Aviation Safety Law and Regulation

A Commentary on the Safety Annexes to the Chicago Convention

By

Ruwantissa Abeyratne

Aviation Safety Law and Regulation: A Commentary on the Safety Annexes to the Chicago Convention

By Ruwantissa Abeyratne

This book first published 2024

Ethics International Press Ltd, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Print Book ISBN: 978-1-80441-602-0

eBook ISBN: 978-1-80441-603-7

Table of Contents

Preface

An earlier book of the author – *Air Navigation Law* – published by Springer in 2012 touched on some safety aspects of air navigation, critically analyzing some Annexes to the Convention on International Civil Aviation. The subjects addressed in that book included territorial sovereignty and flight information; the provision of air traffic services; rules of the air; search and rescue operations; aircraft accident and incident investigations; air crew licensing; aerodromes; carriage of dangerous good by air; aeronautical charts; environmental protection; NextGen and SESAR; ICAO and exploration of outer space; and vulnerabilities of the air transportation system. It must be mentioned that Annex 2 on Rules of the Air had a discussion in Air Navigation Law, but I have included a chapter in this book as well that will supplement discussions already had.

Ten years have passed since the publication of *Air Navigation Law* and it is now considered that aviation safety warrants an expansion of these subjects, particularly with the added dimension of a deeper legal analysis of the relevant provisions of the safety Annexes that impact personnel licensing; airworthiness; operations of Aircraft; carriage of dangerous goods; and safety management systems. This is particularly so, as, in March 2022 the Council of ICAO adopted new Amendments to several safety-related Annexes of the Chicago Convention in relation to new international standards for electronic pilot licenses, flight operations, and continuing airworthiness responsibilities. In most cases the new standards were to become applicable on 3 November 2022.

One such amendment is Amendment 178 to Annex 1 – *Personnel Licensing* of the Chicago Convention which introduces new provisions for the use of electronic pilot licenses, which are increasingly being used by ICAO Member States. It introduces a new common format to provide for simplified license verification by other States. This amendment should assist ICAO member States in the wider adoption of e-licenses, whilst also reducing the number of printed licenses in circulation and realize cost reduction and environmental benefits.

In adopting amendments to Annex 6 – *Operation of Aircraft* to the Convention, the ICAO Council proposes safety features including the use of ground

proximity warning systems by smaller aircrafts, and the introduction of a runway overrun awareness and alerting system intended to reduce runway excursion incidents and accidents. Furthermore, clarification is provided on the need for an aircraft pilot to consider the level of rescue and fire-fighting services available at the airports being used.

The Council of ICAO has introduced another amendment to Annex 6 which contains comprehensive provisions aligned with the ICAO *Technical Instructions for the Safe Transport of Dangerous Goods by Air* (Doc 9284). These provisions assist in the safe and efficient carriage of dangerous goods by helicopters which should be receiving the same oversight as other aircraft. Alternate safe landing considerations for off-shore helicopter operations is another significant area addressed in these provisions.

Amendments to Annex7 -– *Aircraft Nationality and Registration Marks* – and Annex 8 – have also been adopted by the Council, in the context of the development of a standardized certificate of de-registration to aid States in clearly communicating the transfer of an aircraft from one State to another (Annex 7), and assuring that mandatory continuing airworthiness information relating to aircraft modification or repair should be distributed (Annex 8). Furthermore, additional new provisions in Annex 8 concerned the now required availability of cargo compartment fire suppression system details to help improve cargo safety risk mitigation efforts.

The 41st session of the International Civil Aviation Organization (ICAO) was held from 27 September to 7 October 2022. There are several issues of interest listed for discussion by the Legal Commission of the Assembly that bring to bear the need for clarification, among which were: dispute resolution under the Chicago Convention[1]; the enhancement of competence of legal advisers[2]; and the legal interpretation of amendments to the Convention[3].

---

1 *Study on dispute settlement system under chicago convention,* (Presented by the Republic of Korea), A41-WP/124, LE/8, 2/8/22

2 *Competency framework for civil aviation legal advisers,* (Presented by Singapore and co-sponsored by the Member States of the African Civil Aviation Commission, Australia, State, Brazil, Finland, Guyana, North Macedonia, Oman), A41-WP/106, LE/6, 2/8/22.

3 *Seeking harmonization between ratified and non-ratified rules under icao* (Presented by the Republic of Korea), A41-WP/126, LE/10, 2/8/22.

The third issue – on seeking harmonization between ratified and non-ratified rules under ICAO – brings to bear the need for determining the status of both the Chicago Convention and its amendments in the face of a debate among some in the aviation legal community – that a Contracting State to the Convention is bound only by the amendments to the Convention if it ratifies such amendment, the absence of which does not obligate that State to be bound by the amendment concerned. The Republic of Korea – which presented the working paper on this issue – contended that each Contracting State does not have sufficient information about the amendments to international air law instruments, and accordingly ICAO should take necessary action to convene events not only limited to seminars, symposiums and meetings with a view to making efforts to facilitate Contracting States' knowledge of the amendments; and in regard to such purposes, prepare a meeting at which all Contracting States can share with each other ways to accelerate more ratification of international air law instruments amongst Contracting States including not only limited to tools under international law such as reservation of treaties.

When it comes to amendments to Annexes to the Chicago Convention, it is the Council of ICAO which adopts such amendments, which are then sent to member States of ICAO for comment. Standards and Recommended Practices (SARPs) of Annexes and Procedures for Air Navigation Services (PANS) are the foundation leading to harmonization of global aviation safety and efficiency in the air and on the ground and are the backbone of ICAO's meaning and purpose which is to advance the principles and techniques of air navigation and foster the development of air transport. There are 12,000 such SARPs contained in the 19 Annexes. ICAO identifies the process of adoption and amendment of SARPs thus: " The development of SARPs and PANS follows a structured, transparent and multi-staged process – often known as the ICAO "*amendment process*" or "*standards-making process*" – involving a number of technical and non-technical bodies which are either within the Organization or closely associated with ICAO. Typically, it takes approximately two years for an initial proposal for a new or improved Standard, Recommended Practice or procedure to be formally adopted or approved for inclusion in an Annex or a PANS. Occasionally, this timescale can be expanded or compressed depending on

the nature and priority of the proposal under consideration"[4].

To understand the safety Annexes to the Chicago Convention in some depth, it is necessary to commence this book with a legal and regulatory interpretation of the Chicago Convention; the role of the International Civil Aviation Organization and the manner in which the Organization resolves disputes; how amendments to the Convention are adopted and the responsibility of ICAO member States in giving effect to the Chicago Convention and its Annexes. This discussion forms the first Chapter of this book, which is followed by commentaries on the relevant Standards of Annexes 1, 2, 6. 8, and 19 to the Convention. These are Annexes that did not form part of my earlier book Air Navigation Law which I have alluded to at the beginning of my Preface.

It is hoped that the legal and regulatory analysis of Standards in the Annexes that are addressed in this book which are not self-explanatory and need expansion, would be helpful. Furthermore, mention is made of the Conclusion of this book which offers suggestions that are calculated to assist a State in implementing safety in the aviation system within its territory.

With due acknowledgement to ICAO, only the provisions of the Annexes that have academic and professional relevance to the text of this book have been reproduced herein while others have been discussed in general. The Appendices to the relevant Annexes are reproduced for more academic understanding of the guidance offered in the Annexes.

Ruwantissa Abeyratne
Montreal

[4] *https://www.icao.int/about-icao/AirNavigationCommission/Pages/how-icao-develops-standards.aspx*

Chapter 1

The Chicago Convention

To any lawyer with a foundation in aviation, the Convention on International Civil Aviation (Chicago Convention)[5] 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"[6]. 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"[7]

The Vienna Convention on the Law of Treaties[8] (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[9] of the Convention and the fact that the Vienna Convention admits of any designa-

---

5 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 Ruwantissa Abeyratne, *Convention on International Civil Aviation – A Commentary*, Springer: Heidelberg, 2014.

6 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".

7 Emer de Vattel, *The Law of Nations*, (Knut Haakonssen Gen. Ed.,) Liberty Fund: Indianapolis, 2008 at 308.

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

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

tion 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[10] of 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[11]".

In the Vienna Convention[12], it is a general rule that when State parties enter

---

[10] 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 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

[11] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press: 2000 at 348.

[12] *Supra*, note 8.

into a treaty through ratification[13] that they must intend to create legally binding rights and obligations[14]. 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.

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 should reflect how judicial or quasi-judicial interpretation of the treaty would be applied, devoid of political connotations.

1. The Chicago Convention and State Responsibility

As the Chicago Convention has been adopted by sovereign States, according to Vattel[15], 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[16] 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[17].

---

[13] Aust, *supra,* note 11.

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

[15] Vattel, *supra*, note 7 at 338.

[16] 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.

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

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 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[18]. 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 sepa-

[18] Article 28 of the Chicago Convention.

ratist 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[19]. 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 covering the work of that session. The Report was accompanied by a draft general principle 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

[19] *Id*. Article 89.

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*[20] 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.

---

[20] 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*

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 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[21].

2. Understanding in the Chicago Convention

A. Terminology

The Vienna Convention[22] 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

[21] *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.

[22] *Supra,* Note 8.

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 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.")[23], or on the Paris Convention of 1919[24] 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 acknowl-

[23] 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 Shouldiam 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*

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

edgment 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"[25]. Article 2 of the Chicago Convention then goes on to "deem" that "for the purposes of this Convention the territory of a State must 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[26]. It is interesting that the drafters did not consider omitting the words "deemed to be" and use the words "must 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 must be applicable only to civil aircraft[27], and must not be applicable to state aircraft. Aircraft used in military, customs and police services must be deemed to be state aircraft. No state aircraft of a contracting State must 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 "must" 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 "must 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[28].

---

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

[26] Vattel, *supra*, note 7.

[27] 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.

[28] 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;

This ambiguity in treaty terminology of the Chicago Convention in the context of State aircraft[29] 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"[30].

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

---

Civil registered aircraft used in military, customs and police service shall 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*

[29] 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".

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

aircraft". However, in Article 3 *bis* (c), the provision starts with "Every civil aircraft must 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 "must" 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 "recognition" 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"[31]. A second reading of Article 3 *bis* leaves the reader with portions of the provision as being peremptory (must); 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"[32]. 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.

---

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

[32] *https://www.merriam-webster.com/dictionary/agree*

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"[33]. 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[34]. 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 permis-

[33] Vattel, *supra*, note 7.

[34] 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".

sion. 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.

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[35] and the International Tribunal for The Law of the Sea[36]. 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 must 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 "must 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.

---

[35] Concerning Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. U.S*. (1984) I.C.J.392.

[36] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom) (Press Release and Summary of Award)". Permanent Court of Arbitration. 19 March 2015.

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 "must", 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 must *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 "must 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 "must 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 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"[37].

[37] D. O' Connell, A Cause Celebre in the History of Treaty Making, *BYIL*, (1967) 156, at 253.

B. Interpretation

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[38] 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

[38] 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, 1966, vol. II.* See *https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_1_1966.pdf*

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 the light of the surrounding circumstances"[39]. 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 aircrafts should 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 should 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 should see to it that the air which God gave everyone must not become the means of domination over anyone"[40].

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

---

[39] A. McNair, *The Law of Treaties*, (1966), OAP: London, at 365.

[40] *Proceedings of the International Civil Aviation Conference*, Chicago, Illinois, November 1–December 7, 1944, Vol I & II (Washington, D.C.: U.S. Government Printing Office, 1948) at 42–43.

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[41]. 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 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 must 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

[41] 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_i*

of international law applicable in the relations between the parties. A special meaning must 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.

ICAO and the Chicago Convention

It is particularly relevant to this discussion that ICAO was created by the Chicago Convention[42]. 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[43].

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[44]; and the Secretariat and the

---

[42] 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".

[43] 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.

[44] 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 Con-

special status they would enjoy which make ICAO rules standalone which regard to ICAO's aims, objectives, and purpose. In the 1949 *Reparation for Injuries case*[45] 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"[46].

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 must … 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

vention." This provision has given rise to the establishment of the regional civil aviation bodies ECAC; LACAC; AFCAC; and ACAC.

45 [1949] ICJ Rep 174.

46 *http://www.worldcourts.com/icj/eng/decisions/1949.04.11_reparation_for_injuries.htm*

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 should 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"[47].

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"[48].

3. 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"[49].

---

[47] *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.

[48] *Id*. Para 27.

[49] Vattel, *supra,* note 7.

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"[50]. 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

[50] Vienna Convention, *supra*, note 8 at 12.