U.S.S. VINCENNES (CG 49) SHOOTDOWN OF IRAN AIR FLIGHT #655: A COMPREHENSIVE ANALYSIS OF LEGAL ISSUES PRESENTED BY THE CASE CONCENING THE AERIAL INCIDENT OF 3 JULY 1988 (ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

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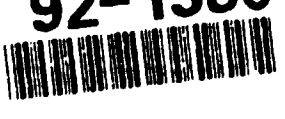

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I. INTRODUCTION

On 3 July 1988 the U.S.S. VINCENNES (CG 49) (hereinafter VINCENNES), operating in the Southern Persian Gulf, shot down an unarmed civilian airliner, Iran Air Flight #655, with two surface-to-air missiles. The 290 passengers and crew onboard the airbus were killed. Following the incident, major investigations convened by the United States Navy and the International Civil Aviation Organization (hereinafter ICAO) revealed the aircraft was proceeding in regularly scheduled commercial transit when the crew of the American warship perceived the incoming contact to be hostile and responded with deadly force.[1] These formal inquiries concluded the downing of the aircraft was due to reasonable mistake in the identification of the incoming contact caused by the compression of time, the "fog of war" atmosphere created by a contemporaneous surface engagement with Iranian gunboats, and a psychological phenomena termed "scenario fulfillment".[2] While numerous recommendations were implemented by ICAO to reduce the potential for similar incidents, no sanctions were imposed on the United States or the naval personnel involved, nor was the use of force assessed to be illegal under

international law. Dissatisfied with this outcome and convinced material facts had been intentionally misrepresented by ICAO and the United States, Iran filed a case in the International Court of Justice (hereinafter ICJ) on 17 May 1989 alleging the American missile cruiser committed an international crime under conventional and customary international law.[3] Iran requests the ICJ condemn the United States and direct the payment of compensation.

Iran's Application and Memorial filed with the ICJ rests jurisdictionally on Article 36(1) of the Statute of the International Court of Justice which permits the Court to review "treaties and conventions in force." Iran invokes the compromissory clause from three mutual conventions to satisfy this requirement: the Chicago Convention of 1944, the Montreal Convention of 1971, and the Treaty of Amity between the United States and Iran of 1955. The United States has entered preliminary objections to the jurisdiction of the ICJ and the case will be docketed for initial proceedings in 1992.[4]

The VINCENNES case presents an interesting casestudy in the legal and political issues which surround international disputes involving national security matters and the use of force in peacetime. First, while history contains examples of the downing of commercial aircraft with significant fatalities, the only previous effort to place an aerial downing before the Court failed for want of jurisdiction. Accordingly, there are no authoritative international legal

rulings to consult and applicable legal principles must be distilled from state practice. Second, the case calls for a determination of the reach of "long-arm" compromissory clauses common to bilateral and multilateral treaties. The steady decline of contentious case referrals to the ICJ noted in the past two decades under the optional provisions of Article 36(2) means compromissory clauses common to many international conventions could, if given broad effect, gain increased importance as the primary generator of international legal cases. Third, the aerial incident presents substantive problems in the laws of neutrality, aerial and surface warfare, and the scope of the inherent right of self-defense in peacetime. Finally, the form and amount of compensation due a victimized state has never been settled. The practice of those nations responsible for aerial downings have run the spectrum from the payment of immediate compensation as a matter of legal obligation, to payments dubbed "ex gratia" in order to avoid admission of an international legal wrong, to the complete refusal to pay any remunerations to the victimized state or its citizens.

The method of analysis adopted for purposes of this paper will be to breakdown the Aerial Case into three parts; jurisdiction, merits, and compensation issues. In so doing it will be necessary to discuss background events in the Persian Gulf which set the stage for the downing of the airbus, the facts of the missile attack, and international practices which have evolved from previous aerial and

maritime incidents involving attacks on unsuspecting airliners and ships. Juridical principles derived from this review will then be used to test Iran's claim and forecast how the ICJ may resolve the Aerial Case.

My thesis is that the ICJ will determine that the compromissory clause of the Treaty of Amity Between Iran and the United States provides international jurisdiction over the Aerial Case. The World Court will then proceed to the merits of the shootdown of Iran Air Flight #655 and find that the VINCENNES acted in self-defense pursuant to Article 51 of the U.N. Charter. My analysis will conclude with a review of the issues surrounding compensation and recommend that an international political organ such as ICAO create a mandatory system for determining appropriate compensation for the unfortunate victims of aerial downings.

II. FACTUAL ANALYSIS OF THE AERIAL INCIDENT OF 3 JULY 1988

A. BACKGROUND EVENTS IN THE PERSIAN GULF

An exhaustive review of the eight year Iran-Iraq War is unnecessary in analyzing the actions of VINCENNES on 3 July 1988. However, an appreciation of the frequency, flavor, and momentum of the hostilities in the Persian Gulf is required because aerial incidents are fact specific, and the perceived circumstances of each encounter largely defines the political response of the international community. Customary international law is created through the process

of state practice and response, and in deciphering aerial incidents this equates to concentrating on; 1) victim state protests, 2) aggressor state replies, 3) the reaction of international political forums such as the United Nations Security Council and the ICAO Council, and 4) the amount and form of compensation which is offerred to the victimized state.

The Gulf War began in 1980 when Iraq invaded Iran for the apparent purpose of territorial acquisition. The initial fighting included massive air and land campaigns fought predominantly on and over Iranian territory. The conflict turned seaward in 1983 for two reasons. First, Iraq acquired EXOCET missiles from France which gave them a new and credible ship attack capability for their superior air forces.[5] Anti-shipping attacks were subsequently launched by Iraq against Iranian oil tankers transiting the Persian Gulf in an effort to cut-off the large amount of revenue gained from the sale of Iranian oil on world markets. Second, Iran conversely sought to stem the large quantity of war munitions and supplies which were reaching Iraq through seaborne commerce. Iran threatened closure of the Straits of Hormuz in order to effectuate this embargo, and when verbal warnings were ignored the Islamic Republic employed small gunboats (Boghammers and Boston Whalers) to harrass merchant shipping.[6] Iran did not limit their operations to Iraqi targets of opportunity or ships bound solely for Iraq, and were indiscriminate in firing on

neutral ships of all nationalities innocently navigating the Gulf.[7] These high speed gunboats operated from ports near the approaches to the Straits of Hormuz, and were equipped with machine guns, rocket thrown grenades, and small arms.[8]

Along with standing up this gunboat fleet, Iran covertly released free floating mines into the Persian Gulf and constructed SILKWORM missile launching sites to strike ships entering or departing the Gulf through the Straits of Hormuz at distances in excess of fifty miles.[9] Iran also used its air force to conduct military operations against neutral shipping. As a result of these arbitrary and aggressive military actions, the Persian Gulf became a perilous region for unarmed oilers and merchants causing major international shipping companies to hold their tankers at anchor rather than risk destruction of ship and cargo. With the stakes for an international community dependent on Middle East oil now implicated, the United States and other maritime powers deployed additional warships and mine-sweepers to the Gulf in an effort to halt the indiscriminate attacks and bring stability to the region.[10] The United States took the additional steps of reflagging Kuwaiti oilers and assigning naval escorts to all tanker convoys navigating through the Persian Gulf.[11]

Despite these efforts to retard Iranian aggression, the number of attacks against neutral shipping in the Gulf continued to rise in 1987.[12] These expanded operations culminated in the apparent mistaken attack by an Iraqi

aircraft on U.S.S. STARK (FFG 31) (hereinafter STARK) with the subsequent loss of 37 American sailors.[13] Additionally, Irani gunboats attacked American owned merchants with machine gun fire, the reflagged Bridgeton hit a mine while under destroyer escort, the reflagged Sea Isle City was attacked with SILKWORM missiles launched from Iranian territory, and U.S. naval helicopters were frequently fired upon by Irani forces.[14] In reprisal for these latter events the United States attacked and destroyed the Iranian owned Rostam Oil Platform.[15] On July 20, 1987 the U.N. Security Council unanimously adopted Resolution 598 which demanded an immediate ceasefire, cessation of all hostilities, and withdrawl of all Iranian and Iraqi forces to internationally recognized borders.[16] The Resolution was promptly accepted by Iraq, but Iran refused to comply with the declaration.[17]

In 1988 the situation between Iran and the United States continued to deteriorate. In April, U.S.S. SAMUEL B. ROBERTS (FFG 58) was struck and severely damaged by a free floating contact mine in international waters.[18] As further reprisal, the United States attacked the Iranian Sirri and Sasson Oil Production Facilities and sank three Iranian vessels.[19] An Iranian F-4 scrambled from the Bandar Abbas airfield during this engagement in an attempt to conduct an aerial attack on an American cruiser located in the area.[20] This ship, U.S.S. WAINWRIGHT (CG 33), responded by launching a missile at the Iranian F-4 when the aircraft failed to answer repeated warnings and continued to close the ship at

high speed. (This exchange occurred in the same geographic area which VINCENNES was operating in when it fired on the airbus.) During this period an Iranian ship, the IRAN AJAR, was also attacked and captured by U.S. military forces while sowing mines in international waters.[21] The hostilities outlined in this abbreviated recital of events set the backdrop for the incident of 3 July 1988, and show in particular that:

1) Iran exceeded traditional belligerent rights in the methods utilized to conduct maritime operations in the Gulf War and ignored U.N. Security Council Resolutions directing them to cease hostilities;
2) These illegal acts triggered a U.S. build-up of naval forces in the region with substantial armament and capabilities;
3) Hostilities between the U. S. and Iran became more frequent and the rhetoric more virulent with each incident; and
4) The United States progressed from a policy of neutrality toward Iran to one of "nonbelligerency", a posture which did not seek direct combat with Iranian force but permitted returning fire or committing acts of reprisal if American forces were provoked or attacked by hostile gunboats.

B. SHOOTDOWN OF IRAN AIR FLIGHT #655

As the above illustrates, the situation in the Persian

Gulf was one of confrontation between U.S. naval vessels attempting to protect neutral shipping, and Iranian military units seeking to interdict this shipping using tactics which appear inconsistent with the U.N. Charter and laws of warfare enshrined in the Hague Conventions of 1907. On the morning of 3 July 1988 tensions were escalated by a broad pattern of Iranian attacks on neutral merchants during the previous two days, and intelligence reports suggesting an Iranian strike against American forces was likely during the July 4th holiday period.[22] At 0300 the U.S.S. ELMER MONTGOMERY (FF 1082) observed approximately thirteen Iranian gunboats position themselves for an attack on a Pakistani merchant steaming in international waters just beyond Iran's territorial sea. Following a request for assistance from the unarmed merchant, VINCENNES was directed to the area and placed in command of the two American warships. VINCENNES launched a helicopter for investigatory purposes which was subsequently fired on by the Irani gunboats.[23] VINCENNES closed the position of the helicopter and small boats, and attacked and sank two Irani craft with naval gunfire at 0643 when these gunboats were judged to have displayed hostile intent toward VINCENNES.[24] During the course of the surface engagement VINCENNES manuevered into the territorial sea of Iran.[25]

As this surface confrontation progressed Iran Air Flight #655 took off from Bandar Abbas Airfield for a routine commercial flight across the Persian Gulf to Dubai.

The airbus departed from a joint military and civilian airstrip approximately 27 minutes after its scheduled departure time. (There was no communication system in place to notify warships when commercial airliners were not on schedule, and the delay experienced by Iran Air Flight #655 dispels the popular myth that VINCENNES could have readily identified the contact if local commercial air schedules had only been checked.) The airbus ascended normally within its assigned air corridor apparently unaware of the ongoing naval engagement below.[26] The airbus was piloted by an experienced crew and squawked its assigned IFF mode III code 6760.[27] (The proper broadcasting of coded commercial aircraft identifying data by the Iranian airbus debunks a second myth that the aircraft was masking its identity or impersonating a military fighter.) Personnel on VINCENNES first detected this air contact at 0647 to the north at 47 nautical miles (hereinafter NM) moving toward the ship on a constant bearing and decreasing range.[28] VINCENNES issued seven voice warnings on the military air distress frequency (243.0mhz) and three on the international air distress network (121.5mhz) which warned the aircraft, identified then as an F-14, to stay clear of the warship and requested the aircraft's identity and purpose.[29] (Subsequent investigation revealed Iranian commercial aircraft were not monitoring the military distress frequency.) Personnel on VINCENNES estimated the incoming contact was a military fighter jet in an attack profile and requested and received

permission from higher authority to engage the aircraft if it closed within 20 NM of the ship.[30] As warnings continued without response, the Captain of VINCENNES made the decision to fire on the incoming aircraft at 0653 with two surface-to-air missiles. The missiles intercepted Iran Air Flight #655 over the territorial airspace of Iran at a range of 8 NM from VINCENNES.[31] The blast destroyed the aircraft and killed all personnel onboard, and the wreckage was subsequently discovered in Iranian internal waters. The black box which recorded key aeronautical data about the abruptly interrupted seven minute flight has never been located. The dead consisted of 290 personnel from six different nations.[32]

C. AFTERMATH OF THE SHOOTDOWN

The first announcement of the shootdown by the United States proved the adage it is unwise to place credence in initial battle reports. The Chairman of the Joint Chiefs of Staff, Admiral William Crowe, hastily reported from the Pentagon that the Iranian airliner was outside its prescribed air corridor, descending toward VINCENNES at increased speed in an attack profile, squawking a military IFF code, and ignoring repeated verbal warnings.[33] Various theories were suggested to explain this event: the possibility an Iranian F-14 was using the civilian airliner as cover to sneak in on the Aegis cruiser; that Iran Air Flight #655 was planning a sneak attack on the cruiser or

conducting a kamikaze suicide mission; or the airliner was acting in concert with the gunboats in a coordinated air and surface attack.[34] Admiral Crowe stated unequivocally, and the United States has never retreated from this point, that VINCENNES acted in self-defense after determining the ship was about to be attacked by an Iranian F-14.[35] Admiral Crowe also appointed a formal investigation which was completed on 28 July 1988. The U.S. Navy investigation concluded VINCENNES did not purposely attack a civilian airliner and that in light of the circumstances the Commanding Officer of VINCENNES acted prudently.[36]

The Government of Iran complained immediately after the incident to the United Nations and ICAO. The U.N. Security Council discussed the shootdown on 14 July 1988 where Vice President Bush reiterated this was an accident caused in "substantial measure" by Iran's failure to divert a civilian airliner from a known combat zone.[37] On 20 July 1988 the Council unanimously adopted a resolution which expressed deep distress over the aerial incident but was silent in affixing blame or directing the payment of compensation to Iran.[38] While the U.N. Council deliberated in New York, the ICAO Council convened in Montreal and approved a statement which expressed condolences to Iran, deplored the use of weapons against civilian aircraft, and instituted an investigation.[39] The ICAO inquiry was completed on 7 November 1988 and generally echoed the conclusions of the U.S. Navy report. ICAO agreed VINCENNES' evaluation of the

contact as hostile was erroneous but reasonable in view of the external circumstances.[40]

Immediately after the incident President Reagan announced the United States would provide voluntary compensation to the families of the victims of all nationalities on an ex gratia basis.[41] All nations save Iran accepted this offer, but Iran maintained such payments were not satisfactory unless compensation was accompanied by admissions from the United States that the attack was wrongful and reparations were due as a matter of legal right.[42] When the United States refused to meet this condition Iran ended all diplomatic communication over this matter and went directly to the ICJ in an attempt to gain legal vindication.

III. HISTORICAL INCIDENTS INVOLVING THE SHOOTDOWN OF COMMERCIAL AIRCRAFT

A. AERIAL INCIDENTS

The first recorded aerial incident dates back to 1904 when the Russians downed a German balloon which strayed over its border.[43] Since then there have been a number of reported incidents involving civil and military aircraft which were either accidentally or intentionally shot down. Focusing strictly on incidents involving commercial aircraft yields the following:

a) April 29, 1952 an Air France plane was attacked by fighters from the Soviet Union and managed an emergency landing in Berlin with two seriously wounded passengers. The Soviets claimed the plane intruded into their airspace and refused to land when directed, but circumstantial evidence suggested the plane was within the Berlin air corridor. The British, American, French, and Allied High Commissioner for Germany all voiced their outrage and stated that the attack on an unarmed airliner in time of peace is contrary to standards of civilized behavior. The Soviet government refused all claims for compensation.[44]

b) July 23, 1954 a Cathay Pacific aircraft on a scheduled commercial flight was shot down by the People's Republic of China killing 13, six of which were U.S. nationals. The world community again responded with outrage, the Chinese took responsibility and stated it acted in the mistaken belief that the aircraft was on a mission of aggression, and made ex gratia payments to the British government in an amount equivalent to nearly one million dollars.[45]

c) July 27, 1955 an EL AL Israel Airliner was shot down by Bulgaria near the Greco-Bulgarian border. All 58

passengers onboard were killed. Evidence showed the fighters knew the aircraft was a commercial aircraft and Bulgaria later admitted it was wrong, expressed its profound regret, and promised to punish those responsible. The United States, United Kingdom, and Israel filed claims in the ICJ but the Court ultimately determined it lacked jurisdiction over Bulgaria. The Bulgarian government offered ex gratia compensation to the victims.[46]

d) February 21, 1973 Israel shot down a Libyan Boeing 727 that flew over the Israeli-occupied Sinai killing 108 people. Israel contended that intelligence information suggested the aircraft was on a hostile mission and that its fighters had acted in strict compliance with international law. Israel was condemned by the ICAO Council, subsequently expressed its profound sorrow, and made ex gratia compensation in the amount of $30,000 per victim.[47]

e) September 1, 1983 a Soviet fighter shot down Korean Air Flight 007, killing 269 people, after it strayed over sensitive Soviet territory. The Soviet Union claimed the aircraft was engaged in espionage and ignored repeated warnings to land, but tape recordings of the pilot's conversation with ground

control suggested otherwise. ICAO and the U.N. condemned the Soviet's actions. Recent investigative reporting by the Soviet newspaper Izvetsia confirms that no attempt was made to communicate with the aircraft on emergency frequencies, tracers were not fired, and the aircraft did not perform evasion manuevers. The Soviet press also speculates that KAL #007 was shot down over international waters and the black boxes from the aircraft were recovered, but Soviet authorities are withholding the information because of its inculpatory nature. At this point the Soviet government has refused all claims for compensation.[48]

These capsulized renditions of the five historical incidents are valuable to this analysis in that they show previous downings have occured under widely different factual circumstances, yet no state has been judicially chastised by the ICJ despite clear condemnation from international political organs. The Chicago Convention and the Montreal Convention have not been utilized to gain jurisdictional or substantive footing, and no state has looked to a friendship treaty for additional legal leverage. While there are occasions when states do not resort to all conventional or customary remedies available under international law, the mass killing of its nationals is generally an event which would precipitate the most

aggressive legal and diplomatic response possible. The Koreans, for example, would have little reason not to invoke these treaties, if legally relevant, after the Soviets refused to apologize or even discuss compensation issues.

It is also interesting to compare and contrast factual aspects of the VINCENNES incident with prior shootdowns. There are clear similarites between the Chinese use of force after a mistaken identification during a period of heightened regional tensions, and the Israeli reaction following ominous intelligence reports. The most obvious difference, on the other hand, is the Iranian airbus did not intrude into another state's territory prior to being attacked, and the VINCENNES was the only attacking force to be located extra-territorially when force was applied against a commercial aircraft.

Common to all examples is that no state argued international law affords the right to down intruding commercial aircraft. While Israel and the Soviet Union hinted that they believed their actions were consistent with international law, each of these nations later backtracked from this position and attempted to differentiate their situation on the facts. This is important because it suggests a customary norm has steadily evolved against the use of force on commercial aircraft. This evolving norm gained full international acceptance when codified by the Montreal Protocal of 1986, which amends Article 3 of the Chicago Convention with new language recognizing that every

state must refrain from resorting to the use of weapons against civil aircraft in flight.[49]

B. MARITIME INCIDENTS

To complete the historical picture three other maritime accidents involving the United States as the victimized nation warrant consideration:

f) 11 December 1937 U.S.S. PANAY (PR 5) was mistaken as a Chinese troopship and attacked by Japanese aircraft while anchored in the Yangtze River. This event marked the first time a U.S. Navy ship was sunk by a hostile force. Japan's quick apology and reparations in the amount of $2.2 million were accepted by the United States.[50]

g) 8 June 1967 U.S.S. LIBERTY (AGER 5) was attacked while patrolling in the eastern Mediterranean Sea by Israeli aircraft. The incident occurred at the height of hostilities in the 1967 Arab-Israeli War and many writers have theorized the ship was deliberately attacked in order to prevent interception of communications intelligence which would have forewarned the United States of Israel's plan to invade the Golan Heights. Israel offered an apology and paid nearly $10 million in compensation. Although the United States accepted

this payment, it did so while maintaining compensation was legally required.[51]

h) 17 May 1987 U.S.S. Stark (FFG 31) was attacked by an Iraqi Mirage while on patrol in the central Persian Gulf as discussed supra. Iraq formally accepted responsibility for the attack, expressed profound regret for "the unintentional incident", and paid approximately $37 million in reparations. Again the United States accepted the compensation but insisted the payments were legally required.[52]

These latter examples contain many of the similarities previously noted. All three ships were operating in or near a regional combat zone in which the United States was a declared neutral. The mission of each ship was to protect U.S. interests, and the official explanation by the attacking nation was "mistaken identity." The nations which launched the attacks quickly expressed deep regrets, made formal diplomatic apologies, and backed this up with adequate and effective compensation. No state argued international law insulated the attacking state from responsibility to pay damages even though the incidents occurred during periods of hostilities and were accidental. The United States and the international community accepted this method of resolution as legally and politically sufficient, although disagreement remains over whether the

compensation was properly offered in ex gratia form, or as a matter of legal right. This state practice may suggest a further feature of the evolving customary law includes the mandatory payment of some form of compensation to the victimized state.

IV. JURISDICTIONAL ISSUES

A. THE CHICAGO CONVENTION OF 1944

Multilateral conventions are the primary source of air law and the most definitive and widely ratified aviation treaty is the Chicago Convention of 1944.[53] The first meeting was attended by representatives of more than fifty states who were invited by the United States to join with it in establishing a comprehensive legal framework for international civil aviation after the Second World War.[54] Three fundamental principles emerged from the conference and formed the foundation of the treaty; 1)the exclusive sovereignty over state airspace, 2)the equality of commercial opportunity, and 3)the development of safe, orderly, and efficient civil aviation. The text of the convention is divided into four major parts which cover air navigation, the organization and structure of ICAO, air transport and dispute settlement. It is a provision within this final part, specifically Article 84, which Iran contends gives the ICJ jurisdiction over the VINCENNES aerial incident. The text of the article reads:

> If any disagreement between two contracting States relating to the interpretation or application...cannot be settled by negotiation, it shall, on 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...appeal from the decision from the decision of the Council to an ad hoc tribunal...or to the Permanent Court of International Justice.

The elements required to enable the Council to address a complaint under Article 84 are: 1)a disagreement; 2)arising over the "interpretation" or "application" of the convention; 3)which cannot be resolved by negotiation. An appeal from the decision of the Council made pursuant to this dispute settlement process is possible either to an ad hoc arbitral tribunal or the ICJ. Article 84 is a typical compromissory clause with standard boilerplate language, and the United States is a party to at least forty such agreements consenting to the jurisdiction of the ICJ.[55] Some multilateral treaties such as the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 makes the compromissory clause, complete with referral to the ICJ, optional with a requirement for a specific declaration accepting the settlement provision. But Article 84 of the Chicago Convention is not similarly optional, and the U.S. and Iran became bound by the compromissory provision when they ratified the treaty.

The procedural mechanisms created in Article 84 for the settlement of international aviation disputes have been invoked on very few occasions. Professor Buergenthal

speculates that the very existence of this adjudication process has contributed to encouraging states to resolve their differences through diplomatic negotiation rather than engaging in lengthy quasi-judicial hearings which may have an economic and political downside.[56]

The sole time the ICJ reviewed an ICAO decision pursuant to Article 84 was in Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan) in 1972.[57] Pakistan's claim concerned alleged breaches by India of the Chicago Convention for suspending overflight of Indian territory by Pakistan, following a hijacking incident involving the diversion of an Indian aircraft to Pakistan. Pakistan submitted the matter to the ICAO Council for adjudication under Article 84 and the Council assumed jurisdiction over the disagreement. India appealed the unfavorable ICAO ruling to the ICJ contending the ICAO Council lacked jurisdiction over the matter because this was not a dispute involving the interpretation or application of the convention. The ICJ held the ICAO Council was competent to review this matter under Article 84. While the case is dissimilar on the merits to the VINCENNES incident, the ICJ opinion is instructive in showing the step-by-step procedures used by the ICAO Council when conducting Article 84 adjudication and how the Court exercises judicial review over the conventional process.

Iran's Memorial urges the Court to determine the actions of the ICAO Council in the months following the

shootdown of Iran Air Flight #655 amounted to Article 84 adjudication, making it now ripe for direct appeal to the ICJ. The United States has responded that the actions of the Council did not constitute Article 84 proceedings and cannot, therfor, confer appellate jurisdiction on the ICJ. It is necessary to return to the elements of the dispute settlement provision to determine if Iran has sufficiently complied with the dispute resolution criteria created by Article 84 and related implementing regulations.

1. ELEMENT ONE: THE DISAGREEMENT

The contentious jurisdiction of the ICAO Council under Article 84 is premised on the existence of a "disagreement." The term "disagreement" is not further defined in the treaty, but the ICJ has provided guidance on what constitutes an international dispute or disagreement. In the case concerning the Interpretation of Peace Treaties, the Court said:

> 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...

In the South West Africa case the ICJ held:

> The question which calls for the Court's consideration is whether the dispute is a "dispute" envisaged within Article 36 of the Statute of the Court... The language used is broad, clear and concise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision (but to) all provisions (in the treaty)...

These legal pronouncements of the ICJ infer a broad reading of the types of disputes which would satisfy Article 84. It would seem that any legitimate point of contention between two states over civil aviation even remotely connected to the Convention could be pled creatively enough to meet this low threshhold. On the facts of the VINCENNES incident, Iran's unhesitant communication of its outrage to ICAO and the United Nations for the downing of an Iranian commercial airliner, followed by the equally rapid response of the United States averring the actions of VINCENNES were legal, creates a qualifying "dispute" between two contracting States. Almost two years have passed since the incident and the positions of the parties remain uncompromising. The lack of realistic diplomatic prospects for settling the "disagreement" further reinforces that the controversy is concrete and ripe.

2. ELEMENT TWO: THE "INTERPRETATION" OR "APPLICATION" OF THE CHICAGO CONVENTION

The substance of the disagreement referred to must, in addition, be based on an "interpretation" or "application" of the convention. Completing this analysis requires comparing the merits of the aerial incident against the substantive reach of the Chicago Convention. In this regard, Articles 1 and 2 extend complete state sovereignty over airspace above land territory and Article 3(c) prohibits another aircraft from flying over that territory

without permission. As developed in the factual sequence, supra, the VINCENNES vectored a U.S. Navy helicopter into the airspace of Iran and then manuevered into the territorial sea of Iran prior to launching two missiles at the airbus. Iran contends this intrusion was a non-consensual sovereign trespass into its air and sea territory. Iran's contention is bolstered by the Commanding Officer of U.S.S. SIDES (FFG 14) who wrote nearly one year after the incident that the helicopter of VINCENNES "got too damned close to the boats for its own good."[58] While the state parties dispute exactly when VINCENNES penetrated the territorial sea and airspace of Iran, the United States admits such passage occurred and that the airbus was shot down over Iranian territory. These facts present a legitmate dispute regarding state sovereignty over territorial airspace, and as such should qualify as one arising under Articles 1-3 of the Chicago Convention.

Although the alleged territorial trespass of Iranian sea and airspace is likely enough to meet the "arising under" requirement, Iran can also point to Article 9 for additional and independent substantive support. This provision permits a state to temporarily restrict or prohibit air traffic over certain areas of its territory in times of military necessity or public safety. The United States relied on the authority of this article to issue Notices to Mariners in 1984 and 1987 (hereinafter NOTAM) for the Persian Gulf region which warned civilian and military

aircraft not to close within 5 nautical miles or 2000 feet elevation of American ships.[59] Iran consistently challenged these moving security "bubbles" of unspecified duration as illegal under the convention, and as these NOTAM's may have contributed to the aerial incident, they too could amount to a substantive disagreement arising from the Chicago Convention. The scope and contour of Article 89, which deals with the impact of war and emergency conditions on the applicability of treaty provisions, may be another provision implicated by the aerial incident.

3. ELEMENT THREE; PRIOR NEGOTIATIONS

Article 84 requires states involved in a "disagreement" arising from the Chicago Convention to first attempt to resolve the problem through negotiation before referring the matter to the ICAO Council for quasi-judicial proceedings. This requirement is common to compromissory clauses in international treaties and is placed within the text of the settlement provision to ensure all friendly efforts to resolve the dispute have been attempted before international organs officially intervene. The responsibility to negotiate is not cast in legal stone though, and international law and practice give deferrence to the state bringing the claim on the theory states are in the best position to judge whether additional diplomatic negotiation may resolve the disagreement.[60] The requirement to negotiate is analagous to the exhaustion of local remedies

doctrine which restricts resort to international courts until the State where the alleged violation occurred is afforded an opportunity to redress the complaint. The rule is subject to exceptions; the primary one being where if it is clear that exhaustion of local remedies would not be effective, there is no need to pursue them.[61] The United States has made it clear through repeated public statements that it will not concede responsibility for the aerial incident, and denies an international wrong was committed. Accordingly, Iran could reasonably infer that bilateral negotiations would be fruitless and ineffective, and would not be required as a condition precedent prior to filing a complaint with the ICAO Council or on appeal to the ICJ.

4. ICAO COUNCIL PROCEDURES

As discussed above, Iran's claim satisfies the procedural and substantive elements for admissability established in Article 84. The crux of the analysis now shifts to whether Iran requested dispute settlement proceedings, and if not, whether the deliberations conducted by the ICAO Council in the wake of the VINCENNES incident substantially complied with ICAO rules for Article 84 adjudication. The failure to conduct quasi-judicial proceedings which satisfy the compromissory provision of the Chicago Convention would likely defeat referral of this matter to the ICJ since the World Court is restricted in this instance to appellate jurisdiction.

Iran has no evidence that it expressly requested Article 84 proceedings, but argues that since the decision and resolution of the ICAO Council were based on a full review of the evidence it constituted an equivalent action. Iran points to their immediate communications to the President of the ICAO Council requesting effective measures be taken to condemn the United States,[62] and the Extraordinary Sessions of the Council which considered the VINCENNES aerial incident, as proof that adjudicatory "dispute settlement" was functionally performed.

The first deliberation on Iran's complaint, conducted 13-14 July 1988, included addresses from both state parties to the dispute and the official views of representatives from thirty two member nations. This meeting concluded with the institution of a formal fact-finding investigation.[63] President of the Council Kotaite stated:

> The imperative task for the Council is to collect all vital information and reach a 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...[64]

The ICAO Council reconvened 5-7 December 1988 to consider the investigation report and an interim decision was reached following additional remarks from representatives of Iran and the United States.[65] The Council met for the last time on 13-17 March 1989 and a final decision was rendered. The ICAO Council adopted a consensus resolution at this meeting

which reaffirmed its policy condemning the use of weapons against civilian airliners but labelled the VINCENNES incident "a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Airliner."[66]

While this deliberative history confirms detailed review was conducted and concluded by the ICAO Council, an analysis of the meetings reveals they were not done in accordance with the dispute settlement provisions of Article 84. When Article 84 proceedings are convened the ICAO Council has standing Rules for the Settlement of Differences which require written pleadings, a verbatim transcript, written arguments, and a final decision which includes voting records.[67] Article 84 also expressly requires parties to the dispute refrain from voting, and envisions a quasi-judicial forum which produces a formal record suitable for appellate review by the ICJ. The ICAO Council Appeal Case, reflects strict compliance with these statutory requirements and procedural regulations. India submitted a lengthy memorial to the Council, Pakistan responded with an equally detailed counter-memorial, the oral arguments and minutes of each meeting were recorded and transcribed in verbatim, and the voting record of each state was documented.[68]

This precedent contrasts dramatically with the format of ICAO Council proceedings into the VINCENNES incident where pleadings were not filed by the parties, the United

States was permitted to vote on the resolution, individual state votes were not recorded, verbatim records were not kept, and at no time did any delegate refer to the hearings and consultation as Article 84 adjudication.[69] The meetings were not conducted in a judicial format, and at no time did Iran request such formalism.

The ICAO Council was more likely acting in their policy capacity under Article 54 and 55 which permits consideration of substantive matters relating to the convention, and authorizes conducting investigations when appropriate. The Canadian delegate specifically stated the Council reviewed the VINCENNES incident under Article 55.[70] Even more telling, the ICAO Legal Director, Dr. Milde, was present during the meetings and stated shortly thereafter:

> ...You will note the proceedings in the Council (on the VINCENNES incident) did not follow the Rules for Settlement of Differences because the matter was not submitted to the Council under the terms of Chapter XVIII (includes Article 84) but was considered under the terms of Article 54(n)...[71]

5. CHICAGO CONVENTION WRAP-UP

The evidence referred to above compels the conclusion the ICAO Council did not render a decision under Article 84. This leaves Iran with the difficult task of persuading the ICJ that even if the technical provisions were not observed, the Court should use supervisory powers to find substantial compliance with Article 84. This contention might be more persuasive in domestic law settings where judges occassionally resort to legal activism to loosely construe a

statute, but it should not prevail in the World Court for a number of reasons. First, ICAO is a specialized agency having wide international responsibilities. Article 57 of the U.N. Charter recognizes its special influence and gives such agencies a preferred position of deference. The ICJ knows the ICAO Council was aware of the dispute settlement provisions in the Convention and could have relied on these procedures, rather than Article 54-55, to address the VINCENNES situation. It would not be judicious for the ICJ to review an agency determination which was intended as a policy judgment and lacks the formal pleadings and argument necessary to properly frame the legal issues for purposes of effective appellate analysis.

Second, judicial oversight of ICAO Council inner-workings would usurp much of the authority of the ICAO Council granted by the Chicago Convention and tamper with a comprehensive multilateral treaty which has been a true international political and legal success story. The vitality of international law springs from treaties like this one which silently promote civil aviation throughout the world.

Third, Iran could have at any time requested the ICAO Council utilize quasi-judicial hearing format described in Article 84 to resove the aerial incident. In fact, the option to request Article 84 proceedings is still available to Iran, and if resorted to without corresponding ICAO action, would enhance their claim. Iran was either

initially unaware of the dispute settlement provisions or had secondary motives for not wanting to elevate this to a higher level of scrutiny within the ICAO Council where Iranian military actions in the Persian Gulf may have been critically reviewed. The ICJ should not allow a contracting party who fails to utilize and exhaust remedies expressly provided for in the compromissory clause to be ignored without consequence.

Finally, multilateral treaties are created by states willing to surrender a portion of their sovereignty in exchange for international stability in areas of mutual interest. The contracting parties have a right to expect that carefully drafted compromissory provisions will be respected and strictly applied by the ICJ. States desiring broader judicial intervention can accept the compulsory authority of the ICJ under Article 36 of the Statute of the Court. Those states which elect not to accept this compulsory jurisdiction, but rather join bilateral or multilateral treaties with more limited access to the Court, should not get "bootstrapped" into the ICJ unless the compromissory provisions they ratified were fully complied with.

For the reasons outlined above, Article 84 of the Chicago Convention does not provide Iran a basis for appellate jurisdiction in the ICJ in the case of the VINCENNES aerial incident.

B. THE MONTREAL CONVENTION OF 1971

Iran claims the conduct of the Commanding Officer of VINCENNES, and the United States, constituted an international offense under the Montreal Convention. Iran further contends that by failing to take all measures to prevent and punish such offense with severe penalties the United States also violated Articles 3 and 10 of that Convention. The United States has made it clear it considers the actions of VINCENNES to have been lawful, and has no intention of prosecuting the Commanding Officer.[72] The United States also answers that the Montreal Convention does not speak to the VINCENNES incident, where the real issue is the anticipatory use of force in self-defense under the U.N. Charter and customary law. Both Iran and the United States ratified the Montreal Convention without reservation.

The Montreal Convention contains a compromissory clause which closely tracks that of the Chicago Convention. Article 14 states that disagreements which cannot be settled through negotiation and arbitration may be referred to the ICJ. Rather than repeating the prior analysis used to break down the compromissory clause elements of the "dispute", "application" and"interpretation" under the convention,etc., discussion of the compromis will be reserved until substantive aspects of the Convention are reviewed. This is prudent because the most pressing legal issue raised by

Iran's complaint under the Montreal Convention center on whether a state can even be charged with an offense under Article 1. If the letter or spirit of the Montreal Convention does not encompass official state actions then the treaty has no legal bearing on the judicial outcome of the Aerial Case. The United States has grasped the significance of this issue and urged the ICJ to conclude the Montreal Convention does not provide a basis for jurisdiction because it addresses criminal acts performed by individuals and does not address the legitimate actions of the U.S. Navy.[73]

1. APPLICABILITY OF ARTICLE 1 TO OFFICIAL STATE ACTION?

Article 1 can be summarized as defining an offense as an action by any "person" which "unlawfully and intentionally" destroys an aircraft or causes violence against a person onboard. The provision is drafted clearly and is not encumbered by vague clauses or ambiguous language. Article 31 of the Vienna Convention on the Law of Treaties establishes the groundrules for interpreting a treaty provision and indicates:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms in their context and in light of its object and purpose.

Dissecting this provision leads to a two-part test; 1)

determining the ordinary meaning of the treaty text, and 2)assessing the object and purpose of the treaty.

Applying the "ordinary meaning" test to Article 1 leads to the clear implication the Montreal Convention was intended to proscribe the conduct of persons and not states. Throughout the Convention the term "person", "he", and "alleged offender" are used to denote the anticipated reach and scope of the treaty.[74] If the contracting parties desired the term "person" mean something other than its ordinary meaning the drafters could have included a special provision within the text to clarify that "person" was synonomous with "state".

A review of the object and purpose of the treaty also reinforces this conclusion. The Montreal Convention was intended to complement the 1963 Tokyo Convention (dealing with offenses and certain other acts which jeopardize the safety of aircraft or personnel or property onboard), and the 1970 Hague Convention (dealing with hijacking), in responding to the growing number of political and terrorist acts which were being committed against civilian aicraft.[75] This trilogy of agreements attempted to remove all obstacles in branding individuals who commit random acts of violence on unsuspecting travelers as international criminals by placing the responsibility directly on states to implement domestic laws and punish offenders with strict penalties. (Omitting states from the reach of the treaty, as apparently intended, may prove regrettable in view of the Pan Am #103

tragedy over Lockerbie, Scotland where mounting evidence is pointing to the involvement of Syria. By taking a firm stance against extending the reach of Article 1 to state acts the U.S. may be limiting the international diplomatic and legal arsenal which might have otherwise been employed to combat state terrorism directed against aircraft.)

The United Nations General Assembly urged full support for these three conventions[76], and these agreements deserve some credit for stemming the rising tide of aerial hijacking and terrorism in the international community. (Although the recent midair explosion of an Austrian Airliner over Bangkok killing 223, if the product of terrorist activity, may suggest the battle is far from won.) The head of the United States delegation during the negotiation over the Montreal Convention commented later that:

> ...(The Montreal Convention) did not define new offenses-it covers acts which already are common crimes...What this Convention does is to impose obligations on states to prosecute or extradite offenders. It (warns) individuals that the international community has responded with unanimity to condemn such acts.[77]

This insight serves to confirm that the Convention is dedicated entirely toward sending a strong signal to saboteurs and terrorists that they can run but not hide. There is nothing in the the textual language or the legislative history to support that Article 1 has the sub rosa intention of making states potential offenders.

The Vienna Convention provision on treaty

interpretation (Article 31) also takes into account:

> ...any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding it interpretation.[78]

Two of the aerial incidents outlined, supra, occurred after the Montreal Convention entered into force and present examples of the use of force against commercial airliners by states which ratified the agreement. The downing of the Libyan Boeing 727 and KAL #007 (especially in light of new evidence from the Soviet Union concerning the deliberate prosecution and destruction of the commercial airliner) present more compelling factual cases for extending the coverage of Article 1 to states because the downing was intentionally performed or the product of reckless indifference, and the ICAO Council investigated the matters and issued resolutions condemning the states' actions as illegal uses of force.[79] Thus the dual requirements of Article 1 that the act against the commercial aircraft be both intentional and unlawful were arguably satisfied by the conduct of the Israeli and Soviet fighters. The failure of either ICAO, or other interested states, to raise the Montreal Convention as a source of international legal authority despite its apparent application to these incidents suggests it was not deemed to reach such events.

The ordinary usage of the terms of Article 1, coupled with the object and purpose of the treaty and its subsequent practice, all support the view the Montreal Convention was

not aimed at restricting the official conduct of state parties. Accordingly, Iran is on poor legal footing when alleging the United States is in violation of Article 1.

2. APPLICABILITY OF ARTICLE 1 TO INDIVIDUAL ACTS PERFORMED UNDER THE COLOR OF STATE AUTHORITY

The second critical analysis under Article 1 concerns whether the treaty reaches the individual actions of the Commanding Officer of VINCENNES. Iran argues the acts of this "person" constituted a separate violation of Article 1 which makes the Captain of the ship culpable for the destruction of the Iranian airliner. Determining whether the Commanding Officer of VINCENNES committed an "unlawful" and "intentional" act is significant because the additional treaty violations alleged by Iran under Article 3 and 10 derive and build on the assumption an Article 1 offense occurred. In the absence of such a finding the United States would not have an obligation to turn the matter over to domestic criminal processes and would not be in violation of the Montreal Convention. The meaning of the terms "unlawful" and "intentional" are not further defined in the convention but imply that a person must act without legal authority and with scienter. A negligent act, or one which is legally justified under theories of self-defense, would not violate Article 1.

Iran argues the simple negligence or self-defense rationale is inapplicable on the facts of the Aerial Case

because the crew of VINCENNES could not have misidentified Iran Air Flight #655 as a military aircraft and the Captain acted with the purposeful intention of shooting down the airbus as it flew in Iranian territorial airspace. Iran reaches this conclusion by pointing to the state of the art Aegis radar and console system on VINCENNES which is advertised as the most technically advanced in the world. Iran contends that surely this equipment must have displayed that the airbus was ascending at a steady speed and on a flight profile consistent with that of a commercial aircraft. Iran reinforces this point by recalling that other American warships in the area did not treat the air contact as hostile, and that the correct squawking of the Mode III IFF signal fully disclosed the true identity of the aircraft. Lastly Iran reminds the Court that the aircraft was fired on at a distance of 11 NM from the warship despite the NOTAM advisement that an aircraft would only be jeopardized if it closed within 5 NM of an American naval unit.

The United States has consistently answered these allegations with firm reliance on the right of unit self-defense under customary law and Article 51 of the U.N. Charter. Viewed from the American perspective, the Commanding Officer of VINCENNES was directly engaged in an on-going surface engagement initiated by Iranian gunboats. The Captain reasonably surmised the incoming contact, which took off from a military airfield and was headed directly

toward his ship, presented a hostile threat. The crew of VINCENNES issued repeated warnings which went unanswered, and the Commanding Officer requested permission from higher authority and waited until the last possible second before launching intercept missiles. The United States emphasizes that these facts, linked with the compression of time and fog of war conditions, could have reasonably led the Captain to assess that the use of force was necessary and proportionate to protect his crew and ship. In the view of the United States the decision to fire was a professional judgment based in good faith on a factually complex combat scenario made so by the intentional aggression of Iranian naval forces.

As Professor McDougal noted in 1965, all aerial incidents involving the shootdown of commercial airliners center on basic disagreements with respect to the facts.[82] This was clearly the case in the aftermath of the KAL #007 downing (where it now appears that Soviet authorities deliberately concealed or distorted material facts), and it also appears to be at play in the VINCENNES matter. One vital difference between these two incidents is that the ICAO Council conducted their own investigation in each case and opined through resolution that the actions of the United States were not intentional or unlawful, while the actions of the Soviet Union were in contravention of international law. A specific proposal from the Soviet Union to condemn the destruction of Iran Air Flight #655 as an illegal act of

aggression was defeated by vote of the Council.[83] The ICAO Council did not hesitate to affix accountability when Israel and the Soviet Union shot down commercial airliners under more notorious circumstances despite their claims of self-defense or provocation. Additionally, the U.N. Security Council was equally satisfied the VINCENNES did not knowingly fire on a civilian aircraft. Similar efforts by delegates to the U.N. Security Council to have the actions of VINCENNES condemned as illegal under international law were overwhelmingly defeated.[84]

A determination that the Commanding Officer of VINCENNES acted illegally under Article 1 of the Montreal Convention would also be inconsistent with state practices created by previous aerial incidents. The VINCENNES is the only platform to have fired on a commercial airliner while engaged in armed conflict. This scenario differs dramatically from the Soviet SU-15 pilot which was not under threat of attack and had full opportunity to visually identify the Korean airliner before firing two air-to-air AA-3 ANAB missiles at the commercial aircraft. Subsequent disclosures by the Russian pilot, Lt. Col. Osipovich, establish that the efforts to warn off the Korean plane were de minimus, and that the aircraft was actually slowing down and possibly located outside Soviet airspace when the order to fire was received.[85] Similarly the four Israeli interceptor jets which fired on the Libyan Airlines Boeing 727 were aware they were attacking a civilian

airliner.[86] None of these military officers were held accountable under conventional law. It would be anomolous for international law, which is heavily influenced by state practice, to suddenly find Article 1 of the Montreal Convention applicable to the Captain of the VINCENNES when the aerial incident which he was involved in lacks factual evidence of intentional illegal conduct.

3. COMPROMISSORY JURISDICTION UNDER ARTICLE 14

Iran contends it is unnecessary to actually prove the VINCENNES violated Article 1 of the Montreal Convention in order to invoke the compromissory provisions of Article 14 which permit referral of disputes to the ICJ. The language of Article 14 closely tracks the requirements of Article 84 of the Chicago Convention and sets up a settlement regime which first looks to friendly diplomatic negotiation, then independent arbitration, and failing resolution within six months, referral to the ICJ.

Iran argues that it is evident from their immediate complaint, followed by the denial of responsibility by the United States, that a valid dispute exists between the parties which cannot be settled by friendly negotiation.[87] Iran attempts to avoid the second step in the settlement process, arbitration, by pleading that other interim resolution procedures can be waived when it is evident that resort to further extra-judicial forums would be futile. Iran presumes that suitable arbitration could not be

arranged within the six month window and is therefor just another diplomatic tool with little value under the circumstances. The Ambatielos Case (Greece v. UK), decided by the ICJ in 1953 came to the Court through the compromissory clause of a mutual convention which had an arbitration provision grafted into the text of the compromis.[88] England refused to consent to arbitrate the dispute and the World Court held Greece had a right to compel resort to the dispute settlement mechanisms of the compromissory clause prior to referring the matter to the ICJ. As the compromissory clause of the Montreal Convention similarly requires arbitration as a second step, Iran may find they are standing in the same legal shoes which the British wore in the Ambatielos Case.

The efforts of Iran to read the arbitration requirement out of Article 14 should not be persuasive to the Court. The ICJ has stated that omissions of this nature are only permissible when "there is a reasonable probability that further negotiation would not lead to a settlement."[89] The U.S. offer to discuss compensation with Iran presents further opportunity for diplomatic discussions which have not been exhausted, and Iran should not be allowed to rebuff offers to negotiate or arbitrate solely because this method of resolution does not include the admission of criminality which Iran desires.

Iran had the opportunity to press for the condemnation of the United States in the U.N. Security Council and the

ICAO Council, but failed to win such a concession from these international political organs. Iran now seeks to carry this argument to the World Court on the hope a judicial outcome will be more to their liking. While that might be a legitimate strategy if there was an independent bases for jurisdiction in the Court, it would be improper to allow a state to sidestep conventional links in the dispute resolution chain simply because of a state's dissatisfaction with rulings or resolutions issued by public international forums.

The arguments made for strictly construing the compromissory clause of the Chicago Convention have equal application in this context. Restated, the contracting parties to an international agreement carefully weigh exposure to the ICJ which may be created by compromissory language buried within the text of a treaty. If the ICJ loosely construes such clauses, states will be reluctant to include dispute settlement provisions in future agreements. It must be recalled that international courts are constituted by treaty and may only exercise the degree of authority vested in them by appointing charters. This may stunt the progressive growth of the law, but if international legal forums go too far they will lose the support of states' necessary to their treaty-based existence.

In recognition of these concerns, international legal scholars such as Professor Moore and Professor Reisman have

argued that a rule of restrictive interpretation should be applied to compromissory clauses to narrow the range of disputes deemed to fall under the substantive provisions to only those matters that the treat parties are explicitly agreeing to submit.[90] In their view, a conservative approach is necessary to protect this right of states not to be sued in the absence of clear consent. Professor Reisman refers to this reliance by a state as a "presumption of confinement", and believes it is basic to the use of the treaty-based mode.[91] Judge Schwebel adopted this logic in his dissent in the Nicaragua case where he argued the rule of restrictive interpretation should apply and applicants must carry a heavy burden to establish that the compromissory clause grants the Court requisite jurisdiction.[92]

Sir Hersh Lauterpacht, and other scholars such as Professor Sohn and Professor Rosenne, contend that a general rule of treaty interpretation, or a specific rule applicable to compromissory clauses, has not been established by the jurisprudence of the Court.[93] A comprehensive review by Professor Charney of twelve ICJ decisions which present questions of compromissory clause jurisdiction supports the view that a much lower threshhold is applied.[94] He recommends, in complete contrast to Reisman, that any argument which is not "prima facie implausible" should be enough to clear jurisdictional hurdles in order to project a broad and generous policy toward international

adjudication.[95]

While these prominent scholars differ in their assessments of the reception which compromissory clauses have or should receive in international legal practice, the substantive defects noted with Iran's position under the Montreal Convention make it a loser regardless whether a restrictive or "prima facie implausible" standard is applied to the compromissory clause. Accordingly, the Montreal Convention is not a satisfactory basis for ICJ jurisdiction in the Aerial Case.

C. THE 1955 TREATY OF AMITY BETWEEN IRAN AND THE UNITED STATES

Iran's initial Application to the Court relied solely on the compromissory clauses of the two conventions analyzed. When Iran presented its Memorial one year later, the compromissory clause from the Treaty of Amity Between Iran and the United States of 1955 was added as a third basis for jurisdiction. This procedural manuever raises at the outset whether the rules and practice of the ICJ permit a state party to subsequently amend filings with an entirely new jurisdictional premise.

1. DELINQUENT AMENDMENTS TO ICJ PLEADINGS

Baseball enthusiasts will recall that one of Yogi Berra's most memorable quips was that "it seems like deja vu

all over again." This statement is particularly germane to this analysis because Iran's reliance on the Treaty of Amity for jurisdictional and substantive support perfectly mirrors the contentions of Nicaragua in its case against the United States in 1984. Apparently Iran "went to school" on the Nicaragua opinion and has reappeared before the Court cloaked in the compromissory clause of the bilateral Treaty of Amity which is nearly textually identical to the Friendship Treaty invoked by Nicaragua. The ICJ held in the Nicaragua case:

> The Court considers that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial...It is desirable that the "legal grounds upon which the jurisdiction of the Court is said to be based" should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court provide for this to be specified "as far as possible" in the Application. An additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis and provided also that the result is not to transform the dispute brought before the Court into another dispute which is different in character.[96]

This holding is critical to the Iranian complaint because while Article 59 of the Statute of the Court states that ICJ decisions have no binding force except between parties, the Court has consistently recalled prior rulings to guide it on similar questions of law. The precedential value of the Nicaragua opinion is even more certain because the issue is an identical twin and the ruling is so very recent. Accordingly, the first point of contention in the

legal battle to be waged over the compromissory clause in the Treaty of Amity will be fought not over when the treaty was first pled, but rather on whether the addition of this provision "transforms" the dispute into another of much different character.

2. TRANSFORMING THE PLEADINGS THROUGH THE INCLUSION OF NEW ISSUES

Iran's subsequent pleading, which brought the Treaty of Amity into play, add new issues to the case which go beyond previous arguments made under the substantive provisions of the Chicago and Montreal Conventions. While those multilateral treaties are centered on fundamental principles of air law and the protection of civil aircraft and passengers from terrorism, the Treaty of Amity concentrates on establishing bilateral groundrules for consular relations and "beneficial trade and investment and closer economic intercourse."[97] Iran introduces the following substantive provisions from this agreement as further support of American violations:

(i) the failure under Article IV to accord "fair and equittable treatment" to the nationals of the Islamic Republic who were killed as a result of the United States' actions;
(ii) the failure under Article VIII to afford unrestricted trade, in particular concerning the Islamic Republic's ability to purchase a replacement aircraft; and
(iii) the failure to respect the Islamic Republic's freedom of commerce and navigation provided for in Article X(1).[98]

These additional pleadings appear to expand the range of issues before the Court to include events in the Persian Gulf, both before and after, the downing of Iran Air Flight #655. This would seem to inject questions of neutrality under the Hague Conventions, concepts of aggression under the U.N. Charter,and invite American counter-claims concerning the legality of Iranian attacks on merchant shipping and the mining of international waters. However, the Nicaragua case contained similar colatteral matters which were subsequently injected into the dispute and the Court did not find them to be a sufficient "transformation" of issues to prevent full consideration. In light of this precedent, which is seemingly on all fours with Iran's claim, the ICJ is unlikely to find that the addition of commerce and navigation issues transforms this dispute into a "horse of a different color." Accordingly the Court will proceed to analyze the applicability of the Treaty of Amity for jurisdictional purposes.

3. COMPROMISSORY JURISDICTION UNDER ARICLE XXI

Once the ICJ determines that the Treaty of Amity is fair game for review, the first step in the process will be to assess the text of the compromissory provision. This clause, Article XXI(2), states:

> 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 othe pacific means.

The wording of this clause is identical to the compromissory provision contained in the Friendship Treaty looked at and adopted by the Court as a sufficient jurisdictional basis in the Nicaragua case. Additionally, the ICJ reviewed this very Article during the Hostages case pursuant to the claim of the United States, and held it was a sufficient basis for jurisdiction.

There are four simple prereguisites to the Court's jurisdiction under Article XXI(2):

(1) that there be a "dispute";
(2) that the dispute relate to the "interpretation or application" of the Treaty of Amity;
(3) that the dispute be one which is "not satisfactorily adjusted by diplomacy"; and
(4) that there be no agreement to settlement of the dispute by some other pacific means.

The text does not provide in express terms that either party to a dispute may bring the case to the Court by unilateral application, but the United States argued this was clearly the understanding of the parties in its briefs during the Hostages case.[99]

The first requirement of a "dispute" was readily established when Iranian nationals were killed in the aerial incident and subsequent communications between Iran and the United States concerning responsibility broke down without resolution. The second element regarding whether the incident "arises under" the Treaty of Amity is more contentious. The United States argued during the Nicaragua

case that this compromissory language was presumed to apply only to specific commerce or consular related activities. In support of this, a State Department memorandum dealing with the compromissory language of a similar Friendship Treaty was offered which expressed:

> The compromissory clause...is limited to questions of the interpretation or application of this treaty; i.e.,it is a special not a general compromissory clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number treaties, concluded over a long period of time by nearly all nations. Much of the general subject matter-and in some cases identical language-has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are established and well known. Furthermore, certain important subjects, notably traffic in military supplies, and the interests of the country in time of national emergency are excepted from the purview of the treaty.[100]

While this passages persuasively reflects the United States' understanding that compromissory clauses like the one in the Treaty of Amity with Iran were not intended to be a broad grant of jurisdiction, the ICJ did not find this contention compelling (by a vote of 13-2) in the Nicaragua case.[101] Again, the case is on all fours in this respect, and it is unlikely the ICJ would find the argument more attractive the second time around.

The United States will no doubt also point repeatedly to Article XX(d) which says the Treaty will not preclude the application of measures "necessary...for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."[102]

The facts of the Iran-Iraq War, coupled with American involvement to protect national security interests and international peace and stability, would seem to fall squarely under this provision and block applicability of the Treaty of Amity to the aerial incident and collateral issues of navigation and commerce in the Persian Gulf. Once more this argument was tried and tested in the Nicaragua case, and the Court found it wanting. The Court held that while certain matters may have meant to be reserved from the Court's jurisdiction, the determination of whether a matter is excluded is not within the unilateral competence of a state and should be decided by the Court using a reasonable and necessary standard.[103] Iran's contention that VINCENNES acted unreasonably by manuevering into Iranian territory, and exceeded any necessity for using force, would appear to be enough of a showing to meet the legal test articulated in the Nicaragua case and open the matter to the purview of the Court.

The third and fourth prerequisites of the compromissory clause deal with the requirements for friendly diplomacy between the parties and settlement of disputes through other pacific means. As discussed supra, the negotiations requirement is rather elastic and deferential to a state's unilateral determination that discussions would be futile. The Court may have reason to pause a moment on this point because Iran has not been as willing to engage in discussions as Nicaragua was, and because it was critical of

Iran in the Hostages case for spurning offers from the United States to engage in diplomatic negotiations.[104] However, this failure is not likely to be fatal to Iran's claim because it is obvious that the parties are diplomatically stale-mated over the aerial incident and neither state will backdown or concede that its actions violated international law.

4. PREVIOUS DENOUNCEMENTS OF THE TREATY OF AMITY BY IRAN AND THE UNITED STATES

One final legal dilemma which the Court may ponder before applying the compromissory provision of the Treaty of Amity to gain jurisdiction is whether equity should bar Iran from raising the agreement due to a history of inconsistent assertions and conduct. This issue was argued in reverse during the Hostages case where the United States invoked the Treat of Amity and Iran argued the United States had not lived up to the agreement. Iran also refused on that occasion to accept the jurisdiction of the ICJ, or comply with its ruling. Iran also argued then, and later before the U.S. Iran Claims Tribunal, that the agreement had been terminated.[105] While the United States admits that the Treaty of Amity remained in force at the time of the aerial incident, and is still in force, the Court could find Iran has breached an essential provision of the agreement or is estopped from raising it.

Article XXIII(3) indicates that, "Either Party may, by

giving one year's written notice, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter." There is no evidence Iran or the United States presented a written denouncement. Article 54 of the Vienna Convention states that termination of a treaty, or withdrawl of a party, may take place in conformity with the provisions of the treaty or by consent of the parties. Since no such termination has occurred, the only other way to void or suspend the agreement in accordance with the Vienna Convention would be through material breach (Article 60), impossibility of performance (Article 61) or through a fundamental change of circumstances (Article 62). The latter two are unlikely candidates because performance was possible, and any change of circumstances caused by events in the Gulf did not "radically transform" the extent of the obligations.

An argument can be made that Iran has materially breached the agreement through its violation of provisions essential to the accomplishment of the object and purpose of the treaty. Article X of the Treaty of Amity calls for freedom of commerce and navigation between the parties and this would appear to be elementary to the agreement. Iranian attacks on reflagged Kuwaiti tankers would be the clearest examples of violations of this provision, and the release of free floating mines for the purpose of impeding navigation would be further evidence of a repudiation through deeds. However, Article 60(1) of the Vienna

Convention permits the other state to "invoke the breach as a grounds for terminating...or suspending its operation", and there is no indication the United States took steps of revocation following the attacks or in the three years which have elapsed.

A second line of analysis concerns the possibility Iran might be estopped for prudential reasons from raising specific provisions of the Treaty of Amity for international adjudication and enforcement when it has not fully complied with the agreement. There is legal precedent to suggest a state can be restricted by theories of estoppel in international law, and Judge Lauterpacht has written:

> A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes too onerous. It is of little importance whether the rule is based on what in English law is known as estoppel or the more generally conceived requirement of good faith.[106]

The breaches referred to above, as well as Iran's failure to comply with U.N. Security Council Resolutions directing the cessation of attacks on shipping, suggest a lack of "good faith." Judge Schwebel termed it "unclean hands" in his dissent in the Nicaragua case, and he felt it was sufficient justification to deny Nicaraguan reliance on the Friendship Treaty.[107] The only problem with this, from the United States position, is that Judge Schwebel was in a minority of two judges who felt jurisdiction could be forfeited on the basis of conduct which is inconsistent with the treaty.

Numerous legal arguments available to the United States

have merit and could be persuasive to defeat application of the compromissory clause of the Treaty of Amity. However, all arguments ultimately lead back to the Nicaragua case which is so factually similar that it is difficult to imagine the ICJ will render a different judgment in the jurisdictional phase of the case.

D. SUMMARY OF THE JURISDICTIONAL ISSUES

In football jargon, Iran has asserted a three prong "wishbone" attack in order to persuade the ICJ to assume jurisdiction over the aerial incident of 3 July 1988 caused when VINCENNES shot down Iran Air Flight #655. The first option of this offensive attack, ICJ appellate jurisdiction under the Chicago Convention, is potentially sound but the proceedings of the ICAO Council leave little doubt the Council was not convened for the purpose of conducting the required quasi-judicial hearing into the merits of Iran's claim. The procedural deficiencies (lack of verbatim record, party pleadings, oral and written arguments, recorded vote,etc.) are so at odds with the Council's adjudicative regulations that Iran cannot demonstrate the requirements of Article 84 have been satisfied. The only appropriate conclusion is that the ICAO Council was acting in its policy capacity pursuant to Articles 54 and 55 when it considered the aerial incident. Accordingly, the compromissory clause of the Chicago Convention fails for proceedural

non-compliance.

The second phase of the strategy, the compromissory clause of the Montreal Convention, appears to fail for substantive non-compliance. An analysis of the text of the Convention using the Vienna Convention on the Law of Treaties' "ordinary meaning", " objects and purposes", and subsequent state practices tests indicates the agreement was intended to reach the individual criminal conduct of saboteurs and terrorists but not official state actions or the conduct of agents or representatives of the state.

Iran's final "wishbone" option, now that the hand-off to the fullback has been blocked and the speedy tailback has tripped in the backfield, is the quarterback keeper under the compromissory clause of the Treaty of Amity. Although this jurisdictional grounds was offerred by Iran in a later pleading, it appears to be the play most likely to score a touchdown. The factual grounds (exact treaty provisions, a state of quasi-hostilities between the complaining state and the United States, and the subsequent use of force by the United States for the alleged purpose of self-defense) so closely mirrors the situation encountered by the Court in the Nicaragua case as to be indistinguishable. The Court held, by vote of 13-2, that jurisdiction was appropriate in that instance, and the review likely to be conducted in connection with Iran's claim in the Aerial Case is expected to be a legal re-run. A positive finding of jurisdiction is by no means a tragic consequence for the United States, or a

crowning victory for Iran however, because the merits of the Aerial Case are not as readily analagous to Nicaragua as the jurisdictional claims.

IV. MERITS OF THE AERIAL CASE

A. RULES OF NEUTRALITY UNDER THE LAWS OF NAVAL WARFARE

Iran's Memorial contends the deployment of U.S. forces to the Persian Gulf was not for the alleged protection of neutral shipping but part of a larger scheme to assist Iraq in its war effort.[108] Iran asserts that such conduct contravenes neutrality provisions enshrined in the Hague Convention of 1907 and customary law, and through interference with Iran's commerce and navigation violated substantive articles of the Treaty of Amity of 1955. While issues of neutrality and navigation appear tangential to the merits of the aerial incident, they need to be dealt with up front because Iran contends violations of neutrality were the genesis of the subsequent destruction of the airliner. If the ICJ is to reach the merits of the VINCENNES case, it will inevitably have to discuss neutrality concepts at play in the Gulf War.

The bulk of the law of naval warfare devoted to neutrality springs from Hague Conventions V and XIII of 1907. These conventions establish a regime in which all nations have the right to refrain from participation in armed conflict by officially declaring neutral status which

carries with it the right of inviolability.[109] Once invoked, neutral nations are reciprocally obligated to observe principles of impartiality and abstention.[110] Iran and Iraq are not signatories to these conventions, but the provisions are generally declaratory of customary law, and as such, are obligatory on the two belligerents in the Gulf War. Iran and Iraq are equally entitled to belligerent rights since neither was formally designated as the aggressor by the U.N. Security Council.

As reported in the factual section supra, the method of warfare waged by Iran and Iraq departed radically from Hague concepts of neutrality. Both warring states quickly discarded the traditional right of visit and search in favor of unannounced and indiscriminate attacks on neutral merchant ships innocently transiting the Gulf. This unrestricted policy of tanker warfare has led many commentators to speculate that neutrality is no longer a viable concept in international law. Previous practices from World War II, where some neutral merchants were targeted on sight, adds further evidence that belligerents are no longer willing or required to respect neutrality.[111] Other scholars have contended that international response to the Gulf War, as evidenced by numerous and unanimous U.N. resolutions condemning unprovoked attacks on neutral merchants by Iran and Iraq, obviates any possibility that normative law is being redefined.[112] While the debate over neutrality may linger among international law professors for

years, the significance to this analysis is that it shows traditional concepts of neutrality are in flux and were further confused during the Iran-Iraq War.

The blurring of strict definitions of belligerents and neutrals, coupled with the World War II experience described, is generally agreed to have functionally altered the legal description of neutral classes to now include "non-participation of a state in hostilities."[113] This middle tier category of "nonbelligerency" which has emerged from state practice has no defined legal status. The U.N. Security Council impliedly recognized the validity of this middle ground in carefully selecting the term "states not parties to the hostilities" when discussing the rights and responsibilities of neutrals in the Persian Gulf.[114] Under this refined definition a neutral state which does not directly participate in armed conflict is not stripped of neutral status.

These definitional problems are significant because, while the United States announced observance of a "strict attitude of neutrality" in the Iran-Iraq War, subsequent statements by then Secretary of Defense Weinberger suggest a classification of "nonbelligerent" is more appropriate.[115] Revelations of the clandestine sale of American weapons to Iran became an infamous part of the Iran-Contra Scandal, and recent disclosures of prior sales of "joint-use" equipment and the passing of satellite intelligence to Iraq during the Gulf War became public news items when Iraq invaded

Kuwait.[116] Other superpowers were equally involved in Gulf matters, with the Soviet Union supplying arms to Iraq and the Chinese and North Koreans aiding Iran.[117] The great majority of the Gulf states were supporters of Iraq with the exception of Kuwait, which attempted absolute neutrality due to its precarious geographic location between the two combatant states.[118]

Trying to distill legal principles from this quagmire of conflicting state practices is difficult, and thankfully, unnecessary. Focusing strictly on U.S. military actions indicates it did not overstep the bounds of "nonbeligerency." The two different attacks on Iranian oil platforms in 1987 were legitmate forms of reprisals conducted in response to illegal Iranian strikes on U.S. warships. Legitimate resort to self-help remedies does not remove neutral status. If this were to be so, a neutral state would have no mechanism for deterring aggression once attacked illegally other than to join the conflict as a full fledged belligerent. This would be non-sensical since international law is designed at its core to first avoid escalation and participation in warfare, and if unavoidable, limit the scope of the fighting as narrowly as possible. All other engagements between naval units and Iranian forces prior to the VINCENNES incident were confined to localized fighting in which the United States was responding in self-defense.

Iran's pleadings allege repeatedly that U.S. forces

abandoned a neutral posture but conspicuously omit discussion of the indiscriminate and systematic attacks carried out by Iranian gunboats against neutral shipping during the Gulf War. This is done intentionally because referral to these incidents would squarely raise Iranian violations of belligerent responsibilities. The very convention invoked by Iran, Hague XIII, makes it illegal for belligerents to attack neutral shipping in the waters of a neutral country.[119] Therefor, all Iranian attacks on Kuwaiti oil terminals or neutral merchants located in Kuwaiti or Saudi Arabian waters were clearly outlawed by international law. These actions also adversely effected commerce and navigation in contravention of the Treaty of Amity. The American reflagging and escorting effort was in direct response to these violations and was a lawful response to unlawful conduct. Other maritime powers such as the Soviet Union, Great Britain, France, and the Netherlands also provided escort services to merchants.[120]

Similarly the clandestine sowing of mines in international waters violates Hague Convention VIII of 1907 relative to the laying of automatic submarine contact mines.[121] The ICJ addressed the use of mines most recently in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (hereinafter Nicaragua Case) and stated:

> ...if a state lays mines in any waters whatever in which the vessels of another state have rights of access or passage, and fails to give any warning or

> notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907.[122]

Iran's attempt to drag concepts of neutrality into the controversy over the aerial downing of the airbus is a "red herring." Whereas the United States activities in the Persian Gulf might have edged beyond traditional neutral status toward an emerging category of "nonbelligerency", the only clear violations of the Hague Conventions of 1907 were committed by Iran. As discussed, supra, there is legal precedent to suggest a state can be restricted by theories of estoppel under international law, and scholars in the field of international law such as Sir Hersh Lauterpacht do not believe a state which repudiates a treaty through adverse deeds can later benefit from that agreement.[123] Iran pledges allegiance to Hague neutrality principles when charging the United States with violations before the ICJ, but omits discussion of provisions relating to mining and respect for neutral territory and property which would have a boomerang effect if properly reviewed by the Court. The ICJ should not be fooled by such selective memory.

B. TERRITORIAL INTRUSIONS INTO IRANIAN AIR AND SEA ZONES

A review of the historical examples of commercial airliner downings reveals that all prior scenarios included intrusions into the airspace of the over-reacting states. Iran distinguishes the VINCENNES incident as more eggregious

on the grounds Iran Air Flight #655 was shot down over Iranian territory, by a warship which had manuevered into Iran's territorial sea prior to launching missiles. Iran invokes the Chicago Convention of 1944, the United Nations Convention on the Law of the Sea of 1982, and customary law to support the proposition that territorial intrusions for military purposes violate state sovereignty and are per se illegal. Iran also invokes domestic legislation, a 1934 Act on the Territorial Waters and the Contiguous Zone requiring advance notification and approval before a warship may enter Iranian territorial sea, as secondary support for proving a violation of its sovereignty.

Turning first to international principles of airspace, the Chicago Convention does create complete and exclusive state sovereignty over the airspace above land territory (Art.1), and over territorial waters (Art. 2). This multilateral convention is a widely recognized source of air law and the provisions on sovereignty of airspace over land and sea territory are universally accepted as customary international law.[124]

Coastal state control over territorial seas is broad, but unlike airspace, is subject to the right of innocent passage. This peacetime navigational regime flows from the Geneva Convention on the Territorial Sea of 1958, the navigational part of the U.N. Convention on the Law of the Seas of 1982, and customary international law. In order to constitute innocent passage the travel must be continous,

expeditious, and not prejudicial to the peace and good order of the coastal state.[125] The threat or use of force is statutorially described as non-innocent.[126] The conventions also mandate that passage which qualifies as innocent cannot be hampered, nor may the coastal state impose an advance notice and permission regime or other requirements on which have the practical effect of denying or impairing the right of innocent passage.[127]

Applying the law to the facts, VINCENNES was located in international waters on the morning of 3 July 1988 when the cruiser received a call for assistance from an unarmed Pakastani tanker under attack from Iranian gunboats. VINCENNES steamed to the scene and joined in the defense of the merchant. While in the process of returning fire the American warship manuevered within Iran's territorial sea. These events were contemporaneous with the take-off of Iran Air Flight #655 from Bandar Abbas, and the airbus remained within its sovereign airspace when it was downed. Under ordinary peacetime circumstances, VINCENNES' manuever into Iranian territorial sea would be characterized as non-innocent, and therefor illegal, passage. However, the ongoing surface engagement with Iranian gunboats adds a fundamental change in circumstances which gives rise to a justification defense on three separate theories.

First, customary international law has recognized for over a century the right of hot pursuit as an exception to principles of navigation and freedom of the high seas.[128]

While this right is ordinarily invoked by coastal states to permit pursuit beyond its territory of ships and aircraft which have violated its domestic laws, the concept centers around not letting one party gain an advantage from the application of international law. The same logic forms the backdrop to laws of warfare, and are generally interpreted functionally because of the changing techniques employed in armed conflict or by domestic law violators. As applied to VINCENNES, international law does not require the warship to disengage from a legitimate act of self-defense simply because the Iranian gunboats moved within an imaginary territorial line. Any other interpretation would extend boundary protection to a hostile force seeking protection and place international law in the untenable position of providing sanctuary to units committing illegal acts of aggression.

Second, the U.N. Convention on the Law of the Sea contains rules to be applied during peacetime transit. All "bets" are off between belligerents once the shooting starts and laws of warfare "kick-in" to govern transit through the seas. Naval assets are permitted by these laws to move as necessary on and under the sea, and through airspace, to conduct attacks on legitimate military targets, provided military operations respect rules of neutrality for those nations not involved in the hostilities. The surface engagement of 3 July 1988 between VINCENNES and the Iranian gunboats created a combat environment which elevated the

governing rules from peacetime to laws of warfare. If the Court reaches this issue it should decide the territorial encroachment by VINCENNES was lawful under rules of naval warfare.

Third, even if peacetime rules are held to apply throughout the aerial incident, Article 301 of the U.N. Convention on the Law of the Sea calls on contracting states to refrain from threats or the use of force against territorial integrity in any matter "inconsistent with principles of international law embodied in the Charter of the United Nations." While the U.N. Charter outlaws aggression in Article 2(4), it also preserves the inherent right of individual or collective self-defense in Article 51. Thus determining whether a territorial intrusion occured under peacetime navigational rules requires an assessment of the inherent right of unit self-defense under circumstances encountered by VINCENNES, and not on a mechanical application of the navigational regime applied to airspace or the oceans.

Iran also argues that its domestic laws on territorial sea passage by foreign warships requires advance notification and consent which VINCENNES did not apply for or obtain. When an international agreement conflicts with domestic legislation, as is the case here, states are split on whether it "trumps" local law in national courts, but there is no disagreement that in international courts the conflicting domestic provision must give way.[129] Not only

does this canon of interpretation negate the international effect of Iran's local law, but the ICJ addressed a case raising the same substantive issue in the Corfu Channel Case (United Kingdom v. Albania).[130] The Court there considered an Albanian contention that the passage of British warships through the Corfu Channel during peacetime, without the previous authorization of the Albanian government, violated its sovereignty. The Court held that customary law recognizes the right of innocent passage through territorial waters which cannot be prohibited or conditioned on the the previous authorization of the coastal state. Accordingly, Iranian domestic law requiring advance coastal state approval prior to the exercise of innocent passage is inconsistent with international law and has no effect in the World Court.

Iran's attempt to bolster its claim against the United States by adding territorial intrusions as a legal bases for substantive violations is, like neutrality, tangential to the circumstances of the incident and are of no consequence to the merits of the Aerial Case. The primary issue remains whether actions of VINCENNES on 3 July 1988 conformed to the right of self-defense provided in Article 51 of the U.N. Charter.

C. SUBSTANTIVE ASPECTS OF THE MONTREAL CONVENTION

As discussed in the jurisdiction phase, Iran claims the

conduct of the Commanding Officer of VINCENNES, and the United States, amounts to a substantive violation of Article 1 of the Montreal Convention dealing with aerial sabotage. Iran further contends that by failing to take all measures to prevent an offense under the treaty and punish the naval officers responsible with severe penalties, the United States simultaneously violated Articles 3 and 10 of this Convention. The United States has made it clear it considers the actions of VINCENNES to have been lawful, and has no intention of prosecuting the Commanding Officer.[131] The United States also answers that the scope of the Montreal Convention does not reach the VINCENNES incident, where the real issue is not aerial terrorism but the use of force under laws of armed conflict.

The same analysis used to determine the scope and intent of the treaty-- ordinary meaning test, object and purposes test, and subsequent state practices--is applicable when reviewing whether the Montreal Convention influences the merits of the Aerial Case. It is recalled that all three of these methods of review lead to the same conclusion; the Montreal Convention does not reach official state actions and individual accountability is confined to criminal offenses. Accordingly, this convention will not be legally relevant to jurisdiction or merits issues.

D. THE USE OF FORCE UNDER INTERNATIONAL LAW

The "mother" of all legal issues in the Aerial Case, to play on the now popular expression, is whether the use of force by a state in anticipatory self-defense is legally sanctioned by the U.N. Charter or customary international law. And, to continue the analogy, cleanly resolving it in light of all the legal ambiguity surrounding this concept may be more difficult than mounting the air and land campaigns of Operation Desert Storm.

1. U.N. CHARTER BASED ANALYSIS

In conventional law the U.N. Charter is the primary multilateral agreement which sets the groundrules for the use of force in the international community. Although Iran has invoked substantive provisions from numerous other treaties to support the propositon that the United States has committed an illegal act of aggression, all of these pacts take backseat to the Charter if inconsistent. This "trump-card" provision is set out in Article 103 which states:

> In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The U.N. Charter endorses the philosophy that states should settle their differences through peaceful means with

resort to the use of force permissible only when sanctioned by the U.N. Security Council. This broad and dramatic pronouncement is found in Article 2(3) and (4) which state:

> (3) All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> (4) All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The intent of these provisions is to task the U.N. Security Council with maintaining world peace by vesting them with the exclusive right to "determine the existence of any threat to peace...or act of aggression and...to restore international peace and security."[132] The definition of aggression was supplied by the General Assembly nearly thirty years later through adoption of Resolution 3314 in 1974. Article 2 of this resolution provides that the first use of force in contravention of the Charter is prima facie evidence of an act of aggression. Examples of what constitutes aggression are set out in Article 3 and include the invasion, blockade, bombardment, or attack against another state's forces or territory.

Member states were not willing to relinquish all authority to use force to the whims of the politicized Security Council. Accordingly, the Charter recognizes the customary right of self-defense in Article 51 which states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The perhaps intentionally ambiguous drafting of Article 51 has proven to be a fertile area for legal commentators trying to define exactly what the terms "inherent right" and "if an armed attack occurs" mean. Many scholars contend that Article 51 restricts the right of self-defense to only those situations in which an armed attack has already occurred.[133] This camp maintains that the threat of aggression, no matter how real or eminent, is inadequate to trigger the right to respond with force. This narrow view would mean that a country, or its deployed military units, must take the first hit and then seek the endorsement of the United Nations before responding with self-help remedies previously authorized under customary international law. This group of commentators believe the Charter replaces customary law and is the sole and exclusive authority for the use of force. Accordingly, these academicians contend the "anticipatory right of self-defense" is an extinct legal custom which has been overtaken and precluded by the Charter.[134]

Professors McDougal and Mallison presented a different

analyses based on their review of the travaux preparatoires of the San Francisco Conference which hammered out and adopted the Charter.[135] In their collective view, Article 51 was drafted to incorporate customary remedies of self-defense. Judge Lauterpacht commented that the "right of self-defense is a general principle of law, and as such it is necessarily recognized to its full extent in international law."[136] Professor Bowett concurs in this reading of the Charter based on international practice and public policy. He points out:

> ...Such a restriction is both unnecessary and inconsistent with Article 2(4) which forbids not only force but the threat of force, and furthermore, it is a restriction which bears no relation to the realities of a situation which may arise prior to an actual attack and call for self-defense immediately if it is to be of any avail at all. No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardize its very existence.[137]

2. CUSTOMARY INTERNATIONAL LAW BASED ANALYSIS

The requirements for anticipatory self-defense, assuming as I do that the second group of scholars are correct and the doctrine is incorporated into the Charter, have been established through customary law. The most classic statement of the self-defense doctrine comes from 1837 American jurisprudence in The Caroline Case.[138] The Caroline was a small steamer owned by American citizens which was being used by Canadian insurgents to transport and resupply rebels opposing British rule in Canada. One night

a British Commando unit crossed the Canadian border and destroyed the ship, killing several Americans in the process. Secretary of State Daniel Webster rejected the British claim of self-defense but admitted such justification might be appropriate under different circumstances:

> The only exception to the inviolable character of the territory of independent states is self-defense, and that should be confined to cases in which the necessity of that defense is instant, overwhelming and leaving no choice of means and no moment for deliberation. An attack on another state's territory justified by the necessity of self-defense must be limited by that necessity and kept clearly within it.[139]

Webster's definition of self-defense gained wide acceptance in international legal circles in the proceeding century and was relied on by the Nuremberg War Crimes Tribunal in convicting senior German officers of war crimes for invading Norway.[140]

The legal checklist for anticipatory self-defense which emerges from this customary process is:

1)The use of peaceful procedures if available;

2)actual necessity for the use of force in responding to an imminent threat; and

3)porportionality in the type force employed.

Anticipatory self-defense is an exception to the general rule against using force and can only be employed when the threat presents a clear and present danger. A recent use of the anticipatory self-defense doctrine was the Cuban Missile

Crisis of 1962.[141] On that occasion U.S. naval forces imposed a quarantine to prevent the introduction of Soviet manufactured strategic missiles to Cuba. The American response satisfied the legal criteria set out above and was accepted by the international community as a legitimate use of the customary right of self-defense.

3. THE EFFECT OF THE NICARAGUA CASE ON THE USE OF FORCE AND SELF-DEFENSE

Before assessing the VINCENNES incident under traditional concepts of self-defense, attention must be directed to the ruling on the merits by the ICJ in the Nicaragua Case. This decision, which is still being studied and dissected by international scholars, has been hailed by some as "one of the most important judgments ever delivered by the ICJ with seminal findings on the use of force and the exercise of the inherent right of self-defense under Article 51 of the Charter."[142] Others more skeptical label it a "legal tragedy", and claim "the Court gratuitously cut off the already beleaguered law of force and self-defense from whatever clarity and stability go with the written word of the Charter."[143]

The complicated facts of the Nicaragua Case deal with the involvement of the United States in training, arming, and assisting a rebel contra force in their attempt to displace the ruling communist government in Nicaragua in the early 1980's. In 1984 the Court found jurisdiction to

review the claims of Nicaragua under the optional compulsory jurisdiction of the Court even though the United States had, prior to the hearing, revoked its declaration of submission. The United States then boycotted the merits proceedings held in 1986 and declined to present any evidence to the Court in support of its position. The nonappearance of the United States permitted Nicaragua to offer a wide range of uncontroverted evidence which led the Court to rule that the activity of the United States in Central America violated international law. In so finding the Court looked closely at the U.N. Charter and customary law provisions dealing with the use of force and collective self-defense. The Court clearly refuted the argument that the U.N. Charter superseded customary norms of international law in holding:

> As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the U.N. Charter...by no mean covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary law...in the actual text of Article 51 which mention the "inherent right" of individual or collective self-defense. The Court therefor finds that Article 51 of the Charter is only meaningful on the basis that there is a natural or inherent right of self-defense, and it is hard to see how this can be anything other than of a customary nature.. It cannot therfor be held that Article 51 "subsumes and supervenes" customary international law.[144]

The Court also made clear that its decision focused exclusively on the right of collective self-defense following an armed attack and does not address the anticipatory right of unit self-defense under customary law:

> In view of the circumstances in which the dispute has arisen, reliance is placed by the parties only on the right of self-defense in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue.[145]

The importance of this controversial ruling to this analysis is the confirmation that customary law regarding the use of force is alive and was not swallowed by the U.N. Charter, and, that the holding does not limit the anticipatory right of individual self-defense in any way.

4. APPLYING THE FACTS OF THE VINCENNES AERIAL INCIDENT TO THE LAW

The first requisite element for the legitimate use of anticipatory self-defense is the unavailability of peaceful alternatives. Iran Air Flight #655 was first detected at 0647:37 at a distance of 47 NM and a speed of 300 kts. VINCENNES issued its first voice challenge at 0648:25 and continued attempts to communicate with the aircaraft until 0653:04. During these five critical minutes VINCENNES also returned fire on Iranian gunboats, instructed an Iranian P-3 operating in the area to stay clear, contacted higher authority to request permission to engage the inbound aircraft if necessary, and prepared to defend the ship from aerial attack. Voice reports from VINCENNES identified the aircraft as an F-14. The Commanding Officer turned the missile firing key at 0654 with the aircraft at a distance

of 10 NM. This sequence of events presents convincing evidence that VINCENNES had no time to consider or implement additional peaceful options. The crew made repeated effort to communicate with the aircraft to warn it off. Even at flank speed the ship could not have escaped the track of the incoming target or exited to a position of safety in the few minutes available. Due to missile flight characteristics and minimum weapons acquisition ranges it would also have reduced VINCENNES defensive capabilities if the aircraft had been allowed to close the ship farther.

The only testimony to suggest peaceful alternatives remained despite this threatening and rapidly progressing scenario was Cdr. Carlson, Commanding Officer of SIDES.[146] His expertise and firsthand observation of the unfolding events make his testimony significant. Cdr. Carlson points out that even if one presumed the contact was an Iranian F-14 there was insufficient data to attack it without visual identification. The lack of fire control emissions from the contact, no known surface attack capability for this type of fighter, the improbability an approaching aggressor would be squawking any IFF code, and the close proximity of the ship to a commercial air corridor should have delayed the missile launch until additional information was collected.[147] These circumstantial facts may establish that some evidence available to the Captain of VINCENNES militated against using force until more data was available, but this hindsight does nothing to dispel the actual subjective

belief of the Commanding Officer that his unit was endangered and entitled to respond in self-defense. International law, like domestic law, applies an objective person test for self-defense. On these facts the reasonably prudent Commanding Officer could have perceived in good faith that the high speed incoming contact approaching his unit during the surface engagement was an immediate threat. The fact that this judgment is open to professional criticism following investigation and hindsight reflection does not remove it from the realm of legal justification. By analogy to domestic law, the homeowner who elects to use force against an intruder in the home does not lose the self-defense justification simply because another citizen may have resisted resorting to self-defense in the same situation, provided the legal criteria for the defense was satisfied.

The second prerequisite for self-defense is actual necessity at the time force was used. While CDR. Carlson's comments are again germane, the investigations confirmed VINCENNES was fired on by Iranian gunboats and was in the process of returning fire when approached by an air contact known to have originated from a joint military airfield. This data, coupled with threatening intelligence information and a demonstrated Iranian ability to conduct aerial attacks on U.S. warships, further supported a tactical conclusion that force was necessary. Aerial threats present an immediate lethal threat and leave little time for assessment

and reflection. As pointed out by Professor Parks, conventional and customary laws of warfare contain a specific bias against protecting even benign aerial missions because of an inherent distrust for aircraft.[148] The Germans were known to have used aircraft marked for medical evacuation in a dual combat role during WWII[149], and states are aware that seemingly innocent aircraft can be used covertly to gather intelligence, or launch devastating surprise raids. The bias against aircraft is also found in the Law of the Sea where ships are permitted innocent passage through territorial seas, while aircraft are not authorized entry into adjacent airspace.[150] It was not unreasonable for the Commanding Officer of VINCENNES to have shared this institutional apprehension against unidentified aircraft and cautiously concluded that his unit was being threatened. He no doubt recalled the STARK tragedy and the reemphasis placed on defending American units in the Persian Gulf from imminent attack. The factual circumstances, when considered in toto, compel the determination that the decision of the Commanding Officer to use deadly force in self-defense was reasonable and necessary to protect his ship and crew.

The final criteria for the legitimate use of self-defense is that the force applied against the target must be proportional to the threat encountered. There are few things short of deadly force which can be employed by a ship at sea to effectively stop a high speed incoming

aircraft. In the previous Bulgarian and Soviet aerial incidents close in gunfire was used to deter further intrusion by escorting jets, but in those cases there was no immediate threat and the on-scene military aircraft could attempt to cripple the airliners without jeopardizing their own safety. The capability of a guided missile cruiser to fire warning shots or force down an aircraft differs drastically from a fighter jet in visual range of a commercial airliner, and if self-defense is to be a meaningful right it should not require a warship to permit an unidentified aircraft close-in ingress before it can respond with effective force.

The totality of the evidence supports that VINCENNES acted in unit self-defense and satisfied the elements established by customary law and incorporated into Article 51 of the U.N. Charter. This conclusion is reinforced by the decisions of the ICAO Council and the U.N. Security Council which did not condemn the United States in the aftermath of the aerial incident presumably because the international assemblies agreed this was a case of legitimate self-defense.

E. SUMMARY OF THE MERITS OF THE AERIAL CASE

The VINCENNES aerial incident was a tragic accident brought on by a series of intervening events which often accompany conditions within an armed conflict zone. Just as

"friendly fire" casualties are part of combat, so too are incidental and collateral damage to non-participants during hostilities. While laws of warfare are specifically designed to minimize injuries to civilians, there is no way to completely eliminate the risk of inadvertent fatalities when a commercial airliner flies over a "hot" battlefield and is erroneously judged to be a hostile contact.

The Iranian gunboats created the hazard on the morning of 3 July 1988 through a consistent pattern of illegal acts of aggression on neutral merchants transiting the Persian Gulf. The VINCENNES entered this arena of hostilies in lawful response to a request for assistance from a merchant under attack, and this sequence of events set the stage for the misidentification and attack of Iran Air Flight #655 when it wandered into the wrong place at the wrong time. There is some indication the Commanding Officer of VINCENNES did not assimilate all available data in textbook fashion, but there is no evidence to suggest he did not reasonably believe his unit was about to be attacked by a hostile military jet.

The public organs responsible for civil aviation and international peace and security have reviewed the circumstances and found no violation of conventional or customary law. Iran now seeks to place the matter in the lap of the ICJ in hopes of a different outcome. Iran has presented the Court with a smorgasborg of legal entrees in hopes of enticing the ICJ to "bite" on the Chicago

Convention, Montreal Convention, Hague Convention, or the Treaty of Amity as substantive legal bases for condemning the United States. However, these agreements do not cover an aerial incident during time of mutual combat and only serve to mask the only applicable legal theory involved: the anticipatory use of self-defense under customary international law and the U.N. Charter. The ICJ has opined in the Nicaragua Case that the customary right of self-defense remains valid legal authority for resorting to the use of force when no peaceful alternatives exist and the force to be used is necessary and proportional. The actions of VINCENNES satisfied this criteria and were reasonable under the circumstances. If the ICJ finds jurisdictional authority for the case and proceeds to the merits of Iran's claim, it should hold in favor of the United States. At that point the unfortunate VINCENNES incident can be retired to the annals of international law to serve as another striking reminder of the unintended, but deadly, consequences often inflicted on non-combatants in times of armed conflict.

VI. COMPENSATION FOR AERIAL INCIDENTS CAUSED BY OFFICIAL STATE ACTION

Shortly after the facts of the shootdown became clear the United States announced officially, through a speech by President Reagan on July 11, 1988, that compensation would

be offered to the families of the victims once necessary details could be worked out.[151] Vice-President Bush confirmed this during his speech to the U.N. Security Council where he stated, "It is a strongly felt sense of common humanity that has led our government to decide that the United States will provide voluntary, ex gratia compensation to the families of those who died in the crash of #655."[152] Due to the absence of diplomatic relations with Iran, information concerning the ages and earning capacity of the victims was unavailable. The United States requested the Swiss government to intervene, in their capacity as the protecting power for U.S. interests in Iran, for the purpose of gathering data and distributing compensation.[153] Efforts by Swiss representatives to perform this role failed because the Iranian government's sole response to repeated requests for information and assistance was that all financial damages arising out of the incident must be disbursed directly to the "Iran Insurance Company."[154] The United States then unilaterally developed a compensation plan that provided for uniform payments per victim in the amount of $250,000 for wage earning victims and $100,000 for non-wage earners.[155] This offer was extended solely as a humanitarian gesture and on the condition that the United States was not acting out of legal obligation nor admitting an international wrong had been committed.[156]

A. GOVERNING INTERNATIONAL LAW

The basic rules for international claims settlement derive from customary state practice and fall under the category of the law of state responsibility for injuries to aliens.[157] Because this area of international law is a creature of custom, emergence of a norm is tied to historical evidence which establishes a widespread state practice carried on under a sense of legal obligation referred to as opinio juris. Accordingly, the public announcements and compensatory actions of states taken in the aftermath of intentional or accidental attacks on commercial airliners is vital to determining what international laws, if any, govern this aspect of the Aerial Case.

An analysis of the previous aerial downings produces a consistent practice of paying compensation, with one notable exception. The governments of Bulgaria, China, Israel, Japan and Iraq all paid corresponding claims to victim state governments on behalf of the deceased passengers. Among these examples it is interesting to note Bulgaria offerred to pay Western claims in the midst of the Cold War, the Japanese paid a claim to the U.S. just before the start of WW II, and Iraq paid compensation to the U.S. only months before Operation Desert Storm. In each case the official announcement of the intent to provide compensation was made near in time to the incident to diffuse the outrage of the

international community. Countries which have not had a direct stake in accepting compensation due to the death of a citizen-passenger, have nonetheless participated in the ICAO Council and U.N. Security Council deliberations following each tragic event. The concerted call for compensation as a necessary ingredient of internationally accepted remedies has been a common thread in the patchwork of each aerial incident. The countries which paid this compensation are nations with great geographic, political, and ethnic diversity, and as demonstrated, payment was even made when the nations involved were ideologically opposed. This consistent practice of paying compensation, coupled with the concurrance and acceptance of the international community, is strong evidence that a widespread and uniform custom exists in favor of remunerations to the victimized states out of a sense of legal responsibility.

The lone exception to this customary practice is the Soviet government, which refused all claims in 1952 after the attack on the French airliner, and did likewise in 1983 after the Korean airliner was downed. The Soviet Union is a major participant or specially affected state in international aviation, and their inconsistent behavior can either be viewed as proof that a norm in favor of paying compensation lacks the necessary opinio juris to become customary law, or is an abberation which violates customary law.

The latter view is the more attractive for two reasons.

First, one state standing alone against the tide of an otherwise universal practice should not be able to unilaterally prevent the emergence of customary law. A good example of this is Libya and their claim that the Gulf of Sidra is part of their internal or territorial waters. This claim is inconsistent with customary and conventional law regarding the drawing of baselines and boundary delimitation, and as a result, the international community has labelled the Libyan claim excessive and illegal. Second, it is not crystal clear that the Soviet Union has elected to stake out a position which is entirely at odds with customary international law. The downing of the Air France plane in 1952 occurred before any custom had been created, and the reaction of the Soviet government after the attack on KAL #007 was to excuse the aggression as a defensive measures necessary to prevent a sovereign intrusion. This "shoot first" policy was consistent with repeated Soviet pronouncements concerning their absolute sensitivity toward border intrusions. While many states protested this practice, it was only through the Montreal Protocal of 1984 that the international community made certain that the use of weapons against civil aircraft in flight was intolerable. If the KAL incident were to occur today, there is a significant liklihood that the growth of international law in this area would force the Soviet government to respond differently or suffer harsh international condemnation and meaningful sanctions.

While it is always difficult to predict when a particular practice in the international community has become customary law, the practice of paying compensation is an extensive and virtually uniform custom which appears to have matured into normative law.

B. LIABILITY FOR PERSONNEL INJURIES AND PROPERTY DAMAGE INCIDENTAL TO MILITARY OPERATIONS

The shootdown of Iran Air Flight #655 was the first commercial downing to occur amid direct military operations. Accordingly, separate rules which govern the payment of compensation for colatteral damage caused to non-combatants and property during armed conflict must be consulted. While the Geneva Conventions of 1949 and the Hague Conventions of 1907 lay down comprehensive conventional guidelines for the conduct of military operations, the principles concerning payment of liability again spring from custom. The Legal Advisor to the State Department, Abraham Sofaer, testified to Congress in August 1988 that the rules are as follows:

1) Indemnification is not required for injuries or damages incidental to the lawful use of armed force;

2) Indemnification is required where the exercise of armed force is unlawful; and

3) States may, nevertheless, pay compensation ex gratia without acknowledging, and irrespective of, legal liability.[158]

From a legal perspective, the critical determination in these rules is whether the use of force was lawful. If so, no compensation is necessary; if not, compensation is required as a matter of law. Absent intervention by an international political or judicial organ, the state committing the questionable act is apparently permitted to self-judge or auto-interpret the lawfulness of that act. In the case of VINCENNES, the U.S. determined, per my analysis correctly, that the warship properly acted in self-defense and is therefor not legally obligated under current international law to compensate the victims.

C. EX GRATIA COMPENSATION

Despite the perceived lack of a legal duty, the U.S. offerred humanitarian compensation to the victims of Iran Air Flight #655 in the form of ex gratia payments. There is international precedent for ex gratia payments as derived from diplomatic practice and previous aerial incidents, and this type of indemnification appears to be a very handy device for nations who regret the loss of life but are politically unwilling to pay compensation if it implies an international wrong was committed. From one perspective it is a utilitarian and compassionate method for paying unfortunate victims of official state action. Professor Maier has argued:

It is in the interest of the United States and the

> world community, and certainly in the interests of innocent victims of incidents of this kind, to maintain the mechanism of the ex gratia payments. The ability to make such payments without creating a legal precedent permits and encourages de facto aid to victims in circumstances where the actual facts cannot be found and interpreted or where, for other reasons acknowledging legal liability might be politically unacceptable to the nation involved.[159]

Professor Lowenfeld takes a contrary view of ex gratia payments in the Aerial Case because he believes it creates a system which hinges on discretionary humanitarian payments following the downing of commercial airliners and does not properly promote the safety of civil aviation. He argues for a rule of strict liability and mandatory compensation regardless of fault, so long as the cause (official state action) can be established.[160] He reminds that America has asserted a principle of legal responsibility in every prior aerial downing and that proposed Article 3 bis from the Montreal Protocal, which in his opinion is not a fault based rule, is now declaratory of international law.[161]

As is often the case with difficult questions of law and policy, both positions have merit. No doubt there are times when the utility of humanitarian payments, which permit avoiding a public acknowledgement of responsibility, ensures a nation does the right thing to remedy an unfortunate situation or international wrong. However, in the context of aerial mishaps with the corresponding loss of hundreds of innocent lives the proposition that a state can self-judge whether, and to what degree, compensation is appropriate would appear inadequate to protect passengers in

international civil aviation. While the United States made an exhaustive attempt tc gather information necessary to compute compensation after the VINCENNES incident and then elected to make a generous offer, absent mandatory legal mechanisms the possibility looms large that other nations may not be so righteous.

Even within legal circles in the United States, and among friendly allies, there is disagreement over which incidents require mandatory compensation and which are suitably covered by ex gratia payments. For example, the attacks on the STARK or LIBERTY were apparently accidental actions occurring near to combat zones under similar circumstances to that of VINCENNES. In both cases the official position of the United States remains that ex gratia payments are inappropriate and that the compensation tendered was done so as a matter of legal requirement. Yet it is difficult to contrast the VINCENNES incident, where America has adamantly maintained that ex gratia payments are warranted, with that of STARK or LIBERTY. At first glance it might appear that the United States seeks the most favorable position when it is the victim but wants the most lenient regime when it is the unintended aggressor.

While I do not attribute such self-interest to the United States, in my opinion this is precisely the problem. In past cases the nations victimized have demanded compensation as a matter of right while the offending states have insisted on presentating payment in the form of ex

gratia compensation. In the future it can be expected that nations which are victimized will repeat this demand and those responsible for the downings will continue to seek the utility of ex gratia payments. In order to address this problem international law must adopt a compensation mechanism which is not centered on fault. The preambular language of the Montreal Protocal of 1984 speaks of promoting safe and orderly civil aviation, coupled with a concern for elementary considerations of humanity for the lives of persons on board civil aircraft. Creating a fair system to ensure international passengers will not have to rely on the self-judging discretion of a state to determine compensation after an aircraft is attacked and downed, would appear to fall within this charge.

The ICAO Council is the international body with the most expertise in the field of civil aviation. It was in this assembly that the impetus for drafting and adopting the Montreal Protocal derived. It would seem that this body should also develop a mandatory mechanism for awarding compensation when a state uses weapons, either intentionally or accidentally, against commercial aircraft. Placing the assessment of compensation in the hands of an international body should ensure consistency and fairness in the application, and get away from the political posturing and imbalances which have plagued this area of international law to the detriment of global civil aviation.

VII. FINAL CONCLUSIONS

Although the downing of Iran Air Flight #655 occurred almost three years ago, the legal issues involved are just now reaching the ICJ for legal resolution. In my assessment the Court will find jurisdictional authority in the compromissory clause contained in the Treaty of Amity between the United States and Iran. The merits of the case will hinge on the customary right of unit self-defense and the actions of VINCENNES will be found consistent with international law. Finally, this case points out the need for ICAO to create a consistent method for determining compensation so that the rights of innocent victims of aerial incidents will be fully protected.

The only diplomatic mechanism left to derail this pending judicial determination would be a last minute agreement to enter into bilateral negotiations with the subsequent acceptance by Iran of American offers to pay ex gratia compensation. This remains the best possible outcome for both nations, and sometimes it is the threat of actual international judicial intervention which forces states to accept extra-judicial resolution.

FOOTNOTES

1. U.S. Navy, "Formal Investigation Into The Circumstances Surrounding The Downing Of A Commercial Airliner By The U.S.S. VINCENNES (CG 49) On 3 July 1988" (hereinafter Navy Report); and Report of ICAO Fact-Finding Investigation, "Destruction Of Iran Airbus A300 In The Vicinity Of Qeshm Island, Islamic Republic Of Iran On 3 July 1988" dtd November 1988 DOC. C-WP/8708 (hereinafter ICAO Report).

2. Navy Report, Opinion A2, A7 and A12. ICAO Report 3.1.23, 3.1.24, 3.2.1 and 3.2.2. See also Aviation Week and Space Technology, 11 July 1988 p. 16-23.

3. Case Concerning The Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States Of America): Application Instituting Proceedings before the ICJ filed 17 May 1989 (hereinafter Iran Application) and Memorial filed 24 July 1988 (hereinafter Iran Memorial).

4. Case Concerning The Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States Of America): Preliminary Objections submitted by the United States on 4 March 1991 (hereinafter Preliminary Objections).

5. Navy Report III(A)(1) and ICAO Report Para. 2. See also 86 Department of State Bulletin No. 2108 of March 1986.

6. ICAO Report para 2. Los Angeles Times, 5 July 1988.

7. ICAO Report para 1.16.1.2; Navy Report III(A)(1); Preliminary Objections Annex One; and New York Times, 13 January 1986, p.A1.

8. Navy Report III(A)(1); Preliminary Objections Annex One; and see Hearings before the Senate Armed Services Committee on 8 September 1988.

9. See "U.S. to Extend Protection to Neutral Ships in the Persian Gulf" statement by Secretary of Defense Frank Carlucci, Department of State Bulletin, p. 61 (July 1988).

10. New York Times, June 8, 1987, p.1; Washington Post, May 30, 1987 p.3. The United Kingdom, France, Netherlands, Belgium and the Soviet Union deployed units to the Persian Gulf.

11. Caspar W. Weinberger, Fighting For Peace, (1989) p.388-423. Washington Post, May 30, 1987, p.1; and New

York Times, June 8, 1987, p.1.

12. Navy Report III(A)(1)(a); ICAO Report 2.1; and Preliminary Objections Annex One. Neutral merchant ships from Cyprus, Singapore, Panama, Japan, Qatar, Norway, Saudi Arabia, India, Italy, Liberia, Soviet Union, Greece and Romania were attacked by Iranian gunboats.

13. ICAO Report para. 2.1.1; Navy Report III(A)(1); and Hearings Before the Committee of Foreign Affairs, House of Representatives, 19 May 1987.

14. Navy Report III(A)(1); and Preliminary Objections Annex one.

15. Washington Post, October 17, 1987. The U.S. Navy gave the Iranian occupants 20 minutes to evacuate the platform before shelling commenced.

16. Sec. Council Res. 598, July 20, 1987, reproduced in 87 Dep't St. Bull. (No. 2126), Sep. 1987, 76. The Security Council adopted five other resolutions that called on both sides to refrain immediately from the use of force and settle the conflict peacefully. See Res. 479 of Sept. 28, 1980; Res. 514 of July 12,1982; Res. 522 of Oct. 4, 1982; Res. 582 of Feb. 24, 1986; and Res. 588 of Oct. 8, 1986.

17. B. Boczek, Law of Warfare at Sea and Neutrality: Lessons from the Gulf War, 20 Ocean Dev. & Int'l Law 239, 241, (1989).

18. New York Times, April 15, 1988. The mine exploded near the keel, opened a large hole midships, and nearly sank the ship.

19. Navy Report III(A)(1); Washington Post National Weekly Edition July 11-17, 1988, p.6.

20. Navy Report III(A)(1); Preliminary Objections Annex One; and Briefing conducted by Admiral Crowe at the Pentagon August 19, 1988. See also Letter from United States to U.N. Security Council President dated April 18, 1988 (Doc. 88-10448).

21. Navy Report III(A)(1); and Preliminary Objections Annex One. The Iran Ajar was boarded and 10 mines were found onboard.

22. ICAO Report para. 2.11; Navy Report III(A)(1); and Preliminary Objections Annex One. Iran Speaker Rafsanjani announced attacks on U.S. assets would continue unless the U.S. left the Gulf.

23. ICAO Report para. 1.16.1; Navy Report III(B)(2); Preliminary Objections Annex One; and Chicago Tribune, 28 August 1988, p.1.

24. ICAO Report para 1.16.1 and Appendix A; Navy Report III(B)(2).

25. ICAO Report 2.11.7; Navy Report III(B)(2).

26. ICAO Report para 1.1.2, 1.1.3, 1.1.4, 1.1.5, 2.5 and Appendix A. Visibility on the morning of 3 July 1988 was 5 to 10 kilometers in haze.

27. ICAO Report para 1.5.1, 1.5.2, and 1.5.3.

28. ICAO Report para 2.11 and Appendix A; and Navy Report III(C)(2).

29. ICAO Report 1.9, 2.8, 2.9, and 2.10. A British warship, H.M.S. BEAVER, verified hearing the voice warnings issued by VINCENNES on frequency 121.5 MHZ. An Italian warship, ESPERO, heard the warnings on 243 MHZ.

30. Navy Report III(C)(2); and Navy Times, September 19, 1988, p.21.

31. ICAO Report para 1.1.4 and 1.1.5; Navy Report III(C)(2).

32. ICAO Report 1.2, 1.2.1, 1.2.2 and 1.12. The 274 passengers on the airbus comprised 209 adults, 57 children and 8 infants. Of these, 238 were Iranian nationals, 10 Indian citizens, 6 from Yugoslavia and Pakistan, 13 from U.A.E. and one Italian national. All 16 crewmembers were Iranian nationals.

33. Flight International, 16 July 1988, p.8; Japan Times, July 7,1988, p.1; Stars and Stripes, July 8, 1988, p.1; and International Herald Tribune, July 4, 1988, p.4. Admiral Crowe was named a co-winner of the 1988 Double Speak Award by the Committee on Public Doublespeak of the National Council of Teachers of English for the confusing language used to explain the VINCENNES incident.

34. R. S. Williamson, "Iran Air 655: Steps to Avert Future Tragedies", State Department White Paper, Current Policy 1092. Jane's Defense Weekly, 16 July 1988, p.64. Norman Friedman, "The VINCENNES Incident", Proceedings, May 1989.

35. Navy Report IV(A); and Navy Times, August 29, 1988, p.3.

36. Chairman Joint Chiefs of Staff ltr CM-1485-88 of 18 August 1988. News briefing by Secretary of Defense Carlucci and Admiral Crowe at the Pentagon August 19, 1988.

37. Stars and Stripes, July 16, 1988, p.1. Vice-President Bush referred to Iran's failure to comply with U.N. Resolution 598 which called for a permanent cease fire in the Persian Gulf on July 20, 1987.

38. New York Times, July 15, 1988, p.1.

39. See ICAO Working Paper C-WP/8644 dated 8 July 1988.

40. Aviation Week and Space Technology, July 11, 1988, p.22.

41. R. S. Williamson, "Iran Air 655: Steps to Avert Future Tragedies", State Department White Paper, Current Policy No. 1092. Statement of Abraham Sofaer, Legal Advisor to the Department of State, in Hearings before the Defense Policy Panel, House Armed Services Committee on 3 August 1988.

42. Preliminary Objections p.24.

43. D. Johnson, Rights in Air Space, (1966), p.66.

44. W. T. Hughes, "Aerial Intrusions By Civil Airliners And The Use Of Force" 45 Journal of Air Law and Commerce 595 (1980).

45. A. F. Lowenfeld, "Agora, Iran Air Flight 655; Looking Back and Looking Ahead", 83 A.J.I.L. 318 (1989), p.336-341.

46. J. Phelps, "Aerial Intrusions by Civil and Military Aircraft in Time of Peace", 107 Military Law Review 270 (1985).

47. Note, "Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight #007", 97 Harv Law Rev 1198 (1988); H. Maier, Ex Gratia Payments and the Iranian Airline Tragedy, 83 A.J.I.L. 325, (1989).

48. S. Hersh, "The Target Is Destroyed": What Really Happened to Flight 007 (1986); G. Richard, KAL 007: The Legal Fallout", 9 Ann. Air & Space Law (1984); F. Harras, A Legal Analysis of the Shooting of Aerial Flight 007 by the Soviet Union, 49 Journal of Air Law & Commerce (1963), p.562. M. Dobbs, "Soviet Journalists Attack Kal Story", The Washington Post, May 26, 1991, p.1; B. Cutler, "Silence of the KAL Apologists", The Washington Times, April 29, 1991, p. G3.

49. The clearest indication that a customary norm against the use of force on civil airliners was crystallizing is the unanimous adoption by ICAO of the the Montreal Protocal (Article 3 bis) in 1984 which states:

> (a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil airlcraft in flight and that, in the case of interception, the lives of persons on board and the safety of the aircraft shall not be endangered...

I have omitted detailed discussion of this provision because it is not yet in force and does not enhance the jurisdictional claims of Iran. For a discussion of the declaratory character of the proposed amendment, see Cheng, The Destruction of KAL Flight KE007, and Article 3 bis of the Chicago Convention, in Liber Amicorum Honouring Prof. I. H. Diederiks-Verschoor 49, 59-61 (1985).

50. J. Bouchard, "Accidents and Crises: Panay, Liberty, and Stark" 41 Naval War Col Rev 87 (Autumn 1988); H. Swanson, "The Panay Incident: Prelude to Pearl Harbor", U.S. Nav Inst. Proceedings, Dec 1967; M. Okumiya, "How the Panay Was Sunk" U.S. Nav Inst. Proceedings, June 1953.

51. W. Jacobsen, "A Juridical Examination of the Israeli Attack on the U.S.S. Liberty", 36 Nav Law Rev 1 (Winter 1986).

52. U.S. Congress, House, Committee on Armed Services, Report on the Staff Investigation into the Iraqi Attack on U.S.S. Stark, (Washington: U.S. Gov't Print. Off., 14 June 1987).

53. I. H. Ph. Diederiks-Verschoor, An Introduction to Air Law, (1988), p.3

54. O. Lissitzyn, "The Treatment of Aerial Intruders In Recent Practices And International Law", 47 A.J.I.L. 559 (1953).

55. Senate Comm. On Foreign Relations, International Convention on the Prevention and Punishment of the Crime of Genocide, S. Exec. Rep. No. 50, 98th Cong., 2d Sess. 37-41 (1984).

56. T. Buergenthal, Law-Making in the International Civil Aviation Organization, (1969), p.13-16.

57. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan) ICJ (1972) in 48 Intl Law Rep 331

(1975).

58. D. R. Carlson, The VINCENNES Incident, Proceedings, September 1989 p. 88-92. See also Washington Post, 1 September 1989, p.4.

58. South West Africa Cases (Preliminary Objections), (1962) I.C.J. Rep. 319,328. See also Interpretation of Peace Treaties With Bulgaria, Hungary, and Romania (1950), I.C.J. Rep 65, 74 (Advisory Opinion).

59. ICAO Report para 2.2. The 1984 NOTAM advised aircraft not to fly below 2000 ft at closer than 5 NM of an American warship. The 1987 NOTAM was issued after the STARK incident and advised aircraft to listen on frequencies 121.5 MHZ or 243 MHZ. The NOTAM specifically warned that failure to respond to requests for identification and intentions could place the aircraft at risk by U.S. military defensive measures.

60. Case of the Mavrommatis Palestine Concessions P.C.I.J. Ser. A, No. 2, p. 15 which states:
"in applying this rule, the Court cannot disregard the views of 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."

61. Sweeney, Oliver, and Leech, The International Legal System (3rd Ed.)(1988) p. 605.

62. Telex from the Islamic Republic's Vice-Minister of Roads and Transportation dated 3 July 1988; and Ltr from Minister for Foreign Affairs of the Islamic Republic dated 3 July 1988.

63. See Minutes of the First Meeting of the Extraordinary Session of the ICAO Council on 14 July 1988 (ICAO Doc. C-Dec Extraordinary (1988/2) dated 14 July 1988).

64. Id.

65. See Summary of the Fourteenth Meeting of the ICAO Council, 125th Session on 7 December 1988 (ICAO Doc. C-Dec 125/14) dated 7 December 1988.

66. See Minutes of the Eighteenth Meeting of the ICAO Council 126th Session on 13 March 1989 (ICAO Doc. Draft C-Min 126/18) dated 27 June 1989; and Resolution Adopted By The ICAO Council On 17 March 1989.

67. Rules For The Settlement of Differences, ICAO Doc. 7782/2 (1976).

68. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan (Pleadings, Oral Arguments, Documents) Judgment delivered on 18 Aug 1982.

69. Supra, note 63, 64, 66.

70. At the July 17, 1988 ICAO Council meeting the representative from Canada stated explicitly that "in the view of my government, the first requirement is that, pursuant to Article 55(e) of the Chicago Convention, there should be a thorough, impartial and expeditious fact finding investigation by ICAO into all relevant circumstances surrounding the destruction of the Iran Airbus ...." C-Min. Extraordinary (1988)/1 at 19. On July 18th the Spanish representative expressed his belief that the Council could order a fact finding investigation under Article 55. C-Min. Extraordinary ((1988)/2 at 7-8.

71. Ltr fm ICAO Legal Director, Dr. Michael Milde, to ICJ Deputy Registrat Noble reproduced in Preliminary Objections Annex 3.

72. The Commanding Officer of VINCENNES was subsequently awarded the Legion of Merit at the end of his tour. See, The Washington Post, 23 April 1990.

73. Navy Report IV (A) and V(A); and Preliminary Objections Part IV.

74. Convention For The Suppression Of Unlawful Acts Against The Safety Of Civil Aviation signed at Montreal on 23 September 1971.

75. See Convention On Offences And Certain Other Acts Committed On Board Aircraft (1963) ("The Tokyo Convention") 20 U.S.T 2941; and Convention For The Suppression Of Unlawful Seizure Of Aircraft (1970) ("The Hague Seizure Convention") 22 U.S.T. 1641.

76. See UNGA Res. 2251 (XXIV) (1969) and UNGA Res. (XXV) (1970).

77. Sweeney, Oliver and Leech, The International Legal System, (1988), p.291.

78. Vienna Convention on the Law of Treaties, Article 31(3)(b).

79. Resolution A19-1, reprinted in 19 Extraordinary ICAO Assembly, Resolutions and Minutes, Doc. 9061 A19-Res., Min. (New York, Feb 27-Mar 2, 1973.

80. Iran Memorial Section E.

81. Id.

82. M. McDougal, Law And Public Order In Space, (1965).

83. By a vote of 19 to 6 (with 6 abstentions) the ICAO Council rejected the proposal of the Soviet Union and Czechoslavakia to condemn the United States was defeated.

84. See Extraordinary ICAO Assembly, Resolutions and Plenary Minutes, Doc. 9087, A20-Res., P-Min. at 142 (10th Plenary Meeting).

85. Hersch, supra, at 235.

86. W. T. Hughes, "Aerial Intrusions By Civil Airliners By The Use Of Force" 45 Journal of Air Law and Commerce 595 (1980).

87. Iran Memorial at 136.

88. Ambatielos Case (Greece v. U.K.) (Jurisdiction), 1952 ICJ Rep 28 (Judgement of July 1).

89. South West Africa, Preliminary Objections, Judgement I.C.J. Reports, p.319, at p.345.

90. Moore, The Secret War in Central America and the Future of World Order,80 AJIL 43, 93-94 (1986); Reisman, Has the International Court of Justice Exceeded its Jurisdiction? 80 AJIL 128, 130-131 (1986).

91. Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States), (Jurisdiction), 1984 I.C.J. Rep 392 (hereinafter Nicaragua) Dissenting Opinion of Judge Schwebel 628-637.

92. Writing in 1949, Lauterpacht was unable to find any case of the ICJ which the rule of restrictive interpretation had determined the issue. He found the rule of questionable value and could only point to two cases where the rule was stated in dicta. H. Lauterpacht, The Development of International Law by the International Court, 339-341 (1958). Rosenne also has not put much stock in the rule. S. Rosenne, The Law and Practice of the International Court, 406-407 (1980).

93. J. Charney, Compromissory Clauses and the Jurisdiction of the International Court of Justice, 81 AJIL 855, 869 (1987).

94. Id at 887.

95. Nicaragua (Jurisdiction) para. 77-83.

96. Nicaragua, para. 81.

97. Preamble to the 1955 Treaty of Amity between Iran and the United States.
98. Iran Memorial p.181.

99. Case Concerning United States Diplomatic And Consular Staff In Tehran (United States v. Iran, I.C.J. 1980. (1980) I.C.J. Rep. 2. (hereinafter (Hostages Case).

100. Memorandum on Dipute Settlement Clause in Treaty of Friendship, Commerce and Navigation with China (n.d.), reproduced in 1980 ICJ Pleadings (Hostages Case) 233-234 (Ann. 51 to U.S. Memorial)

101. Judge Schwebel and Judge Ruda dissenting.

102. Nicaragua Case at 117, para. 224.

103. Hostages Case at 149.

104. Preliminary Objections Part V p. 2-4.

105. MacGibbon, Estoppel in International Law, 7 I.C.L.Q. 468 (1958). Special Rapporteur Lauterpacht, Report on the Law of Treaties (1953) II Y.B. Int'l L. Comm'n 90, 144; accord, The Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 32; The Arbitral Award made by the King of Spain (Honduras v. Nicaragua), 1960 I.C.J. 213.

106. Id.

107. Dissenting Opinion of Judge Schwebel in Nicaragua Case p.306-311.

108. Iran Memorial Part III(F).

109. The Commander's Handbook on the Law of Naval Operations (Naval Warfare Publication 9) (1987), Chap 7.2.

110. F. Russo, Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary law, 19 Ocean Dev. and Int'l Law pp.381-399, (1988).

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