Jurisdiction Over Events Aboard Aircraft

by

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A - Introduction

The main scope of this work and that I will deal with, is to present a thorough study of past and present decisions concerning the allocation of jurisdiction[1] over events aboard aircraft in international flight. In recommending policies for the future, I should determine the applicability of the factors affecting the general process of decision to the specific problem relating to the aircraft issue. In an active world of constant interaction, since the advent of the aircraft, there has been an increasing need for collaboration of individuals and nation states. Therefore, effective control of participants in certain particular events of value shaping and sharing is needed, so that the states will be willing to maintain public order by yielding part of their sovereignty towards the lines of an international procedure. Numerous conventions and draft

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1. The term "jurisdiction" is vague and susceptible to various meanings. Its use in this work refers to the authority of state officials to control the effects of particular value changes. This authority comprises three distinct authority functions:
   1 - Application - the authority to apply authoritative policy;
   2 - Prescription - the authority to prescribe authoritative policy;
   3 - Derivative application - the authority to apply policy previously prescribed and applied to the particular value change by another decision-maker.

proposals have been submitted to reach a common agreement among the States, but they have failed completely, for the uncomprehension of the decision-makers to understand these rules which have been proposed in these last fifty years. Controversies have arisen with respect to the clarification of the process of interaction on account of changing interests in social and moral values. There are two main interests of the States in this process of interaction; one is the inclusive interest (of all) states in the enjoyment of the airspace; and the other one, is the exclusive interest (of one) state in attributing a national character to aircraft, in the clarification of policies.

The role of coercion or of force to maintain peace and public order among the States cannot be abjured in the international arena, unless more exacting morality might be expected of men when associated together in political communities, than from men acting as individual personalities. There must exist an effective monopolization of force by the community so as to proclaim a policy relevant or not to the characteristics of conformity or disconformity to public order.

Professor Niemeyer has a very good view about maintenance of international order:[1]

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1. Cited in Myres S. McDougal and Feliciano, "Community Prohibitions of International Coercion and Sanctioning Processes: The Technique of World Public Order, 5 Philippine Law Journal, (1960), p. 1263.

> "States, units of supreme government in human society, are by inherent necessity the highest, most powerful and most efficient organizations in the sphere of social order. Accordingly there can be no effective pressure against a state except by another state. This means that to base international law ultimately on the threat of sanctions is equivalent to basing it on the action, and interest in action, of some great power. This was precisely the fundamental defect of the League scheme, and the reason why it failed in all its practical tests. The same inherent weakness will characterize any system of international order which ultimately relies on force.....there is only one form in which compulsion can be employed against these territorial units.....: war....
>
> Consequently an international order which depends on force as its ultima ratio is a permanent source of international struggle rather than a medium of order."

Therefore, the resolution of the jurisdictional problems (whether they are civil or criminal) will depend on how well will the decision-makers of each State be able to clarify their policies and apply them by reaching a common agreement towards the main problem: the legal status of the aircraft. If it is treated in the proper perspectives, problems of jurisdiction over ships, spacecraft and events occurring anywhere might be solved in recommending appropriate alternatives in principle and procedure for the future, in this process of interaction, into which I will proceed.

I - The Process of Interaction

1. Participants.

The participants in the process of interaction are the state and private corporations, which may have contacts with many states; individuals who may be nationals or non-nationals who might enter into agreements (contrasts) and deprivations (torts and crimes). In their interactions the national character is the most significant attribution to them.

The United Nations and other international organizations may figure as future participants.

2. Objectives.

The maximization of various values of each participant which one can describe in terms of power, wealth, skill, respect, well-being, enlightenment, rectitude and solidarity; they are used for the description of objectives and demands in our contemporary world arena.

3. Situations.

The situation in which an interaction occurs is the airspace. Here one must take into account whether the spatial location of an interaction is within or outside the territory of a particular state; the number of participants and the duration of a particular situation; the impact of the particular value changes and the expectations of violence or peaceful procedures.

4. Base Values.

Power and wealth are the principal base values employed in the airspace.

5. Strategies.

The strategies employed by the participants in this process of interaction are: economic, diplomatic, ideological and military. The stress here are on the persuasive means rather than on the coercive ones.

6. Outcomes.

In the process of interaction the outcomes are the range and intensity of impact upon values for all participants in the shared use of the airspace. Wealth moves, contracts are entered into --- these are the value goals that individuals have set, through the attribution of national character to aircraft.

7. Effects.

The effects are the expanding consequences of the outcomes which may affect a wide range of individuals throughout the globe.

8. Conditions.

The conditions are the willingness of states to make the accommodations necessary to shared use and shared competence in the production of values.

II - The Process of Claim

There exists a continuous flow of claims (which are known as claims to jurisdiction) by state against state, in the process of interaction, for authority to prescribe and apply policy to these particular value changes. Controversies arise relating to agreements and deprivations occurring in activities on airspace, upon the oceans and upon the land masses, and the parties to these controversies make claims in the international and national arenas with regard to the exercise of authority over the effects of such agreements and deprivations. This process of claim may be characterized in terms of the claimants, their objectives, and the specific types of demands and conditions which will affect their assertion.

1. The Claimants.

The claimants or participants in the process of authority include all the actors in the world social process, i.e., state and private corporations, individuals and international organizations.

2. Objectives.

The state-participants has the objective to protect their inclusive interests in the shared use of the airspace and their exclusive national interests. As to the private participants, the objective is to protect their property and other interests.

There are many controversies arising with respect to specific types of events, one among others is about the national character of interest. The different types of claims may be subdivided into several different headings, I will devote myself specifically to:

Claims Relating to:

I - Air Sovereignty

II - The Aircraft

III - Nationality of the Aircraft

A) Claims with Respect to Registration

1 - State aircraft

2 - Civil aircraft

B) Claims with Respect to Documentation

IV - The Making and Application of Policies for Jurisdiction.

A) Custom

1 - Jurisdiction and Competence of the Court

2 - Choice of Law

a) Torts

b) Contracts

c) Criminal Acts

B) Treaties

V - Recognition and Enforcement of Foreign Judgments.

3. Conditions.

The most important conditions in this process of claim, is that the participants should give their support to a community authority, instead of a centralized authority capable of monopolizing force in the world arena.

III - The Process of Decision

The process of authoritative decision which is established by the communities of states for resolving jurisdictional controversies which arise from claims and counterclaims shows a development or organizational characteristic in international law. Most decisions in applying the policies, in this system, are taken by states acting unilaterally, but its outlines may be observed under the headings of officials, objectives, strategies, outcomes and conditions.

1. Officials.

The state officials are the most important decision-makers, and one can include as relevant the officials of international governmental organizations[1] as well as judges of international courts and of specially

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1. United Nations, International Civil Aviation Organization, World Meteorological Organization, etc.

constituted arbitral tribunals which will often resolve controversies concerning jurisdiction.[2] The role of the officials are either as mere claimants to authority or on other occasions they are the representatives of the community applying authority to the claims of others to serve an interest.

2. Objectives.

The objectives sought out by the community of states for establishment of authoritative decision-makers are:

(a) to secure and preserve equality of access to the common resource of the airspace;

(b) to maintain the minimal order in airspace by:

(1) preventing unauthorized violence;

(2) preventing controversies from arising;

(c) to protect the inclusive and exclusive interests of states and to promote the most economic accomodation of these interests in the shared use of the airspace;

(d) to promote efficiency in common enjoyment of airspace; and

(e) to authorize states to protect and realize basic values in the internal processes of their territorial communities.

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2. The Lotus case (see Briggs, "The Law of Nations," New York, 2nd ed., (1952), p. 3-14) serves as an illustration for the function of an international court in resolving jurisdictional controversies.

3. Strategies.

The methods used by authoritative decision-makers when engaged in a variety of policy functions are: prescribing, intelligence, recommending, invoking, applying, appraising and terminating.

Our major concern is with the prescribing, invoking, and applying policy functions.

The prescribing function is based on a customary process which has been developed throughout years, transmitting a body of inherited complementary principles. Controversies about these principles are frequently resolved from foreign office to foreign office.

To invoke the processes of authority for the protection of aircraft against abuses of authority has been a universal practice by attributing a national character to aircraft.

The application function may be direct when a court assumes competence to apply community policy; and is derived, when the authority to enforce community policy is derived from prior application and prescription by other decision-makers.

4. Outcomes.

The outcomes of the process of decision form a flow of decisions resolving claims and counterclaims for the establishment of a satisfactory minimal order and a reasonable accomodation of the inclusive and exclusive interests of states.

5. Conditions.

The conditions affecting the process of decision include all the interacting variables of the world arena, but certain factors bear more immediately upon prescription and application. Today, with the expanding scientific knowledge and technology which have accumulated potentialities for production and destruction of our world, no single state or group of states has the effective power necessary to enforce policy — therefore, it is an indispensable condition that the states will continue to recognize their community of interest and the conditions under which a consensus will be able to be maintained to preserve such common interest to a general community policy, for world public order.

IV - Clarification of Policies

The purpose of this work in the clarification of general policies is to examine the controversies concerning claims to effects of particular value changes in the specific instances where an interaction takes place aboard aircraft. There are two conditions which will be examined which affect jurisdictional decisions with respect to aircraft: one is the territorial state in whose sovereign airspace an event occurred, and the other is the nationality of the aircraft aboard which the value changes have taken place. It is evident that the right of an individual to navigate the air depends on the nature and quality of his rights in it as well as upon the right of the government of that state to exercise jurisdiction (the power of a state to apply its laws) in the space above his property to protect his rights. Theories have been developed about air sovereignty and nationality of aircraft and this study hopes to find out their relevance to decisions resolving jurisdictional claims and counterclaims over events aboard aircraft.

The author will attempt to try to answer questions about who governs the air activities, what is an aircraft, which are the laws that regulate the events aboard aircraft, and many others, in relation to Brazilian national, i.e., municipal laws, and international air law, starting with the Paris Convention of 1919 to the provisions of the Chicago

Conference of 1944,[1] and possibly other attempts that have been made since then to our days without any success, so that new standards of substantive policy might also be willing to accept more rational measures in implementation in the clarification of policies for the common interest in the conclusiveness of attributions of national character, in the instance where an interaction takes place on board an aircraft and a state has to exercise jurisdiction.

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1. The Chicago Convention is incorporated as a Brazilian national law, by degree n. 21.713 of August 27, 1946. See Manual de Legislação Aeronáutica, Ministério da Aeronáutica, Rio de Janeiro, Brazil, (1953), p. 167.

V - Trends of Decisions

In the trends of decisions the projections of a rational general community policy with respect to the very different problems in the regulation and characterization of events aboard aircraft is the most relevant question. In the processes of interaction, claim and decision — they constitute the shared enjoyment of airspace: — through this orientation a careful distinction of the problems, relevant policies and appropriate remedies must entail certain further more specific tasks in the well-known and competing principles and notions of jurisdiction, the aircraft, nationality of the participants, territoriality, as well as in the conflict of laws (in the making and applying policies for jurisdiction and, in the recognition and enforcement of foreign judgments) in the appraisals and decisions of the cases cited; thus by studying the past trends of decisions and of the factors affecting them — we will be able to appraise and solve probable future events, to recommend appropriate alternatives in principle and procedure for the future.

All the traditional criteria which states have employed in their exclusive national interest whether singly or in combination which have been transposed into international policy, will be the object of the following chapters of this work, so that a general community policy might be sought for a better world public order.

B - Trend of Past Decisions and Conditioning Factors.

I - Air Sovereignty[1]

One of the most important obstacles to the world's air traffic practical liberation has been the question of the principle of "air sovereignty". Sharp conflicts have arisen among the writers advocating the theory of freedom of the air and those advocating state control and sovereignty.

In order to explain the determination of the applicable law over events aboard aircraft a clear understanding of the principles above mentioned is required, along with its main developments starting from the Paris Convention, 1919 to the Chicago Conference of 1944.

The basic problem between freedom of the air and sovereignty is whether the former will be proclaimed an overriding principles to which sovereign rights will be subordinated, or whether sovereignty will be deemed the paramount principle, subject to free rights of passage. Both have the same social interest in rights of passage and the free use of airspace, with the security interests of states and their rights of self-preservation.

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1. Sovereignty means the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation. Freedom is the state of having self-determination.

Those who advocate freedom of the air are divided into: 1. air freedom without restriction[1]; 2. freedom restricted by some special rights without limitation of height[2]; and 3. freedom restricted by a territorial zone in which full sovereignty will be exercised.[3]

In air freedom without restriction, the proponents of this theory rest it upon the inappropriate character of air as an element and its alleged insusceptibility of control. Thus, they have confused the air element with the airspace,[4] and gradually has been abandoned by most publicists and jurists for complete freedom is undesirable.

In the second freedom, the chief argument is that the air is physically incapable of appropriation because it cannot be continuously occupied. Here, too, few were the jurists who advocated this theory.

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1. See Lycklama à Nizeholt, Air Sovereignty, (The Hague, 1910) 11.

2. Fauchille, R.G.D.I.P. (1901) p. 414 et seq.

3. Lycklama à Nizeholt, op. cit., 12-13, and Appendix A.

4. Edmunds, Aerial Domain and the Law of Nations, (1923) 8 St. Louis Law Review, 93.

In the third one, Paul Fauchille was the main partisan of this theory in stating that freedom of the air, subject to certain rights of self preservation was in favour of the institution of a zone within which these rights would be exercised by the subjacent state, and above that zone, the airspace is completely free.

About the concept of sovereignty, remarks of Professor François in the sharing of authority and cooperation among states are really interesting:[1]

> "It is important to acquire a correct opinion with regard to the nature of sovereignty, many being those who, starting from an antiquated notion of sovereignty, consider state sovereignty the great obstacle in the path leading to international cooperation, and believe that international organization is conditioned by a complete elimination of sovereignty."

Those who advocate sovereignty are divided into: 1 - full sovereignty without any restriction; 2 - a sovereignty territorial zone; 3 - sovereignty to an unlimited altitude but restricted by a servitude of free passage.

In the theory of full sovereignty without any restriction the advocates transplanted the private law principle expressed by the Roman maxim of "Cujus est solum, ejus est usque ad coelum" (whoever has the land possesses

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1. François, Handbock van bet Volkerrecht, (1949) Vol. I, 158, cited by Van Kelffeng, Sovereignty in International Law, 82 Hague Recueils (1953), F. -

all the space upwards to an indefinite extent), is the maxim of law... "So that the word 'land' includes not only the face of the earth, but everything under it, or over it."[1]

This theory confers upon the subjacent state the unfettered right of excluding foreign, public or private craft, the right of regulation of any foreign aircraft it may choose to admit, and the right of jurisdiction over any foreign aircraft thus admitted.[2]

The theory of a sovereign territorial zone is similar to that of freedom of the air above a certain altitude under which will be formed a sovereign territorial zone.[3]

In the last theory of sovereignty the advocates recognized the need of unimpeded aerial navigation and the right of innocent passage through the air[4] for the civil aircraft of all nations.

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1. Cooley's Blackstone (4th ed.), Bk. 1, 19.

2. Mc Nair, The Beginnings and the Growth of Aeronautical Law (1938) 1 Journal of Air Law, 385.

3. See Lycklama à Nizeholt, op. cit., 13 and Appendix A.

4. See Lycklama à Nizeholt, op. cit., 14 and Appendix A.

Sovereignty is not an absolute and exclusive power, but is limited by prevailing conditions and by the operation of basic community policies guiding the allocation of jurisdictional authority. In relation to air sovereignty the complete and exclusive air sovereignty entitles the state to much less interference with a foreign aircraft than its surface sovereignty permits with respect to ships, railway transport, automobiles or foreign visitors -- the main problem is the aircraft gaining access, and this is generally geared to military and economic interests.[1]

The complete sovereignty theory has been adopted by the vast majority of States including Brazil,[2] and

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1. An Air-Services Transit Agreement was adopted "Two Freedoms") that is 1) the privilege to fly across the territory of a Contracting State without landing and 2) the privilege to land for non-traffic purposes, and an International Air Transport Agreement ("Five Freedoms"), in addition was adopted, that is: 3) the privilege to put down passengers, mail, and cargo taken on in the territory of the State whose nationality the aircraft possesses; 4) the privilege to take on passengers, mail, and cargo destined for the territory of the State whose nationality the aircraft possesses; 5) and the privilege to take on passengers, mail, and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail, and cargo coming from any such territory. This agreement known as the International Air Transport Agreement, signed on December 7, 1944, in Chicago, seems to be decreasing in importance for very few states have ratified it. (See Shawcross & Beaumont, On Air Law, (1952), 270 for further reference).

2. Vademecum Forense, Coletânea de Leis do Brazil, (1959), Código do Ar Brasileiro, decreto-lei no. 483 of June 8th, 1938, art. 39 p. 677.

is incorporated in the various Conventions of Chicago, Paris, and Madrid, the Havana (Pan-American) Convention, and numerous bilateral treaties.[1]

Thus the modern concept of air sovereignty does not form any obstacle towards international cooperation and as to the operation of conflict policies, these have always limited the exercise of unrestrained sovereignty conferring a high degree of inclusive and shared authority, which should be equally applicable to issues of jurisdiction aboard aircraft.

About sovereignty directly related to issues of jurisdiction aboard an aircraft there are five main systems proposed in the civil law countries: 1) law of the territory overflown; 2) law of the flag of the aircraft; 3) mixed system of the two systems above proposed; 4) law of the place of departure of the aircraft; and 5) law of the place of arrival of the aircraft.[2]

In the law of the territory overflown there must not be a different law among the events that occur on a certain state's soil from those events aboard an aircraft

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1. Shawcross & Beaumont, On Air Law (1952), 174.

2. Maurice Lemoine, op. cit., 202.

that happen over the state's airspace. But this system has some fallacies in respect to events occurring over the high seas, and over an uncertain territory -- it cannot be applicable.[1]

About the law of the flag of the aircraft, this system has been influenced specifically by the maritime laws. If an aircraft has a nationality it is obvious that the law of its flag should be applicable to events occurring aboard an aircraft. The justification is given: when an aircraft is flying over the high seas or over a no man's land. This system has been severely criticized because an aircraft flying over a state's territory, either by obliging the aircraft to land on dangerous conditions on the surface or by throwing objects and damaging the people on the surface. Consequently, would a State admit not to have jurisdiction over these events occurring aboard an aircraft over its territory and therefore, give up its sovereignty completely?

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1. Vademecum Forense, op. cit., art. 6 p. 674 says "that any act practiced aboard an aircraft, considered to be foreign territory, but which effects will produce or have produced penal or any other kind of damage effects in the national territory, will be reputed as practiced in Brazil." It goes on by saying that "if those acts which have been originated aboard an aircraft, considered Brazilian territory, which will have consequences in a foreign territory, will be cumulatively of the jurisdiction of the Brazilian and foreign laws." Anyhow nothing is said about an event occurring over the high seas.

Professor A. de la Pradelle introduced at the 1930 International Juridical Aviation Congress at Budapest a mixed system of the law of the territory overflown and of the law of the aircraft's flag. In this system the normal law to be applied would be the law of the flag while the aircraft is flying over the high seas or no man's land, but the territorial law would take its place at the exact minute when the aircraft would be flying over the territory of a particular State and the events committed aboard it would have repercussions outwards, i.e., on this particular State.

The difficulty of the system of the law of the place of departure of the aircraft is that a fiction would have to take place about the events occurring aboard an aircraft that would be the territorial law of the place of departure of the aircraft.

In the law of the place of arrival of the aircraft the same consideration may be applied as to the precedent system, with the exception that there is a great choice on the part of the aircraft for its landing. Both systems are too arbitrary!

One might conclude by saying that the most acceptable system is the mixed one, but there is at present no special body of rules as to choice of law applicable to aircraft corresponding to that which has grown up in

relation to ships,[1] although the solution in the present must depend on the general principles applicable to crimes, contracts and torts of the particular state where the events aboard an aircraft have occurred.

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1. Mc Nair, The Law of the Air, (1932), p. 92 cites that as M. titard says (Revue Juridique Internationale de la locomotion aerienne, 1912, 118):
"It is absurd to say that an airplane 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 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 (like the island in Gulliver's Travels, which floated in the air), would seem to the writer to be going too far".

II - The Aircraft

Air Law is one part of the law which studies the rules which govern the utilization and circulation of the aircraft as well as its causes and relations.

Thus, the aircraft is the most important apparatus of the object of studying air law. It is the instrument of navigation in the airspace. Its utilization might be for private ends as; sport, tourism and transport without any profit; and for commercial ends which might include propaganda and agricultural work and specifically commercial transportation of people and things. This last activity of commercial transportation is what is considered the industry of collective interest, on account of its major importance towards the economy and the defense of any State, and thus, intervening in it in a larger or a smaller scale, considering it a public service to be run by the State itself or by concession, declaring the commercial transport of public use and, therefore, intervening through rules and fiscalization.

Even the use of the aircraft for private ends or in commercial activities which in a way might not justify a real influence in the national economy of a State to be included for public use, it should have a direct State control in order that it may control the air traffic, the repression against smugglers and smuggling things into the

particular State, the control of persons coming flowing in or out of the Country, and for the national and public defence.

But, how is an aircraft defined?

In the Convention of Paris, 1919, the term aircraft is defined "as comprising all machines which can derive support in the atmosphere from reactions in the air." [1]
In the Chicago Convention (1944) the aircraft was not defined.

In the United States of America an aircraft is defined as "any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air".[2]

In the Brazilian Air Code[3] the term aircraft is defined "as any kind of apparatus apt to effectuate a transportation and, that can fly by itself and be governed in space".

On account of the peculiar characteristics imposed on aviation the direct control and fiscalization by the State is felt more intensely, and thus, an aeronautical administration must be included in the functions of the State.

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1. Shawcross & Beaumont, op. cit., 12.

2. Shawcross & Beaumont, op. cit. 15 (Civil Aeronautics Act, 1938 s. 1(4). Navigation of aircraft is not defined except to include piloting.

3. Vademecum Forense, op. cit., art. 18, p. 675.

The Aeronautical Administrative law is a conglomerate of acts that regulates all the organs which have been assigned to organize its administration and, it is a series of regulations to regulate air navigation such as: the police power over vehicles by imposing security conditions in the construction, maintenance and operation of aircrafts; the police power over traffic by regulating the air traffic and fixing the norms for the habilitation to fly; and, making economic and financial rules for the commercial air transportation through measures of supervising the tariffs, the concession of licenses for commercial air exploit and, the rules for the air transport contract.

All this regulation is processed under different administrative systems. It might constitute one of the attributions of a Ministry of Transports which will coordinate all the land communications with aviation; or one of the attributions of a Ministry of Commerce which might have a branch like a Ministry of Civil Aviation; or one of the attributions of a Ministry of Defense or of War; or finally one of the attributions of a mixed organ, civil and military, as in the case of Brazil -- a Ministry of Aeronautics.

The degree of intervention of a State on aviation depends on its political administration; on some States all transportation depends on the State's monopolized regime; or on some other places the State will associate with private enterprise; or finally the State stays out of any private enterprise, but is vigilant on cases of strikes or on a national defense, when then it may intervene to restore public order.

The predominant international role of aviation obliged the States to get together and create international organisms so that certain air rules would be set out for the public order of the world community. The first organism to be constituted was "The International Comission for Aerial Navigation (I.C.A.N. or C.I.N.A.) by art. 34 of the Convention of Paris (1919) which exercised legislative, administrative, and judicial functions in respect of subjects covered by the Paris Convention. On December 31st, 1947 it ceased to exist and its assets were handed over to the International Civil Aviation Organization (I.C.A.O.) set up by the Chicago Convention (1944) in art. 43.[1]

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1. Shawcross & Beaumont, op. cit., p. 43 and 647.

The aims and objectives of the ICAO are set out in art. 44 of the Convention:[1]

> "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:
>
> a) Insure the safe and orderly growth of international civil aviation throughout the world;
>
> b) Encourage the arts of aircraft design and operation for peaceful purposes;
>
> c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
>
> d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
>
> e) Prevent economic waste caused by unreasonable competition;
>
> f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
>
> g) Avoid discrimination between contracting States;
>
> h) Promote safety of flight in international air navigation;
>
> i) Promote generally the development of all aspects of international civil aeronautics.

In Brazil, a mixed organ, civil and military -- the Ministry of Aeronautics[2] was created in order to establish

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1. Shawcross & Beaumont, op. cit., p. 647-8.

2. Ministério da Aeronáutica, Manual de Legislação Aeronáutica, (1953), 5: decree-law no. 2961 of Jan. 20, 1941, creating the Ministry of Aeronautics in Brazil.

and to coordinate all the activities of aviation. The aims and objectives of the Ministry of Aeronautics are the same adopted by ICAO on a national basis.

In concluding this part about aircraft in connection with the jurisdiction over events aboard an aircraft article 37 of the Chicago Convention should be cited:[1]

> "Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.
>
> To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:
>
> a) Communications systems and air navigation aids, including ground marking;
>
> b) Characteristics of airports and landing areas;
>
> c) Rules of the air and air traffic control practices;
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> d) Licensing of operating and mechanical personnel;
>
> e) Airworthiness of aircraft;
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> f) Registration and identification of aircraft;

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1. Shawcross & Beaumont, op. cit., p. 645-6.

g) Collection and exchange of meteorological information;

h) Log Books;

i) Aeronautical maps and charts;

j) Customs and immigration procedures;

k) Aircraft in distress and investigation of accidents; and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate."

III - Nationality of the Aircraft

Military, economic, jurisdictional, political and social forces have contributed in several ways to the development of the general concept of nationality.

Nationality has been stated to be "the status of a natural person who is attached to a state by the tie of allegiance."[1]

One of the delegates of the U.S. that attended the codification of the law of nationality held at the Hague in 1930 wrote that:

> "Most, if not all, branches of international law are in a sense political, but, when it is said that nationality is peculiarly a political subject, it is meant, no doubt, that the law of nationality is primarily a domestic matter, as regards each state, to be determined by each state for itself, according to its needs, social, political, military, economic, etc. Thus no state is willing to surrender its sovereign prerogative in the matter of determining the way in which its nationality may be acquired. But this does not mean that international law has nothing to do with nationality. Wherever international relationships arise international law must follow, in one form or another, although its development and crystallization into definable rules may be a slow process... Increase in facilities for travel, especially through the development of the airplane, will, no doubt cause a further increase in movement of people from country to country and still

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1. Harvard Research in International Law - Nationality in: American Journal of International Law, vol. 23 (1929) Supplement p. 13, 22.

> greater multiplication of nationality problems, and these problems must be settled sooner or later by international agreements, tacit or express."[1]

On account of the principles of sovereignty over airspace and nationality of aircraft usually have been declared simultaneously, some writers have deduced that nationality of aircraft is derived from sovereignty over airspace:[2]

> "Thus it has been asserted that the present criterion of nationality determination (for aircraft) is a direct corollary of the principle of 'complete and exclusive' sovereignty (over airspace), and that the criterion has been selected expressly for the purpose of securing the benefits of aerial navigation to nationals of certain States to the exclusion of nationals of other States. The method of determining nationality (of aircraft) can hardly be brushed aside so easily, for it must be remembered that the criterion is no more a direct corollary of the sovereignty (over airspace) view than that of a nearly opposite position. Was it not Fauchille — proponent of the general principle:"l'air est libre" — who urged in 1911, the same criterion — determination of nationality (of aircraft) according to the nationality of the owner? And did not M. de Lapradelle support the doctrine at the same Madrid setting of Jurists, with reasons of a distinctly juristic nature?"

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1. Flournoy, Richard W., Jr., "Nationality Convention, Protocols and Recommendations Adopted by First Conference on Codification of International Law", 24 Am. Jour. of Inter. Law 467 (1930).

2. Fagg, Fred D., Jr., "The International Air Navigation Conventions and the Commercial Air Navigation Treaties," 2 So. Cal. Law Rev. 430, 441 (1929).

Diplomatic protection of its citizens and the property of its citizens is an exercise of the sovereign power of a state.

Fauchille advocated that no sovereignty is exercised by states over the high seas, an analogy of ships could be applied to a certain extent to aircraft, thus deriving the principle of nationality from his theory of freedom of the air.[1] Therefore, concluded Lambie, the principle of nationality is in fact derived from the theory

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1. In 1900 and 1902, before the invention of the airplane Fauchille, when advocating freedom of the air, discussed balloons only. He proposed that the status of the owner, and the owner, commandant and three-fourths of the crew of the balloon be citizens of the same state. He considered that it was not so much the balloon itself as the crew chosen by the owner which could cause international complications. Fauchille probably arrived at these conclusions from the fact that France confers French nationality only upon ships where the captain, officers and three-fourths of the crew are French: Fauchille, Paul, Rapport et Projet du Régime Juridique des Aérostats, 19 L'Annuaire de l'Institut de Droit International 19 (1902), 8 Rev. Gen. de Droit International Public 471 (1901), 1 Rev. Juridique Internationale de la Locomotion Aérienne 101, 172 (1910).

   Other reasons for adopting the principle of nationality for aircraft involves military and jurisdctional purposes as well as diplomatic protection abroad, for a state is composed of 1) territory, 2) population, and 3) sovereign power, legislative authority (imperium). In the early community where collective living prevailed, there was no private property, and "residence" was inconsistent with nomadic habits until individuals realized the advantages of permanent attachment to a locality: Zeballos, E.S., "La Nationalité au point de vue de la Législation Comparée et du Droit Privé Humain." (Paris: Recueil Sirez, 1914 - 2 vols), Vol.I.

of the freedom of the air.[1]

Historically, there are two major schools of thought, with regard to the nature of the link between a particular state and an aircraft, one advocating the "aircraft-automobile" theory, and the other one the "aircraft-ship" doctrine. But the nationality of the aircraft depends upon the nationality of the person owning the aircraft. The traditional method of determining the nationality was the "jus sanquinis" and the "jus soli" theories[2] -- today a third one is added -- the domicile, that is, the place which a man has voluntarily chosen for his permanent residence.

The "aircraft-automobile" theory is that, with the advent of the automobile it was believed that for purposes of identification and protection, it possessed

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1. Lambie, Margaret, "Universality versus Nationality of Aircraft", The Journal of Air Law (1934) p. 6.

2. "jus sanquinis" means nationality by blood prevailed; "jus soli" means the attachment of nationality by one's native land or origin.

the nationality of the owner, because, as some writers said,[1] only natural persons have a nationality in the proper sense of the word. In a "Convention with Respect to the International Circulation of Motor Vehicles," Paris, October 11, 1909,[2] article 4 provided that: "No motor-car shall be allowed to pass from one country into another unless it carries, fixed in a visible position on the back of the car, in addition to the number plate of its own nationality, a distinctive plate displaying letters indicating that nationality. But, in the amendatory Convention of 1926, at this International Convention Relative to Motor Traffic in Paris,[3] from hereon, the reference to nationality was omitted. Anyhow, the jurists, consequently, proposed that nationality of the aircraft would depend upon the nationality of its owner, whose rights with respect to the aircraft would be protected by his

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1. Riese, "Luftrecht," p. 201; Mandl, "Droit Aérien," 1931, p. 161.

2. U.S. Dept of State, Treaty Information Bulletin, n. 13 (1930), 25-36.

3. Treaty Information Bulletin, op. cit., 36-55.

state much alike his rights in any other property.[1] Therefore, nationality of aircraft was just a 'national attribute' derived from ownership, and whose legal import was very limited.

In the "aircraft-ship" theory a permanent link between the state and the aircraft was thought, since the idea of claiming a nationality for aircraft evolved from analogy to seacraft and vessels. A vessel is an inanimate object, a movable thing, but is a "thing of a very particular kind and which from several points of view may be compared to a person;"[2] thus, like a person it possesses a nationality. The attribution of a nationality to a vessel is the basis for intervention and protection of a state on acts committed by persons aboard the vessel against their nationals. This quality of guarantor and protector given to a particular State whose flag the vessel carries has led to a conclusion that the nationality of a vessel "is the primary condition for the peaceful utilization of the high seas", in order that world public

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1. See Gittard, Report to Air Transport Cooperation Committee of the League of Nations, 2d. Session (1931), cited in Lambie, op. cit., 248-249; Henry - Couannier, "De la Nationalité et du Domicile des Aéronefs, 1 R.J.I.L.A. (1910) 165-167.

2. Gilbert Charles Gidel, "Le Droit International Public de la Mer, Chateauroux, Les Établissements Mellotée, 1932-34, Vol. 1 (1932), p. 72.

order may be maintained.[1] But the fact that a vessel has the nationality of the State flag it carries has led to many problems affecting the jurisdiction of such State and other States over such vessels on the various acts committed aboard, and whether the vessel is in its home waters, on the high seas or in foreign waters.[2] Anyhow, there is no doubt that it is recognized amongst the totality of States in the world that a ship has a nationality and, therefore, is entitled to protection of the State whose flag it carries, and that State is the guarantor to other States of the vessel's international conduct.

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1. Gidel, op. cit., Vol. I p. 73-74.

2. For some basic problems see: Harvard Research in International Law, Jurisdiction with Respect to Crime, in: American Journal of International Law, Vol. 29 (1935), Supplement p. 508-519; Higgins and Columbus, The International Law of the Sea, London/New York/ Toronto, Longmans Green, (1934), p. 164-222; Lassa F.L. Oppenheim, International Law: A Treatise, 7th ed., London/New York/Toronto, Longmans Green, (1948), Vol. 1. Secs. 260-264 p. 545-549, Secs. 450-451, p. 764-767; The S.S. Lotus (France v. Turkey), Permanent Court of International Justice, Judgment 9, Sept. 7, 1927, Ser. A No. 10 - also in: Manley O. Hudson, World Court Reports, Washington, Carnegie Endowment for International Peace, 1934-43, Vol. 2, 1927-1932 p. 20-92; Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, New York, Jennings, 1927, p. 191.

In 1901, Fauchille made the first statement claiming a nationality for the aircraft like that of a vessel and to his proposals he further stated that an aircraft is of two categories: public and private; that the aircraft (the private) can only carry the flag belonging to a State where it is inscribed on an official record kept for that purpose (such registration being based on the nationality of the owner, the commander, and three-quarters of the crew); and, that only public aircraft of a State is permitted to fly freely in the "security zone" (defined by Fauchille as a zone prohibited by a State for air navigation, extending 1500 meters up from its surface territory).[1]

The principle of nationality of an aircraft was first accepted at the International Air Navigation conference of 1910, held at Paris, in which many of the decisions influenced the subsequent national and international legislation. In the draft drawn up at the conference, article 2 stated that this only applied to aircraft possessing the nationality of the contracting States; article 3 said that the nationality of the aircraft should be based on the nationality of its owner, this being determined by the law of each contracting State; and article 4 specified that

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1. Annuaire de l'Institut de Droit International, Vol, 19, (1902), p. 19-86.

once an aircraft possesses the nationality of a State, it cannot acquire the nationality of any other State.[1]

Therefore, the principles of nationality of aircraft started to be laid down in the ensuing international and national legislation. International agreements between France and Germany prior and during World War I about the principle of nationality were incorporated into the body of international air law by the adoption of the Paris Convention of 1919. The articles of the convention which are directly applicable to the question of nationality are:

> "Article 5: No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.[2]

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1. Conférence Internationale de Navigation Aérienne, Vol. 1, (1910), Procès-verbaux des séances et annexes, Imprimérie Nationale, p. 188-205, cited at Honig, The Legal Status of Aircraft, The Hague (1956) p. 44.

2. Article 5 was amended by Protocol of October 27, 1922:
"No contracting State shall, except by a special and temporary authorizations, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State, unless it has concluded a special convention with the State in which the aircraft is registered. The stipulations of such special convention must not infringe the rights of the contracting parties to the present Convention and must conform to the rules laid down by the said Convention and its annexes. Such special convention shall be communicated to the International Commission for Air Navigation, which will bring it to the knowledge of the other contracting States."
Article 5 was further amended by Protocol of June 15, 1929 and inserted as the last article of Chapter I:

"Article 6: Aircraft possess the nationality of the State on the register of which they are entered, in accordance with the provisions of Section I (c) of Annex A.

"Article 7: No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.

"No incorporated company can be registered as the owner of an aircraft unless it possess the nationality of the State in which the aircraft is registered, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfils all other conditions which may be prescribed by the laws of the said State.[1]

"Article 8: An aircraft cannot be validly registered in more than one State.

"Article 9: The contracting States shall exchange every month among themselves and transmit to the International Commission for Air Navigation referred to in Article 34 copies of registrations and of cancellations of registrations which shall have been entered on their official registers during the preceding month.

(continued from previous page)

"Each contracting State is entitled to conclude special conventions with non-contracting States.

"The stipulations of such special conventions shall not infringe the rights of the contracting Parties to the present Convention.

"Such special Conventions in so far as may be consistent with their objects shall not be contradictory to the general principles of the present Convention.

"They shall be communicated to the International Commission for Air Navigation which will notify them to the other contracting States."

1. Article 7 was amended by (Protocol of June 15, 1929:

"The registration of aircraft referred to in the last preceding Article shall be made in accordance with the laws and special provisions of each contracting State."

"Article 10: All aircraft engaged in international navigation shall bear their nationality and registration marks as well as the name and residence of the owner in accordance with Annex A.

"Article 30: The following shall be deemed to be State aircraft:

(a) Military aircraft.

(b) Aircraft exclusively employed in State service, such as posts, customs, police.

(c) Every other aircraft shall be deemed to be a private aircraft.

"All state aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.

"Article 31: Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.

"Article 32: No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization. In case of such authorization the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war.

"A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph.

"Article 33: Special arrangements between the States concerned will determine in what cases police and customs aircraft may be authorized to cross the frontier. They shall in no case be entitled to the privileges referred to in Article 32."[1]

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1. John C. Cooper, "A Study on the Legal Status of the Aircraft", prepared for the Air Law Committee of the International Law Association, September 1949, p. 24-25.

The convention, therefore, was giving to the aircraft a national character similar to that of vessels under international law.

Article 7 as drafted in 1919 was amended in 1929, in conformity with the Havana (Pan American) Convention of 1928, in that the nationality of the owner of the aircraft was no longer relevant -- the decision was made that for requirements to registration of aircraft it would be left to the national legislations.

Thus, the status of the aircraft was radically changed from 1919 to 1929. When World War II commenced the rights and duties of an aircraft were fully accepted in customary law and accepted by all the existing states whether it was over the high seas or over the territory of its own State and other States.

The present situation of the nationality of aircraft is given by the Chicago Convention of 1944. Chapter III of the Chicago Convention corresponds to Chapter II of the Paris Convention. The articles that correspond to classifications, nationality and registration of aircraft are:[1]

> Article 3: (a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft.

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1. Shawcross & Beaumont, op. cit., p. 634-641.

(b) Aircraft used in military, customs and police services shall be deemed to be State aircraft.

(c) No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

(d) The contracting State undertake, when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft."

"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 Aviation Organization, on demand, information concerning the registration and ownership 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."

In article 3 it was intended to mean that the Convention is applicable only to "civil aircraft" or all aircrafts except for those 'used in military, customs and police services' by a contracting State.

The Chicago Convention in the subsequent articles deals with nationality and registration of an aircraft. There is no doubt about the existence of nationality of any aircraft lawfully carrying a national insignia of a particular State. There is an innovation about the registration, and that is that each State will decide for itself the basis of which it will permit aircraft to be registered,[1] but that does not mean that it creates nationality.

An obligation is imposed in Article 12 of the Convention for those States which have ratified or adhered to it:

> "Each contracting State undertakes to adopt measures to insure that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting State undertakes to keep its own regulations in those respects uniform, to the greatest possible extent, with those established from time to time under this Commission. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable." 1

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1. See Article 6 of the Paris Convention, Cooper, op. cit., p. 24.

1. Shawcross & Beaumont, op. cit., p. 639.

Any State who has ratified the Chicago Convention without reservations, in relation to this previous article, must see that its aircraft, which has a nationality, will follow the rules of the air laid down by other States -- for the State is a protector of such aircraft.[2]

One of the most interesting innovations here is that if there is a necessity to discipline sea as well as ir traffic, where there is no sovereignty of any State -- over the high seas -- it is one of the principle reasons of the attribution of a nationality to the ship; much more important yet is the attribution of a nationality to the aircraft on account of its capacity to fly over seas,

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2. About the legal status of aircraft is emphasized by article 11 of the Chicago Convention:
"Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State. - (See Shawcross & Beaumont, op. cit., p. 639).

continents and nations in matter of few hours.

Therefore, the aircraft is a movable property "sui generis" to which a nationality is attributed.[1]

The Brazilian Air Code has a disposition about nationality in its article 20:[2]

> "Aircrafts are considered of the nationality of the State where they are regularly registered, and they will not be able to fly over Brazilian territory, without having one and not more than one nationality."[3]

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1. The "sui generis" character of aircraft is very easy to draw to attention that the conditions of sea travel and air travel are entirely dissimilar, as the passenger's connection with the aircraft is much more transitory than with a ship, etc. -- certain Admiralty rules have been attached by legislation, but more and more the legal systems which have to be applied to events aboard aircraft are dissimilar, and therefore, different jurisdictions problems and different legislations have appeared and have been enacted, on account of judicial precedents.

2. Vademecum Forense, op. cit., p. 675.

3. See Shawcross & Beaumont. op. cit., p. 641, article 20 of the Chicago Convention which says: "Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks."

But in the case of joint operating organizations permitted the criteria to be adopted has not been sufficiently clear as in the case of "Scandinavian" Airlines System" whose aircrafts have the nationality and registration marks of each of the three States to which they belong. Article 77 of the Chicago Convention is still obscure:

> "Nothing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Convention, including those relating to the registration of agreements with the Council. The Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies."

There are other problems arising from applying the principle of nationality to aircraft:[1]

> "(a) ownership of aircraft by nationals, aliens, corporations and states, including the question whether and aircraft has a personality and nationality apart from its owner;
>
> "(b) purchase, sale and use of aircraft for business and pleasure, including different types and sizes of aircraft, the nature of aircraft, and effect of nationality of aircraft on aeronautical industry and transportation;

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1. Lambie, op. cit., p. 50.

"(c) state sovereignty and freedom of passage for aircraft, including the question whether nationality of aircraft, as such, aids a state in upholding its sovereignty at home and in extending its diplomatic protection abroad;

"(d) State administration in the interest of public safety through certificates of airworthiness and licenses for aircraft and pilots, distinguishing navigability from nationality;

"(e) state responsibility in peace and war through regulations for civil and military aircraft; and

"(f) jurisdiction over aircraft in respect to location, whether over territory, territorial waters or high seas, in matters of contract, tort and crime, including the applicability of legal systems, common or civil law, statutes, and admiralty procedure".

The principle reasons for the application of nationality as an attribute to aircraft is given by Kingsley:[1]

"(1) A reservation of commercial air traffic between points in the same state for nationals of that state -- the principle of cabotage, which has long been familiar in coast-wise shipping laws;

(2) A protection of the public interest of the state itself against the possibility that its secrets of national defense might be violated by the prying eyes of an observer from the air;

(3) A means whereby the state might protect its citizens against injuries resulting from improper or careless activities of aviators and/or enable its citizens to secure adequate redress if such injuries should occur -- that is:

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1. Kingsley, Robert, "Nationality of Aircraft," 3 Journal of Air Law, (1932) p. 50.

a) Some provision against unsafe craft and incompetent pilots taking to the air, and

b) Some facility for identifying the persons responsible for any injuries which might occur;

(4) Some mode of determining what law governed, and what tribunal had jurisdiction over, the redress for, or punishment of, conduct in aircraft."

As one can see, although there is no doubt that nationality has been accepted by all the world community of states the problems and reasons of having accepted it does not mean that everything has been settled; on the contrary, the often conflicting legal consequences to the choice of criteria for the determination of the nationality, attribute is still very large, specifically, to prevent 'freedom of nationality', which is repugnant to most of the political interests of the States.

The criteria adopted to determine the nationality of aircraft are:[1]

(1) nationality of the owner;

(2) domicile of the owner;

(3) place of construction;

(4) nationality of the pilot;

(5) nationality of the holder or operator;

(6) state where the aircraft is kept;

(7) state of registry.

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1. Lambie, op. cit., p. 246 et seq.

(1) Theory according to Nationality of the Owner:

Under this theory an aircraft may be entered on the aeronautical register of a state if the owner is a national of that state. Another important reason is to favor national construction of aircraft for economic factors and to be assured that the aircraft is owned by nationals in case of state insurrection or war. But there are some disadvantages to this theory, as that, exclusive sovereignty of a state within its own territory does not exist if the state is a member of an international convention allowing foreign owned aircraft to be operated within the state, and that the aircraft might belong to an owner of a given nationality that cannot operate abroad because the government of the country, in which the aircraft is registered is without jurisdiction abroad, as regards to navigability, licenses and pilot regulation.

The justifications for the adoption of this criterion was sought in the doctrine of nationality of ships, but the ship analogy did not prove very useful, for it would limit the authority of the state to assure safe navigation in its sovereign airspace.

Therefore, as this theory proved to be inadequate other solutions were proposed.

(2) Theory according to Domicile of the Owner.

According to this theory of the domicile of the owner it is possible for aliens to own aircraft and register aircraft in the country where the alien owners live, on the same terms allowed to nationals domiciled in the state.

To solve part of the economic difficulties when the registration is made to depend on the nationality of the owner, the domicile theory was stressed by the Air Transport Cooperation Committee of the League of Nations which adopted the following resolution:[1]

> "...the registration of aircraft should not depend solely on the owner's nationality; it should also be possible to register aircraft, the owners of which are foreigners settled in the territory."
>
> "It (the Committee) also expressed the hope that, the rule based on the effective domicile of the owner, subject to any rules laid down by national law concerning duration, will be uniformly adopted for this registration. It being admitted that each aircraft must be registered in one country and in one country only, these uniform rules should allow the possibility of registering aircraft belonging to the national companies having some foreign capital or directors."

Some dissentions were raised on whether the principle of the domicile test should be that of the owner

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1. Lambie, op. cit., p. 200.

of the aircraft, that of the operator, or of the aircraft itself. This led to other proposals.

(3) Theory According to Place of Construction.

The theory according to place of construction is sought to be that of the place of origin of aircraft and the reasons for adopting it were the protection of secrets of manufacture and training of expert builders.

This theory, anyhow, found little support for an aircraft might have a body of one make and an engine of another constructed in different states.

Therefore, other solutions were given.

(4) Theory According to Nationality of the Pilot.

The theory of the nationality of the pilot is based to protect points of military importance against espionage by a person that may become in the future an enemy alien. But due to numerous problems that may arise in the administration of an air company due to the frequent shifts in the personnel of aircraft, this led to other proposals.

(5) Theory According to Nationality of the Holder or Operator.

According to the nationality of the holder or operator is related to operation is the nearest economic

ties between an aircraft and a person, for usually the owner is the operator, and it even happens quite often that the operator is a lessee or a buyer who has not yet acquired full property rights in the aircraft. The objection is the same one as above, on account of the frequent shift in the personnel of aircraft. This again, led to other further proposals.

(6) Theory According to Place Where the Aircraft is Kept.

This theory according to place where the aircraft is kept, sometimes called the place of registry, port d'attache, or which would link the aircraft directly with its state of domicile. The aircraft should have fixed headquarters and should be registered in the state in which the headquarters of the aircraft are situated, thus giving power to the state to refuse registration, if necessary to protect its security, and to stipulate some conditions in the exercise of its sovereignty.

In opposing this theory of determining nationality of aircraft by the domicile or port d'attache of the aircraft, Visscher[1] thinks that the aircraft would as a

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1. Visscher, Ferdinand de, "Le Régime Juridique Atmosphérique et la Question de la Nationalité des Aéronefs", 2 Zeit. fur das Gesamte Luftrecht 18 (Text in French) (1928).

"personality" apart from the owner, attract in foreign countries diplomatic protection by the state of the port d'attache.

Therefore, another theory was proposed.

(7) Theory According to State of Registry.

About this theory according to the state of registry the automatic prerequisites would be one or more of the six criteria described in the foregoing, such as there is much to be said for taking the place of registration of the aircraft as the criterion, as long as it is also the place of the aircraft's headquarters or its "home". Here there would be some uniformity.

In Article 7 of the Convention of 1919 as amended by the Protocol of June 15, 1929 it stated that the registration of aircraft should be made according with the laws and special provisions of each contracting State, this theory, thus, representing a compromise concerning methods for determining nationality of aircraft -- the states being free to determine their own rules. But the controversy here would be very big, for there would not be any uniformity of rules and an owner of aircraft may find himself unable to register his aircraft in any country.

There was still no real agreement here, but the majority of states felt that the aircraft should be under the control of a particular state who would have responsibility for it in behalf to other states, therefore, the aircraft possessing a nationality of a Contracting State, which would be determined by the nationality of the owner as well as by registration.

On May 18, 1910, the first diplomatic conference on air navigation met in Paris and the first official document containing the principle of nationality of aircraft was adopted mainly based on Dr. Kriege's (Germany) views. He suggested that an adequate system of state control and state guarantee for aircraft as: states can claim the right to ascribe their national character if they are granted the authorization to take the aircraft into use, examine its airworthiness, the competence of its pilot and register it in order to insure the greatest possible safety and public order of air navigation. Nationality does not flow from a private ownership link but from the establishment of a direct link between the state to participate in international air navigation.

The Conference made the following declaration:[1]

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1. See Conférence internationale de navigation aérienne, Paris (1910), Procès-verbaux des séances et annexes, Paris, Imprimérie nationale (1910), p. 73 et seq.

"En proposant qu 'un aéronef, pour tomber sous le régime de la Convention, doit avoir une nationalité, le Comité s'est laissé guider par les considerations suivantes:

1. La nature même de la navigation aérienne exclut, pour les Etats la possibilité de vérifier, au moment où un aéronef pénètre dans l'espace au-dessus de son territoire, que cet aéronef repond aux conditions indispensables dans l'intérêt de la sécurité générale. Il semble donc que, pour être admis à la circulation internationale, l'aéronef doit être placé sous le contrôle d'un Etat qui sera responsable envers les autres Etats de l'exercice consciencieux de ce contrôle. Il va sans dire que la responsabilité de l'Etat ne s'étend pas aux dommages causés par la force majeure ou résultant de la fauts ou de la négligence des aéronautes seuls.

2. La contre - partie des obligations imposées à l'aéronef dans la circulation internationale est les droits qu'on lui reconnaîtra. Pour faire valoir ces droits, l'aéronefs peut avoir besoin de la protection d'un Etat qui, dant les limites tracées par le droit des gens, ait qualité pour intervenir dans son intérêt auprès d'un autre gouvernement. Ce rôle reviendra, tout naturellement à celui des Etats qui sera chargé du contrôle de l'aéronef.

3. La responsabilité et le droit de protection, réunis dans les mains d'un seul et même Etat, constituent entre cet Etat et l'aéronefs un lien analogue à celui qui existe entre le navire et l'Etat dont il porte le pavillon et qu 'ou appelle la nationalité du navire. On pourra, sans inconvénient, se servir du même, terme en parlant de la situation de l'aéronef vis-à-vis de l'Etat qui le contrôle et qui en est responsable.

> 4. La portée de la disposition qui reconnait a l'aéronef un caractère national se borne à ces deux points: responsabilité et protection. On n'entend pas y rattacher d'autres conséquences. Nottament, la disposition ne préjuge en rien la solution des conflits de lois et de jurisdictions aux quels la navigation aérienne pourrait donner lieu en matière civile et pénale."

Therefore, responsibility, diplomatic protection of aircraft by a State and reservation of traffic between two points within the national territory, to national aircraft (cabotage), were the principal issues on the nationality of aircraft that emerged from the 1910 Conference, and, which are at the present situation much like it was fifty years ago.

The Chicago Convention says that an aircraft has the nationality of the State in which it is registered (Chicago Conv. art. 17, Paris Conv. art. 6), besides each State deciding for itself the material conditions upon which aircraft will be permitted to register (Chicago Conv. art. 19; Paris Conv. art. 7). Also the transfer of registration of aircraft is possible (Chicago Conv. art. 18; Paris Conv. art. 8), but it can only be registered in one State. The international control of nationality is made by obliging the aircraft of a state to bear its appropriate nationality and registration marks, and to carry all its necessary documents for its identification (Chicago Conv. art. 20 and

29; Paris Conv. art. 10 and 19). To facilitate this international control each Contracting State undertakes to supply all kind of information concerning the registration and ownership of aircrafts registered in that State (Chicago Conv. art. 21; Paris Conv. art. 8), and the International Civil Aviation Organization shall undertake the burden of establishing uniform standards of the identification of aircrafts.

The most interesting thing in ascribing nationality to aircraft is that the essential views of Dr. Kriege which are contained in the 1910 Paris Convention is reproduced in the Chicago Convention.

The majority of national laws today, including Brazil, invoke the criteria of national ownership combined with registration.

The questions of the maritime analogy and the adoption of the flag factor for the resolution of jurisdictional problems of aircraft situations, on account of the close ties between a state and the ship or aircraft, are completely unacceptable, for no standard procedure for determining the nationality of aircraft has successfully evolved.

An evaluation of the weight of the nationality factor in a multifactoral jurisdictional inquiry should

proceed in the following four premises:[1]

1. The factual reference of nationality has a relative significance dependent on the particular objectives underlying its establishment as evidenced by the criteria evolved for its creation.

2. Due to the relative significance of the nationality attribute the same aircraft could be said to have many different "nationalities" for many different purposes.

3. The objectives sought through the establishment of the nationality construct generally lack a common juridical basis. However, one universal policy of balancing exclusive and inclusive claims to the use of airspace is reflected in the establishment of the nationality construct.

4. Aircraft are a base of power whose protection is sought through the attribution of national character creating a public-law link between the state and the aircraft.

As one can see with differing types of value changes and varying ranges of effects upon states on the nationality concept that have occurred, the outcome has been

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1. Levy, Yuval, "Delimitation of States Competence in International Law: A Special Preference to Jurisdiction over Events Aboard Aircraft, a dissertation submitted to the faculty of the Yale University School of Law, in partial satisfaction of the requirement for the degree of Doctor of the Science of Law, April 1960, p. 492-493.

that no uniform consequences can still be attributed to it. About acts committed aboard aircraft and questions about jurisdiction, great difficulties are still arising for there are still many unsolved questions in relation to the real status of the aircraft, air sovereignty and nationality. But there are still some problems which will be discussed in relation to claims relating to national character of aircrafts: claims with respect to registration towards state and private aircraft and claims with respect to documentation.

A - Claims with respect to registration:

1 - state aircraft

2 - civil aircraft

B - Claims with respect to documentation.

Maritime law makes a distinction with respect to ships, air law distinguishes between state and civil aircraft, and Fauchille made such a distinction with regard to balloons in 1902.

The earliest reference to aircraft is found in the first International Conference on Air Law which met in Paris, convened by the French Government, 1889, which prohibited the discharge of projectiles from balloons or "other new methods of a similar nature."[1] The first reported case of damage caused by aviation, was litigated in the United Kingdom.[2]

Fauchille in 1910, at a meeting at the Institute of International Law proposed that the balloons should have the same distinction in the classification, but that the public balloons should be subdivided into military and

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1. Tombs, International Organization in European Air Transport, (1936), p. 4.

2. Scott's Trustees v. Moss (1889), 17 R. (Ct. of Sess.) 32, cited in Shawcross & Beaumont, op. cit., p. 3.

civil State balloons.[1] Meili, a Swiss jurist, made a greater differentiation: he classified aircraft as State aircraft, military aircraft, public service aircraft and private aircraft.[2]

At the International Air Navigation Conference of 1910, public aircraft were defined as:[3]

> "les aéronefs affectés au service d'un Etat et se trouvant sous les ordres d'un fonctionnaire dûment commissionné de cet Etat."
>
> "(a) aéronefs militaires, c.-à.-d. ceux qui, se trouvant au service militaire, sont placés sous les ordres d'un commandant portant l'uniforme et ont à bord un certificat établissant leur caractère militaire;"
>
> "(b) aéronefs de police, c.-à.-d. ceux qui sont chargés notamment du service de la sûreté publique, de la police sanitaire ou de la police douanière; (et qui) doivent être dirigés par un fonctionnaire de l'Etat dûment commissionné."

The difference between state and civil aircraft was in detail laid down in the Paris Convention of 1919, in articles 30 to 33 (see page 41). The criterion here for this classification is, whether an aircraft is for public service

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1. Annuaire de l'Institut de Droit International, (1910) p. 25.

2. Meili, "Das Luftschiff in interness Recht und Volkerrecht, (1908), p. 11. cited in Honig, "The Legal Statue of Aircraft," (1956), p. 36.

3. Conférence internationale de navigation aérienne, Paris, (1910), procès-verbaux des Séances et annexes.

or not and a curious feature is that aircraft carrying mail is classed as State aircraft, but in the second part of the article it says that it must be a civil aircraft. Another criticized article is the one defining "military aircraft;" for, a civil aircraft can also be used for military purposes, or that it can be determined by displaying its marking, but it does not seem right that an aircraft can be so determined.

From the technical point of view several classifications of an aircraft already exist, for they are determined by the conditions of navigability, of construction, or of equipment; but none of these classifications are of juridical interest.

At the Chicago Conference the term aircraft is used to apply to civil aircraft, and it does not apply to state aircraft (see article 3 on page 42-43). The term "public" and "private" are not used in the classification of aircraft, therefore, the convention is applicable to all aircraft whether or not operated by the State unless "used in military, customs and police services" by a Contracting State. No provision is given (as in the Paris Convention) to define the privileges to be accorded in foreign territory to military aircraft; the difficulty having been shifted, leaving it to the courts in each country concerned to decide when the case arises. But, is

the definition of State aircraft adequate?

As no agreement could be reached among nations represented at the Chicago Conference of 1944, the language used was understood to be vague, but it was considered a much more practical solution than any of the past attempts that had been made in defining it. Anyhow, if a particular aircraft is used in one of the three special types of services (military, customs or police) it is a State aircraft; otherwise, it is a civil aircraft. Therefore, the definition of article 3 of the Chicago Conference is more than satisfactory, since the use of the aircraft expressly determines whether it must be regarded as a military, customs or police aircraft. However, a State which intends to make the privileges of the Convention available for a State aircraft must make it comply with all those requirements which are connected with the authorization of international traffic of aircraft and bearing with the appropriate nationality and registration marks mentioned in Article 20 of the Chicago Convention, and carry the prescribed valid documents of registration and airworthiness, and other documents mentioned in Art. 29 of the Convention, and they must be piloted by a person who possesses a valid certificate of competency or a licence under Art. 32 of the Convention (for and aircraft used for

diplomatic, sanitary, survey, firefighting, insecticide or inspection services which are carried out for the political or public administration of a State -- might deemed to be civil aircraft). Article 9 and 12 of the Chicago Convention will be applicable to all aircraft[1] although there is a contradiction in paragraph "a" of article 9, according to which the Convention is only applicable to civil aircraft and not to State aircraft.

In trying to solve the question of whether military, customs and police aircraft might be deemed to be treated alike civil aircraft in trying to solve the competency and jurisdiction of the State of the flag, and the State of the territory where the aircraft might be, the International Law Association proposed at its 33rd Conference in Stockholm, in 1924, the following:[2]

"(a) Civil Jurisdiction

Art. 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 the nationality.

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1. See Shawcross & Beaumont, op. cit. p. 638-639.

2. International Law Association, "Report of the 33rd Conference, Stockholm, (1924), London, Sweet & Maxwell, (1925) p. 117-118.

Art. 2.

"A public airship which is above territory of a foreign State is subject to the laws and jurisdictions 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.

"In all other respects a private airship follows the laws and jurisdiction of the State of the flag.

"(b) Criminal Jurisdiction:

Art. 3.

"If at the commencement or during the progress of any flight or 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 enquired into and the accused tried and punished in accordance with the Rules given under Art. 2. The State of 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.

Art. 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 act shall be tried and, if found guilty, punished according to the laws of such State."

The subject matter of these resolutions have not been included in any international convention, nor have

sufficient cases arisen to assume that the questions covered are settled as part of customary international law.

Article 13 of the Chicago Convention covers the same subject to a very little extent:[1]

> "The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State."

In the Draft Convention on Offenses and Certain Other Acts Occurring on Board Aircraft, which was completed at Munich in 1959, by the Legal Committee of I.C.A.O. (International Civil Aviation Organization),[2] it states in Article 1 that the Convention will apply only to civil aircraft registered in a Contracting State while the aircraft is:

> "(a) in flight in the airspace of a State other than the State of registration; or
>
> (b) in flight between two points of which at least one is outside the State of registration; or

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1. Shawcross & Beaumont, op. cit., p. 639-640.

2. Journal of Air Law and Commerce, Norwestern University, Vol. 26, Summer 1959, n. 3, p. 282-285. It is a provisional draft only, for it is not yet finished, although it represents the solution of problems arising in the case of crimes and certain acts on board aircraft.

(c) in flight in the airspace of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board; or

(d) on the surface of the high seas or of any other area outside the territory of any State."

The Brazilian Air Code in Article 19 says:[1]

"The aircrafts are classified in public and private.

I - Public aircrafts are:

a) the military;

b) those used by the State for public service.

II - All the other aircrafts are considered private aircrafts.

Anyhow, a military aircraft is every aircraft which is piloted by a person who is incorporated in the active service of the national Armed Forces; and are assimilated to private aircrafts, the public ones used exclusively in the commercial or postal traffic, when piloted by civilians."

I am intended not to agree with the last paragraph for if a pilot and the co-pilot of a commercial aircraft in flight are unable to perform their duties on account of food intoxication and a passenger who is an officer in the Air Force takes over in command of the aircraft — why will the aircraft change its category?

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1. Vademecum Forense, op. cit., p. 675.

But there are still two problems in international air law, in the acceptance of the doctrine of the claims of the principles of nationality and the claims for registration of state or civil aircraft:

a) the rights of State aircraft

b) the respective jurisdiction and competence of the State of the flag of the aircraft and of other States, in whose territory the aircraft may be, to deal with matters occurring on board the aircraft.

These problems must be solved so that finally the legal status of the aircraft might be finally determined for all places and conditions arising in international flight. An importance is given to the fact that an aircraft belongs to nationals of the State whose registration marks it bears and to the State whose registration marks it bears and to the documentation it carries, which will be the object of the next chapter.

The international Air Transport Association (I.A.T.A.), which congregates all the important airlines operating scheduled air services has made a study on two major problems, one, is the establishment of an international air register so that the aircraft registered may freely be used by airlines of the contracting States; and, two, is the elimination of any legislation of the Contracting States which prevents aircraft which are not owned by one of the nationals of a State from being registered in the registers of such State. The first one is very unlikely to be

solved for it would have to be exercised by an international authority, which does not exist and would have to be created, and therefore, is also out of the framework of I.C.A.O.,[1] and would affect the sovereignty of States. The second one is also unsolvable for it would then be necessary to permit the registration of aircraft belonging to a foreign airline in the national register when they are in use by a national airline, the problem thus being one of national law.

To conclude, there are still many difficult problems, but the question whether an aircraft is a State or a civil aircraft depends on the use that is made of the aircraft in question.

B - Claims with respect to documentation.

International rules have been laid down with respect to flight documents.

The documents to be carried in an aircraft are specified in Article 29 of the Chicago Convention:

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1. The I.C.A.O. legislation is incorporated in Brazilian law by decree no. 21.713 of August 27, 1946. See Manual de Legislação Aeronáutica, Ministério da Aeronáutica, Rio de Janeiro, Brazil, (1953), p. 167.

"(a) its certificate of registration; (of which it has already been dealt with)
(b) its certificate of airworthiness;
(c) the appropriate licences for each member of the crew;
(d) its journey log book;
(e) if it is equipped with radio apparatus, the aircraft radio station licence;
(f) if it carries passengers, a list of their names and places of embarkation and destination;
(g) if it carries cargo, a manifest and detailed declaration of the cargo."

Article 16 completes this article:

"The appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention."[1]

A certificate of airworthiness is also required which will be given by the State in which the aircraft is registered.[2]

Annex 8 to the Chicago Convention, which was prepared by I.C.A.O. adds:

"a) To ensure that all aircraft engaged in international air navigation are certified and inspected according to uniform procedures; and
b) To establish airworthiness categories of aircraft, which shall define a minimum level of airworthiness for each such category and shall be exclusive in that no Contracting State will classify an aircraft in an I.C.A.O.

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1. See Shawcross & Beaumont, op. cit., p. 640-644.

2. Article 31 of the Chicago Convention.

> airworthiness category unless the aircraft meets the airworthiness standards governing that I.C.A.O. category."[1]

The pilot and other members of the crew of every aircraft engaged in international navigation must be provided with certificates of competency and licences issued or rendered valid by the State in which the aircraft is registered,[2] and they must be carried in the aircraft. Anyhow, any State reserves the right to refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licences granted to any of its nationals by another contracting State.[3]

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1. Honig, op. cit., p. 181 - Article 33 of the Chicago Convention completes the purpose of Annex 8: "Certificates of airworthiness and certificates of competency and licences issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licences were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

2. Article 32(a) of the Chicago Convention.

3. Article 32(b) of the Chicago Convention.

About the journey log books there shall be maintained in respect of every aircraft engaged in international navigation a journey log book in which shall be entered particulars of the aircraft, its crew and of each journey, in such form as may be prescribed from time to time persuant to this Convention.[1] The captain of the aircraft is responsible for keeping the log book.

Due to the fact that only the technical requirements to be met by flight crew members have been regulated on an international level, the result is that the legal relations between the operator and the crew of an aircraft is governed by the national laws of some States. The Brazilian Air Code in articles 147-158 does that.[2] About the certificates article 24 says:[3]

> "All the private (civil) aircrafts must carry certificates of navigability and of the registration marks and, eventually, all sorts of documents in the forms and modalities that are prescribed by the administrative rules."

About pilotless aircraft, Article 8 of the Chicago Convention[4] says:

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1. Article 34 of the Chicago Convention.

2. Vademecum Forense, op. cit., p. 684-685.

3. ibid, p. 676.

4. See Shawcross & Beaumont, op. cit., p. 638.

> "No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft."

To conclude, the Chicago Convention and its annexes, as to the dealing with claims with respect to documentation is quite thorough and it seems that no additional legislation is at this time needed, for there are conflicts with respect to national legislations. But the question as to conflicts in the competence and jurisdiction of the State of the flag of the aircraft and of other States does require solution by international legislation.[1]

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1. Article 11 of the Chicago Convention complements what has been said in the foregoing: (See Shawcross & Beaumont, op. cit., p. 639).

International law has not yet become universal, therefore, one still has to deal with conflicts between international and national (air) laws or with different systems of national laws.

In this next chapter I purport to study the conflict in the competence and jurisdiction of courts of different states to deal with torts, contracts, and crimes committed aboard an aircraft and the persons involved therein. Problems relating to any acts or crimes committed on board a state airplane, whether the aircraft rests on the ground or is in flight will not be discussed in this work. I will also specifically discuss the making and application of policies for jurisdiction regarding the customary practices and treaties in civil and criminal acts committed on board aircraft.

For the purposes of this work aircraft[1] means civil aircraft and it includes all balloons (whether captive or free), kites, gliders, airships and flying machines. Flying machines[2] means an aircraft heavier than

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1. Shawcross & Beaumont, on Air Law, 2nd. ed. London, 1952, p. 208.

2. Ibid.

air and having means of mechanical propulsion.

About the legal aspects of offenses and certain other acts occurring aboard an aircraft, I will discuss the draft that resulted from the Legal Committee of I.C.A.O. (International Civil Aviation Organization), at its meeting in Munich, Germany, held between August 18th and September 4th, 1959, and I will try to make some proposals.

However, the objective is not to try to bring one system of private international law to be recognized as binding by the law of nations, but the main goal here is that certain patterns of uniformity in attaining specific results in particular controversies will become constant, so that it will permit all the participants in the world social progress to persue their objectives, rationally, economically, and effectively.

IV. The Making and Application of Policies for Jurisdiction.

I will focus in here the modes of the making and application of policies for jurisdiction based on the customary practicies of decision makers in allocating competence to control effects of particular value changes, i.e., individuals who may be nationals or non-nationals who might enter into agreements (contracts) and deprivations (torts and crimes), which may be when the aircraft is in flight in the airspace of a state other than the state of registration; or in flight between two points of which at least one is outside the state of registration; or in flight in the airspace of the state of registration if a subsequent landing is made in another state with the said person still on board; or on the surface of the high seas or of any other area outside the territory of any State.

An aircraft is considered to be in flight[1] from the moment when power is applied for the purpose of actual

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1. I.C.A.O. Legal Committee, Draft Convention on Offenses and Certain other Acts Occurring on Board Aircraft, 26 Journal of Air Law and Commerce, Chicago, Summer 1959, p. 283.

take-off until the moment when the landing run ends.

State[1] means a member of the community of Nations, which has complete and exclusive sovereignty over the airspace above its territory.

The modes of the making application of policies for jurisdiction based on the customary practices are: a) jurisdiction and competence of the court; and b) choice of law.

A. Custom

1 - Jurisdiction and Competence of the Court.

The term jurisdiction means the power of a state, through its courts, to create rights which under principles of common law, will be recognized as valid in other states. Private international in the common law countries is almost entirely the result of judicial decisions, but its doctrines had origin in the writings on the Continent, which goes back to the great Roman Empire.

The Roman Rules upon the manner in which they tried to solve the conflicts are not very clear. A person could be connected with more than one urban community at the same time, as for instance, when he was born in one

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1. Fenston, De Saussure, Crimes on Board Aircraft, 1 McGill Law Journal, Montreal, 1952, p. 88.

place, adopted in another, and domiciled in another - the result was that he became subject to several jurisdictions, since the rule was that he might be sued before the magistrates of any urban community of which he was a citizen or in which he had his domicil. And, although a defendant might be sued in one of several places, he logically could not be subject to different and contradictory rules of law. The general rule was that the defendant was subject to his personal law - the law of his origin or domicil.

Savigny in his writings affirms, however, that when a person had citizenship and domicil in two different places he was subject to the system of law that obtained in the place where he was a citizen and not to the law of his domicil.

During the six to the tenth centuries, after the fall of the Roman Empire, there arose the system of personal law, followed by a system of separate territorial laws, due to the influence of feudalism. In the former, criminal law and canon law were exceptions of universal application, for it was necessary to discover the racial law of each party to a dispute and then to choose which of these laws was applicable. In the latter, feudalism was the negation of personality, therefore, a vassal

would be obliged to recognize that he was merely the man of his lord, and as such subject to the law of his lord. This was essentially territorial, applicable to all the persons, and transactions within the fief - all laws were effective only within the territory of the legislator. This system was adopted during the eleventh and twelfth centuries.

But in an era of increasing commerce, this system above could not be tolerated on account of the daily clashes that occurred between the local laws of various cities, especially in Italy. The law schools of Bologna, Padua, Perugia and Pavia made the first attempts to apply a scientific mode of reasoning to the reconciliation of conflicting laws. The era of the statutists went from the first man to deal with the subject on principle, that is, an examining each legal relation in which a conflict of laws was possible, and then indicating the law on the grounds of reason and justice ought most appropriately to govern the matter was Bartolus (1314-1357), who may be described as the father of private international law. The doctrine of the statutists was that all statutes are either real or personal. A real statute is one whose principal object is to regulate things, and they apply exclusively with regard to immovables

within the territory of the enacting sovereign; while, a personal statute is one that is concerned with persons and is applicable even though the subjects may go within the jurisdiction of another territorial sovereign. In the sixteenth century this theory was carried into France, and a study of the conflict of laws became imperative for each province had a different custom of law. Dumoulin was the first exponent of the doctrine that the law to govern a contract is the law intended by the parties - similar to the English theories - which D'Argentre was for the autonomy of the provinces. In the seventeenth century the Dutch jurists propounded, specifically through John Voet (1647-1714) the doctrine of comity, which is the principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. In the eighteenth century some of the French jurists were for the application of laws limited to the territory of the legislator, while others favored the extra-territorial operation of laws.

Meanwhile, in England, the lawyers did not find it necessary to deal with the problem of conflict of laws, until a few centuries ago, for the rule was that the common law courts were unable to entertain foreign causes. There

was one exception of this rule and that was in the Court of Admiralty, which extended its jurisdiction to foreign causes as early as the middle of the fourteenth century, but however, there was no question of choice of law.

However, the eighteenth century in England represents the embryonic period of private international law, when Lord Mansfield in the Holman v. Johnson case gave a clear acknowledgment of the duty of the English courts to give effect to foreign laws:

> "Every action here must be tried by the law of England, but the law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern."[1]

The rules to govern contracts, torts, and legitimation were respectively laid down in 1865, 1869, and 1887. But such matter are still controversial, the number of decisions on these subjects are trifling in comparison with the case law that sorrounds such topics as contracts and torts.

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1. Holman v. Johnson (1775), 1 Cowp. 341.

Mc Nair addresses two questions about jurisdiction in respect of aircraft:[1]

1 - how will the rules of English law determine the country or countries whose national law and jurisdiction govern persons in, and events happening in, an aircraft at any point of time; and

2 - in the case of England, which of two systems of law applicable to persons and events within its jurisdiction, namely, the common law or the law maritime, is applicable to the facts under consideration.

The British Air Navigation Act of 1920, in which the preamble recites that the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air incumbent on all parts of

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1. Mc Nair, A.D., The Law of the Air, London, 1932, p. 87-112.

His Majesty's dominions and the territorial waters adjacent thereto, provides that:[1]

> "(1) Any offence under this Act or under an order in Council or regulations made thereunder, and any offence whatever committed on a British Aircraft, shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time be."
>
> "(2) His Majesty may, by Order in Council, make provision as to the courts in which proceedings may be taken for enforcing any claim under this Act, or any other claim in respect of aircraft, and in particular

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1. Ibid., p. 88.

"(may confer jurisdiction upon any court exercising Admiralty jurisdiction)".[1]

These were the first rules established in England respecting the jurisdiction aboard an aircraft, in the complete absence of judicial precedents. The focus here is upon the allocation of jurisdiction between nation states and not between various courts of one particular state.

The modern theories followed by international private lawyers and writers are: 1) the statutory system; 2) the international system; 3) the theory of acquired rights; and 4) the local law theory.

Those who advocate the statutory system nowadays affirm the personality of law - the law of a man's nationality is that which governs him personally, and it is applicable to him in his own country and in any other country to which he may go. As example of the law of nationality adopted in France is the Code Napoleon of 1803, which provided that the rules provided therein

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1. See Civil Aviation Act 1949 (12 Sec. 13 Geo. 6 Ch. 67), Section 62 (1), (2); — Committee on Science and Astronautics, U.S. House of Representatives, 87th Congress, 1st Session, Air Laws and Treaties of the World, Washington, D.C., 1961, p. 552. The rules of jurisdiction have remained the same as of the British Navigation Act of 1920.

should govern Frenchmen even though residing in foreign countries, and towards foreigners the tendency in the French courts has always been to apply by way of reciprocity the national law of a foreigner to any matter concerning his status or capacity. Mancini is the principal exponent of this theory - at the University of Turin in 1851, he vigorously contended that the law of nationality must govern not merely personal rights but all legal matters concerning an individual member of society. At present many of the most important countries, such as France, Germany, Italy, Spain, Sweden, Holland, Greece, Japan and Mexico adopt the criterion of the personal law. However, this concept of the law of nationality is subject to the exceptions or limitations that result from l'ordre public international, that is, the personal law of a foreigner might not be applied by the courts if to do so it conflicts with some law of the forum that concerns public order.

The international system advocates maintain that there exists a single body of international rules which has grown out of gradually accepted customs and which suffices to solve all legal questions that contain a foreign element. Savigny's thesis is that it is

"an international common law of nations having intercourse with one another", i.e., a judge, when required to decide a dispute, must first determine the nature of the legal relation out of which the conflict of laws arises, and then must discover the system of law to which that relation most appropriately belongs - and this system must be applied regardless of the fact that it may be foreign.

The theory of vested or acquired rights has been elaborated by Anglo-Saxon writers, especially by Dicey in England and by Beale in the United States. This theory is based upon the principle of territoriality, that is, a judge cannot directly recognize or sanction foreign laws nor can he directly enforce foreign judgments, for it is his own territorial law which must exclusively govern all cases that require his decision; however, a right acquired under the law of a foreign country may be enforced, and thus, some writers say that the theory is untrue in fact. The logic of this theory requires that the law of the forum shall apply, not merely the domestic rules, but also the conflict of law rules, of the foreign law selected.

The local law theory means that the court applies its own rules to the total exclusion of all foreign rules, but since it is confronted with a foreign element case it takes into account the laws of the foreign country in question; in other words, it creates its own local rights,

but fashions it as nearly as possible upon the law of the country in which the decisive facts have occurred. After all, these rules are as much part of his own territorial law as those which regulate the conveyance of land in his own country, and that there is no abdication of sovereignty in the conflict of laws of the lex fori to that of a foreign power. The forum thus enforces, not a foreign right, but a right created by its own law.

Private international law as we have seen is not scientifically founded upon the reasoning of jurists nor is it an exact science; anyhow in applying jurisdiction to a conflicts of law case the Anglo-American tribunals must try to reach a just decision in accordance with their own conceptions of utility and justice. But, to whom the jurisdiction of the English (here I am specifically interested in the English system for it has laid down the basis of the Anglo-American law) courts is applicable?

It is widely known that all persons may invoke or may become subject to the jurisdiction of the English courts, although they are foreign by nationality and even though the cause of action has arisen abroad or is connected with a foreign country. This is the general rule.

An alien person who is an enemy cannot sue nor can be initiate an action in an English Court, although he may be sued. The disability of suing is based on public policy. But, there are persons who are immune from the jurisdiction of the English courts, although they might be physically present in England - sovereigns and diplomatic officers. In the case of the sovereign personally if he comes to England, and enters into contracts and other engagements under the guise of an ordinary private person, no action can be entertained against if he chooses to object to jurisdiction.[1] However, a sovereign nay waive his right to immunity and submit himself to the jurisdiction of the courts. An ambassador accredited to the country, his family, his counsellors, secretaries, clerks and domestic servants are exempt from civil and criminal liability. International organizations, such as the United Nations, the International Court of Justice, etc., representatives, and high officers are also granted immunities, but may vary with each case.

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1. Mighell v. Sultan of Johore, (1894), 1 Q. B. 149.

Absent the circumstances in which English courts are competent to exercise civil jurisdiction, in the absence of an Act of Parliament, is founded in the principle of effectiveness or the principle of submission.

The principle of effectiveness means that a judge is not competent to pronounce a judgment if he cannot enforce it within his own territory; of submission means that in some cases a person may voluntarily submit himself to the judgment of a court to whose jurisdiction he would not otherwise be subject.

Leaving the principle of submission out, a common law court will not arrogate jurisdiction over a case, consistently with the principle or effectiveness, if they are not certain that it will be able to enforce its judgment. I will now proceed to examine the different causes of action that may rise a question of conflict of laws.

Jurisdiction over actions in rem is derived from the concept that the local situation of property determines the sovereign to whose physical power it is subject. Temporary situation of certain means of transportation within the territory of a court may confer jurisdiction in rem in actions concerning the property.

Therefore, jurisdiction in rem over vessels when in port is almost universally recognized, but such jurisdiction over aircraft has not yet gained international customary sanction.[1] An action in personam is one in which the techinical object of the suit is to establish a claim against some particular person, with a judgment, which generally, in theory at least, binds his body, or to bar some individual claim or objection.[2] And what court, for example, is competent to entertain a suit for divorce? The English court has stated that status is a res and that an action affecting status is an action in rem, although marriage nor the status of marriage is, in the strict sense of the word, a res, as that word is used when we speak of a judgment in rem. But, one has to discover where this fictitious res is situated. The most that can be said is that prima facie jurisdiction in a such a subject as status is deemed to belong exclusively to the court of domicil. And domicil prevailed after the fall of the Roman Empire in the medieval city states of Italy for over five hundred years. Nationality was not even considered, for, for several

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1. Cooper, The Legal Status of Aircraft, (1949), p. 37-41. (Mimeograph materials).

2. Tyler v. Judges of Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814, 51 L. R.A. 433, 436, 1900.

centuries the problem of choice of law did not usually arise between the subjects of different countries, but between the inhabitants of the various parts of one country. Therefore, the lex domicilii, which means the country in which a man has established his permanent home, won universal recognition, and thus, it is adopted by the British Commonwealth, the United States of America, Norway, Denmark, Brazil, and others.

About an English court possessing jurisdiction to stay proceedings in the case that a defendant is sued by the plaintiff for the same cause of action in two different countries, the rule is that a plea of his alibi pendens will not succeed and the court will not order a stay of proceedings, unless the defendant proves vexation in point of fact in one country and a remedy against the goods in another, or a remedy against land in one state but no such remedy in another.

Thus, I think I have given an outline of the general rules that govern the exercise of jurisdiction and competence of the court more about in civil matters, since its origin to our days, in the civil law countries and specifically in England, for it serves as a paradigma for the common law countries - and, specifically, for the problems of jurisdiction over events aboard aircraft,

with which we will deal further ahead. There is not in existence a one set of rules that will solve the conflict of laws problems, for it embraces those universal principles of right and justice which govern the courts of one state having before them cases involving the operation and effect of the laws of another country.

With respect to criminal acts, the territorial character of penal laws is a general and almost universal principle, and in the majority of cases once a court decides to exercise criminal jurisdiction over a person, the court seized with jurisdiction will apply its own nation state's criminal laws, however, the court will consider whether the alleged crime is justified or not prohibited by the state in whose territory it was committed.[1]

Another modern principle is the nationality principle, which determines jurisdiction by reference to the national character or nationality of the person committing the offense. By virtue of such jurisdiction the state may prosecute its nationals while they are abroad and to execute judments against them upon property within the state, or upon them personally when they return, or the

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1. Wolff, Private International Law, Oxford, 1950, p. 163-164.

state may prosecute its nationals after they return for acts done abroad. But, double jeopardy or "non bis in idem" should not be permitted, for otherwise, such person might be prosecuted by the authorities of his state for the same act he had already been prosecuted in another state.

The protective principle is another one which determines jurisdiction by reference to the national interest of the offense, and is regarded as the basis of an auxiliary competence.

The fourth principle, is the universality principle, determining the jurisdiction by reference to the custody of the person committing the offense.

The passive personality principle determines jurisdiction by reference to the nationality or national character of the person injured by the offense.

Of the five principles that I have just exposed, the most important ones are the territorial character of penal laws and the nationality or national character of the person committing an offense. Penal law is applied only to a public offense, punishable only by the public authorities in the name of the state, and both in the statutory and common law, the object is to discipline

the defendant - therefore, the territorial character of penal laws. The principal problem lies in the necessity of coordinating two systems of law (that of the State where the offense is committed and that of the State where the prosecution begun) and that is established on a strictly territorial basis, for the social order of a community should be restored where it has been upset. Specifically on the problem of offenses committed on board of aircraft not less than eighteen draft conventions and sets of principles concerning this problem have been put forward, and although none of these set principles have not yet been applied internationally, the last draft on this problem published by the International Civil Aviation Organization (I.C.A.O.) will be discussed further ahead.[1]

Therefore, it can be seen very easily that there is a lack of collaboration in the criminal law field which is more obvious than in any other field of law, a solution for the conflict of laws (over offenses committed aboard aircraft) would be to give an international court jurisdiction over any crime involving foreign elements,

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1. See Appendix I at the end of this work, on the Draft Convention on Offenses and Certain other Acts Occurring on Board Aircraft.

but under the present state of international affairs such a goal is still too far to be achieved.

And, it is to be noted that with regard to the jurisdiction and competence of the courts, over particular civil or criminal events, questions whether a given person owes allegiance to a particular state where he is domiciled, whether his status, property rights, and duties are governed by the lex sitas the lex loci, the lex fori, or the lex domicili, are questions with which private international law has to deal (specifically when events aboard aircraft are here involved) and has to make a choice of law (which is the following subject to be discussed), so that the community of countries might have a greater chance to come into being.

2 - Choice of Law

What king of policy will be applied by the Court disposing of an action whether it is in torts, contracts, or crimes (on board an aircraft) - though not seized with judicial competence - so that it will be able to assert and exercise its power and dispose of the controversies towards a decision? The methods employed to allocate jurisdiction of a court, namely, in torts, contracts, or crimes will be discussed below.

a) Torts

A tort is a wrongful conduct which gives to a person whom the law regards as injured by it a remedy against the person responsible for it. However, the wrongful conduct might be at once a tort and a breach of contract.

The torts with which air law is mainly concerned are acts of carelessness; wrongdoing causing injury or death to persons or material damage to property; acts which are breaches of duties specifically prescribed by statutory enactments and cause injury or damage; and acts which are an interference with private rights of property. In English law they are respectively known as negligence and public nuisance; breach of statutory duty; tresspass and private nuisance.[1]

The tort of negligence consists in causing injury or damage to another by a failure to exercise due care, when there is a duty to exercise care. To succeed in an action for negligence the plaintiff must prove:
1 - that the defendant owed him a duty to take care;

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1. Shawcross & Beaumont, On Air Law, 2nd. ed. London, 1952, p. 73.

2 - that the defendant failed to discharge that duty; and

3 - that the failure directly caused damage to the plaintiff.

The breach of duty imposed by a stature may in certain circumstances (as, "it shall be unlawful" to leave an airplane unoccupied with the engine running, and the aircraft so left, ran off and damage others) give a right of action against the person guilty of breach.

Tresspass is of three types: tresspass to land, to goods and to the person. Tresspass to land is the unauthorized entry or occupation of the land of another - and is the one that has no practical importance. Tresspass to goods is any unauthorized physical interference with goods in the possession of another person; to the person, is committed by any unauthorized physical interference with the body of another, or with his liberty or bodily movement. Actual damage does not have to be proved by the plaintiff to maintain an action on tresspass.

Nuisance is of two kinds: public and private. A public nuisance is an act which injuriously affects the health, safety or liberty of the public; a private nuisance is generally some unauthorized interference with the use or enjoyment of the land of another.

A public nuisance is an act which injuriously affects the health, safety or liberty of the public; a private nuisance is generally some unauthorized interference with the use or enjoyment of the land of another.

The rights and liabilities of the parties must be determined upon an action on tort which is brought in England. The theory is that the lex loci delicti, or place of wrong, is the place where the last event necessary to make a person liable for an alleged tort occurs; or the lex fori, or law of the forum, or court, is the jurisdiction of whose judicial system the court where the suit is brought is an integral part - thus, a choice of laws must be made by the courts, i.e., either the lex loci delicti or the lex fori must be chosen, or that these two laws must be combined.

However, two conflicting systems are used for determining the locus, one deals with the place where the tort feasor was present at the time of comission of the tort, and the other refers to the place where the injuries effects of the tort has taken place. This theory of the locus is the most widely accepted - in the United States it is the only one - in England it has combined the lex fori and the lex loci delicti, in such a way that the English court is not the mere guardian of its own public

policy, but is required to test the defendant's conduct by a reference to the English as well as to the foreign law of tort.

In Phillips v. Eyre[1] it was stated that two conditions should be fulfilled in order to found a suit in England, for a wrong alleged to be committed abroad.

1 - the wrong must be of such a character that it would have been actionable if committed in England;

2 - the act must not have been justifiable by the law of the place where it was done.

With respect to torts occurring on board vessels by analogy (one might relate it to aircraft) the law of the flag is the relevant factor wherever the acts complained of have all occurred on board of a single vessel. When the vessel is on the high seas the state of nationality of the vessel is also applied as the locus in which the act occurred - in England a suit must be tested only by English maritime law, besides the plaintiff having to prove that the conduct of the defendant was not justifiable by the law of the flag and that it would have been actionable had it occurred in this country.

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1. (1870), L.R. 6 Q. B. 1, 28.

Prof. Hamel has a good criticism to a reference to the law of the flag:[1]

> "Mais sous cette forme simpliciste le système est innaplicable dans l'état actuel des choses. Il serait absurde de soutenir que le loi nationale de l'aéronef devra régler toutes les situations et toutes les difficultés qui se présenteront à propos des actes passés à bord. Qui oserait prétendre, par exemple, que, si contrat a été passé à bord, la capacité des parties devra s'apprécier d'après la loi nationale de l'aéronef, ou que, si une personne est décédée à bord, sa succession se régera d'apres la même loi?... Il est fort douteux qu'ils aient eu la prétention de bâtir un droit internationale privé spécial au droit aérien, dans lequel tout se réglerait d'après le lieu de l'acte juridique lui-même. Quelle étrange simplification!"

But, let us turn to some cases in which the American courts have not applied the concept of the law of the flag - following the analogy between a vessel and an aircraft.

In the case of Noel v. Airponents, Inc.[2] a libel in admiralty was brought by the personal representative of the decedent for damages under the American Death on the Seas Act.[3] The decedent was an American citizen who had been killed in an aircrash aboard a Venezuelan airliner

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1. Hamel, Nationalité et conflits de lois en droit aérien, 20 Revue de Droit International Public (R.D.I.P.), (1925), p. 207.

2. 169 F. Supp. 348 (1958); noted in 34 Notre Dame Law, (1959), 452.

3. 41 Stat. 537 (1920), 46 U.S.C.A. Sec. 761-768.

in flight over the high seas. The accident was caused by the negligence of an American corporation, in the state of New York. The law of Venezuela, the state of registry of the aircraft, does not create a cause of action in negligence against the American corporation, but American law recognizes such a cause of action and imposes tort liability. The issue was: which is the applicable law? The application of the lex loci delicti rule would have pointed to the law of the flag and legally it would mean the dismissal of the suit, for the Venezuelan Republic had no interest in the outcome; the exculpation of the American corporation responsible for the accident, and the deprivation of the libellant's expected compensatory damages. But the Court upheld the applicability of the American prescription:

> "It is well established that admiralty tort liability... must be determined under the lex loci delicti, here the airspace under such circumstances the tort liability must be determined under the law of the aircrafts registry . This argument rests on a traditional principle of maritime law that

ordinarily the law of the ship's flag is determinative of its tort liability. We are of the opinion that these cannot be a slavish adherence to this principle, in total disregard of other considerations, where the Court is called upon to resolve conflicts between competing laws."[1]

The Court concluded in saying:

"We are of opinion that the conflict of laws here can be fairly and justly determined only under the formula announced in the case of Lauritzen v. Larsen (345 U.S. 571; 73 S. Ct. 921, 97 L. Ed. 1254, 1953) in which the court concluded that the "law of the flag" was determinative of the tort liability... We are of opinion that in the choice of the lex dilicti we should be influenced by the several factors favorable to the choice of local law." [2]

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1. 169 F. Supp. at 350.

2. Ibid., at 351.

In Airline Stewards and Stewardesses Ass'n v. Inter. Northwest Airlines[1] case the petitioner labor union contested an arbitration award recognizing the union as the bargaining agent for stewards and stewardesses on all respondent's flights of domestic origin, but allowing respondent to bargain independently with foreign nationals serving on flights between wholly foreign termini.

The Petitioner contended that the award deprived the union of its statutory right under the Railway Labor Act (48 Stat. 1186 (1934), 45 U.S.C. § 152 (1952) which was made applicable to airlines -- to bargain for the entire class of flight service attendants.

Respondent defended on the ground that the Act had no extraterritorial effect. Petitioner maintained that no extraterritorial application of the Act was required, since under the maritime doctrine of the law of the flag American aircraft are deemed to be part of the territory of the United States, and their crews are therefore subject to the Act's domestic application.

Held (per J. Donovan) at 688: "Our Supreme Court, with clarity and finality, treats air transportation as a type of commerce to be considered apart and distinguishable from foreign commerce by sea. From this it may be inferred that it is not to be read into the Act as a concept of the

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1. 162 F. Supp. 684 (1958), noted in Univ. of Ill. Law Forum (1958), 649-651.

law of the flag as contended for by petitioner." (Therefore, the maritime doctrine of the law of the flag is not applicable to aircraft.)

But, let us now examine other cases, as a cause of action arising in airspace under Death on the High Seas Act:[1] D'Alemán v. Pan Am. World Airways (259 F. 2d. 493, 2d. Cir. 1958).

Plaintiff as administrative of the estate of her deceased husband, brought an action against the defendant, a New York corporation, for wrongful death. The deceased, a resident of Puerto Rico was a passenger on defendant's airflight from Puerto Rico to New York and allegedly suffered shock when the pilot "feathered" the plane's engine while it was over the high seas. Deceased died four days later in New York. Plaintiff contended that since death occurred in New York, and the defendant was a New York corporation, the New York Decedent Estate Law[2] was applicable and not the Federal Death on the High Seas Act.. The action, however, was heard in admiralty under the Death on the High Seas Act, and a decision was rendered in favor of defendant.

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1. 41 Stat. 537 (1920), 46 U.S.C. Sec. 767 (1952).

2. N.Y. Deced. Est. Law Sec. 130.

Section 1 of the Federal Death on the High Seas Act states:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyong a marine league from the shore of any state... the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty..."[1]

Therefore, admiralty will hear tort actions as long as the place of wrong is on the high seas,[2] and the test of admiralty jurisdiction is one of locality, not the nature of circumstances surrounding the wrong. Further, since the purpose of the Act was to give a remedy in an area not adequately covered by existing statutes, a construction restricting the remedy to wrongs occurring on the surface of the sea and denying it to wrongs occurring in the airspace above the sea would seem an arbitrary distinction - though some controversy exists, it is held that the Act, when applicable, gives an exclusive right to sue in admiralty and preempts any right to sue in a civil court.

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1. 41 Stat. 537 (1920), 46 U.S.C. Sec. 761 (1952).

2. 1 Benedict, Admiralty Sec. 127 (6th ed. 1940); Robinson, Admiralty Sec. 11 (1939).

In the instant case, the court determined that the law governing airspace over the high seas is the province of admiralty. Jurisdictions following this decision would deny a plaintiff an action under state law when a wrongful act resulting in death occurs over the high seas.

In Fernández v. Línea Aeropostal Venezolana (156 F. Supp. 94; U.S. Dist. Ct., S.D.N.Y., Oct 21, 1951) there was a libel admiralty for death of stewardess on respondent's aircraft which crashed in Atlantic Ocean outside United States territorial waters. The court held that the admiralty law of the United States, as expressed on the High Seas Act, now grants power to admiralty courts to entertain an action for a wrong done on the high seas even though the person injured has died as a result of the wrong. This power granted to the courts is applicable even though the wrong occurred in an area not subject to the laws of the United States.

The motion to dismiss the cause of action is denied...

A very interesting case of tort is the following one for air pressure injury for its unique fact situation: the Marchant v. American Air Lines, Inc. (146 F. Supp. 612, D.C.D.R.I. 1956), where the court was faced with ruling

upon a motion for judgment not withstanding the jury's verdict, or, in the alternative, for a new trial.

The evidence established that plaintiff while a passenger on defendant's plane, suffered a ruptured eardrum and damage to the inner ear resulting in partial loss of hearing and tinnitus (which is a medical term which simply means a hissing in the ear), occassioned, according to the plaintiff by pressure differences between his middle ear cavity and that of the cabin in which he was riding.

The United States District Court, with no other guide than the testimony given and the rarity of this type of injury, felt it had no alternative but to uphold the jury's verdict in the sum of $24,500 in favor of the plaintiff and overruled the motion for judgment notwithstanding the verdict and denied a new trial.

In the near future the courts might be faced with the following possible solutions:

1 - Follow, the decision of this case in allowing a recovery based upon a jury's evaluation of the evidence ascertainable in each case;

2 - Adopt a policy of denying recovery for such an injury if tinnitus alone is present without other "probable" medical injury; or

3 - Have a court appointed physician examine the injured party and predicate recovery upon his testimony alone.

In Suzanne Thomas Richards, etc., et al., v. United States, et al. (30 L.W. of Feb. 27, p. 4159-4164), decided on February 26, 1962 by the Supreme Court, Mr. Chief Justice Warren delivered the opinion of the Court - the question to be decided in this case is what law a Federal District Court should apply in an action brought under the Federal Tort Claims Act[1] where an act of negligence occurs in one state and results in an injury and death in another State. The basic provision of the Tort Claims Act states that the Government shall be liable for tortious conduct committed by its employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[2] The parties urge that the alternatives in selecting the law to determine liability under this statute are: 1 - the internal law of the place where the negligence occurred,

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1. The provisions of the Tort Claims Act are now found in Titles 28 Sec. 1291, 1346, 1564, 2110, 2401, 2402, 2412, and 2671-2680.

2. 28 U.S.C. Sec. 1346 (b).

or 2 - the whole law (including choice-of-law rules) of the place where the negligence occurred, or 3 - the internal law of the place where the operative effect of the negligence took place.

The petitioners here are the personal representatives of passengers killed when an airplane, owned by the respondent American Airlines crashed in Missouri while enroute from Tulsa, Oklahoma, to New York City. Suit was brought by the petitioners against the United States in the Federal District Court for the Northern District of Oklahoma, on the theory that the Government, - through the Civil Aviation Agency had "negligently failed to enforce the terms of the Civil Aeronautics Act and the regulations thereunder which prohibited the practices then being used by American Airlines in the overhaul depot of Tulsa, Oklahoma."[1]

The Supreme Court affirmed the decisions of both the Federal District Court sitting in Oklahoma, and the Court of Appeals for the tenth Circuit, which have interpreted the pertinent Oklahoma decisions[2] which we have held are

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1. Under 72 Stat. 778, as amended, 49 U.S.C. Sec. 1425, the Administrator of the Federal Aviation Agency is charged with the responsibility of enforcing rules and regulations controlling inspection, maintenance, overhaul and repair of all equipment used in air transportation.

2. Gochenour v. St. Louis - San Francisco R. Co., 205 Okla. 594, 239 F. 2d. 709, Miller v. Tennis, 140 Okla. 185, 282 P. 345, See Fenton v. Sinclair Refining Co., 205 Okla. 19, 240 F. 2d. 748.

controlling, to declare that an action for wrongful death is based on the statute of the place where the injury occurred that caused the death. Therefore, Missouri's statute controls the case at bar.

The Brazilian Air Code, in Article 83,[1] states: "The carrier shall be liable for any damage resulting from the death or bodily injure of a passenger by accidents occurring on board an aircraft while in flight, or while the operations of boarding or leaving the aircraft, when they are the result:

a) of a defect in the aircraft;
b) of negligence of the crew."

As one can see there is a contractual civil responsibility on the operator of the aircraft in the case of events occurring aboard aircraft and there is no problem here about jurisdiction of these acts, for the territorial system of law is applied (according to Article 6).[2]

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1. Vademecum Forense, "Coletânea de Leis do Brasil, Rio de Janeiro, (1959), p. 674-686.

2. Ibid, p. 674. The most important principles adopted by the Air Code of 1938 are:
   1. Principle of Liability.
   a. damage to third parties on the surface: absolute liability (art. 97);
   b. damage to third parties in flight: no special provision;

Finally, in the Kilberg v. Northeast Airlines, Inc. (9 N.Y. 2d. 34, 210 N.Y. 2d. 133, 172 N.E. 2d. 256 (1961), a New York domiciliary purchased in New York a ticket from the defendant airline for transportation from New York to Nantucket, Massachusetts. The airplane crashed at Nantucket and the New York passenger was killed. Both Massachusetts and New York had statutes allowing recovery for wrongful death, the former limits the recovery from a common carrier to not less than $2,000 or more than $15,000; while the latter forbade a limitation on the amount of recovery. The passenger's administrator brought the complaint in New York for the death, and the first cause of action was under the Massachusetts wrongful death statute; the second was a cause of action on the ticket asking for $150,000 in damages.

The Court of Appeals stated that it is law long settled that wrongful death actions, being unknown to the common law, derive from statutes only and that the statute which governs such an action is that of the place of the wrong - the Massachusetts act. This applies to the substantive law,

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2. Limitation of Liability.
a. damage to third parties on the surface: Limited - 100,000 cruzeiros per person (U.S. $5,000). Unlimited for goods,
b. damage to third parties in flight: no principle;
3. Persons Liable - jointly and severally:
a. the person in whose name the aircraft was registered;
b. the person making use of or operating the aircraft;
c. the person on board who had committed the damage (Art. 100).

however, the procedural law is different on account of public policy, therefore the question of recovering damages must be controlled by our own State policies... by applying the New York act which forbade a limitation on the amount of recovery.

Thus, a common law court when dealing with a foreign tort or when presented with a problem in the conflict of laws involving the case of an alleged tort obligation must ascertain the place of wrong and find out whether at the place of wrong a cause (right) of action (in tort) is created on behalf of the plaintiff against the defendant. This is the policy that a court must apply in the case of torts.

Personally, I would adopt a combined system of the law of the flag of the aircraft, as a general principle; and, the territorial system of law in case the State flown over has been harmed and has an interest by a tort committed aboard the aircraft. About the question of jurisdiction, I would advocate the internationalization of air law, by all the Nations accepting the resolutions and interpretations of the various conventions by the International Court of Justice, for up to now there has been a great legal vacuum in this field.

b) Contracts-

A contract is a promisory agreement between two or more persons, who are private individuals, that creates, modifies, or destroys a legal relation.[1] Here, I will deal with the essential validity of contract in the field of conflict of laws, for purposes of jurisdiction of the courts. The intention here, of course, is to try to determine what legal consequences shall be attached to the given situation (a breach of contract occurred aboard an aircraft) and take the position that no other law than the appropriate one has jurisdiction.

There are three main theories that the common - law courts have enunciated:

1 - that the law of the place of making governs - the lex loci contratus;

2 - that the law of the place of performance governs - the lex loci solutionis;

3 - that the law intended by the parties governs.

The lex loci contratus means the law of the place where the contract is made, where the last act is done which is necessary to bring the binding agreement into being so far as the acts of the parties are concerned. The common law's way of settling this problem is by putting into effect

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1. Black, Law Dictionary, 4th ed., St. Paul, Minn., 1957, p. 394.

the legal consequences of the rules of law in force where the act was done, although it may frustrate the intention[1] of the parties in some instances and that the place of contract may have little relation to the business involved in the agreement made.

The lex loci solutionis means that the policy of the state of performance is sometimes applied to the entire contract upon the theory that this place should be regarded as the center of obligation and be treated as a fictitious place of contracting. But difficulty may arise in cases where performance by the promissor is to take place in more than one state, and the agreement is valid by the law of one and not the other.

The law intended by the parties governs is a rule which bristles with theoretical and practical difficulties for the parties. Here say that no matter where they made their agreement, or where it was to be carried out, if there is any law anywhere by which such an agreement is valid, this must be the law they intended to govern this transaction. But no court would ever uphold such a type of agreement on account of its uncertainty in application.

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1. See Fritchard v. Norton (106 U.S. 124, 1 S. Ct. 102, 27 L. Ed. 104, 1882) in which the intention theory was resorted to.

In English law a breach of contract is an actionable wrong although it has caused no actual damage - air law is mainly concerned with contracts of carriage and insurance, and contracts of hire and charter; and in lesser degree, of sale, employment and repair. It is interesting to observe that in many cases the duty in contract and the duty in tort overlap, but the distinction between tort and contract may be important where a question of choice of law arises. Let us turn to some cases:

In Scott v. American Air Lines, Inc. (3 D.L.R., 27, 1944), a citizen of the United States resident in Michigan was killed when an airplane in which he was a paid passenger and which was flying between two American cities crashed in Ontario, and his widow agreed with his employer's insurer to accept compensation under the Michigan Workmen's Compensation Act and the agreement was approved, as required by the Act, by the Michigan Department of Labor and Industry. Mc Farland J. held that the validity and construction of a contract are determined by the law of the place where the contract was made, for under s. 15 of the Michigan Act an injured employee must make his election and cannot proceed both against his employer for compensation and against the third party, the wrongdoer. Therefore, the action for damages under the Fatal Accidents Act (R.S.O. 1937, c. 210)

in Ontario is dismissed on account of the compensation agreement in Michigan, and because it has been laid down frequently that it is contrary to public policy and justice that a person should have two remedies for one wrong, thereby subjecting the wrongdoer to two penalties.

However, the plaintiff after the death of her husband had her choice of three remedies: she could bring an action in Ontario under the Fatal Accidents Act; second she could recover compensation under the Workmen's Compensation Act of Michigan (which was what she did), and third, she could bring an action in Michigan against the defendant.

But, in Chatenay v. the Brazilian Submarine Telegraph Company, Limited (1 Q. B. 79, 1891) in the Court of Appeal the lex loci solutionis was applied, contrary to the decision above.

The plaintiff, a Brazilian subject, executed in Brazil in the Portuguese language a power of attorney to a broker resident in London to buy and sell shares. The broker accordingly sold certain shares of the plaintiff in the defendant company, and they were registered in the name of the purchasers. The plaintiff claimed a rectification of the register, on the ground that the sale was not authorized by the power of attorney. On the trial of a preliminary issue to determine whether the construction of the power of attorney was to be governed by Brazilian or by English law it was held

to be determined by English law.

On appeal, the lower decision was affirmed, and thus, dismissed. However, Lord Esther, M.R., gave a very sound opinion by stating that if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of the construction), is to be construed according to the law of the country where it was made. But the business sense of business men has to come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country.[1]

Thus, the lex loci solutionis is intended to apply here, at any rate as far as the mode of performance is concerned.

The third theory will not be discussed here for, as Professor Beale[2] says of it: "The doctrine was adopted bodily from the continental writers, and is anomaly in our law, though

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1. 1 Q. B., (1891), at p. 82-83.

2. Goodrich, Handbook on the Conflict of Laws, 3rd ed., St. Paul, Minn., (1949), p. 328.

quite consistent with the principles of the modern civil law.

As one can see, at present there is still not much authority on this subject of contracts, but I hope that the general principles cited of conflict of laws might help for a better choice of law, more specifically, to cases that may arise on board aircraft.

c) Criminal Acts.

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. Probable solutions:

1 - in the case that both aircrafts collided in the same country there is no problem in this hypothetic case - Philippine jurisdiction;

2 - in the case that the first aircraft is Philippine and the second one Australian - Philippine jurisdiction because the crime took place and produced effects on its aircraft, and the same can be applied to the Australian aircraft; therefore,

we have a case of concurrent jurisdiction, and thereby, a conflict of laws case.

A crime is an offense against the state. A civil act is an offense against a 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 the criminal offender is punished as to see that the offender in civil cases makes good the damage caused by him. 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.

As I have stated above a crime is a breach of the law which the State will itself punish, however, the same set may be at the same time a tort, a breach of contract and a crime - for example, a pilot carrying paying passengers who fly in contravention of some navigation rule may at the same time commit a breach of a statutory Regulation, a breach of a contract to carry his passengers safely, and the tort of negligence.[1] Anyhow, a large part of air law is criminal law,

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1. Shawcross & Beaumont, op. cit., p. 74.

for, particularly in criminal offenses aboard an aircraft within an area of a particular State - within its jurisdiction - the State will wish by all means to exercise its jurisdiction under all circumstances, i.e. exclusive jurisdiction.[1] But there is a great lack of an internal rule concerning extra-territorial jurisdiction[2] of a State for offenses committed aboard aircraft of its nationality when it is flying over the high seas or above a no man's land. One of the most striking cases of an unpunished

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1. See United v. Causley (328 U.S. 256, 1946) where Mr. Justice Douglas delivering the opinion of the Supreme Court with respect of control of the navigable airspace, he seems to have stated that such airspace above the State, for purposes of its jurisdiction, is not in the underlying State at all; that it is adjacent, and not within.

2. However, in the case of United States v. Flores (289 U.S. 137, 1933), by indictment found in the District Court for Eastern Pennsylvania, it was charged that appellee, a citizen of the United States upon the S.S. Pandsay, an American vessel, white at anchor in the Port of Matadi, in the Belgian Congo (subject to the sovereignty of the Kingdom of Belgium) murdered another citizen of the United States upon the vessel. The appellee, after the commission of the crime was brought into the port of Philadelphia, a place within the territorial jurisdiction of the District Court. Justice Stone held that in the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law. So applied the indictment here sufficiently charges an offense within the admiralty and maritime jurisdiction of the United States.

   This sound judgment should be applied to acts committed on board aircrafts.

crime aboard an aircraft is the United States v. Cordova case.[1]

On August 2, 1948, Diego Cordova and Benito Santana and fifty-eight other passengers entered an airplane owned by Flying Tigers, Inc. and registered as an aircraft of the United States, and the airplane commenced a flight from Puerto Rico to New York, over the high seas. Aboard the airplane Cordova and Santana started to drink toasting each other efusively, until they began to fight. The other passengers fled to the tail of the airplane, and the pilots noticed that the nose unaccountably tended to rise. The captain went into the cabin to see what the trouble might be. Then, Cordova struck and hit the captain of the airplane, thus committing a crime in an American airplane in flight over the high seas and beyond the territorial limits of the jurisdiction of any state. Cordova was brought to trial in the United States District Court of New York, and although he was found guilty of the charges the judge declared that it did not have the jurisdiction to punish the offender since American criminal law only covers United States territory. Under the statute penalizing offenses committed on board an American vessel on the high seas, etc., the statute when speaking of a vessel within the admiralty and maritime

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1. 89 F. Supp. 298, 1950 U.S. Av. R.1.

jurisdiction of the United States evokes in the common mind a picture of a ship, and not of a plane.

Later on, however, the Congress of the United States passed a federal statute which said that federal admiralty criminal statutes which are applicable to United States vessels on the high seas should also be applicable to aircraft of United States registry over the high seas.[1]

But this statute is only applied to a few crimes of violence, and it did not apply to safety, business and economic crimes, as well as tax, food or drug crimes.

About the analogy of the maritime laws to be applied to aircraft, besides the case above which has rejected any similarity to it, another case here -- the Chicago and Southern Air Lines v. Waterman Corp. decided by the U.S. Supreme Court has also rejected the maritime analogy:[2] (Per Mr. Justice Jackson).

> "We find no indication that the Congress either entertained or fostered the narrow concept that airborne commerce is a mere outgrowth or overgrowth of surface-bound transport. Of course, air transportation, water transportation,

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1. Crimes of Violence over the High Seas in American aircraft: Public Law 39-514; title 18 U.S. Code 7; 1952 U.S. Can. Av. R. 437. (approved July 12th, 1952).

2. 333 U.S. 103, 68 Sup. Ct. 431 (1948).

> rail transportation and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce whether at home or abroad, soared into a different realm than any that had gone before... We see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit."

As one can see above the analogy between a vessel within the maritime laws to an aircraft has been rejected by the court, this reinforcing Mc Nair's theory that the aircraft is not a new kind of ship, but that it has developed a legal quality sui generis.[1] This theory is still reinforced with the case of Mc Boyle v. United States.[2]

In this case Mc Boyle was convicted and sentenced for an alleged violation of the National Motor Vehicle Theft Act, 18 U.S.C., Sec. 408. The indictment charged that on October 10, 1924, Mc Boyle caused to be transported in

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1. Mc Nair, The Law of the Air, London, (1932), p. 93.

2. 283 U.S. 25, 1931 U.S. AV. R. 27 (1931), affirming 43 F 2d. 273, 1930 U.S. Av. R. 99 (10th Cir. 1930).

interstate commerce from Ottawa, Illinois, to Cuymon, Oklahoma, one Waco airplane, motor No. 6124, serial No. 256, which was property of the United States Aircraft Corporation and which had therefore been stolen; and that Mc Boyle then and there knew it had been stolen. A writ of certiorari was granted by the 10th Circuit Court of Appeals on the question whether the National Motor Vehicle Theft Act applies to aircraft. Justice Holmes in reversing the previous judgment said that airplanes were well known in 1919 when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress. Thus, the words of the Act indicate that it was meant to be confined to vehicles that run but not on rails, and it did not extend to those that fly,[1] for if the legislature thought of it, very likely broader words would have been used. United States v. Thind,261, U.S. 204, 209.

Again, in United States v. Peoples,[2] a district court held that a seaplane was not a vessel within the meaning of statute defining vessel as including water craft or other artificial contrivance used or capable of being

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1. Congress thereupon amended that Act to include the transportation of stolen aircraft from one State to another (Act of Sept. 24, 1945, 59 Stat. 536, 1945 U.S. Av. R. 375. Formerly 18 U.S.C. Sec. 408; since 1948 renumbered Sec. 2312).

2. 50 F. Supp. 462, 1943 U.S. Av. R. 80.

used as a means of transportation on water.[1]

Lloyd K. Peoples was accused of unlawfully secreting himself aboard the Naval Air Transport PB 2 Y 3, within the jurisdiction of the United States at Honolulu, Hawaii, without the consent of the owner thereof, with intent to obtain, without paying therefor, transportation on such Naval Air Transport from Honolulu to Alameda, California - and did remain, wilfully, unlawfully and knowingly aboard such air transport until before the time of arrival, when he was found - District Judge Rocks held that if Congress wishes to make stowing away on a seaplane a crime, it can so provide, but that is a matter for the legislators and not the court.[2] The demurrer is sustained.

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1. 1 U.S.C.A. Sec. 3, Air Commerce Act of 1926, Sec. 1 et seq., Sec. 7, 49 U.S.C.A. Sec. 171 et seq., Sec. 177; Civil Aeronautics Act Sec. 1 et seq. 49 U.S.C.A. Sec. 401 et seq.
   However, in Reinhardt v. Newport Flying Service Corporation, 232 N.Y. 115, 133 N.E. 371, 18 A.L.R. 1324, decided by the New York Court of Appeals in 1921, Judge Cardozo held that a hydroplane while afloat upon waters capable of navigation, is subject to the admiralty, because location and function stamp it as a means of water transportation.

2. The new stowaway law is the Act of March 4, 1944, 58 Stat. 111, now carried into the U.S. Code (as enacted on June 25, 1948) at Title 18 Sec. 2199, in much abbreviated form.

As I have already stated, of the five principles exposed, the territorial character of penal laws and the nationality or national character of the person committing an offense are the most important ones for the allocation of jurisdiction over events aboard aircraft. Due to the nature of penal law, i.e., where it is applied only to a public offense, punishable only by the public authorities in the name of the state, the jurists have sought to solve the problem of the conflicts of laws the most rapidly possible - however, due to the present state of international affairs such an aim is still too far to be achieved, but, regardless of the difficulties to the near future the International Civil Aviation Organization (I.C.A.O.) has decided to cope with the problem. And, on the problem of offenses committed aboard an aircraft not less than eighteen draft conventions and sets of principles have already been put forward, the last draft on this problem is the one I will proceed to discuss, although, none of these set principles have not yet been applied internationally.

In the draft of the Legal Aspects of Offenses and Certain Other Acts Occurring on Board Aircraft,[1] there are many jurisdictions in connection with an offense on

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1. It resulted from the Legal Committee of I.C.A.O., at its meeting in Munich, Germany, held between August 18th and September 4th, 1959.

board an aircraft which may occur and produce effect in several States and each one of them might be willing to claim jurisdiction according to its laws, or then, in the absence of adequate legal rules an aerial offender could go unpunished as in the Cordova case.

However, this proposed draft in relation to the rule for the States having penal jurisdiction states in paragraph 1 of Article 3 the following:

> "Independently of any other applicable jurisdiction, the State of registration of the aircraft is competent to exercise its jurisdiction over offenses committed on board the aircraft."

This draft will apply to any offense or act committed on board any civil aircraft registered, while the aircraft is: a) in flight in the airspace of a State other than the State of registration; or b) in flight between two points of which at least one is outside the State of registration; or c) in flight in the airspace of the State of registration if a subsequent landing is made in another State with the said person still on board; or d) on the surface of the high seas or any other area outside the territory of any State.

However, the criminal jurisdiction of a State in whose airspace the offense was committed, if such State is not the State of registration of the aircraft or the State where the aircraft lands, should not be exercised unless:[1]

a) if the offense has effect on the territory of such State;

b) if the offense has been committed by or against a national of such State;

c) if the offense is against the national security of such State;

d) if the offense consists of a breach of any rules and regulations relating to the flight and maneuver of aircraft in force in such State;

e) if the exercise of jurisdiction is necessary to insure the observance of any obligation of such State under an international agreement.

The offenses here are those which are punishable by the laws of the competent States.[2]

Although the draft has been a success in harmonizing the aircraft situation with the general principals of private international penal law, it has some

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1. Art. 3 of the Draft. See appendix I at the end of this work.

2. Ibid.

fallacies as not to assure the State's extradition and prosecution of the offender and not safeguarding his rights, for there are no provisions for distinction between types of crimes, although it has stated the principle of "non bis in idem", i.e., a person will not be prosecuted in another State, if he has already served a lawful punishment for the same act committed, unless he is a national of such State.

However, I would like to propose the following insertion to the present draft, which was a proposal made by the International Law Association at its 33rd. Conference in Stockholm, in 1924.[1]

This new draft rejects the system of exclusive and priorities in jurisdiction by providing for concurrent jurisdiction of all substantially affected States similar to the recommendations of de Visscher[2] - who favors plurality of jurisdictions depending on the nature of the offender. The subjacent state, the state of nationality of the aircraft, and the state in whose territory the crime has produced effects would all have the same competence

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1. International Law Association, Report of the 33rd. Conference, Stockholm, 1924, London, Sweet and Maxwell, 1925, p. 117-118. (See page 65/6).

2. See Lemoine, Traité de Droit Aérien, Paris (1947), p. 797-798. In Visscher's system there is a very little chance that an offense will not be prosecuted, nor there is any encroachment on the sovereignty of the States over the airspace above their territory.

to apprehend and to bring the offender to trial.[1] The State of the first place of landing would assume jurisdiction in the case that extradition was not requested by any of the other states. In this system the main problem is the priority of the State which will subject the offender to a fair and just trial.

Anyhow, a fair and just trial under this draft is still a big problem, and many improvements can still be made in the future.

At present the punishment of piracy in admiralty is really all that has been internationalized. This is based on custom and not on treaties.[2] This crime is considered as a crime against all nations and punished,

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1. In the case of Regina v. Martin (1956 U. S. & C.Av. R. 141), three English airmen were indicted in England for unauthorized possession of raw opium in a British registered airplane on a flight from Bahrein to Singapore. The prosecutor had alleged violation of the U.K. Dangerous Drugs Act, 1951, and Dangerous Drugs Regulations, 1953, Regulation 3, and alleged jurisdiction under Section 62 of the United Kingdom Civil Aviation Act, 1949. Devlin J. held that, while the Dangerous Drugs Regulations, 1953 created an offense in England, the particular regulation concerned which created the offense did not apply to acts on British aircraft outside England.
   However, the Munich Draft fills this gap.

2. A similar custom has not been accepted with respect to aviation, and Brazil does not recognize it either.

as such, by the national courts of any country,[1] but a similar custom with respect to aviation crimes seems highly improbable in a near future, that is, in the field of civil law there might be a possibility of an international court, however, such a possibility must be rejected as unrealistic in the field of criminal law.

The draft still deals with the powers and duties of the aircraft commander in relation to acts on board which are so formulated that he needs only to consider whether such acts are prejudicial to the safety of the aircraft or persons or property therein or to good order and discipline on board. However, further discussion

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1. In United States v. Furlong (5 Wheat. 184, 1820), the Court stated: "Robbery on the seas is considered as an offense within the criminal jurisdiction of all nations. It is against all and punished by all; and there can be no doubt that the plea of autrefois acquit would be good in any civilized state, though resting upon a prosecution instituted in the courts of any other civilized State."
In Air Law, Public Law 87-197 (87th Congress, S. 2268 of Sept. 5, 1961), says that s. 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) is amended - Aircraft Piracy means any seizure or exercise of control by force or violence and with wrongful intent, of an aircraft in flight in air commerce, and shall be punished by death or by imprisonment for not less than twenty years, if the death penalty is not imposed. However, a discussion on this subject is beyond the scope of this work. (No case has been reported yet, however, I will refer to the New York Times issue of August 11, 1961, p. 2, c.2, where the F.B.I. filed charges of piracy against Charles Cadon, a New York resident, who was flying in a Pan American Airways jet, which was leaving Mexico City, to Panama, but minutes later after leaving, the pilot was forced to go to Cuba - and it landed in Havana. The crime charged occurred outside the United States and comes under U.S. maritime jurisdiction. Such offenses are not covered by the extradition treaty between the U.S. and Cuba, first signed in 1904. Dr. Castro freed Cadon.)

about the air commander[1] is outside of the scope of this work.

As one can observe, the work on this draft is not yet finished, but it represents a step forward towards the solution of the problems of jurisdiction and choice of law in the case of an offense occurring on board aircraft.

Summing up, a way out must be found in this field of conflict of laws (and choice), and it is natural to suggest that a common effort must be made so that every State might substitute the petty conflicts and uncertainties that have caused irritation in the past towards a common understanding of general principles, specifically, in this area of jurisdiction over events aboard aircraft - and that an action might be brought before the courts of the State of nationality of the aircraft, where the national law of the aircraft is applicable for, the courts of the place where the aircraft is registered shall always have jurisdiction, according the general law which governs the jurisdiction of courts.

The Brazilian Air Code in Article 6[2] deals with events occurring aboard aircraft in case that these events

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1. See Doc. 5190 - LC/88-2/3/48 - put out by the Legal Committee of I.C.A.O., about the Draft Convention on the Legal Status of the Aircraft Commander. See Knauth's, The Aircraft Commander in International Law, 14 Journal of Air Law and Commerce, Chicago, (1947), p. 157 et seq., for a further discussion on the need for a common statement of legal principles in this area.

2. Vademecum Forense, op. cit., p. 674.

produce penal effects in the Country, adopting the territorial principle. But as in the case of civil jurisdiction, Sampaio de Lacerda in his book of Air Law[1] does not cite any cases, and as far as I know no case has been settled in the National Courts.

Professor Beckhuis has a very interesting report about conflicts of jurisdiction:[2]

> "In view of the great number of bases of jurisdiction and of possible priority systems, none of which is capable of avoiding conflicts of jurisdiction nor of ensuring punishment of all offenses, it appears fruitless to try to establish priority for the benefit of any one of them. Would it then not be more reasonable to try to fill the lacunae of the present system of concurrent but equal jurisdictions by dealing efficiently with the practical problems encountered by the Aircraft Commander and the authorities of the landing state?"

In concluding, one can see through this whole work, that a number of States have declared their criminal law applicable wherever the aircraft may be, even when it is over the territory of another State, this means that one is faced with conflict of laws within the territorial systems of law. But a way out must be found by improving this Munich draft in order to bring it into line with that of the Chicago Convention, and a compromise must be found

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1. Sampaio de Lacerda, op. cit., p. 467-542.

2. See LC/SC "Legal Status," W.D. n.36, Sept. 9, 1958, cited in Levy, op. cit., 575.

in the draft between the nationality and the territorial principles, for "lawlessness" in case of flights over the high seas or over a no man's land, as in the Cordova case, must be obviated so that law and order will be maintained aboard the aircraft. The problem of the legal status of the aircraft in giving it the quality of personal responsibility has not yet been overcome entirely, besides a special attention to the aircraft commander in case of arresting an offender. Finally, in the field of criminal law a possibility for considering an international court is much more dimmer to be accepted by all the States, as in the civil proceedings, for the States are not willing to give up an inch of their sovereignty of airspace above their territory; therefore, for the sake of unification of law preference will have to be given to a convention that will furnish consistent solutions to the problems of jurisdiction of offenses and certain other acts occurring aboard aircraft, so that the allocation of authority to the broad community policies might be solved, by a more comprehensive approach to its problems.

In the making and the application of policies for jurisdiction, I first focused on the customary practices of decision makers in trying to solve the

problems of conflicts of laws, mainly in the field of Air Law. Here, I purport to discuss a few agreements, that is, treaties - a treaty is not only a law but also a contract between two nations and must, if possible, be so construed as to give full force and effect to all its parts[1] (United States v. Reid, C.C.A. Or., 73 F.2d. 153, 155) - which, despite insurmountable difficulties, have tried to unify the existing conflicts for jurisdiction of the courts over events aboard aircraft, so that the objections and goals of the world community might be better achieved in the future.

B - Treaties

The treaties with which I will deal here are the Warsaw Convention of October 12, 1929, which was adopted by fifty-five states (and it was amended by the Hague Protocol in September 1953 and ratified by eighteen states); the Chicago Convention of 1944, which has been ratified up to the 1st June 1950, by fifty-eight states; and, the Rome Convention of October 7, 1952, which is a convention on damage caused by foreign aircraft to third parties on the surface, and has had practically no acceptance.

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1. Black, Law Dictionary, 4th ed., St. Paul, Minn. 1957, p. 1674.

But before dealing with the treaties or conventions mentioned above, I must consider the problem of extradition which will depend on the particular treaty or municipal legislation[1] of a state.

As a rule, extradition is limited to crimes committed outside of the territory of the requested state which preserves its territorial basis of jurisdiction.

A very interesting Draft International Convention in Cases of Extraditable Offenses Committed in an Aircraft in Flight[2] was proposed in Rome (1954) to the International Criminal Police Commission by I.C.A.O. It states that the following shall be competent to prosecute and judge persons having committed extraditable offenses in aircraft in flight:

1 - the state over which the offense was committed,

2 - the state to which the aircraft belongs,

3 - the state to which the victim belongs,

4 - the state to which the offender belongs,

5 - the state whose interests or public order have been affected.

6 - the state in which the aircraft lands.

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1. Where neither exist, the government may act as it pleases, however, the primary requirement for applying the law of extradition is based on reciprocity and then on municipal legislation. (See Oppenheim, International Law, London/New York/Toronto (1953), #329, 697-698.

2. See Doc. 8111-LC/146-2, op. cit., p. 111.

Extradition is defined in Black[1] as the surrender by one state of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which being competent to try and punish him, demands the surrender (Waller v. Jordan, 58 Ariz. 169, 118 F.2d. 450, 451). But many states will not extradite their own nationals; however, they might punish them for crimes committed abroad. Extradition may be accorded as a mere matter of comity, or may take place under treaty stipulations between two nations - it is a political duty between the states of imperfect obligation.

The principle of double criminality consists in that it has become customary that an act charged as a "crime or offense" must have been made a crime by the laws of both the requesting and the requested States, for purposes of extradition treaties.[2] In Collins v. Loisel (1922),[3] the Supreme Court stated:

> "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive... It is enough if

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1. Black, op. cit., p. 698.

2. Briggs, The Law of Nations, N.Y., 1952, p. 595-600.

3. 259 U.S. 309. 312.

the particular act charged is criminal in both jurisdictions."

Turning to the realm of Air Law, the Warsaw Convention contains rules on the liability of the air carrier with respect to the international carriage by air of passengers, baggage, goods and cargo. Actions for damage with the liability described beforehand,[1] must be brought, at the opinion of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business or has an establishment by which the contract has been made, or before the court having jurisdiction at the place of destination.[2] Although the objective has been to make it easy for the plaintiff to institute proceedings by giving him the choice of four courts, there is still a great difficulty with regard to enforceability of the judgment when that is passed by a court whose natioanlity is different from that of the carrier.

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1. Guerreri, American Jurisprudence on the Warsaw Convention, McGill Univ., Montreal, 1960, p. 52-72- (See Articles 22 and 25 of the Warsaw Convention).

2. Ibid., See article 28 of the Warsaw Convention.

The Chicago Convention[1] should be the answer to solving the problem of the cases of conflicts and jurisdiction of the State of the flag of the aircraft and other States, for it recognizes the State as the guarantor of the conduct of aircraft possessing its nationality, as well as the protector of such aircraft. Article 12 of the Convention[2] deals with breaches of air traffic regulations and contains rules of jurisdiction which do not fit in the system of the 1924 Stockholm draft; therefore, does not settle the question of civil or criminal jurisdiction of conflicts. However, Article 84 of the Convention has a provision with respect to the settlement of disputes in relation to interpreting or applying the Convention.[3]

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1. See Shawcross & Beaumont, op. cit., p. 30.

2. Ibid., p. 639. (Article 25 of the Paris Convention of 1919 is similar to the disposition of this article).

3. See Shawcross & Beaumont, op. cit., p. 658:
"If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

Is the Council of I.C.A.O. an appropriate organ to settle conflicts between two or more contracting States, specifically, when the majority of the members lack the necessary legal training and are appointed by their appropriate States to solve political questions?

Professor John C. Cooper, in 1952, introduced a draft convention to the 45th Conference of the Air Law Committee of the International Law Association, held at Lucerne, and this draft was supposed to modify the 1924 Stockholm draft, besides trying to reconcile it with Article 12 of the Chicago Convention.[1] Cooper's efforts to introduce wide bases of shared jurisdiction compatible with the objectives of most states, were unsuccessful and failed completely. But he demanded that the question of criminal jurisdiction should be dealt very urgently and he said that to him there were three problems to which regulations are essential:[2]

> "a) competence and jurisdiction for the punishment of crimes committed on board aircraft;
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> "b) the same as to births, deaths and marriages occurring on board;
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> "c) the same as to other occurrences giving rise to questions of civil jurisdiction such as torts committed on board aircraft or contracts there entered into."

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1. See Honig, op. cit., 159-160; I.C.A.O. Legal Committee Working Draft n. 397, May 22, 1953, cited in Moursi, "Jurisdiction Aboard Aircraft," (1955), thesis submitted for the J.S.D. at Yale University, p. 58.

2. International Law Association, Report of the 45th Conference, Lucerne, (1952) p. 116.

The Rome Convention of October 7, 1952, which is a convention on damage caused by foreign aircraft to third parties on the surface has had practically no acceptance, becuase the system is based on the principle of absolute liability of the operator of the aircraft, and that it only recognizes one court, that of the place where the damage occurred, and no country will accept the enforceability of a judgment obtained there. The parties, however, may deviate from this rule by mutual consent, but they are subject to the provisions of Article 20 of the Convention.[1]

Anyhow, besides the Chicago Convention, both the Warsaw and Rome Conventions do not solve the problem of a uniform application of the Convention towards jurisdiction rules.

Another proposal for reaching a solution in the whole question of jurisdiction has been sought in the form of creating an international court for civil actions, but there is a great doubt that the States will be willing to submit to the jurisdiction of an international judicial authority. Professor P. Chauveau proposed at the International Law Association Conference at Dubrovnik, in 1956, the creation of a court of first instance, which

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1. See Shawcross & Beaumont, op. cit., Second Cumulative Supplement to Second Edition, p.B70 - B72.

would have to be designated in each of the States adhering to the relevant convention; and, a court of appeal which would sit in Strasbourg, and its members should be appointed by the President of I.C.A.O. on the nomination of the States represented on the Council of I.C.A.O.[1]

But instead of setting an entire new international court, for the purpose of obtaining a uniform interpretation and application of international private (air) law, one could make use of the International Court of Justice (under the terms of Article 36, par. 2 of the Statute of the Court)[2] if the States which have accepted the Statute will declare that they will recognize the jurisdiction of the Court as compulsory in all the conflicts concerning the interpretation of a treaty — in the field of air law, the Warsaw and Rome Conventions. But up to now this possibility has never been utilized; and, in the case that an amendment to the Statutes of the International Court of the Hague could be studied in relation to appeal cases, therefore, it constituting the final decision by its judges, difficulties could arise in the ratification by Federal States.

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1. Honig, op. cit., p. 123.

2. See Briggs, "The Law of Nations," New York, Second Ed., (1952), p. 1076.
   A little effort was made in the multi-lateral Hague Treaties of 1902, dealing with marriage and divorce, but little success has been obtained. The same is applied to the Code Bustamante, adopted by the 1928 Havana Conference of the Pan American Union, which has 437 articles dealing mostly with problems of choice of law, procedural and penal international law.

For example, the U.S. would have to amend its Constitution in order to ratify this Convention, if this provision were adopted.

Thus, there is still a lot to be done in the making and application of policies for jurisdiction to solve the problems of conflict of laws in the realm of treaties in air law, and more specifically, on events committed aboard aircraft. However, some steps have already been taken in that sense.

V - Recognition and Enforcement of Foreign Judgments.

A court may recognize a foreign judgment and enforce it, or may recognize the judgment but decline enforcement. As one can see, not always will recognition and enforcement of foreign judgment be concurrent. The modern doctrine is that a valid judgment should be recognized and given effect in another state as a conclusive determination of the rights and obligation of the parties. The United States Supreme Court has held that a judgment of a court of a foreign country is conclusive as against the defendant if, and only if, the judgment of a court of this country is conclusive under the law of the country in which the judgment was rendered.[1] The label of comity - a willingness to grant a privilege, not as a matter of right, but out of deference and good will[2] - is conditioned upon reciprocity - which denotes the relation existing between two states when each of them gives the subjects of the other certain privileges, on condition that its own subjects shall enjoy similar privileges at the hands of the latter state.[3] In Hilton v. Guyot,[4] the Supreme Court of

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1. Goodrich, Handbook of Conflict of Laws, St. Paul, Minn., 1949, p. 603.
2. Cox v. Terminal R. Ass'n. of St. Louis, 331 Mo. 910, 55 S.W. 2d. 685.
3. Black, op. cit., p. 1435.
4. 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95, 1895.

the United States held that conclusive effect could not be given to the judgment of the French courts, since French law refused to recognize the authority of foreign judgment.

The Court further said that when action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and the judgment is conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching it, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country it is not entitled to full credit and effect. The comity extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and it is inadmissible when contrary

to its policy[1] or prejudicial to its interests. And, in holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of claim, we do not proceed upon any theory of retaliation upon one person by reason or injustice done to another; but upon the broad grounds that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own nation, which it is our duty to know and to declare, the judgment is not entitled to be considered conclusive. Further, in the absence of statute or treaty, it appears to us equally unwarrantable to assume the comity of the United States requires anything more.

However, the objective of the rules of Conflict of Laws is to attain uniformity in legal relations regardless of the forum in which litigation occurs, although there are many situations in which the results in the particular cases may deviate from the exact measure of justice which the courts would otherwise administer. Nevertheless, the Anglo-Saxon systems of law recognize that some degree of

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1. The term policy, as applied to a statute, regulation, rule of law, course of action, or the like, refers to its probable effect, tendency, or object, considered with reference to the social or political well-being of the state. Thus, certain classes of acts are said to be against public policy, when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality. (Black, op. cit., p. 1317).

recognition must be afforded to judgments of foreign courts of competent jurisdiction, otherwise the objects of private international law, the protection of rights acquired under a foreign system of law will not be reached.

About treaties, there are numerous ones on the subject of recognition and enforcement of judgments,[1] which are mostly bilateral that have been concluded between Civil law countries;[2] and within the British Commonwealth a series of Acts which have been provided for recognition of judgments.[3]

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1. See 33 American Journal of Int. Law, Supp., (1939), p. 15-166.

2. In France (contrary to the attitude adopted by the English law, which had been to permit the successful suitor to bring an action in England on the foreign judgment), when proceedings are brought for the enforcement of a foreign judgment, the French courts first satisfy themselves that the foreign fulfils certain conditions, which if satisfied, then, an exequator is granted, if there is a treaty to this effect with the country from which the judgment issues. But, in the absence of such convention, the foreign judgment is not regarded as final, but merely as a titre or instrument on the basis of which conservatory measures can be taken (See Cheshire, Private Int. Law, Oxford, 1952, p. 586).

3. See Cheshire, op. cit., p. 590-597, (Reciprocal Enforcement) Act, 1933.

Finally, in the field of air law, the Rome Convention of 1952,[1] has a very important provision which concerns recognition and enforcement of foreign judgments, which are contained in Article 20 (4), (5) and (7).

C - Conclusions.

In reviewing the past trends of decision the states have arisen problems and controversies in which their common interests in the shared use and competence over the airspace was at stake. Those states have reciprocally accorded a high degree of conclusiveness, though very little has been done with respect to solving problems as: a State may claim jurisdiction of such factors as nationality of the offender, of the victim, and the fact that the aircraft is one of its registry and the like. In spite that the I.C.A.O. Legal Committee has drawn out a new draft convention[2] at the request of such organs as the International Criminal Police Organization, the International Federation of Airline Pilots' Associations, the International Law Association and the International Commission for Penal Law, the work is not yet finished, for there are many gaps that still remain

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1. See 21 Journal of Air Law and Commerce, (1954), p. 420-430, Comments on Article 20 of the Rome Convention of 1952, by A. Toepper. (The reason it is not discussed here is that it has had no success).

2. See Appendix I, infra.

unsolved in the case of crimes and certain acts on board aircraft.

Anyhow our aim, in this work, was to point out the main fallacies in the problems of jurisdiction over acts committed aboard aircraft, such as the sensitivity of States in regard to questions of sovereignty; and the promise of nationality, which has no single international rule as in regards to the application of the law is concerned; and to advocate an alternative policy - oriented approach -- a crystallized solution.

Unfortunately, there is still a great lacuna in air law! Through the process of interaction we have tried to make the approach to problems of jurisdiction more compprehensive. However, there is so far practically no direct authority to particular problems of air law[1] with respect to international private law the general rule for a court to have jurisdiction is:

1 - over disputes in respect of which it can give an effective judgment; and

2 - over disputes which the parties thereto voluntarily submit to its jurisdiction.

About civil jurisdiction we have reached the conclusion that the solution to the problem of events committed aboard aircraft is to apply the law of the state

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1. See Shawcross & Beaumont, op. cit., p. 75.

of registry of the aircraft, when in flight (when the aircraft is standing on foreign soil there is no other law than that of the foreign State concerned); and, in case of serial collisions a proper solution to the problem of jurisdiction could only be found along the lines of an international system of judicature, so that a uniform interpretation of the law could be reached to satisfy all the participants for a world public order, A solution, to attain international uniformity should be found as to the status of the aircraft commander, for somebody must act as a police officer or registrar on board the aircraft. With regards to the problems of criminal jurisdiction we have reached the conclusion that the solution to the problem of crimes and offenses committed on board aircraft is to apply the law of nationality of the aircraft, subject to concessions to the territorial system of law under special circumstances. Unlike civil jurisdiction, a uniform solution for criminal acts and offenses committed on board aircraft must be sought along the lines of improving the regulations that were sought out at the Munich meeting of 1959, by the Legal Committee of ICAO.

Thus, from the above we may conclude that air law is a field of law in which great development is feasible, and that although the phase of initial development is past,

new regulations on many different subjects are still being sought out. What is needed in the jurisdiction over events aboard aircraft is an expansion of the fundamental conceptions of the Conflict of Laws so that the demands of justice in the particular situation might be given consideration, and that the various policies pertinent to the problems dealt with might be settled by the courts. But, a real solution will have to be sought along the lines of an international procedure - both with respect to civil and criminal jurisdiction aboard aircraft.

APPENDIX I

DRAFT CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS OCCURRING ON BOARD AIRCRAFT*

The Legal Committee of ICAO, at its Munich meeting held between August 18th and September 4th, 1959, considered the subject of the Legal Status of Aircraft.

As the result of this meeting a new Draft Convention was completed as follows:

ARTICLE 1

1. This Convention shall apply in respect of the offenses and other acts hereinafter mentioned when committed or done by a person on board any civil aircraft registered in a Contracting State, while that aircraft is:

(a) in flight in the airspace of a State other than the State of registration; or
(b) in flight between two points of which at least one is outside the State of registration; or
(c) in flight in the airspace of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board; or
(d) on the surface of the high seas or of any other area outside the territory of any State.

2. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends.

3. This Convention shall not apply to State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft; however, any aircraft engaged in the carriage of passengers, cargo or mail for remuneration or hire shall be subject to this Convention.

ARTICLE 2

Offenses, for the purposes of this Convention, are offenses punishable by the penal laws of a Contracting State competent in accordance with Article 3.

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* Provisional title.

ARTICLE 3

1. Independently of any other applicable jurisdiction, the State of registration of the aircraft is competent to exercise jurisdiction over offenses committed on board the aircraft.

2. The criminal jurisdiction of a State in whose airspace the offense was committed, if such State is not the State of registration of the aircraft or the State where the aircraft lands, shall not be exercised in connection with any offense committed on an aircraft in flight, except in the following cases:

(a) if the offense has effect on the territory of such State;
(b) if the offense has been committed by or against a national of such State;
(c) if the offense is against the national security of such State;
(d) if the offense consists of a breach of any rules and regulations relating to the flight and maneuver of aircraft in force in such State;
(e) if the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under an international agreement.

ARTICLE 4

Where a final judgment has been rendered by the authorities of one Contracting State in respect of a person for an offense, such person shall not be prosecuted by the authorities of another Contracting State for the same act, if he was acquitted or if, in the case of a conviction, the sentence was remitted or fully executed, or if the time for the execution of the sentence has expired, unless he is a national of such State and its laws permit such further trial.

ARTICLE 5

1. When the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act which, whether or not it is an offense, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board, the aircraft commander may impose upon such person measures of restraint which seem necessary:

(a) to protect the safety of the aircraft, or persons or property therein; or

(b) to maintain good order and discipline on board; or
(c) to enable him to deliver the person so restrained to competent authorities.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or persons or property therein.

3. Such powers of the aircraft commander, crew members and passengers and the powers conferred by Article 6 may be exercised with respect to acts, whether offenses or not, of the kind described in paragraph 1 of this Article when committed between the moment when embarkation on board has been completed and the moment when disembarkation has commenced if the flight is one of those described in Article 1, paragraph 1. In the case of a forced landing outside an airport, such powers of the aircraft commander shall continue as to acts committed on board until competent authorities take over the responsibility for the aircraft, persons and property on board.

4. For the purposes of this Convention, the aircraft commander is the individual on board an aircraft who is responsible for the operation and safety of that aircraft.

ARTICLE 6

1. The aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed a serious offense on board the aircraft, or has committed, or is about to commit, on board the aircraft an act which, whether or not it is an offense, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board.

2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed a serious offense on board the aircraft.

ARTICLE 7

The aircraft commander shall transmit to the authorities to whom any suspected offender is delivered pursuant to the provisions of Article 6, paragraph 2, relevant evidence and information which, in accordance with the law of the State of registration of the aircraft, are lawfully in his possession.

ARTICLE 8

1. The aircraft commander shall report to the competent authorities of the State of registration of the aircraft the fact that an apparent offense has occurred on board, any restraint of any person, and any other action taken pursuant to this Convention, in such manner as the State of registration may require.

2. The aircraft commander shall, as soon as practicable, notify the competent authorities of any Contracting State in which the aircraft lands of the fact that an apparent offense or an act endangering the safety of the aircraft or persons or property therein has occurred and that the suspected person is on board.

ARTICLE 9

Neither the aircraft commander, other members of the crew, a passenger, the owner or operator of the aircraft nor the person on whose behalf the flight was performed, shall be liable in any proceedings brought in respect either of any reasonable restraint imposed under the circumstances stated in Article 5 or of the reasonable performance of other action authorized by Articles 6, 7 and 8.

ARTICLE 10

1. Any Contracting State shall allow the Commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 6, paragraph 1.

2. Any Contracting State shall take custody of any person whom the aircraft Commander delivers pursuant to Article 6, paragraph 2, upon being satisfied that the circumstances warrant taking such person into custody and the Contracting State assumes such obligation pursuant to its regulations and laws. If the circumstances involve an offense the State having custody shall promptly notify

any State in whose territorial airspace the offense was committed, the State of registration of the aircraft and the State of nationality of the suspected offender of the nature of the apparent offense and the fact that the suspected is in custody.

3. If the State having custody has no jurisdiction over the offense or does not wish to exercise such jurisdiction, it shall make a preliminary investigation of the apparent offense and shall report its findings and such statements or other evidence as it may obtain to any State in whose territorial airspace the offense was committed, the State of registration of the aircraft and the State of nationality of the suspected offender.

ARTICLE 11

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offense committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

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