Celebrating the Chicago Convention’s 75th Anniversary

By Jeffrey Klang

Seventy-five years ago, during the height of World War II, the United States government invited representatives from 54 nations to attend the International Civil Aviation Conference in Chicago. The president of the United States and other world leaders knew the importance of international air commerce to get the world back on its feet after five years of war. More than 700 delegates gathered for five weeks in the Stevens Hotel. On December 7, 1944, the Chicago Convention was signed by representatives of 52 nations.

The importance of the Chicago conference cannot be overstated. The Chicago Convention established the legal framework for the development of international civil aviation as we know it today. The conference also established the International Civil Aviation Organization (ICAO), the body responsible for promulgating standards for international civil aviation. The Chicago Convention arguably is the most important aviation treaty of the past century.

Diplomacy and Drama: The Making of the Chicago Convention

By Jeffrey N. Shane

On December 7, 1944, exactly three years to the day after Pearl Harbor and six months and a day after the Normandy invasion, with war still raging in Europe and the Pacific, delegates from 52 countries signed a new Convention on International Civil Aviation (Chicago Convention). They had been gathered for more than a month in Chicago at the invitation of President Franklin Delano Roosevelt.

The importance of the Chicago Convention to the steady growth of aviation and the remarkable safety record it has achieved are widely acknowledged today. Less understood is what a miracle of diplomacy was achieved during that month at the Stevens Hotel—today’s Hilton Chicago. For the delegates, far more than the future of airline services was at stake; they saw the effort...
As we reflect on the last year, we have much to celebrate. At our gathering in Seattle, we enjoyed a program full of cutting-edge topics—from innovation and digitization to the latest in UTC developments to issues around passenger misconduct during flights. We were treated to a VIP tour of the Boeing Everett facility, which produces the 747, 777, 767, and Dreamliner, and a reception at Amazon Spheres. We learned from each other, laughed with each other, and came away from our time inspired and connected. Special thanks to our cochairs, Brian Friedman, Jeremy Ross, and Jack Rossi for putting together an innovative and engaging program.

The Governing Committee and membership also had an opportunity to hear from our strategic planning consultant, David Tabak, who updated us on the input from our membership on the priorities set by our membership and leaders for the coming years. With the approval of the Governing Committee, we will begin the hard work of implementing the key goals of the strategic plan, which include a governance refresh, as well as enhancing our programming and communications, and improving our financial position over the next few years.

As we heard in Seattle, our timing is particularly timely given the many structural changes occurring at the larger ABA level, and we are hopeful that these changes will ensure our continued position as the go-to resource for learning and networking within the commercial aviation and space bar. I’m pleased to report that our chair-elect, Marc Warren, will be heading up our governance committee. If you are interested in getting involved with the next phase of our strategic plan implementation, please let me know.

I hope you enjoy this issue of The Air & Space Lawyer, and the commemoration of the 75th anniversary of the Chicago Convention. We have some great articles on the history and future of international civil aviation from aviation law legends Jeff Shane and Don Bliss, and interviews with ICAO U.S. Ambassador Thomas Carter, Council President Olumuyiwa Benard Aliu, and Secretary General Fang Liu. We will also be commemorating the anniversary at our upcoming Update Conference in Washington, D.C., on February 28. To this end, we would love to feature your personal and professional reflections on the Chicago Convention over the years via video and text. If you are interested in contributing, please contact David Israel at david.israel@americanbar.org.

Warm wishes for a relaxing and happy Holiday Season and New Year!

Jennifer Trock
Chair, Forum on Air and Space Law
Amid the destructive use of air power in the Second World War, President Franklin Roosevelt perspicaciously foresaw aviation's potential as an instrument of peace, global friendship, commerce, and economic development. The United States invited representatives of 54 nations to Chicago to draft a Convention on International Civil Aviation (Chicago Convention). A Provisional International Civil Aviation Organization (PICAO) was created on December 7, 1944, when 52 states signed the convention in New York, and PICAO convened in Montreal on August 15, 1945. When the convention was ratified on March 5, 1947, the International Civil Aviation Organization (ICAO) formally came into being. In October 1947, it became a United Nations (UN) specialized agency.

Over the past 75 years, international aviation and the work of ICAO have evolved dramatically. What has remained constant is the global commitment to technical cooperation to strengthen and maintain the safety of air travel. In 2018, 38 million flights by the global aviation industry carried over four and a half billion passengers. Look up in the sky and, at any given moment, there are 9,728 planes carrying 1,270,406 passengers, and they compete for airspace with cargo, business, and privately piloted planes and now with drones, rockets, spacecraft, and all manner of novel aircraft types. Maintaining safety and security during a time of fast-changing technologies, climate change, cybersecurity threats, metastasizing terrorism, volatile fuel prices, and the fierce competition of “open skies” presents a formidable challenge to ICAO’s 193 contracting states and the 36-member Council which serves as its governing board. The record speaks for itself. Four and a half billion passengers on international trips demonstrate their confidence in this record.

Yet, maintaining an outstanding safety record, facilitating a modern and efficient global air navigation system, and “leaving no country behind” present enormous challenges, as well as great potential, in today’s technology revolution in which 2,000 satellites are launched annually, the transformation to digital communication is accelerating, forecasts project a doubling of traffic in 20 years, and the sky is increasingly cluttered with unmanned aircraft. This article describes how ICAO has responded to new challenges over the past 75 years and suggests how it can be reinvented and restructured to meet the challenges of the future.

ICAO Responds to Emerging Challenges
In addition to setting forth the foundational rules of airspace, the Chicago Convention established a mechanism for developing uniform global standards and recommended practices (SARPs) for air navigation and safety. During the initial decades, ICAO focused on air navigation routes and procedures, but gradually began to develop safety SARPs that addressed accident investigation findings. As new challenges and threats emerged, the convention proved sufficiently resilient to enable ICAO to respond to environmental issues (initially aircraft noise and now the effect of emissions on the climate), security threats presented by terrorism and regional conflicts, the need for technical assistance to strengthen developing nations’ capability to meet ICAO’s SARPs, the creation of safety and security audits to identify and correct deficiencies in state oversight, the facilitation of international cooperation in accident investigations, and the negotiation of international treaties to enhance the rule of law. The Chicago Conference adopted 12 annexes in 1944 dealing with such subjects as airways systems, communications, rules of the air, air traffic control procedures, licensing operational and mechanical personnel, civil aircraft airworthiness, aircraft registration and markings, meteorology, maps and charts, customs, and search and rescue. Rising to unanticipated challenges, ICAO has adopted seven additional annexes addressing, among other things, accident investigations, airports, the environment, security, dangerous goods, and safety management systems. Of course, the 19 annexes have been amended over the years and, to advance the convention’s mandate of “securing the highest practical degree of uniformity,” over 12,000 SARPs have been adopted implementing the annexes.

Every three years, the ICAO Assembly of 193 states and over 40 observer organizations meet, usually in Montreal, to set the agenda, approve a three-year budget, and elect a 36-member Council that will implement the policies set by the Assembly. The Council elects its president and appoints the secretary general to head the Secretariat and the 15-member Air Navigation Commission to develop

Ambassador Donald T. Bliss was the U.S. Permanent Representative on the ICAO Council from 2006 to 2009. He served as general counsel (acting) of the Department of Transportation under Secretary William T. Coleman Jr. during the administration of President Ford. For many years he led the aviation practice at O’Melveny & Myers LLP and he has served as chair of the ABA’s Forum on Air and Space Law and president of the United Nations Association of the National Capital Area.

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technical recommendations. Under Chapter XVIII of the Chicago Convention, the Council is also empowered to settle disputes among contracting states.

Achieving consensus among the many states with different political and economic systems, languages, and cultures and at various stages of development is a daunting task. With a small budget of about $100 million Canadian annually, of which the U.S. pays 20 percent, ICAO is dependent upon the voluntary contributions and the expertise of its member states, which makes U.S. leadership so critical to its effectiveness. While the U.S. must stand for election to the Council every three years, it has always had a seat at the table and was reelected in October 2019. Moreover, the key safety responsibility in the Secretariat is vested in the director of the Air Navigation Bureau (ANB), one of five bureaus, which has always been a U.S. appointee. The U.S. mission, led by an ambassador in recent years, facilitates a constant flow of experts from the State Department, the Department of Transportation (DOT), the Federal Aviation Administration (FAA), the Transportation Security Administration (TSA), stakeholder organizations, and the private sector to bring the best technical knowledge to the table while addressing political and geopolitical issues that arise in the context of global diplomacy.

Working closely with like-minded allies and seeking common ground with all Council members, the U.S. has been a leader in reinventing ICAO to address the changing dynamics of air travel. ICAO has avoided, for the most part, the political divisions that have constrained other UN venues by tirelessly working for consensus around shared values of safe and secure air travel—values shared by the citizens of every state. In a global economy interconnected by aviation, we are all vulnerable to the weakest link in the chain.

**ICAO Initiatives**

While some legal scholars have asserted that ICAO has reached far beyond the express mandates of the Chicago Convention, ICAO’s legal advisor has opined, based in part on international customary law, that ICAO has appropriately adapted to the changing challenges of international aviation. Spurred by U.S. leadership, some of the most important initiatives include the following.

**Safety**

With fast-changing technologies, prescriptive safety standards, usually three to seven years in development, quickly become obsolete. Accordingly, ICAO had stressed performance standards, coordination with technical standard-setting bodies on prescriptive requirements, safety management systems that cultivate a culture of effective safety oversight, and the sharing of safety information that prevents accidents. ICAO seeks to minimize confusion and miscommunication by harmonizing standards, clarifying state differences, and establishing English proficiency as the language of international aviation. A long-recognized concern, made more urgent by the Boeing 737 MAX accidents, ICAO is addressing automation dependency in the cockpit by working with member states and the industry to improve pilot skills in the manual handling of the aircraft when automated systems do not function as intended. In increasingly congested airspace, the ANB seeks to maintain the downward trend in the worldwide accident rate from over four accidents per million flights in 1978 to a fraction of one in 2017.

Historically, most safety standards have resulted from accident investigations, but increasingly ICAO relies on the protected voluntary reporting and exchange of information about safety incidents and concerns to prevent accidents. After the disappearance of Malaysian Airlines flight 370 (MH370) in November 2018, ICAO adopted the Global Aeronautical Distress and Safety System (GADSS), requiring aircraft position reporting every 15 minutes, and setting a target date of 2021 for systems that can report coordinates every minute for an aircraft in distress. This would enable finding an aircraft’s location within roughly a six-nautical-mile radius. The technology is currently available to meet this target, and the only question is why it took the disappearance of MH370 to initiate a global tracking system. ICAO also has established special programs that focus on regional safety issues. For example, after a series of accidents, it dedicated $5 million to address safety oversight in Africa. In response to another emerging threat, ICAO is working closely with other UN agencies to address the scourge of human trafficking.

**Enforcement**

Under the convention, the enforcement of safety standards is the responsibility of contracting states. Yet, ICAO creatively has provided strong incentives for state enforcement and regulatory oversight. Most importantly, in 1999, ICAO initiated the Universal Safety Oversight Audit Programme (USOAP), which audits the safety oversight of each contracting state. In 2007, the Assembly passed a U.S.-sponsored resolution providing for the public release of safety audits, which has created a strong incentive for states to address safety deficiencies and which has resulted in significant measurable improvements in safety audit findings. ICAO follows up the audits by continuous monitoring of significant deficiencies and by providing technical assistance to states that need help in addressing safety concerns. The Council president
and secretary general have taken specific actions to address potential “flags of convenience”—states that register aircraft, certificate operators, or license pilots without adequate oversight—and ICAO has established an international aircraft registry to provide timely information about registration, ownership, and control of aircraft. Finally, ICAO has implemented the mutual recognition provision embodied in Article 33 of the convention by encouraging states in recognizing the certificates and licenses of other states to verify that ICAO standards have been met.

**Security**

Despite the convention’s silence on the subject, ICAO has developed a five-pronged approach to aviation security. First, the Universal Security Audit Programme (USAP) conducts airport security audits in all contracting states. Second, ICAO issues SARPs and guidance on issues such as the hardening of cockpit doors, flight crew procedures, and machine-readable passports. For example, the Global Aviation Security Plan (GASeP) will elevate security measures and capacities worldwide, issuing outcome-focused standards, guidance material, and data-informed impact assessments, although the GASeP’s time frame should be accelerated. Passenger name record data is being elevated to a standard, which requires states to review airplane reservation data and a passenger’s flying history to determine hidden connections to other travelers and patterns of activity that enable an assessment of a traveler’s potential to commit hostile acts. Technical experts provide harmonized guidance on items permitted on board aircraft, providing necessary protections while minimizing passenger inconvenience and commercial disruption. Importantly, new fast-moving procedures are required because the convention’s standards-setting processes cannot respond quickly enough to inventive new security threats. As chair of the Unlawful Interference Committee in 2008, I had to deal with the liquid, aerosol, and gels threat. Some states saw this as a U.S.-only problem. They were reluctant to impose the inconvenience on their travelers and resented the TSA’s unilateral imposition of new requirements. Because global cooperation is essential to address the weakest link in the chain, I urged TSA to work through ICAO to achieve the most effective results. When we worked through the problems, including the need for global standards that would facilitate the transfer of items purchased in duty free shops, I found a willingness by states to accept ICAO’s guidance. The third prong of the security initiative is to provide technical assistance to states without the capacity to remedy security deficiencies. The fourth prong is the negotiation and amendment of aviation treaties to address the changing threats of terrorism and the means by which they are effected, including by those who plan, finance, and conspire to attack aviation. Finally, conversion to digital communication in the internet age increases aviation’s vulnerability to cyberattacks. Accordingly, ICAO has a cybersecurity team working to stay ahead of hackers with hostile intent.

**Environment**

Despite the silence of the Chicago Convention on environmental issues, ICAO has been thrust into the global climate change debate, having been delegated the responsibility by the Paris Agreement to reduce aircraft emissions, which constitute about 2 percent of overall greenhouse gas emissions. During my tenure at the U.S. mission, this was the most time-consuming, intractable problem I faced with little progress toward a consensus solution. It pitted Europe against the rest of the world, and threatened to bring the north-south divide into ICAO deliberations, which have always been premised on equal treatment of all nations. The U.S. was an honest broker seeking to find common ground. The 2016 Assembly adopted Resolution A39-2 implementing the voluntary Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), which stitched together various initiatives, including technology and operational improvements, sustainable aviation fuels, and market-based mechanisms. CORSIA aspired to reduce aircraft emissions by 1.5–2 percent annually through 2050, achieve carbon-neutral growth by 2020, and reduce carbon emissions by 50 percent against a 2005 base by 2050. The issue remains highly controversial as environmental groups advocate for tougher and mandatory requirements.

**Technical Cooperation**

While not anticipated in the convention, it became evident that the capacity of developing states to comply with SARPs would require technical assistance, and thus the Technical Cooperation Bureau (TCB) was established. Over time this program has evolved from technical assistance to technical cooperation and has become self-funding as ICAO partnerships with 138 states have initiated some 100 projects annually, including construction of a new airport in Panama, implementation of an e-passport system, and specific projects that address deficiencies identified by ICAO safety and security audits. A key objective is building human capacity through the Global Aviation Training program, which offers 200 courses for over 17,000 trainees in skills development, SARP compliance, credentialing instructors, and promoting best practices.
Global Navigation
Enhancing the efficiency and capacity of global navigation helps to achieve other important ICAO safety and environmental objectives. It also significantly reduces costs that can be passed through in reduced fares in a competitive environment. ICAO’s Global Air Navigation Plan (GANP) is updated every three years and overhauled every six years. The 2019 GANP takes into account 23,000 airlines flying 362,000 aircraft with upwards of four million drones. The Global Navigation Satellite System (GNSS) guides the transition to the next generation of satellite-based air navigation by fostering interoperable systems and data, greener airports, optimum capacity, and flexible and efficient flight paths, enabling international aircraft to operate efficiently in satellite-based systems of different states and regions. Automatic Dependent Surveillance—Broadcast (ADS-B) has been endorsed by ICAO as part of its GANP to bring the precision and reliability of satellite-based surveillance to international aviation. In furtherance of global air navigation modernization, ICAO will establish a fully coordinated aviation trust framework that interconnects the global aviation community and increases information sharing to achieve operational improvements.

ICAO Reform
Governance reforms have been essential to ICAO’s reinventing itself to address the growing and fast-changing aviation sector. Given its limited resources, establishing priorities is essential, and ICAO has adopted five strategic objectives: (1) enhancing global aviation safety, (2) increasing the capacity and efficiency of the global civil aviation system, (3) strengthening global civil aviation security and facilitation, (4) fostering the development of a sound and economically viable civil aviation system, and (5) minimizing the adverse environmental impacts of civil aviation activities. In addition, the adoption of a results-based budget has enabled targeting limited resources on these objectives. In any human institution, fighting corruption requires ongoing vigilance, and ICAO is no exception. Limiting key positions to two terms and prohibiting former Council members from taking positions in the Secretariat for a fixed period are among the steps the U.S. pushed through during my tenure. We also pushed through strong provisions to recruit, retain, and promote women into professional positions, an area where ICAO’s record had been woefully inadequate. When I arrived, there were no women in charge of any of ICAO’s five bureaus; by the time I left, three of the five directorships were held by women, one of whom later became secretary general. We also worked diligently to streamline Council deliberations, transforming talkfests into an efficient decision-making mechanism. More recent reforms include the establishment of an independent process to investigate complaints expeditiously and transparency in dealing with cyberattacks on ICAO’s IT systems.

ICAO’s Future
My most important takeaway from serving on the ICAO Council is that U.S. leadership is absolutely critical. Although the U.S. is the largest contributor in funding and expertise, we have only one vote in 36, and thus the U.S. needs to work closely with like-minded counterparts to build coalitions in support of important initiatives, priorities, and reforms. ICAO must constantly be reinvented to meet the challenges of the 21st century. Rapidly changing technologies such as the digitalization of communications, satellite-based navigational efficiencies, artificial intelligence and blockchain innovations, and millions of drones and novel aircraft types all require a far more agile and nimble ICAO if it is to maintain and improve its extraordinary record of safety, thwart cybersecurity threats, meet its CORSIA obligations, and facilitate the interoperability that is essential to a global aviation system. ICAO’s standards-setting process is too slow and cumbersome. The budget is too limited to address serious deficiencies in the capacity of some states and regions. Competing technologies in the private sector threaten to fragment and segment global navigation.

Everything should be on the table, including the respective roles of a uniquely dual-headed organization with both a Council president and secretary general, the ability to recruit and retain the highest quality of professionals, the organization of the Secretariat, the size and procedures of the Council, and the funding mechanisms. There are ongoing discussions about reorganizing the Secretariat to eliminate duplication and fragmentation and improve coordination. One proposal would create separate bureaus for data gathering, standard setting, and implementation. Other proposals would elevate security and the environment to bureau status. Strengthening partnerships with stakeholders and the private sector is critical to enable rapid adjustment to innovative technologies. With clear lines of demarcation that prevent conflicts of interest, industry’s expertise and innovative technologies must be utilized effectively to advance safety and efficiency priorities. The work of the regional offices must be better integrated with headquarters as they undertake regional planning and apply best practices and new generation-skipping technologies to regional air navigation, safety, and security priorities. As we are on the cusp of commercial space travel,
An Interview with ICAO U.S. Representative Ambassador Thomas Carter

Thomas Carter is the Ambassador to the U.S. Mission to ICAO and the U.S. Representative to the ICAO Council. With over 10,000 flying hours as a military and commercial pilot, he served as a military instructor and flight examiner on worldwide missions and later flew for US Airways, attaining the position of B-737 Captain. Further, he performed duties in national security positions at the highest levels within the White House, U.S. Senate, and Department of Defense.

A&SL: Please share a little background on yourself. Where did you grow up, and what influences led you down your career path?

TC: I’m a native of Memphis, Tennessee. When I was 10 years old, my uncle, who was an Air Force mechanic at the time, walked me to my first aircraft. It was a VIP version DC-3. I walked up to the cockpit, sat down in the left seat, and announced that this was the coolest thing ever. From that moment, I wanted to fly.

Another inspiration was the fact that the Memphis Belle sat outside a local National Guard armory near the fairgrounds where I played baseball as a kid. Last year, I was honored to attend the rollout of the newly renovated Belle at the Air Force Museum. In addition, one of the very first books I remember reading as a child was Thirty Seconds Over Tokyo, so I have always been fascinated with the courage that mission required. Ironically, I would meet General Doolittle many years later; what a gentleman.

Finally, I was lucky enough to attend Air Force pilot training in the mid-1970s even though the service was cutting back significantly due to the Vietnam drawdown.

A&SL: You have spent a considerable amount of time in government; please tell us about your experience while in public service.

TC: I guess you can say that I’ve always wanted to do interesting and meaningful things. That sentiment led me to depart the active duty Air Force and become one of Senator Bob Dole’s national security staff members. Participating in formulating critical policies that affect our nation’s overall defense and foreign policy strategies was absolutely fascinating to me. For the remainder of my now 40-plus-year career, I have leapfrogged in and out of government doing interesting things while also continuing to fly either in the Air Force Reserve or with US Airways.

A&SL: You have had a very impressive career. What was the best job or mission you ever had?

TC: While the Council usually passes maybe one or two actual SARPs (standards and recommended practices) per session, I would say that ICAO’s audit program and CORSIA (Carbon Offsetting and Reduction Scheme...
for International Aviation) have probably been the most revealing. ICAO is fond of its “No Country Left Behind” theme, yet only two-thirds of our member states can meet two-thirds of our security standards that are already in place. I’ve even discovered that 30 percent of the countries that ICAO notified of a potential security inspection over the last two years have replied, “no thanks!” So, while the United States performs its own safety and security inspections of countries with airlines that fly directly to our country, many of these other member states could benefit from legitimate and substantive inspections from ICAO. Unfortunately, we’re simply not there yet.

CORSIA has some lofty goals to help limit our overall emissions, but it is also important in precluding many governments from unilaterally imposing their own environmental policies on the rest of the world. It remains to be seen, though, if our ICAO Council actions will placate some of these more aggressive countries.

**A&SL: What are the top goals of the United States at ICAO, and what needs to happen to accomplish them? Can they be achieved?**

**TC:** I want ICAO to focus primarily on its core missions, safety and security, and to uphold the very highest ethical standards while doing so. Unfortunately, I see ICAO starting to attempt other, more expansive and less important missions. These activities distract us from effectively executing our most important mission, which I like to say is “assuring a landing for every takeoff.” That simple phrase should guide everything we do here.

**A&SL: What measures should ICAO take to effectively advance safe, secure, and efficient international aviation?**

**TC:** ICAO needs to become a more transparent, ethical organization that can’t be dominated by any particular regional group or country. Because of a decidedly negative reputation as a place to work within the UN system, ICAO isn’t attracting the necessary talent to make it most effective. While I’m fairly happy with our air navigation and safety efforts, most of the other mission areas are lacking in deep, knowledgeable talent. ICAO had 100 open full-time positions vacant at the end of 2018. Some of these positions had been open for two or three years.

**A&SL: How can U.S. airlines, manufacturers, and other industry stakeholders best support your work at ICAO?**

**TC:** Certainly they can communicate directly with the U.S. Mission here as they do today. I believe that our contacts with industry and associations are superb, and they know that our door is always open to them. We’re here to press for our U.S. government’s aviation priorities, and our daily coordination with DOT, FAA, TSA, NTSB, and State is well known. I encourage all stakeholders to make sure that these agencies are informed of their concerns as well.

**A&SL: What does the ICAO of 2044 look like to you?**

**TC:** It will be a web-based coordination effort among countries that are integral to aviation. The entrenched bureaucracy that we face here today, with its five- to seven-year time frame to get anything done, will be extinct, as well it should be.
Dr. Olumuyiwa Benard Aliu is the fifth President of the ICAO Council, currently fulfilling his second term of office. He previously served as the Representative of Nigeria to ICAO, during which time he was the First Vice-President of the Council and the Chairperson for a number of its key committees.

A&SL: Please tell us a little bit about your background. How did you come to be involved in international aviation and ICAO?

OA: The excitement of aviation was instilled in me from a very young age when I saw an aircraft bring medical supplies to a remote town where my mother was working as a nurse with a Catholic mission. This is one of the reasons why I have prioritized matters relating to youth engagement, the ICAO Next Generation of Aviation Professionals initiative, and human resources development more generally during my presidency. This early inspiration led me to getting my MS in aeronautical engineering from the Kiev Institute of Civil Aviation Engineers in 1983, and an aircraft maintenance engineer's license with multiple ratings. I am also an ICAO certified SMS instructor, and hold an IATA diploma in civil aviation management and a graduate certificate in air and space law from McGill University, Canada.

In the course of my career, I was fortunate to have attained various positions of increasing responsibility in the areas of safety oversight, economic regulation, and negotiations of bilateral and multilateral agreements, including as Chief Airworthiness Surveyor, Director Air Transport Regulation, and Technical Adviser to the Minister of Aviation in Nigeria. I also played an active role in the development of Nigeria’s National Civil Aviation Policy on air transport commercialization, liberalization, and institution of competition and consumer protection programs, and helped to articulate the African Civil Aviation Policy (AFCAP) under the auspices of the African Union Commission.

From 2005 until 2013, I was the Representative of Nigeria on the ICAO Council, but I had been participating with Nigeria at all ICAO Assemblies since 1998. Before I was elected Council President in 2014, it was my privilege to serve as the Council First Vice-President, as Chairman of its Technical Cooperation and Finance Committees as well as the Council Working Group on Governance and Efficiency, and as Chairperson of the Steering Committee of the Comprehensive Regional Implementation Plan for Aviation Safety in Africa (AFI Plan).

A&SL: What does your job as President of the ICAO Council entail?

OA: Mainly my role encompasses helping the 36 states elected to this governing body to find consensus on the complex and at times very challenging issues presented for its decision. As you know, the Council serves as ICAO’s primary decision-making body while the triennial assembly of all 193 ICAO member states is not in session, and so its endorsements and adoptions have global implications for international aviation.

This path toward consensus has many political, economic, operational, and technical aspects to it, given the wide-ranging ways in which international aviation impacts the social and economic well-being of the countries and territories which modern aircraft connect to our global network. As President of the Council, I represent the Council and carry out its delegated functions. The job further involves a lot of political liaison at the highest level with states and industry stakeholders as well as mediation and dispute resolution.

A&SL: Why has the Chicago Convention been so important over the decades? Is it as relevant today?

OA: The Chicago Convention is a widely accepted multilateral treaty drafted in a manner that has made it to stand the test of time. The Convention is considered as the Magna Carta of international civil aviation. It is important to emphasize that the Convention has only been substantially changed twice since its adoption in 1944.

The mechanism which enables ICAO to reflect the modern challenges of civil aviation is embodied in the form of international standards and recommended practices (SARPs), which are contained in the annexes to the Chicago Convention and are adopted by the Council. The process for adoption of the SARPs is more flexible than the procedure for changing the provisions of the Convention itself, and this enables ICAO to reflect the modern trends in a timely manner.

A&SL: What role does the Legal Affairs and External Relations Bureau play in ICAO’s work to advance safe, secure, and efficient international civil aviation?
OA: The Legal Affairs and External Relations Bureau provides advice and assistance to the Secretary General and, through her, to the Council, other ICAO bodies, and ICAO member states. This support is provided on constitutional, administrative, and procedural matters, as well as on problems of international law, air law, commercial law, labor law, settlement of differences among states, and related matters.

The bureau also conducts research and studies in the field of private and public international air law. It prepares documentation for, and serves as the secretariat of, the Legal Committee, relevant bodies of the Assembly, and diplomatic conferences, which adopt multilateral treaties on international air law. Finally, the bureau coordinates legal activities with the United Nations and other international organizations, including the implementation of ICAO’s Policy on Regional Cooperation involving Regional Organizations and regional civil aviation bodies.

A&SL: What are the strengths and weaknesses of ICAO? Are there things it could do better?

AO: Our key strength is our dedication to consensus. It ensures the sustainability of new policies and procedures for air transport, and their full and comprehensive assessment before they are enacted. The problem this poses, however, is one of duration for the processes involved.

A key message I have been conveying in our 75th anniversary year is that we need to do more to engage with aviation innovators, but also to become more innovative ourselves in how we determine new standards and regulatory approvals so that we don’t impede the incredible era of invention we find ourselves in today. We, and state regulators, need to get better at streamlining our respective processes and methods.

A&SL: Are there any particular issues that you feel should command greater attention?

AO: The forecast growth of our sector points to several key priorities ahead. One of these is the need for us to manage the coming traffic increases safely, securely, and efficiently.

Another priority this raises concerns emissions from international flights, which presently account for 1.3 percent of annual man-made contributions to climate change. Aviation has an incredible history of emissions reduction, with modern aircraft being 80 percent more fuel-efficient than the first jets, but in addition to the basket of measures ICAO states have adopted, and the Carbon Offsetting and Reduction Scheme for Aviation (CORSIA) global offsetting program commencing soon, we still need to do more to make aviation fully sustainable.

A last point is the need for so many new, skilled air transport professionals. We need to get much better at training and retaining the next generation of aviation professionals across the industry.

A&SL: In general, what is the best way for industry to have a positive impact on the work of ICAO? How important is interaction with ICAO staff in contrast to interaction with state representatives and their staff?

AO: Industry is already comprehensively engaged in ICAO through the technical panels and working groups we establish relevant to proposals for new and amended aviation standards. They also participate through their various international organizations, such as IATA, ACI, CANSO, ICCAIA, and others, in virtually every major conference or symposium we conduct. We have a very inclusive table in this regard, and I’d also point out that NGOs are similarly represented, for instance on the Council’s Committee on Aviation Environmental Protection (CAEP).

A&SL: What recent and/or pending ICAO actions should aviation lawyers be aware of? Are there new developments of particular interest?

AO: ICAO is constantly dealing with new challenges. While aviation safety remains the primary concern of ICAO as set out in Article 44 of the Chicago Convention, progress is continuously being made in various fields. The 40th Session of the Assembly, for instance, discussed working papers on sustainable fuels, new operational concepts involving autonomous systems, and foreign investment in airlines.

With regard to security, ICAO is aware of the importance and urgency of protecting civil aviation’s critical infrastructure systems and data against cyberattacks and is accordingly developing a cybersecurity strategy. Other security challenges include flight tracking, conflict zone risk mitigation, and landside security at airports.

A&SL: Article 84 cases are rare, but two have been filed within the past two years. Do you have any advice for states that might consider bringing an Article 84 case?

AO: The machinery provided by the Chicago Convention for the peaceful settlement of international civil aviation disputes has proven to be tremendously efficient and effective over the past 75 years. Despite the unique legal context of each dispute, member states have always been able to resolve their disagreements by finding common and mutually acceptable solutions with the invaluable assistance of the Council and its President, supported by the Secretariat. It is gratifying...
to note that all cases presented to the Council within ICAO’s history have been settled through negotiation, conciliation, or mediation between the parties, usually with the good offices of the President of the Council. The fact that member states continue to resort to ICAO for the settlement of their international civil aviation disputes certainly demonstrates that they have full confidence in the judicial functions entrusted to the Council under the Chicago Convention. Overall, ICAO has been very successful in ensuring the peaceful settlement of international civil aviation disputes.

A&SL: What have been your biggest accomplishments during your time as ICAO Council President?

OA: I have been proud to focus the attention of ICAO more acutely on the capacity challenges that many states face in implementing our new and amended standards. The “No Country Left Behind” initiative I launched was instrumental to addressing these gaps, and to us seeing such widespread global improvements in recent years in the areas of safety and security oversight, among others.

The historic consensus we achieved on the CORSIA at the 2016 Assembly was also something I was very proud to lead. This was pertinent in addressing the climate change impact of our sector. It has also been my honor to focus the attention of ICAO member states and the industry on the subject of innovation.

Another message I have been very pleased to raise with senior government officials these past six years has been through the ICAO World Aviation Forums, the goal of which is to help states realize the direct relationship between their levels of ICAO compliance in their international air transport operations vis-à-vis the levels of local socioeconomic prosperity they enjoy.

Lastly, I wish to highlight the Council offsite strategy meetings I initiated during my first term, and which have become an important annual event in terms of that body’s leadership and vision. Many of the topics on the future of aviation and human resources development were discussed at length through these forums as well as many others regarding ICAO and its role.

A&SL: What advice would you give to young lawyers or professionals interested in an aviation career that might include working at ICAO?

OA: Young professionals wishing to work for ICAO should know that its employees are motivated individuals who demonstrate a high level of technical knowledge, understand aviation policy issues, possess analytical skills, and fit in a multicultural environment, as ICAO promotes diversity. Having worked in an international environment in a field relevant to ICAO’s work is also an asset.

Most of the legal officers working at ICAO have an advanced degree in international law or in air and space law. A large number of staff members outside of the Legal Affairs and External Relations Bureau also have a legal education. In fact, legal skills are an asset in various ICAO positions, such as procurement, human resources, and air transport.

More generally, young lawyers and professionals have many options for their careers in the aviation sector. They may, for instance, work for international organizations, ministries of transportation, academic institutions, airlines, airports, aircraft manufacturers, or law firms.

Preamble to the Chicago Convention

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.
An Interview with ICAO Secretary General Fang Liu

Dr. Fang Liu is the Secretary General of ICAO, currently fulfilling her second term of office. She previously served as the Director of ICAO’s Bureau of Administration and Services, and as Deputy Director General in the General Administration of Civil Aviation of China’s Department of International Affairs and Cooperation.

A&SL: The 75th anniversary of the Chicago Convention and the formation of ICAO is a momentous occasion. What does it mean to you?

FL: For me it provides us with an excellent opportunity to consider both the incredible foundation of international civil aviation standardization which ICAO has been able to help states achieve over the last seven and a half decades, so that international civil aviation may be developed in a safe and orderly manner, and that international air transport service may be established on the basis of equality of opportunity and operated soundly and economically, while at the same time appreciating its value as we look ahead today to a very exciting future for flight and to the many new technologies and challenges that the future doubling of air traffic volume poses.

Very soon our skies will see new model aircraft and operations delivering passengers to their destinations and providing an expanding range of new services and benefits for civil societies. This is the promise of urban air mobility and burgeoning outer space transport, in addition to many other new capabilities for 21st-century aircraft, and ICAO needs to ensure these new aircraft are integrated alongside traditional air services safely, securely, and efficiently in terms of both their operations and emissions.

I believe the Chicago Convention still has the flexibility and capacity to address these new challenges and to ensure aviation’s irreplaceable role in the service of the world’s developed and, most especially today, developing economies.

A&SL: What sparked your interest in aviation, and what led you to focus on international aviation? What was your professional experience prior to being named ICAO Secretary General?

FL: My legal education was heavily weighted toward aviation and the international challenges it presents, and after I earned my law degree I began working for the General Administration of Civil Aviation of China (CAAC), where over the course of 20 years I held various posts, including Legal Counsel and Deputy Director General in its Department of International Affairs and Cooperation.

During those years I was responsible for China’s international air transport policy and regulations, and also bilateral and multilateral relations with international and regional organizations, which included ICAO, the World Trade Organization, the Asia-Pacific Economic Cooperation (APEC), the European Union, and the Association of Southeast Asian Nations (ASEAN). I was also the chief negotiator for the Chinese government for all of its bilateral and multilateral air transport agreements with foreign countries.

I was also very fortunate to have served as the chair of the Aviation Group of the APEC forum during this time, and was nominated by China to sit on the Air Transport Regulation Panel in ICAO.

A&SL: When was the Chicago Convention last amended, and have those changes come into force? Is it time to consider updating the Chicago Convention in light of industry changes, modern geopolitics, and technological advances? Can international aviation continue to develop efficiently under the current structure?

FL: There were 10 amendments to the Chicago Convention adopted between 1998 and 2006, though these were mainly related to governance details and were not substantive in terms of redefining the basic principles and articles which have made it such a flexible and resilient international legal instrument since its drafting in 1944.

I think that the success of the Chicago Convention and of ICAO can be primarily attributed to the selection of responsibilities assigned to the organization and the flexibility that was written into the convention. These two factors have enabled the Chicago system to adapt as needed to the demands of a rapidly changing industry.

The more substantive changes to the international civil aviation legal framework which have arisen have had more to do with the separate treaties ICAO has brokered, for example on hijacking and terrorism, and the new annexes we have created, such as on environmental emissions and noise standards, or most
The evolutions ICAO has gone through over the years have been occasioned by both external and internal factors. Externally, we can appreciate, for example, how the epidemic of hijackings in the 1960s demanded an international response, and how ICAO offered a forum within which a response could be formulated. The same dynamic was at play in how the new annexes on noise and environmental emissions followed from the widespread introduction of the jet engine.

Internal evolutions have arisen largely due to the fact that as states have gotten used to working through ICAO and relying on it, it has subsequently become entrusted with an expanding scope of responsibility. For example, our auditing functions for safety and security oversight were in many ways a logical extension, albeit a significant one, of the information-gathering functions ICAO was already performing, and were complementary to the type of coordination problems ICAO was originally designed to solve.

Taking all of the above into proper consideration, I think that it’s plain to see how both ICAO and the Chicago Convention are suitably structured. From both a legal and organizational standpoint, ICAO is able to accommodate innovations of any type well into the future, and the dynamic and very exciting changes now arising in civil aviation can be effectively understood and managed by states through our organization, including through supplemental revisions to the Chicago Convention.

A&SL: How can ICAO best foster the growth of international aviation over the next 20 years?

FL: I think it’s critical that ICAO innovates its standards-making processes to become a more effective and efficient partner both to traditional aviation stakeholders and to the sector’s many new entrants. We focused our entire World Aviation Forum around this theme as a prelude to our Assembly this year, and everyone in attendance was eager to explore what the future of aviation regulation will mean in a world where so much can change so quickly.

But we also need to be clear that ICAO as a standard-setting agency does not by itself foster growth. The reliance of humanity on safe and rapid global air transport is such that passenger traffic has doubled every 15 years quite organically since the mid-1970s, and we therefore see our key challenges today as primarily relating to how we manage and adjust for that growth.

This helps explain why ICAO’s Global Plans for Safety, Security, and Air Navigation all feature targets and timelines extending to and beyond the 2030 time frame, and I’m very proud of the comprehensive and consultative processes which have established and refined these documents.

A&SL: What are the greatest challenges ICAO faces in pursuing its current mandates?

FL: One of the main challenges concerns the topic I just mentioned, the innovation of our standards-making processes relevant to the incredible scope and momentum of the new technological innovations now being introduced in global aviation.

The second is the forecast doubling in flights across the air transport sector, and the significant skilled personnel shortages this could lead to for pilots, controllers, maintenance personnel, or the countless other skilled trades and management roles needed to keep a global air transport system running. I also see this as an opportunity, however, and especially to address the persisting gender gap in air transport which we’re confronted with today.

ICAO is presently working hard to help raise sectoral awareness on these points, and I am encouraged that both governments and industry are now addressing the training and education priorities needed to help mitigate the potentially serious impacts these issues could present. Much more needs to be done, however, especially since aviation now faces so much competition from other industries for the skilled young workers of tomorrow.

We will all be called upon to think faster and respond more quickly than ever in the years ahead, at the same time I am reassured that international aviation’s built-in requirements for consensus and interoperability will protect us from the risks inherent in moving too quickly with nascent technologies.

A&SL: How do the roles of ICAO Secretary General and President differ?

FL: In terms of the private sector parallels that most of your readers would be familiar with, the role of Secretary General in ICAO is akin to what most understand to be a CEO, while the Council essentially serves as our board of directors, with the President being its chairman.

My work as Secretary General therefore focuses around the development of the ICAO Business Plan and budget, and management of the planning, resourcing, and execution of programs and activities for this global organization.

Both the Council President and I seek to augment the vision and mission of the organization by providing leadership on key issues, such as the recent focus on innovation in aviation we’ve embarked on, and a very important aspect of our roles as ICAO’s most senior officials involves the work we do on foreign missions to generate greater ICAO compliance. This involves the political will and firm commitments we seek from countries so that they can meaningfully address the Chicago Convention and eventually optimize the significant local socioeconomic prosperity benefits of their international air connectivity.
A&SL: What opportunities are available for legal or other professionals at ICAO?

FL: ICAO offers a broad range of employment opportunities, and not just for those with a legal background. Given that part of our workforce is aging, the organization is becoming more and more dependent on new talent entering into our work pool, and especially those with an ability to find solutions to cross-cutting and emerging issues. These will have to be founded on a solid legal framework, which will promote legal certainty, procedural propriety, and the rule of law. Therefore, from unmanned aircraft systems to cybersecurity, from big data to the creation of regional safety oversight organizations, we will definitely be seeking out new aviation lawyers at ICAO, and they will have the opportunity to shape crucial elements of the future aviation landscape.

The Legal Affairs and External Relations Bureau of ICAO currently makes very good use of secondment arrangements whereby states make legal talent available to ICAO for a one- to two-year period. The benefits from these engagements flow both ways as ICAO staff is exposed to expertise and approaches of differing states, while the legal professional concerned will bring back home a more thorough understanding of ICAO’s bodies, programs, and initiatives in the legal field and elsewhere.

I would therefore encourage young aviation professionals of all stripes to consider ICAO as a solid career option.

ICAO’s Strength

and space/rocket launches and debris are an increasing factor in airspace management, it is time for ICAO to integrate space launches and travel into its air navigation planning and SARP development.

Given the enormity of the challenges of maintaining a safe, secure, and efficient global aviation system at a time of accelerating change, ICAO’s budget is woefully inadequate and subject to the annual appropriations and political whims of individual states. As ICAO is reformed and restructured to advance its strategic objectives more efficiently and with greater accountability, it should also expand its capability to self-fund its operations. The TCB has demonstrated one approach through its state partnerships. The sale of print and online publications and data including, with appropriate safeguards, advertising is another source of revenue. By organizing task forces with technology firms, ICAO might develop innovative solutions in areas such as passport control, facilitation, infrastructure development, dangerous goods transport, the digitalization of shared safety information, and cybersecurity protection that can be sold to the states. ICAO could work with partners to provide fee-based licensing and credentialing services to certify that innovative technologies are interoperable and safe; promote navigation, infrastructure, and facilitation efficiencies; and protect against cyberattacks. The UN and individual states are always coming up with ideas to tax aviation to serve other noble purposes, such as health care in Africa, proposals that contravene the Chicago Convention. It would make more sense to assess a small charge on each international flight or miles traveled in international airspace with restrictions on how the funds would be used to further ICAO’s strategic missions. All options should be explored.

As Americans increasingly traverse the globe, ICAO remains critically important to maintaining and improving the safety, security, efficiency, and environmental sustainability of air travel. Among UN specialized agencies, ICAO is a shining example of technical cooperation among 193 nations in advancing shared values.

For 75 years, ICAO has repeatedly reinvented itself to address emerging challenges and, in coordination with the states and the private sector, has achieved an enviable record of safety, security, and seamless air navigation that will require continuous diligence, reinvention, and U.S. leadership to maintain and improve in the future.
Celebrating 75th Anniversary

This edition of *The Air & Space Lawyer* shines a spotlight on this historic event, and reflects on the past, present, and future of ICAO and the Chicago Convention. Jeffrey N. Shane, IATA general counsel, provides an excellent history of the events leading up to and during the Chicago conference. Ambassador Donald T. Bliss (ret.), U.S. Representative to ICAO from 2006 to 2009, provides his unique perspective on the viability and importance of ICAO today and into the future.

We conclude with interviews of three of ICAO’s key leaders: Ambassador Thomas Carter, current U.S. Representative to ICAO, Dr. Olumuyiwa Benard Aliu, President of the ICAO Council, and Dr. Fang Liu, Secretary General of ICAO. They provide valuable insights into the Chicago Convention’s importance and ICAO’s ability to evolve to face new challenges, as well as the U.S.’s top goals for ICAO and the measures ICAO should take to effectively advance safe, secure, and efficient international aviation.

On behalf of the editorial board, I hope you enjoy this special edition of *The Air & Space Lawyer*.

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Diplomacy and Drama

to organize a successful framework for international civil aviation as a proxy for the world’s ability to forge global arrangements conducive to an enduring peace.

The proceedings were characterized by prescience and vision, tension and suspicion, soaring rhetoric, backroom haggling, and even gallantry. They almost affected a U.S. presidential election.

The Beginnings

The concept of an international conference on post-war aviation emerged from some visionary thinking in Washington, London, and Ottawa beginning in 1943. It was already assumed that the war would end in victory for the Allies and that international air commerce, severely compromised since 1940, would become an essential contributor to post-war recovery.

In Washington, because the undersecretary of state, Edward Stettinus, was the brother-in-law of Juan Trippe, the storied head of Pan American World Airways, responsibility for aviation matters had been delegated to the assistant secretary of state for Latin American affairs, Adolf A. Berle (pronounced “BUR-lee”). Berle, a brilliant lawyer and economist, had been a Columbia Law School faculty member since 1927 and an original member of FDR’s “brain trust.” He was still an important presidential advisor.

U.S. aviation policy had become domestically controversial during the war—a contest between diametrically opposed visions. At the most radically reformist end of the spectrum was a future imagined by vice president Henry Wallace, among others, who wanted to take international air commerce out of the hands of private companies and vest it in government-owned international operating and regulatory institutions. Newly elected congresswoman Clare Boothe Luce of Connecticut said in her maiden speech in February 1942, “[M]uch of what Mr. Wallace calls his global thinking is, no matter how you slice it, globalo-ney.” She became instantly famous.

At the other end was Pan Am CEO Trippe and his many champions in Congress. Pan Am had long been America’s “chosen instrument” on international routes, and Trippe saw no reason to depart from that choice. He was unapologetically in favor of continued U.S. (i.e., Pan Am) domination of the global skies. It was essential, Trippe wrote to the Civil Aeronautics Board (CAB) in 1942, “that we should seek landing rights without offering them, . . . find plausible reasons to deny most requests [for landing rights] and keep our concessions to a minimum.”

The effectiveness of Pan Am’s advocacy was waning, however, both at the White House and even at the CAB. “[T]here was a well-established conviction in Washington,” historian Alan Dobson has written, “that economic friction in the inter-war period had been a major cause of war and could very well be a causal factor in starting future ones.” FDR had become particularly sensitized to the likely consequences of exploiting U.S. economic advantages too aggressively. He thus supported far more freedom for international air commerce than had existed in the past—an idea that L. Welch Pogue, the CAB chairman, had been espousing since 1942—as well as an end to Pan Am’s virtual monopoly on international routes. The airlines of all nations, FDR believed, should be encouraged to become robust participants in the post-war aviation marketplace. His ideas guided U.S. communications with other governments.

In London, meanwhile, members of Winston Churchill’s government were also thinking about the future of civil aviation. They worried, however, that the U.S., with its huge capacity to build transport category aircraft—Britain had focused its wartime manufacturing on fighters and bombers—would quickly dominate the world’s air routes. As early as 1941, an internal U.K. government report on the future of international aviation had said: “The choice before the world lies between Americanization and internationalization. If this is correct, it is difficult to doubt that it is under the latter system that British interests will best be served.”

“Internationalization,” in the parlance of the day, meant comprehensive economic regulation by an international body.

While the U.S. would have most of the airplanes, however, a great many international destinations were within the British Commonwealth. Britain knew it would have a lot to say about the future of aviation, as long as Commonwealth members understood the importance of alignment.

Canada understood the gap that separated U.S. and U.K. thinking on post-war aviation. A loyal Commonwealth country, Canada was also wary of putting too much ideological distance between itself and its large neighbor to the south. It thus found itself in the role of mediator between Britain and the U.S.

It wasn’t always easy. Lester Pearson, later to become...
one of Canada’s greatest prime ministers, was in 1943 second in command at the Canadian Embassy in Washington. He explained Canada’s delicate position to Churchill during a meeting there at which plans to seek a Commonwealth-wide aviation policy were discussed. Pearson later described Churchill’s reaction:

The Great Man faced me squarely, waved his cigar at me, and told me that he knew our worries in this regard, but he must emphasize that there was going to be a family discussion of this matter within the Commonwealth before we talked outside, whether we wished to attend or not. . . . With an admonitory final wagging of the cigar in my direction, the Prime Minister left.  

Berle at the State Department and CAB chairman Pogue emerged as the leading proponents of FDR’s vision. They were a kind of “odd couple.” Berle was short in stature, abrasive, and reportedly difficult to work with.11 He came to aviation policy from the top down—based on his free trade convictions and his commitment to delivering on the president’s liberal expectations. Pogue was tall, bright, and gregarious. He had developed his ideas about aviation policy inductively during his years at the CAB, working his way up in just a few years from assistant general counsel to chairman. He had long supported creating more opportunities for the growth of international aviation but was deeply skeptical of FDR’s multilateral aspirations.12 He believed that the attractiveness of the American market provided leverage that should not be squandered in the quest for a multilateral agreement on traffic rights likely to be accompanied by unwelcome restrictions on U.S. airline operations.

Tactical differences aside, Pogue and Berle agreed that the extreme nationalist views of Tripe and others were a dangerous anachronism; their radical insistence on maintaining U.S. predominance would merely lead to more international friction. Berle reported to Secretary of State Cordell Hull in April 1943 that this idea—“that Americans could go anywhere and sell anything; but that other countries must be excluded not only from the American market but from any market in which the United States can gain dominance”—had stirred up serious concerns overseas. The U.S., he said, needed to promote “a generalized settlement of the problems of air navigation rights on an equitable basis.”14

A series of exchanges took place between the U.S. and the U.K. throughout 1944, with Berle leading the discussions for the U.S. and Lord Beaverbrook, the Canadian who became a British newspaper tycoon and whom Churchill had put in charge of aviation affairs, representing the U.K. Canada was kept informed of the discussions and produced a draft international aviation treaty in March 1944. It was reportedly the first formal effort to capture the “four freedoms”: the rights of transit, to make technical stops, to carry traffic from the airline’s home country to another country, and to bring traffic back from another country to the airline’s home country.15

While little progress was made in bridging the U.S. and U.K. positions—the U.S. wanted “freedom in the air” while the U.K. wanted “order in the air”—a consensus gradually formed around the need for an international conference. At the U.K.’s suggestion, the U.S. sent invitations on September 11, 1944, to 54 governments, not including Germany and Japan. The invitation letter, from President Roosevelt himself, said that the gathering would “make arrangements for the immediate establishment of provisional world air routes and services” and “set up an interim council to collect, record, and study data concerning international aviation and to make recommendations for its improvement.” The delegates were also invited to “discuss the principles and methods to be followed in the adopting of a new aviation convention.”17

With the exception of the Soviet Union and Saudi Arabia, every government that received an invitation sent a delegation to Chicago.

The Chicago Conference
The conference opened on November 1, 1944, with 700 delegates sitting in the ornate ballroom of the Stevens Hotel. Berle served as head of the U.S. delegation and was joined by Pogue, CAB vice chairman Edward Warner, New York mayor Fiorello LaGuardia, Admiral Richard E. Byrd, and four members of Congress.

Berle had also been designated by FDR as temporary chairman of the conference. He began by reading a message from Roosevelt that left the delegates in no doubt about the importance of their mission. The world had come together, Roosevelt said, “to write a new chapter in the fundamental law of the air.” Large areas of Europe and the Pacific, “closed for four black years,” would soon be reopened to commerce. “Air transport,” Roosevelt said, “will be the first available means by which we can start to heal the wounds of war, and put the world once more on a peacetime basis.” He continued:

You will recall that after the First World War, a conference was held and a convention adopted designed to open Europe to air traffic; but under the arrangements then made, years of discussion were needed before the routes could actually be flown. . . . We do not need to make that mistake.

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again. I hope you will not dally with the thought of creating great blocs of closed air, thereby tracing in the sky the conditions of future wars.19

After reading the president’s statement, Berle offered similarly lofty remarks of his own. “The air has been used as an instrument of terrible aggression,” he said. “It is now being made a highway of liberation. It is our opportunity hereafter to make it a servant of peoples.”20

Soaring rhetoric was clearly the order of the day. No statement at the conference was more powerful or affecting, however, than that of Max Hymans, the chief French delegate. France had been liberated from Nazi occupation only three months earlier. Hymans had been a member of the French resistance but was now director of air transport in the provisional government led by Charles de Gaulle. He would later become the president of Air France. Speaking in French, Hymans said:

I feel that I am expressing the sentiment of all nations which have been or are still occupied by the enemy, isolated from the world, subjected to moral and material asphyxiation, by declaring that the maximum development of air transport appears to them to be one of the indispensable manifestations of the freedom which has been recovered or which is ardently awaited.21

Following opening statements from other delegations, rules of the conference were adopted, committees were formed, and the first plenary session was adjourned to the playing of “The Star-Spangled Banner.”

Berle was elected permanent chairman of the conference on the second day. His first order of business was to deliver a statement of the U.S. position. The U.S., he said, hoped the conference would address itself to three major items: routes, rules of the air, and institutional arrangements. On routes, the U.S. sought a multilateral agreement that would establish market access for the airlines of all countries that were prepared to make that market access available to others. On the rules of navigation, Berle expressed the hope that “the customs affecting friendly intercourse in the air between nations” could be “embodied in a document which will set out in these respects the fundamental law of the air.”22 As to the last issue—the need for a new international organization—Berle explained that there was little controversy over the importance of vesting in a world body the ability to prescribe global technical standards. Aircraft needed to be able to land anywhere in the world and yet “be able to recognize established and uniform signals and to proceed securely according to settled practice.”23 But that was as far as the U.S. was prepared to go in delegating authority to an international body. “Some brave spirits,” he noted, “have proposed that like powers be granted to an international body in the economic and commercial fields as well.”24 The U.S. would not agree to the establishment of such an agency.25

At the end of his remarks, Berle invited the British delegation to address the delegates. Because Lord Beaverbrook had chosen to remain in London, leadership of the British delegation to Chicago had been assigned to Lord Swinton (Philip Cunliffe-Lister), Britain’s recently appointed air minister. As secretary of state for air from 1935 to 1938, it was said that he “more than any other ensured that the RAF was prepared for the exigencies of war.”26

Although it was reported that Berle and Lord Swinton had taken an instant dislike to each other,27 the delegates could not have detected any enmity from Lord Swinton’s remarks. He began by expressing gratitude to the U.S. for having convened the conference, noting that the sheer number of states attending had wholly confirmed its pivotal importance:

In these years of war, looking at the vast destruction which air forces have wrought and the ever increasing range and potentiality of aircraft, it is natural that many [delegates] should be more impressed by the menace of the air than by its power for good. They feel, and indeed they feel rightly, that the whole future of security is bound up with the air.28

Lord Swinton then spoke of a “white paper” that the British government had issued just prior to the conference “after much thought and consultation.” It described “general principles and the system which they believe will effectively and fairly combine national aspirations with international cooperation.” “Every nation, which aspires to be in the air,” he said, “will wish to have, and indeed will insist on it, in addition to its own internal traffic, a fair share of its external air traffic as well.” Then there was “the question of frequencies, i.e., how many services ought we to have on a particular route.” It had been suggested, Lord Swinton said, that the number of services should be fixed in relation to the amount of traffic. “I think that is a good formula,” he said, “provided we don’t apply it too rigidly.” “And then,” he continued, “there is the share each country should have in the services to be operated, that is to say its national quota.”
Any arrangement, he said, “should be both fair and practical.” The white paper suggested “a basic distribution in proportion to the traffic . . . embarked in the respective countries.” Finally, he said, there was the question of rates. “That is not so simple,” he conceded, “but it is very important if we are to avoid waste and to get rid of subsidies. We have suggested that minimum rates should be settled in relation to standards of speed and accommodation.”

Having summarized the white paper’s ideas, Lord Swinton went on to pour cold water on the possibility of negotiating a treaty “round this table.” The best that might be hoped for in Chicago, he said, was an agreed set of principles. The delegates might then set up “a representative body to follow up our work and give them their directions.” Because it would take a long time for any new treaty to come into force, governments would have to pursue bilateral agreements guided by the agreed principles and by the interim international authority that would be established.29

Berle next called on Canada. The Canadian delegation was led by Clarence D. Howe, an American-born Canadian who ultimately counted among his achievements in government the founding of the Canadian Broadcasting Corporation, Trans-Canada Air Lines (predecessor to Air Canada), and the Department of Transport.30 At the time of the conference, he was Canada’s minister of reconstruction.

Howe reminded the delegates that Canada had produced a draft international air convention the previous March that had been the subject of widespread discussion and broad agreement, including with other countries. He outlined its principal elements. Canada, he said, proposed the establishment of an international air authority. It also proposed that all nations should grant the “four freedoms” described in the draft treaty to all airlines “whose operations have been authorized by the authority.” The rest of Howe’s remarks made clear that the international authority contemplated in the draft convention would function as a powerful global regulator, controlling which routes would be flown, which airlines would fly them, how many times a week they would fly, and the fares they would charge. Addressing the U.S. proposal, he said, “We think that it is unrealistic to talk in terms of a multilateral grant of freedom of air transport . . . unless those grants of air freedom are accompanied by the establishment of an effective international authority, with power, in the ultimate resort, to regulate frequencies and to fix rates. Without an effective international regulatory authority, mere freedoms of the air would lead either to unbridled competition, or to the domination of the airways of the world by a few.”31

The next significant contribution to the conference came from the New Zealand minister of industries, commerce, supply, and munitions, Daniel G. Sullivan. After reminding the delegates of their solemn responsibilities to prevent the world from descending into chaos yet again, he got right to the point:

I suggest to you that this is . . . not a time for half measures; this is no time for national or commercial rivalries; this is no time for tinkering or patchwork; and it is for this reason that we in New Zealand are convinced that there is only one proper and lasting solution of the problem in front of us, and that is international ownership and operation of air transport services on international trunk routes.

This single global airline, Sullivan explained, should be owned and controlled internationally “by a body attached to the United Nations organization, which is, we trust, shortly to be established.” The new carrier “will serve all nations and should therefore be owned and operated by all nations.” If the world is to entrust the prevention of war to the UN, Sullivan said, “why should we hesitate to empower an international organization to own and operate air-transport services on international trunk routes?”32

It was late in the afternoon of the second day of the conference by the time Sullivan ended his remarks. One assumes that Berle must have regarded the New Zealand proposal as daft, but as conference chairman it was not his role to react from the dais. Instead, he used the moment to offer a gracious and heartfelt tribute to New Zealand: “I permit myself,” he said, “to recall that in the struggle now pending, New Zealand has sacrificed more of her sons in proportion to her population in the cause of liberty than any other nation in the world.”33

With that, he called a recess to the meeting, asking the delegates to return after dinner.

The meeting reconvened at 9:15 p.m. Of the countries called on to speak that evening, only Australia offered an affirmative position on the future structure of international aviation. Presented by Arthur S. Drakeford, minister for civil aviation, the statement offered strong support for the global, internationally owned airline proposed earlier by New Zealand.

There would be no more plenary meetings until December 5. The battle lines had been drawn, however. The work of the conference now transitioned into the elaborate committee structure established on the first day.
Doing the Work

Four principal committees had been established with responsibility for drafting the language of a multilateral convention (Committee I), prescribing technical standards (Committee II), defining “provisional air routes” (Committee III), and establishing an “interim council” that would oversee the conduct of international aviation pending the ratification of the final convention (Committee IV).

The major proposals presented during the second day of the conference—all controversial—were the province of Committee I. After several days of deliberation, it became clear that agreement was beyond reach.

Curiously, while the Commonwealth countries treated the U.S. proposal as nothing more than a formula for U.S. dominance, FDR's domestic political opponents sharply criticized it as a dangerous giveaway. It should not have been surprising. The U.S. presidential election of 1944 was to be held on November 7, just six days into the conference. FDR was running for an unprecedented fourth term against Republican governor Thomas E. Dewey of New York. The right-leaning Chicago Tribune, perhaps seeing an opportunity to boost the governor's prospects, reported on the liberal U.S. position in a November 4 story headlined “Sellout of U.S. Air Rights at Parley Feared.” An exercise in hyperbole, the story began: “Consternation and amazement at the American position in international air transport as stated by Adolf A. Berle and fear that the international civil aviation conference in Chicago would result in a complete sellout of American overseas aviation and peril to the military security of the United States were expressed [in Washington] today.” Berle refused to dignify the report with a response, other to issue a brief written statement: “I don’t have to inform you gentlemen that there is a national election on and a campaign incident thereto, and that a certain local newspaper has taken a very vivid interest therein.”

The Chicago Tribune needn’t have worried. Nobody at the conference was buying whatever the U.S. was accused of selling. In actual fact, none of the major proposals presented during the first two days appeared to be attracting any groundswell of support within Committee I.

On November 12, worried that the conference would end with no agreement whatsoever, Berle began a week of private consultations with his British and Canadian counterparts. Dubbed the “ABC talks” (America-Britain-Canada), they were an effort to bridge the differences between the U.S. and the Commonwealth countries on the multilateral commercial agreement that had been FDR's most important objective in convening the Chicago conference.

Despite some early attempts at compromise, the effort was unavailing. The U.K. sought to move away from insisting on a global regulatory body but only if the multilateral exchange of landing rights was accompanied by rules on traffic and capacity that the U.S. would not accept. The most significant differences related to traffic permitted on so-called “fifth freedom” flights—an airline’s ability to fly to another country, pick up traffic there, and carry it to a third country.

In an effort to break the logjam, Roosevelt wired Churchill on November 21 saying, “The conference is at an impasse because of a square issue between our people and yours. . . . The limitations now proposed [by the U.K.] would, I fear, place a dead hand on the use of the great air trade routes. You don’t want that anymore than I do.” Churchill was unwavering; he instructed the U.K. delegation to allow the conference to finalize the “technical arrangements” but nothing more.

In a last-ditch effort, Roosevelt communicated again with Churchill, even invoking an upcoming congressional vote on lend-lease. FDR warned that Congress “will not be in a generous mood if it and the people feel that the United Kingdom has not agreed to a generally beneficial air agreement. They will wonder about the chances of our two countries, let alone any others, working together to keep the peace if we cannot even get together on an aviation agreement.” FDR's pleas fell on deaf ears. The ABC talks broke up with “an apparent agreement to disagree.”

The New Zealand-Australia proposal that future international air service should be provided exclusively by a single, internationally owned, global airline—also discussed within Committee I—met with adamant U.S. opposition from the start. Writing later on the occasion of the Chicago Convention's 50th anniversary, Pogue explained that while the inefficiency of government administration was seen as a major problem with the proposal, the biggest issue was the proposal to staff the global airline with nationals of all owning governments. “It would be as confusing,” Pogue wrote, “as was the biblical Tower of Babel.” Diversity and inclusion were apparently not deemed imperatives in 1944.

Outcomes

While the backroom negotiations on the larger issues of market access and international regulation floundered, the four committees, and a large array of subcommittees, labored on with far more success. By the time Berle reconvened the conference at its third plenary meeting on December 5, they had quietly
produced nothing less than the essential foundation for the future of international aviation.

The most important product of their work, of course, was the Chicago Convention itself. It represented, quite simply, a complete modernization of the basic public international law of aviation. The International Air Services Transit Agreement was a second major achievement, enabling states to transcend at last the mercantilist exploitation of national airspace and thus facilitating far more rapid development of air commerce. As Pogue later wrote: "The narrow, rigid, and severely limiting application of the doctrine of the sovereignty over the airspace above each nation’s territory had paralyzed the early development of this remarkable new service for trade and travel." That paralysis was largely overcome at Chicago.

Committee II, covering technical standards and procedures, had established 10 subcommittees that somehow produced in a few short weeks drafts of technical annexes to the Chicago Convention, filling 188 pages of the printed proceedings of the conference. They covered communications, airworthiness, air traffic control, licensing, and other essential requirements. It was another remarkable achievement.

An interim agreement established a Provisional International Civil Aviation Organization (ICAO) pending the coming into force of the permanent Chicago Convention and the establishment of the permanent ICAO. On the day before the conference was to close, however, the delegates conducted an election of the 21-member Interim Council of the ICAO that produced an unexpected 11th-hour crisis.

India, despite its population of 400 million and strategic location, had not won a seat. The omission meant that the U.K. might have to withdraw its support for the agreements achieved at the conference, thereby calling into question the support of all other Commonwealth members. Understanding the magnitude of the problem, the chief delegate of Norway, Ambassador Wilhelm Morgenstierne, immediately asked unanimous consent to permit India to replace Norway on the Council.

The conference was still reeling from the stunning magnanimity of Norway’s gesture when the chief delegate of Cuba, commercial attaché Felipe Pazos, asked for the floor. He said he had learned of Norway’s intentions only 10 minutes earlier and had not had time to consult his government, but he would nevertheless offer Cuba’s seat to India and ask that Norway’s membership be restored. The Cuban offer was accepted. The work of the Chicago conference was thus saved by what may have been one of the most consummate demonstrations of gallantry in the annals of multilateral diplomacy.

Berle concluded the proceedings with characteristic eloquence and justifiable pride. “History,” he said, “will approach the work of the conference with respect. It has achieved a notable victory for civilization. It has put an end to the era of anarchy in the air.” The work done in Chicago, he said, had established “a foundation for freedom under law in air transport.”

Epilogue
Franklin Roosevelt’s health had begun to deteriorate even before his reelection. He died a scant five months after the Chicago conference ended, believing it had been a failure. It had not achieved the multilateral commercial agreement that he believed was essential to avoiding the mistakes of the past. It should not have been a surprise. Indeed, bilateralism remains the defining feature of international aviation to this day.

In 1977, however, President Jimmy Carter instructed his aviation negotiators to use the bilateral process in a different way: “[T]rade opportunities,” he admonished, “rather than restrictions.” Fifteen years later, going well beyond the Carter instruction, the U.S. announced its interest in negotiating aviation agreements in keeping with a new “open skies” template that effectively abolished all constraints on commercial airline operations in the affected markets. More than 125 U.S. open skies agreements later, it may well be said that the U.S. has been working to achieve, bilaterally over time, what FDR sought to achieve multilaterally and all at once—a global aviation system characterized by “freedom of the air.”

There is no need today, therefore, to lament the failure of the Chicago conference to adopt a multilateral commercial agreement. On the other hand, the dramatic growth of international aviation and its astonishing safety record are a lasting tribute to the prescience, wisdom, and diligence of the delegates. They somehow were able to see beyond the terrible fog of war and understand the contribution that civil aviation would make to peace and prosperity in the years ahead.

The introduction to the printed proceedings of the Chicago conference, published four years later, had it right: “[I]t can safely be said that the International Civil Aviation Conference at Chicago was one of the most successful, productive, and influential international conferences ever held.”

Endnotes

3. Berle remained on the Columbia Law School faculty through 1964, the year in which the author took his course on the law of corporations.


5. Id.


8. Dobson, *History of International Civil Aviation*, *supra* note 4, at 41 (quoting *Internationalization of Civil Aviation after the War: The Finlay Report* (1942)). For consistency, American spellings have been substituted for British spellings where they appear in quotations.


12. In a 2000 interview, Pogue remarked: “Well, the trouble with Roosevelt on aviation was he just didn’t know what he was doing.” Dobson, *History of International Civil Aviation*, *supra* note 4, at 3, 44–46.


14. Id.


20. Id.

21. Id. at 81.

22. Id. at 58.

23. Id. at 59.

24. Id. at 60.

25. Id. at 61.


27. Id. (quoting Dobson, *Peaceful Air Warfare*, *supra* note 7, at 163–64).


29. Id. at 64–67.


32. Id. at 79.

33. Id. at 80.


40. Id. at 8.


42. Pogue, *supra* note 2, at 22.

43. Churchill expressed similarly inhospitable thoughts about the human side of internationalization, even to the point of criticizing ideas emanating from his own government: “If by this [internationalization of air transport] is meant a kind of Volapuk Esperanto cosmopolitan organization managed and staffed by committees of all peoples great and small with pilots of every country from Peru to China (especially China), flying every kind of machine in every direction, many people will feel that this is at present an unattainable ideal.” Dobson, *FDR and Civil Aviation*, *supra* note 6, at 145.

44. *Proceedings*, *supra* note 17, at 3.


50. There were three further attempts to craft a multilateral commercial agreement under the auspices of the PICAO over the next three years; all failed. Virginia Little, *Control of International Air Transport*, 3 Int’l Org. 29, 35–36 (1949), https://www.jstor.org/stable/2703909. No subsequent effort to achieve a global agreement on commercial aviation rights has attracted more than a handful of adherents. See, e.g., Multilateral Agreement on the Liberalization of International Air Transportation (MAlIAT), *open ed for signature* May 1, 2001, 2215 U.N.T.S. 33 (entered into force Dec. 21, 2001) (seven signatories); IATA Agenda for Freedom (2008), https://www.iata.org/policy/Pages/agenda-freedom.aspx (11 signatories).


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