Nature of Air Law

Myint Nandar Thein[1]

Abstract

The convention of the Paris Conference of 1910 was an attempt to codify international civil aviation. This Conference did not adopt the freedom of the air theory. At that time the general tendency was already in favour of the sovereignty of States in the airspace above their territories. Subsequently, the Paris Convention of 1919 was adopted but it was eventually replaced in 1944 by the Chicago Convention on International Civil Aviation, commonly referred to as the Chicago Convention, 1944. International Air Law is a combination of Public and Private International Law. Its purposes are to provide a system of international regulation of international civil aviation, and to eliminate conflicts or inconsistencies in Municipal Air Laws. Air sovereignty is one of the most important elements of Air law. The fundamental principle of Air law is that every State has a complete and exclusive sovereignty over the air space above its territory. However, given the fact that aircraft fly through the air space of several countries, it is essential that Air Law has to be international in nature. Accordingly, by its nature Air Law encompasses all the elements of International Law such as territory, sovereignty, jurisdiction, administration, etc. Each of these elements in the context of international civil aviation is elaborated upon in this paper.

Introduction

Air law comprises (i) the medium in which navigation evolves (the air in relation to the infrastructure); (ii) the machines with which aerial navigation is carried out; (iii) persons or property which is transported by air; and (iv) travel by air and the legal implications which arise. The basic principle of the law governing international civil aviation is territorial sovereignty.

Regarding the question of national territory, according to Article 2 of the Chicago Convention, territory is deemed to be "land areas and territorial waters only". According to Article 55 of the Law of the Sea Convention 1982, the Exclusive Economic Zone (EEZ), does not form part of the territorial waters. So, a State has absolute sovereignty over the airspace above its land territory and territorial waters, but not above the EEZ. As regards the airspace above the high seas, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), Article 87 (1) (b) provides for freedom of over flight of the high seas.

In short, the area of territorial airspace over which a State has exclusive sovereignty corresponds to its firmly demarcated land boundaries and to its claimed width of territorial sea. The sovereignty of States over their national airspace is, however, limited in height to the point where the airspace meets outer space itself. No agreement however, has yet been reached as to the exact boundary between national air and outer space, but figures between 50 and100 miles have been put forward.

The right however, to penetrate national airspace without prior permission and to land on national territory in the event of distress or of unfavorable weather conditions is upheld by the Chicago Convention which requires member States to provide all measures of assistance to aircraft in distress.

Nature of Air Law

Air law by its nature comprises (i) the medium in which navigation evolves, that is, the air in relation to the infrastructure; (ii) the machines with which aerial navigation is carried out; (iii) persons or property which is transported by air; and (iv)travel by air and the legal implications which arise. Of these, the air medium is of major importance for aviation. Its explanation and correct understanding provide the response to the problem posed by "freedom

[1] Dr., Lecturer, Department of Law, University of Dagon.

of the air". Although all aircraft are free to fly through the air, it must be mentioned that there is no "freedom of the air" above a States territory.

1.1 Air Territory

As far as territory is concerned, Article 2 of the Chicago Convention determines that the lateral limits of air territory i.e, "air space" comprises the air above the land regions and territorial waters adjacent to them over which a State exercises its sovereignty, suzerainty, protection or mandate.[3]

With regard to the air space above the territorial sea, the current development in the Law of the Sea tends towards acceptance of a twelve nautical mile limit for the territorial sea, and a two hundred nautical mile limit for the exclusive economic zone (EEZ). As far as this concept can be considered to have been accepted, (under Article 2 of the Chicago Convention) the twelve mile limit which constitutes the seaward limit of the air territory or "air space" of such States will have to be regarded as corresponding to their claim to territorial waters.[4]

However, at the present time, no uniform international rule on the seaward extension of national "air space" exists under Article 1 and 2 of the Chicago Convention. The EEZ does not form part of the territorial waters and, therefore, the EEZ is not part of the national sovereign "air space" of the coastal State. Thus, regarding the legal status of national airspace,States have complete and exclusive sovereignty over the air above their territories including the territorial sea but not the contiguous zone.[5]
however, is controlled by no one and hence is free for the u

With regard to, the "height" of the air subject to national sovereignty, though a maximum airspace height of 12 miles has been laid down in United Nations Convention on the Law of the Sea (UNCLOS III), 1982 for both land territory and territorial waters, no agreement has as yet been reached as to the exact boundary between national air and outer space, but figures between 50 and 100 miles have been put forward.[7]

1.2 Sovereignty

Air sovereignty is the exclusive right of a State to grant or refuse entry into its air space to all foreign aircrafts. Article 1 of the Chicago Convention affirms "complete and exclusive" sovereignty of each State over the 'airspace' above its territory.[8] In view of the fact that Article 1 of the Chicago Convention recognizes complete and exclusive sovereignty of each State over the air space above its territory and does not refer to the sovereignty of each contracting State, it appears that the Convention, by its scope, tends to speak for all States, even non-contracting ones. Furthermore, the words "complete" and "excusive" clarify the fact that there is no right of innocent passage. Therefore, there is no "freedom of the air" above a State's territory. Such freedom only exists in the "air space" above the high seas and above the EEZ.[9]

With regard to the air space above artificial islands and structures, such space is open to all overflights under Article 56(1)(b) and Article 61(1). However, Archipelagic States have sovereignty over the airspace above archipelagic sea-lanes passage according to Article 53(2),(4),(5),(12). And, finally, any rights of the coastal State over its continental shelf do not affect the legal status of the airspace above the shelf: that airspace is open to overflight to all.[10]

---

[3] Article 2 of the Chicago Convention, 1944
[4] Nicolas Mateesco Matte, , Treatise on Air Aeronautical Law, 1981, p.135.
[5] Ibid, pp135,334.
[6] Article 87 (1 b) and 88 of the United Nations Convention on the Law of the Sea, 1982.
[7] Gerhard Von Glahn, An Introduction to Public International Law, 7th edition, Allyn and Bacon1995,p.335.
[8] Nicolas Mateesco Matte, Ibid, p.132.
[9] Nicolas Mateesco Matte, Ibid.p.132
[10] Ibid.

Also, Article 38 establishes a right of transit passage in the sea straits for all ships and aircraft, including military vessels and aeroplanes.[11]

Since the basic principle of Air Law is territorial sovereignty, the prior consent of every State is necessary for the flight through its air space of the aircraft of any other State.[12] And States are generally willing to grant this freedom of flight over their territory to foreign aircraft only on such terms as are contained in multilateral agreements such as the US-UK Bermuda Agreement.[13]

The principle of complete sovereignty in the superincumbent air space is discernible in the legislation of all States. This is evidenced in the domestic or national sphere where the same principle has been established in State legislation throughout the world, that is, that the sovereignty of a State extends over the air superincumbent on all parts of its territorial land and waters.

The principle of sovereignty of the skies is not absolute. States have the right to intercept all intruding aircraft, but, they are prohibited from shooting down intruding civil aircraft under Article 3 b is of the Chicago Convention. Intruding military aircraft are, however, not covered by this provision.

2. Jurisdiction under Air Law

The Chicago Convention states: "aircraft have the nationality of the State in which they are registered".[14] Although this fundamental principle of the nationality of the aircraft has been accepted, the problem of jurisdiction in respect of events or incidents on board i.e, jurisdiction in civil matters (births, deaths or marriages conducted on board aircraft) has not yet been given formal expression in general rules. For offences committed on board, however, jurisdiction has been provided in the Tokyo Convention of 1963.[15] The Convention on Offences and Certain Other Acts Committed on Board Aircraft, the Hague Convention of 1970 for the Suppression of the Unlawful Seizure of Aircraft and the Montreal Convention of 1971.[16] The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation defines a number of acts of unlawful interference directed against International Civil Aviation. Whereas, the Hague Convention is concerned exclusively with offences committed on board aircraft, the Montreal Convention, 1971, also combats other unlawful acts against the safety of civil aviation and provides for universal jurisdiction over the offender.[17]

The facts stated above shows that in air law, the areas of jurisdiction have been set as the airspace above national land territory and the airspace above territorial waters. However, for the airspace above the high seas which is controlled by no one, the jurisdiction applicable to an aircraft during its flight above the high seas is the law of the country in which the aircraft is registered.

---

[11] George Schwarzenberger, A Manual of International Law, 5th edition, 1965.p.33
[12] Shawcross and Beaumont, Air Law, 3rd edition,Vol.1, Betterworths& Co.Ltd, London 1966.p.28.
[13] Ibid, p.30.
[14] Article 17 of the Chicago Convention, 1944.
[15] Prof. Dr. I. H. Ph. Diederiks-Verschoor, Ibid, p.23.
[16] http://www.Icao.org.
[17] Ibid.

3. Administration under Air Law

The International Civil Aviation Organization (ICAO) which came into existence on 4th April 1947 is the permanent body charged with administration of the principles of the Chicago Convention.[18]

Two supplementary agreements were adopted by the Chicago Conference: the International Air Services Transit Agreement and the International Transport Agreement. These two treaties also known as the Five Freedom Agreements do not form part of the ICAO constitution and are binding only on the ICAO member states that have ratified them.[19]

The ICAO has also made increasing use of regional administrative machinery. The ICAO Regional Offices assist States in implementing ICAO Standards, Recommended Practices and Procedures, and Regional Air Navigation Plans and organized Regional Air Navigation Meetings and Conferences in conjunction with the Air Navigation Commission.[20]

It is clear that the International Civil Aviation Organization which is the main administrative body of civil aviation is able to ensure that in the administration of its air territory, each sovereign State can equally be assured of the "complete and exclusive sovereignty over the airspace above its territory" due to the uniformity in established air Law.

Acknowledgement

I would like to express my sincere gratitude to Sayar Gyi Dr. U Win Naing, Rector, Dagon University for his encouragement and permission relating to research presentation in the 25th Anniversary of Dagon University Paper Reading Session. My Sincere thanks also go to Professor Dr Mi Khin Saw Aung, Head of the Department of Law, Dagon University, for all of her help and encouragement in all time of this research. I wish also to express my gratitude to Professor Dr Nilar Soe, Department of Law, Dagon University, for her kind advice and suggestions. My grateful thanks also go to all my dear friends, for their words of encouragement.

Conclusion

It has been seen that because of the international nature of civil aviation, aircraft belonging to one State can travel through the territories and spheres of jurisdiction of several other States while in flight. Therefore, by its nature, Air Law encompasses all the elements of International Law as a whole. That is, territory, sovereignty, jurisdiction, administration, etc., as well as the many problems relating to these elements.

Accordingly, the purpose of Air Law is to provide a system of internationally accepted regulations to deal with the administration of civil aviation and to settle its problems. The international community has, to this end, concluded several International Conventions, the chief among these being the Chicago Convention, and has established several organizations over the years in order to achieve uniformity in International Air Law.

A State's air space or air territory is determined as the air space above its land regions and territorial waters adjacent to them over which it exercises its sovereignty. Since the EEZ does not form part of the territorial waters, it follows that the air space above the EEZ is not part of a State's air space.

In view of the fact that it is crucial for States to maintain their political independence and territorial integrity through the exercise of State sovereignty all over their territory, the

[18] Ibid.
[19] http://www.Icao.int/ creation.htm 1
[20] Shawcross and Beaumont, Ibid, p.66.

fundamental principle of Air Law, as contained in Article (1) of the Chicago Convention, is, that every State has complete and exclusive sovereignty over the air space above its territory. This means that air sovereignty is the exclusive right of a State to grant or refuse entry into its air space to all foreign aircrafts. Thus, the prior consent of a State is needed for the aircraft of any other State to fly through its air space.

References

Books

1. George Schwarzenberger, (1965). A Manual of International Law, 5th edition.
2. Gerhard Von Glahn, (1995). An Introduction to Public International Law, 7th edition, Allyn and Bacon.
3. Nicolas Mateesco Matte, (1981). Treatise on Air Aeronautical Law..
4. Prof. Dr. I. H. Ph. Diederiks-Verschoor,(2001). An Introduction to Air Law,7th revised edition, Kluwer Law International, the Hague, London, New York.
5. Shawcross and Beaument, (1966). Air Law,3rd edition,Vol.1, Betterworths& Co.Ltd, London.

Conventions

1. The Chicago Convention, 1944.
2. The United Nations Convention on the Law of the Sea, 1982.

Internet Sources

1. http://www.Icao.org
2. http://www.Icao.int/ creation.htm