



WORKING PAPER

LEGAL COMMITTEE – 40TH SESSION

(Montréal, 26 – 30 October 2026)

Agenda Item 6: Any other business

**INTERPRETATION OF ARTICLE 89 AND THE RIGHTS OF
CONTRACTING STATES TO THE CHICAGO CONVENTION IN
TIME OF WAR**

(Presented by Islamic Republic of Iran)

1. INTRODUCTION

1.1 The *Convention on International Civil Aviation* was adopted on 7 December 1944 (the “Chicago Convention”), while the Second World War was still ongoing. Its drafters included Article 89 under the heading “War and Emergency Conditions”. The provision states that, in case of war, the Convention shall not affect the freedom of action of Contracting States affected, whether as belligerents or as neutrals. The same principle applies to a Contracting State declaring a state of national emergency and notifying the Council.

1.2 Despite its importance, Article 89 remains one of the least developed provisions of the Chicago Convention and has not been subject to a comprehensive and systematic interpretation by ICAO. Its principal ambiguities concern the meaning of “war”, the scope of “freedom of action”, the criteria for determining “belligerent” and “neutral” States, and whether a State may invoke Article 89 regardless of its role in creating the conflict.

1.3 The adoption of the Charter of the United Nations established a general prohibition of the threat or use of force under Article 2(4), subject to limited exceptions including self-defence under Article 51 and Security Council-authorized measures under Chapter VII. Accordingly, Article 89 cannot be interpreted independently of the contemporary international legal order. The central question is therefore whether Article 89 should be interpreted solely by reference to the legal concepts prevailing when the Convention was adopted, or in light of subsequent developments in international law, including the relevant rules applicable between Contracting States.

**2. INTERNATIONAL LEGAL DEVELOPMENTS IN RELATION
TO ARTICLE 89 OF THE CHICAGO CONVENTION**

2.1 Article 89 has a direct historical precedent in Article 38 of the *Convention relating to the regulation of Aerial Navigation* (Paris, 1919 – the “Paris Convention”), which similarly preserved the freedom of action of belligerent and neutral States in time of war. This continuity demonstrates the historical purpose of Article 89. Nevertheless, the two provisions operate within substantially different legal environments. The Paris Convention was adopted when war remained a legally recognized condition of international relations. Although the Covenant of the League of Nations and the 1928 Kellogg–Briand Pact sought to restrict recourse to war, a comprehensive prohibition of the threat or use of force had not yet

become a fundamental rule of international law. Following the adoption of the Charter of the United Nations in 1945, the legal framework governing the use of force underwent a fundamental transformation.

2.2 Under Article 31(3)(c) of the 1969 *Vienna Convention on the Law of Treaties*, treaty interpretation requires regard to relevant rules of international law applicable in the relations between the parties. Contemporary international law therefore cannot simply be excluded from the interpretation of a treaty because it developed after the treaty was concluded. At the same time, the intention of the parties and the legal circumstances prevailing at the time of conclusion remain relevant.

2.3 The ICJ has confirmed this approach, particularly in the *Oil Platforms* case. In interpreting Article 20(1)(d) of the 1955 Treaty of Amity between Iran and the United States, the Court stated that the Treaty could not operate entirely independently of the relevant rules of international law on the use of force. The Court therefore interpreted the treaty provision in light of the Charter of the United Nations and customary international law. The *Gabcikovo-Nagymaros Project* case, also demonstrates that treaty interpretation may take account of the evolution of international law. The Court recognized the relevance of evolving environmental norms to the implementation of the treaty, while the separate opinion of Judge Weeramantry emphasized that treaty implementation should not result in disregard for contemporary human rights and sustainable development principles.

2.4 Another relevant development is reflected in the International Law Commission's Draft Articles on the Effects of Armed Conflicts on Treaties (2011 – "the ILC Draft Articles"). Article 3 establishes that the existence of an armed conflict does not, in itself, terminate or suspend the operation of treaties, while Article 4 gives effect to treaty provisions specifically addressing armed conflict. This is particularly relevant to the Chicago Convention, as its Article 89 expressly addresses war and national emergency. Article 15 of the ILC Draft Articles further provides that an aggressor State cannot terminate, withdraw from, or suspend the operation of a treaty as a consequence of an armed conflict resulting from its act of aggression if doing so would be to its advantage. Although the ILC Draft Articles are not themselves binding, they reflect a contemporary legal approach to the relationship between armed conflict and treaty obligations. Accordingly, Articles 3, 4 and 15 of the ILC Draft Articles provide a relevant framework for assessing the "freedom of action" under Article 89 of the Chicago Convention, demonstrating that armed conflict does not, in itself, authorize disregard of treaty obligations, nor should an aggressor State derive a legal benefit from its own unlawful act.

2.5 The same approach is reflected in Articles 40 and 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. In cases of serious breaches of obligations arising under peremptory norms of general international law, States must cooperate to bring the breach to an end through lawful means, must not recognize the resulting situation as lawful, and must not render aid or assistance in maintaining it. Article 89 of the Chicago Convention should therefore be interpreted consistently with the general framework of State responsibility.

2.6 The terms "war", "neutral States", and "freedom of action", should not necessarily be regarded as having permanently fixed meanings. Where a treaty term is capable of evolution, its interpretation may take account of subsequent developments in international law. This is particularly important for "war", which must now be distinguished from the separate legal question of whether resort to force was lawful under the Charter. The existence of an armed conflict is an objective factual situation, while the legality of resort to force is a separate question governed by the law on the use of force. Article 89 should therefore not be interpreted as converting the existence of an armed conflict into an entitlement to exercise unlimited freedom of action.

2.7 The distinction between “belligerent” and “neutral” States also requires particular attention. Article 89 expressly refers to both categories, but the Chicago Convention does not define neutrality. In contemporary conflicts, a State may provide territory, airspace, military bases, communications or logistical infrastructure to one party without formally declaring war. Whether such conduct is compatible with neutral status therefore requires assessment under the relevant rules of international law and the actual conduct of the State, rather than solely its unilateral declaration. This assessment may also take into account the acts of aggression identified in Article 3 of United Nations General Assembly Resolution 3314 (XXIX).

3. ICAO COUNCIL PRACTICE AND ANALYSIS OF THE COMMENTARY ON ARTICLE 89

3.1 An examination of ICAO practice and the commentary contained in the *Repertory - Guide to the Convention on International Civil Aviation* (Doc 8900) indicates that ICAO has not, to date, provided a comprehensive and independent interpretation of the scope, limits, and legal effects of Article 89. The commentary in Doc 8900 similarly remains predominantly historical and descriptive. It does not establish clear criteria for determining “war”, “belligerent” or “neutral” status, nor does it define the scope of “freedom of action”.

3.2 The practice following the establishment of ICAO, including the declarations of Egypt and Iraq in 1949 and subsequent situations involving India, China, Pakistan, Iraq and Honduras, indicates that the Council’s role has primarily been administrative. The Council received, recorded, circulated and communicated notifications made by Contracting States concerning war or a state of national emergency, without undertaking a substantive determination of whether a “war” within the meaning of Article 89 existed or whether the legal consequences invoked by a State were consistent with its other international obligations.

3.3 A further difficulty is that Article 89 does not identify an authority competent to determine whether a state of “war” exists. It is therefore necessary to identify, on the basis of the relevant facts and applicable rules of international law, the States involved in the conflict, their respective legal status, and, where relevant, the State responsible for initiating the armed conflict through an act of aggression. Such a determination is essential for assessing whether, and to what extent, the freedom of action afforded by Article 89 may be invoked by each State. The Chicago Convention does not specify whether a unilateral declaration by a Contracting State is sufficient for the purposes of Article 89, whether the ICAO Council is competent to determine the existence of a war, or whether such a determination requires assessment by another international authority. ICAO practice to date does not resolve these questions.

4. CONCLUSION

4.1 Article 89 was formulated in a particular historical period but continues to operate within a fundamentally different international legal system. Its continued validity does not necessarily imply that its meaning remains unchanged. The interpretation of Article 89 requires consideration of the contemporary international legal framework, including the Charter of the United Nations, the law on the use of force, international humanitarian law, the law of neutrality, the law of State responsibility, and the law of treaties. Neither the text of the Chicago Convention nor the existing administrative practice of the ICAO Council alone provides sufficient guidance to resolve these issues. In this context, the Legal Committee could undertake a comprehensive study of the interpretation and application of Article 89, including its scope, legal effects and relationship with relevant rules of international law. Such a study could provide the basis for preparing a proposal for requesting an advisory opinion from ICJ, with a view to clarifying the scope and legal effects of Article 89, reducing the risk of conflicting interpretations by Contracting States, and strengthening ICAO’s role in safeguarding international civil aviation during armed conflicts.

5. ACTION BY THE COMMITTEE

5.1 The Legal Committee should undertake a comprehensive study of the interpretation and application of Article 89 of the Chicago Convention and prepare a report addressing relevant legal developments, State practice, ICAO Council practice and existing legal views. The study should examine, in particular:

- a) The Charter of the United Nations, including Articles 2(4), 51 and 103;
- b) The 1969 *Vienna Convention on the Law of Treaties*, particularly Articles 31 and 32;
- c) The rules on the international responsibility of States, including serious breaches of obligations arising under peremptory norms;
- d) The ILC Draft Articles on the Effects of Armed Conflicts on Treaties (2011); and
- e) The principles of international law relating to neutrality and the legal status of neutral States.

5.2 The Legal Committee should also prepare a proposal for requesting an advisory opinion from the ICJ and submit it for approval to the ICAO Council or the Assembly, focusing on the following questions:

- a) Should Article 89 be interpreted in light of developments in international law since the adoption of the Charter of the United Nations, in particular the prohibition of the threat or use of force? If so, what is meant by “war” in this provision?
- b) Can a State that has caused an armed conflict through a violation of fundamental obligations under international law invoke that situation in order to benefit from Article 89?
- c) In view of United Nations General Assembly Resolution 3314 (XXIX), can a State that provides its territory or infrastructure for the armed operations of one of the parties to the conflict and commits an act of aggression benefit from the status of a neutral State under Article 89?
- d) Is the “freedom of action” referred to in Article 89 an absolute discretion extending to all obligations under the Chicago Convention, or is its exercise subject to other applicable rules of international law, including proportionality, necessity, and the principle that a State may not derive a legal benefit from its own unlawful act?
- e) Is a State’s mere declaration of the existence of a war or a state of national emergency sufficient to benefit from Article 89, or does such benefit require an independent legal assessment? If so, which authority or authorities are competent to make such a determination?
- f) In a situation of war between two or more States, is the “freedom of action” referred to in Article 89 limited to international obligations between the States involved in the war or between those States and neutral States, or may it, where the circumstances of the war so require, extend to the international obligations of the States involved in the war vis-à-vis other States?

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