JURISDICTION OVER ACTS AND OCCURRENCES ON BOARD AN AIRCRAFT

THESIS

SUBMITTED BY

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PREFACE

This thesis on jurisdiction over acts and occurrences on board an aircraft deals with both civil and State aircraft. Civil aircraft as implied in the Chicago Convention of 1944 and State aircraft as explicitly defined in the afore-said convention.

Criminal and civil jurisdiction are discussed separately as applied to the various positions in which an aircraft may be situated, to wit:

(1) On or above the high seas or territory not subject to the sovereignty of any State.

(2) In flight above a foreign territory.

(3) On the ground of a foreign State.

DECLARATION

I hereby declare that this thesis was prepared by me personnally. All the materials used were collected by me. No assistance of any kind was solicited and/or received by me from anybody. I wish, however to acknowledge gratefully the invaluable guidance and advice of Professor John C. Cooper in the preparation of the paper.

Justino P. Hermoso

I. INTRODUCTION

The subject of this paper has been much discussed. For even before the Wright Brothers had successfully test-flown their aeroplane, Fauchille in 1902, had already drafted his "Legal Regime of the Aerostats". In that paper provisions were made regarding crimes and birth of a child in a balloon. From that time on up to the present, the subject has been pursued intermittently by international law associations and by well-known publicists.[1] Various conferences or congresses had discussed the subject, but nothing beyond the proposal stage was done. So until now no international covention on this subject has been adopted.

This paper will deal with both civil and State aircraft as implied and define in the Chicago Convention of 1944,[2] respectively. The said convention defines a State aircraft as "aircraft used in military, customs and police services".[3] It fails to define a civil aircraft. Obviously, aircraft that does not fall under the category above-cited are civil aircraft. This paper will not deal with aircraft operated by international agencies or other stateless aircraft, as there is no international agreement yet as to the status of said aircraft. In any discussion of the subject covered by this paper it is both logical and advisable to ground it on the Chicago Convention of 1944, both in principle and terminology.[4] It is now the first and foremost public international air law convention in force, with the greatest number of adherents.[5] It had superseded both the Paris Convention of 1919[6] and Havana Convention of 1928.[7] The Ibero-American

Convention of 1926[8], on the other hand had never came into force. So the only remaining public international air law convention in force is the above-mentioned Chicago Convention. Any digression from it would perforce result in unwanted and unwarranted confusion.

In the course of our research work for this paper, we encountered two main problems, to wit:

1. To determine which State or States shall have jurisdiction over act and occurences on board an aircraft.

2. To provide a rule that will grant at least one State jurisdiction over acts and occurences on board an aircraft.

The first problem may be illustrated in this way:

Suppose while a French aircraft is flying over the territory of the United States, a British passenger assaulted an Italian passenger. In such a case which State should have jurisdiction over the offender? Will it be the United States? France? United Kingdom? or Italy? Suppose further that the aircraft landed in Mexico after the commission of the crime? Will Mexico be entitled to claim jurisdiction?

Suppose that while a French aircraft is flying over the United States, a child is born from an Italian passenger. Is the child deemed to be born in the United States? or in France?

The second problem is best illustrated by the Cordova case[9], wherein two rum-happy Puerto Ricans engaged in a fist fight on board an American aircraft flying over the high seas. When the Captain of the aircraft tried to pacify them one of the protagonists assaulted him. The offender

was tried and found guilty by a Federal Court. The said Court after careful consideration decided to arrest judgment of conviction on the ground that there is no federal jurisdiction to punish those acts. If further stated that the aircraft is not a vessel and on the high seas is not above the high seas. So the offender was able to go unpunished. Our problem therefore, is to formulate a rule that would grant to at least one State jurisdiction over acts and occurences on board an aircraft.

This study in brief will consist of an analysis of the national legislation of the members of the "Family of Nations" on the subject of this paper. Also, an analysis of the various proposals or draft conventions recommended by international law societies and well-known publicists. And lastly, it will also include a study of the rules applicable to vessels and land transportation to see if they are applicable by analogy.

In short we will use analogy whenever it is useful and logical; and formulate a new rule whenever analogy is not possible and advisable.

II. COMPARATIVE STUDIES

The world we live in consists of three basic elements, the land, the sea, and the air. All three elements are important to man in their own ways. The land is his place of abode, the place where he obtains the things needed for his daily life. The sea is significant

to mankind as a modifier of climate, a barrier to movement by land, a highway of commerce and a source of food. And the air is the element that makes the earth habitable.

The home of man is the bottom layer of the great sea of vapor (atmosphere) which surrounds the earth and the outside layer of land and water forms its surface (lithosphere and hydrosphere).[10] The sea surface of the earth is almost three times of its land surface.[11]

As mediums of transportation one complements the other two. So much so that one can safely venture that what cannot be reached by land may be reached by sea; and what cannot be reached by sea may be reached by air. All three used as mediums of transportation have contributed substantially to the development of world commerce.

Comparative studies of the legal status of the land, the sea and the airspace and the instrumentalities using them as mediums of transportation are now in order.

1. THE LEGAL STATUS OF THE LAND, THE SEA, AND THE AIRSPACE.

The purpose of this study is to show the similarities and differences of the legal status of the land, the sea, and the airspace. All of which are used as mediums of transportation by the automotive vehicles, vessels and aircraft, respectively.

This study is essential, since as adverted to in the introduction of this paper, we will use analogy whenever it is both useful and logical. So a comparative study of the land, the sea and the airspace would be very useful. Firstly, we will take the legal status of the land.

LEGAL STATUS OF THE LAND

The exclusive jurisdiction of a State over its territory has never been questioned. Any claim to exemption from jurisdiction must be based on either express or implied consent of the State.

The legal status of the territory of a State, is best expressed by Chief Justice Marshall in the Schooner case,[12] wherein he stated:

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legilimate source. This consent may be either express or implied."

LEGAL STATUS OF THE SEA

Our discussion of the legal status of the sea will be clarified, if we classify it into the high seas, the contiguous zone and the territorial sea.[13] In the order given we will discuss each of them separately.

HIGH SEAS

"The term 'high seas' may be said to refer, in international law, to those waters which are outside the exclusive control of any State or group of States, and hence not regarded as belonging to the territory of any of them. The ocean, until it envelopes the shores of a maritime State and constitutes its maritime belt, is not a part of the domain of any territorial sovereign. Important consequences follow. On the high seas broadest rights of unmolested navigations are asserted and enjoyed by ships of every flag in time of peace. As the Permanent Court of International Justice declared in the course of its judgment in the case of the S.S. 'Lotus', September 7, 1927: 'It is certainly true that - apart from certain special class which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly."[14]

Wherever there is a salt-water sea on the globe, it is part of the open sea (high seas), provided it is not isolated from, but coherent with, the general body of salt water extending over the globe, and provided that the salt water approach to it is navigable and open to vessels of all nations.[15]

To the high seas belong, of course, all the so-called oceans - namely, the Atlantic, Pacific, Indian, Artic and Antartic. But the branches of the oceans, which go under special names, and further, the branches of these branches, which again go under special names, belong likewise to the high seas. To mention a few of these branches

we have the North Sea, the English Channel, etc.

In antiquity and the first half of the Middle Ages, navigation on the open sea was free to everybody. According to Ulpian,[16] the sea is open to everybody by nature, and according to Celsus,[17] the sea, like the air, is common to all mankind.

Claims to sovereignty over parts of the open sea or high seas begin, however, to be made in the second half of the Middle Ages. Thus the Republic of Venice was recognized as the sovereign over the Adriatic Sea. Portugal claimed sovereignty over the whole of India Ocean and of the Antartic south of Morocco, and Spain over the Pacific and the Gulf of Mexico, both basing their claims on two Papal Bulls promulgated by Alexander VI in 1493. These claims were more or less successfully asserted for several hundred years. Thus Frederick III, Emperor of Germany, had in 1478 to ask the permission of Venice for a transportation of corn from Apulia, through the Adriatic Sea.[18] Also Great Britain, in the seventeenth century, compelled foreigners to take out an English license for fishing in the North Sea; and when in 1636 the Dutch attempted to fish without such license, they were attacked and compelled to pay £30,000. as the price for their indulgence. In 1850, the Spanish Ambassador Mendoza lodged a complaint with Queen Elizabeth against Drake for having made his famous voyage to the Pacific, Elizabeth answered that vessels of all nations could navigate on the Pacific, since the use of the sea and the air is common to all, and that no title to the ocean can belong to any nation, since neither nature

nor regard for the public use permits any possessions of the ocean. Queen Elizabeth's attitude was the germ out of which grew gradually the present freedom of the open sea or high seas.[19]

In 1609, Grotius supported the position taken by Queen Elizabeth. He contended that the sea cannot be State property, because it cannot really be taken into possession through occupation, and that consequently the sea is by nature free from the sovereignty of any State. His contention was to show that the Dutch had a right of navigation and commerce with the Indies, inspite of the Portuguese interdictions. Grotius' treatise ushered in the so-called first Battle of Books.[20] Notables among those opposing Grotius view are the following:

Gentilis defended the Spanish claim of sovereignty over the open sea or high seas in his Advocatio Hispanica, published in 1613.

William Welwood defended the English claim to sovereignty in his Book De Dominio Maris, published in 1613.

But doubtlessly, the greatest opponent of Grotius was Selden who wrote Mare Clausum sive de Dominio Maris. This was the best book written in defense of State's sovereignty over the high seas.

This running battle of books between two literary giants, was finally won by Grotius, and by the end of the first quarter of the 19th century, the principle of freedom of the high seas was universally recognized in theory and in practice.

The term freedom of the high seas indicates the rule of the law of Nations that the high seas is not and never can be, under the sovereignty of any State whatever. Since, therefore the high seas is

not the territory of any State, no State has as a rule a right to exercise its legislation, administration, jurisdiction, or police over parts of the high seas. Since, further, the high seas can never be under the sovereignty of any State, no State has a right to acquire parts of the high seas through occupation, for as far as the acquisition of territory is concerned the high seas is what Roman Law calls as res extra commercium. But although the high seas is not the territory of any State it is nevertheless an object of the laws of Nations. The mere fact that there is a rule exempting the high seas from the sovereignty of any State whatever shows this. But there are other reasons. For if the Law of Nations were to content itself with the rule which excludes the high seas from possible State property, the consequence would be a condition of lawlessness and anarchy of the high seas. To obviate such lawlessness, customary International Law contains some rules which guarantee a certain legal order on the high seas, in spite of the fact that it is not the territory of any State, and important international conventions have been concluded with the same object.[21]

The legal order in the open sea is created through the cooperation of the law of Nations and the Municipal Laws of such States as possess of Maritime Flag.

The following rules of the Law of Nations are universally recognized, namely:

(1) that every State which has a maritime flag must lay down rules according to which vessels can claim to sail under

its flag, and must furnish such vessels with some official voucher authorizing them to make use of its flag;

(2) that every State has a right to punish all such foreign vessels as sail under its flag without being authorized to do so;

(3) that all vessels with their persons and goods are, while on the open sea, considered under the sway of the flag State;

(4) that every State has a right to punish piracy on the open sea even if committed by foreigners, and that with a view to the extinction of piracy, men-of-war of all nations can require all suspect vessels to show their flags.[22]

These customary rules of International Law are, so to say, supplemented by the Municipal Laws of the Maritime States comprising provisions, firstly, regarding the conditions to be fulfilled by vessels for the purpose of being authorized to sail under their flags; secondly, regarding the details of jurisdiction over persons and goods on board vessels sailing under their flags; thirdly, concerning the order on board ship and the relations between the master, the crew, and the passengers, fourthly, concerning punishment of ships sailing without authorization under their flags.[23]

The reasons advanced for freedom of the high seas are the following:

(1) that a part of the open sea could not be affectively occupied by a navy and could not therefore be brought under the actual sway of any State.

(2) that nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible and, therefore, sufficient for all.

(3) the real reason for freedom of the open sea or high seas is the freedom of communication, and especially commerce, between the States which are severed by the sea. The sea being an international highway which connects distant lands, it is the common conviction that it should not be under the sway of any State whatever. It is in the interest of free intercourse between the States that the principle of the freedom of the open sea has become universally recognized and will always be upheld.[24]

CONTIGUOUS ZONE

How about the contiguous zone? What is the rule with regard to it? The contiguous zone is that portion of the high seas adjacent to the territorial sea. Various States have claimed jurisdiction over the contiguous zone for various purposes. The United States claimed a zone of 12 miles for enforcement of its prohibition act.[25] Great Britain assumed in the eighteenth century, for the enforcement of its custom and revenue laws, a jurisdiction considerably in excess of the three-mile limit of the territorial sea. These "Hovering Acts" were justified by Lord Stowell in these words:[26]

"The common courtesy of nations for their convenience to consider those parts of the ocean adjoining to their shores as part

of their dominions for various domestic purposes and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare."

The legal status of this portion of the high seas was discussed by the International Law Commission of the United Nations, and this draft was recommended:[27]

"On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, immigration, fiscal or sanitary regulations. Such control may not be exercised at a distance beyond twelve miles from the base line from which the width of the territorial sea is measured."

TERRITORIAL SEA

Now we come to a discussion of the legal status of the territorial sea.

According to the glossators the sea is common in so far as the use thereof is concerned and that the proprietas (ownership) thereof belong to no one.

After the glossators came the classic writers who argued that the King or Emperor had inchoate property rights in the sea adjacent to the territory, namely:

(1) to grant river fisheries and sea fisheries

(2) to grant exemption to certain person from payment of harbor dues

(3) to grant freedom of commerce or travel to specified parties.

In the 14th century Baldus, recorded that the Prince is Lord of his territory and of the sea subject to him. The portion of the sea subject to him is adjacent to the coasts of his territory. One hundred years after Baldus, De Afflictos recorded the existence of a new officer called admiral to punish offenses committed at sea and to suppress piracy. The sea was regarded as a district of the kingdom.

This is the beginning of State's claim to a territorial belt for their protection and also as an exclusive fishing ground for its citizens. So while the States agreed to the principle of freedom of the sea, they nevertheless chose to exercise exclusive control over a belt of water adjacent to its coast now known as territorial sea.[28]

The territorial sea forms part of its territory and it is subject to its jurisdiction. As stated by Hackworth in his Digest of International Law:[29]

"The jurisdiction of a State extends over not only the land within its territorial limits and the marginal sea or territorial waters, as well as the airspace above them..."

There is, however, a distinction between a State's jurisdiction over its land from that of its jurisdiction over its territorial sea and this is the right of innocent passage of merchant vessels. Some writers even extend this right to warships. Of course we should also add that a vessel in distress has a right of entry into the territorial waters and ports of another State.

There seems to be a general agreement among States that three miles from the low water-mark is the breadth of territorial sea. Some countries claims a four mile belt but they admit that this is an exception to the general rules because of the nature and characteristic of

their coastline.[30] Russia claims twelve miles,[31] but so far it was never able to make such a claim stick. The International Law Commission postponed consideration of the breadth of the territorial sea, so for the time being we will consider its as three miles.[32] For practices of States has indicated that three miles from the low water-mark is the breadth of the territorial sea.[33]

While there is a general agreement that a merchant vessel has a right of innocent passage, no such agreement exist in so far as warship is concerned.[34] The reason for this is given by Hall, who states:

> "This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the ground by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war..."

Another reason is that given by Mr. Elihu Root, in his memorial presented in North Atlantic Fisheries case:[35]

> "Warship may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threaten."

The latest trends with regards to the territorial sea is however indicated in the provisional articles concerning the Regime of the Territorial Sea drafted by the International Law Commission.

The recommendation provides that the sovereignty of a State extend to a belt of sea adjacent to the coast. This sovereignty is exercised subject to the conditions prescribed in these regulation and other rules of international law.[36]

One of the limitations imposed on the exercise of the right of sovereignty by a coastal State is the right of innocent passage granted to vessels of all State.[37] Under this provision warship is included. Although the coastal State has a right to regulate the conditions of its passage or in certain cases prohibits such passage.[38] Submarine is required to navigate in the surface when making use of the right of innocent passage.[39] Warships however, when passing through the territorial sea, are required to respect the laws and regulations of coastal State. In case of failure to comply with such law and regulations, they may be required to leave the territorial sea.[40]

How about jurisdiction over acts and occurences on board a vessel other than warship passing through the territorial sea?

As a general rule crimes committed on board a vessel passing through the territorial sea is subject to the jurisdiction of flag State save only in the following cases:

(a) If the consequence of the crime extend beyond the vessel, or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea, or

(c) If the assistance of the local authorities has been requested by the consul of the country whose flag the vessel flies.[41]

The rule adopted for civil jurisidction is analogous to that govern-

ing the exercise of criminal jurisdiction. A vessel which is only navigating the territorial sea without touching the inland waters of the coastal State may in no circumstances be stopped for the purpose of exercising civil jurisdiction in relation to any person on board.[42]

LEGAL STATUS OF THE AIRSPACE

The claim of a State to sovereignty over the airspace above its territory is based on the much-maligned maxim of "cujus est solum, ejus es usque ad coelum et ad inferos." Translated by Mcnair to mean "Whosoever owns a portion of the surface of the earth, also owns anything below and anything above that portion that may be capable of being reduced into private ownership.[43] So under this principle a State could easily claim sovereignty over the airspace above its territory, but it could not do so in case of the airspace above the high seas and territory not subject to the sovereignty of any State. For the high seas and territory not subject to the sovereignty of any State are res nullius. No State has sovereignty over them. They are free for the use of all. Just as the high seas is seaway for all, so the airspace above it is airway for all. And so is the airspace above the territory not subject to sovereignty of any State.

Any treatise on legal status of the airspace will be simplified by dividing the subject into airspace above the high seas and territories not subject to the sovereignty of any State and airspace above the territory of a State.

There is no conflict as to the legal status of the airspace over the high seas or territory not subject to the sovereignty of any State.

As a corollary to the declaration that the airspace above every State is subject to the complete and exclusive sovereignty of the subjacent State, the airspace above the high seas and territory not subject to the sovereignty of any State is free for the use of all. It is an airway for all States. Obviously, this is the only portion of the airspace, wherein it may be truly said that freedom exists in a manner similar to that of freedom of the sea.

In the "Second Battle of Books"[44], the bone of contention was freedom of the air over the airspace above the territory of a State.

The supporter of freedom of the air could not agree among themselves. The first group was for freedom of the air without restriction. The second group was for freedom of the air restricted by some special rights of the ground State without those rights being bound in height. And the third group to which the greatest number of partisans of freedom of the air belongs offered as the best solution the institution of a territorial atmosphere.[45]

To the first group belongs the following:

Wheaton - The sea is an element, which belong to all men like the air. No nation then has the right to appropriate it.

To the second group belongs the following:

Bluntschli - State has no sovereignty over the air, because men cannot keep it within boundaries.

To the third group belongs the following:

Fauchille - The air is free. The states have only such rights as are necessary for its conservation. Therefore all aerial navigation

must be prohibited in principle up to 1500 meters. Oppenheim - The territorial atmosphere is not a special part of the territory of the State, but the State must be allowed to control it and to exercise jurisdiction in it up to a certain height.

The supporters of the sovereignty principle were also divided into three groups. The first group adheres to full sovereignty up to a certain height. Among the supporters of this group are:

Von Holtzendorff - To state territory we will have to reckon the airspace, for instance up to 1000 meters from the highest points of the land.

Chretien - Sovereignty, though not higher than the means of defense can reach, placed on the land or water domain.

The second group recognizes sovereignty to an unlimited altitude, but restricted by a servitude of free passage for aeronauts. To this group belongs the following:

Westlake - Sovereignty to an unlimited height, restricted by the right of innocent passage for aerial navigation.

A. Meyer - The state has but limited sovereignty over the airspace, but about the same as over the maritime belt.

The third group of authors support absolute sovereignty without any restriction either in height or by a servitude. To this group belongs the following:

Von Liszt (1906) - State territory includes the airspace above the land and water domain.

Grunwald (1909) - The airspace is part of the ground state. However, in the same way as where land traffic is concerned, the state cannot with impunity make rules prohibiting or unreasonably impeding aerial traffic, unless for reasons recognized by the law of nations.[46]

These conflicting theories over the airspace above the territory of a State, may be reduced into four, to wit:[47]

(1) The airspace is free, subject only to the rights of States required in the interests of their self-preservation. This theory, which will always be associated with the name of its champion, Fauchille, was adopted by the Institute of International Law in 1906. It rests mainly on the argument that the air is physically incapable of appropriation because it cannot be actually and continuously occupied.

(2) The second theory was that by analogy to the maritime belt there is over the land and territorial waters of each State a lower zone of territorial airspace and a higher and unlimited zone of free airspace.

(3) The third theory was that a State has complete sovereignty in its superincumbent airspace to an unlimited height.

(4) The fourth theory was the third with the addition of a servitude of innocent passage for foreign non-military aircraft, akin to the right of innocent passage of merchant ships through territorial waters.

After a stalemate in the argumentation, the "Second Battle of Books" was finally decided in favor of complete sovereignty of the State over

its airspace. Obviously the danger in the air as spelled out in World War II, tilted the said battle of books in favor of air sovereignty. This theory of complete sovereignty are embodied in international conventions and national legislations.[48] So the Paris Convention of 1919, provides as follows:

Art. 1 - "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the airspace above its territory."

The victory of the proponents of sovereignty over the air theory is further evident in the Ibero-American Convention of 1926,[49] Havana Convention of 1928,[50] and finally in the Chicago Convention of 1944.[51]

Under the Chicago Convention of 1944, a State has complete and exclusive sovereignty over the airspace above its territory. The first two articles[52] of the said convention, provides:

"Art. 1 - The contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory."

"Art. 2 - For the purpose of this Convention, the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."

The declaration in the above quoted article 1, claims sovereignty over the airspace of the territory of every States, and is not limited to contracting States. In other words, the contracting States in claiming sovereignty over the airspace, choose also to recognize such

rights for States, not parties to the Chicago Convention of 1944. It is our honest belief that even before the declaration made in said article, the Members of the Family of nations have in their practices and mutual dealings claim for themselves and reciprocally consented to the exercise of sovereignty over their respective airspace. Article 1 serves only to confirm a then existing right of a sovereign State, i.e., sovereignty over the airspace. And this declaratory confirmation, as we have adverted to earlier is not limited to contracting States, but includes "every State."

Article 2 includes territory under mandate. However, after World War II, several territories were placed under trusteeship. Some territories formerly under mandates are now placed under trusteeship. Will this mean that the islands under trusteeship shall be included in the territory of an administering State? In other words, is the airspace above a trusteeship territory under the complete and exclusive sovereignty of the administering State? Professor Cooper is of the opinion that the terms of the United Nations Charter itself indicates that the term "mandate" does not include a United Nation trusteeship. He further doubted the applicability to the trusteeship territory of the whole Chicago Convention.[53] Apparently in an attempt to solve the doubt we have just mentioned, the Rome Convention of October 7, 1952, provides:[54]

> "Art. 30 - Territory of a State means the metropolitan territory of a State and all territories for the foreign relations of which the State is responsible."

The Harvard Research in International Law[55] defines a State's territory as comprising its land and territorial waters and the air above its land and territorial waters.

Finally, the International Law Commission of the United Nations[56] added its weight to air sovereignty theory, when it recommended that the sovereignty of a coastal State extends also to the airspace over the territorial sea.

So the basic rule of public international air law, in fixing the legal status of the airspace over the earth's surface is best stated by Professor Cooper,[57] in this way:

> "If any area on the surface of the earth whether land or water is recognized as part of the territory of a State, then the airspace over such surface area is also part of the territory of the same State. Conversely, if an area on the earth's surface is not a part of the territory of any State, such as water areas included on the high seas then the airspace over such surface areas are not subject to the sovereign control of any State, and is free for the use of all.

2. THE LEGAL STATUS OF AUTOMOTIVE VEHICLES, THE VESSELS AND THE AIRCRAFT

Now we come to the second part of our comparative studies. This part deals with the legal status of the automotive vehicles, the vessels and the aircraft. Again, the purpose of this comparative study is to show the similarities and differences in legal status of automotive vehicles, vessels and aircraft. Our determination of the legal status of automo-

tive vehicles and vessles in relation to aircraft, would facilitate the application by analogy of the rules of the land and maritime transportation to aircraft.

AUTOMOTIVE VEHICLES

Automotive vehicle s have neither the characteristics of nationality in public international law nor responsibility in private law which are possessed by vessels.

Practices of States from time immemorial have never attempted to endow automotive vehicles with nationality. No attempt was ever made by States in their mutual dealing to invest automotive vehicles with nationality.

Not being possessed of nationality an act or occurence on board automotive vehicle s would always be considered as having taken place in the State where automotive vehicle was situated at the time of the act or occurence. Let us illustrate it in this way:

An assault in a Spanish passenger car touring in France by one passenger upon another is just as much subject to French law as if the fight have taken place in a French soil. Or suppose a baby was born to a passenger on board the said car to one of the passenger, the baby would be also deemed to be born in France as if the child was born in any one of the hospitals in France. An automotive vehicle has no "law of the flag" so any act or occurences on board would be considered as having taken place in the territory of the State where it was situated at the time of the act or occurance. Automotive vehicles which goes

out of the border of the State of its registry or owner is, therefore, assimilated into the law and subject to the jurisdiction of the State visited.

There are several international conventions adopted regarding automotive vehicles but none has invested the automotive vehicles with nationality. It seems that the purpose of one convention is to allow circulation of motor car in a foreign country only after examination and certification of competent authority that it is suitable for the use of the highway.[58] It also requires that the motor car carries, fixed in a visible position on the back of the car, in addition to the number plate of its nationality, a distinctive plate displying letters indicating its nationality.[59] Later on this provision was carefully ommitted. The Pan American Convention for the Registration of Automotive Traffic signed in Washington October 6, 1930, also ommitted mention of nationality.[60] These conventions seem to provide nothing more than means of identifying the motor vehicle as having been registered and licensed in a particular State, without investing the automotive vehicle with the international law characteristic of nationality.[61]

V E S S E L S

A vessel has two principal characteristic which are not possessed by an automotive vehicles, namely, nationality and responsibility.

Nationality is a status of a natural person who is attached to a State by a tie of allegiance.[62] A vessel is an inanimate object a movable thing, but it is a thing of very particular kind and which from several

points of view may be compared to a person.[63] While vessels are classified as movable property, yet they partake, to a certain extent, of the nature and conditions of immovable property by intendment of law.[64] Vessels, like natural persons, possess nationality. The possession of nationality by a vessel, according to Hyde,[65] "implies the existence of a relationship between a vessel and a State of such distinctive closeness and intimacy that the latter may fairly regard the vessel as belonging to itself rather than to any other country."

What is the legal affect of the possession of nationality by a vessel? Professor J. C. Cooper, in his article entitled "Legal Status of the Aircraft,"[66] summarized it in this way:

> "The possession by a vessel of nationality is the basis for the intervention and protection by a State and it is also a protection for other States for the redress of wrongs committed by those on board against their nationals. On the concept that vessels belong each to a determined State, they are submitted to its control, are exposed to its sanctions in case of disobedience, and have at the same time a guarantor (from the international point of view) of the manner in which they will use the seas, and a protector against the abuse which they might be compelled to suffer on the part of vessels of other States. This quality of guarantor and protector given to the State whose flag the vessel carries has in modern times led to the valid conclusion that the nationality of a vessel is the primary condition for the peaceful utilization of the high seas. In the absence of sovereignty over the high seas

chaos might result if the fact of the nationality of vessels had not been accepted into maritime law. But with this concept international order may be maintained. As Westlke said, 'Action on the open sea by a ship belonging to one State or covered by its sovereignty, on or against a ship belonging to another State or covered by its sovereignty, is of the nature of intervention and is normally unlawful'."

The second principal characteristic of a vessel is responsibility. A natural person is responsible for goods purchased by him and services rendered for his benefit with his authority. He is also responsible to compensate for damages negligently or wrongfully caused on injured person.

The responsibility of a vessel is again best described by Professor J. C. Cooper in his above-cited article,[67] in this way:

"In customary maritime law a vessel has been considered to have such legal quasi-personality as to make it similarly responsible under circumstances well known to the maritime law. The responsibility of the vessel is enforceable in the admiralty courts by proceedings in rem against the vessel itself. Salient features of the maritime lien thus enforced are that such lien is not dependent upon the possession by the lienor of the vessel; that the lien is not cut off by a sale even to a bonafide purchaser except by proceedings in an admiralty court; and that the vessel may be responsible in rem even if the owner is not responsible in personam."

A I R C R A F T

Aircraft, like vessels, and unlike automotive vehicles, have that quality of legal quasi-personality in public international law designated as nationality. But unlike vessels, and like automotive vehicles, aircraft are not yet considered as having the quality of responsibility in private law which we have discussed above.[68] The legal status of aircraft make it sui generis. Application in toto of the rules of land and maritime transportation by analogy to aircraft would lead to illogical consequences and inaccuracies.

As Dr. J. M. Spraight, observed:[69]

> "It is absurd to say as M. Pittard does, that an aeroplane is a movable object pure and simple, and strictly analogous to a piano. An aircraft is sui generis and something midway between an automobile and a ship; to assimilate it entirely to the latter, and to assign to it that full nationality which historical reasons have attributed to vessels, so that in French law and to some extent in British, a ship is a floating part of the national territory, would seem to the writer to be going too far."

While aircraft can neither be assimilated into a vessel nor into an automotive vehicle, this, however should not prevent us from using analogy whenever it is useful and logical. As Mcnair has stated, in his "Law of the Air."[70]

> "I have no hesitation in submitting the opinion that from a juristic point of view the analogy between a ship and an aircraft

is fundamentally wrong and misleading and the sooner we eradicate it from our minds the better. That need not prevent us from borrowing from the law relating to ships certain useful provisions and applying them to aircraft by the deliberate process of legislation, but any general attempt to invest the aircraft as such and wherever it may be, with the characteristic legal panoply which belongs to a ship will be disastrous."

In short, as we have adverted to earlier, we will use analogy whenever it is useful and logical; and formulate a new rule, whenever analogy is not possible.

As adverted to earlier in this paper, aircraft unlike vessels are not yet considered as having the quality of responsibility in private law. Aircraft are not directly responsible as are vessels for supplies, services and wrong doings recognized as the bases for what are ordinarily known as maritime lien.

The Convention on "International Recognition of Rights in Aircraft"[71] provides for a very limited international legislation on what might be called responsibility of aircraft.[72] Article 4 of that convention provides that in the event of any claims in respect of compensation for salvage or extraordinary expenses indispensable for the preservation of the aircraft, give rise under the law of the contracting State where the operations of salvage or preservation were terminated, to a right conferring a charge against the aircraft, such right shall be recognized by the contracting States and shall take priority over all other rights in the aircraft. In order that these rights shall be recognized in other contract-

ing States two requisites are required, namely:

(1) the right has been noted on the record within three months from the date of the termination of the salvage or preservation operations, and

(2) the amount has been agreed upon or judicial action on the right has been commenced.[73]

It would appear that this convention will give international force to compensation due for salvage or preservation services if the State in which such operations are completed create a lien against the aircraft for such charges, and provided the claimant carries out the technical requirements of recording the claim in the State of registry of the aircraft and proceed to enforce it as required by the convention. According to Professor J. C. Cooper the inclusion of these provisions seems to be conclusive proof that international air law generally does not recognize responsibility of the aircraft for such claim.[74]

Aircraft as instrumentalities of commerce, are now recognized in public international law as having the characteristic of nationality.[75] A similar characteristic has been recognized in seagoing vessels for several countries.

Both the Paris Convention of 1919[76] and the Havana Convention of 1928 recognized that aircraft possessed nationality. And lastly, the Chicago Convention of 1944[77] which is now in force, recognizes that aircraft have nationality.

The nationality of an aircraft are determined by various rules. Robert Kingsley in his articles, entitled Nationality of Aircraft, sum-

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marized said rules in this way:

"(1) The nationality of the aircraft to be that of its owner.

(2) The nationality of the aircraft to be that of the State of the domicile of the owner.

(3) The nationality of the aircraft to be that of the State wherein it is usually kept (the Port d'Attache)

(4) The nationality of the aircraft to be that of its pilots.

(5) The nationality of the aircraft to be that of the State registering it - the power to register to be determine by one of the above rules; and

(6) The nationality of the aircraft to be that of the State of registry, each State being left entirely free to determine for itself what aircraft it will register."

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The often cited Chicago Convention of 1944 adopted rule No. 6 of Kingsley's summary. Chapter 3 of the said convention on "Nationality of Aircraft", provides:

"Article 17 - Aircraft have the nationality of the State in which they are registered."

"Article 18 - An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another."

"Article 19 - The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations."

"Article 20 - Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks."

"Article 21 - Each contracting State undertakes to supply to any other contracting State or to the International Civil Aivation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State. In addition, each contracting State shall furnish reports to the International Civil Aviation Organization, under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that State and habitually engaged in international air navigation. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting States."

Briefly it provides as follows:

(1) That aircraft have nationality of the State in which they are registered;

(2) That an aircraft cannot be validly registered in more than one State;

(3) That its registration may be changed from one State to another and that the registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations;

(4) Lastly, each contracting State undertakes to supply any contracting State or to the International Civil Aviation Organization on demand information concerning registration and ownership of any aircraft in that State; to furnish report to the International Civil Aviation Organization concerning the ownership and control of aircraft, habitually engaged in international air navigation, and this data obtained are available to other contracting States on request.

The Chicago Convention deals only with civil aircraft having the nationality of the State in which they are registered. No provision is made with regard to status of aircraft operated by international agencies or other stateless aircraft. But as we have manifested before, the latter are not covered by this paper.

Article 77 of the Chicago Convention states that nothing in the convention shall prevent two or more contracting States from constituting joint air transport operating organization.[80] An example of a joint air transport organization is the Scandinavian Airlines System. How is the nationality of the aircraft operated by such organization determined? The same Article 77, authorizes the Council of the International Civil Aviation Organization "to determine in what manner the provisions of this convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies."[81]

The possession of an aircraft of nationality is the basis for the intervention and protection by a State and it is also a protection for other States for the redress of wrongs committed by those on board against their nationals. On the concept that aircraft belong to a determined State, they are submitted to its control, are subject to its sanction in case of disobedience and have at the same time a guarantor of the manner in which they will use the airspace above the high seas. This quality of guarantor and protector given to the State whose flag the aircraft carries has in modern times led to the inescapable conclusion that the nationality of an aircraft is the primary condition for the peaceful utilization of the airspace above the high seas and terri-

tory not subject to the sovereignty of any State. In addition the possession of nationality with its accompanying nationality marks serves to identify aircraft internationally and thus facilitates its entrance to the airspace of a given State. In other words the State whose flag the aircraft carries serves as a protector and guarantor in international law for the conduct of such aircraft, both over national territory and over the high seas. In the national territory of another State, the flag State guarantees that its aircraft would obey the rules and regulations on aerial navigation of the State visited. And on the high seas and territory not subject to the sovereignty of any State, the flag State guarantees that its aircraft would comply with the rules and regulations relating to maneuver, that may be prescribed from time to time by the International Civil Aviation Organization.[82]

In resumé, we might say that our comparative studies of the legal status of the land, the sea and the airspace lead us to the conclusion that under the present state of international law, two States might claim jurisdiction over acts and occurances on board an aircraft, as a matter of legal right, to wit:

(1) The Subjacent State over acts and occurrence on board an aircraft on or above its territory as defined in the above-cited article 2 of the Chicago Convention of 1944;[83] and

(2) The State in which the aircraft is registered (flag State) over its aircraft on or above the high seas or territory not subject to the sovereignty of any State.[84]

III BASES OF STATE'S JURISDICTION

Various principles are relied upon by the States for support in their assumption of jurisdiction. A reference to these various principles is now in order.

The Harvard Research in International Law[85] had made a masterful analysis of the bases of State's jurisdiction. In its introductory comment, it states:[86] "An analysis of modern national codes of penal law and penal procedures, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societes, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less penal jurisdiction is claimed by States at the present time."

These five general principles are:

"First, the territorial principle, determining jurisdiction by reference to the place where the offence is committed;

Second, the nationality principle, determining jursidiction by reference to the nationality or national character of the person committing the offense.

Third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence.

Fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and

Fifth, the passive personality principle, determing jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere re-

garded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence except for the offense of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles."

John Basset Moore in the memorandum drawn by him with reference to the Cutting's case had classified territorial jurisdiction into objective and subjective territorial jurisdiction.[86] Here is what he said: "And it may also be granted that a nation may, under proper limitations, punish offences committed within its territory by persons corporeally outside. It is true that in the case of an offence committed within the territory of one state by a person inside another state, there may be a concurrent jurisdiction, the former state having jurisdiction by reason of the locality of the act, the latter by reason of locality of the actor."

There are, however, two exceptions to the territorial principle of jurisdiction,[87] to wit:

"(1) The exception from territorial theory most commonly claimed is that in favour of jurisdiction over crimes against the security or credit of a State. The territorial basis of jurisdiction, it may be urged, is not a mere dogma; it is justified normally because it is con-

venient that crimes should be dealt with by the State whose social order they affect most clearly and this in general is the State on whose territory they are committed; in this special class of crime it is not the territorial State that is primarily affected, even if that State is affected at all, but rather the State whose security is attacked; here, therefore, the territorial basis of criminal jurisdiction should admit of an exception on the principle of cessante natione legis, cessat lex ipso."

"The second exception to the territorial principle is the assertion of non-territorial jurisdiction when a crime has been committed abroad against their nationals, or when extradition has been offered to and refused by the State on whose territory the crime was committed."

With regard to jurisdiction over acts and occurrences on board an aircraft, Dr. Kaminga in his book entitled "The Aircraft Commander", [88] classified it as follows:

"(1) The theory of territoriality. According to this system the only law applicable is the law of the State over whose territory the aircraft is flying. Objections are that the position of an aircraft flying over the sea or above stateless territory would be in a legal vacuum."

"(2) The theory of nationality. In this case the only law applicable is the law of the country whose nationality the aircraft possesses. One of the critisms raised against this system is that the theory does not take full account of the sovereign rights of the States traversed by the aircraft."

"(3) and (4) The theories of the competency of the place of departure and the place of arrival. An objection against both theories, is that they contain an arbitrary element, and that countries declared competent may not have the slightest interest in the occurrence in question."

"(5) Lastly, there are a number of combination of the above theories, usually based on the very general assumption that the nationality principle applies in the first place, but in criminal proceedings a State flown over by the aircraft is likewise competent insofar as its interest are directly at stake; naturally the maxim of "non bis in idem" applies in this connection."

States have established various grounds for claiming jurisdiction over crimes committed on board an aircraft outside their respective territories.[89] The following are examples:

(1) When offender or the victim is a national of that State (Bolivia, Greece, Iran, Luxembourg).

(2) When the aircraft on board which the crime or offence was committed has the nationality of that State (Ceylon, Ireland, Philippines, Union of South Africa, United Kingdom).

(3) When the criminal act or offence has produced effects in that State (Honduras and Mexico).

(4) When the offender is for the time being within the jurisdiction of that State (Iran and Switzerland).

(5) When the laws of the State relating to civil aviation, public order and security, as well as to fiscal and military matters have been violated (Greece).

(6) When the aircraft lands in the territory of that State after the crime or delict (Bolivia, Greece, Iran and Luxembourg).

IV. CIVIL AIRCRAFT

1. PRELIMINARY STATEMENTS

"Aircraft means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air; and includes all weight carrying devices or structures designed to be supported by air, either by buoyancy or by dynamic action including, helicopters, autogyros, gliders, and balloons, but not parachutes."[90]

The Chicago Convention defines a State aircraft as aircraft used in military, customs and police services. But it fails to define a civil aircraft, although, the said convention by express provision is applicable only to civil aircraft. Obviously, all aircraft not devoted to military, custom and police services are civil aircraft.

"Jurisdiction is the power of a sovereign to affect the rights of a person whether by legislation, by executive decree or by judgment of a court."[91]

In this paper, it is the aim of the writer to suggest a solution to this problem which it is hoped would be adequate and would likely meet the approval of the members of the community of States.

In mathematics, solution to a problem is facilitated by the use of a common denominator. Law, unlike mathematics, is not an exact science, and evolving a formula that would amount to a common denominator is not advisable. However, the nearest approach to a common denominator that might be applicable to the solution of the main problem presented in this paper, is this:

That a State legally entitled to claim jurisdiction over acts and occurrences on board an aircraft declines to do so, when such acts and occurrences do not produce effects in its territory.

Further in solving the problems presented in this paper it would be worth our while to take the following considerations in the order of their priority:

1. That jurisdiction should be given in the first instant to the State legally entitled to it.

2. That jurisdiction should be given to the State most directly concerned with the acts and occurrences.

3. That jurisdiction should be given to the State who could most conveniently exercise it.

4. Lastly, it is better:

(1) to confer jurisdiction to a single State, whenever and wherever possible. Concurrent jurisdiction would be a source of future irritations and animosities. Specially in borderline cases when two or more States are equally determined to take jurisdiction at the exclusion of the other. No doubt a rule might be evolved that would do away with such squabbles. But a State which feels that it was short-changed in the process, would always feel bitter. Like a would that healed, the scar would always be there - as a reminder of an unsatisfactory solution. However, conferring jurisdiction to a single State would completely do away with such unsatisfactory state of affairs. The difficulties of concurrent jurisdiction is pointed in one case:[92]

Yet difficulties might arise, an act forbidden by one state might

be licensed by another; and action under such license of one state might be prosecuted as a crime against another.

If difficulties arose among member states composing a Federal Union, how much easier would difficulties arise in case of concurrent jurisdiction of equally sovereign States.

This portion of our paper would be devoted to a study of national legislations and proposals or draft conventions recommended by international law societies and learned writers on the subject of this paper.

2. ANALYSIS OF NATIONAL LEGISLATIONS AND PROPOSALS AND DRAFT CONVENTIONS RECOMMENDED BY LEARNED WRITERS AND INTERNATIONAL LAW SOCIETIES

NATIONAL LEGISLATIONS

The practices of States are always embodied in their legislations. International bodies or societies in charge of codification of international law, have made it a point to analyse various national legislations on the subject they are dealing with just to get at what they presume to be the practices of States.

States who have legislated on the subject of this paper are too few, their principles so variable - to warrant a conclusion that the principles embodied in the legislation so far made - evidenced the practices of States. Nevertheless, they are analysed here as an aid to solve the problem presented by this paper.

No claim is made here that this analysis of the various national legislations on acts and occurrences on board an aircraft is exhaustive. However, for a paper with a limited objective, as this, it is deemed to be sufficient.

The legislations were selected on the basis of adequate coverage and variety of approach to the subject. The writer has looked over the legislations of more than twenty countries. But for the purpose of this paper, only five would be analysed; two of which were enacted prior to World War II and three after the said date. The five legislations selected to be analysed are that of:[93]

(1) Chile

(2) France

(3) Mexico

(4) Honduras

(5) Philippines

CHILE

Chile's Air Navigation Act of 1925, as revised in 1931, provides:[94]

"Article 47 - Juridical acts occurring on board an aircraft in the course of a journey shall be governed by Chilean law if the aircraft is travelling over national territory or territorial waters."

This is a typical example of a law claiming jurisidction on territorial principle. The claim is absolute. No exception is allowed. Under it all acts occurring on board an aircraft in flight above Chilean territory is subject to its law.

FRANCE

The Air Navigation Act of 31st May, 1924 provides:[95]

"Article 10 - The juridical relationships between persons on board an aircraft in flight are governed by the law of the country under whose flag that aircraft flies in all cases in which territorial legislation would be normally applicable."

"Nevertheless, in the case of a crime or offense committed on board a foreign aircraft, the French tribunal shall be deemed competent if the offender or victim is of French nationality or if the aircraft has landed in France after the commission of the crime or offense."

This legislation covers both civil and criminal jurisdictions of a State. This act is tantamount to an assertion by France of jurisdiction over a French aircraft even when flying above a foreign State; and France renounces its claim to jurisdiction over foreign aircraft flying over French territory. This conclusion is supported by the phrase "an aircraft in flight is governed by the laws of the country under whose flag the aircraft flies in all cases in which territorial legislation would be normally applicable."[96] In short it supersedes the territorial law with the law of the flag State.

As exceptions to the general rule laid down above, the subjacent State is deemed competent to exercise jurisdiction if the crime or offence committed on board a foreign aircraft flying over French territory, falls under the following categories:

(1) the offender or victim is of French nationality or

(2) if the aircraft has landed in France after the commission of the offense.

The use of the phrase "shall be deemed competent" in the text of the act quoted above seems to indicate that jurisdiction of the French tribunals are not exclusive.

As adverted to earlier in this paper, the attitude of the French regarding the subject of this paper is not at all surprising. From Fauchille's time to the present, French delegates to international air conference has always supported the jurisdiction of the flag State. Even in maritime law the French had always claimed and still claims that the law of the flag of the vessel governs acts and occurrences on board a vessel, unless the assistance of the local authority was invoked or the peace and tranquility of the port was compromised.

MEXICO

The decree to amend Book IV of the act on General Means of Communications, 30th December, 1949, provides:[97]

"Article 309 - The following shall be governed by Mexican Law:

1. Any event or juridical act occurring on board a Mexican aircraft in flight whether over Mexican territory or over non-territorial waters, as well as any such event or act on board a Mexican aircraft flying over foreign territory, unless the event or act is of such a nature that it endangers the security or public order of the foreign State over which the aircraft is flying."

"2. Any offense committed on board any aircraft over foreign terri-

tory if the offense produces or is alleged to produce effects in Mexican territory."

The above-quoted act is broad enough to cover both civil and criminal jurisdiction. Briefly, Mexico claims jurisdiction in the following situations:

(1) Any event or juridical act occurring on board a Mexican aircraft in flight over Mexican territory or over non-territorial waters (high seas); and

(2) Any event or juridical act occurring on board a Mexican aircraft in flight over foreign territory, except when the act or event endangers the security or public order of the State flown over. In which case, the subjacent State would have jurisdiction.

In paragraph 2 Mexico also claims jurisdiction even if the offense is committed over foreign territory on board any aircraft (Mexican or non-Mexican) if the offense produces or is alleged to produce effects in Mexican territory. The said paragraph refers to crimes only.

HONDURAS

The aviation law, promulgated by the legislative decree No. 121, 17th March, 1950,[98] provides:

"Article 185-Juridical events and acts which occur on board Honduran aircraft during a flight over foreign territory shall be considered as events or acts occurring in national territory and shall be subject to the laws of the Republic, except when they are of such a character that they endager the security and public order of the underlying foreign State."

"Article 186-Criminal events and acts which occur on board any aircraft flying over foreign territory shall be subject to Honduran laws when they produce or are claimed to have produced criminal effects in national territory."

This legislation like that of France and Mexico covers both civil and criminal jurisdictions. Like the Mexican law it confers jurisdiction to the flag State, subject to the exception in favour of the underlying State if the event and act endangers the security of the said State.

Again, article 186 like the Mexican Act claims jurisidction over criminal events and acts occurring on board any aircraft in a foreign territory - if it produces or is claimed to have produced effect in Honduran territory.

PHILIPPINES

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Under the proposed Code of Commerce for the Philippines, "the Republic of the Philippines had complete sovereignty of the airspace above the lands and territorial and other waters of the Philippines and reserves exclusive power and jurisdiction concerning the same."

With regard to jurisdiction over crimes, it provides as follows:

"Art. 694. JURISDICTIONS OVER CRIMES. - An aircraft in flight is considered as a part of the territory of the country whose flag its flies, subject to the third paragraph of this article. The aircraft and all on board shall be governed accordingly, wherever it may be, subject to international law and treaty stipulations.

Aircraft flying the flag of the United Nations shall be subject to principles developed from time to time under the United Nations Charter.

All foreign aircraft within the airports or in the airspace defined in Article 693 shall be subject to Philippine laws and air transportation regulations."[100]

The Revised Penal Code of the Philippines, on the other hand, provides for jurisdiction over offences committed on board a Philippine airship even if outside Philippines territory.

Those two above quoted articles taken together would produce the following jurisdiction over crimes committed on board a Philippine aircraft.

1. On or above the high seas or territory not subject to the sovereignty of any State, the flag State would have jurisdiction.

2. In flight over foreign territory, jurisdiction would be concurrent with subjacent State.

3. All foreign aircraft in Philippine airports and airspace would be concurrently subject to the jurisdiction of flag State (if its law so provide) and the Philippines.

4. On the ground of a foreign State, it would be subject to the jurisdiction of ground State only. For it is only aircraft in flight that is considered a part of the territory of the country whose flag it flies. Aircraft on the ground is not encompassed within that provision.

With regard to contract, it provides as follows:

ART. 699 CONTRACTS. - All contractual and other obligations entered into by persons while in flight over the Philippines shall have the same effect as if entered into on the land or water beneath.

Contracts agreed upon on board an aircraft of Philippine registry

while in flight shall be governed by the laws of the Philippines.

This is an application of territorial principle to aircraft. So contract entered into by passengers on board an American aircraft in flight over Luzon, Philippines, would have the same effect as if entered into on the land, below. Contracts agreed upon on board a Philippine aircraft in flight would be subject to this rule:

(1) If it is in flight above the high seas or territory not subject to sovereignty of any State and in the Philippines airspace, it is subject to Philippine law.

(2) If it is in flight on a foreign territory and the subjacent State claims jurisdiction under its law, then the laws of the subjacent State and the Philippines are applicable.

A careful analysis of the five aviation acts cited above, clearly shows that a State claims jurisdiction on the following bases:

1. The nationality of the aircraft,[101]

2. The act or occurrence happens while the aircraft is flying above its territory,[102]

3. The aircraft has landed in its territory after the commission of the offense,[103]

4. The offender or victim is its nationals,[104]

5. The criminal events and acts produced or are claimed to produce effect in its territory, even if it occurs while the aircraft is flying over a foreign territory.[105]

These five acts analysed plus other legislations show different shades of variations.[106] Here they are:

One State which claims jurisdiction on the basis of territoriality, agrees to refrain from exercising jurisdiction over foreign aircraft flying above its territory on the basis of reciprocity.[107]

Another claims jurisdiction over its aircraft regardless of the law of the place of the commission of the offence.[108]

Other regard an aircraft as part of its territory wherever it may be, except when they are subject to the law of a foreign country according to international law.[109]

Lastly, one State claims jurisdiction over the crew of its aircraft if they have committed the act on board the aircraft or in performance of their professional duties.[110]

Question may be asked: What are the crimes relating to aircraft which are punishable under various national legislations? Here they are:

(1) Exposing any aircraft to danger or committing an act claculated to obstruct or impede air navigation.

(2) Causing an aircraft to fall.

(3) Any one who, involuntarily or through negligence or lack of due care, does anything likely to endanger the person on board an aircraft.[111]

(4) Destroying aircraft.[112]

(5) Any person intentionally flying or cuasing to be flown an aircraft bearing false or falsified marks.[113]

(6) Any person flying or causing to be flown outside Switzerland an aircraft bearing Swiss marks when not entitled to do so, and

(7) Infringement of the provisions of agreements on air navigation.[114]

PROPOSALS AND DRAFT CONVENTIONS RECOMMENDED BY LEARNED WRITERS AND INTERNATIONAL LAW SOCIETIES

The writer has looked over several proposals and draft conventions recommended by learned writers and international law societies. However, five draft conventions were selected to be analyzed. These draft conventions selected were discussed more or less intermittently over a span of twenty years. The spread was wide enought to include the period in which immense progress was made in the field of aeronautics, so these drafts, as a whole, have three desirable characteristics, it is adequate, up to date and most desirable of all it brought into play a variety of approach on the subject.

The five draft conventions are:

(1) The draft resolution, affirmed at Stockholm in 1924 at the 33rd conference of the International Law Association.[115]

(2) The resolution recommended by the International Juridical Committee of Aviation in 1930.[116]

(3) The resolution recommended at the 7th Conference of American States, at Montevideo in 1933.[117]

(4) The Harvard Research in International Law draft convention with respect to crime in 1936, and[118]

(5) The tentative draft proposal presented by Professor Cooper as Rapporteur of the Air Law Committee of the International Law Association which met at Lucerne (August-September, 1952).[119]

Let us now analyze these draft conventions and resolutions one by one.

(1) Draft resolution presented and affirmed at the 33rd Conference of the International Law Association, at Stockholm, in 1924, provides:[120]

(a) Civil Jurisdiction:

Article 1.

"The airship which is above the open sea or such territory as is not under the sovereignty of any State is subject to the laws and civil jurisdiction of the country of which it has nationality."

Article 2.

"A private airship which is above the territory of a foreign State is subject to the laws and jurisdiction of such State only in the following cases:

1. With regard to every breach of its laws for the public safety and its military and fiscal laws.
2. In case of a breach of its regulations concerning air navigation.
3. For all acts committed on board the airship and having effect on the territory of the said State.

(b) Criminal Jurisdiction:

Article 3.

"If at the commencement or during the progress of any flight of any aircraft passing over any State or States or their territorial waters or over the high seas without landing, any person on board such

aircraft commits any crime or misdemeanour, the person charged shall forthwith be arrested if necessary. Such felony or misdemeanour may be inquired into and the accused tried and punished in accordance with the rules given under Article 2. The State or the place where such aircraft lands shall be bound to arrest the accused if necessary and to extradite him to the State which has jurisdiction over him."

Article 4.

"Acts committed on board a private aircraft, not in flight, in a foreign State, shall be subject to the jurisdiction of such State, and any person or persons charged with the commission of such an act shall be tried and, if found guilty, punished according to the laws of such state."

The draft resolution above-quoted covers the subject adequately. Provisions are made for both civil and criminal jurisdiction. It provides for situations arising while the aircraft is above the high seas or territory not subject to the sovereignty of any State, above a foreign State and on the ground of a foreign State.

For aircraft above the high seas or territory not subject to the sovereignty of any State, jurisdiction is conferred on the flag State.

As a solution to the problem presented by an aircraft flying above the territory of a foreign State, it confers jurisdiction to the flag States, subject to the three exceptions mentioned in above-quoted arti-

cle 2. While it does not fit squarely with the legal status of the airspace, as envisioned in the Chicago Convention of 1944, nevertheless it offers a practical solution. For if we follow the principles and terminology of the said convention, we would have conferred jurisdiction to the subjacent State, subject to exceptions in favour of the flag State.

Article 4 of the above-quoted draft resolution confers jurisdiction to the ground State if the act is committed on board an aircraft, not in flight in a foreign State.

(2) INTERNATIONAL JURIDICAL COMMITTEE.

This Congress recommended the creation of a special jurisdiction called the criminal jurisdiction of air law for criminal acts committed on board a civil aircraft. In the same breadth that maritime jurisdiction deals with acts and crimes on a ship at sea, the criminal jurisdiction of air law would deal solely with crimes committed on board an aircraft.

The criminal jurisdiction of air law are conferred to the flag State and to the State flown over. The scope of this jurisdiction is similar to territorial jurisdiction of a State. In case of criminal acts committed on board an aircraft flying over a foreign territory, the State having custody of the prisoner is given priority. In all other cases, the conflict of jurisdiction is resolved in favor of the flag State, unless:

(1) the act is such as to endanger the safety and public order of the subjacent State.

(2) the act injures the inhabitants of the Subjacent State.

Lastly, a State which does not permit extradition of its nationals shall punish them when they return to its territory after having perpetrated a crime on board a foreign aircraft.[121]

(3) DRAFT RESOLUTION RECOMMENDED BY THE 7TH CONFERENCE OF AMERICAN STATES AT MONTEVIDEO

This Montevideo draft is presented here because it embodies an approach different from all the others.

Briefly the rules recommended are as follows:

1. Acts committed on board a private aircraft while it is in contact with the soil fall within the competence of that State.[122]

2. Any aircraft not within the boundary of any State on the high seas or territory not subject to the sovereignty of any State is subject to the jurisdiction of the flag State.[123]

3. Recommendation No. (3) envisioned 3 situations. It will best be illustrated by the following examples:

(1) Offence committed in State A and next landing was made in same State A - State A has jurisdiction and its laws are applicable;

(2) Offence committed in State A and next landing was made in State B - State B has jurisdiction and the laws of State A (place of commission of offence) are applicable; and

(3) Place of commission of the offence is undetermined and next landing was made at State A - State A has jurisdiction and the laws of the flag State are applicable.[124]

4. In case of damage effected from aircraft on person and property of the underlying State, said State has jurisdiction and its laws are applicable.[125]

5. A State that does not concede extradition of its nationals is obliged to punish them on their return after having committed an offense on an aircraft. In case of a foreigner, the pertinent provision regarding extradition is applicable.[126]

As adverted to earlier, this draft offers a different approach. It always confers jurisdiction to the State of next landing, but the law applicable is always the law of the place of the commission of the offense if it could be determined, otherwise, it is the law of the flag State.

Like the draft of the International Juridical Committee it also provides for a case wherein a State does not provide for extradition of its nationals, by obliging that State to punish such nationals who committed an offense on board an aircraft on their return.[127]

(4) HARVARD RESEARCH IN INTERNATIONAL LAW

The Harvard Research draft Convention with respect to crime as indicated in its title, covers only criminal jurisdiction. It provides as follows:[128]

"Art. 3 - Territorial jurisdiction. A State has jurisdiction with respect to any crime committed in whole or in part within its territory."

"Art. 4 - Ships and Aircraft. A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character."

This draft convention deals with both public and private aircraft. Similar rules are provided for both.

This draft is the product of a thorough research work and a master-

ful presentation of the law as they deem it should be.

The net effect of the above quoted provisions, are the following:

(1) On or above the high seas or territory not subject to the sovereignty of any State, act and occurrences on board an aircraft, would be subject to the jurisdiction of the flag State.

(2) Above the territory of a foreign State, acts and occurrences on board an aircraft would be subject to the concurrent jurisdiction of the subjacent and flag States. This would be the logical conclusion, in as much as a State's territory includes the airspace above its land and territorial waters.

(3) On board an aircraft not in flight in a foreign State, acts and occurrence on board an aircraft would be subject to the concurrent jurisdiction of ground and flag States.

This would follow from the facts that a State is granted jurisdiction not only over crimes committed in its territory but also over crimes committed on board its private and public aircraft.

(5) TENTATIVE DRAFT CONVENTION PRESENTED BY PROFESSOR COOPER AS RAPPORTEUR TO THE INTERNATIONAL LAW ASSOCIATION CONFERENCE AT LUCERNE

The latest attempt to arrive at a satisfactory solution of the manifold problems presented in this paper was made by the Air Law Committee of the International Law Association which met at Lucerne (August-September 1952). Professor Cooper, as Rapporteur put forward the following
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tentative draft convention:

"Article 1 - The jurisdiction of a Contracting State extends (a) to all aircraft which bear its nationality mark wherever such aircraft may be, and

(b) to all aircraft within its territory, including its airspace."

"Article 2 - For the purpose of conferring jurisdiction in case of a crime committed in the airspace, such crime may be deemed to have been committed in the airspace of any Contracting State through which the aircraft has passed, beginning with the last departure of the aircraft preceding the crime until the first landing thereafter."

"Article 3 - When the accused is apprehended in a Contracting State which does not assume jurisdiction, the accused will be delivered, if at all, to the first Contracting State, formally requesting extradition which has jurisdiction hereunder."

"Article 4 - Any person tried under the provisions of this convention may not be tried again for the same offense by the courts of another contracting State."

"Article 5 - This convention does not alter or set aside other bases for criminal jurisdiction which a State may have incorporated into its national laws.

"Professor Cooper pointed out in his report that if the Committee feels that the rule of the territorial jurisdiction of crime would so require, an additional article might well be inserted between the present Article 2 and 3 to give the defendant an opportunity to plead and prove, if he could, that the occurrence for which he is being tried took place within a particular jurisdiction and not the jurisdiction of the trial. In that case the convention should provide that he would thereupon become subject to extradition to the place which he had named if that State desired to extradite him, and that his having been brought to trial al-

ready would not be a bar to a new trial in the State named by the accused as the real place of the occurrence."[130]

This tentative draft proposal, like the Harvard Research draft deals only with crimes.

It confers concurrent jurisdiction to the flag State and to all States flown over in the course of the flight in which the offense is committed.[131]

To obviate the necessity of determining when the crime is committed, a formula was devised conferring jurisdiction to any Contracting State through which the aircraft passed, "beginning with the last departure of the aircraft preceding the crime until the first landing thereafter."[132]

In case the apprehending State refused to assume jurisdiction, the accused will be delivered to the first entitled Contracting State formally requesting jurisdiction.[133]

Embodying the principle of "Nobis in idem," it provides that any person tried under the provision of this convention may not be tried again for the same offense by the Court of another Contracting State.[134]

Finally the draft convention does not alter or set aside other bases for criminal jurisdiction which a State may have incorporated in its national laws.[135] Obviously the aim of this provision is to allow general criminal legislation of a State to stand side by side with it. But criminal legislation specifically referring to aircraft are supersdeded in the interest of harmony.[136]

This tentative draft is the most up to date and covers the subject of crimes committed on board an aircraft adequately.

The report meets the approval of most of the members of the Air Law Committee, of the International Law Association.[137] One member would, however, limit the jurisdiction to two States, namely:

> "(1) that of the State in which the crime has been committed, as far as it is possible to determine this State and as far as this State is disposed to assume jurisdiction, and
>
> (2) that of the State of the flag of the aircraft."[138]

France does not seem to have purged itself of Fauchille's influence, its delegate favoured "The general jurisdiction of the law of the flag with occasional intervention of the law of the country over flown in the case of certain violations of a particular nature."[139]

In an attempt to reconcile the differences between Professor Cooper and Dr. Meyer, (Switzerland), Mr. Wilberforce (United Kingdom) suggested the "factual situation approach." Under it as soon as an aircraft landed, a decision is made whether the criminal is to be arrested by the local authorities or by the Captain of the aircraft. In the former case, then each State flown over is given time within which to assert and establish their claim to jurisdiction. This, in effect, according to him, would avoid any conflict between Professor Cooper's proposal and those of Dr. Meyer: "only one of the States flown over would, in practice, be able to establish its claim and no question of priority would arise except between the State flown over and the State of the flag. As between these I would agree that priority should be given to the State flown over."[140]

This tentative draft convention is a deviation from the stand of the International Law Association, at its conference in 1924, at Stock-

holm.[141] The 1924 draft resolution confers jurisdiction to the flag State, subject to certain exceptions. This tentative draft going further than the Harvard Research draft[142] confers jurisdiction to the flag State concurrently with any State flown over.[143]

From the national legislations and various proposals or draft conventions analyzed, it is clear, that the following jurisdiction are contemplated:

single State[144]

concurrent between flag and subjacent States or flag State and all States passed upon, beginning with the last departure of the aircraft preceding the crime until the first landing thereafter,[145]

alternate with or without a system of priority.[146]

Generally, a State would claim jurisdiction over acts and occurrences committed on board an aircraft in flight over its territory. Although in few cases they may decline to assume jurisdiction. So it can be safely stated that a State claims jurisdiction on the airspace to the same extent that it does in its land territories. Any exercise of jurisdiction by other State, is only made possible, by their refusal to assume jurisdiction. These States usually consider acts and occurrences on board an aircraft in flight over its territory regardless of nationality of the aircraft, to have been committed and occurred on the ground; so it is governed by its laws.

Jurisdiction is conferred to:

the subjacent State[147]

flag State[148]

State of next landing, and[149]

all States flown over, beginning with the last departure of the aircraft preceding the crime until the first landing thereafter.[150]

and the laws applicable are:

laws of the State exercising jurisdiction;[151]

laws of the place of the commission of the offense; and[152]

laws of the flag State, in case the place of the commission of the offense could not be determined[153]

An attempt is here made to harmonize the principles embodied not only in the various proposals and draft conventions analyzed hereinabove; but also other proposals studied by the writer for this paper.[154] The principles referred to with various shades of agreement are:

1. That the aircraft which is above the high seas and territory not subject to the sovereignty of any State, is subject to the jurisdiction of the flag State.

2. That a State over which an aircraft is flying when the acts and occurrences occurred does not usually assume jurisdiction, unless it produces effect on its territory, which are variously described as:

(1) - breach of its law for the public safety and its military and fiscal laws.

(2) - breach of its regulation on air navigation

(3) - having effect on its territory[155]

(4) - violate law intended for self-preservation

(5) - infraction which endangers security or propeety of the State

(6) - violate custom and sanitary regulations[156]

(7) - have relations to the inhabitants

(8) - disturb tranquility[157]

(9) - compromise security and public order[158]

3. That no attempt was made to legislate out of jurisdiction the subjacent State; even the most ardent proponents of flag State jurisdiction[159], always provides an exception in favour of the subjacent State.

There is a noticeable tendency in the earlier proposals to confer jurisdiction to the flag State, subject to certain exceptions in favour of the subjacent State[160], while later ones confer concurrent jurisdiction to the flag State and the subjacent State[161], and the latest one confers concurrent jurisdiction to all States flown over in addition to the flag State[162]. In between the two positions is a third one which confers jurisdiction always to the "State of next landing"[163], - after the commission of the offense, with the qualification that the law of the place where the aircraft was flying at the time of the commission of the offense should be applicable; in case the place of the commission of the offence could not be determined, then the law of the flag State is applicable.

Lastly, another one would create a special jurisdiction called, the criminal jurisdiction of air law for criminal acts committed on board a civil aircraft.[164]

3. CRIMINAL JURISDICTION

In discussing first criminal jurisdiction, it will be noticed that we are not following the patern set forth in the draft resolution of

the International Law Association at its 33rd conference, in 1924, at Stockholm.[165] The reason for that is simple, even the International Law Association at its latest meeting in Lucerne (1952), admitted that there is more urgent need for dealing first with criminal jurisdiction.[166] Besides a State is more concerned with crimes than civil matters, since the former constitute an offense against the State itself. After all is said and done, bases and reasons given for claim of jurisdiction over crimes may also be claimed for civil jursidiction.

Before proceeding to discuss the different rules applicable to the various situations envisioned in this paper, let us indulge in some necessary definitions.

Here they are:

"A State's jurisdiction" is its competence under international law to prosecute and punish for crime."[167]

"A crime is an act or omission which is made an offense by the law of the State assuming jurisdiction."[168]

Any discussion of crimes committed on board an aircraft is bound to give rise to conflict of jurisdiction. For here we are dealing with international flights. The present speed of aircraft permits the crossing of borders in matter of hours.

Under the afore-cited Chicago Convention of 1944, only aircraft not engaged in international air services shall have the right to fly into or across the territory of another State and to make stop for non-traffic purposes, without the necessity of obtaining prior permission. But the State flown over reserves the right to require landing.[169] The aircraft of a contracting State entering another, is subject to the laws

and regulations regarding operation and navigation of aircraft of the State visited.[170] Such rules and regulations should not discriminate against foreign aircraft.[171]

As could be gleaned from the above-quoted provisions, the privileges granted is limited to aircraft not engaged in international air service. It thus explicitly exclude commercial scheduled air lines, which form substantially the bulk of present day air traffic. So that in practical effect the right to fly into or across the territory of another State is a product of hard bargaining, wherein a State strategically located, could demand a high price for such right.

Bearing in mind the formula suggested in the preliminary statements, we have made for civil aircraft, as well as the rules suggested in national legislations and proposals of international law societies and learned writers, we would now discussed the application of such formula and rules to the manifold problems called forth in the different situations encountered in this paper.

A. CRIMES COMMITTED ON BOARD AN AIRCRAFT ON OR ABOVE THE HIGH SEAS OR TERRITORY NOT SUBJECT TO THE SOVEREIGNTY OF ANY STATE.

As indicated in the above sub-topic title, it is broad enought to cover:

1. crimes committed on board an aircraft while flying above the high seas or territory not subject to the sovereignty of any State; and

2. crimes committed on board an aircraft (including seaplane) forced to land on the high seas or territory not subject to the sovereignty of any State.

Situation No. 2, seems to call for clarification. The situation envisioned by the writer are:

1. Suppose a seaplane due to engine trouble was forced to land on the high seas, and while sitting pretty in the ocean, a crime was committed, or

2. Suppose an aircraft was forced to land in the portion of the artic, not subject to sovereignty of any State, and while in that position, a crime was committed.

Obviously a crime committed outside the aircraft while forced to land in the artic as indicated above, would not be within the scope of this paper. So it would not be discussed here.

The high seas and stateless territory is as free as above the high seas and stateless territory. Both are not subject to the sovereignty of any State. Similar situations called for similar solutions. So these two situations were combined in one sub-topic, inasmuch as the rule for one should also be the rule for the other.

As a general rule the situations presented by crime committed on board an aircraft on or above the high seas or territory not subject to the sovereignty of any State does not present a problem. A rule can be easily evolved that fits perfectly into the puzzle. Here no conflicting claims of jurisdiction is presented. In truth there is an agreement as to what should be the rule - both in draft conventions presented by learned writers and international law societies and national legislations.

Airspace over the high seas or territory not subject to the sovereignty of any State is free to the use of all. This is the only portion

of the airspace where there is a complete freedom comparable to the freedom of the sea.[173]

Crimes committed on board an aircraft flying over the high seas or territory subject to the sovereignty of any State is conferred to the State in which the aircraft is registered (flag State). This position is supported by the Harvard Research in International Law, which states, in its comments: "xxx it has seemed clear that a principle which assimilates competence over ships to the state's territorial competence is well founded. A similar solution for the problem of aircraft, while of course impossible to support by an equally impressive array of practice and opinion, seems warranted by similar consideration of convenience and by such authority and opinion as has found expression during the relatively short interval in which the problem has been of practical importance ..."[174]

By analogy to the ship the jurisdiction of a State over its aircraft on the high seas is further supported by the Lotus Case, wherein it was held:[175]

> "A corollary of the principle of the freedom of the seas is that ship on the high seas is assimilated to the territory of the State the flag of which it flies. It follows that what occurs on board a vessel on the high seas must be regarded as if it had occured on the territory of the State whose flag the ship flies..."

A perusal of various legislations, further support the position that a State claims jurisdiction over its aircraft above the high seas or territory not subject to the sovereignty of any State. Claims put forth is

wide enough to consider an aircraft as a territory of the State. Italy's Navigation Code, March 30th, 1942, provides:[176]

> "Article 4 - Italian vessels on the high seas and Italian aircraft in a place or in air space not subject to the sovereignty of any State shall be considered as Italian territory."

Other States made similar claims.[177]

The United Kingdom also claims jurisidction over acts done on board its aircraft. Jurisidction in regard to aircraft is equally wide, since the legislature has extended to aircraft the same attributes for the purposes of criminal jurisdiction as have long been accorded to ships.[178] This may therefore be regarded as another instance of legislative assimilation of aircraft to ships. The Philippines on the other hand, expressly claims jurisdiction over an offence committed while on a Philippine airship, even if it is outside its territory, presumably including the high seas or territory not subject to the sovereignty of any State.[179]

One writer would make us believe that due to dissimilarities between air and sea travel the "law of the flag" applicable to a ship should not apply with equal force to an aircraft.[180] According to him, "the essence of carriage by air as compared with carriage by sea is speed and shortness of duration ..." There is therefore, it is submitted, much less connection between persons and goods aboard an aircraft and the country of its registration than in the case of a ship." Frankly, we could not see our way clear, to agreeing to his proposition. While it is true that one can travel from Manila to San Francisco by air in about three days, the same distance is usually covered by a ship in seventeen days. Yet it is a fact that during the 31 flying hours from Manila to San Francisco, the[181]

persons on board an aircraft should be governed by some law. In question of jurisdiction, such as this, what is important is not the attachment of a person to the aircraft and its country of registration, but rather the applicability of a State law to the aircraft and all persons and things on board such aircraft. Nature hates a vacuum, to the same extent that the law does. Whether the flight above the high seas be one, two or ten hours, the important thing is to have a reign of law for even such a short period. For crime does not need the expiration of an hour for its perpetration. It might be done in matter of minutes. In the high seas which for centuries have been regarded as outside the jurisdiction of any State or equally subject to the jurisdiction of all, the law of the flag of the aircraft should prevail. In the present state of international law, it is only the flag State that could and should assume jurisdiction over its aircraft on or above the high seas or territory not subject to the sovereignty of any State. Any other rule would necessitate an international convention, such as the move to create an international criminal jurisdiction. Crimes on board an aircraft on or above the high seas may be given to the proposed International Court of Criminal Justice. But in the absence of such court, crimes committed on board an aircraft on or above the high seas or territory not subject to the sovereignty of any State should be given to the flag State.

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The Chicago Convention of 1944, by imposing to each contracting State the obligation to see that every aircraft carrying its nationality mark shall comply with the regulations relating to the flight and manoeuvre of aircraft - in effect conferred to the flag State jurisidction over its

aircraft above the high seas or territory not subject to the sovereignty of any State, since this portion of the earth is not subject to the sovereignty of any State.

The rule applicable here is further supported by the status of the airspace and the aircraft which was discussed earlier. In that discussion the writer deduced the conclusion that the airspace above the high seas or territory not subject to the sovereignty of any State - is free- and that the State legally entitled to claim jurisdiction over aircraft is the flag State.

So the general rule with regard to crimes committed on board an aircraft above the high seas or territory not subject to the sovereignty of any State, is simply this:

That it is subject to the jurisidction of the flag State.

This is the only convenient and practical solution. The flag State is legally entitled and most directly concerned with the crimes and in a most convenient position to exercise jurisdiction. In fact, under the present state of affairs, it is the only State which could exercise jurisdiction, in the absence of an international convention.

As an afterthought we might add that there is no reason why the rule for crime committed above the high seas or territory not subject to the jurisdiction of any State be at variant to crimes committed on board an aircraft on the high seas or stateless territory. Both on or above the high or stateless territory are not subject to the sovereignty of any State. Similar situations called for similar rules.

Nevertheless, situations might arise that called for an exception to the general rule thus far evolved. One situation is suggested in a

recent Philippine case.[183] Facts given are modified to suit the situation called for. Briefly here are the facts as modified:

Mr. X a Chinese resident of Manila, was suspected of being a communist. In an attempt to get one jump ahead of the government authorities, Mr. X boarded a Philippine Airlines aircraft bound from one province to another. While the aircraft was flying over the high seas, Mr. X ordered the pilot to fly it to communist China, when he refused, Mr. X shot the pilot. In the ensuing melee the aircraft got out of control and collided with another aircraft.

If the aircraft with which the Philippine Airlines aircraft collided is another Philippine aircraft, no doubt the Philippines will have jurisdiction.

But if the aircraft with which the Philippine aircraft collided is an Australian aircraft, then we have a possible claim of jurisidction by two flag States. The Philippines could claim jurisdiction on the ground that the crime took place and produced effect on its aircraft.[184] And the Australian could also claim jurisdiction on the ground that the crime produced effects on its aircraft.[185]

What is then the solution to the problems presented?

Obviously, one of the solutions applicable is suggested in the Lotus Case.[186] There a Turkish and French vessels collided on the high seas, the Permanent Court of International Justice, held that Turkey and France had concurrent jurisdiction, the court states:[187]

"The offence for which Lieutenant Demons appears to have been prosecuted was an act of negligence or imprudence having its origin on board the Lotus (French Vessel), whilst its effects made themselves felt on the

Boz-Kourt (Turkish Vessel). These two elements are, legally, entirely inseparable, so much so that their separation renders the offense non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdictions of each to the occurences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect to the incident as a whole. It is therefore a case of concurrent jurisdiction." (underscoring supplied)

Another solution is suggested by the Bustamante Code.[188] The said code classifies collision into fortuitous or wrongful. In case it is fortuitous, the law of each State applies to its aircraft. In case it is wrongful, then the law of the injured aircraft is applicable.

Applying the various considerations previously evolved, the writer might conclude:

That the flag State is legally entitled to exercise jurisidction. That the flag State is most directly concerned with the crime; and the flag State is the most convenient State to whom jurisdiction could be given. In fact it is the only State to whom jurisdiction could be given, in the absence of an international convention.

Finally we might add that this position is supported by various drafts convention proposed by learned writers and international law so-[189] cieties, national legislation of various States[190] and by the Chicago Con-vention of 1944.[191]

B. CRIMES COMMITTED ON BOARD AN AIRCRAFT WHILE FLYING OVER THE TERRITORY OF A FOREIGN STATE.

Jurisdiction over crimes committed on board an aircraft while flying

over the territory of a foreign State really poses a problem. Various proposals and national legislations put forth claims in favour of the flag State, subjacent State, State of next landing, all States flown over (from last departure preceding the crime to next landing after commission of the crime) and the State of which the offender or victim is a national. Further jurisdiction may be single-State, concurrent or alternate.

Any acceptable solution to the problem presented here must perforce start with sovereignty as basis. For sovereignty, despite the passing years, has not lost its fascination to States. Unlike a pretty woman who has lost youth and allure with the passing years; sovereignty, like wine mellowed with age and passing years only enchances and increases its fascination to States. For in inspite of the avowed objectives to establish a world government, by a great number of States, still the Charter of the United Nation put sovereignty in the pedistal by stating that it is founded in the "Sovereignty equality of States."[192]

Of course the easy way out is to confer jurisdiction in favour of the subjacent State. This solution fits perfectly the declaration in the Chicago Convention of 1944, with regard to State's sovereignty over the airspace. But does it solve the problem? Obviously not, for we also found that there are cases in which the subjacent State does not wish to exercise jurisdiction. It seems that the best solution is to confer jurisdiction to the subjacent State in the first instant, with a leeway for said State to decline jurisdiction if it chooses to do so.

So the best solution to the problem is this:

To confer jurisdiction in the first instant to the subjacent State;

if she declines jurisdiction, then jurisdiction should be conferred to the flag State.

The system will work like this:

The subjacent State will be given a certain time, after notification, within which to decide whether it will take jurisdiction or not. If it decides to take jurisdiction, no other State can take jurisdiction. If its declines or the allotted time for decision expires, then the flag State will have jurisdiction.

This solution fits in the formula alluded to earlier, to wit:[193]

> "That a State legally entitled to claim jurisdiction over acts and occurrences on board an aircraft declines to do so, when such acts and occurrences do not produce effects on its territory."

Obviously it is not possible to separate acts and occurences that produce effects in a territory from that which do not produce effects. Where it possible our problem would be simpler for we could provide a rule for the former and another for the latter.

But the States themselves could not agree on an exact definition of what produces effects in its territory.[194] In fact some States use the phrases "produce effect or alleged to produce effects in its territory;

Obviously in using the phrases mentioned above, a State wish to have a wide discretion in deciding what acts produce effects in its territory. It does not want the exercise of such discretion be hampered by legal verbiage or by a restrictive definition.

Who shall decide whether an act produces effect on its territory?

Obviously, the subjacent State. Granting the power of decision to a third State or to a group of States, would be a derogation of sovereignty to which States as they are now constituted would not accede. Especially acts concerning self-preservation, a State would not be willing to have other State or group of States for that matter decide for it what acts constitute a violation of its rights of self-preservation. Such being the case, the subjacent State should be the only one to decide what acts produce effects in its territory. In giving the subjacent State priority of jurisdiction, we in effect give it the power of deciding what acts produce effects in its territory.

As the saying goes:

A man is Lord of his castle. A State is Lord of its territory. Her lordship over the airspace is as effective as her lordship on the surface of the earth. A State does not want a sword of Damocles hanging over her head in the form of a rule that would shackle her power to take all measures necessary for self-preservation. A State would not accede to a rule which would in effect decide for it what acts affect its territory. As Zitelman in referring to State's sovereignty over the airspace, pointed out:

> "It is most to be desired that in its future international dealings the German Empire should place itself with entire decision upon this standpoint, which is the only one <u>that permits it to remain master in its own house and to provide for its own safety as it shall think right</u>." (underscoring supplied)

Another reason for granting jurisdiction over the airspace to the subjacent State, in the first instance, to the exclusion of all other States

is the presence of "danger in the air". In fact it is "danger in the air" as spelled out in the First World War, which tilted the Second Battle of Books[195] in favour of the sovereignty of the air theory. The Second World War, enchanced such danger. At present the atomic bomb, H-bomb, nerve gas[196], germ warfare, and intercontinental ballistic missiles, increases such danger tremendously. The "danger in the air" is therefore, real and not imaginary. Such being the case, a State would not readily accede to an agreement which would in any way lessen or cause her to share control over the airspace in which danger lurks.

That the power of decision is given to the subjacent State, is in consonant with the practices of States with regard to vessels. For centuries now, some States in their mutual dealings have agreed that vessels in port are not subject to the jurisdiction of the littoral State, unless the act or occurrence on board a vessel affects public order or the tranquility of the port is disturb or when the local authorities is appealed to. While this rule is disputed by the British, there seems to be no real difference between the British and French rules, except the nationale of the decision. As Jessup observed[197]:

"As a matter of practice, there seems to be little actual devirgence between the action of American and British Courts on one hand and French and Italian Courts on the other. In all countries the court customarily declines jurisdiction when its interests are not affected, the difference being in the rationale of the decisions; the Anglo-American courts are inclined to remark in all cases that their legal power to assert jurisdiction is clear, but that as a matter of discretion they decline to

entertain the case; the courts of France and other countries prefer to rest their decision upon the ground that it is the invariable rule to leave to the ship itself and the authorities of the flag State matters which concerns only the internal affairs of the vessel."

But in the case of disturbance, who determine whether particular incident has affected the peace and tranquility of the port? The local authorities has the power of decision even in cases where there is no actual disturbance in the port. That was the ruling in the Wildenhaus Case.[198] And there is now a tendency of the French Courts to accept the moral disturbance theory enunciated in the said case. So in the final analysis it is the littoral State which has primary jurisdiction; and only when it declines to exercise jurisdiction could the State of the flag of the vessel assume jurisdiction. So also in the acts and occurences on board an aircraft, the subjacent State has primary jurisdiction, and the flag State could claim jurisdiction only when the subjacent State decline to exercise jurisdiction. If that is the rule for vessel, with more reason it should also be the rule for aircraft in flight above a foreign territory, for while a vessel is lateral to the land, an aircraft is just above the land and anything drop from it would by force of gravity find its ultimate destination in land. Progress in atomic warfare, germ warfare and guided missiles served only to enchance the danger that lurks in the air as spelled out in World War II. So a rule that let the subjacent State decides for itself over what acts and occurrences on board an aircraft it would take jurisdiction seems to be the only rule that would best served the interests of States as presently constituted.

In resumé, we might say that in conferring jurisdiction to the subjacent State, in the first instant, at the exclusion of all other States, we in effect:

(1) gives the subjacent State the power to determine what crimes produce effects in its territory. We are compelled to do this as no rule could be formulated that would with succinctness separate the crimes that produce effects in a territory from one that do not produce such effects. It is a matter of taking the chaff with the wheat.

(2) gives the subjacent State enough leeway to decline jurisdiction if the crimes do not produce effects in its territory.

Here, there is no need for an "Ibis in Iden" provision, envisioned in the Harvard Research draft. Here no concurrent jurisdiction is provided for. Only one State could take jurisdiction at a given moment. The decision of the subjacent State to assume jurisdiction preclude any further possibility of the flag State from taking jurisdiction. While the decision of the subjacent State to decline jurisdiction leaves only the flag State as the one and only State entitled to claim jurisdiction.

The writer is also aware of the fact that one proposal would grant
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jurisdiction to all States flown over. Our reason for limiting jurisdiction to two States, is simply this:

> That it is preferrable and logical to confer jurisdiction to the States legally entitled and most directly concerned with the crimes, than to give it to any other States which has no connection whatsoever with the airspace, the aircraft and the crime.

The subjacent State is legally entitled and concerned with the crime inasmuch as it happens above its airspace. The flag State is directly

concerned with the crime, since it happens aboard its aircraft. The flag State is most concerned with the crime because it is its duty to see that every crime that occurs on board its aircraft receives its just punishment. The State that would really take to heart the obligation to punish crime committed on an aircraft is the flag State, because it wants to show the world that on board its aircraft law and order reign. For after all is said and done an aricraft is important to a State, to the extent that is is used as an instrument of national policy, permitted to bear its flag and subsidized to tide it over bad times or just to keep them flying.

As Dr. Alex Meyer pointed out:[200]

> "In my opinion, it is not necessary to confer jurisdiction on so many States, in particular not to States which have no legal connection either with the criminal, or with the crime, and the jurisdiction of which is quite arbitary..."
>
> "It can naturally happen that both States refuse to assume jurisdiction, but in this case, when two States which are, first and foremost, interested that the criminal should be punished, refuse to try him, it seems to me that there is no need to create another jurisdiction able to try him..."

Lastly, to quote a distinguished Judge:[201]

> "no State attempts to exercise a jurisdiction over matters, persons or things with which it has absolutely no concern."

The writer prefers to treat separately a case in which the place of the commission of the offense could not be determined. This is entirely different situation that calls for a different rule.

If the place of the commission of the offense could not be determined due to bad weather or other reasons, a favorite rule, which is akin to solution embodied by various States in their municipal legislations, is to confer jurisdiction concurrently in all the states or provinces flown over.

This is one possible solution. But a better solution is to confer it to the flag State.

Here there is no chance that the crime produces effects in the territory of the underlying States. For if it does the place of commission of the offence could certainly be determined.

What a man does not know would not hurt him. What a State could not even prove that it had happened in its territory would not produce effects in its territory. The underlying States could easily agree to confer jurisdiction to the flag State when the crime did not produce effects in its territory.

Reduced to the simplest terms, the claims of the underlying States and the flag States are as follows:

Underlying States - We are entitled to jurisdiction because it might had happened in our territory.

flag State - I am entitled to jurisdiction because it happened in my aircraft.

As between the "might had happened" and the "it happened" I would prefer to grant jurisdiction to the latter. After all an aircraft is considered by some States as an extension of its territory,[202] and is generally considered as sufficiently impressed with State's nationality as to attract its laws to it.[203]

As adverted to earlier in crimes committed on board an aircraft above the high seas, the flag State has jurisdiction. In crimes committed above the high seas and crimes committed on board an aircraft in which the place of commission of the offence could not be determined, one common element is present, to wit:

> That the crimes were committed on board an aircraft, which is generally considered as sufficiently impressed with the nationality of a State as to attract its law to it.[204]

Such being the case, crimes committed on board an aircraft in which the place of commission of the offence could not be determined should also be subject to the jurisdiction of the flag State.

Is there a necessity here for the "wheel of fortune" rule adopted in municipal laws?

Here there is no need for a "wheel of fortune" rule. Here there is no need to leave to chance which State shall have jurisdiction. Here jurisdiction could be given to the State most directly concerned with the crime the flag State on whose aircraft the crime occured. As against States who could not even prove their dubious claims that it happened in their territory, it is better to confer jurisdiction with the State most directly concerned with the crime.

Besides a State might readily agree to this solution, inasmuch, as it is a case of "Do ut Des, do ut facias", I give that you may give. In giving up a dubious claim to jurisdiction, it gains the right to claim jurisdiction whenever crimes are committed in its aircraft in similar situations.

C. CRIMES COMMITTED ON BOARD AN AIRCRAFT WHILE IT IS ON THE GROUND OF A FOREIGN STATE.

Here again it is necessary to resolve conflicting claims to jurisdiction by the ground State and the flag State.

One solution would grant the States above-mentioned concurrent jurisdiction. Another would confer jurisdiction to the flag State - subject to the qualifications that the crimes did not disturb the tranquility of the airport, or it involves only the crews of the aircraft, or the assistance of the ground authorities has not been requested. Obviously the last rule is an application of the French rule regarding vessels in the ports of another State.[205]

The best rule in the opinion of the writer is one that confers jurisdiction to the ground State.

Before discussing the reasons for the above-mentioned rule, let us first resort to some necessary definitions:

"Aerodrome - is defined as any definite and limited ground, or water area intended to be used, either wholly or in part, for the landing or departure of aircraft."[206]

"In flight - relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereto."[207]

For our purposes, therefore, an aircraft is on the ground whenever it is not in flight, as define above.

This rule is applicable to aircraft on an aerodrome and on other grounds. It includes seaplane in territorial waters. After all a seaplane

is not a ship according to several cases.[208] So the rule applicable to a crime committed on a seaplane within territorial waters is the same as that of crime committed on an aircraft on the ground.

The best rule for this situation as adverted to above, is to confer jurisdiction to the ground State. The reason for this rule is as simple as the relation of the land, the sea and the air to man. Of these three elements, the land is closest to a man's heart. It is the place where a man is rooted; the place where he has his abode. A man might go out to sea, but he always has to return to land. He might for a time enjoy flying up in the "wild blue yonder", but in the end he has to return home. Because of its importance to him, a man, therefore, would be more prone to exercise the greatest degree of jurisdiction over the land, than over the territorial sea or air.[209] As one writer, put it:

> "The element of the earth (land) is preferred before other elements. first and principally, because it is for habitation and resting place of man, for man cannot rest in any of the other elements, neither in the water, air or fire."

A man is lord of his castle. To a State its territory is her castle. Therefore, it is not likely that a State would be willing to share jurisdiction on matters taking on board an aircraft in her land territory.

When a State claims jurisdiction over crimes on board an aircraft on the ground it is just like claiming jurisdiction over cars and trains passing through its territory. True it is that cars and trains are not impressed with the nationality of any State, nevertheless, it is likewise true, that the consensus among states and the prevailing rules of Inter-

national Law is this:

> That in conflict of jurisdiction between territorial and flag States, the former always prevails.

As Jessup pointed out:[210]

> On the land territory of a nation the laws of other nations are recognized only by comity, although certain more or less definite rules determine when such recognition is granted.

This rule conferring jurisdiction to the ground State is further supported by the practices of States. State might by legislation claim jurisdiction to punish offenses committed outside its territory, yet they never attempt to exercise it while the perpetrator is not within their territory.

A State could afford to be complacent to what takes place on a vessel in its territorial waters.[211] It could also be complacent to what is taking place on board an aircraft, 10,000 or 20,000 feet above its air space. But it certainly could not be indifferent to what takes place on an aircraft resting on its ground. For it cannot be denied that airports are usually located in a city or near a city. Its closeness to the population center would perforce make any crime committed on board such aircraft a disturbance of peace or public order, as to warrant prosecution in that State. What difference would it make if the offence was committed in a car in an airport? If the crime committed in a car in an airport would be subject to ground State jurisdiction, why then a crime committed on an aircraft twenty or thirty meters away from the same car be not subject to the jurisdiction of the ground State?

At a conference held at Montevideo on March 19, 1946, this provision was

suggested for crimes committed in an aircraft not in flight:[212]

"If the crimes are committed on board a private airplane which is not in flight, the corresponding trial and imposition of punishment shall be conducted according to the laws and by the judges of the territory where the crimes occurred."

Under the above quoted provision, the private aircraft is assimilated to the territory of the ground State for purposes of jurisdiction; so much so, that it is safe to assume that it is as much subject to the jurisdiction as if the crime occurred in any street of such State.

Aside from the purely legalistic ratiocination given above, it would be more practical and convenient to confer jurisdiction to the ground State.

The usual procedure would be to have the offender arrested by the ground State authorities prior to the departure of the aircraft. Since the ground State has the jurisdiction the necessity of extraditing the culprit to the flag State is obviated. Thus in effect simplyfying the procedure of bringing the offender to justice.

4. CIVIL JURISDICTION

The first problem posed by civil jurisdiction of a State over acts and occurrences on board an aircraft, is this:

Should the rule adopted for civil jurisdiction be similar to criminal jurisdiction?

An affirmative reply would simplify the problem.

It should be noted that the draft resolution of the International Law Association, at its 33rd Conference, in Stockholm, in 1924, provides for[213]

similar solution to both civil and criminal jurisdiction.[214] Fauchille also recommended a similar rule for both civil and criminal jurisdiction.

The answer to the problem posed above could be easily solved by analysing comparatively civil and criminal acts.

A crime is an offence against the State. A civil act is an offence against a private individual. A criminal offender is prosecuted by the State. A civil offender is prosecuted by private individual by the use of governmental machinery created for the purpose. Nevertheless, it is as much a duty of the State to see that criminal offender is punished as to see that offender in civil cases make good the damage cuased by them. It is the prime duty of a State to see that there is a reign of law and order in its territory. Such being the case a State is as interested in claiming and exercising jurisdiction in civil as well as in criminal matters.

Besides in tortious acts there is no hard and fast rule. What is merely considered as tortious in one State may be considered as criminal in another.[215] So the safest solution is to provide the same rule for crimes and torts.

As for other acts and occurrences on board an aircraft like marriages, birth, death, making of a will, contract, etc., again no hard and fast rule could be adopted as to which of the acts and occurrences are more important to a State. So again a rule similar to criminal jurisdiction is in order.

Lastly, we can conclude that the reasons backing the rules adopted for criminal jurisdiction also braced a similar rules for civil jurisdiction with adequately strong force.

A. ACTS AND OCCURRENCES ON BOARD AN AIRCRAFT ON OR ABOVE THE HIGH SEAS OR TERRITORY NOT SUBJECT TO THE SOVEREIGNTY OF ANY STATE.

The acts and occurrences that would usually happen on board an aircraft

are few, occasions, therefore for the exercise of civil jurisdiction would be rare. Acts and occurrences that would probably take place on board an aircraft are torts, marriage, birth, death, wills, and contract.

The problem therefore, presented is this:
When a marriage takes place in an aircraft in flight over the high seas or territory not subject to the sovereignty of any State, which is the locus celebrationis? Is it deemed to have taken place in the flag State? Or in a territory not subject to the jurisdiction of any State, and therefore no law is applicable.

Suppose a birth occurred in the course of such flight? Where is the child deemed to be born?

So in the final analysis, our problem here is a formulating a rule that would provide a situs for the act and occurrences taking place on board an aircraft.

Like in crime, acts and occurrences on board an aircraft on or above the high seas or territory not subject to the sovereignty of any State should be given to the flag State. This rule is backed by proposals of learned writers and international law societies[216] and national legislations. This is also supported by analogy to the maritime rule, wherein acts and occurrences on board a vessel are governed by the law of the flag carried by the vessel.[217] Analogy in this case is called for, because the aircraft like the vessels possess nationality. This characteristic as we have adverted earlier enable the flag State to extend its jurisdiction over aircraft flying its flag. As the Permanent Court in International Justice ruled in the afore-mentioned Lotus case:[218]

"Vessels in the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them."

From the rule aforestated we might state briefly:

That torts committed by one person against another on board an aircraft situated as above-described, would be deemed to have been committed on the territory of the flag State. And so a marriage solemnized, death and birth occurring, wills and contracts executed on board an aircraft on or above the high seas or territory not subject to the sovereignty of any State, are deemed to have occurred in the flag State.

This general rule is however subject to the exception, illustrated in our discussion of criminal jurisdiction, to wit:

When the act caused collision with aircraft of another State in which case the rules would be as follows:

(1) Concurrent jurisdiction of two flag States[219]; or

(2) Jurisdiction of the flag State injured if the collision is wrongful[220]; or

(3) Jurisdiction of each flag State to its aircraft, if the collision is fortuitous.

B. OVER ACTS AND OCCURRENCES ON BOARD AN AIRCRAFT IN FLIGHT OVER A FOREIGN TERRITORY.

Before proceeding with the discussion of the acts and occurrences on board an aircraft, over a foreign territory, let us first define the problem involved in civil jurisdiction. The problem is this:

That torts committed, marriage solemnized, birth and death occuring and wills and aontracts executed on board an aircraft in flight over a foreign territory should have a situs.

Which would be the situs? Should it be the subjacent State? Would it be the flag State? Or would it be concurrent?

We will answer these question separately on the course of our discussion of the various acts and occurrences above-mentioned.

TORTS

"Tort is a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than breach of contract, for which a court of law will afford a remedy in the form of an action for damages. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable."[221]

"What is the rule with regard to torts committed on board a vessel in the territorial sea? Whether an act is tortious or not must generally be determined by the laws of the place where the act was committed.

In a study made by Professor E. Rabel for the University of Michigan, he stated it in this way:[222]

> "For torts committed on board a vessel as well as those inflicted through faulty navigation the territorial law governs. This rule does not cover however, the internal management and discipline of a ship, which, instead is governed by the law of the flag the vessel flies."

Based on the rule above-quoted for vessels in territorial waters, we

could also grant to the subjacent State jurisdiction over torts committed on board an aircraft in flight over a foreign territory. But as there are cases in which the subjacent State would not be interested especially when the torts committed within the confines of the aircraft, involves only the crew or passengers who are not its nationals; so again the best rules would be this:

To grant jurisdiction in the first instant to the subjacent State, if it declines to assume jurisdiction then jurisdiction should be given to the flag State.

In effect we are giving the subjacent State the right to determine for itself, whether it likes to assume jurisdiction or not. For after all the airspace is a part of its territory, so any exemption from jurisdiction could and should only be granted by its express or implied consent.

So for torts committed on board an aircraft in flight over a foreign territory, it would be the duty of the aircraft commander to record it in the Journey log-book and to furnish certified copies of the extracts to both subjacent and flag States.[223] In this way then, the subjacent State could decide whether it would assume or decline jurisdiction.

MARRIAGE

Under the Philippine law a marriage is not a mere contract but an inviolable social institution.[224] It also authorized the Chief of an airplace to solemnize marriage in articulo mortis during a voyage. The latter article confers a special authority upon an airplace chiefs to solemnize marriage. This authority however extends only to marriage in articulo mortis or on the point of death, and subject to the conditions that the marriage

be on board an aircraft during a voyage. The general rule with regard to marriage is this:

That a marriage valid where it is celebrated is valid everywhere.

To this rule however there are two general exceptions which are equally recognized, namely:

(1) Marriages which are deemed to be contrary to the law of nature as generally recognized by Christian civilized States; and

(2) Marriages which the law making power of the forum has declared shall not be allowed validity on grounds of public policy. So the place of celebration of the marriage is a determinative factor. Where is the situs of a marriage solemnize in an aircraft in flight over a foreign territory? The subjacent State should again be given the power to choose as to whether the marriage was celebrated in its territory or in that of the flag State. It should not be at the mercy of a rule which would grant the flag State a concurrent jurisdiction over marriage taking place on its airspace which it deems to be against its public policy or accepted morals. It could be illustrated in this way:

Aircraft of State A flying over State B. A permits bigamous marriage. State B a predominantly Catholic country is strongly opposed to such marriage. Suppose a bigamous marriage took place during such flight, certainly State B would not like that marriage to be declared valid. State B could in effect tell them to have such marriage anywhere else, but not in our air space.

BIRTH

Under the French law birth on a French merchant vessel in foreign territorial water is not deemed to be birth in France.[226] So even France which champions the law of the flag rule does not consider birth in a vessel in territorial water subject to the law of the flag; so with more reason birth in an aircraft in flight over a foreign territory should also be considered as having taken place in the subjacent State.

Again, the rule for birth on board an aircraft in flight over foreign territory is this:

> That the birth should be deemed to have taken place in the subjacent State; unless that State declines to assume jurisdiction in which case, the birth would be deemed to have taken place in the flag State.
>
> So in case of birth on board an aircraft in flight over foreign territory the aircraft commander shall also transmit certified extracts of the Journey log-book in which the birth is recorded to the subjacent State and flag State.

In giving priority to subjacent State, we in effect give that State the power to decide whether it would deem a birth on a foreign aircraft above its territory as having taken place in its territory. For there may be cases in which said State may not want to share claim to nationality of the child with the flag State. As may be illustrated below:

Aircraft of State A flying over State B. State B is strongly for Jus Soli principle. If a birth took place during that flight, the baby might

have dual nationality under a system of concurrent jurisdiction. But State B. may not want to share claim with the flag State, when the child is born of parents, who are both citizens of State B.[227]

DEATH

According to Mcnair,[228] the place of death is rarely if ever of importance as a factor in the devolution of property, though the domicile of the deceased at the time of his death regulates a number of matter. For instance, it is suggested that the Fatal Accidents Acts, 1846 to 1908, can apply to a death occurring to a person in or thrown out of any aircraft on or over the high seas, whatever may be his nationality.[229] Again person killed as the result of aircraft accidents occuring outside the United Kingdom may by virtue of section 77 of the National Insurance Act, 1946, and Regulations made thereunder be entitled to benefits under the Act.[230]

It is the duty of the aircraft commander as in marriage or birth, to record the death in the Journey log-book; and to transmit certified extracts of such record to the subjacent and flag States.

If a death occur in an aircraft in flight above foreign territory, which is deemed to be the situs of such occurrence? Is it the subjacent State? Or the flag State? Again, such death should be deemed to have occurred in the subjacent State in the first instant. The choice of the flag State as a situs could only be made upon the express waiver of the subjacent State.

WILLS

A will is an act whereby a person is permitted with the formalities prescribed by law, to control to a certain degree the disposition of his

estate, to take effect after his death.[231] A will executed in an aircraft in flight over foreign territory may either have as its situs of execution in the subjacent State or the flag State. The subjacent State would certainly be interested if such will was executed by its citizen or its disposition affects land in its territory. So the rule should again give the subjacent State the power to decide whether it would deemed that the will was executed in its territory. Only when it declines to apply its law should the law of the flag State be applicable. Again, the commander of the aircraft would have the duty of recording the will in the Journey log-book, and furnish certified extracts to both the subjacent and flag State. Incidentially, a restatement of conflict of laws with regard to wills provides:[232]

> "The validity and effect of a will of an interest in land are determined by the law of the place where the land is."
>
> "A last will and testament executed without this State in the mode prescribed by the law either of the place where executed or of the testator's domicile shall be deemed to be legally executed..... "[233]

CONTRACTS

The Philippine Civil Code, defines contract as "a meeting of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service."[234] The law of the place of contracting determines whether the contract must be in writing in order to be valid. It also determines the adequacy of the writing and the necessity for witnesses and acknowledgment before a notary public or other public officer.

Contracts executed in an aircraft would be very few. Contracts in which the subjacent State would be interested would be fewer. Again it would be

better to let the subjacent State decide whether the contract is deemed to have been executed in its territory. If after being informed that a contract was executed on an aircraft in flight on its airspace, it refused to apply its law, then the contract would be deemed to have been executed in the flag State.

C. ACTS AND OCCURRENCES ON BOARD AN AIRCRAFT ON THE GROUND OF A FOREIGN STATE

Civil jurisdiction over an aircraft in the ground of a foreign State should be conferred to that State. The reasons for granting jurisdiction over crimes committed on board an aircraft is applicable with equal force to the exercise of civil jurisdiction over other acts and occurrences. After all a State is interested in protecting its inhabitants and territory in all matters whether be they criminal or civil.

A tort committed on board an aircraft on the ground is so close to the population center that in most cases it might be deemed to compromise the public order of the airport or the city or town where it occurs.

A marriage celebrated therein, would in most probability be considered by a State as having taken place on the ground. Also, a birth occurring is of such closeness as to be practically considered as taking place on the ground. The same sense of "closeness" or "as if taking place on the ground" would also apply to a contract or a will made on board an aircraft on the ground.

Lastly, birth and death occurring on board an aircraft on the ground of a foreign State would also be deemed as having taken place on the ground

State.

The thin "artificial barrier" woven on an aircraft commonly referred to as "nationality of aircraft" could not prevail against the superior claim of a sovereign State, on matters taking place on its ground. So aircraft on the ground like an automotive vehicle is subject to exclusive jurisdiction of the ground State. Besides it would be much easier to let those acts and occurrences be subject to the jurisdiction of the ground State as it is in the best position to exercise it both in facilities and machineries, required for it.

5. Conclusion

The writer spelled out the laws regarding "State's jurisdiction over acts and occurrences on board an aircraft" as embodied in the convention now in force.[235] Using the aforesaid convention as a background, he has drawn out a set of rules applicable to the various situations, which are not covered, or not adequately covered, or if covered, a new rule is deemed advisable. The rules drawn which covers both civil and criminal jurisdiction, are as follows:

(1) On or above the High Seas or Territory not subject to the Sovereignty of any State.

The general rule is that it is subject to the exclusive jurisdiction of the flag State. In cases in which the acts and occurrences caused a collision with aircraft of another State, the following rules would be applicable.[236]

a. Concurrent jurisdiction of flag States, or

b. Jurisdiction of the flag State whose aircraft is injured, if collision is wrongful, or

c. Jurisdiction of each State over its aircraft, if collision is fortuitous.[237]

(2) In Flight in a Foreign Territory

Jurisdiction is conferred exclusively in the first instant to the subjacent State. She is given a certain time to decide whether she will assume jurisdiction. If she declines or if the time alloted expires without assuming jurisdiction, then jurisdiction is conferred to the flag State.

This seems to be the only solution that squares with the laws as it is and as it should be. It fits perfectly to the "sovereignty of the air theory"[238] as envisioned in the Chicago Convention of 1944. It also blends with harmonious precision to the "facts of life." At the same time it made concession to those who champion the granting of jurisdiction to the flag State.

For the "facts of life" as they are connotes "danger in the air." The advent of the atomic bomb, H-bomb, nerve gas, germ warfare and inter-continental ballistic missiles[239] have tremendously enhanced that danger. The air space above a State which should be a "highway for all" is also a space of "danger for all." While it is true that granting the subjacent State exclusive jurisdiction over its air space in the first instant is not an insurance against a pearl-harbour type of attack, nevertheless, a State would feel a lot safer if its jurisdiction over its air space is not shared with other States. That if such jurisdiction is ever shared with other States it is only by its permission which naturally includes the power to require safeguards as it may deem fit.

This solution in effect gives the subjacent State the power to decide what acts and occurrences have effect in its territory. It also gives the subjacent State an opportunity to decline jurisdiction when it deems that the acts and occurrences do not warrant its assumption of jurisdiction.

For after all is said and done what acts and occurrences produce or are deemed to produce effects in the territory of a State is incapable of precise definition. What one State may consider as producing effect in its territory, may be regarded by others as too insignificant to bother about.

A rule, therefore, that hinges in such ambiguous phrase as "produces effect in its territory" would in the end be a constant source of conflict.

Recent events in the United Nations, proved beyond cavil, that ambiguous phrase is a constant source of conflicts. The root-cause of this conflict is the phrase "peace loving States." Russia and its satellites define it one way; the Western democracies define it in another way. After so many futile discussions it ends up in such a way that until now nobody seems to understand what is a "peace loving State." At least no agreement has ever been reached as to what is a peace loving State.[240]

Therefore, the ideal rule that should be drafted is one that defines with precision the rights of the different States. And not one which distributes such rights in the form of ambiguous phrases, to wit:

produces effects on its territory[241]

compromise its security and public order[242]

have relations to the inhabitants[243]

disturb tranquility, etc.[244]

These phrases are the pitfalls and crevices that a lawmaker should evade. We are here to make a law that will solve the problem; not a law which would call for the drafting of another.

In a case wherein the situs of the acts and occurrences on board an aircraft in flight over a foreign territory could not be determined, jurisdiction is conferred to the flag State. This rule is dictated by both logic and convenience.

It is logical to grant jurisdiction to the flag State, inasmuch as the only element of claim to jurisdiction that could be determined with certainty is this:

that the acts and occurrences happen on board an aircraft

This would do away with guess-work or wheel of forture rule that confers jurisdiction to any of the State flown over. If a State could readily give up its claim to jurisdiction in favour of any State flown over there in no reason why it could not give up the same claim in favour of the flag State.

One of the reasons advance for granting exclusive jurisdiction to the subjacent State in the first instant, is the impossibility of segregating the acts that produce effects in the territory of a State from the ones that do not produce such effects. Because of such impossibility, jurisdiction is at first conferred to the subjacent State to let it determine for itself what acts it would consider as producing effects in its territory. But in the case of acts and occurrences whose situs could not be determined, no such problem is presented. In fact this is an isolated case, where one could be sure, that it does not produce effects in the territory

of the underlying States. Such being the case, it is only logical that jurisdiction should be conferred to the flag State, which is most directly concerned with the acts and occurrences.

It is convenient to grant jurisdiction to the flag State, inasmuch as it is the State most directly concerned with the acts and occurrences, so it would therefore be more interested in seeing that justice is done.

Besides granting jurisdiction to the flag State alone, would do away with concurrent jurisdiction, which as adverted to earlier should be avoided whenever and wherever possible.

(3) On the Ground State

Lastly, as to acts and occurrences on board an aircraft in the ground of a foreign State, jurisdiction is conferred to the ground State.

In the first place, the ground State is legally entitled to jurisdiction. 245 As Lord Macmillan pointed out:

> "It is an essential attribute of the sovereignty of the realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits."

Airports by and large are situated in a city or near a city. There closeness to the population centers, makes any acts and occurrences there of grave concerned to the ground State authorities. As the report of the Sub-committee of Experts for the Progressive Codification of International Law (1926), on Criminal Competence of States in respect of Offences committed outside their territory, states:

> "Its normal justification is that, as a matter of convenience,

crimes should be dealt with by States whose social order is most closely affected, and in general this will be the State in whose territory the crimes are committed."

In the second place, it is the State most directly concerned with the acts and occurrences, since it happens in its land territory. To a State its land territory surpass all others in importance.

Lastly, it is the State which is in the best position with the greatest facilities, to assume jurisdiction. As Lewis, referring to repression of crimes, pointed out:[246]

"The territorial sovereign has the strongest interest, the greatest facilities and the most powerful instrument for repressing crimes.."

Similarly, in civil matters the ground State would also have the strongest interest and greatest facilities for seeing that justice is done to civil wrongs.

Nobody could deny that acts and occurrences in a car twenty or thirty meters away from an aircraft in an airport would be subject to the jurisdiction of the ground State.

It is only logical, therefore, that jurisdiction over acts and occurrences on board an aircraft twenty or thirty meters away from the above-mentioned car, should also be given to the ground State.

One may ask but a car is not impressed with nationality. But as adverted to earlier the band of nationality woven around an aircraft is not of sufficient stature as to prevail against the claim of a territorial sovereign.

V. STATE AIRCRAFT

1. PRELIMINARY STATEMENTS

This study would consist of an analysis of jurisdiction over friendly forces in the territory of another State and war vessels in port or waters of another State and on the high seas. We would also analyze the draft convention or proposals recommended by international law societies and learned writers and national legislations on the subject.

2. JURISDICTION OVER FRIENDLY FOREIGN TROOPS IN THE TERRITORY OF ANOTHER STATE

This discussion consists in a study of legislation, international agreements, opinions of reliable writers and cases on jurisdiction over friendly foreign troops in the territory of another State. From this study it is hoped to pin-point what constitute the accepted rule on the subject if there is any, and if there is none to suggest a rule that would be acceptable to States.

First we will discuss first the two leading views on the subject as expounded by the United Kingdom and the United States.

TWO LEADING VIEWS ON THE SUBJECT

BRITISH VIEW

The British subscribe to the view that a soldier is as liable to local jurisdiction as an ordinary citizen. To the British, there is nothing special about a soldier that would make them exempt from local jurisdiction. If a British soldier or a soldier from a visiting force commits a

crime in the United Kingdom, he is triable by a civil court as if he is just an ordinary citizen.

Dicey very well described the British view as:[247]

"the fixed doctrine of the English law that a soldier, though a member of a standing army, is in England subject to all duties and liabilities of an ordinary citizen" (underscoring supplied)

This view is supported by a well-known legal principle, to wit:[248]

Equality before the law which negatives exemption from the liabilities of ordinary citizen or from the jurisdiction of the ordinary courts.

Before the court-martial of a visiting force can function in the British territories, an enabling act is required. Without an enabling act, no court-martial can be legally established by a visiting force.

This view are exemplified in various acts of the British Parliament, to wit:

(1) Visiting Forces (British Commonwealth) Act, 1933,[249] which provides for the discipline and internal administration of any forces from other parts of the British Commonwealth when visiting the United Kingdom.

(2) Allied Forces Act, 1940.[250]

Patterned after the Visiting Forces Act of 1933 is the Allied Forces Act of 1940.

The Allied Forces Act of 1940 provides that the naval, military and airforce courts and authorities of any allied or associated power may exercise "all such powers as are conferred upon them by the law of that power."[251]

It further provides, that an Order in Council may apply the relevant provisions of the Visiting Forces (British Commonwealth) Act of 1933, to any visiting forces.

The effects of this act are two-fold, in so far as the Allied Powers to which the above-mentioned Act of 1933, is made applicable by an Order in Council, namely:

(a) to enable the Allied Power to exercise the power necessary to arrest, try and punish the members of its forces; and

(b) to require the British authorities to provide the additional machinery which may be needed.

The Allied Forces Act of 1940, therefore, gives to the Allied Powers complete control over the internal administration of their forces and enables them to administer their own military law, with one exception. This exception refers to the right of the United Kingdom civil court to try any offenders be they civilians or soldiers, so that under the Allied Forces Act the civil court's jurisdiction to try member of any naval, military or air forces is reserved, thus:

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> "Nothing in the foregoing section shall affect the jurisdiction of any civil court of the United Kingdom or any colony or territory to which that section is extended, to try a member of the naval, military or air forces mentioned in that section for any act or omission constituting an offence against the law of the United Kingdom or of that colony or territory as the case maybe."

This means that the jurisdiction of the Allied Military Court is not exclusive, in so far as offenses against British Law is concerned.

The net effect of the quoted provisions, is this:

> If a soldier belonging to an Allied Army commits a crime in the United Kingdom he can be tried by a British civil court; and in case of a serious crime this will inevitably follow. On the other hand in case of minor infractions it is the practice to leave these to be dealt with by the army itself.

This British practice of letting a civil court try a member of the Armed Forces is a distinct departure from the practice of Continental countries under which members of the armed forces are exclusively subject to military law and cannot be tried by a civil court, even for a non-military crime.

Two other provisions are worthy of mention, namely: (a) Sub. sec. (2), provides that if a man has already been tried for the offence by a military court he may nevertheless be tried again in a civil court, but in awarding punishment the civil court must have regard to the punishment already imposed, and (b) Sub. sec. (3), provides that a military court cannot try a person for the same offence for which he has been convicted or acquitted by a civil court. The supremacy of the civil courts has thus been completely maintained in this act.

(3) United States of America (Visiting Force) Act, 1942.

This act is a departure from the British Constitutional principle embodied in Allied Forces Act of 1940.[253][254]

The act provides briefly, that:

"no criminal proceedings shall be prosecuted in the United

Kingdom before any Court of the United Kingdom against a member of the military or naval forces of the United States of America," unless the United States Government shall otherwise request."

This make the jurisdiction of American court martial exclusive.

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This act also provides that:

"any power of arrest, search, entry or custody exercisable under British law, shall not be affected."

In other words, the power of the police remain intact, and they will as a general rule, take all preliminary action in collecting evidence.

In passing this act Parliament have made it clear that it was only prepared to depart from "the rule of law" in exceptional circumstances.

This act is an embodiment of the American principle that a troop admitted in a foreign territory is exempt from local jurisdiction.

The British view as to jurisdiction over friendly troops may be summarized as follows:

(1) a foreign court martial could only exercise its function in the United Kingdom by virtue of an enabling act of the Parliament.

(2) That in the United Kingdom the members of the armed forces (be they British or friendly forces stationed in Great Britain), like ordinary subjects, are subject to the jurisdiction of the civil court.

(3) That Parliament is willing to grant total exemption from local jurisdiction only under exceptional circumstances.

It is to be noted that while the British champion the view of friendly forces being subject to local jurisdiction when on British territory,

nevertheless, it was itself successful in obtaining for its forces immunity from criminal prosecution in the local courts of Belgium, Canada, China, Egypt, India and New Zealand.[256]

AMERICAN VIEW

First and foremost exponent of the American view was Chief Justice Marshall of the United States Supreme Court.

This view was ably and clearly expressed in the case of the Schooner Exchange vs. McFaddon, wherein, he stated:[257]

"A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted. The sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."

It was affirmed in the following cases:

(1) Coleman vs. Tennessee,[258] Justice Field said:

"It is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by permission of its government or sovereign is exempt from the civil and criminal jurisdiction of the place."

(2) Tuckers vs. Alexandroff,[259]

Alexandroff, a member of Russian Naval party deserted. Tucker, the Russian, Vice Consul, requested his arrest. The court held:

" x x x It is thought, however, that the members of a friendly foreign force are subject both to their own service laws and to the laws of the territory where they are stationed with the consent of the sovereign. But they are immune from the jurisdiction over the offences committed by them against either set of laws, unless their commanding officer waives the military jurisdiction in which case the member of the force over whom the jurisdiction is waive may be tried by the local courts for an offence against the local law."

(3) The Republic of Panama vs. Wilberth Schwatzfiger.[260]

"An ambulance driven by a U.S. soldier (on duty) in Colon, Panama, became involved in an accident, as a result of which a man was killed. The Supreme Court of Panama held that the soldier was not amendable to the jurisdiction of the courts of Panama. The Supreme Court went on to say:

It is a principle of International law that the armed force of one state when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of

the territorial sovereign but to that of the officers and superior authorities of its command.

The Court, however, also said that the members of those forces when acting in the name or on behalf of the Government of the United States, are subject to the authority and jurisdiction to which they belong and not to our national authorities, nor to both simultaneously, because such a jurisdiction is contrary to law. By this laguage, the Court appears to confine the rule to wrongs committed while "on duty."

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(4) Tubb & Tedrow vs. Griess.

In this case where the PI.-U.S. Bases agreement is not applicable, the Philippine Supreme Court ruled as follows:

"It is a settled principle of International Law that a foreign army allowed to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. In applying this rule in the case of Raquiza vs. Bradford (41 Off. Gaz. No. 7, 626), this Court held that "if a foreign army permitted to be stationed in a friendly country, 'by permission of its government or sovereign,' is exempt from the civil and criminal jurisdiction of the place, with much more reason should the Army of the United States which is not only permitted by the Commonwealth Government to be stationed here but has come to the islands and stayed in them for the express purpose of liberating them, and further prosecuting the war to a successful conclusion, be exempt from the civil and criminal jurisdiction of this place, at least for the time covered by said agreement of the two Governments. By analogy, an attempt of our civil courts to exercise jurisdiction

over the United States Army before such period expires, would be considered as a violation of this country's faith, which this Court should not be the last to keep and uphold. By exercising it, paraphrasing the foregoing quotation, the purpose for which the stationing of the army in the islands was requested or agreed upon may be hampered or prejudiced, and a portion of said military force would be withdrawn from the control of the sovereign to whom they belong. And, again, by analogy, the agreement for the stationing of the United States army or a part of its forces in the Philippines implies a waiver of all jurisdiction over their troops during the time covered by such agreement, and permits the allied general or commander-in-chief to retain that exclusive control and discipline which the government of his army may require."

Finally, this American view is confirmed by Public Law 384,[262] brought into force as regards United Kingdom armed forces by Presidential proclamation No. 2626 of 11 October 1949,[263] which assumes the existence of this exclusive jurisdiction under International Law and implements it. The Act provides for the arrest of offenders by United States civil and military authorities and their surrender to the foreign armed forces concerned, enables federal courts to compel attendance of witnesses before foreign service tribunals sitting in the United States, insures the immunity of the members of the Tribunals and witnesses and make provision for the imprisonment of offenders sentenced by foreign service tribunal in institutions maintained by the United States Government for the detention or treatment of prisoners.

B. OPINION OF LEARNED WRITERS

WHEATON. -

"A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place."[264]

HALL

"Military forces enter the territory of a state in amity with that to which they belong, either when crossing to and from between the main part of their country and in isolated piece of it, or as allies passing through for the purposes of a campaign, or furnishing garrisons for protection. In cases of the former kind, the passage of soldiers being frequent, it is usual to conclude conventions, specifying the line of road to be followed by them, and regulating their transit so as to make it as little onerous as possible to the population among whom they are. Under such conventions offences committed by soldiers against the inhabitants are dealt with by the military authorities of the state to which the former belong; with and as their general object in other respects is simply regulatory of details, it is not necessary to look upon them as intended in any respect to modify the rights of jurisdiction possessed by the parties to them respectively. There can be no question that the concession of jurisdiction over passing troops to the local authorities would be extremely inconvenient; and it is believed that the commanders, not only of forces in transit through a friendly country with which no convention

exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offences committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow of the case being watched. The existence of a double, jurisdiction in a foreign country being scarcely compatible with the discipline of an army, it is evident that there would be some difficulty in carrying out any other arrangement."[265]

LAWRENCE

"The universally recognized rule of modern times is that a state must obtain express permission before its troops can pass through the territory of another state. x x x Permission may be given as a permanent privilege by treaty for such a purpose as sending relief to garrisons, or it may be granted as a special favor for the special occasion on which it is asked. The agreement for passage generally contains provisions for the maintenance of order in the force by its own officers, and makes them, and the state in whose service they are, responsible for the good behavior of the soldiers towards the inhabitants. In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction and control of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise."[266]

OPPENHEIM

"Whenever armed forces are on foreign territory in the service of their home State, they are considered exterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State. This rule, however, applies only in case the crime is committed, either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison or a fortress leave the rayon of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them."[267]

HYDE

"Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which, with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offences are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up."[268]

HACKWORTH

"It is a principle of international law that the armed forces of one State, when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign, but to that of the officers and

superior authorities of its own command"

"In such a case the government to which the army belongs is responsible for any damages that may be caused by the passage of the force, and for any violations of local law which it may commit. But individually its members remain subject to the jurisdiction of their own officers, and to the laws of the country to which they belong."

"This exemption from local jurisdiction is recognized by all civilized nations; and is not considered a diminution of their sovereignty and independence."[269]

VATTEL

" x x x the grant of passage includes that of every particular thing connected with the passage of troops, and of things without which it would not be practicable; such as the liberty of carrying whatever may necessary to an army; that of exercising military discipline on the officers and soldiers x x x."[270]

COLONEL KING

"That the general principle is abundantly establish by reason, authority, and precedent that the personnel of the armed forces of a Nation A, in Nation B by the latters' invitation or consent, are subject to the exclusive jurisdiction of their own courts martial and exempt from that of the courts of B, unless such exemption be waived."[271]

M. E. BATHURST

"The jurisdiction of United States within its territories - or-

dinarily absolute and exclusive - is limited as regards members of a friendly foreign force within the United States with the consent of the United States Government, by a rule of International Law derived from the common consent of nations. There is no need for the United States Government to imposed by legislation any restriction in this regards. Its formal consent to the imposition of the restriction is not required, although its consent to the admission to United States territory of the members of the friendly force is a pre-requisite to the application of this rule of International Law.

Although most of the early writers on International Law make no reference to the immunity from local jurisdiction of members of foreign armed forces in the territory of a state with the latter's consent, this is probably because such immunity was taken for granted. Vattel makes one reference to the matter. Most modern British and American authorities deal with the question and recognize the existence of some such, rule. French, German and Italian writers on international law recognize the subject too."[272]

C. INTERNATIONAL AGREEMENTS

(1) DENMARK - U. S. AGREEMENT RELATING TO THE DEFENSE OF GREENLAND[273]

Under this agreement the Government of the United States of America shall have exclusive jurisdiction over the following:

(a) Any defense area in Greenland (defense areas as mentioned in preceding articles);

(b) Military and civilian personnel of the United States and their families; and

(c) all other persons within such areas, except Danish citizens and native Greenlanders.

However, the United States is given the discretion to turn over to Danish authorities in Greenland for trial and punishment any person committing an offence within a defense area, if the Government of the United States shall decide not to exercise jurisdiction.

On their part the Danish authorities in Greenland undertakes to take adequate measures to insure the prosecution and punishment in case of conviction of all Danish citizens, native Greenlanders and other persons who may be turned over to them by the authorities of the United State, for offenses committed within the said defense areas.

Lastly, the Kingdom of Denmark retains the sovereignty over the defense areas.

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(2) P. I. - U.S. BASES AGREEMENT

Under this agreement the Philippines consents that the United States shall have the rights to exercise jurisdiction over the following offenses.

(a) Any offence committed by any person within any base except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the U.S. on active duty) or the offence is against the security of the Philippines.

(b) Any offense committed outside the bases by any members of the armed forces of the United States in which the offended party is also a member of the armed forces of the U.S.; and

(3) Any offense committed outside the bases by any member of the armed forces of the U.S. against the security of the U.S.

The Philippines shall have the right to exercise jurisdiction over all other offenses committed outside the bases by any member of the armed forces of the United States.

In cases wherein the Philippine has jurisdiction, it may yield its jurisdiction to the United States if its prosecuting attorney finds:

(1) the accused is engaged in performance of a specific military duty; and also

(2) during a period of national emergency declared by either government.

Either party may waive its jurisdiction in favor of the other. However, in time of war the United States shall have the right to exercise exclusive jurisdiction over any offenses which may be committed by members of the armed forces of the United States in the Philippines.

And lastly, the offended party is not precluded from instituting a separate civil action in the proper court the Philippines to enforce civil liability. This provisions makes the member of the armed forces of the United States, subject to the civil jurisdiction of the Philippines courts.

With regard to the question of whether the offenders were in actual performance of duty, I am quoting hereunder the rulings of the Secretary of Justice of the Philippines in the cases of the "People vs. Avelino Baguio and "People vs. Elias Bermudes:

"This refers to the jurisdictional appeals of the Commanding Officer, Philippine Combat Headquarters, from the rulings of the provincial fiscal of Pangasinan in the cases entitled "People vs. Avelino Baguio" and "People vs. Elias Bermudez," which you forwarded to me thru diplomatic channels.

To review the evidence upon which the provincial fiscal based his ruling in each of the two cases, I had to send for the records from his office, inasmuch as the appeals were not accompanied by the evidence.

1. In the case of AVELINO BAGUIO, the evidence shows that at 4:30 p.m. on March 15, 1947, he drove a six-by-six truck from Camp O'Donnell to Urdaneta, Pangasinan. He had several passengers, some of whom alighted on the way and others in Urdaneta. In Nancayasan Sur, Urdaneta, on the Manila-Baguio Road, his truck hit and killed one Buenaventura Sabado, a street cleaner. After he had discharged all his passengers he proceeded to his home in Nancamaliran, Urdaneta, and did not start on his way back to Camp O'Donnell until 5:30 p.m. of the following day. No evidence was presented either to the justice of the peace or to the provincial fiscal to show that Avelino Baguio was in the actual performance of a specific military duty at the time the accident occurred. By what authority he drove the truck from Camp O'Donnell to his home does not appear from the record. It was not proved that one of the duties of Avelino Baguio as a member of the United States armed forces was to drive a motor vehicle and that on the day in question he was expressly ordered by his military superior to transport military personnel from Camp O'Donnell to Urdaneta, Pangasinan. The lack of such proof and the fact that the accused proceeded to his home in the barrio of Nancamaliran, Urdaneta, where he stayed until 5:30 p.m. of the following day, warrants the fiscal's conclusion, that he was not in the actual performance of a specific military duty.

Under Article XIII of the Military Bases Agreement, when jurisdiction over an offense is claimed by the United States on the ground that the

offender was in the actual performance of a specific military duty at the time the offense was committed, it is incumbent upon the commanding officer of the offender immediately to furnish the fiscal (prosecuting attorney) of the city or province where the offense was committed with such proof or evidence as may be necessary to prove the facts relied upon the establish jurisdiction.

(See Circular No. 78, sec. II (3), Headquarters PHILRYCOM.)

In this case, instead of presenting such proof, Lt. Col. H . J. Stockder, Adjutant General, 12th Infantry Division, Philippine Scouts, wrote to the justice of the peace of Urdaneta on April 10, 1947, claiming that the United States had exclusive jurisdiction over the accused under Executive Order No. 151 of the President of the Commonwealth of the Philippines. Aside from being of doubtful validity after the proclamation of Philippine independence on July 4, 1946, said Executive Order could not in any event be invoked after the signing of the Military Bases Agreement on March 14, 1947.

2. In the case of ELIAS BERMUDEZ, the records show that he was the driver of an army weapons carrier which ran over and killed a four-year old boy named Pepito Perez in the barrio of Pinmaludpud, Urdaneta, Pangasinan, on April 20, 1947. After investigation the chief of police of Urdaneta reported that "the offender and his companions were coming back on a pleasure trip to Lingayen, Pangasinan." No evidence was presented to the fiscal to contradict that report and to show that at the time Bermudez committed the offense he was in the actual performance of a specific military duty. If, as the report showed, he was then coming

back from a pleasure trip to Lingayen, he could not be deemed to have been performing a specific military duty within the meaning of the Military Bases Agreement. (Opinion No. 230, series 1947, Secretary of Justice.)

In view of all the foregoing, I regret my inability to sustain the appeals above referred to. Consequently I hereby affirm the ruling of the fiscal of Pnagasinan in each of the two cases.[275]

(3) BRUSSELS TREATY POWERS

Under this treaty members of the foreign force are not exempted from local jurisdiction. If they commit an offense against the law of the receiving State, they can be prosecuted in the courts of the receiving State.

However, if the act is also an offense against the law of the sending State, the latter may request for the transfer of the accused for trial before the courts of the sending State.

Whenever, the offense committed is against the security or property of the sending State, the receiving State where the offense was committed will prosecute only if they consider that special consideration require them to do so.

Lastly, the sending State is authorized to exercise jurisdiction conferred upon them by their laws, within the receiving State, in relation to an offense committed by a member of their owned armed forces.[276]

(4) UK-U.S. AGREEMENT ON LEASED, NAVAL AND AIR BASES

This agreement between the United Kingdom and the United States on leased "Naval and Air Bases" treats jurisdiction in a wider scope and different categories.

The Government of the United States is empowered to establish both military and civil courts. Presumably, this is due to the fact that this lease is a long term arrangement.

The jurisdiction of the United States over its force is either exclusive or concurrent.

It is exclusive in the following cases:

(a) If a State of war exist over all offenses wherever committed;

(b) If a State of war does not exist, over security offenses wherever committed and United States interest offenses committed inside the leased areas.

It is concurrent with the civil court of the territory if a State of war does not exist, for all other offenses.

The United States civil court has jurisdiction over a British subject, local alien or person not being a British subject or local alien, is not subject to military or naval law.

Concurrent jurisdiction are resolved in this way:

(1) The accused is to be tried by such court as may be agreed upon between the Government of territory and the United States.

(2) Where an offense is subject to the jurisdiction of the civil court of the territory and the military court, conviction or acquittal in one will not bar prosecution in the other, but the second court in awarding punishment shall have regard to the punishment already meted.

(3) If the offense within the jurisdiction of both civil courts of the territory and the United States, trial by one exclude trial by other.

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(5) NORTH ATLANTIC TREATY ORGANIZATION

In this agreement no exemption from jurisdiction is contemplated for the members of a force or its civilian component. On the other hand such jurisdiction is reserved by receiving State for all offenses punishable under its law. The sending State shall have the right to exercise exclusive jurisdiction over persons subject to offenses punishable by the law of the sending State and not punishable by the law of the receiving State. The receiving State has exclusive jurisdiction for offenses punishable under its law and not punishable by the law of the sending State. The right to exercise criminal and disciplinary jurisdiction is reserved to the sending State over all persons subject to its military law, but subject to the concurrent jurisdiction of the receiving State.

In cases where the right to exercise jurisdiction is concurrent these rules shall apply:

The sending State shall have the right to exercise primary jurisdiction over a member of a force or of a civilian component in relation to:

(a) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force of civilian component of that State or of a dependent; and

(b) offenses arising out of any act or ommission done in performance of official duty.

In case of any other offenses the authorities of the receiving State shall have the primary right to exercise jurisdiction.

If the State having primary jurisdiction decides not to exercise it the authorities of the other State shall be notified as soon as practicable.

The authorities of the State having primary jurisdiction shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where the other State considers such waiver to be of particular importance.[278]

From the national legislations, opinions of learned writers, cases and international agreements analyzed, the weight of authority seems to support the following rules for jurisdiction over friendly forces:

(1) That a foreign force merely passing or visiting another State for a short period are invariably granted exemption from local jurisdiction.

(2) That in case of foreign force to be stationed in another State, jurisdiction is usually the subject of agreement between the sending and receiving States.

In the latter case, more often than not exemption from jurisdiction is a prize to be barter at the bargaining table. A State in need of protection to be provided by the visiting force would easily grant exemption from jurisdiction. A State whose base to be leased is needed very much by the visiting force may secure for itself a qualified or concurrent jurisdiction over the visiting force. It all depends on who needs more the bases or the protection. If the sending State needs more the bases than the need of the receiving State for protection, then probably a very restricted exemption from jurisdiction would be granted to the visiting force. On the other hand if the receiving State has more need for protection than the need for bases of the sending State, then exemption from jurisdiction is readily obtained.

In fact it is safe to say that the United Kingdom which upholds the view of non-exemption from jurisdiction was able to wheedle for itself complete exemption from several countries. The United States, on the other hand while insistent and getting exemption from local jurisdiction grudgingly granted exemption to the British force stationed in the United States during the last war. In fact it was the opinion of the Senate Committee, which discussed the bill implementing the jurisdiction of the foreign service court that the phraseology of the act which contain no definition of the jurisdiction of the foreign service court nor any prohibition against the exercise of jurisdiction by American courts was a deliberate rejection by Congress of the concept that absolute immunity is to be accorded foreign forces in a friendly State from criminal jurisdiction.

3. JURISDICTION OVER PUBLIC SHIPS

A. OVER WARSHIPS

ON THE HIGH SEAS

In the proclamation of the President of the United States dated May 279
23, 1917, a warship was defined as follows: "a vessel of war is a public armed vessel under the command of an officer duly commissioned by the Government, whose name appears on the list of officers of the military fleet, and the crew of which are under regular naval discipline, which vessels is qualified by its armament and the character of its personnel to take offensive action against the public or private ships of the enemy." In other words two essential characteristic of a warships are the presence of a crew subject to naval discipline and under the command of a commission

naval officers.

A warship on the high seas is completely exterritorial in the sense that the ship is not subject to the jurisdiction of any State other than her own.[280] As Hall states: "warship represents the sovereignty and independence of their State more fully than anything else can represent it on the ocean; they can only be met by their equals there, and equals cannot exercise jurisdiction over equals. The jurisdiction of their own State over them is therefore exclusive under all circumstances and any act of interference with them on the part of a foreign State is an act of war."

IN TERRITORIAL WATERS

Has a warship the right of innocent passage through territorial waters? The opinion of well-known publicists differ.[281] Hall is of the opinion that a warship has no right of innocent passage. According to him no general interest are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other State with its ships of war and such a privilege may often be injurious to third States and it may sometimes be dangerous to the proprietors of the water used.[282] Westlake dissents from Hall's opinion mainly on the ground that the territorial sovereign could well protect himself from abuse and that an unlimited power of exclusion would subject a belligerent warship to intolerable interruption. Franchille's view is that passage through the marginal belt of a State can only be forbidden in time of war and if the littoral State is belligerent.

But the case of a passage through a territorial strait connecting two portions of the high seas must be distinguished from the passage

through the territorial waters of a State not forming part of a strait. The better opinion as regards straits is that the right of innocent passage through such part of the territorial waters as forms part of the high-
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way for international traffic cannot be denied to foreign men of war. Some examples of straits which forms part of the highway for international traffic are the Corfu Channel in Albania and the San Bernardino Strait of the Philippines. The former connects the Adriatic Sea to the Mediterranean while the latter connects the China Sea to the Pacific Ocean.

This opinions has now been confirmed in the Corfu Channel Case by the International Court of Justice, wherein it was held:

> "It is the view of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace."

However, the latest rule concerning the right of innocent passage through the territorial sea recommended by the International Law Commission of the United Nations, grants warships the right of innocent passage through the territorial sea without previous authorization or notification. The coastal State may however, regulate the conditions of such passage. In addition, said State may prohibit such passage in the interest of public order and security. Submarine is required to navigate in the surface if
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it exercises the right of innocent passage.

A warship exercising the right of innocent passage is bound to respect the laws and regulations of the coastal State. In case it disregarded such rules and regulations it may be required to leave the territorial sea.[285]

Now we will discuss the rule for warships in foreign ports and waters. Warship in foreign ports are exempted from local jurisdiction. This is best illustrated in the classical and often-cited case of "The Schooner".[286] In this case a merchant ship was seized and converted by the French authorities into a warship. Subsequently she entered Philadelphia and her former owners commenced proceedings in the court to recover possession. Chief Justice Marshall, in deciding the case summarized the rule in on sentence, to wit:

"It seems to the court to be a principle of public law that national ships of war, entering the ports of a friendly power open for their reception, are to be considered as exempted by the consent of that Power from its jurisdiction."

The general doctrine is, therefore, that a warship remains under the exclusive jurisdiction of her flag State during her entry and stay in foreign ports and waters. No legal proceedings can be taken against her either for recovery of possession or for damages for collision or for a salvage reward, or for any other cause, and no official of the territorial State is permitted to board the vessel against the wishes of her commander.[287] The doctrine is qualified by the proviso that a ship entering the ports of a foreign Power shall "demean herself in a friendly manner."[288] This implies the duty of observing all the regulations governing her admission issued by

the territorial State. Failure to comply with these regulations may afford good ground for a complaint by the territorial State to the State to which the warship belongs. If a serious and continous offense is committed, the general practice is to call the attention of the commanding officer to the fact. If an offense is persisted in, the foreign warship may be required, and if necessary compelled, to depart.[289]

The Institute of International Law considered carefully the subject of the legal regime of warships at its Stockholm meeting of 1928 and expressed the fundamental rule on the subject as follows: "Warships cannot form the subject of seizure, arrest or detention by any legal means whatsoever, or any judicial procedure. They must, however, respect 'the local laws and regulations, particularly those relating to navigation, anchorage, sanitary, and police' in the ports to which they are admitted."[290]

Ships used specially for the carriage of Monarchs or Heads of State or high diplomatic agents and placed under the command of a naval officer in the service of the State stand on the same footing as men-of-war.[291] This exemption from jurisdiction extends to all vessels in the public service including troopships, supply ships, tender boats and other flotilla.[292]

LEGAL POSITION OF COMMANDER AND CREW IN FOREIGN PORTS

The commander of a man-of-war or a public ship in a foreign port or waters retains complete jurisdiction over the ship and her crew, thus excluding entirely the jurisdiction of the territorial sovereign.[293] The local jurisdiction is equally excluded in the case of disturbances on board her, these having to be dealt with by her commander alone. Her crew and all other persons on board cannot, however, totally ignore the

laws of the country in which he is lying, except in the case of acts beginning and ending on board the ship and having no outside effect.[294] Should disturbances occur whereby the peace of the port is endangered, the vessel may be ordered to depart, and, if necessary, force may be used for her expulsion, provided that it is strictly limited to the measures required to prevent further acts of violence. Such a course is extremely unlikely to be taken.

CRIMES ON BOARD A WARSHIP

If a crime is committed on board a warship by a person not a member of the ship's crew and not belonging to her, the commanding officer may with propriety hand the accused over the local authorities, but he cannot be compelled to do so.[295]

The only exception appears to be in the case of a crime, committed on board the warship by a national of the territorial State against a fellow-subject. In such a case, which must be extremely rare, it would be the duty of the commander to surrender the criminal to the local authorities.[296]

In the case of Chung Chi Cheung v. The King,[297] Lord Atkin in delivering the decision of the Privy Council, stated that the immunities granted to public ships and the naval forces extend to the internal disputes between the crew and that the local courts would not exercise jurisdiction over offences committed on board ship by one member of the crew upon another unless the flag-sovereign elected to waive jurisdiction. The case, dealt with the murder of the British captain of The Cheung Keng, an armed Chinese maritime customs cruiser, by the cabin boy on board the ship, who was also

a British subject, while she was lying in the territorial waters of Hong Kong. The action was tried by the Hong Kong Court and the criminal sentenced to death. The sentence was affirmed on appeal by the Privy Council, which recognized that the Chinese Government would clearly have jurisdiction over the offence and that the surrender of the offender to that Government by the local British authorities would have been in order. The immunities accorded to The Cheung King were, however, waived in this case by the nation to which she belonged, as the Chinese Government "plainly consented to the British Court exercising jurisdiction and such jurisdiction was therefore validly exercised."

POSITION OF COMMANDER AND CREW ON SHORE

The position of officers and crew when ashore is not quite free from doubt. The practice generally followed is to apply the principle of exterritoriality to them when they are on land in uniform and in an official capacity connected with the service of their ship. But if they are ashore not in uniform or on an official business, they are subject to the territorial jurisdiction of the littoral State, which is entitled to prosecute them for any crimes against the local laws. In the case of minor offences, it is usual to hand over, on grounds of international comity, the wrongdoers to the commanding officer for him to deal with, 298 but there is no obligation to do so.

In June 1862, Britain protested to Brazil against the arrest of three of the officers of H.M.S. Forte whilst on shore in a Brazilian port, and the case went to arbitration. It was held by the King of the Belgians,

as arbitrator, that the arrest did not constitute an offence against Great Britain, as it was not shown that in the origin of the affair the Brazilian agents had no provocation; the officers were not in uniform, and were released directly when they proved their status.[299]

In September 1926, when a seaman of the U.S. destroyer Sharkey died in England as a result of wounds received in a shooting affray with another seaman of the U.S. destroyer Lardner in the outskirts of Gravesand, the British Government consented, on the application of the American Ambassador in London, and as a matter of international courtesy, to hand over the culprit to the American authorities, although he had already been convicted by a coroner's jury of "wilful murder." In the statement issued by the Home Secretary, the opinion of the British Government was expressed that "in the special circumstances of this case, a United States tribunal would be the more convenient Court", particularly in view of the "assurance given by the Ambassador" that the guilty person would be dealt with in accordance with the United States Navy Court-martial Regulations. "In coming to this decision, the Secretary of State had in mind the fact that both the accused and the injured seamen belonged to the United States Navy and that no British subject was directly concerned."[300]

B. OVER OTHER PUBLIC SHIPS

What is the rule with regard to other public ships which are not warships? Such as revenue cutter, coast guards or ships belonging to any department or political subdivision of a foreign government.

The reasons for exception of warships are also applicable to the other public ships devoted to public services, namely, you cannot sue a foreign

sovereign without its consent and this include suit against a public property of the sovereign. For if you make a property of a foreign sovereign amenable to local process, that is tantamount to impleading a foreign sovereign.

The following cases, cited below, would illustrate the exemption of other public ships from local jurisdiction.

Berizzi Bros. Co. v. Steamship Pesaro 301

This decree was appealed to the Supreme Court of United States, which stated the question involved to be "whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel in rem by a private suitor in a federal district court exercising admiralty jurisdiction." After reviewing the case of The Exchange, which held that foreign naval vessels are immune from seizure, the Court held:

"We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

302
THE ROSECRIC

The Roseric, a British Merchant vessel under requisition by the British Government and was in the service of that Government as admiralty transport. It was libeled in the District Court of the U.S. for the District of New Jersey. The Court in holding the vessel immune, stated:

"The privilege was based on the idea that the sovereign's property devoted to state purposes is free and exempt from all judicial process to enforce private claims. Such idea is as cogently applicable to an armed vessel employed by the sovereign in the public service as it is to one of his battleships."

304
THE JUPITER

The Jupiter, a Russian merchant vessel, was on January 26, 1918 purportedly nationalized by the decree of the Russian Socialist Federal Soviet Republic. Subsequently it came into the possession and control of the Soviet Government; and while in this possession and control it proceeded into a port of Great Britain where it was made the subject of proceedings in rem by its former owners who claimed possession. The Soviet Government intervened, claiming to be the sole owner, and moved to set aside the proceedings on the ground of sovereign immunity. The motion was granted in the Probate, Divorce, and Admiralty Division of the High Court of Justice and sustained by the Court of Appeal, which said that the suit had the effect of requiring the Russian Government to appear and defend what it claimed to be its property and that rules of international comity did not permit such steps to be taken against foreign sovereigns.

305
The Parlement Belge

The Parlement Belge was a Belgian Mail Pocket (owned by the Belgian State), which collided with a tug in Dover harbour and attempts were made to obtain her arrest by proceedings in the English Courts. The Courts of Appeal refused to entertain jurisdiction, at the same time stating that:

> "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign ambassador of any other state, or over the public properties of any state which is destined to its public use or over the property of any ambassador, though such sovereign, ambassador or property, be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

306
The Jassy

The Jassy belonged to the Rumanian Government and was employed in carrying mails and cargo in connection with the Rumanian State Railways. The ruling in that case is as follows:

"The law is therefore clear . . . and may be summed up into two proposition:

The first is, that the Courts of this country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether, the proceedings involve

process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is now in possession or control."

307
THE CRISTINA

A decree of the Spanish Government of June 28, 1937 requisitioning all vessels registered at the Port of Bilbao included within its scope the merchant vessel Cristina. At the time of the decree the vessel was outside of the territorial jurisdiction of Spain. On entering the port of Cardiff Wales, the Spanish Consul took possession of the vessel and put a new captain and crew. A Spanish Company, claiming as sole owner of the vessel instituted an action in rem under which the vessel was arrested. The Government of the Republic of Spain entered a conditional appearance and moved to set aside the proceedings on the ground that it was at all material times in de facto possession of the vessel and was therefore impleaded without its consent. The Court of First Instance and the Court of Appeal held that they were bound to decline jurisdiction. The House of Lords in affirming this ruling, through Lord Atkins, stated:

"The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether

the proceedings involve process, against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, sieze or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."

Some authors objected to the grant of immunity to government owned vessels engaged in commerce. They support this position with the following reasons:[308]

(1) because of the soundness of the theory that "when a sovereign enters into business, he submits himself to the conditions thereof";

(2) because "if merchant vessels owned and operated by foreign Governments are immune from process in United States Courts, added force would be given to the claim of neutral Governments who are taking over their merchant marine ... that they should be also immune from the operation of municipal regulations in United States Ports";

(3) because "if the claim of immunity were granted, American citizens as well as foreigners would be left without recourse in the Courts for such just claims as they might have against the vessels concerned",

This view finds support in the convention for unification of certain rules relating to the immunity of state owned vessels concluded at Brussels

on April 10, 1926, among a number of maritime countries.[309] Article 1 provides:

"Seagoing vessels owned or operated by States, cargoes owned by them and cargoes and passengers carried on Government vessel and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments."

Lastly, the International Law Commission in its provisional articles concerning regime of the territorial sea provided for the application of the rules for vessels other than warships to government vessels operated for commercial purposes.[310]

4. JURISDICTION OVER STATE AIRCRAFT

1. PRELIMINARY STATEMENTS

One of the problem presented by any treaties on state aircraft is the definition of a state aircraft. Opinions of different delegations to international aviation conferences and eminent publicists invariably differs. For as early as 1902 various proposals were made as to what should be the definition of a state aircraft.[311]

Frauchille in 1902,[312] suggested that aerostats engaged in the service of the State are military or civil. All balloons under the command of an army or naval officers commissioned by the military authorities and carrying military crews are considered military balloons. All balloons under the command of a civil official of the State or its representative are

considered as civil balloons. This draft of Frauchille proposed before the first flight of the Wright Brothers, refers only to aerostats in the service of the State. It does not envisions civil aircraft as we understand it today.

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The Imperial German Government at the Paris Conference on Aerial Navigation of 1910, expressed the view that military aerostats should be placed under military orders of a commander duly commissioned by the State, wearing his uniform and provided they have on board a certificate establishing their military character.

The International Convention in regard to Aerial Navigation drafted
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by the Conference held at Paris in 1910, divides aircraft into:

> Public aircraft are the aircraft employed in the service of the contracting States and placed under the order of a duly commissioned official of that State; and
>
> Military aircraft are the public aircraft in the military service when they are under the orders of a commander in uniform and have on board a certificate proving their military character.

This definition of military aircraft adopoted the German proposal while the definition of public aircraft bears resemblance to Frauchille's definition of civil aircraft mentioned earlier.

The British in March 1919, proposed this definition of State air-
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craft:

> "State aircraft are the aircraft employed in the service of a contracting State and placed under the orders of a duly commissioned official of that State."

(1) military aircraft are State aircraft in military service (including naval service) when they are under the order of a commander in uniform and carry a certificate proving their military character;

(2) State civil aircraft are state aircraft employed exclusively in the service of the State, for instance, that of the department of police, public safety, public health, custom, forestry or postal service; and

(3) State commercial aircraft are state aircraft employed in the commercial service of the State, including State undertakings for carriage of passengers and goods.

The British definition of military aircraft is substantially similar to the German proposal.

The American draft convention submitted to the Aeroneutical Commission of the Peace Conference, provides:[316]

The following will be, considered as state owned aircraft:

(a) military aircraft

(b) aircraft used for State service other than military such as custom, postal, and police services.

(c) all other aircraft which are property of the State.

All other aircraft are considered as private aircraft.

But as finally embodied in the Paris Convention of 1919,[317] State aircraft is confined to military aircraft and aircraft exclusively employed in State service, such as posts, customs and police. Every other aircraft shall be deemed to be a private aircraft. Every aircraft commanded by a

person in military service detailed for the purpose shall be deemed to be military aircraft.

All aircraft other than military, customs and police are treated as private aircraft.

While the different delegations and publicists could not agree on the classification of State aircraft, nevertheless they seem to have reached an agreement in the definition of a military aircraft.

Dr. Warner, President of the Council of the International Civil Aviation Organization, suggested this definition of State aircraft:[318]

> "Aircraft owned or leased by, or operated by personnel permanently or temporarily in the direct employed of the State and engaged in the performance of services for the State under orders of competent authority."

Lastly we have the definition of a State aircraft in the Chicago Convention of 1944 which provides:[319]

> "that state aircraft are aircraft used in military, customs and police services."

Another point to be resolved before proceeding to our main topic, is whether we should provide one rule for military aircraft and another for other state aircraft. A separate rule for military aircraft will in a way simplify our problem, inasmuch, as there are practices of states that deals with armed forces which are not applicable to non-military organization of the State. On the other hand, deviating from the above definition of the Chicago Convention of 1944 may result to unnecessary confusion.

Obviously, it would be better to hold fast to the definition embodied in the Chicago Convention of 1944, as this would be in harmony with the rules for civil aircraft which was grounded on the afore-mentioned convention. Besides, the tendency of modern warfare is to embrance more people and properties of the State within the orbit of war operations. So it is safe to assume, that what would formerly be regarded as non-military aircraft of the State may now be regarded as military aircraft.

While the various delegations and publicists disagreed on the definition and classification of State aircraft, nevertheless they agreed that military aircraft of a contracting State can only fly across or land in another State if there is previous authorization. It is also agreed that such flight is subject to regulation by the State flown over. Such previous authorization to fly over or land in the territory of another State may be dispensed with only in case of distress.

This rule proposed hereunder are applicable to state aircraft only in time of peace. No attempt is here made to discuss the rules for wartime.

How is the nationality of State aircraft determined? State aircraft is not covered by the registration provision of the much-cited Chicago Convention of 1944. However, the American Branch of International Law Association in its progress report at the Copenhagen Conference of 1950, observed: 320

"that State aircraft have the nationality of the State whose flag or nationality mark they carry."

ANALYSIS OF NATIONAL LEGISLATIONS AND PROPOSALS RECOMMENDED BY INTERNATIONAL LAW SOCIETIES AND LEARNED WRITERS

NATIONAL LEGISLATION

The Air Code of Brazil, 8 June 1938, provides that military aircraft, wherever they may be are deemed to be territory of the State whose nationality they possess. This law supports the view that a military aircraft is an extention of the territory of the flag-State. In effect this law grants a qualified extraterritoriality. For even if an aircraft is deemed to be a foreign territory, an act done on board such aircraft is deemed to have been committed in Brazil if it produces in Brazilian territory effects liable to give rise to penal proceedings or causes any damage in that territory.[321] In other words, foreign military aircraft in Brazil are given the privileges of extraterritoriality in so far as no act committed on board produces effect in Brazilian territory.

On the other hand, if an act done on a Brazilian military aircraft produces effect in foreign territory the laws of both countries would be applicable.[322] In other words there will be concurrent jurisdiction by Brazil and the foreign State concerned.

In this code Brazil adheres to the principles of extraterritoriality qualifiedly. What it claims for its military aircraft it also choose to grant foreign military aircraft, as may be gleaned from the provisions that military aircraft wherever they may be are deemed to be territory of the State whose nationality they possess.[323] The statement here is general and not limited to Brazilian military aircraft.

The Syrian penal code of 22 June 1949, in its article 17 (c), considers Syrians aircraft as a Syrian territory to which its penal code is ap-[324]

plicable. No distinction is made between civil and military aircraft, so it is safe to assume that Syria claims jurisdiction over crimes committed on board its military aircraft. If other State also claims jurisdiction on the ground that the crime was committed while the Syrian aircraft is flying in its territory then jurisdiction will be concurrent.[325]

Italian aircraft in a place or in airspace not subject to the sovereignty of any State shall be considered as an Italian territory. So Italy like most States claims jurisdiction over its aircraft in the high seas or territory not subject to the sovereignty of any State, whether the aircraft is civil or military.[326]

The Penal Code of 17 August 1950 considered Greek aircraft as part[327] of the territory of the State wherever they maybe, except when they are subject to the law of a foreign country in accordance with internationall law. Greece like Italy claims jurisdiction over both its civil and military aircraft wherever they maybe, except when in accordance with international law it is subject to the law of a foreign country. In our discussion of legal status of the air space we came to the conclusion that the airspace is subject to the jurisdiction of the underlying State, and that it includes airspace over the territorial waters. We also stated that even in the absence of the declaration in the Chicago Convention proclaiming sovereignty of a State over its airspace, a State has in fact exercised and is entitled to sovereignty over its airspace. The net effect of this conclusion on the above quoted provision of Greek penal code is to limit jurisdiction of Greece over its aircraft on or above the high seas or territory not subject to the sovereignty of any State. In short, it is similar to the preceding Italian claim.

PROPOSALS RECOMMENDED BY INTERNATIONAL LAW SOCIETIES AND LEARNED WRITERS

Frauchille in his 1911 draft convention proposed that public aerostats in a foreign country have a right to privileges of extraterritoriality.[328]

The Imperial German Government proposed a qualified form of extraterritoriality to military aircraft. They admit that the aerostat of one State, possesses in principle the privilege of extraterritoriality. However, the host State may apply upon the aerostat of the visiting State measures that may be required by its security, sanitary reasons or to protect its persons and property from imminent danger.

The German also proposed that the crew of a military aerostat is considered extraterritorial so long as it consist of military agents wearing the uniform and acting within the scope of their duties. But the crew is allowed to alight only if previously authorized by the ground State, except in case of necessity.[329]

The International Convention in regard to aircraft held in Paris in 1910,[330] provides for extraterritoriality of the military aircraft when the sojourn of the aircraft is legitimate. The crew are also granted the privileges of extraterritoriality so long as they wear uniform and do not cease to form a distinct unit or carrying out their duties. Like the German proposals this convention also empowered the ground State to apply measures necessary for the safety of the State, for sanitary regulation and for protection of life and property from imminent danger.

On the other hand the Sub-Committee of the Committee of Imperial Defense (British) proposed that when the stay of military aircraft is legi-

timate such aircraft will enjoy the same privileges as are accorded by international usage and courtesy to warship.[331] The same privileges will also be awarded to members of the crew wearing uniform so long as they do not cease to be a unit or are carrying out their duties. This rule assimilates military aircraft to warship by granting the same privileges to military aircraft and its crew to that granted to warships and its crews.

The British view also grants to military aircraft and its crews the privileges granted to warships and its crews, whenever such aircraft is duly authorized to fly or land in the territory visited.[332] The crews are entitled to extraterritorial privileges if they wear uniform and they form a distinct unit or carrying out their duties. The British proposals also grant to State civil aircraft (employed exclusively by the State for health, police and postal services) extraterritorial privileges. But such privileges are withheld from State commercial aircraft. The obvious reason is to deny State commercial aircraft advantages that it will have over private commercial aircraft. This question also arose in case of state vessel use for commercial purposes and they came out with a solution denying state owned vessel operated for commercial purposes the privileges of exemption from local jurisdiction.

As finally embodied in the Paris Convention of 1919[333] extraterritorial privileges customarily granted to warship is also granted to military aircraft provided the flight or landing is authorized by the State visited. Extraterritorial privileges are, however, denied to police and customs aircraft. It further provides that every aircraft commanded by a person in military service detailed for the purpose is

deemed to be a military aircraft.

(3) CRIMINAL JURISDICTION

A. OVER CRIMES COMMITTED ON BOARD AN AIRCRAFT ON OR ABOVE THE HIGH SEAS OR TERRITORY NOT SUBJECT TO THE SOVEREIGNTY OF ANY STATE

The position of State aircraft on or above the high seas or territory not subject to the sovereignty of any State is that of complete exterritoriality in the sense in which the fiction of exterritoriality must be understood, namely, that the State aircraft is not subject to the jurisdiction of any State other than her own. In other words, crimes committed on board a State aircraft on or above the high seas or territory not subject to the sovereignty of any State, is subject to exclusive jurisdiction of the flag State. In this situation no concurrent jurisdiction can be envisioned similar to the case cited in civil aircraft, wherein a crime committed on board an aircraft produced effect on another aircraft bearing another flag due to collision. If the occurrence just cited happens on a State aircraft, the person committing the crime would be under the exclusive jurisdiction of his flag State, since such member of the crew also enjoy the privileges of the exterritoriality. Neither sovereign would choose to exercise jurisdiction over the aircraft of another.

Thus, a State aircraft on or above the high seas or territory not subject to the sovereignty of any State, is for purposes of jurisdiction considered an extention of the territory of the flag State.

This position is supported by the legal status of the high seas and stateless territory, since both are not subject to the jurisdiction of any State every State is entitled to extend its protection and jurisdiction over its aircraft on or above the high seas or stateless territory.

It is an accepted principle of international law that a State could claim jurisdiction over persons and things outside of its territorial boundary. This claim is usually based on nationality. Aircraft possesses the nationality of the State in which it is registered. Therefore, a State could legally claim jurisdiction over crimes committed on board its aircraft on or above the high seas or territory not subject to the sovereignty of any State.

This position is also supported by national legislations and by proposals made at international Congresses wherein its was recommended that aircraft above the high seas or a territory not under the sovereignty of any State is submitted to the legislation and jurisdiction of the country of which it has the nationality.[335]

It is further supported by analogy to warships. Warships on the high seas are regarded as completely exterritorial, that is, it is subject only to the jurisdiction of the flag State.[336] As Hall States "warships represents the sovereignty and independence of their State more fully than anything else can represent it on the ocean; they can only be met by their equals there, and equals cannot exercise jurisdiction over equals. The jurisdiction of their own State over them is therefore exclusive under all circumstances and act of interference with them on the part of a foreign State is an act of war."

It must also be remembered that State aircraft be they military or

not would in most cases carry only members of its crew. It would indeed be rare, that it would carry non-member of the crew. So it is rather safe to assume that crime committed on board a State aircraft would be committed by one member of the crew against another. We have seen beforehand, that even in a merchant vessel in port when an offense is committed by one member of crew against another which does not distrub the tranquility of the port it is customary to let the flag State assume jurisdiction. So with more reason should jurisdiction be given to the flag State when a crime is committed on board such aircraft on the high seas or territory not subject to the jurisdiction of any State.

In rare cases in which the crime committed caused the State aircraft of one State to collide with a State aircraft belonging to another State, it is best to leave jurisdiction to respective flag States. Equals cannot exercise jurisdiction over equals. So a sovereign cannot exercise jurisdiction over property of another sovereign.

In conclusion we might say that the jurisdiction of the flag State over crimes committed on board State aircraft on or above the high seas or territory not subject to the sovereignty of any State is complete and exclusive.

B. OVER CRIMES COMMITTED ON BOARD A STATE AIRCRAFT IN FLIGHT OVER THE TERRITORY OF A FOREIGN STATE

The various proposals we have studied agree that a State aircraft can only enter, pass through, and land in the territory of another State by previous authorization. That their entry, flight and landing in a foreign State is subject to the regulations and conditions imposed

by the State visited. But once admitted, a military aircraft, is entitled to the privileges of extraterritoriality or as worded in other proposals "to the privileges which are customarily accorded to foreign warships.[337]

Other proposals permit landing without previous authorization in case of necessity. If a military aircraft landed in distress, such aircraft shall enjoy the privilege of extraterritoriality.

The various proposals also grant the members of the crew the privileges of extraterritoriality provided they do not cease to form distinct unit or are carrying out their duties. A military aircraft which is forced to land or which is requested or summon to land is not entitled to the privileges of extraterritoriality.[338]

The British proposals would grant extraterritoriality to military and State civil aircraft. The latter consist of aircraft used in police custom, and postal services.[339] It is not applicable to State commercial aircraft use for carriage of cargo or passengers.

The Paris Convention of 1919 on the other hand, deny to police and custom aircraft privilege of extraterritoriality.[340]

So from the above discussion it can be easily seen that while there is a definite rule as to military aircraft there is however, disagreement as to State non-military aircraft.

In fact according to Hyde "the tendency of the conventional law in relation to the matter appears to concede narrow exemptions from jurisdiction to foreign State aircraft as such, and by implication to confine immunities to military aircraft when authorized to fly over[341]

and land upon the territory of the State concerned." So in the final analysis our dilemma is to decide whether to embrace within the confines of military aircraft other State aircraft such as those use for customs and police purposes. Shall we adopt for the latter the rules for military aircraft? Or shall we formulate a new rule for aircraft used for custom and police purposes?

From the practical point of view it can be easily seen that the previous authorizations of the State to be cross over or landed on would be required. Without such authorization such flight or landing on a foreign territory cannot be countenanced. Since the flight of such State aircraft would be very few and would consequently be subject to the regulations of the State visited, I think it would be better to assimilate other State aircraft to State military aircraft, and thus, the rules for State military aircraft should be made applicable to them in toto. This would harmonize with the Chicago Convention of 1944, and thus prevent unnecessary confusion by simplifying the solution to the problem.

Besides, the reasons for granting extraterritoriality to State military aircraft also exist in case of other State aircraft. The reasons for granting extraterritoriality to State military aircraft is that it is a property of the sovereign use for governmental purposes and that to exercise jurisdiction over it is like exercising jurisdiction over another sovereign. Such state of affairs cannot be countenanced in the present state of international law. Equals cannot exercise jurisdiction over equals. In addition, for damage it may caused the State act as guarantor and hold itself responsible for such acts.

In addition as we have shown before those on board a State aircraft would be members of its crews. State aircraft, unlike commercial airlines are not for hire; and when they leave their State it would in most cases be charged with a mission for such State. It might be sent to another State on a good will mission or just to impress a neighboring State with its strength. But whatever the mission may be it is of importance to the sovereign that it is always under its control. So the best rule is to exempt it from local jurisdiction. A State visited could readily accede to it inasmuch as crimes committed on board such aircraft in flight would in all probability be one committed by crew member against another. Besides if act done on board an aircraft causes damage to the land below, the flag State is bound to make amend for such damage.

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The Paris Convention of 1919 is strong for the view that in no case shall State aircraft used exclusively for police, custom and post services be entitled to the privileges of extraterritoriality.

The British on the other hand supported the view that all State aircraft, excluding those employed for commercial service are entitled to privileges of extraterritoriality or those granted by international usage to ships of war.

The British expose is in line with the rules applicable to public vessels used for commercial pursuits. As shown in our study of jurisdiction over other public vessels, those public vessels operated for commercial purposes are subject to the same rules of liability and to

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the same obligations as those applicable to private vessels. This is

due to the soundness of the theory that when a sovereign enters into business, he submits himself to the conditions thereof. To grant immunity to public vessels engage in commercial operation while at the same time such privileges is denied to private vessel is tantamount to giving the former undue advantages. As observed by Lord Phillimore in the Charkish:[344]

> No principle of international law and no decided case and no dictum of Jurist of which I am aware has gone so far as to authorize a sovereign prince to assume the character of a trader when it is for his benefit; and when he incurs an obligation to a private subject, to throw off, if I may so speak, his disguise and appears as a sovereign, claiming for his own benefit and to the injury of a private person for the first time, all the attributes of his character.

In the same view, therefore, State aircraft operated for commercial purposes should be subject to the rules applicable to civil aircraft. Under this reasoning the military Air Transport Service of the U.S. Army which are engaged in transporting military personnels and cargoes would have the same status and privileges as a military aircraft. But under the definition of State aircraft in the Chicago Convention of 1944,[345] which we adopted for this paper, it is not possible to have such aircraft devoted to commercial pursuits. Nevertheless, we delve on it to show that only State aircraft devoted to military, customs and police services as defined in said convention are entitled to immunity from local jurisdiction. If they are ever used

for transporting cargoes or passengers like commercial airlines, they should be denied the immunity which attached to their status.

While this should be the rules for short stay, a sojourn for a longer period should be the subject of agreement between the receiving and sending States. This seems to be the modern tendency as witnessed by numerous international agreements entered into by the United States with respect to countries in which they have established military, naval and air bases.

Needless to say, a State aircraft entering on or above the territory of another State should comply with laws and regulations of the State visited regarding air navigation.

In resume the rules for State aircraft should be this:

> When a State aircraft is authorized to enter, fly over and land into the territory of another, it should be granted the privileges of extraterritoriality.

All crimes committed on board the aircraft should be subject to the exclusive jurisdiction of the State whose flag the aircraft flies.

C. CRIMES COMMITTED ON BOARD A STATE AIRCRAFT ON THE GROUND OF A FOREIGN STATE

An aircraft in the ground of a foreign State is comparable to a warship in the territorial sea or port of a foreign State. The only difference is that a warship under the rule suggested by the International Law Commission would have a right of innocent passage into the territorial sea, no such right is granted to State aircraft over the

territory of another. The presence of the aircraft in such State, can only be gained by previous authorization.

The commander of a warship in a foreign port or waters retains complete jurisdiction over the ship and crew. The commander of a military aircraft on the ground of a foreign State should also retain complete jurisdiction over the aircraft and the crew. In the same breadth a crime committed on board a warship is subject to the jurisdiction of its commander; so also a crime committed on board a military aircraft should be subject to the jurisdiction of its commander. The only exception mentioned by Higgins and Colombos is a crime committed on board the warship by a national of the territorial State against a fellow-subject.[347] In such a case, it would be the duty of the commander to surrender the offender to the local authorities. A similar duty should devolve on a commander of military aircraft in case of similar crimes occurring on board his aircraft. As we have alluded to in our preliminary statements on State aircraft, similar rules should also be provided for State aircraft which are non-military.

The members of the crew of an aircraft on the ground of a foreign State should be given the same privileges as members of the crew of warships ashore.[348] According to Higgins and Colombos: "The position of officers and crew when ashore is not quite free from doubt. The practice generally followed is to apply the principle of extraterritoriality to them when they are on land in uniform and in an official capacity connected with the service of their ship."

On the other hand the various proposals made with regard to the members of the crew of an aircraft on the ground of a foreign State

also grants the priviliges of extraterritoriality, provided, they do not cease as distinct unit and are carrying out their duties.

A rule, therefore, granting extraterritorial priviliges to the members of the crew of an aircraft passing or staying for a short period in a foreign State would be in consonant with the practices of States with regard to the members of the crew of warship ashore. A State could readily agree to granting members of the crew of aircraft the same priviliges as that granted to crews of warship since the members of the crew of aircraft would be fewer and their stay would be of shorter duration.

So the rule for crews of State aircraft on the ground of a foreign State should be this:

They are entitled to the privileges of extraterritoriality provided, they are on land in uniform and in an official capacity connected with the service of their aircraft; or

They are entitled to the priviliges customarily granted to the crews of warships ashore.

(4) CIVIL JURISDICTION

A. ACTS AND OCCURRENCES ON BOARD AN AIRCRAFT ON OR ABOVE THE HIGH SEAS OR TERRITORY NOT SUBJECT TO THE SOVEREIGNTY OF ANY STATE

The position of a State aircraft on or above the high seas or territory not subject to the sovereignty of any State as we have afore-stated is one of complete exterritoriality. So acts and occurrences on board such aircraft would be subject to the jurisdiction of the flag State. Besides, acts and occurrences on board State aircraft would only affect

the relationship of members of the crew; which as we have explained before should better be governed by the flag State. It would be indeed extremely rare cases in which it would carry non-member of the crew; rarer still is its chance to carry non-national; nevertheless, persons who were accomodated as passenger of State aircraft should be considered as having consented to be subject to the laws of the flag State during the voyage.

So in the rare cases that torts were committed, marriage was solemized, birth and death occurred and a will was executed on board an aircraft in flight on the high seas or territory not subject to the sovereignty of any State, the afore-mentioned acts and occurrences are subject to the exclusive civil jurisdiction of the flag State.

Again in rare cases where a tortious act caused the aircraft to collide with another aircraft, jurisdiction should also be given the respective flag States. No other rule could be countenanced, inasmuch as State aircraft on or above the high seas as we have adverted to earlier is completely exterritorial, and therefore, is subject to the exclusive jurisdiction of its flag State. The system of concurrent jurisdiction envisioned in the Lotus case for merchant vessels is not applicable to war vessels, and consequently would also not apply by analogy to State aircraft.

B. OVER ACTS AND OCCURRENCES ON BOARD AN AIRCRAFT IN FLIGHT IN A FOREIGN TERRITORY.

The rule here again, like in criminal jurisdiction, is to grant jurisdiction to the flag State. Our study has shown that based on State legislations

and international agreements a State would more readily accede to giving up civil jurisdiction than criminal jurisdiction. So if the rule for criminal jurisdiction, is that, a State aircraft is exterritorial when in flight over foreign territory, such rule would be more easily acceded to by States when applied to civil jurisdiction. As we have alluded earlier, since persons on board a State aircraft are members of the crew it is not of any concerned to the subjacent State. It would only be the concerned of the ground State when such acts and occurrences on board such aircraft, produces effects on the ground, in which event the sovereign to whom the aircraft belong is bound to make good the damage.

So the rule for State aircraft in flight above the territory of a foreign State, which could only be done with the previous authorization of the State flown over; whether the flight is for the purposes of crossing the territory or for landing, is this: that such aircraft enjoy the privileges of exterritoriality. The same rule should be applicable to State aircraft force to fly in the territory of another in distress. All acts and occurrences on board such aircraft in flight would then be subject exclusively to the jurisdiction of the flag State. The reasons for these are the following:

That a State military aircraft wherever it may be should always be under the control of its sovereign whose safety might greatly depend on retaining the exclusive control of this force; 350

That other State aircraft are property of the sovereign and to subject them to the jurisdiction of local court would implead the sovereign;

That in both cases, the sovereign who owns the aircraft is bound to make good any damage than might be caused by his aircraft.

Torts committed on board such State aircraft in flight, marriage solemnized, birth and death occurring and wills executed would only involved the members of the crews. So in the final analysis it would not be of any concerned to any State flown over. In case such acts and occurrences produce effects outside, then the sovereign whose flag the aircraft flies is bound to make reparation for the damages. This is usually settled through diplomatic channel.

The German draft proposal[351] provides that military aerostats possess in principle privileges of exterritoriality when above the territory of another State. But the State flown over has a right to apply measures required in the interest of it's security and sanitary interest.

The draft convention[352] drafted by International Convention in regard to Aerial Navigation held at Paris in 1910 grants the privilege of extraterritoriality so long as flight is legitimate. The Committee of Imperial Defense[353] on the other hand, concedes to military aircraft the privileges accorded by international usage and courtesy to foreign warships. The latest convention on the subject,[354] provides for enjoyment in principle in the absence of special stipulation the privileges which are customarily accorded to foreign warships.

Lastly, in so far as civil jurisdiction on board State aircraft in flight over a foreign territory is concerned, it is granted to the flag State exclusively. This rule is back-up by the different draft proposals submitted by the various States at the Paris Convention of

1919.[355] And the Paris Convention of 1919 as finally drafted concedes to military aircraft the privileges customarily granted to warships. As to other State aircraft, such as those used for custom and police services, the same rule should be formulated. While it would not be back by exactly similar reasons, nevertheless as the visit of such aircraft would be extremely rare and subject to previous authorization of the State visited a State could easily concede privileges similar to military aircraft.

C. OVER ACTS AND OCCURRENCES ON BOARD A STATE AIRCRAFT ON THE GROUND OF A FOREIGN STATE

Our task here again would be simplified if we would discuss first State military aircraft as distinguish from State aircraft used in custom and police services. For it cannot be denied, that a study was already made about military aircraft which was formalized in the Paris Convention of 1919.[359]

There is an agreement among States that military aircraft can only enter, fly over and land in the territory of another State on previous authorization of the State visited. There is also an agreement that while such an aircraft is within such territory it is bound to obey the laws and regulations concerning navigation of the State visited. And there is a further agreement among the various delegations that attended the Paris Convention of 1919,[337] that a military aircraft legitimately on the ground of a foreign State enjoy in the absence of stipulation the privileges customarily accorded to foreign warships. In our study of legal regime of warships, we have seen that a warship in

the territorial waters or port of another State is completely exterritorial. So much so that acts and occurrences on board such warship are subject to the jurisdiction of its commander. In the final analysis under the Paris Convention of 1919, a military aircraft legitimately on the ground of a foreign State enjoy the privileges of exterritoriality. This of course included exemption from local jurisdiction.

Therefore, torts committed, marriage solemnize, birth and death occurring, contract and will executed on board such aircraft so situated would be exclusively subject to the jurisdiction of the flag State. Since such acts and occurrences would in almost all cases affects only the relationships of members of its crew, the ground State could afford to be complacent about it.

The above-quoted rule for marriage in State military aircraft on the ground of a foreign State finds support by analogy in Dicey.[358] Dicey says that a marriage performed on board a foreign warship in port is valid if valid by the laws of the flag,[359] or in other words the ship is the locus celebrationis. The United States took the same view with regard to a marriage solemnized in American Warships in Brazilian waters.[360]

With regard to birth our rule finds support in the French Law. According to French law a person is deemed born in France if the birth occurs on a French warship or a postal vessel in a foreign port or other territorial waters.[361]

Now the question is: Would such rule be also applicable to other

State aircraft, such as those used for custom and police services?

As adverted earlier in our preliminary statement to State aircraft, it would be better to have the same rule as this will serve the cause of harmony. Besides, in the same breadth that other public vessels (as distinquished from warships) are exempt from jurisdiction of littoral States visited so also other States aircraft (as distinguished from military aircraft). The reason for exempting other public vessels is that it is a vessel of the sovereign, devoted to public or governmental services. State aircraft used for police and custom services are also devoted to public or governmental services, so it should also be exempted from jurisdiction of the State visited. The latest tendency as exemplified by the International Law Commission[362] is to grant immunity from jurisdiction to government owned vessels not devoted to commercial purposes. So State aircraft not devoted to commercial purposes, should be exempted from jurisdiction of the State visited.

CONCLUSION

The rule for State aircraft is different from civil aircraft. This is due to sovereignty as conceived and exploited by the members of "Family of Nations." Sovereignty as possessed by one State, requires her also to respect sovereignty as possessed by others. A civil aircraft entering another is assimilated into that State, and therefore, is subject to its jurisdiction. A State aircraft entering another State is deemed by fiction to be a floating portion of its

territory, so it is still subject to the jurisdiction of the State whose flag it flies.

In State aircraft concurrent jurisdiction as applied or proposed to be applied to civil aircraft could not be countenanced.[363] It is always regarded as under the exclusive jurisdiction of the flag she carries. A sovereign State would not tolerate concurrent jurisdiction with regard to State aircraft devoted to public services. The only State-owned aircraft that may be subjected to jurisdiction of other States are those devoted to commercial pursuits. At least that is the tendency, as shown by the report of International Law Commission on government-owned vessels. So by analogy it should be applied to State owned aircraft. In so far as State aircraft as defined in the Chicago convention of 1944,[364] is concerned, the rule would be this: That it is subject exclusively to the jurisdiction of the flag State.

Our study has shown that the rule for State aircraft, whether for criminal or civil jurisdiction, whether the aircraft be on or above the high seas and territory not subject to the jurisdiction of any State on or above the territory of a foreign State is this: That it is subject to the exclusive jurisdiction of the flag State.

This rule are supported by national legislations, proposals of various States and by the Paris Convention of 1919, in so far as State military aircraft is concerned. This is further supported by the present state of international law which barred the impleading of a sovereign in its court.

This is also supported by Chief Justice Marshall in the often-cited Schooner[365] case. While it is true that aircraft was not specifically mentioned, there being no aircraft at the time the decision was promulgated, yet the reasons for applying it to foreign troops and warships are also applicable to military aircraft.

We have also extended the rules applicable to military aircraft to other State aircraft as this is justified by the fact that they are also used for public services and therefore are entitled to the same privileges.

From our study, we can conclude that the best rules for State aircraft are these:

(1) That a State aircraft on or above the high seas or territory not subject to the sovereignty of any State is subject to the exclusive jurisdiction of the State whose flag it flies;

(2) If the State aircraft is just passing through or landing for short stay in a foreign State, they should be granted the privilege of exterritoriality provided such entry or passing or landing is legitimate. The entry, passing or landing is legitimate when made with previous authorization or when made in distress. The crew in such a case should also be granted exterritoriality when they are on land in uniform and in official capacity connected with the service of their aircraft.

(3) If the State aircraft is to be stationed in the receiving State for quite a time, it would be better, that the question of jurisdiction be traced out and embodied in an international agreements. Our study has shown that it is much easier for stronger

power to wheedle exemption during war time. Further, it has also shown that in peace time there are agreements that grants complete exterritoriality, some would grant only immunity with respect to certain offenses, and under certain circumstances and limited to certain places; and there are those which would grant immunity from civil jurisdiction only.

FOOTNOTES

1. To mention a few we have the International Law Association, the Harvard Research in International Law, Fauchille, Hall, Richards, etc.
2. Convention on International Civil Aviation, Chicago, December 7, 1944.
3. Ibid, Article 3(b).
4. See LC/Working Draft #397, 22/5/53, ICAO, Legal Committe, 9th Session (Rio de Janeiro).
5. 66 members as of July 13, 1955, See the Evening News (Philippines), June 22, 1955 p. 24.

6 & 7. Chicago Convention of 1944, op. cit., Article 80.

8. Dr. Warner, President of the ICAO Security Council in referring to the Ibero American Convention, observes: "and now appears as of purely and academic and historical interest..."
9. 89 F. Supp. 298.
10. Rand Mcnally, World Guide, 1953, p. 1.
11. Hammond's Complete World Atlas, See Dimensions of the Earth p. 11.
12. Moore, Digest of International Law, Vol. II, Sec. 195, p. 4.
13. Some authors refer to it as territorial waters, but the International Law Commission prefers to call it "territorial sea."
14. Hyde, International Law, Chiefly as Interpreted and Applied by the United States, p. 751, Sec. 327, 2nd revised ed., 1945.
15. Oppenheim, International Law. A Treatise Edited by E. Lauterpacht, Vol. I, 7th ed., London, 1948 p. 538.
16. L. 13, par. D, viii 4: Mare quod natura omnibus patet.
17. L. 3. D. x/iii: Maris Communem usum omnibus hominibus at aeris.
18. Walker, History, i, p. 163.

19. Oppenheim, op. cit., p. 534.

20. Refers to the discussion of freedom of the sea by learned writers.

21. Oppenheim, op. cit., pp. 540-41.

22. Ibid, p. 541.

23. Ibid, pp. 541-42.

24. See Grotius, ii C. 2, Sec. 3; cited by Oppenheim, op. cit., at p. 544.

25. Volstead Act of 1919; See higgins and Colombos on International Law of the Sea, 2nd revised ed., by C. John Colombos, London, 1950, p. 91.

26. Higgins and Colombos, op. cit., p. 87.

27. Report of the International Law Commission covering the work of its 5th session, 1 June-14 August 1953 Supplement No. 9 (A/2456), N.Y., 1953, paragraph No. 105, p. 19.

28. Percy Thomas Fenn Jr., Origin of the Theory of Territorial Waters, 20 A.J.I.L., p. 465.

29. Hackworth, Digest of International Law, Vol. II, 1941, Sec. 112, p. 1.

30. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, New York, 1927, p. 63.

31. See Higgins and Colombos, op. cit., p. 93; refers to a Russian Law of December 10/23, 1910.

32. Report of the International Law Commission, 6th session, June 3-July 28, 1954. Regime of the Territorial Sea, Article 3, See 49 A.J.I.L., No. 1, Official Documents, p. 27.

33. Jessup, op. cit., p. 64.

34. Hall, A treatise on International Law, 8th ed., by A. Pearce Higgins (Oxford 1924), p. 307.

35. Proceedings, North Atlantic Fisheries Arbitration, p. 2006; cited by Jessup, op. cit., p. 120.

36. Report of the International Law Commission, Regime of Territorial Sea, 49 A.J.I.L., No. 1, Article 1, par. 2, p. 26.

37. Ibid, Article 18, p. 37.

38. Ibid, Article 26, par. 2, p. 42.

39. Ibid, Article 26, par. 3, p. 42.

40. Ibid, Article 27, par. 2, p. 43.

41. Ibid, Article 23, p. 39.

42. Ibid, Article 24, par. 1, p. 41.

43. Mcnair, The Law of the Air, 2nd edition by Kerr and MacCrindle, London, 1953, p. 31.

44. For an interesting discussion of the "Second Battle of Books", see Air Freedom. The Second Battle of Books by Joseph English, Revised Aeronutique Internationale, Numero 7, Mars- 1933.

45 & 46. Lycklama A. Nijeholt, Air Sovereignty, pp. 11-14, 1910.

47. Mcnair, op. cit., pp. 6-7.

48. International Convention for Air Navigation, Paris, October 13, 1919, See Journal of Air Law Vol. 3, 1932.

49. Ibero American Convention on Air Navigation, October, 1927, Madrid.

50. Pan American Convention on Commercial Aviation, Havana, Feb. 20, 1928.

51 & 52. Chicago Convention of 1944, op. cit., Articles 1 and 2.

53. Prof. J. C. Cooper, United Nations Trusteeship, p. 13.

54. Rome Convention, 7 October 1952, Article 30, par. 3.

55. Harvard Research in International Law, op. cit., Art. 1(d) 29 A.J.I.L. Supp. Part I, p. 67.

57. Prof. J. C. Cooper, Airspace Rights Over the Artic, Air Affiars, Vol. III, 1950, p. 517.

58. Convention with respect to the International Circulation of Motor Vehicles, Paris, October 11, 1909, in U.S. Dept. of State Treaty Information Bulletin No. 13, October 31, 1930, pp. 25-36.

59. Op. cit., Art. 4.

60. Cited by Prof. J. C. Cooper in his "A Study on The Legal Status of Aircraft", 1949, p. 8.

61. Ibid, p. 8.

62. Prof. Jose M. Aruego, International Law Reviewer, 1955, (Manila), p. 89.

63. Gilbert Charles Gidel Le Droit International Public de la mer, Chateauroux, Les Establissemente Mellothe 1932-34, Vol. 1 (1932) p. 72.

64. Proposed Code of Commerce for the Philippines, See Report on the Proposed Code of Commerce of the Philippines by the Code Commission, Dept. of Justice, Republic of the Philippines, January 11, 1954, Manila.

65. Charles Cheney Hyde, International Law, 2nd rev. ed., 1945 vol. 1, Sec. 243A, p. 809.

66. Prof. J. C. Cooper, The Legal Status of Aircraft, op. cit., p. 3.

67. Ibid, pp. 5 - 6.

68. Ibid, p. 9.

69. Dr. J. M. Spaight, Aircraft in Peace and the Law, p. 17.

70. Sir Arnold Mcnair, The Law of the Air, 1932 p. 91.

71. International Recognition of Rights in Aircraft, See Treaties and other International Acts series 2847 Dept. of State, Publication 5288.

72. Ibid, pp. 7-8.

73. Ibid, Articles 4(a) and (b), p. 7.

74. Prof. J. C. Cooper, Legal Status of Aircraft, op. cit., p. 40-41.

75. LC/Working Draft, #236 18/12/50, ICAO, Legal Committee 7th session, p. 1.

76. Havana Convention of 1919 op. cit., art. 1.

77. Chicago Convention of 1944, op. cit., art. 1.

78. See Journal of Air Law, Vol. 3, (1932), p. 52.

79. Chicago Convention of 1944, op. cit.

80, Ibid, Art. 77.

81. Ibid, Art. 77.

82. Ibid, Art. 12.

83. Ibid, Art. 2.

84. Ibid, Art. 17.

85. Harvard Research in International Law, Draft Convention on Jurisdiction with respect to Crime, Articles 3 & 4, 29 A.J.I.L. Supp. part 1, p. 445.

86. Moore, Digest of International Law, Vol. II, Sec. 202, pp. 243-244.

87. Report on Criminal Competence of States in respect of Offenses Committed Outside their Territories by Committee of Experts for Progressive Codification of International Law, 20 A.J.I.L. Supp.

88. Dr. Kaminga, The Aircraft Commander in Commercial Air Transportation, the Hague, 1953, pp. 32-33.

89. ICAO, LC/Working Draft #397, op. cit., p. 10, No. 4.

90. Fixel, The Law of Aviation, 3rd ed., 1948, p. 2, sec. 1.

91. J. H. Beale, The Jurisdiction of a Sovereign State, Harvard Law Review, vol. XXXVI, No. 3, p. 240.

92. State v Moyers 155 La. 678.

93. For legislation of various States about aircraft, see United Nations Legislative Series, Vol. II, Laws and Regulations of the High Seas, United Nation, New York, 1952.

94. U.N. Leg. Series, op. cit., p. 24.

95. Ibid, p. 48.

96. Ibid, Article 10, p. 48.

97. Ibid, p. 81.

98. Ibid, p. 60.

99. The proposed Code of Commerce is analysed here because the old Code of Commerce had no provisions about aircraft. While this new code drafted by Philippine Code Committee took into consideration the various international air law conventions, op. cit., at No. 64, Art. 693.

100. Solicitor General Amborsio Padilla, Revised Penal Code (Philippines) 1949, Article 2, No. 1, p. 13.

101. Art. 185 of Honduran Act of 17th March 1950, See U.N. Legislation Series, op. cit., p. 60.

102. Art. 47 of Chile's Air Navigation Act of 1947, See U.N. Legislation Series, op. cit., p. 24.

103. & 104. Art. 10, 2nd paragraph of France's Air Navigation Act of 31st May, 1924, See U.N. Leg. Series, op. cit., p. 48.

105. Art. 186 of Honduran Aviation Law of 17th March 1930, op. cit.; and Art. 309, par. 2, of the act on General Means of Communications of 30th December 1949, of Mexico, U.N. Leg. Series, pp. 81, 60.

106. Other legislations analysed are those of Switzerland, Germany, Italy, Greece, etc., See also U.N. Legislative Series, op. cit.

107. Italy's Navigation Code, 30th March 1942, United Nations Legislative Series, Vol. 2, op. cit., p. 70.

108. Germany, Criminal Code, 15th May 1871, as revised on 6th May 1940, U.N. Legislative Series, op. cit., p. 50.

109. Greece, Penal Code, 17th August, 1930, Art. 3(2) Ibid p. 53.

110. Switzerland, Federal Air Navigation Act 21st December, 1948, Art. 97 (3), Ibid, p. 114.

111. See Colombia, Penal Code, Art. 253 Ibid, p. 27; Costa Rica, Penal Code Art. 314, Ibid, p. 28; Luxembourg, Art. 32, Ibid, p. 97.

112. Brazil, Penal Code, Art. 261(1), Ibid, p. 97.

113 & 114. Switzerland, Federal Air Navigation Act 21st December, 1948, Art. 89 (1) and (4), and art. 97(2), Ibid, p. 114.

115. Report of the 23rd conference of the International Law Association at Stockholm in 1924, pp. 117-118.

116. International Juridical Committee of Aviation, 9th Congress, Budapest, September 24 - October 3, 1930, Translation by Margaret Lambie, Journal of Air Law, Vol. 2, 1931, p. 48.

117. For a complete text of the Montevideo draft recommendation, see international Conferences of American States, First Supplement 1933-40, Carnegie Endowment for International Peace, p. 76.

118. Harvard Research in International Law, 29 American Journal of International Law, 1st Supp. Arts. 3 and 4, pp. 439-440.

119. ICAO, LC/Working Draft #397, 22/5/53, op. cit., p. 2.

120. Report of International Law Association, 1924, op. cit.

121. International Juridical Committee, op. cit.

122. Montevideo draft, op. cit., Recommendation No. 1.

123. Ibid, Recommendation No. 2.

124. Ibid, " " 3.

125. Ibid, " " 4.

126. Ibid, " " 3.

127. Ibid, " " 5.

128. Harvard Research draft, Op. cit.

129. ICAO, LC/Working Draft #397, 22/5/53 p. 2.

130. Ibid, p. 2.

131. Ibid, Article 2, p. 2.

132. Ibid, Art. 2, p. 2.

133. Ibid

134. Ibid, Art. 4, p. 2.

135. Ibid, Art. 5, p. 2.

136. Ibid, p. 1.

137. Dr. Alex Meyer (Switzerland), Ibid p. 11.

139. Ibid, p. 11.

139. Mr. Chaveau (France), Ibid, p. 3.

140. Ibid, "Annex A", p. 7.

141. Report of International Law Association, 1924, op. cit.

142. Harvard Research draft, op. cit.

143. ICAO, LC/Working Draft #397, Art. 2, p. 2.

144. Single State jurisdiction above the high seas or territory not subject to the sovereignty of any State as embodied in the International Law Association draft of 1924, and in the Montevideo draft of 1933, op. cit.

145. As embodied in Arts. 3 and 4 of the Harvard Research draft and art. 2 Professor Cooper's tentative draft convention, op. cit.

146. Alternate as provided in Art. 2, of the 1924 draft resolution of the International Law association, p. cit.

147. Article 3, of the Harvard Research draft, op. cit.

148. Article 2 of the International Law Association Resolution of 1924, op.cit.

149. Recommendation No. 3 of the Montevideo draft of 1933, op. cit.

150. Art. 2 of Prof. Cooper's tentative draft recommendation, p. cit.

151. See Montevideo draft resolution, recommendation No. 3, op. cit.

152. Ibid, Recommendation No. 3.

153. Ibid, Recommendation No. 3.

154. Other proposals studied are:

Fauchille's draft of 1902 and 1910, Cooper Appendixes I and II. International Code of the Air 1913, Cooper's Appendix V. Bustamante Code, cited at No. 157.

155. International Law Association draft resolution, 1924, Art. 2, op. cit.

156. Fauchille's draft of 1910, Cooper, Appendix I.

157. Bustamante Code, Op. cit., Article 30, International Legislation by Hudson, Vol. IV (1928-29) p. 2323.

158. Fauchille, draft Convention on the Legal Regime of Aerostat, 1902, Cooper's Appendix I pp. 1-9.

159. Even Fauchille, one of the most ardent advocate of flag State jurisdiction, made exceptions in favour of the subjacent State.

160. Fauchille's drafts and the International Law Association draft resolution of 1924 conferred jurisdiction to the flag State.

161. Harvard Research, op. cit.

162. Prof. Cooper's tentative draft convention, p. cit.

163. Montevideo draft, op. cit.

164. International Juridical Committe's recommendation, op. cit.

165. Report of International Law Association, 1924, op. cit.

166. ICAO, LC/Working Draft #397, op. cit., p. 1(ii)

167. Harvard Research Draft, op. cit., Article 1(b) p. 439.

168. Ibid, Art. 1(c), p. 439.

169. Chicago Convention of 1944, op. cit., Article 5, par. 1.

170. Ibid, Article 5 par. 2.

171. Ibid, Article 9(a).

172. Prof. J.C. Cooper, International Air Law, p. 9.

173. Ibid.

174. Harvard Research in International Law, op. cit. p. 515.

175. Publications, P.C.I.J., Series A, Judgment No. 9, p. 25.

176. United Nations Legislative Series, op. cit., p. 70.

177. Greece, Brazil, China, etc.

178. Civil Aviation Act of the United Kingdom, 1949.

179. Article 2 par. 1 of the Revised Penal Code of the Philippines, cited at No. 100.

180. De Visscher, 48 Receuil (1934) II, 335.

181. Philippine Aviation Annual, Vol. III, 1954, p. 30.

182. Chicago Convention of 1944, op. cit., Article 12.

183. People of the Philippines vs. Ang Cho Kio alias Ki Wa, etc. accused, Court of First Instance of Mountain Province, 2nd Judicial District, case No. 420, March 10, 1953.

184. If one is prepared to accept that aircraft on the high seas is a territory of the flag State, then this is an example of what John Basset Moore called subjective territorial jurisdiction.

185. This is an example of objective territorial jurisdiction.

186. Lotus Case, op. cit.

187. Briggs, The Law of Nations. Cases, Documents and Notes, 1946, p. 298.

188. Hudson, International Legislation, Vol. IV (1928-29), Articles 292, 293, p. 2322.

189 and 190. Fauchille's draft, International Law Association draft resolution of 1924, Prof. Cooper's tentative draft convention, Germany, Greece, Italy, etc., supported that position.

191. Chicago Convention of 1944, op. cit. Article 12.

192.2 United Nations Charter, Article 2(1)

193. As Jessup observes: "In all countries the court customarily decline jurisdiction when its interest are not affected..." See the Law of Territorial waters and Maritime Jurisdiction, op. cit., p. 192.

194. See Aviation Acts of Mexico and Honduras, op. cited, pp. 43 and 45 of this paper.

195. See Journal of Air Law, Vol. II No. 3, July 1931,p. 256.

196. For a Brief discussion of Atom bombs, gas, etc., see U.S. News and World Report, March 5, 1954 p. 54.

197. The Law of Territorial Waters and Maritime Jurisdiction, op. cit., p. 192, 2nd par.

198. [1887] 120 U.S. 1

199. Prof. J. C. Cooper's tentative draft convention, p. cit.

200. Ibid, "Annex A", p. 11.

201. Judge Evatt, 49 Commonwealth Law Report 1933, p. 239.

202. Italy, Greece, etc.

203. ICAO, LC/Working draft #236, p. 1.

204. Ibid.

205. Jessup, op. cit.

206. Shawcross & Beaumont on Air Law 2nd ed., pp 509 [555]

207. Definition by Convention on Damage caused to third parties on the surface (Rome, 1952) Art. 1 par. 2, last sentence.

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