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## International Civil Aviation Organization - Fifteenth Session of the Assembly

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# INTERNATIONAL REVIEW

## INTERNATIONAL CIVIL AVIATION ORGANIZATION

### FIFTEENTH SESSION OF THE ASSEMBLY

BY RENÉ H. MANKIEWICZ†

At its Fifteenth Session held in Montreal from 20 June to 16 July 1965, the ICAO Assembly adopted thirty-eight resolutions, one of which contains twenty-two appendices (Appendix A to Appendix V) setting forth the continuing ICAO policies in air navigation matters.

Questions before the Assembly of legal and constitutional interest included the admission of Rumania, the continuing membership of the Republic of South Africa, and the resolutions on Annexes to the Convention and on the participation of ICAO in outer space programs.

#### I. ADMISSION OF RUMANIA

Rumania had participated on the side of the Axis States in World War II until 24 August 1944. An armistice was concluded on 12 September 1944 and Rumania took an active part in the war against Germany thereafter. She had not been invited to the Chicago Conference. However, she did not seek admission to ICAO under Article 93 of the Chicago Convention which applies to nations other than those that had been united in the war against the Axis States or remained neutral; instead, she addressed a notification of adherence to the United States Government in accordance with Article 92. The State Department informed the interested States and the Secretary General of ICAO of the receipt of that notification but the circular letter did not contain the usual statement regarding the effective date of the adherence. The reason for that omission may have been that the State Department was doubtful as to whether Rumania had followed the proper procedure by choosing adherence under Article 92 rather than seeking admission under Article 93.

On 29 June 1965, the Secretary General of ICAO informed the Assembly of a letter he had received from the United States delegation stating *inter alia* that "it is understood that Rumania wishes to send a delegation to represent it at the Assembly as a Contracting State." The Secretary General's note concluded with the statement that "the question

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of the status of the People's Republic of Rumania as a member State of ICAO is presented to the Assembly."<sup>1</sup>

The Executive Committee of the Assembly took up the question at its Sixth Meeting when the Chairman directed the Committee's attention to the Secretary General's note and pointed out that "the thirty-day period specified in the Article [92] before notification of adherence took effect had elapsed, and it was understood that Rumania would like to send a delegation to represent it at the Assembly as a Contracting State." Since no delegation made any comments on the statement of the Chairman or on the note of the Secretary General, the Chairman of the Executive Committee concluded that "it was agreed that the Rumanian Delegation, when it arrived, would be seated as the Delegation of a Contracting State."<sup>2</sup> The Executive Committee so reported at the Plenary Meeting of the Assembly<sup>3</sup> which approved that report without debate at its Eighth Meeting.<sup>4</sup>

## II. MEMBERSHIP OF SOUTH AFRICA

Thirty-one African States<sup>5</sup> proposed and obtained the adoption of an additional item of the agenda, *viz.* Item 41: The question of South Africa's continued membership in ICAO.<sup>6</sup> These states sought the expulsion of South Africa from ICAO. However, Article 93 bis, which deals with cessation of membership following a recommendation of the General Assembly of the United Nations, was not applicable to the Republic of South Africa since no recommendation had been made by the United Nations General Assembly. No other article of the Chicago Convention provides for expulsion of a member State from ICAO. The proposal was therefore made to amend the Convention by adding the following Article 93 ter:

(a) Notwithstanding the provisions of Article 93 bis above, any contracting State whose government violates the principles laid down in the Preamble to this Convention and practices a policy of apartheid and racial discrimination, shall be suspended or excluded from membership of the International Civil Aviation Organization by the Assembly.

(b) A State which is suspended as a result of paragraph (a) of this Article shall cease to enjoy the rights and privileges of membership in the International Civil Aviation Organization.

(c) A State which is suspended or ceases to be a member of the International Civil Aviation Organization as a result of paragraph (a) of this Article may, on the proposal of the Council of the International Civil Aviation Organization following a detailed report that the government of such State has renounced the policy of apartheid and racial discrimination which

<sup>1</sup> ICAO A15-WP/112 EX/18.

<sup>2</sup> ICAO A15-EX/MIN-6, para. 1.

<sup>3</sup> ICAO Doc. 8522 A15-EX/43.

<sup>4</sup> ICAO Doc. 8516 A15-P/5-8.

<sup>5</sup> These States were Algeria, Comoroun, Chad, Congo (Brazzaville), Congo (Democratic Republic), Dahomey, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Malagasy Republic, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Tunisia, United Arab Republic, Upper Volta, and Zambia.

<sup>6</sup> ICAO A15-EX/MIN-7.

give rise to its exclusion or suspension, be reinstated or re-admitted as the case may be, by the Assembly of the International Civil Aviation Organization.<sup>7</sup>

An obstacle to the discussion of that amendment was Rule 10(d) of the Standing Rules of Procedure of the Assembly which requires that any proposed amendment to the Convention be communicated to Contracting States so as to reach them at least ninety days before the opening of the session of the Assembly at which such proposed amendment is to be discussed.<sup>8</sup> The movers of the proposed Article 93 ter asked for suspension of Rule 10(d) but several States opposed the suspension and argued that the question under consideration was a political one within the exclusive jurisdiction of the United Nations and could not properly be discussed by a specialized agency with purely technical functions such as ICAO. Following a roll call, the Executive Committee, by a vote of 41 to 34 with 8 abstentions, suspended Rule 10(d); after another roll call, by a vote of 39 to 30 with 4 abstentions, the Committee recommended that the Assembly adopt the proposed amendment.<sup>9</sup>

While decisions of the Executive Committee require only a majority of the votes cast, irrespective of the matter under discussion, Article 94 of the Chicago Convention prescribes that any amendment to the Convention must be approved by a two-thirds vote of the Assembly. The roll call in the plenary meeting of the Assembly on the Executive Committee's report relating to the addition of Article 93 ter to the Chicago Convention resulted in the following:

1. Suspension of Rule 10(d) of the Standing Rules of Procedure of the Assembly (suspension requires a simple majority): 41 in favor, 34 against, 11 abstentions, 14 absent.

2. Insertion of a new Article 93 ter in the Chicago Convention which requires a two-thirds majority: 42 in favor, 30 against, 15 abstentions, 13 absent.<sup>10</sup>

The required two-thirds majority not having been obtained, the proposal for amendment of the Convention was defeated. Thereupon, the proponents of the amendment introduced a draft resolution condemning the South African racial policies and requesting all Contracting States to exert pressure on South Africa to abandon these policies, in the following words:

CONSIDERING that the apartheid policies of South Africa were condemned on several occasions by the United Nations Organization and particularly in General Assembly Resolutions 1761 (XVII) of 6 November 1962 and 1904 (XVIII) of 20 November 1963;

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

RECOGNIZING furthermore that the policies of apartheid and racial

<sup>7</sup> ICAO A15-WP/183 EX/35.

<sup>8</sup> Standing Rules of Procedure of the Assembly, ICAO Doc. 7600-Rev.

<sup>9</sup> See Report of the Executive Committee, ICAO Doc. 8522 A15-EX/43, Agenda Item No. 41.

<sup>10</sup> ICAO Doc. 8516 A15-P/5-11.

discrimination are a flagrant violation of the principles enshrined in the Preamble to the Chicago Convention;

THE ASSEMBLY:

- 1) Strongly CONDEMNS the apartheid policies of South Africa;
- 2) REQUESTS all nations and peoples of the world to exert pressure on South Africa to abandon its apartheid policies; and
- 3) URGES South Africa to comply with the aims and objectives of the Chicago Convention.<sup>11</sup>

Upon a roll call vote of 39 to 1, the proposed resolution was adopted, with 40 States abstaining and 20 absent.<sup>12</sup>

Some States which explained their abstention from the vote pointed out that while they were hostile to and, indeed, condemned the policy of apartheid and racial discrimination, they believed that it was not for ICAO to decide the purely political question of the continued membership of the Republic of South Africa. Instead of voting against a proposal which they considered improper, these States by their abstention allowed the condemnation of the South African policy of apartheid by a unanimous vote, except for the vote of South Africa herself.

### III. FORM, CONTENT, AND AMENDMENT OF ANNEXES AND PROCEDURES FOR AIR NAVIGATION SERVICES

After reviewing previous resolutions dealing with the subject matter, particularly Resolutions A14-27, Appendix E,<sup>13</sup> and A10-16;<sup>14</sup> the Assembly adopted a new resolution (Appendix E of Resolution A15-8) concerning the formulation of coordination and recommended practices (Annexes) and procedures for air navigation services (PANS). The Resolution reads, in part, as follows:

THE ASSEMBLY RESOLVES [that] . . .

- 2) adoption of Standards and Recommended Practices [SARPS] be in accordance with the following:
  - a) "Standard" means any specification for physical characteristics, configuration, matériel, 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 Contracting 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;
  - b) "Recommended Practice" means any specification for physical characteristics, configuration, matériel, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavour to conform in accordance with the Convention;
  - c) a high degree of stability in Standards and Recommended Practices to be maintained to enable Contracting States to achieve the necessary stability in their national regulations which relate to international air navigation;

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<sup>11</sup> ICAO A15-WP/239 P/55.

<sup>12</sup> ICAO Doc. 8516 A15-P/5-12.

<sup>13</sup> ICAO Doc. 7670 Vol. II.

<sup>14</sup> ICAO Doc. 7670 Vol. I.

- d) amendments to be limited to those significant to the safety, regularity or efficiency of international air navigation and editorial amendments need to be kept to the essential minimum;
- e) special effort to be made to ensure that complete co-ordination is effected among SARPS and PANS;
- f) special effort to be made to ensure that at all stages the Annexes to the Convention are free from errors or defects of language;
- 3) in the *development* of Standards and Recommended Practices and Procedures all recommendations for SARPS and PANS or for amendments thereto be submitted for consideration to Contracting States for a period of at least three months before the Council adopts or approves them, but this shall not prejudice immediate action by the Organization on material that may call for prompt treatment;
- 4) all Contracting States be urged to discharge their responsibilities in the air navigation activities of the Organization by commenting fully and in detail on the proposals for SARPS submitted to them or to express their agreements or disagreement on the substance of such proposals; and
- 5) the *application* of SARPS and PANS be in accordance with the following:
  - a) in establishing a date by which States may notify their disapproval of SARPS, the time needed for transmission of the Annexes should be taken fully into account, so as to allow for their effective study during the full period of three months provided in Article 90 of the Convention;
  - b) in fixing dates for their application by Contracting States, sufficient time should be allowed to enable States to complete their arrangements for implementation thereof;
  - c) in considering measures relating to the application of the provisions of the Annexes, such steps as may be feasible should be taken to ensure that the preparation of Standards involving the provision and operation of facilities and equipment, whilst ensuring safety and regularity, takes into account the importance of securing the correct balance between the economic aspects of, and the operational requirements for, such Standards;
  - d) a programme for the application of amendments to SARPS and PANS should be followed so that the relevant national regulations of Contracting States will not require to be amended more frequently than at intervals of one year; departures from this policy should be made only in exceptional circumstances.<sup>15</sup>

#### IV. PARTICIPATION BY ICAO IN PROGRAMS FOR THE EXPLORATION AND USE OF OUTER SPACE

The possible impact of outer space activities upon the jurisdiction and functions of ICAO was explored as early as 1956 in the report of the Council to the Assembly on the legal work of the Organization.<sup>16</sup> After examining that report, the Legal Commission (established during the Tenth Session of the ICAO Assembly) considered that "the problems concerning 'outer space' fall essentially within the province of the functions of the Organization and that, at a suitable time, they might be included in the general work programme of the Legal Committee."<sup>17</sup>

At the end of 1958, Mr. R. Golstein, then President of the Legal Com-

<sup>15</sup> ICAO Doc. 8225 A15-P/6.

<sup>16</sup> ICAO A10-WP/30, para. 157.

<sup>17</sup> ICAO Doc. 7712 A10-LE/5, para. 12.

mittee, informed the Secretary General of ICAO that it appeared urgent that the Legal Committee study the legal status of outer space and the use made thereof by space vehicles, with particular attention to the simultaneous use of airspace by civil aircraft and space vehicles. The Council referred the question to the Legal Commission of the Twelfth Session of the Assembly.<sup>18</sup> When the Commission discussed the work program of the ICAO Legal Committee, the Mexican Delegate proposed that the study of the problems of liability relating to the use of atmospheric space in connection with peaceful uses of outer space be listed in Part B of that work program. The United States Delegate strongly opposed such action and pointed out that the problem of the law of outer space was under consideration at the United Nations and that ICAO, being a specialized agency with jurisdiction limited to civil aviation, should not enter the field without being invited to do so by the United Nations. The Legal Commission endorsed these arguments in its report to the Assembly and concluded that it was "unnecessary to include in the work programme of the Legal Committee any specific reference to the consideration of legal problems arising out of the peaceful uses of outer space."<sup>19</sup> Consequently, ICAO has not dealt actively with the law of outer space and the influence of space activities on international civil aviation, particularly with respect to international standards and recommended practices in the Annexes to the Chicago Convention. However, ICAO was represented at certain meetings of the United Nations Special Committee on Peaceful Uses of Outer Space as well as at meetings of other specialized agencies dealing with outer space problems.

The question of ICAO's interest in space activities was brought again before the ICAO Assembly at its Fifteenth Session by the Delegate of Colombia who submitted a draft resolution on participation by ICAO in programs for the exploration and use of outer space. In support of this proposal, during the fifth meeting of the Executive Committee, he stated that

at the present time it would be academic to try to define the boundary between airspace and outer space. Whatever the limits that might one day be established, however, space vehicles would always have to pass through the airspace used by international civil aviation and there would thus be problems of sovereignty and security. . . . Their passage through the airspace would therefore have to be regulated.<sup>20</sup>

He believed that in accordance with the report to the General Assembly in 1959 by the *ad hoc* Committee on Peaceful Uses of Outer Space, it was ICAO's duty to "address itself without any further delay to the technical aspects of space activities affecting international civil aviation." Many other problems arising from the use of outer space appear to be of direct interest to ICAO. For instance, space vehicles re-entering the atmos-

<sup>18</sup> See Minutes of the 4th Meeting of the Council, 36th Session, ICAO Doc. 7988-4 C/916.

<sup>19</sup> ICAO Doc. 8610 A12-LE/1, para. 16-18, and Minutes of the 5th and 6th Meetings of the Legal Commission reproduced in the same document.

<sup>20</sup> ICAO A15-EX-MIN/5, para. 32.

phere fall within the definition of aircraft in Annex 6 to the Chicago Convention and, when not piloted by an astronaut, are "pilotless aircraft" which under Article 8 of the Chicago Convention "shall not be flown over the territory of a Contracting State without special authorization by that State and in accordance with the terms of such authorization." Moreover, there is the possibility of a collision between aircraft and space vehicles, but the ICAO draft convention on aerial collisions does not deal with this problem.<sup>21</sup>

The Delegate of France supported the Columbian proposal. The United States Delegate proposed certain editorial amendments which were adopted by the Columbian Delegate. Thereupon, the Assembly adopted the following Resolution:

WHEREAS events in the past few years relating to the exploration and use of outer space are of great interest to ICAO, since many of these activities affect matters falling within the Organization's competence under the terms of the Chicago Convention;

WHEREAS although the Convention does not specifically define how the term "outer space" should be interpreted, the space used by or usable for international civil aviation is also used by space vehicles;

WHEREAS the use of the same medium by different fields of activity necessarily requires adequate co-ordination to achieve the normal and efficient functioning of both these fields;

WHEREAS ICAO in its particular field of competence and in the aspects relating thereto cannot and should not ignore the aforementioned events concerning the exploration and use of outer space;

WHEREAS while the Organization has closely followed and informed the Assembly of these events, it would be desirable to take an active part in them; and

WHEREAS furthermore, the Special Committee on Peaceful Uses of Outer Space, established by the United Nations, expressed the view, in its Report to the General Assembly, that the existing specialized agencies "can perform various useful functions with regard to space activities" and "their functional interest should, of course, be welcomed and encouraged";

THE ASSEMBLY

- 1) URGES the Governments of Contracting States to keep the Organization informed regarding programmes and progress achieved in the exploration and use of outer space of particular interest to ICAO;
- 2) DIRECTS the Council to carry out a study of those technical aspects of space activities that affect international air navigation and that, in its view, call for special measures, and report the results to the next session of the Assembly;
- 3) REQUESTS the Council to formulate, on the basis of its conclusions, recommendations for steps to be taken to achieve the necessary co-ordination with other international organizations having a basic interest, particularly in the United Nations; and
- 4) REQUESTS the Secretary General to continue to arrange for the Organization to be represented at all conferences and meetings connected with or affecting the interests of ICAO in this field.<sup>22</sup>

At its meeting of 20 July 1965, the Council of ICAO instructed the

<sup>21</sup> See Mankiewicz, *The ICAO Draft Convention on Aerial Collisions*, 30 J. Air L. & Com. 375 (1964).

<sup>22</sup> Resolution A15-1, ICAO Doc. 8525 A15-P/6.

Secretary General to prepare a draft of the study mentioned in paragraph 2 and to inform the Secretary-General of the United Nations of ICAO's growing interest in the problems relating to space activities.

#### V. ARE ICAO RULES OF THE AIR APPLICABLE TO MILITARY AIRCRAFT?

As is well known, the Council of ICAO has power to promulgate rules and regulations relating to the flight and maneuver of aircraft which are the law over the high seas (Article 12 of the Chicago Convention on International Civil Aviation). Since ICAO's jurisdiction is limited to civil aviation, these rules are not binding on military aircraft. However, ICAO has been concerned for quite some time with the situation of a potential danger arising from the simultaneous use of airspace by military and civil aircraft. Nearly ten years ago, in 1956, the Tenth Session of the Assembly (and again in 1962, the Fourteenth Session) resolved, with regard to the joint civil and military use of airspace, that all Contracting States be urged to encourage coordination between their various aeronautical activities in order that the common use of airspace and of certain facilities and services be arranged so that the safety, regularity, and efficiency of international civil air navigation will be safeguarded.<sup>23</sup>

Further steps towards the safety of civil aircraft flying in the same space as military aircraft were taken by the Fifteenth Assembly which decided that "all Contracting States consider the need, when issuing regulations for their State aircraft concerning flight over the high seas, to require such aircraft to comply with the rules of the air in Annex 2 unless measures are taken to ensure that other aircraft are not being in danger. . . ."<sup>24</sup> The Council has decided that no exceptions to the rules of the air in Annex 2 are permitted under Article 12 of the Chicago Convention.

The practical effect of the resolution of the Fifteenth Session of the ICAO Assembly is to submit military aircraft gradually to specific air rules and regulations adopted by the ICAO Council.

#### VI. COMPOSITION OF THE NEW COUNCIL

The Fifteenth Session of the Assembly elected a new Council in accordance with Article 50 of the Convention as amended by the Thirteenth (Extraordinary) Session of the Assembly. Article 50 provides that adequate representation be given to (1) the States of chief importance in air transport, (2) the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation, and (3) the States not otherwise included whose designation will insure that all the major geographic areas of the world are represented. The Assembly decided, as it did at its Fourteenth Session in Rome (1962), that each of the three categories of States should comprise nine States.<sup>25</sup> There were only nine candidates in the first category, including (with

<sup>23</sup> ICAO Doc. 7670 Vol. II.

<sup>24</sup> ICAO Doc. 8525 A15-P/6.

<sup>25</sup> See Report of the Executive Committee on Agenda Item 8.

their votes in parenthesis): Italy (95), Australia (94), Canada (94), Brazil (93), France (92), Sweden (92), Federal Republic of Germany (89), United Kingdom (88), United States of America (87).

Of the ten States which were candidates in the second category, the following nine were elected (votes in parenthesis): Argentina (94), Japan (94), Mexico (91), United Arab Republic (88), India (87), Netherlands (85), Belgium (81), Spain (81).<sup>26</sup>

Eleven States were candidates for the election of the third category: Colombia, Congo (Brazzaville), Costa Rica, Czechoslovakia, Kenya, Malagasy Republic, Nigeria, Pakistan, Philippines, Syrian Arab Republic, and Tunisia. The following were elected: Colombia (86), Kenya (85), Nigeria (85), Costa Rica (84), Tunisia (83), Malagasy Republic (80), Congo (Brazzaville) (73), Philippines (64), and Czechoslovakia (61).

South Africa, which had been a member of the Council since the inception of ICAO, was not a candidate at this election.

At its first meeting held after the Fifteenth Session of the Assembly, the Council re-elected Mr. W. Binaghi as President.

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<sup>26</sup> Czechoslovakia was defeated in the election for the second category but was elected to the third category.