settlement of Differences (Doc 7782/2) ('Rules') and identified the Russian Federation as Respondent. It was also noted in the letter that the Application and the corresponding Memorial concerned "the interpretation and application of the Chicago Convention" following "the downing of Flight MH17 by a Buk-TELAR surface-to-air missile over the east of Ukraine on 17 July 2014, which", according to the Applicants, "is legally attributable to the Russian Federation and constitutes a breach of Article 3 *bis* of the Chicago Convention."

By a letter dated 21 March 2022, ref. LE 6/8.CONF, the President of the ICAO Council, Mr. S. Sciacchitano informed the ICAO Member States that, in accordance with Article 28(3) of the Regulations, he had decided to give the Respondent 12 weeks to file his counter-memorial, in other words, no later than 13 June 2022.

By its letter dated 5 May 2022, ref. 157/22, addressed to the President of the ICAO Council, Mr. S. Sciacchitano and the Secretary General of ICAO, J. C. Salazar, requested: 1) that the Application and Memorial (together with the Annexes) of the Applicants be translated into the Russian language; 2) that the deadline for submission of the Counter-Memorial be set only after

¹² Ruwantissa Abeyratne, *Convention on International Civil Aviation. A Commentary*, 2014, p. 665 ("One of the emergent features of the ICAO Council which became clear at its deliberations was the Council's resolve to address its deliberations to purely technical issues pertaining to the [Iran Air 1988] incident, while stringently avoiding political issues and diplomatic pitfalls. This is certainly true of all incidents discussed above, where the Council restricted its scope to technical issues as applicable to the principles embodied in the Chicago Convention.") [Attachment 52].

the Application and Memorial (with its Annexes – “forming part of this Memorial”¹³) of Australia and the Netherlands had been received by Russia in Russian; 3) that a period of at least 24 weeks be set for submission of the Counter-Memorial.

By a letter dated 10 May 2022, ref. LE 6/8.CONF, Mr. J. C. Salazar, Secretary General of ICAO, transmitted to the Mission of the Russian Federation to ICAO a translation into Russian of the Application and the Applicants’ Memorial without the Annexes.

By its letter in response dated 12 May 2022, ref. 169/22, the Russian Mission to ICAO informed the Secretary General of ICAO that the refusal to translate part of the Memorial from Australia and the Kingdom of the Netherlands into Russian, as required under Article 29, paragraph 1, of the Rules, could be deemed to be a restriction of the Russian Federation’s right to use Russian as a working language of ICAO and would thus put the parties to the proceedings in manifestly unequal situations.

During its meeting of 1 June 2022, the ICAO Council considered Working Paper C-WP/15421 on the issue of the deadlines, submitted by the Secretary General of the Organization. Following its consideration, the Council adopted decision C-DEC 226/5 of 2 June 2022, determining that the 12-week deadline for the submission of the counter-memorial should run from 10 May 2022, the date of receipt by Russia of the text of the Application and the Memorial in Russian. Accordingly, the deadline for the submission of the counter-memorial has been set at 2 August 2022.

In this connection, the Russian Federation would like to stress that the decision in question does not take into account the fact that, on 10 May 2022, Russia received only a partial translation of the memorial, since the untranslated annexes to the memorial are an integral part of it. Furthermore, the 12-week deadline for the submission of the counter-memorial, which remained unchanged, does not reflect the complexity of the issues raised in the memorial and the size of this document, which requires serious consideration, and does not therefore allow adequate time for the Russian Federation to make preparations or for the formation of the necessary legal team. Thus, the Russian Federation’s procedural right to be properly represented in the proceedings has been adversely affected.

Pursuant to Article 5 (1) of the Rules, if the Respondent questions the jurisdiction of the Council to handle a matter presented by the Applicant, he or she shall file a preliminary objection setting out the basis of the objection.

The Russian Federation believes that, for the reasons set out below, the ICAO Council lacks competence to consider the Application and Memorial submitted by the Applicants. At the same time, the Russian Federation considers that the ICAO Council should refuse to consider the Applicants’ Application and Memorial, deeming them inadmissible for the reasons set out below.

The Russian Federation would like to make it clear, however, that the present document does not constitute a counter-memorial of the Russian Federation within the meaning of Article 4

¹³ Memorial of Australia and the Kingdom of the Netherlands, para. 1.29

of the Regulations. The present document is a preliminary objection, as provided for in Article 5 of the Regulations.

Pursuant to Article 27 (1) of the Rules, Galina Sergeyevna Kirichenko, Deputy Representative of the Russian Federation to ICAO, is designated as the agent authorized to represent the Russian Federation in this case. The address for correspondence is 999, Robert-Bourassa Boulevard, Suite 16.25, Montreal, Quebec, Canada, H3C 5J9, Russia@icao.int.

2. INTRODUCTION AND STATEMENT OF FACTS

2.1 Circumstances of the crash of flight MH17 and the conduct of the investigation

On 17 July 2014, a Boeing 777 Malaysian Airlines flight 9M-MRD was on flight MH17 from Amsterdam to Kuala Lumpur. The aircraft departed from terminal H of Schiphol Airport at 10:14 UTC and took off at 10:31 UTC (14:31 Moscow time).

The flight to the Ukrainian border was performed at FL310 (9,450 metres), followed by FL330 (10,050 metres). At 12:53 UTC, when the aircraft entered the area of responsibility of Dnepropetrovsk region, according to the flight plan, it was supposed to climb to FL350 (10,650 meters), but it refused the air traffic controller's request to climb, remaining at FL330, which meant that the air traffic controller had to lift another aircraft to the FL350 level. The FL330 level at which flight MH17 was proceeding was open for international transit flights over Ukrainian territory.

At around 16:20 local time (13:20 UTC), while over the zone of hostilities between the militias of the Donetsk People's Republic and the Armed Forces of Ukraine in south-eastern Ukraine, the aircraft crashed near the city of Torez, Donetsk region. 283 passengers and 15 crew members lost their lives.

The aircraft wreckage was scattered over an area of more than 15 square kilometres. The search area covered more than 34 square kilometres, including the settlements of Moskovskoye, Rassypnoye, Grabovo, Stryukovo, and the Grabovskoye reservoir.

It should be noted that, on 22 April 2014, an An-30B aircraft of the State aviation authority was brought down in Ukrainian airspace. This was the first military aircraft of the Ukrainian Armed Forces to be brought down during the armed conflict in the south-east of Ukraine.¹⁴ The An-30B aircraft incident and the numerous cases of the downing of military aircraft and helicopters that followed manifestly demonstrated that the armed conflict was beginning to pose a real threat to flight safety over the eastern provinces of Ukraine.

At the same time, the restrictions imposed by Ukraine on the use of airspace in connection with military activities¹⁵ were aimed only at the flight safety of Ukrainian military aviation.

Thus, the crash of flight MH17 took place in the airspace of Ukraine in the midst of an armed conflict on Ukrainian territory.

Thirteen weeks have passed from the first downing of the An-30B military aircraft on 22 April 2014 to the crash of flight MH17 on 17 July 2014. During this period, a further 15 military aircraft and helicopters have been lost by the Armed Forces of Ukraine in active combat operations¹⁶.

¹⁴ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, p. 182. [Attachment 32].

¹⁵ Ibid. pp. 179–180.

¹⁶ Ibid., p. 182.

Over the period from April to July 2014, Ukraine built up its military ground forces and stepped up the intensity of its air force flights in the skies over Donbas. On 12 July 2014 a statement by the spokesperson of Ukraine's antiterrorist operation, Vladyslav Seleznev, was published on Facebook,¹⁷ about efforts to bring Ukraine's air defence forces to combat readiness level 1, the highest level of readiness for action.

On 16 July 2014, reports were broadcast by the Central Television and Radio Studio of the Ministry of Defence of Ukraine, to the effect that that Ukraine had deployed Buk anti-aircraft missile systems in the conflict zone, to control the airspace over the area of anti-terrorist operations in the eastern part of Ukraine.¹⁸

Thus, Ukraine was planning to use not only military aircraft in Donbas, but also air defence equipment capable of destroying aircraft flying at high altitudes. Judging from the facts cited above, Ukraine was fully prepared to use heavy weaponry in the armed conflict zone, including the Buk surface-to-air missile system, thereby endangering flight safety.

On 21 July 2014, the authorities of the Donetsk People's Republic handed over the flight recorders of flight MH17 to the official representative of Malaysia. Following further investigation into the crash by the Dutch Safety Board it was concluded that there was no evidence or signs that the flight recorders had been manipulated.¹⁹

On 23 July 2014, in Kyiv, the "Agreement between the National Bureau of Air Accidents and Incidents Investigation with Civil Aircraft (NBAAIL) of Ukraine and the Dutch Safety Board of the Netherlands on delegation of investigation in respect of aircraft accident involving Boeing 777-200, registration: 9M-MRD 'Malaysia Airlines' flight MH17" was signed, which made reference to paragraph 5.1 of Annex 13 to the Chicago Convention.²⁰ As of that date, the Dutch Safety Board (DSB) became the responsible authority for the technical investigation. Paragraph 3.1 of this Agreement states: "The purpose of investigating accidents or incidents in accordance with Annex 13 is the prevention of accidents and incidents. It is not the purpose of such an investigation to apportion blame or liability".

On 25 July 2014, the DSB invited the Russian Federation to participate in the investigation into the crash of flight MH17.²¹

On 28 July 2014, in accordance with Standard 5.23 of Annex 13 to the Chicago Convention, which entitles a State which on request provides information, facilities or experts to appoint an accredited representative to participate in the investigation, the Russian Federation appointed an accredited representative.

¹⁷ <https://www.facebook.com/vladislav.seleznev.94/posts/467802786689783?pnref=story>.

¹⁸ <https://www.youtube.com/watch?v=Q3MomxNHnUA>, snippet between 4:48 and 4:54.

¹⁹ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, Section 2.11.1, pp. 44–45 [Attachment 32].

²⁰ Document "MH17. About the investigation". Dutch Safety Board. October 2015, Appendix D. [Attachment 33].

²¹ Ibid., Appendix F.

On 31 July 2014, the first meeting of Russian experts with experts from the Netherlands and Ukraine was held in Kyiv.

In the course of the investigation and in accordance with Standard 5.23 of Annex 13 to the Chicago Convention, the Russian Federation submitted the following information to the DSB upon request:²²

- (a) radar data recorded by Russian radar stations;
- (b) data on the characteristics of weapons.

A criminal investigation into the crash was initiated by the authorities in the Netherlands, Australia and Ukraine. In order to investigate the circumstances of the loss of life, on 7 August 2014, the Joint Investigation Team (JIT) was formed, comprising representatives from Australia, Belgium, the Netherlands, Ukraine and, subsequently, Malaysia. The composition of this group and its working methods raise serious questions regarding its independence and impartiality. Thus, the right to block the decisions of the group is vested in Ukraine, a State with a direct interest in avoiding responsibility for the loss of an aircraft over its territory.

The JIT is managed by the Netherlands Prosecution Service. Despite requests made by the Russian Federation, no Russian representatives are included in the JIT. The data and evidence provided by the Russian side in the framework of mutual legal assistance to the JIT are largely ignored; requests submitted by the Russian Federation to the Netherlands National Prosecutor's Office are not processed in any meaningful way.

The full circumstances of the crash have not yet been established.

2.2 Role of the Russian Federation in the investigation under Annex 13 to the Chicago Convention.

In accordance with Standard 5.25 of Annex 13 to the Chicago Convention, the participation of the Russian Federation, as a State other than the State of Registry, the State of the Operator, the State of Design and the State of Manufacture, was limited in the investigation of the crash of flight MH17 to those matters which entitled it to participate under Standard 5.23 of Annex 13 to the Chicago Convention.

The Russian Federation did not have the opportunity to:

- 1) visit the scene of the accident (paragraph 5.25 (a) of Annex 13);
- 2) have full access to all relevant evidence as soon as possible (paragraph 5.25 (d) of Annex 13);
- 3) participate in off-scene investigative activities such as testing and simulations (paragraph 5.25 (g) of Annex 13);
- 4) obtain witness information and suggest areas of questioning (paragraph 5.25 (c) of Annex 13).

²² Ibid., subsection 1.3.4, p. 15.

(1) Access to the scene

From 3 to 8 August 2014, Russian specialists were present in Kyiv and were ready at any moment to join the work at the crash site of flight MH17. In August 2014 and thereafter, no Russian specialists were invited to join in the work at the crash site.

(2) Access to physical evidence

The Russian Federation did not have access to all the material evidence underpinning the DSB's conclusions about the downing of flight MH17 by a missile fired from a Buk surface-to-air missile system (SAM),²³ and about the role of Ukrainian aviation authorities in complying with ICAO standards in ensuring flight safety in their sovereign airspace.

On 11 August 2015, after concluding the consultation procedure provided for by Standard 6.3 of Annex 13 to the Chicago Convention with the States participating in the investigation before issuing the final report, the DSB publicly announced, for the first time since the start of the investigation, information about the discovery of missile parts among the wreckage of the aircraft and displayed several photos.²⁴

Russian experts have been denied the opportunity to inspect the missile wreckage directly. Where and when the missile fragments were found remains unknown to this day, despite assurances from the Netherlands that: "[...] the pieces of wreckage of the aeroplane were fitted with a label, photographed and registered in a database. When the pieces were transferred at the various sites, they were inspected with use of this registration"²⁵ and "upon arrival at the air force base,²⁶ all individual pieces of wreckage were again verified, registered and photographed using a fixed procedure and then forensically examined".²⁷

(3) Participation in research and simulations

Russian experts were not involved in drafting and discussing the investigation programmes, nor were they involved in carrying out simulations to determine the type of weaponry that brought down flight MH17. Access by specialists of the Russian Federation to the wreckage of the aircraft was limited to visual inspection and photographing.

The developer of the Buk missile system (the Russian concern Almaz-Antey) has provided the DSB with information on the characteristics of missiles of the Buk system.²⁸

²³ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, Section 10.1, Part 1 (b), p. 253 [Attachment 32].

²⁴ Ibid., subsection 2.12.2.8, illustration 36, p. 82.

²⁵ Document "MH17. About the investigation", Dutch Safety Board, October 2015, subsection 7.1.2, p. 55 [Attachment 33].

²⁶ Gilze-Rijen, Netherlands.

²⁷ Document "MH17. About the investigation", Dutch Safety Board, October 2015, subsection 7.1.4, p. 57 [Attachment 33].

²⁸ See Letter No. 01-09/548k dated 29 July 2015 from the Director General of Almaz-Antey Air Defence Concern OJSC (with attachment) [Attachment 22].

(4) Working with witnesses to the incident

The Russian experts involved in the investigation were not invited to identify and interview witnesses to the MH17 crash, nor were they invited to determine the subject matter of the interviews.

The DSB noted the following: “The safety situation in the eastern part of Ukraine meant that it was not possible to interview eye witnesses in the days following the crash. The Dutch Safety Board chose not to interview the witnesses at a later stage because the reliability of the statements could be affected by the passage of time. Various people and organisations did, of their own accord, share their findings with the Dutch Safety Board and information was gathered from the media. The Dutch Safety Board took note of those statements and, if of value to the investigation, included them in the investigation”²⁹.

Meanwhile, the above conclusion drawn by the DSB is inconsistent with the Applicants’ references in the Memorial to the witness testimonies received by the JIT in which witnesses allegedly observed the missile launch and saw the “Russian” crew of the Buk SAM system and its movement about the territory of Ukraine (paragraph 2.59 of the Memorial). Thus, the DSB and the JIT drew directly opposing conclusions regarding the reliability of the witnesses’ testimonies.

2.3 Analysis during the investigation of the crash of flight MH17 of the application of ICAO standards and recommendations in cases of armed conflict

Aspects of the safety of flights over areas of armed conflict are dealt with in Part B of the final report of the DSB, “Flying over conflict zones”.³⁰

This part of the final report of the DSB draws the unequivocal conclusions that, as a sovereign State, Ukraine exercises full control over its airspace and thus bears primary responsibility for its safety. Therefore, it can decide whether it is necessary to restrict or close the airspace to air traffic.³¹

Decision-making processes regarding the use of Ukraine’s airspace were dictated by the interests of military aviation. The reasons persuading Ukraine on 14 July 2014 to raise the upper limit of the restricted area to flight level 320 remain unclear. At the same time, the NOTAM issued by Ukraine did not include any substantive reason for the altitude restrictions; in other words, Ukraine was not acting in accordance with the guidelines in ICAO Doc 9554-AN/932.³²

Section 3 of Appendix Q to the final report reiterates that “the sovereignty of Member States is ICAO’s starting point. Member States therefore bear responsibility for managing the

²⁹ Document “MH17. About the investigation”, Dutch Safety Board, October 2015, section 3.2, p. 32 [Attachment 33].

³⁰ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, p. 168 [Attachment 32].

³¹ Ibid., section 6, p. 191.

³² Ibid., section 6, p. 209.

airspace above their territories. Member States have the possibility and responsibility to restrict or totally prohibit access to their airspace, if necessary “³³ .

In paragraph 2 (a) of subsection 10.1 “Main conclusions” of section 10, “Conclusions” of the final report of the DSB, the following conclusion is drawn:

“The statements made by the Ukrainian authorities in which they reported that military aeroplanes had been shot down on 14 and 16 July, and in which they mentioned weapon systems that were able to reach cruising altitude of civil aeroplanes, provided sufficient reason for closing the airspace above the eastern part of Ukraine as a precaution ”.³⁴

Thus, the key role of Ukraine, as a sovereign State on whose territory an armed conflict was taking place, in performing the task of ensuring flight safety was logically confirmed during the investigation, which was based on the standards of Annex 13 to the Chicago Convention. Consequently, Ukraine failed in its responsibilities in respect of State safety risk management and State safety assurance.³⁵

The DSB investigation did not find any objective facts regarding the actions or omissions of the Russian Federation in complying with ICAO standards in ensuring flight safety in areas of armed conflict.

2.5 Conclusion of the investigation into the crash of flight MH17

On 2 June 2015, a draft final report was submitted to the Russian Federation for comment. Citing the need to publish the final report “as early as possible”, the cover letter from the DSB requested that the draft be reviewed within 30 days (instead of the 60 days required by Annex 13, paragraph 6.3, to the Chicago Convention) and that comments on the draft final report be submitted by 3 July 2015.³⁶

On 14 July 2015, the Russian Federation sent comments to the DBS on the draft final report.³⁷

There was no mention in the draft final report of the discovery of ground-to-air missile fragments at the scene. As stated above, the discovery of missile parts among the aircraft wreckage was announced by the DSB on 11 August 2015, during the third and final meeting of the States participating in the investigation. The Russian Federation was thus deprived of any opportunity, during the consultation process pursuant to Annex 13 to the Chicago Convention, to express its opinion on the discovery of the missile parts and their connection to the crash of flight MH17.

³³ Dutch Safety Board, Appendices to the report: *Crash of Malaysia Airlines Flight MH17*, Appendix Q, p. 95 [Attachment 35].

³⁴ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, p. 253 [Attachment 32].

³⁵ ICAO: Annex 19 to the Convention on International Civil Aviation: “Safety Management”, 2013, para. 3.1.1 (b), (c).

³⁶ See Letter No. OvV-15500901 dated 02 June 2015 from the investigator-in-charge of the DSB [Attachment 34]

³⁷ See Letter No. 02.3-2039 of 14 July 2015 from the Deputy Director of the Federal Air Transport Agency, Oleg G. Storchevoy, commenting on the draft final report of the investigation into the crash of flight MH17 [Attachment 23]

On 16 September 2015, the Russian Federation addressed a communication to the President of the ICAO Council, Mr. Olumuyiwa Benard Aliou,³⁸ which stated, among other matters, the following:

“[...] This unprecedented closeness of the investigation and partly announced information concerning new facts, even for the members of investigation, keeping us very surprised.

For example, on July 02, 2015 in accordance to the Annex 13 to the Chicago Convention DSB started the official consultations on the draft of the final report with the member states of investigation. As a result of consultations, on August 11, 2015 it became known from DSB official public statements, that among segments taken out from a place of aviation incident there were found the additional important proofs, i.e. the fragments which probably belong to the ground-to-air "BUK" rocket. Based on DSB statement, in accordance with the Annex 13 during the investigation the research of the mentioned fragments is not provided, due to the special interest to them announced by the Joint Investigation Team (JIT) carrying out the criminal investigation.

Providing on a later stage the data on a detection of rocket's fragments and DSB refusal of their appropriate investigation in line with the other data received, can be considered as violation of standards 5.4 and 5.10 of the Annex 13, requesting from the investigation carrying state, to analyze all relevant information on this aviation incident, as well as to provide coordination with the legal authorities, paying the attention to the respective proves which demand the immediate registration and the analysis for the investigation's success.

In this regard it is required to initiate works for establishment of the area in which the rocket fragments were found (if they were found), to identify the rocket on the signs, known to the designer and the manufacturer, and also to investigate its movement between military units after its going out from the factory.

*We would like to remind, that in the beginning of investigation the Russian Federation draw the attention, that during the investigation is required to analyze the utilization of the "BUK" rockets in the Ukrainian army. However, according to our information, this job was not done. Additionally it was not submitted neither information concerning the radio exchange between the Ukrainian military ATC controllers on a day of incident nor plans of the Ukrainian military aviation flights, there was only a statement unsupported by evidence that there was no flights, what was disproved several times by many witnesses. Also, based on our information, Ukrainian side did not submit the information regarding the data on the use of all types of arms including both, "ground-to-air" and "air-to-air" rocket types, and also their location at the time of plane crash.”**

³⁸ See letter dated 16 September 2015 from Oleg G. Storchevoy, Deputy Director of the Federal Air Transport Agency, No. 4.15-785-dsp to the President of the ICAO Council on the progress of the investigation into the crash of flight MH17 [Attachment 24].

* Translator's note: The text quoted above is reproduced verbatim from the English translation provided by the Russian Federation.

Mr Olumuyiwa Benard Aliu, President of the ICAO Council, replied³⁹ to the Russian Federation on 2 October 2015. The response stated, among other points, that ICAO had been subsequently informed that, on 2 June 2015, the Dutch Safety Board (DSB) had submitted the draft final report of the investigation into the crash of flight MH17 to the authorized representatives of the States participating in the investigation for their comments. In accordance with paragraph 6.3 of Annex 13, Investigation of Aviation Accidents and Incidents, to the Convention on International Civil Aviation, upon receipt of comments, the investigating State either amends the draft final report to include the substantive part of the comments received or, if the commenting State so wishes, attaches the comments to the final report. He therefore assured the Russian Federation that ICAO would continue to advise all parties to ensure that the provisions of Annex 13 were properly implemented. It was therefore expected that the final report would also include other views in the form of annexes.*

On 22 September 2015, the Russian Federation submitted its objections to the DSB⁴⁰ relating to actions contrary to Annex 13 to the Chicago Convention. No response to the Russian Federation's communication was received from the DSB.

On 13 October 2015, the final report was published by the DSB without a response to the Russian Federation's letter of 22 September 2015.

2.6 Results of the investigation and the cause of the crash of flight MH17

The key issues of the DSB investigation were:⁴¹

- “– What caused the crash of flight MH17?
- How and why were decisions made to use MH17's flight route?
- How is the decision-making process related to flying over conflict zones generally organised?
- What lessons can be learned from the investigation to improve flight safety and security?”

(1) Determining the type of missile

The Russian Federation considers as unproven and containing internal contradictions the conclusion of the DSB that “the location, shape and boundaries of the damage to the wreckage of flight MH17, the number and density of hits on the wreckage and the objects found with different shapes and sizes were consistent with a fragmentation spray pattern damage of pre-formed

³⁹ See letter from the President of the Council of ICAO dated 2 October 2015 No. E1/1.63, AN 6/32, SMM 1/4 in response to the letter from the Federal Air Transport Agency No. 4.15-785-dsp dated 16 September 2015 on the progress of the investigation into the crash of flight MH17 [Attachment 25].

* *Translator's note:* The original English of Mr. Aliu's letter was not made available to the translator, so this is a back-translation from the Russian.

⁴⁰ See letter dated 22 September 2015 from Oleg G. Storchevoy, Deputy Director of the Federal Air Transport Agency, No. 4.02-798-dsp, to the Dutch Safety Board objecting to actions contrary to Annex 13 to the Chicago Convention [Attachment 26].

⁴¹ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, Section 1.1, p. 15 [Attachment 32].

fragments in the 9H314M warhead carried on the 9M38 series of missiles as installed on the Buk surface-to-air missile system”.⁴²

Standard 5.13, “Reopening of investigation”, of Annex 13 to the Chicago Convention states the following: “If, after the investigation has been closed, new and significant evidence becomes available, the State which conducted the investigation shall reopen it.”

On 14 January 2016, in accordance with Standard 5.13 of Annex 13, the Russian Federation sent a letter to the DSB, providing information on new facts to be reflected in the final report.⁴³

On 25 February 2016, the DSB submitted its responses to the Russian Federation’s comments.⁴⁴ The response from the Netherlands authorities contains only references to the final investigation report. The DSB requested no further information from the Russian authorities on the characteristics of the 9M38 missiles and their test results, in order to confirm or refute the arguments put forward by the Russian authorities, although this information had been declassified specifically for the purpose of a full, thorough and independent international investigation.

The Russian Federation would like to reiterate that the Russian experts involved in the investigation were denied access to the objects of investigation, such as missile warheads and fragments, so experiments and simulations were carried out on the basis of available data.

(2) Closure of airspace over an area of armed conflict

In the view of the Russian Federation, the conclusion drawn by the DSB that statements by Ukrainian authorities reporting the shooting down of military aircraft on 14 and 16 July and mentioning weapons systems that were able to reach the cruising altitude of civil aircraft, provided sufficient grounds to close the airspace over eastern Ukraine as a precautionary measure,⁴⁵ is incomplete.

In the letter dated 14 January 2016 from the Russian Federation to the DSB⁴⁶ it was noted that the final report had not adduced a single fact indicating that the requirements of the ICAO standards or the national instruments of Ukraine were insufficient, which could have justified the failure by the Ukrainian authorities to take a timely decision to close the airspace over the conflict area. As a result, proper implementation by the Ukrainian aviation authorities of national and international legislation would have made it possible to avoid the crash of flight MH17.

⁴² Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, Section 10.2, para 6, p. 255 [Attachment 32].

⁴³ Letter from Oleg G. Storchevoy, Deputy Director of Rosaviatsiya, authorized representative of the Russian Federation in the investigation of flight MH17, to the Dutch Safety Board with information on new facts to be reflected in the final report on the MH17 crash dated 14 January 2016 [Attachment 27].

⁴⁴ See Letter No. OvV-16500274 of 25 February 2016 from the Chariman of the DSB in response to letter No. 4.02-3 of 14 January 2016 from Oleg G. Storchevoy, Deputy Director of the Federal Air Transport Agency [Attachment 28].

⁴⁵ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, Section 10.1, para 2 (a), p. 253 [Attachment 32].

⁴⁶ Letter from Oleg G. Storchevoy, Deputy Director of Rosaviatsiya, authorized representative of the Russian Federation in the investigation of flight MH17, to the Dutch Safety Board with information on new facts to be reflected in the final report on the MH17 crash dated 14 January 2016 [Attachment 27].

In connection with the crash of flight MH17, Mr. Benjamin, Secretary General of ICAO, in his letter of 24 July 2014,⁴⁷ reminded States of their responsibility to ensure the safety of flights over their sovereign territory and suggested the following necessary actions: a) To take note of the need for close coordination between civil and military authorities in the event of armed conflict or the possibility of armed conflict; b) To restrict or prohibit in a uniform manner the flights of aircraft of other States over their territory.*

In his letter dated 24 July 2014, the Secretary General of ICAO draws the attention of States to the requirements of Article 9, “Prohibited areas”, of the Chicago Convention and reminds them that each State must, on an ongoing basis, assess the threat to civil aviation within its territory and adjust the relevant elements of its national civil aviation security programme.

With reference to the aforementioned letter of 24 July 2014 from the Secretary General of ICAO, in their letter of 14 January 2016, the Russian authorities drew the attention of the DSB to the fact that, notwithstanding the requirements of Article 9 of the Chicago Convention, Ukraine had not closed its airspace over the area of armed conflict.

Based on the facts cited by the DSB in its final report on the results of the investigation into the crash of flight MH17, the Russian Federation is convinced that, on 14 July 2014, the Ukrainian authorities had all the formal grounds to decide on a complete ban on the use of the airspace over Donbas, since the requirements announced by the Ukrainian Armed Forces for a further expansion of the area used by military combat aircraft did not meet ICAO standards for the safety of international air navigation.

The attested violations that led to the crash of flight MH17 and posed a danger to other civil aircraft are set out in the application of the Russian Federation against Ukraine, filed on 22 July 2021 with the European Court of Human Rights.⁴⁸

The Applicants’ Memorial concluded that the Russian Federation was responsible for not closing its airspace, which “would have resulted in *de facto* closure of the airspace over the east of Ukraine, as a result of which, amongst others, the flight route taken by Flight MH17 (Airway 980) would not have been available” (paragraph 4.35).

This conclusion drawn by the Applicants contradicts the conclusions about Ukraine’s role⁴⁹ in the crash of flight MH17, drawn from the investigation pursuant to Annex 13 to the Chicago Convention. Moreover, the Applicants’ conclusion sets a dangerous precedent, justifying failure

⁴⁷ See ICAO Secretary-General’s Letter No. Ref AN 13/4.2-14/59 of 24 July 2014 on aviation safety and security of civil aircraft flying in conflict-affected airspace [Attachment 29].

* *Translator’s note*: The original English of Mr. Benjamin’s letter was not made available to the translator, so this is a back-translation from the Russian.

⁴⁸ *Russian Federation v Ukraine*, European Court of Human Rights, 2021, Application No 36968/21, Part 3, Loss of passengers and crew of the Boeing 777 Malaysian Airlines flight MH17 on 17 July 2014, paras. 216–258 [Attachment 51]. [*Translator’s note*: The original English text of this Application was not made available to the translator, nor is it available on the internet, so this title is a back-translation from the Russian.]

⁴⁹ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, section 6.7, section 10.2 (2), pp. 209–210, 260 [Attachment 32].

to conduct a risk assessment and to imposing prohibitions under Article 9 of the Chicago Convention by a State whose sovereign airspace has been affected by an armed conflict.

3. LACK OF COMPETENCE BY ICAO COUNCIL

For the reasons set out below, the ICAO Council does not have competence to consider the matter.

The only basis cited by the Applications for the jurisdiction of the ICAO Council in this matter is Article 84 of the Chicago Convention, which states:

“If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.”

a) The scope of Article 3 *bis* does not extend to situations of armed conflict

The Applicants argue that there is a dispute between them and Russia over the interpretation and application of Article 3 *bis* of the Chicago Convention. Thus, the Australian and Netherlands Application indicates that “the *Russian Federation has refused to accept responsibility for the downing of flight MH17 under Article 3 bis, thus giving rise to a disagreement between the Applicants and the Respondent relating to the interpretation and application of the Chicago Convention*”.⁵⁰ Section III, paragraph 3.1 of the Applicants’ Memorial notes that they “*submit to the Council a disagreement with the Russian Federation over (1) the latter’s role in the downing of Flight MH17; (2) the consequential breach by the Russian Federation of the Chicago Convention, in particular Article 3 bis, and (3) the legal consequences flowing from that breach*”.

The said Article, however, as will be demonstrated below, does not extend to situations of armed conflict, which are governed by international humanitarian law. Added to which, the application of Article 3 *bis* to situations of armed conflict would be counterproductive and, as shown below, would lead to a situation of legal uncertainty.

The crash of Boeing MH17 occurred during an armed conflict that was being conducted on Ukrainian territory.⁵¹ Reference to the armed conflict may be found, among other places, in the final report of the technical investigation prepared by the Dutch Safety Board. It states, for example: “However, during the period from 2 April through 17 July 2014, the period during which the armed conflict in the eastern part of Ukraine broke out and intensified, ICAO did not mention

⁵⁰ Application by Australia and the Kingdom of the Netherlands to the ICAO Council, 14 March 2022, para. 4.

⁵¹ See section 2 of these Preliminary Objections.

the situation in Ukraine again”;⁵² “As the crash area was in an area of armed conflict, it was for a long time not safe for the investigators to travel to the crash area to perform an investigation and to recover the wreckage”.⁵³ .

The rules relating to armed conflicts (both international and non-international in nature) are well established in international law, including in a number of universal treaties, including the 1949 Geneva Conventions and their Additional Protocols I and II. In addition, the corresponding branch of customary international law is very well developed. Both treaty law and customary law of armed conflict provide for the protection of civilians and also lay down principles to distinguish between civilian and military targets.

Issues of the use of force, including against aircraft, during hostilities are governed by international humanitarian law (the law of armed conflict) and these rules are distinct from the rules established by Article 3 *bis*. It is both unnecessary and impossible to consider the interpretation and application of the Chicago Convention in this regard. Accordingly, there is no dispute under the Chicago Convention.

Thus, Article 3 *bis* provides that “the contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight”. At the same time, not every use of weapons against civil aircraft in the course of a armed conflict is unlawful under humanitarian law. For example, the Geneva Conventions for the protection of victims of war and their Additional Protocols afford protection only to “medical aircraft” or “medical transports”, but without the agreement of the parties, such medical transports operate at “their own risk”.

The status of non-medical civil aircraft in armed conflict is even more nuanced and allows, in certain circumstances, for their treatment as a military asset. Thus, in the *HPCR Manual on International Law Applicable to Air and Missile Warfare*,⁵⁴ a publication that was prepared over several years by an international group of respected experts and practitioners, set up under the auspices of Harvard University, to summarize established rules of international law, detailed consideration is given to the conditions under which civil aircraft can become a military objective. In particular, the Manual notes that civil aircraft are civilian objects and as such are entitled to protection from attack; however, they can be the object of attack if they constitute military objectives.⁵⁵ It lists activities that may render a civil airliner a military objective (for example, engaging in hostile actions, transporting troops or military materials, participating in intelligence or communications activities, refusing to comply with orders of military authorities, etc.),⁵⁶ providing detailed commentary on these and other issues.⁵⁷ The Manual repeatedly stresses, however, that Article 3 *bis* of the Chicago Convention does not apply in situations of armed conflict;⁵⁸ the relevant rules are not derived from that Article. Comparable provisions are set out

⁵² Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, p. 178, n. 5.2 [Attachment 32].

⁵³ Ibid. 16, para. 1.4.

⁵⁴ *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, 2013 [Attachment 58].

⁵⁵ Ibid., p. xxxvi.

⁵⁶ Ibid., pp. xxxviii–xxxix.

⁵⁷ Ibid. pp. 171–201.

⁵⁸ Ibid. pp. 16, 184

in the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.⁵⁹ Thus, the substance of, and exceptions to, the rule on the non-use of weapons against civil aircraft in situations of armed conflict lie outside the scope of Article 3 *bis* and, accordingly, the competence of the ICAO Council.

Thus, if Article 3 *bis* were considered to be applicable during an armed conflict, it would be in conflict with the rules of international humanitarian law, leading to a situation of legal uncertainty. The reference in paragraph 3 of the ICAO Council Resolution of 28 October 2014⁶⁰ to Article 3 *bis*⁶¹ is a general appeal to all States to comply with the said rule, and is not associated with the specific circumstances of the Boeing MH17 case, which cannot be taken as affirmation of the applicability of Article 3 *bis* in an armed conflict and has no effect on the qualification of the accident. Added to which, in adopting the said resolution, the ICAO Council was acting as a political body outside the scope of any investigation or dispute settlement procedure under Article 84 and did not intend to provide a legal qualification of the case.

Furthermore, if it is assumed otherwise, it would inevitably follow that the ICAO Council is a competent body for the consideration of issues involving the use of weapons in hostilities, including such aspects and concepts as necessity, proportionality, distinction, military purpose, military advantage, etc. This is clearly inconsistent both with the mandate of the Organization and its bodies and with the principle of speciality, governing the competence of international organizations.⁶²

The applicability of Article 3 *bis* exclusively in peacetime follows from its text. Thus, the obligation of States “to refrain from resorting to the use of weapons against civil aircraft in flight” as set out in paragraph (a) of this article goes hand in hand with the rules on interception, which state that “the lives of the persons on board and the safety of aircraft must not be endangered”. The requirement that interceptions must be conducted without the threat of force clearly demonstrates the peaceful context of the situation.

Furthermore, this general obligation set out in paragraph 1 must be read in conjunction with paragraphs (b) and (c), which stipulate the mechanisms for its implementation. These provisions state that “every State, in the exercise of its sovereignty, is entitled to require the landing at some civil aircraft to land at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations”. This provision clearly indicates the measures that may be taken against an offending civil aircraft in peacetime.

⁵⁹ *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo, 12 June 1994) [Attachment 59].

⁶⁰ ICAO Council Resolution on Malaysia Airlines flight MH17, destroyed over eastern Ukraine on 17 July 2014, adopted on 28 October 2014 and annexed to document C-DEC 203/1 [Attachment 1].

⁶¹ “The Council ... Reaffirms Article 3 *bis* of the *Convention on International Civil Aviation* and relevant ICAO provisions which condemn the use of weapons against civilian aircraft in flight without prejudice to the provisions of the Charter of the United Nations.”

⁶² *Legality of a the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion. ICJ Reports 1996, p. 66 [Attachment 37].

Paragraph (d) strengthens the implementation mechanism of this article with a preventive element – the imposition on States of an obligation to prohibit the use of civilian aircraft under their jurisdiction for “any purpose inconsistent with the aims of this Convention”, in other words, not for civil aviation purposes. This article does not address situations that are specific to wartime, such as the use of civil aircraft to transport troops or munitions. For example, the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* explicitly states that enemy civil aircraft may only be attacked if they meet the definition of a military objective.⁶³ It then lists the kinds of activities that can serve as grounds for classifying them as a military objective, such as refusing an order to identify themselves, divert from their track or proceed for visit and search, and so forth.⁶⁴

The application of Article 3 *bis* to peacetime situations follows from the story of its emergence and its *travaux préparatoires*.

Article 3 *bis* resulted from the ICAO Assembly’s deliberations on the crash of flight KE007 in Soviet airspace.⁶⁵ This determined both the course of the negotiations and the content and scope of the rights and obligations of the States which were recorded by the participants in Article 3 *bis*. As may be seen from the records of the 25th session of the Assembly, at no stage of the negotiations was there any question of using amendments to the Chicago Convention to resolve matters relating to the conduct of armed conflicts.⁶⁶ If that had been the case, it is inconceivable that such self-evident aspects as the criteria outlined above for the use of civil aircraft for military purposes and the closure of airspace to civil aircraft in situations of armed conflict would have remained outside the scope of regulation. This is all the more obvious against the backdrop of the detailed provisions of Article 3 *bis* dealing with interception situations.

By contrast, many delegations defined the object of the future article as being limited to cases where a civil aircraft violated certain rules relating to its presence in the airspace of a foreign State. For example, the delegation of Israel stated the following:

“Rationalization of the possible situations facing the Assembly indicated that the factual terms of reference relied on the knowledge of, or the reasonable grounds to assume, that a number of situations have occurred or may have occurred. Firstly, a violation of sovereignty, intentionally or unintentionally, through the unauthorized entry of an aircraft into the airspace of a State; secondly, utilizing a right to enter airspace and engaging in

⁶³ *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo, 12 June 1994), para. 62 [Attachment 59].

⁶⁴ *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo, 12 June 1994), para. 63 [Attachment 59].

⁶⁵ Ruwantissa Abeyratne, *Convention on International Civil Aviation. A Commentary*, 2014, p. 68 [Attachment 52]; see also Chia-Jui Cheng, editor, “The destruction of KAL Flight KE007, and Article 3 *Bis* of the Chicago Convention”, in *Studies in International Air Law*, 2017, pp. 343–370 [Attachment 53].

⁶⁶ 25th Session (Extraordinary) of the ICAO Assembly, Executive Committee: Report, Minutes and Documents, 24 April–10 May 1984, Doc 9438, A25-EX [Attachment 2]; 25th Session (Extraordinary) ICAO Assembly, Plenary Meetings: Resolutions and Minutes, 24 April–10 May 1984, Doc 9437 [Attachment 3].

activities inconsistent with the Convention; thirdly, deviating from a flight path intentionally or unintentionally while being lawfully within a State's airspace."⁶⁷

A similar approach to the subject of negotiations and the Assembly's objectives is most clearly reflected in, among other sources, the statements by the delegations of Bulgaria,⁶⁸ India,⁶⁹ the USSR,⁷⁰ China,⁷¹ Cuba,⁷² Czechoslovakia,⁷³ Japan,⁷⁴ New Zealand,⁷⁵ Poland,⁷⁶ Belgium,⁷⁷ Switzerland,⁷⁸ and Algeria.⁷⁹ Another pertinent example in this context is the working paper with the telling title: "Basic Principles related to the Interception of Civil Aircraft",⁸⁰ submitted by the Latin American Civil Aviation Commission. During the Assembly session many delegations (notably USA⁸¹, Netherlands⁸², Belgium⁸³, India⁸⁴) expressed their support for this document.

The delegation of the Netherlands also made its position on this very clear:

*"When we are talking about the use of force against unarmed civil aircraft, we are referring to a situation in which a State intercepts an aircraft which has entered its airspace without permission or authorization to do so, in other words about a violation of the sovereignty of that State over the airspace above its territory."*⁸⁵

In that connection, the delegation of the Netherlands considered that the wording of the amendment, as an equally valid alternative, could, in the first place, stipulate the right of a State to require the landing of an aircraft that had violated its sovereignty by unauthorized overflight of its territory, and second, convey a strict non-use of force clause that would be formulated as a necessary limitation to that right.⁸⁶ It is manifestly clear that, in the understanding of the Netherlands delegation, as in that of the other negotiators, the subject matter of the new article of the Chicago Convention did not extend to cases of aircraft entering an area of active armed conflict.

During the work on draft Article 3 *bis*, a number of delegations explicitly stated that the proposed amendments to the Chicago Convention concerning the duty to refrain from the use of

⁶⁷ 25th Session (Extraordinary) of the ICAO Assembly, Executive Committee: Report, Minutes and Documents, 24 April–10 May 1984, Doc 9438, A25 - Min. EX/6, p. 54 [Attachment 2].

⁶⁸ Doc 9437, pp. 32–34 [Attachment 3].

⁶⁹ Ibid., pp. 32–34.

⁷⁰ Ibid., pp. 24–27.

⁷¹ Ibid., pp. 35–36.

⁷² Ibid., pp. 36–38.

⁷³ Ibid., pp. 36–38.

⁷⁴ Ibid., pp. 56–57.

⁷⁵ Ibid., pp. 60–62.

⁷⁶ Ibid., pp. 62–63.

⁷⁷ Ibid., pp. 70–71.

⁷⁸ Ibid., pp. 77–78.

⁷⁹ Ibid., pp. 80–82.

⁸⁰ Doc 9438, A25-WP/9, p.179 [Attachment 2].

⁸¹ Doc 9438, A25-Min. EX/5, p.45 [Attachment 2].

⁸² Ibid., p. 45.

⁸³ Ibid., p. 46.

⁸⁴ Ibid., pp. 50–51.

⁸⁵ Ibid., p. 59. [*Translator's note*: There is no statement by Netherlands on p. 59 of Doc. 9438: this is from Doc. 9437.]

⁸⁶ Doc 9438, p.46 [Attachment 2].

force against civil aircraft merely reflected a rule already enshrined in general international law, and furthermore, applicable to peacetime. The statement of the delegation of Japan at the meeting of the Executive Committee on 27 April 1984, which emphasized, among other matters, the following, is instructive in this regard: “As a number of delegations had expressed in their general statements, the Japanese Delegation believed that the use of force against unarmed civil aircraft in peace time constituted a violation of the rules of international law and what they intended to do was to codify this existing rule”.⁸⁷ It should be noted that the position in question was also formulated in the working paper prepared by the Japanese delegation and distributed at the session.⁸⁸ This point of view was also expressed by the delegation of Japan at the plenary meeting of the 25th session of the Assembly on 25 April 1984.⁸⁹ This statement was made at the outset of the debate and was directly supported by a number of delegations (for example, Canada,⁹⁰ Ireland,⁹¹ Singapore,⁹² Zaire⁹³). By contrast, an examination of the proceedings of the 25th Extraordinary Session of the ICAO Assembly did not uncover any objections from delegations in this regard.

A similar position was reflected in the statements of other delegations. For example, the delegation of the United Kingdom stated:

*“The UK is among those, Mr. President, who do believe that the development of international law, particularly during this century, has made it clear beyond doubt that in time of peace, the use of force against civil aircraft is subject to very severe limitations. But equally, the tragic events of last year have demonstrated that it is desirable for States to reaffirm, by an express provision in the Chicago Convention, the legal rules concerning the use of force against civil aircraft.”*⁹⁴

The delegation of Canada formulated the Assembly’s task as follows

*“It is not for the purpose of creating a new rule of international law prohibiting the use of force against civil aircraft that an amendment to the Chicago Convention is required. ... The use of force against civil aircraft in time of peace is then in violation of well-established rules of international law and, if committed, engages the international responsibility of the State concerned. What is then required from us at this Session is to give formal recognition in the Chicago Convention to the existence of the prohibition on the use of force against civil aircraft.”*⁹⁵

⁸⁷ 25th Session (Extraordinary) of the ICAO Assembly, Executive Committee: Report, Minutes and Documents, 24 April–10 May 1984, Doc 9438, A25-EX, A25-Min. EX/3, p. 27 [Attachment 2].

⁸⁸ Doc 9438, p. 186, A25-WP/12 27/4/84.

⁸⁹ Doc 9438, p. 186, A25-WP/12 27/4/84.

⁹⁰ Doc 9438, A25-EX, A25-Min. EX/7, p. 69.

⁹¹ Doc 9438, A25-EX, A25-Min. EX/7, p. 48.

⁹² Doc 9438, A25-EX, A25-Min. EX/7, p. 85.

⁹³ Doc 9438, A25-EX, A25-Min. EX/7, p. 86.

⁹⁴ Doc 9437, p. 56 [Attachment 3]. [Translator’s note: This quotation is on p. 27 of Doc. 9437, not p. 56.]

⁹⁵ Ibid., p. 68.

“The adoption of an amendment would simply restore a balance which was of course intended by the authors of the Convention but was not formalized because they could not imagine that force would one day be used against civil aircraft in time of peace.”⁹⁶

The delegation of Sweden outlined the Swedish Government’s previously stated approach in this context:

“It is of great importance that the principles of international law are respected in the field of civil aviation. ... A civilian aircraft should in times of peace under no circumstances be subjected to actions that might imperil its safety. This principle is valid also in cases where navigational faults may lead the aircraft into restricted areas. In cases of interception of civilian aircraft the respect of human life should take precedence over the protection of territories.”⁹⁷

A representative of the International Air Transport Association (IATA) summarized the positions of the States that took part in the discussion as follows:

“As was eloquently demonstrated on the opening day by the Chief Delegate of the U.K. and yesterday by the Chief Delegates of France, Canada and by others, there is a prohibition in law against the use of armed force against civil aircraft in time of peace except in very extreme and narrowly defined situations. As a corollary it should be recognised that no other action should endanger the lives or safety of persons on board. These principles must be reflected in whatever measures accepted by ICAO with respect to intercept situations.”⁹⁸

The way in which the President of the ICAO Council, Dr. Assad Kotaite, who presided over the 25th Assembly on 24 April 1984, justified the need to amend the Chicago Convention on the opening day of the 25th Assembly, would seem to be indicative and important for understanding the object and scope of Article 3 *bis*. Drawing attention to the view that the prohibition of the use of force against civil aircraft was already part of general international law and therefore did not need to be codified in the body of the Chicago Convention, he drew a distinction in this respect between time of peace and time of war. He said that international law had explicit provisions for the protection of civilians in armed conflict, whereas, according to the ruling of the International Court of Justice, the relevant humanitarian principles were even more exacting in time of peace. Although, as the President had noted, they existed in customary law, it made sense to enshrine them in an international treaty.⁹⁹ Thus, the aim was to fill an appropriate gap in treaty law precisely in relation to peacetime, when international humanitarian law was not applicable.

Both the President and a number of delegations (for example, the United Kingdom,¹⁰⁰ France,¹⁰¹ Canada¹⁰²) referred in this context to the position of the International Court of Justice

⁹⁶ Doc 9438, p. 69 [Attachment 2].

⁹⁷ Ibid., p. 87.

⁹⁸ Doc 9437, p. 86 [Attachment 3].

⁹⁹ Ibid., p. 19. [Translator’s note: Dr. Kotaite’s statement begins on p. 19, but this observation is actually on p. 20.]

¹⁰⁰ Ibid., pp. 27–30.

¹⁰¹ Ibid., pp. 27–30.

¹⁰² Ibid., pp. 68–69.

in the *Corfu Channel* case. In this case, the Court justified the existence of obligations owed by Albania to the United Kingdom precisely during peacetime. The Court expressly pointed out that, while in wartime those obligations would have derived from the Eighth Hague Convention of 1907, in peacetime they rested on certain general and widely accepted principles, namely “elementary considerations of humanity”, the principle of the freedom of maritime communication and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.¹⁰³

Negotiators, including in the above-mentioned statements, consistently held that the article to be included in the Chicago Convention reflected a rule already existing in general international law. This invariably referred to “elementary considerations of humanity” but not to the developed body of principles and rules of international humanitarian law that operate in situations of armed conflict and protect civilians, including while they are in flight. Thus, the only conclusion to be drawn from an analysis of the proceedings of the 25th Assembly is that the amendments to the Chicago Convention addressed the situation of peacetime and did not deal with cases of active armed conflict.

This approach was also adopted by the Assembly as a whole, being expressly enshrined in its resolution A25-1, adopted without a vote on 10 May 1984. Its preambular part contains the following paragraph:

“Having noted that in keeping with elementary considerations of humanity the safety and the lives of persons on board civil aircraft must be assured”¹⁰⁴

As can be seen, reference is made only to elementary considerations of humanity, a principle which both in the negotiations and in the cited judgment of the International Court of Justice was used to justify the existence of relevant international legal obligations precisely in relation to peacetime. There is no reference in the resolution to the existing sources of international law directly governing the rights and duties of parties to armed conflict. Nor is there any indication of an intention to extend the amendment to situations of active armed conflict in the resolution as a whole, which addresses the development of international civil aviation and its importance in maintaining friendship and understanding among peoples; the inadmissibility of its misuse; the sovereignty of States over their airspace; the inadmissibility of civil aviation for any other purpose inconsistent with the purposes of the Convention; and the inadmissibility of the violation of other States’ airspace.

The above conclusion is supported by doctrine. For example, the authoritative Oxford *Handbook of International Humanitarian Law*, edited by Professor Dieter Fleck, states that “civilian aircraft may not be attacked in peacetime and may not be shot down”.¹⁰⁵ It is noted that this follows from the basic prohibition on the use of force and the general rules of air law codified in Article 3 *bis* of the Chicago Convention. This is clearly distinguished from the prohibition on the use of weapons against civil aircraft in armed conflict, which is derived from international

¹⁰³ *Corfu Channel case, Judgment of April 9th, 1949*, ICJ Reports 1949, p. 22 [Attachment 38].

¹⁰⁴ ICAO Assembly Resolution A25-1, adopted on 10 May 1984, International Civil Aviation Organization, Assembly Resolutions in force (as at 28 September 2007), Doc. 9902, I-10 TO I-12 [Attachment 4].

¹⁰⁵ *The Handbook of International Humanitarian Law*, ed. Dieter Fleck, 4th edition, 2021, Section 7.24, p. 227 [Attachment 54].

humanitarian law and its principle of distinction between military and civilian objects (“principle of distinction”).¹⁰⁶

Other works may also be cited in this context. One is the *HPCR Manual on International Law Applicable to Air and Missile Warfare*,¹⁰⁷ already discussed above. It is noted in the literature on this subject that the main contribution of ICAO’s adoption of Article 3 *bis* was “to achieve the absolute ban on the use of weapons against civil aircraft in flight in time of peace”.¹⁰⁸

Accordingly, the subject matter of Article 3 *bis* does not extend to situations of armed conflict and therefore cannot be applied to the crash of Boeing MH17 that took place during the armed conflict in Ukraine.

b) The ICAO Council has no competence to resolve the issue raised by the Applicants because the ICAO Council is not a court, including one of a criminal nature

The International Court of Justice, in assessing the role of the ICAO Council in resolving disputes under Article 84 of the Chicago Convention, determined that the performance of this function by the Council “does not transform the ICAO Council into a judicial institution in the proper sense of that term”.¹⁰⁹ The Court emphasizes that this follows from the following features of the composition of the Council and the specificities of its working methods and competence:

*“The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body”.*¹¹⁰

The Court emphasizes that the resolution of disputes under the Convention is a function attributed to the Council in addition to its executive and administrative functions, in other words, not a core function.¹¹¹

¹⁰⁶ Ibid.

¹⁰⁷ *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, 2013 [Attachment 58].

¹⁰⁸ Michał Klenka, “Aviation safety: legal obligations of states and practice”, *Journal of Transportation Security*, Norwell, vol. 10 (December 2017), pp. 127–143 [Attachment 55].

¹⁰⁹ *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment, ICJ Reports 2020, p. 81, para. 60 (“The Court observes that it is difficult to apply the concept of ‘judicial propriety’ to the ICAO Council. The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, the Council was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term”) [Attachment 39].

¹¹⁰ Ibid.

¹¹¹ Ibid. [Translator’s note: This sentence, which was presented in the original Russian as part of the quotation, is not in fact part of the judgment being quoted, so we have taken it out of the quoted text.]

ICAO's mission statement on its purpose and mission is as follows: "To serve as the global forum of States for international civil aviation. ICAO develops policies and Standards, undertakes compliance audits, performs studies and analyses, provides assistance and builds aviation capacity through many other activities and the cooperation of its Member States and stakeholders."¹¹² No criminal court functions are involved.

To the question "Can ICAO legislate and adjudicate?" Ruwantissa Abeyratne, a well-known expert on international air law, answers with an emphatic "NO".¹¹³ "ICAO's empowerment by the Chicago Convention is clear in Article 44 of the Convention which restricts ICAO to 'aims and objectives' ... in developing the principles and techniques of air navigation and fostering the planning and development of air transport".¹¹⁴

Thus, it may be stated that the Council is not a judicial institution, but a mechanism for resolving disputes under the Chicago Convention. On this basis, it cannot be required to perform the functions vested in a criminal court – identifying the persons responsible for the crash of the Boeing MH17 in Ukraine; conducting the forensic analysis of primary evidence presented in criminal proceedings; and cross-examining witnesses – which would also be necessary to attribute one or another action to a particular State. The authority of the ICAO Council to carry out such tasks is not provided for in the Chicago Convention (including its Articles 54, 55 and 84), or in the Rules (including their Articles 6, 8 and 9).

Yet these are precisely the tasks that the Applicants are trying to foist on the Council. For example, the Applicants' Memorial includes these telling statements: "As the sole body with the initial jurisdiction to consider the circumstances in which Flight MH17 was shot down by a surface-to-air missile in breach of Article 3 *bis* and causing the loss of 298 lives, it is essential that the Council exercise that jurisdiction";¹¹⁵ "Based on the key facts summarised above, the Council should conclude that a Russian military crew fired the Buk-TELAR missile that shot down Flight MH17. That conclusion is inevitable if the Council accepts the evidence that the Buk-TELAR could not have been successfully operated to launch a missile and strike Flight MH17 without a fully trained crew, and that the DNR separatists did not have the necessary training. The involvement of the Russian commander of the Buk-TELAR also logically follows from the evidence that the final action of launching a missile from the Buk-TELAR cannot occur without a launch key that is held by the commander of a Buk-TELAR."¹¹⁶

And all this notwithstanding the fact that the exact scenario of what happened in the sky over Ukraine on 17 July 2014 is not known even to the Applicants themselves. Thus, paragraph 4.22 of the Australia-Netherlands Memorial notes:

"For the above reasons, the Russian Federation is responsible for breaching the prohibition aspect of Article 3 bis of the Chicago Convention. That is so whether (as it likely)

¹¹²Official ICAO website, URL: icao.int/about-icao/Council/Pages/vision-and-mission.aspx (accessed on 1 June 2022).

¹¹³ Ruwantissa Abeyratne, *Rulemaking in Air Transport*, Springer International Publishers, Switzerland, 2016, p. 81 [Attachment 56].

¹¹⁴ Ibid., p. 81.

¹¹⁵ Memorial of Australia and the Kingdom of the Netherlands, para. 1.16.

¹¹⁶ Memorial of Australia and the Kingdom of the Netherlands, para. 4.13.

the missile that brought down Flight MH17 was fired from the Buk-TELAR by its Russian military crew, or whether (as is not suggested by any evidence, but cannot be conclusively ruled out) DPR separatists participated in some way in the firing of the missile”.

It is not clear in principle how all these “probabilities” and “lack of evidence” may be used by the ICAO Council.

In the form of an Application and Memorial, the Applicants submitted to the Council a sample of evidence from the Joint Investigation Team’s ongoing investigation that was in the interests of the Applicants, and also of the legal proceedings in the Netherlands national court, the District Court of The Hague.

In doing so, the Applicants in their Memorial try to construct a “single line of evidence” for the sake of persuasiveness. If, however, we take a closer look at the sources of the various pieces of “evidence”, it turns out that the Memorial is a sort of filtered set of various judgments and findings reached by different institutions and establishments – the Dutch Safety Board, the Joint Investigation Team, the Netherlands Public Prosecution Service, the Netherlands national police force and the District Court of The Hague.

UN Security Council resolution 2166 (2014), adopted in response to the MH17 disaster on 21 July 2014, stressed “the need for a full, thorough and independent international investigation into the incident in accordance with international civil aviation guidelines, noting in this regard the crucial role played by the International Civil Aviation Organization (ICAO) in aircraft accident and incident investigations”. That said, however, ICAO did not play a key role in the investigation into the crash of flight MH17.

Despite Russia’s persistent demands, an objective, impartial and independent international investigation into the downing of the plane has never been organized. Russia was among the originators of UN Security Council resolution 2166 (2014), which set out requirements for the manner in which the investigation should be conducted.¹¹⁷ Russia was the only country to recall that resolution 2166 (2014) provided for the full assistance of the UN in the investigation. It was our suggestion that consideration should be given to the creation of a post of Special Representative of the UN Secretary-General to assist in ensuring the genuinely international and transparent nature of the investigation.¹¹⁸ Unfortunately, this proposal was not accepted. Nor was the UN Secretary-General’s mandate in resolution 2166 (2014), to submit comprehensive proposals to the Security Council on possible options for United Nations support for the investigation.¹¹⁹

¹¹⁷ See commentary by the spokesperson of the Russian Ministry of Foreign Affairs M. V. Zakharova on the Dutch Safety Board’s report on the technical investigation into the crash of the Malaysian Boeing over Ukraine of 13 October 2015; Russian Ministry of Foreign Affairs website, URL: www.mid.ru (accessed 1 June 2022) [Attachment 20].

¹¹⁸ See statement by Vladimir Churkin, Russia’s Permanent Representative to the United Nations, following the vote on the UN Security Council draft resolution establishing an international criminal tribunal for the Malaysia Airlines MH17 crash, New York, 29 July 2015 // Russian Ministry of Foreign Affairs website, URL www.mid.ru (accessed 1 June 2022) [Attachment 21].

¹¹⁹ Ibid.

Furthermore, we have repeatedly drawn attention to specific problems with the manner in which the technical investigation was conducted by the Dutch Safety Board.¹²⁰ The Dutch Safety Board, which led the technical investigation into the Boeing MH17 crash, ignored a number of substantive criticisms from the Russian side regarding the final report, which raises questions about the objectivity of the Board's work (a list of duly substantiated comments is provided, in particular, in a letter from the then Deputy Head of the Federal Air Transport Agency (Rosaviatsiya), Oleg G. Storchevoy, to the Dutch Safety Board of 14 January 2016.¹²¹). Essentially, Russia was excluded from substantive participation in the investigation (the nominal involvement of the Russian representative did not translate into his full participation in the investigation, much less into consideration of his opinion and the data provided by Russia).

On 7 August 2014, some of the affected States – Australia, Belgium, the Netherlands, Ukraine and later Malaysia – decided to establish a closed Joint Investigation Team to investigate the tragedy as part of the criminal proceedings. The team operates on the basis of the investigation standards adopted in the Kingdom of the Netherlands.¹²² The JIT is directed by the Netherlands Public Prosecution Service. Its purpose is “to determine who is responsible for the downing of flight MH17 and to collect evidence for the criminal prosecution of the perpetrators”.¹²³ The composition of the team and its working methods raise serious questions about its independence and impartiality. To date, the JIT's investigation has still not been concluded.

Despite requests made by the Russian Federation, its representatives are not included in the JIT.¹²⁴ The data and evidence provided by the Russian authorities in the framework of mutual legal assistance by the JIT are largely ignored and the requests of the Russian Federation to the Netherlands Public Prosecution Service are not carried out in any meaningful way.

Since March 2020, a national trial has been under way in the Netherlands against a group of individuals believed by Netherlands prosecutors to have been involved in the Boeing crash. This trial, which is based on the Joint Investigation Team's materials, is being conducted in accordance with the criminal procedure law of the Netherlands.¹²⁵ The Russian Federation is not a party to this trial.

Both processes can hardly be considered independent and impartial, but even these processes remain incomplete. Furthermore, it is clear that the criminal proceedings relating to the

¹²⁰ See commentary by Russian Ministry of Foreign Affairs spokesperson M.V. Zakharova on the Dutch Safety Board's report on the technical investigation into the Malaysian Boeing crash over Ukraine of 13 October 2015 // Russian Ministry of Foreign Affairs website; URL www.mid.ru (accessed 1 June 2022) [Attachment 20].

¹²¹ Letter from Oleg G. Storchevoy, Deputy Director of Rosaviatsiya, authorized representative of the Russian Federation in the investigation of flight MH17, to the Dutch Safety Board with information on new facts to be reflected in the final report on the MH17 crash dated 14 January 2016 [Attachment 27].

¹²² Website of the Netherlands Public Prosecution Service // <https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jut-mh17> (accessed 1 June 2022).

¹²³ Ibid.

¹²⁴ Letter from F.K.G. Westerbeke, Head Prosecutor of the National Prosecutors Office of the Netherlands of 9 September 2015, declining the request by the Russian Federation for the inclusion of Russian representatives in the Joint Investigation Team [Attachment 30].

¹²⁵ Website of the MH17 trial at the District Court of The Hague // <https://www.courtmh17.com/en/the-dutch-legal-system/criminal-proceedings-in-the-netherlands.html> (accessed 1 June 2022).

¹²⁵ Ibid.

MH17 case are being conducted by a group of States outside the procedures established by ICAO, for purposes unrelated to the work of ICAO and the Chicago Convention. These proceedings, accordingly, cannot fall within the competence of ICAO. The ICAO Council is not in possession of all the information obtained as a result of these criminal proceedings. ICAO Member States do not have equal access to all aspects of the criminal proceedings led by the Netherlands.

In any event, to hand down a decision on a case, the ICAO Council is not able to take as a given the materials of an external investigation and would have to make its own appraisal of all the evidence, which, as stated above, is a task beyond its competence. Thus, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice stated:

*“The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance later in this section of the Judgment.”*¹²⁶

Even the competence of the International Court of Justice, which is the principal judicial organ of the UN, to determine responsibility in a case requiring the establishment of responsibility for crimes has been challenged. Although the Court ultimately decided that it could consider the merits of the case, it did so because of two circumstances – it applied the “standard of proof appropriate to charges of exceptional gravity”.¹²⁷ Furthermore, in this case, the Court had before it the judgments of the International Criminal Tribunal for the Former Yugoslavia,¹²⁸ a tribunal established by the UN Security Council through its resolution 827 (1993).

In the present case, the ICAO Council is not a court and has neither the competence nor the capacity to perform the tasks of a criminal tribunal. On this basis, the ICAO Council cannot apply the necessary standards of proof. Moreover, it does not have at its disposal the rulings of an appropriate independent criminal tribunal with recognized competence in the case.

It should be borne in mind that the ICAO Council has never before assumed such a function when dealing with disputes under Article 84 of the Chicago Convention. There is no legal basis for establishing a new practice in this case. Added to which, such a precedent would have a negative impact on the objectives of ICAO.

This argument is supported by the fact that the investigations conducted by States pursuant to the rules and under the auspices of ICAO are technical in nature and not aimed at establishing guilt.

¹²⁶ *On the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports, 2007, p. 43, para. 212 [Attachment 40].

¹²⁷ *Ibid.*, para. 209 (“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts”).

¹²⁸ *Ibid.* para. 216.

The incident investigation procedure under Article 26 of the Chicago Convention is laid out in Annex 13¹²⁹ to the Convention.

Thus, paragraph 3.1 of Annex 13, “Aircraft Accident and Incident Investigation”, to the Chicago Convention (Annex 13) states that “the sole objective of the investigation of an aviation accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability”.

Chapter 1, “Definitions”, of Annex 13 defines “Causes” as: “Actions, omissions, events, conditions, or a combination thereof, which led to the accident or incident. The identification of causes does not imply the assignment of fault or the determination of administrative, civil or criminal liability”. Paragraph 5.4.1 of Annex 13 establishes that any investigation conducted in accordance with the provisions of this Annex shall be separate from any judicial or administrative proceedings to apportion blame or liability.

In accordance with Standard 6.5 of Annex 13 to the Chicago Convention, in the interest of preventing aviation accidents or incidents, the final report of the investigation must be made publicly available.

The report “MH17 Crash”¹³⁰ with annexes, published by the Netherlands on 13 October 2015 on the official website of the Dutch Safety Board, is the only official investigative report of the MH17 crash available to all ICAO Member States, and used “in order that international civil aviation may be developed in a safe and orderly manner”, as provided for in the preamble and paragraph (a) of Article 44 of the Chicago Convention.

ICAO itself, represented by the Council, can also conduct its own investigations, as established in Article 55 (e) of the Chicago Convention.¹³¹ There is a practice of the ICAO Council conducting investigations, but, as with the Chicago Convention Annex 13 investigations, these are not intended to apportion blame or liability. Such an investigation, for example, was conducted in the case of the missile strike over the Persian Gulf on 3 July 1988 of Iran Air flight 655 by the USS Vincennes, with the objective “to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft.”¹³² The investigation into the crash of the Korean Airlines Boeing (flight KE007) on 1 September 1983 was no exception, undertaken to “determine the facts and technical aspects relating to the flight and destruction of the aircraft”¹³³. In other words, these were only technical investigations in all cases. Notably, in

¹²⁹ ICAO: Annex 13 to the Convention on International Civil Aviation: “Investigation of Aviation Accidents and Incidents”, tenth edition, July 2010, incorporating Amendment 14.

¹³⁰ Dutch Safety Board website // <https://www.onderzoeksraad.nl/en/page/3546/crash-mh17-17-july-2014> (accessed 1 June 2022).

¹³¹ “The Council may: ... Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.”

¹³² Paragraph 6 of the ICAO Council decision, adopted at its extraordinary session held on 13 and 14 July 1988, stipulated: “The Council directed the Secretary-General to institute an immediate fact-finding investigation to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft.” **[Attachment 5]**

¹³³ Paragraph 1 of the ICAO Council resolution concerning Korean Airlines flight KE 007, adopted on 16 September 1983, states: “The Council ... directs the Secretary-General to institute an investigation to determine the facts and

the case in question, ICAO did not even conduct such an investigation; the technical investigation was conducted by a group of States.

It is telling that, in 2014, the then Secretary General of ICAO, Mr R. Benjamin, referring to the technical investigation into Boeing MH17, noted:

*“as per Annex 13, the sole objective of the investigation of an accident or incident was related to the prevention of accidents and incidents, and not the apportionment of blame or liability. In addition, any investigation conducted in accordance with Annex 13 provisions was to be separate from any judicial or administrative proceedings to apportion blame or liability.”*¹³⁴

Comparable information was reflected in paragraph 3.1 of the Agreement between the National Bureau of Air Accident and Incidents Investigation with Civil Aircraft (NBAAIL) of Ukraine and the Dutch Safety Board of the Netherlands on the delegation of investigation in respect of aircraft accident involving Boeing 777-200, registration: 9M-MRD “Malaysia Airlines” flight MH17 of 23 July 2014:

*“The purpose of investigating accidents or incidents in accordance with Annex 13 is the prevention of accidents and incidents. It is not the purpose of such an investigation to apportion blame or liability.”*¹³⁵

It is important to be clear and keep in mind at all times the distinction between technical and criminal investigations that are conducted in aviation accident cases. As shown above, ICAO can only relate to technical investigations, regardless in which format and under whose authority they may be conducted.

Assuming that the ICAO Council were to undertake the task of apportioning liability in this process, it would significantly undermine the entire current system of ICAO’s technically-oriented investigations. This would have a direct impact on the effectiveness of future investigations and, consequently, on flight safety. States would be deterred from fully cooperating with ICAO for fear of being held liable for something or other. We are convinced that this would not be in the interests of ICAO and all international civil aviation.

Moreover, the ICAO Council has never, pursuant to Article 84 of the Chicago Convention, considered any cases of the crash of a civil aircraft in accordance with Article 3 *bis*, much less addressed issues of liability for an alleged breach of that Article, which yet again confirms that the ICAO Council lacks competence in the present case. It is indicative that, since the establishment of ICAO in 1944, there have been at least 30 civil aircraft accidents in various regions of the world which have been caused by external impacts (rocket attacks, explosive devices on board, ram

technical aspects relating to the flight and destruction of the aircraft and to provide an interim report to the Council within 30 days of the adoption of this Resolution and a complete during the 110th session of the Council”. **[Attachment 6]**

¹³⁴ C-MIN 203/1, ICAO Council – 203rd session, summary minutes of the first meeting, 27 October 2014, p. 7, para. 13 **[Attachment 7]**.

¹³⁵ Appendix D to the document “MH17. About the investigation”. Dutch Safety Board, October 2015 **[Attachment 33]**.

attacks, etc.). Some of these occurred after the entry into force of Article 3 *bis*.¹³⁶ No fewer than 11 civil aircraft accidents occurred as a result of military activities potentially hazardous for flight operations, with a death toll of 1,352 victims.¹³⁷ A corresponding fact sheet on civil aircraft crashes is annexed.¹³⁸

Thus, the ICAO Council has no competence to decide the issue raised by the Applicants because the ICAO Council is not a court, still less one of a criminal nature. Otherwise, it would contravene the basic principle that States should be subject to the jurisdiction of the ICAO Council only to the extent that they have consented to it.¹³⁹

c) The application by Australia and the Kingdom of the Netherlands cannot be considered because of the absence in the proceedings of States whose direct interests are affected by the Application (the “*Monetary Gold*” or “indispensable party” principle) – Ukraine is not a party to these proceedings

In the *Monetary Gold* case, the International Court of Justice determined that a case could not be heard on the merits without the consent of the State which has a direct interest in the case, whose rights and obligations would be prejudged by the relevant decision.¹⁴⁰

The Applicants, two of the twelve affected States, are demanding a Council decision that will define the rights and obligations of all the States affected by the disaster.

The crash of Boeing MH17 took place on Ukrainian territory. Ukraine was responsible for the relevant part of the airspace. Ukraine decided not to close the airspace even though the armed conflict on its territory was in an active phase.¹⁴¹ The report of the Dutch Safety Board states that,

¹³⁶ The Protocol concerning modifications to the 1984 Convention on International Civil Aviation entered into force on 1 October 1998.

¹³⁷ Working Paper for the 39th Session of the ICAO Assembly: “Analysis of the results of having implemented the Conflict Zone Information Repository (CZIR) in light of the Code of Conduct for Sharing and Using Safety Information” – ICAO Doc. A39-WP376, 8 September 2016 [Error! Reference source not found.].

¹³⁸ [Attachment 61]

¹³⁹ *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Declaration of Judge Gevorgian, Judgment, ICJ Reports 2020, p. 162, para. 11 (“The basic principle remains that States should be subjected to the jurisdiction of the Council only to the extent they have consented to it. As the Court has observed with respect to its own competence, ‘the Court has jurisdiction in respect of States only to the extent that they have consented thereto’, and when consent is expressed in a compromissory clause in an international agreement, the terms of the clause ‘must be regarded as constituting the limits’ on that consent”) [Attachment 42].

¹⁴⁰ “In the determination of these questions – questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy – only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania. The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent. (Attachment 41. *Case concerning monetary gold taken out of Rome in 1943* (Preliminary question), Judgment of June 15th, 1954, ICJ Reports 1954, p. 19 [at p. 32] [Attachment 41].

¹⁴¹ Ukraine’s failure to close its airspace was one of the grounds for the Russian Federation’s lodging of an inter-State application with the European Court of Human Rights against Ukraine on 22 July 2021 (*Russia v. Ukraine*, No. 36958/21).

during the armed conflict in the south-east of Ukraine,* the initiative for taking measures related to the airspace, based on security analyses, originated from the military authorities, and decisions related to the airspace were primarily taken from the perspective of the military's interests, in which a potential risk to civil aviation was not the subject of any explicit consideration.¹⁴²

As stated in section 2 above in connection with the crash of flight MH17, the Secretary General of ICAO reminded¹⁴³ States of their responsibility to ensure the safety of flights over their sovereign territory and proposed “actions required”, which are clearly addressed to States to regulate air traffic over their territory. In the present case the main addressee of these measures is Ukraine.

The Ukrainian Armed Forces actively used weaponry of a corresponding type at the scene. On 16 July 2014, the Central Television and Radio Studio of the Ukrainian Defence Ministry disseminated information from which it is evident that Ukraine had introduced Buk anti-aircraft missile systems into the conflict zone to control the airspace over the anti-terrorist operational zone in the eastern part of Ukraine.¹⁴⁴ Thus, Ukraine was planning to use not only military aircraft in Donbas, but also air defence equipment capable of destroying aircraft flying at high altitudes.

Despite this role in the disaster, Ukraine is not a party to these proceedings. A decision by the ICAO Council in this instance would prejudge Ukraine's lack of responsibility, and its rights and obligations would be substantially affected. Moreover, it would be impossible to establish the truth without the full cooperation of Ukraine.

In addition, not all the affected States are parties to the 1984 Protocol amending the Convention on International Civil Aviation. The rights and obligations of these States will also be substantially affected by the decision.

d) Applicants have not complied with the requirement to negotiate

Pursuant to Article 84 of the Chicago Convention, “If any difference between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council”. Under Article 2 (g) of the Rules, a memorial by a contracting State must contain a “statement that negotiations to settle the disagreement had taken place between the parties but were not successful”.

Thus, the negotiation stage is a mandatory requirement prior to the submission of a dispute to the ICAO Council for resolution. This condition has not been met by the Applicants.

* *Translator's note:* The report of the Dutch Safety Board actually refers to “the eastern part of Ukraine”.

¹⁴² Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17* (English version), 13 October 2015, p. 205, para. 6.6.1 [Attachment 32].

¹⁴³ See ICAO Secretary General's letter Ref AN 13/4.2-14/59 of 24 July 2014 on aviation safety and security of civil aircraft flying in conflict-affected airspace [Attachment 29].

¹⁴⁴ <https://www.youtube.com/watch?v=Q3MomxNHnUA>, snippet between 4:48 and 4:54.

The Applicants argue that negotiations were conducted pursuant to Article 84 of the Chicago Convention (Section III “C” of the Memorial) and its subject matter was the “breach of Article 3 *bis* of the Chicago Convention”.¹⁴⁵

As the International Court of Justice has pointed out, “a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”.¹⁴⁶ Moreover, a dispute presupposes that there is a divergence of legal views between the parties on definite points,¹⁴⁷ and the parties themselves must express clearly opposing views on the fulfilment or non-fulfilment of specific contractual obligations.¹⁴⁸

In 2019, a consultation between Australia, the Netherlands and Russia took place in Vienna, initiated by Australia and the Netherlands (three rounds), but did not in any way address issues of the interpretation or application of Article 3 *bis* of the Chicago Convention.

Here it should be clarified that the Russian Federation was not permitted to participate in the Joint Investigation Team,¹⁴⁹ so Russia entered consultations in Vienna to cooperate in achieving the goals and objectives of UN Security Council resolution 2166 (2014) and to establish, through joint efforts, the true causes of the crash, rather than to discuss issues of the interpretation and application of Article 3 *bis* of the Chicago Convention. The consultations were planned to cover the whole range of issues related to the investigation of the “MH17 case”, including the purpose of conducting a professional discussion directly during these consultations on, among other matters, the responsibility of the State in whose airspace the crash occurred, in addition to the data provided by the Russian Federation to the Joint Investigation Team, as repeatedly noted in the exchange of notes.¹⁵⁰

¹⁴⁵ Memorial of Australia and the Kingdom of the Netherlands, para. 3.10.

¹⁴⁶ See *The Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, Permanent Court of International Justice, Series A, No. 2, p. 11 [Attachment 43]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. Judgment of 1 April 2011, ICJ Reports 2011, p. 70 [at p. 84] [Attachment 44].

¹⁴⁷ *Request for Interpretation of the Judgment of November the 20th, 1950, in the Asylum Case (Colombia v. Peru)*. Judgment of November 27th, 1950: ICJ Reports 1950 p. 395 [at p. 403] [Attachment 45].

¹⁴⁸ *Interpretation of peace treaties with Bulgaria, Hungary and Romania*. Advisory Opinion of 30 March 1950 (first phase). International Court of Justice. ICJ Reports, 1950, p. 65 [at p. 74] (“There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.”) [Attachment 46].

¹⁴⁹ Letter dated 9 September 2015 from F.K.G. Westerbeke, Head Prosecutor of the National Prosecutors Office of the Netherlands [Attachment 30].

¹⁵⁰ Russian Ministry of Foreign Affairs Note No. 9056/1 edn dated 8 August 2018 stated: “The Russian party, based on the principles of sovereign equality of States and international cooperation, confirms its readiness to consult with the Netherlands and Australian Parties – without ultimatums or unfounded accusations – to discuss constructively and in good faith the whole range of issues related to the MH17 investigation and considers it necessary to discuss professionally, among other matters, the issue of State responsibility in the case of MH17” [Attachment 10].

Russian Ministry of Foreign Affairs Note No. 11426/1 edn of 15 October 2018 stated: “The Russian party, referring to note No. 9056/1edn of 8 August 2018, takes note of the willingness of the Embassies [of Australia and the Kingdom of the Netherlands] to hold consultations in Vienna, Austria, in the fourth quarter of 2018 on the full range of issues related to the investigation of the MH17 case, including with a view to discussing professionally directly during these consultations, among other matters, the issue of the responsibility of the state in whose airspace the crash occurred, as well as the data transmitted by the Russian Federation to the Joint Investigation Team” [Attachment 11].

This also follows from the consultation agenda finally agreed upon by the parties through the diplomatic channel following the first round of tripartite consultations (4–5 March 2019). Thus, a joint note from the embassies of Australia and the Netherlands in Moscow, dated 20 March 2019, No 102/19 MOS-033/2019,¹⁵¹ reported that “Australia and the Netherlands look forward to confirmation that the final draft agenda setting out further work in this process, put forward by the delegation of the Russian Federation on 5 March 2019, has the endorsement of the Government of the Russian Federation”. The response from the Russian Ministry of Foreign Affairs, in its note No. 5768/1edn of 4 June 2019,¹⁵² reported: “In accordance with the agreements reached during the tripartite consultations on the issues related to the crash of flight MH17, held on 4 and 5 March 2019 in Austria, the Russian party conducted inter-agency consultations on the draft agenda for further consultations and confirms the acceptability of that agenda in the reading articulated by the Russian delegation on 5 March 2019, namely: 1. Discussion of civil aircraft crashes; 2. Discussion of all the circumstances surrounding the crash of flight MH17; 3. Elements for a mutually acceptable outcome based on the discussion on the preceding items.” The agenda is also reflected in the Applicants’ Memorial (para. 3.14 of the Memorial).

In view of these objectives set for the consultations, the delegation of the Russian Federation was led by the Office of the Prosecutor General of the Russian Federation because, as already noted, the intention was to give priority attention to all the materials that had been handed over by the Russian authorities to the competent authorities of the Kingdom of the Netherlands in the framework of the provision of legal assistance in the criminal case.

Three rounds of consultations took place during 2019, during which it was only possible to cover the first agenda item, “Discussion of civil aircraft crashes”. The consultations were limited to a discussion of specific incidents and factual material, some relevant to the MH17 crash and some unrelated, as will be clearly demonstrated later in the text.

In his opening statement on 23 July 2019, Mr D. E. Grunis, Head of the Russian delegation to the second round (23–24 July 2019) of consultations in Vienna, stated, among other things, the following:

“We recall that the Russian party has agreed to participate in these consultations in order to discuss the whole range of issues connected with the investigation into the crash of flight MH17, including the responsibility of the State that failed to close its airspace over an area of active hostilities. We are convinced that only truly professional dialogue and a comprehensive, thorough, unbiased and depoliticized technical and criminal procedural investigation into the crash, based on facts and irrefutable evidence, will make it possible

Russian Ministry of Foreign Affairs Note No. 102/1edn of 18 January 2019 stated: “The Russian party, referring to its notes <...>, confirms its agreement in principle to hold consultations on the entire range of issues related to the investigation of the MH17 case, including for the purpose of professional discussions directly during these consultations, among other matters, on the responsibility of the State in whose airspace the crash occurred, as well as the data transmitted by the Russian Federation to the Joint Investigation Team” [Attachment 12].

¹⁵¹ [Attachment 13].

¹⁵² [Attachment 14].

*to definitively establish the cause of what happened and get to the truth. This is exactly what United Nations Security Council resolution 2166 says.*¹⁵³

In this same statement, the head of the Russian delegation clearly outlined the range of issues that had been prepared by the Russian authorities, in accordance with the agreed agenda, for presentation and further discussion:

*“...We are ready to share our experience of investigating a number of incidents in which Russian experts have been involved. We will give a detailed account of the circumstances of the crashes and the methods and means used in investigating their causes, which will allow us to achieve quality results and establish an objective picture of what happened. We also want to give a legal assessment of the conclusions arising from the results of such investigations. To this end, we have filled the ranks of our delegation with experts who will not only make presentations on specific aircraft accidents, but are also available to comment on them professionally, supplement them and answer any questions that you may have.”*¹⁵⁴

In the second round of consultations, the parties presented a number of informational reports.

The Russian delegation made the following presentations: “Overview of civil aircraft accidents”; “Aircraft accident involving Tu-154M RA-85693, flight SBI-1812, on 4 October 2001 over the Black Sea”; “Investigation by the Investigation Committee of the Russian Federation of criminal cases of aircraft accidents”. In their closing statement at the end of the second round, the delegation of Australia and the Netherlands thanked the delegation of the Russian Federation for its presentations and acknowledged its constructive approach to the discussions.¹⁵⁵

During the third round of tripartite consultations, delegations exchanged questions and comments on the presentations made during the second round. The Russian delegation also touched upon topics such as the impact of armed conflict on civil aviation safety and airspace closure issues and their impact on aircraft crashes.

The fourth round of consultations, which were delayed for a long time by the constraints of the COVID-19 pandemic, was meant to wrap up the discussion of agenda item 1 (“Discussion of civil aircraft crashes”) and to begin discussion of agenda item 2 (“Discussion of all the circumstances surrounding the crash of flight MH17”). It was planned to start agenda item 2 by considering various aspects of the technical investigation into the causes of the crash of flight MH17.¹⁵⁶

¹⁵³ [Attachment 17].

¹⁵⁴ Ibid.

¹⁵⁵ Closing Statement Joint Australia and the Netherlands, 24 July 2019, para. 2 [Attachment 18]

¹⁵⁶ Note by the Russian Ministry of Foreign Affairs dated 25 February 2020, No. 1886/1edn (“... After discussing the aforementioned issues the Russian party would be ready to proceed with the discussion under Item 2 ‘Discussion of all the circumstances connected with the crash of flight MH17’ (including, but not limited to, the issue of responsibility of the State in whose airspace the crash occurred), starting from the consideration of various aspects of the technical investigation into the cause of flight MH17”) [Attachment 15]

On 10 July 2020, however, the Netherlands Government, without even waiting for the interim outcome of the tripartite consultations, filed an inter-State application against the Russian Federation with the European Court of Human Rights concerning the Malaysian Boeing crash. This unilateral move moved the issue into the domain of judicial proceedings and rendered pointless any further work in the framework of consultations. By Note No. 9266/1 edn, dated 15 October 2020,¹⁵⁷ the Russian Ministry of Foreign Affairs notified the Netherlands and Australian parties that it could not continue its participation in the tripartite consultations in Vienna. The fourth round of consultations therefore did not take place. As a result, the parties never got around to discussing agenda item 2.

The Russian Federation's position on discontinuing the consultations was set out in detail in an official statement by the Russian Ministry of Foreign Affairs dated 15 October 2020. It is appropriate to quote in full the content of this statement:

“As you know, in July the Netherlands filed an inter-State application with the European Court of Human Rights (ECHR) against Russia in connection with the crash of the 2014 Boeing 777 Malaysian Airlines passenger aircraft (flight MH17). We regard this step as yet another blow to Russian-Netherlands relations and a demonstration by The Hague of its firm intention to continue, in defiance of common sense, the misguided path of unilaterally attributing responsibility for the incident in the skies above Donbas to Russia.

From day one, the Netherlands has stuck to a single version of what happened and promoted it in both the technical investigation of the Dutch Safety Board (DSB) and the criminal investigation by the Joint Investigation Team (JIT). The inevitable results is that both investigations have been biased, superficial and politicized. Everything possible has been done to reinforce these precipitate accusations against Russia.

For its part, our country has, from the outset, advocated a full, thorough and independent investigation in accordance with the provisions of United Nations Security Council resolution 2166 and has repeatedly pointed out the shortcomings in the investigations into the plane crash and noted their incompatibility with the criteria set forth in the resolution. Russia has been open to contacts with the investigation, offered comprehensive assistance and handed over a significant amount of valuable material that shed light on what had happened and refuted many of the investigation's 'findings'. Some of the data provided by Russia were specifically declassified for this purpose.

Furthermore, when we agreed in 2018 to hold tripartite consultations with Australia and the Netherlands on the full range of issues related to the circumstances of the crash of flight MH17, we assumed that such consultations would help to establish, on the basis of facts, the true causes of the crash of flight MH17. However, it seems that Australia and the Netherlands have made no particular effort to get to the bottom of what really happened in the summer of 2014, but have aimed instead at getting Russia to admit guilt and obtaining compensation for the relatives of the victims.

In the end, without even waiting for the interim results of the consultations – and only three rounds have taken place – The Hague has chosen a different path, filing an inter-State application against Russia with the European Court of Human Rights. Such unfriendly actions by the Netherlands render it pointless to continue the trilateral

¹⁵⁷ [Attachment 16]

consultations and for us to participate in them. Responsibility for the failure of the tripartite consultations, therefore, lies entirely with the authorities in The Hague.

We believe that by ignoring any arguments and our willingness to engage in dialogue, the Netherlands is pursuing purely opportunistic political interests, shamelessly hiding behind the need to protect the rights of the relatives of the victims of the plane crash.

For our part, while remaining committed to the provisions of United Nations Security Council resolution 2166, we intend to continue to engage with the competent Netherlands authorities, including in investigating Ukraine's failure to close its airspace to civilian aircraft over the area of armed conflict over Donbas, but we will do so in other formats.”¹⁵⁸ .

Thus, before they were brought to an end by the unilateral actions of the Netherlands, the consultations had been of a general nature and had not reached the stage of discussing the crash of the Boeing MH17, much less the interpretation and application of Article 3 *bis* in this regard, and were assessed by the parties, including the Netherlands, as constructive. It is therefore not clear why the Netherlands decided to cut them short by referring the case to a court – the ECHR.

As the International Court of Justice has established, “the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation ... they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.”¹⁵⁹ As the Permanent Court of International Justice has emphasised, the obligation to negotiate includes “not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements,” even if the obligation to negotiate does not mean an obligation to reach an agreement.¹⁶⁰

The consultations demonstrated the good faith of the Russian Federation in discussing the whole spectrum of issues. The Russian delegation was strictly guided by the agenda and by the general subject matter of the consultation, as formulated in the aforementioned notes in response from the Russian Ministry of Foreign Affairs to the Australian and Netherlands embassies in Moscow.

It is noteworthy that one of the Applicants, the Kingdom of the Netherlands, had already once been a party to an ICAO dispute settlement procedure under Article 84 of the Chicago Convention in the matter: *United States and 15 European States (2000)* (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom). The 15 European States, including the Netherlands, had a radically different position on the degree of sufficiency and modalities of the negotiations from that which they hold now.

¹⁵⁸ [Attachment 31]

¹⁵⁹ *North Sea Continental Shelf*, Judgment of 20 February 1969, Judgments, ICJ Reports, 1969, p. 3, para. 85 [at p. 47] [Attachment 47].

¹⁶⁰ *Railway Traffic between Lithuania and Poland*, Advisory Opinion, 1931, Permanent Court of International Justice (Ser. A/B) No. 42, p. 116 [Attachment 48]. [Translator's note: The last part of this phrase, beginning “even if”, which was included in the quotation in the Russian text, is not in fact part of the Advisory Opinion, so we have moved the quotation marks.]

For example, the representative of the 15 European States argued that the US claims were inadmissible because negotiations on points of law that the United States raised for the first time in its Application had not taken place before it had been filed.¹⁶¹ The representative of the 15 European States in the case noted: "... although there had of course been prior negotiations, these had been political negotiations ... The United States had never engaged in a legal debate on why the Regulation could be considered contrary to the Convention or how it could be amended. The text of Article 84 was clear. The prior negotiations must relate to the disagreement about interpretation or application of the Convention. Negotiations to find a political solution – however laudable and desirable – did not serve the same function, which was to define and narrow the legal issues before they were made the subject of a litigation."¹⁶² In further arguing his position, the representative of the 15 European States argued that "the United States had never articulated issues of interpretation or application of the Convention. The rationale for requiring negotiations to define the legal issues in dispute was precisely to distinguish legal from political disputes."¹⁶³

In the recent decision in the case of the *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), the International Court of Justice indicated that a State must make a genuine attempt to negotiate with another State party to the dispute and only if it fails or stalls can it be said that this precondition has been satisfied.¹⁶⁴ Not only did the applicants not make a genuine attempt to negotiate within the meaning of Article 84 of the Chicago Convention, but they did not even take the consultation to the stage of discussing the specific situation of the crash of Boeing MH17, much less the interpretation and application of Article 3 *bis* of the Chicago Convention.

As is well known, the most important criterion for fulfilling the condition for negotiation is that the negotiation must relate to the subject matter of the dispute.¹⁶⁵ The controversy between the parties must be of practical relevance to them, the disagreement must not be of a purely theoretical nature ("It is not the task of the Centre to clarify legal questions *in abstracto*"¹⁶⁶).

¹⁶¹ C-MIN 161/4, ICAO Council – 161st session, summary minutes of the fourth meeting, 15 November 2000, p. 39, para 8. [Attachment 9]

¹⁶² C-MIN 161/4, ICAO Council – 161st session, summary record of the fourth meeting, 15 November 2000, p. 10. 40, para 10. [Attachment 9]

¹⁶³ C-MIN 161/4, ICAO Council – 161st session, summary record of the fourth meeting, 15 November 2000, p. 45. 45, para 35. [Attachment 9]

¹⁶⁴ *Appeal relating to the jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment of 14 July 2020, Judgments, ICJ Reports 2020, p. 110, para. 89 ("Prior to filing an application under Article 84, a contracting State must make a genuine attempt to negotiate with the other concerned State or States. If the negotiation or attempted negotiations reach a point of futility or deadlock, the disagreement 'cannot be settled by negotiation' and the precondition to the jurisdiction of the ICAO Council is satisfied") [Attachment 39].

¹⁶⁵ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*. Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 3 [at pp. 40-41] [Attachment 49].

¹⁶⁶ International Centre for Settlement of Investment Disputes, *AES Corporation v. Argentina*, Decision on Jurisdiction of 26 April 2005, para. 43 [Attachment 60].

The applicants failed to provide sufficient evidence of a dispute between the consulted parties and of effective negotiation within the meaning of the Permanent Court of International Justice and the UN International Court of Justice.

As demonstrated above, the agenda of the tripartite consultations did not include the Chicago Convention. It cannot be ascertained which fact or legal rule, covered by the international treaties in force between Russia, Australia and the Netherlands, in particular the Chicago Convention, involves a contradiction that would have been discussed in the tripartite consultations. Within their framework, Australia and the Netherlands made only general statements, which do not meet the criterion of legal certainty required to state a contradiction and for the Russian delegation to be sufficiently informed of its existence, much less of its content and limits. On 4 March 2019, in the first round of consultations in Vienna, the delegations of Australia and the Netherlands said: “We only asked Russia to enter into negotiations when we were satisfied that we had grounds for such a request. If you want, we are ready to give you our conclusions at a follow-up meeting”. However, no conclusions were subsequently announced. The fact that the Russian Federation took part in the general consultations cannot be regarded as proof that negotiations were held under international law and Article 84 of the Chicago Convention.

Thus, the Applicants failed to comply with the requirement to negotiate. The tripartite consultations that took place could not be regarded as the required negotiations, as they did not deal with any disagreements between Australia, the Netherlands and the Russian Federation concerning the interpretation or application of the Chicago Convention. Moreover, through the fault of the Netherlands authorities, the consultations did not even manage to start discussing the technical investigation into the crash of the Boeing MH17.

e) The actions of the ICAO Council sought by the Applicants are inconsistent with the Council’s existing authority under the Chicago Convention

As demonstrated above in paragraphs (a)–(d) of this section of the preliminary objections, the ICAO Council has no competence to consider the matter. In any event, the actions of the ICAO Council requested by the Applicants¹⁶⁷ are not consistent with the Council’s existing powers under the Chicago Convention, in particular its Article 84. A clear distinction must be made between the course of action desired by the Applicants and the dispute resolution procedure under Article 84 of the Convention.

The Applicants’ requests to the ICAO Council are divided by them into two parts.

The first part requests: “(a) a declaration of non-conformity by the Russian Federation with its obligations under Article 3 *bis* of the Chicago Convention; (b) an order that the Applicants and the Russian Federation immediately enter into good faith negotiations to resolve expeditiously the matters of full reparation for the injury caused by the Russian Federation’s breach of Article 3 *bis*, including the appropriate forms of reparation, and other legal consequences arising from that

¹⁶⁷ Application by Australia and the Kingdom of the Netherlands to the ICAO Council, 14 March 2022, paras. 6–7; Memorial of Australia and the Kingdom of the Netherlands, paras. 5.1, 5.2.

breach; and (c) an order that the Applicants and the Russian Federation report to the Council on the progress of the negotiations at each session of the Council”.

Where point (a) of the Applicants’ request for a “declaration of non-conformity” is concerned, Australia and the Netherlands state that “the power of the Council ... to ‘decide’ disagreements ... necessarily includes the making of decisions on whether the conduct of a disputing Party conforms or does not conform to the Convention.”¹⁶⁸ This assertion is untrue for the following reasons.

The applicants rely in support of their position on cases “with other international dispute settlement bodies”, including the International Court of Justice.¹⁶⁹ This reference is unsubstantiated, since the ICAO Council is not a judicial institution, as demonstrated in paragraph 3 (b) of these preliminary objections and previously established by the International Court of Justice itself.¹⁷⁰ The ICAO Council is entirely *sui generis* as a dispute resolution body and comparisons with other bodies cannot be drawn here.

Moreover, according to the Applicants, “the Council’s ability to make such a declaration is confirmed by the practice of contracting States that have previously brought disagreements to the Council under Article 84.”¹⁷¹ In this context, it should be noted that, for one reason or another, none of the disagreements previously submitted to the ICAO Council have been resolved by it on the merits. It is therefore hardly appropriate in this instance to talk about the practice of the ICAO Council when referring essentially only to positions put forward by States which have not been properly evaluated by the ICAO Council.

In addition, the Applicants refer to the 2001 Articles on State Responsibility.¹⁷² This may suggest that Australia and the Netherlands are not simply seeking a “declaration of non-conformity” from the ICAO Council, but rather a decision to establish that an “internationally wrongful act has been committed and international responsibility has been established”, which is what the Articles on State Responsibility are concerned with. In other words, whether or not the conduct of a party to the dispute constitutes compliance with the Convention is really a question of international responsibility, regardless of the obfuscated manner in which the Applicants may have tried to frame their request to the Council. The Articles on State Responsibility cannot be

¹⁶⁸ Memorial of Australia and the Kingdom of the Netherlands, para. 5.4 .

¹⁶⁹ Memorial of Australia and the Kingdom of the Netherlands, para. 5.4.

¹⁷⁰ *Appeal relating to the jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment, ICJ Reports 2020, p. 81, at p. 104, para. 60 (“The Court observes that it is difficult to apply the concept of ‘judicial propriety’ to the ICAO Council. The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, the Council was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term.”). [Attachment 39]

¹⁷¹ Memorial of Australia and the Kingdom of the Netherlands, para. 5.4.

¹⁷² *Ibid.*

used as an appropriate source in this case, including for the reason that the ICAO Council is not a court and does not decide on questions of international responsibility.

The following must be kept in mind, in order to establish conclusively what actions the ICAO Council could have taken under Article 84 of the Chicago Convention. As noted in the *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation*, the ICAO Council in the exercise of its functions under Article 84 of the Chicago Convention resolves matters relating to civil aviation and, therefore, to the interpretation or application of the Chicago Convention.¹⁷³ Furthermore, the commentary on the Chicago Convention by Ruwantissa Abeyratne emphasizes that, in the incidents considered by the ICAO Council [under Article 84 of the Chicago Convention], the Council limited the scope of its work to technical issues applicable to the principles embodied in the Chicago Convention.¹⁷⁴ As International Court of Justice Judge F. Berman accurately observed, “Rather than conceiving of the Council as endowed with ‘jurisdiction’ of any kind to settle disputes between particular member States, this reading of the Convention would see the Council as carrying the high administrative function, drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings as to what the Convention means and requires”.¹⁷⁵

It can thus be concluded that ICAO’s competence does not include the establishment of international liability. The ICAO Council could, on the basis of its actual competence, address civil aviation-related issues aimed at determining, on a case-by-case basis, what conduct by the affected parties would accord most closely with the provisions of the Chicago Convention, in other words, how States should behave in a particular situation under the Chicago Convention.

Furthermore, paragraphs (b) and (c) of the first part of the Applicants’ requests to the ICAO Council cannot be supported by the ICAO Council, as these matters also fall outside the Council’s authority.

¹⁷³ *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment, ICJ Reports 2020, p. 81, at p. 27, para. 61 (“In any event, the integrity of the Council’s dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction under Article 84 of the Chicago Convention [Attachment 39].

¹⁷⁴ Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary*, 2014, p. 665 (“One of the emergent features of the ICAO Council which became clear at its deliberations was the Council’s resolve to address its deliberations to purely technical issues pertaining to the [Iran Air 1988] incident, while stringently avoiding political issues and diplomatic pitfalls. This is certainly true of all incidents discussed above, where the Council restricted its scope to technical issues as applicable to the principles embodied in the Chicago Convention”) [Attachment 52].

¹⁷⁵ *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), separate opinion of Judge *ad hoc* Berman, Judgment, ICJ Reports 2020, para. 10 (“For all of the above reasons and more, it seems to me that there is another reading of Article 84, in its context within the Chicago Convention as a whole, including specifically the other powers and functions to be carried out by the Council. Rather than conceiving of the Council as endowed with ‘jurisdiction’ of any kind to settle disputes between particular member States, this reading of the Convention would see the Council as carrying the high administrative function, drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings as to what the Convention means and requires, whether or not such issues form part of specific disputes between member States over their particular rights and duties towards one another”) [Attachment 50].

In point of fact, these paragraphs are not aimed at organizing negotiations, as the Applicants try to represent them. If considered in conjunction with the other paragraphs, paragraphs (b) and (c) are nothing more or less than a veiled request to the ICAO Council to oblige the Russian Federation to make “reparation for the injury caused by the internationally wrongful act”, including in the form of compensation.

The applicants again refer to the 2001 Articles on Responsibility of States for Internationally Wrongful Acts to justify the possibility of the ICAO Council taking the measures requested.¹⁷⁶ It should be reiterated that the Articles cannot be used in the present case, including for the reason that the ICAO Council is not a court and does not decide on questions of international responsibility.

As follows from Article 84 of the Chicago Convention, the ICAO Council can only resolve a disagreement concerning the interpretation or application of the Convention. Nor does Article 15 of the Rules, which deals with the issuance of a decision by the ICAO Council, include any indication that it may contain any further instructions to the parties. Article 15 (1) (v) of the Rules establishes that the Council’s decision must contain “the conclusions of the Council together with its reasons for reaching them”.^{*} Accordingly, the mandate of the ICAO Council as a dispute resolution body is to make a finding on the correct interpretation and application of the Chicago Convention in a particular situation. Ruwantissa Abeyratne observes: “The Council takes decisions, adopts policy and resolutions and issues statements. It does not hand down judicial decisions that are enforceable”.¹⁷⁷

Any other matters, including issues relating to the initiation of negotiations (except in the case of negotiations in proceedings under Article 14 of the Rules), financial compensation, and reporting to the ICAO Council, which are not covered by the provisions of the Chicago Convention, do not fall within the competence of the ICAO Council. If they did, it would create new obligations under the Chicago Convention for contracting States.

In the second part of their requests, the Applicants petition the Council to inform the Assembly that: “(a) the Russian Federation has been found in default under Chapter XVIII of the Chicago Convention; (b) that the voting power of the Russian Federation in the Assembly and the Council is therefore to be suspended in accordance with Article 88 of the Chicago Convention; and (c) that the suspension of the voting power of the Russian Federation under Article 88 of the Chicago Convention should continue until such time as the Council informs the Assembly that the negotiations have reached a satisfactory outcome”. These requests cannot be granted by the ICAO Council for the reasons set out below.

The Chicago Convention provides for only two instances in which a contracting State’s voting rights in the ICAO Council and Assembly can be suspended. The first concerns failure to discharge financial obligations to ICAO (Article 62 of the Chicago Convention¹⁷⁸). This provision

¹⁷⁶ See, for example, Australia and the Kingdom of the Netherlands Memorial, para. 5.7

^{*} *Translator’s note*: This remark is from Article 15 (2) (v) of the Rules, not Article 15 (1) (v).

¹⁷⁷ Ruwantissa Abeyratne, *Rulemaking in Air Transport*, Springer International Publishers, Switzerland, 2016, p. 86. [Attachment 56]

¹⁷⁸ “The Assembly may suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organization.”

clearly does not apply in this case. The second instance is provided for in Article 88 of the Chicago Convention and concerns the situation where a contracting State is found to be in default under the provisions of Chapter XVIII, “Disputes and Default”¹⁷⁹ (this chapter sets out the procedure for the settlement of disputes under the Chicago Convention). It is Article 88 to which the Applicants refer in relation to the suspension of the Russian Federation’s voting rights. As stated above, however, for Article 88 to be triggered, one of the articles of Chapter XVIII (Articles 84–88) must be breached.

At the same time, as set out in the section “Key Points” of the present Preliminary Objections, all of the Applicants’ claims are based on Article 3 *bis* of the Chicago Convention, which falls under Chapter I, “General Principles and Application of the Convention”. The Applicants do not allege that the Russian Federation has violated Chapter XVIII “Disputes and Default”. Accordingly, the ICAO Assembly has no legal justification in the present instance for suspending the Russian Federation’s voting rights in the ICAO Council and Assembly.

In attempting to explain this apparent contradiction in their position, the Applicants confine themselves to the following sentence: “Clearly, a finding by the Council under Article 84 that the Russian Federation has violated its obligations under Article 3 *bis* is a finding of ‘default under the provisions’ of Chapter XVIII”¹⁸⁰. There are no arguments in support of this conclusion.

It must be borne in mind that the text of Article 88 of the Chicago Convention explicitly refers only to a violation of one of its chapters. There is no connection between Article 3 *bis*, on the one hand, and Chapter XVIII and its Article 88, on the other. The invocation of Article 88 of the Chicago Convention could only be considered if there had already been a decision of the ICAO Council under Chapter XVIII of the Chicago Convention. Even so, in the absence of any corresponding practice, the question would inevitably be asked about the nature of such a Council decision, as Chapter XVIII does not indicate the legal status of such a decision.¹⁸¹

In any event, it would be impossible and contrary to the Chicago Convention itself to make an isolated assertion of a violation by a contracting State of any provision of the Chicago Convention other than those of Chapter XVIII. The above approach is also reflected in the doctrine. For example, in her work on this issue, Luping Zhang notes that “Articles 87 and 88 [of the Chicago Convention] set out two possible penalties in case of non-conformity of the airline and State with a decision of the ICAO Council.”¹⁸²

¹⁷⁹ “The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter”.

¹⁸⁰ Memorial of Australia and the Kingdom of the Netherlands, para. 5.10.

¹⁸¹ *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Separate Opinion of Judge *ad hoc* Berman, ICJ Reports 2020, at p. 167, para. 7 (“It can be remarked in this connection that, whereas the Chicago Convention goes out of its way, in Article 86, to confer ‘final and binding’ status on appellate decisions of this Court (or an arbitral tribunal), it says nothing at all a few lines earlier about the status in law of a decision arrived at by the Council on a ‘disagreement between two or more contracting States relating to the interpretation or application of the Convention’.”) [Attachment 50].

¹⁸² Luping Zhang, *The Resolution of Inter-State Disputes in Civil Aviation*, Oxford University Press, United Kingdom, 2022, p. 34 [Attachment 57].

Furthermore, it should be noted that, under Article 88 of the Chicago Convention,¹⁸³ the question of whether a State is in compliance with Chapter XVIII is not a matter for the Council to decide but for the Assembly, and should not be prejudged by the Council.

Thus, the ICAO Council has no competence to “inform the Assembly: ... that the Russian Federation has been found in default under Chapter XVIII of the Chicago Convention”. There are no grounds for the suspension of the Russian Federation’s voting power in the ICAO Council and Assembly in this regard. In the absence of any circumstances triggering Article 88 of the Chicago Convention in practice, the Applicants are seeking to take advantage of the situation to create a precedent in their favour, notwithstanding its contradiction with the provisions of the Chicago Convention.

Having regard to the points set forth in the present paragraph of Section 3 of the Preliminary Objections, the actions by the ICAO Council sought by the Applicants are inconsistent with the Council’s existing authority under the Chicago Convention. This, in turn, represents further grounds to deem the Application and the Memorial inadmissible and to confirm that the ICAO Council lacks competence to consider the matter.

¹⁸³ “The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter”.

4. REQUEST TO THE ICAO COUNCIL

Having regard to the points set forth above, the Russian Federation requests the ICAO Council to reject the Application and Memorial from Australia and the Kingdom of the Netherlands and to decide that the ICAO Council lacks competence to consider the issue raised by the Applicants and that the Applicants' Application and Memorial are inadmissible for consideration on their merits, because:

- The subject matter of Article 3 *bis* does not extend to situations of armed conflict;
- The ICAO Council has no competence to decide on the issue raised by the Applicants because the ICAO Council is not a court, still less one of a criminal nature;
- The Application by Australia and the Kingdom of the Netherlands cannot be examined because of the absence in the proceedings of States whose direct interests are affected by the Application (the “Monetary Gold” case or “indispensable party” principle) – Ukraine is not a party to these proceedings;
- The applicants have not complied with the requirement to negotiate;
- The actions of the ICAO Council sought by the Applicants are inconsistent with the Council's existing authority under the Chicago Convention.

The Russian Federation reserves the right to respond to any written statement made by Australia and the Kingdom of the Netherlands in response to the present Preliminary Objections.

Attachments

ICAO documents

- Attachment 1.** ICAO Council Resolution on Malaysia Airlines flight MH17, destroyed over eastern Ukraine on 17 July 2014, adopted on 28 October 2014 and annexed to document C-DEC 203/1;
- Attachment 2.** 25th Session (Extraordinary) of the ICAO Assembly, Executive Committee: Report, Minutes and Documents, 24 April–10 May 1984, Doc 9438, A25-EX;
- Attachment 3.** 25th Session (Extraordinary) of the ICAO Assembly, Plenary Meetings: Resolutions and Minutes, 24 April–10 May 1984, Doc 9437;
- Attachment 4.** ICAO Assembly Resolution A25-1, adopted on 10 May 1984, International Civil Aviation Organization, Assembly Resolutions in force (as at 28 September 2007), Doc. 9902, I-10 TO I-12;
- Attachment 5.** Decision of the ICAO Council at its extraordinary session held on 13 and 14 July 1988;
- Attachment 6.** ICAO Council Resolution concerning Korean Airlines flight KE007, adopted on 16 September 1983;
- Attachment 7.** C-MIN 203/1, ICAO Council – 203rd session, summary minutes of the first meeting, 27 October 2014;
- Attachment 8.** Working Paper for the 39th Session of the ICAO Assembly: “Analysis of the results of having implemented the Conflict Zone Information Repository (CZIR) in light of the Code of Conduct for Sharing and Using Safety Information” – ICAO Doc. A39-WP376, 8 September 2016;
- Attachment 9.** C-MIN 161/4, ICAO Council – 161st session, summary minutes of the fourth meeting, 15 November 2000;

Diplomatic notes

- Attachment 10.** Note No. 9056/1 edn from the Russian Ministry of Foreign Affairs, dated 8 August 2018;
- Attachment 11.** Note No 11426/1 edn from the Russian Ministry of Foreign Affairs, dated 15 October 2018,
- Attachment 12.** Note No 102/1 edn from the Russian Ministry of Foreign Affairs, dated 18 January 2019;
- Attachment 13.** Joint Note No. 102/19 MOS-033/2019 from the Australian and Netherlands Embassies in Moscow, dated 20 March 2019;
- Attachment 14.** Note No. 5768/1 edn from the Russian Ministry of Foreign Affairs, dated 4 June 2019;

Attachment 15. Note No. 1886/1 edn from the Russian Ministry of Foreign Affairs, dated 25 February 2020;

Attachment 16. Note No. 9266/1 edn from the Russian Ministry of Foreign Affairs dated 15 October 2020.

Proceedings of the tripartite consultations

Attachment 17. Opening statement by Mr D. E. Grunis, Head of the Russian Delegation, at the second round of consultations in Vienna on 23 July 2019;

Attachment 18. Closing Statement Joint Australia and the Netherlands, second round of consultations, 24 July 2019.

Statements, letters and comments from the Russian Ministry of Foreign Affairs, other agencies and officials

Attachment 19. Statement of the General Prosecutor's Office of the Russian Federation of July 22, 2021 - "The Russian Federation filed an inter-State application against Ukraine with the European Court of Human Rights" // Official website of the General Prosecutor's Office of the Russian Federation, <https://epp.epp.genproc.gov.ru> (access date: June 1, 2022);

Attachment 20. Commentary by Russian Ministry of Foreign Affairs spokesperson M. V. Zakharova on the Dutch Safety Board's report on the technical investigation into the Malaysian Boeing crash over Ukraine, 13 October 2015 // Russian Ministry of Foreign Affairs website / URL www.mid.ru;

Attachment 21. Statement by V. I. Churkin, Russia's Permanent Representative to the UN, on the results of the vote on the UN Security Council draft resolution on establishing an international criminal tribunal for the Malaysian Airlines MH17 crash, New York, 29 July 2015 // Russian Ministry of Foreign Affairs website / URL www.mid.ru;

Attachment 22. Letter from the General Director of Almaz-Antey Air Defence Concern OJSC dated 29 July 2015 No. 01-09/548k (with attachment);

Attachment 23. Letter from Oleg G. Storchevoy, Deputy Director of the Federal Air Transport Agency, dated 14 July 2015, No. 02.3-2039, commenting on the draft final report on the investigation into the crash of flight MH17;

Attachment 24. Letter dated 16 September 2015 from Oleg G. Storchevoy, Deputy Director of the Federal Air Transport Agency, No. 4.15-785-dsp, addressed to the President of the ICAO Council on the progress of the investigation into the crash of flight MH17;

Attachment 25. Letter dated 2 October 2015 from the President of the ICAO Council No. E1/1.63, AN 6/32, SMM 1/4, in response to Letter No. 4.15-785-dsp of 16 September 2015 from the Federal Air Transport Agency on the progress of the investigation into the crash of flight MH17;

- Attachment 26.** Letter dated 22 September 2015 from Oleg G. Storchevoy, Deputy Director of the Federal Air Transport Agency, No. 4.02-798-dsp, to the Dutch Safety Board objecting to actions contrary to Annex 13 to the Chicago Convention;
- Attachment 27.** Letter from Oleg G. Storchevoy, Deputy Director of Rosaviatsiya and authorized representative of the Russian Federation in the investigation of flight MH17, to the Dutch Safety Board with information on new facts to be reflected in the final report on the MH17 crash dated 14 January 2016;
- Attachment 28.** Letter No. OvV-16500274 of 25 February 2016 from the Chairman of the DSB in response to Letter No. 4.02-3 of 14 January 2016 from the Deputy Director of the Federal Air Transport Agency, Oleg G. Storchevoy;
- Attachment 29.** Letter dated 24 July 2014 from ICAO Secretary General Ref AN 13/4.2-14/59 on aviation safety and security of civil aircraft flying in conflict-affected airspace;
- Attachment 30.** Letter dated 9 September 2015 from F.K.G. Westerbeke, Head Prosecutor of the National Prosecutor's Office of the Netherlands, declining the request by the Russian Federation for the inclusion of Russian representatives in the joint investigation team;
- Attachment 31.** Official statement of the Russian Ministry of Foreign Affairs, 15 October 2020;

Documents on the investigation into the MH17 crash

- Attachment 32.** Dutch Safety Board. Final Report of the Technical Investigation, Malaysia Airlines Flight MH17 Crash (English version), 13 October 2015;
- Attachment 33.** Document "MH17. About the investigation", Dutch Safety Board, October 2015;
- Attachment 34.** Letter No. OvV-15500901 dated 2 June 2015 from the investigator-in-charge of the DSB;
- Attachment 35.** Dutch Safety Board, Appendices to the report: *Crash of Malaysia Airlines Flight MH17*, Appendix Q,

UN Security Council documents

- Attachment 36.** Resolution 2166 (2014), adopted by the Security Council at its 7221st meeting on 21 July 2014, S/RES/2166 (2014) ;

Instruments of the International Court of Justice

- Attachment 37.** *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, p. 66;*
- Attachment 38.** *Corfu Channel case, Judgment of April 9th, 1949, ICJ Reports 1949, p. 4;*

- Attachment 39.** *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment, ICJ Reports, 2020, p. 81;*
- Attachment 40.** *On the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports, 2007, p. 43;*
- Attachment 41.** *Case concerning monetary gold taken out of Rome in 1943 (Preliminary question), Judgment of June 15th, 1954, ICJ Reports 1954, p. 19;*
- Attachment 42.** *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Declaration of Judge Gevorgian, Judgment, ICJ Reports 2020;*
- Attachment 43.** *The Mavrommatis Palestine Concessions, Judgment 1924, Permanent Court of International Justice, Series A, No. 2, p. 11.*
- Attachment 44.** *Case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation). Preliminary Objections, Judgment of 1 April 2011, ICJ Reports, p. 70;*
- Attachment 45.** *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colombia v. Peru). Judgment of November 27th, 1950, ICJ Reports 1950, p. 395;*
- Attachment 46.** *Interpretation of peace treaties with Bulgaria, Hungary and Romania. Advisory Opinion of 30 March 1950 (first phase), International Court of Justice, ICJ Reports, 1950, p. 65;*
- Attachment 47.** *North Sea Continental Shelf, Judgment of 20 February 1969, ICJ Reports 1969, p. 3;*
- Attachment 48.** *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, Permanent Court of International Justice (Ser. A/B) No. 42, p. 116;*
- Attachment 49.** *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda). Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6;*
- Attachment 50.** *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Separate Opinion of Judge ad hoc Berman. Judgment, ICJ Reports 2020;*

Attachment 51. *Russian Federation v Ukraine, European Court of Human Rights, 2021 Application No. 36968/21, Part 3 “Death of the passengers and crew of the Boeing 777 Malaysian Airlines flight MH17 on 17 July 2014”, paras. 216–258.**

Scientific literature

Attachment 52. *Ruwantissa Abeyratne, Convention on International Civil Aviation. A Commentary, 2014;*

Attachment 53. *Chia-Jui Cheng, “The destruction of KAL Flight KE007, and Article 3 Bis of the Chicago Convention”, in Studies in International Air Law, 2017;*

Attachment 54. *The Handbook of International Humanitarian Law, ed. Dieter Fleck, 4th edition, 2021;*

Attachment 55. *Michal Klenka, “Aviation safety: legal obligations of states and practice”, Journal of Transportation Security, Norwell, vol. 10 (December 2017);*

Attachment 56. *Ruwantissa Abeyratne, Rulemaking in Air Transport, Springer International Publishers, Switzerland, 2016, p. 81;*

Attachment 57. *Luping Zhang, The Resolution of Inter-State Disputes in Civil Aviation, Oxford University Press, United Kingdom, 2022;*

Attachment 58. *HPCR Manual on International Law Applicable to Air and Missile Warfare, Cambridge University Press, 2013;*

Other

Attachment 59. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea, San Remo, 12 June 1994;*

Attachment 60. *International Centre for Settlement of Investment Disputes, AES Corporation v. Argentina, Decision on Jurisdiction of 26 April 2005;*

Attachment 61. *Fact sheet on civil aircraft crashes.*

* *Translator’s note:* This document was not made available to the translator, nor is it publicly available on the internet.