

CHAPTER 12

AIR AND SPACE LAW

12.1 Air space

Up until the early part of this century the law relating to air space was not settled. Certain writers suggested that there should be a territorial air space above a state's territory with a similar regime to that of the territorial sea. Through the territorial air space there would be a right of innocent passage for foreign civilian aircraft and above it there would be freedom of navigation. Another school of thought advocated complete freedom of the air. The law came to be settled during the First World War and the customary law was codified in the Paris Convention on the Regulation of Aerial Navigation 1919. The approach adopted at Paris was that states should have complete and exclusive sovereignty over the air space above their land and territorial sea. Sovereignty was understood to extend upwards to an unlimited distance. As far as the air space above the high seas and other areas not subject to national jurisdiction was concerned it was accepted that there was complete freedom of navigation.

12.2 The Chicago Convention

The present regime concerning aerial navigation was developed at the 1944 Chicago Conference and is reflected in the conventions adopted there. The Chicago Convention on International Civil Aviation (the Chicago Convention) entered into force in January 1945.

CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION 1944¹

Article 1

The contracting states recognise that every state has complete and exclusive sovereignty over the air space above its territory.

Article 2

For the purposes of this Convention the territory of a state shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state.

Article 3

- (a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.
- (b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

1 UKTS 8 (1953) Cmd 8742; 15 UNTS 295 – entered into force in 1947.

- (c) No state aircraft of a contracting state shall fly over the territory of another state or land thereon without authorisation by special agreement or otherwise, and in accordance with the terms thereof.
- (d) The contracting states undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

Article 3 bis

- (a) The contracting states recognise that every state must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of state set forth in the Charter of the United Nations.
- (b) The contracting states recognise that every state, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting states may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically para (a) of this article. Each contracting state agrees to publish regulations in force regarding the interception of civil aircraft.
- (c) Every civil aircraft shall comply with an order given in conformity with para (b) of this article. To this end each contracting state shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that state or operated by a person having his principal place of business in that state or permanent residence in that state. Each contracting state shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.
- (d) Each contracting state shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that state or operated by an operator who has his principal place of business or permanent residence in that state for any purpose inconsistent with the aims of this Convention. This provision shall not affect para (a) or derogate from paras (b) and (c) of this article.

Article 5

Each contracting state agrees that all aircraft of the other contracting states, being aircraft not engaged in scheduled international air service, shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the state flown over to require landing. Each contracting state nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any state where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

Article 6

No scheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or other authorisation of that state, and in accordance with the terms of such permission or authorisation.

...

Article 17

Aircraft have the nationality of the state in which they are registered.

Article 18

An aircraft cannot be validly registered in more than one state, but its registrations may be changed from one state to another.

Article 19

The registration or transfer of registration of aircraft in any contracting state shall be made in accordance with its laws and regulations.

A scheduled air service is defined as 'a series of flights that possesses all the following characteristics:

- (a) it passes through the air space over the territory of more than one state;
- (b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;
- (c) it is operated, so as to serve traffic between the same two or more points, either:
 - (i) according to a published timetable; or
 - (ii) with flights so regular and frequent that they constitute a recognisably systematic series.

CHICAGO INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT 1944²

Article 1

- 1 Each contracting state grants to the other contracting states the following freedoms of the air in respect of scheduled international air services.
 - (1) The privilege to fly across its territory without landing;
 - (2) The privilege to land for non-traffic purposes ...

2 UKTS 8 (1953) Cmd 8742; 171 UNTS 387.

12.3 Unauthorised aerial intrusion

A question that flows from the fact that states possess sovereignty over the air space above their territory is what action can be taken against 'trespassing' aircraft. As far as military aircraft are concerned the international law position appears to be clear. Unauthorised intrusion by military aircraft (with the exception of military transport aircraft) may be met by the use of force without warning. The most famous example occurred in the U-2 incident. In May 1960 a U-2 (an American reconnaissance aircraft) was shot down by USSR fighters over Soviet territory. The aircraft had been engaged in the aerial reconnaissance of the Soviet Union. The USSR protested at the flight and the USA made no attempt to justify its action in terms of international law or protest at the shooting down or the subsequent trial of the pilot.

As far as civilian aircraft are concerned, Harris estimates that since 1945 trespassing civil aircraft have been shot down at the rate of nearly one a year. The international law position has become more clear following the shooting down of Korean Airlines Flight 007 by Soviet aircraft in 1983. A scheduled flight from Alaska to South Korea had strayed into Soviet air space and was shot down. All 169 passengers and crew were killed. An ICAO inquiry concluded that the aircraft had strayed off course as a result of the negligence of the crew. They found that the Soviet aircraft had made insufficient efforts to intercept the Boeing 747. It was accepted by all parties that at the time of the shooting there was a US military intelligence aircraft in the area, but in spite of this the inquiry felt that the Soviet aircrew should have made greater effort to establish whether or not the 747 was an intelligence aircraft before shooting it down. As a consequence of the shooting, in 1984 ICAO adopted a new Article 3 *bis* of the Chicago Convention.

12.4 Jurisdiction over aircraft

The nationality of civil aircraft is governed by the Chicago Convention which provides that they shall have the nationality of the state in which they are registered and that they cannot be validly registered in more than one state. The registering state does have a valid claim to exercise jurisdiction while the aircraft is in flight over the high seas or other territory not belonging to any state. As for aircraft within the territory of a state, jurisdiction will be primarily territorial, although the registering state may make express provision for claiming jurisdiction over acts committed on board the aircraft in its own legislation.

12.4.1 Threats to aviation security

The use of hijacking and other acts of terrorism involving aircraft from the early 1960s onwards proved the general rules on jurisdiction inadequate. The nature and situation of the offence meant it was not always easy for the registering state to assert jurisdiction nor was it always clear over whose territory the offence was committed. Furthermore, even if the offenders could be located the limitations of extradition treaties meant that it was often not possible to bring them to trial.

TOKYO CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT 1963

CHAPTER I SCOPE OF THE CONVENTION

Article 1

- 1 This Convention shall apply in respect of:
 - (a) offences against penal law;
 - (b) acts which, whether or not they are offences, may or do jeopardise the safety of the aircraft or of persons or property therein or which jeopardise good order and discipline on board.
- 2 Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a contracting state while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any state.
- 3 For the purposes of this Convention, an aircraft is considered to be in flight from the moment when the power is applied for the purpose of take-off until the moment when the landing run ends.
- 4 This Convention shall not apply to aircraft used in military, customs or police services.

CHAPTER II JURISDICTION

Article 3

- 1 The state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.
- 2 Each contracting state shall take such measures as may be necessary to establish its jurisdiction as the state of registration over offences committed on board aircraft registered in such state.
- 3 This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 4

A contracting state which is not the state of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

- (a) the offence has effect on the territory of such state;
- (b) the offence has been committed by or against a national or permanent resident of such state;
- (c) the offence is against the security of such state;
- (d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in such state;
- (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement.

CHAPTER III
POWERS OF THE AIRCRAFT COMMANDER

Article 5

- 1 The provisions of this chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the air space of the state of registration or over the high seas or any other area outside the territory of any state unless the last point of take-off or the next point of intended landing is situated in a state other than that of registration, or the aircraft subsequently flies in the air space of a state other than that of registration with such person still on board.
- 2 Notwithstanding the provisions of Article 1, para 3, an aircraft shall, for the purposes of this chapter, be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this chapter shall continue to apply with respect to offences and acts committed on board until competent authorities of a state take over responsibility for the aircraft and for the persons and property on board.

Article 6

- 1 The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated by Article 1, para 1, impose upon such person reasonable measures including restraint which are necessary:
 - (a) to protect the safety of the aircraft, or of persons or property therein; or
 - (b) to maintain good order and discipline on board; or
 - (c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this chapter.
- 2 The aircraft commander may require or authorise the assistance of other crew members and may request or authorise, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorisation when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

Article 7

- 1 Measures of restraint imposed upon a person in accordance with Article 6 shall not be continued beyond any point at which the aircraft lands unless:
 - (a) such point is in the territory of a non-contracting state and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with Article 6, para 1(c) in order to enable his delivery to competent authorities;
 - (b) the aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities; or
 - (c) that person agrees to onward carriage under restraint.
- 2 The aircraft commander shall as soon as practicable, and if possible before landing in the territory of a state with a person on board who has been placed under restraint in accordance with the provisions of Article 6, notify the authorities of such state of the fact that a person on board is under restraint and of the reason for such restraint.

Article 8

- 1 The aircraft commander may, in so far as it is necessary for the purpose of sub-para (a) or (b) of para 1 of Article 6, disembark in the territory of any state in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1 para 1(b).
- 2 The aircraft commander shall report to the authorities of the state in which he disembarks any person pursuant to this article, the fact of, and the reasons for, such disembarkation.

Article 9

- 1 The aircraft commander may deliver to the competent authorities of any Contracting state in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the state of registration of the aircraft.
- 2 The aircraft commander shall as soon as practicable and if possible before landing in the territory of a contracting state with a person on board whom the aircraft authorities of such state of his intention to deliver such person and the reason therefor.
- 3 The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this article with evidence and information which, under the law of the state of registration of the aircraft, are lawfully in his possession.

Article 10

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

CHAPTER IV
UNLAWFUL SEIZURE OF AIRCRAFT

Article 11

- 1 When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, contracting states shall take all appropriate measures to restore control to the aircraft to its lawful commander or to preserve his control of the aircraft.
- 2 In the cases contemplated in the preceding paragraph, the contracting state in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

CHAPTER V
POWERS AND DUTIES OF STATES

Article 12

Any contracting state shall allow the commander of an aircraft registered in another contracting state to disembark any person pursuant to Article 8, para 1.

Article 13

- 1 Any contracting state shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, para 1.
- 2 Upon being satisfied that the circumstances so warrant, any contracting state shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11, para 1, and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that state but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.
- 3 Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the state of which he is a national.
- 4 Any contracting state, to which a person is delivered pursuant to Article 9, para 1 or in whose territory an aircraft lands following the commission of an act contemplated in Article 11, para 1, shall immediately make a preliminary enquiry into the facts.
- 5 When a state, pursuant to this article, has taken a person into custody, it shall immediately notify the state of registration of the aircraft and the state of nationality of the detained person and, if it considers it advisable, any other interested state of the fact that such person is in custody and of the circumstances which warrant his detention. The state which makes the preliminary enquiry contemplated in para 4 of this article shall promptly report its finding to the said states and shall indicate whether it intends to exercise jurisdiction.

Article 14

- 1 When any person has been delivered in accordance with Article 8, para 1, or delivered in accordance with Article 9, para 1, or has disembarked after committing an act contemplated in Article 11, para 1, and when such person cannot or does not desire to continue his journey and the state of landing refuses to admit him, that state may, if the person in question is not a national or permanent resident of that state, return him to the territory of the state of which he is a national or permanent resident or to the territory of the state in which he began his journey by air.
- 2 Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, para 2, nor the return of the person concerned, shall be considered as admission to the territory of the contracting states concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a contracting state relating to the expulsion of persons from its territory.

Article 15

- 1 Without prejudice to Article 14, any person who has been disembarked in accordance with Article 8, para 1, or delivered in accordance with Article 9, para 1, or has disembarked after committing an act contemplated in Article 11, para 1, and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the state of landing for the purpose of extradition or criminal proceedings.
- 2 Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a contracting state in whose territory a person

has been disembarked in accordance with Article 8, para 1, or delivered in accordance with Article 9, para 1, or has disembarked and is suspected of having committed an act contemplated in Article 11, para 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such contracting state in like circumstances.

The principal weakness of the Tokyo Convention is that there is no obligation on states to recognise an offence of unlawful seizure of aircraft. During the later 1960s the number of hijackings dramatically increased reaching a peak of 89 separate incidents in 1969. Where hijackers were caught most states were unable to prosecute for hijacking and instead, where they had jurisdiction, prosecuted for the constituent acts of assault, etc. The ICAO, concerned at the increase in hijackings and recognising the deficiencies in the Tokyo Convention, called for the re-enforcement of the law. The problem was highlighted by the Dawson's Field incident.

On 6 September 1970 Palestinian commandos belonging to the Popular Front for the Liberation of Palestine attacked four aircraft. One attack was on an El Al aircraft in London, but three other aircraft belonging to Pan American, TWA and Swissair were captured in flight. The Pan American plane was taken to Cairo where, after the passengers were allowed to leave, it was blown up. The TWA and Swissair flight together with a BOAC plane which had been seized on 9 September were eventually flown to Dawson's Field in Jordan and the 400 passengers on board were held hostage while negotiations continued and US military intervention seemed imminent. As Jordanian troops began attacking Palestinian refugee camps in what came to be known as Black September the hostages were gradually released in return for the release of a number of Palestinian prisoners held around the world (including Leila Khaled who had led the attack on the El Al plane). The three aircraft were blown up.

The hijackings received world-wide publicity and focused attention on the need to reform the law. On 16 December 1970 the ICAO convened an international conference which resulted in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970.

HAGUE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT 1970

Article 1

Any person who on board an aircraft in flight:

- (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or
- (b) is an accomplice of a person who performs or attempts to perform any such act commits an offence (hereinafter referred to as 'the offence').

Article 2

Each contracting state undertakes to make the offence punishable by severe penalties.

Article 3

- 1 For the purpose of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.
- 2 This Convention shall not apply to aircraft used in military, customs or police services.
- 3 This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the state of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.
- 4 In the cases mentioned in Article 5, this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same state where that state is one of those referred to in that article.
- 5 Notwithstanding the paras 3 and 4 of this article, Articles 6, 7, 8 and 100 shall apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a state other than the state of registration of that aircraft.

Article 4

- 1 Each contracting state shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence in the following cases:
 - (a) when the offence is committed on board an aircraft registered in that state;
 - (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
 - (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business, or if the lessee has no such place of business, his permanent residence, in that state.
- 2 Each contracting state shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the states mentioned in para 1 of this article.
- 3 The Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 5

The contracting states which establish joint air transport operating organisations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the state among them which shall exercise the jurisdiction and have the attributes of the state of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organisation which shall communicate the notice to all State Parties to this Convention.

Article 6

- 1 Upon being satisfied that the circumstances so warrant, any contracting state in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that state but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
- 2 Such state shall immediately make a preliminary enquiry into the facts.
- 3 Any person in custody pursuant to para 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the state of which he is a national.
- 4 When a state, pursuant to this article, has taken a person into custody, it shall immediately notify the state of registration of the aircraft, the state mentioned in Article 4, para 1(c), the state of nationality of the detained person and, if it considers it advisable, any other interested state of the fact that such person is in custody and of the circumstances which warrant his detention. The state which makes the preliminary enquiry contemplated in para 2 of this article shall promptly report its findings to the said states and shall indicate whether it intends to exercise jurisdiction.

Article 7

The contracting state in the territory of which the alleged offender is found, if it does not extradite him, shall be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.

Article 8

- 1 The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between contracting states. Contracting states undertake to include the offence as an extraditable treaty to be concluded between them.
- 2 If a contracting state which makes extradition conditional on the existence of a treaty receives a request for extradition from another contracting state with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested state.
- 3 Contracting states which do not make extradition conditional on the existence of a treaty shall recognise the offence between themselves subject to the conditions provided by the law of the requested state.
- 4 The offence shall be treated, for the purpose of extradition between contracting states, as if it had been committed not only in the place in which it occurred but also in the territories of the states required to establish their jurisdiction in accordance with Article 4, para 1.

Article 9

- 1 When any of the acts mentioned in Article 1(a) has occurred or is about to occur, contracting states shall take all appropriate measures to restore control of aircraft to its lawful commander or to preserve his control of the aircraft.