Current Legal Problems in Interpreting International Civil Aviation Law

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Abstract: The progress of international civil aviation law is anchored on two main sources: The Convention on International Civil Aviation (Chicago Convention); and Resolutions adopted by the Assembly of the International Civil Aviation Organization (ICAO). These two sources give rise to subsidiary guidance in the form of Annexes to the Convention and manuals on various subjects that address international civil aviation. However, there is no cohesive link between the two sources as well as there being no formal recognition by ICAO of the legal status of Assembly Resolutions, although such resolutions are adopted at each ICAO Assembly with monotonous regularity. Added to this conundrum is the lack of clarity in the interpretation of the Convention itself, which empowers the Council of ICAO to adopt Annexes to the Convention (which, according to the Convention are so named for convenience) while at the same time taking away any legal obligation of the member States to adhere to the Standards contained in the Annexes. This article discusses the nature of international civil aviation law against the backdrop of treaty law and examines the legal issues that arise from the interpretation of the Chicago Convention and Resolutions adopted by the ICAO Assembly.

Keywords: Chicago Convention, Annexes to the Chicago Convention, ICAO, ICAO Resolutions, United Nations, Aviation law.

1. INTRODUCTION

2022 was an eventful year for the International Civil Aviation Organization – the specialized agency of the United Nations on international civil aviation. In September/October ICAO held its 41st Session of the Assembly where member States adopted various Resolutions, some of which addressed implications for the essential principles of international air law. Up until recently, the philosophy of air law was based on the sole premise of sovereignty of States over the airspace above their territories. While it still remains so as the fundamental postulate of air law, the 21st Century brought in new realizations that act as supplemental, adjusting the perceived inadequacy of addressing State sovereignty as an exclusive right to the exclusion of other States, and introducing a more enlightened dimension that expands the inviolable principle of sovereignty over airspace. This emerging trend makes airspace a shared resource which encompasses a concept called sovereign responsibility. Shared responsibility brings to bear the fact that sovereign responsibility must be recognized as ensuring that air transport is operated with regularity, economically, and with equality of opportunity for all concerned.

This requires the balancing of interests of different users of airspace and recognizes the need to protect the safety of passengers and crew, as well as the public on the ground.

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One of the main areas of interest that surfaced over the past 20 years in the context of sharing resources by all countries and key stakeholders of air transport is the response of aviation to climate change which brought to bear the need to acknowledge the impact of aviation on the environment which transcended sovereign borders, and to promote sustainable practices in the industry. It recognizes the need for cooperation between nations to address issues of air transport through The International Civil Aviation Organization and its triennial Assembly of 193 member States. Another key area – which was given much focus at the 41st Session of the ICAO Assembly in 2022 - was the significance of the work of the ICAO Legal Committee as well as erosion of the principle of State sovereignty.

The starting point of aviation law is anchored on two fundamental factors: standardization and harmonization. Standardization simply means global compliance, and harmonization means global commonality, both of which are absent in the law and regulation of aviation when it comes to addressing climate change. There is simply no global compliance of the ICAO mechanism for handling climate change – CORSIA –nor is there domestic legislation or practices in all of 193 member States of commonality or consistency.

There is no explicit mention of sustainable development in the Chicago Convention, except for the advocacy of “friendship and understanding” among the peoples of the world and the need to ensure that air services are operated internationally in a safe and orderly manner, economically with equality of

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opportunity for all carriers to compete. In this context one can only wonder how carbon offsetting and the purchase of carbon credits by one carrier from another comports with equality of opportunity to compete.

Added to this conundrum is Article 44d) of the Chicago Convention which says that one of the aims and objectives of ICAO under the broad umbrella of "fostering the planning and development of air transport" is to meet the needs of the people for safe, regular, economical, and efficient air transport. Again, one would be stretched to relate these various terms (implicitly or explicitly) to carbon reduction or offsetting. If a future diplomatic conference convened by the ICAO Council, as a result of being spurred on by the ICAO Legal Committee, were to include just one word in Article 44 *i.e.,* the word "sustainable" and make the aim and objective of the Organization "fostering the planning and sustainable development of air transport" this might solve the ambivalence and equivocal message the provision currently sends.

In addition to the strong focus of the ICAO Assembly in 2022 on legal and climate change issues, another key area that was subject to discussion was the interpretation of the Chicago Convention and its amendments in the context of ICAO member States not having a clear enough perspective of how the Convention and its amendments impacted the functions of States in aviation. There was also a discussion on the need to enhance the competence of legal advisors in aviation matters.

The 41st Session of the ICAO Assembly amply demonstrated the perceived inadequacy of balance that ICAO has been working with over the past several decades where a focused concentration on technical issues enunciating "the principles and techniques of air navigation" – as articulated in the Chicago Convention – have gained pre-eminence over "fostering the planning and development of air transport". As an example, in 2022 ICAO launched its Secretariat Strategy of Innovation, where innovation is defined as "the introduction of new things, ideas, concepts or ways of doing something that is ahead of current thinking and forward-looking". The essential strategy of this approach is to *inter alia* identify, develop and deploy, in coordination with States, regulators and/or industry partners, more efficient and effective and /or innovative solutions that enhance the ICAO Strategic Objectives, consistent with the Chicago Convention, and foster the realization of Supporting Strategies.

One of the examples of this innovation strategy was seen on 22 March 2023 when ICAO launched the Electronic Personnel License (EPL) that is calculated to replace hard copy licenses. The technical standards for the EPL came into force on 3 November 2022 which require that the EPL must be verifiable online and offline, without imposing an undue burden on another.

Amidst all innovation there is profound dynamics in geopolitics bringing to bear a compelling need for more effective regulation in aviation in general and air transport in particular. In this context arguably the most important event is the triennial Assembly of ICAO – the Organization's sovereign body convened by the Council of ICAO - where a host of Resolutions are adopted that are calculated to address current trends in international civil aviation.

2. LEGAL LEGITIMACY OF ICAO ASSEMBLY RESOLUTIONS

One of the main functions of the ICAO Assembly is to adopt Resolutions, although ICAO does not acknowledge , nor mention this fact in ICAO's website. An ICAO Resolution is a formal text adopted by the ICAO Assembly which by no means is enforceable law. At best it is a formal expression of an opinion, intention, or decision by an official body or assembly and widely considered as meaning recommendations and decisions. These Resolutions follow a common format and consist of three parts: the heading, the preambular clauses, and the operative clauses (Title; Preamble containing Preambular or Whereas clauses; and action clauses). The entire resolution comprises one long sentence, with commas and semi-colons throughout, and only one period at the very end.

From the outset it can be established that ICAO Resolutions, which are the Resolutions adopted by member States of ICAO at the triennial Assembly of the Organization, can be considered on the same basis as any resolution adopted by the United Nations – as ICAO member States are also members of the United Nations - and *a fortiori*, as ICAO is a specialized agency of the United Nations. These Resolutions are no more than results of political compromises to which no legal legitimacy can be ascribed [1].

Resolutions therefore have a recommendatory nature which are at best comprised of a coercive feature that could push States to follow a particular line of action of compliance. Usually, Resolutions present a normative system which is calculated to establish a

degree of social order.This having been said it must be noted that Resolutions of the ICAO Assembly are not destitute of effect and their effectiveness can vary depending on the situation and context in which they are used. Although these Resolutions can be ambiguous and lack time limits for terminating controls and sanctions, they can assist in the mediation of negotiations, highlight issues to other nations who can then condemn the actions of the aggressive party, allow for the start of humanitarian aid and support, and hopefully lead to a resolution to the situation.

ICAO Assembly Resolutions can exert considerable influence by producing general political effects in the relations among nations. Some commentators, referring to General Assembly (GA) Resolutions of the United Nations have offered a contrarian view: " it can be concluded that the Resolutions of the GA are a legitimate sources of international law. However there are differences of opinion on the legal aspect of such Resolutions. The Resolutions are legitimate in the sense that the breach of the Resolutions will be counterproductive in all aspects of international law. The GA Resolutions do not classify as sources of law as the ICJ lays down the categories that should be construed as the sources of law. In this context there are suggestions that the GA Resolutions should be viewed as an independent source of international law. The roles of the GA Resolutions are to strengthen the international law and can establish a general practice that is recognized by the international law. The GA produces norms that functionally operate as law and the states respond in a positive aspect and comply with the "prescriptive assertions" of the General Assembly as though such Resolutions are binding on the states" [2].

There are three schools of thought which support the view that Resolutions of the United Nations have legal legitimacy. The first is that these Resolutions are derived from the Charter of the United Nations which confer legitimacy to the Resolutions with the authority of the Charter. The 1979 case of *Filartiga v. Pena-Irala* [3] is a case where the United States courts addressed the relevance of a Resolution of The United Nations in the course of their finding based on international law. The Filartiga case was a landmark in United States and international law. The court took a middle ground approach which, while referencing the traditional sources, relied prominently upon United Nations General Assembly Resolutions - a source many authorities would give far less consideration. For purpose of the Alien Tort Claims Act, torture may be considered to violate law of nations. The court observed that there is no definitive statement as to the extent of the "human rights and fundamental freedoms" promoted in the Charter, but there is no dissent from the view that the [Charter] guaranties include, at a bare minimum, the right to be free from torture. The court cited language from two General Assembly Resolutions-the Universal Declaration of Human Rights and the Declaration on the Protection of All Persons as evidence that this prohibition is now part of customary international law. One commentator observed: "Standing alone, General Assembly Resolutions (even those adopted unanimously) have no binding force among the member nations. They are not law, only evidence of it. Their provisions must be balanced against other pronouncements of state practice, which may or may not be consistent with a given resolution" [4].

As for ICAO Assembly Resolutions, it is arguable that although the ICAO Assembly derives its genesis from the Convention on International Civil Aviation also referred to as the Chicago Convention (Article 43) [5], Neither the Chicago Convention [6] nor ICAO recognize this derivation. In its website ICAO identifies the Assembly as having numerous powers and duties, among them to: elect the Member States to be represented on the Council; examine and take appropriate action on the reports of the Council and decide any matter reported to it by the Council; and approve the budgets of the Organization. The Assembly may refer, at its discretion, to the Council, to subsidiary commissions or to any other body any matter within its sphere of action. It can delegate to Council the powers and authority necessary or desirable for the discharge of the duties of ICAO and revoke and modify the delegations of authority at any time; and deal with any matter within the sphere of action of ICAO not specifically assigned to the Council. In general, it reviews in detail the work of the Organization in the technical, administrative, economic, legal and technical cooperation fields. It has the power to approve amendments to the Chicago Convention, which are subject to ratification by Member States.

The second point of view supporting the claim that Resolutions have legal legitimacy is United Nations General Assembly Resolutions can replace elements needed to establish customary law. This cannot be applied to ICAO Assembly Resolutions as States have the opion of rejecting principles contained in the Resolutions by recording their reservations of non-compliance. The third theory is that UN General

Assembly applies normative rules adopted by the entirety of the international community. This does not comport with ICAO Resolutions which are non-binding on States which can mark their reservations.

Other commentators view United Nations Resolutions as mere recommendations, not laws, and thus not binding on member States saying "hence, an important focus has been put on the 'legal status' of the Resolutions: without any formal legal obligation for the member states (MS) to implement, let alone consider these Resolutions, it is difficult for the GA to have any real coercive authority" [7]. They argue that, "even though GA Resolutions enjoy a limited legal status, there is actually a point to having them if we consider first their symbolic as well as political impact and secondly their influence on contemporary international law, especially customary law" [8].

The General Assembly (GA) Resolutions can be symbolic in two main ways: it can have an invaluable influence on the behavior of states and stigmatize or isolate the practice of states that do not conform to it. It is through the symbolic power of GA Resolutions in international relations that one can find a persuasive argument in favor of having them. As an international forum or a 'town meeting of the world', the GA represents the most suitable place for international dialogue and discussion. The Resolutions passed by the GA can then be successfully presented as crystallizing, formulating and expressing the view or opinion of the international community of states.

The Resolutions passed by the General Assembly can have an invaluable influence on the behavior of states and stigmatize or isolate the practice of states that do not conform to it. GA Resolutions, by expressing a 'world opinion', can thus exert considerable pressure for states to take this opinion into account, especially when conducting their domestic or foreign affairs. For example, Resolutions defining or clarifying the meaning of a specific word such as Resolution 3314 on aggression directly reflect this idea of formulating a common view, which then sets 'common standards' that the global community can refer to.

United Nations Resolutions and therefore ICAO Assembly Resolutions share the commonality of reflecting a symbolic gesture by the international community to stigmatize and formally condemn the practice of States which do not abide by fundamental principles that are followed by a rules based order. There is also the political impact that might follow non-adherence of a resolution, although in the ICAO context, some States have freely exercised their prerogative of marking their reservations to ICAO Resolutions in whole or part thereof.

3. PROBLEMS OF INTERPRETING SOME CONTENTIOUS RESOLUTIONS AGAINST THE CHICAGO CONVENTION AND ITS AMENDMENTS

At the 41st Session of the ICAO Assembly in 2022 some member States brought to the attention of the Assembly that the interpretation of the Chicago Convention and its amendments were not clearly accessible.

What was significant in the agenda of the 41st session of the ICAO Assembly was that there were 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 [9]; the enhancement of competence of legal advisers [10]; and the legal interpretation of amendments to the Convention [11]. In the context of dispute settlement, the Republic of Korea – the presenter of the working paper – stated i*nter alia* that The Chicago Convention provides a dispute settlement clause in Article 84. However, it is rarely applied on a practical level in the event of actual disputes and that it is a very rare case that the dispute settlement mechanism is legally invoked under the Chicago Convention. Even if the settlement system proceeded, the ICAO Council has never made a decision for a dispute, as it has been functioning well as a political body by means of negotiation, arrangement, or mediation. In other words, the ICAO Council's role in relation to the non-judicial dispute settlement measures including negotiation, arrangement, or mediation has been working well compared to its role as a judicial body, and it renders its decision based on its consideration of relevant policies and equity rather than based on a strict application of legal principles, bearing significance in facilitating the dispute resolution. The suggestion was that the issue should be continuously studied by the Legal Committee of the ICAO Council. The Republic of Korea suggested that, after such consideration is concluded it would be helpful for ICAO to prepare a workshop/seminar at which all Contracting States will have an opportunity to exchange views on the outcomes of the working group of the Legal Committee studying the issue, especially with regard to the current dispute settlement provisions of the Chicago

Convention and how they can be applied in a more efficient way.

With regard to the proposed competency framework for civil aviation legal advisers, the numerous States sponsoring the working paper suggested that a competency framework is necessary and should be designed to assist civil aviation authorities and their equivalents in the recruitment, training and professional development of civil aviation legal advisers so as to strengthen and enhance their competencies, capabilities and capacities for supporting their organizations and States in carrying out regulatory and other functions, in particular, in the areas of aviation safety and security oversight, the implementation of air law treaty obligations and the updating of national laws and regulations.

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. This is one issue that will be discussed in this article.

A. Interpreting the Chicago Convention

As a treaty [12], the Chicago Convention [13] is intriguing as well as unique in its terminology and presents many ambiguities in its terminology which makes it somewhat difficult to interpret. The Vienna Convention [14] 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 Vienna 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 provides 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*.

Article 1 of the Chicago Convention 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.") [15], or on the Paris Convention of 1919 [16] 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" [17]. 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 [18]. 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 Chicago 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 [19], 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 state 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 [20].

This ambiguity in treaty terminology of the Chicago Convention in the context of State aircraft [21] 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" [22].

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 worse 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" [23]. A second reading of Article 3 *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" [24]. 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" [25]. 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 [26]. 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.

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 [27] and the International Tribunal for The Law of the Sea [28]. 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. 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 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" [29].

B. RATIFICATION OF AMENDMENTS

It cannot be doubted that since the inception of modern commercial aviation after the second world war, the Chicago Convention has been at the forefront in the development of the international aviation industry. Besides, membership of ICAO that the 193 States hold is dependent on the ratification or otherwise formal acceptance of this treaty. In an effort to keep the legal and regulatory regime up to date ICAO has adopted various kinds of "Protocols of Amendment to the Chicago Convention" in relation to the Chicago Convention, which has necessitated States to review their ratification of various amendments to the Convention [30].

In its discussion of the working paper submitted to the Assembly of ICAO, the Republic of Korea argued : " [A]part from the search for methods to accelerate the ratification of international air law instruments, there must also be a search to find a way to interpret the clash between ratified and unratified rules in a way that both rules can coexist harmoniously from the perspective of international law, even when not all States have ratified international air law instruments. It may be unrealistic to expect all Contracting States to ratify simultaneously the ICAO international air law instruments. Thus, rather than quoting Article 94 ("Amendment of Convention") of the "Chicago Convention, one could consider the option of exercising the reservation of Treaties in accordance with the "Vienna Convention on the Law of Treaties" (hereafter, "VCLT")… Contracting States are entitled to exclude or modify the legal effect of a provision of a Treaty…. However, there does not necessarily need to be a clash between non-ratified and ratified rules, and it is possible to harmoniously interpret both laws compatibly. First, international law does not demand to be incorporated into domestic laws. In other words, not incorporating international laws into domestic laws is not necessarily a violation of international laws".

Another issue brought to bear in the working paper of the Republic of Korea is that States do not have sufficient information about amendments made to international air law instruments. ICAO needs to continue to make the effort to ensure Contracting States can easily be aware of and understand the amendments. The paper says : " There is no clash between a ratifying Contracting State's international air law instruments and those of a non-ratifying Contracting State, and therefore, both remain valid. There is coexistence among ratified international air law instruments that remain valid between ratifying Contracting States, non-ratified international air law instruments that remain valid between non-ratifying Contracting States, and nonratified international air law instruments that remain valid between ratifying and non-ratifying Contracting States. Thus, a harmonious international law order continues to remain in place".

At the 40th ICAO Assembly in 2019 the Assembly adopted Resolution A40-28 (Consolidated Assembly Resolutions in the Legal Field) which, in Appendix C

noted *inter alia* with concern the continuing slow progress of ratification of the Protocols of Amendment and mentioned that while a substantial number of States are party to the Protocols introducing Articles 3 *bis* and 83 *bis* of the Chicago Convention, there was still a need to further progress the ratification of those Protocols. The Resolution also recognized the importance of amendments to international civil aviation, in particular to the viability of the Chicago Convention, and the consequent urgent need to accelerate the entry into force of those amendments not yet in force. Furthermore, it recognized that there was a need to accelerate the ratification and entry into force of air law instruments developed and adopted under the auspices ICAO and that only a universal participation in these Protocols of Amendment and other instruments would secure and enhance the benefits of unification of the international rules which they embody.

The Assembly therefore urged *inter alia* all Contracting States which so far had not done so to ratify those amendments to the Chicago Convention which were not yet in force, *i.e.* those amending the final paragraph to add Arabic and Chinese to the authentic texts of the Convention, as well as amendments, as soon as possible, while urging all Contracting States which have not yet done so to ratify the Protocols introducing Articles 3 *bis* and 83 *bis* of the Chicago Convention. Finally, the Resolution urged the Secretary General of ICAO to take all practical measures within ICAO's means in cooperation with States to provide assistance, if requested, to States encountering difficulties in the process of ratification and implementation of the air law instruments, including the organization of and the participation in workshops or seminars to further the process of ratification of the international air law instruments.

This Resolution stems from Article 94 of the Chicago Convention which 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 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. There is an important proviso in Article 94 which states that 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 ICAO and a party to the Convention.

There are two important factors in Article 94. One is that an amendment to the Chicago Convention will come into effect only to those States ratifying such amendment; and the other is that non ratification by a State within a specified period after the amendment has come into force may entail the State to cease being a member of ICAO and a party to the Chicago Convention. The latter condition only applies if a particular amendment carries with it such a condition.

C. What does the Vienna Convention on the Law of Treaties Say?

The Vienna Convention, which entered into force in 1980 and is widely regarded as an instrument of customary international law, in Article 40 provides *inter alia* that every State entitled to become a party to the treaty must also be entitled to become a party to the treaty as amended. This gives a State which has not ratified an amendment a right to take it that an amendment applies to it irrespective of a requirement to ratify to be entitled to the application of that amendment. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement. Article 30, paragraph 4 (b), applies in relation to such State which provides that as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. More importantly, any State which becomes a party to the treaty after the entry into force of the amending agreement must, failing an expression of a different intention by that State be considered as a party to the treaty as amended; and be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 40 unequivocally conveys the principle that the membership structure of the original and the amended treaty must not change. If this cannot be realized the Article regulates and manages the relationship between the original treaty and its amended stature and form. However, this article applies only if there is no amendment clause that otherwise provides in a particular treaty. Therefore, arguably, Article 94 of the Chicago Convention which provides that an amendment applies only to those States that ratify such an amendment, would prevail. Also, the Vienna Convention is clear that the treaty

concerned as amended would only apply and binds the State Parties to the original treaty who both sign and ratify both the treaty as originally adopted and its amendments. There is also a proviso in Article 40 that any State that becomes a party to a treaty after the coming into force of an amendment will *ipso facto* be a party to the treaty as amended. Therefore, if ICAO were to have its 194th member State in the future, such State would be bound by the Chicago Convention as well as all its amendments then in force.

Article 41 of the Vienna Convention provides that two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: the possibility of such a modification is provided for by the treaty; or the modification in question is not prohibited by the treaty and; such a modification does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations. Such a modification should not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. The said Parties are obligated to inform other State Parties of their decision to give effect to such a modification to the original treaty unless this requirement is obviated by the original treaty.

The Chicago Convention contains no provision that accords with Article 41 of the Vienna Convention. However, Article 41 allows for a modification by two or more State Parties to a treaty if the treaty does not prohibit it. The Chicago Convention dies not carry such a prohibition.

The above discussion leaves no room for doubt that Article 94 of the Chicago Convention clearly sets out the principles regarding the ratification of amendments to the Convention and that Article 94 is not derogated or is in any manner contradictory to the Vienna Convention. However, as the Chicago Convention establishes ICAO – an international Organization – there is the view that a treaty establishing an international Organization must have a built-in rule that once an amendment reaches the number of ratifications or other formal acceptance that enables it to enter into force, that amendment should apply to all State Parties to the treaty [31]. The Legal Committee of ICAO should provide an interpretation of this principle. The more important point is made by the Republic of Korea in its working paper that many of the 193 member States of ICAO do not have sufficient information of the amendments to the Chicago convention and other air law instruments. The suggestion made in the working paper is that ICAO convene seminars and other events to educate its member States and provide information on such amendments. This is a proactive recommendation which can even be extended to the provision of information on the various nuances of the Chicago Convention.

As Article 34 of the Vienna Convention provides that 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 [32]).

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 added to the obfuscation in laying down general principles by stating 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. "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.

It might be an opportune time – at the 42nd Session of the ICAO Assembly - for the ICAO member States to review the Chicago Convention and its amendments.

4. CONCLUSION

It is an interesting fact that the Chicago Convention does not mention the resolution adoption function of the ICAO Assembly. Article 49 of the Convention lays down the powers and duties of the Assembly as: electing at each meeting its President and other officers; electing the contracting States to be represented on the Council, (in accordance with the provisions of Chapter IX of the Convention; examining and taking appropriate action on the reports of the Council and deciding on any matter referred to it by the Council; determining its own rules of procedure and establish such subsidiary commissions as it may consider to be necessary or desirable; voting annual budgets and determining the financial arrangements of the Organization, in accordance with the provisions of Chapter XII of the Convention; reviewing expenditures and approving the accounts of the Organization; referring, at its discretion, to the Council, to subsidiary commissions, or to any other body any matter within its sphere of action; delegating to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoking or modifying the delegations of authority at any time; carrying out the appropriate provisions of Chapter XIII of the Convention; considering proposals for the modification or amendment of the provisions of this Convention and, if it approves of the proposals, recommending them to the contracting States in accordance with the provisions of Chapter XXI of the Convention; dealing with any matter within the sphere of action of the Organization not specifically assigned to the Council.

The only statement in the above text that one could argue as relating to the adoption of Resolutions is the last function – "dealing with any matter within the sphere of action of the Organization not specifically assigned to the Council" although it is a link that is seemingly tenuous. Therefore the only way to evaluate the true function of ICAO Assembly Resolutions and their link to the function of ICAO is to examine the status of ICAO as an international organization and the purpose of Resolutions adopted by its assembly in the progress of air law.

Stranger still, is the fact that ICAO, in its description of the functions of the Assembly, does not mention Assembly Resolutions at all, which is one of the main functions of the Assembly when it is convened every three years. ICAO says: "The Assembly has numerous powers and duties, among them to: elect the Member States to be represented on the Council; examine and take appropriate action on the reports of the Council and decide any matter reported to it by the Council; and approve the budgets of the Organization. The Assembly may refer, at its discretion, to the Council, to subsidiary commissions or to any other body any matter within its sphere of action. It can delegate to Council the powers and authority necessary or desirable for the discharge of the duties of ICAO and revoke and modify the delegations of authority at any time; and deal with any matter within the sphere of action of ICAO not specifically assigned to the Council. In general, it reviews in detail the work of the Organization in the technical, administrative, economic, legal and technical cooperation fields. It has the power to approve amendments to the Convention on International Civil Aviation (Chicago, 1944), which are subject to ratification by Member States" [33].

ICAO Resolutions carry legal legitimacy, but not enforceability at law leaving member States of ICAO to abide by and enforce a resolution. ICAO Assembly Resolutions are somewhat different from Resolutions adopted by the United Nations as the latter has Resolutions adopted by two bodies - the General Assembly and the Security Council – where the nature and enforceability of the Resolutions of the United Nations can vary. The legal weight of a UN resolution depends on several factors, including the type of resolution, the authority of the UN body issuing it, and the willingness of member states to abide by and enforce the resolution.

There are two main types of UN Resolutions: binding and non-binding Resolutions. Binding Resolutions, such as those issued under Chapter VII of the UN Charter, are considered legally binding on member states. They can impose obligations and authorize the use of force if necessary to address threats to international peace and security. For example, Resolutions passed by the Security Council

under Chapter VII are binding on all UN member states.

Non-binding Resolutions, on the other hand, do not have the same legal force. They express the opinion or recommendations of the UN body issuing them, but they are not legally enforceable. General Assembly Resolutions, for instance, are generally considered non-binding, although they can carry significant political weight and influence.

The enforcement of binding Resolutions primarily falls within the responsibility of member states. The Security Council, in particular, has the power to impose sanctions or authorize the use of force to enforce its Resolutions. However, the effectiveness of enforcement measures can vary depending on the political will and cooperation of member states.

It's important to note that the legal legitimacy of United Nations Resolutions can sometimes be a subject of debate and interpretation. Different countries may have varying views on the legal status and validity of specific Resolutions, particularly if they are directly affected by them or if they have reservations about certain provisions.

In summary, while UN Resolutions can carry legal legitimacy, the extent of their enforceability depends on factors such as the type of resolution, the authority of the issuing body, and the willingness of member states to comply with and enforce them.

ICAO Resolutions on the other hand are adopted only by one body – its Assembly – making them similar in effect to the Resolutions adopted by the United Nations General Assembly. As for judicial determination of the legal status and legitimacy of Resolutions there is only one recorded instance of the International Court of Justice [34] (ICJ) pronouncing upon a United Nations Resolution in aviation terms. This related to Security Council Resolution 748 - questions of interpretation and application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya* v. *United States*) (1992) [35] In this case, the ICJ addressed the interpretation and application of UN, which called upon Libya to surrender the suspects in the Lockerbie bombing for trial. The Court examined the resolution's legal effects and concluded that it created an obligation on Libya to comply with the resolution's terms.

The International Court of Justice (ICJ) has addressed the issue of UN Resolutions in several cases and has considered them as evidence of customary international law, state practice, or the intentions of states. In certain cases, the Court has referred to relevant UN Resolutions to interpret international legal principles and obligations. In the *Nicaragua case* [36] (Military and Paramilitary Activities in and against Nicaragua) in 1986, the ICJ examined a series of UN Security Council Resolutions to determine the customary law prohibition on the use of force. The Court considered these Resolutions as indicative of state practice and *opinio juris*, which are crucial elements in establishing customary international law. In other cases, the ICJ has referenced UN Resolutions to assess the legality of certain actions or policies. However, it's important to note that the Court's reliance on UN Resolutions may vary depending on the specific circumstances of each case and the relevance of the Resolutions to the legal issues at hand.

The ICJ's reliance on UN Resolutions does not automatically confer legally binding status on those Resolutions. The Court assesses the legal weight of Resolutions based on the specific context and legal principles applicable to the case before it. Overall, the ICJ acknowledges the legal significance of UN Resolutions and may consider them as relevant evidence in its deliberations, but the Court's approach depends on the specific case and the legal questions being addressed.

In the *Legality of the Threat or Use of Nuclear Weapons* case(1996) [37], the ICJ considered General Assembly Resolutions, including Resolution 1653 (XVI) and Resolution 33/71, as expressions of the will of the international community regarding disarmament and non-proliferation. However, the Court did not explicitly state that these Resolutions rendered the use of nuclear weapons unlawful. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) [38] The ICJ referred to UN General Assembly Resolutions, particularly Resolution ES-10/15, as reflecting the international community's position regarding the construction of the wall. The Court considered these Resolutions as supportive of the customary law prohibition on the acquisition of territory by force and the right to self-determination of the Palestinian people. In this case the ICJ examined the legal consequences of the construction of a wall by Israel in the occupied Palestinian territory. In its advisory opinion, the Court referred to several UN Resolutions, including General Assembly Resolution ES-10/15, which called for compliance with international humanitarian law and emphasized the

illegality of the construction. The ICJ considered these Resolutions as evidence of the international community's position regarding the construction of the wall.

In its *Kosovo Advisory Opinion* (2010) [39] the ICJ noted that UN Security Council Resolutions, such as Resolution 1244 (1999), provided important context for its analysis of the legality of Kosovo's declaration of independence. The Court considered these Resolutions as evidence of the Security Council's involvement and decision-making in the matter. In *Whaling in the Antarctic* (2014) [40] case, the ICJ referred to various Resolutions of the International Whaling Commission (IWC) and noted their significance in interpreting the obligations of states under international law, particularly the International Convention for the Regulation of Whaling.

Although Resolutions under the United Nations system are the outcomes of political compromises and are not legally binding, States have certain obligations to recognize the Resolutions and to the extent comply with them under established principles contained in the United Nations Charter. For example, Under Chapter VII of the Charter, United Nations Security Council Resolutions must be complied with. The UN Security Council has the primary responsibility for maintaining international peace and security. Its Resolutions are legally binding on all member states, and states have an obligation to comply with them. This includes implementing measures imposed by the Security Council, such as sanctions, arms embargoes, or peacekeeping mandates.

Additionally, and in a general sense, when a resolution is adopted by the UN, it carries political and moral weight and is intended to guide the behavior of member states. While UN Resolutions are not legally binding in the same way as treaties or conventions, they still create expectations and norms for states to follow. The specific obligations of states to comply with UN Resolutions can vary depending on the nature and content of the resolution. Based on this general principle, States have an obligation to cooperate with thes specialized agencies of the United Nations such as ICAO and implement their Resolutions or recommendations as appropriate.

When Resolutions contain certain immutable and global principles that are *jus cogens*, such as human rights they carry with them an inarticulate premise that they must be followed. Another important compelling feature of a resolution is when it carries established principles of international law particularly where UN Resolutions refer to existing international legal frameworks, such as international humanitarian law, human rights law, or environmental law. States have an obligation to respect and comply with these legal obligations, and ICAO Resolutions can serve as reminders or clarifications of these obligations.

ICAO has limited enforcement mechanisms for ensuring compliance with Resolutions. The responsibility for implementation primarily lies with individual states, and ICAO relies on diplomatic efforts, dialogue, and political pressure to encourage compliance. In some cases, non-compliance with ICAO Resolutions may lead to diplomatic consequences, reputational damage, or the imposition of sanctions by individual states or regional organizations.

In the final analysis, the progress of air law cannot depend on ICAO Assembly Resolutions as they have no link to the Chicago Convention on the one hand, and *a fortiori* cannot be the subject of discussion at a dispute resolution process of the ICAO Council, which can only address a dispute in relation to the Convention. Furthermore, as already discussed, they have not even entered into ICAO’s descriptions of itself and the functions of its organs – The Assembly; Council; and Secretariat in any of ICAO’s references in its web site. The Resolutions therefore are relegated to a regulatory limbo which merely represents a general attitude towards a subject in international civil aviation. This ambivalent status quo makes a compelling argument for a comprehensive study of ways and means to give teeth to Assembly Resolutions of the United Nations and its specialized agencies. At a time when the rules based international order is crumbling a better system of binding agreements at a global level must emerge.

Some commentators have suggested a general approach to start with where a “better rule based international order” that would comprise four categories of binding agreement between States [41]. “The first category—prohibited actions—would draw on norms that are already widely accepted by the United States, China, and other major powers. At a minimum, these might include commitments embodied in the UN Charter (such as the ban on acquiring territory by conquest), violations of diplomatic immunity, the use of torture, or armed attacks on another country’s ships or aircraft. The second category includes actions in which states stand to benefit by altering their own behavior in

exchange for similar concessions by others. Obvious examples include bilateral trade accords and arms control agreements.

When two states cannot reach a mutually beneficial bargain, the framework offers a third category, in which either side is free to take independent actions to advance specific national goals, consistent with the principle of sovereignty but subject to any previously agreed-on prohibitions.

The fourth and final category concerns issues in which effective action requires the involvement of multiple states. Climate change and COVID-19 are obvious examples: in each case, the lack of an effective multilateral agreement has encouraged many states to free-ride, resulting in excessive carbon emissions in the former and inadequate global access to vaccines in the latter. In the security domain, multilateral agreements such as the Nuclear Nonproliferation Treaty have done much to limit the spread of nuclear weapons. Because any world order ultimately rests on norms, rules, and institutions that determine how most states act most of the time, multilateral participation on many key issues will remain indispensable".

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[3] 630 F 2d. 876.

[4] C. Donald Johnson Jr, Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court. See https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1950&context=gjicl.

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

[6] Article 49 of the Chicago Convention which lays out the powers of the Assembly identify the following functions: Elect at each meeting its President and other officers; b) Elect the contracting States to be represented on the Council, in accordance with the provisions of Chapter IX; c) Examine and take appropriate action on the reports of the Council and decide on any matter referred to it by the Council; d) Determine its own rules of procedure and establish such subsidiary commissions as it may consider to be necessary or desirable; e) Vote annual budgets and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII;* f) Review expenditures and approve the accounts of the Organization; g) Refer, at its discretion, to the Council, to subsidiary commissions, or to any other body any matter within its sphere of action; h) Delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time; i) Carry out the appropriate provisions of Chapter XIII; j) Consider proposals for the modification or amendment of the provisions of this Convention and, if it approves of the proposals, recommend them to the contracting States in accordance with the provisions of Chapter XXI; k) Deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.

[7] Celine Van den Rul, Why Have Resolutions of the UN General Assembly If They Are Not Legally Binding? *E-International Relations,* June 16 2016 at https://www.e-ir.info/2016/06/16/why-have-Resolutions-of-the-un-general-assembly-if-they-are-not-legally-binding/

[8] Ibid.

[9] Study on Dispute Settlement System under Chicago Convention, (Presented by the Republic of Korea), A41-WP/124, LE/8, 2/8/22

[10] Competency Framework for Civil Aviation Legal Advisers, (Presented by Singapore and co-sponsored by the Member States of the African Civil Aviation Commission, Australia, Bahamas, Brazil, Finland, Guyana, North Macedonia, Oman), A41-WP/106, LE/6, 2/8/22.

[11] Seeking Harmonization between Ratified and Non-Ratified Rules under ICAO (Presented by the Republic of Korea), A41-WP/126, LE/10, 2/8/22.

[12] The Vienna Convention on the Law of Treaties 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. See The Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

[13] Convention on International Civil Aviation, *supra*, note 12. See ICAO doc 7300/9 (Ninth Edition : 2006).

[14] Ibid.

[15] 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*

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

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

[18] 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". See Emer de Vattel, *The Law of Nations*, (Knut Haakonssen Gen. Ed.,) Liberty Fund: Indianapolis, 2008 at 302.

[19] 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.

[20] 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 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

[21] 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".

[22] Jan Wouters, Sten Verhoeven, State Aircraft, Oxford Public International Law: July 2008. https://doi.org/10.1093/law:epil/9780199231690/e1223

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

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

[25] Vattel, *supra*, note 12 at 322.

[26] 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".

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

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

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

[30] The amendments (Protocols) are: Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 93 bis]; Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 45]; Protocol Relating to an Amendment to the Convention on International Civil Aviation [Articles 48(a), 49(e) and 61]; Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 50(a)]; Protocol on the Authentic Trilingual Text of the Convention on International Civil Aviation (Chicago, 1944); Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 56)]; Protocol Relating to an Amendment to the Convention on International Civil Aviation [Final Paragraph, Russian Text]; Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 83 bis]; Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 3 bis]; Protocols Relating to an Amendment to the Convention on International Civil Aviation [Final Paragraph, Arabic and Chinese Texts]; and Protocol on the Authentic Six-Language Text of the Convention on International Civil Aviation (Chicago, 1944).

[31] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press: 200 at 251-216.

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

[33] https://www.icao.int/about-icao/assembly/Pages/default.aspx

[34] As the principal judicial organ of the United Nations, the ICJ is responsible for settling legal disputes between states and providing advisory opinions on legal questions referred to it by UN organs. The International Court of Justice (ICJ) has addressed the role and significance of UN Resolutions in various cases and advisory opinions. While the ICJ does not have the authority to determine the legal validity or binding nature of UN Resolutions, it has acknowledged their relevance and considered them as evidence of international law.

[35] https://www.icj-cij.org/public/files/case-related/89/089-19920619-ORD-01-00-EN.pdf

[36] https://www.icj-cij.org/case/70

[37] https://www.icj-cij.org/case/95

[38] https://www.icj-cij.org/case/131

[39] https://www.icj-cij.org/case/141

[40] https://www.icj-cij.org/case/148

[41] Dani Rodrik and Stephen M. Walt, How to Build a Better Order Limiting Great Power Rivalry in an Anarchic World, Foreign Affairs, September/October 2022. See *https://www.foreignaffairs.com/world/build-better-order-great-power-rivalry-dani-rodrik-stephen-walt.*

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