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# Aircraft Operated by International Operating Agencies

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# AIRCRAFT OPERATED BY INTERNATIONAL OPERATING AGENCIES

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THE QUESTION of the application and interpretation of the last sentence of Article 77 of the Chicago Convention was again discussed by ICAO at the Fifteenth Session of the Assembly at Montreal in June and July. The sentence in question reads as follows: "The Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international agencies."

The question of the application and interpretation of that provision under a given set of conditions had been brought before the ICAO Council for the first time in December 1959.[1] The League of Arab States proposed to establish a Pan-Arab Airline composed of members of the League and wanted the aircraft of that airline to be registered in other than one of the constituent States. The Council of ICAO established a Panel of Experts which met in June 1960. With respect to the main question, namely "whether, having regard to the provisions of the Chicago Convention, it would be lawful for an aircraft to be registered either with the international operating agency itself or with an international organization authorized by its constituent instrument to register aircraft," the majority of the Panel concluded as follows:[2]

> Recognition of the legality of such registration would be tantamount to substituting the agency or the organization in place of a sovereign State in so far as concerns the obligations which the Convention imposes on the State of registration of an aircraft. In the opinion of the Panel, the Council

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[1] As early as 1948 the Assembly of ICAO had adopted Resolution A2-13, ICAO Doc. 7670 Vol. I, which requested

> that the Council, in accordance with the normal procedures, promptly formulate and circulate to Contracting States its views on the legal, economic and administrative problems involved in determining the manner in which the provisions of the Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.

On request of the Council, the Air Transport Committee submitted a report (C-WP/2284, 15 Nov. 1956) containing a study of questions relating to problems of nationality and registration and recommended that the study be referred to the Legal Committee. Without examining the merits of that study the Council referred the report to the Legal Committee as requested, and the Legal Committee included the question of problems of nationality and registration of aircraft operated by international operating agencies in the "inactive" Part B of its work program. It was only in connection with the request of the Arab States that the Legal Committee established a Subcommittee to report on the problems.

[2] ICAO PE-77/Report which is also attached to C-WP/3186. For discussions of that report and its conclusions, see Mankiewicz, *Aéronefs internationaux*, 1962 Annuaire Français de Droit International 685, 701.

> cannot, under Article 77, make a determination which would have the effect of substituting the obligations and undertakings of an international operating agency or an international registering authority for those of a sovereign Contracting State.

On the other hand, the Panel was unanimous in finding that:

1. An international operating agency, if Article 77 is to apply to it, must be an agency constituted only by States parties to the Convention;

2. A determination by the Council pursuant to Article 77 of the Convention would be binding on all Contracting States, if that determination is made within the scope of the authority given to the Council by that Article; and

3. The expression "provisions of this Convention relating to nationality of aircraft" means not only Articles 17 to 21 (which constitute Chapter III entitled "Nationality of Aircraft") but also all other articles of the Convention which refer to nationality of aircraft directly or by implication, *i.e.* by the use of such expressions as "aircraft of a Contracting State" or "the State in which an aircraft is registered."

In November/December 1960, the Council of ICAO considered the Report of the Panel of Experts and agreed with its unanimous decisions, but did not endorse explicitly the majority decisions. It so informed the League of Arab States.[3]

At its Fourteenth Session (Rome, 1962), the Assembly of ICAO approved a recommendation of its Legal Commission to include the subject "Problems of Nationality and Registration of Aircraft Operated by International Agencies," in the Work Program of the Legal Committee and to instruct the Council of ICAO that if a question concerning the legal aspects of this subject were received, to request the Chairman of the Legal Committee to appoint a subcommittee to study that matter and report thereon to the Legal Committee.[4] Such request was submitted in November 1964 by the Union Africaine et Malgache de Cooperation Economique which stated that eleven members had constituted a multinational airline called Air Afrique and did not wish the aircraft of that airline to be registered nationally.[5] Pursuant to that request and instructions of the ICAO Council, a Subcommittee was established by the Chairman of the Legal Committee which met in Montreal 15-24 July 1965, under the chairmanship of Mr. A. Garnault (France). The Subcommittee decided to limit its study at its first session to the question of the manner in which, pursuant to the last sentence of Article 77 of the Chicago Convention, the provisions of that Convention relating to nationality of aircraft should apply to aircraft operated by international agencies. It reserved for study at a further session the question of the composition of an international operating agency within the meaning of Article 77.[6]

[3] See Minutes of the 41st Session, 3d, 8th and 9th meetings of the Council, ICAO Doc. 8106-3-8-9 C/927.

[4] ICAO Doc. 8279 A14-LE/2.

[5] ICAO C-WP/4115.

[6] See LC/SC Article 77/Report (24 July 1965). The further information given here on the work and the conclusions of the Subcommittee is based on that Report.

The Subcommittee agreed with previous decisions of the Panel of Experts and the Council that:

> provisions relating to nationality of aircraft mentioned in Article 77 include generally all articles of the Convention which either expressly refer to nationality of aircraft or implicitly and that a "determination" made by the Council under Article 77 will be binding on all Contracting States provided it is made within the scope of the authority given to the Council by that Article.

However, members of the Subcommittee differed on the question of the scope of that authority. The majority expressed the view that the Council could (1) permit registration of an aircraft otherwise than in a State and (2) interpret the relevant provisions of the Chicago Convention so as to permit such non-national registration to be carried out, for the simple reason "that otherwise the last sentence of Article 77 of the Convention would be meaningless." Speaking for the member States of Air Afrique, the delegates of Congo (Brazzaville) and Senegal suggested that such non-national registration could be achieved by having aircraft of Air Afrique "jointly registered" in a special register maintained in each of these States on behalf of all of them. A minority of the members of the Subcommittee felt that, in order to make such "joint international registration" possible and to give it the effect attached by the Chicago Convention to registration in a Contracting State, it would be necessary to amend several Articles of the Convention, *e.g.* Articles 18, 20, 21, and 30-33. If the Council, in the determination made under Article 77, were construing these and other articles so as to accommodate aircraft which were "jointly registered," such action would for all practical purposes be tantamount to amending the Convention. In the minority's view, Article 77 cannot be construed as giving such extensive powers to the Council, particularly since in the absence of any special rule, the Council could take such action, *i.e.* adopt such "determination," by a simple majority of 14 votes, in accordance with Article 52 of the Convention.

The Subcommittee finally adopted the following resolution by majority votes:

> The Subcommittee advises:
>
> 1. That the provisions of the Chicago Convention—without it being necessary to amend them—are not an obstacle to the principle of joint international registration;
>
> 2. That the determination made by the Council under Article 77 has sufficient effect for the international registration in question to be recognized by the other Contracting States and for the aircraft so registered to have the benefit of rights and privileges equivalent to those granted by national registration.
>
> It being understood:
>
> a. That the States that have constituted the international operating agency shall be jointly and severally bound to assume the obligations which, under the Convention, attach to a State of registry;
>
> b. That the operation of the aircraft concerned shall not give rise to any discrimination against the aircraft registered in other "Contracting States."

Clause 1 was adopted by a vote of 10 to 4, with 1 abstention, the Representative of the United States of America pointing out that his negative vote should be construed only as reflecting his belief that there was not yet sufficient legal study to warrant a conclusion diametrically opposed to that in the 1960 Panel of Experts' report.

Clause 2 was adopted by a vote of 10 to 3, with 2 abstentions, the abstentions being explained by the belief that there had not been sufficient legal study of this question.

Regarding sub-paragraphs a. and b. of Clause 2, members of the Subcommittee who had not voted in favor of the adoption of Clauses 1 and 2 stated that if joint international registration were admitted, the determination made by the Council should certainly include these two subparagraphs.

The present writer sides with the majority of the Subcommittee and submits that registration of aircraft of an international operating agency on a "non-national" register has been recognized as a desirable alternative to national registration by the framers of the Chicago Convention and that the last sentence of Article 77 was included for that specific purpose.[7] However, there may exist various means and ways of registering such aircraft other than on a national register. Moreover, there are various alternatives with respect to the procedures which need to be established to discharge the obligations imposed by the Chicago Convention on the State of registry and which obviously must be fulfilled by some other legal entity in the case of aircraft not nationally registered. It is therefore submitted that the "determination" to be made by the Council under the said Article 77 cannot be made *in abstracto* but only with respect to a definite method of non-national registration chosen by the States composing the international operating agency. In other words, in this writer's opinion, a request for a "determination" under Article 77 must be accompanied by a complete and detailed explanation of the ways and means by which the interested parties intend to register the common aircraft and to discharge, or have discharged, the obligations attaching to the State of registry under the Chicago Convention. It is quite evident that the "determination" with respect to "in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies" will be entirely different where such aircraft are registered with a public international organization, *e.g.* UN, ICAO, or an organization created for that purpose by the members of the common airline, or by any other group of States such as the members of EUROCONTROL, ASECNA, etc., and where one or several of the interested States establish a special or joint registry, as distinct from their national registry, for the sole purpose of registering common aircraft. There can also be no doubt that the obligations which the Chicago Convention imposes on a Contracting State with respect to aircraft on its national registry—including the issuance or validation of

[7] ICAO PE-77/Report, *supra* note 2, at para. 70.

certificates of airworthiness, licenses of personnel and the enforcement of compliance with applicable air rules and regulations—must necessarily be compiled with in respect to non-nationally registered aircraft and that the choice of the body responsible as well as the procedures for achieving this aim depend on the kind of registration chosen by the international operating agency. While the "manner" in which all that shall be done will be "determined" by the Council under Article 77 in a decision binding upon all Contracting States, such "manner" cannot be the same in the case of registration with a public international organization and particularly where one or several of the States concerned are directly involved in the registration. Thus, it is only on the basis of a concrete scheme proposed by the international operating agency or by the parties thereto that the ICAO Council can frame the "determination" which it is required to make under Article 77. Therefore, the request for a "determination" must set forth these particulars as agreed upon by the petitioners.

Registration with an intergovernmental organization does not present serious difficulties as has been shown in another context.[8] If such registration is chosen, the Council of ICAO may use the power given to it in Article 77 to "determine":

1. that such registration is permissible, provided the organization complies with the conditions which will also be determined by the Council with respect to the discharge by the organization in question of the obligations of a State of registry under the Convention;

2. that aircraft so registered are deemed, for the purposes of articles of the Chicago Convention specified in the "determination," to be registered respectively "in a Contracting State" or "in another Contracting State"; and

3. that with respect to other articles specified in the "determination," the organization has the duties and privileges of a Contracting State.

In the case of joint international registration, the principle of which has been accepted by a majority of the Subcommittee of the Legal Committee, much will depend on the actual mechanics, not yet settled, of such registration and on the interpretation given to Article 17 of the Chicago Convention.

The promoters of that registration system had suggested that the aircraft be registered on a "joint registry" to be kept, in parts, by each or some of the member States of the common airline, each part so kept by a single State, as well as a registry itself, being distinct and separate from the national registry of the State concerned. The argument can be made that, in spite of the peculiar status of the "joint registry," each aircraft would in fact be registered "in a State" and, therefore, Article 17 of the Chicago Convention would apply with the result that each aircraft will have the nationality of the State keeping that part of the "joint registry" on which such aircraft is registered. In other words, such registration

[8] *Id.* at 712, para. 58.

would not be "international." Consequently, no "determination" will be required nor can be applied for under Article 77 of the Convention. This conclusion is also supported by the fact that nothing in the Chicago Convention compels a Contracting State to have but one aircraft registry.

Neither is there anything in the Chicago Convention which obliges a Contracting State to use but one and the same nationality mark for all aircraft registered therein. Annex 7 of the Chicago Convention entitled "Aircraft Nationality and Registration Marks" refers in various parts to "the nationality mark" but does not specifically outlaw the use of several such marks by the same State. The requirement established by Annex 7 with respect to the selection of nationality marks is stated in paragraph 2.3 as follows:

> The nationality mark shall be selected from the series of nationality symbols included in the radio call signs assigned to the State of Registry by the International Telecommunications Regulations. The nationality marks selected shall be notified to ICAO.

One may conclude that if the International Telecommunications Union assigns two different nationality symbols to a State, the aircraft registered on a part of a "joint registry" may use one of these marks, the other being reserved for aircraft registered on the national registry. In this way, the international operating agency will achieve having a different and distinct "nationality" mark for its aircraft. But since these aircraft would nevertheless be registered "in a State," no action of the Council under Article 77 of the Chicago Convention would be required.

Contrary to the construction of Article 17 considered in the preceding paragraphs, one may argue that registration on a "joint registry," as was suggested within the ICAO Subcommittee, is not properly speaking "registration in a State" within the meaning of that Article. If so, difficulties arising from the application of certain articles of the Convention will be overcome if the Council makes a determination[9] to the effect that aircraft jointly registered be deemed, for the purpose of specified articles, to be registered either "in a (Contracting) State"[10] (*viz.*, in each of the member States of the international operating agency) or "in another Contracting State."[11]

There would still remain the question of issuance or validation of certificates and licenses under Articles 30-33 as well as the case of Article 26 relating to investigation of accidents; in the latter case, it can barely be admitted that each of the member States of the airline could be entitled "to appoint observers to be present at the inquiry." An avoidance of that difficulty would be for the States concerned to designate, with respect to each aircraft or a group of aircraft registered in a given part of the joint

[9] It will be noted that the Chicago Convention uses the expressions "aircraft registered in a Contracting State," "aircraft of a Contracting State," "national aircraft" (as well as "aircraft registered in another Contracting State," "aircraft of other (Contracting) States," etc.), indiscriminately. This difference in language will have to be reflected in the "determination" made, and the interpretation given, by the Council.

[10] For the purposes of such articles as Articles 9, 11, 12, 15, etc.

[11] For the purposes of such articles as Articles 5, 7, 9, 15, etc.

register, the State charged with the respective duties of issuance or validation of certificates and licenses and entitled to the privileges under Article 26. Such designation would have to be made before any determination is made by the Council of ICAO, and the latter should so be informed so that its "determination" would contain the designation of the State or States in order to make it binding on all States parties to the Chicago Convention. Such designation of a State for the purpose of specified articles of the Convention would not be a complete innovation, as such procedure is already within the framework of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft. Article 18 of the Tokyo Convention provides that, in the case of aircraft operated by international operating agencies and not registered nationally, the member States of such agencies "shall, according to the circumstances of the case, designate the State among them which, for the purpose of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States parties to this Convention."

The registration of aircraft on a non-national basis also raises legal questions outside the framework of the Chicago Convention, but these questions are of no concern to the Council of ICAO which is only called upon to decide on the application of provisions of the Chicago Convention to such aircraft.[12]

As to the further question of whether the present system of public and private international law makes it legally impossible to operate aircraft internationally which are not registered with a State and whether such aircraft would necessarily be pirate aircraft, it will be recalled that Mr. G. P. A. François, the Special Rapporteur appointed by the International Law Commission to study "the right of international organizations to sail vessels under their flags," has concluded that, "the United Nations, being unable to offer the same guarantees as States for the orderly use of the seas, under general international law is not entitled to register its own ships."[13] However, Mr. François has suggested certain specific steps to be taken by members of the United Nations in order to register ships with the United Nations. It has been suggested by this writer in another context that, having regard to Article 77 of the Chicago Convention, these conclusions do not necessarily apply to aircraft, and that nothing in the rules of international law as applied to aircraft prevents their registration otherwise than in a State.[14]

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[12] ICAO PE-77/Report, *supra* note 2, at paras. 47-71.
[13] U.N. Doc. No. A/CN.4/103 (1956).
[14] ICAO PE-77/Report, *supra* note 2, at paras. 47-51.