

THE INTERNATIONAL CIVIL AVIATION ORGANIZATION AND INTERNATIONAL LAW

As the Australian Representative on the Legal Committee of the International Civil Aviation Organization (ICAO) I was interested in Mr Sassella's recently published article on ICAO's contribution to international law.¹ I would like to make a few comments on the article. Some of these may be necessary because it would appear that some time elapsed between the preparation of the article and its publication. In addition, there have been several important developments in recent years which make it desirable that the record of the Organization's work should be brought up to date.

Mr Sassella states² that the U.S.S.R. is the only major power not a party to the Chicago Convention. In fact the Convention was ratified by the U.S.S.R. in August 1970 and, at the Assembly held in Vienna in June 1971, the U.S.S.R. was elected as a member of the Council of the Organization. The People's Republic of China (which was not referred to in the article) is not a party to the Chicago Convention.

An Extraordinary Assembly held in April 1971 agreed to increase the size of the Council from 27 to 30 members. This change will become effective when ratified by 80 Contracting States. The Air Navigation Act 1971 (Cth) authorized ratification of this Protocol by Australia. As at 20 December 1971, 55 Contracting States had ratified the Protocol and it is likely that an election for the additional 3 members of the Council will be held about the middle of 1972.

The Council has never given a final decision on a matter referred to it under article 84.³ Some disputes have been referred to it but have either lapsed or been settled before it became necessary for the Council to make any decision.

Australia has not ratified article 93 *bis* providing for States to be debarred from membership of ICAO,⁴ although it has ratified all other amendments made to the Convention.

The statement⁵ that the most recent draft to have emerged from the ICAO Legal Committee is the *Draft Convention on Aerial Collisions* (1964) does the Legal Committee less than justice. Since that date three other draft conventions have been prepared, each of which have been the basis of an international convention adopted by a Diplomatic Conference.

¹ (1971) 8 M.U.L.R. 41.

² *Ibid.* 54.

³ *Ibid.* 57-8.

⁴ *Ibid.* 61-2.

⁵ *Ibid.* 76.

It may be appropriate to give a summary of each of these matters in order to have an up to date picture of the work done by the Legal Committee.

The *Convention on the Unlawful Seizure of Aircraft*⁶ was drafted by the Legal Committee at a meeting in February 1970 and was submitted to a Diplomatic Conference held at The Hague in December 1970. This Convention established an 'offence' consisting of the unlawful seizure or exercise of control of aircraft engaged in international civil aviation. Under the Convention each Contracting State undertakes to make this offence punishable by severe penalties and to take steps to exercise its jurisdiction over the offence when it is committed on board an aircraft registered in that State, when the aircraft lands in its Territory with the offender on board, or when the offence is committed on an aircraft (wherever registered) leased without crew to an operator having his principal place of business in that State. Each Contracting State in which an alleged offender is found may, in a proper case, take him into custody and make a preliminary enquiry into the facts. If it does not extradite him it must submit the case to its own competent authority for a decision as to whether he will be prosecuted under its own law. The Convention contains provisions similar to those found in the Tokyo Convention as to such matters as reports to other States, affording the alleged offender assistance in communicating with his Consul or other national representative, restoring control of the aircraft to the crew, and expediting the continued journey of the passengers and crew. This Convention has been signed but not yet ratified by Australia.

A second draft convention prepared by the Legal Committee deals with another aspect of the problem of criminal interference with civil aviation. This draft convention, prepared at a meeting in London in September 1970, deals with acts of unlawful interference with international civil aviation, other than acts of unlawful seizure of aircraft in flight. It formed the basis for a *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* adopted at a diplomatic conference held in Montreal in September 1971. Under this Convention a person commits an offence if he unlawfully and intentionally does any of the following acts:

- (a) performs an act of violence against a person on board an aircraft in flight likely to endanger its safety;
- (b) destroys an aircraft in service or damages it so as to render it incapable of flight or likely to endanger its safety in flight;
- (c) places on an aircraft in service by any means any device or substance likely to destroy it or cause damage likely to endanger its safety in flight;
- (d) destroys, damages or interferes with air navigation facilities used in

⁶ Briefly referred to *ibid.*

- international air navigation if likely to endanger the safety of aircraft in flight; or
- (e) communicates false information thereby endangering the safety of an aircraft in flight.

An aircraft is deemed to be 'in service' from the beginning of its pre-flight preparation for a specific flight until 24 hours after any landing. The Convention contains provisions broadly similar to those in the Hague Convention as to exercise of jurisdiction over the offences created, taking suspected offenders into custody, preliminary enquiries and taking of extradition or prosecution action against the offender. The Montreal Convention has not yet been signed or ratified by Australia or by enough other States to bring it into force as between them.

The third subject matter to which the Legal Committee and its Sub-Committees have devoted a considerable amount of time since 1964 is revision of the Warsaw Convention and the Hague Protocol, which govern the rights and liabilities of international air carriers *vis-a-vis* passengers and consignors of goods. The United States was unhappy with many of the provisions of the Warsaw Convention which was made in 1929. In particular it regarded the limit of liability for death and personal injury, even after this had been increased to U.S.\$14,600 by the Hague Protocol of 1955, as unreasonably low for American citizens. Attempts to have the United States Senate ratify the Hague Protocol failed and in 1965 the United States filed a denunciation of the Warsaw Convention. It is not possible in this note to record the action taken following the notice of denunciation which led to an eleventh hour withdrawal of the notice and a more or less voluntary agreement among the airlines operating into and through the United States to provide a substantially higher limit of compensation for passengers on those flights. A new Protocol to revise the Warsaw Convention and Hague Protocol was prepared by the Legal Committee and adopted, with some modifications, at a Diplomatic Conference held in Guatemala City in February and March 1971.

The principal provisions of the new Protocol are:

- (1) An increase in the limit for death or injury to passengers to U.S.\$100,000.
- (2) The liability of the carrier to be absolute, subject only to reduction of damages on account of contributory negligence.
- (3) Absolute unbreakability of the limits even in the event of ticketing failures or wilful misconduct by the carrier or his servants or agents.
- (4) A Diplomatic Conference is to be held 5 and 10 years after the Protocol comes into force to review the amount of the limits of liability.

This Protocol has not yet been ratified by Australia or by enough other States to bring it into force.

It might be helpful to mention that the Commonwealth Parliament has adopted the convenient practice of reproducing as a schedule to the Act of Parliament authorizing ratification the terms of each air law Convention which has been ratified by Australia. Readers who wish to refer to these Conventions may find it more convenient to refer to the Commonwealth Statutes than the ICAO Documents or the United Kingdom Command Papers referred to in the article. A complete list of these air Conventions and the Commonwealth Acts in which they may be found is as follows:

Air Navigation Act 1920-66

Chicago Convention (1944)

International Air Services Transit Agreement (1944)

Protocol to amend article 45 of the Chicago Convention (1954)

Protocol to amend articles 48, 49 and 61 of the Chicago Convention (1954)

Protocol to amend article 50 of the Chicago Convention (1961)

Protocol to amend article 48 of the Chicago Convention (1962)

Air Navigation Act 1971

Protocol to amend the Chicago Convention to increase the size of the Council to 30 members (1971)

Civil Aviation (Damage by Aircraft) Act 1958

Rome Convention on Surface Damage (1952)

Civil Aviation (Carriers' Liability) Act 1959

Warsaw Convention on International Carriage (1929)

Hague Protocol to amend the Warsaw Convention (1955)

Civil Aviation (Carriers' Liability) Act 1962

Guadalajara Convention supplementary to the Warsaw Convention (1961)

Civil Aviation (Offences on International Aircraft) Act 1970

Tokyo Convention on Offences on Aircraft (1963)

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