

CORRESPONDENCE

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1. THE AGENT OF THE UNITED STATES OF AMERICA
TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

26 September 1989.

I refer to the Application¹ submitted to the Court on May 17, 1989, by the Government of the Islamic Republic of Iran. At your meeting with the Agents on September 12, 1989, you asked the United States to submit a letter explaining the legal basis for the submission and decision of preliminary objections prior to the filing of the Memorial, as well as any other comments the United States may have on the desirability of the sequence it had suggested for addressing preliminary objections. Without prejudice to the rights enjoyed by the Government of the United States, I wish to provide the following views.

The Statute and the Rules of the Court provide the legal basis for the submission and decision by the Court of preliminary objections prior to the Memorial.

The power and obligation of the Court to address its jurisdiction at a preliminary stage of the proceedings can be found in Articles 36 and 53 of the Statute. Pursuant to Article 36, the Court is empowered and obligated to determine its jurisdiction in the event of a dispute as to that jurisdiction. Article 53 of the Statute, which addresses a case in which one party has not appeared or has failed to defend its case, implicitly recognizes this power and obligation. It provides that before reaching a decision on the merits in such circumstances, the Court must satisfy itself that it has jurisdiction. As a previous member of this Court has said: "This requirement must apply *a fortiori* when a case is defended and a preliminary objection has been filed." Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", 67 *American Journal of International Law* 12 (1973).

The Rules of Court deal more directly with the authority and obligation of the Court to address an objection to its jurisdiction or the admissibility of the Application prior to a Memorial. Article 79 of the Rules provides for the filing of an objection within the time limit fixed for the delivery of the Counter-Memorial and, upon receipt by the Registry of a preliminary objection, requires the suspension of the proceedings on the merits and the fixing of the time limit within which the other party may present a written statement of its observations and submissions. It further provides that after hearing the parties, the Court shall give its decision in the form of a judgment.

According to a plain reading of the words of Article 79, a party is authorized to file objections at any time after the filing of an Application through the time fixed for the filing of the Counter-Memorial. Thus, while Article 79 establishes an outside time limit for the filing of an objection, within that limit it leaves the Respondent free to determine whether and, if so, when to file an objection. Apparently this was the understanding of the Court when it considered the 1972 revisions to the Rules. Thus, at that time, the suggestion was made that the Respondent be required to file its objections as soon as it receives the Application; this was rejected on the ground that such a requirement might adversely affect the Respondent's right of defense. Jiménez de Aréchaga, *supra*, 19.

¹ I, pp. 1-8.

A plain reading of the provisions in Article 79 requiring the Court upon receipt of a preliminary objection to suspend proceedings on the merits and render a decision on that objection provides the authority and the obligation of the Court to make a positive finding regarding its jurisdiction even before the Memorial has been filed.

Finally, with regard both to the time limit for filing preliminary objections and the obligation of the Court to address those objections before the submission of the Memorial, the United States understanding of the requirements of Article 79 is consistent with the purpose of the 1972 revisions which, as described by one of the principal participants in that process, was to "regulate preliminary objections so as to settle them as soon as feasible". Jiménez de Aréchaga, *supra*, 1.

While the United States recognizes that the Court has not previously addressed a preliminary objection prior to the Memorial without the consent of the Applicant, there is nothing in the practice of the Court contrary to the United States reading of Article 79. (Proceedings relating to requests for interim measures, which require only a *prima facie* showing of a basis on which jurisdiction might be founded, are to be distinguished for the present purposes from proceedings relating to the question of the Court's jurisdiction to hear the case, as under Article 79, or the merits.) Indeed, it appears that during its consideration of the 1972 revisions to the Rules, the Court assumed that preliminary objections could be filed at any time, but that the Respondent would not normally be in a position to file such objections before studying the Memorial. Jiménez de Aréchaga, *supra*, 19.

The United States believes that it is desirable for the Court to address objections filed before the Memorial as provided in Article 79 not only because that is in keeping with the plain meaning and purpose of that Article, but also because it serves the interest of sound administration of justice. If the Respondent has identified preliminary objections that may dispose of the case on the basis of the Application alone, there is no reason that the Respondent should be required to wait until the Memorial for the Court to address such objections.

Moreover, consideration of the preliminary objections prior to the Memorial would not prejudice the Applicant. The statements of law and fact contained in the pleadings and statements and evidence adduced at oral hearings on the objections must be confined to those matters that are relevant to the objection, so there is no risk that the Applicant's case on the merits will be prejudiced. If, on the other hand, it develops that a decision on the objection would be so inextricably intertwined with the merits that it would involve an examination of the whole of the case, the Court would declare that the objection does not possess an exclusively preliminary character. Indeed, as we previously indicated, the Court recognized when it revised the rules that it is only the Respondent that might be prejudiced by the submission and a decision on objections before the Memorial.

The United States has stated its present intention to file preliminary objections in this case prior to the submission by Iran of its Memorial. As we stated then, in accordance with Article 79 of the Rules of Court, we will at the time of our submission request that the proceedings on the merits be suspended pending a decision by the Court on those preliminary objections, following the submission of written pleadings and a hearing in that matter.

(Signed) Abraham D. SOFAER.

2. THE AGENT OF THE ISLAMIC REPUBLIC OF IRAN TO THE PRESIDENT

19 Mehr 1368.

11 October 1989.

I refer to the Application instituting proceedings¹ in the case concerning *Aerial Incident of 3 July 1988* or in fact *Shooting Down of a Civilian Airliner over the Persian Gulf (IRI v. USA)* submitted to the Court on 17 May 1989 and entered on the Court's General List No. 79. At your meeting with the Agents on 12 September 1989 you asked the Islamic Republic to submit a letter in response to the Respondent's letter, dated 26 and received on 27 September 1989, explaining the legal basis for submission of the Applicant's Memorial prior to the filing of preliminary objections by the Respondent, as well as any other comments the Applicant may have on the desirability of the sequence it had suggested for addressing preliminary objections. Without prejudice to the rights enjoyed by the Government of the Islamic Republic of Iran, I wish to provide the following views.

Under Article 40, paragraph 2, of the Rules of Court, "the respondent upon receipt of the certified copy of the application, or as soon as possible thereafter, shall inform the Court of the name of its agent", referred to in Article 42 of the Statute. This should not take more than a few weeks. Thus, the Application having been filed on 17 May 1989 with the Court and served on the Respondent on 18 May 1989, the Applicant expected the Respondent to appoint its Agent by 1 June 1989 or the Court to write its letter of 5 July 1989, described below, a month earlier. Although it did not file a letter with the Court, by the middle of June 1989 the Applicant made it known that if the Respondent's Agent was not appointed, it would consider to request the Court to proceed with the case under Article 53 of the Statute for non-appearance of the Respondent. Having been advised to wait further, the Applicant forbore until the 5 July 1989 letter of the Court was issued.

The Court by its letter of 5 July 1989 noted the non-compliance of the Respondent in the appointment of its Agent in the case pursuant to Article 40, paragraph 3, of the Rules of Court. In the same letter the Court informed the Parties that the President of the Court intended to ascertain their views with regard to questions of procedure in a meeting with the Agents scheduled for 17 July 1989 and that if there was any difficulty in effecting the appointing of the Respondent's Agent before the meeting, the Respondent's views could be presented by a temporary representative nominated for that purpose.

Pursuant to the Court's letter of 13 July 1989, the meeting was held on 20 July 1989 with Mr. Abraham D. Sofaer, Legal Adviser of the Department of State, and Mr. Michael J. Matheson, Assistant Legal Adviser, as temporary representatives of the United States and the undersigned, the Agent of the Applicant and its delegation. In that meeting the Respondent's representatives raised no question of jurisdiction with the Application nor the possibility of raising it in the form of a preliminary objection. As the Respondent's representatives stated that in two weeks from 20 July 1989 the Agent would be appointed, the President scheduled another meeting for 1 September 1989.

Finally, the Respondent after three months of hesitation by a letter received by the Court and served on the Applicant on 14 August 1989, but dated 9 August 1989, appointed its Agent for the purposes of the case without raising

¹ I, pp. 1-8.

any question of jurisdiction. On 15 August 1989, the *New York Times* at page A3, published an article with the title "U.S. Lets World Court Try Iran Air Case" in which it was reported that the United States

"Officials said the decision to fight Iran's accusation partly reflected a belief that the United States can persuade the Court that the incident was an accident.

The Soviet Angle

But they said the decision also stemmed from a recognition that Washington could not easily refuse to take part when it is working with the Soviet Union to increase the World Court's role in resolving international disputes. "To have withdrawn would have hurt our credibility with the Russians", a senior official said.

Earlier this month, the United States and the Soviet Union agreed to let the court resolve disputes between them over the interpretation of seven treaties relating to terrorism and drug trafficking. Representatives of the two countries said they would ask Britain, France, and China — the other permanent members of the United Nations Security Council — to join their pact.

The aim is for the big powers to agree to let the World Court settle disputes between them in clearly defined areas of international law and then invite other countries to do the same.

Earlier this year, a committee of private American lawyers that advises the U.S. State Department on international legal matters recommended that the administration contest Iran's case, lawyers said.

But the Defense Department was reported to have opposed fighting the case because it feared that the court might contest America's legal right to protect neutral shipping. Administration officials say they will not accept any part of a judgment that goes beyond the facts of Iran's complaint." (Reprinted in *International Herald Tribune*, 16 August 1989, p. 2, under the title: "U.S. to Fight Charges by Iran in World Court".

If the letter of appointment of its Agent, filed with the Court after three months of contemplation and examination of the Application, and its public statements carried in the press did not expressly indicate the Respondent's acceptance of the Court's jurisdiction, they at least implied that the Respondent would not contest the Court's jurisdiction in the case.

However on 1 September 1989, the same day scheduled for the meeting of the Agents with the President since 20 July 1989, the Respondent filed a letter with the Court in which it was stated that "It is the present intention of the United States to file preliminary objections in this case prior to the submission by Iran of its Memorial"; that "at this time we contemplate filing at least two (jurisdictional) objections"; and that

"In accordance with Article 79 of the Rules of the Court, when the Registry receives our preliminary objections, we would request that the proceedings on the merits be suspended pending a decision by the Court on those objections following the submission of written pleadings and a hearing in the matter."

The Applicant believes that questions as to the jurisdiction, irrespective of any form which it may subsequently take, have to be raised with the Court in the first available opportunity, in the present case no later than the 20 July 1989 meeting or 14 August 1989 when the letter of appointment of the Respondent's

Agent, dated 9 August 1989, was filed with the Court. Therefore, it is the Applicant's position that the Respondent is both estopped and time-barred from raising such jurisdictional questions in the case.

However, even if *arguendo*, the Respondent is still entitled to raise the jurisdictional questions in the form of preliminary objections under Article 79 of the Rules, it should not do so prior to the filing of the Applicant's Memorial. In fact the Respondent's action in not filing its preliminary objections by now and instead informing the Court of its present intention to do so in the future admits of the rule that, if at all, such objections should be filed subsequent to the Applicant's Memorial. If it believed to have such a right, the Respondent would have already done so. Notable in this regard are the Respondent's statements in its letter of 1 September 1989 such as: "It is the present intention of the United States to file", or "when the Registry receives our preliminary objections, we would request" "at this time we contemplate filing at least two objections". These points have not been changed in the Respondent's letter of 26 September 1989. For the same reasons, moreover, the Court is not in the possession of a preliminary objection so as to be required to determine its admissibility and effect to suspend the proceedings in the case and thus, the Court should not be used for legal advice in a contentious case.

The preliminary objection procedure is an exceptional procedure requiring "great care not to permit it to be abused for the purpose of evading, under cover of technical objections, an undertaking for which good faith commanded respect". S. Rosenne, *The Law and Practice of the International Court*, 451 and n. 2 (2nd revised ed., 1985).

"The faculty of raising issues of a preliminary character at an early stage of the proceedings — and of having them separately determined in advance of the merits, while these are suspended — is a considerable concession to the party raising such issues, made on the exclusive basis of the Rules of Court." Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", 67 *Am. J. Int'l L.* 1, 15 (1973).

Contrary to the Respondent's contention, neither the Statute nor the Rules of Court provides a legal basis for the submission and decision by the Court of the intended preliminary objections prior to the Applicant's Memorial in this case. Articles 36 and 53 of the Statute have nothing to do with the filing and decision sequence of preliminary objections. It is therefore wrong to argue, as the Respondent does, that on the basis of those Articles there is an *a fortiori* requirement for the Court to decide preliminary objections prior to the filing of the Memorial. Paragraph 6 of Article 36, which could have been intended by the Respondent, only indicates the general principle of *la compétence de la compétence*, according to which: "In the event of a dispute as to whether the Court has jurisdiction, the matter should be settled by the decision of the Court."

Article 53 of the Statute on default proceedings states:

"1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

As the Respondent has finally appeared and so far has defended its case before the Court, the Applicant has not called upon the Court to decide in favour of its claim on the basis of the record before it. It is also clear that the

standard of *ex officio* judicial probity in case of non-appearance should be higher than when a Respondent appears and defends its case in a contentious proceeding but does not raise questions of jurisdiction.

The Applicant does not deny that if jurisdictional questions are properly raised by the Respondent, the Court is entitled to decide them, but that such a point in no way indicates that preliminary objections could be filed and if so must be decided prior to the filing of the Applicant's Memorial.

Neither does the Applicant argue that despite a properly raised and filed preliminary objection subsequent to the Memorial, the Respondent should be compelled to discuss the merits of the case. But it is in the extreme to argue that there is a requirement both under the Statute and the Rules that preliminary objections could be filed and if so must be decided prior to the filing of the Memorial. If the authority for preliminary objections, like that for provisional measures, Article 41, had been provided in the Statute it might be argued to override the provisions of Article 43 of the Statute for the submission of the Memorial. Article 79 of the Rules, paragraph 3, providing for suspension of the proceedings on the merits upon receipt of a preliminary objection is not intended to and has not suspended the filing of Memorials and Counter-Memorials in the practice of the Court. But if the Respondent wished to suspend the filing of its own Counter-Memorial, this has been tolerated. Similarly, where an applicant itself raises the preliminary objection its right of filing a Memorial thereafter could be suspended although it only happened once in the *Monetary Gold* case, 1953 I.C.J. 44-45.

Shabtai Rosenne in his book on *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 158, 161 (1983) states:

"As is well known, as is maintained in this paragraph [1 of Article 79 of the Rules], the Court's practice is only to take formal preliminary objections by the respondent after the merits have been laid before it in a pleading, normally the Memorial, and it will be rare that the application alone will be sufficient to elucidate questions of jurisdiction or admissibility. In *Fisheries Jurisdiction* [1972 I.C.J. 181] (still under the 1946 Rules) and in *Aegean Sea Continental Shelf* [1976 I.C.J. 42-43] (under the 1972 Rules), the Court after objections had been raised formally in provisional measure proceedings, decided that the first pleadings should be directed to the question of jurisdiction, but it did not disturb the normal order of those pleadings — memorial by the Applicant and counter-memorial by the respondent (if it wished to defend its case)."

The Rules have maintained their essential feature in this regard, "namely, that in the normal case in which the respondent State wishes to interrupt proceedings introduced unilaterally by application, it should do so by putting its pleas forward after the memorial has been filed". In fact

"the Court has never disturbed the normal order for the first round of the written pleadings, even when it has been officially informed at the earliest stage of the respondent's intention to contest the Court's jurisdiction. The most it might do is, in the interlocutory order fixing the time-limits, to describe the respondent State's first pleading as its counter-memorial or preliminary objections." S. Rosenne, *The Law and Practice of the International Court*, 437, 451 (2nd revised edition, 1985).

As Geneviève Guyomar states in her treatise on *Commentaire du Règlement de la Cour Internationale de Justice adopté le 14 avril 1978*, 498, 508 (1983), it does not appear that the Court could consider the Respondent's preliminary objec-

tions prior to the filing of the Applicant's Memorial, as the Respondent's objection to the provisional measures, invoking Article 62 of the 1946 Rules on preliminary objections did not stop the Court from ordering for the filing of the Memorial and Counter-Memorial. *Interhandel* case (*Switzerland v. USA*) 1957 I.C.J. 122-123.

Judge Jiménez de Aréchaga himself, in a joint dissenting opinion with Judge Bengzon in both *Fisheries Jurisdiction* cases (1972 I.C.J. 185 and 192) states:

"A preliminary objection must be filed within the time-limit assigned for the Counter-Memorial, that is to say, after the presentation of the Memorial, not before it: it is only then that it may have the suspensive effects provided for in Article 62, paragraph 3, of the Rules. Otherwise, a respondent might be able to block the proceedings before the Memorial is filed." *Accord*, H. Thirlway, *Non-appearance before the International Court of Justice*, 93 (1985).

Article 62, paragraph 3, of the 1946 Rules has remained unchanged in Article 67 of 1972 and Article 79 of the 1978 Rules.

If the concern is to avoid public discussion of the merits by the Applicant before the Court prior to the establishment of jurisdiction, to the necessary extent it has been accommodated by Articles 38 and 53 of the Rules. Article 38, paragraph 5, of the Rules was revised in 1978 in order not to enter an Application in the General List if the Applicant proposes to find the jurisdiction upon consent to be given or to be manifested by the Respondent after the Registrar has transmitted the Application to the Respondent and unless and until he has received the Respondent's consent to the Court's jurisdiction. The Court's practice under Article 53, paragraph 7, of the Rules also does not allow the pleadings including the Applicant's Memorial to be accessible to the public before the opening of the oral proceedings. Moreover in the case of provisional measures, mainly decided before establishment of jurisdiction, there is no way to avoid public discussion of the merits against the Respondent. In any event, a Respondent who attempts to get credit with other States for publicly accepting the Court's jurisdiction in order to prove that the whole affair was "accidental" while continuing to threaten shooting down further civil aircraft and thereby endangering the security of international civil aviation in the Persian Gulf, should not be allowed to hide behind this kind of interpretations.

In fact Judge Jiménez de Aréchaga's discussion of the time-limit for filing a preliminary objection (p. 19) does not indicate that Article 79 of the Rules determines the sequence of the filing of the preliminary objection prior to the Memorial. All he does is to mention that there are suggestions either way though he does not identify the sources of those suggestions. At any rate it is questionable why an Applicant should not be able to shape its Memorial in a manner to remove or cure a rectifiable objection, as did the Applicants in the *United States Nationals in Morocco* (1952 I.C.J. Pleadings 235) and *Phosphates in Morocco* (1938 P.C.I.J., Ser. A/B, No. 74 at 16) cases.

Another problem in retrospect is that of successive preliminary objections and thereby abuse of the process of the Court and blocking of the Applicant's case. The Respondent in both its letters of 1 and 26 September 1989 clearly reserves its right to contemplate raising additional grounds for preliminary objection as it "has not had an opportunity to determine definitively all of" them. Thus there is no assurance for the Applicant that even when the intended objections filed and dismissed prior to the Memorial, the Respondent would not raise further preliminary objections after its examination of the Memorial. Although in order to avoid paralyzing the course of justice Henri Rolin admitted that the prelimi-

nary objection procedure may only be invoked once (*Nottebohm case, I.C.J. Pleadings*, Vol. II, p. 162) and the Respondent in the *Aerial Incident of 27 July 1955, I.C.J. Pleadings*, p. 381, recognized that it could present no further objections, the situation is far from clear in the Court's practice. Therefore the Respondent's suggested sequence of filing and determination of the preliminary objections does not serve the interests of sound administration of justice at all.

As the Respondent has not set forth its contemplated preliminary objections, it is difficult to determine the extent of the necessary arguments of the law and facts. But it is clear that such arguments would be better understood when the Memorial is already filed, relieving the Court from deciding which parts of the Parties' submissions with regard to the preliminary objections are to be maintained or excluded. Moreover, the discussion of law and facts, referred to in Article 79, paragraph 6, of the Rules is limited to jurisdiction, while the Respondent has also contemplated questions of admissibility and otherwise.

Similarly the Applicant is not in a position to comment in detail on whether the assumed preliminary objections if and when filed should be necessarily determined separately from the merits. Article 79, paragraph 7, of the Rules states that the Court shall "either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". Prior to this 1972 amendment, the Court under its practice as well as that of the Permanent Court, incorporated in paragraph 5 of the 1936/1946 Rules, had the option to join to the merits its decision on the objections. It is believed that dropping of the joinder option in the 1972 revision is not to abolish it, thus wiping out a virtually constant jurisprudence itself corresponding to a widely felt need.

Based on Article 48 of the Statute, the Court has an inherent power to join the preliminary objection to the merits as the Permanent Court did before the preliminary objection procedure was included in the Rules in 1936. *Prince von Pless (P.C.I.J., Ser. A/B, No. 52)*. The point that the Court might decide that in the circumstances of the case the objection does not possess an exclusively preliminary character, would add nothing to what the Court already has power to do and which the Permanent Court has done, for instance in *Electricity Company of Sofia (P.C.I.J., Ser. A/B, No. 77)*. The 1972 revision is thus no more than a statement of policy not enjoined by the Statute, jurisprudence and State practice. Indeed as the jurisprudence shows, the joinder power can have many useful applications. Abolishing of the joinder or limiting it to a judgment on the objection would require an explicit provision in the Statute. For example in *Prince von Pless (Ser. A/B, No. 52)* and *Panevezys Salduktiskis Railway (Ser. A/B, No. 75)* the preliminary objections were joined to the merits in the form of orders rather than judgments. Such authority is still available under Article 48 of the Statute. See S. Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 165-166 (1983).

Judge Jiménez de Aréchaga in his 1973 article, referred to above (pp. 13-15), admits that the joinder power has not been abolished although limiting it to non-jurisdictional preliminary questions. But, as described above, the Applicant believes the joinder power should persist with regard to jurisdiction as at times it could also expedite the proceedings.

In fact in the case of *United States Diplomatic and Consular Staff in Tehran*, despite the Islamic Republic's objections to the jurisdiction, the Court joined its decision on them to the merits by ordering the filing of Memorial and Counter-Memorial. 1979 *I.C.J.* 23-24.

It is also noted that Article 80 of the Rules on Counter-Claims maintains the joinder option regarding questions of jurisdiction and admissibility while there is

no reference as to application of Article 79 of the Rules thereto in case of preliminary objections, although its applicability could be argued.

Based on the foregoing, the Islamic Republic of Iran requests the Court to allow the scheduling of the pleadings on the basis of Article 43 of the Statute and Article 44, paragraph 4, and Article 45, paragraph 1, of the Rules of Court.

(Signed) Mohammad K. ESHRAGH.

3. THE AGENT OF THE ISLAMIC REPUBLIC OF IRAN
TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

18 Shahrivar 1371.

9 September 1992.

I have the honour to refer to the Deputy-Registrar's letter of 16 October 1990 and the Registrar's letters of 30 October 1990, 6 March 1991 and 16 April 1991, together with their enclosures, relating to certain correspondence exchanged with the International Civil Aviation Organization ("ICAO") in connection with the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*. That correspondence indicates that ICAO is contemplating submitting observations in the case and that the Court may fix time-limits, under Article 69, paragraph 3, of the Rules of Court, for such a submission.

For the reasons explained below, the Islamic Republic considers that it would be inappropriate for ICAO to submit any observations in the case. Accordingly, the Islamic Republic respectfully requests the Court not to set any time-limits for the submission of such observations.

The Background Situation

In accordance with Article 34, paragraph 3, of the Statute of the Court, ICAO was notified by the Deputy-Registrar's letter of 22 May 1989 that the construction of the 1944 Chicago Convention on International Civil Aviation, as amended (the "Chicago Convention") and the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the "Montreal Convention") is in question in the case. ICAO also has had communicated to it copies of all the written pleadings submitted in the case to date, and was requested to furnish the Court with certified copies of the Chicago and Montreal Conventions in English and French and a certified list of parties to these Conventions as of 17 May 1989.

The Director of the Legal Bureau of ICAO duly responded with the information requested by letter dated 26 May 1989. Regrettably, however, in the last two paragraphs of this letter, the Director added his personal opinion on certain legal aspects of the dispute that is presently before the Court.

On 30 May 1989, the Deputy-Registrar responded to the Director's letter. Quite correctly, the Deputy-Registrar indicated that while he would in due course be communicating its text to the Parties, he was not consigning it to the case-file "in so far as it relates to matters which fall for the Court itself to consider". In itself, this incident illustrates the problems involved in having ICAO submit observations in this case.

The Islamic Republic was not informed of this correspondence until one and one-half years later when, by letter dated 30 October 1990, the Deputy-Registrar

enclosed a copy of a letter he had sent to the Agent of the United States in the case, together with enclosures constituting the correspondence exchanged with ICAO¹.

On the same date, 30 October 1990, the Registrar also addressed a letter to the Secretary General of ICAO drawing his attention, *inter alia*, to the fact under Article 53 of the Rules of Court, the pleadings in the case should be treated as confidential.

By the Registrar's letter dated 14 March 1991, ICAO was invited to indicate whether it wished to submit written observations under Article 69, paragraph 3, of the Rules of Court on this stage of the case. This Article provides, *inter alia*, that :

"The Court, or the President if the Court is not sitting, may, as from the date on which the Registrar has communicated copies of the written proceedings and after consulting the chief administrative officer of the public international organization concerned, fix a time-limit within which the organization may submit to the Court its observations in writing."

By letter dated 27 March 1991, the Secretary General of ICAO indicated that he believed it "would assist the Court in its deliberations" for ICAO to file written observations. The Secretary General added that in order to prepare such observations, "it will be essential to take into account the observations and submissions of the Islamic Republic of Iran on the preliminary objections filed by the United States of America", and that because the Council of ICAO must be apprised of any proposed written observations and confirm them, the time-limit for such observations should be fixed no less than three months after receipt of the Islamic Republic's Observations and Submissions².

*In Contentious Cases, the Practice Has Been
for International Organizations Not to Submit Observations*

The Court's jurisprudence indicates that, in contrast to situations where its advisory opinion has been sought, in contentious cases it has been the Court's practice generally not to invite international organizations to submit observations, but where it was, in cases where the decision of an international organization is being brought to the Court on appeal, it has been the practice of such organizations to refrain from submitting observations *proprio motu*.

In the *South West Africa* case, for example, the Director General of the International Labour Office wrote to the Registrar indicating that the International Labour Organisation was at the Court's disposition to furnish any information which the Court might request in connection with the case³. In the event, however, the Court did not see fit to request either information or observations.

More to the point, in the *Appeal Relating to the Jurisdiction of the ICAO Council* case (the "*Appeal*" case), the Court, acting under Article 57, paragraph 5, of the Rules of Court then in force, fixed a time-limit for ICAO to submit observations on the convention in issue. By letter dated 6 June 1972, the Secretary General of ICAO stated its intention not to submit any observations in the following terms :

¹ Although the Islamic Republic was hitherto unaware of this correspondence, apparently the United States knew of its existence because, as the Deputy-Registrar's letter of 30 October 1990 indicates, it was sent to the US Agent in response to a request received from the United States Embassy in The Hague.

² *Supra*, pp. 281-613. [Note by the Registry.]

³ *I.C.J. Pleadings, South West Africa*, Vol. XI, pp. 543, 550.

"In considering the matter, I have noted that the case brought before the International Court of Justice is an appeal against the decision of the Council of the International Civil Aviation Organization, and also that copies of all the relevant proceedings in the Council have already been submitted to the Court. Taking these considerations into account, I have the honour to inform you that the International Civil Aviation Organization does not intend to submit observations on the above-mentioned questions."¹

This precedent is directly relevant to the present case. As will be seen below, whether or not the matter is deemed to be before the Court on appeal from an action of the ICAO Council is exclusively for the Court to decide. It would be inappropriate for ICAO to comment or take any position on that, or any other issue.

In the first place, it must be noted that it would be wholly inappropriate for ICAO to submit any observations concerning the Montreal Convention. As the Islamic Republic has pointed out in its written Observations and Submissions of today's date, ICAO has virtually no role to play under this Convention and absolutely no authority to interpret or apply its provisions. During the proceedings relating to the destruction of Flight IR 655 before the ICAO Council, the Montreal Convention was not debated and, in fact, the President of the Council in his Statement to the Council dated 9 June 1989 does not appear to have envisaged any role for ICAO to play in terms of submitting observations on the Montreal Convention².

Furthermore, with regard to the possibility of ICAO submitting observations on the Chicago Convention, this would be particularly inappropriate for the reasons alluded to in the *Appeal case*.

The decision of ICAO not to submit its observations in that case points to a principle which is equally applicable here: a forum of first instance should not participate in any manner in an appeal from its original proceedings. This principle is analogous to the *nemo iudex* doctrine by which it is universally accepted that no one can be the judge in his own case. By extension, in order to safeguard the impartial nature of the appeal proceedings, no court or quasi-judicial body should contribute on issues on appeal against its own actions. The appealability of ICAO's actions should thus be decided by the Court with no interference from ICAO. In other words, it would not be appropriate for ICAO in essence to certify the appealability of its own actions.

As W. M. Reisman emphasizes in his commentary on the *nemo iudex* doctrine, "an arbitrator should not have an interest in the decision", an "interest" being defined in the following terms: "... the outcome and effects of the decision will have a direct impact on a value cherished by the arbitrator, thereby impugning his impartiality"³. One of the interests suggested by the author is that of "recititude" or issue preclusion which applies where the arbitrator "has committed himself prior to this appointment to one of the views at issue in the arbitration". Such a situation is analogous to the ICAO Council participating in a case on

¹ *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council*, p. 784.

² In this regard, the Islamic Republic notes that ICAO has not submitted any observations in connection with the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, while the Registrar similarly communicated to ICAO a copy of the pleadings of the parties thereto. Order of 14 April 1982, para. 14.

³ See, W. Michael Reisman, *Nullity and Revision — The Review and Enforcement of International Judgments and Awards*, New Haven and London (1971), pp. 475 *et seq.*

appeal where it has not simply already committed itself to a particular position, but has actually ruled on some of the key points at issue, including whether the United States violated the Chicago Convention¹. It must be stressed in this respect that the decision which the Islamic Republic is appealing was taken by the ICAO Council, and that any observations that ICAO may intend to submit, as suggested by the President of the Council in his Statement of 9 June 1989 (Exhibit 51² to the Islamic Republic's Observations and Submissions), will be made by the Council, not the Assembly. This was confirmed in the letter of the Secretary General of ICAO dated 27 March 1991.

The Islamic Republic considers that any ruling made on the issue of the Islamic Republic's appeal from the original action of the ICAO Council must be made by the Court unfettered by submissions made by the Council. Thus, whether the ICAO Council considers that the Islamic Republic's appeal is proper or not is exclusively for the Court to decide (*compétence de la compétence*).

As Judge de Castro explained in his separate opinion in the *Appeal* case, the interpretation of a rule laying down an appeal procedure is solely within the jurisdiction of the appeal court once the lower court has made a decision at first instance.

"When there are rules as to appeal, the court (or arbitrator) cannot itself decide whether or not it is possible to appeal its own decision. Interpretation of the extent of the rule as to appeal falls within the jurisdiction of the higher court."³

Judge de Castro went on to note: "it is the case *as a whole* which is transferred to the higher court, with *all the question* it entailed before the court of first instance"⁴ (emphasis added).

It is of particular concern that ICAO has indicated that it wishes to review all of the written pleadings in the case before submitting its observations. This suggests that ICAO may wish to comment on particular positions or arguments advanced by one or the other Party in what approaches being a quasi-judicial capacity. Given that what is at issue is an appeal from a decision of the ICAO Council, such comments would be highly inappropriate.

As an international organization, ICAO is under an obligation to exercise its activities on the basis of strict impartiality and neutrality. To the extent that the ICAO Secretariat would participate in preparing observations, therefore, it is appropriate to recall the Staff Regulations promulgated by ICAO. Article 1.3 of these Regulations emphasizes that:

"Staff members shall conduct themselves at all times in a manner befitting their status as international civil servants . . . They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status."

¹ Reference may also be made in this respect to Article 17 (2) of the Statute of the Court which reflects the similar principle that

"No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity."

² Not reproduced. [Note by the Registry.]

³ *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 46, at p. 122.*

⁴ *Ibid.*, p. 123.

Article 1.4 of the Regulations amplifies this point by providing that "Staff members shall exercise the utmost discretion in regard to all matters of official business."¹ This implies that the Secretariat should not become involved in contentious proceedings.

On the other hand, if ICAO, in the light of its status as a neutral public international organization, were nonetheless to limit its observations to strictly decisional facts and to avoid gratuitous comments on legal or factual issues advanced by either Party which are for the Court to decide, such observations would be superfluous since all documents, minutes and actions of ICAO relevant to the case have already been filed with the Court by the Parties. In short, the Court has at its disposal the information necessary to decide the issues before it.

The Problem of the Confidentiality of the Pleadings and Documents

There is a further important reason why it would be inappropriate for ICAO to submit any observations in the case. This concerns the confidentiality of the pleadings and documents under Article 53 of the Rules of Court, a matter that the Registrar has referred to in his letters to ICAO of 30 October 1989 and 6 March 1991.

As the President of the ICAO Council has noted, to the extent that any observations are prepared, they would be submitted to the Council for comment. In the light of the confidentiality of the pleadings, however, it would obviously be inappropriate for any of the Parties' positions as set forth in their pleadings or documents to be reflected in those comments lest such confidentiality be compromised.

This was essentially the problem encountered by the Secretary-General of the Organization of American States in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*. There, the Registrar had drawn the attention of the Secretary-General of the Organization of American States to the case pursuant to Article 34 (3) of the Statute of the Court and had informed him that a time-limit had been fixed by the Court for any observations the Organization might wish to submit.

The Secretary-General of the Organization declined to submit any observations. As the Court noted:

"By a letter of 29 July 1987, the Secretary-General of the Organization of American States informed the Registrar that in his opinion he would not as Secretary-General have the authority to submit observations on behalf of the Organization, and that the convening of the Permanent Council of the Organization would require each member State to be provided with copies of the pleadings; he recorded his understanding, however, that the Court had notified all parties to the Pact of Bogotá of the fact that the proceedings appeared to raise questions of the construction of that instrument."²

For the same reason, the Secretary General of ICAO should decline to submit observations in this case.

¹ A similar requirement is found in Regulation 1.5 of the Staff Regulations of the United Nations. The contentious nature of the case is underscored in connection with issues involving the Chicago Convention by Article 87 of the Rules of Court.

² *I.C.J. Reports 1988*, p. 72, para. 7.

To the Extent Observations Are Submitted, It Is Generally in Connection with Requests for Advisory Opinions

It appears that observations have been submitted by public international organizations only where the Court has been asked for an advisory opinion. This was the situation, for example, in connection with the request by the Security Council for an advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. In contrast, international organizations have not seen fit to submit observations when the Court has been engaged in contentious disputes between two States.

It is also significant that where the ICAO Council has considered the possibility of submitting observations to the Court, this has been in conjunction with the consideration of a matter on its agenda that in no way impinged on proceedings at issue before the Court. Thus, in its consideration of the safety of civil aircraft flying near or over international frontiers at the Thirty-third Session of the ICAO Council, the Secretary General of ICAO drew attention to the proceedings before the Court arising out of the *Aerial Incident of 27 July 1955*¹. In that case, however, ICAO was not contemplating submitting observations on a matter it had already decided — the Court was being asked to act as a court of first instance and the ICAO Council was not involved in the proceedings in any way. The Council ultimately decided that the Secretariat could supply information to the Court on request without reference to the Council, but that if the Court should ask for an opinion or comments from ICAO, that request and the Secretariat's proposed answer to it should be submitted to the Council. In the event, the question never arose and no observations were furnished because the Court made no such request to ICAO.

Conclusions

In conclusion, there are three reasons why the Islamic Republic considers that the Court should neither receive observations from ICAO, nor fix a time-limit for the filing of such observations. *First*, the Court already has before it a full record of the proceedings before the ICAO Council which, as a contemporary record, provides the best evidence of such proceedings. *Second*, it is inappropriate for the ICAO Council to give any substantive comment on an issue in which it has already rendered a decision and which is under appeal. *Third*, the preparation of any observations would inevitably risk a breach of confidentiality contrary to Article 53 of the Rules of Court.

The 1946 Rules, in Article 57, paragraph 5, provided that after a notification had been made, the Court or its President "shall . . . fix a time-limit" for the public international organization in question to submit its observations. This Article has now become Article 69, paragraph 3, of the Rules of Court, and the word "shall" in paragraph 3 has been replaced by the word "may". As the former President of the Court, Eduardo Jiménez de Aréchaga, has explained:

"This makes it clear that under the Statute the Court is empowered but not obliged to fix a time-limit for the presentation of observations by the public international organization in question, even if the interpretation of its constituent instrument is in question in a case before the Court."²

¹ ICAO doc. C-WP/2609, 21 February 1958, para. 5.

² *American Journal of International Law*, Vol. 67 (1973), p. 1, at p. 8.

The Islamic Republic requests that, in the light of the above, the Court decline to fix a time-limit for the submission of observations by the ICAO Council. Such observations would be superfluous, inequitable, contrary to the Rules of Court and contrary to the aims of the compromissory clauses under the Court's consideration. If, contrary to the Islamic Republic's submission, observations are forthcoming, they should not, in any event, be considered by the Court.

4. THE AGENTS OF THE ISLAMIC REPUBLIC OF IRAN
AND THE UNITED STATES OF AMERICA TO THE REGISTRAR

8 August 1994.

We have the honour to refer to the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*.

The parties in this case have entered into negotiations that may lead to a full and final settlement of this case. Taking into consideration these negotiations, the parties request that the Court issue an order under Article 48 of the Statute of the Court and Article 54 of the Rules of Court postponing *sinie die* the opening of the oral proceedings in this case, currently scheduled to commence on September 12, 1994. If the negotiations do not result in a full and final settlement, either party, without the consent of the other party, may request the Court to fix a date for the opening of oral proceedings.

(Signed) Conrad K. HARPER.

(Signed) Mohammad K. ESHRAGH.

5. THE DEPUTY-REGISTRAR TO THE AGENT
OF THE UNITED STATES OF AMERICA

10 August 1994.

I have the honour to acknowledge receipt of a joint letter, dated 8 August 1994 and received in the Registry on 10 August 1994, from the Agents of the Parties in the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, by which the Court is informed:

- (a) that the Parties "have entered into negotiations that may lead to a full and final settlement of this case";
- (b) that "taking into consideration these negotiations, the parties request that the Court issue an order under Article 48 of the Statute of the Court and Article 54 of the Rules of Court postponing *sine die* the opening of the oral proceedings in this case, currently scheduled to commence on September 12, 1994"; and
- (c) that "if the negotiations do not result in a full and final settlement, either party, without the consent of the other party, may request the Court to fix a date for the opening of oral proceedings".

Copies of this letter have been communicated to the Members of the Court.

On the instructions of the President of the Court, I further have the honour to inform you that, due note having been taken of the agreement between the Parties as described above, the President has decided, pursuant to Article 54 of

the Rules of Court, that the date of the opening of the oral proceedings is to be postponed *sinie die*. As in the case of the decision whereby the Court previously fixed the date for the opening of the oral proceedings, as agreed by the Parties during a meeting with the President held on 1 March 1994, no Order is needed for the purpose of the postponement now requested.

I am writing in the same terms to the Agent of the Islamic Republic of Iran.

(Signed) Jean-Jacques ARNALDEZ.

6. THE AGENTS OF THE ISLAMIC REPUBLIC OF IRAN
AND THE UNITED STATES OF AMERICA

22 February 1996.

We have the honour to refer to the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*.

The parties in this case have entered into an agreement in full and final settlement of this case. This agreement, reflected in the attached documents¹, is hereby submitted to the Court. Taking into consideration this agreement, the parties request that the Court issue an order under Article 48 of the Statute of the Court and Article 88 of the Rules of the Court recording the discontinuance of this case, directing that the case be removed from the Court's list, and indicating that the parties have entered into an agreement in full and final settlement of all disputes, differences, claims, counterclaims and matters directly or indirectly raised by or capable of arising out of, or directly or indirectly related to or connected with, this case.

¹ See pp. 649-651, *infra*.