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THE GRANT OF PASSAGE AND EXERCISE OF COMMERCIAL RIGHTS IN INTERNATIONAL AIR TRANSPORT

The Development of Principles and Rules

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by

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C O N T E N T S

C H A P T E R I

GENERAL OBSERVATIONS

1. Transport and International Community

Ever since civilization exists, the notion of exchange and of transporting has been one of the outstanding elements of life in human society. One may say that the development of civilization and the evolution of all its main attributes (economic, political, cultural, and social) rest upon man-made means of communication.[1] Among the many factors which have conditioned and at the same time shaped the history of mankind, transportation and communication have been not causes, but certainly essential elements of the progressive development of society.[2] The evolution of civilization has been speeded up by transportation. There appear to be two main reasons for this. One is that transportation carries ideas and inventions to people in all parts of the world. The use of the wheel spread all over the Globe from the place of its invention; the ideas and the political and cultural heritage of ancient Greece and Rome have influenced our whole Western civilization. The second reason why transportation and communications speed the growth of our social heritage is that they help to build an efficient size of state, and the social organizations within it.[3] Thus, the first cities, those prototypes of the modern State, were founded and their location determined to assist the possibilities

of exchange, i. e., by transport facilities.[4]

Each great epoch of history has had its system of vital communications which left its imprint on its era. Without its great imperial routes, Rome could not have been an Empire; in Europe of the Middle Ages, the improved system of land, river, and sea routes determined the greatness of Empires as well as their decline; perfected means of transportation essentially conditioned and promoted the organization of modern centralized states, and,at the same time, made possible greater international trade and commerce. In particular, the recent revolutionary developments in the means of transportation have produced certain significant and closely related results: (a) Man's relations to his local environment have been radically altered; and (b) human relations have been transformed on a global scale. Men can go farther, bring more back home, utilize more raw materials, and do much more with what they get.[5] The social, economic, and political impact of transport on the evolution of mankind has placed it, indeed, among the most important activities performed by modern man. It is, perhaps, man's most basic activity, since there are very few of his acts which do not comprise, either in their preparation or in their accomplishment, from the starting point to the final goal, the conveying of persons, goods, or thoughts.

The continuous growth and steady perfection of the whole system of communication and transportation has made our world within a lifetime, a real geographical unit, where the

increasing interdependence of nations is a significant fact. This has been achieved in the first place through better ways and means already in use, through the growing frequency, rapidity, and safety of transport. It is due primarily to this development that it is possible atmpresent to speak of a truly international community. Moreover, if ever the idea of a so-called 'World Government' comes true, it will be largely because of the modern means of international intercourse. While serving practically every corner of the Earth, transport itself has become international in the fullest sense of the word. It has ceased to be of concern only to the particular national entities and now affects the whole international community. The problems which it has raised can no longer be dealt with on a local scale only, but must be treated with at the international level. As L. Josserand so reasonably says, - "toutes les communications... tendent à l'absolu dans l'espace; de plus en plus, elles répugnent à la localisation, au particularisme, pour aspirer à une expansion indéfinie, pour s'illimiter: le transport est international par essence même."[6)]

2. Air Transport

If one may designate the different historic periods through which mankind has passed according to their predominant modes of transportation, then there is no doubt that to the Twentieth Century rightly belongs the name of 'The Air Age', or, to use the expression of the French scholar de La Pradelle, of "air civilization"[7]. No other human device has made such progress in so short a space of time as aviation. Indeed, fifty years is a mere fragment of time in the history of humanity, particularly when compared to the millenia that have elapsed since man's invention of the wheel, perhaps the greatest of all devices in transport. Yet in that relatively brief interval, we have seen the airplane grow from a fragile gadget of wood, cloth, and wire, into the fastest means of travel ever devised. Therefore, it is not unreasonable to call the past fifty years of man's powered flight as 'the fifty years that changed the world'. Aviation, the most modern means of transportation, has become in a fascinatingly short period of time one of the outstanding instruments of international intercourse[8]. Its increasing range of action, its speed and unmatched possibilities in overcoming all natural obstacles by eliminating physical barriers which aggravate or sometimes make impossible swift and easy communication between peoples, and its recent incomparable development places aviation, in its national and international importance, almost at the same level as other surface and sea means of transportation.

The amazing progress achieved in aviation during the first half of this century cannot be better appreciated than by comparing the time needed by some of the 'classical' means of trans-

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portation for journeys between the same points, and years which were required for a little progress. For instance by the end of the Seventeenth Century, the horse-drawn vehicle, "les carrosses", needed 8 days in the winter and 7 days in the summer to cover a distance of 75 leagues between Paris and Dijon; this means an average speed of less than one mile an hour. A century and a half was necessary to raise the average speed of the same vehicle to about 4 miles an hour.[9)]

Now let us mention another example taken from sea navigation. A hundred years ago, it took a ship 110 days to reach Bombay sailing from New York; the length of the route (around Africa) was 11,500 miles. In 1920, the distance was considerably shortened by the construction of a new seaway through the Suez Cannal; however, a passenger ship still needed 17 days to complete a journey of 9,500 miles distance.[10)] One must not forget that one may hardly expect any further significant improvement in the speed of seagoing vessels.

It was up to aviation to change, or let us say, revolutionize travel. Only 25 years later, in 1945, aircraft had shortened the distance between New York and Bombay to 7,800 miles and they were able to cover it in a mere 39 hours. A few years later, in 1953, the first passenger jet-plane in service, the British "Comet", made the trip between London and Tokyo, a distance of 10,200 miles, in 35 hours and 35 minutes. Thanks to developments in aviation, there is now no point on earth over sixty hours distant by air transportation. Distance and time have ceased to be important factors in travel. Whereas our ancestors travelled

at only a few miles an hour, we now cruise in comfort at approximately five or more miles a minute.[11] A perfect, condensed appraisal of this evolution through the centuries is given by Boggs in the following sentence:"In the days of both Nebuchadnezzar and Napoleon, the fastest travel was at a rate of a fraction of one percent of the velocity of sound, whereas today it rapidly approaches the speed of sound..."[12] As a result of this, distances on our planet are no more measured in miles but in flying time. The sky has become as important a highway as the land and the sea for international commerce and social intercourse and aviation has become certainly the most promising means now in existence for communication among the peoples of the world.

Before going any further, it might be useful to describe some of the most significant results aeronautics has achieved from its inception up to the present.

(1) The number of aircraft in the world has increased from one (made by the Wright brothers in 1903), to over a quarter of a million at the end of World War II. Today, this number is perhaps even larger, although such industrial powers as Germany, Japan, and Italy are, for the time being, practically out of production.

(2) The average speed of civil aircraft has increased from a modest 30 m.p.h. to nearly 250 m.p.h. while certain types of military planes fly easily at supersonic speed.[13] It may be said that an average civil aircraft is roughly five times as fast as the fastest train, and eight times as speedy as the fastest vessel.

(3) The average size of aircraft has increased from 750

pounds (Wrights' plane weight including fuel and the pilot) to over ten tons.

(4) The aircraft manufacturing industry, which only fifty years ago did not exist at all, today ranks among the most important industries in both national and international economy.

(5) The safety of air transport has greatly improved. The statistics show the average fatalities during the last decade of under two per hundred million passenger-miles of flight.[14] Compared with other means of transportation, the safety record of civil aviation shows better results, a fact which has been overshadowed for a long time. This was achieved by providing accurate weather information, radio beacons, radar control, and the perfection of aircraft and flying instruments.

(6) The number of passengers carried may be considered better than any other data to show the rapid growth of aviation into an enterprise for public service of the first rank. In 1954, the scheduled international and domestic air services of the world flew 1,206 million miles (32,000 million passenger miles) and transported 57.8 million passengers plus 716 million ton-miles of goods.[15] For a true appreciation of these figures, it must be borne in mind that the first passenger service was inaugurated in 1919, and that in 1937 only 165 million miles were flown by world regular services and 2.5 million passengers were carried by air. At this point, another important achievement should be mentioned: In 1954 over one million passengers crossed the North Atlantic by air, thus exceeding the ship carryings which attained 840,000 voyagers.

(7) The cost of passenger travel has decreased from the original twelve cents to approximately 7 cents a mile. Over longer distances, travel by aeroplane has become cheaper than by vessel or railway.

(8) The distances which can be flown without a single landing, for commercial purposes, have increased to over 2,000 miles.

(9) The regularity of commercial flights and the world-wide network of regular (scheduled) operative routes represent another outstanding feature of modern air transport. At least 90% reliability has been achieved in the completion of schedules.

(10) Now that limits have been reached with conventional propeller-driven engines, research is being directed towards jet-powered transport aircraft in an effort to increase maximum speed. The first regular air transport service with jet-powered aircraft was inaugurated by B.O.A.C. on May 2, 1952, but it was called off in 1954 because of a series of mishaps. Obviously, there is a need for further improvements before jets can enter international air transport on a larger scale. However, this appears to be a question of one or two years only.

(11) For the sake of the completeness of the present survey we should mention also the role of aviation as a means of war. How the air arm is ranked in national defence compared with the army and navy can be best described by figures given by President Eisenhower in his Budget Message to Congress for defence funds for the 1955-56 fiscal year. Of a total of $ 34,100,000,000 requested, the following sums were provided for three services of

armed forces:

Air Force	$ 15,600,000,000	($ 400,000,000 more than previous
Navy	$ 9,700,000,000	($ 75,000,000 less " " year
Army	$ 8,850,000,000	($ 50,000,000 " " " "

This example probably reflects the general attitude of all the other great powers. This phenomenon has greatly influenced some of the most vital problems connected with aviation in general, especially in its civil and commercial aspect. The fact that aviation is considered today as the most important part of national defence gravely impedes its free growth as a means of peaceful international intercourse.

Now, on the basis of the above survey, we are in position to attempt to sketch the main economic, social, and political characteristics and advantages of modern air transport.

(a) Because of such qualities as speed, safety, and possibility of penetrating into the most remore areas, the economic role of aviation is manifold. Fast airliners today connect almost every point of the civilized world, and thus speed up business, help to discover new natural resources and afterwards to put them quickly into profitable production. Furthermore, aviation helps develop regions which are either poor in communications or not provided with transport facilities at all. Although still operating on a modest scale, air transport also provides quick distribution of goods (particularly those with high value or of a perishable nature). A considerable part of the mail, especially between continents, today is carried by air. This again fosters and promotes international trade operations. By perfecting high powered engines and developing the light metal industries, aeronautics is an outstanding factor in our general technical progress.[16)]

At the same time, aeronautics provides jobs, directly or indirectly, for a fast-growing number of people all over the world.

The part aviation has played in agriculture is steadily increasing; no other means of transportation can fight parasites and the spread of disease in agriculture more effectively.

Summing up, it is possible to state that aviation ranks high among the bases of a modern nation's economic strength, and it represents an expanding economic power.[17]

(b) In the social field, aviation is performing a superbly fine task in bringing more closely together the people of different nationalities, races, and cultures. Such mutual contact enables them better to appreciate and to know one another's achievements. Today, within a few hours, it is possible to go from one civilization to another completely different. Through such direct intercourse, with its tendency to diffuse cultures and techniques, and to reduce the differences among civilizations, aviation is serving perfectly the idea of a world community and is contributing its share to a united world.[18]

On the other hand, within the national boundaries, aviation has brought metropolitan centers within easy reach of those in rural and inaccessible areas. By bringing medical supplies and the torch of knowledge to remote regions, air transport is fullfilling another highly humanitarian task. Sometimes in elementary distresse an aeroplane is the only adequate means whcih can swiftly bring relief to a population threatened with disaster. Judged in terms of its social implications, the service thus rendered by aircraft is of greater relative importance than its speed.[19]

(c) The influence of aviation on political intercourse and development, both at the national and the international levels is enormous. Aircraft have greatly increased the area over which government can exercise effective power to maintain order and justice.[20] Within a nation's frontiers, aviation has contributed considerably to easier administration; it has created possibilities of greater centralization and uniformity in public administration.[21] In brief, it has produced the necessary conditions for the efficient operation of the complicated machinery of a modern state.

On an international scale, it has opened up unprecedented opportunities for regular and quick personal contact among statesmen of the world, whenever a situation requires their meeting. This is of the utmost importance, particularly at the present time when so often the question of peace depends upon speed of action. An aircraft is today considered more and more as an indispensable part of a statesman's equipment. No other means of transportation could replace its services and the role it plays in modern diplomacy.[22] Apart from this, it is believed that modern aviation has created the technical possibility of a world police force capable of preventing aggression. As Q. Wright says, "detailed studies have suggested that by a suitable distribution of bases and the organization of a relatively small policing force of reconnaissance, combat and bombing planes, international government could today prevent aggression and maintain justice and order throughout the world."[23]

In addition to what has already been said, further progress can be seen in the geographical routes that aircraft are just

commencing to fly. Air transport is taking increased advantage of the shape of our planet by travelling the shortest distance from point to point simply by following the great circle routes over the Arctic. The first commercial, scheduled flight over the North Pole had taken place by the end of 1954 (S.A.S., operating on a route from Los Angeles to Copenhagen). Soon afterwards, another company announced that it would open a service by a trans-polar route beginning in May, 1955 (C.P.A.L., on a route from Vancouver to Amsterdam).[24] There is every reason to believe that these pioneers will soon find their imitators, because the air route across the Arctic regions considerably shortens the distances from the U.S. West Coast, and the Pacific North-West, to Europe and the Mediterranean. These and many other developments in air navigation, not specifically mentioned, such as rockets, guided missiles, etc., give an idea of the large area for further progress which lies ahead. In spite of all these almost incredible achievements, 'air civilization' may still be considered as far from its peak.

3. Freedom of Passage and Right to Trade - the Key-Problems of Modern Air Transport

So far an attempt has been made to stress the importance which, for the world community, transport in general and aviation in particular have played. It has been considered useful and necessary to give certain space to various aspects of aviation in order to understand the complex legal problems which emerge therefrom. Human flight attracted the attention of jurists even before it could serve any serious practical use. The first legal discussions took place during the Franco-Prussian war in 1870, although the real birth of air law should be placed at the beginning of the Twentieth Century, shortly before the first successful engine-powered flight by the Wright brothers. The main question which has faced air law since its inception is the problem of the legal regime of airspace and the related question of air traffic. In the days when Fauchille[25] and Nys[26] commenced to draw the attention of the legal world to these problems, such problems were of a mere academic interest. Whatever their proposals might have contained, they were of no practical use until human flight had become subject to some degree of control. Nevertheless, it is interesting to emphasize that Fauchille and other early jurists concerned with legal aspects of air navigation, anticipating the approaching revolution in the flying art, realized from the very beginning that future of this new means of transportation will greatly depend upon the legal determination of flight space.

Acting, apparently, more on their feelings than upon actual technical development at that time, the pioneers in air law were led to believe that airspace was going to become in the future a new highway for international commercial intercourse, along with land and sea routes. Although before World War I, international air traffic had not yet become a reality, it is important to note that the first problem which these jurists found confronting them was whether the air, like the sea, should be free, or whether the state could exercise sovereignty over its airspace, - in the latter case, either a sovereignty 'usque ad sidera' or sovereignty up to a certain altitude.[27] Apart from the various positions which they have defended in attempts to solve that problem, it appears that all of them had continually in view the practical questions which arise when flight becomes controlled by men. On the other hand, their legal concepts were generally based on the conviction that the airplane will serve mainly peaceful purposes.

In the discussions which followed during the first decade of the Twentieth Century, it seems that all the participants were in agreement at least in one point, - namely, that air navigation among different states should be made legally possible and fostered.[28] The question on which there was no agreement was through what legal regulations this could be brought about: (1) Through the unrestricted freedom of air traffic based upon the denial of any sovereign rights of states in airspace; (2) through the recognition of such a sovereignty but restricted with the right of innocent passage; (3) upon special permission, while recognizing the states' complete sovereignty in superjacent space.

When aviation succeeded in proving itself to be of the utmost use as a tool of national policy, and showed its many advantages, particularly as a means of war, the rigid rules governing the legal status of airspace and of flight were quickly and uniformly accepted. At the outbreak of World War I, the majority of states had already erected artificial barriers around their national territories, and this attitude received international confirmation and sanction at the Paris Conference of 1919, and again twenty-five years later at Chicago. As a result of the creation of a weapon of war out of a new method of transport, "civil aviation has come to be regarded in a wrong perspective, that is to say, as a potential instrument of destruction instead of as a means of facilitating communications between nations, with consequent benefit to the cause of world peace."[29)]

Nevertheless, this attitude of the various countries, together with the destructive performances of the air arm, could not minimize the importance of aviation in international commerce. Simultaneously, while developing as a more and more important weapon, the role of aviation was increasing as a means of communication. This evolution corresponded to general tendencies in world affairs: On the one hand, international cooperation and organization in the technical, economic, humanitarian and, sometimes, political fields have been more generally accepted, were more comprehensive and more active than ever before; on the other hand, the world has, at the same time, witnessed large-scale preparations for war, and then war itself, accompanied by barbarities unprecedented in human history. Such

were the conditions of world politics in this period which Q. Wright has described as "barbarities in the service of national power and expressions of allegiance to the most universal ideals."[30]

However, despite wars and the almost continuous international tension in this 'air century, aviation has been given a chance to demonstrate its value as a fast and reliable means of transport. Nevertheless, the results achieved would certainly be far better had the attitude of the world states been shaped more by interests of international community (which in the final analysis reflect and represent the interests of each individual nation) than by selfish and narrow nationalism.

The only boundaries which could, and actually did, slow the progress of aviation in serving the necessities of friendly world intercourse appear to be - "those invisible political boundaries which nations may maintain for their real or fancied security or to protect their national economy or international prestige and position."[31] Many efforts have been made in the past, especially by scholars, to find out a suitable solution for international air navigation to satisfy both the needs of world air commerce and the sensitive feelings of the states as to their sovereign rights. A great number of bilateral, and several multilateral air agreements have been concluded in the last few decades, but all these attempts have failed to settle the most essential issue for world air transport - the problem often called 'freedom of passage' - freedom to cross those artificial, invisible frontiers, erected vertically along the surface boundaries of the states concerned, without obtaining

prior permission by the state flown over. The only point where all the nations have found themselves in complete agreement is in their claim that "each nation can limit air commerce over its own territory as it sees fit, and that no other nation can question its right to do so."[32)]

It is an axiom which does not need any supporting authority that world commerce cannot exist without transport. Transport itself, on the other hand, will be of a limited use if it does not operate free of unnecessary artificial obstacles. On previous pages the important part that aviation plays in the world system of communications has been established. Without the services of aircraft, communication would be deprived of its fastest medium of transportation. However, ever since air transport became a fact, it has had more restrictions imposed upon it in its life time than there have been on any other means of communication. All essentials of these restrictions are based on international multilateral agreements and claim to be in accordance with the existing principles of international law.

It is true that international law is (or perhaps it is better to say, 'was') primarily 'un droit individualiste', i.e. a law established with the main purpose of protecting the interests of the individual states. Nevertheless, besides this function, modern international law has been continuously developing new principles expressing collectivist ideas, the principles of which are not established in favour of individual states, but in the interest and for the benefit of all nations, to serve the needs of the world community.[33)]

More than in any other field of human activity and international regulation this idea of common interests has penetrated into the field of transport, or more exactly, surface transport. Recent examples of these concepts reflecting the need and spirit of international co-operation may be found in the Barcelona Convention (and annexed Statute) of Navigable Waterways of International Concern of 1921 and the Geneva Convention on the International Regime of Maritime Ports of 1923.

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Perhaps this is the proper place to recall certain principles regarding international commerce and the sea navigation as laid down by two great jurists and scholars of the Middle Ages - Hugo Grotius and Vattel. Their progressive ideas and brilliant legal analyses of the problems of their time affecting international commerce have considerably influenced the general thinking along these lines and thus, indirectly, have created the basis for future, more liberal attitudes of nations toward common necessities. These two classic examples are chosen here for two main reasons; namely, because (1) they have, in a crystal clear manner, established the legal principles, which soon became part of positive international law; and because (2) their teaching reflects to a certain degree two different approaches to the subject. The latter contention requires an explanation. As will be seen, Grotius's views represented an extreme in the liberal treatment of international commerce, whereas those put forward by Vattel were based on a more realistic position. Vattel considered a state's interests as summa lex, whilst it seems that

for Grotius the interests of international trade and commerce took first place. Both of these men had in common the deep conviction that international commerce represents a condition sine qua non of the development of mankind. In this sense they were both partisans of collectivist ideas which have been mentioned before.

Hugo Grotius was the first who clearly expressed new views on international commerce and communications. In the beginning of the Seventeenth Century, he prepared his famous "De Iure Praedae Commentarius" in which Chapter XII, to appear earlier than the whole treatise, separately, in 1609, under the title "The Freedom of the Seas, or a Dissertation on the Right of the Dutch to Carry on Trade in the East Indies", [34] contained his celebrated theses on the freedom of the seas. Here Grotius presented four principles of which three (in his enumeration: Thesis (1), (3) and (4) are of special interest for us. These principles are as follows:

(1) "Access to all nations is open to all, not merely by the permission but by the command of the law of nations."
(3) "Neither the sea itself nor the right of navigation thereon can become the exclusive possession of a particular party, whether through seizure, through a papal grant, or through prescription (that is to say, custom)."
(4) "The right to carry on trade with another nation cannot become the exclusive possession of a particular party,..." [35]

In thesis (1), Grotius declared that "by the authority of that primary law of nations whose essential principles are universal and immutable, it is permissible for the Dutch to carry on trade with any nation whatsoever." [36] Consequently, Grotius arrived at the principle that "anyone who abolishes this

system of exchange, abolishes also the highly prized fellowship in which humanity is united. He destroys the opportunities for mutual benefactions. In short, he does violence to nature herself.....Therefore, the right to engage in commerce pertains equally to all peoples".[37] Continuing, Grotius reached the conclusion according to which " the Portuguese, even if they were the owners of the regions sought by the Dutch, would nevertheless be inflicting an injury if they prevented the Dutch from entering those regions and engaging in commerce therein."[38]

This latter position is, however, not so clear, either as a legal or economic proposition.[39] The conclusion which flows is that there exists the general right to navigate and trade within the foreign territory, enter the national ports as may be desired for commercial purposes, even against the will and interests of the sovereign authority. In the days when Grotius pointed out this view, it was far from being the law among nations. However, later, because of the growing needs of international society for exchange of goods, the freedom of access to foreign maritime territories known as the 'right of innocent passage' and the privilege to enter ports for commercial purposes won international recognition by custom and treaty. Nevertheless, the basis of these freedoms granted to international shipping does not lie in Grotius' "right to trade", since such a right does not (yet) exist in international law, but it forms, however, the legal basis of the so-called 'ius communicationis' theory, which is to be dealt with later.

In thesis (3), in analysing the questions of the sea, Grotius reached the conclusion that "no part of the sea may be regarded as pertaining to the domain of any given nation" [40], considering it "impossible that any private right over the sea itself (for /he made/ an exception in regard to small forks of the sea), should pertain to any nation or private individual, since occupation of the sea is impermissible both in the natural order and for reasons of public utility." [41] Continuing he stated that it would be "unjust to deny the right of passage (that is to say, of course, unarmed and innocent passage) to men of any nation..." [42] Accordingly, Grotius said, "the Dutch plea rests upon a universal right, since it is admitted by all that navigation of these seas is open to any person whatsoever, even when permission to navigate them has not been obtained from any ruler." [43] The principles contained in this thesis afterwards won general acceptance and are known under the name of 'freedom of the high seas'.

Thesis (4) Grotius commenced with the following remark: "Under the law of nations, the following principle was established: that all men should be privileged to trade freely with one another, nor might they be deprived of that privilege by any person" [44], because freedom of trade "springs from the primary law of nations, which has a natural and permanent cause, so that it cannot be abrogated." [45] Moreover, according to Grotius a "just cause of war exists when the freedom of trade is being defended against those who would obstruct it." [46]

Another great scholar, Vattel,[47] while in agreement with Grotius as to the regime of the high seas, expressed more cautious views regarding the aforementioned rights to trade than his famous predecessor. Vattel's ideas on the subject of international commerce reflect not only the long followed practice of states but also the principles of positive international law. Two centuries after they were originally stated, the following simple and clear words of Vattel still express the law in force among sovereign nations:"A Nation...has no natural right to sell its goods to another Nation which does not want to buy them; it has only an imperfect right to buy from others what it has need of.....Men and sovereign States may, by their promise, bind themselves by a perfect obligation to do things in respect to which nature only imposes an imperfect obligation. As a Nation has not by nature a perfect right to carry on commerce with another, it may obtain such a right by an agreement or a treaty.....The treaty which gives a right to commerce is the measure and the rule of that right."[48]

What follows is a direct argument a contrario of Grotius' thinking:"Nations, like individuals, are obliged to trade with one another for the common advantage of the human race, because of the need men have of one another's assistance; but that does not prevent each one from being free to consider, in individual cases, whether it is well for it to promote or to allow commerce..." Should a nation, concludes Vattel, under certain circumstances, come to regard foreign trade as dangerous to its interests, "it may give up and prohibit it." However, there must be "grave and

important reasons" to do that adds Vattel.[49] Nothing needs to be added to this brilliant explanation of the 'natural rights' of nations which eventually came to be incorporated into the positive law of nations.

It might be of interest now to point out Vattel's view upon the question of mutual commerce between nations in order to understand what he considered as a moral obligation binding states in their relations: "Nature rarely produces in one district all the various things men have need of" -wrote Vattel - "one district abounds in this, and another in that; if all these districts trade with one another, as nature intended, none of them will be without what is necessary to them.....Such is the foundation of the general obligation upon Nations to promote mutual commerce with one another."[50]

Vattel demands of nations that they should not only engage in such commerce as much as they reasonably can, but, moreover, they should also protect and facilitate this trade. "Nations are...obliged to maintain the freedom of commerce, and they should not restrict it in any way without necessity." The restrictions which one state may impose in determination of its commercial relations should be, according to Vattel, "considerations of utility and safety." This provision, which at the first sight seems rather ambiguous, Vattel explained while dealing with treaties upon which the individual states may base their commercial relations. Said Vattel: "...all commercial treaties which do not transgress the perfect rights of another

are permissible between Nations, and no opposition may be made to their execution."[51]

These conceptions of Vattel had a great influence upon subsequent international commerce, because they have generally expressed the interests which nations considered as a basis of their sovereignty. However, though emphasizing the 'natural right' of nations to enter into such commercial relations which seem good to them, Vattel nevertheless stressed many times the 'general obligation' of states to "promote mutual commerce." Hence it appears that both contentions, in Vattel's teaching were of equal importance. That he put a stronger emphasis on the rights of individual nations might be explained historically. The liberal and, in this respect, unrealistic ideas of Grotius, which were intended to favour primarily the needs of international trade, were, at the time Vattel wrote his book, so popular that he felt it necessary to demonstrate the problem from another angle, putting a stronger accent on the rights which belonged to individual states.

As has already been said, the common universal needs expressed by both Grotius and Vattel, and eventually by many other scholars, found wider application in the international community through the continuously increasing economic necessities of this community. They have considerably contributed to the realization of the fact that the world community cannot exist without normal, unobstructed commercial intercourse. This is particularly true in our modern times when the notion of 'international community' does not represent only an empty word or

a dream, but a reality. The condition sine qua non of the existence of that community depends upon normal commercial relations among its members, and this condition cannot be accomplished without the help of all available means of transportation. The old saying - 'navigare necesse est' - should be understood today as embracing also the newest element of navigation, that is to say, the space above the surface of both the earth and the sea.

To achieve this goal of normal international commercial intercourse, and thus to satisfy the growing needs of the world community, transport ought to enjoy certain essential, internationally recognized and respected facilities. In other words, the means of transportation should be given the opportunity to perform their economic and social functions which consist in carrying or conveying people or goods from one place to another, or from one country to another. To perform international carriage, it is essential that the means of transportation be allowed to have access to foreign territories. This access appears to be twofold, namely: (1) the access which is comprised of a mere transit across foreign territory, i.e. when the passage across such territory is "only a portion of a complete journey beginning and terminating beyond the frontiers of the country across whose territory the traffic passes"[52]; the access to the place of destination situated in a foreign territory where usual commercial operations, of which transport is only a medium and condition, will take place. The first form of access one might call the 'imperfect' one and the second, the 'perfect' one. These two kinds of access, although they may seem to be substantially different (and they are, indeed, different from the point of

view of the individual state), are actually, in our opinion, the two sides of the same thing.

The mere transit certainly does not fulfil any definite object, since the raison d'être of international carriage, whatever kind it may be, does not consist in transit itself, but in transporting (persons, godds, or mail) from one certain place to another determined point. To complete this task of conveying, every means of transportation serving international commerce will necessarily take advantage of all forms of transit in order to reach the destination point if the route so requires. Consequently, the grant of transit rights solves only half of the problem of international transport; it facilitates its execution but does not consummate it. While it is true that the "ability to cross the territory of one or several states is... in many instances, essential in order to exercise the right to make a journey beginning and terminating in two far distant states"[53], it is equally or even more essential for the accomplishment and the justification of the said journey to bring the passengers or cargo to their destination. Here lies the real raison d'être of transport as a means of economic and social intercourse. Therefore, when we say 'freedom of passage' in this sense, we actually mean both freedom of transit and freedom to complete the international transport operation, the latter consisting in embarkation and/or disembarkation of passengers and/or cargo.

The right of innocent passage through territorial sea, a right which has existed for quite a long time as an indisputed rule of international law, in our opinion cannot be,

practically speaking, separated from the privilege to enter foreign ports (open to international commerce, of course) and to perform there normal commercial activities. Without this privilege, even the most liberal regime of territorial sea would be a mere imperfect right.[54] Thus, sea navigation and maritime commerce, after certain transitional periods in the past, enjoy today the freedom of passage which enables them to fulfil their international assignments. The same cannot be said for air navigation and air commerce. The present arbitrary rights of states to control international flight by barring or admitting foreign aircraft, irrespective of the effect their decision may have on world commerce and on the interests of other nations, directly influence the development of the world community. In the field of aviation there does not exist the universally recognized 'freedom of passage' as on the sea; to fly an aircraft from one country to another requires, at times, long negotiations and, when the permission is onee granted, rarely does the concluded agreement reflect properly the needs of international air transport and its economic possibilities as well. This is the present situation with respect to international air transport which, more than any other means of communication, depends upon the grant and exercise of transit rights in order "to achieve its main purpose, which is the exercise of commercial rights."[55]

As pointed out before, freedom of passage does not exist in air law as a general rule (not even in its narrower, imperfect meaning). The airspace above national territories is considered

to form an inseparable part of the state below, which means in practice the 'sky-highways', often of extreme importance to international air transport, are divided, even sectioned, between the individual states which dominate as they find suitable such sections of the international air routes. Such a situation greatly aggravates international air transport and sometimes makes it almost impossible. Particularly is this true in the operation of international scheduled air services. The latter, at the present time, form the most important part of world air transport, and their role in the universal communications system is continuously increasing. As it is now, they can efficiently operate only by virtue of private agreements between affected states, and what facilities they are granted depends almost entirely upon the bargaining strength of the parties negotiating. The present international legal framework with respect to these services is absolutely inadequate to comply with the necessities of world transport.[56] As the following pages will attempt to show, this state of affairs has advanced surprisingly little in the past three decades; "inability to agree on the vital questions involved has long robbed the world's air lines of an internationally valid legal framework for their operation."[57]

The most recent international multilateral agreement on the subject, the Chicago Convention on International Civil Aviation of 1944, although generally considered an improvement in comparison with the Paris Convention of 1919, with respect

to scheduled international air services, did not mark any advance. Of two ther Chicago acts which were intended to compensate for what failed to be achieved by the general Convention, the Transport Agreement never gained enough support, whereas the Transit Agreement, though an encouraging step forward, is, at first, limited in scope (granting only navigation facilities of technical character), and secondly, confined to only two thirds of the members of ICAO and, finally, can be denounced at one year's notice. If world-wide civil aviation is to operate on the largest possible scale, limited only by the degree of its technical development, and thus serving at its best the needs of international commerce and trade, a new, more liberal, and more stable legal basis has to be found. Inevitably, as the most important and the most urgent problem confronting contemporary civil aviation activities, the solution to freedom of passage should be sought on a universal (as much as possible) and permanent basis. Still, freedom of passage should include not merely technical and transit facilities, but should, at the same time, actively contribute to international air commerce. Present aviation law should be, in this respect, remodelled so as to meet the requirements of modern air transport. The primary role of law is not to hinder human relations and the development, petrifying the 'status quo', but to promote and facilitate them. As it appears at present international air law does not serve this aim.

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As indicated in its title, this thesis is an attempt to analyze the historic development of the principles and rules concerning the grant of passage and exercise of commercial rights in international civil aviation. It is believed that this scope cannot be properly accomplished without commencing the analysis with a brief survey of the origin and the legal nature of the right of innocent passage in territorial sea. Although the writer does not hold that there is any relevant analogy between the legal status in force at sea and in the air, however, he feels that irrespective of that, in the interest of the further progress of international air transport, certain positive principles established in favour of shipping could find their application also in air commerce. On the other hand, as the subsequent pages will show, maritime principles played an important part in the thinking of the early scholars, dealing with the status of airspace; hence, in order to understand their theories, it is necessary to state the origin and the present position of international law regarding the status of territorial sea.

The ensuing pages give, in retrospect, the now historical controversies which took place, at the beginning of the Twentieth Century, among jurists trying to determine the legal status of the air and the rights to be accorded to international flights. There then follows the analysis of the relevant provisions of the first international convention on air navigation, the Paris Convention of 1919, which laid down the principles as to the regime of superjacent space, and the freedom of passage which

since then have formed a part of positive international air law. The analysis of the Havana Convention of 1928 and the survey of the practice of states with respect to the international air transport between two world wars complete this part of the work. In the following chapter will be found an analytical description of the particular proposals submitted at the Chicago Conference by the various national delegations, i.e. by the United States, the United Kingdom, Canada, Australia and New Zealand. Although these proposals have now, more or less, only an historical significance, nevertheless, some of the ideas put forward might be of some use when and if the next attempt to set up a new framework for international air transport is made. Then the Chicago acts are dealt with - i.e.: the permanent Convention of 1944, the Transit Agreement, and the Transport Agreement. The Bermuda Agreement, the proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport, the plans for regional solution of air transport problems, and the doctrinal suggestions as to those problems, are dealt with on subsequent pages. The final part of the thesis is dedicated to the general appraisal of the present position of international air transport.

This thesis does not pretend to offer any easy solution to the problems involved. Its aim and contribution, if any, are to set forth the nature of the problems viewed from the several points of view, as indicated above. From the comments and analysis of the subject under discussion, the reader will easily understand what the author deems necessary to improve in the present regulations governing international air transport.

C H A P T E R II

THE ORIGIN AND THE LEGAL NATURE OF THE RIGHT OF INNOCENT PASSAGE IN TERRITORIAL SEA

1. The Origin and the Notion of Territorial Sea

The legal concept of territorial sea (territorial waters), as the narrow portion of the sea adjacent to a coast is generally designated in international law, has not existed from time immemorial. In ancient times there was not any special or generally recognized notion regarding rights of coastal states over the sea. Attempts made to monopolize certain areas of the sea or even the whole seas, were not based upon legal arguments, but exclusively upon the 'right of might'. Ancient states in the Mediterranean such as Phoenicia, Carthage, Athens or Rome did not limit their maritime claims to any determined portion of the seas. The extension of their maritime dominion depended entirely on the force of arms. When such pretensions collided with the interests of another equally mighty neighbour, the problems used to be settled by negotiations (as e.g. the treaty of 348 B. C. between Rome and Carthage). This period was characterized by the position that the sea belongs to those who actually control it. Therefore, it is no surprise that Roman law did not even mention questions connected with the status of coastal waters. All seas known and navigable at that time were comprised in the Roman Empire, which exercised jurisdiction and (as a correlative) - protection over them. No qualification was

made for adjacent seas. On the other hand, Roman imperium over large sea surfaces, ('mare nostrum') cannot, in legal terms, be identified with the later claims of sovereignty over seas and oceans such as were to be put forward in the Middle Ages. "In sum" - wrote Potter - "it cannot be said that either Athens or Rome held a maritime dominion recognised by a law among independent states as legally valid, in spite of their naval supremacy, their success in suppressing piracy, and the ideas and feelings of historians and poets regarding their position in general."[1)]

Already at this early period the sea was regarded primarily as "un voie de communication".[2)] The sea was considered to be, on the whole, common to all, res communis omnium, i.e. incapable of private or public appropriation. There was no distinction made between the sea adjacent to the shore and the open sea.[3)] It should be emphasized that the Roman jurisconsults did not consider the problems connected with the seas as questions of public law. The main problems concerning the seas which faced the Roman law were the questions of the pure private law.[4)] The celebrated formula of Marcianus as reproduced in the Institutes of Justinian should be interpreted in this sense - " Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris."[5)] Almost identical words were used by authors cited in Digest - Celsus, Pomponius, Paulus and Ulpianus. Thus, Roman law did not supply the legal basis for sovereign claims of any portion of the seas.

It is in the writings of the Italian glossators and

postglossators of the 13th and 14th centuries that we first meet with doctrinal efforts to include portions of the sea within the maritime jurisdiction of the littoral state and to find some legal ground for such claims.[6] According to Raestad the notion of territorial sea was first conceived by the great Perugian jurist, Bartolus de Saxoferrato, in a gloss to the chapter "De Electione" in his "Liber Sextus Decretalium Bonifacii VIII cum glossis." He declared that the 'districtus' of a maritime city-state comprised, besides its land territory, a certain extent of the sea, namely a distance of not more than two days of sailing from the coast, i.e. about one hundred miles off the coast. Within this area, according to Bartolus, the ruler had power to apprehend and punish offenders just as he had on land. Bartolus' idea soon found number of followers, particularly in Italy, but they were certainly not faced with an easy task in having to extract from old Roman texts, which were definitely not in favour of such ideas, conclusions which would support the establishment of special rights at sea, unknown to the existing law of the time. The glossators and their followers had solved the problem in a very peculiar way, as Raestad remarked, by invoking conclusions from the canon law while interpreting Roman texts.[7]

To Baldus, a pupil of Bartolus, one may, perhaps, attribute another important step in the development of the legal status of coastal waters; namely, the inclusion of sovereignty (potestas) and jurisdiction among the rights of littoral authority. He declared that the adjacent sea pertained to the territory

of the coastal power, and with that statement he approached closely the modern theory of territorial sea.[8] Essentially identical claims, though not based upon the same legal ground, were put forward in Northern Europe too. Raestad mentions, as an instance, the treaty between Norway and Russia of 1.326 in which the sea and the land belonging to the king of Norway were described as his territory.[9]

Established thus about the Fourteenth Century, the legal notion of territorial sea further developed in all seas independently, and as the need arose, without special agreement between states. Subsequent dominion sought by a few powerful maritime states over the seas and oceans has nothing to do with the notion and evolution of territorial sea. This notion is older than the dispute about mare liberum, since the latter was related only to the high seas, and arose at the time when the status of coastal waters was already more or less internationally accepted. Wrote Bustamante:" Il y avait une mer territorial, à certain fins, quand nul n'avait pensé et ne pouvait penser à la domination des océans... Il y eut une mer territorial quand la haute mer n'était pas libre, parce que ceux qui s'attribuèrent la domination de celle-ci ne prétendaient pas avoir pour frontière la terre même des autres riverains."[10] According to Raestad,[11] in the Sixteenth Century the idea that to the coastal state belongs jurisdiction over waters adjacent to its land area was already well recognized, though not with the great precision, particularly regarding the breadth of the territorial sea.

2. The Evolution of the Right of Innocent Passage and its Position in Positive International Law

One cannot establish with certainty when the right of innocent passage became a rule of international law. Apparently it developed gradually and by usage and recognition by states as is the case in any other principle of customary law.[12] The geographic discoveries of the 15-17 centuries with the enormous possibilities disclosed in the all-sea routes to India and the New World, together with the corresponding increase of maritime industry no doubt greatly supported the claims for the freedom of transit. Since it was in many occasions almost impossible for vessels of one country to reach the new territories without passing through the coastal waters of another country. In the days when the Spanish and Portugise claims for the sovereignty over vast portion of the oceans culminated, the English Queen, Elizabeth, made a famous statement refusing to admit any right of Spain to prevent her subjects from trading. When Mendoza, the Spanish ambassador, complained of the intrusion of English vessels in the waters of Indies, the Queen firmly declared that the "use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permitteth any possession thereof."[13]

Elizabeth reaffirmed the same principle also in the instruction she gave to the English ambassadors to Denmark in 1602. They were to declare that navigation on the open sea as well

as the use of ports and coasts of "Princes in amity" for the sake of traffic and the avoiding of the dangers of tempest, was free, so that if the English were debarred from the enjoyment of these "common rights", it could only be in virtue of an agreement.[14] Elizabeth was thus the first among the rulers to proclaim freedom of the seas in the modern sense.[15] On the other hand, that part of Elizabeth's statement, where she mentioned the existence of "common rights" regarding the use of ports and coasts, is, for our purposes, even more important. Hence Queen Elizabeth appears to be, to our knowledge, the first sovereign to declare clearly the existence of the right of (innocent) passage. Whatever interpretation be given to Elizabeth's declarations, the fact is that they definitely confirm that the problem of innocent passage at that time had already acquired a practical significance and had raised important diplomatic problems.

One can use as evidence the fact, that in the beginning of the 17th Century innocent passage through territorial sea was already well established in practice, that even opponents of the freedom of the seas such as Selden and Gentilis were willing to recognize this privilege of foreign vessels.[16] Those who attempted to deny this principle had to expect a firm reaction. Further, it may be reasonably assumed that this principle became a rule of customary international law before the principle of the freedom of the seas was universally accepted. It seems to be fair reasoning to say that the principle of innocent passage was generally recognized in practice of states from end of the 17th Century, and therefore may be considered as the customary rule

of international law for at least two centuries.[17] The existence of this principle is reasonably described as a consequence of the freedom of the high seas, for without this right the use of the seas and oceans would often be essentially limited.[18] According to Jessup, the right of innocent passage "seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters."[19]

There is today no dispute that "every state has by customary international law the <u>right</u> to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other state."[20] No nation would be willing to contest this principle. An attempt made by a coastal state to prevent free navigation through its territorial sea, in time of peace, would, no doubt, promptly meet with strong opposition on the part of international community. There is not only complete agreement among the jurists about the existence of that right, but, what is much more significant, among the states as well. As Jessup stated, "as a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law."[21] As an example of universal acceptance of this principle, attention may be called to the text of Article 2 of the Barcelona Convention of April 20, 1921, on the Freedom of Transit, which provides that the "Contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters."[22]

At the Hague Conference for codification held in 1930, all forty-four states present were in favour of this principle,

which was adopted in the Final Act containing the proposed convention on the regime of territorial sea.[23] Again, this principle was restated in the tentative draft-convention on regime of territorial sea elaborated recently by the International Law Commission of the United Nations.[24] This Commission initiated the work on the codification of the law relating to territorial sea in 1951. As a basis on which the Commission has largely relied are the reports and preparatory studies of the Hague Codification Conference of 1930. At its sixth session, held in Paris from June 3 to July 28, 1954, the ILC adopted a number of "provisional" articles among which Art. 18 read as follows:

> "Subject to the provisions of these regulations, /enumerated in Art. 17, stating the meaning of the right of innocent passage/ vessels of all states shall enjoy the right of innocent passage through the territorial sea."

In comment of this provision, added by the ILC itself, it is said that this article "reiterates a principle recognized by international law.[25]

There is, however, a divergency of opinion as to the legal nature of innocent passage. The prevailing concept among authors places innocent passage within the category of international servitudes.[26] On the contrary, Gidel expressly refuses to accept this point of view, reaching the conclusion that it is impossible to establish the legal nature of innocent passage. According to him "il y a donc lieu simplement de constater l'existence du droit de passage inoffensif comme une règle coutumière du droit international en accord avec l'hypothèse que les hommes ont admise dans leur rapports, à savoir que les Etats doivent pouvoir communiquer les uns avec les autres dans toute la mesure où

cette liberté des communications ne porte pas atteinte à leur indépendence."[27)]

It is, however, of greater importance to define what is meant by the term 'innocent passage' and which passage should be considered as 'innocent'. An attempt to provide a satisfactory definition of innocent passage was made at the Hague Codification Conference of 1930 and it is included in Art. 3 of the proposed draft-convention, which reads as follows:

> "Le 'passage' est le fait de naviguer dans la mer territorial, soit pour la traverser, sans entrer dans les eaux intérieures, soit pour se rendre dans les eaux intérieures, soit pour prendre le large en venant des eaux intérieures.
>
> Un passage n'est pas inoffensif lorsque le navire utilise la mer territoriale d'un Etat riverain aux fins d'accomplir un acte portant atteinte à la securité à l'ordre public ou aux intêrets fiscaux de cet Etat.
>
> Le passage comprend éventuellement le droit de stoppage et le mouillage, mais seulement dans la mesure où l'arrêt et le mouillage constituent des incidents ordinaires de navigation ou s'imposent au navire en état de relâche forcée ou de détresse."

The foregoing definition necessarily gives rise to a few comments. In the first place, it should be pointed out that the definition is rather ambiguous and that the adopted description of innocent passage is not precise enough. One of the reasons for these deficiencies evidently lies in the fact that the definition is a compromise of different opinions; on the other hand, it would be scarcely possible to provide in such a legal document, which by its nature ought to be brief and concise, for all the abundance and variety of circumstances which may arise in practice. In any case, the provision contained in paragraph 2 should be more detailed, since in its drafted form it leaves it to the coastal state completely to decide which passage it may consider

as 'dangerous'.

Fortunately, long practice, and doctrine as well, has established certain universally accepted requirements which the vessel must fulfil in order to be considered in innocent passage while sailing through foreign territorial sea. These are of a technical, political,and economic character. So the vessel in passage must strictly follow the navigation regulations of the coastal state and keep to the international routes, must refrain from performing any operation which might be dangerous to the political and/or military interests of the coastal state; further, such a vessel must not exploit the resources of territorial sea or to engage in commercial operations at unauthorized places. Moreover, any unreasonable delay in the territorial sea, or the following of an unusual sea-route, might be regarded as an abuse of the right of innocent passage. Also, sanitary regulations of an international character or enacted by the coastal state must be respected in the passage.

Para 1 of Art. 3 raises another question which involves the content of the 'passage' itself. According to the adopted text, the 'passage' includes not only the mere passing through territorial sea, but also the "entering into the internal waters" and vice versa. In other words, this provision might be interpreted as considering as 'innocent passage' the entering of the vessels into foreign ports too, since the latter belong to internal waters. This point was controversial during the discussions at the 1930 Conference and the delegates of the USA (Miller) and the United Kingdom (Sir Maurice Gwyer) expressed the opinion that

the definition of innocent passage should not cover such passages where a vessel passes through territorial sea for the purpose of entering a port. The delegate of Norway (Raestad), however, declared that "when the passage is inoffensive it is always permitted."[28] In addition, he emphasized that the right of passage applies not only to the vessels which are merely passing along the coast, but also to those which are sailing to or from a port. This view was accepted; nevertheless, it cannot be said that it was clearly formulated in Art. 3 quoted before.

The ILC of the United Nations in a document cited earlier, with respect to the meaning of the right of passage, followed strictly the lines of the 1930 draft-convention. Paragraphs 1 and 3 of the 'provisional' Art. 17 adopted in 1954 in Paris, are identical to the corresponding paragraphs of Art. 3 in the Hague draft. The content of the phrase 'fiscal interests' from para. 2 of the 1930 draft has been now explained and this para. in the new text reads as follows:

> "2. Passage is not innocent if a vessel makes use of the territorial sea of a coastal state for the purpose of committing any act prejudicial to the security or public policy of that state or to such other of its interests as the territorial sea is intended to protect."

However, the foregoing formulation is not sufficiently clear yet and there still remains to be expressed just what is comprised in the notion of innocent passage.

As for warships, because of their very nature, the prevailing opinion is that they do not enjoy the right of innocent passage. This right was introduced into international law

because of the needs of international trade and commerce, to make possible necessary communication among nations. Warships do not serve this purpose; moreover, their presence near the foreign coasts can often be considered as a threat to the security of the coastal state, although it may not be necessarily attributed to hostile intentions. Therefore, we agree with Hall that "a state has...always the right to refuse access to its territorial waters to the armed vessels of other states, if it wishes to do so."[29] A contrary position is upheld by the ILC of the UN which in this case reiterated the provision of Art. 12, para. 1 as adopted at the Hague in 1930. By Art. 26 of the provisional draft-convention agreed by a majority to in Paris, 1954, warships "shall have the right of innocent passage through the territorial sea without previous authorization or notification." To the coastal state is accorded only "the right to regulate the conditions of such passage." Para 2 of this article lays down the rule according to which the coastal state "may prohibit such passage in the circumstances envisaged in Article 20." The latter should be cited here, particularly because, in the opinion of the Commission, it "states the international law in force."[30]

> "Article 20. Right of protection of the coastal state.
> 1. The coastal state may take the necessary steps in the territorial sea to protect itself against any act prejudicial to the security of public policy of that state or to such other of its interests as the territorial sea is intended to protect, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.
> 2. The coastal state may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that

> is necessary for the maintenance of public order and security. In this case the coastal state is bound to give due publicity to the suspension."

It is beyond the scope of the present thesis to analyze these provisions; however, it is submitted that, if accepted, such powers conceded to the coastal state could have grave consequences. Moreover, it should be pointed out that these provisions demonstrate an unfortunate paradox; namely, up to the present time, the liberal treatment of shipping has been taken as an example of how to foster international air traffic by submitting the latter to the liberal rules of sea navigation in the territorial sea. Now, it appears that the restrictive regime of airspace and the extensive powers of states in their flight space have begun to influence the thinking of those responsible for the codification of international maritime law. It is doubtful whether the provisions of this Art. 20, para. 2 express the international law in force as the ILC tries to assure us.

The judgement of the International Court of Justice of April 9, 1949, in the "Corfu Channel Case" did not throw more light on the general problem of transit since the case dealt with the right of innocent passage of warships through an international strait (Corfu Channel). The Court expressly refused to consider and deliver its opinion on the 'more general question', much debated by the Parties, namely, whether states under international law have a right to send warships, in time of peace, through foreign territorial sea, not included in straits. Said M. Zoricic, one of the Judges:"it is obvious that the Judgement

of the Court in the aforementioned case can by no means be applied to passage of warships thrpugh territorial sea."[31] This might be explained as evidence that in the Court's opinion the existence of such a right on behalf of warships is at least highly controversial.

However, the Court's Judgement seems to have laid down the basis of a new, progressive principle as to the duties of the coastal states with respect to navigation through the maritime belt under their sovereignty. Hence, one may find this principle inserted in the draft-convention on regime of the territorial sea prepared by ILC which in Art. 19 contains the following provisions:

> "1. The coastal state is bound to use the means at its disposal to ensure respect in the territorial sea for the principle of the freedom of communication and not to allow the said sea to be used for acts contrary to the rights of other states.
> 2. The coastal state is bound to give due publicity to any dangers to navigation of which it has knowledge."

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Concluding, the position with respect to international sea navigation may be briefly summarized as follows:

International law seems to have been generally adequate to meet the needs of peace-time sea navigation and sea commerce. It does not appear that the existing principles and rules have given rise to any serious international disputes. Speaking in general terms, it may be said that the high seas, territorial sea, ports, international straits, and canals have been open to all merchant vessels on terms of equality.

As regards the situation of the high seas, there seem to be only two questions at present which should be solved internationally in order to avoid possible disagreements and disputes in the future. First, there is the (older) question of criminal and civil jurisdiction over acts committed on board ship, and second, the problems connected with wide-spread claims regarding the extension of national jurisdiction and control over vast portions of the sea subsoil,and seabed (and in certain cases also over the sea surface) denominated as 'rights of states in their continental shelf'. At the present time, however, none of these problems as yet unsolved seem to affect, essentially, the universally recognized freedom of the high seas.

Whilst according to coastal states sovereignty in territorial sea, international law still lacks a uniform rule regarding the breadth of this part of the sea. Attempts have been made in the past to establish a uniform regime for coastal waters, but the differences of national views influenced by considerations such as defence, fisheries, and customs, have been too great for reconciliation. The problems are, at present, again under the study of the UN Commission for Codification of International Law (ILC). Anyway, it would be hard to say that these divergencies have created serious practical difficulties to international sea commerce. The right of innocent passage through the territorial sea is universally recognized. Similarly, the freedom of access to national ports, declared as open to international shipping, and equality of treatment in ports have,

with a few transient exceptions, been generally respected, although the Convention on Maritime Ports has not been ratified by all the important maritime powers.

The only restrictions of commercial character in national territorial sea appear to be a reservation of coastal navigation to the national shipping (cabotage). However, that which is considered as a right reserved by international custom to coastal states, has never been seriously contested in the international arena, and consequently cannot be regarded as a noteworthy obstacle to free international sea trade and navigation.

The international straits and canals have been for many years open in time of peace for the use of merchant shipping, without discrimination.

Summing up, one can say that international law has, in the field of sea navigation and sea trade, played the positive role in the past, setting up the principles and rules which have been generally adequate to the necessities of international shipping and which have, at the same time, promoted its development.

C H A P T E R III

THE FREEDOM OF PASSAGE AND AIR NAVIGATION - THE HISTORY

1. Early Controversies as to the Legal Status of Airspace

Although air law is generally regarded as a product of the Twentieth Century, yet, the Franco-Prussian War of 1870-71 seems to mark the starting point of the practical legal treatment of flight. The first known doctrinal dispute which/ took place at that time arose by reason of Bismarck's letter of November 19, 1870, to the U.S. Minister in Paris, Washburn, in which he warned the French that any foreign balloon passing over Prussian lines would be considered as engaged in spying. The French jurisconsult, Louis Ortolan, commenting upon this threat, strongly opposed its legal value. He asserted that the air should be treated in the same way as the high seas and, consequently, in the case of the French balloons passing over Prussian lines, the rules identical to sea blockade should be applied.[1] Simultaneously, on the other side, the German scholar Bluntschli pointed out that the occupying forces have the right of control over the air above the occupied territory up to a height which can be effectively reached by arms, i.e. by cannon. As to the airspace above the mentioned height, Bluntschli considered it as being no more subjected to such limitations: "If the 'aéronaute' passes above, he will evade the sovereignty of the foreign state and the laws of the occupying forces."[2] In other words, he applied to the airspace Bynkershoek's theory originally established for territorial sea.

On the basis of the aforementioned, one is in a position to draw the following conclusions: (1) Bismarck's letter, and eventually Bluntschli's contention, can be regarded as the first public statement of state rights over the air, and (2) Ortolan's, together with Bluntschli's, views represent the very first attempt at assimilation of the existing rules in force at sea with the rules to govern the regime of airspace. Both these scholars were trying to win the argument by standing on essentially the same legal ground. Eventually, at the beginning of the Twentieth Century, the most prominent jurists were grouping themselves around, and further developing, this legal view. Ever since there have been, among others, two kinds of attempt by jurists to settle the question of legal status of airspace, comparing the latter to the sea: The one, originated by Ortolan, seeking an analogy between the open sea and the air, and the other comparing territorial sea to the air. It seems to be of a certain amount of interest to describe, in brief, the main theories which were developed at this early period, with special regard to the views on the regime to be applied to air navigation.

The discussions which took place in the early years of the Twentieth Century were inaugurated by Fauchille's celebrated article "La domain aérien des Etats et le régime juridique des aérostats"[3], in which he proclaimed that the "air is free". Until the beginning of World War I, the debates were extremely contentious and the legal world was faced once again with a new 'battle of books', as it was wittily described by J. English.[4]

Freedom of the air or sovereignty of the subjacent states - that was the general question. Although the answer to this question was not, at the time of the sharpest controversy, of immediate practical importance, it seems that all the participants in the dispute were under the impression that upon the solution they found would be based the future principles of air navigation. It is impossible to deny the depth of their ideas, and their ability to foresee the future magnificent evolution of aeronautics, which all of them, irrespective of their controversial theoretical views, regarded primarily and perhaps exclusively as a future means of transportation.

As to whom airspace above national territories belongs, there were two main theories: Group I. The theory of 'freedom of the air' and, Group II. The theory which maintained that to the states belongs sovereignty over the superjacent air. The first group should be divided into adherents of the (a) theory of the freedom of the air without restrictions and the (b) theory of the air freedom restricted, either by certain rights accorded to the subjacent state or by the so-called territorial zone. The second group of theories can be divided into (a) theory of sovereignty without restrictions or limitations as to height ('usque ad coelum'); (b) theory which concedes to the states the sovereign rights up to certain limited height and (c) the theory of sovereignty but restricted by the right of innocent passage.[5]

The theory of air freedom without restrictions was most clearly and carefully elaborated by the Belgian scholar, Professor Nys.[6] In his opinion, to the air should be applied the institutions

and principles of maritime law, and consequently the principle of the complete freedom of the high seas ought to be extended to the air sea. Nys looked upon the air as a world sea, and upon air-vehicles as vessels sailing through this sea of air. Just as the sea itself is open and free to the maritime trade of the world, so the air-sea should be open and free to the aerial trade of the world.[7] Thus Nys based his theory upon the analogy of the sea. However, this view never succeded in attracting many supporters and its influence remained rather small.

To P. Fauchille, great French scholar, goes credit for the creation of the theory of the restricted freedom of the air. It was Fauchille who, in his previously mentioned famous article published in 1901, proclaimed the principle that the air does not belong 'à personne', that it cannot be appropriated and is even less subject to sovereignty, because the latter pressumes material possession. The substance of his theory was clearly expressed in his draft-code submitted to the Institut de Droit International at its Brussels meeting in 1902. Article VII of this draft-code read as follows:

> "L'air est libre. Les Etats n'ont sur lui en temps de paix et en temps de guerre que les droits necessaires à leur conservation. Ces droits sont relatifs à la répression de l'espionnage, à la police douanière, à la police sanitaire et aux nécessités de la défence." [8]

Fauchille felt that the recognition of state sovereignty over the air would place burdensome limitations upon the free movement of aircraft, but at the same time he considered that unlimited freedom of the air, on the other hand, would create

considerable dangers for the security and very existence of the states themselves. Thus he was faced with the problem of reconciling two principles - the nations' interdependence, and states' independence, both, in this case, applied to airspace. Being himself wholeheartedly in favour of the freedom of air traffic, the legal framework he elaborated necessarily was influenced by his feelings. The subsequent development of aeronautics, since the first Fauchille article appeared in 1901, had certain repercussions, which, it might be said, were negative to his original idea of rather extensive freedom of the air. Although in his article "La circulation aérienne et les droits des Etats en temps de paix" published in 1910,[9] he reiterated his belief in the principle that the air is free "dans toutes ses parties", yet he imposed so many restrictions upon this air-freedom, all in order to strenghten the national rights of preservation, that finally it appeared he almost admitted the sovereignty of the subjacent states.

From his (renewed) theory Fauchille has drawn the following consequences: (1) The subjacent state has the right to take those measures which are necessary for the security of its population.[10] The state can therefore prohibit the movement of aircarft below a certain height, except for the purposes of taking off and landing, voluntary or forced. Remarked Hazeltine commenting on this passage:"In thus fixing a zone of air from which the traffic of air vehicles is essentially excluded, M. Fauchille has ...greatly limited his doctrine of the freedom of

the air..."[11]

Fauchille first fixed the upper limit of his 'zone de protection' at 1,500 metres above the surface of the earth, but now he reduced it to only 500 m. (2) The second consequence flowing from Fauchille's theory consisted in the introduction into air law of certain 'prohibited zones' in which the state has the right to prohibit air navigation for reasons of its own security. (3) The states have also the right to safeguard their economic and sanitary interests in airspace; (4) The right of preservation permits the state to prevent passage above its territory of foreign military and police aircraft.[12]

These new views of Fauchille influenced also the Institut de Droit International, which adopted the following resolution in 1911: "La circulation aérienne internationale est libre sauf le droit pour les Etats sous-jacents de prendre certaines mesures à examiner en vue de leur propre sécurité et de celle des personnes et des biens de leurs habitants."[13] It should be noted here that at the meeting of the same Institute held in Gand in 1906, the adopted resolution began with essentially different words, i.e., "L'air est libre."

The other supporters of the limited, partial, freedom of the air, in formulating their theories relied more upon principles of maritime law. Thus Meili, another famous name in this group,[14] stated that the air should be declared free for all "as in the course of centuries the liberty of the sea has been proclaimed." The only limitations of this freedom

would be imposed by the necessities of the states' rights of self-preservation. He denied, however, the possibility of fixing the height of the zone where a state should have the right to enforce its prerogatives resulting from its considerations of security.

E. Catellani, in one of the most brilliant and comprehensive books on the subject which appeared in this period, considering the airspace as 'res communis omnium', said: "With respect to the innocent use for passage and as a way of communications, the whole air space is of common interest and should be considered as common to all mankind. Regarding the minimum necessary for the integration of sovereignty and for the defence of subjacent territory, the whole air space should be considered as an accessory of the corresponding territory. It is not the question of a freedom limited by certain rights reserved to the territory or of sovereignty limited by certain servitudes of passage, but the co-existence of two rights of which one extends to the whole world airspace and the other to the space corresponding to the territory of every single state."[15] Nevertheless, Catellani was not in favour of the idea that the basis for the formulation of his 'co-existing rights' should be found in any analogy. Thus he differs from the majority of supporters of the doctrine of limited freedom of the air.

Later developments fully justified Hazeltine's conviction that "first in importance" among the doctrines of sovereignty of the air was the idea of sovereignty without restrictions, up

to an indefinite height. This theory, eventually to become the rule of positive international law, was supported by a number of distinguished internationalists such as Gereis, von Liszt, von Ulmann, Zitelmann, Lycklama à Nijeholt, Hazeltine and Richards. Wrote Zitelmann: " Vertical partition only is possible, i.e. the air space is completely under the same sovereignty /rechtlichen Herrschaft/ as the land or the sea above which airspace lies. Every state has in the air space above its land or seas complete sovereignty to an unlimited extent above; the air is free only above terra nullius and above the open sea."[16]

Dutch lawyer Lycklama was equally categorical:"In principle, the airspace belongs to the sovereign state territory, so the state has full sovereignty to an unlimited height, which sovereignty can only be abolished or restricted by treaty."[17] She pointed out the shooting at German balloons by Russian border guards which ocurred in 1909 and again in 1910 and concluded that these incidents showed that Russian guards "considered the frontier they had to guard, to extend into the air..."[18]

Hazeltine and Richards both shared the views expressed above and held that the state's sovereignty can be restricted only voluntarily, i.e. by treaty. However, they were at the same time interested in reconciling the principle of full sovereignty with the necessities of future communications, for they were fully aware of the latter's importance. It seems that none of them had doubts as to the attitudes of states with respect to air navigation, which would, as they expected, be

favourable to air traffic. So Hazeltine wrote: "...states will naturally refrain from prohibiting aerial traffic; for such a prohibition in these modern days of international intercourse would be quite contrary to the self-interest of states." Anticipating the conclusion of an international agreement on air navigation, he predicted that the states would each thus "voluntarily - by treaty" restrict the exercise of their sovereign rights "within certain defined limits."[19] And further, debating the doctrinal views of Westlake and Meurer, he restated: "No one can doubt that aerial navigation is to play a most important role in the life of the future, and the self-interest of states will lead them naturally to enter into international agreements whereby aerial navigation can be given its proper scope without, at the same time, endangering the natural and legitimate interests of the territorial state itself."[20] Hazeltine firmly believed that the nations would not "prevent the proper development of international aerial navigation any more than they have prevented the proper development of international navigation in territorial waters."[21]

Sir H. Erle Richards, while recognizing the unrestricted sovereign rights of states over their overlying airspace, considered that the admission of this principle was not "inconsistent with the freedom of aerial communication... for the liberty of passage, subject to proper control, is certain to be granted as a matter of reciprocity."[22] To exercise such freedom of passage, continued Richards, it is necessary that states concerned conclude

a treaty; in the absence of any treaty to the contrary, it is open to states to forbid the passage of foreign aircraft. "The liberty of passage over State territory is not impeded by the exercise of sovereign rights in those territories; and no one can doubt that in the same way sufficient liberty of passage would be accorded to foreign air vessels."[23] In Richards' opinion, on the other hand, "the principle of State sovereignty over the air...it requires no Convention to make it effective, but...it is the natural outcome of existing international law... It is a result which follows inevitably from the admitted right of States to exercise sovereign powers to such extent as is necessary for the preservation and security of their territories."[24] The air and the space which it occupies "must be treated as an inseparable part of the territories beneath", concluded Richards.[25]

Some writers, supporters of the sovereignty theory, however, restricted these sovereign rights of states by establishing the so-called 'territorial zone' where the subjacent state would exercise full jurisdiction, not merely the right of preservation, and above which the air should be free; but the jurists who advocated these views were of very divergent opinions as to the height of this zone. Particularly were the older writers in favour of such a horizontal division of the flight space. For instance, von Holtzendorff, first declaring that the air above a state territory "belongs to this territory", held that "the limit of the state's authority in the air space should be determined according to the principle regulating the extent

of the territorial waters."[26] Continuing, he suggested, as the best solution of the problem, an "agreement by which, in time of peace, the air space would be recognized as an accessory to the state territory /Herrschaftspertinenz/ up to a limit of 1,000 meters counted from the highest elevations of the surface."[27]

Another German scholar, von Bar, also considered it "advisable"to fix a limit of the zone of state sovereignty "at a certain height above the highest point of the surface", because, as he claimed, "the air cannot be regarded as belonging to the territory without any limitation."[28] Nevertheless, reporting to the Paris session of IDI in 1910, he seemed to have greatly changed his opinion. "L'idée de la détermination d'une zone pour la navigation libre", stated von Bar, "idée que j'ai crue moi-même juste et rationnelle, doit...être abandonnée...En conséquence, comme tout le monde est d'accord qu'il faut favoriser la navigation aérienne, le principe fondamental doit être que, sauf quelques exceptions, les aérostats circulent librement..."[29]

Belgian Professor Rivier had already written in 1.896 that there exists an air territory; "C' est la colonne perpendiculaire d'air qui couvre et domine le territoire de terre et d'eau. Faut-il la limiter en hauteur ? Si l'on respondait affirmativement,...il y aurait lieu de suivre l'analogie...du territoire maritime et de fixer la limite à portée de tir, c'est-à-dire, semble-t-il, d'un coup de fusil."[30]

It should be noted that the exponents of this sovereignty-zone-theory based their views largely upon the analogy with

territorial sea in a similar way to those who advocated restricted freedom of the air.

The theory of sovereignty to an unlimited altitude but restricted by a servitude of innocent passage was maintained as well by a number of eminent writers (Westlake, Meurer, Weiss, A. Meyer, Kuhn, etc.). Although supporting the sovereignty principle, they nonetheless recognized the need of unimpeded air navigation and therefore were willing to permit the right of innocent passage to aircraft. The ideas of this doctrinal trend found the highest expression in Westlake's statement made at the session of IDI at Ghent in 1906. The following sentence presents a condensed expression of this theory: "Oceanic space and aerial space are two spaces upon which the adjacent state has a 'droit de conservation' and the other states a 'droit de passage innocent."[31] Eventually Westlake proposed to the Institute a modification of first article of the debated draft-code (the latter being composed under the strong influence of Fauchille) so as to read as follows: "The state has a right of sovereignty in the aerial space above its territory, limited, however, by a right of innocent passage for balloons or other aerial craft..."[32] It must be pointed out that Westlake was the only one among the advocates of this theory who clearly expressed the fundamental principles upon which his ideas on the regime of airspace were based. These principles were:(1) sovereignty of the subjacent states to an unlimited height, and (2) customary right of innocent passage which should be enjoyed by all.

While during the World War I, which soon followed, these theoretical discussions were, for the time being, abandoned, they were renewed almost immediately after the Armistice, and particularly flowered after the Paris Convention was signed in 1919. However, only a few of the aforementioned pioneers of air law took active part in the new debates. In general, homines novi entered the field already so abundantly sowed with many ingenious theories indeed. Now, in completely different circumstances, civil aviation having gained its first international charter which laid down firm basic principles which had already been established in previous years through the practice of states, there was little room left for individual theories unless they were to follow the general lines of the Convention. Therefore, the doctrines which followed after the end of the War abandoned (with a few exceptions) the debating of the main issues as, e.g., sovereignty or freedom of the air, and stuck more or less to the interpretation of conventional provisions endeavouring to find out upon such a basis a better regulation of international civil air transport.

2. The Regime of the Airspace and of the Air Traffic Before the Paris Conference of 1910

During the early period just described, the states did not seem to be particularly interested in questions connected with air navigation. The aforementioned doctrinal controversies were limited more or less to a narrow circle of scholars. When the Frenchman, Blériot, crossed the Channel in 1909, as a result of a greatly perfected technique of aircraft and of the art of flying, the situation in this respect rapidly changed. A new element entered into what had previously been of largely academic interest for aviation - the factor of reality. An official diplomatic conference was convened, at Paris on May 10, 1910, to consider the regulation of flight with the ultimate goal of having an international convention signed. On the invitation of the French government, eighteen European countries sent their representatives to Paris. All of the great European powers attended this conference (France, Austro-Hungary, Germany, Italy, Russia, and the United Kingdom). The ready response of practically all the states invited was the best proof of the quickly emerging interest of the governments concerned over the questions of flight.

Although the delegates present in Paris failed to accomplish their main goal (i.e. to conclude a convention), nevertheless, the conference cannot be called a complete failure. On the contrary, it gave an opportunity to the world to hear for the first time a clear declaration of the states' position on the legal status of

usable space, thus enabling the lawyers to continue their academic debates from a more stable and practical basis.

Before the delegates met at Paris and presented the views of their respective governments, it appeared that a number of states did not have any clear ideas of the question of the regime which should be applied to the airspace. This conclusion derives from the replies of certain countries to a questionnaire sent out by the French government to each state, asking for preliminary official views on problems to be dealt with at the conference. Thus, for instance, the Italian Ministry of Public Works (partly in accordance with the Ministry of Justice) recommended that the conference discuss whether it would be convenient to establish an aerial 'territorial zone' of certain altitude in which a state would exercise sovereignty, as in the territorial sea. At the same time, the Italians expressed their opinion that a state had not, in the atmosphere, rights of owneship and sovereignty, but only the rights which were inherent in its preservation.[33]

Russia suggested that a future international conference should discuss the question of the determination of the sovereign rights of the states in the air and the exact delineation of the air frontiers.[34] On the other hand, some countries attended the conference with rather clear standpoints regarding the legal status of airspace and the regime to be applied to air navigation. The German government presented as part of its reply to the questionnaire an entire draft-convention which Cooper describes as "the

first multilateral air navigation convention ever prepared."[35] The British Government, in its reply, stood firmly on the position of full sovereign rights in the air space of the subjacent state, a principle which was, at that time, supported by a majority of British scholars. The French position before, and at the beginning of, the conference was rather ambiguous. France wanted to avoid discussions of the basic problem; namely, that of the legal status of the air and the rights of subjacent states. Accordingly the previously mentioned questionnaire was drafted and consisted of a program which was "surprisingly narrow and technical in scope."[36] In spite of this, the chief of the French delegation,Louis Renault, at the first session, recommended that the conference seek to reconcile freedom of air navigation with legitimate state interests! Thus, at the Paris conference, were faced for the first time in history these different views on fundamental matters of air traffic at the governmental level. It seems useful to examine briefly some of the highlights of this conference.

Certainly the most liberal position toward international air navigation was taken by France, which actually adopted the essence of Fauchille's theory. The French views were explained in a memorandum submitted to the First Commission (on international law) of the conference. The formula there presented read as follows: "Air traffic is free; no restrictions may be adopted by States other than those necessary to guarantee their own security and that of the persons and goods of their inhabitants."[37]

Although this French proposal did not refer directly to the problem of the airspace regime, however, it seemed to "assume the existence of a general international legal right of transit (innocent passage) and entry and landing for every State through flight-space over and into all other States."[38] The French also suggested establishment of a zone of a height to be fixed by convention, in which the flight of aircraft would be prohibited.

As has been pointed out before, the British delegation rigidly advocated the recognition of unrestricted state sovereignty in superjacent space. This wiew was unequivocally expressed in a British interministerial memorandum dated October 11, 1909, from which the following statement may be taken:

> "...it is desirable that no regulation be instituted which implies in any manner whatsoever the right of an aircraft to fly over, or land on, private property, or which excludes or limits the right of every State to prescribe the conditions under which one may navigate in the air above its territory." 39)

However, in the course of the conference, the U.K. recommended that states, as a matter of international courtesy, ought to agree to arrange all reasonable facilities for foreign aircraft to fly above their territories or to land there, subject to restrictions arising from security considerations.[40]

There is no doubt that the German delegation arrived at Paris with the most elaborate and comprehensive views regarding all basic questions expected to be discussed there. The German draft-convention, described by Cooper as a "document of great historical significance",[41] became the real basis for discussion.

Reading this document carefully one hesitates to agree with the opinion that this draft was an expression of the "theory of full and absolute territorial sovereignty in usable space", and that Art. 11 presented the "key to the entire draft convention".[42] Preferring not to deliver a definite judgment upon the particular articles of the German draft, however, we feel it necessary, in order to understand its main idea, to draw attention to the draft as a whole. Such an approach, in our opinion, appears to offer better chances for judging any legal text, including this one also. Seen from such an angle, the German draft seems to contain as the main principle the idea of freedom of air navigation rather than a claim for unrestricted sovereignty.[43] The German position was clarified during the conference itself, in the additional statement which contained, as the most important recommendation, the following provision: "Aircraft should be authorized, in principle, to take off or land in or pass over foreign territory."[44] If there is any ambiguity regarding this passage, then it arises, as Copper remarks, from the use of the term 'foreign territory' without limiting it to the territory of contracting states.[45]

The chairman of the German delegation, Kriege, declared in the First Committee that France and Germany were in agreement on essential points, both favouring, in principle, freedom of air navigation. On the other hand, it should be also noted that all principal powers except the U. K., present at the conference, carefully avoided making any open statement as to the legal status of the air. Of course, this does not necessarily mean that the

majority of the delegates were in favour of the 'freedom of the air' principle. On the contrary, the course of the conference, and the rules adopted by the First Committee, justify the opinion that the prevailing conviction was that each state had sovereign rights in its airspace, although the conference failed to make a clear declaration of it. However, this conviction should not be permitted to overshadow some of the material results of this meeting, which demonstrated a rather favourable attitude of the states towards the idea of the liberal treatment of air navigation.

Notwithstanding its technical failure (to sign a convention) we should not overlook the fact that the conference laid down some principles which were of far-reaching influence on the future regulation of air navigation. These principles were as follows: (1) The subjacent state may set up prohibited zones in which no flight is allowed (Rule 1, para. 1); (2) In extraordinary circumstances a state may take the measures necessary to protect its national defence without an obligation to apply the same treatment to aircraft of other contracting parties (Rule 2, para. 2); (3) Each state has the power to reserve the air cabotage for national aircraft alone (Rule 3, para. 1); (4) The establishment of international air lines depends upon the assent of the interested states (Rule 3, para. 2).[46)]

The Paris conference of 1910 adjourned, having failed to reach an agreement. One may find in the literature of air law quite opposite views as to the chief reason for its failure.

According to Hall the failure should be blamed on the divergence of views on the "fundamental legal principles to be applied to the air-space."[47] Similarly, Henry-Couannier points out that the conference was wrecked on questions of sovereignty and ownership: " à chaque pas les débats s'orientaient irrésistiblement vers la discussion de ces notions fondamentales."[48] N. H. Moller shares the same opinion.[49] A contrary view is held by Cooper who, in his excellent and comprehensive review of the conference, stated that complete agreement, "though tacit", existed as to the legal status of flight-space.[50] "The real causes of breakdown of the conference were political" says Cooper. "Must restrictions on freedom of flight imposed by each State be applied equally to national aircraft and to aircraft of all other contracting States ? ... The conference came to final disagreement on this purely political question as to what restrictions could be applied by the subjacent State to aircraft of other contracting States. The breakdown was not, as popularly supposed, due to opposed theories of freedom of the air and State sovereignty."[51]

Already at that time, although aviation was in its beginnings, political, military and even economic factors played an important role in the thinking of the various governments. One may safely say that in the same proportion as the considerations of security dictated the British unliberal standpoint, as much, on the other side did the great technical progress in aeronautics achieved by Germany with a vision of further expansion under widest possible flight privileges affect the position of the latter.[52]

3. Verona Congress - 'First International Juridical Congress for the Regulation of Air Navigation'

While the diplomatic conference in Paris was already in progress, in the Italian city of Verona a considerable number of jurists were meeting at the officially-named "First International Juridical Congress for Regulation of Air Navigation" (which lasted from May 31 till June 2, 1910). It appears rather curious that this international convention is, as a rule, overlooked in the majority of writings on air law. Furthermore, the results there achieved deserve quite the contrary fate. The fact that, to our knowledge, air law literature in the English language does not pay the necessary attention to the Verona Congress has stimulated the present writer to sketch briefly what is considered the most important achievement of this meeting.

It seems to be of extraordinary significance that the Verona Congress, unaware of the final results of the Paris conference, reached almost unanimously an agreement on the basic question discussed - that of the legal regime of flight space. Point (1) of the 'Ordine del giorno' was drafted as follows:

> " The Congress holds: that the atmospheric space above the territory and the territorial sea of each state has to be considered /"si debba considerare"/ as a territorial space subject to sovereignty of a state and the space above unoccupied territories, or above the high seas has to be considered as free." 53)

Such a clear statement is of special significance if one bears in mind that, at the Verona Congress, were assembled jurists who were not bound by the considerations of the various

governments, as was the case in Paris. This was the first time that a doctrinal assembly had expressed itself so unequivocally in favour of the principle of the state's sovereignty over airspace. Such an attitude should be even more appreciated after one has read the minutes of the Congress. One can easily feel what enthusiasm reigned among those present with respect to the future role of aircraft. Almost all of the participants looked to aircraft as instruments of peace and human progress, and, perhaps, because of these views, the Congress inserted in its 'Ordine del giorno', as a second rule (Point 2) the principle of free transit in the following words:

> "In the territorial space, the transit and traffic of air vehicles have to be free, providing the necessary norms for protection of the public and private interests..." 54)

By far the strongest influence on the work of the Congress was made by the illustrious Italian scholar, Professor D. Anzillotti. It was his report on "The legal status of atmospheric space in international relations and its consequences on air navigation" 55) that made the Congress accept the aforementioned principles in its 'Ordine del giorno'. In his brilliant legal analysis of the new problems arising from the birth of aeronautics, Anzillotti reached the following conclusions:

(a) The atmospheric space above the terrestrial surface constitutes...together with the latter and the subsoil the territory, i.e. the field in which the authority of the state's imperium is exercised; 56)

(b) Rejecting any solution of the regime of the air

based upon analogy with the maritime law he stated: "It is not the physical nature of the sea but the interests and the will /volonta/ of states that constitute the legal basis of the principle /of the freedom of the high seas/. A partition of the seas among the states and the exclusive imperium by each of them in the proper zone has nothing legally inconceivable".[57]

(c) "The territoriality of the space above the terrestrial surfaces occupied by individual states implies their right to permit or to prohibit an access of the foreign airships."[58] Therefore, it is necessary to "introduce a new rule in the international law" which would grant the "right of free inoffensive transit in territorial atmosphere"[59]

(d) "The right of transit does not necessarily imply the right to land in a /foreign/ state and to exercise there the industry of transport of goods or persons..."[60]

(e) In order to make use of airspace as a medium of communication between peoples, according to Anzillotti, it "would not be advisable to limit the height of the territorial atmosphere, i.e. to limit... the exclusive authority of state."[61]

Thus, while in agreement with his great contemporary Westlake as to the sovereignty of flight space, Anzillotti differs basically in respect to the status of transit. To Westlake, the transit through territorial space was a necessary servitude (a customary right) analoguous to the principle of innocent passage in territorial sea, while Anzillotti sought such a privilege in international agreement, which would introduce it into international law as a new rule.

4. Position of States with Respect to the Legal Regime of Space and Toward Air Passage on the Eve of World War I - (Developments 1910 to 1914)

The relatively short interval of time between the Paris conference 1910 and the outbreak of World War I, Cooper considers as "one of the most important historical periods in the development of international air law."[62] Indeed, one may absolutely agree with this opinion because in those few years the aero-political map of the world was built up. From a strictly legal point of view, one may say that before that period, attitude of the states toward the legal status of superjacent space was rather uncertain and ambiguous. Although it is possible to agree with the statement that never has any state disclaimed its sovereign rights in its airspace,[63] nevertheless, on the other hand, it seems to be extremely difficult to prove that before this period did any nation (with the exception of the U. K.) clearly and unequivocally stress such a claim.[64] This is, of course, more an academic and historical question than a practical one. It might be compared with the question dealt with earlier in this work; namely, for how long did the right of innocent passage exist in territorial sea.

At any rate, it is a fact that during the climax of doctrinal controversies on the subject that took place in the first decade of the Twentieth Century, the majority of

national governments did not show a particular interest in the matter. For instance, there is no proof whether Blériot obtained, for his flight across the Channel, prior permission from British authorities, who were the first to erect vertical boundaries around the British Isles. The answer to such a rather indifferent attitude on the part of the states toward aviation probably lies in two facts, one connected with the new flying device, and the other immanent in the state' s machinery itself. The latter does not act always very swiftly, particularly when some new invention is in question. During initial developments of flight, governmental bodies took, toward this new device, almost the same attitude as they did earlier towards steam machines and railways. The action of the states was, in the early stages of development of both devices, limited to regulations of a police character. The responsible national organs did not at all show their approval of early flying experiments nor did encourage them. Their interest was attracted only when the new device proved to be of practical use, and thus could serve the state interests. It is not impossible that the performance of aircraft as useful tools of war, demonstrated for the first time in the Italo-Turkish War of 1912, finally created the necessary elements for decisive government action. 65)

The United Kingdom was the first to take legal steps to put air navigation under strict national control. On June 2, 1911, the Aerial Navigation Act was adopted, but its "sole purpose" was, according to N.H. Moller, 66) " to protect the

public against dangers arising from the navigation of aircraft." Probably because of the developments in aeronautics which occurred in the meantime, the scope of this Act of 1911 was substantially extended in the new Aerial Navigation Act of 1913, to include the provisions for the defence and security of the Realm. The discretionary powers granted to the Home Secretary by this Act have considerably increased, and international air navigation with the U. K. could have been made almost impossible by the creation of the prohibited regions. According to the 1913 A ct "the whole, or any part of the coastline of the United Kingdom, and the territorial waters adjacent to" could be included in the prohibited regions. These provisons can be taken as the first clear legal declaration of a national sovereignty in flight space.

The other European governments also rapidly followed the British example, although perhaps not all in the same unequivocal manner. In France, the presidential decree of November 25, 1911, provided that no aircraft could be put into service without a navigation permit, and the French authorities were authorized to issue such a permit. According to Cooper, such regulations could be justified and enforced, particularly against foreign aircraft, on "no legal basis other than complete French sovereignty in the usable superjacent space."[67] However, it must be noted that this French decree carefully avoided mention of the question of national sovereignty in the air. A similar position was taken by the Serbian royal 'Decree

concerning the navigation of air vehicles' of February 18, 1913, apparently composed under the strong influence of the French decree of 1911.[68]

Two great European powers, Austria-Hungary and Russia, together with smaller nations, such as the Netherlands, also took legislative measures to affirm formally their legal right to control air navigation above their surface territories.[69] To the same effect on July 26, 1913, a Franco-German agreement was signed.[70] Commenting on the provision of this agreement, which introduced prohibited zones along the Franco-German frontiers, Cooper remarks: "Any semblance of free air navigation or right of innocent passage over that border disappeared. These and other prohibited zones took their authority from French and German unilateral sovereign powers respectively, not from the Franco-German agreement. Aircraft of all other nations were equally prohibited from flight over the areas in question."[71]

As æ strong argument in favour of the position that in this period, shortly before the outbreak of World War I, the idea of state sovereignty in superjacent space had won overwhelming recognition, the fact that no government has protested against the policy of 'aer clausus' might be used. Indeed, if at that time (or before) existed certain 'right' of innocent pa s-sage in the air, similar to that in the territorial sea (as many doctrinaires have attempted to argue), it would have been seriously infringed upon by the aforementioned unilateral actions. As has been said, however, no protests have been made. Moreover,

after the declaration of war in 1914, neutrals like Switzerland, Sweden, and the U. S. (the latter for the Canal Zone only) hastily declared their airspaces as prohibited zones. Although the actions of the latter were chiefly due to a wish to avoid air warfare above their respective territories, however, the air-barriers thus erected were never subsequently removed. Hence, to conclude a survey of this period, it is possible to say that the rigid national air boundaries, which constitute at the present time the main characteristic of the aero-political picture of the world, were erected shortly before, or immediately after, the outbreak of World War I. The rules and principles determining the legal status of airspace then established, have laid the base of "almost all subsequent developments in the field of public international air law."[72)]

C H A P T E R IV

EVOLUTION BETWEEN TWO WORLD WARS

1. The First "International Convention For Air Navigation", Paris, 1919 [1]

The unforseen development and the brilliant performance of the air forces during the Great War, 1914-1918, and the new political picture which followed the aftermath, inevitably made a strong imprint on the postwar international legal regulations of flight. There was a wide-spread conviction of the necessity of laying down the basic rules and conditions upon which future international flights and air commerce would be established. In order to achieve this, while the war was still in progress, in September 1917, an "Inter-Allied Aviation Committee" was created (on French initiative) which, after the commencement of the Peace Conference, was transformed into the "Aeronautical Commission of the Peace Conference". This Commission was entrusted by the Supreme Allied Council (by its Resolution of March 12, 1919) to "examine": (a) aviation questions resulting from the work of the Preliminary Conference of Peace; and (b) the preparation of an air navigation convention for peacetime. The Aeronautical Commission was composed of the representatives of twelve allied nations of which the 'principal powers' (the British Empire, France, Italy, Japan, and the United States) had two representatives, while the other

powers, only one. Besides, three sub-commissions were formed: Military, Technical, and Legal. Only the principal powers were represented in these sub-commissions. In general, the Aeronautical Commission and its sub-commissions were largely composed of the military personnel of the Allied powers, the Legal Sub-commission being the only exception, although among its members the military element was also significant. This fact should be kept in mind while discussing the work done by this body.

As early as at its third session, on March 17, 1919, the Commission established several topics considered as fundamental which should be elaborated, and the solution sought, in order to prepare the text of the Convention. The items of special interest for our study are the following:

(1) The principle of state sovereignty in superjacent space (the U.S. proposal);

(2) The recognition of the necessity of allowing international air navigation the utmost freedom insofar as this would be compatible with the security of states, the application of requirements regulating the admittance of aircraft of the contracting parties, and internal legislation (British proposal);

(3) The principle of equality of treatment in national legislation regarding the admittance of aircraft belonging to the contracting parties (British proposal);

(4) The recognition of transit rights without landing for international air traffic originating from and destined to

points outside the state flown over; the reservation of air cabotage to national aircraft;

(5) The recognition of the right of utilization for aircraft of all contracting states of all public airfields.[2)]

Two draft-conventions were officially placed before the Commission, one by Britain, and the other by France. There is evidence that a draft-convention was also prepared by the delegates of the U. S. and Italy while the Commission was in session and circulated among other delegations.[3)] The British draft-convention consisted of 29 articles and several appendices, whilst the French draft-convention had 14 articles, together with a few appendices also. Both these drafts were taken as a basis for discussion. With respect to the most crucial questions with which the Aeronautical Commission was faced, the French proposal[4)] did not lay down any definite or explicit principle. The only more-or-less relevant provision embodied in Art. one of the French proposal, reads as follow:

> "Seront seul admis à survoler les territoires des Etats contractants les aéronefs appartenant en entier à des propriétaires ayant la nationalité de l'un des Etats contractants et satisfaisant aux conditions suivantes:
> 1. Etre dûment immatriculés dans l'un des Etats contractants conformément au réglement Annexe A;
> 2. Avoir un certificat de navigabilité conforme au réglement Annexe B;
> 3. Etre monté par un personnel de conduite ressortissant à l'un des Etats contractants et pourvus de brevets techniques..."

On the problems such as sovereignty, transit, and landing rights, etc., the French draft did not contain a word, except what is mentioned in Art. 1 cited above. The only

explanation for this extraordinarily weak and poor draft-convention may exist in the fact that the memories of the débâcle of their diplomatic efforts of 1910, to elaborate an international agreement on air navigation, were still very fresh.

Quite the contrary may be said for the British proposal "Draft International Convention Providing for Aerial Navigation" 5) submitted to the Aeronautical Commission. This proposal contemplated an exchange of the widest possible privileges of flight that could be restricted only in the interests of security and in connection with the application of national legislation (the latter to be applied on the basis of equality for national and foreign aircraft). Since this British draft of 1919 represents a rare abandoning of the traditional British air policy both of the past and the future, and much resembles the U. S. proposals at Chicago in 1944, it seems worthwhile to give it some space.

The key provisions of the British draft-convention were embodied into Art. 1 and 2 under the correctly chosen title - 'General Principles'.

> "Article 1. - The High Contracting Parties recognise the full and absolute sovereignty and jurisdiction of every State over the air above its territories and territorial waters, but subject thereto; the aircraft of a contracting State may fly freely into and over the territories of the other contracting States provided they comply with the regulations laid down by the latter. Such regulations will permit the free navigation of foreign aircraft except in so far as restrictions appear to the State to be necessary in order to guarantee its own security or that of the lives and property of its inhabitants and to exercise such jurisdiction and

supevision as will secure observance of its municipal legislation. The regulations shall be imposed on foreign aircraft without discrimination except in times of great emergency when a State may deem it necessary to safeguard its own security. It is, however, agreed that any one contracting State may refuse to accord to the aircraft of any other contracting State any facilities which the latter does not itself accord under its regulations.

Article 2.- Each contracting State shall have the right to impose special resrtrictions by way of reservation or otherwise,with respect to the public conveyance of persons and goods between two points on its territory, but such restrictions may not be imposed on a foreign aircraft where such aircraft is proceeding from one point to another within the territory of the contracting State either for the purpose (1) of landing the whole or part of its passengers or goods brought from abroad,or (2) of taking on board the whole or part of its passengers or goods for a foreign destination, or (3) of carrying between the two points, passengers holding through tickets, or goods consigned for through transit to, or from some place outside the territory of the contracting State."

Thus, the British proposal for a convention, while maintaining 'theoretical' sovereignty, nevertheless, if it were accepted "would have resulted in practically no restrictions on commercial flying between the nations which agreed to the convention."[6] It is of interest to look more closely at the background of this unusual British attitude toward air freedom. Earlier, during the war in May 1917, a 'Civil Aerial Transport Committee' was set up to report on the steps which should be taken with a view to the development and regulation of aviation after the war, for civil and commercial purposes from a domestic, imperial, and international viewpoint. The primary conclusion the Committee came to in its

interim report was that the experience of the war had served to increase the force of the doctrine of exclusive state sovereignty in the airspace 'usque ad coelum' and that it should be adopted as the basis not only of international agreement but also of municipal legislation. This claim to sovereignty should also apply in respect to the airspace above territorial sea. However, the Committee recognized that commercial advantages were to be expected mainly from rapid uninterrupted flights of aicraft over long distances, and these advantages would be best secured if aircraft had right to pass across national territory without let or hindrance. The very scattered and unconnected character of the countries constituting the British Empire becomes an obstacle to the development of air transport and air power. Other nations bar access to the great land masses associated within the British Empire. A clear right-of-way, concluded the report, free from restrictions across France, Italy, and Spain, is essential to effective progress in inter-colonial air communications.

Apparently these two conflicting necessities (namely, security considerations on the one hand, and Empire commercial needs on the other), finally found a way of combining and the result was the British advocacy of the largely liberal treatment of international air navigation. However, these liberal views were not accepted in Paris. When, at the meeting of the Legal Sub-commission on March 26, the British proposal was formally put to a vote, it received support from Japan only,

and was opposed by France, Italy, and the U. S. Thus, as Cooper remarks, the vote of the United States controlled the outcome of this critical question. Had the U. S. representative supported the British position, "an entirely different draft convention might have been...adopted...Such a convention would, in substance, have meant that what we now consider as the Third, Fourth and Fifth Freedoms, commercial privileges, would have been written into the Paris Convention from the beginning."[7)]

The final text of the Convention, signed on October 13, 1919, by 26 states, accepted the principle of sovereignty as the corner-stone of the whole Convention. The freedom left to international air transport was pointed out far less than one might have expected. Of special interest for international air transport were the provisions of Article 1, 2, 3, 15, 16, 17, and 24. These contained the fundamental principles on which the later international air commerce was based. Therefore, a brief consideration of these articles is necessary.

Article 1 provided as follows:

> " The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.
> For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto."

The question of sovereignty was one of the easiest for the Aeronautical Commission, which had unanimously adopted the following provisional text at its third session (March 17,

1919): "Recognition: (1) of the principle of the full and absolute sovereignty of each State over the air above its territories and territorial waters, carrying with it the right of exclusion of foreign aircraft;

(2) of the right of each State to impose its jurisdiction over the air above its territory and territorial waters." 8)

Commenting on Art. 1 of the Paris Convention, E. Warner wrote: "Obviously, nothing is left of the doctrine, once espoused by many international lawyers... of the freedom of the air. Experience during the war did away with all that." 9) From para. 1 Art.1 it follows that those who drafted it acted upon the assumption that the sovereignty of the states in superjacent space exists as a customary law. Therefore they did not 'recognise' the granting of complete and exclusive sovereignty only to the contracting states, but clearly declared that such sovereignty belongs to 'every Power'. 10) Hence the provisions cited above cannot be taken as creating, but rather confirming the principle of state sovereignty, already existing in practice.

The second fundamental principle laid down in the Convention was the freedom of innocent passage as a corollary to the principle of sovereignty. Art. 2 of the Convention reads as follows:

" Each Contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality."

There is room for many observations and criticism with respect to the provisions given above. First of all, it is apparent that the principle of sovereignty, asserted so unequivocally in Art. 1, and the principle of free transit adopted in Art. 2 do not stand on an equal footing. This conclusion flows from the mere wording. While sovereignty is 'recognised', with respect to the granting of innocent passage the contracting parties 'undertake' to accord it, but only among themselves.[11] Moreover, taken separately Art. 2 seems to grant freedom of passage to all private aircraft irrespective of the scope or sort of their activity. Thus one might suppose that the right of innocent passage granted by Art. 2 would "at least accorded a right for commercial airlines of any of the contracting states to operate in transit across the territory of any other contracting state in order to reach the country of final destination. One might suppose also that such transit would be possible as a matter of right, and without the necessity of obtaining the formal authorization from the government whose territory would be flown over."[12] However, this was not the case, and all assumptions of that kind had to be abandoned as a correct interpretation of the aforementioned provisions of Art. 2 because the last clause of Art. 15 (especially after being finally amended and clarified) seriously limited the ambiguous declaration of freedom embodied in Art. 2.

As a matter of fact, Art. 2 ought to be regarded as

only a partial picture of the right of transit as finally agreed upon in the Paris Convention. In our opinion, the actual substance of this right regarding commercial operations is found in Art. 15, which is obviously a supplement to Art. 2. Art. 15, the most controversial in the whole Convention, restates in para. 1 the provision contained in Art. 2, namely, that:

> "Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so..."

As can be noticed, the supposedly unrestricted freedom of passage granted in Art. 2 was already limited by two very important concessions made to satisfy national sovereignty. Para. 3 (originally para. 2) further strengthened the rights of a subjacent state:

> "Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter..."

The last para., 4 (originally para. 3) of Art. 15 produced more discussions and raised more divergent interpretations than probably any other provision of the Convention. The problem first emerged in the Aeronautical Commission during the work on the Convention. Originally, the text proposed by the Legal Sub-commission read: "The establishment of international airlines shall be subject to the consent of the States flown over."[13] While the British and the U. S. repre-

sentatives held that this paragraph was unecessary, the French delegate, as a compromise, proposed replacing the word 'airlines' with the word 'airways' ('voies') and this was accepted, with the U. S. dissenting. In the debate which followed, the British delegate (General Sykes) pointed out that since, by the Convention, the right to fly across foreign territory without landing is given to aircraft, hence such an aircraft should also have the right to choose the shortest route and the one presenting the best meteorological conditions.[14] However, this substitution did not remove the misunderstanding - "as paragraph 3 certainly had in view the institution of airlines in the sense of air services", says L. H. Slotemaker.[15] This is not so certain and the records of meetings held during those days in Paris do not give a clear, unequivocal, picture of the real intentions of the drafters of the Convention. On the other hand, as regards the practice of states with respect to this provision of Art. 15, this practice was based upon the assumption that, by virtue of the Convention, they have the right to demand that no regular (or scheduled) airline of any contracting state be operated into, or in transit across, their territory, with or without landing, unless prior permission has been granted by the state whose territory will be flown over.[16]

Nevertheless, the text of the knotty last clause of Art. 15 was retained, and remained unchanged for the next ten years. In June, 1929, an extraordinary session of the International Commission for Air Navigation (ICAN) was convened in

Paris and, among other subjects, it discussed the final clause of Art. 15 so as to make it more distinct and thus avoid any further misinterpretation. At this meeting were present not only the contracting states, but also those nations which had not acceded to the Convention; altogether 43 countries were present, among which were 17 non-contracting parties. At the beginning of the debate, the vote was taken on the question whether freedom of previous authorization, to be granted by the subjacent states, was desired. An overwhelming majority of the delegations voted in favour of 'previous authorization' and against freedom, the latter idea receiving support only by the Netherlands, Sweden, the United Kingdom, and the U. S. This was a clear expression of the desire of many of the states not "to do any more than to bring art. 15 into line with the interpretation which had been placed upon it."[17] A new text was unanimously adopted as a fourth paragraph to read as follows:

> "Every contracting State may make conditional on its prior authorisation the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."

Thus, the new provision made the last para. of Art. 15 more restrictive than the original form. "Each nation was thereby left full authority to admit or to refuse the entry of commercial air operations into its territory on any basis or for any reason that it saw fit. Straight political bargaining

was accepted as the rule to be followed."[18] The advantage of the right of innocent passage granted by Art. 2 could thus be assumed only by civil aircraft of the contracting states in making casual or special flights and not operated on regular services.

The restrictions thus far mentioned were not the sole obstacles to international air traffic. According to Art. 3, the prohibited zones were established "for military reasons or in the interest of public safety" where no flight was permitted. While the original text of Art. 3 required the same treatment for national aicraft and aicraft of other contracting states, Art. 3, revised and enlarged at the ICAN session of 1929, embodied significant changes. The new para.2 of Art. 3 read as follows:

> " Each contracting State may, as an exceptional measure and in the interest of public safety, authorise flight over the said areas by its national aircraft."

Furthermore, an entirely new provision was added as para. 4:

> " Each contracting State reserves also the right in exceptional circumstances in time of peace and with immediate effect temporarily to restrict or prohibit flight over its territory on condition that such restriction or prohibition shall be applicable without distinction of nationality to the aircraft of all the other States."

Hence, the revised Art. 3 also made clear the tendencies earlier described which dominated the Paris meeting in 1929. The provision of para. 2 cannot be understood otherwise than as the expression of discrimination against foreign aircraft, whereas the provision of para. 4 opened up to the full extent possibilities for uncontrolled unilateral action which at any

moment, could stop international flight over whatever state should take advantage of this unwise and too vaguely defined right. Even the usual goodwill of A. Roper could not prevent him from commenting that these amendments to the original text were evidently "une sensible atteinte au principe de la liberté de la circualtion aérienne posé à article 2 de la Convention."[19]

Art. 16 accorded to the contracting states the right to establish 'reservations and restrictions' in favour of their own aircraft with regard to cabotage. Although this is one of the few sacrosanct and basic principles of international law of the air, dating back almost to its beginnings, however, it might be noted that while cabotage in the sphere of maritime transport covers only traffic along the coast-line, air cabotage appears to be of much wider application and may cover very distant points in metropolitan territory as well as places between the latter and the dependent territories of the state concerned.[20] This distinction between the content of maritime cabotage and that of air cabotage should be borne in mind when considering this question. It seems to be rather doubtful whether this conventional concept of reservation of air cabotage, still in full force at the present time, entirely corresponds to the requirements of a sound international air transport policy.[21]

Art. 17 served as a corollary to Art. 16, providing that:

> "The aircraft of a contracting State which establishes reservations and restrictions in accordance with Article 16, may be subjected to the same reservations and restrictions in any other contracting State, even though

> the latter State does not itself impose the reservations and restrictions on other foreign aircraft."

Finally, Art. 24 appears to be one of those provisions which indicated a liberal trend toward international air traffic:

> "Every aerodrome in a contracting State, which upon payment of charges is open to public use by its national aircraft, shall likewise be open to the aircraft of all the other contracting States."

Since the implementing of this right depended primarily upon the possibility of crossing the air frontier of a certain country, the latter could always make it useless for regular air services by refusing to grant permission for entrance.

Let us now, in concluding the review of the Paris Convention, make some necessary observations for the sake of completeness. Nobody can deny the necessity that existed in those days, after the World War I, for a multilateral agreement relating to the regulation of international air traffic. Nevertheless, a grave error was made in associating this work with the preparations of peace treaties. A document prepared under such circumstances could not but bear a strong imprint of the spirit which dominated the victorious powers. Although it would be unfair to say that among certain delegates in the Aeronautical Commission there were not good intentions, nonetheless, it is obvious that a majority tried to gain as much advantage as possible from their position as victors. It is historic irony that Germany, which as little as nine years ago in Paris advocated freedom of air traffic, now finds, in

the same city, the Allies making a guarantee to themselves that this very same freedom shall be enjoyed by them in relation to German territory; however, no reciprocal right has been accorded in Germany's favour. By the now famous Art. 313 of the Versailles' Peace Treaty, aircraft of the Allied and Associated powers were to have "full liberty of passage and landing over, and in the territory, and territorial waters of Germany." Through Art. 314, the right was maintained for aircraft belonging to victors while in transit to any foreign country whatever, to enjoy the right of flying over the territory and territorial sea of Germany without landing. In the same way, in Art. 315, aerodromes were to be open to the use of Allied aircraft "upon a footing of equality" with German planes. Art. 318 reveals that the drafters had also in mind economic advantages which could be extracted from their unchallenged position.[22] "From the point of view of internal commercial air traffic" - read this article - " aircraft belonging to Allied and Associated Powers shall enjoy in Germany the treatment of the most favourised Nation."[23] These obligations were to remain in force until January 1, 1923, unless before that date Germany were admitted to the League of Nations or had adhered to the Paris Convention, neither of which came about.

Although there was no direct connection between the World War I peace treaties and the Paris Convention, nevertheless, an international aviation charter produced under such circum-

stances could not avoid meeting with various objections and difficulties, particularly on the part of those nations which did not take part in the recent hostilities. Hence, certain neutral nations were not prepared to adhere to the Convention because Art. 5 originally contained a prohibition for the contracting states to allow any passage over their territories of aircraft not having the nationality of any one of the contracting parties unless this was effected by virtue of special authorization of a temporary nature. Furthermore, Art.34 establishing ICAN provided that the five great powers (the British Empire, France, Italy, Japan, and the U. S.) would have two votes each. The amendments removing these obstacles were accordingly made and came into force in December, 1926, and as a result, more countries adhered. However, this was far from being a universal convention. Many nations continued to demonstrate a reserved attitude to it, and never joined the Convention.[24] Thus, for instance, the relation between the League of Nations and the ICAN constituted a stumbling block to ratification by the U. S.[25] Moreover, the Convention failed to take into account the close connection between freedom of passage for international air traffic and the necessities of international regulation of civil aviation in the economic sphere.[26]

In the years which followed the Paris conference of 1919, the Convention was subjected to severe criticism. Nevertheless, it must be pointed out that despite its numerous

shortcomings it also had positive results. In the first place, the World, by the introduction of the Convention, finally received the long-sought international code regulating the most acute problems of aviation in time of peace.[27] Secondly, this Convention put an end to the uncertainty over the legal regime of the flight space above national territories, recognizing the 'complete and exclusive' sovereignty of the subjacent states. This became a fundamental precept of positive international law of the air. Consequently, the Convention made it clear that freedom of innocent passage does not represent a 'natural right' but exists only as a conventional privilege, and as such, can be granted or refused by the state concerned. Although this postulate of the Convention severely obstructed subsequent air transport development, still, it made at least legally clear the situation by removing previously existing doubts. A further merit of the Paris Convention consists in the fact that it achieved, to a considerable degree, unification of public air law.[28] Thirdly, the establishment of ICAN as a permanent international body to deal with technical aviation matters marked an important step toward closer co-operation in the field of world aviation.[29] Its experience was of great help when later, at Chicago, the foundations for the new, universal, world aviation organization were laid down.

2. Pan-American (Havana) Convention for Commercial Air Navigation of February 20, 1928

When the drafters of the latest of the three inter-war international aviation conventions[30] met early in 1928 at Havana, they were faced, it appears, with an easier task than that of their predecessors who met in Paris in 1919. Now, they had at their disposal not only the text of the Paris Convention, but also the experience of its application in practice. Besides, in the years which had elapsed since the Paris conference, aviation had made important progress, especially in the field of its commercial use, and consequently, the practice of states towards international air traffic had become more crystallized; thus, the Havana drafters were in a position to take advantage of all this development. On the basis of these facts, it was reasonable to expect that the Havana Convention would mark progress in comparison with the previous similar documents. Was that the case ? There does not exist complete unanimity in answering this question.

Let us begin our analysis in the same order as applied previously while discussing the provisions of the Paris Convention. Art. 1 of the Havana Convention recognized, just as did the Paris Convention, 'complete and exclusive' sovereignty of each state over its superjacent airspace. Thus, the basic principle of the Havana Convention is, on this point, the

same as in the corresponding provision of the Paris Convention. E. Warner described this similarity in the following words: "Essentially the same statement, except for phraseology. The Pan-American form has the virtue of brevity, but the Paris Convention is the more specific."[31)]

Art. 4 provided that " each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the private aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed." This article is almost identical to Art. 2 of the Paris Convention. Now the same approach is as necessary as it was earlier when we discussed Art. 2 of the Paris Convention, in order to see how far this freedom of passage was extended, especially with respect to regular commercial operations. The Havana Convention did not contain the provision of para. 1, Art. 15 of the Paris Convention, where the right of innocent passage was restated. Warner attributes this omission to the specific geo-political conditions of the American continent where "freedom of passage across the territory of a state without landing is of much less importance... than in Europe, except in special cases in Central America."[32)]

Regarding the much-discussed problem of the last para. (4) of the Art. 15 of the Paris Convention, with respect to the establishment of 'international airways', the Havana Convention was lacking in the arbitrariness given in favour of states accorded by the Paris document. Unlike other agreements, both

multilateral and bilateral, relating to air navigation in general, the Havana Convention contained no words stating expressly that the establishment and operation of regular air transport services would be subject to the consent of the state whose territory is flown over. Art. 21 of the Havana Convention set forth that the territory of any contracting state might be used as the base for the initiation or completion of a transport operation under the flag of any other contracting state, provided only that the authorization did not extend to any individual transaction of transport completed in its entirety within the territory of a single state. Warner remarked: "In framing the Pan-American Convention, the question of authorization for international lines was simply ignored, the presumption being made that it was already fully covered by the general extension of the right of free passage contained in Article 4. To make certain"- continued Warner -"that there would be no question of the liberty of such a line to engage in normal commercial operation, however, Article 21 was inserted."[33]

L. H. Slotemaker held that Art. 21 of the Havana Convention recognized "full freedom of commercial air navigation between the contracting Parties"[34]; according to Goedhuis, in comparison with the other two multilateral air conventions, the Havana Convention "fait donc preuve d'un certain libéralisme"[35]; similarly, to M. Le Goff, "before the war of 1939 the American regime was more liberal"[36] than the European one;

W. Wagner considers the provisions of Art. 21 as "la suppression totale des restrictions pour l'établissement des lignes internationales réguliéres", and notwithstanding the absence of the term 'regular services' in the text of Art. 21 - "son interprétation ne devrait susciter aucun doute."[37] On the other hand, to Roper the differences between the two texts were not of such importance that they should be regarded "as compromising the unity of the air law."[38] The latter view seems to be the acceptable one, although on the surface, abstractly and ideally, as Warner said, Havana's provision appears to be more liberal on this point than the respective Paris rule.

To S. Latchford, so far as the right of innocent passage and the establishment of international air services were concerned, the Havana Convention was "probably the most ambiguous of all international agreements."[39] As to the question of what was meant by the 'right of innocent passage', granted in Art. 4, Latchford gives the following answer: "It has generally been interpreted to mean, as in the case of the bilateral air navigation agreements and the Paris convention, that the civil aircraft of each contracting state making special flights and not operated on regular service may fly into and away from the territory of any other contracting state without the necessity of obtaining prior flight authorization from such other state."[40]

As to the operation of regular services, Art. 21 of

the Havana Convention has been interpreted in such a way that no air transport enterprise of any of the contracting states could operate into or through the territory of another contracting state without the latter's prior consent.[41] The position of the U. S. with respect to Art. 4 was that by the terms of the article each state undertook in time of peace to accord freedom of innocent passage above its territory, subject to the conditions laid down in the Convention, rendering it unnecessary for any state party to the Convention and complying with its conditions to obtain special permission for the flight of aircraft over the territory of other states parties to the Convention. It communicated this interpretation to the other contracting parties but only eight of them (Costa Rica, Chile, Dominican Republic, Ecuador, Guatemala, Haiti, Nicaragua, and Panama) expressed their acquiescence in the interpretation. The U. S. has not contended that its interpretation applied to a regular air transport services.[42]

Henceforth, on this point, one comes to the same conclusion as in the case of the last para. of Art. 15 of the Paris clause: Different wording in the two instances could not prevent the same result from occurring again.

As was the case in the Paris Convention, the Havana Convention also contained a few other provisions of direct interest to commercial flight. Under Art. 5 - each contracting state has reserved the "right to prohibit, for reasons

which it deemed convenient in the public interest, the flight over fixed zones of its territory by the aircraft of the other contracting States and privately owned national aircraft employed in the service of international commercial aviation..." The same article stipulated also that each contracting party could prescribe the route to be taken across its territory by foreign aircraft. Both provisions, except for some minor differences, were similar to those in the Paris Convention. By Art. 22 the right was granted to the contracting states to establish reservations and restrictions in favour of their own national aircraft with respect to air transportation between two points within their territory (air cabotage).

If one compares the work done at Paris in 1919 (and in 1929) with that which was accomplished at Havana in 1928 as a whole, and the effects which resulted from these air-law agreements in particular, a sound conclusion seems to be definitely in favour of the Paris achievements, this owing primarily to the following facts: (a) The Havana Convention was geographically limited, embracing only the states of the Western Hemisphere (without Canada); (b) Although signed initially by 21 American states, it has never received more than 12 ratifications which fact restricted even more the area of its application; (c) No permanent body similar to ICAN was established, and hence, the whole formation remained practically without the necessary co-ordinating authority; and lastly, (d) The Havana Convention was lacking in technical appendices, which were an extremely vital part of the Paris Convention.

3. The Conventional Law Established in Paris and at Havana as Applied in Practice to Commercial Air Navigation

Between wars, the attitude of the states with regard to international air commerce demonstrated to the full extent the striking contrast between the needs of world trade and what was called 'national interests'. The developments which have taken place since the Paris Convention was signed, clearly indicated that political, economic, and military considerations will be paramount in every action undertaken by most of the nations in aviation. To these strictly national interests the interpretation of multilateral agreements had to be adjusted. Instead of giving them an extensive interpretation, as some idealists expected, the contracting states (with very few exceptions) tried to interpret those agreements in the most restrictive way in order to strengthen their own bargaining positions. As far as the establishment of regular international air services was concerned, many nations considered themselves bound neither by the general provisions of the Paris Convention nor by the last clause of Art. 15 which read: "...may make conditional on /their/ prior authorisation the establishment of international airways", but acted as if it were written instead: "shall make..." "In this they have based their attitude upon the provision of art. 1 and upon the literal text of art. 15, being of the opinion that they are at liberty to exercise the rights of sovereignty allotted to them. Here the requirements of art. 15 are made use of for

the submitting of the creation and operation of foreign airlines to all kinds of hampering restrictions, going much further than would be necessary with a view to public order and security; it has even occurred that the establishment of an airline was refused without any reason's being given.[43]

So many restrictions were imposed in practice upon civil aviation that it was scarcely possible to see any trace of liberalism contained in even a few of the provisions of the Paris Convention. Other than legal considerations dominated world air traffic and air commerce. The states interpreted the rights granted to them by international law, particularly sovereignty over their airspace, in such a way that it approached the concept known as an 'abuse of rights'. The prevailing interpretation of state sovereignty in the airspace involved, as its positive consequence, the right to dispose of this space, and negatively, the right to exclude third parties such as foreign aircraft from traffic. Accordingly, however important its territory may be to international air commerce, in this predominant opinion, as applied in practice, a state could reserve it for certain foreign nations or close it to all. Such action has been considered as "in conformity with modern conceptions of international law, whenever the exclusion of foreigners is dictated by interests of the state, whether by considerations of its security or by the wish to gain economic advantages."[44] This period of aviation development was described as "one of the raison d'Etat, of the

commencement of conflicts of interests, of the gradual appearance of the principle of might at the expense of the principle of law."[45)]

It is necessary to review briefly the most influential among those non-juridical factors which have so greatly affected international commerce by air in the period between the two wars. Once established, some of them even before the outbreak of the World War, they/ were to follow civil aviation development like a shadow, continuing their hampering influence right up to the present.

As a first, initial, motivation in the restriction of international air commerce, reasons of a military and security character were put forward. It was quite early realized that aircraft could be used as an effective instrument of warfare. This was fully proved during World War I. Hence, the first claims that international law should recognize the right of states to close their air frontiers to aircraft of other nations were established. To this was added the fear that unrestricted freedom of flight over national territory by foreign aircraft would, in time of peace, permit future enemies to observe, take photographs, or make sketches of military bases, fortifications, and military movements.[46)] Furthermore, civil aviation and air transport were being increasingly considered as intimately related to military aviation in such a way as actually to be a part thereof. This developed in common and in general the conviction that civil aircraft can be

utilized most effectively for military operations, whilst the pilots and personnel belonging to commercial air transport may always be considered as a reserve peacetime force capable of taking over in time of war.[47] Though the uses of aviation can be various, both military and civil, -"it is basically indivisible"- writes Cooper and continues:"The armed air forces represent but one use of the nation's air power. Civil and commercial aviation are supported by and spring from the same basic national elements."[48]

Another reason for the restriction of free international air traffic was soon found out after World War I. When the first successful commercial flights were performed, it was realized that civil aviation, as a means of international commerce, might significantly serve the purposes of national wealth and power.[49] Soon afterwards, the air routes became the scene of political developments, and the question of their control was a primary aim of national foreign policy. Air transport and the control of air routes were firmly regarded as of a piece with the national economic and military power. "The drive to foster and develop air transport" - has become, writes Thomas -" a national incentive inasmuch as this form of transportation is a vital influence, an element of power contributing to the strength and wealth of nations."[50] The states appeared to be aware of these facts and consequently acted upon them with increasingly greater nationalism in the same proportion as aviation developed. The inevitable result was

severe trade rivalry and the division of the world commerce areas not only between certain states but also between individual companies. Whilst the great powers possessed strong technical supremacy, the small countries retained, as a sole weapon of gaining some advantage in air competition, sovereign rights in their airspace of which they were unquestioned masters. Consequently, the latter became increasingly reluctant to grant to foreign aircraft the right of entry into their airspace, unless they were sure that they would get in return for such permission 'reasonable' advantages. Thus, in this period, many nations imposed on the operation of commercial aircraft restrictions which by far exceeded those regulating the traffic of merchant vessels. "Special permission was required merely to fly over a country, and many nations were selfish about granting even this privilege, hoping that they could trade their geography for other advantage regardless of the effect on air commerce."[51)]

An even worse situation existed, as mentioned earlier, with respect to the establishment of regular international air services. Long and troublesome negotiations were necessary before an airline could commence operations.[52)] Moreover, the permission to pick up and discharge traffic was often restricted by limiting the number of trips that could be made, regardless of the amount of traffic available.[53)] However, nationalism on the part of the small countries was not the only obstacle to the free development of international air commerce. The policy

followed by the great powers was equally unsound in relation to civil aviation. There were certain indications which led one to believe that attempts were made to divide among few nations the most important world air-trade areas.[54] Titans in world air transport were emerging, just as the great trading companies, the Dutch East Indies Co. and the British East Indies Co., had emerged as a sequel to the era of discovery a few centuries earlier.[55] The idea of economic co-operation in the field of air commerce hardly existed in this period; instead, air transport represented an instrument of unfair nationalistic economic competition.[56] Instead of bringing nations closer each to one another and thus serving the cause of common peace and prosperity, civil aviation was rather the source of serious international misunderstanding and dangerous friction.

A natural and inevitable question crops up at this point: should the conventional limitations to air traffic be blamed for the anarchy which developed in international air transport between the two great wars ? It appears that to certain, rather numerous writers this is the obvious answer. According to F. de Visscher, the recognition of state sovereignty over the airspace in the Paris Convention represented "un obstacle invincible à la reconnaissance d'un régime de libre circulation aérienne internationale." This was to be blamed, in Visscher's opinion, for "la carte européenne de la navigation aérienne offre un aspect chaotique..."[57] J. W. Garner wrote in the same vein. The solemn recognition of the sovereign rights of states

in airspace as set forth in the Convention of 1919, this author considered as "un retour au régime du moyen âge où les Etats revendiquaient le droit de s'approprier pour leur propre usage de vastes étendues de haute mer, de fermer aux vaisseaux étrangers des rivières internationales dont ils contrôlaient l'embrouchure et de prohiber le commerce ou les relations des peuples étrangers avec leur pays."[58)]

To L. H. Slotemaker it appeared "very distincly" that generally there existed in practice but little freedom of traffic for international aviation and that, on the contrary, "in many instances the rights of sovereignty allotted to the State have been abused."[59)] However, he did not consider that the rights of sovereignty "would render free traffic impossible", because the contracting parties to the Paris Convention undertook the obligation of according freedom of innocent passage in time of peace; but, this "basic right granted to air navigation /was/...insufficiently guaranteed as regards the international lines..."[60)] The views of Goedhuis are well summarized in the following comments:" The'Commission de l'Aéronautique' ...could not have rendered any greater desservice to the development of the positive, creative element in aviation than by drawing up a text for Art. I of /the Paris Convention/ by which the States acknowledged not only the sovereignty over the air space above their territories but the complete and exclusive sovereignty."[61)] In Goedhuis's opinion, the Commission should have recognized the principle of sovereignty without the

'pleonastic' adjectives complete and exclusive; in addition, "there should have been bound up with this recognition a formal declaration of the states acknowledging the principle of freedom of aviation as a legal principle inherent in air régime..."[62] With respect to the provision of Art. 15 of the Convention of 1919, the same author wrote in 1936: " Ce système a provoqué de veritables abus de droit. Dans la pratique, l'autorisation de survol d'un pays a souvent été refusée pour des motifs qui n'avaient rien de commun avec les besoins de la sécurité ou de la conservation de l'Etat survolé. Ceci est d'abord en pleine contradiction avec le principe de la liberté de communication consacré par l'art. 23 du Pacte de la Société des Nations." Goedhuis concluded that the system established by the Convention is contrary to the principles of international law and therefore should be rejected.[63]

H. Oppikofer, proceeding from the conviction that the full and exclusive sovereignty of states in superjacent airspace presents an "incontestable fact" stated that these sovereign rights "are in themselves less prejudicial to international air traffic than the fact that their exercise is not conditional upon the existence of any national interests worth protecting. For the sake of frontier control" - continued Oppikofer - "it may be admitted that the state may close certain parts of its frontiers...but this closed zone should not consist of precisely those comparatively small areas which constitute the shortest way of entry for a foreign com-

peting line...The same considerations also apply to prohibited areas..."[64] Thus, it appears that Oppikofer placed the problem within the right framework by pointing out that the chief question was "how can the interests of international air navigations be brought into harmony with the admitted administrative competence of the different states ?"[65] Indeed, it seems that this was a problem which, however, could not be solved in the postwar period. The spirit of international co-operation and the understanding of common necessities were subjected to narrow national interests. As a result, some positive and generally liberal (but unfortunately, not sufficiently clear) provisions in multilateral air agreements were submitted to the most restrictive interpretation in practice. The task of developing the air law, or establishing principles decisive of rights and obligations flowing from the granting by states of the privilege of use of their airspace was "far from complete" - wrote C. C. Hyde, and was "necessarily retarded by the slowness with which several members of the international society find it possible to agree on what is to be deemed responsive to fresh and changing conditions that confront them."[66] Hence it might be said that then the existing multilateral conventions have served the interests of the national administrations more than those of international air commerce, the latter supposedly being their main goal.[67] The very existence of two such agreements also contributed to the general anarchy; the one largely confined

to the European, and the other to the American continent. This fact implied a division of world aviation into spheres in a manner little consistent with the universal character of civil aviation and air commerce.

C H A P T E R V

PROPOSALS SUBMITTED AT THE CHICAGO CONFERENCE OF 1944

1. The Preparations for the Conference - The Main Controversy Over the Regulation of International Air Transport

World War II was at its peak when on November 1st, 1944, the delegates of 54 nations met in Chicago in response to the invitation of the United States Government. That year (1944) was important with respect to the future of world civil aviation. Although the fury of the global conflict was more devastating at that time than in any of the previous years, nevertheless, the eventual victory of the Allies was no longer in doubt. The successful prosecution of the war gave to those among the United Nations responsible for civil aviation an opportunity to look forward to, and to commence preparing, plans for the approaching time of peaceful use of aeronautics. Air transportation was no longer in its infancy, as was the case in days of World War I, when it did not matter too much if the international regulation of flight came some time after the end of hostilities. When war broke out in 1939, the carriage by air, although rapidly growing in importance, was still only a relatively minor means of transportation except in those regions where surface transportation was unavailable. Many parts of the world were still without adequate ground organization for the normal operation of air services. During the

war, because of military necessity, aircraft developed from a minor to a major component of the world transportation system. Thus it was that the military pressure of a world at war telescoped a quarter-century of normal peacetime aviation development into the space of a few years.

There was no doubt that the liberated parts of the world would desperately need air transport services even before the total defeat of the enemy. - "The approaching defeat of Germany, and the consequent liberation of great parts of Europe and Africa from military interruption of traffic, sets up the urgent need for establishing an international civil air service pattern on a provisional basis at least, so that all important trade and population areas of the world may obtain the benefits of air transportation as soon as possible, and so that the restorative processes of prompt communication may be available to assist in returning great areas to processes of peace" - thus was worded the official invitation of the U. S. to the Chicago conference. There was a general feeling that before world civil aviation lay a great task and an equally great opportunity; hence it should be ready to take over immediately after circumstances permitted.

Wartime co-operation hurdled many previously existing political barriers; nevertheless, there were numerous problems, political, economic, legal, and technical, to which solution had to be found if the fruits of this wartime enterprise were to be of benefit to postwar international civil aviation.

There was the entire problem of transit and commercial rights - what arrangements would be made for airlines of one country to fly into and through the territories of another ? Furthermore, what measures should be taken to minimize the legal and economic conflicts that might arise in peacetime flight across national frontiers ? What could be done to maintain war-created air navigation facilities, and soforth ? [1)]

As early as in October 1943 the representatives of the British Commonwealth of Nations met to discuss the questions of future Imperial co-operation with regard to civil aviation. In January 1944, the Governments of Australia and New Zealand had announced in the so-called "Co-operation Agreement" their plans as to the post-war regulation of international aviation. In March of the same year the Canadian Government indicated its views on the subject. In April 1944, the British Labour Party published a pamphlet "Wings for Peace, Labour's Post-War Policy for Civil Flying" in which were set up the views of Laborites on the future organization of world aviation. During the early months of 1944 and later, it is known that the U. S. Government conducted exploratory discussions with the representatives of others of the Allied nations (e. g. with the U. K., the Soviet Union, China, the Netherlands) on the problems of post-war arrangements for civil aviation. All these developments, along with the favourable course of the war operations, served as groundwork for the subsequent convocation of an international aviation conference.

On September 11, 1944, the Government of the United States sent an official invitation for participation in an international conference to the following governments and authorities: (a) all members of the United Nations; (b) nations associated with the United Nations in the current war; (c) the neutral nations of both Europe and Asia, and (d) the Danish and Thai Ministers in Washington in their personal capacities. All of the nations accepted the invitation and attended the conference except the Soviet Union. The reason given for the U. S. S. R.'s absence was the fact that certain nations with which the Soviet Union did not maintain diplomatic relations (i. e., Spain, Portugal, and Switzerland) were invited to the conference and that therefore the Soviet Union could not participate. This excuse is, of course, hard to accept, because some of the other nations which did participate at the conference had similar political difficulties, but were nonetheless able to overcome these.[2] Thus, once again, as in 1919, two great nations, the Soviet Union and Germany, were absent from the place where the foundations for future international aviation were laid down. The absence of the U.S.S.R. was certainly to be regretted, although she was the only one to be blamed for this.[3] Notwithstanding the non-cooperative attitude of Russia, and the absence of the 'enemy' countries, the Chicago conference was much closer to the concept of universality than any prior aviation assembly.

The U. S. Government suggested in its invitation, as

a basis for discussion at the conference, the following objectives: (I) the establishment of provisional world route arrangements which would form the basis for the prompt establishment of international air transport services; (II) the establishment of an Interim Council to collect, record, and study data concerning international aviation and to make recommendations for its improvement; and (III) agreement upon the principles to be followed in setting up a permanent international aeronautical body, and a multilateral aviation convention dealing with air transport and related problems.[4] It soon developed, however, that other nations represented at Chicago, particularly the United Kingdom and Canada, attached the utmost importance to agreement on the organization and functions of a permanent aeronautical body, and thus the scope of the conference underwent a significant broadening right from its beginning.

The work of the conference was divided into:

(1) the establishment of a permanent multilateral convention and international aviation authority;

(2) the creation of international technical standards and procedures;

(3) the perfecting of arrangements for provisional air routes; and

(4) the establishment of an interim council to function in international aviation pending ratification of a convention. Accordingly were set up four technical committees with

appropriate sub-committees.

At the outset, there were four basic proposals before the conference submitted by the United States, the United Kingdom, Canada, and a joint proposal from Australia and New Zealand, the U. S. and the Canadian were in the form of draft conventions. It soon became clear that the main point of issue at the conference was to determine how and to what extent world air transport could be subjected to international economic and political control; in other words, upon what basis international air transport should be regulated. The phrase 'economic control', so frequently used at Chicago and afterwards, requires some explanation. It appears to the present writer that this phrase, with respect to international air transport, actually has a twofold meaning: the broader one (political), and the narrower one (technical). At Chicago, both aspects were considered. The political aspect of the phrase involves considerations of sovereignty and economic independence of states, since it seeks to solve the question whether freedom of operation would be granted to world air transport by an international agreement where air services (both domestic and international) remain under national control, or whether world air transport activities would be performed and controlled by an international and supranational authority. In the latter case, should this authority be invested with only regulatory and/or co-ordinative powers, or should it operate as an owner of international air transport, and if so, for which services ? The technical

meaning of 'economic regulation' of international air transport includes the following factors: (a) routes to be operated; (b) privileges accorded to an airline of one country in the flight space of another; (c) frequency of aircraft operation on each particular route by a certain nation; (d) rates to be charged the public; (e) capacity of aircraft, (i. e., for example, the number of seats) offered the public in some unit of time such as the number per week.[5]

Early in the discussions the joint Australia-New Zealand proposal for international ownership and operation of civil air services on world trunk routes was rejected. This clearly indicated the tendency of the majority of delegations away from extensive international control of air transport. Of the three other plans, the U. S. project of a Convention called for an international aviation authority with powers limited to the technical and consulatative fields;[6] the Canadian plan aimed to set up an international authority "charged with the duty of planning and fostering the organization of international air services" and in performing these duties, it would have the power to allocate routes, review rates, and determine frequencies of operation.[7] The British project, fundamentally similar to the Canadian, also provided for the establishment of an International Air Authority with wide discretionary powers in allocating routes, fixing rates, and determining frequencies. The early debates also indicated that

none of the foregoing concepts would succeed in getting the necessary support of a majority of the delegations and thus become a basis of a convention.

The work first took place in Sub-committees of Committee I, where the Canadian and U. S. drafts were used as the basis of discussions. However, it soon became apparent that the fundamental issues of international organization and air transport regulation could not easily be resolved within these sub-committees, and eventually extensive discussions at closed meetings between the delegates of the U. K., Canada, and the U. S. took place in order to reconcile their divergencies. As a result of these discussions a tripartite proposal emerged and was placed before the conference.[8] The tripartite plan, entitled "Section of an International Air Convention Relating Primarily to Air Transport" and issued November 20, indicated that the proposed world air authority would have purely advisory and consultative functions so far as economic questions were concerned, but as to the fixing of the frequencies of operation over specific routes, this joint plan left the question open. It was just this problem of the so-called 'five freedoms of the air' and the frequency of operation that almost broke the conference following the wide differences in the concepts of the U. K. and the U. S. The tripartite plan and related proposals were subsequently referred to a new, ad hoc Joint Sub-committee of the Committees I, III, and IV, which held altogether ten meetings in the period between November 24 and

December 4, 1944. During its sessions, three complete revisions of the tripartite proposal were made.[9] Exhaustive discussions revealed that it was impossible to find an acceptable solution which would satisfy all points of view and all circumstances likely to appear in practice. As a compromise, the Conference drew up, besides the basic Convention, two separate agreements which were left open for signing. These were: the International Air Services Transit Agreement, and the International Air Transport Agreement. Both these agreements were sponsored by the United States. Thus, the adopted final text of the Convention on International Civil Aviation[10] lacked the controversial economic provisions, which were transferred into two additional agreements, as previously mentioned.

2. United States Project of a Convention on Air Navigation

At the opening of the plenary session of the Chicago conference, the position of the U. S. was outlined, in general terms, in the message from President F. D. Roosevelt. It seems useful to recall some parts of his message. He said, inter alia: " The rebuilding of peace means reopening the lines of communication and peaceful relationship. Air transport will be the first available means by which we can start to heal the wounds of war, and put the world once more on a peacetime basis.

"You will recall that after the First World War, a conference was held and a convention adopted and designed to open Europe to air traffic; but under the arrangements then made, years of discussion were needed before the routes could actually be flown. At that time, however, air commerce was in its infancy. Now it has reached maturity and is a pressing necessity.

"I do not believe that the world of today can afford to wait several years for its air communications. There is no reason why it should.

"It would be a reflection on the common sense of nations if they were not able to make arrangements, at least on a provisional basis, making possible the opening of the much needed air routes.

"I do hope you will not dally with the thought of

creating great blocs of closed air, thereby tracing in the sky the conditions of future wars. I know you will see to it that the air which God gave to everyone shall not become the means of domination over anyone.

"...with full recognition of the sovereignty and juridical equality of all nations, let us work together so that the air may be used by humanity, to serve humanity."[11)]

President Roosevelt thus indicated that the intention of the U. S. Government was not so much to obtain immediately at the conference a final settlement of all the essential problems of international air transport, but to seek agreement in principle and, for the time being, on a provisional basis only, in order to "open the sky" as soon as possible for commercial activity. A more explicit and more detailed expression of the U. S. position was given by A. Berle, the Chairman of the U. S. Delegation, at the second plenary session, on November 2, 1944.

Mr. Berle immediately asserted that the U. S. A. believes that each country "has a right to maintain sovereignty of the air which is over its lands and its territorial waters. There can be no question of alienating or qualifying this sovereignty."[12)] However, Mr. Berle stressed the fact that nations ought to subscribe to those rules which shall enable them to maintain friendly commercial intercourse; "this obligation rests upon nations, because nations have a natural right to communicate and trade with each other in times of

peace."[13] Talking about the right of innocent passage, Mr. Berle underlined the similarity which exists between intercourse by sea and intercourse by air, and stressed the necessity of working "upon the basis of exchange of needed privileges and permissions which friendly nations have a right to expect from each other."[14] Subsequently, he indicated that the U. S. would propose an exchange of such privileges "between friendly nations" and warned that, in such exchanges, "no exclusion or discrimination shall exist."[15] In trying to make clear the standpoint of his Government, Mr. Berle drew a line between traffic by air and traffic by sea; he declared that the air routes of the world are "far more like railroad lines than like free shipping; and indeed, the right of air intercourse is primarily a right to connect the country in which the line starts with other countries, from which, to which, or through which there flows a normal stream of traffic to and from the country which established the line."[16]

Following this, the Chairman of the U. S. Delegation made plain what was indicated earlier in the message by the President of the U. S. A., - namely, the immediate purpose of this conference as viewed by the Americans. Asking the delegates "not to try to see too far now into the unknowable future" he pointed out that the business in hand at that time consisted in the establishment of the means "by which communications can be established between each country and another, by reasonably direct economic routes, with reasonably convenient

landing points connecting the chief basins of traffic."[17] Subsequently, Mr. Berle requested the conference to endeavour to work out the "general form of the friendly permissions... to be exchanged on a provisional basis."[18]

Continuing, Mr. Berle admitted the intimate connection between the problem of routes and that of rules of the air on the one hand, and the problem of international air organization on the other. He emphasized that while there was a general agreement on the need of such organization, there wa s a difference as to the extent of the powers to be granted a world air authority. Referring to the proposals made by "some brave spirits" who suggested that the wide powers in the economic and commercial field be granted to an international body, Mr. Berle stressed the lack of experience in this matter and stated that under these circumstances, "imprecise formulae mean in reality arbitrary power, or even worse petty deals to exclude competitors where one can, and divide traffic and profits where one must."[19] For these reasons, as Mr. Berle said, the U. S. was in favour of an organization whose duties on economic and commercial fields would consist primarily in "fact-gathering" and "fact-finding"; the U. S. was willing to support an international authority in the realm of air commerce having power in technical matters, and having consultative functions in economic matters and related political questions.[20] However, Mr. Berle did not entirely exclude the possibility of investing in an international organization wider additional powers, but

this would be possible only "after a reasonable period of experience...and as prudence and well-being may dictate."[21]

Feeling that there were wide-spread suspicions among many of the delegations concerning the real intentions of the U. S. as a result of its overwhelming superiority in the number of available aircraft and airplane industry,[22] Mr. Berle pointed out, at the end of his speech, that his Government was prepared to make available,"on non-discriminatory terms", civil aircraft to those countries which "recognize, as do /the United States/, the right of friendly intercourse, and grant permission for friendly intercourse to others."[23] It seems rather obvious that this implied that only those countries which were prepared to subscribe to the U. S. plans for future operation of international air transport could reasonably count on American supplies.

Turning now to the official draft-convention submitted by the U. S., one may observe more closely the ideas which dominated the American position at Chicago. The "United States Proposal of a Convention on Air Navigation"[24] contained 32 articles preceded by a preamble. The preamble itself, in a condensed form, restated the general principles of the U. S. policy on civil aviation. A passage from it reads as follows:

> "The contracting States desiring to agree upon certain basic principles designed to facilitate the establishment and operation of international air transport services between their respective territories on a sound, safe, and economic basis";

and then:

> "Having in mind the desirability of encouraging the development of international aviation on the basis of equality of opportunity..."

These principles were subsequently, in slightly different form, adopted in the Preamble of the permanent Convention.

Art. 2 of the U. S. draft reiterated the principle of "complete and exclusive" sovereignty of each contracting state over the airspace above its territory. At this point the U. S. proposal differed remarkably from the adopted text of the Convention, the latter recognizing the sovereignty over the superjacent airspace to "every State", while the U. S. draft contemplated such recognition only between and for the contracting parties. Articles 5, 6, 7, and 8 present the key-provisions of the U. S. draft-proposal. Art. 5 provided:

> "(a) Each Contracting State grants the right to fly across its territory without landing, and the right to make technical stops in its territory, to the aircraft of the other Contracting States engaged in scheduled airline services;..."

These are the first two freedoms of the air which were later incorporated into a separate Air Transit Agreement.

By Art. 6, each contracting state agrees that aircraft of the other contracting states

> "not engaged in the carriage of passengers, cargo, or mail for compensation or hire shall have the right to make flights into or in transit across or to land in territory under the jurisdiction of such State, without the necessity of obtaining its prior permission."

This provision was adopted as Art. 5, para. 1 in the permanent Convention, but, in a new, final edition it was

accompanied by a variety of limitations.

Art. 7 of the U. S. draft provided that aircraft of each contracting state

> "engaged in the carriage of passengers and cargo for compensation of hire on other than scheduled airline services shall have the right to make flights into or in transit across territory under the jurisdiction of such State and to make technical stops without the necessity of obtaining prior permission from such State, subject to the right of the State flown over to require landing. Such aircraft shall also, subject to provisions of Article 21 /cabotage clause/, have the right to take on or discharge passengers and cargo, subject to the right of the State flown over to impose such regulations, conditions or prohibitions as it may consider necessary."

The idea contained in the above provision found a place in Art. 5, para. 2 of the Convention, but the original term 'right' was replaced by the term 'privilege'.[25]

Art. 8 (corresponding to Art. 6 of the Convention) provided that the taking on and the discharging of passengers, cargo, and mail by the scheduled air services

> "of any Contracting State in the territory of one or more other Contracting States shall be dependent upon the consent of such other State or States and shall be governed by the terms of a special agreement on the subject between the States concerned."

Articles 23, 24, and 25 of the U. S. project deal with the establishment, composition, and powers of the permanent organization, called "International Aviation Assembly," and its "Executive Council". The proposal suggested as duties of the Assembly: (1) to select the members of the Executive Council;

(2) to receive and consider recommendations from the Council and to take such action as it deems advisable;

(3) to meet "from time to time as occasion may require, and at least every two years";

(4) to receive a report of the Council submitted at each meeting of the Assembly and to decide any matter referred to it by the Council;

(5) to refer to the Council any matter within the sphere of jurisdiction of the Council. (Art.23)

The U. S. draft contemplated the Executive Council as being composed of fifteen members, including the president. With respect to the composition of the Council, the U. S. draft sharply differred from the final text of the Convention. According to the U. S. proposal, the Council would include two members for each of the following countries: the United States, the U.S.S.R., and two others appointed by the British Commonwealth of Nations; Brazil, China, and France would appoint one member each, while the remaining six members of the Council would be selected from other countries "with a view to assuring that all major areas of the world are represented." (Art. 24). However, in the election of these remaining six members of the Council the Assembly would not have much choice, since the same article provided that they be selected from each of the following regions: three representatives of Continental Europe; two representatives of the Western Hemisphere, and one of Asia and Africa taken together. The duties entrusted to this Council would be even more limited than those which the Convention grants to the Council of ICAO.

In general, the position of the U. S. at Chicago was very similar to the position which its delegation had taken at Paris in 1919, at Havana in 1928, and at the special meeting of ICAN in 1929. It may be said, that the U. S. views expressed in 1944 were somewhat like those which were put forward by the British at the earlier air navigation conferences.[26] Right at the beginning of the Chicago conference, the American delegation announced that the U. S. doctrine would be to allow aircraft to fly wherever there was traffic need, provided only that they should fly reasonably full, a 65 percent load factor being suggested as 'reasonable'. Schedules, however, should be increased as rapidly as needed and airlines should be free to fly such types of aircraft and with such frequency as sound and economic business principles should dictate. Given free operation together with the technical progress stimulated by competition, the Americans stressed the fact that a large volume of traffic would almost certainly be available to the airlines of the world.[27] They reiterated frequently that the fear of free competition, shared by so many delegations in Chicago, in field of aviation was more unreasonable than in probably any other field of human activity. Here, in air transport, "competition does not mean taking away from someone that which he has - though it may mean that one will get more of the increase than another" - asserted Mr. Berle.[28]

3. The United Kingdom Proposal on International Air Transport

Shortly before the Chicago conference met, the British Government had outlined its position in the 'White Paper' (Cmd. 6561) of October 8, 1944.[29] When the conference convened, this document was placed before the delegations present in the hope that it might "be the basis of international accord."[30] The British White Paper contained the general principles and the system which, as the British believed, would "effectively and fairly combine national aspirations with international cooperation."[31] At the opening of the conference, Lord Swinton in his address declared that his Government's ideal was to establish such an organization of world civil aviation which would satisfy "legitimate national aspirations and at the same time...reconcile these aspirations with international cooperation" and introduce such a system in which would be avoided "disorderly competition with the waste of effort and money and loss of good will which such competition involves."[32] Furthermore, he made it clear that the U. K. would insist on having as every other nation had, in addition to its own internal traffic, a fair share of the external air traffic as well.

In its White Paper, the British Government, after having subjected the systems in force between two World Wars to severe criticism, expressed its desire to see a radical change in the situation after the war and indicated the following as the general principles which should govern the post-war arrangements

in world civil aviation:

(i) omitted;

(ii) "to maintain broad equilibrium between the world's air transport capacity and the traffic offering;

(iii) "to ensure equitable participation by the various countries engaged in international air transport;

(iv) "to eliminate wasteful competitive practices and, in particular, to control subsidies;

(v) omitted;

(vi) "in general, to contribute to world security."

A new air convention to be drawn up and taking the place of both the Paris Convention of 1919 and the Havana Convention of 1928, should, according to the British, give effect to these principles:

(i) "reaffirm the principle of national sovereignty of the air...";

(ii) "define the degree of freedom of the air to be enjoyed by the ratifying States..."

It was proposed that freedom of the air should extend to:-

(a) "the right of innocent passage through a State's air space;

(b) the right to land for non-traffic purposes...;

(c) the right to disembark passengers, mails and freight from the country of origin of the aircraft;

(d) the right to embark passengers, mails and freight destined for the country of origin of the aircraft."

The 'fifth-freedom' rights and the right to engage in cabotage within another country would be a matter for negotiation.

(iii) "define the international air routes which should be subject to international regulation; these would be reviewed from time to time as necessary;

(iv) provide for the elimination of uneconomic competition by the determination of frequencies (total services of all countries operating on any international route), the distribution of those frequencies between the countries concerned and the fixing of rates of carriage in relation to standards of speed and accommodation;

(v) provide for the licensing of international air operators who undertook to observe the Convention and to abide by the rulings of the appropriate authority, and for the withdrawal of the licence in the event of a breach of the obligations;

(vi) provide for the denial of facilities to any unlicensed operator;"

(vii) to (xi) omitted.

The British plan also contemplated for the administration of the Convention an "International Air Authority" and under it (a) an "Operational Executive" with subsidiary "Regional Panels", and (b) "Sub-Commissions" to deal with technical matters. The Authority would consist of representatives of all the ratifying states with voting powers to be determined on an equitable

basis. As to the composition of the Operational Executive, unlike the U. S. draft, the U. K. project left this open, as a matter for "further examination," at the same time indicating three possibilities in the selecting of its members. Membership of a Regional Panel would be confined to those states having an interest in international air transport in the areas for which each Panel was responsible. The number and the areas which these Regional Panels would cover were not indicated in the British plan.

The first task of the International Air Authority would be to give effect to the provisions of the Convention for the determination and distribution of frequencies and for the fixing of rates of carriage in relation to standards of safety and accommodation, It would, for this purpose, work through the Operational Executive which, in turn, would delegate its functions as appropriate to the Regional Panels, the decisions of the Panels being subject to review by the Executive, whenever necessary, by the I. A. Authority.

Such were, in broad outline, the ideas put forward by the U. K. at Chicago for the ordering of post-war international civil air transport. From these, it may be easily concluded that the British and the U. S. positions on air transport, as brought forward at Chicago, typified two different points of view toward post-war civil aviation and the post-war economy as a whole.[33] It is apparent that the U. K. views were strongly influenced on the one hand by security considerations, and on

the other hand by the lack of transport aircraft at that time.[34] To the Americans it appeared that the British, and the others who shared the British position were "more concerned with preventing the recurrence of the present perils than with exploring the opportunities contained in air transport."[35] It seems, however, that even more influential in the British thinking than such security questions was the fear that, without some effective international control over routes, rates, and schedules, the U. S., with its undisputed advantages in the field of air transport, and with a practical monopoly on long-range transport planes, would so control the world air transport of the immediate future, that other nations, when ready to enter the competition, would find themselves outdistanced, and with no room left to a newcomer. The British considered that under the existing circumstances 'equality of opportunity' combined with uncontrolled freedom of air traffic, would mean equality in theory, constituting actually an advantage and a privileged position for the U. S.[36] Therefore, it was not surprising that the U. K. and the other (mostly European) nations in a similar situation were the most vigorous advocates of the strict economic control of world air transport. Besides, as has been remarked and with reason by an American author, to such countries, as operate their airlines along government monopolistic lines rather than as commercial businesses, such international control would mean nothing extraordinary, since they were "accustomed to controlling all types of international

trade... and they saw no reason why air transport should not be subject to similar restraint."[37)]

It is certainly interesting to note how much the British position has changed towards these air transport problems in a quarter of a century. The views which the British delegates defended at Chicago were little consistent with those taken at Paris in 1919 and again in 1929. At the same time, it is worth pointing out a reversal of the historic economic policies followed by the U. S. A. and Great Britain. The United States, "long an ardent protectionist nation, appeared as an eloquent advocate of free trade in the air, and Great Britain, long identified with the gospel of free trade and freedom of the seas, apparently forgot her assaults on mercantilism in the Nineteenth Century and favored restriction and control in the air."[38)]

4. Canadian Draft of an International Air Transport Convention

The specific political and geographic position of Canada, determined on the one hand by its membership in the British Commonwealth, and on the other by the strong economic ties which it shares with its neighbour, the United States, necessarily had a strong influence on Canada's attitude toward civil aviation problems which were to be dealt at the Chicago conference. Canada was undoubtedly in a better position to be familiar with and to understand the different trends which were bound to collide than any other nation present at Chicago. At the same time, it was natural that she took the middle way by acting as a kind of mediator, and by endeavouring to iron out the divergencies of the various conflicting interests. This role is always a rather unpleasant one, usually offering more disappointments than advantages to those who play it. Nevertheless, Canada, and the men who were charged to explain her views at the conference, deserve the highest praise for their sincere efforts made in an attempt to find a solution for the problems involved. Moreover, it may be said that the Canadian outline of the future organization of world civil aviation was probably closer to the workable and practical solution of international air transport questions than any other proposal submitted. The draft-convention placed before the conference by Canada was rightfully described by Mr. Berle as "by far the most carefully worked out plan of cooperation."[39]

Unfortunately, the tendencies leading away from the idea of close international collaboration were too powerful within the Chicago assembly, and consequently, the main goals of the Canadian plan could never have been attained at that meeting.

The head of the Canadian delegation at Chicago, Mr. C. D. Howe, should be credited for the most explicit setting forth of a nation's views at the second plenary session of the conference. He pointed out in his introductory words that an international air authority, established along the lines of the Civil Aeronautics Board of the U. S., was the principal proposal of his Government. Mr. Howe eventually stressed that Canada believes in that kind of healthy competition which develops "most fruitfully under an international authority."[40] Then he proceeded to outlining the Canadian views on international aviation as contained in a tentative and preliminary draft-convention which was published in Ottawa on March 17, 1944.[41]

Broadly speaking, in addition to the international authority, already mentioned, Canada suggested that the contracting states to the convention should grant four freedoms of the air to airlines whose operations have been authorized by the I. A. Authority. The highlights of the Canadian plan may be summarized as follows:

Considering the establishment of an international regulatory body as the main objective, the Canadian draft-

convention provided, in Art. I, Section 1:

> "An authority is hereby established to be known as the International Air Authority and to consist of an Assembly, a Board of Directors, Regional Air Councils..."

This I. A. Authority "shall plan and foster the organization of international air services so as", inter alia,

> "to ensure that...international air routes and services are divided fairly and equitably between the various member states, and to ensure to every state the opportunity of participating in international airline operation in accordance with its needs for air transportation service;" (Sec. 2, (d)

In Section 3, the Authority was granted exclusive jurisdiction over international air services, provided that "any two contiguous member states may reserve arrangements for services between them."

Under Art. II, each member state would undertake to grant first four freedoms of the air to international air services of the contracting parties (Sec. 1) reserving, however, the right for each member state to designate the route to be followed within its territory and the airports to be used (Sec. 2, (a).

The International Air Assembly would be composed of representatives of the member states, each of them having the right to appoint two representatives and being entitled to two votes (Art. III, Sec. 1).

The International Air Board, the most important part of Canada's proposed world aviation machinery, was contemplated as sonsisting of twelve members and a president. It would

include one national of each of the eight member states of "chief importance in international air transport" while the remaining four seats would be filled by nationals of four other countries designated by the Assembly and for a defined period of time (not indicated in the draft). The Board would be a permanent body responsible tomthe Assembly, and its duties would include, among others, : (1) the constitution of the Regional Air Councils and delimitation of their boundaries; (2) the designation of the routes over which the Council would have jurisdiction; (3) the naming, as participating states, those member states which are principally concerned in the air transport of the region; (4) the granting of certificates over routes coming within the jurisdiction of two or more Regional Councils, or of no Regional Council, and in such cases, the performing of the duties of a Regional Council (Art. IV, Sec. 2).

The Board was given power:

> "To revoke or alter, after public notice or hearing, any decision of a Regional Air Council including any decision to grant, withold, alter, amend, modify, revoke or suspend a certificate, and any decision determining frequencies of service, allocation of quotas, or rates of carriage." (Art. IV, Sec. 3, (1)

The Regional Air Councils, according to the project real operational units, would consist "of not less than six members," some of whom would be experts appointed by the Board (one third of them) and some of whom would be representatives appointed by states principally concerned in the airlines of the area (Art. V, Sec. 1). Each Regional Council would elect

a Managing Director. These Councils would be entrusted with very extensive powers, as determined in Sec. 4 of Art. V. For example, the Council would grant certificates covering international air services within the region; it would have power to withold certificates; to attach to certificates "such reasonable terms, conditions and limitations as the public interest may require"; to alter, amend, modify, suspend, or revoke any certificate, in whole or in part, for "deliberate failure to comply with any provision of this /draft-/ convention or of any order, rule or regulation issued under this /draft-/ convention or any term, condition or limitation of the certificate"; to review and alter, if necessary, the rates of carriage for passengers and cargo, and soforth.

An airline holding such a certificate would automatically be entitled to the four freedoms mentioned.[42] Furthermore, the Canadian plan proposed that any nation should have the right to have one of its airlines operate "at least one round trip per week on any international route commencing in the nation's territory."[43] Any airline, holding a certificate, would be granted an inalienable right to increase its operated capacity whenever, for a substantial length of time, more than 65 percent of its total available capacity had actually been occupied by revenue-paying commercial loads, and conversely it would have to decrease the capacity whenever the proportion remained less than 40 percent (Art. V, Sec. 5). In no case could an airline be refused one frequency

a week.[44]

In the following words Mr. C. D. Howe explained the reasons which led Canada to assign such wide powers to an international body: "We think that it is unrealistic to talk in terms of a multilateral grant of freedom of air transport and commercial outlet, unless those grants of air freedom are accompanied by the establishment of an effective international authority, with power, in the ultimate resort, to regulate frequencies and to fix rates. Without an effective international regulatory authority, mere freedoms of the air would lead either to unbridled competition, or to the domination of the airways of the world by a few."[45]

Art. IX of the Canadian draft-convention puts the I. A. Authority into a very close relationship with the international security organization. For instance, Sec. 2 of Art. IX provides that the Board may, upon the request of the world security organization, "immediately and without formal hearing grant, withold, alter, amend, modify, suspend or revoke any certificate in whole or in part."

Art. XI declares that "every state has complete and exclusive sovereignty over the air space above its territory." Art. XII accord to aircraft of member states, in time of peace, "freedom of innocent passage" while Art. XXIV reiterates this principle, declaring that "every aircraft /except state aircraft and pilotless aircraft/ of a member state has the right...to cross the air space of another member state

without landing." Art. XXV appears to accord to aircraft of member states also the right to land and stop is such landing or stoppage is "reasonably necessary for the purpose of such transit". However, these rights can be enjoyed by aircraft engaged in international services only if operating under a certificate issued by the Regional Council or by the Board.

Thus, as may be seen, the Canadians proposed at Chicago as a solution to the international air transport problems the doctrine of four freedoms, combined with an international body which would regulate frequencies, allocate routes, and fix rates. The all-embracing fifth freedom did not find a place in this project. Some delegations, headed by the U. S. , regarded this as a "serious omission." They thought that an airline operating a long route under the Canadian formula would fly with a constantly growing number of empty seats. Without the right to carry intermediate, so-called 'pick-up' traffic along the route, it was submitted that such a restriction "would strangle the lines of every country except those operated, for political reasons, with heavy government subsidies."[46] Although this criticism seems fairly reasonable, the Canadians should certainly not be blamed for the failure of the Chicago conference to take into consideration this and similar objections. Had the Canadian proposals been included in the permanent Convention, the international air services would be operating today under much better circumstances than they actually do.

5. Australia-New Zealand Plan and the Idea of Internationalization of World Civil Aviation

With respect to the future operation of international air services the most radical project announced at Chicago was sponsored jointly by Australia and New Zealand. It contemplated international ownership and operation of air transport services on international trunk routes, while reserving to each country complete freedom in its own internal air communications and its right to enter into agreements to establish secondary air routes and services with contiguous nations.[47] An international corporation, according to this plan, would not only operate prescribed international world routes and services and own the aircraft employed thereon, but would also own ancillary equipment and accessories utilized in connection therewith.[48] The chief reasons for advocating the introduction of these revolutionary measures were, as indicated by the Chairmen of the Australian and New Zealand Delegations, the following: (1) "an organization with such powers and authority could be more effectively integrated with any world security council than an authority with lesser powers"; (2) "sanctions and supervision can be more readily applied if all nations participate in the ownership and control of the instrumentality operating the services;" (3) "any lesser proposal than that...will deny to small nations who by themselves have inadequate resources

to operate air services to other countries, a measure of participation in air communication to which they are justly entitled, in accordance with the principle of economic justice for all nations"[49]; (4) "the struggle for concessions between competing interests and competing nations can produce and facilitate the tragedy of war unless we take international aviation clean out of the domain of private and national competition"[50]; (5) "from the purely technical point of view, there are obvious advantages in having one international authority controlling and operating air transport routes and services. The international air transport authority would have at its command all the best technical, research, and other aviation resources of all countries. Under past conditions such resources were often preserved in secrecy in national interests, instead of being pooled in the common interests of mankind."[51]

On behalf of both the Australian and the New Zealand Delegations, Mr. Sullivan submitted the above ideas in a form of resolution[52] which, in the most concise manner, contained the main principles upon which internationalization would be based. The substantial part of this Resolution read as follows:

> /The nations represented at the Chicago conference/ "agree that these /supra/ objectives can best be achieved by the establishment of an international air transport authority which would be responsible for the operation of air services on prescribed

> international trunk routes and which would own the aircraft and ancillary equipment employed on these routes; it being understood that each nation would reatin the right to conduct all air transport services within its own national jurisdiction, including its own contiguous territories subject only to agreed international requirements regarding landing and transit rights, safety facilities, etc., to which end it is desirable that... the Conference should consider the organization and machinery necessary for the implementation of this resolution."

As has been pointed out before, this Australia-NZ joint proposal met with strong opposition at Chicago. Many delegates stressed, when speaking on behalf of their respective governments, that time and conditions were not yet ripe for such an advanced step as that advocated by Australia and New Zealand. Mr. Guimaraes, the leader of the Delegation of Brazil, went even further in declaring that the "time will never be ripe" for internationalization.[53] Mr. Berle, writing on the subject shortly after the conference adjourned, expressed a much more moderate view, stating that this "noble" conception was one to which "the world will be increasingly turning as the years roll by...but it cannot be expected to become a reality until all nations are prepared to pool their interests."[54]

The serious shortcoming of the Australia-NZ proposal consisted in introducing into the field of debates the term 'trunk routes', without defining its true meaning. While the formula might be clear so far as isolated countries, such as Australia and New Zealand, are concerned, lying as

they do at the end of long international air ways, it appears to be ambiguous in cases where countries which lie across many international air routes are involved.[55]

There is no doubt that the atmosphere of close international collaboration, an essential condition for the success of any kind of internationalization, did not exist at Chicago in 1944. This fact will partly explain why the Australian-NZ proposal was supported only by two other nations, - namely Afghanistan and France, the standpoint of the latter, however, not being very clearly expressed.[56] After their attempts at internationalization had failed, both Australia and New Zealand took rather restrictive positions at the conference. Australia declared that it would favour a "system of 'regulated' or 'ordered' air in which the four freedoms...were granted bilaterally rather than multilaterally",[57] while the representative of New Zealand stated that his country "would have preferred a large degree of international control" but failing that, it backs the U. K. proposal.[58]

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For the sake of the completeness of the problem discussed in this section it seems necessary to give briefly the historic background of the idea of internationalization of civil aviation. Historically, the first relevant discussion on the subject began during the preparatory work for the 1932-1934 League of Nations Disarmament Conference. At the meeting of the Air Transport Co-operation Committee of the

LN Organization for Communications and Transit held in Geneva in July, 1930, the idea of internationalization was brought forward, by the French and Belgian delegates, though in rather vague terms. However, they were concerned solely with the advantages of internationalization as a means of economic collaboration in air transport, and no security problems were considered.[59] The subsequently convened Conference for the Reduction and Limitation of Armaments which met at Geneva in 1932 under the auspices of the LN had a very different approach. As its title reveals, the chief aim of the Conference was to seek a platform on which lasting peace and international security could be based. Since aviation as a whole (military and civil) was considered as the most dangerous threat to world security, the plans were accordingly submitted in order to eliminate air power as a possible cause of war and international tension. At the beginning of the Conference, the French Delegation formally proposed its disarmament plan, which included, among other things, internationalization of civil air transport under a regime to be established by the League, an air police force, and general air disarmament. The French project urged that stringent military disarmament regulations be adopted, and simultaneously, as a vital supplementary measure, "in order to achieve a genuine limitation of armaments", and to "prevent countries from utilising civil aviation for military puposes", all civil air transport be internationalized.[60] With this plan, no single nation would own or operate

transport aircraft in excess of a tonnage to be fixed in a disarmament agreement. The French proposal suggested, inter alia, that international bodies alone should be authorized to "foster and develop" commercial aviation and they would make decisions particularly on questions such as the creation, modification, control, and administration of airlines; international bodies to be set up under a name such as "International Air Transport Unions" would "alone be allowed to own transport aircraft with specifications in excess of those defined in the future Convention"; the member states would have to give "every possible facility for flying over their territory and for the determination of routes"; the Unions would be under the supervision of the LN which in turn would have a "permanent right of requisition over all the aircraft of the Union"; the operation of the "air lines" would be entrusted to "international companies" which would work under the supervision of the Union concerned, subject to the commercial conditions laid down by the latter.[61] It is believed that this project, if extended to present world conditions, would require that all internal air transport operation in such great national land masses as the Soviet Union, the U. S., Brazil, Canada, China, Australia, and India would be included in a single international scheme.[62]

Following the 1932 discussions, a new 'Air Committee' of the Disarmament Conference was established early in 1933. The debates of the various air disarmament and internationalization proposals went on for almost a month. According to the Minutes

of the Air Committee, the sympathetic attitude towards the French plans for internationalizing civil aviation and establishing an international air police force under the LN was demonstrated by the Delegations of Belgium, Czechoslovakia, Norway, Poland, Spain, Sweden, and Yugoslavia, while Turkey favoured internationalization only.[63] On the other hand, certain delegations firmly opposed the idea of internationalization, particularly the representatives of Germany, Italy, and the U.S.S.R. However, after lengthy discussions, the Air Committee adjourned after having failed to reach any decision. Following the adjournment of the Air Committee in 1933, the Disarmament Conference itself finally collapsed in 1934.[64]

The developments in the world situation which soon followed, starting with the Italian aggression in Ethiopia (1935), the Civil war in Spain (1936), the new outburst of Sino-Japanese hostilities (1937), the Anschluss of Austria (1938), the dissapearance of Czechoslovakia (1939), and the eventual outbreak of World War II, supply, in great measure, the answer why the debates on disarmament and organized international control of air power were so futile. With the outbreak of the new global conflict in 1939, the discussions of internationalization as well as other plans for the world-wide organization of civil aviation were abandoned to give place to military considerations. A few years later, with an Allied victory on the horizon, the problem once more began to attract public attention. In this field of internationalization, as previously

mentioned, Australia and New Zealand took the lead, signing on January 21, 1944, the now famous "Co-operation Agreement", a part of which, concerning post-war regulation of world civil aviation, was to be later submitted to the Chicago conference, as the official proposal of the two Governments. The next step in the same direction was to be made by the British Labour Party in April 1944. The British Laborites made public their views on the post-war organization of world civil aviation in a pamphlet under the title of "Wings for Peace - Labour's Post-War Policy for Civil Flying". This project of the British Labour Party strongly resembled the ideas put forward by their Australia-NZ political counterparts. It contemplated the organization of the world's future civil aviation with the following principles:

(1) A 'World Air Authority' should be created, and it would be subordinate only to the (future) international organization for peace;

(2) All nations participating in this Authority should waive, in favour of the Authority, their sovereignty in the air over their territories and should accord to the Authority "full rights of passage and landing"; they should also prohibit the operation of air transport services other than those authorized by the Authority;

(3) This Authority should have "the sole right to own and operate World Airways, on behalf of the community of nations." This would cover all the main trunk air lines around

the world, and such extensions as might be found convenient;

(4) The Authority should own all the airports, airfields and ground organization required for World Airways, and should provide the flying staff and ground staff;

(5) In addition to the establishment of World Airways, there should be a regional pooling of air transport services; operations within the region should be organized by a Regional Air Authority related to and supervised by the World Air Authority. There should be established "Europa Airways" which should include, besides the Continent itself, the United Kingdom and Eire. In Europe, the internal and international services "ought...to be owned and controlled as a unified system"; however, the internal services in certain (probably larger) states "might well be administered locally...but the administration should be a local section of Europa Airways." In some areas, e. g., Australasia, it may well be appropriate that internal air lines be run separate from the international lines;

(6) It is "desirable that all aircraft suitable for transport services should be owned by the World Air Authority", and in addition, all privately owned planes should be subject to international control. No aircraft should be allowed to operate on any transport service without the Authority's licence;

(7) The World Air Authority should arrange for the formulation of a unified code of air navigation valid for the

whole world;

(8) The Authority should have the aid of a "Security Police Force", supplied by the world's security organization.

The drafters of this ambitious programe expected to encounter "very formidable opposition" and therefore, if the full aim described above could not be achieved immediately, they had an alternative plan in reserve. The latter considered as essential aims to be reached:

(a) A World Air Authority with "wide functions";

(b) A unified World Airways, owned and operated by the Authority;

(c) If a World Airways system, as described, should be rejected, then, "as a second best", a system of "Regional Air Unions" should be created;

(d) The full internationalization of air transport in Europe and the establishment of "Europa Airways" certainly ought to be achieved.

None of the proposals brought forward by the Labour Party was ever given a chance to be tested or applied in practice, nor were they a subject of discussion at any international gathering. Although to the drafters of this plan goes credit for a very carefully elaborated scheme for the future organization of world civil aviation, it should be pointed out, just the same, that their project expressed doctrinal and political views rather than a basis for the practical solution of the problems involved. On the other

hand, the French plan submitted at the Disarmament Conference had even less hope of succeeding. It seems that it was a grave mistake to believe that the problems of (air) disarmament and the problems concerning civil aviation could be dealt with at the same time as one problem. These are, in our opinion, two distinctly separate problems accordingly which should be treated separately. This, of course, does not imply that the French project of internationalization, separately discussed, would have had a better chance of gaining the necessary support under the circumstances prevailing at that time. The political situation between the two world wars was certainly not favourable to such radical plans nor, as the course of events has shown, did such a favourable situation exist at Chicago, where even the nations fighting on the same side were unable to find a common ground for much less revolutionary ideas. Of all these ideas on internationalization the nations assembled at Chicago agreed to insert into the Convention, with respect to permissive functions of the Council of ICAO (Art.55, (d), nothing more than the following provision:

> "The Council may : study any matters affecting the organization and operation of international air transport, including the international ownership and operation of international air services on trunk routes, and submit to the Assembly plans in relation thereto..."

It should be borne in mind that the Australia-New Zealand plan proposed at Chicago was more limited in scope than the French or the British Labour projects.

C H A P T E R VI

THE FREEDOM OF PASSAGE AND COMMERCIAL RIGHTS IN POSITIVE CONVENTION AIR LAW - CHICAGO ACTS OF 1944

1. Convention on International Civil Aviation of December 7, 1944 (Chicago Convention)

Despite the failure to include the economic articles in the general convention, the latter does contain a number of very important provisions which affect the right of nations to fly. By Art. 1 of the Chicago Convention: - "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." Here one finds substantially the same principle as in the Paris and Havana conventions. No limit is laid down for this sovereignty as to the altitude; the only limitation is horizontal, or territorial.[1] Whilst in 1919 and in 1928 such terminology would have been satisfactory, today, when flights at high altitudes are rapidly developing, the question as to the meaning of 'airspace', as used in the Convention, increasingly gains in practical importance. Does it mean that the state's sovereignty is vertically limited to those parts of space which are filled with gaseous air, or should it be understood that this sovereignty extends 'usque ad coelum' ?[2] It would be beyond the scope of this thesis to discuss further the implications of such terminology, but attention, however,

has to be called to the problem which might arise.[3]

In Art. 2 the word "territory" is defined, but a wider understanding is applied than in the Paris Convention, the latter mentioning only the territory of the "mother country and of the colonies". The terminology used in Art. 2 of the Chicago Convention with respect to the non-self-governing areas ("the territory...under the...suzerainty, protection or mandate") is now obsolete and it has been replaced in all international legal documents with the modern terms, following the lines of the UN Charter language. The developments which took place after Chicago, such as, e. g. the creation of the Associated States of the French Union might require a revision of the present text of Art. 2.[4]

Of special interest for our purposes are the provisions of Chapter II of the Convention dealing with flight over the territory of contracting states. Here are principles which had provoked at Chicago the utmost turmoil, and threatened the very success of the conference. Art. 5 defines the rights of so-called 'non-scheduled flight' and reads as follows:

> "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

> Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, /cabotage/ have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

As to scheduled international air services, the Convention provides in Art. 6:

> "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

The two articles reproduced here actually represent a real sedes materiae of the entire Convention as regards the regime of international flight. Therefore it seems necessary to discuss them at length.

As may be seen, the much-discussed and rather controversial phrase 'innocent passage' finally dissapeared from the Chicago Convention which uses more precise, descriptive, wording instead. As to the category of aircraft to which the contracting states regognize the right of transit and technical stop, the Convention does not define the phrase 'aircraft not engaged in scheduled international air services'. Definitions in Art. 96 of the Convention do not contain the answer needed. Since it is essential, in order to understand the real meaning of articles 5 and 6, to draw the line between scheduled and non-scheduled, or isolated operations, it might be useful to

mention, at this point, a definition of the term 'scheduled international air service' as adopted by the Council of ICAO on March 28, 1952.[5] This definition, adopted after a few years of studies, "for the guidance of Contracting States in the interpretation or application of the provisions of Articles 5 and 6" of the Convention, reads:

> "A scheduled international air service is a series of flights that possesses all the following characteristics:
> (a) its passes through the air-space over the territory of more than one State;
> (b) its is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;
> (c) it is operated, so as to serve traffic between the same two or more points, either
> (i) according to a published time-table, or
> (ii) with flights so regular or frequent that they constitute a recognizably systematic series."

Is is emphasized that the main elements of the definition are cumulative in their effect. If, for a series of flights, any of the mentioned characteristics (under (a), (b) or (c) is missing, the series must be classified as non-scheduled.[6]

Art. 5 lays down the rule that the exchange of privileges set out in para. 1 and 2 shall take place only between the contracting parties. This means a reiteration of the already existing principle that there does not exist a general freedom of air transit except between the parties to an agreement. Moreover, this provision implies tacitly that any contracting state renouncing the Convention is thereby released from any obligations that it may have to allow foreign aircraft to enter its

territory. From the definition of the 'scheduled international air services' set forth before it is possible, by the negative deduction, to get an idea under what circumstances an aircraft of the contracting state can avail itself of the right described in para. 1. Three different types of flight are included in this 'right': 1. Entry into and flight over a state's territory without a stop; 2. Entry into and flight over a state's territory with a stop for non-traffic purposes; and 3. Entry into a state's territory and final stop there for non-traffic purposes.[7)]

According to the text of para. 1, aircraft of the contracting states are entitled to operate on flights of the type described above without applying for prior permission; "a general requirement for prior negotiation over the use of routes or landing places would be in contravention of this clause."[8)] The right to enter, fly over, and make non-traffic stops granted by this para. is, however, subject to certain qualifications. In the first place, the right of non-scheduled flight is only granted "subject to the observance of the terms of this Convention." Important relevant parts of the Convention appear to be, according to the ICAO analysis of Art. 5, those which may be found in the following articles: 4, 8, 10, 11, 12, 13, 16, 18, 20, and also in Chapters V and VI in general.[9)] The next qualification consists in the right retained by each contracting state to require landing of any non-scheduled foreign aircraft flying over any part of its territory. The last sentence of

para. 1 contains in fact the most important limitations for the free exercise of the rights granted by Art. 5, para 1. It accords to the states the right, "for reasons of safety", to require aircraft which intend to fly over "inaccessible" regions or those without "adequate air navigation facilities" to follow prescribed routes and/or to obtain a special permit. Thus formulated, this provision makes possible real abuses as shown in the India-Pakistan dispute which is to be dealt with later.

While the first para. of Art. 5 would seem primarily to concern the rights of flights undertaken for pleasure, individual business, or other similar reasons, the second para. lays down rules with respect to the operation of chartered or taxi flights. The phrase "shall also,...have the privilege" indicates that aircraft engaged in such activity should have the advantages given by the first para. of Art. 5. However, the term 'privilege' is considered to be something less than the term 'right' in the first para. and "means a form of qualified right".[10] The ICAO analysis of Art. 5 states that such aircraft have "first the right to enter, fly over, and stop for non-traffic purposes without the necessity of obtaining prior permission and not subject to the 'regulations, conditions or limitations' mentioned in the second paragraph. Then, in addition, with certain qualifications they have the privilege of taking on or discharging passengers, cargo, or mail at a stop."[11] Of these

qualifications, the first one concerns cabotage (Article 7), which is generally reserved for the subjacent state. The other qualifications of the privilege of performing chartered commercial activities are of far-reaching importance. The final part of the second para. of Art. 5 authorizes each state to frame "regulations, conditions, or limitations as it may consider desirable" which virtually means reducing the privileges and rights granted to merely nominal ones.[12] It is difficult to understand the attitude of those who recommended this provision at Chicago in view of the fact that they "fully understood that the limitations authorized could be so stringent as to result in actual prohibition of the entry of nonscheduled transport aircraft."[13] The interpretation of this provision submitted by the Council of ICAO unequivocally confirms that the actual exercise of the rights and privileges of nonscheduled commercial flight lies entirely in the hands of each particular state: "The right of the State includes the right to require its special permission for the operation of taking on or discharging passengers, cargo or mail in its territory or for any specified category of such operations."[14] Conferring to the states such unlimited powers practically means shutting the door on the development of international air-chartered transport, that type of air commerce which is so young, and yet so promising.[15]

Apart from these conventional limitations of nonscheduled flights, it should be pointed out that many states

which are parties to the Chicago Convention, nevertheless, in their national legislation lay down rules which are definitely inconsistent with the obligations they have accepted in ratifying the Convention. The answers received by ICAO to the questionnaire sent out in 1949 to member-states asking for the practice of the latter with respect to foreign non-scheduled flights for non-commercial purposes showed that fourteen states require prior permission for such flights, and only four states do not insist upon such prior permit.[16]

Attempts made at the Chicago conference to find an acceptable formula which would make possible the establishment of international scheduled air services and grant a certain degree of freedom in their operations, had failed. Of the five freedoms of the air, consisting of various transit and commercial rights, not a single one was granted to the scheduled world air transport. As a matter of fact, the provisions of Art. 6 of the Chicago Convention compared with Art. 15, para. 4 of the Paris Convention (as revised in 1929) appear to be more restrictive. The latter was permissive ("every contracting State may make conditional...") whereas the first one is imperative ("no scheduled international air service may be operated..."). [17] Hence the right of establishment and of operation of international scheduled air services may be obtained at the present time, not upon the respective provision of the Convention, but through one of the following methods: (a) By the Transit Agreement; (b) By the Transport Agreement or

(c) By bilateral agreements between the states concerned. All these methods will be separately discussed later. Fundamentally, therefore, the legal situation which existed before, remained unchanged at Chicago and afterwards. As Cooper remarked, "any nation...is still fully authorized to take advantage of its own political position and bargaining power, as well as the fortunate geographical position of its homeland and outlying possessions, and unilaterally determine (for economic or security reasons) what foreign aircraft will be permitted to enter or be excluded from its airspace, as well as the extent to which such airspace may be used as part of world air trade routes."[18)]

Similarly to the preceding multilateral aviation agreements, the Chicago Convention also contains another restriction on free air transport, in reserving cabotage for the national aircraft. However, the cabotage provisions of Art. 7 of the Chicago Convention differ from those in the Paris Convention in one point; namely, that any exclusive grant of exemption from cabotage restrictions to a foreign state is now prohibited. Again, as earlier, when discussing the corresponding provisions of the Paris Convention, attention should be called to the existing differences between maritime and aerial cabotage which seem to require different treatment in international regulation. The concept of cabotage as set out in the Chicago Convention is broad enough to embrace countless air routings between a mother country and its

dependent territories which are often thousands of miles away from the former. If ever a revision of the Chicago Convention is undertaken, the present rule as laid down in Art. 7 should be seriously considered, because it does not seem to be adequate to the requirements of modern air transport policy.[19)]

Art. 9 of the Convention, containing provisions as to the 'prohibited areas' appears to be one of the most important articles in this document. It provides the contracting states with an instrument by which they can, to a large extent, modify, or even nullify the rights and privileges of flight granted by the Convention itself. By Art. 9 (a),

> "each contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged..."

Such prohibited areas shall be of "reasonable extent and location so as not to interfere unnecessarily with air navigation" and their description shall be communicated "as soon as possible" to other contracting parties and to the ICAO (para.1). Furthermore, according to para. 2 of Art. 9, each contracting state has also the right,

> "in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temprorarily to restrict or prohibit flying over the whole or any part of its territory,"

on condition that there is no distinction made between aircraft of various nationalities.

Pursuant to the first sentence of Art. 9, prohibited areas can be introduced for reasons of military necessity, or public safety, but there is no answer as to who is to be the judge in assessing these reasons. Apparently, this is left to the state laying down such regulations for its territory.[20] It is interesting to compare, here, the provision of Art. 5, para. 1 which mentions 'safety of flight' with the phrase 'public safety' as used in Art. 9. The question arises as to whether the term 'public safety' includes 'safety of flight'. If so, as has been rightly remarked upon by some commentators of Art. 9, the "second sentence of par. 1 of Art. 5 would have little significance because the right to restrict or prohibit flight under Art. 9 is broader than the right of Art. 5. Only on one point could it be thought that application of Art. 5 offers an advantage: that of not containing any express anti-discrimination clause."[21]

At this point, it will perhaps be useful to make a digression from the analysis of the text of Art. 9 in order to give some pertinent facts, since these provisions were, in one recent controversy, applied in practice between the two of the contracting states. In 1952 there arose a dispute between India and Pakistan relating to the interpretation and application of the provisions of the Convention, particularly Articles 5, 6 and 9 thereof. Pakistan had declared as prohibited area a large part of its territory in the West with the result that Indian airline operating a service to Afghanistan (Kabul) had

to fly a designated route of 2080 miles in length, instead of 642 miles which was the distance on a 'direct and natural' route between Delhi and Kabul. In its reply to the Indian accusations, the Government of Pakistan based its rights to such an action mainly on the following arguments: (a) the attitude of tribes in these prohibited areas toward India was unfriendly, and the prohibition against Indian aircraft was therefore imposed in the interest of such aircraft; (b) upon the argument under (a) the imposed restrictions should continue "in the interest of safety of air passengers and crew".[22)]

This appears to be a combined use of the rights of both Art. 5 and Art. 9 conferred upon the contracting states, and seeking to restrict the privileges of flight granted by the Convention and supplementary agreements (in this case - Transit Agreement) to aircraft of contracting parties. Although the dispute mentioned was finally ironed out, nevertheless, it clearly indicated the dangers which might result from unilateral interpretation of the insufficiently defined provisions of the Convention (as, for example, falling back on 'public safety' as an excuse for prohibiting flights).

A special clause was inserted in the Convention in order to avoid the use of prohibited or restrictive areas by a contracting state as a discriminatory measure against foreign international scheduled air services. However, the state imposing such restrictions has, according to the terms of para. 1 of Art. 9, the right to favour its own national aircraft in

two cases: (1) provided these aircraft are not engaged in scheduled international services and, (2) if a carrier is engaged in scheduled domestic services.[23]

The most serious attempt to satisfy the particular interests of states is contained in a provision of the second para. of Art. 9. It conferrs on the states the undisputable right to close their air frontiers immediatelly whenever they find it necessary to do so. For the undefined phrase 'in exceptional circumstances' appears to be so vague and all-embracing that it might actually cover countless situations. Furtehrmore, Art. 9 (b) imposes no duty at all of subsequent notification to contracting states or to the ICAO and, what is even more important, such restrictive action does not include the aircraft of the state whose territory is involved, which can continue to operate both domestic and international services as well.

A rather unfortunate formulation is contained in Art. 12 dealing with rules of the air. Inter alia this Article declares that "over the high seas, the rules in force shall be those established under this Convention." It is an axiomatic, undisputed principle of international law that inter-state agreements (such as the Chicago Convention) are binding only on the contracting parties, and their provisions cannot, and should not interfere with the rights or interests of the other non-contracting parties. Is is also an undisputed principle of international law that the high seas do not belong

either to a certain inter-state organization or to a group of states, but to the whole international community; it is 'res communis omnium' in the broadest sense. Now someone could question upon what basis or legal principle the contracting states to the Chicago Convention could claim the right to establish rules which are supposed to be obligatory in connection with the high seas. The wording of the formula applied seems to imply that such rules established by ICAO shall be compulsory for every state and not only for the contracting parties to the Convention (though there was no such intention by the drafters of this clause). Therefore the formula used appears unprecise, particularly since it is included in the chapter entitled "Flight Over Territory of Contracting States".

Among the other provisions of the Convention relating to international air transport, articles 15 and 68 particulrly should be mentioned. By Art. 15,para. 1

> "every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all other contracting States..."

These uniform conditions should apply also to the use of all air navigation facilities on the basis of equal treatment for all aircraft of contracting parties, no distinction made between national and foreign operators. On the other hand, Art. 68 provides that

> "each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use."

This is again one of those provisions which, to a certain degree, place international air services at the mercy of the individual states. Strangely enough, the following Article, 69, which was apparently contemplated as a remedy for "not reasonably adequate" air navigation facilities offerred by the particular state, in its final clause only encourages the hampering of economical operation of international air services. Whereas the whole Art. 69 contemplates a conciliatory role for the Council of ICAO in improving air navigation facilities and provides that it "may make recommendations for that purpose, however, the final sentence of the same Article contains the following essential clause: "No contracting State shall be guilty of an infraction of this Convention if it fails to carry out these recommendations." This provision, perhaps better than any other, demonstrates what unfortunate results might occur while endeavouring to find a compromise between the entirely divergent views, as was the case at Chicago.

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This, as briefly sketched, is the position of international air transport under the provisions of the Chicago Convention which, according to Art. 80, superseded the Conventions of Paris and Havana previously referred to.[24] The Convention applies only in time of peace, while in wartime, its provisions "shall not affect the freedom of action of any of the contracting States affected."(Art. 89). The Convention also ceases to bind a party which declares a "state of

national emergency and notifies the fact to the Council" of ICAO (Art. 89). The Chicago Convention came into force on April 4, 1947, the thirtieth day after the twenty-sixth instrument of its ratification has been deposited with the Government of the U. S., in accordance with Art. 91 (b). At the present time (Summer, 1955) sixty-six nations have deposited their ratifications with the State Department of the U. S.[25)]

The fact that the International Civil Aviation Conference, convened at Chicago, was unable to include in the general Convention a larger degree of freedom for international flight (scheduled and non-scheduled as well) and thus failed to satisfy the growing needs of modern air commerce, accounts for its comparative failure to effect the much-needed improvement on the Conventions of 1919 and 1928. It contributed to further clarification of the legal framework upon which international civil aviation operations are based, but failed to realize the needs of global air transport, thus depriving mankind of the benefits which, under a more liberal regime, aircraft could provide. The results achieved at Chicago unequivocally confirm the fact that the time has not yet arrived for air transport to be generally considered as an equally important part of the world system of communication as transport by sea. Nevertheless, even in its present form, the Convention of 1944 is much more nearly complete than both of the preceding conventions which it has superseded, although, in substance and as to the privileges accorded to international flying,it follows, on the whole,

the lines of the Paris Convention from which it does not differ significantly. Despite its obvious shortcomings, the Chicago Convention has already proved itself an important success, particularly in two points: (1) It has assembled 66 sovereign nations of the world, thus attaining the goal which exceeds by far the respective results of both the Paris and the Havana Conventions. Through this achievement, and by amalgamation of the three preceding conventions, it has contributed to the easier unification of the solutions;[26] (2) By establishing the International Civil Aviation Organization as a permanent institution charged with the administration of principles laid down in the Convention, it has provided a useful forum where all the problems concerning international civil aviation can be discussed at a really world-wide level.[27]

ICAO has already rendered valuable services to world aviation and can, no doubt, do much more to foster and guide it. Unfortunately, the prerogatives of ICAO are, by the Convention itself, limited mostly to technical matters, while its economic powers are largely of an administrative and advisory character. Even within this restricted economic field, ICAO has already made certain efforts which, had they been successful, might have improved considerably the picture of present global air commerce. Reference is made here to the endeavours sponsored by ICAO to conclude a multilateral agreement on commercial rights in international air transport, attempts which have failed for the time being. This aspect is, however, to be discussed later.

Before concluding this section, it should be mentioned that, following the provisions of Art. 57 of the United Nations Charter, and Art. 64 of the Chicago Convention, the International Civil Aviation Organization was recognized by the Agreement of October 3, 1947, as a specialized agency of the United Nations (Art. I of the said Agreement).

2. International Air Services Transit Agreement - Flight Privileges for International Scheduled Air Services

As has already been explained, the largest areas of controversy at Chicago were the economic control problems in connection with the operation of scheduled international air services. Because of this disagreement, the controversial economic provisions were omitted from the permanent Convention. Hence, the mutual right of flight across each other's territory, granted by the contracting parties to the Convention applies only to "aircraft not engaged in scheduled international air services". In order to make possible international flight and commerce by air, within a few days of the end of the Conference, two separate agreements were drawn up and submitted to the delegates. These were Transit Agreement and Transport Agreement. They were both based on the so-called 'Five Freedoms of the Air' as originally defined by Canada. In their analysis of international air commerce, the Canadians split the essential requirements of air traffic operations into five elements - 'freedoms'. These were in order: (1) The freedom to fly across the territory of a contracting state without landing; (2) The freedom to land for non-traffic purposes; (3) The freedom to put down passengers, mail, and cargo taken on in the territory of the state whose nationality the aircraft possesses; (4) The freedom to take on passengers, mail, and cargo destined for the territory of the state whose nationality

the aircraft possesses; (5) The freedom to take on passengers, mail, and cargo destined for the territory of any other contracting state and the freedom to put down passengers, mail, and cargo coming from any such territory.

These 'freedoms', all five, or only the first two, depending on the agreement adhered to, really constitute between the contracting parties mutual rights of temporary character although both the agreements call them 'privileges'. The contrary opinion, claiming that because every country reserves the sovereignty of its airspace these 'freedoms' should be considered as privileges, does not appear correct.[28] In its territorial sea, every state also has undisputed sovereignty; however, even without any special multilateral or bilateral agreement, nobody will contest the existence of right of innocent passage which the shipping of all the other nations enjoys.

Actually, in the Chicago acts, the terms 'freedom' and 'privilege' have been widely used instead of the term 'right'. In many articles of the Chicago instruments, the term 'right', which originally appeared in various submitted national drafts was, in the course of redrafting, eliminated and replaced by the terms 'privilege' or 'freedom'. In the final drafts of the main agreements, the term 'right' appears only in Art. 5 of the Convention, granting the freedom of non-stop transit to aircraft not engaged in scheduled international air services. Those who are responsible for these changes, and for

the final phraseology adopted, apparently acted upon the conviction that the terms 'privilege' or 'freedom' legally mean an authorization of a lower degree than that included in the term 'right'. It is beyond the scope of the present thesis to analyse here the legal meaning of these terms.[29] However, it might be noted that, to our knowledge, it is impossible to see any essential legal difference, for instance, between the content of authorization given by the term 'right' and by the term 'privilege' as applied in Art. 5 of the Convention, - or between the terms 'freedom' and 'privilege' as referred to in Art. I, Sec. 1 of the Transit Agreement. (See below).

As far as scholarly views on these problems are concerned, there exists a rather symptomatical uncertainty as to the legal meaning of the preceding terms applied in various air law conventions. E. Warner, in an article previously cited[30] referring to both the Paris and the Havana Conventions, expressly stated that "freedom of innocent passage is granted as a privilege"; on the other hand, commenting on the Transit Agreement, Warner said that it "gives the accepting states a free and unlimited right of passage" and to their aircraft a "general right to interrupt their passage for refueling or mechanical attention."[31] A. Meyer considers the "freedom of innocent passage" accorded by Art. 2 of the Paris Convention to be a "contractual right which has the character of a revokable permission."[32] H. Oppikofer spoke about the "right of passage which States grant each other".[33] McNair draws a strict line between the

"privilege accorded to Contracting States by Article 5 of the Chicago Convention" and the right of innocent passage through territorial waters.[34] A. de La Pradelle refers to the first freedom as expressed in the Chicago acts as "droit de passage",[35] whereas, to Cooper the Transit Agreement authorizes "certain privileges, not rights, of flight."[36] W. Burden is of the same opinion when he says that freedoms of the air granted at Chicago are "really privileges".[37] P. Heller appears to be right in saying that there is no "justification for different terms to be applied in the various Chicago instruments for these legal capabilities, all of which are enforceable and of the same contractual and temporary nature."[38]

The first two freedoms cover privileges of flight or of air navigation only, since they do not include the right to perform commercial operations. Therefore, they are of a technical character. On the other hand, the last three freedoms cover the privileges of trading by air. Hence, they are of a commercial character, "since they pertain to doing business in the countries granting them."[39]

The purpose of the Transit Agreement is to enable airlines to operate international scheduled services over the territory of contracting states. In order to make this possible, the Transit Agreement provides in Art. I, Sec. 1:

> "Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:
> (1) The privilege to fly across its territory without landing;
> (2) The privilege to land for non-traffic purposes."

Just as the Chicago Convention does, so the Transit Agreement does also provide that these freedoms will be enjoyed only among the parties to the agreement, these being members of the ICAO (Preamble of TA and similarly Art. VI, para. 2). Thus the main condition for deriving benefits from this agreement is to be a member of ICAO; in other words TA is not an open agreement. The right afforded to planes of the signatory powers under (1) and (2) corresponds to the rights which belong to aircraft not engaged in scheduled international services by virtue of Art. 5 of the Convention. This means the right of (innocent) passage extended to include the privilege to make stops for non-traffic purposes, i. e. refueling, repairs, and emergencies. Although the provision of TA as cited contemplates the reciprocal grant of these rights, nevertheless, it is submitted that the exercise of these rights by one contracting state cannot be denied simply because another party does not exercise them.[40] The exercise of the foregoing freedoms ought to be "in accordance with the provisions of the ...Convention" drawn up at Chicago (Sec. 2).

The question arises whether, under the provisions of TA, a contracting state is entitled to require that a prior permit be obtained by a scheduled international service of other states (who are parties to the Agreement) for flights without landing across its territory ? To this question the text of TA does not offer a clear and unequivocal answer. The problem of operating permission, unanswered in TA, is "one

of the many regrettable lapses which occurred in drafting the Chicago instruments" observes Heller.[41] However, the answer perhaps might be deduced from the provisions of Sections 4 and 5 of the Agreement. Sec. 4 provides that each contracting state "may, subject to the provisions of this Agreement,

> (1) Designate the route to be followed within its territory by any international air service and the airports which any such service may use;"

and Sec. 5 reserves the right for each contracting state

> "to withold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement."

The fact that the contracting state may designate routes to be followed within its territory (Sec. 4) together with the right to withold or revoke a certificate or permit to an air transport enterprise of another contracting state (Sec. 5) appears to imply also, although tacitly, the right to require prior permission for flights over its territory with or without landing. As a matter of fact, the provisions of Sec. 5 seem rather explicit in this respect, because, before any permit or certificate can be 'revoked' or 'witheld' it has first to be issued.

Despite the close relationship between the Transit Agreement and the Chicago Convention, it is not clear whether Art. 6 of the latter, setting forth "special permission or other authorization" as a condition for operation of inter-

national scheduled air services, contemplated as sufficient permission the adherence to the Transit Agreement (or Transport Agreement) or the issuance of a new, independent, permit. Heller considers that the requirements of an operating permit, and of qualifying before the aeronautical authorities of another state, is not "just a 'nuisance'...but a reasonable requirement."[42] However, he concludes, "an operating permission should certainly not be witheld as a means of evading the obligations assumed under the TA or of delaying the exercise of the freedoms granted."[43]

In addition to the rights of transit described, the Agreement also authorizes any contracting state which is flown over to require the foreign aircraft which intends to stop in its territory for non-traffic purposes to "offer reasonable commercial service at the points at which such stops are made" (Art. I, Sec. 3). Such a requirement ought not to involve "any discrimination between airlines operating on the same route" nor should it be exercised in such a manner "as...to prejudice the normal operations of the international air services concerned or the rights and obligations of a contracting State." (Art. I, Sec. 3). Thus on the basis of the provisions of Sec. 3 and Sec. 1 of Art. I the conclusion may be drawn that to require the landing by aircraft in mere transit would not be permissible among the signatories to the TA.[44] However, there are opinions to the contrary, - that is to say, that the state flown over may require the landing despite the fact that an aircraft may intend to fly

across its territory non-stop.[45]

A reasonable objection was put forward against the application of the term 'airline' in Sec. 3 of Art. I. Indeed, being an inter-state treaty, the TA reference to the 'airlines' of the contracting states appears incorrect with respect to the principles of international law. The latter regulates the relationship between the states and not among various national enterprises which are subject to municipal laws. Accordingly, the drafting of the first para. of Sec. 3 ("A contracting State granting to the airlines of another contracting State...") appears from this point of view to be wrong and misleading.[46]

The considerations of state security have also found their expression in the provisions of the Transit Agreement, which meets the security problem by allowing each contracting party to designate the route and airports to be used in its territory (Sec. 4).[47]

Special attention requires the provision of Art. II, Sec. 1 of the TA, which accords to ICAO powers of a 'quasi-judicial nature'[48] to deal with situations arising out of the action of one party to the Agreement which is deemed to cause to another party "injustice or hardship". The contracting state which feels that its rights have been infringed upon may "request the Council to examine the situation" and eventually the Assembly of ICAO is authorized to suspend the guilty state "from its rights and privileges" under the TA if "suitable corrective action" is ordered and not taken.

The Transit Agreement does not answer the question whether a state, a party to the Agreement, which has denounced the Convention, by this fact, eo ipso, ceases to be regarded as a contracting state to the TA. Heller is of the opinion (which is acceptable) that the words in Art. III "could well mean that the withdrawal of a contracting Party from the Convention under Art. 95, or cessation of memebrship under para. (b) of Art. 94 of the Convention...has automatically the effect of withdrawal from the TA. The withdrawal from the TA would then take effect on the same day when the withdrwal from the Convention under Art. 95, or cessation of membership under Art. 94 becomes effective..."[49]

The Transit Agreement is according to Art. III intended to remain in force "as long as the /Chicago/ Convention," which implies the conclusion that should the Chicago Convention one day be abolished or superseded by any other new multilateral aviation treaty, the TA simultaneously and autbmatically ceases to exist too. However, the TA can be denounced by any contracting party on one year's notice.

The Transit Agreement came into force on January 30, 1945, "as between contracting States upon its acceptance by each of them" (Art. VI, para. 3) and is to be communicated to the Government of the U. S. A. Out of 66 states which are parties to the Convention at the present time, only 42 have accepted the T.A. Some of the very important world-route states such as Brazil, Egypt, France, Portugal, Burma, Ceylon,

and Libanon are not yet signatories to the Agreement. This is one of the relevant reasons that it cannot be considered for the time being as an adequate part of world organization; and vice versa, if it were universally accepted in a more permanent form, "it would largely solve the difficulties caused by the legal right of any State to prevent the establishment of world trade routes through its territory."[50]

The Transit Agreement was hailed as the "most important" accomplishment of the Chicago conference[51] representing the "only bright point on the sky"[52] and "the most happy augury for the future".[53] Wrote E. Warner, not long after the Chicago conference adjourned: "For the first time, nations which wish to trade with one another through the air can plan to do so,...without needing to meet the terms imposed separately by every state along the way...The participants to the Transit Agreement undertake to abstain from the role of feudal baron who levied private tribute on all the commerce passing along the highroads within his grasp."[54] It is not an exaggeration, indeed, to emphasize that the World has never before seen an instrument which can have a similar effect upon the legal status of international air transport as in case of the TA. However, its influence on world air transport is weakened by the already emphasized fact that certain important nations have failed to accept it. Besides, it contains only transit rights, i.e. it accords to scheduled international air services only what we call 'imperfect

right of passage' whilst the right to trade still remains the realm of bilateral bargaining, through the failure of the Transport Agreement.

That the application of the Transit Agreement on a world-wide scale is still relatively limited although significant, clearly shows the analysis made by P. Heller of some 322 bilateral agreements concluded up to August 1, 1953. Fifty percent of the bilateral agreements examined by Heller deal with the air transport relations of states, one or both of whom were not parties to the TA on August 1, 1953. From this fact he draws the conclusion that in the international relationship "with regard to transit operations of scheduled international air services bilateral agreements and negotiations leading to their conclusion, with all the usual play of power politics and international barter, still play a very important part."[55] Thus, Heller's methodical survey reveals that the degree of standardization achieved in the international regulation of transit operations by international scheduled services is still rather low. Nevertheless, even though the TA does not wholly solve the problem of international commerce by air, and notwithstanding the shortcomings previously pointed out, it is fair to say that it represents the most significant success achieved in Chicago. It has really done much to eliminate some of the obstacles earlier limiting the development of world-wide air trade, by granting the right of transit on a multilateral basis for international scheduled air services, thus obviating the necessity for bilateral negotiations and agreements among a number of nations.

3. International Air Transport Agreement - Commercial Privileges for International Scheduled Services

Of the two separate agreements submitted to the Chicago Conference for signing, the Transport Agreement, vigorously sponsored by the United States, provides for the exchange of all five freedoms of the air, and is therefore often called 'The Five-Freedoms Agreement'. It accords to the airlines of all states which accept it "virtually complete freedom of the air for transport purposes", including both transit and commercial privileges.[56] Art. I, Sec. 1 reads as follow:

> "Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:
> (1) The privilege to fly across its territory without landing;
> (2) The privilege to land for non-traffic purposes;
> (3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
> (4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;
> (5)The privilege to take on passengers, mail and cargo destined for the terriotory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory."

The granting of these five freedoms was the goal toward which the U. S., the Netherlands, the Scandinavian countries and some other states including the South-American, were aiming, at Chicago. The granting of the fifth freedom was regarded as being of the utmost importance and therefore it is no wonder that the debates concentrated to a large extent on that problem. The U. S. was especially concerned

with the question of the so-called 'intermediate traffic' because, as it was feared, in effect,"the formula of the four freedoms alone might well have stopped American operations at the western gateways of Europe, and on the South American routes, might have made it impossible to operate on a business basis beyond Trinidad on the east coast, and perhaps Guayaquil on the west."[57] Intermediate traffic is "absolutely essential to the economic operation of long-distance routes, and it is on such routes that air transport can perform its greatest service to mankind...A limitation on carrying intermediate traffic hardly seems consistent with the theory that one of the main purposes of international regulation is to prevent the running of largely empty aircraft."[58] This and similar statements were heard at and after Chicago Conference while debate went on over the crucial problems of international air trade. Indeed, it appears rather clear that all five of the mentioned freedoms are necessary for the sound economic operation of international air transport. Taken as a whole, they would make it possible for an airline to operate without any special permission on any route to and from its homeland, picking up and dropping traffic at all places along the route and flying as many schedules as the traffic would justify. Operating on such a basis international air transport would have practically the same freedom as that granted to shipping, in accordance with the long-established custom of the sea.

The contrary feeling, pointing out that the primary

purpose of an airline should be to carry its own country's traffic and that other traffic should be incidental to its operation, proved to be strong enough to modify essentially the more liberal views on the subject. In the same Art. I, Sec. 1, para. 6, it is provided that the commercial privileges specified under paras. (3), (4), and (5) are available "only to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses." Omitting any provision concerning the rate control, or limitation of capacity and frequencies, however, the Agreement includes a few other limitations and restrictions, some of them similar to those inserted in the Transit Agreement. Thus, for instance, the Transport Agreement provides in Sec. 3 that a contracting State granting to the other contracting state the privilege of stopping for non-traffic purposes "may require" that the aircraft of the latter offer "reasonable commercial service at the points at which such stops are made." Section 4 contains the provision as to the reservation of cabotage for the aircraft of the contracting states. Further, by Sec. 5 (1) the route and airports to be used in the territory of a contracting state, may be designated by the nation flown over. Under this provision, it is not clear whether the same port of entry has to be made available for traffic from all nations parties to the Agreement. In the establishment and operation of through services, "due consideration shall be given to the

interests of the other contracting States so as not to interfere unduly with their regional services or to hamper the development of their through services." (Art. III).[59]

Still the most important shortcoming and weakness of the Transport Agreement consists in the provision of Art. IV, Sec. 1 which allows the possibility of signing the Agreement with reservation as to the fifth freedom or, if this was not originally the case, however, the contracting states may "at any time after acceptance, on six months' notice,...withdraw" from such rights and obligations. The Agreement itself is intended to remain in force as long as the Chicago Convention, provided, however, that any contracting party may denounce it on one year's notice given by it to the Government of the U. S. (Art.V). Similarly to the Transit Agreement, it appears that only the states which are members of ICAO may accept the Transport Agreement (Art. VIII).

It is not clear whether the drafters of the Transport Agreement contemplated it as being a document of provisional character, or whether it was intended originally to serve international air transport for a longer period of time. If the verdict has to be made upon its highly flexible and sometimes rather vague provisions, then the latter conclusion cannot be reached. The French author, Le Goff, in discussing the provisions of Art. IV, Sec. 1, observes: "Il n'y a jamais rien de définitif, c'est la mobilité la plus totale...Pour une disposition de cette importance cette extrême mobilité des

engagements est peut-être regrettable."[60] Another French writer, P. Chaveau, complains against "les termes vagues" used in the Transport Agreement.[61] Nevertheless, independently of the intentions of its drafters, the Transport Agreement soon proved in practice to be of a provisional and limited nature. It has been accepted by comparatively few nations (at its peak, the number of signatures reached 20) of great importance to world air transport. Moreover, what may be taken as the real end of this document came about when the U. S., its sponsor, denounced it on July 25, 1946, on the same day as it ratified the Chicago Convention. Commented W. Burden, the Chairman of the U. S. Delegation at the Interim Assembly of PICAO on this withdrawal: "A year-and-half ago, the United States assumed the responsibility of initiating a multilateral agreement, known as the Air Transport Agreement. The passage of time and further study of the problem by many nations led them to reject it for variety of reasons. In fact it has been accepted by such a small number of countries that it can no longer be considered as the basis of world-wide scheme for international civil aviation."[a/][62]

Thus came to an end the hopes of those who believed that the Transport Agreement, certainly the most courageous step undertaken at Chicago, will finally enable the world airlines to do business under better circumstances than ever before. In fact, it should be noted, this Agreement, because of its clauses regarding the possibility of accepting it with reservations as to the fifth freedom, was never really a 'Five Freedoms Agreement', but only a 'Four Freedoms Agreement'. Eventually, through

bilateral agreements some degree of what was intended to be gained by the Transport Agreement was achieved.

C H A P T E R VII

POST-WAR TRENDS IN THE REGULATION OF INTERNATIONAL CIVIL AIR TRANSPORT

1. The Bermuda Agreement

As a consequence of the failure of the Chicago Conference to come to a satisfactory economic agreement on the establishment and operation of international air transport services, an inter-governmental conference between the United Kingdom and the United States was convened in Bermuda in January, 1946, and eventually resulted in the conclusion of an Agreement relating to the Air Services between their respective territories, signed on February 11, 1946. By the time the two countries negotiated this agreement, there had already been sufficient experience in operating international air services under the "Standard Form" (of Agreement for Provisional Air Routes), recommended in the Final Act of the Chicago Conference, to enable the two powers to seek more appropriate and more detailed provisions to govern their international air services. This arrangement, known as the "Bermuda Agreement", consists of three parts: (I) a Final Act; (II) an Agreement; and (III) an Annex. The principles expressed in the Bermuda Agreement and the provisions thereof are of such far-reaching international importance that it may be called the corner-stone of the bilateral negotiations

of air transport rights. Its impact on subsequent bilateral negotiations of air transport matters is so grea t that it deserves to be dealt with in some detail.

The Bermuda Agreement represents a compromise between the British and American views. It succeeded in finding a balance between American liberalism and British protectionism, the two conflicting trends which collided at Chicago.[1] The general effect of the Agreement is that, for the purpose of operating air services over a number of routes (specified in the Annex), each contracting party grants to the "designated air carriers" of the other the use of airports and facilities on these routes, as well as rights of transit, of stops for non-traffic purposes, and of "commercial entry and departure" for international traffic in passengers, cargo, and mail (Annex I). The commercial rights accorded are valid only at the airports specified in the Agreement, and the routes generally indicated. The exercise of these rights on the other hand, is to be subject to a number of general traffic principles and limitations as laid down in the resolution of the Final Act. The main object of the latter is apparently to provide the means of avoiding unfair competition, and the effect is to restrict the full 'Five Freedoms' rights.[2] It provided, inter coetera, the following principles to govern the traffic to be handled:

(1) the air transport facilities available to the public must bear a close relationship to the requirements of the public for such transport;

(2) there shall be a fair and equal opportunity for the carriers of the two nations to operate on the routes between their territories covered by the Agreement and its Annex;

(3) in the operation of the trunk services by the air carriers of either Government, the interests of the air carriers of the other Government shall be taken into consideration, so as not to affect unduly the services which the latter Government provides on the same routes;

(4) the right to embark or disembark international traffic destined for, or coming from third countries shall be applied in "accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the principle that capacity should be related:

(a) to traffic requirements between the country of origin and the countries of destination;

(b) to the requirements of through airline operation; and

(c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services." (Resolution (6).

By far the most important provisions of the Bermuda Agreement relate to questions such as routes, extent of rights granted, frequency of operations, capacity of aircraft, and the measures to be taken in case of disputes.

Routes and the rights granted. Under the Bermuda

Agreement, as already stated, the "designated air carriers" are accorded the use of definite routes and airports expressly named, and the traffic is to be governed in compliance with the principles agreed upon. Among the routes named for use by the U. K. are those under which British carriers can fly from London to New York, then on to San Francisco, and then, via Honolulu, Midway, Guam, or Manila to Singapore or Hong Kong (Annex, III, (a), 1 & 7). British carriers may operate also from London or Prestwick to New York, and then either to New Orleans and on to Mexico City, or to Cuba and thence, via Jamaica or Panama, to Colombia, Ecuador, Peru, and Chile (Annex, III, (a), 3). The U. S. carriers can fly transatlantic services to London or Prestwick, and thence to the designated points in Holland, Gemany, the Scandinavia n countries, and the Soviet Union, or to Belgium, Central Europe, the Middle East, and on to India (Annex, III, (b) 1 & 2); also across the Pacific to Hong Kong, China, Indo-China, Thailand, Burma, and India, or to Singapore and then to Indonesia (Annex, III, (b) 6 & 7). At each point named under U. S. sovereignty, British air carriers may pick up or discharge traffic from or to their own territory or to third countries; and reciprocally, at each specified point in British territory, American carriers may discharge or pick up international traffic.

It is believed that on the routes specified in the Agreement, the air carriers have a "limited right of cabotage" in case of a "change of gauge" (i. e., trans-shipment from

a larger to a smaller aircraft, or vice versa, for onward carriage). (Annex, V).[3] The Agreement provides that if either party wishes to make changes in the points (described in Sec.III of the Annex) served in the territory of the other contracting party, such changes may be made only after consultation and in accordance with the clauses of A rt. 8 of the Agreement (Annex, IV, (a).However, if other route changes are desired, they may be made and put into effect at any time, prompt notice to that effect having been given by the aeronautical authorities of the other contracting party (Annex, IV, (b). It was agreed also that if such a contracting party found that these route changes prejudiced the interests of its carriers, as a result of carriage of traffic between the territory of that contracting party and a new point in the territory of a third party, it should so inform the party which had made the change. It was further agreed that if a satisfactory solution of the problem thus raised could not be reached by consultation, the question could be referred to the ICAO Council for an advisory report.

It is necessary here to point out certain differences between the Bermuda Agreement and the Transport Agreement with respect to 'fifth freedom' traffic. Under the Transport Agreement, any contracting state might, on six months' notice, withdraw from fifth freedom obligations, while in the BA, 'fifth freedom' rights cannot be separated from the rest of the system established. In the Transport Agreement, 'fifth freedom' rights extended only to traffic to or from other states which were

parties to the agreement, while under the BA, for instance, a U. S. carrier can pick up and discharge at London traffic to or from any country en route. Finally, whilst the Transport Agreement accorded to the contracting parties (in rather ambiguous terms), the right to fix the port of entry, under the BA, ports of entry are named and cannot be changed except by agreement.

All the provisions of the BA so far cited indicate, among other things, the willingness of both parties to allow competition, but regulated in such a way that no nation can suffer damage from it. In other words, as Cooper expressed it, - "air transport is now a business in which a foreign commodity is sold in the local market in competition with domestic sellers and without the protection of a tariff."[4)]

Rate provisions. One of the outstanding achievements of the Bermuda conference is contained in Annex II of the Agreement embodying the provisions regarding the rates to be charged by the air carriers of the two nations. The determination of rates shall be made at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit, and the rates charged by any other air carrier. Rates to be charged by the air carriers of each party operating between points in the territory of the two countries "shall be subject to the approval of the Contracting Parties within their respective constitutional powers and obligations." (Annex, II, (a). This provision explicitly accords to each

party the right to disapprove any rate proposed by the other's carriers, thus providing a guaranty of effective and reasonable control over any traffic operations between the respective territories.[5)]

The rate provisions further recognize the traffic conference arrangements of the International Air Transport Association and indicate that rate arrangements concluded through IATA will be subject to the approval of the Civil Aeronautics Board of the U. S. If the two countries are unable to agree on rates, through IATA machinery or otherwise, the BA makes provision for the settlement of such a situation. Should the parties fail to reach an agreement through direct consultation, both agree to submit the question to ICAO for an advisory report, and to exert their "best efforts under the powers available" to them to put into effect the opinion expressed in such a report (Annex, II, (g). These provisions as to the settlement of disputes are of great and far-reaching importance. Unlike at Chicago, the United States, as it appears, was willing at Bermuda to make some concessions toward acceptance of the authority of an international agency to fix rates where the governments concerned could not agree. If this experiment proves not to be harmful to the American air carriers it is reasonable to expect in the future a less unfavourable attitude on the part of the U. S. towards the idea of investing wider economic powers in some international air authority.

Another of the outstanding provisions of the BA concerns the question of the control of the frequency and capacity of the services offered by the international airlines of the two nations. The relevant provisions as to the frequencies and capacities were incorporated into the Agreement by means of a resolution, the main principles of which have alrea dy been cited in this section. Besides, in the "Joint Statement" issued by the two negotiating delegations at the close of the Conference [6] it was indicated that the Agreement contemplates "freedom by each country to determine the frequency of operations of its airlines," and "freedom to carry fifth freedom traffic in accordance with defined principles subject to adjustment in particular cases where such adjustment may be found necessary in the light of experience." The same statement declared that the Conference "has placed no specific limitations on frequencies." Each party operating under the principles agreed to is "to be free to determine for itself the number of frequencies which are justified; services being related to traffic demands." Thus, the BA does not provide for frequencies to be allocated in advance. President H. Truman, in his statement of February 26, 1946, expressly confirmed this by stating that under the BA, there would be "no control of frequencies, and no control of...Fifth Freedom rights on trunk routes operated primarily for through service." [7]

In the case of disagreement on the matters of frequency and capacity, the questions are subject to review by ICAO.

As indicated previously, the accord reached at Bermuda is of equal significance not only to the parties to the Agreement, but also, in equal measure, to the international air transport as a whole.[8] What should particularly be emphasized is the fact that, for the first time in its history, the United States has entered into an international agreement for the control of transport rates and has granted foreign air carriers fixed routes across its territory.[9] Speaking in the House of Lords, on February 28, 1946, Lord Swinton called the accord as "probably the most important civil aviation agreement that /the U. K./ has entered into."[10]

The French author, Verdurand, considers the BA as a "turning-point in the history of air transport";[11] Cooper suggested that the results of the Bermuda Conference should be incorporated in a form of multilateral convention, which would serve as a basis for a world-wide scheme of international air transport activities;[12] Le Goff went even further, stating that the Bermuda achievements, together with the subsequent similar bilateral agreements, should be considered as the actual realization of the multilateral agreement :" Il faut que l'accord des Bermudes et ceux auquels il a servi de modèle deviennent bientôt après avoir été étudiés et réunis le grand texte international de la navigation aérienne entre les peuples."[13]

Nevertheless, at the same time are heard criticisms indicating dissatisfaction with the obvious postwar trend toward bilateral negotiation of air transport rights, instead

of the seeking of the solution on a multilateral basis. In this respect, writes Juglart, "le texte signé aux Bermudes... ne faisait qu'accroître les difficultés."[14)]

However, it must be said that the principles of the Bermuda Agreement have been accepted not only by the U. S. and United Kingdom, who have used it as a general basis of their international air policy, but have also, in many instances, been used by other nations in their negotiations of air transport matters. From this point of view, the Bermuda Agreement really can be called a model agreement.

2. Endeavours Within ICAO Toward Multilateral Agreement on Commercial Rights

In Resolution X of the Final Act, adopted at the end of the Chicago Conference, it was recommended that matters on which it has not been possible to reach agreement between the participating states, in particular matters relating to the economic control of international air transport, be referred to the Interim Council, with instructions to give these problems "continuing study and to submit a report thereon with recommendations to the Interim Assembly as soon as practicable." Accordingly, PICAO, and its successor ICAO, worked diligently on the development of both old and new ideas in trying to iron out the manifold difficulties arising from views which were already known to conflict, with the final aim of reaching a satisfactory multilateral agreement. These endeavours took place from 1945 through 1947 but, unfortunately, all efforts to arrive at a multilateral agreement which would be acceptable to the majority of the member states and which could supersede the great mass of bilaterals, failed.

In May, 1946, when the first interim Assembly of PICAO met in Montreal, its agenda included a draft of the "Multilateral Agreement on Commercial Rights in International Civil Air Transport"; this draft was prepared to meet the economic problems unsolved at Chicago.[15] The proposed draft differed considerably from the Transport Agreement. It consisted of

41 articles divided into nine chapters. The following are the more important provisions:

In Art. 1, the contracting parties would mutually accord to one another all five freedoms of the air; Art. 5 would provide the reservation of cabotage for national carriers; Freedoms 3, 4 and 5 would be granted "only in respect of through air services on routes constituting reasonably direct lines out from and back to the territory of the Contracting State whose nationality the aircraft possesses" (Art. 8); Art. 9 would provide that the capacity offered by any airline exercising the Freedoms 3, 4 and 5 would have "as its primary objective" the satisfaction of the traffic demands between the point of origin of the route in the national territory of the airline concerned, and the point of ultimate destination of the traffic. It followed the enumeration of principles to which capacity should be related. Further provisions regarding capacity can be found in Chapter III, entitled "Capacity". E. g., Art. 15 while recognizing a "reasonable discretion" to airlines as regards the initial capacity to be offered on any route, however, insisted that national airlines should desist from (1) unduly continuing to operate excessive capacity, and (2) initiating capacity obviously in excess of requirements and intended for "destructively competitive purposes." In Chapter II one finds an introduction of the so-called 'Permissive Rate Differentials' in multilateral agreements. Thus Art. 10 provides that any contracting state may require the airlines of

another contracting state to charge, in respect of the traffic carried in the exercise of the fifth freedom, and taken on or put down in its territory, a "differential in excess of the rates charged for the carriage of similar traffic by reasonably competitive airlines of the State imposing the requirement." This differential could be established in different amounts for different routes but the percentage was not determined (Art. 11).

Chapter IV which deals with rates, provides that the contracting states should take necessary measures to see that their national airlines charge reasonable rates (Art.19). Rates are to be deemed unreasonable, as indicated in Art. 20, if they are found "by the board to depart unduly from the level indicated by the costs of the most economic comparable operator, plus a profit reasonable in circumstances." The draft, further, contemplated the creation, within ICAO, of an international civil air transport board composed of "not less than five nor more than seven members," to be elected by the Assembly of ICAO 'ad personam' for an undetermined (in the draft) length of time (Art. 26, 27). The board was to act in the capacity of interpreter and administrator of the provisions of the agreement. It was to have vested in it rather large powers, ranging from the rendering of advisory opinions, to the ordering of corrective actions whenever necessary. This agreement was to be open for adherence to all members of ICAO.

Even from the few provisions taken from this draft-agreement and cited above, it is clear that it was too ambitious an attempt to regulate the international air services. Perhaps it was not too ambitious if we speak in general terms, but certainly too advanced under the circumstances. During the discussions of the Draft at the First Interim Assembly, there remained indeed very few among its provisions which were unanimously agreed upon. The debates disclosed highly controversial views on practically every point, and it is no wonder that a decision could not be reached. However, the Assembly adopted a resolution (IV) affirming the opinion of its members that a "multilateral agreement on commercial rights in international civil air transport constitutes the only solution compatible with the character" of ICAO and accordingly instructed the Air Transport Committee to continue study of the problems to the end that it could present at the next annual Assembly a document, that may be of "benefit in developing a multilateral agreement."[16)]

The discussion continued at the First Assembly of ICAO which took place in May 1947, at Montreal. Again no area of general agreement was reached, but the debate penetrated more deeply than ever before into the fundamental issues and it seemed that a concentrated effort might bear fruit.[17)] The Assembly therefore formally resolved to convene "a commission open to all member states...for the purpose of developing and submitting for consideration of member states an agreement

respecting the exchange of commercial rights in international civil air transport." The Commission met at Geneva from November 4th through November 27, 1947. Thirty nations were represented, among them the U. S., the U. K., France, China, Brazil, Canada, India, etc. No specific draft was adopted as a basis for discussion, although the Majority Draft of the Air Transport Committee, submitted to the First Assembly in 1947, was used as a general guide. Major differing proposals placed before the Commission expressed the following views as to the substance of the multilateral agreement (MA):

(1) The MA should comprise the grant of the Third, Fourth, and Fifth Freedoms, but the authority to operate over specific routes should be subject to separate bilateral negotiation, without obligation to grant any such authorization;

(2) The MA should grant the Third and Fourth Freedoms automatically, leaving only the Fifth Freedom to be negotiated bilaterally; provided, however, that if this freedom were granted, it should be granted in accordance with certain principles, some guarantees being given that routes would not be refused (Canada's addition);

(3) The right to exercise Fifth Freedom traffic should be recognized as subsidiary to the right of every state to operate air services carrying its own Third and Fourth Freedom traffic, notwithstanding the fact that

Fifth Freedom rights could be granted on a complementary basis at the discretion of the interested states.[18]

There was general understanding that, while an all-embracing MA was unlikely to gain the necessary support, the aim of the Commission should be to embody the largest measure of agreement in the MA, and to leave as little as possible to the bilateral negotiations. The debates at the Geneva Conference concentrated on the same major issues as had previous meetings on this subject, namely; (a) The nature of the rights to be granted (the so-called Freedoms), (b) The methods of authorization of operation on specific routes, (c) The principles governing the capacity, (d) The method of determining the rates to be charged, and (e) The procedure of settling disputes arising from the interpretation or application of the agreement (arbitration).

Ad (a). It developed early in the discussion that, in view of the existence of the Transit Agreement, it might not be necessary to include the first two freedoms (technical) in an agreement dealing essentially with commercial rights. Therefore, the discussion proceeded on the assumption that only Freedoms nos. 3 to 5 were to be covered. However, it was agreed to hold in abeyance the question of whether the MA should comprise the Third, Fourth, and Fifth Freedoms, or only the Third and Fourth, pending a final decision by the Commission on the capacity provisions.

Ad (b). At the beginning of the discussion on routes,

Canada proposed as a compromise solution that the MA provide for an automatic exchange of the Third and Fourth Freedoms, but that the Fifth Freedom rights be left entirely to bilateral negotiation. On the other hand, the United States and a number of other nations insisted upon complete freedom for the separate bilateral negotiations of routes, with no obligation being imposed upon any country to agree to the granting of a route to another country. In the prevailing opinion, the MA should not, in itself, convey the right to operate air services over the territory of another state, and that every state should retain freedom to refuse a route agreement without assigning a cause, or to refuse an agreement for any particular route. Finally, it was decided to leave completely to bilateral agreement conditions concerning routing and the designation of points open to international traffic, as well as the closely related matter of the location of the terminal of an air route.[19]

Ad (c). A special working group, composed of the representatives of Canada, France, the United Kingdom and the United States, prepared the draft capacity provisions which actually clarified the Bermuda principles and adapted them to the requirements of a multilateral agreement.[20] This proposal contemplated total capacity over a given route in reasonable relationship to the requirements of the public for air transportation thereon. Services thus operated would have the primary objective of providing capacity for the

carriage of Third and Fourth Freedom traffic, with the provision that such capacity might be augmented by complementary Fifth Freedom capacity related to the traffic requirements of the areas through which the airlines would operate, after taking account of the special position of local and regional air services. The Commission also decided (at the instance of the U. K.) to incorporate into the Agreement a principle to the effect that in the development of long-distance air services to meet the needs of the public for such transport, the development of local and regional services should not be unduly prejudiced, the development of the latter services being recognized as a primary right of the countries concerned.

The debate on capacity again raised the question of the rights to be granted. It soon became clear that certain delegations did not regard the position of the local and regional services as sufficiently assured under the proposed capacity articles. The matter came to a head in the consideration of both route authorization and capacity taken together, where opposing proposals on the necessary regulatory measures were brought forward. Canada insisted that any nation be free to agree with any other nation that on the routes agreed bilaterally between them neither nation should exercise Fifth Freedom rights in this respect. This actually meant allowing the contracting states to eliminate Fifth Freedom traffic rights from agreed routes.[21] After lengthy discussion, a roll-call vote was taken on a Mexican proposal which embodied the sub-

stance of the Canadian plan. The Mexican amendment suggested that Article 21-A be inserted (in Annex III, (Draft MA) Art. 21-A appeared as Art. 9), providing that:

> "Nothing in the present Agreement shall prevent a Contracting State from entering into a Route Agreement which will only grant to another Contracting State the privilege of taking on and putting down international air traffic originating in or destined for the territory of the other party to the Route Agreement and not the privilege for the carriage of international air traffic both originating in and destined for points on the agreed routes in the territories of States other than the parties to the Route Agreement." 22)

The Mexican motion which produced a badly split vote clearly demonstrated how deep were the controversies among the present delegations. It was this vote and the discussion on capacity and the problem of the Fifth Freedom that unequivocally indicated that general agreement was not attainable.

Ad (d). With respect to rates, a common conviction early crystallized in Geneva that it was essential to establish detailed provisions if rate wars were to be averted. There was general agreement that rates might be fixed by conferences of airlines, subject to the approval of the governments concerned; it was further agreed that every government should have the right to initiate action to revise rates; and finally, that disputes should be solved through consultation if possible, or through special procedure if consultation failed. A disagreement arose with regard to the situations in which the introduction of the new rate could be postponed indefinitely because of the opposition of some country. This question was, however, settled

by the formula setting time limits within which consultation had to occur and within which any disagreement remaining after such consultation had to be submitted to the International Court of Justice.

Ad (e). As declared in the Final Report of the Commission, "one point on which a reasonable degree of unanimity was apparent was the need for effective and binding machinery" for the settlement of disputes.[23] The states represented at the Geneva Conference generally agreed to submit disputes to the jurisdiction of the International Court of Justice, or, if the parties in the dispute so desired, to arbitral tribunals with power to render binding decisions.

The Geneva Conference, like those which had gone before, failed to achieve its main goal, i. e., to produce an acceptable multilateral agreement which could be submitted for signature. In the course of discussion, it appeared rather evident that practically all the participating nations were in favour of such an agreement, but the debates also indicated wide differences of opinion among the advocates of multilateralism in regard to what the agreement should contain, and particularly about what clauses it should embrace, if any, for the restraint of wasteful or damaging competition. The fear of competition, which, like a dark shadow, dominated the discussion at Chicago, was present also at this Conference. However, this was not the only reason for the failure to reach a satisfactory solution. For example, in Goedhuis' opinion, there are three main causes

to be blamed for the failure of these endeavours: (a) A tentency to consider civil aviation as an instrument of national policy and an increasing feeling of exclusive nationalism; (b) Insufficient recognition of the fact that civil aviation is still in its pioneer stage; and (c) The fluid position of international law in general.[24]

Whatever the reasons of the disagreement may have been, no one would question the necessity and desirability of having a multilateral agreement on commercial rights as soon as possible. The world needs uniform economic principles and rules universally applicable for international air transport as urgently as it needs uniform operating and safety regulations in air navigation.[25] Since the adjournment of the Geneva Conference, several sessions of the Assembly of ICAO have given the matter further consideration, and work has also been carried out on the subject by the Air Transport Committee and the Council. However, it is the general impression at the present time that, although a multilateral agreement is, in principle, desirable as an ultimate goal, the wide differences of opinion which exist make such an agreement impossible of achievement now.

The possibility of securing a multilateral agreement in the future rests in either (1) re-examining the formulas proposed in the period 1945-1947, and discovering that some one of them have now become acceptable to states that rejected them then (a change in which there has been as yet

no affirmative indication); or (2) discovering a new formula to circumvent the controversies that have so far been insurmountable; or in (3) seeking a more limited achievement, with a multilateral agreement to cover only a part of the total range of international air transport operations.[26] Which of these possibilities will be chosen as the road toward a MA is, at the present time, a matter of guesswork. It is certain, however, that the discussions which have taken place, and the work done so far by the meetings sponsored by ICAO can and will supply an extremely useful basis for any further development in this field.

3. Plans for Solution on a Regional Basis

The present thesis would lack completeness if it did not mention the endeavours made towards the solution of the problems of international air transport on a regional basis. Since Europe represents the area where most of these endeavours have occurred and where the need for them is most urgent and necessary, this survey will be centred only on the efforts undertaken and the results achieved in this field with respect to Europe.

First of all, it is necessary to call attention to the peculiar geo-political position of Europe as it appears in comparison with other regions of the world. On no other continent does there exist, in such a small area, such a multiplicity of sovereign nations. These nations are jealous of their sovereignty for reasons which go back many, many years and the fact that the political and technical developments of the last half-century threaten their sovereignty tends only to increase nationalism and the defensive reactions associated therewith. The diversity of traditions, races, languages, climates, civilizations, cultures and living standards is such that a journey of a few hours is enough to bring a traveller from one world into another. On the other side of the border, everything is different, except - quite frequently - the mutual distrust and misunderstanding, the mental scars left by ten centuries of devastating wars.[27)]

Europe, itself, and the Mediterranean basin which is complementary to it, constitute a distinct economic entity in the modern world. Its dense population, its advanced and yet ancient civilizations have contributed to the establishment in Europe of the oldest and the most dense network of ground communications, and/ as a result easy intercourse developed. World War II left Europe just as divided as it was before, but the feeling of urgent necessity for unified action has emerged stronger than ever. Co-operation among European nations has significantly increased in the post-war period in some fields; however, Europe has not yet found the way to greater political and economic unity. The attempts of the European nations to reconcile their political structure with their means of joint salvation can also be noted in the sphere of civil aviation. As indicated before in this thesis, from the moment that aircraft became a new means of transportation, civil aviation emerged in Europe as an additional medium of national expression, a new symbol of the nationalist spirit of rivalry, and a new instrument to serve the cause of national self-preservation. It is amazing and symptomatic in this connection to note, as did the Institut Français du Transport Aérien, [28] that international civil aviation services were established in Europe ten years earlier than in the United States, where the economic need for such services was much greater. The reason for this anomaly is obvious; European airlines have been considered, since their inception, a

powerful tool of state interests, and therefore they have experienced no difficulties in obtaining the subsidies which in the early days of aeronautics were an absolute 'sine qua non' for any ambitious development of air transport.

Through the process of merger or elimination, which developed a little before World War II and was completed after it, in the post-war European states one can see international air transport operations usually entrusted to a single national company, nationalized or otherwise. It was, therefore, to be expected that the European states actually controlling their principal airlines would find it somehow easier to agree to closer international co-operation with respect to air commerce. However, this has not happened as yet, although certain attempts have been made, particularly under the aegis of the Council of Europe.

Various political plans for air transport co-ordination and co-operation have been brought forward since 1951 and have been submitted to the Council of Europe. The first comprehensive project for the regional solution of European air transport problems was submitted to the Council of Europe in May 1951 by the late Italian Minister of Foreign Affairs, Count Sforza. The highlight of his plan (known as 'Sforza Plan') consisted in advocating an agreement among the European Powers belonging to the O. E. E. C., which would create a 'European Airspace'. Within this common airspace the European airlines would enjoy complete transit and commercial freedoms

for fifty years, i. e. for the period during which the agreement was intended to be in force among the signatory states. This regional multilateral agreement was to replace the existing bilaterals regulating commercial air operations in Europe. The Sforza Plan contemplated also the establishment of a European Air Transport Authority, intended to replace the civil aviation departments of the signatory states to the agreement. This Authority would regulate and supervise transport operations in accordance with the provisions of the agreement. The parties to the agreement set forth by Count Sforza, while enjoying all five Freedoms of the Air in the European 'single airspace', nevertheless, would retain their individual political sovereignty. All internal air traffic would represent cabotage for the European states which would join this agreement, but they would still be dependent on the system of exchange of commercial rights through bilateral negotiations as far as non-European nations are concerned.

The Sforza Plan, undoubtedly the most advanced proposal for co-operation in the field of European international air transport heard so far in the Council of Europe, in order to succeed requires, first of all, political agreement among the states concerned. The solution it proposes demands, as an inevitable condition for its success, the understanding of the common necessities of the O. E. E. C. members and their sincere desire for co-operation. That member-states of the Council of Europe have not as yet reached such a degree of mutual trust

and willingness for wider co-operation as far as air transport is concerned was proved at the 1954 Conference on Co-ordination of Air Transport in Europe, held in Strassbourg. In discussion the Italian delegate pointed out with regret that the Sforza Plan "seemed to have been forgotten" as there was no mention of it in the documents distributed, nor was any mention made at that Conference.[29] Thus, it is likely that this ambitious plan for the regional solution of international air transport problems is, at least for the time being, considered impractical for the immediate purposes of the Council of Europe.

Another important proposal submitted in 1951 to the Council of Europe was prepared by its Committee on Economic Questions. This proposal, actually more in the nature of a suggestion than a real plan, had a narrower scope than the Sforza Plan. It advocated the establishment of an association or 'consortium' of European air companies, which would be similar to that of the 'Scandinavian Airlines System' (SAS) or, a charter company which would manage the European network by leasing the aircraft of existing companies against payment on a suitable mileage basis. The individual airlines would retain their trunk services which would be left outside the European organization. This project was widely discussed at Strasbourg in December 1951 and eventually it was recommended that a meeting of governmental experts and airline delegates be convened in order to consider the possibilities of its

realization. However, the results achieved were extremely modest and generally unsatisfactory.

Efforts to find some acceptable solution for European air transport problems were renewed in the spring of 1954 at the aforementioned Conference on Co-ordination of Air Transport in Europe. Convened on the suggestion of the Committee of Ministers of the Council of Europe, and pursuant to a Resolution of the Council of ICAO, this regional conference was attended by the representatives of 17 European countries as well as by a considerable number of observers representing non-European nations and many international organizations. The main subjects on the agenda were:

(a) Exchange of traffic rights:

i) Examination of existing bilateral agreements and authorization for scheduled services, with a view to suggesting the elimination or modification of those provisions which particularly tend to restrict the development of air transport within Europe; and thereby to enable air transport better to meet the requirements of the European economy and to promote the objectives of the Chicago Convention;

ii) Examination of desirability of taking special action with regard to non-scheduled services;

iii) Interchange of routes;

(b) Methods of organizing future work in order to assure the continuation of the work of this Conference.[30]

In considering the problem of traffic rights for scheduled air services, the Strasbourg Conference examined, inter

alia, a number of different types of multilateral agreements which had been submitted. Although the delegations present demonstrated a certain amount of interest in achieving such an agreement, there arose, however, divergent opinions as to the kind of agreement that would best serve the purpose and common interest of all. The chief points at issue in connection with this related, as usual, to capacity control, the avoidance of excessive competition, and the assurance of fair treatment for every carrier. A special working group was appointed to seek a solution of these problems, but their discussions soon showed that it would be impossible to reach an agreement at this Conference on many provisions necessary to be included in a European multilateral agreement. The results of the debates on this problem are reflected in the adopted Recommendation No. 1 which was addressed to the states "invited to be members of" the proposed European Civil Aviation Conference. The Conference recommended that these states "give support to co-operative studies and arrangements among their airlines related to particular sections of the European air transport network, aiming at the development of the traffic by such measures as the interchange of routes and other bilateral or plurilateral route arrangements."[31] In Recommendation No. 2, the Conference recommended that the European multilateral agreement to be prepared should, inter coetera: "aim at a progressive liberalisation of air transport undertaken by European

operators in the European region and particularly at the relaxation of traffic restrictions based on the distinctions at present made between the various 'freedoms' of the air;" further, "embody...those provisions that are common in substance to existing European bilateral agreements" and, include "safeguards to enable governments if necessary to prevent the development of excessive competition" and finally, not to interfere with the "fundamental principle of the sovereignty of each State over its air space."[32)]

The Conference dedicated some of its time also to a discussion of the possible liberalization of a non-scheduled air transport within Europe. It was agreed that action of this kind was necessary only with respect to the operations of aircraft "engaged in the carriage of passengers, cargo or mail for remuneration or hire on other than scheduled international air services", referred to in the second para. of Art. 5 of the Chicago Convention. The actual aim of the Conference was to determine whether, within the European area, the states would be prepared to agree not to exert their right to impose the "regulations, conditions or limitations" referred to in the para. 2 of Art. 5, or to reduce such restrictions for certain types of operation or under certain circumstances. The discussions made it clear that it was not possible at Strasbourg to agree on a multilateral agreement in this matter, to apply in a general way to all European commercial non-scheduled air services. Thus, while agreeing

that intra-European non-scheduled operations "should be accorded the maximum degree of freedom to develop", and that progress towards the liberalization of these services could be achieved by the "development of a unified policy within a European multilateral agreement", the Conference advised in Recommendation No. 5 to the states "invited to be members of the Conference", inter alia, to "accept the general policy that all intra-European non-scheduled flights that do not affect the interests of the scheduled services could be freely admitted to their territories without the imposition of 'regulations, conditions or limitations' referred to in the second paragraph of Article 5 "of the Chicago Convention, provided that such flights "comply with the other provisions of that Convention."[33] The Conference also requested the Council of ICAO and the proposed European Civil Aviation Conference to have a draft made for a European multilateral agreement.[34]

The Strasbourg Conference crystallized the idea that its work should be carried forward, on a continuing basis, by some sort of machinery to be set up. It was decided that matters of a substantive nature should be handled by a body called the "European Civil Aviation Conference", meeting periodically (in plenary sessions once a year) and maintaining liaison with other interested organizations, particularly ICAO. However, it was not deemed necessary to set up a special Secretariat to serve this body. As regards the functions of the proposed ECAC, they are designed to be all-inclusive on the

questions affecting European air transport. ECAC is expected to function at the highest, or ministerial, level when the subject matters so require, but normally the states will be represented by the administrative authorities responsible for the problems to be dealt with on a given occasion.[35] Recommendation No. 28 was drafted and accepted along these lines and contains provisions as to the composition and objectives of ECAC.[36] It was furthermore recommended that ECAC should convene its first meeting before the end of 1955. (It has been called for November 29, 1955).

It is easy to note, especially when reading the texts of the 29 recommendations adopted, how soon the ambitions of the member-states of the Council of Europe decreased with respect to the re-organization of European air transport. Although commencing in 1951, these endeavours which had such ambitious and far-reaching aims (as, for example, the Sforza Plan) by 1954, a scant three years later, on the agenda of the Conference (composed practically of all the states attending the 1951 meetings) one finds topics of secondary importance and undoubtedly incapable of solving any of the serious problems with which European air transport has for a long time been contending. The adopted recommendations, full of non-committal phrases (such as "support", "study", "favourable consideration", etc.), could hardly convince anyone of the real willingness of European nations to co-operate more closely. The only concrete step undertaken appears to be the proposed creation of ECAC. Therefore, it is impossible to consider the Strasbourg Conference of 1954 otherwise than as another frustrated meeting, and following the line of similar efforts undertaken in the past.[37]

4. Recent Doctrinal Suggestions

Ever since the beginning of air law until the present day a number of writers have endeavoured, while discussing the manifold legal aspects of flight, to find a legal basis which would best serve the purposes of international civil aviation. Notwithstanding the fact that the number of genuinely original theories and plans thus brought forward has, at the present time, in comparison with the early age of air law sharply decreased, it would, however, be unjust to say that in our days there are no individual proposals which should be considered as a contribution to the solution of the complicated problems involved. This decrease is specifically due, in the first place, to the fact that modern air law today represents a field which is largely covered with firmly established principles and detailed provisions which are internationally recognized, thus leaving little room for the untrammeled expression of individual views. Hence, what might have been considered forty years ago as a brilliant legal suggestion, would, today, be considered as nonsense or, at best, an unrealistic dream.

On the following pages will be disclosed three recent individual points of view which reflect three different approaches of the contemporary doctrine to the basic problems of world air transport. These points of view have been selected from among various existing suggestions because,

it is believed, they represent three outstanding and distinct schools of thought, i. e., the American, French and Dutch. This, of course, does not mean that the authors of these views necessarily express,in every instance, the official position of their respective governments. The scholars whose ideas as to the improvement of the present legal framework of world civil air transport we are to review are J. C. Cooper, (U.S.A.), P. de La Pradelle, (France) and D. Goedhuis,(Netherlands), all three of them being regarded domestically and internationally as well, as leading jurisconsults in the field of air law.

Cooper, while recognizing that the Chicago Convention failed to satisfy the urgent needs of world air transport, has pointed out in many of his writings that the Convention should be completed and remedied "at the earliest practical time."[38] This, he believes, can be done by an amendment to the Convention or by a supplementary treaty. The following principles should, in his opinion, be given primary consideration:

(1) In the first place, world air transport must be dealt with as a single problem through one cohesive international agency. In order to achieve this aim the respective powers and functions of the United Nations, of the Security Council, of the Economic and Social Council, and also of the ICAO, must be co-ordinated.

(2) Every nation has the right to develop its air power, as represented in part by its air transport, to the extent

needed by its domestic and foreign commerce and other legitimate objectives. However, "somewhere an impartial forum must exist in which the legitimacy of these objectives can be challenged by other nations directly concerned."[39] There should be a forum and an efficient machinery which would remedy situations arising from disputes. Furthermore, world organization should be invested with sufficient international control so that air transport does not become an instrument of unfair nationalistic competition or political aggression. But such regulation and interference with national action by "any international body must be kept at minimum."[40]

(3) Every nation should be left free to use its air power in its domestic transport services without international interference.

(4) It does not seem that internationalization presents a practical solution to the problems of present world air transport.

(5) Transit privileges (Freedoms one and two) should be interchanged between all nations subject to the right of each nation to fix the routes over its territory and the airports to be used by foreign aircraft in transit. States overflown might also bi given the right to require airlines flying over their territories to stop and give commercial service. Cooper does not see a "valid argument" against each nation's being required to accord transit privileges to the others.[41]

(6) Nations should agree upon definite principles

covering commercial privileges to be applied uniformly, with a right of review by ICAO. As to rates, frequency, and capacity the corresponding principles of the Bermuda Agreement might well be used as a model. The fixing of routes for trading purposes should be left to special agreement between the nations affected.

(7) Any nation that so desires could name an airport or airports in its territory and routes to and from such airports and declare them open to international traffic without special agreement. The traffic of the world would then enter such airports on invitation and be governed by the application of universally accepted rules of commercial air trading.[42]

(8) ICAO would have, under peaceful circumstances, only advisory and review jurisdiction over rates, frequency, and capacity similar to that under the Bermuda Agreement.

An agreement reached following the above outline would, in Cooper's opinion, bring about international commercial uniformity but would leave to the nations concerned the right to determine with what states and over what routes they might wish to trade.[43]

Professor P. de La Pradelle's proposals are by far more radical and they closely follow what appears to be already a tradition in French aviation thinking. In his report submitted in May 1948 to the Tenth Congress of the Comité Juridique International de l'Aviation, held at

Aix-en-Provence, he proposed as the only satisfactory solution of civil aviation problems internationalization of world air services.[44] De La Pradelle pointed out that the problem of internationalization appears today under a new aspect; it is no longer disarmament which lies in the foreground of the study but the economic aspect of the question is that which predominates over the military or disarmament aspect.[45] In presenting his plan, de La Pradelle emphasized the advantages of the idea of internationalization in political, economic, social and humanitarian fields. In his opinion internationalization of world air services will undoubtedly result in general pacification of the present world. It will prevent air imperialism, and at the same time assure equality among nations. However, the latter would not be a mathematical equality, which is "unattainable and undesirable", but an equality of opportunity. In the economic field, stressed de La Pradelle, internationalization offers equal advantages; it would avoid wasteful competition between airlines and flags thus putting an end to the deficit operations of air companies which would eventually result in lower fares. In the social and humanitarian fields, internationalization would finally make it possible to achieve the general enforcement of the safety standards prescribed by ICAO, which are, under existing circumstances, hardly attainable for many national companies.[46] These are, in brief, the advantages of internationalization as viewed by Professor de La Pradelle.

To internationalize, in this respect, means, as emphasized by the author of this plan, - "substituer, sur une ligne ou un réseau, à des exploitations nationales concurrentes, une exploitation internationale."[47] Thus, internationalization, as defined by de La Pradelle, would affect not only the traffic but also the means, matériel and personnel of transport. From the definition cited above it follows that agreements of the 'pool' type between companies and interstate agreements of the Bermuda type cannot be considered as a sort of internationalization. This is because, as de La Pradelle pointed out, agreements of the 'pool' type leave intact the independence of the companies involved and comprise only what amounts to mutual exchange of routes and the division of receipts, while bilateral agreements of the Bermuda type achieve only a framework of common regulations and procedures for consultation and arbitration, with these objects in view, - avoiding harmful effects of competition, harmonizing tariffs and sharing equitably the traffic over the same route.[48] In order better to illustrate what he meant by the term 'internationalization' one may use de La Pradelle's own explanation: to him S.A.S. appears as a confederation of states while internationalization in its "true" meaning would appear as a federal state.[49]

But the question is how to achieve the goal advocated by this illustrious scholar. De La Pradelle has in view two possible forms. Initially, as the first step toward true

internationalization, he contemplates the organization of an "Entente" between the private or nationalized companies themselves which would retain the character of a private entity.[50] The other form under which internationalization could be achieved consists in the inter-governmental agreement which would appear in a normal form of an international convention creating the "Union Aéronautique Internationale".[51] The legal status of the Union would be similar to that which is enjoyed by the specialized agencies of the UN. The Union would own its aircraft and would have a special flag; such a flag exists in the case of the Danube Commission.[52] Aircraft belonging to the Union would enjoy immunity against seizure (saisie) and would not be subjected to requisition by any of the contracting states to the convention. The personnel of the Union would be granted such immunity as is accorded at present to the international officials.[53] - This is the general outline of the plan proposed by de La Pradelle.

Among the three main systems seeking an improvement of the present situation with respect to international air transport activities, i. e. (a) the system of laisser-faire, (b) the system of internationalization, and (c) the system of regulated competition, D. Goedhuis favours the last one. While considering the first two of them as impractical under present circumstances he can see the only rational solution of civil aviation problems in the application of the system of regulated competition.[54] Goedhuis points out that the

final aim should be to create legal rules which would, on one hand, prevent arbitrariness and, on the other, make competitive system effective. He is of the opinion that the efforts should be directed in three different directions and should be participated in by airline companies, states and legal writers as well. The primary duty to find put the adequate measures leading toward the greater integration of air community lies, says Goedhuis, upon the airlines themselves. "Free co-operation" among companies offers the greatest hope for the future and Goedhuis places before the reader as the most significant example of such co-operation that of the S.A.S. consortium.[55] As far as individual states are concerned, they should encourage and facilitate this kind of co-operation and, at the same time, renounce some of their rights as to complete arbitrariness in aviation matters.

Goedhuis has stressed on many occasions that "strong anti-dynamic forces are at work in civil aviation."[56] By this he means the uncontrolled play of conflicting political and economic national interests. While subscribing to the principle of sovereignty over the airspace as preferable to any other alternative, he advocates, however, at the same time the general acceptance of the principle of freedom of passage for air communications.[57] It is interesting to note that he expects the latter principle to be accepted on the same legal basis as that applicable to other international communications.[58] It appears that his thinking is based upon the conviction

that there exists a so-called ius communicationis which should prevail when in conflict with universally recognized rights of individual nations. The foundation of this view lies in the attempt to 'open the air' by applying to it the principles valid at sea. Hence Goedhuis asserts that the "reasons given for the freedom of the sea are equally valid for the freedom of the air above the sea, but, if one bases the freedom of the air above the sea on the principle that the air is the natural means for communication necessary to enable men to participate in the totality of the earth, how can one reconcile the principle of state sovereignty over the airspace above the land with this general principle?" [59] Although the facts are different, nevertheless, he asserts that a "common conviction is existent", according to which freedom of passage by air should be a "logical consequence of the general principle of freedom of international communications in territorial waters and in international rivers." [60]

Just here, in this legal domain, says Goedhuis, lies the opportunity for the writers to create a public opinion which would ultimately influence the governments to change their present restrictive attitude toward the needs of aviation. [61]

Thus, it seems, that the solution advocated by Goedhuis would consist mainly in the following: (1) Nations should partly renounce their presently unlimited sovereign rights in superjacent airspace and allow to world civil aviation innocent passage through their air domain, i. e., to grant

aviation the same privilege as shipping enjoys in the territorial sea; (2) Simultaneously the airline companies should co-operate apparently in order to minimize wasteful and uncontrolled competition; and (3) Jurisconsults should contribute to the fulfilment of these goals by presenting the problem from a legal point of view which, as Goedhuis firmly believes, would unequivocally prove that states can only gain by rejecting their arbitrary attitude toward aviation.

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On the basis of the foregoing survey one is in a position to make some comments as to these doctrinal proposals. For the present writer there is no doubt that Cooper's suggestions are the most practical and at the same time most likely to attract the support of governments which is, at least under existing circumstances, indispensable for any progress in this field. The fact that Cooper's proposals are, as regards certain important improvements which he advocates, already part of a number of bilaterals as well as of the Transit Agreement should make it even easier to accept them on a universal basis. Another important feature of the suggestions submitted by Cooper consists in their clarity, a quality which the two other proposals reviewed do not posses in the necessary degree.

Thus Goedhuis appears to be rather ambiguous in his proposals, especially while seeking the solution of aviation problems in the recognition of the ius communications. He says in one place: "Dans le domaine de l'air un droit de com-

munication existe, parce que l'aviation constitue un moyen de communication indispensable à la vie humaine."[62] Actually, what this author calls the 'right of communications' is deemed to be in fact a mere moral obligation falling upon states, but not as yet part of the positive law of nations. If it were otherwise, then practically all states would act contrary to international law because none of them accords the right of passage to foreign aircraft except upon agreement or by special permission. And just this right of passage appears to be the most essential part of 'ius communicationis'.

On the other hand, the idea of internationalization of any kind must be abandoned for the time being as a solution of world air transport problems which is likely to succeed. During the last quarter century this plan has been discussed on many occasions, but, as it seems, states are not yet prepared to entrust to an international authority such an important attribute of power as aviation. It is obvious that so long as nations are not inclined to greater co-operation in political and economic fields, plans of the kind de La Pradelle suggests have little or no chance at all to succeed. However, it is interesting to note that in spite of all this internationalization continues to be the leading idea in the thinking of many French writers. W. Wagner, for instance, brought forward a plan which would, in his opinion, provide a genuine type of internationalization. In his article entitled "Vers l'internationalisation de la navigation aérienne"[63]

he has proposed a draft international convention which would authorize the forming of international enterprises for joint air transport operations. This convention would accord to such international enterprises an international legal status, provided that the enterprise was created by airlines of two or more states or by two or more states directly whose air services cross the frontiers of a state. Professor G. Scelle, member of the International Law Commission of the UN, propagates similar ideas. H. Mourer advocates the organization of a European pool in air transport [64]; M. Lemoine suggested, some time ago, the common exploitation of certain international trunk routes as the best solution, at least for European air transport; [65] another well-known author, Le Goff, also enthusiastically supports the idea of internationalization. He wrote recently: "Il n'y pas d'autre moyen d'assurer une exploitation générale et rationnelle de la navigation aérienne internationale que son internationalisation." [66] These and other distinguished French authors, as it seems, fail to realize that real internationalization presents many difficulties, not only of a political and economic, but also of a legal nature. Perhaps one day these noble plans will be universally accepted, but, at the present time, the world does not seem to be ready for the realization of such far-reaching projects.

CONCLUSION

In the foregoing pages an attempt has been made to present the problem of international air transport as viewed from various aspects. As emphasized in the introduction and elsewhere while discussing the respective legal documents upon which present international air transport is based, it is apparent that the solution of the essential problems of world aviation is still a matter of future. While, as has been pointed out, international law seems to be generally adequate to meet the needs of peacetime sea commerce, it does not appear that there is the same adequacy with respect to air traffic. The airspace above the high seas is the sole area where freedom of air communications exists. However, this, taken by itself is of little practical importance for world air commerce. International society has failed as yet to take the next step, namely, that of inserting in the law of nations even such a basic right as the right of transit for world air services. To enable airliners to fly, even between friendly countries, protracted bilateral negotiations are often necessary. Ten years after the Chicago Conference, which was expected to result in the opening of the skyways to humanity, the world air network is still limited to rigid bilateral channels.[1] Thus, the facts themselves impose the conclusion that the positive air law of 1955 does not differ basically from that of 1919 in so far as concerns the legal

regime in force for international air traffic.[2] It is highly surprising and regrettable to see how slowly is growing the awareness that air communications are for our modern society the means of transportation which is equally important for the social, economic and cultural progress as the other, classic means of intercourse among peoples. Some of the data mentioned at the beginning of this thesis, concerning the rapid growth of civil aviation and its importance in the system of world communications, could easily convince anyone that to give civil aviation more freedom would ultimately result in a benefit to all. However, national governments do not appear to be inclined to follow this line of thought. Obviously there is not yet sufficient understanding of the importance of international trade and commerce. As O. Newfang says, commerce has become "the life-blood of the world, like the circulatory system of the human body. Curtail the flow of this life-blood and the world languishes in shortages, rationing, want, and undernourishment; cut it entirely and the modern world would die."[3] Indeed, no country on earth can maintain a reasonable standard of living and welfare without the free flow of world commerce. On the other hand, no modern nation is wholly self-sufficient; communication and transport and the increasing complexities of modern life have made every nation in varying degree dependent upon its trade with others.[4]

In particular, the analysis of the economic aspect of

civil aviation leads to the conclusion that the ultimate interests of all nations, whether small or large, whether economically strong or weak, require the acceptance of a more liberal regime for international commercial flights. 5) No state should be reluctant, for reasons of economic protection or political advantages, to allow foreign aircraft to fly to, from or over its territory. Civil aviation, to a greater degree than any other aspect of international economic relations, exemplifies the interdependence of nations as brought about by modern conditions. Such interdependence cannot be effectively recognized by international agreement unless states are willing to restrict their arbitrary attitude in this respect not only by permitting freedom of transit and possibly commercial freedom, but also by acquiescing in a measure of international regulation. Without the latter there will be always a danger of both the disregard of the legitimate economic interests of the weaker countries and uncontrolled, and therefore possibly wasteful, competition. However, this international control should not be so rigid as to hinder ambitious initiative and sound competition.

At the present time of general world tension it would be an illusion to expect any substantial change in existing principles governing international air transport. Evidently the main reason for the failure of all the plans for the improvement of the present unsatisfactory situation as regards world aviation lies in the political divergencies existing

between states. These divergencies are in certain fields so big as to impede practically agreement on the minimum common interests indispensable for the acceptance of a common rule or principle. This situation has resulted, as Lemoine indicates, in the fact that no state is willing to negotiate voluntarily unless it expects to gain some advantage from such negotiations;[6] "Variétés des situations géographiques, inégalités économiques, diversités des concepts politiques et juridiques sont les trois sources d'où découlent les divergences et les oppositions"[7] - concludes this author.

In creating closed areas in the airspace above their territories, supposedly for security reasons, states are making wide use of their rights recognized by general international law and/or by treaty air law. There is no adequate international authority which could judge whether, in every particular case, restrictions and obstacles thus imposed on air traffic are reasonable and justifiable. To cite a recent example: IATA members operating in Europe "continue to experience interference by military aircraft on established air routes, and to suffer economic penalties due to prohibited and danger areas created for military purposes across certain established air routes, forcing civil operators to make extensive detours" complained the Final Resolution (XII) adopted at the Tenth Annual General Meeting of IATA held at Paris in September 1954.[8] At the same meeting IATA members agreed that "urgent action is now required to alleviate this

unsatisfactory situation" and, therefore, resolved to urge ICAO to "take immediate steps" and to initiate any action which might effect "standardization and reduction of military restricted or danger areas to the minimum necessary."[9)]

The present picture of the world air transport clearly shows that powerful and deeply rooted anti-dynamic forces still dominate in civil aviation. Because of them the more rapid growth of air communications is delayed and the world is deprived of wider utilization of speedy air transport. In these days one hears a lot of discussion all over the world on the problem of peace and war. In this connection air power receives special attention and publicity but, unfortunately, in a negative sense. It is usually described as the most potential power of destruction and, consequently, appears in the mind of an ordinary man as the most dangerous threat to world peace. Such a presentation of air power is misleading and only half true. Nobody will deny the destructive possibilities of modern aircraft if used as a tool of war, but, it seems to be often forgotten that aviation has already proved itself as a great asset for humanity when given an opportunity to serve peaceful purposes. As such, it is our understanding that commercial flying on a global scale is an immediate corollary to the existence and preservation of peace.[10)]

Before all of those who have something to do with aeronautics and particularly with international air transport

lies a great and responsible task, namely, to point out this humanitarian and progressive side of aviation which is continuously over-shadowed by its destructive counterpart. Therefore Goedhuis is on the right road when he suggests that the efforts to be made with a view to seeking a more liberal treatment of world aviation problems should inevitably also include writers. In a large measure it is up to them to create a public opinion which will be based upon a conviction that aviation's primary aim is not to destroy humanity but to serve it as an instrument of peaceful international co-operation for the common benefit. Writers and especially legal ones have already greatly contributed towards the attainment of this goal. Their analyses of the vital problems affecting world air transport and their endeavours to work out some better legal framework for its operations will undoubtedly serve a useful purpose when the new foundations for world civil aviation are laid down. In this respect valuable use will also be made of the plans, reviewed earlier in these pages, advanced by individual states on different occasions. The main aim of any further development in this field should be to create a legal and economic framework within which the whole world could take advantage of the air age. Since civilization is so largely a matter of transportation, the air should, in the same way as the sea, be recognized as a vital factor in the development of the international community, for it provides the medium for the most rapid, facile and promissing means of international

communication. If and when there is a realization of the necessity of having a sort of 'Magna Carta of Transportation' (such as the League of Nations intended to create a few decades ago) applicable to the whole world, and to all means of transportation, the liberty of transit should be laid down as its basis. It would be, however, an idle dream to expect that this aim will be achieved easily and soon. There is every reason to believe that there will take place a gradual development which, after all, corresponds to the general rate of progress of mankind and civilization, culture and legal institutes. A political agreement should, undoubtedly, precede any aviation agreement seeking an introduction of substantial novelties into the existing framework of international civil air transport.

It is both inevitable and necessary that such a dynamic force as civil aviation must sooner or later be freed from its present restrictions and accorded sufficient freedom of action in order to - "help to create and preserve friendship and understanding among the nations and peoples of the world"; "promote that co-operation between nations and peoples"; and "be developed in a safe and orderly manner and ...operated soundly and economically".[11]

FOOTNOTES

Chapter I

1) Lissitzyn, O. J., International Air Transport and National Policy, New York, 1942, p. 18.

2) Lissitzyn, op. cit., p. 18.

3) Ogburn, W. F., The Social Effects of Aviation, Cambridge, 1946, p. 11.

4) De Castillon de Saint-Victor, A., Le transport aérien, Paris, 1947, p. 3.

5) Boggs, S. W., Mapping Some of the Effects of Science and Technology on Human Relations, Department of State Bulletin, Vol. XII, No. 294, 1945.

6) Josserand, L., Les transports en service intérieur et en service international, Deuxième édition, Paris, 1926, p.43.

7) La Pradelle, de A., Dixième Congrès International de Législation Aérienne du Comité Juridique International de l'Aviation tenu a Aix-en-Provence du 18 au 22 mai 1948, Paris, p. 36. Professor de La Pradelle suggests, from the point of view of the different predominant modes of transportation in use during various epochs, the following division of the whole history of mankind: First, the civilization of rivers; second, the civilization of the sea; and third, the civilization of the air.

8) "...l'aviation commerciale atteint la masse, transplante l'homme et ses richesses d'un point du globe à l'autre, pèse définitivement sur son mode de vie, et ses relations d'affaires ou d'esprit. Un nouvelle image de la vie, des échanges et du commerce en général, se dégage de cette évolution de la dynamique humaine...Ainsi se renouvellent sous nos yeux les données de la géographie humaine et économique. Pendant vingt siècles, deux éléments: la terre et l'eau, ont conditionné l'évolution historique de la circulation humaine. Voici qu'un troisième élément, l'Air, apparaît en pleine lumière devant nous depuis le début de ce siècle." Juglart, M., Traité élémentaire de droit aérien, Paris, 1952, p. 65.

9) Josserand, op. cit. pp. 5 et seq.

10) Boggs, op. cit.

11) Leyson, B. W., Wings Around the World, New York, 1948, p. 15.

12) Boggs, op. cit.

13) The U. S. F-100 flies supersonically in level or climbing flight and holds the present official world speed record of 755.149 m.p.h.

14) On February 11, 1953, the U. S. domestic scheduled air carriers completed 12 months of operations without a single fatality. In 1954, U. S. scheduled airlines flew some 21 billion passenger miles with only 16 deaths, thus setting a record low fatality rate of only .08 deaths per hundred million passenger miles. Only one of the 1,754,629 passengers carried by Canadian airlines on scheduled flights in 1953 was killed.

15) The above figures exclude the P. R. of China and U.S.S.R.

16) Moraze, C., L'aviation et la civilisation, Revue générale de l'air, 1946, p. 494.

17) For a comprehensive analysis see: Lissitzyn, op. cit., pp. 11 et seq.

18) Moraze, C., op. cit. p. 492.

19) The latest example of this kind: During the unprecedented floods in East Pakistan, in August 1954, the U. S. airlifted relief reached the disaster area within three days, delivering men and medicine an endangered region 12,620 miles away. This action was properly described as probably the swiftest, most dramatic response to a distant cry for help the world has ever known.

20) Wright, Q., Problems of Stability and Progress in International Relations, University of California Press, 1954, p. 300. /Originally published in Air Affairs, I, Sept. 1946/.

21) Goedhuis, D., Idea and Interest in International Aviation, The Hague, 1947, p. 6.

22) An example of the utilization of aircraft in the foregoing sense might be useful. The U. S. Secretary of State, John Foster Dulles, travelled 101,521 miles by plane in 1954 conferring on four continents. Within one fortnight alone, he talked to statemen in Manila, Formosa, Tokyo, Denver, Bonn, and London. (According to TIME Magazine,

No. 1, of January 3, 1955).

23) Op. cit., p. 300.

24) The first flight was made between Vancouver and London on April 12th, 1955.

25) Le domaine aérien et le régime juridique des aérostats, Revue générale de droit international public, Tome VIII, 1901, pp. 414-485.

26) Sur le régime juridique des aérostats, /Report to the Institut de Droit International at its session of 1902/, l'Annuaire de l'Institut de Droit International, Vol. XIX, (1902), pp. 86-114.

27) Goedhuis, D., Idea and Interest in International Aviation, op. cit., p.2.

28) Goedhuis, ibidem.

29) Moller, N. H., The Law of Civil Aviation, London, 1936, p. 5.

30) Wright, Q., op. cit. p. 301.

31) Cooper, J. C., The Right to Fly, New York, 1947, p. 123.

32) Ibidem.

33) As Max Huber said in the Islands of Palmas Arbitration, 1928: "Territorial sovereignty cannot limit itself to its negative side, i. e., to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum protection of which international law is the guardian..."- Briggs, The Law of Nations, second edition, New York, 1952, p. 298.

34) Mare Liberum is now known to be simply a revised version of Chapter XII. See: The Classics of International Law, Grotius, De Iure Praedae, Vol. I, /Translation/, Carnegie Endowment for International Peace, Oxford University Press, 1950, p. xv et 216 (note 1).

35) Grotius,op. cit., p. 216.

36) Grotius, op. cit., p. 218.

37) Grotius, op. cit., p. 218.

38) Ibidem, pp. 219-220.

39) Cooper, J. C., Air Transport and World Organization, The Yale Law Journal, Vol. 55, 1946, p. 1199.

40) Grotius, op. cit., p. 236.

41) Ibidem, p. 238.

42) Ibidem, p. 244.

43) Ibidem, p. 244.

44) Ibidem, p. 255.

45) Ibidem, p. 257.

46) Ibidem, p. 262.

47) Vattel, E. De, The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns, /Translation/, 1758, Carnegie Institution of Washington, 1916,

48) Ibidem, Chapter VIII, p. 41.

49) Ibidem, p. 41.

50) Ibidem, Chapter II, p. 122.

51) Ibidem, p. 122.

52) Definition of 'traffic in transit' in Art. 33 of the Havana Charter for an International Trade Organization.

53) Heller, P., The Grant and Exercise of Transit Rights in Respect of Scheduled International Services, (A thesis presented to the Faculty of Graduate Studies and Research of McGill University, Montreal), 1954, p. 2.

54) The terms 'the right of innocent passage' and 'the privilege' of entering foreign ports for commercial purposes are here purposely used, since, as will be explained later, the first is unanimously accepted in the practice of states, and in doctrine as a factual right, whilst as to the latter, there exists some hesitation in its legal determination, but not, however, in the attitude of states who treat both as a single international servitude. Says McNair: "...although there is no right... for merchant ships to enter ports of a foreign state, it is the practice to allow them to do so." The Law of the Air, Second ed., London, 1953, p. 253.

55) Heller, op. cit., p. 2.

56) Juglart writes: "Il est... absolument nécessaire que le transporteur international possède:
1 - Le droit de déposer, en un point quelconque du parcours, des passagers, du frêt ou du courrier, venant du pays d'origine;
2 - Le droit de prendre, en un point quelconque du parcours, des passagers, du frêt ou du courrier, à destination du pays d'origine de l'aéronef.
Ces concessions sont nécessaires: l'Air veut des routes.....les concessions commerciales sont absolument indispensables à la juissance de l'air." Traité élémentaire de droit aérien, Paris, 1952, pp. 24-25.

57) McNair, op. cit., p. 10.

Chapter II

1) The Freedom of the Seas in History, Law, and Politics, New York, 1924, pp. 34-35.

2) Raestad, La Mer territoriale, Paris, 1913, p. 2.

3) "It was from Rome, in the period when the Imperial jurists enjoyed a three-fold duty as legislators, expounders, and administrators of the law for the whole civilized world, that the first positive declaration of the free and common enjoyment of the seas was enunciated..." Ogilvie, P. M., in International Waterways, New York, 1920, p. 32. See also: Gidel, G., Le droit international de la mer, Tome III, Paris, 1934, p. 25.

4) Gidel, op. cit., p. 25.

5) "By the law of nature these things are common to mankind - the air, running water, the sea, and consequently the shores of the sea."

6) Op. cit., p. 13. See also: Fulton, T. W., The Sovereignty of the Sea, Edinburgh and London, 1911, pp. 539 et seq.; Gidel, op. cit., pp. 26 et seq.

7) Op. cit., p. 13.

8) The glossators and commentators used various formulas in their attempts to attribute to the coastal power a portion of the adjacent sea, as e. g. : "Mare est ejus cujus est terra cui adjacet"; "Mari imperare videtur qui in continenti proximo imperat"; " Ea quae fiunt in mari adjacente

territorio dicuntur fieri in territorio", and soforth. Nys, E. , Le droit international, Deuxième éd., Bruxelles-Paris, 1904, p. 498.

9) Raestad, op. cit., p. 49.

10) Bustamante y Sirven, La mer territoriale, Paris, 1930, pp. 19-20. Concurr: Gidel, op. cit.,pp. 32-35; Katicic, N., More i vlast obalne drzave, Zagreb, 1953, pp. 64-65, /in Croatian/.

11) Raestad, op. cit., p. 63.

12) Zoricic, M., Teritorijalno more, Zagreb, 1953, p. 149, /in Croatian/; McNair, op. cit., p. 254.

13) Hall, W. E., Treatise on International Law, 8th ed., Oxford, 1924, p. 181.

14) Fulton, op. cit., pp. 110-111.

15) Higgins and Colombos, The International Law of the Sea, 2nd revised ed., London-New York-Toronto, 1951, p. 42.

16) Selden wrote: "Humanitatis officia exigunt ut hospitio excipiantur peregrini, etiam ut innoxius non negetur transitus" etc.Mare Clausum, London, 1636, p. 157; Gentilis put it this way: "transire est intrare et exire"; Vattel stressed that a nation "cannot refuse access to non-suspected vessels, for innocent purposes, without infringing its duty." Op. cit., p. 248.

17) Compare: Hall, op. cit., pp. 197-8.

18) Oppenheim-Lauterpacht, International Law, Vol. I, - Peace, 7th ed. revised, London, 1948, p. 447; Scelle, G., Manuel de droit international public, Paris, 1948, p. 431; Higgins and Colombos, op. cit., p. 85.

19) Jessup, P., The Law of Territorial Waters and Maritime Jurisdiction, New York, 1927, p. 120.

20) Oppenheim-Lauterpacht, op. cit., p. 447, underlined by Oppenheim himself.

21) Jessup, op. cit., p. 120. - A rather curious attitude in respect to innocent passage was shown by Albania before the incident in the Corfu Channel occurred. The Albanian Chief of Staff in a communication, dated May 17, 1946, asserted that foreign warships, and merchant vessels as well, had no right to pass through Albanian territorial sea without prior notification to, and permission of,

the Albanian authorities. This assertion was later evoked in correspondence that Albania had with the U. K. One may consider this as a unique restriction imposed on sea navigation in time of peace and almost uknown in modern times.

22) 7 League of Nations Treaty Series, 13, 27.

23) Article 4 began as follows: "L'Etat riverain ne peut entraver le passage inoffensif des navires étrangers dans la mer territoriale."

24) The International Law Commission was established in pursuance of Resolution 174 (II) of November 21, 1947, of the General Assembly of UN with the task of working on topics which are considered to be of sufficient importance to be codified. On the list of the most urgent matters for international codification was put also the regime of territorial sea.

25) United Nations, Report of the International Law Commission covering the work of its sixth session June 3-July 28, 1954. Can be found in the Supplement of the American Journal of International Law, Vol. 49, No. 1, 1955; pp. 23-43 deal with the regime of the territorial sea. For the analysis of this Report see: Jessup, The International Law Commission's 1954 Report on the Regime of the Territorial Sea, A.J.I.L., Vol. 49, No.2, 1955, pp. 221-229.

26) E. g.: Hall, op. cit., p. 166; Jessup, The Law of Territorial Waters and Maritime Jurisdiction, op. cit., p. 119; Fenwick, C., International Law, 3rd ed.,New York & London, 1948, p. 394.

27) Discussing in general the legal nature of the rules of internationa law, J. Spiropoulos shares the same opinion. See his Théorie générale du droit international, Paris, 1930, pp. 28 et seq.

28) Actes de la Conférence pour la Codification du Droit International, Vol. III, Procès verbaux de la Deuxième Commission, Eaux Territoriales, Gnève, 1930, p.70.

29) Hall, op. cit., p. 198.Concur: Jessup, op. cit. p. 120; Gidel, op. cit., pp. 284-5; Baldoni, Les navires de guerre dans les eaux territoriales étrangeres, Recueil des Cours, l'Academie de droit international /The Hague/, 1938-III, pp. 223-6. For the contrary opinion see: W. Schuking's "Memorandum" which appeared in Publications

of the League of Nations, V, Legal Questions, 1926, V, 10, p. 18 et seq.; Higgins and Colombos, op. cit., p. 85; A. Verdross, Règles générales du droit international de la paix, Recueil des Cours, 1929, Vol. V, p. 391. It is of interest to note that the latter, liberal opinion is supported also by the Soviet authors Durdenevski and Krylov, who hold that a warship "may" pass through the foreign territorial sea without obtaining prior permission or giving notice of its intentions. Meshdunarodnoye pravo, Moscow, 1947, p. 257.

30) UN, Report of the ILC, op. cit., p. 38.

31) Zoricic, M., op. cit., pp. 165-6.

C h a p t e r III

1) Ortolan, L., Les paysans combattant l'invasion, Revue des cours litteraires de la France et de l'étranger, October 29, 1870 - Janvier 17, 1871, p. 758.

2) Quoted from Nys' report at the Brussels session of the Institut de Droit International, held in 1902, l'Annuaire de l'IDI, 1902, p. 105.

3) Le domaine aérien et le régime juridique des aérostats.

4) English, J., Air Freedom: The Second Battle of the Books, Revue Aéronautique Internationale, No. 8, Juin 1933.

5) See: Catellani, E., Il Diritto Aereo, Torino, 1911, pp. 27 et seq.; Lycklama à Nijeholt, J., Air Sovereignty, The Hague, 1910, pp. 11 et seq.; Hazeltine, H., The Law of the Air, London, 1911, pp. 11 et seq.; Richards, H. E., Sovereignty over the Air, (A lecture delivered at the University of Oxford on October 26, 1912); English, J., op. cit. pp. 191-204; Kroell, J., Traité de droit international public aérien, Tome I, Paris, 1934, pp. 14 et seq.; Wagner, W., Les libertés de l'air, Paris, 1948, pp. 27 et seq.

6) Le régime juridique des aérostats, op. cit.

7) Hazeltine, op. cit., pp. 13-14.

8) L'Annuaire de l'IDI, Vol. XIX (1902), p. 32.

9) Revue générale de droit international public, Tome XVII, 1910, pp. 55-62.

10) Ibidem, p. 60.

11) Hazeltine, op. cit., pp. 20-21.

12) Fauchille, La circulation aérienne et les droits des Etats en temps de paix, pp. 60-61.

13) Le Comité Juridique International de l'Aviation at its first session in Paris (1911) adopted as Article 1 of the "Code international de l'air" almost the same wording as IDI's resolution of 1911: "La circulation aérienne est libre."

14) Meili, F., Das Luftschiff im internen Recht und Voelkerrecht, Zurich, 1908, p. 28.

15) Catellani, op. cit., pp. 46-7.

16) Zitelmann, Luftschiffahrtsrecht, Zeitschrift fur internationales privat und offentliches Recht, XIX, 1909, p. 474.

17) Lycklama à Nijeholt, op. cit., p. 46.

18) Ibidem, p. 43.

19) Hazeltine, op. cit., 30-31.

20) Ibidem, pp. 36-37.

21) Ibidem, p. 37.

22) Richards, op. cit., /A mymeograph of the Institute of International Air Law, Montreal/, p. 17.

23) Ibidem.

24) Ibidem, p. 27.

25) Ibidem.

26) Holtzendorff, von, Handbuch des Voelkerrechts, Vol. II, Hamburg, 1887, p. 230.

27) Ibidem.

28) Bar, L. von, Lehrbuch des internationalen privat und Strafrechts, Stuttgart, 1892.

29) Bar, L. von, L'Observations et projet sur le régime des aérostats, l'Annuaire de l'IDI, Vol. XXIII, 1910, pp. 312 et seq.

30) Rivier, A., Principes du droit des gens, Tome I, Paris, 1896, pp. 140-141.

31) Westlake, J., L'Annuaire de l'IDI, Vol. XXI, 1906, p. 298.

32) Ibidem, p. 299. See for similar views e. g., A. K. Kuhn, The Beginnings of an Aerial Law, A.J.I.L., January, 1910, pp. 114 et seq.

33) Catellani, op. cit., p. 46.

34) Ibidem, p. 46.

35) Cooper, J. C., The International Air Navigation Conference, Paris 1910, The Journal of Air Law and Commerce, Vol. 19, No.2, 1952, p. 130.

36) Ibidem, p. 129.

37) Conference Internationale de Navigation Aérienne. Procès verbaux des séances et annexes (18 mai-28 juin 1910), p. 244.

38) Cooper, The International Air Navigation Conference, op. cit., p. 131.

39) Op. cit., Exposé des vues, pp. 133-140.

40) Op. cit., Procès-verbaux, pp. 269-272.

41) Cooper, supra, p. 132.

42) Ibidem. Art. 11 of the German draft provided that aircraft of a contracting state should be authorized to take off, land, and to fly over the territory of other contracting states. Professor Cooper obviously used the method of a strict legal interpretation of the words "contracting state" and "authorized" in arriving at his conclusions.

43) Comp.: Catellani, op. cit., p. 134, note 1.

44) Op. cit., Procès-verbaux, pp. 239-242.

45) Cooper, supra, p. 133.

46) Op. cit., Rules recommended by the First Commission, pp. 322-3.

47) Hall, op. cit., p. 205.

48) Henry-Couannier, A., Elémemts créateurs du droit aérien, Paris, 1929, p. 23.

49) See also: Moller, N. H., The Law of Civil Aviation, London, 1936, pp. 3 and 7.

50) Cooper, The International Air Navigation Conference, op. cit., pp. 140 et seq.

51) Ibidem, pp. 139-140 and restated in his most recent article - State Sovereignty in Space: Developments 1910 to 1914, - appeared in Beitraege zum Internationalen Luftrecht, Dusseldorf, 1954, p. 41. Quite a different view had been expressed earlier by the same author in his book The Right to Fly, published in 1947. Then he wrote: "the fact is that had a majority rule been in effect at the Paris Conference in 1910 and had a vote been taken, a convention might then have been adopted on this majority vote solemnly recognizing as the long-established Law of Nations that the 'air is free."(p.33).

52) Catellani was thus probably right in assuming that "in consequence of the more considerable progress made by Germany in the control of aircraft and in the formation of an air fleet, more complete liberty for international circulation of aircraft would be more advantageous to the Empire and to the expansion of its military power." Op. cit., p. 130. A rather similar situation arose at Chicago in 1944, as will be seen later.

53) 1° Congresso Giuridico Internazionale per il Regolamento della Locomozione Aerea. Atti e Relazioni, Verona, 1910, p. 178.

54) Ibidem.

55) Ibidem, pp. 160-176.

56) Ibidem, p. 163.

57) Ibidem, p. 166.

58) Ibidem, p. 168.

59) Ibidem, pp. 168-9.

60) Ibidem, p. 171.

61) Ibidem.

62) Cooper, State Sovereignty in Space, op. cit., p. 41.

63) Comp.: Cooper, J. C., International Air Law, /A lecture delivered at the U.S. Naval War College, Newport, Rhode Island, on December 20, 1948, mimeographed/, p.4.

64) Catellani, op. cit., p. 46.

65) It might be useful here to recall another most recent example. Until recently, no nation has ever claimed specific rights in the areas today known as the continental shelf and the epicontinental sea. Even these terms were unfamiliar to legal terminology. However, at the present time, over thirty countries have put forward their claims and have swiftly enforced, through respective legislative acts, their "sovereign rights" over vast areas considered, as recently as ten years ago, sacrosanct, classically inappropriable, res communis omnium. If it were not for the discovery of rich mineral resources in the subsoil of the continental shelf, there is no doubt that no state would ever have raised the aforementioned claims. Mutatis mutandis, one may apply the same ideas in endeavouring to explain the attitude of the states toward air navigation in its early period of development.

66) Moller, op. cit., pp. 3-4, 25, and 50.

67) Cooper, State Sovereignty in Space, op. cit., p. 43.

68) Two 'key' provisions of the Serbian decree are contained in Articles 2 and 11. Art. 2 provides that air vehicles "cannot be used without the permission of the Minister of Interior", whereas Art. 11 states that "Air vehicles from a foreign territory, irrespective of to whom they belong (private, public, police etc., except military) may pass over Serbian territory only at such a place and at a time which prescribes the custom authority with the consent of the Minister of the Interior." Art. 13 provided that "foreign military air vehicles by no means can fly over the Serbian territory, not even in time of peace." From: I. Przic, Osnovi vazduhoplovnog prava, Belgrade, 1926, /in Serbian/.

69) Cooper, supra, p. 46.

70) For the text see: Revue générale de droit international public, Vol. XX (1913), pp. 697-701.

71) Op. cit. supra, p. 45.

72) Cooper, ibidem, p. 49.

Chapter IV

1) On the Paris Convention of 1919 there exists abundant literature covering the subject from almost every angle.

The following are some among the valuable writings: La Paix de Versailles, Commission de l'Aéronautique, /Minutes/, Paris, 1934; A. Roper, La Convention internationale du 13 octobre 1919, portant réglementation de la navigation aérienne; son origine, son application, son avenir, Paris, 1930; E. Warner, The International Convention for Air Navigation: and the Pan American Convention for Air Navigation: a Comparative and Critical Analysis, Air Law Review, Vol. III, No. 3, 1932, pp. 221-308; L. H. Slotemaker, Freedom of Passage for International Air Services, Leiden, 1932, pp. 14-31; S. M. Cacopardo, Principles of Public International Law applicable to Air Transports, Enquires into the Economic, Administrative and Legal Situation of International Air Navigation. League of Nations, Organisation for Communications and Transit, Geneva, 1930. Series of League of Nations Publications: VIII. Transit. 1930. VIII. 6; Official No. C. 339. M. 139. 1930. VIII (R.R.C.T. 3), pp. 159-207; Cooper, The Right to Fly, op. cit. (useful particularly for the political and economic analysis of the Convention).

2) La Paix de Versailles, op. cit. pp. 19-22; Roper, op. cit., pp. 41-43.

3) The American dr&ft comprised 26 articles and its contributions to the drafting of the Paris Convention included the suggestion of the use of the technical term "air space" and not "air" in stating the principle of sovereignty and in using the term "innocent passage". See: Cooper, J. C., United States Participation in Drafting Paris Convention 1919, Journal of Air Law and Commerce, pp. 266-276, Vol. 18, 1951.

4) Projet de convention internationale sur la navigation aérienne, Paix de Versailles, op. cit., pp. 219 (18-19).

5) La Paix de Versailles, pp. 219 (3-9).

6) Cooper, J. C., Some Historic Phases of British International Civil Aviation Policy, International Affaires, April, 1947, p. 193.

7) Cooper, United States Participation etc., supra, p.276.

8) La Paix de Versailles, p. 19.

9) Warner, supra, p. 226.

10) The adjectives "complete" and "exclusive" used in Art. 1 gave rise to much criticism in the doctrine. Goedhuis

considers these adjectives as mere redundancy, actually "meaningless". Moreover, in his opinion, the form in which Art. 1 appears has been exploited as an argument in favour of the states who insist on complete arbitrariness with respect to the admittance of foreign aircraft to their territory. (Goedhuis, The Development of Rules to Govern International Aviation Communications, Transport and Communications Review, United Nations, Vol. V, No. 3, 1952, p. 2). W. Wagner, (Les libertés de l'air, p. 51) writes in the same vein and adds: "Si la Convention parle, cependant, d'une souveraineté limitée, et si elle ajoute 'exclusive' c'est probablement pour s'opposer à la conception d'une souveraineté collective de la société internationale, d'une sorte de condominium sur l'espace aérien. Néanmoins, les deux termes paraissent superflus..."

11) Comp.: Slotemaker, op. cit., p. 17.

12) Latchford, S., The Right of Innocent Passage in International Civil Air Navigation Agreements, Department of State Bulletin, July 2, 1944, Vol. XI, No. 262, p. 20.

13) In French: "les lignes internationales".

14) La Paix de Versailles, p. 50; Slotemaker, op. cit., pp. 18-19; Roper, op. cit., p. 143; Cooper, The Right to Fly, pp. 135 et seq.

15) Slotemaker, op. cit., p. 19.

16) According to Slotemaker the practice of states with respect to Art. 15 was contrary to the original intentions of the drafters of the Convention which was, in his opinion, "not to make it a requirement for international air lines that they should have previous permission for flights over a State in case no intermediary landing on the territory of that State was effected." (P. 20).

17) Latchford, op. cit. p. 21.

18) Cooper, Some Historic Phases etc., op. cit., p. 196.

19) Op. cit., p. 129. See also: Oppenheim-Lauterpacht, op. cit., Vol. I, p. 476; R. Y. Jennings, International Civil Aviation and the Law, The British Yearbook of International Law, 22 (1945) p. 204.

20) Oppenheim-Lauterpacht, supra.

21) Comp. :Oopikofer, H., International Commercial Aviation and National Administration, Enquires into the Economic,

Administrative and Legal Situation of International Air Navigation. League of Nations, Organization for Communications and Transit, Geneva, 1930. Series of League of Nations Publications: VIII. Transit. 1930. VIII. 6; Official No. C. 339. M. 139. 1930. VIII (R.R.C.T. 3), p. 121.

22) Comp.: Goedhuis, D., Civil Aviation After the War, A.J.I.L., Vol. 36, 1942, p. 606.

23) In its Report presented to the Preliminary Peace Conference the Aeronautical Commission also suggested, under the title "Economic Measures" /to be applied against Central Powers/ the following: Complete interdiction of the manufacture and use by the Central Powers of anything relating to aeronautics "pendant le temps qu'il serait utile pour se rendre compte exactement de la sincerité des sentiments des ces Etats;" and in order "not to deprive the enemy powers of an instrument of progress" the French proposed that during the above (undefined) period, air transport services in enemy territories be performed by the Allied companies. This latter proposal received support by six out of the twelve members of the Commission, - the U. S., the U. K., Japan, Portugal, Brazil, and Cuba dissenting. In its final proposals to the Peace Conference, the Aeronautical Commission included a few other severe restrictions upon the aviation of former enemy states. See: La Paix de Versailles, pp. 123, 125; Cooper, The Right to Fly, pp. 67 et seq.

24) The Paris Convention came into effect on July 11, 1922, after 14 states had deposited their instruments of ratification. Altogether, 38 countries ratified or adhered to the Convention until 1939, but in the meantime, five of them (Bolivia, Panama, Iran, Chile, and Austria) had given notice of withdrawal. Lacombe et Saporta, Les Lois de l'Air, Paris, 1953, p. 3.

25) Hackworth, G. H., Digest of International Law, Vol. IV, Department of State Publication 1756, Washington, 1942, p. 363.

26) Oppenheim-Lauterpacht, op. cit., pp. 476-7.

27) Riese-Lacour, Précis de droit aérien, Paris, 1951, p. 65.

28) Le Goff, M., Manuel de droit aérien, Paris, 1954, p. 97.

29) Hyde, C. C., International Law, Second rev. ed., Vol. I, Boston, 1945, p. 599.

30) In the meantime, in 1926, the "Ibero-American Convention for Air Navigation" was signed at Madrid, but remained without necessary support and never came into force. It followed the Paris Convention very closely, almost literally, except in few instances. Spain was the main sponsor of this attempt to ignore the Paris Convention.

31) Warner, op. cit., p. 226.

32) Ibidem, p. 262.

33) Ibidem, pp. 267-8.

34) Slotemaker, op. cit., p. 32.

35) Goedhuis, Le régime juridique de l'espace aérien et le developpement des lignes aériennes internationales, Revue Aéronautique Internationale, No. 22, 1936, Paris, 1936, p. 408.

36) Le Goff, op. cit., p. 165.

37) Wagner, op. cit., p. 60.

38) Roper, op. cit., p. 104.

39) Latchford, op. cit., p. 23. Similarly Lissitzyn, op. cit., pp. 371-2.

40) Ibidem, p. 23. However, Latchford added, Mexico and Guatemala did not agree even to such an interpretation. For example, Mexico insisted that despite the provision of Art. 4, no special flights could be made into its territory without prior authorization for each flight.

41) Ibidem. Similarly C. C. Hyde, op. cit., p. 600.

42) Hackworth, op. cit., p. 366.

43) Slotemaker, op. cit., pp. 38-39. In the same sense wrote A. Ambrosini: "...nous croyons que la condition juridique crée par la Convention de Paris n'est pas la plus favorable au développement pratique des transports aéronautiques internationaux." Le régime juridique des lignes aériennes, Revue général de droit aérien, 1934, p. 505.

44) Oppikofer, op. cit., p. 112. The same position was held by another German scholar, A. Meyer. He claimed that a state acts completely within its rights when it refuses authorization to a foreign airline in order to eliminate competition which seems to be unjustified. Freiheit der Luft als Rechtsproblem, Zurich, 1944, p. 173.

45) Goedhuis, Idea and Interest in International Aviation, The Hague, 1947, p. 5.

46) Lissitzyn, op. cit., pp. 407 et seq.

47) Thomas, A. J., Economic Regulation of Scheduled Air Transport, Buffalo, 1951, pp. 188 et seq; L. C. Tombs, International Organization in European Air Transport, New York, 1936, pp. 1 to 25.

48) Cooper, J. C., Air Power and the Coming Peace Treaties, Foreign Affairs, Vol. 24, 1946, p. 442.

49) See for details: Lissitzyn, op. cit., especially Chapters III & IV.

50) Thomas, supra, p. 189. See also for the developments in South America: W. A. Burden, The Struggle for Airways in Latin America, New York, 1943, pp. 38-54.

51) Burden, W. A. M., Opening the Sky: American Proposals at Chicago, Blueprint for World Civil Aviation, Department of State Publication No. 2348, Washington, 1945, p. 17.

52) Comp. : Lissitzyn, op. cit., pp. 396 et seq.

53) Burden, supra.

54) As an individual point of view of the situation which reigned between two world wars, let us mention briefly the substance of the article written by Mr. A. Berle, Chairman of the U. S. Delegation to the Chicago Conference. He described the pre-war British-American bargaining as follows: "The British air magnates thought the North Atlantic traffic ought to be divided half-and-half between the American and the British interests; other countries, apparently, were expected to keep out of Europe and the Middle East, or at any rate, ought not to travel much east of the cities on the western shores of Europe...Pacific development apparently was to remain largely, though not exclusively - in American hands. There is solid reason for believing that this general division of the world would have been satisfactory to both Pan American and British monopoly." (Berle, Freedoms of the Air, Blueprint for World Civil Aviation, Department of State Publication No. 2348, Washington, 1945, pp. 3-4). According to this pattern, if one may rely upon Mr. Berle's information, two big airlines would be thus able to eliminate any competition which might appear, either from other companies

within their own countries, or from other nations less favoured by geography or politics.

55) Berle, op. cit., p. 4.

56) The following is another example of how the economic picture of Europe, on the eve of World War II, appeared to an American author: " Today the barriers to trade in Europe rise like walls between nations, slow the pulse of industry, rob artisans and laborers of a chance to earn living, impoverish peoples whose ample capacities are thwarted, and instill fear and despair." And further: "...the continent of Europe as a whole presents the anomaly of being the most highly industrialized, and intrinsically the most interdependent continent on Earth, and at the same time of being the most highly compartmentalized, measured both by the length of boundaries proportional to the area and, much more significantly, by the height of its towering nationalism." S. W. Boggs, International Boundaries, New York, 1940, pp. 110, 130, 131. - Referring to the influence of narrow nationalism on prewar air transport in Europe Le Goff observed: "Parler de liberté de l'air à l'Europe est insensé, elle ne voit que souverainetés et frontières, précautions et méfiances." Op. cit., p. 175.

57) Visscher, F. de, Régime juridique de l'espace atmosphérique, /Report presented to the IDI at its session held in Lausanne, 1927/, L'Annuaire de l'IDI, 1927, Tome I, pp. 347-8.

58) Garner, J. W., La réglementation internationale de la navigation aérienne en temps de paix, Revue de droit international et de législation comparée, 1923, p. 374.

59) Slotemaker, op. cit., p. 59.

60) Ibidem, p. 62.

61) Goedhuis, Idea and Interest etc., p. 10.

62) Ibidem, p. 11.

63) Le régime juridique de l'espace aérien et le développement des lignes aériennes internationales, op. cit., p. 409.

64) Oppikofer, op. cit., pp. 128-9.

65) Ibidem, p. 129.

66) C.C. Hyde, op. cit., p. 605.

67) In the British "White Paper" of October 1944, containing the U. K. proposal on international air transport submitted later at Chicago, one can find the following appraisal of the Paris and the Havana Conventions: "Neither of these Conventions made provision for international regulation in the economic field. In the result, the growth of air transport was conditioned by political rather than economic considerations and its development as an orderly system of world communications was impeded. Summed up, the major evils of the pre-war period were, first, that any country on an international air route could hold operators of other countries to ransom even if those operators only wished to fly over or refuel in its territory; secondly, that there was no means of controlling the heavy subsidisation of airlines which all too often were maintained at great cost for reasons mainly of national prestige or as a war potential; and thirdly, that the bargaining for transit and commercial rights introduced extraneous considerations and gave rise to international jealousies and mistrust." Proceedings of the International Civil Aviation Conference, Chicago, Illinois. November 1 - December 7, 1944, Department of State Publication 2820, Washington, 1948, Vol. I, p. 567.

Chapter V

1) Memorandum on ICAO, Montreal, 1953, pp. 7-8.

2) Commenting on this Soviet refusal to attend the Chicago Conference, Le Goff remarked that the U.S.S.R. represents - "le bastion du nationalisme le plus intrasigeant, le moins pénétré par l'esprit nouveau qui anime désormais le monde...Le peuple qui s'est théoriquement consacré à l'internationalisme aboutit pratiquement à un nationalisme à tendance impérialiste." Op. cit., p. 79.

3) "Régler la navigation aérienne internationale sans la Russie est une entreprise difficile, la convention qu8on aurait voulu universelle ne sera encore une fois qu'un traité collectif multilatéral." Le Goff, op. cit., p.154.

4) Proceedings, op. cit., p. 12.

5) See: Cooper, The Right to Fly, p. 163; P. Chaveau, Droit aérien, Paris, 1951, pp. 78 et seq.

6) Proceedings I, pp. 554 et seq.

7) Ibidem, pp. 570 et seq.

8) Document No. 358, Proceedings I, pp. 418 et seq.

9) Documents 402, 422, and 442; Proceedings I, resp. pp. 404 et seq., 391 et seq., 375 et seq.

10) Document 454; Proceedings I.

11) Proceedings I, pp. 42-43.

12) Ibidem, p. 55.

13) Ibidem.

14) Ibidem, p. 56.

15) Ibidem, p. 57.

16) Ibidem.

17) Ibidem.

18) Ibidem, p. 58.

19) Ibidem, p. 60. - E. Warner wrote soon after the Conference that the U. S. had presented two major objections to the regulation of world air traffic by an international body: (1) "that no set of principles has been proposed for the authority's guidance; " and (2) "that in such circumstances its decisions would be as uncertain as those of a judge with no law to guide him." The Chicago Air Conference: Accomplishments and Unfinished Business, Blueprint for World Civil Aviation, op. cit., p. 29.

20) Proceedings I, p. 61.

21) Ibidem, p. 60.

22) From a low of 6,000 aircraft of all types manufactured in 1938, the U. S. production increased to 48,000 in 1942, to 86,000 in 1943, and to 100,000 in 1944. A considerable part of these were destined to serve transport purposes. Comp.: Juglart, op. cit., p. 22.

23) Proceedings I, p. 62.

24) Document No. 16; Proceedings I.

25) See for discussion on the subject of different terms applied in the Chicago acts our pp. 171 et seq.

26) Cooper, The Right to Fly, pp. 164 and 170; Cooper, Some Historic Phases of British International Civil Aviation Policy, International Affairs, April, 1947, p. 198.

27) Burden, Opening the Sky etc., op. cit., p. 18.

28) Berle, Freedoms of the Air, op. cit., p. 7.

29) Document No. 48, Proceedings I.

30) Lord Swinton, the head of the U. K. Delegation, in his inaugural speech delivered at the second plenary session. Proceedings I, p. 64.

31) Ibidem.

32) Ibidem.

33) Warner, The Chicago Air Conference etc., op. cit., p. 33.

34) Cooper, The Right to Fly, p. 171; Warner, supra, p. 33.

35) Warner, supra.

36) Comp. : Chauveau, op. cit., p. 66.

37) Burden, Opening the Sky etc., p. 19.

38) Ibidem, p. 19; concurs Cooper, The Right to Fly, p. 172.

39) Berle, Freedoms of the Air, p. 6.

40) Proceedings I, p. 67.

41) Document No. 50; Proceedings I.

42) Howe, C. D., opening address; Proceedings I, p. 68.

43) Ibidem, p. 71.

44) Ibidem.

45) Ibidem, p. 73.

46) Morgan, S. W., The International Civil Aviation Conference at Chicago, Blueprint for World Civil Aviation, Department of State Publication No. 2348, Washington, 1945, pp. 12-13.

47) Mr. Drakeford, head of the Australian Delegation, in his address. Proceedings I, p. 84.

48) Drakeford, Proceedings I, p. 542.

49) Ibidem.

50) Mr. Sullivan, Chairman of the New Zealand Delegation, Proceedings I, p. 541.

51) Drakeford, Proceedings I, p. 83.

52) Document No. 49, Proceedings I.

53) Proceedings I, p. 544.

54) Berle, Freedoms of the Air, op. cit., p. 6.

55) Cooper, J. C., Summary and Background Material on International Ownership and Operation of World Air Transport Services, Princeton, 1948, p. 15.

56) According to Le Goff, France had supported at Chicago a thesis "proche de celle" of Australia and New Zealand which was, in general, similar to its position as taken at the Disarmament Conference of 1933. (Op. cit., p. 163). - Mr. Hymans, Chairman of the French Delegation at Chicago, proposed at the plenary session of Committee I, on November 8, the following amendment: "Being determined to go as far as possible toward the aims involved in the New Zealand resolution, i. e. cooperation, regulated development, contribution to security and to 'freedom from fear', the French Delegation thinks that the way to these general objectives may be, in various instances, a joint utilization of aeronautical resources by creation of a joint international instrument responsible for operation of international air services." Proceedings I, p. 546.

57) Proceedings I, p. 477.

58) Ibidem.

59) Cooper, Summary and Background Material etc., supra, p.6.

60) Series of League of Nations Publications: IX. Disarmament, 1935, IX. 42; Memorandum relating to the French Delegation's Proposals on the Internationalisation of Civil Air Transport.

61) Ibidem.

62) Cooper, The Right to Fly, pp. 119-120.

63) League of Nations Conference for the Reduction and Limitation of Armaments, Minutes of the General Commission, Air Committee, Vol. II. See also: Tombs, op. cit., pp. 17 et seq.

64) See for discussion and analysis of the Geneva Conference with respect to internationalization, besides already mentioned, the following works: Lissitzyn, op. cit., 416-418; Van Zandt, Civil Aviation and Peace, Washington, 1944, pp. 44 et seq.; Mance, O., International Air Transport, London-New York-Toronto, 1944, pp. 77 et seq.; Goedhuis, Le régime juridique de l'espace aérien, Revue de droit international et de législation comparée, No. 2, 1936, pp. 394 et seq.

Chapter VI

1) Chauveau, op. cit., p. 35.

2) For discussion of this aspect see: I. Vlasic, Cikaska konferencija i razvoj suvremenog zracnog prava, Zbornik Pravnog Fakulteta, Zagreb, God. III, 1953 /in Croatian/, p. 33 and note 15.

3) See for details: Cooper, J. C., Air Law - A Field for International Thinking, Transport and Communications Review (United Nations), Vol. 4, 1951, pp. 1-7. See also: Shawcross and Beaumont, Air Law, 2nd ed., London, 1951, p. 175.

4) Chauveau, op. cit., p. 36; Shawcross and Beaumont, op. cit. p. 176.

5) Report by the Council to Contracting States on the Definition of a Scheduled International Air Service and the Analysis of the Rights Conferred by Article 5 of the Convention, ICAO Doc. 7278-C/841; 10/5/52.

6) Ibidem, p. 3. - In commenting upon this definition, E. Warner, President of the Council of ICAO, pointed out that it would not be "self-operating. Its application will not be free from doubt in all cases...ICAO's definition certainly will not put an end to arguments... /but/ the location of the dividing-line will be much more clearly and uniformly established than in the past." ICAO After Six Years, /ICAO reproduction of the article appeared in the IATA Bulletin, June 1952/, p. 13.

7) ICAO Doc. 7278-C/841, op. cit., p. 8. - Art. 96 (d) of the Convention defines 'stop for non-traffic purposes' as meaning "a landing for any purpose other than taking on or discharging passengers, cargo or mail." In analysing the rights conferred by Art. 5 the Council of ICAO adopted the following additional interpretation of the term 'stop for non-traffic purposes': (a) "the term ...should be taken to include stops where passengers, or

goods not carried for remuneration or hire are embarked or disembarked", and (b) "a stop for non-traffic purposes should not be regarded as a traffic stop by reason of the temporary unloading of passengers, mail or goods in transit, if the stop is made for reasons of technical necessity or convenience of operation of the flight." Ibidem, pp. 8-9.

8) Ibidem, p. 9.

9) Ibidem, p. 10.

10) Shawcross and Beaumont, op. cit., p. 178.

11) ICAO Doc. 7278-C/841, op. cit., p. 12.

12) Shawcross and Beaumont, supra.

13) Cooper, The Right to Fly, p. 173.

14) ICAO DOc. 7278-C/841, p. 12. See also: Wagner, op. cit., p. 131.

15) Chauveau, op. cit., p. 74.

16) Goedhuis, D., The Development of Rules to Govern International Aviation Communications, Transport and Communications Review (United Nations), Vol. V, No. 3, 1952, p. 4. The present rule and practice in the U. K. is as follows: (1) Prior permission must be obtained, normally through diplomatic channels, for all non-scheduled commercial flights to U. K. territory by Dominion and foreign aircraft, except when such flights are covered by a bilateral agreement or an exchange of notes between the Governments of the U. K. and the Dominion or country concerned; (2) Non-commercial flights by aircraft registered in states parties to the Chicago Convention do not require prior permission, nor do landings for non-traffic purposes by such aircraft in the course of non-scheduled commercial flights. - In the U. S. A. similar rules are in force. A foreign air carrier must still obtain permission even if his country is a party to the Transit Agreement, or to a bilateral treaty with U. S. A. (Shawcross and Beaumont, op. cit., pp. 178 & 200).

17) Comp.: Goedhuis, The Development of Rules etc., op. cit., pp. 2-3.

18) The Right to Fly, p. 174. - See also: McNair, op. cit., p. 10; Jennings, R. Y., Some Aspects of the International Law of the Air, Recueil des Cours, l'Academie de droit international (The Hague), 1949-II, pp. 513 et seq.

19) Comp.: Sheehan, W. M., Air Cabotage and the Chicago Convention, Harvard Law Review, Vol. 63, 1950, pp.1157 et seq. On air cabotage in general see: A. Meyer, Le cabotage aérien, Paris, 1948.

20) Referring to the term 'public safety' (sécurité public) as used in Art. 9, Chauveau observes that this formula is "assez large et imprécise pour laisser aux gouvernements un pouvoir presque discrétionnaire pratiquement difficile à soumetter au contrôle des tribunaux, tout au moins en France." Op. cit., p. 48.

21) Bhatti- Drion - Heller, Prohibited Areas in International Civil Aviation, United States and Canadian Aviation Reports, March 1953, p. 121.

22) Ibidem, p. 113.

23) Ibidem, p. 124.

24) For comparative study of the Paris, the Havana, and the Chicago Conventions see: S. Latchford, Comparison of the Chicago Aviation Convention with the Paris and Havana Conventions, Department of State Bulletin, XII, No. 298, 1945, pp. 411-420; For the French views on the Chicago achievements consult: A. de La Pradelle, La Conférence de Chicago - sa place dans l'évolution politique, économique et juridique du monde, Revue généerale de l'air, 1946, pp. 107-167; A scholarly view expressing the British standpoint can be found in the articles, previously cited, by R. Y. Jennings.

25) West Germany was the sixty-sixth nation to join ICAO.

26) Chauveau, op. cit., p. 35.

27) "Il est vrai de dire que... entre la convention de Paris et celle de Chicago il y a une profonde différence de nature, la première est une convention strictement européenne, la seconde intercontinentale et que c'est sans doute cette nature nouvelle... La convention /de Chicago/ contient des possibilités immenses pour faire de la navigation aérienne internationale un instrument au service unique de l'humanité." Le Goff, op. cit., pp. 206-7.

28) Burden, Opening the Sky etc., op. cit., p. 21.

29) See for such analysis the comprehensive work of P. Heller /a thesis/ quoted earlier, pp. 90-97.

30) The International Convention for Air Navigation etc., Air Law Review, Vol. III, No. 3., 1932, p. 227.

31) The Chicago Air Conference etc., op. cit., p. 25.

32) Meyer, A., Freiheit der Luft als Rechtsproblem, Zurich, 1944, p. 143.

33) International Commercial Aviation etc., op. cit., p. 115.

34) Op. cit., pp. 253-4.

35) La Conférence de Chicago etc., op. cit., p. 136.

36) The Right to Fly, p. 174.

37) Opening the Sky etc., p. 21.

38) Op. cit., p. 96.

39) Burden, Opening the Sky, p. 21.

40) Heller, op. cit., p. 74.

41) Ibidem, p. 82.

42) Ibidem, p. 83.

43) Ibidem.

44) Lemoine, M., Traité de droit aérien, Paris, 1947, p. 96; Heller, op. cit., p. 110.

45) See: Chauveau, op. cit., p. 47.

46) Comp.: Heller, op. cit., pp. 175-6. - An example of misinterpretation of the provision of Sec. 3, para. 1, because of the use of the term "airlines" may be found in the following conclusion by a well-known French author Le Goff: "En réalité, le texte de la section 3 tend à donner au service aérien qui n'est ni international, ni régulier un caractère commercial, un possibilité d'utilisation commerciale." /?!?/ Op. cit., p. 208.

47) Cooper, The Right to Fly, p. 175.

48) Oppenheim-Lauterpacht, op. cit., p. 480, note (1).

49) Heller, op. cit., p. 191.

50) Cooper, J. C., Air Transport and World Organization, The Yale Law Journal, Vol. 55, 1946, p. 1207.

51) Warner, The Chicago Air Conference etc., p. 24.

52) Goedhuis, The Development of Rules to Govern International Aviation Communications, op. cit., p. 3.

53) MacNair, op. cit., p. 10.

54) The Chicago Air Conference etc., pp. 24-25.

55) Heller, op. cit., p. 200.

56) Warner, The Chicago Air Conference etc., p. 27; Le Goff, op. cit., p. 171.

57) Morgan, S. W., The International Civil Aviation Conference at Chicago, op. cit., p. 13.

58) Burden, Opening the Sky etc., p. 20.

59) The exact meaning of this provision is rather uncertain. "It is very difficult to understand the exact scope of this Article" - comment Shawcross & Beaumont. Op. cit., p. 271 (footnote (k).

60) Op. cit., p. 171. See also: Cooper, The Right to Fly, pp. 175 et seq.

61) Op. cit., p. 71.

62) Statement on behalf of the U. S. on the Report of the Air Transport Committee of the Interim Assembly, PICAO Doc. 1733, EC/21, 1946.

Chapter VII

1) Garnault, A., La première Assemblée de l'O.A.C.I. et le projet d'accord multilatéral sur les libertés commerciales de l'air, Revue Française de droit aérien, 1947, No. 3, p. 232.

2) Shawcross and Beaumont, op. cit., p. 277.

3) Ibidem, p. 278.

4) Cooper, J. C., The Bermuda Plan: World Pattern For Air Transport, Foreign Affairs, Vol. 25, No. 1, 1946, p. 64.

5) Gazdik, J. G., Rate-Making and the IATA Traffic Conferences, The Journal of Air Law and Commerce, Vol. 16, No. 3, 1949, pp. 298-9.

6) Joint Statement by the United Kingdom and United States Delegations, Department of State Bulletin, Vol. XIV, No. 347, 1946, pp. 302-6.

7) Cooper, The Bermuda Plan, p. 69.

8) Walstrom, J. D., Bilateral Air-Transport Agreements Concluded by the United States, The Department of State Bulletin, Vol. XV, No. 390, 1946, pp. 1126-1129.

9) Cooper, supra, p. 63.

10) Ibidem, p. 59.

11) Verdurand, A., Transport aériens internationaux - Les conséquences de la Conférence de Chicago, Revue générale de l'air, 1946, p. 226.

12) Cooper, supra, p. 71.

13) Le Goff, op. cit., p. 223.

14) Op. cit., p. 28.

15) PICAO Doc. 2089-EC/57, Commission Number 3 of the First Interim Assembly; Discussion on the Development of a Multilateral Agreement on Commercial Rights in International Civil Air Transport /May 22nd - June 5th, 1946/, October,1946.

16) For a comprehensive analysis of the Report and the Draft multilateral agreement prepared by the Air Transport Committee see: Cooper, J. C., The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport, Journal of Air Law and Commerce, Vol. 14, 1947, pp. 125-149.

17) Mc Clurkin, R. J. G., The Geneva Commission on a Multilateral Air Transport Agreement, Journal of Air Law and Commerce, Vol. 15, 1948, p. 39.

18) Records of the Commission on Multilateral Agreement on Commercial Rights in International Civil Air Transport, (Session held at Geneva, November 4th-27th 1947), Vol.I, ICAO Doc. 5230, A2-EC/10, Montreal, April, 1948, /Final Report/, p. 126.

19) Ibidem, pp. 127-8.

20) Mc Clurkin, supra, p. 45.

21) Ibidem.

22) ICAO Doc. 5230, A2-EC/10, supra, p. 119.

23) Ibidem, p. 129.

24) Goedhuis, The Development of Rules to Govern International Aviation Communications, op. cit., p. 5.

25) Cooper, The Proposed Multilateral Agreement etc., op. cit., p. 126.

26) Warner, Icao After Six Years, op. cit., pp. 13-14.

27) Existing Forms of Commercial and Technical Co-operation Between European Airlines in Regional Air Services, (Study by the Institut français du transport aérien), ICAO Circular 28-AT/4, June 1952, p. 10.

28) Ibidem, p. 12.

29) Conference on Coordination of Air Transport in Europe, (Strasbourg, April-May 1954), Report, ICAO Doc. 7575-CATE/1, p. 48.

30) Ibidem, pp. 5 et seq. See also: Co-ordination of European Aviation - Strasbourg Meeting, ICAO Bulletin, May 1955, pp. 11-13.

31) Conference on Coordination etc., supra, pp. 7-8.

32) Ibidem, pp. 8-9.

33) Ibidem, pp. 12-13.

34) Ibidem, p. 14; Recommendation No. 6.

35) Ibidem, p. 36.

36) Ibidem, pp. 37-38.

37) Interavia, No. 7 (1954), Zurich, /Editorial comment/, p. 450.

38) The Right to Fly, p. 192; The Proposed Multilateral Agreement etc., p. 126.

39) The Right to Fly, p. 193.

40) Ibidem.

41) Ibidem, p. 194.

42) Ibidem, 195.

43) The Bermuda Plan, op. cit., p. 71.

44) La Pradelle, P. de, L'Internationalisation des lignes aériennes long courrier , /Report/ Dixième Congrès International de Législation Aérienne du Comité Juridique International de l'Aviation tenu a Aix-en-Provence du 18 au 22 mai 1948, Paris, pp. 44-63.

45) Ibidem, p. 44.

46) Ibidem, pp. 49-50.

47) Ibidem, p. 51.

48) Ibidem, pp. 51 et seq.

49) Ibidem, p. 52. - The Scandinavian Airlines System (SAS) the most important operating entity of multiple nationality yet achieved, is a consortium of three companies - one Swedish, one Norwegian, and one Danish - all of which retain their separate national corporate capacities.

50) La Pradelle, op. cit. supra, pp. 53-54.

51) Ibidem, p. 55.

52) Ibidem, p. 57.

53) Ibidem, p. 61.

54) The Development of Rules to Govern International Aviation Communications, op. cit., p. 10.

55) Ibidem.

56) Ibidem, p. 2.

57) Civil Aviation After the War, A.J.I.L. Vol. 36, 1942, pp. 606 et seq.

58) Ibidem, p. 610.

59) Ibidem, p. 607.

60) Ibidem, p. 601; In an earlier article, Goedhuis commenting on the Paris Convention of 1919 wrote: "...the granting of free passage on a purely conventional basis is contrary to the principle of the 'ius communicationis', which exists 'pleno jure gentium." (Air Law in the Making, The Hague, 1938, p. 23)

61) The Development of Rules etc., supra, p. 11.

62) Le régime juridique de l'espace aérien et le développement des lignes aériennes internationales, op. cit., p. 409.

63) Revue générale de l'air, XI, No. 2, 1948, pp. 130-144.

64) Mourer, H., Pour un 'pool' européen des transports aériens, Revue générale de l'air, 1951, pp. 309-325.

65) Lemoine, M., Des principes et méthodes dans le droit aérien international, Revue Française de droit aérien (IV), 1950, pp. 119 et seq.

66) Manuel de droit aérien, op. cit., p. 223.

Conclusion

1) 333 air transport agreements were registered with ICAO in January, 1955, - fifty of them belonging to the type other than so-called 'Chicago-type'. (Aeronautical Agreements and Arrangements, ICAO Doc. 7568 LGB/92, January, 1955).

2) Lemoine, M., A la recherche du droit international aérien, Revue Française de droit aérien, No. 1, 1955, p. 7.

3) Newfang, O., World Government, New York, 1942, p. 2.

4) Dickinson, E. D., Law and Peace, Philadelphia, 1951, p.17.

5) Goedhuis, Civil Aviation After the War, p. 611.

6) A la recherche du droit international aérien, supra, pp. 13-14.

7) Ibidem, p. 14.

8) IATA Bulletin, No. 20, December 1954, p. 86.

9) Ibidem.

10) Comp.: Cleveland and Neville, The Coming Air Age, 1944, New York-London, p. 63.

11) Convention on International Civil Aviation, signed at Chicago, on 7 December 1944 (Preamble).

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