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INTERNATIONAL REVIEW

NATIONALITY AND REGISTRATION OF AIRCRAFT — ARTICLE 77 OF THE CHICAGO CONVENTION

By DR. BIN CHENG†

Nationality of aircraft is a fundamental principle of the Chicago Convention whether aircraft are individually operated or whether they are the subject of joint or international operation. There is now an accelerating trend toward joint operation with the status of aircraft thus becoming a problem of growing importance in international civil aviation. The problem is not limited in its significance to air law, and the solution adopted is likely also to influence the future development of the law of the sea, space law, and the law of international institutions. For this reason, the Air Law Committee of the International Law Association included in its work program the subject of nationality and registration of aircraft with special reference to Article 77 of the Chicago Convention. Early in 1966 the Rapporteur, Professor John Cobb Cooper, distributed to the Committee a preliminary memorandum outlining the general problems which he felt should be included in the subject matter and asking for comments of the members. The following are what he considered the basic questions:

(a) Does the Council of ICAO have the power to authorize international registration of aircraft, waiving the necessity for the registration of such aircraft by an individual member State?
(b) If so, are such aircraft entitled to the rights and privileges accorded under the Chicago Convention to aircraft which have been registered with a particular State and have thus acquired the nationality of such State?

Dr. Bin Cheng, Chairman of the Committee, submitted the following memorandum. It subsequently became Annex C to Professor Cooper’s Report which was adopted by the Air Law Committee at its meeting of 22 June 1966 for submission to the Fifty-Second Conference of the International Law Association at Helsinki in August, 1966. Dr. Cheng’s memorandum is of great importance presenting certain new, original, and valuable suggestions, and the Journal wishes to acknowledge its thanks to the author and to the International Law Association for permission to reproduce it.

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I. JOINT AND INTERNATIONAL ORGANIZATIONS DISTINGUISHED

1. The Chicago Convention in its Chapter XVI (i.e., Articles 77-79), which is derived from Article X of the Canadian draft,\(^1\) obviously permits and, where appropriate, even encourages ICAO members to form pools, joint organizations, or international agencies to operate air services. For the purpose of the Convention, "'air service' means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo."\(^2\)

2. Article 77 of the Convention draws a clear distinction between "joint operating organizations" and "international operating agencies," and its last sentence refers only to "international operating agencies." On the other hand, Article 79 mentions only "joint operating organizations," but not "international operating agencies." While the Convention probably sees no great difference between the words "organization" and "agency," it attributes two clearly different meanings to the adjectives "joint" and "international."

3. Joint operating organizations are those established by States through their Governments or their airlines, which may be State-owned or privately-owned,\(^3\) for the purpose of operating air services. Inasmuch as they may be formed even of privately-owned airlines, they are not of a type that would be endowed with international legal personality. Examples include Tasman Empire Airways, British Commonwealth Pacific Airlines, Ltd., Central African Airways Corporation, East African Airways Corporation, S.A.S., and probably also Air Afrique.\(^4\)

4. International operating agencies are also organizations established to operate air services, but they and, where appropriate, their parent organizations are international in character, being the result of treaties between States and are endowed by their participating States with international legal personality, as well as legal capacity in their municipal legal systems. They fall into two types which are treated differently by the Chicago Convention, if account is taken of the preparatory work of the Convention.

Type I consists of those established by public international organizations, the right of which to engage in international air navigation under the terms of the Convention is recognized by ICAO.\(^5\) They are not those referred to in the first sentence of Article 77, but they do come under the last sentence of Article 77.

Type II consists of those coming under the first, as well as the last, sentence of Article 77. They are inter-governmental agencies established

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\(^1\) See PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE (Chicago Conference of 1944) 370, 581 (1949) (hereinafter Chicago Conference).


\(^3\) Chicago Convention, art. 78.

\(^4\) Chicago Convention, art. 96a.

\(^5\) Chicago Convention, art. 79.


\(^7\) See paras. 5-11 infra, 41-45 infra.
by member States of ICAO *jure imperii*. Those established by member States through their Governments *jure gestionis* or through their designated airlines fall within the category of joint operating organizations contemplated in Article 79 which is *not applicable* to international operating agencies. A possible illustration of Type II international operating agencies would be the European Organization for the Safety of Air Navigation (EUROCONTROL), with its air traffic services Agency, if EUROCONTROL had been established to operate air services, and not to control air traffic.  

5. Provision for the establishment of Type I international operating agencies (they would hardly have come under the category of joint organizations) by ICAO, upon request received from the United Nations Security Council, was made in Article IX(3) of the Canadian draft. Under Article II(5) of the draft, these operating agencies had the right to carry international traffic to and from ICAO member States. This proposal apparently did not receive support and was not repeated in the subsequent tripartite draft presented by Canada, the United Kingdom, and the United States.

II. POWER OF THE ICAO COUNCIL UNDER ARTICLE 77

6. In the Canadian draft, there was no provision that aircraft of ICAO operating agencies should be registered in individual member States or that such agencies should be "subject to all the provisions of" the Convention. On the other hand, the last sentence of Article 77 would have been applicable to such aircraft, with the result that the ICAO Council would have had a free hand in determining in what manner the provisions of the Convention relating to nationality of aircraft should apply to such aircraft or aircraft operated by other Type I international operating agencies and entitled to engage in international air navigation under the terms of the Chicago Convention.

7. Since, however, ICAO is not now competent to establish such operating agencies without an amendment of the Convention, and there are no other Type I international operating agencies with the right to engage in international air navigation under the terms of the Chicago Convention, this power of the ICAO Council under the last sentence of Article 77, in so far as Type I international operating agencies are concerned, is at present inoperative, but probably not extinct. It may be of interest to observe that a Canadian representative to the ICAO Council expressed a very similar view many years after the Chicago Conference.

8. On the other hand, according to the first sentence of Article 77, Type II international operating agencies, as well as pooled services and
joint operating organizations, "shall be subject to all the provisions of this Convention."

9. Consequently, aircraft operated in pooled services or by joint organizations and Type II international operating agencies have to conform, inter alia, to Articles 17-21 of the Convention in order to engage in international air navigation under the terms of the Convention.11

10. The last sentence of Article 77 is not applicable to either pooled services or joint organizations.10

11. In the light of paragraphs 8 and 9, the power of the ICAO Council under the last sentence of Article 77, in respect of Type II international operating agencies in contradistinction to Type I international operating agencies,11 is limited merely to determining in what manner the provisions of the Convention relating to nationality, without having to be modified—at least in substance—shall be applied to aircraft operated by such agencies,12 for instance, by specifying a solution similar to that incorporated in Article 18 of the 1963 Tokyo Convention on Offenses on Board Aircraft.16

III. STRUCTURE OF OPERATING ORGANIZATION NOT TO BE EQUATED WITH REGISTRATION

12. The problem which has caused difficulty and controversy is not, strictly speaking, that of operating air services by "aircraft operated by international operating agencies" or, for that matter, by aircraft operated by joint organizations or in pooled services, because services operated in pool, by joint organizations, and by international agencies, can all make use of aircraft which are individually registered each in a contracting State and no problem will then arise in applying the provisions of the Convention relating to nationality to such aircraft.

13. For the same reason, it would not be correct simply to equate the problem of joint operating organizations with that of dual or multiple nationality resulting from joint registration of aircraft by two or more States,13 or the problem of international operating agencies with what may be called "internationality" or "institutionality" of aircraft resulting from international registration of aircraft by an international institution possessing international legal personality.18

14. By "internationality" or "institutionality" of aircraft is meant the same relationship between an aircraft and an international institution possessing international personality as that between an aircraft and its national State. While it is recognized that this relationship, outside the context of the Chicago Convention, might be acquired through ownership
or perhaps even operational control, as well as registration, for the sake of convenience, the question of the possibility for international organizations to confer their internationality on their aircraft is subsumed under that of international registration.

15. Both the 1960 ICAO Panel of Experts and the 1965 Report of the Subcommittee on Article 77 of the ICAO Legal Committee have rightly perceived that the main problem involved in operation of air services by joint or international operating organizations under the terms of the Chicago Convention is one relating to the general question of registration and nationality of aircraft under the Convention. The principal provisions are Articles 17-21. Several other articles are, however, also relevant. Both bodies whose contributions to the elucidation of the subject under discussion have been invaluable have, however, each in its own way, ignored one or another of the distinctions which it is felt ought to be made, such as those between joint organizations and international operating agencies, between joint registration and international registration, between the structure of the organization and the nationality of the aircraft it operates.

IV. THE OVERRIDING CHARACTER OF ARTICLES 17-21

16. Articles 17-21 are derived via Article 19 of the United States draft and Articles XVI-XIX of the Canadian draft from Chapter II of the 1919 Paris Convention.

17. The reference to the Paris Convention is intended to draw attention inter alia to the relevance of the history of the Paris Convention for the interpretation of the Chicago Convention.

18. The reference to the Canadian draft is intended to draw attention inter alia to the unavoidable inference that, in the opinion of the Canadian Government which also proposed that ICAO should be empowered to establish operating organizations with aircraft presumably not registered in any member State, internationality of aircraft was not only practicable but also not incompatible with the fundamental fabric of the Chicago Convention, even though the provisions of the Convention relating to nationality would have to be suitably adapted by the ICAO Council before they could apply to such ICAO aircraft. In particular, the Canadian Government must have considered coexistence between internationality of aircraft and Articles 17-21 possible.

19. A further inference is that, in the opinion of the Canadian Government, which made the proposal, services operated in pool, joint organizations, and Type II international operating agencies, which were per-

19 Cf. para. 28 infra.
20 Cf. paras. 30, 35 infra.
21 Cf. paras. 28, 31 infra.
22 1 Chicago Conference 554.
23 Id. at 570.
24 2 Chicago Conference 1348.
25 See paras. 5, 6 supra.
26 See para. 1 supra.
mitted subject to compliance with "all the provisions of the Convention," would be able to operate within the terms of Articles 17-21.

20. It must have intended, consequently, to limit the power of the ICAO Council under the last sentence of Article 77 in relation to Type II international operating agencies merely to determining how they can operate their aircraft within the provisions of the Chicago Convention, including Articles 17-21, without modification.

21. It follows that, save in the case of aircraft owned and operated by Type I international operating agencies the right of which to engage in international air navigation under the terms of the Chicago Convention ICAO members may at some future date recognize, the permissibility under the Chicago Convention of no registration, dual registration, multiple registration, joint registration, and international registration of aircraft has to be examined primarily by reference to Articles 17-21, without assistance from the last sentence of Article 77.

22. A further reason why this interpretation appears correct is that, if any of the above types of registration are not permissible under Articles 17-21, it would be difficult to understand why it should be made permissible, through the last sentence of Article 77, solely for aircraft operated by Type II international agencies engaged in scheduled air services. If, for instance, dual registration is made possible for aircraft operated by Type II international operating agencies, why should it be denied to private aircraft or aircraft engaged in commercial non-scheduled flights, in pooled services, in scheduled services operated by the ordinary airlines or by joint operating organizations? Articles 17-21 must consequently be considered overriding in character. What is said below regarding registration is thus true of all aircraft intending to engage in international navigation under the terms of the Chicago Convention, with the exception of those operated by Type I international operating agencies.

V. REGISTRATION AND DUAL REGISTRATION

23. First of all, it seems clear that every aircraft, in order to engage in international air navigation under the terms of the Convention must be registered, even though the Convention may not be entirely specific on the subject. Witness, for instance, the importance attached to registration in Article 21, and see also Articles 20 and 29.

24. Dual or multiple registration of an aircraft "in more than one
State is, however, forbidden by Article 18 of the Convention. Dual or multiple registration means the registration of an aircraft by its owner or operator in more than one State with the result that the aircraft has more than one nationality. Unless there is coordination between the States concerned, both negative and positive conflicts of jurisdiction will almost inevitably follow which, as well as other undesirable consequences, might easily open the door to abuse.\(^{30}\)

VI. JOINT REGISTRATION

25. The position is different in the case of joint registration where two or more States maintain a joint register. Aircraft borne on such a register would also have dual or multiple nationality, but in this case the States maintaining the joint register would doubtless have taken measures in order to remove possible conflicts of jurisdiction. A joint nationality mark would probably also be selected. From this point of view, it is to be doubted whether the majority of the 1960 Panel was correct in saying that aircraft entered in a joint register would have “no nationality,”\(^{38}\) unless, in its opinion, Article 18 prohibited joint registration and consequently rendered it void. But this would be begging the question; for the question is whether Article 18 permits joint registration. Furthermore, it is more than doubtful:

(i) whether Article 18 really prohibits joint registration;
(ii) whether, even if it does, it can have the effect of depriving the aircraft entered in a joint register of all its nationalities; and
(iii) whether, assuming for argument’s sake that it can, it will deprive the aircraft of all its nationalities, including its active nationality.

Even Article 6 of the 1958 Geneva High Seas Convention does not purport to have such far-reaching effects. Its paragraph 2 merely permits contracting States to “assimilate” a ship sailing under two or more flags to a “ship without nationality” in the event of the ship “using them according to convenience.”

26. In fact, joint registration does not contravene at least the wording of Article 18; for presumably such a register will either be kept in one of the participating States or a part of it will be maintained in each of the participating States, and actual registration in one State will be deemed sufficient. It is not impossible to interpret Article 18 as prohibiting only actual and uncoordinated, but not joint and merely constructive, registration in more than one State. Moreover, if two or more ICAO members which exercise condominium over a territory establish a joint register and confer their nationalities on aircraft entered in the joint register, will they be contravening Article 18? It is to be doubted.

27. Furthermore, it does not appear that joint registration is incom-


compatible with either the letter or the spirit of the remaining provisions of the Chicago Convention. The status of such joint registering States as parties to the Convention is in no way affected. In so far as their rights and obligations in relation to aircraft of their registration are concerned, what is involved in most cases is merely to interpret the words “State of registration” as meaning also “States of registration” and this can hardly be regarded as contrary to the accepted rules of interpretation. An aircraft with joint registration is to be considered an aircraft registered in ICAO member States and entitled to the privileges conferred by the Convention on such an aircraft only if all the joint registering States are ICAO members. As regards the obligations of the joint registering States under the Convention in respect of such an aircraft, each of the registering States is a registering State of the aircraft for the purpose of the Convention. The problem becomes one which is far from being unknown to general international law. If a State assumes certain treaty obligations in respect of its nationals, it is no less bound by these obligations in cases where its nationals have dual or multiple nationality.

28. In this regard, the objection of the majority of the 1960 Panel does not appear to be either convincing or even pertinent. In its view:

only aircraft having the nationality of contracting States are entitled to the privileges of the Chicago Convention since by the terms of that treaty such privileges are given only to States as distinguished from international organizations.

But on the assumption that these aircraft, even if they have a joint nationality mark, have the nationalities of all the registering States, the privileges they enjoy would merely be the privileges of their registering States. No “international organization” is involved. The fact that the aircraft may be operated by either joint operating organizations or international operating agencies is in reality irrelevant; for aircraft with joint registration may well be operated also by individuals or airlines that have only one nationality. In this regard, the majority view of the Panel erroneously equates joint registration with joint or perhaps international operating organizations, and, if valid, would lead to the rejection of the possibility of joint or international operating organizations. This would be contrary to the express provisions of Articles 77-79 and what is already daily occurrence; for both joint operating organizations and public international institutions are today perfectly able to operate within the terms of the Chicago Convention by using aircraft registered in individual ICAO member States. Rights of commercial entry and exit are separate issues.

29. Indeed, the preparatory work of Articles 77-79 of the Convention, which are derived from Article X of the Canadian draft, seems to indi-
cate that the permissibility of joint registration was taken for granted, bearing in mind that Chapter II of the Paris Convention was in substance also to be found in the Canadian draft. Thus paragraph 11 of the Summary of the Canadian draft stated:

Two or more member States may decide that the best way of operating all or some of the air services between them is not by rival companies each carrying a national flag but by a joint organization. The member States are not prevented from establishing such joint operating organization..."46

The notion of a joint flag seemed implicit. Moreover, it may be observed that the last sentence of Article 77 mentions only "international operating agencies" and not "joint organizations,"47 assuming thus, it would appear, that "joint organizations" carrying a "joint flag" (presumably on their aircraft) would raise no special problem requiring intervention by the Council.

30. To this extent, it seems that, adopting the basic idea in Professor Kelsen's view on interpretation48 that, except for purposes of authoritative or authentic interpretation, most legal rules are in truth polysemous,49 the interpretation that "the provisions of the Chicago Convention—without it being necessary to amend them—is not an obstacle to the principle of joint registration"50 is certainly not an impossible one. The same is, however, not necessarily true of international registration,51 as was apparently assumed by the 1965 Resolution of the Legal Subcommittee which used the rather ambivalent expression "joint international registration."

31. But, if joint registration were deemed permissible under the existing Chicago Convention, it seems highly desirable, from the practical point of view, that the last sentence of Article 7752 should be so re-interpreted and stretched beyond its present wording as to allow the ICAO Council to attach certain conditions to "aircraft with joint registration" instead of simply determining "in what manner the provision of this Convention shall apply to aircraft operated by international operating agencies." Paragraph (2) of the 1965 Resolution of the Legal Subcommittee appears to assume that this re-interpretation of the last sentence of Article 77 is possible, but in reality a substantial de facto amendment of this provision would be involved. If such an amendment were accepted, whether de facto or de jure, the Council might wish to incorporate inter alia the substance of the two eminently reasonable provisos contained in the 1965 Resolution of the Subcommittee. It might also wish to require, as a prerequisite to the establishment of a joint register, that the participating

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46 See paras. 16-22 supra.
47 See paras. 2, 10 supra.
50 Cf. Resolution of the 1965 Session of the ICAO Legal Subcommittee, para. 1.
51 See paras. 35-45 infra.
52 See paras. 6-11 supra.
States establish joint aeronautical authorities similar to the East African Common Services Organization or the Central African Higher Authority for Civil Air Transport and take such other steps as may be necessary in order to obviate potential conflicts of jurisdiction between the participating States and to prevent possible abuses on the part of the operators. The existence of joint or common aeronautical authorities will, from the standpoint of the other contracting States, facilitate the application of such provisions of the Convention as, for instance, Article 26 on investigation of accidents.

32. The main objection against joint registration is, however, to be found in the history of Articles 17-21, which, as has already been pointed out, are derived from Chapter II of the 1919 Paris Convention. In this regard, the learned Rapporteur has rightly drawn attention to what the Aeronautical Commission of the 1919 Peace Conference regarded as the basic principles to be incorporated into the Convention: "Reconnaissance du principe que tout aéronef doit posséder la nationalité d'un Etat contractant et que tout aéronef doit être inscrit sur les registres de l'Etat dont il possède la nationalité." This principle was originally proposed by the United States, but it found expression also in Article 3(v) of the British Draft Convention: "Nationality shall not be conferred upon an aircraft by more than one of the contracting States."

Military considerations appear to have lain behind the prohibition of dual nationality and of registration by a contracting State of aircraft which were not wholly owned by its own nationals. The subsequent amendment of Article VII in 1929 allowing every contracting State to make its own rules governing registration removed much of the ratio legis prohibiting dual nationality. Nevertheless, it must be recognized that what was originally intended to be a provision prohibiting dual nationality has been retained in Article 18 of the Chicago Convention.

33. The more explicit evidence of the original intention of the contracting parties to prohibit dual nationality, the desirability of certain conditions being attached to the establishment of joint registration, and the need of a substantial de facto amendment of the last sentence of Article 77 of the Convention in order to achieve this objective combine to tilt the balance in favor of the view that a de jure amendment of the Chicago Convention is needed in order to permit joint registration.

34. In view of the general compatibility of joint registration with the basic fabric of the Chicago Convention, and the practical need felt by many States for such joint registration, it is suggested that ICAO should give urgent consideration to such an amendment. In this connection, it may be observed that it is certainly desirable that international organizations should, in principle, avoid de facto amendments of their constitu-

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51 See paras. 16-17 supra.
52 2 Chicago Conference 1384. See also Roper, LA CONVENTION INTERNATIONALE DU 13 OCTOBRE 1919 PORTANT REGLEMENTATION DE LA NAVIGATION AERIENNE 42 (1930).
53 Roper, op. cit. supra note 52, at 217, 274 (art. 1 of the French draft).
tion and conscious deviations from the Rule of Law for the sake of ad hoc expediency.\textsuperscript{55}

VII. INTERNATIONAL REGISTRATION

35. It is suggested that ICAO should at the same time consider the possibility of amending the Convention in order to permit also "international registration" which, with due respect to the Legal Subcommittee, is an entirely different problem from joint registration.\textsuperscript{56}

36. "International registration," or perhaps more accurately, internationality of aircraft\textsuperscript{57} implies the right of an institution possessing international personality to claim and exercise quasi-territorial jurisdiction over aircraft\textsuperscript{58} independently of any State. The institution concerned confers its internationality on the aircraft in much the same way as the State of registration confers its nationality on aircraft entered in its register of aircraft. The problem has already been much discussed in relation to ships.

37. The right of an international institution to bestow its internationality on ships and aircraft (not only through registration, but also through ownership or possibly even operational control) depends entirely on the extent of its own international legal personality which, in turn, depends, first of all, on its own constitution as established by its members and ultimately on recognition by other subjects of international law.

38. In so far as members of an international institution are concerned, there is no reason why they may not confer such competence on the institution they intend to establish or have established. Having done so, they will be bound to recognize such internationality. Non-members which have recognized the full extent of the international legal personality of such an institution may also have to recognize the logical consequences of their own action. Other non-members, however, which have not recognized the international legal personality of the institution remain free whether or not to recognize such internationality, notwithstanding the doctrine of "objective international personality" propounded by the International Court of Justice in the \textit{Reparation for Injuries suffered in the Service of the United Nations} Advisory Opinion (1949).\textsuperscript{59}

39. It may well be that, before States decide to confer such powers on an international institution which they intend to establish, or of which they are members, before an international institution to which such powers have been granted proceeds to exercise them, or before third States recognize the internationality of such an institution over its aircraft, they will all wish to be assured that at least powers exist also for the institution

\textsuperscript{56} Cf. para. 30 supra.
\textsuperscript{57} See para. 14 supra.
\textsuperscript{58} Cf. Cheng, \textit{The Extra-Terrestrial Application of International Law}, 18 \textsc{Current Legal Problems} 132, 134-42 (1965).
concerned effectively to discharge the functions and duties normally incumbent on the national State of an aircraft. If an international institution claims quasi-territorial jurisdiction over aircraft, it should be in a position to exercise it. But ultimately this is a matter which is the concern of the institution and the other subject or subjects of international law in question.

40. That, on a consensual basis, there is nothing to prevent aircraft of an international institution from enjoying all the rights and privileges of aircraft with a nationality and perhaps even more seems to have been the opinion of CINA which at its 13th Session in 1927, in answer to a request from the League of Nations, advised that: "[T]he best procedure for ensuring to aircraft of the League of Nations the possibility of flying freely, even at times of emergency, over the territory of States parties to the Convention of October 13, 1919, consists in inserting provisions to the effect in the said Convention." Reference may also be made to the New Zealand and Australian proposal, put forward at the Chicago Conference, 1944, to internationalize international air transport to Articles II (5) and IX (3) of the Canadian draft, and to Article 7 of the 1958 Geneva High Seas Convention.

41. In many ways, the question now being discussed is the extent, if any, to which members of ICAO are under a duty to recognize the internationality of aircraft. The answer appears to be in the negative.

42. Had the proposal of the Canadian draft that ICAO should be empowered to establish, upon request received from the Security Council, operating organizations to operate international air services been accepted, ICAO members would doubtless have been bound to recognize the ICAO internationality of the aircraft of such operating agencies, should ICAO decide not to register them in any contracting State. Under the last sentence of Article 77, the ICAO Council would then determine in what manner the provisions of the Convention relating to nationality of aircraft would apply to them. The ICAO Council could decide to establish an ICAO register or to institute some other system of identification of ICAO aircraft. Such a determination would be binding on ICAO member States. But, the Canadian proposal not having been adopted, neither ICAO nor ICAO members are bound to recognize the internationality of aircraft of any international institution.

43. Even, for argument's sake, were it admitted that under the last sentence of Article 77 the ICAO Council would be able through a determination to render the internationality of aircraft of either a Type I international operating agency (or its parent body) or a Type II inter-

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62 Chicago Conference 139.
63 See paras. 5-11 supra.
64 Ibid.
65 See para. 7 supra.
national operating agency (or, where appropriate, its parent organization) binding on ICAO member States, all the objections raised by the majority of the 1960 Panel of Experts against "international registration" would still be decisive. The essence of these objections consists in the fact that, inasmuch as such international institutions or operating agencies possess independent international legal personality, they constitute independent international persons who cannot, even through an ICAO Council determination, benefit from the provisions of the Chicago Convention without being parties thereto. They would be aircraft of non-parties to the Convention. Herein lies the fundamental difference between joint registration and international registration, and between a joint operating organization and an international operating agency.

44. But, here again, the objections are not against internationality of aircraft, as such, which is neither legally impossible nor, it would appear, fundamentally incompatible with the basic provisions of the Chicago Convention.

45. While Type II international operating agencies (see para. 4 supra) should, in principle, conform to the ordinary provisions of the Chicago Convention and resort to joint registration of their aircraft, once this has been formally made possible, instead of international registration, international registration might be justifiable in special circumstances. On the other hand, in the case of public international organizations, many of which, especially the United Nations, have already felt for some time the need to operate their own aircraft, individual or joint national registration of their aircraft may often be impractical, inappropriate, or inexpedient. The question has not been sufficiently explored by all concerned why the constitution of ICAO should not be so amended in order to permit international registration and the admission into membership of suitable international institutions satisfying certain minimum requirements, so that aircraft of such institutions which are not "used in military, customs and police services" will be able to operate under the terms of the Chicago Convention, bearing the internationality mark of their registering institution. Indeed such a step would seem to be highly in conformity with the aims and objectives of the Convention as stated in its Article 44, the first and foremost of which is "to ensure the safe and orderly growth of international civil aviation throughout the world." From this point of view, the decision of the International Communications Conference at Atlantic City in 1947 to accept the Secretariat of the United Nations as a "special member" of ITU with all the rights and obligations of a full member, except the right to vote, serves as a useful precedent. It is a precedent that should be commended to the serious consideration of ICAO and other interested international organizations.

66 See paras. 4-11 supra.
68 Chicago Convention, art. 3.
70 Cf. DETTER, LAW MAKING BY INTERNATIONAL ORGANIZATION 141 (1965).
THE DRAFT CONVENTION ON AERIAL COLLISIONS: SOME TEXTUAL CRITICISMS

BY T. J. KELLIHER†

I. INTRODUCTION

While the Montreal Draft, it constitutes a significant improvement on the Paris Draft, it is fortunate that the ICAO Legal Committee decided that the new draft should not be regarded as a definitive one for submission to a diplomatic conference. There are a number of features of the Montreal Draft which on the face of it appear unusual or unsatisfactory and which require further examination by the ICAO Legal Committee and its Subcommittee on Aerial Collisions. The purpose of this short article is to make certain textual criticisms of the Montreal Draft, some of these criticisms relating to matters of substance and others to points of drafting.

II. INTERCHANGE OF AIRCRAFT

As with the Rome Convention of 1952 on Damage Caused by Foreign Aircraft to Third Parties on the Surface (see Article 23), the geographical scope of the Montreal Draft is based on the place of registration of the aircraft (see Article 1). This criterion does not appear to provide for the situation where an operator based in a Contracting State charters an aircraft from an operator based in a non-Contracting State. Set out below

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2 ICAO LC/SC/Aerial Collisions WD. No. 71. For commentary of the draft prepared by the ICAO Secretariat, see ICAO LC/SC/Aerial Collisions WD. No. 72.

are certain examples of possible situations which illustrate how anomalies can arise under the Montreal Draft. For the purposes of these examples, it is assumed that Australia and New Zealand become Contracting States whilst Malaysia and Canada either do not or delay becoming so.

Example 1
Collision occurs over New Zealand. One aircraft is operated by Qantas and is registered in Australia. The other aircraft is operated by CPAL and is registered in Canada. The Draft Convention applies.

Example 2
Collision occurs over New Zealand. One aircraft is operated by Qantas on charter from Malaysian Airways and is registered in Malaysia. The other aircraft is operated by CPAL and is registered in Canada. The Draft Convention does not apply.

Example 3
Collision occurs over the high seas. One aircraft is operated by Air New Zealand and is registered in New Zealand. The other aircraft is operated by Qantas and is registered in Australia. The Draft Convention applies.

Example 4
Collision occurs over the high seas. One aircraft is operated by Air New Zealand and is registered in New Zealand. The other aircraft is operated by Qantas on charter from Malaysian Airways and is registered in Malaysia. The Draft Convention does not apply.

The failure of the Montreal Draft to accommodate the case of interchange of aircraft could be rectified by the inclusion of an additional Article worded along the following lines: “If an operator who is ordinarily resident or has his principal place of business in a Contracting State uses an aircraft belonging to another operator and registered in a non-Contracting State, such aircraft shall, for the purposes of this Convention, be deemed to be registered in the Contracting State using such aircraft.”

There is a precedent in the Montreal Draft itself for departing, in special circumstances, from the criterion of the place of registration. Article 21, which did not occur in the Paris draft, makes special provision for aircraft operated by a multinational airline where the aircraft is not registered in any particular State. Such aircraft are, for the purposes of the Convention, deemed to be registered in each of the States involved, except that if the collision or interference occurs over the territory of any one such State the aircraft is deemed to be registered in that State only.

III. Carriage of Airmail

On the face of it, the words “property carried under an agreement for carriage” used in Article 5(1)(b) and “any other property on board the aircraft if such property is carried under an agreement for carriage” used in Article 10(1)(e) of the Montreal Draft are broad enough to include airmail. Air New Zealand, for example, has a contract with the New Zea-
land General Post Office so that airmail carried by Air New Zealand on behalf of the Post Office appears to be "property carried under an agreement for carriage" for the purposes of the Draft Convention.

The author does not know whether the apparent inclusion of airmail is intentional or the result of an oversight. Whichever be the case, there are compelling reasons for excluding airmail from the ambit of the Draft Convention. Readers will note that the Warsaw Convention of 1929 does not apply to carriage performed under the terms of any international postal convention (see Article 2(2)), and the Hague Protocol of 1955 does not apply to the carriage of mails and postal packages (see Article 2(2)). The exclusion of airmail from the Warsaw-Hague system and its inclusion in the aerial collisions regime could lead to some odd situations. A postal administration, or the sender, or their cessionaries, could bring an action in tort against the air carrier and the damages would not be limited by any international agreement. But in the rare case where the loss should be caused by an aerial collision, the damages recoverable from the carrier at fault would be limited by Article 10(1)(e) to 250 gold francs per kilogram (approximately £2-2-6 or $5.95 per lb.).

Such an anomaly could lead to injustice in recourse actions. The New Zealand General Post Office has limited its liability for insured items of other administration origin to £400 (approximately $1,120) being "the sum adopted in its internal service" as permitted by the Final Protocol to the Vienna Agreement of 1964 concerning Insured Letters and Boxes. Thus, where loss of insured mails is caused by an aerial collision, a sum up to £400 per item could be recovered from the New Zealand General Post Office, but in a recourse action against the carrier at fault the Post Office could recover only £2-2-6 per lb.

In the circumstances, the author feels that airmail must be excluded from the scope of the Draft Convention, and that this should be achieved either by the inclusion of an appropriate definition of the term "property" or by the inclusion of a new Article corresponding to Article 2(2) of the Hague Protocol.

IV. ACUMULATION OF DAMAGES

Article 13(2) of the Draft Convention is designed to prevent a claimant from accumulating damages in excess of the limitation by the device of suing more than one operator or suing both an operator and his servants and agents. "A claimant may not recover more than the maximum amounts specified with respect to death or injury caused to each passenger or damage caused to the property concerned . . . regardless of whether the claim is brought against one or more of the operators or owners of the aircraft involved in the collision or interference or their servants or agents."
Notwithstanding the intent of Article 13(2), it is arguable that the wording adopted, when read together with Article 19, permits aggregation of damages by the simple expedient of proceeding against more than one operator under different Conventions. Article 13(2) states in part that “a claimant may not recover more than the maximum amounts specified in paragraph 1 of Article 10 in the cases therein referred to.” However, the cases referred to in Article 10 specify the limits of the liability of the operator of an aircraft in relation to damage caused to another aircraft or to persons or property on board that other aircraft. The cases referred to in Article 10 do not specify the limits of the operator’s liability to persons or property on board his own aircraft. Moreover, Article 19 contains a savings clause with respect to the Warsaw Convention, whether or not as amended by the Hague Protocol or supplemented by the Guadalajara Convention of 1961. Thus there appears to be nothing in the Montreal Draft to prevent a claimant from recovering in excess of the limitation by proceeding against one operator under the proposed Aerial Collisions Convention and by proceeding separately against the other operator under the Warsaw Convention.

The author believes that the accumulation of damages in this manner is contrary to the spirit of the Draft Convention and that the Montreal Draft should be amended to prevent the possibility of any such aggregation. It is suggested that Article 19 (which is unnecessary and serves no useful purpose) be deleted entirely and that Article 13(2) be redrafted along the following lines:

The aggregate of the amounts recoverable from the operators and the owners of the aircraft and from their servants and agents acting within the scope of their employment who are subject to liability under this Convention or any other international convention or any other legal rules shall not exceed the limits specified in paragraph 1 of Article 10 except as provided in Article 11 or as otherwise provided in such other international convention. The reference to “any other legal rules” is necessary because neither the Hague Protocol nor the Draft Aerial Collisions Convention create a cause of action against servants or agents but merely limit their liability under other legal rules.

V. Miscellaneous

The Report of the Legal Committee’s Fifteenth Session states that the definition of the expression “in flight” is applicable also to aircraft capable of vertical flight (see paragraph 9). On the wording of Article 1(2), this appears to be so only in the uncommon situation where such an aircraft makes a conventional landing, i.e., a landing run. To make it perfectly clear that vertical landings are included, the first part of Article 1(2) could perhaps be reworded as follows:

An aircraft is deemed to be in flight from the moment when power is applied for the purpose of take-off until, in the case of an aircraft which makes a

landing run, the moment when the landing run ends and, in the case of an aircraft which makes a vertical landing, the moment when the landing touch-down ends.

Possibly the last phrase might be better reworded as "the moment when it has alighted on the surface."

The wording of Article 7 seems rather obscure. The author is uncertain whether the expression "any other legal rules" is intended to refer solely to rules created by other international conventions, or whether it is intended also to include national laws. Similarly, the author is uncertain whether the expression "damage other than damage contemplated in Article 4" is intended to refer to damage contemplated in Article 5, or whether it is intended also to refer to damage outside of the scope of the Draft Convention for which liability arises under "any other legal rules." The expression "proved to have been at fault" seems inappropriate, as proof of fault is not required under various legal rules to which, presumably, the expression "any other legal rules" refers. Proof of fault is not required under Article 5 of the Draft Convention nor under the Warsaw-Hague system as fault is presumed; and proof of fault is not required under the Rome Convention as liability is absolute.

In Article 10 it is not clear whether the expression "value" refers (a) to the book or balance sheet value (i.e., cost price less annual provision for obsolescence) or (b) to the market value (i.e., re-sale value) or (c) to the insured value (which, in practice, may correspond to the book value or to the market value or to the replacement value or a sum approximating either value). If it refers to the book value, injustice will result where the market value is greatly in excess of the value shown in the operator's balance sheet, as is often the case. If it refers to the market value, how can this be assessed for aircraft for which there is no market value, for example certain military aircraft or aircraft which are prototypes? If it refers to the insured value, what is the position where, owing to the limited market value of an aircraft, it is not covered by insurance?

An important feature of the Draft Convention is that where damage is caused to persons not carried under an agreement for carriage (e.g., crew), the liability of the offending operator is unlimited for death, injury, or delay caused to such a person. But where destruction, loss, damage, delay, or loss of use is caused to the property of such a person (e.g., the crew's personal effects), the liability of the offending operator is limited to the values specified in Article 10(1)(a) and (b). This conclusion seems to follow from the expression in Article 10(1)(a) "or to any property thereon other than property specified in Article 5." It is anomalous that the offending operator's liability in respect to death, injury, or delay caused to the crew of the other aircraft is unlimited whereas his liability in respect to destruction, loss, damage, delay, or loss of use of the property of the crew of the other aircraft is limited, bearing in mind that the principle of liability is the same with respect to both—proof of fault.
In Article 9 the fault of the operator’s servants and agents acting within the course of their employment, whether or not within the scope of their authority, is attributed to the operator. In Article 12 the servants and agents are also made personally liable when acting within the course of their employment upon proof of fault. The words “whether or not within the scope of his authority” which appear in the former Article should surely also appear in the latter?

VI. SOME LANGUAGE DIFFICULTIES

The words “servants or agents” used in Article 5(2) of the Draft Convention introduce an element of ambiguity by suggesting that servants and agents constitute two separate classes. If a case were to arise before a court in an English-language country, the operator might succeed in rebutting the presumption of liability by proving that his agents took all necessary measures, notwithstanding that his servants did not. This would seem to follow from the word “or” which normally suggests alternatives. The words “for him or them” could be construed in the same way.

To discover the derivation of this wording it seems that one must refer to the legislative history of the Warsaw Convention and the Hague Protocol. As the Warsaw Convention was drafted in French only, there is no authentic English text with international validity. Difficulty arose in finding the precise English equivalent of the French term “préposés.” Looking at the translation scheduled to the United Kingdom Carriage by Air Act of 1932, it can be seen that this term was first translated simply as “agents.” However, later an “explanation” was inserted by Section 54 of the Civil Aviation Act 1949 to declare that “references to agents... includes references to servants.”

The phrase “servants or agents” made its first appearance in the authentic English text of the Hague Protocol. At the Hague Conference, unlike the Warsaw Conference, the drafting had to be done in three languages and the Drafting Committee was conscious of the difficulty. The Secretariat looked into the meaning of the term “préposés” and in consequence the Drafting Committee came to the conclusion that it included both servants and agents. In most places in the English text, the servants and agents have been linked by “and” or “or” according to whichever is appropriate to the context. Generally, where there is a negative (e.g., A servant or agent shall not... )“or” has been used, but this was not intended as an alternative “or” conveying a choice.

As between parties to the Hague Protocol, the Warsaw Convention and the Protocol are to be read and interpreted as a single instrument (see Article XIX). It thus became necessary for English-language countries to check their translations of the text of the Warsaw Convention in order to ensure the adoption of uniform terminology throughout the amended Convention. In the United Kingdom, the words “servants or agents” were substituted for the word “agent” in Article 20 of the new English text
scheduled to the Carriage by Air Act of 1961. Likewise, in New Zealand a
similar substitution was made in the English text scheduled to the Carri-
age by Air Act of 1962. The author believes that the new wording adopted
in both countries is ambiguous and open to misinterpretation. Fortunately,
the potential dangers have been removed by the scheme adopted in both
the United Kingdom and New Zealand statutes. Each scheduled both
English and French texts, and each provided expressly that if there were
any inconsistency the text in French should prevail.

Article 5(2) of the Draft Convention uses the exact words of the
English text of Article 20 of the amended Warsaw Convention. Presum-
ably the French texts of the two Conventions will also be made to corre-
spond exactly. In short, the words “servants or agents” will presumably
be rendered in French as “préposés” and the words “for him or them” as
“leur.” In that case it should hardly matter which text was the more
authoritative, should a case be referred to any international tribunal.
After examining the legislative history, it would be clear to any interna-
tional tribunal that the draftsmen were relying on the Warsaw-Hague
precedent, which equates the word “préposés” with the words “servants
or agents.” But would a domestic court in an English-language country
arrive at the same conclusion? And should a domestic court be required
to examine the legislative history, not only of this Convention but of the
Warsaw Convention and the Hague Protocol as well, to arrive at a mean-
ing contrary to the ordinary and natural meaning of the words? Presum-
ably, too, the final clauses, as in the Chicago Convention, will provide
that each text should be of equal authenticity, and consequently there
will be no prevailing French text for the English-language courts to re-
fer to in order to resolve the ambiguity.

It has been suggested to the author that the ambiguous expressions in
Article 5(2) be replaced with the words “he and those who are his serv-
ants or agents” and “for him and those who are his servants or agents.”
The introduction of the relative shows that servants and agents are a
single class; the retention of the word “or” shows that one does not have to
be both a servant and an agent to qualify as a member of the class. Howev-
er, the author believes that this wording is unnecessarily cumbersome and recommends that the words “servants and agents” and “for
him and them” be substituted for the words “servants or agents” and
“for him or them.”