AN HISTORICAL SURVEY OF INTERNATIONAL AIR LAW SINCE 1944*

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I. INTERNATIONAL CIVIL AVIATION AND PUBLIC INTERNATIONAL AIR LAW SINCE 1944[1]

World War II compelled aviation to take a most radical step forward. It brought about tremendous progress in the technical standards of aircraft (increasing speed and capacity), in navigation aids (opening the North Atlantic route by air bases, radio stations, and floating weather stations), and in international organization,[2] resulting in a considerable reduction in aviation costs. Commercial air transportation on a self-supporting basis finally seemed to become a reality.

As early as 1943, therefore, States began to envisage the legal pattern of post-war international civil aviation.[3]

Some of the proposals intended to abolish the traditional concept of State sovereignty in the air.[4] "Freedom of the air" took on a new economic meaning. Going beyond Fauchille's "free circulation in the airspace", it tended towards "free trade by air".[5]

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[1]*Cf.* Goedhuis, *Politiek en Recht in de Internationale Luchtvaart*, The Hague (Nijhoff, 1953); Wassenbergh, *Post-War International Civil Aviation Policy and the Law of the Air*, The Hague (Nijhoff, 1957).

[2]The Allied *Air Transport Command*, which existed only on paper in 1941, employed 400,000 people in 1944, and operated 3,000 aeroplanes which flew 600 million miles in that year, equivalent to 25,000 round-the-world trips.

[3]In December 1943, a U.S. Committee established by Assistant Secretary of State Adolf A. Berle, Jr., made a report suggesting the creation of an international body for the control of international air transport and airports. In the U.K., plans were made for an international aviation authority, an *Empire Air Board*, and an international company *Airopia* for European air transport; *cf.* Meyer, *Freiheit der Luft als Rechtsproblem*, Zürich (Air-Editions 1944) 267.

[4]In the United States, Prof. Renner proposed a joint air domination of the world by the U.S.A., the U.K., the Soviet Union and China, maintaining 13 strategic air transport bases comparable to the old maritime strategic bases of the British Empire; see Victor, *Bases d'une géopolitique de l'air*, 10 Revue Générale de l'Air, 251 *sq.*, (1947).

[5]*Cf.* "freedom of airspace" and "freedom of air transport", Meyer, *op. cit.*[3], 65, 129.

On the other hand, the idea of sovereignty also found a new justification in the economic evolution of aviation. Whereas the traditional reasons of air sovereignty had been territorial integrity and safety, economic protection of the national air transport industry now became the dominating factor.[6]

1. The Chicago Conference of 1944[7]

After preliminary conversations between the United States and the United Kingdom 1943-44, the U.S. Department of State on September 11, 1944 invited allied and neutral powers[8] to attend an international conference to be held at Chicago later that year. Only Saudi Arabia and the Soviet Union[9] declined the invitation.

The invitation mentioned three major objectives: the establishment of provisional world air route arrangements; the establishment of an International Air Interim Council; agreement on principles for a permanent aeronautical body and a multilateral aviation convention.[10]

The conference was inaugurated on November 1, 1944, under the chairmanship of Assistant Secretary of State Berle. Fifty-four States had sent a total number of more than 400 delegates, about 90 of whom were military officers.[11]

Four different proposals for the organization of civil aviation were presented. The United States proposed that an international body should be established with executive functions in the technical field, but merely advisory functions in the economic field.[12] The United Kingdom, on the other hand, wanted to give to the organization the power to fix routes, frequencies and

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[6]Thus extending to air transport the ambiguous concept of "economic nationalism"; see Schenkman, *International Civil Aviation Organization*, Geneva (Droz, 1955) 310, 333.

[7]This section is based on an unpublished lecture at the Paris *Institut des Hautes Etudes Internationales*, in 1959-60, by Professor E. Pépin, former Director, Institute of Air and Space Law, McGill University. See also *Proceedings of the International Civil Aviation Conference*, Department of State, Washington (Government Printing Office, 1948); *Report of the Chicago Conference on International Civil Aviation*, United Nations Information Organization, London (1945); *Blueprint for World Civil Aviation*, Department of State No. 2348, Conference Ser. 70, Washington (Gov't Print. Off. 1945); Bowen, *The Chicago International Civil Aviation Conference*, 13 Geo. Wash. L. Rev. 308-327 (1945); *Osterhout, A Review of the Recent Chicago International Air Conference*, 31 Va. L. Rev. 376-386, (1945); Waldo, *Sequels to the Chicago Aviation Conference*, 11 Law and Contemp. Prob. 609-628 (1946); De la Pradelle A., 9 Revue Générale de l'Air 107-167 (1946); Parker van Zandt, *The Chicago Civil Aviation Conference*, 21 Foreign Policy Reports 289-308 (1945); Warner, *The Chicago Air Conference*, (1945) Foreign Affairs, 406-421.

[8]Except Argentina; see Riese, *Luftrecht*, Stuttgart (Koehler 1949) 98, note 1.

[9]According to TASS, October 29, 1944, the reason for the Russian absence was that invitations had been sent to Spain, Portugal, and Switzerland; see *Report of the Chicago Conference, op. cit.*[7], 2; New York Times, Oct. 30, 1944, pp. 1, 6.

[10]*Proceedings, op. cit.*[7], 12.

[11]Schenkman, *op. cit.*[6], 76.

[12]Thus implying a system of "free enterprise" in international air transport, for which the U.S.A. was particularly well prepared because of her large war-stock of transport aircraft. See *Proceedings, op. cit.*[7], 55 *sq.*

rates.[13] The Canadian proposal also attributed economic functions to the organization, such as the power to issue permits for international air transport operators, as the Civil Aeronautics Board does in the United States.[14] The joint Australia-New Zealand draft was the most radical one. It proposed international ownership and operation of all international air services.[15] This last proposal, however, was rejected during the early discussions.

As a consequence of the continued "bitter opposition"[16] between the United States and the United Kingdom proposals, tripartite secret talks took place between the delegations of the United States, the United Kingdom and Canada. They finally agreed on a joint plan into which drafts proposed by other States were incorporated. Thus a compromise was found; "bur it is a rather tortuous path",[17] the deficiencies of which are reflected in the final text.[18]

The Final Act, summarizing the work of the conference, was adopted and signed by all delegations except one,[19] on December 7, 1944.

2. The Final Act

The Final Act contains twelve resolutions and five important Appendices: the Interim Agreement on International Civil Aviation, the Convention on International Civil Aviation, the International Air Services Transit Agreement, the International Air Transport Agreement, and the Draf·s of Technical Annexes.[20]

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[13]In order to prevent overwhelming American competition, at least until the U.K. could improve the position which had resulted from necessary war-time neglect of commercial air transportation. See *British Parliament White Paper*, Cmd. 6561 (1944); *Proceedings*, *op. cit.*[7], 568 *sq.*

[14]*Proceedings*, *op. cit.*[7], 67 *sq.*

[15]*Proceedings*, *op. cit.*[7], 77-80. *Cf.* also the British Labour Party's plan "*Wings for Peace*", in April 1944; see Cooper, *International Ownership and Operation of World Air Transport Services*, Princeton (1948) 128. The idea of "internationalisation" of air transport dates back to the League of Nations disarmament conferences in 1932-35; *cf.* Cooper, *op. cit.*, and: *Internationalisation of Air Transport*, 2, Air Affairs 546-560 (1949); De la Pradelle, P., *L'internationalisation des lignes aériennes long-courrier*, 11 Revue Générale de l'Air 120-129 (1948).

[16]Thomas, *Civil Aviation Questions Outstanding*, 25 International Affairs, 59 (1949).

[17]Arne, *United Nations Primer*, New York (1948) 87; as quoted by Schenkman, *op. cit.*[6], 92.

[18]The different parts of the text were established by different committees (mostly composed of engineers and not of lawyers), coordinated in a very short time by a control drafting committee, several members of which had an insufficient knowledge of the English language. It is not surprising, therefore, that criticism has been voiced to the effect thar the convention is poorly drafted.

[19]Liberia; see *Report of the Chicago Conference*, *op. cit.*[7], 42. Although the final clause speaks of "a text drawn up in the English, French, and Spanish languages, each of which shall be of equal authenticity, . . . opened for signature", there was only one official text (in English) for signature. A translation in French was later drawn up by the UN Secretariat. Other (and sometimes differing) translations in French and Spanish were published by ICAO.

[20]See Garnault, *Les Conventions et Résolutions de Chicago*, 1 Revue Française de Droit Aérien 25-32 (1947).

(a) *The Interim Agreement*

Its 17 articles set up a provisional organization (PICAO) and established rules for international flights during an interim period, until the permanent organization and convention entered into force. It became effective exactly six months after the conference, on June 6, 1945, and lasted until April 4, 1947.[21]

(b) *The Convention*

Signed by 32 States, the Convention on International Civil Aviation is the substantial result of the conference, and is generally referred to as the "Chicago Convention". It is divided into four parts[22] containing 22 "Chapters", and 96 "Articles".

Article 1 of the Convention almost literally repeats Article 1 of the 1919 Paris Convention: "The Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory".[23] Consequently, "no scheduled international air service may operate over or into the territory of a contracting State" without its previous consent (Article 6). The right of innocent passage for non-scheduled flights, laid down in Article 5, is regarded by most writers, not as a rule "pleno jure gentium", but as only a rule "jure contractus".[24]

Article 17 confirms the equally traditional principle that "aircraft have the nationality of the State in which they are registered".[25] Article 77 appears to make an exception to this rule in the case of aircraft operated by "international operating agencies".[26]

The signatory States undertake to collaborate in international measures to secure the uniformity of aviation regulations, standards, procedures, and

[21]See Shawcross and Beaumont *on Air Law*, London (2nd ed. Butterworth 1951) para. 38. *Cf. infra* 3 (a), footnotes (42) (43).

[22]Air Navigation, The International Civil Aviation Organization, International Air Transport, Final Provisions.

[23]See Latchford, *Comparison of the Chicago Aviation Convention with the Paris and Havana Conventions*, 12 Dep't of State Bull. 411-420 (1945).

[24]See *e.g.* Plischke, *in* 37 Am. Pol. Sci. Rev. 1007 (1943). McBrayne, *Right of Innocent Passage*, Thesis, Montreal (McGill, 1956). Although "not much room is left for custom in aviation" (Chauveau, *Droit Aérien*, Paris 1951, 37), some writers contend that the right of innocent passage has acquired the force of customary law, see Wassenbergh, *op. cit.*[1], 107-109, and: *Na-oorlogse praktijk der Staten t.a.v. de Burgerluchtvaart*, Nederlands Juristenblad, 208 *sq.*, of March 10, 1951.

[25]Cooper, *A Study on the Legal Status of Aircraft*, Princeton (1949) 23-50, and Honig, *The Legal Status of Aircraft*, The Hague (Nijhoff 1956) 41-47, appear to found the nationality régime in analogy to maritime law. Other authors prefer analogy to the régime of automobiles: *cf.* Mandl, *La nationalité des aéronefs n'est qu'une dénomination erronée*, (1931) Droit aérien, 161; Oppikofer, *Die aktuellen Probleme des Luftrechts*, (1946) Revue de Droit Suisse, n. 4; Riese, *op. cit.*[8], 201 *sq*; Dutoit, *La collaboration entre compagnies aériennes*, Thesis, Lausanne (1957), 73-79.

[26]See Jennings, *International Civil Aviation and the Law*, 22 Brit. Yb. Int'l L. 208 (1945). The reason for such an exception may date back to 1927, when ICAN considered the legal status of special League-of-Nations aircraft, see Shawcross, *op. cit.*[21], para 230, b. The ICAO Council, during its session in December 1960, obviously hesitated to apply it to the proposed "Pan-Arab Airline".

organization,[27] outlined in other articles of the Convention, and dealt with in detail in the Technical Annexes. Part II of the Convention deals with the permanent organization (*infra*, 3).

(c) *The International Air Services Transit Agreement*

Signed by 26 States, the "Transit Agreement" purports to create a conventional right of innocent passage for scheduled flights, granting the first "Two Freedoms" (passage without landing, and landing for non-traffic purposes).[28] It has been greeted as a "genuine advance, albeit a modest one, in substantive international air law".[29] Two points should, however, not be overlooked: the fact that a number of States abstained from signing the Agreement, and, therefore, do not recognize a right of innocent passage,[30] and the fact that the Agreement may be denounced on one year's notice by any one State, and, therefore, does not provide a solid "basis for permanent routes".[31]

(d) *The International Air Transport Agreement*

Signed by 16 States, the "Transport" or "Five Freedoms" Agreement was an attempt to achieve the freedom of air trade advocated by the United States. In addition to the two "technical freedoms" of transit and stops for technical purposes, it contains the three "commercial freedoms" (to discharge passengers and freight in a foreign country, to take them on from a foreign country, and to carry them from one foreign country to another[32]). When the United States became aware that a majority of the States refused to accept a "free enterprise" system in air transport, they finally withdrew from the Agreement. Other denunciations followed,[33] so that today the Agreement is virtually a "dead letter".

(e) *The Draft Technical Annexes*[34]

Unlike the Paris Convention of 1919, the Chicago Convention itself does not contain technical rules for air navigation. These can be found in the "Technical

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[27]*Cf.* Part I, Chapters IV-VI, and Part III; Schenkman, *op. cit.*[6], 95 *sq.*

[28]Article I, sec. 1 of the Agreement, similar to Article 5 of the Convention. *Cf.* Heller, *The Grant and Exercise of Transit Rights in Respect of Scheduled International Air Services*, Thesis Montreal (McGill, 1954).

[29]Jennings, *op. cit.*[26], 528.

[30]See Wassenbergh, *op. cit.*[1], 108; *cf.* also Prof. Goedhuis's recommendation at the International Law Association conference at Dubrovnik in 1956 "that States which have not as yet signed the Agreement, do so without undue delay", Wassenbergh, *ibid.* note 1.

[31]Article III of the Agreement; see Cooper, *The Right to Fly*, New York, (Holt 1947) 175.

[32]Sometimes called "the right to exploit the aerial highway", Wassenbergh, *op. cit.*[1], 114 *sq.* See Article I, sec. 1 of the Agreement.

[33]U.S.A. withdrawal, on July 25, 1946; See Riese, *op. cit.*[8], 144.

[34]See Le Goff, *Les Annexes Techniques à la Convention de Chicago*, 19 Revue Générale de l'Air 146 *sq.*, (1956); see also *infra* 3 (d) and footnote (63); Schenkman, *op. cit.*[6], 98-100.

Annexes", which do not require signature, and, therefore are generally considered as simple recommendations without binding force.[35]

There is, however, an important exception: according to Article 12 of the Convention, "over the high seas, the rules in force shall be those established under this Convention". Such rules are essentially the "rules of the air" contained in Annex 2, as has been confirmed by the ICAO Council in April 1948, and November 1951. The foreword of Annex 2 consequently states that "over the high seas, therefore, these rules apply without exception".[36]

The Technical Annexes were of great importance for international air navigation.[37]

Evaluations of the Final Act as a whole, though stressing the failure of the conference in the economic sphere, generally underline the success reached in the technical field, in international organization, and the universal acceptance of the principal agreements.[38] On the other hand, the documents manifested the fact that "the United States had . . . taken over the leadership in the field of international air law which up to that time . . . had been the prerogative of the European States with France predominant."[39]

3. The International Civil Aviation Organization (ICAO)

(a) *PICAO*

The Provisional International Civil Aviation Organization (PICAO) established by the Interim Agreement on June 6, 1945, was the first of the post-war organizations of the United Nations to get under way.[40] Its structure was shaped along the lines of the permanent organization to come: an Interim Assembly, an Interim Council, and a Secretariat. Montreal was selected as PICAO's headquarters, and on June 6, 1946, as permanent headquarters for ICAO.[41] The new organization replaced, in fact, the prewar International Commission of Air Navigation which was dissolved in 1947, when the Chicago

[35]*Cf.* Riese, *op. cit.*[8], 111. There is a slighr difference in degree between "standards" and "recommended practices" contained in the Annexes, as defined by the ICAO Assembly in June 1947: Whilst States "shall conform" to standards (uniform application of which is deemed "necessary"), they shall merely "endeavour to conform" to recommended practices (uniform application of which is recognized as "desirable"). *Cf.* Shawcross, *op. cit.*[21], para. 55, h.

[36]Annex 2, *Rules of the Air*, ICAO (4th ed., May 1960), 5. The application of these rules was the object of considerable discussion, when the U.S.A. and the U.K. unilaterally established "dangerous zones" in the Pacific Ocean for their nuclear tests; *cf.* particularly Annex 2, Chapter III, para. 3.1.6 , and Article 9 of the Convention.

[37]"If the Conference had accomplished nothing else, this work would have justified all the time and effort expended"; Burden, in: *Blueprint for World Civil Aviation*, *op. cit.*[7], 22.

[38]*Cf.* the authors quoted by Schenkman, *op. cit.*[6], 100-106. By the end of December 1960, 83 States were parties to the Convention, 55 to the Transit Agreement, and 11 to the Transport Agreement; *cf.* ICAO Document 7965.

[39]Riese, *op. cit.*[8], 109.

[40]Schenkman, *op. cit.*[6], 109.

[41]For criticism of this choice, see Schenkman, *op. cit.*[6], 224-228.

Convention came into force.[42] During the 20 months of PICAO's existence, it proved to be a "virile, going concern with a great number of successes to its credit, which amply justified its establishment".[43]

After the necessary 26 ratifications of the Convention, the permanent ICAO was established on April 4, 1947. The new Convention superseded the previous conventions of Paris (1919) and Havana (1928).

(*b*) *Membership*

The admission procedure distinguishes three classes of States: Signatory States (all of which have become "original members" by ratification, Article 91), members of the United Nations other than "original members" of ICAO (Venezuela, Argentina, Costa Rica, Panama, Article 92), and other States (*i.e.*, the ex-enemy States: Italy, Austria, Finland, Japan, and Germany, Article 93).[44] The Convention does not mention "new States", although the case had been discussed at Chicago. The U.S. Department of State acting as depositary of the Convention, appears to extend Article 92 to their admission by requiring preliminary admission to the United Nations, thus avoiding the complicated procedure of Article 93.[53]

The "desirable universal membership"[45] is obviously contradicted by the absence of the Soviet Union, many East European States,[46] and Saudi-Arabia. A special problem was raised in 1947 in the case of Spain, which had been an "original member". In order to obtain the status of a UN specialized agency, however, the ICAO Assembly had to amend the Convention so as to grant to the UN General Assembly a general power of expulsion.[47] This resulted in a suspension of Spain's membership. Only after the UN General Assembly had revoked its resolution on membership in specialized agencies, was Spain re-admitted in 1951.[48] In 1950, the People's Republic of China asked ICAO to "drive out" the Chinese Nationalist Delegation.[49] But after having withdrawn from the Organization on May 31, 1950, Nationalist China reratified the Convention in 1953 and re-entered ICAO on January 1, 1954.[50]

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[42]Le Goff, *L'Organisation Provisoire de Chicago sur l'Aviation Civile*, 9 Revue Générale de l'Air 601, (1946).

[43]Schenkman, *op. cit.*[6], 118; *cf.* also Warner, *PICAO and the Development of Air Law*, 14 J. Air L. and Com. 1 *sq.*, (1947).

[44]See Bärmann, *Artikel 93 des Abkommens von Chicago und das Völkerrecht*, Zeitschrift für Luftrecht 1 *sq.*, (1952).

[45]ICAO Assembly Resolution A1-9, 242-243, which Schenkman calls "a grave understatement", *op. cit.*[6], 126.

[46]Poland and Czechoslovakia are members; so is Yugoslavia, after some difficulties because of a reservation contained in its adherence, see Schenkman, *op. cit.*[6], 129.

[47]Jennings, *op. cit.*[26], 569.

[48]UN Resolutions 386, V, GA, Off. R., 5th Session Suppl. No. 20, A/1575, 16; ICAO 5th Assembly, June 1951, Doc. 7173, A5-P/3, Resolution A5-18, 10.

[49]See *Interavia*, (1950) Air Letter No. 1971, 3; Schenkman, *op. cit.*[6], 130-132.

[50]ICAO Document 7376, A7-P/1, 50; see comments Schenkman, *loc. cit.*

(c) *Organization*

The main bodies of ICAO are the Assembly, the Council and the Secretariat.[51]

The Assembly is the "sovereign body" of the Organization[52] in which every member State has one vote. Decisions are taken by a simple majority, except in two cases.[53] The Assembly holds annual "limited meetings", and a full-scale meeting every three years. It has three "statutory" committees[54] and may establish special commissions.[55]

The Council is the permanent "governing body"[56] consisting of 21 member States elected by the Assembly for a three-year period. A special position was given to the President of the Council. He is elected for a three-year term and is re-eligible, as "a salaried official representing no nation and pledged to be influenced by none".[57] Two subordinate bodies of the Council were provided for by Article 54 of the Convention: the Air Navigation Commission[58] and the Air Transport Committee. In addition, the Council has established a Committee on Joint Support of Air Navigation Services, and a Finance Committee; the Assembly has established a Legal Committee replacing the former Comité International Technique d'Experts Juridiques Aériens (CITEJA).[59]

The Secretariat consists of five main divisions: the Air Navigation Bureau, the Air Transport Bureau, the Technical Assistance Bureau, the Legal Bureau, and the Bureau of Administration and Services.[60] It is headed by a Secretary General who is appointed by the Council.[61]

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[51]See Bédin. *L'Organisation de l'Aviation Civile Internationale*, 12 Revue Générale de l'Air 179 *sq.*, (1949); Rosenmöller, Thesis, Münster (1955).

[52]See *Memorandum on ICAO*, Montreal (1960) 13; "legislative body" according to Schenkman, *op. cit.*[6], 145.

[53]Admission of "other States", by 4/5, Article 93; Amendments to the Convention, by 2/3, Article 94a.

[54]Credentials, Executive, Coordination; *Rules of Procedure*, sec. II, 7,15,16.

[55]*E.g.*, Administrative, Technical, Economic Legal; Schenkman, *op. cit.*[6], 154.

[56]*Memorandum*, *op. cit.*[52], 13; "executive body", Schenkman, *op. cit.*[6], 154.

[57]Warner, *op. cit.*[7], 408. Consequenrly, if a Council member is elected president, his State shall fill his seat by a new delegate; Schenkman, *op. cit.*[6], 165. See also (61) *infra*.

[58]Article 56, 57; see Sheffy, *The Air Navigation Commission of the ICAO*, 25 J. Air L. & Com. 281, 428 *sq.*, (1958).

[59]On May 23, 1947; See Latchford, *Coordination of CITEJA with the New International Civil Aviation Organization*, 12 Dep't of State Bull. 310-313, (1945); Latchford, *CITEJA and the Legal Committee of ICAO*, 17 Dep't of State Bull. 487-497, (1947); Draper, *Transition from CITEJA to the Legal Committee of ICAO*, 42 Am. J. Int'l L., 155-157 (1948).

[60]Five Regional Offices have been established, (see Schenkman, *op. cit.*[6], 229 *sq.*).

[61]ICAO appears to be the only international organization, which appoints two permanent executive heads, the President of the Council and the Secretary General. For conflicts on this ground, *cf.* Schenkman, *op. cit.*[6], 206-209; Mankiewicz, *O.A.C.I.* (1956) Annuaire Français de Droit International, 655.

The legal status of ICAO in Canada and in the Province of Quebec constituted a major problem. After lengthy negotiations the Canadian Government agreed to apply to ICAO's headquarters and staff the "Convention on Privileges and Immunities of Specialized Agencies" of the UN.[62]

(*d*) *Functions*

The functions of ICAO are regulatory, judicial, and executive. ICAO has regulatory power to adopt and amend the technical Annexes[63], exercized as a "mandatory function" by the Council (Art. 54 (l)-(m); Art. 90). Although the Annexes do not have binding force on the States[35], and "notified departures" are possible[64], it is presumed that a State agrees to them if no notification is given to the contrary.

Judicial powers have been attributed to ICAO by Chapter XVIII of the Convention[65]: The Council exercises a role of mandatory arbitration in disputes between member States relating to the interpretation of the Convention. In addition, many bilateral and some multilateral agreements have conferred a similar power on the Council.[66] The Council's Rules of Procedure, revised in 1953 and in 1957, are rather similar to those of the International Court of Justice, which served as a model.[67] By virtue of Art. 54 (n) of the Convention, the Council occasionally gives "advisory opinions", if so requested by member States.[68] The Council's arbitration is subject to appeal either to an ad-hoc

[62]*UN Treaty Series*, Vol. 33, No. 52, 261-303; *Agreement between the United Nations and the ICAO*, Lake Success (UN Publication, 1947); *Agreement between ICAO and the Government of Canada regarding the headquarters of ICAO*, ICAO—Doc. 7147, April 27, 1951; R.S.C. 1952, C. 219; O.C., P.C., 1954—1791, Statutory Orders and Regulations, Vol. 3, 2589.

[63]Article 37 of the Convention. *Cf.* Malintoppi, *La fonction normative de l'O.A.C.I.*, 12 Revue Générale de l'Air 1050 *sq.*, (1949); Jones, *Amending the Chicago Convention and its Technical Annexes*, 16 J. Air L. & Com. 185 *sq.*, (1949); Pépin, *Le Droit Aérien*, 71 Rec. des Cours 477 *sq.*, (1947), at 503; Pépin, *ICAO and Other Agencies Dealing with Air Regulation*, 19 J. Air L. & Com. 152-155, (1952); Ros, *Le pouvoir législatif international de l'O.A.C.I.*, 16 Revue Générale de l'Air 25 *sq.*, (1953); Mankiewicz, *L'adoption des annexes à la Convention de Chicago par le Conseil de l'O.A.C.I., Beitrage zum internationalen Luftrecht*, Düsseldorf (Droste 1954), 82-94; Riese, *op. cit.*[8], 126 *sq.*; Lemoine, *Traité de Droit Aérien*, Paris (Sirey 1947), 58 *sq.*

[64]Article 38. These "departures" are in fact a sort of reservation. Until now, none of the Annexes and Amendments have been disapproved by a majority, or even by a large number, of States; *cf. Memorandum, op. cit*[52]., 23.

[65]As already to the Interim PICAO Council by Article III, sec. 6, No. 8 Interim Agreement; *cf.* also the quasi-judicial review of airport taxes, Article 15.

[66]*E.g.* the International Air Services Transit Agreement, Article III, sec. 1; the International Air Transport Agreement, Article IV, sec. 2; the Bermuda Agreement, Article 9; the Rome Convention of 1952, Article 15. See Domke, *The Settlement of Disputes in International Agencies*, 1 International Arbitration Journal 145-155, (1946); Domke, *L'arbitrage dans la Convention de Chicago*, 10 Revue Générale de l'Air 254-262, (1947); Rabcewicz-Zubkowski, *Le règlement des différends internationaux relatifs à la navigation aérienne civile*, 2 Revue Française de Droit Aérien 340-396, (1948).

[67]*Cf.* ICAO—Doc. 7456, A8-P/2, 53.

[68]See Article 9, Bermuda Agreement; *cf.* also Pakistan request in 1951; Shawcross, *op. cit.*[21], Suppl. (1952) para. 298.

arbitral tribunal, or to the International Court of Justice.[69] Until now, only one major dispute has been submitted to the Council (*India v. Pakistan*, 1952-53[70]), but after nine months of negotiation an amicable settlement was reached.

ICAO's executive functions concern administrative, technical, and economic matters. Among the administrative powers is the registration by the Council, of bilateral aviation treaties and agreements.[71] The technical functions consist of Technical Assistance for under-developed countries[72], joint navigation plans and meetings, etc.[73] In the economic field, the powers of ICAO are restricted to requesting, collecting, examining, and publishing information and to conducting research.[74]

4. The International Air Transport Association (IATA)[75]

After the Chicago Conference had failed to resolve the economic question of commercial rights and rates, the air carriers themselves immediately realized the necessity and the chance to cover the ground which had been left open by the governments. Following a meeting of aviation operators at Chicago, in December 1944, air carriers from thirty-one States met at Havana in 1945 to establish a new "International Air Transport Association".[76] It set up its headquarters in Montreal and was incorporated there by Act of Parliament.[77] Because of its status, however, it has been considered "not as a corporation under Canadian law, but more precisely as a corporation to which Canadian law attributes an international nature".[78]

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[69]The Convention still refers to the old Permanent Court of International Justice.

[70]India complained that Pakistan had established an unreasonable prohibited zone on the air route from New Delhi to Kabul (Afghanistan); see Schenkman, *op. cit.*[6], 377-380. Minor disputes involved Egypt and Jordan, *e.g.*, and East European complaints on balloon flights.

[71]Article 81, 83; now more than 400, see *Memorandum, op. cit.*[52], 33.

[72]In 1959 ICAO's portion in the UN Economic and Social Council program of Technical Assistance was $1,450,000; see *Memorandum, op. cit.*[52], 45.

[73]North Atlantic stations. See Schenkman, *op. cit.*[6], 265, *sq.* and Mankiewicz, *Le rôle du Conseil de l'O.A.C.I. comme administrateur des services de navigation aérienne*, 8 Revue Française de Droit Aérien, 223 *sq.*, (1954).

[74]Article 54(i), 55(c), 67; see, *e.g. Memorandum, op. cit.*[52], 16-19, 33-35.

[75]*Cf.* Morand, *L'Association des Transporteurs Aériens Internationaux*, 1 Revue Française de Droit Aérien, 132 *sq.*, (1947); Hildred, *International Air Transport Association*, (1946, 1947, 1950) Air Affairs; Cohen, *IATA: The First Three Decades*, Montreal (1949); Guinchard, *International Air Transport Association*, (1956) Annuaire Français de Droit International 666-672; De Boursac, *L'I.A.T.A.* et le *transport aérien international*, 21 Revue Générale de l'Air 224 *sq.*, (1958).

[76]Succeeding the International Air Traffic Association of 1919, which had linked until 1939 all European airlines and some outside Europe; see Shawcross, *op. cit.*[6], para. 70.

[77]20th Parl., 9 George VI, 1st session (1945); Royal Assent received December 18, 1945; *cf.* IATA—Bulletin, No. 2 (1945), Annex 3, p. 15.

[78]Guinchard, *op. cit.*[75], 668.

The majority of the world's airlines became either active or associate members of IATA.[79] Its principal organs are the policy-making Annual General Meeting, the Executive Committee elected by the General Meeting, and the Director General elected by the Executive Committee. The Executive Committee has appointed four Standing Committees (Financial, Legal, Technical and Traffic), and established a Clearing House in London,[80] an Enforcement Office in New York, and three Regional Offices in New York, Paris, and Singapore.

The main function of IATA is the economic regulation of international air transport, concerning rates and service conditions. Three Regional Traffic Conferences fix the international air rates by unanimous resolutions.[81] If States do not object, the rates become binding on the airlines. Violations of these fixed rates by "undercutting" are subject to heavy fines.[82] This strict price control by a private association was one of the reasons why IATA was involved in a series of hearings before an Antitrust-Subcommittee of the U.S. Congress.[83]

Another important activity of IATA is the establishment of uniform air transport documents and "general conditions" for contracts of air carriage, in accordance with the interests of the carriers.[84] Additional functions include the exchange of information on accidents, operating practices, and airline cooperation with ICAO.

5. Bilateral Agreements

The "main unfinished business at Chicago concerned the right of conducting trade".[85] As the Multilateral Transport Agreement was rejected by the majority of States, bilateral negotiation became the only means by which the "commercial freedoms" could be obtained. The Chicago Final Act already

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[79]Associate members are domestic airlines, which do not vote in IATA, *cf. Article IV of Association*, issued by Head Office IATA, Montreal (2nd ed., 1955), 11. Admission through the Executive Committee, with an appeal to the General Meeting. By 1960, IATA had ninety members.

[80]Handling more than 90% of the revenues derived from international air transport in the Western World. Its expected annual turnover for 1960 is $1,600,000,000.00; see also Capdeville, *La Chambre de Compensation de l'I.A.T.A.*, 10 Revue Française de Droit Aerien 349 *sq.*, (1956).

[81]See Gazdik, *International Rate-Making*, IATA—Bulletin, No. 9 (1949), 6; Gazdik, *Rate-Making and the IATA-Traffic Conference*, 16 J. Air L. & Com. 298 *sq.*, (1949); Wager, *International Airline Collaboration*, 18 J. Air L. & Com. 197 *sq.* (1951).

[82]The Enforcement Office has charged up to $25,000.00 on airlines.

[83]"IATA's Activities . . . have resulted in the substitution of monopolistic price-fixing for the principle of free competition"; *Report on Airlines*, H.R., 85th Cong., 1st session, Washington (1957) 233. The Civil Aeronautics Board described IATA as "an all-embracing international cartel", *ibid.*, 234; *cf.* Bebchick, *The IATA and the CAB*, 25 J. Air L. & Com., 8-43, (1958).

[84]See Shawcross, *op. cit.*[21], para. 71; Gazdik, *Uniform Air Transport Documents and Conditions of Contract*, 19 J. Air L. & Com. 184 *sq.*, (1952); Gazdik, *The New Contract between Air Carriers and Passengers*, 24 J. Air L. & Com. 151 *sq.*, (1957).

[85]Warner, *op. cit.*[7], 411.

contained a "Standard Form of Agreement for Provisional Air Routes",[86] which served as a model for bilateral agreements (therefore called "Chicago Type" agreements[87]). Another type of agreements, called "British Type", included provisions on rates, capacity and frequencies.[88]

In January 1946 representatives of the United States and the United Kingdom met at Bermuda in order to work out a standard agreement, which was to serve as a model for all air transport agreements to be concluded by the two countries, and actually became a model for agreements between other countries.

The Bermuda Agreement[89] was admittedly a compromise[90]. Each nation granted to the air carriers of the other nation the two "technical freedoms" to operate through the airspace of the other and to land for non-traffic purposes, subject to the right of the States to designate routes and airports, as defined in the Chicago Transit Agreement.[91] Each nation also granted to the other the three "commercial freedoms" of entry and departure to embark and disembark traffic in the territory of the other; but, in contrast to the technical privileges, these commercial privileges are valid only at airports named in the agreement, and on routes generally indicated (Annex III), and in accordance with certain general traffic principles and limitations. These principles are: government approval of rates[92], adequate traffic capacity[93], and an "*ex post facto* review" of the carriers' operation as to their compliance with these principles.[94]

According to Lord Swinton, Ex-Minister of Aviation and Chairman of the British Delegation at Chicago, the Bermuda Agreement was "probably the most important civil aviation agreement that this country has entered into".[95]

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[86]Resolution III, see *Proceedings*, *op. cit.*[7], 128-129.

[87]See Shawcross, *op. cit.*[21], para. 301.

[88]The first "British Type" agreement is the UK—South Africa agreement, of October 26, 1945. *Cf.* also the first UK—Cauada agreement of December 21, 1945, now superseded (Shawcross, *op. cit.*[21], para. 301, para. 6006).

[89]See *Treaty Series*, No. 3 (1946), H. M. Stationery Office, London; Shawcross, *op. cit.*[21], para. 8001 *sq.* Amended by Exchange of Notes (1947), see Shawcross, *op. cit.*, para. 303(b).

[90]See *Joint Statement by the United Kingdom and US Delegations*, 14 Dep't of State Bull. 302-306, No. 347 (1946); Cooper, *The Bermuda Plan: World Pattern for Air Transport*, 25 Foreign Affairs 59-71, (1946).

[91]Article 1 sec. 4 Transit Agreement. See Cooper, *op. cit.*[31], 178.

[92]Annex Article II of the Bermuda Agreement refers to the rates fixed by IATA, but also provides for an "open rate situation" where IATA rates would not be applicable.

[93]Fifth-freedom traffic (not embarked or disembarked in the carrier's own country) was understood to be secondary only, and related to "traffic requirements"; see sec. 6, Final Resolution. *cf.* Wassenbergh, *op. cit.*[1], 54 *sq.*

[94]To be exercised by PICAO's Interim Council, if consultation between the governments could not settle the dispute; see Article 9 of the Agreement, and Article 11(g) of the Annex.

[95]House of Lords, February 28, 1946; see Cooper, *op. cit.*[31], 178. President Truman gave out a special statement expressing his satisfaction with the Agreement.

The United Kingdom had waived her prior insistence on direct international control of traffic, frequencies, and capacity[96]; the United States for the first time conceded a certain amount of control "*ex post facto*", and granted fixed routes across her territory, to foreign carriers.

About one third of all the bilateral air transport agreements, which are in existence today, are based on the Bermuda provisions, and another third are very similar in character.[97] Some of them are of the "light Bermuda" type,[98] *i.e.* less restrictive. Most of them are, however, of the "heavy Bermuda" type, *i.e.* containing more restrictive clauses. The additional restrictions concern the nature of the traffic,[99] and especially the preliminary fixing of capacity (depending on the type of aircraft) and frequencies.[100]

The bilateral air transport agreements constitute a serious constitutional problem in countries like the United States, where they are put into effect as Executive Agreements.[101] But they are an even more serious problem to international law, as they serve as an instrument of economic discrimination.

6. Attempted Multilateral Air Transport Agreements[102]

The system of bilateral bargaining is far from satisfactory.[103] Following the failure of the Chicago Transport Agreement, PICAO continued its efforts to find a multilateral solution. A first draft multilateral transport agreement

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[96]The President of the U.S. Civil Aeronautics Board stated: "Great Britain accepted at Bermuda the American transport philosophy"; as quoted by Schenkman, *op. cit.*[6], 316.

[97]There are now more than 400 bilateral agreements filed with ICAO.[71]

[98]Wassenbergh, *op. cit.*[1], 18.

[99]Limitation of the percentage of 5th-freedom traffic; called "predetermination of traffic", see Wassenbergh, *op. cit.*[1], 56.

[100]"Predetermination of capacity and frequencies", which is substantially different from the Bermuda "*ex post facto review*"; *cf.* also Jennings, *Some aspects of the International Law of the Air*, 75 Rec. des Cours, 534, (1949). The practice of predetermination of the seats offered, has the same economic effect as an "import quota"; see Little, *Control of International Air Transport*, 3 International Organization 29, (1949). *Cf. e.g.* the French agreements with Spain, Ireland, Italy, Portugal, and the UK; see *Etude sur les accords bilatéraux européens de transport aérien*, ICAO Note de Travail (1960), ECAC COLI I-WP 2. See also Van der Tuuk-Adriani, *The "Bermuda" Capacity Clauses*, 22 J. Air L. & Com., 406 *sq.*, (1955); Wassenbergh, *op. cit.*[1], 46 *sq.*

[101]After vigorous attacks aimed at including them in treaties and submitting them to the Senate for ratification, the Attorney General in 1946 confirmed that the President has the right to enter into such executive agreements; see Cooper, *op. cit.*[90], 70. *Cf.* also Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, 17 J. Air L. & Com. 1 *sq.*, (1952); Stoffel, *American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age*, 26 J. Air L. & Com. 119 *sq.*, (1959).

[102]*Cf.* Keller, *Der Versuch einer multilateralen Regelung der kommerziellen Rechte des internationalen Luftverkehrs und die Schweizerische Luftverkehrspolitik der Nachkriegszeit*, Ravensburg (1952), particularly p. 61 *sq.*; Schenkman, *op. cit.*[6], 307 *sq.*; Wassenbergh, *op. cit.*[1], 40 *sq.*; De Dongo, *Progress Toward a Multilateral Agreement*, Thesis Montreal (McGill, 1954).

[103]According to Dr. Warner, about 2400 bilateral agreements would be necessary for a sufficient regulation of world air transport, see *Interavia*, No. 12 (1947) 11, 18.

was submitted to the PICAO Interim Assembly at Montreal in 1946,[104] but was returned to the Air Transport Committee for further consideration. A second draft, presented to the first ICAO Assembly in May 1947,[105] suffered a similar fate, but, on this occasion, the Assembly decided to convene a special commission on the subject. The commission met at Geneva in November 1947. In the meantime, however, the United States and the United Kingdom had concluded the Bermuda Agreement, and, being quite satisfied with its effect in practice, did not want a multilateral agreement to replace it.[106] This attitude was resented by other States. On the other hand, the small countries wanted to reserve their right to contract out of the "fifth freedom", in order to maintain their bargaining position in bilateral route negotiations.[107] Since the inclusion of a clause to this effect was unacceptable to the United States and the United Kingdom, the draft itself was not accepted.[108] The 1953 General Assembly of ICAO at Brighton also had to conclude that a universal multilateral convention was at the moment unattainable.[109]

In 1954, nineteen European States made a new attempt on a regional basis. At the "Conference on Coordination of Air Transport in Europe" at Strasbourg, they created the European Civil Aviation Commission (ECAC), with advisory status, its staff and headquarters being provided by the ICAO Regional Office in Paris.[110] At its first meeting in 1955, the ECAC did not succeed in reaching a multilateral agreement on scheduled air transport, but adopted a "Multilateral Agreement on Commercial Rights of Non-Scheduled International Air Services within Europe". It was signed by fifteen States, but has not yet received a sufficient number of ratifications.[111] In 1955 and 1960, the Commission adopted

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[104]PICAO Doc. 1577—AT/116, A.

[105]PICAO Doc. 4014, Al—EC/; Schenkman, *op. cit.*[6], 318; Cooper, *The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport*, 14 J. Air L. & Com. 125 *sq.*, (1947); Garnault, *La première Assemblée de l'OACI et le projet d'accord multilatéral sur les Libertés Commerciales de l'Air*, 1 Revue Française de Droit Aérien, 231-240, (1947).

[106]Under Secretary of State Webb, *in*: 3 Air Affairs 37, (1949): "Routes . . . should continue to be the subject of bilateral air transport agreements."

[107]Wassenbergh, *op. cit.*[1], 44 (note 1).

[108]Riese, *op. cit.*[8], 154. Only a report to the Assembly was drawn up. *Cf.* ICAO-Doc. 5221, A2-P/5; 5230; McClurkin, *The Geneva Commission on a Multilateral Air Transport Agreement*, 15 J. Air L. & Com., 39 *sq.*, (1948).

[109]Resolution A7-15, p. 27; as Dr. Warner had put it, in: *ICAO after six years*, IATA-Bulletin, No. 15 (1952), 82: "Everyone wants a multilateral agreement; but unfortunately there are wide differences of opinion . . . about what the agreement should contain . . ."

[110]*Report of the Conference on Coordination of Air Transport in Europe* ICAO-Doc. 7575, CATE/1; Schenkman, *op. cit.*[6], 324-329; Coulet, *L'Organisation Européenne des Transports Aériens*, Thesis, Toulouse (1958), particularly 86 *sq.*

[111]See Weld, *Some Notes on the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe*, 23 J. Air L. & Com., 180 *sq.*, (1956); Coulet, *op. cit.*[110], 61 *sq.*; Lemoine, *L'idée européenne dans l'aviation de transport et l'accord multilatéral sur les droits commerciaux pour les transports aériens non réguliers en Europe*, 11 Revue Française de Droit Aérien, 1 *sq.*, (1957); Goedhuis, *The Rôle of Air Transport in European Integration*, 24 J. Air L. & Com., 273 *sq.* (1957).

a recommendation to the States, on "liberalization of freight services"; in April 1960 it adopted a "Multilateral Agreement Relating to Certificates of Airworthiness for Imported Aircraft",[112] signed by ten States. Several other European organizations are considering air transport cooperation problems.[113]

In spite of all these attempts, the failure of the Chicago Conference to achieve multilateral agreement in air transportation has proved a hindrance to the development of post-war international air law. Bilateral pacts are still the legal as well as the economic basis of air transport. They "sectionalize the world and make air transportation both more expensive and less convenient than it should be".[114] The late André Siegfried, of the Académie Française, once described the situation with the words: "La vitesse a provoqué la défense sous forme de l'obstacle".

II. PRIVATE INTERNATIONAL AIR LAW SINCE 1944

Notwithstanding the deficiencies in the development of public air law, private air law has been constantly reappraised and developed, if not always successfully, by the ICAO Legal Committee which continued the work of CITEJA in this respect. There follows a summary of the two conventions and one protocol concluded since 1944 and a brief outline of the present programme of work of the Legal Committee.

1. The Convention on the International Recognition of Rights in Aircraft, 1948.

The enormous and potential growth of the aviation industry and the expansion of export trade in aircraft after the War made urgent the problem of the international validity of rights in aircraft. Aircraft were so costly that credit terms had to be arranged. The problem was to ensure protection to creditors where the aircraft and equipment secured were situated abroad or where the registration of the aircraft was changed from the register of one State to that of another. It was difficult if not impossible to predict the extent to which property rights and security interests in aircraft would be recognized in foreign countries.

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[112]See 15, ICAO-Bulletin, 81 *sq.*, (1960).

[113]The Council of Europe had discussed two ambitious plans in 1951: the "*Bonnefous Plan*" for a supranational European Transport Authority, and the "*Sforza Plan*" for a common European airspace; both were rejected by the Council's Committee of Ministers. The Rome Treaty of 1957, establishing the *European Common Market*, provides for future regulation of air transport by the Council, Article 84 II. In May, 1959, the airlines of France, Belgium, Italy, and Germany concluded an agreement on future common operation as "*Air Union*". The most recent convention is the "*Eurocontrol*" agreement on a common air traffic control authority, which arose from NATO's *Committee on European Airspace Coordination* and was signed on December 13, 1960, by France, Germany, the United Kingdom and the Benelux States. *Cf.* Cartou, *La structure juridique du transport aérien en Europe à la veille du Marché Commun*, (1957) Annuaire Français de Droit International, 535-557; 12 Revue Française de Droit Aérien, 102-128, (1958); Dutoit, *L'Aviation et l'Europe*, Lausanne (1959).

[114]Gazdik, *International Review*, 20 J. Air L. & Com. 308, (1953).

At the Chicago Conference of 1944, a resolution was passed recommending the conclusion of a convention "dealing with the transfer of aircraft"[115] to be based on two draft conventions that the Comité International Technique d'Experts Juridiques Aérien (CITEJA) had adopted as early as 1931.[116] Following discussion by PICAO, ICAO, and the Legal Committee of ICAO, a draft "Convention on the International Recognition of Rights in Aircraft" was prepared and subsequently signed by twenty States at the 1948 meeting of the ICAO Assembly held at Geneva between the 19th and 25th of June.

The general objective of the convention is the facilitation of the financing of aircraft employed in international carriage. More specifically, the objectives can be said to be four:[117] the protection of secured creditors who lend money on the security of aircraft; the protection of third parties dealing in or with aircraft against hidden charges; the definition and protection of "privileged" and "priority" claims against aircraft; and the facilitation of the transfer of aircraft from one nationality to another.

To achieve these objectives, the convention could have taken one of two forms. It could have created a standard form of mortgage and transfer for use in all contracting States, having uniform effect in all jurisdictions,[118] or it could have provided for the recognition and enforcement by contracting States of any type of charge created in accordance with the law of the State in which the aircraft is registered as to nationality. Unfortunately, the first solution proved unattainable. The divergence in national conceptions proved too great at the time for an adequate compromise standard to be reached. Thus, the convention became a convention not of unification but of recognition.

An attempt was then made to produce an internationally acceptable form of words to cover all the types of charges on aircraft or, more accurately, rights in aircraft to be recognized by contracting States. This was found to be impossible and so an enumeration of four types of rights was resorted to.[119] These are rights of property in aircraft; rights to acquire aircraft by purchase coupled with possession of the aircraft;[120] rights to possession of aircraft under leases of six months or more.[121] mortgages, hypotheques and similar rights

[115]Final Act, Sec. V.

[116]The Conventions dealt with (i) mortgages, other real securities and aerial privileges, and (ii) the ownership of aircraft and the aeronautic register.

[117]R. O. Wilberforce, *International Recognition of Rights in Aircraft*, (1948-49) 2 I.L.Q. 421, 424, to which the authors are much indebted.

[118]For advantages of this solution see R. O. Wilberforce, *Report on Recognition of Rights in Aircraft*, I.L.A., Report on 44th Conference (Copenhagen, 1950) 223 (1952).

[119]Art. 1(1).

[120]*E.g.* the "conditional sale" where the lender pays the manufacturer and takes over his position as against the purchaser. The property remains in the lender, and passes on payment of the purchase price.

[121]*E.g.* the "equipment trust" which normally contains a lease in favour of the borrower. Title is in the lender who leases the aircraft to the borrower. At end of lease, borrower becomes owner on payment of purchase price. He may procure release and transfer of aircraft to him during the currency of the lease by paying a fixed release price.

in aircraft which are contractually created as security for payment of an indebtedness. Two conditions are required before a right is recognized and enforced.

First, it must be constituted according to the law of the Contracting State in which the aircraft was registered as to nationality at the time of its constitution.[122] The basic philosophy of the convention is reflected in this provision which leaves each State free to develop its own law as to charges on aircraft. There was a great deal of discussion at the conference as to what law was meant, the domestic law only, or both the domestic law and the private international law. Two proposals, one to include the word "internal" and the other to add the phrase "including the rules of conflict of laws" were rejected. The result appears to be that a State may apply its conflict of laws rules if it thinks fit although it has been said that the domestic law must be meant, otherwise such a provision would be a mere statement of the status quo and thus meaningless.[123] Grave problems are created by the provision as far as States with federal constitutions are concerned. While registration may be a central matter, the law governing charges will normally be that of a province or of an individual State. How is the province whose law is to be applied to be chosen?[124] There is no solution provided in the convention as to the law applicable where an aircraft is not registered at the time the right is constituted nor as to the law to be applied when the construction or effect of the contract creating a right are in issue.

Secondly, the right must be recorded in a public record of the contracting State in which the aircraft is registered as to nationality.[125] No State is obliged to keep a record. Since "recordation" is a condition of recognition, it was assumed that a State ratifying the convention would necessarily establish a registry, otherwise, it would not obtain recognition for the rights of its own secured creditors. The priority of recorded rights and the regularity of the record are left to be governed by the law of the State maintaining the record. All recordings relating to the same aircraft must appear on the same record.[126] This simplifies matters as far as interested persons such as prospective purchasers and mortgagees are concerned. A Contracting State may prohibit the recording of rights which cannot be validly constituted according to its own law.[127]

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[122]*Ibid.*

[123]Bayitch, *Aircraft Mortgage*, 13 U. of Miami L.R. 152, 434 (1958).

[124]See Calkins, *Creation and International Recognition of Title and Security Rights in Aircraft*, (1948) 15 J. of Air L. & Com., 156 for discussion of this problem. In Canada, the recording of chattel mortgages, liens and other charges on chattels or immoveables is established by Provincial laws. The question arises as to whether or not Parliament has the constitutional authority to establish a central registry where charges on aircraft would be recorded exclusively.

[125]*Ibid.*

[126]Art. II(1).

[127]Art. II(3).

There are two special effects attributed to recognition by the Convention. Apart from them, the exact consequences of recognition are undefined. Under Article 1(2) once a valid charge is entered on a record, no other right can have priority over it except where there is a "privileged" claim under Article IV (*infra*). Under Article IX, a secured creditor is protected against the transfer of the aircraft to a State where his charge might not be recognized. A transfer cannot be made to another national register or record unless the holders of all recorded charges have been satisfied or consent to the transfer.

The question of "privileged" or "priority" claims had next to be considered. Article IV contains detailed provisions designed to prevent these subsisting as hidden charges and thus proving an embarrassment to a purchaser. It was felt that the number and extent of these liens to be given priority over recorded charges should be limited to expenses incurred directly in the interest of the preservation of security. Thus, the article limits them to salvage claims and extraordinary expenses indispensable for the preservation of the aircraft. They must be recorded within three months. It was thought that any such lien arising within three months would be most unlikely to escape a purchaser's notice.

A third category of "priority" claims, referred to as "fiscal claims", was discussed at great length and the proposal for its inclusion in the convention was only defeated by the narrowest of margins. Its exclusion has in fact prejudiced the acceptance of the Convention and is one of the main reasons for the convention's lack of success. Equal priority was desired for State fiscal claims because the Brussels Convention of 1926, which provided for the international recognition of maritime liens, conferred priority on certain classes of fiscal claims and States could not be expected to accept a Convention which not only did not make provision for the claims but in terms excluded them.[128] In some States in fact, it was unconstitutional to give any claim priority over the fiscal claims of the State. It was argued on the other side that no lender would advance money if exposed to the risk of a priority claim by a foreign State. The whole utility of the Convention would be destroyed thereby. Also, quite apart from the impossibility of keeping the claims within bounds and the fact that States do not really need this protection anyway, their inclusion would be contrary to the general principle of the non-enforcement of such claims in international law. At Geneva, after a lengthy discussion, the voting was 14 to 12 against their inclusion in the Convention. This controversy represents the only serious disagreement at the conference despite the many contentious problems discussed.

The Convention accepts only two objects as security—aircraft and "spare parts". As far as securing aircraft was concerned, "fleet mortgages" presented some difficulty in the preparation of the Convention. These are preferred by air

[128]In Art. I(2).

carriers who purchase a number of aircraft of the same type from the same manufacturer. They can obtain better terms from the lender if he is given security over the whole fleet. The difficulty was caused by the fact that any individual aircraft is subject to a charge for the whole amount raised. States were unwilling to allow aircraft subject to such a charge to enter their territory because local creditors would be prejudiced by the existence of the charge, the extraterritorial effect of which would deprive them of any remedy for their legitimate claims. The complicated provisions of Article VII (5) were finally devised to take care of the problem as far as "involuntary" creditors[129] were concerned. As for "voluntary" creditors,[130] it was thought that they should demand cash payment or search the record, if credit was required. Article VII (5), then, provides that if claims for injury or damage caused to persons or property on the surface are not met by insurance coverage, the State on whose surface the injury or damage is caused may provide that as against a person setting up such a claim, any right referred to in Article I which, of course, includes fleet mortgages, shall only be asserted to the extent of 80% of the amount realized on the sale in execution of the aircraft.

A supply of "spare parts" is essential for the maintenance of a fleet of aircraft and any order for aircraft invariably includes an order for spare parts. Since the cost may amount to as much as a fifth of the cost of an entire fleet of aircraft, capital is required to finance their purchase and methods of securing the repayment of money advanced by the lenders for that purpose must be found. But there are many difficulties involved in using the "spare parts" themselves as security for the payment of the money loaned. They are of necessity distributed abroad along the air routes, are liable to frequent substitution and are of a numerous and miscellaneous character. Instead of facing the difficulties, the Convention leaves it for the national laws to establish the conditions upon which a charge on "spare parts" may be created. The Convention merely provides for the recognition of such charges.[131] Stringent conditions must be fulfilled before recognition is allowed. The charge must be an extension of a charge on aircraft. The parts must be stored in "psecified" places where a warning must be exhibited giving notice of the existence of the charge to third persons. The charge must be recorded. The spare parts may be replaced by "similar parts" without affecting the creditor's rights. Finally, to protect the rights of local creditors, a local competent authority may limit the secured charge to two-thirds of the proceeds of the sale in execution of the spare parts.

The Convention only requires two ratifications before it comes into force.[132] These were forthcoming from Mexico and the United States as between whom

[129]Those who have suffered damage through the operation of the aircraft.

[130]*E.g.*, those who have entered into a contract with the creditor for the supply of fuels or to carry out repairs, etc.

[131]Art. X.

[132]Art. XX.

it should have come into force on 4th July, 1950.[133] After twelve years there have only been nine further ratifications and four adherences. A number of reasons have been put forward to explain this lack of success. The fact that there is no provision for the international recognition of the priority of fiscal claims over those of secured creditors, is probably the main reason. Another is the absence or seeming absence in some States of a need for the Convention. Vendors of aircraft and financial institutions have not brought much pressure on their respective governments to ratify the Convention. It has also been said that the Convention attempted too much too soon and that it is dominated by the specific legal traditions of a few countries who were more ambitious than interested in it.[134]

A resolution was passed at the Geneva meeting of the ICAO Assembly calling for further study and expressing the hope that a uniform standard form of charge could be devised which would be automatically accepted and enforced. The air law committee of the International Law Association has since given much time to this further study. Thus it has always been recognized that the Convention was but a stage in the development of an effective system of international protection for secured creditors.

2. The Rome Convention 1952

At the first session of the ICAO Assembly in 1947, it was pointed out by certain representatives that, in view of the changing conditions in air transport,[135] their Governments would not ratify the 1933 Rome Convention relating to damage caused by foreign aircraft to third parties on the surface. It was, therefore, proposed that a revision of the Rome Convention [136] and the Brussels Protocol[137] should take place through the instrumentation of the Legal Committee. At its first session at Brussels in 1947, which was devoted almost entirely to the draft "mortgage" Convention,[138] a sub-committee on the Rome Convention was set up. This committee was composed of representatives from five States, from IATA and from the International Union of Aviation Insurers (IUAI). On 18th June 1949, by which time the sub-committee had held three sessions, the Legal Committee considered that studies were

[133]Mexico's instrument of ratification contained a reservation concerning "priorities granted by Mexican law to fiscal claims and claims arising out of work contracts over any other claim". The United States declared itself unable to accept such a reservation and unwilling to regard the Convention as being in force between itself and Mexico. [1952] U.S.Av.R.433. It refused to recognize a similar reservation by Chile [1952] U.S.Av.R.433.

[134]Bayitch, *op. cit.*, 446.

[135]ICAO Doc. 7379-LC/34 *Conference on Private International Air Law*, Rome, Sept.-Oct., 1952, p. 13.

[136]Only 5 States had ratified this Convention: Spain, Roumania, Belgium, Guatemala, Brazil.

[137]Only 2 States had ratified this protocol: Guatemala and Brazil.

[138]Convention on the International Recognition of Rights in Aircraft, 1948, resulted from these deliberations, see *supra*.

sufficiently advanced to begin preparation of a draft Convention. Following extensive discussion at the Fifth Session of the Legal Committee at Taormina, Sicily, in January 1950 and by the Legal Commission at the Fourth Session of the ICAO Assembly, held in Montreal in June, 1950, the final draft was established at the Seventh Session of the Legal Committee at Mexico City in January, 1951. This draft was submitted to the first post-war conference on Private International Air Law which took place in Rome from 9th September to 7th October, 1952. Twenty-eight States and seven International organizations[139] were represented.

Apart from the desire to unify a plethora of national laws on the subject, the conference had two main objectives. It was necessary, on the one hand, to ensure adequate compensation for damage caused on the surface by foreign aircraft to innocent persons who were subject to a risk which they could neither forsee nor prevent. It was necessary, on the other hand to secure the operator against the ruinous consequences of a "catastrophe" by providing for a limitation on his otherwise strict liability and for his insurance against a risk which it was thought he ought to bear.[140]

The scope of application of the new Convention was the first subject to be considered at the conference. What damage was to be redressed? Upon whom should liability fall?

With respect to the first question the 1933 Convention in Article 2(1) provided that the damage to be redressed was that caused by a foreign aircraft in flight to persons or property on the surface and defined flight in Article 2(3) as occurring from the beginning of the operations of departure until the end of the operations of arrival. There had been varying interpretations of this definition. The French courts, for example, by applying Article 53 of the law of 31st May, 1924,[141] showed that they would have extended this definition to damage caused to third parties while an aircraft was being taken to a hangar or while it was being unloaded.[142] At the conference, it was argued that an aircraft did not present the same risk on the ground as it did in the air. Was it fair to impose the same liability in the two cases? Further, any person injured on an airfield could be said to have assumed some of the risk involved in being in close proximity to aircraft manoeuvering on the ground. The definition of flight was, therefore, narrowed in the new Convention. It begins from the moment when power is applied for the purpose of actual take-off until the

[139]International Institute for the Unification of Private Law, International Chamber of Commerce, International Union of Aviation Insurers, International Aviation Federation, International Federation of Private Air Carriers, International Law Association, International Air Transport Association.

[140]It should be realized that the insurance provisions had a dual purpose: (i) to furnish assets for the victim; (ii) to protect operators as is mentioned in the paragraph.

[141]Now Art. 36 of the new 1955 codification.

[142]*Cf. Federation Aeronautique c. Stievenard*, Cour d'appel de Douai, 6 March, 1951. (1951) 5 Rev.Fr. de Dr. Aérien, 211.

moment when the landing run ends.[143] The Convention further limits its field of application by excluding indirect damage. The damage must be the direct consequence of the incident giving rise thereto.[144] This provision is almost certain to cause uncertainty and lack of uniformity in its application. Indeed, many representatives indicated the difficulty that would be caused in their courts in applying this concept. There was a long discussion on whether damage caused by noise and vibration of an aircraft should come within the terms of the Convention. Most representatives thought that the general interest damands that society become accustomed to a certain amount of inconvenience caused by aircraft. As noise and vibration form a part of that inconvenience, a general provision was proposed which excluded reference to them. Damage resulting from the mere fact of passage through the airspace does not give rise to liability if the passage is in conformity with existing air traffic regulations.[145] Presumably there will have to be a causal connection between the damage and a breach of an air traffic regulation before a court will hold that the damage did not result from the mere fact of passage through the airspace. As in the 1933 Convention, damage caused by falling persons or things is included within the field of liability.[146]

As far as the second question is concerned, Article 4 of the 1933 Convention was retained. Liability shall attach to the operator of an aircraft.[147] It is in the definition of an operator that a change has been made. The new definition is more precise although it still creates uncertainty which can only be resolved by application of the Convention over a lengthy period. The operator is the person who was making use of the aircraft at the time the damage was caused provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.[148] The difficulty a claimant will have in finding a defendant under this definition is resolved by Article 2(3) which provides that the registered owner is presumed to be the operator unless he proves that some other person was the operator and, as far as legal proceedings permit, takes appropriate measures to make that other person a party to the proceedings. Two persons are jointly and severally liable in the following cases: First, where a person is only the operator for a period of not more than fourteen days, then both he and the person from whom such right was derived are liable.[149] Secondly, where a person makes

[143]Art. I(2). Does this include the case of a third person who after an aircraft has crashed is injured while attempting to rescue passengers? Probably not. See French Case cited in footnote (142) *supra*.

[144]Art. I(1).

[145]*Ibid.* The question arises as to whether liability for damage caused by sonic boom is excluded by this provision if national air traffic regulations do not provide against breaking the sound barrier below certain altitudes.

[146]*Ibid.*

[147]Art. 2(1).

[148]Art. 2(2) (a).

[149]Art. 3.

use of an aircraft without the consent of the person entitled to its navigation control, then both the latter, unless he proves he exercised due care to prevent such use, and the unlawful user will be liable.[150] Finally, were two aircraft collide and damage results to third persons, both operators will be liable.[151]

Having decided the damage to be redressed and the persons liable to redress the damage, the conference had next to determine the nature of liability. As had happened on earlier occasions, there was considerable controversy between the delegates in favour of strict liability and those in favour of fault liability, the former maintaining that the innocent victim should have the right to automatic reparation, the latter deploring the treatment of the aircraft and its operator as "wild beasts", such treatment offending the Christian principle that liability should only rest on fault.

In 1933, the principle of absolute liability was agreed on with comparative ease. Aviation was young and regarded as dangerous. Those willing to participate in it should bear the risk to the life and welfare of the public involved. It was now argued, however, that to retain the principle would be unreasonable. Technical developments and the present stage of aerial security should mitigate to some extent the operator's liability. Thus, it was proposed to replace the principle with a rule based on negligence. But only the United States and Mexico were in favour of such a change. Greece adopted a similar position but with a modification. Canada would have preferred a new rule but was not prepared to object if the majority of States was in favour of absolute liability. Furthermore, out of 39 national legislations, 34 were favourable to the principle of absolute liability in 1952.[152] The objectivists, therefore, gained a convincing majority. This is not surprising since, however safe aviation may become, there will always be strong reasons for retention of the principle. The inequality between the person causing and the person receiving the injury, the impossibility on the part of the person injured of showing proof of the fault of the aviator[153] and the difficulty of obtaining accurate evidence from witnesses when witnesses and aircraft are wiped out in the crash are but three of these reasons. The principle is also in accord with principles of social policy which have led to its adoption in other fields.[154] Again the development of liability insurance and the fact that many States refuse to allow foreign operators into their airspace unless the operators are insured against third party liability provides a strong argument for the principle's retention as it provides a means by which inevitable damage caused by aircraft may be distributed among

[150]Art. 4.

[151]Art. 7.

[152]ICAO, *op. cit.*, p. 15, Chap. 1, App. A. See Juglarr, *La Convention de Rome*, 1952, p. 7 for list of national laws supporting the principle.

[153]These two reasons were used by M. Ambrosini in his report submitted to the 3rd conference of CITEJA. See Kaftal, *Problems of Liability caused by Aircraft on the Surface*, (1934) J. of Air L. 347, 360.

[154]*E.g.* Workmen's Compensation Acts.

operators and the cost of insurance may be passed on by rates and prices to the public served.[155]

The nearest the proposal came to accepting liability based on negligence was at the Taormina session when a compromise was reached through the efforts of the American, United Kingdom and French delegations. The compromise provided for a system having three degrees: absolute liability within specified limits; a threefold increase in the amount of liability where negligence is shown to exist; and unlimited liability where intent to cause damage is shown.[156] This compromise was eliminated at Mexico City,[157] however, largely because of IATA's plea for a less complex liability rule with a reasonable limitation of that liability. All the injured person has to do, therefore, is to prove that damage was caused by an aircraft in flight or by any person or thing falling therefrom.[158] Only fault of the victim,[159] intervention of a public authority, armed conflict or civil disturbance[160] will free the operator from the absolute liability thus imposed which still exists in the event of an Act of God, force majeure, or an act of a third party. Compensation will be reduced if the damage has been contributed to by the injured person.[161]

The next step the conference had to take was to decide on the extent of liability. It was agreed that it should be limited but how far and in what way caused heated controversy. Some States thought the limits proposed too high (U.K.), some thought them too low (*e.g.* U.S. and France), others were incensed at the particular limitation on liability for death or personal injury (*e.g.* France). Except where liability for death or personal injury is concerned, liability is limited according to the weight of the aircraft. This was in accord with the opinion of the Air Transport Committee[162] which, while recognizing that small and medium aircraft might cause damage in somewhat greater proportion to their weights, felt it desirable that the limits should increase without abrupt changes throughout the scale of weights.[163] Liability is not limited whenever damage is caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage. Where the act or omission is caused by a servant or agent, it must be proved that he was acting in the course of his employment or within the scope of his authority.[164] The liability of a person who wrongfully takes and makes use of the aircraft without consent is also unlimited.[165]

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[155]See Prosser, *Torts*, 2nd Edition, 1955, para. 61.

[156]ICAO Doc. 6029 LC/126, pp. 316-318.

[157]ICAO Doc. 7157 LC/130, p. 47.

[158]Art. 1(1).

[159]Art. 6.

[160]Art. 5.

[161]Art. 6.

[162]For their report see ICAO Doc. 7379 LC 34, p. 186.

[163] [164] [165]See page 149.

The problem of insurance next came up for discussion. Under the 1933 Convention, the operator must be insured, the sanction in the event of non-insurance being unlimited liability. Such a solution could only grant to the victim a doubtful remedy. This time, rather than apply a sanction, another safeguard was thought desirable. Over-flown States, being in the best position to protect their nationals, are given the right to require the operatior of an aircraft to be insured[166] as a condition of flight over or landing on its territory. Other forms of security will be sufficient as well as insurance: a cash deposit in a depository maintained by the State where the aircraft is registered; a guarantee given by a bank authorized to do so by the State where the aircraft is registered or a guarantee given by the State where the aircraft is registered if the State undertakes that it will not claim immunity from suit in respect of that guarantee.[167] To prevent differing insurance demands from every State over-flown, the Convention provides in Article 15 (2) (a) that the State must accept as satisfactory, insurance conforming to the provisions of the Convention. One State, for example, cannot demand a cash deposit when an airline already has a guarantee from a bank. These rules were hardly proposed before they provoked objection. How was a State to be certain of the financial responsibility of the insurer or bank and their capability of paying damages in the currency of the place of accident or tribunal seized of the dispute? The only answer under the Convention is that a State may require a certificate from the State where the insurer has his residence or principal place of business or from the State in which the aircraft is registered, certifying the financial responsibility of the

[163]Scale of weights and their limits set out in Article 11 are as follows:

LIMIT	WEIGHT
5000,000 fr. ($33,163.48) *scale*	1,000 kg. or less
plus 400 *fr. per kg. to*	6,000 kg.
2,500,000 fr. ($165,817.40) *scale*	6,000 kg.
plus 250 *fr. per kg. to*	20,000 kg.
6,000,000 fr. ($397,961.76) *scale*	20,000 kg.
plus 150 *fr. per kg. to*	50,000 kg.
10,500,000 fr. ($696,433.08) *scale*	50,000 kg.
plus 100 *fr. per kg. to*	infinity

sub-limit per person
500,000 fr.
($33,164.48)
see ICAO Doc. 7379 LC/34 p. 186 for graph.

[164]Art. 12(1).

[165]Art. 12(2).

[166]Art. 15(1).

[167]Art. 15(4).

insurer.[168] A bitter controversy arose out of acceptance of this system. Certain States were not ready to trust the integrity of other States in the event of pressure from insurers and national banks. Some wanted an international authority to verify the financial responsibility of insurers and list those who deserved confidence. Others wanted the overflown State to be able to contest the validity of the certificate. This latter wish was accepted. If the State overflown has reasonable grounds for doubting the financial responsibility of the insurer, that State may request additional evidence of financial responsibility and if a dispute arises between the States as to the adequacy of the additional evidence, it will be submitted to an arbitral tribunal.[169] Until the tribunal has given its decision, the insurance or guarantee shall be considered provisionally valid by the State overflown.[170] There is no guidance in the Convention as to the standard a State is to employ when verifying an insurer's financial responsibility nor is it stated what is undertaken by such verification. Defences open to the insurer are limited. In addition to the defences open to the operator and the defence of forgery, he may plead the following: either that damage occurred after the security ceased to be effective or that it occurred during a flight outside the territorial limits provided for by the security unless such flight was caused by force majeure, assistance justified by the circumstances or an error in piloting, operation or navigation. Insurance is required to continue in force if it expires during flight until the next landing specified in the flight plan.[171]

There remained the important question of jurisdiction. Where could the claimant bring his action? The most convenient forum from the point of view of evidence would be the place of accident. On the other hand, to be certain of a judgement's execution, the principle place of business of the operator would be the most convenient. At Taormina, the French proposed that the place of accident should be the only forum where an action should be brought and that there should be a provision for the automatic execution of a court's judgment in whatever State execution is applied for. After much discussion, these proposals were accepted and incorporated into Article 20 of the Convention, "the Convention within a Convention".[172] A number of strong reasons were put forward for adopting the single forum. The limit of liability had to be protected. If a number of claims had to be reduced one court only should deal with the reduction. In most cases, the party injured would be a national of the State in which the damage occurred. It is more advantageous for him to bring an action in the courts of his own country. Legal costs would be smaller and the production of evidence less difficult. Finally, it could be said that, since an operator accepts the protection of the law of that State and makes use of its

[168]Art. 15(5).

[169]Art. 15(7)(a).

[170]Art. 15(7)(c).

[171]Art. 16.

[172]See Toepper, *Comments on Art. 20 of the Rome Convention, 1952*; (1954) 21 J. of Air L. & Com. 420.

navigational aids and facilities, it is not unreasonable that he should be subject to a decision of the courts of that State.[173] Execution of the judgment may be refused for many of the classic reasons including the fact that it is contrary to the public policy of the State in which execution is required. A new action may then be brought in the State where execution has been refused.[174] Article 20 (1) also allows the claimant to bring an action in the courts of any contracting State if the defendant agrees thereto. Thus, it would seem possible, although hardly likely, to bring an action in a State which has no connection whatsoever with the accident.

What is the future of this Convention? Unfortunately, it is not possible to be over optimistic. Only seventeen of the twenty-eight States at the conference signed the Convention. Only nine of these have ratified it. Neither the United Kingdom[175] nor the United States[176] signed the Convention and this is quite serious when it is considered that these two States alone represent over 50% of the world's air transport. If the seventeen signatory States were to ratify the Convention, the carrier's from the United Kingdom and United States would be at a disadvantage when flying over their territory. They would be subject to a mass of national laws some of which impose absolute liability without any limitation when damage is caused to third parties (*e.g.* France). Such discrimination might exert great pressure on these recalcitrant States and force them into line.[177] This is wishful thinking, however. The fact still remains that only nine States have ratified the Convention seven years after the conference completed its work.[178] The only conclusions that can be drawn are that either States do not consider such a Convention in their interests at this time or else if they want such a Convention, they have found too many defects in the 1952 version to warrant its acceptance.

3. The Hague Protocol of 1955

The second conference on Private International Air Law to be held after the Second World War concerned the revision of the Warsaw Convention, 1929. It will be remembered that this Convention established a system of

[173]ICAO Doc. 7157 LC/130, 362.

[174]Art. 20(7).

[175]Main reason was that British insurance companies were opposed to the Convention.

[176]For list of reasons see *Report of Chairman of U.S. delegation* (1953) 20 J. of Air L. & Com. 91.

[177]See Garnault, *La Convention de Rome, 1952*, (1953) Rev. Fr. de Dr. Aérien, 1, 14. The Australian Civil Aviation Damage by Aircraft Act of 1952 contains provisions "putting the squeeze" on non-ratifying States operating in Australia.

[178]Canada ratified the Convention almost immediately. See Foreign Aircraft Third Party Damage Act S.C., 1955, c.15. This quick action is now regretted as only one State whose airlines operate over Canada has ratified it. CPA operates into Australia which has ratified the Convention. QUANTAS operates to Vancouver. See Thorne, *Anticipated Problems in Interpretation and Application of "Foreign Aircraft Third Party Damage Act"*, Canadian Bar Association, Papers presented at the Annual Meeting, Quebec, 1960, p. 111.

liability for damage caused to passengers, luggage and goods during international carriage by air. While this liability was based on negligence, the burden of proof was transferred to the carrier who to escape the liability had to show that he and his agents had taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. A limit of liability was established in the case of injuries to or death of a passenger occurring during the period of international carriage. This limit was 125,000 Poincaré francs.[179] Liability for damage to luggage or goods was also limited. While a great number of States had ratified or adhered to this Convention by the end of World War II there was disatisfaction with it both in regard to certain ambiguous provisions and the limits of liability. Indeed, as early as 1935, shortly after the Convention came into force, CITEJA had begun its revision. The ICAO Legal Committee which had taken over the work of CITEJA in 1947 finished the preliminary studies necessary in 1952 when the draft text of a new Convention was prepared at Paris in January of that year. At Rio, however, in September 1953, where the final preparatory work was accomplished, it was decided to abandon the idea of a new Convention and produce a protocol to the Warsaw Convention containing limited amendments only. This was partly because it was considered easier for the States to adopt a modifying protocol.

The Netherlands Government offered to play host to the conference which was held under the auspices of ICAO. Forty-four States attended the conference, among them a number of Communist countries, including the USSR, who were not members of ICAO. In addition, eight International organizations were represented. The conference took place from the fifth to the twenty-eighth of September under the Presidency of Professor D. Goedhuis, head of the Netherlands delegation.

The first amendments of any substance[180] were made to the provisions in the Warsaw Convention relating to passenger tickets, baggage checks and air waybills. The Convention required a great many particulars to be included in these documents.[181] Since failure on the part of the carrier to insert many of these particulars was subject to the sanction of unlimited liability,[182] the result would be frequently far out of proportion to the gravity of the fault. In any case, it was thought that the requirements were far too detailed and

[179]$8,291 U.S. approx.

[180]Although the scope of the Convention remained unaltered, Art. 1(2) was redrafted. All reference to territory subject to the "sovereignty, suzerainty, mandate or authority" of a State has been deleted. Does this mean that carriage between two places in the same State with an agreed stopping place in territory subject to its "sovereignty, suzerainty, mandate or authority" is now international and therefore subject to the Warsaw Convention? Answer will depend on whether such territories are to be regarded as States *cf. Veuve Attias v. Cie Air Afrique*, France, Cour d'appel d'Alger, 24 Dec., 1943. Tunis is there regarded as a State although a protectorate of France at the time.

[181]See Arts. 3-11.

[182]Arts. 3(2), 4(4), 9.

imposed an unnecessary burden on air carriers who found them difficult to comply with. The redrafted articles only require the particulars necessary to indicate that carriage is international and therefore governed by the Warsaw Convention. In the case of the passenger for example, Article III of the Protocol requires the delivery of a ticket containing the following information:

1. an indication of the point of departure and destination;
2. if these points are situated in the same State, one or more agreed stopping places, if these are within a foreign country; and
3. notice to the effect that if the passenger's journey involves a destination or stop in a foreign State, the Warsaw Convention may be applicable.

The sanction of unlimited liability only applies to the carrier if, with his consent, the passenger embarks without delivery of a ticket or if the ticket does not include the notice required. Analogous provisions apply in the case of contracts to carry baggage and goods.[183] The Rio draft had required the carrier to state on the ticket whether the carriage was in fact international or not. As this would require the carrier to decide in a few minutes what it had taken courts many hours of argument to decide,[184] it was thought that only a warning of its possible applicability should suffice. Other changes made to the documents of carriage were an extension of the rules governing the probative force of the documents of carriage,[185] acceptance of goods by the carrier without his immediate signature on the waybill being necessary[186] and the fact that nothing in the Convention prevents the issue of a negotiable air waybill.[187]

Apart from deletion of the defense open to the carrier that in the carriage of goods and luggage, damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation, the provisions relating to the liability of the carrier remain unaltered. This, despite the criticism of Article 17 in that it only provided for liability in the event of the "wounding of a passenger or any other bodily injury". Major Beaumont, the United Kingdom delegate at the conference, has pointed out that in addition to mental injuries, other non-bodily injuries are possible and that, therefore, the article should be extended to cover these.[188] The article also restricts liability to damage caused through an "accident". The same writer has pointed out that this term might not cover injuries caused by a sudden reduction in cabin pressurization or by air turbulence. The word "occurrence" used in Article 18 should replace it.[189]

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[183]Arts. IVa, VI, VII of the Protocol.

[184]*Cf. Grein v. Imperial Airways* [1937] 1 KB 50, (1936) U.S.Av.R. 211.

[185]Art. IIIb, IVb of Protocol.

[186]Art. V of Protocol.

[187]Art. IX of Protocol.

[188]Beaumont, *Warsaw Convention as amended by Protocol signed at The Hague*, (1955), 22 J. of Air L. & Com., 414, 417.

[189]Beaumont, *op. cit.*, 417.

The second major alteration made to the Warsaw Convention concerned the limitation of liability provisions. It was proposed to revise the figure fixing the carrier's maximum liability in the carriage of passengers. In some parts of the world, notably North America, in the case of air carriage not governed by the Warsaw regime, claimants were receiving amounts considerably higher than the maximum amounts allowed in the Convention. The States concerned, therefore, wished to increase the limits. The Latin American States, the Communist States and Japan, however, were perfectly satisfied with the existing limits either because of the economic situation in their country or, more generally, because the value put on human life was not so high. Thus, the conference had to consider proposals ranging from a preservation of the existing limits (125,000 gold francs)[190] to the adoption of a limit of 375,000 gold francs[191]. It was soon realized that the compromise ultimately adopted would depend on the formula for determining the circumstances in which the carrier would have no limitation of liability. These had to be restricted before certain States were prepared to agree to an increase in the figures fixing liability. In addition, the United States required a *quid pro quo* before they would agree to an increase which was less than their proposal. They wanted a provision to the effect that the limits prescribed should not prevent a court from awarding the court costs and other expenses of litigation incurred by the plaintiff. Fortunately, this provision was accepted,[192] the circumstances, in which the carrier's liability became unlimited, were restricted[193] and thus a compromise was reached. It was agreed to raise the limit to 250,000 gold francs.[194] No change was made to the limits for checked baggage, handbaggage or goods. A new article was inserted into the Convention[195] extending the benefit of the carrier's limitation of liability to his servants and agents. It was feared that without such a clause claimants would try to avoid the Convention by suing the servants or agents for an amount in excess of the limits and that the latter would then recoup their losses from their employers, the carriers, under indemnity clauses in their contracts of employment. Thus, the limitation provisions would be easily circumvented. Also, if the carrier himself is given the protection of unlimited liability, it is only just that his servants and agents should enjoy the same limitation.

The third major change in the Convention was made to Article 25 (1), which disentitled the carrier from availing himself of the provisions excluding or limiting his liability if the damage was caused by his wilful misconduct or such default on his part as, in accordance with the law of the court seized of

[190]$8,291 U.S. approx.

[191]$24,873 U.S. approx.

[192]Art. XI of Protocol.

[193]Art. XIII of Protocol, see *infra* for details.

[194]Art. XI of Protocol. $16,582 U.S. approx.

[195]New Art. 25a of Convention.

the case, is considered to be equivalent to wilful misconduct. The term "wilful misconduct" has not been uniformly interpreted by the courts considering "Warsaw" cases and, in any event the term is an inadequate translation of the French expressions *dol* and *faute lourde*.[196] As there is no full agreement even in French-speaking States on just what consitutes "faute lourde",[197] it can be said that this provision was certainly not promoting the unification of private international law. Instead, it was creating a great deal of uncertainty. A more precise provision was, therefore, adopted. A carrier is now exposed to unlimited liability if it is proved that the damage resulted from an act or omission by him his servants or agents, done with intent to cause damage or recklessly and with knowledge that the damage would probably result. It must be proved in order to engage the unlimited liability of the carrier that the servant or agent was acting within the scope of his employment.[198] It has been said that the new article conveys the notion of wilful misconduct as applied by the Anglo-Saxon judges without significantly departing from the French jurisprudence on the subject.[199]

Miscellaneous amendments include Article XV which lengthens the period within which a claimant must complain to the carrier. In the case of damage to baggage, he must complain within seven days from the date of receipt. In the case of damage to cargo, the period is fourteen days from the date of receipt and in the case of delay, complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at the carrier's disposal. A carrier may include in the contract a stipulation exonerating him from liability in the case of loss or damage resulting from the inherent defect, quality or vice of the cargo carried.[200] The rule excluding the application of the Convention from international carriage performed experimentally has been deleted.[201]

Article XXII requires thirty ratifications before the Protocol comes into force. This is an attempt to prevent as far as possible, a dichotomy arising in the world between States where liability is subject to the Warsaw Convention alone and States where liability is subject to the Warsaw Convention as amended by The Hague Protocol.

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[196]Despite the remark of Sir Alfred Dennis, the U.K. delegate to the Warsaw conference 1933 that: "... we have in English the expression 'wilful misconduct' to translate these words, which expression is well known and has a well defined meaning in our law"! ICAO doc. 7838, p. 140.

[197]*Cf. Hennessy v. Cie Air France*, Cour d'appel de Paris (1954) 8 Rev. Fr. de Dr. Aérien 48 and *Fisscher v. Cie Sabena*, Trib de première instance de Bruxelles (1950) 4 Rev. Fr. de Dr. Aérien, 411; (1950) U.S.Av.R.367.

[198]Art. XIII of Protocol.

[199]Garnault, *Le Protocole de La Haye*, (1956) 10 Rev. Fr. de Dr. Aérien, 6.

[200]Art. XVI of Protocol.

[201]Art. XVI of Protocol.

Since 1955, there have been eighteen ratifications. Wide acceptance is still anticipated, however, because of the large measure of agreement that was reached at the conference. But although acceptance will put into effect an up-to-date set of legal rules governing the bulk of international carriage by air, several problems were left unsolved and will continue to cause uncertainty and lack of uniformity.

Does the Warsaw Convention create a cause of action, for example? Presumably the courts in the United States will continue to answer this in the negative and apply the conflict of laws rules relating to torts to determine the cause of action,[202] while the civil law jurisdictions will still regard the Convention as having established the rule of contractual liability of the carrier.[203] An associated problem concerns the law to be applied for the purpose of deciding which persons have the right to bring suit in the event of the death of a passenger. The United States will refer to the *lex loci delicti* while the civil law courts will apply the law of the contract.[204] The United Kingdom[205] and other Commonwealth countries have overcome both problems by enacting a statute creating a cause of action and setting out the persons entitled to sue in the event of a passenger's death. Nevertheless, lack of uniformity between the three systems continues to prevail.

Another problem left unsolved concerns the definition of a carrier. Is he the person who enters into an agreement for international carriage with a passenger or consignor or is he the person who actually performs the carriage in whole or in part? A draft Convention on the hire, charter and interchange of aircraft has been prepared by the Legal Committee of ICAO and is intended to solve this problem.[206] In the opinion of the Committee, the text is now ready for presentation to States as a final draft. It provides that where there is both a

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[202]See Calkins, *The Cause of Action under the Warsaw Convention* (1959) 26 J. of Air L. & Com., 217 and *Komlos v. Cie Air France* III F Supp. 393 (SDNY 1952) also *Noel v. Linea Aeropostal Venezolana* 247 F 2d. 667 (CA 2, 1951).

[203]*Hennessy v. Cie Air France*, Cour d'appel de Paris 25 Feb. 1954; *X.v.Y.* Germany, Reichsgericht, 5 July, 1939.

[204]*Munier v. Divry*, Trib. Civil de la Seiue, 27 Nov. 1953; *Torino Football Club v. S.A. Aviolanee Italiane A.L.I.* (Italy), Corte di Cassazione, 9 March, 1953.

[205]Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36.

[206]ICAO Doc. 8101 LC/145 Sept. 26, 1960. Riese, *Le Projet de la Commission Juridique de l'OACI (Tokyo, 1957) sur l'affrètement, la location et la banalisation des aéronefs dans le transport international*, Rev. Fr. de Dr. Aérien (1959) 1 *sq.*; Georgiades, *Quelques réflexions sur l'affrètement des aéronefs et le projet de convention de Tokyo*, Rev. Fr. de Dr. Aérien (1959) 113. See also, Lissitzyn, *Change of Aircraft on International Air Transport Routes* (1947) 14 J. of Air L. & Com. 57; Serraz, *De l'affrètement aérien et de certains rapports juridiques qui en découlent*, Rev. Gén. de l'Air (1949) 349 *sq.*; Haguenau, *Les formes de la collaboration internationale dans le transport aérien*, Rev. Fr. de Dr. Aérien (1954) 347-379; Winkelhake, *Interchange service among the airlines of the United States*, (1955) J. of Air L. & Com. 1; Grönfors, *Air Charter and the Warsaw Convention*, The Hague (1956); Dutoit, *La collaboration entre compagnies aériennes; ses formes juridiques*, Lausanne (1957), pp. 23 *sq.*; Keefer, *Airline Interchange Agreements*, (1958) 25 J. of Air L. & Com. 55.

"contracting carrier"[207] and an "actual carrier"[208] involved in the carriage of persons or goods by air, they will both be subject to the rules of the Warsaw Convention in respect of the carriage which the "actual carrier" performs[209] and a plaintiff, at his option, may bring an action against either or both of them.[210] If he brings an action against one of them only, that carrier has the right to have the other made a party to the proceedings.[211] Until this Convention has been accepted by the States, parties to the Warsaw Convention, however, the problem will remain unsolved and will be subject to differing solutions in the courts of these States.

These are three of the more serious problems left unsolved by the conference. Despite them, however, the Protocol is a great improvement and deserves a better fate than the Rome Convention of 1952 appears to have received.

4. Present Programme of Work of ICAO Legal Committee

An examination of the Work Programme of the Legal Committee of ICAO reveals that, despite past achievements, the development of Air Law is as yet far from complete. This Programme is divided into two parts:[212] Part A concerns the subjects of current work, and Part B those subjects which have been noted by the Committee, but which are left dormant until the Assembly or the Council orders that active work be undertaken on them.

Part A presently provides for work on (a) aerial collisions; (b) the legal status of the aircraft (subject to consideration by the Committee of the comments of States and international organizations); (c) the carriage of nuclear material by air; (d) the legal status of the aircraft commander; and (e) the liability of air traffic control agencies. Part B relates to (a) the study of a system of guarantees for the payment of compensation in pursuance of the Warsaw Convention; (b) a study aimed at unifying the rules relating to procedure in cases arising under air law Conventions, and of the rules of procedure for the execution of judgments; (c) research into measures which would ensure the international authority of judgments by competent tribunals on Conventions in force on air matters and the distribution and allocation of awards in pursuance of such Conventions; (d) consideration of problems concerning assistance on land and

[207]"Contracting carrier" means the party by or on behalf of whom an agreement for carriage governed by the Warsaw Convention has been made with a passenger or consignor or with a person acting on behalf of the passenger or consignor: Art. I(b) of Draft.

[208]"Actual carrier" means a person, other than the contracting carrier, who performs the whole of the carriage contemplated in paragraph (b) or performs parts of such carriage but is not, with respect to such part, a successive carrier within the meaning of Art. 30 of the Warsaw Convention: Art. I(c) of Draft.

[209]Art. II of Draft.

[210]Art. VII.

[211]*Ibid.*

[212]ICAO Doc. 8101 LC/145, September 26, 1960.

sea, and its remuneration; and (e) problems of nationality and registration of aircraft operated by international agencies.[213] Although no work has been ordered on them, the Chairman of the Committee has been authorized to appoint *Rapporteurs* on sections (a), (b), and (c) of Part B.[214]

(*a*) *Aerial Collisions*

At its Annual General Meeting in 1958, IATA emphasized the pressing nature of the problem of aerial collisions by sending to the Legal Committee of ICAO a resolution urging it to give first priority to the preparation of a draft Convention on this subject. This Convention was to deal with both Civil and State aircraft.[215] ICAO committees considered the question at Paris and Montreal in 1960.[216] The Legal Committee discussed the possible liability of Air Traffic Control agencies (*vide infra*); the possibility of direct actions in cases of damage, arising out of a collision, to third parties on the surface; the bases of liability in respect of passengers and their baggage; and the system of limiting liability.[217] The Warsaw system for locating the onus of proof was favoured, as were the Hague Protocol limits of liability, together with no overall limitation, and no cumulation of amounts recoverable. The Sub-Committee on Aerial Collisions was asked by the Legal Committee in September of 1960 to prepare a draft Convention for presentation to the next Session in 1961.

(*b*) *Legal Status of the Aircraft*[218]

The work of ICAO towards defining the legal status of the aircraft has been limited to the field of criminal law.[219] This does not prejudice the possibility of future discussions on the civil aspects of this matter (*e.g.* Conflict of Laws in

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[213]*Ibid.*

[214]ICAO Bulletin, Vol. XV No. 8, 1960, p. 146.

[215]ICAO Doc. LC/Working Draft, No. 644, May 3, 1960, Appendix 1.

[216]ICAO Doc. 8101 LC/145, September 26, 1960, Annex C.

[217]De Rode Verschoor, *La responsabilité dans l'abordage entre des aéronefs*, Rev. Gen. de l'Air, (1959) 279; Guldimann, *La méthode de travail du comité juridique de l'O.A.C.I.*, 14 Revue Française de Droit Aérien (1959), p. 20-27; *Draft Convention on Aerial Collisions*, 9 Zeitschrift für Luftrecht 261-267 (1960).

[218]Cooper, *The legal status of aircraft*, Princeton (1949); Honig, *The legal status of aircraft*, The Hague (1956).

[219]Niemeyer, *Crimes et délits à bord des aéronefs*, Revue de Droit Aérien (1929) 285; Pholien, *Des crimes et délits à bord des aéronefs en vol*, Revue de Droit Aérien (1929) 289; Danilovics-Szondy, *Les infractions à la loi pénale commises à bord des aéronefs*, Droit Aérien (1930); Volkmann, *Crimes et délits à bord des aéronefs en droit international*, Droit Aérien (1931); Steidle, *Das Luftfahrzeug als Begehungsort strafbarer Handlungen*, Cologne (1934); Meyer, *Crimes et délits à bord des aéronefs*, Rev. Gen. de l'Air (1946) 544, 614; Knauth, *Crime in the High Air, A Footnote to History*, 25 Tulane Law Rev. 447, 460 (1950-51); Rabut, *Loi applicable aux crimes et délits commis à bord des aéronefs en évolution*, Rev. Fr. de Dr. Aérien (1951) 394 *sq.*; Meyer, *Comments on the Munich Draft Convention on Offences and Certain Other Acts Occurring on Board Aircraft prepared by the Legal Committee of ICAO*, 9 Zeitschrift für Luftrecht 151-156 (1960); Williams & Wright, *Some Aspects of the* 1959 *Amendments to the Canadian Criminal Code pertaining to Crimes committed on Aircraft*, Canadian Bar Association, Papers presented to the Annual Meeting 1960, p. 90.

Contract and Tort[220]). On November 18, 1959, the Council approved the circulation of a draft Convention concerning offences committed on board aircraft to the States and international organizations for comment.[221]

(c) *Carriage of Nuclear Material*

The *Rapporteur* on the Carriage of Nuclear Material by Air informed the 1960 meeting of the Legal Committee of the development by the Organization for European Economic Cooperation and by the International Atomic Energy Authority of Conventions on the liability for nuclear incidents. The *Rapporteur* is to prepare, for circulation to the members of the Legal Committee, an analysis of the O.E.E.C. Paris Convention of July 1960. The Committee view is that ICAO has a special interest in "such aspects of Conventions on liability for nuclear incidents prepared by various international organizations as might have a bearing on international air transport".[222]

(d) *Legal Status of the Aircraft Commander*

Despite the attention it has long received from Air Lawyers,[223] the legal status of the aircraft commander still remains a nebulous concept. IATA has stated that "there is no immediate need for a Convention of this character",[224] but the Legal Committee of ICAO has noted that "uncertainty may cause no harm in the case of commanders of aircraft belonging to regular and well-defined airlines, but may present difficulties in the case of non-regular airlines or small operators, some of whom may be, at the same time, their own aircraft commander".[225] The International Federation of Airline Pilots' Associations has prepared a list of nine occasions on which it is essential that the status of the aircraft commander be defined.[226] Included are action after an emergency

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[220]De Planta, *Principes de droit international privé applicables aux actes accomplis et aux faits commis à bord d'un aéronef*, Geneva (1955); Makarov, *Conflits de lois en matière de droit aérien*, Annuaire de l'Institut de Droit International (Session de Neuchâtel 1959), Vol. 48 I, 359, 457 *sq.*

[221]ICAO Doc. LC/Working Drafr, No. 644, May 3, 1960, Appendix 1.

[222]ICAO Doc. 8101 LC/145 September 26, 1960.

[223]ICAO Doc. A10-WP/30 LE/1 March 2, 1956; ICAO Doc. A12-WP/32 LE/2 March 10, 1959 Appendix 1; ICAO Doc. C-WP/899 December 22, 1950; Charlier, *Le commandant d'aéronef en droit privé*, Rev. Gen. de l'Air (1947) 20 *sq.*; Knauth, *The Aircraft Commander in International Law* (1947) 14 J. of Air L. & Com. 157; Bucher, *Le statut juridique du personnel navigant de l'aéronautique civile*, Lausanne (1949); Kamminga, *The aircraft commander in commercial air transportation*, Leyden (1953); Beaubois, *Le statut juridique du commandant de l'aéronef* Rev. Fr. de Dr. Aérien (1955) 221 *sq.*; De la Pradelle, P., *Le commandant d'aéronef*, Rev. Gen. de l'Air (1955) 14 *sq.*; Von Weber, *Die Befugnisse des Luftfahrzeugkommandanten nach den Artikeln 5 bis 10 des Münchener Entwurfs eines Abkommens über strafbare Handlungen und bestimmte andere Handlungen an Bord von Luftfahrzeugen*, 9 Zeitschrift für Luftrecht 215 *sq.* (1960); Tancelin, *Le partage de l'Autorité entre les diverses catégories de personnels participant à la navigation aérienne*, Thesis Paris (1960).

[224]ICAO Doc. C-WP/899 December 22, 1950, Appendix D.

[225]ICAO Doc. C-WP/980.

[226]ICAO Doc. AN-WP/1375, Attachment.

landing; interference in the operation of the aircraft; and entry into the cockpit. The burthen of the Pilots' wish for a Convention is that they bear heavy responsibilities without being supported by a corresponding authority.

(e) *Liability of Air Traffic Control Agencies*

The liability of the Air Traffic Control agencies was mentioned in the discussions on Aerial Collisions, but it was decided to deal with it separately.[227] The problems of Air Traffic Control multiply in sympathy with the increasing number of aircraft flying, their mounting speeds, and their higher operating altitudes. Complications arise when an Air Traffic Control agency is situated in one State, and controls aircraft in the airspace of another State, and when such agencies are government-controlled.[228]

CONCLUSION

This survey of the legal developments in civil aviation since 1944 indicates the extent to which aviation impinges upon many branches of a State's legal system. To paraphrase Lord Cooper, the fabric of mature air law will be as variegated as a tartan;[229] it should therefore prove of interest to lawyers in all types of practice and not merely to the specialist.

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[227]ICAO Doc. 8101 LC/145 September 26, 1960.

[228]Eastman, *Liability of the Ground Control Operator for Negligence* (1950) 17 J. of Air L. & Com. 170; Chauveau, *La responsabilité des aides à la navigation*, Rev. Gen. de l'Air (1953) 214 *sq.*; Narx, *Government Tort Liability for Operation of Airports* (1958) 25 J. of Air L. & Com. 173; Guerreri, *Governmental Liability in the Operation of Airport Control Towers in the United States*, Montreal (McGill 1960).

[229]Rt. Hon. Lord Cooper, *The Scottish Legal Tradition*, Edinburgh, (1949), p. 11.