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THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION OF 1944: CATALYST TO OR DESTROYER OF INCENTIVES FOR MULTILATERAL AIR SERVICES?*

By **Solomon Musa***

Introduction

It is trite law that treaties and conventions are the most common sources of international law and ipso facto, sources of air law. Treaties may be bilateral or multilateral. They represent the assertion or expression of free sovereign will by states arrived at sometimes after intense negotiation and horse-trading.

During the Second World War, it became clear that aviation needed to be organized on a worldwide basis, rather than regional basis. President Roosevelt, upon the realization of a necessity for the provision of a sound basis for the organization of civil aviation after the war, invited a large number of governments to attend a conference in Chicago. Fifty-two governments attended.[1]

The conference was held in held in Chicago and the following agreements were signed on 7th December, 1944;

1. The Final Act, signed by fifty-two states;
2. An Interim Agreement on Civil Aviation, signed by forty States;
3. A Convention on international Civil Aviation, signed by thirty-eight States;
4. International Air Services Transit Agreement, commonly known as the "Transit" or "Two Freedoms" Agreement signed by thirty-two States;
5. International Air Transport Agreement, signed by twenty States.[2]

What are the bases for the Chicago Convention and Agreements? ; What are the features and principles contained therein? What again are the prospects (if any) as well as the challenges of the Convention and the Agreements?

* Solomon Musa, Lecturer, Faculty of Law, ABU Zaria.

[1] Johnson, D.H.N "Rights in Air Space" Manchester University Press. Oceana Publications Inc.

[2] Shawcross and Beaumont: "Air Law", Fourth Edition, Vol.1 General Text London Butterworth's. 1977 P.52 1

2. Bases For The Chicago Convention On International Civil Aviation And Agreements

The bases for the Chicago Agreements on international civil aviation may be summarized as follows: (a) The challenge of increasing development of aviation and its activities from the period preceding the conference leading to increase or need for more flights over the superjacent air space of other States, thus raising the issue of the extent of the sovereignty of the States so over flown over their airspace; (b) Due to technical developments around the Second World War period leading to prodigious increase in trans-continental and inter-oceanic aviation, new problems as to freedom of air transit and landing rights for international airlines emerged; (c) As a result of the aforementioned problems, the challenge of setting out general principles of international air law became necessary (d) Ipso facto, the need for a permanent international civil aviation organization to enhance and advance the principles in the latter challenge; (e) Finally, the challenges of regulation of air navigation; codes of operation for aircraft and regulation of air traffic etc.[3]

3. Features and Principles of the Chicago Convention on International Civil Aviation and Agreements

The most important feature. of the conference was the formulation of the Convention on International~ Civil Aviation, (CICA) better known as the Chicago Convention, 1944 which came into force on 4th April, period between the signing of the Convention and it's coming to force (7th December, 1944 to 4th April, 1947), an Interim Agreement on Civil Aviation, signed by forty States was entered, designed to cover the period until the main Convention came into force. The Interim Agreement set up the Provisional International Civil Aviation Organization (PICAO), the precursor of ICAO on 6th June, 1945 consisting of an Interim Assembly, an Interim Council and a Secretariat under a Secretary General. When eventually the main Chicago Convention came into force, PICAO was superseded by the permanent Organization (ICAO).[4]

Besides the Interim Agreement and the Main Convention, the conference drew up two other agreements viz: the International Air Services Transit Agreement or the "Two Freedoms" Agreement; and the International Air Transport. Agreement or the "Five Freedoms".[5] More will be said on these two agreements later.

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[3] Shearer, I.A "Starkes International Law" Eleventh Edition, Butterworth and Co Publishers. London (1994) P. 213

[4] Ibid

[5] Ibid

Besides the Convention and the agreements mentioned, the conference adopted resolutions, for example, in recognition of the "part that bilateral agreements would have to play in developing civil aviation, prepared a 'Form of Standard Agreement for Provisional Air Routes"[6]

4. Features of the Chicago Convention on International Civil Aviation

Let's now discuss the features of the Convention albeit in brief as more of its provisions will be considered in due course with respect to the principles therein. It suffices for now to point out that the Convention is divided into four parts and twenty-two chapters. Part one of the Convention deals with the subject matter of Air Navigation including technical matters as well as International Standards and Recommended Practices.

Part two sets up the International Civil Aviation Organization, its Organs and Subsidiaries and specifies their functions and powers thereof;

Part three deals with International Air Transport; while part four deals with final provisions including procedural matters, technical annexes to the convention, definitions and such like matters.[7]

The above represents the basic features of the Chicago Convention and Agreements. What then are the principles of the Convention and the Agreements? We shall attempt to summarize the fundamental and basic principles as the scope of this work will not permit a more in-depth consideration of the principles.

5. Principles of the Convention on International Civil Aviation of 1944

The first issue was the resolution of the then increasingly contentious issue of the sovereignty of states over their superjacent airspace, territorial waters and over occupied territory.[8] The only consensus on these contentious issues before 1914 was that the airspace over the open sea or high seas and over terra nullius, i.e., unappropriated territory was absolutely free and open.

The theories on the issue then varied largely on two wavelengths with the pendulum of the theories swinging either towards the British theory of

[6] Ibid 58,59
[7] Text of the Chicago Convention itself
[8] Shearer, I.A

state sovereignty or the French postulation of freedom of the air. There was the view that the airspace was completely free; the view that the airspace above a state was entirely within its sovereignty; then another view of sovereignty of the subjacent states up to a Specific height, the remaining air space being free. Another view is that which accords recognition of sovereignty over the airspace above a state, subject however, to a right of innocent passage through the airspace for foreign civil aircraft; and finally, sovereignty of the subjacent State up to a specific height, that State having a right to regulate the passage of aircraft through the remaining air space.

Practical realities arising from the security implications of the use of the air and the need for regulation of flights over national territory after the First World War ensured the universal acceptance by all States of the theory of Sovereignty of the Subjacent State over the airspace to an unlimited height otherwise known as the Usque ad Coelum principle.[9] How then did the Chicago Conference resolve the issue of the freedom of the air

Article ,1 of the Convention Simply reiterated the provisions of Article 1 of the Paris Convention 'of 1919 for the Regulation of Aerial Navigation. Article 1 of the 1944 Convention provides for sovereignty of states over the airspace above their land and territorial sea[10] the following words:

> *"The contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory".*

There, thus, is no right of passage. over the airspace above the territory of the State save with the agreement of the State concerned. This is where the principle of sovereignty and state

Security dovetailed and blended with those of protection of national economic interest through protectionist regulation of air services and air transport nationally and internationally. Article 7 of the Convention in recognition of the sovereignty of the subjacent state over their airspace above its land concedes the right of Cabot-age to the subjacent state. The Article granted each contracting state:

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[9] For the competing theories see Shearer, L.A Op.Cit P. 155; Johnson Op. Cit P. 12-17 and Shaw. M.N "International Law" Fourth Edition, Cambridge University Press, 1977, P. 369, 370

[10] See Article 2 of the Convention which define the territory of a State to "be the land arrears and territorial waters thereto under the Sovereignty, protection or mandate of such State"

"The right to refuse permission to the aircraft of other Contracting States to take on in its territory passengers, Mail and Cargo carried for remuneration or here and destined for another point within its territory.. ."

The Convention with respect to commercial rights accords recognition to protectionism which is slackened only with respect to non-commercial matters. Articles 5 and 6 of the Convention deal with the issue of flight over territory of contracting States with respect to whether the flight is non-scheduled or scheduled. Article 6 severely restricted, circumscribed and limited scheduled air services to the authorization and permission of the subjacent state. Article 6 provides

"No Scheduled International air Service may be operated over or into the territory of a contracting state except with the special permission or other authorization of that state, And in accordance with the terms of such permissions or authorization."

The contracting state may thus restrict, refuse or in allowing such flights "designate the route to be followed", and the airport which may be used. [10(a)]

At this junction, it is necessary to pause and briefly look at the terms "Scheduled International ,Air Service" and "Non-Scheduled international Air Service" in order to set down the correct tone perspective and focus of the discourse.

The convention did not give any direct definition of "Scheduled Air Service." However, when the entire definition is considered contextually, a direction is discerned which is later supplemented in 1952 by the Council of ICAO which becomes at least a working or a descriptive definition.

Article 96 of the Convention[11] provides:

"For the purpose of this Convention the expression:

a) 'Air Service means any Scheduled Air Service performed by aircraft for the public transport of passengers, mail or cargo.
b) 'International Air Service' means an air service which passes through the airspace over the territory of more than one State.
c) 'Airline' means any air transport enterprise offering or operating an international air service.

[10(a)] Article 68 of the 1944 Chicago Convention

[11] Chicago Convention, 1944

d) 'Stop for non – traffic purposes' means a landing for any purpose other than taking on discharging passengers, cargo or mail."

A gleaning of the combined effect of the above provision shows that no injustice will be occasioned to the concept of scheduled air Service if viewed in the light of air performed by airline or aircraft for the public transport of passengers, mail or cargo. This service becomes "international" when performed through the airspace over the territory of more than one state. Added to this according to Johnson[12], is the definition by the Council of ICAO in 1952:

> *"... When it said that in addition the service must be performed for 'remuneration, in such a manner that each flight is open to use by members of the public and that it must be '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 or frequent that they constitute a recognizably Systematic Services"*

6. Chicago Convention: Death Knell of Multilateral or Triumph of Bilateral Air Service?

We shall at this stage consider the effect the Chicago Convention on International Civil Aviation (CICA) of 1944 had on multilateral air service. Did the Convention sound its death knell on the one hand while promoting Bilateral air Service on the other?

For a meaningful discussion, we shall consider the issue through the following prisms viz; the general principles of the Chicago Convention; the right of non-scheduled flight; scheduled international air services and freedom of the air and; Bermuda Model Agreements; Triumph over Multilateralism?

(A) The General Principles of the Chicago Convention

(a) Generally and as can be seen from the penultimate paragraph, the Chicago Conference rather than liberalizing the concept of the freedom of the air, restricted and constricted it. This limitation of the concept of the freedom of the air was achieved through

(i) The recognition by contracting States that every State has complete and exclusive sovereignty over the airspace above its territory. States thus had no right of passage over the airspace above other States, unless there is a prior agreement to that

[12] Johnson Op. Cit. P. 62

effect. [12(a)]

(ii) As pointed out above, Article 7 of the 1944 Convention concedes the right of cabotage to the Subjacent State. The Subjacent State therefore reserves the right to be enjoyed by its nationals or may permit other Contracting States to enjoy the right of cabotage

(iii) Expressly subjected the operation of scheduled international air service into the territory of a contracting state strictly only to the special permission or authorization of that state[12(b)]

(iv) The Contracting State is given the powers to restrict, refuse or in allowing such flights designate the route to be followed and the airport which may be used.[12(c)]

(b) The Right of Non – Scheduled Flight

Let us at *this* juncture consider the right of aircraft "not engaged in scheduled international air service. This is covered by Article 5[13].

The Article provides:

> *"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 nonstop 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 on 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."*

[12(a)] Article I of the 1944 Convention

[12(b)] Article 6 of the 1944 Convention

[12(c)] Article 68 Chicago Convention

[13] Chicago Convention, 1944

While the Article does not exactly give carte blanche powers for international flights without permission or regulation by the subjacent state, it nevertheless is the article that granted such rights of flight as are available under the Convention but gives reasonably,, extensive rights of flight albeit to purely private aircraft. These rights have been restrictively and harshly interpreted due to the hostility of governments as a whole and the ICAO Council to the provision and the rights.[14] States have consequently required that permission be obtained prior to the acceptance of charter flights over or into their territory, even though such flights do not really come within the meaning of Article 6 or within the definition of scheduled international air services.

It also became clear that while agreement is possible and not too difficult to obtain on a fairly extensive scale so far as air navigation generally was concerned, the same is not the case with the regulation of commercial air transport which had largely eluded a multilateral solution and had proved to be the subject of hard bargaining on a purely bilateral basis. Commercial air traffic rights relating to international aviation; freedom of air transit; landing rights as well as allocation of air traffic between States were, of course, part of the seemingly intractable problems the Chicago Conference sought to address. These issues are of course issues that are core to scheduled international air service. We will now examine the efforts or measures taken or sought to be taken with regards to scheduled international air services.

(C) Scheduled International Air Services and Freedom of the Air

The Chicago Conference. "agreed to disagree" on the issue of scheduled international air services' in the main convention except for article 6.[15] The three fairly rigid positions that were advocated at the conference can be summarized as follows: The position led by United States and a few other countries was for the principle of the "freedom of the air" at least in a Commercial Sense. Five Freedoms were formulated or proposed by the U.S which was eventually set out in the International Air Transport Agreement; secondly, the extreme position of Australia and New Zealand which championed the internalization of commercial air transport; and finally the middle position advanced by the United Kingdom, supported by Canada was that of what was called "order in the air" according to which the first four freedoms exclusive of the fifth

[14] Johnson, Op. Cit. P. 63
[15] Johnson Op.Cit. p. 64, 65

would be exchanged multilaterally.[16]

Due to the intense disagreement based on the three divergem positions canvassed above, the conference resolved not to deal with the issue of scheduled international air service in the main convention, rather, the conference was constrained to draw up two agreements, both agreements revolving round the issue of the five freedoms. What are these five freedoms and what are the two agreements besides the Main Convention revolving round the five freedoms?

The Five Freedoms of the Air were if conceded by contracting states, the rights of the airlines of each state in respect of scheduled international air services to:

1. Fly across foreign territory without landing;
2. The privilege to land for non-traffic purposes (stop over);
3. The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
4. The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;
5. The privilege to take on passengers, mail and cargo destined for the territory of any other contracting state and the privilege to put down passengers, mail and cargo coming from any such territory, in other words the privilege to carry traffic between two foreign countries.

While there were disagreements on concessions to the entire five freedoms, the first two freedoms appeared to obtain the support of, a majority of the States represented at the conference. Accordingly the two Agreements reached at the conference concerning the Five Freedoms were:

a) The International Air Service Transit Agreement providing for the first two agreements; and
b) The International Air Transport Agreement containing all "Five Freedoms"

While the first agreement received the support of majority of the states present at the conference, the second did not as it was felt that too much of commercial value had been granted away. The second agreement was not ratified by many countries, and ironically even the United States its chief proponent withdrew from it in 1946.[17] The Countries generally felt

[16] Ibid
[17] M.N. Shaw Op. Cit. P. 371

that the sovereignty which they possess over their land territory and their air space, must in aviation matters be exploited as an economic asset.

Thus, the exchange of air routes simply becomes a matter of bargaining by two or more countries. Bilateralism therefore gained prominence over multilateralism. initiative for multilateral air service was again squandered or sacrificed on the altar of selfishness, sovereignty and independence of the contracting states.

At the termination of the conference, this subject of allocation of traffic between competing scheduled international airlines was not settled by multilateral general agreement.

Thus, as a result of this failure, in actual practice., "the regulation of scheduled services has been achieved by an extensive network of bilateral agreements"[18] between states concerned such as the agreement between the United Kingdom and the United States reached on 11th February, 1946 at Bermuda.

(D) Bermuda Model Agreements: Triumph of Bilateralism Over Multilateralism?

The agreement reached at Bermuda between the UK and USA in 1946 provided an option out of the failure of the Chicago Conference to reach a multilateral agreement on air services. The agreement provided a framework and became a model and precedence for subsequent bilateral agreements by and between other countries.

The Bermuda Agreement of 1946 was replaced by another Bermuda Agreement of July, 1977, known, commonly as "Bermuda 2" entered into between the United Kingdom and the United States. The Bermuda Agreements main thrust may be summarized thus:

In the actual agreement, the two countries granted to each other rights to the extent described in the annex to the agreement for the purpose of the establishment of the air services described therein. The routes set out in the annex contained or included the contentious third-fifth freedom rights, thus tackling the challenging problem of capacity and the competitive position generally as between the airlines of the two Countries.

[18] Ibid

The agreement also stressed the need for a fair and equal oppor the carriers of the two nations; also

> *"In the operation by the air carriers of either government of the trunk services described in the Annex to the agreement, the interest of the air carriers of the other government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes."*[19]

The parties also provided:

> *"That it is the understanding of both governments that services provided by a designated air carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the Country of which such air carrier is a national and the Country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third Countries at a point or. points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that capacity should be related:*
>
> *(a) To traffic requirements between the Country of origin and the Countries of destination;*
>
> *(b) To the requirements of through airline operation; and*
>
> *(c) To the traffic requirements of the area through which the airline passes after taking account of local and regional services; and that it is the intention of both governments that there should be regular and frequent consultation between their respective aeronautical authorities and that there should thereby be close collaboration in the observation of the principles and the implementation of the provisions outlined therein and in the Agreement and its Annex.*[20]

A practical example of the rights involved in the Agre

[19] Johnson P. 69

[20] See Generally Shaw Op. Cit. P. 372, 373; Johnson Op. Cit. 67, 68 and Shearer Op. Cit

graphically illustrated by Johnson thus:[21]

> *"United Kingdom air carriers were granted the right to fly from London to Hong .Kong via New York, San Francisco and Manila; whilst United States carriers could fly from Chicago to Frankfurt via Shannon and London. ."*

As has been pointed out earlier, as a result of the failure in Chicago to reach a multilateral general agreement on air services, bilateral agreements between States such as the Bermuda Agreements of 1946 and 1977 between the United Kingdom and the United States were entered into.

The Bermuda model of agreements which came to be followed by other countries "healed" the "breach which appeared" at Chicago. It provided a framework and became a model and precedence for subsequent bilateral agreements by other Countries. It did not only provide a precedence for other countries but was used as a precedence for the UK and USA to the extend that the agreements crystallized by force of notoriety into what became known as the Bermuda Principles.

These Bermuda type or models of agreements therefore emerged as options or substitutes to multilateral air service agreements thereby not only sounding the death knell of multilateral air service agreements but concomitantly promoting bilateral air service agreements to the detriment of multilateralism.

Finally, these Bermuda models of agreements are premised on reciprocity and the recognition of the principle that international air transport should be facilitated by the bilateral agreements of countries. Besides discouraging multilateralism, another effect of the agreements is that they have impaired the uniformity of laws and practices internationally which was one of the primary objects of the Chicago Conference.

CONCLUSION AND SUGGESTIONS

The triumph of the Bermuda model of agreements clearly signified the death knell for further triumph of multilateral air agreements particularly with regards to commercial air services. Rather than being a knight in shining armour the Bermuda agreements became the grim undertaker that nailed the coffin and lowered it into the deceptively beautiful white painted sepulture of protectionism. The executioner was of course the

[21] Johnson Op. Cit. P. 67

Chicago Conference of 1944. Of course, in most cases, the task of both executioners and undertakers brings profits to only a few (themselves) but loss, sorrow and grief to many.

An example of the absurdity and economic loss attendant on the failure to reach a multilateral agreement on commercial air services may thus be illustrated by the recent Bilateral Air Service Agreement (BASA) Nigeria signed with Sao Tome and Principe. From the exploratory talks between the two countries on the desirability for the agreement in 1978, the agreement could not be signed until after 28 years in 2006!!, secondly even though the two countries are two hours apart by air, yet because there was no direct link through Bilateral Air service Agreement nor of course any multilateral agreement it usually takes a passenger from Nigeria 20 hours virtually a whole day, to reach Sao Tome and Principe!![22]

It is very clear therefore that while the Chicago Convention had its own successes, especially with regards to other matters such as the setting up of the International Civil Aviation Organization and its Subsidiaries, the same cannot be said of multilateral agreement on understanding and cooperation in respect of scheduled air services which deals with commercial air services. The failure the Chicago Convention has turned out to be the gain of protectionism epitomized by Bilateralism with the attendant absurdities, hardships, economic loss and failure to communicate better as exemplified by the pathos of Nigeria/Sao tome and Principe. The way forward it appears is for the nations of the world to call for another. Conference, akin to that of Chicago. In order to avoid the theater~ of the absurd the time has come and urgently too to review the Chicago Convention. For African Countries, the failures of Chicago should not prevent them through the instrumentality of the African Union from entering into Multilateral Agreement on commercial air services at least on continental or regional basis. After' all the 'African relishes on the time worn but time tested aphorism "we are our brother's keeper".

[22] The Guardian, Wednesday, August 30, 2006, P. 80