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INTERNATIONAL LEGISLATION ON AIR NAVIGATION OVER THE HIGH SEAS

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ARTICLE 12 of the Convention on International Civil Aviation signed at Chicago on 7 December 1944 gives somewhat unobtrusively, in its third sentence, broad legislative powers on air navigation over the high seas to the Organization set up by the Convention. It reads as follows:

"Rules of the Air

"Each Contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each Contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each Contracting State undertakes to insure the prosecution of all persons violating the regulations applicable." 2

In contrast with the generally non-binding character of the technical legislation adopted pursuant to the Convention, the rules applicable over the high seas are to be complied with by civil aircraft of Contracting States without possible deviations. As the Annexes to the Convention embodying technical rules are adopted by the Council of the International Civil Aviation Organization (ICAO) by a vote of two-thirds of its members 3 and in principle become effective within three months after their submission to the Contracting States, unless in the meantime a majority of the Contracting States register their disapproval with the Council, the provision on the high seas is a rare example of International legislation by majority decision. It appears worthwhile, in view of its unique character, to consider the numerous and interesting problems of interpretation it raises. They will be examined hereunder in the light of the restrained and wise exercise by the Council of ICAO of its legislative powers to date.

Preparatory work on Article 12 of the Chicago Convention

In view of the delphic vagueness of Article 12 in certain respects, it is not superfluous to explore in some detail the preparatory work on this provision.

When it convened at Chicago on November 1, 1944, the International Civil Aviation Conference had before it two drafts of an International Air Convention, submitted by the United States of America and Canada respectively. Of the two drafts, only the Canadian one included a provision in any way similar to present Article 12. It was numbered Article XXXII, and reproduced Article 25 of the International Convention relating to the Regulation of Aerial Navigation signed at Paris on 13 October 1919:

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1 The opinions expressed herein are the personal views of the writer.
2 The Chicago Convention does not provide expressly for the freedom of flight over the high seas. This rule of customary law has recently been embodied for the first time in an international convention by the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958. See Article 2 of the Convention on the High Seas adopted by the Conference on 27 April 1958.
3 The Council of ICAO is composed of twenty-one Contracting States nominated from the seventy-three States members of the Organization (as of 15 August 1968).
"Each member State undertakes to adopt measures to ensure that every aircraft flying above the limits of its territory and that every aircraft wherever it may be carrying its nationality mark, shall comply with the regulations contained in Annex...."

"Each of the member States undertakes to ensure the prosecution and punishment of all persons contravening these regulations."

Article XXXII did not contain a special provision concerning the rules in force over the high seas, since the Canadian draft was based upon the assumption that an Annex to the Convention referred to, having the same effect and coming into force at the same time as the Convention itself, would embody rules for air traffic applicable without possible deviations over the high seas, as in the Paris Convention. In fact, Article 25 of that Convention provided for compliance with the regulations contained in Annex D, entitled "Rules as to lights and signals, Rules for air traffic." In principle, departures from Annexes to the Paris Convention were not authorized. However, paragraph 53 of Annex D stated that none of its provisions was to be considered as preventing a State, even by way of derogation from the rules of the said Annex, from establishing special regulations relative to the navigation of aircraft within its territory, in the vicinity of aerodromes or in other places, provided that such regulations were duly published and communicated to the International Commission for Air Navigation and that they were justified in each case by exceptional circumstances. The authorization to depart from the rules of Annex D was restricted to the territory of the member States, so that such rules were to be complied with over the high seas without possible deviation.

When the Steering Committee of Committee I (Multilateral Aviation Convention and International Aeronautical Body) of the Chicago Conference allocated the provisions of the above-mentioned draft Conventions among the three Subcommittees of Committee I, Article XXXII of the Canadian draft was not assigned for consideration to any of these Subcommittees.

Article XXXII, however, was taken up again at the suggestion of Sir Frederick Tymms, in the following circumstances: at its sixth meeting, held on November 15, Subcommittee 2 (Air Navigation Principles) of Committee I considered Articles 24 and 25 of the United States draft, dealing respectively with the powers of the Council of ICAO and the avoidance of conflict between State regulations and rules established by the Council. A suggestion that there should be a definite reference in the Convention to the basis of authority for each of the Annexes was referred to the Drafting Committee, of which Sir Frederick Tymms was a member. On that date, it was already clear that, although considerable progress had been made in the development of technical Annexes, it would not be possible for the Conference to adopt them in final form for attachment to the proposed Convention. Furthermore, the need was recognized for the utmost flexibility in the adoption and amend-

5 The draft included a provision identical to Article 39 of the Paris Convention, reading as follows:
   "Article XLV:
   The provisions of the present Convention are completed by the Annexes . . . which shall have the same effect and shall come into force at the same time as the Convention itself."
8 On November 12, the Steering Committee of Committee II (Technical Standards and Procedures) had adopted the text of a resolution to the effect that the drafts of Annexes should be accepted by the Conference upon the basis that they would be accepted by the participating States for immediate and continuing study and as constituting models of the desirable scope and arrangement of the several Annexes. This resolution was adopted by Committee II on November 18 and by the Conference on December 5, 1944.
ment of Annexes with the necessary consequence that the constitutional requirements of the States would have to be met by some flexible procedure. The Drafting Committee prepared and submitted in a document a set of articles exclusively dealing with or related to the legal status of Annexes. Article XXXII of the Canadian draft reappeared in this document as Article 11A of a proposed Part I—Air Navigation—of a complete Convention on International Civil Aviation. It had undergone substantial changes and was worded:

"Rules of the Air, etc.

"Each Contracting State undertakes to adopt measures to ensure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever it may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force, and to keep its own regulations uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each Contracting State undertakes to ensure the prosecution of all persons violating the regulations applicable."

The main changes introduced, namely the provision concerning rules in force over the high seas and the undertaking by each Contracting State to keep its regulations uniform, to the greatest possible extent, with those established under the Chicago Convention and to ensure that its aircraft, wherever they might be, would comply with the rules there in force, were due to the new and original legal status formulated in the Convention of the Annexes thereto. Since the Annexes were no longer to have the same effect or come into force at the same time as the Convention itself, and since it would be possible for States to adopt within their own territories regulations or practices differing in any particular respect from those established in the Convention, it was necessary, in the interest of air navigation safety, to ensure that the same rules would apply over a given area. In view of the absence of sovereignty over the high seas, it had proved indispensable to prescribe, as in the case of the Paris Convention, that the civil aircraft of all Contracting States should, when flying over the high seas, abide by the same rules without any possible deviation.

Article 11A reappeared, unchanged, as Article 12 of the Proposed Convention on International Civil Aviation approved by Committee I at its plenary session on 4 December 1944.

In the Convention itself, certain changes of form were made. "Whenever it may be" was changed to "wherever such aircraft may be." After "aircraft there in force," there was placed a full stop. Before "uniform," the phrase "in these respects" was inserted. It should also be noted that the word "etc." is omitted in the Convention from the title of the Article.

The body of ICAO responsible for establishing rules applicable over the high seas

Article 12 of the Chicago Convention merely prescribes that the rules in
force over the high seas shall be those established under the Convention and does not specify what body of ICAO is to establish such rules.

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

Other provisions of the Convention demonstrate that the Council of ICAO is the proper and exclusive body for establishing such rules and, consequently, the rules referred to in Article 12. Article 49, which enumerates the powers and duties of the Assembly, does not refer to rule-making, except for the rules of procedure of the Assembly itself. Paragraph (k) of that Article, which establishes the overriding power of the Assembly, exempts explicitly from its jurisdiction matters "specifically assigned to the Council." Among such matters is the power to adopt international standards, recommended practices and procedures vested in the Council, as one of its mandatory functions, by Article 54, paragraph (1). The Council is further instructed to designate them, for convenience, as Annexes to the Convention. The procedure for the adoption and amendment of Annexes is set forth in Article 90. Once an Annex has been adopted by a vote of two-thirds of the Council at a meeting called for that purpose, it is submitted to each Contracting State and becomes effective within three months thereafter, unless in the meantime a majority of the Contracting States register their disapproval with the Council.

It thus results that Article 12 should be read in conjunction with Articles 37, 54(1) and 90 and that the Council alone, subject to observance of the procedures set forth in Article 90, has jurisdiction to establish rules referred to in Article 12. This interpretation, based upon the general philosophy of the Convention, is confirmed by the preparatory work on that Article at the Chicago Conference. It will be recalled that Article 12, which originated as Article XXXII of the Canadian draft, was at first left aside, but it was later taken up again and amended by the Drafting Committee of Committee I when it prepared, in a special document, a set of provisions exclusively dealing with or related to the legal status and the implementation of the Annexes. Article XXXII, renumbered Article 11A, appeared as the first provision of this document. The relationship of that Article to the Annexes is further underscored by the changes made in Article XXXII. All the modifications were due to the fact that the Annexes were not to have the status envisaged implicitly by that Article, as already explained above.

In practice, the Council has recognized, in connection with the adoption of Annex 2 to the Convention (Rules of the Air), that it was the department

15 The wording of Article 12 indicates clearly that the Organization is to exercise its legislative power over the high seas to the exclusion of individual Contracting States. No State is competent to require compliance with certain rules by a foreign aircraft when flying over the high seas. Failure on the part of the Organization to take appropriate action would not allow Contracting States to impose any such rules repugnant to international law, thus moreover constituting a serious hazard in view of the possible differences in national regulations.

The status of the American and Canadian Air Defense Identification Zones and the question as to whether they are consistent with the Chicago Convention are examined by John T. Murchison in his book The Contiguous Air Space Zone in International Law, Ottawa, 1955. But see particularly the excellent review of said book in the JOURNAL OF AIR LAW AND COMMERCE, Vol. 24, 1957, No. 3, pp. 372-375, where the reviewer submits "that to the extent the security rules may be in direct conflict with the rules of the air laid down by ICAO they are violative of the provisions of the Convention, notwithstanding the difference in purpose of the regulations concerned." The absence of protests on the part of other States should however be pointed out.
of ICAO entrusted with the establishment of the rules referred to in Article 12. It may be mentioned that when the Council was considering the adoption of the Rules of the Air Annex, a Representative stated that the Council should confine its action to the adoption of the Annex and that the interpretation of Article 12 insofar as it applied to the Rules of the Air was a subject for Assembly consideration.\textsuperscript{16} However, this suggestion, which was rejected, was not intended to refer the matter to the Assembly, as a rule-making body, but rather as a forum where Contracting States could make known their views on the interpretation of Article 12.

As the rules referred to in the third sentence of Article 12 are among those assigned to the Council as part of its mandatory function, it is apparent that the Council cannot delegate its authority in the matter. This question was presented in connection with the adoption of Annex 11 to the Convention (Air Traffic Services), the purpose of which, together with Annex 2, was to ensure that flying over international air routes is carried out under uniform conditions designed to improve the safety and efficiency of air operations.\textsuperscript{17} As it was realized that some standards in the Annex did constitute rules relating to the flight and maneuver of aircraft, the suggestion was made that those standards should be mandatory over the high seas. But the Council shared the point of view of the Air Navigation Commission, which had felt that a State deviating from certain provisions of the Annex should be able to continue to do so while providing air traffic services over the high seas or in airspace of undetermined sovereignty; otherwise, such State would have two sets of air traffic services regulations, one applicable to the airspace above its own territory, the other to the airspace over the high seas and areas of undetermined sovereignty where it provides air traffic control services.\textsuperscript{18} It was also feared that States might be deterred from supplying much needed services over the high seas if the standards were made mandatory in these areas. Accordingly, the Council decided to insert the following clause in the Foreword to the Annex:

"The standards and recommended practices in Annex 11 apply in those parts of the airspace under the jurisdiction of a Contracting State where Air Traffic Services are provided and also wherever a Contracting State accepts the responsibility of providing Air Traffic Services over the high seas or in airspace of undetermined sovereignty. A Contracting State accepting such responsibility may apply the standards and recommended practices in a manner consistent with that adopted for airspace under its jurisdiction."

It thus results that the Contracting State concerned will determine in the last resort the rules covered by Annex 11 to be applied over the high seas. Insofar as these rules relate to the flight and maneuver of aircraft, it is questionable whether such a procedure is in conformity with Article 12.

\textit{Determination of the rules applicable over the high seas by reason of their substance}

The third sentence of Article 12 does not give any specification as to the substance of the rules established under the Convention which are applicable over the high seas. Do they comprise all rules established under the Convention which are capable of application over the high seas, or solely the rules of the air, as suggested by the title of the Article, or more specifically the rules relating to the flight and maneuver of aircraft, as it would appear from the first two sentences of Article 12? There can be little doubt that this last interpretation is the correct one.

\textsuperscript{16} ICAO Doc. 5701, C/672, para. 306.
\textsuperscript{17} See Annex 11, Third Edition, September 1956, p. 3. The adoption of that Annex will be examined under other aspects in the following sections.
\textsuperscript{18} ICAO Doc. 7037-2, C/814-2, para. 77 ff.
In its original form, as Article XXXII of the Canadian draft, the provision was intended to contain a specific reference to the Annex which would replace Annex D to the Paris Convention entitled "Rules as to lights and signals, Rules for air traffic." However, it was necessary to replace this provision by a descriptive phrase and to avoid making reference to any particular Annex, when it became clear that a different approach from the one adopted in the Paris Convention was to govern the Annexes to the Chicago Convention, and that it would not be possible for the Conference to adopt the Annexes in final form.

It appears clearly from the construction of Article 12 that the intention of its draftsmen was to deal with the same kind of rules. The provision first imposes compliance with the "rules and regulations relating to the flight and maneuver of aircraft" in force over the territory of each Contracting State. It then seeks to secure uniformity in regulations applicable over these territories by urging States to avoid departing from the rules established under the Convention in these respects, after which, quite logically, it prescribes that these rules shall apply uniformly over areas not subject to the sovereignty of any State. It results from this logical development that the rules referred to are meant to be the same throughout the article, namely those "relating to the flight and maneuver of aircraft."

A broader interpretation that the "rules in force over the high seas" include all rules established under the Chicago Convention, provided that they can be applied over such areas, would not be justified. It would be contrary to proper principles of interpretation to isolate the third sentence of Article 12 from its context which should be read as a whole, particularly since the provision has not been sub-divided into paragraphs.

As to an interpretation based upon the title of Article 12, "Rules of the Air," so as to restrict the rules referred to in the third sentence to such rules it may be pointed out that the title of a provision can be used for the purpose of interpreting its contents only if it helps reveal the true intent. In this particular case, it would obscure rather than clarify the issue. It may appear to be raising a straw man to suggest that the "rules of the air" can have a limiting effect on "rules relating to the flight and maneuver of aircraft," since the later expression is no doubt more descriptive and more precise than the former. However, this point is important for the following reason: the ICAO Council on April 15, 1948 adopted Annex 2 to the Chicago Convention entitled "Rules of the Air" and decided that the Annex constituted rules relating to the flight and maneuver of aircraft within the meaning of Article 12 of the Convention. Since it is the only instance so far in which the Council has made such a decision, it could be argued that the rules referred to in the third sentence of Article 12 are limited to those contained in Annex 2. Although there has been no formal ruling on this point, it appears from the discussions held in connection with the adoption of Annexes 2 and 11 to the Convention that, in the Council's opinion, the "rules relating to the flight and maneuver of aircraft" are not confined to those set forth in Annex 2.

It will be observed that Article 12 uses indifferently the expression "rules" and "regulations," or a combination of both. Such variation might easily be the consequence of hasty drafting, as the Article was not considered in detail at the Chicago Conference, except as stated above. There seems to be little doubt that the intention was to make Article 12 applicable to any provision of a regulatory and binding character, e.g. a statute or an administrative decree, with which aircraft must comply.

As stated above in the section dealing with the preparatory work on Article 12, Article XXXII of the Canadian draft taken up and amended by the Drafting Committee I was first entitled "Rules of the Air, etc." The word "etc." was later omitted, presumably because it would have been inartistic.

See particularly ICAO Doc. 7037-2, C/814-2, para. 81.
The exact determination and the sorting out of the rules according to their substance will depend on the interpretation given to the words "relating to the flight and maneuver of aircraft." The first method of interpreting which comes to mind is to compare the rules referred to in Article 12 to the rules of the road. This would probably narrow these rules to the shortest set. But a broader view could be taken and it might be argued that all rules imposed upon airmen which affect the conduct of the flight relate to flight and maneuver. It should, however, not be forgotten that the underlying purpose of Article 12 is to ensure the uniform application of rules considered as essential for the safety of air navigation.

**Determination of the rules applicable over the high seas by reason of their status as "standards," "practices," procedures, etc.**

Article 12 refers to the "rules established under this Convention." An examination of the provisions of the Convention relating to the rule-making power of the Council shows that only the adoption of Annexes is provided for. As the Council also approves sets of "Procedures" (which are not adopted as Annexes) to be followed in air navigation operations, it should be considered whether such Procedures are "established under the Convention" and, if so, whether they are "rules" and may thus be regarded as mandatory over the high seas insofar as they relate to the flight and maneuver of aircraft.

Moreover, while there is no doubt that Annexes are established under the Convention, the division of their contents into international standards and recommended practices makes it necessary to examine whether both kinds of provisions have the status of "rules" and should be fully complied with over the high seas if they relate to the flight and maneuver of aircraft.

These questions will be considered successively hereunder:

1 **Procedures for Air Navigation Services and Supplementary Procedures**

Although the Convention does not specifically provide for technical legislation other than "Annexes," the Council of ICAO has been approving Procedures for Air Navigation Services for world-wide application and regional Supplementary Procedures.

The development and particular status of such Procedures stem from practical necessities. As explained in an ICAO document, the Procedures for Air Navigation Services comprise, for the most part, operating procedures regarded as not yet having attained a sufficient degree of maturity

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22 With regard to the respective power of the Contracting States and of the Council to interpret these words, see hereafter the section entitled "Determination of the rules applicable over the high seas by reason of their enactment."

23 For an historical summary of the development of these Procedures, see ICAO Doc. AN-WP/386; for the text of the Procedures presently in effect, see ICAO Doc. 4444-RAC/501/6 (Rules of the Air and Air Traffic Services), Doc. 7181-C/831/1 (Radiotelephony), Doc. 7458-OPS/610/2 (Holding and Approach-to-land), Doc. 7605-MET/526/2 (Meteorology) and Doc. 7030 (Regional Supplementary Procedures).

Mention could also be made of the Air Navigation Plans the purpose of which is to set forth in detail the facilities, services and procedures required for international air navigation within the eight ICAO regions (African-Indian Ocean, South East Asia, Middle East, European-Mediterranean, North Atlantic, Caribbean, South American/South Atlantic and Pacific regions). The rules of procedure and directives for regional air navigation meetings state that a regional plan shall be in accord with the standards and recommended practices and procedures of ICAO. See Doc. 7214-C/831/1, p. 11.

24 Directives to ICAO technical meetings and rules of procedure for their conduct, Doc. 7689 (May 1968), Part IV, Section 2, p. 20.
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for adoption as international standards or recommended practices, as well as material of a more permanent character which is considered too detailed for incorporation in an Annex or is liable to be frequently amended, for which the processes of the Convention would be too cumbersome. The latter reason points to the essential difference in the processing of Annexes and Procedures. Whereas the Annexes are "adopted" by the Council pursuant to Article 90 of the Convention, namely by a two-third majority vote at a meeting called for that purpose, the Procedures and amendments thereto are merely "approved" by a majority vote. It should also be noted that while an amendment to an Annex is subject to the full application of Article 90, which involves a certain lapse of time before the amendment can become effective, a more flexible and expeditious procedure is followed in the case of amendments to Procedures.

What is the status of the Procedures? It is certain that they are not contemplated by the Convention. As Sir Frederick Tymms stated at a meeting of the Council, in reply to a Representative who "wondered" what the term procedures in Article 38 meant, the Procedures for Air Navigation Services and the Supplementary Procedures had never been thought of when the Chicago Convention was drafted. The authors of the Convention had only envisaged international standards and recommended practices embracing a variety of material, including specifications for equipment, procedures (e.g. for communications and air traffic control) and practices. That explains the link already stressed between the Annexes and the rules "established under the Convention" referred to in Article 12.

It a strict construction of the Convention were to be advocated, particular emphasis could be put on the lack of any explicit provision, among those dealing with the mandatory or permissive functions of the Council and more specifically with its rule-making power, which would authorize the approval of Procedures. The formality attendant upon the adoption of Annexes and the exclusive procedure provided for the adoption of technical legislation could be recalled and the conclusion might be offered that the Procedures are not established under the Convention and thus cannot come within the ambit of Article 12.

On the other hand, we can assert that a useful purpose is served by not including the Procedures in Annexes, and the principle of effectiveness may be invoked to uphold the imaginative method which was followed in process-

25 For instance, the Foreward to the Procedures for Air Navigation Services—Meteorology (ICAO Doc. 7605-MET/526/2) contains the following statement: "Whilst the Procedures for Air Navigation Services may contain material which may eventually become standards or recommended practices when it has reached the maturity and stability necessary for adoption as such."

At its Fourth Session, the Assembly of ICAO adopted Resolution A4-7 in which it resolves "that the Council ensure that Procedures for Air Navigation Services are incorporated in the appropriate Annexes to the Convention as soon as these Procedures have become sufficiently stable."

26 The first Procedures were developed at the Regional Air Navigation Meetings held in Dublin (March 1946) and Paris (April-May 1946) because the international standards and recommended practices formulated by the technical Divisions of the PICAO Air Navigation Committee on the basis of the draft Annexes adopted by the Chicago Conference did not include detailed procedures for air navigation services on international air routes.

27 At the 22nd meeting of its Third Session, the Council decided that amendments to the Annexes should be carried or lost by a simple majority of those present and voting. The Representative of the United States had rightly pointed out that the adoption of an amendment should require the same majority as the document itself. Cf. ICAO Doc. 7310-C/846, p. 27 and Doc. 5701, C/672, p. 12. The Council, however, never applied this decision and it would appear that it is now discarded. At the 17th meeting of the Seventeenth Session, an amendment which failed to receive the concurring votes of two-thirds of the total membership of the Council was declared to be lost. Cf. ICAO Doc. 7328-17, C/853-17, p. 195. See also Doc. 7328-12, C/853-12, p. 130.

28 ICAO Doc. 7057-12, C/817-12, p. 166.
The status of the Procedures would be altogether different if they were incorporated by reference in the standards themselves. The relevant Procedures would thereby acquire the same status as the standards. But they could then only be amended in the same manner as international standards.

2 International standards and recommended practices

While there is no doubt that the Annexes are “established under this Convention,” it remains to be considered whether both sets of provisions which they may embody, namely international standards and recommended practices, are to be considered as “rules” within the meaning of Article 12.

The Convention does not define “standards” or “recommended practices,” nor does it give any specification as to their respective legal standing. This was perhaps unnecessary, as these terms are self-explanatory to a large extent. A standard implies a compliance requirement and in principle is regulatory in character. A recommended practice, on the other hand, is not aimed at imposing an obligation but is designed to serve as a useful guide, which should be followed so far as practicable. Since a rule and a recommendation are certainly mutually exclusive, it follows that only “standards” can be regarded as “rules established” under the Convention. A closer scrutiny of the Convention seems to confirm this tentative conclusion.

It should first be noted that when the Drafting Committee at Chicago developed the articles relating to Annexes, Chapter VI of the Convention was provisionally entitled “International air regulations, minimum standards and recommended practices,” this indicates an intended distinction between

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29 As to the notification of differences or departures, the Council has agreed that the Procedures do not have the status accorded international standards adopted an Annexes to the Convention and, therefore, do not come within the obligations imposed by Article 38 of the Convention to notify differences in the event of non-implementation. Nevertheless, the Council considers it desirable (as it does in the case of recommended practices) that differences between the Procedures and national regulations and practices be notified to the Organization and invites States to do so. See discussions on this subject in ICAO Doc. 7057-4, C/817-4, p. 54. See also Assembly Resolution A4-7.

30 ICAO Doc. 7605-MET/526/2, p. 8, para. 3; Doc. 4444-RAC/601/6, p. iii, para. 3.

31 ICAO Doc. 7658-OPS/610/2, p. 3, para. 2.

32 This is not the case in practice. The Directives to ICAO technical meetings and rules of procedure for their conduct provide that the text of a standard must not depend upon or include references to material of lower status. Cf. ICAO Doc. 7659, p. 17.

33 As already pointed out in connection with the preparatory work on Article 12, this Article originated as Article XXXII of the Canadian draft which reproduced verbatim Article 25 of the Paris Convention. Article 25 referred to the provisions contained in an Annex and used the expression “regulations,” as the Annexes to the Paris Convention embodied only one kind of provisions, having in principle the same effect as the Convention itself.

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regulatory provisions and mere recommendations. The difference in this regard between "standards" and "recommended practices" was no doubt fully understood by the Conference. Thus, the report of Committee II (Technical standards and procedures) contains the following remarks:

"A particular problem of status is that of recommended practices. The Committee believes that in certain branches of regulatory action some subjects should be fully standardized, while upon others the internationally agreed documents should present only recommendations implying no obligation, but expressive of a hope that the several nations will follow the recommendation as closely as may be practicable under their particular circumstances. It is believed that in the future development of the technical documents considerable freedom should be exercised in the introduction of such recommendations, some of which may thereafter become international standards if they gain a sufficient degree of acceptance during the probationary period of mere recommendation."\[35\]

Another strong indication to the same effect is given by the terminology used in the Convention, where the words "established" or "prescribed" on the one hand and "recommended" on the other hand appear to have been carefully picked to contrast the respective force of the provisions to be adopted by the Organization.\[36\] It is submitted that provisions which are "established" or "prescribed" correspond to "standards" and those which are "recommended" bear the hallmark of "recommended practices." Thus, the "rules established under this Convention" referred to in Article 12 can only be "international standards." It might be pointed out in this connection that the two other Articles of the Convention which also require full compliance with the provisions adopted by the Organization, also refer to provisions "established" and "prescribed" under the Convention.\[37\]

It is again apparent, from the measures, heretofor taken by ICAO with regard to international standards and recommended practices, that only the former may reasonably be considered "rules" established under the Convention.

At its First Session, the Assembly noted that it was necessary that the Contracting States have a uniform understanding of their obligations under the Convention with respect to international standards and recommended practices to be adopted and amended from time to time by the Council, and it defined them as follows:

"'Standard': any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Member States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention."

"'Recommended practice': any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of

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36 The following expressions are used: "regulations ... established under this Convention" (Article 12); "rules ... established under this Convention" (Article 12); "practices ... established or recommended ... pursuant to this Convention" (Article 23); "co-ordinated measures ... recommended ... pursuant to this Convention" (Article 25); "procedure ... recommended by the International Civil Aviation Organization" (Article 26); "standards and practices recommended or established ... pursuant to this Convention" (Article 28(a)); "practices and rules recommended or established ... pursuant to this Convention" (Article 28(b)); "standards ... recommended [sic] or established ... pursuant to this Convention" (Article 28(c)); "minimum standards ... established ... pursuant to this Convention" (Article 33); "forms ... prescribed ... pursuant to this Convention" (Article 34).
37 Cf. Article 33 on certificates of airworthiness, certificates of competency and licenses, and Article 34 on journey-log books.
safety, regularity, or efficiency of international air navigation, and to which Member States will endeavor to conform in accordance with the Convention.\footnote{Resolution A1-31.}

To emphasize the different legal status of standards and recommended practices, particularly the difference between “conform” and “endeavor to comply,” the Directives to ICAO technical meetings provide that a standard must contain a main statement specifying an obligation by means of “shall” and that, in a recommended practice, “should” is to be used instead of “shall.”\footnote{ICAO Doc. 7689, p. 17.}

The distinction between standards and recommended practices was not made expressly when the Council discussed the question of the application of Annex 2 and Annex 11 over the high seas, though some Representatives referred exclusively to standards. In the special clause adopted in connection with Annex 2, the Council stated that “the Rules of the Air Annex” constituted rules relating to the flight and maneuver of aircraft within the meaning of Article 12 of the Convention and that deviations from “these rules” were not authorized insofar as they related to flight over the high seas.\footnote{ICAO Doc. 5701, C/672, pp. 57-60.}

This all-inclusive treatment was due perhaps to the presence in the Annex of two recommended practices not susceptible to direct application over the high seas. It should be noted that the present text of Annex 2 no longer contains recommended practices.

It is difficult to see how Article 12 as worded could possibly purport to change the legal status of the provisions adopted under the Convention and to metamorphose recommendations into rules. This Article, it would appear, concerns only standards, and its effect is to prohibit departures therefrom which otherwise are permissible over the territory of Contracting States provided a notification is filled with ICAO.

\textit{Determination of the rules applicable over the high seas by reason of their enactment}

Article 12 merely provides that the rules relating to the flight and maneuver of aircraft in force over the high seas shall be those established under the Convention. It imposes no requirement or procedure additional to those prescribed for the adoption of any technical Annex. Nor does it provide for any particular method of enactment by which those rules would be made applicable without exception over the area concerned. On the contrary, this results automatically from the third sentence of the Article, read in conjunction with the second one, that Contracting States undertake to keep their own regulations in these respects uniform with those established under the Convention.\footnote{The principle “pacta tertiis nec nocent nec prosunt” will apply with regard to non-contracting States. This traditional rule taken from the law of contracts prevails in practice, although there is a trend in the doctrine towards recognition of a special force to law-making treaties with respect to third parties. As to the often quoted statement of the International Court of Justice that “fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims” (Reparations for injuries suffered in the service of the United Nations, Advisory opinion: I.C.J. Reports, 1949, p. 185), it does not suggest in any way that non-contracting States are to be bound by the rules laid down by the Contracting States, however numerous they may be. It may be added that the Chicago Convention does not contain a provision similar to Article 2(6) of the Charter of the United Nations, under which ICAO would ensure that non-member States act in accordance with certain principles so far as may be necessary for the safety of air navigation. But those States will no doubt be inclined in fact to observe, for safety considerations, the rules established under the Convention.}
However, it might be argued that the mere fact that the standards relate to the flight and maneuver of aircraft is not sufficient to make them applicable over the high seas, because an involuntary act of legislation cannot be imputed to the Council. Therefore—so the argument goes—some specific act on the part of this Council is required. However, Article 12 is quite explicit on this point, and it must be assumed that the Council knowingly adopts rules which relate to the flight and maneuver of aircraft.

From the policy point of view Contracting States might object to a specific act of the Council on the ground that it would amount in fact to a determination that certain standards did or did not constitute rules relating to the flight and maneuver of aircraft. Possibly such an action could lead to a de facto amendment of the Convention, either by restricting or by extending the rules referred to in Article 12. Obviously the rules adopted pursuant to the Convention either relate or do not relate to the flight and maneuver of aircraft. If they do—and that particular feature does not depend upon a decision of the Council— their application is mandatory over the high seas without possible deviation. Should Contracting States disagree on the character of certain rules, the Council might be called upon to act as a judicial body in a specific case, since the Convention empowers it to decide any disagreement between two or more Contracting States relating to the interpretation or application of its provisions and its Annexes.

While a special enactment does not seem to be necessary to make the rules referred to in Article 12 applicable over the high seas, it is of course open to the Council to express its own view as to whether certain standards constitute rules relating to the flight and maneuver of aircraft and to remind the Contracting States, in a special clause, of their obligation under Article 12. Such a clause might even appear desirable, as the lack of any action on the part of the Council might create a serious hazard in view of the possible differences of national interpretation. But the usefulness of measures of this kind would largely depend on their being exhaustive. The safety of air navigation would perhaps be better served by collecting in one place all rules to be applied without deviation over the high seas.

So far, the Council has had two occasions to consider whether special action was required under Article 12 in connection with the establishment of rules applicable over the high seas.

The first instance occurred when the Council adopted Annex 2 to the Convention (Rules of the Air). One Representative suggested that the Annex should contain a clause making it clear that deviations therefrom were not permissible insofar as they related to flights over the high seas. Another Representative, as already mentioned in another context, stated that the interpretation of Article 12 insofar as it applied to the Rules of the Air was a subject for Assembly consideration. It was also observed that the suggested clause was unnecessary, since the provisions of Article 12 were explicit. The Council finally decided to include in the resolution of adoption "a clause calling attention to the special character of Annex 2 and its relation to Article 12 of the Convention." Clearly, this decision was nothing more than the expression of the Council's own opinion that Annex 2

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42 If a rule relating to the flight and maneuver of aircraft should be such that its application over the high seas would be of doubtful value, the Council could specifically limit its validity to the airspace above the territory of the Contracting States.

43 A different view was held by the Chief of the Legal Bureau when the Council was discussing Annex 11 (Air Traffic Services) in this connexion. He stated that "the rules and regulations relating to the flight and maneuver of aircraft were any rules that the Council designated as such." Cf. ICAO Doc. 7037-2, C/814-2, para. 81.

44 Article 84 of the Convention.

45 ICAO Doc. 5701, C/672, pp. 57-60.

46 Ibid., para. 318.
contained rules relating to the flight and maneuver of aircraft, accompanied
by a reminded to Contracting States of their obligations with respect to
such rules under Article 12. But the Council was in no way implying that, in
the absence of such expression of opinion, Annex 2 would not have been
applicable over the high seas. Thus, to carry out the Council’s decision, the
following clause was suggested:

“That pursuant to Article 12 of the Convention, deviations from the
Rules of the Air established under the Convention may not be made
insofar as they relate to flight over the high seas.”

Another Representative expressed concern at a specific reference to the
filing of deviations, and it was suggested not to include such reference but
to indicate instead that in the opinion of the Council the Rules of the Air
were rules relating to the flight and maneuver of aircraft within the mean-
ing of Article 12. The author of the original suggestion insisted that his
purpose was to make it clear to Contracting States that they could not devi-
orate from the Rules of the Air over the high seas. The Council then adopted
a text based on the two suggestions combined as follows:

“That the Rules of the Air Annex constitute rules relating to the
flight and maneuver of aircraft within the meaning of Article 12 of the
Convention and deviations from these rules may not be made insofar as
they relate to flight over the high seas.”

Although the underlying purpose of that clause is evident from the
above-mentioned decision and from the discussions which preceded the adop-
tion of the clause, the final wording may convey the idea that the Council
had chosen to make a formal ruling and that in the absence of such action
it cannot be deemed to have enacted rules applicable over the high seas.48

The situation is more complex with regard to the second occasion the
Council passed on this question—when it adopted Annex 11 to the Conven-
tion (Air Traffic Services).49 Several Representatives undoubtedly realized
that at least some of the rules contained in this Annex indeed related to the
flight and maneuver of aircraft,50 and in debate it was questioned whether

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47 ICAO Doc. 5701, C/672, pp. 57-60, para. 332.
48 Even if the decision of the Council is merely the expression of its own view
on the special character of certain rules, it no doubt carries a great weight in
practice.

ICAO drew the attention of the Contracting States to the special clause
adopted by the Council and enquired on what date they had the intention to put
the provisions of Annex 2 into force over the high seas pursuant to Article 12 of
the Chicago Convention. A few States have adopted specific provisions to ensure
compliance with Annex 2 over the high seas. Thus Australia (Air Navigation
Regulations: “4A. When an Australian aircraft is flying over the high seas, the
provisions of Annex 2 to the Convention shall apply to and in relation to that
aircraft and that flight in substitution for the corresponding provisions of these
Regulations relating to the flight and maneuver of aircraft.”), Canada (The Air
Regulations, Part V—Rules of the Air—Division I: “500. All Canadian aircraft
in flight over the high seas shall comply with the Rules of the Air contained in
Annex 2 to the Convention as amended from time to time.”) and the United States
of America (Civil Air Regulations, Part 60—Air Traffic Rules, para. 60.1 a:
“Operation over the high seas. Aircraft of United States registry operated in air
commerce shall while over the high seas comply with the provisions of Annex 2
(Rules of the Air) to the Convention on International Civil Aviation.”) Further-
more, a certain number of States have adopted Annex 2 without deviations, so
that aircraft of their registry comply fully with the rules of said Annex while
over the high seas (See Index, Supplement to Annex 2, Third Edition, p. 3).

By way of contrast, it may be mentioned that no State appears to have singled
out, from all the rules established by the Council, those which it considers as re-
ating to the flight and maneuver of aircraft within the meaning of Article 12.

49 Reference may be made to the fact that the first draft of Annex 11 had
formed the second part of the PICA0 recommendations for standards, practices
and procedures—Rules of the Air and Air Traffic Control (Doc. 2010 RAC/104)
and were separated therefrom during the discussion of Annex 2. Cf. ICAO Doc.
5701, C/672, p. 60.
there was any reason why the Air Traffic Services standards should not be mandatory over the high seas or in airspace of undetermined sovereignty. However, as already mentioned in connection with Council delegation of its rule-making power over these areas, it was feared that a specific decision of the Council on the question of whether Annex II was in the same category as Annex 2 might deter States from supplying useful services over the high seas. The Council therefore refrained from taking a firm position on this point, and authorized Contracting States providing air traffic control services over the high seas or in airspace of undetermined sovereignty to apply Annex 11 in a manner consistent with that adopted for airspace under their jurisdiction. It thus appears that the Council recognized in this instance that no part of the Annex could be considered “rules and regulations relating to the flight and maneuver of aircraft.” It can also be said—and this point was expressly made—that to give Contracting States a freedom of action which Article 12 excludes would imply that the Air Traffic Services are not rules and regulations relating to the flight and maneuver of aircraft within the meaning of Article 12. However, it would be unrealistic to speculate on all the possible implications of the Council’s decision. It should suffice to observe that if Annex 11 contains rules relating to the flight and maneuver of aircraft, it is legally questionable to ignore this fact and allow deviations.

Sanctions

The last sentence of Article 12, following immediately the provision relating to the application of uniform rules over the high seas, states that “each Contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.”

What is to be understood by the words “each Contracting State?” Do they refer only to the State of registry of the offending aircraft or also to the State of registry of the complainant aircraft? Is it possible to hold that under the terms of the last sentence of Article 12 a person violating the rules in force over the high seas is liable to prosecution by any Contracting State, thus suggesting that a breach of these rules should be equated with an act of piracy?

As Article 25 of the Paris Convention similarly provided that each of the Member States undertakes “to ensure the prosecution and punishment of all persons contravening these regulations,” it might be of interest to compare the measures taken with respect to that provision. The International Commission for Air Navigation referred to its Legal Sub-Commission, for study and report, the question of the prosecution contemplated in Article 25, as well as in paragraph 16 of Annex H (Customs) which held the State in which an aircraft was registered and to which there was reported an infringement committed by such aircraft in respect of the regulations of the said Annex, to suspend either for a limited time or permanently the certificate of registration of the offending aircraft. In its report, the Sub-Commission concluded that these provisions aimed at the infliction by a State of penalties for infringements committed outside its territory and that it behooved the Contracting States to adopt the necessary legislative or administrative measures to give effect to those provisions. The Commission instructed thereupon its Secretary General to send a note to all Contracting States

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51 Article 25 referred to the regulations contained in Annex D wherefrom Member States could derogate under certain conditions within their territory, but not over the high seas.

52 No mention was made of the obligation of each Member State “to adopt measures to ensure that every aircraft flying over the limits of its territory . . . shall comply with the regulations contained in Annex D.”

calling their attention to the desirability of taking the necessary legislative or administrative measures.

Insofar as the violations committed over the high seas are concerned, Article 12 does not seem to present any difficulty. It results from the first sentence thereof that each Contracting State is to ensure on the one hand that within its territory all aircraft shall comply with its rules and regulations relating to the flight and maneuver of aircraft and on the other hand that outside its territory the aircraft carrying its nationality mark shall comply with the rules and regulations in force wherever such aircraft may be. As no State may claim territorial sovereignty over the high seas or the airspace above, the obligation to insure compliance with the rules there in force can only rest with each Contracting State with respect to the aircraft carrying its nationality mark. The rules in force over the high seas being those established under the Chicago Convention, they are supposedly implemented in national laws and regulations. Thus, the obligation of each Contracting State to insure the prosecution of all persons violating the regulations applicable concerns only the violation of its own regulations by aircraft carrying its own nationality mark.

In practice, the normal procedure will be for the pilot-in-command of the complainant aircraft to address a report to his employer. If the violation so warrants, the operator of the aircraft will then report to the aeronautical authorities of his own State, who may, if they deem it necessary, address the aeronautical authorities of the Contracting State where the offending aircraft is registered.

Article 12 does not prescribe the sanctions to be applied in case of non-compliance with the rules applicable. A survey of the penalties established by Contracting States with respect to breaches of what is generally known as rules of the air shows an evident lack of uniformity. There are great differences in the amount of fines to be imposed. Some States spell out the penalties on the basis of providing an unusually large maximum penalty against the owner or operator and a lighter penalty by way of a fine against the pilot or pilot-in-command. The pilots are often faced with a prison term. Perhaps, here again, ICAO could be instrumental in achieving an adequate uniform scale of penalties.

It would exceed the scope of this article to examine whether the State of registry of an aircraft which has committed a violation of the rules in force over the territory of another State is under an obligation to prosecute such an aircraft for a breach of foreign laws and regulations. See ICAO Assembly Resolutions A1-30 and A2-45.

Since the aircraft of all Contracting States are to comply with the same rules when flying over the high seas, it would appear that the obligation of each Contracting State provided for in the last sentence of Article 12 does not preclude the State of registry of the complainant aircraft from taking disciplinary or other action if it is materially feasible and subject to the application of the rule non bis in idem.