5-1-1965

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Recommended Citation

John Cobb Cooper, The Chicago Convention -- After Twenty Years, 19 U. Miami L. Rev. 333 (1965)

Available at: http://repository.law.miami.edu/umlr/vol19/iss3/1
THE CHICAGO CONVENTION—AFTER TWENTY YEARS*

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The Chicago Convention on International Civil Aviation signed December 7, 1944 came into force just eighteen years ago on April 4, 1947. It is an international agreement "on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically." It created the International Civil Aviation Organization, an inter-governmental agency later affiliated with the United Nations.

The success of the Chicago Convention as a major international regulatory arrangement can be measured by the fact that 108 states have ratified or adhered to it as a formal treaty and have thereby become members of the International Civil Aviation Organization (ICAO). All of these states except the Federal Republic of Germany, Indonesia, Republic of Korea, Switzerland and Viet Nam are also members of the United Nations. At the same time certain members of the United Nations are not members of ICAO, namely: Albania, Bulgaria, Burundi, Byelorussian SSR, Hungary, Mongolia, Romania, Togo, Uganda, Ukrainian SSR, Union of Soviet Socialist Republics.

Delegates from Moscow were actually en route to the Chicago Conference in 1944 when suddenly recalled without explanation. The Union of Soviet Socialist Republics has never since shown public interest in adhering to the Convention. But nevertheless, the principles of the Chicago Convention and its regulations have been accepted by a

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* This is a speech delivered on April 8 at the Second Interamerican Aviation Law Conference held at the University of Miami School of Law, April 6, 7, 8, 1965.

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large majority of the world powers actively engaged in international civil aviation.

The twenty years which have passed since the Chicago Convention was signed have witnessed giant strides and startling new developments in man made flight, both in the airspace and in space beyond. It seems useful therefore, to review briefly to what extent the Convention has stood the test of time and also to examine possible present and future weaknesses. Certain major fields are of particular importance. These are:

I. The Convention as a continuing vehicle for the restatement of principles of international law.

II. The general nature of the International Civil Aviation Organization (ICAO).

III. The relationship between the Convention and its Technical Annexes.

IV. Some major ambiguities in the Convention.

V. Can the Convention continue to function successfully in the light of present and future outer space developments?

I. PRINCIPLES OF INTERNATIONAL LAW IN THE CONVENTION

The Convention has served as a useful and powerful vehicle to restate certain principles of international law applicable world-wide, irrespective of ICAO membership. These are: (a) sovereignty of each state in its airspace; (b) freedom of flight over the high seas; (c) nationality of aircraft as transport instrumentalities; and (d) special limitations on flight of “state” aircraft.

A. Airspace Sovereignty

Article 1 of the Convention states that “The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”

This was a restatement of similar provisions in the Paris Convention of 1919 and the Havana Convention of 1928. My own views are, I believe, well known. It is true that between 1900 and 1914 there were certain over-emphasized doctrinal disputes as to whether the “air” was free. But I have long been convinced after years of careful historical research that interested states prior to the Paris Convention had factually assumed that national territory is three dimensional, including then usable space above its land and waters. The quoted article means that every member state of ICAO has formally acknowledged that airspace above national lands and waters is an integral part of the territory of a subjacent state whether the latter is or is not a member of
ICAO. Article 1 thus states international law believed to have already had world-wide acceptance when the Chicago Convention was signed.

The decision to include this important provision at Chicago was not accidental. It had been recommended in substance in the British statement of position and had been included practically verbatim in the Canadian draft convention. The United States, on the other hand, had presented a draft convention which would have provided that the high contracting parties recognized that each contracting state has complete and exclusive sovereignty over its airspace. The conference did not accept the limited United States proposal but reasserted the broad provisions of the Paris and Havana Conventions, thereby accepting again the principle of airspace sovereignty as an existing part of international law applicable world-wide.

B. Freedom of Flight over the High Seas

The principle that the seas are a highway open to all nations and subject to the sovereignty of none is one of the foundations of international transport law. Long before the Chicago Conference it had been asserted that the same freedom should be available to aircraft flying over the high seas as was enjoyed by vessels on the surface. For example, the report of the drafting committee at the Paris 1919 Conference said: "It is only when the column of air rests on a res nullius or communis, the sea, that freedom becomes the rule of the air." This principle was finally affirmed in article 12 of the Chicago Convention dealing with "rules of the air." This requires each contracting state to keep its own rules of the air uniform to the greatest possible extent with those established from time to time in the Convention. But it then adds that "over the high seas the rules in force shall be those established under this Convention." The legal effect is clear. Member states thus admit that they have no sovereignty in space above the high seas and thus no power to regulate the flight of any aircraft except their own. They have then delegated to ICAO the right to adopt rules of the air which shall be applicable to their aircraft in this non-sovereign area without exception or limitation. These rules must be complied with by the civil aircraft of all ICAO states. The legal status of usable space over the high seas has since been formally restated in the "Geneva 1958 Convention On the High Seas." This includes the "freedom to fly over the high seas" as one of the elements of the freedom of the seas. It should be noted that neither the Chicago nor Geneva Conventions limit this freedom to the "airspace."

C. Nationality of Aircraft as Transport Instrumentalities

Chapter 3 of the Convention is entitled "Nationality of Aircraft." Article 17 states that "aircraft have the nationality of the State in which
they are registered," and article 18 provides that an aircraft cannot be validly registered in more than one state but that its registration may be changed from one state to another. The term "nationality" is nowhere defined but the term has long had a well known background in international maritime law. A ship flying the flag of a sovereign state is said to have the nationality of that state. The latter thereby accepts responsibility to other states for the public good conduct of the ship and is internationally authorized to see to it that the ship enjoys the rights and privileges to which it may be entitled as against other states.

At the first important international aviation conference held in Paris in 1910 it was agreed in substance that aircraft should have the maritime law characteristics of "nationality" and the principle has since been accepted. Article 6 of the Paris Convention of 1919 is practically identical with article 17 of the Chicago Convention. The provisions as to registration in the Chicago Convention are legislative and effective between member states of ICAO. They apply only to civil aircraft. On the other hand international law applies the characteristic of nationality to all aircraft, state and civil, whether or not operated by a member state of ICAO. Registration does not confer nationality but is merely evidence thereof.

D. Special Limitations on Flight of State Aircraft

The Convention by its title and major provisions establishes legislative rules as to civil aircraft. Article 3(b) provides that aircraft used in military, customs and police service shall "be deemed State aircraft," but does not say that no other aircraft used by a state shall be so deemed. Article 3(c) then provides:

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.

It is submitted that the term "territory" as thus used refers to the technical definition of territory contained in article 2 of the Convention where it is described as "land areas and territorial waters adjacent thereto" and that the prohibition should be construed to apply to state "aircraft" flying in the "airspace" as the terms were then understood.

International maritime law has traditionally permitted a sovereign state to regulate strictly the conditions under which foreign warships are permitted to enter its ports. Before World War II a similar customary rule was widely effective as to military aircraft. Article 3(c) merely restated the understanding that state aircraft may not use the airspace or surface territories of another state without the latter's specific permission. It is my understanding that the article was inserted
in the Convention so as to assure continued acceptance of the general rule and to make it clear that rights of entry provided in the Convention would not apply to state aircraft.

II. THE GENERAL NATURE OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

Among the most important provisions of the Convention are those creating the International Civil Aviation Organization (ICAO). The miracle is that an international conference working under continuous and sometimes controversial pressure between November 1 and December 5, 1944 could have produced an organization which has functioned so well. The final statement as to its powers and duties was of course a compromise. It is not an international "Civil Aeronautics Board" such as Great Britain proposed and Canada supported in modified form, with the objective that the Board would grant international route certificates and exercise control generally over capacity, frequency of flights and rates. I have often wondered what would now be the international transport situation if that type of organization had been created. Instead, ICAO was given strong technical powers together with economic functions applicable generally within the advisory and research fields. After twenty years I am convinced that the decisions made at Chicago were sound.

III. THE RELATIONSHIP BETWEEN THE CONVENTION AND ITS TECHNICAL ANNEXES

Many of the American republics, including the United States, have strict constitutional and legislative provisions applicable to the ratification of a treaty and of any amendment to it before the same can become effective. One of the major objectives of the Chicago Convention is, as stated in the preamble, to agree on "certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner . . . ." To meet similar objectives the Paris Convention had contained technical annexes designed to assure uniform regulations wherever the Convention was in effect. These annexes were parts of the Convention, but nevertheless could be modified by the internal machinery provided in the Convention without the amendments going back to states for formal ratification. A weakness of the Havana Convention was that it had no adequate machinery for the adoption of uniform regulations.

One of the major problems behind the scenes at Chicago was how to provide practical international uniformity of flight regulations without infringing on the constitutional procedures of those states which require formal ratification of treaty amendments. A compromise was finally adopted which I believe has worked well. Article 37 contains a statement that each contracting state undertakes to collaborate in securing
the *highest practicable degree* of *uniformity* in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which uniformity will facilitate and improve air navigation. ICAO is then directed to adopt and amend from time to time international standards and recommended practices and procedures dealing with such matters as communications systems and air navigation aids, characteristics of airports, rules of the air and traffic control practices, licensing of operating and mechanical personnel, air worthiness of aircraft, registration and identification of aircraft, meteorological information, maps, customs and immigration procedures, aircraft in distress and investigation of accidents and "such other matters concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate."

Article 38 requires member states of ICAO to notify it when any state finds it impracticable to comply with such standards or to bring its own regulations or practices into full accord therewith. Article 54 directs the Council of IACO to adopt such international standards and recommended practices and "for convenience designate them as annexes to this Convention."

It was fully understood at Chicago, and is apparent from the test of the Convention, that the annexes when adopted do not thereby become parts of the Convention. But in practice, so I understand, wide uniformity of regulations has nevertheless resulted. At the same time the convention has been ratified by many states which would have had difficulty in accepting it with a delegation of power to ICAO which might have resulted in modifying the annexes as parts of the Convention without re-ratification. I believe that the compromise arrived at in Chicago was wise and has been successful.

In the Department of State Bulletin of March 11, 1945, published shortly after the Chicago Conference, Mr. Stephen Latchford, then air law adviser in the aviation division of the State Department and one of the advisers to the United States delegation at Chicago, wrote:

Although it is evident from the proceedings and Final Act of the Chicago Aviation Conference that it is expected and urged that all the countries becoming parties to the Convention shall cooperate with a view to attaining the highest degree of uniformity with reference to the application of international standards and practices, it was realized by the delegates at Chicago that there might be some exceptional cases where a particular country would find it highly desirable and necessary to adopt some departure from an international standard. This, it is believed, will not constitute any serious impediment to the general acceptance and application of uniform international standards and practices and it is thought that the various states will accept and apply them to the greatest extent possible.
IV. SOME MAJOR AMBIGUITIES IN THE CONVENTION

The passing of time has brought out certain ambiguities and difficulties in the language of parts of the Convention. But none have destroyed its usefulness. Perhaps the major difficulties have been encountered in articles 5 and 6 dealing with non-scheduled and scheduled flight, in article 15 dealing with airport and similar charges, and in article 77 dealing with joint air transport operating organizations.

Article 5 authorizes aircraft of other contracting states "not engaged in scheduled international air services" to make flights into or non-stop across the territory of a contracting state and to make stops for non-traffic purposes without the necessity of obtaining prior permission. It also authorizes such aircraft, if engaged in the carriage of passengers, cargo or mail for remuneration to have the privilege of taking on or discharging the same, subject to the right of any state where such embarkation or discharge takes place "to impose such regulations, conditions or limitations as it may consider desirable."

Article 6 states flatly that no scheduled international air service may be operated over or into the territory of a contracting state except with the special permission of such state and in accordance therewith.

The term "scheduled" was not defined, though on such definition rests the decision as to whether a particular international air service is entitled to the privileges described in article 5 or is subject to the strict limitations of article 6. Questions also arose as to whether prior permission was needed for non-scheduled passenger and cargo flights and as to the nature of the "regulations, conditions or limitations" which might in that case be imposed.

Article 84 of the Convention authorizes the Council of ICAO to decide any disagreement between contracting states relating to the interpretation or application of the Convention. In the absence of such formal dispute the power of ICAO to construe is doubtful. In this situation the second and fourth assemblies of ICAO took cognizance of the difficulties created by articles 5 and 6 and requested the Council to provide a definition of the term "scheduled international air services" for the guidance of contracting states, and also to present an analysis of the rights conferred by article 5. The Council formally complied with these directions. A summary in part of its decisions can be found in ICAO document 7278-C/841 as follows:

Definition of a Scheduled International Air Service

A scheduled international air service is a series of flights that possesses all the following characteristics:
(a) it passes through the air-space over the territory of more than one State;

(b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;

(c) it is operated, so as to serve traffic between the same two or more points, either
   (i) according to a published time-table, or
   (ii) with flights so regular or frequent that they constitute a recognizably systematic series.2

After defining what was meant by a scheduled air service the Council analyzed article 5. It found that no permit should normally be required of non-scheduled transport as this would render this form of air transport impossible or non-effective. But it also found that the right of each state included the right to require special permission for the operation of taking on or discharging such passengers, cargo or mail in its territory, or for any specified category of such operations.

While it is understood that certain states then advised ICAO that they had not accepted the definitions and recommendations referred to above, nevertheless during the thirteen years that have intervened no serious disputes appear to have developed, even though the ICAO decisions are not technically binding on member states.

Article 15 of the Convention deals with airport and similar charges. Its provisions, in my judgment, constitute definite limitations on the general power of a state to fix charges for the airports and navigation facilities constructed on its territory. It provides in substance that airports and air navigation facilities open to public use by national aircraft shall also be open under uniform conditions to the aircraft of all other contracting states; that charges imposed for the use of such airports and air navigation facilities shall not be higher than those paid by national aircraft for similar services; and that charges imposed shall be subject to review by the Council of ICAO which shall make recommendations thereon for the consideration of the state or states concerned. No authority is given to contracting states by the Convention to impose charges for other than the use of such airports or facilities. Also no provision is made in article 15 that a decision by the Council as to particular charges shall be binding on the states concerned. Of even more importance is the fact that the article ends with the following provision:

2. This definition was adopted by the Council on March 25, 1952 for the guidance of contracting states in the application of articles 5 and 6 of the Convention.
No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory or any aircraft of a contracting State or persons or property thereon.

It is understood that ICAO now has under consideration certain applications of this article. Important questions are obvious. Can a state make any charges against foreign aircraft when its national aircraft used in similar service are not subject to charges? Can a state assess charges merely because it has provided airports, and such air navigation facilities as radio and weather information? Can a state levy charges against aircraft flying over the high seas when the aircraft concerned does not enter the territory of that state? Can a state levy charges for air traffic control services and require payment of such charges by aircraft beyond its territory even though such service is not required or desired by the aircraft concerned? In such case is the quoted provision in the article applicable which denies the right to levy charges based solely on the right of transit over or entry into or exit from the territory of the state concerned? These and other similar questions have not been as yet definitively settled. It is of interest that the only court decision of importance involving article 15 arose from operations of the Miami airport. 8

Article 77 states that nothing in the Convention shall prevent two or more contracting states from constituting joint air transport operating organizations or international operating agencies. It further provides that "the Council shall determine in what manner the provisions of this convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies." Questions have arisen as to whether some form of international registration might be provided under this article, notwithstanding the provisions of articles 17 and 18 which state that aircraft have the nationality of the state in which they are registered and that an aircraft cannot be validly registered in more than one state.

In 1960, ICAO assembled a panel of experts to advise the Council on various questions raised by article 77, and in particular on the application of the last sentence dealing with nationality of aircraft operated by international operating agencies. In this report to the Council this panel concluded, among other things, that the power of the Council under the last sentence of article 77 must be limited to determining the manner in which the provisions of the Convention relating

to nationality shall apply and that such power does not extend to authorizing operation under the Convention of an aircraft without nationality. The panel felt that only aircraft having nationality of a contracting state are entitled to the privileges of the Chicago Convention "since by the terms of that treaty such privileges are given only to States as distinguished from international organizations." This was apparently a majority decision of the panel. These questions have now been re-opened.

On December 11, 1964 the Council of ICAO asked the Chairman of the Legal Committee to appoint a subcommittee to make a study and report. The subcommittee will meet later this year and its decisions will thereafter be acted upon by the full Legal Committee of ICAO. It is obvious that the problem created by the organization of international operating transport units must be settled, with particular reference as to how the aircraft operated by such units shall be registered, and on what state or states shall rest the responsibility that the aircraft in question comply with the provisions of the Convention.

V. CAN THE CONVENTION CONTINUE TO FUNCTION SUCCESSFULLY IN THE LIGHT OF PRESENT AND FUTURE OUTER SPACE DEVELOPMENTS?

The Convention, as signed at Chicago in 1944, with its annexes as later adopted, has limited application as to the areas in which its rules are in force, and as to what flight instrumentalities are governed by these rules. By its terms the Convention applies only to civil aircraft. As to other aircraft each state retains its individual power of regulation. Of even more importance the Convention does not define the term "aircraft." Nor does it define the term "airspace."

Today, man-carrying flight-instrumentalities are in use high above the areas deemed usable in 1944. The question is: Can the Chicago Convention as now framed survive these changes, or are we to be faced with two different international organizations, one regulating "civil aircraft" operating in the airspace with no power over state aircraft operating in the same areas, nor any power to regulate flight beyond the airspace, and another organization dealing with flight-instrumentalities which can operate through the airspace into areas beyond?

In this situation, a primary weakness of the Convention flows from the self-imposed limitations under which ICAO now operates in determining the flight-instrumentalities to which its rules apply. More than forty years ago the parties to the Paris Convention adopted, through one of its binding annexes, a definition to the effect that the word "aircraft" shall comprise all machines which derive support in the atmosphere from reactions of the air. Later the United States in the Air Commerce Act of 1926 adopted the following definition:
Aircraft means any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air.

It will be noted that the United States definition included instrumentalities *used* for flight in the air while the older Paris definition was limited to machines which can derive support in the atmosphere from reactions in the air.

At Chicago in 1944, when tentative annexes were under consideration, the United States suggested a definition similar to that in the Air Commerce Act quoted above. But this was not accepted and a definition was recommended substantially the same as the one in the Paris Convention. When the annexes to the Chicago Convention were finally adopted, annex 7 stated the following definition following the Paris Convention:

*Aircraft*—Any machine that can derive support in the atmosphere from the reactions of the air.

No effort, so far as I am advised, has ever been made to widen this definition. As a result ICAO has imposed on itself the limitation that its rules do not apply to flight-instrumentalities used in the air unless such instrumentalities can derive support in the atmosphere from the reactions of the air. Obviously the ICAO definition will not apply to most spacecraft and satellites even while passing through the airspace en route toward outer space or when returning. As to those instrumentalities which may be operated through the airspace using partial atmospheric lift, an even more difficult question must be answered—are they aircraft or are they spacecraft and when does the Chicago Convention apply if at all?

Certainly the rules of the Chicago Convention are in force only in the “airspace.” But again this area has not been defined. The sovereignty of the subjacent state, one of the primary and basic rules of the Convention, ceases to be effective beyond the airspace. The recent unanimous resolutions of the United Nations make it apparent that we now have general international agreement to the effect that outer space is like the high seas, namely not subject to the sovereignty of any state. But where is the line between the airspace in which ICAO regulations are effective and outer space beyond? It seems obvious that there must be international regulation of the registration, responsibility and general conduct of flight-instrumentalities usable in outer space. If this results in a second international organization, grave confusion may well result, as ICAO has no effective jurisdiction beyond the use of “aircraft” in the “airspace.”

While it is quite true that most instrumentalities usable in outer space are not civil in character but are launched and controlled by a
particular state, nevertheless this will not always be true. It is my understanding that the communications satellites to be put in use by the Communications Satellite Corporation, a United States privately owned body, are in no sense "aircraft," are not subject to ICAO regulations, but might well be subject to rules adopted by a new organization set up to control outer space flight. In that event the ICAO rules could not apply to such satellites when being launched through the airspace, but they could well be subject to the rules of a new outer space organization even while passing through the airspace.

These remarks indicate very briefly my personal grave concern as to the future of the Chicago Convention if its powers continue to be limited solely to civil aircraft (as now defined) when in the airspace. As long as flight-instrumentalities, which required no support from reactions of the air, were not used, and as long as flight operations were limited to the use of the "airspace," then the Chicago Convention might have survived for many years to come. But under present conditions its future may be subject to international difficulties which may well be fatal. This problem must be faced. It seems obvious that a single set of future rules must govern all international flight, at whatever altitude. Whether the Chicago Convention can meet this test is most doubtful.