CHAPTER ONE

INTERNATIONAL LAW OF AIR OPERATIONS

A. Development

Unlike natural boundaries such as rivers, lakes and oceans, man-made borders are invisible from the air; thus, the European nations had early concerns about illegal entry and departure, and even aerial invasion. In the age of balloons, European statesmen, wary of the use of balloons for observation and for the carriage of foreign passengers and cargo, sought to impose rules on their cross-border movements. These concerns surfaced before the actual use of airships and planes as weapons became practical in the First World War. As the delegates gathered to prepare the Chicago Convention in 1944, national air security was clearly on their minds.

Outside of the Chicago Convention, the privilege of over-flight was considered by the International Court of Justice (ICJ) on the basis of customary international law in the case of Right of Passage Over Indian Territory (Portugal v. India) (1960 I.C.J. 6).

In 1955, India prohibited Portuguese aircraft from flying over the Indian territory between the Portuguese colonies (enclaves) on the West Coast of India. (The colonies had been established 450 years before and tolerated by the British Empire.) Newly independent India had prohibited flights by Pakistani civilian and military aircraft over the 900 miles of Indian territory separating East Pakistan from West Pakistan, and eventually extended the prohibition of over-flight to Portugal in an effort to bring an end to these colonial outposts. (The dispute of Pakistan v. India before the ICAO Council was resolved by the independence of East Pakistan (Bangladesh) in 1971.)

The ICJ recognized Portugal’s right by custom to over-fly Indian territory for private persons, civil officials and goods, but the court rejected a right to fly armed forces, armed police and arms and ammunition over the same territory. The basis of the right was a specific constant and uniform practice. The court refused to rule on the question whether general international custom or the general principles of law of civilized nations recognized such a right of over-flight. (The Indian Army invaded the Portuguese colony of Goa and the enclaves in December 1961 bringing an end to Portuguese rule.)

The first multi-lateral effort to regulate movement by air across boundaries came in 1898 when the Central Powers (Germany, Italy and Austria-Hungary)
agreed on the conditions under which military balloons and dirigibles could cross their respective frontiers. In the next year, the Hague Convention of 1899 on Land Warfare prohibited launching explosives or projectiles from balloons or other kinds of aircraft for five years; the prohibition covered other new methods of a similar nature (Annex II, art. 25). This prohibition was also included in the 1907 Hague Convention on Land and Naval Warfare for a period of time until the next Hague Conference. Furthermore, attacks on undefended cities by any means whatever were prohibited (Annex II, art. 25).

By 1910, excitement about the new aviation industry was apparent in all European countries, and there were frequent international air meetings with all the new aircraft competing for important prizes. Delegates from 19 nations met in Paris to hold the First International Conference on Air Navigation, May 18—June 29, 1910. This meeting was considerably influenced by the ideas of Professor Paul Fauchille, an international law scholar, and the members of the Institute of International Air Law founded in 1902. Professor Fauchille favored the freedom of the air for all peoples and nations, except in war time. In contrast, these early meetings also considered proposals to treat air law in a manner similar to maritime law with similar concepts of territorial air and the right of innocent passage.

The 1910 conference actually prepared a draft convention, but the meeting ended before a resolution to send the draft to a diplomatic conference could be adopted. The discussions developed a number of ideas that would return after the First World War in the first treaty on air law:

1. State sovereignty extends to an unlimited region of airspace over the land and water areas of the state.
2. States may establish prohibited zones over their territory.
3. There can be no commercial flights for carriage of goods or passengers without the consent of the states of take-off and landing.
4. Foreign aircraft may not carry goods or passengers from one point in a state to another point in the same state, the principle of cabotage from maritime law.

The Institute of International Air Law adopted a Code of Air Law, prepared by Professor Fauchille, at a meeting in Madrid in 1911. Professor Fauchille realized the opposition of states to unlimited freedom and the security risks even in peace time and proposed a zone of control of the territorial state up to a height of 330 meters—the height of the Eiffel Tower plus a wireless telegraphy mast. Under this Code the flag state of the aircraft would have jurisdiction over all acts on board the aircraft. See P. Fauchille, La Circulation Aérienne et les Droits des États en Temps de Paix, 17 Rev. Gen. Droit Int’l Pub. 55 (1910).

The First World War brought an end to these theoretical discussions and produced ample evidence of the destructive capacity of aircraft in the bombing of London and the air war over the Western Front. Thus, the resolution of problems