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*Articles and essays*

# Treaty interpretation of the Chicago Convention *

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**Abstract**

*Treaty interpretation of the Chicago Convention.*

*In many ways the Convention on International Civil Aviation (Chicago Convention) defies precise treaty interpretation if the ordinary meaning of certain provisions therein is applied by Contracting States in their conduct, as required by the Vienna Convention on the Law of Treaties. In this context the Chicago Convention is a unique treaty that must be discussed with a view to arriving at an originalist's perspective. Just as an example, the Chicago Convention has 19 Annexes to the Convention, which, as the Convention identifies, are so named "for convenience". This ambivalent phrase leaves the reader confused and befuddled as to whether the Annexes are an integral part of the Convention, where one can ascribe the same legal credibility and legitimacy that the provisions of the Convention demand. The Vienna Convention on the Law of Treaties prescribes that an Annex to an international treaty has ipso facto and per force the same legal effect of compulsive adherence that a provision of that treaty has, unless specifically mentioned to the contrary in that treaty. However, the Chicago Convention effectively precludes this recognition as articulated in the Vienna Convention by providing elsewhere in the former that Contracting States need not adhere to the Standards and Recommended Practices if States find it impossible or impracticable to implement them.*
*Another instance is where the Vienna Convention on the Law of Treaties requires Contracting States to perform requirements of treaty provisions "in good faith". States have not been clear in their acceptance of this requirement in the application of the Chicago Convention, as reflected in their conduct in certain instances, which leads to an obfuscation of the principles of the Chicago Convention.*
*This article extrapolates classical theory and applicable treaty law and practice against such ambivalence and seeks to interpret the meaning and purpose of the Chicago Convention in light of modern aviation practice.*

*Key words*: Chicago Convention; Vienna Convention on the Law of Treaties; Pacta sunt servanda; ICAO Assembly; State responsibility; Dispute settlement.

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*Ubi lex non distinguit, nec nos distinguere debemus*

## 1. Introduction

To any lawyer with a foundation in aviation, the Convention on International Civil Aviation (Chicago Convention)[1] is a familiar multilateral treaty which sets out basic principles of State conduct in matters concerning international civil aviation. The Chicago Convention is linked to 19 Annexes to the Convention, which, as the Convention identifies are so named *"for convenience"*[2]. At the outset of this article, it is necessary to clarify this intriguing definitive identifier with a view to determining whether the 19 Annexes – so named for convenience – form part of the Chicago Convention as one integrated treaty according to accepted principles of treaty law. The first known definition of a treaty was offered by Emer de Vattel in 1753: "*A treaty, in Latin foedus, is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time*"[3].

The Vienna Convention on the Law of Treaties[4] (hereafter, Vienna Convention) defines a treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Here, the operative words are "*embodied in a single instrument or in two or more related instruments and whatever its particular designation*". There is no gainsaying that the Annexes are related to the Chicago Convention through Article 37[5] of the Convention and the fact that the Vienna Convention admits of any designation being used to identify instruments related to a treaty, would arguably lead one to the conclusion that the 19 Annexes to the Chicago Convention form an integral and inextricable part of the treaty.

The above notwithstanding, there is seemingly a problem with identifying the Annexes as part of the Chicago Convention and ascribing to the Annexes the status of a treaty. Article 38 of the Chicago Convention, which provides *inter alia* that any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after Amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, must give immediate notification to ICAO[6] of

[1] Convention on International Civil Aviation signed at Chicago on 7 December 1944. ICAO Doc. 7300/9 2006. For an in-depth discussion and commentary on the Chicago Convention's main provisions see R. Abeyratne, *Convention on International Civil Aviation – A Commentary*, Heidelberg, 2014.

[2] Article 54 (l) states that "*the Council* (*of* ICAO) *shall adopt, international standards and recommended practices, and, for convenience, designate them as Annexes to this Convention*".

[3] E. De Vattel, *The Law of Nations*, Indianapolis, 2008, at 308.

[4] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331

[5] Article 37 specifies the subjects to be designated as Standards and Recommended Practices (SARPs) which form the composition of the Annexes.

[6] The International Civil Aviation Organization (ICAO) is the specialized agency of the United Nations handling issues of international civil aviation. ICAO was established by the Chicago Convention. The

the differences between its own practice and that established by the international standard. This provision, which effectively releases contracting states from the obligation of complying with international Standards of a treaty, does not comport with the legal obligation imposed upon a State of compliance. This inconsistency, paired with the fact that the Chicago Convention has not explicitly stated that the Annexes are a part of the Convention, militates against recognizing the treaty nature of the Annexes. As one commentator has observed: "[*W]hen a treaty has an annex it is normal to provide, though not necessarily in a separate article, that the annex is an integral part of the treaty. Since there are often other documents produced at the time the treaty is adopted, such as agreed minutes, declarations, and interpretative exchanges of notes, it is important to know whether they are an integral part of the treaty or merely associated with it*"[7].

In the Vienna Convention[8], it is a general rule that when State parties enter into a treaty through ratification[9] that they must intend to create legally binding rights and obligations[10]. This obligation is anchored on the *Pacta sunt servanda,* which is explained in Article 26 of the Vienna Convention with the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Herein lies the problem with the Chicago Convention. Although States which ratify the Convention are called upon to perform obligations therein "*in good faith*", the Convention has not been clear in certain instances, leading to an obfuscation of the principles it carries. A example can be cited in relation to the 41st Session of the Assembly of ICAO (which took place from 27 September to 7 October 2022) where The United States submitted a working paper[11] for consideration which stated that Article 15[12] of the Chicago Convention contains a condition that effectively precludes the right of a State to charge for airspace access and establishes a national treatment standard for related user charges. The United States went on to say that for the continuance of global growth and development, it is essential that Contracting States adhere to the rules established by the Chicago Convention and that specific guidance and legal analysis have become

overarching objectives of ICAO, as contained in Article 44 of the Convention are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport to meet the needs of the peoples for safe, regular, efficient and economical air transport. ICAO has 193 member States, who become members of ICAO by ratifying or otherwise issuing notice of adherence to the Chicago Convention

[7] A. Aust, *Modern Treaty Law and Practice*, Cambridge, 2000, at 348.

[8] *Supra*, note 4.

[9] "*Ratification*", "*acceptance*", "*approval*" and "*accession*" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty. Vienna Convention, Article 2.1 (b). Also, A. Aust, *Modern Treaty*, cit., at 81-87.

[10] *Vienna Convention on the Law of Treaties* – a Commentary (Oliver Dorr, Kirsten Schmalenbach ed.), Germany, 2018, at 41.

[11] Requesting Guidance Regarding Article 15 and Airspace Access, A41-WP/199 EC/14, 2/8/22.

[12] Article 15 provides *inter alia* that no fees, dues, or other charges must be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon. It also goes on to say that any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State must not be higher, as to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar services and as to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

increasingly necessary for Member States to understand and apply Article 15. The United States requested that The Assembly direct the ICAO Council and its working bodies to undertake an analysis of Contacting States' obligations pursuant to Article 15 of the Convention as they relate to States' sovereign right to exchange the first- and second-freedoms of the air[13] as they see fit. Such an analysis would provide a basis to promote Contracting States' adherence to Article 15.

On the issue of the sovereignty of States, while the Convention in Article 1 recognizes that States have sovereignty over the airspace above its territory, there was no clear interpretation of State responsibility of Ukraine's responsibility in not directing the aircraft of Malaysian Airlines operating Flight MH 17 despite the right of Ukraine to divert aircraft over the deeply troubled area of Eastern Ukraine where the aircraft was shot down. This is an instance where the Chicago Convention is both ambivalent and inefficient. It is discussed in greater detail below. which will be discussed below.

Another area is dispute resolution where a working paper was submitted for the consideration of the 41st Session of the ICAO Assembly. The Republic of Korea in its working paper[14] submitted to the Legal Commission claimed while the Chicago Convention provides a dispute settlement clause in Article 84 it is rarely applied on a practical level in the event of actual disputes. their disputes. The ICAO Council has offered a viable avenue for contracting States to settle their disputes. The Assembly was requested *inter alia* to prepare a workshop/seminar at which all Contracting States will have an opportunity to exchange views on the outcomes of a study being carried out on the dispute resolutions of the Chicago Convention and how they can be applied in a more efficient way. This subject is also discussed in some detail below.

The subject of States' position on the obligations brought to bear on ratified and non-ratified provisions of the Chicago Convention and questions arising from amendments to the Convention has been another area calling for clarity. Again, at the 41st Session of the ICAO Assembly the Republic of Korea contended that the paucity of communications between ICAO and States on ratified and non-ratified provisions as well as amendments of the Convention needed looking into[15].

These areas bring to bear the need to discuss, against their various backdrops, the overall legal principles of treaty interpretation of the Chicago Convention.

The treaty interpretation of the Chicago Convention that follows is strictly based on international rules of interpretation which are not related to any domestic legislation or jurisprudence. Furthermore, the discussions that follow will reflect how judicial or quasi-judicial interpretation of the treaty would be applied, devoid of political connotations.

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[13] Called transit rights, the first and second freedoms are also known as non-commercial / non-traffic privileges. The first freedom allows a state's aircraft to fly over another state's airspace while the aircraft is on its way to another destination. The second freedom is very similar however, it allows state's aircraft to land in a state for non traffic purposes such as refueling or technical stops while on its way to another state.

[14] Study on Dispute Settlement System Under Chicago Convention A41-WP/124 LE/8 2/8/22.

[15] See Seeking Harmonization Between Ratified and Non-Ratified Rules Under ICAO, A41-WP/126, LE/10, 2/8/22.

## 2. The Chicago Convention and State responsibility

As the Chicago Convention has been adopted by sovereign States, according to Vattel[16], it is a public treaty. Vattel posits that a public treaty can only be entered into by the "*superior powers*" (my emphasis) or by sovereigns who contract in the name of the State. Although Vattel does not clearly distinguish a difference between a nation, State, or country[17] in his treaty but later treaties in the 20th Century have clearly made the distinction. The Charter of the United Nations begins the Preamble by using the words "*We the peoples of the world*", explicitly recognizing that the nation is the people, the Montevideo Convention of 1933 - which codifies the declarative theory of Statehood as accepted as part of customary international law - lays out the four characteristics of a State as comprising a permanent population; a defined territory; government; and capacity to enter into relations with the other States[18].

In the context of the Chicago Convention, Article 3 of the Montevideo Convention recognizes that the political existence of the State is independent of recognition by the other States, along with the provision that a State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. One has to distinguish between the essential fact that a State must have the capacity to enter into relations with other States and the fact that, irrespectively, the political independence of a State is a standalone right of a State to set its own laws within the parameters of its governance independent of international relations.

The latter – on governance independent of other States - is reflected in Article 9 of the Chicago Convention *inter alia* that, in the aeronautical context, a State has the right to restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, for reasons of military necessity or public safety, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. It is important to note that Article 9 bestows on the State a "*right*" and not a responsibility, giving the State the power to decide.. This brings to bear the inevitable question as to whether a right in this context is linked to responsibility.

A case in point which brings Article 9 into focus is Flight MH 17 which was shot down by Russian backed rebels over Ukrainian airspace in July 2014. The claim by some that Ukraine should take responsibility for the destruction of the aircraft which operated flight MH 17 may deserve some consideration. To seek an answer to the question, one must first look at some incontrovertible facts and established principles.

First, the destruction took place over Ukrainian airspace. Second, the airspace was over a territory which, although it is in Ukraine, was a conflict zone at the time. Third, the claim against Ukraine and its responsibility is not based on direct aggression but rather

[16] Vattel, *The Law of Nations*, cit., at 338.

[17] Vattel posits that "*every nation that governs itself, under what form soever, without dependence on any foreign power, is a sovereign state*" *Id*. 83. Elsewhere, he states "*Nations or States are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength*". *Id.* 67.

[18] See Montevideo Convention of 1933 & UN Articles on Responsibility of States (2001), Article 1. *https://h2o.law.harvard.edu/text_blocks/28904.*

on Ukraine's lack of control of air navigation services over its territory. Fourth, there is a regime of State responsibility at international law that may be directly relevant to the cruel, unfortunate and sad event.

In the MH 17 incident, the question that would arise is whether Ukraine has the responsibility to make reparation for the damage caused to a Malaysian registered aircraft and the death of its passengers (it must be noted that the air carrier is liable for damage caused as a result of death or injury to passengers if the accident which caused the damage occurred on board or in the process of embarkation or disembarkation. Since Flight MH 17 operated between the Netherlands and Malaysia, the application of the Chicago Convention would depend on the ratification of the treaty by both parties. The Netherlands ratified the treaty on April 29 2004 and Malaysia ratified it on December 31 2007).

Technically, according to the Chicago Convention of 1944 which contains details of obligations of States in civil aviation, Ukraine and its people were obligated to make every effort to refrain from using force against the Malaysian aircraft. One could argue that, in the exercise of its sovereignty, Ukraine should have required the landing of Flight MH 17 at some designated airport If Ukraine believed that the aircraft was flying above its territory without authority or if there were reasonable grounds to conclude that it was being used for any purpose inconsistent with the aims of the Convention, it was also entitled to give such aircraft any other instructions to put an end to such violations. For this purpose, Ukraine could have resorted to any appropriate means consistent with relevant rules of international law, including the relevant provisions of the Chicago Convention. Also, Ukraine was required to specifically publish its regulations in force regarding the interception of civil aircraft.

Responsibility of States for the provision of air navigation services in their territories is founded in principles contained in the Chicago Convention of 1944[19]. However, it must be noted that this is not an absolute obligation as the State is called upon to provide such services only in so far as it finds practicable to do so.

Ukraine could anchor itself on the argument that armed separatist groups had taken over the territory over Donetsk Oblast in Eastern Ukraine where the aircraft was shot down, and Ukraine was therefore not in control and that it was not practicable to ensure with certainty the safety of aircraft flying over what was deemed to be a "*conflict zone*". These armed separatist groups were in full control of the crash site, even preventing international investigators from entering the site which prompted the United Nations Security Council to unanimously adopt Resolution 2166 (2014) calling on those controlling the MH17 crash site to allow unfettered access to international investigators. It must be noted in this context that the Chicago Convention provides that in case of war (which is a state of armed conflict between different nations or states or different groups within a nation or State), the provisions of the Convention do not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same applies in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council[20]. It is therefore arguable that the Chicago Convention would not apply to Ukraine in the circumstances of Flight MH 17.

In 2001 the International Law Commission (ILC) adopted text on Responsibility of States for Internationally Wrongful Acts at its fifty-third session, and submitted the text to the General Assembly of the United Nations as a part of the Commission's report

[19] Article 28 of the Chicago Convention.
[20] *Id*. Article 89.

covering the work of that session. The Report was accompanied by a draft general principles which stipulate that every internationally wrongful act of a State entails the international responsibility of that State and that there is an internationally wrongful act of a State when conduct consisting of an action or omission: is attributable to the State under international law; and constitutes a breach of an international obligation of the State. The conduct of any State organ, according to these principles, is considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. An organ is deemed to include any person or entity which has that status in accordance with the internal law of the State.

The conduct of a person or entity which is not an organ of the State, but which is empowered by the law of that State to exercise elements of the governmental authority is considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. The conduct of a person or group of persons is considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. The claim that Ukraine should take responsibility since its air traffic controllers (under the control of Ukraine) did not warn Flight MH 17 of the danger of flying over the particular airspace in which it was shot down, has to be examined in the context of the above provision of the ILC principles. In the 1986 Nicaragua case, the International Court of Justice opined that, if the order for the Contra guerrillas to conduct themselves in the manner in which they did could be attributable or even imputable to the United States (which financed and equipped the Contras), it would have to be proved that the US had effective control of the Contras' military or paramilitary operations. General or overall control would not have been sufficient to find the US accountable or responsible.

In the 1990 *Rainbow Warrior Arbitration*[21] between France and New Zealand the arbitral tribunal noted that international law did not distinguish between tortious or contractual responsibility, which in turn led to the conclusion that if any State were to violate its obligation, of whatever origin or nature, such violation would give rise to a duty of reparation. The intrinsic nature of State responsibility is anchored upon certain basic elements: firstly, the existence of an international legal obligation in force as between two particular States; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the State responsible, and finally, that loss or damage has resulted from the unlawful act or omission.

A significant factor to be considered in the consideration of liability and responsibility of Ukraine is that, if as Ukraine, which seemingly acted in good faith and without negligence, and assuming that the missile fired at the aircraft was fired by rebels and not Ukrainian armed forces, Ukraine would not be liable, provided it shows that it exercised due diligence. As the above discussion reflects, one could argue either way as to the ultimate responsibility of Ukraine. However, it is indisputable that the principles that apply to

[21] The Rainbow Warrior Case was a dispute between New Zealand and France that arose in the aftermath of the sinking of the Rainbow Warrior. It was arbitrated by UN Secretary-General Javier Pérez de Cuéllar in 1986 and became significant in the subject of Public International Law for its implications on State responsibility. *https://iilj.org/wp-content/uploads/2016/08/Arechaga-etal-Rainbow-Warrior-1990.pdf.*

liability and responsibility of States are embodied in globally established principles, treaties, and case law. One has to argue Ukraine's case with regard to MH 17 against this backdrop.

However, this notwithstanding, the issue of State responsibility in this regard can be considered as settled in the Chicago Convention itself when one links Article 9 of the treaty with Article 28 which, as already discussed, provides *inter alia* that the State must provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to the Convention. The discretion given to the State in Article 9 is transformed into an obligation in Article 28 that the State is obligated to provide "*other air navigation facilities*" *(i.e.* air traffic control advice) which in the case of flight MH 17 the Ukrainian authorities ought to have known they were not able to provide over the rebel held area over which the aircraft was shot down[22].

## 3. Understanding in the Chicago Convention

### *3.1 Terminology*

The Vienna Convention[23] in Article 31 (1) and (2) states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty comprise, in addition to the text, including its Preamble and Annexes: any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Accordingly, the words contained in the provisions of the Chicago Convention must be interpreted so that their contents comport with the ordinary meaning in their context.

Additionally, the Convention must be implemented by those States which have ratified, acceded to or accepted the Convention formally (by formally notifying acceptance to the depository State) in good faith in accordance with Article 26 of the Vienna Convention which states that every treaty in force is binding upon the parties to it and must be performed by them in good faith according to what is identified as *Pacta sunt servanda*.

As a treaty, the Chicago Convention is intriguing as well as unique in its terminology. Article 1 acknowledges that the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory. One could argue that the phrase "*the contracting states recognize that*" could have been omitted by

[22] *Draft Articles of State Responsibility,* drawn up by the International Law Commission provide in Article 2 that there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State. Furthermore, Article 4 states that the conduct of any State organ must be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State.

[23] *Supra*, note 4.

the drafters of the treaty. Here the operative word is "*recognize*" which would appear to mean that State sovereignty over airspace above its terror already existed as a recognized norm in international law. One cannot know for certain whether the drafters based this recognition on the ancient Latin maxim *Cuius est solum, eius est usque ad caelum et ad inferos* ("*for whoever owns the soil, it is theirs up to Heaven and down to Hell."*)[24]*,* or on the Paris Convention of 1919[25] which in Article 1 provides that "*The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory*".

The term "*recognize*" has been defined as "*the confirmation or acknowledgment of the existence of an act performed, of an event that transpired, or of a person who is authorized by another to act in a particular manner*"[26]. Article 2 of the Chicago Convention then goes on to "*deem*" that "*for the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State*". The word "*deem*" conveys the meaning of having certain characteristics. A territory is usually a geographic area with assigned responsibility[27]. It is interesting that the drafters did not consider omitting the words "*deemed to be*" and use the words "*shall be*". One reason could be the uncertainty of the time with regard to geopolitics and possibilities of changes in State control of certain geographic areas.

Another curious provision in the Convention is Article 3 which uses words which may have their own connotations. The provision says that "*This Convention shall be applicable only to civil aircraft*[28]*, and shall not be applicable to state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft. No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof*". Firstly, the word "*shall*" denotes a peremptory requirement that the Convention applies only to civil aircraft. This is followed by categorizing military aircraft into three categories (military, customs, and police services) with an inclusive term "*shall be deemed to be*", with the nuance that other types of aircraft may be included (without saying that State aircraft are aircraft used in military, customs or police services). If, as stated above, the three categories are mentioned to identify certain characteristics in the use of aircraft, one could argue that even a civil aircraft, used for military purposes would be deemed to be a State aircraft for that purpose[29].

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[24] This eloquent Latin proverb was seemingly first used in the 13th century by the Roman commentator Accursius and was subsequently introduced into English law by William Blackstone in his Commentaries on the Law of England (1766). See *https://www.liquisearch.com/cuius_est_solum_eius_est_usque_ad_coelum_et_ad_inferos.*

[25] Convention Relating to the Regulation of Aerial Navigation.

[26] *https://legal-dictionary.thefreedictionary.com/recognize.*

[27] Vattel identifies "*territory*" as "*domain*" which he defines thus: "*The domain of a nation extends to everything she posses by a just title. It comprehends her ancient and original possessions and all her acquisitions made by means which are just in themselves, or admitted as such among nations – concessions, purchase, conquests made in regular war & c. And by her possessions, we ought not only to understand her territories, but all the rights she enjoys*". Vattel, *The Law of Nations*, cit*.*, at 302.

[28] Annex 6 to the Chicago Convention defines an aircraft as any machine that can derive its support in the atmosphere from the reactions of the air other than reactions of air on the earth's surface.

[29] For ATM purposes and with reference to article 3(b) of the Chicago Convention, only aircraft used in military, customs and police services shall qualify as State Aircraft. Accordingly: "*Aircraft on a military register, or identified as such within a civil register, shall be considered to be used in military service and hence qualify as State Aircraft; Civil registered aircraft used in military, customs and police service shall*

This ambiguity in treaty terminology of the Chicago Convention in the context of State aircraft[30] has given rise to diverse interpretations, one of which is: "*State aircraft have been defined as all aircraft owned and operated by the government. This definition is very wide and is based on ownership. Consequently, not only typical State aircraft, such as military, police, or customs aircraft, but equally aircraft owned and operated by a public body for commercial purposes are considered State aircraft. Although the scope of this definition might be too wide, it has the advantage of clarity and transparency. Another approach distinguishes State aircraft mainly on the basis of the purpose of their utilization*"[31].

In Article 3 *bis*, one comes across the word "*recognize*", where the Convention provides that Contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that States also recognize that each State has the right to require aircraft to land at designated airports. In 3 bis b) the Convention says: "*The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft*". However, in Article 3 *bis* (c), the provision starts with "*Every civil aircraft shall comply with an order given in pursuance of paragraph b) of the Article*", thus bringing in the mandatory element of compliance.

There are words such as "*recognize*", "*may*" and "*shall"* in Article 3 *bis* which leave the reader confused if not confounded. When it comes to "*recognize*" although it is the same word used in Article 1 of the Chicago Convention, which denotes precedent, there is no link to the past in this provision. The word "r*ecognition*" in the context of Article 3 *bis* can be subsumed into the statement that at international law, it can mean that recognition could be reflected in a political act whereby "*a subject of international law, whether a state or any other entity with legal personality, expresses its unilateral interpretation of a given factual situation, be it the birth of a new state, the coming to power of a new government, the creation of a new intergovernmental organization, the status of an insurgent, the outcome of an election, the continuation of a defunct state by another, a specific territorial arrangement, and so on*"[32]. A second reading of Article 3

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*qualify as State Aircraft; Civil registered aircraft used by a State for other than military, customs and police service shall not qualify as State Aircraft*" See Skrybrary at *https://skybrary.aero/articles/state-aircraft*

[30] The predecessor of the Chicago Convention—The Paris Convention of 1919 is much clearer when it provides that State aircraft are military aircraft and aircraft exclusively used in State service such as posts, customs and police sand that every other aircraft shall be deemed to be private aircraft. The Paris Convention goes on to say:

*"All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention"*.

[31] J. Wouters, S. Verhoeven, *State Aircraft*, at *Oxford Public International Law*, July 2008, at *https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1223.*

[32] J. d'Aspremont, I. Aral, *Recognition in International Law*, at *Oxford Bibliographies*, at *https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0009.xml*

*bis* leaves the reader with portions of the provision as being peremptory (shall); portions as being discretionary (may) and the central theme (of not using weapons against civil aircraft) being one of objective acceptance with no peremptory prohibition.
A slight deviation is seen in Article 4, where the Convention provides that each Contracting State "*agrees*" not to use civil aviation for any purposes inconsistent with the aims of the Convention. Here, the word "*agrees*" implies general agreement of States, and the non-legal definition of the word is: "*to concur in (something, such as an opinion): admit, concede. to consent to as a course of action*"[33]. From a legal perspective, it is arguable that the particular use of the word leaves a window of opportunity for a State to deviate from its agreement if it is impossible for that State to keep to its agreement. In the following Article, the word "*agrees*" occurs once again where States are recognized as having agreed to allow non-scheduled flights the right to make technical and non-commercial flights into their territory.
Article 6 of the Chicago Convention is the single provision which has caused the most inhibitive consequences to market access and the liberalization of air transport. It is also diametrically opposed to the fundamental premise enunciated in the Preamble which advocates that air transport should be developed in a safe and orderly manner, soundly and economically with equality of opportunity. Here, equality of opportunity means equal opportunity to compete and not just equality in the operation of air transport services. Article 6 is the antithesis of "*equality of opportunity*" to compete where it provides: "[*N]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization*". The words "*no scheduled international air service may be operated…*" effectively precludes an opportunity for carriers to have equality of opportunity to compete with national carriers of States which could adopt a protectionist policy, which is not found in any other mode of international transport.
This is a negative premise of international law which could have its roots in Vattel's premise – that although "*the entire Earth was common to all mankind…nobody could be entirely deprived of this right; but the exercise of it is limited by the introduction of domain and property*"[34]. There are some instances in the Vienna Convention which have such preclusive clauses. For instance, Article 45 prohibits a State Party from invoking a ground for invalidating or in any manner suspending implementing the treaty after it has ratified the treaty with full knowledge of relevant facts[35]. Another example is Article 38 which states "[*N]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such*". The thrust of this negativity hinges on absolute prohibition, which, in the case of Article 6 of the Chicago Convention, prohibits airlines from carrying out scheduled international air services into any country without its permission. The main purpose of article 6 is to prevent airlines from the right of equality in competing which the Preamble of the Chicago Convention explicitly provides for.

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[33] *https://www.merriam-webster.com/dictionary/agree.*
[34] VATTEL, *The Law of Nations*, cit., at 322.
[35] Article 45 States: "*A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be*".

The preclusion in Article 6 is reliant upon principles of acquiescence and estoppel, the latter being a procedural preclusion. In international treaty law, estoppel is a rule that precludes a party from going back on its previous representations when those representations have induced reliance or some detriment on the part of others. This principle has been recognized both by the International Court of Justice[36] and the International Tribunal for The Law of the Sea[37]. In the context of the Chicago Convention, at least for the sake of argumentation, Article 6 should be considered as subject to estoppel in the face of the earlier undertaking in the Preamble to the Chicago Convention that States should allow equality of opportunity for other States to compete in air transport through their national carriers. It is by no means contended that Article 6 should be considered destitute of effect. Rather, that it should be harmoniously blended with the Preambular notion of equality of opportunity with a view to obviating protectionism and promoting liberalization of air transport.
Article 8 of the Convention is another challenging provision in that it deviates from the positive approach of many provisions by saying that each Contracting State shall have the right to refuse cabotage rights or commercial air traffic rights to foreign aircraft between points within their own territory. The use of the words "*shall have the right to refuse*" is skillfully used to convey the meaning that a State's discretion to grant cabotage rights already exists, subject to a non-exclusivity caveat that precludes discrimination or favoritism by the grantor State.
As already discussed, the discretionary right of a State is explicitly recognized in Article 9, which provides that each Contracting State may, for reasons of military necessity or public safety, restrict or prohibit aircraft in certain circumstances from flying over their territory. The use of the word "*may*" is clear in its meaning and purpose, that it is discretionary.
Article 12 carries yet another nuance of language where each Contracting State is required to undertake to adopt certain measures. The word "*undertake*" means "*to take upon oneself*" and implies accountability and responsibility. The difference between the use of the words "*agrees*" and "*undertakes*" brings to bear the clear intent of a treaty carved out many years ago by its founding fathers with vision and foresight that leaves room for interpretation as required by future exigencies as air transport developed.
The above terminology can be compared with the use of the words in Article 17, which states that "*aircraft have the nationality of the State in which they are registered*". It is to be noted that this provision does not have the peremptory admonition issued by the word "*shall*", and one could only conclude that the provision conveys that it is a fact taken for granted, that once an aircraft is registered in a particular State it shall *ipso facto* be deemed registered in that State. The statement that follows in Article 18, that aircraft cannot be validly registered in more than one State, conveys the impossibility of such an exigency. Here, the use of the word "*cannot*" instead of "*shall not*" leaves no room for doubt that in this instance the right for dual registration of aircraft is a given. did not exist to begin with. This usage is contrasted with the use of the words "*shall not*", which implies that a right that seemingly exists is taken away.
The various terms discussed above that are couched in ambiguity and ambivalence make it difficult to interpret the true intent of the drafters of the treaty from an

[36] Concerning Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. U.S.* (1984) I.C.J.392.
[37] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom) (Press Release and Summary of Award). Permanent Court of Arbitration. 19 March 2015.

originalist point of view. The only conclusion one can make is that the founding fathers of the Convention, realizing that air transport could evolve exponentially in the future, left room for interpretation as exigencies demanded. In some ways this ambivalence has blurred the clarity required in the Convention. *A fortiori*, these terms make it even more difficult to place them in the modern context in a meaningful way. As one commentator put it: "*the problem of treaty interpretation…is one of ascertaining the logic inherent in the treaty and pretending that this is what the parties desired. In so far as this logic can be discovered by reference to the terms of the treaty itself, it is impermissible to depart from those terms. In so far as it cannot, it is permissible*"[38].

*3.2 Interpretation*

*3.2.1 General Principles*

The above discussion gives rise to the manner in which terminology in the Chicago Convention has to be interpreted under treaty law. It has already been mentioned that Article 31 of the Vienna Convention provides *inter alia* that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The provision further goes on to say that the context for the purpose of the interpretation of a treaty must comprise, in addition to the text, including its preamble and annexes: any agreement relating to the treaty which had been made between all the parties in connection with the conclusion of the treaty; and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Article 27 of the Draft Articles on the Interpretation of Treaties[39] drawn up by the International Law Commission provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty must comprise, in addition to the text, including its preamble and annexes: any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Also to be taken into account together with the context are: any subsequent agreement between the parties regarding the interpretation of the treaty; any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation; any relevant rules of international law applicable in the relations between the parties. The draft Articles also provide that a special meaning must be given to a term if it is established that the parties so intended.

One commentator has said of interpreting a treaty as: "*giving effect to the expressed intention of the parties, that is, there intention as expressed in the words used by them in*

[38] D. O' Connell, *A Cause Celebre in the History of Treaty Making*, in *BYIL,* n. 156, 1977, at 253.

[39] Text adopted by the International Law Commission at its eighteenth session, in 1966, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 38). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission,, II, 1966.* See *https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_1_1966.pdf.*

*the light of the surrounding circumstances*"[40]. The "*surrounding circumstances*", it is suggested, call for an originalist approach. The chronological context in 1952, when President Roosevelt invited 52 countries to the Chicago Conference in 1944 just as the war was ending, is reflected in his invitation: "*I do not believe that the world today can afford to wait several years for its air communications. There is no reason why it should. Increasingly, the aeroplanes will be in existence. When either the German or Japanese enemy is defeated, transport planes should be available for release from military work in numbers sufficient to make a beginning. When both enemies have been defeated, they should be available in quantity. Every country has its airports and trained pilots; practically every country knows how to organize airlines.*
*You are fortunate to have before you one of the great lessons of history. Some centuries ago, an attempt was made to build great empires based on domination of great sea areas. The lords of these areas tried to close the areas to some, and to offer access to others, and thereby to enrich themselves and extend their power. This led directly to a number of wars both in the Eastern and Western Hemispheres. We do not need to make that mistake again. I hope you will not dally with the thought of creating great blocs of closed air, thereby tracing in the sky the conditions of future wars. I know you will see to it that the air which God gave everyone shall not become the means of domination over anyone*"[41].
The Chicago Convention, which was the result of this sustained conference in 1944, echoes the words of President Roosevelt who called for the use of thousands of military aircraft to be used for peaceful purposes, eschewing the formation of "*great blocks of air*" leading to "*domination over anyone*". This was arguably the genesis of the term "*equality of opportunity*" in the Preamble to the Convention. If one were to stick to this originalist approach one could envision an open skies regime applicable globally where market access would be the inherent right of every carrier. This was not to be, as the polarized discussions ensued at the Conference, primarily between the United States, which was seeking a liberalized system where it could use the multitude of aircraft in its possession, and the United Kingdom which had several countries that it had colonized which were an asset to the United Kingdom in terms of capitalizing on their market protection. As a political compromise, Article 6 of the Chicago Convention was developed which has already been discussed[42]. The ideological clash between the Preambular clause pertaining to equality of opportunity and Article 6 could be a matter of discussion under Article 32 of the Vienna

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[40] A. McNair, *The Law of Treaties*, London, 1966, at 365.
[41] *Proceedings of the International Civil Aviation Conference,* Chicago, Illinois, November 1-December 7, I e II, 1944, (Washington, D.C.: U.S. Government Printing Office, 1948), at 42–43.
[42] A separate bilateral agreement was reached subsequently between the United States and the United Kingdom in Bermuda (called the Bermuda Agreement in 1946) which set the stage for bilateral agreements between other States. In the Agreement, while the United States compromised by withdrawing its opposition to the international regulation of fares and agreed that primary fare-setting functions should devolve upon the International Air Transport Association (IATA), the United Kingdom agreed to retract its earlier position that capacity should be regulated and recognized that airlines should be allowed to regulate capacity by determining their frequency on a given route provided that Governments were the ultimate arbiters of the control of capacity on the routes that were relevant to their territories. Accordingly, the Bermuda 1 Agreement determined that capacity should bear a strong and close relationship to the requirements of the public for air transport. See *Agreement between the Government of the United Kingdom and the government of the United States relating to Air Services between their respective Territories, Bermuda, 11 February 1946. https://www.liquisearch.com/bermuda_agreement/bermuda_it.*

Convention which provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

This originalist approach, and surrounding circumstances can be questioned when one considers Article 31 of the Vienna Convention which states inter alia : "[*T]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. A special meaning shall be given to a term if it is established that the parties so intended*", This essentially means that subsequent developments as well as agreements between parties that involve contemporary practices, must be considered.

*3.2.2 ICAO and the Chicago Convention*

It is particularly relevant to this discussion that ICAO was created by the Chicago Convention[43]. Therefore, the Convention is *ipso facto* the constituent instrument of ICAO. The Vienna Convention in Article 5 states that: "[*T]he present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization*". The fact that the Vienna Convention has the "*without prejudice*" clause makes ICAO's rules standalone if such were to conflict with the provisions of the Vienna Convention, in particular in the context of ICAO's aims and objectives; performance of its functions and other imperatives of practice[44].

In all other cases, the Vienna Convention's provisions would be applicable in infusing its principles to the Chicago Convention. The *"without prejudice*" clause applies in particular to three recognized rules which deserve mention here in this context. Firstly, under the *Object and Purpose rule*, particular focus would be on the effective performance of ICAO and its constituent elements *i.e*. The Assembly; the Council[45]; and the Secretariat and the special status they would enjoy which make ICAO rules standalone which regard to ICAO's aims, objectives, and purpose. In the 1949

[43] Article 43 of the Chicago Convention says: "*An organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary*".

[44] The International Court of Justice held in its opinion on the Nuclear Weapons case (WHO): "*Such treaties can raise specific functions of interpretation owing inter alia to their character…the very nature of the Organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions as well as its own practice, are all elements which may deserve special attention when the time comes to interpret constituent treaties*". ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 19.

[45] Article 55 a) of the Chicago Convention provides: "[*W]here appropriate and as experience may show to be desirable, create subordinate air transport commissions on a regional or other basis and define groups of states or airlines with or through which it may deal to facilitate the carrying out of the aims of this Convention*." This provision has given rise to the establishment of the regional civil aviation bodies ECAC; LACAC; AFCAC; and ACAC.

*Reparation for Injuries case*[46] The International Court of Justice held: "*In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims*"[47].

The second principle pertains to subsequent practices of ICAO, where interpretation would be entirely based on a practice adopted by the Organization that would be *sui generis* and distinctive where such practice would deviate from the words of a treaty. For example, in exercising its jurisdiction under Articles 84-86 of the Chicago Convention the Council can establish its own rules of procedure and practice. As was held by Judge Lachs of the International Court of Justice: "*The Council shall ... determine its organization and rules of procedure*." Within the powers thus vested in it, the Council approved, on 9 April 1957, the "*Rules for the Settlement of Differences*". These were intended to "*govern the settlement of ... disagreements between Contracting States which may be referred to the Council*", and "*the consideration of any complaint regarding an action taken by a State party to the Transit Agreement*" (Art. 1 (1) and (2) In the light of these provisions the Contracting States have the right to expect that the Council will faithfully follow these rules, performing as it does, in such situations, quasi-judicial functions, for they are an integral part of its jurisdiction. Such rules constitute one of the guarantees of the proper decision-making of any collective body of this character and they set a framework for its regular functioning: "*as such, they are enacted to be complied with*"[48].

The Third rule is *Autonomous Interpretation* which entitles an international organization to exclude itself from being tied to national legal concepts, terminologies, and traditions. Here again one could cite the opinion of the International Court of Justice in the *India v. Pakistan* case which stated: "*…the Council was prima facie competent to hear Pakistan's application. The Court further added that the Council could not be deprived of jurisdiction merely because considerations that are claimed to lie outside the Treaties may be involved*"[49].

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[46] [1949] ICJ Rep 174.

[47] *http://www.worldcourts.com/icj/eng/decisions/1949.04.11_reparation_for_injuries.htm.*

[48] *India v Pakistan*, Judgment, ICJ Reports, 1972, at 33. For cases on this point concerning the United Nations see *ICJ Namibia*, [1971] ICJ Rep 16 para 22 and Construction of a Wall in the Occupied Palestinian Territory, *[2004] ICJ Rep 136*, paras 27-28.

[49] *Id*. Para 27.

## 4. Dispute Settlement

Centuries ago, Vattel set the pace on dispute settlement in the law of nations by saying "*If neither of the nations who are engaged in a dispute thinks proper to abandon her right or her pretensions, the contending parties are, by the law of nature, which recommends peace, concord, and charity, bound to try the gentlest methods of terminating their differences…compromise is a second method of bringing disputes to a peaceable termination. It is an agreement, by which, without precisely deciding on the justice of the jarring pretensions, the parties recede on both sides…when sovereigns cannot agree on their pretension, and are nevertheless desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators chosen by common agreement*"[50].

A commentary on the Vienna Convention follows Vattel's fundamental premise of peaceful settlement when it says: "*it is commonplace that disputes over the application and interpretation of treaties should, like all other international disputes, be settled by peaceful means*"[51]. However, the Vienna Convention does not contain a specific provision on disputes concerning the interpretation of a treaty provision which is left to individual treaties themselves to provide for such. Article 65 of the Vienna Convention pertains to disputes concerning the invalidity or termination, withdrawal from or suspension of a treaty. Embodied in the Convention is the basic principle that disputes should be settled between States in conformity with the principles of justice and international law.

The Chicago Convention's dispute settlement provisions follow the classic Vattelian doctrine. Article 14 of the Rules of Settlement promulgated by the Council in 1957, allows the Council to request the parties in dispute to engage in direct negotiations at any time if the Council is of the view that all avenues of a direct negotiation have not been exhausted by the concerned States. Article 84 states that if any disagreement between two or more contracting States relating to the interpretation or application of the Convention and its Annexes cannot be settled by negotiation, it must, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council must vote in the consideration by the Council of any dispute to which it is a party. Any contracting State has the discretion, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. It is required that any such appeal be notified to the Council within sixty days of receipt of notification of the decision of the Council.

A perceived inconsistency exists in the Chicago Convention between one of the mandatory functions of the Council and Article 84. Article 54 (n) provides that the Council may consider any matter referred to it. It is not clear whether this means that a distinction exists between the Council merely "*considering*" any matter in Article 54 (n) and the Council "*deciding*" on a dispute as provided in Article 84. One could argue that on a strict interpretation of Article 54 (n) even a disagreement between two States as envisaged under Article 84 could well be considered as "*any matter*" under Article 54 (n). On the face of it therefore seemingly the two provisions could well be interpreted as

Vattel, *The Law of Nations*, cit., at 450-451.
Vienna Convention, supra, note 10 at 12.

overlapping. The Council would not be perceived as functioning incorrectly if it merely considers a matter placed before it, despite a request of a State for dispute resolution in its application under Article 54 (n) as Article 54 (n) is perceived to be comprehensive as the operative and controlling provision that lays down mandatory functions of the Council.

Article 85 follows by saying that in the event of any contracting State party to a dispute in which the decision of the Council is under appeal not accepting the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting States parties to the dispute is required to name a single arbitrator who shall name an umpire. If either contracting State party to the dispute fails to name an arbitrator within a period of three months from the date of the appeal, an arbitrator must be named on behalf of that State by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council must designate an umpire from the list previously referred to. The arbitrators and the umpire are required then jointly constitute an arbitral tribunal. Any arbitral tribunal established under Article 85 or 84 Article must settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive.

Article 86 on appeals provides that unless the Council decides otherwise any decision by the Council on whether an international airline is operating in conformity with the provisions of the Convention must remain in effect unless reversed on appeal. On any other matter, decisions of the Council if appealed from, will be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding (It must be noted that the International Court of Justice was not in existence when the Chicago Convention was drafted which refers in this context to the predecessor).

A State can bring a disagreement before the Council of ICAO only on a question of interpretation of the Chicago Convention' provisions. In general, when it comes to settling on an interpretation of a treaty provision, it can be settled diplomatically, or through quasi-judicial or judicial means.

It is incontrovertible that the Council of ICAO is not a judicial body[52]. In the dispute between Qatar and Saudi Arabia *et.al* in 2020 The International Court of Justice observed: "*The Court observes that it is difficult to apply the concept of "judicial propriety" to the ICAO Council. The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, the*

[52] One commentator says: "*The Council of ICAO cannot be considered a suitable body for adjudication in the proper sense of the word—i.e. settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of States (not independent individuals) and its decisions would always be based on policy and equity considerations rather than on pure legal grounds. . .. Truly legal disputes . . . can be settled only by a true judicial body which can bring into the procedure full judicial detachment, independence and expertise. The under-employed ICJ is the most suitable body for such type[s] of disputes"*. See M. Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization, (ICAO)*, in *Settlement of Space Law Disputes*, Karl Heinz Bockstiegel Ed., 1980, at 87 at 95.

*Council was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term*"[53].

## 5. Effecting amendments to the Chicago Convention

Article 94 of the Chicago Convention provides that any proposed Amendment to the Convention must be approved by a two-thirds vote of the Assembly and then come into force in respect of States which have ratified such an Amendment when ratified by the number of contracting States specified by the Assembly. The number so specified must not be less than two-thirds of the total number of contracting States**.** If in its opinion the Amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the Amendment has come into force must thereupon cease to be a member of the Organization and a party to the Convention.

There are various key issues in this provision that need to be identified separately. Firstly, an Amendment has o be proposed (presumably by one or more member States) and approved at the ICAO Assembly with two thirds vote. Secondly, such an Amendment must be ratified by a specified number of States as specified by the Assembly (by Resolution) to enter into force and will only apply to those member States that have ratified the Amendment. Finally, the Assembly of ICAO is given the discretion to stipulate in the Resolution that any non-ratifying State will cease to be a member of ICAO and thereupon cease to be a contracting party to the Chicago Convention if that State does not ratify the Amendment within a time limit specified in the Resolution.

It is more efficient to start at the bottom of Article 94 for purposes of this discussion – the Resolution – where a conundrum emerges. A Resolution of ICAO is nothing but the outcome of political compromise between States and a State can mark its reservation that would render the Resolution destitute of effect for that State which would in turn give the State an opportunity to argue that non-ratification in this context does not render the State as removed from ICAO membership. Two international law professors of Oxford and Cambridge Universities have, in their respective textbooks on international law have confirmed the legal status of Resolutions of the United Nations (of which ICAO is a specialized agency). Ian Brownlie says that decisions by international conferences and organizations can in principle only bind those States accepting them[54]. Shaw, referring to the binding force of United Nations General Assembly Resolutions states: "*...one must be alive to the dangers in ascribing legal value to everything that emanates from the Assembly. Resolutions are often*

[53] Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (Bahr., Egypt, Saudi Arabia & U.A.E. v. Qatar), 2020 I.C.J. (Judgment) (July 14) [hereinafter ICJ Decision] at 23. For a more detailed discussion on the mechanisms the ICAO Council is able to invoke in rendering its findings in a dispute between ICAO member States see R. ABEYRATNE, *Decision of The International Court of Justice on the Qatar Issue and the ICAO Council, Issues in Aviation Law and Policy*, XX I, 2020, at 7 -26. See also generally by the same author, *Jurisdiction of The ICAO Council in The Settlement of Disputes—The Qatar Case*, *Annals of Air and Space Law,* XLV, 2000, at 483-504.

[54] I. BROWNLIE, *Principles of Public International Law*, Oxford, 1990 4th Ed., p. 691.

*the results of political compromises and arrangements and, comprehended in that sense, never intended to constitute binding norms. Great care must be taken in moving from a plethora of practice to the identification of legal norms*"[55].

An Amendment under Article 94 must be approved by a vote of two thirds in the ICAO Assembly which makes it difficult to imagine how two thirds of attendees at an Assembly, which adopts Resolutions by consensus, would be of the same mind. To add to this bottleneck, Article 94 prescribes that an Amendment must come into force only upon ratification by two thirds of ICAO's membership of 193 States which is an even more difficult hurdle to clear. An authority on international treaty law is of the view that treaties that establish international Organizations (such as ICAO) must devise their own modalities of adopting Amendments to their treaties although once the specified number of ratifications is reached such an amendment must come into force for all member States[56]. Article 94 does not comport with this view. Finally, the message conveyed by Article 94 is that it will be almost impossible to amend the Chicago Convention.

On the other hand, the ICAO Council has regularly made Amendments to the Annexes to the Chicago Convention, the most recent being in the first quarter of 2022 when the Council adopted new Amendments to several safety-related Annexes Convention in regard to new international standards for electronic pilot licenses, flight operations, and continuing airworthiness responsibilities. In most cases the new standards were expected to become applicable on 3 November 2022[57].

One could argue that there have been additions to the Chicago Convention from time to time. Which may be considered Amendments. An example is Article 3*bis* adopted in 1984 as a result of the shooting down of Korean Air Flight 007 by the Russian Air Force. Article 3 is proclaimed within a "PROTOCOL relating to an amendment to the Chicago Convention. It is submitted that the word "*amendment*" is a misnomer as it is an addition to an existing provision (Article 3) which was not altered or changed in text or substance in any manner and remains as it was.

Article 39 of the Vienna Convention sets out the general rule regarding he amendment of treaties as: *"A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide*". It is generally accepted that the term "*amendment*" denotes a formal agreement between states parties to alter the provisions of a treaty with respect to all of them[58]. While Articles3 *bis,* 83 *bis* and 93 *bis* of the Chicago Convention do not alter all provisions therein, it is also debatable whether an ICAO resolution forms an agreement between parties. One conundrum is that it is not clear whether Article 39 of the Vienna Convention is meant for bilateral treaties only, although the Convention does not say so explicitly[59]. In various discussions on the precise meaning of the word "*amendment*" has been interpreted as "*revision*" or "*review*"[60], none of which correspond to an addition to an existing text of treaty.

Another provision in the Vienna Convention that is relevant to this discussion is Article 40 which states *inter alia* that, unless the treaty otherwise provides, the amendment of

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[55] M. N. Shaw, *International Law,* Cambridge, 2003 Fifth Ed, at 110.
[56] A. Aust, *Modern Treaty*, cit., at 215.
[57] *https://www.icao.int/Newsroom/Pages/ICAO-Council-adopts-amendments-supporting-electronic-pilot-licenses-flight-operations-continuing-airworthiness-responsibili.aspx.*
[58] Vienna Convention, *supra*, note 10 at 757.
[59] *Ibid.*
[60] Vienna Convention, *supra* at 760.

multilateral treaties must be governed by the principle that any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which has the right to take part in: the decision as to the action to be taken in regard to such proposal; the negotiation and conclusion of any agreement for the amendment of the treaty. Every State entitled to become a party to the treaty must also be entitled to become a party to the treaty as amended. This is a basic rule of procedure that applies to all treaties, including the Chicago Convention, as Article 4 in the phrase "*unless the treaty otherwise provides*" means either that a particular treaty has no amendment clause or that the amendment clause in a treaty is not exhaustive, as the latter is the case with the Chicago Convention. The rationale for this procedure is that all States must be involved in the decision-making process of amendment, and they must maintain the equality of status they hold in the international community.

In order to maintain this equality of status, typically, the amendment procedure should identify the number of parties or votes in the meeting convened to adopt the meeting that is needed to support the amendment before it is taken up for discussion; the majority needed for adoption of the amendment (which is specified in Article 94 of the Chicago Convention); whether the adopted amendment needs to be ratified (which is also provided for in the Chicago Convention); whether the amendment binds the parties which have not ratified it[61]. Article 94 deviates in the first and last of these requirements where it does not say how many votes are needed to support the amendment before it can be brought up for discussion, and whether the amendment would bind parties which do not ratify it.

An interesting thought has been put forward by one commentator who says: "*...[F]ortunately, paragraph (b) of Article 94 provides for a "safety net" in just such a case: it specifies that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention, rendering the amendment's ratification almost obligatory, in order for states to avoid being marginalized*"[62]. However, this exigency will arise only if the Resolution has expressed a condition that any State which does not ratify the amendment will cease to be a member of ICAO and a contracting State to the Chicago Convention.

## 6. Conclusion

There are a few basic principles that one can attenuate from the above discussion. The need for interpretation of the text of a treaty arises only when there is a need for such interpretation. A clearly expressed and explicit provision has to be developed and adopted, as the Vienna Convention puts it, in accordance with its ordinary usage and meaning. The Chicago Convention is replete with ambiguous terminology as this discussion shows. If the drafters of the treaty have used overtly diplomatic language to leave room for interpretation, an originalist approach to interpretation may not suit modern exigencies and therefore current trends and principles should be considered in interpreting the treaty as a living piece of legal literature. This notwithstanding, no State

[61] A. Aust, *Modern Treaty*, cit., at 216.

[62] Y. Kalogirou, *Do We Need a New Chicago Convention? Don't Replace It, Fix It!*, in the *Canadian Bar Association site*, January 17 2018. *See https://www.cba.org/Sections/Air-and-Space-Law/Articles/Chicago-Convention.*

party is entitled to interpret the treaty to its own benefit or advantage. There can be no arbitrary and capricious nuance attached to the provisions of a treaty. Interpretation should comport with established rules and in the spirit of *Pacta sunt servanda.*

As Article 34 of the Vienna Convention states treaties are valid and effectual only between States parties and not applicable to third States which are not parties or any other third party. The fundamental principles are laid out clearly in Articles 31 to 33 of the Convention which say that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this context treaties, their Annexes and any other relevant documents accepted by the parties to a treaty can be subject to interpretation. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and any relevant rules of international law applicable in the relations between the parties can also be subject to interpretation. State parties can ascribe a special meaning to any statement or term if the parties agree to such. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail (The Protocol on the Authentic Six Languages text of the Chicago Convention was signed on 1 October 1998[63]).

The problem with the Chicago Convention is that, given its variance in abstruse terminology, the Vienna Convention itself – the beacon that shines a light on treaty law – has also obfuscated its language in laying down general principles by stating that a treaty shall be interpreted in good faith in accordance with the "*ordinary meaning*" to be given to the terms of the treaty in their context and in the light of its object and purpose. "*Ordinary*" connotes a common, routine or usual context of a normal order of things and events and it may not clearly provide interpretative guidance. The Chicago Convention and many of its Annexes which are technical in nature contain technical terminology and not ordinary words. In a hermeneutic sense the Chicago Convention and its unique and esoteric regime cannot always be interpreted in ordinary usage. In the aviation industry which is heavily regulated with regional, transnational and national regulations which are all expected to be under the umbrella of the Chicago Convention, any application of "*ordinary meaning*" of text must be teleological and related to the object and purpose of the provisions of the treaty.

[63] Article 1 of the Protocol recognizes English, French, Spanish, Russian, Arabic and Chinese as equally authentic texts of the Chicago Convention

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