

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)
ICAO COUNCIL

AUSTRALIA AND THE KINGDOM OF THE NETHERLANDS

v.

THE RUSSIAN FEDERATION

(2022)

**REJOINDER OF THE RUSSIAN FEDERATION
TO THE REPLY FILED BY AUSTRALIA AND THE KINGDOM OF THE
NETHERLANDS TO THE 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”

10 November 2023

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CHAPTER I

Introduction

1. For over a year and a half now, the case concerning the crash of Malaysia Airlines flight MH17 in 2014 has been pending before the ICAO Council under Article 84 of the 1944 Convention on International Civil Aviation (Chicago Convention).¹

2. Flight MH17 crashed in Ukrainian airspace, which was open to civil aviation despite active hostilities affecting a large part of that State's territory, in which the Ukrainian Armed Forces were active participants.

3. At that moment, Russia, which has also experienced the pain of tragedies involving the loss of civilian aircraft, shared the grief of those affected by the disaster. The President of the Russian Federation² and the Head of Government of the Russian Federation³ conveyed their condolences.

4. From the very beginning, Russia has advocated a thorough and objective investigation into all circumstances of the plane crash, called for the utmost to be done to ensure the security of the work by international experts at the site of the tragedy, and has spoken in favour of involving all those willing and able to assist in establishing the truth. Russia participated actively in the drafting of UN Security Council Resolution 2166 of 21 July 2014 and supported its adoption; it stipulates the need to "establish a full, thorough and independent investigation into this incident".⁴ To date, however, no investigation fulfilling such criteria has been organized or conducted.

5. In order to promote the establishment of the truth, Russia has continuously provided the Dutch Safety Board, which conducted the technical investigation, and the Joint Investigation Team, which conducted the criminal investigation, with the available data, and even conducted a series of technical tests and declassified military documents. All of these important materials were unjustifiably ignored.

6. The Russian Federation categorically denies any involvement in the crash of flight MH17. The version presented by the Applicants does not correspond to reality. The purpose of the

¹ Chicago Convention of 1944. [Annex 3 to the Counter-Memorial of the Russian Federation].

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

³ Russian Prime Minister offers condolences over Malaysian airliner crash, 17.07.2014, Interfax news agency, <https://www.interfax.ru/amp/386455>

⁴ Resolution 2166 (2014) adopted by the Security Council at its 7221st meeting, held on 21 July 2014, S/RES/2166 (2014) [Annex 36 to the Preliminary Objections of the Russian Federation].

legal modelling used in the present Rejoinder is merely to facilitate the correct interpretation and application of the rules of the Chicago Convention.

7. The position of the Applicants in the present case – Australia and the Kingdom of the Netherlands – is, unfortunately, far from the truth. The most recent document in the case, the Reply of Australia and the Netherlands to the Counter-Memorial of the Russian Federation, is distinguished, as was the case with the Applicants’ other pleadings, by extreme politicization. It also unacceptably presumes Russia’s responsibility for the crash of flight MH17 and fails to respond to the factual and legal arguments submitted by Russia, which clearly demonstrate the groundlessness of the allegations against it.

8. In terms of content and quality, the Reply of Australia and the Netherlands does not stand up to any criticism whatsoever. The majority of the information, both legal and factual, contained in the Applicants’ Reply has no basis in reality.

9. In this sense, it is important to note that the Applicants do not provide any fundamentally new arguments in the Reply. They arbitrarily repeat phrases from prior pleadings in this case about “Russia’s responsibility”, “investigations”, “transports of Buk TELARs” and other clichés that have nothing to do with reality.

10. The above is clearly not sufficient to respond to the Russian Federation’s complete argument or to convince the ICAO Council. At the same time, the majority of information in the Russian Federation’s Counter-Memorial (43 pages in total) is dedicated to the issue of the physical non-involvement of the Russian Federation in the accident. The Russian Federation, as it has stated before, categorically disagrees with the allegations of its involvement in the MH17 crash.

11. The Applicants use manipulative techniques in their Reply, attempting to make the Russian Federation appear responsible for the crash of the Malaysian Boeing flight MH17 (which, in reality, is not the case) through the selective application of facts and legal provisions.

12. Therefore, the Russian Federation is compelled to exercise its right to submit the present Rejoinder to the Applicants’ Reply in order to draw the attention of the members of the ICAO Council to the clear inadequacy of the position of Australia and the Netherlands.

13. The Russian Federation hereby draws attention to the fact that the absence in the present document of comments regarding any of the specific points made by Australia and the Netherlands does not imply that the Russian Federation agrees with them.

14. The present Rejoinder consists of the following sections: Chapter I “Introduction and Procedural information”, Chapter II “The Russian Federation was not involved in the crash of flight MH17 – The conduct resulting in the crash of MH17 cannot be attributed to the Russian Federation”, Chapter III “Legal aspects of the case – the Russian Federation has not violated Article 3 *bis* of the Chicago Convention”, Chapter IV “The actions of the Council sought by the

Applicants are inconsistent with the Council’s authority under the Chicago Convention” and Chapter V “Conclusion”. Each of the chapters is structured to align with the questions raised by the Applicants in their Reply of 28 July 2023 and the logic of the reasoning set out in the Russian Federation’s Counter-Memorial of 24 April 2023.

15. Additionally, the Russian Federation hereby draws attention to the fact that the present Rejoinder does not fully reflect the Russian Federation’s position, since its main purpose is to respond to the arguments put forth by the Applicants in their Reply. In this context, the Russian Federation’s complete position on the merits of the case can be found only in a combined reading of the Russian Federation’s Counter-Memorial⁵ and the present Rejoinder containing additional information.

16. Furthermore, since two matters raised by the Russian Federation at the stage of determining jurisdiction (namely that 1) the actions of the ICAO Council sought by the Applicants are inconsistent with the Council’s authority under the Chicago Convention and that 2) the subject matter of Article 3 *bis* does not apply to situations of armed conflict) were deferred by the ICAO Council to the merits stage,⁶ then the Russian Federation’s Preliminary Objection of 28 July 2022⁷ and the Russian Federation’s Rejoinder of 10 January 2023⁸ to the Reply of Australia and the Netherlands of 10 November 2022 are likewise relevant for the determination of the Russian position.

Procedural information

17. In his letter SG 2613/22 dated 17 March 2022, ICAO Secretary General Juan Carlos Salazar informed ICAO Council Member States that the Delegations of Australia and the Netherlands to ICAO had submitted to the Organization a joint Application and accompanying Memorial on the settlement of differences by means of *note verbale* dated 14 March 2022.

18. On 28 July 2022, the Russian Federation submitted to ICAO Preliminary Objections to the competence of the ICAO Council to consider the matter raised by the Applicants, enclosed with letter No. 317/22 from the Representation of the Russian Federation to ICAO.

19. In his letter Ref.: LE 6/8.CONF dated 22 November 2022, ICAO Secretary General Juan Carlos Salazar communicated that on 10 November 2022, Australia and the Kingdom of the Netherlands had submitted to ICAO a Reply to the Preliminary Objections of the Russian Federation on the matter presented to ICAO on 28 July 2022.

⁵ Counter-Memorial of the Russian Federation dated 24 April 2023 in English. [Annex 1], as well as corrections to the translation made by the ICAO Secretariat [Annex 2].

⁶ Cf. paras. 1a) and 1e) of the ICAO Council Decision of 17 March 2023 [Annex 7].

⁷ Annex 106 to the Counter-Memorial of the Russian Federation

⁸ Annex 107 to the Counter-Memorial of the Russian Federation

20. On 10 January 2023, the Russian Federation submitted to ICAO a Rejoinder to the Reply from Australia and the Kingdom of the Netherlands, enclosed with letter No. 8/23 from the Representation of the Russian Federation to ICAO.

21. On 17 March 2023, the ICAO Council took a decision on the Preliminary Objections of the Russian Federation, recognizing its competence to consider the dispute. The Russian Federation also hereby draws attention to the fact that it still does not recognize the true competence of the ICAO Council to consider this dispute pursuant to the Chicago Convention, and the submission of the present Rejoinder must not be interpreted as a recognition of such competence. Issues concerning the Chicago Convention and armed conflict, as well as the authority of the ICAO Council, were deferred by the Council to the merits phase. They will be considered again in detail in our Rejoinder.

22. The Russian Federation also wishes to note that the ICAO Council, in carrying out its dispute settlement functions, unfortunately did not assimilate the recommendation of the International Court of Justice to include in the ICAO Council Decision the reasons of law and fact that led the ICAO Council to its conclusions.⁹ Copying and pasting the operative clauses of the Applicants' Memorial cannot be viewed as providing factual and legal grounds for the adoption of a Council Decision on the Council's competence or lack thereof.

23. On 24 April 2023, the Russian Federation submitted to ICAO a Counter-Memorial enclosed with letter No. 101/23 from the Alternate Representative of the Russian Federation to ICAO.

24. In turn, on 1 August 2023, ICAO Secretary General Juan Carlos Salazar informed the Russian Federation that on 28 July 2023, Australia and the Netherlands had submitted a Reply (in English) to the Counter-Memorial of the Russian Federation.

25. On 15 August 2023, ICAO Council President Salvatore Sciacchitano informed the Parties that he had decided to grant the Russian Federation a five-week period for the submission of a Rejoinder to the Applicants' Reply. He informed them that this period would begin to run only as of the date when a translation into Russian of the Reply was provided to the Russian Federation.

26. On 3 October 2023, ICAO Secretary General Juan Carlos Salazar sent the Russian Federation a translation into Russian of the Applicants' Reply (letter Ref.: LE 6/8.CONF dated 3

⁹ *Appeal concerning the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia, United Arab Emirates and Saudi Arabia v. Qatar), Judgment of 14 July 2020. International Court of Justice // Compendium of Judgments of the International Court of Justice 2020, para. 125. [Annex 39 to the Preliminary Objections of the Russian Federation].

October 2023). Therefore, the five-week period for the Russian Federation to submit a Rejoinder to the Reply began to run on 3 October 2023.

27. On 27 October 2023, ICAO Secretary General Juan Carlos Salazar communicated that, in accordance with the request of the Agent for the Russian Federation in the case, the ICAO Council had decided to extend the five-week period for submitting the Rejoinder by an additional week, so the Rejoinder would have to be received by ICAO no later than 15 November 2023 (cf. letter Ref.: LE 6/8.CONF).

28. Additionally, on 3 August 2023, in the letter SG 2702/23 Ref.: LE 6/8.CONF, ICAO acknowledged receipt of letter No. 197/23 dated 2 August 2023 and signed by the Acting Representative of the Russian Federation to ICAO, with which was enclosed a letter dated 31 July 2023 from D.E. Grunis, Agent of the Russian Federation in the case, containing a request to the ICAO Council to conduct, in accordance with the ICAO *Rules for the Settlement of Differences* and UN Security Council Recommendation 2166, a full, complete, and independent investigation of the crash. The Russian Federation is certain that its position is correct, which is precisely why it decided to request that ICAO conduct a new investigation that satisfies the criteria established by the UN Security Council. The need for such an investigation will be further demonstrated in the present Rejoinder.

29. The Agent of the Russian Federation in the case is Denis Yevgenyevich Grunis, Senior Assistant on Special Assignment of the Procurator General of the Russian Federation. Contact Information: 999 ROBERT-BOURASSA BOULEVARD, SUITE 16.25, MONTREAL, QUEBEC, CANADA H3C 5J9, Phone : +1 (514) 954-8300, Fax : +1 (514) 954-5729, Cell: +1 (514) 699-5727, e-mail: legalprotection@genproc.gov.ru, russiaicao@mintrans.ru.

CHAPTER II. THE RUSSIAN FEDERATION WAS NOT INVOLVED IN THE CRASH OF FLIGHT MH17 – THE CONDUCT RESULTING IN THE CRASH OF MH17 CANNOT BE ATTRIBUTED TO THE RUSSIAN FEDERATION

Subsection II.1. Russian servicemen and military equipment, including servicemen and military equipment of the 53rd Anti-Aircraft Missile Brigade, did not cross the Ukrainian border on 16-18 July 2014.

30. The Applicants submit that the MH17 aircraft was downed on 17 July 2014 by a missile launched from the territory of Ukraine by a Buk TELAR missile system belonging to the 3rd Division of the 53rd Anti-Aircraft Missile Brigade of the Russian Federation.¹⁰

31. These allegations are false, since on 17 July 2014, the servicemen and military equipment of the 53rd Anti-Aircraft Missile Brigade (Troop Unit 32406), including its 3rd Division, were on the territory of the Russian Federation, and specifically, either at their permanent base (in Kursk) or at the Kuzminsky training ground located in the Rostov *oblast*, where they were taking part in tactical exercises in accordance with the brigade's combat training plan.

32. The excerpt from the Order of 15 July 2014 to deploy servicemen from the aforementioned troop unit on a mission to Millerovo, Rostov *oblast*, is fake. This excerpt was reproduced in the article by journalist Pavel Kanygin, to which the Applicants repeatedly refer,¹¹ and they attached a translation of it to their Memorial.¹²

33. The Kuzminsky training ground is 80km by road from the nearest point on the Russian-Ukrainian border.¹³

34. The statement by Witness G8850 referred to by Australia and the Netherlands¹⁴ to the effect that supposedly after the destruction of the Boeing, the “crew returned to the 53rd Brigade's camp in Kamensk-Shakhtinsky,” is false. This troop unit did not have any camps whatsoever in or near Kamensk-Shakhtinsky in Rostov *oblast* in 2014. The Kuzminsky training ground is located much closer to larger cities (Rostov-na-Donu and Taganrog) than to Kamensk-Shakhtinsky.

¹⁰ Applicants' Reply. Paras. 1.5, 2.8. [Annex 3].

¹¹ Para. 2.46 of the Applicants' Memorial [Annex 4], para. 4.24 (b) of the Applicants' Reply [Annex 3]

¹² Annex 88 to the Memorial between Australia and the Netherlands

¹³ Location and map of the Kuzminsky training group in Rostov Oblast in 2014 [Annex 34]

¹⁴ Applicants' Reply. Para. 4.23 [Annex 3], Annex 28 to the Memorial of Australia and the Netherlands.

35. Therefore, the military equipment and personnel of the 53rd Anti-Aircraft Missile Brigade (Troop Unit 34206) did not cross the State border between Russia and Ukraine on 16-18 July 2014, or at any other time, either individually or as parts of units.

Subsection II.2. The Applicants lack any credible evidence of the transport of a Buk TELAR from Russia to Ukraine and back and of its accompaniment by a Russian military crew

Unsubstantiated and contradictory allegations by the Applicants concerning the transport of a Buk TELAR from Russia to Ukraine and back

36. The Applicants stated in their Memorial that the Buk TELAR that shot down flight MH17 was driven under its own power from the Russian Federation into Ukraine on the morning of 17 July 2014.¹⁵ In their Reply, the Applicants claim that the Buk TELAR system was delivered in the night of 16 to 17 July 2014.¹⁶ Notwithstanding these contradictions, in neither case do Australia and the Netherlands provide any evidence of Russian military equipment crossing the Russian-Ukrainian border – its precise location, exact time, or surrounding circumstances. Thus, these allegations of Russian military equipment crossing the border are contradictory, unsubstantiated and false.

37. Australia and the Netherlands conclude that a single Buk TELAR separated from the convoy and then (secretly) headed towards Ukraine, based on a social media chat between two individuals called “Anastasia” and “Serviceman M.”, who supposedly served in the 53rd Brigade and was part of the convoy.¹⁷ The contents of the chat are themselves extremely vague and cannot constitute a basis for any conclusions whatsoever. Furthermore, the Applicants did not even establish the real names of these two individuals, who could have confirmed that such chat did, in fact, occur, that one of the participants actually is or was a serviceman in the 53rd Brigade, and that what they were referring to in their discussion was, in fact, Ukraine. Without such confirmation, no such chat can serve as the basis for any conclusions of legal significance. It should be noted that the Joint Investigation Team (hereinafter “JIT”) did not send any requests for legal assistance to Russia to identify these individuals or question them as witnesses. Such actions could have proven the very existence and authenticity of the chat and clarified its content. Such passivity demonstrates that Australia and the Netherlands had no interest in establishing the truth this about the chat and this, in turn, testifies either to the lack of professionalism of the JIT investigators or to the fact that the chat was fabricated.

¹⁵ Applicants’ Memorial. Para. 2.51 [Annex 4]

¹⁶ Applicants’ Reply. Paras. 2.11, 2.12, 2.14 [Annex 3]

¹⁷ Applicants’ Memorial. Para. 2.49 [Annex 4]

38. As confirmation that a Russian Buk TELAR was present on Ukrainian territory, the Applicants refer to the fact that such military equipment was captured on photo and video in Donetsk on 17 July 2014, and then in Lugansk on 18 July 2014, with only three anti-aircraft missiles, not four.¹⁸

39. Russian experts studied these photo and video materials shown during the JIT press conference on 28 September 2016. It was not possible to determine when these materials were created because they had been recoded multiple times and there was no audio-visual data indicating the date of their creation. Due to their low quality, it was not possible to capture images of the digital symbols on the on-board numbers of the caterpillar vehicles being transported. The quality of the images of the caterpillar vehicles being transported was so low that it was impossible to identify any set of characteristic attributes, and even their large structural elements were not visible. Multiple modifications were detected on the video recordings.¹⁹

40. The JIT presented the Russian Party with video footage of Buk TELARs having a tactical number starting with “3” and ending with “2”. The footage was allegedly taken on 23-24 June 2014 near the towns of Neznamovo and Alekseyevka in the Belgorod *Oblast* and was provided as attachments to one of the requests for legal assistance.²⁰ The Russian experts studied the footage, but it was not possible to determine the date when the materials were created because of repeated recoding and the absence of audio-visual data indicating the date of their creation. At the same time, the following issues were identified: discrepancies in perspective in portions of the images of the transported equipment, disproportionality in the images of objects and their parts; unwarranted differences in the degree of sharpness in the details of the images of single and multiple objects; absence of blur zones at the contrast boundaries between images of different brightness; significant differences in the spaces between the first and last characters (digits) on the images of the transported caterpillar equipment; and presence of artifacts next to the digital characters.²¹

41. It is impossible to confirm the original source of the aforementioned photo and video materials. Thus, it is an unfounded assertion by Australia and the Netherlands that the materials they cite (photo and video in Ukraine and the Russian Federation) show an image specifically of a Buk TELAR, rather than of other equipment, and moreover of one and the same launcher rather than various ones, and that it was a Russian launcher, not a Ukrainian one, in the case of movement across Ukraine.

¹⁸ Applicants’ Memorial. Paras 2.51, 2.65 [Annex 4]

¹⁹ Expert Opinion Nos. 5407, 5443/16-1, 1249/21-1 dated 15 April 2019, pp. 44-46 [Annex 35]

²⁰ JIT request for legal assistance dated 6 April 2018 [Annex 33]

²¹ Expert Opinion Nos. 5408, 5444/16-1, 1250/21-1 dated 19 April 2019, pp. 24-37, 42-48 [Annex 45]

42. The authenticity of these video recordings is also questionable because the Applicants have not established or confirmed the source of the information in question. The people who made these video recordings were neither identified nor questioned as witnesses.

43. Australia and the Netherlands again fail to provide any evidence of the Buk TELAR crossing back across the Russian-Ukrainian border in the opposite direction – its precise location, exact time, and the surrounding circumstances. Instead, the Applicants make reference to an allegedly intercepted telephone conversation between two militiamen at 7:45 am on 18 July 2014 in which one says that “the vehicle has been in Russia for a long time already”.²²

44. First, it is not clear from the discussion what “vehicle” is meant. This word in Russian usually refers to a simple automobile, not to a Buk TELAR. There is no mention of military equipment in the discussion. Second, the expression “has been... for a long time already” in Russian does not mean “since last evening” or “yesterday”, yet the Applicants asserted that the Buk TELAR had returned to Russia by 18 July 2014.²³ Third, Australia and the Netherlands did not provide any information whatsoever about the identities of the interlocutors, indicating merely that they are “high-ranking separatists”. Thus, as in the case of the aforementioned social media chat, it is impossible to confirm the authenticity of this conversation and its content. Fourth, Russian experts studied this video material from the JIT press conference held on 28 September 2016. They identified multiple changes to the recording which may have distorted the contents. The utterances of one of the interlocutors were not adequate for the purposes of an identity search.²⁴ Consequently, the Applicants’ claim that the Buk TELAR had returned to Russia is likewise unsupported by any evidence.

The Applicants’ references to recordings of telephone conversations cannot be taken into account, as they were provided by an interested Party (Ukraine), show signs of falsification, and the participants in such conversations deny their authenticity.

45. The Applicants claim that critical telecommunications intercept material demonstrates that the Buk TELAR was provided with a crew, that the crew accompanied it from the Russian Federation, and that the crew was made up of members of the Russian Armed Forces.²⁵

46. At the same time, the Applicants admit that all of the recordings of telephone conversations were provided to the JIT by the Security Service of Ukraine (hereinafter “SBU”). The JIT members themselves were not involved in obtaining this evidence.²⁶

²² Applicants’ Memorial. Para. 2.66 [Annex 4]

²³ *Ibid.*

²⁴ Expert Opinion Nos. 1327, 1328, 1329/16-1-20; 1330/33-1-20; 1072/15-1, 1073/15-1 dated 30 October 2020. Pp. 52-54, 97-98, 100-101 [Annex 36]

²⁵ Applicants’ Reply. Para. 4.16 [Annex 3]

²⁶ Appendix 9 to the Applicants’ Memorial

47. Ukraine is an interested party which is attempting to deflect all suspicions about its involvement in the MH17 tragedy while blaming Russia for it. Thus already on 18 July 2014, the day after the crash and without waiting for any investigation results, the President of Ukraine Petr Poroshenko, in his video address to the nation, blamed Russia and Donetsk militias for the crash of the Boeing. He also accused them of intending to take the plane's flight recorders to Moscow. In the same address, he announced the creation of a State commission to investigate the plane crash.²⁷

48. From that moment on, the State authorities of Ukraine, including the SBU, were incapable of conducting an independent and impartial investigation. All evidence they submitted was meant to confirm only one version of events as voiced by the President of Ukraine. This in itself points to the possible falsification of the telephone conversation recordings.

49. The results of the Russian experts' examination of the materials from the JIT press conference held on 28 September 2016 testify to the possible falsification of the audio recordings. Specifically, the experts analysed fragments of discussions allegedly between Sergey Dubinsky, Leonid Kharchenko, and other people in which the words "Buk", "launcher" and "crew" were used.²⁸ The experts noted numerous modifications made to the audio recordings after the recording process by means of recoding, oversampling, filtering, amplitude normalization of the recording signals, and by removing portions of the recording and introducing audio signals into the recording. This may serve as evidence not only of intentional distortion of the contents of the audio recording, but also of intentional concealment of the traces of other modifications. In order to identify the source of such modifications and when they were made, the device/recording device and original audio recordings have to be examined. The experts also concluded unequivocally that the speakers' utterances are not adequate for the purposes of an identity search.^{29,30}

50. It is thus not clear how Australia and the Netherlands can claim that the voices on the audio recordings are those of Dubinsky and Kharchenko if these people did not participate in either the investigation or the trial before the District Court of The Hague and were sentenced *in absentia*. The Applicants did not provide any information about any expert analyses of voice samples from Dubinsky and Kharchenko.

51. Dubinsky himself denied that any such conversation had taken place, and he accused the Netherlands Public Prosecution Service of having falsified it.³¹ The Applicants have

²⁷ URL: http://youtube.com/watch?v=yR_hzmAcUBg#t=120

²⁸ Applicants' Reply. Paras 4.17 – 4.18 [Annex 3]

²⁹ Expert Opinion Nos. 1327, 1328, 1329/16-1-20; 1330/33-1-20; 1072/15-1, 1073/15-1 dated 30 October 2020. Pp. 52-54, 95-102 [Annex 36]

³⁰ Expert Opinion Nos. 1319, 1320, 1321/16-1-20; 1322/33-1-20; 1074/15-1, 1075/15-1 dated 3 August 2020. Pp. 65-68 [Annex 37]

³¹ URL: <http://youtube.com/watch?v=KEeTXYNv-k>

not submitted any evidence to the contrary (for example, witness testimony from his interlocutor or expert analyses of samples of Dubinsky's voice).

52. Oleg Pulatov, who was accused by the JIT of involvement in the obliteration of flight MH17 and fully acquitted by the District Court of The Hague, claims that the Donetsk militia often deliberately misled the enemy, knowing that their conversations were being tapped by the special services of Ukraine. They wished to use such disinformation to achieve a certain advantage in the difficult circumstances of the armed conflict.³²

53. Thus, the intercepted telephone conversations cannot constitute evidence, since the individuals who took part in the conversation either are not identified on the basis of samples of their voices, or they do not confirm the fact that this conversation took place. They do not explain what they really meant when using fragmentary phrases or whether or not they deliberately wished to mislead the special services of Ukraine. Recordings of these conversations show signs of falsification.

The Applicants lack credible witnesses, and the testimony from possibly non-existent persons whom the Applicants claim to be witnesses is inconsistent and uncertain.

54. Australia and the Netherlands state that the JIT collected important witness statements that confirm that a Russian military crew accompanied the Buk TELAR to the missile launch site.³³

55. Instead of the witnesses' real names, the Applicants used three combinations of letters and numbers (M58, X48 and G8850), claiming thereby to be preserving the anonymity of the witnesses because of the need to protect them.³⁴ Australia and the Netherlands do not, however, provide any evidence that they the witnesses are or were in any real danger. This means that the Applicants may deliberately and unjustifiably be using anonymity in order to make it more difficult to refute the witnesses' statements or to conceal the fact that there are no real people at all behind these letters and numbers.

56. As stated by the lawyer Sabine ten Doesschate, who defended the interests of Pulatov, a defendant in the MH17 case (who was later fully acquitted), "The anonymity of the witnesses makes it difficult to assess their statements... No one, including the judges, knows the biographies of these anonymous witnesses."³⁵ She also stated, "The witnesses' reliability must be checked. The aircraft was shot down in an area with ongoing hostilities. Therefore, nearly everyone supported one side or the other. Many witnesses who testified were directly involved in the

³² URL: <http://youtube.com/watch?v=73Pz5obZVps&t=366s>

³³ Applicants' Reply. Para. 4.21 [Annex 3]

³⁴ Netherlands Public Prosecution Service. Official report on witness testimony (17 June 2020) [Annex 22 to the Applicants' Memorial]

³⁵ URL: <http://aex.ru/news/2020/11/5/218819/>

conflict. Moving from one side to the other, these people may have had an interest in making false statements... We don't know how they were found and selected. For this reason, it is very difficult to assess their reliability and whether or not they have an interest in the situation.”³⁶ It is not possible to carry out such verification while maintaining anonymity.

57. There may be no real people at all behind the alphanumeric designations, and if not, the information passed off as testimony is a complete fabrication. Or perhaps Australia and the Netherlands are hiding people behind a screen of anonymity who have an interest in giving false statements favourable to the Applicants, for example in order to receive financial compensation or an Australian or Dutch residence permit (or citizenship). Another possibility is revenge against one of the people convicted in the case, or against Pulatov, who was acquitted.

58. Moreover, the statements by these “alphanumeric combinations” are inconsistent and vague. The Applicants claim that witness M58, who was present at the missile launch site, gave a statement indicating that “Russian military servicemen, whom the DPR fighters said were from the FSB, were with the Buk TELAR at the launch site”.³⁷ That is, M58 is referring to unidentified DPR fighters who asserted that the SAM was being operated by servicemen from the Russian FSB. However, the Russian FSB’s weaponry does not include any SAMs at all. Therefore, the statements of the putative witness M58 are in and of themselves contradictory and false.

59. Witness G8850 only heard, incidentally from some kind of mythical “person in the Russian army”, that four people serving in the 53rd Brigade had been involved in the destruction of the Boeing.³⁸ Thus, the Applicants are attempting to pass off the words of an unknown person heard, in turn, by a person unknown to that person, as evidence that an unknown person from the 53rd Brigade was involved in the MH17 tragedy. Therefore, the statements by witness G8850 cannot be taken into consideration for the purposes of drawing conclusions given their uncertainty and false nature.

60. Witness X48 does not make any claims to having seen specifically Russian military servicemen near the “Buk”. The Applicants themselves note this, clearly distorting the statement of their own witness. Thus, allegedly citing the witness, they state that the crew wore uniforms that differed to the uniforms worn by the DPR separatists.³⁹ So as even witness X48 claims, “These soldiers looked different from those manning the roadblock.”⁴⁰ That is, witness X48 did not say that the uniforms of these “soldiers” differed from the uniforms of all DPR militiamen in general. The

³⁶ URL: <http://tass.ru/proisshestviya/9914431>

³⁷ Applicants’ Reply. Para. 4.21 [Annex 3]

³⁸ Applicants’ Reply. Para. 4.23 [Annex 3]

³⁹ Applicants’ Reply. Para. 4.30 [Annex 3]

⁴⁰ Applicants’ Reply. Para. 4.22 [Annex 3]. Cf. also Netherlands Public Prosecution Service. Official report on witness testimony (17 June 2020) [Annex 22 to the Applicants’ Memorial]

issue here is that in July 2014, no single, identical set of uniforms had been established for the militia of the Donbass Republic. The majority of them wore khaki-coloured uniforms available for retail sale in Ukrainian territory. With this, the Applicants intend to mislead the ICAO Council, distorting even the testimony of their own witness, who may not even actually exist.

61. In paragraph 4.31 of their Reply, the Applicants assert that, “the Russian Federation does not dispute the evidence that the soldiers were wearing ‘helmets with ears’ which, as noted above, match the description of the tank cap typically worn by the Russian military crew of a Buk TELAR”. This does not reflect reality.

62. First, the Russian Federation denies that its servicemen and their military equipment were present on 17 June 2014 on the territory of Ukraine, both generally and specifically at the location indicated by the Applicants. Second, the description by witness X48 of a “helmet with



ears” fits that of the third model of the TSh-4M tank helmet (cf. image), which was supplied to the Armed Forces of the USSR back in 1982. This helmet was included in the set of supplies for all tanks, infantry combat vehicles, armoured personnel carriers, self-propelled artillery units, other types of weapons and military equipment mounted on armoured tracked

and wheeled chassis, and certain types of vehicles. It is used widely by the armed forces of all countries using Soviet/Russian equipment, **including the Armed Forces of Ukraine**. Third, the presence of such a helmet in no way proves that the wearer is a crew member of a combat vehicle. There are known cases in which helmets of this type have been used by various types of servicemen as a means to communicate with an armoured vehicle or as defensive means for protecting the head from minor injuries.

63. The allegations of Australia and the Netherlands that “it is well documented that members of the Russian Armed Forces present in Ukraine dispensed with their military insignia” because they had allegedly received orders to remove insignia from their uniforms (paragraph 4.31 of the Applicants’ Reply) are undocumented and false. Annex 1 to their Memorial, to which they refer, does not contain any evidence at all in support of these claims.

64. The statements by witnesses M58 and X48 to the effect that they saw specifically the Buk rather than a different air Defence vehicle cannot be taken into consideration because specialized knowledge of military technology is required in order to accurately identify a specific SAM type and model. The Applicants do not indicate that their anonymous witnesses possess such specialized knowledge. As the lawyer Sabine ten Doesschate pointed out in the District Court of The Hague, “First and foremost, we must bear in mind that all of the events unfolded in the context of an armed conflict, which implies that the transport of military equipment was occurring in the

region on a regular basis. In this light, it is possible that some witnesses saw not a Buk, but something else.”⁴¹

65. None of the “witnesses” presented by the Applicants say anything about how the Russian servicemen supposedly addressed each other, what rank they held, what positions they held, who was senior among them in the military hierarchy, or what each of them was doing at the site of the alleged missile launch. This further confirms the uncertainty and false nature of the statements of those people presented by the Applicants as witnesses to the launch of a missile against a civilian aircraft.

Aleksandr Khodakovsky and Igor Girkin, who are quoted by the Applicants, actually claim that that Ukraine, rather than Russia, was involved in the obliteration of flight MH17. Khodakovsky’s statements have been falsified and distorted. The Applicants do not draw the attention of the ICAO Council to Girkin’s statements although they attached them to their submissions.

66. Beyond the anonymous witnesses who may possibly not even exist, Australia and the Netherlands also refer to real people in their submissions. The Applicants either distort or falsify the words of these people, however, or they fail to draw the ICAO Council’s attention to them.

67. Thus, in support of their allegations that the Buk SAM with a Russian military crew arrived in Ukraine from Russia, the Applicants repeatedly refer to an interview by a German-based investigative journalism newsroom with one of the Donbass militia commanders, Khodakovsky, in which he allegedly stated that “the popular militia did not shoot down the Boeing” as they “didn’t have specialists who can operate such high precision weapons systems”.⁴²

68. In his statement dated 12 October 2023⁴³, Khodakovsky underscored the following: “I did not state to the journalists that the militia does not and did not have specialists who could operate such high-precision systems, and that this was precisely why the militia did not shoot down the Boeing. To the contrary, the militia ranks have always contained many fighters with experience serving in the USSR Armed Forces and skills operating various types of military equipment, including modern anti-aircraft defence systems, the majority of which, including the Buk, had been introduced in the USSR already in the late 1970s and 1980s. This fact in and of itself, however, provides no basis whatsoever for concluding that the Boeing was shot down by the militia. In fact, I stated and continue to assert that the Donetsk militia were not involved in the crash of flight MH17, and moreover, the Russian Federation was not involved in this event. On 17 June 2014,

⁴¹ URL: <http://tass.ru/proisshestviya/9914431>

⁴² Applicants’ Memorial. Paras. 2.44, 2.64 [Annex 4]. Applicants’ Reply. Para. 4.24 [Annex 3].

⁴³ Statement of A.S. Khodakovsky to the ICAO Council dated 12 October 2023 [Annex 38]

neither Russian soldiers nor Russian military equipment were in the vicinity of the city of Snezhnoye or of the village of Zaroshchenskoye. On 17 July 2014, the Armed Forces of Ukraine were in the vicinity of the MH 17 Boeing aircraft crash, with anti-aircraft defence systems in their possession, including Buk SAMs, which could have been used to destroy this aircraft. My actual statements were distorted and falsified in the submissions of Australia and the Netherlands to the ICAO Council.”

69. Australia and the Netherlands also refer to an allegedly intercepted telephone conversation on 8 June 2014 during which the DPR Minister of Defence Igor Girkin requested assistance in the form of anti-aircraft defence equipment from a certain Mikhail Sheremet.⁴⁴ From this, the Applicants conclude that Russia sent a Buk SAM with a trained crew that allegedly shot down flight MH17.

70. At the same time, Australia and the Netherlands attached to their Memorial a transcript of Ukrainian journalist D. Gordon’s interview with Igor Girkin on 18 May 2020.⁴⁵ In the interview, Girkin states, “[158:33] The militia didn’t shoot down the Boeing... [159:03] By the way, I had no doubt as to Ukraine’s involvement, and I still have no doubt that this Boeing was destroyed with the involvement of the Ukrainians... [160:19] For me, as an operative, first and foremost the question “Who benefits?” is obvious. Neither the militia nor even the Russian Federation benefited from the destruction of the Boeing.”⁴⁶

False allegations from the Applicants about the use of satellite images as evidence

71. Paragraph 2.11 of the Applicants’ Reply states that “In this case, the forensic evidence assembled by the DSB (Dutch Safety Board) and the JIT both reinforces – and is reinforced by – other evidence, including photographic evidence, **satellite images**.... When all of that evidence is considered, the conclusion that Flight MH17 was shot down by a 9N314M warhead carried by a 9M38-series missile launched by a Russian Buk TELAR that was brought into Ukraine from the Russian Federation in the night of 16-17 July 2014 becomes inevitable.”

72. With this, the Applicants are misleading the ICAO Council by making it appear that they have at their disposal satellite images that prove their conclusions. In reality, however, the Applicants have no such satellite images. They did not submit any. On 24 June 2021, during the hearing of the “MH17” case at the District Court of The Hague, Dutch Prosecutor Thijs Berger stated that, “the Prosecutor’s Office will not use the Memorial (which discusses the existence of

⁴⁴ Applicants’ Memorial. Para. 2.44 [Annex 4]

⁴⁵ Dmitri Gordon’s Interview with Igor Girkin published on 18 May 2020 (English translation) [Annex 29 to the Applicant’s Memorial]

⁴⁶ *Ibid.*

American satellite images supposedly depicting the moment of the missile launch against flight MH17) as evidence”.⁴⁷ This means that the images themselves never were in the possession of the DSB or the JIT. They merely had a piece of paper indicating that such images existed.

73. In paragraph 2.56 of their Memorial, Australia and the Netherlands stated that, “on 18 July 2014, the United States of America confirmed that it had satellite data that indicated Flight MH17 was ‘shot down by a surface-to-air missile’ that was launched from an area that is controlled by Russian-backed separatists inside of Ukraine”.

74. If such satellite images really existed, they would record not only the moment the missile was launched, but also the movements of the SAM that preceded it and its subsequent movements. The United States does not present such data, which casts doubt upon the very existence of these satellite images.

75. Even if we were to believe in the existence of such mythical satellite images of the missile launch, they do not prove in any way that a SAM was moved from Russia, nor that it was operated by Russian servicemen.

Subsection II.3. The technical investigation conducted by the Dutch Safety Board (DSB) did not comply with ICAO Standards, was incomplete, and its conclusions resulted from the manipulation and/or falsification of evidence.

Australia and the Netherlands did not present any arguments refuting the violations of ICAO standards during the technical investigation

76. In Section II of its Counter-Memorial, the Russian Federation detailed the specific violations of Standards 3.2, 3.3, 5.1, 5.25, 5.4, 5.10 and 6.3 of Annex 13 to the Chicago Convention committed during the DSB’s technical investigation.

77. In their Reply, the Applicants present no arguments to refute this, instead limiting themselves to the bald assertion that the DSB investigation is consistent with the ICAO Standards.⁴⁸ Paragraph 2.17 of the Reply merely attempts to justify Ukraine’s violation of Standards 3.2 and 3.3 by saying that “the crash site was in fact under the control of the Donetsk People’s Republic (‘DPR’) separatists”, making reference to Annex 16 of their Memorial. That Annex does not, however, cite a single fact that would demonstrate that the DPR authorities obstructed the investigation in any way.

78. Thus, the Applicants failed to prove that Ukraine had fulfilled its international obligations to prevent the possibility of material evidence being falsified.⁴⁹

⁴⁷ URL: <http://interfax.ru/world/773762>

⁴⁸ Applicants’ Reply. Para. 2.3 [Annex 3]

⁴⁹ Counter-Memorial of the Russian Federation, paras. 17 – 33. [Annex 1]

The Applicants attempted to interpret the fact that ICAO welcomed the completion of the DSB's technical investigation as an acknowledgement and endorsement of its findings.

79. The Applicants claim that ICAO “welcomed” the findings of the DSB investigation.⁵⁰ Presumably, in the Applicants’ view, this should persuade the Council not to revisit the still unresolved questions surrounding the conditions under which weapons allegedly struck down flight MH17.

80. “Welcoming” the issuance of the final report does not mean that its contents have been verified and approved by ICAO, since neither the Chicago Convention nor its Annexes provide for a procedure by which ICAO does or does not recognize final investigation reports of aviation accidents and incidents.

81. Paragraph 2.75 of the Applicants’ Memorial provides a completely different interpretation of ICAO’s reaction to the publication of the final DSB report: “In accordance with Annex 13 to the Convention, a copy of the final DSB report was provided to ICAO, which reviewed and welcomed the recommendations made in the report”.

82. Since the DSB final report proposed six recommendations relating to ICAO documents,⁵¹ the Netherlands, having conducted an investigation of the flight MH17 disaster, were required in accordance with Standard 6.9 of Annex 13 to the Chicago Convention to inform ICAO by means of a dated transmittal letter.

83. The ICAO letter and the ICAO press statement, to which the Applicants refer, contain the reaction to the DSB final report recommendations.⁵² The reaction of the President of the ICAO Council to the DSB final report⁵³ was more than clearly in line with the Standards and spirit of Annex 13 to the Chicago Convention. He underscored, “Now that the Dutch Safety Board has published its final report, ICAO will consider its recommendations applicable to our Organization and take the necessary measures to ensure that air transport remains the safest means of travel. In this regard, it is important to remind all stakeholders that Annex 13 investigations are directly related to the improvement of flight safety, not to establishing responsibility or blame.”

84. By analogy with the DSB final report on the investigation of the flight MH17 crash, the official ICAO website contains, for example, the final report on the findings of the investigation of the Boeing 737 crash, flight PS752, and information on ICAO’s response⁵⁴ to the safety

⁵⁰ Applicants’ Reply. Para. 2.3 [Annex 3]

⁵¹ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, Section 11, paras. 1-9 [Annex 85 of the Counter-Memorial of the Russian Federation]

⁵² Footnote 196 and Annex 56 to the Memorial of Australia and the Netherlands

⁵³ *Ibid.*

⁵⁴ ICAO, *Safety Recommendations to ICAO*

recommendations proposed by the Islamic Republic of Iran. At the same time, the statement by Canadian officials on the findings of the flight PS752 investigation⁵⁵, which call into question the completeness of the investigation, failed to serve as an impetus for ICAO to adopt a special decision on the investigation report issued by the Islamic Republic of Iran.

85. Thus, the fact that ICAO or the UN “welcomed” the DSB final investigation report on the flight MH17 disaster is in no way linked to the approval of the conclusions therein concerning the missile trajectory modelling aimed at determining the launch site or type of warhead, much less an acknowledgement of the Russian Federation’s responsibility.

86. The recommendations of the DSB final report do not, and taking into account the Standards of Annex 13 to the Chicago Convention, cannot contain any direct or indirect accusations of the Russian Federation’s responsibility for the MH17 disaster, including in the context of the dispute initiated by the Applicants over the interpretation of Article 3 *bis* of the Chicago Convention.

All conclusions of the DSB technical investigation pertaining to the determination of the missile launch site were obtained by manipulating and/or falsifying evidence.

87. The main instances of manipulation consisted in disregarding crucial studies on power frame damage, replacing studies with modelling, and hiding or ignoring inconvenient excerpts or parameters, which led to the falsification of all three “Best Match” components:

- 1) models of the damaged Boeing 777;
- 2) the dynamic model of the warhead detonation;
- 3) coordinates of the point of the detonation.

88. Based on the analytical results of the *in situ* experiment conducted in accordance with the terms of the Dutch experts' conclusions, the results of special studies of the penetration capability of the destructive elements, the assessment of damage to the outer skin, interior equipment and power frame of the Boeing 777 aircraft, and of *in situ* experiments with the Utyos-T en route radar facility, it has been determined that the DSB’s findings that the aircraft was destroyed by a 9M38M1 missile “flying in the opposite direction” have not been confirmed.

<https://www.icao.int/safety/airnavigation/AIG/Lists/Safety%20recommendations%20to%20ICAO/Search1.aspx>, latest communication of 6 October 2023.

⁵⁵ Transportation Safety Board of Canada, *Release of Iran’s final safety investigation report into the downing of PS752*, <https://www.bst-tsb.gc.ca/eng/medias-media/discours-speeches/2021/03/a20f0002-20210318.html>, latest communication of 6 October 2023.

89. Similarly, facts concerning the manipulation and falsification of evidence during the DSB technical investigation are detailed in the conclusion of the representative of JSC Almaz-Antey Aerospace Defence Concern.⁵⁶

The Applicants did not submit sufficient counter-arguments to the evidence provided by the Russian Federation in its Memorial with respect to the incompleteness of the investigation and the unsubstantiated nature of its conclusions.

90. Avoiding a detailed discussion of the investigation methods presented by the Russian Party, the Applicants refer to the capability and expertise of the experts from the DSB and the Netherlands Forensic Institute.⁵⁷ However, the Applicants also have no reason to doubt the expertise of the experts from the Central Research Institute of the Air Force at the Ministry of Defence of the Russian Federation⁵⁸ and the Almaz-Antey Concern.⁵⁹ It should be kept in mind that only the Almaz-Antey Concern, as the manufacturer of the Buk SAM missiles, has exhaustive information about these missiles.

91. In paragraph 2.31 of their Reply, the Applicants stated that they did not rely on the evidence concerning the missile fragments to support their argument because the origin of these fragments could not be confirmed. In so doing, Australia and the Netherlands are abandoning their own references to missile debris found at the crash site as part of the evidence.

92. In August 2015, international audiences were presented with the idea that missile debris was an argument in support of flight MH17 having been destroyed by a Buk SAM; the Russian Federation responded immediately concerning the need to study this material evidence.⁶⁰

93. Since the Applicants were not able to confirm the origin of the missile fragments, it means that either the missile fragments were left unsecured at the crash site due to attempts to falsify material evidence and lead the investigation to false conclusions, or the missile fragments belong to a missile transferred in 1986 to a military unit of the Ukrainian SSR, and its appearance in the vicinity of the crash necessitates a new investigation.

94. The Applicants' assertion in paragraph 2.32 of their Reply that the Russian Federation did not submit evidence relating to the possibility to detect the Buk SAM missile launch has no basis in reality. The Counter-Memorial of the Russian Federation devotes an entire sub-

⁵⁶ Conclusion of the representative of the Almaz-Antey Aerospace Defence Concern JSC on the facts concerning the manipulation and falsification of documentation during the Dutch Safety Board technical investigation [Annex 39]

⁵⁷ Applicants' Reply. Paras 2.27, 2.28 [Annex 3]

⁵⁸ Counter-Memorial of the Russian Federation, para. 58. [Annex 1]

⁵⁹ *Ibid.*, paragraph 163.

⁶⁰ Preliminary Objection of the Russian Federation, Section 2.2 (2) (pp. 12-13), Section 2.5 (pp. 15-17). [Annex 5] Counter-Memorial of the Russian Federation, paras. 37-48. [Annex 1]

section to this issue (paragraphs 140-148), demonstrating a probability of over 99% that at least one trace of the Buk SAM missile's flight would be recorded. This fact was confirmed by a flight test. A detailed report of the flight test is provided in Annex 95 of the Counter-Memorial of the Russian Federation.

95. Paragraph 145 of the Counter-Memorial of the Russian Federation states that the objective of the flight test was to evaluate the spatial characteristics of the Utyos-T primary surveillance radar and its ability to detect flying objects having flight and reflective characteristics similar to those of the 9M38 missile series. The results of the tests conducted by the Russian Federation were recorded using primary en route radar recording files, recordings from parameter recorders, GPS sensors, audio, photo and video equipment installed on en route radars, controlled flying objects, and other objects.

96. Paragraphs 2.33-2.34 of the Applicants' Reply make reference to the recovery of "370 metal fragments that were not part of the aircraft" from the wreckage and from the remains of the deceased, including a "bow-tie shape fragment found in the body of a crew member that had melted cockpit glass fused to it" (this object being separate and distinct from any objects referred to by the Russian Federation in its Counter-Memorial)".

97. At the same time, the Applicants' Reply cites a judgment of the District Court of The Hague (paragraphs 2.36-2.42), but they fail to support these citations with the submission of any evidence in the form of investigation findings that would disprove the Russian Federation's conclusions. The judgment of the District Court of The Hague does not contain a description of the source data, a single photograph, the results of measurements and tests of the chemical composition of the fragments, or any references to the USSR State standards for steel production.

98. The cited findings of the Court obviously contain technically ignorant inferences. For example, when speaking about the destructive element penetrating the aircraft structure, the District Court of The Hague draws the conclusion that the "fuselage of the aircraft was the only barrier between the warhead and the crew member's body; consequently, there were not multiple similar barriers that the destructive element could have struck." (paragraph 2.37 of the Applicants' Reply). The aircraft fuselage is a complex framework comprised of the fuselage skin, frames (with flange and wall elements), and stringers. Cables extend from the inner side (in the sealed portion) with nodes for fastening them, cockpit equipment is installed (if reference is being made to the front part), as are other structural elements that are natural and significant obstacles for the destructive element. It is absurd to assume, as the above quotation does, that the destructive element encountered only one barrier along its way, namely the outer skin of the fuselage, before hitting the body.

99. In contrast, paragraph 2.39 of the Reply of Australia and the Netherlands actually confirms the Russian Federation's argument that when there is a significant loss of mass, the destructive element cannot maintain its bow-tie shape: "some bow-tie-shaped destructive elements exhibited a significant decrease in weight after detonation (weight before detonation was 8.1 grams and after detonation between 2.5 and 8 grams) Consequently, the results of these tests show that it is quite possible that the destructive element with SIN number AAHJ9117NL weighing 5.72 grams was originally a bow-tie-shaped destructive element. Again, this quotation from the judgment of the District Court of The Hague lacks accompanying photographs, mass-measurement protocols and other evidence. Therefore, it is still understandable that a bow-tie-shaped destructive element with a loss of mass of at least 24-29% and a plastic deformation of 50-60% was found.⁶¹

100. In paragraph 2.44 of their Reply the Applicants state that "...because having regard to the totality of the evidence there is no plausible alternative scenario for the downing of Flight MH17....the weight of evidence in support of the conclusion that Flight MH17 was downed by a...warhead...renders any remaining uncertainty as to the exact point of detonation irrelevant." Thus, Australia and the Netherlands simply refuse to dispute the Russian Federation's arguments about the DSB experts' error in determining the missile's point of detonation because of its alleged irrelevance to the investigation findings.

101. By refusing to discuss the issue surrounding the determination of the point of detonation, the Applicants are misleading the Council, since the task of determining the point of detonation did not first arise during the JIT investigation and the ensuing legal proceedings. This issue began to be discussed long before the conclusion of the DSB investigation, when the case did not yet involve missile debris, traces of explosives on the aircraft wreckage which could not have been in the missile, allegedly intercepted telephone conversations, or anonymous witness testimony. The determination of the point of detonation is not an end in itself. Instead, it is a key objective of any explosives analysis. Section II, paragraph 2.1.2 of the Counter-Memorial of the Russian Federation provides a detailed and substantiated description of the purpose of determining the point of detonation of the missile, which is essential to determining the mass of the warhead, and therefore the type of missile. This objective was not met during the MH17 crash investigation.

102. Here is a chronology of the discussion of this issue:

- a) At the first meeting of authorised representatives in February 2015, the DSB presented preliminary findings on the determination of the point of detonation, which was located at a distance of 4.0-4.5 m from the left cockpit window.
- b) At the second meeting of authorised representatives in May 2015, the Central

⁶¹ Counter-Memorial of the Russian Federation, paras. 83-92. [Annex 1]

Research Institute of the Air Force presented the results of the calculation of the point of detonation, according to which the point was located at a distance of approximately 1.2 m from the aircraft window.⁶²

- c) In June 2015, the draft DSB final report indicated, with reference to the calculations of the Netherlands Aerospace Centre (NLR) and the Netherlands Organisation for Applied Scientific Research (TNO), that the point of detonation was located at a distance of around 4.63 m (NLR) or 4.20 m (TNO) from the window.
- d) At the third meeting of authorised representatives in August 2015, the Central Research Institute of the Air Force disclosed the methodology and presented revised calculations of the detonation point (0.8 – 1.6 m) from the window.⁶³ At the same meeting, the calculations of Almaz-Antey were presented.⁶⁴
- e) In October 2015 in the published final DSB report, the results of the calculations changed and the point of detonation moved closer to the aircraft, to a distance of 3.75 m (NLR) or 3.24 m (TNO).⁶⁵
- f) In September 2018, the findings of an investigation by the Belgian Royal Military Academy (RMA) determined that the point of detonation was located at a distance of 1.6 m from the aircraft window.⁶⁶

Thus, already before publication of the final report, the DSB had information about significant discrepancies in the determination of the point of detonation, and the RMA investigation, which was conducted independently of the DSB, the Central Research Institute of the Air Force and the Almaz-Antey Concern, confirmed that the conclusions of the Russian experts were correct.

103. An additional *in situ* experiment conducted in November 2020 by the Central Research Institute of the Air Force confirmed that the earlier calculations had been correct. The experiment demonstrated that the point of detonation of the missile was located at a distance of approximately one metre from the left cockpit window.⁶⁷ Consequently, the experiments by the NLR and TNO involved serious errors in the determination of the position of the point of detonation. Its actual position was 2-3 times closer to the aircraft than indicated in the DSB report.

⁶² **Annex 90 of the Counter-Memorial of the Russian Federation**

⁶³ **Annex 93 of the Counter-Memorial of the Russian Federation.**

⁶⁴ **Annex 96 of the Counter-Memorial of the Russian Federation.**

⁶⁵ Dutch Safety Board, Final report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, p. 142 [**Annex 85 of the Counter-Memorial of the Russian Federation**]

⁶⁶ Conclusion of the representative of the Almaz-Antey Aerospace Defence Concern JSC on the facts concerning manipulation and falsification of evidence during the Dutch Safety Board technical investigation, Appendix 5, p. 675 [**Annex 39**]

⁶⁷ Counter-Memorial of the Russian Federation, para. 70 [**Annex 1**]

This fact calls into question all subsequent DSB investigation findings with respect to determining the circumstances surrounding the destruction of the aircraft, the type of warhead, the location of the missile launch, etc.

104. Paragraph 2.50 of the Applicants' Reply does not accept the results of the *in situ* experiments "because of the fundamental differences between the circumstances in which the tests were conducted and the circumstances in which Flight MH17 was downed." This assertion is erroneous because the results of *in situ* experiments and laboratory research are traditionally used in calculations, modelling, and the development of missile technology. Appropriate corrections are introduced to transform the static picture (destructive element spray, nature of damage, etc.) obtained from the results of static experiments into dynamic models typical of specific atmospheric conditions, taking into account the position and velocity of the missile and the target (the aircraft).

105. Information to this effect was provided in paragraphs 111-126 of the Counter-Memorial of the Russian Federation. Australia and the Netherlands restricted their references to the conclusions of the District Court of The Hague and the expert opinions,⁶⁸ but they were not able to provide any evidence whatsoever that the scientific and methodological system of the Almaz-Antey Concern, the developer of the Buk SAM, cannot be used to create or verify the characteristics of both the missile as a whole and of its component parts.

106. With respect to the traces of explosives found in the aircraft wreckage which could not have been in the missile, paragraph 2.53 of the Applicants' Reply indicates that although "...no direct relationship can be established between that substance and the explosion that struck the aircraft, there are many reasons why it may have been present." Thus, again the Applicants, having failed to clearly and unambiguously establish the origin of another piece of evidence, explain this by its alleged insignificance to the outcome of the investigation.

107. The MH17 tragedy claimed a large number of lives, and so any evidence uncovered during the investigation should be duly investigated. The reason for the appearance of traces of extraneous explosives on the aircraft wreckage requires a clear, rational explanation rather than abstract assumptions about "for example, through explosions of military material on the ground before or after the crash".⁶⁹ With such an attitude toward physical evidence, any damage to the aircraft's structure that does not align with the Applicants' logic could be attributed to damage sustained as a result of combat operations on the ground.

108. The Applicants assert that the Russian Federation and Almaz-Antey were quite actively involved in the technical investigation,⁷⁰ while making no mention of their efforts to

⁶⁸ Applicants' Reply, para. 2.48 [Annex 3]

⁶⁹ Applicants' Reply, para. 2.54 [Annex 3]

⁷⁰ Applicants' Reply, Section IX. p. 31 [Annex 3]

isolate and exclude Russia from full participation in the search for the truth. As noted in the Preliminary Objections of the Russian Federation to the Applicants' Memorial,⁷¹ the Russian Federation had an extremely limited opportunity to familiarize itself with certain exhibits in the course of the investigation. Its representatives were not permitted to participate in the inspections, investigations and experiments to identify the type of missile and the circumstances under which it was used, as should have been done in accordance with ICAO Standards.

109. Standard 5.25 of Annex 13 to the Chicago Convention sets out the conditions for professional relationships among partners in the investigation of aviation accidents. Compliance with these principles in the investigation of the MH17 would have eliminated reasonable doubts concerning the impartiality and completeness of the DSB investigation.

110. The Applicants indicate in their Reply that "the Russian Federation alleges that the 9M38-series missile that downed Flight MH17 was an older series missile that had been sent to a military unit in the former Ukrainian Soviet Socialist Republic in 1986 and which had never been in service with the Russian Army. It does this by reference to serial numbers allegedly found on missile fragments at the crash site, being serial numbers and fragments for which it provides no evidence."⁷²

111. The Netherlands Public Prosecution Service provided Russia with the numbers on the fragments of the missile (from its engines and nozzles) in the request for legal assistance No. KLR-U-2018015927 dated 3 May 2018 and filed on behalf of the JIT.⁷³

112. The request claimed, in particular, "During the work to collect the wreckage from the crash of flight MH17 in Eastern Ukraine, in addition to fragments of the downed aircraft itself, missile fragments were also found."⁷⁴ Thus it is the JIT that claims that precisely those serial numbers researched by Russia were found on the missile fragments found at the crash site. The results of the search for the origin of the missile fragment numbers referred to in pp. 149-161 of the Counter-Memorial of the Russian Federation were obtained as evidence and submitted to the Netherlands Public Prosecution Service in response to the aforementioned request.⁷⁵

113. Thus, in paragraph 2.60 of their Reply, Australia and the Netherlands themselves call into question the results of the JIT investigation. In particular, they question whether the missile fragments having the referenced serial numbers were, in fact, found at the MH17 crash site rather than somewhere else.

⁷¹ Preliminary Objections of the Russian Federation, Section 2.2. [Annex 5]

⁷² Applicants' Reply, para. 2.60 [Annex 3]

⁷³ JIT request for legal assistance dated 3 May 2018 [Annex 40]

⁷⁴ *Ibid.*, p.1

⁷⁵ Response to the JIT request for legal assistance dated 3 May 2018 [Annex 41]

The incompetence of the JIT comparative study of fragments from the 9M38 and 9M38M1-series missiles and the erroneous conclusion that the fragments bear a greater resemblance to the 9M38M1-series missile

114. Despite the fact that the Applicants indicated in paragraph 2.31 of their Reply that they were not relying on the missile fragments as evidence in support of their argument because the origin of the fragments allegedly could not be confirmed, in paragraph 2.61 of their Reply they again made an unsuccessful attempt to somehow justify the appearance of the missile fragments in the case by means of the findings of comparative studies of three fragments: “the cast of a metal shard of part of an antenna”, “a metal connector”, and “an electronic transit main”.

115. These comparative studies were conducted without the involvement of the missile designer or manufacturer. This has resulted in incompetent conclusions similar to those concerning the missile marking, which was discussed in detail in paragraphs 157, 158 and 159 of the Counter-Memorial of the Russian Federation.

116. The JIT comparative studies made use of the 9M38 and 9M38M1-series missiles provided by Ukraine, as follows:

- “white 9M38, No. 9M38 885637845, manufactured in 1985;
- “green 9M38M1, No. 9M38M1 887221023, manufactured in 1987.

The conclusion that the missile fragments found bear greater resemblance to the 9M38M1-series missile was made on the basis of the paint colour on the outer surface of the fragments, the presence of screw holes, and the rectangular plate’s lack of magnetic properties.⁷⁶

117. The paint colour is not a “marker” of any particular missile modification. It depends on the date of manufacture and also on the place of its intended use (by ground troops, navy, in a hot climate, for export). The white 9M38-series missile model transferred by Ukraine has tail number 9M38885637845, which corresponds to factory serial number 8856743: the 43rd missile of the 67th batch, produced in the 3rd quarter of 1985. By virtue of Notice 9M38.7373 to the Technical Requirements 9M38.0000.000D3, the white enamel was replaced with dark green enamel in the missile assembly process cycle starting on 8 October 1985. For 9M38-series articles, this change applies starting from factory serial number 8868701. The missile debris found at the crash site belongs to a missile with factory serial number 8868720 (the 20th missile of the 87th batch, produced in the 3rd quarter of 1986). Thus, the 9M38-series missile with factory serial number 8868720 had dark green enamel applied at the manufacturing plant.

⁷⁶ Text submitted by the Public Prosecutor at the court hearing on 8 June 2020 – Presentation of expert reports, p.32 [Annex 16 of the Memorial of Australia and the Netherlands]

118. The screw hole is the grounding point for the Sh4 connector. By virtue of Notice 9M38. 7420 to the Technical Requirements 9M38.0000.000D3 in the missile assembly process cycle, a plating location (grounding enhancement) was introduced as of 20 June 1986 for 9M38-series missiles with factory serial number 8868601, and for 9M38M1-series missiles with factory number 8851301. The 9M38-series missile No. 9M38885637845 provided by Ukraine has factory serial number 8856743 and belongs to the 67th batch (manufactured before factory serial number 8868601) and, in accordance with Notice 9M38. 7420, no modification to it was made. The 9M38M1-series missile No. 9M38M1 887221023 provided by Ukraine has factory serial number 8872102 and belongs to the 21st batch (produced after factory serial No. 8851301, and in accordance with Notice 9M38. 7420, a modification has been made on it. The 9M38-series missile debris found at the crash site belongs to the 87th batch (manufactured after factory serial No. 8868601 and, in accordance with Notice 9M38. 7420, a modification has been made on it.

119. The “rectangular plate” is an item 9M38.7000.054 included in the harness.⁷⁷ By virtue of Notice 9M38. 6857 to Technical Requirements 9M38.0000.000D3, in the assembly process cycle for 9M38 and 9M38M1-series missiles, in order to increase the rigidity of the plates as of 10 January 1985, the material of plate 9M38.7000.054 was changed from GOST 21631-76 alloy AMG67BML 0.5 to GOST 2284-79 strip 20-0.5. Alloy AMG67BML 0.5 (GOST 21631-76) does not have magnetic properties. Strip 20-0.5 (GOST 2284-79) has magnetic properties. Plates manufactured from strip 20-0.5 were used to make the harnesses of 9M38-series missiles with factory serial number 8857001 and of 9M38M1-series missiles with factory serial number 8851126. The 9M38-series missile No. 9M38885637845 has factory serial number 8856743: it belongs to the 67th batch (produced before factory serial No. 8857001) and was completed with harnesses made of plates produced from AMG67BML 0.5 material, which does not have magnetic properties. The 9M38M1-series missile No. 9M38M1 887221023 has factory serial number 8872102, belongs to the 21st batch (produced after factory serial No. 8851126) and was completed with harnesses produced from plates made of strip 20-0.5 (GOST 2284-79), which has magnetic properties. The missile fragments presented during the investigation belong to an 9M38-series missile with factory serial number 8868720: it belongs to the 87th batch (produced after factory serial number 8857001) and completed with harnesses produced from plates made of strip 20-0.5 (GOST 2284-79), which has magnetic properties.

120. Thus, only the technical documentation (technical passport and missile assembly documentation) of the factory technical and serial numbers allows for accurate identification of the series and number of the missile (or its modification). Such documentation was submitted by

⁷⁷ The plate is identical for two modifications of the missile, 9M38 and 9M38M1. It is this plate that the court materials refer to as the “rectangular plate”.

the Office of the Procurator General of the Russian Federation to the JIT in response to their request for legal assistance dated 3 May 2018.⁷⁸ The documentation demonstrates that the missile, fragments of which were found by the JIT at the MH17 crash site, belonged to the Armed Forces of Ukraine.

Subsection II.4. The materials submitted by the Applicants to the ICAO Council do not support, and in some respects refute, the claim that the flight MH17 aircraft was struck by a 9H314M warhead of a 9M38-series missile of a Buk surface-to-air missile system.

121. The Russian Federation has conducted a factual analysis of the Application and Memorial of Australia and the Netherlands entitled “*The Downing of Flight MH17 in Contravention of Article 3 bis of the Convention on International Civil Aviation*” and the Annexes thereto with regard to the allegations concerning the means of destruction.⁷⁹

122. The report found that all of the evidence claiming that the aircraft was hit by an 9N314M warhead of a 9M38-series missile of a Buk surface-to-air missile system amounts purely to speculation and presumptions.⁸⁰

123. The claimed evidence, which is purely speculation, i.e. completely inconsistent with the facts, is based upon the following:

- a recorded sound peak,⁸¹ on the basis of which it is impossible in principle to determine the type of destruction means and its specific modification;
- the location, shape and type of damage on the wreckage of the aircraft,^{82,83} due to the fact that the investigation did not determine the shape of the damage or the extent of over 78% of the damage, without which it is not be possible to assess the characteristics of the type of destruction means or its specific modification;

⁷⁸ Response to the JIT’s request for legal assistance dated 3 May 2018 [Annex 41]

⁷⁹ Report on the research conducted by the Central Research Institute of the Air Force at the Ministry of Defence of the Russian Federation dated 23 August 2023 [Annex 42]

⁸⁰ *Ibid.* p.138

⁸¹ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, p. 256 [Annex 85 of the Counter-Memorial of the Russian Federation]

⁸² Applicants’ Memorial, paras. 2.25 and 2.27 [Annex 4]

⁸³ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, pp. 120, 128, and 254-256 [Annex 85 of the Counter-Memorial of the Russian Federation]

- the location, shape and type of damage to the bodies of three crew members,^{84,85} due to the fact that during the investigation, the type of destruction means and its specific modification were not identified based on these indicators;
- explosive residues found on the wreckage of the aircraft,^{86,87,88} due to the fact that it is impossible to identify the type of destruction means and its specific modification without determining the quantity of RDX and TNT, and since the presence of traces of explosives that clearly do not belong to the TG-24 used in the 9N314N warhead invalidates the evidence put forward.

124. All of the evidence based on the information below amounts to mere presumptions. These presumptions are based on the following:

- The analysis of the destruction of the aircraft,^{89,90} presumptive given that no causal link was identified between the nature of the destruction and the 9H314M warhead;
- A large number of small, high-energy fragments,^{91,92,93} presumptive due to the fact that the investigation did not demonstrate that the fragments belonged to the destructive elements of the 9H314M warhead in terms of mass and size, the correspondence in terms of shape is presumptive, and the elemental composition of the fragment material presented refutes the evidence presented;
- The individual foreign objects found at the Gilze-Rijen base,^{94,95,96} presumptive due to the fact that the investigation did not establish any causal link to the destruction of the aircraft;

⁸⁴ Applicants' Memorial, para. 2.25 [Annex 4]

⁸⁵ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, p. 256 [Annex 85 of the Counter-Memorial of the Russian Federation]

⁸⁶ Applicants' Memorial, paras. 2.25 and 2.27 [Annex 4]

⁸⁷ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, pp. 93, 95, and 254-256 [Annex 85 of the Counter-Memorial of the Russian Federation]

⁸⁸ Text read out by the Public Prosecutor of the Netherlands Public Prosecution Service at the court hearing on 8 June 2020, p. 20 [Annex 16 of the Applicants' Memorial]

⁸⁹ Applicants' Memorial, para. 2.25 [Annex 4]

⁹⁰ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, p. 256 [Annex 85 of the Counter-Memorial of the Russian Federation]

⁹¹ Applicants' Memorial, para. 2.26 [Annex 4]

⁹² Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, pp. 132, 135, and 254-256 [Annex 85 of the Counter-Memorial of the Russian Federation]

⁹³ Text read out by the Public Prosecutor of the Netherlands Public Prosecution Service at the court hearing on 8 June 2020, pp. 21 and 25 [Annex 16 of the Applicants' Memorial]

⁹⁴ Applicants' Memorial, para. 2.26 [Annex 4]

⁹⁵ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, pp. 254-256 [Annex 85 of the Counter-Memorial of the Russian Federation]

⁹⁶ Text read out by the Public Prosecutor of the Netherlands Public Prosecution Service at the court hearing on 8 June 2020, p. 29 [Annex 16 of the Applicants' Memorial]

- The identical paint on the foreign objects recovered from the aircraft wreckage and the objects found at the Gilze-Rijen base,^{97,98} presumptive given that it is not possible to definitively determine that objects belong to a specific type modification of the destructive means solely on the basis of the standard composition and the method used to apply the paint coating.

125. The stated allegation that the aircraft broke up in flight as a result of the use of a large surface-to-air missile system⁹⁹ is conjecture given the absence of conclusions to this effect in the investigation materials presented.¹⁰⁰

126. The Applicants' conclusion that the Boeing aircraft operating flight MH17 was destroyed by a 9H314M warhead is based on two small pieces of metal remotely resembling, in plan view, fragments of an I-beam and a cube.¹⁰¹ This, while the warhead has over 1800 destructive elements of each of the alleged types.¹⁰² In turn, Australia and the Netherlands did not present any evidence to the ICAO Council demonstrating that all of the small metal fragments recovered (72 pieces) were destructive elements from a 9H314M warhead.

127. In their submissions to the ICAO Council, the Applicants failed to explain the following facts:

- The fragment material does not correspond to the material of the destructive elements of a 9H314M warhead;^{103,104}
- The recovered fragments are significantly smaller in size and mass than those obtained after various tests of the 9H314M warhead;¹⁰⁵
- The mass of one recovered fragment is, at a minimum, almost twice the mass of the heaviest destructive element of the 9H314M warhead;¹⁰⁶

⁹⁷ Applicants' Memorial, para. 2.27 [Annex 4]

⁹⁸ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, pp. 93, 94, and 254-256 [Annex 85 of the Counter-Memorial of the Russian Federation]

⁹⁹ Applicants' Memorial, para. 2.24 [Annex 4]

¹⁰⁰ Report on the research conducted by the Central Research Institute of the Air Force at the Ministry of Defence of the Russian Federation dated 23 August 2023, p. 26 [Annex 42]

¹⁰¹ Applicants' Memorial, para. 2.26 [Annex 4]

¹⁰² Letter from the Director General of Almaz-Antey Aerospace Defence Concern JSC to the Chairman of the DSB, July 2015, p. 4 [Annex 97 of the Counter-Memorial of the Russian Federation]

¹⁰³ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, p. 93 [Annex 85 of the Counter-Memorial of the Russian Federation]

¹⁰⁴ Report on the research conducted by the Central Research Institute of the Air Force at the Ministry of Defence of the Russian Federation dated 23 August 2023, p. 96 [Annex 42]

¹⁰⁵ Report on the *in situ* experiment. Almaz-Antey Aerospace Defence Concern JSC, Moscow – 2016, p.182 [Annex 94 of the Counter-Memorial of the Russian Federation]

¹⁰⁶ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, p. 92 [Annex 85 of the Counter-Memorial of the Russian Federation]

- The fragment material with the characteristic “cube” shape differs from the material of the other recovered fragments.¹⁰⁷

128. The investigation could not even approximate the original dimensions of the high-velocity objects, the fragments of which the Applicants believe to be fragments of “I-beam” type destructive elements.^{108,109}

129. The aircraft wreckage did not contain the characteristic bow-tie-shaped holes left by I-beam-type destructive elements of an 9H314M warhead.¹¹⁰ At the same time, Australia and the Netherlands gave the completely absurd explanations that this was influenced by “*conditions in a dynamic situation at an altitude of ten kilometres (temperature, cabin pressure, and above all velocity vectors)*”.¹¹¹

130. The aircraft wreckage contains many (more than one hundred) holes formed by destructive elements whose “velocity vectors” are close to the normal to the affected surface, but there is not a single bow-tie-shaped hole. The Applicants have not adequately explained this fact, since the results of the test of the 9H314M warhead, including the missile launches at aerial targets, show the mandatory presence of bow-tie-shaped holes.¹¹²

Subsection II.5: The JIT investigation is not complete, thorough, independent and international.

Participation in the activities of the JIT by representatives of Ukraine, a State with an interest in specific results of the investigation.

131. As noted above, Ukraine cannot be considered an independent participant in the investigation, since its President publicly laid the blame for the crash on Russia and the Donetsk militia the day after the crash, without waiting for any results of the investigation.¹¹³ No Ukrainian citizens were victims of the crash; the aircraft did not belong to a Ukrainian airline; and Ukraine was not the manufacturer of the aircraft that crashed. As affirmed by the Applicants themselves, Ukraine had no control over the area where the crash occurred.¹¹⁴ Nevertheless, representatives of

¹⁰⁷ *Ibid.*

¹⁰⁸ Dutch Safety Board, Final Report on the Findings of the Investigation, *Crash of Malaysia Airlines Flight MH17, Grabovo, Ukraine, 17 July 2014* (English version), 2015, p. 93 [**Annex 85 of the Counter-Memorial of the Russian Federation**]

¹⁰⁹ Report on the research conducted by the Central Research Institute of the Air Force at the Ministry of Defence of the Russian Federation dated 23 August 2023, p. 91 [**Annex 42**]

¹¹⁰ Report on the *in situ* experiment. Almaz-Antey Aerospace Defence Concern JSC, Moscow – 2016, p.46 [**Annex 94 of the Counter-Memorial of the Russian Federation**]

¹¹¹ Applicants’ Reply, para. 2.48 [**Annex 3**]

¹¹² Conclusion of the representative of the Almaz-Antey Aerospace Defence Concern JSC on the facts concerning the manipulation and falsification of evidence during the Dutch Safety Board technical investigation [**Annex 39**]

¹¹³ URL: http://youtube.com/watch?v=yR_hzmAcUBg#t=120

¹¹⁴ Applicants’ Reply, para. 2.17 [**Annex 3**]

Ukraine were members of the JIT from the very outset and were able to influence the outcome of the investigation, whereas representatives of Malaysia, the State whose airline owned the crashed airliner and whose nationals died in the crash, were only allowed to participate in the JIT three months later, in November 2014.

132. Ukraine, as a participant in the investigation, did not provide the JIT with primary data from its radar, although, at the time of its crash, flight MH17 was within the area of responsibility of Ukrainian air traffic controllers.¹¹⁵ In this regard, Netherlands prosecutor Theis Berger told the District Court of The Hague: “...Ukraine has told the Dutch Safety Board that no primary radar data was registered, as the radar was not operating at that moment”.¹¹⁶ This explanation may indicate that Ukraine is concealing evidence that does not fit its version of what happened.

133. Clearly, all the evidence presented by Ukraine was intended to support only the one version of events put forward by the President of Ukraine. All the recordings of telephone conversations, which form the main basis for the conclusions about Russia’s involvement in the plane crash, were provided to the JIT by the Security Service of Ukraine. The members of the JIT themselves were not involved in obtaining this evidence.¹¹⁷

134. Thus, in view of the participation of representatives of Ukraine in the JIT, the investigation cannot be considered independent.

Russia was refused permission to include its representatives in the JIT and its suggestion that the materials of the criminal case against Russian citizens or copies thereof should be transferred for further investigation on the territory of Russia was rejected

135. Despite the participation of biased representatives of Ukraine in the JIT, Russia, in full compliance with its obligations under UN Security Council resolution 2166 (2014), actively cooperated with the Netherlands Public Prosecution Service as the representative of the JIT in the investigation of the crash of flight MH17 and complied with its requests for legal assistance. Requests by the Netherlands Public Prosecution Service to familiarize itself with the transferred materials of other JIT participants have invariably been satisfied by Russia.¹¹⁸

136. In April 2015, members of the JIT – representatives of the Netherlands Public Prosecution Service and the Netherlands police – visited Moscow, where, in fulfilment of the request for legal assistance, materials were handed over to them. At the same time, representatives of the Russian Office of the Procurator General proposed that representatives of Russian law

¹¹⁵ Applicants’ Memorial, paras. 2.13–2.16 [Annex 4]

¹¹⁶ URL: <http://ria.ru/20200609/1572672174.html>

¹¹⁷ Annex 9 to the Applicants’ Memorial.

¹¹⁸ Letter from the Office of the Procurator General of the Russian Federation to the Head of the JIT F. Westerbeke dated 25 May 2015. Correspondence on the question of Russia’s admission to the JIT, pp. 1–2 [Annex 43]

enforcement agencies (investigators and operatives) with experience in investigating major air crashes be included in the JIT. The proposal was justified by the need for familiarity with all the investigation materials, and for these materials to be analysed and supplemented in order to establish the truth, objectivity and impartiality of the investigation and to complete it as swiftly as possible.

137. This request was subsequently submitted in writing twice – on 25 May 2015¹¹⁹ and 25 June 2015.¹²⁰ Only at the end of 2015, however, was a reply received, dated 9 September 2015, in which the head of the JIT, F. Westerbeke, officially declined the request for the inclusion of Russian representatives in the JIT on the grounds that such a step would allegedly “lead to even greater complication of joint work”.¹²¹

138. On 10 October 2019, after Russian citizens I.V. Girkin, S.N. Dubinsky and O.Y. Pulatov had been accused in absentia of involvement in intentional and unlawful actions leading to the crash of flight MH17, the Office of the Procurator General of the Russian Federation approached the Minister of Justice and Security of the Netherlands on the basis of paragraph 11 of UN Security Council resolution 2166 (2014) and the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972 with a request for the materials of the criminal case against the aforementioned persons or copies thereof to be transferred for the organization of the case’s further investigation by the investigative authorities of Russia in accordance with the law of the Russian Federation.¹²² The request was motivated by the interests of due process and the need to establish the truth in a criminal case, and also by the principle of “*aut dedere aut judicare*”. In a response dated 10 December 2019, the Netherlands Ministry of Justice and Security, citing the opinion of the JIT, declined such transfer.¹²³

139. On 8 February 2023, the JIT and the Netherlands Public Prosecution Service announced that the JIT investigation had progressed as far as possible without the cooperation of the Russian Federation.¹²⁴ Thus, the JIT’s position is clearly inconsistent and hypocritical, in that the JIT itself refused to include Russian representatives in its membership and to hand over to Russia the criminal case file against its nationals.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, pp. 5–6

¹²¹ *Ibid.*, pp. 7–10

¹²² Letter from the Office of the Procurator General of the Russian Federation to F. Grapperhaus, Minister of Justice and Security of the Netherlands, dated 10 October 2019. Correspondence on the transfer to Russia of the materials of the JIT investigation of its nationals, pp. 1–4 [Annex 44]

¹²³ Response of the Ministry of Justice and Security of the Netherlands to the letter of the Office of the Procurator General of the Russian Federation dated 10 December 2019. Correspondence on the transfer to Russia of materials from the JIT investigation of its nationals, pp. 5–11 [Annex 44]

¹²⁴ Applicants’ Reply, para. 4.43 [Annex 3]

140. It is evident that the refusal to allow Russia to include its representatives in the JIT, at the same time as allowing the participation of representatives of Ukraine in its work, and the rejection of Russia's proposal to transfer the materials of the criminal case against its citizens for investigation clearly demonstrate the bias of the JIT against Russia. As a consequence, the JIT's investigation itself cannot be deemed independent and international in the full sense. Thus, the allegation that Russia failed to provide evidence to counter the factual findings of the JIT, as asserted by the Applicants in paragraph 4.25 of their Reply, is explained by the fact that Russian representatives were not allowed to participate in the activities of the JIT.

The JIT ignored important evidence presented by Russia and refused to make any further investigation of facts that did not mesh with a particular version of the crash. The only defendant who was afforded a defence was fully acquitted by the court.

141. Despite the above-mentioned refusals by the JIT to cooperate, Russia complied with the requests for legal assistance from the Netherlands Public Prosecution Service in the MH17 case and transmitted responses that included an impressive amount of important data. In preparing these responses, the Russian State authorities carried out a tremendous amount of work, ranging from declassifying data on Russian military equipment and conducting a complex and costly full-scale missile detonation simulation to transmitting primary radar data and technical documentation on the missile, fragments of which were found when the wreckage of the aircraft was recovered.

142. Crucial evidence submitted by Russia was ignored by the JIT, however. For example, the JIT ignored the fact that the primary radar data did not register any missile launch from the area which the JIT considers to be the launch site. Data on the manufacture and dispatch to a military unit in Ukraine of the missile whose fragments were found near the wreckage of the aircraft were also disregarded. Rather than investigating these and other facts independently established by the JIT, the team preferred to focus on various explanations for why these facts did not tally with the main version (such as traces of foreign explosives on the aircraft wreckage), or to exclude them from the evidence base altogether (such as the missile fragments found at the crash site).

143. As described above, the JIT actively used testimonies of anonymous witnesses, the reliability of which cannot be assessed, and also used blatantly falsified materials taken from the media or from the Security Service of Ukraine.

144. The quality, thoroughness and completeness of the investigation conducted by the JIT is evidenced by the fact that the only defendant in the MH17 case who was afforded a defence

in court (O.Y. Pulatov) was fully acquitted on the grounds of his non-involvement in the offence.¹²⁵ And yet the Netherlands Public Prosecution Service, on the basis of the evidence collected by the JIT, asked the court to sentence Pulatov to life imprisonment.¹²⁶ After the acquittal, the Public Prosecution Service lodged no appeal against it, thereby acknowledging that it had sought to sentence an innocent person to life imprisonment. Boudewijn van Eyck, the defence lawyer of the acquitted person, stated that a full investigation had not been conducted.¹²⁷

145. In view of the above, the investigation conducted by the JIT cannot be recognized as complete, thorough, independent and fully international.

Subsection II.6. The Applicants’ references to the judgment of the District Court of The Hague of 17 November 2022 are inappropriate: an international organization cannot be guided by the decision of a national court and the Russian Federation was not involved in the trial, which did not comply with international standards of justice.

146. In their Reply, the Applicants attempt to replace the submission of arguments in support of their position with 15 quotations from the judgment of the District Court of The Hague of 17 November 2022, which they cite 23 times.¹²⁸ In doing so, the Applicants are attempting to foist upon the ICAO Council their view that the Council does not need independently to examine the merits of their claims, as the District Court of The Hague has allegedly already done that for the Council. Moreover, in paragraphs 2.15, 2.22, 2.42, 2.53 and 2.64 of their Reply, Australia and the Netherlands directly assert that the Council “should” reach the same conclusions as the District Court of The Hague. In paragraph 4.46 of the Reply, the Applicants indicate that the evidence supporting the findings of the District Court of The Hague is sufficient to establish the liability of the Russian Federation for a violation of Article 3 *bis* of the Chicago Convention.

147. This is tantamount to an irregular attempt by the Applicants to extend the jurisdiction of a national court to an international organization. The ICAO Council acts on the basis of the Chicago Convention and cannot be guided in its decision-making by the rulings of national courts, including the District Court of The Hague.

148. In paragraph 2.62 of their Reply, Australia and the Netherlands attempt to mislead the ICAO Council by claiming that “attempts by the Russian Federation to introduce alternative theories for the downing of Flight MH17 were considered and dismissed by the District Court of

¹²⁵ URL: <http://www.gazeta.ru/social/news/2022/11/17/19060849.shtml>

¹²⁶ URL: <http://www.pravo.ru/news/237827>

¹²⁷ URL: <http://www.gazeta.ru/social/news/2022/11/17/19062331.shtml>

¹²⁸ Applicants’ Reply, paras. 1.23, 2.2., 2.5, 2.6., 2.12, 2.13, 2.19, 2.28, 2.36, 2.37, 2.39, 2.40, 2.41, 2.42, 2.48, 2.53, 2.59, 2.62, 2.64, 4.23, 4.44, and 4.46 [Annex 3]

The Hague”. The Russian Federation did not participate in the trial and did not have any rights to present any evidence. The representative of the Almaz-Antey concern acted in court as an expert and was not a representative of the Russian Federation.

The three persons sentenced to life imprisonment did not participate in the trial and had no defence counsel, which is not in line with international standards of justice

149. Girkin, Dubinsky and Kharchenko were sentenced by the District Court of The Hague to life imprisonment, although none of them participated in the trial or in the investigation of the criminal case. Not one of them was assisted by defence counsel. Furthermore, Girkin and Dubinsky publicly declared their innocence prior to their sentencing.^{129,130} The deprivation of the defendants’ right to defence constitutes a substantial violation of international standards of administration of justice.

150. According to Article 11, paragraph 1, of the Universal Declaration of Human Rights (adopted by UN General Assembly resolution 217 A (III) of 10 December 1948), everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.¹³¹ In accordance with Article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights (adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966), everyone has the right, in the determination of any criminal charge against him, to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.¹³²

151. The Human Rights Committee, which considers individual communications concerning violations by States parties of the provisions of the International Covenant on Civil and Political Rights under the Optional Protocol thereto (hereinafter “the HRC”), has also concluded unequivocally in its practice that it is necessary in all circumstances to uphold the right of the accused to defend himself or herself, either in person or through a representative.

152. Thus, in paragraphs 7.4 and 7.5 of its Views of 28 March 2006 on communication No. 1123/2002 Correia de Matos v. Portugal, the HRC found that the interests of justice may, in a

¹²⁹ Interview by Dmitry Gordon with Igor Girkin, published on 18 May 2020. [Annex 29 to the Applicants’ Memorial]

¹³⁰ URL: <http://youtube.com/watch?v=KEeTXYNv-k>

¹³¹ URL: http://www.un.org/ru/documents/decl_conv/declarations/declhr.shtml

¹³² URL: https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf

specific case, require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in his own interests. The HRC indicates that it is the task of the competent courts to assess whether in a specific case the assignment of a lawyer is necessary in the interests of justice, inasmuch as a person facing criminal prosecution may not be in a position to make a proper assessment of the interests at stake.¹³³

153. The Netherlands is a party to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and is under the jurisdiction of the European Court of Human Rights (ECtHR). In accordance with Article 6, paragraph 3 (c), of the Convention, everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.¹³⁴

154. In paragraph 40 of its judgment of 22 September 1994 in application No. 16737/90 *Pelladoa v. the Netherlands*, the ECtHR stated that “in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial. [...] However, it is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal. [...] Consequently, the fact that the defendant, in spite of having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right under Article 6 para. 3 (art. 6-3) of the Convention to be defended by counsel.”¹³⁵

The trial was conducted under pressure from the Netherlands Government and the media, and the Public Prosecution Service contributed, in breach of the principle of due process, to shaping public opinion on the criminal case

155. Throughout the trial, the District Court of The Hague was under unprecedented pressure from Netherlands politicians, members of the Public Prosecution Service and the media, foisting upon it a politically motivated outcome. For example, Netherlands journalist Eric van de Beek stated that “...the Government of the Netherlands, the media and representatives of Netherlands relatives of the victims exerted huge pressure on the court to deliver a guilty verdict”.¹³⁶

156. A clear illustration that the Government of the Netherlands was in no doubt about the court delivering a guilty verdict may be seen in the aforementioned response of the Netherlands

¹³³ URL: <https://digitallibrary.un.org/record/583160?ln=en>

¹³⁴ URL: <http://www.coe.int/en/web/human-rights-convention/reference-texts>

¹³⁵ URL: [http://www.hudoc.echr.coe.int/eng#{“itemid”:\[001-57902\]](http://www.hudoc.echr.coe.int/eng#{“itemid”:[001-57902])

¹³⁶ URL: <http://www.tass.ru/proisshestviya/16221891>

Ministry of Justice and Security of 10 December 2019 to the letter from the Office of the Russian Procurator General in which it refused to transfer the criminal case file against the Russian citizens for further investigation. In the same letter, the official of the Netherlands Ministry of Justice suggests “that we would engage in an exploration of the possibilities to transfer the implementation of sentences concerning the downing of flight MH17”.¹³⁷ Thus, even before the trial began, the Netherlands Government was confident that the judgment in the criminal case would be exclusively a guilty verdict.

157. Statements by the Netherlands Public Prosecution Service and the JIT on the fate of flight MH17 and the release of the names of the suspects contributed to the formation of public opinion on the criminal case. The court itself recognized that the disclosure of the suspects’ personal details and the release of their photographs at press conferences was a potential infringement of their right to privacy and therefore a procedural violation.¹³⁸

158. Long before the judgment was handed down, the Public Prosecution Service posted an application on the Internet, in which it set out the evidence in the case file. This application, however, did not contain any reference to the extensive objections and position taken by Pulatov’s defence. Even the District Court of The Hague had to recognize this action by the Public Prosecution Service as a violation of due process.¹³⁹

159. Thus, the trial before the District Court of The Hague cannot be recognized as independent, impartial and in conformity with international standards of judicial proceedings.

Subsection II.7: The references by Australia and the Netherlands to the judgment of the European Court of Human Rights of 30 November 2022 are unsubstantiated and inappropriate

160. As in the case of the judgment of the District Court of The Hague, in their Reply the Applicants also attempt to replace the presentation of arguments in support of their position with extensive quotations from the ECtHR judgment of 30 November 2022 in the inter-State applications Nos. 8019/16, 43800/14 and 28525/20 “Ukraine and the Netherlands v. the Russian Federation” (hereinafter “the judgment”), which they cite 13 times.¹⁴⁰ By so doing, the Applicants are attempting to foist upon the ICAO Council their view that it should not independently examine the validity of their claims, as the ECtHR has allegedly already done that for the Council.

¹³⁷ Response of the Ministry of Justice and Security of the Netherlands to the letter of the Office of the Procurator General of the Russian Federation dated 10 December 2019. Correspondence on the transfer to Russia of the materials of the JIT investigation into its nationals, pp. 7, 11 [Annex 44]

¹³⁸ URL: <http://www.courtmh17.com/en/insights/news/2022/court-decision/> [Translator’s Note: The cited source is in Russian only. The English version is available here:

<https://www.courtmh17.com/en/insights/news/2022/transcript-of-the-mh17-judgment-hearing/>]

¹³⁹ *Ibid.*

¹⁴⁰ Applicants’ Reply, paras. 1.23, 2.2, 2.5, 2.7, 2.14, 2.20-2.22, 2.25, 2.27, 2.64, 4.37 and 4.40 [Annex 3]

Moreover, in paragraphs 2.15, 2.22 and 2.64 of the Reply, Australia and the Netherlands expressly state that the Council “should” reach the same conclusions as the ECtHR. The ICAO Council acts under the Chicago Convention and cannot be guided in its decision-making by the judgments of regional international courts, including the ECtHR. It will be further demonstrated that the Applicants’ reliance on the ECtHR judgment is unsubstantiated and inappropriate.

Australia and the Netherlands are overriding the legal force of the ECtHR’s decision on the application “Ukraine and the Netherlands v. the Russian Federation” and distorting the court’s findings

161. The Applicants are deliberately misleading the ICAO Council, as the ECtHR’s decision of 30 November 2022 is not final, deals only with the procedural aspect of the admissibility of the complaints and does not address the issue of the Russian Federation’s violation of international rules of law. The ECtHR itself limited its competence in the said decision and noted that it was concerned “only with the extent of the jurisdiction and responsibility of the Russian Federation” for the alleged commission of the violations listed in the complaint. “Only the question of whether the Russian Federation had jurisdiction in respect of these violations falls to be discussed.”¹⁴¹ Furthermore, the Court has consistently explained that issues of the responsibility of the respondent State ... for the acts complained of fall to be examined at the merits phase of the proceedings.¹⁴² 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.¹⁴³

162. The Applicants’ assertion that the facts established by the ECtHR in assessing fulfilment of the effective control criterion allegedly support their arguments set out in the application submitted to the ICAO Council¹⁴⁴ is untenable. The ECtHR’s decision on the admissibility of the complaint leads only to such legal consequences as the continued examination of the case on the merits and the State’s inability to continue maintaining the inadmissibility of the complaint. The ECtHR’s finding that a complaint is admissible does not prejudice the definitive nature of the resolution of the issues raised by the complaint. The final decision as to whether or

¹⁴¹ Paras. 395 and 552 of the Ukraine and Netherlands v. Russian Federation judgment of 30 November 2022.

¹⁴² Para. 550 of the decision “Ukraine and the Netherlands v. the Russian Federation” of 30 November 2022, and also para. 266 of the decision of the Grand Chamber of 16 December 2020 in applications Nos. 20958/14 and 38334/18, Ukraine v. Russian Federation (Crimea) (“The Court’s decision on this preliminary issue at this stage of the proceedings is without prejudice to the issues of attribution and responsibility of the respondent State under the Convention for the acts complained of, which fall to be examined at the merits phase of the proceedings (see *Loizidou* (preliminary objections), cited above, § 61; *Cyprus v. Turkey*, Commission decision of 28 June 1996, cited above; *Al-Skeini and Others*, cited above, § 102; and *Georgia v. Russia (II)*, cited above, § 63)”).

¹⁴³ Para. 551 of the judgment Ukraine and the Netherlands v. Russian Federation of 30 November 2022.

¹⁴⁴ Applicants’ Reply, para. 1.23 [Annex 3]

not there has been a violation of the Convention will be taken by the Court at a separate stage of the proceedings.

163. The Applicants admit their inaccurate citation of the ECtHR’s reasoning. Thus, paragraph 632 of the judgment states:

“It was argued by the applicant Governments that the provision of the Buk TELAR used to down flight MH17 was an example of a request for particular material being answered, and owing to the extensive criminal investigation there is a particularly full account of how it came to be in eastern Ukraine...”.

In paragraph 2.7 of their Reply, however, when quoting this provision of the ECtHR judgment, the Applicants omit this reference by the ECtHR to themselves. By so doing, Australia and the Netherlands are passing off their allegations as ECtHR findings.

Russia withdrew from the jurisdiction of the European Court of Human Rights as of 16 March 2022 and since that time has not participated in the examination of the complaint “Ukraine and the Netherlands v. Russia”

164. On 15 March 2022, in other words, even before the ECtHR judgment in question, Russia withdrew from the Council of Europe. The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ceased to be in force for the country on 16 March 2022, along with other closed international treaties within the framework of this international organization. Thus, decisions of the ECtHR adopted after this date have no legal force for the Russian Federation and cannot be considered as enactments imposing any international obligations on it. Since the same date, the Russian Federation has ceased its participation in the consideration of complaints Nos. 8019/16, 43800/14 and 28525/20, “Ukraine and the Netherlands v. the Russian Federation”. Thus, any decision adopted by the ECtHR on the merits of this case will be based on arguments and evidence submitted to the court unilaterally, without the participation of the respondent State. Such decisions cannot be called impartial and objective.

165. Thus, the Applicants are misleading the ICAO Council by asserting in paragraph 2.21 of their Reply that “the procedure before the European Court of Human Rights is an adversarial procedure in which the Russian Federation had every opportunity to convince the Court of alternative scenarios for the downing of Flight MH17 and to refute allegations made by the Netherlands”.

166. In view of the above, the citations of Australia and the Netherlands in their Reply of the ECtHR decision are inappropriate and unsubstantiated.

Subsection II.8: The Applicants’ allegations that there are no other plausible alternative scenarios for the destruction of flight MH17 are inconsistent with the facts

167. When the Applicants lack sufficient reasoning to explain the facts that do not fit with their chosen version of the causes of the crash, in addition to declaring those facts to be of little relevance to the investigation, they also claim that there are allegedly no plausible alternative scenarios for the destruction of flight MH17.¹⁴⁵

168. In other cases, where it is to their advantage, the Applicants claim that the Russian Federation allegedly put forward alternative “theories” or “scenarios”, but these were allegedly rejected.¹⁴⁶

169. Indeed, it is difficult for the Russian Federation to offer its own carefully calibrated and factual and evidence-based chronology of events. The reason for this is the Applicants’ exclusion of the Russian Federation from all the investigations under way, the lack of access to all materials, the lack of any possibility of examining the wreckage of the aircraft and the bodies of the victims or of participation in the examination of all witnesses, and the lack of access to documentation on the movement of air defence assets and flights by the aircraft of the neighbouring State. Furthermore, the tragedy in 2014 occurred on the territory of a foreign country with an aircraft of a foreign airline and of foreign manufacture.

170. At the same time, while complying with the JIT’s requests for legal assistance, a number of pieces of evidence were obtained that may point to the involvement of the Ukrainian Armed Forces in the tragedy. In particular, as mentioned above, the wreckage found at the site of the tragedy came from a missile belonging to the armaments of a Ukrainian military unit. In their statements, Dubinsky, Girkin and Khodakovsky claim that the Ukrainian army was involved in the tragedy, or that the Ukrainian army had air defence equipment, including Buk SAMs, in the area of the crash of flight MH17 on 17 July 2014.

171. It should be taken into account that MH17 was flying under the control of Ukrainian air traffic control authorities and was guided by their radar equipment, although the available primary radar information was never provided by Ukraine under the pretext of radar malfunction. Without waiting for an investigation to be organized, Ukraine shifted all responsibility for the tragedy on to Russia the very day after it occurred. Despite this, representatives of Ukraine were involved in the investigation from the outset. The main evidence in support of Russia’s alleged involvement in the crash is the recordings of telephone conversations provided by the Security

¹⁴⁵ *Ibid.*, paras. 2.44, 2.47, 2.55 [Annex 3]

¹⁴⁶ *Ibid.*, paras. 1.23, 2.21 [Annex 3]

Service of Ukraine, which show signs of having been falsified. The alleged participants in the negotiations themselves deny any involvement in such tampering.

172. In addition to the destruction of the Boeing flight MH17 by a Ukrainian Buk SAM missile, there are also possible theories of the destruction of the aircraft by an air-to-air missile fired by a Ukrainian military aircraft while it was out of radar range, or by an air-to-air missile adapted for use by a Ukrainian ground-based launcher. None of these theories have been properly verified during the investigations conducted by the Security Service of Ukraine and the JIT.

Subsection II.9. Conclusion.

173. The conclusion of this chapter is that all these, along with other facts and theories, should be verified in the course of a new thorough, full and independent international investigation into the crash. All the conclusions currently being pushed forward by the Applicants about the alleged involvement of the Russian Federation in the crash of flight MH17 are inconsistent with the objective facts. The Russian Federation was not involved in the crash of flight MH17 – the actions that led to the crash of MH17 cannot be attributed to the Russian Federation.

CHAPTER III. LEGAL ASPECT OF THE CASE: THE RUSSIAN FEDERATION DID NOT VIOLATE ARTICLE 3 BIS OF THE CHICAGO CONVENTION

Subsection III.1 General provisions

174. The Russian Federation categorically denies its involvement in the crash of flight MH17. The version presented by the Applicants is not consistent with the facts. This has been convincingly demonstrated in Chapter II of the present Rejoinder. Consequently, legal responsibility for the crash of flight MH17 cannot be attributed to the Russian Federation on the basis of the Chicago Convention, despite the Applicants' insistence to that effect.¹⁴⁷

175. In addition, there is in principle no causal link between the actions of the Russian Federation and the destruction of MH17,¹⁴⁸ and responsibility for ensuring the safety of air navigation on the territory of the Donetsk People's Republic at the time of the crash of MH17 was borne by Ukraine,¹⁴⁹ which did not close the airspace above the area of active hostilities. The conclusion to be drawn from this is similar in its substance: the Russian Federation has no responsibility for the crash of flight MH17.

176. The Russian Federation was not in breach of the legal obligation set out in Article 3 *bis* of the Chicago Convention, Article 3 *bis* is not applicable in principle to the events of the MH17 crash (at the same time, Russia categorically rejects allegations of its involvement in the MH17 crash).

177. The Applicants' position is based on an incorrect interpretation of Article 3 *bis*, and also Article 89 of the Chicago Convention, which forms the basis for their incorrect application of these legal provisions.

178. We may recall that section III of the Russian Federation's Counter-Memorial¹⁵⁰ included the necessary legal reasoning in this regard (all of which remains relevant).

179. In the present chapter we shall now turn to an analysis of the Applicants' "counter-argumentation" in Chapter III of their Reply of 28 July 2023.

Subsection III.2: The provisions of Article 3 *bis* of the Chicago Convention shall not apply by virtue of Article 89 of that treaty.

180. The future decision of the ICAO Council on the merits of this case will unquestionably be important for the subsequent application of the Chicago Convention. One of the

¹⁴⁷ Applicants' Reply, Chapter IV [Annex 3]

¹⁴⁸ Counter-Memorial of the Russian Federation, paras. 332–337 [Annex 1]

¹⁴⁹ *Ibid.*, paras. 338–357 [Annex 1]

¹⁵⁰ This issue is addressed in Section III of the Counter-Memorial of the Russian Federation, paras. 178–357 [Annex 1]

key issues will be the impact of armed conflict on the application of the Convention, both in general and of its individual provisions in situations of armed conflict.

181. The US position on the Chicago Convention and the terms of armed conflict is notable in this context, in that the USA proposes deletion of the reference to armed conflict in the ICAO Council decision of 17 March 2023. Thus, at the hearing on the competence of the ICAO Council on 17 March 2023, “the Representative of the United States proposed to amend paragraph 1 a) by deleting the phrase ‘... during armed conflict is not a preliminary objection, but rather a question that ...’,”¹⁵¹ and then “proposed a compromise wording, such that paragraph 1 a) would read ‘the question whether Article 3 *bis* applies to this case can only be dealt with at the merits stage’.”¹⁵² The relevant wording of the ICAO Council decision was ultimately left unchanged, however: “the question whether Article 3 *bis* applies during armed conflict is not a preliminary objection, but rather a question that can only be dealt with at the merits stage”.

182. As demonstrated in the Russian Federation’s Counter-Memorial, the Chicago Convention is a international treaty for time of peace.¹⁵³ This means that Article 3 *bis* does not impose international legal obligations on States during an armed conflict. This does not mean that the destruction of a civil aircraft in the circumstances of an armed conflict is “permitted” by international law; it means that the question of the lawfulness 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 Boeing flight MH17). At the same time, under Article 84, the ICAO Council has the authority to resolve only those disputes that arise solely from the interpretation and application of the rules of the Chicago Convention. Questions of international humanitarian law do not fall within the purview of the ICAO Council as a body for settling disputes between Contracting States concerning the interpretation or application of the Chicago Convention and its annexes. Accordingly, the ICAO Council has no competence in principle to consider the present case.

183. In their Reply, the Applicants failed to provide convincing evidence of their contrary interpretation, according to which Article 89 incorporates international humanitarian law within the scope of regulation of the Chicago Convention, which allegedly gives the Council the power to resolve the dispute. A clear majority of the Russian Federation’s arguments remained unanswered. At the same time, the arguments put forward by the Applicants are legally flawed. By deliberately distorting the rules of interpretation of international treaties and ignoring a

¹⁵¹ 228th Session of the ICAO Council, Minutes of the 4th Meeting, C-MIN 228/4, 25 April 2023, item 5. [Annex 11]

¹⁵² *Ibid.*, item 6 [Annex 11]

¹⁵³ Counter-Memorial of the Russian Federation, paras. 179–203. [Annex 1]

significant number of legal nuances, the Applicants are attempting to mislead the members of the ICAO Council about the international law-related substance of Article 89.

184. One of the most egregious cases of wilful misinterpretation of Article 89 of the Chicago Convention is the Applicants' assertion that, in order to invoke this provision, the Russian Federation must acknowledge that it is a belligerent.¹⁵⁴ This is an example of a deliberate distortion of the rule in question, since Article 89 of the Chicago Convention expressly provides that it applies not only to belligerents but also to neutral States affected by an armed conflict.

185. The Russian Federation was undoubtedly affected by the armed conflict in south-eastern Ukraine in 2014. Active hostilities with the use of anti-aircraft defence were conducted right on its borders. In July and August 2014, Russian territory, including populated areas and a customs post, was repeatedly shelled from Ukrainian territory (at the same time, Russia categorically rejects allegations of its involvement in the crash of MH17).

186. It should also be noted that, within the ICAO Council, the question of the legal substance of Article 89 of the Chicago Convention has already been resolved in a dispute between India and Pakistan.¹⁵⁵

187. In the Counter-Memorial, it was demonstrated that the disputing States had taken a similar position with regard to the purpose of Article 89.¹⁵⁶ At that time, no member of the Council objected to this approach to interpretation.

188. The following paragraphs set forth a detailed rebuttal of all the Applicants' arguments concerning the interpretation that they put forward of Article 89 of the Chicago Convention.

i. Interpretation of Article 89 in accordance with the ordinary meaning of its terms

189. The Applicants groundlessly accuse the Russian Federation of violating the rules of international treaty interpretation established by the 1969 Vienna Convention on the Law of Treaties¹⁵⁷ (hereinafter "the Vienna Convention").¹⁵⁸

¹⁵⁴ Applicants' Reply, para 3.73. [Annex 3]

¹⁵⁵ During the Council's discussion, the representative of France stated the following: "As far as the Chicago Convention is concerned, Article 89 has been cited and commented on at some length. This Article, as we know, provides that in case of war or national emergency Contracting States **regain their full freedom as regards their obligations under the Convention.**" 75th session of the ICAO Council, *Minutes of the Sixth Meeting*, Doc 8956-c/1001, p. 275. URL: <https://www.icj-cij.org/sites/default/files/case-related/54/9377.pdf>

¹⁵⁶ Counter-Memorial of the Russian Federation, para. 182 [Annex 1]

¹⁵⁷ Applicants' Reply, para 3.58. [Annex 3]

¹⁵⁸ Vienna Convention on the Law of Treaties, 1969, art. 31 [Annex 1 to the Russian Counter-Memorial]; Article 31, paragraph 1, of the Vienna Convention provides as follows: "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".

190. The interpretation of Article 89 of the Chicago Convention¹⁵⁹ presented by the Russian Federation in the Counter-Memorial means that the actions of States affected by an armed conflict cannot be regarded as contrary to the Chicago Convention. In other words, the Chicago Convention does not impose international legal obligations under Article 3 *bis* on States in such circumstances (this assertion does not mean that, in conditions of armed conflict, the destruction of a civil aircraft is “permitted” by international law; it means that the question of the lawfulness of the use of weapons in 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).

191. In the Applicants’ view, Article 89 of the Chicago Convention has the following legal substance: “Article 89 establishes that during armed conflict (‘in case of war’), the provisions of the Convention **do not change or influence** (‘shall not affect’) the **rights and obligations** (‘freedom of action’) afforded to a contracting State as a belligerent or neutral under **international humanitarian law**.”¹⁶⁰

192. The passage quoted above already shows how freely the Applicants interpret Article 89, by contrast with the Russian Federation, arbitrarily adding elements that are not contained in the rule itself, thus violating the rules of interpretation of the Vienna Convention.

193. Thus, by “freedom of action” the Applicants understand “rights and obligations”. The Russian Federation’s Counter-Memorial provided quotations from authoritative international jurists who understood freedom of action to mean the absence of international legal obligations. The Applicants do not dispute the substance of these quotations or defend their own interpretation in any way.¹⁶¹

194. According to the Cambridge Dictionary, the word “freedom” means “the condition or right of being able or allowed to do, say, think, etc. whatever you want to, without being controlled or limited”.¹⁶² A similar definition is given by the Oxford Dictionary, according to which “freedom” means “the power or right to do or say what you want without anyone stopping you”.¹⁶³ The authoritative Black’s Law Dictionary provides the following definition: “The quality,

¹⁵⁹ “In case of war, the provisions of this Convention shall not affect the freedom of action of any of the Contracting State affected, whether as belligerent or as neutrals. The same principle shall apply in the case of any Contracting State which declares a state of national emergency in its territory and notifies the fact to the Council”.

¹⁶⁰ Applicants’ Reply, para 3.56 [Annex 3].

¹⁶¹ For further details, see below.

¹⁶² Cambridge Dictionary. URL: <https://dictionary.cambridge.org/dictionary/english/freedom>

¹⁶³ Oxford Advanced Learner’s Dictionary. URL: <https://www.oxfordlearnersdictionaries.com/definition/english/freedom>

position, or state of being free or liberty; specifically, the right to do what one wishes without anyone's control or restraint."¹⁶⁴

195. None of the definitions includes within the scope of "freedom" the notion of "obligation", which implies certain restrictions. Such a reading would directly contradict the ordinary meaning of the phrase "freedom of action".

196. Article 31, paragraph 4, of the Vienna Convention provides that "a special meaning shall be given to a term if it is established that the parties so intended". The Applicants have not even attempted to demonstrate in any way that the international law-related substance of "freedom of action" under Article 89 of the Chicago Convention should be accorded this special meaning, which so radically changes its ordinary meaning.

197. A similar situation arises from the Applicants' arbitrary addition of a reference to international humanitarian law, which is not found in Article 89. Moreover, as will be shown below, this liberty is inconsistent with the preparatory documents and circumstances of the conclusion of the Chicago Convention, the practice of States and international organizations, and international legal teachings.

ii. Interpretation of Article 89 in the light of the preparatory materials and circumstances of the conclusion of the Chicago Convention

198. According to Article 32 of the Vienna Convention, "Recourse may be had to supplementary means of interpretation, including the preparatory materials of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31".¹⁶⁵ The Applicants have not in any way backed up their interpretation of Article 89 of the Chicago Convention with the positions of States drawn from the preparatory materials of the Chicago Convention. The explanation for this is quite simple: the outcome of recourse to these means of interpretation would have been directly contrary to the Applicants' position and fully consistent with the approach of the Russian Federation.

199. As already noted in the Counter-Memorial, Article 89 of the Chicago Convention is worded in an identical manner to Article 38 of the 1919 Convention Relating to the Regulation of Aerial Navigation (hereinafter "the Paris Convention") and its international law-related substance is fully consistent with that Article.¹⁶⁶

¹⁶⁴ Bryan A. Garner, *Black's Law Dictionary*, 10th edition. Thomson Reuters, 2015, p. 563 ["The quality, state, or condition of being free or liberated; esp. the right to do what one wants without being controlled or restricted by anyone."]. [Annex 18] [Translator's Note: the 10th edition of the dictionary was not available to the translator. Thus the text provided is a translation from the Russian rather than a direct quotation from the dictionary. The 9th edition of *Black's* defines "freedom" as "1. The state of being free or liberated. 2. A political right"]

¹⁶⁵ Vienna Convention on the Law of Treaties, 1969, art. 31 [Annex 1 to the Counter-Memorial]

¹⁶⁶ Counter-Memorial of the Russian Federation, para. 189 [Annex 1]

200. Initially, the wording that, “In case of war, the provisions of the present Convention shall not affect the freedom of action of any of the member states, whether as belligerents or as neutrals” appeared in Canada’s draft.¹⁶⁷ Canada was one of four States (along with the USA, the UK and New Zealand) whose proposals formed the basis for substantive discussion at the Chicago Conference. It was Canada’s draft that was used as the basis for work in subcommittees 1 and 3 of Committee I, which were responsible for the development of rules on a special international organization (which eventually led to the establishment of ICAO) and principles in the field of air transport.¹⁶⁸

201. As noted in the *travaux préparatoires*, “After several subcommittee meetings, it became apparent that the fundamental issues of international organization and air-transport regulation could not easily be resolved in the large meetings of Subcommittees 1 and 3”.¹⁶⁹ As a result, the subcommittee meetings were suspended while Canada, the UK and the USA drafted the so-called “tripartite proposal”, in which this basic wording was reintroduced without any changes and reached the final act of the conference in this form.

202. Nothing in the preparatory materials suggests that the drafters of the Chicago Convention intended to depart from the meaning of similar wording in the Paris Convention. Moreover, the position was expressly stated that the Chicago Convention should have the same scope as the Paris Convention in war.¹⁷⁰

203. At the time, there was a clear understanding among States that the Paris Convention was a treaty that operated exclusively in time of peace. This is evidenced by the report of the Organisation for Communications and Transit of the League of Nations (a unit within the Secretariat).¹⁷¹

¹⁶⁷ Canadian Revised Preliminary Draft of an International Air Convention, Document 50, Article XLIV, p. 588. 588. In Proceedings of the International Civil Aviation Conference: Chicago, Illinois, 1 November–7 December 1944. US Government Printing Office, 1948 [Annex 29]

¹⁶⁸ Proceedings of the International Civil Aviation Conference: Chicago, Illinois, 1 November–7 December 1944. United States Government Printing Office, 1948, p. 5 [Annex 29]

¹⁶⁹ *Ibid.*

¹⁷⁰ Thus, Great Britain took the following position: “His Majesty’s Government propose that a new Convention should be drawn up to take the place both of the Paris Convention of 1919 and of the Havana Convention of 1928, and to make provision for the regulation of international air transport. This Convention would (i) reaffirm the principle of national sovereignty of the air and define what should, for this purpose, constitute the territory of a State; (ii) define the degree of freedom of the air to be enjoyed by the ratifying States, conditional on the acceptance in full of the rest of the Convention. Subject to the right of each State to reserve its position in time of war or national emergency...”. *Ibid.*, p. 568 [Annex 29]

¹⁷¹ The report interpreted Article 38 of the Paris Convention as follows: “Article 38 provides that in case of war the provisions of the Convention shall not affect the freedom of action of the contracting States, either as belligerents or as neutrals. This is another principle which reveals the nature of the Paris Convention and shows that it is to be applied in time of peace alone: the authors had no desire to restrict the freedom of contracting States in the event of a conflict. The achievement of a sincere understanding between States which is so greatly desired, with a view to removing the risk of this contingency, has been *left to other treaties and other international organisations*: the Paris Convention regulates air navigation in peace time only and its limits are defined in Article 38.” League of

204. It follows from the report that the Paris Convention has no regulatory functions in the context of armed conflict. In the comments, particular emphasis is placed on the fact that, in the event of war, the Paris Convention is replaced by other treaties, in other words, by other sources of international law. These include international humanitarian law, which the Applicants quite groundlessly wish to bring within the scope of regulation of the Chicago Convention.

205. Moreover, the same wording may be found in Article XXIX of the 1928 Convention Regarding Commercial Aviation (hereinafter “the Havana Convention”). The only way in which the provision in question differs between the Paris and Havana Conventions, on the one hand, and the Chicago Convention, on the other, is the addition of the word “affected” after Contracting States, whether as belligerents or as neutrals.¹⁷²

206. The intentions of the parties in drafting the Chicago Convention may be ascertained by looking at the position taken by John Cooper, head of the Drafting Subcommittee of the 1944 Chicago Conference, which was responsible for drafting rules on the principles of aerial communication. At the 1948 US Senate hearings, he clearly pointed out the inapplicability of the Chicago Convention in situations of armed conflict.¹⁷³

207. The very circumstances of the conclusion of the Chicago Convention also indicate that it was intended to be a convention exclusively for time of peace.¹⁷⁴ The States parties to the Chicago Conference also expressly contrasted wartime and peacetime situations.¹⁷⁵

Nations, Organisation for Communications and Transit, *Enquiries into the Economic, Administrative and Legal Situation of International Air Navigation*, Geneva, League of Nations, 1930, pp. 176–177 [Annex 27].

¹⁷² The US State Department revealed the meaning of this change: “It is recalled that some of the delegates at the Chicago aviation conference thought that it was not clear whether the provisions of the Paris and Habana conventions referred to would be applicable in the case of outbreak of war in some part of the world remote from particular areas in which aircraft happened to be operating internationally ... The word affected is understood to have been inserted in article 89 of the Chicago convention for the purposes of making the article clearer than the corresponding provisions in the Paris and Habana conventions.” *Aspects of United States Participation in International Civil Aviation*, Articles. Division of Publications, Office of Public Affairs, 1948, p. 45 [Annex 28].

¹⁷³ “Considering first the applicability of international conventions, the Chicago Convention definitely authorizes contracting states, in article 89, to **disregard its provisions in time of war**. This article states that ‘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.’ In my judgment this will authorize any contracting state to **disregard all of the legislative provisions of the convention in time of war**. I do not think that it changes in the slightest the basic international air law rules as to airspace sovereignty, which, as I have sought to demonstrate earlier, existed long prior to the convention. The fact is that no presently existing convention **can be relied on as a source of international air law applicable to war conditions**.” John Cobb Cooper, International Air Law, Astronautics and Space Exploration, Hearings before the Select Committee on Astronautics and Space Exploration, 85th session on H. R. 11881, 15 April–12 May. US Government Printing Office, 1958, p. 1324 [Annex 19].

¹⁷⁴ This follows even from President Roosevelt’s letter by which countries were summoned to the Chicago Conference: “I do not believe that the world of today can afford to wait several years for its air communications. There is no reason why it should. As we begin to write a new chapter in the fundamental law of the air, let us all remember that we are engaged in a great attempt to **build enduring institutions of peace**. These peace settlements cannot be endangered by petty considerations or weakened by groundless fears.” The Postal History of ICAO, 1944: The Chicago Conference. URL: https://applications.icao.int/postalhistory/1944_the_chicago_convention.htm

¹⁷⁵ Proceedings of the International Civil Aviation Conference: Chicago, Illinois, 1 November–7 December 1944. US Government Printing Office, 1948 [Annex 29]. These included such States as: **Canada** (p. 74), **United States of America** (p. 42), **India** (pp. 75–76), **Poland** (p. 85), **Brazil** (p. 530), **United Kingdom**: (pp. 566–567), **Australia**

208. All of these positions confirm that States were aware of the specific nature of the situation that emerges in the field of international air traffic, depending on whether civilian flights are conducted in peacetime or wartime.

209. Wanlu Zhang, who conducted a detailed study of Article 89 of the Chicago Convention, came to similar conclusions in her recent doctoral research.¹⁷⁶

210. The preparatory materials and the circumstances of the conclusion of the Chicago Convention show that Article 3 *bis* of the Chicago Convention, as an integral part of the Convention, does not apply in situations of armed conflict (this does not mean that in situations of armed conflict the destruction of a civil aircraft is “permitted” by international law; it means that the question of the lawfulness of the use of weapons in situations of 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 flight MH17).

211. Thus, the preparatory materials, the circumstances of the conclusion of the Chicago Convention and subsequent State practice demonstrate that Article 3 *bis* of the Chicago Convention, as an integral part of the Convention, does not apply in situations of armed conflict (this, we repeat, does not mean that, in situations of armed conflict, the destruction of a civil aircraft is “permitted” by international law; it means that the question of the lawfulness of the use of weapons in situations of 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 flight MH17).

iii. Article 89 is a military exclusion clause

212. The Applicants, in support of their position regarding the piecemeal application of Article 89 to other provisions of the Chicago Convention, make extensive expository statements about the operation of international treaties in armed conflict,¹⁷⁷ which have never been challenged by the Russian Federation. The Russian Federation has never claimed that all international treaties cease to be in force during an armed conflict, nor has it challenged the findings of the UN International Court of Justice Advisory Opinion on the Legality of the Threat of Use of Nuclear

(p. 84), **Australia and New Zealand** (p. 83), **New Zealand** (p. 540), **China** (p. 107), **France** (p. 82), **Ecuador** (p. 476) and **Afghanistan** (p. 545).

¹⁷⁶ “State representatives invited to the Chicago Conference understood that the issue of peace and war shall be dealt by “an overriding peace treaty”, later known as the Charter of the United Nations. Under that assumption, the Chicago Conference was set to draft a peace treaty, dealing with peaceful relations among friendly countries in the field of aviation. The Chicago Convention belongs to the category of post-war treaties to establish a peaceful order. Wanlu Zhang, Protection of aviation security through the establishment of prohibited airspace, doctoral dissertation, Leiden University, Netherlands, 2023, p. 193 [Annex 17]; “In conclusion, Article 89 of the Chicago Convention was adopted to foreshadow a future arrangement regarding the use of airspace in times of war and national emergency, separate from other provisions of the Chicago Convention which deal with peacetime.” Ibid., p.194 [Annex 17]

¹⁷⁷ Applicants’ Reply, paras 3.49 and 3.51 [Annex 3]

Weapons.¹⁷⁸ The Russian Federation has never taken the position that Article 3 of the Draft Articles on the Effects of Armed Conflicts on Treaties (hereinafter “the Draft Articles”) prepared by the UN International Law Commission (hereinafter “the ILC”) is flawed.¹⁷⁹ This Article establishes that “the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties”. At the same time, these general provisions, which have been expounded in such detail by the Applicants in order to give the appearance of persuasive arguments, have no bearing on the applicability of the Chicago Convention in armed conflict, as expressly indicated by Article 4 of the Draft Articles.

213. Without generally refuting that, “where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply” (Article 4 of the Draft Articles), the Applicants nevertheless deny that Article 89 of the Chicago Convention is a military exclusion clause, in other words, a provision limiting the application of the Chicago Convention in situations of armed conflict.¹⁸⁰ They attempt to represent it as a rule that establishes the parallel application of international humanitarian law and the Chicago Convention.

214. In support of their position, the Applicants cite examples of military exclusion clauses included in other treaties. Thus, they refer to the wording¹⁸¹ set out in Article 6, paragraph 2, of the 2010 Convention for the Suppression of Unlawful Acts Against the Safety of International Civil Aviation (hereinafter “the Beijing Convention”).¹⁸²

215. The Applicants point to textual discrepancies between Article 89 of the Chicago Convention and Article 6, paragraph 2, of the Beijing Convention.¹⁸³ This notwithstanding, the international law-related substance of Article 6, paragraph 2, of the Beijing Convention is comparable to that of Article 89 of the Chicago Convention for the reasons set out below.

216. First, the difference in wording may be explained by the date of the Chicago Convention. The drafters of the Chicago Convention could not in any event have used the formulation, as this wording became established in international legal practice only several decades later – in 1997.

217. Second, the preparatory documents of the Beijing Convention indicate that Article 6, paragraph 2 of the Beijing Convention was considered by the drafters of the treaty to be an

¹⁷⁸ *Ibid.*, 3.50 [Annex 3]

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, para. 3.53 [Annex 3]

¹⁸¹ *Ibid.*, para. 3.53 [Annex 3]

¹⁸² This Convention enshrines the following: “*The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.*” Convention for the Suppression of Unlawful Acts Relating to International Civil Aviation, 2010 [Annex 9].

¹⁸³ Applicants’ Reply, para. 3.53 [Annex 3]

analogue to Article 89 of the Chicago Convention.¹⁸⁴ Given that the military exclusion clause was included in the final text of the Beijing Convention, it must be concluded that an identical position was held by the majority. Thus, Article 89 of the Chicago Convention, like Article 6, paragraph 2, of the Beijing Convention, is a provision which excludes regulation of the activities of armed forces during an armed conflict. The Applicants have not provided any counter-arguments.

218. Third, during the elaboration of the Draft Articles on the Effects of Armed Conflicts on Treaties, the Special Rapporteur noted that the *suspension of international air service treaties was justified in the event of conflicts*.¹⁸⁵

219. It follows that international treaties governing air traffic do not apply in an area of armed conflict. This does not mean that the destruction of a civil aircraft in an armed conflict is “permitted” under international law; it means that the question of the lawfulness 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 flight MH17).

220. Fourth, the ILC Secretariat considered Article 89 to be a military exclusion clause, as is directly apparent from its Memorandum on the effect of armed conflict on treaties.¹⁸⁶ By and large, the section on the operation of treaties in the field of air communications summarizes the work of C. M. Chinkin, who characterizes Article 89 of the Chicago Convention as a provision which determines the effect of war on the obligations of the parties and establishes freedom of action in war.¹⁸⁷ In other words, she categorizes Article 89 as a military exclusion clause.

221. Fifth, in the Counter-Memorial, the Russian Federation has already demonstrated that the international legal teachings also support the position that Article 89 is an example of the

¹⁸⁴ ICAO, Report of the Legal Commission for the general section of its report and on agenda items 7, 8, 45, 47 and 48, Doc A36-WP/34, para. 46.2. “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”. [Annex 24 to the Counter-Memorial].

¹⁸⁵ [“One Member State has expressed concern *about the fate of treaties dealing with international transport, such as air agreements*. Certainly, many such instruments do not fall within the categories contained in the list annexed to the draft articles, which, as has been said before, is not exhaustive. Their survival may also particularly depend on the nature and extent of the conflict. It is certain, for example, that an interruption of the applicability of this *type of agreement is justified for conflicts that cover the whole territory, airspace and territorial waters of a State party*, whereas the opposite may be true for more localized conflicts; also, a conflict may escalate the longer it goes on”.] First report on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur, document A/CN.4/627 and Add.1, para. 157 [Annex 30]

¹⁸⁶ The effect of armed conflict on treaties: an examination of practice and doctrine, Memorandum by the Secretariat, document A/CN.4/550, para. 55 [Annex 31]

¹⁸⁷ Christine Chinkin, “Crisis and the performance of international agreements: the outbreak of war in perspective”, *Yale Journal of World Public Order*, vol. 7, 1980, p. 182 [Annex 20]

most extensive military exclusion clause.¹⁸⁸ This interpretation is the same as that held by Dr. Wanlu Zhang.¹⁸⁹

222. All this shows that Article 89 of the Chicago Convention is a military exclusion clause.

223. The Applicants' principal argument about the applicability of the Chicago Convention in situations of armed conflict is based on a systematic interpretation of international treaties. The Russian Federation does not in any way dispute that the provisions of any treaty must be interpreted in their interrelation with one another. Upon closer examination of the Applicants' argumentation, however, it becomes clear that, although they assert the contrary,¹⁹⁰ they are presenting Article 3 *bis* as some kind of *sui generis* provision.

224. The first indication of a deliberate misrepresentation of the facts of international law on the part of the Applicants is that they quote the following extract from the report of the ILC Study Group on the fragmentation of international law: "when several norms bear on a issue they should, to the extent possible, be interpreted so as giving rise to a single set of compatible obligations".¹⁹¹ The Applicants have not specified how Article 89 regulates matters relating to the use of weapons against civil aircraft. This does not follow from the text of the Article and cannot be an implied in some fashion, since Article 3 *bis* was adopted 40 years after the Chicago Convention. Articles 3 *bis* and 89 serve quite different purposes. While the former contains a substantive obligation, the latter outlines the scope of application of the Chicago Convention.

225. In addition, it may seem strange that the ILC has considered a potential situation where, within one and the same treaty, there are rules that govern similar aspects and yet contradict one another. This has not occurred. The report goes on to state that the principle of harmonization applies when dealing with the interaction of a norm with general international law.¹⁹² In other words, this had nothing at all to do with the conflict of norms within a single treaty. The Applicants have simply taken the most appropriate quotation for their position, while the quotation in fact had no connection with the interpretation of Articles 3 *bis* and 89 of the Chicago Convention.

226. The Applicants' weakest argument, again misrepresenting both Article 89 of the Chicago Convention and the Russian position, concerns the provisions of the Chicago Convention that deal with ICAO. The Applicants argue that the Russian position is untenable because it

¹⁸⁸ Counter-Memorial of the Russian Federation, para. 184 [Annex 1]

¹⁸⁹ Wanlu Zhang, Protection of aviation security through the establishment of prohibited airspace, doctoral dissertation, Leiden University, Netherlands, 2023, p.193 [Annex 17].

¹⁹⁰ Applicants' Reply, para. 3.71 [Annex 3]

¹⁹¹ *Ibid.*

¹⁹² Report of the Study Group of the International Law Commission, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682 and Add. 1, p. 105 [Annex 9 to the Applicants' Reply].

assumes that, in the event of an armed conflict, all the Articles of the Chicago Convention shall cease to be in force, but that ICAO shall continue to function. In this they see a contradiction.¹⁹³

227. The Russian Federation has never interpreted Article 89 in such a fashion. It is true that some of the provisions of the Chicago Convention are constituent provisions for ICAO, and do not lay down substantive rights and obligations for States. They do, however, delineate the boundaries of competence of ICAO and its organs. Article 89 of the Chicago Convention deals with the freedom of action of States in the event of war. This freedom of action means that any action by States in a situation of armed conflict cannot be considered contrary to the Chicago Convention and constitute an internationally wrongful act (this does not mean that in armed conflict the destruction of a civil aircraft is “permitted” by international law; it means that the lawfulness of the use of weapons in armed conflict is regulated by another branch of international law: humanitarian law). Inasmuch as ICAO, including the Council, does not allow itself to deviate from the precepts of its founding treaty, the freedom of action of States under Article 89 will not be affected.

228. The Applicants cite several provisions of the Chicago Convention which, in their view, continue to apply in situations of armed conflict. It should be noted that, in order to justify that, under Article 89, Article 3 *bis* does not apply in situations of armed conflict, it is not necessary to prove that each provision does not apply on its own account in armed conflict.

iv. International legal teachings are an appropriate means of interpreting Article 89

229. In its Counter-Memorial, the Russian Federation has submitted a significant number of extracts from the works of leading international lawyers,¹⁹⁴ which fully support the Russian Federation’s position regarding the interpretation of Article 89 of the Chicago Convention.

230. The Applicants have failed to refute this position in any substantive way, or to present the position of other scholars which would have supported their approach to the relationship between Articles 3 *bis* and 89. Instead, they urge the Council simply to ignore the current facts of international law. They observe as follows: “Not only is the academic commentary on Article 89 limited and somewhat divided, such sources cannot be used to displace the ordinary meaning of the Article derived in accordance with established principles of treaty interpretation”.¹⁹⁵

¹⁹³ Applicants’ Reply, para. 3.60 [Annex 3]

¹⁹⁴ Counter-Memorial of the Russian Federation, paras. 179–183 [Annex 1].

¹⁹⁵ Applicants’ Reply, para. 3.58 [Annex 3]

231. In footnote 143, they point out that Article 32 of the Vienna Convention does not include academic commentary as a source of international treaty interpretation, and the Statute of the UN International Court of Justice stipulates that the teachings of the most highly qualified publicists of the various nations are only subsidiary means for the determination of rules of international law.

232. First, it is most likely that the Applicants are not specifically citing the text of Article 32 of the Vienna Convention. The word “including” indicates that the rule is not establishing an exhaustive list of subsidiary sources of interpretation.

233. Second, as already noted above, the Russian Party has submitted some 20 academic works, among them the writings of eminent specialists in the field of international air law. The Applicants’ claim that the citations are “limited and somewhat divided” are entirely groundless.

234. Third, it has previously been demonstrated that it is the Russian Party that is adhering to universally recognized principles of interpretation, giving priority to the text. The academic sources submitted merely confirm the correctness of Russia’s approach and the erroneousess of the Applicants’ approach. It is the Applicants who are deviating from the ordinary meaning of words, arbitrarily ascribing to Article 89 a reference to international humanitarian law and interpreting freedom of action as a set of rights and obligations, which contradicts the ordinary meaning of the phrase.

235. Fourth, international legal teachings are a generally recognized subsidiary means for the definition of international law, which is actively used in the resolution of international disputes. The Applicants themselves make extensive use of references to numerous academic works. This tendency is typical of all international dispute settlement bodies, as confirmed by the Rapporteur of the UN International Law Commission, Charles C. Jalloh.¹⁹⁶

236. In addition, even within ICAO, use of the work of international lawyers to resolve legal issues is a well-established practice. Thus, according to the Procedure for the Preparation of

¹⁹⁶ “Whereas the teachings of publicists are only somewhat present in the judgments of the ICJ, with a relatively small number of main judgments referring to them, scholarly works are quite prominent in the separate opinions of individual judges as well as in the rulings and judgments of numerous other international courts and tribunals. They are also common in decisions of regional and other international tribunals. These include, out of many possible examples, the African Court of Human and Peoples’ Rights, the European Court of Human Rights, the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights as well as the International Criminal Tribunals including the International Criminal Court as well as others such as the World Trade Organization. Some courts and tribunals at the municipal and international levels even frequently receive, or invite, the views of scholars acting as *amicus curiae* on specific legal issues.” “Subsidiary means for the determination of international law”, *Report of the International Law Commission*, seventy-sixth session, doc. A/76/10, Annex, para. 30 [Annex 32]

Draft Conventions of the ICAO Legal Committee, academic literature is actively used for the consideration of items on the agenda of the Legal Committee.¹⁹⁷

237. Of the entire body of material which was submitted by the Russian Federation in its Counter-Memorial, the Applicants have identified only two works which allegedly do not support the Russian Party's interpretation.¹⁹⁸ It will be shown below that the authors of these two works interpret Article 89 as a provision which establishes that the Chicago Convention does not impose obligations on affected States in situations of armed conflict.

238. We may recall that a similar situation had already arisen in the framework of an earlier exchange of pleadings: in their Reply to the Preliminary Objections, the Applicants maintained without any substance that M. Klenka, whom the Russian Federation had previously cited, was in fact of the view that Article 89 of the Chicago Convention did not exclude the operation of the treaty rule set out in Article 3 *bis*. In the Counter-Memorial, it was convincingly demonstrated, using relevant quotations, that it was in fact the Applicants who had deliberately misrepresented the essence of the work in question. The Applicants have not refuted this in any way.¹⁹⁹

239. The first paper is an article by the international lawyer Michael Milde. The Applicants argue that, in his view, "the duty of States to refrain from the use of weapons against civil aircraft in flight in Article 3 *bis*, would not be suspended even during hostilities".

240. The Applicants again deliberately fail to quote and purposefully misrepresent Milde's position.²⁰⁰

241. As may be seen from the passage quoted, Milde takes the position that States in the event of armed conflict are free to determine the extent to which they will adhere to the provisions of the Chicago Convention. This does not mean, however, that this will result in some kind of "legal vacuum", as the Applicants wish to present it. In this case, special rules of international humanitarian law come into play, also including a general prohibition on the use of weapons

¹⁹⁷ Legal Committee: Constitution – Procedure for Approval of Draft Conventions – Rules of Procedure, Doc 7669, seventh edition, p. 29 [Annex 12].

¹⁹⁸ Applicants' Reply, paras 3.58–3.59 [Annex 3].

¹⁹⁹ Counter-Memorial of the Russian Federation, paras. 196–198 [Annex 1].

²⁰⁰ *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. Does that imply that inter arma silent leges (amidst the arms the laws are silent)? Such an assumption would be unacceptable. There are specific rules of international law and conventions the applicability of which is in fact triggered by the outbreak of hostilities and which otherwise are meaningless in time of peace. Again, the general principles of humanitarian law – whether codified or customary – override the actual cruelty of an armed conflict and their disregard may carry serious legal consequences for the offending State or individual.*

It could be submitted that in the specific area of international air law the outbreak of hostilities would not suspend the duty of States to refrain from the use of weapons against a civil aircraft in flight (whether belonging to a belligerent or a neutral State) and, in case of interception, not to endanger the lives of persons on board and the safety of aircraft. Michael Milde, "Aeronautical consequences of the Iraqi invasion of Kuwait", Air Law, vol. XVI, No. 2, 1991, p. 71 [Annex 69 to the Counter-Memorial of the Russian Federation].

against civilian objects, in this case a civil aircraft. This does not fall within the scope of the Chicago Convention, otherwise Milde would have pointed this out explicitly when deliberating on the practical purpose of Article 89.

242. All of this may in theory fall within the jurisdiction of permanent international judicial institutions, but under no circumstances within the jurisdiction of the ICAO Council pursuant to Article 84 of the Chicago Convention.

243. If we take the Applicants' position, this means that Milde is contradicting himself in the subsequent paragraphs, which is quite difficult to accept, given the worldwide authority enjoyed by this jurist and his extensive experience in the field of international air law.

244. Jiefang Huang, for his part, first provides a formal legal interpretation of Article 89. He correctly notes that Article 3 *bis* is part of the Chicago Convention and the modalities of its application depend on Article 89.²⁰¹ He goes on to confirm that, on the basis of Article 89, States are not bound by the obligations arising from the Chicago Convention, including Article 3 *bis*. In his view, however, this does not mean that States are not bound by customary law and international humanitarian law.²⁰²

245. With regard to the passage from the work of Jiefang Huang quoted by the Applicants, attention must be drawn to the final part of the sentence, which shows that the author is not sure of the fairness of his approach in view of the wording of the Chicago Convention itself.²⁰³ Moreover, if his text is considered in a holistic fashion, it may be correctly concluded that, in referring to the prohibition of the use of force against civil aircraft, he was also referring to international humanitarian law and not to the Article 3 *bis* treaty rule.

246. This approach to interpretation is fully consistent with the position of the Russian Federation. It should be noted, however, that the Russian Federation questions the existence of a rule of customary law, distinct from international humanitarian law, pursuant to which the Article 3 *bis* treaty rule applies in situations of armed conflict. At the same time, on the basis of Article 84, the ICAO Council has the competence to resolve disputes arising exclusively from the Chicago Convention, which does not incorporate the rules of customary law and international humanitarian law.

v. *The interpretation of Article 89 of the Chicago Convention presented by the Applicants is erroneous because of significant internal contradictions.*

²⁰¹ Huang Jiefang., *Aviation safety and ICAO. Meijers-reeks*. Kluwer Law International, Alphen aan den Rijn, 2009, p. 94. **[Annex 52 to the Counter-Memorial of the Russian Federation]**

²⁰² *Ibid.*

²⁰³ "[A]lthough it would have been clearer had the drafters of Article 3 *bis* inserted a clause of 'notwithstanding Article 89' in the text". Applicants' Reply, para. 3.59 **[Annex 3]**

247. If the interpretation of Article 89 submitted by the Applicants is examined on a *quod non* basis, many contradictions come to light, which render such an interpretative approach totally untenable.

248. Thus, the Applicants, in their endeavour to justify Ukraine's lack of responsibility for failure to close its airspace, emphasize that Article 9 of the Chicago Convention "permits but does not require the closure of airspace over an area of armed conflict".²⁰⁴ They further note the following: "*In circumstances where a State's airspace does remain open to civil aircraft during an armed conflict (as was the case in the east of Ukraine in July 2014), it would be contrary to the object and purpose of the Chicago Convention if Article 89 had the effect of displacing other provisions of the Convention, including those that are fundamental to the safety of civil aviation.*"²⁰⁵

249. It follows from this that failure to close the airspace over an area of armed conflict would not be contrary to the object and purpose of the Chicago Convention. If, however, we pursue our examination within the framework of the interpretation of Article 89 proposed by the Applicants, the opposite conclusion must be reached.

250. We may recall that, according to the Applicants, the "freedom of action" of States under Article 89 of the Chicago Convention is upheld to the extent that it does not conflict with the rights and obligations of States under international humanitarian law.²⁰⁶ Thus, if a State's right under the Chicago Convention conflicts with obligations under international humanitarian law, the rules of international humanitarian law shall prevail.

251. In accordance with the obligation enshrined in Article 57 of Additional Protocol I to the Geneva Conventions, "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."²⁰⁷ In the Applicants' own view, this source is relevant in determining the legal qualification of the events in the Donbass in 2014.²⁰⁸

252. It follows from all the above that Ukraine had an international obligation to close its airspace. In its Counter-Memorial the Russian Federation cited substantial evidence showing that the Ukrainian authorities were fully aware of the risk to civil aviation within their territory. This evidence included both attested instances of the destruction of other aircraft by weapons capable of striking objects at the flight altitude of civil aircraft; statements by Ukrainian officials prior to the crash; and the use of air defences by the Ukrainian armed forces. Ukraine had at its

²⁰⁴ Applicants' Reply, para. 3.62 [Annex 3]

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, para. 3.57 [Annex 3]

²⁰⁷ [Annex 19 to the Applicants' Reply]

²⁰⁸ Applicants' Reply, para. 3.64 [Annex 3]

disposal all the information indicating the need to close the airspace in south-eastern Ukraine to civil aircraft.²⁰⁹

253. The Applicants simply ignored these circumstances; they merely noted that the Russian Federation had failed to prove that the Ukrainian authorities had been aware of the risks to civil aviation in its airspace.²¹⁰ It may therefore be assumed that, in the Applicants' view, such awareness is only brought about by the actual occurrence of the destruction of civil aircraft. Such an interpretation of Article 9 by the Applicants would be contrary to the purposes of the Chicago Convention.

254. The Russian Federation does not consider it necessary in the present proceedings to provide a categorization under international law of the destruction of flight MH17 within the context of the Applicants' version (which in any event is not consistent with the facts) from the point of view of international humanitarian law, since these issues do not fall within the purview of the ICAO Council.

Subsection III.3. Article 3 *bis* of the Chicago Convention does not apply *per se* to situations of armed conflict.

255. In the context of considering the legal consequences of the armed conflict on the territory of Ukraine in 2014, the following point should be recalled.

256. Detailed arguments have been set forth above to demonstrate that Article 3 *bis* of the Chicago Convention is not applicable to the crash of flight MH17 by virtue of its Article 89. There is another aspect of this situation, however: the inapplicability of Article 3 *bis per se* in situations of armed conflict, which was spelled out in the Russian Federation's Counter-Memorial²¹¹ and which the Council has carried forward to the merits stage.²¹²

257. As already noted, the crash of Boeing flight MH17 occurred during an internal armed conflict taking place on the territory of Ukraine.²¹³ The rules relating to armed conflicts are firmly established in international law, including in a number of universal treaties, including the Geneva Conventions of 1949 and their Additional Protocols I and II. There is also a well-developed branch of customary international law in this area. Both treaty law and the customary law of armed conflict provide for the protection of civilians and establish principles for distinguishing between civilian and military targets.

²⁰⁹ Counter-Memorial of the Russian Federation, paras. 269, 314 and 352 [Annex 1].

²¹⁰ Applicants' Reply, para. 3.79 [Annex 3].

²¹¹ Counter-Memorial of the Russian Federation, Subsection III.3 [Annex 1].

²¹² Paragraph 1a) of the decision of the ICAO Competence Council of 17 March 2023 [Annex 7].

²¹³ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 178, para. 5.2, and p. 16, para. 1.4 [Annex 85 to the Counter-Memorial of the Russian Federation].

258. Issues of the use of force during hostilities, including against aircraft, are regulated by international humanitarian law (the law of armed conflict) and this regulation differs from the rules established by Article 3 *bis*. It is neither necessary nor possible to consider the interpretation and application of the Chicago Convention in this regard.

259. The provisions of Article 3 *bis* of the Chicago Convention are worded in such a way as to indicate that it does not apply *per se* to situations of armed conflict. It would be counterproductive to apply the rules set forth in this Article to situations of armed conflict. Moreover, if Article 3 *bis* were considered to be applicable in armed conflict, it would conflict with the rules of international humanitarian law, leading to a situation of legal uncertainty.

260. Added to all this, if even in theory one were to accept the Applicants' position, it would inevitably follow that the ICAO Council is the competent body to deal with the use of weapons in hostilities, including such aspects and concepts as necessity, proportionality, distinction, military purpose, military advantage and others. It is clear that this is not in accordance with either the mandate of the Organization and its organs or the principle of the special competence of international organizations.²¹⁴

261. The applicability of Article 3 *bis* exclusively in peacetime follows from its text and is something that the Applicants attempt to refute in their Reply²¹⁵ by referring only to the Russian Federation's incorrect application of the rules of interpretation.²¹⁶ They raise no objection on the merits.

262. Thus, the obligation of States set out in Article 3 *bis*, paragraph (a), to "*refrain from resorting to the use of weapons against civil aircraft in flight*", goes hand in hand with interception rules to the effect that "*the lives of persons on board and the safety of aircraft must not be endangered*". The precept to intercept without the threat of force clearly points to the peaceful context of the situation.

263. Furthermore, this general obligation, as set out in Article 3 *bis*, paragraph (a), must be read in conjunction with paragraphs (b) and (c), which spell out the mechanisms for its implementation, clearly describing the measures that may be taken against an offending civil aircraft in peacetime.

264. Paragraph (d) of Article 3 *bis* further strengthens the implementation mechanism of this Article with an explicit preventive element: an obligation is imposed on States to prevent the use of civil aircraft under their jurisdiction for "*any purpose incompatible with the aims of this*

²¹⁴ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, pp. 15–16 [Annex 9 to the Counter-Memorial of the Russian Federation]

²¹⁵ Applicants' Reply, para. 3.64 [Annex 3]

²¹⁶ *Ibid.*

Convention”, in other words, for any purpose other than civil aviation. This Article does not address situations that are typical of wartime, such as the use of civil aircraft to transport troops or ammunition. 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.²¹⁷ It then goes on to list the types of activities that may be grounds for categorizing them as military objectives. For example, refusing an order to identify themselves and to divert from their track or to proceed for visit and search, and so forth.²¹⁸

265. The application of Article 3 *bis* to peacetime situations follows from the history of its drafting, the *travaux préparatoires* and doctrine, as has been more than convincingly demonstrated by the Russian Federation in its Counter-Memorial.²¹⁹

Subsection III.4: The scope of Article 3 *bis* is limited to cases of the interception of aircraft violating the sovereignty of airspace

266. The present subsection is inextricably linked to the previous subsection (one flowing from the other and vice versa), which dealt with the application of Article 3 *bis per se* only in time of peace. The discussion which follows will focus on the circumstances under which this Article actually applies in peacetime, as intended by its authors.

267. Yet again, we draw attention to the Applicants’ endeavour arbitrarily and unjustifiably to widen the scope of Article 3 *bis* of the Chicago Convention. In Section IIIC²²⁰ they argue that the application of Article 3 *bis* is not limited to cases of interception.

268. The Russian Federation, for its part, believes – not unreasonably – that the purpose of this Article was from the outset to exclude the use of force by a State against civil aircraft intruding into its airspace (and, furthermore, in peacetime). This is confirmed by many sources besides the text of Article 3 *bis* itself, where even the very word “interception” is used twice – in paragraph (a) and in paragraph (b).

269. First, it is confirmed by the preparatory materials to the Convention, which is a source of interpretation in accordance with Article 32 of the Vienna Convention, reflecting customary international law. Second, it is confirmed by the circumstances surrounding the adoption of Article 3 *bis*, which also constitutes a source of interpretation under Article 32 of the Vienna Convention, reflecting customary international law. Third, it is confirmed by the opinion of a number of qualified experts in public international law.

²¹⁷ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, San Remo, 1994, para. 62.

[Annex 113 to the Counter-Memorial of the Russian Federation].

²¹⁸ *Ibid.*, para. 63 [Annex 113 to the Counter-Memorial of the Russian Federation].

²¹⁹ Counter-Memorial of the Russian Federation, paras. 215–231 [Annex 1]

²²⁰ Applicants’ Reply, paras. 3.31–3.47 [Annex 3]

270. The reasoning in this subsection should begin, however, not with an analysis of Article 3 *bis*, but with an analysis of the Vienna Convention, of which the Applicants make a very specific interpretation. Attention has already been drawn to this in subsection III.2 of the present chapter, since the argument of the alleged misinterpretation of the Chicago Convention by Russia is invoked by the Applicants in a perfunctory and unprompted manner in many parts of their Reply. Apparently, this is seen by the Applicants as a convenient means for the ICAO Council to “turn a blind eye”, so to speak, to the entire available array of sources of interpretation (in fact, the Applicants say: “*the Council should not concern itself with the supplementary materials to which the Russian Federation refers*”).²²¹ Let us explore this in more detail.

271. The Russian Federation was very surprised at the position taken by Australia and the Netherlands on the rules of treaty interpretation. In particular, the Applicants argue that recourse to supplementary means of interpretation, to which Article 32 of the Vienna Convention refers, including the preparatory materials and the circumstances of the conclusion of the treaty, is not permitted in the present instance because the conditions laid down in Article 32 of the Vienna Convention have allegedly not been met.²²² This assertion by Australia and the Netherlands is groundless.

272. Article 32 of the Vienna Convention²²³ may be used for two purposes: to confirm the meaning that is obtained after the application of Article 31, or to determine the meaning if, after an interpretation pursuant to Article 31, the result is manifestly absurd or unreasonable, ambiguous or obscure. It is beyond dispute, however, that in either case an interpretation pursuant to Article 31 of the Vienna Convention is required as a starting point.

273. An interpretation of Article 3 *bis* of the Chicago Convention (and not only this Article of the Chicago Convention) has already been carried out by the Russian Federation in accordance with Article 31 of the Vienna Convention, starting with the very first document in this process, the Preliminary Objections.²²⁴ This part of the condition set in Article 32 of the Vienna Convention has been met.

274. In addition, the intent of Article 32 of the 1969 Vienna Convention is far from establishing some sort of prohibitory threshold for States with regard to recourse to supplementary

²²¹ See, for example, paragraph 3.66 of the Applicants’ Reply [Annex 3]

²²² Applicants’ Reply, para. 3.32 [Annex 3]

²²³ Article 32 of the Vienna Convention provides that “it is possible to resort to additional means of interpretation in order to confirm the meaning derived from the application of article 31 or to determine the meaning when an interpretation in accordance with article 31 (a) leaves the meaning ambiguous or unclear; or (b) leads to results which are manifestly absurd or unreasonable”.

²²⁴ Preliminary Objections of the Russian Federation to the competence of the Council [Annex 5], pp. 23–24; see also paragraphs 211–213 of the Counter-Memorial of the Russian Federation [Annex 1]

means of interpretation or totally excluding the use of supplementary means of interpretation by limiting them to the text.

275. It should be made clear at the outset that the Vienna Conference on the Law of Treaties, in its work on Articles 31 and 32 of the future convention, accorded preference to the treaty text as the material expression of the will of the contracting States, but at the same time recognized that recourse could be had to supplementary means of interpretation, including the preparatory materials and the circumstances of the conclusion of the treaty, in order to ascertain the intention of the parties.²²⁵ Thus, the Vienna Convention ultimately reflected a compromise approach to interpretation that took into account the interests of two approaches at once: the intention of the parties and the textual approach. This information will enable the ICAO Council to analyse the Applicants' allegations with greater clarity.

276. The main purpose of Article 32 of the Vienna Convention is to clarify that the preparatory work plays a subsidiary role in the interpretation of a treaty.²²⁶ It is assumed that such preparatory work performs an interpretative function only after the application of the general rule, in other words, after the application of the whole of Article 31 of the Vienna Convention²²⁷ (we note again that this is what happened in the present case, which means that this requirement has been fulfilled).

277. Moreover, it is important that the rule set out in Article 32 of the Vienna Convention should be dispositive, since the parties may decide otherwise and agree that the use of the preparatory work is much more important for the interpretation of their treaty.²²⁸ This case likewise involves such invisible, tacit consent, since the Applicants themselves have recourse to supplementary means in their interpretation of Article 3 *bis*, as will be discussed separately below.

278. The Applicants have simply decided to argue that the first part of Article 3 *bis* (a) is unconditional, *unqualified*,²²⁹ that is, its understanding is entirely unambiguous and established. Apparently, therefore, no recourse may be had to supplementary means of interpretation. This statement should not be taken seriously, since it is based on a subjective value judgment and cannot form the basis of a convincing position. The Russian Federation is proceeding on the basis that the process of legal proof must be somewhat more intricate in appearance than a simple utterance that "we are right and you are wrong", as made by the Applicants.

²²⁵ Vienna Convention on the Law of Treaties. Commentary. Compiled by A.N. Talalaev, Moscow, Yuridicheskaya Literatura, 1997, p. 81 [Annex 14]

²²⁶ Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer Publishers, 2012, pp. 572. [Annex 13].

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ Applicants' Reply, para. 3.34 [Annex 3]

279. At the same time, the Applicants simultaneously argue that, even if recourse is had to supplementary means of interpretation, their own interpretation of Article 3 *bis*²³⁰ is confirmed (which, however, is not the case). In other words, the Applicants have taken the very interesting position that recourse to supplementary means of interpretation is possible, but only if it is to the advantage of the Applicants themselves, and only then can the Council take it into account.

280. The disagreement under consideration in the ICAO Council concerns precisely the interpretation and application of the Chicago Convention (the Application by Australia and the Netherlands to the ICAO Council of 14 March 2022 is titled in this manner). In this case, the positions differ not only between the parties to the proceedings, but also between the members of the ICAO Council, since in the Council vote of 17 March 2023, a number of States supported Russia's position on the interpretation of the relevant provisions of the Chicago Convention. Consequently, without prejudice to Russia's position, the substance of Article 3 *bis* is either ambiguous or obscure, which is precisely what is specified in Article 32, paragraph (a), of the Vienna Convention.

281. In general, it is normal practice for parties to a disagreement to take different approaches to the reading of one or another provision. Otherwise, there would be no actual disagreements. As noted in authoritative legal literature, parties to a dispute will always refer the court to the preparatory materials and the court will invariably consider them together with all other material submitted to it.²³¹ The preparatory work should be given priority when the general rule of interpretation has failed or produced a clearly questionable result.²³²

282. It can also be argued that the Applicants' interpretation of the general rules leads to results which are manifestly absurd or unreasonable (Article 32, paragraph (b), of the Vienna Convention), since, by widening the application of the Article, they render it allegedly applicable in conditions of armed conflict, removing the requirement that the intention is to strike a civil aircraft, although that is precisely what the Article is about, or generally extend the scope of the Article beyond the interception of aircraft (in other words, the Applicants are simply striking out the results of the 25th session of the ICAO Assembly). Other examples of absurd and unreasonable interpretation by the Applicants, and instances of ambiguous and obscure content of the commentary on provisions of the Chicago Convention are also demonstrated in other corresponding subsections of the present chapter of the Russian Federation's Rejoinder.

283. In addition, the Russian Federation has recourse to supplementary means of interpretation in order, among other purposes, to confirm the meaning resulting from the

²³⁰ Applicants' Reply, para. 3.37 [Annex 3]

²³¹ Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2013, p. 218 [Annex 16]

²³² Duncan B. Hollis, *The Oxford Guide to Treaties*, Oxford University Press, 2012, p. 489 [Annex 15]

application of Article 31. This meaning of the terms and of Article 3 *bis* is presented by the Russian Federation in its entirety in section III of the Counter-Memorial, “Legal Aspects”.

284. Furthermore, Australia and the Netherlands themselves refer to the preparatory materials and circumstances of the conclusion of the 1984 Protocol on Article 3 *bis* in each and every pleading in these proceedings.

285. Further on in the Reply – in paragraph 3.39 – the Applicants cite verbatim the statements of, among others, the delegates of Jamaica, Canada and the United Kingdom at the 25th session of the ICAO Assembly in 1984. In addition, on numerous occasions, they invoke the case of the crash of flight KE007 in 1983 as a prerequisite and circumstance for the conclusion of an international treaty.²³³

286. In this way, the Applicants’ position is self-contradictory and prejudicial from the point of view of international treaty law.

287. In any event, the criteria laid down in Article 32 of the Vienna Convention have been fulfilled. The Russian Federation is rightly and justifiably resorting to supplementary means of interpretation, as prescribed by Article 32 of the Vienna Convention.

288. Let us return directly to Article 3 *bis* and its application to cases where civil aircraft infringe certain rules concerning the presence in the airspace of a foreign State. It is impossible to accept the Applicants’ assertion that acceptance of the Russian position “would seriously undermine long-standing principles safeguarding international civil aviation, of which the Council is a custodian”.²³⁴ In fact, this has nothing to do with any long-standing principles safeguarding civil aviation: acceptance of Russia’s position would be nothing other than a correct interpretation of the Chicago Convention in accordance with the aims and objectives that have been assigned to the legal rules of that Convention.

289. Article 3 *bis* emerged from the ICAO Assembly’s discussion of the crash of flight KE007 in Soviet airspace.²³⁵ This determined the course of the negotiations, and also the substance and scope of the rights and obligations of the States, which were enshrined by the negotiation participants in Article 3 *bis*. This is described in detail in the Russian Counter-Memorial.²³⁶

290. As may be seen from the proceedings of the 25th session of the Assembly, at which the draft future Article 3 *bis* was discussed, many delegations defined the subject matter of the

²³³ See, for example, paragraphs 1.3, 3.11, 3.21, 3.38 of the Applicants’ Reply [Annex 3]

²³⁴ Applicants’ Reply, para. 3.31 [Annex 3]

²³⁵ Ruwantissa Abeyratne, *Convention on International Civil Aviation. Commentary*, Springer Publishers, 2014, p. 68 [Annex 41 to the Counter-Memorial of the Russian Federation]; see also Cheng Bin, “The destruction of KAL flight KE007 and Article 3 *bis* of the Chicago Convention”, in *Studies in International Air Law: Selected Works of Bin Cheng*, Brill Publishing, 2017, pp. 343–370 [Annex 78 to the Counter-Memorial of the Russian Federation]

²³⁶ Russia’s Counter-Memorial, Subsection III.3 [Annex 1]

future Article as being limited to cases where a civil aircraft violates one or another regulation relating to presence in the airspace of a foreign State.²³⁷

291. As for the Australian and Netherlands delegations' own position at the 25th session of the ICAO Assembly in 1984,²³⁸ which the Applicants seek to correct in their Reply in a surreptitious, "ex post facto" manner,²³⁹ the following must be borne in mind. The delegation of the Netherlands is very clear: "*When we are talking about the use of force against unarmed civil aircraft, we are referring to a situation in which a State intercepts an aircraft which has entered its airspace without permission or authorization to do so, in other words about a violation of the sovereignty of that State over the airspace above its territory.*"²⁴⁰

292. In this regard, the delegation of the Netherlands was of the view that the wording of the amendment, as an equivalent alternative, could, in the first place, stipulate the right of a State to require the landing of an aircraft that violated its sovereignty by unauthorized overflight of its territory and, in the second place, include a strict non-use of force clause, which would be formulated as a necessary limitation of that right.²⁴¹

293. The delegation of the Netherlands also explained that "*any non-use of force clause in this context should never mean that as from now airliners may feel free to violate the sovereignty of another State by entering its airspace at will.*"²⁴²

294. It is absolutely clear that, in the understanding of the Netherlands delegation, and also that of other negotiators, the regulatory scope of the new Article of the Chicago Convention did not extend, first, to cases of aircraft entering an area of active armed conflict and, second, to situations going beyond the interception of aircraft that had violated the border.

295. The same holds true for the second Applicant, Australia,²⁴³ whose delegation at the 25th session of the Assembly argued, after making the statement quoted in that Applicant's Reply, that "*a fine balance will need to be struck between the rights and obligations of States in regard to non-use of force, to require an intruding aircraft to land and the need to safeguard the safety and lives of persons on board a civilian aircraft*".²⁴⁴

²³⁷ Paragraphs 216–217 of the Russian Federation's Counter-Memorial, e.g., statement by the delegation of Israel at the ICAO Assembly 25th Session (Extraordinary), *Executive Committee: Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438, p. 54 [Annex 19 to the Russian Counter-Memorial]

²³⁸ Counter-Memorial of the Russian Federation, paras. 323 and 324 [Annex 1]

²³⁹ Applicants' Reply, paras. 3.43 and 3.44 [Annex 3]

²⁴⁰ ICAO Assembly 25th Session (Extraordinary), *Plenary Meetings: Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 59 [Annex 20 to the Russian Counter-Memorial]

²⁴¹ ICAO Assembly 25th Session (Extraordinary), *Executive Committee: Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438, pp. 179 and 46 [Annex 19 to the Russian Counter-Memorial]

²⁴² ICAO Assembly 25th Session (Extraordinary), *Plenary Meetings: Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 59 [Annex 20 to the Russian Counter-Memorial]

²⁴³ Applicants' Reply, para. 3.44 [Annex 3]

²⁴⁴ ICAO Assembly 25th Session (Extraordinary), *Plenary Meetings: Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, p. 30 [Annex 20 to the Russian Counter-Memorial]

296. The statements of a few other delegations at the 25th session of the ICAO Assembly²⁴⁵ – the delegations of Jamaica, Canada and the United Kingdom – quoted by the Applicants do not change the situation; this is made manifestly clear merely by opening the original source and seeing the full context.

297. The above quotations do not refute the position held by the majority of delegations at the 25th session of the ICAO Assembly and put forward by the Russian Party. Thus, the representative of Jamaica, at the beginning of the 25th session (in the course of the third meeting), did indeed indicate the elements that countries were proposing for the formulation of Article 3 *bis*.²⁴⁶ Neither he nor the other delegations concluded, however, that any approach dealing with cases of interception should be excluded. This conclusion is reached by the Applicants themselves after quoting the Jamaican delegation.²⁴⁷

298. Neither, for example, does the statement of the United Kingdom quoted subsequently by the Applicants²⁴⁸ affect the interpretation of Article 3 *bis*, as it concerned the regulations in force at the time of the drafting of the said Article relating to the use of weapons and civil aircraft (other provisions of the Chicago Convention and the UN Charter were being analysed).²⁴⁹

299. Added to this, the Applicants again refer to paragraphs of the ICAO Council decision and resolution which purportedly confirm the absolute and all-encompassing nature of Article 3 *bis*.²⁵⁰ Thus, the Applicants again invoke the example of the crash of Iranian flight IR655, which was shot down by the US Navy cruiser USS Vincennes.²⁵¹ In addition, the Applicants also refer again to the ICAO Council resolution on MH17.²⁵² The Russian Federation's Counter-Memorial provides detailed information demonstrating that the destruction of the Iranian civil aircraft in 1988 and of flight MH17 in 2014 did not fall within the provisions of Article 3 *bis* of the Chicago Convention.²⁵³ The decisions and resolution of the ICAO Council on these cases cannot serve as reaffirmation of the specific scope of Article 3 *bis*, on which the Applicants insist in the last sentence of paragraph 3.47 of their Reply.

²⁴⁵ Applicants' Reply, paras 3.39–3.44 [Annex 3]

²⁴⁶ ICAO Assembly 25th Session (Extraordinary), *Executive Committee: Report, Minutes and Documents*, 24 April–10 May 1984, Doc 9438, pp. 179 and 20–24 [Annex 19 to the Russian Counter-Memorial]

²⁴⁷ Applicants' Reply, last part of paragraph 3.40 [Annex 3]

²⁴⁸ *Ibid.*, para. 3.42 [Annex 3]

²⁴⁹ ICAO Assembly 25th Session (Extraordinary), *Plenary Meetings: Resolutions and Minutes*, 24 April–10 May 1984, Doc 9437, pp. 28 [Annex 20 to the Russian Counter-Memorial]

²⁵⁰ Applicants' Reply, paras. 3.45–3.47 [Annex 3]

²⁵¹ *Ibid.*, para. 3.46 [Annex 3]

²⁵² *Ibid.*, para. 3.47 [Annex 3]

²⁵³ Counter-Memorial of the Russian Federation, paras. 278–283 [Annex 1]

Subsection III.5. Article 3 *bis* applies only to cases where the aircraft has been provisionally identified as civilian.

300. As previously demonstrated in the Russian Federation’s Counter-Memorial, Article 3 *bis* of the Chicago Convention applies only to cases where the aircraft has been previously identified as civilian.²⁵⁴ In Section III B²⁵⁵ of their Reply, however, the Applicants unjustifiably propose an expansive interpretation which is entirely inconsistent with the literal interpretation of the Chicago Convention.

301. In their Reply, the Applicants again reach the erroneous conclusion that the mere fact of using force against a civil aircraft constitutes a breach of the obligation under Article 3 *bis* of the Chicago Convention, whether or not the aircraft had been previously identified as civil.²⁵⁶

302. The Applicants’ entire argument, through which they ostensibly seek to prove that Article 3 *bis* does not require that the aircraft be previously identified as civil and that the act in question does not require intent, effectively confuses categories such as *mens rea* (namely, the subjective side of the act) and *actus reus* (the objective side of the act).

303. The Russian Federation does not dispute that the aircraft carrying out flight MH17 does itself fall within the definition of a civil aircraft. These factual circumstances constitute the *actus reus*. The Russian Party, for its part, has argued in its Counter-Memorial that Article 3 *bis* presupposes intent to use a weapon against a civil aircraft. This proceeds from the functional criterion for distinguishing between civil and State aircraft, from which it follows that such a determination in each case is subjective and is shaped by circumstances, place and time.²⁵⁷ This aspect constitutes the *mens rea* of the act. If the negative obligation enshrined in Article 3 *bis* had been absolute, no-fault liability would have ensued. In the Counter-Memorial, evidence was adduced in support of this thesis.²⁵⁸ The Applicants do not deny their relevance. In their Reply, having found no legal support for their position that intent plays no role in the legal qualification of acts from the standpoint of Article 3 *bis* of the Chicago Convention, the Applicants only argue that the Malaysian aircraft was *de facto* a civil aircraft,²⁵⁹ which may mislead the ICAO Council as to the legal position of the Russian Federation.

304. The Applicants naively argue that flight MH17 was readily identifiable as a civilian flight.²⁶⁰ In support of this, they cite the argument that the flight was scheduled, had an approved flight plan, followed a prescribed route and altitude along with other aircraft, stayed outside

²⁵⁴ *Ibid.*, Subsection III.5.1 [Annex 1]

²⁵⁵ Applicants’ Reply, paras. 3.10–3.30 [Annex 3]

²⁵⁶ *Ibid.*, para. 3.11 [Annex 3]

²⁵⁷ Counter-Memorial of the Russian Federation, paras. 257–292 [Annex 1].

²⁵⁸ *Ibid.*

²⁵⁹ Applicants’ Reply, paras. 3.15, 3.17 [Annex 3]

²⁶⁰ *Ibid.*, para. 3.15 [Annex 3]

restricted airspace, was in contact with and followed the clearances of the responsible Ukrainian air traffic controller, and provided unambiguous civilian identification modes and codes through its radar. Of course, all these indications took place. At the same time, the fact that the flight was scheduled or that it had a flight plan or other characteristics is hardly sufficient in the context of the rapidly developing hostilities on the ground in Ukraine, where the parties to the internal conflict were actively using anti-aircraft defence and aircraft.

305. The Applicants argue that “the prohibition contained in Article 3bis(a) demands that, in circumstances where the status of an aircraft is unclear, States must refrain from resorting to the use of weapons against that aircraft”.²⁶¹ We are obliged to point out, however, that the Applicants in this case have “inferred” the substance of the Article, since it contains no such provision. Article 3 bis (a) states that “every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered”.

306. The Applicants submit that the practice cited by the Russian Federation of the mistaken destruction of civil aircraft due to their misidentification, which demonstrates that this is not a violation of Article 3 bis of the Chicago Convention, should be rejected.²⁶² The Applicants justify this only on the grounds that a number of the cited cases occurred prior to 1 October 1998, in other words, before the 1984 Protocol on Article 3 bis entered into force.

307. At the same time, the Applicants do not miss the opportunity to continue citing cases of downings that occurred before 1 October 1998. Literally two paragraphs earlier in their Reply,²⁶³ examples are cited which date back to 1954, 1973, 1983 and 1988.

308. Moreover, in the very first pleading in the present proceedings – the Applicants’ Memorial²⁶⁴ – Australia and the Netherlands also cite certain practices relating to civil aircraft crashes dating back to earlier than 1 October 1998, accompanied by citations of the customary nature of the legal rule imposed by Article 3 bis. As a consequence, it seems very strange that the Applicants should take a position criticizing references to past practices only when such references arise in documents written by the Russian Federation.

309. What we have here is the practice of double standards. There are no grounds for rejecting the practice cited by the Russian Federation.

310. Moreover, it is worth recalling once again in this regard that there is extensive State practice confirming that the mistaken destruction of a civil aircraft due to its initial

²⁶¹ *Ibid.*, para. 3.16 [Annex 3]

²⁶² *Ibid.*, para. 3.25 [Annex 3]

²⁶³ *Ibid.*, para. 3.23 [Annex 3]

²⁶⁴ Applicants’ Memorial, para. 4.4 [Annex 4]

misidentification does not constitute a violation of Article 3 *bis* of the Chicago Convention (at the same time, Russia categorically rejects allegations of its involvement in the crash of MH17).²⁶⁵

311. In the context of the example of the destruction by Ukraine of the Tu-154 in 2001, the following should be noted. The Applicants refer to the diplomatic note of the Russian Ministry of Foreign Affairs of 7 October 2002, No. 7949/2dsng, addressed to the Embassy of Ukraine in Moscow on the reasons for the crash of the Tu-154, which states that the crash was the result of an internationally unlawful act by Ukraine.²⁶⁶ In this connection, the Russian Federation deems it necessary to record the following.

312. First, the diplomatic note in question referred to an internationally wrongful act of Ukraine without invoking any international treaty, including the Chicago Convention. What was meant was responsibility under general international law by virtue of the damage caused.

313. Second, the Applicants deliberately provide no information on how the Tu-154 disaster was finally resolved. Let us fill this gap.

314. As a result of the crash of the Tu-154 aircraft in 2001, a series of negotiations were held between the Russian Federation and Ukraine at the diplomatic level on a comprehensive settlement of claims. On 26 December 2003, the negotiations resulted in the conclusion of an Agreement between the Government of the Russian Federation and the Government of Ukraine on the settlement of claims arising from the air disaster of 4 October 2001.²⁶⁷ In the Agreement, the parties stated their desire to comprehensively settle all claims arising from the crash. The claims featuring in the Agreement are exclusively civil law claims.

315. In accordance with the Agreement, the Ukrainian Party undertook to make an *ex gratia* (without admitting legal liability) payment of 7,809,000 US dollars to the Russian Party for distribution among the relatives of the victims of the disaster. The Agreement did not provide for restitution or compensation for damage in full (there was no compensation for the loss of the aircraft or any other damage), nor is there any evidence in the Agreement of satisfaction as a form of compensation for damage.

316. The settlement of claims through the conclusion of the said Agreement was final, and no other diplomatic or legal steps were taken by the Russian Party. Ukraine was not held liable under international law.

²⁶⁵ See para. 289 of the Russian Federation's Counter-Memorial [Annex 1]. A full information summary of the crash cases was provided in **Annex 61 to the Preliminary Objections of the Russian Federation**.

²⁶⁶ Applicants' Reply, para. 3.26 [Annex 3]

²⁶⁷ Agreement between the Government of the Russian Federation and the Government of Ukraine on the Settlement of Claims Arising out of the Air Crash of 4 October 2001, signed on 26 December 2003. [Annex 8].

317. Another example of a crash highlighted by Australia and the Netherlands is that of Ukrainian Airlines flight PS752 in Iran in 2020.²⁶⁸ The Applicants refer to the proceedings initiated in July 2023 by Canada, Sweden, Ukraine and the United Kingdom against Iran before the International Court of Justice, proceedings which, in the opinion of the Russian Federation, should be disregarded in the present case.

318. As Australia and the Netherlands themselves point out, the claims in the present proceedings are based on the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention). Paragraphs 2 and 3 of the application²⁶⁹ to the International Court of Justice, dated 4 July 2023, set out the legal claims of Canada, Sweden, Ukraine and the United Kingdom against Iran, which are covered only by the provisions of the 1971 Montreal Convention. The present proceedings before the International Court of Justice therefore have no bearing on the practice of application (or non-application) of the Chicago Convention in cases of the crashes of civil aircraft.

319. In addition, to date only the claimants' application has been submitted to the International Court of Justice, which in no way prejudices a future possible decision of the Court on the establishment of international responsibility.

320. Moreover, the claims against Iran by the said countries specifically under the Montreal Convention, rather than the Chicago Convention, once again prove that, in principle, the Chicago Convention cannot be applied in the case of MH17 either. Otherwise, it would be difficult to explain why that choice of legal basis for claims was made by Canada, Sweden, Ukraine and the United Kingdom.

321. The citation by the Applicants in paragraph 3.27 of the response from the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on the legal qualification of the incident of flight PS752 in 2020 shall be left in principle without comment, as air law issues are beyond the competence of that official. As stated on the website of the Office of the UN High Commissioner for Human Rights (OHCHR), this rapporteur is an independent expert on human rights²⁷⁰ (not air law).

322. Thus, the extensive State practice cited by the Russian Federation, which confirms that the mistaken destruction of a civil aircraft due to its initial misidentification does not constitute

²⁶⁸ Applicants' Reply, para. 3.27 [Annex 3]

²⁶⁹ International Court of Justice, Application Instituting Proceedings Concerning a Dispute under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Canada, the Kingdom of Sweden, Ukraine and the United Kingdom of Great Britain and Northern Ireland v. the Islamic Republic of Iran), 4 July 2023, paras. 2 and 3 [Annex 10]

²⁷⁰ URL: <https://www.ohchr.org/en/special-procedures/sr-executions#:~:text=and%20methods%20of%20work-.The%20current%20mandate,Tidball%2DBeans%20was%20born%20in%20the%20year>

a violation of Article 3 *bis* of the Chicago Convention, is correct and fully consistent with the facts (at the same time, Russia categorically rejects allegations of its involvement in the crash of MH17).

323. The Applicants' contention that the making of *ex gratia* payments is of no relevance to the legal issues and that such payments are made in circumstances where there has been a clear breach of international law²⁷¹ must also be rejected.

324. As mentioned by the Russian Federation in its Counter-Memorial, *ex gratia* payments indicate the absence of violation of any international legal rule. Black's authoritative Law Dictionary defines *ex gratia* as "made as a favour or gift, not by virtue of any legal obligation, not legally necessary".²⁷²

325. In addition, the Applicants' contention could hardly be supported by countries which have made *ex gratia* payments in connection with, at the very least, the crashes of civil aircraft. For example, in the case of the destruction of an Iranian aircraft over the Persian Gulf in 1988, the United States strenuously defended the view before the International Court of Justice that there had been no violation of international law in that case. This did not prevent the US from subsequently making an *ex gratia* payment.

Subsection III.6. Article 3 *bis* does not contain an obligation to prevent, and the concept of "due diligence" cannot be applied to the international obligation enshrined therein.

326. The Applicants persist in their unjustifiably expansive interpretation of Article 3 *bis* of the Chicago Convention. In their view, this Article, along with its prohibition of the use of force against civil aircraft, enshrines the so-called obligation to prevent. In this vein, they regard the alleged supply of the Buk SAM and the failure by the Russian Federation to close its airspace as circumstances falling within the scope of Article 3 *bis*.²⁷³

327. In its Counter-Memorial, the Russian Federation presented arguments regarding the absence of any obligation to prevent in the rule enshrined in Article 3 *bis* and, consequently, the inapplicability of the concept of due diligence to the Russian Federation.²⁷⁴ The Russian Federation draws the attention of the ICAO Council to the fact that a significant proportion of the Russian Party's arguments remained unanswered.

²⁷¹ Applicants' Reply, para. 3.29 [Annex 3]

²⁷² Black's Law Dictionary, revised tenth edition, 2015, p. 502 [Ex gratia. Made as favour or gift, and not because of any legal duty; not legally necessary] [Annex 18]. [Translator's Note: The 10th edition was not available to the translator, and thus a translation from the Russian has been provided in lieu of a direction quotation. However, the 9th edition of Black's defines "ex gratia" as "As a favor; not legally necessary."]

²⁷³ Applicants' Reply, paragraphs 3.74 to 3.81 [Annex 3]

²⁷⁴ Counter-Memorial of the Russian Federation, paras. 293-319 [Annex 1].

328. In addition to the position set out in the Counter-Memorial, attention should be drawn to the following fundamental aspect of international law, which literally renders null and void all the Applicants' arguments concerning the existence in Article 3 *bis* of an obligation to prevent.

329. Obligations under international law are generally divided into two categories: positive and negative. Positive obligations presuppose the performance of any positive acts, they are also called obligations of conduct, and it is precisely to such obligations that the concept of due diligence applies. Negative obligations require the non-performance of positive acts, in which case the achievement of a result prohibited by the corresponding rule would be an internationally wrongful act. These are referred to as obligations of result.²⁷⁵

330. This distinction is well established in international jurisprudence. All the decisions of the International Court of Justice cited by the Applicants in their Memorial make reference to positive obligations, in other words, obligations whose literal reading required States to perform affirmative acts rather than to achieve a certain result by prohibiting certain conduct.

331. This jurisprudence is also reflected in international legal scholarship.²⁷⁶

332. Even without delving into the theoretical aspects of international law, it will suffice to note that the Applicants share this position. In their Memorial, they correctly note that a standard of due diligence is not applied in relation to all obligations, but only to obligations with a preventive or protectionist character.²⁷⁷ In other words, they are presenting Article 3 *bis* as a positive rather than a negative obligation.

²⁷⁵ See *The Law of International Responsibility*, James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds.), Oxford University Press, 2010, pp. 371–381 [Annex 22].

²⁷⁶ Thus, J. Kulezsa, in her monograph devoted exclusively to due diligence in international law, notes the following: “Moreover, the due diligence obligation can only be applicable only to positive duties of state, i.e. ones consisting of a need to protect the interests of third parties, rather than those dealing with negative obligations of states, that is ones requiring states to refrain from violations of legally protected interests of others.” Kulesza J. *Due Diligence in International Law*, Netherlands: Brill, 2016, p. 265 [Annex 23]; C. Trapp, an authoritative specialist in contemporary international law, confirms this position with numerous references: “There are two generally accepted distinctions between the positive obligation to prevent and the negative obligation to refrain from acquiescing. The first is that only positive obligations are subject to a due diligence standard of conduct. Obligations to refrain are obligations of result.” Trapp K. N. *State Responsibility for International Terrorism*. UK: OUP Oxford, 2011, p. 80 [Annex 24]; Riccardo Pisillo-Mazzeschi, the author of the most cited work on the subject, concludes that “the empirical examination of the practice confirms that the obligations which contain the ‘diligence’ factor are precisely those in which the result pursued by the obligation is conditioned by a particular latitude of risk”. Riccardo Pisillo-Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States”, *German Yearbook of International Law*, vol. 35, 1992, p. 49. [M. Longobardo also confirms this thesis: “Although obligations of conduct are not rare in international law, not every obligation must be assessed with reference to due diligence. For instance, negative obligations are always obligations of result and accordingly, they do not allow the application of due diligence.” Marco Longobardo, “The Relevance of the Concept of Due Diligence for International Humanitarian Law” *Wisconsin International Law Journal*, vol. 37, 2019, p. 50. [Annex 26].

²⁷⁷ Applicants' Reply, footnote 271 at page 62 [Annex 3] [Translator's Note: apparent error in the Russian: there is no footnote 271 on p. 62 in this text; this reference should be to Applicants' Memorial, Annex 4]

333. Clearly, Article 3 *bis* enshrines a negative obligation of result to which the concept of due diligence cannot be applied. The UN Office on Drugs and Crime takes the position that the negative obligation “refers to the duty not to act, that is, to refrain from acting in a manner that interferes with respect for human rights”.²⁷⁸ The very definition of negative obligation is similar to the text of Article 3 *bis*, which stipulates that “every State must refrain from resorting to the use of weapons against civil aircraft in flight”.

334. The Applicants have endeavoured to present a negative obligation as a positive obligation by treating “obligation to refrain” as synonymous with “obligation to prevent”. This, however, directly contradicts the text of the rule itself, which should take precedence. This approach to interpretation is followed by the Applicants themselves.

335. It goes without saying that the Applicants have once again failed to provide any jurisprudential support for their interpretation.

336. From all the above, it may be concluded that Article 3 *bis* of the Chicago Convention enshrines a negative obligation to which the concept of due diligence cannot be applied.

337. Otherwise, a situation would be created in international law where virtually any action could be considered the breach of a negative obligation, since the fulfilment or non-fulfilment of the due diligence obligation does not depend on the achievement or non-achievement of an end result.

338. As a result, an absurd situation would arise²⁷⁹ in which, according to the Applicants, the issues of arms transfers and airspace closures would fall within the scope of Article 3 *bis* of the Chicago Convention. Realizing this, the Applicants are already stepping back from their initial position. In their Reply, they state that “the Applicants in no way suggest that the Russian Federation was somehow obliged (or indeed able) to close the airspace above the east of Ukraine”.²⁸⁰ Yet this is precisely what they are *de facto* accusing the Russian Federation of doing.

339. The Applicants submit that the Russian Federation, in the exercise of its due diligence obligation, should have closed its airspace, as a result of which Ukraine could also have closed its airspace in eastern Ukraine. Consequently, the Russian Party allegedly had an obligation to close its airspace over the territory of the armed conflict, which was under the sovereignty of

²⁷⁸ UNODC, Positive and Negative Obligations of States. [“refers to a duty not to act; that is, to refrain from actions that would hinder human rights.”]. URL: <https://www.unodc.org/e4j/zh/tip-and-som/module-2/key-issues/positive-and-negative-obligations-of-the-state.html#:~:text=Negative%20obligations%20refers%20to%20a,that%20would%20hinder%20human%20rights.>

²⁷⁹ Although the Applicants deny this. Applicants’ Reply, para. 3.80 [Annex 3]

²⁸⁰ *Ibid.*

the Ukrainian Party. This is nothing more or less than shifting responsibility for the safety of air navigation within sovereign airspace.

340. The Applicants continue to ignore the fact that the Ukrainian Party had at its disposal all the information necessary to demonstrate that the safety of civil aviation flights in eastern Ukraine in 2014 was at risk. The Applicants claim that the Ukrainian Party was not aware of this. This assertion is fundamentally flawed. In the Counter-Memorial, the Russian Party provided arguments demonstrating such awareness.

341. According to the DPR press service, on 29 June 2014, members of the militia took control of military unit No. A-1402 of the air defence unit with Buk TELAR systems.²⁸¹ This information was confirmed by the Ukrainian Party. As announced by the head of the counterintelligence department of the Security Service of Ukraine, Vitaliy Nayda, information to the effect that the militia had Buk SAM systems at their disposal was also conveyed to the Ukrainian Party on 14 July 2014 by counter-intelligence units.²⁸² In other words, the Ukrainian authorities were aware of the presence in the so-called ATO [Anti-Terrorist Operation] zone of long-range anti-aircraft defence equipment prior to the appearance in the DPR of the alleged Russian Buk SAM systems, which, according to the Applicants, crossed the border on the night of 16 to 17 July or in the morning of 17 July (at the same time, Russia categorically disagrees that flight MH17 was shot down by Donbass militias and rejects allegations of its involvement in the crash of flight MH17).

342. In addition, the Dutch Safety Board has established 16 instances of the destruction of military aircraft of the Ukrainian armed forces during the conflict in the Donbass prior to the crash of flight MH17.

343. The Applicants reject the relevance of such previous cases of aircraft destruction, noting that they occurred at low altitudes at which civil aircraft do not normally fly. It must also be borne in mind that, in its report, the Dutch Safety Board draws attention to the fact that, in the event of a failure of on-board systems or of one engine and the consequent need for immediate descent, civil aviation aircraft (such as the Boeing 777) could not have continued their flight without being forced to enter an area of armed conflict.²⁸³

²⁸¹ TASS, “DPR militias take control of an anti-aircraft defence unit with Buk TELAR systems”, 2014, URL: <https://tass.ru/mezhdunarodnaya-panorama/1287030> (in Russian)

²⁸² Youtube, *Press conference with Vitaliy Nayda of 19 July, Head of Counterintelligence of the State Security Service of Ukraine*, 2014. URL: <https://www.youtube.com/watch?v=PWtH8AA42Fc>

²⁸³ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17 Hrabove, Ukraine, 17 July 2014* (English version) [Dutch Safety Board, Report “Crash of Malaysia Airlines Flight MH17 Hrabove, Ukraine, 17 July 2014”], 2015, p. 219 [**Annex 85 to the Counter-Memorial of the Russian Federation**].

344. As we have noted before, the Applicants ignore all these arguments of the Russian Party and make no attempt to refute them. They even effectively dispute the conclusions of the Dutch Safety Board, which note that the aforementioned arguments “provided sufficient reason for closing the airspace over the eastern part of Ukraine as a precaution”.²⁸⁴

345. The Applicants also groundlessly claim that the autonomous Buk TELAR system is a non-discriminatory weapon. In recent hearings before the UN International Court of Justice on the dispute between Ukraine and Russia under the 1999 International Convention for the Suppression of the Financing of Terrorism, the representative of Ukraine, influenced by the arguments of the Russian Party²⁸⁵ and the expert report²⁸⁶ submitted to it, was forced to admit that the autonomous Buk TELAR system is not a non-discriminatory weapon and that the commander of such a weapon can distinguish between targets.²⁸⁷ The targeting capability of the autonomous Buk TELAR is lower than that of a full-fledged system, but this does not mean that this weapon is non-discriminating.

346. If the ICAO Council upholds the Applicants’ interpretation of the due diligence obligation under Article 3 *bis* and the Applicants’ assertion of the non-discriminatory nature of the Buk TELAR, the use of which in open airspace is a violation *per se* of Article 3 *bis*, it would follow that Ukraine has also violated the Chicago Convention. The fact is that the Dutch Safety Board found that the Ukrainian armed forces used similar weapons and there was a risk of their capture by the DPR and the LPR²⁸⁸ (at the same time, Russia categorically disagrees that flight MH17 was shot down by Donbass militias).

347. Thus, the actions imputed by the Applicants to the Russian Federation do not constitute a violation of Article 3 *bis*. The members of the Council might logically ask: “If, in the Applicants’ view, there is indisputable factual and legal evidence that Russia has violated Article

²⁸⁴ Dutch Safety Board, Final Report of the Technical Investigation, *Crash of Malaysia Airlines Flight MH17, Hrabove, Ukraine, 17 July 2014* (English version), 2015, p. 253 [**Annex 85 to the Counter-Memorial of the Russian Federation**].

²⁸⁵ International Court of Justice, Rejoinder of the Russian Federation to Ukraine’s Reply, paras. 300–324. Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation). URL: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20230310-WRI-01-00-EN.pdf>

²⁸⁶ International Court of Justice, Expert Opinion of Yuri Vladimirovich Bezborodko, 10 March 2023 (Annex 6). Rejoinder of the Russian Federation to Ukraine’s Reply. Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), vol. II. URL: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20230310-WRI-01-02-EN.pdf>

²⁸⁷ Public sitting held on Tuesday 6 June 2023, at 10 a.m., at the Peace Palace, President Donoghue, presiding, in the case concerning Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation) CR 2023/5 p. 61. URL: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20230606-ora-01-00-bi.pdf>

²⁸⁸ Netherlands Public Prosecution Service, Findings of the JIT MH17 investigation into the crew members of the Buk TELAR and those responsible in the chain of command, 2023, p. 64 [**Annex 82 to the Russian Counter-Memorial**].

3 *bis*, why then are the Applicants endeavouring to invoke the concept of due diligence, which *a priori* cannot be applied in the present case?” The answer may be found in international practice.²⁸⁹

348. The Applicants have realized that, even if they were to convince the ICAO Council that their position regarding the facts would be accepted by the Council, it would still not be possible to conclude that the Russian Party had breached Article 3 *bis* of the Chicago Convention. It is for this very purpose that the Applicants have resorted to the flexible concept of due diligence, notwithstanding its apparent inapplicability to the negative obligation enshrined in Article 3 *bis*.

Subsection III.7. Conclusion

349. The conclusion of the present chapter is that Article 3 *bis* of the Chicago Convention does not apply to the MH17 disaster and that the Russian Federation did not breach its obligations under Article 3 *bis* of the Chicago Convention.

²⁸⁹ “Due diligence has traditionally been used (and still is) in situations where it establishes the legal responsibility of a State in connection with the behaviour of private actors that cannot be attributed directly to the State”. Timo Koivurova and Kritika Singh, “Due diligence”, *Max Planck Encyclopaedia of International Law*. URL: <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1034?prd=MPIL> [Translator’s Note: The link requires subscription access. Text is a back-translation from the Russian, as the original English was not available to the translator.]

CHAPTER IV. THE COUNCIL ACTION SOUGHT BY THE APPLICANTS IS INCONSISTENT WITH THE COUNCIL'S EXISTING AUTHORITY UNDER THE CHICAGO CONVENTION

350. On 17 March 2023, the ICAO Council decided that “the arguments concerning the scope of the relief sought ... can only be addressed at the merits stage.”²⁹⁰

351. The Applicants claim that they have allegedly demonstrated that “the requested relief legally and logically follows as a consequence of the Russian Federation’s breach of Article 3 *bis* and is consistent with the Council’s role in deciding disputes arising under the Chicago Convention”.²⁹¹ This is far from the case.

352. The Russian Federation reiterates that it disagrees in principle with allegations of its involvement in the crash of flight MH17 and its violation of the Chicago Convention. As long, however, as the Applicants continue to raise in their documents the issue of the result of the action of the ICAO Council, Russia remains compelled to keep commenting on this issue as well, concerning the Council’s lack of authority.²⁹² The associated reasoning will be summarized in the present document, also taking into account the ICAO Council’s decision of 17 March 2023 to postpone this issue to the merits stage.

353. The Russian Federation justifiably believes that the competence of the ICAO Council does not extend to questions of establishing international responsibility and determining the legal consequences of a violation of the Chicago Convention.²⁹³

354. Based on its actual competence, the ICAO Council could address civil aviation-related issues aimed at determining, on a case-by-case basis, what conduct by the affected parties would best comply with the provisions of the Chicago Convention.

355. The ICAO Council is not identical to the International Court of Justice; it is a *sui generis* institution and its role in resolving disputes under Article 84 of the Chicago Convention, as determined by the International Court of Justice, “does not transform the ICAO Council into a judicial institution in the proper sense of that term.”²⁹⁴

²⁹⁰ Paragraph 1 (e) of the Council’s decision of 17 March 2023. [Annex 7]

²⁹¹ Applicants’ Reply, para. 5.2 [Annex 3]

²⁹² The issue of the ICAO Council’s lack, in principle, of the necessary authority under Chapter XVIII of the Chicago Convention to settle all the Applicants’ claims was addressed in the Russian Federation’s Counter-Memorial (paras. 2 and 3 on p. 104 of the English translation), in the Russian Federation’s Preliminary Objections (section 3 (e), pp. 42–47 of the English translation) and in the Objections of the Russian Federation to the Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objections of the Russian Federation (section 5, pp. 25–30).

²⁹³ Applicants’ Reply, paragraphs 5.2–5.4, 5.7, 5.10 and 5.11 [Annex 3]

²⁹⁴ *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment, ICJ Reports 2020, p. 81, para. 60 [Annex 39 to the Preliminary Objections].

356. The ICAO Council is not a body that decides issues of international responsibility.²⁹⁵ The rules on State responsibility, along with the of the International Court’s own practice in this field, cannot be fully applied as an appropriate source in the present case. We might recall again that, in the *Appeal to relating the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation*, it was noted that the ICAO Council, in the exercise of its functions under Article 84 of the Chicago Convention, resolves questions concerning civil aviation and, accordingly, the interpretation or application of the Chicago Convention.

357. The ICAO Council has no authority under Chapter XVIII of the Chicago Convention to compel Member States of the Organization to negotiate, including in relation to such questions as: the incorporation into national law of guarantees of compliance with and implementation of obligations under the Chicago Convention; the payment of reparations and compensation for a particular act; the public acknowledgement of and apologies for alleged wrongdoing; and other actions which the Applicants require the Russian Federation to perform.

358. The Applicants refer to Article 2 (f) of the ICAO Rules for the Settlement of Differences.²⁹⁶ This paragraph states that the memorial should specify the relief desired by action of Council on the specific points submitted. The paragraph does not indicate that the memorial may contain requirements for the ICAO Council, which are specified by the Applicants in their Application and Memorial.

359. Just because the Applicants regard negotiation as an appropriate mechanism for resolving the matter,²⁹⁷ and the ICAO Council encourages the resolution of disputes on its platform through negotiations,²⁹⁸ this does not mean that the Council is empowered to “*order the parties to a dispute*”,²⁹⁹ which are sovereign States, to enter into negotiations or, especially, to decide on the merits of the dispute.

360. It is no coincidence that, even in the ICAO Rules for the Settlement of Differences, in all cases where reference is made to negotiations and the Council’s powers in this area, the words “invite” and “invitation” are used rather than “order”, “prescribe”, “compel”, and so forth (Articles 6 and 14 of the Rules).

361. The Applicants again argue in their Reply that, as a consequence of the ICAO Council finding a breach of the obligation under Article 3 *bis*, Article 88 obliges the ICAO

²⁹⁵ Applicants’ Reply, Section II, p. 38 [Annex 3]

²⁹⁶ Applicants’ Reply, para. 5.4 [Annex 3]

²⁹⁷ Applicants’ Reply, para. 5.5 [Annex 3]

²⁹⁸ Applicants’ Reply, para. 5.12 [Annex 3]

²⁹⁹ Applicants’ Reply, para. 5.5 [Annex 3]

Assembly to suspend the voting power of the Russian Federation in the Assembly and the Council.³⁰⁰ This is not the case.

362. The Russian Party continues to take an unambiguous approach to the reading of Article 88 of the Chicago Convention. Article 88 “Penalty for non-conformity by State” actually reads: “The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter” (emphasis added).

363. That is, Article 88 covers situations where a Contracting State is found to be in default under the provisions of Chapter XVIII, “Disputes and Default” (the Chapter sets out the procedure for resolving disputes under the Chicago Convention). In other words, for Article 88 to be triggered, one of the Articles of Chapter XVIII (Articles 84–88) must be breached.

364. This approach is also reflected in the academic literature: for example, Luping Zhang notes that “Articles 87 and 88 [of the Chicago Convention] set out two possible penalties in case of non-conformity of the airline and State with a decision of the ICAO Council”.³⁰¹ Or, for example, P.S. Dempsey states in his study that “Chapter XVIII also includes some rather stringent sanctions for noncompliance with decisions rendered thereunder.”³⁰² Another jurist, M. Nash (Leich), takes a similar position.³⁰³ In this case, the Applicants’ claims are based on Article 3 *bis* of the Chicago Convention, which forms part of another Chapter: Chapter I, “General Principles and Application of the Convention”.

365. Perhaps the Applicants’ persistent problem in the reading and correct interpretation of the Article consists in the fact that, in the English version of Article 88 of the Chicago Convention used by the Applicants, it is linguistically more difficult to determine which obligations are being referred to in the Article (“*the Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter*”). Let us review the interpretation of this provision in accordance with the ordinary meaning of its terms in other languages.

366. The Russian text, which, along with the other texts of the convention, is equally authentic, states more unambiguously that it refers to obligations prescribed by the provisions of this Chapter (i.e., Chapter XVIII). The participial phrase “provided for by the provisions of this

³⁰⁰ Applicants’ Reply, paragraphs 5.6 and 5.9 [Annex 3]

³⁰¹ Zhang Luping. *The Resolution of Inter-State Disputes in Civil Aviation*, Oxford University Press, United Kingdom, 2022, p. 34. [Annex 57 to Russia’s Preliminary Objections].

³⁰² Paul Stephen Dempsey, “Flights of fancy and fights of fury: arbitration and adjudication of commercial and political disputes in international aviation”, *Georgia Journal of International and Comparative Law*, vol. 32, No. 2, 2004, p. 268 [Annex 21].

³⁰³ Marian Nash (Leich), cited in: “Flights of fancy and fights of fury: arbitration and adjudication of commercial and political disputes in international aviation”, *Georgia Journal of International and Comparative Law*, vol. 32, No. 2, 2004, p. 262, footnote 146 [Annex 21].

Chapter” has as its qualifier the word “obligations”. Reference cannot be made to any other obligations.

367. Let us look at the texts in Spanish and French. The Spanish states: “*La Asamblea suspenderá el derecho de voto en la Asamblea y en el Consejo a todo Estado contratante que se encuentre en falta con respecto a las disposiciones del presente Capítulo*”. The French: “*L’Assemblée suspend le droit de vote à l’Assemblée et au Conseil de tout État contractant trouvé en infraction au regard des dispositions du présent chapitre*”.

368. As the Spanish and French texts of Article 88 of the Chicago Convention clearly show, the possessive preposition “*de*” places the obligations exclusively under Chapter XVIII. The situation is exactly the same in the Russian text.

369. Thus, no legal grounds may arise in the present case for the ICAO Assembly automatically to suspend the voting power of the Russian Federation in the ICAO Council and Assembly. The Applicants’ arguments that voting powers may be suspended by the Assembly as a consequence of a breach of Article 3 *bis* are therefore spurious.

370. To summarize the Applicants’ contentions in Section V of their Reply, we may conclude the following. The ICAO Council has no legal grounds to satisfy the Applicants’ claims, not only because of the attested non-involvement of Russia in the disaster (Section II of the Russian Federation’s Counter-Memorial and Chapter II of the present Rejoinder) and the legal inapplicability of Article 3 *bis* to the disaster/absence of any breach by Russia of its obligations under Article 3 *bis* (Section III of the Counter-Memorial and Chapter II of the present Rejoinder), but also because the ICAO Council lacks the authority to satisfy all the claims made against it by Australia and the Netherlands.

CHAPTER V. CONCLUSION

371. The legal arguments and factual circumstances adduced in the Applicants' Reply attest to the legally and factually groundless nature of the charges brought by the Applicants against the Russian Federation and preclude the determination of the truth in the Boeing MH17 crash.

372. All the conclusions advanced by the Applicants about the alleged involvement of the Russian Federation in the crash of flight MH17 are inconsistent with the objective facts. It follows, among other things, that a new, full, thorough and independent investigation of the crash is required in this case.

373. As is well known, an internationally wrongful act of a State only occurs when certain conduct consisting in an act or omission: (a) is attributable to a State under international law; and (b) constitutes a breach of an obligation of that State under international law. Accordingly, even if, without prejudice to Chapter IV of the present Rejoinder, the ICAO Council had jurisdiction and appropriate authority in the present case, the fact of internationally wrongful conduct by the Russian Federation could not in any event be established, since the crash of MH17 cannot be attributed to the Russian Federation and does not constitute a breach of an obligation of the Russian Federation under international law – Article 3 *bis* of the Chicago Convention.

374. In the light of the positions put forward in the present Rejoinder and the Counter-Memorial, the Russian Federation renews its request to the ICAO Council to decline any satisfaction of the claims by Australia and the Netherlands in their entirety and to issue a decision finding as follows:

1) the Russian Federation was not involved in the crash of flight MH17 – the acts that led to the crash of MH17 may not be attributed to the Russian Federation; Article 3 *bis* of the Chicago Convention is not applicable to the crash of MH17; and/or the Russian Federation has not breached its obligations under Article 3 *bis* of the Chicago Convention;

2) the ICAO Council has no authority under Chapter XVIII of the Chicago Convention either to accept declarations of the breach of international legal obligations by a State, or to establish international responsibility, or to compel Member States of the Organization to negotiate, including on such issues as:

- a) providing assurances of the fulfilment and incorporation into national law of the obligations under the Chicago Convention;
- b) payment of reparations and compensation for a specific act;
- c) public acknowledgement of alleged wrongdoing and the rendering of apologies;
- d) and other actions that the Applicants require the Russian Federation to perform.

Nor does the ICAO Council have the right to oblige Member States of the Organization to inform the ICAO Council of the progress of negotiations between them.

3) In the absence of any attested failure to comply with a decision of the Council passed under Article 84 of the Chicago Convention, the ICAO Council and Assembly have no right to impose sanctions under Article 88 of the Chicago Convention, namely, to suspend the voting power of the Russian Federation in the ICAO Assembly and Council.

375. The Russian Federation reserves the right to supplement or amend these requests to the ICAO Council.

376. The Russian Federation reserves the right to reply to any written statement by Australia and/or the Kingdom of the Netherlands filed in response to the present Rejoinder.

Agent of the Russian Federation

**Senior Assistant on Special Assignment
of the Procurator General of the
Russian Federation**

(handwritten signature)

D.E. Grunis

ANNEXES

Case materials

- Annex 1.** Counter-Memorial of the Russian Federation of 20 April 2023, in English.
- Annex 2.** Correction of the translation of the Russian Federation Counter-Memorial by the ICAO Secretariat.
- Annex 3.** Reply of Australia and the Netherlands of 28 July 2023 to the Counter-Memorial of the Russian Federation of 24 April 2023, in English.
- Annex 4.** Memorial of Australia and the Netherlands of 14 March 2022, in English.
- Annex 5.** Preliminary Objections of the Russian Federation of 28 July 2022, in English.
- Annex 6.** Objections of the Russian Federation of 10 January 2023 to the Reply of Australia and the Netherlands to the Preliminary Objections of the Russian Federation, in English.
- Annex 7.** ICAO Council Decision of 17 March 2023 concerning the competence of the Council.

International treaties

- Annex 8.** Agreement between the Government of the Russian Federation and the Government of Ukraine on the settlement of claims arising from the air disaster of 4 October 2001.
- Annex 9.** Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, 2010.

Documents of the UN International Court of Justice

- Annex 10.** International Court of Justice, Application instituting proceedings concerning a dispute under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Canada, the Kingdom of Sweden, Ukraine and the United Kingdom of Great Britain and Northern Ireland v. the Islamic Republic of Iran) 4 July 2023.

ICAO documents

- Annex 11.** 228th Session of the ICAO Council, Minutes of the Fourth Meeting, C-MIN 228/4, 25 April 2023.
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Annex 33. Request by the JIT for legal assistance dated 6 April 2018.

Annex 34. Location and map of the Kuzminsky training ground in Rostov province as of 2014.

Annex 35. Expert opinion Nos. 5407, 5443/16-1 and 1249/21-1, dated 15 April 2019.

Annex 36. Expert opinion Nos. 1327, 1328, 1329/16-1-20, 1330/33-1-20, 1072/15-1 and 1073/15-1, dated 30 October 2020.

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Annex 38. Statement of A.S. Khodakovsky to the ICAO Council dated 12 October 2023.

Annex 39. Conclusion of the representative of Almaz-Antey Aerospace Defence Concern JSC on evidence of manipulation and falsification of evidence during the technical investigation by the Dutch Safety Board.

Annex 40. JIT Request for legal assistance dated 3 May 2018.

Annex 41. Response to the JIT request for legal assistance dated 3 May 2018.

Annex 42. Report on research work of the Central Research Institute of the Air Force of the Ministry of Defence of Russia of 23 August 2023.

Annex 43. Correspondence on the question of Russia’s admission to the JIT.

Annex 44. Correspondence on the transfer to Russia of materials from the JIT investigation relating to Russian nationals.

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