

**INTERNATIONAL COURT OF JUSTICE**

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**APPEAL FROM THE DECISION OF THE ICAO COUNCIL UNDER  
ARTICLE 84 OF THE CONVENTION ON INTERNATIONAL CIVIL AVIATION**

**(RUSSIAN FEDERATION V. COMMONWEALTH OF AUSTRALIA AND KINGDOM OF THE  
NETHERLANDS)**

**APPLICATION INSTITUTING PROCEEDINGS  
SUBMITTED BY THE RUSSIAN FEDERATION**

**18 SEPTEMBER 2025**



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## I. INTRODUCTION

1. The present Application constitutes an appeal from the decision that the Council of International Civil Aviation Organization (the “**ICAO Council**”) made on 30 June 2025 in proceedings brought by the Commonwealth of Australia and the Kingdom of the Netherlands (the “**Respondents**”) against the Russian Federation on 14 March 2022 under Article 84 of the 1944 Convention on International Civil Aviation (the “**Chicago Convention**”).
2. The proceedings before the ICAO Council concerned a disagreement relating to the interpretation and application of the Chicago Convention regarding the aerial incident of the Boeing 777 Malaysian Airlines Flight MH17 (“**Flight MH17**”) that occurred on 17 July 2014. The Respondents claimed before the ICAO Council that the Russian Federation was internationally responsible under the Chicago Convention for the shooting down of Flight MH17 with a “Buk” surface-to-air missile system (“**Buk SAM**”). The Russian Federation opposed this claim.
3. On 17 March 2023, the ICAO Council rendered a “Decision on the Preliminary Objection in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022)”<sup>1</sup> (the “**Decision on Preliminary Objection**”), in which it rejected some of the preliminary objections raised by the Russian Federation and determined that it had jurisdiction to hear the Respondents’ claim. The ICAO Council considered that two of the objections concerned questions that could only be dealt with at the merits stage and deferred a decision on them.<sup>2</sup>
4. On 30 June 2025, the ICAO Council rendered a “Decision in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022)”<sup>3</sup> (the “**Final Decision**”), in which it found the Respondents’ claim to be “well founded in fact and law” and considered that “the shooting down of Flight MH17 on 17 July 2014 constitutes a non-conformity by the [Russian Federation] with its obligations under Article 3 *bis* of the Chicago Convention”.<sup>4</sup>

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<sup>1</sup> Decision on Preliminary Objection, p. 3 (Annex 1).

<sup>2</sup> *Ibid.*

<sup>3</sup> Final Decision (Annex 2).

<sup>4</sup> *Ibid.*, p. A-6.

5. In accordance with Article 84 of the Chicago Convention, the Russian Federation submits the present appeal from the Final Decision, in which the ICAO Council erred both in law and in fact, and caused moreover prejudice in a fundamental way to the requirements of due process and just procedure.
6. The Russian Federation underscores that it categorically rejects the legitimacy and validity of the Decision on Preliminary Objection and the Final Decision, which were adopted despite the ICAO Council's lack of jurisdiction, are tainted with irreparable procedural irregularities and reflect a manifest bias against the Russian Federation. The present appeal should not be interpreted as an admission of the legitimacy or validity of any of these decisions or the ICAO Council's competence to issue them.
7. Pursuant to Article 87(2) of the Rules of Court, a copy of the Final Decision is annexed hereto.

## **II. JURISDICTION OF THE COURT**

8. The jurisdiction of the Court to entertain the present appeal is founded on Article 84 of the Chicago Convention, in conjunction with Articles 36(1) and 37 of the Statute of the Court.
9. Article 84 of the Chicago Convention reads as follows:

*“Settlement of disputes*

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

10. Article 84 of the Chicago Convention confers the ICAO Council “the function of settling disagreements between two or more contracting States relating to the interpretation or

application of the Convention and its Annexes.”<sup>5</sup> The appellate jurisdiction of the Court under Article 84 extends to decisions of the ICAO Council irrespective of whether those are on preliminary objections or on the merits.<sup>6</sup>

11. In conformity with Article 84, the Russian Federation notified the present appeal to the ICAO Council and submitted this Application to the Court within the sixty-day period after the ICAO Council notified the Final Decision on 25 July 2025.

### III. STATEMENT OF FACTS

#### A. THE FLIGHT MH17 INCIDENT

12. On 17 July 2014, while *en route* from Amsterdam, the Netherlands, to Kuala Lumpur, Malaysia, Flight MH17 was shot down and crashed over territory of the former Donetsk Region – then under Ukraine’s sovereignty. All 298 passengers and crew members on board Flight MH17 tragically lost their lives.
13. The aerial incident occurred over an area where an internal armed conflict broke out in early 2014 between the new government in Kiev, installed after the “Maidan” *coup d’état*, and the population of the Donbass region, who did not recognise the authority of the new regime and declared the Donetsk People’s Republic (the “DPR”) and the Lugansk People’s Republic (the “LPR”) as independent States. The Russian Federation, while not a party to the conflict, was still affected by it in a multitude of ways as a neighbouring State. The ongoing hostilities in the area were, at the time, highly active, including air-to-surface bombardments by Ukrainian air forces. On 2 June 2014, for example, two Ukrainian fighter aircraft conducted an attack on Lugansk, killing eight civilians.<sup>7</sup> On 15 July 2014, Ukraine launched another deadly bombing against residential buildings in

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<sup>5</sup> *Appeal Relating to the Jurisdiction of the ICAO Council Under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, Judgment, I.C.J. Reports 2020, p. 104, ¶60.

<sup>6</sup> *Ibid.*, p. 96, ¶30; *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, pp. 60-61, ¶26.

<sup>7</sup> CNN, *Air attack on pro-Russian separatists in Lugansk kills 8, stuns residents* (3 June 2014), available at: <https://edition.cnn.com/2014/06/03/world/europe/ukraine-luhansk-building-attack/index.html> (Annex 44).

Snezhnoye, Donetsk. The attack was carried out early in the morning, when the residents were still in their homes, and took the lives of at least ten people.<sup>8</sup>

14. By 17 July 2014, extensive surface-to-air defensive action by the DPR and LPR's militia had resulted in the downing of several Ukrainian warplanes.<sup>9</sup> There was, moreover, a presence of Ukraine's own Buk SAM systems in the conflict zone<sup>10</sup> and Ukraine had prior knowledge of mobile SAM units – including at least one Buk SAM captured from Ukraine – in possession of the militia. Despite the clear danger to civil aviation that existed in such circumstances, Ukraine did not adequately close its airspace to civil aviation traffic or take any other measures that could have prevented the shooting down of civil aircraft overflying that area at the relevant time.
15. The Russian Federation expressed its deep regret for the MH17 incident and its support for the victims' families. It called for a comprehensive investigation of the circumstances surrounding the downing of the aircraft and urged all interested parties to contribute to establishing the facts of the crash.<sup>11</sup> The Russian Federation actively participated in the drafting and voted in favour of the adoption of UN Security Council Resolution 2166 (2014) of 21 July 2014, which, *inter alia*, “support[ed] efforts to establish a full, thorough

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<sup>8</sup> Donetsk News Agency, *Hundreds Rushed to Remove the Rubble: Eyewitnesses on the Aftermath of the Airstrike in Snezhnoye in Summer 2014* (15 July 2020), available at: <https://dan-news.ru/obschestvo/sotni-brosilis-razbirat-zavaly-ocheydicy-o-posledstviyax-aviaudara-v-snezhnom-letom-2014-goda/> (Annex 45).

<sup>9</sup> Dutch Safety Board, *Crash of Malaysia Airlines flight MH17, October 2015*, pp. 182-183, available at: [https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport\\_mh17\\_crash.pdf](https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport_mh17_crash.pdf).

<sup>10</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶352 (Annex 7). See also Facebook, Vladislav Seleznyov Account, *11.50 In order to reduce the response to possible threats...* (12 July 2014), available at: <https://www.facebook.com/share/p/1F1U54JNbf/> (Annex 42); YouTube, Army TV – Military Television of Ukraine account, *Program “Chas Ch” No. 129 (16.07.2014. Evening edition)* (16 July 2014), available at: <https://www.youtube.com/watch?v=Q3MomxNHnUA> (Annex 43).

<sup>11</sup> Permanent Mission of the Russian Federation to the United Nations, Statement by H.E. Ambassador Vitaly I. Churkin, Permanent Representative of the Russian Federation to the United Nations, during the Security Council Meeting on the situation in Ukraine, 21 July 2014, available at: [https://russiaun.ru/en/news/sc\\_ukr2107/](https://russiaun.ru/en/news/sc_ukr2107/): “On behalf of the Russian Federation, let me once again extend my condolences to all the families of the dead, and the governments of the countries whose nationals were on the plane which crashed on the 17 July in Ukraine. We need to ensure an absolutely impartial, independent and open international investigation into the crash of the Malaysian airliner. This is the purpose of today's SC resolution, which was supported by us and prepared with our participation” (Annex 22). See also Ministry of Foreign Affairs of the Russian Federation, Press release, The Foreign Ministry's statement on the discussion of further steps related to the continuing investigation into the MH17 disaster at the UN Security Council, 30 July 2015, available at: [https://www.mid.ru/en/foreign\\_policy/news/1512259/](https://www.mid.ru/en/foreign_policy/news/1512259/): “We would like to reiterate our commitment to a thorough and unbiased international investigation into the crash of the Malaysian aircraft. Russia will continue to do its utmost to provide every possible assistance to the investigation” (Annex 23).

and independent investigation into the incident in accordance with international civil aviation guidelines”.<sup>12</sup>

16. Such a full, thorough and independent investigation was, however, never conducted. Instead, on 23 July 2014, Ukraine delegated the investigation on certain factual aspects of the incident to the Dutch Safety Board (the “**DSB**”)<sup>13</sup> – a Dutch public administrative body established under the law of the Kingdom of the Netherlands and financed by the Dutch Government. The Netherlands is a NATO member State, a consistent opponent of the Russian Federation on the geopolitical stage, one of the two Applicants against the Russian Federation before the ICAO Council, and an active supporter of Ukraine, including in cases against the Russian Federation before the Court.<sup>14</sup> The DSB investigated only limited issues such as possible technical causes of the crash. It did not address matters of State responsibility, nor did it identify the individuals who may have been involved in the downing of Flight MH17. At the same time, the DSB considered that the Ukrainian authorities had taken insufficient notice of the dangers to civil aviation and failed to adopt measures to protect civil aircraft against the weapon systems present in the area of hostilities (including Buk SAMs).<sup>15</sup>
17. The Russian Federation, recalling UN Security Council Resolution 2166 (2014), raised serious concerns with this way forward and the manner in which the DSB investigation was conducted.<sup>16</sup> Those concerns were regrettably disregarded.

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<sup>12</sup> Resolution 2166 (2014), adopted by the Security Council at its 7221st meeting on 21 July 2014, S/RES/2166 (2014), ¶3.

<sup>13</sup> Agreement between the National Bureau of Air Accident and Incidents Investigation with Civil Aircraft (NBAAI) of Ukraine and the Dutch Safety Board of the Netherlands on Delegation of Investigation in Respect of Aircraft Accident Involving Boeing 777-200, Registration: 9M-MRD “Malaysia Airlines” Flight MH17, 23 July 2014, available at: [https://web.archive.org/web/20160304133144/http://www.geenstijl.nl/archives/images/Agreement\\_NBAAI\\_and\\_DSB\\_website.pdf](https://web.archive.org/web/20160304133144/http://www.geenstijl.nl/archives/images/Agreement_NBAAI_and_DSB_website.pdf) (Annex 47).

<sup>14</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Joint declaration of intervention of Canada and the Netherlands, 7 December 2022.

<sup>15</sup> Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, October 2015, p. 209, available at: [https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport\\_mh17\\_crash.pdf](https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport_mh17_crash.pdf).

<sup>16</sup> TASS, *Ryabkov: Report on Boeing in Ukraine – an attempt to fulfill a political order* (13 October 2015), available at: <https://tass.ru/politika/2343538> (Annex 46). See also Ministry of Foreign Affairs of the Russian Federation, Press Release, Statement on the impossibility of Russia’s continued participation in trilateral consultations with Australia and the Netherlands on the MH17 plane crash in eastern Ukraine on 17 July 2014, 15 October 2020, available at: [https://www.mid.ru/en/foreign\\_policy/news/1444296/](https://www.mid.ru/en/foreign_policy/news/1444296/): “From the outset, the Netherlands adhered to the only scenario of what happened and promoted it both as part of a technical investigation conducted by the Dutch Safety Board (DSB) and a criminal investigation carried out by the Joint Investigation team (JIT). Naturally, both investigations were biased, superficial and politicised. Everything was done to back

18. Further, on 7 August 2014, while the DSB was conducting its investigation, some of the States affected by the Flight MH17 incident set up among themselves the so-called Joint Investigative Team (the “JIT”) to investigate the incident.<sup>17</sup> Unlike the DSB, the JIT was tasked with conducting a criminal investigation in order to identify the persons responsible for the shooting down of Flight MH17 and enable their prosecution.<sup>18</sup> The JIT’s composition was profoundly predisposed against the Russian Federation. It involved four States that expressed animosity against the Russian Federation (Australia, Belgium, the Netherlands and Ukraine); two of such States are members of NATO (Belgium and the Netherlands); and two of them moreover became Applicants in the ICAO proceedings against the Russian Federation (Australia and the Netherlands). Furthermore, the JIT included Ukraine, which was engaged in an internal armed conflict with the DPR and LPR and considered itself at war with the Russian Federation. It is remarkable that some JIT members immediately made statements claiming the Russian Federation to be responsible for the incident, even before the so-called investigation commenced.<sup>19</sup>
19. The Russian Federation, despite repeated unfounded accusations that it may be responsible for the shooting down of Flight MH17, was not invited to participate in the JIT’s investigation. It requested the JIT in 2015 to include Russian representatives into its work, but it was rejected as this would supposedly “complicate the cooperation” between the JIT members “even further”.<sup>20</sup> This rejection was all the more extraordinary

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the hasty accusations against Russia. In turn, our country initially advocated a full, thorough and independent investigation in accordance with the provisions of UN Security Council Resolution 2166, repeatedly pointed out the shortcomings in the investigations of the plane crash, and noted the inconsistency with the criteria contained in the resolution” (Annex 24).

<sup>17</sup> The JIT was an investigation team composed of competent authorities of Australia, Belgium, Malaysia, the Netherlands and Ukraine, and was supported and financed by the European Union Agency for Criminal Justice Cooperation (EUROJUST), an agency of the European Union.

<sup>18</sup> Netherlands Public Prosecution Service, *What is the difference between the Dutch Safety Board investigation and the JIT Investigation?* (21 December 2021), available at: <https://www.prosecutionservice.nl/topics/mh17-plane-crash/frequently-asked-questions/mh17/difference-investigation-ovv-and-jit> (Annex 37).

<sup>19</sup> Australian High Commission, Statement from the Prime Minister on MH17, 18 July 2014, available at: [https://singapore.embassy.gov.au/sing/ahcsg\\_140718\\_pmstatement.html](https://singapore.embassy.gov.au/sing/ahcsg_140718_pmstatement.html): “Malaysia Airlines MH17 has been shot down over the Eastern Ukraine it seems by Russian backed rebels” (Annex 25). See also Consulate General of Ukraine, Information on the terrorist act against Malaysian Airlines Boeing-777 plane, 18 July 2014, available at: <https://ny.mfa.gov.ua/en/news/25785-informacija-shhodo-zbitogo-litaka-malajzijsykih-avialinij>: “Within a few hours after the attack the Security Service of Ukraine received and published the undeniable evidence that the aircraft was shot down by pro-Russian terrorists with Russian arms” (Annex 36).

<sup>20</sup> Letter from the Head Prosecutor of the National Prosecutors Office of the Netherlands F.K.G. Westerbeke to the Prosecutor General’s Office of the Russian Federation, 9 September 2015 (Annex 48).

because Ukraine – a State with a direct interest in the outcome of the investigation as its responsibility may be engaged at least for failure to close its airspace to civil aviation traffic at the relevant time, and at most for actually perpetrating the downing of Flight MH17 by one of the Ukrainian Buk SAMs operational in the zone of conflict – was invited to join the JIT and allowed to exercise considerable influence on its work. In such circumstances, the Russian Federation voiced serious concerns about the JIT’s lack of independence and bias.<sup>21</sup> These concerns were yet again not taken seriously.

20. Despite the abovementioned severe shortcomings in the DSB and JIT investigations, and in an effort to establish the facts of the incident pursuant to UN Security Council Resolution 2166 (2014), the Russian Federation provided both bodies with all the relevant information gathered by its competent authorities, including through sophisticated technical tests and the declassification of official documents related to armaments that were allegedly used to shoot down Flight MH17 (the Buk SAM).<sup>22</sup> However, and notwithstanding its obvious relevance, both the DSB and the JIT systematically dismissed the information supplied by the Russian Federation.
21. On 7 July 2017, Ukraine and the Netherlands, with the support of the other JIT members, concluded an “Agreement on international legal cooperation regarding crimes connected with the downing of Malaysia Airlines Flight MH17 on 17 July 2014”, which aimed at

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<sup>21</sup> Ministry of Foreign Affairs of the Russian Federation, Press Release, Statement on the impossibility of Russia’s continued participation in trilateral consultations with Australia and the Netherlands on the MH17 plane crash in eastern Ukraine on 17 July 2014, 15 October 2020, available at: [https://www.mid.ru/en/foreign\\_policy/news/1444296/](https://www.mid.ru/en/foreign_policy/news/1444296/) (Annex 24).

<sup>22</sup> For the results of the Russian Federation’s investigative efforts *see e.g.* Report of JSC Air and Space Defense Corporation “Almaz-Antey” on the results of studies related to the technical investigation into the crash of the Malaysian airlines Boeing 777-200 9M-MRD (flight MH17), 2023, available in full at: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20210809-WRI-01-01-EN.pdf> (Annex 56). *See also* Federal Air Transport Agency of the Russian Federation, Letter No. 02.3-2039 from Deputy Director O. Storchevoy commenting on the draft final report on the investigation into the crash of flight MH17, 14 July 2015 (Annex 51); Federal Air Transport Agency of the Russian Federation, Letter No. 4.15-785-dsp from Deputy Director O. Storchevoy to the President of the ICAO Council on the progress of the investigation into the crash of flight MH17, 16 September 2015 (Annex 52); Federal Air Transport Agency of the Russian Federation, Letter No. 4.02-798-dsp from Deputy Director O. Storchevoy to the Dutch Safety Board objecting to actions contrary to Annex 13 to the Chicago Convention, 22 September 2015 (Annex 53); Federal Air Transport Agency of the Russian Federation, Letter No. 4.02-3 from Deputy Director O. Storchevoy to the Dutch Safety Board with information on new facts to be reflected in the final report on the MH17 crash, 14 January 2016 (Annex 54); and Dutch Safety Board, Letter No. OvV-16500274 from the Chairman of the DSB in response to Letter No. 4.02-3 from the Deputy Director O. Storchevoy of the Federal Air Transport Agency of the Russian Federation, dated 14 January 2016, 25 February 2016 (Annex 55) (demonstrating the dismissive attitude of the DSB towards the Russian Federation’s evidence and explanations).

concentrating the criminal proceedings related to the incident in the Netherlands.<sup>23</sup> In March 2020, the Netherlands Public Prosecution Service brought criminal proceedings under Dutch law against four individuals who were allegedly involved in the shooting down of Flight MH17.

22. On 17 November 2022, The Hague District Court convicted three of the four accused individuals *in absentia* for “co-perpetration of causing an aircraft to crash intentionally and unlawfully, when there was danger to another person’s life and the act resulted in a person’s death”, as well as “conspiracy to commit murder, committed multiple times”, whilst acquitting the only accused that was represented by counsel in the trial. It is of note that The Hague District Court did not identify the individuals who had allegedly launched the missile from the Buk SAM or issued the order to do so. It determined, moreover, that Flight MH17 was shot down by mistake, in the belief that it was a military aircraft; in the words of the District Court, “it is completely implausible that a civil airplane was deliberately shot down”.<sup>24</sup> Such mistake, according to the District Court, was made in the midst of the military clashes between the DPR and LPR militia and the Ukrainian Armed Forces with the use of heavy weaponry, where the DPR and LPR forces “suffered increasing losses as a result of constant Ukrainian aerial bombardment” and had a “concrete need for air defense”, employing their own anti-aircraft equipment (including SAM units) to shoot down several Ukrainian military aircraft prior to the MH17 incident.<sup>25</sup>
23. Separately, on 9 July 2025, the Grand Chamber of the European Court of Human Rights (the “ECtHR”) rendered its judgment in the *Case of Ukraine and the Netherlands v. Russia*, which concerned, *inter alia*, alleged violations of the European Convention on

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<sup>23</sup> Agreement between the Kingdom of the Netherlands and Ukraine on international legal cooperation regarding crimes connected with the downing of Malaysia Airlines Flight MH17 on 17 July 2014, 7 July 2017 (Annex 49).

<sup>24</sup> See e.g. District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022, ¶6.2.5.3, available at: <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2022:14040>: “The Court first of all states that it is completely implausible that a civil airplane was deliberately shot down. Not only because it is impossible to see what purpose this would have served, but also because neither the criminal file nor the investigation at the hearing offer any indication of this. On the contrary, from the statement of M58 who was present at the field and from the telephone responses following the shooting down of MH17, it is rather clear that those involved initially thought that they had succeeded in shooting down a Ukrainian military aircraft” (Annex 50).

<sup>25</sup> See e.g. *ibid.*, ¶4.4.3.1.1.

Human Rights in relation to the Flight MH17 incident.<sup>26</sup> Like The Hague District Court, the ECtHR was unable to identify the persons who fired the missile that caused the crash of Flight MH17 and concluded that the missile was launched “most likely in the mistaken belief that [Flight MH17] was a military aircraft”.<sup>27</sup>

## **B. THE CONSULTATIONS BETWEEN THE PARTIES**

24. In 2019, the Respondents conducted three rounds of consultations with the Russian Federation, which took place in Vienna. The Russian Federation entered the consultations with a view to cooperating and achieving the objectives of UN Security Council Resolution 2166 (2014) so as to establish, through joint efforts, the causes of the crash. The consultations were envisaged to cover a whole range of issues related to the investigation of the shooting down of Flight MH17, including central questions raised by the Russian Federation, such as the relevance of the data that it had transmitted to the JIT and the potential responsibility of Ukraine, the State in whose airspace the incident occurred.
25. Following the first round of tripartite consultations (4-5 March 2019), the Parties had reached agreement on the agenda for the subsequent rounds, which encompassed the following items: (a) “discussion of [previous] civil aircraft downings”, (b) “discussion of all the circumstances related to the downing of Flight MH17”, and (c) “elements of a mutually acceptable outcome based on the discussion of the preceding items”.<sup>28</sup>
26. During the second (23-24 July 2019) and third (19-20 November 2019) rounds of consultations, the Parties only addressed the first item on the agenda (“discussion of civil aircraft downings”). The fourth round of consultations was meant to progress to item 2 (“discussion of all the circumstances surrounding the downing of Flight MH17”);

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<sup>26</sup> The case originated in four separate applications (nos. 20958/14, 43800/14, 42410/15 and 11055/22) against the Russian Federation lodged with the ECtHR under Article 33 of the Convention for the Protection of Human Rights and Fundamental Freedoms by Ukraine on 13 March and 13 June 2014, 26 August 2015 and 28 February 2022 respectively; and an application (no. 28525/20) against lodged under the same article by the Kingdom of the Netherlands on 10 July 2020. The Russian Federation’s participation in these proceedings was curtailed after it was suspended and later expelled from the Council of Europe. It ceased to be a party to the Convention on 16 September 2022.

<sup>27</sup> ECtHR, *Case of Ukraine and the Netherlands v. Russia* (Applications nos. 80196/16, 43800/14, 28525/20 and 11055/22), Judgment, 9 July 2025, ¶455, available at: <https://hudoc.echr.coe.int/eng?i=001-244292>.

<sup>28</sup> Preliminary Objections of the Russian Federation, 28 July 2022, p. 37 (Annex 5).

however, this round was delayed due to the constraints related to the COVID-19 pandemic, and ultimately did not take place.

27. Thus, the consultations held in 2019 were limited to discussing specific incidents of civil aircraft downings, and the Parties did not in any way consider the particular circumstances of the Flight MH17 incident, nor the issue of the Russian Federation's alleged responsibility for violating its obligations under the Chicago Convention.
28. The Respondents initially declared some readiness to continue the consultations.<sup>29</sup> Nevertheless, on 10 July 2020, the Netherlands filed an inter-State application against the Russian Federation with the ECtHR in relation to the downing of Flight MH17 – later merged with a separate application by Ukraine in the *Case of Ukraine and the Netherlands v. Russia* –, thus rendering any further negotiations on the subject moot.
29. Consequently, on 15 October 2020, the Russian Ministry of Foreign Affairs notified the Respondents that, in such circumstances, it could not continue its participation in the tripartite consultations.<sup>30</sup>

### **C. THE PROCEEDINGS BEFORE THE ICAO COUNCIL**

30. On 14 March 2022, the Respondents filed an Application (together with a Memorial) with the ICAO Council for the settlement of a disagreement with the Russian Federation regarding “the responsibility of the Russian Federation under international law for its role in the downing of Flight MH17”.<sup>31</sup>
31. The Respondents alleged, *inter alia*, that “Flight MH17 was shot down by a surface-to-air missile fired from a Buk-TELAR that belonged to the 3<sup>rd</sup> Battalion of the 53<sup>rd</sup> Anti-Aircraft Military Brigade (‘AAMB’), being a unit of the armed forces of the Russian Federation, and accompanied by a Russian military crew”.<sup>32</sup> The Respondents also alleged that “the Russian Federation knew that its own acts created a serious danger of

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<sup>29</sup> Memorial of Australia and the Kingdom of the Netherlands, 14 March 2022, ¶3.17 (Annex 11).

<sup>30</sup> Ministry of Foreign Affairs of the Russian Federation, Note No. 9266/1 edn, 15 October 2020 (Annex 26); Ministry of Foreign Affairs of the Russian Federation, Press Release, Statement on the impossibility of Russia's continued participation in trilateral consultations with Australia and the Netherlands on the MH17 plane crash in eastern Ukraine on 17 July 2014, 15 October 2020, available at: [https://www.mid.ru/en/foreign\\_policy/news/1444296/](https://www.mid.ru/en/foreign_policy/news/1444296/) (Annex 24).

<sup>31</sup> Memorial of Australia and the Kingdom of the Netherlands, 14 March 2022, ¶1.7 (Annex 11).

<sup>32</sup> *Ibid.*, ¶1.19.

the use of weapons against civil aircraft in flight, and failed to take measures available to it that would have prevented that serious danger from materializing”.<sup>33</sup> They further claimed that “[b]ut for the actions and inactions of the Russian Federation, Flight MH17 would not have been shot down on 17 July 2014, and the 298 passengers and crew would have reached their destination safely”;<sup>34</sup> thus, “the shooting down of Flight MH17 involved a clear contravention of Article 3*bis* of the Convention, which is plainly attributable to the Russian Federation”.<sup>35</sup>

32. On 28 July 2022, the Russian Federation filed Preliminary Objections pursuant to Article 5(2) of the ICAO Rules for the Settlement of Differences (the “**ICAO Rules**”), in which it showed that the ICAO Council lacked jurisdiction under Article 84 of the Chicago Convention to settle the difference or, alternatively, that the Respondents’ claim was inadmissible.<sup>36</sup> Five objections were raised:
- (a) The scope of Article 3 *bis* of the Chicago Convention does not extend to situations of armed conflict;
  - (b) The ICAO Council has no jurisdiction to resolve the issue raised by the Respondents because the Council is not a court, let alone one of a criminal nature;
  - (c) The Application is inadmissible because of the absence in the proceedings of States whose direct interests are affected (the *Monetary Gold* or indispensable third party principle) – in particular, Ukraine was not a party to the proceedings;
  - (d) The Respondents had failed to meet the negotiation pre-condition under Article 84 of the Chicago Convention; and
  - (e) The actions of the ICAO Council sought by the Respondents are inconsistent with the Council’s powers under the Chicago Convention.

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<sup>33</sup> Memorial of Australia and the Kingdom of the Netherlands, 14 March 2022, ¶1.20 (Annex 11).

<sup>34</sup> *Ibid.*, ¶1.21.

<sup>35</sup> *Ibid.*, ¶1.19.

<sup>36</sup> Preliminary Objections of the Russian Federation, 28 July 2022, p. 5 (Annex 5); Objections of the Russian Federation to the Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objection of the Russian Federation, 12 January 2023, p. 4 (Annex 6).

33. On 10 November 2022, the Respondents filed their Reply to the Russian Federation’s Preliminary Objections. On 10 January 2023, the Russian Federation filed a Rejoinder on Preliminary Objections.<sup>37</sup>
34. On 17 March 2023, at the Third Meeting of its 228<sup>th</sup> Session, the ICAO Council rendered its Decision on Preliminary Objection, in which it dismissed some of the preliminary objections raised by the Russian Federation and found that it had jurisdiction to settle the disagreement. The ICAO Council deferred its decision on the other preliminary objections, considering that they could only be addressed at the merits stage. The text of the Decision, taken by a secret ballot (22 votes to 3, with 10 abstentions), reads as follows:
- “The preliminary objection of the Respondent is not accepted in its entirety because:
- a) 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;
  - b) it is within the scope of the dispute settlement function of the Council to exercise its jurisdiction and determine whether there is a responsibility of the Russian Federation for the downing of Flight MH17. That function concerns the resolution of disagreements relating to the interpretation or application of the Convention as a whole, including disagreements about the interpretation and application of Article 3*bis*;
  - c) the Council is not required to consider the conduct of any other State to resolve the dispute. The principle established by the International Court of Justice (ICJ) in the Monetary Gold case has no application to this dispute, because the legal interests of third States (including, in particular, Ukraine) do not form the ‘very subject-matter of the dispute’;
  - d) the negotiation precondition established by Article 84 of the Convention has been met; and
  - e) the arguments concerning the scope of the relief sought do not constitute a preliminary objection, meaning that such arguments can only be addressed at the merits stage.”<sup>38</sup>
35. The ICAO Council provided no legal reasoning whatsoever for its decision to reject the Russian Federation’s Preliminary Objections. By doing so, the Council ignored the

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<sup>37</sup> Objections of the Russian Federation to the Reply of Australia and the Kingdom of the Netherlands to the Preliminary Objection of the Russian Federation, 12 January 2023 (Annex 6).

<sup>38</sup> Decision on Preliminary Objection, pp. 2-3 (Annex 1).

Court's guidance, consistent with Article 84 of the Chicago Convention, to include "the reasons of law and fact that led to the ICAO Council's conclusions".<sup>39</sup>

36. On 24 April 2023, the Russian Federation filed its Counter-Memorial as per Article 4 of the ICAO Rules.<sup>40</sup> The Russian Federation, notwithstanding its rejection of the Decision on Preliminary Objection, and together with a rebuttal of the factual account asserted by the Respondents, advanced, *inter alia*, the following arguments in response to the Respondents' claim:

- (a) The crash of Flight MH17 does not fall within the purview of the Chicago Convention on the basis of Article 89 of that instrument;
- (b) The application of Article 89 of the Chicago Convention is not limited to actions permitted under international humanitarian law ("IHL"), and in any event the crash of Flight MH17 cannot be regarded as a violation of IHL;
- (c) The matters regulated by Article 3 *bis* of the Chicago Convention do not apply to situations of armed conflict;
- (d) International legal responsibility for the crash of Flight MH17 cannot be assigned to the Russian Federation under Article 3 *bis* of the Chicago Convention;
- (e) In any event, the actions attributed by the Respondents to the Russian Federation do not constitute a breach of Article 3 *bis* of the Chicago Convention;
- (f) There is no causal link between the alleged actions of the Russian Federation and the shooting down of Flight MH17; and

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<sup>39</sup> *Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, Judgment, I.C.J. Reports 2020, p. 117, ¶125.

<sup>40</sup> In the Counter-Memorial, ¶6, the Russian Federation stressed the ICAO Council's lack of jurisdiction to consider the dispute: "The Russian Federation draws the attention of the ICAO Council members to the fact that the issue of the ICAO Council's competence to hear this dispute was not definitively resolved at the stage of preliminary objections. In accordance with the ICAO Council's decision at that stage of the proceedings, the Russian Federation's preliminary objection that the ICAO Council lacks competence to hear the case in view of the inapplicability of Article 3 *bis* of the Chicago Convention in conditions of armed conflict was deferred to the merits stage of the proceedings. The Russian Federation continues not to recognize the competence of the ICAO Council to consider this dispute, and the filing of the present counter-memorial may not be construed as a recognition of such competence" (Annex 7).

- (g) Ukraine was responsible for ensuring the safety of aviation over the territory of the DPR when Flight MH17 was shot down.
37. On 28 July 2023, Australia and the Netherlands filed their Reply to the Counter-Memorial of the Russian Federation.
38. On 2 August 2023, in the absence of an independent investigation of the incident, the Russian Federation filed an official request with the ICAO Council to conduct, in accordance with the ICAO Rules and as called for in UN Security Council Resolution 2166 (2014), a “full, thorough and independent investigation [of the MH17 crash] with full and equal participation of all Parties to the dispute, including the Russian Federation”.<sup>41</sup> However, the Council rejected the Russian Federation’s request.<sup>42</sup>
39. On 10 November 2023, the Russian Federation filed its Rejoinder, in which it further developed its arguments laid down in the Counter-Memorial.<sup>43</sup> The Russian Federation, *inter alia*, reacted to the Respondents’ assertion that the Chicago Convention continues to apply in situations of armed conflict and that, under Article 89, “the ‘freedom of action’ to which Article 89 refers is to the freedom of action that international law (including, in particular, international humanitarian law) allows belligerents and neutrals in situations of armed conflict”.<sup>44</sup> The Rejoinder explained that: (i) by virtue of Article 89, the Convention only applies in times of peace and the question of the lawfulness of the use of weapons against civil aircraft during armed conflict is regulated by IHL alone;<sup>45</sup> (ii) the Council has no jurisdiction to rule on alleged breaches of IHL;<sup>46</sup> and (iii) in any event, the downing of Flight MH17 did not constitute a breach of IHL, particularly because there

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<sup>41</sup> Letter from the Representation of the Russian Federation to the President of the ICAO Council No. 197/23 dated 2 August 2023, enclosing Letter from the Agent of the Russian Federation, 31 July 2023 (Annex 8).

<sup>42</sup> Final Decision, p. A-6, ¶4 (Annex 2).

<sup>43</sup> In the Rejoinder, ¶21, the Russian Federation reiterated its position that the ICAO Council lacked jurisdiction 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” (Annex 9).

<sup>44</sup> Reply of Australia and the Kingdom of the Netherlands, 28 July 2023, ¶3.56 (Annex 12).

<sup>45</sup> Rejoinder of the Russian Federation, 10 November 2023, ¶¶180-254 (Annex 9).

<sup>46</sup> *Ibid.*, ¶182.

was no evidence of intentional targeting of a civilian aircraft and the Buk SAM is not an indiscriminate weapon.<sup>47</sup>

40. Even before the ICAO Council proceedings commenced, it was apparent that the Council's decisions would not rest upon an objective determination of legal and factual issues, but on pre-determined political considerations of certain members of the Council. The latter included, for example, six Member States of the European Union (Austria, France, Germany, Italy, Romania and Spain), which both individually<sup>48</sup> and collectively<sup>49</sup> had accused the Russian Federation of the downing of Flight MH17 before the ICAO Council had an opportunity to consider the matter before it. The United Kingdom,<sup>50</sup> the

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<sup>47</sup> Rejoinder of the Russian Federation, 10 November 2023, ¶303, 345 (Annex 9).

<sup>48</sup> See e.g. AP News, *The Latest: Putin denies Russia responsible for MH17 downing*, Statement Made on Behalf of the German Government by its Spokeswoman, Ms. Fietz (25 May 2018), available at: <https://apnews.com/general-news-450ba5218bf24c6a9d5052cc346cbc4a>: "Russia should meet its responsibilities so that the tragedy can be fully cleared up and the perpetrators can be held to account" (Annex 38); Permanent Council of the Organization for Security and Cooperation in Europe, Australia's National Statement to the 1383rd Meeting, 21 July 2022, available at: <https://austria.embassy.gov.au/vien/8thAnniversaryDrowningMH17.html>: "As noted by the Netherlands, Australia and the Netherlands have instituted legal proceedings in the International Civil Aviation Organization. This is an important step in our pursuit of accountability for Russia's role in the downing" (Annex 27).

<sup>49</sup> Council of the European Union, Declaration by the High Representative on Behalf of the EU on the Findings of the Joint Investigation Team on the Downing of Malaysia Airlines Flight MH17, 25 May 2018, available at: <https://www.consilium.europa.eu/en/press/press-releases/2018/05/25/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-findings-of-the-joint-investigation-team-on-the-downing-of-flight-mh17/>: "On 24 May 2018, the Joint Investigation Team presented further findings of its independent, professional and impartial investigation. It concluded that the BUK installation used to bring down flight MH17 belonged beyond doubt to the armed forces of the Russian Federation. The European Union calls on the Russian Federation to accept its responsibility and to fully cooperate with all efforts to establish accountability... The Candidate Countries the former Yugoslav Republic of Macedonia\*, Montenegro\* and Albania\*, and the EFTA countries Iceland, Liechtenstein and Norway, members of the European Economic Area, as well as Ukraine, the Republic of Moldova and Georgia, align themselves with this declaration" [Emphasis added] (Annex 28); Council of the European Union, Declaration by the High Representative on Behalf of the EU on the Occasion of the 8th Anniversary of the Downing of Malaysia Airlines Flight MH17, 16 July 2022, available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/07/16/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-occasion-of-the-8th-anniversary-of-the-downing-of-flight-mh17/>: "Russia's war of aggression against Ukraine is a painful reminder of what happened eight years ago to the 298 people on board Flight MH17 and it strengthens the need to establish accountability. Recalling its previous statements, the European Union takes note of all legal proceedings that are taking place in this regard and expects Russia to accept its responsibility and to fully cooperate with efforts to establish accountability" (Annex 29).

<sup>50</sup> See Organization for Security and Co-operation in Europe, UK Statement at the 1187th Meeting of the Permanent Council, 31 May 2018, available at: <https://www.osce.org/files/f/documents/6/2/383646.pdf>: "Earlier investigations, by both the Joint Investigation Team and the Dutch Safety Board, concluded that the aircraft was brought down by a Russian-made Buk missile system, launched from within territory held by Russian-backed separatist groups. Thanks to the investigators, we now know that that missile belonged to the 53rd Anti-Aircraft Military Brigade of the Russian army. The Russian Federation must now answer for its actions in relation to the downing of MH17 and fulfil its obligations under UN Security Council resolution 2166 to provide any requested assistance to the investigation. The UK fully supports the Kingdom of the Netherlands and Australia in their call for the Russian Federation to accept state responsibility, and to cooperate with their efforts to deliver the justice that the 298 victims, including 10 British nationals, deserve" [Emphasis added] (Annex 30).

United States,<sup>51</sup> Canada<sup>52</sup> and Japan,<sup>53</sup> which were also members of the Council at the time, similarly attributed responsibility for the incident to the Russian Federation.

41. NATO – nine member States of which sat in the ICAO Council (Canada, France, Germany, Iceland, Italy, Romania, Spain, the United Kingdom, and the United States) – also openly blamed the Russian Federation for the incident, calling on the Russian Federation to “accept responsibility” for the crash of Flight MH17 as early as 24 May 2018.<sup>54</sup> Two months later, the so-called “Group of Seven (G7)” (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States) similarly “call[ed] on Russia to account for its role in this incident”.<sup>55</sup>
42. In addition, Canada, France, the United Kingdom and the United States made further baseless accusations against the Russian Federation at the ICAO Assembly, alleging violations of multiple provisions of the Chicago Convention.<sup>56</sup>

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<sup>51</sup> See Organization for Security and Co-operation in Europe, US Statement at the 1187th Meeting of the Permanent Council, 31 May 2018, available at: <https://www.osce.org/files/f/documents/7/a/383634.pdf>: “The United States has confidence in the findings of the Joint Investigation Team (JIT) as presented by the Dutch Public Prosecutor on May 24. So should Russia, which has had every opportunity to cooperate with investigators and present the evidence at its disposal. Russia should immediately cease its callous disinformation campaign and acknowledge its role in the destruction of MH-17. Mr. Chair, the JIT findings showed that the BUK missile launcher used to bring down the passenger aircraft is owned by Russia, and was assigned to the Russian 53rd Anti-aircraft Brigade near Kursk. The missile launcher was brought into sovereign Ukrainian territory from Russia, fired from Russian-controlled territory by Russia-led forces in eastern Ukraine, and then returned to Russian territory. The United States recalls the UN Security Council’s demand in Resolution 2166 that “those responsible ... be held to account and that all States cooperate fully with efforts to establish accountability.” We urge Russia to adhere to Resolution 2166 and respond to the request from Australia and the Netherlands, which came after a thorough, detailed, and impartial investigation into the downing of MH-17” [Emphasis added] (Annex 31).

<sup>52</sup> See CBC, *Canada levels new sanctions against Ukrainian rebel leaders, Russian firms* (24 July 2014), available at: <https://www.cbc.ca/news/politics/canada-levels-new-sanctions-against-ukrainian-rebel-leaders-russian-firms-1.2717206>: “Foreign Affairs Minister John Baird stated that ‘The Kremlin may not have pulled the trigger, but it certainly loaded the gun and put it in the murderer’s hand’” (Annex 39).

<sup>53</sup> See Daily News, *Japan is stepping up sanctions against Russia amidst downing of Malaysia Airlines Flight MH17* (9 January 2019), available at: <https://www.nydailynews.com/2014/07/28/japan-is-stepping-up-sanctions-against-russia-amidst-downing-of-malaysia-airlines-flight-mh17/>: “We urge Russia to exercise influence over separatist groups in Ukraine so that they will cooperate in the international probe into the Malaysia Airlines shoot-down” (Annex 40).

<sup>54</sup> North Atlantic Treaty Organization, Statement by the NATO Secretary General on MH17 Investigation, 25 May 2018, available at: [https://www.nato.int/cps/en/natohq/news\\_154585.htm](https://www.nato.int/cps/en/natohq/news_154585.htm) (Annex 32).

<sup>55</sup> See Ministry of Foreign Affairs of Japan, G7 Foreign Ministers’ Statement on MH17, 15 July 2018, available at: [https://www.mofa.go.jp/fp/pc/page25e\\_000210.html](https://www.mofa.go.jp/fp/pc/page25e_000210.html) (Annex 33).

<sup>56</sup> ICAO Assembly, Resolution A41-2, 7 October 2022 (Annex 14). See Statements made by the representatives of Canada, the United States, France and the United Kingdom in ICAO Assembly 41st Session, 11th Meeting of the Executive Committee (Transcript from ICAO TV), 5 October 2022 [1:38-1:50, 10:45-11:08, 11:20-11:28, 12:00-13:05, 13:52-14:10, 14:27-16:12], available at: <https://www.icao.tv/icao-assembly/season:2/videos/a41-11th-executive-committee> (Annex 13).

43. Finally, a number of members of the ICAO Council (all members of the European Union, the United States, Canada, the United Kingdom and Iceland) are respondents in separate ICAO proceedings that the Russian Federation had brought against them concerning sanctions imposed on the Russian Federation in the aviation sector,<sup>57</sup> and they were thus additionally interested in undermining the Russian Federation's position before the ICAO Council.
44. In sum, 12 out of 36 members of the ICAO Council (Austria, Canada, France, Germany, Iceland, Italy, Japan, Malaysia, Romania, Spain, the United States and the United Kingdom) publicly and expressly aligned themselves against the Russian Federation far before the Council could adequately consider the dispute before it in the light of the legal arguments and evidence put forward by the Parties. In a letter dated 27 November 2023, the Russian Federation proposed that these members either intervene as parties to the dispute under Article 19 of the ICAO Rules or refrain from voting on the merits of the case.<sup>58</sup> The ICAO Council dismissed this proposal.<sup>59</sup>
45. On 17 June 2024, the Russian Federation informed the ICAO Council of its decision to end its participation in the proceedings.<sup>60</sup> This decision was based on several factors, including the Council's refusal to conduct an independent investigation into the downing of Flight MH17 and to exclude its members with clear predisposition against the Russian Federation from the voting process within the Council, which made a fair and impartial resolution of the disagreement unrealistic, as well as the Council's failure to recognise the Court's judgment of 31 January 2024<sup>61</sup> dismissing Ukraine's claim that the Russian Federation was responsible for the incident under the International Convention for the Suppression of the Financing of Terrorism.<sup>62</sup> Consequently, the Russian Federation did

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<sup>57</sup> RuAviation, *Russia appealed to the ICAO Council in connection with the violation of the provisions of the Chicago Convention* (11 October 2023), available at: <https://ruavia.ru/russia-appealed-to-the-icao-council-in-connection-with-the-violation-of-the-provisions-of-the-chicago-convention/> (Annex 41).

<sup>58</sup> Letter from the Agent of the Russian Federation to the President of the ICAO Council, 27 November 2023 (Annex 10).

<sup>59</sup> ICAO Council, 231<sup>st</sup> Session, 4<sup>th</sup> Meeting dated 15 March 2024, Summary of Decisions, C-DEC 231/4b, 18 March 2024, pp. 1-2, ¶3 (Annex 3).

<sup>60</sup> Letter from the Agent of the Russian Federation to the President of the ICAO Council, 17 June 2024 (Annex 35).

<sup>61</sup> *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)*, Judgment, I.C.J. Reports 2024.

<sup>62</sup> Ministry of Foreign Affairs of the Russian Federation, Press Release on the Termination of the Russian Federation's Participation in the Dispute Before the ICAO Council with Australia and the Netherlands Concerning

not participate in the oral hearings on the merits of the dispute that took place during the 232<sup>nd</sup> (18 and 20 June 2024), 233<sup>rd</sup> (9 and 11 October 2024) and 234<sup>th</sup> (7 February 2025) Sessions of the Council.

46. Despite the abovementioned procedural defects, the ICAO Council proceeded to deliver its Final Decision. It comes as no surprise that the manner in which the Council arrived at this Decision, too, was remarkably irregular. It involved several consecutive “decisions” the nature of which is entirely unclear, and which confirm a clear bias against the Russian Federation:

(a) On 12 May 2025, the ICAO Council issued a press release, in which it informed the public that, on that day, the Council had “voted that the Russian Federation failed to uphold its obligations under international air law in the 2014 downing of Malaysia Airlines Flight MH17”. The press release further stated that “[a] formal decision document setting out the reasons of fact and law leading to the Council’s conclusions will be issued in a future meeting”.<sup>63</sup> On 15 May 2025, this decision was communicated to the Council Members.<sup>64</sup> In other words, at this point, the Council had already decided against the Russian Federation without having fully determined the reasons of fact and law leading to that “decision” – those would be specified *ex post facto*.

(b) On 21 May 2025, at the Fourth Meeting of the ICAO Council’s 235<sup>th</sup> Session, the Council adopted a similar “decision”, which it communicated to its Members on 22 May 2025. In that “decision”, the ICAO Council indicated that it:

“a) decided that the [Parties] immediately enter into good faith negotiations in order to resolve expeditiously the matters of full reparation for the non-conformity of the Respondent with its obligations under Article 3 bis of the Chicago Convention, including the appropriate forms of reparation, and the other legal consequences arising from the non-conformity;

b) further decided that the Parties report regularly to the Council, starting from its 236<sup>th</sup> Session, on the progress made in this regard; and

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the Crash of Malaysia Airlines flight MH17 (Boeing 777-200), available at: <https://mid.ru/en/maps/be/1957651/> (Annex 34).

<sup>63</sup> ICAO, ICAO Council Vote on Flight MH17 Case, 12 May 2025, available at: <https://www2023.icao.int/Newsroom/Pages/RU/icao-council-vote-on-flight-mh17-case.aspx> (Annex 21).

<sup>64</sup> ICAO Council, 235<sup>th</sup> Session, Summary of Decisions of the Third Meeting dated 12 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-DEC 235/3, 15 May 2025 (Annex 17).

c) invited the President of the Council to be available to provide his good offices for consultations between the Parties if so requested.”<sup>65</sup>

- (c) It was only over two months later, on 25 July 2025, that the Russian Federation received Letter No. LE 6/8.CONF from the ICAO Secretary General. This letter enclosed a certified copy of the ICAO Council’s Final Decision, purportedly rendered a month earlier – 30 June 2025 – at the Eleventh Meeting of the Council’s 235<sup>th</sup> Session. The Decision was taken by a secret ballot, with 22 Members voting in favour, three against, and 10 abstaining.

47. In its Final Decision, the ICAO Council held that “the Applicants’ claim is “well founded in fact and in law, such that the shooting down of Flight MH17 on 17 July 2014 constitutes a non-conformity by the Respondent with its obligations under Article 3 *bis* of the Chicago Convention”.<sup>66</sup> The Council’s reasoning is reproduced below in full:

“1. The provisions of Article 3 *bis* of the Chicago Convention are clear. Contracting States recognize that each State must refrain from resorting to the use of weapons against civil aircraft in flight. Article 3 *bis* does not modify the rights and obligations of States as set forth in the Charter of the United Nations, which includes States’ inherent right to self-defence. Article 89 of the Chicago Convention provides that in case of war, the provisions of the Convention shall not affect the freedom of action of Contracting States affected, whether as belligerents or as neutrals. These provisions make it clear that a State’s use of force in accordance with the Charter of the United Nations or its operations in armed conflict in accordance with international humanitarian law do not violate Article 3 *bis*. In relation to this claim, a number of Delegations noted that Article 3 *bis* applies both in times of peace and in times of armed conflicts.

2. While there is no doubt that Article 3 *bis* contains a direct prohibition on the use of weapons against civil aircraft in flight, there was no consensus amongst the Council that the alternative interpretation presented by the Applicants namely, that Article 3 *bis* imposes an additional obligation to prevent the use of weapons against civil aircraft in flight, is supported by the ordinary meaning of the text or by the official records of the drafting of the Protocol Relating to an Amendment to the Chicago Convention (Article 3 *bis*) in 1984.

3. The legal test or standard applicable in the present case is that which is set out in Article 16 of the Rules, namely: the Council must, before pronouncing itself on the merits, satisfy itself that the claim is well founded in fact and in law. For a claim to be well founded in law, a Party’s legal arguments,

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<sup>65</sup> ICAO Council, 235<sup>th</sup> Session, Summary of Decisions of the Fourth Meeting dated 21 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-DEC 235/4, 22 May 2025 (Annex 19).

<sup>66</sup> Final Decision, p. A-6 (Annex 2).

including the application of the law to the facts of the case, must be well reasoned and supported by the relevant rules of international law including recognized principles of treaty interpretation, customary international law, and the case law of the International Court of Justice.

4. The Council, by majority, deemed itself satisfied with the written and oral pleadings, evidence and other documents and information presented by the Parties on the facts and the law pertaining to the claim before it, and in doing so, agreed that there was no need for the Council to conduct any further investigations, institute an inquiry or request an expert opinion pursuant to Article 8(1) of the Rules;

5. The Applicants' claim is underpinned by an extensive and painstakingly collected body of reliable and documented evidence gathered, verified and validated through the course of two independent investigations conducted in accordance with the highest international standards consistent with United Nations Security Council Resolution 2166. As part of the evidence adduced in support of their claim, the Applicants presented the findings of the investigation carried out by the DSB which was conducted in full compliance with Article 26 and Annex 13 of the Chicago Convention, with the participation of an ICAO expert as observer, and which established the technical causes of the MH17 accident. The outcome of the DSB investigation was acknowledged by ICAO and Secretary-General of the United Nations. The Applicants also relied on the findings of the criminal investigation conducted by the Joint Investigation Team (JIT) in accordance with the highest international standards. Both the DSB and JIT investigation reports carry substantial evidentiary weight and probative value and have been judicially upheld by the European Court of Human Rights and by the Hague District Court. Accordingly, even though the Applicants' evidence may appear circumstantial in certain respects, it is highly persuasive and is to be preferred given that it is consistent and interlinked.

6. While the Respondent presented several hypothetical claims in its written pleadings, it did not provide enough evidence in support of those claims notwithstanding repeated requests and invitations from the Council to do so. The Respondent also refused to acknowledge that its forces engaged in the shooting down of Flight MH17, much less to explain how its actions, (which it refuses to acknowledge) would be justified, for example by self-defence or under international humanitarian law. As a result, the majority of the Council was of the view that the Respondent failed to demonstrate how its actions are consistent with Article 3 *bis* or Article 89 of the Chicago Convention.

7. All relevant conduct resulting in the downing of Flight MH17 and the breach of Article 3 *bis* is attributable to the Russian Federation under customary international law as reflected in Articles 4 and 8 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, being the conduct of Russian military personnel and other Russian authorities which are the State Organs of the Russian Federation or, alternatively, being the conduct directed or controlled by the State Organs of the Russian Federation, and therefore the Russian Federation bears international responsibility for the downing of Flight MH17.

8. The question of reparations and other legal consequences arising from the downing of Flight MH17 is best handled through negotiations between the Parties.”<sup>67</sup>

48. Additionally, the Final Decision included in its text the determinations made on 21 May 2025, ordering the Parties to “immediately enter into good faith negotiations in order to resolve expeditiously the matters of full reparation for the non-conformity of the Respondent with its obligations under Article 3 *bis* of the Chicago Convention, including the appropriate forms of reparation, and the other legal consequences arising from the non-conformity”<sup>68</sup> and to “report regularly to the Council, starting from its 236th Session, on the progress made in this regard”.<sup>69</sup>
49. While the Final Decision includes the results of certain deliberations held by the ICAO Council during its 235<sup>th</sup> Session (5, 7, 12 and 21 May 2025), it contains only very brief consideration of some of the arguments advanced by the Parties, without a detailed assessment of the matters of fact or law as required under Article 15.2(v) of the ICAO Rules, and ignores or glosses over most of the Russian Federation’s argumentation – unlike any decision properly adopted by a judicial body or a quasi-judicial body tasked with the settlement of international legal disputes, where the position of the parties would be adequately considered and all the reasons leading to the decision would be spelled out.
50. It is of note that, according to Rule 57 of the Rules of Procedure for the ICAO Council, the ICAO Council must prepare draft minutes of each meeting within six weeks after the Council session (with a ten-day period for the representatives to submit their corrections) and distribute them to representatives and the Contracting States.<sup>70</sup> Despite this Rule, the ICAO Council has only provided the Russian Federation with the minutes of the meetings held on 5 and 7 May 2025, when certain deliberations took place, and forwarded the minutes of the meetings held on 12 and 21 May 2025 only on 15 September 2025, when this Application was about to be filed, while the minutes of the meeting held on

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<sup>67</sup> Final Decision, pp. A-5–A-6 (Annex 2).

<sup>68</sup> *Ibid.*, p. A-7.

<sup>69</sup> *Ibid.*

<sup>70</sup> Rules of Procedure for the Council, ICAO Doc. 7559/10, 11<sup>th</sup> ed., 2022, Rule 57: “(b) The Secretary General shall prepare Draft Minutes of each meeting within six weeks of the session of the Council to which they relate. These shall be submitted to the President for agreement, distributed to Representatives who shall have ten working days to comment thereon and adopted by the Council either through written procedure or at a subsequent meeting. (c) After adoption, the text of Decisions and Minutes shall be made available to Representatives and to Contracting States” (Annex 4).

30 June 2025, where additional deliberations were allegedly conducted, have not been provided to the Russian Federation at all. As a result of these inexplicable delays and disregard for the Rules of Procedure, the Russian Federation’s right to file the present appeal was undermined.<sup>71</sup>

#### IV. SUBJECT OF THE DISPUTE AND GROUNDS OF APPEAL

51. The subject of the dispute referred to the Court is an appeal by the Russian Federation from the Final Decision rendered by the ICAO Council on 30 June 2025. The Russian Federation’s appeal is based on the following grounds:

- (a) The ICAO Council failed to correctly interpret and apply Article 89 of the Chicago Convention – a crucial provision according to which “[i]n 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”. By virtue of Article 89, which constitutes a “military exclusion clause”, read in accordance with the rules on treaty interpretation reflected in the Vienna Convention on the Law of Treaties and taking into account extensive legal doctrine, the Chicago Convention – frequently characterized as a peacetime treaty – does not apply to action of States in situations of armed conflict.<sup>72</sup> Contrary to what the Respondents and some members of the ICAO Council claimed, this does not mean that the use of weapons against civil aircraft during an armed conflict is somehow “legitimized”,<sup>73</sup> but that such action is not governed by the Chicago Convention.<sup>74</sup> Instead, it is governed by IHL – a different body of law with rules that are extrinsic to the Convention.<sup>75</sup>

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<sup>71</sup> See Section VI below.

<sup>72</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶179-190 (Annex 7); Rejoinder of the Russian Federation, 10 November 2023, ¶¶180-254 (Annex 9).

<sup>73</sup> See e.g. ICAO Council, 235<sup>th</sup> Session, Summary Minutes of the Second Meeting dated 7 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-MIN 235/2, 27 June 2025, ¶9 (Annex 16).

<sup>74</sup> See e.g. Rejoinder of the Russian Federation, 10 November 2023, ¶211 (Annex 9).

<sup>75</sup> The ILC’s commentaries to the Draft Articles on the Law of Treaties provide as follows: “a number of treaties contain a clause in which the parties declare either that the treaty is not incompatible with, or that it is not to affect, their obligations under another designated treaty. ... Such clauses, in so far as they relate to existing treaties concluded by the contracting States with third States, merely confirm the general rule *pacta tertiis non nocent*. But they may go beyond that rule because in some cases not only do they affect the priority of the respective treaties as between States parties to both treaties, but they may also concern future treaties concluded by a contracting State with a third State. They appear in any case of incompatibility to give pre-eminence to the other treaty” [Emphasis added]. See Reports of the Commission to the General Assembly, Draft Articles on the Law of Treaties with Commentaries, 1966, pp. 214-215, ¶4. In the case of Article 89, pre-eminence is given to “the freedom of

Since the downing of Flight MH17 occurred in the context of an armed conflict between Ukraine and the DPR and LPR, with the Russian Federation also being affected by the conflict, and the Council's jurisdiction is limited to resolving differences concerning the interpretation and application of the Chicago Convention exclusively, the Council should have dismissed the claim brought by the Respondents in its entirety;<sup>76</sup>

- (b) The ICAO Council incorrectly determined the scope of Article 3 *bis* of the Chicago Convention. The Council failed to properly address various of the alternative arguments advanced by the Russian Federation on this matter, in particular that Article 3 *bis* does not *per se* apply to situations of armed conflict;<sup>77</sup> that it is limited to cases of interception of aircraft violating the sovereignty of a State over its airspace;<sup>78</sup> and that it only applies where aircraft has been provisionally identified as civilian.<sup>79</sup> In doing so the ICAO Council ignored a multitude of evidence in support of the position of the Russian Federation, including, *inter alia*, the opinion of the President of the ICAO Council at the time of drafting and adoption of Article 3 *bis*;<sup>80</sup>

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action of any of the contracting States affected” by war. Any other rules limiting such freedom of action would be extrinsic to the Chicago Convention and thus not subject to its dispute resolution mechanism. The Court has carefully addressed the question of incorporation of extrinsic rules into a treaty in previous cases. *See*, most recently, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, Preliminary Objections, Judgment, I.C.J. Reports 2024, pp. 420-421, ¶146: “The Court did not intend, by its 2007 ruling, to interpret the Convention as incorporating rules of international law that are extrinsic to it, in particular those governing the use of force. It sought to clarify that a State is not required, under the Convention, to act in disregard of other rules of international law. Nor can a State avail itself of the obligation of prevention under the Convention to act beyond the limits permitted elsewhere by international law. Those limits are not defined by the Convention itself but by other rules of international law. Thus ... it is not the Convention that the Russian Federation would have violated but the relevant rules of international law applicable to the recognition of States and the use of force. These matters are not governed by the Genocide Convention and the Court does not have jurisdiction to entertain them in the present case” [Emphasis added].

<sup>76</sup> Notably, the Final Decision remarks that only “a number of Delegations” agreed with the claim that “Article 3 *bis* applies both in times of peace and in times of armed conflicts” – suggesting that no consensus was reached on the issue. *See* Final Decision, p. A-5 (Annex 2).

<sup>77</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶204-232 (Annex 7); Rejoinder of the Russian Federation, 10 November 2023, ¶¶255-265 (Annex 9).

<sup>78</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶211-212 (Annex 7); Rejoinder of the Russian Federation, 10 November 2023, ¶¶266-299 (Annex 9).

<sup>79</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶257-292, 322-326 (Annex 7); Rejoinder of the Russian Federation, 10 November 2023, ¶¶300-325 (Annex 9).

<sup>80</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶225 (Annex 7).

- (c) The ICAO Council, having wrongly claimed competence to pass judgment on issues of IHL, nevertheless failed to properly assess the legality of the downing of Flight MH17 under that body of law. Even assuming, *arguendo*, that the Chicago Convention and IHL could apply simultaneously, and that a violation of Article 3 *bis* of the Convention in situations of armed conflict is to be determined by reference to the relevant rules of that body of law (*quod non*), the Council still erred in concluding that the Russian Federation allegedly failed to “justify” the incident under IHL. In so doing, the ICAO Council improperly shifted the burden of proof on the issues of IHL onto the Russian Federation as the Respondent in those proceedings, while it was for the Applicants to demonstrate that the breach of IHL they claimed indeed took place – which they failed to do. The ICAO Council in fact neglected to scrutinize the latter claim, accepting it at face value without any substantive examination. Furthermore, the Council did not adequately consider the arguments of the Russian Federation showing the absence of a breach of IHL,<sup>81</sup> even going as far as falsely claiming that the Russian Federation “refused” to provide such arguments. As a result, not only the existence of an IHL-related exception to Article 89 was never proven, but the application of such a hypothetical exception to the present case was in any event groundless;<sup>82</sup>
- (d) The ICAO Council caused prejudice in a fundamental way to the requirements of a just procedure. In particular:
- (i) The ICAO Council failed to comply with its obligation under Article 15(2)(v) of the ICAO Rules to state the reasons for the Final Decision. Those reasons are either absent or extremely brief in the text of the Decision, fail to state an intelligible position in some instances, and lack adequate factual and legal arguments advanced by the Parties – in particular those of the Russian Federation. The Council’s conclusion that the Respondents’ evidence “is highly persuasive” rests primarily on evidence produced by interested parties and endorsed by bodies holding a biased position against the Russian Federation, without any consideration of the evidence produced by the latter;

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<sup>81</sup> *E.g.* Rejoinder of the Russian Federation, 10 November 2023, ¶345 (Annex 9).

<sup>82</sup> Final Decision, p. A-6 (Annex 2).

- (ii) The ICAO Council did not properly deliberate on the factual and legal questions at issue before voting on the Final Decision, evidencing that the latter was pre-determined and biased. The Council first adopted a “decision” claiming a breach of Article 3 *bis* by the Russian Federation on 12 May 2025 without providing any reasons at all. The Final Decision was adopted by vote much later, at the 11<sup>th</sup> Meeting of the 235<sup>th</sup> Session on 30 June 2025, again without providing reasons. The text of the Decision was issued *ex post facto* on 25 July 2025 and only included a terse and cursory motivation for finding the Russian Federation responsible. The available minutes of deliberations on the Decision, to which the Russian Federation had access, show only a superficial discussion of the Parties’ positions, with no substantive assessment of the evidence presented;<sup>83</sup>
- (iii) When adopting the Final Decision, the ICAO Council failed to ensure an impartial composition and to exclude interested parties from voting.<sup>84</sup> The ICAO Council admitted parties in the same interest as the Respondents to the voting procedure, which openly aligned themselves with the former on the subject-matter of the dispute.<sup>85</sup> Several of the Council members had already pre-determined their positions before the conduct of the ICAO proceedings<sup>86</sup>

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<sup>83</sup> ICAO Council, 235<sup>th</sup> Session, Summary Minutes of the First Meeting dated 5 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-MIN 235/1, 27 June 2025 (Annex 15); ICAO Council, 235<sup>th</sup> Session, Summary Minutes of the Second Meeting dated 7 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-MIN 235/2, 27 June 2025 (Annex 16).

<sup>84</sup> B. Cheng, *THE LAW OF INTERNATIONAL AIR TRANSPORT* (London: Stevens, 1962), pp. 100-101: “An additional judicial function of the ICAO is the power of the Council to hear disputes between member States regarding the interpretation or application of the Chicago Convention, 1944. In such an event, the Council must consider itself an international judicial organ and act in accordance with rules of international law governing judicial proceedings. Thus, *inter alia*, members of the Council, even though they may be national representatives nominated by Governments must, when functioning under Chapter XVIII of the Chicago Convention, 1944, act in an impartial and judicial capacity” [Emphasis added].

<sup>85</sup> See ¶¶40-44 above.

<sup>86</sup> It must be noted in this regard that the ICAO Council is composed of representatives (“delegations”) that represent the political position of the respective member States and are not required to have any legal training. See M. Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)* in K.H. Böckstiegel (eds.), *SETTLEMENT OF SPACE LAW DISPUTES: THE PRESENT STATE OF THE LAW AND PERSPECTIVES OF FURTHER DEVELOPMENT: PROCEEDINGS OF AN INTERNATIONAL COLLOQUIUM* (Heymann, 1980), p. 88, cited in R. Abeyratne, *CONVENTION ON INTERNATIONAL CIVIL AVIATION: A COMMENTARY* (Springer, 2014), p. 666: “The Council of ICAO cannot be considered a suitable body for adjudication in the proper sense of the word—i.e., settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of States (not independent individuals) and its decisions would always be based on policy and equity considerations rather than on pure legal grounds...” [Emphasis added]; D. Goedhuis, *Questions of Public International Air Law* in *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* (Brill | Nijhoff, 1952), Vol. 81, pp. 223-

and/or have had to hold uniform positions with other governments (*i.e.* EU member States),<sup>87</sup> irrespective of the substance of the ICAO proceedings and well before appropriate consideration of the arguments of the Parties by the Council. This situation resulted in a pre-determined outcome, thus ridding the proceedings of any semblance of judicial impartiality and due process. Had the above members been excluded, the number of affirmative votes would have shifted dramatically and there would not have been a requisite majority under Article 52 of the Chicago Convention; and,

- (iv) In ruling that “the [Respondents’] claim is well founded in fact and in law”, the ICAO Council chose wrongly to apply Article 16(2) of the ICAO Rules.<sup>88</sup> **First**, this provision is relevant only where the conditions of Article 16(1) are satisfied – namely, “[i]f one of the parties does not appear before the Council ... or fails to defend its case”. However, the Final Decision acknowledges that the Russian Federation appeared and submitted its arguments in writing and that the Council was “satisfied” with the evidence before it;<sup>89</sup>

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224: “In the first place it should be considered that the members of the Council are chosen by their respective States. They do not act independently but according to the instructions of their respective Governments... it is virtually impossible for the Council members to free themselves of political motivation. Settlement of disputes by any authority requires confidence in its impartiality and a common conviction relating to the principles which have to govern the decision. With respect to the Council both conditions are lacking.” [Emphasis added]. See also ICAO Council, 235<sup>th</sup> Session, Summary Minutes of the First Meeting dated 5 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-MIN 235/1, 27 June 2025, ¶107: “The Representative of Brazil noted that it would be important that the Council be granted enough time to consult with their capitals regarding the different aspects highlighted by the present discussion and, in light of this consideration, consulted the President of the Council on the possibility of the vote taking place at the next meeting of the Council or even later” (Annex 15); D. Goedhuis, *Questions of Public International Air Law* in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (Brill | Nijhoff, 1952), Vol. 81, p. 224.

<sup>87</sup> Under Article 24(3) of the Treaty on European Union, “[t]he Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area.” In particular, under Article 34(1) of the Treaty, “Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union’s positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination. In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union’s positions” [Emphasis added]. This covers the EU members’ positions before the ICAO Council, which are also subject to coordination, as “the European Union ... coordinates the views of its Member States prior to meetings of ICAO bodies”: see *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, Case C-366/10, Opinion of Advocate General Kokott, 6 October 2011, European Court Reports 2011, pp. 13789-13790, ¶64, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CC0366>.

<sup>88</sup> Final Decision, p. A-5: “The legal test or standard applicable in the present case is that which is set out in Article 16 of the Rules, namely: the Council must, before pronouncing itself on the merits, satisfy itself that the claim is well founded in fact and in law” (Annex 2).

<sup>89</sup> See *e.g. ibid.*, p. A-6: “[t]he Council, by majority, deemed itself satisfied with the written and oral pleadings, evidence and other documents and information presented by the Parties on the facts and the law pertaining to the

consequently, the Russian Federation could not have been deemed to be “default in appearance or in defending”. **Second**, Article 16(2) – like the similarly-worded Article 53(2) of the Statute of the Court – does not impose any special standard of proof and does not entail a lowering of such standard compared to what would normally be applicable. **Third**, Article 16(2) provides that the Council must, before deciding in favour of a party’s claim, “satisfy itself ... that the claim is well founded in fact and law”; instead, the ICAO Council made its Final Decision on 30 June 2025 without any concrete reasons, which were only issued after the fact, on 25 July 2025;

- (e) The ICAO Council failed to apply the requisite standard of proof. Given the gravity of the accusation at issue,<sup>90</sup> the Council should have applied a high threshold of certainty – proof “beyond reasonable doubt”, necessitating evidence that is “fully conclusive”. Instead, the Council in its deliberations explicitly rejected this<sup>91</sup> and chose to apply a significantly lesser threshold of evidence.<sup>92</sup> In doing so, the Council misinterpreted the relevant law, relied on weak (including adverse)<sup>93</sup>

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claim before it, and in doing so, agreed that there was no need for the Council to conduct any further investigations, institute an inquiry or request an expert opinion pursuant to Article 8(1) of the Rules” [Emphasis added].

<sup>90</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. p. 129, ¶209: “The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”.

<sup>91</sup> ICAO Council, 235<sup>th</sup> Session, Summary Minutes of the First Meeting dated 5 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-MIN 235/1, 27 June 2025, pp. 7-8, ¶¶36-37: “On the standard of proof, the Representative [of the Republic of Korea] cited the former registrar of the ICJ, Mr. Eduardo Valencia Ospina, who held that the notion of ‘standard of proof’ emanated from the common law system, with its application being the concept of ‘beyond a reasonable doubt’ in criminal proceedings, and the more lenient ‘balance of probabilities’ in civil proceedings. Mr. Ospina had also observed that the ICJ tended to reflect the civil law system, in which all that was needed was for the Court to be persuaded without reference to a specific standard. With that in mind, the Representative highlighted that the Council’s deliberations were not a criminal proceeding, and thus, the Organization’s dispute settlement mechanism did not require any standard of proof beyond a reasonable doubt....To that point, he underscored that the Council had received various types of evidence including, circumstantial evidence, and that this evidence should be considered in the same manner as it has been considered by the ICJ. In that regard, he referred to the Court’s 1949 proceedings in which the Court had relied on circumstantial evidence to infer the Respondent’s involvement, with the balance of probabilities having played a central role in the Court’s reasoning. The Representative underscored that particular weight should be accorded to circumstantial evidence when it is based on a series of facts linked together, leading to a single conclusion” [Emphasis added] (Annex 15). By all indications, this statement was unopposed.

<sup>92</sup> Final Decision, p. A-5, ¶3 (Annex 2).

<sup>93</sup> The minutes of deliberations include numerous references to the Russian Federation’s decision to withdraw as a determinative factor. *See e.g.* ICAO Council, 235<sup>th</sup> Session, Summary Minutes of the Second Meeting dated 7 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-MIN 235/2, 27 June 2025, ¶7: “[the Representative of Chile] expressed his regret that the Respondent had decided to withdraw from the proceedings and that they had not answered any of the questions

inferences and ignored multiple factual and legal arguments brought to its attention by the Russian Federation. The ICAO Council conceded that “the Applicants’ evidence may appear circumstantial in certain respects”, but somehow still found it “highly persuasive”, ignoring the fact that the evidence in question was produced by non-independent bodies (the DSB and the JIT). Moreover, in its reasoning, the ICAO Council relied on Article 16 of the ICAO Rules, which does not suggest that a lesser standard of proof should be used. In any case, Article 16 of the ICAO Rules did not apply because the Russian Federation did comply with its provisions and fully presented its position in the Counter-Memorial and in the Rejoinder, as noted above and recorded in the Decision itself;

- (f) The ICAO Council erred in determining that the downing of Flight MH17 is attributable to the Russian Federation under the law of State responsibility – which it is not.<sup>94</sup> Neither the Respondents nor the Council substantiated their conclusions with sufficient evidence to demonstrate that the downing of Flight MH17 was carried out by State organs of the Russian Federation, or that the latter exercised effective control over the specific persons and actions involved.<sup>95</sup> The test used by the Council to determine attribution was manifestly contrary to the rules of international responsibility and established practice of the Court.<sup>96</sup> Additionally,

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posed by the Council over the course of the oral hearings, thereby depriving the Council of information which might have been essential to understanding their arguments. In this way, the Respondent’s silence had worked against them, in line with concept of adverse inference, and consistent with that concept’s application by the International Court of Justice (ICJ) in the context of its consideration of the *Corfu Channel* case” (Annex 16).

<sup>94</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶233-255 (Annex 7); Rejoinder of the Russian Federation, 10 November 2023, ¶¶30-175 (Annex 9).

<sup>95</sup> See e.g. the Russian Federation’s remarks concerning the apparent falsifications and inconsistencies in the evidence presented by the Respondents in the Rejoinder of the Russian Federation, 10 November 2023, ¶¶45-75 (Annex 9).

<sup>96</sup> See ICAO Council, 235<sup>th</sup> Session, Summary Minutes of the Third Meeting dated 12 May 2025, Settlement of Differences: Australia and the Kingdom of the Netherlands and the Russian Federation (2022), Closed Meeting, C-MIN 235/3, 26 August 2025, ¶8: “soldiers of the Russian Federation fired the missile that brought down Flight MH17, or instructed, directed, or controlled DPR (Donetsk People’s Republic) separatists to enable the firing of that missile” [Emphasis added] (Annex 18). This is not in conformity with the jurisprudence of the Court, which demands effective control over the particular operation in question, as opposed to “enabling” the relevant events: see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 64, ¶115: “The Court has taken the view ... that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law

the ICAO Council attributed the purported conduct to the Russian Federation on the basis of two alternative grounds (Articles 4 and 8 of ARSIWA), which is contrary to the principle of sound administration of justice, reveals uncertainty regarding the basis of attribution, and, in turn, calls into further question the validity of the Final Decision. Ultimately, since the downing of Flight MH17 could only have happened by mistake (as conceded even by The Hague District Court and the ECtHR), no attribution of that act to the Russian Federation is possible under Article 8 of ARSIWA;<sup>97</sup>

- (g) The ICAO Council failed to consider Ukraine’s involvement in the downing of Flight MH17, despite the undeniable fact that (i) multiple Ukrainian Buk systems operated in the zone of conflict;<sup>98</sup> (ii) DPR/LPR forces captured a Ukrainian Buk TELAR from Ukrainian forces and possessed other anti-aircraft units including mobile SAMs;<sup>99</sup> (iii) multiple Ukrainian military aircraft had been shot down over the zone of conflict prior to the crash of Flight MH17;<sup>100</sup> and (iv) Ukraine failed to take the necessary measures to ensure the safety of civil aviation in its airspace.<sup>101</sup> Responsibility of the Russian Federation for the MH17 incident cannot be adequately determined without having regard to Ukraine’s responsibility on the matter. As the State that exercised sovereignty on the territory where the incident took place, Ukraine was responsible for ensuring the safety of civil aviation in the

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alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States.”

<sup>97</sup> Article 8 of ARSIWA refers to conduct “authorised” by a State, or, in other words, undertaken under its specific “direction or control”. See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 64, ¶115. Thus, actions conducted by individuals by mistake cannot, in principle, be attributed to a State under Article 8 of ARSIWA. See International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 47, Article 8, ¶3: “More complex issues arise in determining whether conduct was carried out ‘under the direction or control’ of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control” [Emphasis added].

<sup>98</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶352 (Annex 7).

<sup>99</sup> Rejoinder of the Russian Federation, 10 November 2023, ¶¶341, 344, 346 (Annex 9); Dutch Safety Board, Crash of Malaysia Airlines flight MH17, October 2015, pp. 187-188, available at: [https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport\\_mh17\\_crash.pdf](https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport_mh17_crash.pdf).

<sup>100</sup> Rejoinder of the Russian Federation, 10 November 2023, ¶342 (Annex 9); Dutch Safety Board, Crash of Malaysia Airlines flight MH17, October 2015, p. 259, available at: [https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport\\_mh17\\_crash.pdf](https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport_mh17_crash.pdf).

<sup>101</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶338-357 (Annex 7).

area of the incident.<sup>102</sup> It thus had to close its airspace or at least adequately limit transit therethrough, being aware of the existence of an armed conflict – including surface-to-air and air-to-surface combat – that created a serious risk for civil aviation.<sup>103</sup> Ukraine failed to do so and therefore bears responsibility for the downing of Flight MH17.<sup>104</sup> Thus, the real cause behind the incident were the omissions of Ukraine’s authorities – not any purported actions of the Russian Federation. Furthermore, the ICAO Council failed to properly investigate the presence of Ukrainian Buk SAMs in the zone of conflict<sup>105</sup> proximate to the crash site and the possibility that Flight MH17 was downed by Ukrainian forces, despite evidence pointing in that direction (such as the serial number on the missile fragments found at the crash site identifying it as belonging to a Ukrainian unit)<sup>106</sup> and the fact that Ukraine had already previously shot down a passenger airliner.<sup>107</sup> This assessment is completely absent in the Final Decision;

- (h) The ICAO Council erred in ordering the Parties to “immediately enter into good faith negotiations in order to resolve expeditiously the matters of full reparation for the non-conformity of the Respondent with its obligations under Article 3 *bis* of the Chicago Convention, including the appropriate forms of reparation, and the other legal consequences arising from the non-conformity” and to “report regularly to the

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<sup>102</sup> Dutch Safety Board, Crash of Malaysia Airlines flight MH17, October 2015, p. 207, available at: [https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport\\_mh17\\_crash.pdf](https://onderzoeksraad.nl/wp-content/uploads/2023/11/debcd724fe7breport_mh17_crash.pdf): “However, the safety of a state’s airspace is the exclusive responsibility of the sovereign state concerned, in this case, Ukraine.”

<sup>103</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶338-357 (Annex 7).

<sup>104</sup> *Ibid.*, ¶332. See e.g. V. Lanovoy, Causation in the Law of State Responsibility, *British Yearbook of International Law*, 2022, p. 53: “In sum, the standard of a direct causal link presupposes a rather basic construction of causation, following which the injury in question must be brought about in one causal step or moment. The adoption of such standard may substantially simplify the adjudicator’s task, limiting the scope of their inquiry” [Emphasis added]; A. Gattini, Breach of International Obligations, in P.A. Nollkaemper and I. Plakoefalos (eds), *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART* (2014): “the adequate (or efficient) causal theory seems more appropriate for all cases of negative obligations, in which the wrongful conduct typically consists of a specific act. According to this causal theory, among the possible multifarious causal factors, the one that has created the danger which has primarily led to the violation of the obligation will be selected” [Emphasis added].

<sup>105</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶352 (Annex 7). See also Facebook, Vladislav Seleznyov Account, *11.50 In order to reduce the response to possible threats...* (12 July 2014), available at: <https://www.facebook.com/share/p/1F1U54JNbf/> (Annex 42); YouTube, Army TV – Military Television of Ukraine account, *Program “Chas Ch” No. 129 (16.07.2014. Evening edition)* (16 July 2014), available at: <https://www.youtube.com/watch?v=Q3MomxNHnUA> (Annex 43).

<sup>106</sup> Rejoinder of the Russian Federation, 10 November 2023, ¶¶120, 142, 170 (Annex 9).

<sup>107</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶60, 289(h) (Annex 7); Rejoinder of the Russian Federation, 10 November 2023, ¶¶311-316 (Annex 9).

Council, starting from its 236th Session, on the progress made in this regard”, as such actions are inconsistent with the Council’s powers under Article 84 of the Chicago Convention;

- (i) The ICAO Council erred in holding that “the [Respondents’] claim is well founded in fact”.<sup>108</sup> The ICAO Council unjustifiably disregarded the Russian Federation’s evidence that demonstrated that the materials referred to by the Applicants were biased, unreliable and marred with significant technical deficiencies, as well as clear falsifications.<sup>109</sup> The Council concluded that the Respondents’ claim “is underpinned by an extensive and painstakingly collected body of reliable and documented evidence”, while noting that the said evidence “may appear circumstantial in certain respects”.<sup>110</sup> The two observations are irreconcilable and, again, do not satisfy the high evidentiary standard (“fully conclusive” evidence) that is applicable to charges of such exceptional gravity. This includes, *inter alia*, anonymized witness evidence produced by persons which the Parties had no opportunity to examine or verify the authenticity of their accounts.

## V. RELIEF SOUGHT

52. The Russian Federation respectfully requests the Court to adjudge and declare that, in adopting the Final Decision, the ICAO Council erred in fact and in law, as well as breached fundamental principles of proper administration of justice. In particular, the Russian Federation asks the Court to adjudge and declare that:

- (a) By virtue of Article 89 of the Chicago Convention, the Convention does not apply to situations of armed conflict and, consequently, the ICAO Council does not have competence under Article 84 of the Chicago Convention to settle differences arising in such contexts;
- (b) Alternatively and subsidiarily, Article 3 *bis* of the Chicago Convention is limited in scope such that it: (i) does not *per se* apply to situations of armed conflict; (ii) is limited to cases of interception of an aircraft that violates the sovereignty of a State

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<sup>108</sup> Final Decision, p. A-6 (Annex 2).

<sup>109</sup> Counter-Memorial of the Russian Federation, 20 April 2023, ¶¶17-177 (Annex 7); Rejoinder of the Russian Federation, 10 November 2023, ¶¶30-175 (Annex 9).

<sup>110</sup> Final Decision, p. A-5 (Annex 2).

over its airspace; and/or (iii) only applies where an aircraft has been provisionally identified as civilian;

- (c) Alternatively and subsidiarily, the downing of Flight MH17 did not constitute a breach of IHL and, consequently, Article 3 *bis* of the Chicago Convention was not violated;
- (d) Alternatively and subsidiarily, the ICAO Council caused prejudice in a fundamental way to the requirements of a just procedure;
- (e) Alternatively and subsidiarily, the ICAO Council failed to apply a proper standard of proof, which in light of the gravity of the allegations against the Russian Federation is that of certainty beyond reasonable doubt, and requires evidence that is fully conclusive;
- (f) Alternatively and subsidiarily, the downing of Flight MH17 is not attributable to the Russian Federation under the law of State responsibility;
- (g) Alternatively and subsidiarily, the ICAO Council failed to consider the implications of Ukraine's involvement in the incident when deciding on the Russian Federation's responsibility for the downing of Flight MH17;
- (h) Alternatively and subsidiarily, the remedies ordered by the ICAO Council are inconsistent with the Council's powers under Article 84 of the Chicago Convention;
- (i) Alternatively and subsidiarily, the Respondents' claim was not well-founded in facts because it relies on evidence that is biased, unreliable, marred with significant technical deficiencies and clear falsifications, disregards the evidence supplied by the Russian Federation, and, by the ICAO Council's admission, is in many respects circumstantial; and, therefore,
- (j) The Final Decision is null and void and without legal effect.

## **VI. REQUEST UNDER ARTICLE 69(1) OF THE RULES OF COURT**

53. The Russian Federation reiterates that the ICAO Council failed, in accordance with its own Rules of Procedure, to communicate to the Russian Federation the minutes of the meeting held on 30 June 2025, when the Final Decision was adopted. This significantly

undermined the Russian Federation's ability to appeal from that Decision. In light of this, and in accordance with Article 69(1) of the Rules of Court, the Russian Federation respectfully asks the Court to request the ICAO to furnish all information and documents related to the aforementioned proceedings in the ICAO Council, including the above-mentioned minutes of meeting.

#### **VII. APPOINTMENT OF A JUDGE *AD HOC***

54. In accordance with Article 35(1) of the Rules of Court, the Russian Federation hereby gives notice of its intention to choose a judge *ad hoc* pursuant to Article 31(3) of the Statute of the Court.

#### **VIII. RESERVATION OF RIGHTS**

55. The Russian Federation reserves its right to supplement and/or amend this Application, including as regards the legal grounds and the relief requested.

Agent of the Russian Federation

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Vladimir TARABRIN

The Hague, 18 September 2025



## CERTIFICATION

I hereby confirm that the Annexes are either true copies of the original documents referred to in the Application, or translations (marked accordingly) from their original language into English, an official language of the Court, pursuant to Article 51 of the Rules of Court.

Agent of the Russian Federation

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Vladimir TARABRIN

The Hague, 18 September 2025



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- Annex 4 Rules of Procedure for the Council, ICAO Doc. 7559/10, 11<sup>th</sup> ed., 2022
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### ***Official statements***

- Annex 22 Permanent Mission of the Russian Federation to the United Nations, Statement by H.E. Ambassador Vitaly I. Churkin, Permanent Representative of the Russian Federation to the United Nations, during the Security Council Meeting on the situation in Ukraine, 21 July 2014
- Annex 23 Ministry of Foreign Affairs of the Russian Federation, Press Release, The Foreign Ministry's statement on the discussion of further steps related to the continuing investigation into the MH17 disaster at the UN Security Council, 30 July 2015

- Annex 24 Ministry of Foreign Affairs of the Russian Federation, Press Release, Statement on the impossibility of Russia's continued participation in trilateral consultations with Australia and the Netherlands on the MH17 plane crash in eastern Ukraine on 17 July 2014, 15 October 2020
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- Annex 38 AP News, *The Latest: Putin denies Russia responsible for MH17 downing*, Statement Made on Behalf of the German Government by its Spokeswoman, Ms. Fietz (25 May 2018)
- Annex 39 CBC, *Canada levels new sanctions against Ukrainian rebel leaders, Russian firms* (24 July 2014)
- Annex 40 Daily News, *Japan is stepping up sanctions against Russia amidst downing of Malaysia Airlines Flight MH17* (9 January 2019)
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- Annex 42 Facebook, Vladislav Seleznyov Account, *11.50 In order to reduce the response to possible threats...* (12 July 2014)
- Annex 43 YouTube, Army TV – Military Television of Ukraine account, *Program “Chas Ch” No. 129 (16.07.2014. Evening edition)* (16 July 2014) (*excerpt*)
- Annex 44 CNN, *Air attack on pro-Russian separatists in Lugansk kills 8, stuns residents* (3 June 2014)
- Annex 45 Donetsk News Agency, *Hundreds Rushed to Remove the Rubble: Eyewitnesses on the Aftermath of the Airstrike in Snezhnoye in Summer 2014* (15 July 2020)
- Annex 46 TASS, *Ryabkov: Report on Boeing in Ukraine - an attempt to fulfill a political order* (13 October 2015)

#### ***Other documents***

- Annex 47 Agreement between the National Bureau of Air Accident and Incidents Investigation with Civil Aircraft (NBAAI) of Ukraine and the Dutch Safety Board of the Netherlands on Delegation of Investigation in Respect of Aircraft Accident Involving Boeing 777-200, Registration: 9M-MRD “Malaysia Airlines” Flight MH17, 23 July 2014
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- Annex 50 District Court of The Hague, Case No. 09/748004-19, Judgment against I.V. Girkin, 17 November 2022 (*excerpt*)
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- Annex 53 Federal Air Transport Agency of the Russian Federation, Letter No. 4.02-798-dsp from Deputy Director O. Storchevoy to the Dutch Safety Board objecting to actions contrary to Annex 13 to the Chicago Convention, 22 September 2015
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- Annex 55 Dutch Safety Board, Letter No. OvV-16500274 from the Chairman of the DSB in response to Letter No. 4.02-3 from the Deputy Director O. Storchevoy of the Federal Air Transport Agency of the Russian Federation, dated 14 January 2016, 25 February 2016
- Annex 56 Report of JSC Air and Space Defense Corporation “Almaz-Antey” on the results of studies related to the technical investigation into the crash of the Malaysian airlines Boeing 777-200 9M-MRD (flight MH17), 2023 (*excerpt*)