INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING THE AERIAL INCIDENT OF 3 JULY 1988

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

VOLUME II

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE L'INCIDENT AÉRIEN DU 3 JUILLET 1988

(RÉPUBLIQUE ISLAMIQUE D'IRAN c. ÉTATS-UNIS D'AMÉRIQUE)

VOLUME II

The case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)*, entered on the Court's General List on 17 May 1989 under Number 79, was removed from the List by an Order of the Court of 22 February 1996, following discontinuance by agreement of the Parties *(Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), I.C.J. Reports 1996,* p. 9).

The pleadings in the case are being published in the following order:

Volume I. Application instituting proceedings of the Islamic Republic of Iran; Memorial of the Islamic Republic of Iran.

Volume II. Preliminary objections of the United States of America; Observations and submissions of the Islamic Republic of Iran on the preliminary objections; Observations of the International Civil Aviation Organization; selection of correspondence; Settlement Agreement.

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Regarding the reproduction of case files, the Court has decided that henceforth, irrespective of the stage at which a case has terminated, publication should be confined to the written proceedings and oral arguments in the case, together with those documents, annexes and correspondence considered essential to illustrate its decision. The Court has also specifically requested that, whenever technically feasible, the volumes should consist of facsimile versions of the documents submitted to it, in the form in which they were produced by the parties.

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L'affaire de l'*Incident aérien du 3 juillet 1988 (République islamique d'Iran c. Etats-Unis d'Amérique)*, inscrite au rôle général de la Cour sous le numéro 79 le 17 mai 1989, en a été rayée par ordonnance de la Cour du 22 février 1996 à la suite du désistement par accord des Parties *(Incident aérien du 3 juillet 1988 (République islamique d'Iran c. Etats-Unis d'Amérique), C.I.J. Recueil 1996,* p. 9).

Les pièces de procédure écrite relatives à cette affaire sont publiées dans l'ordre suivant:

Volume I. Requête introductive d'instance de la République islamique d'Iran; mémoire de la République islamique d'Iran.

Volume II. Exceptions préliminaires des Etats-Unis d'Amérique; observations et conclusions de la République islamique d'Iran sur les exceptions préliminaires; observations de l'Organisation de l'aviation civile internationale; choix de correspondance; arrangement amiable.

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La Haye, 2000.

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INTRODUCTION AND SUMMARY

On 17 May 1989, the Government of Iran filed an Application with this Court instituting the present case against the United States. Iran stated that "[t]his dispute arises from the destruction of an Iranian aircraft, Iran Air Airbus A-300B, flight 655 and the killing of its 290 passengers and crew by two surface-to-air missiles launched from the U.S.S. Vincennes, a guided-missile cruiser on duty with the United States Persian Gulf/Middle East Force in the Iranian airspace over the Islamic Republic's territorial waters in the Persian Gulf on 3 July 1988." This incident occurred in the midst of an armed engagement between U.S. and Iranian forces, in the context of a long series of attacks on U.S. and other vessels in the Gulf.

In its Application, the Government of Iran sought relief from this Court on the basis of Article 84 of the Convention on International Civil Aviation of 1944 (hereinafter the "Chicago Convention") and Article 14 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (hereinafter the "Montreal Convention").

On 12 June 1990, the Court ordered that the Government of Iran file its Memorial by 24 July 1990, and that the United States file its Counter-Memorial by 4 March 1991. In

accordance with this Order and with the Court's Order of 13 December 1989, the United States submits the following preliminary objections to the jurisdiction of the Court to entertain the claims filed by Iran.

In this case, Iran is, under Article 36(1) of the Statute of the Court, invoking three titles of jurisdiction provided for in conventions to which the United States and Iran are party. They are Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention, and Article XXI(2) of the 1955 Treaty of Amity between Iran and the United States (hereinafter the "Treaty of Amity"). Each of these provisions confers on the Court jurisdiction to decide disputes relating to the interpretation and application of the subject convention once certain conditions are satisfied. It is the contention of the United States that in no case are the applicable conditions satisfied and that the Court has no jurisdiction under any of these conventions. The United States accordingly is requesting that the Court address the issue of jurisdiction first, in accordance with Article 79 of the Rules of the Court.

In its Application, Iran invoked Article 84 of the Chicago Convention, "in order to appeal from the decision rendered on 17 March 1989 by the Council of the International Civil Aviation Organization"; and Article 14 of the Montreal

Convention. Fourteen months later, in its Memorial, Iran invoked for the first time Article XXI of the Treaty of Amity. None of these conventions, placed in the context of the facts of this case, provides a basis for the jurisdiction of this Court as alleged by Iran.

With respect to the Chicago Convention, the International Civil Aviation Organization (hereinafter "ICAO") Resolution of 17 March 1989 was not a "decision" of the ICAO Council within the meaning of Article 84 of the Chicago Convention. Iran never asked for a decision of the Council under Article 84 and the Council never rendered a decision under that Article. The proceedings that led to the ICAO Resolution, as well as the form and substance of the Resolution itself, clearly show that the Council was not acting under Article 84 when it adopted its Resolution, but rather under an entirely separate procedure from which there is no appeal to the Court. Iran's attempt to by-pass the established ICAO procedures for resolution of disputes threatens the institutional integrity and effective operation of ICAO.

The Montreal Convention also provides no basis for the Court's jurisdiction. Iran has failed to satisfy the prerequisites for the Court's jurisdiction under the Montreal Convention by not having sought to resolve this dispute through

negotiations prior to filing suit in the Court, and by failing to comply with the Convention's clear requirements for the prior exhaustion of arbitration procedures. Furthermore, Iran's claim has absolutely no connection to the Montreal Convention and is clearly outside its scope. The terms and history of that Convention, as well as the subsequent practice of the parties, make clear that it does not apply to acts of States against civil aircraft -- particularly acts committed by the armed forces of States. The actions of the United States upon which Iran relies to sustain its claim are governed by the laws of armed conflict and not the Montreal Convention.

With respect to the Treaty of Amity, Iran is asserting this Treaty in bad faith, given Iran's past inconsistent assertions and conduct under the Treaty. The United States contends that the Court does not have jurisdiction because Iran failed to assert this Treaty as a basis of jurisdiction in its Application and is now seeking to transform the dispute as set forth in its Application into another dispute which is wholly different in character. Further, the Treaty of Amity has no connection to the dispute that is the subject of Iran's Application. Finally, Iran may not invoke the compromissory clause of the Treaty of Amity because Iran has made no effort to resolve that dispute by diplomacy, as is required by the

Treaty of Amity. Nor has Iran pursued the United States' efforts to make compensation for the incident.

In its Memorial, Iran also asserted that the United States has violated the United Nations Charter and various other conventions and principles of international law. The Court must disregard these allegations, since the Court has jurisdiction over none of them.

In effect, Iran has deliberately avoided normal diplomatic practice and disregarded the procedures for resolution of disputes provided in the conventions it cites. Iran has instead brought to this Court questions over which the Court has no jurisdiction, and for which there is no adequate record nor reasonable basis for judicial resolution. After trying and failing to obtain condemnation of the United States in ICAO under procedures which do not contemplate further review, Iran has -- after the fact -- wholly recast the nature of its complaint in an attempt to recoup its fortunes in this Court. As a result of Iran's actions, the United States has been unable to proceed with the payment of compensation to the Iranian families of the victims of this tragic incident. The Court has the authority under Article 79 of the Rules of the Court to act on these preliminary objections; it is submitted that the Court should do so by rejecting Iran's improper invocation of the Court's jurisdiction.

The United States reserves its right to object to any other issue of the Court's jurisdiction over, or the admissibility of, Iran's claims that arise in the course of these proceedings, as well as the right under Article 80 of the Rules of the Court to present counter-claims in the event the Court determines that it has jurisdiction in this matter.

PART I

STATEMENT OF FACTS RELEVANT TO JURISDICTION

The Application and Memorial filed by Iran in this case are based on an incident that occurred on 3 July 1988, in the Gulf near the coast of Iran involving Iranian gunboats, U.S. naval vessels, and Iran Air Flight 655. In considering the jurisdiction of this Court, many of the factual assertions made by Iran need not be addressed at this time by the Court. It is, however, important for the Court to appreciate that this incident occurred in the midst of an armed engagement between U.S. and Iranian forces, in the context of a long series of attacks on U.S. and other vessels in the Gulf. The incident of Iran Air Flight 655 cannot be separated from the events that preceded it and from the hostile environment that existed on 3 July 1988, due to the actions of Iran's own military and paramilitary forces. The report of investigation of the International Civil Aviation Organization (hereinafter "ICAO") found that:

> "As a result of difficulties experienced by international shipping in the Gulf, naval forces of several States entered the area to provide a protective presence and safeguard the freedom of navigation. The extent and intensity of hostile activities varied considerably from time to time. The incident on 17 May 1987 in which the USS Stark was severely damaged by two air-launched Exocet missiles was of particular relevance in the chain of events leading to the destruction of flight IR655[1]."

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[1] "Destruction of Iran Air Airbus A300 in the Vicinity of Qeshm Island, Islamic Republic of Iran on 3 July 1988: Report of ICAO Fact-Finding Investigation, November 1988", ICAO Doc. C-WP/8708, restricted, Appendix, para. 2.1.1 (Exhibit 9) (hereinafter referred to as "ICAO Report").

For more than four years prior to 3 July 1988, Iran had repeatedly attacked merchant shipping in the Gulf as a part of its conduct of the Iran-Iraq war, which had been actively waged since September 1980. Several U.S. merchant ships, as well as several hundred merchant ships from other States, were attacked and damaged by Iranian naval vessels, aircraft, mines, and missiles during this period. These ships, which were on the high seas travelling to and from non-Iraqi ports, were almost never stopped and searched by Iran to determine whether they were trading with Iraq or carrying contraband destined for Iraq.

On 3 July 1988, U.S. naval vessels, after seeking to assist a merchant vessel, found themselves forced to take action in self-defense as a result of an unprovoked attack by Iranian gunboats. In the midst of this surface engagement, an unidentified aircraft departed from the Iranian joint military/civilian airfield complex near Bandar Abbas and set a course which would take it directly over the USS Vincennes. The Commanding Officer of the USS Vincennes was aware that Iran recently had moved sophisticated, high performance Iranian F-14 fighter aircraft to the airfield at Bandar Abbas; indeed, Iran had recently operated these fighter aircraft from Bandar Abbas on several occasions in the vicinity of the incident of 3 July 1988. On that date, the rapidly approaching unidentified

aircraft failed to respond to repeated warnings and directions to turn away which were broadcast on both military and civilian air distress frequencies. Instead, the aircraft continued to close to within ten nautical miles of the ship (well within the range of the Maverick missiles that had been employed by the Iranian Air Force to attack shipping in this area). At this point, the Commanding Officer of the USS Vincennes determined that he could no longer withhold his fire and still adequately ensure the defense of his ship against the approaching aircraft. Consequently, and as a matter of necessity, he responded by firing two missiles that downed the aircraft less than eight nautical miles from the U.S. naval vessels. The subsequent ICAO Investigation Report concluded in paragraph 3.2.1 that "[t]he aircraft was perceived as a military aircraft with hostile intentions and was destroyed by two surface-to-air missiles."

Only afterwards did it become clear that the approaching aircraft was a civilian airliner, which Iranian authorities had permitted to take off and fly directly towards the U.S. vessels while they were involved in a surface engagement with Iranian gunboats. The United States immediately expressed its deep regret over the incident and cooperated fully with the team established by the ICAO Council to investigate the circumstances of the incident. Before the United Nations

Security Council and the ICAO Council and in communications to each State having nationals aboard the flight (including Iran), the United States offered to pay compensation to the families of the victims. While some families of the victims initially chose to pursue legal remedies in U.S. courts, in due course this compensation offer was accepted by many of the families and payments were made. Of the States involved, only Iran has rejected the U.S. offer and has prevented its nationals from accepting payment.

All these events are important in understanding why U.S. naval vessels came to be off the coast of Iran in 1988; why on 3 July of that year the USS Vincennes feared an imminent attack from Iranian aircraft and reacted accordingly; how the United States thereafter worked on its own and within the United Nations and ICAO, the competent specialized agency, to understand why this incident occurred; and how the United States made efforts to provide compensation for the incident.

CHAPTER I

IRANIAN ATTACKS ON MERCHANT SHIPPING DURING THE IRAN-IRAQ WAR THREATENED THE FREEDOM OF NAVIGATION AND PROMPTED THE DEPLOYMENT OF MILITARY FORCES BY VARIOUS NATIONS TO THE GULF.

It is well known that in late 1980, armed hostilities broke out between Iran and Iraq, leading to extensive fighting between those two countries for eight years. The war between Iran and Iraq extended into the Gulf in March of 1984 when Iraq initiated attacks on tankers using Iran's oil terminal at Kharg Island. Lacking comparable Iraqi targets which could be easily attacked, Iran chose to retaliate by attacking on the high seas ships calling at non-Iraqi Arab ports in the Gulf. These Iranian attacks on merchant vessels in the Gulf became extensive in 1987 and continued until the incident of 3 July 1988 and thereafter. The United States submits as Annex 1 to this pleading a description of many of the incidents of unprovoked Iranian attacks on merchant vessels during 1987-88.

The major thrust of U.S. policy in the region during the Iran-Iraq War was to seek a peaceful settlement of the conflict, largely through the U.N. Security Council[1]. In the interim, however, the United States undertook appropriate steps

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[1]During the Gulf war, the U.N. Security Council passed six resolutions calling upon Iran and Iraq to cease their military operations. Res. 479, U.N. Sec. Council (2248th meeting, 28 Sep. 1980), reprinted in U.N. Doc. S/INF/36, p. 23; Res. 514, U.N. Sec. Council (2383rd meeting, 12 July 1982), U.N. Doc. S/RES/514; Res. 522, U.N. Sec. Council (2399th meeting, 4 Oct. 1982), U.N. Doc. S/RES/522; Res. 540, U.N. Sec. Council (2493rd meeting, 31 Oct. 1983), U.N. Doc. S/RES/540; Res. 552, U.N. Sec. Council (2546th meeting, 1 June 1984), U.N. Doc. S/RES/552; Res. 582, U.N. Sec. Council (2666th meeting, 24 Feb. 1986), U.N. Doc. S/RES/582; Res. 588, U.N. Sec. Council (2713th meeting, 8 Oct. 1986), reprinted in U.N. Doc. S/INF/42, p. 13; Res. 598, U.N. Sec. Council (2750th meeting, 20 July 1987), U.N. Doc. S/RES/598. These resolutions are Exhibit 31.

Pursuant to a letter by the Governments of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates complaining of Iranian attacks on commercial ships en route to and from Kuwait and Saudi Arabia, the Security Council condemned those attacks, demanded that they cease, and requested that the Secretary-General report on the progress of the implementation of Resolution 552. Exhibit 31, Res. 552.

Attached as Exhibit 32 is the Report plus addenda of the Secretary General in pursuance to Resolution 552, which recount the dates of incidents, the name, type and nationality of the vessels attacked, and information on the location and type of attack. Report of the Secretary-General in Pursuance of Security Council Resolution 552 (31 Dec. 1984), United Nations Doc. S/16877; Add. 1, 22 Jan. 1985; Add. 2, 31 Dec. 1985; Add. 3, 31 Dec. 1986; Add. 4, 22 Jan. 1987; Add. 3, Corr. 1, 10 Feb. 1987; and Add. 5, 31 Dec. 1987.

to protect its interests and those of other friendly States, especially because of an Iranian threat to close the Strait of Hormuz and the likelihood that U.S. ships might be attacked in the Gulf[1].

In particular, the United States deployed warships to the Gulf to help protect merchant ships flying U.S. and other flags that were not engaged in carrying contraband for either of the two belligerents. Many other States also deployed warships to the Gulf for this purpose, including the United Kingdom, France, the Netherlands, Italy, Belgium, and the USSR[2].

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[1] See "U.S. Policy in the Persian Gulf", Special Report No. 166, U.S. Dep't of State, pp. 3-4 (July 1987), Exhibit 36; see also P. DeForth, "U.S. Naval Presence in the Persian Gulf: The Mideast Force Since World War II", Naval War College Review, p. 28 (Summer 1975), Exhibit 37.

[2] See "Iran Fires Missile at Kuwait", Washington Post, 5 Sep. 1987, p. A-1 (hereinafter "Wash. Post"); "Dutch Sending 2 Ships to Hunt Mines in Gulf", New York Times, 8 Sep. 1987, p. A-3 (hereinafter "N.Y. Times"); "Perez de Cuellar's Gulf Trip Ends in Apparent Failure", Wash. Post, 16 Sep. 1987, p. A-1; "Reagan Accepts Plan to Escort Tankers", Wash. Post, 30 May 1987, p. A-1; "Baker Hints at U.S. Action if Iran Deploys Gulf Missiles", N.Y. Times, 8 June 1987, p. A-8; "U.S. Policy in the Persian Gulf," op. cit., Exhibit 36, pp. 5-7. In April 1987, Kuwait signed an agreement with the Soviet Union to lease Soviet tankers to Kuwait; by May 1987 the first of three Soviet ships leased to Kuwait began operating in the Gulf, with a Soviet frigate and two minesweepers as escorts. "Iraqi Missile Hits U.S. Navy Frigate in Persian Gulf", N.Y. Times, 18 May 1987, p. A-1; "Preemptive U.S. Strike on Iran Missiles Debated", Wash. Post, 5 June 1987, p. A-1. For copies of all newspaper articles referred to in this Part, see Exhibit 35.

Many of Iran's indiscriminate attacks on merchant vessels were conducted by small gunboats of Boghammar manufacture. These gunboats were typically equipped with machine guns, rocket launchers (including rocket-propelled grenades), and small arms[1]. U.S.-owned vessels were among those attacked by Iranian gunboats. For example, on 9 July 1987, an Iranian gunboat attacked the U.S.-owned Liberian-flagged tanker Peconic off Kuwait, while on 6 November 1987, Iranian gunboats attacked the U.S.-owned Panamanian-flagged Grand Wisdom[2]. On 16 November 1987, Iranian gunboats attacked the U.S.-owned, Bahamian-flagged Esso Freeport and attacked the U.S.-owned Liberian-flagged Lucy near the Strait of Hormuz[3].

U.S. military forces took an active role in responding to requests for help from U.S. vessels and from other vessels in distress when attacked by Iranian military and paramilitary gunboats. On 12 December 1987, a helicopter from the destroyer

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[1]ICAO Report, para. 1.16.1.2.

[2]Exhibit 32, S/16877/Add.5, pp.8, 14.

[3]"Gunboats Attack U.S. Tanker", Foreign Broadcast Information Service, 16 Nov. 1987, p. 23 (hereinafter "FBIS"); "Lloyds Reports Liberian Tanker Attacked by Iran", FBIS, 17 Nov. 1987, p. 20; Exhibit 32, S/16877/Add. 5, p. 15.

USS Chandler rescued 11 seamen from the burning Cypriot-flagged tanker, the Pivot, off Dubai following an attack by an Iranian frigate[1]. On 25 December 1987, a U.S. Navy helicopter rescued 11 seamen and a British Navy helicopter rescued nine seamen from a burning South Korean freighter, the Hyundai-7, after it had been attacked by Iranian small boats 25 miles north of Sharjah[2].

This assistance sometimes brought U.S. military forces into hostile contact with the Iranian gunboats, which would attack the U.S. forces. For instance, on 8 October 1987, three Iranian gunboats about 15 miles southwest of Farsi Island fired upon U.S. helicopters. Three U.S. helicopters returned fire, sinking all three of the Iranian boats[3]. Several other

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[1]"U.S. Navy Rescues Tanker Crew in Gulf", N.Y. Times, 13 Dec. 1987, p. L-3; Exhibit 32, S/16877/Add.5, p.17.

[2]"Lloyds Cited on Attack on S. Korean Ship", FBIS, 28 Dec. 1987, p. 27; Exhibit 32, S/16877/Add.5, p.18.

[3]Letter dated 9 Oct. 1987 from the Permanent Representative of the U.S. to the U.N. Addressed to the President of the Security Council, U.N. Doc. S/19194 (Exhibit 33); Letter dated 10 Oct. 1987 from President Reagan to the President Pro Tempore of the Senate and the Speaker of the House, Weekly Compil. of Pres. Docs., p. 1159 (1987) (Exhibit 33); "U.S. Helicopters Sink 3 Iranian Gunboats in Persian Gulf", Wash. Post, 9 Oct. 1987, p. A-1; "U.S. Gulf Forces Said to Seek More Powers", Wash. Post, 13 Oct. 1987, p. A-1.

nations also were forced to take steps to protect their shipping.

In addition to gunboats, Iran used naval mines, missiles and aircraft to attack shipping in the Gulf. On 24 July 1987, the S.S. Bridgeton, a U.S.-reflagged Kuwaiti tanker under U.S. military escort into the Gulf, hit a mine about 18 miles west of the Iranian island of Farsi, causing extensive damage to the ship[1]. Consequently, the United States ordered U.S. Navy minesweeping helicopters to the Gulf[2]. Other nations dispatched minesweeping units as well[3]. At times Iran denied

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[1]"After the Blast, Journey Continues", N.Y. Times, 25 July 1987, p. 5; Exhibit 32, S/16877/Add.5, p.9.

[2]"U.S. Acts to Bolster Gulf Mine Defenses on Several Fronts", Wall Street Journal, 4 Aug. 1987, p. 1 (hereinafter Wall St. Journal"); "8 U.S. Helicopters Arrive for Mission to Sweep the Gulf", N.Y. Times, 17 Aug. 1987, p. A-1; "U.S. Orders 8 Old Minesweepers to the Gulf", N.Y. Times, 20 Aug. 1987, p. A-1.

[3]See Annex 1.

that it was the source of these mines. Nevertheless, in a Tehran radio dispatch on 20 August 1987, Iran admitted that it had mined the Persian Gulf, purportedly to "protect" its coastline[1].

Iran constructed missile sites and launched Silkworm missiles primarily from the Faw Peninsula in 1987, damaging Kuwaiti shipping facilities and merchant ships off Kuwait, including the U.S.-flagged tanker Sea Isle City[2]. Iran also inflicted considerable damage on shipping in the Gulf with attacks by Iranian aircraft, usually fighter aircraft using Maverick missiles and "iron" or gravity bombs[3]. On 2 February 1988, five months before the incident of 3 July 1988, two Iranian F-4s launched two Maverick missiles at the Liberian tanker Petrobulk Pilot about 30 nautical miles south-southwest

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[1] "Iran Says it Mines the Gulf", Wash. Post, 21 Aug. 1987, p. A-1.

[2] See Annex 1.

[3] Maverick missiles can be launched from ranges of 0.5 to 13 nautical miles and are television guided. The launching aircraft must be able to keep visual track of the target, but does not have to scan the target with radar. "Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988" (hereinafter "ICAO Report, Appendix E"), p. E-12.

of the area where the incident of 3 July 1988 took place[1]. A few days later, on 12 February 1988, an Iranian helicopter attacked the Danish vessel Karama Maersk.

This state of tension and conflict continued through the spring and into the summer of 1988. On 14 April 1988, the USS Samuel B. Roberts was struck by naval mines laid by Iranian gunboats in shipping channels, east of Bahrain, causing extensive damage to the vessel and injuring ten crewmen, some seriously[2]. In response to this unlawful use of force and as a proportionate measure to deter further Iranian attacks on merchant vessels, on 18 April 1988, United States

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[1] "Iran Tries Aerial Attack on Cargo Ship in Gulf", Christian Science Monitor, 3 Feb. 1988, p. 2. Military forces in the Gulf knew that Iranian F-14s could be configured to drop iron-bombs on naval vessels if they could approach within two nautical miles of the target. ICAO Report, Appendix E, p. E-12.

[2] "Blast Damages U.S. Frigate in Gulf", N.Y. Times, 15 Apr. 1988, A-21. The mine exploded on the port side of the keel by the engine room, opening a hole 30 by 23 feet. Extensive damage occurred from the explosion and subsequent fire and flooding. R. O'Rourke, "Gulf Ops," Naval Review Proceedings, p. 44 (1989) (Exhibit 38). Several mines were subsequently found in the Central Gulf. "U.S. Finds 2 Mines Where Ship was Damaged", N.Y. Times, 16 Apr. 1988, p. 32; "U.S. Warship Damaged by Gulf Blast", Wash. Post, 15 Apr. 1988, p. A-21.

military forces used force to inflict damage upon oil platforms where Iranian military command and control facilities were located and from which Iranian gunboats were deployed to attack shipping and to lay naval mines. Before doing so, the United States directed the evacuation of personnel on the platforms. In retaliation, Iranian fighter aircraft were deployed from the airport near Bandar Abbas (the same airport from which Iran Air Flight 655 would depart) to join Iranian frigates and small boats from Abu Musa Island and Qeshm Island in attacks on U.S.-owned or associated oil rigs, platforms and jack-up rigs. During the engagement with U.S. forces protecting these rigs and platforms, two Iranian frigates and one missile patrol boat were sunk or severely damaged. One of the Iranian F-4s that scrambled from Bandar Abbas during this incident failed to respond to repeated U.S. warnings; when it continued to close on U.S. vessels, the USS Wainwright launched missiles, damaging the aircraft. Much of this activity took place just to the south of the area where the incident of 3 July 1988 occurred[1].

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[1]Letter dated 18 Apr. 1988 from the Acting Permanent Representative of the U.S. to the U.N. Addressed to the President of the Security Council, U.N. Doc. S/19791 (Exhibit 34); ICAO Report, Appendix E, pp. E-11 - E-12; Wash. Post, 23 Apr. 1988.

In the month preceding the incident of 3 July 1988, Iranian F-14s were transferred to Bandar Abbas, which was perceived by the United States as a significant upgrade in Iranian offensive air capability at that airport[1]. In the three-day period prior to the incident, there was heightened air and naval activity in the Gulf, including over-water flights by Iranian F-14s in the vicinity of U.S. naval vessels. U.S. forces in the Gulf were alerted to the probability of significant Iranian military activity against merchant shipping or U.S. military vessels in retaliation for recent Iraqi military successes in the land war; it was expected that such retaliation could come over the weekend of 4 July, the day the United States celebrates its independence.

On 2 July and into 3 July 1988, Iranian small boats positioned themselves at the western approaches to the Strait of Hormuz from which they routinely challenged and indiscriminately attacked merchant vessels[2]. On 2 July 1988,

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[1]ICAO Report, Appendix E, pp. E-6, E-13.

[2]ICAO Report, Appendix E, pp. E-6, E-7.

the Danish vessel Karama Maersk, outbound from Saudi Arabia, was repeatedly attacked by Iranian small boats. The Karama Maersk issued a "mayday" distress call requesting assistance. The USS Elmer Montgomery responded and observed several Iranian small boats to fire rockets at the Danish ship. When the USS Elmer Montgomery fired a warning shot at the small boats, the Iranian boats retired[1].

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[1]ICAO Report, Appendix E, p. E-7; "U.S. Warship Fires Warning at Iranian Boat", Wash. Post, 3 July 1988, p. A-25.

CHAPTER II

ON 3 JULY 1988, IRANIAN GUNBOATS AND U.S. NAVAL VESSELS WERE ENGAGED IN COMBAT WHEN AN UNIDENTIFIED IRANIAN AIRCRAFT RAPIDLY APPROACHED THE U.S. VESSELS AND, UPON FAILURE TO RESPOND TO REPEATED RADIO WARNINGS, WAS SHOT DOWN.

On 3 July 1988, the USS Elmer Montgomery was on patrol in the northern portion of the Strait of Hormuz outside the territorial waters of Iran[1]. At approximately 3 UTC, the USS Elmer Montgomery detected seven small Iranian gunboats with manned machine gun mounts and rocket launchers approaching a Pakistani merchant vessel. Shortly thereafter, the USS Elmer Montgomery detected a total of 13 Iranian gunboats breaking into three groups, one of which took a position off the USS Elmer Montgomery's port quarter. The USS Elmer Montgomery

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[1]All U.S. naval vessels prior to the engagement with Iranian small boats were in international, not Iranian waters. The ICAO investigation determined that at 6:10 a.m. the position of the three U.S. ships was as follows:

USS Vincennes	26 26 N, 056 02 E
USS Elmer Montgomery	5 nautical miles northwest of the USS Vincennes
USS Sides	18 nautical miles northeast of the USS Vincennes

See ICAO Report, Appendix A, p. A-1. These positions are all outside of Iranian territorial waters.

could hear the gunboats over communications channels challenging merchant ships in the area and shortly thereafter heard explosions to the north[1].

The USS Vincennes was directed to proceed north to the vicinity of the USS Elmer Montgomery to investigate[2]. A USS Vincennes helicopter, designated "Ocean Lord 25," was vectored to the north to investigate and to monitor the Iranian small boat activity. At 6:15 UTC, Ocean Lord 25, while operating in international airspace, was fired upon by small boats[3]. The USS Vincennes then took tactical command of the USS Elmer Montgomery and both ships proceeded to close the position of the helicopter and the small boats at high speed. At the same

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[1]ICAO Report, Appendix E, pp. E-7, E-26. Throughout this Memorial, the United States lists time as Co-ordinated Universal Time (UTC), as was done by the ICAO investigation team.

[2]ICAO Report, Appendix E, p. E-26.

[3]ICAO Report, Appendix A, p. A-1. At no time was the helicopter in Iranian internal waters. The helicopter was in international airspace approximately four nautical miles from Iranian territorial waters.

time, the USS Vincennes was tracking and communicating with an Iranian P-3 military surveillance aircraft, which had closed from about 60 to about 40 nautical miles[1].

As the USS Vincennes and USS Elmer Montgomery approached the small boats, two groups of them were observed turning towards the USS Vincennes and USS Elmer Montgomery and commencing high-speed attack runs, which prior experience in the Gulf had shown to be quite dangerous methods of attack[2]. This closing action was interpreted as a demonstration of hostile intent to attack the U.S. vessels. The Commanding Officer of the USS Vincennes then requested and was granted

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[1]The USS Vincennes' command and control system is not capable of differentiating between different aircraft without an identification signal from the aircraft. When the USS Vincennes challenged the Iranian P-3 at 6:48:25 UTC (ICAO Report, Appendix B, p. B-17), the USS Vincennes had already been monitoring and communicating with the P-3 for a period of time (ICAO Report, Appendix A, p. A-1). Although the United States had an Airborne Warning and Control (AWAC) aircraft airborne at the time of the incident, it provided no link information; its radar is unable to provide coverage of the entire Persian Gulf area, which at that time included the area in which this incident occurred. ICAO Report, Appendix E, p. E-26.

[2]ICAO Report, Appendix E, pp. E-27-E-29; see ICAO Report, Appendix A, p. A-2; N. Friedman, "The Vincennes Incident", Naval Review Proceedings, p. 74 (1989) (Exhibit 39).

permission by his immediate superior (the Commander, U.S. Joint Task Force Middle East) to engage the small boats with gunfire[1].

At approximately 6:43 UTC, the USS Vincennes and USS Elmer Montgomery opened fire on the two closing groups of Iranian small boats, including the group of small boats that had fired upon Ocean Lord 25[2]. The surface boats opened fire on the two U.S. warships. Although both U.S. and Iranian vessels were in international waters at the commencement of this engagement, during the 17-minute engagement it became necessary for the USS Vincennes, in defending itself, to maneuver into waters claimed by Iran as territorial waters[3].

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[1]ICAO Report, Appendix A, p. A-2; ICAO Report, Appendix E, p. E-27.

[2]ICAO Report, Appendix E, p. E-27.

[3]At the time the USS Vincennes fired its surface-to-air missiles (6:54 UTC), it was located at 26 30 47 N, 056 00 57 E. ICAO Report, para. 2.11.7. Since the USS Vincennes was under armed attack by Iranian small boats, it was clearly entitled to maneuver as necessary (including entry into Iranian territorial waters) as a matter of self-defense. Moreover, under the Treaty of Amity between the United States and Iran (Exhibit 8), Article X, paras. 5 and 6, a U.S. warship in distress is permitted to enter territorial waters claimed by Iran.

This surface engagement remained active from the time Iran Air Flight 655 took off from Bandar Abbas through the downing of Iran Air Flight 655. The crew of the USS Vincennes were at battle stations as Iranian gunfire was heard to ricochet off the USS Vincennes' starboard bow. (The post-action analysis indicated that shrapnel and/or spent bullets appeared to have hit the USS Vincennes and damaged the protective coating behind the forward missile launcher)[1]. During the engagement, the USS Vincennes experienced a "foul bore" or faulty discharge in the forward gun of its two guns capable of engaging surface targets. Consequently the Commanding Officer of the USS Vincennes ordered a full rudder at 30 knots to turn the ship around and bring the aft gun to bear in defending the USS Vincennes from the attacking gunboats. This caused the ship to list at a 30-degree angle, causing books, publications, and loose equipment to fall from desks and consoles in the USS Vincennes' Combat Information Center (CIC)[2].

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[1]ICAO Report, Appendix E, p. E-28.

[2]ICAO Report, Appendix A, p. A-7; Exhibit 9, Appendix E, pp. E-9, E-28.

Iran Air Flight 655 was scheduled to take off from Bandar Abbas International Airport at 6:20 UTC en route to Dubai Airport in the United Arab Emirates. Bandar Abbas is a joint military/civilian airport located 4.5 miles northeast of the town of Bandar Abbas. The flight did not leave on time, but left almost a half-hour (27 minutes) late. Such flights normally push away from the gate close to the scheduled departure time[1].

The unidentified aircraft (later identified as Iran Air Flight 655) was immediately detected by the USS Vincennes and the USS Sides, at a range of 47 nautical miles and closing on the U.S. vessels[2]. The approaching aircraft was thereafter monitored by the USS Vincennes' "Aegis" weapons system, which consists of an electronically-scanned radar system and large-screen display system integrated with the vessel's surface-to-air missiles. The large-screen display shows the

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[1]ICAO Report, paras. 1.1.1; 1.1.3; 1.1.4; 2.4.2. The statement in para. 3.1.7 of the ICAO Report that the flight departed 20 minutes after the scheduled time appears incorrect.

[2]ICAO Report, Appendix E, p. E-8.

relative speed and course of an aircraft using symbology[1]. The exact course, speed and altitude are displayed on a separate digital readout. The system cannot positively determine the size, type or character of an approaching aircraft. It is the responsibility of the personnel of the CIC to assist the ship's commanding officer in assessing the contact's nature and intent on the basis of all available information. In the few minutes available in this case, the CIC assessment was based on various factors, including: the contact's departure from a joint military/civil airfield; the direct course of the contact to the USS Vincennes; a perceived interception of an IFF Mode II signal (typically emitted by military aircraft); and the constantly closing range of the contact.

Information on civilian flight schedules was available in the CIC. The ICAO Report, however, confirms that such information was of limited value in estimating overflight time

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[1]On the Aegis display screen, an aircraft is displayed as a symbol; its speed is depicted by a vector attached to it. The higher the speed, the longer the vector. The vector's direction depicts the aircraft's course. The unidentified approaching aircraft was designated by the USS Vincennes as TN 4474 (subsequently changed to TN4131) and identified as an "unknown--assumed enemy". ICAO Report, Appendix A, p. A-3.

of an aircraft. The Report states: "In the absence of flight plan and flight progress information, a realistic traffic picture could not be established and positive aircraft identification could not be obtained on that basis[1]." Moreover, the actual take-off time of Iran Air Flight 655 differed from its scheduled departure time, thus creating the appearance of an unidentified radar contact that could not be related to a scheduled time of departure for a civil flight[2].

Although over a period of four minutes the U.S. vessels issued four warnings on the civil international air distress frequency (121.5 MHz VHF) and seven warnings on the military air distress frequency (243 MHz UHF), the U.S. vessels received

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[1]ICAO Report, paras. 2.8.3; 3.1.19. Consequently any assertion that the USS Vincennes knew Iran Air Flight 655 was expected to pass over at that time is wrong.

[2]ICAO Report, paras. 2.11.1; 3.1.23.

no response from the rapidly approaching aircraft[1]. A non-hostile military aircraft would be expected to respond just as the Iranian P-3 in fact did respond to such warnings only minutes earlier, even though it was located much further away from the USS Vincennes[2]. Likewise civil aircraft would be expected to respond; under provisions of the Chicago Convention Annexes all civil aircraft are required to have equipment capable of communicating on 121.5 MHz, the international air distress frequency. Furthermore, all civil aircraft are

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[1]Iran asserts that the 121.5 MHz warnings never actually occurred or were incapable of being heard or understood. Iranian Memorial, at 55. The ICAO Report, however, confirms that these warnings were made and that without question the final one should have been clearly understood by Iran Air Flight 655 as directed at it. ICAO Report, para. 2.10. Further, Iran is wrong when it says that the United States admits the warnings were not clear and that Iran Air Flight 655 had good reason not to listen (Iranian Memorial, p. 54). Although the same information was not provided for all of the warnings, Iran Air Flight 655 had completed its take-off procedures and should have been monitoring the 121.5 MHz frequency; had it done so it would have realized that it was being addressed, just as the Iranian P-3 realized that it was being addressed.

For the period of 2 June to 2 July 1988, U.S. military vessels in the Gulf issued 150 challenges to unidentified aircraft, of which 83 percent proved to be Iranian military aircraft, including F-14s. ICAO Report, Appendix E, p. E-18.

[2]ICAO Report, Appendix A, pp. A4-A5.

expected, on long over-water flights, to monitor that frequency when the aircraft is in operation[1]. It is critical that this channel be monitored since military vessels, including U.S. military vessels, are usually not provided with equipment for VHF communications other than on this frequency. On 16 September 1986, Iran Air itself had issued to flight crews operating in the Gulf area a company advisory notice which required the monitoring of frequency 121.5 MHz at all times; the subsequent ICAO investigation determined that this notice was included in the briefing material for Iran Air Flight 655 of 3 July 1988 and therefore concluded that the Iran Air Flight 655 flight crew was aware of the instruction[2]. The ICAO investigation also concluded that there was no indication of failure of the communications equipment during the flight[3].

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[1]Chicago Convention, Annex 6, para. 7.1.2 (Exhibit 2); Chicago Convention, Annex 10, paras. 5.2.2.1.1.1, 5.2.2.1.1.2, and 5.2.2.1.1.3 (Exhibit 3).

[2]ICAO Report, paras. 2.7.3; 3.1.14.

[3]ICAO Report, para. 3.1.3.

Given the requirements of the Annexes to the Chicago Convention and Iran Air's instructions, it is unclear why Iran Air Flight 655 did not respond to the repeated warnings of the U.S. armed forces.

There does not appear to be any practical reason why Iran Air Flight 655 was not monitoring this channel and did not respond to the warning. The aircraft was equipped with two radios; therefore it was technically feasible (as well as extremely prudent given the state of affairs in the Gulf) to undertake all normal cockpit responsibilities on one radio and monitor frequency 121.5 MHz on the other. Furthermore, the crew of Iran Air Flight 655 could speak English and, for at least the last two warnings issued over 121.5 MHz, the crew was not engaged in routine communications with any air traffic controllers. The fourth and final challenge on this frequency would have been without question recognizable by the crew as intended for them, and almost a minute elapsed between that final warning and the firing of the USS Vincennes' missiles[1].

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[1]ICAO Report, para. 2.10.18. The fourth challenge was issued at 6:53:25 UTC and the missiles were launched at 6:54:22 UTC. ICAO Report, para. 2.11.5.

The Bandar Abbas airport tower is also equipped with the 121.5 MHz channel, but curiously the airport authorities claimed in statements to ICAO that it did not hear or record transmissions on this frequency[1]. Had it been monitoring the frequency, Bandar Abbas might have been in position to assist in warning Iran Air Flight 655. It is also curious that the Iranian P-3 did not seek to assist Iran Air Flight 655, since it was clearly monitoring the military distress frequency over which seven warnings were issued.

Nor does it appear that Iranian authorities used their own procedures for protecting Iran Air Flight 655 from the hazard of flying into an area of active hostilities. Iranian military authorities did not activate the "red alert" procedure normally used to notify air traffic control centers of military activities which posed a risk to the safety of civil aircraft. As was noted in the ICAO investigation report, in some

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[1]ICAO Report, para. 2.10.7. The existence of these warnings is not in question. The ICAO investigation found that the warnings were issued, based on both United States records and those of the British vessel HMS Beaver. For transcripts of communications related to Iran Air Flight 655, see ICAO Report, Appendix B.

instances Iranian aircraft already off the ground were successfully recalled by using this "red alert" process[1]. This failure by the Iranian military to alert Iranian air traffic authorities was wholly unjustifiable, and can only be viewed as either intentional or grossly lacking in judgment; not only were Iranian authorities aware that hostile action was in progress directly under a civil air corridor, but they had initiated the hostile action themselves by firing on a U.S. helicopter in international airspace and by commencing a high-speed attack on U.S. naval vessels.

Without any response from Iran Air Flight 655, the USS Vincennes had to rely on other sources of information. First, intelligence information available to the U.S. Joint Task Force Middle East indicated the deployment of Iranian F-14 fighters to Bandar Abbas against the background of expected heightened hostile activities around the 4 July weekend[2]. Only weeks earlier, Iranian military aircraft had been scrambled from

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[1]ICAO Report, para. 2.5.1.

[2]ICAO Report, para. 2.11.1; ICAO Report, Appendix E, pp. E-13, E-43.

Bandar Abbas to assist in interdiction of U.S. vessels in this part of the Gulf[1]. As was noted by the ICAO Report, "the possibility of Iranian air support in the surface engagements with United States warships could not be excluded in view of precedent albeit not with F-14 type fighter aeroplanes[2]."

Second, immediately prior to the warnings to Iran Air Flight 655, the USS Vincennes was monitoring an Iranian P-3 military patrol aircraft to the west of the USS Vincennes. The P-3 can serve (and had frequently served) as a "stand-off" aircraft to assist Iranian fighter aircraft in finding and accurately attacking vessels[3].

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[1] See above, p. 21.

[2] ICAO Report, para. 2.11.1.

[3] The P-3 was flying a routine morning patrol to the West and then turned inbound during the surface engagement. ICAO Report, Appendix E, pp. E-7, E-45, E-48. This represents a typical targetting profile of standing clear of the target but remaining within range. N. Friedman, op. cit., Exhibit 39, p. 74.

Third, the constantly approaching aircraft was initially identified as an Iranian F-14 and did not emit certain electronic emissions that could be expected from a civil aircraft, such as aircraft weather radar and radio altimeter. The USS Vincennes was receiving other information that did not correlate with what would normally be the case for an attacking military aircraft[1], but there was very little time to conduct an accurate assessment of the aircraft's flight profile[2]. Further, the lack of response to the warnings on frequencies 121.5 MHz and 243 MHz reinforced the belief that the aircraft was engaged in a hostile mission[3].

Fourth, while the constantly approaching aircraft was within the corridor of airway A59, it was also tracked on a course straight towards the USS Elmer Montgomery and the USS Vincennes slightly diverging from the centerline of airway

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[1]ICAO Report, para. 2.9.

[2]From the time the Commanding Officer first became aware of the approaching aircraft until he made his decision to fire, the elapsed time was approximately 3 minutes, 40 seconds. ICAO Report, Appendix E, p. E-47.

[3]ICAO Report, para. 2.11.2.

A59[1]. Iranian military aircraft had been known to follow the commercial air routes within the Persian Gulf and even to have squawked on all IFF (I, II, and III) modes and codes, presumably as a means of disguising their military identity[2].

At 6:51 UTC, the USS Vincennes informed the U.S. Commander of the Joint Task Force Middle East (CJTFME) that it had what it believed to be an Iranian F-14 on a constant bearing and decreasing range which it intended to engage at 20 nautical miles unless the aircraft turned away. The CJTFME concurred and told the USS Vincennes to warn the aircraft again before firing[3]. The aircraft closed to within 20 nautical miles, but the USS Vincennes continued its concerted efforts to warn off the aircraft, placing

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[1]ICAO Report, para. 3.1.24. The fact that an aircraft is within a commercial air corridor is not surprising in the Gulf; a total of 18 commercial air routes cross the Gulf, covering at least 50% of Gulf's navigable waters. ICAO Report, Appendix E, p. E-16.

[2]ICAO Report, Appendix E, p. E-18. For example, at 6:51 UTC on 3 July 1988 -- right before Iran Air Flight 655 was shot down -- an Iranian military C-130 took off from Bandar Abbas using the same air corridor as used by Iran Air Flight 655. ICAO Report, Appendix A, p. A-8. It is contrary to recommended ICAO practice for military aircraft to squawk on other than Mode II.

[3]ICAO Report, Appendix E, pp. E-35-E-36.

itself at risk of attack. At approximately 6:54 UTC, after the eleven warnings were not answered or acknowledged, the USS Vincennes fired two missiles which intercepted the approaching aircraft at a range of eight nautical miles from the USS Vincennes[1].

The United States offered rescue and recovery assistance to the Government of Iran regarding Iran Air Flight 655, but Iran did not respond to the United States[2].

The USS Vincennes fired its missiles because its Commanding Officer perceived the approaching aircraft to be an Iranian military aircraft with hostile intentions[3]. Although Iran

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[1]The surface engagement with the Iranian gunboats ended about 10 minutes after the USS Vincennes fired its missiles. ICAO Report, Appendix A, pp. A-10 and A-12.

[2]ICAO Report, Appendix E, pp. E-45-E-46.

[3]ICAO Report, paras. 2.11.5 and 3.2.1. The conduct of the USS Vincennes was criticized in an article written by the Commanding Officer of the USS Sides a year after the incident occurred. See D. Carlson, "Comment and Discussion", Proceedings, pp. 87-92 (Sep. 1989) (Exhibit 40). That article, which appeared in a non-U.S. Government publication, represents one point of view regarding certain aspects of the Iran Air Flight 655 incident, just as other articles on this incident in the same publication represented wholly different views. See, e.g., N. Friedman, op. cit., Exhibit 39, pp. 72-80. Notwithstanding Commander Carlson's reflections, the Commanding Officer of the USS Vincennes perceived that his ship was under the threat of an imminent attack.

has since the time of this incident sought to equate it with previous shootdowns of civil aircraft -- such as the shootdown of Korean Air Lines Flight 007 in 1983 -- this comparison is not sustainable. Unlike the 1983 incident, the incident of 3 July 1988 involved the rapid approach of an unidentified foreign aircraft to a warship that was itself engaged in armed conflict initiated by the country of the aircraft's registry. ICAO's treatment of the two incidents evidences the international recognition that the incidents are not comparable.

CHAPTER III

ONCE IT BECAME KNOWN THAT THE AIRCRAFT SHOT DOWN WAS A CIVILIAN AIRLINER, THE UNITED STATES INVESTIGATED THE INCIDENT WITH A VIEW TO PREVENTING SUCH TRAGEDIES IN THE FUTURE AND SOUGHT TO COMPENSATE THE FAMILIES OF THE VICTIMS, WHILE IRAN IMMEDIATELY SOUGHT POLITICAL CONDEMNATION OF THE UNITED STATES BY THE UNITED NATIONS AND THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO).

The responses of the United States and Iran to this incident were different. The United States immediately sought on its own and in conjunction with ICAO to investigate the incident with the objective of determining what happened and how to avoid such tragedies in the future. Furthermore, the United States also immediately expressed its regret and announced its intent to provide compensation for the families of the victims of Iran Air Flight 655. In due course, the United States contacted Iranian authorities to obtain information on which to base the specific level of payments to be offered to the families of the victims.

Iran, however, made no effort to discuss this incident with the United States, let alone negotiate or arbitrate any disputes between them. Rather, Iran immediately and unsuccessfully sought political condemnation of the United States at the United Nations Security Council and ICAO. Iran essentially ignored repeated efforts by the United States to gather information on the victims and their families.

Neither the Security Council nor ICAO heeded Iran's demand for political condemnation. The Security Council on 20 July 1988 adopted by consensus (including the United States) a resolution expressing its "deep distress" at the downing of Iran Air Flight 655.

At the conclusion of an Extraordinary Session of the ICAO Council in July 1988, the Council resolved inter alia to conduct a fact-finding investigation to determine all relevant facts and technical aspects of the incident. The purpose of the investigation was generally to help safeguard civil aviation, and specifically to examine possible revisions to ICAO standards and recommended practices, as necessary. Once the investigation report was completed by a team of experts, the ICAO Council (with the United States and Iran participating) discussed the report. In December 1988, the Government of Iran sought to have the report examined to identify any violations of the Chicago Convention and drew the Council's attention to Article 54 of that Convention. However, Iran did not request that the Council undertake dispute-resolution procedures under Article 84 of the Chicago Convention, nor did Iran seek to apply the comprehensive and exclusive ICAO Rules for the Settlement of Differences promulgated to address disputes arising under that Article.

The Council dealt with this matter in its policy capacity under Articles 54 and 55 of the Chicago Convention, which do not contemplate appeals to this Court.

The Council referred the investigation report to the Air Navigation Commission (ANC) and, in March 1989, adopted by consensus a wide-ranging resolution that, inter alia, noted the report of the fact-finding investigation and endorsed the conclusions of the Air Navigation Commission on the report's safety recommendations. This resolution did not decide a "disagreement" under Article 84 of the Chicago Convention, and the proceedings had no relation whatsoever with Article 84. Frustrated with its failure to obtain condemnation of the United States through the political and technical proceedings of the ICAO Council, Iran now seeks to recharacterize to this Court the ICAO proceedings and resolution as falling under Article 84.

Section I. The United States Immediately Announced Its Intention to Compensate the Families of the Victims of Iran Air Flight 655 While at the Same Time Investigating the Incident and Taking Steps to Avoid Its Recurrence.

Unlike Iran, which sought political condemnation of the United States at the U.N. Security Council and at ICAO, the United States undertook immediate steps to offer compensation

to the families of the victims, to approach Iran for the purpose of paying this compensation, to investigate the incident, and to take steps to improve safety guidelines where possible.

Although the United States announced its intention to compensate the families of the victims and approached the Government of Iran to work out the details of such compensation, the Government of Iran ignored the United States' offer. Shortly after the general facts of the incident had been confirmed, President Reagan expressed his regret that Iran Air Flight 655 had been shot down and his condolences to the families of the victims. These sentiments were also publicly stated by the Vice President and other U.S. officials.[1]

In addition, on 11 July 1988, the White House announced that the United States would offer compensation to the families of the victims, with details concerning amounts, timing, and

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[1]Statement of President Ronald Reagan, 3 July 1988; White House Statement, 11 July 1988; Address by Assistant Secretary of State Richard S. Williamson to the ICAO Council, 13 July 1988; Statement of Vice President George Bush to the U.N. Security Council, 14 July 1988. These statements are reprinted in Department of State Bulletin, pp. 38-43 (Sep. 1988) (Exhibit 25).

other matters to be worked out. On 13 July 1988, U.S. Assistant Secretary of State Richard S. Williamson announced this offer to the ICAO Council, in the presence of a representative of Iran, stating that "the United States is prepared to provide compensation to the families of the victims, of all nationalities, who died in this accident." Then-Vice President George Bush also confirmed this offer in the presence of a representative of Iran in his speech to the U.N. Security Council on 14 July 1988: "It is a strongly felt sense of common humanity that has led our government to decide that the United States will provide voluntary, ex gratia compensation to the families of those who died in the crash of #655[1]."

To implement its compensation plan, however, the United States needed specific and accurate information about the victims, including their ages and earning capacity, and their families. Due to the lack of diplomatic relations between Iran and the United States, this could not be done through normal

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[1]Statement of Vice President George Bush to the U.N. Security Council, 14 July 1988 (Exhibit 25).

diplomatic channels. Consequently, the United States approached the Government of Switzerland, which acts as the protecting power with respect to U.S. interests in Iran, to have the Swiss Government act on behalf of the United States in this matter[1]. On 23 September 1988, the Swiss Government undertook to approach the Government of Iran to determine whether it would allow the Swiss Government to act as an intermediary for purposes of gathering information and distributing compensation[2]. On 23 January 1989, having received no response, the United States orally requested the Swiss Government to follow up.

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[1]U.S. Cable dated 31 Aug. 1988, from Washington, D.C. to Berne, Switzerland instructing the U.S. Embassy to approach the Swiss Ministry of Foreign Affairs to request that it serve as an intermediary with the Government of Iran; U.S. Cables of 2 and 6 Sep. 1988, from U.S. Embassy, Berne, Switzerland to Washington, D.C. reporting Swiss Government reaction; U.S. Cable dated 23 Sep. 1988, from Washington, D.C. to U.S. Embassy, Berne, Switzerland providing U.S. Embassy additional guidance and noting that the next step would be for the Swiss to determine Iran's disposition to Swiss involvement in this matter (Exhibit 29).

[2]U.S. Cable dated 26 Sep. 1988, from U.S. Embassy, Berne, Switzerland to Washington, D.C., reporting Swiss Government agreement to approach the Government of Iran (Exhibit 29).

On 8 February 1989, the Iranian Department of Foreign Affairs provided the text of a letter to the Swiss Government from the "Iran Insurance Company[1]". The letter asserted that the Iran Insurance Company claimed all of the financial damages arising out of the incident, both for persons and for the aircraft. Further, the letter said that the Company "declares its readiness to introduce its representative in order to determine the amount of the damages and the method for collection." However, no further messages were received from the Iran Insurance Company designating such a representative.

On 30 March 1989, the United States requested the Swiss Government to transmit to the Government of Iran a diplomatic note enclosing a letter to the Iran Insurance Company, asking it to provide specific kinds of information on the victims and

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[1]U.S. Cable dated 8 Feb. 1989, from U.S. Embassy, Berne, Switzerland to Washington, D.C. transmitting letter of the Iran Insurance Company under cover of an Iranian Department of Foreign Affairs transmittal note (Exhibit 29).

their families, and to identify whether it was an entity of the Government of Iran. The Government of Switzerland did so on 16 April 1989[1].

Having still received no response from the Government of Iran or the Iran Insurance Company through the Government of Switzerland, the United States asked the Swiss Government on 13 June 1989, to transmit both a note to the Government of Iran and a letter to the Iran Insurance Company again requesting

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[1] U.S. Cable dated 30 Mar. 1989, from Washington, D.C. to U.S. Embassy, Berne, Switzerland, instructing Embassy to request the Swiss Government to transmit a letter to the Iran Insurance Company; U.S. Cable dated 31 Mar. 1989, from U.S. Embassy, Berne, Switzerland to Washington, D.C., reporting request made to the Swiss; Dip. Note 43, 16 Apr. 1989, from Embassy of Switzerland in Iran to the Iranian Ministry of Foreign Affairs enclosing a letter to the Iran Insurance Company in English and Persian (Exhibit 29).

On 17 May 1989, the Government of Iran filed its Application before the Court. In it, Iran stated in a footnote:

> "under the circumstances and in particular the United States total refusal of all voluntary methods of pacific settlement of the present dispute, the arbitration referred to in Article 14(1) of the Montreal Convention cannot be considered as a viable course of action."

that specific kinds of information be provided on the victims and their families by July 1989. The Government of Switzerland did so on 20 June 1989[1]. No response from Iran was received.

The United States ultimately concluded that Iran was either unwilling or unable to share this information. Because of this, and because of difficulties generally in obtaining this type of information, the United States decided to develop an alternate compensation plan that would provide for essentially uniform payments per victim, rather than based on the victim's actual earnings and life expectancy. Under this plan, the family of each wage-earning victim was offered $250,000, to be divided among the surviving parents, spouse, and children (families of non-wage earning victims were offered $100,000

[1]Copy of U.S. Diplomatic Note of 13 June 1989 to the Government of Switzerland, enclosing the text of a note verbale to the Government of Iran and the text of a letter to the Iran Insurance Company; Copy of a Swiss Diplomatic Note of 26 June 1989 to the United States reporting its transmittal to Iran and the Iran Insurance Company on 20 June 1989 (Exhibit 29).

each)[1]. Although the United States did not and does not now admit any liability in making this offer of compensation, the amounts offered were calculated in light of international legal standards, and were in fact quite generous in comparison to international practice with respect to comparable victims.

This compensation plan was communicated directly to the five governments other than Iran that had nationals on board Iran Air Flight 655. On 11 July 1989, the United States requested the Government of Switzerland to deliver a note to the Government of Iran explaining the new U.S. compensation plan, which was developed on the basis of uniform payments. The Government of Switzerland did so on 12 July 1989[2]. The

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[1]This may be compared with the approximately US $20,000 (250,000 gold francs) ceiling per victim for claims that may be brought against an air carrier under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded 12 Oct. 1929, 137 LNTS 11, (commonly referred to as the "Warsaw Convention"), as amended by the Hague Protocol of 28 Sep. 1955, 478 UNTS 371 (to which Iran is a party).

[2]U.S. Diplomatic Note of 11 July 1989 to the Government of Switzerland requesting transmittal of a note verbale to the Government of Iran; Swiss Diplomatic Note of 12 July 1989 to the Government of Iran (Exhibit 29).

compensation plan was subsequently announced publicly[1]. Since that time, of the seventy-nine identified family members of non-Iranians eligible to receive compensation, thirty-two have accepted and have been paid such compensation, for a total of US $1,838,998. (The others are either in the process of being paid or have elected to pursue suits in U.S. courts.) None of the Iranian family members have received compensation, due to the Government of Iran's decision to pursue these proceedings and to preclude separate recovery by its nationals.

The United States conducted an immediate and thorough investigation to ascertain the circumstances of the incident. Immediately after the incident, the United States convened its own investigation into the circumstances of the downing of Iran Air Flight 655. The investigation was conducted by Rear Admiral William M. Fogarty, U.S. Navy, whose team arrived in

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[1]Department of State Daily Press Briefing, pp. 2-4 (17 July 1989) (Exhibit 30).

To date, the United States has only been able to make payments to the families of non-Iranian victims because Iran has chosen to litigate this matter before this Court and has forbidden its nationals from accepting U.S. payments or otherwise settling their claims outside the context of the suit before this Court.

Bahrain on 5 July 1988, and began formal hearings on 13 July. Statements and testimony of witnesses were taken, the relevant naval vessels were inspected, and information was collected and collated with respect to the professional training of the USS Vincennes crew, the situation in which it was placed on 3 July, and the details of Iran Air Flight 655. The report was published and communicated to ICAO on 28 July 1988[1]. The most salient conclusions of the report were:

> "1. The USS VINCENNES did not purposely shoot down an Iranian commercial airliner. Rather, it engaged an aircraft the Commanding Officer, USS VINCENNES believed to be hostile and a threat to his ship and to the USS MONTGOMERY (FF 1082).
>
> 2. Based on the information used by the CO in making his decision, the short time frame available to him in which to make his decision, and his personal belief that his ship and the USS MONTGOMERY were being threatened, he acted in a prudent manner.
>
> 3. Iran must share the responsibility for the tragedy by hazarding one of their civilian airliners by allowing it to fly a relatively low altitude air route in close proximity to hostilities that had been ongoing for several hours, and where IRGC gunboats were actively engaged in armed conflict with U.S. Naval vessels.

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[1] ICAO Report, Appendix E.

4. The downing of Iran Air 655 was not the result of any negligent or culpable conduct by any U.S. Naval personnel associated with the incident[1]."

This report was given considerable weight by the ICAO investigating team and by the ICAO Council (discussed below); it is appropriate for this Court to do so as well. The report represents an early, contemporaneous review of the events that occurred on 3 July 1988, based on interviews with servicemen on the relevant U.S. vessels. A remarkable aspect of the investigation was the availability of the USS Vincennes' data recordings, which enabled the investigation team to break down the critical time period of the shootdown into a "minutes and seconds sequence" of actions as they occurred on the USS Vincennes[2].

Iran could have conducted its own investigation of the incident and submitted to ICAO and to this Court any results of that investigation, which would have then allowed the Court to weigh both reports. For its own reasons, however, Iran chose not to do so. Had Iran done so, Iran could have explained why

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[1]ICAO Report, Appendix E, p. E-46.

[2]At the time Iran Air Flight 655 was shot down, the Commanding Officer of the USS Vincennes did not know all of the information included in the U.S. investigation report. Rather, the U.S. Investigation Report reflects a thorough attempt by the United States in the aftermath of the incident to determine the details of the incident from various sources.

its gunboats were threatening merchant vessels and engaging in hostile acts with U.S. vessels, why Iran did not issue a red alert to civil aircraft once hostile action occurred between Iranian and U.S. forces, and why neither Bandar Abbas nor Iran Air Flight 655 monitored the civil distress frequency of 121.5 MHz. Instead, Iran chooses to make maximum use for its own purposes of the open and candid U.S. Government reports and testimony, while withholding any comparably open and candid assessments of its own conduct.

The United States took steps to improve international procedures to avoid recurrence of such an incident. The United States has one of the largest civil aircraft fleets in the world and consequently has always been strongly committed to the safety of international civil aviation. Consequently, it has promoted improvements toward this end in the relevant provisions of the Annexes to the Chicago Convention and other documents, as well as international operating practices. In the aftermath of the 3 July 1988 incident, U.S. civilian and military experts met with ICAO to discuss concrete steps that could prevent incidents of this type in the future. As a result of the U.S. military investigation, as well as comparable subsequent findings by the ICAO investigation, the United States undertook various steps to help preclude any

further incidents of this type. The United States also pursued generally the objective of improved military and civilian coordination through meetings in Montreal in August 1988 and again in January 1989 with officials of ICAO, the International Federation of Airline Pilots Associations, and the International Air Transport Association.

Section II. The Government of Iran Did Not Approach the United States Either Directly or Indirectly, but Rather Immediately Sought Political Condemnation of the United States by the United Nations and ICAO.

In the aftermath of the Iran Air Flight 655 incident, the Government of Iran did not approach the United States, whether to seek an explanation, information, apology, or reparation. This was the case even though the United States and Iran have communicated frequently since the breaking of diplomatic relations in 1980 through the good offices of their two protecting powers, the Government of Switzerland and the Government of Algeria, and have directly settled and arbitrated claims between each other on a daily basis before the Iran-U.S.

Claims Tribunal in The Hague[1]. In many cases, these claims have involved monetary amounts, and political implications, far exceeding those involved in the present case. Iran's only response, however, was immediately to raise the incident in two multilateral fora, the United Nations and the ICAO, and to seek political condemnation of the United States.

The day after the incident, Iran sent a letter to the U.N. Secretary-General, stating that it expected the United Nations to condemn the United States' actions and to take immediate steps to compel the United States to remove its naval forces from the Gulf[2]. The U.N. Security Council convened to

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[1]The Iran-U.S. Claims Tribunal is a product of the 1981 Algiers Accords, which led to the release of the U.S. hostages held by the Government of Iran in Tehran. The Iran-U.S. Claims Tribunal is empowered to decide, through binding arbitration, both private and intergovernmental claims arising from the Islamic Revolution in Iran and the resulting disruption in commercial and economic relations between Iran and the United States. The Algiers Accords are reprinted in Vol. 1, Iran-U.S. Claims Tribunal Reports; in Department of State Bulletin, p. 1 (Feb. 1981); and in 20 I.L.M. 230 (1981).

[2]Letter dated 3 July 1988 from the Acting Permanent Representative of the Islamic Republic of Iran to the U.N. Addressed to the Secretary-General, U.N. Doc. S/19979 (Exhibit 26).

discuss the incident on 14 July 1988; after its deliberation, the Security Council on 20 July unanimously adopted a resolution expressing its "deep distress" at the downing of an Iranian civil aircraft[1].

On the very day of the shootdown -- 3 July 1988 -- the Iranian Vice Minister of Roads and Transportation sent two telexes to ICAO Council President Assad Kotaite informing him of the downing of Iran Air Flight 655. In the telexes, Iran requested President Kotaite to "take effective measures in condemning said hostile and criminal acts", and invited President Kotaite and his experts "to have a visit and study of this inhuman act of U.S.A. in Persion Gulf [sic] promptly[2]".

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[1]Res. 616, U.N. Sec. Council (2821st meeting, 20 July 1988), U.N. Doc. S/RES/616 (Exhibit 28). The debate of the Security Council (2818th to 2821st meetings, July 1988) is contained in U.N. Docs. S/PV.2818 to S/PV.2821. Complete copies of these documents have been deposited in the Registry pursuant to Article 50 of the Rules of Court.

It must also be noted that Iranian gunboat attacks against commercial shipping continued even after the incident of 3 July 1988. For instance, on 7 July 1988, an Iranian speedboat attacked the Romanian merchant vessel Plataresti. "Iranian Speedboats Attack Romanian Ship", FBIS, 11 July 1988, p. 14.

[2]Telexes from the Islamic Republic's Vice-Minister of Roads and Transportation dated 3 July 1988, attached to letter dated 4 July 1989 from ICAO Council President to ICAO Council Representatives, ICAO Doc. PRES AK/165 (Exhibit 10).

This was followed on 4 July by a telex by the Iranian Vice Minister of Roads and Transportation requesting that "this grave matter be tabled in the ICAO Council as a matter of urgency with the view that an extraordinary session of ICAO Assembly be urgently convened to conduct a thorough investigation of all aspects of the catastrophe[1]."

None of these telexes referenced any specific provision of the Chicago Convention as the basis for Iran's request, much less purported to be bringing an "application" to the Council under Article 84. Indeed, the 4 July telex requested that the ICAO Assembly be convened. Under Article 48 of the Chicago Convention, an extraordinary meeting of the Assembly may be held upon the call of the ICAO Council, which is established under the Chicago Convention as ICAO's 33-member permanent governing body. President Kotaite notified Iran on 4 July 1988 that he was "consulting the members of the Council concerning the convening of an extraordinary session of the Council"

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[1]Exhibit 10, Telex from the Islamic Republic's Vice-Minister of Roads and Transportation dated 4 July 1988.

(emphasis added)[1]; he then agreed on 5 July 1988 to convene such a session, to begin on 13 July[2].

Section III. The ICAO Council Resolved to Undertake an Investigation of the Incident for the Purpose of Taking Steps to Ensure Safety of Civil Aviation.

On 13 and 14 July, 1988, the ICAO Council met to consider the request from the Government of Iran. Not being a member of the ICAO Council, Iran was invited to participate in the consideration of the incident without a vote, and was represented at the session, in accordance with Article 53 of the Chicago Convention and Rule 32 of the Rules of Procedure of the Council.

Iran's request to the Council had not been framed as a difference or disagreement on the interpretation or application of the Chicago Convention or of the Montreal Convention[3].

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[1]Letter dated 4 July 1989 from ICAO Council President to ICAO Council Representatives, op. cit., Exhibit 10.

[2]Letter dated 5 July 1989 from ICAO Council President to ICAO Council Representatives, ICAO Doc. PRES AK/166 (Exhibit 11).

[3]Letter dated 26 May 1989 from Dr. Michael Milde, ICAO Legal Bureau Director, to the Court (Exhibit 24).

Rather, President Kotaite, in introducing this matter on the ICAO Council agenda, described the purpose of the Council's work as follows:

> "The imperative task for the Council now is to collect all vital information and to reach a complete technical understanding of the chain of events which led to this tragedy. We have to explore every element of our international regulations in the ICAO Standards, Recommended Practices, guidance material and procedures which could prevent the repetition of a similar tragedy, not only in the area where this tragic incident occurred but anywhere else in the world[1]."

With this mandate, the ICAO Council did not treat the matter under consideration as a dispute between two Parties to be resolved under Article 84 of the Chicago Convention. During the course of the ensuing discussions, all the Council members, including the United States, agreed with the President's view that the role of the Council would be to undertake an investigation of the incident and to promote improvements in the Chicago Convention Annexes and other documents as may be necessary. The Observer from Iran never challenged this characterization of the role of the Council. When the debate

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[1]Minutes, ICAO Council (extra. sess., 13 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/1, p. 4 (Exhibit 13).

on 13 July concluded, the President summarized the debate and, without objection from Iran, asked that the Council's deliberations be restricted to the technical aspects surrounding the 3 July 1988 incident, with a view to determining a complete technical understanding of the chain of events which had led to the incident and to developing technical preventative measures to ensure the safety and security of international civil aviation[1]. There is no indication that any of the Council Members or Iran believed that the Council was acting under Article 84 of the Chicago Convention or referred in any way to that Article.

The next day, 14 July, the ICAO Council approved by consensus (including the United States) as its decision a statement by President Kotaite that expressed condolences to Iran and to the families of the victims, deplored the use of weapons against civilian aircraft, and instituted a fact-finding investigation[2]. The debate preceding this

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[1]Exhibit 13, p. 40.

[2]Minutes, ICAO Council (extra. sess., 14 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/2, pp. 9-10 (Exhibit 14).

statement indicates that the investigation was undertaken by the Council pursuant to its authority under Article 55(e) of the Chicago Convention. At no time during the Council's proceedings on 13-14 July 1988 did any participant, including Iran, refer to Article 84 of the Chicago Convention. Nor was any mention made of the ICAO Rules for the Settlement of Differences, the exclusive basis for bringing Article 84 disputes before the Council. Instead, the investigation was ordered under Article 55(e) of the Chicago Convention rather than Article 8 of the Rules for the Settlement of Disputes. This reflects that the Council believed it was carrying out a broad mandate in its role as a technical and policy body and not as a quasi-judicial body[1].

From 29 July through 28 September 1988, an ICAO investigation team (composed of five aviation experts from the ICAO Secretariat of diverse nationalities) travelled to the Middle East, London, and Washington to investigate the incident. The United States cooperated fully in this investigation. The team was given a full briefing at the

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[1] See discussion infra at Part III, Chapter II, section II.

Pentagon in Washington, D.C., and by the Commander of the U.S. Joint Task Force Middle East and his staff in the Gulf area, including a tour of the USS Vincennes. ICAO President Kotaite, ICAO Secretary General Sidhu and other ICAO officials visited the Aegis Combat Systems Engineering Development Center in Moorestown, New Jersey, where they received briefings on the computerized Aegis system that was employed on the USS Vincennes at the time of the incident. The investigation team asked for and received information from the Government of Iran. The team also visited the Iranian Civil Aviation Authority in Tehran, the Tehran area control center, Iran Air headquarters in Tehran, and the Bandar Abbas airport, tower and approach control unit, and Iran Air station[1].

On 7 November 1988, the ICAO report was completed and distributed. The report provided a review of the factual background to the flight as well as an analysis of the facts and certain conclusions. The report generally corroborated the

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[1]Working Paper (11 Nov. 1988), ICAO Doc. C-WP/8708, restricted, para. 2 (Exhibit 9).

conclusions of the U.S. Investigation Report as to the causes of the accident. The ICAO Report found that the causes of the incident were:

> "3.2.1 The aircraft was perceived as a military aircraft with hostile intentions and was destroyed by two surface-to-air missiles.
>
> 3.2.2 The reasons for misidentification of the aircraft are detailed in the findings (paragraphs 3.1.23 and 3.1.24)."

Paragraphs 3.1.23 and 3.1.24 of the ICAO Report are as follows:

> "3.1.23. The initial assessment by USS Vincennes that the radar contact (IR655) may have been hostile, was based on:
>
> a) the fact that the flight had taken off from a joint civil/military aerodrome;
>
> b) the availability of intelligence information on Iranian F-14 deployment to Bandar Abbas and the expectation of hostile activity;
>
> c) the possibility of Iranian use of air support in the surface engagements with United States warships;
>
> d) the association of the radar contact with an unrelated IFF mode 2 response; and
>
> e) the appearance of an unidentified radar contact that could not be related to a scheduled time of departure of a civil flight.
>
> 3.1.24. The continued assessment as a hostile military aircraft by USS Vincennes and the failure to identify it as a civil flight were based on the following:
>
> a) the radar contact had already been identified and labelled as an F-14;

b) the lack of response from the contact to the challenges and warnings on frequencies 121.5 MHz and 243 MHz;

c) no detection of civil weather radar and radio altimeter emissions from the contact;

d) reports by some personnel on USS Vincennes of changes in flight profile (descent and acceleration) which gave the appearance of manoeuvering into an attack profile; and

e) the radar contact was tracked straight towards USS Montgomery and USS Vincennes on a course slightly diverging from the centreline of airway A59."

On 5-7 December 1988, the ICAO Council met in Montreal to consider the ICAO report. Iran was critical of the ICAO report, largely because Iran believed it relied in part on information contained in the U.S. military investigation[1]. Most other Council members, however, commended the ICAO team

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[1]Although Iran criticized the ICAO Report before the ICAO Council, Minutes, ICAO Council (126th sess., 13 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/18 (Exhibit 19), the ICAO report is the product of an objective investigation by independent experts of a highly specialized international organization. Although Iran may not like the fact that much of the ICAO Report confirms the findings of the U.S. investigation report, the fact is that essentially the same information available to the U.S. investigation team was available to the ICAO investigating team, for it to review and determine on its own the probative value of such information. The ICAO investigation team impartially obtained, reviewed, and weighed for accuracy information received both from the Government of Iran and from the United States. The United States respectfully urges the Court to accept the report of the ICAO investigation as an authoritative finding with regard to the incident of 3 July 1988.

for its report. Iran also pressed the Council to condemn the shootdown, but the Council resolved by consensus to defer substantive consideration of the report until the 15-member ICAO Air Navigation Commission (ANC) had an opportunity to consider the report and to recommend any improvements in ICAO standards and recommended practices[1]. As was the case for the Council's meetings in July 1988, at no time during the Council's proceedings on 5-7 December 1988 did any participant, including Iran, refer to Article 84 of the Chicago Convention. Nor was any mention made of the ICAO Rules for the Settlement of Differences, the exclusive basis for bringing Article 84 disputes before the Council.

During January and February of 1989, the ANC reviewed the ICAO report and found that no significant improvements were needed in the ICAO standards and recommended practices.

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[1] See Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/14 (Exhibit 17). The Air Navigation Commission (ANC) is a technical body established under the Chicago Convention composed of aviation experts appointed by the ICAO Council from persons nominated by Contracting States. Chicago Convention, Article 56. Article 56 provides that "[t]hese persons shall have suitable qualifications and experience in the science and practice of aeronautics."

Essentially, the ANC concluded that existing ICAO procedures, if properly implemented, were adequate to preserve the safety of civil aviation[1].

Consequently, during 13-17 March 1989, the ICAO Council met again in Montreal to undertake substantive consideration of the ICAO report and the recommendations of the ANC[2]. Iran once again asked that the shootdown be condemned by the Council. In response to a motion by the Soviet Union and Czechoslovakia, the ICAO Council voted on whether the resolution should contain

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[1]Minutes, ICAO Air Navigation Commission (2 Feb. 1989), ICAO Doc. AN. Min. 120-6; Minutes, ICAO Air Navigation Commission (7 Feb. 1989), ICAO Doc. AN. Min. 120-7; Minutes, ICAO Air Navigation Commission (9 Feb. 1989), ICAO Doc. AN. Min. 120-8 (Exhibit 23). The ANC also concluded that Annex 11, para. 2.15.1.1, of the Chicago Convention (Exhibit 4) should be upgraded to a standard and its text clarified. That paragraph recommends that initial coordination of activities potentially hazardous to civil aircraft should be effected through the ATS authority of the State where the organization planning potentially hazardous activities is located, in the event that that authority is not the appropriate ATS authority for the geographic areas concerned.

[2]Minutes, ICAO Council (13 Mar. 1989), op. cit., Exhibit 19; Minutes, ICAO Council (126th sess., 15 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/19 (Exhibit 20); Minutes, ICAO Council (126th sess., 17 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/20 (Exhibit 21).

language condemning the United States. By a vote of six in favor, 19 against, and six abstentions, the motion was defeated99/. All 31 Council members present at the meeting, including the United States, voted on that motion. No objection was raised to the United States' participation in the vote.

On 17 March 1989, after debate in which oral amendments were made to develop an acceptable text, the ICAO Council adopted by consensus the resolution of which Iran complains. The United States voted in favor of this resolution; again no objection was raised regarding the United States' participation in the vote. In the Resolution, the ICAO Council said inter alia that it:

> "Deeply deplores the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives;
>
> Expresses again its profound sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families;
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> Appeals again urgently to all Contracting States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 bis into the Convention on International Civil Aviation;

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[1]Exhibit 21, p. 10.

> Notes the report of the fact-finding investigation instituted by the Secretary General and endorses the conclusions of the Air Navigation Commission on the safety recommendations contained therein;
>
> Urges States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and the proper identification of civil aircraft[1]."

The resolution did not refer to Article 84 of the Chicago Convention, nor did it purport to decide a disagreement between two parties to the Chicago Convention. Once again, at no time during the Council's proceedings on 13-17 March 1989 did any participant, including Iran, refer to Article 84 of the Chicago Convention. Nor was any mention made of the ICAO Rules for the Settlement of Differences, the exclusive basis for bringing Article 84 disputes before the Convention.

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[1]Exhibit 21, p. 11.

CHAPTER IV

IRAN, UNSATISFIED WITH THE RESPONSE OF ICAO AND THE UNITED NATIONS TO THE INCIDENT, FILED SUIT BEFORE THIS COURT ON 17 MAY 1989.

On 17 May 1989, Iran filed its Application with this Court, purportedly seeking jurisdiction based on: (1) an appeal of the 17 March 1989 ICAO Council resolution under Article 84 of the Chicago Convention; and (2) Article 14(1) of the Montreal Convention. Pursuant to the Court's order of 12 June 1990, Iran filed its Memorial on 24 July 1990, which pled an additional basis of jurisdiction under the U.S.-Iran Treaty of Amity. For the reasons stated in the following Parts, the claim advanced by Iran is not sustainable under any of these bases.

PART II

THE COURT HAS AUTHORITY IN THESE PRELIMINARY PROCEEDINGS TO UPHOLD THE OBJECTIONS OF THE UNITED STATES TO THE COURT'S JURISDICTION

Iran is invoking three titles of jurisdiction. They are Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention, and Article XXI(2) of the 1955 Treaty of Amity between Iran and the United States[1]. Each of these provisions confers on the Court jurisdiction to decide disputes relating to the interpretation and application of the subject convention once certain conditions are satisfied. It is the contention of the United States that in no case are the applicable conditions satisfied, and that the Court has no jurisdiction under any of those conventions. The United States accordingly is requesting that the Court address the issue of jurisdiction first, in accordance with Article 79 of the Rules of Court.

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[1]Iranian Memorial, para. 2.01. The United States notes at the outset that, as Applicant, it is Iran's duty to establish that the Court has jurisdiction and that Iran's Application is otherwise admissible. S. Rosenne, The Law and Practice of the International Court p. 580 (2d ed. 1985) ("Generally, in application of the principle actori incumbit probatio the Court will formally require the party putting forward a claim to establish the elements of fact and of law on which the decision in its favor might be given.") (Exhibit 62). The United States will demonstrate in this submission that Iran cannot meet that burden.

Some of these objections deal with purely procedural prerequisites to suit. Others go only to the question of whether there is a reasonable connection between the convention relied upon by Iran to establish jurisdiction and the claims submitted to the Court. In our view, all of these objections are sustainable on the basis of the facts alleged or admitted by Iran, and on the basis of any reasonable interpretation of the three conventions. Moreover, the Court is authorized to address these objections during this preliminary phase even if they raise issues that touch upon the merits of the case. Paragraph 6 of Article 79 of the Rules of Court authorizes the Court to address all legal and factual questions that bear on the issue of a preliminary objection, even to the extent of adducing evidence on such questions, in order to dispose of that objection. The history of that provision demonstrates that its essential purpose was to facilitate and encourage the Court to dispose of cases at the preliminary objection stage even where to do so may touch upon the merits of the proceeding.

In the early 1970s, in connection with the consideration of proposals to enhance the effectiveness of the Court, representatives in the Sixth Committee of the General Assembly criticized the previous practice of the Court in joining preliminary objections with the merits. The debates in the

Sixth Committee were summarized in 1970 in the analytical report of the Committee to the General Assembly as follows:

> "In particular, the view was expressed that it would be useful for the Court to decide expeditiously on all questions relating to jurisdiction and other preliminary issues which might be raised by the parties. The practice of reserving decisions on such questions pending consideration of the merits of the case had many drawbacks and had been sharply criticized in connexion with the South West Africa cases and the Barcelona Traction case[1]."

This was repeated the next year and was summarized as follows in the 1971 report of the Committee:

> "Mention was also made of a suggestion that the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential[2]."

In 1972, the Rules of Court were revised to encourage rulings on preliminary objections prior to the merits phase. Previously, the Rules expressly authorized the Court to join the objection to the merits. Paragraph 5 of Article 62 of the 1946 Rules had provided:

> After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits.

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[1]Report of the Sixth Committee, UNGA (25th sess., Dec. 1970), U.N. Doc. A/8238, p. 19 (Exhibit 63).

[2]Report of the Sixth Committee, UNGA (26th sess., Dec. 1970), U.N. Doc. A/8568, p. 21 (Exhibit 63).

In 1972, the Rules relating to preliminary objections were revised to eliminate this express authorization and provide instead a rule intended to encourage the disposition of such objections prior to the consideration of the merits, even if this required addressing questions of law or fact that may touch upon the merits. Paragraph 7 of Article 67 of the 1972 Rules, which corresponds to paragraph 7 of Article 79 of the current Rules, provides:

> "After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time limits for further proceedings."

Moreover, the Court added a new provision in Article 6 that provides:

> "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

These revisions have been recognized as introducing one of the most important amendments to the Rules[1].

Prior to these revisions, the Court had felt compelled to join the issue of jurisdiction with the merits where determination of a preliminary objection required consideration of questions of fact or law that may bear a close relationship to some of the issues on the merits of the case. As recognized by one of the principal architects of the revisions, paragraph 6 is intended to provide a different solution to such difficulties:

> "In the presence of such an objection, the Court, instead of bringing in the whole of the merits by means of a joinder, would, according to paragraph 6, request the parties to argue at the preliminary stage those questions, even those touching upon the merits, which bear on the jurisdictional issue. Thus, there would no longer be justification for leaving in suspense or for postponing a decision of the Court's own jurisdiction[2]."

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[1]E. Jimenez de Arechaga, "The Amendments to the Rules of Procedure of the International Court of Justice," 67 A.J.I.L., p. 1, at p. 11 (1973) (Exhibit 64); G. Guyomar, Commentaire du Reglement de la Cour Internationale de Justice - Interpretation et Pratique, p. 371 (1972) (Exhibit 65).

[2]E. Jimenez de Arechaga, op. cit., Exhibit 64, p. 13.

Similarly, Professor Guyomar concluded:

> L'alinéa 6 reconnait à la Cour le droit d'inviter les Parties à débattre tout point de fait ou de droit, et à produire tout moyen de preuve ayant trait à la question de la compétence de la Cour, ceci afin de permettre à cette dernière de se prononcer sur ce point au stage préliminaire de la procédure. L'accent semble donc mis sur la nécessité de statuer sur la compétence avant d'entamer l'examen de l'affaire au fond : c'est là un élément nouveau et vraisemblablement très important[1]."

The United States' objections to Iran's assertion of jurisdiction under the Chicago Convention, the Montreal Convention, and the 1955 Treaty of Amity are the kind of objections which can and should be disposed of under paragraph 6 of Article 79 of the Rules. All of these objections, including in particular the objections that go to the question of whether there is a reasonable connection between these conventions and Iran's claims, address the fundamental issue of the consent of the United States to the institution of these proceedings.

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[1] G. Guyomar, op. cit., Exhibit 65, p. 371. As translated into English, Professor Guyomar concluded: "Paragraph 6 acknowledges the Court's right to invite the Parties to debate any point of fact or law, and to produce any evidence relating to the issue of the Court's jurisdiction in order to allow the Court to rule on this point in the preliminary stage of the procedure. In this way, the emphasis appears to be placed on the need to rule on the matter of jurisdiction prior to undertaking an examination of the case on its merits. This is a new and seemingly very important element." (Emphasis added.)

In accordance with Article 36(1) of the Statute, the jurisdiction of the Court under each of the three conventions must rest on the consent of the States concerned[1]. As the Court said in the Peace Treaties case, "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases[2]."

A state cannot, however, be presumed to have consented to jurisdiction simply on the basis of a mere assertion by another state that a particular dispute arises under one of those conventions. As the Court expressly concluded in Ambatielos, "It is not enough for the claimant government to establish a remote connection between the facts of the claim" and the

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[1] See Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952, p. 93, at p. 103; Ambatielos, Preliminary Objections, Judgment, I.C.J. Reports 1952, p. 28, at p. 38; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 71.

[2] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 71.

treaty upon which jurisdiction was founded[1]. The claimant

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[1] Ambatielos, Merits, Judgment, I.C.J. Reports 1953, p. 10, at p. 18. In that case, the question was whether the Court had jurisdiction under a 1926 Treaty of Commerce and Navigation between the United Kingdom and Greece to decide whether the United Kingdom was under an obligation to submit to arbitration a dispute between the two governments as to the validity of the Ambatelios claim in so far as the claim was based on an 1886 Treaty of Commerce and Navigation between the parties. The Court rejected the contention by the United Kingdom that before the Court could decide upon arbitration it was necessary for the Court to determine whether the claim was actually or genuinely based upon the 1886 Treaty, holding that to do so would be to substitute the Court impermissibly for the special commission of arbitration established under the 1886 Treaty. Ibid., pp. 16-17. In the unique circumstances of that case, the Court concluded that it must determine whether the arguments were "sufficiently plausible" to establish a connection between the claim and the 1886 Treaty. Ibid., p. 18. Before concluding that it had the jurisdiction to refer the dispute to the special commission, the Court analyzed the particular claim to determine if it came within the scope of the 1886 treaty. Ibid., pp. 16, 18. For the purposes of that case, the Court concluded that its function was limited to determining simply whether the arguments were of a sufficiently plausible character to warrant a conclusion that the claim at issue was based on the treaty. Ibid., p. 18. A few years later, in a case involving a contract dispute between UNESCO and four former employees, the Court was asked to address a similar question of interpretation regarding the relationship of the contract claims to the provisions of the Statute of the Administrative Tribunal of the International Labour Organization. In that case, the Court concluded that "it is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked" and characterized the issue as "whether the terms and the provisions invoked appear to have a substantial and not merely an artificial connexion with the refusal to renew the contracts." Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 77, at p. 89.

government must establish a reasonable connection between the treaty and the claims submitted to the Court[1].

For the purposes of disposing of the United States' objections, the Court may rely on a reasonable interpretation of the three conventions and upon the facts as alleged or admitted by Iran[2]. In accordance with paragraph 6 of Article

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392, at p. 427. In that case, the United States objected that a treaty of Friendship, Commerce and Navigation relied upon by Nicaragua to establish jurisdiction in those proceedings was irrelevant to the subject matter of Nicaragua's claims before the Court and, therefore, provided no basis for such jurisdiction. While the Court concluded that the treaty provided a basis for jurisdiction, it did so on the basis of an analysis of Nicaragua's claims in light of the circumstances in which Nicaragua brought its Application to the Court and the facts asserted by Nicaragua. A similar analysis of Iran's claims in light of the circumstances in which Iran brought its Application to the Court and the facts asserted by Iran demonstrate that the Chicago Convention, the Montreal Convention, and the Treaty of Amity do not provide jurisdiction in these proceedings.

[2] To the extent that a factual issue relating to the downing of Iran Air Flight 655 arises incidentally to the disposition of these objections, that issue can be resolved on the basis of the extensive public record of the proceedings of the ICAO on this matter. There is no need for a further examination of the facts of this incident.

79, the Court may and, in the view of the United States, should uphold each of the objections of the United States without proceeding to the merits of this case.

In its Memorial, Iran asserts that the United States has violated international law in a number of respects unrelated to the three conventions upon which it relies to establish the Court's jurisdiction and requests the Court to make findings based upon those violations, without even a pretense of establishing the jurisdiction of the Court to entertain such claims. Iran has not asserted that the jurisdiction of this Court arises under Article 36(2) of the Statute of the Court, nor pursuant to the compromissory clauses of any convention other than the three discussed above. In its Memorial, however, Iran makes various assertions that the United States has violated the United Nations Charter, principles of the Hague Conventions of 1907, and rules of customary international law regarding the use of force, neutrality, sovereignty, non-intervention, and the law of the sea[1]. In the submissions

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[1]Iranian Memorial, pp. 2-3.

contained in its Memorial, Iran asks the Court to find that by shooting down Iran Air Flight 655 the United States has violated "fundamental principles of international law", and that by stationing and operating warships and aircraft within Iranian territorial sea and internal waters the United States has violated "general and customary international law[1]". The United States denies that its actions have violated any of these conventions, principles, or rules of customary international law. In any event, this Court does not have jurisdiction to determine whether the United States has violated the United Nations Charter, the Hague Conventions, or the rules of customary international law, and must accordingly disregard these allegations.

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[1] Iranian Memorial, Fourth and Ninth Submissions.

Iran also states, and requests this Court to find, that the action of the United States on 3 July 1988, is an "international crime[1]". The United States strongly protests the assertion of this baseless claim. This Court was not established as a criminal court and States have never consented to its operation as such. Since the Court is without jurisdiction to make such a finding, those parts of the Iranian case based on "criminal" allegations must be immediately dismissed.

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[1] Iranian Memorial, para. 1.03; Sixth and Eleventh Submissions.

PART III

THE COURT DOES NOT HAVE JURISDICTION UNDER ARTICLE 84 OF THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION

In its Application and its Memorial, Iran asserts that the Court has jurisdiction on the basis of Article 84 of the Chicago Convention[1], in the guise of an appeal from a 17 March 1989 decision of the ICAO Council. These assertions are completely without foundation in fact and in law. The clear and unambiguous record of the deliberations in the ICAO Council -- including Iran's own statements before the Council -- establishes beyond question that the Council was never seised of a disagreement between Iran and the United States pursuant to Article 84 of the Convention. Instead, all of the Council's actions were taken pursuant to Articles 54 and 55 of the Convention, provisions under which most of the Council's business is conducted. In all such cases, decisions of the Council are final and not subject to appeal to this Court.

Iran has utterly ignored the Council's broad mandate under articles of the Chicago Convention other than Article 84 to examine matters that may involve the application or interpretation of the Convention. Indeed, Iran's pleadings would leave the impression that any ICAO Council decision that

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[1]The Chicago Convention appears at Exhibit 1.

bears on the application or interpretation of the Chicago Convention is, perforce, a decision under Article 84. On the contrary, such issues are rarely dealt with under the quasi-judicial procedures of Article 84, and when the Council has resorted to Article 84 it has always made clear that it was doing so.

ICAO many years ago adopted comprehensive, exclusive, and mandatory rules and procedures for the handling of Article 84 disputes. The record of the relevant Council deliberations establishes beyond doubt that Iran never invoked Article 84 or those exclusive procedures. The Council's deliberations did not address a disagreement relating to the interpretation or application of the Chicago Convention between Iran and the United States. Instead, the Council carried out its essential responsibility to take measures to ensure the safety of civil aviation. It follows that the proceedings of the Council do not -- and were never intended to -- form a basis for any review by this Court within the scope of Article 84.

Having attempted to rewrite history to recharacterize the Council's deliberations as Article 84 proceedings, Iran asks this Court to overturn and disregard those long-established rules developed by ICAO and the Contracting States to the Chicago Convention that enable the Council to perform its

quasi-judicial functions under Article 84. Such a ruling would threaten the institutional integrity and proper functioning of ICAO by making subject to appeal a broad range of Council decisions taken under articles other than Article 84. The United States submits that the respect due a coordinate body of the United Nations obliges the Court to reject Iran's assertion.

Moreover, by asking the Court to hear an appeal where no Article 84 proceeding ever occurred before the Council, Iran asks for this Court to act as a court of first instance, rather than as a court of appeals. As Article 84 permits this Court to act only as a court of appeals, Iran's argument must be rejected[1].

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[1]For purposes of clarity, the United States in this part focuses its argument on the fact that the 17 March 1989 ICAO Council resolution about which Iran complains was not a decision of the ICAO Council pursuant to Article 84 of the Chicago Convention. As Iran has failed to satisfy this basic requirement, the United States does not in this pleading raise other arguments which might be regarded as fundamental in character. For example, the Chicago Convention, including Article 84 thereof, does not regulate in any way the conduct of surface vessels engaged in active combat. Exhibit 1, Arts. 89 and 3. The United States reserves the right to adduce these arguments, if necessary, at a subsequent point in these proceedings.

CHAPTER I

THE CHICAGO CONVENTION AND THE ICAO RULES CLEARLY DISTINGUISH BETWEEN THE ICAO COUNCIL'S QUASI-JUDICIAL FUNCTIONS UNDER ARTICLE 84 (FOR WHICH THERE IS A POSSIBILITY OF APPEAL TO THE COURT) AND ITS FUNCTIONS UNDER OTHER ARTICLES REGARDING THE IMPLEMENTATION OF THE CONVENTION (FOR WHICH NO REVIEW BY THE COURT IS PROVIDED).

In examining Iran's treatment of the Chicago Convention issues, the United States is struck by the omission from the Iranian Application and Memorial of basic and fundamental information concerning the operation of ICAO. Although Iran's Memorial often cites legal commentaries on dispute resolution in ICAO, it fails to mention the fundamental observation in these commentaries that the Convention envisages two distinct and mutually exclusive methods under which the ICAO Council may examine matters involving the Convention.

On the one hand, the ICAO Council is a principal policy organ of the Organization and is called upon to deal with a broad range of aviation matters. These will necessarily include, from time to time, matters that raise issues concerning the application or interpretation of the Chicago Convention. On the other hand, on truly rare occasions, the Council is called upon, under Article 84, to act as a quasi-judicial dispute-settlement organ. Article 84 states:

> "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by

> the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

As described in greater detail below, to enable it to carry out this function, ICAO many years ago developed particular Rules for the Settlement of Differences[1]. Those rules are detailed, comprehensive, exclusive, and mandatory in all instances in which the Council acts under Article 84 of the Convention.

Absent from Iran's lengthy Memorial is any mention of the distinction between the Council's quasi-judicial functions under Article 84 and its functions under other articles. Even more conspicuous is the absence of any reference to the Council's Rules for the Settlement of Differences. By ignoring these fundamental facts, Iran would attempt to mislead this Court into believing that the Council was acting under Article 84 in its consideration of the 3 July 1988 incident and, thus, into a manifestly erroneous application of the Court's jurisdiction under Article 84.

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[1]Rules for the Settlement of Differences, ICAO Doc. 7782/2 (1975) (hereinafter the "Rules"). The official ICAO versions of the Rules, in the English, French, Spanish, and Russian languages, appear at Exhibit 6.

Section I. The ICAO Council, Acting Under Articles of the Chicago Convention Other Than Article 84, Has the Power and Obligation to Deal with a Broad Range of Potentially Contentious Aviation Matters Involving the Application of the Convention, Without Possibility of Review by the Court.

In addition to being a multilateral agreement that prescribes general rules for international civil aviation, the Chicago Convention created[1] and established the charter of the International Civil Aviation Organization (ICAO). The Convention established two principal policy organs of ICAO, the Assembly and the Council. The Assembly, which is composed of representatives of all Contracting States, "shall meet not less than once in three years and shall be convened by the Council at a suitable time and place[2]." As provided in Article 50(a), the Council is a permanent body which is "responsible to the Assembly" and is composed of thirty-three Contracting States elected by the Assembly.

As provided in Articles 54 and 55, the scope of the Council's functions is broad. Article 54 prescribes 14 mandatory functions of the Council. Among other things, the Council is obliged to report to Contracting States any infraction of the Convention or failure of a Contracting State

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[1]Exhibit 1, Art. 43.

[2]Exhibit 1, Art. 48.

to carry out Council recommendations or determinations[1]; to report to the Assembly any infraction of the Convention in which a Contracting State has failed to take appropriate action[2]; to adopt international standards and recommended practices dealing with air navigation and other matters[3]; to consider recommendations of the Air Navigation Commission for amendment of standards and recommended practices[4]; and, most relevant in light of its discussions in the Iran Air matter, to "[c]onsider any matter relating to the Convention which any Contracting State refers to it[5]."

Permissive functions of the Council are set forth in Article 55 and are also broad. They include the right to "[c]onduct research into all aspects of air transport and air navigation" of international importance[6] and to

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[1]Exhibit 1, Art. 54(j).

[2]Exhibit 1, Art. 54(k).

[3]Exhibit 1, Art. 54(l).

[4]Exhibit 1, Art. 54(m).

[5]Exhibit 1, Art. 54(n).

[6]Exhibit 1, Art. 55(c).

"[i]nvestigate, at the request of any Contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation[1]." In light of the authorities granted to it under the Chicago Convention, the ICAO Council enjoys a broad mandate to deal with a wide range of issues involving international civil aviation. Because of the breadth and overlapping nature of the functions set forth in Articles 54 and 55, Council actions typically engage several of its enumerated powers under those Articles. It is manifest that in carrying out its multitude of functions under Articles 54 and 55, the Council will be called upon to consider many kinds of contentious issues. Those issues will frequently involve questions concerning, among other things, the interpretation or application of the Chicago Convention.

The practice of the Organization, moreover, indicates that Council discussions concerning the application or interpretation of the Convention are undertaken routinely outside the framework of Article 84. In its 132 sessions since its creation, the ICAO Council has convened over a thousand

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[1]Exhibit 1, Art. 55(e)

meetings and rendered many thousands of decisions of various kinds. In contrast, over that period the Council has been called upon only three times to exercise its Article 84 powers[1]. Not surprisingly, absent a specific invocation of Article 84 procedures by a Contracting State, the Council would have no basis to believe that it was deciding a dispute under Article 84.

In operation, Articles 54 and 55 of the Chicago Convention give the ICAO Council wide latitude to address issues relating to the interpretation or application of the Convention. In one well-known instance in 1956, the Government of Czechoslovakia charged before the Council that the United States had launched leaflet-carrying balloons into Czechoslovakian airspace[2]. In

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[1]M. Milde, "Dispute Settlement in the Framework of the International Civil Aviation Organization", Settlement of Space Law Disputes, p. 87, at p. 90 (1980) (Exhibit 66); N.M. Matte, Treatise on Air-Aeronautical Law, pp. 205-207 (1981) (Exhibit 67); R. Gariepy and D. Botsford, "The Effectiveness of the International Civil Aviation Organization's Adjudicatory Machinery", 42 Journal of Air Law and Commerce, p. 351, at p. 357 (1976) (Exhibit 68); ICAO, Repertory - Guide to the Convention on International Civil Aviation, ICAO Doc. 8900/2, Art. 84, pp. 1-4 (2nd ed. 1977) (Exhibit 69); see T. Buergenthal, Law-Making in the International Civil Aviation Organization, p. 123 (1969) (Exhibit 70).

[2]For a more detailed discussion of the ICAO Council discussions of the weather balloon matter, see T. Buergenthal, op. cit., Exhibit 70, pp. 131-36.

its charges against the United States in the ICAO Council, Czechoslovakia claimed violations of Articles 1 and 8 of the Chicago Convention and asked the Council under Article 54(j) and 55(e) to take effective steps against the release of the balloons[1]. Although the issue brought by Czechoslovakia entailed both the interpretation and application of the Convention, it was not an Article 84 disagreement[2].

More recent examples of matters that involved the application of the Chicago Convention and that were not handled under Article 84 include requests for ICAO Council action involving Israel's 1973 downing of a Libyan airliner over the Sinai and the Soviet Union's 1983 downing of Korean Air Lines

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[1]T. Buergenthal, op. cit., Exhibit 70, p. 133.

[2]Professor Thomas Buergenthal has noted that "the ICAO Council did not regard the Czech complaint against the U.S. as an application for adjudication under Article 84 of the Convention because Czechoslovakia had not invoked that provision. . . ." T. Buergenthal, op. cit., Exhibit 70, p. 135.

Flight 007[1]. In both instances, the Council addressed shootdowns of civil aircraft under its Article 54 and 55 authority[2]. In both, the Council addressed allegations that the state in question had violated provisions of the Chicago Convention. In neither instance did the Council consider and

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[1]ICAO's summary of the ICAO Council's handling of the Libyan airliner shootdown appears in Action of the ICAO Council, ICAO Doc. 9079 (78th sess., Jan. - Mar. 1973), pp. 11-13 (Exhibit 44); Action of the ICAO Council (79th sess., May - June 1973), ICAO Doc. 9097, pp. 30-34 (Exhibit 46). ICAO's summary of the ICAO Council's handling of the Korean Air Lines shootdown appears in Action of the Council (110th and extra. sess., Sep., Oct. - Dec. 1983), ICAO Doc. 9428, pp. 20-28 (Exhibit 57); and Action of the Council (111th sess., Feb. - Mar. 1984), ICAO Doc. 9442, pp. 9-11 (Exhibit 59).

[2]As reflected in the ICAO Record of its Action in its 78th Session, the ICAO Investigation of the Libyan airliner was ordered by the Council pursuant to Article 54(b). Exhibit 44, p. 12. Similarly, as reflected in the Council minutes, Council consideration of the Soviet shootdown of the Korean airliner began at an extraordinary session on 15 and 16 September 1983, which, pursuant to Article 55(e), requested that the Secretary General prepare a fact-finding report. Minutes, ICAO Council (111th sess., Feb.- Mar. 1984), ICAO Doc. 9441, pp. 85, 90, and 102 (Exhibit 58). Subsequent ICAO Council action on the Korean airliner incident, including the Council's 5 March 1984 resolution that, inter alia, condemned the Soviet Union, was taken under the Council's mandate to consider that report. Exhibit 59, pp. 9-11.

decide those matters under Article 84[1]. In neither instance did any of the parties involved attempt to appeal the Council's decision to the Court or suggest that there was any option to do so.

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[1]In the Council deliberations of 4 June 1973, the Israeli observer

> ". . . questioned the right of Egypt and Lebanon, under Article 53 of the Convention, to vote on the resolution. When the Director of the Legal Bureau expressed the opinion that this Article was linked with Article 84 and that sponsorship of the resolution did not make Egypt and Lebanon parties to a 'dispute', he (the Representative of Israel) rejoined that the difference of opinion between these two States and Israel on the interpretation of the report now before the Council was a dispute within the meaning of Article 53. He did not press the point after the President indicated that the term "dispute" within Article 53 had always been interpreted as a dispute within the meaning of Article 84. . . ."

Minutes, ICAO Council (79th sess., May - June 1973, closed), ICAO Doc 9073, p. 27 (Exhibit 47). In rejecting the Israeli suggestion, the President of the Council alluded to the strict distinction in the Chicago Convention between Council deliberations under Article 84 and Articles 54 and 55. The President specifically noted that "if every difference of opinion between States on matters coming within the orbit of the Convention was considered a 'dispute', the Council would have no time for other business." Id., p. 56. As noted above, the Israeli observer did not press the point precisely because all participants recognized that the Council discussion was not being conducted pursuant to Article 84.

The Chicago Convention provides that only disputes that satisfy the requirements of Article 84 may be subject to appeal to the International Court of Justice. The Convention does not permit decisions taken pursuant to Articles 54 and 55 to be appealed to the Court, and the Court has no jurisdiction under Article 84 to consider such "appeals".

Section II. In Carrying out Its Article 84 Functions, ICAO Has Developed Detailed Rules for the Settlement of Differences, Which Are the Exclusive Basis for Bringing Article 84 Disputes Before the Council.

In addition to carrying out the policy functions described in Articles 54 and 55 of the Convention, the Council, under Article 84, may be called upon to act as a quasi-judicial body in the formal resolution of disputes between Contracting States involving the interpretation or application of the Convention which are referred to it under that Article. In carrying out its functions under Article 84, the ICAO Council is called upon to function very differently than when it conducts policy deliberations under Articles 54 and 55. As explained by Professor Bin Cheng:

> "In such an event [when the Council resolves disputes under Article 84], 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[1]."

Confronted with this obligation under Article 84 to function as "an international judicial organ [acting] in accordance with rules of international law governing judicial proceedings", the Council realized many years ago that its ordinary procedures were inadequate and that special procedures -- to be employed only under that Article -- were needed. Thus, in 1952, when India brought a formal complaint in the Council against Pakistan for alleged violations of the Chicago Convention, the Council, acting under its Article 54(c) authority to "[d]etermine its organization and rules of procedure[2]", adopted provisional rules of procedure governing the discharge of its functions under Article 84 and established

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[1]Bin Cheng, The Law of International Air Transport, pp. 100-101 (1962) (citations omitted) (Exhibit 71).

[2]In Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, at p. 74, Judge Lachs noted that "Within the powers thus vested in it [under Article 54(c) of the Convention] the Council approved, on 9 April 1957, the 'Rules for the Settlement of Differences'. . . ."

a working group to review and improve those rules[1]. The Council provisionally adopted the rules in 1953. After receiving comments from Contracting States to the Chicago Convention, the Council promulgated final Rules for the Settlement of Differences (hereinafter referred to as the "Rules") on 9 April 1957[2].

The Rules are the exclusive basis for bringing Article 84 disputes. Paragraph 1 of Article 1 of the Rules states in pertinent part:

> "The Rules of Parts I and III [of these Rules] shall govern the settlement of the following disagreements between Contracting States which may be referred to the Council:
>
> (a) Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International

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[1] T. Buergenthal, op. cit., Exhibit 70, p. 180. An excellent description of the Rules appears in R.H. Mankiewicz, "Pouvoir Judiciare du Conseil et Reglement pour la Solution des Differends", 3 Annuaire Francais de Droit International, pp. 383-404 (1957) (Exhibit 72, with English translation).

[2] T. Buergenthal, op. cit., Exhibit 70, p. 183. Since November 1975, when the Rules were amended in minor respects, the Rules have remained unchanged.

> Civil Aviation . . . and its Annexes (Articles 84 to 88 of the Convention) . . . ."

(Emphasis added.) Thus, the Rules make clear at their outset that any disagreement which is to be decided under Article 84 of the Convention must be submitted to the Council and decided in accordance with the Rules. Other articles of the Rules also emphasize the mandatory nature of the Rules. Thus, under Article 2, any State submitting a disagreement to the Council under Article 84 "shall" file an application. In this way, the Rules put States on notice of what types of submissions will constitute an "application" under Article 84.

In carrying out the requirements of the Rules, parties and the ICAO Council create a clear documentary record which establishes whether a disagreement relating to the interpretation or application of the Convention has in fact been decided by the Council. The Rules place a heavy emphasis on written proceedings[1]. For example, Article 2 of the Rules provides:

> "Any Contracting State submitting a disagreement to the Council for settlement (hereinafter referred to as "the applicant") shall file an application to which shall be attached a memorial containing:

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[1]See T. Buergenthal, op. cit., Exhibit 70, p. 189.

(a) The name of the applicant and the name of any Contracting State with which the disagreement exists (the latter hereinafter referred to as "the respondent");

(b) The name of an agent authorized to act for the applicant in the proceedings, together with his address, at the seat of the Organization, to which all communications relating to the case, including notice of the date of any meeting, should be sent;

(c) A statement of relevant facts;

(d) Supporting data related to the facts;

(e) A statement of law;

(f) The relief desired by action of Council on the specific points submitted;

(g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful."

Articles 5 and 6 set forth rules for a respondent State's submission of a counter-memorial and preliminary objections. In each instance, such responses must be in writing.

Other provisions reinforce the Rules' emphasis on the development of a written record. Thus, under Article 9, parties that wish to produce information in addition to that contained in their written pleadings (including testimony of witnesses and experts) are required to submit that evidence in writing, absent a Council order to the contrary. Similarly, Article 12(2) provides that final arguments, absent a Council order to the contrary, must be presented in writing, and Article 15(2) states that "[t]he decision of the Council shall be in writing".

The Rules impose clear and distinctive procedural requirements on the Council. Just as the Rules instruct parties how they may bring and defend a proceeding before the ICAO Council under Article 84, the Rules establish requirements of comparable formality on the Council and other ICAO organs. Thus, upon receipt of an application instituting proceedings in the Council under Article 84 of the Convention, Article 3 requires the ICAO Secretary General to verify compliance with Article 2 of the Rules by the applicant State; to notify all parties to the Convention and all members of the Council that an application has been received; and to forward the application and its supporting documentation to the respondent State, inviting the respondent State to submit a counter-memorial within a time limit fixed by the Council.

Chapter IV (Articles 7 through 20) of the Rules establishes extensive additional procedural requirements that govern Article 84 proceedings. These include matters such as the filing of additional pleadings (Article 7); the production of evidence (Article 9); and questions during oral argument (Article 11). Similarly, Article 15 establishes detailed requirements for Council decisions.

Section III. The ICAO Rules Provide Essential Protections to Contracting States and to ICAO as an Organization.

It is not by accident that the Rules are formulated as they are. Indeed, as noted above, the Rules represent many years of careful work and review by jurists, the ICAO Council, and the Contracting States. The Rules serve three important functions which protect both the parties to an Article 84 proceeding and the institutional integrity of the ICAO Council.

First, the Rules ensure that the parties to a dispute will enjoy essential and fair notice of the proceeding, an opportunity to present legal arguments and factual evidence, and a reasoned and written decision by the ICAO Council.

Second, the Rules ensure the creation of a proper quasi-judicial record, which would enable the Court or a reviewing arbitral tribunal to evaluate the decision made by the Council without necessarily being required to speculate about what the arguments of the disputants or the rationale of the Council might have been. In this way, the Rules preserve the clear intent of Article 84 that the ICAO Council be the forum of first instance in resolving disagreements relating to the interpretation or application of the Convention.

Finally, the Rules safeguard the proper functioning of the ICAO Council and, ultimately, of ICAO itself. As has been noted above, the ordinary function of the ICAO Council is that of a policy body, which enjoys a broad mandate to examine and deal with a wide array of matters involving international civil

aviation and the Chicago Convention. In contrast, under Article 84, the Council is called upon to exercise an extraordinary and far different function, as a quasi-judicial body. Not only do the Rules instruct the Council how it shall act once proceedings under Article 84 are initiated by recourse to the Rules, but the exclusive nature of the Rules gives the Council and all concerned parties fair notice that they are being called upon to take part in a quasi-judicial proceeding. Absent recourse to those procedures, the ICAO Council acts only under Articles 54 or 55. While such actions could conceivably be subject to some form of scrutiny by the ICAO Assembly, the Chicago Convention does not provide for their review by this Court.

In light of the clear structure of, and practice under, the Chicago Convention, a Contracting State that believes that a disagreement concerning the interpretation or application of the Convention exists between it and another Contracting State may pursue one of two mutually exclusive courses of action.

First, should it wish to have the matter decided under the dispute-resolution mechanisms of Article 84, it may submit an application and memorial as provided for under the Rules, and subsequently participate in ICAO Council proceedings under those Rules. In such a case, a lengthy and particularized

documentary record will be created, while both the ICAO Council and the respondent State will understand that dispute settlement under Article 84 provisions have been invoked.

In the alternative, should a Contracting State for whatever reason not wish to invoke Article 84, it may call upon the Council to act otherwise with respect to matters relating to the Convention, a request which the Council would consider under Articles 54 and 55. What a State may not do, consistent with the Convention, is choose one course of action and later, dissatisfied with the result, claim that it had pursued the other course all along.

As the analysis below will establish, in its request for ICAO discussion of the Iran Air incident and its subsequent actions at ICAO relating to the incident, Iran chose not to bring a dispute under Article 84. Instead, the Council, the United States, and all participants in those Council sessions properly believed that the Council was acting under Article 54 and 55, and was not deciding an Article 84 dispute. The historical record of those discussions -- including the complete absence of any reference to, or application of, Article 84 or the Rules for the Settlement of Differences -- irrefutably supports this conclusion.

CHAPTER II

THE 17 MARCH 1989 RESOLUTION OF THE ICAO COUNCIL WAS NOT A DECISION OF THE COUNCIL WITHIN THE MEANING OF ARTICLE 84 OF THE CHICAGO CONVENTION.

Section I. Iran Did Not Invoke or Otherwise Rely on Article 84 of the Convention in Bringing the Incident of 3 July 1988 Before the ICAO Council.

As described in Part I, Iran brought the incident of 3 July 1988 to the attention of the ICAO Council for the first time in two 3 July 1988 telexes[1]. In neither of those communications, nor in its 4 July 1988 telex which requested a meeting of the Council, nor in its subsequent written and oral communications to the Council did Iran seek to invoke, or even refer in any way, directly or indirectly, to Article 84, the Rules, or the Council's dispute settlement functions thereunder.

Iran's 4 July communication is particularly revealing, as it informed Council President Kotaite of its view that "this grave matter [should] be tabled in the ICAO Council as a matter of urgency with the view that an extraordinary session of the ICAO Assembly be urgently convened to conduct a thorough

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[1]The Iranian telexes of July 3 and 4 appear as attachments to Exhibit 10.

investigation of all aspects of the catastrophe[1]." This request could not have been for adjudication of a dispute under Article 84, as the Assembly has no function whatsoever under that Article. Equally significant, the ICAO Council had no reason at all to believe, based on the Iranian communication of 4 July, that Iran was seeking to invoke Article 84 procedures.

Nowhere in Iran's subsequent submissions to the Council is there any suggestion that the Council was being called upon to decide a dispute under Article 84. Similarly, the exhaustive records of the ICAO Council meetings of 13 and 14 July 1988, 5 and 7 December 1988, and 13, 15, and 17 March 1989 show beyond refutation that Iran consistently failed to characterize the

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[1]Exhibit 10.

Council's deliberations as proceedings under Article 84[1]. It is indeed unbelievable that a State that wished to invoke the long-established dispute settlement machinery of Article 84 of the Convention would remain utterly silent on such a fundamental point throughout the relevant Council deliberations.

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[1]In the voluminous minutes of the Council sessions of 13 and 14 July 1988, 5, 7, and 14 December 1988, and 13, 15, and 17 March 1989, Iran can point to no instance in which any party referred to Article 84 or stated that the Council was being called upon to decide a disagreement under that provision. See Minutes, ICAO Council (extra. sess., 13 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/1 (Exhibit 13); Minutes, ICAO Council (extra. sess., 14 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/2 (Exhibit 14); Minutes, ICAO Council (125th sess., 5 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/12 (Exhibit 15); Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/13 (Exhibit 16); Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/14 (Exhibit 17); Minutes, ICAO Council (125th sess., 14 Dec. 1988), ICAO Doc. DRAFT C-Min. 125/18 (Exhibit 18); Minutes, ICAO Council (126th sess., 13 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/18 (Exhibit 19); Minutes, ICAO Council (126th sess., 15 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/19 (Exhibit 20); Minutes, ICAO Council (126th sess., 17 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/20 (Exhibit 21). Nor do the "working papers" that were submitted for the Council's information refer to such a dispute nor examine which particular provisions of the Chicago Convention might have been violated by the United States.

Section II. Throughout the ICAO Council Proceedings, Neither Iran nor the ICAO Council Acted Under the Longstanding and Exclusive Procedures Prescribed for the Consideration and Decision of Disputes Under Article 84 of the Convention.

As described previously, the dispute settlement machinery established by the ICAO Council to enable it to exercise its functions under Article 84 is noteworthy for its highly specific, formal, written, and quasi-judicial character. Nowhere in its lengthy Memorial to this Court does Iran provide evidence that the Council discussions even mentioned Article 84 or the Rules, much less followed those procedures. Iran does not because it cannot. The unquestionable fact that neither Iran nor the Council acted under well-settled requirements shows that the Council's consideration did not take place, nor was it thought to have taken place, under Article 84 of the Convention.

A written record, which surely would have existed had an Article 84 dispute been before the Council, does not exist. In light of the requirements in the Rules for written pleadings, evidentiary submissions, Council decisions, and written communications by the ICAO Secretary General, had the Council decided a disagreement under Article 84, a significant written record would have been created. Even the most cursory review of the record of the Council's discussions of the incident of 3 July 1988 establishes beyond doubt that no such documentary record exists.

Thus, as would otherwise have been the case under the express requirements of Article 2 of the Rules, Iran did not file a written application to the Council. Nor did it file a written memorial. Also absent from the record is any Iranian statement of law, a written description of the relief desired on the specific points submitted, or a statement by Iran that negotiations to settle the disagreement had taken place between the parties but were unsuccessful[1]. In the face of this irrefutable evidence, Iran's assertions in its Memorial that it filed an application to the Council[2] and that the Council,

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[1]Indeed, the only piece of written documentation presented by Iran that appears to refer at all to possible violations of the Chicago Convention was a "working paper" submitted by Iran, which was titled "BACKGROUND INFORMATION." That paper did not refer to Article 84 of the Chicago Convention or the ICAO Rules or characterize itself as an "application", instead focussing on purported violations of international law by the United States that would have occurred prior to 3 July 1988. Working Paper, ICAO Council (extra. sess., July 1988), ICAO Doc. C-WP/8644 (Exhibit 12).

[2]Iranian Memorial, paragraph 2.53.

acting under Article 84, had "a full file before it" are inexact and deliberately misleading[1].

Absent any act by Iran to commence Article 84 procedures, it is not surprising that no such documentary record exists. Contrary to what would have been the case had the Council been acting pursuant to Article 84, the Secretary General was not called upon to fulfill his responsibilities under Article 3 of the Rules to a) verify that any such application complied with the requirements of Article 2; b) immediately notify all parties to the Convention and members of the Council that the interpretation or application of the Convention was in question; and c) forward copies of the application and

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[1]Iranian Memorial, paragraph 2.54. The discussion in the Iranian Memorial is indicative of Iran's selective and misleading handling of the Chicago Convention jurisdictional argument. Indeed, the Council decision was a "final" decision, in the same respect that a great number of Article 54 decisions may have concluded the Council's examination of a particular subject. So too, the Council members had read many papers when they adopted the 17 March 1989 resolution. These were, however, the type of working papers and technical reports on which the Council relies on a daily basis to conduct its daily business. What the Government of Iran cannot establish is that any of those documents that were before the Council on 17 March 1989 were of the type that would have existed had the Council been deciding a formal quasi-judicial dispute under Article 84 of the Chicago Convention.

supporting documentation to the respondent, with an invitation to file a counter-memorial within a time limit specified by the Council.

Additional pleadings -- such as a United States counter-memorial or preliminary objections, an Iranian reply thereto, or a subsequent rejoinder by the United States -- are also absent from the record. Other written submissions envisioned under the ICAO Rules similarly do not exist. Thus, written evidence of experts was not submitted pursuant to Article 9 of the Rules, declarations by witnesses and experts were not submitted pursuant to Article 10, and final written arguments were never presented to the Council, as called for in Article 12. This total absence of a written record eloquently establishes that the ICAO Council was never called upon to adjudicate an Article 84 dispute.

The deliberations of the Council further indicate that the matter was not brought as an Article 84 dispute. As noted in Part I above, the Council addressed the incident of 3 July 1988 in meetings held on 13 and 14 July 1988, 5, 7, and 14 December 1988, and 13, 15, and 17 March 1989. The lengthy documentary record of those meetings is completely devoid of any reference to Article 84, much less of any evidence that the Council believed that it was charged with resolving a dispute under

that Article. Indeed, the documentary record of those sessions, as memorialized in the official ICAO Minutes, establishes beyond doubt that the Council addressed this matter under its Article 54 and 55 authorities and not under Article 84.

The minutes of the Council meeting of 13 July 1988 -- at which the Council first addressed the Iran Air incident and which began the process that culminated in the Council resolution of 17 March 1989 -- indicate clearly that the Council was not acting under Article 84. In the words of the President of the Council, in introducing that agenda item to the Council:

> "The imperative task for the Council now is to collect all vital information and to reach a complete technical understanding of the chain of events which led to this tragedy. We have to explore every element of our international regulations in the ICAO Standards, Recommended Practices, guidance material and procedures which could prevent a repetition of a similar tragedy, not only in the area where this tragic incident occurred but anywhere else in the world. And most of all, we have to appeal to all States not to compromise the safety of civil air navigation by any acts and for any reason whatsoever. We have to look ahead and take every technical preventive action possible in the field of safety of air navigation to make sure that similar tragedies will never occur again[1]."

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[1] Exhibit 13, p. 4.

No one, not even Iran, challenged or sought to challenge this characterization of what the Council intended in its consideration of the incident of 3 July 1988. No one, not even Iran, rose to state that the Council had before it a disagreement governed by Article 84. Had Iran wished a different result, the proper course would have been for Iran to initiate proceedings under Article 84 in the manner prescribed by the Rules. Iran should not now be relieved of the consequences of its failure to do so.

Far from asking the ICAO Council to act under Article 84, Iran specifically requested that the Council act under Article 54(j) of the Chicago Convention. The official ICAO minutes from the Council's 7 December 1988 meeting record the following statement of the Iranian observer:

> "Bearing in mind that this incident has a legal aspect, we expect that this aspect of the matter will be examined together with the ANC's [the ICAO Air Navigation Commission's] consideration of the technical aspects of the incident. We also wish to draw the attention of the Council to paragraph j) of Article 54 of the Chicago Convention, which clearly states that the Council should report to Contracting States any infractions of the Convention on International Civil Aviation, as well as any failure to carry out recommendations or determinations of the Council[1]."

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[1]Exhibit 16, p. 19.

To assist the ICAO Council's action under Article 54(j) of the Chicago Convention, Iran noted its "expect[ation]" that the ICAO Legal Bureau would examine the expert's report "to identify infringement [sic] of legal principles which have been committed[1]."

The President of the Council's response to the above Iranian intervention, moreover, further indicates that the Council was acting under Article 54, and was not engaged in quasi-judicial deliberations that might have eventually led to a decision of a disagreement under Article 84:

> "With reference to the observation of the Observer of the Islamic Republic of Iran, regarding Article 54 j) of the Convention on International Civil Aviation . . . the President explained that, as in the past when the subordinate bodies had considered questions relating to the high seas, territorial waters and sovereignty in the airspace, the ANC would be free to consult the Legal Bureau if a legal opinion, or interpretation, was required on the subject under consideration. He also drew attention to Article 54 k), requiring that the Council 'Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction;' and indicated that any

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[1]Exhibit 16, p. 19.

> decision taken on this matter would be reported to the next ordinary session of the Assembly through the medium of the Annual Report of the Council to the Assembly[1]."

This statement is particularly significant, as the Council President stated in clear terms that the final Council resolution of the 3 July 1988 incident would be taken under Article 54, rather than Article 84. That decision was rendered at the next session of the Council, on 17 March 1989, in the form of the Council resolution of which Iran now complains.

Other evidence from the Council meetings further supports this conclusion. For example, although Iran used the July 1988 Council meetings to excoriate the United States, the principal focus of that session was to order a "fact-finding investigation to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the [Iran Air] aircraft[2]." There are two

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[1]Exhibit 17, p. 20. (Emphasis added.)

[2]This is the precise mandate of the ICAO investigation team, as memorialized in the ICAO Council decision of 14 July 1988. Exhibit 14, pp. 9-12.

possible authorities under which the Council could have commissioned such an investigation. Were the Council to order an investigation under its ordinary functions, it could do so under Article 55(e) of the Convention[1]. In instances in which the Council would order an investigation in an Article 84 proceeding, it would do so under Article 8 of the Rules[2].

The record of the discussions from 13 and 14 July indicates clearly that the Council acted pursuant to Chicago Convention Article 55(e) and not Article 8 of the Rules. On 13 and 14 July, Council Representatives from Canada and Spain stated their belief that the Council should convene an investigation

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[1]Chicago Convention Article 55(e) empowers the Council to "[i]nvestigate, at the request of any Contracting State, any situation which may appear to present avoidable obstacles to the development of air navigation . . . ."

[2]Article 8 of the Rules provides that the Council, after hearing the parties to an Article 84 disagreement, may select "any individual, body, bureau, commission, or other organization" to conduct an inquiry or render an expert opinion.

under Article 55[1]. No participant at that meeting, including the Observer of Iran, contested this characterization.

Just as the Council did not order the investigation under its Article 84 authority, the record of its proceedings is totally devoid of any other evidence that any of its decisions or actions were taken pursuant to the distinctive and exclusive procedures of the Rules. Thus, the Council never discussed whether to appoint a Committee of five Council members to conduct a preliminary examination of the matter[2], nor were the distinctive procedures under Articles 7 through 20 of the Rules ever discussed or followed.

The complete absence of any actions under the Rules by Iran, the United States, or the Council indicates, as a matter of substance and evidence, that no one considered the Council

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[1]At the 13 July 1988 Council meeting, the representative from Canada stated explicitly that "[i]n the view of my government, the first requirement is that, pursuant to Article 55(e) of the Chicago Convention, there should be a thorough, impartial and expeditious fact finding investigation by ICAO into all relevant circumstances surrounding the destruction of the Iran Air Airbus. . . ." Exhibit 13, p. 19. On 14 July, the Spanish Representative expressed his belief that the Council should order a fact-finding investigation under Article 55. Exhibit 14, pp. 7-8.

[2]Rules, op. cit., Exhibit 6, Art. 6(2).

to be acting under Article 84. Consequently, the Council resolution of 17 March 1989 cannot be a "decision" within the meaning of Article 84, and no appeal from that resolution may be taken to the Court under that Article.

The United States had, and exercised, a right as a member of the Council to vote on matters concerning the incident of 3 July 1988, which would have been precluded under Article 84. As noted above, Article 84 of the Convention unequivocally precludes a State which is a party to a dispute submitted to the Council under that Article from voting in the Council's consideration of such dispute. This prohibition is carried forward into Article 15(5) of the Rules in exactly the same language as is employed in Article 84.

Had the Council been acting under Article 84, therefore, the United States would have been deprived of the opportunity to exercise its right to vote in the Council's is consideration of the 3 July 1988 incident. It is significant, therefore, that the United States did exercise its right to vote in the Council's consideration of that incident, not only by joining in the adoption by consensus of the Council resolution of 17 March 1989 and in the ICAO decisions taken on 14 July and 7 December 1988, but also in voting in opposition to an amendment to the 17 March resolution offered by the member of the Council

from Czechoslovakia[1]. At no time before, during, or after those votes was any objection made to the right of the United States to cast its vote; nor did any discussion take place in the Council concerning the question. This fact is particularly significant in that Iran participated throughout the Council's consideration of this matter, yet never raised the issue of U.S. voting. It is also significant to bear in mind that the Director of the ICAO Legal Bureau, the foremost expert in ICAO procedures, attended that session[2] and yet neither raised directly nor apparently brought to the attention of the President of the Council what would have been a crucial and obvious procedural point had the proceeding been bought under Article 84. In light of the clear prohibition in Article 84 on

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[1]The fact that the United States voted can be established from the Council Minutes of 17 March 1989. Exhibit 21. As noted in the record of attendance of that meeting, thirty-one Council members attended the meeting. The record of the vote -- six votes in favor, nineteen opposed, and six abstentions -- clearly establishes that all Council members in attendance, including the U.S. Representative, voted on the proposed amendment. Ibid., p. 10.

[2]The presence of Dr. Michael Milde, the Director of the ICAO Legal Bureau, is reflected in the attendance list in ICAO Minutes of the 17 March 1989 Council meeting. Exhibit 21, p. 1.

the voting of parties to a dispute brought before the Council under that Article, Iran's silence, and the silence of all other participants, provide additional confirmation that the Council did not decide a dispute under Article 84.

The resolution adopted by the Council on 17 March 1989 did not, on its face, decide or otherwise address a dispute under Article 84 of the Chicago Convention. In those rare instances in which the Council decides a disagreement between Contracting States, the Rules require it to do so in a distinctive manner. Indeed, the Rules require that an Article 84 decision be presented in a form not very different from judgments of this Court under Article 95 of the Rules of Court. Specifically, Article 15 of the Rules provides, inter alia, that:

> "(2) The decision of the Council shall be in writing and shall contain:
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> (i) the date on which it is delivered;
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> (ii) a list of the Members of the Council participating;
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> (iii) the names of the parties and of their agents;
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> (iv) a summary of the proceedings;
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> (v) the conclusions of the Council together with its reasons for reaching them;
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> (vi) its decision, if any, in regard to costs;

(vii) a statement of the voting in Council showing whether the conclusions were unanimous or by a majority vote, and if by a majority, giving the number of Members of the Council who voted in favour of the conclusions and the number of those who voted against or abstained.

(3) Any Member of the Council who voted against the majority opinion may have its views recorded in the form of a dissenting opinion which shall be attached to the decision of the Council.

(4) The decision of the Council shall be rendered at a meeting of the Council called for that purpose which shall be held as soon as practicable after the close of the proceedings."

The text of the Council resolution of 17 March 1989 manifestly does not follow these distinctive and well known requirements for Council decisions under Article 84:

"THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Recalling its decisions of 14 July and 7 December 1988 concerning the shooting down, on 3 July 1988, of Iran Air Airbus 300 on flight IR655 by a warship of the United States;

Having considered the report of the fact-finding investigation instituted by the Secretary General pursuant to the decision of the Council of 14 July 1988 and the subsequent study by the Air Navigation Commission of the safety recommendations presented in that report;

Expressing appreciation for the full co-operation extended to the fact-finding mission by the authorities of all States concerned;

Recalling that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight;

Reaffirming its policy to condemn the use of weapons against civil aircraft in flight without prejudice to the provisions of the Charter of the United Nations;

Deeply deplores the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives;

Expresses again its profound sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families;

Appeals again urgently to all Contracting States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 bis into the Convention on International Civil Aviation;

Notes the report of the fact-finding investigation instituted by the Secretary General and endorses the conclusions of the Air Navigation Commission on the safety recommendations contained therein;

Urges States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and the proper identification of civil aircraft."

It is clear from that resolution that the Council had been acting throughout under its general authority deriving from Articles 54 and 55 of the Convention, and was not acting as a quasi-judicial body sitting to decide a disagreement or dispute between Iran and the United States relating to the interpretation or application of the Convention. Indeed, the resolution does not even refer to a dispute between two States, much less purport to decide such a dispute. Nor does it contain a list of members of the Council who participated, the names of the parties and their agents, a summary of the

proceedings, the conclusions of the Council with its reasons for reaching them, or a statement of the voting. In light of the repeated Iranian criticism of the Council's refusal to condemn the United States, moreover, it is significant that the 17 March resolution, in its fifth paragraph, noted that such condemnations were a question of "policy".

The Council resolution provides an excellent summary of deliberations of the Council throughout its discussion of the Iran Air incident. Throughout, the Council responsibly and dispassionately carried out its Article 54 and 55 responsibilities to assess the facts which led to the tragic downing of the Iran Air airliner and took necessary steps to ensure that such tragedies would not recur. When seen in this light, the Council's 17 March resolution ably completed the task presented to it eight months earlier by the President of the Council to reach a complete technical understanding of the chain of events which led to the tragedy, to explore possible changes to ICAO Standards and Recommended Practices, to appeal to States not to compromise the safety of civil air navigation, and to take other necessary technical steps to make sure that similar disasters would not recur.

Iran's attempt to recharacterize those proceedings and that resolution as a legal proceeding under Article 84 and then to criticize the Council for not acting in a sufficiently judicial manner must be rejected.

Section III. The Conclusion That This Was Not an Article 84 Dispute Has Been Confirmed by ICAO.

Less than three months after the ICAO Council action was completed on this matter, a senior officer in the ICAO Secretariat confirmed, in an official communication to the Office of the Registrar of the Court, that the matter was not submitted to ICAO under Article 84, nor treated as such. Pursuant to a 24 May 1989 request to ICAO for information, ICAO's Legal Bureau Director, Dr. Michael Milde, informed the Court's Registrar's Office of that fact:

> "You will note that the proceedings in the Council [on the 3 July 1988 incident] did not follow these Rules for the Settlement of Differences because the matter was not submitted to the Council under the terms of Chapter XVIII of the Convention on International Civil Aviation (Articles 84 to 88) but was considered under the terms of Article 54(n).
>
> The matter before the Council was not framed as a difference or disagreement on the interpretation or application of the Convention on International Civil

> Aviation and its annexes; similarly, the interpretation and application of the Montreal Convention of 1971 was not the subject of the deliberations by the Council of ICAO[1]."

This statement is highly relevant and probative in a number of respects. First, coming from one of the foremost experts in the field of aviation law, the Chicago Convention, and ICAO, the ICAO Legal Bureau Director's opinion on the subject is entitled to great weight[2].

Equally important, his statement, coming shortly after the Council's completion of its work on the 3 July 1988 incident, is powerful evidence of the state of mind of the participants in those deliberations. As reflected in the Minutes of those sessions[3], Dr. Milde, in his capacity as Legal Bureau

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[1]This letter from ICAO Legal Director Michael Milde to the Court's Deputy Registrar Bernard Noble appears at Exhibit 24.

[2]Dr. Milde, LL.M., Ph.D., received his legal training in Czechoslovakia, the Netherlands, and Canada. He is the Director of the ICAO Legal Bureau and professor of international aviation law at McGill University in Montreal, Canada. Since 1 June 1989, Dr. Milde has held the position as Director of McGill University's Institute of Air and Space Law. It should also be noted that the Iranian Memorial cites Dr. Milde as an authority on international air law. Iranian Memorial, para. 3.16, n. 2; para. 2.41, n. 1.

[3]See Exhibit 13, p. 1; Exhibit 14, p. 1; Exhibit 15, p. 1; Exhibit 16, p. 1; Exhibit 17, p. 1; Exhibit 19, p. 1; Exhibit 20, p. 1; and Exhibit 21, p. 1.

Director, was a participant in Council sessions in which the matter was discussed. Quite clearly, the Organization believed that it was not deciding a dispute under Article 84, but rather was addressing the matter in its policy role under Article 54(n). In addition to the other evidence submitted above, the statement of the ICAO Legal Bureau Director removes any possible doubt that the issue before the ICAO Council could have satisfied the requirements of Article 84.

CHAPTER III

IRAN'S ATTEMPT TO EVADE THE CLEAR PROVISIONS OF THE CHICAGO CONVENTION WOULD BE HIGHLY PREJUDICIAL TO THE PROPER FUNCTIONING OF ICAO.

As the discussion above indicates, Iran could always have attempted to initiate proceedings in the ICAO Council on the basis of Article 84 of the Chicago Convention and the Rules for the Settlement of Differences. For reasons of its own, Iran chose not to do so. Now, dissatisfied with the resolution reached by the Council, Iran attempts to challenge that decision, a decision embodying both policy and technical elements and reached after prolonged examination both by the ICAO investigation and by the technical examination of the ICAO Air Navigation Commission. In essence, Iran is asking the Court to ignore the constitutional basis on which the ICAO Council acted, namely Article 54 of the Chicago Convention, and by some sleight of hand transmute those proceedings into something entirely different, namely proceedings under Article 84 leading to a decision on a disagreement between the parties

relating to the interpretation or the application of the Chicago Convention. In so doing, Iran is asking the Court to embark upon a course of action that would be highly prejudicial to the United States and, indeed, to all parties to the Chicago Convention, to the duly constituted organs of ICAO, particularly the ICAO Council, and to the proper functioning of the whole of the International Civil Aviation Organization.

Section I. The Respect Due a Coordinate Body of the United Nations Obliges the Court to Reject Iran's Claims.

The acts of ICAO, a specialized agency of the United Nations' system, are entitled to respect and deference on the part of other organs and elements of the United Nations system, including this Court. Iran, in basing its jurisdictional allegations on Article 84 of the Chicago Convention, is necessarily asking that the Court determine that the Council resolution of 17 March 1989 constitutes a "decision" of the Council taken pursuant to Article 84 of the Convention. As the United States has shown, Iran, the United States, the Council, and the ICAO Secretariat did not believe themselves to be acting pursuant to Article 84 in connection with consideration of the 3 July 1988 incident at any time up to or during the

adoption of the 17 March 1989 resolution. Iran is asking the Court to find otherwise, notwithstanding the overwhelming uncontroverted record to the contrary.

What Iran seeks is a distortion of the carefully structured dispute settlement regime of the Chicago Convention. Iran seeks to have the Court impose upon the ICAO Council an *interpretation of the Council's actions in respect of the* 3 July 1988 incident that is not only unsupported by Article 84 of the Convention and its implementing Rules for the Settlement of Differences, but is also entirely at variance with Iran's own actions in bringing the matter to the attention of the Council, and the Council's intentions and purposes in its consideration of the matter. In effect, the interpretation Iran is putting forward requires such a broad reading of Article 84 that it would severely disrupt the established manner in which the Council regularly deals with disagreements and disputes relating to the interpretation or the application of the Convention. These assertions open the way for any party to the Convention -- not merely a party to a particular disagreement or dispute -- that considers itself dissatisfied

with any decision of the ICAO Council to invoke Article 84 retroactively and initiate recourse to this Court. This would turn the whole system of the Chicago Convention upside down.

Section II. The "Supervisory Role" of the Court Should Not Be Used in the Manner Suggested by Iran.

In its Memorial, Iran seeks to rely on this Court's decision in Appeal Relating to the Jurisdiction of the ICAO Council (hereinafter, the "Appeal" case)[1] to support the argument that this Court should take an expansive view of its appeal authority and, accordingly, find jurisdiction over the 17 March 1989 ICAO Council resolution. Such assertions are misplaced and misleading, as nothing in the Court's judgment in the Appeal case suggests that Iran's distorted view of Article 84 and the Court's jurisdiction thereunder has merit.

In the Appeal case, the issue before the Court was the limited one of whether an interlocutory decision of the Council, acting under Article 84, constituted a "decision" of the Council within the meaning of Article 84 so as to confer

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[1] I.C.J. Reports 1972, p. 46.

jurisdiction on this Court by way of "appeal". In that proceeding, however, there was no doubt in that case that the Court had jurisdiction in relation to the underlying dispute which had been brought for decision before the ICAO Council, which had indeed been properly seised by India as required by Article 84 of the Convention and Article 2 of the Rules for the Settlement of Differences[1]. This was common ground between the parties in that case and was not challenged either in the ICAO Council or in this Court. It follows that a principal issue in the present proceedings -- namely whether the Court has the jurisdiction to entertain a case presented as an appeal under Article 84 of the Chicago Convention when the impugned decision of the Council itself was not taken in application of Article 84 -- simply did not arise in that case.

There is nothing in the Court's decision that would indicate that it believed that its supervisory function over the quasi-judicial determinations of the Council under Article

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[1] See, e.g., Repertory - Guide, op. cit., Exhibit 69, Art. 84, pp. 3-4; and G. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", 12 Canadian Yearbook of Int'l Law, p. 153, at pp. 159-60 (1974) (Exhibit 73).

84 would in any way extend to include the review of Council technical and policy determinations under other articles of the Chicago Convention. There is nothing in the Convention that could possibly support the exercise by the Court of "supervisory" functions over matters not considered under Article 84.

The Court's judgment in the Appeal case does, however, have certain relevance insofar as the nature of the Court's functions and responsibilities under Article 84 are concerned. As to this matter the Court noted that:

> "The case is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it). Yet in the proceedings before the Court, it is the act of a third entity -- the Council of ICAO -- which one of the Parties is impugning and the other defending. In that aspect of the matter, the appeal to the Court contemplated by the Chicago Convention and the Transit Agreement must be regarded as an element of the general regime established in respect of ICAO[1]."

In bringing the instant proceeding, Iran is asking the Court to depart from its special responsibilities with respect to the "good functioning" of ICAO by finding jurisdiction to

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[1] I.C.J. Reports 1972, p. 46, at p. 60.

exist under Article 84 in circumstances in which absolutely no support for such jurisdiction may be found in the text of Article 84 or its implementing Rules, or in the record of the Council proceedings that led ultimately to the resolution of 17 March 1989. Iran's request must be rejected.

Section III. The Decision Requested of this Court by Iran Would Frustrate the Dispute-Settlement Regime Established in the Chicago Convention and by ICAO and Would Threaten the Institutional Integrity of ICAO.

The Government of Iran, for reasons known only to itself, did not invoke the established and exclusive procedures for Council resolution of disputes under Convention Article 84. Accordingly and as a matter of course, the Council proceeded to deal with the incident of 13 July 1988 pursuant to Article 54, as it routinely does with respect to aviation matters in which Article 84 has not been expressly, and properly, invoked. The Application filed by Iran to institute the instant proceedings, however, proceeds on an entirely different basis, attempting as it does to rewrite what occurred in the ICAO Council. To add to the deliberate confusion Iran is attempting to create, in its Memorial it criticizes the Council for doing precisely what

it is supposed to do, namely, taking into consideration factors of aviation policy and political factors in reaching the decision that it adopted on 17 March 1989[1].

Iran asks this Court to circumvent the longstanding and comprehensive procedures adopted by ICAO, and thereby frustrate and in effect nullify the regime carefully adopted by the Organization and accepted by its Contracting States for more than thirty years. Such a decision could threaten the institutional integrity of ICAO. As a Member of this Court has stated:

> ". . . the Contracting States have the right to expect that the Council will faithfully follow these rules, performing as it does, in such situations, quasi-judicial functions, for they are an integral part of its jurisdiction. Such rules constitute one of the guarantees of the proper

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[1]Iran's statements in paragraphs 2.41, 2.57, and 2.59 of its Memorial are typical in this respect. One particular grievance raised by Iran in its Memorial is the Council's differing treatment of the Iran Air Incident from the 1983 KAL 007 shootdown and the 1973 downing of a Libyan civilian airliner by Israel. Iranian Memorial, paras. 2.36-2.41. Clearly the Iranian argument is premised on a belief that the 17 March 1989 Council decision is similar in nature to the 4 June 1973 Council decision regarding the shootdown of Libyan aircraft and the 5 March 1984 resolution regarding the downing of Korean Air Lines Flight 007. This comparison, in one respect, is apt, as ICAO Council actions in both instances did not involve a resolution of disagreements under Article 84. As established above, the Council in both aforementioned prior instances acted pursuant to Articles 54 and 55.

> decision-making of any collective body of this character and they set a framework for its regular functioning: as such, they are enacted to be complied with[1]."

Every year, the Council makes a very large number of "decisions" in a wide array of matters. Many of these decisions and resolutions necessarily, and to a greater or lesser extent, implicate issues of law. As noted above, Article 54(n) gives the Council competence to "[c]onsider any matter relating to the Convention which any Contracting State refers to it." On its own initiative, the Council reviews other matters related to the provisions of the Convention. Under the Convention, these decisions are final and not subject to appeal to any judicial body.

Allowing Iran to evade the long-established procedures for bringing Article 84 disputes before the Council could open up for review virtually all actions of the Council that might be said to implicate or involve one or more provisions of the Convention. Subjecting such decisions to lengthy judicial review could delay crucial aviation safety-related actions of the Council and cripple the operation of ICAO. The United

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[1] I.C.J. Reports 1972, p. 46, at pp. 74-75 (Declaration of Judge Lachs).

States respectfully submits that this result would not be consistent with the terms or intent of the Chicago Convention, or the longstanding practice of States under that Convention.

Iran's actions in this regard, moreover, would violate the clear language and intent of Article 84, under which this Court acts as a court of appeals rather than as a court of first instance. As an appellate court, this Court functions as a judicial body of the highest order, determining questions of law based on a full, and fully-articulated, legal record developed by the contending parties. In such circumstances, the Court's proper functioning depends greatly on its ability to review and assess the legal positions of the parties, based on a coherent legal record deriving from the proceedings of the forum from which the appeal has been taken. As established above, no such record exists in this case, for the simple reason that none of the concerned parties -- not the United States, the Council, or, indeed, even Iran -- conceived that the prior Council discussions and resolutions had a judicial character, from which an appeal to this Court would be available. None so conceived, and none so acted.

In short, the Council did not deal with the matter before it in a quasi-judicial proceeding. The legal questions that Iran seeks to have this Court confront were neither confronted,

nor decided, by the Council under Article 84 of the Convention. Rather than function in an appellate capacity, this Court, in effect, has been asked by Iran to act as the court of first instance. That is manifestly not the Court's role under Article 84, and that Article unambiguously does not confer jurisdiction on the Court for that purpose. Iran's claim that the Court has jurisdiction under Article 84 of the Chicago Convention is completely unfounded and should be rejected.

PART IV

THE COURT DOES NOT HAVE JURISDICTION UNDER ARTICLE 14 OF THE 1971 MONTREAL CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

Iran asserts that Article 14 of the Montreal Convention confers jurisdiction on the Court in these proceedings[1]. Article 14 of the Convention gives the Court jurisdiction over disputes concerning the interpretation and application of the Convention which cannot be settled through negotiation or arbitration:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

In its Application, Iran asserts that "by refusing to accept liability for the actions of its agents in destruction of Iran Air Flight 655, and by failing to pay compensation for the aircraft, or to work out with the Islamic Republic a proper mechanism for determination and payment of damages due to the bereaved families, the United States has violated Articles 1, 3 and 10(1) of the Montreal Convention[1]." In its Memorial,

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[1]Iranian Memorial, para. 2.63. The Montreal Convention appears at Exhibit 7.

[2]Iranian Application, p. 7.

Iran argues that the United States violated those provisions of the Convention by virtue of its "conduct in destroying Iran Air Flight 655 and in failing to take all practical measures to prevent such an offense and to make it punishable by severe penalties[1]." More specifically, Iran argues that both the United States and the Commanding Officer of the USS Vincennes violated Article 1 of the Convention[2] and that the United States violated Article 3 and 10(1)[3].

Iran cannot rely upon the Montreal Convention as a basis for jurisdiction because Iran has failed to establish that its dispute with the United States regarding this matter could not be settled through negotiation. In fact, prior to filing this proceeding, Iran rebuffed all attempts by the United States to discuss the payment of compensation.

Likewise, Iran wholly disregarded the additional and independent requirement of Article 14 that it seek arbitration of the dispute for a period of six months prior to reference to

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[1]Iranian Memorial, para. 2.61.

[2]Iranian Memorial, paras. 3.58, 3.59, and 4.57.

[3]Iranian Memorial, paras. 3.60, 3.61, and 4.73.

the Court. In fact, during this period Iran never requested or tried to organize the arbitration of the dispute and disregarded attempts by the United States to discuss compensation, notwithstanding the extensive negotiations and arbitrations on claims issues which the two governments were conducting on a daily basis at The Hague.

Moreover, the Montreal Convention cannot provide a basis for jurisdiction in these proceedings because the Convention has no connection to the downing of Iran Air Flight 655. The Convention addresses criminal acts by individuals against the safety of civil aircraft. It was never intended to address the responsibility of States for any actions they may take against such aircraft, particularly actions taken by armed forces engaged in hostile action. The actions at issue here are governed by the laws of armed conflict--an entirely separate and independent branch of law for which ICAO has no responsibility and which the parties to the Montreal Convention and other conventions dealing with civil aircraft did not purport to address.

The Court can determine these threshold issues on the basis of preliminary objections and should not proceed to the merits of Iran's claims until the jurisdiction of the Court is determined.

CHAPTER I

IRAN HAS FAILED TO SATISFY THE REQUIREMENT THAT IT SEEK TO NEGOTIATE OR TO ARBITRATE BEFORE INSTITUTING PROCEEDINGS IN THIS COURT.

In its Application and Memorial, Iran brushes aside the very specific prerequisites to the Court's jurisdiction that are written into Article 14 of the Montreal Convention. Yet the ordinary language of Article 14 without question calls upon a complaining State to seek negotiation and then arbitration prior to submission of a dispute to this Court. Article 14(1) states:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

The comments that were made regarding Article 14 during the conference at which the Montreal Convention was drafted demonstrate that the provision was understood to require an

effort by the complaining State to seek agreement on arbitration before referring the dispute to the Court[1].

Article 14(1), therefore, requires an effort by the complaining State to negotiate a settlement of the dispute concerning the interpretation or application of the Convention. If negotiations fail to settle the dispute, the State must seek to arbitrate the dispute. Only if that fails within a period of six months may recourse be had to the Court. The requirements first to negotiate and then to organize an arbitration are not mere formalities. They are clear prerequisites to any right of resort to the Court. Iran clearly failed in any way to meet these essential prerequisites. They cannot be avoided or dismissed as useless based on the relations between Iran and the United States. Indeed, during this same period, Iran and the United States

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[1]Only one delegate at the Montreal Conference spoke directly to the requirements of this Article. "Article 14 provided for the reference of disputes to the International Court of Justice in the case of parties unable to agree on arbitration". Exhibit 43, p. 134 (emphasis added). No other delegate took issue with this statement. Indeed, only one other delegate commented on the substance of Article 14, and then only indirectly by associating himself with the previous remarks. Ibid.

were engaged almost daily in The Hague in intense and largely successful efforts to resolve diplomatically and by arbitration important and politically sensitive claims.

With regard to these prerequisites, the language of Article 14 sets an even higher standard of conduct by the complaining Party than exists in many other compromissory clauses of this type. For instance, it sets a higher standard than the compromissory clauses that appeared recently before this Court in both Elettronica Sicula S.p.A. (ELSI)[1] and Military and Paramilitary Activities in and against Nicaragua[2]. In the Nicaragua case, Article XXIV(2) of the 1956 Treaty of Friendship, Commerce and Navigation stated:

> "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means[3]."

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[1] I.C.J. Reports 1989, p. 15.

[2] I.C.J. Reports 1984, p. 392.

[3] I.C.J. Reports 1984, at p. 452 (Separate Opinion of Judge Ruda).

As Judge Ruda stated in commenting on this provision:

> ". . . it is essential that diplomatic negotiations should have taken place prior to coming before the Court, because, first, that is what is set out in clear terms in Article XXIV of the Treaty and second, because it is impossible to know the existence and scope of the dispute without one party submitting a claim against the other, stating the facts and specifying the provisions of the Treaty alleged to have been violated. It is the essence and therefore the indissoluble attributes of the concept of dispute that negotiations between the interested States should precede the institution of proceedings before the Court, because negotiations or the adjustment by diplomacy fixes the points of facts and law over which the parties disagree[1]."

The requirement to negotiate, therefore, cannot be and has never been viewed by the Court as a mere formality.

Article 14 of the Montreal Convention not only contains a requirement to negotiate, it also expressly calls upon the complaining party to seek arbitration within a specified period of time before resorting to resolution of the dispute by this Court. The clear distinction between the requirements of a compromissory clause such as Article 14 of the Montreal Convention and that of the Treaty of Friendship, Commerce and

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[1] Ibid., p. 453. As the Court said in Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, at p. 15, "[B]efore a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations."

Navigation in Nicaragua was recognized by Judge Singh:

> "In the aforesaid Treaty [Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973, Article 13(1)] . . . it would appear that the jurisdictional clause made negotiations an essential condition before proceeding to arbitration; and a lapse of six months from the date of the request for arbitration a condition precedent to referring the dispute to the International Court of Justice[1]."

Not to give effect to the express conditions of Article 14 would undermine the purpose of such conditions, which is to avoid escalating a dispute between States to this forum before the attempt has been made to resolve it through a dialogue between the States or through arbiters of their choosing. Were this Court to brush aside such explicit language, the Court would ultimately serve to discourage States from crafting compromissory clauses in which they believe they are fostering a bilateral, low-profile resolution of disputes.

Section I. Iran Had No Justification for Its Failure to Seek Negotiations or Arbitration Prior to Resort to this Court.

The principal arguments that Iran makes for failing to satisfy the requirement in Article 14 to seek negotiations or request arbitration are that there were no diplomatic channels

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[1] I.C.J. Reports 1984, at p. 446.

of communication for pursuing negotiations and that, in any event, a request for arbitration would have been fruitless. In fact, there were a number of diplomatic channels for communicating with the United States and the United States very early indicated its willingness to provide compensation to the victims of this accident and to discuss the matter with Iran.

In its Application, Iran makes the following assertion in a footnote:

> "The Islamic Republic of Iran submits that under the circumstances and in particular the United States total refusal of all voluntary methods of pacific settlement of the present dispute, the arbitration referred to in Article 14(1) of the Montreal Convention cannot be considered a viable course of action[1]."

In its Memorial, Iran argues that the extent of public debate over the legality of the United States actions in ICAO and the United Nations Security Council, coupled with the fact that no diplomatic relations exist between the two countries, "demonstrates that it would be fruitless to hope that any further 'negotiation' could be expected to settle the dispute[2]." Iran also criticizes the United States for failing

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[1] Iranian Application, p. 6.

[2] Iranian Memorial, para. 2.65.

to give any indication that it preferred a separate arbitration over Iran's claims under the Convention to proceedings before the Court[1].

Iran's assertions notwithstanding, despite the absence of formal diplomatic relations, a number of diplomatic channels existed that provided Iran with the opportunity to request negotiations or arbitration of its claims. On its own volition, Iran simply determined to proceed with the filing of these proceedings without any effort to comply with the requirements of Article 14. Indeed, Iran ignored and rebuffed the persistent efforts of the United States to address with Iran the subject of compensation to the victims of this accident.

From the time of the incident of 3 July 1988 until Iran's Application was filed in this case, the Government of Iran never requested to meet with U.S. officials to negotiate this matter or to discuss arbitration. Although Iran and the United States do not maintain diplomatic relations, Iran could have

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[1]Iranian Memorial, para. 2.68.

approached the United States through a number of channels: the U.S. Interests Section at the Swiss Embassy in Tehran; the Iranian Interests Section at the Algerian Embassy in Washington, D.C.; the United Nations; the Iran-U.S. Claims Tribunal in The Hague; or any willing third-country or international organization. These channels have in fact been used by both parties on many occasions to communicate requests and negotiate and resolve specific bilateral issues.

Moreover, there is no basis upon which to conclude that such efforts did not have the potential for succeeding. Quite to the contrary, notwithstanding their political relations, the United States and Iran have, since 1981, been engaged in very substantial and frequent negotiations on claims issues and arbitration before the Iran-U.S. Claims Tribunal involving billions of dollars. Indeed, they have reached agreements settling disputes worth hundreds of millions of dollars and have arbitrated other disputes worth many more hundreds of millions of dollars.

During the very period in question (from 3 July 1988 to 17 May 1989), representatives of the two governments were engaged in ongoing settlement discussions in connection with both private and government-to-government claims before the Tribunal, and representatives of the governments held

face-to-face meetings no less than 16 times in The Hague. Such discussions resulted in a large number of settlements. For example, there were 26 awards on agreed terms of U.S. nationals' claims during this period, each authorizing and approving payment of settlements agreed upon by the two governments[1]. Similarly, on 16 March 1989, the Tribunal issued an award on agreed terms reflecting a settlement between Iran and the United States of two claims by agencies of the two governments[2].

The two governments also engaged in active arbitration before the Tribunal. For example, in August 1988, following extensive briefing and oral argument by the two governments, the Tribunal handed down a decision denying Iran's claim for the return of substantial amounts of military equipment held by the United States, but requiring the United States to pay Iran the value of those items[3]. The two sides thereafter engaged

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[1]See Annual Report of the Iran-U.S. Claims Tribunal for the Period Ending 30 June 1989, pp. 184-88 (Exhibit 83).

[2]See Iranian Assets Litigation Reporter, 24 Mar. 1989, pp. 17064-17065 (Exhibit 83).

[3]See Iranian Assets Litigation Reporter, 23 Sep. 1988, pp. 16312-16313 (Exhibit 83).

in extensive negotiations on the amounts due for various categories of equipment. In addition, in November 1988 Iranian and U.S. arbitrators at the Tribunal agreed on two neutral arbitrators to replace two arbitrators who had resigned[1].

Through 30 June 1989, the Tribunal had issued a total of 189 awards on agreed terms and 204 awards relating to disputed claims[2]. Including awards in agreed terms, the Tribunal had awarded over US $1,500 million to U.S. and Iranian private and government claimants[3].

Iran's claim that negotiations over any claims arising from the incident of 3 July 1988 would have been fruitless is clearly contradicted by this record of uninterrupted, productive negotiation and arbitration between the two governments.

Iran's assertions that the United States refused other methods of pacific settlement of this matter and refused to

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[1] See Annual Report, 30 June 1989, op. cit., Exhibit 83, p. 1; Annual Report of the Iran-U.S. Claims Tribunal for the Period Ending 30 June 1988, pp. 3-4 (Exhibit 83).

[2] Annual Report, 30 June 1989, op. cit., Exhibit 83, p. 23. These figures do not include partial awards in either category.

[3] Annual Report, 30 June 1989, op. cit., Exhibit 83, p. 24.

express a preference for arbitration are similarly misleading and seek to shift from itself to the United States the burden for satisfying the requirement under Article 14 to request arbitration. Iran fails to identify when or how the United States "refused" such other methods. The reason is that the United States in fact never refused to undertake negotiation or arbitration with Iran. Iran never communicated to the United States a request to enter into negotiations or arbitration about this dispute, whether for purposes of liability under the Chicago Convention or liability on any other basis. Iran did not identify the Montreal Convention as the basis for any claim against the United States in connection with the incident of 3 July 1988 until it filed its Application[1], and even then did not identify the Treaty of Amity as a basis for its claim.

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[1]The only reference to the Montreal Convention by Iran in its presentation to the ICAO Council or the U.N. Security Council during their deliberations concerning the Iran Air Flight 655 incident was contained in a Working Paper submitted by Iran to the ICAO Council. That reference was contained in a list of general authorities and ICAO actions relating to alleged violations of international law by the United States unrelated to the shootdown of Iran Air 655. See Exhibit 12, ICAO Doc. C-WP/8644.

Contrary to Iran's suggestions[1], it was the United States that repeatedly sought to engage the Government of Iran in this matter, for the purpose of establishing a mechanism for compensating the families of the Iranian victims. By diplomatic demarches throughout 1988 and 1989, the United States sought to engage the Government of Iran and its entities in a discussion of this matter, and especially sought information for purposes of paying compensation to the families of the victims -- compensation now sought by Iran before this Court. Had Iran responded to these overtures, there would perhaps be no need for Iran to now ask this Court for such relief. The fact that the compensation was offered on an ex gratia basis and that the United States wished it to be paid directly to the families, does not undermine the willingness of the United States to seek a resolution of this matter. If Iran objected to the terms of the United States offer, it was incumbent on Iran to make a counter-offer through negotiation,

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[1]Iranian Memorial, para. 2.68.

or to request that unresolved issues be put to an arbitral tribunal. Iran, however, did nothing along these lines prior to filing its Application before this Court.

Nor can Iran rely upon differences between its position and that of the United States on the substance of its claims to excuse its failure to seek negotiations or arbitration. The purpose of negotiations and arbitration is to resolve such differences.

Section II. The Court's Prior Rulings Require a Much Greater Effort at Resolving a Dispute Than Has Been Shown by Iran.

Prior rulings by this Court are clear that a much greater effort by Iran at resolving this dispute is necessary before it can be said that further negotiations are futile. At the time the Application was filed in this case, there was no discussion between the parties that resulted in a deadlock or in a refusal of one of the parties to go on[1]. Rather, the longstanding and highly successful negotiations and arbitrations between

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[1] See Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, at p. 13.

Iran and the United States at the Claims Tribunal and the United States' offer to pay compensation is evidence that no deadlock existed on the basis of which the Court might find that "no reasonable probability exists that further negotiations would lead to a settlement[1]." In reality, Iran by its Application -- not the United States by its offers to engage Iran on the question of compensation -- preempted the possibility for negotiation or arbitration.

The requirement to seek arbitration is in no way conditioned on the notion that the requirement may be ignored if the effort appears fruitless. At a minimum, a request for arbitration must be made, the moving party must be prepared to engage in discussion of the terms for such an arbitration, and six months must elapse, before there is any right to resort to the Court. Iran complied with none of these essential requirements.

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[1] South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, at p. 345.

But even if there is thought to be some exception where negotiations or arbitration is not a reasonable probability, the burden is upon Iran to show that there was and is no "reasonable probability" that diplomatic negotiations or arbitration between Iran and the United States can resolve this dispute. When faced with a similar burden in United States Diplomatic and Consular Staff in Tehran, the United States introduced evidence that Iran had refused to receive a representative sent to negotiate on the matter (Mr. Ramsey Clark) and that the Ayatollah Khomeini had ordered that under no circumstances should members of the Islamic Revolutionary Council meet with U.S. representatives[1].

Iran can produce no such evidence in this case. The Government of Iran made no effort to provide a representative to negotiate this issue. If the Iran Insurance Company constitutes such a representative, it did not identify itself as such, and did not respond to efforts by the United States to

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[1] I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, pp. 136-37.

determine its relationship to the Government of Iran. There was never any statement by the United States that it was unwilling to talk with Iranian Government representatives about this matter. Moreover, Iran did not respond to repeated efforts by the United States to resolve this matter.

Indeed, the record clearly indicates that Iran never considered this case in light of the Montreal Convention until it decided to go to the Court and began casting about for a basis of jurisdiction to do so. Certainly, Iran never made any attempt to satisfy its obligation to negotiate or seek arbitration under the Montreal Convention.

CHAPTER II

THE CLAIMS SUBMITTED BY IRAN HAVE NO CONNECTION TO THE MONTREAL CONVENTION.

As demonstrated in Part II, the mere assertion by Iran that the United States' actions relate to the Montreal Convention is not sufficient to establish the jurisdiction of the Court. Iran must establish a reasonable connection between the subject matter of the dispute and the Convention.

Iran argues that the mere assertion of a violation of an agreement providing jurisdiction for the Court to entertain disputes is sufficient to establish jurisdiction under that convention. Thus, after alleging violations by the United States of the Montreal Convention, Iran asserts that "[t]he very fact that the United States denies any legal responsibility for its actions evidences the existence of a dispute" concerning the interpretation or application of the Convention[1]. Such an assertion flies in the face of simple logic and the pronouncements of the Court.

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[1] Iranian Memorial, para. 2.63.

The principal issue is a purely a question of law: whether the Montreal Convention is relevant to the facts upon which the claims asserted by Iran rest. Both the terms of the Convention and its history, as well as subsequent practice, demonstrate that the Convention does not address the actions of States against civil aircraft, and in particular clearly does not apply to the actions of a State's armed forces engaged in armed conflict.

Section I. The Terms of the Montreal Convention and Its History Demonstrate That Offenses Referred to in That Convention Relate to the Conduct of Individuals, Not to the Actions of States Against Civil Aircraft.

In the first instance, a treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose[1]. On its face, the Montreal Convention addresses acts against civil aircraft committed by individuals -- not by States.

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[1] See Vienna Convention on the Law of Treaties, Art. 31(1), U.N. Doc. A/CONF. 39/27, p. 293 (1969), reflecting customary international law on this point.

(Individual terrorists might, of course, be covertly directed or supported by States in particular incidents; that, however, is not the situation in the present case.)

Although the Convention establishes various obligations on Contracting States, these obligations only apply in cases where "persons" have committed offenses under Article 1[1]. Specifically, Article 1 provides:

> "1. Any person commits an offence if he unlawfully and intentionally:
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> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
>
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
>
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

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[1] Iran's assertion to the contrary notwithstanding (Iranian Memorial, para. 3.55), the 1988 Convention on Maritime Safety (Exhibit 74) does not define "person" to include a foreign State.

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

(a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or

(b) is an accomplice of a person who commits or attempts to commit any such offence."

(Emphasis added.)

The use of the terms "person" and "he" in their ordinary meaning does not refer to States or governments, which are abstract and incorporeal entities. Moreover, the actions which are made offenses under Article 1 generally describe common criminal activities of individuals, not the activities of States[1].

Had the Contracting States to the Montreal Convention intended the word "person" to be interpreted in a manner different from its common meaning, they would have so defined the term or otherwise given some other clear indication of their intent to do so. No such definition or indication

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[1] See also Exhibit 7, Arts. 7, 8, and 13.

exists. Indeed, the meaning of the term, when read in the context of the Montreal Convention, confirms that the Contracting States used the term to apply to human beings, and not to States or governments. For example, throughout the Convention a "person" who perpetrates an "offence," i.e., an "offender," is referred to as "he" or "him"[1]. Article 5 speaks of extraditing the "offender" and Article 6 speaks of taking "him" into custody. That article also refers to an offender's physical presence in the territory of a Contracting State and communications with the State of which the "person" is a "national". Such provisions would become nonsensical and meaningless if the word "persons" included States or governments.

Moreover, the history of the Montreal Convention makes clear that the "unlawful" acts to which the Convention refers are sabotage and other terrorist or criminal activities of individuals. The 1971 Montreal (Sabotage) Convention was intended to complement the 1963 Tokyo Convention and the 1970

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[1] See, e.g., Exhibit 7, Arts. 5, 6, and 7.

Hague (Hijacking) Convention[1]. All three were developed in response to hijackings and other terrorist actions committed by individuals against civilian aircraft. The Tokyo Convention requires States to take all appropriate measures to restore control of the hijacked aircraft to its commander and to permit its passengers and crew to continue their journey as soon as practicable. The Hague Convention is designed to pick up where the Tokyo Convention left off. When a plane is hijacked and diverted to another State, the Convention obligates the receiving State to apprehend the hijacker and either prosecute or extradite him. The Montreal Convention is similar to the Hague Convention in that it obligates States to apprehend offenders and either prosecute or extradite them.

As the United Nations General Assembly noted in 1969, when urging support for the efforts of ICAO in preparing the Hague Convention, the need for the Convention was made clear by the

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[1] See Convention on Offences and Certain Other Acts Committed On Board Aircraft of 1963 (the "Tokyo Convention") (Exhibit 75); Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (the "Hague Convention") (Exhibit 76).

large number of hijackings by individuals that occurred in the late 1960s, over forty in 1969 alone[1].

The immediate impetus for the Montreal Convention was two acts of aircraft sabotage that occurred in Europe on 21 February 1970, one involving SWISSAIR and the other Austrian Airlines. The acts were planned and perpetrated by individual terrorists. As a result of these incidents, the Swiss and the Austrian Governments asked the ICAO Council to convene on an urgent basis an international conference on aviation security. In March, a formal request was made by the member States of the European Civil Aviation Conference for an Extraordinary Session of the ICAO Assembly on the subject. The Assembly convened in June and directed the ICAO Legal Committee to prepare before November 1970 a draft convention on acts of violence against international civil aviation (other than acts covered by the draft convention on unlawful seizure of aircraft) for consideration at a diplomatic conference no later than the

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[1]UNGA Res. 2551 (24th sess., 1969); see also UNGA Res. 2645 (25th sess., 1970) (urging full support for the diplomatic conference convened by ICAO at The Hague in 1970 for the purpose of adopting the Hague Convention); UN Security Council Res. 286 (1554th meeting, 1970).

summer of 1971[1]. The ICAO Legal Committee prepared a draft convention modelled on the draft convention on unlawful seizures (hijacking) of aircraft. ICAO convened a diplomatic conference in September of 1971 to consider and approve the proposed convention[2].

At the conference, it was generally agreed that the provisions of the new convention should follow the approach of the recently adopted Hague (Hijacking) Convention. Article 1 describes a series of acts which constitute offenses under the Montreal Convention. In developing Article 1 of the draft convention, the Legal Committee of ICAO determined that an act would not constitute an offense if the act or omission was done with legal authority, in self-defense, or with other legal justification[3]. The initial language of that Article goes

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[1]Minutes and Documents, International Conference on Air Law (Sep. 1971), ICAO Doc. 9081, pp. 1-2 (Exhibit 43).

[2]See generally Exhibit 43.

[3]Documents, ICAO Legal Committee (18th sess., Sep. - Oct. 1970), ICAO Doc. 8910, reprinted in ICAO Doc. 8936, Vol. 2, p. 16 (Exhibit 42).

even further by also requiring the intention to deliberately commit an unlawful act. It provides that "any person commits an offense if he unlawfully and intentionally" performs one of the listed acts.

It is clear from an examination of the terms of the Convention and its history that it does not relate to the actions of States against civil aircraft. The object and purpose of the Convention, and its companion convention on hijacking, was to prevent and deter individual saboteurs and terrorists from unlawfully interfering with civil aviation and to ensure the punishment of such individuals. (Again, individual terrorists might be covertly directed or assisted by States in particular incidents; that, however, is not the situation in the present case.)

Section II. Subsequent Practice in the Application of the Montreal Convention Further Establishes That the Convention Does Not Apply to the Actions of States Against Civil Aircraft.

When considering the context of the terms of a treaty, it is appropriate to take into account any subsequent practice in the application of the treaty which establishes the agreement

of the parties regarding its interpretation[1]. In examining subsequent practice with respect to the Montreal Convention, it is particularly useful to look to actions taken by ICAO, because ICAO is the principal international organization responsible for matters relating to civil aviation and was responsible for producing the Montreal Convention and other Conventions on civil aviation[2]. Moreover, all of the parties to the Montreal Convention are members of ICAO.

Since the Montreal Convention entered into force in 1973, ICAO has considered two previous incidents involving the shootdown of a civilian airliner by the forces of a State. While ICAO condemned those uses of force against civil aircraft, it did not rely upon the Montreal Convention in

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[1]See Vienna Convention on the Law of Treaties, Art. 31(3)(b), reflecting customary international law.

[2]Art. 44 of the Chicago Convention assigns to ICAO the functions of developing the principles and techniques of international air navigation and fostering the planning and development of international air transport so as to ensure the safe and orderly growth of international civil aviation throughout the world. For example, ICAO was responsible for developing the Tokyo Convention of 1963 and the Hague Convention of 1970, upon which the Montreal Convention was modelled, as well as the Rome (Terrorism) Convention of 1980.

making these condemnations, nor did the States whose nationals were affected. On the contrary, ICAO has responded to incidents of State action against civilian aircraft by considering the adoption of new international agreements that would address such acts.

ICAO has not referred to the Montreal Convention in condemning actions of States against civilian aviation. On 21 February 1973, military aircraft of the Government of Israel deliberately shot down a Libyan civilian airliner that was off-course, flying over Israeli military sites in the Sinai, which was a highly sensitive military area. The Montreal Convention had entered into force less than a month before the incident, on 26 January 1973. Israel and nearly twenty other ICAO members had already become parties. Nonetheless, the Montreal Convention never entered into the intense ICAO discussion of the incident.

The ICAO Assembly discussed the incident at an extraordinary session that met from 27 February to 2 March 1973[1]. Over forty delegates made statements on the

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[1] See Minutes, ICAO Assembly (19th sess. - extra., Feb. - Mar. 1973), ICAO Doc. 9061, pp. 17-64 (Exhibit 45).

incident. Most of the speakers strongly denounced Israel's action. During the politically charged debate, delegates characterized Israel's deliberate downing of a civilian airliner as a "violation of international law", and a violation of the Chicago Convention[1]. No delegate, however, mentioned the Montreal Convention. On the contrary, the delegate from Pakistan stated:

> "This incident had given a new dimension to the problem of unlawful interference with international civil aviation. So far, it had been the problem of interference by individuals for which ICAO had been trying to find a solution. Now, thousands of passengers on aircraft operating in troubled areas of the world faced another kind of threat, which might give rise to serious doubts about the safety of civil aviation generally[2]."

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[1]The Yugoslavian delegate described the action as a "clear violation of international law as well as of the principles and purposes of the International Civil Aviation Organization". Exhibit 45, p. 40. More particularly, many delegates stated that the action was a violation of the Chicago Convention. See, e.g., ibid., p. 35 (statement of Lebanon), p. 40 (statement of Senegal), p. 41 (statement of Malaysia), p. 44 (statement of Burundi).

[2]Exhibit 45, p. 43.

After considering the incident, the Assembly adopted a resolution condemning the Israeli action and instituting an investigation[1].

The ICAO Council considered the report of the investigation at its 79th session in June 1973. Again, no delegate raised the Montreal Convention[2]. The Council adopted a resolution in which the Council recalled Israel's actions, stated that it was "convinced that such actions constitute a serious danger against the safety of international civil aviation," "recogniz[ed] that such attitude is a flagrant violation of the principles enshrined in the Chicago Convention," "strongly condemn[ed] the Israeli action", and urged Israel "to comply with the aims and objectives of the Chicago Convention[3]."

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[1]Exhibit 45, Res. A19-1, p. 11.

[2]Minutes, ICAO Council (79th sess., June 1973, closed), ICAO Doc. 9073 (Exhibit 47).

[3]Action of the ICAO Council (79th sess., May - June 1973), ICAO Doc. 9097, p. 33 (Exhibit 46).

Neither of these resolutions mentioned the Montreal Convention. This omission must have been deliberate, since the delegates to the Assembly and the Council were familiar with the terms of the Montreal Convention, which (as noted above) had been adopted at a September 1971 international conference convened under ICAO's auspices, had recently entered into force, and was in force with respect to Israel.

More recently, on 1 September 1983, a Soviet military airplane deliberately shot down a Korean civil airliner after Soviet authorities had tracked the aircraft for over two hours by radar and visually tracked the aircraft for over twenty minutes. Again, the Soviet Union and Korea were parties to the Convention at the time of the incident, but the Convention was not discussed during intense ICAO debate.

On 15 and 16 September, the ICAO Council met in extraordinary session to discuss the incident[1]. Many delegates strongly condemned the Soviet action. And, as in ICAO's consideration of the 1973 shootdown, while delegates

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[1] See Minutes, ICAO Council (extra. sess., Sep. 1983), ICAO Doc. 9416 (Exhibit 55).

described the incident as a violation of international law and of the Chicago Convention[1], they did not cite the Montreal Convention.

The Council adopted a resolution recognizing the airliner's destruction as incompatible with the Chicago Convention, and directing the Secretary General to investigate the incident[2]. There was no mention in the resolution of the Montreal Convention. On 1 October 1983, the ICAO Assembly

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[1]For example, the delegate of the Federal Republic of Germany stated that "the spirit and the principles of the ICAO Convention and its Annex 2 have obviously been violated." Exhibit 55, p. 17. The delegate of the United States said that the incident violated "not only the basic principles set forth in the Convention, but also the fundamental norms of international law enshrined in the Charter of the United Nations and established firmly in the practice of the civilized world." Ibid., p. 23. The delegate of the United Kingdom stated: "My government regards such explanations as have been given [by the Soviet Union] as falling well short of valid justification for the actions of the Soviet military authorities in international law." Ibid., p. 36. The delegate of Jamaica condemned the shootdown "as a grave violation of international law, particularly in relation to the safety regulations of the International Civil Aviation Organization of which the USSR is a member." Ibid., p. 38.

[2]Exhibit 55, Appendix A.

endorsed the resolution and urged ICAO Member States to co-operate in its implementation, without mentioning the *Montreal Convention*[1].

On 6 March 1984, after considering the report of ICAO's investigation into the incident, the ICAO Council adopted a further resolution condemning the Soviet action. In the discussion, delegates condemned the action as a violation of the Chicago Convention, but not the Montreal Convention[2]. The resolution again specifically cited the Chicago Convention and did *not* mention the Montreal Convention[3].

If ICAO or the parties to the Montreal Convention (all of whom are members of ICAO) construed Article 1 of the Convention as applying to the actions of States against civil aircraft, the resolutions and debates leading to their adoption would have stated that the Montreal Convention, as well as the

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[1]Reports and Minutes, Exec. Comm., ICAO Assembly (24th sess., Sep. - Oct. 1983), ICAO Doc. 9409, pp. 10-15 (Exhibit 53); Minutes, ICAO Assembly (24th sess., Sep. - Oct. 1983), ICAO Doc. 9415, pp. 160-167 (Exhibit 54).

[2]Minutes, ICAO Council (111th sess., Feb. - Mar. 1984), ICAO Doc. 9441 (Exhibit 58).

[3]Exhibit 58, p. 106.

Chicago Convention, had been violated. The fact that the Montreal Convention was not relied upon reflects the understanding that it did not apply to such actions.

That conclusion is further supported by ICAO's response to the shootdown of Iran Air Flight 655. Although that incident was very different from the Israeli and Soviet shootdowns (in that it occurred while the USS Vincennes was defending itself during the course of active hostilities against what it believed was a military aircraft), it is noteworthy that none of the delegates, including the observer from Iran, mentioned the Montreal Convention during their discussions of Iran Air Flight 655[1]. Rather, as discussed below, many delegates

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[1]Minutes, ICAO Council (extra. sess., 13 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/1 (Exhibit 13); Minutes, ICAO Council (extra. sess., 14 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/2 (Exhibit 14); Minutes, ICAO Council (125th sess., 5 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/12 (Exhibit 15); Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/13 (Exhibit 16); Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/14 (Exhibit 17); Minutes, ICAO Council (125th sess., 14 Dec. 1988), ICAO Doc. DRAFT C-Min. 125/18 (Exhibit 18); Minutes, ICAO Council (126th sess., 13 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/18 (Exhibit 19); Minutes, ICAO Council (126th sess., 15 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/19 (Exhibit 20); Minutes, ICAO Council (126th sess., 17 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/20 (Exhibit 21).

urged the prompt ratification of Article 3 bis of the Chicago Convention, which expressly addresses unlawful interference by States. The resolution adopted by the Council on 17 March 1989 appealed to States to ratify Article 3 bis of the Chicago Convention, but did not mention the Montreal Convention.[1] Similarly, at the July 1988 Security Council discussion of the incident, no representative, including the representative of Iran, mentioned the Montreal Convention[2].

The response of ICAO to the use of force by States against international civil aviation has been to consider new international agreements that would address the problem. As is demonstrated above, neither ICAO nor any of its Members relied on the provisions of the Montreal Convention in condemning the 1973 and 1983 incidents. Instead, in 1973, and again in 1984, ICAO considered new proposals that would address the use of force by States against civilian aircraft.

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[1]Summary, ICAO Council (126th sess., 17 Mar. 1989), ICAO Doc. C-DEC 126/20 (Exhibit 22).

[2]Minutes, U.N. Sec. Council (2818th to 2821st meetings, July 1988), U.N. Docs. S/PV.2818 - S/PV.2821. Copies of these documents have been deposited in the Registry pursuant to Article 50 of the Rules of Court.

In August 1973, approximately six months after ICAO condemned Israel for deliberately shooting down a Libyan aircraft over the Sinai, Israeli military aircraft diverted and seized a Lebanese civilian airliner chartered by Iraqi Airways. Although Israel soon released the airliner, the ICAO Council met in extraordinary session and adopted a resolution stating, in part, that the Council "considers that these actions by Israel constitute a violation of the Chicago Convention[1]."

In the same resolution, the Council noted that the ICAO Assembly and a Diplomatic Conference on Air Law were about to meet concurrently in Rome. The Assembly was to consider proposals to amend the Chicago Convention to provide for enforcement of the obligations assumed by States under the Hague and Montreal Conventions (e.g., their obligation to prosecute or extradite individual offenders). The Conference was to consider new agreements to the same end. The Council recommended to the Assembly "that it include in its agenda

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[1]Action of the ICAO Council (extraordinary & 80th sess., Aug., Oct. - Dec. 1973), ICAO Doc. 9098, p. 57 (Exhibit 52).

consideration of these actions [by Israel] in violation of the Chicago Convention" and it recommended to the Conference that it "make provision in the conventions for acts of unlawful interference committed by States[1]." If Article 1 of the Montreal Convention already applied to such acts, then the Council's recommendation to the Conference to "make provision in the conventions" for such acts would have been unnecessary.

The proceedings of the Assembly and Conference confirm the understanding that Article 1 of the Montreal Convention was understood not to apply to the actions of States against civil aircraft. After the Assembly discussed Israel's force-down of the Lebanese aircraft, it adopted Resolution A20-1, condemning

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[1]Exhibit 52, p. 57.

the act as a violation of the Chicago Convention[1]. It then convened its Executive Committee to consider proposals to amend the Chicago Convention[2].

The Executive Committee initially had before it three proposals to amend the Chicago Convention to incorporate

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[1]Res. A20-1, Resolutions and Plenary Minutes, ICAO Assembly (20th sess. - extra., Aug. - Sep. 1973), ICAO Doc. 9087, p.14 (Exhibit 48).

[2]Rule 15 of the Standing Rules of Procedure of the ICAO Assembly, states that the Committee consists of the Presidents of the Assembly and Council and the Chief Delegates of Contracting States. ICAO Doc. 7600/5 (Exhibit 41). It has jurisdiction to consider and report on any item of the Assembly's agenda that the Assembly refers to it. Ibid., Rule 15(e).

provisions of the Hague and Montreal Conventions[1]. Later, during the Executive Committee's discussions, Switzerland, France, and the United Kingdom jointly introduced an additional proposed amendment to the Chicago Convention regarding acts of unlawful interference by States "[t]o meet the wish of the ICAO

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[1]One proposal, by France, would have incorporated the operative provisions of the Hague Convention into the Chicago Convention, and provided that Article 94(b) of the Chicago Convention would apply. See Working Paper, ICAO Assembly (20th sess. - extra., Aug - Sept. 1973), ICAO Doc. A20-WP/2 (Exhibit 49). Therefore, any State that did not ratify the proposed amendment within one year would cease to be a member of ICAO. The other proposal, by the United Kingdom and Switzerland, would have amended the Chicago Convention so that (1) parties would be obligated to extradite or prosecute persons alleged to have committed acts defined as offenses by the Hague and Montreal Conventions, and to facilitate the continuation of the journey of the passengers and crew, and (2) Article 87 of the Chicago Convention would apply to States that the ICAO Council decided had not complied with these obligations, so that such States would not be allowed to operate their airlines through other States' airspace. Exhibit 49, ICAO Doc. A20-WP/3.

The third proposal, which Switzerland raised at the beginning of the Executive Committee meeting on behalf of it, France, and the United Kingdom, provided that Articles 1 to 11 of the Hague Convention and Articles 1 to 13 of the Montreal Convention would become part of the Chicago Convention when two-thirds of the parties to the Chicago Convention became parties to the other two Conventions. See Reports and Minutes, Exec. Comm., ICAO Assembly (20th sess. - extra., Aug - Sept. 1973), ICAO Doc. 9088, pp. 7-9 (statement of Switzerland) (Exhibit 50); Exhibit 49, ICAO Doc. A20-WP/4, p. 4 (text).

Council . . . [in] its resolution of 20 August[1]." That amendment would have required States not to interfere by force or threat of force with an aircraft of another State, subject to the provisions of the U.N. Charter, the Chicago Convention, and any agreement between the States concerned[2].

To guide the delegates' discussion of the proposals, the Chairman of the Committee prepared Questions of Principle. Question 3 stated "Does the Executive Committee wish to include, in the Chicago Convention, provisions of the Hague and Montreal Conventions?" Question 5 stated "Does the Executive Committee wish to include in the Chicago Convention provisions concerning acts of unlawful interference committed by States?[3]" The Committee voted yes to both Questions[4].

No delegate responded that Question 3 and Question 5 overlapped, or said that an affirmative answer to Question 3 would necessarily make Question 5 redundant, as they would have

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[1]Exhibit 50, p. 8; see Exhibit 50, pp. 34, 60.

[2]Exhibit 49, ICAO Doc. A20-WP/15.

[3]Exhibit 49, ICAO Doc. A20-WP/14.

[4]Exhibit 50, pp. 59, 63-64.

if the Montreal and Hague Conventions were understood to apply to the actions of States against civil aircraft. On the contrary, in discussing the Questions of Principle, the delegate of Egypt stated that the Committee "should not equate the failure of a State to act in conformity with the provisions of the Hague and Montreal Conventions with the commission by a State of an act endangering international civil aviation[1]." The delegate of Switzerland noted that those two Conventions "dealt with measures to be taken with respect to individuals who committed acts of unlawful interference[2]."

The discussion within the Committee of the Swiss/French/UK proposal on unlawful interference was brief[3]. Again, no delegate stated that the proposal was unnecessary or redundant because of the Montreal Convention. On the contrary, in discussing the proposals in general, the Swedish delegate stated that "his delegation thought it quite appropriate for

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[1]Exhibit 50, p. 41.

[2]Exhibit 50, p. 41.

[3]Exhibit 50, pp. 117-119.

the ICAO Assembly or Council to consider the kinds of offences covered by the Hague and Montreal Conventions and also acts of unlawful interference with international civil aviation committed by States[1]."

Thereafter, a working group prepared a draft resolution containing the text of a proposed amendment to the Chicago Convention. The proposed amendment incorporated the proposals and suggestions made during the Executive Committee debate into a proposed new Chapter XVI bis to the Chicago Convention. Several articles in the Chapter would have amended the Chicago Convention to include the obligations of States under the Hague

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[1]Exhibit 50, p. 110 (emphasis added).

and Montreal Conventions, thus subjecting States that violated those obligations to the enforcement measures provided for in the Chicago Convention[1].

The draft Chapter XVI bis also included a provision, Article 79 quater, based on the Swiss/French/UK proposal on unlawful State interference with civil aviation. After a brief

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[1]In particular, the Chapter included Article 79 bis, which said "When an act of unlawful seizure of an aircraft has been committed or when, due to the commission of an unlawful act against the safety of civil aviation, a flight has been delayed or interrupted," States must facilitate the continuation of the journey of the passengers and crew; Article 79 ter, which would have obligated States to report to the Council on acts of unlawful seizure of an aircraft, unlawful acts against the safety of civil aviation, action taken pursuant to Art. 79 bis, and measures taken by States with regard to the offender; and two articles (79 quintum and sextum) that would have incorporated Articles 1-11 of the Hague Convention and Articles 1-13 of the Montreal Convention into the Chicago Convention. Exhibit 49, ICAO Doc. A20-WP/30.

discussion of the Article, the Executive Committee approved it by a vote of 52 in favor, none opposed, and 39 abstaining[1]. As approved, the Article stated:

> "Each Contracting State undertakes to refrain from the use or threat of force against civil aircraft, airports or air navigation facilities of another State, subject to the provisions of the Charter of the United Nations and this Convention. This Article shall, in no event, be interpreted as legitimizing the use or threat of force in violation of the rules of international law[2]."

Consistent with the circumstances surrounding the development of this proposal, no delegate indicated that Article 79 quater was redundant, or would simply reproduce obligations already found in the Montreal or Hague Conventions. On the contrary, to the extent that the delegates addressed the point in their remarks, they expressly confirmed that the provision would go beyond the existing scope of those agreements.

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[1]Exhibit 50, pp. 145-146.

[2]Exhibit 50, pp. 143, 145. Upon the submission of the Executive Committee's report to the Assembly, the wording of the second sentence was amended in the Assembly to read "This Article shall not be interpreted as authorizing in any circumstances the use or threat of force in violation of the rules of international law." Exhibit 48, pp. 123-124.

For example, the Belgian delegate asked whether Article 79 bis was meant to apply "not only to acts of unlawful interference covered by the Hague and Montreal Conventions but also to an act committed by a State in contravention of Article 79 quater[1]." The French delegate replied that Article 79 bis would apply to all acts of interference with international civil aviation[2]. The Belgian delegate then pointed out that Article 79 ter would be broader than the corresponding reporting obligations in Article 11 of the Hague Convention and Article 13 of the Montreal Convention, since "the reporting obligation [of Article 79 ter] would cover also acts of unlawful interference committed by States[3]." The delegate from Barbados agreed that because they covered acts of State

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[1]Exhibit 50, p. 131.

[2]Exhibit 50, p. 131.

[3]Exhibit 50, p. 132. The Belgian representative repeated this understanding of Article 79 ter just before the vote on the Article in the Assembly. Exhibit 48, p. 129.

interference, Articles 79 bis and ter "were broader than the corresponding provisions in the Hague and Montreal Conventions[1]."

The Executive Committee referred Chapter XVI bis to the Assembly[2]. There was no substantive discussion of Article 79 quater before the Assembly vote, which was 65 in favor, none opposed, and 29 abstentions[3]. Because it did not receive the necessary two-thirds majority of members of the Assembly, the Article was not approved.

On the last day of the Assembly, debate on Article 79 quater was reopened. In supporting the motion to reopen debate on the Article, the delegate from Bahrain stated that "he had been shocked by the failure of Article 79 quater, which covered

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[1]Exhibit 50, pp. 133; see also ibid., p. 141 (statement of Syria noting that a difference between Articles 79 bis and ter and their counterparts in the Hague and Montreal Conventions was that the former "covered acts committed by States in contravention of Article 79 quater").

[2]Exhibit 48, p. 122.

[3]See Exhibit 48, p. 130.

a kind of unlawful interference with international civil aviation not dealt with in any existing conventions -- the use or threat of force by States against civil aircraft, airports and air navigation facilities[1]." Delegations proposed amendments to the Article, but it again failed to receive the two-thirds vote necessary for adoption[2].

Like the Assembly, the Conference focused on proposals to strengthen States' existing obligations under the Hague and Montreal Conventions. Although the Conference did not have before it proposals like Article 79 quater designed specifically to address interference by States with civil aviation, the delegates' statements nevertheless indicate that they understood the Hague and Montreal Conventions not to apply to actions of States against civil aircraft.

A draft convention proposed by Denmark, Finland, Norway, and Sweden would have allowed a State to convene the ICAO Council to consider possible violations by another State of its obligations under the Hague or Montreal Conventions, and would

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[1]Exhibit 48, p. 134.

[2]Exhibit 48, p. 133-141.

have provided that the Council could investigate the matter and make appropriate recommendations[1]. The proposal took the language defining violations directly from Article 1 of the Hague and Montreal Conventions. If that language were understood to cover State acts against civil aviation, the new convention would have covered the acts of States as well as of individuals. But the sponsors expressly said that their proposal did not extend to State interference with civil aviation. In introducing the convention, the Swedish delegate stated that it:

> "established a machinery and a procedure for dealing with the failure of a State, after an act of unlawful interference had been committed or attempted, to take the sort of action required under the Hague and Montreal Conventions. . . . He would point out, in passing, that it would be fairly easy to extend it to cover acts committed by States, for which the Council, in its resolution of 20 August, had recommended that the Conference make provision[2]."

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[1]Minutes and Documents, ICAO International Conference on Air Law (Aug.- Sep. 1973), ICAO Doc. 9225, pp. 341-343 (Exhibit 51).

[2]Exhibit 51, p. 98.

The delegate of Finland later repeated that the proposal did not currently cover acts of unlawful interference by a State, although it could be amended to do so[1].

No delegate challenged this reading of the Hague and Montreal Conventions, or otherwise asserted that the Montreal Convention already covered acts of States against civil aviation.

Belgium complained that this proposal was too narrow, since it was limited to the legal obligations of the State under the Hague and Montreal Conventions, and introduced its own proposal[2]. The Belgian proposal would have allowed any State Party to complain to an ICAO Commission of Experts if it "considers that an act or omission on the part of another Contracting State constitutes a threat to the safety of

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[1]Exhibit 51, p. 143.

[2]Exhibit 51, pp. 100, 367-380.

international civil aviation[1]." The Belgian delegate explained that this provision "anticipat[ed] the recommendation made by the Council in its resolution of 20 August 1973[2]." Several delegates stated that the Belgian proposal was too vague[3], but none stated that the Montreal or Hague Conventions already covered certain acts by States against civil aviation.

In the end, the Conference and the Assembly were unable to agree on any new conventions or amendments to the Chicago Convention.

At the September 1983 ICAO Council meeting on the Korean Air Lines incident, France proposed "a full and impartial enquiry" of the incident and put forward "technical proposals aimed at preventing a repetition of such events[4]." In

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[1]Exhibit 51, p. 369 (Article 3(1)). The Commission would then be able to investigate the allegation and make recommendations to States to "take the protective measures it deems necessary to ensure the security of international civil aviation to the exclusion of penal or coercive measures." Ibid., p. 370 (Article 3(6)).

[2]Exhibit 51, p. 101.

[3]See, e.g., Exhibit 51, p. 147 (statement of Argentina), p. 156 (statement of Mexico).

[4]Minutes, ICAO Council (Sep. 1983), op. cit., Exhibit 55, p. 10.

addition, France requested "all States, through this Council, to adopt with the highest priority an amendment to the Convention on International Civil Aviation involving an undertaking by all Member States of the Organization to refrain from recourse to the use of force against civil aircraft subject to the provisions of the Charter of the United Nations[1]."

Many representatives spoke in support of the French proposal to amend the Chicago Convention[2]. In their statements of support, some representatives referred to the similar proposals raised in 1973 at the Rome Conference, and expressed their disappointment that those proposals had not been approved[3]. Notably, no representative referred to the Montreal Convention.

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[1]Exhibit 55, p. 10; see Working Paper, ICAO Council (extra. sess.), ICAO Doc. C-WP/7694 (text of French proposal with addendum) (Exhibit 56).

[2]See, e.g., Exhibit 55, pp. 14-15 (statement of Japan), p. 17 (statement of the Federal Republic of Germany), p. 29 (statement of Colombia), p. 31 (statement of Denmark), p. 53 (statements of Venezuela and the United States).

[3]Exhibit 55, p. 17 (statement of Nigeria), p. 21 (statement of Venezuela).

The Council agreed by consensus "to include in its work programme and examine with the highest priority the question of an amendment to the Convention on International Civil Aviation involving an undertaking to abstain from recourse to the use of force against civil aircraft[1]." The Council then voted to convene an extraordinary session of the ICAO Assembly to meet in 1984 to consider the amendment[2].

The ICAO Assembly met from 24 April to 10 May 1984. After discussion of ways to prevent unlawful interference by States with civil aircraft, the Executive Committee proposed that the Assembly approve a new Article 3 bis, which states in part,

> "The Contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision should not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations[3]."

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[1]Exhibit 55, pp. 53-54.

[2]Exhibit 55, pp. 55-56.

[3]Reports and Minutes, Exec. Comm., ICAO Assembly (25th sess. - extra., Apr. - May 1984), ICAO Doc. 9438, p. 3 (Exhibit 60); see Protocol Relating to an Amendment to the Convention on International Civil Aviation, signed at Montreal on 10 May 1984, ICAO Doc. 9436. See Exhibit 61.

The Assembly approved the proposal and submitted it to member States for ratification[1].

Again, neither the resolutions nor the discussion in ICAO stated that the Montreal Convention already covered acts by States against civil aircraft[2].

The fact that ICAO has never applied the Montreal Convention to acts of States against civil aviation, even when it has condemned those acts as contrary to international law, unequivocally confirms that the Montreal Convention does not address the actions of States against civil aircraft. When

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[1]Art. 3 bis has not yet entered into force although 61 States have ratified it. In accordance with para. 4(d), the Protocol shall come into force on the date of deposit of the 102nd instrument of ratification. (Exhibit 61). Neither the United States nor Iran had ratified Art. 3 bis at the time of the incident.

[2]A large number of delegates stated that the obligation for States not to use force against civil aviation already existed in general international law. Exhibit 60, p. 3 (statement of France), p. 19 (statement of the Republic of Korea), p. 22 (statement of Jamaica), p. 30 (statement of Canada), p. 36 (statement of Australia), p. 44 (statement of the United States), p. 45 (statement of the Netherlands), p. 47 (statement of Ireland), p. 61 (statement of Switzerland), p. 75 (statement of Brazil). None, however, suggested that the Montreal Convention was one of the sources of that obligation, much less stated that the provision simply incorporated Article 1 of the Montreal Convention into the Chicago Convention.

ICAO's affirmative steps to draft provisions in the Chicago Convention to provide for such action are also considered, it is clear that the subsequent practice with respect to the Montreal and Chicago Conventions demonstrates that Article 1 of the Montreal Convention does not apply to such State action.

Section III. The Montreal Convention Was Never Intended to Address the Actions of Military Forces Engaged in Active Hostilities.

As demonstrated above, the Montreal Convention was intended to prevent and deter saboteurs and terrorists from unlawfully interfering with civil aviation and endangering innocent lives. The drafters of the Convention did not discuss the actions of military forces acting on behalf of a State during hostilities, and there is no reason to believe that they intended the Convention to extend to such actions. Indeed, if the drafters had intended to address such actions, they would necessarily have had to address many other aspects of the actions of military forces during armed conflict.

The laws of armed conflict are firmly established in customary international law as a well-developed body of law

separate from the principles of law generally applicable in times of peace[1].

One fundamental aspect of the laws of armed conflict is the inherent right of self-defense, recognized in Article 51 of the Charter of the United Nations[2]. This right includes the right of individual military units to defend themselves from attack. The conditions calling for the application of this inherent right of self-defense must be exercised in the judgment of the officers responsible for the safety of those military units and their personnel. The application of these

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[1]See F. Kalshoven, Constraints on the Waging of War, p. 7 (1987) (Exhibit 77).

[2]Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." Following the events of 3 July 1988, the United States submitted a letter to the President of the Security Council reporting the actions that its military forces had taken in the exercise of its inherent right of self defense. Letter dated 6 July 1988 from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, United Nations Document S/19989 (Exhibit 27).

laws of armed conflict does not depend on the recognition of the existence of a formal state of "war", but on whether an "armed conflict" exists[1]. Although it may be difficult to define in the abstract all of the circumstances that constitute an armed conflict, there is universal agreement that hostile operations carried out by military units of one country against the military units of another (such as was occurring between the military forces of the United States and Iran at the time that Iran Air Flight 655 was downed) constitute an armed conflict[2].

The United States consistently applied the law of armed conflict, including the 1949 Geneva Conventions, to all of its hostile encounters with Iranian forces during this period. For example, Iranian crewmen captured during the incident involving the Iran Ajr (see Annex 1) were accorded prisoner of war status and were released to the Omani Red Crescent Society for their return to Iran.

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[1]International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Y. Sandoz, C. Swinarski, B. Zimmermann, eds.), pp. 39-40 (1987) (hereinafter the "ICRC Commentaries") (Exhibit 78); F. Kalshoven, op. cit., Exhibit 77, p. 27.

[2]ICRC Commentaries, op. cit., Exhibit 78, p. 40.

Infringements on the laws of armed conflict through international agreements primarily addressing situations other than armed conflict are not to be presumed. There is no indication that the drafters of the Montreal Convention intended it to apply to military forces acting in armed conflict. If they had so intended, they would have had to address a myriad of issues relating to acts by military forces. For example, the First Additional Protocol to the Geneva Conventions of 1949 applies to medical aircraft during armed conflict[1]. It addresses, inter alia, the status of medical aircraft in areas controlled by an adverse Party (Article 27), in areas not controlled by an adverse Party (Article 25), and in zones in which opposing forces are in contact (Article 26). It lists restrictions on the use of medical aircraft (Article 28), provides for means of

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[1] "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)", reprinted in 72 Am. J. Int'l Law (1978), pp. 457, 467-470 (Exhibit 79).

notification of the aircraft's presence to a Party (Article 29), and provides for inspection of the aircraft by Parties to ensure that it is a medical aircraft acting in accordance with the Protocol (Article 30).

Similar provisions on identification, restrictions, notification, and inspection would have been required if the Montreal Convention had been intended to apply to acts by military forces in armed conflicts. Most obviously, the Convention would have had to address civilian aircraft that stray into combat zones, and under what conditions such aircraft were no longer protected by the terms of the Convention. Article 26 of the First Protocol, for example, states that medical aircraft flying over a combat zone "operate at their own risk" absent an agreement between the competent military authorities to the conflict[1]. Similarly, the 1923 Hague Rules of Aerial Warfare stated that if:

> "a belligerent commanding officer considers that the presence of an aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he

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[1]Exhibit 79, p. 468.

> may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which it has had notice issued by the belligerent commanding officer, may be fired upon[1]."

It is inconceivable that the drafters of the Montreal Convention, who never mentioned any of these issues, let alone addressed them in the Convention, intended it to apply to the actions of of the armed forces of States.

When, 14 years later, the ICAO Assembly drafted Article 3 bis of the Chicago Convention, discussed above, it was careful to include in the Article a statement that it "should not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations," which included the inherent right of self-defense. The participants at the Montreal conference would have included a similar provision if they had intended the Montreal Convention to modify the laws of armed conflict, and particularly if they had intended to address actions by military forces in armed conflict. There is no such provision in the Montreal Convention. Quite to the contrary, the only reference to

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[1] Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, pp. 255-256 (1923) (Exhibit 80).

military forces in the Convention is Article 4(1), a provision that effectively excludes from the definition of offenses actions directed at military aircraft.

The subsequent practice of States with respect to the Montreal Convention confirms that it was the understanding of ICAO and its member States that the Convention does not apply to actions of the armed forces of States. As noted above, ICAO did not condemn either the 1973 Israeli action or the 1983 Soviet action as a violation of the Convention. Nor did any delegation suggest during the extensive deliberations in ICAO that the pilots of the military aircraft involved violated the Convention. This practice simply confirms that the Convention was not intended and has not been understood to apply to actions taken by members of the armed forces of a State acting under military command.

There have been a number of instances since the Montreal Convention in which military aircraft have destroyed civilian

aircraft in the context of an armed conflict[1]. The ICAO Council has never condemned any of these actions as violations of the Montreal Convention.

It is noteworthy that one of these incidents occurred in February 1986, during the Iran-Iraq War, when Iran reported that Iraqi fighters had shot down an Iranian civilian aircraft. In Iran's letters reporting the incident to the President of the ICAO Council and to the U.N. Secretary-General, Iran did not describe the action as a

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[1] See, e.g., "Downed French Aircraft Found in Gaza Province", FBIS, 4 Aug. 1981, p. U1; "Government Confirms Role in French Plane Downing", FBIS, 5 Aug. 1981, p. U3 (French civilian airliner reportedly shot down by Mozambique in Mozambique airspace); "Iraqi Troops Push Back Iranians in Key Gulf Area", N.Y. Times, 21 Feb. 1986; "6 M.I.P. Died on Plane, Iran Says", N.Y. Times, 22 Feb. 1986, p. L+5 (Iran reported that Iraq shot down an Iranian civilian airplane); "Mozambique Downs Plane", N.Y. Times, 8 Nov. 1987, p. 26; "Communique Issued on Malawi Aircraft Incident, FBIS, 30 Nov. 1987, p. 10 (Air Malawi aircraft shot down by Mozambique). See Exhibit 35.

violation of the Montreal Convention, despite the fact that both it and Iraq were at the time parties to the Convention. Instead, it cited only the Chicago Convention[1].

It is clear that from the plain meaning of the terms in their context and in light of the object and purposes of the Convention, the history of the Convention and subsequent practice of States in regard to it, not only that the Montreal Convention does not address the actions of States against civil aircraft, but also that the Convention was not intended in any way to affect or add to the laws of armed conflict.

As clearly demonstrated above in Part I, Chapter II, the actions of the United States upon which Iran's claims in this case rest were taken by the military forces of the United

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[1]Letter dated 10 Mar. 1986 from the Representative of the Islamic Republic of Iran to the ICAO Council President, ICAO Doc. PRES AK/106; Letter dated 20 Feb. 1986 from the Representative of the Islamic Republic of Iran to the Secretary-General, U.N. Doc. S/17850; Letter dated 25 Feb. 1986 from the Representative of the Islamic Republic of Iran to the Secretary-General, U.N. Doc. S/17863; Letter dated 5 Mar. 1986 from the Representative of the Islamic Republic of Iran to the Secretary-General, U.N. Doc. S/17896 (Exhibit 81).

States engaged in active hostilities with military forces of Iran. Under customary international law and relevant conventions, the actions of the parties in such a situation are governed by the laws of armed conflict.

It follows from the above that the Convention does not apply to the actions of the USS Vincennes on 3 July 1988. The actions of the United States that occurred in regard to the incident of 3 July 1988 were taken by the captain and crew of the USS Vincennes, with the authorization of the U.S. Commander of the Joint Task Force Middle East, while they were engaged in active hostilities provoked by Iranian armed forces. These were actions of the United States, and not of "persons" as contemplated by Article 1.

It is clear that the Montreal Convention was not intended to address such actions, whether under Article 1, prohibiting certain actions by individuals, or under Articles 3 and 10(1), imposing certain affirmative obligations on Contracting States

in regard to such individuals[1]. (Again, this is not a situation where individual terrorists might have been covertly directed or assisted by a State.)

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[1]The formal investigation by United States military into the circumstances surrounding the downing of Iran Air Flight 655 included an investigation into and recommendations regarding possible disciplinary and administrative action against any United States naval personnel associated with the incident. Based upon an exhaustive analysis of all of the available information, that investigation concluded that no disciplinary or administrative action should be taken. ICAO Report, Appendix E, p. E-55. In approving the recommendations regarding disciplinary and administrative action, the U.S. Chairman of the Joint Chiefs of Staff stated:

> "It is my view that, understanding the entire context, reasonable minds will conclude that the Commanding Officer did what his nation expected of him in the defense of his ship and crew. This regrettable accident, a by-product of the Iran-Iraq war, was not the result of culpable conduct onboard VINCENNES."

Ibid., p. E-70.

PART V

THE TREATY OF AMITY PROVIDES NO BASIS FOR JURISDICTION IN THIS CASE

In its Memorial, Iran asserts for the first time that the 1955 Treaty of Amity between Iran and the United States constitutes an additional basis of jurisdiction for the Court[1]. Iran's inclusion of the Treaty of Amity in its Memorial as a basis of jurisdiction is striking because Iran, through its words and actions, for many years has consistently treated this Treaty as no longer in force. Nevertheless Iran expects this Court to ignore Iran's previous conduct under the Treaty and accept that it is "entitled to invoke its provisions[2]." The United States is compelled to bring to the Court's attention Iran's prior conduct with respect to its obligations under this Treaty, which shows that Iran is now asserting in bad faith its rights under the compromissory clause of the Treaty of Amity.

In the case concerning United States Diplomatic and Consular Staff in Tehran[3], the United States filed an Application before this Court asserting that it had

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[1] Iranian Memorial, para. 2.72.

[2] Iranian Memorial, para. 2.77.

[3] 1980 I.C.J. Reports, p. 3.

jurisdiction inter alia under Article XXI of the Treaty of Amity, the same basis of jurisdiction now pled by Iran in this case. The Government of Iran informed the Court that the United States' claims were not properly before the Court; indeed, Iran did not even appear before the Court in that case[1]. When the Court ultimately rendered its judgment, Iran did not comply with it. Now Iran expects this Court to allow Iran to bring the United States before the Court on the basis of the very same compromissory clause of the Treaty of Amity. This manifest abuse of its obligations under the Treaty should bar Iran from prevailing now in asserting its rights under the Treaty. As Sir Hersch Lauterpacht has written:

> "A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppel or the more generally conceived requirement of good faith[2]."

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[1] Ibid., pp. 18-19.

[2] Special Rapporteur Lauterpacht, "Report on the Law of Treaties", II Y.B. Int'l L. Comm'n, p. 90 at p. 144 (1953) (Exhibit 82); accord, Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 6, at p. 32; Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960, p. 192, at p. 213. See generally I.C. MacGibbon, "Estoppel in International Law", 7 Int'l & Comp. L.Q., p. 468 (July 1958).

Equally, a state cannot repudiate a treaty when it suits it to do so, and then assert it when it appears to be a useful basis of jurisdiction.

In a variety of cases before the Iran-U.S. Claims Tribunal, Iran also has asserted that the Treaty of Amity was terminated long before the incident of 3 July 1988. The Tribunal has rejected Iran's assertion and found that the Treaty was in force at the time the claims before it arose, that is, prior to January 1981, but never passed on the question of the Treaty's continuing validity after that time[1].

Nonetheless, the United States will not similarly engage in this type of manipulation by reversing its own past positions and asserting before this Court that the Treaty is not now in force between the United States and Iran, even though the previous decisions of the Court and the Claims Tribunal do not foreclose that possibility. In light of Iran's conduct, however, Iran is barred from now invoking the compromissory clause of the Treaty of Amity. At a minimum, in light of

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[1] See, e.g., Phelps Dodge v. Iran, Award No. 217-99-2, at p. 15 (19 Mar. 1986) ("No Party contends that the Treaty was ever terminated in accordance with its terms, but the Respondent suggests that the Treaty has been terminated by 'implication' as a result of economic and military sanctions imposed on Iran by the United States in late 1979 and 1980"); Amoco International Finance Corp. v. Iran, Award No. 310-56-3, at pp. 38-39 (14 July 1987) (Exhibit 84).

Iran's conduct, it is appropriate for the Court to be rigorous in determining whether Iran's sudden introduction of this Treaty as a basis of jurisdiction is sustainable.

The United States maintains that the Treaty does not provide such a basis for jurisdiction. First, by invoking the Treaty of Amity in its Memorial, Iran is seeking to transform the dispute brought before the Court in the Application into another dispute which is wholly different and much more expansive in character. Second, the Treaty of Amity is wholly irrelevant to the dispute that is the subject of Iran's Application. Third, as was the case for the compromissory clause of the Montreal Convention, Iran has made no effort to adjust by diplomacy its alleged dispute under the Treaty, as is required by the Treaty.

CHAPTER I

IN INVOKING THE TREATY OF AMITY IN ITS MEMORIAL, IRAN IS TRANSFORMING THE DISPUTE BROUGHT BEFORE THE COURT IN ITS APPLICATION INTO ANOTHER DISPUTE WHICH IS WHOLLY DIFFERENT AND MUCH MORE EXPANSIVE IN CHARACTER.

In its Memorial, Iran for the first time asserts the 1955 Treaty of Amity as a basis of the Court's jurisdiction[1]. Throughout Iran's efforts at the United Nations and ICAO to obtain condemnation of the United States for the incident of 3 July 1988, Iran never once asserted that the United States had violated the Treaty of Amity. In its Application, Iran neither referred to this treaty as a basis for jurisdiction nor asserted any claims arising under the treaty. Iran should not be permitted to raise the Treaty of Amity now.

In proceedings instituted by means of an Application pursuant to Article 40 of the Statute of the Court, the jurisdiction of the Court is founded upon the legal grounds specified in that Application. Article 38 of the Court's Rules requires that the Application "specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based." Iran asserts that after the filing of the

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[1] Iranian Memorial, para. 2.72.

Application an additional ground of jurisdiction may be brought to the Court's attention and may be taken into account by the Court; Iran supports this by citing to Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment (hereinafter Nicaragua, Jurisdiction)[1].

By introducing the Treaty of Amity in its Memorial, Iran in fact is transforming the dispute with respect to that Treaty into another dispute which is wholly different in character from that presented to the Respondent when it first appeared before the Court in this matter. In its Application, Iran stated that the facts of this case arose from a single incident: the destruction of an Iranian aircraft by a United

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[1] I.C.J. Reports 1984, p. 392, at pp. 426-427. Iran misinterprets the Court's ruling in the Nicaragua, Jurisdiction case. Although it is possible under the Statute and Rules of the Court for "the parties to transform the character of the case" through amendments in both their submissions, Societe Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 160, at p. 173, it is not possible for one party to unilaterally transform the case in the face of an objection by the other party. The decision in Nicaragua, Jurisdiction recognized this when it stated that additional grounds may not be taken into account if the result is "to transform the dispute brought before the Court by the application into another dispute which is different in character." I.C.J. Reports 1984, p. 427.

States warship[1]. Based on these facts, Iran requested a judgment from this Court on three points. First, Iran asked this Court to decide that "the ICAO Council decision" of 17 March 1989, regarding the destruction of the aircraft was erroneous. Second, Iran asked this Court to decide that the United States had violated the Montreal Convention by destroying the aircraft. Third, and finally, Iran asked to Court to declare that the United States is responsible to pay compensation to the Islamic Republic, in the amount to be determined by the Court, for these violations. Iran made absolutely no claim in its Application that the United States infringed upon its rights of commerce or navigation.

In its Memorial, however, Iran goes far beyond its initial factual statement to assert a new argument under the Treaty of Amity. No longer does Iran focus solely on the shootdown of Iran Air Flight 655, nor on the issue of the lawful use of force, but instead expands its complaint to cover the effect of U.S. military deployments in the Gulf, and of other U.S.

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[1] Iranian Application, section I.

actions not involving military force, on the commerical relations of Iran and the United States over an extended period of time.

In the Memorial's statement of facts, Iran discusses in depth the deployment of U.S. forces to the Gulf, the issuance of certain notices to airmen, the U.S. economic sanctions against Iran, and the "U.S. interference in civil aviation" in the Gulf, particularly involving Iranian aircraft[1]. None of these alleged factual matters are the basis of the claims set forth in Iran's Application.

Iran then discusses in its Memorial the applicable principles and rules of law in the case. In this section, with respect to the alleged failure to accord "fair and equitable treatment" under Article IV(1) of the Treaty, Iran refers to the "obligation not to interfere repeatedly with Iranian commercial aircraft[2]." With respect to the alleged failure under Article VIII to afford unrestricted trade, Iran states that this Court "has already held that the imposition of a

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[1] Iranian Memorial, paras. 1.36 - 1.57.

[2] Iranian Memorial, para. 3.66

general trade embargo violates the terms of a similar treaty provision calling for freedom of commerce[1]." In discussing the alleged violation of Articles IV(1) and X(1), Iran states that "the question arises in the context of this case whether repeated interferences with civil and commercial aircraft by one State's military forces, resulting in the destruction of a commercial airliner over the internal and territorial waters of the other State, is any less of a violation of Articles IV(1) and (X)1 of the Treaty of Amity[2]." Iran's application of the Treaty of Amity to the actual incident of 3 July 1988 is at best cursory. In stretching to find legal principles in the Treaty that connects it to the incident, Iran is reduced to introducing an entirely new factual element never discussed before by Iran relating to "the Islamic Republic's ability to purchase a replacement aircraft[3]."

In its section that purports to apply the law to the facts, Iran cites only one article of the Treaty of Amity, in a subsection entitled "The Deployment and Conduct of the U.S. Fleet in the Persian Gulf." According to Iran, this subsection deals with "the deployment and conduct of the U.S. fleet in the

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[1]Iranian Memorial, para. 3.66

[2]Iranian Memorial, para. 3.68.

[3]Iranian Memorial, para. 3.65.

Persian Gulf leading up to the incident"; this subsection is to be distinguished from the section dealing with "the actual shooting down of Iran Air Flight 655[1]." Iran asserts that, under Article X(1) of the Treaty, the United States breached its obligation "to guarantee to the Islamic Republic freedom of commerce and navigation[2]." Likewise in its submissions to the Court, Iran pays lip service to the idea that the shooting down of Iran Air Flight 655 was a violation of Articles IV(1) and X(1) of the Treaty of Amity[3], but is much more thorough in its description of the alleged Treaty violations completely outside the context of the shootdown. The eighth submission states:

> "[T]he United States, in stationing its warships in the Persian Gulf within the Islamic Republic's internal waters and territorial sea and in the international waters, and in issuing and operating under the NOTAMs discussed herein, has violated its legal obligations to the Islamic Republic to guarantee freedom of commerce and navigation under Article X(1) of the Treaty of Amity."

In raising the Treaty of Amity, Iran has departed entirely from the shootdown of Iran Air Flight 655 to try to establish that

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[1]Iranian Memorial, para. 4.01.

[2]Iranian Memorial, para. 4.12.

[3]Iranian Memorial, fourth submission, p. 292.

U.S. military forces in the Gulf over a long period of time threatened and hindered commercial activities in violation of the Treaty of Amity.

Furthermore Iran seeks to depict the shootdown of Iran Air Flight 655 itself as some form of interference with commercial relations between the United States and Iran in the sense contemplated by the Treaty of Amity. In doing so, Iran is trying to transform this dispute from one that involves a single incident involving the use of force, and that incident's relation to two aviation conventions, into a dispute that attempts to implicate U.S.-Iran commercial relations throughout the Gulf War.

In Military and Paramilitary Activities in and against Nicaragua, the Court permitted the Applicant to plead an additional basis of jurisdiction after the filing of the Application. In that case, however, Nicaragua only asserted that the Treaty of Friendship, Commerce, and Navigation (FCN) had been violated "by the military and paramilitary activities of the United States in and against Nicaragua, as described in

Nicaragua's Application[1]". Not only did the Application in that case describe the activities that the Memorial alleged violated the FCN Treaty (the mining of Nicaraguan ports and territorial waters, attacks on Nicaragua's airports, and military operations that endanger and limit trade and traffic on land), but the Application itself specifically alleged that the United States had infringed the "freedom of the high seas" and interrupted "peaceful maritime commerce[2]." Consequently, in its Memorial Nicaragua argued that the FCN Treaty was "a complementary foundation for the jurisdiction of the Court . . . insofar as the Application of Nicaragua implicates violations of provisions of the Treaty[3]."

In the present case, Iran is now raising factual circumstances and allegations of conduct (i.e. interference with commerce) that are in no way reflected in Iran's

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[1]Nicaragua, Jurisdiction, Memorial of Nicaragua, para. 165 (emphasis added).

[2]Military and Paramilitary Activities in and against Nicaragua, Application of Nicaragua, para. 26(e).

[3]Nicaragua, Jurisdiction, Memorial of Nicaragua, para. 164.

Application. It is understandable that Iran feels compelled to introduce activities other than the shootdown of Iran Air Flight 655, since the incident of 3 July 1988 is not the type of situation addressed by the Treaty of Amity. Nevertheless, Iran cannot be permitted to so deviate from the factual and legal basis stated in its Application so as to transform the nature of this dispute. The new Iranian cause of action would of necessity require an examination of the entire pattern of military actions during the Iran-Iraq War, the details and justification for the alleged U.S. commercial embargo, and the circumstances concerning civil air operations in the area during this entire period. To allow such a departure from the basis of fact and law established in the Application would threaten the ability of this Court to maintain an orderly judicial process.

CHAPTER II

THE TREATY OF AMITY IS WHOLLY IRRELEVANT TO THE DISPUTE THAT IS THE SUBJECT OF IRAN'S APPLICATION.

The true subject of Iran's Application and Memorial is the incident of 3 July 1988 as it relates to the lawful use of force; that incident, however, is wholly irrelevant to the Treaty of Amity. As this Court held in Ambatielos, "[i]t is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty" upon whose compromissory clause it relies[1]. Iran must establish a reasonable connection between the Treaty of Amity and its claim against the United States for the incident of 3 July 1989. Iran has failed to do so.

The Treaty of Amity is concerned with the commercial relationship between the two countries and their nationals, not with damages resulting from an incident involving armed force between the two Parties. In Article XX(1)(d), the Treaty

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[1] Ambatielos, Merits, Judgment, I.C.J. Reports 1953, p. 10, at p. 18.

explicitly states that it "shall not preclude the application of measures . . . necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests" (emphasis added). As stated in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment (hereinafter Nicaragua, Merits), this Court "cannot entertain . . . claims of breach of specific articles of the treaty, unless it is first satisfied that the conduct complained of is not 'measures . . . necessary to protect' the essential security interests of the United States[1]."

Action taken in self-defense is without question a part of the category of measures "necessary to protect" essential security interests[2]. The USS Vincennes was engaged in

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[1] I.C.J. Reports 1986, p. 14, at p. 136.

[2] I.C.J. Reports 1986, p. 117 ("It is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests.").

self-defense against armed attack at the time of the incident of 3 July 1988, and perceived itself to be under an armed attack from a hostile approaching aircraft. As the ICAO Investigation report concluded: "The aircraft was perceived as a military aircraft with hostile intentions . . . .[1]" Consequently, on the facts as pled by Iran, the Court is presented with exactly the type of situation the Treaty of Amity does not cover.

In Nicaragua, Merits, the Court was not faced with a situation involving self-defense against a perceived imminent armed attack. In assessing allegations that the United States had engaged in mining of ports and direct attacks on ports and oil installations, the Court determined that such actions, even if not acts of self-defense against armed attack, might still implicate essential security interests if "the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary.[2]'" In the context of the facts of that case, the

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[1]ICAO Report, para. 3.2.1.

[2]Nicaragua, Merits, I.C.J. Reports 1986, p. 117.

Court found that there was no threat to the United States' essential security interests necessitating the mining of ports and attacks on ports and oil installations[1].

Furthermore, even a cursory review of the operative articles of the Treaty of Amity discussed by Iran shows that these articles have no reasonable connection to the incident of 3 July 1988. Although in its Memorial Iran discusses different articles of the Treaty[2], the only articles upon which Iran ultimately bases its claims in its Submissions to the Court are Articles IV(1) and X(1) of the Treaty of Amity[3].

Article IV(1) provides:

> "Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractural rights are afforded effective means of enforcement, in conformity with the applicable laws."

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[1] Ibid., pp. 141-142.

[2] Iranian Memorial, paras. 3.62-3.68.

[3] Iranian Memorial, Submissions, pp. 292-293.

This article must be read in the context of Articles II and III of the Treaty, which provide for the rights of nationals and companies of one Party to enter and remain in the territory of the other Party for the purpose of conducting commercial activities. Article IV(1) then provides a general principle by which the host Party must treat these nationals and companies: a principle that is designed to preclude host State actions that would impair ownership and managerial control, and to permit the vindication of contractual rights. It cannot, and should not, be read as a wholesale warranty by each Party to avoid all injury whatsoever to the nationals and companies of the other Party regardless of location and regardless of whether the injury relates to commercial activities. In Nicaragua, Merits[1], the Court refused to read into the FCN Treaty a rule that a State binds itself "to abstain from any act toward the other party which could be classified as an unfriendly act, even if such an act is not in itself the breach of an international obligation." Iran has not alleged and

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[1] Nicaragua, Merits, I.C.J. Reports 1986, pp. 136-137.

cannot allege that there has been discriminatory treatment against Iranian nationals or companies. It bears noting that in Nicaragua, Merits, this Court did not reach the issue of whether the United States had violated the obligation to accord "equitable treatment" since the evidence did not demonstrate that the acts alleged to have violated that obligation could be imputed to the United States[1]. Thus Article IV(1) has no reasonable connection to the incident of 3 July 1988.

Article X(1) provides that "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." Iran's claim as stated in both the Application and in its Memorial does not involve commerce "between the territories of" the United States and Iran. Furthermore, Iran's claim does not in any fashion state a course of action on the part of the United States to hinder the freedom of maritime commerce. This is to be contrasted with the claims presented in Nicaragua, Merits, in which the Court

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[1] Ibid., pp. 138-139.

found that there had been a hindering of the right of access to Nicaraguan ports by the laying of mines in early 1984 close to various ports[1].

Thus, taking Iran's claims under the Treaty of Amity as relating only to the incident of 3 July 1988, these claims cannot sustain the jurisdiction of the Tribunal under that Treaty, since they are wholly irrelevant to the subject matter contemplated by the Treaty.

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[1] Ibid., p. 139.

CHAPTER III

IRAN MAY NOT INVOKE THE COMPROMISSORY CLAUSE OF THE TREATY OF AMITY BECAUSE IT HAS MADE NO EFFORT TO RESOLVE BY DIPLOMACY ANY DISPUTES UNDER THE TREATY OF AMITY.

The United States showed in Part IV, Chapter I, that from the time of the incident of 3 July 1988, until Iran's Application was filed in this case, Iran never requested to meet with U.S. officials to discuss, negotiate, or arbitrate this matter. Iran could have approached the United States through any number of channels, including the frequent contact of U.S. and Iranian lawyers at the Iran-U.S. Claims Tribunal in The Hague. Moreover, from 3 July 1988 to the filing of its Application with this Court, Iran made no effort to respond in any meaningful fashion to attempts by the United States to make compensation to the families of the victims of Iran Air Flight 655.

Nevertheless, Iran asserts that this Court has jurisdiction pursuant to the compromissory clause of the Treaty of Amity. Article XXI of the Treaty states:

> "1. Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting party may make with respect to any manner affecting the operation of the present treaty.

> 2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

(Emphasis added.)

This compromissory clause is common to the bilateral investment treaties negotiated by the United States in the post-World War II era. The structure provides that two conditions must be fulfilled in order to open the way to recourse to the Court. First, there must be a dispute between the Parties as to the interpretation and application of the Treaty. Second, it must be the case that the dispute has not been "satisfactorily adjusted by diplomacy."

Neither condition has been fulfilled. It cannot be said that there is a dispute between Iran and the United States when Iran has never approached the United States and asked for the relief sought from this Court under the Treaty of Amity. Even if one believes that there is a dispute between the parties that can somehow be fit into the terms of the Treaty, Iran likewise has not in any way fulfilled the second condition. Iran's allegations must have been the subject of negotiations of some kind prior to the institution of these proceedings for this Court to conclude that the dispute has not been "satisfactorily adjusted by diplomacy."

Iran would like to use this Court's ruling in Nicaragua, Jurisdiction to support its position, but Iran fails to note critical differences with the dispute now before the Court. In Nicaragua, Jurisdiction, the Court held that "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty[1]." In that case, there were, however, bilateral talks between the United States and Nicaragua, as well as multilateral discussions in the Contadora Group, over their general differences[2]. In the present case, however, Iran not only did not discuss with the United States alleged violations of the Treaty of Amity, it never entered into any discussions or negotiations whatsoever relating to the incident of 3 July 1988, prior to the filing of its Application.

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[1] I.C.J. Reports 1984, p. 428.

[2] Nicaragua, Jurisdiction, Counter-Memorial of the United States, para. 182 and footnote.

The purpose in limiting the reference of disputes to this Court to only those that are "not satisfactorily adjusted by diplomacy" is to ensure that the parties first attempt to resolve matters directly through diplomatic discussion. It is only through diplomatic negotiations or discussions of some kind that the respondent State can learn of, and either accept or reject, the basic legal and factual assertions of the complainant State. It is the essence of the concept of dispute resolution that discussions between the interested States should precede the institution of proceedings before the Court because such discussions or the adjustment by diplomacy fix the points of fact and law over which the Parties disagree.

In assessing its jurisdiction under this same treaty in United States Diplomatic and Consular Staff in Tehran[1], this Court found critical the fact that the United States had tried to negotiate with Iran and that Iran had refused to enter into any discussion of the dispute. In that case, the United States offered to send a former Attorney General of the United States,

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[1] I.C.J. Reports 1980, p. 3.

Mr. Ramsey Clark, to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini; Mr. Clark was authorized to discuss all avenues for resolution of the crisis. Although the Government of Iran initially agreed to receive Mr. Clark in Tehran, it subsequently refused to do so. Shortly thereafter, Tehran radio broadcast a message from the Ayatollah Khomeini stating that no Iranian officials could meet with U.S. officials. All other efforts by the United States to make contact were rebuffed as well[1]. Under these circumstances, the Court stated, "[i]n consequence, there existed at [the date of the Application] not only a dispute but, beyond any doubt, a 'dispute . . . not satisfactorily adjusted by diplomacy' within the meaning of Article XXI, paragraph 2, of the 1955 Treaty. . . ."[2]

The circumstances in this case are just the opposite. Iran has made no effort to approach the United States on this matter and has ignored U.S. efforts to discuss compensation for the incident and to pay such compensation. Therefore the Court should reject Article XXI as a basis for its jurisdiction in this case.

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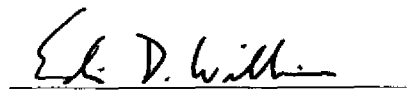
[1] United States Diplomatic and Consular Staff in Tehran, U.S. Memorial, pp. 24-25.

[2] I.C.J. Reports 1980, p. 27.

SUBMISSION

The United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court.

4 March 1991



Edwin D. Williamson
Agent of the United States
of America

ANNEX 1

IRANIAN ATTACKS ON INNOCENT SHIPPING DURING THE IRAN-IRAQ WAR

In the Statement of Facts, the United States noted that the Government of Iran conducted extensive attacks against innocent shipping during the Iran-Iraq war. These ships, which were travelling on the high seas to and from non-Iraqi ports, were almost never stopped and searched by Iran to determine whether they were trading with Iraq or carrying contraband destined for Iraq. The following is a description of some of the Iranian attacks against shipping primarily in the 18 months preceding the incident of 3 July 1988. The Court may also wish to refer to the reports of the Secretary General pursuant to U.N. Security Council Resolution 552 of 1 June 1984 (Exhibit 32).

Section I. Iranian Gunboat Attacks Caused Extensive Damage to Merchant Vessels and the Deaths of Numerous Merchant Seamen.

Iran predominantly attacked merchant vessels by using small gunboats, typically equipped with machine guns, rocket launchers (including rocket-propelled grenades), and small arms. For instance, throughout 1987, Iranian gunboats conducted extensive, unprovoked attacks on ships of various nations, causing extensive damage and the deaths of numerous merchant seamen. The more egregious attacks are as follows.

On 26 February 1987, Iranian gunboats attacked a Chinese cargo vessel, leaving four crewmen dead[1]. Off the coast of the United Arab Emirates, on 12 March 1987 a Saudi-registered tanker Arabian Sea was attacked by missiles launched from an Iranian vessel, while on 28 March 1987, the Singapore-registered tanker Sedra was attacked by what appeared to be an Iranian gunship using a Seakiller missile; at least seven seamen were killed[2]. On 29 March 1987, Iranian gunboats attacked a Singaporean-registered tanker, killing at least eight crew members[3].

On 4 May 1987, an Iranian gunboat fired on a Panamanian-flagged tanker, the Petrobulk Regent, that had left Kuwait. One member of the tanker's crew was wounded in the attack[4]. On 5 May 1987, the Japanese-registered Shuho Maru was attacked by an Iranian gunboat; the next day the Soviet cargo

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[1]Exhibit 32, S/16877/Add.5, p. 4.

[2]Exhibit 32, S/16877/Add.5, p.5; "7 Killed in Attack on Gulf Tanker", Wash. Post, 29 Mar. 1987, p. A-21.

[3]"Iranian gunboat attacks tanker in Persian Gulf", Christian Science Monitor, 30 Mar. 1987, p. 2.

[4]"Gunboat Attacks Tanker Carrying Kuwaiti Oil", FBIS, Middle East & South Asia Review, 6 May 1987, p. C1; Exhibit 32, S/16877/Add.5, p.6.

ship Ivan Korotoyeu was attacked with rockets by Iranian patrol boats in the southern Persian Gulf, suffering moderate damage[1]. On 11 May 1987, Iranian gunboats attacked the Kuwaiti-bound, Indian-registered B.R. Ambedkar off the coast of the United Arab Emirates[2]. On 18 May 1987, an Iranian ship attacked the Liberian-registered tanker Golar Robin en route to Kuwait[3]. On 22 May 1987, Iranian revolutionary guard units attacked and seriously damaged the Qatar-registered tanker Rashidah northwest of Bahrain[4].

On 26 and 30 June 1987 respectively, Iranian gunboats attacked the Norway-registered Mia Margrethe and Kuwait-registered Al Mergaab[5]. On 9 and 13 July 1987

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[1]Exhibit 32, S/16877/Add.5, p. 6; "Soviet Ship Attacked by Iran in Gulf, U.S. Says", N.Y. Times, 9 May 1987, p. 1.

[2]"Iran Raids Tanker in the Gulf and Again Threatens Kuwait", N.Y. Times, 12 May 1987, p. A-8; Exhibit 32, S/16877/Add.5, p. 7.

[3]"Iranian Ship Attacks Liberian Tanker off Kuwait", FBIS, Near East & South Asia Review, 19 May 1987, p. C1; Exhibit 32, S/16877/Add.5, p.7.

[4]"Missiles Hit Qatari Freighter off Bahrain", FBIS, Middle East & South Asia Review, 22 May 1987, p. C1; Exhibit 32, S/16877/Add.5, p.7.

[5]Exhibit 32, S/16877/Add.5, p.8.

respectively, Iranian gunboats attacked the Liberian-registered Peconic and French-registered Ville D'Anvers[1]. By 3 August 1987, the Iranian Navy was conducting "Martyrdom Maneuvers" which involved training suicide squads to ram warships with explosive-laden speedboats[2]. On 18 August 1987, two Iranian gunboats attacked the Liberian-registered Osco Sierra outside the Strait of Hormuz[3].

On 3 September 1987, Iranian gunboats attacked the Japanese-registered Nisshin Maru with rocket-propelled grenades and the Italian-registered Jolly Rubino with bazookas[4]. On 10 September 1987, Iranian gunboats raked the Cypriot-registered Haven with rocket and machine gun fire.[5] On 20 September 1987, an Iranian speedboat attacked the Saudi-registered tanker

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[1]"Hit Ship is Liberian-Owned", Wash. Post, 11 July 1987, p. A-19; Exhibit 32, S/16877/Add.5, p.8.

[2]"U.S. Plans to Send Elite Units to Gulf", Wash. Post, 5 Aug. 1987, p. A-1; "Iran Concludes Naval Exercises", Wash. Post, 8 Aug. 1987, p. A-13 (Exhibit 35).

[3]"Iran Said to Attack Ship in Gulf of Oman", Wash. Post, 19 Aug. 1987, p. A-1; Exhibit 32, S/16877/Add.5, p.9.

[4]"Iran, Iraq Attack More Gulf Ships", Wash. Post, 4 Sep. 1987, p. A-1; Exhibit 32, S/16877/Add.5, pp. 10-11.

[5]"Gulf Foes Attack on Land and Sea", Wash. Post, 11 Sep. 1987, p. A-27.

Petroship B in the Strait of Hormuz[1]. On 7 October 1987, an Iranian speedboat attacked the Saudi-registered tanker Raad Al-Bakry VIII[2]. On 14 October 1987, Iranian gunboats attacked the Liberian-registered tanker Atlantic Peace off Dubai[3]. Iran used rocket launched grenades to hit the Panamanian-registered Prosperventure L off the United Arab Emirates on 23 October 1987[4]. On 23 November 1987, Iranian speedboats attacked the Romanian-registered cargo ship Fundulea, seriously injuring three crew members, and the Panamanian-registered container ship Uni-Master[5]. On 26 November 1987, an Iranian speedboat off Dubai attacked the Romanian oil tanker Dacia[6].

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[1] "Arab League Postpones Move Against Iran", Wash. Post, 21 Sep. 1987, p. A-20; Exhibit 32, S/16877/Add.5, p. 11.

[2] "Iranian Boat Attacks Saudi Tanker in Dubayy", FBIS, 7 Oct. 1987, p. 14; Exhibit 32, S/16877/Add.5, p. 13.

[3] "New Raids by Iran and Iraq are Reported in Gulf", N.Y. Times, 15 Oct. 1987, p. A-7; Exhibit 32, S/16877/Add.5, p.14.

[4] N.Y. Times, Oct. 25, 1987; Exhibit 32, S/16877/Add.5, p. 14.

[5] "Iran Strikes Panamanian, Romanian Vessels", FBIS, Near East & South Asia, 24 Nov. 1987, p. 34; Exhibit 32, S/16877/Add.5, p. 16.

[6] "Iranian Speedboat Attacks Romanian Tanker", FBIS, Near East & South Asia, 27 Nov. 1987, p. 19.

In early December 1987, Iranian gunboats hit, set ablaze, and sank the Singapore-registered Norman Atlantic, and attacked the Danish-registered tanker Estelle Maersk[1]. On 18 December 1987, an Iranian gunboat opened fire on the Liberian-registered supertanker Saudi Splendor off Dubai and the Norwegian-registered tanker Happy Kari in the Strait of Hormuz[2]. On 23 December, Iranian gunboats attacked and set ablaze the Norwegian-registered tanker Berge Big[3].

Several nations took steps to protect their shipping. After the 13 July 1987 attack by Iranian gunboats on the French container ship Ville d'Anvers, France broke diplomatic relations with Iran and announced on 29 July 1987 that the aircraft carrier Clemenceau and three support ships were being

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[1]"Iranian Speedboats Attack 2 Tankers", N.Y. Times, 7 Dec. 1987, p. A-3; "Iraq reports making hits in Iran and in the Gulf", Christian Science Monitor, 11 Dec. 1987, p. 2; Exhibit 32, S/16877/Add.5, p. 16.

[2]"Iranian Boats Attack Norwegian, Saudi Tankers", FBIS, 18 Dec. 1987, p. 22; Exhibit 32, S/16877/Add.5, p. 17-18

[3]"Iranian Gunboats Attack Norwegian Supertanker", FBIS, 24 Dec. 1987, p. 15.

dispatched to the Gulf area[1]. After the 3 September 1987 attack on the Italian cargo ship Jolly Rubino, Italy announced that it would send ships to the Gulf to protect Italian merchantmen[2]. On 3 October 1987, Iran launched about 60 armed speedboats, apparently at the Saudi Arabian offshore oilfield at Khafji. Saudi Arabia sent jets and warships to intercept these gunboats and turn them back. No gunfire was exchanged[3].

Section II. Iranian Naval Mines Damaged Numerous Vessels and Prompted the Deployment of Minesweepers and Sealane Surveillance Forces to the Gulf.

Iran also without notice seeded mines on the high seas and in international shipping channels to threaten and damage shipping. On 17 May 1987, a Soviet-registered tanker leased to Kuwait, the Marshal Chuykov, suffered mine damage as it approached Kuwait[4]. By 16 June 1987, Iran was reportedly

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[1]"French Ship is Attacked in Gulf, Raising Paris-Teheran Tensions", N.Y. Times, 14 Jul. 1987, p. A-6; "Mine-Hunter Helicopters Sent to Gulf", Wash. Post, 30 Jul. 1987, p. A-1.

[2]"Iran Fires Missile at Kuwait", Wash. Post, 5 Sep. 1987, p. A-1 (Exhibit 35).

[3]"Saudis Turn Back Iranian Flotilla Near Oil Terminal", Wash. Post, 4 Oct. 1987, p. A-1 (Exhibit 35).

[4]"Iraqi Missile Hits U.S. Navy Frigate in Persian Gulf", N.Y. Times, 18 May 1987, p. A-1 (Exhibit 35); Exhibit 32, S/16877/Add.5, p. 7.

mining approaches to Kuwait's Al-Ahmadi oil terminal[1]. On 24 July 1987, the Bridgeton, a Kuwait-owned U.S.-flagged tanker under U.S. military escort into the Gulf, hit a mine about 18 miles west of the Iranian island of Farsi[2]. Consequently, the United States ordered U.S. Navy minesweeping helicopters to the Gulf[3]. Other nations followed suit. On 11 August 1987, the United Kingdom and France announced that they would send minesweepers to the Gulf[4]. In September, Belgium, the Netherlands, and Italy announced that they also would dispatch minesweepers to the Gulf[5].

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[1]"What's News", Wall Street Journal, 17 June 1987, p.1.

[2]"After the Blast, Journey Continues", N.Y. Times, 25 July 1987, p.5 (Exhibit 35).

[3]"U.S. Acts to Bolster Gulf Mine Defenses on Several Fronts", Wall Street Journal, 4 Aug. 1987, p.1; "8 U.S. Helicopters Arrive for Mission to Sweep the Gulf," N.Y. Times, 17 Aug. 1987, p. A-1 (Exhibit 35); "U.S. Orders 8 Old Minesweepers to the Gulf", N.Y. Times, 20 Aug. 1987, p. A-1 (Exhibit 35).

[4]"Europeans Send Mine Sweepers", Wash. Post, 12 Aug. 1987, p. A-1 (Exhibit 35).

[5]"Dutch Sending 2 Ships to Hunt Mines in Gulf", N.Y. Times, 8 Sep. 1987, p. A-3; "Perez de Cuellar's Gulf Trip Ends in Apparent Failure", Wash. Post, 16 Sep. 1987, p. A-1 (Exhibit 35).

Unfortunately, the mines continued to inflict damage indiscriminately to vessels. On 10 August 1987, the U.S.-owned, Panama-registered tanker Texaco Caribbean struck a mine off Fujaira, south of the Hormuz Peninsula[1]. On 22 September 1987, the Panamanian-registered Marissa I survey ship sank after hitting a mine north of Bahrain; four of its seven crewmen were believed dead[2].

Although at times Iran denied that it was the source of these mines, in a Tehran radio dispatch on 20 August 1987, Iran admitted that it had mined the Gulf, purportedly to "protect" its coastline[3]. Any doubts as to the origin of these mines were put to rest when, on 21 September 1987, U.S. helicopters identified an Iranian ship, the Iran Ajr, planting mines in international waters of the Gulf. The ship was incapacitated

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[1] "Iran Says it Mines the Gulf", Wash. Post, 21 Aug. 1987, p. A-1 (Exhibit 35); Exhibit 32, S/16877/Add.5, p. 9.

[2] "U.S. Arranges Return of 26 Iranian Sailors", Wash. Post, 25 Sep. 1987, p. A-1.

[3] "Iran Says it Mines the Gulf", Wash. Post, 21 Aug. 1987, p. A-1 (Exhibit 35).

by the helicopters and then boarded by the U.S. Navy. Ten mines being readied for deployment in shipping channels were found on board the Iran Ajr[1]. Within days, Iranian President Seyed Ali Khamenei declared to the United Nations General Assembly that "the United States will receive a proper response to this abominable act[2]."

Section III. In Addition to Gunboat Attacks and the Laying of Naval Mines, Iran Launched Silkworm Missiles Against Kuwait Shipping and Shore Facilities.

Along with its use of gunboats and mines, Iran constructed missile sites and launched Silkworm missiles to disrupt shipping of oil. On 4 September 1987, Iran fired a Silkworm missile from the Faw Peninsula toward Kuwait; the missile hit an uninhabited beach area two miles south of an oil loading

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[1]"U.S. Helicopters Hit Iranian Navy Ship in Persian Gulf", Wash. Post, 22 Sep. 1987, p. A-1; "U.S. Reports Firing on Iranian Vessel Seen Laying Mines", N.Y. Times, 22 Sep. 1987, p. A-1 & "26 Iranians Seized with Mine Vessel; More U.S. Shooting", N.Y. Times, 23 Sep. 1987, p. A-1.

[2]Address by the President of the Islamic Republic of Iran, Seyed Ali Khamenei, to the United Nations General Assembly, 22 Sep. 1987, A/42/PV.6.

terminal[1]. On 15 October 1987, however, an Iranian Silkworm missile fired from the Faw peninsula hit the U.S.-owned, Liberian-flagged oil tanker Sungari anchored off Kuwait's Mina al-Ahmadi port in Kuwaiti territorial waters. There were no casualties[2]. The next day another Iranian Silkworm missile hit the Sea Isle City, a Kuwait-owned, U.S.-registered tanker also anchored off Mina al-Ahmadi. Eighteen seamen, including the U.S. captain, were injured[3]. On 22 October 1987, an Iranian

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[1]"Iran Fires Missile at Kuwait", Wash. Post, 5 Sep. 1987, p. A-1 (Exhibit 35).

[2]"Iran Hits U.S.-Owned Tanker", Wash. Post, 16 Oct. 1987, p. A-1 (Exhibit 35); Exhibit 32, S/16877/Add.5, p. 14.

[3]"UN Head Told of Attack", FBIS, Middle East & South Asia Review, 19 Oct. 1987, p. 17. In response to Iraq's unlawful use of force against shipping -- especially its October 16 Silkworm attack -- four U.S. destroyers on October 19, 1987, destroyed an inactive Iranian oil platform used as a base for Iranian speedboat attacks against Gulf ships. The U.S. Navy gave the Iranian occupants of the oil platform 20 minutes to evacuate before shelling the platform, which was some 100 miles south of Lavan Island. "U.S. Destroyers Shell Iranian Military Platform in Gulf", Wash. Post, 20 Oct. 1987, p. A-1.

Silkworm missile hit Kuwait's Sea Island terminal[1].

Section IV. The Most Damaging of Iran's Attacks Against Shipping Were Attacks by Iranian Fighter Aircraft, Which Resulted in Notices by the United States That All Aircraft for Their Own Safety Should Avoid Approaching Military Vessels.

Although most of Iran's attacks against merchant shipping were through use of small boats, there had been very damaging attacks as well by Iranian military aircraft, particularly during 1984-1986. Iranian fighter aircraft conducted a majority of these attacks using Maverick missiles and iron bombs[2]. Maverick missiles can be launched from ranges of 0.5 to 13 nautical miles and are television guided. The launching aircraft must be able to keep visual track of the target, but does not have to scan its target with radar[3]. For example, on 2 February 1988, two Iranian F-4s launched two Maverick missiles at the Liberian tanker Petrobulk Pilot about 30 nautical miles south-southwest of the area where the incident

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[1]"Silkworm Hits Kuwaiti Oil Terminal", Wash. Post, 23 Oct. 1987, p. A-1.

[2]Exhibit 9, Appendix E, p. E-12.

[3]Ibid.

of 3 July 1988 took place[1]. In addition to Maverick missiles, military forces in the Gulf knew that aircraft, including Iranian F-14s, could be configured to drop iron bombs on naval vessels if they could approach within two nautical miles of the target[2].

Section V. Iranian Attacks on Innocent Shipping Continued into 1988.

Iranian gunboats attacked the Norwegian tanker Igloo Espoo on 15 January 1988, near the Strait of Hormuz[3]. Agence France-Presse reported a 15 January 1988, Iranian attack on a Norwegian tanker, and 16 January attacks on the Liberian-registered Atlantic Charisma and Liberian-registered Rainbow[4]. On 21 January, Iran attacked the Norwegian-owned Hafpel in

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[1]"Iran Tries Aerial Attack on Cargo Ship in Gulf", Christian Science Monitor, 3 Feb. 1988, p. 2 (Exhibit 35); Exhibit 9, Appendix E, p. E-10.

[2]Exhibit 9, Appendix E, p. E-12.

[3]"Iranian Gunboats Attack Norwegian Tanker", FBIS, Near East & South Asia, 15 Jan. 1988, p. 20.

[4]"Iran-Iraq War", FBIS, Near East & South Asia, 19 Jan. 1988, p. 2.

the Strait of Hormuz and set ablaze the Panamanian Topaz. Iran asserted that its attack on the Hafpel was a mistake[1]. Iranian gunboats on 23 January 1988, attacked the empty Danish-flagged Torm Rotna[2]. On 3 February 1988, Iranian gunboats hit and set ablaze a Norwegian freighter approximately ten nautical miles from the United Arab Emirates port of Al-Sharigah[3]. On 5 February 1988, Iranian gunboats attacked the Panamanian-registered Tavistock near Dubai[4]. On 7 February 1988, the U.S.-owned, Liberian-registered Diane was set ablaze in an attack by gunboats off the coast of the United Arab Emirates[5]. On 10 February 1988, an Iranian speedboat

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[1]"Panamanian Tanker Attacked" & "Reportage on Iranian Attacks on Oil Tankers", FBIS, Near East & South Asia, 22 Jan. 1988, p. 19.

[2]"Two Ships Attacked in Gulf; Iraqi General Dies in Crash", Wash. Post, 24 Jan. 1988, p. A-24.

[3]"Iranian Speedboats Attack Noregian Ship", FBIS, Near East & South Asia, 3 Feb. 1988, p. 18.

[4]"Iranian Boats Attack Tanker Off Dubayy", FBIS, Near East & South Asia, 5 Feb. 1988, p. 27.

[5]"Iranian Gunboats Attack U.S.-Owned Tanker", FBIS, Near East & South Asia, 8 Feb. 1988, p. 20.

attacked a Liberian tanker[1].

On 12 February, Iranian military units fired on U.S. helicopters on reconnaisance over a Kuwaiti convoy[2]. On 7 March 1988, U.S. helicopters on reconaissance flights came under machine-gun fire from an oil platform and several boats in the central Gulf[3].

In March 1988, Iranian gunboats attacked Norway's tanker Berge Lord, Liberia's Fumi, Spain's Iberian Reefer, and Cyprus' tanker Odysseus AG in the Strait of Hormuz, as well as Norway's

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[1]"Iran-Iraq War", FBIS, Middle East & South Asia Review, 11 Feb. 1988, p. 1.

[2]"U.S. Helicopters Fired on From Oil Platforms", FBIS, Near East & South Asia, 16 Feb. 1988, p. 60.

[3]"What's News" (U.S. Helicopters Drew Machine-gun Fire in the Central Persian Gulf), Wall Street Journal, 7 Mar. 1988, p. 1; "U.S. Helicopters Come Under Fire in the Gulf", N.Y. Times, 7 Mar. 1988, p. A-5.

Hukumit 12 miles off the Dubai coast (killing two crewmen), Liberia's Atlantic Peace near Sharja, and the Singapore-registered Neptune Subaru[1].

In May and June of 1988, Iranian gunboats in the Strait of Hormuz attacked the Japanese Ace Chemi; the Norwegian-owned Berge Strand; the Liberian Mundo Gas Rio; the West German Dhaulagiri; and a U.S.-owned, British-registered supertanker[2].

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[1]"3 Tankers Hit by Gunboats", FBIS, Near East & South Asia, 18 Mar. 1988, p. 56; "Norwegian Tanker Attached", FBIS, Near East & South Asia, 23 Mar. 1988, p. 17; "54 Feared Dead on 2 Oil Tankers in Iraqi Attack on Iran Terminal", N.Y. Times, 22 Mar. 1988, p. A-1; "Liberian Oil Tanker Attacked", FBIS, Near East & South Asia, 22 Mar. 1988, p. 1 & 67; "Iranians Hit Cypriot Ship", FBIS, Near East & South Asia, 24 Mar. 1988, p. 33; "Iranian Gunboats Hit Liberian Tanker in Gulf", FBIS, Near East & South Asia, 28 Mar. 1988, p. 17.

[2]"Speedboats Attack Japanese Chemical Tanker," FBIS, Near East & South Asia, 19 May 1988, p. 11; "Teheran Claims Gains in Northeastern Iraq", N.Y. Times, 19 May 1988, p. A-11; "Iranian Boats Attack Tanker", N.Y. Times, 20 May 1988, p. A-3; "Iranian Speedboats", Christian Science Monitor, 27 May 1988, p. 2; "Reportage on Iranian Gunboat Attacks on Tanker", FBIS, Near East & South Asia, 27 May 1988, p. 14; "UK Supertanker Attacked Near Saudi Port 11 Jun", FBIS, Near East & South Asia, 13 Jun. 1988, p. 69; "Iranian Gunboats Launch Attacks on Freighters", FBIS, Near East & South Asia, 14 Jun. 1988, p. 16.

Section VI. Efforts by the United Nations to End the Gulf War Were Unsuccessful.

Efforts in the United Nations to end the attacks on merchant shipping were unsuccessful. On 20 July 1987, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, passed unanimously Resolution 598 calling for a cease-fire in the Iran-Iraq War and calling for further meetings if the two States did not comply with the resolution[1]. On 12 November 1987, resolutions at the Arab League summit meeting in Amman, Jordan, stated that the Arab countries condemned Iran for attacking Kuwait and condemned Iran's interference in the internal affairs of the Arab gulf states[2].

As a result of the United States' efforts to protect its vessels in the Gulf, Iran repeatedly charged (as it does in its Memorial) that the United States was not a neutral in the Iran-Iraq war[3]. The United States certainly worked to bring

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[1]U.N. Security Council Resolution 598 of July 20, 1987 (S/RES/598); "U.S. Warships Set to Begin Escorts of Gulf Tankers", N.Y. Times, 22 Jul. 1987, p. A-2. Iraq responded to the Resolution as "positive" while Iran called it "null and void". "Iraq is Warm to Truce Call; Iran is Harsh", N.Y. Times, 22 Jul. 1987, p. A-20.

[2]"Gulf Conflict", FBIS, Near East & South Asia, 12 Nov. 1987, p. 2; "Arab Summit Conference", FBIS, Near East & South Asia, 13 Nov. 1987, p. 1.

[3]Iranian Memorial, paras. 1.36-1.45.

the war to a negotiated end, leaving neither victor nor vanquished, but any concerted U.S. pressure on Iran reflected Iran's intransigence to negotiate with Iraq despite Security Council Resolution 598, and not an attempt by the United States to intervene in the war on behalf of Iraq[1].

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[1]The United States position was that the Security Council should impose an arms embargo on either Iran or Iraq, whichever failed to comply with Resolution 598. See "U.S. Policy in the Persian Gulf", op. cit., Exhibit 36, pp. 3-4. Even Members of the Arab Gulf Cooperation Council urged the imposition of sanctions against Iran for its aggressive tactics in the Gulf. "Arab Nations on Gulf Urge Sanctions Against Iran", N.Y. Times, 30 Dec. 1987, p. A-3.

ANNEX 2

U.S. ISSUANCE OF NOTAMS REGARDING AIRCRAFT

IN THE GULF AREA

Out of concern for the safety of its vessels, and the need for those vessels to respond to perceived threats, the United States in early 1984 wished to inform civil aircraft in the Gulf about U.S. defensive precautions with respect to air attacks. Annex 15 of the Chicago Convention provides that origination of civil Notices to Airmen (NOTAM) is the responsibility of the State which exercises air traffic service authority over the affected area[1]. Consequently, in January 1984, the U.S. Federal Aviation Administration, in compliance with Annex 15, provided the proposed a Special Notice to States controlling Flight Information Regions in the affected areas, so that they they could issue an appropriate NOTAM[2]. The

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[1]Chicago Convention, Annex 15, paras. 3.1.1.1, 3.1.2, 3.1.4, and 5.1.1.1 (Exhibit 5).

[2]U.S. Special Notice of Information, Jan. 1984 (Exhibit 85). The designation "KDCAYN" in this notice represents the U.S. Federal Aviation Administration International Notice to Airman office in Washington, D.C. The designation "KCNFYN" represents the Central Notice to Airmen Facility, Carswell Air Force Base, Ft. Worth Texas. The designation "SVC" represents the term "service message" which distinguishes the notice from a notice to airmen.

Special Notice stated that U.S. naval vessels in the Persian Gulf, Strait of Hormuz, Gulf of Oman, and Arabian Sea (north of 20 degrees north) were taking defensive precautions. The Special Notice stated that aircraft approaching within five nautical miles of U.S. vessels should establish and maintain contact with the U.S. vessels on either the international civil air distress frequency (121.5 MHz VHF) or the international military air distress frequency (243.0 MHz UHF)[1].

Under Annexes 11 and 15 of the Chicago Convention, the aeronautical information service of each State should obtain and publish (in the form of NOTAMS and other publications) critical information that they receive concerning the safety of civil aviation in their territories, as well as areas over which they have responsibility[2]. The Government of Iran, however, objected to this Special Notice and in February 1984 sent messages to all States in the region denouncing the

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[1]U.S. Special Notice, Jan. 1984, op. cit., Exhibit 85.

[2]See Chicago Convention, Annex 11, para. 2.15.3 (Exhibit 4); Chicago Convention, Annex 15, paras. 3.1.4 and 5.1.1.1 (Exhibit 5).

Special Notice as illegal[1]. Further, Iran lodged a complaint at the ICAO Middle East Regional Air Navigation meeting in March 1984 urging that steps be taken in response to the Special Notice[2]. The Gulf States did not publish the special notice provided by the United States.

Faced with the fact that Iran did not intend to comply with its obligation under the Chicago Convention annexes to promulgate this safety information, and that Iran was actively denouncing it as illegal to other States in the region, the United States felt compelled to publish the Special Notice as a U.S. international civil NOTAM[3]. Following the USS Stark

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[1]Notice from the Civil Aviation Organization of Iran, 27 Feb. 1984 (Exhibit 86).

[2]"Restrictions Imposed in the Airspace over the High Seas and over Territorial Waters of other States in the Mid Region," presented by Iran to the Third Middle East Regional Air Navigation Meeting and U.S. Amendment. Working Papers, Third Middle East Regional Air Navigation Meeting (Mar. - Apr. 1984), ICAO Docs. MID/3-WP/108, MID/3-WP/77 (Exhibit 87).

[3]ICAO Report, para. 2.2.2. International Civil Notice to Airmen, 11 Jan. 1985 (Exhibit 88). The designation "KFDC" in this notice shows that the originating agency of the NOTAM is Washington, D.C. The designation "A0002/85" is the international NOTAM identifier number.

incident, in which an Iraqi military aircraft attacked a U.S. naval vessel and killed 37 crewmen, the United States updated its NOTAM[1]. The NOTAM was further updated in September 1987[2]. The NOTAM was current on 3 July 1988[3]. The NOTAM and its updates were distributed to States on the distribution list for NOTAMs issued by the United States and through official civil and military channels, as well as through the U.S. Embassies in the area[4].

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[1]Updated International Civil Notice to Airmen, 19 Aug. 1987 (Exhibit 88).

[2]Updated Notices to Airmen, 8 and 9 Sep. 1987 (Exhibit 88).

[3]ICAO Report, para. 2.2.2; ICAO Report, Appendix F, p. F-4.

[4]ICAO Report, para. 2.2.3. The United States transmitted the updates to U.S. Embassies in the Gulf for hand delivery to the civil aviation authorities of the host countries with responsibility for the affected areas, with a request that they publish it. By using U.S. Embassy channels the United States could verify receipt of the notice and lend emphasis and urgency to the need for the appropriate States to publish the notice. As a result of these efforts, Iran again complained to ICAO about the matter in September 1987. Telex dated 14 Sep. 1987 from Iranian Civil Aviation Organization to ICAO Council President (Exhibit 89).

Iran argues that the promulgation of these NOTAMs was not in conformity with the provisions of Annex 15, but neglects to note that Iran's refusal to publish such critical information is inconsistent with Annexes 11 and 15[1], and that Iran's objection to the Special Notice discouraged other States from publishing it. Although it would have been more appropriate for Iran to disseminate such information, under the circumstances it was a reasonable, appropriate, and necessary step taken by the United States since Iran refused to comply with its responsibility to warn the civil aviation public of the potential danger in overflying U.S. naval vessels in the Gulf. Further, Annex 15 does not state that other countries are prohibited from issuing on their own such information by NOTAM or otherwise.

Iran's suggestion that increased dangers to civil air traffic in the Gulf was attributable to U.S. naval activities is incorrect[2]. Attacks by both Iran and Iraq in the Gulf

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[1]See Footnote 4 of this Annex, supra.

[2]Iran complained to ICAO about an incident that allegedly occurred on 26 May 1987 involving U.S. naval aircraft. The U.S. Navy, however, did not have any fighter aircraft in the Gulf on that day, nor any record of a radio transmission telling an aircraft not to proceed on course. ICAO took no action in this matter.

created the climate of danger, in part due to the establishment and realignment of some Air Traffic Service (ATS) routes at variance with the ICAO regional air navigation plan[1]. Yet most important, countries such as Iran failed to establish and maintain close cooperation with foreign military authorities in the Gulf responsible for activities that could affect civil aircraft[2].

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[1]Letter of ICAO President Kotaite, Working Paper, ICAO Council (extra. sess., July 1988), ICAO Doc. C-WP/8642, Appendix B (Exhibit 12).

[2]Under Chicago Convention, Annex 11, para. 2.14.1, ATS authorities are supposed to establish and maintain close cooperation with military authorities responsible for activities that may affect flights of civil aircraft. Indeed, arrangements are to be made to permit information relevant to the safe and expeditious conduct of flights of civil aircraft to be promptly exchanged between ATS units and appropriate military units. Chicago Convention, Annex 11, para. 2.14.3 (Exhibit 4). Similarly, the appropriate ATS authorities are obliged to initiate the promulgation of information regarding military activities that that are potentially hazardous to civil aircraft. Ibid., para. 2.15.3. The objective of such co-ordination is to achieve the best arrangements which will avoid hazards to civil aircraft and minimize interference with the normal operations of such aircraft. Although the United States had sought to establish guidelines for the safe interaction of civil aircraft with U.S. military forces, Iran's only efforts in this area consisted of denouncing the United States' efforts.

After extensive consultations with the affected states, on 1 March 1989, the United States withdrew the NOTAM it had issued for the Gulf and again asked regional States to issue the NOTAM themselves. This time virtually all the Gulf States (including Iran) issued NOTAMs pursuant to the U.S. request.

TABLE OF EXHIBITS [1]

Pursuant to Article 50 of the Rules of Court, the United States has also deposited several documents in the Registry in connection with these Preliminary Objections. The documents so deposited are noted below.

1. Convention on International Civil Aviation of 1944 (the "Chicago Convention").

2. Annex 6 to the Chicago Convention (excerpts).

3. Annex 10 to the Chicago Convention (excerpts).

4. Annex 11 to the Chicago Convention (excerpts).

5. Annex 15 to the Chicago Convention (excerpts).

6. Rules for the Settlement of Differences, ICAO Document 7782/2 (1975) (the "Rules").

7. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (the "Montreal Convention").

8. Treaty of Amity, Economic Relations and Consular Rights of 1955 between the United States and Iran.

9. Working Paper (11 November 1988), ICAO Document C-WP/8708, restricted.

   Report of ICAO Fact-Finding Investigation (November 1988), ICAO Document C-WP/8708, restricted, Appendix (the "ICAO Report").

10. Letter dated 4 July 1988 from ICAO Council President to ICAO Council Representatives, ICAO Document PRES AK/165 (with attachments).

11. Letter dated 5 July 1988 from ICAO Council President to ICAO Council Representatives, ICAO Document PRES AK/166.

12. Working Papers, ICAO Council (extraordinary session, July 1988), ICAO Documents C-WP/8643, Appendix B, C-WP/8644 (with attachments).

13. Minutes, ICAO Council (extraordinary session, 13 July 1988), ICAO Document DRAFT C-Min. EXTRAORDINARY (1988)/1.

14. Minutes, ICAO Council (extraordinary session, 14 July 1988), ICAO Document DRAFT C-Min. EXTRAORDINARY (1988)/2.

[1] Not reproduced. *[Note by the Registry.]*

15. Minutes, ICAO Council (125th session, 5 December 1988, closed), ICAO Document DRAFT C-Min. 125/12.

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