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Law-Making in the International Civil Aviation Organization. by Thomas Buergenthal.

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LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION. By Thomas Buerghenthal.* (Volume 7 in the *Procedural Aspects of International Law Series*) Syracuse, New York: Syracuse University Press. 1969. xiii + 247 pages. \$10.50.

DANIEL G. PARTAN**

Law-Making in the International Civil Aviation Organization is a book that can be pursued at two levels. First, it is a careful and thorough exposition of the law of the International Civil Aviation Organization (ICAO) in four areas selected by the author: the development of ICAO technical legislation, the settlement through ICAO of international civil aviation disputes, the disposition of ICAO membership problems, and the law relating to the amendment of the Chicago Convention on International Civil Aviation.¹ Second, the book is an effort to explore and evaluate what the author terms the "law-making process" of the Organization through a "thorough analysis of the manner" in which the Organization has dealt with questions in the areas selected for analysis, leading to "important new insights about ICAO's institutional personality and the effect it has on the resolution of legal problems."²

By any test of size or significance, ICAO certainly ranks among the top two-dozen public international organizations. With 117 members in 1969, ICAO deals with the civil aviation problems of nearly every area of the world.³ The Chicago Convention and ICAO technical legislation establish standards and procedures for ICAO members in such matters as the nationality of aircraft, licensing of pilots, airworthiness of aircraft, aeronautical charts, air navigation facilities, rules of air navigation, accident investigation, access to and characteristics of airports, customs and immigration procedures and the right to fly over the territories of ICAO member states.⁴ In addition to making civil aviation law for its members, ICAO has jurisdiction to hear and decide disputes between ICAO members concerning their rights and obligations under the Chicago Convention and ICAO technical legislation.⁵ Finally, in common with most major public international organizations, ICAO has various functions of an administrative, exploratory or recommendatory nature geared to advancing its basic objectives of developing "the principles and techniques of international air navigation" and fostering "the planning and development of international

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1. 15 U.N.T.S. 295, 61 STAT. 1180, T.I.A.S. 1591. The Convention was signed at Chicago on December 7, 1944, and entered into force on April 4, 1947. It is referred to in this review as the *Chicago Convention*, with citations to the text as published in the *United Nations Treaty Series*.

2. P. 3.

3. See U.S. DEP'T OF STATE, TREATIES IN FORCE, 1969, 265. The only two major states that were not members in 1969 are the People's Republic of China and the Soviet Union.

4. See Chicago Convention, arts. 5-42, 15 U.N.T.S. 295, 298-324; pp. 57-122.

5. See Chicago Convention, arts. 84-88, 15 U.N.T.S. 295, 352-54; pp. 123-54.

air transport,"⁶ and various powers of an internal or housekeeping nature designed to give the Organization the requisite degree of control over its procedures, programs, funds, staff and the like, and over membership status and constitutional change.⁷

Action taken by international organizations in carrying out the four roughly distinguishable types of functions mentioned above—housekeeping tasks, facilitating action by members, rule-making, and rule-application—develops and is part of a legal process that determines the manner in which issues are decided and action is taken within and by the organization. The legal process of each organization both shapes and is shaped by the institutions, functions, powers and purposes of the organization. It parallels the legal process of other international organizations, but the legal process of each is also unique, having grown out of that organization's own peculiar context and history. The legal process of an organization produces its law and helps to determine its action, and it is only through a study of that law and action that the organization's legal process can be understood and evaluated.

The detailed study by Professor Buergenthal of the Chicago Convention and ICAO action in four areas of ICAO practice provides the basis for critical commentary on the ICAO legal process and on the relationship of that legal process to ICAO decisions and action.⁸ In each of the four areas of ICAO practice, the making of air law, the settlement of aviation disputes, the handling of membership problems, and the amendment of the Chicago Convention, Professor Buergenthal's discussion of ICAO action leads to some general conclusions about the character of that action. For example, the author concludes that membership problems have been handled "discreetly, with a minimum of disruption and recrimination, and a tendency to decide no more than absolutely necessary," probably "motivated by the fear that embroilment in political controversy would seriously affect the ability of the Organization to perform its technical functions, and a conviction that the resolution of political questions should be left to other international bodies."⁹ As to ICAO technical legislation, the author finds that "the real genius of the Organization's regulatory system lies in its non-compulsory character"¹⁰ where a complex and sophisticated aviation code has been built up with little opposition largely because

6. Chicago Convention, art. 44, 15 U.N.T.S. 295, 326.

7. The functions and powers of ICAO are set forth in part II of the Chicago Convention, arts. 43-66, 15 U.N.T.S. 295, 324-42. The Chicago Convention has the dual function of establishing ICAO and providing principles of air law governing the relations of the contracting parties *inter se*.

8. Professor Buergenthal uses the term "law-making process" evidently to refer to the process by which the "body of law that governs the manner in which the organization transacts its business and exercises its functions" is developed. P. 1. This reviewer would prefer the term "legal process" used as explained in the text above. So understood, the legal process is a function of and helps to develop what Buergenthal refers to as the "institutional personality" and both embraces and is distinct from the organization's rule-making or legislative process.

9. P. 55.

10. P. 121.

ICAO members retain the option to decline to implement standards with which they find it "impracticable to comply."¹¹ Implementation problems are then open to exploration between the state and the Organization in a "collaborative climate" without "dispute-like confrontation."¹² As to dispute settlement, the author finds a "policy that favors settlements by political and diplomatic rather than judicial means," a policy that is brought to bear by "strong institutional pressures that can be employed to discourage litigation and to encourage settlement."¹³ Although under the Chicago Convention the ICAO Council was intended to act as an arbitral tribunal with regard to disputes submitted to it, the Council prefers to act as a conciliator which is "in greater harmony with its institutional character" and uses its position to pressure the parties to dispose of their dispute on that basis.¹⁴ And, as to amendments to the Chicago Convention, the author comments that modifications in the provisions of the Convention that "cannot be achieved directly by amendment can often be obtained through acquiescence to certain practices that bring about these modifications,"¹⁵ and the "process of law-making by precedent-setting practice has proved to be more effective than formal amendment in resolving many of the constitutional problems" that have confronted ICAO.¹⁶ In a too-brief general conclusion, the author indicates that what this reviewer has termed the ICAO legal process has "avoided formal legal rulings" and functions "primarily as an instrument to legitimate action or to encourage compromise" rather than to compel action that is not acceptable to member states.¹⁷

The conclusions quoted above are well founded in the particular ICAO cases, decisions and actions discussed by the author. A few examples may be cited without intending to cover the field.

Article 92(a) of the Chicago Convention provides that "members of the United Nations and States associated with them, and States which remained neutral during the present world conflict"¹⁸ may join ICAO by depositing an instrument of adherence to the Convention. Other states, and in particular former enemy states, must apply for admission under the terms of article 93.¹⁹ Since these provisions were adopted in 1944 prior to the establishment of the United Nations, it seems clear that the term "United Nations" in article 92(a) refers to the Allied Powers of World War II. Yet in 1965 Romania, a former enemy state that is a member of the present United Nations, was permitted

11. See Chicago Convention, art. 38, 15 U.N.T.S. 295, 322; and pp. 76-80.

12. P. 120.

13. P. 195.

14. P. 196.

15. P. 226.

16. P. 228.

17. Pp. 229-30.

18. 15 U.N.T.S. 295, 358.

19. Applications under art. 93 must be approved by "any general international organization set up by the nations of the world to preserve peace" and accepted by a four-fifths vote of the ICAO Assembly. In addition, art. 93 stipulates that "in each case the assent of any State invaded or attacked during the present war by the State seeking admission shall be necessary." 15 U.N.T.S. 295, 358.

without objection to become a member of ICAO by adherence under article 92(a) rather than by admission under article 93. The author concludes from this case that article 92(a) is now to be interpreted as extending membership by adherence to all members of the present United Nations regardless of their status during the Second World War.²⁰

The author's excellent section on ICAO Technical Legislation²¹ clearly describes the intricate system for consultation in the formulation and adoption of ICAO International Standards and Recommended Practices (known as SARPS) that assures that the end product will be acceptable to the member states. SARPS are adopted under article 37 of the Convention in which the members pledge to "collaborate in securing the highest practicable degree of uniformity" in matters relating to air navigation;²² with only limited exceptions, member states have no legal obligation to comply with ICAO technical legislation.²³ One exception is that ICAO rules "relating to the flight and maneuver of aircraft" are made mandatory over the high seas by article 12 of the Convention.²⁴ Since article 12 does not further specify the rules that are to be mandatory over the high seas, ICAO Council practice has been to specify which ICAO rules fall under the article 12 definition and the Council has made only modest use of the resulting power to require compliance with ICAO legislation.²⁵ The Council's reluctance to utilize or develop coercive powers is equally evident in other aspects of its practice relating to ICAO standards and recommended practices.²⁶

In the area of dispute settlement, the author analyzes the provisions of the Chicago Convention giving the ICAO Council jurisdiction to hear and decide disputes between members relating to the interpretation or application of the Convention or ICAO standards and recommended practices²⁷ and discusses the few cases that have been brought to the Council. In one case involving a formal complaint by India against Pakistan, the Council, without reaching the merits of the dispute, was able to bring the parties into direct negotiations that produced an agreed solution.²⁸ In another case Czechoslovakia complained that

20. Pp. 16-17.

21. Pp. 57-122.

22. 15 U.N.T.S. 295, 320-22.

23. See pp. 76-88; and Chicago Convention, arts. 12, 22, 23, 26, 28, 33, 34, 37, 38, 15 U.N.T.S. 295, 304, 310, 312, 314, 318, 320-22.

24. 15 U.N.T.S. 295, 304.

25. Pp. 80-85.

26. Selections from ICAO documents relating to the formulation and implementation of SARPS are reproduced in L. SOHN & D. PARTAN, *LEGAL PROBLEMS OF INTERNATIONAL ADMINISTRATION*, 654-95 (prel. ed. 1968). See also the determination by the ICAO Council regarding the relationship between a member's obligations under article 26 of the Chicago Convention and under annex 13 containing SARPS relating to aircraft accident investigation, *id.* at 1022-26.

27. Chicago Convention, arts. 84-88, 15 U.N.T.S. 295, 352-54. See also L. SOHN & D. PARTAN, *supra* note 26, at 987-1021.

28. Pp. 129-30, 137-40. The documents in the India-Pakistan case are reproduced in L. SOHN & D. PARTAN, *supra* note 26, at 994-1002.

leaflet-carrying balloons were being released by the United States and carried into Czech airspace in violation of the Chicago Convention. Since Czechoslovakia had not explicitly invoked the Council's dispute settlement powers, the Council chose not to regard the Czech complaint as a request for Council adjudication and instead asked the ICAO Secretary General to prepare a study of the situation. By the time the study was submitted and considered, Czechoslovakia had reported that no more balloons were observed and the Council decided to take no further action on the Czech request.²⁹ These cases certainly demonstrate the Council's reluctance to exercise its adjudicatory function under the Convention.

Professor Buergenthal's examination of the four selected areas of ICAO practice is considerably more systematic and comprehensive than these few examples can indicate. Each area is discussed in a separate part that is organized according to the needs of the subject matter and sets forth ICAO law and practice with full citation to ICAO documents.³⁰ Each part is therefore a useful addition to the literature on the law of ICAO and the entire work deserves to be read on this basis alone.

The four parts are then drawn together under a unifying theme as an examination of the "law-making process" of ICAO. Although, as this reviewer has indicated, the unifying theme is viable and important and perhaps best understood and articulated as the legal process of the Organization, the book falls short of presenting a systematic and thorough analysis of the ICAO legal process. Since each of the four parts is basically a systematic analysis of ICAO law and practice in the area under consideration, each part naturally contains much that is not directly relevant to an analysis of the legal process of the Organization. The discussion in each part is also focused on the particular ICAO decisions and the points of ICAO law under consideration and frequently does not explicitly relate that discussion to the legal process conclusions stated at the close of the part. Too much is left to the ingenuity and mental agility of the reader. The work would have profited from the addition of a summary chapter articulating the legal process concept and defining the ICAO legal process with reference to the detailed discussion of ICAO law and practice contained in the earlier sections.

29. Pp. 131-36. A fresh complaint by Czechoslovakia in 1960 relating to balloons launched from the territory of the German Federal Republic led to assurances from the Federal Republic that it would make every effort to prevent recurrence of the practice, and to an ICAO Council resolution declaring that "the flight of uncontrolled balloons not released under appropriate safeguards and conditions may constitute a definite hazard to the safety of air navigation." P. 135. Documents in the balloon cases are reproduced in L. SOEN & D. PARTAN, *supra* note 26, at 1003-21.

30. The four main chapters are preceded by a useful General Introduction that outlines the functions and describes the institutions of ICAO and followed by a valuable brief note on ICAO documentation. Pp. 3-12 and 231-36. There is also a topical index that unfortunately does not include page references to discussions of individual articles of the Chicago Convention, which is frequently more useful in locating relevant commentary than is the usual topical index. Otherwise the book has been well produced and is a pleasure to read.

Law-making in the International Civil Aviation Organization is nonetheless a significant contribution to scholarship and, perhaps with the suggestions offered above, should serve as a model for similar studies of the legal process of other international organizations.