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A NEW CENTURY AND A NEW ATTITUDE TOWARDS SAFETY OVERSIGHT IN AIR TRANSPORTATION

BY

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November 2000

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of LL.M.

ABSTRACT

Public international air law is not in itself an autonomous system. It follows the legal principles and notions applicable to public international law in general. The principle of good faith performance or enforcement of a contract, in particular, emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party unless an expressed intention to the contrary has been declared.

By signing the Chicago Convention on International Civil Aviation of 1944, all 185 Contracting States agreed to certain principles and arrangements in order that international civil aviation could be developed in a safe and orderly manner. They undertook, *inter alia*, to collaborate in securing the highest practicable degree of uniformity in all matters in which such uniformity could facilitate and improve air navigation. Thus, they all agreed to a common purpose and to the means for ensuring it.

At a dawn of a new century civil aviation is epitomized by such developments as globalization and transnationalization, emergence of regional and sub-regional blocks, commercialization of service providers, economic liberalization, environmental consciousness, emergence of new technology, and capacity constraints. These developments illustrate not only how far aviation has gone since the first engine-powered flight was successfully carried out by the Wright Brothers in 1903, but also confront the aviation community with the challenge of safeguarding safety in the new era of globalization. It also means that there are grounds to reconsider the States' responsibilities for safety oversight under the Chicago Convention so that the objectives of the Chicago Convention could be accomplished.

With the presence of several regulatory levels, namely, national, regional and international, and given the challenges of the new century in parallel with the increased sophistication of civil aviation systems, safety in air transportation requires that it be a shared responsibility. This can only be achieved if all participants in civil aviation adopt a new attitude of co-operation, co-ordination and harmonization.

RÉSUMÉ

Le droit international aéronautique n'est pas un système autonome en soi. Il suit les principes juridiques et les notions applicables au droit international public général. Le principe de l'exécution de bonne foi d'un traité international en particulier fait valoir, en l'absence de déclaration expresse dans le sens contraire, l'attachement à l'objectif commun convenu et la conformité de l'exécution avec les espérances justifiées de l'autre partie.

Par la signature de la Convention de l'aviation civile internationale en 1944, les 185 pays contractants ont accepté certains principes et dispositions pour que l'aviation civile puisse se développer de manière sécuritaire et réglementée. Ils se sont engagés, *inter alia*, à collaborer les uns avec les autres pour assurer le plus haut niveau praticable d'uniformité dans tous les domaines où une telle uniformité pourrait faciliter et améliorer la navigation aérienne. Ainsi, ces pays ont tous accepté de poursuivre un objectif commun et ont convenu des moyens à utiliser pour l'atteindre.

À l'aube d'un siècle nouveau, l'aviation civile est caractérisée par des développements tels que la globalisation et la transnationalisation, l'émergence de blocs régionaux et sub-régionaux, la commercialisation de fournisseurs de services, la libéralisation économique, la conscience environnementale, l'émergence des nouvelles technologies et les contraintes de capacité. Ces développements illustrent, d'une part, à quel point l'aviation a progressé depuis le premier vol d'un engin à moteur effectué avec succès par les frères Wright en 1903, mais, d'autre part, confrontent la communauté aéronautique au défi primordial de sauvegarder la sécurité dans la nouvelle ère de globalisation. La Convention de Chicago impose aux États la responsabilité d'assurer la sécurité du transport aérien. Mais une révision de cette responsabilité est justifiée pour que les objectifs de ladite convention soient effectivement atteints.

De par l'existence de plusieurs niveaux de régulation, à savoir, national, régional et international, et étant donné les défis du nouveau siècle ainsi que la haute sophistication des systèmes de l'aviation civile, la sécurité du transport aérien doit être une responsabilité partagée. Cela n'est possible que si les participants à l'aviation civile adoptent une nouvelle attitude de coopération, de coordination et d'harmonisation.

ACKNOWLEDGEMENT

This work was possible thanks to many people and I would like to express my gratitude to all of them. First of all, I am especially grateful to my supervisors Catherine Zuzak from ICAO and Prof. Armand de Mestral from the Faculty of Law for their help, confidence and kindness.

I would also like to thank Dr. Ruwantissa Abeyratne and Roy Barnett from ICAO for giving me useful thoughts and suggestions, George Tompkins, Jr., from Schnader Harrison Segal & Lewis L.L.P., for helping me in my research; Michael Jennison from FAA and Robert Papkin from Squire, Sanders & Dempsey L.L.P. for sharing with me their views on the issues of this work; Leslie Berkowitz from Metropolitan Washington Airports Authority, Lynn Jensen from the U.S. Department of Transportation, Louise Mailett, Duncan Monaco and Kim Millen from FAA for their help in providig me with documents and ideas, as well as Ghislaine Giroux and Diane Bertrand from the ICAO Library for their assistance through the course of my research.

I would also like to thank the academic and administrative staff of the Institute of Air & Space Law at McGill University for creating such a stimulating academic environment and to my fellow students that made my stay in Montreal a memorable experience.

Most importantly, I am most grateful to my family whose love, confidence and patience have encouraged me throughout my life.

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INTRODUCTION

SAFETY IN AIR TRANSPORTATION

Safety means "the state of being protected from or guarded against hurt or injury; freedom from danger."[1] In the context of air transportation it means "care", or "no (avoidable) accidents" or, more realistically, "as few accidents as possible."[2] Safety is regarded as "the single most important element of the entire aviation industry."[3]

There is certainly no need to comment on the soundness of these statements, nor to choose among them. It is beyond any doubt how important safety is in any aspect of human conduct, and for the aviation in particular. Indeed, it is not difficult to list the many important issues related to aviation, this amazing achievement of the human kind—be it only the realization of the dream to fly, to mention just one. By examining the rapidly growing developments in civil aviation history, one is astonished to see how far that dream has gone.

The dawn of a new century inevitably calls for an analysis of what has been achieved in securing the safety of air transportation and the direction in which the participants in this industry are moving. The attitude of the recognized world's international regulator in the civil aviation, namely the International Civil Aviation Organization (ICAO), toward the shortcomings of safety oversight is the main indication in this respect, and thus plays a predominant role in the present paper.

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[1] *The New Shorter Oxford English Dictionary*, 1993, *s.v.* "safety".
[2] Henry Wassenbergh, "Safety in Air Transportation and Market Entry - National Licensing and Safety Oversight in Civil Aviation" (1998) XXIII-II J. of Air & Sp. L. 74.
[3] George N. Tompkins, Jr., "Enforcement of Aviation Safety Standards" (1995) XX-I Ann. Air & Sp. L. 319 at 321.

On February 7, 1997 the Council of ICAO adopted the first comprehensive evaluation of ICAO's mission since its inception in 1944: the Strategic Action Plan.[4] This Plan, "*Guiding Civil Aviation into the 21st Century,*" is designed to work within the framework of the Chicago Convention[5] to ensure that the Organization responds to the major challenges for civil aviation in the coming years and meets the needs of all its member States, which have grown from the 52 that attended the Chicago Conference in 1944 to 185 today.

The Strategic Action Plan is intended to ensure that ICAO maintains its position as the main standard-setting body for international civil aviation and encourages national ratification of instruments of international air law and implementation of ICAO Standards and Recommended Practices (SARPs) to the greatest extent possible in order to maintain a common aviation system world-wide.

The following statement by the President of the Council of ICAO, Dr. Assad Kotaite, made in January 2000, sheds light on the reasons for and the aims of the Organization's blueprint for the new century:

> The year 2000 bridges two extraordinary periods in the history of mankind: the second millennium with its astounding discoveries and the third millennium with its unbounded possibilities.
>
> [A]t the crossroads of two centuries, we are beginning to understand the forces that are shaping our future. Fundamentally, everything is becoming interconnected. Issues are global, whether economic, social, humanitarian or environmental. The Convention on International Civil Aviation of 1944 remains a sound flight plan for the future of air transport. The words of its inspiring Preamble can guide us in other endeavours:
>
> > *[I]nternational civil aviation can greatly help to create and preserve friendship and understanding among nations and peoples of the world...*

---

[4] See ICAO, *Launch of the Strategic Action Plan*, online: ICAO <http://www.icao.int/icao/en/strat_txt.htm> (date accessed: 21 September 2000).

[5] See ICAO, *Convention on International Civil Aviation*, opened for signature at Chicago on 7 December 1944, entered into force on 4 April 1947, ICAO Doc. 7300/6 [hereinafter *Chicago Convention*].

> This is a call to humanize the globalization process we have embarked upon, to allow for worldly pursuits while caring for humans and the planet that supports us.[6]

Fundamental elements of the Strategic Action Plan are the Organization's *Safety Oversight* and *Unlawful Interference* programs, which together constitute a quantum leap forward in identifying safety shortcomings in the air navigation field. This new focus of ICAO signifies, in particular, a changing emphasis on the role of the Organization, from development to implementation. As the President of the Council, Dr. Assad Kotaite, stated in this connection:

> ICAO is already the accepted authority for the development of civil aviation security and safety standards. Our goal should now be:
>
> > To become the recognized world-wide auditor of safety and security standards for international civil aviation.[7]

Thus, ICAO has manifested a strong desire for a change in its role. The Strategic Action Plan rekindled more brightly the torch that the Organization has been successfully carrying for half a century. But has this light yet burst into full flame?

This paper presents an overview of the main principles of the Chicago Convention and ICAO's law-making function is the focal point to start with in discussing the transition undertaken by the Organization with the establishment of the *Safety Oversight Program* (Chapters One and Two). This background serves to provide a better understanding not only for the reasons of ICAO's action, and the mechanism of its program, but also for the response to the shortcomings of safety oversight on the national

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[6] See ICAO, *Message from the President of the Council of ICAO, Dr. Assad Kotaite*, January 2000, online: ICAO <http://www.icao.int/cgi/goto.pl?icao/en/pres_2000.htm > (date accessed: 21 September 2000).

[7] See ICAO, *Address by the President of the Council of ICAO, on the Occasion of the Launch of the Strategic Action Plan*, May 1997, online: ICAO <http://www.icao.int/cgi/goto.pl?icao/en/strategy.htm> (date accessed: 21 September 2000).

and regional levels and, in particular, the FAA's reaction, the *International Aviation Safety Assessment Program* (IASA) (Chapters Four and Five).

On the other hand, this paper argues that given the dynamics of the international relationships and the challenges posed by an era of globalization of trade and economics, in parallel with the increased sophistication of civil aviation systems, the undertaking of the ICAO Member States to "collaborate in securing the highest practicable degree of uniformity...in all matters in which such uniformity will facilitate and improve air navigation,"[8] has a new meaning. The conclusion is that the fundamental character of the common purposes declared more than 50 years ago has not changed; rather it is the understanding that there is a need for a change in the attitude toward and the means of ensuring them.

While it is recognized that ICAO's law-making function is considered to be quasi-legislative since the adopted SARPs are not binding on the ICAO member States against their will, it is argued that the role of international law in human conduct is primary and above the authority of States. It binds the role of States—as units of the international order—to the role of international law. According to this premise, the right of a carrier to operate air services anywhere in the world, and the duty of a State to enforce international regulations on air safety, security, facilitation and airport planning *inter alia*, may be viewed *prima facie* as internationally recognized and enforceable rights and duties. It is also argued that under public international law, the principle of good faith demands from a signatory party, which expressly has not declared its intention to the contrary, to abstain from acts contrary to the principle in question. It means that good faith performance emphasizes faithfulness to an agreed common purpose; thus, this paper suggest that given the challenges of the new century it may be appropriate to reconsider the legal position of States in terms of their responsibilities under the Chicago Convention (Chapter Three)

The basis of the States' obligations under the Chicago Convention is the desire to promote and conduct safe and regular aircraft operations through the development and

[8] See Article 37 of the Chicago Convention.

implementation of internationally acceptable standards.[9] An individual State's responsibility for safety oversight is the foundation on which safe operations are built. The need for safety oversight is clear when one looks at the number of provisions in the Chicago Convention that create a network of safety-related articles and concepts, and interconnect the national regulatory systems of all 185 ICAO Member States with the Organization. The provisions of the relevant articles create a global set of standards for safety-related national legislation, and this allows States freely to recognize each other's level of implementation of these provisions. Lack of appropriate safety oversight in any Contracting State threatens the viability of international aircraft operations. This being said, it is in the best interests of any State to comply with international standards and to ensure they are maintained by operators and personnel licensed under its authority.

The paper concludes with the premise that given the challenges of the new century, there is something that can be considered paramount about aviation safety—namely, the attitude towards safety, which should be the preoccupation of everyone involved in air transportation: airlines, manufacturers, governments, international bodies. This could be best achieved if every participant on the world aviation scene were to share the responsibility for safety oversight and support and pursue the principles of co-operation, co-ordination and harmonization through the International Civil Aviation Organization—the recognized international regulator in civil aviation. After all, "this is what the 50-year young Chicago Convention is all about."[10]

Before continuing with the detailed discussion, the words of the Secretary General of the United Nations, Kofi Annan, addressed to the Millennium Assembly in New York on September 5, 2000, are relevant to the conclusions of this paper:

> If one word encapsulates the changes we are living through, it is 'globalization'. We live in a world that is interconnected as never before—one in which groups and individuals interact more and more directly across state frontiers, often without involving the State at all.

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[9] *Ibid.*, Preamble.
[10] Tompkins, Jr., *supra* note 3 at 322.

[T]he benefits of globalization are obvious...faster growth, higher living standards, and new opportunities—not only for individuals but also for better understanding between nations, and for common action.

[T]he overarching challenge of our times is to make globalization mean more than bigger markets. To make a success of this great upheaval we must learn how to govern better, and—above all—how to govern better together.[11]

[11] See United Nations, *Millennium Report of the Secretary General - We, the Peoples: the Role of the United Nations in the 21st Century*, online: United Nations <http://www.un.org/millenium/index.html> (date accessed: 21 September 2000).

CHAPTER ONE

THE CHICAGO SYSTEM

A. Objectives of the Chicago Convention of 1944

The Convention on International Civil Aviation[1] creates a distinct picture of the world. On the one extreme, the predominant role of the nation-States is clearly emphasized.[2] Article 1 of the Chicago Convention stipulates that: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."[3] Article 3 further provides that: " No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."[4]

On the other hand, the Chicago Convention expresses the hope that "...international civil aviation can greatly help to create friendship and understanding among the nations and people of the world..."[5] Nation-States are encouraged to co-operate in order to achieve, through a sound and economic development of aviation air transport, the broader goals of peace, friendship and mutual understanding among themselves.[6] It is between these two extremes—the idealism on the one hand and the recognition of the existence of the sovereignty of nation-States on the other—that international civil aviation has developed.

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[1] See ICAO, *Convention on International Civil Aviation*, opened for signature at Chicago on 7 December 1944, entered into force on 4 April 1947, ICAO Doc. 7300/6 [hereinafter *Chicago Convention*].

[2] The principle of complete and exclusive sovereignty of States over the airspace above their territories was recognized by the first legal instrument to enter into force in the province of Air Law—the *Convention Relating to the Regulation of Aerial Navigation*, opened for signature by the plenipotentiaries of thirty-two Allied and Associated Powers represented at the Paris Peace Conference, 1919 [hereinafter *Paris Convention*], in conformity with the Roman adage: *Cujus est solum, ejus est usque ad coelum et ad inferos.*

[3] See Article 1 of the Chicago Convention.

[4] *Ibid.*, Article 3 (c).

[5] *Ibid.*, Preamble.

[6] *Ibid.*

Before turning to a more detailed description of the objectives of the Chicago Convention, a few statements of its drafters, made at the Chicago Conference in 1944, will provide a better understanding of the spirit in which they operated. In his message, President Roosevelt said:

> You are fortunate in having 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 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 blocks of closed air, thereby tracing in the sky the conditions of future wars. I know that you will see to it that the air that God gave to everyone shall not become the means of domination over anyone.[7]

The Chairman of the Conference, Adolph A. Berle, Jr., an Assistant Secretary of State, endorsed the President's comments by observing:

> There are many tasks which 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.[8]

A proof that the world was moving toward a new attitude in the field of international aviation, as well as international relations as a whole, was one of the most memorable events of the Chicago Conference. India—one of the world's most populous countries, which was then moving toward independence and was foreseen to play a major role in post-war civil aviation—had not been successful in its candidacy for a Council

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[7] See U.S. Department of State, *Proceedings of the International Civil Aviation Conference*, at 43; quoted by Ruwantissa I.R. Abeyratne, "Would Competition in Commercial Aviation Ever Fit Into the World Trade Organization" (1996) 61 J. of Air L. 793 at 795.

[8] *Ibid.* at 796.

seat in either category B or category C.[9] Norway announced that it found India's absence on the Council regrettable, its claim to a seat just, and in a gracious and diplomatic gesture placed its own seat at the disposal of the Conference. Then Cuba intervened and offered its seat so as not only to give India its due, but also to achieve a more equitable regional balance on the Council.[10] This display of a new global spirit caused most participants to leave Chicago with an "abiding belief that the world was truly on the threshold of a new era of internationalism in both words and deeds."[11]

B. Main Principles

The main principles of the Chicago Convention may be summarized as follows:

1. Airspace Sovereignty

1.1 PRINCIPLE

Sovereignty has traditionally been used as a term to denote "the collection of functions exercised by a State."[12] Initially, it was a term concerned with the powers within a State. Later it came to be used to describe both internal powers and certain external relations.[13] In the 16th century it was perceived that sovereignty has a double aspect—namely, first, that the State is the "supreme power over subjects in a particular territory and, secondly, that the State ought to enjoy freedom from interference by other

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[9] The Conference elected the States to become members of an Interim Council composed of twenty-one seats. It was agreed that there would be three categories of representations:

Category A—States of chief importance in air transport, to which seven States were elected: Belgium, Brazil, France, Mexico, The Netherlands, the United Kingdom and the United States.

Category B—States not otherwise included which made the largest contribution to the provision of facilities for international air navigation, to which five States were elected: Canada, India, Iraq, Norway and Peru.

Category C—States not otherwise included whose designation would ensure that all major geographic areas of the world were represented on the Council, to which eight States were elected: Austria, Chile, China, Colombia Czechoslovakia, Egypt, El Salvador and Turkey; see Adrianus D. Groenewege, *Compendium of International Civil Aviation*, 2nd ed. (Canada: International Aviation Development, 1998) at 46; see also Article 50 of the Chicago Convention, which deals with the composition and election of the ICAO Council.

[10] See *Groenewege, ibid.*

[11] Wenceslas J. Wagner, *International Air Transportation as Affected by State Sovereignty* (Bruxelles: Establissements Emile Bruylant, 1970) at 47. For an analysis of the background to the Chicago Conference see generally Bin Cheng, *The Law of International Air Transport* (London: Stevens & Sons, 1962) at 3-28.

[12] See Ingrid Detter De Lupis, *International Law and the Independent State,* 2nd ed. (England: Gower Company, 1987) at 3ff.

[13] *Ibid.*

States."[14] Hence, sovereignty was conceived of as possessing both internal and external aspects.

The concept of sovereignty was used to cover three important rights of a State under international law: the right of equality, the right of independence, and the right to self-determination.[15] "Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state."[16]

The fundamental question that arose at the dawn of international air transportation was: Should the use of air space be subjected to the restrictions and arbitrariness of State governments, based upon their sovereignty—a theory considered as a principle of the positive international law—or should freedom of the air be recognized as a rule similar to freedom of navigation upon the high seas,[17] so as to render it impossible for individual governments to disturb the liberty of air transportation?[18]

Most of the theories based on the idea of either complete or limited freedom of the air were advanced in France—the country considered to be the "birth land of aviation," not only because the art of flying was born there, but also because of the fact that the first pilots were trained there, and the first statutes dealing with aviation were enacted there.[19] It is interesting to note, on the other hand, that the various theories based on sovereignty

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[14] *Ibid.*

[15] *Ibid.*

[16] Permanent Court of Arbitration (1928): *Reports of International Arbitral Awards*, Vol. 2, at 829, quoted by *Detter*, *ibid.* at 4.

[17] According to Articles 86-120 of the *United Nations Convention on the Law of the Sea* of 1982, high seas are all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. On the high seas all States enjoy the traditional freedoms of navigation, overflight, freedom to lay submarine cables and pipelines, to construct artificial islands and other installations, freedom of fishing and scientific research. The high seas are reserved for peaceful purposes and no State may validly purport to subject any part of the high seas to its sovereignty; States must cooperate in measures to manage and conserve living resources of the high seas.

[18] See *Wagner*, *supra* note 11 at 6.

For more information on the possible implications of the *UN Convention on the Law of the Sea* for the Chicago Convention of 1944, its Annexes and other international air law instruments, see Michael Milde, "United Nations Convention on the Law of the Sea - Possible Implications for International Air Law" (1983) VIII Ann. Air & Sp. L. 167.

came chiefly from England, which having secured domination over the seas, felt at ease on her island and did not wish to be disturbed by any air passage not subjected to fixed regulations. [20]

The main theories were the following:

i) Unlimited Freedom of the Air

The proponents of this theory stood against any idea of sovereignty over the air space, which, according to them, had no justification. They were in favor of permitting airships of any kind to fly freely at the altitude they desired without even the slightest interference on the part of the subjacent States. They argued that air space should be treated in the same way as the open seas. The application of the theory, however, was difficult and presented serious disadvantages to States being overflown: it offered wide possibilities for espionage, such as taking, during flights, photographs of strategic objects and drawing up plans of territories seen from airships. Besides, there were also unsolved problems attached to this theory, such as customs duties, contraband, falling objects and ballast.[21]

ii) States' Sovereignty over the Airspace above Their Territories

This theory, although supported by several commentators by different methods of reasoning, is based chiefly on the requirements of national safety and the avoidance of dangers to which the inhabitants of an overflown country and their property might be exposed by unrestricted use of the air space.[22]

iii) Intermediate Theories

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[19] See *Wagner*, *ibid.* at 12.

[20] *Ibid.* The development of air law can be traced back as early as April 23, 1784, when a French police directive was issued, aimed directly and exclusively at the balloons of the Montgolfier Brothers: in order to protect the population, flights were not to take place without prior authorization; see I.H. Ph. Diederiks-Verschoor, *An Introduction to Air Law*, 3rd ed. (The Netherlands: Kluwer Law and Taxation, 1988) at 2. Wagner, in this respect, points out as the first document of international importance relating to aviation the letter sent by Bismarck to the French Government on November 19, 1870, in which he warned that aeronauts would be treated in the same way as persons crossing enemy lines on the ground; *ibid.*

[21] See *Wagner*, *ibid.* at 13.

[22] For more details on the different methods of reasoning, *ibid.* at 38.

These were the theories that had the greatest impact on the formulation of the principles in the international air law instruments that were adopted during the years that followed, and that expressed the shared view of the States concerning the question of their sovereignty over the air space above their respective territories. Thus, their development requires more detailed attention.

As the wording implies, these theories attempted to reconcile the claims of States with the possibility of achieving international air navigation without the obstacles attendant upon States exercising their sovereignty in an unrestricted way.[23] Based on their points of departure, these theories can be classified into the following groups:

(a) Limited Freedom of the Air

Paul Fauchille, a French lawyer, was the first to lay the foundations of this theory, which states the counterpart to the doctrine of the freedom of the seas propounded by Hugo Grotius in the year 1609.[24] Fauchille's point of departure was that "any right of sovereignty results from the ability to take into possession the object in question."[25] In addition to this, he put forward the argument that since the air constitutes an important means contributing to the development of international intercourse, to strengthening relations between States, and to increasing the prosperity of all nations, it would, consequently, be unreasonable to submit the air to the sovereignty of a subjacent State. These considerations led to recognition of the freedom of the air in all it parts.

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[23] *Ibid.* at 16

[24] Grotius, Hugo (1583-1645)—a Dutch jurist and scholar, whose enduring fame stems from his legal masterpiece *De Jure Belli ac Pacis* (*On the Law of War and Peace*), 1625, in which he laid the foundations for International Law. His chief innovation was his insistence that nations are bound by natural law, which he considered to be independent of God and based on man's own nature; see *Hugo Grotius*, online: Encyclopedia Britannica <http://www.eb.com/bol/search?type=topic&query=hugo+grotius&Dbase=Articles> (date accessed: 29 August 2000). It is worth mentioning that Grotuis reconsidered his doctrine of the freedom of the sea and decided that sovereignty over the sea was indeed feasible—contrary to the theories he had previously adopted; see *Wagner*, *ibid.* at 15.

[25] He argued that the landowner may appropriate the air space up to the altitude to which he is able to erect buildings and constructions. Since at the time the Eiffel Tower in Paris was the highest edifice ever constructed by man, Fauchille adopted its height as the maximum limit that was not likely to be surpassed by any future structure. Applying these observations to the field of international public law, he maintained that the air layers beyond the altitude of 300 meters, not being a possible subject of appropriation, cannot be submitted to sovereignty, which requires physical occupation; *ibid.*

The prominent lawyer, however, went further. In his opinion, States are entitled to certain rights of self-preservation, thus the freedom is to be restricted to a certain degree. He suggested an altitude of 1,500 meters as the upper limit of the zone of protection wherein States might prohibit any flight over their territories in order to be safe from espionage, contraband, etc. Beyond this altitude, States are entitled to exercise some rights, up to the most distant layers of the atmosphere; therefore, they can oppose anything that might threaten their territorial integrity and can take all necessary measures to insure the safety and the health of their population, as well as protecting their economic welfare against the competition of foreign countries.[26]

The impact of Fauchille's theory became clear when other theories, relating to freedom of the air, were subsequently developed by various other writers.[27] All of these, together with the eloquence of Fauchille at the session of the *Institute of International Law*[28] in Ghent in 1906, resulted in the adoption by the Institute of the principle that "the air is free and that States have only those rights which in time of war or peace are necessary to their existence and protection."[29] At its session in Madrid in 1913, the International Law Association drew up the following text:

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[26] This theory was published in 1901, in a Treatise entitled "*Le domaine aerien et le régime juridique des aerostats.*" Following the publication, Fauchille's ideas underwent a certain evolution. He continued to advance the principle of freedom of the air, limited by the right of existence of the subjacent State, but he established the idea of a uniform status of the air above an altitude of 330 meters (to the height of the Eiffel Tower he added the maximum height of structures transporting electric power). The air, therefore, was considered free in all its layers; acts committed on board an aircraft were subject to the jurisdiction of the State in which the aircraft was registered, but the States overflown could enforce rights necessary for their own protection; see *Wagner, ibid.*

[27] About these theories and their classification, see J.P. Honig, *The Legal Status of Aircraft* (The Hague: John Cobb Cooper Collection, 1956) at 10.

[28] The *Institute of International Law* is an international organization founded in Ghent, Belgium, in 1873 to develop and implement international law as a codified science responsible for the legal morality and integrity of the civilized world. The Institute's founder, Baron Rolin-Jacquemyns, felt that such a body was necessary for the establishment and acceptance of the concept of international law—a concept that was only beginning to form at this time and that was not universally accepted in the legal circles. See *Institute of International Law*, online: *Encyclopedia Britannica* <http://www.eb.com/bol/search?type=topic&query=institute+of+international+law&Dbase=Articles> (date accessed: 29 August 2000).

[29] *The Yearbook of the Institute of International Law*, Session of Ghent, September, 1906, quoted by *Wagner, supra* note 11 at 20.

> It is the right of every State to enact such prohibitions, restrictions and regulations as it may think proper in the regard of the passage of aircraft through the air space above its territory and territorial waters; subject to this right of subjacent States, liberty of passage of aircraft ought to be recorded freely to the aircraft of every nation.[30]

Hence, a stage was reached where the theory of absolute freedom of the air was rejected, although the Institute of International Law did not go so far as to adopt the theory of sovereignty.

(b) The Intermediate Theory

This theory sought to find a solution for the coexistence of the right for a free use of the air space as a means for communication along with the other right, based on the extension of the State's territorial rights to the air space above it. The proponents realized how inefficient it was to proclaim principles that were likely to be ignored by States, so coordination of the two rights was needed. They acknowledged that the air space, as a whole, was a matter of interest for the human race without exception, and that it must be regarded as belonging to humanity; therefore, it seemed necessary to subject it to international legislation. The idea for a coherent and efficient international organization was born.

The principle of the sovereignty of each State over its air space was accepted right from the start at the different conferences that followed.[31] The Roman principle "*Cujus est solum eujus est esque ad coelum*,"[32] transplanted to the arena of public international law, meant that a State should claim sovereignty over the whole of the airspace above its territory. The air space had become too important for a State to neglect its sovereignty over it. It was soon seen that it was necessary for reasons in the interest of military,

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[30] International Law Association, 28th Report, Madrid, 1913, at 533-545, quoted by *Honig, supra* note 27 at 12.

[31] The Air Navigation Conference of 1910; Pan-American Aeronautics Federation, 1926; the Scandinavian Air Conference of 1918; Congrès Juridique International pour la Locomotion Aerienne, 1910; for all these international conferences see generally P. Sand et al., "An Historical Survey of International Air Law" (1960) 7 McGill L.J. 25; J. C. Cooper, "Backgrounds of International Public Air Law" (1965) Y.B. Air & Sp. L. 3.

[32] For the history of the maxim, see generally E.G.Sweeney, "Adjusting the Conflicting Interest of the Land Owner and Aviator in Anglo-American Law" (1932) 3 J. of Air L. 329.

police, sanitary and customs law to recognized a State's territorial air sovereignty as a rule of international law.[33] And this was done.

1.2 APPLICATION

It follows from the principle of airspace sovereignty that no aircraft may fly in, into or through a State's national airspace, at no matter what altitude, without its permission, acquiescence or tolerance. It also means that once within the territory of another State, a foreign aircraft, together with its crew and passengers, must comply with local laws and regulations.

These consequences of the principle of territorial sovereignty are expressed in many of the provisions of the Chicago Convention, in particular those on reservation of cabotage to nationals (Article 7); control of pilotless flight (Article 8); establishment of prohibited areas or temporary prohibition of flight (Article 9 (a)); designation of customs airports (Article 10); air regulations (Article 11); rules of the air (Article 12); entry and clearance regulations (Article 13); search of aircraft on landing or departure (Article 16); assistance to aircraft in distress (Article 25); investigation of accidents (Article 26); use of radio transmitting apparatus (Article 30);carriage of munitions of war, implements of war or other dangerous articles (Article 35 (a)); use of photographic apparatus (Article 36); and flight by aircraft the certificate of airworthiness of which—and personnel whose licenses—do not conform to ICAO standards (Article 40.)

1.3 PRIVILEGES EXCHANGED

Pursuant to the inability of the Contracting States to reach multilateral agreement on uniformity in the award of air traffic rights, two agreements emerged which attempted to group States into accepting a limited common base on commercial aviation.[34] The first—the Transit or Two Freedoms Agreement[35]—was signed by thirty-two States and permitted aircraft of those States to fly across each other's territories or land in them for non-traffic purposes, without having to obtain permission from the grantor State. The

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[33] See *Honig, supra* note 27 at 15.

[34] For a discussion of the legal foundation of sovereignty and air traffic rights, see e.g. Ruwantissa I.R. Abeyratne, "The Air Traffic Rights Debate—A Legal Study" (1993) XVIII-I Ann. of Air & Sp. L. 3 at 16-20; see also *Wagner, supra* note 11 at 147-162.

[35] See *International Air Services Transit Agreement*, 84 U.N.T.S. 38; ICAO Doc. 7500.

second—the Five Freedoms or Transport Agreement[36]—was signed by twenty States and granted the free use of the Five Freedoms of the air as they are known today.[37] Those States which did not sign either of these agreements were required to sign bilateral air service agreements if their aircraft were to operate commercial air services into each others' territories that involved taking on or discharging passengers, mail, and cargo in the other country. In addition, cabotage was introduced in Article 7 of the Convention, which prohibits aircraft from picking up or discharging passengers, mail and cargo destined from one point of a State to another.[38]

2. Nationality of Aircraft

The second important principle accepted by parties to the Chicago Convention is that: "Aircraft have the nationality of the State in which they are registered."[39] Thus, according to the Convention, the nationality of aircraft represents a specific relation to a particular State and from that relation, certain rights and obligations for the said State arise, and these have an important connection to safety.[40] Article 18 prohibits double registration of an aircraft, although according to Article 77 joint registration or international registration is permitted.[41]

3. Conditions to Be Fulfilled with respect to Aircraft or by Their Operators

The Chicago Convention also imposes a number of conditions that must be complied with by aircraft of Contracting States engaged in international air navigation, as

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[36] See *International Air Transport Agreement*, 171 U.N.T.S. 387.
[37] See *Diederiks-Verchoor, supra* note 20 at 12-18; *Cheng, supra* note 11 at 9-17, 123-127. See also Henry Wassenbergh, *Principles and Practices in Air Transport Regulation* (Paris: Institut du Transport Aerien, 1993) at 97-114.
[38] See Article 7 of the Chicago Convention.
[39] *Ibid.*, Article 17. For more information see *Honig, supra* note 27 at 34-58, 179-204; *Diederiks-Verschoor, supra* note 20 at 22-26; *Wassenbergh, supra* note 37 at 155-159.
[40] See Articles 30-33 of the Chicago Convention.
[41] For analysis of Article 77 of the Chicago Convention, see Michael Milde, "Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organizations or International Operating Agencies" (1985) X Ann. Air & Sp. L. 133. For the difference between nationality of aircraft and nationality of airline; see e.g. J. Gertler, "Nationality of Airlines: Is it a Janus with two (or more) Faces?" (1994) XIX-I Ann. Air & Sp. L. 211.

well as their operators' crews and passengers, especially when over the territory of other Contracting States.[42]

4. International Co-operation and Facilitation

The fourth principle accepted by the Contracting parties to the Chicago Convention is that of mutual co-operation in the development and facilitation of international air transportation. This principle finds expression in various provisions in the Convention, some of which are:

- Article 37 (Adoption of international standards and procedures);
- Article 28 (Air navigation facilities and standard systems);
- Article 12 (Rules of the air);[43]
- Under Article 33, certificates of airworthiness and certificates of competency, and licenses issued or rendered valid by the Contracting State in which an aircraft is registered, are to be recognized by the other Contracting States, only "provided that the requirements under which such certificates or licenses were issued or rendered valid are equal or above the minimum standards which may be established from time to time pursuant to this Convention";[44]
- Article 34 requires that journey log books of aircraft registered in the Contracting State, when engaged in international navigation, shall be maintained "in such form as may be prescribed from time to time pursuant to this Convention,"[45] and such

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[42] These conditions are, *inter alia*, as follows:
- Restrictions with respect to instruments of flight – Articles 3 (c), (d) and 8;
- Restrictions with respect to the right to fly:
  (a) Restrictions based on the type of operation - Articles 4, 5 (b), 7, 6, and 35;
  (b) Restrictions of geographical character - Articles 5, 9,10, and 68.
- Entry and departure of aircraft - Articles 10, 13, 16, 24, 27 (b).
- Marks, documents, certificates and licenses - Articles 20, 29, 30 (a) and (b), 31, 32 (b), 33, 34, 39-42.

[43] For more information about Article 12 of the Chicago Convention and the application over the high seas of rules of the air adopted by the Council of ICAO, see e.g. Carroz, J.E., "International Legislation in Air Navigation over the High Seas" (1959) 26 J. of Air L. 158; and Nicholas Grief, *Public International Law in the Airspace of the High Seas* (The Netherlands: Martinus Nijhoff, 1994).

[44] Article 33 of the Chicago Convention.

[45] *Ibid.*, Article 34.

aircraft must also carry the documents specified in Article 29 "in conformity with the conditions prescribed" in the Convention;[46]

- Other categories coming under this heading are the items covered by Articles 10 (Landing at customs airport); 13 (Entry and clearance regulations); 23 (Customs and immigration procedures); 24 (Customs duty); 14 (Prevention of spread of disease); 25 (Aircraft in distress) and 26 (Investigation of accidents) of the Chicago Convention.

The drafters of the Chicago Convention had anticipated the emergence of a United Nations type of post-war organization: the International Civil Aviation Organization (ICAO). The fundamental aims of ICAO, as defined in Art. 44 of the Chicago Convention, are "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport."[47] What is the mechanism for accomplishing these aims is the scope of the next chapter.

C. Conclusion

The above overview of the objectives and the main principles of the Chicago Convention illustrated their fundamental character and thus, it can be concluded that they will remain the basic point of departure of any aviation activity on the world-wide scene.

[46] *Ibid.*, Article 29.
[47] *Ibid.*, Article 44.

CHAPTER TWO

THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

A. ICAO and the United Nations

ICAO was established as a specialized agency of the United Nations on May 13, 1947, pursuant to Article 57 of the UN Charter and the Statute of the International Court of Justice (ICJ).[1] This provision pertains to the Economic and Social Council (ECOSOC) of the United Nations and the creation within it of various specialized agencies, ICAO being one of them. The ECOSOC may enter into agreements with any of these specialized agencies, coordinate their activities through consultation, and define terms on which the agency concerned would be brought into relationship with the United Nations.[2]

Since their establishment and despite their great many structural and constitutional similarities, all specialized international organizations that have emerged since the nineteenth century, have tended to develop an institutional personality or *modus operandi* of their own. This institutional personality is a product of many factors. Among these are the organization's history, its functions, and its membership complexion. In turn, the

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[1] See *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7 [hereinafter *UN Charter*]. See also ICAO, *Agreement with ICAO*, Res. A1-2 and *Relations with ICAO*, Res. A2-24, ICAO Doc. 9730: *Assembly Resolutions in Force* (as of 2 October 1998) at I-31.

[2] See Article 63 of the UN Charter.

The concept of "United Nations family" should not be confused with that of "specialized agencies". The former is a term often used to refer to a large number of institutions of various types that in one way or another are connected with the United Nations; see M.J. Peterson, *The General Assembly in World Politics* (Boston: Allen & Unwin, 1986) at 20, quoted by Peter Ateh-Afac Fossungu, *A Critique of the Powers and Duties of the Assembly of the International Civil Aviation (ICAO)* (LL.M Thesis, McGill University, 1996) [unpublished].

For general information about the genesis of the United Nations, its basic principles and organization, see e.g. A. Leroy Bennet, *International Organizations. Principles and Issues*, 3rd ed. (New Jersey: Prentice-Hall, 1984) at 35-168; see also Werner J. Feld & Robert S. Loran, *International Organizations–A comparative Approach*, 2nd ed. (New York: PRAEGER, 1988) at 41-75; for the history and political background of the specialized agency system, see Douglas Williams, *The Specialized Agencies and the United Nations—The System in Crisis* (London: Hurst & Company, 1987) at 1-47.

organization's *modus operandi* has a significant effect on the manner in which it resolves legal problems or articulates the rules that are applicable to them.[3]

These general observations on the relationship between the UN and its specialized agencies, as well as on the factors that influence any international organization, serve to orient further discussion on the *modus operandi* of the International Civil Aviation Organization (ICAO). The purpose is to get to the core issue of the current chapter, namely, the legal status of ICAO's regulations. Abeyratne suggests that by analyzing this question, one can achieve two things: first, to answer what role ICAO has in the international community, and second, by answering the first question, to shed some light on the legal status of its regulations (with all due implications for their addressees).[4] Thus, he considers the analysis of the term "specialized agency" to be a starting point in this respect, and refers to a definition given by Potter:

> [T]hey are Specialized as to subject-matter, of course, but the implications of the second term may not be so clear. These agencies are in fact, as the general UN is not, examples of international administrative agencies...whose chief function is the administrative one, although the conference or representative organs associated with them (or with which they are associated), and the legislative or policy determining activities of the latter, are not to be disregarded...[5]

The above comment supports the view that a certain amount of coordination exists between specialized agencies and the United Nations on the basis of their relationship *ipso facto*. Hence, concludes Abeyratne, "it may be inferred from this argument that the regulations promulgated by a specialized agency should have similar status and leverage as any of those created by the parent United Nation."[6] However, this conclusion does not seem to be very convincing, even to its author:

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[3] See Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization*, 1st ed. (New York: Syracuse University, 1969) at 1.
[4] See Ruwantissa I.R. Abeyratne, "ICAO's Strategic Action Plan—A Legal Analysis" (1996) 45 ZLW Jg. 231 at 238.
[5] Pitman B. Potter, *An Introduction to the Study of International Organizaion*, 5th ed. (New York: Appleton Century-Crofts, 1935) at 273-274, quoted by *Abeyratne, ibid.*
[6] *Abeyratne, ibid.*

> In the present context of international relations, however, the status of a specialized agency and its regulations cannot be dismissed in such a simplistic manner. The answer to the question would inevitably lie in an analysis of State sovereignty; the character of international law; and international government.[7]

The following statement, made by the delegation of the United States to the Chicago Conference in 1944, supports a conclusion that a basic objective of any project for an international organization, and for ICAO in particular, is to reconcile divergences and to compromise on whatever will be acceptable to a majority of the States or, rather, to a sufficient number of them:

> It is generally agreed that it is true, in the purely technical field, a considerable measure of power can be exercised by, and indeed must be granted to, a world body. In these matters, there are few international controversies which are not susceptible of ready solution through the counsel of experts. For example, it is essential that the signal arrangements and landing practice at the Chicago Airport for an intercontinental plane shall be similar to the landing practice at Croydon, or Le Bourget, or Prague, or Cairo, or Chungking, that a plane arriving at any of these points, whatever its country of origin, will be able to recognize established and uniform signals and to proceed securely according to settled practice...A number of other similar technical fields can thus be covered; and, happily, here we are in a field in which science and technical practice provide common ground for all.[8]

With the burden of harmonizing different interests, but above all "*meeting the needs of the peoples for a safe, regular, efficient and economical air transport*,"[9] the law-making function of ICAO is a special tool for achieving this goal. It is interesting in this respect to see how the line between political and non-political issues, which inevitably reflect on the ICAO's work, can be drawn by turning to the record on the

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[7] *Ibid.* at 239.

[8] *Proceedings of the International Civil Aviation Conference*, Chicago, Illinois, November 1-December 7 1944, (Washington: United States Government Printing Office, 1948) at 59, quoted by *Abeyratne, ibid.* at 242.

[9] Article 44 (d) of the Chicago Convention.

Commemorative Ceremony in honor of the twentieth anniversary of ICAO held in Montreal in 1965, when a message from the Secretary General of the United Nations—Mr. Thant—contained the following statement:

> I realize that it is not easy to draw the line between what is political and what is not. Several of the specialized agencies are described as technical organizations and yet certain political concepts underline the very basis of their charters. For example, in the field of the International Civil Aviation Organization, there is the fundamental political concept which forms the basis of its Convention; namely, that a country has exclusive sovereignty in the air space above its territory. It is therefore obvious that even in those organizations that are primarily technical, political questions must arise from time to time. However, I would urge that in dealing with problems of a political character, it is essential for the member Governments to respect the charter, the conventions and the constitutional procedures of the agency concerned. This is essential, not only for the successful functioning of that organization, but for the future of international order itself, which has to be safeguarded in our common interest.[10]

B. The Law Making Function of ICAO

1. International Standards and Recommended Practices (SARPS)—General Characteristics

In spite of the weakness of ICAO in the economic field of air transport regulation, the Organization has been constitutionally endowed with extensive powers in the regulation of the technical aspects of air navigation for purposes of safety. Under Article 37 of the Chicago Convention, ICAO has the authority to adopt International Standards and Recommended Practices (SARPs) on eleven enumerated subjects:

(a) Communications systems and air navigation aids, including ground marking;
(b) Characteristics of airports and landing areas;
(c) Rules of the air and air traffic control practices;
(d) Licensing of operating and mechanical personnel;
(e) Airworthiness of aircraft;

[10] See ICAO Doc. 8516 A15-P/5, Appendix, at 17.

(f) Registration and identification of aircraft;
(g) Collection and exchange of meteorological information;
(h) Log books;
(i) Aeronautical maps and charts;
(j) Customs and immigration procedures;
(k) Aircraft in distress and investigation of accidents;
and such other matters concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate. [11]

This last clause gives the Organization an open-ended authority to adopt regulations on all matters falling within the general field of air navigation that it considers appropriate for international regulation. It is a "unique feature among all organizations of the United Nations system that the Council of ICAO possesses quasi-legislative power to adopt SARPs in the form of Annexes to the Chicago Convention."[12] Indeed, civil aviation could not have evolved without worldwide uniformity in regulations, standards, and procedures in relation to air navigation—in particular, personnel licensing, characteristics of airports, rules of the air, airworthiness of aircraft, etc. The elaboration and regular updating of such standards are "the real centers of gravity of ICAO's work and give to ICAO a unique position and responsibility in the world." [13]

The Chicago Convention does not define "international standards" or "recommended practices." It was the ICAO Assembly that formulated the requisite definitions in 1947 "for use by the Organization in relation to air navigation matters."[14] Resolution A1-31 defines a "Standard" as:

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[11] Article 37 of the Chicago Convention.
[12] Michael Milde, "Enforcement of Aviation Safety Standards - Problems of Safety Oversight" (1996) 45 ZLW Jg. 3 at 4. See also Mateesco Matte, *Treatise on Air-Aeronautical Law* (Montreal: McGill University, 1981) at 225-228; Bin Cheng, *The Law of International Air Transport* (London: Stevens & Sons, 1962) at 63-71; Pepin, "ICAO and Other Agencies Dealing with Air Regulations" (1952) 19 J. of Air L.152.
[13] *Milde, ibid.*
[14] See ICAO, Res. A1-31, ICAO Doc. 4411 A1-P/45 (1947). The current definition is in Res. A32-14 Appendix A (II-2), ICAO Doc. 9730: *Assembly Resolutions in force* (as of 2 October 1998) at II-2.

> Any specification for physical characteristic, configuration, materiel, performance, personnel, or procedure, the uniform application of which is recognized as *necessary* for the safety or regularity of international air navigation and to which Member states *will conform* in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention [emphasis added].[15]

The same resolution describes a "Recommended Practice" as:

> Any specification for physical characteristic, configuration, materiel, performance, personnel, or procedure, the uniform application of which is recognized as *desirable* in the interest of safety or regularity or efficiency of international air navigation, and to which Member states *will endeavour* to conform in accordance with the Convention [emphasis added].[16]

These definitions remain in force today. Since the foregoing resolution applied only to "air navigation matters," corresponding definitions for SARPS relating to air transport had to be supplied by the ICAO Council when it adopted Annex 9, which deals with the facilitation of international air transport. These definitions read as follows:

> Standard: Any specification, the uniform observance of which has been recognized as practicable and as *necessary* to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Art. 54(l) of the Convention, and in respect of which *non-compliance must be notified* by States to the Council in accordance with Art. 38 [emphasis added].
>
> Recommended Practice: Any specification, the observance of which has been recognized as generally practicable and as *highly desirable* to facilitate and improve some aspects of international air navigation, which has been adopted by the Council pursuant to Art. 54 (l) of the Convention, and to which contracting states *will endeavour* to conform in accordance with the Convention [emphasis added].[17]

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[15] *Ibid.*
[16] *Ibid*
[17] *Ibid.*

The preamble of Resolution A1-31 indicates, that the Assembly took the step to provide the Contracting States and their representatives at ICAO meetings with a "uniform understanding of the obligations of the Contracting States under the Convention with respect to International standards and Recommended Practices to be adopted and amended from time to time..."[18]

According to Article 54 (l) of the Chicago Convention, international standards and recommended practices are "for convenience" designated as "Annexes" to the Convention. Over the years, the ICAO Council has developed and adopted 18 technical Annexes[19] pursuant to Articles 54, 37 and 90 of the Chicago Convention in English, French, Russian, Spanish (as of 1 January 1998), and some in Arabic as well. An ICAO Annex is made up of the following component parts, not all of which, however, are necessarily found in every Annex:

a) *Standards and Recommended Practices (SARPs)* adopted by the ICAO Council under the provisions of the Chicago Convention.

b) *Appendices* comprising material grouped separately for convenience but forming part of the SARPs adopted by the ICAO Council.

c) *Definitions* of terms used in SARPs, which are not self-explanatory in that they do not have an accepted dictionary meaning. A definition does not have independent status but is an essential part of each SARP in which the term is used, since a change in the meaning of the term would affect the specification.

d) *Tables and Figures*, which add to or illustrate a Standard or Recommended Practice and which are referred to therein, form part of the associated Standard or Recommended Practice and have the same status.

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[18] See ICAO, Res. A1-31, ICAO Doc. 4411 A1-P/45 (1947).

[19] Annex 1 (Personnel Licensing); Annex 2 (Rules of the Air); Annex 3 (Meteorological Service for International Air Navigation); Annex 4 (Aeronautical Charts); Annex 5 (Units of Measurement to be used in Air and Ground Operations); Annex 6 (Operation of Aircraft); Annex 7 (Aircraft Nationality and Registration Marks); Annex 8 (Airworthiness of Aircraft); Annex 9 (Facilitation); Annex 10 (Aeronautical Telecommunications); Annex 11 (Air Traffic Services); Annex 12 (Search and Rescue); Annex 13 (Aircraft Accident Investigation); Annex 14 (Aerodromes); Annex 15 (Aeronautical Information Services); Annex 16 (Environmental Protection); Annex 17 (Security—Safeguarding International Civil Aviation against Acts of Unlawful Interference) and Annex 18 (The Safe Transport of Dangerous Goods by Air).

All ICAO Annexes are the responsibility of the ICAO Air Navigation Commission, except for Annexes 9—a responsibility of the ICAO Air Transport Committee and Annex 17—a responsibility of the Committee on Unlawful Interference.

It should be noted that the Annexes are amplified by a wide variety of ICAO Technical Manuals and other publications.[20]

2. Development, Adoption and Amendment of Annexes

> [M]uch of what has been written about ICAO's legislative process bears a little resemblance to the actual practice of the Organization. The legislative process of the Organizations has, furthermore, moved further and further away from the governing provisions of the Chicago Convention. These were for the most part poorly drafted, and thus required extensive interpretative improvisations which have been accomplished in large measure without any formal or express legal rulings.[21]

This view, expressed by Buergenthal, provokes the questions: What is the "actual practice" of ICAO's legislative process, and which were the "extensive interpretative improvisations" needed for overcoming the "poor drafting" of the Chicago Convention?

The Air Navigation Commission, which is responsible for the air navigation SARPS, and the Air Transport Committee, --for SARPS dealing with the facilitation of international air transport, are entrusted with the task of developing and formulating ICAO Annexes and amendments thereto.[22] These two bodies have various sub-

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[20] The ICAO general publications include:

ICAO JOURNAL – The official ICAO publication, which provides a concise account of ICAO's activities in establishing international aeronautical standards and practices, and also features additional information of interest to government aviation authorities and the international aeronautical community at large. It commenced regular monthly publications in 1947 (as the ICAO Bulletin) and is issued in English, French and Spanish, and quarterly in Russian.

ICAO Publications and Audio Visual Training Aids Catalogue – This catalogue *contains* a general description of all current salable ICAO publications (Reports of Meetings, Circulars, and Manuals), and audio visual training aids (audio slides, posters and video films), including details of some of the publications offered free on request. ICAO Circulars are intended to disseminate to the Contracting States specialized information, such as: air transport and technical studies; analyses, reproductions of or extracts from informative documents supplied by the Contracting States; reports on the implementation of ICAO SARPs; aircraft accidents/incidents; human factors in flight crew training; financial data on airport and route facilities; and surveys of international air transport fares and rates.

[21] *Buergenthal, supra* note 3 at 58.

[22] See Articles 56 and 57of the Chicago Convention. For more information about the functions and activities of the Air Navigation Commission, as well as its predecessor, the Air Navigation Committee--which existed on an interim basis during the first two years after ICAO was established--see Sheffy, "The Air Navigation Commission of the International Civil Aviation

committees (divisions) whose activities they coordinate. Their aim is to establish or convene the establishment of international forums for formulation and review of different SARPS.[23]

Each Contracting State is given the opportunity to participate in divisional meetings and conferences, convened by the Air Navigation Commission/Air Transport Committee for the purpose of developing international SARPS or amendments thereto, where States can initiate and help develop proposals for SARPS. The steps in this operation are broadly as follows:

States are consulted on the agenda and comment on advance documentation. The latter is placed before the meeting and comes not only from the Contracting States, but also from the Secretariat and international organizations as well. All proposals, or amendments to SARPS, must be submitted to the Contracting States for their comments after the Air Navigation Commission or the Air Transport Committee has reviewed them. The Contracting States are given a period of three months within which to consider these proposals and submit their comments.[24] These comments are in turn carefully analyzed by the Air Navigation Commission or the Air Transport Committee before the final draft of SARPS proposals is submitted to the Council.[25]

The reasons for assigning the power to adopt and amend the ICAO Annexes to the Council rather than to the Assembly, the more representative body, are not expressly stated in the published proceedings of the Chicago Conference. The Assembly has nevertheless exercised a certain role in relation to this activity in its capacity as the most representative organ of the Organization with the responsibility for overseeing the activities of the Organization and of the Council. For example, in the early years of the

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Organization" (1958) 25 J. of Air L. at 281 (Part I) and at 428 (Part II). See also ICAO, Res. A1-7, ICAO Doc. 4411 A1-P/45 (1947); Res. A2-8, ICAO Doc. 5692 A2-P/37 (1958); *Rules of Procedure of the Air Navigation Commission*, ICAO Doc. 8229 AN/876 (1962); and *Development and Coordination of Technical Annexes to the Convention*, ICAO Doc. 7215 AN/858 (1951).

[23] See ICAO, *Rules of Procedure for the Conduct of Air Navigation Meetings and Directives to Divisional-Type Air Navigation Meetings*, ICAO Doc. 8143 AN/873 (1961).

[24] See ICAO, Res. A15-8 Appendix E, ICAO Doc. 8528 A15-P/6 (1965).

[25] See *Sheffy*, *supra* note 22 at 6. Articles 54 (l) and 54 (m) of the Chicago Convention vest the power to the ICAO Council for the adoption of international SARPs comprising an Annex, as well as the adoption of any amendments thereto.

existence of the Organization it acted as an impetus to the Council's action in adopting the Annexes, urging the Technical Division and the Council to proceed as rapidly as possible in this regard.[26] It recommended to the member States that the various PICAO Recommendations for Standards, Practices, and Procedures, PANS and SUPS be treated as having the same legal status under ICAO as they had under the Interim Agreement, until action in their regard by the Council.[27] Furthermore, it adopted definitions of the status intended to be given to Standards and Recommended Practices (definitions drafted by the Air Navigation Commission and the Council).[28] While it may be thought that the intervention of the Assembly into such matters might at some point give rise to conflict with the policy of the Council, it should be noted that the action of the Assembly has generally resulted from the submission of these questions to it by the Council and has been based in large measure upon the documentation approved by that body. This desire on the part of the Council to give the Assembly, at least formally, a policy-making role in respect of the procedure of elaboration of the Annexes and their implementation can be explained as an attempt to provide a more universal basis for the application in the Organization of the general policies involved.[29] The competence of the Assembly in this regard may be founded on Article 49 (c) of the Chicago Convention, which requires the Assembly to examine and take action on the reports of the Council and decide on any matter, referred to it by the Council.

Now let us turn to those provisions of the Chicago Convention that were considered to lack clarification and had to be subsequently interpreted. Article 90 (a) stipulates that the adoption of an Annex requires "*...the vote of two-thirds of the Council at a meeting called for that purpose...*" The Council has interpreted the phrase "vote of two-thirds" as meaning that the vote "should be interpreted as the vote of two-thirds of *the total membership* of the Council" [emphasis added].[30] It should be noted that at the time the interpretation was rendered, the Council had a membership of 21 States as

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[26] See ICAO, Res.A1-33, ICAO Doc. 7670: *Resolutions and Recommendations of the Assembly*, Vol. I (1956), at 27.
[27] Res. A1-34, *ibid. at 27-28.*
[28] Res. A1-31, *ibid.* at 25-26.
[29] See E Yemin, *Legislative Powers in the United Nations and Specialized Agencies* (Leyden: A.W.SIJTHOFF, 1969) at 123-124.

provided for by the original text of the Convention.[31] Since then it has expanded to 33; thus, accordingly, the adoption of an Annex to the Convention requires 22 affirmative votes.

There are, however, different views in the literature about the number of votes required for the adoption of an amendment to an Annex. The language of Article 90 (a) is relevant here:

> The adoption by the Council of the Annex described in Article 54, subparagraph (l), shall require the vote of two-thirds of the Council... Any such Annex or any amendment to an Annex shall become effective within three months after its submission to the contracting States.[32]

Detter argues that since Article 90 (a) speaks only of Article 54 (l), when referring to the two-thirds -vote requirement (which deals with the adoption of Annexes only), then the adoption of amendments to Annexes requires no more than a simple majority vote of the Council.[33] Buergenthal maintains a different position and argues that "considering ... that an amendment to an Annex may amount to a complete revision of the Annex in full but of form, it is obvious that the requirement of a two-thirds-vote applicable to Annexes could be easily circumvented if this view [for the simple majority vote] were to be accepted."[34] The position the ICAO Council took was in favor of the latter view and proceeded on the assumption that the adoption of an amendment to an Annex is governed by the same voting requirements that apply to Annexes.[35]

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[30] See ICAO, *Proceedings of the 3rd Session of the Council*, ICAO Doc. 7310 C/846 (1952), at 27.
[31] The text was subsequently amended at the 13th (Extraordinary) Session of the Assembly on 19 June 1961; that amendment entered into force on 17 July 1962 and provided for twenty-seven Members of the Council; a further amendment was approved by the 17th (A) (Extraordinary) Session of the Assembly on 12 March 1971 providing for thirty Members of the Council; this amendment entered into force on 16 January 1973. The last amendment was approved by the 21st Session of the Assembly on 14 October 1974, which provided for thirty-tree Members of the Council; see Article 50 of the Chicago Convention.
[32] See Article 90 (a) of the Chicago Convention.
[33] See Ingrid Detter, *Law Making by International Organizations* (Stockholm: P.A. Norstedt & Soners Forlag, 1965) at 250. See also *Cheng*, *supra* note 12 at 65.
[34] *Buergenthal*, *supra* note 3 at 64.
[35] See ICAO, *Action of the Council – 48th Session*, ICAO Doc. 8351 C/946 (1963), at 16.

It is also noteworthy that the rules laid down by the Chicago Convention on the adoption of international standards are not in full accord with those governing their amendment in certain respects other than the rules for the required number of votes. The *ratio legis* behind these differences appears to be a desire to allow member State greater freedom in controlling the material scope of Annexes to the Convention:[36]

- according to Article 90 there is no requirement for a special meeting of the Council to be called for the purpose of amendment of an Annex;

- the Convention does not stipulate that any amendment to an international standard adopted by the Council must be immediately notified to all Contracting States, as in the case of the adoption of the original Annex;

- according to the strict wording of the Convention, the rules governing departures from an amendment of the Annexes by individual member States differ slightly from those governing departures from newly adopted Annex. In regard to the former, but not the latter, Article 38 prescribes specifically that:

> In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take.[37]

A literal interpretation of this Article, suggested by Cheng, leads to the conclusion that member States would be precluded from the option of not following any amendment to an international standard, if they had not given notice of their intention of doing so within the sixty-day period.[38]

- Article 90 of the Chicago Convention only requires the adoption of an Annex to be notified immediately to all member States; thus the Council may notify member States of amendments of an Annex at any time of its own choosing subsequent to their adoption. This provision may put in a difficult situation

[36] See *Cheng, supra* note 12 at 67.
[37] See Article 38 of the Chicago Convention.
[38] See *Cheng, supra* note 12 at 67.

member States if one takes into account the commencement of the sixty-day period, mentioned above, which is the date of the adoption of the amendment in question by the ICAO Council and not the date of its notification to member States. In Cheng's opinion, it appears that there is no more than an equitable duty incumbent upon the Council not to delay the notification of the adoption of an amendment to such an extent as to deprive member States of reasonable time to give notice of their decision not to follow the amendment within the sixty-day period.[39]

The Council also clarified the right of disapproval of the Contracting States to an Annex or amendment thereto, as Article 90 (a) stipulates, and the question whether in exercising this right the States have an option between disapproval in whole or in part. The ICAO Council considered this question in 1948 on a motion of the U.S. Representative, who urged that the Member States be given this option so as not to force them to veto an entire Annex merely because they could not accept some of the standards or recommended practices set out in the Annex.[40] The Council, following the opinion of the Legal Bureau, by a vote of nine to six ruled that the Contracting States had the option to disapprove of an Annex and amendment thereto either in whole or in part.[41]

Another issue that had to be resolved in the practice of the Organization was the question of promulgation of an Annex or amendment thereto. The problem was created by the fact that the Convention does not tell when an Annex or amendment thereto is deemed to have "come into force."[42] In 1948, when the Council promulgated the

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[39] *Ibid.*

[40] See ICAO, *Council - 3rd Session*, ICAO Doc. 5159 C/6410 (1948), at 11. This issue turned into a strong debate when the U.S. motion was opposed by the Canadian Representative who contended that Article 90, because it did not expressly provide for the disapproval of the Annex "or any part thereof," intentionally foreclosed the right of partial disapproval. The Chairman of the Air Navigation Commission, Mr. Craham, took the same view, stating that "... to allow disapproval by States of parts of an Annex might disrupt the operations of the Annex so completely that it would be virtually of no effect"; *ibid.* at 12.

[41] See ICAO, *Council - 18th Session, Revised Form of Resolution of Adoption of an Annex*, ICAO Doc.7361 C/858 Appendix A (1953), at 199.

[42] Article 90 (a) provides when an Annex or Amendment thereto "*shall become effective*," and in subparagraph (b) it stipulates that "the Council shall immediately notify all contracting States of the *coming into force* of any Annex or Amendment thereto" [emphasis added].

Standard Form Resolution for the Adoption of Annexes, it also interpreted Article 90 of the Chicago Convention.[43] Paragraph 2 of this resolution fixed 120 days (D+120) following the adoption of an Annex as the period within which the Contracting States must register their disapproval of the Annex. Paragraph 3 provides that "if on the said (D+120) a majority of the contracting States have not registered their disapproval of the said Annex, it shall then *become effective.*" Paragraphs 6 and 7 stipulate that "the said Annex ... *shall come into effect* and be implemented on (D+365)" and that "the *becoming effective* of the said Annex shall forthwith be notified to each Contracting States, and each State also, at the same time, be notified: (a) of the said date upon which the said Annex shall *come into force*" [emphasis added].[44] Accordingly, if one attempted to redraft Article 90 (b) as it was understood by the Council in 1948, one would come up with the following provision:

> The Council shall immediately notify all Contracting States of the becoming effective (enactment) of an Annex or amendment thereto and of the date on which the said Annex or amendment thereto shall become applicable (come into force).[45]

The Resolution underwent revision in 1953, after a series of debates challenging the use of the phrase "shall come into force" and "be implemented" found in Paragraph 6,[46] and led to the adoption of the *Revised Form of Resolution of Adoption of an Annex.*[47]

An analysis of this Resolution, suggested by Buergenthal, indicates that the Council has proceeded on the assumption that an Annex, which "has become effective" in

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[43] See ICAO, *Proceedings of the 3rd Session of the Council*, ICAO Doc. 7310 C/846 (1952), at 24-25.
[44] *Ibid.*
[45] *Buergenthal, supra* note 3 at 70. FitzGerald supports this view and concludes that at least at this date (when an Annex becomes effective) "it has a certain form for the purposes of the next phase of it life (a few months after it becomes effective, the Annex becomes applicable, the date of applicability being specified by the Council in the resolution of adoption)"; see Gerald FitzGerald, "The International Civil Aviation Organization—A Case Study in the Implementation of Decisions of a Functional International Organization," in S. M. Schwebel, *The Effectiveness of International Decisions* (New York: Oceana, 1971) at 188.
[46] For more information about these debates, see *Buergenthal, ibid.* at 71-74.
[47] See ICAO, *18th Session of the Council., Revised Form of Resolution of Adoption of an Annex,* ICAO Doc. 7361 C/858 Appendix A (1953).

accordance with the provisions of Article 90 (a), has acquired the status of a duly enacted legislative act, and as such it can no longer be withdrawn or modified by the Contracting States without recourse to the formal amendment process prescribed in Article 90 (a). Furthermore, by settling on "shall become applicable" in its *Revised Resolution of Adoption of an Annex* instead of retaining "shall come into force and be implemented," the Council clearly intended to dispel the erroneous assumption that the Contracting States were under an obligation to implement an Annex as soon as it had entered into force.[48] Buergenthal concluded that it was also obvious that the language of Paragraph 4 of the *Revised Resolution of Adoption of an Annex* is predicated on the assumption that the expressions "become effective" and "coming into force" are synonymous, for this clause requires the ICAO Secretary General on behalf of the Council to notify the Contracting States that an Annex has "become effective," whereas Article 90 (b) provides that such notice be given upon the "coming into force" of an Annex. Up to this point the standards prescribed in an Annex do not create legal obligations for the Member States.[49]

Thus, it could be concluded that when the Chicago Convention speaks of "minimum standards, which may be established from time to time pursuant to this Convention,"[50] these standards do not bind the Member States until they have become applicable. The same is true of the obligation, which the Contracting States have assumed in Article 38 of the Convention, wherein they undertake to conform their domestic legislation and practices to the provisions of an international standard or to notify the Organization of existing differences. In connection with the timeframe within which such notification has to be done, Cheng interprets Article 38 in the sense that it may be done by individual member States either before or after an Annex has come into force. In other words, a member State may decide at any time not to comply with a given international standard, with the sole exception of international standards incorporating rules of the air applicable over the high seas.[51] This exception apart, the only duty incumbent on a member State deciding to depart from an international standard is to "give immediate

[48] See *Buergenthal, supra* note 3 at 74ff.
[49] *Ibid.* at 75-76.
[50] See *e.g.* Article 33 of the Chicago Convention.
[51] *Ibid.*, Article 12.

notification to the ICAO of the differences between its own practice and that established by the international standard."[52]

The President of the Council has delegated authority to approve Regional Supplementary Procedures (SUPPS). Proposals for amendments are requested by a State or group of States and are circulated by the Secretary General to all States considered to be affected. If there is no objection, the Secretary General circulates the proposal to members of the Air Navigation Commission and the representative on the Council with a request that he be notified by a certain deadline (seven days to three weeks) whether formal discussion is desired. If there is no request for formal discussion, the proposal is approved by the President of the Council. If on the basis of the original inquiry of the Secretary General, a State objects, and consultation does not remove the objection, the matter will be considered by the Air Navigation Commission and, if amendment is necessary, by the Council. While failure to make the above-mentioned objections will not make the SUPPS binding, the technique of absence-of-objection has an important role to play in the process of consultation, and can lead to the establishment of a text that may raise community expectations.[53]

3. Implementation of ICAO SARPs

The process of implementation of ICAO regulatory material begins before the decision of the Council to adopt or approve the material to be implemented, becomes applicable, even before the decision is taken. This is so because of the opportunities given to the Contracting States to participate at different stages in the process of developing international SARPS, an issue discussed in the subchapter above.

Notwithstanding the fact that the ICAO Council has the "unique" authority to legislate,[54] its law-making functions are considered to be quasi-legislative since the adopted international standards and recommended practices are not binding on the ICAO member States against their will. It is worth mentioning here that most of the Annexes to

[52] *Cheng, supra* note 12 at 65.
[53] See *FitzGerald, supra* note 45 at 188.
[54] See *Milde, supra* note 12 at 4.

the inter-war Paris Convention of 1919, adopted by the International Commission for Air Navigation (ICAN), the predecessor of ICAO, were binding on member States of ICAN, at least Annexes A to G were (though not Annex H, which dealt with customs).

After the Council has adopted the SARPS the following sequence of actions is required for their implementation:

(a) Proper changes made by States and in good time in their regulations and instructions. This involves:

  (i) The embodiment of the SAPRS in the national legislation or regulation;

  (ii) The preparation of manuals or operating instructions under enabling legislation;

  (iii) Distribution of ICAO texts for use at installations.

(b) The practical application by States of the changes.

It is, however, up to each contracting State to decide whether or not to comply with or give effect to an international standard adopted by the ICAO Council under Articles 37, 54 (l) and 90 of the Chicago Convention. This is the condition of "practicability."[55] There is no room for differing opinions on this limitation, since the drafters of the Chicago Convention themselves clearly stated that:

> No Annex is specifically identified in the Convention; and there is no limit to the adoption by the Council of any Annexes which may in [the] future appear to be desirable. On the other hand, and in fact as a necessary consequence of that flexibility, the *Annexes are given no compulsory force.* It remains open to any State to adopt its own regulations in accordance with its own necessities [emphasis added].[56]

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[55] The legal maxim "*ultra posse nemo tenetur*" is reflected in Articles 22, 23, 28, 37 and 38 of the Chicago Convention. This concept, "impossibility of performance," is not unknown in international law—see Article 61 of the 1969 *Vienna Convention on the Law of Treaties*, UN 1155 U.N.T.S. 331.

[56] Statement from Dr. Edward Warner in presenting the report of the Committee that drafted the provisions of the Chicago Convention relevant here; quoted by *Buergenthal, supra* note 3 at 78.

There are, however, grounds in international relations for judging this criterion, namely, the principle of good faith that demands from a signatory party, which expressly has not declared its intention to the contrary, to abstain from acts contrary to the principle in question. It means that good faith performance (also termed *bona fides*) emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.[57] Certainly, one can argue that since there is no sanction for non-compliance there is not any obligation at all, and besides, a State can always find the necessary "practical reasons" to justify non-compliance with or deviation from international standards (e.g., due to lack of funds or properly trained personnel resources, impossibility of obtaining or installing particular kinds of equipment or introducing new procedures within a specified time, etc.) Last, but not least, the Chicago Convention does not provide for a mechanism for questioning the propriety of a Contracting State's decision in this regard.

That having been said, the conclusion that ICAO standards are devoid of legal significance and of binding power does not seem to be too far-reaching. Such a conclusion, however, would be contrary to the express provisions of the Chicago Convention, and this is the place to emphasize that in the Preamble the Contracting States say that they have:

> [A]greed 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.[58]

Furthermore, under Article 37 they have accepted an explicit legal undertaking to collaborate in securing the highest practicable degree of uniformity in regulations,

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[57] *Black's Law Dictionary*, 7th ed., *s.v.* "good faith".
[58] Preamble of the Chicago Convention.

standards, procedures and organization in relation to aircraft, personnel, airways, etc. in all matters in which such uniformity will facilitate and improve air navigation. If a State finds it impracticable to comply in all respects with any international standard, it has an unconditional legal duty, under Article 38 of the Chicago Convention, to give "*immediate notification*" to ICAO, and the Council of ICAO is obliged to make "*immediate notification*" on its part to all other States of the difference that exists between an international standard and the corresponding national practice of the particular State. The rationale for this strict and unconditional requirement is clear—there is a vital need for full transparency on the level of implementation of the Standards. It is in the interest of the safety of air navigation that all States must be made aware that in a particular place standard procedures, facilities, services and flight safety as a whole could be seriously jeopardized. Milde draws a distinction between the "weak" legal force of the international standards in theory, and their real force in actual practice:

> [I]n practice the Standards assert themselves with a persuasive objective force comparable to the law of gravity – a disregard of the ICAO Standards would entail serious consequences, possibly eliminating the State concerned from any meaningful participation in international air navigation and air transport.[59]

FitzGerald draws the same conclusion, in analyzing what has been called the "normative function of the organized international community."[60] In his opinion, if a community of this kind has established an international organization to enact norms for the performance of a particular activity (e.g., international civil aviation), enactment of these norms would raise community expectations of compliance with them even where, in the interests of flexibility, States are permitted to contract out. It follows that if States wish to participate in and benefit from a particular activity, they ought to recognize and observe these norms as the price of their participation. Non-compliance with the norm

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[59] *Milde*, *supra* note 12 at 6, supports his view by the example of the former USSR, which "meticulously observed most ICAO Standards ... long before it joined ICAO in 1969; without such compliance their aircraft and personnel could not operate over or into the territory of ICAO States and their aviation products would not be saleable abroad."

[60] *FitzGerald*, *supra* note 45 at 161ff.

would entail a "disentitlement to enjoyment" of the activity in the company of other States belonging to the norm-establishing organization.

It should be mentioned, however, that there are certain exceptions to the freedom of action that the member States enjoy. Furthermore, there are sanctions in the Chicago Convention that would serve to bring about compliance with decisions of the ICAO Assembly and the Council:

(1) Failure to pay, within a reasonable time, contributions to the regular budget voted by the Assembly may lead to suspension of voting power in the Assembly and in the Council.[61]

(2) A Contracting State will not recognize as valid certificates of airworthiness and certificates of competency and licenses of personnel issued or rendered valid by another Contracting State, in which the aircraft is registered, unless the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to the Convention.[62] The standards in question would be those adopted by the Council and found in Annex 1 (Personnel Licensing) and 8 (Airworthiness) to the Chicago Convention. Non-compliance of a State with the standards adopted by the Council for the certificates and licenses concerned would lead to the non-recognition of these documents for the purposes of international air navigation. The Convention provides for endorsement of certificates and licenses that fail to satisfy the international standards[63] and prohibits the aircraft or personnel concerned from participating in international air navigation, except with the permission of the State or States whose territory is entered.[64]

(3) Depending on circumstances, under Chapter XVIII of the Convention, a final and binding decision on a disagreement concerning the interpretation or application of the Convention and its Annexes may be rendered by the Council, the International Court of

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[61] Article 62 of the Chicago Convention. See also ICAO, *Action to be taken in the case of Contracting States failing to discharge their financial obligations to the Organization*, Res. A16-56, ICAO Doc. 8770.
[62] See Article 33 of the Chicago Convention.
[63] *Ibid.*, Article 34.
[64] *Ibid.*, Article 40.

Justice or an arbitral tribunal.[65] The Convention provides for compliance with this decision and stipulates the following penalties:

(i) If the Council has decided that an airline of a Contracting State is not conforming to the decision, each Contracting State undertakes not to allow the operation of the airline through the airspace above its territory.[66]

(ii) The Assembly shall suspend the voting power in the Assembly and in the Council of any Contracting State that is found in default under the provisions of Chapter XVIII.[67]

The fact that a disagreement concerning the interpretation or application of the Convention, or of an Annex, can be brought before the Council could be an incentive for a State to comply with the provisions of the Convention and, in the case of an Annex, not only with the provisions of the Annex, but also with Council decisions relating to it.[68]

C. Conclusion

The law making function of ICAO is a unique mechanism for achieving the objectives of the Chicago Convention, and thus, meeting the needs of the peoples for a safe, regular, efficient and economic air transport.[69]

The description of the ICAO's legislative process serves to indicate the great extent to which Contracting States are consulted in advance in the development of international SARPs before their becoming applicable and this consultation is a step forward toward implementation.

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[65] *Ibid.*, Articles 84-85. For general information about aviation disputes see e.g. Michael Milde, "Dispute Settlement In the Framework of the International Civil Aviation Organization (ICAO)" in *Public International Air Law-Casebook* (Montreal: McGill University, 1999) 204; Isabella Diedericks-Verschoor, *Settlement of Aviation Disputes*, (1995) XX-I Ann. Air & Sp. L. 335.
[66] Article 87 of the Chicago Convention.
[67] *Ibid.*, Article 88.
[68] See *FitzGerald*, *supra* note 45 at 163.
[69] See Article 44 (d) of the Chicago Convention.

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CHAPTER THREE

THE INTERNATIONAL OBLIGATION

A: Under Public International Law

The purpose of this section is to analyze Article 37 of the Chicago Convention through the notion of international obligation and to argue that the undertaking of the member States to "collaborate in securing the highest practicable degree of uniformity ... in all matters in which such uniformity will facilitate and improve air navigation"[1] could be considered a peremptory norm of customary international law with all due implications that follow from this conclusion.

The International Court of Justice (ICJ), in the *North Sea Continental Shelf Case*,[2] held that legal principles that are incorporated in treaties become customary international law by virtue of Article 38 of the 1969 Vienna Convention on the Law of Treaties.[3] Article 38 recognizes that a rule set forth in a treaty would become binding upon a third State as a customary rule of international law if it is generally recognized by the States concerned as such.[4] Article 37 of the Chicago Convention, which designates that ICAO will adopt international Standards and Recommended Practices—for the common good of humanity—establishes the principle of international co-operation and facilitation.[5]

Therefore, it can be argued that this principle is a principle of customary international law, or *jus cogens*. Abeyratne supports this view by saying: "Obligations arising for *jus cogens* are considered applicable *erga omnes*, which would mean that

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[1] Article 37 of the *Convention on International Civil Aviation*; the Convention was opened for signature at Chicago on 7 December 1944 and entered into force on 4 April 1947, see ICAO Doc. 7300/6 [hereinafter *Chicago Convention*].

[2] *North Sea Continental Shelf Case* [1970] I.C.J Rep. at 32.

[3] See *Vienna Convention on the Law of Treaties* of 1969, UN 1155 U.N.T.S. 331.

[4] *Ibid.*, Article 38.

[5] See Article 37 of the Chicago Convention and C. I, section 2 (Main Principles) of this paper.

States owe a duty of care to the world at large in adhering to Article 37 of the Convention." [6]

Can we consider the *owing* of this "duty of care" to have more than a declaratory meaning, as most principles of public international law have, and analyze it through the notion of international obligation? The answer does not seem to be so simple when one takes into account the dynamics of the international relationships and the challenges posed by an era of globalization. Thus, new meaning is given to the common purposes declared more than 50 years ago. Their fundamental character has not changed; rather, it is the understanding that there is a need for a change in the means of ensuring them.

1.The Theory

In Schachter's opinion, there are five processes that constitute the necessary and sufficient conditions for the establishment of an obligatory legal norm.[7] These processes purport to tell us how to recognize an obligatory rule or principle. The definitions he uses, are thus intended to apply to obligatory norms in their most generalized sense—whether in treaty, custom, statute, decision, or resolution; whether international or national; whether specific or highly general, concrete or vague. They are as follows:[8]

(i) The formulation and designation of a requirement as to behavior in contingent circumstances;

(ii) An indication that that designation has been made by persons recognized as having competence (authority or legitimate role) to perform that function and in accordance with procedures accepted as proper for that purpose;

(iii) An indication of the capacity and willingness of those concerned to make the designated requirement effective in fact;

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[6] Ruwantissa I.R. Abeyratne, "ICAO's Strategic Action Plan – A Legal Analysis" (1996) 45 ZLW Jg. 231 at 243.

[7] Oscar Schachter, "Towards a Theory of International Obligations," in S. M. Schwebel, *The Effectiveness of International Decisions* (New York: Oceana, 1971) at 16ff.

[8] *Ibid.*

(iv) The transmittal of the requirement to those to whom it is addressed (the target audience);

(v) The creation in the target audience of responses—both psychological and operational—which indicate that the designated requirement is regarded as authoritative (in the sense specified in iii above) and as likely to be complied with in the future in some substantial degree.

Each of these defining traits points to the kind of material that would—if available—validate or refute a characterization that a given proposition should be regarded as an obligatory norm. Moreover, concludes the author, "it enables us to discover underlying factual assumptions that have not otherwise been noticed and to look beyond words to the realities of obligational phenomenon."[9]

When applying the theory of international obligation, one should be very cautious always to bear in mind the scope of international law and its specifics. In the famous *Lotus* case of 1927 the Permanent Court of International Justice held:[10]

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

The subject of the "foundation of obligation" is considered to be as old as international law itself; it had a prominent place in the seminal treaties of the founding fathers—Suarez, Vitoria, Grotius, Pufendorf—and it remained a "central issue in the great controversies of the nineteenth century."[11] In the twentieth century, when the international community became conscious after World War II of the necessity for any legal order to be based on a consensus concerning fundamental values, which were not at the disposal

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[9] *Ibid.*

[10] *Lotus case* (1927), P.C.I.J. (Ser. A.) No. 9 at 18.

of the subjects of this legal order, several theories emerged, and have been put forward as the basis of obligation in international law. These include: consent of states; customary practice; a sense of "rightness"—the juridical conscience; natural law or natural reason; social necessity; the will of the international community (the "consensus" of the international community); direct (or "stigmatic") intuition; common purposes of the participants; effectiveness; sanctions; "systematic" goals; shared expectations as to authority; and rules of recognition.[12]

Traditional international law, the rules of which aimed principally at reconciling the jurisdiction of states when they came into conflict, was created chiefly by custom: a mode of law-making that relies on the passage of time and accumulation of precedents. When it became necessary to subject to legal regulation matters requiring rapid, purposive solutions, states resorted to the contractual mode of law-making—the convention or treaty. The first and foremost manner of legal protection of interests provided by this mode is that it is binding upon those subjected to it.[13] Thus, it imposes upon its subjects respect for its rules.

The subjective nature of obligation, as opposed to the objective nature of rules, leads to the conclusion that it is not sufficient to prove that a rule exists, what it prescribes and to whom it applies, but it is also necessary, having regard to the practical circumstances prevailing at the time of its application, to specify to what extent the rule obligates States to follow a certain course of conduct in those circumstances.[14] An opinion on the nature of rules and what springs from them (obligations and rights) in the context of breach of international obligations is reflected in the following statement:

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[11] *Schachter, supra* note 7 at 9ff.
[12] For more information about these theories, see *ibid*.
[13] See Article 26 of the Vienna Convention on the Law of Treaties proclaiming "*pacta sunt servanda*" principal.
[14] This conclusion is relevant to the suggestion, argued in this thesis, that the undertaking of the ICAO member States under Article 37 of the Chicago Convention to "collaborate in securing the highest practicable degree of uniformity...in all matters in which such uniformity will facilitate and improve air navigation" possesses a new meaning in the era of globalization.

> The rule is law in the objective sense. Its function is to attribute in certain conditions subjective legal situations—rights, faculties, powers and obligations—to those to whom it is addressed. It is these situations which, as their global appellation indicates, constitute law in the subjective sense; it is in relation to these situations that the subject's conduct operates. The subject freely exercises or refrains from exercising its subjective right, faculty or power, and freely fulfills or violates its obligation, but it does not 'exercise' the rule and likewise does not 'violate' it. It is its duty which it fails to carry out and not the principle of objective law from which the duty flows. This does not mean that the obligation whose breach is the constituent element of an internationally wrongful act must necessarily flow from a rule, at least in the proper meaning of that term. The obligation in question may very well have been created and imposed upon a subject by a particular legal act, a decision of a judicial or arbitral tribunal, a decision of an international organization, etc.[15]

In 1949, in the *Reparation for Injuries Case*,[16] the International Court of Justice pronounced the end of the old orthodoxy that States are the only subjects of international law. The Court advised that the United Nations, although not a State, has the capacity to bring certain kinds of claims directly against a State under the rubric of international law. Thus, the sense of international responsibility that the United Nations had ascribed to itself had reached a highly potent phase in which the role of international law in international human conduct was perceived to be primary and above the authority of States. In its Report to the General Assembly, the International Law Commission recommended a draft provision that required the following:

> Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.[17]

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[15] Andre de Hoogh, *Obligations erga omnes and International Crimes - A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (The Netherlands: Kluwer Law International, 1996) at 17.

[16] *Reparation for Injuries Case*, [1949] I.C.J. Rep.174.

[17] *Report of the International Law Commission to the General Assembly on the Work of the First Session*, UN Doc. A/CN.4/13, June 9 1949, at 21, quoted by *Abeyratne*, *supra* note 6 at 241.

This principle, which forms a cornerstone of international conduct by States, provides the basis for strengthening international community and regulating the conduct of States both internally—within their territories—and externally—towards other States. States are effectively precluded by this principle from pursuing their own untrammeled interests in disregard to principles established by the international community.[18]

While it is not disputed that the international community comprises a number of separate States that form a community of nations, and that the existence of these independent States is essential to the existence of international organizations, the multiplication of States, unquestionably, makes the task of international cooperation more complicated and more difficult. Often, States tend to pursue their national interests and legislation relentlessly, purely on the ground that their sovereignty requires them to hold their own in international fora. Potter observes that, "this attitude may frequently tend to obfuscate the need to take collective international measures in an issue that requires a certain degree of homogeneity in the international community."[19] He also states that:

> It is a familiar observation of political science that a moderate amount of homogeneity is indispensable as a basis for law among units of any order. Some common denominators among nations must be found in the intercourse among them. If there are no common interests and standards there can be no legal community.... At this point arises the thought that a substantial international spiritual unity or community must precede any effective international organization and the denial that any such thing exists.... The two elements—spiritual community and practical organization—interact upon another moreover to produce results not anticipated by an oversimplified analysis.[20]

The premise that a common denominator between States is essential to coalesce them into a single conceptual group for implementing international regulations is admittedly the starting point. In the final analysis, however, the effectiveness of regulation would lie only in adherence by States on a collective basis to those regulations.

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[18] See *Abeyratne*, *ibid.*
[19] Pitman B. Potter, *An Introduction to the Study of International Organization*, 5th ed. (New York: Appleton Century-Crofts, 1935) at 8-9.
[20] *Ibid.*

The challenge is therefore to find a common basis that would add credence to Potter's premise of homogeneity.[21] This basis has been provided by Wassenbergh who observes:

> To find a solution to conflicts between States with regard to regulation of international civil aviation and notably between a big and a small State, one should perhaps approach the problem by bearing in mind that the States are the *locum tenentes* of their nationals in the international sphere, not only representing their citizens as a national group but also, and more importantly, representing each individual as a subject of international society as well as of his State. In other words, a government must consider the interests of its citizens also as members of a society beyond that government's own bounds.[22]

Wassenbergh's proposal imputes to States an ineluctable international responsibility towards their citizens that requires States to align their local policies to be in consonance with international policy, thereby assuring their citizens a certain participation in the international law-making process. This argument is consistent with the sense of international responsibility that the United Nations ascribed to itself in recognizing that the role of international law in human conduct was primary and above the authority of States.[23] It also cleverly binds the role of States—as units of the international order—to the role of international law in the international community of States. According to this premise, the right of a carrier to operate air services anywhere in the world, and the duty of a State to enforce international regulations on air safety, security, facilitation and airport planning *inter alia*, may be viewed *prima facie* as internationally recognized and enforceable rights and duties.

One of the most perplexing questions that remains unanswered concerns the fact that States have apparently regarded ICAO's Annexes to the Chicago Convention—which are all of a technical nature—as non-binding. The Standards contained in the Annexes all carry explicit requirements stating that States "shall" comply with regulations. Moreover,

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[21] See *Abeyratne*, *supra* note 6 at 241.

[22] A. Wassenbergh, *Aspects of Air Law and Civil Air Policy in the Seventies* (The Hague: Martinus Nijhoff, 1970) at 5.

[23] See *Abeyratne*, *supra* note 6 at 242.

the Chicago Conference of 1944, which was the precursor to the Chicago Convention, also explicitly recognized that ICAO would exercise power over States in requiring adherence to its regulations in the technical field. In the words of the delegation of the United States to the Conference:

> It is generally agreed that it is true, in the purely technical field, a considerable measure of power can be exercised by, and indeed must be granted to, a world body. In these matters, there are few international controversies which are not susceptible of ready solution through the counsel of experts. For example, it is essential that the signal arrangements and landing practice at the Chicago Airport for an intercontinental plane shall be similar to the landing practice at Croydon, or Le Bourget, or Prague, or Cairo, or Chungking, that a plane arriving at any of these points, whatever its country of origin, will be able to recognize established and uniform signals and to proceed securely according to settled practice.... A number of other similar technical fields can thus be covered; and, happily, here we are in a field in which science and technical practice provide common ground for all.[24]

2. The Scope of Obligations *Erga Omnes* and Their Relation to the Concept of *Jus Cogens*

Without expressly using the notion of *jus cogens*, the International Court of Justice (ICJ) implied its existence when it referred to obligations *erga omnes* in its judgment of February 5, 1970 in the *Barcelona Traction Case*:[25]

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concerns of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligation *erga omnes*.

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[24] *Proceedings of the International Civil Aviation Conference*, Chicago, Illinois: November 1-December 7 1944, United States Government Printing Office: Washington, 1948 at 59, quoted by *Abeyratne*, *ibid.* at 242.

[25] *Barcelona Traction, Light and Power Company Limited*, [1974] I.C.J. Rep. 253 at 269 [hereinafter *Barcelona Traction Case*]. As examples of obligations *erga omnes*, the Court mentioned the prohibition of aggression and genocide, as well as the principles and rules

The International Law Commission has observed of the ICJ decision:

> [I]n the Court's view, there are in fact a number, albeit limited, of international obligations which , by reason of their importance to the international community as a whole, are—unlike others—obligations in respect of which all States have legal interest.[26]

The views of the ICJ and the International Law Commission, which has supported the approach taken by the ICJ, give rise to two possible conclusions relating to *jus cogens* and its resultant obligations *erga omnes*:[27]

a) obligations *erga omnes* affect all States and thus cannot be made inapplicable to a State or group of States by an exclusive clause in a treaty or other document reflecting legal obligations without the consent of the international community as a whole;
b) obligations *erga omnes* preempt other obligations which may be incompatible with them.

Hoogh emphasizes that what is important is to recognize that obligations *erga omnes* are "most ultimately connected to the realm of secondary rules of international law, in that all States can be held to have a legal interest" is the consequence of the characterization of an obligation as *erga omnes* "only if and when such an obligation is breached."[28] Being *erga omnes* is a "consequence, not the cause, of a right's fundamental character."[29]

Hoogh further observes that the expression "obligations *erga omnes*" is misleading. He supports his opinion with the argument that in reality "almost all obligations of customary international law are obligations *erga omnes* in the sense that

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concerning the basic rights of the human person, including protection from slavery and racial discrimination.

[26] See Y.B. Int'l L. Comm. 1976, Vol. II, Part I at 29, cited by *Abeyratne*, supra note 4 at 243.

[27] See *Abeyratne*, *ibid.*

[28] See *Hoogh*, *supra* note 15 at 53ff. The secondary rules of international law are taken to mean those rules, which involve the determination, implementation and enforcement of the international responsibility of States, while primary rules of international law are taken to mean substantive rules of international law; *ibid.*

[29] *Ibid.*

they are towards each and all States."[30] Thus, his conclusion is that the essential idea of these obligations is not that the obligations are owed to all States, but that "in case of the breach of such an obligation the corresponding rights of protection are in possession of each and every State," as the ICJ acknowledged in the previously mentioned *Barcelona Traction Case* in holding that "all States can be held to have a legal interest in their protection."[31] A legal interest in possession of a State has been considered to stand for a right of protection, that is, a right to demand the performance of (breached) obligations. Therefore, if a breach of an obligation *erga omnes* entails for every State a legal interest in its protection, that *ipso jure* means that the States are in possession of a corresponding or correlative right of protection.[32]

The 1969 Vienna Convention on the Law of Treaties contains some provisions on *jus cogens*. Its basic Article 53 stipulates that any treaty in conflict with a peremptory norm exists if a norm is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.[33] According to Article 26, every treaty that remains in force is binding upon the parties and its obligations must be performed in good faith.[34] Article 60 describes the available remedies for a material breach.[35]

3. Conclusion

How much theoretical the issue of the basis of the obligation really is? Schachter assumes that the practical international lawyer is probably not inclined to regard the issue as deserving a lot of attention. The lawyer's view probably rests on the principle that:

> [A]s long as the obligation itself can be identified in one of the formal sources of international law—treaty or custom or in general

[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] See Article 53 of the Vienna Convention on the Law of Treaties. In its commentary, the International Law Commission indicated that "the law of the Charter concerning the prohibition of the use of force constituted a conspicuous example of a peremptory norm"; see *Hoogh, supra* note 15 at 2.
[34] See Article 26 of the Vienna Convention on the Law of Treaties.
[35] See *ibid.*, Article 60.

> principles of law—it seems to matter little what the underlying basis of the obligation may be. He is rather supposed to be concerned with the so-called 'sources', formal and material.[36]

For this reason, objections to the importance of a theory on the foundations of obligation are quite possible. But action implies choice, and choices are not made in vacuum. They have determinants and these determinants will include the perspectives of the actors with regard to authority and its effectiveness.[37] The phenomenon of obligation can help to clarify the choices to be made and to evaluate them on a realistic basis. Theory is no more than an instrument to this end, a means of answering the question "Why this and why not that?" It provides no final answer, but it may reveal alternatives.[38]

> When we examine the arguments and the grounds for decision, we find more frequently than not that the test of whether a "binding" rule exists or should be applied will involve basic jurisprudential assumptions. Even the International Court of Justice, which is governed expressly by article 38 of its Statute as to the sources of law, has demonstrated time and again that in their deliberative process the judges have had to look to theory to evaluate practice.[39]

Yemin expresses the view that when an international organ has been granted the power to legislate for its member states—to adopt or revise such rules without their having to be subsequently accepted by the states to which they are addressed— it then becomes possible to speak of a "radical transformation of the law-making structure of international law."[40] Thus, the quasi-legislative activity of the UN bodies—as ICAO's law-making function is—purporting to lay down, expressly or by implication, requirements of state conduct, is a factor that gives special importance to the problems of the indeterminacy of international obligation.

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[36] See *Schachter, supra* note 7 at 10.
[37] *Ibid.* at 31.
[38] *Ibid.*
[39] *Schachter, supra* note 7 at 12.
[40] Edward Yemin, *Legislative Powers in The United Nations and Specialized Agencies* (Leyden: A.W. Sijthoff, 1969) at 2.

B. Under The Chicago Convention: Safety Oversight - State's Responsibility

1.The Need for Safety Oversight

The basis of the States' obligations under the Chicago Convention, is the desire to promote and conduct safe and regular aircraft operations through the development and implementation of internationally acceptable certificating and licensing standards.[41] Some of the general obligations include ensuring provisions for transient general aviation and commercial air transport operations such as adequate:

- airports;
- navigation aids;
- charting and instrument approach minima;
- weather reporting;
- air traffic control;
- search and rescue;
- aviation security; and
- timely correction of safety deficiencies with respect to these obligations.[42]

The need for safety oversight is clear when one looks at the number of provisions in the Chicago Convention that create a network of safety-related articles and concepts, and interconnect the national regulatory systems of all 185 ICAO Member States with the Organization. These provisions are contained in, *inter alia*, Articles 12 (Rules of the air); 29 (Documents carried in aircraft); 30 (Aircraft radio equipment); 31 (Certificates of airworthiness); 32 (Licenses of personnel); 33 (Recognition of certificates and licenses); 34 (Journey log books); 35 (Cargo restrictions); 37 (Adoption of international standards and procedures); and 38 (Departure from international standards and procedures.) The provisions of the relevant articles create a global set of standards for safety-related national legislation, and this allows States freely to recognize each other's level of implementation of these provisions.

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[41] See ICAO, *Safety Oversight Manual*, Part A: "The Establishment and Management of a State's Safety Oversight System", ICAO Doc.9734-AN/959, section 2.3 [hereinafter *Safety Oversight Manual*].
[42] *Ibid.*

Article 33 of the Chicago Convention, for example, clearly illustrates the interconnection by stipulating that when a State does not adhere to international standards, other signatory States are no longer obliged to accept certificates of airworthiness or competency issued by the former State.[43] Having said that, it is in the best interests of any State to comply with international standards and to ensure they are maintained by operators and personnel licensed under its authority.

Based on the above considerations, safety oversight can be defined as:

> [T]he function by which States ensure effective implementation of safety-related SARPs and associated procedures contained in the Annexes to the Chicago Convention, as well as related safety guidance material. Such oversight ensures that national aviation industries provide a level of safety that is at least equal to that defined by the SARPs.[44]

As such, "an individual State's responsibility for safety oversight is the foundation on which safe operations are built. Lack of appropriate safety oversight in any Contracting State threatens the viability of international aircraft operations."[45]

2. Critical Elements for a Safety Oversight System

For a State to fulfill its safety oversight obligations in all civil aviation activities, "regardless of the size and complexity of the latter,"[46] it should consider the critical elements of a safety oversight system in implementing ICAO SARPs, which are as follows:

2.1 Primary aviation legislation

The Chicago Convention does not specifically require a State to promulgate "primary aviation legislation," a national legislative framework commonly known as the

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[43] See Article 33 of the Chicago Convention.
[44] Capt. Haile Belai, "Safety oversight requires renewed commitment in era of increasing complexity, challenges" (1999) 54:4 ICAO J. 16.
[45] *Ibid.* A State's responsibilities for safety oversight should be understood as comprising of the respective responsibilities incumbent on the State of registry and/or State of the operator. Belai, however, argues that such clearly defined roles "do not exclude a State's obligation as a place of aircraft design and manufacture, if such activities take place," *ibid.*
[46] *Ibid.* at 17. See also *Safety Oversight Manual, supra* note 41, sub-section 2.3.2.2.

"civil aviation code" or the "civil aviation act" that proclaims the establishment of a State's civil aviation organization. However, the Convention in many of its Articles refers to a State's national laws and regulations relating to aircraft entry into, or departure from, its territory.[47] It also refers to State regulations in respect of the operation and navigation of such aircraft within its territory,[48] the registration of aircraft in the State[49] and the certification of airworthiness and of aviation personnel.[50] Further, under the Convention "each Contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under the Convention."[51] The Convention, however, does not stop at requiring States to align their operational regulations with those imposed by the Annexes; it explicitly obligates States by stipulating that "each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable."[52]

Adhering to the Convention requires a State, without exception, to fulfill the requirements of the Articles of the Convention and the associated Annex provisions in international operations. Implementation of these requirements necessitates that State's own aviation laws and regulations be built on a solid national legislative foundation at par with all other national codes legislated by the sovereign State. For example, in order to prosecute a person for violating a specific aviation regulation, it is essential that the State legislate that violation of civil aviation regulations is punishable in accordance with the national penal code or other penal legislation. Thus, by inference, all Articles of the Convention referring to a State's aviation laws and regulations require the State to promulgate primary aviation legislation to serve as the legal basis for the establishment of a civil aviation organization responsible for all aviation activities in the State.[53]

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[47] See e.g. Article 11 of the Chicago Convention.
[48] *Ibid.*
[49] *Ibid.*, Article 19.
[50] *Ibid.*, Articles 31 and 32.
[51] *Ibid.*, Article 12.
[52] *Ibid.*
[53] See *Safety Oversight Manual, supra* note 41, c. 3, section 3.2.3.

Ideally, primary aviation legislation should contain provisions that would enable governments and their administrative bodies to actively supervise and regulate civil aviation activities, notably:

- the qualification and competency of aviation personnel (issuance, validation, renewal, suspension or cancellation of licenses and certificates of competency as appropriate);
- airworthiness of aircraft (registration, issue/validation of Type Certificates; issue renewal or validation of Certificates of Airworthiness; airworthiness directives; approval of design, manufacturing and maintenance organizations as appropriate; etc.); and,
- operations of aircraft (issue, renewal, suspension of Air Operator Certificate).

There should also be provisions for the establishment of a Civil Aviation Authority responsible for the above and including:

- a personnel licensing system;
- an operations inspection organization; and,
- an airworthiness organization.[54]

2.2 Specific Operating Regulations

The Annexes to the Chicago Convention provide a clear presentation of the broad international specification for licensing and certificating, as applicable, agreed upon by the Contracting States. For this reason, many specifications are not given in enough detail for the day-to-day handling of licensing, certificating, supervising and controlling matters. In some parts of the Annexes, it is left to States to decide on the details that form part of the requirements provided for in the Annexes. Thus, the individual States, regardless of the size and complexity of their civil aviation operations, are responsible for developing equivalent regulations and rules that contain a sufficient amount of detail to ensure that satisfactory compliance will result in the desired level of safety.[55]

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[54] *Ibid.*, section 3.2.4.

[55] For example, the provisions of Annex 1 (Personnel Licensing) are written in such a way as to facilitate incorporation into national legislation without major textual changes, but most of the specifications are not given in enough detail to satisfy the day-to-day management of a State's

A State's laws and regulations must be framed in legal phraseology. They must also be written in such a way that they can be used by the staff of the licensing authority in the execution of their day-to-day activities as well as by the general public, who need to know how to go about qualifying for a particular license.[56]

With respect to the certification and surveillance of an air operator, a State's rules and regulations should provide a framework of positive control and guidance, but should also allow the operator the flexibility to develop instructions for the guidance of personnel on the details essential to the conduct of the operations. It should be recognized that while the scope of the regulations and rules will need to be extensive, it may not be feasible or desirable to attempt to cover every conceivable operational detail.[57]

2.3 Civil Aviation Structure

For a State to fulfill its obligations under the Chicago Convention, an organized and empowered civil aviation administration (CAA) must be established on the basis of national legislation. This means that a State must establish an appropriate and practical CAA and employ the necessary qualified personnel to carry out the various functions of a national civil aviation authority. As States' aviation activities and requirements differ, so do their respective civil aviation establishments, and that is why there is no fit-all model for the guidance of States. It is important, however, to recognize that the scope of authority and responsibility of a civil aviation system should not vary substantially from State to State, and that whatever the size of the CAA, it should always ensure that a proper system of checks and balances is maintained.[58]

2.4 Technical Guidance

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personnel licensing activities. These detailed requirements are left for States to develop, and it is for this reason that there are significant differences in States' personnel licensing practices. This is particularly true for the medical assessment of license holders, where individual evaluation and judgment have led to significant variations in the application of the medical requirements; see *Safety Oversight Manual, ibid.*, sub-section 3.3.5.1.

[56] Ibid., sub-section 3.3.5.2.

[57] *Ibid.*, sub-section 3.3.6.1.

[58] *Ibid.*, sub-section 3.4.1.1. It is also possible for the CAA of a State the size and complexity of whose aviation industry is relatively small to fulfill its responsibilities in a cost-effective manner

The effectiveness of the safety oversight system and the implementation of national and international standards need to be supported by technical guidance, which is essential for all oversight activities. ICAO has developed and published technical guidance to assist States in implementing the provisions of Annexes 1, 6 and 8.[59] The respective provisions can be used in their present form or adapted by States for the use of their technical experts. However, States are encouraged to develop their own technical guidance documentation as well.[60]

2.5 Qualified Technical Personnel

The ability of a State to effectively manage safe and orderly civil aircraft operations in the public interest depends to a very large extent on the competence of the CAA technical staff. Thus, to fulfill effectively its responsibilities, the CAA's flight safety standards department must be properly organized and staffed by qualified personnel capable of accomplishing the required wide range of technical duties and inspection activities. Ideally, CAA technical personnel, for example, should be at least as qualified as the personnel whom they inspect or supervise. With respect to personnel licensing officers, the qualification required should include considerable experience in one of the professions for which the license or rating is issued.[61]

3. The Balanced Approach to Control and Supervision

In enacting its basic aviation law and adopting provisions that will govern the implementation of the operational regulations, there are models a particular State can use as patterns:[62]

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through co-operative inspection arrangements with neighboring States or through regional arrangements; *ibid*, sub-section 3.4.1.4.

[59] See ICAO, *Manual of Procedures for Operations Inspections, Certification and Continued Surveillance*, ICAO Doc. 8335; *Preparation of Operations Manual*, ICAO Doc. 9376; *Manual of Model Regulations for Navigation Control of Flight Operations and Continuing Airworthiness of Aircraft*, ICAO Doc. 9388; *Airworthiness Technical Manual*, ICAO Doc. 9051; *Manual of Procedures for an Airworthiness Organization*, ICAO Doc. 9389; and *Continuing Airworthiness Manual*, ICAO Doc. 9642.

[60] See *Belai, supra* note 44 at 19; *Safety Oversight Manual, supra* note 41 section 3.5.1.

[61] *Safety Oversight Manual, ibid.*, sub-section 3.6.2.3.

[62] *Ibid.*, c. 2, section 2.4.

i) *Stringent Regulatory Role*—under this model, close day-to-day involvement in industry direction and control of activities would be carried out by the State through an inspection organization.

ii) *Passive Role*—the State would intervene only to institute proceedings or investigatory actions in the case of violation of the regulations. A State exercising a passive role relies almost completely on the industry's technical competence and commitment to safety. The industry becomes responsible for both the interpretation and the implementation of the regulations, and thus becomes self-regulating. The State is not in a good position to assess the adherence of the industry to the regulations, other than by knowledge acquired fortuitously or in the course of accident or incident investigation. Such a system would not enable the State to exercise the necessary preventive and corrective responsibilities required under the Convention.

It is recommended that States should avoid the opposite extreme as well.[63] The State safety oversight system should not be so rigorous as to amount to complete domination over and dictation of the conduct of operations. Such a system creates an environment where the industry itself is not empowered with the responsibility and self-sufficiency for safe operations.

In practice, however, neither of these extremes is compatible with the objective of a well-balanced division between the State and the aviation community. That is why the public interest would be best served by a *balanced approach*, where both the State and the aviation community have responsibilities for the safe and efficient conduct of their functions. The following elements characterize an effective State safety oversight system:[64]

a) a well balanced allocation of responsibility between the State and the industry for the safety of air navigation;

b) economic justification within the resources of the State;

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[63] *Ibid.*, section 2.4.4.
[64] *Ibid.*, sections 2.4.5 and 2.4.6.

c) maintaining continued State supervision of the activities of operators without unduly inhibiting their effective direction and control of their own organization; and

d) the cultivation and maintenance of harmonious relationships between the State and the industry.

4. Article 83*bis* of the Chicago Convention

Under the Chicago Convention the act of registering an aircraft imposes on the State of Registry[65] several obligations, which directly relate to the safety of the aviation system as a whole. Thus, on registering an aircraft, a State of Registry is obliged to:[66]

a) determine whether the airworthiness of the aircraft meets minimum established Standards;

b) issue or validate the airworthiness certificate for the aircraft;

c) ensure the continuing airworthiness of the aircraft regardless of where it is operated in the world;

d) determine that the personnel performing maintenance work on the aircraft meet minimum experience, knowledge and skill requirements;

e) issue or validate maintenance personnel certificates;

f) determine that the flight crew operating the aircraft meet minimum experience, knowledge and skill requirements to safely operate the aircraft;

g) issue or validate the flight crew with licenses and/or ratings as appropriate;

h) verify that the aircraft and personnel related with its operation continue to meet the conditions, which were required for the initial issue of certificates and licenses; and

i) take timely and appropriate actions to correct all deficiencies that are found with respect to the maintenance of the aircraft and its operation by the flight crews.

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[65] See Article 17 of the Chicago Convention.

[66] See *Safety Oversight Manual, supra* note 41 section 2.3, sub-section 2.3.3

At the time the Chicago Convention was negotiated, the parties did not envision, and the resulting Convention did not provide for, aircraft that are operated by an operator belonging to a State other than the State of Registry. By the late 1980s commercial operations of lease, charter and interchange of aircraft have represented a significant progress in international civil aviation because they permit a more flexible and economical use of costly equipment.[67] This progress, however, was soon recognized by the aviation community to carry a particular difficulty along with it. In the framework of the above-mentioned commercial agreements used in international operations, it became evident that the State of Registry might often loose control of the aircraft and its crew, thus becoming unable to exercise adequately its functions and duties under the Chicago Convention for enforcement of air safety vis-à-vis this aircraft and crew.[68]

A solution had to be found for transferring effectively that responsibility to the State of the operator; and after several studies initiated by ICAO, followed by lengthy discussions of alternative approaches by the 23rd ICAO Assembly in 1980, an amendment to the Chicago Convention was adopted introducing Article 83*bis*.[69]

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[67] *Equipment leasing* is essentially a commercial arrangement whereby an equipment owner (lessor) conveys to the user (lessee) the right to use the equipment for payment of specified rentals over an agreed period of time (term). The lessee must return the equipment to the lessor or its nominee at the expiration of the term; see Bunker, *The Law of Aerospace Finance in Canada* (Montreal: Institute and Center of Air and Space Law, 1988) at 23.

Charter services are non-scheduled air services whereby a person, company, tour operator or freight forwarder (charterer) concludes a contractual arrangement with an airline, at an agreed amount, for the exclusive use of an aircraft or part thereof for one or more trips; see *The Encyclopedia of International Civil Aviation* in A. Groenewege, *Compendium of International Civil Aviation*, 2nd ed. (Canada: International Aviation Development, 1998 at 436 [hereinafter *Compendium of International Civil Aviation*].

Interchange is a flight that gives passenger the benefit of a through service (transit flight) and is operated by two or more airlines from the boarding point to the deplaining point (the point at which a passenger is scheduled to disembark from a flight of the boarding airline, using the same aircraft; see *Compendium of International Civil Aviation, ibid.* at 488.

[68] Regarding the aircraft, major difficulties for the State of Registry include the need to ensure compliance with its own aircraft maintenance requirements and, accordingly, to renew the certificate of airworthiness while the aircraft is outside its jurisdiction. Regarding the aircraft crew, *dry lease* (i.e., the lease of an aircraft without flight or cabin crew, fuel, supplies or supporting services; see *Compendium of International Civil Aviation, ibid.* at 532) raises the problem of validating foreign licenses in the State of Registry, where licensing rules and regulations may differ from those of the State that originally issued the licenses.

[69] See ICAO, *23rd Session of the Assembly (*16 September – 7 October 1980), ICAO Doc. 9311 A-23-Ex (1980) at 34-37.

For comprehensive background on Article 83*bis*, see G.F. FitzGerald, "The Lease, Charter and Interchange of Aircraft in International Operations: Amendments to the Chicago and

It took seventeen years for this major amendment to enter into force on 20 June 1997, when the Republic of Moldova deposited the 98th instrument of ratification with ICAO.[70] This amendment reflects the general desire of the Contracting States to provide for the transfer of certain functions and duties under Articles 12 (Rules of the air), 30 (Aircraft radio equipment), 31 (Certificates of airworthiness) and 32 (Licenses of personnel) from the Sate of registry to the State of the operator.

It should be noted that Article 83*bis* is a discretionary provision; its ratification does not entail an automatic transfer of functions and duties, as described above. Such transfers must be expressly made trough bilateral agreements between the relevant States. Accordingly, the State of registry shall be relieved of responsibility for the functions and duties so transferred. Contracting States, which have ratified the amendment to the Chicago Convention, are bound to recognize the State of the operator as a substitute for the State of registry. States that are not parties to bilateral agreements organizing this kind of transfer are bound to recognize the authority of the State of the operator with respect to these transferred functions and duties, only if two cumulative conditions are met:[71]

1. Such third-party States must have ratified Article 83*bis*; and,
2. They must have been officially informed about the transfer either by ICAO pursuant to Article 83 of the Chicago Convention, or directly by a State party to the agreement.

Verhaegen summarizes the concrete requirements regarding the bilateral agreements, which are, *inter alia*, as follows:[72]

Rome Conventions" (1977) II Ann. Air & Sp. L. 103; and G.F. FitzGerald, "The Lease, Charter and Interchange of Aircraft in International Operations: Amendments to the Chicago and Rome Conventions" (1977) II Ann. Air & Sp. L. 103

[70] According to Article 94 (a) amendments to the Chicago Convention enter into force upon ratification by the number of Contracting States specified by the ICAO Assembly, and the number so specified should not be less than two-thirds of the total number of Contracting States; see ICAO, *Letter of the ICAO Secretary-General to All Contracting States* (8 August 1997) (indexed as State Letter LE 3/1.13-97/73) The related Protocol has since been in force with respect to the States that have ratified it; see ICAO, *Protocol Relating to an Amendment to the Convention on International Civil Aviation*, 6 October 1980, ICAO Doc. 9318.

[71] See Article 83*bis* (b) of the Chicago Convention.

[72] See B.M. Verhaegen, "The Entry Into Force of Article 83*bis:* Legal Perspectives in Terms of Safety Oversight" (1997) XXII-II Ann. Air & Sp. L. 269 at 278.

(i) The transferred duties and functions pertaining to Articles 12, 30, 31 and 32 (a) must be specifically mentioned in the agreement, as the transfer works by way of exception;

(ii) The aircraft affected by the transfer must be clearly identified in the related agreement, by way of mentioning their type and registration number;

(iii) The duration of the State's agreement on a transfer should not exceed the period covered by the commercial transaction regarding the aircraft's international operation;[73]

(iv) The mutually accepted level of authority for signing transfer agreements should be similar to the one required for administrative arrangements between aeronautical authorities;

(v) Contracting States which have ratified Article 83*bis* should ensure that their legislation accordingly allows recognition of certificates of airworthiness, as well as radio licenses and crew licenses issued by the State of the operator;

(vi) The certificates and licenses issued by the State of the operator in accordance with the transfer agreement should be validated by the State of registry, and these documents of validation should also be carried on-board, in case the relevant aircraft and crew enter into the airspace of Contracting States which are not party to Article 83*bis*; and

(vii) Contracting States which have ratified Article 83*bis* should ensure that the information received concerning the existence of transfer agreements for aircraft operating to and from their territory is relayed to their inspecting authorities. To facilitate the tracing of responsible States during ramp checks, it would also be desirable for a certified true copy of the transfer

[73] It is noteworthy to mention that the terms "lease", "charter" and "interchange" are not specifically defined for the purposes of interpretation of Article 83*bis*. The ICAO's Legal Committee was of the opinion that these terms did not require definition because they referred to private law agreements between airlines, while the task of the Legal Committee was to find a public law solution providing for an effective transfer of certain functions and duties of the State of Registry to the State of the operator in order to safeguard the regulation and enforcement of air safety; see FitzGerald, "The Lease, Charter and Interchange of Aircraft in International Operations: Article 83*bis* of the Chicago Convention on International Civil Aviation" (1981) VI Ann. Air & Sp. L. 49 at 52.

agreement to be carried on-board the aircraft at all times while the transfer agreement is in force.

From these brief observations, one can conclude that the solution to the growing problem of safety oversight in the cases of lease, charter and interchange operations is beneficial not only to the State parties to the transfer agreements, but also to the general public in any State in which the aircraft are operated.[74]

[74] See Michael B. Jennison, "Bilateral transfers of safety oversight will prove beneficial to all States" (1993) 48:4 ICAO J. 16; see also E. Howie & R. van Dam, "Facilitating the lease and interchange of civil aircraft" (1989) 44:2 ICAO Bull. 9, and Dr. Z. Joseph Gertler, "Nationality of airlines: a hidden force in the international air regulation equation" (1982) 48 J. of Air L. 51; the author assumes that "the new formula would have a less certain effect on wet leases, arrangements whereby it is not always clear who actually has the control of a leased aircraft"; *ibid.* at 69.

CHAPTER FOUR

ICAO's RESPONSE TO THE IMPLEMENTATION OF SAFETY OVERSIGHT

A. The Voluntary Safety Oversight Program of 1996

1. Background

The history of the recognition of the problem of safety oversight can be traced back to 1956 when Resolution A10-29 was adopted at the 10th Session of the ICAO Assembly.[1] This Resolution stressed the need for member States to notify their differences or to indicate their intention to comply with international standards and recommended practices.[2]

An "alarm" was rung in 1992 at the 29th Session of the Assembly with the adoption of Resolution A29-13,[3] which recognized that ICAO's international safety standards require effective governmental oversight for their implementation. Through this Resolution, Contracting States reaffirmed their responsibilities and obligations in respect of safety oversight. They also undertook to review national legislation implementing those obligations as well as their safety oversight procedures in order to ensure their effectiveness. The Resolution also committed States to provide other States with technical co-operation and assistance in meeting their obligations for the oversight of air carrier operations.[4]

Assembly Resolution A29-3 on Global Rule Harmonization,[5] adopted in 1992, was another step taken by ICAO towards providing a mechanism designed to ensure safety in air transportation on a world-wide scale. It requested the ICAO Council to

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[1] See ICAO, Res. A10-29, ICAO Doc. 7707 at 45.
[2] *Ibid.*
[3] See ICAO, *Improvement of Safety Oversight*, Res. A29-13, ICAO Doc. 9602: *Assembly Resolutions in force* (as of October 1992) at I-39.
[4] *Ibid.*
[5] See ICAO, *Global Rule Harmonization*, Res. A29-2, *ibid.* at I-37.

pursue enhancement of ICAO SARPs and to consider the feasibility of establishing a multilateral mechanism to monitor them.[6]

The ICAO Council has, on many occasions, drawn attention to these resolutions and called upon States to take steps in this direction. The President of the Council is on the record as saying that the subject of safety oversight has "overriding priority" in the work of ICAO:

> With regard to improvement of safety oversight, ICAO should pursue this matter not only by adopting texts, but by establishing a machinery for implementing and assisting States with regard to their responsibility, both for safety oversight on their territory, and for safety oversight of aircraft on their national registries ... in my view, and taking into account safety as an overriding priority in ICAO activities, this matter should be considered by the ANC in this session, and a report should be presented to the Council with the utmost urgency during the current session.[7]

This statement leaves no doubt about ICAO's recognition of the existence of a problem concerning implementation of safety oversight by the governments of the member States. It also indicates the need for the Organization to overcome the lapses in effectiveness of the existing mechanism provided in the Chicago Convention.

It should be mentioned that there were sharp criticisms of ICAO's reaction to facing and dealing with this problem. Among the critics were Milde, who used the following metaphor: "ICAO moves ahead like a fast locomotive, happy with its speed but without noticing that many wagons of the train may have become unhitched and stay behind."[8]

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[6] *Ibid.*

[7] The statement was made on 20 September 1994, when the President of the Council made his address to the *First Meeting of the 137th Session of the Air Navigation Commission*, and was recalled at the *Eleventh Meeting, 143th Session of the Council* (22 October 1994), see ICAO, C-Min 143/11, para. 5 at 2-3, 101. It was also restated in C-WP/10069 (20 October 1994). See also ICAO, *Letter from the ICAO President to the Administrator of the FAA dated 23 September 1994* in Discussion Paper No. 2 relating to AN-WP/6938 (11 October 1994), attachment 6.

[8] Michael Milde, "Enforcement of Aviation Safety Standards - Problems with Safety Oversight" (1996) 45 ZLW Jg. 3 at 7. Although I would not attempt to comment on the validity of the above

2. The *Strategic Action Plan*

In October 1992, the ICAO Assembly endorsed the development of a *Strategic Action Plan* designed to provide a vehicle for increasing the effectiveness of ICAO and to establish a basic framework for its priority activities into the 21st century.[9] It is a milestone in the whole history of the Organization, as it represents the first comprehensive re-evaluation of the ICAO's mission since the signing of the Chicago Convention. While the fundamental aims and objectives of the Chicago Convention remain "as relevant in these times of change and adaptation as when they were conceived in 1944,"[10] the *Strategic Action Plan* is designed as a corporate framework to adapt the vision of ICAO's founding fathers to the rapidly changing world-aviation environment, thus ensuring that ICAO will be able both to respond adequately to the major challenges facing civil aviation in years to come and to meet the related needs of all ICAO Member States.

The call for reform by the world's aviation community reflects rapidly changing circumstances epitomized by such developments as globalization and

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statement, in my opinion the basic point that has to be taken into account when the effectiveness of an intergovernmental organization is analyzed is the question of its legal personality and the means available of carrying out its functions, which are expressed or implied in its constituent instrument.

[9] See ICAO, *Annual Report of the Council – 1993: Projects given special attention during 1993*, ICAO Doc. 9622 at 32. Intensified efforts for its development were called for at the ICAO Assembly in October 1995. Several years in the making, the *Strategic Action Plan* was adopted by the ICAO Council on 7 February 1997, and officially launched on 22 May 1997, at ICAO's Headquarters in Montreal.

[10] *Address by the President of the Council of ICAO, on the occasion of the launch of the ICAO Strategic Action Plan*, presented at the ICAO Headquarters, Montreal, 22 May 1997, online: ICAO <http://www.icao.int/icao/en/strat_txt.htm> (date accessed: 21 September 2000). The President stated also that "the Plan not only represents a *repositioning* by ICAO within its present mandate, but identifies the need for *empowerment* and provides a launching pad for such empowerment [emphasis added];" *ibid.*

This statement clearly demonstrates the strong belief that ICAO should have a new role on the world aviation scene if it is to accomplish the objectives of the Chicago Convention, a historic document whose principles are to be kept alive because of their fundamental nature and because of the basic need for a universal mechanism capable of safeguarding safety in air transportation, but challenged by the tremendous pressure on the world's aviation community by the processes of globalization of trade and economics, in conjunction with the sophistication of civil aviation systems.

For more detailed analyses about the reasons why there is a need for change in ICAO's focus and why the Strategic Action Plan is the primary vehicle for that change, see *Description of the Plan by Leader of Secretariat Team—Mr. Chris Lyle*, online: ICAO <http://www.icao.int/icao/en/strat_txt.htm> (date accessed: 21 September 2000) [hereinafter *Description of the Plan*]; see also Ruwantissa I. R. Abeyratne, "ICAO's Strategic Action Plan—A Legal Analysis" (1996) 45 ZLW 45 Jg. 231 at 232ff.

transnationalization;[11] emergence of regional and sub-regional blocks;[12] blurring of sectoral boundaries;[13] commercialization of service providers;[14] diversification of fiscal measures;[15] economic liberalization;[16] environmental consciousness;[17] emergence of new technology;[18] and capacity constraints.[19]

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[11] "Globalization" in aviation is illustrated by commercial, marketing and technical alliances among airlines, in some cases involving ownership and control issues beyond national boundaries, while "transnationalization" refers to the trend within the airline industry to locate parts of their activities and operations in other countries, outside their national base; see A. Groenewege, *Compendium of International Civil Aviation*, 2nd ed., (Montreal: International Aviation Development, 1998) [hereinafter *Compendium of International Civil Aviation*] at 205.

[12] The emergence of trading and regulatory blocks provides vehicles for devolution of some of the safety responsibility in a common regional approach. A typical example is the Joint Aviation Authorities (JAA)—an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States that have agreed to cooperate in developing and implementing common safety regulatory standards and procedures. The existence of such blocks adds a new dimension to the setting of worldwide aviation standards and procedures; see *Compendium of International Civil Aviation, ibid.*

[13] Developments in economic activity have led to a lessened distinction between the responsibilities of regulatory authorities (for example, among trade, tourism, transport and communications) at national, regional and global levels alike. This can lead to evasion of labor, competition and, most importantly, safety regulation, in the absence of adequate safeguards, particularly when the international dimension is added; see *Description of the Plan*, *supra* note 10.

[14] The provision of airport and other air navigation facilities and services is, under Article 28 of the Chicago Convention, the responsibility of States. The commercialization of such a provision, therefore, necessitates both prescribed delegation of operational functions of governments and their changed regulatory functions; see *Description of the Plan*, *ibid.*

[15] Trends in fiscal policy, which place limits on deficit financing and on generic funding of budgets and movement toward increased "user pay" and "polluter pay" have already had a significant impact on civil aviation; see *Description of the Plan*, *ibid.*

[16] Civil aviation is unique in that it remains regulated at the international level, largely by bilateral agreement, although several regional and sub-regional air service agreements replacing less liberal bilateral agreements are already in place (for example, among the States of the European Union, of the Andean Pact and Mercosur Groups in South America, and of the Caribbean Community). Economic liberalization is being fostered transnationally by the Organization for Economic Cooperation and Development (OECD), as well as globally by the World Trade Organization (WTO), whose members at the current stage apply the General Agreement on Trade In Services (GATS) to three specific air transport services: namely, aircraft repair and maintenance; sales and marketing, and computer reservation systems. see ICAO, *Description of the Plan*, *ibid.*; see also Ruwantissa I.R. Abeyratne, "Would Competition in Commercial Aviation Ever Fit into the World Trade Organization?" (1996) 61 J. of Air L. 793.

[17] Some of the main environmental issues facing world aviation include: air pollution; depletion of the ozone layer and the greenhouse effect; surface water, soil and ground water contamination; waste disposal; noise and engine emissions; consumption of resources; natural resource conservation and sustainable development; environmental laws and legislation; technology development and transfer; and development, harmonization and implementation of environmental standards and practices.

These challenges are not just related to solving specific environmental problems, but involve the development of industry policies and strategies, managerial tools, and educational programs directed to the future. The global nature of air transport and environmental issues must

The *Strategic Action Plan* focuses on the following eight major objectives to further the safety, security and efficiency of international civil aviation:

a) to foster the implementation of ICAO Standards and Recommended Practices to the greatest extent possible worldwide;

b) to develop and adopt new or amended Standards, Recommended Practices and associated documents in a timely manner to meet changing needs;

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be dealt with on an international level and, as such, a constant exchange of information and expertise and, as necessary, the pooling of resources to conduct research and development are essential requirements to solve common problems and achieve environmental solutions in civil aviation.

ICAO's environmental-related activities are largely undertaken by the Council through its Committee on Aviation Environmental Protection (CAEP). The *ICAO Annex 16—Environmental Protection* reflects the current Standards and Recommended Practices relating to aircraft noise and engine emissions. Also, ICAO has further developed its cooperative arrangements with those UN bodies responsible for preparing scientific assessment reports on climate change and on depletion of the ozone layer; inventories of aircraft engine emissions are being made available to assist the scientific community in this work; see *Compendium of International Civil Aviation, supra* note 11 at 66.

[18] The evolution and application of a satellite-based systems concept that will be able to meet the future communications, navigation, and surveillance/air traffic management (CNS/ATM) needs of civil aviation is a very significant achievement by ICAO in close cooperation with the International Air Transport Association (IATA), the International Mobile Satellite Organization (Inmarsat), and other aviation bodies. The general objective of ATM, which comprises air traffic services (ATS), air traffic flow management (ATFM), and air space management (ASM), is to enable operators to meet their planned times of aircraft departure and arrival and adhere to their preferred flight profiles with minimum constraints, without compromising safety. This major task includes the development of SARPs and guidance material, which will be applied well into the 21st century.

A possible timetable set by ICAO for the implementation of the CNS/ATM Systems Concept reads:

a) *up to 2000:* developments, trials and pre-operational demonstrations. In parallel, gradual implementation of various elements of the system and partial utilization by some aircraft and aviation authorities of the new CNS/ATM system with back-up from the present systems;
b) *2000 to 2005:* full new CNS/ATM services available in parallel with existing navigation systems so that appropriate equipped aircraft could have operating benefits solely on the CNS/ATM system;
c) *2005 to 2010:* the international terrestrial system not required for the new CNS/ATM system, progressively dismantled; and
d) *2010 onward:* the new CNS/ATM systems are the sole systems for international use.

See generally *Compendium of International Civil Aviation, ibid.* at 285.

[19] The expansion to near saturation point of physical limits on the capacity of airports, airspace and the radio communications spectrum has special implications for a sector with continued above-average growth. By mid-1997, ICAO forecasts were for an increase of 5.5 percent per annum in scheduled passenger traffic and 7 percent per annum in scheduled freight traffic through the year 2005, thus placing further constraints on airport and airspace capacity in various regions of the world; *ibid.* at 206.

c) to strengthen the legal framework governing international civil aviation by the development of new international air law instruments as required and by encouraging the ratification by States of existing instruments;
d) to ensure the currency, co-ordination and implementation of Regional Air Navigation Plans and provide the framework for the efficient implementation of new air navigation systems;
e) to respond on a timely basis to major challenges to the safe and efficient development and operation of civil aviation;
f) to ensure that guidance and information on the economic regulation of international air transport is current and effective;
g) to assist in the mobilization of human, technical and financial resources for civil aviation facilities and services; and
h) to ensure the greatest possible efficiency and effectiveness in the operations of the Organization.[20]

The above strategic objectives represent traditional and fundamental activities, such as the development and implementation of aviation standards, as well as new challenges—namely, the need to assist member States in carrying out their responsibilities for implementing these standards (see the next subsection: "The universal mandatory safety Oversight Program of 1999"). For each of the eight objectives, the Council has defined key activities and a program of implementation (containing expected results, priorities and target dates) that reflects the core program of the Organization. The *Strategic Action Plan* also identifies issues that need to be addressed in the evolution of these key activities.

ICAO's ability to adopt a modern, forward-looking Plan illustrates the flexibility of the Chicago Convention and represents a renewed commitment by ICAO, on behalf of all its Member States, that the Organization will continue to discharge successfully both the traditional and the new responsibilities required of it in a rapidly changing world

[20] This is reproduced from *Description of the Plan*, *supra* note 10.

aviation environment. The challenge for the future is to ensure that the objectives of the *Strategic Action Plan* are fully implemented.

3. Scope and Objective of the Voluntary Safety Oversight Program

In October 1994, the ICAO Council agreed to establish a *Safety Oversight Program* incorporating, as its core function, safety oversight assessments of States, on a voluntary basis, by an ICAO team.[21] The scope of the Program was limited to assessing licensing of personnel, airworthiness of aircraft and operations. The objective was to assist member States in identifying deficiencies in implementing ICAO SARPs and to recommend plans of action to remedy noted deficiencies by providing advice, including the development of additional practical documentation, the proposal of effective solutions, the preparation or adaptation of basic regulations, and on-the-job and institutional training.

The Council agreed to the establishment of the Program following upon similar principles and the experiences gained from the aviation security (AVSEC) mechanism.[22] The latter had shown that in matters concerning the safety and security of civil aviation, States were aware that "it was in the interest of their sovereignty to accept outside advice and assistance, on the understanding that the implementation of safety oversight remained with the sovereign States."[23]

At the 31st Session of the Assembly, held in Montreal from 19 September to 4 October 1995, a report was reviewed on the implementation of Resolution A29-13—

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[21] See ICAO, *Approval of the Report on the Improvement of Safety Oversight*, C-WP/10069 (20 October 1994).

[22] See ICAO, *Annual Report of the Council – 1994: Projects given special attention during 1994*, ICAO Doc. 9637 at 37. Aviation security is a subject requiring unceasing precautions and the implementation of effective security controls and procedures by governments, airport authorities and airlines to ensure the safety of passengers, crew, ground personnel and the general public at airports and in flight; see *Compendium of International Civil Aviation, supra* note 11 at 612.

ICAO Annex 17 to the Chicago Convention defines aviation security as: *"A combination of measures and human and material resources intended to safeguard international civil aviation against acts of unlawful interference"* and contains SARPs for safeguarding international civil aviation worldwide.

[23] See ICAO, *Annual Report of the Council – 1994, supra note 22.*

Improvement of Safety Oversight—and the establishment of the ICAO *Safety Oversight Program* and the mechanism for financial and technical contributions to the Program, as approved by the Council at the seventh meeting of its 145th Session, were endorsed. It should be mentioned that the focus on the reaction of the Assembly to the proposed draft Resolution was very critical, as had been highly anticipated. An observer considered all other items of the Assembly's agenda to be "secondary in comparison with the critical issue of aviation safety and with the world wide enforcement of aviation safety standards" and that the "credibility and continuing relevance of ICAO will be tested" at this Session of the Assembly.[24]

In 1996 the civil aviation community faced a difficult challenge created by the largest number of accidents in airline operations and the largest number of fatalities on record.[25] The Air Navigation Commission noted that the expected growth in the volume of international civil aviation would result in an increasing number of aircraft accidents unless the accident rate was reduced:

> As aviation accidents are newsworthy events, the public is conscious of the number of accidents, rather than the accident rate. An increase in accident numbers is therefore likely to adversely affect the public's perception of the safety of air travel. The challenge for the aviation community in the future is to reduce the accident rate so as to improve safety, not only in actual fact, but also in the public's perception.[26]

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[24] *Milde*, *supra* note 8 at 15.

[25] In 1996 there were 23 aircraft accidents involving 1135 passenger fatalities compared to 27 fatal accidents and 803 passenger fatalities in 1995 on scheduled air services; see *ICAO World Statistics*, ICAO Doc. 9180/23.

[26] See ICAO, *Working Paper-Assembly 32nd Session, Agenda Item 25: ICAO Global Safety Plan*, A32-WP/58. It is worth mentioning that in 1984 ICAO recognized that additional safety efforts were required in order to further reduce the accident rate, which was already low at that time, and published the *Accident Prevention Manual*, ICAO Doc. 9422. This manual stresses that, in addition to regulatory activities, other methods to prevent accidents had to be developed. Guidance material was provided in the manual for the design of such programs.

ICAO's commitment to a strong accident prevention program was reaffirmed in 1995 when the Assembly adopted Resolution A31-10—*Improving accident prevention in civil aviation*—urging all Contracting States to "enhance accident prevention measures, particularly in the areas of personnel training, information feedback and analysis and to implement voluntary and non-punitive reporting systems..." and to "co-operate with ICAO and other States ... in the development and implementation of accident prevention measures..."; online: ICAO <http://www.icao.int/icao/en/res/a31_10.htm> (date accessed: 6 October 2000).

4. Need for change: DGCA Conference on a Global Strategy for Safety Oversight of 1997

To reduce the rate of airline accidents worldwide and maintain civil aviation as the safest mode of transportation, a special global Conference of the Directors General of Civil Aviation (DGCA) was held in Montreal from 10 to 12 November 1997. It was devoted exclusively to the issue of air safety and formulating a global strategy for improving safety oversight. The conference was attended by 436 participants from 147 Contracting States, one non-Contracting State and 13 international organizations.[27] In the opening remarks, the President of the Council stated:

> Your participation in this conference reflects and confirms the world-wide concern and interest for aviation safety in general and for safety oversight in particular, a concern and interest which are shared by ICAO...If the world aviation community is not successful in reducing the rate of accidents, we would, in the future, be facing at least one major accident per week because of the anticipated growth in the airline industry. That is simply unacceptable. In fact, in my view, one accident is still too many.[28]

The delegates discussed the results from the ICAO safety oversight program, which were part of the eight topics included in the agenda of the conference.[29] By that time there were more than fifty assessments conducted under the ICAO program, which had revealed that many States, "in spite of their best intentions and efforts", were facing serious difficulties in fulfilling their safety oversight obligations.[30] The assessment had also confirmed that safety oversight shortcomings were not unique to a particular State or region and that their effects were felt by the world aviation community as a whole.[31]

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[27] See ICAO, *Report: Directors General of Civil Aviation on a Global Strategy for Safety Oversight* [hereinafter *Report*], ICAO Doc. 9707 DGCA/97 at ii-1.
[28] Report, *ibid.* at ii-2.
[29] The particular topics were as follows: "Public Perception of aviation safety" (Topic 1.1); "ICAO's perception of aviation safety" (Topic 1.2); "States' responsibilities derived from the Convention" (Topic 1.3); "ICAO's vision of safety oversight" (Topic 1.4); "Current initiatives on safety oversight" (Topic 1.5); "Results from the ICAO safety oversight programme" (Topic 1.6); "Progress on corrective actions taken by States" (Topic 1.7) and "Dealing with confidentiality and sovereignty issues" (Topic 1.8); see *Report, ibid.* at iv-1.
[30] See *Report, ibid.* at ii-3.
[31] See *Report, ibid.* at ii-3.

In an information paper provided by the Kingdom of Netherlands and titled "The ICAO safety oversight program, a quality assurance approach to safety"[32], it was stated, *inter alia*, that:

> Regular consultation and auditing by an independent organization is healthy for any organization which endevours to improve quality, and in aviation this is synonymous for preventive safety: quality assurance equals safety assurance!
>
> Support for safety oversight provides a great opportunity to further improve aviation safety.

The ensuing discussions revealed there was general agreement that the matter of assistance by ICAO to assessed States was equally important as assessments: "Without doubt, a truly effective safety oversight program could not be realized without first identifying the problems, and then taking all necessary measures to revolve them."[33]

While there was no answer to the question as to how the safety oversight problems had occurred in the first place, it was suggested that they might have resulted from the varying degrees by which States had been able to embrace and implement ICAO SARPs. It was further recognized that there was a large variance in the abilities of the different Civil Aviation Administrations (CAAs) to design effective programs around the Annexes, and that might also have been a contributing factor.[34]

The Conference adopted thirty-eight recommendations, most notably:[35]

a) that regular, mandatory, systematic and harmonized safety audits be introduced, which should include all Contracting States, and which should be carried out by ICAO;

b) that greater transparency and increased disclosure be implemented in the release of audit results, by expanding the information in the summary reports,

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[32] See ICAO Doc. DGCA/97-IP/6.

[33] See ICAO, *Summary of discussions for DGCA/97-WP/3: Progress on corrective actions taken by States*, see *Report, supra* note 27, section 3 at 1-3.

[34] *Ibid.* section 4 at 1-3.

[35] See ICAO, A32-WP/61 EX/23, section 3.1 at 3.

so that other Contracting States could form an opinion as to the safety oversight status of the assessed States, while also giving the latter reasonable time to remedy deficiencies before such information would be disclosed;[36]

c) that systematic reporting and monitoring mechanism on the implementation of SARPs be introduced;[37]

d) that the ICAO safety oversight program should be expanded to other technical fields a the appropriate time, initially to include air traffic services, aerodromes and support facilities and services; the Conference further recommended that new criteria be developed requiring regulatory oversight of these technical fields, since a number of individual civil aviation administrations do not have national legislation in this regard;[38]

e) that the ICAO Council ensure the allocation of adequate funds for the safety oversight program in the regular budget of the Organization taking into

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[36] The record shows that the delegates at the conference had different opinions on the issue of confidentiality and sovereignty, which illustrates the complex character and the major step taken by the States with the adoption of this recommendation.

During the debates it was emphasized by a majority of speakers that the interests of the travelling public constituted the paramount consideration in addressing the subject of confidentiality *vis-à-vis* access to information, and that, while the sovereignty of individual States and their legitimate right to fair treatment should continue to be respected, as much information as possible should be made publicly available on safety deficiency. It was suggested that the dissemination of such information would provide an incentive to States to improve their own safety oversight procedures and would establish a foundation for international cooperation in raising safety oversight standards. The concept expressed was that the program needed to move incrementally from the situation of full confidentiality and voluntary subscription to a situation of mandatory assessments with full disclosure.

A number of delegates pointed out, however, that during the incremental change the disclosure of information on safety deficiencies could have adverse political and economic consequences for the assessed States and that this could discourage other States from voluntary requesting assessments. The main purpose of assessments should be to assist in providing remedies to shortcomings and not to penalize assessed States. It was suggested that confidentiality was directly linked to the voluntary nature of the act on the pat of the requesting State, and that as long assessments were carried out on a voluntary basis, the results must be kept confidential. Some speakers suggested that the results of assessments should only be disseminated after States failed to take measures within a reasonable time frame to rectify shortcomings; see ICAO, *Summary of discussions for DGCA/97-WP/4*, *supra* note 27, sections 2 and 3 at 1-4.

[37] See ICAO, DGCA/97-WP/5.

[38] See ICAO, DGCA/97-WP/6 and DGCA/97-IPs/4, 9 12. 22 and 26. During the discussions on the expansion of the ICAO safety oversight program, ECAC member States advocated for expansion at an appropriate time, but considered that development and refinement of the program as it stood at present had higher priority; that any expansion should take into consideration the availability of the appropriate funds and expertise; and that the effectiveness of the existing program should not be compromised by spreading resources too thinly; see ICAO, *Report*, *supra* note 28, section 2 at 1-7.

account the possible use of surpluses, in order to guarantee the continuity and sustainability of the program for as long as it is needed;[39]

f) that ICAO urge Contracting States that any safety oversight activities be properly co-ordinated with ICAO, be based on compliance with ICAO SARPs and guidance material, and be conduced in accordance with standardized procedures developed and implemented by ICAO;[40] and

g) that donors and funding organizations be encouraged to co-operate with ICAO in making use of the technical co-operation services of ICAO for implementing their programs of assistance to civil aviation and to contribute to the ICAO objectives implementation mechanism.[41]

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[39] During the debates on the enhancement of the ICAO safety oversight program, the Chairman of the conference highlighted the importance of funding to the enhancement of the assertiveness and effectiveness of the program, including the implementation of regular safety audits. He indicated that, in formulating its recommendations, the conference could request the Council, in its consideration of the program budget for the 1999-2001 triennium, to allocate top priority to the issue of safety oversight and to provide basic budgetary appropriations therefore. Such funds would be in addition to the voluntary contributions received from States. While voicing appreciation for these contributions and expressing the hope they would continue to be made, the Chairman emphasized the need to provide a sound basis for the continuity of the safety oversight program. "Otherwise, current budgetary limitations and problems arising from the non-payment or late payment of assessed contributions would render it impossible to provide the safety oversight program envisioned by the conference – a program which was in the interest of all contracting States"; see ICAO, Summary of discussions for DGCA/97-WP/5, *supra* note 27, section 3.11 at 1-7.

[40] Under Topic 1.5 "Current initiatives on safety oversight" the following programs were examined and reviewed: The Safety Assessment of Foreign Aircraft (SAFA) program of the European Civil Aviation Conference/Joint Aviation Authorities (ECAC/JAA); information was provided for the Federal Aviation Administration's (FAA) International Aviation Safety Assessment (IASA) program, the work of the Asia Pacific Economic Cooperation (APEC) Group of Experts on Aviation Safety and Assistance (GEASA), and ICAO initiatives in the establishment of a regional program in Latin America, the Caribbean and Pacific for the development of operational safety and continuing airworthiness on a regional and co-operative basis; see ICAO, *ibid.* at iv-2.

It is noteworthy to mention that during the conference, ICAO and the European Civil Aviation Conference (ECAC) signed a Memorandum of Understanding, which provided for qualified ECAC assessment personnel to participate as ICAO assessment team members – a result of the collaborative efforts of ICAO and ECAC on the harmonization of their safety oversight initiatives; see ICAO, *ibid.*, section 7 at 1-9.

B. The Universal Mandatory Safety Oversight Program of 1999

1. Approval of the program by the 32nd Session of the ICAO Assembly

Following the November 1997 DGCA Conference, the ICAO Council completed a preliminary review of the conclusions and recommendations, and instructed the Secretary General to prepare and submit to Council an action plan addressing the thirty-eight recommendations of the DGCA conference; on 6 May 1998, at the second meeting of the 154th Session of the Council, the establishment of an ICAO Universal Safety Oversight Audit Programme was approved and it was agreed that adequate funds should be allocated for its implementation.[42]

At the 32nd Session of the ICAO Assembly, a Resolution A32-11 on the "Establishment of an ICAO Safety Oversight Audit Programme" was adopted.[43] The Assembly:

a) resolved that the universal safety oversight audit program be established, comprising regular, mandatory, systematic and harmonized safety audits, to be carried out by ICAO; that such universal safety audit program shall apply to all Contracting States; and that greater transparency and increased disclosure be implemented in the release of audit results;

b) directed the Council to bring into effect, from 1 January 1999, a universal safety oversight audit program accordingly, including a systematic reporting and monitoring mechanism on the implementation of safety-related Standards and Recommended Practices;

c) urged all Contracting States to agree to audits to be carried out upon ICAO's initiative, but always with the consent of the State to be audited, by signing a bilateral Memorandum of Understanding with the Organization, as the principle of sovereignty should be fully respected;

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[41] See ICAO, *Assembly– 32nd Session, Working Paper—Agenda Item 17: Safety Oversight*, online: ICAO <http://www.icao.int/icao.en/a32/wp/061.pdf > (date accessed: 2 October 2000).
[42] See ICAO, C-DEC 154/2.
[43] See ICAO, *Establishment of an ICAO Safety Oversight Audit Program*, Res. A32-11, ICAO Doc. 9739: *Assembly Resolutions in force* (as of 2 October 1998) at I-48.

d) directed the Council to apply the resources made available in order to implement the ICAO universal safety oversight audit program; and

e) requested the Council to report to the next ordinary Session of the Assembly on the implementation of the program, and to present to the Session proposals for funding the program on a long-term basis.[44]

The Assembly was "rare", said Dr. Kotaite, because it showed "real co-operation and understanding of the importance safety. We did not have any votes; all resolutions were carried by consensus."[45]

2. Program Objective and Main Principles

The Assembly decision represents the basis for the ICAO policy for conducting safety oversight audits; thus, giving authority to the Council to establish the program. According to the *Safety Oversight Audit Manual*,[46] which is approved by the Secretary General and published under his authority, the safety oversight audit primary objectives are to:

- *determine* the degree of conformance of the State in implementing ICAO Standards;
- *observe and assess* the State's adherence to ICAO Recommended Practices, associated procedures, guidance material and safety related practices;

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[44] *Ibid.*

[45] See Graham Warwick, "Improving safety – The International Civil Organization is focusing on honing its safety oversight responsibilities" *Flight International* 154:4647 (14 October 1998) 31.

[46] See ICAO, *Safety Oversight Audit Manual*, ICAO Doc.9735 [hereinafter *Audit Manual*].

The *Manual*, which is one of series of documents prepared pursuant to the ICAO Universal Safety Audit Programme (SOAP), is published to provide the ICAO Universal Safety Oversight Programme auditors and ICAO Contracting States with standard auditing procedures for the conduct of safety oversight audits. These standards are not part of an ICAO Annex in the sense of Articles 37 and 38 of the Chicago Convention; they have been developed by the ICAO Safety Oversight Audit Unit (SOAU) as part of proven industrial management auditing concepts. The audit benchmark standards will ensure that audits are completed consistently and in accordance with a systematic, objective and proven process.

In support of the program, ICAO has also published related documents providing procedural guidance and training material for auditors. The following documents are produced and maintained by the SOAU: *Safety Oversight Training Manual* – it contains detailed systems based training package for SOAP audit team members training as well as requirements for approving audit team members; and *Safety Oversight Audit Procedures Handbook* - it supports the Safety Oversight Audit Manual by giving detailed information to auditors for the organization and conduct of an audit; and *SOAU Administration and Organizational Handbook* – it is an internal document detailing the establishment and function of the SOAU.

- *determine* the effectiveness of State's implementation of a safety oversight system, through the establishment of legislation, safety authority and inspection and auditing capability;
- *provide* Contracting States with an advice to improve their safety oversight capability [emphasis added].[47]

The management of the program is conferred to the ICAO Safety Oversight Audit Unit (SOAU), which is also responsible for all safety-related activities in ICAO.[48] All personnel assigned for an ICAO safety oversight audit duty are required to satisfy a pre-determined qualification criteria and training requirements prior to being assigned as full members of an ICAO safety oversight audit team.[49]

The principles, on which the SOAP is based are as following:[50]

Sovereignty – in accordance with the main principle of states' sovereignty over the airspace above their respective territories, recognized in Article 1 of the Chicago Convention,[51] ICAO fully respects the sovereign States' responsibility and authority for safety oversight including its decision making powers with respect to implementing corrective actions related to audit findings.

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[47] See *Audit Manual, ibid.*, section 3.2 at 3-1.

[48] The Unit is established within the Organization and Airworthiness (OPS/AIR) Section, Air Navigation Bureau (ANB) in the ICAO headquarters in Montreal. In addition to the core staff, the SOAU has access to the services of the Regional Officers, Safety Oversight based in the seven ICAO regional Offices (Asia and Pacific Office in Bangkok, Thailand; Eastern and Southern African Office in Nairobi, Kenya; European and North Atlantic Office in Paris, France; Middle East Office in Cairo, Egypt; North American, Central American and Caribbean Office in Mexico City, Mexico; South American Office in Lima, Peru; and Western and Central African Office in Dakar, Senegal.) They are full partners in the activities of the SOAU as assigned and are normally expected to participate in safety oversight audits, follow- up audits and to assist in the organization of safety oversight seminars and workshops in their respective regions; see ICAO, *Audit Manual, ibid.*, section 4.1 at 4-1.

[49] *Ibid.*, section 4.2 at 4-2. It is noteworthy to mention that the Chief, Safety Oversight Audit Unit (C/SOAU) may, as required, assign team members from among experts made available to ICAO by Contracting States or by regional civil aviation organizations in accordance with applicable co-operation agreements (see e.g., *supra* note 41, para. 2.) Experts assigned for audit duties with ICAO will be appropriately qualified and approved by C/SOAU; the latter may also approve observers to ICAO safety oversight audits, who would generally be audit team members assigned to on-the-job training; *ibid.*, sections 3-11 and 3-12 at 3-7.

[50] *Ibid.*, section 3.4 at 3-2.

[51] See C. I of this paper ("The Chicago System").

Universality – the mandate given to ICAO explicitly requires the Organization to conduct safety oversight audits on all ICAO contracting States.[52] Therefore, safety oversight audits will be conducted on all ICAO contracting States in accordance to an audit program established by ICAO and agreed upon by the contracting States.

Transparency and disclosure – safety oversight audit reports (interim and final) are confidential and will only be available to the audited contracting State and the accredited ICAO Regional Office. However, an audit summary report, containing an abstract of the findings, recommendations and the proposed State corrective action plan and action implemented, if any, will be distributed to all contracting States.

Timelines – results f the audits will be produced and submitted on a timely basis in accordance to a pre-determined report preparing and submitting schedule.

All-inclusiveness – the ICAO SOAP is currently limited to Annexes 1, 6 and 8. However, it is expected to expand, at an appropriate time, to include other Annexes to ensure implementation in all technical fields of an ICAO contracting State's civil aviation system.

Systematic, consistent and objective – standardization and uniformity in the scope, depth and quality of audits will be assured through an initial and refresher training of all auditors, the provision of guidance material and through the implementation of an audit quality control system within the SOAU.

Fairness – audits are to be conducted in a manner such that contracting States are given every opportunity to monitor, comment and respond to the audit process, but to do so within the established time frame.

Quality – safety oversight audits will be conducted y appropriately trained and qualified auditors and in accordance with recognized auditing quality concepts.

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[52] See ICAO, Res. A32-11, *supra* note 43.

It can be concluded that, the mere transition of the character of the Program, namely from 'voluntary' to 'mandatory' speaks of a delegation of authority of a completely different nature, reflecting its implications.[53] In my opinion, the core issue here is what is the justification for that transition, and if one considers the main objective of ICAO, namely "to develop the principles and techniques of international air navigation...so as to insure the safe and orderly growth of international civil aviation throughout the world" [54] and that the Contracting parties to the Chicago Convention expressed their agreement "on certain principles and arrangements "in order that international civil aviation may be developed in a safe and orderly manner..."[55] the ramification for the transition is quite sound. It would be relevant to cite here the Schachter's opinion, who says:

> When an organ applies a Charter principle or any other rule of law to a particular set of facts, it is asserting, as a matter of logic, a new rule of a more specific character. This is a law-creative act. Even though the members of the organ maintain (as they often do) that their decision is confined to the specific facts and they do not intent to establish a precedent. It may be that the "rule" of that case will not be followed in other situations and that its applicability will prove to be limited. But the contrary may also prove true, since, once a decision is rendered by an authoritative body, it has entered into the stream of decisions that will normally be looked to as a source of law. Considerations of equity and equal treatment will tend to favor its application in "equivalent" situations; moreover the reasons which impelled its adoption in the one case are likely to have influence in other cases.[56]

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[53] According to Oscar Schachter, whether a designated requirement is to be regarded as obligatory depends on part whether those who have made that designation are regarded by those to whom the requirement is addressed (the "target audience") as endowed with the requisite competence or authority for that role. The fact that "divergent political and ideological viewpoints have been harmonized in an agreed draft is widely treated as persuasive evidence that that draft has an enhanced authority"; Schachter, *Towards a Theory of International Obligations,* in S.M.Schwebel, *The Effectiveness of International Decisions,* (New York: Oceana, 1971) at 16ff.

[54] Article 44 of the Chicago Convention.

[55] *Ibid.*,Preamble.

3. The Program in Operation

3.1 Notification

An ICAO Contracting State is formally notified of an audit normally at least three months prior to the commencement of an audit through a letter signed by the Secretary General. States should confirm agreement with the scheduled audit period and return a signed Memorandum of Understanding (MOU) to ICAO, which is forwarded to the State as an attachment to the formal confirmation. The latter confirms to the audited State that the safety oversight audit will be conducted in accordance with the terms specified therein. [57]

Another attachment to the formal audit confirmation letter is the safety oversight pre-audit questionnaire, which also should be completed and returned before the commencement of an audit. The questionnaire has been developed to assist the auditor and audited State in establishing cross-references between the State's national legislation and the safety-related SARPs.[58]

3.2. On-site audit

The on-site audit is a process of gathering of evidence through interviews, review of documents and observation of activities and conditions in a State's aviation system. All

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[56] Schachter, "The Quasi-Judicial Function of the General Assembly and the Security Council" (1964) 58 Am. J. Int'l L. 960 at 964.

[57] See ICAO, *Audit Manual*, *supra* note 46 sections 5.2 and 5.4. The MOU itself raises a lot of important issues, which are worth mentioning, even though they go beyond the scope of this paper: the MOU's legal force; is it a necessary authorization for ICAO to conduct an audit since the legal base for the ICAO's mandat is the Assembly Resolution A32-11; the difference between the MOU under the ICAO's voluntary safety oversight program and the mandatory program; the question of whether a State has a right to refuse to sign MOU, to name just a few.

[58] *Ibid.*, section 5.6. The State may also be required to forward any documentation relevant to the audit, such as personnel licensing regulation, aircraft operating and airworthiness regulations, etc. The audited State should indicate the preferred ICAO language to be used for the conduct of the safety oversight audit; *ibid.*, section 3.8.

Prior to the commencement of an audit, a "State-specific safety oversight plan" is developed and provided to the audited State. The purpose of the plan is to outline the sequential process of the audit and provide the State with the necessary information, which includes, *inter alia*, the dates, objective and scope of the audit; identification of documents necessary to conduct the audit; identification of State CAA's key personnel including contact person designated by the State, etc.; *ibid.*, section 5.7.

audit findings[59] are recorded on standardized audit findings and recommendations forms, with reference made to the relevant ICAO SARPs for which the finding was made.

Visits to selected air transport operators, manufacturing companies, maintenance organizations, training schools and institutes, etc., are undertaken to verify the State's capability to control and supervise aviation activities in the State. These visits do not constitute an audit of the aviation industry, but are used to assist in determining the State's safety oversight capability.[60]

3.3 Audit findings

All audit findings that identify lack of compliance or implementation of ICAO SARPs are recorded as "non-conformances."[61] A copy of the form, on which the findings are recorded by the audit team and including recommendations for corrective action, are provided to the State at the end of the audit.

Audit findings that specify lack of adherence to ICAO Recommended Practices, procedures, safety-related guidance material and recognized aviation safety practices are recorded as "non-adherence or observation" on the ICAO auditing finding form.[62]

3.4 Post-audit meeting

At the end of the audit, the audit team leader convenes a post-audit meeting with the State's CAA Chief Executive and his staff as appropriate, to brief them on the audit findings and resulting recommendations if applicable. The briefing should be made in such a way as to ensure that the State authorities clearly understand the situation as audited by the ICAO team and are enabled to start working on a corrective action plan if it is necessary.

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[59] Audit finding is defined as "the determination with respect to the conformance and/or adherence to SARPs, procedures and good aviation safety practices"; see *Definitions and Audit Terminology*, *ibid.*, section 1.5.

[60] *Ibid.*., section 5.9.4.

[61] *Ibid.*, section 5.11. Non-conformance is defined as a "deficiency in characteristic, documentation and/or a procedure, which does not meet the requirements of the ICAO Standard"; *ibid.*, section 1.5.

[62] *Ibid.*, section 5.12. Non-adherence is defined as a "deficiency in characteristic, documentation or procedure, which does not meet the requirements of a recommended practice, procedure, guideline or good aviation safety practice"; *ibid.*, section 1.5.

The audit team also informs the State on the follow-up activities, critical dates for the expected availability of the interim, final and summary reports.[63]

3.5 State's corrective action plan

The State's corrective action plan responds to the audit findings and recommendations by proposing action to promote the State's regulatory framework into conformance and/or adherence with the ICAO SARPs, procedures, safety related-guidance material and good safety practices. The action plan should provide detailed information of action to be taken including a time frame for the commencement and completion of each action. It must be signed by an authorized CAA Chief Executive or the Government Official as appropriate.[64]

3.6 Audit reports

i) Audit-interim report

The audit interim report is a confidential formal report of the audit containing full details of the audit findings and recommendations. State's corrective action plan to be submitted is based on the audit interim report although the State is provided the opportunity to initiate the corrective action plan on the basis of the post-audit meeting brief.[65] The audit interim report forms the basis for the preparation of the audit final report and is superseded by the audit final report when completed.

The audit interim report is prepared by the SOAU at the ICAO Headquarters on the basis of the post-audit meeting brief forwarded by the audit team leader. The interim report is made available only to the audited State and to the Regional Director of the accredited ICAO Regional Office.[66]

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[63] *Ibid.*, section 5.13.

[64] *Ibid.*, section 6.7. It is noteworthy mentioning that the audit team may provide aural advice to the audited State, if requested, while the audit is being conducted or during the post-audit meeting. In addition to this, the audited State may seek assistance from the ICAO's Technical Co-operation Bureau (TCB) in preparing the corrective action plan. Alternatively, regional civil aviation organizations, such as AFCAC, ECAC, LACAC, etc., may also provide assistance in this respect; *ibid.*, sections 5.14 and 6.7.

[65] A post audit-meeting brief is presented to the State's CAA Chief Executive prior to the departure of the audit team and its purpose is to communicate the results of the audit; *ibid.*, section 6.2.

[66] *Ibid.*, section 6.3

ii) Audit final report

The audit final report represents the official and actual report of the audit. The structure and contents of the audit final report are similar to the audit interim report, with the exception that the former includes an analysis of the corrective action plan submitted by the audited State, information on the progress made by the audited State on the implementation of the latter, and information on any remedied deficiencies and outstanding differences to ICAO SARPs. The final report is made available only to the audited State and to the Regional Director of the accredited ICAO Regional Office.[67]

iii) Audit summary report

A non-confidential audit summary report providing an overview of an audited State's conformance and /or adherence to ICAO SARPs, procedures, safety-related guidance material and good safety practices is prepared with the audit final report and forwarded to the audited State for comments prior to its distribution to all ICAO Contracting States.[68]

The sole purpose of distributing the audit summary report is for aviation safety reasons; it is prepared in such a way as "to enable ICAO Contracting States to make up their own determination regarding the status of safety oversight activities in the audited State."[69]

3.7 Follow-up audit

A follow up is conducted between one and two years following an originating audit, as necessary, to determine the progress with respect to the implementation of recommendations and/or the corrective action plan. The standard auditing procedure applied to the follow-up audit is the same as for a regular safety oversight audit. The exception is the difference in the scope, as follow-up audits will be essentially limited to issues identified as deficient during the scheduled audit completed earlier. The follow-up

[67] *Ibid.*, section 6.5.
[68] *Ibid.*, section 6.6.
[69] *Ibid.*

audits are covered by the original Memorandum of Understanding (MOU), signed by the Secretary General of ICAO and the State's CAA.[70]

4. Future Plans for the Program

As of 30 September 2000, there were 109 audits completed, 84 corrective action plans submitted and 65 summary reports have been distributed to the ICAO Contracting States.[71]

The plans are for all the audits to be completed by the end of 2001 and there are discussions under way in ICAO for the program's continuation, and possible expansion of its scope.[72] All these future plans are subject, *inter alia*, to appropriate funding, which should be made available for their realization.

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[70] *Ibid.*, section 5.17.

[71] Information provided by the Safety Oversight Audit Unit at the ICAO Headquarters in Montreal, November 2000.

[72] At the 2000 Annual Meeting and Conference of the American Bar Association Forum on Air & Space Law: "*GLOBAL SKIES: Working Toward an Open Global Aviation System*" held in August 3-4 2000, in Montreal, the Director of the Legal Bureau of ICAO—Dr. Ludwig Weber—made a presentation of the ICAO Safety Oversight Audit Program (SOAP) and stated that there are plans for the SOAP to be expanded as of 2003 with three more Annexes, namely, Annex 11 (Air Traffic Services), Annex 13 (Aircraft Accident Investigation) and Annex 14 (Aerodromes).

It is noteworthy mentioning that there is an initiative at ICAO, which is still under progress, in connection with the enhancement of the SOP, namely the development of an aviation safety database for analyses of the findings and differences noticed during the safety oversight audits.

CHAPTER FIVE

THE FAA AND ITS ROLE IN PROMOTING AVIATION SAFETY OVERSIGHT

A. The Establishment of The IASA Program

On 25 January 1990, Avianca aircraft Boeing 707-321B crashed on Long Island, while in a holding pattern awaiting landing at New York's Kennedy Airport, killing seventy-three people. After an unsuccessful approach in bad weather, the crew executed a missed approach and was put into holding. The First Officer declared "minimum fuel" to ATC but never declared an emergency.[1] The National Transportation Safety Board (NTSB) said the primary causes of the crash were "the failure of the flight crew to adequately manage the airplane's fuel load and the failure to communicate an emergency fuel situation to Air Traffic Control before fuel exhaustion occurred."[2]

This accident in particular, as well as some other accidents that happened around the same time,[3] is considered to be the event that "shook" American confidence that

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[1] Online: Aircraft Accident Database <http://www.airdisaster...s.cgi?date=01251990&airline=Avianca > (date accessed: 1 August 2000).

[2] See C. Spence, "NTSB Cites Flight Crew Fuel-Load Management, Communications Lapse" *Air Safety Week* (6 May 1991) 1. It is noteworthy that in the civil litigation arising out of the accident, the United States agreed to contribute a substantial sum towards the total settlement of all claims. The United States was charged with negligence in rendering air traffic control services to the Avianca flight crew, which resulted in the aircraft's being delayed in the air for over 2 hours after being cleared to Kennedy Airport a number of times; see George N. Tompkins, Jr., "Enforcement of Aviation Safety Standards" (1995) XX-I Ann. Air & Sp. L. 319. at 324-325.

[3] The tragic midair collision of an Aeromexico DC-9 aircraft with a small private aircraft while approaching Los Angeles International Airport on 31 August 1986 was considered to be among the "series of accidents" mentioned by the Secretary of Transportation, since it was the only other foreign air carrier accident in the previous five years in the United States; see *Tompkins, Jr., ibid.* The aircraft crashed after colliding with a privately owned Piper PA-28 Cherokee. The 57-year-old private pilot, along with his wife and daughter, were flying a VFR flight below the lower limit of the Los Angeles terminal control area when the PIC suffered a heart attack. During the effort to revive the pilot, the airplane entered LAX airspace and was involved in the collision with the DC-9. ATC was unaware of the aircraft because regulations at the time did not require aircraft operating over or under TCA airspace to be transponder equipped; see online: Accident Database <http://www.airdisaster.com/cgi_bin/view_details.cgi?date=08311986&airline=Aeromexico> (date accessed: 1 August 2000).

In the civil litigation arising out of the crash, Aeromexico was absolved of all fault and the United States was found to be equally at fault with the pilot of the private aircraft. The fault of the

foreign governments exercise their responsibilities for safety oversight of carriers flying into the United States.[4] At a news conference on 2 September 1994, the Secretary of Transportation, Federico Pena, made the following announcement:

> After a series of accidents and incidents in the US involving foreign commercial aircraft, the Congress and the Department of Transportation, led by the FAA, began to question the assumption that oversight of foreign air carriers was adequately addressed by the home governments since a country must pledge to adhere to ICAO's international safety standards.[5]

In mid-1991, the Federal Aviation Administration (FAA) began to formulate a program to address these concerns and initiated an International Aviation Safety Assessment Program (IASA) in order to determine whether foreign civil aviation authorities (CAA) were implementing ICAO SARPs.[6] It included visits to twelve countries with airlines seeking authority to operate to and from the United States. The assessments were carried out on site, on a co-operative basis and within the consultative process foreseen by the bilateral agreements on air services. During these visits, a small team of inspectors from the Flight Standards Service (AFS) verified data on the international structure of each country's CAA and gained a better understanding of its laws, regulations, and methods of compliance with the Chicago Convention and its Annexes. It is to be noted that the US authorities make their assessments on the basis of ICAO international safety-related standards rather than applying their own regulations. This trial phase culminated in a policy revision that formally established the program.[7]

United States was premised upon negligent air traffic control procedures and services rendered that day to the Aeromexico flight crew; see *Tompkins, Jr., ibid.*

[4] See Michael Jennison, "The Chicago Convention and Safety after Fifty Years" (1995) XX-I Ann. Air & Sp. L.289 at 293.

[5] Pena, *Address*, Foreign Safety Assessment News Conference (Washington, 2 September 1994) [hereinafter *Address*], quoted by *Tompkins, Jr., supra* note 2 at 324.

[6] See *Jennison, supra* note 4 at 293.

[7] See FAA, *Information concerning FAA Procedures for Examining and Monitoring Foreign Carriers*", 57 Fed. Reg. 38342 (1992).

On 2 September 1994, the US Secretary of Transportation, Federico Pena, released results of the FAA's assessment of 30 countries and stated at the news conference in Washington, mentioned above, that:

> The assessments we announce today are of importance because 46 per cent of all arriving and departing passengers between the US and other parts of the world are carried on foreign carriers. From now on, when people fly commercially on foreign carriers serving US cities, passengers will have a new, valuable tool to help them choose a carrier that has an approved civil aviation authority overseeing its operations.[8]

It was stated that the assessments are not an indication whether an individual foreign air carrier is safe or unsafe; rather, they determine whether or not the county has a civil aviation authority in place and the extent to which that authority ensures that operational and safety procedures are maintained by its carriers.[9]

The basic elements that the FAA considered necessary for an adequate infrastructure for aviation safety oversight, as defined by the ICAO oversight standards, include:[10]

1. law enabling the appropriate government office to adopt regulations necessary to meet the minimum requirements of ICAO;
2. current regulations that meet those requirements;
3. procedures to carry out what the regulations require;
4. air carrier certification, routine inspection, and surveillance program; and
5. organizational and personnel resources to implement and enforce the above.

Of the first 30 countries assessed, nine were found not to meet these standards.[11] Four countries were given "conditional acceptance ratings that allow them to fly in the US

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[8] The statement is quoted by *Tompkins, Jr., supra* note 2 at 323.
[9] *Ibid.*
[10] This is reproduced from Michael Milde, "Enforcement of Aviation Safety Standards – Problems of Safety Oversight" (1996) 45 *ZLW* 3 at 10.
[11] These countries were Belize, Dominican Republic, Gambia, Ghana, Honduras, Nicaragua, Paraguay, Uruguay and Zaire. Tompkins criticizes the selection made by FAA of the assessed countries on the grounds that "none of these countries ... has a carrier currently operating to the United States" and raises the question as to "why the FAA did not concentrate in the initial

under heightened FAA surveillance."[12] The remaining seventeen countries were found by the FAA to "have acceptable safety oversight."[13] After identifying those thirteen countries found to have inadequate or conditionally acceptable "safety oversight," the Secretary of Transportation made the following statement:

> I would like to emphasize that travel to these groups of countries is not necessarily unsafe. To fly to these destinations, travelers should consider using US flag carriers and the carriers of the countries that have adequate civil aviation safety oversight.[14]

B. The program in Operation

The way in which the FAA conducts assessments may be summarized as follows:[15]

1. The national CAA authority is asked to complete a FAA questionnaire describing how the aviation authority is meeting its ICAO obligations.

2. A FAA team, consisting of at least an airworthiness inspector, visits the national civil aviation authority for three to five days (for larger aviation authorities, the team includes a FAA legal counselor);

3. The assessment concentrates on ICAO Annexes 1, 6 and 8 and addresses the adequacy of:

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assessment on those countries which actually have an air carrier operating to the United States pursuant to a foreign air carrier permit issued by the DOT"; see *Tompkins, Jr., supra* note 2 at 326.

[12] These were Bolivia, El Salvador, Guatemala and the Dutch Antilles; see *Tompkins, Jr., supra* note 2 at 326.

[13] *Ibid.*

[14] Pena, *Address, supra* note 5 As a result of the assessment program, the FAA established a toll free hotline (1-800-FAA-SURE) that travelers could call to obtain a summary statement about whether a foreign country has been assessed and the results if available. See *Tompkins, Jr., ibid.* at 327 for his opinion on the meaning of the Secretary's statement. He queries that since the responsibility of the CAA for "safety oversight" is not only for purposes of licensing the operators within their respective countries, but also includes air traffic control facilities, instrument landing systems, runway conditions, the accuracy of approach charts and the furnishing of airport terminal information, including weather data, etc., "why is it any more safe to fly US flag carriers to these 'deficient' countries than the local flag carrier?"

[15] This is reproduced from Bart J. Crotty, "FAA Assesses Non-US Civil Aviation Authority Safety Oversight Capability" *Air Line Pilot* 65:8 (1996) 35.

- National aviation laws that established the national CAA and that empower it to create and enforce safety regulations, policies and procedures;
- The aviation authority's organizational structure and qualified safety inspector staffing;
- The country's aviation safety regulations and aviation personnel licensing systems; and
- The aviation authority's certification of air carriers, including written procedures and inspection forms, administration systems, technical data and manuals, training and capability of inspectors, monitoring and surveillance programs, and airworthiness-defect reporting system.[16]

4. The FAA presents its findings to the national CAA and to the US embassy in that country informing them of any shortcomings the team found during the assessment.

5. After the inspectors' team returns to the US, the FAA transmits a formal written report to the aviation authority through its country's US embassy.

6. The FAA issues the official results[17] from its Headquarters in Washington, D.C., by assigning the national aviation authority one of the following two ratings:[18]

- **Category 1, Does comply with ICAO Standards:** A country's civil aviation authority has been assessed by FAA inspectors and has been found to license and oversee air carriers in accordance with ICAO aviation safety standards.

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[16] The most important aspects of the FAA's assessments are verifying that established written requirements and procedures for certification have been met and verifying that surveillance of its international air carriers is being conducted.

[17] The public disclosure of the assessment results, reflects the FAA's policy that the findings should be provided to all US citizens so they can make informed choices about their international flights; see FAA, *Public Disclosure of the Results of Foreign Civil Aviation Authority Assessment*, 59 Fed. Reg. 173 (1994) at 46332.

[18] See FAA, online: International Aviation Safety Assessment <http://www.faa.gov/avr/iasa/iasadef5.htm> (date accessed: 29 October 2000).

- **Category 2, Does Not Comply with ICAO Standards:** The FAA assessed this country's CAA and determined that it does not provide safety oversight of its air carriers operations in accordance with the minimum safety standards established by ICAO. This rating is applied if one or more of the following deficiencies are identified:[19]

i) the country lacks laws or regulations necessary to support the certification and oversight of air carriers in accordance with minimum international standards;

ii) the CAA lacks the technical expertise, resources, and organization to license or oversee air carriers operations;

iii) the CAA does not have adequately trained and qualified technical personnel;

iv) the CAA does not provide adequate inspector guidance to ensure enforcement of, and compliance with, minimum international standards; and

v) the CAA has insufficient documentation and records of certification and inadequate continuing oversight and surveillance of air carriers operations.

Category 2 comprises two groups of countries:[20]

1) Countries that have air carriers with existing operations to the United States at the time of the assessment. While in Category 2 status, carriers from these countries will be permitted to continue operations at current levels under heightened FAA surveillance. Expansion or changes in services to the United States by such carriers is not permitted while in Category 2, although new services will be permitted if using aircraft wet-leased[21] from duly authorized and properly supervised U.S. carrier or a foreign air carrier from a Category 1 country that is authorized to serve the United States using its own aircraft.

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[19] *Ibid.*

[20] *Ibid.*

[21] The lease of an aircraft with flight and cabin crew, fuel, supplies, supporting services and all other operating necessities; see *The Encyclopedia of International Civil Aviation* in A. Groenewege, *Compendium of International Civil Aviation*, 2nd ed. (Montreal: International Aviation Development, 1998) at 532.

2) Countries that do not have air carriers with existing operations to the United States at the time of the assessment. Carriers from these countries will not be permitted to commence service to the United States while in Category 2 status, although they may conduct services if operated using aircraft wet-leased from a duly authorized and properly supervised U.S. carrier or a foreign air carrier from a Category 1 country that is authorized to serve the United States with its own aircraft.

It is worth mentioning that at the time the IASA program was announced in 1994, there was a third category ("Unacceptable") in addition to Category 1 ("Acceptable") and Category 2 ("Conditional") described above. Categories 2 and 3 applied to countries whose CAAs were found not to be providing safety oversight in compliance with the minimum international standards established by ICAO. The FAA normally placed a country in Category 2 if one of its carriers provided air services to the United States at the time of the FAA assessment; they were permitted to maintain, but not expand, current levels of service under heightened FAA surveillance. Carriers from Category 3 countries were not permitted to commence air services to the United States.

From 25 May 2000, however, the FAA has commenced a new phase of the IASA program following the completion of initial determinations on the safety oversight exercised by virtually all countries whose air carriers operate or have applied to operate to the United States. It was announced that in the future the FAA would use only two categories. [22] The change was made to eliminate any confusion that has resulted from having two different categories regarding non-compliance with the ICAO standards:

> We believe that there has been a misimpression created that being in Category 2 reflects a higher degree of compliance with ICAO standards than being in Category 3. To correct this misimpression and make clear that no inferences should be drawn about relative degrees of ICAO compliance, we are deleting Category 3 and redefining Category 2....[23]

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[22] See FAA, *Summary of the Changes to the International Aviation Safety Assessment Program (IASA)* 65 Fed. Reg. (2000) at 33752.

[23] See FAA, *Categorization of Results of FAA Assessments, Changes to the International Aviation Safety Assessment Program (IASA), ibid.* at 33753. Prior to this policy change in 2000, the definition of Category 2 countries was as follows:

Due to the transition to the new phase of the IASA program, the FAA announced it would initially place the countries that were in the former Category 1 in the new Category 1 (in compliance with ICAO standards). Countries in the former Categories 2 and 3 would initially be placed in the new Category 2 (not in compliance with ICAO standards).[24]

The initial findings of the IASA program revealed that two-thirds of the 87 countries that were assessed by February 1998 were not in full compliance with ICAO standards.[25] The deficiencies found were identical to those identified by ICAO during its safety assessments of six Asian countries, and included:[26]

- inadequate and in some cases non-existent regulatory legislation;
- lack of advisory documentation;
- shortage of experienced airworthiness staff;
- lack of control on important airworthiness related items, such as issuance and enforcement of Airworthiness Directives, Minimum Equipment Lists, investigation of Service Difficulty Reports, etc.;
- lack of adequate technical data;
- absence of Air Operation Certification (AOC) system;
- non-conformance with the requirements of the AOC system;
- lack or shortage of adequately trained flight operations inspectors including a lack of type ratings;

The FAA assessed (this country's) civil aviation authority (CAA) and found it did not license and oversee its air carrier operations to and from the U.S. in accordance with International Civil Aviation Organization safety oversight standards. While negotiations to correct the deficiencies are ongoing, air carriers licensed by (this country) are permitted to conduct limited operations to the U.S., subject to heighten FAA operations inspections. Heightened inspections are not being provided for operations to destinations other than the U.S. for air carriers licensed by this country.

[24] Transition to New IASA Categorization System, *Changes to the International Aviation Safety Assessment Program (IASA)* 65 Fed. Reg. (2000) at 33753.
[25] See FAA, online: International Aviation Safety Assessment (IASA) Program <http://www.faa.gov/avr/iasa/iasabr15.htm> (date accessed: 29 October 2000).
[26] *Ibid.*

- lack of updated company manuals for the use by airmen; and
- inadequately trained cabin attendants.

C. Safety and Market Entry in The United States

For a more comprehensive understanding of the purpose of the international safety oversight assessments conducted by the FAA, one needs to consider US regulations on market entry of foreign air carriers so as to distinguish the change brought by the US administration through the establishment of the IASA program in 1994.

Under the US Federal Aviation Act,[27] a foreign air carrier desiring to conduct air transportation operations into the United States, has to file an application with the Department of Transportation (DOT) for a foreign air carrier permit. The Office of the Secretary determines the carrier's economic fitness under US domestic law. Parts 211 and 302 of the Economic Regulations of Department of Transportation[28] prescribe the requirements for issuance of these authorities.

Before the DOT grants a foreign air carrier economic authority to operate to and from the United States, it requires a positive safety recommendation from the FAA on the oversight capability of the national CAA of the applicant airline.[29] Until 1991, the FAA's primary role in this connection had been to issue certificates to non-U.S. air carriers, largely on an administrative basis. The FAA relied to a considerable extent on the air carrier's national CAA to ensure the carrier's compliance with international standards. Thus, issuance of foreign air carrier certificates had been "perfunctory" for many years.[30]

The IASA program changed the FAA's role in the following way: upon DOT notification of a pending foreign air carrier application, if the FAA has not made a

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[27] See United States, *Federal Aviation Act*, 49 U.S.C. § 41302 (1994).
[28] See United States, 14 C. F.R. parts 211 and 302 [hereinafter *14 C.F.R.*].
[29] Consistent with international law, certain safety requirements for operations into the United States are prescribed by the FAA's Part 129 regulations. The latter specify that the carrier must meet the safety standards contained in Part 1 (International Commercial Air Transportation) of Annex 6 (Operation of Aircraft) of the Chicago Convention; see United States, 14 CFR part 129.

positive assessment of that country's safety oversight capabilities, the FAA Flight Direct Service will direct its appropriate international field office to schedule an FAA assessment visit to the CAA of the applicant country.[31]

> This aggressive foreign carrier assessment program has, in effect, shifted the burden of proof away from the presumption that a new applicant and its government meet the ICAO standards—a shift justified in the light of experience.
>
> [I]t is not valid to presume that a given civil aviation authority is even aware of what the standards are, much less that it meets them in every instance.[32]

If a CAA is found to be meeting the minimum international safety standards, the FAA will forward a positive recommendation to the DOT. The latter will issue the requested economic authority and FAA will issue operations specification to permit the carrier to begin operations to or from the United States.[33]

When the CAA of countries with existing air carrier services to the US are found not to meet ICAO standards, the FAA formally requests consultations with the respective national CAAs. The purpose of these consultations is to discuss the deficiencies in more detail and to explore means to rectify the shortcomings, in order to enable the foreign air carriers to continue their services to the US. During the consultation phase, the air carrier's operations from that country into the US are frozen at the existing levels.[34]

The FAA may also heighten its surveillance inspections (ramp checks) on these carriers while they are in the US. If the deficiencies noted during the consultation period cannot be successfully corrected within a reasonable period of time, the FAA will notify DOT that air carriers from that country do not have an acceptable level of safety oversight and will recommend that DOT revoke or suspend its carriers' economic operating authority.[35]

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[30] See *Jennison*, *supra* note 4 at 293.
[31] See *Crotty*, *supra* note 15.
[32] *Jennison*, *supra* note 4 at 297.
[33] See *Crotty*, *supra* note 15.
[34] See United States, 60 Fed. Reg. (1995).
[35] See FAA, *supra* note 25.

When the CAAs of countries with no existing air carrier service to the United States are found not to meet ICAO standards, the FAA does not undertake consultations. It notifies DOT that the respective CAA does not have an acceptable level of safety oversight and its application for economic authority will be denied. The FAA does reassessment of the CAA after evidence of compliance with the ICAO provisions has been received.[36]

The FAA does not assess some countries' national CAAs because it is satisfied with them after having worked together on many joint programs and areas of mutual interest. The FAA recognizes the member countries of the of the European Joint Aviation Authorities (JAA) as complying with the requirements and standards of the ICAO Annexes.[37]

The FAA plans to revisit periodically the CAAs of countries with air carriers operating into the US in order to maintain full familiarity of the methods of those countries' continued compliance with the ICAO provisions. The FAA may also find it necessary to reassess a CAA at any time if it has reason to believe that minimum ICAO standards are not being met.

The IASA program has had an impact on the DOT treatment of code-shares[38] involving US and foreign carriers. In August 1999 DOT and the Air Transport

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[36] *Ibid.*

[37] See *Crotty, supra* note 15. The Joint Aviation Authorities (JAA) are an associated body of the European Civil Aviation Conference (ECAC), with headquarters located in The Netherlands, representing the civil aviation regulatory authorities of a number of European States that have agreed to develop and implement common safety regulatory standards and procedures. This co-operation is intended to provide high and consistent standards of safety and a *level of playing-field* for competition in Europe. Much emphasis is also placed on harmonizing JAA regulations with those of the FAA.

In particular, the JAA and the FAA have agreed to work together on a *Co-operative and Concurrent Certification* process, where evaluation teams from both sides integrate their work. Though each team has to satisfy its own legal obligations, the combined presentations from the manufacturer and single discussion sessions are believed to be of great value in reaching common interpretation and findings. This process is being applied on the Boeing 777, Learjet 45 and to the Boeing 737–X; see *Partners in International Civil Aviation* in A. Groenewege, *Compendium of International Civil Aviation, supra* note 21 at 229-230.

[38] *Code-share* is a marketing arrangement in which an airline places its designator code (that is, the two-letter airline designation used in the computer reservation systems (CRS)) on a flight

Association of America (ATA) entered into a Memorandum of Understanding that established a code-share safety audit program for foreign air carriers that transport DOT personnel. That initiative has provided important benefits that were taken into consideration for the actions that followed: at the December 1999 Chicago Aviation Conference, DOT announced its plan for reviewing the code-share passenger services of US air carriers using foreign air carriers' aircraft to see if they meet the international safety standards.

A principal measure of the level of safety of these foreign code-share carriers is obtained from the results of the IASA program. With respect to that measure, a code-share arrangement with a foreign air carrier will only be approved if the latter is:

(1) from a country that maintains a Category 1 rating under the IASA program; or

(2) is from a country that either holds an IASA Category 2 or has not been assessed by the FAA and the foreign air carrier is using aircraft wet leased and operated by a duly authorized and properly supervised US carrier or foreign carrier from a Category 1 country. If a country's category rating slips from IASA Category 1 to Category 2, the impact on existing code-share arrangements will be considered on a case-by-case basis.[39]

D. The IASA Program and its "Assessment" by the Aviation Community

The unilateral action by the US Federal Aviation Administration in undertaking the IASA program was not welcomed very warmly by various participants in the aviation community. A brief summary of some of the critics' views includes the following arguments:

By signing the Chicago Convention, all 185 member States agreed that the principal function of ICAO is safety in aviation and "without the exercise of this function

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operated by another airline and sells and issues tickets for that flight. Air carriers throughout the world continue to form code-share alliances to strengthen or expand their market presence or competitive ability. The practice of code-share has helped air carriers overcome some of the bilateral restrictions and economic constraints that have limited international growth; see e.g. Harris, Jr. & Kirban, " Antitrust Implications of International Code-sharing Alliances" (1998) XXIII Air & Sp. L. 166.

... the international air transportation would be in chaos."[40] Building on this conclusion, George Tompkins, Jr., draws another one, namely, that when a member State determines that safety standards of another member State do not meet the minimum safety standards of ICAO, the matter should be brought to the attention of ICAO in accordance with the dispute resolution procedures set forth in Articles 84, 85, 86 and 87 of the Chicago Convention.

> No member State ... should take upon itself unilaterally to become the self appointed policeman of the world and for the world in matters affecting safety in international aviation. ICAO was established for this purpose 50 years ago. ... So long as a nation remains a party to the Chicago Convention, the enforcement of the ICAO minimum safety standards must be pursued through ICAO.[41]

Nevertheless, Tompkins' final opinion is that the main focus should not be on confrontation and condemnation, especially when the "accused" party is the acknowledged leader, the "Alpha and the Omega of aviation safety," to whom every developing and even some highly developed aviation nations are looking for guidance and direction in formulating, adopting and implementing aviation safety oversight standards that will meet the minimum ICAO standards. For the United States, the course of action for being a true leader is to "enthusiastically support and pursue the principles of multilateral consultation through ICAO.... After all that is what the 50 year young Chicago Convention is all about."[42]

Michael Milde, however, is of the opinion that the impact of the US action could not be global—"it solves only the specific bilateral issues between the U.S. and the countries directly concerned"—although he admits that the action "has visibly shaken

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[39] See United States, DOT: *Code-share Safety Program Guidelines* (29 February 2000).
[40] *Tompkins, Jr., supra* note 2 at 322.
[41] *Ibid.* See also "Safety in Isolation" *Flight International* (14-20 September 1994) 3; here it is argued again that "in an ideal world, the correct approach of the FAA would have been to take its findings, not in isolation, but having completed its assessments, to the International Civil Aviation Organization ... to consider those findings and rule properly."
[42] *Tompkins, Jr., supra* note 2 at 334.

the international community and gave a powerful impetus forcing ICAO to initiate actions to catch up with the U.S. initiative."[43]

Liyanage supports this view and states that:

> It would be unacceptable to most States for any one State, irrespective of its technology advancement, to unilaterally assume a vigilant role in aviation safety oversight. Therefore, in order to maintain its effectiveness and also to fulfill the aspirations of its members, ICAO is bound to take the lead role in ensuring aviation safety.[44]

Tompkins extends his criticism to two more factual issues: first, according to him, the stated basis for undertaking the assessment program, namely a "series of accidents and incidents in the US involving foreign commercial aircraft"[45] was factually unsupported by the historical record;[46] and second, the release to the press and the public by the FAA and DOT of the results of the first thirty nations assessed was "improper and contrary to the letter and spirit of the Chicago Convention."[47]

Another criticism of the establishment of the IASA program is that "it was promulgated in a legally questionable manner" and that "it is not clearly authorized by the Chicago Convention."[48] Milde again does not support this view, arguing that the unilateral action was taken within US jurisdiction under Articles 1 and 11 of the Chicago Convention, in conformity with Article 33, and in the best spirit of Articles 37 and 38; and, finally, within the framework of the existing bilateral agreements on air services.[49] Respecting the limits of extraterritorial application of authority, the United States' argument for the justification for establishing the IASA program is that

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[43] *Milde*, *supra* note 10 at 11.
[44] Senarath D. Liyanage, "Aviation Safety Oversight Assessment" (1996) XXI-II Ann. Air & Sp. L. 235 at 245.
[45] See *Address*, *supra* note 5.
[46] See *Tompkins, Jr.*, *supra* notes 2 and 3, and accompanying text.
[47] *Ibid.* at 333.
[48] See Robert Papkin, "Some Comments on International Safety Oversight and the IASA Program of the FAA" (American Bar Association Forum on Air & Space Law, 2000 Annual Meeting and Conference, Montreal, 4 August 2000) [unpublished].
[49] See *Milde*, *supra* note 10 at 11. See also *Jennison*, *supra* note 4 at 296.

> [A] fundamental aspect of sovereignty is the right—and a duty—of each state to protect its inhabitants from threats to their safety.
> Moreover, a State clearly has authority under international law to regulate conduct that has so direct a potential impact on its residents and its territory as unsafe air carrier operations.[50]

It should be noted, apart form the above criticisms, that at the same time there were positive reactions towards the US action: "The world should be grateful that the FAA has done this survey of how individual countries rate in controlling their airlines,"[51] "a potent catalyst for ICAO to understand that continuing lethargic attitudes to aviation safety are not tolerable ... and to focus ICAO's attention to real priorities,"[52] "the objective of the FAA is commendable because the assessment program is for the purpose of improving international aviation safety for the benefit of all, "[53] and

> IASA has required a hard look at the safety oversight capability of many countries ... it has been instrumental in bringing the attention of the international aviation community to a most important concept that had been virtually overlooked during nearly 50 years. ... The concept raised by IASA ... is sound; the goal is noble; and the need for action is imperative.[54]

Specifically, it was the administration and application of the IASA program that aroused a great deal of criticism within the aviation community. The following examples will not be discussed in detail, since it would be outside the scope of this work to do so; rather, they are intended to show how complex the public assessment of the IASA program really is:[55]

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[50] See *Jennison, ibid.*
[51] See *"Safety in Isolation", supra* note 41.
[52] *Milde, supra* note10 at 12.
[53] *Tompkins, Jr., supra* note 2 at 333.
[54] See *Papkin, supra* note 48.
[55] The above summary reproduces the criticisms presented by *Papkin, ibid.* and by *Liyanage, supra* note 44 at 245. See also Les Blatner, "Restoring Public Confidence in FAA's Aviation Safety Oversight" *Air Line Pilot* 66:2 (1997) at 34. This article describes the damage to public confidence suffered by the FAA and its role in overseeing aviation safety after ValuJet accident on 11 May 1996.

i) In the administration of the program, the US does not follow the standard safety clause provision contained in the bilateral agreements, according to which:

- The US may request consultation with its bilateral partner regarding safety standards.
- If the US finds that the other country does not effectively maintain the minimum ICAO standards, the US must notify the other country of these findings and of the steps necessary to meet them.
- The party that is so notified is then obliged to take appropriate corrective actions.
- If such appropriate actions are not taken within a reasonable time, revocation or limitation of the operating authority of the airlines of the non-complying country may be imposed.

Such is supposed to be the normative pattern. In practice, however, differences from the prescribed norm have been identified throughout the IASA program. They are often described in the following manner:

- The US does not request consultations before beginning an assessment. The FAA contacts the aviation authorities of a target country directly and proposes an assessment.
- The other country accepts and invites the FAA, and the smaller the country the quicker it accepts.
- The FAA visits, assesses and makes its report to Washington as to the proposed category designation of the country.
- Then—and only then—a formal consultation request is made and an FAA diplomatic team arrives to announce the results of the assessment.

The aircraft crashed shortly after takeoff from Miami International Airport, killing 110 people. Improperly packed generators ignited, leading to a fire which burned through control cables and filled the cabin with smoke. The ValuJet maintenance contractor was criminally charged and found liable for placing the canisters aboard the aircraft; online: Aircraft accidents data <http://www.airdisaster.com/cgi_bin/view_details.cgi?date=05111996&airline=Valujet > (date accessed: 30 October 2000).

- If the result of the assessment is a Category 2 designation, the respective country is given no opportunity to take appropriate action, and the FAA simply publishes the designation and applies its Category 2 to the carrier of that country.

(ii) The logic of a policy that allows carriers from Category 2 countries to continue to operate to the US to the same degree they were operating when their countries were assessed, while limiting their ability to conduct the services that bilateral authorization and the marketplace demand, is not clearly understood. The argument is as follows: "If the FAA truly wanted to protect the traveling public, why would it allow any service at all from a country that does not meet the basic ICAO standards; such approach would have been more consistent with the Chicago Convention, which provides only for compliance or for non-compliance with the minimum standards. Moreover, it would have sent the strongest possible signal that all parties to the Chicago Convention must meet their full safety responsibilities." The reality of the IASA program is described as "Your country does not comply. But your airlines still may fly."

A further criticism is that there is no public description of the freezing process. Moreover, changes of categorization for a particular country from Category 1 to Category 2, and the other way round, lack a clear explanation for their occurrence, and this tends to undermine the confidence in the entire program.

E. Conclusion

The establishment of the IASA Program is an indication of a new attitude towards safety oversight and represents a different level of response to the shortcomings of the safety oversight from the one of the ICAO and its Safety Oversight Program.

Although, the IASA Program is not ultimately accepted by the different participants of the international community due to reasons described above, the fact that FAA is the acknowledged leader of aviation safety to whom developing and developed countries are looking for guidance and direction, suggests a conclusion that the emphasis

should not be on pointing fingers, but rather analyzing the problems and through co-operation, co-ordination and harmonization to achieve optimum level of safety in air transportation.

CONCLUSION AND SUMMARY

On completion of the discussion on attitude towards safety in air transportation at a dawn of a new century, some conclusions may now be stated:

International air law is not in itself an autonomous legal system. It follows the legal principles and notions applicable to public international law in general. Thus, in the light of the theory of international obligation it may be argued that in era of globalization there are grounds to reconsider the responsibilities of States under the Chicago Convention.

ICAO's regulatory function is a fascinating example of international law-making. The legislative process illustrates not only ICAO's position as the main standard-setting body for international civil aviation, but also indicates the great extent to which Contracting States are consulted in advance in the development of international SARPs, before their becoming applicable. This consultation is a step forward toward implementation. The general principle of good faith, as well as the *pacta sunt servanda* principle, demand from the Contracting States fulfillment of their obligations under Article 37 of the Chicago Convention unless they expressly declare their intention to the contrary in accordance with Article 38 of the Chicago Convention.

The threats to aviation safety from the shortcomings of States' responsibility for safety oversight and the need to meet the challenges of the new century, which will be characterized by the globalization of trade and economics, in parallel with the increased sophistication of civil aviation systems, have reflected the beginning of a new attitude in ICAO toward ensuring States' responsibility for safety oversight.

Respecting the principles of the Chicago Convention, and ensuring that it continues to meet the needs of the peoples for safe, regular, efficient and economic air transport, ICAO is manifesting a strong desire for a change in its role. The adoption of the *Strategic Action Plan* and its component *Safety Oversight Program* ensure that the Chicago Convention remains a sound flight plan for the future of air transportation and that ICAO will maintain its position as the main standard-setting body for international civil aviation. The new focus of ICAO signifies a changing emphasis on the role of the Organization from development to implementation, that is, from being the accepted authority for the development of civil aviation safety standards to becoming the recognized world-wide auditor.

The international level, is not the only scene where action has been taken with respect to ensuring compliance with safety-related standards. The establishment of the FAA's IASA Program is an indication of a new attitude towards safety oversight and represents a different level of response to its shortcomings. The same is true with the Joint Aviation Authorities (JAA)—an associated body of the European Civil Aviation Conference (ECAC)—representing the civil aviation regulatory authorities of a number of European States that have agreed to develop and implement common safety regulatory standards and procedures. This co-operation is intended to provide high and consistent standards of safety and a level playing-field for competition in Europe. A recently established agency in Central America called ACSA (a Spanish acronym for Central American Aviation Safety Agency), created as a dependency of COCESNA (the Central American Air Navigation Services Corporation) with the purpose of providing basic aviation safety inspections, safety certifications and expert advice to all COCESNA member States, is another example of the trend that regional organizations will be a major factor in the safety regulatory level.

ICAO welcomes such regional activities, as is illustrated by the signed Memorandum of Understanding (MOU) between the Organization and the European Civil Aviation Conference (ECAC) at the memorable DGCA Conference of 1997. The role of ECAC is to co-ordinate air transportation policy among its European Member States. The MOU formalizes a long-standing co-operaton between the two bodies in the areas of

safety oversight and serves as a model for other regions in aligning safety oversight initiatives with ICAO's program within the context of global oversight safety. Another contribution to the global aviation safety effort is the FAA's recent commitment to ICAO's safety oversight program. The FAA, in coordination with ICAO, developed a Model Aviation Regulatory Document in order to provide a basis for smaller Contracting States to prepare their own laws and regulations so as to meet the ICAO standards. It also began developing a series of Government Safety Inspectors' Standardized Training Packages for inspectors and course instructors in air operator and maintenance organization certification, and presented the first one to ICAO in May 2000 at the Organization's Headquarters in Montreal.

Hence, there are three safety regulatory levels that have emerged and that will play a role in meeting the challenges of the new century: international, regional, and national levels. This assumes that a mechanism is needed for their co-ordination in order to ensure that the most fundamental objective of air transportation—its safety—is accomplished. ICAO's "torch" has burst into new flame with the adoption of the *Strategic Action Plan* and the establishment of the *Safety Oversight Program*, and this light illuminates a new attitude towards safety in air transportation on the world-wide level. The challenges of the new century, however, also require a new attitude from all participants and safety has to be the pre-occupation of everyone involved in air transportation.

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