

# **United Nations Conference on the Law of the Sea**

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## **Comments by the International Civil Aviation Organization on the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session**

Extract from the *Official Records of the United Nations Conference on the Law of  
the Sea, Volume I (Preparatory Documents)*

COMMENTS BY THE INTERNATIONAL CIVIL AVIATION ORGANIZATION ON THE  
DRAFT ARTICLES CONCERNING THE LAW OF THE SEA ADOPTED BY THE  
INTERNATIONAL LAW COMMISSION AT ITS EIGHTH SESSION \*

[Original text : English]  
[24 January 1958]

1. The articles concerning the Law of the Sea prepared by the International Law Commission contain certain provisions which either directly relate to international air navigation and the right to fly, or are specifically stated as applying to aircraft, or, although intended to apply to ships, are so drafted that they could either by interpretation or by analogy be considered as capable of application to aircraft also. Insofar as concerns the aforementioned provisions of the articles in question, comments are made hereunder with a view to inviting attention to the provisions of the Convention on International Civil Aviation, 1944, on corresponding topics. Seventy-two States are parties to that Convention (see annex).

*Article 1*

2. As has been pointed out by the Commission in its Commentary, the Convention on International Civil Aviation of 1944 treats the territorial sea in the same way as other parts of State territory. The Convention uses the expression "territorial waters" and includes within the territory of a State the land areas and territorial waters adjacent thereto. The actual text (article 2) of the Convention reads as follows:

"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 2*

3. The rule of sovereignty over airspace is stated in article 1 of the Convention on International Civil Aviation, 1944, as follows:

"The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

Since "the territory" includes the territorial sea, the legal status of the airspace above the territorial sea is, under the Convention on International Civil Aviation, the same as that of the airspace over other parts of the territory of a State.

*Articles 15, 16 and 17*

4. The Convention on International Civil Aviation makes no distinction, in regard to passage by foreign

\* This document contains comments transmitted to the Secretariat of the United Nations by a letter from the Secretary-General of ICAO, dated 17 January 1958.

aircraft through the airspace above the territory of a State, as between the subjacent area being the land area of that State or the territorial sea. States participating in the Convention have agreed to one another's civil aircraft<sup>1</sup> making flights through their airspace when such aircraft are not engaged in scheduled air services, in accordance with the terms of article 5 of the Convention.<sup>2</sup> Except within the limits of the grant under that article or under some special authorization, a foreign aircraft does not enjoy a right of aerial passage over the land area of a State or over the adjacent territorial sea.

*Article 18*

5. Foreign aircraft flying through the airspace above the territory of a State, including the territorial sea, must, under the terms of the Convention on International Civil Aviation,<sup>3</sup> comply with the air regulations of the coastal

<sup>1</sup> This does not apply to State aircraft, that is to say aircraft used in military, customs and police services as to which Article 3 (c) of the Convention provides:

"No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."

<sup>2</sup> Article 5 of the Convention on International Civil Aviation, 1944, reads:

"Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services 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 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, 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."

<sup>3</sup> See articles 11 and 12 of the Convention, which read as follows:

"Article 11 - Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State."

"Article 12 - Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever

State, but such regulations are to be applied to the aircraft of all contracting States without distinction as to nationality.

#### Article 19

6. The Convention on International Civil Aviation, while specifying certain conditions relating to airport and similar charges, provides: "No fees, duties or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon."<sup>4</sup>

#### Article 20

7. The question of crimes committed on board aircraft engaged in international air navigation and the detention and arrest of offenders is at present being studied by the Legal Committee of the International Civil Aviation Organization which has the function, among others, of preparing drafts of international air law conventions. No firm principles or draft articles on this subject have yet been developed.

#### Article 27

8. This article enunciates the principle of freedom to fly over the high seas. The existence of such freedom would not be denied if its exercise were subject to international regulations concerning safety of air navigation. Thus, with respect to the rules relating to flight and manoeuvre of aircraft, the Convention provides: "Over the high seas, the rules in force shall be those established under this Convention" (See article 12 of the Convention reproduced in footnote (3)). Accordingly, the Council of ICAO has adopted Annex 2 to the Convention on International Civil Aviation, entitled "Rules of the Air" and has specified that the Annex constitutes rules relating to the flight and manoeuvre of aircraft within the meaning of article 12 of the Convention and that, therefore, over the high seas those rules apply without exception.

#### Articles 28, 29, 30 and 31

9. The Convention on International Civil Aviation contains the following provisions concerning nationality and registration of aircraft:<sup>5</sup>

"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 registration may be changed from one State to another.

"Article 19 - The registration or transfer of registration of

such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable."

<sup>4</sup> See article 15 of the Convention.

<sup>5</sup> Annex 7 to the Convention on International Civil Aviation contains detailed provisions concerning aircraft nationality and registration marks.

aircraft in any contracting State shall be made in accordance with its laws and regulations.

"Article 20 - Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks."

#### Article 34

10. Certain provisions concerning water operations of aircraft, particularly concerning avoidance of collision and lights to be displayed, are included in Annex 2 (Rules of the Air) to the Convention on International Civil Aviation mentioned above.<sup>6</sup>

#### Articles 39, 40, 45 and 47

11. In the English text of these articles of the draft, the following expressions are used: "private aircraft", "government aircraft", "military aircraft" and "aircraft on government service". The Convention on International Civil Aviation uses the expressions "civil aircraft" and "state aircraft", the latter being defined as follows (article 3 (b)):

"Aircraft used in military, customs and police services shall be deemed to be state aircraft."

12. An aircraft can be a "civil aircraft" even if it is owned and operated by a government. As a matter of historical interest, it may be stated that the Convention Relating to the Regulation of Aerial Navigation (Paris, 1919) used the term "private aircraft" to describe all aircraft other than "military, customs and police aircraft",<sup>7</sup> but that is otiose. In modern aviation practice, the expression "private aircraft" is used to describe such "civil aircraft" as are engaged in "private flying", which means flights which are performed without any remuneration by a person who does not operate a scheduled air transport service. A "civil aircraft", even if owned and operated by a government, is subject to the provisions of the Convention on International Civil Aviation (and also other international conventions on air law, such as the International Air Services Transit Agreement of 1944 and the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952).

13. In the French text of the draft, however, the term "*aéronef d'Etat*" is used to describe government aircraft.

14. In drafting the proposed Convention on the Law of the Sea, note might be taken of the modern aeronautical practice and of the expressions "civil aircraft" (instead of "private aircraft") and "state aircraft" used in the Convention on International Civil Aviation, as explained above.

<sup>6</sup> In para. 3.2.7.3 of the Annex it is provided that "In areas in which the International Regulations for Preventing Collisions at Sea are in force, aircraft on the water shall, in addition . . . comply with such other of the Regulations as are pertinent."

<sup>7</sup> Article 30 of the Paris Convention of 1919 read as follows:

"The following shall be deemed to be state aircraft:

"(a) Military aircraft;

"(b) Aircraft exclusively employed in state service, such as posts, customs, police.

"Every other aircraft shall be deemed to be a private aircraft.

"All state aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention."

*Article 42*

15. This article appears to be consistent with the provisions of articles 17 and 19 of the Convention on International Civil Aviation (see paragraph 9 above).

*Article 48, paragraph 3*

16. Pollution of the airspace above the seas resulting from experiments or activities with radioactive materials or other harmful agents could be significant in respect also of the safety of aircraft operations.

## APPENDIX

*List of Parties to the Convention on International Civil Aviation*

Afghanistan	Germany (Federal Republic of)	Netherlands
Argentina	Ghana	New Zealand
Australia	Greece	Nicaragua
Austria	Guatemala	Norway
Belgium	Haiti	Pakistan
Bolivia	Honduras	Paraguay
Brazil	Iceland	Peru
Burma	India	Philippines
Cambodia	Indonesia	Poland
Canada	Iran	Portugal
Ceylon	Iraq	Spain
Chile	Ireland	Sudan
China	Israel	Sweden
Colombia	Italy	Switzerland
Cuba	Japan	Syria
Czechoslovakia	Jordan	Thailand
Denmark	Korea (Republic of)	Tunisia
Dominican Republic	Laos	Turkey
Ecuador	Lebanon	Union of South Africa
Egypt	Liberia	United Kingdom of Great Britain and Northern Ireland
El Salvador	Libya	United States of America
Ethiopia	Luxembourg	Uruguay
Finland	Mexico	Venezuela
France	Morocco	Viet Nam (Republic of)