

Fundamental Principles and Procedures of International Air Law

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Abstract

The Chicago Convention on International Civil Aviation is an international agreement "on certain principles and arrangements so that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established based on equality of opportunity and operated soundly and economically." It created the International Civil Aviation Organization, an inter-governmental agency later affiliated with the United Nations. Several principles and procedures were established under the convention that governs the operations of international civil aviation.

The Convention has served as a useful and powerful vehicle to restate certain principles of international law applicable world-wide, irrespective of ICAO membership. These are: (a) sovereignty of each state in its airspace; (b) freedom of flight over the high seas; (c) nationality of aircraft as transport instrumentalities; and (d) special limitations on flight of "state" aircraft.¹

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I. Introduction

The Chicago Conference of 1944 met with the objective of make arrangements for the immediate establishment of provisional world air routes and services and to set up an interim council to collect, record and study data concerning international aviation and to make recommendations for its improvement.

The conference led to the conclusion of the Convention on International Civil Aviation. The treaty aimed world cooperation towards development of civil aviation and promotion of general security and safety by standardization of operations and systems. As of March 2019, the Chicago Convention had 193 state parties, which includes all member states of the United Nations other than Liechtenstein.

¹ John Cobb Cooper, *The Chicago Convention -- After Twenty Years*, 19 U. Miami L. Rev. 333 (1965).

The treaty convention was signed for the first time on December 7, 1944, by 52 signatory states. In October 1947, the International Civil Aviation Organization was established as a specialized agency of the United Nations Economic and Social Council. The Convention has been revised eight times since the 1944.

The treaty convention modernized the existing public international law of the air and recognized certain fundamental principles and procedures of International Air Law namely, 1) Territorial Sovereignty; 2) National Airspace; 3) Nationality of Aircraft; 4) Freedom of Navigation over High Seas; 5) Standards and Notification of differences; 6)

Article 1 of the Convention recognizes that the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory. Further, the convention made an essential distinction between civil and State aircraft, manned and unmanned aircraft, and scheduled and nonscheduled services.



II. APPLICABILITY OF PRINCIPLES

Article 3 of the Chicago Convention restricts the applicability of the Convention to civil aircrafts, and explicitly excludes state aircrafts. The article further provides that the aircraft used in military, customs and police services shall be deemed to be state aircraft and hence are excluded from the applicability of these principles of civil aviation.

Article 3 mandates the contracting states to have due regard for the safety of navigation of civil aircraft when issuing regulations for their state aircraft.

III. PRINCIPLE OF TERRITORIAL SOVEREIGNTY

Sovereignty over a particular territory can be defined as “ultimate authority, held by a person or institution, against which there is no appeal”.² Sovereignty being fundamental to international law is recognized reciprocally. The present day concept of sovereignty can be traced back to the Treaty of Westphalia wherein the basic principles for the recognition of a State as being a sovereign State were laid down; (1) territorial integrity, (2) border inviolability, (3) the supremacy of the State and (4) a supreme law making body within the territory.

² World Encyclopedia (Oxford University Press, 2008).

Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or foreign law other than public international law.³ Territory is the airspace over and within a state's territorial borders. Territorial airspace has no vertical limit, but it does have the same lateral limits as the state.

Article 1 of the Chicago Convention of 1944 provides that the contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory. It is to be noted that by the aforementioned provision the Chicago Convention reaffirmed Article 1 of the Paris Convention of 1919. The Paris Convention and the Chicago Convention were both enacted after two destructive world wars. Wars reinforce nationalism and give to the respectable principle of State sovereignty a defensive character.⁴

To understand the concept of territorial sovereignty it is essential to recognize the Latin proverb "*Cuius est solum, eius est usque ad caelum et ad inferos*", which suggests that whoever owns the soil, it is theirs up to heaven and down to hell. It suggested that the land the owner of land, owns the airspace above the land. However, absolute recognition of such a right of land is not possible due to the requirements of aviation. Article 2 of the Chicago Convention further provides that the territory of a state shall be deemed to include land areas and the adjacent territorial waters under the sovereignty, protection, and mandate of the state.

The International Air Services Transit Agreement was drafted in form of a multilateral agreement, signed at the Chicago Conference. The Transit Agreement provided for the two freedoms of air:

- I. **First Freedom**: It grants the privilege to fly over the territory of a treaty country without landing.
- II. **Second Freedom**: It is the right to stop in one country solely for refueling or other maintenance on the way to another country.

The freedoms of air provided under the International Air Services Transit Agreement aid the provisions of the Chicago Convention, in total 129 countries are parties to the agreement.

³ H Steinberger, 'Sovereignty', in Max Planck Institute for Comparative Public Law and International Law, Encyclopedia for Public International Law, vol 10 (North Holland, 1987) 414.

⁴ J. Naveau, Droit de l'Air et Nationalisme Historique, 15 Annals of Air and Space Law 183 (1990).

Article 6 of the Chicago Convention states that “no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or authorisation of that State, and by the terms of such permission or authorization.” Which suggests that the airspace of all contracting parties shall be deemed close unless the state declares the air space open.

Article 7 of the Chicago Convention gives to each nation the right to reserve cabotage to itself. The second sentence of Article 7 prohibits States from entering “into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any State, and not to obtain any such exclusive privilege from any other State.”⁵

The principle of sovereignty over airspace enables regulation of uses of air above the land of a state and is essential in ensuring national security.

However, a minority of authors, such as Nicolas Matte, argue that the airspace belongs to the ‘physical space’ in which the world community interacts and therefore no parts of it can be made subject to sovereignty claims from any nation, even for a limited period. Matte believes that the airspace is a common good that must be used peacefully by humanity. Hence such a conception must be predominant over ‘egoistic’ claims of individual States that seek their interests and immediate economic benefits.⁶

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III. TRAFFIC RIGHTS AND SO-CALLED FREEDOMS

The first two freedoms of the air discussed above are known as transit rights. Freedoms three to five are classified as traffic rights and any freedoms beyond the fifth freedom are classified as ‘so-called’ freedoms as they are not officially recognized by any international convention or treaty.

i. Traffic Rights

The third freedom provides that scheduled international air services have the freedom to put down, in the territory of the first state, traffic coming from the home state of the carrier. The fourth freedom states the right in respect of scheduled international air services, granted by one State to

⁵ Dr. Paul Stephen Dempsey, *The Chicago Convention as A Source of International Air Law* (2015).

⁶ Erotokritou, C. (2012). "Sovereignty Over Airspace: International Law, Current Challenges, and Future Developments for Global Aviation." *Inquiries Journal/Student Pulse*, 4(05).

another State to take on, in the territory of the first State, traffic destined for the home State of the carrier.

The fifth freedom allows an airline to carry revenue traffic between foreign countries as a part of services connecting the airline's own country.⁷

ii. **So- Called Freedoms**

The sixth freedom is unofficial freedom, it can be a combination of the third and fourth freedom. It grants the right to ferry passengers between two countries by stopping in the home country of the carrier.

The unofficial seventh and ninth freedoms are variations of the fifth freedom. It is the right to carry passengers or cargo in foreign territories without any continuing service to one's own country. The unofficial eighth freedom is the right to carry passengers or cargo between two or more points in one foreign country and is also known as 'cabotage'.⁸

IV. **AIRCRAFT NATIONALITY**

The concept of nationality for aircraft was adapted from maritime law where the national flag is used to indicate a ship's country of registration.⁹

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By the Chicago Convention, an aircraft has the nationality of the State in which it is registered. It is mandated that every aircraft undertaking international air navigation shall bear nationality and registration marks to facilitate identification. Annexure 7 to the convention prescribes Standards and Recommended Practices for the allocation, assignment and display of nationality, registration, and common marks. It also sets the format of the certificate of registration.

Article 17 of the Chicago Convention states that, "Aircraft shall have the nationality of the State in which they are registered." Further, an aircraft cannot be registered in more than one state however registration from one state can be transferred to another under Article 18. Such registrations and transfer shall be in accordance to the domestic law of the registering state.

⁷ Rowell, David "Freedoms of the Air". *The Travel Insider* (2002).

⁸ Vallero, Luigi "The Freedom of Fifth Freedom Flights". *Airways*. Airways International 31–36 (2004).

⁹ R.T. Slatter, *Nationality Marks Should Comply with ICAO Annex 7 Specifications*, ICAO Journal (1992).

At the time when the Chicago Convention was adopted, commercial aircraft were predominantly purchased directly by their operators who then retained ownership of such aircraft for use during most or all of their useful lives. Changes to aircraft nationality were not common since an aircraft tended to reside within one State for most or all of its useful life. However, over the past three decades, aircraft operators have realized substantial capital and operational efficiencies by leasing (rather than owning) a portion of their fleets for various periods. According to a Market Research Future (MRFR) analysis, in recent years leasing activities have increased from 2% in 1980 to more than 50% in 2016. Based on various studies, the aircraft leasing market will continue to grow.¹⁰

As a result, aircraft will most likely be transferred from one operator to another changing nationality multiple times during their useful lives. The change of aircraft nationality or registration from one State to another is referred to as cross-border transfers of aircraft. The increase in the number of cross-border transfers of aircraft globally, along with differences in States' regulations, requirements and practices has highlighted certain inefficiencies in a global system that was developed when cross-border transferability (XBT) was relatively uncommon.¹¹

V. FREEDOM OF NAVIGATION OVER HIGH SEAS

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International law recognizes the right of aircraft of all nations to fly in the airspace over the high seas. Article 12 of the Chicago Convention merely prescribes that the rules in force over the high seas shall be those established under the Convention and does not specify what body of ICAO is to establish such rules.

The basic provision of the Chicago Convention dealing with the establishment of rules on air navigation is to be found in Article 37. That Article provides that, with a view to facilitating and improving air navigation, the "International Civil Aviation Organization" shall adopt and amend from time to time international standards and recommended practices and procedures dealing with various matters enumerated therein.¹²

¹⁰ Tatiana Pak, Aircraft Nationality and Registration (2019) <<https://www.unitingaviation.com/news/safety/aircraft-nationality-and-registration/>>.

¹¹ Tatiana Pak, Aircraft Nationality and Registration (2019) <<https://www.unitingaviation.com/news/safety/aircraft-nationality-and-registration/>>.

¹² Jean Carroz, International Legislation on Air Navigation over the High Seas, 26 J. Air L. & Com. 158 (1959).

The principle that the seas are a highway open to all nations and subject to the sovereignty of none is one of the foundations of international transport law. Long before the Chicago Conference, it had been asserted that the same freedom should be available to aircraft flying over the high seas as was enjoyed by vessels on the surface.¹³

The legal status of usable space over the high seas has since been formally restated in the "Geneva 1958 Convention on the High Seas." This includes the "freedom to fly over the high seas" as one of the elements of the freedom of the seas. It should be noted that neither the Chicago nor Geneva Conventions limit this freedom to the "airspace".¹⁴

VI. STANDARDS AND NOTIFICATION OF DIFFERENCES

The advent of international civil aviation made it essential that the operations, equipment, airports and other air navigation facilities should be in accordance with the standards laid down by the International Civil Aviation Organization. Article 28 of the Chicago Convention mandates the contracting parties to maintain and operate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention. The article also creates an obligation upon states to secure the publication of aeronautical maps and charts in accordance with standards.

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The Chicago Convention provides for standardization of systems and operations which is essential for safety and efficiency in flight operations. Article 33 mandates that the issue of the certificate of airworthiness and licenses should be in accordance with the minimum standards. Article 37 mandates each contracting state to ensure that the uniform standards are followed to the highest practicable degree to facilitate air navigation.

By virtue of Article 38 of the Convention the Contracting States are mandated to notify the International Civil Aviation Organization (ICAO), of any differences between their national regulations and practices and the international standards.

A duty to keep the organization informed is cast upon all contracting states, this duty also extends to inform of any deviations that may occur. However, if current deviations are corrected

¹³ John Cobb Cooper, *The Chicago Convention -- After Twenty Years*, 19 U. Miami L. Rev. 333 (1965).

¹⁴ John Cobb Cooper, *The Chicago Convention -- After Twenty Years*, 19 U. Miami L. Rev. 333 (1965).

subsequently to meet to international standards, such notification of deviation can be withdrawn. In response the ICAO will make immediate notification to all the contracting states.

