OBSERVATIONS AND SUBMISSIONS OF THE ISLAMIC REPUBLIC OF IRAN ON THE PRELIMINARY OBJECTIONS

OBSERVATIONS ET CONCLUSIONS DE LA RÉPUBLIQUE ISLAMIQUE D'IRAN SUR LES EXCEPTIONS PRÉLIMINAIRES

IN THE NAME OF GOD

INTRODUCTION

1. These Observations and Submissions are submitted pursuant to the Court's Order of 9 April 1991, subsequently amended by its Orders of 18 December 1991 and 5 June 1992, fixing 9 September 1992 as the time-limit for the submission of the Islamic Republic of Iran's observations and submissions on the Preliminary Objections filed by the United States on 4 March 1991.

CHAPTER I GENERAL OBSERVATIONS ON THE PRELIMINARY OBJECTIONS

2. In its pleadings, the Islamic Republic has invoked three separate, yet complementary, titles of jurisdiction pursuant to which the Court, under Article 36(1) of its Statute, is empowered to decide the claims submitted by the Islamic Republic. They are Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention and Article XXI(2) of the Treaty of Amity between Iran and the United States. Each of these Articles contains a compromissory clause vesting jurisdiction in the Court to decide disputes between the Parties concerning the interpretation or application of the treaties or conventions in question.

3. The United States admits at page 2 of its Preliminary Objections that as a matter of principle each of the provisions invoked by the Islamic Republic confers jurisdiction on the Court to decide disputes relating to the interpretation or application of the relevant treaties. However, the United States goes on to argue that the invocation of these provisions is subject to certain preconditions which, according to the United States, have not been satisfied in this case. Accordingly, the United States requests the Court to address its Preliminary Objections under Article 79 of the Rules of Court, and to uphold

those objections. Significantly, the United States does not raise any objection as to the admissibility of the Islamic Republic's Application.

4. In these Observations, the Islamic Republic will show that disputes clearly exist between itself and the United States over the interpretation or application of each of the treaties invoked. This is evidenced not only by the positions that the Parties took before the institution of these proceedings as to the legal consequences of, and responsibility for, the shooting down of Flight IR 655, but also by their submissions in this case. In its Preliminary Objections the United States continues to argue that its actions were justified as self-defense or as measures designed to protect its essential security interests (both essentially defenses on the merits). The Islamic Republic, on the other hand, maintains that the United States breached substantive provisions of all three treaties by shooting down an unarmed, commercial aircraft flying within its own airspace, by otherwise interfering with the Islamic Republic's navigation and commerce in the Persian Gulf, and by failing to accept responsibility for the incident or compensate the victims for the damage provoked.

5. Although the Islamic Republic relied on the repeated U.S. declarations of neutrality during the Iran/Iraq war, and treated the United States as a neutral, the Islamic Republic was aware that the actions that the United States took against it leading up to and including the events of 3 July 1988 were part of a deliberate policy designed to assist Iraq in its war efforts and provoke the Islamic Republic. This view has been confirmed by recent disclosures by U.S. officials and others, which evidence the profoundly hostile attitude that the United States adopted towards the Islamic Republic at the time, in particular with respect to the activities of U.S. forces in the Persian Gulf. It was in part as a result of this policy that Flight IR 655 was shot down and 290 innocent lives were lost. This evidence will be discussed further on in this pleading (see, Part II), and

it will be seen that disputes exist over these facts and their relation to the treaties invoked by the Islamic Republic. Thus, by far the most important pre-requisite to the Court's jurisdiction - the existence of a dispute over the interpretation or application of each of the treaties - is clearly met in this case. In fact, even the United States does not dispute that the Parties take opposing views with respect to the treaties concerned.

6. Recognizing this difficulty, the United States relies instead on formalistic objections. These take the guise of arguing either that the Islamic Republic did not follow the proper procedural rules in raising its claim (in the case of the Islamic Republic's appeal under the Chicago Convention from the decision of the ICAO Council), or that the Islamic Republic did not exhaust prior remedies by seeking to negotiate or arbitrate the dispute before instituting these proceedings (in the case of its claims arising under the Montreal Convention and the Treaty of Amity). Moreover, in what is principally an argument on the merits, in that it concerns the interpretation or application of the treaties concerned, the United States also contends that neither the Montreal Convention nor the Treaty of Amity have any substantive connection to the shooting down of Flight IR 655, and thus cannot be relied on to provide a basis of jurisdiction. If nothing else, this argument demonstrates that the Preliminary Objections do not possess an exclusively preliminary character.

7. With respect to the Chicago Convention, the Islamic Republic will demonstrate that the United States' argument that the decision of the ICAO Council from which an appeal is being sought was not a "decision" within the meaning of Article 84 of the Convention, and that in considering the matter the Council was not acting under Article 84, is not correct. As will be seen, in submitting the dispute to ICAO, the Islamic Republic did not refer to any particular provision of the Chicago Convention. Its concern was to have the

matter considered and ruled on as rapidly as possible, given the gravity of the incident and the continued threat to air navigation in the Persian Gulf posed by the actions of the U.S. warships. There are no grounds, therefore, for the United States' assertion that the matter was dealt with under Article 54(n) of the Chicago Convention. In fact, that provision was never invoked by the Council at any time during its deliberations.

8. What is clear from the record of the proceedings before the ICAO Council is that the requirements of Article 84 of the Chicago Convention, which is the sole basis of the Court's jurisdiction, were met. In other words, a disagreement over the Convention's application or interpretation was submitted to and decided on by the Council. In itself, this is sufficient to establish the Court's jurisdiction.

9. The Islamic Republic pursued both legal claims (that the United States should be held responsible for breaches of the Chicago Convention) and practical concerns (to ensure the safety of air navigation) before the ICAO Council. Being a non-member of the Council, the Islamic Republic left it to the Council to determine the procedures it would follow for deciding the matter. This approach was fully consistent with the Convention which gives the Council full power to determine the appropriate procedures in any matter before it. In the light of the urgency of the matter, the application of ICAO's Rules for the Settlement of Differences ("the Rules") could be suspended or varied with the agreement of the Parties in order to lead to a more expeditious or effective disposition of the case as effectively happened in this instance. Regrettably, despite a full airing of both Parties' positions on the issues and the commissioning of a fact-finding investigation, the Council failed to respond adequately to the legal aspects of the Islamic Republic's claim. Instead, the Council limited itself mostly to discussing "technical" aspects of the matter. Nevertheless, there is no

doubt that the Council rendered a final decision on the dispute submitted by the Islamic Republic finding that the shoot-down was an accident, albeit due to errors in identification of the aircraft, and rejecting the Islamic Republic's requests for relief. It is this decision which the Islamic Republic is appealing pursuant to Article 84 of the Convention.

10. Whether the Council's failure to properly address the Islamic Republic's claims resulted from the fact that its membership is heavily weighted in favor of certain powerful States in the field of aviation, or from an inherent reluctance or inability to grapple with judicial issues, or even from its lack of uniformly applied procedures, the fact remains that the Council's decision is precisely the kind of decision which the Court should consider on appeal in exercising its supervisory powers over ICAO pursuant to Article 84 of the Chicago Convention. The need for the Court's review is compelling when there so evidently existed a disagreement between the Islamic Republic and the United States over the interpretation or application of substantive provisions of the Chicago Convention which was decided on by the Council, where the requirements of Article 84 have been met, and where the United States' objections to jurisdiction are of a purely formalistic nature. With regard to such formalistic objections, it is appropriate to recall the words of the distinguished jurist Charles De Visscher, recently referred to by Judge Shahabuddeen at page 22 of his Separate Opinion in the Case Concerning Certain Phosphate Lands in Nauru:

> "The temptation to formalism, and the proneness to generalization by abstract concepts and to premature systematization, represent one of the most serious dangers to which international-law doctrine is still exposed ... International justice especially must maintain a

proper relationship between social data and the rules designed to govern them[1]."

11. With respect to the Montreal Convention, the United States' argument that the Islamic Republic failed to satisfy the jurisdictional prerequisites of Article 14(1) by not having sought to resolve the dispute through negotiation or arbitration does not stand up to scrutiny. Prior to the filing of the Islamic Republic's Application, the United States had an explicit policy not to deal with the Government of the Islamic Republic on the matter, including on the issue of compensation. Official U.S. State Department communications confirm that the United States insisted on avoiding any Iranian "interference" in the matter. Moreover, the prospect of negotiating with the Islamic Republic regarding Flight IR 655 was not perceived by either the executive or legislative branches of the U.S. Government as a viable alternative. Bearing in mind that the two States did not then, and still do not, maintain diplomatic relations, the possibility of fruitful negotiations leading either to settlement or to arbitration was, in the circumstances, virtually nil. For these reasons, it is untenable for the United States to allege that the Islamic Republic "has deliberately avoided normal diplomatic practice[2]". It is the United States which was unwilling to discuss the matter with the Government of the Islamic Republic.

12. In addition, ever since the incident occurred, the United States has made it clear that it refuses to consider the attack on Flight IR 655 as anything other than a legitimate act of self-defense. The Islamic Republic has contested this view before both ICAO and the United Nations Security Council. The positions of the Parties being so totally irreconcilable, international law does not impose an obligation for further negotiations in order to bring the dispute

1 De Visscher, C.: Theory and Reality in Public International Law, tr. P.E. Corbett, 1968, p. 143.

2 U.S. Preliminary Objections, p. 5.

before the Court, particularly when one of the States (the United States) has not even recognized the rights of the other in the matter and when parliamentary forms of diplomacy before international organizations have been unable to bridge their differences. In short, the obligation to negotiate is not absolute but rather depends on the relevant facts and circumstances of each particular case.

13. As for the assertion that the Islamic Republic's claims fall outside the scope of the Montreal Convention because the Convention does not apply to the acts of States or State agents (such as members of the armed forces) against civil aircraft, this is no more than a petitio principii. Such arguments may reflect the United States' position as to the interpretation or application of the Convention, but this is a question which the Court is called upon to decide at the merits stage of the proceedings. The United States' thesis thus serves only to provide further evidence that a dispute exists between the Parties over the interpretation or application of specific provisions of the Convention, including Article 1 which plainly states that the Convention applies to any person in the broadest sense of the term.

14. With respect to the Treaty of Amity, the arguments presented by the United States suffer from many of the same defects. Given the divergent positions of the Parties on liability, obviously a dispute exists over the interpretation or application of the Treaty's provisions, particularly Article 1 (calling for peace and friendship between the countries), Article IV(1) (providing that the nationals of the Islamic Republic be accorded "fair and equitable treatment") and Article X(1) (providing for freedom of commerce and navigation). The mere fact that the Islamic Republic only invoked the Treaty of Amity in its Memorial has in no way changed the fundamental nature of the case introduced in its Application. That case remains based on the events leading up to the destruction of Flight IR 655 and the shoot-down itself. Thus, there are no

grounds for holding that the Islamic Republic is somehow estopped from invoking the Treaty at this stage of the proceedings.

15. In addition, contrary to what the United States says, the Treaty of Amity's compromissory clause (Article XXI(2)) does not require that negotiations are a pre-requisite to bringing a case under the Treaty. All that is required, as several members of the Court confirmed in the jurisdictional phase of the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (the "Nicaragua case"), in connection with an identical compromissory clause in a treaty between Nicaragua and the United States, is that the dispute be one "not satisfactorily adjusted by diplomacy". Such a situation undoubtedly exists in the present case. Moreover, even if an attempt to negotiate had been required, the United States' categorical refusal to deal with, or to allow any "interference" by, the Government of the Islamic Republic on the matter, or even to recognize the interests of the Islamic Republic relating to the shoot-down, would preclude the United States from raising the issue now as a bar to jurisdiction.

16. Finally, it will be necessary to comment on the United States' extraordinary accusation that the Islamic Republic is invoking the Treaty of Amity in bad faith. For over ten years, the United States has consistently taken the position that the Islamic Republic is barred from repudiating the Treaty. The United States adopted this position because it was relying on the Treaty and wished to reap its benefits in both the Case Concerning United States Diplomatic and Consular Staff in Tehran (the "Diplomatic and Consular Staff" case) before this Court and numerous other cases before the Iran-United States Claims Tribunal. Now the United States has reversed its position, insisting that the Islamic Republic is barred from invoking the Treaty. Having successfully relied

on the Treaty over the past decade in cases where it was the claimant, the United States now seeks to preclude the Treaty's application where it is the respondent.

17. Such a volte face finds no support in law and is manifestly unacceptable. If ever there was an example of a State "blowing hot and cold", this is it. The equal application of justice demands that the United States be held to the same standards under the Treaty as have been applied against the Islamic Republic in other cases. The fact is that the Treaty of Amity provides a solid basis of jurisdiction in this case - a conclusion entirely supported by the Court's decisions in both the Nicaragua and the Diplomatic and Consular Staff cases.

18. All of these considerations lead the Islamic Republic to submit that under Article 79(7) of the Rules of Court, the Preliminary Objections must be rejected with respect to all three bases of jurisdiction. Subsidiarily, however, the Islamic Republic calls the Court's attention to the fact that many of the United States' arguments, especially those that relate to the Montreal Convention and the Treaty of Amity, are directed to the merits of the case. Consequently, if, contrary to the Islamic Republic's principal submission, the Court concluded that it could not reject the United States' Preliminary Objections in limine at this stage of the proceedings, it would still be open for the Court to declare that, in the circumstances of the case, the objections raised do not possess an exclusively preliminary character.

19. In either event, it is clear that this case raises important issues relating to the interpretation or application of all three conventions. Because of their importance not only to the Parties, but also to the safety of international air navigation and commerce in general and in order to ensure the payment of due compensation, there are compelling reasons for the Court to address these issues on the merits.

20. The Court's jurisprudence demonstrates that the Court has solid jurisdictional grounds for tackling all of the issues raised and that in similar circumstances in the past the Court has not hesitated to exercise its jurisdiction. For States such as the Islamic Republic that are not superpowers, recourse to the Court remains their best hope for resolving international legal disputes on the basis of procedural due process and respect for the rule of law. When States have consented to the Court's jurisdiction to resolve disputes over the interpretation or application of international agreements, the Court should exercise that jurisdiction.

CHAPTER II THE STRUCTURE OF THESE OBSERVATIONS

21. These Observations are submitted in three volumes. Volume I contains the Observations themselves and is divided into seven Parts following this Introduction.

22. Part I deals with the overall deficiencies of the U.S. Preliminary Objections and explains how they do not rise to the level of legitimate preliminary objections, stricto sensu, under Article 79 of the Rules, but rather constitute defenses to the merits.

23. Parts II and III then take up some of the factual issues in the case. It is not the Islamic Republic's intention to plead the merits of the case at this stage; however, it is necessary to restore some balance to the very selective and one-sided account of the "facts" given in the U.S. Preliminary Objections, particularly to the extent that they have a bearing on the jurisdictional issues and in the light of the recent evidence that has emerged confirming that the United States was engaged in a policy designed to provoke the Islamic Republic and that the Vincennes, and its helicopter, penetrated Iranian territorial waters to pursue acts of aggression against the Islamic Republic on the day of the incident.

24. After addressing these matters in Part II insofar as they relate to the events leading up to and including the destruction of Flight IR 655 on 3 July 1988, Part III will then discuss the relevant facts following the incident including the question of negotiations between the Parties, the crystallization of the dispute, and the legal principles underlying the question of negotiations.

25. Thereafter, Parts IV, V and VI will address the individual bases of jurisdiction provided for under Article 84 of the Chicago Convention (Part IV), Article 14(1) of the Montreal Convention (Part V) and Article XXI(2) of the Treaty of Amity (Part VI). The Observations then end with the Islamic Republic's conclusions and submissions in Part VII.

26. Volumes II to IV contain additional documentary exhibits that are referred to in the course of these Observations. For the convenience of the Court, these include both new documents and some of the more relevant documents relating to the jurisdictional issues that have already been supplied by the Parties.

PART I

UNDER ARTICLE 79 OF THE RULES OF COURT, THE PRELIMINARY OBJECTIONS SHOULD EITHER BE REJECTED OR DECLARED NOT TO POSSESS AN EXCLUSIVELY PRELIMINARY CHARACTER

1.01 The United States has filed its Preliminary Objections pursuant to Article 79 of the Rules of Court. In those Objections, the United States requests the Court to address the issue of jurisdiction before taking up the merits of the case[3].

1.02 This request presents the United States with a dilemma. On the one hand, the United States is anxious to introduce its version of the events surrounding the destruction of Flight IR 655 in order to justify its actions. To this end, the United States spends some 70 pages of its pleading discussing the facts, even to the extent of trying to justify its issuance of what were clearly illegal NOTAMS and of introducing copious materials relating to attacks on shipping in the Persian Gulf, neither of which have any relevance to its jurisdictional objections.

1.03 On the other hand, the more the United States discusses the facts of the case, the more this serves to point up how its objections are principally concerned with the merits of the case, not with strictly jurisdictional issues. Consequently, in order to avoid this dilemma, the United States seeks to have the best of both worlds: arguing a number of issues on the merits while maintaining that this is necessary under Article 79(6) of the Rules in order to dispose of the jurisdictional issues at a preliminary stage without joining the objections to the merits. On this latter point, the United States goes to great pains to show that the 1972 revision of the Rules was designed to encourage the Court to address all

3 U.S. Preliminary Objections, p. 75.

legal and factual questions bearing on jurisdiction, even if they touch on the merits, at a preliminary stage of the proceedings. There are several flaws in the United States' line of argument which will be discussed below.

CHAPTER I ARTICLE 79(7) OF THE RULES AUTHORIZES THE COURT TO ORDER FURTHER PROCEEDINGS IF THE PRELIMINARY OBJECTIONS ARE EITHER REJECTED OR DECLARED NOT TO POSSESS AN EXCLUSIVELY PRELIMINARY CHARACTER

1.04 Under Article 79(7) of the Rules, the Court has three avenues open to it when confronted with preliminary objections. The Court may either (i) uphold the objection; (ii) reject it; or (iii) declare that it does not possess, in the circumstances of the case, an exclusively preliminary character.

1.05 For the reasons that will be explained in the following Parts, the Islamic Republic believes that there are overwhelming grounds for the Court to adopt the second approach - to reject the United States' Preliminary Objections at this stage of the proceedings. Nevertheless, it does not follow from this, as the United States would have the Court believe, that simply because an objection might not be rejected at this stage it necessarily must be upheld in a preliminary judgment. As the Court recognized in its judgment on the jurisdictional issues in the Nicaragua case, it is perfectly possible (as indeed happened in that case) that particular objections may be held not to have an "exclusively preliminary character" and thus not to constitute an obstacle for the Court to entertain the proceedings brought by the application on the merits[4]. In such a situation, Article 79(7) obliges the Court to fix time-limits for the further proceedings (i.e., the merits) in the case.

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4 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 425-426, para. 76.

1.06 While the actual language of Article 79(7) of the Rules may no longer expressly refer to the possibility of joining the jurisdictional issues to the merits, it is difficult to see what other alternative would be available for an objection that is declared not to have an "exclusively preliminary character". As the former President of the Court, Judge Jiménez de Aréchaga, wrote, in such circumstances "[i]t would then be for the Respondent to raise such a defense at the stage of the merits, if it so wished[5]".

1.07 One striking aspect of Article 79(7) is its provision that the Court shall fix time-limits for the further proceedings if the Court either rejects the preliminary objection or declares that it does not possess an exclusively preliminary character. The mandatory nature of the word "shall" coupled with the use of the word "exclusively" suggests that this criterion must be strictly interpreted. Thus, if there is any possibility that an objection which is not rejected

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5 Jiménez de Aréchaga, E: "The Amendments to the Rules of Procedure of the International Court of Justice", 67 Am. J. Int'l L. (1973), at p. 17. Exhibit 1. See, also, Dissenting Opinion of Judge Schwebel in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 613.

In this connection, reference may also be made to the opinion of Professor Rosenne who notes:

"The puzzle that the new version sets ... is whether the effect of the new provision is to abolish the option of joining an objection to the merits, thus wiping out a virtually constant jurisprudence itself corresponding to a widely felt need, or whether the holding that the objection does not, in the circumstances, possess an exclusively preliminary character simply means that it is not admissible as a preliminary objection. In that event, such a holding would be the equivalent of joining it to the merits, perhaps in the technical classification of a plea in bar, while not requiring the Court to deal with it specifically in the operative clause of the judgment." Rosenne, S.: Procedure in the International Court, Martinus Nijhoff, The Hague, 1983, p. 165. Exhibit 2.

at the preliminary stage is so intertwined with the merits of the case that it is not exclusively preliminary, it must be deferred to the "further proceedings"[6].

1.08 Notwithstanding their other deficiencies, a number of the United States' objections run afoul of this provision. Reference may be made, for example, to the United States' argument that the Treaty of Amity has nothing to do with the shooting down of Flight IR 655 because it is purely a commercial treaty which does not preclude measures taken by a party to protect its essential security interests. In Part VI, the Islamic Republic will show that under the Court's prior jurisprudence these contentions cannot be sustained. Yet even if there was some merit to the argument, it would still be so inextricably linked with the merits of the case - the interpretation or application of the Treaty of Amity with respect to the shooting down of Flight IR 655 - that it could not be said to have "an exclusively preliminary character". In such circumstances, it would fall upon the Court to proceed to the merits of the case.

1.09 The same can be said about the United States' contentions regarding the scope of the Montreal Convention, particularly whether it applies to State actions or the acts of military forces against civil aircraft. Even accepting, arguendo, that such arguments present a legitimate jurisdictional question, it cannot be said that they possess an "exclusively preliminary character" given that the whole question concerning the scope of the Convention is linked to issues that the Court must decide on the merits: namely, the interpretation or application of

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6 See, Ago, R.: "Eccezioni non esclusivamente preliminari" in Il Processo Internazionale, Studi in onore di Gaetano Morelli, Giuffré, 1975, p. 13. See, also, Jiménez de Aréchaga, supra, at p. 17, where the author notes that:

> "If ... the objection that has been raised by a party as preliminary is so intertwined with elements pertaining to the merits that a hearing of those issues would siphon off into the preliminary stage the whole of the case, then the Court would declare that, in the circumstances, the objection raised as preliminary does not really possess such a character".

the Convention. Accordingly, such an objection cannot operate as a bar to jurisdiction at this stage, and the Court would in any event be obliged to proceed with the "further proceedings" in the case[7].

CHAPTER II ARTICLE 79(6) IS NOT RELEVANT TO THE U.S. OBJECTIONS

1.10 There is a further weakness to the United States' argument in so far as it is based on Article 79(6) of the Rules. In essence, the United States relies on this provision as an excuse for treating factual questions that are actually directed to the merits of the dispute. However, this tactic rests on a misinterpretation of the Article in question. Article 79(6) states that:

> "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."

1.11 As plainly stated, Article 79(6) enables the Court to request the Parties to argue certain factual or legal questions bearing on the jurisdictional issues. In the present case, however, the Court has made no such request, so the provisions of Article 79(6) can hardly justify the United States' detailed treatment of the facts in its pleadings. Moreover, there is no need for the Court to make such a request since it is readily able to decide the jurisdictional issues in the case on the basis of the procedural record before it and the compromissory clauses

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7 In this connection, it is useful to bear in mind the definition of a preliminary objection offered by Judges de Visscher and Rostworowski in their Joint Separate Opinion in the Panevezys-Saldutiskis Railway case:

> "... an objection is prima facie preliminary when, by its nature or its purpose, it appears directed against the judicial proceedings, that is, against the conditions governing the institution of the proceedings and not against the law on which they rest. In order, however, that it may definitely be granted this character, it is necessary in each case to weigh the arguments cited in its support. The objection will be treated either as preliminary or as a defence of the merits, according as these arguments may or may not prejudge the justice or injustice of the claim." Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J. Series A/B, No. 76, p. 24.

themselves, without having to address factual matters that are inseparable from the merits of the case.

1.12 The situation is simply the following: the purely procedural objections to the Court's jurisdiction raised by the United States - such as that the Islamic Republic failed to negotiate the dispute, or that it failed to adhere to the procedural rules relating to the bringing of a dispute before the ICAO Council under Article 84 of the Chicago Convention, or that it is estopped from invoking the Treaty of Amity because of its past conduct - can be disposed of at this stage without any reference to the merits. The other objections raised by the United States - relating to whether or not the Islamic Republic's claims fail to have more than a "remote connection" with either the Montreal Convention or the Treaty of Amity - are neither valid nor possess an exclusively preliminary character. Either way, these objections cannot be upheld as genuine preliminary objections under Article 79.

CHAPTER III THE SCOPE OF THE UNITED STATES' CONSENT TO JURISDICTION

1.13 The United States then shifts its argument and asserts that it has not consented to the Court's jurisdiction in this case within the meaning of Article 36(1) of the Statute[8]. This allegation also falls wide of the mark, as a review of the relevant facts readily reveals.

1.14 There is no dispute between the Parties that both of them are parties to all three treaties invoked by the Islamic Republic, and that these treaties remain in force between them. Similarly, it is undisputed that all three treaties contain compromissory clauses that vest jurisdiction in the Court to decide disputes between the parties as to their interpretation or application. This

8 U.S. Preliminary Objections, pp. 80-81.

is important because it defines the scope of what the United States consented to. By becoming a party to the treaties in question, the United States agreed in principle that disputes over their interpretation or application could be submitted to the Court for adjudication either directly, or in the case of the Chicago Convention, on appeal from a decision of the ICAO Council.

1.15 Nonetheless, the United States argues that it cannot be presumed to have consented to jurisdiction just because another State asserts that a particular dispute arises under one of these treaties. Borrowing from the Court's words in the Ambatielos case, the United States asserts that it is not sufficient for there to be a "remote connection" between the facts of the Islamic Republic's claims and the treaties in question; there must be a "reasonable connection"[9].

1.16 Notwithstanding that the "reasonable connection" test is not one that has been specifically endorsed by the Court, the Islamic Republic will show that not only is there a "reasonable connection" between the above-mentioned treaties and the facts of this case, but that there have been express violations of these treaties as well. In so doing, it must be borne in mind that these issues are not matters to be addressed at the jurisdictional stage since they do not, strictly speaking, possess an exclusively preliminary character. Any assessment of the United States' arguments would require a full analysis by the Court of the facts of the case and an interpretation and application of the treaties in the light of the facts. Such issues are precisely those which come within the jurisdiction of the Court pursuant to the terms of the compromissory clauses invoked by the Islamic Republic.

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9 Ibid., p. 83.

1.17 The United States' confusion on this point rests on a fundamental mischaracterization of the findings of the Court in the three cases on which it relies[10]. In the Ambatielos case, for example, the Court found that it had jurisdiction to decide whether the United Kingdom was under an obligation to submit to arbitration a dispute brought by the Royal Hellenic Government on behalf of Mr. Ambatielos. The compromissory clause in that case provided that claims had to be "based on" the 1886 treaty which formed the basis of jurisdiction. The issue on the merits was thus whether Mr. Ambatielos' claims were "based on" the 1886 treaty, and whether they could be submitted to arbitration. In the circumstances of the case, the Court found that Greece had to show a "sufficiently plausible" (not a "reasonable") connection between the claim and the treaty in order to establish that the claim was "based on" the treaty[11].

1.18 The difference between Ambatielos and the present case is self-evident. Unlike in the 1886 treaty at issue in Ambatielos, there is no requirement in the compromissory clause of either the Treaty of Amity, the Montreal Convention or the Chicago Convention that a prior showing must be made that a claim is "based on" these treaties. To the contrary, the compromissory clauses of all these treaties cover disputes over their interpretation or application, and thus the very issue of whether a claim falls within the scope of the treaties is a matter within the jurisdiction of the Court, not a matter that has to be established before the Court's jurisdiction can be upheld. This being said, the Islamic Republic will still show that there is much more than a reasonable connection between its claims and the treaties involved.

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10 See, U.S. Preliminary Objections, pp. 81-83.

11 Ambatielos, Merits, Judgment, I.C.J. Reports 1953, at p. 18.

1.19 The same point applies to the United States' reference to the Court's advisory opinion in the Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO case. In that case, the Court noted that the Administrative Tribunal was only competent to hear complaints by an official alleging non-observance of the terms or provisions of certain contracts. The Court found, however, that given the specific terms of the clause governing the competence of the Administrative Tribunal, it was necessary to establish as a prior matter a substantial, not merely artificial, connection between the allegations and the provisions relied on. Again, this case is not applicable to the present situation where all such issues are within the Court's jurisdiction inasmuch as the parties have consented that all disputes relating to the interpretation or application of the treaties invoked can be submitted to the Court. Moreover, the connection between the Islamic Republic's claims and the treaties at issue will be seen to be well established.

1.20 Finally, the United States refers to a third case: the jurisdictional phase of the Nicaragua case. This case did involve a treaty very similar to the Treaty of Amity where the compromissory clause vested jurisdiction in the Court to decide questions of interpretation or application. The United States cites a statement in the Court's judgment to the effect that Nicaragua "must establish a reasonable connection between the treaty and the claims submitted to the Court", in order to buttress its allegation that the Islamic Republic must make a similar showing here[12].

1.21 Two comments may be made about this citation. First, the reference given is to a part of the Court's judgment where the Court was recapitulating the United States' own argument, not stating its independent view

12 U.S. Preliminary Objections, p. 83 and fn. 1 thereto.

as to the extent of the nexus between the claims and the Treaty that was required for jurisdictional purposes. In rejecting the United States' position on this issue, the Court made no suggestion that a test such as that advocated by the United States had to be satisfied[13]. Second, there clearly is in any event a "reasonable" - indeed, intimate - connection between the claims of the Islamic Republic and the treaties invoked here. As the Court made clear in its judgment in the Nicaragua case, the question whether the use by one State of armed force against the territorial sovereignty of another State constitutes a breach of substantive provisions of a treaty such as the Treaty of Amity gives rise to a question of interpretation or application of the treaty in question. As the Court stated -

> "... for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that in the circumstances in which [the Application was brought], and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the 'interpretation or application' of the Treaty[14]."

1.22 The same considerations apply to the Montreal Convention. On its face, Article 1 of the Montreal Convention applies to any person involved in the offenses against civil aircraft mentioned therein. No exception is made anywhere in the Convention for persons acting on behalf of a State, and thus for State actions or the acts of armed forces. Prima facie, therefore, the Islamic Republic's claims relating to the destruction of one of its civil airliners by the crew of the Vincennes have at least a reasonable connection to the Convention. The burden of proof is on the United States to show otherwise; but this is a burden to be satisfied at the merits stage of the proceedings since it relates to the very

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13 See, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 427-429, paras. 81-83.

14 Ibid., p. 428, para. 83.

subject matter of the Court's jurisdiction - the interpretation or application of the Montreal Convention.

1.23 It follows that even if a "reasonable connection" test has to be met, it has been satisfied by the Islamic Republic with respect to its claims in this case. As such, there are no grounds for upholding the Preliminary Objections under Article 79 of the Rules of Court.

PART II

FACTUAL ISSUES RELEVANT TO THE PRESENT PROCEEDINGS

2.01 There are three reasons why the facts of this case should be heard by the Court. First, the true story of what happened on 3 July 1988 has never been told by the United States and this case offers perhaps the last chance for a full disclosure of the facts. Second, despite its jurisdictional objections, the United States has shown itself willing in its Preliminary Objections to enter into all aspects of the merits of the case. Third, and perhaps most important for the present stage of the proceedings, the Parties have consented to the Court's jurisdiction over the merits under the relevant compromissory clauses of the Chicago and Montreal Conventions and the Treaty of Amity.

2.02 Significantly, the United States' version of what happened on 3 July 1988 has changed with every telling. Different versions have been presented at different times to the public, to the press, to the United States Congress, to the U.N. Security Council and to the Council of ICAO. With every new version, the United States has been forced to revise its story. In an article published in July of this year, Newsweek magazine summed up the different "official" versions of the incident in its headline - a "Sea of Lies[15]".

2.03 Still another version has been presented to the Court in the statement of facts set out in Part I of the United States' pleading. As the Islamic Republic will show below, this version contains half-truths, misrepresentations and inaccuracies similar to all the other versions. In particular, the United States misrepresents the role of the U.S. forces in the Persian Gulf, misrepresents the

15 Newsweek, 13 July 1992. Exhibit 3.

actions of forces of the Islamic Republic prior to and on the day of the incident, and gives an incomplete and inaccurate version of the incident itself.

2.04 Moreover, new evidence about the incident, some of which has only come to light in the last few months, not only contradicts the official U.S. version of events (insofar as such exists), but effectively substantiates the factual presentation that has been made by the Islamic Republic since the date of the incident.

2.05 In this regard, one important event of which the Court will be well aware is the finding of the Secretary-General of the United Nations in his Report of 9 December 1991 that Iraq started and must bear responsibility for the 8-year war which caused such terrible suffering and cost hundreds of thousands of lives[16]. Despite this finding, the United States seeks to portray the Islamic Republic as the guilty party in the war. It totally ignores the fact that Iraq had started the war, invading a considerable part of Iran, a fact that was well-known at the time. It also ignores Iraq's use of chemical weapons[17], and that Iraq initiated attacks on neutral shipping in the Persian Gulf[18]. These facts, taken together with the Secretary-General's report, confirm that the United States' presentation of the Islamic Republic's role in the war is inaccurate. It is designed only to color the case and to distract attention from the main issues.

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16 Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987), 9 December 1991, U.N. Doc. S/23273. Exhibit 4.

17 A fact confirmed in the Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq, 19 August 1988; U.N. Doc. S/20134, p. 5. Exhibit 5.

18 See, para. 2.37 below.

2.06 The Secretary-General's Report is also significant because it shows that the United States' hostility towards the Islamic Republic throughout the imposed war was totally unjustified. Further evidence has recently come to light revealing that the U.S. Government endorsed a policy of direct military and financial assistance to Iraq and of military action against the Islamic Republic. This evidence is of direct relevance to the incident of 3 July 1988 in as much as it shows that the United States was predisposed to adopt an aggressive position against the Islamic Republic and its shipping and commercial air operations.

2.07 New evidence concerning the events of 3 July 1988, much of which was only made public in July of this year, also suggests a very different version of the facts than the United States has hitherto sought to portray. On the other hand, this new evidence substantially confirms the presentation of the facts that the Islamic Republic has made since the date of the incident in the statement of Mr. Velayati, the Minister of Foreign Affairs of the Islamic Republic, before the U.N. Security Council, in the Islamic Republic's presentations before the ICAO Council, and in its Memorial before the Court. This evidence shows that -

- Statements to the Security Council in 1988 by Vice-President Bush that the U.S. forces went to assist a neutral vessel on 3 July 1988 were false - it is now admitted that no neutral vessels were being "threatened" in any way by Iranian small patrol boats on the day of the incident and none sought U.S. assistance;

- Statements by President Reagan to Congress that the U.S. vessels were operating in international waters at the time of the shoot-down were false - it has now been admitted that U.S. forces intruded into Iranian territorial waters in order to pursue and harass Iranian small patrol boats just prior to the shoot-down;

- Repeated statements that the U.S. forces acted in self-defense are false - it now appears that the U.S. forces launched a direct attack on the Iranian small patrol boats on the day of the incident;

- Despite the admission in the United States pleading that the Vincennes was within the Islamic Republic's territorial waters when it shot down Flight IR 655, the United States has never been honest about the positions of its vessels or its helicopters at various times of the incident - it appears that this is because each of these vessels was violating the Islamic Republic's territorial sovereignty prior to the incident itself and prior to any engagement with Iranian small patrol boats.

2.08 All of these points will be discussed further in the following Chapters. The Court is invited to pay particular attention to the Newsweek article and the transcript of the ABC Nightline programme included in Exhibit 3 and Exhibit 6 hereto, and the statements of U.S. government and military officials made therein[19]. Although these are media reports, the Court will note that the writers have had access to unique sources of information. The Court will also note that a very substantial part of the United States' factual presentation in its pleading is based on newspaper articles. Most importantly, it appears that the United States has made no coherent attempt to dispute any of this new evidence.

2.09 The Islamic Republic understands that, in the light of the Newsweek and ABC Nightline stories, a further investigation of the incident is now under way in the United States conducted by the House Armed Services Committee. The fact that such an investigation has been found necessary, implying that the Government is not sure of its own version of the events, undermines the United States' rejection of responsibility for the incident. It also makes a mockery of the United States' protestations that it conducted a full, open investigation of the incident, in the form of the Defense Department Report,

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19 As noted, a copy of the transcript of the ABC Nightline programme is included as Exhibit 6. However, a videotape of the full programme has also been deposited with the Registry pursuant to Article 50(2) of the Rules of Court. The Islamic Republic does not of course accept every statement made in Exhibits 3 and 6 and only relies on them to the extent specifically indicated in this pleading.

which was presented to ICAO[20].

2.10 The United States' failure to tell the whole truth about this incident is not only an abuse of international organizations like the Security Council, the ICAO Council and the Court itself, to whom the various versions of the story have been told, it is also an abuse of the rights of the 290 innocent victims. The proceedings before the Court are perhaps the last opportunity for the full story to be told and for the victims and the Islamic Republic to obtain proper redress from the United States together with a full acknowledgment of responsibility.

2.11 If the United States genuinely believes that as a matter of law it has no responsibility for the incident, it should have no reason to prevent a full airing of the facts. However, the consideration of this new evidence is something the United States gives every appearance of wanting to avoid. It asks the Court "to accept the report of the ICAO investigation as an authoritative finding with regard to the incident of 3 July 1988[21]", arguing that any issue of fact "can be resolved on the basis of the extensive public record of the proceedings of the ICAO on this matter[22]". This argument is without basis as a matter of fact and law.

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20 The U.S. Defense Department Report is Appendix E to the ICAO Report. See, Exhibit 4 to the Memorial of the Islamic Republic. See, also, U.S. Preliminary Objections, pp. 52-55. The United States characterization of this report as "candid" is beyond belief, given that its conclusions were misleading and/or quite incorrect and that it has only been made available in a heavily censored form.

21 U.S. Preliminary Objections, p. 66, fn. 1.

22 Ibid., p. 83, fn. 2. As will be seen in Part IV below (see, paras. 4.53 to 4.55) this is an extraordinary argument because it totally contradicts the United States' position that the ICAO Council only conducted an investigation into the technical aspects of the incident and did not make nor was intended to make legal findings on the main factual issues.

2.12 First, it is now clear that ICAO was not given an accurate version of the facts. Second, the United States' own presentation of the facts is not restricted to the ICAO Report. A myriad of new exhibits is introduced, including press materials and U.S. policy papers, which relate to issues hardly touched on in the ICAO Report. Third, what the United States means by the ICAO Report is generally not the report prepared by the ICAO investigation team, but the one-sided and heavily censored Report prepared by its own Defense Department which is Appendix E to the ICAO Report. In the light of recent evidence, it is now clear that this Defense Department Report was misleading in its presentation of the events and incorrect in its conclusions.

2.13 It should anyway be recalled that there is no reason in law why the Court should not hear all of the facts relating to the incident de novo. There is thus no justification for the argument that an appeal from an ICAO decision should be limited to the facts of the case as presented to ICAO, and the United States cites none[23]. Moreover, where different treaties are under consideration that were not considered by the ICAO Council (i.e., the Treaty of Amity and the Montreal Convention) and where new facts have been discovered which might have significantly affected the Council's decision, there can be no basis for restricting the scope of the Court's review.

2.14 The approach of the United States in this case is inappropriate not only because of its inaccurate version of the facts but also

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23 See, Lauterpacht, E.: "Aspects of the Administration of International Justice" in Hersch Lauterpacht Memorial Lectures, Cambridge, Grotius Publications, 1991, p. 106. Exhibit 7. Referring to the Court's ruling in Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, Lauterpacht notes that: "...although there was no discussion of what was meant by the idea of 'appeal', the Court proceeded to determine de novo on its merits the competence of the ICAO Council, there being no suggestion that the concept of 'appeal' meant anything less."

because the United States has sought in its Preliminary Objections to make a full presentation of its version of the facts while, at the same time, it has sought to prevent a full hearing of the case based on purely formalistic objections.

2.15 In raising preliminary objections, a State may in some cases have an interest in, and justification for, limiting the Court's power to hear all the facts of a case. In this case no such justification exists. Not only did the United States widely publicise its version of the facts prior to the institution of these proceedings, but in its pleading it also makes a detailed presentation on all relevant issues, including issues relating to the war imposed on the Islamic Republic by Iraq, the role of the United States' forces in the Persian Gulf, the problems of commercial maritime and air traffic in the Persian Gulf, and the NOTAMs issued by the United States[24]. It also presents a new version of the shooting down of Flight IR 655, the prior engagement with Iranian small patrol boats and the alleged warnings given by the Vincennes.

2.16 In making such a detailed presentation, the United States takes issue with virtually all aspects of the statement of facts made in the Islamic Republic's Memorial which addressed the merits of the case[25]. The United States thus shows that the Parties continue to have opposing positions concerning most of the main factual issues and their legal significance, and that a dispute continues to exist with regard to these issues.

2.17 The United States has also presented the main aspects of its defense on the merits of the case. It seeks to justify its military presence in the

24 This latter issue is discussed in detail in Annex 2 to the U.S. Preliminary Objections.

25 The United States' presentation of the facts, including Annexes 1 and 2 to its pleading, is even longer in terms of number of pages than the Islamic Republic's presentation in its Memorial on the merits.

Persian Gulf and its interference in commercial maritime and air traffic on the grounds that they constituted "essential security measures" within the terms of Article XX(1)(d) of the Treaty of Amity. Similarly, with respect to the shoot-down, the United States presents all the facts relevant to its self-defense argument while at the same time calling into question the responsibility of the Islamic Republic in the incident.

2.18 The United States makes no attempt to explain the relevance of this factual discussion to the objections to jurisdiction raised in other parts of its pleading. Although the United States asserts that "many of the factual assertions made by Iran need not be addressed at this time by the Court[26]", it neither distinguishes which facts are relevant nor in relation to which jurisdictional issue they might be relevant, if at all. This last is a requirement implicit in Article 79(5) of the Rules of Court, which provides that "statements of fact ... in the pleadings ... shall be confined to those matters that are relevant to the objection". As pointed out in Part I above, the United States seeks the best of both worlds, arguing merits issues, while at the same time attempting to restrict the Court's consideration of the merits. Moreover, by arguing the facts at the same time as it asks the Court to dismiss the case on jurisdictional grounds, the United States effectively seeks a summary judgment on the merits, without allowing the Court, or the Islamic Republic, to examine fully the facts and the law, which properly belong to a later stage of the proceedings. This is totally inappropriate, and in considering the United States' jurisdictional objections the Court should bear in mind the United States' willingness to delve into the merits of the case.

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26 U.S. Preliminary Objections, p. 9.

2.19 A response to the United States' version of the facts is thus necessary for two main reasons: first, to correct the numerous misrepresentations of factual issues by the United States, shown, not least, by new evidence which directly supports the Islamic Republic's explanation of the facts of this incident; and second, because the United States has shown itself willing to enter into the facts of this case in detail. The Islamic Republic will seek to correct the inaccurate version of events portrayed by the United States. However, this is not meant to be (nor should it be) a detailed rebuttal of all the factual statements made by the United States and, unlike the United States, the Islamic Republic will seek to relate its factual discussion to the relevant jurisdictional issues in the case.

2.20 In Chapter I below, the Islamic Republic will discuss the relevance of the period prior to the shoot-down of Flight IR 655. In Chapter II the shoot-down itself is discussed, while Chapter III contains a conclusion showing the relevance of these facts to the jurisdictional issues.

CHAPTER I THE FACTS RELATING TO THE PERIOD PRIOR TO THE SHOOT-DOWN OF FLIGHT IR 655

2.21 This Chapter discusses the period prior to the incident and focusses on the United States' allegations that the Islamic Republic has somehow expanded its complaint by introducing facts relating to the background situation in the Persian Gulf. It will be shown below that this allegation is incorrect as a matter of fact (Section A), that facts relating to the background situation in the Persian Gulf are directly relevant to an understanding of the shoot-down (Section B), and that, in any event, part of the dispute submitted by the Islamic Republic to the Court in its Application concerned events that occurred prior to the incident (Section C).

SECTION A. **The Islamic Republic Has Not Expanded Its Complaint by Introducing Background Facts from the Period Prior to the Shoot-down**

2.22 The United States maintains that the dispute submitted in the Islamic Republic's Application "arose from a single incident: the destruction of an Iranian aircraft by a United States warship[27]". The United States then asserts that, in its Memorial, the Islamic Republic "expands its complaint to cover the effect of U.S. military deployments in the [Persian] Gulf, and of other U.S. actions not involving military force, on the commercial relations of Iran and the United States over an extended period of time[28]". This assertion is without merit.

2.23 It is quite obvious that the shoot-down of Flight IR 655 cannot be fully understood without reference to the situation in the Persian Gulf prior to the incident. To this end, the Islamic Republic introduced in its Memorial facts showing the clear breaches of the laws of neutrality by the United States during the Iran/Iraq war, the hostile attitude shown by U.S. military forces towards Iranian forces, the continuous interference by these forces in Iranian commercial traffic, the United States' issuance of the illegal NOTAMs, and the U.S. military forces' lack of coordination with civil aviation authorities in the region. These facts are all directly relevant to a full understanding of the shoot-down. They explain why U.S. forces barged into Iranian territorial waters on 3 July 1988, provoked Iranian forces and were predisposed to treat Flight IR 655 as hostile and fire on it[29].

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27 U.S. Preliminary Objections, pp. 218-219.

28 Ibid., pp. 219-220. For the sake of clarity, the full term "Persian Gulf" is used throughout this pleading in conformity with the relevant Un Secretarial Note No.AD311/1 GEN (5 March 1971); UN Secretarial Editorial Directive No. ST/CS/SER, A29 (10 January 1990), Exhibit 7A.

29 See, paras. 2.48-2.51 below.

2.24 In total contradiction of its argument that the Islamic Republic is guilty of expanding its complaint by introducing such facts, the United States acknowledges their relevance in the very first page of its own discussion of the facts by noting that:

> "It is ... 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 [Persian] Gulf[30]."

While the Islamic Republic disputes the content of this statement, it is a clear admission of the relevance of the background facts. Indeed, the United States goes on to acknowledge that "[t]he incident of Iran Air Flight 655 cannot be separated from the events that preceded it[31]", and cites from the ICAO Report, which made the same conclusion.

2.25 The United States further contradicts itself by devoting an entire chapter of its Statement of Facts to a detailed survey of attacks on "neutral" shipping in the Persian Gulf throughout the period of the imposed war, and a review of U.S. military policy and actions in the Persian Gulf region prior to the incident.

2.26 Thus, there is no real argument over the relevance of the events prior to the shoot-down of Flight IR 655, and the Islamic Republic has not expanded its complaint by referring to such events. However, the United States has given a version of these events that is misleading and inaccurate, which the Islamic Republic will attempt to correct below, whilst at the same time explaining the relevance of these events to the claims made in its Application.

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30 U.S. Preliminary Objections, p. 9.

31 Ibid.

SECTION B. The Relevance of the Background Facts to the Shoot-down of Flight IR 655

(i) The non-neutral policy of the United States towards the Islamic Republic

2.27 The United States asserts that the major thrust of its policy in the war imposed by Iraq on the Islamic Republic was to seek a peaceful settlement of the conflict, in particular by the implementation of the Security Council's Resolution 598[32]. In fact, while the United States repeatedly and as late as 23 May 1988 professed its neutrality in the conflict on which the Islamic Republic relied, the United States actively supported Iraq and adopted a provocative and hostile attitude towards the Islamic Republic. This policy was a contributory factor to the shoot-down of Flight IR 655.

2.28 In his book Fighting for Peace, the U.S. Secretary of Defense at the time, Caspar Weinberger, while noting that "official policy was to remain neutral", stated that he "managed to have official United States statements and actions convey that we 'tilted' toward Iraq[33]". It has now become common knowledge, particularly in the aftermath of the war between Iraq and Kuwait, that this tilt was far more extreme than suggested by Mr. Weinberger. The following facts give a better appreciation of the true status of U.S. policy from 1980 to 1988:

- Diplomatic relations which had been broken since 1967 were reestablished with Iraq, one of the belligerents, in November 1984 and remained intact throughout the war, whereas the United States had no diplomatic relations with the Islamic Republic;

- Economic sanctions were imposed on all goods of Iranian origin and an almost total restriction on trade relations of any kind with the Islamic Republic from 1980 onwards. No

32 U.S. Preliminary Objections, p. 14.

33 Weinberger, C.W.: Fighting for Peace, Warner Books, 1990, p. 358. See, Exhibit 8 to the Memorial of the Islamic Republic.

such sanctions were imposed on Iraq. Indeed, trade with Iraq was substantially increased during this period to assist Iraq's ailing war economy;

- The United States put into effect "Operation Staunch" which was designed to prevent the Islamic Republic from receiving arms from almost anywhere in the world. This was combined with a near blockade of Iranian ports and coastlines together with comprehensive monitoring and surveillance of vessels going to and from such ports[34]. No such steps were taken against Iraq. In fact, the United States expressly authorized trade with Iraq to include equipment that could be used for military purposes[35];

- The United States' policy of reflagging Kuwaiti ships was directly aimed at assisting Iraq. As has become apparent since the Kuwait-Iraq war, Kuwait supported Iraq in its war effort, providing Iraq with massive financial support and other assistance[36];

- It has also been revealed in U.S. Congressional Hearings held this year that the United States was involved in an extensive agreement whereby military intelligence was provided to Iraq throughout the war. As stated in those records, this program began in 1984, out of fear that Iraq might lose the war, and was extended in 1986[37]. The aim of this arrangement was expressly to provide "intelligence and advice with respect to the pursuit of the war[38]";

- The same Congressional Records suggest that massive U.S. Government supported loans of billions of dollars were

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34 Ibid., pp. 421-424.

35 See, Boyle, F.A.: "International Crisis and Neutrality: U.S. Foreign Policy toward the Iraq-Iran War", in Neutrality - Changing Concepts and Practices, ed. Leonhard, A.T., University Press of America, 1988. Exhibit 8. This article contains a detailed review of non-neutral actions by the United States during the war. See, also, The Washington Post, 16 September 1990 for a review of the United States' policy toward Iraq. Exhibit 9.

36 See, Chubin, S. & Tripp, C.: Iran and Iraq at War, London, 1988, p. 154. Exhibit 10.

37 Congressional Record-House of Representatives (March 9, 1992), H 1109. Exhibit 11.

38 Ibid.

> made to Iraq during the war and used for military purchases[39].

2.29 These actions violated the laws of neutrality and show that the United States failed to abide by Security Council Resolution 598, which in paragraph 5 called on "all other States to exercise the utmost restraint and to refrain from any act which may lead to further escalation and widening of the conflict, and thus to facilitate the implementation of the present resolution[40]". This policy was particularly unacceptable given the fact, well-known at the time, that Iraq had imposed the war on the Islamic Republic by its invasion in 1980.

2.30 Iraq's responsibility for the conflict has now been confirmed by the Secretary-General of the United Nations. It will be recalled that under paragraph 6 of Resolution 598 (1987), the Secretary-General was requested by the Security Council -

> "... to explore, in consultation with Iran and Iraq, the question of entrusting an impartial body with inquiring into responsibility for the conflict and to report to the Security Council as soon as possible[41]".

2.31 As a result of investigations carried out in implementation of Resolution 598, the Secretary-General issued his Report on 9 December 1991 which concluded that -

> "... the war between Iran and Iraq, which was going to be waged for so many years, was started in contravention of international law,

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39 Ibid., H 1110.

40 Resolution 598 (1987), United Nations Security Council (2750th Meeting, 20 July 1987), U.N. Doc. S/RES/598 (1987). Exhibit 12.

41 Ibid.

> and violations of international law give rise to responsibility for the conflict[42]".

In this connection, the Report found that the specific concern of the international community was "the illegal use of force and the disregard for the territorial integrity of a Member State[43]". The Report stated that the outstanding event under these violations was -

> "... the attack of 22 September 1980 against Iran, which cannot be justified under the Charter of the United Nations, any recognized rules and principles of international law or any principles of international morality and entails the responsibility for the conflict[44]."

The Report added that Iraq's aggression against Iran was "in violation of the prohibition of the use of force, which is regarded as one of the rules of jus cogens[45]".

2.32 Notwithstanding Iraq's responsibility for starting the Iran-Iraq war, the United States continues to protest that its actions in the Persian Gulf were entirely justified. Thus, in Annex 1 to its Preliminary Objections it states:

> "As a result of the United States' efforts to protect its vessels in the [Persian] Gulf, Iran repeatedly charged (as it does in its Memorial) that the United States was not a neutral in the Iran-Iraq war. The United States certainly worked to bring 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

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42 Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987), 9 December 1991, U.N. Doc. S/23273. Exhibit 4, para. 5.

43 Ibid.

44 Ibid., para. 6.

45 Ibid., para. 7.

> Iraq despite Security Council Resolution 598, and not an attempt by the United States to intervene in the war on behalf of Iraq[46]."

In the light of the facts recounted in paragraph 2.28 above, this statement can be seen to be totally inaccurate. It was not the United States' business to pressure one side or the other or interfere under Resolution 598. Indeed, paragraph 5 of the Resolution called upon all other States to "exercise the utmost restraint". Despite this admonition, the United States still took sides with Iraq. As Lawrence Korb, the Former Assistant Secretary of Defense, stated in an interview on CNN on 2 July 1992 -

> "... when the United States went into the [Persian] Gulf it was not simply just to escort Kuwaiti tankers. We wanted to ensure that Iran did not win that war. In other words, we became de facto allies of Iraq[47]."

2.33 In drawing attention to these issues, the Islamic Republic is not, as the United States alleges, seeking to expand its complaint or to submit new disputes concerning violation of the laws of neutrality to the Court[48]. The sole purpose of this presentation is to show that, despite its repeated professions of neutrality, the United States in fact adopted a hostile and provocative attitude towards the Islamic Republic. This forms part of the explanation of the shoot-down of Flight IR 655 and the continued application of the illegal U.S. NOTAMs in the Persian Gulf.

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46 U.S. Preliminary Objections, Annex 1, pp. 17-18 (footnotes omitted).

47 See, the interviews with William Colby, Former Director of the CIA, and Lawrence Korb, Former Assistant Secretary of Defense, on Larry King Live, 2 July 1992. The transcript of this programme is included in Exhibit 13. See, in particular, pp. 10, et seq.

48 U.S. Preliminary Objections, pp. 84-85.

(ii) The role of U.S. military forces in the Persian Gulf

2.34 The United States seeks to justify the presence of its military forces in the Persian Gulf by reference to the need to protect neutral shipping and the need to keep open the Strait of Hormuz[49]. It provides a separate Annex and numerous references to press reports of alleged attacks on neutral shipping to support this contention. These facts have no relevance to the jurisdictional issues in the case, and seem designed only to color the Court's appreciation of the case.

2.35 These facts are also of limited relevance to the merits of the case. The Islamic Republic's actions with respect to commercial traffic during the war with Iraq were entirely directed at preventing contraband being passed to Iraq, which is a right of any belligerent State. This right was recognized by the U.S. Government at the time as well as by other third States, in particular the United Kingdom. The Islamic Republic had no quarrel with U.S. forces per se and never initiated any attack against U.S. military forces in the Persian Gulf. Indeed, it has been confirmed both by U.S. Government and military officials that the Islamic Republic always acted in a restrained and professional manner in dealings with U.S. forces[50]. In such circumstances, claims that Iranian actions were directed against commercial traffic can provide no justification for the Vincennes treating Iranian aircraft, military or otherwise, as hostile.

2.36 Most important of all, it has now become clear from evidence recently come to light that on the day of the incident there was no "harassment" of merchant vessels of any kind by Iranian forces which might have explained the involvement of U.S. forces. While this point will be discussed

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49 See, U.S. Preliminary Objections, pp. 15, et seq., and Annex 1 thereto.

50 See, paras. 2.46-2.47 below.

further below[51], it shows that the United States' presentation of facts concerning alleged attacks on neutral shipping cannot help to excuse the Vincennes' actions.

2.37 Nevertheless, to correct the impression which the United States seeks to give by its lengthy presentation on this issue, it is necessary to draw attention to facts which the United States fails to mention:

> First: just as Iraq had started the war and was thus responsible for it, Iraq also started the attacks on shipping in the Persian Gulf in 1980, attacks which continued and increased in intensity for 4 years without any response from the Islamic Republic[52];
>
> Second: Iraq was primarily responsible for such attacks[53];
>
> Third: disruption of shipping in the Persian Gulf was contrary to the Islamic Republic's interests because the large part of its trade was conducted through the shipping lanes and ports of the Persian Gulf;
>
> Fourth: Iranian commercial shipping was one of the heaviest sufferers from such attacks[54];
>
> Fifth: the Islamic Republic's actions were aimed at identifying and, in case of doubt, stopping and searching vessels considered to be carrying contraband of war, which is the recognized right of any belligerent State. Moreover, as was well-known at the time, other Persian Gulf States supported Iraq directly or indirectly in its war efforts. Iraq has no usable port on the Persian Gulf and it was obvious that shipments of war materials through ports of other States could be destined for Iraq. For example, it was also well-known that both Kuwait and Saudi Arabia had not only made extensive loans to Iraq but had also opened up their ports for the shipment of goods bound for Iraq[55];

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51 See, paras. 2.68-2.71 below.

52 See, for example, The Washington Post, 13 October 1987, which is included in Exhibit 35 to the U.S. Preliminary Objections.

53 Ibid.

54 Ibid.

55 Chubin, S. & Tripp, C., supra, p. 154. Exhibit 10.

> Sixth: the Iranian Navy had made clear in a series of Notices to Mariners issued as early as 1980 the steps it was being forced to take as a result of Iraqi aggression. The Navy called on States using the Persian Gulf shipping lanes to follow prescribed safety routes outside the war zone in the northern part of the Persian Gulf, where they could become involved in hostilities, and not to set anchor in the Shatt 'al Arab. Vessels could only come into this war zone if destined for Iranian ports. It also called on neighbouring States with ports on the Persian Gulf not to give assistance to Iraqi vessels, or to vessels carrying consignments of arms to Iraq. In so doing, the Islamic Republic informed such States of its right as a belligerent to enforce such rules[56].

2.38 For the same reasons, and contrary to the United States' allegations, the Islamic Republic was committed to keeping open the Strait of Hormuz, on which it depended for a substantial amount of its trade. The Notices to Mariners referred to above did not cover the Strait of Hormuz and the Islamic Republic made clear its commitment to keep the Strait open in a letter to the Secretary-General of the United Nations[57].

2.39 The United States acknowledges that Iraq initiated the so-called "tanker war" by "attacks on tankers using Iran's oil terminal at Kharg Island[58]". The United States has also recognized that belligerents have a traditional right "to prevent war supplies from being shipped to an enemy[59]". For example, when on 12 January 1986, a U.S. vessel, the President Taylor, was

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56 Copies of the Notices to Mariners issued by the Islamic Republic. Exhibit 14.

57 Letter dated 21 October 1980 from the Chargé d'Affaires of the Permanent Mission of Iran to the United Nations to the U.N. Secretary-General. U.N. Doc. S/14226, 22 October 1980. Exhibit 15.

58 U.S. Preliminary Objections, p. 13.

59 See, New York Times, 13 January 1986. Exhibit 9 to the Memorial of the Islamic Republic.

boarded and searched by Iranian officials, the Department of State admitted that "There is a basis in international law for ship searches by belligerents[60]".

2.40 In such circumstances, the United States had an obligation to remain neutral and to restrict its role to the protection of neutral shipping. In fact, it did no such thing. The U.S. forces repeatedly violated the territorial sovereignty of the Islamic Republic and repeatedly interfered with Iranian civil and military traffic[61]. In reflagging Kuwaiti ships when Kuwait was a de facto ally of Iraq, the United States was also directly helping Iraq in its war efforts[62]. The United States was engaged in a form of "gunboat diplomacy" thousands of miles from its own shores, aimed at pressurizing the Islamic Republic and provoking an incident that would further the United States' interests in the war[63].

2.41 These actions were part of what then Vice-President Bush described as attempts by the United States to find means "to bolster Iraq's ability and resolve to withstand Iranian attacks[64]". Despite the fact that Iraq had imposed the war on the Islamic Republic and was largely responsible for all attacks on shipping (making no attempt to abide by the rules of visit and search governing belligerents), the United States exercised no similar pressure on Iraq.

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60 Department of State Bulletin (March 1986), No. 2108, p. 41. Exhibit 9 to the Memorial of the Islamic Republic.

61 This is clearly evidenced in the Islamic Republic's repeated protests to the U.N. Secretary-General for distribution as Security Council documents. Exhibit 16. See, also, its protests to the United States through the Islamic Republic's Interests Section at the Embassy of the Democratic and Popular Republic of Algeria. Exhibits 19 and 21 to the Memorial of the Islamic Republic.

62 See, Chubin, S. & Tripp, C., supra, p. 154. Exhibit 10.

63 See, Exhibit 17.

64 Congressional Record-House of Representatives (March 2, 1992), H 860. Exhibit 11.

Even today, from the United States' Preliminary Objections, one would not know that Iraq had played any role at all in the hostilities.

2.42 As one historian has noted in reviewing the role of the U.S. forces in the Persian Gulf -

> "Iran's activity in the [Persian] Gulf before the U.S. entry was almost entirely in retaliation for Iraqi attacks on tankers bound for Iran; the Iranians are the party most interested in keeping the [Persian] Gulf open to tankers. It has been Iraq, not Iran, that over the years has attacked and disrupted by far the most shipping, for the simple reason that Iran depends completely on the [Persian] Gulf and the Strait of Hormuz to export all its oil, while Iraq sends its oil abroad by pipeline. The United States could do far more to pacify the [Persian] Gulf, if that is what it really wants to do, by persuading Iraq to stop its attacks on Iranian shipping, which are what started and perpetuate the naval war in the [Persian] Gulf[65]."

This statement represents a far truer picture of the role of the U.S. forces in the Persian Gulf at the time and substantially confirms the Islamic Republic's presentation of the facts. The Former Assistant Secretary of Defense, Lawrence Korb, explained U.S. policy as follows:

> "The great irony was [that] Iraq was destroying many more ships trying to get out of the [Persian] Gulf than Iran was at that time. But when we went in, we wanted to ensure that Iran didn't win that war from Iraq. That was our real objective, and so we were doing a lot of things to ensure that we could teach the Iranians a lesson[66]."

(iii) Iranian forces acted in a non-aggressive manner towards U.S. forces

2.43 In an effort to show that U.S. forces were justified in treating the Islamic Republic as hostile, the United States refers to a number of alleged engagements between U.S. and Iranian military forces in the period prior to the

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65 Keddie, N.R.: "Iranian Imbroglios: Who's Irrational?", World Policy Journal, Winter 1987-1988, p. 46. Exhibit 18.

66 Exhibit 13, pp. 11-12.

shoot-down[67]. Again, it must be noted that these "facts" relate solely to the merits of the case and can have no relevance to the United States' jurisdictional objections. Moreover, there is a certain unreality in the United States' argument that the modest Iranian naval and air forces would engage the most powerful fleet in the world. The Islamic Republic's forces were fully engaged in the war imposed by Iraq and the idea that they would have risked bringing the United States into the war by a direct attack on the U.S. Navy defies belief.

2.44 The Islamic Republic never initiated any attack against U.S. military forces or U.S. flagged vessels. Among the numerous press reports filed by the United States, only one refers to an alleged attack by Iranian forces on U.S. military forces. This concerns what was said to be an attack by small Iranian boats on a U.S. helicopter on 8 October 1987. However, the Islamic Republic immediately denied that the boats had attacked the helicopter and the United States itself concedes that the outcome of the "incident" was the sinking of three Iranian boats and loss of life, while U.S. forces suffered no damage at all[68].

2.45 The only other incident in which U.S. and Iranian forces were directly involved arose from the U.S. attack on Iranian forces on 18 April 1988, which the United States sought to justify as an armed reprisal for damage to a U.S. vessel that had hit a mine in the Persian Gulf a number of days

67 U.S. Preliminary Objections, pp. 16, et seq.

68 Ibid., pp. 17-18.

before[69]. Notwithstanding that such reprisals are illegal under international law, according to Mr. Weinberger, the U.S. destroyed half of the Islamic Republic's naval forces in this attack[70]. It is significant that this attack coincided exactly with one of the major Iraqi offensives of the war in which Iraq took the Fao peninsula. This was one of the worst blows to the Islamic Republic's effort to make Iraq abide by the 1975 Frontier Treaty and withdraw from the considerable parts of Iranian territory that it had unlawfully occupied[71]. Despite this attack, the United States was at pains to stress that this was an isolated incident, that it did not seek confrontation with the Islamic Republic and that it remained neutral[72].

2.46 The best reply to the contentions that the Islamic Republic threatened U.S. forces was given by the former U.S. Secretary of Defense, Caspar Weinberger, who stated that Iranian forces had demonstrated "a decided intent to avoid American warships[73]". This description is confirmed by the Commander of the USS Sides, Commander Carlson, who was present in the area on 3 July 1988

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69 The United States makes much of the Islamic Republic's alleged mining of the Persian Gulf. See, inter alia, U.S. Preliminary Objections, pp. 18-19. However, the sole evidence it points to in this regard is a statement by an Iranian official reported in The Washington Post that the Islamic Republic had mined certain areas "to protect Iranian coastal installations". The official also pointed out that use of these mines was designed for defence not "to block freedom of navigation". The Washington Post, 21 August 1987, U.S. Preliminary Objections, Exhibit 35. See, also, the letter from the Minister of Foreign Affairs of the Islamic Republic to the U.N. Secretary-General dated 26 September 1987. U.N. Doc. S/19161, 29 September 1987 included in Exhibit 16.

70 See, Weinberger, supra, p. 425. Exhibit 8 to the Memorial of the Islamic Republic.

71 Ibid. See, also, ABC Nightline transcript, p. 6, on the timing of this incident. Exhibit 6.

72 See, the letter dated 18 April 1988 from the Acting Permanent Representative of the United States to the United Nations to the President of the Security Council. U.N. Doc. S/19791, 18 April 1988. Exhibit 19.

73 Weinberger, supra, p. 401. Exhibit 8 to the Memorial of the Islamic Republic.

and perhaps best able to judge the so-called "threat" from Iranian forces. In a remarkably candid assessment, he stated that these forces were "pointedly non-threatening" in the month preceding the destruction of Flight IR 655 and that they were "direct and professional in their communications", consistently heeding and taking steps to avoid U.S. forces[74].

2.47 It should be remembered that the Islamic Republic was engaged in a full-fledged armed conflict with Iraq and had been subjected to hundreds of attacks by Iraqi forces in the Persian Gulf. It was also subjected to almost daily violations of its territorial sovereignty and interference in its civil and military aviation by the United States[75]. Despite this situation, on every occasion Iranian aircraft and vessels made it a policy to keep clear of U.S. forces. No hostile intent was shown, and no attack was ever made on a U.S. warship. As the U.S. Assistant Secretary of Defense stated in May 1987, "Iran has been careful to avoid confrontations with U.S. flag vessels[76]".

(iv) **U.S. forces showed an aggressive and hostile attitude**

2.48 Notwithstanding the "non-threatening" and "professional" conduct of Iranian forces, the Defense Department Report attached to the ICAO Report states that planes and boats originating from the Islamic Republic were

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74 See, Carlson's statement in Proceedings, September 1989, at p. 87. Exhibit 23 to the Memorial of the Islamic Republic.

75 Exhibit 16 contains the protests made by the Islamic Republic to the U.N. Secretary-General concerning these violations. It can be seen from these protests that there were hundreds of illegal warnings given to Iranian aircraft, that aircraft were intercepted for as long as 1 hour at a time, and that U.S. forces repeatedly intruded into Iranian airspace and Iranian territorial waters.

76 U.S. Department of State Bulletin, July 1987, p. 60. Exhibit 29 to the Memorial of the Islamic Republic.

automatically assumed to be hostile by U.S. forces[77]. This attitude was reflected in the United States' rules of engagement and its NOTAMs and was the direct result of the bias characterizing U.S. Government policy in the region.

2.49 The posting of the Vincennes to the Persian Gulf was a key part of the U.S. strategy. The Vincennes, as well as the presence of the U.S. fleet as a whole, constituted a pre-planned show of force specifically intended to intimidate the Islamic Republic. Despite being confronted with this kind of provocation, the Islamic Republic exercised a considerable measure of restraint. By way of contrast, it can readily be imagined that the United States would have regarded it a serious threat to national security if a foreign State amassed its forces just off the coast of the United States and acted in a similarly provocative manner.

2.50 The hostile attitude of the Vincennes was confirmed by the Commander of the the Sides - the Vincennes' companion ship. He attested that the Vincennes' actions "appeared to be consistently aggressive", that "an atmosphere of restraint was not her long suit", and that her crew "hankered for an opportunity to show their stuff[78]". In other words, on 3 July 1988 the Vincennes was not only predisposed as a result of the U.S. rules of engagement to treat any aircraft taking off from the Islamic Republic as hostile, but was looking for an excuse to use its weapons. As Lawrence Korb, the Former Assistant Secretary of

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77 The Defense Department Report (p. E-52 (emphasis added)) is telling in this regard. It stated that as long as hostilities continued in the area, "Commercial air, particularly commercial air from Iran, is at risk ...". Exhibit 4 to the Memorial of the Islamic Republic. Thus, Flight IR 655 was immediately identified as an "unknown-assumed enemy" by the USS Vincennes. U.S. Preliminary Objections, p. 30, fn. 1.

78 See, Carlson, Proceedings, September 1989, at p. 88. Exhibit 23 to the Memorial of the Islamic Republic. These descriptions are vividly confirmed in the ABC Nightline and Newsweek reports attached as Exhibits 6 and 3.

Defense, has indicated, the United States was "doing a lot of things to ensure that we could teach the Iranians a lesson[79]".

2.51 The Islamic Republic submits that the events in the Persian Gulf prior to the shoot-down show that U.S. military forces treated Iranian forces as hostile but had no justification for doing so. Such a conclusion is obviously relevant to what happened on 3 July 1988, because the Vincennes assumed Flight IR 655 to be hostile, wholly without reason. The introduction of such facts cannot therefore be regarded as an expansion of the Islamic Republic's complaint to the Court.

SECTION C. The Relevance of the Background Facts Concerning the NOTAMs and the Issue of Civil/Military Coordination

2.52 In its Memorial, the Islamic Republic showed that U.S. forces had repeatedly interfered with or threatened Iranian commercial traffic in the Persian Gulf region in the period prior to the incident[80]. These facts directly related to the contention made in the Islamic Republic's Application that the United States violated Annex 15 of the Chicago Convention and Recommendation 2.6/1 of the Third Middle East Regional Air Navigation (MIDRAN) meeting[81]. In particular, the United States' issuance of illegal NOTAMs and the failure of its forces to coordinate with civilian ATS authorities in the region caused interferences in civil aviation and constituted violations of the Chicago Convention. Given that these actions were referred to in the Islamic Republic's Application, there can be no merit in the United States' argument that the Islamic Republic has expanded its original complaint by introducing

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79 Exhibit 13, p. 12.

80 See, Memorial of the Islamic Republic, pp. 33-42.

81 See, Application of the Islamic Republic, p. 8.

background facts relating to such violations. In any event, as shown above, these actions are also relevant to an understanding of the shoot-down itself.

2.53 The provisions enshrined in Annex 15 of the Chicago Convention and in the Recommendation of the Third MIDRAN Meeting were designed to give effect to certain fundamental principles set out in the body of the Chicago Convention, in particular those principles found in the Preamble and Articles 1, 2, 3 bis, and 44(a) and (h) of the Convention on which the Islamic Republic specifically relied in its Application.

2.54 The United States deployed its forces in the Persian Gulf ignoring such fundamental principles. In particular, the United States failed to take steps to coordinate its military activities with civilian ATS authorities in the region and promulgated illegal NOTAMs[82]. There is no doubt as to the factual basis of the Islamic Republic's contentions. The ICAO Report found that:

> "There was no coordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the [Persian] Gulf area[83]."

With regard to the NOTAMs, the Report also found that -

> "... the promulgation of the NOTAM was not in conformity with the provisions of ICAO Annex 15[84]."

2.55 The United States' forces constantly interfered with Iranian civil aviation traffic and repeatedly violated the Islamic Republic's sovereignty

82 See, Memorial of the Islamic Republic, pp. 209-238.

83 ICAO Report, para. 2.8.4. Exhibit 4 to the Memorial of the Islamic Republic.

84 Ibid., para. 2.2.4.

over its own airspace. In so doing, they also created a grave safety risk. The Islamic Republic made repeated protests both to the Secretary-General of the United Nations, to ICAO and to the United States concerning these violations of international law, and the threat to the safety of civil aviation that they posed[85].

2.56 The actions of the United States constituted violations not only of specific provisions of the Chicago Convention but also of the Treaty of Amity[86], which enshrines numerous principles intended to preserve freedom of commerce and navigation in any form and to avoid any unreasonable or discriminating measures which might impede such freedom of commerce and navigation (see, in particular, Articles IV, VIII and X). These actions were also violations of the principles of customary international law relating to the prohibition against the use of force, principles of good-neighbourliness, sovereignty and freedom of commerce enshrined in both treaties. There is thus no merit in the United States' argument that the Islamic Republic has sought to expand its complaint by making reference to various rules of customary international law regarding the use of force, sovereignty and freedom of

85 Protests to the Secretary-General are attached hereto as Exhibit 16. For the protests to ICAO and to the United States, see, Exhibit 15 and Exhibits 19 and 21 to the Memorial of the Islamic Republic, respectively.

86 In this regard, there is no substance in the United States' argument that by introducing the Treaty of Amity in its Memorial the Islamic Republic has sought to transform the dispute submitted to the Court in its Application. The same disputes can be treated by the Court under both the Chicago Convention and the Treaty of Amity. The Treaty of Amity affords the Court an additional basis of jurisdiction for the same dispute. See, generally, Part VI, below.

commerce and navigation[87].

2.57 As will be shown below, the illegal NOTAMs and the lack of civil/military coordination are also directly related to the shoot-down. If the United States really did not know that Flight IR 655 was a commercial flight, this cannot be used as an excuse because this ignorance resulted directly from the United States' failure to coordinate its military activities with civilian ATS authorities. Similarly, the alleged U.S. warnings to Flight IR 655 cannot be relied on because these warnings were made pursuant to the United States' illegal NOTAMs, and were thus themselves totally illegal[88].

CHAPTER II THE SHOOT-DOWN OF FLIGHT IR 655

2.58 The United States also sets out in detail its version of facts relating to the shoot-down itself. Its primary aim is again to present its defense on the merits - that it acted in self-defense and that the Islamic Republic shares part of the burden of responsibility - without even pretending that such facts have any relevance to its jurisdictional objections. As will be shown further below, the United States' presentation of the facts remains misleading and inaccurate.

87 See, U.S. Preliminary Objections, pp. 84-85. With regard to the use of force, Article 3 bis of the Chicago Convention has not been ratified. However, it represents a fundamental principle of international law which is already enshrined in the Chicago Convention. See, the Memorial of the Islamic Republic, pp. 147-154. The United States was the strongest supporter of this Article and, given that it is already enshrined in the Convention, should be estopped from violating this principle even if not ratified. Significantly, the United States does not take issue with the status of Article 3 bis in its Preliminary Objections. Although Article 3 bis has not yet been ratified by the Islamic Republic, immediate steps were taken to initiate this procedure after its signature.

88 In Annex 2 to its Statement of Facts, the United States seeks to justify the promulgation of its illegal NOTAMS, although again this is in no way a factual issue related to its jurisdictional objections. The United States once again presents a defense on the merits while seeking by filing preliminary objections to prevent the Islamic Republic from having the opportunity to present its rebuttal. Taking this into consideration, the Islamic Republic has chosen to restrict its reply to the U.S. presentation to an Annex hereto.

2.59 Section A will focus on the events immediately prior to the shoot-down. It will be shown that this was a particularly calm period in the Persian Gulf, that the United States had no reason to expect any hostilities and that the United States unjustifiably provoked hostilities on the morning of 3 July 1988, violating the Islamic Republic's territorial sovereignty. The flight of IR 655, and the alleged warnings given by the U.S. forces to the aircraft as well as their failure to identify it as a civilian flight will then be discussed in Section B.

SECTION A. Events Immediately Prior to the Shoot-down of Flight IR 655

(i) The week preceding the shoot-down

2.60 In the United States' Statement of Facts, it is alleged that during the three-day period prior to the incident there was heightened air and naval activity in the Persian Gulf, that the Islamic Republic had in the preceding month deployed F-14s to Bandar Abbas airport, and that U.S. forces in the Persian Gulf were alerted to "the probability of significant Iranian military activity against ... U.S. military vessels in retaliation for recent Iraqi military successes" over the Fourth of July holiday weekend[89]. The sole purpose of this discussion is to seek to show that there was a hostile atmosphere prior to the incident and to lend credence to the United States' self-defense argument. It is totally without relevance to the United States' jurisdictional objections.

2.61 The United States gives no evidence whatsoever to support its contentions that there was such a hostile atmosphere. Its arguments are simply drawn from statements made in its one-sided and censored Defense Department Report. In fact, objective evidence shows that there was no heightened activity in the Persian Gulf prior to the incident. An article in The Washington Post on 3 July 1988, filed as an Exhibit by the United States, reports that prior to 3 July

89 U.S. Preliminary Objections, p. 22.

there had been "a nearly three-week lull in the [Persian] gulf's 'tanker war'", broken only by an Iraqi attack on two Iranian tankers on 2 July 1988[90].

2.62 Speaking on 2 July 1988, one day before the incident, Lieutenant General George B. Crist, the head of the U.S. Central Command, confirmed this, stating that "Iran's naval vessels and gunboats of its Revolutionary Guard have avoided U.S. ships since U.S. military forces destroyed or sank six Iranian vessels [on] April 18[91]".

2.63 The United States also gives no evidence as to the alleged increased activities of F-14s at Bandar Abbas airport in the three days prior to the shoot-down, an allegation which the Islamic Republic categorically denies. In fact, Iranian F-14s were used for scheduled reconnaissance trips in an area distant from where the incident itself occurred, their activity had considerably decreased in the period prior to the incident and no F-14s were in operation on 3 July 1988.

2.64 In any event, the alleged deployment of F-14s can be of no significance. As was explained in the Islamic Republic's Memorial, these aircraft are designed for air-to-air combat, not attacks on surface vessels, and in fact had never been so used[92]. The United States was well aware that the Islamic Republic had no capability to attack U.S. warships. The U.S. Assistant Secretary of Defense stated in May 1987 that "Iran lacks the sophisticated aircraft and weaponry used by Iraq in the mistaken attack on the U.S.S. Stark[93]". The United

90 Ibid., Exhibit 35. The Washington Post, 3 July 1988.

91 The Washington Post, 2 July 1988. Exhibit 20.

92 Memorial of the Islamic Republic, pp. 73, et seq.

93 Department of State Bulletin, July 1987, p. 60. Exhibit 29 to the Memorial of the Islamic Republic.

States also recognized that the Iranian air force had been direct and professional in its communications and non-threatening.

2.65 Finally, why the United States should have expected an attack on 4 July in response to Iraqi successes in the war is left unexplained. The Islamic Republic was at war with Iraq not the United States. Despite the infliction of heavy damages by Iraq on several previous occasions, this had never resulted in attacks by the Islamic Republic on U.S. forces, even though, as has subsequently been confirmed, the United States was assisting Iraq. Indeed, as explained above, Iranian forces never initiated any attack on U.S. military forces and had always taken steps to avoid such confrontations.

2.66 The only specific incident to which the United States can point during this period involved a Danish vessel, the Karama Maersk, on 2 July 1988[94]. This incident involved a routine search by Iranian small patrol boats of a vessel carrying goods from Saudi Arabia, a nation supporting Iraq in its war effort[95]. This action was fully within the rights of the Islamic Republic as a belligerent, and vessels trading in the Persian Gulf were aware of the Islamic Republic's exercise of these rights[96]. The Karama Maersk suffered no harm and the small patrol boats retired immediately after a U.S. warship, the Elmer Montgomery, approached[97]. These facts hardly portray a threatening or dangerous attitude by the Iranian forces towards U.S. forces in the period prior to the incident.

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94 U.S. Preliminary Objections, pp. 22-23.

95 See, Chubin, S. & Tripp, C., supra, p. 154. Exhibit 10.

96 See, the Notices to Mariners in Exhibit 14.

97 U.S. Preliminary Objections, Exhibit 35. The Washington Post, 3 July 1988.

(ii) The morning of 3 July 1988

2.67 The events of 3 July 1988 are vividly portrayed in the Newsweek and ABC Nightline reports filed as Exhibits 3 and 6, and to which the Court is urged to give due attention. The Islamic Republic will not refer to every statement made in these reports which contradicts the United States' pleading, but it will be obvious that they paint a very different picture of what happened to that given by the United States. The Court is also directed to the statement of the Minister of Foreign Affairs of the Islamic Republic of Iran, Dr. Velayati, made before the U.N. Security Council on 14 July 1988. It will be apparent from this statement that Dr. Velayati's presentation of the facts with regard to what happened on 3 July 1988 was accurate and has now been substantially confirmed by the recent disclosures in the United States[98].

2.68 The United States claims that early on the morning of 3 July 1988 there was hostile Iranian gunboat activity in the northern portion of the Strait of Hormuz outside the territorial waters of the Islamic Republic, and that it was noted that these boats were approaching a Pakistani vessel[99]. No evidence is given for this statement, either as to the position of the Iranian boats or as to their confrontation of the Pakistani vessel. In fact there was no such hostile gunboat activity and no confrontation of the Pakistani vessel, a fact confirmed by other U.S. government sources.

2.69 The United States has told so many different versions of what happened thereafter that it is difficult to accept any as accurate. Vice-President Bush told the U.N. Security Council that the Vincennes went to the assistance of a neutral vessel that was under attack by Iranian small patrol

98 Exhibit 21 contains the full text of Dr. Velayati's statement.

99 U.S. Preliminary Objections, pp. 24-25.

boats[100]. Admiral Fogarty told U.S. Congress that a Pakistan merchant vessel had been harassed and had issued a distress call, and that a Liberian merchant ship called the Stoval was also attacked[101]. Similar allegations were made before the ICAO Council[102]. However, the Defense Department Report, prepared by the same Admiral Fogarty stated that on 3 July 1988 "No merchant vessels requested assistance[103]". The United States has never explained the mystery behind these phantom requests for assistance.

2.70 ABC checked with the Captain of the Pakistan vessel, the Sirghoda[104]. He confirmed that he issued no distress calls that day and that he was not being harassed[105]. From the ABC and Newsweek investigations, there is no record of any vessel called the Stoval existing in the Liberian shipping registry. Despite the fact that there is now no evidence of any hostile action by the small patrol boats, the Vincennes was directed to proceed north (i.e., towards the coast of the Islamic Republic) and the Vincennes sent a helicopter "Ocean Lord 25" ahead to monitor the activity.

2.71 It must be recalled that in visiting and searching merchant vessels, especially if these vessels were in the Islamic Republic's territorial waters or exclusion zones, the Islamic Republic was acting within its rights. On the other hand, the United States had no legal basis for dispatching its forces to confront

100 Exhibit 11 to the Memorial of the Islamic Republic, p. 51.

101 Hearing before the Committee on Armed Services of the United States Senate held on 8 September 1988. Exhibit 7 to the Memorial of the Islamic Republic, p. 9.

102 Draft C-Min. Extraordinary (1988)/1, 13 July 1988, p. 8. Exhibit 40.

103 Defense Department Report, p. E-26. Exhibit 4 to the Memorial of the Islamic Republic.

104 This vessel has also been referred to as the Saraguda.

105 Exhibit 6, p. 3.

the Iranian boats, especially as no request for assistance had been received. According to the Secretary of Defense at the time, U.S. naval rules of engagement stated that distress assistance would only be provided to non-U.S. flagged merchant vessels when requested, and only after confirmation that these vessels were not carrying war-related materials[106]. On 3 July 1988, U.S. forces and the Vincennes ignored such procedures. Indeed, it was common practice for the U.S. forces to contact the merchant vessels and ask them if they wanted assistance, thus interfering with the Islamic Republic's lawful right to visit and search vessels and encouraging merchant vessels not to respond to the Islamic Republic's requests.

2.72 In pursuing the small patrol boats, the Vincennes' helicopter violated the territorial sovereignty of the Islamic Republic. While the United States denies that this occurred[107] this statement is contradicted by the ICAO Report itself which states that at 0615 on 3 July 1988 the helicopter was "8 to 10 NM north of USS Montgomery" when it was allegedly fired upon by the Iranian boats[108]. As the ICAO Report also gives the position of the USS Montgomery relative to the Vincennes at 0610, it is possible to plot the approximate position of Ocean Lord 25 at 0615. This was done in Figure 5 facing page 80 of the Islamic Republic's Memorial, from which it is clear that the helicopter was well within Iranian territorial waters at that time. Both the Newsweek and the ABC reports state that the United States has been dishonest about the actual position of the

106 U.S. Preliminary Objections, Exhibit 35. The Washington Post, 3 July 1988.

107 See, U.S. Preliminary Objections, p. 25, fn. 3.

108 ICAO Report, Appendix A, p. A-1. Exhibit 4 to the Memorial of the Islamic Republic.

helicopter and confirm that it was within territory under the Islamic Republic's sovereignty in contravention of Article 2 of the Chicago Convention[109].

2.73 In any event, the helicopter was also within the Islamic Republic's Flight Information Region and under the Islamic Republic's jurisdiction. Military aircraft have no right under the Chicago Convention to enter another State's FIR without prior notification and proper coordination with the relevant civilian authorities. Of course, the United States made no attempt to abide by any of these rules.

2.74 The United States has presented no evidence for the allegation that the helicopter Ocean Lord was fired upon by Iranian boats. The pilot simply alleged that he saw "puffs of smoke[110]". It should be noted, however, that these kinds of boats have no effective means of attack against a helicopter, although they would have been fully justified in firing warning shots against a foreign military aircraft unlawfully intruding into the Islamic Republic's airspace, and, as past experience had shown, causing a direct threat to the small boats. U.S. helicopters had previously sunk three small Iranian boats on 8 October 1987[111]. What really happened, as Commander Carlson has noted, was that the helicopter was "just too damned close to the boats for its own good", and that the helicopter was "not hit"[112]. Despite this situation, the U.S. warships then obtained permission to close on and engage the small boats considerably later, when the boats had retired in the direction of the shore.

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109 ABC Nightline transcript, p. 4. Exhibit 6. Newsweek, p. 16. Exhibit 3.

110 Newsweek, p. 12. Exhibit 3. See, also, Defense Department Report, p. E-27, para. 2(h). Exhibit 4 to the Memorial of the Islamic Republic.

111 See, para. 2.44 above.

112 Carlson, Proceedings, September 1989, p. 92. Exhibit 23 to the Memorial of the Islamic Republic.

2.75 In its Preliminary Objections, the United States alleges that, although its warships had not previously entered Iranian territorial waters, during the course of the attack on the small boats these forces were compelled as a matter of self-defense "to maneuver into waters claimed by Iran as territorial waters[113]". Quite incredibly, given its argument that the Treaty of Amity is not applicable to this dispute, the United States seeks to justify this action by reference to Article X, paragraphs 5 and 6, of the Treaty of Amity, pursuant to which the United States alleges that "a U.S. warship in distress is permitted to enter territorial waters claimed by Iran[114]".

2.76 The ICAO Report indicates that it was at least some thirty minutes after the alleged firing on the helicopter that the U.S. warships opened fire on the Iranian small boats, although the Islamic Republic believes that it was in fact after about an hour.. By this time, the U.S. vessels were already well within the Islamic Republic's territorial waters. Moreover, the United States acknowledges that at 0643 it was the U.S. warships who opened fire on the Iranian boats[115]. This gap in time completely undermines the United States' assertion that the attack on the small boats was an act of self-defense.

2.77 The United States has consistently sought to conceal the evidence concerning the true positions of its warships during this incident. The Defense Department Report was recently reviewed in the U.S. press, where it was recognized that the "heavily censored public version of the investigation does not show the position and course of the Vincennes, the Iranian gunboats and the

113 U.S. Preliminary Objections, p. 27. The United States has never questioned in any way the Islamic Republic's right to its territorial sea.

114 Ibid., fn. 3.

115 U.S. Preliminary Objections, p. 27.

airliner at various times throughout the fateful morning[116]". This in itself is revealing. However, the same report goes on to state the following:

> "The Vincennes has the capability to record that information, and the data were retrieved but not made public. The Navy rebuffed a request under the Freedom of Information Act for the geographic track file of the Vincennes.
>
> Such a time-distance chart has not been made public because the information it contains may not look too good. It might well show that in her full-speed pursuit of harassing Iranian gunboats, the Vincennes barged into Iranian territorial waters and was in those waters when her crew mistakenly blasted the unsuspecting airliner out of the sky.
>
> The investigation is absolutely silent on this vital issue, but a videotape of the activities on Vincennes' bridge that morning contains a radio transmission from a friendly Omani warship. 'Your actions are not in accordance with the rights of passage, please leave Iran's territorial waters immediately', declared a voice with a heavy British accent over the loudspeaker on Vincennes' bridge.
>
> The warning was given, not once, but twice[117]."

2.78 The United States' statement that its warships only entered Iranian territorial waters during the engagement with the small patrol boats is also contradicted by the ICAO Report. From the ICAO Report it is apparent that even at 0610, the Montgomery, the Sides and Ocean Lord 25 were all within, or over, the Islamic Republic's territorial waters[118]. While the Vincennes may have been just outside territorial waters at 0610, at 0615 the ICAO Report states that the Vincennes then proceeded north "at high speed[119]". In so doing, the Vincennes was heading directly into the Islamic Republic's territorial waters.

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116 Chicago Tribune, 25 October 1991. Exhibit 22.

117 Ibid.

118 ICAO Report, Appendix A, p. A-1. Exhibit 4 to the Memorial of the Islamic Republic, and Figure 5 facing page 80 of the Memorial. The Islamic Republic believes that the U.S. vessels were even further into Iranian territorial waters and that Flight 655 was hit at 2643N.. and 5603E, Exhibit 21, p. 5, rather than what has been reflected by the ICAO Report.

119 Ibid.

the Vincennes was 8 miles into the Iranian territorial waters rather than the 2 miles that the U.S. Navy recently had to admit. This intrusion into the Iranian territorial waters continued for more than 15 minutes before the firing on Flight 655.

2.79 In other words, it was well before any engagement with the small boats that the Vincennes barged into Iranian territorial waters, at a time when two other warships and a U.S. helicopter were already violating Iranian territory. This manoeuvre cannot be justified as an act of self-defense. Rather, as the Commander of the Sides put it, the Vincennes "likely provoked the sea battle with the Iranian gunboats that preceded the shootdown'[120].

2.80 These facts are further confirmed by the ABC and Newsweek reports, both of which suggest that the Vincennes and the Montgomery had entered into Iranian territorial waters well before any alleged incident with the patrol boats. The same reports state that the Montgomery had been posted in Iranian territorial waters early on the morning of the incident in order to act as a decoy, sending out fake distress signals with the intention of luring out the Iranian small patrol boats and giving the United States an excuse to attack[121].

2.81 It was during the Vincennes' attack on the small patrol boats that the shoot-down of Flight IR 655 occurred. The United States makes much of the alleged drama of the incident. However, there is no clear evidence of any U.S. warships being damaged by the Iranian forces or indeed of any aggressive action at all by the Iranian small boats against the U.S. forces[122]. As

120 The Washington Post, 23 April 1990. Exhibit 64 to the Memorial of the Islamic Republic.

121 See, Exhibits 3 and 6.

122 Ibid.

Commander Carlson pointed out, it is totally implausible that small patrol boats would dare to attack or could pose any serious threat to a vessel of the Vincennes sophistication and power[123]. In any event, the U.S. forces were at best reckless in seeking to engage the Iranian forces and violating the Islamic Republic's sovereignty without any justification. The United States cannot therefore excuse the resulting shoot-down on the basis of self-defense when as a result of its own illegal actions its forces had manoeuvered into a position within Iranian territorial waters that they considered dangerous.

SECTION B. The Flight of IR 655 and the Alleged Warnings Given by the U.S. Vessels

2.82 As was explained in the Islamic Republic's Memorial, Flight IR 655 was on a regularly scheduled flight with an experienced crew and was flying in the centre of the international air corridor over the Persian Gulf when it was shot down. It was also crossing the Persian Gulf well within its flight schedule[124].

2.83 The United States makes much of the fact that it could not have known that Flight IR 655 was a civilian flight and that it warned the aircraft of its intentions on several occasions. Although the Islamic Republic in no way endorses the factual presentation made by the United States, it is only necessary at this stage to make certain general points in response to these contentions. A more detailed treatment of the facts is more appropriately left to subsequent proceedings.

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123 Proceedings, September 1979, p. 92. Exhibit 23 to the Memorial of the Islamic Republic.

124 See, Memorial of the Islamic Republic, pp. 10, et seq.

2.84 It is only partly a question of whether the United States knew or did not know that Flight IR 655 was a civilian flight. Even if IR 655 had been a military plane, the United States still had no reason to shoot it down. It is totally unreasonable to assume that any military plane flying within its own airspace is hostile, especially when Iranian military planes had never previously attacked U.S. forces. Moreover, the fact that it was thought to be an F-14 should have alerted the Vincennes to the fact that it was unlikely to be making an attack. As was shown in detail in the Islamic Republic's Memorial, the theory that an F-14 could attack a U.S. warship is totally implausible[125].

2.85 It was well-known by the U.S. military that an F-14 was incapable of launching an attack on the Vincennes and that the Islamic Republic had no forces capable of such an attack. As was pointed out in Aviation Week & Space Technology "F-14A fighters sold to Iran by the U.S. were equipped to carry air-to-air missiles and have limited surface attack capabilities"[126]. Referring to the "hostile F-14" scenario adopted by the U.S. Government, and pleading to "spare us more fog", Commander Carlson asked why an F-14 would bother to energize its IFF system to squawk Mode II (a military signal) if it was trying to disguise its presence for a sneak attack. He also pointed out that one of the reasons why the Sides had classified Flight IR 655 as a non-threat was because of the "lack of any significant known F-14 antisurface warfare (ASUW) capability"[127]. The Defense Department's conclusion of May 1987 confirms the absurdity of this hypothesis, noting that -

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125 Ibid., pp. 69, et seq.

126 Aviation Week & Space Technology, 11 July 1988, p. 16. Exhibit 16 to the Memorial of the Islamic Republic.

127 See, Carlson, Proceedings, September 1989. Exhibit 23 to the Memorial of the Islamic Republic.

"Iran lacks the sophisticated aircraft and weaponry used by Iraq in the mistaken attack on U.S.S. Stark[128]".

2.86 In any event, the Vincennes should have known that Flight IR 655 was a civilian flight. The Vincennes had a civilian flight schedule on board and Flight IR 655 was the only flight scheduled to take off from Bandar Abbas that morning. It should also have been aware from its AEGIS system, which is able to monitor literally scores of aircraft up to a range of 250 nautical miles, that Flight IR 655 had already arrived at Bandar Abbas from Tehran earlier that day on the first leg of its regularly-scheduled flight.

2.87 The United States' failure to coordinate its military activities with civilian aviation authorities in the region is significant in this context[129]. The ICAO Report found, that "There was no coordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the [Persian] Gulf area" and that "The United States warships were not provided with equipment for VHF communications ... Thus, they could not monitor civil ATC frequencies for flight identification purposes[130]".

2.88 The ICAO Report's finding on this point was based on the Defense Department Report. However, the Defense Department Report does not say that the U.S. vessels did not have VHF radios, but only that the "limited number" of such radios "degrades their [i.e., U.S. vessels] ability to simultaneously monitor the IAD frequency and communicate with civilian air traffic control

128 Department of State Bulletin, July 1987, p. 60. Exhibit 29 to the Memorial of the Islamic Republic.

129 See, paras. 2.52-2.57, above.

130 ICAO Report, para. 2.8.4. Exhibit 4 to the Memorial of the Islamic Republic.

agencies"[131]. It simply defies belief that the U.S. forces did not have sufficient capacity to listen to and communicate with civilian aircraft on VHF, especially when it had three warships in the immediate area. The United States admits that it was able to give warnings on a VHF frequency, and the U.S. NOTAMs required aircraft to maintain contact with U.S. military vessels on VHF frequencies. At the very least, the U.S. helicopters and the U.S. F-14s which, as will be shown below, were in the vicinity would have had the capacity to listen to these communications. On the other hand, civilian aircraft are not required under the Chicago Convention to be equipped with equipment for picking up military frequencies.

2.89 The reckless disregard for the safety of civil aviation revealed in the ICAO Report's findings must be regarded as reprehensible. It was as a direct result of this illegal behaviour - and the U.S. forces' intrusion into Iranian territorial waters coupled with their intent to provoke the Islamic Republic - that the Vincennes shot down Flight IR 655. If the United States had shown from the beginning proper respect for the freedom of commercial traffic in the Persian Gulf, and of civil aviation in particular - which are obligations under the Chicago Convention and the Treaty of Amity - it would have taken steps to ensure that it could identify Flight IR 655, and this incident might never have occurred. In such circumstances, the United States cannot use its alleged misidentification of Flight IR 655 as an excuse when its military forces barged into the territorial waters of a distant State and engaged in threatening and provocative actions.

2.90 With regard to the U.S. challenges said to have been made to the aircraft, these were also totally illegal under the Chicago Convention and

131 Defense Department Report, p. E-53, para. 6. Exhibit 4 to the Memorial of the Islamic Republic.

represented unreasonable and discriminating measures impeding freedom of commerce and navigation under the Treaty of Amity. The ICAO Report noted explicitly that the U.S. NOTAMs, pursuant to which the challenges were made, were "not in conformity with the provisions of ICAO Annex 15[132]". It went on to note that the NOTAMS were not only illegal but also unclear, and it concluded that the safety risks to civil aviation caused by the presence of the U.S. forces in the Persian Gulf may have been "underestimated[133]".

2.91 The ICAO Report found that as a result of these failures to abide by the Chicago Convention the "presence and activities of naval forces in the [Persian] Gulf area have caused numerous problems to international civil aviation[134]". In particular, it stated that -

> "Civil aviation requirements such as airways, standard approach and departure procedures, and the fixed tracks used by helicopters to oil rigs were not a consideration in warship positioning. This resulted in warships challenging civil aircraft often in critical phases of flight, i.e. during approach to land and during initial climb[135]."

The resulting challenges, according to the ICAO Report, caused "additional confusion and danger[136]".

2.92 The ICAO Report also found that out of the eleven challenges supposedly made by the U.S. vessels only one identified Flight IR 655 with sufficient clarity for the pilot, if he had heard the challenge, to realize that his

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132 Ibid., para. 2.2.4.

133 Ibid., para. 2.2.5.

134 Ibid., para. 2.3.1.

135 Ibid., para. 2.3.2.

136 Ibid.

plane was being addressed[137]. This challenge was made 39 seconds before the plane was destroyed. During 11 of these vital seconds, the pilot was in routine communications with the Bandar Abbas tower. Thus, the pilot had no chance to respond, even if he had heard the challenge. Even the U.S. Defense Department Report notes that "Current verbal warnings and challenges used by JTFME [Joint Task Force Middle East] units are ambiguous because they do not clearly identify to pilots exactly which aircraft the ship is attempting to contact[138]." Moreover, it appears that none of the challenges allegedly made by U.S. forces complied with the requirements of its own NOTAM[139].

2.93 The United States' allegation that the Vincennes was subject to an imminent attack has thus been shown to be without foundation. The Vincennes had all the information available to know that Flight IR 655 was a civilian aircraft. It had no reason to fear an attack even if it had misidentified Flight IR 655 as an F-14. Finally, it had no reason to believe it was subject to a coordinated attack as the U.S. forces had themselves initiated the attack on the small patrol boats.

2.94 In such circumstances, it is totally unacceptable for the United States to call into question the professionalism of Iran Air and its pilots

137 Ibid., para. 2.10.18.

138 Defense Department Report, p. E-53, para. 5; see, also, p. E-18, para. 18. Exhibit 4 to the Memorial of the Islamic Republic.

139 Under the NOTAM that had been issued by the United States, aircraft approaching a U.S. warship were only supposed to be at risk of "defensive measures" if they had not been cleared from a regional airport and if they came within 5 nautical miles of a warship at an altitude of less than 2000 feet. In this case, the interception of IR 655 took place at a distance of 10 nautical miles from the Vincennes and at a height of 12,950 feet. Not only was this outside the lateral and vertical limits appearing in the NOTAM, but IR 655 was also a flight "cleared" to depart from a regional airport to which the NOTAM purported not to apply. For the text of the September 1987 NOTAM, see, Exhibit 14 to the Memorial of the Islamic Republic of Iran.

with regard to its practices in listening out for such warnings and responding to them[140]. The onus was on the United States not to interfere with civilian traffic, but to coordinate with civil aviation authorities and to have equipment capable of identifying civilian aircraft. Moreover, the United States had no authority to issue NOTAMs in the Persian Gulf region nor illegally to challenge aircraft. At the least, it should have taken the trouble to ensure that its challenges were clear and followed its own procedures.

2.95 The important issue, therefore, is not, as the United States would have it, why Flight IR 655 failed to respond to the U.S. challenges[141]. This is easily understood by the fact of the heavy pilot workload during the early part of the flight, as is even acknowledged in the U.S. Defense Department Report[142], and the fact that most of the challenges were sent on a military frequency which the aircraft could not hear. It is also explained by the fact that out of all the numerous vessels and ATS authorities in the area, only one other British vessel heard these challenges. There is thus no reason to think that Flight IR 655, or Bandar Abbas airport tower, or the Iranian P-3, an unarmed surveillance plane, could have identified the challenges as directed at Flight IR 655. The important issue is the United States' total disregard for the safety of civil aviation in all aspects of this incident[143].

2.96 The final part of the United States' presentation of the facts involves an attempt to place some of the responsibility for this event on the Islamic Republic. This leads the United States to make wholly new and utterly

140 See, U.S. Preliminary Objections, pp. 31-34.

141 Ibid.

142 Defense Department Report, p. E-53, para. 3. Exhibit 4 to the Memorial of the Islamic Republic.

143 See, Memorial of the Islamic Republic, pp. 53, et seq.

baseless allegations. The United States suggests that Iranian authorities should have initiated a "red alert" procedure to notify air traffic control centres of the military activity in the Persian Gulf and that the failure to initiate this procedure may have been "intentional" or "grossly lacking in judgment[144]". The implication that Iranian authorities intentionally allowed the innocent passengers and crew of Flight IR 655 to meet their deaths is too outrageous to warrant comment.

2.97 As a factual issue, the United States' argument that a "red alert" procedure should have been initiated because Iranian authorities knew that a hostile action was taking place, and because Iranian forces were in any event responsible for having attacked U.S. forces, is wrong on all points. Iranian authorities had no knowledge of the hostile action. Moreover, as has been shown above, it was the U.S. forces who first violated Iranian territory and then initiated the attack on the small patrol boats who had retired well within their territorial waters after performing their well-recognized rights of visit and search[145]. Most significantly, the United States had interfered with the communications equipment of the small patrol boats, another common practice of the U.S. forces during this period, thus effectively preventing the boats from making any communications[146].

2.98 In general, it should be noted that a "red alert" procedure had only occasionally been instigated in the Bandar Abbas area which, because it was well away from the war zone, was not normally an area of hostilities. Moreover, red alerts would not normally be adopted as a result of the presence of

144 U.S. Preliminary Objections, p. 36.

145 See, para 2.35, above.

146 This had happened on several other occasions. See, for example, the Islamic Republic's protest of 10 May 1988 to the U.N. Secretary-General on one such incident. U.N. Doc. S/19874, 10 May 1988. Exhibit 16.

U.S. warships, because of the frequency of their presence, their neutral status and because it was not expected that they would attack Iranian civilian aircraft[147].

2.99 In any event, according to the United States, the Vincennes opened fire on the Iranian small patrol boats at 0643[148]. This was only 11 minutes before the shoot-down. In this same amount of time, the United States alleges it could not identify Flight IR 655 as a civilian flight when it was signalling its commercial flight Mode III code, was flying on schedule, and was communicating over open radio channels. How it expects that the Islamic Republic's military authorities could have become aware of the hostilities and of the fact that Flight IR 655 was flying in an area in which such hostilities were taking place, and that these authorities would have been able to warn Iranian civil aviation authorities who in turn would have been able to warn IR 655 in time is left totally unexplained.

2.100 Moreover, it now appears from the ABC and Newsweek reports that the United States had other means available to assess whether Flight IR 655 could have posed any possible threat. What the Defense Department Report failed to acknowledge is that there were two U.S. F-14s within 5 minutes flying time from the area and, as had happened many times in the past, they could easily have been called upon to assist in identification of the Iranian plane. In the circumstances, it is incredible that this solution was not used[149].

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147 The frequency of U.S. forces' violations of Iranian territory is attested to by the numerous protests submitted by the Islamic Republic to the U.N. Secretary-General for distribution as Council documents. See, Exhibit 16.

148 U.S. Preliminary Objections, p. 27.

149 See, ABC Nightline transcript, p. 4 (Exhibit 6) and Newsweek report, p. 12 (Exhibit 3).

2.101 In such circumstances - where the United States had violated the Islamic Republic's territorial sovereignty, attacked Iranian small patrol boats, and flagrantly ignored international treaty provisions designed to ensure the safety of international civil aviation - the responsibility for this incident lies wholly with the United States whose actions cannot be justified as a legitimate act of self-defense.

CHAPTER III CONCLUSIONS: THE RELEVANCE OF THE FACTS RELATING TO THE SHOOT-DOWN OF FLIGHT IR 655 TO THE JURISDICTIONAL ISSUES IN THIS CASE

2.102 In the preceding Section, the Islamic Republic has not endeavoured to present a full rebuttal of the version of events presented in the United States' Statement of Facts. However, it was essential to correct some of the United States' more blatant mischaracterizations of the events. The Islamic Republic was obligated to take this position by the fact that the United States' factual presentation is only relevant to a defense on the merits of the case, and in no way bears on its Preliminary Objections.

2.103 Nonetheless, the facts are relevant because they show that the actions of the U.S. forces in shooting down Flight IR 655 involved violations of provisions of the Chicago Convention, the Treaty of Amity and the Montreal Convention, in addition to the principles and rules of customary international law reflected in those conventions. The use of force against a commercial civilian flight is an explicit violation of all three treaties. Both the infringement of Iranian sovereignty by the U.S. warships during the shoot-down and the reckless disregard shown by the U.S. forces for commercial civilian air traffic, which reached its nadir in the shooting down of Flight IR 655, represent breaches of specific provisions of the treaties invoked. As such, the interpretation and application of

all three treaties is directly in issue. These are matters that the Court has jurisdiction to decide.

2.104 By way of conclusion to this Part, a re-examination of the United States' comparison of the shoot-down of Flight IR 655 with that of Korean Air Line Flight 007 is worthwhile. The United States is quite right in that a comparison between the two incidents "is not sustainable[150]". Its justification of this statement is, however, as follows:

> "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[151]."

There is nothing in this statement which is other than grossly misleading or simply untrue. The elements of this statement may be re-examined as follows:

- "the rapid approach": even the transcripts of the Vincennes' challenges show that its crew was aware that the plane was steadily ascending and slowing down[152]. In fact, when it was shot down, Flight IR 655 was flying at an altitude of roughly 13,500 feet and cruising well within its flight corridor under which the Vincennes had placed itself in violation of the Islamic Republic's territorial sovereignty;

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150 U.S. Preliminary Objections, p. 41.

151 Ibid.

152 See, ICAO Report, Appendix B, p. B-15. Exhibit 4 to the Memorial of the Islamic Republic.

- "an undentified foreign aircraft": even the Vincennes identified Flight IR 655 as a "possible COMAIR[153]". The United States claims that there was a "perceived interception of an IFF Mode II signal[154]", and yet it is a fact that the Vincennes identified Flight IR 655 as squawking Mode III (the signal of a commercial aircraft) throughout the entire flight[155];

- "engaged in armed conflict initiated by the country of the aircraft's registry": there is an obvious contradiction here - given that Flight IR 655 was referred to in the Vincennes' warnings as "an unidentified foreign aircraft", it could not be known that there was any link between Flight IR 655 and the small patrol boats allegedly involved in the confrontation, especially as many other airliners use the same air corridor as Flight IR 655. Moreover, the armed conflict referred to was illusory. There was no more than a limited confrontation initiated and provoked by the United States. Moreover, it was the United States which initiated the events of that day by intruding into the Islamic Republic's territorial waters on the pretext of coming to the assistance of neutral shipping.

2.105 The real reasons for the unsustainable nature of the comparison between the shoot-downs of Flight IR 655 and Flight KAL 007 are as follows: KAL 007 was flying 500 kilometres outside its flight path and in another country's territorial airspace. By contrast, in this case, a United States' helicopter first unlawfully entered Iranian airspace under the pretense of assisting neutral vessels, although no such vessels required assistance. Much later, the U.S.

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153 Defense Department Report, p. E-37. Exhibit 4 to the Memorial of the Islamic Republic

154 U.S. Preliminary Objections, p. 30.

155 Defense Department Report, p. E-51. Exhibit 4 to the Memorial of the Islamic Republic.

warships also unlawfully entered Iranian territorial waters and, the United States admits, opened fire on Iranian small boats. Meanwhile, Flight IR 655 was flying on course, on schedule, was signalling its civilian flight code, and was still within Iranian airspace, within its established air corridor, and on its scheduled flight path when it was shot down. It was President Reagan who described the Soviet's shooting down of KAL 007 as a "massacre" constituting an international crime. This judgment applies a fortiori in this case. It is a matter of regret that this far more serious incident was treated differently by the ICAO Council. It is for this reason that the Islamic Republic is now seeking justice before the Court.

2.106 The dispute arising from these events crystallized in the subsequent months as steps were taken by the Islamic Republic to seek redress from the United States both before the United Nations and before ICAO. This part of the facts will be taken up in the next Part.

PART III

THE RELEVANT FACTS CONCERNING NEGOTIATIONS AND THE EMERGENCE OF THE DISPUTE FOLLOWING THE SHOOT-DOWN

3.01 One of the United States' main jurisdictional objections rests on the contention that because the Islamic Republic made no attempt to resolve the dispute by negotiation or arbitration, it is precluded from relying on the Treaty of Amity and the Montreal Convention as bases of jurisdiction in this case. This argument stems from the language in Article 14(1) of the Montreal Convention providing that only disputes between two or more Contracting States concerning the interpretation or application of the Convention "which cannot be settled through negotiation" may be submitted to the Court and the reference in Article XXI(2) of the Treaty of Amity to the submission of disputes as to the Treaty's interpretation or application "not satisfactorily adjusted by diplomacy".

3.02 In advancing this thesis, the United States has sought to seize the moral high ground by arguing that while it repeatedly sought to offer ex gratia compensation for the families of the victims and to find ways to avoid such tragedies in the future, the Islamic Republic took an obstructionist view by refusing to negotiate and pressing for a "political condemnation[156]". Such self-serving statements are so divorced from the truth that they warrant a thorough rebuttal. In so doing, it is appropriate to recall that the scope of any requirement of prior negotiations is a function not only of the specific provisions of the compromissory clauses in question, but also of the facts and circumstances of each case.

3.03 As will be seen herein, the facts show that following the shoot-down, irreconcilable differences arose between the Parties as to the legal,

156 U.S. Preliminary Objections, p. 42.

moral and financial responsibility for the incident and the events leading up to it. While the Islamic Republic made it clear that it held the United States responsible for breaches of its international obligations, the United States refused to accept responsibility, and argued that the Islamic Republic was ultimately to blame. The Parties' positions thus evidenced the existence of a fundamental disagreement as to the scope and application of their respective international obligations.

3.04 These positions were articulated in the course of parliamentary debates that took place before a number of international organizations, including the ICAO Council and the United Nations Security Council (discussed in Chapter I below), as well as in domestic fora, such as the United States Congress (discussed in Chapter II). Despite a full airing of each side's views, it became clear that the dispute could not be resolved by negotiation.

3.05 In so far as bilateral contacts between the Parties were concerned, prior to the filing of the Islamic Republic's Application, the United States refused as a matter of policy to negotiate with the Islamic Republic over the shoot-down and the question of compensation. This attitude, which is taken up in Chapter II below, is documented by contemporary State Department records setting forth official U.S. policy on the matter, as well as by statements made by the U.S. Legal Adviser and leading Congressional representatives before the U.S. Congress. Not only do these records demonstrate the unwillingness of the United States to deal with the Islamic Republic, they also show that the United States refused to recognize that the Government of the Islamic Republic even had an interest in the incident. Of course, not only was the Islamic Republic entitled to espouse the rights of the persons on board; it was also entitled, in its own right, to pursue its own interests, in particular its claims for breaches by the United States of various international agreements to which it was a party as well

as those of its national air carrier and all others who suffered loss as a result of the incident.

3.06 The policy constraints under which the United States was operating ensured that when the two Parties did finally meet to discuss the matter after the filing of the Islamic Republic's Application, these discussions failed to bridge any of the substantive issues that divided them (see, Chapter III). Moreover, the United States showed absolutely no interest in pursuing any other kind of arbitration as might have been envisaged under Article 14(1) of the Montreal Convention.

3.07 Consequently, as Chapter IV brings out, any obligation that international law imposed on the Parties to attempt to resolve their dispute by diplomacy before having recourse to the Court was fully satisfied in the circumstances in which the case was brought. A deadlock had arisen over the incident which neither "parliamentary negotiations", in the form of debates before international organizations such as ICAO and the United Nations Security Council, nor direct meetings were able to resolve.

CHAPTER I THE CRYSTALLIZATION OF THE DISPUTE AND THE IRRECONCILABLE NATURE OF THE PARTIES' POSITIONS

SECTION A. Debates Before the United Nations Security Council

3.08 The debates before the special session of the United Nations Security Council held on 14 July 1988 to consider the destruction of Flight IR 655 demonstrate that, from the beginning, the Parties' positions were so divergent as to be "unnegotiable".

3.09 The Islamic Republic's position was presented by Dr. Ali-Akbar Velayati, the Minister of Foreign Affairs. In discussing the particular

circumstances surrounding the shoot-down, Dr. Velayati underlined the unreality of the United States' claim that the incident was the result of a mistake. Even so, he added, such a contention would not "reduce the heavy responsibility of the United States[157]". Referring to basic principles of international law, Dr. Velayati recalled that all States must refrain from the threat or use of force "against the territorial integrity and political independence of other States" and that they are "bound to refrain from any measure which may endanger international peace and security[158]".

3.10 Dr. Velayati also drew attention to Article 44 of the Chicago Convention. He emphasized that the objective of the Convention was "to protect international civil aviation against acts of aggression[159]", and noted that "according to well-established principles of international law, the United States' criminal act of attacking a civilian airliner can never be justified under the term 'self-defense' particularly since the civilian airliner did not even have the potential of launching an attack[160]". Referring to repeated U.S. violations of Iranian sovereignty, Dr. Velayati recalled that "the Islamic Republic of Iran has officially and repeatedly protested against such breaches of international law through United States Interests Section in Tehran and has circulated its protest notes as documents of the Security Council[161]".

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157 See, Statement of His Excellency Dr. Ali-Akbar Velayati, Minister for Foreign Affairs of the Islamic Republic of Iran, before the Special Session of the Security Council, 14 July 1988, p. 13. Exhibit 21.

158 Ibid., p. 14.

159 Ibid., p. 15.

160 Ibid., pp. 16-17.

161 Ibid., p. 20.

3.11 The Foreign Minister concluded by addressing the adverse legal consequences of the U.S. presence in the Persian Gulf which included (i) the violation of the principle of neutrality claimed by the United States in the war; (ii) the violation of the sovereignty of the Islamic Republic; and (iii) the prevention of the exercise by the Islamic Republic of its sovereign rights. In his final remarks, Dr. Velayati insisted that the United Nations and other pertinent international bodies should "respond adequately to the serious concerns of the international public opinion following this tragedy[162]".

3.12 In his address to the Security Council on the same day George Bush, who was then the U.S. Vice-President, refused to accept any responsibility for the incident. Instead, he attempted to deflect attention from the shoot-down by arguing that the critical issue was not the "how and why" of the destruction of Flight IR 655, but rather "the continuing refusal of the Government of the Islamic Republic of Iran to comply with Resolution 598, to negotiate an end to the war with Iraq, and to cease its acts of aggression against neutral shipping in the Persian Gulf". Mr. Bush even insisted that the Islamic Republic "should declare its readiness unequivocally to comply with Resolution 598 - today, for the first time, right here, now, before this body[163]".

3.13 Mr. Bush's argument that the Islamic Republic was to blame for the destruction of Flight IR 655 because it had not accepted Resolution 598 was extraordinary in several respects. In the first place, Resolution 598 had nothing to do with the actions that the United States took in the Persian Gulf against the Islamic Republic. If Resolution 598 had any relevance, it was with respect to paragraph 5 thereto, which the United States violated by stationing its

162 Ibid., p. 23.

163 See, Exhibit 26, S/PV. 2818 at p. 52.

forces in the Persian Gulf in the first place[164]. In any event, the U.S. actions, whether in shooting down Flight IR 655, or in issuing unauthorized NOTAMs, or in otherwise interfering with and provoking the Islamic Republic, were plainly unlawful in and of themselves. Moreover, in the light of the Secretary-General's finding that Iraq was responsible for initiating the hostilities against the Islamic Republic and the well-documented fact that Iraq was also responsible for commencing attacks on Persian Gulf shipping, detailed in Part II, the attempt to blame the Islamic Republic was entirely misplaced. Also incredible was the fact that Mr. Bush used the Security Council proceedings to re-state official U.S. policy that the United States remained "steadfastly neutral in the war[165]", when it has subsequently been admitted by U.S. officials that Washington's policy was specifically designed to assist Iraq in its war efforts against the Islamic Republic.

3.14 For present purposes, what is significant is that by insisting that the Vincennes had "acted in self-defense" and that the "accident occurred against a back-drop of repeated, unjustified, unprovoked, and unlawful Iranian attacks against U.S. merchant shipping and armed forces[166]", Mr. Bush confirmed that a fundamental difference existed between the Parties as to the legal consequences arising out of the destruction of Flight IR 655. Given this situation, there was no prospect that these differences could have been bridged by further negotiations. As the United States' Preliminary Objections rightly point out: "The responses of the United States and Iran to this incident were different[167]". These differences arose not because of the Islamic Republic's intention to seek "political condemnation of the United States at the U.N.

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164 See, para. 2.29 above.

165 Ibid., p. 51.

166 Ibid.

167 U.S. Preliminary Objections, p. 42.

Security Council[168]", but because the Islamic Republic sought to hold the United States accountable under basic principles of international law while the United States refused to accept such responsibility.

SECTION B. The Debates Before the ICAO Council

3.15 Immediately after Flight IR 655 was shot down, the Islamic Republic notified the President of ICAO that the incident constituted a breach of general principles of international law, the Chicago Convention and its related Annexes, Standards and Recommended Practices, and the Tokyo, Hague and Montreal Conventions[169].

3.16 The Minutes of the subsequent proceedings of the ICAO Council point to the fact that the positions of the Islamic Republic and the United States were completely at odds with each other. This disagreement concerned factual points and legal issues, notably on the question of responsibility, rights of compensation, and claims of self-defense in the light of the circumstances of the event.

3.17 A comparison of the interventions of the delegates of the Islamic Republic and the United States at the sessions of the ICAO Council demonstrates, in the words of the Court, that a "conflict of legal views or of interests" between the Parties existed[170]. At the Extraordinary Session of the Council on 13 July 1988, for example, the Islamic Republic asked for (i) "explicit recognition of a delict of international character relating to the breach of international law and legal duties of a Contracting State, Member of ICAO"; (ii)

168 Ibid., p. 44.

169 ICAO Working Paper C-WP 8644 (8/7/88), p. 5. Exhibit 38.

170 Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

recognition of the "international responsibility" of the United States "for the criminal actions of its officials"; and (iii) "explicit condemnation of the use of weapons against the Iran Air passenger aircraft" by the United States[171]. It also noted that the "use of force against civil aircraft cannot be justified under any circumstances and is a flagrant violation of international law[172]".

3.18 In contrast, the United States gave a version of the facts which sharply conflicted with that of the Islamic Republic[173], although the U.S. representative conceded that the incident "cannot be considered in isolation[174]".

3.19 Throughout the discussions before the ICAO Council, this pattern repeated itself. The Islamic Republic continued to press the Council to recognize the existence of fundamental breaches of international law by the United States as a result of the U.S. military presence in the Persian Gulf[175], while the United States denied responsibility and sought to deflect attention from the legal issues by focussing on purely "technical" steps which could be taken to avoid similar incidents in the future.

3.20 At the final ICAO Council meetings in March 1989, the two Parties continued to stand on opposite sides, each firmly maintaining the divergent views they had previously expressed. Thus, at the 13 March 1989 session, the Islamic Republic reaffirmed the requests made to the Council in

171 C-Min. Extraordinary (1988)/1, 13 July 1988. Exhibit 40.

172 Ibid., p. 6.

173 Ibid., p. 9, et seq.

174 Ibid., p. 9. This view undermines the United States' contention that the Islamic Republic has changed the nature of the case in its Memorial by discussing the background facts.

175 See, for example, the intervention of the representative of the Islamic Republic on 5 December 1988, Draft C-Min. 125/12 (Closed). Exhibit 43.

December for the legal consequences of the incident to be recognized, adding that "the time is ripe for decisive action to be taken by the ICAO Council to demonstrate its mandate enshrined in the Convention on International Civil Aviation and in the principles of humanity[176]". The position articulated by the United States showed no sign of change from what had previously been advanced.

3.21 If further confirmation that the Parties' positions were irreconcilable were needed, it was provided on the final day of the ICAO Council's deliberations when an amendment to the draft ICAO Resolution was proposed condemning the use of armed force against civil aviation, including the act which resulted in the destruction of Flight IR 655[177]. Even this proposal, which fell well short of the Islamic Republic's requests, was strongly objected to by the United States[178]. At the close of the debate before ICAO, therefore, the Parties were no closer to bridging their differences than when the incident occurred. If anything, the proceedings before the ICAO Council had revealed that a negotiated settlement was impossible given the incompatibility between each side's position.

CHAPTER II THE REFUSAL OF THE UNITED STATES TO NEGOTIATE WITH THE ISLAMIC REPUBLIC

3.22 The United States makes much of the fact that shortly after the facts of the incident became known, it announced its intention to compensate the families of the victims on an ex gratia basis[179]. The United States says that to do this it needed information about the victims' ages and earning capacity and that because there were no diplomatic relations between the two States at the

176 See, Draft C-Min. 126/18, 13 March 1989, p. 7. Exhibit 47.

177 See, Draft C-Min. 126/20, 17 March 1989, p. 5. Exhibit 49.

178 Ibid., p. 6.

179 U.S. Preliminary Objections, pp. 45, et seq.

time of the incident[180], it sought to use the Government of Switzerland as an intermediary. In particular, the United States claims that it tried to obtain information from the Iran Insurance Company via the Government of Switzerland[181].

3.23 In contrast, the United States accuses the Islamic Republic of seeking a political condemnation rather than a negotiated settlement. According to the United States' argument, the Islamic Republic could have approached the United States to discuss the matter through the U.S. Interests Section at the Swiss Embassy in Tehran, the Iranian Interests Section at the Algerian Embassy in Washington, D.C., the Iran-U.S. Claims Tribunal or any willing third-country or international organization[182]. Not having taken these steps, the United States contends that the Islamic Republic is barred from invoking either the Montreal Convention or the Treaty of Amity which, so the argument goes, require an attempt at prior negotiation before a dispute can be brought to the Court.

3.24 The specific requirements of the Montreal Convention and the Treaty of Amity will be taken up in Parts V and VI, respectively. The purpose

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180 Although the United States had formally recognized the new Government of the Islamic Republic following the Islamic Revolution in February 1979, had established diplomatic relations for over one year thereafter, and had negotiated and signed the Algiers Declarations with the Islamic Republic on 19 January 1981 pursuant to which the Agents of the Parties before the Iran-U.S. Claims Tribunal regularly met, by 1985 the United States had decided not to extend that recognition to subsequent governments of the Islamic Republic. Consequently, at the time of the incident involving Flight IR 655 the United States did not even recognize the Government of the Islamic Republic. See, Amicus Curiae Brief of the United States in National Petrochemical Company of Iran v. The M/T Stolt Sheaf, et al, (United States Court of Appeals, 2nd. Cir.), No. 87-9022, 29 Feb. 1988, p. 5. Exhibit 23.

181 U.S. Preliminary Objections, pp. 47-52.

182 Ibid., pp. 154-155.

of the present Chapter is to show that based on incontrovertible evidence before the Court, the United States, as a matter of official government policy, refused to deal with the Islamic Republic on the issue prior to the institution of this case. To the extent that the United States made a concrete offer to compensate some of the families of the victims without admitting liability, this was made on 12 July 1989, two months after the Islamic Republic had already filed its Application. Even then, the U.S. position was lacking in three very important elements: (i) that there would be no compensation paid directly to the Islamic Republic for the families of the victims, for the plane or for other related damages suffered as a result of the breach by the United States of its international obligations; (ii) that there would be no recognition of any interest of the Islamic Republic in the incident; and (iii) that there would be no admission of liability or responsibility under international law and no guarantee of the non-recurrence of the incident or that steps would be taken to avoid further interference in the Islamic Republic's commerce or navigation in the Persian Gulf[183]. The adoption of such a stance precluded any meaningful negotiations from taking place and rapidly resulted in a deadlock. In such circumstances, the United States is not in a position to complain that the Court lacks jurisdiction because of any lack of prior negotiations.

SECTION A. Official U.S. Documents Evidencing the United States' Refusal To Deal with the Islamic Republic on the Matter

3.25 As early as 14 July 1988 in his address to the U.N. Security Council, Vice-President Bush signalled the United States' intention not to have any dealings with the Iranian Government on the question of responsibility or compensation. Mr. Bush stated:

183 Although the Islamic Republic was prepared to accept payments made by the United States as partial compensation pending a final determination of the matter by the Court, the United States showed no interest in such a proposal.

> "In the case of Iranian victims, we will take appropriate measures to ensure that the money flows directly to the families and not to the government; we will provide none of these funds to the Government of the Islamic Republic of Iran[184]."

3.26 The same policy decision not to deal with the Government of the Islamic Republic was reflected in the State Department's communications to the Swiss Government filed here as Exhibit 24. On 31 August 1988, for example, the State Department cabled the U.S Embassy in Bern as follows[185]:

> "Department is in the process of investigating the mechanics of providing ex gratia compensation to the family members of those killed on Iran Air Flight 655 on July 3, 1988. Department has not worked out the details, but pursuant to the President's decision, the Government of Iran will not receive the compensation payments on behalf of its nationals."

The cable went on to spell out the United States' policy in very explicit terms:

> "Eventually the USG [United States Government] will also need to make payments to the family members in Iran, but is unwilling to deal directly with the Government of Iran to accomplish this."

The State Department then added:

> "To disburse payments, the GOS [Government of Switzerland] would have to establish a method of payment directly to the family members which had no risk of Government of Iran interference."

3.27 Shortly afterwards, the Swiss Government asked the United States to reconfirm that it was unwilling to deal with the Government of the Islamic Republic with respect to effecting compensation. The United States emphasized that this was the case. As a cable dated 6 September 1988 from the U.S. Embassy in Bern to Washington reported:

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184 See, Exhibit 26, p. 51.

185 Exhibit 24 (emphasis added).

> "Staehelin [the Chief of Political Division 1 (Europe and North America) of the Swiss Department of Foreign Affairs] asked whether unwillingness to deal directly with the Government of Iran to accomplish any payments to survivors was a sine qua non for the USG. Pol Off [U.S. Political Officer] noted that the decision that the Government of Iran would not receive compensation payments on behalf of its nationals had been made by President Reagan. This should be presumed to be an essential element of the USG inquiry[186]."

3.28 This position was further underscored by the State Department in a cable signed by Secretary of State George Shultz sent on 23 September 1988. It stated:

> "The USG wishes to make ex gratia payments to family members of those killed on Iran Air Flight 655, but continues to be unwilling to deal directly with the GOI [Government of Iran] to accomplish this[187]."

3.29 In contrast to the inflexible attitude of the United States, on 6 February 1989 the Iran Insurance Company wrote to the U.S. Interests Section of the Swiss Embassy in Tehran indicating that it had been designated as the representative of the beneficiaries and successors of the victims and others in respect of their losses arising out of the destruction of Flight IR 655 and was authorized to collect compensation due from the incident[188]. In its letter, the company declared that it was prepared to nominate its representative for determining damages and the method of collecting compensation in the matter.

3.30 In the light of the U.S. policy not to deal with the Islamic Republic or its agents and instrumentalities over the question of compensation, the United States wrote back to the Iran Insurance Company on 16 April 1989 asking for information as to the company's structure and management so that the

186 Ibid.

187 Ibid. (emphasis added).

188 Ibid.

United States could "determine whether it is an entity of the Government of Iran[189]." Rather than accept the Insurance Company's offer to name a representative to discuss compensation, the United States letter simply requested information to be provided regarding the victims and their successors.

3.31 Such a response was no more than a prevarication. The United States knew full well at the time that the Iran Insurance Company was wholly owned and operated by the Government of Iran and constituted an official governmental entity[190]. Not only did the Insurance Company's letter of 6 February 1989 bear the official seal of the Islamic Republic, it had been forwarded under cover of a Diplomatic Note from the Ministry of Foreign Affairs evidencing that it had the Government's full authorization and approval.

3.32 Moreover, from its experience before the Iran-U.S. Claims Tribunal, the United States was also well aware that the Iran Insurance Company had been named by U.S. companies as an official governmental entity in several cases before that Tribunal. It will be recalled that under the Algiers Declarations, Iran was defined as "the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof[191]." Under Article II of the Claims Settlement Declaration between the Islamic Republic and the United States, claims by U.S. companies could only be directed against Iranian entities as so defined.

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189 Ibid.

190 The Iran Insurance Company was incorporated as a state-owned company on 6 November 1935. Its amended Articles of Incorporation were published in the Official Gazette of 25 February 1974 and in the Iranian Law Digest for the same year. In any event, all Iranian insurance and credit companies were nationalized by an act passed by the Islamic Revolutionary Council on 17 November 1979. Exhibit 24.

191 See, Article VII(3) of the Claims Settlement Declaration.

3.33 In seven cases before the Iran-U.S. Tribunal, the Iran Insurance Company had been named as a respondent entity of the Government of Iran. In fact, as early as 27 May 1985, the Tribunal had held in the case of Component Builder, Inc. v. the Islamic Republic of Iran, et al. that the company fell within the definition of "Iran" as set forth in the Claims Settlement Declaration[192]. Accordingly, the United States was under no illusion as to the fact that the Iran Insurance Company was a governmental entity when it demanded assurances to the contrary in its letter of 16 April 1989.

3.34 What the United States' letter did underscore, however, was the continued refusal of the United States to enter into negotiations with the Islamic Republic over the matter. After all, the Islamic Republic, acting through the Iran Insurance Company had offered to name a representative to discuss the matter. This offer was not accepted by the United States. This same attitude endured up to the point when the Islamic Republic filed its Application on 19 May 1989, and even for several months afterwards, as the United States hesitated to name its Agent in the case.

3.35 Not only was the United States thus unwilling to deal with the Islamic Republic over the question of compensation, it was also unprepared

192 Award No. ITM/ITL 51-395-3, 27 May 1985, reprinted in 8 Iran-U.S. C.T.R. 216, at pp. 220-221. The other cases involved were as follows: Fortres-Icas-Continental Associates, v. the Islamic Republic of Iran and Sherkate Sahami Bimeh Iran (Case No. 301). Frank B. Hall & Company Inc., v. The Islamic Republic of Iran, the Central Insurance Company of Iran (Bimeh Markazi), Insurance Company of Iran (Bimeh Iran), Telecommunications Company of Iran (TCI) (Case No. 376) AFIA, v. Islamic Republic of Iran, Alborz Insurance Company, Bimeh Iran (Iran Insurance Company), Bimeh Markazi (The Central Insurance Company of Iran), Bimeh Melli (National Insurance Company, Ltd.), Bimeh Hafez (Hafez Insurance Company), and Shargh Societe Anonyme (Case No. 453). The Sentry Corporation, v. The Islamic Republic of Iran (Bimeh Iran) (Case No. 426). George W. Drucker, v. Foreign Transaction Company, Insurance Company of Iran, National Grain, Sugar and Tea Organization (Case No. 121). Fluor Corporation, v. Bimeh Iran (Iran Insurance Company) (Case No. 811). See Exhibit 24A.

to recognize the interests of the Government of the Islamic Republic in the matter. This is evidenced by the fact that the United States was only willing to discuss its own formula for ex gratia compensation for passengers on the plane (provided this was not done through the Government of the Islamic Republic), without addressing the Islamic Republic's own interests and damages arising out of the incident.

3.36 It is readily apparent, however, that the Islamic Republic itself had important rights to espouse in the matter. As the late Judge Fitzmaurice's Treatise of The Law and Procedure of the International Court of Justice states, referring to Hersch Lauterpacht, there is an -

> "... important distinction between State rights and interests, and those of an individual person or entity, even where they relate to the same subject-matter or arise out of the same incident. Although a State on such an occasion speaks and acts for its national, its own position in relation to any wrong it has suffered in his person is never completely identified with his .... Thus, if there is a breach of a treaty an individual may suffer damage as the result, but his Government always has an independent ground of complaint in relation to the wrong it has itself suffered through the breach, in addition to the right of complaint on behalf of its national[193]."

3.37 Equally apparent was the United States' decision not to recognize or negotiate those interests. As Abraham Sofaer, the Legal Adviser to the U.S. State Department, stated to members of the U.S. Congress in his testimony regarding the incident, to the extent that any compensation ex gratia was accorded -

> "... this is compensation for the victims' families, and not intended for the states involved.

193 Fitzmaurice, G.: The Law and Procedure of the International Court of Justice, Vol. II, Cambridge, Grotius, 1986, pp. 670-671. Exhibit 25.

> The President in effect has made it clear that he does not intend to compensate Iran for the plane[194]."

3.38 It is also striking that the United States' refusal to deal with the Islamic Republic was in stark contrast to its attitude towards other States which had nationals killed on Flight IR 655. In a State Department briefing on the question of compensation held on 17 July 1989 (more than a year after the incident and after the Islamic Republic had instituted these proceedings), it was confirmed that other governments were receiving money directly from the United States Government for the shoot-down while the Islamic Republic was not. The exchange with the State Department's spokesman went as follows:

> "Q: You say that only the Government of Iran is being asked to find an intermediary to distribute the payments but that the other governments are getting the money directly?
>
> A. That's the case, yes[195]."

3.39 These documents show beyond any doubt that prior to the filing of the Islamic Republic's Application, negotiations between the two Parties were impossible, not simply because of the fundamental differences in each side's position, but also because of the United States' categorical refusal to have any

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194 Hearings before the Defense Policy Panel of the U.S. House of Representatives, H.A.S.C. No. 100-119, 100th Cong. Second Sess., 1988, p. 59, Exhibit 26. Of course, the Islamic Republic claims not simply for the plane, but for the various violations by the United States of its treaty obligations, as well as on behalf of the victims.

195 Department of State Daily Press Briefing, 17 July 1989. Exhibit 27. At p. 52 of its Preliminary Objections, the United States makes certain allegations concerning compensation that family members of non-Iranian victims are said to have received. The Islamic Republic has no information regarding these payments, and thus reserves its position on the issue.

dealings with the Government of the Islamic Republic on the key issues[196].

SECTION B. The Hearings Before the Defense Policy Panel of the U.S. House of Representatives

3.40 As alluded to above, the hearings before the Defense Policy Panel of the Committee of Armed Services of the U.S. House of Representatives held in August, September and October 1988 provide further evidence of the unwillingness of the U.S. Government to admit legal liability or to deal with the Government of the Islamic Republic. It is important to recall that the Panel was aware of the position publicly held by the Islamic Republic on the incident since in the course of the hearings the Chairman of the Panel quoted a statement given by the Iranian Foreign Minister on 15 July 1988 at a news conference at the United Nations to the effect that:

> "The U.S. compensation offer will be acceptable to Iran only within the context of the United States accepting responsibility for shooting down the Iranian airliner[197]."

3.41 With respect to the question of responsibility, the State Department's Legal Adviser, Mr. Sofaer, advanced the same self-defense argument previously raised by Mr. Bush, arguing that "the damage caused, in our judgement, was pursuant to the lawful use of force". He added: "we agree completely ... that Iran is to blame ultimately for this accident[198]". With respect

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196 In contrast, in other cases the United States has made ex gratia payments directly to the Governments concerned. Thus, the United States made ex gratia payments to the Government of Japan for radiation injuries to a Japanese fishing boat and crew caused by atomic testing in the Pacific as well as to the Government of Mexico for injuries to Mexican citizens injured in attempting to cross the U.S.-Mexico border. See, Yates, G.T.: "State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era", in International Law of State Responsibility for Injuries to Aliens (ed. Lillich, R.), 1983, p. 220. Exhibit 28.

197 See, Hearings Before the Defense Policy Panel of the House of Representatives. Exhibit 26, p. 61.

198 Ibid., p. 49.

to the question whether the United States would be willing to deal directly with the Islamic Republic, Mr. Sofaer left no doubt as to the United States' position. He asserted:

> "We are not going to work through the Government of Iran. We are not going to permit the Government of Iran to take any of this money, to the fullest extent of our ability to prevent it[199]."

3.42 Professor Harold Maier, another witness before the Congressional Panel, argued that the Islamic Republic "would like to use the incident as a political tool" and that there were "no illusions about whether the Iranian citizens themselves would actually get the money[200]". Such remarks should be beneath comment. Nonetheless, they reveal the extent of hostility that existed in the United States at the time against any thought of dealing with the Government of the Islamic Republic on the dispute. They demonstrate in addition that the United States had made up its mind beforehand that direct discussions with the Islamic Republic were a practical and political impossibility.

3.43 In this connection, it is important to recall that for funds to be appropriated for any compensation involving Flight IR 655, congressional approval was required. Yet the attitude of the Members of Congress on the Defense Policy Panel demonstrates that they were no more willing than the administration to deal directly with the Government of the Islamic Republic on the issue.

3.44 In the course of the hearings, for example, Congressman Darden told Mr. Sofaer that "the only way you are going to get any congressional approval of your intentions to make these payments is that the Congress be

199 Ibid., p. 55.

200 Ibid., p. 31.

absolutely and totally satisfied that the proper people receive these payments under terms and conditions which would carry out the humanitarian purposes that you outline[201]". The mood of the Panel was summed up by the Chairman who asked Mr. Sofaer:

> "Is there a guarantee that if we cannot be absolutely certain that this will go to the people and not to the government that we will not pay the money? ... I think that would be something if you are talking about bipartisan cooperation with Congress, I think we would like to see some absolute guarantees. I am not even sure that with that, that it would be something that people would like to go along with in Congress. There is going to be some problem on the issue[202]."

SECTION C. The Iran-U.S. Claims Tribunal Did Not Afford an Opportunity To Negotiate

3.45 Notwithstanding the United States' refusal to deal with the Islamic Republic on the issue, the United States alleges that one of the fora that the Islamic Republic could have used to negotiate its claims was the Iran-U.S. Claims Tribunal in The Hague[203]. In the light of the purpose of the Claims Tribunal and U.S. policy towards the Islamic Republic over questions of responsibility and compensation, the suggestion that the Claims Tribunal could have provided a negotiating forum for the destruction of Flight IR 655 is entirely misplaced.

3.46 In the first place, it has already been shown that official U.S. policy precluded any negotiations that would have resulted in an admission of

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201 Ibid., p 73.

202 Ibid., p. 60. Speaking later, the Chairman added:

> "We are dealing with, I think, a very difficult and sensitive issue here that I hope you understand just the politics of this whole issue of the kind of general visceral reaction against the Iranian Government which runs very, very deep". Ibid., p. 70.

203 U.S. Preliminary Objections, pp. 155-157.

liability by the United States or the payment of any compensation to the Government of the Islamic Republic. The United States has offered no evidence to demonstrate why this same policy would not have applied to contacts between the two States at the Iran-U.S. Claims Tribunal. Indeed, had the United States been genuinely interested in dealing with the Islamic Republic on the matter, it could have attempted to raise it with the Iranian Agent or other officials at the Tribunal instead of going through the Swiss Government in Bern. The fact that it did not do so was attributable to the decision that had been made at the highest levels of the U.S. Government to avoid what was said to be Iranian "interference" in the matter.

3.47 Even if U.S. policy had not precluded meaningful discussions, the Iran-U.S. Claims Tribunal would not have been an appropriate forum in which to negotiate the issue given that any negotiations under the auspices of the Tribunal had been intentionally limited by both Governments to claims already filed with the Tribunal. Due to domestic sensitivities in each country concerning contacts with the other, both Governments emphasized the limitations of the forum of the Tribunal not to trespass on areas falling outside of its jurisdiction and the need to avoid burdening the work undertaken at the Tribunal with matters not falling within the Tribunal's mandate. In short, the representatives of both governments at the Tribunal had no authorization to discuss any matters falling outside of the jurisdictional parameters established by the Algiers Declarations.

3.48 Moreover, the assertion by the United States that from 3 July 1988 to 17 May 1989 representatives of the two Governments held face-to-face meetings no less than 16 times is grossly exaggerated. High level meetings between the principal legal advisers of the two countries were suspended in late 1986 due to the Reagan administration's embarrassment over the so-called

"Irangate" affair. After that incident, United States officials were extremely wary of dealing with Iranian representatives at the Tribunal even on official Tribunal matters. Indeed, from November 1986 until the date that the Islamic Republic's Application was filed with the Court (17 May 1989), no high level meetings between the Parties' principal legal advisers occurred. There was thus no realistic possibility of the Iran-U.S. Claims Tribunal providing an appropriate forum to negotiate the issues arising out of the destruction of Flight IR 655.

3.49 The United States suggests that negotiations at the Tribunal were possible because the two governments were able to reach a settlement in Case B/1 (Claim 4), over the amount owed by the United States to the Islamic Republic for various categories of military equipment, and because Iranian and U.S. arbitrators at the Tribunal were also able to agree on the appointment of neutral arbitrators. The United States' suggestion that such limited discussions could have any relevance to possible settlement of this case is quite incomprehensible. The United States fails to mention that the negotiations over Case B/1 (Claim 4) did not start until September 1989, after the filing of the Application. It also fails to mention that the appointment of neutral arbitrators was only achieved after repeated interventions from the relevant Appointing Authority.

CHAPTER III DEVELOPMENTS AFTER THE FILING OF THE APPLICATION

3.50 The foregoing discussion has shown that there was no possibility of negotiating a settlement of the dispute before the Islamic Republic filed its Application. There was simply no interest or incentive for the United States to deal directly with the Islamic Republic on the matter. It was only after the Application had been filed and Agents appointed that discussions were attempted at The Hague. These meetings took place on 1 September 1989 and

12 September 1989 at the Peace Palace shortly after the United States finally informed the Court of its appointment of an Agent in the case.

3.51 These initial two meetings were followed by four more meetings between the legal advisers of the two Parties in late 1989 during which the issues of liability and methods of compensation were broadly discussed. However, it rapidly became apparent that the United States remained unwilling to accept any legal responsibility for the incident. Accordingly, by the end of 1989 the talks broke down, and no further meetings were held on the matter.

3.52 In these circumstances, it cannot be maintained that the Court lacks jurisdiction because the Islamic Republic failed to attempt to resolve the dispute through diplomacy or negotiations. Prior to the institution of these proceedings, the United States refused to have any contacts with the Islamic Republic regarding the incident. The limited talks that took place after the filing of the Application confirmed the deadlock that had previously arisen and demonstrated that because the Parties' positions were irreconcilable, any hope of a negotiated settlement was doomed to failure. As the following Chapter will show, in such circumstances international law does not impose an absolute obligation on the parties to continue with negotiations, particularly when the dispute is shown to be one that cannot be expected to be settled or adjusted by diplomacy.

CHAPTER IV THE LIMITATIONS TO THE LEGAL REQUIREMENT OF PRIOR NEGOTIATIONS

3.53 While this subject will be dealt with in greater detail in connection with the specific provisions of the Montreal Convention (Part V) and the Treaty of Amity (Part VI) where it will be shown that the prerequisite that negotiations precede the submission of the present dispute to the Court has been

fully met to the extent that this is required by the relevant treaty provisions, it is opportune here to consider, by way of general introduction to those Parts, the elements by which the requirement of prior negotiations is ordinarily characterized. To this end, the present Chapter will briefly review the rationale and significance of the relevant international clauses and survey the relevant case law of the Permanent Court and the present Court on the issue.

3.54 Close scrutiny of the requirement of prior negotiations shows that:

- The requirement of prior negotiations presupposes that negotiations will be carried out in good faith. A party that refuses as a matter of policy to deal with the other party on a dispute between them fails to demonstrate even a minimum level of good faith, and thus cannot be heard to complain that the other party did not pursue the negotiations.

- Moreover, the original rationale behind this requirement has been remarkably played down by the Court. The Court has essentially construed the requirement as a means of ascertaining whether a legal dispute has arisen between the contending States.

- In addition, the Court has interpreted the requirement of prior negotiations to the effect that it does not entail an obligation to pursue negotiations when it is clear that the dispute cannot be expected to be settled by negotiations or when one side refuses to negotiate with the other or is adamant in its position.

SECTION A. The Emergence in Modern International Arbitration of the Prior Negotiations Requirement and Its Ratio

3.55 Clauses requiring States to settle their disputes by negotiations before submitting to arbitration appeared chiefly in what was considered as the heyday of arbitration, i.e., towards the end of the 19th Century. In noting only the most important texts, which contained such clauses, reference can be made to Article 20 of the 1st Hague Convention of 29 July 1899, Article 38 of the 1st Hague Convention of 18 October 1907, and Article 13 of the Covenant of the League of Nations.

3.56 Clearly , the prior negotiations clause had not been regarded as necessary in previous arbitrations, when the method of submitting disputes to arbitration was almost exclusively by means of a compromis (which, as is well known, always concerns a dispute that has already arisen). The clause at issue was instead regarded as necessary when compromissory clauses concerning future disputes became widespread.

3.57 Despite the strict interpretation placed on such clauses by the Permanent Court, which greatly limited their scope (a point which will be addressed presently), they continued to be used in subsequent treaties[204]. These clauses were motivated by, and were indicative of, the tendency of States to give preference to the amicable, out-of-court settlement of their differences as opposed to international adjudication or third-party judicial settlement. The primary purpose of such clauses was to safeguard as much as possible a State's sovereignty. Whenever States go to the length of agreeing to submit to arbitration, this submission is immediately accompanied by a significant proviso:

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204 Suffice it to mention here some of those of a general purport: Article 1 of the General Act of the Peaceful Settlement of International Disputes of 26 September 1928 and Article 1 of the revised text of this Act of 28 April 1949.

the prestige and interests of States should not be harmed by a summons to appear before an international court when the State concerned could easily have acceded to the demands of the complainant State before being made answerable in court.

3.58 It is thus plain that the clauses were intended as a sort of stumbling block on the road to judicial settlement for the sake of protecting State sovereignty. In other words, States, as soon as they agreed to submit to arbitration, hastened to narrow the scope of their obligation, by providing escape clauses designed to render arbitration a last resort. As Anzilotti rightly pointed out in 1915, it is significant that most of the clauses requiring the prior exhaustion of negotiations also excluded from arbitration matters impinging upon the "independence", "honor" or "integrity" of States[205].

SECTION B. The Case Law of the Permanent Court

3.59 As soon as a standing international tribunal, the Permanent Court of International Justice, was set up in 1922, it became apparent that many of the clauses that previously qualified the acceptance by States of their submission to arbitration were incompatible with the primacy of adjudication. State sovereignty could no longer be said to hold sway. As a result, not only were the traditional clauses excluding from jurisdiction matters pertaining to the "independence", "honor", etc. of States jettisoned, but in addition no clause concerning the prior exhaustion of negotiations was placed in the Statute of the Permanent Court.

3.60 It is indeed striking that while the Advisory Committee of Jurists entrusted with the task of drafting the Statute of the Permanent Court proposed a rule (Article 33) concerning the prior exhaustion of diplomatic

205 See, Anzilotti, D.: Corso di diritto internazionale, Vol. III, Part I, Rome, 1915, pp. 68-69.

negotiations, this rule was not taken up either by the League Council or by the Assembly and, consequently, no such provision can be found in the Statute of the Court[206].

3.61 It is therefore only natural that, once confronted with compromissory clauses that nevertheless included the requirement of prior negotiations, the Court should have placed a restrictive interpretation on these clauses so as considerably to reduce their scope.

3.62 This the Court achieved by propounding two concepts: first, the requirement in question was primarily conceived of as a means of making it possible for a legal dispute proper to take shape between the contending parties. Since a legal dispute is a conflict between legal claims, a disagreement on a point of law or fact, the Court stated that the legal positions of the parties should clearly come to the fore in the course of the exchange of notes or in diplomatic negotiations. It is thus apparent that the rationale of the requirement for prior negotiations was no longer founded in the need to safeguard State sovereignty as much as possible from third-party adjudication, but rather in the need for the Court to be seized with a full-fledged legal dispute.

3.63 Secondly, it follows from the foregoing that, seen in this perspective, the requirement of prior negotiations does not entail the need for negotiations to be prolonged and intense. As soon as it becomes apparent that one party is unwilling to settle the matter by bilateral talks or to compromise its position and that the parameters of the dispute have been set out, it is no longer necessary to wait before instituting judicial proceedings.

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206 See, Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee 16 June-24 July 1920, at p. 726.

3.64 This position was clearly articulated by the Court in one of its first cases, the Mavrommatis case. In that case, the respondent State, Great Britain, argued that the compromissory clause upon which Greece relied (Article 26 of the Mandate for Palestine) established as a precondition for submitting a dispute to the Court that it be one that "cannot be settled by negotiation". Great Britain maintained that because negotiations had not been exhausted - Greece, after receiving a British note of 1st April 1924 responding to a previous Greek note of 26 January 1924, had applied to the Court on 12 May 1924 without further delay - the condition set out in the compromissory clause had not been fulfilled[207].

3.65 The Court rejected the British objection by making three points. First, it specified that the primary purpose of prior negotiations was to make it possible for a legal dispute to take shape:

> "The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognises, in fact, that before 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[208]."

3.66 Second, the Court insisted that in any case negotiations may be relatively short:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can

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207 Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 13.

208 Ibid., p. 15.

> therefore be no doubt that the dispute cannot be settled by diplomatic negotiation[209]."

3.67 Third, the Court attached importance to the views of the parties concerned on the question whether the negotiating process was likely to yield results or was instead destined to lead to deadlock. It stated that -

> "... in applying this rule [on prior negotiations], the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation[210]".

3.68 In the light of this last pronouncement, it would seem that the Court's view must be interpreted to the effect that it is for the parties themselves to assess the political nature of their relations as being (or not being) conducive to a possible out-of-court settlement. To put it another way, it is not for the parties to state whether or not negotiations may be undertaken (each of them may hold a different view on the matter); rather, it is for each party to appraise the general political context of their relations for the purpose of deciding whether or not negotiations constitute a realistic avenue open to them. It goes without saying that, as the Court explicitly stated, the views of the parties are merely one of the various factors to be taken into account by the Court.

3.69 It is noteworthy that the Court's view on this point has remained consistent in its subsequent case law. For example, this view was later taken up by one of its most distinguished members, Manley O. Hudson, in 1939, who stated in his Dissenting Opinion in the Electricity Company case:

> "The provision in Article 1 of the Treaty [of Conciliation, Arbitration and Judicial Settlement, of 1931, between Belgium and

209 Ibid., p. 13 (emphasis in the original).

210 Ibid., p. 15.

> Bulgaria], that the dispute must be one which it may not have been possible to settle by diplomacy, is not a meaningless formality. In the past the Court has drawn attention to the importance of prior negotiations [in the Mavrommatis case, Series A, No. 2, p. 15], and where the requirement is expressly laid down in a treaty it cannot be disregarded. What is essential is that prior to the filing of an application by one party bringing the dispute before the Court, the other party must have been given the opportunity to formulate and to express its views on the subject of the dispute. Only diplomatic negotiations will have afforded such an opportunity. The precise point at which it may properly be said that the negotiations instituted cannot result in a settlement of the dispute may have to depend, as the Court has also recognized [Series A, No. 2, p. 15], upon 'the views of the States concerned'[211]."

3.70 It is apparent from the above that the Court construed the clauses on prior negotiations in such a way as to deprive them of their original, sovereignty-oriented rationale. Indeed, prior negotiations were no longer required as a means of impelling States to settle their disputes out of court. They were now conceived of as a means of ascertaining whether a disagreement on a point of law or fact had emerged between two or more States, and, if so, what the content of this conflict of legal claims was.

3.71 It follows that compromissory clauses calling for prior negotiations have been interpreted in a realistic manner, and even downplayed, according to circumstances of the case. As was aptly emphasized by the learned author, N. Kaasik, the interpretation advanced by the Court actually "led to the

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211 Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77, Dissenting Opinion of Judge Hudson, at pp. 132-133 (emphasis added).

thwarting, or almost, of the condition of prior negotiations[212]."

SECTION C. The Debates at the Institut de Droit International in 1956 for the Suppression of the Requirement of Prior Negotiations

3.72 The case law of the Permanent Court contributed to convincing a number of distinguished international lawyers that the clause on prior negotiations had become a relic of the past no longer compatible with the essence of modern adjudication. Therefore, when in 1952-1956 the Institut de Droit International met to discuss a draft model clause on the compulsory jurisdiction of the present Court, a few eminent jurists proposed that the requirement of prior negotiations, upheld by the rapporteur Guggenheim, be dropped altogether. Among these, mention can be made of Jessup (American), Rolin (Belgium), Andrassy (Yugoslav), de la Pradelle (French), Vallindas (Greek) and Waldock (British)[213]. As a result of these suggestions, the clause was deleted from the draft resolution[214].

3.73 It is of interest here to quote the views forcefully set out by two of these eminent lawyers, Jessup and Waldock. The former pointed out that

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212 Kaasik, N.: "La clause de négociations diplomatiques dans le droit international positif et dans la jurisprudence de la Cour Permanente de Justice internationale", in Revue de droit international et de législation comparée, Vol. 14, 1933, p. 81. Exhibit 29. See, also, pp. 90-92, ibid., and Soubeyrol, J.: "La négociation diplomatique élément du contentieux international", in Revue de droit international public, Vol. 68, 1964, pp. 334-335. Exhibit 30.

The sentence by Kaasik cited above reads in the original French version:

"L'interprétation de la Cour aboutit à une annulation ou presque de la condition de priorité des voies diplomatiques".

213 See, Annuaire de l'Institut de Droit International, Vol. 46, 1956, pp. 197-206. Exhibit 31.

214 Ibid., pp. 217, 263-264. For the text of the resolution, see, Institut de Droit International, Tableau général des résolutions (1873-1956), Bâle, 1957, pp. 160-161. Exhibit 32.

"this formula, which has been used in very numerous old treaties, seems to be a survival from the period in which Governments balked at submitting their disputes to the Court. This period must now be regarded as gone by, and in any case the Institut must not encourage this hesitation of Governments[215]". The latter, after supporting the view of Jessup, emphasized that the clause at issue, if upheld, would only result in encouraging the parties to raise preliminary objections with a view to using delaying tactics[216].

3.74 The debates in the Institut de Droit International and the resolution eventually adopted testify to the sharp decline in the importance of the clauses at issue. By the same token, those debates were indicative of the widely felt need to interpret the existing clauses on prior negotiations as strictly as possible[217].

SECTION D. The Case Law of the Present Court Confirms the Interpretation of the Permanent Court

3.75 The present Court has not departed from the interpretation placed by its predecessor on clauses on prior negotiations. It may suffice here to mention briefly the most important cases.

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215 Unofficial translation. The original French text reads: "Cette formule qui a été employée dans de très nombreuses conventions anciennes paraît être seulement une survivance de la période au cours de laquelle les gouvernements étaient hésitants à soumettre leurs différends à la Cour. Cette période doit être maintenant considérée comme révolue et en tout cas l'Institut se doit de ne pas encourager cette hésitation des gouvernements", Annuaire de l'Institut de Droit International, pp. 197-198.

216 "Le seul résultat qu'aurait l'insertion de la clause traditionnelle serait d'inciter les parties à soulever des exceptions préliminaires et à utiliser des moyens dilatoires" ibid., p. 205.

217 These views are also consistent with the provisions of Article 33 of the U.N. Charter which does not provide for any hierarchy between solutions reached by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or managements, or other peaceful means". Thus, under the U.N. Charter, settlement by judicial settlement is placed on an equal footing as settlement by negotiation.

3.76 In the preliminary objections phase of the South West Africa case, for example, the Court focused on the question of the duration of negotiations, as well as on the issue whether it was admissible, for procedural purposes, that such negotiations should take place not in a bilateral framework but within a parliamentary framework such as the United Nations.

3.77 On the first issue, the Court, after quoting the Mavrommatis case, pointed out that in the case with which it was dealing "a deadlock on the issues of the dispute was reached and has remained since", and that "no modification of the respective contentions [had] taken place since the discussions and negotiations in the United Nations[218]".

3.78 On the *second* issue the Court stated that -

> "[I]t is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties[219]."

It is worth noting that the views expressed by the Court on this matter were forcefully taken up, in their Separate Opinions, by Judges Bustamante and Jessup[220].

3.79 A compelling restatement of the Court's view can be found in the Separate Opinion of Judge Wellington Koo in the Northern Cameroons

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218 South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, at p. 346.

219 Ibid.

220 Ibid., pp. 381-382 and 435-436.

case. In quoting the previous case law, he framed the question in the following, particularly lucid, terms:

> "[I]t is to be recalled that both the Permanent Court and this Court have stated to the same effect that when the parties to a dispute have both defined their position and have both clearly indicated that they insist upon their respective views with no possibility of any modification or compromise, and when a deadlock is thus reached, it can be reasonably concluded that the dispute cannot be settled by negotiation. No particular form or procedure of negotiation is required, nor is any importance to be attached to the duration of such negotiation[221]".

3.80 The Court took up this line of reasoning in two subsequent cases. In the Diplomatic and Consular Staff case, it held in 1980 that the requirement of prior negotiations was met both because there was a conflict of views between the two parties and because the "refusal of the Iranian Government to enter into any discussion of the matter" had brought about a deadlock, although only 3 weeks had passed since the incident and the United States' application instituting proceedings[222].

3.81 In the Nicaragua case, the Court further developed its anti-formalist doctrine. It held that the failure, by Nicaragua, to refer expressly to a particular treaty in the course of its negotiations with the United States did not debar Nicaragua from invoking before the Court the compromissory clause of that treaty[223]. In other words, in the view of the Court the requirement under discussion is met even if in the course of negotiations the parties do not advert to

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221 Northern Cameroons, Judgment, I.C.J. Reports 1963, Separate Opinion of Judge Wellington Koo, p. 15, at p. 49.

222 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, at p. 27, para. 51.

223 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. 428, para. 83.

the treaty that the applicant State subsequently relies upon as the basis for the Court's jurisdiction.

3.82 The long-standing tradition of the Court on the matter at issue was cogently summed up by Judge Ago in his Separate Opinion in the Nicaragua case where he underlined, in particular, the limitations to which the prior negotiation requirement is subjected. After quoting the relevant treaty provision (whereby "any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy" could be submitted to the Court), Judge Ago went on to say the following:

> "It is not always necessarily the case under these terms that diplomatic negotiations must be ascertained to have been first begun and then pursued, and finally to have broken down. The requirements of the text can even be met, under certain circumstances, without negotiations in the strict sense ever having taken place. More generally speaking, I am in fact convinced that prior resort to diplomatic negotiations cannot constitute an absolute requirement, to be satisfied even when the hopelessness of expecting any negotiations to succeed is clear from the state of relations between the parties, and that there is no warrant for using it as a ground for delaying the opening of arbitral or judicial proceedings when provision for recourse to them exists[224]"

3.83 A similar clause was considered by the Court in its Advisory Opinion of 26 April 1988 on Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947. Under Section 21(a) of the Headquarters Agreement between the United States and the United Nations, disputes could be submitted to arbitration if they were "not settled by negotiation or other agreed mode of settlement".

3.84 When a dispute arose between the United States and the United Nations over the status of the PLO Observer Mission, the United States

224 Ibid., I.C.J. Reports 1984, at pp. 515-516, para. 4 (emphasis added).

Permanent Representative to the U.N. proposed to the U.N. Secretary-General that the negotiations phase of the procedure should commence on 20 January 1988. A series of consultations were held until February 1988; technical discussions, on an informal basis, were also held between 28 January and 2 February 1988. However, the United States subsequently stated that it did not consider these contacts and consultations "to be formally within the framework of Section 21(a) of the Headquarters Agreement" and noted that it could not "enter into the dispute settlement procedure outlined in Section 21 of the Headquarters Agreement". The Court did not uphold this objection. It held that:

> "Taking into account the United States' attitude, the [U.N.] Secretary-General has in the circumstances exhausted such possibilities of negotiation as were open to him[225]".

3.85 Once again, the Court took a flexible and broad view of the prior negotiations clause. It did not attach value to the United States' contention that no negotiations proper had taken place; it instead held that contacts and consultations, however informal, were sufficient to meet the requirements at issue. This confirms that, whatever the view of one of the parties, what really matters for the Court is that some attempt at contact or negotiation should have been made, provided of course there was at least a minimum chance of settlement.

3.86 More recently, the matter at hand has been discussed by Judge Bedjaoui in his Dissenting Opinion in the case of Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie. Following up on some of the themes that Judge Ago had enunciated in the Nicaragua case, Judge Bedjaoui dwelt, inter alia, on

225 Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Order of 9 March 1988, I.C.J. Reports 1988, p. 3, at p. 33, para. 55.

the fact that under certain circumstances the requirement of prior negotiations need not be met owing to the adamant position taken by the contending parties. He made the following remarks:

> "Since Libya refused to extradite its nationals and proposed substitute solutions (surrender of the two suspects to the United Nations, to the Arab League, to the judicial authorities of a third country, or to an international judicial or arbitral body, whereas the United Kingdom and the United States only offered Libya the choice between an extradition that as a matter of principle was not negotiable or the adoption of sanctions by the Security Council), it was obvious that the very notion of a negotiating process was meaningless in such a context[226]."

3.87 Judge Oda voiced a similar conclusion. He noted that, in the circumstances of the case -

> "... there does not seem to exist any convincing ground for asserting that the Court's jurisdiction is so obviously lacking. The Respondent's argument whereby the Court's jurisdiction is denied through the non-lapse of the six-month period would appear too legalistic, if one were to find that no room remained to negotiate on the organization of arbitration in the face of a categorical denial of the possibility of an arbitration[227]."

3.88 The Lockerbie case is significant in this respect inasmuch as one of the main arguments advanced by the Respondent States in opposing jurisdiction was that the negotiation and time-limit requirements of Article 14(1) of the Montreal Convention had not been satisfied by the Applicant. In its Order, the Court did not accept this argument and, in fact, did not even address the point as might have been expected if it had presented an obstacle to the Court's jurisdiction. To the contrary, as several of the separate and dissenting opinions noted, given that the Respondents had effectively refused to negotiate, the

226 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. United States of America), Order of 14 April 1992, I.C.J. Reports 1992, p. 145, para. 8.

227 Ibid., Declaration of Judge Oda, p. 136, (emphasis added).

provisions of Article 14(1) did not present a bar to jurisdiction. Indeed, as Judge Weeramantry noted, the refusal to negotiate in effect constituted an anticipatory breach of the provisions of Article 14(1) by the Respondent States[228] - a view that was shared by Judge Ajibola[229].

3.89 Once again, therefore, the case law of the Court on the practical inapplicability of the prior negotiations requirement in cases of clear, repeated and irreconcilable disagreements between the contending States, has been forcefully reaffirmed.

SECTION E. Concluding Observations

3.90 The authoritative opinions of the Judges cited above constitute the logical development and outcome of a long judicial process whereby the prior negotiations requirement has been increasingly restricted in its importance and scope. The case law surveyed above proves beyond any doubt that:

- The primary purpose of the clause is to make it possible for a legal disagreement between two States to take shape in such a manner as to enable the Court to identify the terms of this disagreement;

- To the extent that there may be a requirement of prior negotiation, this presupposes the good faith of the parties. When one party to a dispute refuses to deal with the other,

228 Ibid., Dissenting Opinion of Judge Weeramantry, p. 161.

229 Ibid., Dissenting Opinion of Judge Ajibola, p. 188.

its good faith is lacking and it cannot thereafter complain about any lack of negotiations;

- By the same token, whenever it becomes apparent that the parties to a dispute have clearly defined their legal positions and insist upon their respective views without appearing to be open to compromise, the resulting deadlock makes it superfluous for them to try and settle the matter by bilateral (or multilateral, for that matter) negotiations. In these cases it is not strictly necessary for negotiations even to commence. To hold the contrary view would result in the requirement at issue becoming an unacceptable means of delaying recourse to international adjudication - as Waldock noted in 1956 in the Institut de Droit International and Ago restated in 1984 in the Court;

- Some allowance should be made by international courts for the views that the parties concerned may have expressed about the very feasibility of negotiations, in the light of the general political context of their relations.

3.91 In Parts V and VI below it will be shown that, by instituting proceedings before the Court against the United States, the Islamic Republic has fully met the prior negotiations requirement, in so far as it is laid down in the relevant treaties.

PART IV

THE JURISDICTION OF THE COURT OVER THE ICAO COUNCIL DECISION OF 17 MARCH 1989 PURSUANT TO ARTICLE 84 OF THE CHICAGO CONVENTION

4.01 The United States' objection to the jurisdiction of the Court pursuant to Article 84 of the Chicago Convention is based essentially on one issue: the Islamic Republic's alleged failure to follow the procedures set out in the ICAO Council's Rules for the Settlement of Differences ("the Rules")[230]. The United States argues that the Islamic Republic did not properly submit a dispute under Article 84 to the Council pursuant to the Rules, that the Islamic Republic's submission to the Council was not dealt with under the Rules, and that the Council did not render a decision of the kind foreseen in the Rules that can be appealed to the Court.

4.02 Before turning to these arguments, it is important to note what the United States does not contest. It does not contest that the Islamic Republic submitted a dispute to the ICAO Council concerning violations of the Chicago Convention by the United States[231] - a dispute defined by disagreements arising from (i) the shoot-down of Flight IR 655, (ii) the issuance by the U.S. of illegal NOTAMs, and (iii) the lack of coordination by U.S. military forces with civilian ATS authorities. It does not contest the fact that the Chicago Convention is applicable to this dispute, nor does it contest that the ICAO Council had jurisdiction to render a decision on this dispute. It does not even contest that this was a dispute over the interpretation and application of the

230 Exhibit 33.

231 The words "dispute" and "disagreement", which are the relevant words in Article 84 of the Chicago Convention, are used interchangeably in this Part. It is the Islamic Republic's view, however, that the use of the word "disagreement" in the relevant part of Article 84 of the Convention establishes a lower threshold test than that which would be required to show a dispute existed.

Chicago Convention. The argument of the United States is based on purely formalistic reasoning: that the Rules were not applied, and therefore the dispute did not fall within Article 84. It contends that the failure to apply the Rules should act as a bar to the Court's jurisdiction.

4.03 The Islamic Republic will address this argument in detail in this Part. In Chapter I, it will be shown that the jurisdiction of the Court over decisions of the ICAO Council is governed not by a set of procedural rules adopted by the Council by a simple majority vote, but by Article 84 of the Convention. It is this Article to which States' parties to the Convention have consented and the real question in this case therefore is whether the requirements of Article 84 have been fulfilled: i.e., whether a disagreement over the interpretation or application of the Chicago Convention which could not be settled by negotiation was considered and decided by the Council. If so, then the Islamic Republic has the right to appeal to the Court against that decision and this right cannot be limited by consideration of whether or not certain purely procedural rules were followed to the letter.

4.04 The satisfaction of the requirements of Article 84 is a matter that must be determined objectively in the light of the relevant facts and the clear language of this provision. The Islamic Republic will show in Chapter II that the requirements of Article 84 are met in this case. In other words, that a disagreement over the interpretation and application of the Chicago Convention which could not be settled by negotiation was presented to, considered and decided on by the Council.

4.05 In Chapter III, the Islamic Republic will show that the United States' emphasis on the Rules is misplaced, and that even if the Rules

were not followed by the Council in its handling of the dispute, this should not act as a bar to the jurisdiction of the Court, for the following reasons:

- The Rules are of a highly flexible, ad hoc nature, and do not at all have the detailed exclusive, comprehensive and mandatory character alleged by the United States. For example, pursuant to Article 32 the Rules can be "varied or their application suspended" with the agreement of the parties when the Council considers that "such action would lead to a more expeditious or effective disposition of the case"[232]. This is effectively what happened in this case;

- The Council's past practice shows that it has handled disputes with considerable flexibility and has in fact never strictly followed the Rules. The fact that the Council has chosen to adopt such a flexible, ad hoc approach, an approach which it also adopted in this case, cannot be used against the Islamic Republic as a bar to the Court's jurisdiction;

- Such Rules were adopted by the Council to govern the Council's own functioning. It is solely the Council that decides how it deals with disputes and a member State of ICAO (especially a State like the Islamic Republic who is not a member of the Council) cannot be held accountable, and thus barred from having recourse to the Court, for the Council's own failure to follow the Rules strictly;

232 See, Exhibit 33, p. 12.

- Even if the Rules were not strictly followed by the Council in this case, all of their main procedural requirements were nevertheless met, and for this reason also the Islamic Republic should not be barred from making an appeal to the Court.

4.06 The United States also argues that because the Rules were not followed this shows that the Council was acting under Article 54 of the Convention and not under Article 84. This argument, which will be addressed in Chapter IV, introduces a formalistic division between the Council's functions under Article 54 and Article 84 which is not justified by a correct reading of the Convention. The United States itself acknowledges that under Article 54 the Council may be obliged to address questions concerning the interpretation or application of the Treaty. Thus, even if the Council was acting under Article 54 in handling the dispute over the shoot-down of Flight IR 655, a decision rendered by the Council on such a dispute, which clearly concerned the interpretation and application of the Convention, would still be appealable as the objective requirements of Article 84 would be met.

4.07 Finally, Chapter V will address the United States' argument that there are policy reasons why the Court should not accept jurisdiction in relation to this appeal from a decision of the Council ICAO. It will be shown that this argument is without foundation and that, to the contrary, all relevant policy considerations support a finding of jurisdiction.

CHAPTER I THE COURT'S JURISDICTION DERIVES FROM ARTICLE 84 OF THE CHICAGO CONVENTION

4.08 Article 84 provides as follows:

"Settlement of disputes

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

4.09 The United States submits a highly distorted reading of Article 84. It seeks to limit the appeal to the Court only to proceedings stipulated ab initio as being an "Article 84 proceeding" and pursued in strict conformity to the Rules. The plain meaning of the Convention affords no basis for such a narrow reading. Article 84, which is incorporated in Part IV of the Convention entitled "Final Provisions", and therefore relates to the Convention as a whole, allows appeal from any decision of the Council on any disagreement regarding the Convention's interpretation or application. It says nothing about procedural requirements. As will be shown below, it is Article 84 alone which governs the Court's jurisdiction and the Rules cannot in any way derogate from this jurisdiction.

4.10 Article 84 entrusts the ICAO Council with a right to resolve disputes over the interpretation or application of the Convention subject to appeal to the Court. Essentially the same structure is adopted in the Food and Agriculture Organization, the World Health Organization, and the World

Meteorological Organization, where the plenary organ of each of these organizations has the power to decide questions or disputes concerning the relevant constitutive instruments, subject to appeal to the Court or, in the case of the World Meteorological Organization, an independent arbitrator appointed by the President of the Court[233]. However, in the Chicago Convention the right of decision is given not to the plenary organ of ICAO, the Assembly, but to the Council, which is of limited membership[234].

4.11 Although the Chicago Convention was signed on 7 December 1944, ICAO existed until 1957 - for 13 years - without any rules for the settlement of disputes under Article 84[235]. Thus, signatories to the Convention in 1944 consented to the jurisdiction of the Court on the basis of the provisions of Article 84 alone without this consent being limited in any way by any procedural rules.

4.12 Under Article 84, three conditions are envisaged in order to establish the jurisdiction of the Court. There must be (*i*) a disagreement between States over the interpretation or application of the Convention; (ii) the disagreement must be one which cannot be settled by negotiation; and (iii) the disagreement must be considered and decided on by the Council on the application of any State concerned in the disagreement. Other than the provision

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233 Constitution of the Food and Agriculture Organization, Article XVII(1); Constitution of the World Health Organization, Article 75; Convention of the United Meteorological Organization, Article 29. The text of the relevant provisions is given in Exhibit 34.

234 See, also, Bowett, D.W.: The Law of International Institutions (London, 1975), at p. 134, where this distinction is emphasized. Exhibit 35. This is a significant factor in the present case due to the particular characteristics and composition of the ICAO Council. See, paras. 4.120-4.129, below.

235 Both Iran and the United States signed the Convention on 7 December 1944. Iran ratified the Convention on 19 April 1950, the United States on 9 August 1946.

of Article 84 that the application be considered and decided by the Council, no other formal prerequisites are set out for the procedure to be followed by the Council[236].

4.13 The Islamic Republic sought to show in its Memorial that all of the conditions of Article 84 had been met: as objective questions of fact and law, disagreements between the Parties concerning the interpretation or application of the Convention in connection with the events surrounding the destruction of Flight IR 655 were submitted to the Council; these disagreements could not be settled by negotiation; consequently, they were considered and decided upon by the Council[237].

4.14 The United States' argument is essentially that the Council has established special Rules for handling Article 84 disputes and that the Islamic Republic's alleged failure to follow the Rules should act as a bar to the Court's jurisdiction. This cannot be correct. It is Article 84 alone which governs the jurisdiction of the Court. The Rules cannot have created new substantive condition for an appeal to the Court that did not figure in Article 84. In other words, whatever rule-making power the ICAO Council possesses cannot be employed for the purpose of introducing new substantive requirements for bringing an appeal not found in Article 84 of the Convention.

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236 The only procedural requirement is that no party involved in the dispute should have a right to vote in any decisions made by the Council. See, para. 4.99, below.

237 In this regard, contrary to its position with regard to the Montreal Convention and the Treaty of Amity, the United States does not raise in its Preliminary Objections any objection to the effect that the Islamic Republic has failed to show that the disagreement before the Council could not be settled by negotiation. This in itself is a recognition that the dispute over the Chicago Convention, which was fully aired before the ICAO Council, could not be settled by negotiation. Part III has shown conclusively that such negotiations were rendered impossible by the opposing positions of the Parties and the United States' refusal to deal with the Islamic Republic on the matter.

4.15 The subsidiary nature of the Rules is confirmed by two important facts. First, the Rules were adopted by the Council only in 1957 pursuant to Article 54(c) of the Convention which authorizes the Council to "Determine its organization and rules of procedure". It must be stressed that the Rules were therefore adopted not by the plenary organ of ICAO of which all States' parties to the Chicago Convention are members, but rather by a simple vote of the Council. Moreover, the language of Article 54(c) is clear that the Rules were adopted by the Council solely for its benefit and in order to regulate its own procedures.

4.16 Second, these Rules remain flexible and subject to revision. Article 32 of the Rules specifies that they may be varied or suspended with the agreement of the contending parties whenever the Council deems this appropriate for the more expeditious or effective disposition of the case. The Rules may also be amended by the Council even on ad hoc basis under Article 33. This contrasts sharply with the provisions for amending the Chicago Convention itself. Under Article 94(a) of the Convention, any proposed amendment must be approved by a two-thirds vote of the Assembly and then must be ratified by more than two-thirds of the total number of the contracting States. It follows that any attempt to limit the scope of Article 84 of the Convention could only be undertaken in accordance with this constitutional procedure. It would completely undermine the structure and integrity of the Convention if, as the United States seems to contend, substantive provisions of the Convention could be limited by subsidiary provisions adopted by the Council.

4.17 The relation between the Rules and the Convention is analogous to that between the Court's Rules and its Statute. For example, the subsidiary nature of the Rules of Court has been recognized by the Court in considering the provisions of the Statute and the Rules with regard to the right of

intervention. Thus, the Court has held that a State's right to intervene in a case is governed by Article 62 of the Statute and must be decided on that basis. The Rules of Court cannot add any additional requirements governing the right to intervene beyond those set out in the Statute. Even though Article 81 of the Rules of Court provides for the furnishing of certain additional information relating to an intervention, the Court has noted that any questions concerning intervention should "be decided on the basis of the Statute and in the light of the particular circumstances of each case[238]". In the same manner, Article 84 of the Convention takes precedence over the Rules, and the question of the Court's jurisdiction must be determined on that basis.

4.18 All these points are no doubt familiar to the Court as they were commented on by several distinguished Judges in the Appeal Relating to the Jurisdiction of the ICAO Council case ("the Appeal case"). As Judge Jiménez de Aréchega explained in his Separate Opinion:

> "15. The question of the competence of the appeal must be determined on the exclusive basis of the treaty provisions establishing the Court's jurisdiction ...
>
> The Rules for the Settlement of Differences adopted by the Council of ICAO cannot have the effect of ousting the Court's jurisdiction, if it exists on the basis of the relevant treaty provisions. A regulation adopted by the organ of first instance cannot add to or detract from the appellate jurisdiction possessed by the Court under provisions which have been agreed to by the contracting States, on whose consent that jurisdiction is grounded.
>
> 16. In any case, it was not the object of these Rules to affect or diminish the Court's jurisdiction, but only to regulate the procedures within the ICAO Council itself[239]."

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238 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981, p. 16, para. 27.

239 Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 145.

4.19 The same points were made by Judge de Castro in his Separate Opinion:

> "Article 84 of the Convention must be taken as the starting point in order to solve the problem of appeals, and it is starting from that Article that the provisions of the Rules must be studied[240]."

Judge de Castro also noted that -

> "... it cannot be said ... that the Rules of Procedure are statutory rules, having the same force as the constituent instrument of the Council. The Rules for the Settlement of Differences were not adopted by vote of the Parties to the Convention, or of the members of the Assembly; it was the Council which approved them ... It is not the constituent instrument of the Council, but something which the Council itself has produced. The Council reserves to itself powers over the procedure (Art. 28), and Article 33 tells us that 'the present Rules may, at any time, be amended by the Council'[241]."

4.20 The comments of these distinguished Judges point to a fatal flaw in the United States' argument, which places undue emphasis on the Rules and fails to give proper significance to Article 84, which is the statutory basis of the Court's jurisdiction. It will be shown in Chapter II that each of the conditions of Article 84 has been met and that a decision of the ICAO Council appealable to the Court was rendered.

CHAPTER II THE COUNCIL'S HANDLING OF THE DISPUTE ARISING FROM THE SHOOT-DOWN OF FLIGHT IR 655

4.21 In Chapter 2 of its discussion of the Chicago Convention, the United States seeks to show that the dispute submitted by the Islamic Republic

240 Ibid., p. 121.

241 Ibid., p. 138.

was not dealt with by the Council under the procedural rules established by the Council to deal with Article 84 disputes[242]. It contends that -

- no proper application was submitted by the Islamic Republic referring to the fact that it was submitting an Article 84 dispute, as required by the Rules;
- no written record of the proceedings exists, as would have been the case if the dispute had been dealt with under the Rules;
- the deliberations of the Council show that it was not acting under the Rules;
- the United States exercised a right of vote which it should not have done had the matter been considered under Article 84;
- no decision of the kind envisaged under the Rules was rendered by the Council; and
- the ICAO's Legal Bureau Director has stated that the Council was acting under Article 54(n).

4.22 These arguments are of a purely formalistic nature and fail to address the essential issue for the purposes of determining whether the Court has jurisdiction - whether or not a disagreement over the interpretation or application of the Chicago Convention was submitted to, considered and decided on by the Council? As the Court observed in the Appeal case, this must be "an objective question of law, the answer to which cannot depend on what occurred before the Council[243]". At best, the United States' arguments, if factually accurate, would only count as evidence as to whether or not objectively such a disagreement had been decided. However, in themselves, they cannot answer the question of whether or not the conditions of Article 84 of the Convention have been met.

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242 See, U.S. Preliminary Objections, pp. 110, et seq..

243 Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 70.

4.23 The specific factual contentions made by the United States as to alleged procedural defects in the Council's treatment of the dispute will be addressed in Chapter III. However, it will become apparent from the following discussion not only that the Rules were followed in essence but also that to the extent there was any departure from the Rules this was done with the agreement of the Parties and in recognition of the urgent nature of the dispute and the need for its effective disposition, pursuant to Article 32 of the Rules.

4.24 Even if the Rules were not applied to the letter, it must be asked whether the United States is seriously arguing that the case should be reheard by the Council de novo for a second decision to be made in compliance with the Rules. This would clearly be an absurd suggestion when the Council has dealt so fully with the dispute and given its final decision on the issue. It would make no sense in terms of the good administration of justice and would conflict with one of the established exceptions to the exhaustion of local remedies rule that:

> "There can be no need to resort to the municipal courts ... if the result must be a repetition of a decision already given[244]."

Precisely for these kinds of reasons, in similar circumstances the Court has ruled

244 Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 18. See, also, the Dissenting Opinions of Judges Hudson and Erich at pp. 47-48 and pp. 53-54, respectively.

that it should not allow itself to be hampered by mere defects of form[245].

4.25 In the light of the above comments, this Chapter will show that all the requirements of Article 84 have been met in the present case; that a disagreement over the interpretation or application of the Convention was submitted to the Council (Section A); that the United States recognized that such a disagreement was before the Council (Section B); and that the Council considered and made a decision on this disagreement (Section C). In such circumstances, the Court has jurisdiction, and mere defects of form cannot act as a bar to that jurisdiction.

SECTION A. The Islamic Republic Submitted a Disagreement Over the Intepretation or Application of the Convention to the Council

(i) The Islamic Republic's communications of 3-4 July 1988

4.26 Reflecting the extreme urgency of the matter, the Islamic Republic brought the attention of both the U.N. Security Council and ICAO to

245 Thus, in the Nicaragua case the Court found that it "... would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed,

> 'the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned' (Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14)."

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 428-429.

the incident immediately after it occurred[246]. To this end, the Islamic Republic sent three telexes to the President of the ICAO Council, two on 3 July 1988, and one on 4 July 1988. In the first telex, the Islamic Republic referred to the "aggressive and criminal attack" by U.S. forces and concluded:

> "In the interest of safety and security of civil aviation in the region and for the benefit of humanity as a whole I kindly request you to take effective measures in condemning said hostile and criminal acts[247]."

In the second telex, the Islamic Republic requested the President and other members of the Council to give the issue their personal attention and invited them to visit the Persian Gulf and study the incident[248]. Finally, in the third telex the Islamic Republic requested that the issue be tabled in the 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".

The telex added:

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246 In his letter of 3 July 1988 to the Secretary-General of the United Nations, Mr. Velayati, the Minister of Foreign Affairs of the Islamic Republic, was explicit in stating that the United States' actions were a "clear violation of all international rules and principles, particularly Articles 1 and 2 of the 1944 Chicago Convention". Exhibit 32 to the Memorial of the Islamic Republic. He also pointed out the serious threat to civil aviation in the region posed by the presence of U.S. forces, stressing that mere verbal expressions of regret would not satisfy the requirements of the situation, and called on the Secretary-General to assist in mobilizing pertinent international bodies to investigate the extent of the U.S. atrocity. It is clear from this letter and from the telexes discussed here that the Islamic Republic was from the very first instant charging the United States with violations of the Chicago Convention.

247 Exhibit 36.

248 Ibid.

"We firmly believe prompt and effective attn. of ICAO is necessary if safe conduct of civil air transportation is to be fostered by ICAO[249]."

4.27 It emerges from these telexes that the Islamic Republic's immediate concerns were fourfold: first, to report the incident as a matter of urgency to the highest organ responsible for international civil aviation; second, to seek a condemnation of the United States' actions by ICAO; third, to request ICAO to take steps to restore the safety of civil aviation in the region; and fourth, to request that a thorough investigation of all aspects of the catastrophe be instituted.

4.28 The telex of 4 July called for an Extraordinary Session of the Assembly. The United States argues that this shows that the Islamic Republic was not acting under Article 84 of the Chicago Convention because the Assembly has no role in Article 84 disputes[250]. Even if relevant, the President of the Council clearly understood that the issue should be heard by the Council. He replied to the Islamic Republic on 4 July 1988 stating that he was consulting members of the Council "concerning the convening of an Extraordinary Session of the Council[251]". However, as all further proceedings were before the Council, and the appropriateness of this was never disputed by the Islamic Republic, this argument is hardly relevant. The important point is that the President recognized the need to deal with the Islamic Republic's request as a matter or urgency and was able to convene the Extraordinary Session of the Council within 9 days.

4.29 The Islamic Republic did not refer either expressly or impliedly to any specific provision of the Chicago Convention in making its

249 Ibid.

250 U.S. Preliminary Objections, p. 111.

251 Exhibit 36.

submissions to the President of the Council. Thus, it cannot be argued that the Islamic Republic acted under any one provision of the Convention to the exclusion of others. The Islamic Republic relied on the Convention generally, and any and all provisions that were applicable. The Islamic Republic took the only action open to it given the urgency of the matter, as there is no provision for calling an urgent meeting of the Council under either Article 84 of the Convention or the Rules.

4.30 Moreover, the Islamic Republic acted as any non-Council member of ICAO would be expected to act. The issue was placed in the hands of the Council, which was requested explicitly and as a matter of urgency to take effective measures. The question of how the issue should be dealt with was left to the Council. This approach was fully consistent with the Convention which obliges the Council to deal appropriately with all matters referred to it by member States and gives the Council full power to apply appropriate procedures[252]. The Islamic Republic was thus entitled to rely on the Council's obligations to take all necessary steps appropriate to its requests.

(ii) The Islamic Republic's Application to the ICAO Council

4.31 The first Extraordinary Session of the Council dealing with the incident opened on 13 July 1988. The Islamic Republic's presentation included a statement of the relevant facts, and drew on a number of factual

252 The Council's obligations in this regard are discussed further in paras. 4.79-4.87, below.

reports that had been submitted to the Council prior to the Session[253]. It also included a rebuttal of arguments that had appeared in public statements by U.S. officials about the incident - that the Vincennes thought it was being attacked by an F-14, as well as the self-defense argument relating to the alleged attack by the small patrol boats. The Islamic Republic's representative concluded with the following requests:

> "The delegation of the Islamic Republic of Iran requests that the attention of the Council and its deliberation during this Extraordinary Session be directed towards the following aspects of this tragic incident:
>
> 1. Explicit recognition of a delict of international character relating to the breach of international law and legal duties of a Contracting State, Member of ICAO.
>
> 2. Recognition of the fact that the Contracting State shall bear an international responsibility for the criminal actions of its officials, regardless whether they have acted within the limits of their authority or have exceeded it.
>
> 3. Explicit condemnation of the use of weapons against the Iran air passenger aircraft by a member of ICAO, namely the United States.
>
> 4. Formation of an ad hoc commission to conduct an investigation of various legal, technical and other aspects of the shooting down of the Iran air passenger aircraft to be reported, through the Council, to an Extraordinary Session of the Assembly for the purpose of taking necessary action in devising relevant rules, regulations and standards, as well as ensuring their proper and effective implementation for prevention of similar occurrence.
>
> 5. Demand for the immediate termination of present obstacles, restrictions, threats and use of force against the airspace of the Islamic Republic of Iran and the coastal

253 On 7 July 1988 the Islamic Republic had submitted a report to the President of the Council about other incidents which had taken place in the Persian Gulf since 1987 and which "... resulted from the violations of international Aviation law and regulations by the United States with respect to safety of the International Civil Aviation". Exhibit 37. The first report contained a detailed statement of incidents where civilian aircraft had been endangered by U.S. forces, a report on the illegal U.S. NOTAMs, and a discussion of the issue of civil-military coordination. It also contained a record of the Islamic Republic's repeated protests to the Council about these actions. Exhibit 38. This report was supplemented by a further report on 12 July 1988, giving details, inter alia, of Flight IR 655, its route, its communications and the number of victims. Exhibit 39.

> States of the Persian Gulf, which endanger the safe and orderly operation of civil air transport in the region[254]."

4.32 These requests revealed that the Islamic Republic's application had a dual nature . On the one hand, there were clear requests for a determination by the ICAO Council of the existence of a breach of "legal duties of a Contracting State, Member of ICAO", recognition that that State should bear responsibility for its illegal actions, and condemnation of the use of force by that State (requests 1, 2 and 3). On the other hand, the Islamic Republic was also concerned with the safety of air navigation in the Persian Gulf (requests 4 and 5). During the course of the proceedings, the Islamic Republic repeatedly emphasized the legal aspects of its application.

4.33 Requests 1, 2 and 3 clearly presented to the Council a charge of violation of the Convention by the United States, and thus a dispute over the interpretation and application of the Convention within the meaning of Article 84. In this respect, the test formulated by the Court in the Appeal case is of the greatest relevance:

> "Consequently the legal issue that has to be determined by the Court really amounts to this, namely whether the dispute ... is one that can be resolved without any interpretation or application of the relevant Treaties at all[255]."

In the Appeal case, the Court held that where there was a charge of breach of treaties, the Council would inevitably be involved in the interpretation and application of the Convention:

> "It was essentially a charge of breaches of the Treaties, - and in order to determine these, the Council would inevitably be obliged

254 Draft C-Min. Extraordinary (1988)/1, 13 July 1988, p. 7. Exhibit 40.

255 Appeal Relating to the Judgment of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 62.

> to interpret and apply the Treaties, and thus to deal with matters unquestionably within its jurisdiction[256]."

The United States has argued this point before the Court itself in the United States Diplomatic and Consular Staff in Tehran case. There it claimed that the mere fact that the United States had charged Iran with violating various provisions of the Treaty of Amity "inevitably requires the interpretation and application of the Treaty[257]". The same criteria apply to the Islamic Republic's submissions to the Council.

(iii) The Islamic Republic maintained its legal claims before the ICAO Council throughout the Council's deliberations

4.34 The next Council meetings dealing with the incident commenced on 5 December 1988 to consider the fact-finding report that had been ordered by the Council (hereinafter referred to as the "ICAO Report"). The floor was taken once more by the representative of the Islamic Republic who expressed the hope that the Council's "deliberation on this issue will result in decisive action against the perpetrator as well as a safeguard for preventing further occurrences of such an incident[258]". In other words, the Islamic Republic fully maintained its request that the Council consider both legal claims and safety issues.

4.35 Having expressed his Government's view that in the light of the ICAO Report the United States "should be held responsible and bear the

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256 Ibid., p. 66.

257 Oral Argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, (USA v. Iran), p. 285. See, also, Conditions of Admission of a State to Membership in The United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61. This argument is considered in greater detail in Part VI below.

258 Draft C-Min. 125/12 (Closed), 5 December 1988, p. 8. Exhibit 43.

consequences of the tragic incident[259]", the representative of the Islamic Republic repeated his Government's legal requests by seeking the following action by the Council:

> "1) Condemnation of the shooting down of IR 655 by the United States military forces in the Persian Gulf.
>
> 2) Explicit recognition of a crime of international character to the breach of international law and legal duties of a Contracting State of ICAO.
>
> 3) Explicit recognition of the responsibilities of the United States Government, and calling for effecting compensation for moral and financial damages.
>
> 4) Demand for the immediate termination of present obstacles, restrictions, threats, and the use of force against civilian aircraft in the region, including Council's appeal to relevant international bodies to demand the withdrawal of all foreign forces from the Persian Gulf[260]."

These statements are as clear-cut a set of submissions of a legal claim based on violations of international law and treaty obligations as any that could be found in any international judicial or arbitral proceedings, and include charges of violations of the Convention and requests for compensation. There could thus be no question that the Council was still faced with a serious legal dispute concerning the interpretation and application of the Convention.

4.36 At the next meeting two days later, it was decided that the ICAO Report commissioned by the ICAO Council should be submitted to the Air Navigation Commission (the "ANC"). A clear picture of how the Islamic Republic understood the proceedings is given in this meeting. After agreement was reached on reference of the ICAO Report to the ANC, the Islamic Republic's representative stressed that the reference to the ANC was purely to deal with the technical and safety aspects of the incident, and that once the ANC

259 Ibid., p. 11.

260 Ibid.

had issued its report there would still be the legal issues which had to be decided by the Council[261].

4.37 The Islamic Republic's representative also went on to remind the Council of its obligations under Article 54(j) of the Convention:

> "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[262]."

The United States alleges that this shows that the Islamic Republic was acting under Article 54(j), not Article 84[263]. To the contrary, the use of the word "also" clearly shows that Article 54(j) was an additional matter for the Council to consider. In any event, as will be shown in Chapter IV below, even if the Council acted under Article 54(j), this does not necessarily preclude an appeal to the Court providing the requirements of Article 84 are still met.

4.38 At the end of this meeting, the President of the Council "gave assurance" that reference of the technical aspects to the ANC "would not preclude detailed consideration, at a later stage, of the full text of the report of the Investigation Team" by the Council (i.e., the ICAO Report)[264]. He also confirmed directly to the Islamic Republic that Articles 54(j) and (k) would be taken into consideration.

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261 Draft C-Min. 125/13 (Closed), 7 December 1988, p. 19, para. 20. Exhibit 44.

262 Ibid.

263 U.S. Preliminary Objections, p. 118.

264 Draft C-Min. 125/13 (Closed), 7 December 1988, pp. 19-20, para. 22. Exhibit 44.

4.39 The final meetings at which the incident was considered by the Council were held on 13, 15 and 17 March 1989. As far as the Islamic Republic was concerned, the purpose of these meetings was twofold: to consider the safety recommendations of the ANC and to deal finally with the legal issues. For this reason, the Islamic Republic once more repeated its requests for relief in almost identical terms to those set out in paragraph 4.35 above[265]. This confirms that the Islamic Republic had relied on the President's assurances that these issues were still to be decided by the Council. Reflecting the Islamic Republic's dual concerns, the Council's final decision of 17 March 1989 dealt first with the incident itself, finding that the shoot-down was an accident although there had been errors in identification of the aircraft, and second with the safety issues, by approving the recommendations in the ANC report[266].

4.40 It is clear from the above that the Islamic Republic had applied to the Council for a decision on a disagreement involving the interpretation and application of the Chicago Convention. To this extent, therefore, one of the main requirements of Article 84 had been met.

SECTION B. The Response of the United States Before the ICAO Council Confirms That a Disagreement Over The Interpretation and Application of the Convention Had Been Submitted to the Council

4.41 The response of the United States to the Islamic Republic's application must be considered in the light of the overriding question as to whether a disagreement between the Parties over the interpretation or application of the Chicago Convention within the meaning of Article 84 was submitted to the Council. In the words of Judge Onyeama in his Separate Opinion in the Appeal case, such a disagreement must exist wherever there is "a

265 Draft C-Min. 126/18, 13 March 1989, p. 7. Exhibit 47.

266 C-Dec 126/20, 17 March 1989, p. 3. Exhibit 50.

difference of opinion as to the meaning of some provision of the Convention, or as to how such a provision should be applied between contracting States in the field of civil aviation[267]".

4.42 Judge Onyeama's view reflects the findings of both the Permanent Court and the present Court as to when a dispute can be said to exist. As the Permanent Court indicated in its Judgment of 30 August 1924 in the Mavrommatis case:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons[268]."

4.43 As the record shows, it immediately transpired before the ICAO Council that such a disagreement existed between the Islamic Republic and the United States and that this disagreement had been submitted to the Council for decision.

(i) **The United States immediately took issue with the Islamic Republic's position**

4.44 At the first meeting of the Council to consider the incident on 13 July 1988 the United States' representative made a detailed presentation of its version of the incident before the ICAO Council. This presentation was introduced in the following terms:

> "In my statement today, I intend to address the following:
>
> First, I will discuss the general background to the incident, including comment on the continuing conflict in the Persian Gulf;

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267 Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 87.

268 Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

> Second, I will describe the specific situation confronting the captain of the United States ship Vincennes on July 3, 1988, as the facts are known to us at this time; and
>
> Third, I will discuss possible steps that the International Civil Aviation Organization might consider in order to avoid future incidents such as the one we address today. My government wants to work with ICAO on steps that can be taken, as soon as possible, to increase the safety of international civil aviation in the Persian Gulf, a fundamental goal of this Organization and certainly of the United States. We hope this Extraordinary Session of the Council will initiate work to that end[269]."

4.45 The United States' approach mirrored the dual nature of the Islamic Republic's claims: in essence it was divided into (i) legal/factual assertions and (ii) an alleged concern for safety issues. Like the Islamic Republic, the United States made no reference to Article 54 or any other Article of the Convention. However, the United States did make a legal and factual presentation concerning the background situation in the Persian Gulf prior to the incident, as well as the incident itself, very similar in scope to that made in its Preliminary Objections. It specifically rejected the Islamic Republic's contention that the U.S. naval presence in the Persian Gulf was to blame for the incident[270]. It presented its self-defense argument in detail: alleging that the Vincennes had gone to assist neutral vessels that were being "attacked or threatened" by "Iranian gunboats"; that the Vincennes misidentified Flight IR 655 as an F-14; and that "the captain felt compelled to take action to protect his men and his vessel from what then appeared to be an air attack in support of the Iranian surface combat"[271]. Finally, it blamed the Islamic Republic for a share of the responsibility for the incident[272].

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269 Draft C-Min. Extraordinary (1988)/1, 13 July 1988, pp. 8-9. Exhibit 40.

270 Ibid., p. 9.

271 Ibid., pp. 10-11.

272 Ibid., pp. 11-12.

4.46 In other words, the United States made a detailed rebuttal of the Islamic Republic's contentions as presented to the Council. In and of itself, the presentation of these arguments showed that there existed a disagreement as to the United States' performance of its obligations under the Chicago Convention, and thus as to the interpretation and application of the Convention, and that these issues were placed before the Council. The United States also recognized the urgency of the matter and the need for effective and expeditious treatment by the Council of the issues raised.

4.47 The United States indicated that it expected the Council to decide these issues. Giving its agreement to the Islamic Republic's request for a full fact-finding investigation of the incident, the United States concluded its opening presentation with the following statement -

> "Mr. President, this Council has a long history of careful deliberations and of fairness and wisdom in its judgments. My government trusts that its Members, as in past incidents, will reach its conclusions only after all the facts have been received[273]."

The whole presentation by the United States, and in particular the explicit use of its self-defense argument, confirms the judicial nature of the issues facing the Council, and the judicial nature of the role that the Council was expected to adopt.

4.48 The Court will appreciate, therefore, that as from the very outset of the ICAO deliberations there was a disagreement over what each State regarded as the relevant factual and legal issues. Moreover, both States maintained their positions in the subsequent proceedings and the United States did not cease to dispute the claims made by the Islamic Republic.

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273 Ibid., p. 14 (emphasis added).

4.49 For example, in the last deliberations before the Council, at the meeting on 17 March 1989, the United States sought to distinguish this case from earlier cases involving the shooting down of civilian aircraft. According to the United States, the case of Flight IR 655 was "far different" from these other cases because "[i]n none of the previous cases had there been on-going hostilities or any other circumstances to explain the justification of use of force"[274]. In essence, the United States was arguing that in previous cases there had been no real element of dispute. The shooting of Flight IR 655 was, according to the United States, fundamentally different because the use of force in question was said to be justified, and therefore no violation of the Chicago Convention had taken place.

4.50 Given the specific request of the Islamic Republic for a finding that the United States had violated the Convention, it is clear from the above that the United States recognised that an Article 84 type disagreement existed and that in dealing with this disagreement the Council had jurisdiction to consider the United States' arguments on self-defense and other issues. Such arguments could not be considered without engaging the Council in a judicial capacity relating to the interpretation or application of the Convention.

SECTION C. The ICAO Council's Approach to the Shoot-down of Flight IR 655

4.51 It has been shown above that a disagreement between two States over the interpretation and application of the Chicago Convention was presented to the Council. It is now appropriate to consider whether the remaining requirements of Article 84 were fulfilled: that this disagreement was considered and decided by the Council. It should be recalled in this regard that once the Council has a disagreement before it, the obligation is on the Council

274 Draft C-Min 126/20, 17 March 1989, p. 7. Exhibit 49.

under Article 84 to decide on that disagreement. Article 84 provides that any such disagreement "shall ... be decided by the Council".

(i) **The ICAO Council's consideration of the disagreement**

4.52 There can be no doubt that the Council "considered" the disagreement with which it was faced. It held several meetings, spanning a period of over 9 months, specifically to deal with the incident. It heard detailed legal and factual argument by both the Islamic Republic and the United States. It also initiated a fact-finding investigation with the express purpose of determining "all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft[275]". There is thus a very full written record of these proceedings.

4.53 From the record of the Council's deliberations it is clear that some Council members sought to ignore or even exclude consideration of the legal issues, notwithstanding repeated appeals from the Islamic Republic. For example, the Venezuelan representative stated at the 15 March 1989 meeting that legal issues were "outside of ICAO's purview[276]". The United Kingdom representative likewise suggested that the "safety of international civil aviation" was the Council's concern, and that the Council should "restrict itself to consideration of the technical issues within its mandate"[277]. In the view of the two leading members of the Council, the United Kingdom and the United States, ICAO was merely "a technical body[278]", endowed with a "specific technical

275 C-Dec Extraordinary (1988)/2, 14 July 1988, p. 2, para. 6. Exhibit 42.

276 Draft C-Min. 126/19, 15 March 1989, p. 5, para. 9. Exhibit 48.

277 Draft C-Min. 125/13 (Closed), 7 December 1988, p. 12, para. 11. Exhibit 44.

278 Draft C-Min. 126/20, 17 March 1989, p. 6, para. 8. Exhibit 49.

mandate[279]". Thus, in spite of the Islamic Republic's reminders that there were two aspects to its case, legal and technical[280], and its call for a "just and impartial decision[281]", some Council members seemed more interested in reaching a purely political solution in the "spirit of the rebirth of the Helsinki accord of 1975[282]"!

4.54 The United States also alleges, that in his summary of the opening Session of 13 July 1988 of the Council the President failed to recognise the elements of disagreement that were evident between the Islamic Republic and the United States, focussing instead on the "technical aspects[283]". The language used by the President was 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[284]."

4.55 If the United States is correct that the President sought to ignore the Islamic Republic's legal requests, then such statements, as well as the statements of the other Council members who sought to restrict the Council's role to technical question, were clearly inappropriate where legal issues were before the Council. Under the Convention, the Council has an obligation to consider

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279 Ibid., p. 7, para. 9.2.

280 Draft C-Min. 125/13 (Closed), 7 December 1988, p. 19, para. 20. Exhibit 44.

281 Draft C-Min. 126/18, 13 March 1989, p. 16, para. 12. Exhibit 47.

282 Ibid., p. 19, para. 16.

283 U.S. Preliminary Objections, pp. 117-118.

284 Draft C-Min. Extraordinary (1988)/1, 13 July 1988, p. 4. Exhibit 40.

and deal with such legal issues and the Council cannot escape such obligations by pretending that its role is purely technical and by denying judicial treatment to requests for legal decisions of the kind submitted by the Islamic Republic. If the Council sees its role in this way, or finds it difficult to deal with legal issues, then this denial of justice is an additional reason for the Court to exercise its supervisory jurisdiction in this case[285].

4.56 In fact, it appears uncertain under which Article the Council itself thought it was acting. The United States has argued that the Council was acting under Article 54(n), which obliges the Council to "Consider any matter relating to the Convention which any contracting State refers to it"[286]. However, this provision was never once referred to in any of the Council proceedings concerning the incident. Even if the Council thought it was acting under Article 54(n), in referring to "any matter relating to the Convention which any contracting State refers to it" (emphasis added), this provision is clearly broad enough to include disagreements relating to the interpretation or application of the Convention as provided for under Article 84.

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285 See, in general, Chapter V below on this issue.

286 U.S. Preliminary Objections, pp. 129-131. The United States relies on a statement by Mr. Milde, the Director of the ICAO Legal Bureau, to this effect, in Mr. Milde's letter to the Deputy Registrar of the Court of 26 May 1989. U.S. Preliminary Objections, Exhibit 24. Mr. Milde's views were not only inaccurate for the reasons explained but it was also totally inappropriate for him to make such gratuitous observations. Quite correctly, the Registrar did not put Mr. Milde's letter in the record of this case, and Dr. Kotaite, the President of the ICAO, subsequently made clear in his oral statement of 9 June 1989 to the Council in Council Meeting 127/10 that any written observations of ICAO will be properly submitted in due course if requested and if appropriate. See, Exhibit 51.

The United States' inclusion of Mr. Milde's letter as an Exhibit to their Preliminary Objections has obliged the Islamic Republic to make this response, without prejudice to its view that Mr. Milde's letter can have no status in these proceedings.

4.57 What is clear is that the Islamic Republic submitted a legal dispute to the Council for decision. This was recognized by the United States at the time and, while some members of the Council may have sought to play down the legal aspects of the dispute, this dispute was nevertheless considered and, as will be shown below, decided on by the Council. In such circumstances, where the requirements of Article 84 of the Convention have been so clearly fulfilled, a right of appeal to the Court exists.

(ii) The Council's decision of 17 March 1989 was of a nature appealable to the Court

4.58 The Council meetings of March 1989 focussed on both the legal and the safety aspects of the incident, reflecting the dual concerns that had been expressed during the previous proceedings before the Council. In arguing the legal issues, some members of the Council, such as the Soviet Union and Czechoslovakia, supported the Islamic Republic's request for a condemnation of the United States and proposed appropriate resolutions[287]. Others, however, such as the United Kingdom, stressed that the tragedy was an accident and that no action should therefore be taken against the United States - in other words, that the Islamic Republic's requests should be rejected[288].

4.59 It is true that some members of the Council remained reluctant to deal with the legal dispute in the appropriate manner and instead concentrated on the safety and technical issues. Nevertheless, there is also no doubt that the Council was aware that the legal dispute had to be dealt with, a conclusion that is evidenced by the fact that there were divergent views as to how the Council should decide. For example, recognizing the legal and final nature of

287 See, Draft C-Min. 126/20, 17 March 1989, pp. 4-5. Exhibit 49.

288 Ibid., p. 6, para. 8. In coming to this conclusion, the majority of the Council was relying on the fact-finding investigation, the primary source of information for which was the U.S. Defense Department Report.

the decision to be taken, the Kenyan representative stressed that it should be consistent with previous decisions, taken in accordance with the Council's mandate and not influenced by political considerations[289].

4.60 The legal nature of the decision expected from the Council was explicitly brought to the attention by the Islamic Republic:

> "Since the decision adopted by the Council at this meeting would remain on ICAO's record and would most probably be used as a precedent in future decision-making, the Delegation of the Islamic Republic of Iran believed that such decision should reflect a strong and impartial position against such violations, irrespective of political considerations[290]."

The Council's decision may not have met all the requirements of the Islamic Republic, but that does not alter the fact that it consituted a binding decision that dealt with the issue before the Council.

4.61 In the end, the Council did not condemn the United States as it had been requested to do, and the Islamic Republic's submissions were not upheld. The decision was nonetheless a legal decision which concluded the Council's consideration of the shoot-down of Flight IR 655. In these circumstances, the United States' assertion that the Court is being asked to act as a court of first instance in the present case is wholly without foundation[291]. A decision was reached by the Council that can be validly subjected to appeal as it was reached after a comprehensive consideration of the positions of the Parties and of the facts.

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289 Ibid., pp. 7-8, para. 10.

290 Ibid., p. 4, para. 5.

291 U.S. Preliminary Objections, p. 142.

4.62 As for the United States' argument that the decision of the Council was not an Article 84 decision because it did not comply with the distinctive and well-known requirements for such a decision[292] - the short answer is that this argument is irrelevant. First, the contention is made in a legal vacuum. The fact is that there are no "distinctive and well-known requirements for Article 84 decisions", as there has never been such a decision except in the dispute over the suspension by India of flights of Pakistani aircraft over Indian territory in 1971 (the "Pakistan/India" case), which was not, of course, a Council decision on the merits[293].

4.63 Moreover, in the Pakistan/India case the Rules were by no means strictly adhered to by the Council and the decision rendered was not in the "correct" form. In particular, statutory voting provisions were ignored and no reasons were given for the decisions. However, when the Court heard India's appeal against the Council's decision, it did not consider the alleged procedural irregularities in any detail as it considered that such irregularities would only confirm the appealability of the decision[294]. In any event, as will be shown in the next Chapter, the Rules were followed in essence in the present case in the Council's rendering of a decision on 17 March 1989[295].

4.64 Second, whatever form the decision was in - whether termed a "decision" or a "resolution" - the Council made a substantive and final decision on the disagreement submitted to it by the Islamic Republic within the meaning

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292 Ibid., p. 125.

293 See, Action of the Council, Seventy-fourth Session, 27-29 July 1971. Doc. 8987-C/1004, pp. 42-46. Exhibit 52.

294 Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, pp. 69-70.

295 See, paras. 4.88-4.101, below.

of Article 84. Specifically, the Council found that the incident "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[296]". As a result of the finding of "accidental destruction", there was no condemnation of the United States, no finding of violations of the Convention and no ruling that compensation was due[297].

4.65 The Islamic Republic does not accept that this decision was correct in fact or law. In this regard, the mere finding that there were "errors" in indentification of the aircraft should have been sufficient to engage the United States' responsibility. As Professor Lowenfeld has stated, this decision was "bad international law", even if it is accepted that the shoot-down was an accident, noting that there should be "liability regardless of fault, so long as the cause is established, as it clearly was in the case of Iran Air 655, as in the case of Korean Air Lines 007"[298].

SECTION D. Conclusion

4.66 All the requirements of Article 84 are met in the present case. A disagreement between two States over the interpretation or application of the Convention was submitted to the Council, considered by it and decided on.

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296 C-Dec 126/20, 17 March 1989. Exhibit 50.

297 On the other hand, the safety aspects of the incident were dealt with quite separately by the Council in its endorsement of the findings and safety recommendations of the ANC. No action was taken by the Council on the NOTAMs. Members were informed by the United States that these NOTAMs had been cancelled. See, Draft C-Min. 126/18, 13 March 1989, p. 10, para. 6. Exhibit 47. However, they were subsequently reintroduced by the United States and continue to interfere with and endanger civil aviation in the region. See, Memorial of the Islamic Republic, p. 227, para. 4.28. See, also, the Annex hereto.

298 Lowenfeld, A.: "Looking Back and Looking Ahead", Agora: Iran Air Flight 655, 83 Am. J. Int'l. Law (1989), p. 338. Exhibit 53.

4.67 In rendering its decision, the Islamic Republic maintains that the Council erred on substantive grounds in not properly considering the legal requests before it, and in not condemning the United States for breaches of the Chicago Convention. It is this decision that the Islamic Republic is now appealing.

CHAPTER III THE UNITED STATES' EMPHASIS ON THE SIGNIFICANCE OF THE RULES IS MISPLACED

4.68 The United States accuses the Islamic Republic of ignoring the Rules in its Memorial[299]. While the Islamic Republic's Memorial was not principally devoted to the issue of jurisdiction, it must be said that the United States' discussion of the Chicago Convention gives undue prominence to the Rules at the expense of Article 84 of the Convention. It has already been explained above that it is Article 84 that governs the Court's jurisdiction which cannot in any way be limited by an ad hoc set of procedural rules adopted by the Council[300]. Additional reasons why the significance of the Rules is exaggerated by the United States will be discussed in this Chapter: first, the Rules themselves are clearly not of the detailed, comprehensive, exclusive or mandatory nature suggested by the United States. Second, the Rules have never been strictly followed by the Council. Third, any failure to follow the Rules was a failure of the Council not of the Islamic Republic. Under the Chicago Convention, the Council has the duty and the power to determine its own rules of procedure. Fourth, the United States' argument is inaccurate because the essential features of the Rules were followed by the Council in its handling of the dispute and agreement was reached between the Parties on these procedures in accordance with Article 32 of the Rules.

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299 U.S. Preliminary Objections, p. 93.

300 See, paras. 4.08-4.20 above.

SECTION A. The Rules Are Neither Detailed, Comprehensive, Exclusive Nor Mandatory

4.69 The United States argues that the Rules are "detailed, comprehensive, exclusive and mandatory[301]". This statement is simply not true. Gerald Fitzgerald, former Principal Legal Officer of ICAO, gave a more accurate description of the Rules when, referring to the "relatively primitive decision-making procedure followed by the ICAO Council when acting as a judicial body", he noted that there were "inherent weaknesses in the procedures for the settlement of disputes arising under the Chicago Convention"[302]. Other commentators have stressed the extremely flexible approach embodied in the Rules. Thus, Buergenthal observed that the Council does not act as a "court of law in the strict sense of the word" and pointed out that it "is therefore free to adopt very flexible procedures for dealing with disputes that are referred to it"[303].

4.70 A brief analysis of the Rules bears out these points[304]. Article 1 of the Rules states that they shall govern -

> "Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation ... and its Annexes ...".

However, it should be noted that the obligation to ensure the Rules are followed rests primarily on the Council.

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301 U.S. Preliminary Objections, p. 93.

302 Fitzgerald, G.F.: "The Judgment of the International Court of Justice on the Appeal Relating to the Jurisdiction of the ICAO Council", XII The Canadian Yearbook of International Law (1974), pp. 170-171. Exhibit 54.

303 Buergenthal, T.: Law Making in the International Civil Aviation Organisation (Syracuse Univ. Press, 1969), p. 136. Exhibit 55.

304 See, Exhibit 33.

4.71 The only substantive requirement on a member State is that it should submit a disagreement to the Council for settlement under Article 2. After that initial step, it is for the Council and the Secretary General of ICAO in particular to determine the specific Rules that should be followed and to ensure the correct application of the Rules.

4.72 Article 2 of the Rules sets out the procedural requirements for a State submitting a disagreement to the Council. In particular, the contracting State should "file an application to which shall be attached a memorial". But even this obligation is subject to control by the Secretary General of ICAO. It is he, under Article 3 of the Rules, who is obliged to verify that the application "*complies in form with the requirements of Article 2*" and "if necessary", he may "require the applicant to supply any deficiencies appearing therein"[305].

4.73 The only further proceedings which are obligatory under the Rules are that the respondent State should be invited by the Secretary General to file a counter-memorial. However, the Council has the option to take a whole range of steps:

- it may invite the Parties to enter into direct negotiations under Article 6(1);
- it may decide to deal with the matter itself or appoint a committee to do the same under Article 6(2);
- it may allow further written pleadings under Article 7;
- it may conduct an investigation under Article 8 which shall be incorporated into a report;

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305 In earlier cases the Council has been diligent in informing State members of the requirements of the Rules. See, paras. 4.84-4.86 below.

it may agree to receive oral testimony under Article 9.

After hearing any arguments or evidence by the parties under the procedures outlined above, the Council "shall render its decision" pursuant to Article 15 of the Rules.

4.74 It can be seen from the above that the Council has allowed itself a great deal of freedom in its decision-making process. As noted by Judge de Castro, a further indication of the flexibility of the Rules is that they remain subject to amendment by the Council and may be varied or suspended at any time with the agreement of the parties to a disagreement whenever this would assist the expeditious or effective disposition of the case[306].

4.75 Article 32 of the Rules is of particular significance in this case because even in its first telexes to the Council the Islamic Republic had stressed the urgent nature of the case and the need for effective measures to be taken. The Council also recognized the need for such an approach in convening an Extraordinary Session within 9 days of the incident. The fact that all further procedural steps were taken with the agreement of the Parties shows that the Council's actions remained fully consistent with Article 32.

SECTION B. The Rules Are Not Well Established Within the Practice of the ICAO Council

4.76 The United States gives the impression that the Rules are well-established within the workings of the ICAO Council. In fact, the Rules have never been strictly followed in practice. The Rules were developed during the 1950s in the context of a dispute raised by India against Pakistan concerning a prohibited zone created by Pakistan in India's airspace (the "India/Pakistan"

306 See, Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 138.

case). Despite the fact that the Rules were not finalized in time for that case, the Council did not consider this to be an impediment to its consideration of the dispute. In putting forward a proposal for action for the Council to take in that dispute, the representative for Canada stated that "he thought that prepared rules were unnecessary at this stage[307]". This approach was adopted by the Council which accepted, in the words of the representative for Mexico, that there "was nothing unusual in the adoption of ad hoc rules for the settlement of disputes[308]". Accordingly, the procedural steps taken by the Council and the interested parties were approved, and they were invited to consult with the Council on any further steps in the proceedings[309].

4.77 Although it was a dispute raised after the adoption of the Rules, the Rules were not followed in the 1971 Pakistan/India case. As noted above, improperly formulated propositions were voted on, statutory majority voting provisions were ignored, and no reasons were given for the Council's decision[310]. These irregularities formed one of the bases for the subsequent appeal to the Court[311]. Several commentators have noted the validity of these criticisms[312].

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307 Council Minutes, Sixteenth Session, 13 May-24 June 1952. Doc. 7291 - C/845, p. 49. Exhibit 56.

308 Ibid., p. 51.

309 This dispute was eventually settled without further proceedings before the Council. See, Action of the Council, Sixteenth Session, 13 May-24 June 1952. Doc. 7314 - C/849, pp. 26-29. Exhibit 57.

310 See, para. 4.63 above.

311 See, Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, pp. 69-70. The Court found that it was neither appropriate nor necessary for it to go into these procedural irregularities, noting that it was faced with "an objective question of law, the answer to which cannot depend on what occurred before the Council". See, para. 4.22 above.

312 See, for example, Fitzgerald, G.F., supra, Exhibit 54.

4.78 It is therefore misleading to argue that the Rules provide a comprehensive, well-established structure for handling disputes known to all States. Only one case has ever proceeded beyond the initial stage of an application, and even in that case (Pakistan/India) the Rules were not properly followed.

SECTION C. The Council Has the Obligation To Determine Its Procedures, Not the Applicant State

4.79 The United States' argument is also misguided because it ignores the fact that under the Chicago Convention and the Rules, it is for the Council to determine its own procedures. As explained above, the duties of an ICAO member are limited to submitting to the Council a disagreement over the interpretation or application of the Convention.

4.80 The basis of the Council's duty in this regard starts with Article 54(c) of the Convention which obliges the Council to determine its rules of procedure. However, even under the Rules themselves it is for the Council to determine that a member State's application is in the correct form (under Article 3 of the Rules) and to decide on any further proceedings necessary (under Article 6) when faced with a disagreement submitted by a member State. The Council has great flexibility in this regard. Under Article 32, the Rules may be suspended, varied or even dispensed with at any stage of the proceedings with the agreement of the parties. Article 32 thus indicates the non-mandatory nature of the Rules. In such circumstances, and where, as here, the Parties specifically agreed to the procedural steps taken by the Council, any departure from the Rules cannot act as a bar to the Court's jurisdiction.

4.81 It follows that when the Islamic Republic, a non-Council member, submitted its disagreement to the Council, it left the question of

procedure with respect to these submissions entirely up to the Council in recognition of the Council's power and duty to advise on the most appropriate procedure to follow. In dealing with this situation, the Council never insisted on the formal application of any set of rules; instead it relied on the general consensus that a full fact-finding investigation was necessary (which had been requested by the Islamic Republic and was specifically agreed to by the United States); that safety and technical questions should be considered by the ANC (which was again agreed by the Parties); and that the deliberations should take place in formal Council meetings. This approach was supported by nearly all Council members and was reflected in the Council's various procedural decisions.

4.82 On previous occasions, the Council has taken a similar ad hoc approach and has recognized that it has an obligation to advise and consult with the parties on the procedures to be followed. Thus, in the 1952 India/Pakistan case, Council members considered that the formation of the Rules was not a necessary precursor to the commencement of proceedings[313]. In the absence of such Rules, the Council simply followed the Assembly's resolution adopted at its first session in 1947 to the effect that the "procedure to govern the arbitral procedures shall be determined in agreement between the Council and all the interested parties[314]". In the words of the representative of Canada, the aim was "to work out the next steps along lines that would be mutually satisfactory to [the parties] and to the Council", and to inform the parties "that the Council wished to consult them and would take into account their views on the method of procedure to be adopted"[315].

313 See, para. 4.76 above.

314 Doc. 4411, A1-P/45, 3 June 1947. Exhibit 58.

315 Council Minutes, Sixteenth Session, 13 May-24 June 1952. Doc. 7291 - C/845, pp. 49 and 52. Exhibit 56.

4.83 Although the Council's discussion in the India/Pakistan case predated the adoption of the Rules, the President of the Council believed that consultation as to procedure was desirable even where procedural rules were in force:

> "The President thought that even where general rules of procedure were being applied, it was common practice and would be useful to give an opportunity for objections to those rules to be considered[316]."

4.84 On the other hand, the Council also recognized that it had an obligation to inform members if it thought that a member had not followed the proper procedures. For example, on receipt of a communication from the Government of Afghanistan, which regarded itself as a party to the India/Pakistan case, the Council took steps to advise Afghanistan that it had not submitted an Article 84 application and of the steps that were necessary in order to submit an application that the Council would regard as valid[317]. Significantly, no similar step was taken by the Council in its consideration of the Flight IR 655 incident. The Council never informed the Islamic Republic that its request for legal remedies was not properly submitted; nor did the Council ever suggest that the Islamic Republic had not followed the correct rules.

4.85 Of even greater relevance is the 1958 dispute between Jordan and the United Arab Republic concerning prohibitions against overflight imposed by each State against the other in which Jordan alleged violations of the Chicago Convention (the "Jordan" case). In response to Jordan's allegations, "the Secretary General ... sent a communication to Jordan indicating the procedure that should be followed, as prescribed in the Rules for the Settlement of

316 Ibid., p. 53.

317 Action of the Council, Sixteenth Session, 13 May-24 June 1952. Doc. 7314 - C/849, p. 29. Exhibit 57.

Differences[318]". As it was not clear what was the appropriate procedure, it was also agreed that "it was essential to know just what the two States desired of the Council[319]".

4.86 By analogy, if the Council had thought it necessary in the present case, further efforts should have been made to ensure that appropriate procedures were followed. No communications were ever sent, and the Islamic Republic's attention was never drawn to the need for application of the Rules. Nor was there any suggestion from the President that he seek from the Parties "a precise indication of the nature of their requests to the Council" as there had been in the Jordan case[320]. Because the Parties were so evidently in disagreement over the interpretation and application of the Convention, the Council had the obligation to ensure that the correct procedure was followed if it deemed this necessary. In accordance with the Council's obligations under the Convention and the Rules, as well as under its past practice, the Islamic Republic was entitled to rely on the Council to advise it accordingly.

4.87 However, in this case, it was never once suggested by the President or the United States (or any other Council member) that the requests of the Islamic Republic were in any way improper for Council proceedings or that the Council could not render a decision on these requests. It was also never suggested that the Council was unable to deal with the Islamic Republic's requests under the procedures adopted. Instead, the Council relied on the Parties' own agreements in this regard - that a fact-finding investigation should be initiated, that the ANC should make safety recommendations and that the matter

318 Council Minutes, Thirty-fifth Session, 25 September-17 December 1958. Doc. 7934 - C/912, p. 12. Exhibit 59.

319 Ibid., p. 11.

320 Ibid., p. 16.

should be deliberated in formal Council sessions. As already explained, such a procedure was fully consistent with Article 32 of the Rules as it allowed the expeditious and effective disposition of the case, something that the Islamic Republic had specifically requested, and was adopted with the agreement of the Parties.

SECTION D. The Rules Were Followed in Essence

4.88 The United States argues that because there was no proper legal deliberation about the incident and no record of the proceedings, the Court would essentially be hearing the issues as a court of first instance, not as an appellate court. As pointed out above, this argument ignores the fact that the Council conducted extensive deliberations concerning the disagreement, produced a fact-finding report, and rendered a final decision on the matter. There is an extensive record of all these proceedings as can be seen from the exhibits filed by the Parties[321]. There is thus no question of the Court acting as a court of first instance.

4.89 In any event, during the proceedings before the Council, all the main procedural requirements of the Rules, such as there are, were met. In particular, the Islamic Republic's submissions to the Council fulfilled all the conditions of Article 2 of the Rules for filing an application:

- it named the State with which the disagreement existed, the United States (Article 2(a));
- it appointed a special representative to act in the proceedings (Article 2(b));
- it made both written and oral statements of facts and submitted supporting data relating to those facts (Article 2(c) and (d));

321 A full copy of the Hearings of the Council is included in Exhibits 40 through 50 hereto.

- it made a statement of law setting out the United States' violations of the Convention and its Annexes and rebutting the United States' defenses to these actions (Article 2(e)); and
- it made clear the relief that it sought (Article 2(f)).

While the Islamic Republic's submissions did not explicitly contain a statement as required under Article 2(g) that negotiations between the parties had taken place but were not successful, this requirement was effectively redundant given the state of relations between the United States and the Islamic Republic, and given the fact that the United States had already made it clear that it accepted no responsibility for the incident. In any event, if the Islamic Republic's application had been deficient in any way, it was for the Secretary General under Article 3 of the Rules to verify this and to request the Islamic Republic to rectify such matters. This was never done; nor did the United States ever make any demand or objection before the Council to the effect that the Rules were not being followed correctly or that the procedures adopted were not appropriate.

4.90 As explained above, the only other procedural requirement under the Rules was that the United States should be invited to reply to the Islamic Republic's application. Again, this was an obligation on the Secretary General under Article 3 of the Rules. While the Secretary General may not formally have done this, the United States effectively presented its detailed rebuttal in oral argument before the Council and in the form of the U.S. Defense Department Report.

4.91 Under the Rules, it was for the Council to decide on the next stage of the proceedings. Faced with the mutual agreement of the Parties on this point, the Council ordered a fact-finding investigation. Again, this step was fully consistent both with Article 32 and Article 8 of the Rules.

4.92 As far as the Islamic Republic was concerned, the investigation was related to the issue of establishing responsibility and thus bore on the legal aspects of the incident. In asking the Council to make its judgments only after all of the facts had been received, the United States also seemed to have understood that this was part of the role of the investigation[322].

4.93 It is clear, however, that Council members saw the purpose and nature of the investigation as being twofold. Some members focussed on the need to investigate the technical and safety aspects. Others took the opposite view arguing that the investigation should be used to determine responsibility for the incident. The Council's final decision commissioning the investigation was wide enough to deal with both aspects of the issue. In adopting a flexible, ad hoc approach to the matter, the Council directed -

> "... the Secretary General to institute an immediate fact-finding investigation to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft[323]."

Notwithstanding this, the Islamic Republic made clear its understanding that the issue of responsibility remained open, to be determined after the investigation, and that it recognized that the Council's decision represented a compromise of interests determined in part by political considerations[324].

4.94 Significantly, the Council never stated on what basis it was ordering the investigation. The United States now asserts that this investigation was carried out under Article 55(e) of the Convention, and that this proves that

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322 See, para. 4.47 above.

323 C-Dec Extraordinary (1988)/2, 14 July 1988. Exhibit 42.

324 Draft C-Min. Extraordinary (1988)/2, 14 July 1988, pp. 12-13. Exhibit 41.

the Council was not considering an Article 84 disagreement[325]. However, the nature of the investigation called for was much broader in its scope than provided for by Article 55(e). Indeed, it was more of the nature of an investigation carried out under Article 8 of the Rules, with the organization of the investigation being entrusted to the Secretary General of ICAO[326].

4.95 Under Article 55(e) of the Convention, the Council may:

> "Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable."

The investigation ordered by the Council in this case was not principally concerned with "obstacles to the development of international air navigation". It was an expert fact-finding report to understand the chain of events that led to the shoot-down of a civilian aircraft. As such, the scope of the report was of exactly the kind that might be ordered in international arbitral proceedings in order to determine the factual and technical issues relevant to a dispute.

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325 U.S. Preliminary Objections, pp. 121-122. The United States points out that Council representatives from Spain and Canada stated their belief that the Council should convene an investigation pursuant to Article 55(e). Of course, whatever the Canadian and Spanish representatives thought should happen does not necessarily reflect what did happen.

326 Article 8 reads as follows:

"Investigations by Council

(1) The Council may at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion. In such cases it shall define the subject of enquiry or expert opinion and prescribe the procedure to be followed.

(2) A report incorporating the results of the investigation, together with the record of the enquiry and any expert opinion, shall be submitted to the Council in such form, if any, as the Council may have prescribed, and shall be communicated to the parties."

4.96 After consideration of the fact-finding report, no other procedural steps are obligatory under the Rules except the rendering of the decision itself. The United States makes much of the Council decision's failure to follow the "distinctive and well known requirements for Council decisions under Article 84[327]". However, as already pointed out, the only Council decision under Article 84 to date (in the 1971 Pakistan/India case) did not follow the requirements of Article 15 of the Rules[328].

4.97 In general terms, the decision reached by the ICAO Council on 17 March 1989 met the requirements of Article 15 of the Rules:

- the decision was made after hearing arguments, and after consideration of the fact-finding report as required under Article 15(1);
- the decision was in writing and stated the date on which it was delivered as required under Article 15(2)(i);
- it is clear from the accompanying minutes, which form part of the record of the proceedings, who were the Members of the Council participating and who were the parties to the disagreement, as required by Article 15(2)(ii) and (iii);
- as noted by the United States, the resolution itself "provides an excellent summary of deliberations of the Council throughout its discussion of the Iran Air incident[329]", as required by Article 15(2)(iv); and
- it states the conclusion of the Council, that the shoot-down was an accident, and the Council's reasons for reaching that conclusion that it was "a consequence of events and errors in identification" as required by Article 15(2)(v).

The decision was also taken at a meeting of the Council convened solely for the resolution of the proceedings as required by Article 15(4).

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327 U.S. Preliminary Objections p. 126.

328 See, para. 4.63 above.

329 U.S. Preliminary Objections, p. 128.

4.98 The United States emphasizes the fact that the Council decision of 17 March 1989 was given in the form of a resolution and argues that this shows that the Council was not acting under Article 84[330]. In fact, the Convention makes no distinction between decisions and resolutions; nor does the Council make any such distinction in its ordinary Rules of Procedure[331]. So far as the Council is concerned, it appears that the difference between a decision and a resolution is purely semantic. In the final sessions leading up to the decision of 17 March 1989 there are multiple references to the need for a "decision" to be taken[332]. Due to this practice, and the fact that the U.S. vote had no effect on the final decision, the Islamic Republic did not make an objection on this point. In any event, according to one commentator a "decision" was seen by Council members "as possessing less authority than a formal resolution"[333].

4.99 A final argument raised by the United States in its effort to show that this matter was not dealt with under Article 84 is that it was allowed the right to vote in the Council's decision[334]. There are three comments to make about this argument: first, the United States' vote made no difference to the final decision, which was supported by the majority of Council members; second, the United States should not have been allowed to vote in the Council in this matter whether the Council was acting under Article 84 or any other Article of the

330 Ibid., pp. 126-128.

331 Although the decision of 17 March 1989 was phrased as a resolution, its reference became C-DEC 126/20, i.e., a Council decision. In addition, the Council press release relating to the Council's finding in the dispute made specific reference to a "decision". Exhibit 60. The President of the Council has repeatedly referred to it as a decision. Exhibit 51.

332 See, for example, the statements of the Kenyan, Cuban, Venezuelan and Panamanian representatives. Draft C-Min. 126/19, 15 March 1989, pp. 5-6 Exhibit 48.

333 Sochor, E.: The Politics of International Aviation (London, 1991), p. 140. Exhibit 61.

334 U.S. Preliminary Objections, pp. 123-125.

Convention - Article 53 of the Convention prohibits a State from voting in any dispute of any kind in which it is involved; and third, in practice, the Council, like the United Nations Security Council, which is governed by a similar clause in Article 27(3) of the Charter, seems not to have required this provision to be strictly enforced[335]. In the light of this practice, and the fact that the U.S. vote had no effect on the final decision, the Islamic Republic did not make an objection. In any event, the fact that this provision was not followed should not act as a bar to jurisdiction, but should furnish the Islamic Republic with additional grounds for appeal.

4.100 To the extent that the decision was in any way deficient as to its form, recourse can always be had to the record of these proceedings. In the Appeal case, the Court was not hindered by a similar failing in the Council's decision in the 1971 Pakistan/India dispute. As Judge Jiménez de Aréchaga pointed out in his Separate Opinion:

> "The Court had no difficulty in pronouncing on the appeal because of the form of the decision. In the verbatim record of the Council's discussions and decisions, which was before the Court, there was a complete transcript of the reasons and arguments invoked by the Parties and of the explanations of vote and other statements made by the President and those members of the Council who chose to state the grounds for their vote[336]."

While this statement was made with respect to a jurisdictional decision of the Council, it applies equally in this case.

4.101 On the basis of the foregoing, the Islamic Republic submits that it is clear from the record that the substantive conditions of Article 84 were

335 With regard to the Security Council's practice, see, the discussion in Cot, J.P. & Pellet, A.: La Charte des Nations Unies (Paris, 1985), pp. 508, et seq.

336 Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 155.

fulfilled and that all the essential requirements of the Rules were met in any event.

CHAPTER IV EVEN IF MADE UNDER ARTICLE 54, DECISIONS OF THE COUNCIL ON THE INTERPRETATION OR APPLICATION OF THE CONVENTION ARE APPEALABLE

4.102 The United States seeks to draw a radical distinction between the Council's functions under Articles 54 and 55 of the Convention, on the one hand, and its quasi-judicial function under Article 84, on the other. Specifically, the United States argues that the Chicago Convention -

> "... envisages two distinct and mutually exclusive methods under which the ICAO Council may examine matters involving the Convention[337]."

On the basis of this distinction, the United States seeks to show that the dispute arising from the shoot-down of Flight IR 655 was dealt with exclusively under Articles 54 and 55 of the Convention, not under Article 84, and that the ICAO Council's decision is therefore not appealable to the Court.

4.103 For reasons already explained, this argument is largely irrelevant because, by its very terms, Article 84 governs any decision on any disagreement over the interpretation or application of the Convention, whatever provision of the Convention the Council may have acted, or thought it was acting, under. Quite apart from this point, it will be shown below that there is no clear-cut distinction between the Council's role under Articles 54 and 55, on the one hand, and Article 84, on the other, and that under Articles 54 and 55 of the Convention, the Council may also be called upon to decide disagreements over the interpretation or application of the Convention - a fact acknowledged by the

337 U.S. Preliminary Objections, p. 92.

United States as will be shown in Section C below. Article 84 of the Convention makes no distinction as to why such decisions should not be appealable.

SECTION A. The Structure of the Chicago Convention Does Not Provide a Clear-Cut Distinction Between Articles 54 and 55 of the Convention, On the One Hand, and Article 84, On The Other

4.104 Articles 54 and 55 of the Convention set out respectively the mandatory and permissive functions of the Council. They provide an exhaustive list which includes the role entrusted to the Council as arbiter in disputes over the interpretation or application of the Convention under Article 84. Pursuant to Article 54(b), the Council is obliged to "discharge the duties and obligations which are laid on it by this Convention" (which, by definition, include the Council's role under Article 84); pursuant to Article 54(n), the Council is obliged to "Consider any matter relating to the Convention which any contracting State refers to it". The Council's duties to receive disputes over the interpretation or application of the Convention and to consider and decide on those disputes thus come within the Council's obligatory functions under Article 54. Far from establishing mutually exclusive methods for dealing with matters, Articles 54 and 84 are complementary.

4.105 It follows that even within the Convention itself there is no distinction of the kind suggested by the United States that decisions rendered by the Council under one set of Articles are appealable to the Court, while decisions under another set of provisions are not. Such a distinction is purely formalistic and does not reflect the intention of the signatories of the Chicago Convention which was clearly that any disagreement over the interpretation or application of the Convention should be capable of being decided by the Council and appealable to the Court.

4.106 The United States' insistence on the importance of form over substance leads it to draw further distinctions between different kinds of matters brought under Articles 54 and 55. At different points in its pleading, the United States argues that the dispute submitted to the Council in this case was dealt with under Articles 54(j), Article 54(k)[338], Article 55(e)[339] or even Article 54(n)[340].

4.107 These distinctions are equally artificial and rest on the same confusion. All of the obligatory functions of the Council are set out in Article 54. These obligations exist concurrently. The Council must address any given situation taking into account both its obligatory functions under Article 54 and its permissive functions under Article 55. For example, the Council must consider its obligations under the Convention pursuant to Article 54(b), must also report infractions of the Convention under Article 54(j), must report any failure to take appropriate action after an infraction of the Convention under Article 54(k), consider an investigation under Article 55(e), and so on.

4.108 It is for the Council to determine what specific steps should be taken in any given case, taking into account the objective demands of the situation. A situation presented to the Council may require the reporting of an infraction of the Convention to the Assembly even when no State has specifically requested it. In this regard, the Council's duties are directed to the safeguarding of the Convention as a whole, and not to any individual State. It is for this reason that obligatory functions are imposed on the Council. It bears repeating that under Articles 54(b) and 54(n) of the Convention, one of these obligatory

338 U.S. Preliminary Objections, p. 119.

339 Ibid., p. 121.

340 Ibid., p. 129.

functions is to decide on disagreements over the interpretation or application of the Convention when such matters are presented to it.

SECTION B. Under Article 54 The Council May Be Called Upon to Make Decisions on the Interpretation or Application of the Convention

4.109 It has already been noted that in the proceedings before the ICAO Council, the Islamic Republic made reference to Article 54(j) of the Convention[341]. The United States suggests that the whole of the Council's treatment of this case may have taken place under this provision[342]. Far from this being a reason for the Court to find that there was no disagreement within the scope of Article 84 decided upon by the Council, it in fact provides alternative grounds for the Court accepting jurisdiction.

4.110 Under Article 54, the Council may be called upon to make decisions on disagreements over the interpretation or application of the Convention. The quasi-judicial nature of issues facing the Council under Article 54(j) has been considered by Professor Bin Cheng, a prominent expert in the field. Professor Cheng writes:

> "The supervisory function of the Council under the first part of Article 54(j) of the Convention, which places upon it a duty to report any infraction of the Convention to the contracting States, including the State in default, must be regarded as essentially judicial in nature, for what the Council is to report under Article 54(j), as well as Article 54(k), is not an alleged infraction, but an infraction. This means an infraction the existence of which has been objectively ascertained by the Council with effect binding on the Organisation and all its members. It would appear that, under general principles of law, before such an infraction can be said to exist, the party or parties concerned must have first been given an opportunity to be heard and a judicial or at least quasi-judicial procedure must have been followed. Moreover, in exercising its function under Article 54(j) and (k), it would appear that both parts of Article 53 must be applied. In other words, the member States

341 See, para. 4.37 above.

342 U.S. Preliminary Objections, p. 119.

> concerned, whether or not members of the Council, should be allowed to take part without vote in the Council's consideration of the alleged infraction[343]."

4.111 It may be said that any claim lodged with the ICAO Council under Article 54(j) by one ICAO member against another alleging that an *infraction* of the Chicago Convention has been committed is, by its very nature, a dispute relating to the interpretation or application of the Convention. It follows that such a dispute should be settled by the ICAO Council in accordance with legal principles and in a similar way to its treatment of disagreements under Article 84.

4.112 This simply confirms the lack of a clear distinction between the role of the Council under Articles 54 and 55, on the one hand, and Article 84, on the other. The Council may make decisions on contentious issues involving the interpretation or application of the Convention under either Article 54(j) or Article 84. There are no reasons why decisions made under Article 54(j) should be any less appealable to the Court than those made under Article 84[344].

4.113 It is true that in dealing with Article 54(j) matters, the Council has not developed any specific rules to follow in exercising its quasi-judicial functions. Thus, the ICAO Council can decide legal disputes relating to the interpretation or application of the Chicago Convention under Article 54 without reference to the Rules, although it may be seen as a failing of the Council that a similar set of rules has not been drafted and applied for such disputes. This

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343 Cheng, B.: The Law of International Air Transport, (London, 1962), p. 100 (footnotes omitted). Exhibit 62.

344 The reference in Article 53 precluding ICAO Council members from voting in disputes to which they are parties, which is repeated almost verbatim in Article 84, is also an indication that the Council may be called upon to consider disputes between member States under Articles 54 and 55 and that it is obliged to consider such disputes in a quasi-judicial manner.

is significant for two reasons. First, it points to the relative unimportance of the Rules generally. Second, to the extent that the Rules were not followed in the dispute over Flight IR 655, this is not relevant if the ICAO Council was exercising its quasi-judicial functions under Article 54.

SECTION C. The United States Acknowledges that the Provisions of Articles 54 and 55 May Involve the Council Making Decisions Over the Interpretation or Application of the Convention

4.114 In its Preliminary Objections, the United States acknowledges "the breadth and overlapping nature of the functions set forth in Articles 54 and 55" and that "Council actions typically engage several of its enumerated powers under those Articles"[345]. Furthermore, the United States concedes that there is no real distinction between the nature of the Council's role under Articles 54 and 55 and its role under Article 84, pointing out -

> "... 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[346]."

4.115 This is correct. As explained above, in carrying out its obligation under Article 54(j) to "Report to contracting States any infraction of this Convention ...", it is difficult to see how the Council could avoid making a decision bearing on the interpretation or application of the Convention.

4.116 Notwithstanding these features of the Convention, the United States argues that because the practice of the Council allegedly shows that it routinely decides disagreements over the interpretation or application of the

345 U.S. Preliminary Objections, p. 96.

346 Ibid.

Chicago Convention under Article 54, it follows that "absent a specific invocation of Article 84 procedures by a Contracting State", such decisions cannot be appealable[347]. Neither the premise nor the conclusion of this argument can be accepted. The Council is not routinely asked to decide on disagreements over the interpretation or application of the Convention under Article 54. Such applications are in fact very rarely dealt with, and the quasi-judicial role of the Council under Article 54(j) has rarely been invoked[348].

4.117 In any event, it cannot be argued that the Court's jurisdiction should depend entirely on the invocation of certain procedural rules. This would mean that two exactly similar cases could be heard and decided on by the Council, one pursuant to Article 54, the other pursuant to Article 84, but only in the latter case would the decision be appealable. In such a situation, the Court's jurisdiction would depend entirely on the procedures invoked, and not on whether the conditions of Article 84 had been met. This cannot be correct. The Court's jurisdiction is based on the express terms of Article 84 of the Convention alone, and procedural rules cannot limit the extent of this jurisdiction.

4.118 In this regard, the United States' references to the Council's decisions on the KAL 007 incident and on the 1973 shooting down of a Libyan plane by Israeli fighter planes, which the United States argues were dealt with

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347 Ibid., p. 97.

348 In fact, according to the Repertory Guide to the Convention on International Civil Aviation, Doc. 8900/2 (Second Edition), the Council had, up to 1977, taken action on no matters under Article 54(j) or 54(k). In the light of the United States' allegation that the "ICAO Council has convened over a thousand meetings and rendered many thousands of decisions of various kinds" (U.S. Preliminary Objections, pp. 96-97), it should also be noted that according to the 1977 Repertory Guide it has considered only ten matters under Article 54(n), under which the United States alleges the shoot-down of Flight IR 655 was considered. Exhibit 63.

under Article 54 and which were not appealed, miss the point[349]. The fact that no appeals were made may be taken as the relevant parties' acceptance of the Council's decisions, but they cannot be evidence that the decisions were not appealable. The question thus remains open as to whether the requirements of Article 84 were fulfilled in the Council's discussions of these incidents. If they were, then the Council's decision in each case would have been appealable to the Court.

CHAPTER V POLICY CONSIDERATIONS WHY THE COURT SHOULD ACCEPT JURISDICTION IN THIS CASE

4.119 As a final element to its objection, the United States puts forward certain "policy" considerations which it argues should lead the Court to reject jurisdiction in this case. Reduced to its essentials, the United States contends that the Islamic Republic seeks to widen the scope of Article 84 and to extend the supervisory role of the Court over ICAO in a way that would undermine ICAO's authority to deal with disputes and open the floodgates to appeals to the Court from almost any decision of the Council[350]. As will be shown below, this is an unjustified fear and an incorrect characterization of the Islamic Republic's position. It also fails to take into account the far more significant factors that mitigate in favor of the Court's accepting jurisdiction in this case.

SECTION A. The Limitations of the ICAO Council Justify an Appeal

4.120 ICAO is based on a constitution that is far from being democratic in several important respects. When ICAO was first conceived by the wartime allies in the closing years of World War II, it was as a convenient administrative grouping of the larger airline States which could be expected to

349 U.S. Preliminary Objections, pp. 98, et seq.

350 Ibid., pp. 132, et seq.

dominate post-war civil passenger transportation. This bias towards the principal air transport States is reflected in the composition of the Council.

4.121 Notwithstanding successive constitutional amendments aimed at enlarging the composition of the ICAO Council both quantitatively and qualitatively, membership in the Council during the period from July 1988 to March 1989 was limited to only 33 States. In an organization with a plenary membership which stood at 160 at the end of 1988, this amounted to just slightly more than one-fifth of the total membership. Even more significantly, Article 50 of the Chicago Convention reserves two-thirds of the 33 Council seats to (i) "States of chief importance in air transport" and (ii) States which otherwise "make the largest contribution to the provision of facilities for international civil air navigation". The consideration of ensuring "that all the major geographic areas of the world are represented on the Council" accounts for only the remaining one-third of the 33 seats available. Furthermore, the Assembly's Rules of Procedure allow those States who fail to be elected under the first category to stand under the second category, and those who fail to be elected under the second category to stand under the third[351].

4.122 The effect of these provisions is that the ICAO Council is dominated by a powerful and self-perpetuating minority of States. This is significant in this case, as will be apparent from the above discussion, because States like the United States are able to wield an enormous influence in Council proceedings, as in other international organizations, whereas non-Council members like the Islamic Republic can have little influence. It also means that the vast majority of ICAO member States, which perpetually fail to be elected

351 Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization (4th ed., 1980). Doc. 7600/4, Rules 56-57. Exhibit 64.

onto the Council, have little acquaintance with the workings of the Council, let alone any practical experience. This makes it even more difficult for non-Council members to have an effective role in proceedings.

4.123 ICAO also has a highly dirigiste structure. It places practically all the responsibility for the functioning of the organization on the Council, and leaves the plenary organ, the ICAO Assembly, of which the Islamic Republic is a member, so little to do that it has been decided by a constitutional amendment that it needs to meet no more than once every three years.

4.124 The structure of ICAO makes the right of appeal a particularly important safeguard. First, the right of appeal counter-balances the weighting in the Council in favour of those nations of chief importance in air transport. Second, as the Director of the Legal Bureau of ICAO has noted, even when acting in its judicial capacity the Council is comprised of the representatives of the respective member States, not of individuals acting as judges. Thus, Dr. M. Milde, in a paper written in 1980 when he was Acting Director of ICAO's Legal Bureau, examined the practice of the Council in dealing with cases submitted to it and cited as a "convincing illustration that the Representatives of the Council do not act in 'an impartial and judicial capacity'" the way the Council members acted in the Pakistan/India dispute before the Council in 1971[352]. Dr. Milde concluded that "the Council cannot be considered as a true judicial body", noting that a Council member's "decision may be based on policy considerations ... rather than on strictly legal rules"[353]. This, it has been argued, is an inherent defect in the

352 Milde, M.: "Dispute Settlement in the Framework of the International Civil Aviation Organisation (ICAO)" in Settlement of Space Law Disputes, (Köln, 1980), p. 90. Exhibit 65. Dr. Milde was referring in particular to the fact that various Council members wanted to defer making a decision in this dispute, pending receipt of instructions from their governments.

353 Ibid.

machinery for dispute settlement under the Chicago Convention - a State is required to act judicially in circumstances where it is practically impossible for the State to divorce itself from the political context[354].

4.125 As noted in the Appeal case, the Council has "limited experience on matters of procedure" and is "composed of experts in other fields than law"[355]. This is a problem of many international organization. As one author notes -

> "... the members of a political or administrative body do not normally have any special legal competence. They are ordinarily diplomats or specialists in the particular subject with which the organization is concerned. Finally, clauses calling for reference to such a body do not usually include the elaborate rules of procedure which govern judicial proceedings, and they do not often provide for the application of stated principles or rules of law.
>
> Such freedom of action is not necessarily conducive to systematic jurisprudence[356]."

Where such organizations have to deal with such fundamental legal issues, as the Council did in this case, such factors must argue in favor of a wide interpretation of the Court's jurisdiction and the exercise of its supervisory role.

4.126 Another feature of ICAO's structure is that certain Council members have sought to restrict the Council's consideration of legal issues and to focus instead on technical questions, partly in recognition of the Council's deficiencies as a judicial body and partly for political reasons. The technical approach to ICAO's role has been strongly supported by the United States, and

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354 See, Fitzgerald, G.F., supra, at p. 169. Exhibit 54.

355 Declaration of Judge Lachs, Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 75.

356 Sohn, L.B.: Settlement of Disputes Relating to the Interpretation and Application of Treaties, 150 Recueil des Cours (1976), p. 265. Exhibit 66.

was adopted by many Council members during the dispute relating to Flight IR 655. One of the United States' aims in the proceedings dealing with this incident was to divert attention away from the legal and factual disputes in favor of having the Council concentrate on less contentious "technical" issues.

4.127 This attitude was typical of the United States' general approach to the ICAO Council in the past. On several occasions the United States has found it expedient to draw attention to the inadequacy of the Council to deal with issues of a contentious or political character, and has attempted to limit the Council's consideration of particular issues to purely technical matters. In the 1973 dispute concerning the shooting down of a Libyan civil aircraft over Sinai, for example, the United States' representative proposed a series of amendments severely limiting the scope of the draft resolution - "with the object of bringing it into closer accord with the proper role of ICAO and of the Council[357]". These amendments were designed to dilute the resolution substantially so as not to condemn Israel and to focus attention instead on the technical issues.

4.128 As noted above, much the same happened in this case where several Council members, including the United States, sought to restrict the scope of the Council's mandate to purely technical issues[358]. Such actions reflected the political weighting of the Council and the fact, as one commentator has noted, that the United States had "let it be known that it would not go along with any text that would invite comparisons with the KAL affair[359]". On the

357 Council Minutes, Seventy-ninth Session, 4 June 1973. Doc. 9073 - C/1011, C-Min. 79/4 (Closed), p. 27. Exhibit 67.

358 See, paras. 4.53-4.54 above.

359 Sochor, E.: "ICAO and Armed Attacks against Civil Aviation", XLIV International Journal (Winter 1988-89), p. 166. Exhibit 68.

other hand, in the KAL affair, with the political weight of the United States behind it, the Council did not hesitate to make a full-fledged condemnation of the Soviet Union[360].

4.129 Such inconsistency is totally inappropriate in the light of the Council's obligation to uphold the principles of international law enshrined in the Chicago Convention and its obligation to act as a quasi-judicial body when called upon to do so. To ensure that these obligations are fulfilled, it is essential that the Court should exercise its supervisory role. According to the Judgment in the Appeal case, it is specifically for "the good functioning of the Organization" that the Chicago Convention "enlist[s] the support of the Court[361]".

SECTION B. An Appeal is Justified Given the Nature of the Proceedings in this Case

4.130 As the Islamic Republic has submitted, the Council was clearly faced with disagreements over the interpretation or application of the Chicago Convention within the meaning of Article 84 with respect to the destruction of Flight IR 655. Moreover, a full record was established, a detailed investigative report was prepared, and deliberations took place over some eight full Council sessions. The procedures adopted by the Council remained within the essential requirement of the Rules, which are themselves of a highly flexible nature and subject to ad hoc amendment by the Council. In particular, in this case the Council relied on the agreement of the Parties as to procedure in recognition of the need for an expeditious and effective disposition of the case, consistent with Article 32 of the Rules. The Council also rendered a final decision finding that the "tragic incident ... occurred as a consequence of events and errors

360 Such inconsistency in approach has not gone unnoticed. Ibid., p. 158. See, also, Lowenfeld, A., supra, p. 338. Exhibit 53.

361 Appeal Relating to the Judgment of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 60.

in identification of the aircraft which resulted in the accidental destruction of an Iran Air airlines and the loss of 290 lives[362]". Where there is such an extensive record of the proceedings and a clear decision by the Council, there is no question of the Court being asked to act as a Court of first instance.

4.131 In such circumstances, to the extent certain procedural rules may not have been exactly followed, this should not act as a bar to the Court's jurisdiction which is derived from Article 84 alone. This is especially true given the ad hoc nature of the Rules and the fact that they can be amended by the agreement of the Parties[363].

4.132 To the contrary, to the extent that there were any procedural defects, this should further encourage the Court to exercise its supervisory function on appeal. In the Appeal case, the Court held that procedural irregularities did not need to be considered provided that they did "not prejudice in any fundamental way the requirements of a just procedure[364]". However, several Judges thought the Court should have exercised a greater degree of its supervisory control on this issue and given guidance to the Council precisely because of such irregularities. In his Declaration, for example, Judge Lachs regretted that the Court had not gone into the matter, noting that the consideration of such a matter would surely come within the "supervision by the

362 C-Dec 126/20, 17 March 1989. Exhibit 50.

363 A related problem is that because of the ambiguous and ad hoc nature of the Rules adopted by the Council and because these Rules have scarcely ever been followed in practice, even Council members may be unfamiliar with how the Rules should operate. In the Pakistan/India case there was great confusion among Council members as to voting procedures partly because of their lack of familiarity with the Rules. This problem is even greater for non-Council members.

364 Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 69.

Court over those decisions"'referred to in the Court's judgment[365]. Judge Dillard argued that to the extent procedural irregularities led to a miscarriage of justice, this would in and of itself be sufficient to justify an appeal to the Court[366].

4.133 Equally significant is the fact that if there have been procedural irregularities, these are the Council's responsibility and it is the Islamic Republic which has suffered as a result. As already explained in Chapter III, the Council has full control over how it treats a particular matter and the form in which it renders a decision. This constitutes an additional reason why the Court should accept jurisdiction. As Judge Lachs pointed out, "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[367]". A fortiori, a State also has the right to expect that the Council will correctly address legal issues addressed to it.

SECTION C. The Operation of ICAO Would Not Be Hampered by the Court's Accepting Jurisdiction Concerning the Dispute over Flight IR 655

4.134 The United States argues that allowing an appeal in this case would mean that nearly every decision of the Council would be subject to appeal, and it adds that "Subjecting such decisions to lengthy judicial review could delay crucial aviation safety-related actions of the Council and cripple the operation of ICAO[368]."

365 Ibid., p. 75.

366 Ibid., p. 100.

367 Ibid., p. 74.

368 U.S. Preliminary Objections, p. 140.

4.135 This alarmist view has already been presented to the Court without success. In the Appeal case, Pakistan argued that Article 84 specifically referred to "the decision" of the Council, not "any decision", and that its provisions should therefore be construed narrowly lest the dispute-settlement regime of the ICAO be frustrated. This argument was rejected by the Court. It was also commented on by Judge De Castro who, in his Separate Opinion, considered that such an argument was based on a misinterpretation of Article 84:

> "However, a reading of Article 84 without any preconceived view leads us to give it a different meaning. It refers to 'any disagreement' which cannot be settled by negotiation. It does not of course refer to every kind of disagreement which could be resolved by an Order. It refers to disagreements which could be settled by negotiation and which relate to the interpretation or application of the Convention. The number of possible disagreements is limited, and decisions on these do not include any kind of Order whatsoever. They must be important decisions, and decisions of a certain general interest[369]."

When consent has been given by the Convention itself to allow an appeal of any Council decision on any disagreement - particularly a matter as important as the destruction of Flight IR 655 - it is impossible to argue that this consent should be limited in any way for alleged policy reasons. The only way any limitation could be imposed would be by an amendment of the compromissory clause in the Convention.

4.136 The Court has not been swamped by a mass of appeals following its decision to accept jurisdiction in the Appeal case and the dispute-settlement regime of ICAO has not been frustrated in any way. The United States' emotive argument that accepting jurisdiction in this case would "open up for review virtually all actions of the Council that might be said to implicate or

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369 Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, pp. 119-120.

involve one or more provisions of the Convention" ignores this fact[370]. The vision of the floodgates opening to appeals has simply not materialized, and there is no reason why it should if the Court accepts jurisdiction here. Fortunately, commercial aircraft flying within their own airspace are not destroyed by the military forces of another State very frequently. The large body of the Council's work does not involve disputes between individual States, and to the extent that there are such disagreements, the vast majority of these will be settled by negotiation. However, when such incidents do occur, and when the ICAO Council reaches an erroneous decision, the path must be open for appeal to the Court, which Article 84 provides.

4.137 The United States' argument in this context that the Court should not accept jurisdiction unless the Rules are followed to the letter is also misplaced. The Council operated for 13 years prior to the adoption of the Rules without a single appeal to the Court. By way of comparison, the Food and Agriculture Organisation, the World Health Organisation, and the World Meteorological Organisation, the constitutive instruments of which all contain clauses broadly similar to Article 84, have never formulated rules for the settlement of disputes as the ICAO Council has done, and yet this has not led to the Court's being inundated by appeals from decisions made by these organisations relating to the interpretation or application of their respective charters. In fact, the Court has not had one such appeal referred to it. There is therefore nothing to suggest that if the Court accepts jurisdiction in the present case, it might suddenly become subject to a flood of appeals.

4.138 There is also no reason why the Council's work on safety-related issues should in any way be affected by an appeal to the Court over a legal

370 U.S. Preliminary Objections, p. 140.

dispute. The Council's work on such issues can proceed unaffected by an appeal to the Court, and the Court has always shown itself willing to deal with the legal aspects of disputes that may have a composite character involving political or technical matters more appropriately dealt with in other fora.

4.139 In the same vein, the United States has submitted the further argument that the Court, if it were to entertain an appeal from the ICAO Council's decision, would breach the respect due to a coordinate body of the United Nations. The Court, in its modern jurisprudence, has rejected similar arguments aimed at prohibiting it from acting in any dispute simply because the Security Council, or the General Assembly, has acted or is also acting upon it[371].

4.140 It is true that the legal role of the Council might grow in recognition of the fact that it is obliged to deal with disputes in a more strictly judicial way. However, this cannot be regarded as a negative development. On the contrary, when provided for in their charters, the legal role of international organizations should be carried out in a properly judicial way; this would be strengthened by allowing the right of appeal to the Court.

SECTION D. The Integrity of ICAO Would be Strengthened by Granting a Right of Appeal in this Case

4.141 The dispute before the Council, which concerned the use of force against a civilian aircraft, arguments of self-defense, and issues of State responsibility, clearly involved legal issues of fundamental importance including

371 See, in this regard, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16; Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, p. 3; 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.

principles enshrined in the U.N. Charter. The Court, as the principal judicial organ of the United Nations, of which ICAO is a specialized agency, is under an obligation to ensure such principles are respected throughout the United Nations. Moreover, the Court's role to ensure respect for international law and to ensure that this law is applied universally and consistently both within and outside the United Nations, make this case most appropriate for treatment by the Court[372].

4.142 These considerations were reflected by several Judges in the Appeal case. For example, in his Separate Opinion, Judge de Castro stated -

> "The question of the appeal to this Court is of undeniable importance, both for the Court and for international organizations. The Court cannot evade its responsibility. For such organizations, it is necessary that there should be a supervisory body, to exercise supervision over complicated legal decisions, and over the interpretation and application of their constitutional and internal rules ...
>
> It is indeed a fact that the administrative and technical nature of the ICAO Council makes it a practical necessity that there should be the widest possibility of appeal to a judicial body such as the Court, with regard to the interpretation of the Convention and of the Agreement[373]."

4.143 Judge de Castro also referred to the Institut de droit international's study of the question of "Recours judiciaire contre les décisions d'organes internationaux" noting that "it is one of the desiderata of the international community that the possibility of appeal should be extended to

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372 See, in this regard, the Separate Opinions of Judge Lachs in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. United Kingdom), Order of 14 April 1992. See, also, the President of the Court's recent address to the General Assembly of the United Nations where this aspect of the Court's role is discussed. Report of the International Court of Justice (A/46/4), pp. 15, et seq.. See, also, pp. 19-20 with regard to the Court's role as principal judicial organ of the United Nations.

373 Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 123.

cover all the decisions of international organizations"[374]. This view is widely shared:

> "... there is one area of international activity where there is a very strong case to be made for the provision of some measure of appeal or review. This is in relation to the exercise of quasi-judicial powers by international organizations[375]".

4.144 As Judge Lachs pointed out, also referring to the Institut's work, an extensive interpretation of the jurisdiction of the Court may be important precisely in order to protect the integrity of the lower forum:

> "Indeed, the same reasons which underlie the necessity of interpreting jurisdictional clauses strictly impel one to adopt an interpretation of provisions for appeal that would lend maximum effect to the safeguards inherent in such provisions. For, as between the 'lower forum' and 'the court of appeal', there exists as it were a see-saw of jurisdictional powers. Hence to apply a restrictive interpretation of rights of appeal - and thus of the powers of the 'court of appeal' - would obviously entail an extensive interpretation of the jurisdictional powers of the 'court of first instance'. This would in fact imply more onerous obligations on the States concerned: something which (as indicated above) international tribunals have continuously endeavoured to avoid. To restrict the rights of States to seek relief from what they deem to be wrongful decisions would to some extent, at least, defeat the very object of the institution of appeals[376]."

There is nothing in the Chicago Convention that implies that the signatories wished to limit the right of appeal. To the contrary, it must be recognised that the breadth of the ICAO's functions, and the role it has to play in disagreements which inevitably have political aspects not foreseen in 1944, make it essential that the right to appeal in Article 84 should not be restrictively construed.

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374 Ibid..

375 Lauterpacht, E.: "Aspects of the Administration of International Justice", in Hersch Lauterpacht Memorial Lectures, (Cambridge, 1991), pp. 112-113. Exhibit 69.

376 Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 74.

SECTION E. The United States Has Recognized that this Kind of Incident Should Be Heard By the Court

4.145 It has been shown above that both in this case and in previous cases the United States has sought to restrict the role of ICAO to safety and technical issues. The United States presumably takes the view that ICAO is not an appropriate body to hear such disputes. However, the United States has repeatedly stressed that the Court is an appropriate forum.

4.146 Where the United States has been directly involved with civil aviation incidents in the past it has attempted to refer its disputes directly to the Court and has not sought to seek condemnation from the ICAO Council. Thus, in numerous aerial incidents cases in the 1950s, the United States made applications directly to the Court without seeking to bring the matters before ICAO[377].

4.147 More significantly, in a dispute brought before the ICAO Council by Czechoslovakia concerning problems related to the flight of uncontrolled balloons, and which was considered by the Council under Article 54 of the Convention, the United States made a specific attempt to refer the matter to the Court instead of to the Council[378]. In that case, the Czechoslovakian Government had alleged that the United States had breached Articles 1 and 8 of the Chicago Convention. According to the United States, however, "the ICAO Council was not the proper forum for the consideration of such contentious

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377 Aerial Incident of 10 March 1953, Order of 14 March 1956, I.C.J. Reports 1956, p. 6; Aerial Incident of 7 October 1952, Order of 14 March 1956, I.C.J. Reports 1956, p. 9; Aerial Incident of 4 September 1954, Order of 9 December 1958, I.C.J. Reports 1958, p. 158; Aerial Incident of 7 November 1954, Order of 7 October 1959, I.C.J. Reports 1959, p. 276; and Aerial Incident of 27 July 1955 (United States of America v. Bulgaria), Order of 30 May 1960, I.C.J. Reports 1960, p. 146.

378 Council Minutes, Fortieth Session, 27 April-22 June 1960. Doc. 8078 - C/924, p. 61. Exhibit 70.

charges[379]". This is entirely consistent with the United States' attitude to the Council, but of greater significance is the fact that the United States considered that the Court should have jurisdiction over a matter specifically considered by the Council under Article 54. As the U.S. representative stated:

> "As a result of a careful and thorough investigation, the United States Government had found that the charges were without foundation, and in a note dated 14 May 1958 had invited the Government of Czechoslovakia to resort to the international forum provided by the International Court of Justice to determine their validity[380]."

4.148 In the face of these precedents, it is inconsistent for the United States now to argue that the Court has no jurisdiction in the present case where the existence of a dispute has crystallized, where a Council decision has been taken and where the requirements of Article 84 have been fulfilled. Given that the United States considered that the Council was not the correct forum for its "contentious" matter with Czechoslovakia and that an Article 54 matter could and should be referred to the Court for determination, it cannot now argue that the present case should not be determined by the Court, regardless of whether it was brought under Article 54 or Article 84.

SECTION F. Conclusions

4.149 In the final analysis, the very nature of this case justifies an appeal. It involves fundamental and complex principles of international law which extend beyond the scope of the Chicago Convention and the expertise of the ICAO Council. In the interests of the Council and the Parties, and in accordance with the Court's role as guardian of international law, it would be proper if the Court exercised its jurisdiction in this case.

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379 Ibid., p. 63.

380 Ibid., pp. 62-63.

4.150 In conclusion, the Islamic Republic submits that the jurisdiction of the Court is established under Article 84 of the Chicago Convention, which is the sole basis of the Court's jurisdiction and which is the basis of jurisdiction to which both Parties have consented. There is nothing in the procedures before the Council nor in the policy considerations raised by the United States which can act as a bar to that jurisdiction. To the contrary, these factors support a finding of jurisdiction.

PART V

THE JURISDICTION OF THE COURT ON THE BASIS OF THE MONTREAL CONVENTION

5.01 In its Memorial, the Islamic Republic has already explained why the Court has jurisdiction in the present case under Article 14(1) of the Montreal Convention, pursuant to which a dispute between two or more Contracting States concerning the interpretation or application of the Convention can be submitted to the Court at the request of one of the Parties if the dispute is one "which cannot be settled through negotiations", and "if within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration."

5.02 There undoubtedly exists a dispute between the Islamic Republic and the United States on the question whether - as the Islamic Republic contends - Articles 1, 3 and 10(1) of the Convention are applicable to the actions of the United States in shooting-down Flight IR 655 and in failing to take appropriate measures to prevent the reoccurrence of similar incidents, or whether the Montreal Convention is not relevant at all to the incident, as is asserted by the United States[381]. As the Islamic Republic has demonstrated in Part III above, this dispute, i.e., a disagreement on a point of law and fact, arose between the Parties following the shoot-down of Flight IR 655, and took shape in the discussions between the Parties before the U.N. Security Council and ICAO.

5.03 With respect to the formal requirements of prior negotiations and prior resort to arbitration, the Islamic Republic has already pointed to the reasons why in this case they can be dispensed with, on account of

381 See, Memorial of the Islamic Republic, pp. 172-178.

the fact that each contending Party from the outset strongly insisted on its legal view, making any out-of-Court settlement practically impossible[382].

5.04 In contrast, the United States' objections to the jurisdiction of the Court under Article 14(1) of the Montreal Convention are based on the following arguments:

- The Islamic Republic cannot rely on the Convention because it has failed to establish that the dispute could not be settled through negotiations; moreover, the Islamic Republic disregarded the additional requirement to seek arbitration of the dispute within a period of six months;

- The Montreal Convention addresses criminal acts committed by individuals against the safety of civil aircraft and was not intended to address actions taken by the armed forces of a State engaged in hostile action;

- The subsequent practice of ICAO with respect to aerial incidents confirms that the Montreal Convention does not apply to State actions against civil aircraft; and

- The Montreal Convention cannot apply to the downing of *Flight IR 655* because international armed conflicts, such as that in which the United States and the Islamic Republic were said to be engaged on 3 July 1988, are outside the province of the Convention.

382 See, Part III above.

5.05 These arguments will be examined in three successive Chapters below: the first dealing with the conditions of prior negotiation and arbitration, the second with the relevance of the Montreal Convention to the destruction of Flight IR 655 and the question whether actions taken by State agents and, in particular, by members of armed forces are covered by the Montreal Convention, and the third dealing with the question whether the relationship between the United States and the Islamic Republic was that of an armed conflict and, if so, whether such a conflict excludes the application of the Montreal Convention.

CHAPTER I THE CONDITIONS OF PRIOR NEGOTIATION AND ARBITRATION UNDER ARTICLE 14(1) OF THE MONTREAL CONVENTION

5.06 The United States contends that the requirement of prior negotiation and arbitration set forth in Article 14(1) of the Montreal Convention is not a mere formality. Such a requirement represents, in the United States' opinion, a pre-requisite to the jurisdiction of the Court and is an essential step in defining the dispute in order to fix "the points of facts and law over which the parties disagree[383]". Furthermore, if the Court were to underestimate the importance of the conditions indicated in Article 14(1) of the Montreal Convention, the United States argues that this would discourage States from agreeing upon compromissory clauses providing for preliminary "bilateral and low-profile resolution of disputes".

SECTION A. The Condition of Prior Negotiation

5.07 It has already been emphasized in Chapter IV to Part III that the requirement of prior negotiations entails that, before instituting

383 U.S. Preliminary Objections, p. 151, citing the Separate Opinion of Judge Ruda in Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America) Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 453.

international judicial proceedings, the disagreement between the parties on their international obligations must have clearly emerged in direct discussions, public statements or parliamentary debates.

5.08 It has also been stressed that according to the case law of the Court, once the legal positions of the parties have clearly shown the existence of a legal dispute, diplomatic negotiations need not necessarily be conducted, let alone be protracted and intense. Everything depends on the circumstances of each particular case. In any event, if one of the parties refuses to discuss the matter with the other, or if the parties insist upon their respective views with no possibility of any modification or compromise, it can be reasonably concluded that the dispute cannot be settled by negotiation. If this is the case, the requirement can be regarded as fulfilled, even if no negotiations, or very limited negotiations, have taken place.

5.09 In the light of these considerations, it is entirely justified to conclude that, under the specific circumstances of this case, the requirement of prior negotiations, to the extent it exists, has been satisfied.

(i) **Prior to the submission of the case to the Court the dispute had been clearly defined**

5.10 The steps taken immediately by the Islamic Republic before the United Nations Security Council and ICAO show that the subject-matter of the dispute raised by the Islamic Republic against the United States was clearly articulated at an early stage. The Islamic Republic requested the United States (i) to acknowledge that the shooting down of Flight IR 655 was contrary to international law, (ii) to recognize its consequent legal responsibility, (iii) to terminate immediately its threats to and interference with civil aviation in the

Persian Gulf and, (iv) to provide compensation for the damages resulting from the shoot-down.

5.11 The dispute was rapidly and clearly defined because of the radically opposed position adopted by the United States when confronted with the precise demands of the Islamic Republic. The United States denied that the attack was in any way contrary to international law, whereas the Islamic Republic insisted that it amounted to an international wrong and considered that the United States' responsibility was an essential element of its claim.

5.12 The dispute was also clearly defined with regard to another point. Apart from unspecific gestures that compensation might be forthcoming, the United States only offered to compensate some of the families of the victims two months after the filing of the Application, and then only ex gratia, i.e., without accepting any responsibility for the attack on Flight IR 655 or recognizing the legitimate interests of the Islamic Republic in the matter. In fact, prior to the filing of the Islamic Republic's Application, the United States constantly denied having any obligation to deal with the Islamic Republic concerning the incident[384]. Moreover, in order to avoid any contact with Iranian authorities or agencies, the United States refused to take into consideration any compensation for the loss of the plane by the Islamic Republic, or for other damages resulting from the attack, and refused to guarantee that similar incidents would not reoccur.

5.13 Finally, while the United States, by excluding any international responsibility, implicitly ruled out not only the applicability of any

384 See, paras. 3.25-3.44, above. As pointed out at paras. 5.38-5.40 of the Islamic Republic's Memorial, the amounts offered by the United States paled in comparison to the amounts demanded by the United States from Iraq for its attack on the U.S.S. Stark.

general rule on State responsibility but also the relevant treaties and conventions on the protection of civil aviation, it is significant that the report of the Islamic Republic submitted to the President of ICAO on 7 July 1988 specifically referred to violations by the United States of "general principles of international law, the Chicago Convention and all its relative Annexes and Standards and Recommended Practices, the Tokyo, Hague and Montreal Conventions[385]".

5.14 The fact that the Islamic Republic invoked the Montreal Convention in its report of 7 July 1988, while it referred generally to "international law" in later submissions made before ICAO[386], does not imply that the disagreement between the Parties did not relate also to the applicability of the Montreal Convention. Since the views of the two States were so far apart and neither was ready to forgo its contentions, it was not necessary for the Islamic Republic to recite in detail all the international principles and conventions that in its view were relevant to the issue and had been breached by the United States. As discussed in Chapter II below, ICAO had no jurisdiction to address the interpretation or application of the Montreal Convention in any event. Consequently, the reference made to the Montreal Convention in the letter of 7 July 1988 was sufficient to place the United States on notice that a question as to its interpretation or application had arisen[387].

5.15 In this connection, mention should be made of the Court's decision in the jurisdiction phase of the Nicaragua case where the Court held that

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385 See, Exhibit 38, p. 5.

386 Draft C-Min Extraordinary 1988/1, 13 July 1988, p. 7. Exhibit 40. See, also, Draft C-Min 125/12, 5 December 1988, p. 8. Exhibit 43; and Draft C-Min 126/18, 13 March 1989, p. 7. Exhibit 47.

387 In fact, prior to the United States' first concrete offer of ex gratia compensation, the Islamic Republic had also invoked the Montreal Convention in its Application.

a dispute can be submitted to it even if during the prior negotiations no mention is made of the treaty on which the applicant State relies to establish the Court's jurisdiction[388]. In that case, the United States had argued that Nicaragua had never raised in negotiations the application of the Treaty of Friendship of 1956 to the factual or legal allegations made in its Application. The Court rejected this objection by noting that:

> "[I]t 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. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do[389]."

5.16 Furthermore, the fact that in the present case the disagreement between the Parties primarily took shape during the course of debates in international fora (the U.N. Security Council and the ICAO Council), and not in bilateral talks, in no way detracts from the fact that the prior negotiation clause could be regarded as complied with to the extent to which it was applicable. As the Court stated in South West Africa, Preliminary Objections, negotiations can take place in international parliamentary bodies in the form of "conference or parliamentary diplomacy" provided, of course, that the contending parties set out their views clearly, it becomes apparent that they are strongly conflicting, and "both sides remain adamant". In such situations direct negotiations between the parties are not necessary because "it is not so much the

388 Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America) Jurisdiction and Admissibility, I.C.J. Reports 1984, at p. 428, para. 83.

389 Ibid., pp. 428-429.

form of negotiation that matters as the attitude and views of the Parties[390]". Of course, when one State refuses to negotiate with the other, the implications for trying to settle the matter are clear.

(ii) Prior negotiations did not prove necessary in view of the strong disagreement between the Parties

5.17 As Part III has shown, discussions regarding the dispute took place between the Parties, at least to the minimum extent required by Article 14(1) of the Montreal Convention and the relevant international case law. What must be stressed is that, according to the Court, the character and quality of these discussions needs to be evaluated by taking into account the political relationship existing between them at the time the dispute arose, as well as their views on the matter[391].

5.18 The United States now contends that it made attempts to negotiate, but these proved unsuccessful because of the negative attitude of the Islamic Republic[392]. Apart from the parliamentary-type debates before ICAO and the United Nations, the Islamic Republic denies that the United States ever tried to negotiate the dispute with it arising from the the shoot-down of Flight IR 655 prior to the institution of these proceedings. Any attempts made by the United States to deal with the matter were limited to seeking information regarding some of the victims without tolerating any intervention or "interference" on the part of the Islamic Republic. It was only after the Islamic Republic filed its Application that the United States agreed to meet on the matter. Yet even then, and despite the fact that the United States then knew that the Islamic Republic

390 South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346. See, in this respect, paras. 3.75-3.77, above.

391 Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2.

392 U.S. Preliminary Objections, p. 159.

was alleging a breach of the Montreal Convention, the discussions rapidly reached an impasse due to the radically diverging approaches adopted by the Parties.

5.19 Accordingly, there is no basis for arguing that the conditions laid down in Article 14(1) of the Montreal Convention were not satisfied and that the dispute could not be properly submitted to the Court. The attitude of the United States, in refusing to recognize or discuss the unlawful character of the attack, rendered the fulfilment of the conditions set out in Article 14(1) of the Montreal Convention otiose, if not impossible. In these circumstances, it is reasonable to conclude, in the words of Article 14(1), that the dispute was one that "cannot be settled through negotiation".

5.20 The United States cannot now take advantage of the requirement of prior negotiations set forth in Article 14(1) of the Montreal Convention given that the reason why negotiations failed was because the United States refused to deal with the Islamic Republic prior to the bringing of this case or to accept responsibility for the incident[393].

5.21 This is not to say that some channels, such as the U.S. interests section of the Swiss Embassy in Tehran, were not open between the Parties notwithstanding the absence of official diplomatic relations between them[394]. However, the Islamic Republic submits that given the attitude of the United States, which was illustrated by its refusal to respond positively to the Iran

393 In its Preliminary Objections, the United States argues that the Montreal Convention is not applicable to the case. Undoubtedly, the United States would have held the same view if the issue had been raised in negotiations, and a fundamental impasse would immediately have thereby been reached.

394 U.S. Preliminary Objections, pp. 154, et seq.

Insurance Company's offer on 6 February 1989 to send a representative to discuss the matter, these channels could not have been usefully exploited.

5.22 Another possible forum was, in the United States' contention, the Iran-United States Claims Tribunal. However, as Part III, Chapter II(C) has explained, the importance of the role of this Tribunal in providing a possible negotiating forum has been greatly exaggerated in the U.S. Preliminary Objections. While it is true that the Tribunal was functioning at the time of the incident, as it currently is, it is also true that its jurisdiction was strictly limited at that time, as it is now, to the fulfilment of the tasks entrusted to it by the Algiers Declarations of 19 January 1981. The powers of the representatives of the Parties to the Tribunal were accordingly limited to the matters being dealt with by the Tribunal, and did not encompass matters such as the destruction of Flight IR 655 falling outside of the Tribunal's official business.

5.23 Although other fora were also at the disposal of the Parties such as ICAO and the United Nations, serious negotiations were effectively impossible there because of the conflicting positions taken by the Parties, and especially because the United States consistently declared its unwillingness to engage in contact, discussions and negotiations with the Islamic Republic or its agencies over the question of compensation.

SECTION B. The Condition of Prior Arbitration

5.24 The United States also contends that the second condition laid down in Article 14(1) of the Montreal Convention has not been satisfied by the Islamic Republic: arbitration was not officially requested and consequently, the requirement of a six-month period from the date of the request for arbitration has not lapsed.

5.25 It will be shown below that:

- The requirement at issue is not an absolute one: its fulfilment is subject to the condition that both contending parties should show a modicum of political will to cooperate and therefore be ready to agree upon not only the resort to arbitration, but also the practical modalities of such resort and, in particular, the organization of the arbitration;

- In the dispute under consideration, the opposition between the legal position of the Parties was so marked and unbridgeable from the outset that they lacked not only a minimum will to try and settle the disagreement by negotiation, but also, a fortiori, the will to set in motion the complex process of arbitration;

- Given these circumstances, the terms of Article 14(1) of the Montreal Convention do not require that one party to the dispute should perform the mere formality of giving notice to the other party of its intention to resort to a judicial settlement of the dispute by putting forward a "preliminary" request for arbitration and then waiting for the six-month period to elapse;

- Consequently, Article 14(1) of the Montreal Convention does not stand in the way of the Islamic Republic instituting proceedings before the Court with a view to asking it to declare, among other things, that the respondent State has breached the Montreal Convention.

5.26 Before dealing with the specific circumstances of this case, it is fitting to dwell briefly on the purpose and scope of international clauses on prior arbitration. A general, if short, analysis of their role makes it possible to grasp better the reason why, in the circumstances of the present case, Article 14(1) of the Montreal Convention can be regarded as having been satisfied by the Islamic Republic.

(i) The purpose and scope of international clauses requiring prior recourse to arbitration

5.27 As the United States points out, the purpose of the prior arbitration clause is "to avoid escalating a dispute between States to this forum [the Court] before the attempt has been made to resolve it through ... arbiters of their choosing[395]". According to the United States, "[w]ere 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[396]".

5.28 Clearly, the clauses at issue are designed to enable the parties to a dispute to avoid resort to adjudication by a permanent and institutionalized body such as the Court by instead opting for a third-party settlement that has the merits of being less conspicuous and solemn and more within the control of the parties (as regards the organization of the procedure and especially the appointment of arbitrators).

5.29 It is however obvious that resort to arbitration presupposes, on the part of both contending parties, a high degree of will to prefer arbitration in lieu of adjudication. That both parties to a dispute must have a strong

395 U.S. Preliminary Objections, p. 152.

396 Ibid.

intention to settle the dispute by arbitration is apparent from the fact that, to set in motion the arbitration process, a host of bilateral steps must be agreed. After one of the parties has requested arbitration and the other has responded favourably, both parties must agree upon the general framework of arbitration, that is the structure of the arbitral tribunal, the rules of procedure and who establishes them, the composition of the tribunal, the applicable law, etc., and then they must cooperate in order to appoint the arbitrators, as well as a chairman if there is not a sole arbitrator, and define their terms of reference.

5.30 All these steps perforce require a strong and continuing desire on the part of both parties (i) to eschew formal adjudication; (ii) to bridge their differences, hence to come to some sort of agreement for their settlement; and (iii) to have the dispute solved by an independent arbitral tribunal.

5.31 The difficulties inherent in achieving agreement on all of these points should not be underestimated. Article 14(1) provides absolutely no guidelines for the procedural or structural framework of the arbitration. In this respect, it falls tar short of even the minimum guidelines for arbitration provided for in Article 85 of the Chicago Convention. The latter at least stipulates the number of arbitrators and, more importantly, the procedures that the appointing authority (in this case the President of the ICAO Council) will adopt for naming a party arbitrator if one of the parties fails to name an arbitrator within the stipulated time limit, and the Chairman or umpire, if the party arbitrators are unable to agree amongst themselves. Article 14(1) contains no similar provisions designating an appointing authority, and no procedures for the naming of arbitrators.

5.32 Experience has shown that even when the arbitration clause in question designates an appointing authority difficulties can arise. Thus, in the

Interpretation of Peace Treaties case (Second Phase), the Court held that a dispute resolution clause containing such a provision did not apply when one of the parties failed first to appoint its own arbitrator. As the Court noted -

> "by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein. The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner[397]."

5.33 It follows that the will of the contending parties to be ready and disposed to bridge their differences and have them settled by third-party arbitration, while agreeing on all of the elements of the arbitration, is the lynchpin of the clauses under discussion and, indeed, the sine qua non conditio of the operation of these clauses. Whenever that will is proved to be lacking, the clauses cannot and should not operate, lest the requirements they lay down become mere formalities, devoid of any practical significance. To develop this point, the two elements of this part of Article 14(1) (the request for arbitration and the six-month period) will be considered separately.

5.34 With respect to the need to submit a request for arbitration, clearly a contesting State may legitimately be required to make such a request only if there is some chance of it being accepted by the other party. Whenever it is apparent from the outset that one of the parties refuses to deal with the other or that their disagreement is so fundamental that it cannot be settled by negotiation but only by resort to an institutionalized judicial body to which either party can unilaterally resort, to continue to insist that one of the parties should perform the formality of making a request for arbitration would be tantamount to

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397 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 221 at p. 227.

introducing into international proceedings formalities which are absolutely alien[398].

5.35 In this connection, it should be recalled that as early as 1925 the Permanent Court stated that it could not "allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned[399]". This fundamental ruling has been recently restated by the Court in the Nicaragua case[400].

5.36 The same holds true for the requirement of the six-month period. Again, this proves to be a mere formality which States are allowed to dispense with in the case of a substantial and overall disagreement between them, and where there is no reasonable prospect that they can reach agreement on the elements of the dispute, much less the organization of an arbitration.

5.37 This point has been cogently made by several members of the Court in the opinions they delivered in the recent Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie[401]. Given the importance of these opinions and

398 This is not to say that arbitrations cannot be a useful means of dispute resolution. However, when there are so many procedural obstacles to agree to or overcome, and when one of the parties has shown no inclination to discuss the matter in dispute, recourse to the Court should be readily available without having to wait for a six-month time period to elapse.

399 Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J. Series A, No. 6, p. 14.

400 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 429, para. 83.

401 Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Order of 14 April 1992, I.C.J. Reports 1992, p. 114.

their direct relevance to the issue under discussion, it is proper to dwell briefly on the case from which they originate.

5.38 In its two Orders on the matter handed down on 14 April 1992, the Court did not accept the argument raised by the respondent States for denying the Court's jurisdiction under the Montreal Convention based on the non-expiration of the six-month period provided for in Article 14(1) of that Convention. Although the Court did not take an express position on this point, it seems remarkable at any rate that it did not uphold the respondent States' arguments, as it could have done. The contention could therefore be made that the Court implicitly rejected that argument. Be that as it may, what matters is that three Judges, the Acting President of the Court, Judge Oda, Judge Bedjaoui and Judge Weeramantry, forcefully rejected in their opinions the aforementioned argument as put forward by the respondent States.

5.39 In his declaration appended to the Orders, Judge Oda stated:

> "In the present case, there does not seem to exist any convincing ground for asserting that the Court's jurisdiction is so obviously lacking. The Respondent's argument whereby the Court's jurisdiction is denied through the non-lapse of the six-month period would appear too legalistic, if one were to find that no room remained to negotiate on the organization of arbitration in the face of a categorical denial of the possibility of an arbitration[402]."

5.40 In his dissenting opinion Judge Bedjaoui stated that:

> "There are several reasons why in the present case this requirement does not stand in the way of the Court being seised. It should first be noted that in response to the request for arbitration made by Libya the Permanent Representative of the United Kingdom to the United Nations stated that that request was 'not relevant', since this makes it obvious that the decision by the United Kingdom and the

402 Ibid., p. 130.

> United states to bring the matter to the Security Council so as to obtain from it a political solution foreclosed, from the outset, any possibility of an arbitral solution. The request for arbitration therefore appeared to be fundamentally inappropriate and inconsistent with the political measures which the Security Council was expected to take and were later taken. Accordingly arbitration was inherently and as a matter of principle ruled out, no matter how long Libya were to wait. The six-month time-limit was altogether meaningless inasmuch as it was inconsistent with the type of political settlement chosen by the two Respondent States, seeing that they opted for submission of the matter to the Security Council last January[403]."

5.41 A similar stand was taken by Judge Weeramantry in his dissenting opinion. He pointed out, among other things, the following:

> "[W]here a party has in anticipation indicated that it will not consider itself bound by mediation or negotiation, the insistence by that party on a waiting period specified as a prerequisite before the matter is taken to the International Court could defeat the purposes of such a provision [i.e. Article 14(1) of the Montreal Convention] [...]. The question of law before us is this: if, in a hypothetical case, a party refuses negotiation, can such party insist on the six-month period of delay before the matter is brought to this Court? Such insistence can well be a roadblock in the path of a party seeking relief from this Court[404]."

5.42 After quoting approvingly the opinion delivered by Judge Ago in the Nicaragua case, Judge Weeramantry continued:

> "It can be plausibly argued that there is no purpose in allowing a party who has repudiated conciliation to argue for the rejection of an application on grounds of its non-compliance with procedures which it has itself rejected. A period of freedom from conciliatory and judicial processes would thus be given to the party repudiating, leaving it at liberty to pursue other non-conciliatory procedures, while its opponent is required to stand by without help or remedy.
>
> Such a construction of the Article [Article 14(1) mentioned above] fits also within theories of interpretation which emphasize that

403 Ibid., p. 146, para. 9 (English translation).

404 Ibid., p. 161.

treaty provisions must be so interpreted as not to render nugatory their object and purpose[405]."

5.43 As is apparent from the above, the three aforementioned Judges shared the view that to require a party to wait six months before applying to the Court would amount to a meaningless formality whenever it was clear that arbitration had no chance of being instituted. In addition, when either of the parties can unilaterally block the arbitration process by refusing to agree on elements necessary to organize the arbitration (such as the composition of the arbitral tribunal, the place of arbitration, the applicable law, the procedure, etc.), it is inappropriate to require the parties to adhere to the six-month period when it would be futile to do so and when the compromissory clause in question explicitly leaves open the possibility of having ultimate recourse to the Court if the elements of arbitration cannot be agreed on within six months. To hold otherwise would mean depriving Article 14 of its object and purpose, contrary to well-established principles of treaty interpretation.

5.44 The conclusion is therefore warranted that both requirements under discussion (the making of a request for arbitration and the lapse of a six-month period before instituting proceedings before the Court) can be legitimately dispensed with any time it becomes apparent that there exist unbridgeable differences between the contending parties and where, consequently, there is a lack of even the minimum basis for setting in motion the arbitration process.

5.45 International judicial proceedings are hostile to mere procedural formalities that uselessly stand in the way of the proper administration

405 Ibid., p. 162. As noted in Part III, several Judges also pointed out that the actions of the Respondent States in refusing to negotiate effectively acted as an anticipatory breach of Article 14(1) of the Convention. See, para. 3.88, above.

of justice; at any rate, such formalities are not suited to international adjudication, as the Court has consistently held. It follows that whenever it can be shown that the fulfilment of the requirements under discussion would amount to a mere formality, these requirements can be dispensed with without this amounting to a breach of the relevant treaty provisions. This is the case for the dispute with which the Court is currently seized.

(ii) The inapplicability of the prior arbitration clause in the case under discussion

5.46 On the basis of the above discussion, it is easy to show why in the instant case the prior arbitration requirement was not applicable as a practical matter. Indeed, the situation is analagous to that presented in the Diplomatic and Consular Staff case where the Court referred to one of the parties' refusal to enter into discussions on the matter as a reason why the other party could understand such refusal as "ruling out, in limine, any question of arriving at an agreement to resort to arbitration[406]". In that case, moreover, the United States had invoked as one of the bases of jurisdiction the 1973 Convention on the Prevention of Crimes Against Internationally Protected Persons. Article 13 of that Convention contained the same kind of temporal arbitration provision as appears in Article 14(1) of the Montreal Convention. Notwithstanding this provision, the United States maintained:

> "This limitation on the court's jurisdiction can have no application in circumstances such as these, where the party in whose favour the six months' rule would operate has by its own policy and conduct made it impossible as a practical matter to have discussions related to the organization of an arbitration, or, indeed, even to communicate a direct formal request for arbitration. It is submitted

406 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 26, para. 49, see, also, Memorial of the Islamic Republic, paras. 2.67-2.68.

> that when such an attitude has been manifested, an application to the Court may be made without regard to the passage of time[407]."

This attitude is in stark contrast to the United States' position here.

5.47 Having reviewed the United States' past conduct, the argument of the United States that the Islamic Republic made no effort to have the dispute submitted to arbitration, did not provide a representative to negotiate the issue and never made the request for arbitration provided for in Article 14(1) of the Montreal Convention can be placed in context. So also can the United States' claim that, by contrast, it never refused to talk with representatives of the Islamic Republic about the matter.

5.48 As explained in paragraphs 3.24 to 3.44 above, the description of the facts offered by the United States does not correspond to what actually happened. Prior to the institution of these proceedings, the United States refused to deal with the Government of the Islamic Republic and its agencies as a matter of official policy. Similarly, the United States was unwilling to deal with the representative that the Iranian Insurance Company proposed naming to discuss the matter without receiving assurances that this company was not owned by the Government of the Islamic Republic. As the U.S. note to the Iranian Insurance Company dated 16 April 1989 observed (transmitted by the U.S. Interests Section of the Swiss Embassy in Tehran), the United States required information on the structure and management of the company to determine "whether it is an entity of the Government of Iran[408]". Yet this

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407 I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), Memorial of the United States, p. 155. In the present case, the Islamic Republic waited some 11 months after the incident occurred to file its Application whereas in the Diplomatic and Consular Staff case, the United States filed its Application just three weeks after the events that give rise to the dispute.

408 See, Exhibit 24.

request was simply a smokescreen since the United States already knew that the Iran Insurance Company was a governmental entity.

5.49 Moreover, before the institution of these proceedings, the United States never accepted the right of the Islamic Republic to discuss the legal issues raised by the incident involving Flight IR 655 and the question of compensation arising therefrom. It stands to reason that the firm refusal of the United States to negotiate with the Government of the Islamic Republic and its public agencies, coupled with the United States' view that the Montreal Convention is not applicable to the incident, rendered it inconceivable that agreement could have been reached within six months on all of the elements necessary to put in place an arbitration.

5.50 In the situation described above, and keeping in mind the diametrically opposed approaches and views of the Parties concerning the settlement of the dispute, it is warranted to conclude as in the Diplomatic and Consular Staff case, that no "reasonable probability" existed even for starting serious negotiations and that, consequently, any request for arbitration would have been pointless.

5.51 Consequently, the dispute being one which could not be settled by negotiation, the Islamic Republic was fully entitled to file its Application with the Court, in conformity with Article 14(1) of the Montreal Convention.

CHAPTER II THE MONTREAL CONVENTION IS RELEVANT TO THE FACTS UPON WHICH THE CLAIMS OF THE ISLAMIC REPUBLIC REST

5.52 The United States contends that the Montreal Convention cannot apply to the facts upon which the present dispute rests. It asserts that

"[b]oth 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 action of a State's armed forces engaged in armed conflict[409]".

5.53 In the opinion of the United States, since the destruction of Flight IR 655 and the killing of its 290 passengers was perpetrated by U.S. armed forces, it constituted an act attributable to the United States. The United States then argues, however, that, the term "any person" used in Article 1 of the Montreal Convention refers to individuals and not to "abstract and incorporeal entities" such as States[410].

5.54 The United States also contends that the inapplicability of the Montreal Convention to this case is further confirmed by the conduct of ICAO in condemning episodes of armed attacks brought against civil aviation by the armed forces of a State when ICAO has always referred to the Chicago Convention and not to the Montreal Convention.

5.55 In the Sections that follow, the Islamic Republic will show that each of these arguments is ill-founded. Before doing so, it is important to make a preliminary observation regarding the essence of the United States objections. What is striking about these arguments is that they are all related to the merits of the case - i.e., the actual interpretation or application of the Montreal Convention to the facts of the case. As a result, they do not rise to the level of genuine preliminary objections within the meaning of Article 79 of the

409 U.S. Preliminary Objections, p. 165.

410 Ibid., p. 167.

Rules of Court, and they certainly do not constitute objections that possess an exclusively preliminary character.

5.56 For example, the United States devotes considerable attention to the phrase "any person" appearing in Article 1 of the Montreal Convention in an effort to show that these words really mean "any private person", not a person engaged in an official or State capacity. Such an argument directly relates to the interpretation or application of the Montreal Convention - an issue for the merits - and not the preliminary question whether the Court has jurisdiction to hear the case.

5.57 The United States proves the point by introducing its argument with the well-known maxim enshrined in the Vienna Convention on the Law of Treaties that a treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose[411]. The Islamic Republic fully agrees, but notes that the question of the Montreal Convention's interpretation, as well as its application, is precisely a question which the Court has jurisdiction to address at the next (merits) phase of these proceedings under Article 14 (1) of the Convention.

5.58 In addition, the United States' arguments make it clear that a dispute exists between the Parties over the Convention's interpretation or application. While such a dispute cannot be settled during the preliminary phase of the case, its existence demonstrates that the U.S. Preliminary Objections in this respect cannot be deemed to possess "an exclusively preliminary character". It will therefore be appropriate, in conformity with the Rules, for the Court to order further proceedings in the case.

411 U.S. Preliminary Objections, p. 165.

5.59 Having made these introductory observations, the rest of this Chapter consists of two Sections in which the United States' arguments are rebutted on their merits. Section A will deal with the interpretation of the expression "any person" contained in Article 1 of the Montreal Convention and the scope of the Convention. Section B will rebut the United States' allegations concerning ICAO practice in circumstances analogous to the shooting down of Flight IR 655.

SECTION A. The Expression "Any Person" Used in Article 1 of the Montreal Convention Does not Distinguish between a Private Individual and a State Agent

5.60 The United States asserts that the Montreal Convention lays down obligations to prevent and suppress acts of individuals; the Islamic Republic does not argue anything to the contrary, but also maintains that such individuals can be State agents and can, when engaged in an official capacity, thereby engage the responsibility of the State. If it is true that the Montreal Convention focusses on the prevention and sanctioning of unlawful individual conduct, it cannot be inferred from this that its scope should be limited to the conduct of private individuals. Indeed, the Convention, in imposing upon Contracting States obligations in connection with "unlawful acts against the safety of civil aircraft" does not qualify the individual; in particular, it does not differentiate between individuals acting in their private capacity and those acting qua State agents. The expression "any person" thus includes any individual whether acting in a private or official capacity. If such person is acting in the latter capacity, the responsibility of the State will also necessarily be engaged.

5.61 The following Sub-Sections will show how such a broad meaning of the expression "any person" is confirmed by an analysis of the text of the Montreal Convention (Sub-Section (i)), its preparatory works (Sub-Section (ii)) and by international practice (Sub-Section (iii)).

(i) **The text of the Montreal Convention**

5.62 The literal interpretation of the expression "any person" used in Article 1 of the Montreal Convention cannot lead to a restriction of the scope of that provision. According to the rule of interpretation of international treaties laid down in Article 31 of the Vienna Convention on the Law of Treaties:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[412]."

5.63 The Court itself has had occasion to apply these rules of interpretation on a number of occasions. For instance, in the case of the Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, the Court held that, in the interpretation and application of the provisions of an international treaty, it is necessary:

> "to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter[413]."

5.64 The plain meaning of the term "any person" does not leave room for any distinction or exclusion: by use of the qualifying word "any", the provisions of the Montreal Convention were purposely kept as broad as possible. As Judge Bedjaoui indicated in his Dissenting Opinion in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie:

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412 It is well established that Article 31 reflects customary international law on this point.

413 Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8. The Court reaffirmed this principle in the Case Concerning the Arbitral Award of 21 July 1989 (Guinea Bissau v. Senegal), Judgment, I.C.J. Reports 1991, p. 69, para. 46.

> "In the first place, Article 1 of the 1971 Montreal Convention removes all doubt on this score to the extent that it refers to 'any person' committing certain 'acts' characterized as 'offences'. This means that the Convention applies very broadly to 'any' person, whether that person acts on his own account or on behalf of any organization or on the instructions of a State[414]".

5.65 The "object and purpose" of the Montreal Convention, as well as all the other international conventions in the field of crimes against the peace and security of mankind, is to make any person who performs acts seriously impairing certain values accountable. The Convention therefore does not attach any importance to the question whether such acts are carried out by individuals acting in a private capacity or on behalf of a State or other organization or entity.

(ii) The preparatory works

5.66 The above interpretation of the expression "any person" included in Article 1 is borne out by the preparatory works.

5.67 At the Montreal Conference of 1971 the discussion on Article 1 essentially revolved around the classes of offences to be included and the way of mentioning them (whether by a precise enumeration or by a general reference). It is therefore only natural that very little was said as to the categories of persons falling within the purview of that provision.

5.68 However, even a cursory survey of the debates makes it clear that, when referring to the possible authors of offences against the safety of

414 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahariya v. United States of America), Order of 14 April 1992, Dissenting Opinion of Judge Bedjaoui, I.C.J. Reports 1992, p. 147, para. 10 (English translation).

civil aviation, participants in the Conference used a broad terminology, which of necessity included both private individuals and State agents[415].

5.69 That most of the time delegates referred to both categories of "persons" is borne out by the fact that only in one case did a delegate mention an example which could only be limited to acts of private individuals[416]. It can be deduced from this, a contrario, that in all other cases delegates intended to cover acts of both private individuals and State organs.

5.70 The above interpretation is further confirmed by the only instance of a discussion, in the Commission of the Whole, on the question of whether the class of "persons" referred to in Article 1 should also embrace State agents.

5.71 The question was raised by the delegate of Czechoslovakia, who contended that in his view, since the Convention must cover acts of public officials too, it should also provide for the responsibility of the State agency on whose behalf the individual had acted. He stated the following:

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415 See, ICAO, International Conference on Air Law, Montreal, September 1971, Vol. I, Minutes, Doc. 9081-LC/170-1, pp. 21-49. Exhibit 71.

416 "The Delegate of Italy considered, like many other Delegations, that the present drafting of Article 1(1) was not satisfactory. There was a risk, according to that formulation, that acts would be included which had nothing to do with the safety of civil aviation - for example, the case where two passengers had a quarrel and used a dagger or a knife. In that case it was evident that the armed attack had no consequence with regard to the safety of the aircraft in flight. Nevertheless, if a passenger made an attack on the life of a pilot, even without the use of firearm, the safety of the aircraft would be certainly jeopardized. He therefore suggested a compromise solution to the effect that all acts of violence against the crew, by any means whatsoever, should be considered as punishable offences under the terms of the present convention, and that it would be a punishable offence if a person used a firearm or any explosive substances or devices on an aircraft in flight". Ibid., p. 30, para. 27.

> "[B]efore it proceeded to discuss paragraphs (8) and (9) [of draft Article1], the Commission should decide the scope of the convention as regards the persons committing the offence defined in Article 1. The acts or omissions listed might be perpetrated by an employee of a State or airport authority or, for example, by someone entrusted with the regulation of air navigation safety. In such a case, his Delegation believed that the convention should provide that the authority concerned must also bear responsibility for the act or omission in question[417]."

5.72 This question was answered, rather unsatisfactorily, by the Secretary of the Commission, and then by the President. The Secretary failed to address the main point raised by the Czechoslovak delegate and only dealt with the question of "omissions". He stated:

> "The Secretariat had intended to draw to the attention of the Drafting Committee the difficulty of interpreting the term 'or omissions' in this Article, and to suggest that the terminology 'an act or a failure to perform a legal duty' might better express what was intended[418]."

5.73 The President, reacting to this statement, rightly stressed that it did not provide an answer to the main question raised by Czechoslovakia. He pointed out that he -

> "[F]elt that while the proposed rewording would meet one element of the question raised by the Czechoslovak Delegate it would still leave unanswered the situation of a person falling within the ambit of a State authority. That point might perhaps be covered by means of an exclusion in Article 4[419]."

In the event, it was decided not to include any further exclusions in Article 4. This implies that persons falling within the ambit of a State authority were still

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417 Ibid., p. 46, para. 38.

418 Ibid.

419 Ibid.

covered by Article 1. In short, there was "no proposal for amendment advanced, and the matter was not pursued further"[420].

5.74 It is apparent from this last discussion that no delegate challenged the view of the Czechoslovak Delegate whereby Article 1 also covered acts or omissions of State agents, and on the other hand, no delegate made any proposal designed to address the specific point raised by Czechoslovakia, namely the issue of the additional responsibility of the State on whose behalf the agent was acting. The conclusion is therefore warranted that this discussion further confirms that Article 1 also addresses acts of State organs.

5.75 In considering the scope of the Montreal Convention, it is also important to recall the environment in which it was drafted. As the United States points out[421], the Montreal Convention, together with the 1970 Hague Convention, was drafted in the aftermath of a number of hijackings and other terrorist activities by liberation organizations and other non-self-governing entities that had taken place against civil aircraft.

5.76 These incidents helped spark a debate within the international community as to the definition of "terrorism" and whether it comprised State actions as well as the actions of individuals. As the United States acknowledges in its Preliminary Objections, "individual terrorists might, of course,

420 Ibid., para. 39.

421 U.S. Preliminary Objections, pp. 168-169.

be covertly directed or supported by States in particular incidents[422]".

5.77 The possible involvement of States or State organs in terrorist activities was subsequently discussed at length, including at the 1984 meeting of the International Law Association. The American scholar, Professor Alfred Rubin summed up the issue at that time as follows -

> "All acts of terrorism are performed by 'people' whether or not purportedly clothed with the authority of a State, just as war crimes can be committed by soldiers as such ... In our opinion, or at least in mine, the legal and political factors underlying that solution to the problem of war criminality apply equally to 'terrorism' and to make the concept of 'State terrorism' both inappropriate and unnecessary[423]".

5.78 The issue of "State terrorism" was also addressed by the Soviet delegate, Professor Staroushenko, who noted that:

> "State terrorism opens the way to the use of armed force and thus poses a direct threat to world peace ... Using the armed forces against another State's sovereignty, its territorial integrity and political independence - and being the first to do so - constitutes an act of aggression. Inflicting any 'preventive' blows, without the Security Council sanctioning them, is also a crime. State terrorism is the shortest way to aggression, and very often it is a deliberate preparation for an act of aggression[424]."

5.79 When the Montreal Convention was drafted in 1971, it was quite clear that there was no desire to provoke a lengthy debate over the scope of

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422 Ibid., pp. 166 and 172. The U.S. State Department has in fact defined terroism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience." U.S. Department of State, Patterns of Global Terrorism: 1988, p. v (1989), cited in Lambert, J.J.: Terrorism and Hostages in International Law, Grotius, Cambridge, 1990, at p. 18. Exhibit 72.

423 International Law Association, Sixty-first Conference, Paris 1984, p. 167, cited in McWhinney, E.: Aerial Piracy and International Terrorism, 1987, p. 155. Exhibit 73.

424 Ibid., p. 153.

what might be deemed "State terrorism". The issue was simply too contentious. The drafters of the Convention therefore quite deliberately left the door open for a broad interpretation of Article 1 by referring to offences committed by "any person" without limiting the reference to "any private person" or "any person in his individual capacity"[425]. In so doing, they were well aware that such persons could, in the words of the United States, be directed or supported by States, and thus be acting as State agents capable of engaging State responsibility.

(iii) The international practice bears out the interpretation of Article 1 of the Montreal Convention set out above

5.80 To support the interpretation of the expression "any person" advanced above, reference can be made to the general practice in the field of crimes against the peace and security of mankind. This practice, followed since the end of the First World War, has now crystallized in all the international instruments, binding and non-binding, which deal with such crimes and has also found express acceptance in most domestic legal systems including the U.S. legal system.

5.81 Admittedly, the Montreal Convention does not expressly mention State agents and uses a term more sweeping and synthetic. However, other international instruments which refer to delicta juris gentium also use the generic term "person" without further specification. This is so, for instance, with regard to Resolution 3074-XXVIII adopted by the General Assembly on 3

425 As has been noted by one author -

> "... with the political discussion of the United Nations (UN) the concept of international terrorism is used in a very broad sense and as a notion including two different types of violations: not only crimes committed by juridicial or physical persons, but international wrongful acts committed by States as well."
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> Konstantinov, E.: "International Terrorism and International Law", German Yearbook of International Law, Vol. 31, Duncker & Humblot, Berlin, 1988, P. 291. Exhibit 74.

December 1973, concerning the "Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity". This Resolution refers in paragraph 4 to "persons suspected of having committed such crimes" and to "persons against whom there is evidence that they have committed war crimes and crimes against humanity" (paragraph 5). It is common ground that the term "person" referred to in this Resolution includes both private individuals and State agents.

5.82 This practice shows that the obligation imposed upon States to prevent and repress delicta juris gentium and to exercise criminal and possibly civil domestic jurisdiction over their individual authors, exist regardless of the functions that such individuals may carry out within the organisation of a State.

5.83 The importance that crimes against the peace and security of mankind have taken on at the international level is closely bound up with and dependent upon the interest that States show for the protection of certain essential values, such as life, human dignity and the freedom of civil aviation. The criminal acts that impair such values are seen as a threat to international coexistence and cooperation. The individuals perpetrating them are regarded as hostes humani generis.

5.84 Furthermore, there is a wide measure of agreement on the idea that the best deterrent against such crimes is represented by the possibility for the greatest number of States to exercise repressive authority, even more so when the crime has been committed by an individual State agent.

5.85 Many treaties and other international legal instruments provide for the duty of States to search for, arrest and bring to trial or,

alternatively, extradite to another State concerned all persons responsible for international crimes including war crimes and crimes against peace and humanity.

5.86 It should be emphasized again that this duty is incumbent upon States, regardless of whether the person accused of the crime has acted in his personal capacity or as a State agent. Whenever he has acted as a State agent, a double responsibility however arises: the personal responsibility of the State agent who has perpetrated the crime and the responsibility of the State on whose behalf the individual has acted.

5.87 The personal responsibility operates at the level of domestic legal orders: it is in view of such responsibility that States have the duty to search for, apprehend and prosecute or extradite persons suspected of international crimes. The responsibility of the State operates at the international level: other States are entitled to take to task the State on whose behalf the individual is alleged to have perpetrated an international crime[426].

426 See, para. 5.70 above. The same generic term is used by the four Geneva Conventions of 1949, which deal with the criminal responsibility of the members of the armed forces responsible for "grave breaches of the Conventions". See, in particular, Articles 49 of the First Convention, 50 of the Second Convention, 129 of the Third Convention and 146 of the Fourth Convention.

5.88 Clearly, the two classes of responsibility are not mutually exclusive, but rather cumulative[427]. That there exists in these cases a dual, cumulative responsibility, although it operates at different levels, is best illustrated by the 1977 Geneva Protocol I to the four Geneva Conventions of 1949. Articles 85-89 of the Protocol provide for the penal repression of "breaches and grave breaches" of the Protocol within the domestic legal system of the High Contracting Parties. However, Article 91 then lays down the principle of State responsibility in the following terms:

> "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

It can be seen, therefore, that the Protocol acts on both the personal (domestic) level and State responsibility (international) level.

5.89 Regard may also be had, by way of illustration, to Article 4 of the Convention for the Prevention and Repression of Genocide of 9 December 1948 which provides, inter alia, that:

> "Persons committing genocide or any of other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals."

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427 On this matter see, Oppenheim, L. and Lauterpacht, H.: International Law, II, 7th ed., London, 1952, pp. 577-588; Greenspan, M.: The Modern Law of Warfare, Berkeley and Los Angeles, 1955, pp. 418-511; Bassiouni, M.C. and Nanda, V.P.: (eds.), A Treatise on International Criminal Responsibility, Springfield, Ill, 1973, Vol. I, pp. 103-155 (papers by E.G. Tornaritis, S.P. Sinha and F. Münch), Vol. II, pp. 65-86 (paper by R. Baxter) and 86-96 (paper by O. Triffterer); Röling, B.V.A.: "Aspects of the Criminal Responsibility for Violations of the Laws of War", in Cassese, A. (ed.), The New Humanitarian Law of Armed Conflict, I, Napoli, 1979, pp. 199-231; Cassese, A.: International Law in a Divided World, Oxford, 1986, pp. 274-276, 290-293; Brownlie, I.: Principles of Public International Law, 4th ed., Oxford, 1990, pp. 561-564.

5.90 The same concept is taken up in the International Convention of 30 November 1973 for the Suppression and Punishment of the Crime of Apartheid, the purpose of which is the prevention and punishment of acts of apartheid for which "individuals, members of organizations and institutions and representatives of the State" are responsible (Article 3, paragraph 1).

5.91 Similarly, the Convention on the Non-Applicability of *Statutory Limitations to War Crimes and Crimes against Humanity of 26* November 1968 applies to both "representatives of the State authority" and "private individuals" (Article 2). Attention must be drawn to the fact that when this provision specifically refers to individuals, acting in their private capacity, it uses the term "private individuals". This contrasts with the wording of Article 1 of the Montreal Convention which refers to "any person", and underscores the significance of the fact that no exclusion was provided for in Article 4 of the Convention for the acts of State agents.

5.92 The same approach is reflected in a recent international instrument, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which entered into force on 1 March 1992. This Convention, which used as its model the Montreal Convention (indeed, even the titles are almost identical) is similar to the Montreal Convention, both as to the content of the criminal acts it bans and as to the obligations on the Contracting States. In Article 3 it provides for offences committed by "any person", as does the corresponding provision contained in Article 1 of the Montreal Convention.

5.93 It should be noted that in the course of the conference which led to the adoption of the Maritime Convention there was a certain amount of discussion as to the inclusion of a reference to unlawful acts committed by persons acting on behalf of a State. In the event, a consensus was reached that

there was no need to make express reference to State-sponsored acts since the acts covered by the Convention were expressed to be acts committed by "any person", and this included, as a matter of course, acts of persons sponsored by States[428].

5.94 It must be noted that the Preamble of the Maritime Convention offers a key to the interpretation of the term "any person" used in Article 3, in that it explicitly mentions the U.N. General Assembly Resolution 40/61 of 9 December 1985, notably where it "unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardise friendly relations among States and their security" (emphasis added).

(iv) Conclusions as to Article 1

5.95 Under international law, references to "persons" are by no means limited to private individuals. For example, in its Restatement (Third) of the Foreign Relations Law of the United States, the American Law Institute states:

> "The principal persons under international law are states[429]."

5.96 There is no doubt that the drafters of the Montreal Convention were aware that "persons" as such could include States and that they intentionally used the term "any person" in Article 1 so as not to limit its effect. It

428 See, Plant, G.: "The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation", Int'l Comp. L. Q., Vol. 39 (1990) at p. 33. Exhibit 75.

429 Restatement (Third) of the Foreign Relations Law of the United States, the American Law Institute, Washington, D.C., 1986, p. 70 (emphasis added). A copy of this page is attached in Exhibit 76. See, also, Brownlie, I.: Principles of Public International Law, Oxford, 1979, p. 436 where the author confirms that States exist as legal "persons" under international law.

follows that absent any express restriction in Article 1 indicating that it only applies to private individuals, the reference to "any person" must also include State agents when the acts complained of are carried out by State officials or agents. This, in turn, gives rise to State responsibility.

5.97 To sum up, it is warranted to hold the view that international legal instruments show that quite apart from the personal responsibility of State agents who can be held responsible at the domestic level, the responsibility of the State to which they belong as organs is also engaged and operates at the interstate level.

5.98 In any event, as has been pointed out at paragraphs 5.55 to 5.58 above, the entire question of the scope of the term "any person" is one for the Court to address at the merits stage of the case since it involves the interpretation or application of the Montreal Convention. This being said, the survey of international practice undertaken above, as well as the interpretation based on the preparatory works, fully bears out and substantiates the plain and ordinary meaning of Article 1 of the Montreal Convention.

SECTION B. The Practice Followed by ICAO Is Not Germane to the Question Whether the Montreal Convention Is Applicable to the Present Dispute

5.99 The United States contends that the non-applicability of the Montreal Convention to the present dispute is confirmed by what it calls "subsequent practice" in application of the Convention such as the action of ICAO in not referring to the Convention when dealing with analogous incidents including the 21 February 1973 shooting down of a Libyan civilian airliner by Israeli military aircraft and the 1 September 1983 shoot-down by a Soviet military airplane of a Korean civil airliner. According to the United States, when ICAO condemned or deplored these kind of attacks, it did so solely by invoking the

provisions of the Chicago Convention[430]. Had the Montreal Convention been relevant, so the United States contends, it would have been referred to as well.

5.100 This inference is demonstrably incorrect. As is explained below, in the incidents just named, the injured parties only took issue with the application of the Chicago Convention and its Annexes and not with the application of the Montreal Convention. Consequently, ICAO was never called upon to touch upon, much less interpret or apply, the Montreal Convention.

(i) **The lack of legal relevance of the "subsequent practice" referred to by the United States**

5.101 The first flaw in the United States' argument is that the "practice" referred to has no legal relevance to the interpretation of the Montreal Convention. The United States cites Article 31(3)(b) of the Vienna Convention on the Law of Treaties to support its view that any subsequent practice in the application of the Montreal Convention which establishes the agreement of the parties regarding its interpretation may be taken into account[431]. However, reliance on this article is entirely misplaced because its application depends on the existence of two criteria: (i) that the "subsequent practice" be in application of the treaty being interpreted, and (ii) that such practice establish the agreement of the parties regarding its interpretation. With respect to the "practice" referred to by the United States, it neither has anything to do with the Montreal Convention, nor does it evidence an agreement amongst contracting parties as to its interpretation. Since both elements are prerequisites for Article 31(3)(b) of the Vienna Convention to apply, their absence completely undermines the validity of the United States' argument.

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430 U.S. Preliminary Objections, pp. 172-181.

431 Ibid., pp. 172-173 and note 1 to p. 173.

5.102 As will presently be seen, neither the 1973 Israeli shoot-down of the Libyan civil airliner, nor the subsequent Israeli diversion of a Lebanese civil aircraft, nor the 1983 shoot-down of KAL Flight 007 was discussed by ICAO in the context of the Montreal Convention. Since ICAO had no power to address the interpretation or application of the Montreal Convention to those incidents, it is impossible to see how its debates can rise to the level of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". There was no effort to interpret the Montreal Convention in connection with any of the "practice" cited, and certainly no agreement on its interpretation[432].

5.103 Similarly, the debates before the ICAO in 1973 on whether to amend the Chicago Convention were not directed at interpreting the Montreal Convention, which the participants had no authority to do, but focused instead on modifying the Chicago Convention[433]. Quite simply, the application of the Montreal Convention was not at issue, and there was no agreement amongst the State parties to it regarding its interpretation within the meaning of Article 31(3)(b) of the Vienna Convention. Indeed, there was not even agreement amongst the parties with respect to amending the Chicago Convention.

5.104 It follows that the legal premise on which the United States' entire argument based on "subsequent practice" rests is faulty, and the practice

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432 There is further logical defect in the U.S. argument. If, as the United States has maintained, the "subsequent practice" shows that the Montreal Convention did not apply to the incidents in question, how can this practice be relied on as an example of subsequent practice in the application of the Convention as Article 31(3)(b) of the Vienna Convention requires for it to be taken into account?

433 Unlike Article 94 of the Chicago Convention, which provides for its amendment, there is no similar provision in the Montreal Convention. Moreover, the States that met in 1973 to consider amending the Chicago Convention were not identical to the State parties to the Montreal Convention.

referred to is not really practice within the meaning of the Vienna Convention and has no relevance at all to the interpretation of the Montreal Convention.

(ii) The discussions in ICAO on other aerial incidents

5.105 Notwithstanding the legal shortcomings to the United States' argument, it can also be shown that the argument is misplaced on the facts. While it is true that in neither the Libyan nor the Korean incident did the discussions before ICAO focus on the Montreal Convention, this is not because the Convention was not relevant to such actions, but because ICAO had no power to consider the application or interpretation of the Montreal Convention to the events in question.

5.106 In this respect, the United States fails to appreciate that there is a fundamental difference between the role that ICAO plays under the Chicago Convention and its role under the Montreal Convention.

5.107 As explained in Part IV, under the Chicago Convention the ICAO Council and its Assembly possess a broad spectrum of functions relating to international civil aviation. To name just a few, the Council has an obligation to "consider any matter relating to the Convention which any contracting State refers to it" (Art. 54(n)) and to report any infraction of the Convention to contracting States as well as any failure to carry out recommendations or determinations of the Council (Art. 54(j)). The Council also has the power to carry out investigations of situations which may appear to present obstacles to the development of international air navigation (Art. 55(e)) and, of particular relevance to the present case, to decide disagreements between two or more contracting States as to the interpretation or application of the Chicago Convention (Article 84). As for the Assembly, it has the power to amend the Chicago Convention under Article 94, as well as other powers under Article 88.

5.108 In contrast, under the Montreal Convention ICAO has a much more limited role. This is entirely natural given that the Montreal Convention essentially provides for a series of State rights and obligations whereas the Chicago Convention is the constituent instrument creating the International Civil Aviation Organization, including the ICAO Council and Assembly, and thus defines ICAO's functions.

5.109 Unlike the Chicago Convention which spells out in considerable detail the functions of the ICAO Assembly and Council, ICAO is only mentioned in two places in the Montreal Convention: Article 9 and Article 13. Article 9 provides that contracting States which establish joint air transport operating organizations or agencies, which operate aircraft subject to international registration, shall designate for each aircraft the State that will have the attributes of the State of registration for purposes of the Montreal Convention. Under Article 9, States are obliged to notify such designations to ICAO. ICAO's only duties in this respect are to communicate these notices to State parties to the Montreal Convention.

5.110 Article 13 of the Montreal Convention provides that every contracting State, in accordance with its national law, shall report to the ICAO Council any relevant information in its possession concerning the circumstances of an offence committed under the Montreal Convention[434]. Notwithstanding this obligation, the Council itself has no power to investigate or rule on such matters. Its function is limited to receiving reports. Moreover, neither the Council nor the Assembly have any power to decide matters relating to the interpretation or application of the Montreal Convention. Failing a negotiated

434 Significantly, the Islamic Republic did notify ICAO of the United States' violation of the Montreal Convention in shooting down Flight IR 655 when it introduced the matter before ICAO in July 1988. See, Working Paper C-WP/8644 dated 8 July 1988, p. 3, Exhibit 38.

settlement or an agreement to arbitrate, these remain within the exclusive jurisdiction of the Court.

5.111 In the light of the completely different structures of the Chicago and Montreal Conventions, it is hardly surprising that the Montreal Convention was not invoked in front of ICAO during its debates over the Libyan and Korean incidents. Quite simply, ICAO had no authority to discuss or apply the Montreal Convention to the circumstances at issue[435].

5.112 By the same token, when the United States refers in its Preliminary Objections to the fact that investigations were commissioned by ICAO in both the Libyan and Korean incidents, this simply highlights the fact that ICAO could only act in this way under the Chicago Convention; it had no power to order such investigations under the Montreal Convention. As will be seen in the next section, it was precisely because the ICAO Council lacked the power to deal with matters falling under the Montreal Convention that subsequent efforts were made to amend the Chicago Convention to incorporate elements from the former into the latter.

5.113 It follows that the United States' argument that if ICAO or the parties to the Montreal Convention had construed Article 1 of the Montreal 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 Chicago Convention, had been violated" is completely misplaced[436]. The Council had no authority to act under the Montreal Convention, and thus did not do so. Moreover, ICAO had no power to

435 Moreover, at the time of the Libyan incident, Libya was not yet a party to the Montreal Convention and thus could not have invoked it in any event.

436 U.S. Preliminary Objections, pp. 179-180.

rule on the Montreal Convention's interpretation or application, or whether it had been violated in the circumstances of the case.

5.114 For these reasons, it is not surprising that the debates before the ICAO Council relating to the destruction of Flight IR 655 also did not refer to the Montreal Convention. Any consideration by the Council of the application or interpretation of the Montreal Convention to the incident would have been ultra vires.

5.115 Instead, ICAO dealt with the case on the basis of the Islamic Republic's claims set out in different telexes to ICAO, qualifying the United States' action as a direct interference against the safety and regularity of international air transport operation. The Islamic Republic then requested from the Council the following[437]:

- Explicit recognition that the downing of Flight IR 655 was a breach of international law and of the legal duties of the United States;

- Recognition of the fact that that Contracting State bore international responsibility for the criminal actions of its officials, especially where it had authorized and ratified such actions;

- Explicit condemnation of the use of weapons against Flight IR 655 by the United States, a Member of ICAO;

437 See, Part IV above, paras. 4.31 to 4.33.

- Commissioning of a detailed fact-finding report;

- The setting up of an ad hoc commission (the ANC) charged with conducting an enquiry into the various legal, technical and other aspects of the shoot-down of Flight IR 655. This commission was to report to the Council for the purpose of taking the necessary action to devise relevant rules, regulations and standards, as well as to ensure their proper and effective implementation for the prevention of similar occurrences; and

- The immediate termination of obstacles, restrictions, threats and the use of force against the airspace of the Islamic Republic and the coastal States of the Persian Gulf, which endangered the safe and orderly operation of civil air transport in the region.

5.116 As previously explained, in addition to the condemnation of the United States for the shoot-down of Flight IR 655, the immediate concern of the Islamic Republic was that ICAO demand in the interim that the United States ensure the necessary coordination between the military activity of its naval forces in the Persian Gulf and foreign civil aviation in order to prevent similar disasters. The rest of the debate before the ICAO Council concerned the issues raised under the Chicago Convention since ICAO had no authority to address the interpretation or application of the Montreal Convention.

(iii) The irrelevance of ICAO's suggestions for new agreements or amendments to existing agreements

5.117 In support of its argument that the Montreal Convention is not applicable to the shoot-down of Flight IR 655, the United States further contends that "the response of ICAO to the use of force by States against international civil aviation has been to consider new international agreements[438]". The United States adds that if recourse to force by States was already dealt with by the Montreal Convention, there would have been no need to propose, as occurred during the Extraordinary Sessions of the ICAO Assembly in 1973 and 1984, the adoption of new conventional instruments or the amendment of the Chicago Convention.

5.118 As the United States rightly points out, one of the principal impetuses for the proposal in 1973 to amend the Chicago Convention came from the diversion and seizure of a Lebanese civilian aircraft by Israeli warplanes on 10 August 1973[439]. It does not follow from this, however, that such amendments would have been superfluous had the Montreal Convention already covered the use of force by States against civil aircraft. As will be seen, there were other compelling reasons why ICAO debated incorporating the Hague and Montreal Conventions into the Chicago Convention.

5.119 What is significant about the Lebanese incident is that it involved an action taken against a civil aircraft that was not already covered by either the Hague or Montreal Conventions. This was not because these conventions did not concern State actions, but rather because neither of them dealt with the same kind of interference in civil aviation as had occurred in connection with the diversion of the Lebanese aircraft.

438 *U.S. Preliminary Objections*, p. *181*.

439 Ibid., p. 182

5.120 The Hague Convention, it will be recalled, deals with offences committed by persons and their accomplices who, on board an aircraft in flight, seize or otherwise unlawfully take control of that aircraft. Consequently, nothing in the Hague Convention would have covered an incident where foreign military aircraft had diverted a civil airliner.

5.121 The Montreal Convention, on the other hand, does not address "interference" with civil aircraft in the broad sense of the term, but rather deals with the actual destruction of, or the attempt to destroy, an aircraft in flight or an act of violence against a person on board if that act is likely to endanger the airplane's safety. Thus, nothing in the Montreal Convention would have covered the Lebanese aircraft incident either since the destruction of the aircraft was not in question.

5.122 It is clear that one of the considerations in proposing amendments to the Chicago Convention in 1973 was to close what were perceived to be gaps in the Hague or Montreal Conventions as illustrated by the Lebanese aircraft incident. There is no basis, therefore, for asserting that such amendments would not have been necessary if the Montreal Convention already covered State actions. For even if the Montreal Convention did cover State actions, as the Islamic Republic submits is the case, the incident involving the diversion and seizure of the Lebanese aircraft would still have fallen outside the scope of its application. In short, neither the Hague nor the Montreal Convention dealt with such a situation, and thus amendments were considered necessary in order to deal with "interference" in civil aviation in the broader sense of the word.

5.123 There was an additional, equally important reason why some delegates considered that elements of the Hague and Montreal Conventions should be incorporated into the Chicago Convention. This

concerned the role of ICAO in matters that otherwise would fall within the purview of those two instruments.

5.124 As noted in the previous section, ICAO's role under the Montreal Convention is restricted essentially to disseminating information and reports submitted by contracting States. It has no independent power to examine questions under the Montreal Convention, to decide matters of interpretation or application, to provide enforcement measures, or to amend the Convention[440].

5.125 In order to broaden ICAO's jurisdiction over matters falling within the scope of the Hague and Montreal Conventions to match the powers provided for in the Chicago Convention, it was necessary to incorporate the provisions of the former into the latter. As the United States acknowledges, the proposals for the incorporation of the Hague and Montreal provisions into the Chicago Convention were aimed at subjecting States that violated the obligations contained in the first two Conventions to the "enforcement measures provided for in the Chicago Convention[441]". This argument constitutes the most cogent confirmation that the provisions of the Montreal Convention were not already subject to ICAO enforcement measures and consequently could not be relied upon before ICAO bodies - contrary to what the United States implies, when it stresses the fact that the Montreal Convention was never invoked before ICAO in incidents concerning attacks on civil aviation.

5.126 That one of the most important purposes behind the proposals to amend the Chicago Convention was to expand the role of ICAO has

440 The situation was similar with respect to the Hague Convention, with ICAO's role limited to that provided for in Article 5 (corresponding to Article 9 of the Montreal Convention) and Article 11 (corresponding to Article 13 of the Montreal Convention).

441 U.S. Preliminary Objections, p. 189.

been noted by Judge Guillaume in his seminal work on Le Terrorisme Aérien. Judge Guillaume writes:

> "Une telle incorporation aurait permis au Conseil de l'Organisation de procéder à des enquêtes, de formuler des recommendations et de régler d'éventuels différends en cas de violation des dispositions des Conventions de La Haye et de Montréal par les Etats parties. Par ailleurs ces Etats auraient pu être l'objet des sanctions actuellement prévues par l'article 88 de la Convention de Chicago[442]."

Under the Montreal Convention, of course, the Council had no such power to carry out investigations or report infractions and no power to impose sanctions.

5.127 Clearly, therefore, there was nothing redundant in incorporating these aspects of the Montreal and Hague Conventions into the Chicago Convention regardless of whether they already covered State actions. The intent was to provide ICAO with powers it did not otherwise have.

5.128 In the light of the above, it is clear that the United States' argument based on the fact that the ICAO Committee replied affirmatively to the following two questions: "Does the Executive Committee wish to include in the Chicago Convention, provisions of the Hague and Montreal Conventions?", and "Does the Executive Committee wish to include in the Chicago Convention provisions concerning acts of unlawful interference committed by States?" is misdirected. It is not surprising that no delegate judged as "redundant" the affirmative answers given to both questions since by incorporating provisions of the Hague and Montreal Conventions into the Chicago Convention, the role of ICAO would have been considerably expanded. All this did not mean, however,

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442 Guillaume, G.: "Le Terrorisme Aérien", I.H.E.I. (1976/77) at pp. 48-49. Exhibit 77.

that the Montreal Convention did not already deal with the actions of the States as the United States incorrectly suggests[443].

5.129 As for the U.S. argument that the proposal in 1984 to adopt a new Article 3 bis to the Chicago Convention would have been unnecessary if the Montreal Convention had already covered State actions against civil aircraft, it too falls short of the mark. It is well known, as the Islamic Republic pointed out in its Memorial, that in adopting Article 3 bis the ICAO Assembly did not intend to create a new rule of law, but to reflect a pre-existing one[444]. This simply confirms that the mere fact that there were proposals to amend the Chicago Convention does not in itself signify that the amendments suggested were not already part of the corpus of existing law under the Convention. As in the case of Article 3 bis, it was perfectly possible to adopt new provisions in the Chicago Convention which reflected pre-existing rules of law.

5.130 In conclusion, both the practice followed by ICAO after State attacks against civil aircraft, and the proposals presented during the Diplomatic Conferences in 1973 and 1984 with a view to inserting in the Chicago Convention the explicit prohibition of armed attacks against civil aviation (proposals resulting in the adoption of Article 3 bis), are perfectly compatible with the Islamic Republic's contention that the Montreal Convention is applicable to unlawful acts committed by State agents against civil aviation.

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443 U.S. Preliminary Objections, pp. 186-187. The kind of flaw in the United States' reasoning is symptomatic of a more general methodological defect in the pleading as a whole. Often the United States tries to draw inferences based on a pyramid of hypotheses as to what a conference or debate did not do, rather than focusing on the points where agreement was actually reached. This is why the Islamic Republic submits that the "practice" cited by the United States is irrelevant to the points at issue; it simply does not reflect any agreement by the contracting parties as to the Montreal Convention's interpretation.

444 See, Memorial of the Islamic Republic, pp. 147-154.

CHAPTER III THE MONTREAL CONVENTION AND INTERNATIONAL ARMED CONFLICT

5.131 It has lastly been contended by the United States that "there is no indication that the drafters of the Montreal Convention intended it to apply to military forces acting in [international] armed conflict". According to the United States, since the confrontation between U.S. forces, which had intruded into the Islamic Republic's territorial waters on the morning that IR Flight 655 was shot down, constituted an "international armed conflict", the Montreal Convention is not applicable to this case[445].

5.132 The Sections below shall demonstrate that:

- The incident that led to the shoot-down of Flight IR 655 did not occur within the framework of an international armed conflict;

- Nonetheless, even assuming for the sake of argument that an international armed conflict was in progress between the United States and the Islamic Republic at the time of the downing, this would by no means entail the inapplicability of the Montreal Convention to the case at issue.

SECTION A. At the Time of the Shoot-down of Flight IR 655 the United States and the Islamic Republic Were Not Engaged in an International Armed Conflict

(i) The factual aspects of the issue

5.133 A review of the salient facts surrounding the destruction of Flight IR 655 reveals that the events of that day did not rise to the level of an intentional armed conflict as the United States would have the Court believe. It

445 U.S. Preliminary Objections, pp. 200-203.

has been shown in Part II that the entire incident was triggered by the unilateral decision of the United States to send a military helicopter from one of its warships into Iranian territorial waters on the pretext of "assisting neutral shipping" when what was actually involved was a mission to harass and provoke the Islamic Republic's small patrol boats.

5.134 Having been warned away by the patrol boats, the helicopter left, only to be followed in a separate incident almost an hour later by the Vincennes itself which intruded some eight nautical miles into the Islamic Republic's territorial waters. In what was virtually an ambush, the Vincennes then attacked the small patrol boats, firing over 350 rounds at them.

5.135 This was not the first time that the United States had engaged in such activities. In October 1987 and again in April 1988 the United States had attacked and destroyed several offshore Iranian oil platforms. Moreover, by the admission of its own officials, the United States had also routinely harassed the Islamic Republic's patrol boats which were engaged in defensive measures necessitated by the war initiated by Iraq.

5.136 In contrast to its present arguments, never once during 1987 or 1988 did the United States indicate that it considered itself to be in an "armed conflict" with the Islamic Republic. To the contrary, the kind of incidents mentioned above were viewed by the United States as isolated incidents, and the United States repeatedly stressed to its public and to the United Nations that it did not seek a confrontation with the Islamic Republic and that it was neutral in

the Iran-Iraq war[446]. Obviously, the concept of remaining neutral is fundamentally incompatible with the argument that a state of "armed conflict" existed.

5.137 The Commander of the Vincennes' sister ship, the Sides, has also belittled the idea that the United States was engaged in an armed conflict with the Islamic Republic. As noted in the Islamic Republic's Memorial, Commander Carlson of the Sides wrote after the downing of Flight IR 655:

> "My experience was that the conduct of Iranian military forces in the month preceding the incident was pointedly non-threatening. They were direct and professional in their communications, and in each instance left no doubt concerning their intentions[447]."

These words scarcely conjure up the image of a state of armed conflict between the two countries.

5.138 Nor did the United States ever intimate during the debates before ICAO or the U.N. Security Council that it had been engaged in an armed conflict with the Islamic Republic at the time of the shoot-down. That argument has surfaced for the first time purely as an afterthought in the United States' Preliminary Objections[448].

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446 See, for example, the letter dated 23 May 1988 addressed by the Acting Permanent Representative of the United States to the United Nations to the Secretary-General. Exhibit 78. The U.S. Secretary of Defense, Mr. Weinberger, reiterated this position by emphasizing that the United States was not seeking further hostilities with the Islamic Republic. Financial Times, 21 October 1987. Exhibit 79.

447 See, Memorial of the Islamic Republic, p. 75.

448 Similarly, the United States made no reference to Article 89 of the Chicago Convention, an alternative that was open to it if it genuinely concluded that it and the Islamic Republic were belligerents.

5.139 Having itself instigated whatever confrontations occurred on 3 July 1988 by sending a military helicopter and, subsequently, two warships into the Islamic Republic's territorial waters, the United States cannot now seek to exculpate itself by arguing that these actions effectively suspended the operation of the relevant treaty provisions.

(ii) **Legal considerations**

5.140 Citing the Commentary by the International Committee of the Red Cross ("ICRC") on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, the United States asserts that "[a]lthough 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[449]". This argument may be controverted both in law and in fact, since in view of the facts, it is apparent that the state of relations between the two Parties did not then rise to the level of an international armed conflict.

5.141 The assertion that there is "universal agreement" on the definition of "armed conflict" that the United States presents is grossly exaggerated. It is true that the ICRC Commentary quoted by the United States suggests a very broad concept of such conflicts. Indeed, according to the Commentary, an international armed conflict is " any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by

449 U.S. Preliminary Objections, p. 202.

the situation of the persons and the objects protected by it[450]". It must also be conceded that the ICRC Commentary on the four Geneva Conventions of 1949 takes the same view[451].

5.142 However, this does not mean that the Commentaries set forth an authoritative view on the matter. Nor do they necessarily reflect the official position of States. In fact, the Foreword to the ICRC's Commentary on each of the Geneva Conventions specifically states that:

> "Although published by the International Committee, the Commentary is the personal work of its authors. The Committee, moreover, whenever called upon for an opinion on a provision of an international Convention, always takes care to emphasize that only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty[452]."

5.143 On the other hand, the very broad concept of armed conflict the Commentaries advocate is accounted for by the need - deeply and laudably felt by the ICRC - to try and expand, as far as possible, the scope and impact of the international humanitarian law of armed conflict in order to extend the protection accorded to non-combatants. To ascertain whether States uphold the

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450 Commentary, by the International Committee of the Red Cross on the Additional Protocols of 8 June 1977 to the 1949 Geneva Convention, p. 40, para. 62. U.S. Preliminary Objections. Exhibit 78.

451 See, for instance, Pictet, J.S.: Commentary on the IVth Geneva Convention, Geneva, 1958, p. 20 ("Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place".) Exhibit 80.

452 For example, see Commentary by the ICRC on the Fourth Geneva Convention. Foreword. Exhibit 81. A similar reference to this point is made in the Foreword to the ICRC's Commentary to the 1977 Additional Protocols where the President of the ICRC notes that "the ICRC also allowed the authors their academic freedom, considering the Commentary above all as a scholarly work, and not as a work intended to disseminate the views of the ICRC." Exhibit 81.

very broad notion propounded by the ICRC, it is necessary to undertake an examination of their official views.

5.144 In this respect, it is first worth pointing out that the United States has not even ratified the 1977 Geneva Protocols. With respect to the position taken by the United Kingdom after the adoption of the two Geneva Protocols of 1977, reference can be made to the manual "The Law of Armed Conflict" prepared under the Direction of the British Chief of the General Staff and approved in 1981 by the U.K. Ministry of Defence. In Section 2, para. 4 of the Manual it is stated that:

> "Because of the consistent failure of countries to recognise the existence of a state of war, the term 'law of armed conflict' is strictly more accurate than 'the law of war'. The aim is to ensure the wider application of the law of armed conflict which applies if there is
> a. a war; or
> b. occupation of the territory of one state by another; or
> c. sustained and concerted military operations akin to war[453]."

5.145 It is apparent from the above that in the official opinion of the United Kindom's authorities, not every "difference" between the armed forces of two or more States can amount to an "international armed conflict" coming within the purview of the Geneva Conventions and Protocols. Only those armed clashes that involve such large-scale and protracted hostilities as to be "akin to war" can be classified as "armed conflict".

5.146 An even more significant piece of evidence as to the opinion of States can be found in Article 1, paragraph 2 of the Second General Protocol Additional to the 1949 Geneva Conventions, of 10 June 1977. This provision stipulates that:

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453 See, The Law of Armed Conflict, Manual prepared by the U.K. Chief of the General Staff, 1981, p. 6 (emphasis added). Exhibit 82.

> "This Protocol [concerning non-international armed conflict] shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts[454]."

5.147 As was rightly pointed out by Professor K.J. Partsch, this provision furnishes the answer to the question of what is to be meant by "armed conflict"[455]. In this respect, the provision has a value and significance which goes beyond the definition of "non-international armed conflict". The specific terminology used by the Diplomatic Conference ("as not being armed conflicts") shows that the draftsmen intended to clarify what in their view was meant by such a notion - a notion equally applicable to "international armed conflicts". In the light of these considerations, it follows that "isolated and sporadic acts of violence and other acts of a similar nature" do not reach the threshold required for an "international armed conflict" in the same manner as they do not constitute a "non-international armed conflict".

5.148 That the law of armed conflict does not encompass isolated and sporadic military confrontations is borne out by close scrutiny of the contents of that law. It embraces such rules as those on the protection of civilians in hospital and safety zones and localities, the so-called neutralized zones, on the treatment of aliens in the territory of a party to the conflict, the regulation of occupied territories, the treatment of internees - to quote just the major provisions of the Fourth Geneva Convention of 1949 - as well as all the detailed regulation of prisoners of war that can be found in the Third Geneva Convention of 1949 and the extensive legal regulation of the condition of the sick, wounded and shipwrecked contained in the First and Second Geneva Conventions.

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454 Emphasis added.

455 Partsch, K.J.: "Armed Conflict", in Bernhardt, R. (ed.): Encyclopedia of Public International Law, Vol. 3, 1982, p. 25 at p. 26. Exhibit 83.

5.149 If all these rules do not apply to an isolated incident between the armed forces of two States, the obvious reason for this non-application is that the incident does not fall within the province of armed conflicts proper, although of course such incidents could remain subject to those "elementary considerations of humanity, even more exacting in peace than in war", to which the Court has rightly adverted in the Corfu Channel case[456].

5.150 Having reviewed in Section (i) above the factual aspects of the matter, if one were to term the events of 3 July 1988 an "international armed conflict", then practically any resort to force by a State against another State, whatever the scale and duration of the use of force, would have to be defined as an "international armed conflict" making operational all the detailed and numerous aforementioned rules and principles of the law governing such conflicts. The absurdity of such consequences clearly show how unrealistic and unacceptable it would be to refer to the breaches of international law perpetrated by the United States on 3 July 1988 as an "international armed conflict" for the sole purpose of the United States' avoiding liability.

5.151 The correct legal description of the position of the Parties is as follows: while the Islamic Republic and Iraq were engaged in an international armed conflict that had taken on the proportion and characteristics of a war proper, the position of the United States vis-a-vis this war was that of a third party, bound by the duties - stemming from neutrality law - of impartiality towards the belligerents and non-participation in the armed conflict, particularly where the United States had repeatedly professed its neutrality in the war.

456 Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 4, at p. 22.

5.152 At the same time, vis-à-vis the two belligerent countries, the United States was also bound by all the rules and principles of the law of peace - to the extent that they had not been replaced by the laws of neutrality - including the U.N. Charter and all the various conventions protecting the safety of civil aviation, among which of course is the Montreal Convention[457].

SECTION B. Even Assuming that the United States and the Islamic Republic Were Engaged in an International Armed Conflict, Quod Non, the Montreal Convention Was Nevertheless Applicable

5.153 Even assuming, arguendo, that the United States is right in holding that at the time of the downing of Flight IR 655 the two States were engaged in an international armed conflict, it would by no means follow, as the United States contends, that the Montreal Convention was suspended or otherwise inapplicable as between the two States. In fact, the view advocated by the United States in its Preliminary Objections is based on a misconception: the United States fails to see the fundamental difference between an international armed conflict and a state of war. This is a crucial point on which it is necessary to dwell, if only briefly.

5.154 According to the unanimous view taken in the legal literature, war is only a class of international armed conflict. More specifically, war is an armed conflict characterized by the following elements:

457 It is necessary to add that to the extent the Court deems it necessary to determine whether there was an "armed conflict" such as to suspend the application of the Montreal Convention, this would also be an issue to take up at the merits stage since it would relate not only to the facts of the case, but also to the question of the interpretation, and particularly the application, of the Montreal Convention.

(i) The intention of at least one of the belligerent States to replace the law of peace with the status of belligerency vis-a-vis the other belligerent (so called animus belligerandi);

(ii) The actual replacement of the law of peace with the law of war in its entirety between the belligerents;

(iii) The applicability of the law of neutrality, in its entirety, to the relations between each belligerent and third States;

(iv) The breaking off of diplomatic relations between the belligerent States;

(v) The termination of political treaties between the belligerents, the suspension of multilateral treaties not radically incompatible with the status of war, in addition to the specific treaties on warfare becoming operational for them[458].

5.155 International armed conflicts that are not elevated to the rank and status of war do not entail the radical change in legal status between the belligerents as well as between each belligerent and third States as is rendered necessary by the state of war.

458 See, in particular, Schindler, D.: "State of War, Belligerency, Armed Conflict", in Cassese, A. (ed.): The New Humanitarian Law of Armed Conflict, Vol. I, Napoli, 1979, pp. 3-20, Exhibit 84. See, also, Skubiszewski, K.: "Peace and War", in Bernhardt, R. (ed.): Encyclopedia of Public International Law, Vol. 4, 1982, pp. 74-78, Exhibit 85.

5.156 Contrary to what the United States argues now, at the time of the incident it recognized that no such radical change had occurred such as to suspend the operation of its international obligations under the Montreal or other Conventions. Certainly, the United States gave no notice, whether under Article 65 of the Vienna Convention on the Law of Treaties or otherwise, that it considered any conventions to be so suspended. Moreover, as alluded to above, the United States also did not invoke Article 89 of the Chicago Convention regarding suspension of its obligations thereunder, and never raised the issue in the various parliamentary debates before ICAO or the United Nations in which it participated. Even if this had not been the case, as one commentator has noted, "[a]cts directed against the safety of international civil aviation as a rule are not covered by the international law of war[459]". Still less would they be covered by the doctrine of "armed conflict".

5.157 To the extent that the United States argues that the drafters of the Montreal Convention would have had to address a myriad of issues relating to the acts of military forces if they had intended the Convention to apply to military forces acting in an armed conflict, there is no support for such an alarmist position. The United States seeks to buttress its argument by referring to Articles 25-30 of the First Additional Protocol to the Geneva Convention of 1949[460]. Yet these articles apply to the activities of domestic, military or civilian medical aircraft involved in non-scheduled domestic operations, in un-established air routes, and used in military or police services although exclusively assigned to medical transport. As such, medical aircraft are not covered by the Montreal Convention under Article 4, paragraphs 1 and 2. For that reason, they have been

459 See, Hailbronner, K.: "Civil Aviation, Unlawful Interference With", in Encyclopedia of Public International Law, Vol. 11, 1989, p. 57 at p. 58. Exhibit 86.

460 U.S. Preliminary Objections, pp. 203-204.

given a limited protection in the Protocol. This situation therefore has nothing to do with civil aircraft involved in regularly-scheduled international commercial flights in predetermined air corridors which are covered by the Convention.

5.158 The United States also contends that the drafters of the Montreal Convention would have had to pay attention to the 1923 draft Hague Rules of Aerial Warfare if they had intended the Convention to apply to the actions of a State's armed forces[461]. However, this argument fails to take into consideration that the draft 1923 Rules were never adopted in a legally binding form[462].

5.159 In this respect, the United States' argument exhibits a remarkable inconsistency. On the one hand, the United States seeks to rely on the 1923 draft Rules to support its argument that the Montreal Convention is not applicable to this case. On the other hand, the United States, as well as expert authorities in the field, have consistently held that there are no set rules covering aerial warfare. As U.S. Major W.G. Downey observed in the Proceedings of the Amercian Society of International Law, "as you are probably aware, there are no rules governing aerial warfare[463]." Similarly, de Saussure has concluded:

> "There is no dearth of opinion that in the matter of air warfare there are, in fact, no positive rules... 'In so sense but a rhetorical one' wrote Professor Stone in 1955 'can there still be said to have emerged a body of intelligible rules of air warfare comparable to the traditional rules of land and

461 Ibid., pp. 204-205.

462 See, Documents on the Laws of War (Roberts, A. and Guelff, R.; eds.), Oxford, 1982, p. 121. Exhibit 87.

463 Downey, Revision of the Rules of Warfare, Proceedings of the American Society of International Law, Forty-third Session,1949, p.102,at p.107. This view is endorsed in the U.S.Department of the Air Force's Pamphlet No. 110/31 of 1976 (p.31) which notes that The Hague draft Rules of 1923 "do not represent customary international law as a total code" even though they "have some authority because emminent jurists prepared them".

sea warfare'" [464].

5.160 Moreover, the United States' argument also ignores the duties that a State's military forces have to coordinate their activities with civil aviation authorities under Annexes 2, 11 and 15 to the Chicago Convention. As ICAO has already observed, the United States failed to respect these obligations, as well as those under the Chicago Convention, which were in no way suspended in connection with its activities in the Persian Gulf[465]. Of course, it is significant that the United States does not raise a similar argument with respect to the Treaty of Amity for the period from 1980 through 1988. Since the United States constantly was relying on the Treaty before this Court, the Iran-U.S. Claims Tribunal, and its own domestic courts during this period, the United States obviously had no interest in arguing that the Treaty's effect was suspended[466].

5.161 As for the United States' assertion that the Islamic Republic never complained to the ICAO Council that the Montreal Convention had been violated when it reported that Iraq had shot down a civilian aircraft in 1986[467], this argument suffers the same fate as the United States' other references to previous aerial incidents. The short answer is that the Islamic Republic requested ICAO to condemn Iraq's actions, including its issuance of an illegal NOTAM, under the Chicago Convention because that was the Convention under which the ICAO Council had authority to act. As noted above, the Council had no similar

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464 De Saussure, The Laws of Air Warfare: Are There Any? U.S. Naval War College, International Law Studies, 1947-1977 Vol. 62 (1980), 280, at p. 281 citing J. Stone, Legal Control of International Conflicts (New York: Rinehart, 1954), p. 609.

465 See, paras. 3.01-3.52 and paras. 4.15-4.32 of the Memorial of the Islamic Republic.

466 At footnote 1 to page 91 of the U.S.Preliminary Objections, the United States only reserves its position as to the application of the Chicago Convention to surface vessels engaged in combat.

467 U.S. Preliminary Objections, p. 207.

power to act with respect to the interpretation or application of the Montreal Convention.

5.162 Thus, even assuming that the United States and the Islamic Republic were engaged in an international armed conflict at the time of the shoot-down, it would not follow that the Montreal Convention had somehow become inapplicable. Indeed, the Convention aims at safeguarding the safety of civil aviation, regardless of whether or not an international armed conflict is in progress. Close scrutiny of the object and purpose of the Convention's provisions shows that they are not incompatible with the international principles and treaty rules governing international armed conflicts; rather they supplement and strengthen the protection afforded by these principles and rules. Thus, while general principles on international armed conflicts require the belligerent parties not to attack civil aircraft[468], the Montreal Convention supplements this regulation[469].

5.163 It can therefore be concluded that neither the text of the Montreal Convention nor the relevant international rules governing international armed conflicts warrant the view that the applicability of the Montreal Convention to the downing of Flight IR 655 was to be excluded on account of the existence of an international armed conflict between the United States and the Islamic Republic. On the contrary, the Montreal Convention usefully and conveniently supplements the principles and rules regulating armed conflicts, in that it restates and strengthens that humanitarian protection against unlawful

468 As the First Geneva Protocol of 1977 has not yet been widely ratified (one of the States that so far have failed to ratify it being the United States), Articles 48-60 of the Protocol, concerning the general protection of the civilian population against effects of hostilities, are only binding on the contracting States.

469 The same duty is provided for in Article 85 of the First Geneva Protocol, but of course this provision is only binding on contracting States.

attacks on civil aircraft, which constitutes one of the pillars of both the law of peace and the law of armed conflict.

5.164 In conclusion, whether or not the relations between the United States and the Islamic Republic at the time of the downing of Flight IR 655 are termed an international armed conflict, the applicability of the Montreal Convention appears in any case to be unquestionable.

PART VI

JURISDICTION UNDER THE TREATY OF AMITY

6.01 The compromissory clause in the Treaty of Amity on which the Islamic Republic relies as a basis of jurisdiction is contained in Article XXI(2), which provides:

> "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[470]."

6.02 In its Preliminary Objections, the United States has raised four reasons why jurisdiction should be refused under the Treaty[471]. The United States alleges (i) that the Islamic Republic is asserting the Treaty in bad faith and is thus barred from invoking it because of its past conduct; (ii) that the Islamic Republic is seeking to transform the dispute into a different dispute from that raised in its Application; (iii) that the Islamic Republic may not rely on the Treaty's compromissory clause because it has made no effort to resolve the dispute by diplomacy; and (iv) that the Treaty of Amity is purely a commercial treaty and is thus irrelevant to the subject-matter of the Islamic Republic's Application, the shooting down of Flight IR 655 and its attendant circumstances.

6.03 As will be shown in this Part, these contentions do not stand up to scrutiny. For over ten years, the United States has consistently taken the position before this Court and the Iran-U.S. Claims Tribunal that the Treaty of Amity may be invoked against the Islamic Republic and that the Islamic Republic is barred from repudiating it. In these circumstances, the argument that the

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470 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, signed on 15 August 1955, 284 U.N.T.S. 93, Exhibit 3 to the Memorial of the Islamic Republic.

471 See, generally, U.S. Preliminary Objections, pp. 213-237.

Islamic Republic is now precluded from relying on the Treaty is not in good faith. Having repeatedly relied on the Treaty during this period, and having reaped the benefits of judicial decisions predicated on its application, it is the United States which should be precluded from objecting to the Treaty as a basis of jurisdiction. Moreover, while certain Iranian entities may have questioned the application of the Treaty in cases before the Iran-U.S. Claims Tribunal during this period, the Government of the Islamic Republic refrained from taking a position on the issue[472]. Even if the United States had not changed its position, therefore, and even if the Court and the Iran-U.S. Claims Tribunal had not consistently applied the Treaty, the Islamic Republic would still be entitled to invoke the Treaty here.

6.04 It is also clear that the Islamic Republic has not transformed the dispute into a different one from that introduced in its Application. It has simply added a complementary basis of jurisdiction without changing the underlying subject-matter of the case. Quite clearly, the attack and destruction of a civil aircraft navigating within its own airspace on a commercial flight, together with the issuance of illegal NOTAMs and other U.S. actions intefering with the Islamic Republic's aviation in the Persian Gulf, involve ipso facto a question whether there have been violations of the Treaty of Amity which provides, inter alia, for peace and friendship and freedom of commerce and navigation between the two States.

6.05 While the Islamic Republic has, as is customary, supplied greater factual detail in its Memorial to substantiate these claims, the United States has itself acknowledged the relevance of this material by arguing that the

472 See, for example, INA Corporation v. the Government of the Islamic Republic of Iran, Award No. 184-161-1 (Lagergren, Chairman), 12 August 1985, reprinted in 8 Iran-U.S. C.T.R. 373, at p. 378 where the Tribunal noted that the Government of the Islamic Republic was not prepared at that time "to present its definitive views as to the validity of the Treaty".

shooting down of Flight IR 655 by the USS Vincennes cannot be viewed in isolation, but must be examined against the backdrop of the Parties' actions in the Persian Gulf leading up to the incident. As a result, there is no basis for the United States' argument that simply because the Treaty was not mentioned in the Islamic Republic's Application, or because the Islamic Republic's Memorial discussed some of the relevant background events in greater detail, the Treaty cannot be raised as a valid basis of jurisdiction at this stage of the proceedings.

6.06 With respect to the argument that the Treaty's compromissory clause cannot be invoked because the Islamic Republic made no effort to resolve the dispute by negotiation, this claim also falls short of the mark. Quite simply, the Treaty of Amity does not refer to the word "negotiations" and does not provide that negotiations, or even diplomacy, are a prerequisite to submitting a dispute as to its application or interpretation to the Court[473]. All that is required is that the dispute be "not satisfactorily adjusted by diplomacy", a state of affairs which the record shows exists in the present case.

6.07 Even if the Treaty provided otherwise, Part III has demonstrated that the United States has fundamentally misrepresented the rule relating to the need for prior negotiations, and has failed to take into account its own refusal to deal with the Islamic Republic on the matter. Moreover, the Court will be aware that the arguments on this issue advanced by the United States in its Preliminary Objections are in complete contradiction to the position it took with respect to the Treaty in the 1980 Case Concerning United States Diplomatic and Consular Staff in Tehran. In the sections that follow, the Islamic Republic will cite from the United States' pleadings in that case to show how the Preliminary Objections are manifestly incompatible with the United States' prior conduct.

473 In this regard, the general reference to "diplomacy" does not necessarily presuppose an exchange of views or "negotiations".

6.08 As for the assertion that the Treaty of Amity is irrelevant to the dispute that is the subject of the Islamic Republic's Application, this argument is essentially related to the merits of the dispute because it concerns the application or interpretation of the Treaty in the light of the relevant facts. Quoting passages from the merits phase of the Nicaragua case (which in itself is curious since the Court had already found it had jurisdiction over the dispute), the United States argues that its actions were justified as self-defense because the U.S. feared an imminent attack from the Islamic Republic and "perceived" the aircraft as hostile. Such arguments simply confirm that a dispute exists between the Islamic Republic and the United States over the interpretation or application of the Treaty. This is a dispute which must be decided at the merits phase - a conclusion reinforced by the Court's decision in the Nicaragua case, which concerned comparable treaty provisions as well as analogous acts of armed aggression by one State within the territory of another[474].

6.09 In contrast to the United States' approach, the Islamic Republic submits that, in examining the scope of the Court's jurisdiction under the Treaty of Amity, the correct starting point is the compromissory clause itself. Under Article XXI(2) of the Treaty, there are four prerequisites to the Court's jurisdiction:

(i) That there be a "dispute";

(ii) That the dispute relate to the "interpretation or application" of the Treaty;

(iii) That the dispute be one "not satisfactorily adjusted by diplomacy"; and

(iv) That there be no agreement between Iran and the United States to settle the dispute by some other pacific means.

474 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 246.

6.10 In the sections that follow, the Islamic Republic will show that each of these prerequisites is satisfied in this case. The Islamic Republic will also show that prior to the institution of these proceedings, the United States had strenuously argued that the compromissory clause in the Treaty of Amity had been drafted in a manner that was intended to be very broad, and that when the Treaty was being negotiated, the United States resisted any attempt to narrow its jurisdictional scope[475]. There are thus no impediments to the Court's exercising jurisdiction over the dispute under the Treaty.

6.11 Having set out these introductory comments, Chapter I will take up the fact that the Treaty remains in force between the Parties and the reasons why the Islamic Republic is not barred from invoking it. Chapter II then deals with the United States' assertion that the Islamic Republic has changed the nature of the dispute in its Memorial, and will show that this is not true. Chapter III sets forth the way in which the provisions of the Treaty are relevant to the subject-matter of the dispute and also demonstrates how there is unquestionably a dispute between the Parties as to its interpretation or application. Lastly, Chapter IV will indicate how the dispute has been shown to be one "not satisfactorily adjusted by diplomacy", and that the Parties have not agreed to settle it by some other pacific means.

475 See, paras. 6.61 to 6.64 below.

CHAPTER I THE UNITED STATES IS PRECLUDED FROM OBJECTING TO THE TREATY AS A BASIS OF JURISDICTION

SECTION A. The Treaty Remains in Force Between the Parties

6.12 It is appropriate to recall at the outset that the Treaty of Amity remains in force between the Parties. Under the Treaty, termination can only occur in accordance with Article XXIII, which provides in relevant part that:

> "2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.
>
> 3. Either High Contracting Party may, by giving one year's written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter."

6.13 The importance of respecting formal termination provisions such as those contained in the Treaty of Amity is underscored by Article 54 of the Vienna Convention on the Law of Treaties which provides that termination should take place "in conformity with the provisions of the treaty". Significantly, neither Party has ever invoked the provisions of Article XXIII(3) or suggested that the one-year period has begun to run. To the contrary, the United States has expressly acknowledged in its Preliminary Objections that it does not assert that the Treaty is not in force as a reason why jurisdiction should be refused[476]. Such an argument would, of course, be untenable given that the U.S. State Department has repeatedly maintained that the Treaty remains in force and that the State Department's official publication, Treaties in Force, continues to list the Treaty as valid and binding[477].

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476 U.S. Preliminary Objections, p. 215.

477 See, United States Department of State, Treaties in Force, 1 January 1990, p. 117. A copy of this document is attached in Exhibit 88. See, also, pp. 132-133 of the Islamic Republic's Memorial and Exhibit 54 thereto.

6.14 Both this Court and the Iran-United States Claims Tribunal have previously held that the Treaty of Amity survived the fundamental disruption in relations that occurred between the Parties as a result of the events of 1979 and 1980. In its judgment in the Case Concerning United States Diplomatic and Consular Staff in Tehran, the Court stated -

> "... although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran[478]."

6.15 This holding was cited with approval by the Iran-United States Claims Tribunal on several occasions. In Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran (Virally, Chairman), for example, the Tribunal referred to the Court's reasoning in the Diplomatic and Consular Staff case to support the conclusion that the Treaty remained in force after the rupture of relations between the two States in late 1979. The Tribunal added that "the rights and obligations it established were valid and enforceable according to its terms[479]".

6.16 It is true that the Court's ruling in the Diplomatic and Consular Staff case only went so far as to hold that the Treaty remained in force as of 29 November 1979 when the United States submitted its dispute to the Court. Similarly, the decisions of the Iran-United States Claims Tribunal have been limited to holding that the Treaty was still in effect as of January 1981, the date by which claims submitted to the Tribunal had to have arisen.

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478 Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 28, para. 54.

479 Award No. 310-56-3, 14 July 1987, reprinted in 15 Iran-U.S. C.T.R. 189, at p. 219.

6.17 Nonetheless, it is clear that no events have taken place since 1981 which could be viewed as terminating the Treaty. As noted above, the United States continues to view the Treaty as remaining in force, and neither Party has taken any of the formal steps required under Article XXIII(3) of the Treaty to terminate it even though they could have done so if they had so chosen[480]. As noted by the Iran-U.S. Claims Tribunal, all the most serious disruptions in the Parties' relations "took place before the Court's finding that the Treaty was still in force[481]". Moreover, as recently as 1989, the United States Federal District Court held that the Treaty of Amity was, as of the date of the opinion, still in force and provided a "controlling legal standard" with respect to certain issues of compensation in the event of expropriation or nationalization[482]. Consequently, the Treaty remains part of the corpus of law between the two States, particularly the provisions in its compromissory clause

480 As the Iran-United States Claims Tribunal observed, "... Iran could easily have denounced the Treaty if it thought it proper to do so. Such a decision could be notified at any time, pursuant to the procedure described in Article XXIII, paragraph 3 of the Treaty, or made known by any other means of publicity. If Iran considered the judgment of the International Court of Justice to be in error in finding that the Treaty remained applicable, it could certainly have remedied the error by an express notice of termination to remove all doubt." Amoco International Finance Corporation v. Islamic Republic of Iran, supra, 15 Iran-U.S. C.T.R. at p. 218.

481 Ibid., p. 217.

482 Foremost McKesson Inc., v. Islamic Republic of Iran, Civ. action No. 82-0220 (D.D.C. 18 April 1989), reprinted in Iranian Assets Litigation Reporter, 28 April 1989, at pp. 17177-17178, affirmed on these points by the United States Court of Appeals (D.C. Cir.), 15 June 1990, reprinted in Iranian Assets Litigation Reporter, 16 July 1990, at pp. 19093, et seq.. It should be noted in connection with these two cases that the U.S. courts disregarded Iran's arguments as to the proper jurisdictional fora for disputes arising under the Treaty. Exhibit 88A.

providing for the jurisdiction of the Court[483].

SECTION B. The Islamic Republic Is Not Barred from Invoking the Treaty

6.18 In its Preliminary Objections, the United States asserts that the Islamic Republic is invoking the compromissory clause of the Treaty of Amity in bad faith and that it should be therefore barred from relying on the Treaty as a basis of jurisdiction[484]. Such a contention is demonstrably without merit in the light of the United States' own conduct relating to the Treaty. For over ten years, the United States has successfully sought to apply the provisions of the Treaty against the Islamic Republic in a variety of different fora, and has argued that the Islamic Republic is barred from repudiating it. Consequently, it is the United States' own argument which shows a lack of good faith.

6.19 So inconsistent is the United States' assertion in this case with its previous position that it is not surprising that the Preliminary Objections show less than full confidence in the "estoppel" claim. The sole conclusion which the United States is able to muster is: "[a]t a minimum ... 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[485]".

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483 It is quite clear that the Parties knew how to terminate bilateral treaties which they no longer wished to continue. Following the Islamic Revolution, for example, the Parties terminated a 1959 Treaty of Cooperation between them. In contrast, they took no such action vis-a-vis the Treaty of Amity. See, Diplomatic Note No. 191 dated 19 Nov. 1979, by the Embassy of the Islamic Republic of Iran to the U.S. Department of State concerning the termination of the Agreement of Cooperation between the Imperial Government of Iran and the Government of the U.S.A. dated 5 March 1959. (Exhibit 89). See, also, Reisman, W.M.: "Termination of the USSR's Treaty Right of Intervention in Iran", in Am. J. Int'l. L., Vol. 74 (1980), at p. 153. Exhibit 89.

484 U.S. Preliminary Objections, pp. 213-214.

485 Ibid., pp. 215-216.

6.20 The essence of the United States' contention is that because certain Iranian entities may have argued in other proceedings that the Treaty of Amity terminated following the fundamental changes that accompanied the Islamic Revolution, the Islamic Republic is barred from relying on the Treaty here. The United States cites the Islamic Republic's conduct in the Diplomatic and Consular Staff case as well as its position before the Iran-United States Claims Tribunal as support for this contention.

6.21 The reference to the Diplomatic and Consular Staff case is misplaced for several reasons. First, the Islamic Republic took no position as to the Treaty of Amity in that case and did not participate except to the extent of furnishing limited observations which the Court adverted to in its judgment. In contrast, the Islamic Republic is fully participating in this case and the Court is thus apprised of its views. Moreover, as the Court recognized in its judgment, the Islamic Republic's communications made in connection with the Diplomatic and Consular Staff case were directed at the wider aspects of the problems between it and the United States and did not address the status of the Treaty[486]. Nonetheless, even if the argument had been advanced, it is doubtful that the Court would have accepted it. As the Court stated:

> "It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed[487]."

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486 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 19, paras. 35-36. The Court also confirmed that Iran had not made any suggestion that the Treaty was not in force on 29 November 1979 when the United States submitted the dispute. Ibid., p. 28, para. 54.

487 Ibid.

6.22 The Islamic Republic submits that this reasoning is equally applicable in the present case. Having already decided in the Diplomatic and Consular Staff case that the Treaty of Amity survived the deterioration of relations between the Islamic Republic and the United States in 1979 so as to provide a valid basis of jurisdiction in that case, a similar finding that the Treaty provides a basis of jurisdiction here would seem to follow. As for the United States, having previously invoked the Treaty in its favor and in favor of its nationals in cases where either it or its nationals were claimants, and having prevailed on this point and received positive decisions from the Court, it should not be allowed to preclude application of the Treaty here simply because it is the respondent.

6.23 The same comments may be made about the United States' references to the Islamic Republic's position before the Iran-U.S. Claims Tribunal. In numerous cases before the Tribunal, U.S. claimants, with the assistance of the State Department, argued that the Treaty of Amity remained in force after 1981, and that Article IV(2) of the Treaty governed the standard of compensation allegedly due as a result of expropriations said to have taken place due to the Islamic Revolution.

6.24 In some of these cases, Iranian entities questioned whether the Treaty had survived the change of circumstances that occurred in 1979 and 1980. The United States vehemently opposed this position. To buttress its claim that the Treaty remained applicable, the State Department prepared a white paper in October 1983 entitled "Memorandum on the Application of the Treaty of Amity to Expropriations in Iran". That Memorandum emphasized the continuing validity of the Treaty by concluding that:

> "Because it has not been terminated in accordance with its terms of the provisions of international law, the Treaty of Amity remains in force between the United States and Iran[488]."

6.25 This position was further endorsed by the State Department when it issued a second Memorandum on the Application of International Law to Iranian Foreign Exchange Regulations in February 1984. That Memorandum also took the position that the Treaty remained in force and was applicable between the Parties[489].

6.26 As noted above, the Iran-U.S. Claims Tribunal accepted the United States' position that the Treaty survived the break in relations of 1979. Accordingly, the Tribunal has repeatedly applied the provisions of the Treaty against the Islamic Republic in a number of different cases[490].

6.27 It can be seen, therefore, that the situation is simply that while the Islamic Republic did not advance a position on the Treaty before the Court in the Diplomatic and Consular Staff case, certain Iranian entities have maintained a position before the Iran-U.S. Tribunal with respect to the Treaty which was not accepted as a matter of law. The United States advanced an opposing position that prevailed. There is absolutely no legal principle, and the United States has cited none, indicating that a party, having adopted a position on a matter of law which turns out to be incorrect, should be estopped thereafter

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488 Copies of this Memorandum, together with a second Memorandum prepared by the State Department on the "Application of International Law to the Iranian Foreign Exchange Regulations", dated 15 February 1984, have been furnished with the Memorial of the Islamic Republic at Exhibit 54. For the convenience of the Court, both Memoranda are reproduced here in Exhibit 90.

489 See, note to the Foreign Exchange Regulation Memorandum, ibid., p. 1185 (Exhibit 90).

490 See, for example, Amoco International Finance Corporation v. Islamic Republic of Iran, supra, 15 Iran-U.S. Claims C.T.R. at p. 219.

from relying on a correct statement of the law. As one commentator has recently noted in a comprehensive study of the recent law and procedure of the Court, such a proposition cannot be accepted:

> "Whether the idea of acquiescence or the idea of preclusion is applied, it is difficult to accept that a State is bound in its own affairs by a view of the law which it asserted against another State on a previous occasion[491]."

The same author then added:

> "If the facts are known to both States, each can form its own assessment of the legal situation which results from them, and the assertion by one of them that the legal situation is thus and thus - which means no more than that is the opinion of that State that such is the legal situation - cannot be relied on to support an estoppel to that effect[492]."

6.28 What is most extraordinary about the United States' argument is that in the 1983 State Department Memorandum referred to above, the United States cited exactly the same opinion of Sir Hersch Lauterpacht - to the effect that "a State cannot be allowed to avail itself of the advantages of a treaty when it suits it to do so and repudiate it when its performance becomes onerous" - to support the contention that the Islamic Republic was barred from repudiating the Treaty as it cites now in its Preliminary Objections for the proposition that the Islamic Republic is estopped from invoking the Treaty[493]. If ever there was an example of a State "blowing hot and cold", this is it.

6.29 The United States' argument is reminiscent of the argument that Pakistan advanced in the 1972 Appeal Relating to the Jurisdiction of the

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491 Thirlway, H.: "The Law and Procedure of the I.C.J. 1960-1989", British Yearbook of International Law, 1989, p. 41. Exhibit 91.

492 Ibid., p. 43 (footnotes deleted).

493 See, Exhibit 90.

ICAO Council case. There Pakistan asserted that India was precluded from affirming the competence of the Court because she had maintained that the treaties containing the compromissory clauses upon which the Court's jurisdiction was based were no longer in force. The Court rejected this argument on a number of grounds including the following:

> "The argument based on preclusion could also be turned against Pakistan, - for since it is Pakistan not India which denies the jurisdiction of the Court, and affirms the force of the Treaties, it must be questionable whether she can be heard to utilize for that purpose an Indian denial of the force of the Treaties ...".

The Court went on to observe:

> "The question of the Court's jurisdiction on the other hand, is necessarily an antecedent and independent one - an objective question of law - which cannot be governed by preclusive considerations capable of being so expressed as to tell against either Party - or both Parties[494]."

6.30 In view of these considerations, the United States' argument cannot be relied upon to avoid the proper application of the Treaty of Amity as a basis of jurisdiction in this case.

CHAPTER II THE ISLAMIC REPUBLIC HAS NOT CHANGED THE NATURE OF THE DISPUTE BY INVOKING THE TREATY

6.31 The second argument advanced by the United States seeks to make use of the fact that the Islamic Republic only invoked the Treaty of Amity in its Memorial rather than in its Application[495]. While the United States realizes that it cannot go so far as to allege that the Islamic Republic is barred from invoking a supplementary basis of jurisdiction in its Memorial not

494 Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 54, para. 16(c).

495 U.S. Preliminary Objections, p. 217.

mentioned in its Application, it does claim that by introducing the Treaty the Islamic Republic has transformed the nature of the dispute into one with a wholly different character from that submitted in the Application[496].

6.32 Such a contention fails to reflect either the facts or the law. It rests on the accusation that whereas the Application only concerned a single incident - the shooting down of Flight IR 655 - the Memorial went "far beyond its initial factual statement" so as to expand the complaint "to cover the effect of U.S. *military deployments in the [Persian] Gulf, and of other U.S. actions not involving* military force ...[497]". A mere glance at the Application, however, reveals that it was not limited to the shoot-down alone. Moreover, the United States' own pleadings confirm that the "incident" cannot be viewed in isolation without taking account of the surrounding events leading up to the event.

SECTION A. The Dual Nature of the Islamic Republic's Claims

(i) The claims based on the illegal use of force by the United States

6.33 The United States does not dispute that the aspect of the Islamic Republic's claims based on the use of armed force to shoot-down Flight IR 655 has not changed with the submission of the Islamic Republic's Memorial. Quite clearly, the illegal nature of the shoot-down remains a central element of the Islamic Republic's claims under all three bases of jurisdiction invoked.

6.34 With respect to the Treaty of Amity, the shoot-down involves the question whether the United States has violated not only the whole purpose of the Treaty, but also the specific provisions of Article 1 which provides

496 Ibid., p. 218.

497 Ibid., pp. 219-220.

that "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran". In and of itself, the destruction of a civil aircraft operating within its own airspace by a foreign warship that had intruded into the territorial waters of the State of registration of the aircraft is anathema to the principles underlying the Treaty.

(ii) **The claims based on illegal interference with the Islamic Republic's commerce and navigation**

6.35 Without repeating the points made in Part II, it is important to recall that the Islamic Republic's Application not only raised the question of the United States' illegal use of armed force, it also referred to the United States' "continuous interference with the Persian Gulf aviation" as one of the grounds for its submission that the United States had breached its international obligations[498]. The Islamic Republic drew attention to the fact that the United States had issued illegal NOTAMs and that its military forces operating in the Persian Gulf had failed to coordinate their activities with local air traffic control centres in charging the United States with violating Annex 15 of the Chicago Convention, as well as Recommendation 2.6/1 of the Third Middle East Regional Air Navigation (MID RAN) meeting of ICAO.

6.36 Both of these claims have a direct bearing on the Islamic Republic's commerce and navigation. The plain fact is that Flight IR 655 was engaged in a regularly scheduled commercial flight, navigating within the recognized international air route in its own airspace, when it was shot down by two missiles launched by the USS Vincennes which itself had intruded into the Islamic Republic's territorial waters. In addition, the continuous United States' interference in the Islamic Republic's aviation in the Persian Gulf prior to the

498 Application of the Islamic Republic, p. 8.

incident also directly affected the Islamic Republic's commerce and navigation. By definition, such acts relate to the issue of freedom of commerce and navigation guaranteed under Article X(1).of the Treaty of Amity. As such, the United States' argument that the Application was only concerned with the shoot-down and that the Islamic Republic made no claim that the United States had infringed upon its commerce and navigation can be seen to be without merit[499].

(iii) The appropriateness of the Islamic Republic's submissions

6.37 By its nature, an Application instituting proceedings before the Court is expected to summarize the main elements of the dispute submitted. As Article 38(2) of the Rules of Court makes clear, the purpose of the Application is to present a succinct statement of the facts and grounds on which the claim is based. It is thus entirely appropriate for a party to present a more fully developed statement of the facts and law in its Memorial, particularly when, as the Islamic Republic did, the applicant State reserves its right in its Application to supplement and amend its submissions.

6.38 Both of the Islamic Republic's previous pleadings conformed to these rules. In discussing elements of the United States' conduct leading up to the shoot-down in more depth in its Memorial, and in pointing out that the U.S. actions constituted breaches of the Treaty of Amity, the Islamic Republic in no way changed the fundamental nature of the dispute submitted to the Court in its Application. The shooting down of Flight IR 655 and the associated U.S. interference with the Islamic Republic's aviation remain the subject-matter of the dispute. These matters clearly give rise to questions of interpretation or application of the Treaty generally, as well as to Article I (providing for peace and friendship), Article IV(1) (providing that nationals of

499 U.S. Preliminary Objections, p. 219.

Iran be accorded "fair and equitable treatment" by the United States) and Article X(1) (providing that there be freedom of commerce and navigation), specifically. Thus, there is no basis for arguing that the essential nature of the case has changed from that presented in the Application.

SECTION B. The United States' Admission as to the Relevance of the Background Facts

6.39 What is striking about the United States' argument is that the relevance of the background facts to the destruction of Flight IR 655 has been expressly recognized by the United States in its Preliminary Objections. There the United States stated:

> "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 [Persian] 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[500]."

6.40 This admission could not be more explicit. In the light of the extensive discussion devoted to the background facts in the Preliminary Objections (which includes an entire chapter and two annexes devoted to alleged Iranian attacks on neutral shipping during the Iran-Iraq war and the issuance by the United States of NOTAMS for aircraft in the Persian Gulf), the argument that the Islamic Republic is trying to transform the nature of the dispute beyond the shoot-down is unsustainable. If anything, the United States' selective discussion of the facts makes it all the more important for the Court to examine the merits of the dispute under the jurisdiction conferred upon it by the treaties invoked by the Islamic Republic. The actual shooting down of Flight IR 655 is

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500 Ibid., p. 9 (emphasis added).

intimately related to the factual circumstances that preceded and contributed to its occurrence and must be examined in that context.

6.41 It follows from the above that the United States' attempt to rely on the Court's judgment in the jurisdictional phase of the Case Concerning Military and Paramilitary Activities in and against Nicaragua is misplaced. In that case, the Court observed that Article 38(2) of the Rules of Court only provides that an application should specify the legal grounds upon which the Court's jurisdiction is based "as far as possible[501]". An additional ground of jurisdiction may be brought to the Court's attention later provided that "the Applicant makes it clear that it intends to proceed upon that basis" and that "the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character[502]".

6.42 The United States has not taken issue with the Islamic Republic's declaration that it intends to proceed on the basis of the Treaty of Amity in this case [503]. Indeed, the point is indisputable. The Islamic Republic has alleged fundamental breaches of the Treaty arising out of the same events and subject-matter that was mentioned in its Application. The Islamic Republic fully intends to proceed with its claims under the Treaty of Amity as thus articulated, as well as under the other bases of jurisdiction it has invoked. It

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501 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 427, para. 80. In the present case, the Islamic Republic was also under a time-constraint since, under Article 84 of the Chicago Convention, any appeal from the decision of the ICAO Council had to be made within 60 days during which time the Islamic Republic also had to name an Agent. In contrast, the United States took almost three months to name its Agent in the case after the Application was filed. See, para. 3.34, above.

502 Ibid.

503 See, Memorial of the Islamic Republic, p. 135.

follows that this element of the test laid down in the Nicaragua case is fully satisfied.

6.43 As for the second criterion referred to by the Court, the same conclusion reached in Nicaragua applies here. In Nicaragua, the Court was dealing with a Friendship, Commerce and Navigation ("FCN") treaty that in all material respects was identical to the Treaty of Amity in this case. The Court was also dealing with a factual situation involving the use of armed force by one party against the other (the mining of Nicaragua's ports and territorial waters and the bombing of its airports by the United States) that closely parallels the situation in the present case. Despite the fact that Nicaragua had not referred to the treaty in its application, the Court held:

> "Taking into account these Articles of the Treaty of 1956, particularly the provisions in, inter alia, Article XIX[504], for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the 'interpretation or application' of the Treaty[505]."

6.44 These findings are especially relevant because of the remarkable similarities between the two cases. The Islamic Republic has cited extensively from the Court's decision in Nicaragua to underscore the importance of the fact that the provisions of the Treaty of Amity being invoked by the Islamic Republic do not come before the Court as a matter of first impression. Not only do both cases involve practically identical treaty provisions (including their compromissory clauses), they also present similar factual questions relating to the

504 Article XIX in the Nicaragua/U.S. Treaty is identical to Article X(1) of the Iran/U.S. Treaty of Amity.

505 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 428, para. 83.

infringement by one State of another State's sovereignty and the illegal use of armed force.

6.45 For this reason, the Court's conclusion in Nicaragua - that the mere fact that a State does not expressly refer to a particular treaty as having been breached by another State in negotiations with that State does not bar the first State from invoking the compromissory clause in the treaty - assumes a special relevance[506]. As the Court observed:

> "The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do[507]."

6.46 This same reasoning applies mutatis mutandis to the present case. In its presentations before ICAO and the United Nations Security Council, as well as in its Application, the Islamic Republic asserted facts relating to the destruction of Flight IR 655 as well as to the U.S. presence and interference in the Persian Gulf generally leading up to the shoot-down. Now the United States complains that the Islamic Republic has widened its submissions under the guise of the Treaty of Amity to cover "the effect of U.S. military deployments in the [Persian] Gulf, and of other U.S. actions not involving military force...[508]". However, the United States is fully aware, and has been since the day that Flight IR 655 was attacked, that the Islamic Republic maintains that this conduct constituted a breach of the United States' international obligations. The United States' response, articulated before the U.S. Congress, the Security Council and

506 Ibid.

507 Ibid., pp. 428-429, para. 83.

508 U.S. Preliminary Objections, pp. 219-220.

the ICAO Council, as well as in its Preliminary Objections, is that its actions were justified as self-defense. To support this argument, the United States has felt it necessary to address in considerable detail the background events in the Persian Gulf that preceded the destruction of Flight IR 655. As the Preliminary Objections concede:

> "All these events are important in understanding why U.S. naval vessels came to be off the coast of Iran in 1988; [and] why on 3 July of that year the USS Vincennes feared an imminent attack from Iranian aircraft and reacted accordingly...[509]."

6.47 These arguments not only illustrate the relevance of the wider aspects of the case, they are also directed to the merits of the dispute - a dispute that crystallized at a very early stage after the shoot-down, and that was further defined in the Islamic Republic's Application. What is evident is that the underlying nature of the case has not changed with the submission of the Islamic Republic's Memorial. The Memorial has simply sought to address in greater detail issues which the United States itself admits are relevant and which were already alluded to in the Application.

6.48 Finally, it is necessary to add a brief word about the Court's recent decision in the Case Concerning Certain Phosphate Lands in Nauru (the "Phosphate" case) in so far as it may have a bearing on the present proceedings. In that case, one of Australia's preliminary objections was based on the assertion that Nauru had raised a "new claim" in its Memorial, not presented in its Application, which had the effect of transforming the dispute brought before the Court by the Application into a different dispute[510].

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509 Ibid., p. 12.

510 Certain Phosphate Land in Nauru (Nauru v. Australia), Judgment, Jurisdiction and Admissiblity, p. 28, para. 63.

6.49 The Court upheld the objection on the grounds that if it had to entertain the new claim on the merits -

> "... the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute orginally submitted to it in the Application[511]."

Because consideration of Nauru's "new claim" would have involved the Court in having to consider a number of factual questions extraneous to the original claims, it was ruled inadmissible both in form and in substance[512].

6.50 The present situation may be readily distinguished from the situation in the Phosphate case. Unlike Nauru, the Islamic Republic did not raise a "new claim" in its Memorial arising out of a set of facts distinct from those addressed in its Application. Rather, the Islamic Republic introduced a supplementary basis for the Court's jurisdiction - the Treaty of Amity - which related to the same essential facts. While it is true that this additional basis of jurisdiction gave rise to the submission that the United States had breached its obligations under the Treaty, the important point is that the underlying subject-matter of the dispute remained unchanged from that presented in the Application. The dispute before the Court continues to arise out of the destruction of Flight IR 655 and the events in the Persian Gulf leading up to that incident. Both of these subjects were raised in the Application, and are thus fully admissible as claims under a supplementary basis of jurisdiction.

6.51 In short, unlike the situation in the Phosphate case, the Court here will not need to consider any new factual questions extraneous to the Islamic Republic's original claim in order to rule on the issues involving the

511 Ibid., p. 30, para. 68.

512 Ibid., p. 31, para. 70.

Treaty of Amity. The underlying facts asserted in the Application form the subject-matter of the dispute under the Treaty, just as they did in the Nicaragua case. This reinforces the conclusion that, unlike in the Phosphate case, the invocation by the Islamic Republic of the Treaty of Amity in its Memorial has in no way served to transform the nature of the case brought before the Court.

CHAPTER III THE TREATY OF AMITY IS DIRECTLY RELEVANT TO THE SUBJECT-MATTER OF THE DISPUTE

SECTION A. The Existence of a Dispute over the Treaty's Interpretation or Application

6.52 Article XXI(2) makes it abundantly clear that any dispute as to the interpretation or application of the Treaty of Amity, not satisfactorily adjusted by diplomacy, may be submitted to the Court unless the parties agree to settlement by some other means. The first step, therefore, is to determine whether there is a dispute as to the Treaty's interpretation or application[513]. Thereafter, it will be necessary to examine whether the dispute is one not satisfactorily adjusted by diplomacy (this subject being taken up in the next Chapter).

6.53 This Court has provided numerous guidelines as to when a dispute exists over a treaty's interpretation or application. Since many of the Court's pronouncements in this respect have been addressed in Part III, they need only be briefly restated here.

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513 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 27, para. 52. The Court has already decided in the Diplomatic and Consular Staff case, and the United States does not dispute the fact, that although the words of Article XXI(2) do not expressly so provide, a case may be brought by a unilateral application by one of the parties. As the Court noted, "it is evident, as the United States contended in its Memorial, that this is what the parties intended".

6.54 The classical definition of a dispute has, of course, been given by the Permanent Court in the Mavrommatis case where the Court stated:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons[514]."

This definition was developed further by the Court in the Interpretation of Peace Treaties case where the Court stated:

> "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence ... There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen[515]."

To this may be added the observations of the Permanent Court in the case of Certain German Interests in Polish Upper Silesia to the effect that -

> "... a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views[516]."

6.55 This line of reasoning has been fully adopted by the United States in its pleadings in the Diplomatic and Consular Staff case. One of the jurisdictional issues presented there hinged on whether there was a dispute arising out of the interpretation or application of the same Treaty of Amity. In the oral hearings in that case, Counsel for the United States argued very forcefully that the mere fact that the United States had charged the Islamic Republic with

514 Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, p. 11.

515 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.

516 Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, P.C.I.J., Series A, No. 6, p. 14.

violating various provisions of the Treaty of Amity "inevitably requires the interpretation or application of the Treaty[517]".

6.56 The United States' Memorial in the Diplomatic and Consular Staff case made the same point. There the United States stated -

> "... if the Government of Iran had made some contention in this Court that the United States interpretation of the Treaty was incorrect or that the Treaty did not apply to Iran's conduct in the manner suggested by the United States, the Court would clearly be confronted with a dispute relating to the 'interpretation or application' of the Treaty[518]."

6.57 Similar arguments were advanced by the United States with respect to the application and interpretation of the two Vienna Conventions on Diplomatic and Consular Relations. The United States claimed that Iran's conduct condoning the seizure of the U.S. Embassy in 1979 violated several provisions of these conventions. From this, the United States concluded: "If Iran had disputed these claims, there would obviously be a 'dispute' as to the 'interpretation and application' of the two Conventions[519]".

6.58 The Islamic Republic submits that the same reasoning applies here. As has been demonstrated in Part III, not simply a dispute, but a fundamental difference of opinion between the Islamic Republic and the United States over the facts and legal consequences relating to the destruction of Flight IR 655, emerged shortly after the incident occurred. The United States took the position that it bore no responsibility for the incident because its actions were

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517 Oral argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), p. 285.

518 U.S. Memorial, ibid., p. 153.

519 Ibid., pp. 142-143.

justified as self-defense. The Islamic Republic contested this view, and has asserted that the United States is morally, legally and financially responsible.

6.59 The existence of this dispute has persisted, and if anything has become more sharply defined, with the submission of each Party's written pleadings. In its Preliminary Objections the United States contends that the Treaty of Amity is irrelevant to the case because the Treaty is concerned with commercial relations between the two countries, not with the use of armed force[520]. The United States also argues that its actions were justified as self-defense and that they fell within a category of measures "necessary to protect its essential security interests" permitted under Article XX(1)(d) of the Treaty[521].

6.60 The Islamic Republic flatly rejects these contentions which are supported neither by the plain meaning of the Treaty, nor by the Court's ruling on similar treaty provisions in the Nicaragua case, nor by the fact that the aircraft was clearly involved in "commerce and navigation" within the meaning of Article X(1) of the Treaty when it was shot down. While more will be said about these issues later, for present purposes it may be noted that the Parties hold opposite views as to the performance or non-performance of obligations under the Treaty of Amity. As such, it cannot seriously be contested that a dispute exists between the Parties over the application or interpretation of the Treaty.

6.61 This conclusion is reinforced by the fact that when negotiating the Treaty of Amity with Iran, the United States insisted that a broad-

520 U.S. Preliminary Objections, p. 226.

521 Article XX(1)(d) provides that the Treaty of Amity "shall not preclude the application of measures ... necessary to fulfil the obligation of a High Contracting Party for the restoration of international peace and security, or necessary to protect its essential security interests".

based compromissory clause be included. As the United States pointed out in its Memorial in the Diplomatic and Consular Staff case:

> "It is significant that during the negotiations of the Treaty Iran sought to delete the term 'application' from the text and that the United States successfully resisted that suggestion, precisely because the United States wanted to avoid any narrowing of the jurisdictional provision[522]."

6.62 The State Department took this issue very seriously at the time. Noting that the matter was "fundamental" and that if Iran persisted in arguing that the word "application" should be deleted from the compromissory clause a solution would be "very difficult", the Secretary of State cabled the U.S. Embassy in Tehran during the negotiations stating that any restriction of the scope of the clause "might seriously curtail means for settlement [of] disputes under U.S.-Iran Treaty[523]".

6.63 The inclusion of a compromissory clause in the Treaty was also important for Iran. The Treaty was the first such treaty to include a broad-based compromissory clause following the withdrawal by Iran of its declaration accepting the Court's jurisdiction in the aftermath of the Anglo-Iranian Oil case. Iran was thus well aware of the content of Article XXI(2) and fully consented to the right of either Party to submit disputes unilaterally to the Court concerning the Treaty's interpretation or application. Had there been an intention to limit the scope of this Article, the Parties would not have agreed that "any" dispute could be submitted to the Court in this manner.

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522 I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), p. 153, note 14 (emphasis added).

523 See, Annex 50 to the U.S. Memorial, ibid., pp. 232-233, reproduced in Exhibit 92 hereto.

6.64 In the light of these considerations, the State Department's concerns were agreed to by Iran, and Article XXI (2) of the Treaty was drafted in such a way as to provide a broad jurisdictional mandate. What is important is to appreciate that the position that the United States took when originally negotiating the Treaty is fundamentally inconsistent with the stance it is adopting now. As the Court has previously held, the manifest intention of a State in drafting, accepting and construing a compromissory clause merits significant weight[524]. That intention was that Article XXI(2) should be as broad-based as possible and that disputes over the interpretation or application of the Treaty such as those presented by the Islamic Republic in this case could be submitted to the Court by either of the Parties.

6.65 It is well established that the subsequent conduct of the parties relating to a treaty can be taken into account as an indication of their real intentions. As McNair noted in his work on The Law of Treaties:

> ".... the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called "practical construction") has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law[525]".

In this regard, the United States' position in the Diplomatic and Consular Staff case is of direct relevance to the application and interpretation of the Treaty here.

6.66 On the basis of the United States' own conduct, and the legal precedents, it is apparent that there exists a dispute between the Islamic Republic and the United States over the interpretation or application of the

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524 See, for example, the Court's decision in Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952, p. 93, at pp. 104-107.

525 McNair, L.: The Law of Treaties, Oxford, Clarendon Press, 1961, at p. 424. Exhibit 93.

Treaty of Amity. To borrow from the Court's words in the South West Africa case, the claims of the Islamic Republic are "positively opposed" by the United States[526]. In these circumstances, and bearing in mind the United States' previous position with respect to the jurisdictional scope of Article XXI(2) of the Treaty, the first two prerequisites to the Court's jurisdiction - that there be a "dispute" and that the dispute relate to the "interpretation or application of the Treaty" - are clearly satisfied.

SECTION B. The Relevance of the Treaty to the Subject-Matter of the Dispute

6.67 Instead of focusing on the relevant criteria under Article XXI(2) of the Treaty, the United States has attempted to divert attention by alleging that the Treaty of Amity as a whole is irrelevant to the subject of the Islamic Republic's Application because it is solely concerned with commercial relations between the two countries, not with damages resulting from an incident involving the use of armed force between the Parties[527]. Not only is this contention simply a resurrection of arguments raised by the United States in the jurisdictional phase of the Nicaragua case and soundly rejected by the Court, it is also flatly contradicted by the U.S. Preliminary Objections themselves where the United States seeks to justify the intrusion of its warships into Iranian territorial waters on 3 July 1988 on the basis of Article X, paragraphs (5) and (6) of the Treaty of Amity[528]. How can the United States claim that the Treaty has nothing to do with the incident, on the one hand, while invoking its provisions to justify its actions, on the other?

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526 South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, at p. 328.

527 U.S. Preliminary Objections, p. 226.

528 Ibid., note 3 to p. 27.

6.68 The United States also asserts as an objection to jurisdiction that Article XX(1)(d) of the Treaty provides that the Treaty "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[529]". According to the United States, the actions of the USS Vincennes in shooting down Flight IR 655 were taken in self-defense because the Vincennes thought that it was being attacked by a hostile aircraft. Such actions, so the argument goes, were measures "necessary to protect ... essential security interests" of the United States and, thus, were permitted under Article XX(1)(d) of the Treaty. That being the case, the United States argues that the Court cannot entertain the Islamic Republic's claims[530].

6.69 The Court will appreciate that each of the United States' arguments rests on factual or legal assertions that fall to be proved at the merits stage of the proceedings. For example, the contention that the Treaty of Amity is a commercial treaty having nothing to do with acts of armed force reflects no more than the United States' position on the interpretation or application of the Treaty. While the Islamic Republic is confident that this position is incorrect, the question is precisely the type of issue over which the Court has jurisdiction to decide on the merits under Article XXI(2) of the Treaty. It is, in short, a classical example of a dispute over two opposing views as to the interpretation or application of a treaty.

6.70 Similarly, whether the actions of the Vincennes were legitimate acts of self-defense, or whether they fell within the ambit of Article

529 Ibid., p. 227 (emphasis supplied by the United States).

530 Ibid.

XX(1)(d) of the Treaty relating to measures necessary to protect the essential security interests of the United States, are quintessentially merits questions. It is simply begging the question for the United States to assert that these actions were not covered by the Treaty, for that is the very issue relating to the Treaty's interpretation or application that the Court must decide.

6.71 With respect to the first point raised by the United States - that the Treaty of Amity is essentially a "commercial" treaty - it is worth noting that this is exactly the same argument that **Judge Schwebel advanced in his** Dissenting Opinion to the Nicaragua judgment on jurisdiction. He contended:

> "The Treaty as a whole has nothing to do with the use of force in international relations, or rights to be free of such use .... It is purely a commercial treaty ...[531]."

6.72 By an overwhelming majority, the Court rejected this view. Not only did the Court rule that it had jurisdiction over the substance of the matter, it subsequently decided at the merits stage that the use of armed force by the United States against Nicaragua's ports, airports and territorial waters violated Article XIX of the Nicaragua-U.S. treaty which provided (as Article X(1) of the Treaty of Amity does here) that, "Between the territories of the two Parties there shall be freedom of commerce and navigation[532]". In so doing, the Court also rejected the argument now being advanced by the United States that the applicant's claim had to arise out of a direct commercial link between the two parties to the treaty. No such requirement existed in the Nicaragua case, and no such requirement exists here.

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531 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Dissenting Opinion of Judge Schwebel, p. 632.

6.73 That the Treaty is not limited exclusively to commercial matters is borne out by its title: "Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran". The concept of "amity", not to mention of economic relations and consular rights, is far broader than mere "commerce" and refers to a wide range of activities. As one American specialist has observed:

> "The single label, 'commercial', as applied to the type of bilateral treaty under consideration is perhaps misleading, for the scope of subject-matter commonly included comprises far more than provisions concerning the exchange of goods[533]".

6.74 These views coincide with those expressed by the former U.S. Advisor on Commercial Treaties with the Department of State, Herman Walker, who was involved in the 1950s in drafting various FCN treaties. As Mr. Walker has explained:

> "An FCN treaty in its fully realized form is a house of many mansions, concerned with all citizens and their interests, great and small, and whether or not of an economic nature; it is implicitly concerned also, in a major way, with the intangibles of good will between nations in their everyday relations. Although the United States may now in general be motivated primarily by investment considerations in seeking such treaties, the other side may share this motivation only to a secondary extent[534]."

6.75 Further evidence that the United States does not view the Treaty of Amity as concerned simply with commercial relations is provided by the United States' own conduct with respect to the Treaty. It will be recalled that

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532 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 147, para. 292(7) (dispositif).

533 Wilson, R.A.: "Postwar Commercial Treaties of the United States", Am. J. Int'l L., Vol. 43 (1949), at p. 264. Exhibit 94.

534 Walker, H.: "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice", 5 Am. J. Comp. L., Vol. 5 (1956), at p. 243. Exhibit 95.

when the United States instituted proceedings in the Diplomatic and Consular Staff case, it invoked the Treaty of Amity as a basis of jurisdiction. Obviously, that case dealt with wholly non-commercial matters.

6.76 In any event, the destruction of Flight IR 655 and the interference by the United States with the Islamic Republic's aviation in the Persian Gulf does have a direct and logical link to matters involving the Islamic Republic's freedom of commerce and navigation. As previously noted, Flight IR 655 was involved in a commercial flight and was navigating in the Islamic Republic's airspace when it was shot down[535]. As a result of the incident, commercial aviation in the Islamic Republic, including the activities of Iran Air, were severely disrupted and confidence undermined. This had an effect well beyond the immediate consequences relating to Flight IR 655 itself. As a result, even if the Treaty of Amity had been limited to "commercial relations", which it was not, the Islamic Republic's claims would still be admissible under the provisions of Article X(1) of the Treaty since they give rise to questions involving freedom of both commerce and navigation.

6.77 As for the second argument advanced by the United States - that its actions cannot be considered by the Court "unless it is first satisfied that the conduct complained of does not constitute "measures ... necessary to protect the essential security interests of the United States"[536] - this, too, was rejected by

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535 The United States also implies that the Treaty only relates to "maritime commerce" (see, p. 231 of the U.S. Preliminary Objections). This argument is completely misplaced inasmuch as the Treaty refers to freedom of commerce in general, not to either maritime or air commerce. As the Supreme Court of Justice of the United States has recognized, "... although commerce includes traffic in the narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse". Jordan, Secretary of State of California v. Tashiro, 278 U.S. 123, 127-128 (1928).

536 U.S. Preliminary Objections, p. 227.

the Court in the Nicaragua case as a bar to jurisdiction and as a defense on the merits. Quite apart from the fact that it is impossible to see how the "essential security interests" of the United States include the need to shoot-down an unarmed, civilian aircraft thousands of miles from U.S. territory, the Court has made it clear that the whole issue is one to be addressed at the merits stage of the proceedings. Even under the United States' own reasoning, how can the Court be first satisfied that the conduct complained of is "necessary to protect essential security interests" if it does not examine the merits of the issue? As the Court recognized in the Nicaragua case:

> "This article [Article XX(1)(d) of the Treaty of Amity] cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in [Article XXI(2)] that any dispute about the 'interpretation or application' of the Treaty lies within the Court's jurisdiction. Article [XX(1)(d)] defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article [XXI(2)][537]."

6.78 In this context, the Court contrasted the wording that appears in Article XX(1)(d) of the Treaty of Amity with the wording that is found, for example, in Article XXI of the General Agreement on Tariffs and Trade. As the Court observed:

> "This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty [as well as the Treaty of Amity],

537 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 116, para. 222.

on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such[538]."

6.79 These holdings dispose of the United States' argument that Article XX(1)(d) somehow acts as an impediment to the Court's accepting jurisdiction in this case. Moreover, when the issue was ultimately addressed at the merits stage of the Nicaragua case, the Court decided that the United States' attacks on Nicaragua's ports could not "possibly be justified as 'necessary' to protect the essential security interests of the United States[539]". While the Islamic Republic will develop this point further at a subsequent stage of the proceedings, it submits now, prima facie, that the destruction of a commercial aircraft flying within the recognized international air corridor and within its own airspace cannot be viewed as necessary to protect the essential security interests of a State lying thousands of miles away under any reading of the facts.

6.80 Equally specious is the United States' claim that the Islamic Republic only paid "lip service" in its Memorial to the idea that the shooting down of Flight IR 655 was a violation of Articles IV(1) and X(1) of the Treaty of Amity[540]. This assertion is based on nothing more than the fact that the Islamic Republic's eighth submission, dealing with the United States' violation of Article X(1) of the Treaty of Amity resulting from the prior conduct of its warships and the issuance of illegal NOTAMs in the Persian Gulf, is longer than its fourth submission, dealing with the violations of the Treaty caused by the shoot-down itself. Such an argument is hardly serious. It merely serves to introduce yet a further reason why the Preliminary Objections cannot be considered as genuine

538 Ibid. On the merits of the issue, the Court went on to hold that this provision does not apply to the exercise of self-defense. Ibid., pp. 116-117, para. 223.

539 Ibid., p. 141, para. 282.

540 U.S. Preliminary Objections, p. 222.

preliminary objections in the true sense of the words: they are arguments which, in the final analysis, are related to the application or interpretation of the Treaty to the facts - i.e., to the merits of the case. As such, they neither possess an exclusively preliminary character nor divest the Court of its legitimate jurisdiction over the dispute.

6.81 What is significant is that the same treaty provisions corresponding to Article IV(1) and X(1) of the Treaty of Amity were invoked by Nicaragua in its case against the United States. At the jurisdictional phase of that case, the Court accepted that the claims advanced gave rise to a dispute over the interpretation or application of the treaty[541]. Accordingly, the Court accepted jurisdiction on the issue, reserving the points that the United States had raised for the merits. In the present case, therefore, it can be seen that whatever objections the United States has raised in its Preliminary Objections with regard to the applicability of these Articles of the Treaty, they relate to their interpretation or application and are thus properly reserved for the next phase of the case.

6.82 From the foregoing it is clear that the Islamic Republic has established much more than a "reasonable connection" between the Treaty of Amity and its claims[542]. In this respect, it is important to recall that it is not incumbent upon the Islamic Republic to demonstrate at this stage that its

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541 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 428, para. 83.

542 See, also, Riesman, W.M.: "The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua" where the author finds significance in the fact that the Court has developed a theory that "there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it". Am. J. Int'l. L., Vol. 87 (1987), at p. 171, citing I.C.J. Reports 1986, p. 138, para. 275. Exhibit 96.

interpretation of the Treaty is necessarily the correct one. It suffices that the connection between its claims and the Treaty is not remote.

6.83 Surely such a test is met here. As Professor Charney has noted in his comprehensive study on the subject of "Compromissory Clauses and the Jurisdiction of the International Court of Justice" -

> "... once a compromissory clause is invoked and the substantive provisions of the treaty are relied upon by the applicant, defenses on the merits purporting to limit the scope of the compromissory clause will be of little or no avail to the respondent. At most, the Court will seek to determine whether the applicant's allegations, standing alone, have a reasonable or plausible connection to the treaty containing the compromissory clause."

Professor Charney went on to add:

> "This review of the cases suggests that the International Court has not imposed a heavy burden on the applicant to establish that a dispute concerning the 'application or interpretation' of a treaty is involved once it is alleged that substantive provisions of the treaty would provide the applicant with a right to relief. Nor has a rule of restrictive interpretation been adopted[543]."

6.84 The defenses raised by the United States themselves point up the existence of a dispute between the Parties over the interpretation and application of the Treaty[544]. In the light of the plain meaning of the relevant provisions of the Treaty, and particularly in view of the Court's previous decision on closely analogous issues in the Nicaragua case, it would have been expected that the United States would have refrained from raising objections which have

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543 Charney, J.I.: "Compromissory Clauses and the Jurisdiction of the International Court of Justice", in Am. J. Int'l. L., Vol. 81 (1987), at p. 883. Exhibit 97.

544 See, Judge Lachs' Separate Opinion in the Nicaragua, Merits judgment, where he observed that "the jurisdiction established by the bilateral treaty of 1956 [the FCN Treaty] leaves no room for doubt" (Separate Opinion of Judge Lachs, I.C.J. Reports 1986, p. 165.

already been so soundly rejected by the Court. As in the Nicaragua case, most of the United States arguments concern issues to be resolved on the merits, and do not therefore create a bar to the Court's accepting jurisdiction.

CHAPTER IV THE DISPUTE HAS BEEN SHOWN TO BE ONE "NOT SATISFACTORILY ADJUSTED BY DIPLOMACY"

6.85 Under Article XXI(2) of the Treaty of Amity, one of the preconditions for submitting a dispute as to the Treaty's interpretation or application is that the dispute "not be satisfactorily adjusted by diplomacy". In its Preliminary Objections, the United States argues that the Islamic Republic cannot invoke the Treaty as a basis of jurisdiction because it made no meaningful attempt to settle the dispute by negotiation prior to filing its Application. The United States adds that there cannot be said to be a "dispute" between the Parties when the Islamic Republic never approached the United States and asked for the relief sought from the Court under the Treaty of Amity[545].

6.86 There are several basic flaws undermining this line of argument. First, the United States misreads Article XXI(2) of the Treaty as requiring prior diplomatic negotiations when the Article in fact contains no such obligation. Second, the United States forgets that in the Diplomatic and Consular Staff case, it recognized that the test under Article XXI(2) was not whether the dispute "cannot be resolved by diplomacy", but whether it has already been satisfactorily adjusted by diplomacy, a situation that clearly has not occurred here[546]. Third, the United States fails to recall that it endorsed the view that "there is no rule of international law that a dispute in the international legal sense

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545 U.S. Preliminary Objections, p. 234.

546 See, Oral Argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), pp. 284-285.

exists only if it is reflected in a formal exchange of official representations[547]". Finally, even if Article XXI(2) did provide that negotiations were a prerequisite to bringing a case, which it does not, international law still does not impose a requirement of negotiation when the parties' positions are so evidently opposed to each other that discussions would be futile.

SECTION A. Article XXI(2) of the Treaty Does Not Require Prior Negotiations

6.87 Article XXI(2) of the Treaty of Amity simply provides that disputes as to the Treaty's interpretation or application that have not already been satisfactorily adjusted by diplomacy, or subject to an agreement to settle the matter by some other pacific means, may be submitted to the Court. In accordance with normal rules of treaty interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties, the provisions of Article XXI(2) "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

6.88 In the present case, there is absolutely nothing in the ordinary meaning of Article XXI(2) indicating that diplomatic negotiations have to have been exhausted as a precondition for instituting proceedings before the Court. The plain language found in Article XXI(2) provides no more than that disputes over the Treaty's interpretation or application can be submitted to the Court as long as they have not been satisfactorily adjusted by diplomacy or subject to some other means of settlement.

6.89 That this is the correct meaning of Article XXI(2) has been confirmed by the Court in the Diplomatic and Consular Staff case, as well as by

547 Ibid., p. 277.

several Judges in their separate opinions to the Nicaragua judgment on jurisdiction.

6.90 In the Diplomatic and Consular Staff case, the Court did not suggest that prior negotiations were a precondition to the institution of proceedings under Article XXI(2) of the Treaty. Instead, the Court stated that:

> "Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties agree to settlement by some other means[548]."

This clearly implies that the dispute is admissible unless it has already been settled by some other pacific means, including diplomacy. However, there is no requirement that the Parties must first attempt to do so through negotiations.

6.91 This conclusion finds support in the Judgment of the Court and in the Separate Opinions of several Judges in the Nicaragua case. The Court in that case noted that the language employed in the compromissory clause of the treaty did not require the treaty to be invoked in negotiations between the parties when the respondent State was aware that the other party was alleging that its conduct constituted a breach of its international obligations[549]. In commenting on this language, Judge Jennings observed:

> "In the present case, the United States claims that Nicaragua has made no attempt to settle the matters, the subject of the application, by diplomacy. But the qualifying clause in question merely requires that the dispute be one 'not satisfactorily adjusted by diplomacy'. Expressed thus, in a purely negative form, it is not an exigent requirement. It seems indeed to be cogently arguable that all that is required is, as the clause precisely states, that the

548 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 27, para. 52 (emphasis supplied by the Court).

549 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 428, para. 83.

> claims have not in fact already been 'adjusted' by diplomacy. In short, it appears to be intended to do no more than to ensure that disputes that have already been adequately dealt with by diplomacy, should not be reopened before the Court[550]."

6.92 Judge Ago also drew attention to the fact that the language used in Article XXI(2) of the Treaty does not require prior negotiations. He noted that the corresponding provision of the U.S.-Nicaragua treaty -

> "... does not make use of the wording to be found in other instruments which formally requires diplomatic negotiations to have been entered into and pursued as a prior condition for the possibility of instituting proceedings before an arbitral tribunal or court of justice[551]."

Judge Ago added that:

> "It is not always necessarily the case under these terms that diplomatic negotiations must be ascertained to have been first begun and then pursued, and finally to have broken down. The requirements of the text can even be met, under certain circumstances, without negotiations in the strict sense ever having taken place[552]."

6.93 Judge Singh expressed a similar view. He noted that the particular wording found in Article XXI(2) of the Treaty of Amity did not require prior negotiations as a condition precedent to bringing a case, and observed -

> "... if the wording of the compromissory clause of the Treaty is examined, it would appear that negotiations or representations affecting the operation of the present Treaty are not prescribed as a condition precedent to invoking the jurisdiction of the Court .... There is, however, no binding obligation to negotiate. The above

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550 Ibid., Separate Opinion of Judge Jennings, p. 556.

551 Ibid., Separate Opinion of Judge Ago, p. 515 (English translation).

552 Ibid.

> conclusion would appear to be clearly justified from the wording [of the article][553]."

6.94 It is beyond question that the dispute between the Parties over the interpretation or application of the Treaty of Amity has not been satisfactorily adjusted by diplomacy. The dispute remains outstanding, as the Parties' pleadings have made abundantly clear. In as much as the Parties have not agreed to settle the matter by some other pacific means, it follows that the Court's jurisdiction is fully established under Article XXI(2).

SECTION B. The Parties' Positions Were So Positively Opposed to Each Other that Negotiations Would Not Be Required in any Event

6.95 Even if Article XXI(2) of the Treaty had been drafted in such a manner as to call for prior negotiations, such a requirement would not have been absolute under international law when the state of relations between the Parties was such that the pursuit of negotiations clearly would have been fruitless. While these points have been brought out in Part III above, it should be noted here that it is not necessary for negotiations to take place in order for there to be a "dispute" between two States. As the United States itself has conceded:

> "Any such rule would suggest a stultifying formalism inconsistent with the jurisprudence of this Court and with the realities of international life[554]."

6.96 The Islamic Republic has shown that the attitudes of the two Parties towards the events surrounding the destruction of Flight IR 655 were incapable of being reconciled. The Islamic Republic claimed before the ICAO

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553 Ibid., Separate Opinion of Judge Singh, p. 445. Only Judge Ruda dissented from this view in his Separate Opinion; see, ibid., Separate Opinion of Judge Ruda, pp. 453-454.

554 Oral Argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, (USA v. Iran), p. 277.

Council and the United Nations that the United States had committed fundamental breaches of international law. The Islamic Republic sought recognition through these bodies of the legal and financial responsibility of the United States.

6.97 The United States refused to accept such responsibility, and sought from the outset to justify its conduct on grounds of self-defense. As documented above, the Legal Adviser to the U.S. State Department repeatedly argued before the U.S. Congress that the destruction of Flight IR 655 had come about "pursuant to the lawful use of force". In these circumstances, he categorically asserted that "Iran is to blame ultimately for this accident[555]".

6.98 The record also shows that from the day the incident occurred to the institution of these proceedings, the U.S. Government had no intention of dealing with the Government of the Islamic Republic as far as discussing the matter or providing compensation was concerned. Indeed, the State Department had precise instructions not to deal with Iranian officials so as to avoid what was termed Iranian "interference[556]". In a candid assessment of the official United States position at the time, the State Department cabled its embassy in Bern on 23 September 1988 that the U.S. Government -

> "... continues to be unwilling to deal directly with the GOI [Government of Iran] ...[557]."

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555 Hearings Before the Defense Policy Panel of the U.S. House of Representatives, Exhibit 26, p. 49. Similarly, the U.S. letter to the Security Council of 6 July 1988 sought to justify the Vincennes' actions as self-defense (see, Exhibit 98).

556 See, State Department telegram dated 31 August 1988. Exhibit 24.

557 Ibid.

6.99 In the light of this attitude, it ill-behooves the United States to argue that the Islamic Republic's claims cannot be brought because there have been no negotiations between the Parties. The Court has made it very clear that in considering the issue of negotiation, it will take into account the views of the States concerned who are, after all, "in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiations[558]". In the present case, both Parties have made it evident that reconciliation of their respective positions by means of negotiation is not a realistic possibility, although the refusal of the United States to negotiate with the Islamic Republic diposes of the point in any event.

6.100 This view has been endorsed by Judge Ago in his Separate Opinion in the Nicaragua case where he stated:

> "More generally speaking, I am in fact convinced that prior resort to diplomatic negotiations cannot constitute an absolute requirement, to be satisfied even when the hopelessness of expecting any negotiations to succeed is clear from the state of relations between the parties, and that there is no warrant for using it as a ground for delaying the opening of arbitral or judicial proceedings when provision for recourse to them exists[559]."

6.101 What matters is that the respective positions of the Parties on the essential issues have become well-defined on the international plane. As such, the Court's reasoning in the South West Africa cases that "it is not so much the form of negotiations that matters as the attitude and views of the Parties on

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558 Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p.15.

559 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 515-516 (English translation provided by the Registry).

the substantive issues of the question involved" assumes special relevance[560]. As the Court went on to note:

> "So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties[561]."

6.102 This reasoning applies with equal force to the present proceedings. Given that the Parties had ample opportunity to express their positions before international organizations such as the United Nations and ICAO, yet these discussions failed to bridge their differences, no further "negotiations" were required. As the Court noted in the South West Africa case -

> "... diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation ... If [the dispute] is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiations with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition[562]."

6.103 All of these considerations lead to the conclusion that the claims brought by the Islamic Republic under the Treaty of Amity are fully admissible and subject to the Court's jurisdiction. The existence of a dispute over the Treaty's interpretation or application could not be clearer. The Parties' positions, presented publicly on many occasions since the shoot-down, have remained fundamentally opposed to each other. There is simply no reason to impose upon the Parties a needless charade of going through the motions of negotiations when the result of such discussions is a foregone conclusion. In

560 South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346.

561 Ibid.

562 Ibid.

short, there is no reason to delay bringing this case before the Court under the jurisdiction provided by Article XXI(2) of the Treaty of Amity.

PART VII

CONCLUSIONS AND SUBMISSIONS

7.01 On the basis of the foregoing, the Islamic Republic submits that it has shown that the Court has jurisdiction under all three agreements cited: the Chicago Convention, the Montreal Convention, and the Treaty of Amity.

7.02 The purely formalistic objections of the United States, such as that the Islamic Republic did not satisfy the requirement to negotiate its claims prior to instituting proceedings, or that it did not follow the correct procedural rules, or that it is estopped from invoking certain provisions, have been seen to be based on an incorrect assessment of the facts and a misapplication of the law.

7.03 With respect to the United States' objections that the treaties in question (particularly the Montreal Convention and the Treaty of Amity) have no connection to the claims submitted by the Islamic Republic, these are arguments that also do not stand up to scrutiny. Prima facie, claims based on the destruction of a civil aircraft flying within its own airspace on a commercial flight have a direct relationship to the Montreal Convention and the Treaty of Amity, as well as to the Chicago Convention. In addition, the Islamic Republic's claims based on the United States' interference generally with its aviation, including its issuance of illegal NOTAMs, also relate to the latter two instruments.

7.04 With respect to each of the three titles of jurisdiction, the Islamic Republic has shown that a fundamental disagreement exists between the Parties as to the interpretation or application of the treaty in question in the light of the facts concerning the attack on Flight IR 655. This existence of such a dispute is critical in as much as the United States has consented to the jurisdiction of the Court to resolve questions relating to the interpretation or application of

these treaties in their compromissory clauses. The Court is thus fully empowered to exercise its jurisdiction in this case based on the consent of the Parties.

7.05 As has been seen, many of the United States' arguments are directed to the merits of the dispute. They therefore highlight the fact that a disagreement exists between the Parties over the interpretation or application of the treaties in question. This is particularly the case with respect to the United States' assertions over the scope of the Montreal Convention and the Treaty of Amity. It is for this reason that the Islamic Republic has maintained that in so far as the Preliminary Objections are not rejected by the Court in a separate judgment, they should be declared not to possess, in the circumstances of the case, an exclusively preliminary character under Article 79(7) of the Rules of Court.

7.06 This case is an important one not only for the Parties to these proceedings, but for the families of the victims and the international community as a whole. International civil aviation is simply too important to be indiscriminately subject to the kind of attack that the United States launched against Flight IR 655. States are under a vigorous duty to ensure that their military forces, particularly when operating far from their own territory, do not endanger, threaten or shoot-down unarmed civilian aircraft.

7.07 In the present case, the arguments for the Court accepting jurisdiction are even more compelling in the light of the evidence that has surfaced concerning the policies that the United States was pursuing by the presence of its naval and air forces in the Persian Gulf. It is now undisputed that the United States' official policy of neutrality in the Iran-Iraq war was a sham and that the United States actively assisted Iraq in its war efforts against the Islamic

Republic. To this end, the United States took increasingly hostile and provocative actions against the Islamic Republic.

7.08 The events of 3 July 1988 were the culmination of this highly antagonistic policy - a policy which resulted on that day in U.S. warships and aircraft deliberately intruding into Iranian territorial waters to harass and attack Iranian patrol boats under the pretext of assisting neutral shipping. As the United States itself has now admitted, there were no requests for assistance from neutral shipping on that day. Thus the whole pretense for the events that triggered the tragic destruction of the aircraft has been seen to have no basis in fact. As a result of such a flawed policy, 290 innocent people met their deaths and serious damages were inflicted on the Islamic Republic. Yet the United States does not give up its presence in the Persian Gulf and the operation of its illegal NOTAMs, nor does it guarantee that such events will not reoccur.

7.09 The United States has already shown that it is predisposed to argue the merits of the case by its extensive treatment of the facts in its Preliminary Objections. In view of the fact that both States have accepted the principle of the Court's jurisdiction set out in Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention and Article XXI(2) of the Treaty of Amity, the Islamic Republic respectfully requests the Court to exercise its jurisdiction, as well as its supervisory powers, in this important case. The principles and rules of international law at issue are too critical to be sidestepped by the kind of formalistic preliminary objections that the United States has raised. As the Islamic Republic has shown, all of the requirements for jurisdiction to vest in the Court have been met with respect to each instrument invoked. Accordingly, the Islamic Republic seeks justice for the violations of international law perpetrated by the United States.

7.10 On the basis of the foregoing, the Islamic Republic respectfully makes the following submissions.

SUBMISSIONS

Having regard to the requirements of Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention and Article XXI(2) of the Treaty of Amity;

In view of the facts and arguments adduced by the Islamic Republic in these Observations and the applicable principles and rules of international law, and reserving its right subsequently to amend or modify these submissions in the light of the subsequent proceedings;

May it please the Court, rejecting all claims and submissions to the contrary:

To adjudge and declare:

1. That the Preliminary Objections of the United States are rejected in their entirety;

2. That, consequently, the Court has jurisdiction to entertain the claims submitted by the Islamic Republic in its Application and Memorial as they relate to (i) an appeal from the decision of the ICAO Council concerning the interpretation or application of the Chicago Convention under Article 84 thereof; (ii) a dispute between the Parties as to the interpretation or application of the Montreal Convention under Article 14(1) thereof; and (iii) a dispute between the Parties as to the interpretation or application of the Treaty of Amity under Article XXI(2) thereof;

3. That, on a subsidiary basis, the Preliminary Objections of the United States do not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79(7) of the Rules of Court.

The Hague
9 September, 1992

Signed

Mohammad K. Eshragh
Agent of the Islamic
Republic of Iran

ANNEX

THE ILLEGAL U.S. NOTAMS AND THE LACK OF COORDINATION BY U.S. FORCES WITH CIVILIAN ATS AUTHORITIES IN THE PERSIAN GULF REGION

SECTION 1. **Introduction**

1. The United States' discussion of the NOTAMs in Annex 2 of its Preliminary Objections is devoted to presenting a defense on the merits of the case. The United States has made no attempt to relate this issue to its jurisdictional objections.

2. In making this defense on the merits, the United States is fighting a lost cause. The one issue on which the ICAO Report was absolutely clear was that the U.S. NOTAMs were illegally promulgated and did not conform to the standards applicable to NOTAMs under the Chicago Convention and its Annexes. This in itself was an acknowledgment by the Council that the United States had violated the Chicago Convention. However, in addition, in seeking by means of these illegal NOTAMs to create restricted zones around its forces operating in the Persian Gulf, the United States also violated the territorial sovereignty of the Islamic Republic, interfered with the freedom of the Islamic Republic's commerce and navigation, and endangered civil aviation. These are violations of fundamental rules and principles of customary international law which are enshrined in both the Chicago Convention and the Treaty of Amity.

3. The United States fails to mention the only direct relevance the issue of the NOTAMs has to the jurisdictional issues in this case: namely that the illegal interference by U.S. military forces in Iranian civil aviation was a clear violation of provisions of the Treaty of Amity designed to guarantee the Islamic Republic's freedom of commerce and navigation. The United States' interference with Iranian civil aviation, which culminated in the shoot-down of Flight IR 655 on 3 July 1988, is so obviously related to provisions of the Treaty of Amity that there can be no doubt about the applicability of this Treaty to the facts of this case.

4. Each of these issues will be explained in more detail below after a brief statement of the relevant facts. It is not the purpose of this presentation to give a detailed review of all the relevant issues relating to the NOTAMs but only to correct the inaccurate presentation given by the United States[1].

SECTION 2. The Facts

5. In January 1984, the United States issued a Notice to the States responsible for flight information services in the Persian Gulf region, including the Islamic Republic of Iran. This Notice stated that U.S. vessels in the region were taking "defensive precautions[2]", as follows:

> "Aircraft at altitudes less than 2000 ft AGL which are not cleared for approach/departure to or from a regional airport are requested to avoid approaching closer than five NM to US naval forces. It is also requested that aircraft approaching within five NM establish and maintain radio contact with US naval forces on 121.5 MHZ VHF or 243.0 MHZ UHF. Aircraft which approach within five NM at altitudes less than 2000 ft AGL whose intentions are unclear to U.S. naval forces may be held at risk by U.S. defensive measures."

6. The United States describes this document as a "U.S. Special Notice of Information" and alleges that it was provided to the relevant States "so that they could issue an appropriate NOTAM"[3]. It accuses the Islamic Republic, and other States responsible for providing air transport services in the region, of failing to comply with their obligations under the Chicago Convention and its Annexes to publish this information as a NOTAM.

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1 A detailed exposition of the issue of the NOTAMs and the related issue of civil/military coordination was given in the Islamic Republic's Memorial. See, in particular, Part I, pp. 33-42, paras. 1.46-1.57; Part III, pp. 157-172, paras. 3.28-3.52 and Part IV, pp. 218-230, paras. 4.15-4.32.

2 For the text of this Notice, see, U.S. Preliminary Objections, Exhibit 85.

3 U.S. Preliminary Objections, Annex 2, p. 1 and fn. 2.

7. In fact, there is no evidence that the United States requested the States concerned to issue such a NOTAM. The United States simply issued its "U.S. Special Notice of Information". There was no request, no attempt at discussion or negotiation - simply a unilateral notification that these steps would be taken by U.S. vessels. Even if such a request had been made, the Islamic Republic had no obligation whatsoever under the Chicago Convention or its Annexes to issue the information contained in the U.S. Notice as a NOTAM. As will be seen in more detail below, no State has an obligation to issue a NOTAM on behalf of a third State (unless that third State is within its FIR), especially when the NOTAM requested is on its face illegal in nature and violative of fundamental principles of international law.

8. The result of these events was that none of the States responsible for air transport services in the region published the U.S. Notice as a NOTAM. Although the relevant information may have been relayed to airmen in the region for safety reasons, no States were prepared to recognize the U.S. actions as legal.

9. The Islamic Republic lodged a complaint with ICAO concerning this Notice on 27 February 1984[4]. This complaint stated in part as follows:

> "Reference is hereby made to the (Special Notice) issued by KDCAYN to OIIIYN, dated 220220 (January 1984) regarding restriction of overflight above certain areas of high seas in the Persian Gulf and the Sea of Oman. The Notice is a clear violation of international law and common practices regarding the freedom of flying over the high seas. It is indeed a flagrant infringement of principles laid down by the Chicago Convention on Civil Aviation as well as other Conventions regarding the Law of the Sea.
>
> ...
>
> The Notice which purports to claim sovereignty over undefined areas of the high seas in the Persian Gulf, Sea of Oman and

4 Exhibit 61 to the Memorial of the Islamic Republic.

> Arabian Sea is basically unfounded and legally invalid and unacceptable.
>
> The Islamic Republic of Iran considers the Special Notice as a direct interference in the internal affairs of the Coastal States of the Persian Gulf and the Sea of Oman and threat against the safety and security of international air and sea navigation.
>
> Furthermore, due to special circumstances in the area, the Islamic Republic of Iran declares that it will continue to perform its rights and obligations, for the protection and safeguard of its national interests in the (security perimeter), zone adjacent to its territorial seas.
>
> It is, therefore, requested that appropriate measures be taken for immediate cancellation of this Notice, otherwise the United States of America will be held responsible for all consequences resulting from such violation."

10. As a result of this protest, the ICAO MIDRAN meeting, comprising States responsible for providing air transport services in the Middle East, discussed the U.S. Notice at a meeting in Montreal in 1984. Paragraph 2.6.8 of the Recommendations of this meeting called on States, as a matter of urgency, to review any restrictions "imposed in the airspace over the high seas with a view to eliminating them[5]".

11. Notwithstanding this ICAO Recommendation by the States exclusively responsible for air transport services in the region, and because States in the region had refused to promulgate the Notice as a NOTAM, on 11 January 1985 the United States reissued the Notice in the form of what it calls a "U.S. international civil NOTAM[6]" ("the U.S. NOTAM"). As will be shown in Section 3 below, there is no basis in international law for such a NOTAM, and consequently this document, like the earlier Notice, can have no legal status.

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5 See, ICAO Working Paper C-WP/8644 (8/7/88), Addendum No. 1 (12/7/88), p. 1. Exhibit 38. See also, Islamic Republic Memorial's paras. 4.29-4.34.

6 U.S. Preliminary Objections, Annex 2, p. 3.

12. The U.S. NOTAM was updated in September 1987. The final text which was current on 3 July 1988 read in relevant part as follows:

> "Aircraft (fixed wing and helicopters) operating in these areas should maintain a listening watch on 121.5 MHZ VHF or 243.0 MHZ UHF. Unidentified aircraft, whose intentions are unclear or who are approaching U.S. naval vessels, will be contacted on these frequencies and requested to identify themselves and state their intentions as soon as they are detected. In order to avoid inadvertent confrontation, aircraft (fixed wing and helicopters) including military aircraft may be requested to remain well clear of U.S. vessels. Failure to respond to requests for identification and intentions, or to warnings, and operating in a threatening manner could place the aircraft (fixed wing and helicopters) at risk by U.S. defensive measures. Illumination of a U.S. naval vessel with a weapons fire control radar will be viewed with suspicion and could result in immediate U.S. defensive reaction. This Notice is published solely to advise that measures in self-defense are being exercised by U.S. naval forces in this region. The measures will be implemented in a manner that does not unduly interfere with the freedom of navigation and overflight[7]."

13. This NOTAM also contained the provision that aircraft flying at altitudes less than 2000 feet and within 5 nautical miles of a U.S. vessel, and not cleared for approach/departure from a regional airport, could be at risk from U.S. defensive measures.

14. The Islamic Republic immediately protested against this NOTAM to ICAO[8]. It also made repeated protests to both the United States, ICAO, and the U.N. Secretary-General concerning the interferences by U.S. forces in Iranian commerce and navigation arising from the application of the measures set out in the NOTAM[9].

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7 Exhibit 14 to the Memorial of the Islamic Republic.

8 ICAO Working Paper C-WP/8644 (8/7/88), Attachment 7. Exhibit 38.

9 See, Exhibits 15, 19 and 21 to the Memorial of the Islamic Republic for protests made to ICAO and the United States, respectively. See, also, Exhibit 16 hereto for protests made to the U.N. Secretary-General for distribution as Council documents.

15. The illegal nature of the NOTAMs was again raised by the Islamic Republic as forming part of the dispute before the ICAO Council concerning the shoot-down of Flight IR 655 on 3 July 1988. However, at the 13 March 1989 meeting of the Council, the United States announced that it had cancelled its NOTAM on condition that the Persian Gulf Provider States disseminated the U.S. NOTAM as "information"[10].

16. Subsequent to the 13 March 1989 meeting, the United States took steps for the first time to make a request for the issuance of the NOTAM to the ATS providers in the Persian Gulf region through the proper ICAO channels, and not by illegal unilateral actions. While ATS providers in the region have complied with this official request for safety reasons, this does not alter the fact that the NOTAM remains completely illegal in scope and, to the extent it is still in force today, continues to interfere with and endanger civil and commercial air traffic. For this reason, most ATS providers in the region including the Islamic Republic of Iran have issued this information with a clear disclaimer. Thus, the United Arab Emirates prefaced their issuance of this NOTAM with the following statement:

> "The following information originates from the United States of America and is promulgated in the interest of the safety of the flight: the promulgation does not necessarily imply endorsement of this information by the United Arab Emirates[11]."

A similar disclaimer was made by the Islamic Republic[12]. Thus, the United States' conclusion to its Annex 2, to the effect that virtually all the Persian Gulf States (including the Islamic Republic) have now issued NOTAMs "pursuant to

10 Draft C-Min. 126/18, 13 March 1989, p. 10. Exhibit 47.

11 See, Exhibit 99.

12 Ibid..

the U.S. requests[13]", is without significance. The NOTAM has not been endorsed by these States and remains illegal in scope.

SECTION 3. The Illegality of the U.S. NOTAMs

17. As explained in the Islamic Republic's Memorial, under the Chicago Convention and its Annexes a large part of the globe is divided into Flight Information Regions ("FIRs") which are the exclusive responsibility of the relevant Air Transport Service ("ATS") provider in that region. No third State, and least of all the military forces of a third State, has any authority over civil aviation within another State's FIR[14]. It will be shown below that in seeking to create restrictive zones around its vessels in another State's FIR the United States was acting in violation of this principle, as well as violating other fundamental principles of international law enshrined in the Chicago Convention and the Treaty of Amity.

18. The United States alleges that in issuing its Notice in January 1984 it requested Persian Gulf States to promulgate a NOTAM containing such information and that these States failed to meet their obligation under the Chicago Convention to take this action. As a result, the United States argues that it was forced on 11 January 1985 to promulgate its own "U.S. international civil NOTAM".

19. It has been seen above that the United States has produced no evidence that it requested these States to publish a NOTAM, nor any evidence that it attempted to discuss its content in any way with such States. However, even if it

13 U.S. Preliminary Objections, Annex 2, p. 7.

14 See, Memorial of the Islamic Republic, pp. 157, et seq..

had, it is appropriate to examine why it would have been rejected by the relevant States.

20. The U.S. Notice was simply a unilateral warning to aircraft to avoid flying within a certain range of any U.S. naval vessel, whether in international waters or within the territorial sea of another State, and stated that any aircraft flying within range could be at risk from U.S. defensive measures from these vessels. In effect, this meant the creation of a form of floating danger zone around any U.S. naval vessel anywhere within the region covered by the Notice, in other words anywhere in the Persian Gulf, the Strait of Hormuz, the Gulf of Oman and the Arabian Sea (north of 20 degrees north), including the territorial waters of States bordering these areas[15].

21. It is self-evident that the issue of such a Notice can have no basis whatsoever in international law:

- No State has the right to create such permanent, floating danger zones over international waters;

- Implicitly such danger zones could cover the territory and airspace of the States in the area and thus violate their exclusive and complete territorial sovereignty;

- No State has the right to create a danger zone in the Flight Information Region for which another State is exclusively responsible;

15 See, Memorial of the Islamic Republic, p. 224, para. 4.23.

No State has the right to challenge or intercept civil aircraft or ask such aircraft to change their route in the manner foreseen in the U.S. Notice.

22. Moreover, the U.S. Notice was not in a form that could be promulgated as a NOTAM. Under the Chicago Convention, a NOTAM must be clear and accurate and is supposed only to cover temporary disruption or hazards to air traffic[16]. The U.S. Notice met none of these requirements. The principle behind the measures set out in the Notice was that U.S. vessels could go anywhere in the Persian Gulf region while civilian aircraft would have to take steps to avoid them. Given that civilian aircraft are on set flight plans which cannot be changed, while U.S. vessels were manoeuvering freely around the Persian Gulf, the potential for disruption is self-evident.

23. It follows from the above that the United States' argument that the Persian Gulf States violated the Chicago Convention in failing to publish their U.S. Notice as a NOTAM is wholly without merit. The U.S. Notice was illegal on its face.

24. In any event, there is no obligation in the Chicago Convention on States responsible for FIRs to issue NOTAMs on behalf of third States not within that FIR. One can imagine what the reaction of the United States would have been if third States sought to issue restrictive notices of the kind proposed by the United States within the United States' FIR.

25. As noted above, on 11 January 1985 the United States promulgated its Notice as a "U.S. international civil NOTAM" through its Washington D.C.

16 See, Memorial of the Islamic Republic, pp. 169, et seq..

NOTAM office. This NOTAM was updated in September 1987, and it was this NOTAM which was current when Flight IR 655 was shot down.

26. The September 1987 U.S. NOTAM was far wider in scope than the 1984 Notice. It provided that "unidentified aircraft, whose intentions are unclear or who are approaching U.S. naval vessels, will be contacted ... and requested to identify themselves as soon as they are detected[17]". This purported to extend the danger zone as far as the technology of the vessel would allow. In the case of the AEGIS system, this would be 250 nautical miles (approximately 463 kilometers) in all directions from any U.S. vessel carrying such a system.

27. Thus, the same points as made above with respect to the U.S. Notice apply a fortiori to the September 1987 U.S. NOTAM:

> First, the United States had no authority to issue a NOTAM covering FIRs which are the responsibility of another State. Thus, the NOTAM was ultra vires and had no legal status;
>
> Second, in illegally creating permanent, floating danger zones over international waters, the NOTAM interfered with the freedom of navigation;
>
> Third, the NOTAM violated the territorial sovereignty of the States concerned;
>
> Fourth, the procedures envisaged for challenging and directing aircraft under the NOTAM were illegal and resulted in the continuous

17 See, Exhibit 14 to the Memorial of the Islamic Republic (emphasis added).

interference with and endangerment of civil aviation in violation of international law;

Fifth, the U.S. NOTAM did not meet the standards applicable to NOTAMs under the Chicago Convention and its Annexes being neither temporary in nature, nor "adequate, accurate and timely[18]".

28. The illegal nature of the September 1987 U.S. NOTAM has been confirmed by ICAO. This NOTAM was discussed by ICAO at a meeting in Paris on 6 October 1988. The findings of this meeting could not be more explicit on this subject:

> "The meeting expressed its belief that this NOTAM is in contravention of approved ICAO Standards and Recommended Practices. The meeting disagreed with this practice by the United States. It stressed that the promulgation of aeronautical information is the responsibility of the appropriate ATS authority of the States which provide services in the FIRs concerned, including the airspace extending over the high seas, in accordance with relevant ICAO provisions and the Air Navigation Plan of ICAO. In the light of these circumstances, the meeting requests the Council of ICAO to urgently address this matter, and to take appropriate measures to secure the withdrawal of the referenced NOTAM[19]."

29. Referring to the problems caused to air traffic in the Persian Gulf, the meeting -

> "... again emphasized that the issuance of the NOTAM by the United States authorities (FAA NOTAM KDZZNA 056/88 dated 131429/08) is the primary cause of the problems outlined above[20]."

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18 See, Memorial of the Islamic Republic, p. 170, para. 3.50.

19 Exhibit 40 to the Memorial of the Islamic Republic, p. 2, para. 10.

20 Ibid., p. 3, para. 15 (emphasis added).

30. The meeting also affirmed that "the responsibility for providing Air Traffic Services rests solely with the States concerned, both within their national airspace and that airspace over the high seas for which they have accepted responsibility[21]."

31. The ICAO Report confirms the conclusions of this meeting at paragraph 2.2.4. It found that the NOTAM was illegally promulgated:

> "Aeronautical information service authority. In accordance with the provisions of ICAO Annex 15, ICAO Contracting States provided an aeronautical information service and published aeronautical information concerning the territory of the State as well as areas outside its territory in which the State was responsible for air traffic services. International NOTAM offices were designated by States for the international exchange of NOTAMs in accordance with the ICAO regional air navigation plans. The United States NOTAM concerning the [Persian] Gulf, Strait of Hormuz, Gulf of Oman and Arabian Sea covered an area within the responsibility of International NOTAM Offices Abu Dhabi, Baghdad, Bahrain, Bombay, Karachi, Kuwait, Muscat and Tehran. Therefore, the promulgation of the NOTAM is not in conformity with the provisions of ICAO Annex 15[22]."

32. The ICAO Report also found that the NOTAM was unclear:

> "The full implications of the rules of engagement of the United States warships were not sufficiently reflected in the notice promulgated by the United States. It was not specified what was considered to be 'operating in a threatening manner', what distance was considered 'well clear of United States warships', and what was meant with 'could place the aircraft at risk by United States defensive measures'. The safety risks imposed by the presence of naval forces in the [Persian] Gulf area to civil aviation may have been underestimated, in particular as civil aircraft operated on promulgated tracks including standard approach and departure routes from airports in the area[23]."

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21 Ibid, p. 3, para. 12.

22 ICAO Report, para. 2.2.4 (emphasis added). Exhibit 4 to the Memorial of the Islamic Republic

23 Ibid., para. 2.2.5.

33. It is highly relevant that the U.S. Defense Department itself has condemned its own warnings made pursuant to the NOTAM as unclear. As stated in the Defense Department Report:

> "The current verbal warnings issued by CJTFME [Commander Joint Task Force Middle East] units do not clearly identify exactly which aircraft the ship is attempting to contact[24]."

34. The conclusions of the ICAO Report further confirm this. Not only did the Report conclude that "(t)he presence and activities of naval forces in the [Persian] Gulf area have caused numerous problems to international civil aviation[25]", it also stated:

> "Civil aviation requirements such as airways, standard approach and departure procedures, and the fixed tracks used by helicopters to oil rigs were not a consideration in warship positioning. This resulted in warships challenging civil aircraft often in critical phases of flight, i.e. during approach to land and during initial climb. In the absence of a clear method of addressing challenged civil aircraft, such challenges were, on occasion, mistaken by pilots to whom the challenge was not addressed, causing additional confusion and danger[26]."

SECTION 4. The Consequences of the Illegal U.S. NOTAMs

35. The typical practice of the United States in the Persian Gulf was to challenge virtually every aircraft that came even remotely close to its warships. This resulted in continuous interference with and endangerment of civil aviation traffic in the region. Many of the resulting incidents have been well documented, and repeated protests were made by the Islamic Republic to ICAO, the United

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24 Defense Department Report, p. E-18 (emphasis added). Exhibit 4 to the Memorial of the Islamic Republic.

25 ICAO Report, para. 2.3.1. Exhibit 4 to the Memorial of the Islamic Republic.

26 Ibid., para. 2.3.2.

States and the U.N. Secretary-General for distribution as Security Council documents on this subject[27].

36. These interferences in civil aviation were violations of both the Chicago Convention and the Treaty of Amity. However, the most serious consequence of the NOTAMs and the measures taken by U.S. forces pursuant to the NOTAMs was the shoot-down of Flight IR 655.

37. In considering the U.S. forces' application of its NOTAM on 3 July 1988 one can appreciate why such measures are prohibited under international law:

> First, the United States' forces applied the NOTAM against a civilian aircraft cleared for take-off from an international airport, while that aircraft was still flying over the territory of the Islamic Republic;
>
> Second, the United States' forces applied the NOTAM improperly given that they were violating the Islamic Republic's territorial sovereignty at the time; and
>
> Third, the United States issued illegal warnings and challenges to Flight IR 655 pursuant to the NOTAM although there is no basis in international law for challenging civilian aircraft in such a manner.

38. The Vincennes failed even to abide by the conditions for engagement set out in its own NOTAM. Under the NOTAM that had been issued by the United

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27 See, Memorial of the Islamic Republic, pp. 33-42. See, also, Exhibits 15, 19 and 21 thereto for protests made to ICAO and the United States and Exhibit 16 to these Observations for protests made to the Security Council for distribution as Security Council documents.

States, aircraft approaching a U.S. warship were only supposed to be at risk of "defensive measures" (i) if they had not been cleared for take-off from a regional airport, and (ii) if they came within 5 nautical miles of a warship at an altitude of less than 2000 feet. In this case, the interception of IR 655 took place at a distance of 10 nautical miles from the Vincennes and at a height of 12,950 feet. Not only was this outside the lateral and vertical limits appearing in the NOTAM, but Flight IR 655 was also a flight "cleared" to depart from a regional airport to which the NOTAM purported not to apply. Thus, under the terms of the United States' own NOTAM, there was no justification for the attack.

39. As explained in paragraph 16 above, this NOTAM (albeit in a revised form) is still being imposed on the ATS providers in the Persian Gulf region by the United States. A number of these States have refused to endorse the NOTAM because of its illegal nature and it has only been promulgated by these States for safety reasons. The Islamic Republic has continued to protest the illegal nature of the NOTAM since the incident of 3 July 1988 and continues to seek its removal.

SECTION 5. The U.S. Forces' Total Failure to Coordinate their Activities with Civilian ATS Authorities in the Persian Gulf Region

40. The United States ends its discussion of the NOTAMs by alleging that the disruption of civilian air traffic in the Persian Gulf was caused by the Iran-Iraq war and by the failure of countries such as the Islamic Republic "to establish and maintain close cooperation with foreign military authorities in the [Persian] Gulf responsible for activities that could affect civil aviation[28]". In the footnote to this statement, the United States suggests that under the Chicago Convention the

28 U.S. Preliminary Objections, Annex 2, p. 6.

burden is on civilian authorities to coordinate their activities with military authorities[29].

41. It is certainly true that the war imposed on the Islamic Republic by Iraq together with the attacks on neutral shipping initiated by Iraq in 1980 disrupted commercial navigation in the Persian Gulf region. However, as explained in Part II of these Observations, the responsibility for the consequent disruption of air traffic lay entirely with Iraq.

42. In any event, steps had been taken by the Islamic Republic and other ATS providers in the region to control this situation and to ensure that civil aviation kept clear of the area of hostilities between Iraq and the Islamic Republic. It was only the presence of the United States' forces in the Persian Gulf and their failure to coordinate with the ATS providers in the region which disrupted this situation and resulted in the interference with and endangerment of civilian air traffic.

43. The United States is entirely wrong when it implies that the burden was on countries in the Persian Gulf to maintain and establish close cooperation with military forces in the Persian Gulf. The provision of the Chicago Convention to which the United States refers on this point is related to military forces within a State's own FIR, not to the military forces of a third State. The military forces of a third State must obviously have the obligation to initiate cooperation when acting within another State's FIR and must accept the authority of the ATS provider in that FIR.

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29 Ibid., fn. 2.

44. This point is confirmed by the ICAO Report. It found conclusively that -

> "There was no coordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the [Persian] Gulf area[30]."

45. The Safety Recommendations of the ICAO Report clearly show that the burden was on the United States in this regard, holding that -

> "a) Military forces should, initially through their appropriate State authorities, liaise with States and ATS units in the area concerned.
>
> b) Military forces should be fully informed on the extent of all promulgated routes, types of airspace, and relevant regulations and restrictions[31]".

These findings were confirmed in the ANC's report on the incident to the Council, which itself was endorsed by the Council in its final decision on 17 March 1989[32].

46. The United States made no attempt whatsoever to take such steps. It failed to inform ATS providers of the movements of its vessels and made no attempt to establish a communication link with ATS providers. This failure, combined with the illegal NOTAMs, was a direct cause of the shooting down of Flight IR 655 and in itself constituted a violation of both the Chicago Convention and the Treaty of Amity.

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30 ICAO Report, para. 2.8.4. Exhibit 4 to the Memorial of the Islamic Republic.

31 Ibid., para. 4.1.

32 C-Dec 126/20, 17 March 1989. Exhibit 50.

LIST OF EXHIBITS [1]

Exhibit	
1	Jiménez de Aréchaga, E.: "The Amendments of the Rules of Procedure of the International Court of Justice", in American Journal of International Law, Vol. 67, No. 1, January 1973, p. 17.
2	Rosenne, S.: Procedure in the International Court, Martinus Nijhoff, The Hague, 1983, pp. 164-165.
3	Barry, J. and Charles, R.: "Sea of Lies" in Newsweek, 13 July 1992.
4	Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987), 9 December 1991; U.N. Doc. S/23273.
5	Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq, 19 August 1988; U.N. Doc. S/20134.
6	Transcript of ABC Nightline, 1 July 1992.
7	Lauterpacht, E.: "Aspects of the Administration of International Justice" in Hersch Lauterpacht Memorial Lectures, Cambridge, Grotius Publications, 1991, pp. 104-107.
7A	United Nations Secretariat Note No. AD311/1 GEN (5 March 1971) to the Permanent Mission of Iran; UN Editorial Directive No. ST/CS/SER.A/29 (10 January 1990).
8	Boyle, F.A.: "International Crisis and Neutrality: U.S. Foreign Policy toward the Iraq-Iran War", in Neutrality - Changing Concepts and Practices, ed. Leonhard, A.T., University Press of America, 1988.
9	"At War, Iraq Courted U.S. into Economic Embrace", The Washington Post, 16 September 1990.
10	Chubin, S. and Tripp, C.: Iran and Iraq at War, London, 1988, pp. 152-157, 272-275.
11	Congressional Record - House of Representatives, 2 March 1992, H 860. Congressional Record - House of Representatives, 9 March 1992, H 1109/H 1110.
12	Resolution 598 (1987), United Nations Security Council (2750th Meeting, 20 July 1987); U.N. Doc. S/RES/598 (1987).
13	CNN Transcript, Larry King Live, 2 July 1992.
14	Telegraph to the Embassy of the Islamic Republic at The Hague containing copies of Notices to Mariners issued by the Islamic Republic (translation supplied by the Islamic Republic).

[1] Not reproduced. *[Note by the Registry.]*

15 Letter dated 21 October 1980 from the Chargé d'Affaires of the Permanent Mission of Iran to the United Nations to the U.N. Secretary-General; U.N. Doc. S/14226, 22 October 1980.

16 The Islamic Republic's protests to the Secretary-General of the United Nations. U.N. Doc. S/18794, 10 April 1987; U.N. Doc. S/18889, 2 June 1987; U.N. Doc. S/18988, 20 July 1987; U.N. Doc. S/19016, 3 August 1987; U.N. Doc. S/19161, 29 September 1987; U.N. Doc. S/19224, 21 October 1987; U.N. Doc. S/19225, 21 October 1987; U.N. Doc. S/19267, 13 November 1987; U.N. Doc. S/19335, 11 December 1987; U.N. Doc. S/19369, 22 December 1987; U.N. Doc. S/19451, 26 January 1988; U.N. Doc. S/19460, 28 January 1988; U.N. Doc. S/19474, 3 February 1988; U.N. Doc. S/19516, 18 February 1988; U.N. Doc. S/19558, 1 March 1988; U.N. Doc. S/19613, 14 March 1988; U.N. Doc. S/19687, 25 March 1988; U.N. Doc. S/19796, 18 April 1988; U.N. Doc. S/19840, 26 April 1988; U.N. Doc. S/19863, 5 May 1988; U.N. Doc. S/19871, 9 May 1988; U.N. Doc. S/19874, 10 May 1988; U.N. Doc. S/19885, 16 May 1988; U.N. Doc. S/19923, 3 June 1988; U.N. Doc. S/19961, 24 June 1988; U.N. Doc. S/19965, 27 June 1988; U.N. Doc. S/19970, 29 June 1988; U.N. Doc. S/19977, 1 July 1988; U.N. Doc. S/19979, 4 July 1988; U.N. Doc. S/20026, 18 July 1988.

17 Letter dated 6 July 1987 from the Chargé d'Affaires A.I. of the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations Addressed to the Secretary-General; U.N. Doc. S/18970, 7 July 1987.

18 Keddie, N.R.: "Iranian Imbroglios: Who's Irrational?", World Policy Journal, Winter 1987-1988, pp. 46-47.

19 Letter dated 18 April 1988 from the Acting Permanent Representative of the United States to the United Nations to the President of the Security Council; U.N. Doc. S/19791, 18 April 1988.

20 Moore, M.: "U.S. Positions Ship to Counter Underground Iran Missile Site" in The Washington Post, 2 July 1988.

21 Text of the Statement by His Excellency Dr. Ali-Akbar Velayati, Minister for Foreign Affairs of the Islamic Republic of Iran before the Special Session of the Security Council, 14 July 1988.

22 Evans, D.: "Vincennes Case a Cloud over Navy" in Chicago Tribune, 25 October 1991.

23 Amicus Curiae Brief of the United States in National Petrochemical Company of Iran v. the M/T Stolt Sheaf, et al; (United States Court of Appeals, 2nd. Cir.), No. 87-9022, 29 February 1988, p. 5.

24 United States cable dated 31 August 1988 from Washington, D.C. to United States Embassy, Berne, Switzerland.

United States cable dated 2 September 1988 from United States Embassy, Berne, Switzerland to Washington, D.C.

United States cable dated 6 September 1988 from United States Embassy, Berne, Switzerland to Washington, D.C.

United States cable dated 23 September 1988 from Washington, D.C. to United States Embassy, Berne, Switzerland.

Letter dated 6 February 1989 from Amir Sadeghi Neshat, Managing Director, Iran Insurance Company to the Swiss Embassy in Tehran.

Note dated 7 February 1989 from the Ministry of Foreign Affairs of the Islamic Republic of Iran to the Swiss Embassy, U.S. Interests Section in Tehran.

Letter dated 16 April 1989 from the Swiss Embassy, U.S. Interests Section on behalf of the Government of the United States of America replying to Iran Insurance Company's letters dated 6 February 1989 and 7 February 1989.

Articles of Incorporation of the Iran Insurance Company, Official Gazette, 25 February 1974.

Act of Nationalization of Insurance Credit Institutions, 17 November 1979.

24A Award No. ITM/ITL 51-395-3, 27 May 1985, reprinted in 8 Iran-U.S. C.T.R. 216, at pp. 220-221. The other cases involved were as follows: Fortres-Icas-Continental Associates, v. the Islamic Republic of Iran and Sherkate Sahami Bimeh Iran (Case No. 301). Frank B. Hall & Company Inc., v. The Islamic Republic of Iran, the Central Insurance Company of Iran (Bimeh Markazi), Insurance Company of Iran (Bimeh Iran), Telecommunications Company of Iran (TCI) (Case No. 376) AFIA, v. Islamic Republic of Iran, Alborz Insurance Company, Bimeh Iran (Iran Insurance Company), Bimeh Markazi (The Central Insurance Company of Iran), Bimeh Melli (National Insurance Company, Ltd.), Bimeh Hafez (Hafez Insurance Company), and Shargh Societe Anonyme (Case No. 453). The Sentry Corporation, v. The Islamic Republic of Iran (Bimeh Iran) (Case No. 426). George W. Drucker, v. Foreign Transaction Company, Insurance Company of Iran, National Grain, Sugar and Tea Organization (Case No. 121). Fluor Corporation, v. Bimeh Iran (Iran Insurance Company) (Case No. 811).

25 Fitzmaurice, Sir G.: The Law and Procedure of the International Court of Justice, Vol. II, Cambridge, Grotius Publications, 1986, pp. 670-671.

26 Hearings Before the Defence Policy Panel of the House of Representatives, H.A.S.C. No. 100-119, 100th Cong. Second Sess., 1988, pp. 30-31; 48-49; 50-51; 54-55, 58-59; 60-61; 70-73.
Statement of Vice President Bush, S/PV. 2818 (14.7.1988) pp. 48-61.

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28 Yates, G.T.: "State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era", in International Law of State Responsibility for Injuries to Aliens, ed. Lillich, R., 1983, p. 220.

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