

Preamble

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security;

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.

At a glance, one would note that the Preamble to the Convention on International Civil Aviation (Chicago Convention), which sets the tone of the Convention, resonates a message of peace and harmony among nations of the world through aviation. The Preamble, and its *raison d'être* was invoked at the 15th Session of the Assembly (Montreal, 16 June–22 July 1965) of the International Civil Aviation Organization (ICAO)¹ on the theme of peace when the Assembly adopted

¹The International Civil Aviation Organization is the United Nations specialized agency dealing with international civil aviation. ICAO was established by the Convention on International Civil Aviation (Chicago Convention), signed at Chicago on 7 December 1944. Fifty two States signed the Chicago Convention on 7 December 1944. The Convention came into force on 4 April 1947, on the thirtieth day after deposit with the Government of the United States. Article 43 of the Convention states that an Organization to be named the International Civil Aviation Organization is formed by the Convention. ICAO is made up of an Assembly, which is the sovereign body of the Organization composed of the entirety of ICAO member (Contracting) States, and a Council which elects its own president. The Assembly, which meets at least once every 3 years, is convened by the Council. The Council is a permanent organ responsible to the Assembly, composed of 36 Contracting States. These 36 Contracting States are selected for representation in the Council in three categories: States of chief importance to air transport; States not otherwise included which make the largest contribution to the provision of facilities for international air navigation; and States not otherwise included whose designation will insure that all the major geographic areas of the world are represented on the Council. Article 47 of the Chicago Convention provides that ICAO enjoys “such legal capacity as may be necessary for the performance of its functions” and goes on to say that “full juridical personality shall be granted to the Organization wherever compatible with the constitution of the laws of the State concerned.” The Council has two main subordinate governing bodies, the *Air Navigation Commission* and the *Air Transport Committee*. The *Air Navigation Commission* is serviced by The Air Navigation Bureau and is responsible for the examination, coordination and planning of all of ICAO’s work in the air navigation field. This includes the development and modification of SARPS contained in the ICAO Annexes (all except Annexes 9 and 17), subject to the final adoption by the ICAO Council. At the time of writing, ICAO had 191 member States.

Resolution A15-7 (Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa). The Assembly Resolution went on to say inter alia:

BEARING IN MIND that the apartheid policies constitute a permanent source of conflict between the nations and peoples of the world; and

RECOGNIZING, furthermore, that the policies of apartheid and racial discrimination are a flagrant violation of the principles enshrined in the Preamble to the Chicago Convention;

THE ASSEMBLY: . . .URGES South Africa to comply with the aims and objectives of the Chicago Convention.

The aims and objectives of the Chicago Convention which are enshrined in Article 44 of the Convention 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:

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

Another Assembly Resolution followed at the 17 Session of the ICAO Assembly (Montreal, 16–13 June 1970) wherein the Assembly adopted Resolution A 17-1 (Declaration by the Assembly) which stated inter alia:

WHEREAS international civil air transport helps to create and preserve friendship and understanding among the peoples of the world and promotes commerce between nations;

THE ASSEMBLY ADOPTS THE FOLLOWING DECLARATION: The Assembly of the International Civil Aviation Organization. . .mindful of the principles enunciated in the Convention on International Civil Aviation;

SOLEMNLY requests concerted action on the part of states towards suppressing all acts which jeopardize the safe and orderly development of international civil air transport.

At its next Session (Vienna, 15 June–7 July 1971) the Assembly adopted Resolution A 18-4 (Measures to be taken in pursuance of resolutions 2555 and 2704 of the United Nations General Assembly in relation to South Africa where the Assembly stated:

THE ASSEMBLY, recalling its condemnation of the apartheid policies in South Africa in Resolution A15-7;

RECOGNIZING the need for maximum co-operation with the United Nations General Assembly in implementing its Resolutions;

RESOLVES that as long as the Government of South Africa continues to violate the United Nations General Assembly resolutions on apartheid and on the Declaration on the Granting of Independence to Colonial Countries and Peoples;

South Africa will not be invited to attend any meetings convened by ICAO. . . .

Two years later, the ICAO Assembly, at its 19th (Extraordinary) Session (New York, 27 February–2 March 1973) adopted Resolution A19-1 which condemned Israeli action which resulted in the loss of 108 lives.

The same year, the ICAO Assembly, at its 20th (Extraordinary) Session (Rome, 28 August–21 September 1973) adopted Resolution A20-2 (Acts of Unlawful Interference with Civil Aviation) which stated *inter alia*:

THE ASSEMBLY, MINDFUL that the development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security;

CONSCIOUS of the mandate bestowed on the International Civil Aviation Organization to ensure the safe and orderly development of international civil aviation;

REAFFIRMS the important role of the International Civil Aviation Organization to facilitate the resolution of questions which may arise between Contracting States in relation to matters affecting the safe and orderly operation of civil aviation throughout the world.

One glean four key elements in the Preamble to the Chicago Convention: peace and friendship through aviation; safety; economical and orderly air transport.

The elements of peace and friendship have already been discussed as being reflective of the Assembly Resolutions discussed above. On safety, and its relevance projected by the Preamble to the Convention, the ICAO Council on 4 June 1973 adopted a Resolution which recalled the adoption by the United Nations Security Council of Resolution 262 in 1969 which condemned Israel for its premeditated action against Beirut Civil Airport which resulted in the destruction of thirteen commercial and civil aircraft. The Resolution urged Israel to comply with the aims and objectives of the Chicago Convention.

On the economic side, the Preamble to the Convention featured prominently in ICAO Assembly Resolution A21-28 (International Air Services Transit Agreement) adopted by the 21st Session of the Assembly (Montreal, 24 September–15 October 1974) which quoted the Preamble in part which recognized that one of the objectives of the Chicago Convention was that international air transport services may be operated soundly and economically. In pursuance of this objective, Resolution A21-28 urged Contracting States to become Parties to the International Air Services Transit Agreement which strengthened the operation of international scheduled services and facilitated the achievement of that objective.

In general terms, the Preamble to the Chicago Convention leaves no room for doubt that, being a post war instrument, its overall theme is on aviation and peace, which has its genesis in the Chicago Conference that led to the adoption of the Chicago Convention. The Conference which took place from 1 November to 7 December 1944 was inaugurated with the reading of a message to the Conference from the President of the United States. In his message, President Roosevelt, referring to the Paris Conference of 1919 which was designed to open Europe to air traffic, but unfortunately took years to be effectively implemented, stated:

I do not believe that the world today can afford to wait several years for its air communications. There is no reason why it should.

Increasingly, the aeroplanes will be in existence. When either the German or Japanese enemy is defeated, transport planes should be available for release from military work in numbers sufficient to make a beginning. When both enemies have been defeated, they should be available in quantity. Every country has its airports and trained pilots; practically every country knows how to organize airlines.

You are fortunate to have before you one of the great lessons of history. Some centuries ago, an attempt was made to build great empires based on domination of great sea areas. The lords of these areas tried to close the areas to some, and to offer access to others, and thereby to enrich themselves and extend their power. This led directly to a number of wars both in the Eastern and Western Hemispheres. We do not need to make that mistake again. I hope you will not dally with the thought of creating great blocs of closed air, thereby tracing in the sky the conditions of future wars. I know you will see to it that the air which God gave everyone shall not become the means of domination over anyone.²

Thus, President Roosevelt urged States to eschew protectionism, while encouraging them to avoid dominance over one another. Ever since, the fate of economic regulation of international air transport has become an obdurate dilemma to regulators since they were faced with the question as to how States could avoid dominance by others without protecting themselves. The elusive and delicate balance between the two is still being vigorously sought, as will be seen in discussions to follow in this paper.

The Chairman of the Conference, Adolf A Berle Jr. endorsed the President's comments by observing:

There are many tasks which our countries have to do together, but in none have they a clearer and plainer common interest than in the work of making the air serviceable to mankind. For the air was given to all; every nation in the world has access to it. To each nation there is now available a means of friendly intercourse with all the world, provided a working basis for that intercourse can be found and maintained.³

At the Conference, the United States took the position that the use of the air and the use of the sea were both common in that they were highways given by nature to all men. They were different in that man's use of the air is subject to the sovereignty of nations over which such use is made. The United States was therefore of the opinion that nations ought to arrange among themselves for its use in such manner as would be of the greatest benefit to all humanity, wherever situated. The United States further asserted the rule that each country has a right to maintain sovereignty of the air which is over its lands and its territorial waters. There was no question of alienating or qualifying this sovereignty. This absolute right, according to the United States, had to be qualified by the subscription by States to friendly intercourse between nations and the universal recognition of the natural rights of States

²*Proceedings of the International Civil aviation Conference, Chicago, Illinois, November 1–December 7 1944, Vol I & II (Washington, D.C.: U.S. Government Printing Office, 1948) at 42–43.*

³*Id.* 43.

to communicate and trade with each other. This right could not be derogated by the use of discriminatory measures.⁴ The fact that the United States required States to exchange air traffic rights reciprocally is clearly evident in the statement:

It is therefore the view of the United States, that, without prejudice to full rights of sovereignty, we should work upon the basis of exchange of needed privileges and permissions which friendly nations have a right to expect from each other.⁵

The privilege of communication by air with friendly countries, according to the United States was not a right to wander at will throughout the world. In this respect, it was contended that traffic by air differed materially from traffic by sea, where commerce need have no direct connection with the country from which the ship may have come. The air routes were analogous to railroad lines and the right to connect communication links between States was to establish a steady flow of traffic, thereby opening economic routes between countries. According to the United States, it was too early to go beyond this concept and States should accept the fact that what the Chicago Conference would accomplish was to adopt a Convention that would establish communication between States.⁶

The ICAO Assembly, at its 28th Session of the Assembly (Montreal, 22–26 October 1990) adopted Resolution A28-7 (Aeronautical consequences of the Iraqi invasion of Kuwait) which recalled that the *Convention on International Civil Aviation* is based on the belief that the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and that it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends and noted United Nations Security Council condemnation of the invasion of Kuwait and Security Council Resolution 662 which decided that annexation of Kuwait by Iraq has no legal validity and is considered null and void and called upon all States, International Organizations and Specialized Agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation. The Resolution also noted further, Security Council Resolution 661, which calls upon all States to take appropriate measures to protect assets of the legitimate Government of Kuwait and its agencies.

The Assembly also noted Security Council Resolution 670 which affirmed that the specialized agencies are required to take such measures as may be necessary to give effect to the terms of Resolution 661 and condemned the violation of the sovereignty of the airspace of Kuwait and the plunder of Kuwait International Airport by Iraqi armed forces including the seizure and removal to Iraq of 15 aircraft of Kuwait Airways and their purported registration by Iraq. The Assembly called upon Iraq to facilitate the early recovery by their owners of foreign registered aircraft stranded at

⁴*Id.* at 55.

⁵*Id.* 56.

⁶*Id.* 57.

Kuwait International Airport and declared that the unilateral registration of aircraft of Kuwait Airways by Iraqi aircraft is null and void and called upon the Iraqi government to return the Kuwaiti aircraft to the legitimate Government of Kuwait. It also requested all States in whose territory any of these aircraft are found to hand them over to the legitimate Government of Kuwait and not to supply Iraq, its companies or nationals, whether directly or indirectly, with any spare parts, equipment or supplies or services to enable Iraq to use the aircraft.

The attacks of 11 September 2001 inevitably highlighted the strategic position of civil aviation both as an industry vulnerable to attack and as an integral tool in ensuring peace and security in the world. The modernist view of civil aviation, as it prevailed when the Convention on International Civil Aviation was signed at Chicago on 7 December 1944, was centered on State sovereignty and the widely accepted post-war view that the development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security. This essentially modernist philosophy focussed on the importance of the State as the ultimate sovereign authority which can overrule considerations of international community welfare if they clashed with the domestic interests of the State. It gave way, in the 1960s and 1970s to a post-modernist era of recognition of the individual as a global citizen whose interests at public international law were considered paramount over considerations of individual State interests.

The 11 September 2001 events led to a new era that now calls for a neo-post modernist approach which admits of social elements and corporate interests being involved with States in an overall effort at securing world peace and security. The role of civil aviation in this process is critical, since it is an integral element of commercial and social interactivity and a tool that could be used by the world community to forge closer interactivity between the people of the world. This discussion will assess the position of civil aviation in a world community embroiled in a neo post modernist approach towards securing world peace and understanding among nations.

Until 11 September 2001, the link between civil aviation and world peace was somewhat conceptual and intellectual. However, when four civilian aircraft on United States domestic services were destroyed by terrorist acts and crews, hundreds of passengers and thousands of innocent victims in buildings located in New York City and Washington DC were killed, civil aviation ceased to be isolated from the world peace efforts and became immediately inextricably linked to overall endeavours of the world community toward achieving peace and economic sustainability.

The significance of peace and security of the world involving civil aviation was signalled by United National Resolution A/RES/421(XIV) which referred to the immediate consequences of the attacks of 11 September 2001 as the closure of civil airports in the United States and disruptions of air services. The Resolution also referred to A/RES/145(V) which concerned the safety of civil aviation in relation to tourism. The new era brought about by the paralysis experienced in terms of world trade brought in both states and their instrumentality together with the private sector to join in finding solutions toward keeping the trade machine of the world functioning.

The pursuit of peace has been inseparable from policy making and dispute settlement in affairs of aviation. Varied and chronologically sequential instances where ICAO was requested by its Contracting States to address contentious issues relating to civil aviation are reflective of the importance of political considerations that underlie such disputes and the relentless search by nations of the world to settle disputes peacefully. Although political contentions may exist between States, which is a natural corollary of Statecraft and international politics, it is not the purview of an international organization to address political motivations of individual States when considering issues referred to it or adjudicating disputes between States. In this regard, ICAO has tread a delicate line between diplomacy and objectivity.



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A Commentary

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