

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)
ICAO COUNCIL

AUSTRALIA AND THE KINGDOM OF THE NETHERLANDS

v.

THE RUSSIAN FEDERATION
(2022)

COUNTER-MEMORIAL
OF THE RUSSIAN FEDERATION

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”

Agent for the Russian Federation
(*Signed*) A. A. Novgorodov

20 April 2023

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SECTION I. INTRODUCTION

SUBSECTION I.1 Agent for the Russian Federation

1. Alexey Anatolyevich Novgorodov, Representative of the Russian Federation to the International Civil Aviation Organization (ICAO), has been appointed as the agent for the Russian Federation authorized to act on behalf of the Russian Federation in the proceedings.

2. Official correspondence relating to the proceedings may be sent to the address: 999 Robert-Bourassa Boulevard, Suite 16:25, Montreal, Quebec, Canada, H3C 5J9.

SUBSECTION I.2 The Applicants' assertion that the Russian Federation is responsible for the use of a Buk SAM is unfounded

3. The Application of Australia and the Kingdom of the Netherlands (hereinafter referred to as "the Applicants") reads as follows on its title page:

"Disagreement on the interpretation and application of the Convention on International Civil Aviation pursuant to Article 84".

4. In essence, however, the Application and the attached Memorial are an indictment against the Russian Federation for the downing of Malaysian Airlines Flight MH17 on 17 July 2014. Paragraphs 1.1, 2.22, 2.25–2.28 and 4.10 of the Memorial expressly state that flight MH17 was shot down by a 9M38 series missile with a 9H314M warhead, launched by the Armed Forces of the Russian Federation from a "Buk" surface-to-air missile system (SAM).

5. The Russian Federation categorically rejects this assertion in view of the fact that the investigation into the crash of flight MH17 failed to conduct the necessary and sufficient research to determine the type of missile whose explosion caused the in-flight destruction of the civilian aircraft.

In considering the merits of the case, the Russian Federation urges the ICAO Council to pay particular attention to the fact that the research results referred to by the Applicants are invalid, inconsistent with the characteristics of the 9M38 missile and the 9H314M warhead, inherently contradictory, derived from unreliable sources and in bad faith, as detailed in Section II of the present Counter-Memorial.

6. The Russian Federation draws the attention of the ICAO Council members to the fact that the issue of the ICAO Council's competence to hear this dispute was not definitively resolved at the stage of preliminary objections. In accordance with the ICAO Council's decision at that stage of the proceedings, the Russian Federation's preliminary objection that the ICAO Council lacks competence to hear the case in view of the inapplicability of Article 3 bis of the Chicago Convention in conditions of armed conflict was deferred to the merits stage of the proceedings. The Russian Federation continues not to recognize the competence of the ICAO Council to consider this dispute, and the

filing of the present counter-memorial may not be construed as a recognition of such competence.

7. Subsection II.1 of the Counter-Memorial contains information from the materials available to the Russian Federation of the investigation into the crash of flight MH17, which support the conclusion that the failure to take adequate measures to protect the scene of the accident by the State of occurrence – Ukraine¹ – has led to falsifications and the appearance in the investigation of such items as

- Two double-T-shaped (“bow-tie”) projectiles; and
- The wreckage of a Buk missile.

These items are used without justification by the Applicants as evidence of the Russian Federation’s involvement in the use of Buk SAMs on Ukrainian territory.

Accordingly, subsection II.2 of the Counter-Memorial provides facts indicating that the test and modelling methods used in the investigation of the MH17 crash failed to take into account the specifics of identifying weapons used to attack aircraft and the fact that the results used by the Applicants were not verified against the actual flight performance of the Buk SAM and its components.

Subsection II.2.1 of the Counter-Memorial details the Applicants’ failure to carry out the requisite examination of the missile debris – allegedly found at the site of the accident, as claimed by the Applicants. Furthermore, the Russian side is confident that the wreckage belongs to a missile transferred to military unit no. 20152 stationed in 1986 in the town of Terebovlya in the Ukrainian Soviet Socialist Republic (now western Ukraine). The missile had not been returned to the territory of the Russian Federation (subsection II.2.3).

8. Failure to comply with ICAO standards and recommendations for the investigation of aviation accidents prevented the investigation from objectively and comprehensively examining all issues related to the destruction of the Boeing 777 Flight MH17 and identifying those responsible for this tragedy (subsection II.2.4 of the Counter-Memorial). No use was made of the capabilities of the Russian Federation as the developer State of the Buk SAM system, an omission which is not in compliance with the standards of Annex 13 of the Chicago Convention.

¹ Annex 13 of the Convention on International Civil Aviation, Standard 3.3: “The State of Occurrence shall take all reasonable measures to protect the evidence and to maintain safe custody of the aircraft and its contents for such a period as may be necessary for the purposes of an investigation. Protection of evidence shall include the preservation, by photographic or other means, of any evidence which might be removed, effaced, lost or destroyed. Safe custody shall include protection against further damage, access by unauthorized persons, pilfering and deterioration.”

SUBSECTION I.3 The Applicants' position regarding the interpretation and application of the rules of international law is contrary to the Chicago Convention and has no legal basis

9. The Russian Federation shares the Applicants' view that determining the State responsible for the downing of the Malaysian Boeing aircraft is necessary in order to prevent similar tragedies in the future. Legal responsibility cannot be determined, however, on the basis of political and opportunistic considerations. International legal responsibility must, first, derive from existing international legal rules and, second, be based on indisputable factual circumstances. Otherwise the international community will draw no lesson from this tragedy and the international legal regime governing the use of airspace for the purposes of air navigation will cease to be a genuine regulator of inter-State relations which ensures the safe flight of civil aircraft.

10. Article 89 of the Chicago Convention stipulates that the Convention shall not affect the freedom of action of any of the States affected by an armed conflict, whether as belligerents or as neutrals. Such actions cannot be considered a violation of the Chicago Convention. This does not mean that the downing of a civilian aircraft is "permitted" under international law; it means that the question of the legality of the use of weapons in an armed conflict is regulated by another branch of law – international humanitarian law (at the same time, Russia categorically rejects allegations of its involvement in the crash of MH17). The existence of an armed conflict on the territory in whose airspace the Malaysian Boeing was brought down is an indisputable fact confirmed by numerous sources and not disputed by the Applicants. In 2014, the Russian Federation was among the States affected by the conflict, albeit not as a belligerent. Accordingly, as shown in subsection III.1 of the Counter-Memorial, the acts attributed by the Applicants to the Russian Federation cannot a priori constitute a basis for assigning liability for a violation of the Chicago Convention.

11. Article 89 of the Chicago Convention applies irrespective of how certain acts are defined under international humanitarian law. It does not include any provisions limiting its application in the event of armed conflict. The Applicants' interpretation that the exemption provided by Article 89 applies only to acts not contrary to international humanitarian law is without merit. Evidence to this effect is included in subsection III.2 of the Counter-Memorial.

12. Article 3 bis of the Chicago Convention *per se* governs the peacetime situation and does not deal with the loss of civil aircraft during an armed conflict, as occurred with the Malaysia Airlines aircraft (subsection III.3 of the Counter-Memorial). This does not mean that the downing of civilian aircraft is "permitted" under international law; it means that the question of the legality of the use of weapons in armed conflict is governed by a different branch of law – international humanitarian law.

13. The factual circumstances of the catastrophe known to date and, among them, the materials submitted by the Applicants show that, to date, it has not been possible reliably to identify the persons

constituting the crew of the Buk SAM from which, according to the Applicants, the Malaysian Boeing was shot down. In any event, the available information, an analysis of which is included in subsection III.4 of the Counter-Memorial, leads to the conclusion that the actions of the crew of the Buk SAM cannot be attributed to the Russian Federation.

14. Article 3 bis of the Chicago Convention applies only to cases where the aircraft has been previously identified as civilian. Furthermore, Article 3 bis does not contain an obligation of prevention. The Applicants unreasonably propose an extended interpretation which is wholly inconsistent with the literal interpretation of the Chicago Convention. In any event, the actions and omissions of which the Applicants accuse the Russian Federation do not constitute a violation of any international legal rules (subsection III.5 of the Counter-Memorial). The prescribed actions, in particular those relating to the closure of airspace, should have been taken by Ukraine, in whose airspace the crash of flight MH17 occurred.

15. The Russian Federation bears no liability because there is no causal link between the actions of the Russian Federation and the downing of MH17 (subsection III.6 of the Counter-Memorial). In this respect, Russia categorically rejects the allegations of its involvement in the crash of MH17.

16. The downing of the Malaysian Boeing occurred in Ukrainian airspace. It is precisely Ukraine, according to ICAO practice and Annex 11 of the Chicago Convention, which has an obligation to ensure the safety of air navigation in sovereign airspace (subsection III.7 of the Counter-Memorial). At the time of the crash of flight MH17, Ukraine was well aware of the risks to civil aviation due to the armed conflict in the east of the country, including the presence of anti-aircraft defence equipment of the Donetsk People's Republic (DPR) militia. Driven by mercenary and reputational interests, however, as well as a desire to use civilian aircraft as a "human shield" to protect the Ukrainian air force, the Ukrainian authorities decided to disregard their obligations under international law, with tragic consequences.

SECTION II. RESPONSES TO THE ISSUES RAISED IN THE APPLICANTS' MEMORIAL

SUBSECTION II.1 Excerpts from the criminal investigation file provided by the Applicants cannot be considered reliable

17. The crash of flight MH17 was the result of the plane disintegrating in mid-air, raising the question from the first day of the accident as to what caused the airframe to disintegrate prior to impact with the ground.

18. The only fully informative and objective source of data about the cause and sequence of destruction was the wreckage of the aircraft. Obviously, an extremely important and pivotal role in

this investigation was played by the comprehensive scope of the efforts to collect and examine the wreckage of the aircraft.

19. Under standard 3.2 of Annex 13 “*Aircraft Accident and Incident Investigations*” to the Convention on International Civil Aviation (hereinafter referred to as the Chicago Convention) Ukraine was required, as the State of occurrence, to take “*all necessary measures to protect the evidence and to maintain safe custody of the aircraft and its contents for such a period as may be necessary for the purposes of an investigation*”.²

20. In the Memorial and the documents referred to by the Applicants there is no confirmation that Ukraine took all necessary and sufficient measures to secure the wreckage of the aircraft. Such measures taken by Ukraine should have included the cessation of military operations in the area immediately adjacent to the crash site and full cooperation in the international investigation, including with regard to the provision of immediate and unrestricted access to the crash site, as required by paragraphs 7 and 9 of United Nations Security Council resolution 2166 (2014).

21. For their part, the authorities of the self-proclaimed republics in eastern Ukraine have fully honoured their obligation to “*provide safe access and security guarantees to the national investigation commission, including international investigators, in the area under their [representatives of separatist groups] control*”, together with their commitment to “*cooperate with the relevant authorities of Ukraine on all practical questions arising in the course of the recovery and investigation works*”.³

22. In this connection, the Russian Federation was forced to send a letter to the ICAO Secretary General on 29 September 2014, Ref. 9-3763, stating, among other things, the following:

“UN Resolution 2166 emphasizes the crucial role of ICAO in investigating aviation accidents and incidents and, in view of the remaining open issues that directly impact ensuring a full, thorough, and independent international investigation of the aviation accident which are identified, among other places, in paras 5, 6, and 7 of UN Resolution 2166, I have the honour to request that you, Mr. Secretary General, appeal to the competent authorities of Ukraine and the Donetsk People’s Republic with a call to ensure jointly that the international committee has immediate, safe and unlimited access to the accident location, and to create the necessary conditions so that all existing fragments of the aircraft may be collected and delivered to the agreed-upon location for expert assessment.”

² ICAO: Annex 13 to the Convention on International Civil Aviation: Aircraft Accident and Incident Investigation, tenth edition 2010, including Amendment No. 14.

³ OSCE: Press statement by the Trilateral Contact Group, Kyiv, Ukraine, 18 July 2014, <https://www.osce.org/ru/home/122136> (last accessed 9 December 2022).

23. The Dutch Safety Board (DSB) report does not contain any information or facts indicating that the authorities of the self-proclaimed Donetsk People's Republic (DPR) hindered the arrival of investigators at the scene of the accident, or that there was any opposition on their part to the expert investigators, such as prohibiting them from inspecting, moving or seizing parts of the aircraft, taking video film and photographs, interviewing witnesses and other activities that should be carried out at the scene of the accident. Representatives of the unrecognized DPR did not hinder the investigation, as evidenced by the handover of the aircraft's flight recorders to Malaysian investigators⁴ on 22 July 2014.

24. Standard 5.4 of Annex 13 to the Convention on International Civil Aviation requires the accident investigation authority as follows: *"Where feasible, the scene of the accident shall be visited, the wreckage examined and statements taken from witnesses"*.

25. The final report of the DSB states:

"Under escort of the Organisation for Security and Cooperation in Europe (OSCE), air accident investigators from Ukraine and Malaysia, the Australian Federal Police and journalists had access to the crash area in the days following the crash. During these visits, the wreckage was photographed extensively and showed the locations mostly undisturbed. The information gathered was shared with the Dutch Safety Board."

*Due to the security situation within the geographic area of the crash, the Dutch Safety Board was unable to start the collection and preservation of the wreckage directly after Ukraine had delegated the investigation to the Netherlands."*⁵

26. Ukraine's transfer of investigative powers to the Netherlands did not relieve Ukraine of its obligation to use every means to facilitate the investigation, as required by Standard 5.1 of Annex 13 to the Convention on International Civil Aviation. Moreover, Standard 3.3 of Annex 13 to the Convention on International Civil Aviation obliged Ukraine to *"take all reasonable measures to protect the evidence and to maintain safe custody of the aircraft and its contents for such a period as may be necessary for the purposes of an investigation [...] Safe custody shall include protection against further damage, access by unauthorized persons, pilfering and deterioration."*

27. Ukraine has failed to comply with these requirements. The OSCE Special Monitoring Mission to Ukraine (SMM) spot report for 21 July 2014 reported that:

"[...] At 13:20 hrs the SMM arrived at the main crash site, which the SMM had visited on the three previous days, near the village of Grabove. The SMM did not see any perimeter security in place and was given unhindered access to the site. There was noticeably less activity and the Emergency Services were no longer present, with three of the four tents previously used for administration and planning, having been removed [...]".

⁴ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 2.11.1 (pp. 44, 45) [Appendix 85].

⁵ Ibid., Section 2.12.1 (p. 53) [Appendix 85].

And, in addition:

“[...] At 16:15 hrs the SMM arrived at an incident scene previously not visited by the SMM, near the village of Nikishine, approximately 4 km from the main crash site. The SMM saw multiple pieces of debris of various sizes widely scattered over an area of approximately one square kilometre. There was no evidence of human remains. The site was not guarded. The SMM left the site at 16:45 hrs [...].”⁶

28. It should be noted that the agreement between Ukraine and the Netherlands on the transfer of investigative powers was signed on 23 July 2014 – seven days after the crash. As may be seen from the above information, Ukrainian authorities had unrestricted access to the crash site immediately after the crash, but they were not involved in the protection of the wreckage.

29. Ukraine’s breach of Standards 3.2 and 5.1 of Annex 13 to the Convention on International Civil Aviation has contributed to the deliberate distortion and falsification of material evidence relating to the crash of flight MH17.

30. Three expeditions were conducted to search for and collect the wreckage at the site of the accident. The first such expedition did not take place until November 2014, more than three months after the crash. During the first search and rescue operation (4–22 November 2014), *“On site the pieces of wreckage of the aeroplane were fitted with a label, photographed and registered in a database. When the pieces were transferred at the various sites, they were inspected with use of this registration”*.⁷ *“During the first recovery mission, the Dutch Safety Board concluded an agreement with the Minister of Emergency Services of the Donetsk Region Administration, requesting the Minister’s assistance with regard to the removal of the remaining pieces of wreckage when the Netherlands ended its first recovery mission (see Appendix J). It was also agreed that these remaining pieces of wreckage could be recovered without any Dutch Safety Board representatives being present”*.⁸ According to the said agreement, concluded on 20 November 2014 between the DSB and the Minister for Emergencies of the Donetsk regional administration, *“all debris remaining after the handover to the DSB falls outside the scope of the above mentioned independent international investigation. The DSB therefore requests the assistance of the Ministry of Emergency Services of the Donetsk region administration with regard to the **disposal of all remaining debris of the MH17 wreckage**”*.⁹

⁶ OSCE: *Spot report by Special Monitoring Mission to Ukraine (SMM) on visit to locations related to Malaysia Airlines flight MH17 crash, 21 July 2014, Donetsk, 22 July 2014*, <https://www.osce.org/ru/ukraine-smm/121682> (last accessed 9 December 2022).

⁷ Dutch Safety Board. “MH17: About the investigation”, 2015. Subsection 7.1.2 (p. 55) [Error! Reference source not found.].

⁸ Ibid., [Error! Reference source not found.].

⁹ Ibid., Annex J (pp. 91–92) [Error! Reference source not found.].

31. It follows that between the first and second search operations the local authorities had no obligation to make any effort to preserve the wreckage of the plane. In this connection, it is logical for the DSB to report that, during the second and third expeditions to the crash site, some of the wreckage was not recovered.¹⁰

32. During the second and third search operations (from 20 to 28 March 2015 and from 19 April to 2 May 2015), eight more containers of wreckage were recovered. The containers contained various parts of the aeroplane's fuselage, parts of the aeroplane's cabin and a large number of mostly small, burned details. The eight containers were delivered to the Netherlands at the end of the third mission.¹¹ *"Upon arrival at the air force base,¹² all individual pieces of wreckage were again verified, registered and photographed using a fixed procedure and then forensically examined. They were then sorted and a selection was made of the pieces of wreckage that were needed to ascertain the causes of the crash and that were required for making the reconstruction. On 10 December 2014, this process started for the wreckage that had been loaded onto sixteen trucks after being recovered from the wreckage area during the first recovery mission. For the other eight containers of wreckage recovered during the second and third recovery missions, this process started on 12 May 2015"*.¹³

33. It is important to note that the Russian Federation was not involved in the examination of the wreckage at the scene or in its identification after its transfer to Gilze-Rijen Air Base. The information on the careful sorting and identification of the evidence taken from the scene of the accident is inconsistent with the actual state of the material evidence adduced by the Applicants to prove their version of the incident, which is based on allegations of the discovery (a) of double-T-shaped ("bow-tie") projectiles,¹⁴ which led to the conclusion that the shooting down of the aircraft had been caused by a Buk missile, and (b) of fragments of the missile itself.¹⁵

a. Emergence in the investigation of "double-T-shaped" ("bow-tie") projectiles

34. The information in the final report of the DSB on the location where the projectiles were found is limited to general phrases such as "*document binder*" or "*cockpit*",¹⁶ although it is important for the determination of the type of warhead and missile. Specific references to the location where

¹⁰ Ibid., Subsection 7.1.2 (p. 56) [Error! Reference source not found.].

¹¹ Ibid., Subsection 7.1.2 (pp. 55–56) [Error! Reference source not found.].

¹² Gilze-Rijen, Netherlands.

¹³ Dutch Safety Board. "MH17: About the investigation", October 2015. Subsection 7.1.4 (p. 57) [Error! Reference source not found.].

¹⁴ Applicants' Memorial, paragraph 2.26 [Appendix 104].

¹⁵ Applicants' Memorial, paragraph 2.27 [Appendix 104].

¹⁶ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Table 11 (p. 92) [Appendix 85].

they were found are available only for two elements forming part, in all likelihood, of the warhead housing,¹⁷ and also for elements recovered from the bodies of the pilot-in-command, the co-pilot and the chief flight attendant.

35. From the caption to figure 37 of the final report of the DSB it appears that the “bow-tie” item “#1” (top left photo)¹⁸ was found in the “cockpit”. To date, the exact location in the cockpit where this alleged “projectile” was found remains a mystery. Below, in subsections 0 and 0 of the Counter-Memorial, it will be proved that this object has nothing to do with the disaster.

36. The second “bow-tie” projectile was allegedly recovered from the body of the pilot-in-command. Yet the body of the pilot-in-command was not specifically examined – instead, the body of the Captain from Team B, **who had been outside the cockpit of the aircraft at the time of the crash**, was examined.¹⁹ In Part 0 of the Counter-Memorial, it is demonstrated that, in terms of its geometrical dimensions and residual mass after the penetration of obstacles, this object cannot be related to the wreckage of Boeing 777 flight MH17.

b. Emergence in the investigation of missile fragments

37. According to subsection 2.12.2.8 of the DSB final report: “During the recovery of the wreckage, a number of parts that did not originate from the aeroplane and its content were found in the wreckage area. The parts found **appeared to be connected with a surface-to-air missile**.”²⁰

38. Manipulation of the missile debris is a deliberately biased action designed to cast blame on the Russian Federation. The discovery of the missile wreckage by the Netherlands was announced in August 2015 (more than a year after the event) and only after the consultation procedure with the Russian Federation had been completed before the publication of the final report of the investigation. Thus, in violation of Standard 6.3 of Annex 13 to the Convention on International Civil Aviation, the Russian Federation was deprived of the opportunity to formally comment and receive a reasoned response. Contrary to Standard 6.3, the final report was published by the Dutch Safety Board (DSB) without the attachment of the comments by the Russian Federation on the emergence in the investigation of missile fragments.

39. During the investigation of the crash and to date, no opportunity has been provided to the Russian Federation to examine this missile wreckage, in breach of Standard 5.25 (b) and (d) of Annex 13 to the Convention on International Civil Aviation.

¹⁷ Ibid., figure 40 (p. 94) [Appendix 85].

¹⁸ Ibid., figure 37 (p. 89) [Appendix 85].

¹⁹ Ibid., Section 2.13.2 (p. 85) [Appendix 85].

²⁰ Ibid., Section 2.12.2.8 (p. 80) [Appendix 85].

40. In the final report of the DSB, **there is no information about the area where “fragments of a surface-to-air missile” were found or about the search expedition (first, second or third) during which the fragments were found.** In view of this, the Russian Federation has every reason to believe that the information provided by the DSB on the verification and recording of the debris recovered from the site cannot be entirely in line with the facts.

41. Up until the conclusion of the investigation, information about the alleged discovery of rocket fragments was withheld from the Russian Federation, thereby denying the Russian side an opportunity to take part in the examination of those fragments and to make its opinion known by annexing it to the final report of the investigation into the crash of flight MH17, as required by Annex 13, Standard 6.3, of the Convention on International Civil Aviation.

42. On 2 June 2015, a draft final report was submitted to the Russian Federation for comments. Citing the need to publish the final report “*as early as possible*”, the cover letter from the DSB requested that the draft be reviewed within a period of 30 days (instead of the 60 days stipulated by paragraph 6.3 of Annex 13 to the Chicago Convention) and that comments be provided on the draft final report by 3 July 2015.²¹

43. On 14 July 2015, the Russian Federation submitted comments to the DSB on the draft final report.²²

There was no mention in the draft final report of the discovery of ground-to-air missile fragments at the scene.

44. As stated above, information about the discovery of missile parts among the wreckage of the aircraft was announced on 11 August 2015, during the third and final meeting of the States parties to the investigation. The Russian Federation was thus deprived of the opportunity to express its opinion on the discovery of the missile parts and their connection to the crash of flight MH17 during the process of consultations prescribed by Annex 13 to the Convention on International Civil Aviation.

45. On 16 September 2015, the Russian Federation addressed a communication to the President of the ICAO Council, Mr. Olumuyiwa Benard Aliu,²³ which stated, among other things, the following:

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

²¹ Letter dated 2 June 2015 No OvV-15500901 from the Investigator in Charge of the DSB [Appendix 98].

²² Letter dated 14 July 2015 from the Deputy Director of the Federal Air Transport Agency, Oleg G. Storchevoy, No. 02.3-2039, commenting on the draft final report on the investigation into the crash of flight MH17 [Appendix 89].

²³ Letter dated 16 September 2015 from the Deputy Director of the Federal Air Transport Agency, Oleg G. Storchevoy, No. 4.15-785-dsp, addressed to the President of the ICAO Council on the progress of the investigation into the crash of flight MH17 [Appendix 99].

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

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

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

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

46. Mr Olumuyiwa Benard Aliu, President of the ICAO Council, replied²⁴ to the Russian Federation on 2 October 2015. The response stated, among other things:

"[...] ICAO is further informed that the DSB presented the Draft Final Report on the investigation of flight MH17 to the accredited representatives of States participating in the investigation on 2 June 2015, for their comments. In accordance with Annex 13 – Aircraft Accident and Incident Investigation, to the Convention on International Civil Aviation, paragraph 6.3, upon receipt of the comments, the State conducting the investigation shall either amend the draft Final Report to include the substance of the comments received or, if desired by the State that provided comments, append the comments to the Final Report. Rest assured that ICAO continues to advise all parties to ensure that Annex 13 provisions are followed accordingly. In this regard, a Final Report is expected to include dissenting views appended thereto."

²⁴ Letter dated 2 October 2015 from the President of the ICAO Council No. E1/1.63, AN 6/32, SMM 1/4 in response to letter No. 4.15-785-dsp of 16 September 2015 from the Federal Air Transport Agency on the progress of the investigation into the crash of flight MH17 [Appendix 100].

47. On 22 September 2015, the Russian side sent its objection to the DSB²⁵ for actions contrary to Annex 13 to the Convention on International Civil Aviation. **No response to the Russian Federation's request was received from the DSB.**

48. On 13 October 2015, the DSB published its final report **without responding to the Russian Federation's letter** of 22 September 2015.

49. In subsection 0 of its Counter-Memorial, the Russian Federation provides objective facts proving that **the missile fragments presented by the Netherlands belong to a missile previously supplied to Ukraine** and have nothing to do with the Armed Forces of the Russian Federation.

50. According to the DSB: *"The material that was found at the wreckage sites was not unscathed. The wreckage had been lying at the wreckage sites unguarded for several months and was prone to being damaged, altered or removed. The wreckage was partially affected by weather and by the handling that was necessary during the first few weeks to recover the human remains and personal belongings. The latter in some cases required moving pieces of wreckage. Furthermore, there had been repeated fighting in the area, which could also have had repercussions on the state of the wreckage when it was recovered."*²⁶ Notwithstanding this finding, the DSB did not take the necessary steps to verify the physical evidence obtained to ensure a thorough investigation, as required by United Nations Security Council resolution 2166 (2014).

51. Consequently, in deciding this case, the ICAO Council should take into account Ukraine's failure properly to secure the scene, and also the lack of objective information about the location of where the projectiles and "ground-to-air missile fragments" were found. The appearance of the alleged projectiles and missile fragments at the unguarded crash site and in the wreckage of the Boeing 777, flight MH17, could have been fabricated by unidentified persons with an interest in the case.

52. This conclusion is supported by the findings of studies and experiments, the results of which are given in subsection II.2 of the Counter-Memorial.

SUBSECTION II.2. In its technical investigation the DSB did not carry out the necessary and sufficient research to determine the type of missile that shot down flight MH17 and the place where it was launched

II.2.1. Examination of aircraft wreckage and projectiles

²⁵ Letter dated 22 September 2015 from Oleg G. Storchevoy, Deputy Director of the Federal Air Transport Agency, No. 4.02-798-dsp to the Safety Board of the Netherlands objecting to actions contrary to Annex 13 to the Chicago Convention [Appendix 101].

²⁶ Dutch Safety Board, "MH17: About the investigation", 2015. Subsection 7.1.3 (p. 56) [Error! Reference source not found.].

53. Standard 5.25 of Annex 13 to the Convention on International Civil Aviation grants States the entitlement to participate in all aspects of the investigation under the control of the investigator-in-charge, including participation in off-site investigative activities such as component examinations, technical briefings, tests and simulations. According to Note 3 to Standard 5.25, “Nothing in this Standard precludes the State conducting the investigation from extending participation beyond the entitlement enumerated”. This notwithstanding, the Russian Federation, as the developer and manufacturer of the Buk SAM system, was not invited to participate in the examination of the aircraft wreckage, the projectile components and the missile debris allegedly found at the site of the accident.

54. The following are facts indicating that the test and simulation methods did not take into account the specifics of identifying weapons used to strike aircraft, and the results obtained were not verified against the actual flight characteristics of the Buk SAM system and its components.

II.2.1.1 Research methods used in the investigation do not make it possible to identify the type of weapon used

55. According to ICAO recommendations, the selection of the facility at which it is planned to conduct special tests for an accident investigation depends on the nature of the specialist examinations and the type of components and systems to be tested. The investigator must be confident that the facility chosen is capable of providing the required examination and testing.²⁷

56. The investigation of damage to aircraft caused by means of a weapon (“combat damage”) is an unusual task that civil aviation accident investigators seldom encounter, and in dealing with which some States have no experience at all. Suffice it to note that Chapter 19, “*Investigation of explosives sabotage*”, Part III of the ICAO *Manual of Aircraft Accident and Incident Investigation* (ICAO Doc 9756) briefly mentions the desirability of a three-dimensional reconstruction when investigating the destructive effects of a missile impact.²⁸ The ICAO document does not provide any methodology for investigating “*combat damage*” to an aircraft for the **purpose of identifying the type of weapon**.

57. In the course of the investigation into the crash of flight MH17, the Russian Federation has repeatedly drawn attention to the need for in-depth analysis and detailed discussion of methods for determining the characteristics of the warhead whose explosion led to the destruction of the Boeing 777 aircraft, flight MH17.

²⁷ ICAO: Manual on Accident and Incident Investigation Policies and Procedures, Doc 9962 (2011). Chapter 9, “Tests and component examinations, paragraph 9.2.1.

²⁸ ICAO: Manual of Accident and Incident Investigation, Doc 9756, Part III: Investigation (2011). Chapter 8 “Reconstruction of wreckage” (paras. 8.2.1 and 8.3.8) and Chapter 19 “Investigation of explosives sabotage”.

58. In the Russian Federation, a specialized research organisation has been in operation since 1942, now called the *Central Research Institute of the Air Force of the Ministry of Defence of the Russian Federation*. “*Combat damage*” research has been carried out at this institute since as long ago as the Second World War, but the methodology finally took shape as an independent scientific discipline in the 1980s (during the Afghan campaign), on the basis of a huge volume of practical experience of aircraft accident investigation and experimental research. The result was the development of a set of techniques making it possible:

- To identify, from among the multitude of injuries in the wreckage of the aircraft, combat damage created by the means of the attack;
- To calculate the spatial conditions of aircraft damage (point of detonation and the orientation in space of the weapon at the moment of detonation) from the specific features of the combat damage;
- To determine the material of the projectiles, their dimensions, shape and weight;
- To estimate the mass of the warhead; and, as a result,
- To identify the type of weapons used.

59. The methodology for identifying the type of damage was developed by the Central Research Institute of the Air Force for use by the Armed Forces, but it has been used successfully in cases of “*combat damage*” to civilian aircraft. At a meeting of authorized representatives held in May 2015, the Russian Federation delivered a report on the methodology for conducting “*combat damage*” studies using the example of the crash over the Black Sea of a Tu154 passenger aircraft, on flight SBI-1812, en route from Tel Aviv to Novosibirsk.²⁹

60. Use of the methodology made it possible to determine that the Tu-154, flight SBI-1812, had been shot down by a 5B28 anti-aircraft missile fired from a C-200V missile system. The type of missile was determined by the Central Research Institute of the Air Force as follows:³⁰

- From the damage consisting of multiple, uniform perforations in the form of round holes it was concluded that these were caused by remotely detonated projectiles equipped with a fragmentation warhead;

²⁹ Central Research Institute of the Air Force. “Findings of damage research on fragments of Tupolev 154M RA85693 crashed on 4 October 2001, over Black Sea”, May 2015 [Error! Reference source not found.].

³⁰ State Research Institute of the Ministry of Defence of the Russian Federation. “Report on the results of additional studies of the structure of the Tu-154M RA-85693 that crashed over the Black Sea on 4 October 2001” (in Russian) [Error! Reference source not found.].

- On the basis of volumetric modelling it was established that the explosion of the warhead had occurred at a distance of about 13 metres from the fuselage, with the missile approaching the aircraft from the left rear at an angle of about 46°–50° to its longitudinal axis;
- The projectiles recovered from the aeroplane fragments were made of bearing-grade alloyed ShKh-15 steel and in their original state were spherical in shape, approximately 9.5 mm in diameter and weighing about 3.5 grams;
- Based on the material of the projectile, its structural state, mass and geometric characteristics, and on the nature of the projectile fragmentation, it was concluded that they came from a 5B14SH warhead used in the 5B28V anti-aircraft missile of the C-200 type;
- Based on flight-ballistic calculations and mathematical modelling of the missile's flight to the target, it was determined that the impact on the aircraft matched the standard conditions of the 5B28B semi-active homing missile and the standard conditions of its warhead being triggered in the event that the aircraft was detected by the ground radar of the target in the frequency range corresponding to the settings of the onboard radio equipment.

61. During a further investigation into the crash of the Tu-154, flight SBI-1812, it was established that, immediately before the aircraft was hit, a 5B28 missile had been launched from the launch site of an S-200V anti-aircraft missile system located near Feodosiya during exercises conducted by the Ukrainian air defence forces. The missile had been launched at an unmanned aerial vehicle, a Reis target. Owing to errors in the preparation and conduct of the exercise, however, it was in fact the Tu-154 passenger aircraft that had been destroyed.³¹

62. Thus, the downing of the Tu-154 aircraft by a S-200V SAM missile had been established not by the presence of this type of weapon in the region, but by the nature of the damage to the aircraft's airframe and the properties of the projectile components.

63. During the investigation into the crash of flight MH17, the discussion and coordination of investigation methods, and also of the investigation itself, were conducted without the participation of Russian specialists. Accordingly, in order to analyse the specific details of the damage that led to the crash of Boeing 777, flight MH17, the Russian side used photographic materials obtained during the

³¹ Inter-State Aviation Committee. "Final report on the results of the crash investigation" (Tu-154M aircraft, registration No. RA-85693), 29 October 2001 (in Russian) [Appendix 91].

examination of the wreckage of the Boeing 777 in February and May 2015, and also the results of **full-scale simulation** experiments conducted by the Russian side.

II.2.1.2 The point of detonation of the missile's warhead is incorrect.

64. The main methodological error made during the investigations into the crash of flight MH17 was the incorrect determination of the point of detonation of the weapon. This was pointed out by the Russian side even before the final report was published.³²

65. The final report from the DSB concluded that the point of detonation was between 3.24 and 4.39 m from the aircraft.³³ The detonation position was determined by direct modelling.³⁴ This means that a mathematical simulation model of the warhead of a Buk SAM system was created. The simulation was then used to find the position of this warhead at which the theoretically derived damage area on the aircraft coincided with the actual one.

66. This is a fundamental error. The detonation position is determined for the purpose of identifying the characteristics of the warhead, but not vice versa. In fact, in the investigation of the MH17 crash, the detonation position was adjusted to a virtual model of the warhead (with selected characteristics) under predetermined conditions.

67. Following this approach, if the warhead differs from the warhead that has been specified, any match between the theoretically derived damage area and the actual damage area would be coincidental. It is therefore natural that the annexes to the final report state that “*finding a single combination for the point of detonation point and orientation [of the warhead] is not possible*”.³⁵

68. In the course of the investigation into the crash of flight MH17, the Russian Federation was not given the opportunity to conduct a study in full accordance with the methodology developed. Nevertheless, several investigations were carried out to determine the point of detonation of the warhead using special photographs taken by Russian investigators in February and May 2015. In addition, an experimental verification of the results obtained was carried out on a Boeing 777 replica aircraft.

³² Letter dated 14 July 2015 from the Deputy Director of the Federal Air Transport Agency, Oleg G. Storchevoy, No. 02.3-2039, commenting on the draft final report on the investigation into the crash of flight MH17 [Appendix 89].

³³ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17 Crash, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 142, Table 20 [Appendix 85].

³⁴ Ibid., pp. 135–141 [Appendix 85].

³⁵ Ibid., Appendix Y “Damage reconstruction due to impact of high-energetic particles on Malaysia Airlines flight MH17”, Annex A (page 9) [Appendix 85].

69. The results of the Russian investigations were reported to the DSB in May 2015, during the second meeting of the authorized representatives of the States participating in the investigation.³⁶ According to Russian calculations, the minimum distance from the point of detonation to the aircraft (left cockpit window) is in the range of 0.8–1.6 m.

70. The experiment on the Boeing 777 replica aircraft was repeated in 2020 following a new methodology, using additional technical devices in the form of laser equipment (with the visualization of laser beams). As a result of the experiment, the detonation position was refined to about 1 m from the left cockpit window (fig. 1).

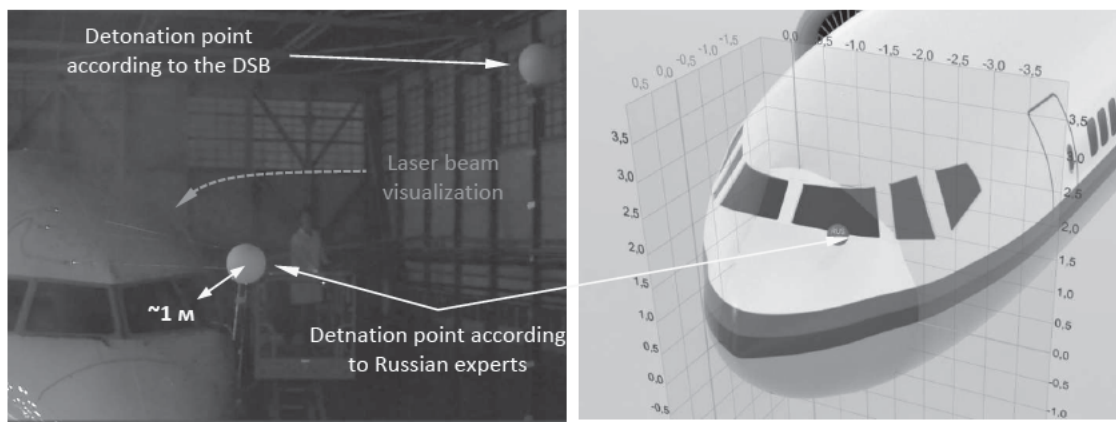


Figure 1. Results of a 2020 experiment on a replica aircraft with laser-assisted trajectory visualization of target trajectories

68. *The results obtained are decisive, since at this blast distance neither the nature of the blast damage to the aircraft, nor the density of the shrapnel damage area **matches the detonation of a Buk SAM missile warhead**.

II.2.1.3 Projectiles: The chemical composition of the material does not match that of the 9H314M warhead.

71. The DSB report shows that the detected projectiles differ significantly in their chemical composition, i.e. they were made from different grades of steel.³⁷ The DSB report does not, however,

³⁶ Air Force Central Research Institute. "Preliminary findings of photo research after examination of MH17 wreckage", May 2015 (in Russian). [Appendix 90].

* Translator's note: error in paragraph numbering in the original, which goes 70, 68, 71.

³⁷ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 2.16.2, Table 12 (p. 93) [Appendix 85].

include data on the content of carbon and silicon in the material of the projectiles, without which it is impossible to ascertain the steel grade. The grade of steel was not established, although this procedure is mandatory for identifying the type of weapon.

72. Consequently, **the final report does not provide necessary and sufficient evidence that the chemical composition of the projectiles analysed matches the chemical composition of the 9H314M projectile material.**

73. The Russian side carried out analyses of the chemical composition of the 9H314M warheads, selected after conducting full-scale simulation experiments (information on the experiments is given in subsection 0 of the Counter-Memorial). The results were compared to those published in the DSB report.

The following conclusions have been drawn from the results:

1) The chemical composition of the projectiles published in the DSB report may correspond to carbon (unalloyed) steel, yet, owing to the lack of data on the content of such major elements as carbon and silicon, it is not possible to determine the grade of this steel. The published chemical composition contains no data on the presence of certain impurities that are characteristic of carbon steels produced in the USSR and the Russian Federation.

2) An element-by-element comparison of the chemical composition of the material of the two groups of projectiles as published in the DSB report and that of the 9H314M warheads, showed that, of the eight chemical elements, there was full matching in two and partial matching in four chemical elements, while there was partial matching in only one group of projectiles.

3) The chemical composition of the projectiles published in the DSB report does not support the conclusion that these projectiles came from the 9H314M warhead.

74. The Russian side notes that the use of modern equipment enables the DSB to determine the content of such elements as vanadium, cobalt, and molybdenum, the content of which does not exceed thousands of percentiles. It did not, however, determine the content of such major chemical elements as carbon and silicon, the content of which is two orders of magnitude higher than the above-listed impurities in carbon (unalloyed) steels. This unexplained contradiction in the DSB report, combined with the facts presented above, gives the Russian side grounds to reject the comprehensive nature and objectivity of the studies of the chemical composition of the projectiles. Consequently, **there is insufficient evidence that the presented projectiles actually came from the 9H314M warhead.**

II.2.1.4 Projectiles: the shape and geometric dimensions do not correspond to those of the 9H314M warhead.

75. The DSB report contains photos of two projectiles (figure 2)³⁸ which, according to the DSB, are the “double-T-shaped” projectiles of the 9H314M warhead of the Buk air defence missile. They are referred to in the DSB report as “bow-ties”.

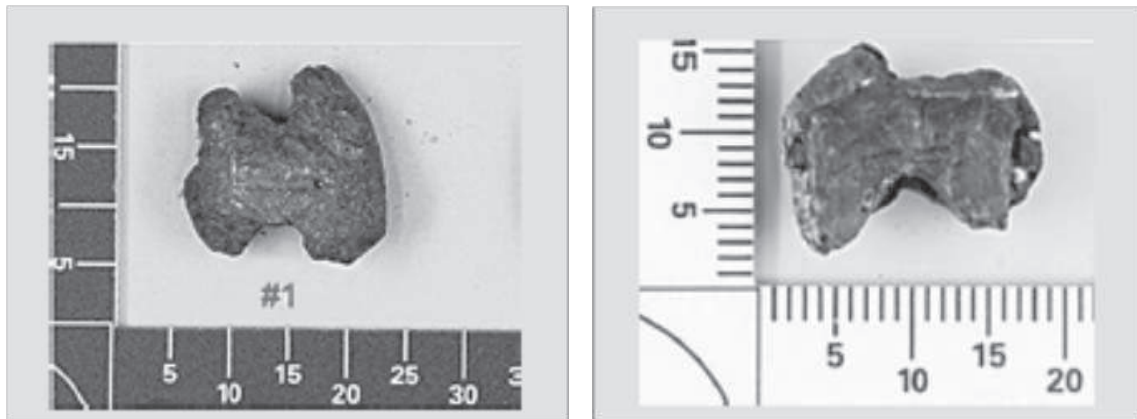


Figure 2. Photographs of the “bow-tie” projectile from the DSB final report, according to which the left fragment was found in the “cockpit” and the right fragment in the “Captain’s body”.

76. Indeed, the 9H314M warhead of the 9M38M1 Buk air defence missile contains almost 8,000 projectiles, of which **1,870 are shaped like a “bow-tie”**. It was precisely from these “bow-tie” projectiles that the DSB concluded that flight MH17 had been shot down by a Buk SAM.

77. There is an important point to be made in this regard. Buk SAMs are equipped with two types of projectiles:³⁹

- a) 9M38M1 with a 9H314M warhead containing projectiles of three fragmenting types, including “bow-tie-shaped” components; or
- b) 9M38 with a 9H314 warhead containing only two fragmenting types, among which there are no “bow-tie” projectiles.

78. This feature is noted in the DSB report.⁴⁰ No investigations have been carried out, however, to confirm that it was specifically a 9H314M warhead that was detonated. The only identifier of the 9H314M warhead, the **“bow-tie-shaped” fragments, has not even been adequately investigated.**

³⁸ Ibid., Section 2.16.1, figure 37 (p. 89) [Appendix 85].

³⁹ Letter No. 0109/548k dated 29 July 2015 from the Director General of “Almaz-Antey” Air Defence Corporation, JSC (with attachment). Appendix, section 2 “Combat components of 9M38 and 9M38M1 missiles” (pp. 2–6) (in Russian) [Appendix 97].

⁴⁰ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 3.6.5 (pp. 131–133) [Appendix 85].

79. The DSB report indicates that only two “bow-tie-shaped” projectiles were found in the wreckage of the aircraft.

80. The location of the first projectile (left photo in figure 2) is labelled “cockpit”, without the provision of any detail about the location in the cockpit where it was allegedly found.

81. The second projectile (right photo in figure 2) was allegedly removed from the body of the captain. The final report contains the following information: “*Following a request from the public prosecutor four bodies, that were suspected to be those of crew members, were selected for further investigation. These were provided to NFI [Netherlands Forensic Institute] for a detailed autopsy and toxicological examination*”.⁴¹ and, further: “*Following identification, it was found that the body of the Captain from Team A was not one of the four bodies that underwent detailed examination.*”⁴² Thus, the body of the captain, from whom the projectile was allegedly removed, was not subjected to a detailed autopsy. The bodies of the other crew members were not found to contain similar projectiles.

82. Uncertainties about the location of the discovery and the circumstances surrounding the extraction of the projectiles make it impossible to unequivocally link them to the circumstances of the MH17 crash.

83. The “bow-tie” projectile of the 9H314 has initial dimensions of 13×13×8.2 mm and a weight of 8.1 g.

84. Looking now at the larger projectile, considered by the DSB to be the a “bow-tie” (left photo in figure 2), this appears to be about 3.0–4.0 mm wide. Consequently, if it is indeed a 9H314M projectile, while retaining the external “bow-tie” shape, its extent of lateral deformation was about 50%–60%, that is, its thickness was reduced from 8.2 mm to 3.0–4.0 mm.

85. Assuming that the fragment did in fact have the original “bow-tie” shape, it is likely that its impact on the obstacle (for example, the outer skin of the aircraft) was on its frontal surface. This is the only way it could have retained this shape. Consequently, the deformation of the fragment came about through a process of one-sided compression.

86. Figure 3 shows the results of a one-sided compression experiment carried out by the Russian side on a “bow-tie” projectile.

⁴¹ Ibid., Section 2.13.3 (p. 84) [Appendix 85].

⁴² Ibid, p. 85 [Appendix 85].

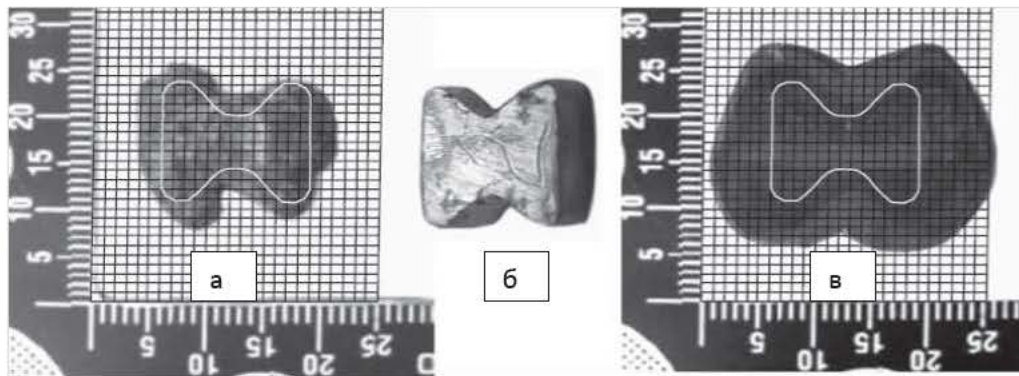


Figure 3. (a) Initial shape of the projectile of a Buk air defence missile from the DSB report, and the external appearance of the “bow-tie” projectile before (b) and after (c) relative deformation of 50%–60%

87. The experiment confirmed that it is physically impossible for a steel component to achieve a one-time deformation of this extent while maintaining its integrity. At a degree of deformation of 50%–60%, the projectile would have to break up. Even if the “bow-tie” did not break up, at this degree of deformation it would completely lose its initial shape. In this case, it would no longer resembles a “bow-tie” but would take the shape of a “flapjack”(figure 3 (c)).

88. According to the DSB report, the mass of the first “bow-tie” projectile was 6.1 grams and that of the second “bow-tie” was 5.7 grams. Consequently, the loss in mass of the “bow-ties” was at least 24% and 29%, respectively, while the “bow-tie” shape was retained.

89. This fact contradicts the test results of the 9H314M warhead, which provide for the detonation of warheads in a target environment consisting of two shields each lined with 5 mm thick steel plates. Under these conditions, 96% of the “bow-tie” projectiles are retained, with a loss in mass of 6%–7%.⁴³

90. The control test results were confirmed by a full-scale simulation experiment with a Buk SAM system. The mass loss of an undisintegrated “bow-tie” projectile upon penetrating a replica aircraft airframe was no more than 10%. Moreover, when the loss of mass of the “bow-tie” projectile exceeded 21%, it completely lost its original shape.⁴⁴

91. A similar ratio between the shape, and the initial and residual mass of the projectile was noted in the investigation of the Tu-154 crash, flight SBI-1812. Investigations by the Central Research

⁴³ Letter No. 01-09/548k dated 29 July 2015 from the Director General of “Almaz-Antey” Air Defence Corporation (with attachment). Appendix, section 3 “Test results of combat units 9N314M” (pp. 6–8) (in Russian) [Appendix 97].

⁴⁴ JSC “Almaz-Antey” Air Defence Corporation. Document “Report on the Field Experiment” (with attachment), 2016, p. 170 (in Russian) [Error! Reference source not found.].

Institute of the Air Force demonstrated that the loss of mass of a projectile when it retained its original shape was only 6%–12%.⁴⁵

92. The Russian Federation once again draws the attention of the ICAO Council to the fact that, at the meetings in May and August 2015, the Russian side communicated to the DSB the results of the research and experiments being carried out in order to identify the missile that brought down flight MH17. The results of the experiment on the shape deformation of the “bow-tie” projectile and estimation of its residual mass were demonstrated to the DSB in August 2015, at the last meeting of the authorized representatives for the investigation into the crash of flight MH17.⁴⁶ These studies were not taken into account, however, in determining the characteristics of the missile’s warhead.

93. Apart from unexplained inconsistencies in the shape and mass of the projectiles, referred to in the DSB report as “bow-tie”, the investigation did not draw attention to the absence on the outer skin of the fuselage of Boeing 777, flight MH17, of such obvious features as “bow-tie-shaped” holes, which should have been caused by the “bow-tie” projectiles. The full-scale simulation experiment, the results of which are presented later in subsection 0 of the Counter-Memorial undoubtedly confirmed that the explosion of the 9H314M missile warhead should result in characteristic multiple instances of damage to the outer cladding in the shape of a bow-tie.

94. Thus, the **Russian Federation has grounds to conclude that, while the final report by the DSB contains references to “bow-tie-shaped” projectiles, these most likely have nothing to do with the MH17 crash.** Given Ukraine’s failure to secure the wreckage at the scene, it is reasonable to assume that the appearance of these projectiles in the investigation of the MH17 crash show signs **of falsification** and therefore cannot be considered as material evidence.

95. The technical investigation failed to include the necessary and sufficient research into the structural damage to the fuselage of Boeing 777, flight MH17, and the extracted projectile elements, the findings of which would have supported a well-founded conclusion about the type of warhead on the missile. Despite the conclusions that the missile came from a Buk SAM, the capabilities of the Russian Federation, as the developer and manufacturer of Buk SAMs, were not employed in the investigation of the crash of flight MH17.

II.2.2. Study of the missile’s flight characteristics and the explosion of the warhead of the Buk SAM system

⁴⁵ State Research Institute of the Ministry of Defence of the Russian Federation, “Report on results of additional study of structural damage of Tu-154M RA-85693 that crashed over the Black Sea on 4 October 2001”, Lyubertsy, 2001, Section 4 (pp. 62–75) (in Russian) [Error! Reference source not found.].

⁴⁶ Air Force Central Research Institute, “Research results of photo and video data obtained during wreckage examination of Malaysian Airlines Boeing 777-200 9M-MRD (MH17 AMS-KUL)”, August 2015, pp. 38–39 [Appendix 93].

II.2.2.1 The Russian Federation is the developer and manufacturer of the Buk surface-to-air missile system

96. Subsection 0 demonstrates the lack of necessary and sufficient evidence in the DSB report that the Boeing 777, flight MH17, was shot down by a Buk SAM missile. Yet, in order to ensure a comprehensive and thorough investigation, the theory that flight MH17 was downed by a Buk SAM missile clearly required verification.

97. Taking into account the missile's inherent design flight characteristics, the results of State tests conducted during its acceptance for service and the special experiments conducted in connection with the MH17 crash, the Russian Federation, as the developer and manufacturer State, claims that the theory that a Buk SAM missile was employed, with the warhead characteristics and flight paths described in the DSB report, is untenable. This assertion is based on:

- Verified original technical data, such as the design and production documentation for the Buk SAM and the 9M38 and 9M38M1 anti-aircraft guided missiles;
- Analysis of the nature of the damage to the airframe structure (subsections 0 and 0 of the Counter-Memorial);
- Material from additional full-scale simulation experiments with the missile warhead (subsection 0 of the Counter-Memorial);
- Radar data from the Utyos-T en-route radar system (subsection 0 (2) of the Counter-Memorial);
- Data from the technical certificate of the 9M38 anti-aircraft guided missile with serial number "8868720", debris from which is being presented by the Applicants as having been involved in the accident (subsection 0 of the Counter-Memorial).

II.2.2.2 The structural damage to the Boeing 777, flight MH17, is not consistent with the 9H314M warhead.

98. The conclusions in the final DSB report about the type of weapon are based on an analysis of *"the location, shape and boundaries of the damage to the wreckage of flight MH17, the number and density of hits on the wreckage"*.⁴⁷ The location, shape and boundaries of the damage and the objects found with different shapes and sizes were consistent with a fragmentation spray pattern damage of pre-formed fragments in the 9N314M warhead carried on the 9M38-series of missiles as

⁴⁷ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 10.2, paragraph 6 (page 255) [Appendix 85].

installed on the Buk surface-to-air missile system. These conclusions are based on incomplete data.

The main inconsistencies are as follows:

- The actual boundaries of the area of fragmentation spray on the aircraft wreckage differ from the simulated fragmentation spray pattern at the theoretical derived point of detonation of the warhead.⁴⁸ As a consequence, almost half of all the damage was not taken into account when determining the spatial direction taken by the warhead;
- The direction of the damage observed on the outer skin and airframe differs radically from the DSB's basic theory;⁴⁹
- The DSB's basic theory does not objectively take into account such immutable parameters as the actual number and density distribution of instances of damage from the projectiles of the missile warhead;
- The absence of characteristic "bow-tie-shaped" holes on the aircraft fragments and of exit holes on the starboard side of the aircraft, which is inconsistent with the characteristics of a missile equipped with the 9H314M warhead.

99. An analysis of the data obtained during inspection of the wreckage in February, May and August 2015, and also photographs published in the DSB preliminary report,⁵⁰ gave the Russian side grounds to conclude that the objectively observed pattern of damage on fragments of the aircraft's nose section, components of the fuselage's airframe, internal equipment of the cockpit, the left wing and the left engine differs significantly from the simulated fragmentation spray pattern at the theoretically derived point of detonation of the warhead, identified by the DSB as credible evidence of the encounter between the aircraft and the Buk SAM missile, travelling "in the opposite direction" to the direction of flight of the aircraft.

100. In the technical investigation materials it is stated that no damage was found from the projectiles aft of the windows of the captain, i.e. further than STA220.⁵¹ In fact, the aircraft fragments show fragmentation damage located substantially beyond those considered in the investigation.^{52,53}

⁴⁸ Ibid., Section 3.8 [Appendix 85].

⁴⁹ Ibid., Section 3.8.3 [Appendix 85].

⁵⁰ Dutch Safety Board, Preliminary report, *Crash involving Malaysia Airlines Boeing 777-200 flight MH17* (English version), 2014. [Appendix 87].

⁵¹ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 3.5.2, Explanation of figure 46 (p. 121) and Annex Y (p. 7) [Appendix 85].

⁵² Ibid., Section 2.10.2, Illustration 9 (page 24) [Appendix 85].

⁵³ Dutch Safety Board. Document "MH17: About the investigation", 2015. Annex I, paragraph 4 (p. 84) [Error! Reference source not found.].

101. During the investigation into the crash of flight MH17, Netherlands experts carried out significant work on the 3D reconstruction of the front part of the fuselage. It should be noted that the Russian experts were only given the opportunity to view the 3D reconstruction for a few hours during the last meeting in August 2015, after completing the consultation procedure prior to publication of the final report, which precluded them from properly analysing the damage on the reconstructed part of the fuselage.

102. Analysis of available photographs of fuselage fragments, as well as 3D reconstruction photographs published after the completion of the DSB technical investigation, led the Russian side to conclude that damage from fragmentation of the warhead was observed on the fuselage skin at a greater distance from the nose of the aircraft than indicated in the DSB report.⁵⁴ Some of the damage to airframe components along the port side of the aircraft and the left side of the roof extends beyond the visible boundaries of the outer skin damage and substantially beyond the damage pattern indicated in the investigation report.

103. Thus, the nature of the damage to the front of the fuselage is inconsistent with the conclusions of the investigation report regarding the missile's point of detonation and its direction of travel.

II.2.2.3 The traces of explosives on the wreckage do not correspond to the explosive in the 9H314M warhead.

104. An examination of the aircraft wreckage and missile fragments found traces of three explosives: TNT, RDX and PETN.⁵⁵

105. The DSB did not take into account the fact that the explosive charge of 9H314 and 9H314M warheads contains the explosive substance TG-24, which is a mixture of TNT and RDX. Pentaerythritol tetranitrate (PETN) is not used in the explosive charge of 9H314 and 9H314M warheads. Moreover, PETN-based explosive compositions have not been used in ammunition within the USSR or the Russian Federation.⁵⁶

Thus, the traces of explosive material on the wreckage do not match the explosive material TG-24 used in the warhead of the Buk SAM missile.

⁵⁴ JSC "Almaz-Antey" Air Defence Corporation. *Findings of Expert Assessments on MH17 Accident*, pp. 9–18 [Appendix 96].

⁵⁵ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 2.16.3 (p. 93) [Appendix 85].

⁵⁶ See Appendix, paragraphs 48-49 for more details.

II.2.2.4 Full-scale simulation experiments with the 9H314M warhead of the 9M38M1 missile were not taken into account in preparing the final investigation report.

106. During the technical investigation, the Russian Federation conducted two full-scale simulation experiments: on 31 July 2015 and 7 October 2015.

1. The first full-scale simulation experiment demonstrated the specific features of the 9H314M warhead.

107. The first full-scale simulation experiment was conducted under the conditions of an encounter between a missile and an aircraft on intersecting courses, i.e. under conditions different from those specified in the DSB report.⁵⁷ In the first experiment, the target set-up consisted of five shields, the first of which consisted of two layers of duralumin with a total thickness of 4 mm and the four following shields had one layer of duralumin with a thickness of 2 mm (figure 4).⁵⁸

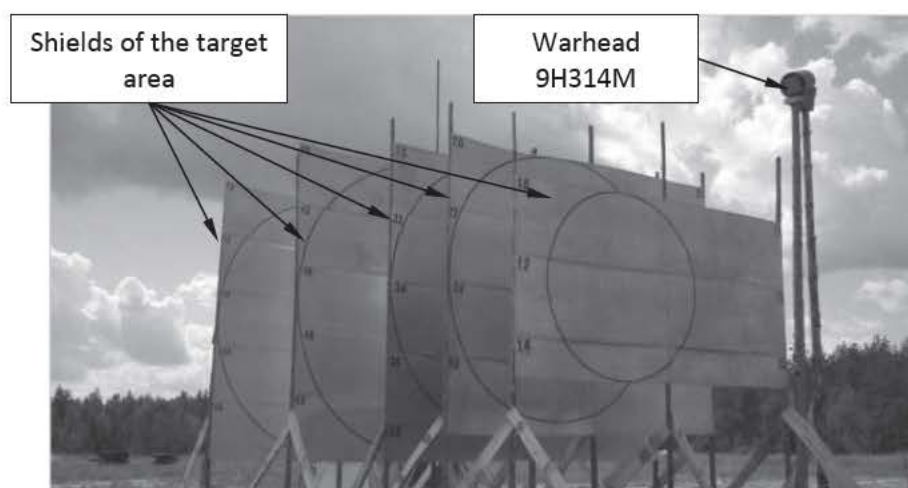


Figure 4. Target set-up of the first experiment

108. Test results have shown that the prefabricated “bow-tie” projectiles are capable of perforating widely separated obstacles with a total thickness of up to 14.0 mm and leaving a characteristic “bow-tie-shaped” holes not only in the first target shield, but also in all subsequent shields.⁵⁹

109. There are no comparable “bow-tie-shaped” signs of damage on the wreckage of the

⁵⁷ Letter from the General Director of “Almaz-Antey” Air Defence Corporation dated 29 July 2015, No. 01-09/548k (with attachment) (in Russian) [Appendix 97].

⁵⁸ JSC “Almaz-Antey” Air Defence Corporation. Document “Report on the Field Experiment” (with attachment), 2016. Subsection 6.2 (pp. 141–142) and Appendix A (in Russian) [Error! Reference source not found.].

⁵⁹ Ibid., figure 6.24 (p. 144) (in Russian) [Error! Reference source not found.].

Boeing 777, flight MH17. The signs of damage on the fuselage airframe well aft of the front section of the fuselage may be explained, however, by the perforating force of the projectiles.

110. The Russian Federation briefed the DSB in August 2015 about the results of these experiments – during the third (last) meeting of the authorized representatives of the States participating in the investigation of the MH17 crash.⁶⁰

2. The second full-scale simulation experiment was a reconstruction of the crash of flight MH17.

(a) Preparing for the experiment

111. The Russian Federation decided to conduct a full-scale simulation experiment in order to enable the experts conducting the technical investigation to verify their conclusions and hypotheses and to obtain the additional facts necessary to establish all the details of the tragic events of 17 July 2014 involving flight MH17.

112. To this end, in October 2015, comparative studies were carried out on the damage to fragments of Boeing 777, flight MH17, and on the damage to the IL-86 target aircraft from the close blast factors of the 9H314M warhead.⁶¹

113. The baseline data for the study were the conditions specified in the draft final report submitted by the DSB for discussion by the States participating in the technical inquiry in June 2015. The tests were conducted by detonating a 9H314M warhead mounted on a 9M38M1 missile against a target set-up, taking into account compensatory corrections for the dynamics of the missile and the aircraft at the point of impact.

114. In preparing the experiment, *first of all*, account was taken of the need to match the diameter of the fuselage of the target aircraft as closely as possible to that of the Boeing 777. The difference between the fuselage diameter of the Boeing 777 (6.20 metres) and the IL-86 (6.08 metres) is 0.12 metres, i.e. less than 2%.

115. *Second*, it was necessary to take maximum account of the specific contours of the roof of the cockpit of the IL-86 target aircraft and the Boeing 777. This consideration was vital to ensuring that it would be possible, in the future, to make an objective analysis of the details of the structural damage to the aircraft airframe of flight MH17 noted in subsection 0 of the Counter-Memorial.

⁶⁰ JSC “Almaz-Antey” Air Defence Corporation. *Findings of Expert Assessments on MH17 Accident*, pp. 41–51 [Appendix 96].

⁶¹ JSC “Almaz-Antey” Air Defence Corporation. Document “*Report on the full-scale simulation experiment*” (with attachment), 2016 (in Russian) [Error! Reference source not found.].

116. To compensate for inaccuracies in mounting the target aeroplane on the test stand, a special mounting⁶² was used which made it possible to align the roof contours in the cockpit area as closely as possible.

117. In addition, due account had to be taken of the fact that the experiment was being conducted on the ground and in static conditions, i.e. in a stationary environment.

118. The joint-stock company “Almaz-Antey” Aerospace Defence Concern, as a developer of missile weapons, is the exclusive holder of a mathematical model for the dispersal of projectiles, which makes it possible:

- to take into account the actual positions of the aircraft and the missile in the air relative to each other;
- to calculate the velocity and coordinates of each of the fragments (over 12,900 trajectories) at any point of time, and to determine the distribution density of the fragment area at any selected distance and direction from the detonation point.

119. As input data for the static and dynamic detonation model of the 9H314M warhead, the technical documentation for the 9H314M warhead and test results from 1980 to 1991, included in the following documents, were used:

- 9H314M warhead. Specifications, 9H314M TU, 1980;
- Technical Report No. 5-514 on controlled explosive testing in on-the-ground and static conditions, 1980;
- 9H314M warhead. Control tests to verify the impact area parameters, 1981;
- 9N314M warhead. Final report on development of the 9N314M warhead with a shaped projectile, 1981;
- control and periodic test reports, 1990–1991

120. A model of projectile dispersion during the static explosion of a 9H314M warhead was constructed on the basis of statistical data on the two-degree zones of the meridional angle of projectile dispersion obtained by the manufacturer during the State, control and production full-scale simulation tests conducted when the Buk SAM system was accepted for service in the USSR.

121. Compensation corrections were also used to account for the static experimental conditions,⁶³ and these were verified and adjusted using supercomputer technology. The simulation results have a reliability level of 99.2%. Information on how these corrections were selected may be

⁶² Ibid., figure 3.4 (p. 12) [Error! Reference source not found.].

⁶³ Ibid., p. 8 [Error! Reference source not found.].

found in a scientific article published in the *Journal of “Almaz-Antey” Air Defence Corporation*, No. 1 for 2016,⁶⁴ and was also explained during a special press conference of the Almaz-Antey Aerospace Defence Concern, held in October 2015.⁶⁵

122. *Third* – and most important – the target set-up for the experiment was put together in such a way as to fully reproduce the version adopted in the DSB report (fig. 5). In other words, the detonation point of the missile’s warhead (about 4 metres from the outer contours of the fuselage) and the direction in which it was pointed (on a collision course with the aircraft) during the experiment was fully consistent with the DSB’s main theory about the damage to the MH17 aircraft.⁶⁶



Figure 5. *Target set-up of the second experiment, recreating the conditions indicated in the DSB report for the contact between the Boeing 777, flight MH17, and the missile*

123. According to Russian experts, these experimental conditions were deliberately “accommodating” for the target, since it had previously been demonstrated by theoretical calculations (subsection 0 of the Counter-Memorial) that the detonation point should be about 1 metre away from the outer contours of the aircraft, i.e. 4 times closer than indicated in the DSB report.

124. The IL-86 aircraft belongs to the 2nd generation of aircraft with a cockpit equipped for a crew of four. In addition to the workstations of the captain and the co-pilot, the IL-86 aircraft has workstations for the navigator (left) and flight engineer (right).

125. The navigator’s and flight engineer’s workstations are equipped with panels with mechanical (pointer) control devices and other devices, the housing of which is an additional and

⁶⁴ *Journal of “Almaz-Antey” Air Defence Corporation*, No. 1, 2016, pp. 114-125, “Employing supercomputer technologies for aircraft accident investigation”, <http://journal.almaz-antey.ru/jour/article/view/224> (accessed 24 November 2022).

⁶⁵ Information Telegraph Agency of Russia (ITAR TASS), *Results of a full-scale experiment to assess the causes of the crash of MH17*, <https://tass.ru/eksperiment-almaz-anteya/vvodnaya-chast/2343999> (accessed 24.11.2022).

⁶⁶ JSC “Almaz-Antey” Air Defence Corporation. Document “*Report on the field experiment*” (with attachment) 2016. Section 3 (pp. 6–9) (in Russian) [Error! Reference source not found.].

very significant obstacle to projectiles from the missile's warheads. The Boeing 777, which is a 4th generation civil aircraft, does not have similar "natural" obstacles to projectiles.

126. The explosive power of the Buk missile's warhead had previously been confirmed during State tests conducted prior to the acceptance of the SAM system as a service weapon. For that reason, the choice of the IL-86 aircraft as a replica target had to clearly demonstrate that the explosive power of the Buk SAM system's warhead was such that even under "accommodating" experimental conditions it was impossible for there to be no perforation of the front end of a wide-body passenger aircraft.

(b) Experimental results

127. The experiment showed that, when the 9H314M warhead fitted on a 9M38M1 missile was detonated under conditions consistent with the DSB's main theory, **the nature of damage to the IL-86 target aircraft did not match the damage observed on the fragments of the Boeing 777, flight MH17:**

1) The explosion of the 9H314M warhead on the 9M38M1 missile could not have caused the crash, since there were multiple "bow-tie-shaped" holes both on the skin and inside the cockpit of the IL-86 target aircraft (fig. 6). The experiment confirmed that the shape of the holes on the first obstacle was not related to the respective directions of travel of the missile and the aircraft at the moment of detonation, and had no direct correlation with the dynamics of the missile and the point of detonation of the warhead. When a 9H314M-type warhead is detonated, the formation of characteristic "bow-tie-shaped" holes on the outer hull (the first obstacle) is not accidental.⁶⁷ **There are no such holes on the wreckage of the Boeing 777, flight MH17.**

⁶⁷ Ibid., pp. 131–141 and 143–148, and also Annex A (pp. 89–94) [Error! Reference source not found.].

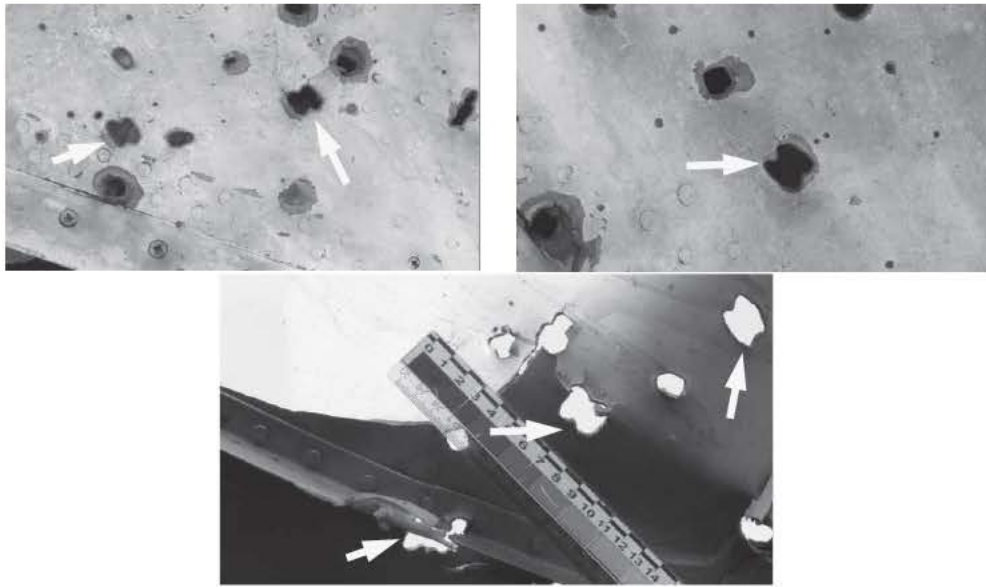


Figure 6. Example of “bow-tie-shaped” holes in the skin of the front fuselage of the Il-86 target aircraft.⁶⁸ The arrows indicate the holes caused by “bow-tie” projectiles

2) Even despite the “accommodating” conditions of the experiment (the explosion was four times farther away than estimated by Russian experts) and the design features of the IL-86 (with additional natural obstacles in the form of the navigator and flight engineer workstations), the target aircraft’s airframe was perforated by shrapnel, as evidenced by the numerous exit holes on the starboard side and right lower part of the IL-86 aircraft.⁶⁹ **There are no perforation holes on the starboard side of the fuselage in the wreckage of the Boeing 777, flight MH17.**

3) The damage to the cockpit,⁷⁰ the port side⁷¹ and the cockpit roof⁷² are fundamentally different from the damage to the Boeing 777, flight MH-17. Experiments have confirmed that, when a missile is detonated “on a collision course” with an aircraft, the damage to the skin of the “roof” and the port side of the fuselage is of a fundamentally different nature. There is no damage to the bulkhead walls,⁷³ although damage to the bulkhead walls may be observed in the wreckage of the

⁶⁸ Ibid., Section 5, pp. 55, 56 (figures 5–42, 5–44), p. 73 (figures 5–77) (in Russian) [Error! Reference source not found.].

⁶⁹ Ibid, pp. 75–88; 149–157 (in Russian) [Error! Reference source not found.].

⁷⁰ Ibid, pp. 33–45 (in Russian) [Error! Reference source not found.].

⁷¹ Ibid, pp. 47–61 (in Russian) [Error! Reference source not found.].

⁷² Ibid, pp. 62–74 (in Russian) [Error! Reference source not found.].

⁷³ Ibid, pp. 107–112, 127 (in Russian) [Error! Reference source not found.].

Boeing 777, flight MH-17. The impact of the blast on the airframe of the IL-86 target aircraft is different from the impact of the blast on the skin of the Boeing 777, flight MH17.⁷⁴

128. The difference in the nature of the damage to the airframe can only be explained by the angles of approach of the projectiles to the skin of the aircraft, which differ from a “collision course”.

129. Thus, according to the results of the experiments, it was established that the shape of the perforation holes and the penetration effect of the flow of preformed projectiles resulting from the detonation of the 9H314M warhead were not consistent with the penetration effect of the projectiles from the munitions that hit the Boeing 777, flight MH17.

130. The full-scale simulation experiment displayed a high convergence of its results with the computer modelling results. The discrepancy is less than 2.0%, and the estimate of the standard deviation of the results of the full-scale simulation tests from the modelling results was about 1.1%.

131. The experiment also confirmed the matching of the main characteristics of the fragmentation area of the 9H314M warheads (penetration capability, angle of colatitude of the boundaries of the preformed projectiles and distribution of the perforation holes in the two-degree colatitude angle zones), which were conveyed to the Dutch specialists during the joint work.⁷⁵

II.2.2.5 The trajectory of the missile has not been correctly defined.

132. Paragraph 2.56 of the Applicants’ Memorial states that, **on 18 July 2014**, the United States of America confirmed that it had satellite data indicating that flight MH17 had been “shot down by a surface-to-air missile that was launched from an area that is controlled by ‘*Russian-backed separatists*’ inside of Ukraine, and that the launch location was situated near Snizhne”. **These data were not provided, however.**

133. Paragraph 2.55 of the Memorial states that the Buk SAM took up its firing position on 17 July 2014 – in an agricultural field in the east of Ukraine, south of Snizhne and west of the city of Pervomaiskyi.

134. The allegations in paragraphs 2.55 and 2.56 of the Applicants’ Memorial about the location of the missile launch do not match the characteristics of the Buk SAM, as confirmed by the findings described in the following subsections.

1. The conclusions about the point of detonation of the warhead and its direction of travel are inconsistent with the operating algorithms of the radar homing head of the

⁷⁴ Ibid., Section 5, figures 5–28 and 5–29 (pp. 46 and 48) (in Russian) [Error! Reference source not found.].

⁷⁵ Letter from the General Director of “Almaz-Antey” Air Defence Corporation OJSC dated 29 July 2015 No. 01-09/548k (with attachment) (in Russian) [Appendix 97].

Buk SAM system. As a result, the missile's presumed launch area has been incorrectly determined.

135. The 9M38 and 9M38M1 missiles use a combined method of missile guidance – inertial guidance in the initial guidance section and semi-active homing in the terminal section of their trajectory.

Missile targeting begins with an azimuthal rotation of the Buk launcher guides in the direction of the target (the anticipated collision point of the missile with the target). Operating in pre-launch preparation mode, the missile's autopilot speeds up the gyromotors of the sensing elements, which ensures stabilization of the missile on the launch site relative to the firing line.

After the missile leaves the launcher, it begins its movement along the firing line (in the direction of the anticipated point). Missile control and angular and Doppler targeting of the radar homing head until target lock-on is performed by the onboard computer, with or without the use of a radar correction line.

For missiles launched from a self-propelled firing system, the radar homing head locks on to the signal reflected from the target during flight, after the missile leaves the launcher. For a large airborne object with high radar visibility (for example, a Boeing 777 aircraft), this means that almost immediately after launch, the radar homing head of the missile will lock on to the target.

In the absence of jamming, the homing of the missile is performed by the signal reflected from the target. The illumination of the target, necessary for semi-active homing of the missile, is performed by the illuminator located on the self-propelled firing unit.

After the radar homing head locks on to the target, the missile is guided by the proportional navigation method. The essence of the method is that the missile's flight to the target contact point on the homing section follows a trajectory at each point of which the angular rate of turn of the missile's velocity vector is proportional to the angular velocity of the missile-target line (the target sighting line of the radar homing head's antenna).

With proportional navigation (the proportional navigation method), if an airborne target is moving uniformly and straight at the same altitude, the missile's trajectory in the horizontal plane is effectively straight. Hence, the trajectory of a missile aiming at a non-maneuvring target is nearly straight in the horizontal plane. Accordingly, the final orientation of a missile in the horizontal plane at the moment of warhead detonation is a crucial parameter for identifying a possible launch area.

136. Thus, taking into account the special features of the Buk missile guidance system, determining the relative position in the air of the missile and the aircraft, as well as the speed of the aircraft and missile at the moment of detonation, is of critical importance for determining the launch area of the missile.

137. Determination of the aircraft-missile encounter conditions is based on a combination of three components: (1) the detonation point, (2) the area of the front of the fuselage covered by fragments, (3) the characteristics of the missile and its warhead.

138. None of the three components is supported by other objective data:

(1) Locating the detonation point at a distance of 3 to 4 metres from the cockpit⁷⁶ is inconsistent with the operating algorithm of the proximity fuse of the Buk SAM system.

The warhead of a 9M38 or 9M38M1 missile cannot detonate before reaching the tip of the nose of the target. If the aircraft and missile meet on a collision course, as stated in the DSB report, the point of detonation of the warhead of the 9M38 or 9M38M1 missile would have to shift at least 3–5 metres from the nose of the aircraft towards the tail fin. **Accordingly, the damage to the airframe would have been of a fundamentally different nature.**⁷⁷

In assessing the nature of the damage to the front of the aircraft, the current flight parameters of flight MH17 (roll angle, angle of attack and drift angle) were not taken into account,⁷⁸ which, taking due account of the algorithms of the proximity fuse, leads to an incorrect assessment of the orientation of the missile warhead in space at the moment of detonation.

In a letter from the “Almaz-Antey” Air Defence Corporation, the attention of the Netherlands experts was drawn to the discrepancy between their theory of the encounter between flight MH17 and the missile on a collision course and the logic of the proximity fuse. The same letter contained a description of the principles of operation of the proximity fuse and the missile’s firing mechanism.⁷⁹

(2) The model of the damage used as a “reference” takes into account only part of the damage to the front of the fuselage.⁸⁰

When modelling the trajectories of the 9M38 and 9M38M1 missiles, the Russian side used a software package based on the combat algorithms described in the design and technical documentation for these missiles. The reliability of the resulting calculations is confirmed by the

⁷⁶ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 3.8 [Appendix 85].

⁷⁷ JSC “Almaz-Antey” Air Defence Corporation. *Findings of Expert Assessments on MH17 Accident*, pages 29–30 [Appendix 96].

⁷⁸ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Annex Y, “Damage reconstruction due to impact of high-energetic particles on Malaysian Airlines flight MH17”, section 4.2 (page 13) [Appendix 85].

⁷⁹ Letter No. 01-09/548k dated 29 July 2015 from the Director General of “Almaz-Antey” Air Defence Corporation JSC (with attachment). Section 4 “Principle of operation of the proximity fuse and firing mechanism of the missile” (pp. 8–12) (in Russian) [Appendix 97].

⁸⁰ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 3.8 [Appendix 85].

approximation of the simulation results to external trajectory measurements and telemetry information obtained during actual launches of the 9M38 and 9M38M1 missiles.

The results of the calculations show that the range of approach angles in the horizontal plane when aiming the missile at a Boeing 777 aircraft-type target flying straight ahead at a constant speed, taking into account the influence of angular noise on the homing head, lies between 4.2° and 6.9°.

Based on the possible range of missile approach angles determined from the actual pattern of damage on the Boeing 777 aircraft,⁸¹ the position of the aircraft's centreline in space, and also the marginal range of angles derived from the missile guidance model, the conclusion was drawn that, if fired from any point specified in the materials of the DSB as a probable launch area,⁸² the 9M38 or 9M38M1 Buk SAM missiles could not approach the aircraft with encounter conditions such that the aircraft would incur damage comparable to that found on the wreckage of the Boeing 777, flight MH17.

(3) The “virtual” model of the missile's warhead was not created using data from the manufacturer of the Buk air defence system. Instead, a model “*most realistic for the purpose of this investigation because of the physical basis of the design*” was chosen,⁸³ but it was significantly different from the actual characteristics of the 9H314M warhead of the Buk SAM system:

- a composition consisting of 60% hexogen (RDX) and 40% TNT (TNT) was used as the explosive charge of the “virtual” warhead.⁸⁴ In fact, the ratio of the TNT/hexogen mixture in the 9H314M warhead is significantly different – only 24% of TNT is used;
- The shape and geometric dimensions of the body and side plates of the warhead⁸⁵ do not match those in the warhead designs;⁸⁶

⁸¹ JSC Almaz-Antey” Air Defence Corporation. *Findings of Expert Assessments on MH17 Accident*, pp. 9–18 [Appendix 96].

⁸² Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 3.8.6, figure 62 (p. 144) [Appendix 85].

⁸³ Ibid., Annex Y “Damage reconstruction due to impact of high-energetic particles on Malaysia Airlines flight MH17”, section 4.3.2, Table 4.2 (p. 15) [Appendix 85].

⁸⁴ Ibid., Appendix Z “Numerical simulation of blast loading of Malaysia Airlines flight MH17 due to a warhead detonation”, para. 2.2.1 (pp. 4–5) (in Russian) [Appendix 85].

⁸⁵ Ibid., Annex Y “Reconstruction of damage caused by high-energy particles to Malaysia Airlines flight MH17”, Section 4.3.2, Illustration 4.4 (page 14) [Appendix 85].

⁸⁶ Letter from the General Director of “Almaz-Antey” Air Defence Corporation OJSC dated 29 July 2015 No. 01-09/548k (with attachment) (in Russian) [Appendix 97].

- The dimensions of the preformed projectiles used in the modelling exercise are also different from those reported by Russian experts.⁸⁷

139. Thus, the actual characteristics of the Buk SAMs rule out any possibility of the aircraft being hit by a 9M38 (9M38M1) missile from the area indicated in the DSB report.

2. The flight of the missile from the area indicated in the DSB report was not recorded by any radar data.

140. The Utyos-T radar data provide further confirmation that the missile could not have been launched from the area indicated in the DSB report.

141. In addition to the Boeing 777 flight MH-17, the Utyos-T system recorded the flight of a Russian Orlan-10 unmanned aerial vehicle, which was flying along the Russian-Ukrainian border in the territory of the Russian Federation. The Orlan-10 unmanned aerial vehicle is mainly composed of composite materials and has an effective dispersion area 3–5 times smaller than that of a Buk SAM missile. Accordingly, a missile made of metal with a large effective reflective surface area is an easier target for radar detection.

142. In the case of a missile flying on a collision course with the Boeing 777, flight MH17, the missile would have been within the detection range of the Utyos-T radar system for three observation periods. The probability of detecting an aerial object with parameters corresponding to the missile flying on a collision course in relation to the Boeing 777 is about 90%. At the same time, the probability of recording at least one sighting in three consecutive periods of radar observation is above 99%. Up until the moment of the crash of flight MH17, however, no objects had been detected approaching the aircraft from the east, i.e. on a collision course.

143. The technical capabilities of the Utyos-T radar system are such that it is impossible to determine whether the missile was launched from an area to the south or west of the crash point of flight MH17. If, however, flight MH17 had been shot down by a missile fired from any area east of the crash point, it would have been detected by the primary radar.

144. This conclusion was confirmed by a special flight test of the Utyos-T radar system's performance.⁸⁸

145. The purpose of the flight test was to assess the spatial characteristics of the Utyos-T primary en-route surveillance radar and its ability to detect airborne objects similar in their flight and

⁸⁷ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015. Section 3.6.5, Table 15 [Appendix 85].

⁸⁸ Report on the conduct of an in-flight test of the Utyos-T en-route radar system located at the Ust-Donetsk en-route radar station of the Rostov zonal centre of the Consolidated Air Traffic Management System of the Russian Federation, 2019 (in Russian) [Appendix 95].

reflection characteristics to the 9M38 series missile. The results of the flight test confirmed that it was effectively impossible for a missile fired in a collision course with the MH17 aircraft, i.e. from the area of the settlements of Snezhnoye and Pervomayskiy, as claimed in the Applicants' Memorial, not to be detected.

146. Appendix 48 to the Applicants' Memorial⁸⁹ (referring to unnamed experts) contains abstract arguments about the radar data provided by the Russian side. At the same time, however, no facts are adduced to refute the results of the Utyos-T radar system's in-flight test.

147. The possibility of a missile being detected by conventional radar is not a unique or purely theoretical conclusion. For example, the investigation of the crash over the Black Sea of the Tu-154, flight SBI-1812 showed that, during two observation periods an en-route radar had recorded a missile approaching the plane at a speed of about 1,000 m/s.⁹⁰

148. Thus, the radar data do not confirm the possibility that a missile with characteristics that matched those of the Buk SAM system was launched from the area of the settlements of Snezhnoye and Pervomayskiy as claimed in the Applicants' Memorial.

II.2.3 Technical documentation for parts of the missile allegedly recovered from the crash site of flight MH17 does not confirm that it belonged to the Russian Armed Forces

149. As mentioned earlier, the Russian Federation, as the State that developed and manufactured the Buk SAM missile, was not given the opportunity to study the missile debris. In consequence, an analysis of the movement of the missile, to which the debris belongs, from manufacture to delivery to an army unit was carried out by the Russian side on the basis of photographs and video footage.

Fragments of the missile were demonstrated by the Joint Investigation Team:

- Part of the engine marked "9D1318869032";
- Nozzle section marked "9D131.05.000 No. 8.30.113".

150. The missile was identified by the Russian side using information from the archive of product technical specifications held by the manufacturer that had been declassified for the purposes of the MH17 investigation.

151. In the engine number "9D1318869032", the last four digits "9032" denote the serial number. An engine with serial number "9032" had been installed in the 9M38 missile with the factory

⁸⁹ Applicants' Memorial, Annex No. 48, subsection "Findings Radar set 1" and "Findings Radar set 2" [Appendix 104].

⁹⁰ Inter-State Aviation Committee, "Final report on the results of the crash investigation (Tu-154M aircraft RA-85693)" (in Russian) [Appendix 91].

technical number “8868720”. A nozzle with serial number “9D131.05.000 No. 8.30.113” had also been installed in the missile with factory technical number “8868720”.

152. Thus, according to the missile manufacturer’s technical documents, both numbered fragments: the missile engine and the nozzle, had been installed in the 9M38 missile (without the “M1” index, i.e., an older modification) with the factory technical number “8868720”.

153. The missile was given a tail number “9M38 886847379” and on 29 December 1986 it was sent to military unit No. 20152, which was stationed in 1986 in the town of Terebovlya in the Carpathian military district on the territory of the Ukrainian Soviet Socialist Republic. The missile never returned to the territory of the Russian Federation.⁹¹

154. Annex 18 to the Applicants’ Memorial concludes that there is a “*striking difference*” in the missile assembly dates: the documents indicate that the missile engine parts and the entire missile were assembled on 24 December 1986, while the stamp on the engine casing found during the investigation shows “assembly date 15 December 1986”. From this it was concluded that “the Russian Federation is not acting in good faith in this investigation”.⁹²

155. This conclusion is yet another example of the incompetence of the investigation and the bias against the Russian Federation.

156. In order to understand how and when markings are placed on a missile, it was necessary to understand the final missile assembly process.

157. The stamp with the inscription “Assembly date 15.12.86” is technological (date of engine assembly, not missile assembly) and has nothing to do with the date of final assembly as stated in the missile’s technical documents.

158. Once the “Assembly date” stamp has been applied, a number of assembly operations continue with both the engine itself and the missile as a whole, including:

- 1) Assembly of the fourth compartment, including loading (filling) with gunpowder the pyrotechnic components that make up the missile. For the missile with serial number “8868720” this operation was carried out on 23 December 1986.
- 2) Assembly (joining up) of the rocket compartments with sealing of the joints. The complete joint is not ready until 24 hours after the last coat of sealant has been applied.
- 3) Fitting the “C” unit (nozzle). Final installation of the nozzle on the engine is only possible after the fourth compartment has been fully assembled and joined up with the third compartment. In the technical specifications sheet for the missile No. “8868720” it is noted

⁹¹ Russian Ministry of Defence: *Briefing on newly discovered circumstances of Malaysia Airlines Boeing 777 crash*, <https://www.youtube.com/watch?v=L1IqaljHWw8> (last accessed 13 December 2022).

⁹² Applicants’ Memorial, Annex 18, page 43–44 [Appendix 104].

that “final assembly of the engine as part of the 9M38 No. 8868720 with the installation of the “C” unit was carried out on 24 December 1986”.

- 4) 24 hours after completing the sealing of the rocket compartments with the number “8868720” the sealant is coated with dark green EP-140 enamel. The drying time of EP-140 enamel in assembly shop conditions is set at 8–9 hours.
- 5) Once the EP-140 enamel has finished drying, the connection (transit) harnesses and missile wings are installed.
- 6) At the end, the missile is painted with dark green EP-140 enamel. After that the flight number is painted on to the missile with black enamel. Full resistance of the paint coating to the specified effects is achieved after 24 hours. Accordingly, transfer of the missile to the test bench for acceptance testing is not carried out earlier than 24 hours after application of the markings.
- 7) After the tests, the missile is packed, the documentation is drawn up, and it is handed over to the client. From this it is clear that final acceptance of the missile with serial number “8868720”, which included the 9D131 engine with serial number “8869032”, was carried out on 27 December 1986.

159. On the fully assembled missile, it is not possible to see the technological marking on the engine: “Assembly date 15.12.86”, as it is located under the wing, which is mounted after the final assembly of the rocket and engine compartments. Suffice it to note that the shade of paint on the hull in the area of the “Assembly date” stamp differs from that on the rest of the engine.⁹³

160. Consequently, there is no contradiction in the information provided by the Russian Federation regarding the manufacture of the missile.

161. Thus, the ICAO Council needs to draw attention to the fact that the Applicants’ claims are based on false and incompetent conclusions. The 9M38 missile with engine No. 9D1318869032 and nozzle 9D131.05.000 No. 8.30.113 has never been in service with the Russian Army. For that reason, the Applicants’ claims against the Russian Federation must be rejected.

II.2.4. The developer of the missile was not involved in preparing the programme for the investigation, or the conduct of the studies and experiments, which is not in compliance with ICAO standards and recommendations

162. The exclusion of the Russian side from participating in and conducting the investigation

⁹³ Ibid., Annex 18, illustration on page 46 [Appendix 104].

programmes is not in line with United Nations Security Council resolution 2166 (2014), which stressed “*the need for a full, thorough and independent international investigation into the incident in accordance with the international civil aviation guidelines*”.

163. The Russian enterprise “Almaz-Antey” Air Defence Corporation JSC is the exclusive developer and holder of all design documentation, as well as the results of all types and stages of testing of Buk-type surface-to-air missile systems. The Russian Federation engaged “Almaz-Antey” Air Defence Corporation JSC in the investigation of the crash of flight MH17.

164. The Russian Federation has declassified the technical specifications of the 9M38 and 9M38M1 missiles in connection with the crash of flight MH17.

165. Yet, as the developer and manufacturer of the Buk SAM, the Russian Federation was deprived of the opportunity to participate fully in the investigation of the crash of flight MH17. The Russian Federation’s participation in the investigation was limited by the rights of a State providing information, facilities or experts (Standards 5.23 and 5.25⁹⁴ of Annex 13 to the Convention on International Civil Aviation). It should be emphasised, however, that according to Note 3 to Standard 5.25: “*Nothing in this Standard precludes the State conducting the investigation from extending participation beyond the entitlement enumerated*”.

166. Consequently, the extent of the Russian Federation’s involvement in the investigation of the crash of flight MH17 was unreasonably constrained, despite the provisions of Standard 5.25 of

⁹⁴ ICAO: Annex 13 to the Convention on International Civil Aviation “Aircraft Accident and Incident Investigation”, 2010, Chapter 5 “Investigation”:

“5.25 Participation in the investigation shall confer entitlement to participate in all aspects of the investigation, under the control of the investigator-in-charge, in particular to:

- a) visit the scene of the accident;
- b) examine the wreckage;
- c) obtain witness information and suggest areas of questioning;
- d) have full access to all relevant evidence as soon as possible;
- e) receive copies of all pertinent documents;
- f) participate in read-outs of recorded media;
- g) participate in off-scene investigative activities such as component examinations, technical briefings, tests and simulations;
- h) participate in investigation progress meetings including deliberations related to analysis, findings, causes, contributing factors and safety recommendations; and
- i) make submissions in respect of the various elements of the investigation. However, the participation of States other than the State of registry, the State of the operator, the State of the developer and the State of the manufacturer may be limited to those matters which entitle such States to participate in the investigation in accordance with para. 5.23.

However, participation of States other than the State of Registry, the State of the Operator, the State of Design and the State of Manufacture may be limited to those matters which entitled such States to participation under 5.23.

Annex 13 and UN Security Council resolution 2166 (2014). As a result, the technical investigation did not use the capabilities of the Russian Federation, as the State of design and the State of manufacture of the Buk SAM system, to identify the type of weapon, the conditions of its use and its impact on the aircraft of flight MH17.

167. ICAO issued the “*Manual of Aircraft Accident and Incident Investigation*” (Doc 9756) “*to encourage the uniform application of the Standards and Recommended Practices contained in Annex 13 and to provide information and guidance to States on the procedures, practices and techniques that can be used in aircraft accident investigation*”.⁹⁵

In Part I “*Organisation and Planning*”, Doc 9756 recommends:

- a) “5.7.1.3. [...] *Consideration should be given to using the component manufacturer’s facilities where specialized equipment and trained personnel are readily available.*”
- b) “5.7.1.4. [...] *Occasionally it is necessary to devise special tests that will fully exploit the component’s capabilities. A wide range of specialized testing equipment will permit simulation of a variety of malfunctions, the only limitation being the ingenuity of the investigators.*”
- c) “5.7.2.1 *The nature of the specialist examination and the type of components and systems to be tested will determine the facility to be chosen. The investigator must be confident that the facility chosen is capable of providing the required examination and testing. Prior arrangements should be made with the facility as far in advance as practicable so that the facility’s management can plan the tests and assign personnel and equipment.*”

168. On the very day of the crash of flight MH17 (17 July 2014), media outlets such as CNN⁹⁶ were claiming that the plane could have been shot down by a missile launched from a Buk SAM.

169. During the first meeting of the States participating in the investigation (16–25 February 2015), the theory that flight MH17 had been shot down by a Buk SAM missile was put forward by experts from the Netherlands Aerospace Centre (NLR). For an objective consideration of this version of events, the active involvement of the developer of the Buk SAM system was required in the investigation and analysis programmes.

170. In the course of the investigation conducted by the DSB, simulations to examine the blast site were carried out by the Netherlands Aerospace Centre (NLR), the Netherlands Organisation for Applied Scientific Research (TNO) and the Kiev Forensic Science Research Institute of the Ukrainian

⁹⁵ ICAO: “Guidelines for the Investigation of Air Accidents and Incidents”, Doc 9756, Part I “Organization and Planning”, 2000, section “Foreword”.

⁹⁶ <https://www.youtube.com/watch?v=PRAtWI3WgmA> (last accessed 17 August 2022).

Ministry of Justice. These simulations reconstructed flight and aircraft characteristics and also weapons characteristics. The results of the simulations were compared with the actual pattern of damage. The conclusions drawn from the analysis of the damage pattern on the wreckage matched those from the simulation, confirming the conclusion relating to the weapon used.⁹⁷ The Russian Federation was not invited to participate in these studies. Access to the wreckage by Russian Federation specialists was limited to visual inspection and the taking of photographs.

171. Over the entire course of the investigation, the DSB has only once asked the Russian Federation for information on the characteristics of the Buk SAM missile launcher and it received a comprehensive response from “Almaz-Antey” Air Defence Corporation JSC. The letter from “Almaz-Antey” Air Defence Corporation JSC stated that “*all data correspond to the original design and technical documentation and, if necessary, can be verified*”.⁹⁸

172. The experience of civil aircraft accident investigations conducted over many years around the world has shown that investigators need to work closely with and seek the assistance of aircraft manufacturers, in particular in assessing flight performance and conducting related simulations.⁹⁹ Modern heavy missile weapons are no less complex than aircraft. Moreover, the need to conduct research using missile characteristics in civil aircraft accident investigations is something that arises extremely rarely, and many missile characteristics are State secrets.

173. It is therefore logical to conclude that the involvement in the investigation of the missile weapons developer, as is the practice with the involvement of civil aircraft developers, is essential for the avoidance of critical errors in the conclusions.

174. This conclusion is supported by the history of the development of procedures for the investigation of aviation accidents. The historical background to Annex 13 to the Convention on International Civil Aviation mentions Assembly Resolution A14-22, which directed the ICAO Council to:

“(b) study whether it is practicable to establish procedures by which the State of Manufacture or the State that first certificated the aircraft type, would, in appropriate cases and upon invitation, make available competent experts for advice or consultation in the investigation of accidents, and in the light of the results of such study:

⁹⁷ Dutch Safety Board. “MH17. On the investigation”, 2015, Section 2, page 36 [Error! Reference source not found.].

⁹⁸ Letter from the Director General of “Almaz-Antey” Air Defence Corporation OJSC dated 29 July 2015 No. 01-09/548k (with attachment) (in Russian) [Appendix 97].

⁹⁹ ICAO: Aircraft Accident and Incident Investigation Manual, Doc 9756, Part III Investigation (2011), Chapter 6, Aircraft Performance Investigation.

“i)determine the most practicable means of ensuring that the fullest possible advantage will be taken of the specialized knowledge of such experts and notify all Contracting States accordingly”.

175. The exclusion of Russian specialists from the process of studying the debris prompted the need for the Russian Federation to conduct its own research and testing in areas of expertise accessible only to the developer of the Buk SAM system.

176. The Russian Federation considers that the DSB was unable to refute the facts put forward in the letter from Rosaviatsiya dated 14 January 2016,¹⁰⁰ and limited its responses to mere references to the final report on the investigation.¹⁰¹

177. Thus, despite the provisions of the standards set out in Annex 13 to the Convention on International Civil Aviation, the recommendations of Doc 9756 and United Nations Security Council resolution 2166 (2014), the Russian Federation was excluded from participating in the investigations to determine the type of missile that shot down flight MH17. The exclusion of the Russian Federation, as the State of design and manufacture of the Buk-type surface-to-air missiles, from the technical and criminal investigation of the MH17 crash rendered it impossible to prove the link between the characteristics and capabilities of the type of weapon used and the location of its deployment and the specific features of the damage to the airframe of flight MH17. Consequently, **the Applicants’ references to the results of the technical investigation regarding the identification of the type of weapon and the location of its deployment should be considered null and void** and should not be accepted by the ICAO Council.

SECTION III. LEGAL ASPECTS

178. As will be demonstrated below, the position put forward by the Applicants regarding the interpretation and application of international law, in which they seek to justify the liability of the Russian Federation for the crash of flight MH17 and the infringement of Article 3 bis of the Chicago Convention, is not only at variance with the facts (as already shown in Section II of the Counter-Memorial), but also has no legal basis. Moreover, the Applicants’ position runs counter to the object and purpose of the Chicago Convention and undermines the international civil aviation safety regime, as it favours and protects the real culprit behind the crash, Ukraine.

¹⁰⁰ Letter from Oleg Storchevoy, Deputy Director of Rosaviatsiya and accredited representative of the Russian Federation to the International Investigation Team on the MH17 crash, dated 14 January 2016, to the Dutch Safety Board with information on new facts to be reflected in the final report on the MH17 crash [Appendix 102].

¹⁰¹ Letter No. OvV-16500274 dated 25 February 2016 from the President of the DSB in response to Letter No. 4.02-3 dated 14 January 2016 from the Deputy Director of the Federal Air Transport Agency, Oleg G. Storchevoy [Appendix 103].

SUBSECTION III.1. The crash of flight MH17 does not fall within the purview of the Chicago Convention on the basis of Article 89 of that instrument

179. In their Memorial, the Applicants list the key circumstances surrounding the crash of flight MH17.¹⁰² They are silent, however, about the fact that flight MH17 crashed in an area of armed conflict. This circumstance, pursuant to Article 89 of the Chicago Convention, has significant legal implications in terms of determining the scope of application of the Chicago Convention. Article 89 provides as follows: *“In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.”*¹⁰³ ICAO interprets this article as follows: *“In the event of armed conflict or the potential for armed conflict, the Convention on International Civil Aviation does not affect the freedom of action of any Contracting State affected, whether as belligerents or as neutrals (Article 89 of the Convention). Nevertheless, the need for close co-ordination between civil and military authorities and units is even more critical”*.¹⁰⁴

180. According to the general tenets of international law, the freedom of States to act in a certain area is equated to the absence of international legal rules governing these relations:

a. George Berge in 1927, on the basis of the SS Lotus case, wrote: *“in the absence of law on the subject, freedom of national action is presumed”*.¹⁰⁵

b. The eminent expert on international law, Hersch Lauterpacht, pointed out in his seminal work: *“One of these principles – which is a principle of general application – is that, in the absence of a clear rule imposing upon a State a duty of action or abstention, a State is entitled, subject to the obligation to act in good faith, to proceed according to discretion and that a claim which is not based on any such rule must be dismissed. In such cases there is no question of a gap in the law; the situation is governed by the residuary rule that the State possesses freedom of action”*.¹⁰⁶

¹⁰² Applicants’ Memorial, paragraph 4.10. [Appendix 104].

¹⁰³ Convention on International Civil Aviation, 1944, art. 89. [Appendix 3].

¹⁰⁴ ICAO, Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations, Doc 9554-AN/932, 1990. URL: <https://www.wing.com.ua/images/stories/library/oavd/9554.pdf>, para 10.1. [Error! Reference source not found.].

¹⁰⁵ George Wendell Berge, “The case of the S.S. ‘Lotus’ (France v. Turkey)”, *Michigan Law Review*, vol. 26, No. 4, 1928, p. 377. [Appendix 45].

¹⁰⁶ Hersch Lauterpacht (ed.), *International Law: Collected Papers*, Cambridge University Press, 1970, p. 95. [Appendix 60].

c. The same approach is shared by contemporary authors. For example, Alexander Orakhelashvili notes that “*sovereign freedom of action is relevant only in the absence of a legal obligation*”.¹⁰⁷

181. Thus, the actions of Contracting States affected by an armed conflict cannot be regarded as a priori contrary to the provisions of the Chicago Convention. Such an interpretation is, in turn, widely supported by international legal doctrine:

a. Michael Milde, Chair of the ICAO Legal Committee, takes the position that, based on its Article 89 “*the Chicago Convention accords to States ‘freedom of action’, i.e. it creates a situation in which States are free to decide whether to apply the Convention or some of its provisions or to disregard the Convention completely*”.¹⁰⁸

b. Interpreting Article 89, Bin Cheng noted that “*in circumstances described in this provision, the Convention no longer applies*”.¹⁰⁹

c. Benjamyn Scott and Andrea Trimarchi note that, “*while the Chicago Convention 1944 applies to international civil aviation, Article 89 provides that in cases of war or national emergency, whereby in the latter case notification is made to the Council, the provisions of the Chicago Convention 1944 shall not apply. This could include the entirety of the Convention or just specific Articles*”.¹¹⁰

d. As noted by Jiefang Huang: “*in case of war or national emergency, any member State of ICAO may choose not to be bound by any provision of the Convention, including Article 3 bis*”.¹¹¹

e. The position taken by Eugene Sochor is that: “*a country can only suspend its obligations under the Chicago Convention in case of war or national emergency*”.¹¹²

f. James Busuttil pointed out that “*Article 89 of the Chicago Convention allows States to take any action during a war or declared state of national emergency*”.¹¹³

¹⁰⁷ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford University Press, 2008, p. 18. [Appendix 69].

¹⁰⁸ Michael Milde, “Aeronautical consequences of the Iraqi invasion of Kuwait”, *Air Law*, vol. 16, 1991, p. 71. [Appendix 64].

¹⁰⁹ Bin Cheng, *The Law of International Air Transport*, New York: Oceana Publications, 1962, p. 113 [Appendix 77].

¹¹⁰ Benjamyn I. Scott and Andrea Trimarchi, *Fundamentals of International Aviation Law and Policy*, Routledge Press, 2019, p. 40. [Appendix 73].* *Translator’s note: this quotation is on p. 42, not 40.*

¹¹¹ Jiefang Huang, *Aviation safety and ICAO*, Kluwer Law International, 2009, p. 94.

¹¹² Eugene Sochor, *The Politics of International Aviation*, Palgrave Macmillan, United Kingdom, 1991, p. 218. [Appendix 74].

¹¹³ James J. Busuttil, “The Bonn Declaration on International Terrorism: a non-binding international agreement on aircraft hijacking”, *International and Comparative Law Quarterly*, vol. 31, No. 3, 1982, p. 480. [Appendix 46].

g. P.C. Dempsey, commenting on the India-Pakistan dispute before the International Court of Justice, emphasised that “*Article 89 of the Chicago Convention allows a contracting state to disregard its obligations under the Convention in times of war or national emergency*”.¹¹⁴

h. According to the position of the International Committee of the Red Cross, ‘*As for civil aviation, it is protected in time of peace by conventions banning the capture or destruction of civilian aircraft and defining a number of offences against civilian aircraft that may occur on board or in airports. However, the extent to which these conventions apply in times of war is a point of debate*’.¹¹⁵

182. In addition to doctrinal sources, the interpretation provided finds support in the legal positions of States. For example, during the 1971 ICAO Council hearing on the India-Pakistan dispute, the Indian representative noted that “*Article 89, which recognized the freedom of action of States in times of war or national emergency, was irrelevant to the present case, having nothing to do with the right of termination for material breach*”.¹¹⁶ A largely similar position was taken by Pakistan, which viewed article 89 of the Chicago Convention as establishing the suspension and termination of a treaty in the event of war.¹¹⁷ A similar interpretation is reflected in the official position of the United States Department of Justice, which stipulates that “*Article 89 of the Chicago Convention relieves a state party from its obligations under the Convention*”.¹¹⁸

183. A similar position is held by Ruwantissa Abeyratne, former Head of the ICAO Treaty Office and an authority on international air law, who, analysing the crash of flight MH17, writes the following: “*It must be noted in this context that the Chicago Convention provides that in case of war, the provisions of the Convention do not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same applies in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council. It is therefore arguable that Article 3bis of the Chicago Convention would not apply to Ukraine in the circumstances of Flight MH 17*”.¹¹⁹

¹¹⁴ Paul Stephen Dempsey, “The role of the International Civil Aviation Organization on deregulation, discrimination, and dispute resolution”, *Journal of Air Law and Commerce*, vol. 52, No. 3, 1987, p. 567. **Appendix 51**].

¹¹⁵ International Committee of the Red Cross, Air warfare, URL: <https://casebook.icrc.org/law/air-warfare>. **Appendix 38**].

¹¹⁶ Minutes of the Council of the International Civil Aviation Organization, (a) Council – Seventy-Fourth Session. *Minutes of the Second Meeting*, Doc 8956-c/1001, para. 58. **Appendix 22**]. * Translator’s note: as may be seen from the text in Appendix 22, it is 74th session, not 75th, as stated in the Russian.

¹¹⁷ Ibid., para. 5 **Appendix 22**].

¹¹⁸ *Opinions of the Office of Legal Counsel of the United States Department of Justice*, vol. 18, 1994, p. 149 **Appendix 66**].

¹¹⁹ Ruwantissa Abeyratne, “Flight MH 17: the legal and regulatory fallout” *Air and Space Law*, vol. 39, No. 6, 2014, p. 337. **Appendix 42**].

184. Moreover, the Applicants' position is inconsistent with Article 4 of the Draft Articles of the United Nations International Law Commission on the Effects of Armed Conflicts on Treaties, according to which "*Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.*".¹²⁰ The Applicants refer to these Draft Articles and note that, unlike other universal treaties in the field of international aviation law, the Chicago Convention contains no provisions excluding its operation during an international armed conflict.¹²¹ It is not clear on what basis the Applicants have drawn this conclusion and why Article 89 of the Chicago Convention cannot be regarded as such a provision. It is clearly recognized in international legal thinking that the use in Article 89 of the Chicago Convention of the phrase "freedom of action" in the context of armed conflicts underlines precisely that this provision is an example of a particularly extensive military reservation. As Theodor Meron notes: "*Article 89 of the Chicago Convention provides an important contextual link with the law of belligerent rights. That very broad war clause of the Convention reserved the freedom of action of the contracting states affected by war (or emergency conditions) whether as belligerents or as neutrals.*"¹²²

185. This understanding is confirmed by the fact that a clear parallel was drawn between military reservations and Article 89 of the Chicago Convention in the ICAO Legal Committee during its discussion of the agenda item "Acts or offences of concern to the international aviation community and not covered by existing air law instruments": "*While applauding the work so far accomplished, one delegation wished to reiterate its reservations in the Sub-Committee with regard to the military exclusion clause. This delegation could perhaps accept the exemption of armed forces activities during armed conflict, which would be in line with Article 89 of the Chicago Convention, but could not accept a total military exemption even during peacetime.*"¹²³ To which the Vice-Chairman of the Special Sub-Committee of the Legal Committee, who was involved in the elaboration of this aspect, replied as follows: "*In response to an inquiry by a delegation, the Vice-Chairman of the Sub-Committee clarified that the Sub-Committee recommended inclusion of the military exclusion clause on the clear understanding that military activities were governed by other international rules regarding State actions.*"¹²⁴

¹²⁰ General Assembly, Official Records 56th session, *Report of the International Law Commission on the work of its fifty-third session*, Document A/56/10, 23 April–1 June and 2 July–10 August 2001. [Appendix 17].

¹²¹ Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objection, paragraph 1.10 [Appendix 105].

¹²² Theodor Meron, "Applicability of multilateral conventions to occupied territories", *American Journal of International Law*, vol. 72, No. 3, 1978, p. 556. [Appendix 63].

¹²³ ICAO, "Report of the Legal Committee for the general section of its report and on agenda items 7, 8, 45, 47 and 48", Doc A36-WP/341, para. 46.2 [Appendix 24]. * Translator's note: the document symbol is A36-WP/341, not A36-WP/34, as stated in the Russian.

¹²⁴ Ibid., para. 46.5. [Appendix 24].

186. In the provisions of international treaties quoted by the Applicants, which in their view contained a “military reservation”, particular emphasis is placed on the phrase “armed conflict”. As stated above, however, the official position of ICAO is that the term “war” in Article 89 is equivalent to “armed conflict”, which is consistent with contemporary international humanitarian law.¹²⁵ Historically, the use of the term “war” in the text of the Chicago Convention is explained by the fact that this treaty was developed against the background of the Second World War, but at the present time, in the light of the development of international humanitarian law, the term “war” in Article 89 should be considered as synonymous with the term “armed conflict”.¹²⁶ It should be noted here that the Applicants themselves interpret “war” under Article 89 of the Chicago Convention to mean “armed conflict”.¹²⁷

187. In addition, the aforementioned draft articles in the annex to Article 7 contain a list of treaties the effect of which does not cease in the event of armed conflict. No treaties regulating international air traffic are included in that list.

188. Article 89 of the Chicago Convention is therefore a specific provision on the operation of the treaty in situations of armed conflict within the meaning of Article 4 of the Draft Articles of the UN International Law Commission on the effects of armed conflicts on treaties.

189. The purpose of Article 89 is that the actions of Contracting States affected by an armed conflict cannot a priori be regarded as contrary to the provisions of the Chicago Convention, in other word, the Article ceases to limit the “freedom of action” of States Parties. As noted by the eminent expert on air law Bin Cheng, Article 89 of the Chicago Convention “*imposes an important limitation on its functional scope*”.¹²⁸ The wording of the first sentence of Article 89 was taken from Article 38 of the Paris Convention for the Regulation of Aerial Navigation of 1919.¹²⁹ Article 38 of the Paris Convention is proof that the rules contained therein were “*designed primarily for peacetime*

¹²⁵ Abeyratne also interprets the term “war” in Article 89 as “*a state of armed conflict between different nations or states or different groups within a nation or State*”. See Ruwantissa Abeyratne, “Flight MH17 and State responsibility for ensuring safety and security of air transport”, *Journal of Transportation Security*, vol. 7, 2014, p. 351. [Error! Reference source not found.].

¹²⁶ Laura Wanlu Zhang, “Humanitarian considerations in international air law”, *Cambridge Journal of International and Comparative Law*, No. 5 No. 2, 2016, page 456. [Appendix 79]. (Many international lawyers commenting on this provision also make explicit reference to the term “armed conflict”. See Michel Bourbonniere and Louis Haeck, “Military aircraft and international law”, *Chicago Opus 3, Journal of Air Law and Commerce*, No. 66, 2000, p. 963. [“Unlike most other multilateral treaties, the Chicago Convention contains a specific disposition pertaining to its application during times of armed conflict.”] [Error! Reference source not found.]).

¹²⁷ Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objection, paragraph 1.11 [Appendix 105].

¹²⁸ Bin Cheng, *The Law of International Air Transport*, p. 113. [Appendix 77].

¹²⁹ *Proceedings of the International Civil Aviation Conference, Appendix 2* “Commentary on the Development of Individual Articles of the Convention on International Civil Aviation, Chicago, 1 November–7 December 1944, p. 1395. [Appendix 32].

conditions”.¹³⁰ Given the timing of these provisions and the choice of similar wording in Article 38, it is clear that the drafters sought to reflect the *jus pacis* and *jus belli* distinction typical of international law at the time. All the provisions of the Chicago Convention, which replaced the Paris Convention, were undoubtedly intended to refer to *jus pacis*. An authoritative monograph on international air law states: “Regulating aviation in times of peace, the Paris Convention was the first multilateral instrument dealing with aviation, and, though no longer in force since it was superseded by the 1944 Chicago Convention”.¹³¹ This principle remains in force today. As observed in the doctrine: “It is noteworthy that the Chicago Convention is an international law of peace. Its Article 89 states that in case of war and emergency conditions, the Convention ‘shall not affect the freedom of action of any of the contracting States affected’.”¹³²

190. The Applicants have thus failed to demonstrate that Article 89 of the Chicago Convention applies in a piecemeal fashion to the various provisions of that treaty. It follows that Article 3 bis does not impose international law obligations on States in situations of armed conflict. In the absence of obligations under the Chicago Convention, the Russian Federation, as a neutral State affected by an armed conflict, could not a priori violate Article 3 bis of that treaty in relation to the crash of flight MH17. This does not mean that the downing of a civil aircraft is “permitted” under international law; it means that the question of the legality of the use of arms in an armed conflict is governed by another branch of international humanitarian law. (At the same time, Russia categorically rejects allegations of its involvement in the crash of MH17).

SUBSECTION III.2 The application of Article 89 is not limited to actions permitted under international humanitarian law

191. In the Applicants’ view, Article 89 only applies in cases involving acts that do not violate international humanitarian law. This is untrue and contrary to the purpose of the Article. Furthermore, in any event, the crash of MH17 cannot be regarded as a violation of international humanitarian law.

192. Under this interpretation, the assertion that the Chicago Convention “does not affect freedom of action” refers not to the provisions of the Chicago Convention, but to the rules of international humanitarian law. In so doing, the Applicants are arbitrarily detaching it from the

¹³⁰ Oliver Lissitzyn, “The treatment of aerial intruders in recent practice and international law”, *American Journal of International Law*, vol. 47, No. 4, 1953, p. 564. [Appendix 61].

¹³¹ Vincent Correia, “The legacy of the 1919 Paris Convention relating to the regulation of aerial navigation”, in *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty*, Pablo Mendes de Leon and Niall Buissing, eds., Wolters Kluwer, 2019, p. 5. [Appendix 59].

¹³² S.G. Sreejith, “Legality of the Gulf ban on Qatari flights: State sovereignty at crossroads”, *Air and Space Law*, vol. 43, No. 2, 2018, p. 203 [Appendix 75].

framework of the treaty in question. As will be shown below, however, this approach runs counter to Article 31 of the 1969 Vienna Convention on the Law of Treaties, according to which “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”¹³³

193. The Applicants’ interpretation of Article 89 suggests that the provision of Article 3 bis represents a special rule to which the provisions of Article 89 do not apply in their entirety. This assertion lacks any convincing justification.

194. The Chicago Convention was adopted in 1944, whereas the amendment by which Article 3 bis was incorporated into the text of the treaty was adopted in 1984. The original text of the Chicago Convention, including Article 89, cannot be regarded as containing any “exception” to Article 3 bis, which was only incorporated 40 years later. This is also confirmed by the absence of any indication of such an intention on the part of States when drafting the protocol that introduced this article into the Convention and that included no special conditions or “exceptions” to the general regime of Article 89. As noted in international legal doctrine: “*Article 3 bis was adopted in the form of a protocol which is subject to a separate ratification process from the Chicago Convention. It could have been drafted as a treaty independent from the Chicago Convention, but its architects chose to incorporate it into the body of the latter. As a result, its application is subject to other provisions in the Chicago Convention, in particular Article 89.*”¹³⁴

195. This demonstrates that Article 89 extends fully to Article 3 bis of the Chicago Convention. This thesis is also confirmed in the joint work of Hugo Caminos and Vincent Cogliati-Bantz, who point out: “*Article 3bis of the Chicago Convention says that the contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight, but this, too, is reserved by Article 89.*”¹³⁵ As shown above, on the basis of Article 89, the “freedom of action” of war-affected states is not limited by the provisions of the Chicago Convention.

196. The Applicants cite in support of their position the work of Michal Klenka to which the Russian Federation refers in its Preliminary Objections. In their view, the author of that article “*expressly acknowledges the limitations on the effect of Article 89 and states that it should not be invoked to entirely exclude the application of Article 3bis(a)*” and also notes that “*the ‘freedom of*

¹³³ Vienna Convention on the Law of Treaties, 1969, Article 31. [Appendix 1].

¹³⁴ Jiefang Huang, *Aviation safety and ICAO*, Kluwer Law International, 2009, p. 94 [Error! Reference source not found.].

¹³⁵ Hugo Caminos and Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions*, Cambridge University Press, 2014, p. 22 [Appendix 58].

action' afforded under Article 89 would not extend to allowing a State to shoot down civil aircraft unconditionally".¹³⁶ It is worth noting that the Applicants do not cite any specific quotation from this work, which allows them to alter the author's original message. Analysing Article 89 of the Chicago Convention, Klenka reaches the following conclusion: *"It may be argued, therefore, in case of war or national emergency, any member State of ICAO may choose not to be bound by any provision of the Convention, including Article 3 bis. This does not mean, however, that States are not bound by customary international law independent of Article 3 bis. Moreover, they are also bound by the law of war or international humanitarian law"*.¹³⁷

197. Consequently, contrary to the Applicants' false assertion, Klenka expressly supports the position that Article 89 extends to all provisions of the Chicago Convention, including Article 3 bis, and excludes the application of the latter in the event of war. He only allows the application of the rules of customary international law and international humanitarian law independent of Article 3 bis, which are not covered by the Convention. This is confirmed by what Klenka writes further on this point:

*"In view of the declaratory nature of Article 3 bis, paragraph (a), even if States have expressly invoked Article 89, it is seriously questionable whether their freedom of action could be exercised to such extent as allowing them to shoot down civil aircraft unconditionally. From this point of view, one may tentatively trace the sign of 'opinio juris' from the subsequent practice of States that Article 89 could not exclude the application of Article 3 bis, paragraph (a) as a customary rule, although it may exclude the application of some other provisions of the Chicago Convention."*¹³⁸

198. Thus, Klenka takes the position that Article 3 bis declared a rule of customary international law existing in parallel to the Chicago Convention. It should be stressed that the Russian Federation does not agree that there is an analogous rule parallel to Article 3 bis of the Chicago Convention, which allegedly applies in wartime, and which is not covered by Article 89 of the Chicago Convention and does not form part of international humanitarian law. In Klenka's view, however, this rule of customary international law is not part of the Chicago Convention and therefore does not fall under its dispute settlement provisions. This rule, in Klenka's view, would apply separately and

¹³⁶ Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objection of the Russian Federation, note 19 [Appendix 105].

¹³⁷ Michal Klenka, "Aviation safety: legal obligations of states and practice", *Journal of Transportation Security*, Norwell, vol. 10, 2017, p. 8. [Appendix 57].

¹³⁸ Ibid, p. 9 [Appendix 57].

independently of the Chicago Convention. In this case, however, violations of this rule and related disputes would of course not lie within the jurisdiction of the ICAO Council under Article 84 of the Chicago Convention.

199. Stefan Kaiser, in his work on the MH17 disaster, comes to the unequivocal conclusion that the possible existence of a rule of customary international law analogous to Article 3 bis does not preclude the non-application of Article 3 bis under Article 89 in cases of armed conflict, including in eastern Ukraine: in these cases, in his view, relations should be governed by international humanitarian law, which also applies to the incident of the downing of MH17: *“The customary rule on protection of civil aircraft recognized in Article 3bis is not limited to peacetime, but applies also in armed conflict. To that end Article 89 of the Chicago Convention states: ‘In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals’. At the time of the downing of MH17, the armed hostilities in eastern Ukraine were intensifying to a level which can be regarded as a non-international armed conflict, although there is no clear threshold for the level of hostilities to qualify as a non-international armed conflict under existing treaty law. The hostilities had escalated beyond internal disturbance and tensions, such as riots, isolated and sporadic acts of violence. Regardless of their apparent fragmented organizational set-up and unclear command and control structure, the organized separatist groups were at least under such a degree of coordinated control as to execute sustained and coordinated military operations and to effectively control areas in eastern Ukraine, while the Ukrainian government de facto had lost it. As a result, the downing of MH17 needs to be assessed under international humanitarian law as the rules of conduct of armed conflict”*.¹³⁹ Kaiser comes to the conclusion: *“The responsibility of States can neither be substituted by ICAO,”* meaning that State responsibility cannot be established by ICAO.¹⁴⁰

200. The existing limitations on, and principles regarding, the use of force apply, not by virtue of Article 3 bis, the effect of which is excluded by Article 89 of the Chicago Convention, but by virtue of international humanitarian law, which does not form part of the Chicago Convention.

201. The above arguments demonstrate that the provisions of Article 3 bis do not apply to the actions of States in situations of armed conflict. This does not mean that the downing of a civilian aircraft is “permitted” under international law; it means that the question of the legality of the use of

¹³⁹ Stefan A. Kaiser, “Legal considerations about the loss of Malaysia Airlines flight MH 17 in eastern Ukraine”, *Air and Space Law*, vol. 40, No. 2 (2015) p. 110 [Appendix 56].

¹⁴⁰ Ibid., p. 118 [Appendix 56].

weapons in armed conflict is governed by a different branch of law – international humanitarian law. (At the same time, Russia categorically rejects allegations of its involvement in the crash of MH17.)

202. The crash of flight MH17 must be considered primarily in the context of international humanitarian law. However, the ICAO Council has no competence to establish a violation of international humanitarian law because these rules apply in situations of armed conflict. As Abeyratne has pointed out, the invocation of Article 89 suspends the application of the Chicago Convention and the Council's powers under Chapter XVIII: *"States have invoked Article 89 which suspends the application of the Chicago Convention and hence the Council's rights under Chapter XVIII. The article says that in case of war, the provisions of the Convention will not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals"*.¹⁴¹

203. The competence of any mechanism for the settlement of international disputes, including those that may issue legally binding rulings, is based on the consent of the States concerned. The Russian Federation does not dispute the fact that international humanitarian law regulates the use of force during armed hostilities, including against civilian objects. Meanwhile, as the International Court of Justice points out, *"Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State"*¹⁴² without the expression of that State's consent. The Russian Federation and other States have not consented to the ICAO Council pronouncing on issues of international humanitarian law (at the same time, Russia categorically rejects allegations of its involvement in the MH17 crash).

SUBSECTION III.3. The matter regulated by Article 3 bis does not apply to situations of armed conflict

204. In any event, the provisions of Article 3 bis of the Chicago Convention are drafted in such a way as to lead to the conclusion that the Article does not apply *per se* to situations of armed conflict. Applying the rules set forth in this article to situations of armed conflict would be counterproductive and, as shown below, would lead to a situation of legal uncertainty.

205. The crash of the Boeing MH17 took place during an armed conflict that was under way on the territory of Ukraine. Reference to the armed conflict is made in, among other sources, the final report of the technical investigation by the Dutch Safety Board. It states, for example: *"However, during the period of 2 April through 17 July 2014, the period during which the armed conflict in the*

¹⁴¹ Ruwantissa Abeyratne, *Legal Priorities in Air Transport*, Springer-Verlag, 2019, p. 21 [Appendix 39].

¹⁴² *East Timor (Portugal v. Australia)*, Judgment, I. C.J. Reports 1995, para. 29 [Error! Reference source not found.].

*eastern part of Ukraine broke out and intensified, ICAO did not mention the situation in Ukraine again”;*¹⁴³ *“As the crash area was in an area of armed conflict, it was for a long time not safe for the investigators to travel to the crash area to perform an investigation and to recover the wreckage”*.¹⁴⁴

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

207. The use of force, including against aircraft, during hostilities is regulated by international humanitarian law (the law of armed conflict) and this regulation is different from the regime under Article 3 bis. There is neither need nor possibility to take up the issue of interpretation and application of the Chicago Convention in this regard. Accordingly, there is no dispute under the Chicago Convention.

208. Thus, Article 3 bis provides that *“The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight”*. The HPCR Manual on International Law Applicable to Air and Missile Warfare¹⁴⁵ repeatedly emphasises that Article 3 bis of the Chicago Convention is inapplicable in situations of armed conflict;¹⁴⁶ the relevant rules are not derived from this article. Similar provisions are to be found in the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea.¹⁴⁷ Thus, the substance of the rule on the non-use of weapons against civil aircraft in situations of armed conflict, and any exceptions to that rule, lie outside the scope of Article 3 bis and, accordingly, the competence of the ICAO Council.

209. Thus, if Article 3 bis were considered to be applicable during an armed conflict, it would be in conflict with the rules of international humanitarian law, leading to a situation of legal uncertainty. The reference to Article 3 bis in paragraph 3 of the ICAO Council resolution of 28

¹⁴³ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, section 5.2, p. 178 [Appendix 85].

¹⁴⁴ Ibid., section 1.4, p. 16 [Appendix 85].

¹⁴⁵ *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Bern, 2009 [Appendix 112].

* Translator’s note: this is not a Cambridge University publication: it is published by Harvard University (in Cambridge, Massachusetts), and the place of publication is Bern, not either of the two Cambridges

¹⁴⁶ Ibid., 16, 184 [Appendix 112].

¹⁴⁷ *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, San Remo, 1994 [Appendix 113].

October 2014¹⁴⁸ is a general appeal to all States to comply with the said rule without reference to the specific circumstances of the Boeing MH17 case, and cannot therefore be taken to justify the applicability of Article 3 bis in an armed conflict and to influence how the incident is categorized. Furthermore, by adopting the resolution in question, the ICAO Council was acting as a political body outside the scope of any investigation or dispute resolution under Article 84 and was not seeking to provide a legal classification of the case.

210. Furthermore, if the opposing view were to be assumed, it would inevitably follow that the ICAO Council was the authority competent to deal with 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 both with the mandate of the Organization and its bodies and with the principle of the special competence of international organizations.¹⁴⁹

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

212. Furthermore, this general obligation set out in paragraph 1* must be read in conjunction with paragraphs (b) and (c), which set out 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 describes the measures that may be taken against an offending civilian aircraft in peacetime.

213. Paragraph (d) strengthens the mechanism for the enforcement of this article with a preventive element – imposing an obligation on States to prevent the use of sub-jurisdictional civilian courts for “*any purpose inconsistent with the aims of this Convention*”, i.e. not for civil aviation

¹⁴⁸ ICAO Council Resolution on Malaysia Airlines flight MH17, destroyed over eastern Ukraine on 17 July 2014, 2014: “The Council ... *Reaffirms* Article 3 bis of the *Convention on International Civil Aviation* and the 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*” [Appendix 35].

¹⁴⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, paras.15–16 [Error! Reference source not found.].

* Translator’s note: paragraph 1 of what? Perhaps this should read “paragraph (a)” – referring to paragraph (a) of Article 3 bis (which does not have a “paragraph 1”).

purposes. This article does not address situations that are specific to wartime, such as the use of civilian aircraft to transport troops or munitions. For example, the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea explicitly states that enemy civil aircraft may be attacked if they meet the definition of a military objective.¹⁵⁰ It then lists the activities that can serve as a basis for classifying them as a military objective. For example, refusing to obey identification, changing course and heading for inspection, etc.¹⁵¹

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

215. Article 3 bis resulted from the deliberations by the ICAO Assembly on the crash of flight KE007 in Soviet airspace.¹⁵² This determined the course of the negotiations, and also the content and scope of the rights and obligations of States, which were captured by parties to the negotiations in Article 3 bis. It so transpired from the proceedings of the 25th session of the Assembly that, at no stage in the negotiations, was there any talk of settling issues relating to the conduct of armed conflicts by making amendments to the Chicago Convention.¹⁵³ If this had been the case, it is inconceivable that such obvious aspects as the criteria outlined above for the use of civilian aircraft for military purposes, and also the closure of airspace to civilian aircraft in situations of armed conflict, would have been left outside the scope of regulation. This is all the more obvious against the backdrop of the detailed provisions of Article 3 bis dealing with situations of interception.

216. On the contrary, many delegations defined the object of the future article as being limited to cases where a civil aircraft violated certain rules relating to its presence in the airspace of a foreign State. For example, the delegate of Israel stated the following: “*Rationalization of the possible situations facing the Assembly indicated that the factual terms of reference relied on the knowledge of, or the reasonable grounds to assume, that a number of situations have or may have occurred. Firstly, a violation of sovereignty, intentionally or unintentionally, through the unauthorized entry of an aircraft into the airspace of a State; secondly, utilizing a right to enter the airspace and engaging*

¹⁵⁰ *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* [San Remo Manual on International Law Applicable to Armed Conflicts at Sea], San Remo, 1994, para. 62. [Appendix 113].

¹⁵¹ *Ibid.*, para. 63 [Appendix 113].

¹⁵² Ruwantissa Abeyratne, *Convention on International Civil Aviation. A Commentary*, Springer-Verlag, 2014, p. 68 [Error! Reference source not found.]; see also Bin Cheng, “The destruction of KAL flight KE007, and Article 3 bis of the Chicago Convention”, in *Studies in International Air Law: Selected Works by Bin Cheng*, Chia-Jui Cheng, ed., Brill Publishing, 2017, pp. 343–370 [Appendix 78].

¹⁵³ ICAO Assembly 25th Session (Extraordinary) Executive Committee: *Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438 [Appendix 19]; ICAO Assembly 25th Session (Extraordinary) Plenary Meetings: *Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437 [Appendix 20].

*in activities inconsistent with the Convention; thirdly, deviating from a flight path intentionally or unintentionally while being legally within a State's airspace".*¹⁵⁴

217. A similar approach to the subject matter of the negotiations and the Assembly's objectives is reflected with the utmost clarity in, among other sources, the statements by the delegates of Bulgaria,¹⁵⁵ India,¹⁵⁶ the USSR,¹⁵⁷ China,¹⁵⁸ Cuba,¹⁵⁹ Czechoslovakia,¹⁶⁰ Japan,¹⁶¹ New Zealand,¹⁶² Poland,¹⁶³ Belgium,¹⁶⁴ Switzerland¹⁶⁵ and Algeria.¹⁶⁶ Another relevant example in this context is the working document with the significant title "Basic principles related to the interception of civil aircraft",¹⁶⁷ submitted by the Latin American Civil Aviation Commission. During the Assembly session many delegations (notably USA¹⁶⁸, Netherlands¹⁶⁹, Belgium¹⁷⁰, India¹⁷¹) expressed their support for this document.

218. The delegation of the Netherlands also made its position on this very clear: "*When we are talking about the use of force against unarmed civil aircraft, we are referring to a situation in which a State intercepts an aircraft which has entered its airspace without permission or authorization to do so, in other words about a violation of the sovereignty of the State over the airspace above its territory*".¹⁷²

¹⁵⁴ ICAO Assembly 25th Session (Extraordinary) Executive Committee: *Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438, pp. 54 [Appendix 19].

¹⁵⁵ ICAO Assembly 25th Session (Extraordinary) Plenary Meetings: *Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, pp. 32–34 [Appendix 20].

¹⁵⁶ Ibid., pp. 32–34 [Appendix 20].

¹⁵⁷ Ibid., pp. 24–27 [Appendix 20].

¹⁵⁸ Ibid., pp. 35–36 [Appendix 20].

¹⁵⁹ Ibid., pp. 36–38 [Appendix 20].

¹⁶⁰ Ibid., pp. 36–38 [Appendix 20].

¹⁶¹ Ibid., pp. 56–57 [Appendix 20].

¹⁶² Ibid., pp. 60–62 [Appendix 20].

¹⁶³ Ibid., pp. 62–63 [Appendix 20].

¹⁶⁴ Ibid., pp. 70–71 [Appendix 20].

¹⁶⁵ Ibid., pp. 77–78 [Appendix 20].

¹⁶⁶ Ibid., pp. 80–82 [Appendix 20].

¹⁶⁷ ICAO Assembly 25th Session (Extraordinary) Executive Committee: *Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438, pp. 179 [Appendix 19].

¹⁶⁸ Ibid., p. 45 [Appendix 19].

¹⁶⁹ Ibid., p. 45 [Appendix 19].

¹⁷⁰ Ibid., p. 46 [Appendix 19].

¹⁷¹ Ibid., pp. 50–51 [Appendix 19].

¹⁷² ICAO Assembly 25th Session (Extraordinary): Plenary Meetings: *Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 59 [Appendix 20].

219. In that connection, the delegation of the Netherlands expressed the view that the wording of the amendment, as an equivalent alternative, could firstly provide for the right of a State to require landing of an aircraft that had violated its sovereignty by unauthorized overflight of its territory, and secondly, contain an explicit non-use of force clause, which would have to be formulated as a necessary limitation to that right.¹⁷³ Clearly, in the understanding of the Dutch delegation, as well as the other negotiators, the subject of the new article of the Chicago Convention did not extend to cases of aircraft entering an area of active armed conflict.

220. During the work on draft Article 3 bis, a number of delegations explicitly stated that the proposed amendments to the Chicago Convention regarding the duty to refrain from the use of force against civil aircraft merely reflected a rule already established in general international law, and in peacetime. The statement of the Japanese delegation at the meeting of the Executive Committee on April 27, 1984, which emphasized in particular the following, is instructive in this regard: *“As a number of delegations had expressed in their general statements, the Japanese Delegation believed that the use of force against unarmed civil aircraft in peace time constituted a violation of the rules of international law and what they intended to do was to codify this existing rule.”*¹⁷⁴ It should be noted that the said position had also been put forward in the working paper prepared by the delegation of Japan and distributed at the session.¹⁷⁵ This point of view was also expressly stated by the delegation of Japan at the plenary meeting of the 25th session of the Assembly on 25 April 1984.¹⁷⁶ The delegation’s statement was made at the beginning of the debate and was directly supported by a number of delegations (e.g. Canada,¹⁷⁷ Ireland,¹⁷⁸ Singapore,¹⁷⁹ Zaire¹⁸⁰). By contrast, an examination of the proceedings of the 25th extraordinary session of the ICAO Assembly did not reveal any objections by delegations in this regard.

221. A similar position was reflected in the statements of other delegations. Thus, the delegation of the United Kingdom stated: *“The UK is among those, Mr. President, who do believe that the development of international law, particularly during this century, has made it clear beyond doubt that in time of peace, the use of force against civil aircraft is subject to very severe limitations. But*

¹⁷³ ICAO Assembly 25th Session (Extraordinary) Executive Committee: *Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438, p. 46 [Appendix 19].

¹⁷⁴ Ibid., p. 27 [Appendix 19].

¹⁷⁵ Ibid, p. 186 [Appendix 19].

¹⁷⁶ Ibid, p. 186 [Appendix 19].

¹⁷⁷ Ibid., p. 69 [Appendix 19].

¹⁷⁸ Ibid., p. 48 [Appendix 19].

¹⁷⁹ Ibid., p. 85 [Appendix 19].

¹⁸⁰ Ibid., p. 86 [Appendix 19].

*equally, the tragic events of last year have demonstrated that it is desirable for States to reaffirm, by an express provision in the Chicago Convention, the legal rules concerning the use of force against civil aircraft”.*¹⁸¹

222. The delegate of Canada articulated the Assembly’s task as follows: *“It is not for the purposes of creating a new rule of international law prohibiting the use of force against civil aircraft that an amendment to the Chicago Convention is required. The use of force against civil aircraft in time of peace is then in violation of well-established rules of international law and, if committed, engages the international responsibility of the State concerned. What is then required from us at this Session is to give formal recognition in the Chicago Convention to the existence of the prohibition on the use of force against civil aircraft”;*¹⁸² *“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”.*¹⁸³

223. The delegation of Sweden outlined the Government’s earlier approach in this context: *“It is of great importance that principles of international law are respected in the field of civil aviation. ... A civilian aircraft should in times of peace under no circumstances be subjected to actions that might imperil its safety. This principle is valid also in cases where navigational faults may lead the aircraft into restricted areas. In cases of interception of civilian aircraft the respect of human life should take precedence over the protection of territories”.*¹⁸⁴

224. A representative of the International Air Transport Association (IATA) summarized the positions of the States participating in the discussion of the topic: *“As was eloquently demonstrated on the opening day by the Chief Delegate of the U.K. and yesterday by the Chief Delegates of France, Canada and by others, there is a prohibition in law against the use of armed force against civil aircraft in time of peace except in very extreme and very defined situations. As a corollary it should be recognized that no other action should endanger the lives or safety of persons on board. These principles must be reflected in whatever measures accepted by ICAO with respect to intercept situations”.*¹⁸⁵

¹⁸¹ ICAO Assembly 25th Session (Extraordinary) Plenary Meetings: *Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 56 [Appendix 20]. * Translator’s note: this statement is on p. 27 of Doc 9437.

¹⁸² Ibid., p. 68 [Appendix 20].

¹⁸³ ICAO Assembly 25th Session (Extraordinary) Executive Committee: *Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438, p. 69 [Appendix 19].

¹⁸⁴ Ibid., p. 87 [Appendix 19].

¹⁸⁵ ICAO Assembly 25th Session (Extraordinary) Plenary Meetings: *Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 86 [Appendix 20].

225. The way in which the President of the ICAO Council, Dr. Assad Kotaite, who chaired the 25th Assembly on 24 April 1984, justified the need to adopt amendments to the Chicago Convention on the opening day of the 25th Assembly, would seem to be illustrative and important for understanding the subject and scope of Article 3 bis. Drawing attention to the existing view that the prohibition of the use of force against civil aircraft was already part of general international law and therefore did not need to be included in the text of the Chicago Convention, he made a distinction in this respect between a time of peace and a situation of war. As he put it, in a situation of war, international law had clear provisions regarding the protection of civilians in situations of armed conflict, whereas the relevant humanitarian principles were even more necessary in times of peace, according to the findings of the International Court of Justice. Although, as the President had noted, they existed in customary law, it made sense to enshrine them in an international treaty.¹⁸⁶ The objective, therefore, was to fill an appropriate gap in treaty law specifically in relation to peacetime, where international humanitarian law was not applicable.

226. Both the President and a number of delegations (for example, the United Kingdom,¹⁸⁷ France¹⁸⁸ and Canada¹⁸⁹) referred in this context to the position of the ICJ in the *Corfu Channel* case. In that case, the Court justified the existence of obligations owed by Albania to the United Kingdom precisely in peacetime. The Court specifically pointed out that, while in time of war those obligations would have arisen under the Hague Convention VIII of 1907, in time of peace they were based upon certain general and widely accepted principles, namely “*elementary considerations of humanity*”, the principle of the freedom of maritime communications and the duty of every State to prevent the deliberate use of its territory for activities contrary to the rights of other States.¹⁹⁰

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

¹⁸⁶ Ibid., p. 19 [Appendix 20]. * Translator’s note: this passage relates to Kotaite’s words on p. 20, not p. 19.

¹⁸⁷ Ibid., pp. 27–30 [Appendix 20].

¹⁸⁸ Ibid., pp. 27–30 [Appendix 20].

¹⁸⁹ Ibid., pp. 68–69 [Appendix 20].

¹⁹⁰ *Corfu Channel case, Judgment of 9 April 1949: I.C. J. Reports 1949*, p. 22 [Appendix 8].

228. This approach was also adopted by the Assembly as a whole, as expressly stated in its resolution A25-1, adopted without a vote on 10 May 1984. Its preamble contains the following paragraph: “*Having noted that in keeping with elementary considerations of humanity the safety and the lives of persons on board civil aircraft must be assured*”.¹⁹¹

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

230. The above conclusion is supported by the doctrine on the issue. For example, the authoritative *Handbook on International Humanitarian Law*, edited by Professor Dieter Fleck, states that “*Civilian aircraft may not be attacked in peacetime and may not be shot down*”.¹⁹² It is noted that this follows from the basic prohibition on the use of force and the general rules of air law codified in Article 3 bis of the Chicago Convention. At the same time, this is clearly distinguished from the prohibition on the use of weapons against civilian aircraft in situations of armed conflict, which is derived from international humanitarian law and its principle of distinction between military and civilian objects (*principle of distinction*).¹⁹³

231. Other works may also be cited in this context. One of these is the *HPCR Manual on International Law Applicable to Air and Missile Warfare*,¹⁹⁴ already discussed above. The literature on the subject notes that the main contribution of the adoption by ICAO of Article 3 bis was to achieve, in times of peace, “*the ‘absolute’ ban on the use of weapons against civil aircraft in flight*”.¹⁹⁵

¹⁹¹ ICAO Assembly Resolution A25-1 *Modification of the Convention on International Civil Aviation (Article 3 bis)*, Doc. 9902, Assembly Resolutions in force (as at 28 September 2007), p. I-10-I-12 [Appendix 33].

¹⁹² Dieter Fleck (ed.), *Handbook of International Humanitarian Law*, Oxford University Press, vol. 2, 2021, p. 220 [Appendix 71].

¹⁹³ Ibid. [Appendix 71].

¹⁹⁴ *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Bern, 2009 [Appendix 112].

¹⁹⁵ Michal Klenka, “Aviation safety: legal obligations of states and practice”, *Journal of Transportation Security*, Norwell, vol. 10, 2017, pp. 127–143 [Appendix 57].

232. Thus, the matter regulated by Article 3 bis does not extend to situations of armed conflict and cannot therefore be applied to the Boeing MH17 crash, which took place during an armed conflict in Ukraine (at the same time, Russia categorically rejects allegations of its involvement in the MH17 crash).

SUBSECTION III.4. International legal responsibility for the crash of MH17 cannot be assigned to the Russian Federation under Article 3 bis

233. The Applicants have presented two lines of argument, each of which seeks to attribute the actions of the crew of the Buk SAM launcher to the Russian Federation. First, the Applicants argue that the crew members were representatives of the State authorities of the Russian Federation, namely its Armed Forces (Russia does not accept this).¹⁹⁶ Second, they attempt to prove that the crew was under the direction or control of the Russian Federation (Russia does not accept this).¹⁹⁷ As will be demonstrated later, there is no substance for this classification of the crew of the Buk SAM system.

234. First of all, it should be noted that even the Joint Investigation Team, which takes a manifestly anti-Russian position, failed to reach a conclusion regarding the composition of the crew of the Buk SAM from which, according to the Applicants' argument, the Malaysian Boeing was shot down. In its latest report, the Joint Investigation Team concluded: *"The investigation into the crew of the Buk TELAR used to down MH17 produced second-hand information about the possible involvement of three former officers of the 53rd AAMB. This information is ambiguous, and thus far it cannot be confirmed to an adequate extent. Since it has not yet been possible to establish the identity of the Buk TELAR crew members, it is not possible to prove via this line of enquiry why they fired a Buk missile at MH17. It is equally impossible to establish whom they received which orders from. Nor could this information be found by other means."*¹⁹⁸

235. Thus, the Council does not have sufficient factual information at its disposal to assign responsibility to the Russian Federation for the actions of the Buk SAM crew. In any event, even the evidence presented by the Applicants shows that such attribution is not possible.

A. The actions of the Buk TELAR crew are not the actions of a government agency of the Russian Federation

236. The Applicants refer to Article 4 of the Draft Articles on Responsibility of States of the United Nations International Law Commission, which provides as follows: *"I. The conduct of any*

¹⁹⁶ Applicants' Memorial, paragraphs 4.12–4.15 [Appendix 104].

¹⁹⁷ Ibid., paragraphs 4.18–4.22 [Appendix 104].

¹⁹⁸ Netherlands Public Prosecution Service, "Report: Findings of the JIT MH17 investigation into the crew members of the Buk TELAR and those responsible in the chain of command", 2023, p. 63 [Appendix 82].

State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State”.

237. According to the Applicants, the crew of the Buk SAM launcher consisted of representatives of the Armed Forces of the Russian Federation (Russia does not accept this). They draw this conclusion based on two premises: first, the representatives of the Armed Forces of the Donetsk People’s Republic did not have the necessary skills to use the Buk SAM system;¹⁹⁹ second, the crew members of the Buk SAM system wore the uniforms of the Armed Forces of the Russian Federation. Both of these allegations are untrue, as is proved, among other evidence, by the materials submitted by the Applicants themselves.

238. First of all, it should be emphasized that the Buk SAM system is one of the main weapons of the air defence forces of Ukraine and a number of other countries. This system was in service with the Army of the USSR and, subsequently, remained widely distributed across the post-Soviet space, and also in third countries, which had been supplied with these SAMs by the Soviet Union. After the break-up of the USSR, Buk SAMs were still being manufactured and sold abroad. Persons who did their military service and those who served under contract in the USSR and Ukrainian Armed Forces have the knowhow and practical skills necessary to use the Buk SAM system.

239. This is confirmed even by the wiretaps provided by the Applicants themselves: *“The separatist claims that they have people in their midst who served in the Russian [Soviet – see below] army and have experience with air defense systems.*

(...)

Recipient: *‘There’s only one hope – Russia. (...) I wish they give us surface to air system.’*

Caller: *‘That’s what I’m telling. I wish they give you at least something. If you can’t come, don’t come. Give something, they will deal with it.’*

Recipient: *‘[inoudible]. We have air defence guys [sic!]. We have everyone. Everyone was serving in the Soviet [sic!] army. Give us that weapon.’²⁰⁰*

Thus, the wiretap indicates that the crew did not include members of the Armed Forces of the Russian Federation. All that can be concluded from this is that, in the Donbass, there were persons with experience of having served in the Soviet Armed Forces, including air defence specialists, hence there was no need for Russian specialists. It should be noted that, in their restating of the issue, the Netherlands police distorted the actual words of the negotiations by replacing “Soviet” army with

¹⁹⁹ Applicants’ Memorial, paragraph 4.13 [Appendix 104].

²⁰⁰ Ibid., Annex 8, p. 8 [Appendix 104].

“Russian” army. This distortion also appeared in the Memorial of Australia and the Netherlands. It is also indicated by the circumstance that, even before the alleged Buk appeared in the airspace over the territory of Ukraine, the Donbass militia had repeatedly shot down military aircraft of the Ukrainian Armed Forces, including from the Strela-10 self-propelled anti-aircraft missile launcher.²⁰¹ All this attests incontrovertibly to the presence in the Donbass of air defence specialists who are not members of the Armed Forces of the Russian Federation (Russia categorically disagrees that MH17 was shot down by Donbass militia).

240. The Applicants claim that the crew of the Buk SAM launch crew was wearing the uniform of the Armed Forces of the Russian Federation. First of all, however, the mere wearing of a uniform does not in itself indicate affiliation with the armed forces of that State. Second, the evidence submitted by the Applicants indicates, on the contrary, that the uniform allegedly worn by the crew members of the Buk SAM crew was not the Russian uniform. Thus, the witness testimony submitted by the Applicants states that the crew wore “*sand-coloured camouflage*”, which matches the uniform of the Armed Forces of Ukraine. By contrast, the Russian soldier’s “*ratnik*” (“warrior”) combat kit, which was also used by Russian forces in Crimea in the spring of 2014, is bright green in colour. The sandy colour is not characteristic of the Russian Armed Forces uniform (even Russian soldiers in Syria were equipped with green “*ratnik*” fatigues).



Photo. 1. Ratnik combat kit used by the Russian Armed Forces²⁰²

²⁰¹ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 182. 182 [Appendix 85].

²⁰² State Corporation for the Promotion of the Development, Manufacture, and Export of High Tech Products “Rostec”, “Rostec has delivered almost 300,000 ‘ratnik’ combat outfits”, 2020. URL: <https://rostec.ru/news/rostezh-postavil-pochti-300-000-komplektov-boevoy-ekipirovki-ratnik/>. [in Russian]; RBC, “Three Russian soldiers killed in Syria”, 2019. URL: <https://www.rbc.ru/politics/25/03/2019/5c9924cd9a79477f008a4a3e?ysclid=ldy7ysaa3b784094146> [in Russian].



Photo. 2. Uniform of the Ukrainian Armed Forces²⁰³

241. The testimony by the Associated Press journalist that the servicemen had a “Russian accent” is also not proof of their affiliation with the Russian Armed Forces. Also outside the Donbass, there are many Ukrainian citizens who are Russian speakers. Moreover, a foreign journalist would hardly be able to tell from the pronunciation of the foreign language in which the conversation was obviously taking place whether the person in front of him was Russian-speaking or Ukrainian-speaking. Thus, pronunciation with a “Russian accent” not only does not prove that the person in question came from the Russian Federation, but also does not rule out that the person was a member of the Armed Forces of Ukraine.

242. It is noteworthy that none of the sources cited by the Applicants indicates that the alleged members of the Buk crew were wearing uniforms bearing the rank insignia of military servicemen of the Russian Federation, although such insignia are a mandatory element of the field uniform of any country, including that of the Russian Federation. This also confirms that the individuals in question were not members of the Russian armed forces.

B. The Buk SAM crew is not a group under the control or direction of the Russian Federation

243. In any event, the crew of the Buk SAM is not a group under the control or direction of the Russian Federation. The criteria for effective control are defined by the International Court of Justice in the *Nicaragua v. United States* judgment: “*The Court has taken the view ... that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself [sic!], on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in*

²⁰³ Kyiv Independent, “British instructors train Ukrainian military to operate NLAW tank killers (photos)”. URL: [https://kyivindependent.com/national/british-instructors-train-ukrainian-military-to-operate-nlaw-tank-killers-photos.](https://kyivindependent.com/national/british-instructors-train-ukrainian-military-to-operate-nlaw-tank-killers-photos;); Reuters, *Ukraine holds military drills with U.S. forces, NATO allies*, 2021. URL: <https://www.reuters.com/business/aerospace-defense/ukraine-holds-military-drills-with-us-forces-nato-allies-2021-09-20/>.

*the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.*²⁰⁴

244. The criteria for effective control were also considered by the International Court of Justice in *Bosnia v Serbia*: “First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of ‘complete dependence’ on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its ‘effective control’. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations”.²⁰⁵

245. The 2014 European Court of Human Rights (hereinafter ECHR) judgment in the case of *Ukraine and the Netherlands v. Russia* allegedly established the Russian Federation’s “effective control” over the eastern part of Ukraine. This “effective control”, however, is solely intended to determine spatial jurisdiction under Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; it is not identical to effective control, which is necessary to attribute responsibility to States under international law. This is explicitly noted in the ECHR judgment: “... the test for establishing the existence of jurisdiction under Article 1 of the Convention is not the same as the test for establishing a State’s responsibility for an internationally wrongful act under international law, now codified in *ARSIWA* ... ”.²⁰⁶

246. The difference in approaches to defining the substance of the term “effective control” in ECHR practice and the law of international responsibility was also highlighted in the report of the Human Rights Steering Committee to the Council of Europe: “The Court does not always clearly

²⁰⁴ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, para. 193. [Appendix 7] * Translator’s note: it’s in para. 115, not 193.

²⁰⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 400 [Appendix 11].

²⁰⁶ *Case of Ukraine and the Netherlands v. Russia*, Decision, European Court of Human Rights, 2022, para. 551 [Appendix 15].

*distinguish jurisdiction in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. In choosing the term “effective control of an area”, the Court appears to have taken up a concept familiar to international law, but as a basis for attributing the conduct of one entity to another in the law of State responsibility”.*²⁰⁷

247. Furthermore, a comparative analysis of the practice of the ECHR and the International Criminal Tribunal for the former Yugoslavia (hereinafter “the ICTY”) has shown that the threshold for establishing “effective control” is much lower in the ECHR than in other international judicial bodies: “As regards the ECtHR, its mandate differs both from that of the ICJ and that of the ICTY, and the Court regularly stresses ‘the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings’. It may be noted that the necessary degree of control of a State over an entity, defined in *Ilaşcu and Others* as ‘under the effective authority, or at the very least under the decisive influence’, of the respondent State, and ‘surviv[ing] by virtue of the military, economic, financial and political support given to it’ by the respondent State, is less stringent than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under the case-law of the ICJ and ICTY referred to above.”²⁰⁸

248. The circumstances of the case, as established by the ECHR, do not demonstrate that the Russian Federation has effective control over the actions of the Armed Forces of the DPR (at the same time, Russia categorically disagrees that the DPR was involved in the downing of MH17). In the case *Nicaragua v. United States*, the International Court of Justice expressly determined that financing, organising and supplying are not a prerequisite for attributing responsibility for the acts of certain individuals to a State.

249. Thus, the criterion of effective control necessary to attribute responsibility to the State for the acts of non-State entities requires proof of effective control not only over the non-State forces concerned as a whole, but also over a particular operation. Satisfaction of the “effective control” criteria as defined by the International Court of Justice has not been demonstrated by the Applicants.

250. The fact that the Russian Federation lacked effective control over the alleged actions of the “Buk crew”, as alleged by the Applicants, is directly confirmed by the judgment of the District Court of The Hague in the MH17 crash case. Even that court, relying on the work of the Netherlands prosecution service and the “international investigation team”, which were also acting in a biased manner, failed to establish the existence of “effective control” by Russia even over the DPR itself, let

²⁰⁷ Council of Europe, *The Place of the European Convention on Human Rights in the European and International Legal Order*, Report of the Steering Committee for Human Rights (CDDH) adopted at its 92nd meeting (Strasbourg, 26–29 November 2019), paragraph 148 [Appendix 13].

²⁰⁸ *Ibid.*, para. 167 [Appendix 13].

alone over any specific operation (at the same time, Russia categorically disagrees that the DPR was involved in the downing of MH17). Although this court considered that Russia had allegedly provided funding, supplies and training to the DPR, and had also “*had a decisive influence on appointments in senior positions within the DPR*”, as stated above, this is not sufficient to establish “effective State control” even over the DPR as a whole, let alone sufficient to establish “*effective control*” over a specific operation. The District Court merely concluded that this may be sufficient for so-called “*overall control*”, a lower criterion unsuitable for determining State responsibility. As the UN International Court of Justice has explained: “*the ‘overall control’ test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, which is to say the conduct of persons acting, on whatever basis, on its behalf.*”²⁰⁹

251. As for the actions of the Buk crew themselves, the District Court was entirely unable to establish the actions of the Buk crew, whether an order was given to launch the missile, if so, by whom it was given and why it happened: “*The court notes - along with the prosecution and counsel for defendant Pulatov - that the actions of the crew of the Buk TELAR when launching the Buk missile at MH17 cannot be established on the basis of the case file. The case file also fails to identify who gave the instruction to launch a missile, and why that order was given.*”²¹⁰

252. The Applicants point out that no step in the use of the Buk could have been performed without the command of Russian military personnel with specific knowhow, and that the use of the Buk SAM system itself involves more than just “*the final act of ‘pressing the button’.*”²¹¹ As has been demonstrated earlier, however, former servicemen of the Armed Forces of Ukraine and the USSR were able independently to operate the Buk SAM system.

253. The lack of any justification to hold the Russian Federation responsible for the crash of flight MH17 has also been noted in the academic community. As Tatyana Eatwell points out: “*The ‘effective control’ standard means that state responsibility for the conduct of non-state actors is strictly limited. For the ICJ, ‘[a state’s] participation, even if preponderant or decisive, in the financing, organising, training, supplying and equipping of [an armed group]’ will not provide a sufficient basis for attribution of that armed group’s conduct to the state. Thus, on the question of Russia’s responsibility for the downing of flight MH17 over eastern Ukraine, the evidence that Russia*

²⁰⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, I.C.J. Reports 2007, para. 406 [Appendix 11].

²¹⁰ District Court of The Hague, “Transcript of the MH17 judgment hearing, 17 November 2022”, URL: <https://www.courtmh17.com/en/news/2022/transcript-of-the-mh17-judgment-hearing.html> [Appendix 84].

* Translator’s note: the quotation is not to be found on this website - it’s on p. 81 of Appendix 84

²¹¹ Applicants’ Memorial, paragraph 4.20 [Appendix 104].

*provided the BUK-missile to the group that fired the missile is not sufficient to prove that the persons who fired the missile were acting as ‘state agents’ for the purposes of engaging Russia’s responsibility”.*²¹²

254. According to M. Gibney, “*there is no apparent evidence of ‘complete dependence’ that would transform Ukrainian insurgents into ‘state agents’ of Russia ...*”. He further notes that “*With respect to Article 8, it seems highly unlikely that Russia exercised the requisite level of ‘effective control’.*”²¹³

255. Consequently, responsibility for the downing of a civilian aircraft, proceeding on flight MH17, cannot be attributed to the Russian Federation on the basis of the following circumstances:

- a. the evidence submitted by the Applicants themselves does not confirm that the Buk was operated by Russian servicemen;
- b. those operating the Buk were not part of the Russian Federation’s command structure;
- c. the Russian Federation did not exercise effective control over the actions of the DPR.

SUBSECTION III.5. In any event, the actions attributed by the Applicants to the Russian Federation do not constitute a breach of Article 3 bis

256. The Russian Federation categorically denies its involvement in the crash of flight MH17 and the version presented by the Applicants is untrue, but even if the Applicants’ scenario is maintained, the crash does not constitute a breach of Article 3 bis. The Russian Federation did not breach the obligation set forth in Article 3 bis because (A) the obligation itself is not absolute and (B) it does not contain an obligation to prevent the use of force, contrary to the allegations by the Applicants. Moreover, the acts which the Applicants seek to attribute to Russia do not fall within the ambit of Article 3 bis (C).

III.5.1. The prohibition on the use of force under Article 3 bis of the Chicago Convention is not absolute²¹⁴

257. Abeyratne points out: “*The two operative words are ‘recognize’ and ‘refrain’.* This provision came into being as a result of ICAO Assembly deliberations on the shooting down of Korean Air Flight 007 over Soviet airspace. It becomes obvious that this provision was cobbled together

²¹² Tatyana Jane Eatwell, *State Responsibility for the Unlawful Conduct of Armed Groups*, Doctoral Dissertation, Cambridge, 2019, p. 20 [Appendix 55].

²¹³ Mark Gibney, “The downing of flight MH17: Russian responsibility?” *Human Rights Law Review*, vol. 15, No. 1, 2015, p. 174 [Appendix 48].

²¹⁴ Michael Milde, *International Air Law and ICAO*, Netherlands, 2011, p. 72 [Appendix 65]; Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary*, p. 68 [Error! Reference source not found.].

amidst highly charged and polarised discussions at the Assembly, and the consensus reached – which most participating States could ‘live with’ (a popular phrase within ICAO Assemblies and Council sessions) were these two words. There were of course States which insisted on more peremptory words to deal with this extremely important issue of aviation safety. Had these States prevailed Article 3 bis would have started with words to the effect that: *Contracting States shall ensure that every State shall (a) not resort to the use of weapons against civil aircraft in flight ...*”.²¹⁵ Different versions of Article 3 bis have thus been proposed, but the choice has been made in favour of a more declaratory and less peremptory version. From the point of view of treaty law, the fact that the said proposal was rejected by the parties during the discussions may be a clear indication that its meaning should be excluded from the final text agreed by the parties.²¹⁶ Consequently, the broader interpretation of Article 3 bis which the Applicants are seeking “*to impose*”²¹⁷ has already been rejected previously by the international community when negotiating and adopting the text of Article 3 bis.²¹⁸

258. The phrasing used in the Article demonstrates the non-absolute nature of the provision, in such a way that not every downing of a civilian aircraft constitutes *a priori* a violation of the Article: each case must be considered separately.

259. The *Oslo Manual on Selected Topics of the Law of Armed Conflict* states the following: “‘Civilian airliner’ means a civilian aircraft identifiable as such and engaged in carrying civilian passengers in scheduled or non-scheduled service”.²¹⁹ A similar logic can be seen in United States Air Force regulations: “*If identified as a civil aircraft, air transport in flight should not be the object of attack, unless at the time it represents a valid military objective such as when there is an immediate military threat or use*”.²²⁰

²¹⁵ Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary*, Springer-Verlag, 2014, p. 68 [Error! Reference source not found.].

²¹⁶ C.F. Amerasinghe, *Studies in International Law*, Lake House Investments, 1969, p. 98 [Appendix 43].

²¹⁷ Applicants’ Memorial, para. 4.6 [“*Focusing first on the prohibition, the wording of Article 3bis is clear. It prohibits States from using weapons against civil aircraft in flight, save for certain limited circumstances as provided for in the text of the Convention.*”] [Appendix 104].

²¹⁸ The declaratory nature of the Article is also confirmed in the doctrine: Michael Schmitt, *Essays on Law and War at the Fault Lines*, Springer-Verlag, 2012, p. 264: “*There is disagreement over whether Article 3 bis creates a new norm of international law or is only declaratory of existing law based on the principle of humanity. However, use of the term ‘recognize’, in light of commonly accepted rules of interpretation, indicates that the latter view is more supportable*” [Appendix 80].

²¹⁹ Yoram Dinstein and Arne Willy Dahl, *Oslo Manual on Select Topics of the Law of Armed Conflict*, Springer-Verlag, 2020, Rule 91, p. 84 [Appendix 54].

²²⁰ Department of the Air Force, AF Pamphlet 110-31, *International Law - The Conduct of Armed Conflict and Air Operations*, 1976, p. 48 [Appendix 109].

260. The same view is supported by international legal doctrine. According to Ruwantissa Abeyratne, “*a civilian aircraft, if identified as such, cannot be attacked*.”²²¹

261. The commentary to the Handbook of International Law Applicable to Air and Missile Warfare developed by the Humanitarian Policy and Conflict Research Program at Harvard University notes that “‘*Civilian airliner*’ means a civil aircraft identifiable as such and engaged in carrying civilian passengers in scheduled or unscheduled service”.²²²

262. In addition, the problem of the identification of civil aircraft as such in the context of the prohibition on the use of force against civil aviation was addressed during the discussion on the adoption of Article 3 bis. The delegation of India noted “*the problem of identification, i.e., how to ensure positive identification of an aircraft in all conditions of weather, at all times of day and night, with the speed and accuracy needed*”.²²³ Thus, the issue of identification of the aircraft came up during the discussion of the Article, indicating that there were problems in predetermining the status of an aircraft when deciding whether force could be used.

263. Furthermore, Terry Gill and Dieter Fleck also write that: “*Although aircraft entering a no-fly zone without proper authorization may be attacked without warning, the international humanitarian law regarding attacks nevertheless continues to apply. Thus, civil aircraft which have been identified as such retain their immunity from attack. The no-fly zone simply creates a rebuttable presumption that the aircraft is engaging in activities that are non-innocent and subject it to attack*”.²²⁴

264. In this context, the importance of the absence of civilian vessels over the territory of armed conflicts is also reaffirmed: “*Civil aircraft should avoid entering areas which have been declared restricted flight areas or combat zones by the belligerents, since this increases their risk of being attacked and exposes its civilian passengers to improper risk*”.²²⁵

265. The risks posed to civilian aircraft when flying over a war zone were also highlighted by the International Committee of the Red Cross in its analysis of the Manual on Air and Missile Warfare: “*The danger of surprise and the difficulties of identifying civil aircraft, in the sense that in the air environment an attacker has less opportunity to verify the true character of an unknown*

²²¹ Ruwantissa Abeyratne, *Convention on International Civil Aviation. A Commentary*, Springer-Verlag, 2014, p. 678, citing Vlasic (1982), p. 161 [Error! Reference source not found.].

²²² *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Bern, 2009, Section A, para. 1 (i), p. xxii. [Appendix 112].

²²³ ICAO Assembly 25th Session (Extraordinary): *Plenary Meetings, Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 51 [Appendix 19].

²²⁴ Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, Oxford University Press, 2015, p. 366 [Appendix 49].

²²⁵ Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, 1993, p. 180 [Appendix 50].

aircraft, lead the Manual to prescribe several passive precautions against attacks and corresponding active precautions. Passive precautions that must be taken by civil aircraft include inter alia filing their flight plans, not to deviate from those plans, or to avoid areas of military operations”.²²⁶

266. Article 3 of the Chicago Convention establishes a functional criterion for distinguishing between civil and government (including military) aircraft.²²⁷ An ICAO study addressing the problem of determining the status of aircraft has specified the zone of flight as one of the criteria. In this context, the ICAO Secretariat has established that the fact of flying over an area of armed conflict can be grounds for qualifying an aircraft as military.²²⁸

267. This provision is supported by the fact that “all aircraft entering such zones [i.e. combat zones], including the aircraft of neutral states, are subject to damages from military hostilities”.²²⁹ Thus, a civilian aircraft over a war zone is subject to certain risks, such as the armed forces qualifying it as military in the context of the need for the military to make an immediate decision to engage a target.

268. According to the Dutch Safety Board report, active hostilities have been taking place in Ukraine’s airspace since April 2014: “During the period between the conflict breaking out in the eastern part of Ukraine in April 2014 and the day of the crash of flight MH17 on 17 July, a number of Ukrainian military aircraft were shot at (mostly from the ground). The Ukrainian authorities officially confirmed some of these incidents although specific details, such as the weapons used or the altitude at which the incident occurred, were not always revealed. [...] It cannot be ruled out that, during the period mentioned, other incidents also occurred. Therefore, no verified overview of the total number of incidents can be provided”.²³⁰

269. The Dutch Safety Board has established 16 incidents of the shooting down of military aircraft by the Ukrainian Armed Forces during the conflict in the Donbass before the MH17 crash. These include the shooting down of an Antonov An-26 flying at an altitude of 6,500 m on 14 July

²²⁶ International Committee of the Red Cross, “Air warfare”, URL: <https://casebook.icrc.org/law/air-warfare> [Appendix 38].

²²⁷ Michael Milde, “Rendition flights and international air law”, REDRESS, June 2008 [Appendix 62].

²²⁸ “It is submitted that whether an aircraft is “used” in military, customs and police services can only be determined by examining all the circumstances surrounding the flight, and taking into account a number of factors. These could include: <...> 10. Area of operations. Will the aircraft fly to, or over, areas in a situation of on-going or imminent armed conflict?” See ICAO Legal Committee – 29th Session: Secretariat Study on “Civil/State Aircraft”, LC29/WP-2/1, para. 5.3.3 [Appendix 31].

²²⁹ *International Law – The Conduct of Armed Conflict and Air Operations*, US Department of the Air Force, 1976, pp. 2–6 [Appendix 110]. * Translator’s note: the cited source is identical to that in Appendix 109 – perhaps they should be consolidated?

²³⁰ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 181 [Appendix 85].

and the shooting down of an Sukhoi Su-25 flying at an altitude of 8,500 m* on 16 July. According to the Ukrainian authorities, the shootings were carried out using weapons that could reach the cruising altitude of civilian aircraft.²³¹ Moreover, Ukraine miscalculated the impossibility of shooting down an aircraft using a man-portable air defence system (hereinafter MANPADS), which was confirmed by the Dutch Safety Board: *“In an official statement related to the shooting of the An-26, the Ukrainian authorities specified an altitude of 6,500 metres – an altitude that, in their opinion, could not be reached using MANPADS. The Dutch Military Intelligence and Security Service (MIVD) concluded on the basis of images of the damage and witness statements that the aeroplane must have been shot down with a MANPADS. The possibility of an air-to-air missile was not mentioned.”*²³²

270. In such an intense armed conflict, when airspace becomes part of the theatre of military operations, it is impossible to guarantee that the status of an aircraft will be established with absolute precision. This is confirmed by the position taken by the European Aviation Safety Agency, which notes the following: *“As shown by previous wars, misidentification is easy in confused arenas of warfare. The development of this risk is common to all combatants. If we add in the likelihood of jamming of electronic aids that may be involved with navigation and/or a/c identification tools, then it is easy to see the potential for innocent aircraft being subject to missiles or radar laid weapons.”*²³³

271. It could be argued that the persons launching the missile would have had every reason to believe that their fire was directed at a military aircraft and not at flight MH17, as active military operations to shoot down aircraft have been conducted over the territory of the DPR since 2014, and DPR military forces have regularly repelled attacks by the Ukrainian army against civilians:²³⁴ *“From the aforementioned it is clear that between April and July, the armed conflict in the eastern part of Ukraine was continuing to extend into the air. Ukrainian armed forces aeroplanes and helicopters conducted assault flights and transported military personnel and equipment to and from the conflict area. The armed groups that were fighting against the Ukrainian government attempted to down these aeroplanes. In May 2014, mainly helicopters were downed, while in June and July also military aeroplanes were downed, including fighter aeroplanes”.*²³⁵

* Translator's note: According to DSB report, the Su-25 altitude is 8,250 m, not 8,500 m, and the year for both incidents is 2014.

²³¹ Ibid., p. 206 [Appendix 85].

²³² Ibid., p. 185 [Appendix 85].

²³³ European Union Aviation Safety Agency, “Review of aviation safety issues arising from the war in Ukraine”, 2022, para. 4.3. [Appendix 37].

²³⁴ *Voennoye Obozrenie* [Military Review], “First unrest and first casualties in the Donbass in 2014, 17 March 2021 [in Russian]. URL: <https://topwar.ru/180885-pervaja-krov-na-donbasse-v-2014-godu-prolilas-li-ona-naprasno.html>.

²³⁵ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 185 [Appendix 85].

272. This was also confirmed even by the biased District Court of The Hague, which pointed out that the need for the use of Buk SAMs by DPR armed formations was dictated by the fact that *“DPR forces were suffering greatly from air strikes by Ukrainian military aircraft”*²³⁶ (at the same time, Russia categorically disagrees that the DPR was involved in shooting down flight MH17). Prior to the MH17 crash, for example, the centre of Lugansk and the regional administration building had been hit by missiles on 2 June 2014. Eight civilians were killed.²³⁷ The CNN broadcast from the scene provided the first documented confirmation of the use of aircraft and artillery by Kiev in shelling populated areas and destroying civilians. Later, on 18 July, Armed Forces of Ukraine artillery shelled the centre of Lugansk once again, causing the largest number of civilian casualties (more than 20 people). Prior to this, between 12 and 15 July, 17 civilians were killed and 73 injured in Lugansk.²³⁸ In addition, on 15 July, the Armed Forces of Ukraine launched an air strike on the town of Snezhnoye, which claimed 11 civilian lives.²³⁹

273. The lack of intent on the part of the persons who allegedly shot down the Malaysian Boeing is also confirmed by the judgment of the District Court of The Hague in the MH-17 case. In this judgment the Court notes: *“First and foremost, the court considers it completely implausible that a civil aircraft was deliberately downed. Not only because it is impossible to see what purpose that would have served, but also because neither the case file nor the trial provide any indication of this. On the contrary, the statement of M58, who was present in the field, and the telephone reactions following the downing of MH17 rather show that those involved initially thought that they had succeeded in shooting down a Ukrainian military aircraft. ... In summary, the court considers that ... they did not intend to kill these people”*.²⁴⁰

274. The joint investigation team also found in its investigation that there had been no intention to shoot down a civilian aircraft: *“The fact that it turned out to be another aircraft and other people than the defendants had likely intended does not stand in the way of a finding that the charges have been proven”*. Speaking in 2019 about the reaction to the downing of the aircraft, witness M58 told the examining magistrate the following: *“We were really happy, because they told us that a military*

²³⁶ District Court of The Hague judgment in the MH17 case, 2022, p. 81. URL: <https://www.courtmh17.com/en/news/2022/transcript-of-the-mh17-judgment-hearing.html>. [Appendix 84].

²³⁷ CNN, “Air attack on pro-Russian separatists in Luhansk kills 8, stuns residents”, 2014. URL: <https://www.cnn.com/2014/06/03/world/europe/ukraine-luhansk-building-attack/index.html>.

²³⁸ Fakty, “More than 20 civilians were killed in Luhansk on 18 July” (in Russian and Ukrainian). URL: <https://fakty.ua/185004-segodnya-v-luganske-pogbili-bolee-20-mirnyh-zhitelej>.

²³⁹ See Internet portal Vesti.ru: <https://www.vesti.ru/article/1842254>.

²⁴⁰ District Court of The Hague judgment in the MH17 case, 2022, pp. 82 and 109. URL: <https://www.courtmh17.com/en/news/2022/transcript-of-the-mh17-judgment-hearing.html>. [Appendix 84].

*transport aircraft had been hit. That's what everyone said, including the commanders. (...) I also spoke to someone who was their commander, a well-built fellow, someone local, a Ukrainian. He said: we're heading to the spot where the plane crashed, and like us he was happy. They drove away. (...) About an hour later, or maybe a bit more, they returned, looking really sombre. I asked: what's going on? He said, 'it isn't a military aircraft.'*²⁴¹

275. This position is echoed by Professor Kevin Heller: *"But everything we know to date about the attack indicates that the separatists honestly believed MH17 was a Ukrainian military transport, not a civilian airplane. If so, that changes the legal assessment of the attack considerably. The attack would still qualify as murder under domestic law — but it would not qualify as a war crime, under either the Rome Statute or the jurisprudence of the ICTY."*²⁴²

276. Thus, the persons who, according to the Applicants, were allegedly responsible for the crash of the aircraft performing flight MH17 were convinced and had reasonable grounds to believe that their fire was being directed at a military aircraft. This crash, even viewed from the Applicants' standpoint, would have been a reasonable and justifiable mistake which, as will be shown below, would not have constituted a breach of Article 3 bis (at the same time, Russia categorically rejects the allegation of its involvement and the involvement of the DPR in the crash of MH17).

277. The Applicants in their Memorial wrongly conclude that the very fact of using force against a civil aircraft is a breach of the obligation under Article 3 bis of the Chicago Convention, regardless of whether or not it might previously have been classified as civil. Such an approach to the interpretation of Article 3 bis contradicts the State practice outlined below, which, pursuant to paragraph 3 (b) of Article 31 of the 1969 Vienna Convention on the Law of Treaties, establishes the agreement of the parties regarding the interpretation of treaty rules.²⁴³

278. In support of their position, the Applicants cite incidents ostensibly supporting that position, which in fact only demonstrate the contrary. Thus, as a "flagship" example, the Applicants cite the crash of an Iranian aircraft on flight 665 which was shot down by the USS Vincennes cruiser.

279. In the Applicants' view, the mere fact that ICAO formed a commission to establish the facts of the crash of flight 665 demonstrates that Article 3 bis imposes obligations on States in such situations. The said commission, however, did not consider the international law aspects of the

²⁴¹ Ibid. [Appendix 84]. * Translator's note: This quotation could not be found in appendix 84 – which is 152 pp long but it is computer-searchable. It was found in section 3.5.2.1.2, "Witness M58" of the "Closing Speech of the Public Prosecution Service day 2 (21 December 2021)" - see the PPS website.

²⁴² Kevin Jon Heller, "MH17 should be framed as murder, not as a war crime", *OpinioJuris*, 2014, URL: <http://opiniojuris.org/2014/08/11/mh-17-framed-murder-war-crime/>. [Appendix 76].

²⁴³ Vienna Convention on the Law of Treaties, 1969 [Appendix 1].

tragedy, but focused only on the technical aspects.²⁴⁴ Thus, when presenting its final report, its chair refused to state publicly that the aircraft had been shot down in Iranian territorial waters, pointing out that this would be a legal assessment which he was not mandated to make,²⁴⁵ and limited himself to indicating in the report the geographical coordinates of the deployment of the American warship.

280. The ICAO Council, in establishing the commission, had only deplored the use of weapons against civil aircraft and had called on States to ratify the amendment to the Chicago Convention, incorporating Article 3 bis in the text of the Convention. After considering the report of the fact-finding commission, the ICAO Council held a discussion, in the course of which the Iranian delegation asked the 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*”. The final text of the document contains only the following relevant passages, however:

“*The Council:*

...

6. *Reaffirmed again the fundamental principle of general international law that States 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*”.²⁴⁶

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

282. In particular, in the discussion of this disaster:

a. The representative of Japan stated the following: “*Obviously, this incident is closely related with the political conflicts in the Persian Gulf, but action by ICAO should be confined to the technical aspects of the incident. ICAO is a technical and specialized agency*”;²⁴⁷

b. The representative of France noted that “*Let us confine ourselves to the technical role which is and must continue to be the purview of the Organization, as ICAO has always succeeded in doing*”;²⁴⁸

²⁴⁴ 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 [Appendix 34].

²⁴⁵ 125th ICAO Council Session, C-MIN 125/12 (Closed), p. 234 [Appendix 18].

²⁴⁶ *Observations of the International Civil Aviation Organization, Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. United States), ICAO Council Decision of 8 December 1998 [Observations of the ICAO, Decision of the Council of ICAO], 1992, Annexes A and B, pp. 619 and 621 [Appendix 23].

²⁴⁷ Extraordinary Session of the ICAO Council, Minutes. Doc 9541-C/1106/. C-min EXTRAORDINARY (1988)/1 and 2, 13 and 14 July 1988, p. 26 [Appendix 36].

²⁴⁸ Ibid., p. 26 [Appendix 36]. * Translator’s note: quotation is on p. 33, not p. 26 – it is para. 26.

c. The UK representative pointed out that *“it is essential to the continuing integrity of ICAO, that it restrict itself to consideration of the technical issues within its mandate, whatever the provocation or temptation may be to range wider. It is not the responsibility of this Council, for example, to comment on the difficult and complex political issues which surrounded this incident, nor is it the responsibility of this Council to seek to apportion personal blame”*.²⁴⁹

The ICAO Council Resolution on MH17, referred to by the complainants, also did not find the shooting down of the aircraft in question to be a violation of international law, although Article 3bis has long been in force, including for Ukraine and Russia. This Resolution establishes 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”.²⁵⁰

283. The fact that, unlike the incident involving the shooting down of the Iranian passenger aircraft, the ICAO Council found it necessary to condemn the shooting down of MH17 is purely political. Accordingly, the available information indicates that the shooting down of the Iranian civilian aircraft in 1988 was not covered by the provisions of Article 3 bis of the Chicago Convention.

284. Furthermore, in the Applicants’ view, the fact that, in the process of drafting Article 3 bis, reference was made to cases of the shooting down in error of civil aircraft suggests that the rule in question should be extended to such cases. Among the cases mentioned were the shooting down of a Hong Kong aircraft by the Chinese air force in 1954 and the shooting down of a Libyan aircraft by an Israeli fighter jet. This does not prove, however, that the shooting down of a civil aircraft in the light of its misidentification is evidence of a breach of the obligation under Article 3 bis. The incidents in question were in fact mentioned in the statement by the representative of the United Kingdom, who described the States whose armed forces had used weapons against civil aircraft as “responsible”.²⁵¹

²⁴⁹ ICAO Council – 125th Session, Minutes of the Twelfth Meeting, 5 December 1988, C-MIN 125/12 (closed meeting), p. 234 [Appendix 18].

²⁵⁰ ICAO Council Resolution on Malaysia Airlines Flight MH17, Destroyed over Eastern Ukraine on 17 July 2014, 2014 [Appendix 35].

²⁵¹ ICAO Assembly 25th Session (Extraordinary) Plenary Meetings: *Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 28 [Appendix 20].

In the first place, however, this was the position of only one State, and, second, in all these cases *ex gratia* payments were made, demonstrating that there was no violation of any international legal rule.

285. The 1983 shooting down of the Korean aircraft mentioned by the Applicants is also not relevant in this context. In 1983, the pilot who shot down the civil aircraft determined by visual observation that the aircraft was civilian, but assumed that it was not being used for its intended purpose. By contrast, the perpetrators of the shooting down of the Malaysian Boeing were convinced that it was a military aircraft. In these cases, State practice shows that no international legal responsibility is engaged.

286. It should also be taken into account that the treaty obligation enshrined in Article 3 bis is merely a reflection in the Chicago Convention of a customary rule of law that existed prior to the adoption of the relevant article. Thus, the above-mentioned practice of States prior to the adoption of Article 3 bis, which represents one component of an international obligation, demonstrates that the shooting down in error of a civil aircraft cannot be qualified as a violation of the obligation to refrain from using force against civil aircraft (at the same time, Russia categorically rejects allegations of its involvement in the crash of MH17).

287. On this same point, the Applicants' reference to the commentary of the United Nations International Law Commission to the draft articles on State responsibility, which established that “[i]n the absence of any specific requirement of intention in the primary obligation that is alleged to have been breached, it is only the act of a State that matters, independently of any intention”, seems speculative.²⁵² This phrase refers exclusively to the obligation and not to a textual analysis of a particular treaty provision. Although Article 3 bis does not contain a provision on “*intention*”, the obligation that it sets out, crystallised by States' practice, suggests the absence of an international legal act in the event of a reasonable error resulting in the use of force against a civil aircraft.

288. The close connection between the obligation under Article 3 bis of the Chicago Convention and the correct identification of the aircraft may be observed in the report of the International Air Transport Association on the crash of flight MH17. It notes the following: “*As enshrined in article 3 bis of the Chicago Convention, the targeting and downing of a civilian airliner is both a violation of this tenet and wholly unacceptable by any measure.*”²⁵³ At the same time, questions of correct targeting are closely related to the concept of intent: “*...the concept of directing*

²⁵² Applicants' Memorial, paragraph 4.7 [Appendix 104].

²⁵³ International Air Transport Association, response to the Dutch Safety Board's Recommendations posed in its report on the crash of Malaysia Airlines Flight MH-17, 2016, p. 1 [Appendix 83].

attacks has some level of intent, and that an honest and reasonable mistake of fact could negate that element of intent...”²⁵⁴

289. In addition to the incidents mentioned above, there is extensive State practice confirming that the shooting down in error of a civil aircraft as a result of its incorrect prior identification is not a breach of Article 3 bis of the Chicago Convention (at the same time, Russia categorically rejects allegations of its involvement in the MH17 crash):

a. On 8 February 1980, a Zambian Shenyang J-6 fighter shot down an Angolan civilian Yak-40 aircraft of TAAG Angola Airlines. Nineteen people were killed. According to an ICAO report (Report No. 12/80), an emergency situation had arisen involving a foreign aircraft, in which the Yak-40 was shot down accidentally. The incident was directly related to the uneasy relations between Zambia and Angola and also to the civil war. Zimbabwe* has not been held accountable under international law.

b. On 1 September 1983, Korean Air Lines flight 007 from New York and Seoul crashed near Sakhalin Island. A Korean Air Lines Boeing 747 flying 007 from New York to Seoul crashed near Sakhalin. The Korean aircraft had violated Soviet airspace, did not make contact and was shot down by an Su-15 interceptor. 269 people were killed. ICAO concluded from its investigation that the pilots had failed to take all possible steps to maintain the correct course of the aircraft, and that the Soviet pilots had not conducted an exhaustive check of the aircraft’s affiliation. There was no question of liability. The USSR was not held liable under international law.

c. On 6 November 1987, an SC.7 Skyvan of Air Malawi on a domestic flight in the Republic of Malawi crashed. The flight took place partly over Mozambican territory, where it was shot down by the Mozambican military. Ten people were killed. According to one version, the plane had flown too close to a Mozambican military base. Mozambique was not held accountable under international law.

d. On 3 July 1988, an Iran Air Airbus, on flight 655 from Tehran to Dubai, was hit by a missile from the United States cruiser “Vincennes” over the Persian Gulf. 290 people were killed. The cause was that the US military had mistaken the airliner for an Iranian F-14. The incident was investigated by ICAO. The USA has not been held liable under international law.

e. On 9 May 1992, an Armenian Yak-40 was shot down by an Azerbaijani Su-25 in the skies over Armenia, carrying refugees from Stepanakert (Nagorny Karabakh Republic) to Yerevan.

²⁵⁴ Marko Milanovic and Sangeeta Shah, *Ukraine and the Netherlands v. Russia* (Nos. 8019/16, 43800/14 and 28525/20, “Amicus Curiae Brief submitted on behalf of the Human Rights Law Centre of the University of Nottingham”, 2020, para. 30. [“the concept of directing attacks has some level of intent, and that an honest and reasonable mistake of fact could negate that element of intent”]. [Appendix 14].

* Translator’s note: The Russian says “Zimbabwe”, but it should be “Zambia”.

All survived. Azerbaijan considers the Nagorny Karabakh Republic to be its sovereign territory. There are no reports of any prosecutions. Azerbaijan has not been held liable under international law.

f. On 21 December 2012, a UN-chartered Mi-8 of the airline Nizhnevartovsk Avia was shot down in South Sudan. Five people were killed (including four Russians). The South Sudanese military had mistaken the UN Mi-8 for a Sudanese attack helicopter carrying out reconnaissance missions. South Sudan has not been held liable under international law.

g. On 8 January 2020, the Iranian Armed Forces shot down in error a Boeing 737 belonging to Ukraine International Airlines, flying from Tehran to Kiev. The reason for the downing of the aircraft was its misidentification in a tense military and political situation. Iran has not been held liable under international law.

h. On 4 October 2001, a Sibir Airlines Tu-154 aircraft on flight 1812 from Tel Aviv to Novosibirsk was shot down by an S-200V SAM system missile during an exercise by the Ukrainian Air Defence Forces. The air route followed by the aircraft was not subject to any restrictions, including temporary restrictions (NOTAMs) in force for the period of the exercise by the Ukrainian Air Defence Forces. The Ukrainian authorities should have made a comprehensive assessment of the full range of risks associated with the exercise and, on that basis, determined the parameters for closing the airspace. Unfortunately, this had not been done, which led to the tragedy. Seventy-eight people lost their lives. The then President of Ukraine Leonid Kuchma commented: “*We are not the first and not the last; there is no need to make a tragedy of it*”. On 19 October 2001, the Ukrainian State Commission set up to investigate the causes of the crash came to the conclusion that there were no substantiated alternative versions of the tragedy, except the one that the aircraft had been struck by a 5B28 S-200V air defence missile launched by the Ukrainian Air Defence Forces during the exercises on the Crimean peninsula. This did not lead to Ukraine being held liable under international law. No claims were lodged against Ukraine under Article 3 bis of the Chicago Convention.

290. International legal doctrine, based on the law enforcement practice of States under Article 3 bis, concludes that “*the usual cause of shooting down aircraft by States is a faulty conviction that it was a military object resulting in non-application of provisions prohibiting the use of force, as it only concerns civil aircraft*”.²⁵⁵

291. As for the situation where a State has no control over the State or non-State entities which have mistakenly shot down a civil aircraft, there is no history not only of international responsibility for such incidents being attributed to such a State, but even of *ex gratia* compensation being paid by

²⁵⁵ Mateusz Osiecki, “Shooting down civil aircraft in the light of sovereignty in the airspace”, *Sociological Study*, vol. 6, No. 6, 2016, p. 396 [Appendix 70].

that State. For example, in the following cases no State has incurred international liability or paid compensation:

a. On 3 September 1978, the Zimbabwe People's Revolutionary Army (ZIPRA) shot down an Air Rhodesia Vickers Viscount passenger plane on a domestic flight from Kariba to Salisbury during the war in Southern Rhodesia, using an Strela-2 MANPAD. Forty-eight people were killed;

b. On 12 February 1979, the same Zimbabwe People's Revolutionary Army shot down an Air Rhodesia Vickers Viscount passenger plane on a domestic flight from Kariba to Salisbury during the war in Southern Rhodesia using a Strela-2 MANPAD. Fifty-nine people were killed. ZIPRA officials said that they believed a high-ranking government military official had been on board the aircraft;

c. On 24 February 1985, a Dornier Do 228 aircraft operated by the Alfred Wegener Institute (Germany) was shot down over Western Sahara by representatives of the "Western Saharan People's Front for the Liberation of Saguia el-Hamra and Rio de Oro" ("Polisario"). Three people were killed. Polisario fighters had mistaken the aircraft for a Moroccan reconnaissance aircraft;

d. On 14 October 1987, a Lockheed L-100 HB-ILF aircraft operated by the ICRC on a domestic flight in Angola was shot down by unidentified individuals involved in the Angolan civil war. Eight people were killed;

e. On 29 September 1988, a Lionair An-24 (leased from Gomelavia) performing domestic flight 602 in Sri Lanka was shot down from the ground by representatives of the rebel movement "Liberation Tigers of Tamil Eelam". Fifty-five people were killed;

f. On 8 December 1988, a DC-7 aircraft chartered by the US Agency for International Development was shot down in the skies over Western Sahara. The above-mentioned Polisario front had mistaken it for a Moroccan C-130 aircraft. Five people were killed;

g. On 6 April 1994, a Falcon 50 carrying the presidents of Rwanda and Burundi was shot down by MANPADS while landing at Rwanda Airport. Twelve people were killed;

h. On 9 January 2007, an An-26 aircraft belonging to the Moldovan airline Aeriantur-M crashed in Iraq while on a flight from Adana (Turkey) to Balad (Iraq). As many as 34 people died. According to the main version of events, the airliner was shot down by fighters of the Islamic Army of Iraq using MANPADS;

i. On 23 March 2007, an Ilyushin Il-76 cargo plane belonging to the Belarusian airline Transaviaexport that was flying from Mogadishu to Minsk (carrying the wreckage of an Ilyushin Il-76 that had been shot down on 9 March 2007) crashed in Somalia. The aircraft was allegedly shot down during the civil war in Somalia by the anti-government group Hizbul Islam using Igla MANPADS;

j. On 26 August 2014, a UTair Airlines Mi-8 helicopter contracted to the United Nations Mission in South Sudan (UNMISS) was shot down from rebel-held territory in South Sudan by a surface-to-air missile.

292. Taking into account all the above, the conclusion may be drawn that the crash of flight MH17 is not a breach of Article 3 bis of the Chicago Convention because it was the result of the mistaken use of air defence capabilities in an armed conflict. This does not mean that the downing of a civil aircraft is “permitted” under international law; it means that the question of the lawfulness of the use of weapons in armed conflict is governed by another branch of law – international humanitarian law

III.5.2. The obligation to prevent is not set out anywhere in Article 3 bis

293. According to the Applicant States, Article 3 bis of the Chicago Convention includes two aspects: an explicit prohibition of the use of weapons against civil aviation and an obligation to prevent such use by other agents (an obligation to take action to prevent the use of weapons).²⁵⁶

294. The text of the Article in question does not, however, contain any reference to the obligation of prevention (at the same time, Russia categorically rejects the allegations of its involvement in the crash of MH17). The Applicants arbitrarily interpret Article 3 bis by referring to some kind of “implied” obligation, and such interpretation is inconsistent with the approach generally accepted in international law that a literal interpretation shall prevail.

295. This follows, in particular, from the Advisory Opinion of the International Court of Justice in the case concerning *the Competence of the General Assembly regarding the admission of States to the United Nations*: “*The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. **If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.** If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words*”.²⁵⁷

296. Moreover, the International Court of Justice has made it clear (Advisory Opinion on *the Interpretation of Peace Treaties*) that it is the duty of a judicial body to interpret a treaty, but in no

²⁵⁶ Applicants’ Memorial, Section C, paragraphs 4.23–4.41 [Appendix 104].

²⁵⁷ *Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, p. 8 [Appendix 10].

case to rewrite it - hence the inclusion in the text of a treaty of provisions which it does not contain is unacceptable: *“It is the duty of the Court to interpret the Treaties, not to revise them”*.²⁵⁸

297. In this case, the text of Article 3 bis and its paragraph (a) of the 1944 Convention do not contain any ambiguity and are clear as they stand. The text was developed in a multilateral manner, through lengthy discussions, painstaking verification and comparison of different proposals, through a scrupulous analysis of the international law in force at the time.

298. It may be noted in this regard that the “obligation of prevention” is contained in another paragraph of Article 3 bis – paragraph (d). This paragraph unambiguously and explicitly states that *“Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft <...> for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph a) or derogate from paragraphs b) and) of this Article”*. There is no mention in paragraph (a) of the said Article of any form of prevention.

299. If States had intended to enshrine the “element of prevention” in the wording of the Article 3 bis provisions, they would have directly reflected this in the Article. It should be noted that this practice is followed in the case of instruments, including in the area of air law, aimed at criminalizing specific offences. For example, paragraph 1 of Article 10 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation states that *“Contracting States shall, in accordance with international and national law, endeavour to take all practicable measure for the purpose of preventing the offences mentioned in Article I”*.²⁵⁹

300. Without prejudice to the preceding argument, even assuming that the text of Article 3 bis of the Chicago Convention admits different interpretations, the arbitrary extension of the scope of obligations imposed on contracting States is unacceptable – in case of doubt, preference should be given to the interpretation that is the least onerous for the parties to the treaty.

301. This follows from the arbitral award in *Kronprins Gusaf Adolf and Pacific (Sweden v. the United States)*: *“[I]t must be observed that, considering the natural state of liberty and independence which is inherent in sovereign states, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting parties to a treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and that those provisions, in case of doubt, are to be interpreted in favour of the natural liberty and independence of the party concerned”*.²⁶⁰

²⁵⁸ *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950*, p. 229 [Appendix 12].

²⁵⁹ *The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 1971, Article 10 [Appendix 4].

²⁶⁰ *Arbitral Decision “The Kronprins Gustaf Adolf and Pacific case”* (Kingdom of Sweden and United States of America), 1932, p. 21 [Appendix 16].

302. The existence of this principle in general international law was also mentioned in the Advisory Opinion of the Permanent Court of International Justice on the Turkey-Iraq border.²⁶¹

303. Among the most highly qualified experts in public law, according to their thinking, this rule of interpretation is supported by Lassa Oppenheim: “*The principle in dubio mitius must be applied interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, the meaning is to be preferred which is less onerous for the obliged party, or which interferes less with the parties’ territorial and personal supremacy, or which contains less general restrictions upon the parties*”.²⁶²

304. Moreover, there is no indication in the *travaux préparatoires* of the 1984 Protocol amending the 1944 Convention that the scope of the article in question could be extended in the manner that it is extended by the Applicant States. On the contrary, the statements of the States Parties at the relevant conference, reflected in the *travaux préparatoires*, demonstrate that the issue concerned the responsibility for acts committed directly by State authorities, i.e. for the direct use of arms by State authorities, and not for the failure to prevent the use of arms by non-State entities.

305. In particular, according to the representative of the Republic of Korea (one of the main initiators of Article 3 bis in its most peremptory version), one of the key considerations is the need “*to hold a State accountable for resorting to the use of force against civil aircraft*”.²⁶³

306. ICAO documents also show that the provisions of Article 3 bis only relate to indirect and direct action by public authorities: “*Article 3 bis of the Chicago Convention only applies to State actors*”.²⁶⁴

307. Thus, there are no ways and means of interpreting Article 3 bis that support the reading of the provision propounded by the Applicant States. In the situation under consideration, general international law does not permit the scope of the obligations expressly circumscribed in the text of the rule in question to be expanded through a process of interpretation.

308. Even if the Council mistakenly believes that there really is an obligation of prevention, as insisted by the Applicants, Russia is still not a State in breach of that obligation.

²⁶¹ Permanent Court of International Justice, Ninth (Extraordinary) Session: Article 3, paragraph 2, of the Treaty of Lausanne (*Frontier between Turkey and Iraq*), *Advisory Opinion*, para. 66 [This argument appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound” [Error! Reference source not found.].

²⁶² Lassa Francis Lawrence Oppenheim, *International Law: A Treatise*, Longmans, Green and Co., 1905, p. 561 [Appendix 68].

²⁶³ ICAO Assembly 25th Session (Extraordinary) Executive Committee: Report, Minutes and Documents, 24 April–10 May 1984, Doc 9438, p. 69 [Appendix 19]. * Translator’s note: quotation is on page 19 of the printed text.

²⁶⁴ 38th session of the ICAO Legal Committee, Working Paper on “*Consideration of the adequacy of existing international air law instruments in addressing cyber threats against civil aviation*”, LC/38-WP/2-2, 22–25 March 2022, Appendix A, p. 5 [“Article 3 bis of the Chicago Convention only applies to State actors”] [Appendix 21].

309. The Applicants argue that Russia has breached the obligation of prevention because its actions created a serious danger of actions contrary to Article 3 bis; it was aware of that serious danger; and it failed to take measures within its capacity that met the required standard of due diligence.²⁶⁵

310. With regard to the first argument, that it was precisely Russia's alleged actions in transporting the Buk that led to the crash of the aircraft, it should again be emphasised that the Applicants have not provided convincing evidence capable of corroborating this claim. Even the delivery of arms would not *per se* constitute a breach of the said hypothetical obligation. The following list demonstrates the ubiquitous range of the practice of arms trading. As of 2021, a total of some 122,000 air defence weapons had been exported.²⁶⁶ As an *opinio juris*, the provisions of the Arms Trade Treaty may be cited that indicate, among the prohibitions on arms transfers, the need for reliable knowledge of the unlawful use of the weapons in question.²⁶⁷

311. As to the argument about Russia's awareness of the danger, there is no evidence in general international law of rules that would, in general terms, prohibit a State from taking any action that would hypothetically harm other States. In any event, even in the highly controversial *Corfu Channel case*, the Court referred to every State's obligation "*not to allow knowingly its territory to be used for acts contrary to the rights of other States*". Russia cannot be regarded as having "knowledge" of the existence of any danger because the events took place outside its territory.

312. The Applicants refer to the NOTAM (Notice to Airmen) issued by the Russian Federation as evidence of its awareness of the danger to flight safety. At the same time, they note the following: "*the Russian Federation knew that the unrestricted airspace above FL320 was well within the effective range of a missile fired from a Buk-TELAR, which is reported to be to an altitude of up to 80,000 feet (FL800). When taken together with its knowledge that it had transported and deployed a Buk-TELAR into the east of Ukraine, the Russian Federation therefore knew that the NOTAMs that had been issued requiring civil aircraft to fly above FL320 were inadequate to protect civil aircraft from weapons that could be expected to be used in that area*".²⁶⁸

313. The Applicants failed to find a convincing justification for the key logical contradiction: if the Russian Federation was aware of the risks of using air defence capabilities against civil aircraft, why did it not completely close the airspace in its border territories? The Applicants correctly point out that the flight altitude restrictions imposed by the Ukrainian NOTAMs matched those applied by

²⁶⁵ Applicants' Memorial, paragraph 4.25 [Appendix 104].

²⁶⁶ SIPRI database, Air defence systems trade, 2021. URL: https://armstrade.sipri.org/armstrade/page/trade_register.php [Appendix 108].

²⁶⁷ The Arms Trade Treaty [The Arms Trade Treaty], 2013, Article 6(4) [Appendix 2].

²⁶⁸ Applicants' Memorial, para. 4.32 [Appendix 104].

the Russians.²⁶⁹ This only shows that the Russian authorities were relying on information from the Ukrainian side within whose territory the armed conflict was taking place. Contrary to the Applicants' position, the Russian NOTAMs demonstrate quite the opposite, that the Russian Federation would on no account allow the possibility of civil aircraft being shot down.

314. The Applicants claim that the Russian Federation failed to meet the standard of due diligence by omitting to implement a number of measures aimed at ensuring the security of Ukraine's airspace:²⁷⁰

a) The Russian Federation allegedly should have informed Ukraine that there was a risk to the safety of aviation within its sovereign airspace. The Ukrainian authorities, however, had information about threats to civilian aircraft. According to reports from the DPR press service of 29 June 2014, representatives of the militia took control of military unit No. A-1402 of the air defence system with Buk surface-to-air missile systems.²⁷¹ This information was confirmed by the Ukrainian authorities. The head of the counter-intelligence department of the Security Service of Ukraine, Vitaliy Nayda, said that the Ukrainian authorities had also been informed by counter-intelligence units on 14 July 2014 that the militia had acquired a Buk SAM system.²⁷² In other words, the Ukrainian authorities were aware of the presence of high-range air-defence systems in the anti-terrorist operations zone before the appearance in the DPR of the alleged Russian Buk SAM system, which, according to the Applicants, crossed the border on 17 July. In addition, the Dutch Safety Board has established 16 instances of the downing of military aircraft by the Armed Forces of Ukraine during the conflict in the Donbass prior to the crash of flight MH17. These include the shooting down of an An-26 military transport aircraft flying at an altitude of 6,500 metres, which occurred on 14 July, and the shooting down of an Su-25 aircraft flying at 8,250 metres, which occurred on 16 July. According to statements by the Ukrainian authorities, also made prior to the MH17 crash, the aircraft were shot down with the use of air defence weapons capable of reached the cruising altitude of civilian aircraft, including flight MH17.²⁷³ It should also be taken into account that the Dutch Safety Board reports draws attention to the fact that, in the event of the failure of its on-board systems or of one

²⁶⁹ Ibid., para. 4.31 [Appendix 104].

²⁷⁰ Ibid., para. 4.35 [Appendix 104].

²⁷¹ TASS, "DPR militia take control of air defence unit with Buk surface-to-air missiles", 29 June 2014 (in Russian). URL: <https://tass.ru/mezhdunarodnaya-panorama/1287030>.

²⁷² YouTube, *Press conference of 19 July with Vitaliy Nayda, Head of Counter-Intelligence of the State Security Service of Ukraine, 2014*. URL: <https://www.youtube.com/watch?v=PWtH8AA42Fc>.

²⁷³ Dutch Safety Board, *Final Report of the Technical Investigation, Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 206 [Appendix 85].

engine and the associated need for immediate descent, a civil aircraft (such as a Boeing 777), could not have continued its flight without having to enter a zone of armed conflict.²⁷⁴

b) In the Applicants' opinion, the Russian Federation should have closed its airspace, which would have meant the de facto closure of airspace over the eastern part of Ukraine. At the same time, the Applicants did not specify on what grounds the closure of airspace in one State will entail the automatic closure of airspace in the neighbouring States. It should be recalled that Article 1 of the Chicago Convention establishes that every State has complete and exclusive sovereignty in its airspace. The territory over which the aircraft performing flight MH17 was shot down was the territory of Ukraine. The fact of the closure or non-closure of the airspace of the Russian Federation would in no way have restricted flights over that territory. In an attempt to substantiate this absurd thesis, the Applicants argue that, if the Russian Federation had closed its airspace, the air route followed by flight MH17 would have been closed, but that does not mean that all civil aircraft would have been forced to bypass Ukrainian territory where an armed conflict is under way. The Applicants maintain that the Russian Federation should have issued NOTAMs warning civil aircraft of the danger of flying at any altitude along any air routes adjacent to the conflict zones. The Russian Federation has issued a NOTAM that restricts air traffic in the south of the country owing to the belligerent conflict in the east of Ukraine. The Russian Federation has no obligation to ensure flight safety over the territory of Ukraine by issuing NOTAMs and has no authority to do so.

c) The Applicants also maintain the position that the Russian Federation has failed to comply with the requirements of Annex 11 of the Chicago Convention to provide military units with information on the movement of civil aircraft. It should be noted that the Armed Forces of the DPR were not part of the Armed Forces of the Russian Federation, so the rules of Annex 11 do not in any way regulate relations between Russia and the DPR.

315. The obligations of prevention to which, as ascribed by the Applicants, the Russian Federation was allegedly held are obligations pertaining to Ukraine arising from its sovereignty over the airspace in which the crash occurred:

a) The Ukrainian authorities held information about the presence of air defence weapons in the conflict zone and should have warned neighbouring countries about the risks to civil aviation.

b) Ukraine should have completely closed its airspace over the area of armed conflict. According to the DSB's conclusion: *"The statements made by the Ukrainian authorities in which they reported that military aeroplanes had been shot down on 14 and 16 July, and in which they*

²⁷⁴ Ibid, p. 219 [Appendix 85].

*mentioned weapon systems that were able to reach cruising altitude of civil aeroplanes, provided sufficient reason for closing the airspace above the eastern part of Ukraine as a precaution”.*²⁷⁵

c) Ukraine should have issued a NOTAM warning of the risks of flying at any altitude and along any air route over an area of armed conflict. As the Dutch Safety Board notes: “*The NOTAMs did not contain any substantive reason for the altitude restrictions. Therefore, Ukraine did not act in accordance with the guidelines in ICAO Doc 9554-AN/932*”.²⁷⁶

d) Ukraine should have ensured interaction between the military and civilian authorities, with the result that all the necessary measures aimed at ensuring the safety of civil aviation would have been taken.

316. Had Ukraine complied with all of the above-listed obligations, which arise from its sovereignty over the territory in question, the MH17 disaster would never have occurred and the lives of 298 passengers would have been saved. In an endeavour to shift the burden of responsibility for this tragedy on to Russia, the Applicants unreasonably resort to an overly expansive interpretation of Article 3 bis which, if accepted, will lead to the absurd conclusion that neighbouring States are responsible for the safety of air traffic on the territory of a particular State.

317. The ICAO Risk Assessment Manual indicates that it is the responsibility of the State providing air traffic control services over the combat zone to assess the risk and need for security measures: “*3.1.6 Principally, the need for any safety measures will depend on the results of the **risk assessment conducted by the State or States responsible for providing ATS**. Flight operations by civil aircraft through the airspace should only be allowed to continue if the **risks can be mitigated to an acceptable level***”.²⁷⁷

318. Russia did not provide and could not have provided air traffic control over the area of hostilities as it had no sovereignty over the airspace above the area of hostilities and was not otherwise held to any obligation to provide air traffic control services. Consequently, the obligation to assess the safety risk of civil aviation rested not with Russia, but with Ukraine, so Russia cannot be considered a State whose actions were not duly circumspect.

319. It follows from the foregoing that Article 3 bis does not set out any obligation of prevention. Moreover, the Russian Federation is under no legal obligation to take the actions which, in the Applicants’ view, it should have taken under Article 3 bis of the Chicago Convention. All the measures ascribed by the Applicants to the Russian Federation should have been taken by Ukraine as the State within whose territory the armed conflict was taking place.

²⁷⁵ Ibid., p. 253 [Appendix 85].

²⁷⁶ Ibid., p. 209 [Appendix 85].

²⁷⁷ ICAO, Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones, Doc 10084, 2018, para. 3.1.6 [Appendix 30].

III.5.3 The acts which the Applicants seek to attribute to Russia do not fall within the ambit of Article 3 bis

320. The Applicants arbitrarily and groundlessly seek to extend the scope of Article 3 bis of the Chicago Convention. From the very outset, the purpose of this Article was to rule out the use of force by a State against civil aircraft intruding into its airspace.

321. This is confirmed by: a) the *travaux préparatoires* to the Convention (a means of interpretation based on Article 32 of the 1969 Vienna Convention on the Law of Treaties, which reflects customary international law); b) the circumstances of the adoption of Article 3 bis (similarly: a means of interpretation based on Article 32 of the 1969 Vienna Convention on the Law of Treaties, which reflects customary international law); c) the views of a number of qualified experts in public international law.

322. First, a number of delegations discussed the adoption of the rule in question – that a State should refrain from the use of force against civil aircraft – precisely in the context of cases where a civil aircraft appears in the sovereign territory of such a State. A number of statements in this context have already been cited above, in section III of the present Counter-Memorial, regarding the exclusion of situations of armed conflict from the scope of Article 3 bis. In addition, the following may be noted:

a. The delegation of Canada, referring to the very essence of the amendment (the addition of Article 3 bis to the Chicago Convention), stressed that it was precisely about finding a balance between the concept of sovereignty and the need to protect civil aviation. The importance of the principle that every State has full and exclusive sovereignty over the airspace above its territory was mentioned during the debate and the need to strike a balance between this principle and the prohibition on the use of force against civil aircraft.²⁷⁸

b. The delegation of Belgium argued along similar lines, noting that “*We need to be thoroughly concerned [i.e., within the very essence of the proposed amendment] with such old categories as ‘sovereignty’ and ‘self-defence’*”;²⁷⁹

²⁷⁸ ICAO Assembly 25th Session (Extraordinary): *Plenary Meetings, Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 69 [“*In the course of the debate, references have been made to the importance of the principle that every State has complete and exclusive sovereignty over the airspace above its territory, and the need to maintain an equilibrium between that principle and the prohibition on the use of force against civil aircraft <...> In Canada’s view, it is precisely to ensure a proper equilibrium between these two, in practice, that creates a requirement for an amendment to the Chicago Convention.*”] [Appendix 19]. * Translator’s note: the English text provided in the footnote (as in the Russian original) is quite different from the wording in the quotation provided in the text, which summarizes the points made in the quoted extract, so I have removed the quotation marks.

²⁷⁹ ICAO Assembly 25th Session (Extraordinary) Executive Committee: Report, Minutes and Documents, 24 April–10 May 1984, Doc 9438, p. 60 [Appendix 19].

c. The delegation of Israel made a similar point: *“Rationalization of the possible situations facing the Assembly indicated that the factual terms of reference relied on the knowledge of, or the reasonable grounds to assume, that a number of situations have or may have occurred. Firstly, a violation of sovereignty, intentionally or unintentionally, through the unauthorized entry of an aircraft into the airspace of a State; secondly, utilizing a right to enter the airspace and engaging in activities inconsistent with the Convention; thirdly, deviating from a flight path intentionally or unintentionally while being legally within a State’s airspace”*.²⁸⁰

d. The United Kingdom delegation, in an overview of significant arbitration practice and State practice, cited only those examples that related to the intrusion of aircraft (or, for the purposes of analogy, other vehicles) into the sovereign space of the State that applied force as a consequence of the act in question.²⁸¹

e. The head of the Senegalese delegation said: *“For my Government, an amendment to the Convention ... intended to invite Member States avoid using force against civil aircraft and at the same time protecting the rights of States in respect of their sovereignty over their airspace ...”*.²⁸²

f. According to the head of the Chinese delegation, the merit of the Chicago Convention *“lies in the fact that it establishes a fairly reasonable balance between two basic principles – inviolability of territorial airspace and the safety of civil aviation”*.²⁸³

g. The head of the Egyptian delegation stressed that the Chicago Convention *“has been capable of maintaining the balance between two basic principles. First, States’ sovereignty over their territory and airspace; and second, international aviation safety and security, and protection of lives and property in the transport by air”*.²⁸⁴

h. The delegate of Jamaica drew attention to the following: *“international law had faced practical questions which would allow this Assembly to harmonize the concept of sovereignty with the concept of the non-use of force. ... the concept of sovereignty carried with it necessary responsibilities and obligations. The statement on sovereignty contained in Article 1 of the Chicago Convention did not constitute in itself a licence to act unreasonably or irresponsibly. The basis of*

²⁸⁰ Ibid., p. 54 [Appendix 19].

²⁸¹ Ibid., p. 29 [Appendix 19]. * Translator’s note: this quotation was not traced: p. 29 is FRG and Canada. This is a back-translation from the Russian.

²⁸² ICAO Assembly 25th Session (Extraordinary) Plenary Meetings: *Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 24 [Appendix 20].

²⁸³ Ibid., 34 [Appendix 20]. * Translator’s note: on p. 36, not p. 34.

²⁸⁴ Ibid., 42 [Appendix 20].

*sovereignty was the obligation to act in accordance with certain norms of conduct and in a reasonable fashion.*²⁸⁵

i. The delegate of the USSR noted in his statement that his delegation also believed “*that the provision to refrain from the use of armed force must in no way infringe on the rights of the Contracting States to protect their sovereignty and ensure their security. At the same time, ... States should use to the utmost every peaceful means to prevent a violation, make sure that it was corrected*”.²⁸⁶

j. The delegate of Poland made the following point, referring to “*what, in view of the general statement made by other delegations, seemed to be the common objectives of most of the governments represented here, namely, to ensure a proper balance between the requirements of safety of civil aviation security on the one side, and the requirements of national air sovereignty and national security on the other side. ... the two proposals in question* [referring to draft Article 3 bis considered at the session] *aiming at the limitation of sovereign States’ action with respect to civil aircraft*”.²⁸⁷

k. Similar positions were taken, for example, by the delegations of Benin,²⁸⁸ Ivory Coast (now Côte d’Ivoire),²⁸⁹ Switzerland,²⁹⁰ Peru,²⁹¹ Tanzania,²⁹² Austria,²⁹³ the Philippines,²⁹⁴

l. The draft amendment proposed by Austria and France (A25-WP/4), in enumerating the acts of a State that engage its liability under the proposed article, lists only two – interception of irregular flights, i.e. interception as the totality of the actions by a State in its territory which involve the unlawful use of force against civil aircraft, and violation of sovereignty (wrongful entry into sovereign airspace); emphasis is also placed on the need to balance sovereignty with the protection of civil aviation;²⁹⁵

m. It is important to note that the Republic of Korea (one of the main initiators of the rule in question), when referring to liability for violations of the proposed article, indicated: “*If a*

²⁸⁵ ICAO Assembly 25th Session (Extraordinary) Executive Committee: *Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438, pp. 91–92 [Appendix 19].

²⁸⁶ Ibid., p. 14 [Appendix 19].

²⁸⁷ Ibid., pp. 24–25 [Appendix 19].

²⁸⁸ Ibid., 57 [Appendix 19].

²⁸⁹ Ibid., 41 [Appendix 19].

²⁹⁰ Ibid., 61 [Appendix 19].

²⁹¹ Ibid., p. 84 [Appendix 19].

²⁹² Ibid., pp. 89–90 [Appendix 19].

²⁹³ Ibid., p. 95 [Appendix 19].

²⁹⁴ Ibid., p. 72 [Appendix 19].

²⁹⁵ Ibid., p. 164 [Appendix 19].

*territorial sovereign uses force against a civil aircraft in violation of its obligation not to use force, it must assume all responsibility arising from the use of force”;*²⁹⁶

n. The statement summarizing the main points made during the discussion on the amendment, prepared by the Chairman of the Executive Committee, also notes in particular the need for a “*Balance ... between the complete and exclusive sovereignty of States over their airspace and the safety of civil aircraft and persons on board*”.²⁹⁷

323. It should be particularly emphasized that the Netherlands (the Applicant State in the present case), while calling for as clear, unambiguous wording as possible, specifically stipulated that the proposed article should deal with situations where an unarmed aircraft enters the airspace of a State which then uses force against that aircraft.²⁹⁸

324. The delegation of Australia (also an Applicant State in the case) similarly emphasized the need to strike a balance between the non-use of force against civil aviation and ensuring the right of a territorial sovereign to demand the landing of an intruder aircraft.²⁹⁹

325. Second, where the circumstances of the adoption of this amendment are concerned, it is common knowledge that the introduction of Article 3 bis into the Chicago Convention was initiated precisely after the tragic incident with flight KAL 007, which was shot down on the sovereign territory of the Soviet Union on 13 August 1983.³⁰⁰ In their statements, the Republic of Korea and Australia drew particular attention to these circumstances, which were inextricably linked to the adoption of Article 3 bis. This further demonstrates that the rule in question was adopted precisely in response to the need to prevent State authorities from using weapons against aircraft on their territory.

326. Third, this position is supported by the opinion of leading experts in international air law. For example, the renowned jurist Ruwantissa Abeyratne, describing the essence of the obligation under Article 3 bis, observes: “*Article 3 bis is the result of attacks on aerial intrusions and what are*

²⁹⁶ Ibid., p. 181 [Appendix 19].

²⁹⁷ Ibid., p. 192. [Appendix 19].

²⁹⁸ ICAO Assembly 25th Session (Extraordinary) Plenary Meetings: *Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 59 [“*When we are talking about the use of force against unarmed civil aircraft, we are referring to a situation in which a State intercepts an aircraft which has entered its airspace without permission or authorization to do so*”] [Appendix 19].

²⁹⁹ Ibid., p. 30 [Appendix 19]. * Translator’s note: Russian had incorrectly put Appendix 19.

³⁰⁰ Phillip A. Johnson, “Shooting down drug traffickers”, *International Law Studies*, vol. 72, 1998, p. 85: “*After military aircraft of the Soviet Union shot down KAL 007 on 13 August 1983, killing its 269 passengers and crew, the resulting international outrage led to the unanimous adoption by the 152-member International Civil Aviation Organization of a new Article 3 bis to the Chicago Convention*”. [Appendix 53]; John O’Brien, *International Law*, Cavendish, 2001, p. 461: “*This was illustrated by the most serious incident in recent years, which arose on 1 September 1983 when a Soviet fighter shot down a Korean Air Lines flight (KA 007) resulting in the deaths of all 269 persons on board. The response of the international community was immediate and unequivocal <...> the Council of the ICAO investigated the matter and recommended the strengthening of the provisions of the 1944 Chicago Convention*”. [Appendix 67]; Jiefang Huang, *Aviation Safety through the Rule of Law: ICAO’s Mechanisms and Practices*, Kluwer Law International, 2009, p. 109 [Error! Reference source not found.].

*deemed to be incursions into sovereign airspace. This was the argument in KL 007 as with other instances of into aerial intrusions ... Article 3 bis is intended to effectively preclude a State from using its unfettered discretion to use weapons against an intruding aircraft and to ensure that people on board are not harmed”.*³⁰¹

327. A similar point of view is expressed by international law specialist Ntorina Antoni: **“Responsibility for the safety of the civil aircraft and the lives of passengers is attributed to the country over the territory of which the aircraft is shot down, as the only supreme authority exercising sovereignty therein”.**³⁰²

328. Since at the time of the crash the airspace over the conflict zone was under the control of Ukraine, which was providing air traffic control and had the sovereign ability to close the air traffic over this territory, the responsibility for the safety of the aircraft rested with Ukraine.

329. The accusations that it was supplying weapons, which Russia denies, having repeatedly asserted its non-involvement and cited a range of evidence, do not fall within the scope of Article 3 bis. Moreover, the supply of weapons capable of shooting down aircraft is a widespread practice of other States³⁰³ (at the same time, Russia has not supplied anyone with any of the weapons that were used in the MH17 crash).

330. Added to which, Russia did in fact assess the risks arising from Ukraine’s dangerous activities in the eastern regions and took all possible measures to avoid the use of force against civil aircraft in the light of the already existing threat to civil aviation safety, as required by the Chicago Convention, namely by partially and effectively closing its airspace in the vicinity of the area of hostilities, stating the exact reason for this decision.³⁰⁴

331. Consequently, the first component of international responsibility, namely the breach of an international obligation under Article 3 bis, is absent from the actions taken by Russia.

³⁰¹ Abeyratne, R., *Convention on International Civil Aviation: A Commentary*, Springer-Verlag, 2014, p. 70. [Error! Reference source not found.].

³⁰² Ntorina Antoni, “Safety oversight over disputed airspace”, *The Aviation and Space Journal*, vol. 14, No. 3, 2015, pp. 11–24 [Appendix 44].

³⁰³ SIPRI database, Air defence systems trade, 2021. URL: https://armstrade.sipri.org/armstrade/page/trade_register.php [Appendix 108].

³⁰⁴ NOTAM V6158/14 [Appendix 111].

SUBSECTION III.6. The Russian Federation is not responsible because there is no causal link between the actions of the Russian Federation and the shooting down of MH17

332. The effective cause (*conditio sine qua non*) of the incident was the failure of the Ukrainian authorities (who, naturally, maintained effective control over the airspace) to close the airspace, but not in any way the actions of Russia, as alleged by the Applicants.

333. As the International Court of Justice stated in its judgment in the *Bosnian Genocide case*: “The question is whether there is a sufficiently direct and certain **causal nexus** between the wrongful act, the Respondent’s breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations.”³⁰⁵

334. Consequently, the action with the closest causal link to the shooting down of a civilian aircraft is the failure to close the airspace over the territory of hostilities by the State which has the *exclusive (sic!)* power to close that airspace. This is confirmed by the opinion expressed in the most authoritative academic periodical on international air law: “In the Caire Claim judgment (French–Mexican Claims Commission in 1929) the objective test was applied, pursuant to which the State is responsible for the acts of its officials and organs even if in the absence of any fault of its own¹⁷. Accordingly, Ukraine could be held responsible for the act of its air traffic controllers to lead the aircraft over the airspace of potentially hazardous military activities taking place, irrespective of the information Ukraine had for these activities and any fault thereof”.³⁰⁶

335. If the airspace had been closed to civilians, flight MH17 would not have been over the area of hostilities and would not have been shot down. Moreover, these weapons could have been used by the Ukrainian army itself, which had them in its possession at the time of the downing of MH17.

336. The criterion of foreseeability specified by the Permanent Court of International Justice in the *Lighthouses case (France v. Greece, 1934)* is also met: in not closing its airspace, Ukraine could have foreseen that a civilian aircraft might be shot down in the situation of armed conflict on its territory, as many military aircraft had been shot down on its territory before.

³⁰⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 452 [Appendix 11].

³⁰⁶ Ntorina Antoni, “Safety oversight over disputed airspace”, *The Aviation and Space Journal*, vol. 14, No. 3, 2015, p. 22 [Appendix 44].

337. Consequently, even if (without prejudice to the position of the Russian Federation) the fact of the delivery of the Buk system is admitted, the Applicants have still not proved a direct causal link between this fact and the shooting down of the aircraft: the mere fact of delivery does not inevitably entail use in a specific area; use in a specific area does not in itself mean that the system will be used against a specific aircraft (at the same time, Russia has not supplied anyone with any weapons that were used in the MH17 crash). The criteria of “direct” and “certain” causality, as stated above,³⁰⁷ are clearly not met. Consequently, the Russian Federation cannot be held responsible under international law for the shooting down of flight MH17.

SUBSECTION III.7. Ukraine was responsible for ensuring the safety of aviation on the territory of the DPR when MH17 was shot down

338. According to ICAO, one of the obligations of countries party to the Chicago Convention is to “*Provide airports, radio services, meteorological services and air navigation facilities necessary to support safe and secure international civil aviation*”.³⁰⁸ The crash of flight MH17 “*example of multiple cases where States failed to provide navigational safety and security as mandated by the Chicago Convention*”.³⁰⁹ There are no grounds to dispute the fact that “*The air traffic control and air navigation services for Donetsk Oblast and the surrounding regions of the territory are still provided under the authority of the Ukraine, therefore, it is unquestionable that it is Ukraine is liable for ensuring the safety of civil aviation operations in their sovereign and delegated airspace*”.³¹⁰

339. It goes without saying that the safety of civil aircraft flying directly over areas where military aviation and missile armaments are used in combat operations cannot be ensured by partially closing the airspace within the established flight altitude range. At any moment of flight, a civil aircraft may be forced to change its flight altitude (fire on board, depressurization, engine failure and other reasons), which will entail unacceptably high risks of the destruction of the civil aircraft through the use of weapons of all kinds, even including small arms.

340. On 17 July 2014, Russian radio reconnaissance equipment in the area of the plane crash picked up the operation of radar stations of the Ukrainian Armed Forces assigned to carry out airspace reconnaissance and control, which confirms the presence of Ukrainian air defence weapons in the area of the plane crash.

³⁰⁷ Counter-memorial of the Russian Federation, para. 333.

³⁰⁸ ICAO, *Responsibilities of Member States* [Appendix 26].

³⁰⁹ Andika Immanuel Simatupang, “State responsibility over safety and security on air navigation of civil aviation in international law”, *Indonesian Journal of International Law*, vol. 13, No. 2, 2016, p. 5, p. 277. [Appendix 72].

³¹⁰ Ewa Jasiuk, Anna Konert, Aleksandra Detyniecka, Elwira Targońsk, “The responsibility of a State in the crash of Malaysian Airlines flight MH17”, *Transportation Research Procedia*, No. 43, 2019, p. 117. [Appendix 81].

341. Ukraine failed to exercise its right under subparagraph (a) of Article 9 of the Chicago Convention to prohibit civilian aircraft from flying over the area of hostilities “*for reasons of military necessity or public safety*”. Thus, **the responsibility for the destruction of the Boeing 777 flight MH17 lies primarily with Ukraine**, which, guided by considerations incompatible with its responsibility to ensure the safety of civil aircraft flying in its sovereign airspace, failed to ensure the closure of all altitude ranges over the area of hostilities. In its investigation report, the DSB stated

*“The statements made by the Ukrainian authorities in which they reported that military aircraft had been shot down on 14 and 16 July, and in which they mentioned weapon systems that were able to reach cruising altitude of civil aeroplanes, provided sufficient reason for closing the airspace above the eastern part of Ukraine as a precaution.”*³¹¹

342. This practice opens up extensive possibilities for failure to comply with the obligation to provide safe air navigation in national or delegated airspace, without attributing any responsibility to the State providing air navigation services in that airspace. On 27 October 2014, the Russian Federation, together with the Bolivarian Republic of Venezuela,* submitted working paper C-WP/14227 to the ICAO Council at its first session, entitled “*Risk assessment of operations over airspace affected by armed conflict – responsibility of States for ensuring the flight safety of civil aircraft within their national and delegated airspace over armed conflict zones of military exercises*”, in which it proposed, among other measures, to codify the responsibility of States for flight safety in the text of Article 9 of the Chicago Convention. The ICAO Council did not take up this proposal by the Russian Federation and the Bolivarian Republic of Venezuela.³¹²

343. Annex 11 to the Chicago Convention includes the following relevant provisions:

*“2.17.1: * Air traffic services authorities shall establish and maintain close cooperation with military authorities responsible for activities that may affect flights of civil aircraft.*

[...]

2.18.1: The arrangements for activities potentially hazardous to civil aircraft, whether over the territory of a State or over the high seas, shall be coordinated with the appropriate air traffic services authorities. The coordination shall be effected early enough to permit timely promulgation

³¹¹ Dutch Safety Board, Final Report of the Technical Investigation, *Report: Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 253 [Appendix 85].

* Translator’s note: This may be an error in the Russian. the WP was sponsored by the RF and Bolivia - not Venezuela: see the minutes of the 203rd Council Session, Doc 10048-C/1179: “As one of the two co-sponsors of C-WP/14227, the Representative of Bolivia (Plurinational State of) stated that ...”

³¹² Preliminary Objections of the Russian Federation, Attachment 1. *ICAO Council Resolution on Malaysia Airlines flight MH17, destroyed over eastern Ukraine on 17 July 2014, adopted on 28 October 2014 and annexed to document C-DEC 203/1*, para. 13 [Appendix 106].

* Translator’s note: Para. Nos. are incorrect in the Russian: 2.17.1 should be 2.18.1, 2.18.1 should be 2.19.1 and 2.24.1.2 should be 2.25.1.2.

of information regarding the activities in accordance with Procedures for Air Navigation Services — Aeronautical Information Management (PANS-AIM, Doc 10066).

[...]

2.24.1.2: As soon as an air traffic services unit becomes aware of an unidentified aircraft in its area, it shall endeavour to establish the identity of the aircraft whenever this is necessary for the provision of air traffic services or required by the appropriate military authorities in accordance with locally agreed procedures. [...]

[...]

4.1 (Attachment C): Time is essential in contingency planning if hazards to air navigation are to be reasonably prevented. Timely introduction of contingency arrangements requires decisive initiative and action, which again presupposes that contingency plans have, as far as practicable, been completed and agreed among the parties concerned before the occurrence of the event requiring contingency action, including the manner and timing of promulgating such arrangements.

4.2 [...] Such preparatory action should include:

b) assessment of risk to civil air traffic due to military conflict

[...]

6.2.2.2.1: A flight information centre and an area control centre shall have facilities for communications with the following units providing a service within their respective area of responsibility:

a) appropriate military units;”³¹³

344. In addition, the Manual Concerning Safety Measures relating to Military Activities Potentially Hazardous to Civil Aircraft Operations emphasizes that “*States play a major role in providing various parties with essential risk information related to the airspace above conflict zones that feed into their decision-making processes. States are required under Annex 17 to keep under constant review the level and nature of threats to civil aviation in their territory and the airspace above it, and adjust their security programmes accordingly based upon a security risk assessment. <...> In the event of armed conflict or the potential for armed conflict, the Convention on International Civil Aviation does not affect the freedom of action of any Contracting State, whether as belligerents or as neutrals (Article 89 of the Convention). Nevertheless, the need for close co-ordination between civil and military authorities and units is even more critical*”.³¹⁴ The following

³¹³ ICAO, *Annex 11 “Air Traffic Services”*, Convention on International Civil Aviation, 2001, including amendment No. 49, paras. 2.18.1, 2.19.1, 2.25.1.2, 4.1, 6.2.2.2.1 [Appendix 27].

³¹⁴ ICAO, *Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones*, Doc 10084, 2018, para. 3.1.1 [Appendix 30] and ICAO, *Manual Concerning Safety Measures relating to Military Activities Potentially Hazardous to Civil Aircraft Operations*, Doc 9554-AN/932, 1990. URL: <https://standart.aero/ru/icao/book/документ->

provisions from the Handbook also indicate that Ukraine has an obligation to ensure the safety of civil flights.

345. Paragraph 9.1 establishes that air traffic restrictions ideally constitute “the selection of locations outside promulgated ATS routes and controlled airspace for the conduct of the potentially hazardous activities”.

346. Paragraphs 9.3 and 9.4 refer to the establishment of so-called flight levels – levels at or above which civil aircraft may continue to operate without incurring any hazard. In the most extreme case, when a given area cannot be closed to flights,* it is recommended that an agreement be concluded between the air traffic authorities over whose territory the flight is to take place and the State concerned on the use of alternative routes or, if none are available, temporary routes.

347. Paragraph 10.3 establishes the following responsibilities for the State responsible for providing air traffic services: to identify the geographical area of conflict; to assess the hazards or potential hazards to international civil aircraft operations; to determine whether flights in or through the area of conflict should be avoided or may be continued under specified conditions. A special international NOTAM containing the necessary information, advice and safety measures to be taken should then be issued. Consequently, it may be concluded that ICAO documents establish the responsibility of the State on whose territory a conflict is taking place to ensure the safety of flights by foreign civil aircraft.

348. Paragraph 10.5 states that the safety measures required to be taken will depend on the assessment by the State of the hazards to the overflight of foreign civil aircraft.

349. The Dutch Safety Board report states that during the armed conflict in south-east Ukraine, the initiative for taking measures related to the airspace, based on safety analyses, originated from the military authorities, and decisions related to the airspace were primarily taken from the perspective of the military’s interests, in which a potential risk to civil aviation was not the subject of any explicit consideration.³¹⁵

350. It follows from this conclusion by the Dutch Safety Board that Ukraine failed to fulfil its obligations to coordinate activities potentially hazardous to civil aircraft in order to ensure optimal conditions that would avoid endangering civil aircraft and minimize interference with normal flight

9554-руководство-по-мерам-безопасности-принимаемым-в-связи-с-военной-деятельностью-ру-конс [Error! Reference source not found.].

* Translator’s note: I suspect there might be an error in the Russian here. Para. 9.4 of the Manual says: “If the temporary closure of certain ATS routes is unavoidable ...”, so this should read “When a given area has to be closed to flights”, not “When a given area cannot be closed to flights”.

³¹⁵ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 205 [Appendix 85].

operations of such aircraft.³¹⁶ Consequently, Ukraine's interests in continuing hazardous military activities in the Donbass prevailed over its obligation to ensure the safety of international civil aviation over its territory.

351. The Ukrainian authorities, as described earlier, were well aware that the Armed Forces of the DPR and the LPR had air defence capabilities. It should be noted that, in any event, there was a threat to civil aviation. This threat extended to civilian airliners as well, for example, in the event of a forced descent due to an accident.

352. Furthermore, Ukraine itself was actively deploying air defence weapons, which naturally endangered the safety and health of persons flying in civilian aircraft over the territory of eastern Ukraine in 2014. From April to July 2014, Ukraine built up its military ground grouping and increased the intensity of its military flights in the skies over the Donbass. On 12 July 2014, the spokesman for Ukraine's antiterrorist operations, Vladislav Seleznev, published a statement on Facebook about placing Ukraine's air defence forces on combat readiness No 1, the highest level of readiness for deployment.³¹⁷ On 16 July 2014, the Central Television and Radio Studio of the Ministry of Defence of Ukraine broadcast a report indicating that Ukraine had deployed Buk anti-aircraft missile systems in the conflict area in order to control the airspace over the anti-terrorist operations zone in the eastern part of Ukraine.³¹⁸ On 17 July 2014, Russian radio reconnaissance equipment in the area of the crash of flight MH17 picked up the operation of radar stations of the Ukrainian Armed Forces assigned to carry out airspace reconnaissance and control, confirming that Ukrainian air defence weapons were present in the area of the plane crash.³¹⁹

353. Moreover, 13 weeks had elapsed between the first shooting down of an An-30B military aircraft on 22 April 2014 and the crash of flight MH17 on 17 July 2014. This was more than enough time for Ukraine to assess the risks to the safety of civil aviation due to the military conflict and to take appropriate decisions. Over this period, the Ukrainian Armed Forces lost another 15 military aircraft and helicopters in active combat operations.³²⁰

³¹⁶ ICAO, *Annex 11 "Air Traffic Services", Convention on International Civil Aviation*, 2016, para. 2.18.2 [Appendix 27].

³¹⁷ Statement by Vladislav Seleznyov, Speaker of Ukraine's Anti-Terrorist Operation, 2014. URL: <https://www.facebook.com/vladislav.seleznev.94/posts/467802786689783?pnref=story>.

³¹⁸ Central Television and Radio Studio of the Ministry of Defence of Ukraine, 2014. URL: <https://youtube.com/watch?v=Q3MomxNHnUa>, excerpt between 4:48 and 4:54.

³¹⁹ Russian News Agency (TASS), "Russian Aerospace Forces: Russian radar would have picked up a missile fired at Boeing MH17 from the east" (in Russian), <https://tass.ru/politika/3654128> (accessed 15 December 2022).

³²⁰ Dutch Safety Board, *Final Report of the Technical Investigation, Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 182 [Appendix 85].

354. The Ukrainian authorities were guided, however, by self-interest and reputational considerations. In its final report, the Dutch Safety Board explicitly 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”*.³²¹

355. On 14 July 2014, Ukraine issued NOTAMs A1492/14 and A1493/14 allowing military aircraft to fly up to flight level 320 (9750 metres).³²² When a civil aircraft was flying at flight level 330 (flight altitude of 10050 m, the flight altitude of MH17) the difference in altitude between military and civil aircraft could be only 300 m rather than the required 600 m, which meant that Ukraine would be breaching air navigation rules and causing a flight safety hazard.³²³ When issuing these NOTAMs, Ukraine was aware that flight level 320 forms part of the airspace for which ICAO rules establish special safety measures and equipment requirements for aircraft,³²⁴ but it failed to take measures to comply with those requirements.

356. Thus, Ukraine, knowing that the MiG-29, Su-27 and Su-25 military aircraft that it uses in the area of armed conflict are not subject to ICAO requirements,³²⁵ and that safe separation minima cannot be guaranteed between military and civil aircraft,³²⁶ did not close its airspace to civil aviation over the area of conflict on 14 July 2014.

357. Prior to the events of 14 and 17 July 2014, Ukraine should have closed the entire airspace over the conflict area, as the very large extent of this area in terms of altitude (up to 9,750 metres) and area (over 50,000 sq km) posed additional risks to civil aircraft flying over it.

³²¹ Ibid., p. 207 [Appendix 85].

³²² Ibid., pp. 195–197 [Appendix 85].

³²³ ICAO, *Regional Supplementary Procedures*, Doc 7030, 2008, para. 6.2.4.1 (b) [Appendix 25]. * *Translator’s note: there is no (b) in para. 6.2.4.1.*

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³²⁶ ICAO, *Annex 11 “Air Traffic Services”*, *Convention on International Civil Aviation*, 2001, para. 3.4.1 (a) [Appendix 27].

SECTION IV. CONCLUSION

The legal arguments and factual circumstances of the case set out in the Applicants' Memorial demonstrate that the charges brought by the Applicants against the Russian Federation are legally and factually unfounded and obstruct the determination of the truth in the crash of Malaysian Airlines flight MH17. Attempts of this kind to shift responsibility undermine the system of international justice and are not conducive to ensuring the safety of civil aviation.

On the basis of its submissions in the Counter-Memorial, the Russian Federation is requesting the ICAO Council to reject the claims put forward by Australia and the Netherlands and to issue a decision determining as follows:

1) Article 3 bis of the Chicago Convention is not applicable to the MH17 disaster and/or the Russian Federation has not breached its obligations under Article 3 bis of the Chicago Convention and/or

2) The ICAO Council has no authority under Chapter XVIII of the Chicago Convention to compel the Member States of the Organization to negotiate, including on such issues as:

- a) providing assurances that obligations under the Chicago Convention are implemented and enforced in national law;
- b) payments of reparation and compensation for a specific act;
- c) a public admission of alleged wrongdoing and an apology;
- d) and other actions which the Applicants are requiring the Russian Federation to perform and/or
- e) The ICAO Council has no authority to oblige its Member States to inform the ICAO Council of the progress of negotiations between them and/or

3) The ICAO Council has no authority to impose sanctions under Article 88 of the Chicago Convention in the absence of a judgment of default by the Council under Article 84 of the Chicago Convention, namely to suspend the voting power of the Russian Federation in the ICAO Assembly and in the Council. The detailed reasoning on the authority of the ICAO Council is set out in Section 3 e) of the Preliminary Objections of the Russian Federation³²⁷ and Section 5 of the Objections to the Reply of Australia and the Kingdom of the Netherlands.³²⁸

The Russian Federation reserves the right to respond to any written statement submitted by Australia and/or the Kingdom of the Netherlands in response to the present Counter-Memorial.

³²⁷ Preliminary Objections of the Russian Federation [Appendix 106].

³²⁸ Objections of the Russian Federation to the Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objection of the Russian Federation [Appendix 107].

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Appendix 106. Preliminary Objections of the Russian Federation

Appendix 107. Objections of the Russian Federation to the reply of Australia and the Kingdom of the Netherlands

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