THE INTERNATIONAL CIVIL AVIATION ORGANISATION: AFTER 50 YEARS AND BEYOND

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The basic purpose of law is to balance conflicting social interests, to avoid, prevent or resolve social conflicts, and thus to foster mutually beneficial harmony in social relations. After 50 years in existence, it is legitimate for one to ask if the International Civil Aviation Organisation (ICAO), in its law-making role, was able to achieve this.

Air law is a vast concept encompassing both national and international law. It touches upon all branches of law that may govern different aspects of the social relations created by the aeronautical uses of airspace. Domestic air law evolves in accordance with the technical, economic and political realities of each national constituency, namely, the state. Similarly, in view of the inherent international nature of aviation, international air law cannot evolve without regard to the evolution that takes place in national constituencies. International air law has been seen to evolve rapidly and strongly on a regional basis when like-minded states integrate their economic and political institutions. However, on the global scale, international air law will always be the lowest common denominator in a climate of conflicting political wills, reflecting the consensus reached by the states of the international community.

It is historic fact that codified international air law has developed in the shadow of two devastating world-wide armed conflicts and is marked by them. In 1919, the Paris Convention Relating to the Regulation of Aerial Navigation was drafted during a peace conference following a war during which aviation proved its military potential for the first time. In 1944, the Chicago Convention on International Civil Aviation was drafted during a war in which aviation proved to be a critically effective strategic and tactical military force. These historic roots are a dominant reason for the emphasis on the security aspects in the drafting of the rules of law, and for the patent pre-occupation with the concept of sovereignty over national air space.

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The period of the Cold War was not conducive to any relaxation of the emphasis on national sovereignty over airspace, as sadly illustrated by the over-zealous protection of national airspace. An example is the 1983 shooting down of Flight KE 007 which was in the name of the protection of the sacred airspace of the "fatherland". In reality, it was a mass murder of 269 innocent passengers. More recently, in February 1996, the Cuban Air Force did not hesitate to use deadly force against two unarmed United States light aircraft, and to make matters worse, the incident had occurred over the high seas.

The political will of states must reassess this legal axiom of sovereignty and its practical interpretation and application. Aviation must no longer be perceived primarily as a potential menace to national security. It is an indispensable part of the world economy, an essential public service and an indivisible part of the international trade in services. Its safety, regularity and economic efficiency should be the guiding principles of legal regulation. And it should also take priority over national pride, prestige and wasteful protectionism.

The Chicago Convention, the backbone of the international legal regulatory framework of civil aviation, is 52 years old, with a current membership of 184 states. It had been originally adopted by 52 states under vastly different technical, economic and geopolitical circumstances. This means that 132 states (namely 71.58%) had no influence on the tenuous consensus reached at the Chicago Conference more than half a century ago. Today, the Chicago Convention stands as a monument of stagnation. No substantive amendment has entered into force since its adoption more than 50 years ago. The small number of administrative and constitutional amendments which have entered into force were purely cosmetic and might even be considered to be rather harmful. For instance, there was a *de facto* reduction of the role of the ICAO Assembly with the introduction of the triennial rather than the annual cycle of Assembly sessions. There have also been repetitive self-serving increases in the composition of the ICAO Council and of the Air Navigation Commission that had not been motivated by the need for greater efficiency. On the contrary, they were to preserve the quasi-permanent representation and vested interest of some member states.

The two substantive amendments of the Chicago Convention in 1980 and 1984, namely, Article 83 *bis* and Article 3 *bis* respectively, had been necessitated by proven practical needs. Yet they have not entered into force in spite of their unanimous adoption by the ICAO Assembly. It would be accurate to note that stagnation in the development of the legal framework has been accompanied by a stagnation in the working methods of that organisation. While it may be considered a matter of pride and stability that in 50 years ICAO has had only three Presidents, on the other hand, the lack of turnover may be indicative of a lack of innovative courage, or it may be a manifestation of an over-anxious need to preserve the *status quo*.

In air transport, the Chicago Convention failed to create a multilateral framework for the exchange of traffic rights. Instead, it relegated the issue of mutual exchange of traffic rights to the current maze of bilateral agreements on air services. There are at present more than 4,000 such agreements registered with ICAO. The Conference even failed to grant the basic *right to fly* over foreign territory for non-commercial purposes. The 1944 International Air Services Transit Agreement (the two freedoms agreement) is currently in force for only 104 states, representing 57% of ICAO's membership. A number of states which have large territorial airspace are not even party to this Agreement, instead choosing to trade the basic right of overflight for other economic advantages. These states include Russia, Canada, China, Indonesia and Brazil. The recognition of economic rationalisation and the need for the globalisation of air transport recently led to more liberal, and even "open skies", agreements among like-minded and innovative states in the European Union. However, it would be true to say that the protectionist regime continues to predominate in the world today.

Contrary to previous practice, the Fourth Air Transport Conference in November-December 1994 was called "The World-Wide Air Transport Conference." This name may be considered to be misleading because it was attended by only 137 states or 72.6% of ICAO membership. Moreover, since the Conference was held during the 50th anniversary of the Chicago Conference, it was felt that the euphoria of the occasion might assist in the validation of bold perspectives for the future of international air transport regulation. They included the liberalisation of market access, air carrier ownership, effective control, and the "doing of business".

Unfortunately, they did not eventuate and no amount of liberal interpretation can lead one to conclude that the Conference succeeded in overcoming the fundamental conflicts of interest among states. This cannot happen as long as states come from different regions and have different levels of economic development. Or when words like sovereignty, equality of opportunity and reciprocity continue to be key, and hence significant, words for states. Furthermore, there was no consensus at the Conference on the fundamental proposals regarding the progressive introduction of full market access and the associated "safety net" which was to act as a safeguard for weaker economies.

In the light of the above, the following recommendation of the Conference sounds very hollow and unconvincing:

> that ICAO, in accordance with the aims and objectives of Article 44 of the Chicago Convention and in line with its global responsibilities, take, and be seen to take, effective action to exert a leadership role in the economic regulation of international civil aviation.

The ICAO mandate in the field of economic regulation has never been convincingly defined or effectively exerted. The practical position is that economic realities will always assert themselves, while like-minded states and regions will progress towards liberalisation and the seamless globalisation of their markets. This will be the case, regardless of ICAO or dissent from other states.

If ICAO does not exert effective leadership in this field, it is very likely that the economic regulation of air transport, as part of the international trade in services, will come under the regulatory framework of GATT and the World Trade Organisation. It may even come to pass that the aviation industry will benefit from such a move when it is treated as an integral part of the global trade in services regulatory framework, instead of being a separate and distinct regulatory system perpetuating outdated principles and practices. However, at present, GATS excludes traffic rights from its scope and the Air Transport Annex is limited to marketing, maintenance and computer reservation systems only.

While acknowledging the weakness of ICAO in the regulation of air transport, it has always been a matter of ICAO pride that it has scored

successes in the regulation of air navigation. The quasi-legislative function of the ICAO Council in the adoption of international standards and recommended practices is a vital function. It is actually unique within the organisational structure of the United Nations system. The 18 Annexes to the Chicago Convention unify the standards and procedures for international air navigation and other related subjects like facilitation, aviation security and the carriage of dangerous goods. The Annexes are adopted by the Council after extensive consultations in specialised panels, and dialogues with states in Regional and Divisional meetings and in the Air Navigation Commission.

States have an international legal obligation, under Article 37 of the Convention, to comply with ICAO standards to the "highest practicable degree". In addition, they are legally obliged to notify the Council, under Article 38, in case of any differences between ICAO standards and their national practices. Historically, the number of differences filed by states have been low indicating that they endeavour to align their national practices and procedures with ICAO standards. Legally, the assumption is that in the absence of notification there is full compliance. However, in practice, it is apparent that many states do not comply with ICAO standards and fail to comply with the notification requirements under Article 38. Since the subject matter here is aviation safety, this legal assumption is a very dangerous one to make.

Another worrisome matter is the fact that with regard to a number of standards, 66-75% of member states do not respond to the communication of new or amended standards. They do not indicate either way if their reaction is positive or negative. Owing to political sensitivities or political convenience, the Council and officials of ICAO do not directly question states on the actual implementation of standards. On the other hand, their actions are limited to vague and general "invitations", "urgings" and "exhortations".

In addition, the international forum lacks a specific institutional enforcement machinery and there has been no political will or courage in the use of available mechanisms. For example, under Article 54(j) of the Convention, there is a mandatory duty on the ICAO Council to report to member states any infraction of the Convention, including any failure to carry out Council recommendations or determinations. The sad reality is that there is no

international enforcement, nor an audit or inventory taken on the actual implementation of international standards. It is also uncertain as to whether and to what degree some of the standards are implemented in practice.

Any proud achievement of ICAO in the past 50 years in technical law-making may thus prove to be in practice no more than the proverbial "Emperor's clothes", with the politicians in ICAO claiming to see or even believing they see something which is non-existent. Unfortunately, what is at stake here is not merely the Emperor's pride or fancy, or that of his sycophants. On the other hand, it is a matter of grave concern because what is at stake is the safety of international civil aviation. It appears that ICAO's pusillanimity in this field is tantamount to a cover-up of the deficiencies for political convenience, with possible far-reaching consequences for the safety of aviation.

In September 1994, the United States Department of Transportation published the results of the Federal Aviation Administration's assessment of 30 foreign states that operated in the United States. It was to assess their capability to provide the necessary safety oversight of their air carriers. The result was that nine states did not meet the international aviation safety standards that were required by existing ICAO standards; and four states were given a conditional acceptance rating under heightened FAA inspections.

These findings sent shockwaves through the international aviation community as the action of the United States government amounted to the "blacklisting" of the foreign states involved. They were not allowed to fly into the United States. In spite of the fact that this action was in perfect harmony with the provisions of Articles 11-13 of the Chicago Convention, protests were voiced and the United States accused of arrogating to itself the role of international policeman.

Although the unilateral enforcement of international standards is effective on a one-to-one basis, as shown by the above United States example, it does not provide the solution on a global basis. As a consequence, ICAO needs to conduct an international audit on the implementation of air navigation safety standards and introduce a full transparency policy into the audit for the common good.

Indeed, it is not an encouraging sign when, in the belated steps taken to implement ICAO Assembly Resolution A29-13 on the Improvement of Safety Oversight, the discussion did not focus on important substantive safety issues. Instead, it centered on who would be financially responsible for the establishment of the oversight/audit program. It debated the way to ensure that the safety assessment would be performed only at the request of the state concerned, and it sought the confidentiality of findings. Once again, safety and transparency had to give way to national sensitivities. This presents a danger for ICAO. If it cannot find a way to enforce the implementation of international standards and compliance with Article 38 of the Convention on the duty to notify any departure from such standards, the role and authority of ICAO will diminish and states will start to take uncoordinated unilateral steps to protect what they consider to be their own vital interests.

The last 50 years also witnessed a vast progression in the unification and codification of international air law. The future perspectives of air law will require an intensive and effective progression made in this field. It has to respond to, and even anticipate the evolution of technical, operational and economic realities. The early pioneers and some of their successors in ICAO's Legal Committee ought to be saluted for their wisdom, leadership and professionalism in the evolution of international air law. Nevertheless, the future has to learn not only from the successes but also from the failed attempts at codification and unification in the past.

One fundamental lesson which can be learnt is that the unification and codification of air law has no place for academic speculation or perfection in the sense that "the best may be the enemy of the good". Academic perfection is of little relevance if it is not in harmony with the political will of states and if it does not respond to a sense of priority and the necessity for international action. Be that as it may, it is quite spectacular that the unification of international air law has been exceptionally successful in the public law sector dealing with aviation security. The 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft has been ratified by 157 states. The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft has been ratified by 158 states. And the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation has been ratified by 159 states. No

other unification of law in other fields has come close to such international acceptance.

Although the above Conventions are not masterpieces of legal drafting and embody a difficult compromise, they did respond to an urgent and practical need of the international community. In spite of this, states are not ready to accept the idea of enforcement. For example, the 1973 attempt to amend the Chicago Convention failed. Similarly, the attempt to draft a new instrument on enforcement action against states that disregard their legal duties under the aviation safety instruments failed utterly.

In the field of private air law, attempts at unification have not been particularly successful. For example, the problem of liability in international carriage by air has been referred to as "a Leitmotif of a very unfinished symphony". The 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air is an outdated instrument, adopted at a time when state-owned infant airlines badly needed protection against catastrophic risks. Moreover, although the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface epitomises academic perfection and superb legal drafting, its fundamental philosophy is flawed and it does not respond to the needs and priorities of states. For this reason, states like Australia that have not yet denounced the Convention should do so immediately.

There is no justification at present for any limitation on liability in international carriage by air as long as the courts do not entertain fanciful claims and do not award unrealistically high compensatory amounts. Amounts that exceed the real economic damage suffered result in the unjust enrichment of both claimants and their lawyers.

As stated earlier, the Warsaw system is a shadow of the past and must be modernised as a matter of priority. Past efforts to amend the 1929 Warsaw Convention merely produced cosmetic amendments in the 1955 Hague Protocol. And the profound and positive amendments which were adopted in Guatemala City in 1971, and in Montreal in 1975 have failed to enter into force. As a result, the airlines of the world have left Warsaw behind by reaching an Agreement in 1995 at industry level. They could not wait any longer for states to find a solution for them. A similar thing happened in 1966 with the signing of the Montreal Agreement – CAB No 18900

between the United States government and airlines. The 1995 Agreement, known as the Kuala Lumpur Agreement on Measures to Implement the IATA Intercarrier Agreement, is expected to enter into force on 1 November 1996.

ICAO seems to have lost leadership in this field. Belatedly, it amended its work program to include the study of a new instrument to replace the antiquated Warsaw system with a new convention. This will take place in early 1997 when its Legal Committee meets. In conclusion, the time has therefore come for states, including Australia, to reassess their position and question whether existing instruments best serve their current needs and interests. They should not wait for ICAO to do the job for them.