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Preface

The 70th Anniversary of the signature ceremony of the Convention on International Civil Aviation (Chicago Convention) will fall on 7 December 2014. This day each year also happens to be designated "International Civil Aviation Day" marked by a modest ceremony by the International Civil Aviation Organization (ICAO). In reality, the 7th of December is not the day the Chicago Convention's anniversary should be associated with. It should be the date on which the Chicago Convention entered into force, which was 4 April 1947. However, the ICAO Assembly chose otherwise and, at its 29th Session (Montreal, 22 September–8 October 1992), adopted Resolution A29-1, which declared that each year, starting in 1994, the 7th of December shall be designated "international civil aviation day". This practice is at variance with "The United Nations Day", which is celebrated each year on 24 October—the day on which the United Nations came into existence.

At the time of writing, there were 191 States that had signed or otherwise adhered to the Chicago Convention, which *ipso facto* make them member States of ICAO. However, in 1944, only 52 signatory States (approximately 27 % of the current number) were party to the Convention. Over the years, the Convention has retained its pristine purity with no fundamental amendments or revisions, although a few "cosmetic" revisions have been added. In particular, three amendments entered into force, relating to articles: Article 3 *bis*, Article 83 *bis*, Article 50(a), and Article 56, in 1995–1998.

The Chicago Convention has been an enduring multilateral treaty for the past several decades, showing both resilience and vision. The treaty is far-reaching and can today be taken to apply to aspects of aviation such as security and environmental protection, which are not even explicitly referred to therein. However, The Chicago Convention has been vulnerable to misinterpretation and has often been misquoted by States mostly for political reasons and gains. For example, the provision on State sovereignty over airspace has been used to block useful initiatives on the liberalization of air transport, the imposition of air navigation charges, and other levies on airlines. It is submitted that the Convention should be interpreted to accord with the intent of its forefathers and current exigencies so that it

achieves its main objective of serving the needs of the people of the world and not exclusively those of individual businesses and States.

One of the unique characteristics of the Chicago Convention is its wording in various provisions that ascribes specific meaning and purpose to its provisions. To this extent, the Chicago Convention stands out as an international treaty carved out in the early years of international comity after World War 2, having particular diplomatic nuances in its language. Various provisions, depending on their compelling nature, use words that effectively describe the meaning and intent of the treaty. For example, Article 1, on the question of sovereignty, states that the Contracting States "recognize" that each State has complete and exclusive sovereignty over the air space above its territory. Here, the word "recognize" conveys the meaning that the legal recognition of sovereignty of nations has already existed, which is a fact, as sovereignty over national airspace was first referred to in the Paris Convention of 1919. In Articles 2 and 3 that follow, the Convention uses the word "shall" to denote a peremptory rule of law (for example, in Article 3(a)) the Convention stipulates that it "shall" be applicable only to civil aircraft and shall not be applicable to State aircraft).

In Article 3(a) and (b), one sees again the word "recognize", where the Convention provides that Contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that States also recognize that each State has the right to require aircraft to land at designated airports. However, in Article 3(c), the provision starts with "Every civil aircraft shall comply with an order given in pursuance of paragraph b) of the Article", thus bringing in the mandatory element of compliance.

A slight deviation is seen in Article 4, where the Convention provides that each Contracting State "agrees" not to use civil aviation for any purposes inconsistent with the aims of the Convention. Here, the word "agrees" implies general agreement of States. It is arguable that the particular use of the word leaves a window of opportunity for a State to deviate from its agreement if it is impossible for that State to keep to its agreement. In the following Article, the word "agrees" occurs once again where States are recognized as having agreed to allow non-scheduled flights the right to make technical and non-commercial flights into their territory.

Article 6 deviates from the positive approach of the preceding provisions by saying that each Contracting State shall have the right to refuse cabotage rights or commercial air traffic rights to foreign aircraft between points within their own territory. The use of the words "shall have the right to refuse" is skillfully used to convey the meaning that a State's right to grant cabotage rights already exists.

The discretionary right of a State is explicitly recognized in Article 9, which provides that each Contracting State may, for reasons of military necessity or public safety, restrict or prohibit aircraft in certain circumstances from flying over their territory. The use of the word "may" is clear in its meaning and purpose.

Article 12 carries yet another nuance of language where each Contracting State is required to undertake to adopt certain measures. The word "undertake" implies accountability and responsibility. The difference between the use of the words

"agree" and "undertake" brings to bear the clear intent of a treaty carved out many years ago with vision and foresight by its founding fathers.

The above terminology can be compared with the use of the words in Article 17, which states that "aircraft have the nationality of the State in which they are registered". It is to be noted that this provision does not have the peremptory admonition issued by the word "shall", and one could only conclude that the provision conveys that it is a fact taken for granted, that once an aircraft is registered in a particular State it shall *ipso facto* be deemed registered in that State. The following statement in Article 18, that aircraft cannot be validly registered in more than one State, conveys the impossibility of such an exigency. Here, the use of the word "cannot" instead of "shall not" leaves no room for doubt that in this instance the right for dual registration of aircraft did not exist to begin with. This usage is contrasted with the use of the words "shall not", which implies that a right that seemingly exists is taken away.

This book provides a commentary on the Chicago Convention and its various provisions against the backdrop of legal analysis. I was prompted to write this commentary as I had not seen a comparable treatise that explains the Convention, its nuances, and the manner in which the ICAO Assembly and Council have interpreted the Convention. In doing so, I address the main provisions of the Convention that impact civil aviation law. Those provisions, which are self-explanatory and have not been subject to actions of the international aviation community or of ICAO, are not mentioned in the text under separate chapters. The text of the Chicago Convention is attached for ease of reference.

1 July 2013 Ruwantissa Abeyratne

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