

THE DOWNING OF FLIGHT MH17 IN CONTRAVENTION OF ARTICLE 3BIS OF THE
CONVENTION ON INTERNATIONAL CIVIL AVIATION
(*AUSTRALIA AND THE NETHERLANDS v. THE RUSSIAN FEDERATION*)

**REPLY OF AUSTRALIA AND THE KINGDOM OF THE NETHERLANDS
TO THE
COUNTER-MEMORIAL OF THE RUSSIAN FEDERATION**

28 JULY 2023

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not governed by this Convention’.¹³⁹

3.54 Article 89 does not say that the Convention only applies in peacetime, or that it does not apply ‘in case of war’, that being the kind of language that would have been used if it was intended to set aside the whole of the Convention in time of armed conflict. The text of Article 89 therefore provides no support for the Russian Federation’s claim that it should be characterised as a provision excluding the application of the Chicago Convention in armed conflict.¹⁴⁰ There is no warrant for reading Article 89 as if it contained limiting language that is not there.

3.55 The text of Article 89 also stands in clear contrast to the language used in other Articles of the Convention when it was intended to exclude the application of certain provisions of the Convention in particular circumstances. For example, Article 3(a) provides that ‘[t]his Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft’, while Articles 41 and 42 provide that ‘[t]he provisions of this Chapter shall not apply to’ certain types of aircraft and aircraft equipment and to certain personnel respectively.

3.56 The Russian Federation’s attempt to treat the reference to ‘freedom of action’ in Article 89 as equivalent to a statement that ‘the Convention does not apply’ should be rejected.¹⁴¹ The ‘freedom of action’ to which Article 89 refers is to the freedom of action that international law (including, in particular, international humanitarian law) allows to belligerents and neutrals in situations of armed conflict. Thus, it is only actions that are lawful under international law that fall within the ‘freedom of action’ referred to in Article 89, there being no ‘freedom’ to engage in conduct that is prohibited by international law. This is important, because international humanitarian law only allows for civil aircraft to

¹³⁹ See for example, Article 3bis(2) of the *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971) as introduced by Art VI of the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 10 September 2010, ICAO Doc 9959 (entered into force 1 January 2018) [**Annex 18 to the Reply of Australia and the Netherlands to the Preliminary Objection of the Russian Federation**]; Article 6(2) of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, opened for signature 10 September 2010, ICAO Doc 9960 (entered into force 1 July 2018) [**Annex 19 to the Reply of Australia and the Netherlands to the Preliminary Objection of the Russian Federation**]; Article 3 of the *Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001) [**Annex 18**].

¹⁴⁰ Counter-Memorial of the Russian Federation, [184] and [187]. While it may be accepted that Article 89 is a ‘provision on the operation of treaties’ in accordance with Article 4 of the Draft Articles, an armed conflict exclusion clause is only one form of a ‘provision on the operation of treaties’ referred to in Article 4.

¹⁴¹ Counter-Memorial of the Russian Federation, [180].

be the object of an attack in very limited circumstances, which are irrelevant to this case.¹⁴² Outside those circumstances, parties to an armed conflict have no ‘freedom of action’ to make civil aircraft the object of an attack, and Article 89 therefore provides no justification for such conduct.

3.57 Properly interpreted, Article 89 establishes that during armed conflict (‘in case of war’), the provisions of the Convention do not change or influence (‘shall not affect’) the rights and obligations (‘freedom of action’) afforded to a contracting State as a belligerent or neutral under international humanitarian law. In other words, Article 89 makes clear that the provisions of the Convention continue to apply in accordance with their terms *except to the extent* that they would affect the ‘freedom of action’ afforded to a party to an armed conflict consistent with international humanitarian law (which only permits the targeting of military objectives). It is undisputed that Flight MH17 was not at any time a military objective.

3.58 Having ignored the words of Article 89 and the rules of treaty interpretation, the Russian Federation’s relies heavily on selective quotations and misrepresentations of academic literature to support its interpretation of Article 89. Not only is the academic commentary on Article 89 limited and somewhat divided, such sources cannot be used to displace the ordinary meaning of the Article derived in accordance with established principles of treaty interpretation (which give primacy to its text).¹⁴³ Furthermore, many of the sources quoted by the Russian Federation in its Counter-Memorial, when read in full, do not in fact support its argument. For example, in citing the works of former ICAO Chairman Michael Milde,¹⁴⁴ the Russian Federation omits the subsequent statements by Milde where he states that certain provisions of the Chicago Convention, including the duty of States to refrain from the use of weapons against civil aircraft in flight in Article 3bis, would not be suspended even during hostilities.¹⁴⁵

3.59 The Russian Federation also quotes from Huang Jifang who recalls the varied

¹⁴² *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), Art 52. For example, when a civilian airline has lost its protection as a civilian object and has become a military objective because of its military use.

¹⁴³ Academic commentary is not included as a source of treaty interpretation under Articles 31 and 32 of the VCLT. Under Article 38(d) of the ICJ Statute, recourse can be made to ‘the teachings of the most highly qualified publicists... as a *subsidiary* means for the determination of rules of law’. (emphasis added)

¹⁴⁴ Counter-Memorial of the Russian Federation, [181].

¹⁴⁵ Michael Milde, ‘Aeronautical consequences of the Iraqi invasion of Kuwait’ (1991) 16 *Journal of Air Law* 63, 72 [**Appendix 64 to the Counter-Memorial of the Russian Federation**].