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General Elements of the ICAO—International Civil Aviation Organization Activities

Filip Turčinović
University "Nikola Tesla", Belgrade, Serbia
Aleksandar Kovačević
University "Mediteran", Podgorica, Montenegro

The International Civil Aviation Organization (ICAO) is a specialized agency of the United Nations. Functionally, it has emerged as the organizational necessity of both the universal complex structure and the importance of its overall activity. It was created on the basis of Article 57 of the *United Nations Charter*, stipulating that the specialized UN agencies are autonomous international organizations. They enjoy their autonomy on the basis of the contract they were established by, being engaged in activities within the United Nations system. On the territories the organization member states comprise, they enjoy privileges and immunities, having the international legal capacity to carry out their activities in accordance to the Statute. *The 1944 Multilateral Convention* was to establish both protection and efficient development of international civil aviation. In accordance to that rights and obligations of member states were established. It is of a special importance to emphasize obligation of parties to take their parts in both co-operation and programs aimed at improvement of international transport, navigational equipment, and installations. In the globalized world of today, air traffic is an irreplaceable part of the system of communication. It enables fast and timely business contacts between the people from various continents, as well as transport of goods.

Keywords: civil aviation, air navigation, air traffic, aviation, specialized agency, non-government international organizations, security

Introduction

The very beginnings of the international legal regulation of civil aviation are related to the 1919 Paris International Conference. From these right-heartedly beginnings to our day, we could see that the international legal aspect is rich in content since many issues of the area have been regulated. It should be noted that there are many unregulated questions as well.

At the end of the World War Second, the United States invited 55 countries to participate in the Chicago International Conference held from November 1 to December 7, 1944. At that meeting, the *Chicago Convention on Civil Aviation* was signed.

The limit of the application of national law in a limited sense is partially regulated by the *1958 Geneva Convention on Territorial Sea and Foreign Belt*. When it comes to the airspace, there is not a limit beyond the

Filip Turčinović, Ph.D., professor, Business and Law Faculty, University "Nikola Tesla", Belgrade, Serbia.
Aleksandar Kovačević, Ph.D., assistant professor, Faculty of Law, University "Mediteran", Podgorica, Montenegro.
Correspondence concerning this article should be addressed to Filip Turčinović, Business and Law Faculty, University "Nikola Tesla", Kneza Mihaila 33, Belgrade 11000, Serbia.

objective spatial level vertically above the territories of the states.

It should be emphasized that in the open sea the right of over-flight in this zone is regulated by the *1958 Geneva Convention*. The open sea is the zone outside the territorial sea. In this zone, the right of navigation is also enjoyed by landlocked states, implying therefore co-operation between coastal and landlocked countries in order to make their ships and sea-farers able to get free access to the open sea.

The 1944 Chicago Convention

Analogously to the above stated, the *1944 Chicago Convention* establishes the right of over-flight across the territories of the contract parties for the purpose of making civil aviation do its business at large. That does not affect the right of sovereign states to establish the national legal order on their territories. Sovereign states are also due to execute their international legal obligations in good faith.

At the Chicago Conference itself, two opposing principles came into being: 1) sovereignty one with supporters advocating consistent compliance with the principle; and 2), contrary to that, the principle supporting the complete freedom of airspace.

The Convention applies to civilian aircrafts. State aircrafts are not covered by the Convention. That creates serious difficulties as there is no precise definition of aircrafts not comprised by the category of military ones, such as police, postal, and customs aircrafts. The category includes aircrafts of the Head of State or of the Prime Minister. On the basis of the Article 3 of the Convention, these planes may fly over or land in another state only on the basis of an explicit permission.

The unauthorized entry into the airspace of another state of a civilian and, in particular, a military aircraft is considered a threat to the security of the given country, allowing it to take the appropriate measures. Specific problems in these cases are entries of civilian aircrafts, because in the event of refusal of the crew to land a plane, the coercive measures could be applied. If the entry of the kind is motivated by failure or is unintended, the remedial measure is considered to be unlawful one.

One could say that the most essential and the most important provision of the Convention is the Article 5 which provides that “all civilian aircrafts registered in the contracting parties shall be entitled, unless they are engaged on the basis of an international flight order to provide international services, to fly over the territories of the member states and to land on them in the cases of non-traffic non-commercial necessities”.

Contrary to that, an aircraft engaged in international aviation services does not enjoy the same rights, since the contracting parties taking their parts in the Chicago Conference did not agree on a generally accepted model of commercial exploitation in international air traffic.

However, numerous bilateral agreements between the states, concerning commercial cooperation, have arisen on the basis of the *Chicago Convention* provisions. The right to free air navigation is among them. The importance of this right is reflected in the fact that it allows transit to countries without a fixed flight order.

Therefore, legal rules outside the corpus of the *Chicago Convention* on mutual commercial rights and obligations of participants in international air traffic have been created. They are comprised by the following two legal documents: 1) agreement on international air transport; and 2) agreement on international air transit. These two agreements grant aircrafts of member states the right to over-fly and land in their territories in the event of technical malfunction. The right applies to civil aircrafts only.

The Final Act of the Chicago Conference allows for greater freedom of contract and includes models of particular contracts.

1. Agreement on transport: This agreement comprises the following five freedoms: 1) the right of innocuous fly-over of the state territory without landing; 2) the right to lend for commercial purposes; 3) the right to disembark passengers, post and goods from the state they originate from; 4) the right to disembark and board passengers; and 5) the right to discharge mail and goods intended for the territory of any contracting state.

2. Agreement on transit: This Agreement has been known as the Agreement on two freedoms, as follows: 1) the right on fly-over a territory without landing; and 2) the right on landing for non-commercial purposes.

Establishment of ICAO

The necessity of unique arrangement of international aviation is indisputable, primarily because economic relations are of a global character and therefore have to be arranged uniformly. Otherwise, unsolvable problems may arise. How complex this problem is shows the number of already established international governmental and international non-governmental organizations regulating numerous issues of both their overall activities and security.

Non-governmental international organizations mainly regulate the domain of commercial and professional statuses of employees in airline companies.

The path of establishment of the organization is specific. It was necessary to make an agreement on the provisional determination of both air routes and provision of services. ICAO officially started operating in 1947 as an intergovernmental international organization. Its headquarters are in Montreal, Canada. It has been operating operational issues in this field since 1945. Later on, it has become a specialized organization of the United Nations.

It deals with standardization tasks and making agreements between contracting parties by regulating almost all technical, economic, and legal aspects of international civil aviation. It has a prevalent institutional structure that allows it to perform the very complex tasks.

When a state becomes a member of the ICAO, it accepts responsibility for the application of its rules. The member states are required, in accordance to the Article 38 of the *1944 Chicago Convention*, to notify the ICAO of differences between national rules and standards adopted by the ICAO. This is particularly important when national regulations take precedence in relation to international regulations.

ICAO has the following seven regional offices: Bangkok, Cairo, Dakar, Lima, Mexico City, Nairobi, and Paris. The role of the regional offices is to further assist the development of civil aviation in the domain of services, to create additional procedures in the case of high density traffic, and to introduce new types of aircrafts.

Law Within the ICAO

ICAO has a very rich activity in the field of creation of law, but it also realizes it through participation in numerous traditional forms of both creation and establishment of international law in this area. In this area, a great importance is given to its Legal Committee. It is open to the initiatives of all member states concerning international legal issues of air navigation. It has been given the authority to prepare draft legal documents and submit them to rapporteurs or to the subcommittee. After considered by the rapporteur and by the subcommittee, the Legal Committee makes a decision whether to accept a draft convention or not. The Committee also decides whether to propose holding of an international conference where, after considered by the states, it would decide whether to adopt the document or not.

A number of legal documents are known as adopted in this way.

These are the following very important international documents:

(1) At the 1963 Tokyo Conference, the Convention on criminal and other acts carried out on aircrafts was adopted. The Convention refers to unlawful acts committed on board an airplane on a flight outside the territory of a state and on the high seas. The aircraft's crew has been authorized by this Convention to undertake appropriate measures for the safety of both the aircraft and passengers. In accordance to the terms of this Convention, a state has the discretionary power to make extradition of the offender or not. It has the right to prosecute the offender.

(2) At the 1970 Hague Conference the Convention on suppression of unlawful abduction of aircrafts was adopted.

According to the provisions of that Convention, the abduction of an airplane is defined as an act performed during the flight of the aircraft, in the following ways:

(a) Unauthorized violent takeover of an aircraft or control over it, or an attempt to do one of those two procedures;

(b) Acting as an accomplice of a person who makes one of these proceedings or tries to.

(3) At the 1971 Montreal Conference, the Convention on the suppression of unlawful acts focused against the safety of civil aviation and its Protocol were adopted.

The Montreal Convention has established an offence against the security of civil aviation as:

(a) Any acts of violence directed against a person in an aircraft in flight;

(b) Destruction or damage to aircraft;

(c) Placing a destructive material in a plane.

(4) Destruction or damage to navigation devices or unauthorized interference with its operation.

(5) Reporting the wrong data.

In accordance to provisions of these Conventions, states are due to penalize abductors with severe penalties on the basis of their criminal legislation or to extradite them to the state in which the aircraft was registered.

Obviously, this procedure is not legislative. The norms are valid only in those countries that have given their consent to be obliged. Of course, these are the 1944 Convention member states.

Pursuant to the provisions of the above mentioned Convention, the ICAO Council has been granted the authority to prescribe aviation standards without the obligation to undergo the contract making proceedings[1].

This is the way the Annexes to the Convention entitled "International Standards and Recommendations for Practice" concerning international air navigation, safety, and efficiency have been adopted[2].

According to the interpretations of the ICAO Assembly, the standards are in fact a uniform application recognized as necessary for both the safety and accuracy of international aviation navigation, accordingly harmonized to the Chicago Convention by the contracting parties without the possibility of disagreement included. The above is mandatory submitted to the ICAO Council[3].

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[1] The Council is consisted of 33 to 36 members from the ICAO Statute member states.

[2] See the *Chicago Convention*, Articles 28, 37, 38, Annexes are adopted by a two-thirds majority of the Member States to which an annex or amendment is submitted.

[3] See the Article 38 of the *Chicago Convention*.

Regarding the Recommended Practice, it comes as a necessity of accurate determination of the details of the work so that they could be strictly applied for the purpose of achievement of the safety, legality, and efficiency of air traffic and in order to ensure compliance with the *Chicago Convention* provisions. It should be noted, however, that the ICAO Assembly, although it is a plenary agent, has no authority to give authentic explanations and interpretations of the Convention.

During the work in the period after the establishment of the ICAO, a large number of annexes and amendments were adopted. That had to be done in situations when the circumstances that led to their adoption were essentially or significantly changed[4].

The problem of obligations of both the Standards and the Recommended Practice generates variance in opinions of theoreticians and scientists.

Some of them say that they are mandatory unless a member state has regularly excluded itself from the application of a particular provision. The others believe that the Standards have never had the purpose of making them mandatory, as follows from the Article 38 of the Convention. However, there is a consistent practice that cannot deny the importance of the Standards for the smooth running of international air navigation. They fairly exceed the nature of the Practice.

It is considered that opposition of the contracting parties to the *International Air Navigation Standards* at their international airports is impractical. Instead, it would be more meaningful to get promoted their own regulatory patterns that would be notified to all airlines. It is obvious that such an approach would prove them unnecessary to be notified to the ICAO. However, in the event of an accident or collapse of an airplane at an international airport, the question arises as to whether the airline has the right to claim damages even in the case of lack of its compliance with the standards set by ICAO.

Such a requirement would inevitably arise if proved that an accident or damage to the aircraft has arisen as a result of non-compliance with international rules of the state in which the airport is located. The similar case would arise should it be proven that the host country did not respect the indisputable international legal obligation of protection of foreigners. As a rule, in these cases the court of a Convention member state would not be authorized to arbitrate. It would be possible to resort to negotiating between foreign ministers of the involved states. In the event, it failed and such a type of problem solution was not organized, the dispute could be submitted to the ICAO Council for consideration.

If we were to analyze the assumed situation in the event that the US Federal Administration adopted the rules applicable in the United States and on transatlantic flights, these would be, in particular provisions, different from the rules laid down in the *ICAO Standards*. As a result, the question arises as to whether the United States violates its international obligations set forth in the *1944 Convention* since its carriers apply regulation that is contrary to the valid international law.

Under the provisions of the *1982 Convention on the Law of the Sea*, it is regulated that a coastal state may claim the right to 200 miles of an exclusive economic zone for the purpose of using both living and non-living resources in the zone. In addition to that, the rights of fly-over and free navigation are recognized for all countries beyond the economic zone. It is symptomatic to the case that the open sea zone has not been mentioned, although the flights above it are completely in the domain of international public law[5].

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[4] Quote some annexes and amendments as consulted in p. 304. For instance, the Annex 14, Airports: Specification of airport design and equipment, and the like.

[5] Article 58 of the 1982 Convention on the law of the sea.

Given the problems regarding the Convention in 1982 ratification, it should nevertheless be emphasized that a large part of the rules contained therein are included in the customary international law of the sea.

For the purposes of this paper, the importance of the Article 12 of the 1982 Convention on the law of the sea should be pointed out in order to determine what legal practices of the International Standards Annex 2 are in the exclusive economic zone. It is appropriate to point out that the ICAO Council operates in politically difficult situations as well as which regulation it administers.

The ICAO's Legal Bureau made a case study of the crush of the South Korean aircraft on Flight 007 from Anchorage to Seoul went astray 500 miles away in the Soviet airspace in 1983.

In the study, legal arguments were made as contrary to the approaches of numerous significant and large states. Initially, the Navigation and flight commission provided a comprehensive report on ICAO rules in this area. In the following year, the ad hoc Task force drafted an amendment to Annexes 2 and 6. The Commission identified numerous items to be considered in order to make possible a request for specific comments from both states and international organizations.

Great attention was paid to the admissibility of legal upgrades in the special recommendation in Attachment A to Annex 2 regarding the legal statuses of both the Standards and Recommended Practices.

A difficult problem arose before the Task force concerning the character of the interpretation of Articles 3 and 54 of the *Chicago Convention*. The Article 3 implicitly stipulates that the Convention applies only to civil aircrafts. According to that, the same article reads that "an airplane used for military purposes is considered to be state or military one". In the task force itself, there has been a dilemma whether determination of the character of the aircraft falls within the legitimate ICAO jurisdiction. The air navigation commission is, in fact, a group of experts. It is therefore necessary to address the ICAO Secretariat when a legal advice is required.

The ICAO Legal Bureau took the view that it was necessary to prepare draft new regulations concerning the damage and crash of civil aircrafts. They should contain provisions prohibiting state military airplanes to use deathy objects against civilian aircrafts.

The Article 3 of the *Chicago Convention* provides for the right of states to take appropriate measures to ensure the safety of civil navigation. This article is not the source of the legislative authority of the ICAO Council, but it does not prohibit any institute creating obstacles to the adoption of the Standards relating to the safety of civil aviation, including precluded flying situations.

The task force has accepted this method of legal reasoning in detailed standards. However, it is clearly stated that the crush or prevention and forcible disabling of civil aircrafts to perform their operation can be used as utter instruments only. They should also be used restrictively, or to the limited extent, in order to get the identity of an aircraft detected, to carry an airplane out of its airspace and guiding it to leave the restricted zone, or to instruct landing of it at a determined airport.

The United States expressed, through its representative, its disagreement with the proposed amendment to the Annex 2. It was stated, in the disagreement argumentation, that both the amendment and Appendix from Sections 1 and 2 of Annex 2 were contrary to the *1944 Chicago Convention* and that they violate its regulations applied on civil aviation only, which therefore means that they cannot be applied to state and military aircrafts. The proposed standards are in fact *ultra vires* and, for this reason, they cannot have any legal effects.

The Soviet Union representatives pointed out that their government had no problem to accept both the amendment proposed by the Commission and the opinion of the majority expressed by the ICAO Council. The representatives of Egypt and Pakistan at the Council meeting responded similarly to the above. Norwegian

countries also shared their opinion with the USA, suggesting that it was necessary to improve the existing proposals or to get new necessary materials included into the Annex 2, making sure that they could not be of a legal effect so as to prevail the recommended practice.

The ICAO Legal Bureau requested the general legal opinion to be made in the context of significance and validity of the Part XVIII of the *Chicago Convention*. There were serious difficulties in that regard as there were no civil servants having the authority to give an authoritative interpretation of the international legal document. In spite of that, the Council gave modest interpretation pointing out that the Article 3 of the *Chicago Convention* could not be the source of the legislative authority of the Council. We addition to that, it considered that this was not an obstacle to development of international regulation on the issue of both flight disability and aircraft damage.

The issue of regulation of the legal position of state military airplanes under the state jurisdiction was also considered. The states were supposed to be due to take into account the safety of international civil aviation. In addition to that, a standpoint adopted was that it would be necessary to recondite the ICAO jurisdiction in accordance to the Article 44 of the *Chicago Convention*. Also, the work of the ICAO Commission should not be interrupted so as it should be enabled to create precedents on new factual legislative basis.

When it comes to both the paragraph 3.8.1 and the proposal for an amendment to the Annex 2, efforts made by diplomats of various countries to achieve any consensus were evident, bearing in mind the difficulty of reaching consensus on the above issues.

The British diplomat made a proposal to replace the paragraph in order to make it fully acceptable within the entire ICAO Council. Aircraft damage and detention had to be regulated by its own rules established by the contracting parties in accordance to both the *Chicago Convention* and legislation of states regulating the issue of legal position of state military aircrafts in terms of the civil aircrafts navigation safety. The British proposal was supported by France, Belgium, Japan, the Federal Republic of Germany, Australia, Jamaica, and Lebanon.

The USA did not support the UK proposal, emphasizing that it was contrary to the Article 3 of the *Chicago Convention* which restricts application of this functional rule to civilian aircrafts only. As a result, such a proposal was *ultra vires* and could not be supported. The Soviet Union agreed with the USA attitude, emphasizing also the fact that this proposal was *ultra vires*.

A total of 22 Council members voted, out of which 13 voted in favor of the proposal put forward by the United Kingdom, and five members did not vote. Apparently, the number of two-thirds of the necessary votes had not been reached. The delegates expressed dissatisfaction, although they did not expect to achieve the necessary number of votes.

The USA persistently insisted on its position. Its diplomats in their official correspondence with their competent authorities kept on emphasizing that the rules passed on by the ICAO Council were advisory ones by their nature.

Due to this attitude of the USA, the standpoint taken was that it was necessary to point to the process of making amendments in accordance to the Article 94A of the *Chicago Convention*. Any proposed amendment had to be accepted by two-thirds of the Assembly votes when coming into effect with respect to the state it had been accepted by, provided that it had been ratified by the above requested number of contracting parties—not lower than two-thirds of the total number of *1944 Convention* contracting parties[6].

[6] Article 94 of the *1944 Convention*.

As a rule, amendments were never adopted by all contracting parties. However, by adoption of amendments to the Article 50 of the Convention the number of Council members was repeatedly increased, firstly to 21, then to 27, 30, 33, and 36 respectively. The implementation was carried out after ratification made by two-thirds of the total number of member states. It should be emphasized that the amendments to the increased number of Council members were for the most part accepted by all states.

In addition to that, it would be worth to point out the issue of both interpretation and application of international public law as well as to emphasize that it is not unambiguous since legal experts and commentators maintain various opinions, especially when it comes to the role of the International Court of Justice in particular incidental situations. Of the greatest importance is the issue of ability of the Court concerning consideration of decisions made by the Security Council since they are, according to the Article 25 of the *UN Charter*, mandatory for all its members.

When it comes to states that have lost their statuses of the UN members due to exclusion from that organization or suspension of their governments as suggested by the General Assembly, they are simultaneously excluded or suspended from the United Nations Specialized Agencies. In the event of their expulsion, their membership in ICAO is terminated and upon the UN's request suspended[7].

The ICAO Assembly adopted, at its extraordinary session held in 1984 after the South Korean aircraft crashed at Flight No. 007 by the Soviet Union, the new Article 3 bis of the *Chicago Convention*. It stipulates that each state must refrain from using weapons against civil aircrafts in flight, and that in the cases of interruption and interception passengers and aircrafts must not be damaged. This provision cannot be used for any kind of modification of the Article 4 of the *United Nations Charter*.

In addition to the above mentioned, sovereign states are entitled to require landing of any aircrafts flying over their territories being not permitted to, in the cases they are reasonably suspected as flying contrary to the provisions of the *1944 Convention*. An aircraft operating that way must be warned to end its flight above the territory of a given state.

Also, every contracting state shall be due to publish its regulations on interception and interruption of aircraft flights over its territory[8].

Conclusion

The unforeseen development of aviation in the past 100 years, starting from establishment of the first commercial flights in 1919, brought a large number of new legal documents. This in turn coincides with the First international conference held the same year in Paris. Those days of beginnings of international regulation are dominated by efforts aimed at achievement of as high degree of cooperation between states as possible for the purpose of providing the highest possible safety of civil aviation.

The general advancement of technology in the world induced safe and comparatively fast development of civil aviation. After the World War Second, the USA organized, as the winning power, the 1944 Chicago Conference, which was attended by 52 countries. From that date on, we can observe accelerated development of the international legal structure as a necessary element of safe and unobstructed air navigation. At that meeting the Chicago Convention was signed. It was the legal basis for achievement of the necessary standards and desirable practices regarding regulation of navigation between contractors, as well as for setting up

[7] See the Article 93 bis adopted by the ICAO General Assembly in 1947, effective in 1961.
[8] See ICAO Doc.9558 at I-5 1989.

installations and equipment as technical conditions for safe air navigation free of redundant administrative procedures.

An international organization, ICAO, was established as well, to become a specialized agency of the United Nations later on. This specialized agency developed a prolific normative activity decisively influencing adoption of numerous standards and Recommended practice of international air navigation. It was not just an autonomous normative order of competencies within this specialized agency, but also a significant participation in traditional forms of creation of international public law regulation.

This is justified by the following conventions according to which the ICAO began its operation: (1) Convention on crimes and other acts carried out in aircrafts, Tokyo 1963; (2) Convention on the suppression of illegal hijacking, Hague 1970; (3) Convention on the suppression of unlawful acts against the civil aviation safety, Montreal 1971, with the 1983 New York Protocol enclosed to this Convention; (4) International convention against takeover of hostages, New York 1979.

However, despite numerous legal documents enacted, both development of technology and general progress prompt the necessity of the further perfection of legal documents on air navigation.

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