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TURKISH AVIATION ACADEMY



Conventional and Customary International Aviation Law

Module 3

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Air Law, Regulation and Compliance Management

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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.

3. *Nationality of Aircraft.*

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

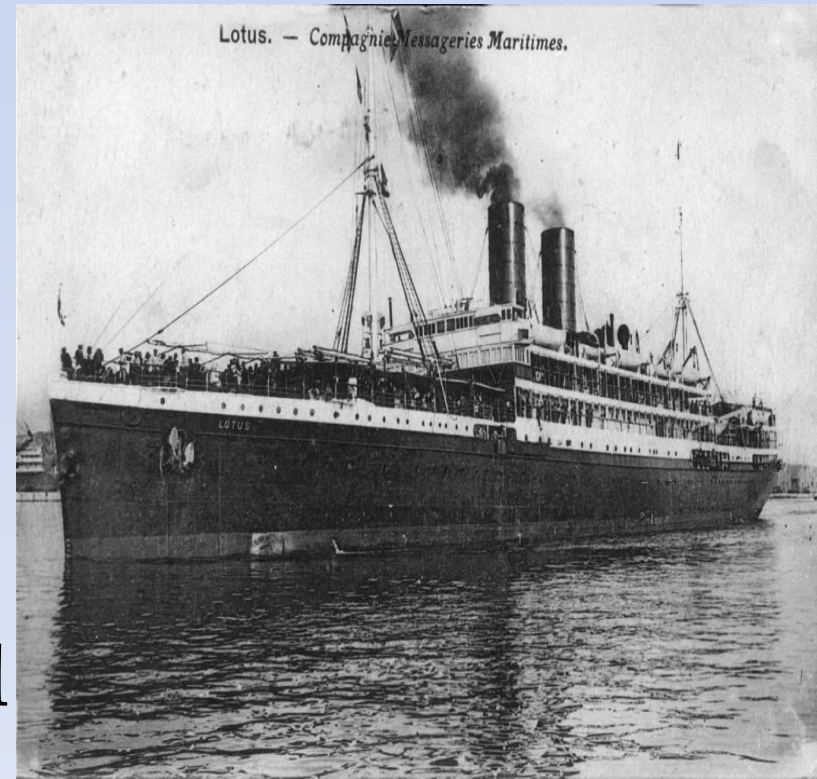
The Case of the S.S. "Lotus"

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”.

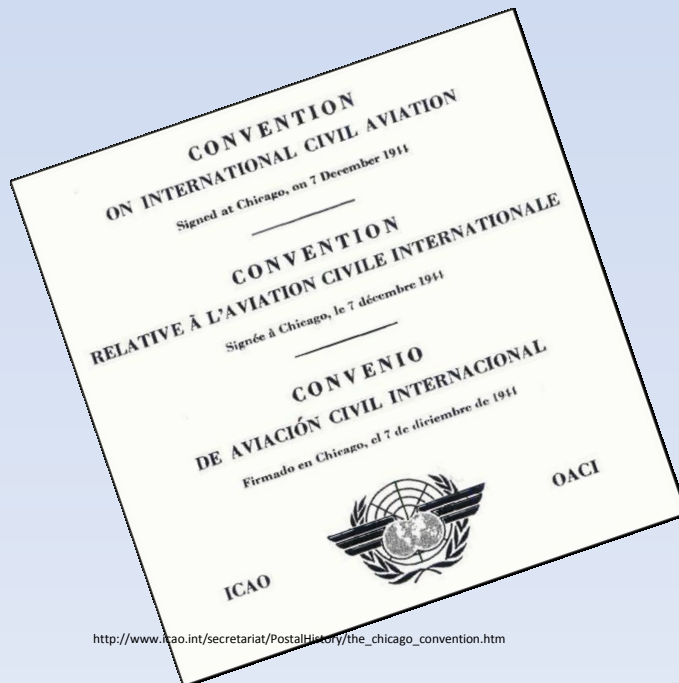
Statute of the International
Court of Justice (ICJ)
Article 38



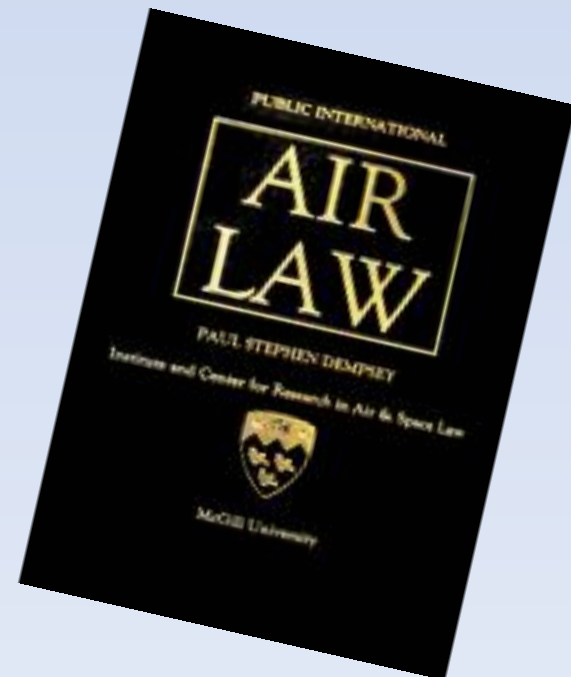
Source of International Air Law

- 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



http://www.icao.int/secretariat/PostalHistory/the_chicago_convention.htm

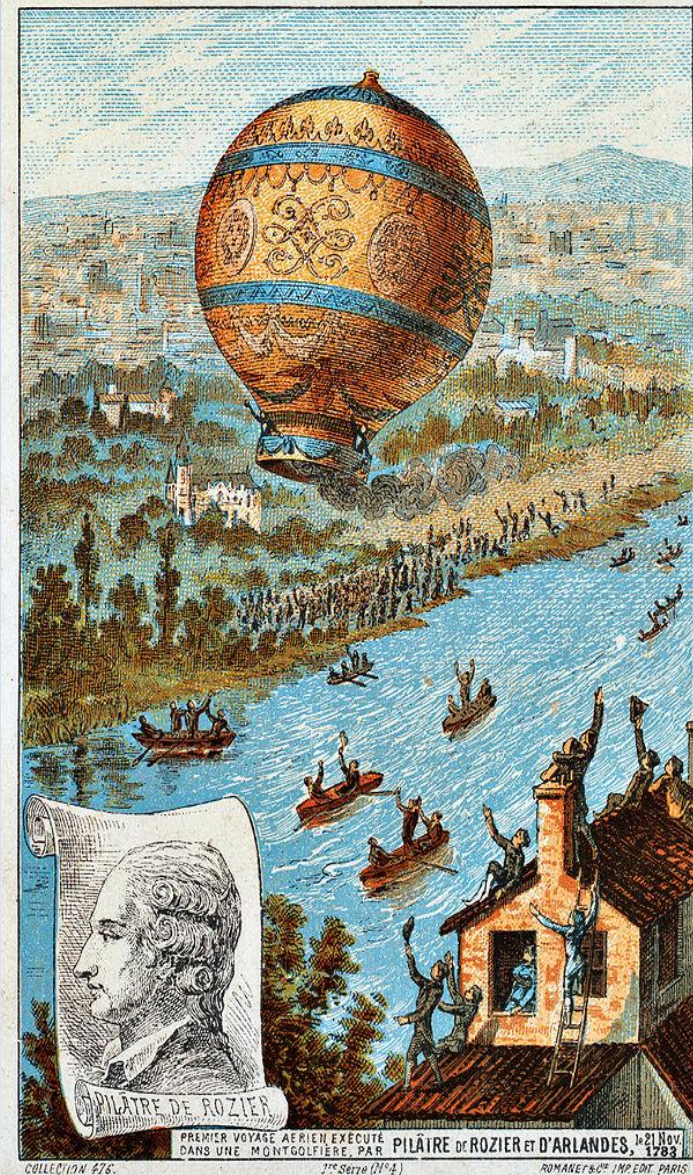
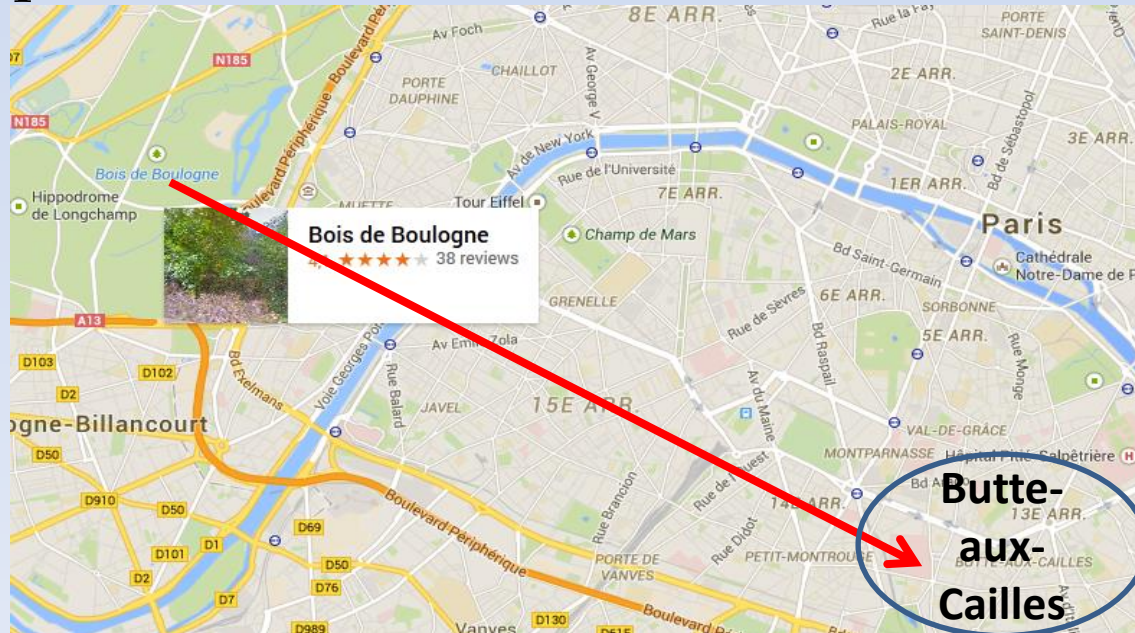


Air law began with...

A hot air balloon!

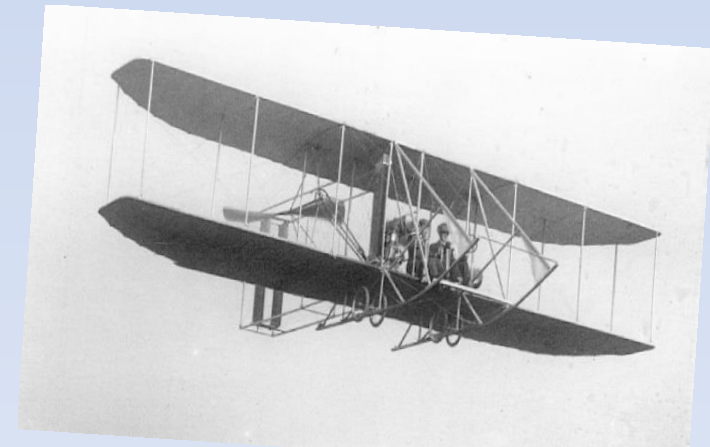
On 21 November 1783, Frenchman Jean-François Pilâtre de Rozier flew 9 km in 25 minutes over Paris.

Paris police issued a directive prohibiting balloon flights without prior authorisation.



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.**
- *Paris International Air Navigation Conference*, 8 May to 29 June 1910.
- Conference produced a draft convention addressing *inter alia*:
 aircraft nationality and registration,
 certification of aircraft (airworthiness),
 crew licences, radio equipment, prohibited zones,
 cabotage



Wright Model B, 1910-1914

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*”.



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.



First Ottoman plane in 1912

<http://www.turkeywar.com/aviation/aviation.html>

عاشقانیلک ایلک طیارهسی — ۱۴ یسان ۱۳۲۸ خاتون
 «برنجی، غول-اوردو» طیارهسی — یون آستانه فوسده اوچشدر : پر کونده کیت ریم سلعانیستده
 اوچاقدیر — ۱۳۰۰ لرایه آتشدیر — یوقاری ریم دون آستانه فوسده اوچقه حاضر لایزکن چیقارلشدر



“Goliath” first commercial aircraft 1919

http://en.wikipedia.org/wiki/Henri_Farman#/media/File:Farman_goliath.jpg

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...**

1908-1909

Hot air balloons floating from Germany into France

1909

First commercial airlines

“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”

World War I
1914-1918

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**)

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**”



Paris Convention 1919

Sovereignty

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...

Aviation grew tremendously in the 1920-1930s...

World War I
1914-1918

1929

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

World War II
1939-1945

1944

International Civil Aviation Conference (**Chicago Conference**)

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

International Civil Aviation Organisation (**ICAO**)

1919

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

International Commission on Air Navigation (**ICAN**)

1910

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

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 :

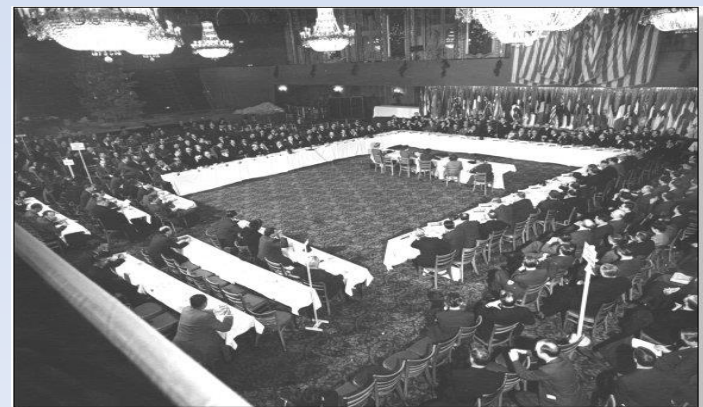
- An “International Air Authority” to control routes and frequencies and allocation of quotas

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*
(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 1944

Sovereignty

Paris Convention 1919

Article 1

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

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**.

Chicago Convention 1944

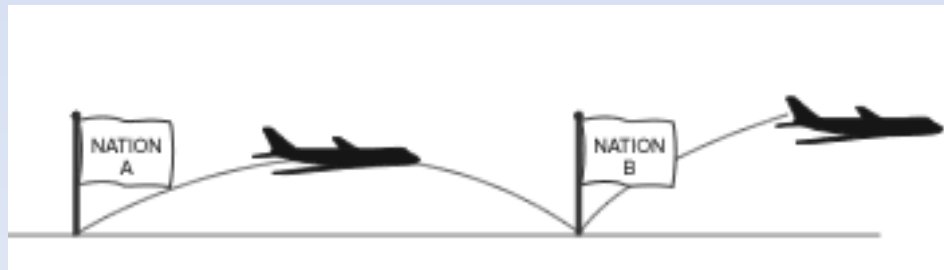
right of passage

Non-Scheduled flights

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



1st freedom of the air
transit across territory



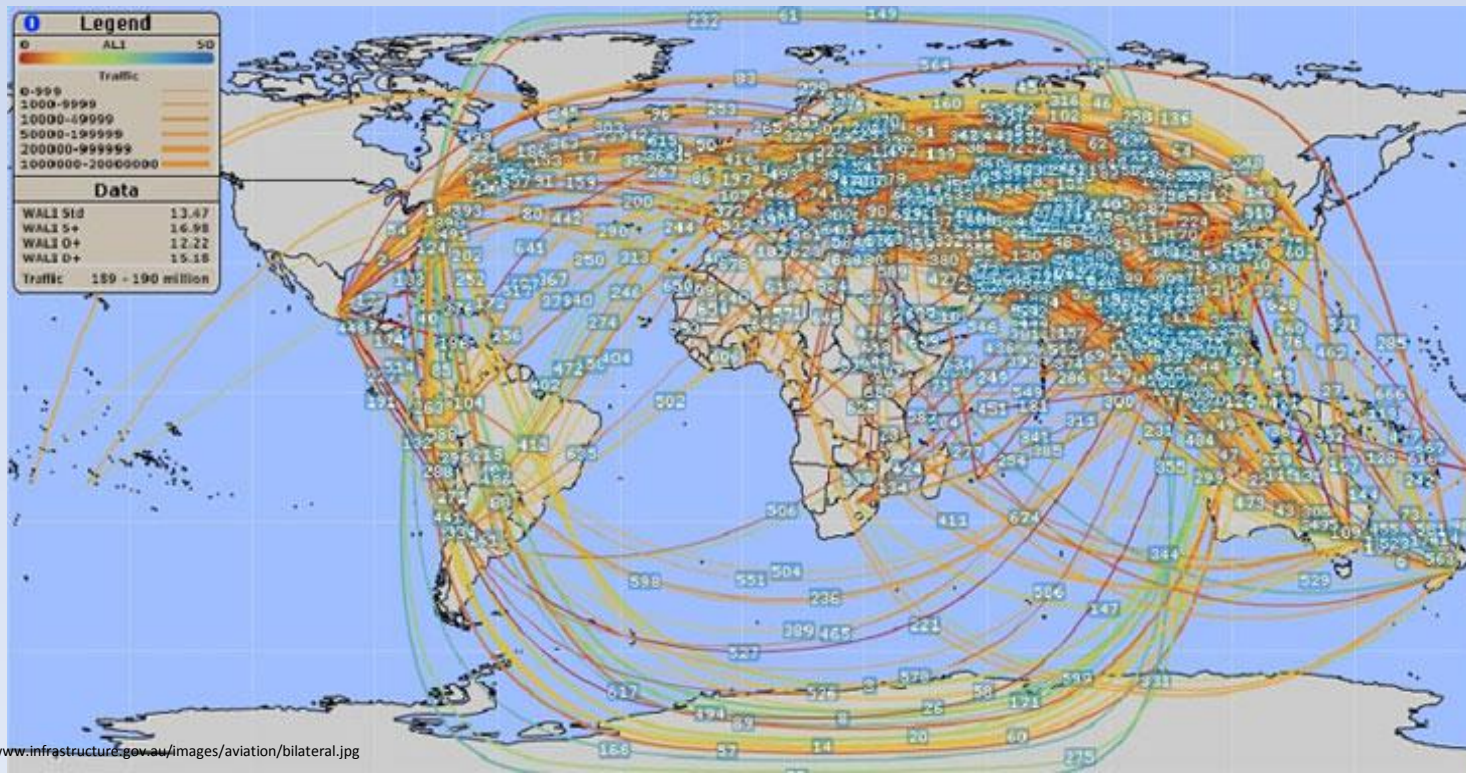
2nd freedom of the air
Fly into territory for non-traffic purposes (refueling, maintenance; non-commercial service)

Chicago Convention 1944

right of passage

Scheduled flights

- 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)

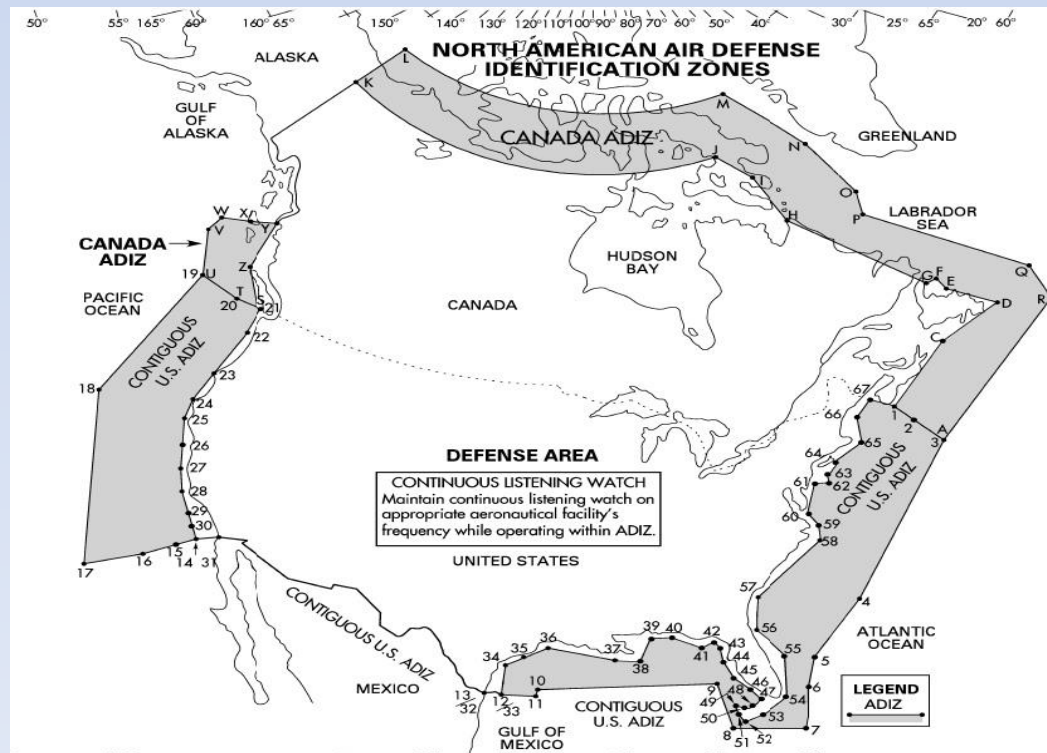
9.45hrs EST, FAA closes US airspace



Sovereignty and air space

Air Defense Identification Zones (ADIZ)

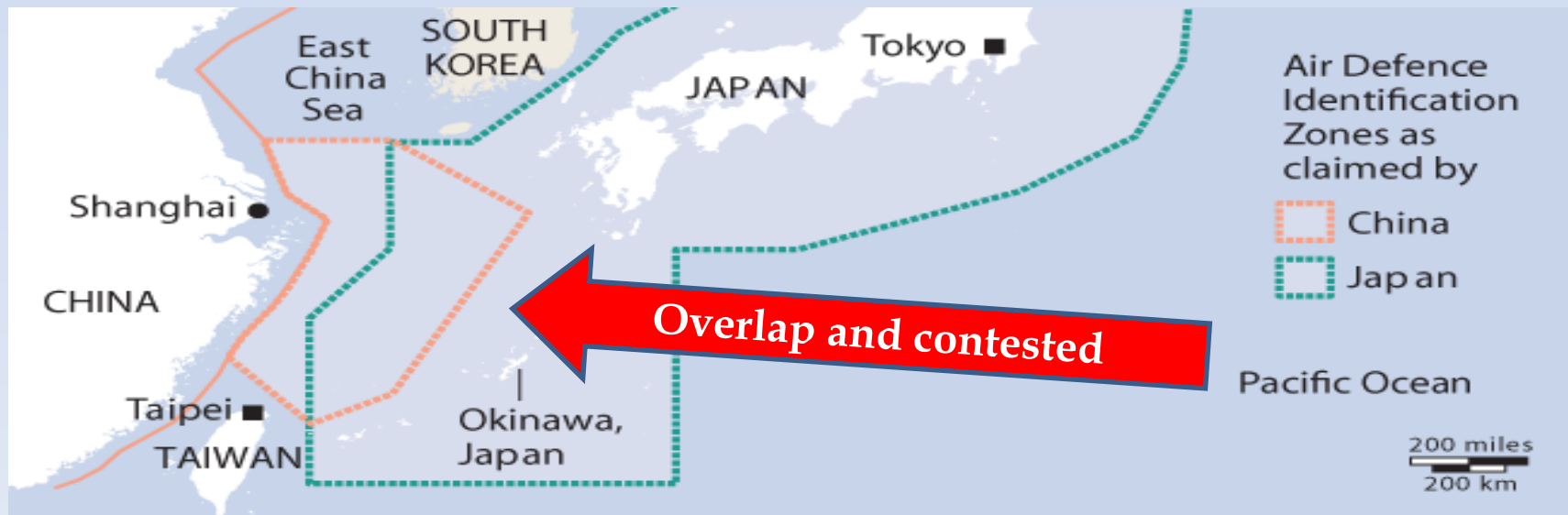
- A number of States have established ADIZ, requiring aircraft to **provide identification and location BEFORE** entering air space.
- Established claim based on right to self-defence



Sovereignty and air space

Air Defense Identification Zones (ADIZ)

- 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

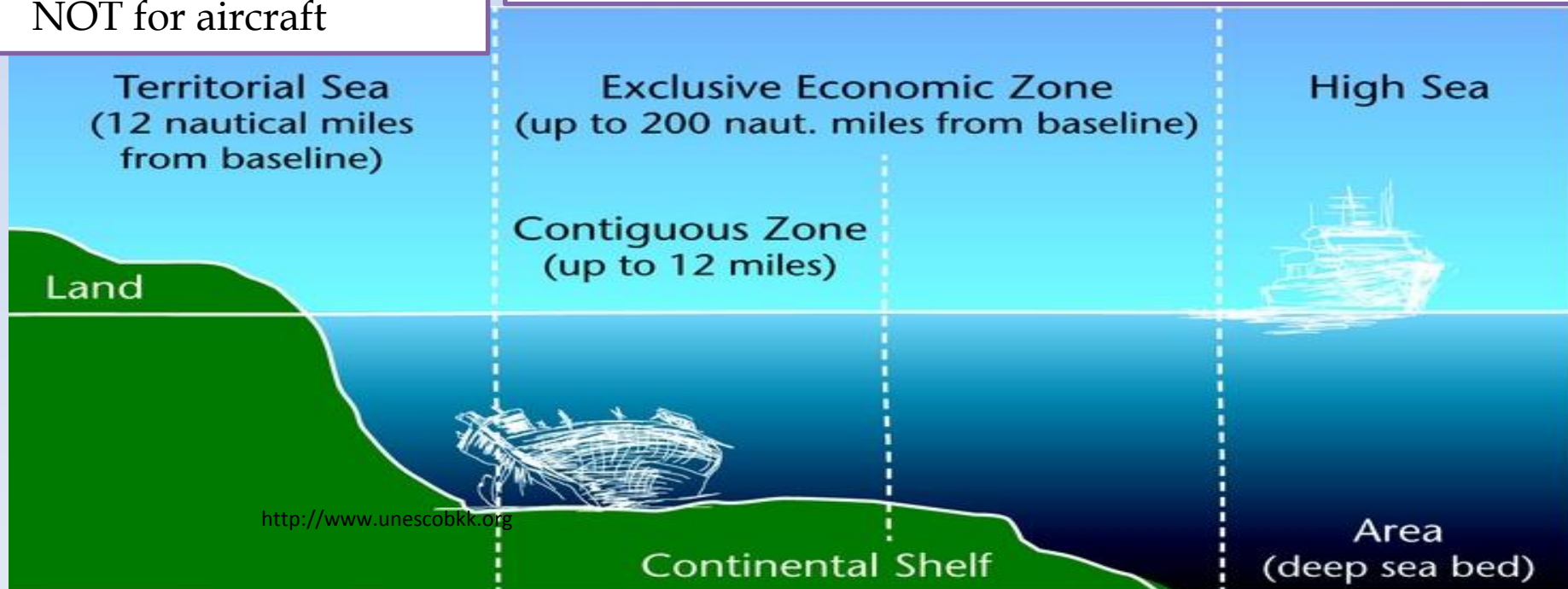


Other concepts of sovereignty

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;

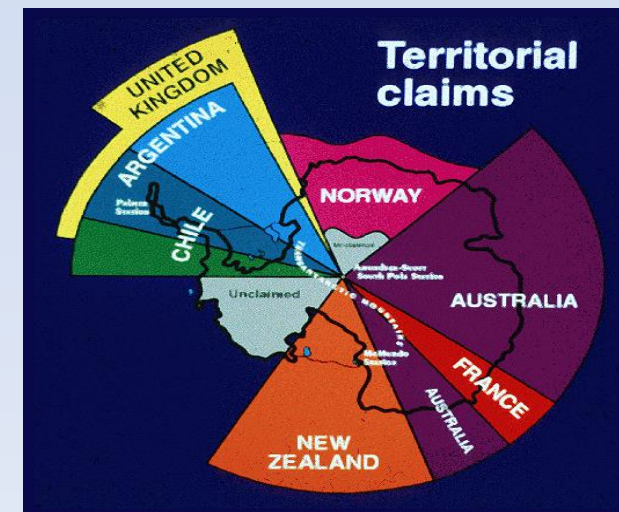


Other concepts of sovereignty

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)



Chicago Convention

registration and nationality of aircraft

- 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

UNITED STATES OF AMERICA DEPARTMENT OF TRANSPORTATION—FEDERAL AVIATION ADMINISTRATION STANDARD AIRWORTHINESS CERTIFICATE			
1. NATIONALITY AND REGISTRATION MARKS	2. MANUFACTURER AND MODEL	3. AIRCRAFT SERIAL NUMBER	4. CATEGORY
5. AUTHORITY AND BASIS FOR ISSUANCE This airworthiness certificate is issued pursuant to the Federal Aviation Act of 1958 and certifies that, as of the date of issuance, the aircraft to which issued has been inspected and found to conform to the type certificate therefor, to be in condition for safe operation, and has been shown to meet the requirements of the applicable comprehensive and detailed airworthiness code as provided by Annex 8 to the Convention on International Civil Aviation, except as noted herein. Exceptions:			
6. TERMS AND CONDITIONS Unless sooner surrendered, suspended, revoked, or a termination date is otherwise established by the Administrator, this airworthiness certificate is effective as long as the maintenance, preventative maintenance, and alterations are performed in accordance with Parts 21, 43, and 91 of the Federal Aviation Regulations, as appropriate, and the aircraft is registered in the United States.			
DATE OF ISSUANCE	FAA REPRESENTATIVE	DESIGNATION NUMBER	
Any alteration, reproduction, or misuse of this certificate may be punishable by a fine not exceeding \$1,000, or imprisonment not exceeding 3 years, or both. THIS CERTIFICATE MUST BE DISPLAYED IN THE AIRCRAFT IN ACCORDANCE WITH APPLICABLE FEDERAL AVIATION REGULATIONS.			
FAA Form 8100-2 (8-82)		U.S. GPO:2001 - 668-455	

Outcome of the Chicago Conference

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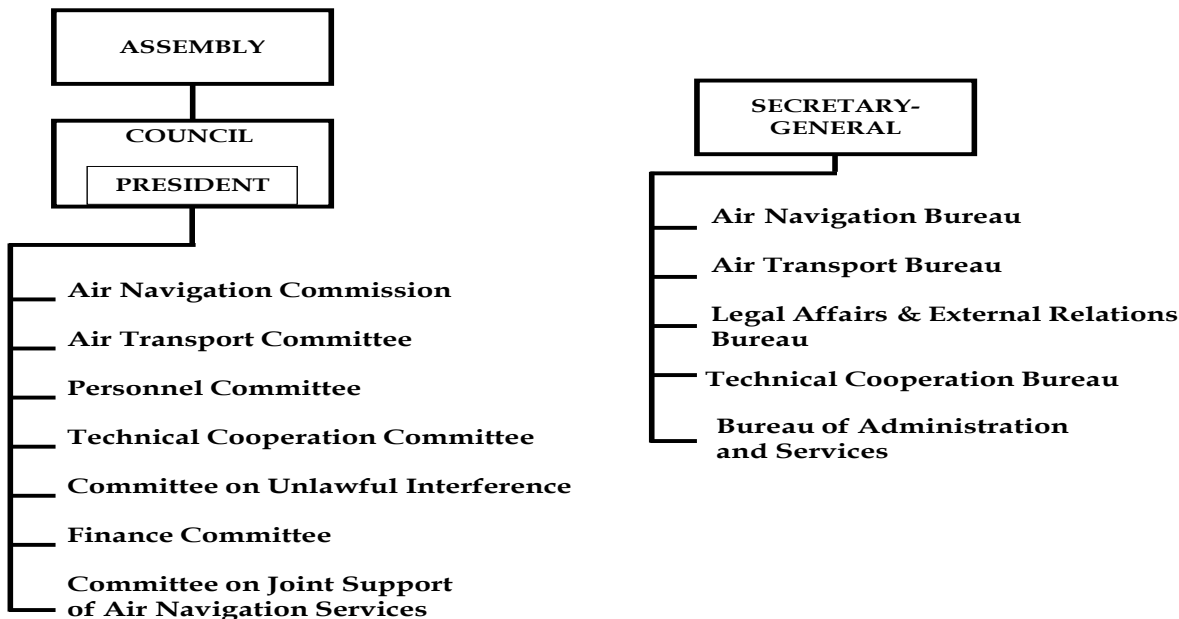
Chicago Convention

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



ICAO Assembly



ICAO headquarters in Montreal, Canada

Chicago Convention

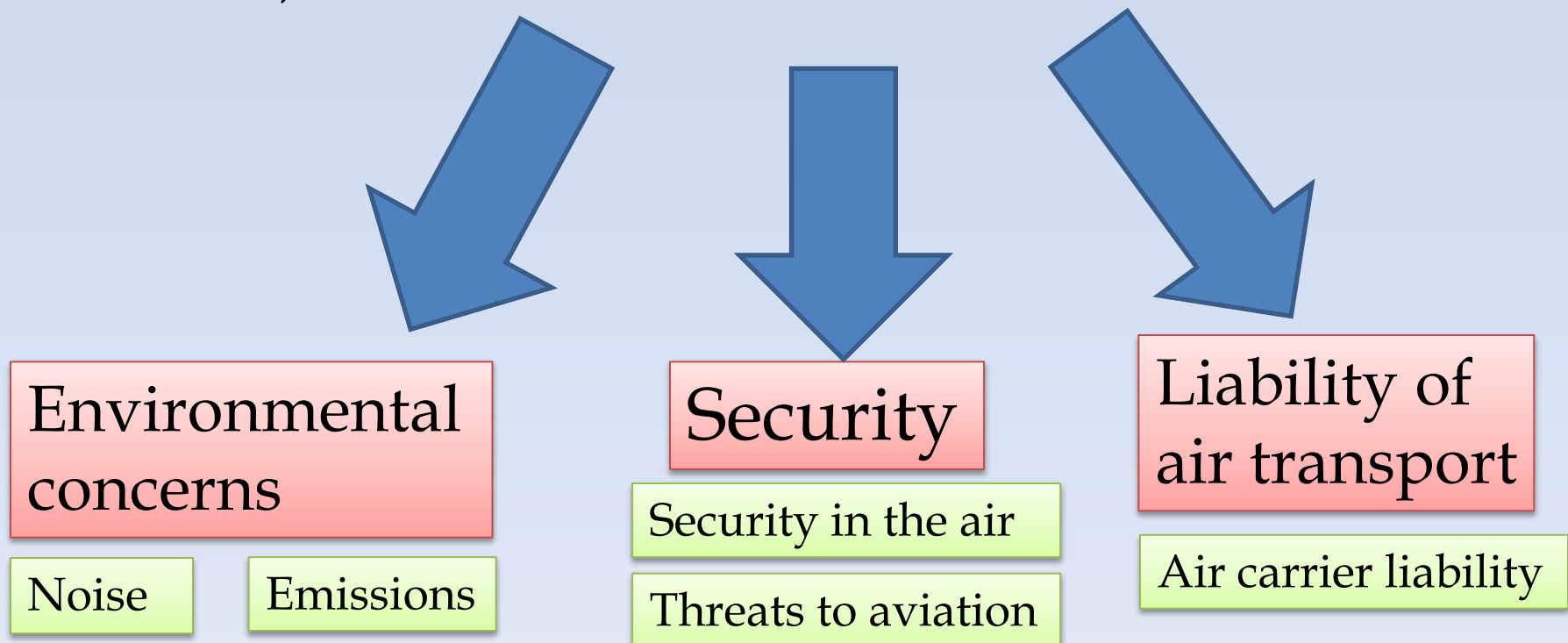
ICAO's objectives (Article 44)

- 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)

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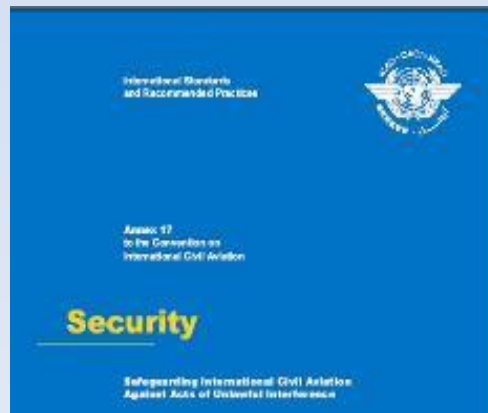
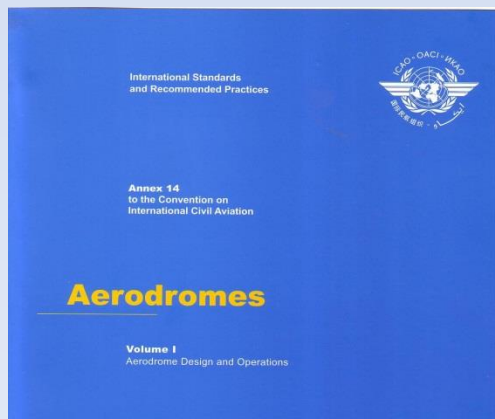


Source of International Air Law

- 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.



Annex 1	Personnel Licensing	<h1>ICAO SARPs</h1>
Annex 2	Rules of the Air	
Annex 3	Meteorological Service for International Air Navigation	
Annex 4	Aeronautical Charts	
Annex 5	Units of Measurement to be Used in Air and Ground Operations	
Annex 6	Operation of Aircraft	
Annex 7	Aircraft Nationality and Registration Marks	
Annex 8	Airworthiness of Aircraft	
Annex 9	Facilitation	
Annex 10	Aeronautical Telecommunications	
Annex 11	Air Traffic Services	
Annex 12	Search and Rescue	
Annex 13	Aircraft Accident and Incident Investigation	
Annex 14	Aerodromes	
Annex 15	Aeronautical Information Services	
Annex 16	Environmental Protection	
Annex 17	Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference	
Annex 18	The Safe Transport of Dangerous Goods by Air	

- 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.

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.
 3. Nationality of Aircraft.
- 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