

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)
ICAO COUNCIL

AUSTRALIA AND THE KINGDOM OF THE NETHERLANDS

v.

THE RUSSIAN FEDERATION

(2022)

OBJECTIONS OF THE RUSSIAN FEDERATION

TO THE REPLY OF AUSTRALIA AND THE KINGDOM OF THE NETHERLANDS TO
THE PRELIMINARY OBJECTION 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*)

Representative of the Russian Federation

A. A. NOVGORODOV

12 January 2023 (Corrigendum)

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INTRODUCTION

The Reply of Australia and the Netherlands to the Preliminary Objection of the Russian Federation is highly politicized, unacceptably presuming Russian responsibility for the downing of flight MH17, which is not the issue under consideration at the Preliminary Objections stage. Most important, the aforementioned reply of Australia and the Netherlands to the Preliminary Objections of the Russian Federation does not respond to the legal arguments put forward by Russia, which clearly demonstrate that the Council of the International Civil Aviation Organization (ICAO) is not the appropriate body to consider the merits of the dispute and to rule on the Application and the Memorial of Australia and the Kingdom of the Netherlands.

It is the firm view of Russia that the ICAO Council is designed to deal with civil aviation matters and is not competent to rule on the issue of liability for the use of force in an armed conflict. This is the gist of the correct interpretation of Article 3 *bis* of the 1944 Convention on International Civil Aviation (“the Convention”, “the Chicago Convention”), on which the Applicants seek to base all of their claims. The Applicants have not refuted Russia’s argument on this article, which is intended to apply exclusively in peacetime. In a manipulative manner, they put forward arguments under Article 89 of the Convention and under the “*Draft Articles on the Effects of Armed Conflicts on Treaties*” of the International Law Commission, which are not addressed in the Preliminary Objections. In the absence of clear legal arguments, Australia and the Netherlands resort to speculation about “Russia’s clear responsibility”.

The families of the victims deserve to know the truth about the deaths of their loved ones. Such truth cannot, however, be established by the Organization, which does not have the necessary competence and hence no tools to establish the truth in this case. In essence, the Applicants are inviting the Organization to take their version of events on trust without being able to verify it independently through the due process of law; in other words, the Council is being pushed towards a political solution.

Moreover, the Applicants are trying to shield Ukraine from responsibility (by withdrawing it from the process), while Ukraine failed to close the airspace over the territory where the tragedy occurred and where the armed conflict was taking place. The Ukrainian Armed Forces were conducting active combat operations on this territory using air defence equipment, including Buk surface-to-air missiles. Ukraine was part of all the investigations referred to by the Applicants in support of their claims; it was in a position to influence these processes and their conclusions. Yet Ukraine is not a participant in the process before the ICAO Council. This means that Ukraine is released from answering the difficult questions and the Council is denied the proper opportunity to ask it to provide documents or statements. This clearly demonstrates that the Applicants are not seeking the truth, but only wish to pin responsibility on Russia.

The Applicants press upon the Council that it should take up the merits of this case because the Council has never before refused Applicants in other cases. What they forget to point out is that the Council has never been asked to determine whether or not a State has responsibility for the use of force in an armed conflict; furthermore, the Council has never been asked to determine the issue of State responsibility for the crash of an aircraft in general. As Russia has already pointed out in its preliminary objections, if the Application is accepted for consideration, the competence of the Council will be radically changed and the Council will be transformed into a body capable of imposing international legal responsibility on States. Thus, Stefan Kaiser notes, in the context of the MH17 disaster, that “the responsibility of States can neither be substituted by ICAO”.¹

The Applicants assure the Council that they would have preferred to resolve the matter by negotiating in good faith. Not only did they fail to discuss the merits of the issue in the course of

¹ Stefan A. Kaiser, “Legal considerations about the loss of Malaysia Airlines flight MH 17 in Eastern Ukraine”, *Air and Space Law* 40, No. 2, p. 118 [attachment 9]

consultations, however, but they also failed to raise the issue of the Russian Federation's responsibility for a breach of Article 3 *bis* of the Chicago Convention. They preferred to refer the case to the European Court of Human Rights.

It is important to note that, in their reply, the Applicants did not address the technical part of the Russian Federation's Preliminary Objections. It may be concluded from this that the Applicants are unable to put forward substantive objections on this aspect, which is critical in considering the causes of the crash of flight MH17 and in determining liability. In particular, the Applicants do not dispute the presence of a Buk surface-to-air missile system operated by the Armed Forces of Ukraine in the conflict zone in the Donbass at the time of the MH17 disaster; they ignore the fundamental technical errors and inaccuracies in the investigation by the Joint Investigation Team and the findings of the Hague District Court; they deliberately omit any mention of Ukraine's obligation to ensure the safety of air navigation in its airspace. This all confirms the Applicants' unwillingness to approach the investigation of the crash in an objective manner.

The Russian Federation hereby submits its Objections to the Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objection of the Russian Federation.

The Russian Federation believes that the ICAO Council lacks competence to consider the Application and Memorial submitted by the Applicants for the reasons set forth below and in the Russian Federation's Preliminary Objections of 28 July 2022.² The Russian Federation maintains its view, in this connection, that the ICAO Council should refuse to consider the Application and Memorial of the Applicants, deeming them inadmissible.

The Russian Federation's Preliminary Objections, in addition to describing the events surrounding the crash of flight MH17, stated that the ICAO Council should reject the Application and Memorial from Australia and the Kingdom of the Netherlands and conclude 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:

- 1) The matters regulated by Article 3 *bis* do not extend to situations of armed conflict;
- 2) The ICAO Council has no competence to decide the issue raised by the Applicants because the ICAO Council is not a court, including one of a criminal nature;
- 3) The Application of Australia and the Kingdom of the Netherlands cannot be examined because of the absence from the proceedings of the States whose essential interests are affected by the Application (the principle of the "Monetary Gold" case or the "indispensable party" principle) – Ukraine is not a party to the present proceedings;
- 4) The Applicants have not complied with the requirement to hold negotiations;
- 5) The actions of the ICAO Council which are being requested by the Applicants are inconsistent with the Council's existing authority under the Chicago Convention.

In its Preliminary Objections, the Russian Federation followed up on these points by pointing out that all of the Applicants' claims were 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"), applies to the situation of peacetime and does not deal with the loss of civil aircraft during armed conflict, as occurred with the Malaysia Airlines aircraft. This is also confirmed by the history of its creation and the practice of the Organization.

2. In the form of an Application and a Memorial, the Applicants have essentially presented the Council with extracts from the criminal case conducted by the national authorities of the State and are seeking to impute to the Council a function both extraneous to its mandate and inappropriate - that of a criminal court and investigative authority under Article 84 of the Chicago Convention of identifying those responsible for the tragedy and conducting examinations of evidence unrelated to civil aviation

² Preliminary Objections of the Russian Federation, submitted to ICAO on 28 July 2022, 3151 pp.

matters. At the same time, the District Court in The Hague, in its verdict of 17 November 2022 against four individual defendants, failed to shed any light on the circumstances of the accident and said that “the file also fails to identify who issued the instruction to launch a missile, and why that instruction was issued”. The verdict also stated unequivocally that “uncertainty about the cause of and the reasons for this catastrophe therefore persists” and that “the accused cannot be regarded as part of the armed forces of the Russian Federation”.³ An assessment of the said verdict is given in the official statement of the Ministry of Foreign Affairs of the Russian Federation of 17 November 2022.⁴

3. Two Applicant States, out of the twelve affected States, are calling for a decision of the ICAO Council that would define the rights and obligations of all States affected by the disaster, including prejudging the issues of the responsibility of Ukraine 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 of the affected States are even parties to the Protocol.

4. The Applicants had not complied with the requirements to hold negotiations. The subject of the consultations between Russia, the Netherlands and Australia referred to by the Applicants did not in any way relate to issues of the interpretation and application of Article 3 *bis*, either theoretically or even less in relation to the Malaysia Airlines crash. Russia entered into consultations in Vienna in 2019, with a view to working together to achieve the goals and objectives of United Nations Security Council resolution 2166 (2014) and jointly to establish the true causes of the aircraft crash. In any event, these consultations were interrupted by the unilateral decision of the Netherlands to refer the matter to the European Court of Human Rights, pursuant to which the Court was enjoined to rule on the circumstances of the crash of MH17 and on Russian responsibility for the crash, thus rendering pointless the continuation of consultations.

5. The action by the ICAO Council action sought by the Applicants is inconsistent with the Council’s authority under the Chicago Convention. It is evident from the content of the Reply that the reasoning by the Russian Federation, as set out in its Preliminary Objections, is objective in nature, since the Applicants have failed to refute any of the Russian Federation’s arguments. The Applicants’ comments do not convey any fundamentally new information that might lead the ICAO Council, contrary to the arguments of the Russian Federation, to accept the Application and the Memorial for consideration on the merits. Moreover, the Applicants’ Reply is based on legal and factual inaccuracies and omissions, and also on the deliberate manipulation of international legal rules in pursuit of narrow opportunistic and political interests. Attention will be drawn to these facts, among other matters, in the present Objections.

The Russian Federation considers it necessary to recall once again that, in order to facilitate the establishment of the truth and in accordance with United Nations Security Council resolution 2166 (2014),⁵ it has continuously provided both the Netherlands Security Council responsible for the technical investigation and the Joint Investigation Team responsible for the criminal investigation with the available data, and has even conducted a number of technical tests and has declassified military documents. All these important materials have been unjustifiably ignored under contrived pretexts (for example, that the alleged expertise of Almaz-Antey, the manufacturer of the Buk system, could not be taken into account as Almaz-Antey is a State-owned enterprise of the Russian Federation). In addition, on 22 July 2021, the Russian Federation itself lodged an inter-State application with the European Court of Human Rights against Ukraine. One of the infringements that gave rise to this application was “the crash of Malaysian Airlines flight MH17 on 17 July 2014 due to the Ukrainian authorities’ failure to

³ Official website of the District Court of The Hague, “Transcript of the MH17 judgment hearing 17 November 2022”, <https://www.court-mh17.com/en/news/2022/transcript-of-the-mh17-judgment-hearing.html>.

⁴ Official website of the Russian Ministry of Foreign Affairs, “Foreign Ministry Statement on the District Court of The Hague’s verdict on the MH17 criminal case” (in Russian and English), 17 November 2022, available at https://www.mid.ru/ru/press_service/spokesman/official_statement/1839243/.

⁵ Resolution 2166 (2014), adopted by the Security Council at its 7221st meeting on 21 July 2014, S/RES/2166 (2014), [attachment 36 to the Preliminary Objections of the Russian Federation].

close the airspace over the war zone and the death of 298 people – all the passengers and crew members”.⁶

The Russian Federation reiterates that its participation in the consideration of this case in no way affects the issue of the involvement of the Russian Federation in the tragedy that occurred with Malaysian Airlines flight MH17. The Russian Federation also recalls that neither a technical investigation, much less a criminal investigation carried out by a group of interested States, can be regarded as meeting the high standards set out in United Nations Security Council resolution 2166 (2014). In particular, the Russian Federation has been barred, on spurious pretexts, from participating in the Joint Investigation Team which is conducting the criminal investigation into the plane crash.⁷ Nevertheless, the purpose of the Russian Federation’s Preliminary Objections, and also the purpose of the present Objections to the Australian and Netherlands Reply, is simply to demonstrate the apparent lack of competence of the ICAO Council in this case.

PROCEDURAL INFORMATION

By letter SG 2613/22 of 17 March 2022, Mr. J. C. Salazar, Secretary General of ICAO, informed ICAO Member States that, by a note verbale dated 14 March 2022, the delegations to ICAO of Australia and the Netherlands had submitted to the Organization a joint Application and associated Memorial for the settlement of differences.

On 28 July 2022, the Russian Federation, by letter No. 317/22 from the Representative of the Russian Federation to ICAO, transmitted to ICAO its Preliminary Objections to the competence of the ICAO Council to consider the issue raised by the Applicants.

By letter Ref: LE 6/8.CONF of 22 November 2022, Mr. J. C. Salazar, Secretary General of ICAO, conveyed the information that, on 10 November 2022, Australia and the Kingdom of the Netherlands had communicated to ICAO their Reply (in English) to the Statement of preliminary objection filed by the Russian Federation in the matter, which had been submitted to ICAO on 28 July 2022.

The said letter of 22 November 2022 from the Secretary General of ICAO notes that the Russian Federation “will have an opportunity to provide verbal comments to the Applicants’ Reply during the meeting of the Council which will consider the preliminary objections filed in this matter”.

Subparagraph 2 (c) of the Summary of Decisions of the ICAO Council (C-DEC 227/5 of 1 December 2022), adopted at the fifth meeting of the 227th session, states that “a timeframe of two weeks, from the date of receipt by the Respondent of a copy of the translated reply, would be granted for submission to the Council”.

By letter Ref: LE 6/8.CONF of 20 December 2022, Mr. J. C. Salazar, Secretary General of ICAO, circulated a translation into Russian of the text of the Reply of Australia and the Kingdom of the Netherlands. In this letter, the Secretary General of ICAO reiterated “the decision of the Council taken at the Fifth Meeting of its 227th session (25 November 2022), in which the Council agreed that, a timeframe of two weeks, from the date of receipt by the Respondent of a copy of the translated Reply, would be granted for submission to the Council”.

By letter No. 623/22 of 27 December 2022 from A. A. Novgorodov, Representative of the Russian Federation to ICAO and agent of the Russian Federation in the case under consideration, to Mr. S. Sciacchitano, President of the Council of ICAO, a request was made for deferral due in connection with the Christmas and New Year holidays in the Russian Federation.

⁶ Statement by the Office of the of the Prosecutor of the Russian Federation of July 22, 2021, “The Russian Federation filed an interstate complaint against Ukraine with the European Court of Human Rights”. Official website of the Office of the Prosecutor-General of the Russian Federation, <https://epp.epp.genproc.gov.ru> (accessed on 1 June 2022) [attachment 19 to the Russian Federation’s Preliminary Objections].

⁷ Letter dated 9 September 2015 from F.C.G. Westerbeke, Head Prosecutor of the National Prosecutors Office of the Kingdom of the Netherlands [attachment 30 to the Preliminary Objections of the Russian Federation].

By his letter Ref: LE 6/8.CONF of 3 January 2023, Mr. J. C. Salazar, Secretary General of ICAO, conveyed the decision of Mr. S. Sciacchitano, President of the Council of ICAO, of 28 December 2022 “to extend the two-week time-limit for the filing of the Rejoinder by the Russian Federation by an additional week, i.e. until 10 January 2023”.

In the light of the above, and also of previous practice and the ICAO Rules for the Settlement of Differences (Doc 7782/2), the Russian Federation is submitting herewith, in written form, the present Objections to the Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objections of the Russian Federation.

1. FIRST PRELIMINARY OBJECTION BY THE RUSSIAN FEDERATION: THE SCOPE OF ARTICLE 3 *BIS* DOES NOT EXTEND TO SITUATIONS OF ARMED CONFLICT

In an attempt to challenge Russia’s position, the Applicants contend that the exclusive applicability of Article 3 *bis* to times of peace is not inferable from the interpretation put forward by the Applicants themselves of general principles of law, the Draft Articles on the Effects of Armed Conflicts on Treaties of the International Law Commission and Article 89 of the Chicago Convention.

Russia is not proposing, however, that the Council should rule on the interpretation of Article 89 or the Draft Articles or general principles of law. The validity of Russia’s position on the peacetime applicability of Article 3 *bis*, as set out in the Preliminary Objections, is based on the text of Article 3 *bis* itself, its history and practice of application. This article was approved by the 1984 Protocol and has its own history and practice of application. The Applicants’ attempt to throw in arguments for the Russian Federation and then refute them is manipulation in bad faith. After all, the Applicants themselves admit that the Preliminary Objection “makes no mention of Article 89, despite its obvious relevance”.⁸

Thus, it is not necessary for the Council to consider the Applicants’ arguments under Article 89 of the Chicago Convention or the Draft Articles. Nor is the Applicants’ reference to the 1972 judgment of the International Court of Justice in the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, in which the consideration of questions of the application and interpretation of Article 89 was assigned to the merits of the proceedings.

Regarding the scope of Article 3 *bis* as presented by Russia, its application in peacetime is based on the following arguments:

- 1) The text of the article itself;
- 2) The history of the article, preparatory materials;
- 3) The practical application of the article;
- 4) The incompatibility of this article with the rules of international humanitarian law.

The Applicants have not found any means of objecting to argument 4. In other words, they accept that there is an irreconcilable contradiction between Article 3 *bis* and international humanitarian law. This is already enough to establish the inapplicability of Article 3 *bis* in a situation of armed conflict.

In an attempt to counter argument 2 (the practical application of the article), they referred only to the statement by the delegation of the Republic of Korea,⁹ which understandably occupied a special position within the Assembly, since the drafting of Article 3 *bis* had been prompted by the downing of a Korean aircraft in 1983.

⁸ Applicants’ Reply, paragraph 1.2.

⁹ Ibid.

In so doing, the Applicants are endeavouring to ignore the interventions of a total of 22 delegations,¹⁰ who had unequivocally expressed themselves in favour of understanding Article 3 *bis* as applicable to peacetime only. In particular:

- 1) The delegation of Japan believes that “*the use of force against unarmed civil aircraft in peace time constitutes a violation of the rules of international law and what we intend to do is to codify this existing rule*”;¹¹
- 2) In the view of the Canadian representatives, “acceptance of the amendment would simply restore the balance that was of course intended by the drafters of the Convention, but was not formalized because they could not imagine that force would ever be used against civilian aircraft in peacetime”.¹² Canada has also declared its position that “the use of force against civilian aircraft in time of peace is then in violation of well-established rules of international law”;¹³
- 3) As noted by the delegation of Ireland, “the French-Austrian proposal would make the most useful starting point, if it were suitably amended to take account of the improvements in wording suggested by several delegations, in particular those of Canada and Japan”;¹⁴
- 4) According to Singapore’s position, “the Franco-Austrian proposal provided a balanced approach, and could be used as a basis for further detailed discussion, taking into account the various valuable comments made by several delegations such as Canada and Japan”;¹⁵
- 5) The United Kingdom noted 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 civilian aircraft is subject to very severe limitations”;¹⁶
- 6) The representatives of Sweden maintained the position that “a civilian aircraft should in time of peace under no circumstances be subject to actions that might imperil its safety”;¹⁷
- 7) The representative of the International Air Transport Association pointed out that “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”¹⁸.

As regards State practice (argument 3), here too the Applicants are attempting to mislead the Council. They seek to base their position on the example of the downing of Iran Air flight 655 from Tehran to Dubai on 3 July 1988¹⁹ and the associated ICAO Council decision of 14 July 1988.²⁰ Based on the abstract call in that decision (without any assessment of specific events) for ratification of the 1984 Protocol relating to an amendment of the Convention on International Civil Aviation, Australia

¹⁰ Preliminary Objections of the Russian Federation, Section 3 (a).

¹¹ 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 to the Preliminary Objections of the Russian Federation of 38 July 2022].

¹² Doc 9438, A25-EX, A25-Min. EX/7, p. 69. [“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”].

¹³ 25th Session (Extraordinary) of the ICAO Assembly, Plenary Sessions: Resolutions and Minutes, 24 April–10 May 1984, Doc 9437, p. 68 [attachment 3 to the Preliminary Objections of the Russian Federation of 28 July 2022].

¹⁴ Doc 9438, A25-EX, A25-Min. EX/7, p. 48 [“the France-Austrian proposal would make the most useful starting point, if it were suitably amended to take account of the improvements in wording suggested by several delegations, in particular those of Canada and Japan”].

¹⁵ Doc 9438, A25-EX, A25-Min. EX/7, p. 85.

¹⁶ Doc 9437, p. 27 [“the development of international law, particularly during this century, has made it clear beyond doubt that in a time of peace, the use of force against civil aircraft is subject to very severe limitations”].

¹⁷ Doc 9438, p. 87 [“a civilian aircraft should in time of peace under no circumstances be subject to actions that might imperil its safety”].

¹⁸ Doc 9437, p. 86.

¹⁹ Applicants’ Reply, para. 1.15, p. 11.

²⁰ Decision of the ICAO Council at its extraordinary session held on 13 and 14 July 1988 (attachment A to the Observations of the International Civil Aviation Organization: Aerial Incident, 3 July 1988) [attachment 2].

and the Netherlands boldly conclude that the ICAO Council was thereby “*reaffirming the competence of ICAO even in a situation of war*”.

In the Applicants’ view, the mere fact that ICAO formed a commission to establish the facts of the flight 655 disaster demonstrates that Article 3 *bis* imposes obligations on States in such situations. This commission did not, however, look into the international legal aspects of the tragedy and focused exclusively on the **technical aspects**.²¹ By establishing the commission, the ICAO Council merely “*expressed profound regret over the loss of 290 lives*”²² and called on States to ratify the amendment to the Chicago Convention, which incorporates Article 3 *bis* into the text of the treaty. After considering the report of the fact-finding commission, the ICAO Council held a discussion in which the Iranian delegation asked the ICAO Council to recognize the incident as “*a crime of international character to the breach of international law and legal duties of a Contracting State of ICAO*”.²³ The final Council decision contains only the following relevant passages, however:

“*The Council*

...

6. *Reaffirmed again the fundamental principle of general international law that a State must refrain from resorting to the use of weapons against civil aircraft;*

7. *Appealed urgently to all States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 bis into the Convention on International Civil Aviation* “. ²⁴

Accordingly, the members of the ICAO Council proceeded on the basis that the issue of the use of force against civil aircraft in wartime did not fall within the competence of the ICAO Council.

The ICAO Council Resolution on MH17, to which the Applicants refer, also did not recognize the downing of the aircraft in question as an infringement of international law, although Article 3 *bis* had long been in force, including for Ukraine and Russia. This Resolution states the following

“*The Council*

1. *Condemns in the strongest terms the downing of Malaysia Airlines flight MH17 over eastern Ukraine resulting in the tragic loss of 298 innocent lives;*

...

3. *Reaffirms Article 3 bis of the Convention on International Civil Aviation and relevant ICAO provisions which condemn the use of weapons against civil aircraft in flight without prejudice to the provisions of the Charter of the United Nations* “. ²⁵

The fact that, unlike in the incident involving the downing of the Iranian passenger jet, the ICAO Council found it necessary to condemn the downing of MH17 demonstrates the overtly political nature of that action.

As regards the text of the Article (argument 1), again the Applicants’ objection is unconvincing. The absence of the words “in time of peace” from Article 3 *bis* of the Chicago Convention²⁶ does not alter the fact that the entire text of the Article demonstrates that the Article is applicable to time of peace. Thus, the obligation of States to “*refrain from resorting to the use of weapons against civil aircraft in flight*” in paragraph (a) of the Article goes hand in hand with the rules of interception, which

²¹ International Civil Aviation Organization: Resolution and Report concerning the Destruction of Iran Air Airbus on July 3, 1988, *International Legal Materials*, vol 28, No. 4, 1989, pp. 896-943 [attachment 1].

²² Paragraph 2 of the ICAO Council’s decision at its extraordinary session on 13 and 14 July 1988 (attachment A to the Observations of the International Civil Aviation Organization: Aerial Incident, 3 July 1988 [attachment 2].

²³ Observations of the International Civil Aviation Organization: Aerial Incident, 3 July 1988, p. 619 [Annex 2] [“a crime of international character to the breach of international law and legal obligations of a Contracting State of ICAO”].

²⁴ Decision of the ICAO Council, adopted at its 125th session on 7 December 1988 (attachment B to the Observations of the International Civil Aviation Organization: Aerial Incident, 3 July 1988) [attachment 2].

²⁵ ICAO Council Resolution on Malaysia Airlines flight MH17, destroyed over eastern Ukraine on 17 July 2014, adopted on 28 October 2014 and annexed to C-DEC 203/1; [attachment 1 to the Preliminary Objections].

²⁶ Applicants’ Reply, para. 1.9, p. 10.

state that “the lives of the persons on board and the safety of the aircraft must not be endangered”. The requirement that interceptions must be conducted without the threat of force clearly points to the peaceful context of the situation.

In response, the Applicants merely pointed out that interception measures “*can be taken in times of peace, but equally they could be taken in times of armed conflict*”.²⁷ Russia’s point, however, was not that interception could not take place during an armed conflict, but that this obligation went “*hand in hand with the rules on interception*”, according to which “*the lives of the persons on board and the safety of aircraft must not be endangered*”.

Russia has pointed out that “*this general obligation set out in paragraph 1 must be read in conjunction with paragraphs (a) 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 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”. This approach is also confirmed in the work of Chia-Jui Cheng.²⁸

In response, the Applicants merely argue that paragraphs (b) and (c) are unrelated to paragraph (a) and contain separate obligations.

It is clear that the application of the rule in Article 3 *bis* without any exemptions relating to military action would create a conflict with international humanitarian law. Accordingly, the Russian Federation was justified in its recourse to preparatory material (*travaux préparatoires*).

The Applicants attempt to persuade the Council that this issue is, in principle, a substantive one²⁹ and therefore allegedly should not be considered at the stage of determining the Council’s jurisdiction.

In support of this assertion, they refer to a single judgment of the International Court of Justice in the *Nuclear Tests (Australia v France)* case,³⁰ which, however, in no way supports the Applicants’ position. In that judgment, the Court stated that “the scope of the preliminary stage of the proceedings was limited to ‘*questions of the jurisdiction of the Court and the admissibility of the Application*’.”³¹ The question of the scope of Article 3 *bis* is clearly a question of jurisdiction *ratione materiae*. In the case of *Armed Activities on the Territory of the Congo*, the International Court of Justice noted that “*jurisdiction exists only in respect of those who are bound by that clause and within the limits set out in that clause*”.³² This means that “the scope of every provision in a treaty is always limited both *ratione personae* and *ratione materiae*”³³.

The Applicants argue that the interpretation of this article does directly to the merits of the case. This, however, is not the case. The Applicants are not asking the Council to decide whether Article 3 bis applies in a situation of armed conflict. They are inviting the Council to resolve the issue of Russia’s responsibility, which is central to this case.³⁴

Moreover, the question of the scope of Article 3 *bis* is clearly a preliminary one, as its resolution does not necessitate going into the merits of the case and considering questions of fact. That there was

²⁷ Applicants’ Reply, para. 1.16, p. 12.

²⁸ Chia-Jui Cheng, *Studies in International Air Law*, Leiden: Brill Nijhoff, 2018, p. 362 [attachment 11].

²⁹ Applicants’ Reply, para. 1.1, p. 7.

³⁰ Applicants’ Reply, para. 1.3, p. 7.

³¹ Ibid.

³² *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 219, paragraph 71 [at p. 245] [attachment 4].

³³ Juan José Quintana Aranguren, *Litigation at the International Court of Justice: Practice and Procedure*, 2015, Leiden: Brill, p. 93 [attachment 10].

³⁴ Applicants’ Reply, paragraph 1.6.

an armed conflict at the place where the aircraft was brought down is a fact undisputed and accepted by all, including the Applicants.

It could be imagined that, if any ICAO Member State were to initiate proceedings before the ICAO Council under Article 84 of the Chicago Convention in a matter involving, for example, State aircraft, at the stage of determining jurisdiction, the Council would already have to recognize its lack of competence, as Article 3 (a) of the Chicago Convention stipulates that it only applies to civil aircraft and does not apply to State aircraft. In the case under consideration, the situation is essentially the same, since Article 3 *bis*, independently of other provisions of the Convention, indicates that it does not apply to situations of armed conflict. The ICAO Council cannot consider those cases and issues which have not been assigned to its competence by the Convention (and hence by the Contracting States).

The Council should therefore rule at this preliminary stage of the proceedings that Article 3 *bis* does not apply to the use of force in armed conflict.

2. SECOND PRELIMINARY OBJECTION BY THE RUSSIAN FEDERATION: 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 Applicants argue that “it is within the scope of the dispute settlement function of the Council to exercise its jurisdiction and determine the responsibility of the Russian Federation for the downing of Flight MH17 in breach of Article 3 *bis*”.³⁵ They also state that “part of that dispute resolution function is to consider and weigh evidence presented to it by the parties in order to resolve disputes”.³⁶ In relation to these specific proceedings, these assertions cannot be considered to be substantiated.

The Applicants refer to previous ICAO Council cases in which the Council established its jurisdiction and dealt with more than just technical issues relating to civil aviation.³⁷ The whole point, however, is that the examples cited (India v. Pakistan 1971; Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar 2017) were in principle about airspace closures and not about State responsibility for the use of force. Furthermore, the question was to assess the known factual circumstances, undisputed by the parties, in terms of the Chicago Convention. And that, in the Russian Federation’s view, is the true function of the ICAO Council.

In the proceedings under consideration, however, apart from everything else, no conclusive factual basis has been set before the ICAO Council which it may assess from the perspective of the Chicago Convention. The full circumstances of the plane crash have not yet been established. It should be noted that the judgment handed down by the District Court of The Hague on 17 November 2022 on the four individual defendants did not clarify this issue. The judgment states, for example, that “*uncertainty about the cause of and the reasons for this catastrophe therefore persists*”. In that judgment of 17 November 2022, however, the Court stated that “*the file also fails to identify who issued the instruction to launch a missile, and why that instruction was issued*”. The judgment also unequivocally stated that “*the accused cannot be regarded as part of the Armed Forces of the Russian Federation*”.³⁸ Added to which, the Court took a highly politicized approach to justice in this case, ignoring evidence that contradicted the Court’s original position on the responsibility of the Russian Federation. Thus, the Court found that the conclusions provided by Almaz-Antey were not convincing because, first, Almaz-Antey is a State-owned enterprise of the Russian Federation, which had allegedly falsified various pieces of evidence and had denied its involvement in the conflict in Ukraine. Moreover, the Court repeatedly referred to the testimony of witness M58, which, on the Court’s own admission, had been inconsistent. The Court did not, however, find any evidence of deliberate deception, attributed these inconsistencies to “memory failure” and concluded that the evidence was credible. Thus, the

³⁵ Applicants’ Reply, para. 2.1, p. 16.

³⁶ Ibid.

³⁷ Applicants’ Reply, paragraphs 2.12 and 2.13, p. 20.

³⁸ Website of the District Court of The Hague, “MH 17 judgment – Text read out at court hearing on 17 November 2022 (in Russian)”, <https://www.courtmh17.com/en/news/2022/court+decision.html>.

Court was amenable only to those pieces of evidence that were consistent with the case brought by the prosecution. This notwithstanding, the only one of the four defendants who had exercised his right to defend himself with the assistance of local lawyers was fully acquitted by the Court. The Court found that there was no evidence that he had assisted in the use of weapons against the aircraft.

The ICAO Council cannot take for granted the findings of this national court, which was based on the findings of the national investigation by a group of countries, which includes Ukraine. At the same time, ICAO has neither the competence nor the tools to make an independent assessment of the facts of the case and should not act as an investigative body.

Once again, it should be pointed out that if the ICAO Council were to establish this factual basis, it would be asserting its competence to deal with issues of the use of weapons in hostilities, including such aspects and concepts as necessity, proportionality, distinction, military purpose, military advantage, and so forth. Clearly, this is inconsistent with the mandate of both the Organization and its organs and with the principle of the special competence of international organizations.³⁹ In addition to the ICAO Council lacking such competence, it should also be noted that the members of the ICAO Council involved in reviewing and voting on the case are not experts in the above matters, nor in matters of criminal law, procedure, evidence, forensics and other areas. The real purpose of the dispute resolution mechanism provided by the Chicago Convention is that the ICAO Council is competent to consider technical and applied issues relating to application of the provisions of the Chicago Convention, but by no means the attribution of international legal responsibility for purported internationally wrongful acts allegedly committed in connection with an armed conflict.

Furthermore, 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*”.⁴⁰ The Court emphasized that this follows from the following features of the Council’s composition and the specific nature 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*”.⁴¹

Leading international lawyers in the field of international air law also hold the position that the ICAO Council is not the body with competence to review the downing of flight MH17.⁴² These include Ruwantissa Abeyratne, a former member of the ICAO Office of Legal Affairs and External Relations and an authority on international air law.⁴³

3. THIRD PRELIMINARY OBJECTION BY THE RUSSIAN FEDERATION: THE APPLICATION BY AUSTRALIA AND THE KINGDOM OF THE NETHERLANDS CANNOT BE CONSIDERED BECAUSE OF THE ABSENCE FROM THE PROCEEDINGS OF STATES WHOSE DIRECT INTERESTS ARE AFFECTED BY

³⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. Advisory Opinion. Compilation of Judgments of the International Court of Justice 1996, p. 66 [attachment 37 to the Preliminary Objections]

⁴⁰ *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, paragraph 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 to the Preliminary Objections]

⁴¹ *Ibid.*

⁴² Stefan A. Kaiser, “Legal considerations about the loss of Malaysia Airlines flight MH 17 in Eastern Ukraine”, *Air and Space Law* 40, No. 2, p. 118 [attachment 9]

⁴³ Ruwantissa Abeyratne “Flight MH 17: the legal and regulatory fallout”, *Air and Space Law*, vol. 39, No. 6, 2014, pp. 337–339. [attachment 8].

THE APPLICATION (THE “MONETARY GOLD” CASE OR “INDISPENSABLE PARTY” PRINCIPLE) – UKRAINE IS NOT A PARTY TO THESE PROCEEDINGS

With regard to the Russian Federation’s third preliminary objection, Australia and the Netherlands argue that the principle of the *Monetary Gold* case is not applicable in this case because the criteria enshrined in that principle have not been met. In the *Monetary Gold* case the International Court of Justice determined that the 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.⁴⁴

The Applicants observe that the application of the principle of the *Monetary Gold* case requires that the legal interests of a third State form the very subject matter of the dispute such that the issues affecting a third State amount to a prior dispute which would have to be decided before proceeding to a decision on the dispute that is the subject of the case.⁴⁵ According to Australia and the Netherlands, the only question raised in the so-called dispute is whether the Russian Federation defaulted on its obligations under the Convention, and that does not depend upon determining the rights and obligations of Ukraine.⁴⁶

The Russian Federation strongly disagrees, since the establishment of Ukraine’s international legal responsibility for the crash of Boeing MH17 due to the failure to close its airspace over the zone of active hostilities⁴⁷ would certainly have a direct bearing on the present case.

In particular, even the Dutch Safety Board’s report on the investigation into the crash states the following:

*It is conceivable that considerations other than those related to safety could also have played a part in Ukraine’s decision not to completely close the airspace to civil aviation, such as possible financial consequences. A complete closure may also have given the impression that the state had lost control over a part of its airspace. Such factors do not appear to have played a role in the decision to keep the airspace open at cruising altitude”.*⁴⁸ 50

Ukraine’s aviation authorities have failed to appreciate the dangerous consequences of the constant demands made by the Ukrainian Armed Forces for more and more airspace closures, to allow its military aircraft to fly,⁴⁹ although the frequency and substance of these demands was clearly indicative of a dangerous trend. This indifferent attitude and lack of coordination eventually led to the breach of international safety standards.

An obvious prerequisite for consideration of the present case would be, at the outset, to determine the rights and obligations of the State in whose airspace the crash occurred. This in essence is the established approach referred to as “the very subject matter of the dispute”.

The International Court of Justice cases cited by the Applicants, in which the application of the “*Monetary Gold*” principle was rejected by the Court, have nothing in common with the present proceedings, as the Court, based exclusively on the facts of those cases, found that there was no indication, as required, that third-party interests would form “*the very subject matter of the decision to be rendered by the Court*”. This does not apply to the present case before ICAO.

⁴⁴ “ 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” (*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 to the Preliminary Objections].

⁴⁵ Reply by Australia and the Netherlands, paragraph 3.3, p. 24.

⁴⁶ Reply by Australia and the Netherlands, para. 3.7, p. 25.

⁴⁷ Preliminary Objections of the Russian Federation, pp. 5 and 14.

⁴⁸ Para. 6.4.2 of the Dutch Safety Board Report MH17 Crash, p. 198.

⁴⁹ Para. 6.2 of the Dutch Safety Board Report MH17 Crash, pp. 193-195

The Ukrainian Armed Forces actively used Buk surface-to-air missiles at the scene. On 16 July 2014, the Central Television and Radio Studio of the Ukrainian Ministry of Defence circulated information from which it may be understood that Ukraine brought Buk surface-to-air missile systems into the conflict zone to control the airspace over the area of counter-terrorist operations in the eastern part of Ukraine.⁵⁰ Thus, Ukraine was planning to use not only military aircraft in the Donbass, but also air defence equipment capable of destroying aircraft flying at high altitudes – and of the same model (Buk-M1) as that which, according to the District Court of The Hague, was used to shoot down flight MH17.

In addition, a number of the Russian Federation's claims against Ukraine have been processed through the European Court of Human Rights. In July 2021, Russia lodged an inter-State application with the Court against Ukraine and one of the violations that gave rise to the complaint was “the crash of Malaysian Airlines flight MH17 on 17 July 2014 due to the Ukrainian authorities' failure to close the airspace over the war zone and the death of 298 people – all passengers and crew members”.⁵¹ The case is pending before the European Court of Human Rights.

Despite the role that it played in the disaster, Ukraine is not a party to the proceedings in this case. A decision by the ICAO Council in this case would prejudice the issue of Ukraine's responsibility; its rights and obligations would be substantially affected. But it is precisely these issues that would form the essence of a potential decision by the ICAO Council.

4. FOURTH PRELIMINARY OBJECTION BY THE RUSSIAN FEDERATION: THE APPLICANTS HAVE NOT COMPLIED WITH THE REQUIREMENT TO NEGOTIATE

As may be recalled, according to Article 84 of the Chicago Convention, “*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*”. Under Article 2 (g) of the Rules for the Settlement of Differences, the 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*”. The negotiation stage is a mandatory requirement prior to the submission of a dispute to the ICAO Council for resolution. This condition has not, however, been met by the Applicants.

In 2019, consultations between Australia, the Netherlands and Russia took place in Vienna, initiated by Australia and the Netherlands (there were three rounds), but they did not touch on any issues of interpretation or application of Article 3 *bis* of the Chicago Convention. It should be emphasized that the Russian Federation was not allowed to join the Joint Investigation Group,⁵² and for that reason Russia participated in the consultations in Vienna so as to work together with others in pursuit of the goals and objectives set by United Nations Security Council resolution 2166 (2014) and in jointly establishing the true causes of the plane crash.

The agenda agreed upon by the parties in this context was enshrined in note No. 5768/1edn of 4 June 2019 of the Russian Ministry of Foreign Affairs:⁵³ “1. Discussion of civil aircraft downings; 2. Discussion of all the circumstances related to the downing of flight MH17; 3. Elements for a mutually acceptable outcome based on the discussion of preceding items”. The agenda is also reflected in the Applicants' Memorial (para. 3.14 of the Memorial). The consultations never progressed, however, beyond the first agenda item. By fault of the Netherlands party, which moved the MH17 issue to the platform of the European Court of Human Rights, the consultations were unable even to start discussing

⁵⁰ <https://www.youtube.com/watch?v=Q3MomxNHnUA>, snippet between 4:48 and 4:54.

⁵¹ Statement of 22 July 2021 from the Office of the Prosecutor-General of the Russian Federation: “The Russian Federation filed an inter-State complaint against Ukraine with the European Court of Human Rights”. Official website of the Office of the Prosecutor-General of the Russian Federation, <https://epp.epp.genproc.gov.ru> (accessed on 1 June 2022) [attachment 19 to the Preliminary Objections of the Russian Federation].

⁵² Letter dated 9 September 2015 from F.C.G. Westerbeke, Chief Public Prosecutor of the National Public Prosecution Service of the Kingdom of the Netherlands [attachment 30 to the Preliminary Objections of the Russian Federation].

⁵³ [Attachment 14 to the Preliminary Objections of the Russian Federation]

issues of the technical investigation of the Boeing MH17 crash, not to mention issues of legal responsibility. Moreover, during the consultations, the Applicants gave absolutely no indication that they were considering these issues under the dispute settlement procedure laid out in Article 84 of the Chicago Convention.

Prior to their termination due to the unilateral action by the Netherlands, the consultations were of a general nature,⁵⁴ and did not reach a consideration of the circumstances of the crash of Boeing MH17, much less questions of interpretation and application of Article 3 *bis*. No clear requests or demands under international law were made to the Russian Federation.

In their response, the Applicants state that “*the negotiation record clearly demonstrates that Article 3 bis was at the heart of the dispute*”.⁵⁵ In so doing, they point out that they “*consistently and expressly referred to the Chicago Convention and, in particular Article 3 bis, throughout the negotiations*”.⁵⁶ These claims are far from the facts.

In support of this, the Applicants cite four relevant cases⁵⁷ which, when disseminated in detail, do not in any way refute the arguments put forward by the Russian Federation.

Thus, the first reference to the Chicago Convention and its Article 3 *bis* is to be found in the joint note of 22 June 2018 from the embassies of Australia and the Kingdom of the Netherlands in Moscow, which states that “negotiations would include, but not be limited to, the interpretation and application of the Convention on International Civil Aviation (Chicago Convention) as amended, including by its Protocol relating to an amendment to the Convention on International Civil Aviation of 1984 (which incorporates Article 3 *bis* into the Chicago Convention) ...”. There is no indication in this note of any responsibility by the Russian Federation for breach of Article 3 *bis*, so it cannot be regarded as proof that such responsibility was the subject of consultations.

This issue, however, namely the interpretation and application of the Chicago Convention, including its Article 3 *bis*, was effectively not addressed in any way throughout the rounds of tripartite consultations, the course of which is described in detail in the Russian Federation’s Preliminary Objections.⁵⁸ This is confirmed, in particular, by the agreed agenda of the consultations (1. Discussion of civil aircraft downings; 2. Discussion of all the circumstances related to the downing of flight MH17; 3. Elements for a mutually acceptable outcome based on the discussion of preceding items).⁵⁹ It is not possible to ascertain in what context, for what purpose and what exactly the Applicants intended the phrase about the Chicago Convention to signify. Their apparent intention to discuss some particular issue, which never actually materialized, cannot be regarded as proof that negotiations were held on the Chicago Convention and its Article 3 *bis*. As it happens, the consultations were devoted to entirely different issues.

The second reference cited by the Applicants is to be found in the opening statement of the Kingdom of the Netherlands of 4 March 2019 in the first round of the tripartite consultations. It repeats the same phrase that was set out in the above joint note of 22 June 2018 from the Australian and Netherlands embassies in Moscow. For whatever reason, neither has any further action relating to this reference to the Chicago Convention been taken in the course of the consultations.

The third reference to the Chicago Convention and Article 3 *bis* as cited by the Applicants is to be found in the opening statement of the same day, 4 March 2019, by the delegation of Australia. It alleges that “*the Russian Federation has breached obligations under international law owed to Australia and the Netherlands including Article 3 bis of the Convention on International Civil Aviation*”. Just as in the previous cases, no indication was given as to the premises for this allegation.

⁵⁴ The course of the consultation and the issues discussed are set out in detail in paragraph 3 (d) of the Preliminary Objections of the Russian Federation.

⁵⁵ Section IV, subsection B (1) of the Applicants’ Reply, p. 28.

⁵⁶ Paragraph 4.5 of the Applicants’ Reply, p. 28.

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⁵⁸ Preliminary Objections of the Russian Federation, para. 3 (d), pp. 41–43.

⁵⁹ Note by the Russian Ministry of Foreign Affairs dated 4 June 2019, No. 5768/ledn. [attachment 14 to the Preliminary Objections of the Russian Federation]

The Australian party did not indicate exactly what the Russian Federation's breach had been, and there was no substantive discussion of the issue.

The fourth reference to the Chicago Convention and Article 3 *bis* cited by the Applicants is to be found in joint note MOS 347/22 of 14 March 2022, from the Australian and Netherlands embassies in Moscow. This reference is not in any way relevant, as the note had already dealt with the decision of Australia and the Kingdom of the Netherlands to initiate proceedings before the ICAO under Article 84 of the Chicago Convention.

The actual course of the consultations and the issues discussed are set out in detail in paragraph 3 (d) of the Russian Federation's Preliminary Objections. In brief, however, it is worth noting that all three rounds of consultations in 2019 addressed only the first agenda item, namely "Discussion of civil aircraft downings". The consultations were limited to a discussion of individual incidents and factual material, some relevant and some not relevant to the MH17 crash.

The first round was devoted to coordinating the agenda for further meetings. In the course of the second round of consultations the parties presented a number of reports (the Russian delegation reported on the following issues: "Review of civil aircraft accidents", "Air accident with the aircraft Tu-154M RA-85693, flight SBI-1812, on 4 October 2001 over the Black Sea", "Investigation by the Investigation Committee of the Russian Federation into criminal cases involving aviation accidents"). During the third round of consultations, the delegations exchanged questions and views on the presentations made at the second round. The Russian delegation also touched upon such topics as the impact of armed conflict on ensuring the safety of civil aviation and issues of the closure of airspace and its impact on aircraft accidents. The fourth round of consultations was intended to take stock of the discussion under agenda item 1 ("Discussion of civil aircraft downings") and to launch the discussion under agenda item 2 ("Discussion of all the circumstances related to the downing of flight MH17"). It was planned to start agenda item 2 by reviewing various aspects of the technical investigation into the causes of the crash of flight MH17.⁶⁰

Accordingly, the tripartite consultations did not in any way take up questions of the interpretation or application of Article 3 *bis* of the Chicago Convention.

Further, the Australian and Netherlands Reply to the Russian Federation's Preliminary Objections states that "express reference to the Convention or Article 3 *bis* is not required to satisfy the Article 84 negotiation precondition". In support of that assertion, a number of positions of the International Court of Justice are cited, which state that "*to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause*".

It must be said that, through its practice over the years, the International Court of Justice has set a benchmark for satisfying the negotiation requirement in the course of the settlement of disagreements on international treaties. The criteria that it has laid down are clear and consistent. Thus, the International Court of Justice has noted that "*a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two parties*"⁶¹ (no such conflict arose or was discussed during the consultations between the delegations of Australia and the Netherlands on the one hand and the delegation of the Russian Federation on the other). Furthermore, a dispute presupposes that there is a divergence of views between the parties on definite points,⁶² and the parties themselves must express

⁶⁰ Note of the Russian Ministry of Foreign Affairs dated 25 February 2020, No. 1886/ledn ("... After discussing the above issues, the Russian Party would be ready to proceed with the discussion of item 2 "Discussion of all the circumstances related to the crash of flight MH17" (including, but not limited to, the issue of the responsibility of the State in whose airspace the crash occurred), starting with the consideration of various aspects of the technical investigation into the causes of the crash of flight MH17") [attachment 15 to the Preliminary Objections].

⁶¹ See *The Mavrommatis Palestine Concessions*. Judgment. 1924. Permanent Court of International Justice, Series A, No. 2, pp. 11 [attachment 43 to the Preliminary Objections]; *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. Judgment of 1 April 2011. International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 2011, p. 70 [attachment 44 to the Preliminary Objections].

⁶² *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*. Judgment of 27 November 1950. International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1950, p. 395 [at p.

clearly opposing views on the performance or non-performance of specific contractual obligations⁶³ (this criterion has also not been met by the consultations). Extensive further clarification by the International Court of Justice of what can be considered to be a negotiation in international law and relations may be found in paragraph 3 (d) of the Russian Federation's Preliminary Objections.

As the Applicants point out, "*as set out in the section above, the record of negotiations submitted to the Council related to the subject matter of the Convention – being civil aviation*".⁶⁴ In their view, this is sufficient to satisfy the prerequisite under Article 84 of the Chicago Convention. The Applicants cite no evidence, however, in support of the claim that the consultation concerned the subject matter of the Chicago Convention. Where the tripartite consultations are concerned, these did not deal with the subject matter of the Chicago Convention, as is clearly evident from the consultations themselves and the exchange of notes reflected in the details in paragraph 3 (d) of the Russian Federation's Preliminary Objections (listing, among other things, the reports and statements made by the parties). Moreover, they ignore the second sentence that they quoted from the judgment of the International Court of Justice in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*,⁶⁵ which states that "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question".⁶⁶ Thus, it is not sufficient to prove that the negotiations per se concerned civil aviation matters, it must be proved that the negotiations involved "substantive obligations" of the States parties to the international treaty. The consultation material shows that the consultation did not address the interpretation of rights and obligations under Article 3 *bis* of the Chicago Convention.

The Applicants then refer to the 2000 case before the ICAO Council of *United States v. 15 European States* (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom). These 15 European States, including the Netherlands, had a radically different view regarding the extent to which the negotiations were adequate and their modalities from that held today. For example, the representative of these States argued that the United States demands were unacceptable because the negotiations on points of law that had been raised by the United States for the first time in its Application had not taken place prior to the filing of the Application.⁶⁷

Australia and the Netherlands state that, in the aforementioned proceedings, the ICAO Council rejected the argument of the 15 European States and pointed out that "the negotiations between the parties, which were held over a period of three years at various levels, were adequate and sufficient to fulfil the requirement of Article 84 of the Convention on Civil Aviation".

The inference by Australia and the Netherlands that the ICAO Council should also reject the Russian Federation's similarly worded contention in the present case is without merit. The main issue that should engage the attention of the ICAO Council, as is evident from the 2000 case of *United States against 15 European States*, is the adequacy, duration and sufficiency of the negotiations. In view of their subject matter, the tripartite consultations of Australia, the Netherlands and Russia do not meet these criteria, as required to bring the issues of the Malaysian Boeing issue before the forum of ICAO.

403] [attachment 45 to the Preliminary Objections].

⁶³ *Interpretation of peace treaties with Bulgaria, Hungary and Romania*. Advisory Opinion of 30 March 1950 (first phase). International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1950, p. 65 [at p. 74] ("the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations"), [attachment 46 to the Preliminary Objections].

⁶⁴ Applicants' Reply, paragraph 4.10.

⁶⁵ *Ibid.*

⁶⁶ *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, I.C.J. Reports 2011, [at p. 133] [attachment 33 to the Applicants' Reply].

⁶⁷ C-MIN 161/4, ICAO Council – 161st Session, Summary of the Fourth Meeting, 15 November 2000, 45 at [35] [attachment 9 to the Preliminary Objection of the Russian Federation]

The Applicants also argue that the filing by the Netherlands of its complaint with the European Court of Human Rights “did not ‘render meaningless’ negotiations”⁶⁸, and that the proceedings before the European Court of Human Rights and the ICAO Council “have nothing else in common”⁶⁹. These assertions are at variance with the facts.

The position taken by the Russian party with regard to the termination of the consultations was set out in detail in an official statement of the Russian Ministry of Foreign Affairs of 15 October 2020.⁷⁰ Russia entered the consultations in Vienna in good faith, with a view to cooperating in achieving the aims and objectives set out in United Nations Security Council resolution 2166 (2014) and, through joint efforts based on the facts, establishing the true causes of the plane crash. At the same time, by initiating proceedings before the European Court of Human Rights, without waiting even for the interim results of the tripartite consultations, the Netherlands was emphasizing that “*the Dutch government decided to bring Russia before the European Court of Human Rights (ECtHR) for its role in the downing of Flight MH17*”.⁷¹ In support of their position that the initiation of proceedings before a dispute settlement body on the same circumstances does not mean that the negotiations have been discontinued, the Applicants cite the *Aegean Sea Continental Shelf* case:

*“The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued pari passu.”*⁷²

First, this passage referred to a general objection by the party regarding the Court’s lack of competence to hear a dispute. Thus, this conclusion does not affect the compromissory clause, which specifies negotiation as a precondition for submitting a dispute to a particular body, as provided for in the Chicago Convention. Second, the Applicants contend that the dispute before the European Court of Human Rights concerns the right to life, which is outside the ambit of the Chicago Convention, and that the proceedings are therefore not in any way connected. The Applicants’ position does demonstrate, however, that, where the MH17 disaster is concerned, they are explicitly associating exercise of the right to life with a breach of the Chicago Convention. Thus, in the introduction to their Reply to the Preliminary Objections, the Applicants, in providing general comments on the Russian Federation’s position, state the following:

*“Using various arguments and attempts at blame shifting, the Russian Federation has a single objective: to prevent the Russian Federation from being scrutinized or held accountable for its actions in shooting down a civil aircraft in flight, causing 298 deaths”.*⁷³

As stated in the press release of the European Court of Human Rights, “*according to the Government of the Netherlands, the plane was shot down from a Buk-TELAR surface-to-air missile system which belonged to and was provided by the Russian Federation*”.⁷⁴ It follows that this proceeding will cover such issues as the weapon used to shoot the aircraft down, its presumed location, the role and degree of responsibility of the Russian Federation, and other matters. Thus, the Applicants, without even moving to substantive negotiations on the MH17 disaster, have demonstrated their unwillingness to engage in meaningful dialogue with a view to establishing the truth about the crash.

Accordingly, in compliance with the Court’s case-law, the Applicants should have demonstrated that, not only did the dispute relating to Article 3 *bis* of the Chicago Convention take

⁶⁸ Section IV, subsection C, of the Applicants’ Reply, p. 33.

⁶⁹ Applicants’ Reply, para. 4.13, p. 33.

⁷⁰ Attachment 16 to the Preliminary Objections of the Russian Federation.

⁷¹ Official website of the Government of the Kingdom of the Netherlands:

<https://www.government.nl/latest/news/2020/07/10/the-netherlands-brings-mh17-case-against-russia-before-european-court-of-human-rights>.

⁷² Official website of the Government of the Kingdom of the Netherlands:

<https://www.government.nl/latest/news/2020/07/10/the-netherlands-brings-mh17-case-against-russia-before-european-court-of-human-rights>.

⁷³ Applicants’ Reply, paragraph 4.16.

⁷⁴ Applicants’ Reply, paragraph i, p.1.

⁷⁵ New inter-State application brought by the Netherlands against Russia concerning downing of Malaysia Airlines flight MH17, press release issued by the Registrar of the Court, ECHR 213 (2020), 15 July 2020. Official website of the European Court of Human Rights.

shape in the course of the said consultations, but an attempt was also made to resolve that dispute through negotiation. Following the Applicants' position, at this stage, the proceedings of the tripartite consultations give no indication even of the emergence of a dispute about Article 3 *bis*, namely, the existence of conflicting approaches to an understanding of the rights and obligations of the parties under Article 3 *bis* of the Chicago Convention. As for negotiations on a settlement of the dispute, these have not even been initiated.

Thus, the Applicants had not complied with the requirement to negotiate.

5. FIFTH PRELIMINARY OBJECTION BY THE RUSSIAN FEDERATION: THE ACTIONS OF THE ICAO COUNCIL SOUGHT BY THE APPLICANTS ARE INCONSISTENT WITH THE COUNCIL'S AUTHORITY UNDER ARTICLE 84 OF THE CONVENTION

In paragraph 3 (e) of the Russian Federation's Preliminary Objections, it was noted that the actions of the ICAO Council sought by the Applicants⁷⁵ are inconsistent with the Council's existing authority under the Chicago Convention. This, in turn, is the basis, together with other arguments, for declaring the Application and the Memorial inadmissible and, accordingly, confirming that the ICAO Council lacks competence to consider the matter.

The Russian Federation reasonably believes that it is not within the competence of ICAO to establish international responsibility. The ICAO Council could, on the basis of its actual competence, take up civil aviation-related issues aimed at determining, on a case-by-case basis, the conduct of the affected parties that would best comply with the provisions of the Chicago Convention. Furthermore, the Russian Federation believes that the ICAO Council lacks competence to inform the Assembly that Russia "*has been designated as non-compliant under Chapter XVIII of the Chicago Convention*" and as a consequence that the Russian Federation's "voting rights in the Assembly and the Council should be suspended in accordance with Article 88 of the Chicago Convention".

Contrary to the assertions by Australia and the Netherlands, paragraph 3 (e) of the Preliminary Objections of the Russian Federation and the arguments that it advances do not relate to the merits stage of the proceedings⁷⁶ but are solely a question of jurisdiction. The Applicants' invocation⁷⁷ of the ICAO Council Decision on Jurisdiction in the 2000 matter of *United States v. 15 European States* (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom),⁷⁸ in which the Applicants' preliminary objection relating to the scope of the Claimants' claims against the ICAO Council was rejected, cannot be considered relevant in support of their position.

First, it was not the abstract objection by the 15 European States that the ICAO Council accepted as relevant to the merits of the matter, but rather the objection⁷⁹ relating to paragraphs 2–4 of the requests by the United States to the ICAO Council, which in turn were worded as follows: "2) to order them [the 15 European States] to comply with all provisions of the [Chicago] Convention; 3) to further order them to take immediate steps to procure their release from their obligations under the EU Regulation; and 4) to grant the United States such other and further relief as the Council deems proper and just".⁸⁰ As may be seen, these requests are not identical to those made in the Statement and the

⁷⁵ Statement by Australia and the Kingdom of the Netherlands to the ICAO Council, 14 March 2022, paras. 6 and 7; Memorial of Australia and the Kingdom of the Netherlands, paras. 5.1 and 5.2.

⁷⁶ Reply by Australia and the Netherlands, para. 5.2, p. 36.

⁷⁷ Reply by Australia and the Netherlands, para. 5.3, p. 36.

⁷⁸ ICAO Council, 161st Session, Sixth Meeting, Summary of Decisions, Decision on Settlement of Differences: *United States and 15 European States* (2000), adopted on 16 November 2000, 2 [attachment 1 to the Reply by Australia and the Netherlands]

⁷⁹ ICAO Council, 161st Session, Sixth Meeting, Summary of Decisions, Decision on Settlement of Differences: *United States and 15 European States* (2000), adopted on 16 November 2000, 2 [attachment 1 to the Reply by Australia and the Netherlands], ["the second to the fourth items of requests relief are inadmissible since the first item fully describes the forms of decision which a Contracting State is entitled to request the Council to take under Article 82 ['Abrogation of inconsistent arrangements'] of the Convention"].

⁸⁰ ICAO Council, 161st Session, Summary of the Fourth Meeting, C-MIN 161/4, 15 November 2000, para. 8, p. 39. [attachment 3].

Memorial from Australia and the Netherlands.⁸¹ In this way, the ICAO Council recognized as falling within its competence issues of how best to implement the Chicago Convention and not the issues of liability,⁸² which lie beyond the competence of the Council, as Russia pointed out in its Preliminary Objections. Accordingly, this decision should not be regarded as having been adopted in a similar situation and therefore relevant to the present proceedings.

Second, the countries that put forward this preliminary objection also included the Netherlands. Consequently, Russia's position in this regard could be close to that of the Netherlands itself (if, that is, they consider their situations to be similar), which is currently asserting a fundamentally opposite point of view. Conduct of this kind by one of the Applicants is inconsistent and in bad faith. As the Vice-President of the International Court of Justice noted in his Separate Opinion in the case *Temple of Preah Vihear*:

*“inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendus est). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (nemo potest mutare consilium suum in alterius injuriam).”*⁸³

As Judge Lauterpacht succinctly put it in the Bosnian Genocide case, the party in the case *“cannot blow hot and cold”*.⁸⁴

Third, ICAO Council decisions are adopted on the basis of the Chicago Convention and the ICAO Rules for the Settlement of Differences and by those States that are represented on the Council at the time. Previous ICAO Council decisions are not a binding source of law for the ICAO Council.

Fourth, by knowingly exceeding the competence of the ICAO Council, the requests by Australia and the Netherlands to the ICAO Council render the Application and the Memorial inadmissible on their merits and, therefore, deprive it of its competence in the present case. In this context, the International Court of Justice has explained that objections to admissibility generally take the form of the assertion that, even if the Court has jurisdiction and assumes that the facts alleged by the applicant State are correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.⁸⁵

As for objections to the admissibility of an application specifically to ICAO, the International Court of Justice has noted that “Article 5 of the ICAO Rules for the Settlement of Differences does not preclude the Council from considering an objection to the admissibility of a claim as a preliminary issue”.⁸⁶ In view of the above, it is precisely the requirements of the request by Australia and the Netherlands to the ICAO Council that constitute the legal ground preventing the Council from proceeding to the consideration of the merits, depriving it of its competence. It must be borne in mind

⁸¹ Paragraph 5.1 of the Memorial of Australia and the Kingdom of the Netherlands.

⁸² The requirements for the Russian Federation are set out in statement by the Australia and the Kingdom of the Netherlands to the ICAO Council (paras. 6 and 7) and the Memorial of Australia and the Kingdom of the Netherlands (paras. 5.1, 5.2).

⁸³ Separate Opinion of Vice-President Alfaro, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962*, p. 40 [attachment 6].

⁸⁴ Separate Opinion of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, para. 34. [“cannot blow hot and cold”] [attachment 7].

⁸⁵ *Oil Platform (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29 (“Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct”) [attachment 5].

⁸⁶ *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, I.C.J. Reports 2020*, p. 81, paragraph 56, [at p. 26] (“Article 5 of the ICAO Rules for the Settlement of Differences ... bears the heading ‘Preliminary objection and action thereon’. Its first paragraph provides that “[i]f the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection” (emphasis added). This provision does not expressly mention preliminary objections to admissibility. However, the Rules for the Settlement of Differences were drafted following the model of the 1946 Rules of this Court, which also did not expressly mention preliminary objections to admissibility. This lack of specificity did not prevent the Court from dealing with objections to admissibility as a preliminary issue before the amendment of the Rules of Court in 1972 ... Likewise, Article 5 of the ICAO Rules for the Settlement of Differences does not preclude the Council from considering an objection to the admissibility of a claim as a preliminary issue.”) [attachment 38 to the Preliminary Objections].

that all five grounds for recognizing the ICAO Council's lack of competence to consider the issue set out in the Russian Federation's Preliminary Objections are interrelated.

The Applicants also argue, without merit, that the Council can determine the legal consequences of a breach of the Chicago Convention, including the appropriate remedies.⁸⁷ In support, reference is made to the well-known case of *Lagrande (Germany v. the United States)*.⁸⁸ In that case, the International Court of Justice noted that “*a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction*” (emphasis added). Further, the Court also noted that “*Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation*”⁸⁹ (emphasis added by Russian Federation). The practice of the International Court of Justice, however, which predetermines its institutional features, powers and competence, is not relevant to the issues of the ICAO Council's own powers and competence. The ICAO Council is not identical to the International Court of Justice, it is a *sui generis* institution and the role of the ICAO Council in the settlement of disputes under Article 84 of the Chicago Convention, as the International Court of Justice has determined, “*does not make the ICAO Council a judicial institution in the proper sense of the term*”.⁹⁰

As set out in detail in the Preliminary Objections by the Russian Federation,⁹¹ the ICAO Council is not the body which decides questions of international responsibility.⁹² The rules on State responsibility, and also the practice of the International Court of Justice in this area, cannot be used as an appropriate source in this case. It should again be recalled that, in the case *Appeal relating to the jurisdiction of the ICAO Council under article 84 of the Convention on International Civil Aviation*, it was noted that, in the exercise of its functions under Article 84 of the Chicago Convention, the ICAO Council resolves issues relating to civil aviation and, therefore, to the interpretation or application of the Chicago Convention.

Regarding the suspension of the voting power of the Russian Federation in the ICAO Council and Assembly,⁹³ the Russian party abides by its unambiguous reading of Article 88 of the Chicago Convention. The Applicants argue that the finding that the Russian Federation's conduct was not in conformity with the Chicago Convention “*gives rise to ... a decision of the Assembly to suspend the voting power of the Russian Federation*”.⁹⁴ It may seem very odd, but the Applicants' only argument on this occasion was essentially that the title of Article 88 refers to sanctions against a State in default of its obligations.⁹⁵ As they put it, in accordance with the 1969 Vienna Convention on the Law of Treaties, this reflects the object and purpose of the Article.

In actual fact, Article 88, “Penalty for non-conformity by State”, reads: “*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*” (emphases added). In other words, Article 88 covers

⁸⁷ Applicants' Reply, para. 5.14. p. 40.

⁸⁸ Applicants' Reply, paragraph 5.14 [attachment 42 to the Australian and Netherlands Reply]

⁸⁹ *Lagrande (Germany v. the United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, paragraph 48 [attachment 42 to the Applicants' Reply].

⁹⁰ Appeal concerning 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, Compendium of Judgments of the International Court of Justice 2020, p. 81, paragraph 60 (“The Court notes that it is difficult to apply the concept of ‘judicial ethics’ to the ICAO Council. The Council is a permanent body responsible to the ICAO Assembly, composed of appointed representatives of contracting states elected by the Assembly, rather than persons acting independently in their individual capacity, which is a 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 has been given, under Article 84, the function of settling disagreements between two or more Contracting States concerning the interpretation or application of the Convention and its Annexes. This does not, however, make the ICAO Council a judicial institution in the proper sense of the word”) [attachment 38 to the Preliminary Objections].

⁹¹ Preliminary Objections of the Russian Federation, pp. 48–50.

⁹² Reply by Australia and the Netherlands, Section II, p. 38.

⁹³ Reply by Australia and the Netherlands, Section D, pp.42–43.

⁹⁴ Reply by Australia and the Netherlands, para. 5.21, p. 42.

⁹⁵ Reply by Australia and the Netherlands, para. 5.22, p. 43.

situations where a contracting State is determined to be in default under the provisions of Chapter XVIII, “Disputes and default” (the Chapter sets out the procedure for settling disputes concerning the Chicago Convention). Thus, for Article 88 to be triggered, one of the Articles of Chapter XVIII (Articles 84–88) must be breached. This approach is also reflected in the doctrine: for example, Lupin 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*”.⁹⁶ In this context, the Applicants’ claims are based on Article 3 *bis* of the Chicago Convention, which falls under another chapter, Chapter I “General principles and application of the Convention”. Thus, the ICAO Assembly cannot invoke any legal grounds in relation to the present case to suspend the voting power of the Russian Federation in the ICAO Council and Assembly.

In summary, it may be asserted that the actions of the ICAO Council that are requested by the Applicants are inconsistent with the Council’s existing authority under the Chicago Convention. This, in turn, is a further reason for declaring the Application and the Memorial inadmissible and for confirming that the ICAO Council lacks competence to consider the matter.

6. REQUEST TO THE ICAO COUNCIL

The request by Australia and the Kingdom of the Netherlands to the ICAO Council, as set out in their Reply to the Preliminary Resolutions of the Russian Federation, should be rejected in full.

The Russian Federation reiterates the request that it made to the ICAO Council in its Preliminary Objections:

To reject the Application and Memorandum 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 the 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 c, 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.

ATTACHMENTS

ICAO documents

Attachment 1. International Civil Aviation Organization: Resolution and Report concerning the Destruction of Iran Air Airbus on July 3, 1988, *International Legal Materials*, vol 28, No. 4, 1989, pp. 896-943.

Attachment 2. Decisions of the ICAO Council at its extraordinary session held on 13 and 14 July 1988. Decision of the ICAO Council, adopted at its 125th session on 8 December 1988. See Observations of the International Civil Aviation Organization: Aerial Incident, 3 July 1988 (attachments

⁹⁶ Luping Zhang, *The Resolution of Inter-State Disputes in Civil Aviation*, Oxford University Press, United Kingdom, 2022, p. 34 [attachment 57 57 to the Preliminary Objections].

A and B to the Observations of the International Civil Aviation Organization: Aerial Incident, 3 July 1988).

Attachment 3. ICAO Council, 161st Session, Summary of the fourth meeting, C-MIN 161/4, 15.11.2000

International jurisprudence

Attachment 4. Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 219.

Attachment 5. Oil Platform (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 161.

Attachment 6: Separate Opinion of Vice-President Alfaro, Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 39.

Attachment 7: Separate Opinion of Judge ad hoc Lauterpacht in Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 407.

Scientific literature

Attachment 8. Ruwantissa Abeyratne, “Flight MH 17: the legal and regulatory fallout”, *Air and Space Law*, vol. 39, No. 6, 2014.

Attachment 9. Stefan A. Kaiser, “Legal considerations about the loss of Malaysia Airlines flight MH 17 in Eastern Ukraine”, *Air and Space Law* 40, No. 2.

Attachment 10. Juan José Quintana Aranguren, *Litigation at the International Court of Justice: Practice and Procedure*, 2015, Leiden: Brill, 2015.

Attachment 11. Chia-Jui Cheng. *Studies in International Air Law*, Leiden: Brill Nijhoff, 2018.