Outline

• Major principles of international air law
• Sources of International Air Law
• The Origins and Evolution of Conventional and Customary International Air Law

• The Role of the International Civil Aviation Organization in Establishing Standards and Recommended Practices

• Which international aviation conventions have States ratified, and how are they being implemented?
Major Principles of International Air Law
John Cobb Cooper, Backgrounds of International Public Air Law (1967)

1. Sovereignty over airspace.

- Every State has absolute sovereignty and jurisdiction over the air space directly above its territory (including territorial waters).
- Every State has the unilateral and absolute right to permit or deny entry into the area recognised as its territory, and a right to control all movements within such territory.

2. Freedom over the High Seas and other areas.
Air space over the high seas, and over other parts of the Earth's surface not subject to any State's jurisdiction, is free to the aircraft of all States.

Aircraft have a special relationship to a particular State.

That State determines the privileges to which such aircraft may be entitled and such State is also reciprocally responsible for the international good conduct of such aircraft.
Source of International Air Law
Sources of international law

The Case of the S.S. "Lotus"

France v. Turkey

Permanent Court of International Justice 1927

“International law governs relations between independent states. The rules of law binding upon states [are] expressed in conventions or by usages generally accepted as expressing principles of law”.

Statute of the International Court of Justice (ICJ)

Article 38
Source of International Air Law

- Customary International Law
- Multilateral Conventions / Treaties
- ICAO Standards and Recommended Practices (SARPs)
- Bilateral agreements (e.g., traffic rights, safety, security)
- Intergovernmental decisions and regulations (e.g., European Union regulation on flight delay, Emissions Trading Scheme etc.)
- National legislation and regulation
- Administrative practice and procedure
- Contracts (e.g., air carrier alliance agreements, airport agreements)
- Judicial decisions and opinions
The Origins and Evolution of Conventional and Customary International Air Law
Air law began with...

A hot air balloon!


http://upload.wikimedia.org/wikipedia/commons/9/9d/Early_flight_02562u_%284%29.jpg
Air law developed in peacetime...

- German balloons drifted over the French border and landing in France in 1908-1909.
- France responded by calling an international conference to address the violation of airspace.

- Conference produced a draft convention addressing *inter alia*: aircraft nationality and registration, certification of aircraft (airworthiness), crew licences, radio equipment, prohibited zones, cabotage.
Issues left unresolved after the 1910 Paris Conference

HOWEVER, States could not agree:

1. whether airspace should be “open” to all (like the high seas) or whether States have sovereignty over airspace
2. whether there should be right of innocent passage or need prior authorisation

• in 1911, the United Kingdom enacted the Aerial Navigation Act, allowing the UK to prohibit air navigation of any area, including the coastline and adjacent territorial waters, for the sake of the “defence or safety of the realm”.

http://www.zazzle.ca/lyon_france_1910_airplane_poster_round_stickers-217136179112350071
Air law developed during and after wartime...

- War demonstrated the destructive but also valuable power of aviation
- It became clear that aviation and control of airspace is closely linked to national security
- Many aircraft and pilots became available for civilian use, potential for transportation
- First commercial airlines began forming from 1909, and first regular service began in 1919.
Historical development of international air law

The regulation of aviation developed largely due to the potential impact of aviation on transportation, commerce and national security…

“We were once told that the aeroplane had ‘abolished frontiers’. Actually it is only since the aeroplane became a serious weapon that frontiers have become definitely impassable. George Orwell

1908-1909
Hot air balloons floating from Germany into France

1909
First commercial airlines

1910
Paris International Air Navigation Conference (Paris Conference)

1914-1918
World War I

1919
Convention Relating to the Regulation of Aerial Navigation (Paris Convention)

International Commission on Air Navigation (ICAN)
Convention Relating to the Regulation of Aerial Navigation
PARIS CONVENTION 1919

- Remember the Paris Conference of 1910?

Issue of sovereignty over airspace and right of passage unsettled.

Preamble identified:

- the need to establish rules of “universal application”
- the “necessity” to agree on “certain principles and rules”
- need “to encourage the peaceful intercourse of nations by means of aerial communication”
Article 1

“The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory”.

- “Recognise” hints this is a customary rule
- “complete and exclusive sovereignty”
- “Territory” includes territorial waters adjacent thereto
Paris Convention 1919
right of passage

Article 2

“in time of peace” States must “accord freedom of innocent passage above its territory” to aircraft of other States under “the conditions laid down in the present Convention”

• Prohibit aircraft for military reasons or in the interest of public safety (Art 3)
• Right of flyover without landing; fixed route; designated aerodromes; establishment of international airways (Art 15)
Historical development of international air law

The regulation of aviation developed largely due to the potential impact of aviation on transportation, commerce and national security...

- **1910**
  - Paris International Air Navigation Conference (Paris Conference)

- **1919**
  - Convention Relating to the Regulation of Aerial Navigation (Paris Convention)
  - International Commission on Air Navigation (ICAN)

- **1929**
  - Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air

- **1939 - 1945**
  - World War II
  - International Civil Aviation Conference (Chicago Conference)

- **1944**
  - Convention on International Civil Aviation (Chicago Convention)

- **1945**
  - International Civil Aviation Organisation (ICAO)

Aviation grew tremendously in the 1920-1930s...
Chicago Conference 1944

- Trends in aviation before the Chicago Conference…

- aviation is international in scope
- States closed and controlled their airspace during WWI
- commercial importance of air transport recognised
- airports and air navigation services were recognised as key to support a growing air transport industry

- the airline was seen as a source of national pride (“flag carrier”)

- in Europe, the national carrier was a means to link overseas colonies, thus government owned
  - in the US, private companies developed, and the government felt it was necessary to manage competition, thus government regulated (Civil Aeronautics Board)
Chicago Conference 1944

- As the end of WWII approached:
  - recognised the need to have a **uniform** approach to international civil aviation
  - the **US emerged as the dominant aviation power**, with aircraft production power and technological expertise
  - Disagreement on the economic regulation of air transportation (right of entry, capacity, route, fares)

The US proposed:
- Unrestricted operating rights for all airlines on international routes
- Multilateral “freedoms of the air” so market forces can determine capacities, frequencies and fares

The UK proposed:
- An “International Air Authority” to control routes and frequencies and allocation of quotas

The New Zealand and Australia proposed:
- A single international airline providing worldwide service
Outcome of the Chicago Conference

- **Convention on International Civil Aviation** (Chicago Convention)
- **International Air Services Transit Agreement**
  (1\textsuperscript{st} and 2\textsuperscript{nd} freedoms)
- **International Air Transport Agreement**
  (exchange of 3\textsuperscript{rd}, 4\textsuperscript{th} and 5\textsuperscript{th} freedoms)
- **standard form of bilateral agreement** for the exchange of air routes
- **Establishment of the International Civil Aviation Organization (ICAO)**
Chicago Convention 1944
Sovereignty

Article 1
Sovereignty
The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2
Territory
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.
Right of **non-scheduled flights** to fly into or transit across its territory and to make stops for non-traffic purposes (Article 5) = 1\textsuperscript{st} and 2\textsuperscript{nd} freedoms of the air

1\textsuperscript{st} freedom of the air
transit across territory

2\textsuperscript{nd} freedom of the air
Fly into territory for non-traffic purposes (refueling, maintenance; non-commercial service)
Scheduled air services operated with “special permission or other authorization” and “in accordance with the terms of such permission or authorization” (Article 6)

Foundation of all air transport agreements
Chicago Convention 1944
right of passage
prohibited areas

• Chicago Convention (Article 9) allows States to establish “prohibited areas” for military or public safety purposes.

http://www.flytandem.com/airspace.htm
Chicago Convention
right of passage
closure of airspace

• in exceptional circumstances, or during national emergencies, State may temporarily restrict or prohibit flights over a portion or all of its territory (Article 9)

9.06AM: 3875 flights
12.06hrs:  554 flights

9.45hrs EST, FAA closes US airspace
Sovereignty and air space

Air Defense Identification Zones (ADIZ)

• A number of States have established ADIZ, requiring aircraft to provide identification and location BEFORE entering air space.

• Established claim based on right to self-defence
In November 2013, China claimed a large section of the East China Sea.

China requests ALL flights to provide flight plan and other information, and reserves right to take action against aircraft.

Overlapping with ADIZ of Japan and South Korea.

Strong protests by Japan, South Korea, US and Australia.
Other concepts of sovereignty

UN Convention on the Law of the Sea 1982 (UNCLOS)

- State has regulation of territorial sea
- Sovereignty extends to airspace over territorial sea (UNCLOS Art 2(3))
- “innocent passage” for maritime vessels but NOT for aircraft

- Complete freedom of navigation and overflight (UNCLOS Art 58 and 87; Chicago Convention Art 12)

UNCLOS, Article 87:
1. The high seas are open to all States... Freedom of the high seas...comprises, *inter alia*, …
   (a) freedom of navigation;
   (b) freedom of overflight;

http://www.unescobkk.org
Other concepts of sovereignty

Antarctic Treaty 1959

• Several States had claimed sovereignty over Antarctica
• The Antarctic Treaty suspended new territorial claims
• Flights over Antarctica treated as over high seas

Article IV (2): …No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.
Other concepts of sovereignty
Outer Space Treaty 1967

• outer space shall be free for exploration and use by all States; (Article I)
• outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means; (Article II)
• the Moon and other celestial bodies shall be used exclusively for peaceful purposes; (Article IV)
Chicago Convention
registration and nationality of aircraft

• Every aircraft has nationality of the State they are registered in (Article 17)
• Must bear the nationality and registration marks (Article 20)

http://www.aeroinside.com/item/4424/thy-b739-at-istanbul-on-jul-28th-2014-bird-strike
States must make sure aircraft flying over their territory or carrying their nationality mark comply with the rules and regulations governing flight (Article 12)

State must provide certificate of airworthiness, certificates of competency and licenses for pilots and flight crew (Article 31-32)

“basis for the intervention and protection by a State; it is also a protection for other States for the redress of wrongs committed by those on board against their nationals”

John Cobb Cooper
Outcome of the Chicago Conference

- Convention on International Civil Aviation (Chicago Convention)
- International Air Services Transit Agreement (1st and 2nd freedoms)
- International Air Transport Agreement (exchange of 3rd, 4th and 5th freedoms)
- standard form of bilateral agreement for the exchange of air routes
- Establishment of the International Civil Aviation Organization (ICAO)
Chicago Convention establishment of ICAO

- Chicago Convention not only source of international air law, but also constitution of the International Civil Aviation Organization
- Specialised agency of the United Nations, with 191 Member States
Chicago Convention
ICAO’s objectives (Article 44)

- Ensure the safe and orderly growth of international civil aviation throughout the world.
- Encourage the development of airways, airports and air navigation facilities for international civil aviation.
- Meet the needs of the people of the world for safe, regular, efficient and economical air transport.
- Ensure that the rights of the Contracting States are fully respected ...
- Avoid discrimination between Contracting States.

- Promote generally the development of all aspects of international civil aeronautics (catch-all mandate of ICAO)
Chicago Convention
ICAO’s objectives (Article 44)

• Promote generally the development of **all aspects** of international civil aeronautics (catch-all mandate of ICAO)
Source of International Air Law

- Customary International Law
- Multilateral Conventions / Treaties
- ICAO Standards and Recommended Practices (SARPs)
ICAO Standards and Recommended Practices (SARPs)

• Chicago Convention gives ICAO power to adopt measures to achieve ICAO’s objectives of guaranteeing “safe, regular, efficient and economical air transport”

• uniformity and harmonise rules in air transportation

• Article 37: international standards and recommended practices (SARPs) dealing with: communications, airports, rules of the air, registration and identification etc. etc.
ICAO SARPs

- Adopted by the ICAO Council (Article 54)
- Assisted to develop SARPs by:

  **Air Navigation Commission** in technical matters,

  **Air Transport Committee** on economic matters

  **Committee on Unlawful Interference** on aviation security matters.

<table>
<thead>
<tr>
<th>Annex</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Personnel Licensing</td>
</tr>
<tr>
<td>2</td>
<td>Rules of the Air</td>
</tr>
<tr>
<td>3</td>
<td>Meteorological Service for International Air Navigation</td>
</tr>
<tr>
<td>4</td>
<td>Aeronautical Charts</td>
</tr>
<tr>
<td>5</td>
<td>Units of Measurement to be Used in Air and Ground Operations</td>
</tr>
<tr>
<td>6</td>
<td>Operation of Aircraft</td>
</tr>
<tr>
<td>7</td>
<td>Aircraft Nationality and Registration Marks</td>
</tr>
<tr>
<td>8</td>
<td>Airworthiness of Aircraft</td>
</tr>
<tr>
<td>9</td>
<td>Facilitation</td>
</tr>
<tr>
<td>10</td>
<td>Aeronautical Telecommunications</td>
</tr>
<tr>
<td>11</td>
<td>Air Traffic Services</td>
</tr>
<tr>
<td>12</td>
<td>Search and Rescue</td>
</tr>
<tr>
<td>13</td>
<td>Aircraft Accident and Incident Investigation</td>
</tr>
<tr>
<td>14</td>
<td>Aerodromes</td>
</tr>
<tr>
<td>15</td>
<td>Aeronautical Information Services</td>
</tr>
<tr>
<td>16</td>
<td>Environmental Protection</td>
</tr>
<tr>
<td>17</td>
<td>Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference</td>
</tr>
<tr>
<td>18</td>
<td>The Safe Transport of Dangerous Goods by Air</td>
</tr>
</tbody>
</table>
SARPs as a source of international air law

- SARPs describe the **minimum requirement** for international aviation

- States must ensure that their national laws are **uniform “to the greatest possible extent”** with SARPs (Article 12)

- States must collaborate to **make sure their domestic law, regulations and procedures reach the “highest practicable degree of uniformity”** with SARPs (Article 37)

- But, if a State finds it “impracticable to comply”, they can notify ICAO and their practices can differ from SARPs (Article 38)

- SARPs are **binding on ALL flights over the high seas** (Article 12)
Source of International Air Law

• Customary International Law

• Multilateral Conventions / Treaties

• ICAO Standards and Recommended Practices (SARPs)
Multilateral Conventions / Treaties

**Security**
- Tokyo Convention of 1963 (addressing offenses on board aircraft)
- Hague Convention of 1970 (addressing aircraft hijacking)
- Montreal Convention of 1971 (addressing aircraft and air navigation security)
- Beijing Convention and Protocol of 2010 (addressing aviation security)
- Montreal Protocol of 2014 (amending the Tokyo Convention)

**Air carrier liability**
- Warsaw Convention of 1929 (addressing carrier liability to passengers and shippers)
- Rome Convention of 1933 (addressing aircraft operator liability for surface damage)
- Geneva Convention of 1948 (addressing aircraft registration)
- Rome Convention of 1952 (addressing aircraft operator liability for surface damage)
- Montreal Protocols of 1975 (amending the Warsaw Convention)
- Montreal Convention of 1999 (addressing carrier liability to passengers and cargo)

**financial interests in aircraft**
- Cape Town Convention of 2001 (addressing financial interests in aircraft)
Conclusion

• There are different sources of (international) air law
• Major principles of air law are:
  1. Sovereignty over airspace
  2. Freedom over the High Seas and other areas.

• War and security concerns shaped the development of air law
• Paris and Chicago Conventions contain important provisions on airspace sovereignty and nationality of aircraft
• Chicago Convention provided the legal foundation for adopting Standards and Recommended Practices (SARPs)
• There are various other conventions dealing with issues of security, liability and financial interest in aircraft