

International Air Law of Safety

— With Special Reference to the Enforcement of Aviation Safety Standards —

Cheng Chia-Jui

Chairman, Asian Institute of International Air and Space Law;

Dean, Faculty of Law, Soochow University, Taipei;

*Director, Center of Air and Space Law Studies, Faculty of Law,
Soochow University, Taipei*

Mr. Chairman, Ladies and Gentlemen:

Civil Aviation Authority of Macau and Macau University's Faculty of Law are to be congratulated on organizing this timely conference on international air law at the time when Macau Airport is to celebrate its anniversary operation. We do hope that Macau Airport will be further successfully developed into a new regional hub airport of East Asian region.

Speaking of enforcement of aviation safety standards, we should observe the entire system of international air law of safety within the framework of international legal order. There are different levels of laws which are applicable to international aviation safety within the framework of public international law in general and of international air law in particular. In discussing the subject of aviation safety standards enforcement, I would like to take this opportunity to analyze a new system of law of aviation safety which deals mainly with the rules and enforcement of aviation safety standards.

1. ORIGIN AND DEVELOPMENT OF INTERNATIONAL AIR LAW OF SAFETY

Aviation safety has been the subject of national regulation for quite a long time. However, modern conditions has turned it from a traditional phenomenon of transnational transportation into one under international regulation, particularly after the creation of International Civil Aviation Organization (ICAO) in 1944¹. Then, the attention and the problem of international civil aviation safety started to become the focus on the agendas of ICAO's activities; ICAO not only has accelerated and

¹ Buergenthal, Th., *Law Making in the International Civil Aviation Organization* (1969).



accentuated its own objectives, but also has made itself one of the prime targets which need to overcome such a problem. However, the reaction of sovereign States, who are essentially the creators of international law, to aviation safety standards, has largely depended on traditional theory of international law which states that the enforcement and sanctions of that part of law must rely on the internal legal order in order to achieve legal effect.

2. NATURE, CHARACTERISTICS AND SCOPE OF INTERNATIONAL AIR LAW OF SAFETY

The very nature of international air law of safety has been questioned by many in the field. Many States and jurists have derided or disregarded international air law of safety, including the enforcement of aviation standards. They have questioned first, the entitlement of such rules and standards to be called "law"; second, its effectiveness in enforcing these rules of law; and third, and perhaps the most notable, the very existence of any international rules governing aviation safety.

Many jurists claim that the hallmark of any system of law is in its capability to enforce its rules against violators². Consequently, one of the most frequent arguments used against international air law is that it is not 'true' law because it is not generally enforceable. This raises several issues. First, as a matter of principle, does the existence of any system of international air law of safety depend on the chances of effective enforcement. Secondly, is it true that international air law of safety is not enforceable or effective. Thirdly, how is a new legal framework created internationally enforce the aviation safety rules and standards within the framework of international air law.

To answer the first question we have to examine the very nature of international law before giving the definition of international air law of safety. The legal force of international law had been doubted by jurists before the twentieth century. However, the modern jurists have positively confirmed that international law is a body of rules for human conduct within a community which, by common consent of this community, shall be enforced by external power³. Therefore, any convention and other instruments adopted by major contracting States are formed as an indispensable body of rules regulating mostly the relations between states; without which, it would virtually be impossible for the States to have normal intercourse.

It is certain that international law is not only a code of rules of conduct of moral force only. It is a true law; although weak from the point of its enforcement and sanction. With this in mind, international air law of safety has to be examined from the context of international law.

² von Glahn, G., *Law Among Nations*, 4th edition, Macmillan, New York, 1981, p8.6-15; Dixon, M., *International Law*, 2nd edition, Blackstone Press, London, 1933, pp.2-12.

³ Jennings, R., and Watts, A., *Oppenheim's International Law*, 9th edition, Vol. I. Longman, London, 1992, p.9.



Historically, the 1919 Paris Convention on the Regulation of Aerial Navigation (ICAN), the predecessor of ICAO, were binding on member States of ICAN, at least Annexes A to G⁴. These standards of safety were obligatory for Contracting Parties. Although the Paris Convention was significant as the first attempt at international regulation of aerial navigation by general treaty, it was, unfortunately, not enforced by contracting States on most important provisions. However, foundation was laid down at this formative stage of international air law of safety.

One of the most important formulating agencies of international air law of safety has been the ICAO, established by the Chicago Convention (Part II) on 13 May, 1947. The nature, origin and development of international air law of safety is fully reflected in Article 44 of the Chicago Convention: "The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- (a) Insure the safe and orderly growth of international civil aviation throughout the world;
- (b) Encourage the arts of aircraft design and operation for peaceful purposes;
- (c) Encourage the development of airways, airports and air navigation facilities for international civil aviation;
- (d) Meet the needs of the peoples of the world for safe, regular, efficient and economic air transport;
- (e) Prevent economic waste caused by unreasonable competition;
- (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between contracting States;
- (h) Promote safety of flight in international air navigation;
- (i) Promote generally the development of all aspects of international civil aeronautics."

The aims and objectives of the ICAO contained in Article 44 are mainly to give the ICAO's functional regulatory power to regulate international aviation safety through the formulation and adoption of International Standards⁵ and Recommended

⁴ Cheng, Bin, *The law of international Air Transport*, Stevens, London, 1962, Third Impression, 1984, p. 64.

⁵ The definition was adopted by the First Assembly of ICAO in 1947 in Resolution A131; the current definition is in Resolution A29-7, Appendix A and reads: "Standard - any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention."



Practices (SARPS)⁶, and procedures concerning the safety, regularity and efficiency of air navigation in order to secure “the highest practical degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation” as stipulated Article 37. Furthermore, Article 54 gives the Council of ICAO a mandatory function to adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; to designate for convenience, as Annexes to the Convention; and to notify all contracting States of the action taken.

Over the years, the Council of ICAO has adopted eighteen standards in its Annexes of the Convention, including Personnel Licensing, Rules of the Air, Meteorological Service for International Air Navigation, Aeronautical Charts, Units of Measurement to be used in Air and Ground Operations, Operation of Aircraft, Aircraft Nationality and Registration Marks, Air worthiness of Aircraft, Facilitation, Aeronautical Telecommunications Air Traffic Services, Search and Rescue, Aircraft Accident and Incident Investigation, Aerodromes, Aeronautical Information Services, Environmental Protection, Security, and the Safe Transport of Dangerous Goods by Air, which constitute a modern code of international civil aviation safety law.

3. INTERNATIONAL ENFORCEMENT OF AVIATION SAFETY STANDARDS

The legal effect of these Standards and Recommended Practices is controversial. One school advocates that the Annexes do not form an integral part of the Chicago Convention and therefore they do not possess the same legal force as the convention.⁷ According to Article 38 of the convention, “any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the ICAO of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within 60 days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case the Council shall make immediate notification to all other States of the difference which

⁶ “Recommended Practice - any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention.”

⁷ van Dam, Roderick D., “Regulating International Civil Aviation: An ICAO Perspective” in *Air and Space Law: De Lege Ferenda - Essays in honour of Henri A. Wassenbergh*, edited by Tanja L. Masson - Zwaan and Pablo M. J. Mendes de Leon, Martinus Nijhoff, Dordrecht/Boston/London, 1992, p. 13.



exists between one or more features of an international standard and the corresponding national practice of that State. It is evident that States are thus allowed to discharge certain obligations created by the Standards and Amendments.

The following criteria, as may be appropriate to different annexes, are to be used as a guide in determining reportable differences:

- (a) When the national regulations of a contracting state affect the operation of aircraft of other contracting states in and above its territory:
 1. by imposing an obligation within the scope of an annex which operation of byan ICAO standard, or
 2. by imposing an obligation different in character from that of the corresponding ICAO standard, or
 3. by being more exacting than the correspond ICAO standard, or
 4. by being less protective than the corresponding ICAO standard.
- (b) When the national regulations of a contracting state applicable to its aircraft and their maintenance, as well as to aircrew personnel engaged in international air operations over the territory of another contracting state:
 1. are different in character from the correspond ICAO standard, or
 2. are less protective than the corresponding ICAO standard.
- (c) When the facilities or services provided by a contracting state for international air navigation:
 1. impose an obligation or requirement for safety additional to any that may be imposed by the corresponding ICAO standard, or
 2. while not imposing an additional obligation, differ in principle, type or system from the corresponding ICAO standard, or
 3. are less protective than the corresponding ICAO standard⁸.

Other positivists would attribute to the ICAO safety standards the full force of a source of international air law equivalent to an international convention which binding force is based on one supreme, fundamental principle or norm, the principle that agreements between States are to be respected, or as the principle is better known, *pacta sunt servanda*⁹. This principle is an absolute postulate of the international legal system and manifests itself in one way or another in all the rules belonging to international law as well as international air law¹⁰. Moreover, according to the 1969 Vienna Convention on the Law of Treaties, annexes to the Chicago Convention constitute an indivisible part of the Convention, whatever embodied in a single instrument or in two or more related instruments and whatever its particular designation¹¹. Therefore, the Standards in the Annexes have the same legal status and effect as the Convention itself.

⁸ Martin, P., McClean, J. D., Margo, R. D., and Balfour, J. M., *Shawcross and Beaumont Air Law*, Butterworths, London, 1996, p. II (7)

⁹ Sorensen, M., *Manual of Public International Law*, London, 1968, pp. 127-8.

¹⁰ Shearer, I. A., *Starke's International Law*, 11th edition, Butterworths, London, 1994, p. 22.

¹¹ Article 2, 1(a), Vienna Convention on the Law of Treaties.



From the point of view of its legal nature, international air law of safety may be divided into two groups of rules: hard law rules and soft law rules/or obligatory rules and optional rules. The hard law aspect of aviation safety has been formulated by such international conventions adopted by sovereign States within the framework of international law. The contracting states to Chicago Convention have been given the general obligations intended to promote the application, over as wide and complete an area as may be possible in the different circumstances of the various contracting states, of international standards and recommended practices of ICAO. These general obligations are derived from the norms created and mutually consented by contracting states under the principle of *pacta sunt servanda*.

Other multilateral conventions dealing with matters arising from the international civil aviation safety and security as well as with question of jurisdiction also constitute an integral part of international air law of safety. These instruments are: The Tokyo Convention 1963 dealing with offenses and certain other acts committed on board aircraft; The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970, providing for the exercise of jurisdiction over hijackers, or their extradition; The Montreal Convention of September 23, 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation, extending the Hague scheme for jurisdiction and extradition to the placing of bombs on aircraft and other acts of sabotage endangering the safety of aircraft and persons on board. Violence at airports was dealt with in the Montreal Protocol of 24 February, 1988.

States have sovereignty over the soft law aspect of aviation safety. Whether a particular rule or standard is obligatory or optional, depends on the practicability and interest of each State. However, if the international interest so demands, the rule is obligatory and enforceable as the provisions of international operation of aircraft and routing contained in Annexes of Chicago Convention as well as the provisions of international penal law of aviation.

If the provisions of Chicago Convention and its Annexes allow States to "disapprove" the Annex or to depart from it by filing a difference, it is the area of optional law. The contracting States to the Chicago Convention must follow standards and recommended practices that have been developed into and recognized as international customary rules. Aside from that, they have complete discretion in deciding which standards and practices to which they wish to comply. Any State that finds it impracticable to abide by, in any respect, the international standards must notify the council. Although differences in recommended practices do not need to be reported, States are encouraged to notify the council of the differences between their national regulations and practices and the corresponding recommended practices contained in an annex if such difference(s) is important for the safety or regularity of international air navigation.

The arrangement of hard law and soft law provisions in the law of international safety and security is the foundation on which modern international law and



modern international air law of safety can be rapidly built. The States have, as we have seen, no objection to the matter where optional law of international aviation safety are developed by the contracting parties, provided that such law should respect every nation's interests, sovereignty and jurisdiction.

4. REGIONAL REGULATIONS AND ENFORCEMENT OF AVIATION SAFETY STANDARDS

The second level of international air law of safety is founded on the ground of regional unification and harmonization of aviation standards and other matters arising from regional operation of international aerial navigation. In this context, regional rules of aviation safety standards are necessarily subordinate to general rules of international air law of safety but may be in a sense 'complementary' or 'correlated' thereto, and other states must give effect to such regional safety rules as are duly proved as within the framework of international air law of safety.

In this connection, the European Union plays a vital role in the formulation of regional aviation safety standard by means of the unification and harmonization of national air law in general and national aviation safety standards in particular of Member States which are constituted as a part of European Community Air Law¹². European Community Air Law encompasses two rather different types of laws - those specifically related to commercial air transport law, and those which are of general application but particularly relevant to aviation safety. Its sources are derived, on the one hand, specifically from secondary legislation and, on the other, generally from the EC Treaty law and related implementing measures.

The released European Commission White Paper on the common transport policy in December, 1992 set out the guidelines of the common transport policy. The guidelines included the standardization of air traffic control equipment and procedure to be developed of a single unified system of air traffic management in Europe in association with eurocontrol, ECAC and national authorities and further work to be undertaken on aviation safety, and is based on previous work and in conjunction with other relevant international organizations.

The Council Regulation (EEC) 3922/91 on Harmonization of Technical Requirements and Administrative Procedures in the field of Civil Aviation¹³, which entered into force on 1 January, 1992, is to harmonize the design, manufacture, operation and maintenance of aircraft and persons and organizations involved in these tasks. Meanwhile, the fundamental requirement of the regulation is to oblige each Member State to be a member of the Joint Aviation Authorities (JAA) which plays a central role in the operation of EC safety regulation¹⁴.

¹² Balfour, J., *European Community Air Law*, Butterworths, London, 1995.

¹³ Council Regulation (EEC) 3822/91, OJL 373. 1291, p.4.

¹⁴ The task of the JAA has focused on the development of joint aviation requirements (JARs) concerning



The task of the JAA is focused on the development of joint aviation safety requirements (JARs) and an Operations Committee was therefore created in order to draft a "European Book of Operational Rules", known as JAR - OPS. It was decided that JAR - OPS should be based on ICAO Annex 6 to the Chicago Convention, and Part 1 and 3 of JAR - OPS would be implemented on 1 April, 1998.

In order to enforce JAR - OPS, Operations Standardization Teams (OPST) will be formed in the immediate future. The role of the OPSTs will be to monitor the activities of the Member Authorities to ensure that JARs are being uniformly interpreted and applied in accordance with the JIP. Their activities are intended to commence during the last quarter of 1997.

The procedural rules of JAR do not prevent a national authorities from taking immediate and urgent safety action, e.g. by issuing an airworthiness directive in the light of experience gained from an accident. However, where such action is unilateral, or not supported by a relevant JAR or NPA, the national authority or authorities must also inform the commission and other Member States.

In the absence of relevant JARs, Member State may continue to apply their existing national regulations. Thus, a Member State would continue to be able to impose new special conditions in respect of an aircraft to account for of current safety experience.

As to the maintenance organizations, JAR 145 was adopted on 1 January, 1992 and implementation was required by 1 January, 1994. Therefore, maintenance organization must obtain JAR145 approval from their national authorities. Under this system each national authority will be checked for consistency with the intended procedures by an international maintenance approval standardization team (MAST), which comprises of three members nominated by participating authorities and selected by consensus by the JAA Maintenance Committee. A similar checking system is expected to be introduced in respect of other matters.

In the absence of common standards, national authorities can impose their own requirements in respect of any operational matters. It is evident that the implementation and enforcement of JAR-OPS will not be simple as it will involve not only

the airworthiness of aircraft, their operation and maintenance and aviation personnel licensing. The JAA's scope of activity does not presently extend to aerodromes, air traffic services or aircraft accident investigation. Joint implementation procedures are a fundamental part of the JAA's work. Such procedures attempt to define methods of and procedures for joint technical assessment of compliance with a JAR. The JAA has no formal international legal status, having been informally created among the Directors General of Civil Aviation of the participating states, under the auspices of ECAC. As the JAA includes a number of non-member States, it cannot be given comprehensive legal status under Community law; rather a treaty among participating states would be required. As a result, the JAA has no power in itself to enforce its requirements and procedures or to levy charges, although the regulation's incorporation of JARs into Community law gives the JARs themselves a mandatory status under Community law.



a different set of rules, but the introduction of methods of enforcement procedures of these rules will be the key factor to decide whether the uniformed rules of safety standards may be satisfactorily enforced by JAA and national aviation authorities of European Union.

Moreover, the Members of European Union may soon achieve harmonization of rules and regulations by implementation of coordinated standards in the aircraft design and application of common aviation safety rules in Europe which will replace the role of ICAO in its enforcement of aviation safety standards and practices. Although there are many other aviation regional organizations in Africa, Latin American and Asia, these organizations are consultation institutions and are not able to undertake the responsibility of enforcing aviation safety standards.

5. NATIONAL REGULATION AND ENFORCEMENT OF AVIATION SAFETY STANDARDS

The complete and effective enforcement of national aviation safety standards is the key factor to safeguard both domestic and international air transport safety, particularly at a time when international aviation safety standards cannot be executed by ICAO. In facing such a reality, world's major aviation nations are relying on their own aviation safety regulations to achieve full compliance with international safety regulations and standards.

Since 1919, the United Kingdom and the United States have been the most extensive and sophisticated aviation regulatory regimes in the world, as evidenced in the rapid development in their aircraft technology, and especially through the commercial development of aviation in the transportation system of the United States. Many leading aviation countries in the world have adopted the standards of the US Federal Aviation Regulation, either in part or as a whole; as such standards may be universally applicable.

The structure of the US regulatory system on aviation safety standards has served as a strong mechanism in the enforcement of aviation safety. In fact, the rulemaking process of the Federal Aviation Authority (FAA) is based on enforcement and fully reflects tripartite interests, namely of the public, consumer's and manufacture's, in domestic sector. In addition, where a proposed rule is of interest to the international aviation community, foreign aviation authorities and other safety authorities of foreign countries are given the opportunity to participate in the formulation and modification of such a rule. Inviting full and active participation of the international aviation community in the constitution of the US FAA safety standards is a means to ensure future compliance with and enforceability of the United States' aviation safety standards.

The US government has also placed vital importance in its policy in the domestic enforcement of the safety standards. It urged that violations be revealed



and addressed at the earliest possible time, prompt and efficacious surveillance and investigations be continued, and imposition of sanctions be conducted in a manner and in an amount capable of substantiating future compliance of the violators as well as others similarly situated.

In its effort to warrant compliance with the aviation standards, the US FAA has utilized the power of investigation to determine whether a basis exists for taking an enforcement action. During the determining process, it institutes an informal investigation, a formal fact-finding investigation and criminal actions to decide which type of enforcement action to take. Two types of actions are provided by the US Federal Aviation Regulations, namely the administration and legal enforcement actions.

The administrative enforcement action deals with minor types of violations, while the legal enforcement action are instituted against violators with more serious violations and need more stringent enforcement. The selection of an appropriate type of action and the sanction to be used in legal actions depends on the result of the investigation¹⁵.

There are several actions that may be taken independently or simultaneously, which include: certificate action, civil penalty action, orders of compliance, cease and desist orders, orders of denial, other orders, and seizure of the aircraft involved. All actions may be terminated in the process of judicial decision (in the District Court of the United States) to enforce in compliance with statutory provisions of the Act and regulations and orders promulgated thereunder by the issuance of injunctions or other process restraining violators from further violations.

In the on-site checking program of foreign countries by the FAA, the FAA applies to a country one of three ratings for the status of the countries at the time of assessment. Such ratings are "acceptable", "conditional" or "unacceptable". The "conditional" rating is given where the FAA's inspectors found areas of non-compliance with ICAO safety standards. The FAA will then negotiate with the country's relevant authority to implement corrective measures; during these negotiation period, the FAA will allow flights to operate within the USA while it conducts strict surveillance. The "unacceptable" rating is given when a country's civil aviation authority is found to be in non-compliance with ICAO standards - if the civil aviation authority has not developed or implemented laws or regulations in accordance with ICAO standards; if it lacks the technical expertise or resources to license or oversee civil aviation; if it lacks the flight operations capability to certify, oversee and enforce air carrier operations requirement; if it lacks the maintenance requirements; and or if it lacks appropriately trained inspector personnel as require by ICAO standards.

¹⁵ The Swiftest punishment is imposed through an emergency suspension; The second form of legal enforcement action is suspension; The third is deferred suspension. See, Gesell, L.E., *Aviation and the Law*, 2nd edition, Costa Aire Publication, Chandler, Arizona, 1994, pp. 224-227.



It is worth to note that the US FAA's assessment standard is based on the standards and recommended practices contained in the Annex 6 of the Chicago Convention: international general aviation in part I, aeroplanes in part II, and international operations in part III.

The present Annex 6, Part I, contains Standards and Recommended Practices adopted by the International Civil Aviation Organization as the minimum Standards applicable to the operation of aeroplanes by operators authorized to conduct international commercial air transport operations. These international commercial air transport operations include scheduled international air services and non-scheduled international air transport operations for remuneration or hire.

The purpose of Annex 6, Part I, is to contribute to the safety of international air navigation by providing criteria of safe operating practice and to contribute to the efficiency and regularity of international air navigation. It encourages States to facilitate the passage over their territories of aeroplanes in international commercial air transport belonging to other States that operate in conformity with such Standards.

An element of the safety of an operation is the intrinsic safety of the aircraft, that is, its level of airworthiness. The level of airworthiness of an aircraft is, however, not fully defined by the application of the airworthiness Standards of Annex 8, but it does require the application of those Standards in the present Annex that are complementary to them.

It was recognized that the ICAO standards of airworthiness would not replace national regulations and that national codes of airworthiness contains the full scope and extent of detail considered necessary by individual State would be necessary as the basis for the certification of individual aircraft. Each State would establish its own comprehensive and detailed code established by another Contracting State. The level of airworthiness defined by third code would be indicated by the Standards, supplemented, if necessary, by Acceptable Means of Compliance.

A revised text consistent with the above principles was prepared for Chapter 5 of Annex 6. It includes: a) broad Standards that were complementary to the Standards related to aeroplane performance in Annex 8; and b) two Acceptable Means of Compliance which illustrated by examples the level of performance than that illustrated by these Acceptable Means of Compliance was considered to be a violation of the Standards in Chapter 5 of this Annex.

The most effective means to enforce aviation safety standards has been the new program and procedures introduced in 1992 for the safety assessment of foreign carriers which fly to and from the United States in a point as a point of origin, point of destination, or agreed stopping place. The program for the safety assessment has been carried out on site, on a cooperative basis and within the consultation process stipulated by the air service agreements between the United States and a foreign contracting party.

From the point of international Law, the US FAA has no authority to investigate or to assess the foreign carriers whether they are in compliance with the safety standards of ICAO or of FAA. Such a procedure might touch upon the problem of extra-territoriality of enforcement of the aviation safety standards. To assess whether a State has an adequate infrastructure for aviation safety oversight as defined by the ICAO oversight standards, it has to be within the framework of ICAO program of assessment, otherwise, it might be interpreted as investigation of national jurisdiction of a sovereign State. Until now, no disputes have arisen between the US and the countries subject to assessment.

The standards of assessment have emphasized the following five elements:

1. a law enabling the appropriate government office to adopt regulations necessary to meet the minimum requirements of ICAO;
2. current regulations that meet those requirements;
3. procedures to carry out the regulations;
4. air carrier certification, routine inspection, and surveillance program; and
5. organizational and personnel resources to implement and enforce the above.

From a practical point of view, the program and procedures for safety assessment of foreign carrier of the United States has really filled the vacuum left by the ICAO for enforcement of aviation safety standards. A recent example of such positive effect was a monitoring visit from the US FAA to Taiwan for assessing the safety of Taiwan air carriers in October, 1996. Before the arrival of the US FAA delegation to Taiwan, Civil Aviation Bureau of ROC took immediate measures of enforcement of safety standards in compliance with the requirements contained in Annex 6 of Chicago Convention as following:¹⁶

- 1) to amend the regulations in order to comply with the requirements contained in Annex 6, such as to amend "The Procedure of Aircraft Management," "The Code of Operation of Aircraft," etc.; to take urgently administrative measures to comply with these requirements;
- 2) to enforce the professional training program for inspectors; to hire the retired professionals from the US FAA to train those inspectors and to train continually a certain number of inspectors;
- 3) to increase the number of inspectors; to employ another 32 inspectors;
- 4) to change the methods of inspection; to abolish the item by item inspection procedure to airlines at the different interval of the year and assign professional inspectors to an airlines for a long term of inspection, analysis and supervision; and
- 5) to reinforce the supervision to locally registered airlines; to request each airlines in compliance with the above-mentioned procedures of correction and completed in a given period of time according to the requirement of ICAO Annex-6.

¹⁶ See news release from the Civil Aviation Bureau of the Republic of China, October, 1996



Moreover, every newly registered airline should be assessed, tested and inspected by the Civil Aviation Bureau of the Republic of China (ROC) and inspectors will be sent to that airline as permanent inspectors for safety and security of its operation. In order to comply with the minimum standards prescribed by ICAO Annex-6, Civil Aviation Bureau of the Ministry of Communications and Transport of the ROC has recently reorganized its working team for correcting the following items:

- 1) to select and appoint the director-inspectors in charge of air navigation, aircraft engines and propellers and appliance at China Airlines and Eva Airways for conducting the inspection and for inspecting all manuals and procedures if it is in compliance with ICAO Annex-6¹⁷
- 2) to amend all manuals and procedures of domestic airlines according to the minimum standards of ICAO Annex-6¹⁸
- 3) to assign the Director-Inspectors in charge of air navigation, aircraft engines and propellers and appliances at domestic airlines which will be implemented after the approval to increase a number of inspectors from Government.

Another successful example of national enforcement of aviation safety standards is in the United Kingdom, a leading aviation nation of the world, which exerts considerable influence particularly to members of the British Commonwealth of Nations in the field of harmonization and unification of aviation safety standards. The British Air Navigation Order and Regulations, which are widely used by the former British dependent colonies, self-governing colonies and dominions and now the British dependencies, such as Hong Kong, contains different kinds of enforcement and sanctions provisions imposing sanctions for its breach and providing power for its enforcement¹⁷. There are:

- 1) penalties. Three scales of penalties are laid down for contraventions of the order and Regulations, including a fine¹⁸, imprisonment¹⁹ and summary conviction²⁰;
- 2) detention of aircraft²¹;
- 3) powers to require aircraft to land²²;
- 4) revocation, suspension and variation of certificates, licenses, etc.²³;

¹⁷ Article 75 (i) of the Order.

¹⁸ Article 75 (6) of the Order.

¹⁹ Article 75 (5) of the Order.

²⁰ Article 75 (2) of the Order.

²¹ Article 69 (1) of the Order.

²² s. 8 (2) (1) of the Civil Aviation Act.

²³ Article 54 of the Order and s. 8 (2) (n) of the Civil Aviation Act.



- 5) ancillary provisions as to enforcement. The order contains a number of other provisions designed to facilitate its enforcement ²⁴:
- i) rights of inspection for airworthiness;
 - ii) right of access of aerodrome;
 - iii) the production of documents and records;
 - iv) obstruction of persons; and
 - v) offenses relating to documents and records.

By Art. 76, all these sanctions apply to foreign aircraft (i. e., in breach of those parts of the Order applicable to them in the United Kingdom as they do to the UK aircraft. In so far as the UK aircraft, the sanctions can be imposed on such aircraft in the United Kingdom in respect of offenses committed abroad).

Conversely, any aircraft registered in the United Kingdom when abroad is required to comply with requirement of safety rules, standards and practices imposed by the foreign country, even a breach of the law of the foreign country in which they are flying will not in itself involve any penalties in the United Kingdom, unless it happens also to be a breach of some provision of English law. However, by British practice, a breach of foreign law will often also constitute a breach of the English Air Navigation Order or Regulations, since the laws of all countries which are parties to the Chicago Convention are largely based on the Convention, and on the decisions of the ICAO of which they are all members. The United Kingdom has recognized the obligation imposed by the Chicago Convention. While in a foreign country, British aircraft will be liable to any penalties or other sanctions provided by such country.

The American unilateral action assessment for and the British legal action against the contravention of aviation safety standards of a national aviation authority have been in conformity with Article 33 of the Convention of International Civil Aviation and in the best spirit of Articles 37 and 38. However, jurists from certain developing countries have often argued against the extraterritorial application of national aviation laws and regulations of aviation safety and security. They contend that there are no internationally agreed and accepted uniform enforcement procedures and thus the extra-territorial enforcement of a foreign aviation safety standards is more or less contrary to the principle of "sovereign equality of States before international law". Irrespective of that argument, the US FAA and other regional organizations as Joint Aviation Authorities (JAA) in Europe may achieve what the ICAO could not achieve, mainly the functional enforcement of ICAO Safety Oversight Program based on bilateral and multilateral agreement. From the point of international air law of safety, it is, of course, not normal to grant such right of assessment to a national civil aviation authority of a State with mainly developed air technology. Even though the United States and the United Kingdom play a vital role in coordinating, harmonizing, supervising and enforcing the global aviation safety, a multilateral arrangement of international enforcement within the framework of ICAO may still better serve the international aviation community.

²⁴ Article 13, 70, 52, 71, 55 of the Order.



CONCLUSION

A new branch of international air law of safety is in the process of formation on an international, regional as well as national level and within the framework of public international law and international air law. In recent years, the ICAO has taken a sharp eye on the problem of international aviation safety enforcement, including the critical issue of aviation safety, security and the global enforcement of aviation safety standards. It is evident that the international organizations, such as the ICAO as a specialized agency of the United Nations, have their inherited weaknesses. Their participants are independent sovereign States of different levels of economic development.

A controversial question is the extent to which enforcement and sanctions, including enforcement and sanctions by way of external force, are available under international air law of safety, to secure observance of its rules, standards and practices. At the extreme there is the view that international air law of safety is a system of law without enforcement or sanctions. Such a view holds that although the ICAO has laid down the legal framework of aviation safety standards to be observed by Member States, there is no enforcing power for it in international air law. However, it is not quite true that there are no forcible means of compelling a state to comply with aviation safety rules and standards contained in Annexes of Chicago Convention.

After the interpretation of the Charter of the United Nations and the Chicago Convention on International Civil Aviation, the ICAO may, in the event of a violation of safety and security rules, institute an enforcement action against a particular member State, and to the extent that the state concerned is in breach of treaty law obligation. This is in effect a form of implied sanction to enforce international air law of safety. In addition, if the word "enforcement" and "sanctions" be taken in the larger sense of measures, procedures, and expedients for exerting pressure upon a state to comply with its international legal obligations, then the provisions of the Chicago Convention are not exhaustive of the enforcement and sanctions which may become operative in different areas and levels of international law.

The integration of European Union has provided another opportunity for harmonizing and to unifying the aviation safety rules, standards and practices of member States which will perform the objective of aviation safety intended by the ICAO on the regional level. A Joint Aviation Authorities of Europe will gradually transform its present status of coordination into a supervising agency of all member States and a formulating agency of a European code of aviation safety.

Most important of all, the enforcement of aviation standards must rely, at the present stage of development of international air law of safety, on internal legal order of certain industrialized countries with advanced aviation technology, such as the United Kingdom and the United States. In this connection, the US FAA has successfully established a mechanism of monitoring foreign safety standards through a program and procedures for the safety assessment of foreign carriers. In spite of the fact that such unilateral action may produce positive effects, it is still not the optimal



way to resolve the problem of enforcement. For example, those airlines which do not operate directly in the United States, the US FAA is unable to check whether or not that country is in compliance with the minimum standards imposed by the ICAO.

Moreover, the gap on the acceptance of the ICAO safety standards between countries with economically and technologically advanced aviation countries and majority of the developing countries is significant. Countries are not able to reach even an understanding, let alone an agreement on the enforcement of aviation safety standards. This is not a new phenomenon but has been a chronical problem of international relations after the Second World War. This is the reason why the Secretariat of ICAO desperately concludes that "it is at the present time impossible to indicate with any degree of accuracy or certainty what the state of implementation or regulatory Annex material really is, because a large number of contracting (developing) States have not notified ICAO of their compliance with or differences to the Standards in the Annexes for some considerable time"²⁵.

The enforcement of aviation safety standards is an international phenomenon and, therefore, the final solution of the program still relies on the efforts and coordination of the ICAO. The way to exercise the mandatory power of the Council of ICAO on safety matter has to be re-considered and a stronger enforcement procedure thus has to be re-arranged. The national enforcement procedure and program may, at the same time, co-exist with the ICAO's enforcement program. The ICAO, however, should create its own comprehensive rules and procedures of enforcement within the framework of international air law. The characters of unenforceable law should not be attributed to international air law of safety. The ICAO acquires its mandatory characters by the principle of *pacta sunt servanda* and the principle of good faith in international treaty law. In discussing the priority of enforcement program of the ICAO, the 29th Session of the ICAO Assembly in 1992 reaffirmed that "individual State's responsibility for safety oversight is one of the tenets of the Convention"²⁶. The ICAO has repeatedly urged all member states to "respond to the ICAO's Council requests for comments and agreement or disagreement on ICAO proposed standards; and requesting the ICAO Council "to pursue the enhancement of ICAO Standards and to study the feasibility of establishing a multilateral monitoring mechanism"²⁷.

How to reinforce the functional power of international organization so as to maintain international aviation safety and security is concerned by all interesting parties and is in conformity with the benefit of mankind. As Professor Milde rightly pointed out: "there is no need to look for new methods and institutional arrangements or amendment of the Convention, the legal framework for enforcement has been in existence since 1944 and it is only a matter of leadership and political will to use it in practice in the primary interest of aviation safety"²⁸.

²⁵ C-WP/10218 of 26 May 1995, appendix, para 4.9 on p. 6.

²⁶ Resolution A 29-13, first resolving clause, the 29 Session of the ICAO Assembly Resolution, 1992.

²⁷ Resolution A 29-3: "Global Rule Harmonization". the 29 Session of the ICAO Assembly Resolution, 1992.

²⁸ Milde, M., *Enforcement of Aviation Safety Standards - Problems of Safety Oversight*, Proceeding of the Fourth International Aviation Seminar - New International Aviation Issues in the Twenty- First Century-, Hankuk Aviation University, November 9, 1995, Seoul, Korea, p. 22.12

