

# ICAO Perspective of Emerging Legal Issues

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## INTRODUCTION

I am delighted and greatly honoured to be with you today amidst this gathering of learned academicians. I must say I am a bit overwhelmed by the richness of thought and the depth of knowledge that has prevailed in the person of many eminent speakers.

I am indebted to Mr. Jose Queiroz, the Chairman of Civil Aviation Authority, for his kind invitation in providing me this opportunity to share my thoughts with you today.

At the outset, on behalf of the President of the Council of ICAO, Dr. Assad Kotaite, and the Secretary General, Dr. Philippe Rochat, allow me to extend our sincere gratitude and our congratulations to the authorities of Macau on the first anniversary of the completion of the Macau International Airport, which is a landmark in contributing to the growth of air transport in the Region.

Today, I will take up some of the emerging legal issues from ICAO's perspective, and in doing so, I will take you to Chicago, have a look at the current challenges, identify the strategic plan, touch on a few of the critical air law instruments and finally examine the evolving role of sovereignty with regard to Airspace Organization and the Global Navigation Satellite system (GNSS).

## CHICAGO CONVENTION

On 7 December 1994, in celebrating the 50<sup>th</sup> Anniversary of the signing of the Convention on International Civil Aviation in Chicago, a special meeting of the Council of ICAO was held in Montreal in the presence of the Secretary General of the United Nations, Dr. Boutros Boutros-Ghali.

The Council adopted a declaration in which it pledged to dedicate all its energies and resources to preserving the safety, security and efficiency of International Civil Aviation and to ensuring that ICAO responds to the major challenges facing civil aviation in the coming years.



The Secretary General of the United Nations in his address to the Council, emphasized the essential nature of ICAO's role within the United Nations System, in working for better understanding among peoples and cultures, for agreement among States and for greater solidarity in international society.

On 20<sup>th</sup> June 1995, the United Nations commemorated the 50<sup>th</sup> Anniversary of the signing of the UN Charter in San Francisco. Dr. Boutros Boutros-Ghali pledged that the United Nations will keep alive "the Dream of the Global Cooperation". He said "We are custodians of the Dream of Global Co-operation. We will not let it perish".

184 Contracting Member States of ICAO have put their faith in this Partnership, this co-operation by subscribing to the Chicago Convention, which is one of the world's most widely accepted legal instruments.

Let me briefly take you back to Chicago for a moment. Speaking of Chicago, in the same breath, both Al Capone and ICAO come to my mind - though for entirely different reasons. Al Capone, a legendary Mafia mobster who always broke the law. The Chicago Convention created law - an air law instrument of universal application that has not only withstood the ravages of times but has gained immense relevance with the passage of times as well.

The 50<sup>th</sup> anniversary of the opening of the Conference on International Civil Aviation was revisited in Chicago on 1 November 1994. ICAO was a co-host of the Chicago Convention 50<sup>th</sup> Anniversary Conference and Exhibition held on 31 October and 1 November 1994 in the very room in which the Conference took place. It was a memorable event, a major commemoration among many that took place in every part of the world to honour both the Chicago Convention and the 50<sup>th</sup> Anniversary of ICAO.

On 7 December 1944, the representatives of the 52 States present at the Chicago Conference signed the constitution of ICAO. And it was the vision, the ideas, the drafting, the compromises and the insights of those who set in the conference room in the Stevens Hotel, 52 years ago that have led to the modern international civil aviation.

We would be amiss today if we were not to express our gratitude to the more than 400 who toiled in Chicago on our behalf more than a half century ago.

We are grateful because the delegates who met at Chicago performed their task surpassing all expectations. The intent had been to seek agreement upon a new permanent convention in principle only, referring the matter for further study to a proposed interim organization. In the end, however, a permanent convention was completed - the delegations had crafted a singular international instrument - one without any serious flaws that might have prevented or delayed its broad ratification or required subsequent fundamental amendment. That instrument laid out a philosophy for the development of international civil aviation; its established principles, structures and procedures for a permanent body to be known as the International Civil Aviation Organization; and with its Annexes it provided a flexible system for the adoption and future adaptation of international minimum standards to govern the technical side of aviation.

Anticipating the creation of United Nations in the year to follow, the drafters of the Chicago Convention incorporated in it, for the first time in an international agreement, the expression "United Nations". ICAO later become a specialized agency of the United Nations.

### **CURRENT CHALLENGES**

Let me now turn to the current situation. As aviation is about to move into the last century, States and the civil aviation industry are facing unprecedented challenges by:

- traffic which continues to grow but is at times difficult to predict.
- emerging new technology.
- a rapidly changing commercial and regulatory framework.
- a growing awareness of the need for protection of the human environment.
- a requirement for substantial investment in infrastructure, equipment and human resources at a time of increasingly competitive pressures for financial resources.

Noting the need for States and the Organization to keep pace with the rapidity of change and developments in civil aviation, the ICAO Council developed a global strategy of implementation priorities for the economic, technical and legal fields for the next decade.

### **STRATEGIC PLAN**

A strategic plan was developed to promote the principles enshrined in the Convention on International Civil Aviation by:

- a) Developing and adopting international Standards, Recommended Practices and associated documents in a timely manner to meet changing needs and foster the implementation of existing and future ICAO Standards and Recommended Practices to the greatest extent possible world-wide.
- b) Strengthening the legal framework governing international civil aviation by the development of new international air law instruments and amendments of existing instruments, and by encouraging the ratification by States of these instruments.
- c) Ensuring the currency, co-ordination and implementation of Regional Air Navigation Plans.
- d) Providing the framework for the efficient implementation of the new air navigation systems.
- e) Addressing on a world-wide basis any environmental problems that may be associated with civil aviation.
- f) Assisting in the economic assessment of, and mobilisation of human and financial resources for, civil aviation facilities and services.



- g) Developing new arrangements and related proposals for the economic regulation of international air transport.
- h) Ensuring the greatest possible efficiency and effectiveness in the operations of the Organization, inter alia to meet the above objectives.

### CRITICAL AIR LAW INSTRUMENTS

One of the greatest single challenges facing ICAO and its Contracting States is that of ratification of legal instruments such as Article 3 bis and 83 bis of the Convention on International Civil Aviation, the Warsaw System Protocols and the existing aviation security conventions and protocol; and of implementation, through increased application of the SARPs in the Annexes to the Convention. The legal components of the majority of the challenges facing ICAO (e. g. airport and airspace congestion, unlawful interference, environment) can only be dealt effectively through the regulatory system established in the Convention and its Annexes or through separate instruments of International Air Law. The ICAO Assembly has repeatedly advised States of their obligations and responsibilities in this field but quite a number of international instruments have yet to come into force.

In this regard, let me deal with a few of the legal instruments that are of particular interest to States.

Fifty-two States attended the Chicago Conference; when the Convention entered into force in 1947, it had 26 parties. In the intervening period of 52 years the number of parties has grown to 184, almost the entire world community of States. A large number of these States were not even in existence when the Convention came into force. With these increasing number have come corresponding desires from the new States to have representation on the ICAO Council, the Organization's governing body. This has necessitated four amendments to Article 50(a) of the Chicago Convention, three of which resulted in an increase in Council membership from the original 21 members to 27, 30 and 33 respectively. The last amendment to Article 50(a), drafted in 1990 to increase the membership to 36, is not yet in force.

The increasing complexities of modern aviation technology and rules have also necessitated an increase in the Air Navigation Commission from 12 to 15 members through an amendment to Article 56 of the Convention. Another amendment adopted in 1989 to increase the number of Commission members from 15 to 19 is not yet in force.

The first substantive amendment to the Convention was the adoption of Article 83 bis in 1980. The Convention attaches a number of all-important functions and responsibilities to the State of registration of an aircraft. However, the way aircraft are operated and financed has changed over the years, to the extent that the aircraft may be registered in one State but operated by someone in another State. In these circumstances, it may be difficult or impossible for the State of Registry to discharge its functions in respect of a particular aircraft.

Article 83 bis provides for the transfer of certain functions and duties. Notwithstanding the provisions of Articles 12, 30, 31 and 32(a) of the Chicago Convention, when an aircraft registered in a Contracting State is operated pursuant to an



agreement for lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another Contracting State, the State of Registry may, by agreement with such other State, transfer to it all or part of its functions and obligations and duties as State of Registry in respect of that aircraft under Articles 12, 30, 31 and 32(a). The State of Registry shall be relieved of responsibility in respect of the functions and duties transferred.

The transfer shall not have effect in respect of other Contracting States before either the agreement between States in which it is embodied has been registered with the Council of ICAO and made public pursuant to Article 83 of the Chicago Convention, or the existence and scope of the agreement have been directly communicated to the authorities of the other Contracting State or States concerned by a State Party to the agreement. This amendment requires 98 ratifications for entry into force, but has until now received 91 - short by only seven.

Another important amendment that I want to touch upon is Article 3 bis of the Convention. This Protocol was adopted unanimously on 10 May 1984 by the 25<sup>th</sup> Session, Extraordinary, of the ICAO Assembly. The drafting history of this Article supports the conclusion that Article 3 bis is declaratory of the existing general international law with respect to the following elements:

- a) the obligation of States to refrain from resorting to the use of weapons against civil aircraft in flight;
- b) the obligation in case of interception, not to endanger the lives of persons on board and the safety of aircraft;
- c) the right of States to require landing at a designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of the Convention.

This Protocol of Amendment has obtained 82 of the 102 ratifications required for its entry into force.

## SOVEREIGNTY

Let me move on to other important aspects, that of Sovereignty and the obligation of States to comply with the ICAO standards.

The importance of sovereignty in the field of international commitments air law cannot be overstated; it is the very core of the notion of entry into binding international commitments, of relationships in general between and among States. Yet sovereignty both confronts, and presents many challenges.

Today, we are a witness to a marked contradiction; on one hand, a growing trend towards regionalism with the surrender of authority to a larger entity, on the other, a simultaneous opposite trend towards the dissolution of once federated or unified States, with a splintering into smaller sovereign entities.

This growth in the number of Sovereign States introduces complexities due

to the increasingly larger number of Contracting States which must ratify an amendment to an instrument of air law for its entry into force. In short, sovereignty is essential, but at the same time, sovereign jurisdictions are growing in number as the concept of sovereignty continues to evolve.

Multilateral conventions have proved to be an extremely useful tool in international relations over the years. The adherence of a State to a convention is an act of sovereignty by which the State accepts being bound by the provisions of that convention.

### **SAFETY OVERSIGHT**

An important air law issue involving sovereignty questions is that of Safety Oversight. Articles 37 and 38 of the Chicago Convention established a sound process of:

- 1) Collaboration by States working in ICAO to establish international standards and procedures;
- 2) Incorporation by sovereign States of such standards and procedures into their national legislation and regulations; and
- 3) Immediate notification to ICAO of any departures from such International Standards and procedures.

The structure put in place by ICAO's founders is a watertight system. Either States comply with the Standards or they file differences. The Convention does not allow for a situation where States do not comply and do not file differences. Although this process is fundamentally sound, nevertheless, there are serious problems in current practice.

A major problem is the failure of many Sovereign States to fulfil the obligation they assumed to notify ICAO of any differences between these International Standards and Practices and those that each State actually maintains. The Sovereignty of States of course effectively precludes the design or use of sanctions to obtain essential compliance.

When safety standards and procedures are involved on international flights, one cannot take the position that non-compliance by a Sovereign State affects only citizens of that State. Any other State that receives flights of aircraft registered in the non-complying State has every reason to be concerned about whether International Standards and Procedures are indeed being followed with respect to such aircraft and crews.

To tackle the problem of non-compliance with the filing of differences, the recently concluded 31<sup>st</sup> ICAO Assembly considered a strategy to foster proper implementation, based on improving the awareness of States of the seriousness of this problem, analyzing the reasons for non-implementation, and assisting States with implementation where necessary and possible. One approach considered was the creation of an electronic "bulletin board" through the use of the INTERNET or a similar network to get more input from States during the development of Standards as whether they intend to file differences and, if so, the reason for doing so; and to



seek verification of the accuracy of notifications. This approach may induce a higher degree of awareness amongst the States.

### **AIRSPACE ORGANIZATION**

I move on to the emerging trend on airspace organization issues. Air Navigation safety, regularity and efficiency presently rely on air traffic services which are based on an airspace organization of Flight Information Regions (FIRs). In many cases, air traffic services are provided on a national basis rather than a co-operative basis, and FIRs are closely aligned with national boundaries. While the sovereignty of States over the airspace above its territory is recognized in Article 1 of the Convention on International Civil Aviation as the first general principle, the current organization of FIRs may in the future only be useful in the lower airspace especially for low level and regional traffic. Further efficiency and economy can be achieved if neighbouring States jointly provide air traffic services over large geographical areas. A growing sense of the need to work together may now permit an unprecedented level of co-operation between States, in particular for the use of satellite technology in communications, navigation and surveillance systems which provides coverage that far exceeds national boundaries.

The concept of global air traffic management is widely recognized as essential, even if it has not yet been described in detail and with clarity. In order to support this operational concept, there is a need to define a global air traffic management architecture, including the organization of airspace in large air traffic management regions, consisting of the upper airspace of sizeable geographical areas. Strategic airspace management on a regional and global scale will employ infrastructure planning and implementation to achieve a cohesive, global system of airspace organization, supporting CNS/ATM facilities and services and corresponding airborne capabilities.

### **GLOBAL NAVIGATION SATELLITE SERVICES**

The principle of complete and exclusive Sovereignty of States over the airspace above their territory is a cornerstone of customary international air law, which has been recognized by the Paris convention, 1919 and the Chicago Convention, 1944.

The sovereign rights of a State include the right to regulate and control the provision, operation and management of air navigation services within its territory. In the case of GNSS, the navigation facilities, at least as far as the space segments are concerned, would be controlled and operated by one or more foreign countries, representing a dramatic step away from past practice in the application of the principle of sovereignty. Naturally, this situation gives rise to certain concerns, particularly in view of the fact that the GNSS services currently available for the international aviation community have originated from systems designed and operated for military purposes.

To alleviate this concern, ICAO has adopted a policy on 9 March 1994 to the effect that implementation and operation of CNS/ATM systems which States have





undertaken to provide in accordance with Article 28 of the (Chicago) Convention shall neither infringe nor impose restrictions upon States' sovereignty, authority or responsibility in the control of air navigation and the promulgation and enforcement of safety regulations. States' authority shall be preserved in the co-ordination and control of communications and in the augmentation, as necessary, of satellite navigation services.

As mentioned above, the policy of ICAO is not a binding instrument, although it carries with it persuasive value and influential power. The ideal instrument would of course be a multilateral convention creating treaty obligation for States providing GNSS services. Nevertheless, the past experience has demonstrated that it is both difficult and time-consuming to conclude a new multilateral convention, let alone to bring it into force. It would not be desirable for the international community to await reaping the benefit of the new navigation technology until the conclusion and entry into force of a new international convention. Therefore, as a transitional arrangement, ICAO has, by exchange of letters on 14 October and 27 October 1994, accepted the offer of the United States concerning the Standard Positioning Service of GPS for use by the international community.

In his letter of 14 October 1994, Mr. David Hinson, Administrator of the Federal Aviation Administration, reiterated on behalf of the US Government that the United States intends, subject to the availability of funds as required by United States law, to make GPS-SPS available for a period of 10 years, on a continuous, worldwide basis and free of direct user fees. The United States shall take all necessary measures to maintain the integrity and reliability of the service and expects that it will give at least 6 years notice prior to termination of GPS operations or elimination of the GPS-SPS.

The letter of 14 October 1994 further states that the availability of GPS-SPS is not intended in any way to limit the rights of any state to control the operations of aircraft and enforce safety regulations within its sovereign airspace

A similar approach is now taken with respect to the offer by the Russian Federation. By a letter dated 5 February 1996, Mr. N. P. Tsakh, Minister of Transport of the Russian Federation, confirmed on behalf of his Government the proposal concerning the provision of a standard-accuracy GLONASS channel to the world aviation community for a period of at least 15 years with no direct charges collected from users. The Minister stated that the provision of the GLONASS system to the world aviation community was not intended in any way to limit the right of any State to control aircraft operations and monitor compliance with flight safety regulations in its airspace. The Council accepted on 14 March 1996 the letter in principle, however, with some modifications to emphasize non-discriminatory access, sovereignty, integrity and reliability of the service and the exchange of information. These modifications met with the agreement of the Russian Federation and, through an exchange of letters dated 4 and 29 July 1996, an understanding has been executed thus representing a mutual agreement between ICAO and the Russian Federation.

Accordingly, through the exchange of letters with ICAO, the United States and the Russian Federation have respectively committed to respect the principle of sovereignty in the provision of GPS and GLONASS.





Closely related to the issues of universal accessibility and sovereignty, another important issue is how to ensure the continuity and quality of services. There has always been some concern that the service provider States will discontinue or downgrade the services for national security reason or otherwise. At this stage, as discussed above, the appropriate means to secure accessibility, reliability and continuity of services is through a commitment of the service providers under their agreement with ICAO. In the long run, the international community will have to decide whether it should establish an international civil global navigation system based on satellite technology. ICAO continues to explore the feasibility of achieving a civil, internationally controlled GNSS.

In accordance with Assembly Resolution A31-7, ICAO will be organizing a world-wide CNS/ATM System Implementation Conference, which will address financial, organizational, co-operative, legal and other institutional aspects of CNS/ATM systems implementation. This Conference is planned for the first half of 1998.

One of the difficult questions which will have to be addressed is the question of liability. This is a complex issue because GNSS services will give rise to relationships in both private and public law, as well as space law and air law.

From a private law perspective, there will be contractual relations between service providers and users. Non-performance of the former may constitute a breach of contract which may give rise to liability. However, according to the clarification of the US Representative on the Council, this does not mean that the provider may never be held liable for negligent failure of the system; GPS are in principle subject to the same liability provisions as other navigation aids provided by States; whether the availability of the services for the time being, have legal implications for the liability aspects of GPS and GLONASS, will need to be further clarified.

It would be appropriate to quote Professor Henri Wassenbergh, Chairman of the International Institute of Air and Space Law at the Leiden University, Netherlands, who is also the recipient of the ICAO Medal of Honour on the occasion of the 50<sup>th</sup> Anniversary Celebrations of ICAO.

Professor Wassenbergh in "The Future of International air Transportation Law" said "States are free to choose what they feel is right and what they think is wrong. The ultimate choice is between absolute independence and 'national' freedom on the one hand and international economic, financial, technological, social and environmental inter-dependence and international co-operation."

The above statement on international co-operation touches on the core of the Preamble of Chicago convention, which brings out the need to avoid friction and to promote co-operation between nations and peoples upon which the peace of the world depends.

International Civil Aviation has developed to such a stage, both in terms of technology and economy, that at no point of time is the urgency for global co-operation felt as strongly as now. And, in the words of the Secretary General of the United Nations, we all become the custodians of Global Co-operation.

I have briefly and generally touched upon some of the larger but complex issues that, I think, may be of interest and relevance to the contemporary aviation community of States from ICAO's perspective.



I have taken you to the past and let you have a quick glimpse into the future, and whilst in between the past and the future, let me conclude by stating what Dr. Assad Kotaite had to say with reference to the 50<sup>th</sup> Anniversary Celebration of ICAO. He asked "Why celebrate an anniversary? Is an anniversary year or date not like any other? Should we not concentrate on shaping our future?"

To this he replied himself "the past, present and future are all important, and as ICAO has demonstrated over the years, we can work with all three simultaneously. We commemorate because there is a real human need to look back to one's origins and to remember together the important events of our beginnings. It seems to be as human to celebrate anniversaries as it is to develop history and create bodies of law."

I couldn't agree with him more.

I thank you for your patience in taking this tour with me.