III. CHICAGO SYSTEM: AN ATTEMPT TO ACHIEVE MULTILATERALISM

The pre-Second World War and attempts to evolve a set of principles for establishing international air services was conditioned more by political intentions rather than economic considerations.\textsuperscript{47} This rendered the "transit rights" and "landing facilities" as the objects of mutual bargain and thereafter commercial aviation became a bilaterally feasible exercise depending exclusively upon the bargaining capacity of states. This development proved detrimental to the cause and interest of international air transportation in terms of its futuristic growth.\textsuperscript{48} This situation gave rise to conflicts and tensions, whereby, commercial aviation temporarily came to a standstill. Though the consequences of the Second World War were global misery and distress, yet it was a blessing in disguise for it triggered an unprecedented growth in international commercial aviation.


\textsuperscript{48} Air Ministry Command 6561, ibid.
As a part of the wartime plans and strategies, activities such as construction of air-bases with landing facilities, use of the latest technology to manufacture more sophisticated aircraft to serve the dual purpose of military requirements and carriage of defence personnel, training of pilots and transportation of goods, took precedence. The end of the war rendered jobless thousands of pilots and wartime installations became unused paving way for them to be turned into the centres or sites responsible for extensive growth of commercial aviation. Also in some countries such as India, there was a glut of aircraft and other aviation equipment, awaiting to be utilised.

To find out a workable solution for the post-Second World War international civil aviation and also to diffuse the international conflicts and tensions, Great Britain called for international co-operation "to meet the needs for the peoples of the world for plentiful, efficient and cheap air services; maintain broad equilibrium between the world's air transport capacity and the traffic offering; ensure equitable
participation by various countries engaged in international air transport capacity and the traffic offering; eliminate wasteful competitive practices and, in particular, to control subsidies; standardize practice on technical matters important to the safety of flying; in general contribute to world security.\textsuperscript{49}

These events and the related developments on civil aviation matters led to the necessity of having an international conference. This took place in 1944 in Chicago\textsuperscript{50} at the instance of US, and the outcome is known as the Chicago Convention. The Conference was attended by 52 nations - both allied and neutral States. The enemy powers (the Axis powers) were kept out of this conference.\textsuperscript{51} The conference was expected to reach an agreement on two sets of issues:

(1) to establish procedures for setting, enhancing and upgrading technical standards of safety and

\textsuperscript{49} Air Ministry Command 6561, ibid.

\textsuperscript{50} For detailed discussion on the serious considerations of political diplomatic arrangements for post-war international civil aviation, see Duane W. Freer, "Enroute to Chicago 1943 to 1944", ICAO Bulletin, July 1986, pp.39-41.

\textsuperscript{51} The notable absentees were the USSR and Saudi Arabia. Argentina was not invited, whereas Danish and Thai representatives attended the conference on their personal capacity as they were happened to be in the city during the time of conference.
sharing technical improvements etc.; and

(2) to chalk out the principles and procedures for the economic regulations of international civil aviation, authorising air routes, setting of fare-regulation, frequency and capacity of aircraft flown over the routes.\(^5^2\)

In light of these objectives, a comprehensive set of rules regarding the technical aspects involved (concerning the first issue), were formulated combined with technical annexes. As the content of most of the rules drafted here, had already been on the agenda of previous conferences and CINA, delegates had little difficulty in arriving at a consensus.

The principal focus of the second issue on the agenda of the Conference, related to the economic aspects of civil aviation regulations in the global perspective. It eventually figured as the most crucial and controversial issue and an acrimonious debate ensued over it. It became evident, well in advance from the

\(^5^2\) See ICAO Doc.7300/6 (1980).
pre-conference letter of Mr. Adolf A. Berle who declared that "the forthcoming air-conference will probably concern itself with matters relating to routes, landing rights and the general principles of air-navigation and international air organisation."\textsuperscript{53}

The prognosis of Mr. Berle was not as simple as declared, since states had failed to reach any consensus on the commercial aspects of the industry. The diverse stands taken by states during deliberations on economic aspects, was one reason for the limited success of the Chicago Conference. It was difficult to identity who was to be blamed.

The USA, which emerged as a major aviation power after the end of the war, propounded a liberal international civil aviation policy and contended that it would have an added value for the maintenance of a

\textsuperscript{53} Mr. Adolf A. Berle, Chairman of the Chicago Conference as well as the Head of the American Delegation, see Howard Osterhont, "A Review of the Recent Chicago International Air Conference", \textit{Virginia Law Review}, vol.31 (1945), p.376.
strong aviation industry. Accordingly it advocated the laissez-faire policy, i.e., the theory of free-trade approach to establish international air services. To pursue and support this ideology, Berle strongly urged other countries to accept the four freedoms such as the right to fly, the right to land and the rights involving the embarkation and disembarkation of traffic forthwith as a basis for post-war international civil aviation. The proposal was overwhelmingly supported by Sweden and the Netherlands. On other hand, the U.K., whose economy was shattered by the war, espoused protectionism and sought equitable participation for all countries in international air transport and also a broad equilibrium between air transport capacity and traffic availability. Supporting its demand, the U.K. strongly advocated an international regulatory mechanism to exercise control over international routes, capacity and frequencies. As opposed to this, Australia and New Zealand favoured creation of an international organisa-

---

54 Secret Memorandum from General H.H. Arnold, Commanding General, US Army Air Force, to Franklin D. Roosevelt, the then President of the U.S., March 26, 1944, See Dierikx, n.47, p.802.

55 See Peter Masefield, Summary of the British Position regarding International Civil Aviation (June 20, 1944), cited in Marc L.J. dierikx, n.47, p.803.
tion which would own aircraft and manage their operations on all non-domestic air-routes. They perceived international civil aviation as essentially an international public utility rather than a form of commerce, and airspace as 'res communis' and not 'res nullius'. The Canadian delegate too expressed a similar opinion favouring the establishment of an International Air Transport Authority to look into the needs of the people of world for efficient and economic international air-transport and to ensure that the air routes and services were apportioned equally between various member states. The Canadian proposal differed with the joint proposal of New Zealand and Australia in one respect: the former does not speak of the internationalisation of airways. Yet another difference between the US and UK over the exchange of fifth freedom traffic rights culminated a discussion on how national and public interest could be protected and taken care of.

---

56 See Jeswald W. Salacuse, n.23, p.820; and also See Duane W. Freer, "Chicago Conference (1944): UK-US Policy Split revealed", ICAO Bulletin, August 1986, p.24. Where it was held that the Australia, New Zealand joint proposal had a tendency against extensive international control of air service.

57 See the Canadian Draft for a New International Convention on Civil Aviation (January 8, 1944), cf. Marc L.J. Dierikx, n.47, p.804; and also see Duane W. Freer, ibid.
simultaneously. The outcome was a spectrum of diverse views and ultimately no consensus could be reached. After continued deliberations over a period of five weeks, the Chicago conference finally succeeded in adopting six sets of instruments, namely, the Convention on International Civil Aviation, an Interim Agreement on International Civil Aviation Organisation, the International Air Services Transit Agreement, the International Air Transport Agreement, drafts of 12 Annexes and a Standard Form of Bilateral Agreement for the exchange of traffic rights. The Chicago Convention which has been highly regarded as the 'charter' of international civil aviation, is one of the most widely ratified of all international instruments.\textsuperscript{58} Till December 1995, 183 States have adhered to the convention.\textsuperscript{59} In its final draft, the Chicago convention preferred to remain largely silent, over the commercial aspects such as specification of routes.

\textsuperscript{58} The Chicago convention came into force upon ratification by 26 States on 4 April 1947 (47 years ago) and is now having a world-wide universal applicability.

fixation of rates, allocation of frequency and capacity sharing. However, it envisaged some of the following provisions which have had considerable effect on scheduled international air transportation.

First Article 1 of the convention reaffirms the now traditional custom of recognising the complete and total sovereignty of states over the airspace above its territory. This provision firmly lays down the foundation of the regulation of international air transportation. The basis of commercial aviation regulation, whose viability is subject to the extent of states' willingness to surrender their sovereignty, can be attributed to the enumeration of Article 1.

The second provision of significance is Article 6 which states that "no scheduled international air services may be operated into the territory of a contracting state except with the special permission or other authorization of that state and in accordance with the terms of such permission and authorization". The scheduled air services, despite being a major
constituent of the international air-transportation, are denied operations without the consent of state. Interestingly, the Chicago Convention does not define the term "Scheduled International Air Service".  

A third salient provision is Article 68, which provides that "each contracting state may, subject to the provisions of this convention, designate the route to be followed within its territory by any international air service and the airports which any service may use."

Evidently, international air transportation is heavily regulated and exchange of commercial rights became non-operational except through bilateral bargaining and reciprocity.

However, the Chicago Conference cannot be dismissed as a failure multilateralism. It witnessed adoption of two optional agreements, namely, the International Air

---

60 The definition of a Scheduled International Air Service was in fact adopted by the ICAO Council on 25 March 1952, for the guidance of contracting states in the application of Articles 5 and 6 of the Chicago Convention, 1944, in order to distinguish scheduled from non-scheduled air services. See ICAO Doc.C-WP/1123 and 7278-C/841 of May 10, 1952.
Transit Agreement and International Air Transport Agreement, popularly called as the Two Freedoms and the Five Freedoms Agreements respectively. The Transit Agreement incorporated the following features:

(a) privilege to fly across its territory without landing;

(b) privilege to land for non-traffic purposes.

This agreement gained wider acceptance, though it did not have much economic significance, the reason being its non-commercial framework and the nature of privileges that it incorporated.

The Transport Agreement, on the other hand featured all the five freedoms of the air on its Charter:

---

61 For the text of the Transit and Transport Agreement, see ICAO DOC 2187. The Transit Agreement opened for signature on 7 December 1944, came into force on 30 January 1945, and the Transport Agreement on 7 December 1944, came into force on 8 February 1945.

62 See ICAO DOC 7500. At present 99 States are parties to the International Air Services Transit Agreement and the number does not include states possessing vast territorial air space such as Canada, China, Brazil, Indonesia and the former USSR. Many states, still, "trade off" the basic right of over flight of landing for non-traffic purposes for other commercial advantages.
(a) privilege to fly across foreign territory without landing;
(b) privilege to land for non-traffic purposes.
(c) privilege to discharge traffic in a foreign country;
(d) privilege to take on traffic from a foreign country; and
(e) privilege to discharge and take on traffic from one foreign country to any other country.63

The unrelenting attitude of the US for an unconditional acceptance of five freedoms and the outright refusal of the UK which stressed on reciprocity as the basis of acceptance, led to the non-ratification of the agreement by majority of States. As a result, the agreement has not come into force. The reservations of States about the Transport Agreement highlights their narrow interests and their preference for regulated competition rather than free competition, or their choice of bilateralism over multilateralism.

See ICAO DOC.2187.