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INTERNATIONAL LAW AND AIR TRANSPORTATION *

Charles S. Rhyne†

THERE was never a time when the people of this nation were more internationally-minded than they are today. The position of world leadership which has now been assumed by, or thrust upon, the United States makes the study of international relations under international law a most vital subject. It is our purpose here to consider the legal rules which have been and are being developed to govern a field whose technical achievements are one of the primary reasons why lawyers and laymen alike are vitally concerned with international law today—the field of international air transportation.

The airplane is indeed the architect of a changing world. It has extended man's range and expanded his vision to horizons beyond even his most fantastic dreams of the past. Global air transportation is certainly redefining frontiers and shrinking nations to neighborhoods.¹ Moreover, it holds out a prospect of mutual cooperation more alluring in terms of human welfare than any other invention in the history of man.

International law and air transportation is not entirely a matter for academic theorizing and international politics. There is also involved the down-to-earth, day-by-day business of operating fourteen scheduled air carriers of the United States into foreign nations all over the world and the business of operating twenty-seven scheduled air carriers owned by foreign nations which hold permits to operate to and from this country. There are also hundreds of non-scheduled commercial flights and private non-commercial flights in international air transportation which give rise to problems in international law similar to those created by scheduled air carriers.

To us in the United States, international air transportation has meant that our so-called inland cities are today, or they may soon become, international ports of call just as much as our great coastal sea-

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¹ See VAN ZANDT, *THE GEOGRAPHY OF WORLD AIR TRANSPORT* (1944) and VAN ZANDT, *WORLD AVIATION ANNUAL* 21 (1948).

ports. Legal rules governing international air transportation are therefore of vital concern not only to the lawyers practicing in our great seaport cities, but also to the so-called "main street lawyer"² of even our smallest city.

The creation and administration of legal rules which are of necessity world-wide in scope is and was the challenge faced by those who are responsible for bringing about the international Conventions, agreements and legislation which have present or prospective application in this great new and rapidly expanding field of international law.

In this review I want to cover for you the major developments in the field of international law affecting air transportation, notwithstanding the difficulty met in covering by summary statement certain subjects to which one could well devote an entire volume.

It is our plan here to review the Chicago International Aviation Convention, and the developments under that convention, and to consider some of the most interesting and timely problems arising under the Warsaw Convention on aviation accident liability in international air transportation, the new international convention covering property rights in aircraft, and the convention to define the status of aircraft commanders. Some of the problems arising under the Civil Aeronautics Act in certificating air carriers for international operations and in granting permits to foreign air carriers to operate into the United States will be taken up. Reference will also be made to bilateral agreements between the United States and foreign countries which are such an important part of this picture of legal rules for international air transportation.

I

SOVEREIGNTY OF NATIONS OVER THEIR AIRSPACE

In considering international air transportation problems and developments it is important to remember that settled principles of international law now give each nation absolute sovereignty over the airspace above the territory under its jurisdiction.³ This means that no aircraft may be flown across an international boundary without consent of the country whose territory it enters.⁴ Russia, Yugoslavia, Eng-

² Cooper, "Aviation Law Comes Home to the Main Street Lawyer," 11 LAW AND CONTEMP. PROB. 556 (1946).

³ CURRENT STATUS OF AVIATION LAW, A.B.A. Rep., Comm. Aeronautical Law, Feb. 26, 1947.

⁴ "International Civil Aviation, 1945-1948," INT. ORG. AND CONF. SER. II, Dept. of State Pub. No. 3131 (1948).

land or the United States may exclude all foreign aircraft, or these nations may prescribe the terms and conditions under which foreign aircraft may land on their territory or fly over such territory, for any purpose. If foreign aircraft attempts to cross a nation's territory without permission, there is no doubt under international law of the right of the aggrieved nation to force such aircraft to land or to shoot such aircraft down if necessary. All progress in solving international air transportation problems, just as in other fields of international relations, therefore, depends upon voluntary cooperative effort.

II

THE CHICAGO CONFERENCE AND CONVENTION

A. *Considerations motivating calling of Conference.* International air service had bridged both the Pacific and the Atlantic on a small scale prior to World War II. During the war, the Army and Navy established an integrated world-wide air transport network which brought all parts of the globe within a few hours of the United States. In many instances the Commercial Airlines (as contract operators) were a part of this network. It was apparent to all that with the end of hostilities our commercial airlines would be ready, willing and able, as well as most anxious, to carry civil air commerce throughout the world.

Our government and airline officials were fully aware long before the end of hostilities that steps must be taken to prepare for the situation which would arise when military air transport services must be replaced by civil operations; when military airports and navigation facilities would be abandoned by the armed forces and must be taken over by civil authority or be closed to air commerce; when standard operating procedures would be essential if a world-wide aviation network was to become a reality; and when air transport rights granted as a war measure would lapse and would have to be replaced by normal commercial agreements.⁵

It was certain that the demand for air transportation would be increased many fold over the pre-war demand and that it would be far greater than pre-war or wartime facilities could possibly accommodate. Besides the establishment of services by the scheduled airlines on many new routes, with a great number of new carriers, a tremendous

⁵ See *ibid.*

increase in non-scheduled commercial operations and private flying was confidently anticipated.

With a wide variety of regional, overlapping, out-of-date or limited international conventions on air transportation in effect,⁶ the United States was quick to realize that a single post-war system of international legal and technical rules was an absolute necessity if its air carriers were to be free to navigate the air lanes of the world.

Unfortunately, the great technical progress made in aviation during the war had not been accompanied by similar progress in solving the legal and administrative difficulties which had plagued international air operations before the war and threatened to do so again. Before the war, permission to fly across an international boundary was often difficult and sometimes impossible to obtain. The securing of international air transport rights was likewise an almost impossible task. Furthermore, if airlines were to traverse numerous countries, along a single route, there would have to be a more complete standardization of technical regulations and operational procedures. A wholly unworkable situation would arise if each nation were to fix its own rules in total disregard of those in force in neighboring countries, and if every airline pilot had to familiarize himself with a different set of rules for each country and change his operating procedure at every frontier.

The United States, because of its wide experience with long-range military air transport during the war, its leadership in transport aircraft design and manufacture, and its experienced technical personnel, was in the best position to assume leadership in assisting the world to prepare for post-war aviation conditions. American flag airlines were and are the chief users of the international airways and these airlines wanted to be ready to operate once hostilities ended.

The realizations outlined above were quite understandably the motivation back of the creation and carrying out of the International Civil Aviation Conference in Chicago in 1944.

B. *The Invitation.* On September 11, 1944, the United States sent a formal letter to fifty-five nations stating that bilateral exploratory conversations with a number of other governments indicated great interest in the problems of post-war international civil aviation with a need for agreement on basic principles of international air transportation—that the United States was now inviting these nations to send

⁶ For a review of these conventions see Rhyne, "Legal Rules for International Aviation," 31 VA. L. REV. 267 (1945).

representatives to a conference on the subject to be convened in Chicago on November 1, 1944.⁷ Fifty-four nations (all except Russia of those invited) accepted and sent representatives to the conference.

C. *Work of the Conference.* This conference met for some five weeks of almost continuous plenary and committee sessions and made remarkable progress in meeting and solving many of the problems of international air transportation. It was found that technical agreements were not difficult to draft and agree upon. It was upon business or economic problems that the delegates found agreement difficult or impossible.

Finding that governmental delays, and necessary executive or legislative approval of a permanent convention to govern international air transportation would require more than a year and that a body to take hold of international civil aviation problems was an immediate necessity, the conference drafted an interim agreement creating a Provisional International Civil Aviation Organization (referred to hereafter as PICAO) to coordinate and guide international aviation until a permanent convention could be ratified and a permanent organization could be set up. The draft of a permanent Convention on International Civil Aviation creating a permanent organization and with certain regulations for its operation together with certain principles upon which agreement could be achieved was approved by the conference and provision therein was made that it was to come into effect upon ratification by twenty-six nations.

The United States and forty-five other nations signed the interim agreement and the temporary operating organization created thereunder, PICAO, began to function. PICAO made good progress in the technical phases of international air transportation through its interim council and interim assembly by putting into effect the technical agreements made at Chicago. PICAO also explored the economic problems of international air transportation to accumulate information for future action when it might be possible to consider various agreements in that field.

The United States ratified the Permanent Convention on August 9, 1946, the twelfth nation to do so. The required twenty-sixth ratification was received on March 5, 1947, and the convention came into effect thirty days later. "PICAO" became "ICAO."

⁷ For text see International Civil Aviation Conference—Final Act and Related Documents, U.S. CONFERENCE SER., No. 64, pp. 1-3 (1945).

D. *Outline of the Text of the Convention.* The primary powers of ICAO under the Permanent Convention relate to safety, research and development of air navigation facilities—the technical phases of international air transportation. The convention creates an organization consisting of an annual Assembly, concerned with policy, in which each of the forty-seven states that have ratified the convention is entitled to representation; a Council of twenty-one elected states, which meets in nearly continuous session, and an international secretariat which includes experts on technical, economic and legal matters. The permanent seat of ICAO is at Montreal.

The Convention also sets forth the aims and objectives of ICAO. They include insuring the orderly growth of international civil aviation throughout the world; meeting the needs of the peoples of the world for safe, regular, efficient, and economical air transport; and in general, promoting the development of all aspects of international civil aviation. The work has fallen naturally into two main divisions: technical matters concerning air navigation, airworthiness, and the operation of aircraft; and economic matters relating to the exchange of commercial operating rights between the nations, the facilitation of air travel, and the operation of airlines.

The Convention sets forth certain basic principles in international air navigation and air transportation which member nations of ICAO are to follow and while it is impossible to summarize this very comprehensive document and do justice to all of its provisions, I can within the space allotted indicate that it covers, among others, sovereignty of nations over airspace above their territory, flight over territory of contracting states by "aircraft not engaged in scheduled international air services," nationality of aircraft, measures to facilitate air navigation, the conditions which aircraft of member nations engaged in international air transport must meet in the way of documents, and licenses.

In any field so new, so competitive, and so rapidly expanding as international air transportation, disputes of grave importance are almost inevitable. Provision is made in the Permanent Convention for the settlement of such disputes by the ICAO Council with an appeal allowed to the International Court of Justice by any nation dissatisfied with the council's decision.

I have mentioned the invaluable work of the Chicago Conference in the technical field. It agreed upon recommendations with respect to airways systems, air traffic control practices, communication proce-

dures, rules of the air, meteorological services, licensing of personnel, airworthiness requirements for aircraft, aeronautical maps and charts, customs procedures, search and rescue, and investigation of accidents. These recommendations were called the "draft technical annexes" to the Convention, and although the conference could not, of course, give its findings the force of law or compel compliance, they have become the recognized patterns for operating practices throughout the world. As a result of these technical annexes and the work of PICAQ in getting member nations to accept them, international aviation expanded to meet the needs of commerce upon the termination of hostilities with a rapidity and universality which would otherwise have been impossible.

I have referred to the difficulties encountered at the Chicago Conference in the economic field. The final solution in this field was the attachment as appendices to the convention, but not as a part of it, of the now famous "two freedoms" and "five freedoms" agreements which are optional for member nations.⁸ The so-called "two freedom" International Air Services Transit Agreement gives the nations signing it the right to fly over the territory of other signatories without landing and the right to land for non-traffic purposes. The United States is a party to this agreement. The so-called "five-freedoms" International Air Transport Agreement grants each contracting nation the privileges just named in the "two freedoms" agreement and, in addition, the privilege to put down and take on passengers, mail and cargo destined from or to the nation whose nationality the aircraft possesses, and passengers, mail or cargo destined to or from any other contracting nation. When the United States ratified the Convention it withdrew from this agreement.

In sum, the Chicago Conference marked the beginning of a new epoch in international aviation and represents the consummation of plans for an agency to promote the safe and orderly growth of international civil aviation throughout the World. It may well lay claim to having been one of the most successful conferences ever held and one of the most important milestones in the history of aviation.

E. Achievements under the Convention. It is generally agreed

⁸ The "five freedoms" are these: (1) To fly across a country without stopping; (2) To fly across a country and stop for nontraffic purposes, such as refueling; (3) To carry passengers from the aircraft operator's home country to another country; (4) To pick up passengers in another country and carry them to the operator's home country; and (5) To pick up passengers in another country and carry them to a third country.

that the progress of PICAO and ICAO in the technical field has exceeded the expectations of the Chicago Conference.⁹ Progress in the technical field has not, however, been matched by equal progress in the economic field.

Beginning with the Chicago International Civil Aviation Conference held in 1944, repeated attempts were made to secure international agreement to a convention regulating the inauguration and operation of international air routes.¹⁰ None of these efforts to date has been successful. In the meantime, the United States has entered into bilateral agreements with foreign nations authorizing the operation by United States airlines of routes all over the world. The United States is a party to thirty-six such bilateral agreements with foreign countries, providing for the operation of international airline operations.¹¹

The latest attempt to draft an agreement covering commercial rights in international air transportation, made in Geneva in the fall of 1947, failed to develop any real agreement even though the convention did draft some suggestions for circulation to ICAO members.¹² There is seemingly an insoluble conflict between members of ICAO who favor the proposed creation of a centralized economic control board to divide the world's air transportation business between nations, and other members, the latter including the United States, who want free competition for that business. The so-called long-line operators (like the United States) want an opportunity to pick up the so-called fifth freedom traffic (that is, to pick up passengers in another country and carry them to a third country) to fill up empty seats along routes. A recent study by ICAO shows that the United States with 6.8 per cent of the world's population operates 61.08 per cent of the reported airline mileage of the world.¹³ While reliable figures for traffic carried are not readily available it is safe to say that the United States operates and carries more than 50 per cent of the world's air traffic. If there were an international board to divide up international air traffic the United States could hardly expect to maintain its present dominant position.

It seems safe to conclude that so long as the United States can secure

⁹ The technical annexes referred to, *supra*, have been accepted and operations are now being conducted under them. See "International Civil Aviation, 1945-1948," INT. ORG. AND CONF. SER. II, Dept. of State Pub. No. 3131 (1948).

¹⁰ Cooper, "The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport," 14 J. AIR L. AND COMM. 125 (1947).

¹¹ See A.B.A. Rep., Comm. Aeronautical Law (1948).

¹² McClurkin, "The Geneva Commission on a Multilateral Air Transport Agreement," 15 J. AIR L. AND COMM. 39 (1948).

¹³ See 1947 U.S. Av. Rep. 436.

fifth freedom and other air transport economic rights by bilateral agreements, it will not agree to an international board such as that just mentioned. It seems unnecessary, therefore, to consider more fully the maze of conflicting ideas on cartels and other systems advocated in this field, none of which is likely to materialize in the near future.

III

ICAO RELATIONS WITH THE UNITED NATIONS

The Charter of the United Nations makes provision for bringing specialized agencies established by intergovernmental agreement and having wide international responsibilities into relation with the United Nations. Accordingly, during the latter half of 1946, negotiations took place at Lake Success between the Interim Council of PICAQ and the Economic and Social Council of the United Nations for the purpose of reaching an agreement on the relationship which could exist between those organizations. The agreement in final form was approved by the PICAQ Interim Council on October 29, 1946. On December 14, 1946, it was approved by the General Assembly of the United Nations on condition that the aviation organization comply "with any decision of the General Assembly regarding Franco Spain." ICAO at its first Assembly expelled Spain so the United Nations agreement is now in effect.

The agreement provides that ICAO and the United Nations shall consult and cooperate on all matters of common interest, be invited to send representatives to all meetings of either in which the other may have concern, and exchange documents and information. All applications for membership in ICAO by states not members of the United Nations must be approved by the General Assembly of the United Nations before such application can be accepted by ICAO.

IV

BILATERAL AGREEMENTS

In the discussion of economic problems under the Chicago Convention the fact was mentioned that such agreements in the aviation field are a very important part of the legal rules governing international aviation operations. Over one hundred such agreements have been made between other countries and the United States.¹⁴ Bilateral

¹⁴ Rhyne, "Legal Rules for International Aviation," 31 VA. L. REV. 267 at 281-286 (1945). The weekly issues of the DEPARTMENT OF STATE BULLETIN list these agreements as they are released.

agreements between the United States and foreign countries cover four main subjects:

- (1) Operation of civil aircraft of one country in the other country.
- (2) Issuance by each country of pilots' licenses to nationals of the other country authorizing them to pilot civil aircraft.
- (3) Acceptance by each country of certificates of airworthiness for aircraft exported from the other country as merchandise.
- (4) Reciprocal air transportation operations such as those already mentioned herein.

There are also certain miscellaneous agreements which have been effected with foreign countries which in one way or another have an effect on aeronautical relations between the two countries. These agreements have covered such subjects as: the use of radio for civil aeronautical services, the control over islands, the construction of ports in the nature of foreign trade zones, the return of stolen aircraft or parts, the transit of military aircraft, and the matter of taxation.

V

UNITED STATES AIR CARRIERS IN FOREIGN AIR TRANSPORTATION

Air carriers of the United States which operate in foreign air transportation are subject to the same requirement of a certificate of public convenience and necessity as domestic air carriers.¹⁵ The granting of such certificates for foreign air transportation by the CAB is subject to approval of the President. The Supreme Court of the United States has held that the Civil Aeronautics Act of 1938 does not confer jurisdiction upon the courts to review action by the President in approving or disapproving the issuance of such a certificate.¹⁶ The court based its decision upon the reasoning that the President may base his action on facts of a confidential, diplomatic and political character so the Congress could not have intended that the courts review his action.

The Civil Aeronautics Act now states a policy of regulated competition in the public interest in both the domestic and foreign fields, and as stated in the beginning of this paper, there are now fourteen air carriers holding temporary or permanent certificates to operate in foreign air transportation. There has been, however, some agitation for

¹⁵ Section 401(a), Civil Aeronautics Act of 1938, 52 Stat. L. 987, 49 U.S.C. (1946) § 481(a).

¹⁶ *Chicago and Southern Air Lines v. Waterman Steamship Corp.*, (U.S. 1948) 68 S.Ct. 431, 2 Avi. 14,532.

a change in this policy from "competition" to a "Chosen Instrument" policy. Senator McCarran and others have introduced bills¹⁷ to pool all United States air carriers into one giant All-American Flag Line to act as our "chosen instrument" in the foreign air transportation field. This line would be our only subsidized air carrier in the foreign field.

Most of the foreign nations are represented in the foreign air transportation field by one government-owned or subsidized air carrier and the argument is that the United States can compete with such air lines of other governments only by having one air line represent it in the foreign air transportation field. It is argued that air carriers of other nations would provide the competition for this "chosen instrument" of the United States so we do not need the competition here in the foreign field which is so essential to progress and improved service in the domestic aviation field. It is argued on the other hand that we should not have a government-owned "chosen instrument" which would take care of all foreign air transportation for this nation because government ownership is contrary to American ideals. Without going into the many other arguments pro and con, let us leave the subject with the statement that the Congress has not adopted the proposed legislation and the nature of Congressional and other sentiment as developed at the hearings indicates that it is not probable that the "chosen instrument" policy will be adopted in this country.¹⁸ The chief supporter of the "chosen instrument" policy and legislation, Pan-American Airways, has now applied for domestic air routes to link its foreign routes, so evidently it has given up the fight.

VI

PERMITS TO FOREIGN AIR CARRIERS

Any air carrier owned by a citizen of a foreign nation is required to obtain a permit from the Civil Aeronautics Board in order to operate to or over the United States.¹⁹ To issue such a permit, the CAB must find that the carrier is "fit, willing and able to perform such transportation properly" and that it will conform to the Civil Aeronautics Act, and the rules, regulations and requirements of the Board. Presidential approval is also required.

¹⁷ S. 326, 79th Cong., 1st sess. (Dec. 3, 1945); S. 987, 80th Cong., 1st sess. (March 24, 1947).

¹⁸ For summary of the arguments, see Rhyne, "Legal Rules for International Aviation," 31 VA. L. REV. 267 at 289-297 (1945).

¹⁹ Section 401(a), 52 Stat. L. 987 (1938), 49 U.S.C. (1946) § 481(a).

There are now twenty-seven foreign air carriers which hold permits to operate to and from the United States. The CAB and the State Department cooperate in handling all applications for such permits, and the present requirements are that the applications must come to the State Department through diplomatic channels for transmission to the CAB.

Generally speaking, when our nation secures the right to have its airlines operate to a given foreign country, that country will insist upon the reciprocal right of having one or more airlines under its flag fly to our country. The Civil Aeronautics Act of 1938 provides that the board shall exercise its powers consistently with "any obligation assumed by the United States in any treaty, convention, or agreement" between the United States and any foreign country.²⁰ It appears that the board will automatically issue a permit to a foreign flag airline in any case where an Executive Agreement with the nation, whose flag is flown by that airline, requires the issuance of such permit.

If, in the grant of reciprocal air transportation rights, our government does not limit them to cases where the foreign airline is controlled by the interests of the nation whose flag is flown, there is the possibility that very valuable airline franchises will be enjoyed by financial interests which are entirely foreign to the nation for whose benefit the reciprocal rights are extended.

A considerable number of foreign flag airlines are said to be controlled by United States interests. There is a substantial possibility that in the course of time a number of foreign flag airlines controlled by United States interests will have received valuable franchises to operate to and from this country on the basis of reciprocal privileges extended to foreign nations even though there has been no proof of a public need for the operation of such services. There are already notable cases where a privilege extended to a foreign nation is being enjoyed by financial interests of this country. And in the course of time it is entirely possible that such automatic rights will be enjoyed extensively by the interests of certain other nations who may find it expedient to fly a variety of flags.

It is not easy to determine what policy should be followed with respect to this important question. There is the gravest danger in a

²⁰ Section 1102, 52 Stat. L. 1026 (1938), 49 U.S.C. (1946) § 672.

policy which leaves entirely to the foreign nation the designation of the airline to enjoy the reciprocal privileges extended to that nation.²¹

VII

INTERNATIONAL AVIATION LAW AND PRIVATE RIGHTS

A. *Introduction—CITEJA*. The history of the development of international air law as affecting private rights is largely the history of one organization, CITEJA.²² The name of this organization was formed from the initials of its French title (Comité International Technique d'Experts Juridiques Aériens) meaning the International Technical Commission of Aerial Legal Experts. This body was formed pursuant to a resolution adopted by the delegates to the First International Conference on Private Air Law held at Paris in 1925. The purpose of CITEJA was to assist in the development of a code of private international air law through the preparation of draft agreements to be submitted for adoption at subsequent international air law conferences and for subsequent ratification or adherence by interested states.²³ Accordingly, the commission, composed of experts from several states, met for the first time in Paris in 1926 and began the work of drafting conventions which would meet the problems affecting private rights in international air transportation and which would at the same time be acceptable to as many nations as possible.

In the years thereafter CITEJA met regularly and frequently until the war called a halt to its efforts.²⁴ After the war it again held several meetings, devoted to its primary objective of producing draft conventions and also for the purpose of terminating its affairs in view of the advent of the International Civil Aviation Organization. At CITEJA's final meeting, held at Montreal in May of 1947, a plan was adopted for its liquidation. Henceforth its work is to be carried on by the Legal Committee of ICAO, which will be considered later.

²¹ See "National Aviation Policy," Rep. of the Congressional Aviation Policy Board, S. Rep. 949, 80th Cong., 2d sess., p. 28, ¶ 41 (March 1, 1948).

²² See Latchford, "The Growth of Private International Air Law," 13 GEO. WASH. L. REV. 276 (1945).

²³ Ibid.

²⁴ Sixteen Plenary Sessions were held in various cities from its inception in 1926 until its termination in 1947. See Latchford, "Private International Air Law," 12 DEPT. OF STATE BUL. 11 (1945), and Latchford, "Pending Projects of the International Technical Committee of Aerial Legal Experts," 40 AM. J. INT. L. 280 (1946).

During the course of its existence the CITEJA drafted ten major conventions designed to bring about uniformity in the field of private international air law. These conventions were for the unification of certain rules relating to the following: (1) International Transportation by Air; (2) Damages to Third Parties on the Surface; (3) Precautionary Attachment of Aircraft; (4) Assistance and Salvage of Aircraft or by Aircraft at Sea; (5) Ownership by Aircraft and the Aeronautic Register; (6) Aerial Mortgages, Other Real Securities, and Serial Privileges; (7) Aerial Collisions; (8) Assistance and Salvage of Aircraft by Aircraft on Land; (9) Recordations of Title to Aircraft and Aircraft Mortgages; (10) Legal Status of the Aircraft Commander. Four of these were adopted at international conferences on private air law²⁵ and the remaining ones have been subject to continued study on the part of CITEJA and its successor, the Legal Committee of ICAO. The present legal problems of international air transportation relate largely to the adequacy of these conventions which have come into use through ratification or adherence by interested states, and to the matters which the proposed conventions now under discussion are intended to solve.

B. *Aviation Accidents—The Warsaw Convention.* It comes as a surprise to most lawyers that there exists a convention to which the United States is a party which limits recovery of damages for injury to or death of a passenger in international air transportation to \$8,291.87. When these uninitiated lawyers then find out that recovery of damage for loss of checked baggage or goods of passengers is limited to \$16.58 per kilogram (a kilogram is 2.046 pounds) and recovery for loss of jewelry and objects of which the passenger takes charge himself is limited to \$331.67, their astonishment knows no bounds. But that is the situation. Some of the problems which this convention has created are outlined below.

This convention is the first and most well-known of the CITEJA conventions presently in force. It is known officially as the "Convention For the Unification of Certain Rules Relating to International Transportation by Air," but is commonly referred to as the "Warsaw

²⁵ Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 1929); Convention for the Unification of Certain Rules Relating to Damages to Third Parties on the Surface (Rome, 1933); Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (Rome, 1933); Convention for the Unification of Certain Rules Relating to the Assistance and Salvage of Aircraft or by Aircraft at Sea (Brussels, 1938).

Convention" of 1929. This convention, drafted by CITEJA was adopted at the Second International Conference on Private Air Law held at Warsaw in 1929. It has been widely adopted, having been ratified or adhered to by some thirty-three nations,²⁶ and is the principal source of the law governing the legal relations between the carrier and its passengers and shippers in international air transportation. The United States adhered to this convention in 1934.²⁷

Appropriately, the convention sets forth at the outset what it is intended to govern.²⁸ Accordingly, it defines "international transportation" of persons, baggage or goods by aircraft for hire as any transportation in which, according to the contract of carriage between the carrier and the passenger or shipper, the place of departure and the place of destination are situated within the territories of two nations which are parties to the convention, or within the territory of a single state which is a party to the convention if there is an agreed stopping place in the territory of any other state.²⁹

For example, if the contract of carriage, that is, the airline ticket, shows the passenger to be traveling from Ann Arbor in the United States to Montreal, Canada, such a flight would come within the meaning of international transportation and would, therefore, be subject to the rules of the Warsaw Convention, since both the United States and Canada are parties to it. On the other hand, if the same flight had taken place prior to 1947 it would not have come under the terms of the convention since, Canada not having adhered to it until that date, the flight would have had its point of origin in a contracting state—the United States—and its point of destination in a non-contracting state—Canada. Again the transportation would have been international in character if prior to Canada's adoption of the convention, the passenger's ticket called for a round trip from and to Ann Arbor, with an agreed stopping place in Montreal, for in that case we would have both the point of origin and the point of destination in the United States, with an agreed stopping place in another country.³⁰

²⁶ See 1948 U.S. Av. Rep. i-iii, for list of ratifications and adherences as of April 15, 1948.

²⁷ 49 Stat. L. 3000 (1934), U.S. TREATY SER., No. 876. See RHYNE, AVIATION ACCIDENT LAW 252-283 (1947), for a discussion of the court decisions arising under this convention with full text of the convention at pp. 284-293.

²⁸ Article 1(1), U.S. TREATY SER., No. 876, p. 2 (1934).

²⁹ Article 1(2), *ibid.*

³⁰ See *Grein v. Imperial Airways, Ltd.*, [1937] 1 K.B. 50 (1936); and *Garcia*

It must be remembered that whether transportation is or is not international within the meaning of the Warsaw Convention depends entirely upon the contract of carriage between the carrier and the individual passenger or shipper, and not upon the flight of the airplane itself. There may be on the same airplane passengers whose trip comes within the liability limitations of the convention and those whose trip does not if their "contract" is different. For example, there are definite provisions which a ticket must contain to make it a "Warsaw" ticket, and if those things are left out the liability limitations do not apply.

What is the effect, then, upon the passenger whose trip does come within the terms of the Warsaw Convention? In the event of injury or death to such a passenger during "international transportation" the convention fixes the limit of liability on the part of the carrier to the injured passenger, or, in the case of death, to his personal representative of 125,000 French gold francs³¹ unless "willful misconduct" of the carrier or carrier's agent is proved, in which case an unlimited amount can be recovered.³² The equivalent of this amount in United States currency is the \$8,291.87 mentioned above. This does not mean that in any event the injured passenger, or if deceased, his personal representative, is entitled to that sum from the carrier. As in the usual negligence case he must still prove that he suffered damages, but despite the amount of damages he has suffered, the largest amount he can receive is \$8,291.87 if the convention applies. The limits on damage claims for injury to checked baggage, goods and objects in the passenger's personal possession are also expressed in gold francs, with the dollar value of those limits being stated above.

In order to compensate for this inadequate amount of damages, the convention creates a presumption of negligence on the part of the air carrier which presumption may only be overcome by a successful showing that the carrier took all possible measures to avoid the accident or that it was impossible for it to take such measures.³³ And in the case of damage to goods and baggage the carrier may escape liability by successfully showing that the damage was caused by an error in piloting, in the handling of the aircraft, or in navigation.³⁴

v. Pan American Airways, Inc., 269 App. Div. 287, 55 N.Y.S. (2d) 317 (1945), for similar factual situations.

³¹ Article 22(1), U.S. TREATY SER., No. 876, p. 7 (1934).

³² Article 25(1), (2), *id.*, p. 8.

³³ Article 20(1), *id.*, p. 7.

³⁴ Article 20(2), *ibid.*

There has been much discussion as to the adequacy of the limitation of \$8,291.87, and suggestions have been made that the limit is too low and should be revised upward. One of the chief contentions of those who take the position that the limitation should remain as is, is that whereas \$8,291.87 or its equivalent may not be adequate compensation for injury or death to a passenger, by American or British standards, such an amount is adequate and in certain cases more than adequate by the standards of other countries who are parties to the convention. This argument is to the effect that a higher limitation would prove to be a stumbling block to the adherence to the convention by those nations whose customary value on a human life is less than our own; that it is better to have an amount which is satisfactory to the greatest number of states so that the convention may have the greatest possible acceptance.³⁵

Such an argument, nonetheless, does not save the fact that a recovery of \$8,291.87 is in many instances just too meager to be equitable. The argument that the plaintiff is compensated by having the burden of proof of freedom from negligence placed upon the carrier is somewhat weakened when we consider that in many courts the doctrine of *res ipsa loquitur* is already, apart from the Warsaw Convention, available to the plaintiff and that it may be the only tactic available to him in view of the difficulties encountered in gathering sufficient evidence to prove the cause of an airplane accident.³⁶ In other words, the convention, by way of compensation for an inadequate recovery, gives something which in many courts is already available to the plaintiff; namely, the equivalent of a *res ipsa loquitur* case.³⁷

At one of the last meetings of CITEJA, held in Cairo in 1946, one of the British delegates recommended that the liability limitation given the carrier be doubled, to an amount, the equivalent of which in United States currency, would be \$16,583.74³⁸ and in the latest meeting in Brussels some of the English delegates are reported to have recommended \$24,875.61 as a more equitable limit. This would

³⁵ See Parker, "The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929," 14 J. AIR L. AND COMM. 37 (1947).

³⁶ For most recent decision holding the doctrine of *res ipsa loquitur* applicable to aircraft accidents, see *Smith v. Pennsylvania Central Airlines, Inc.*, (D.C. D.C. 1948) 76 F. Supp. 940, 2 Avi. 14,618.

³⁷ RHYNE, AVIATION ACCIDENT LAW 121-138 (1947), where the aviation accident cases discussing *res ipsa loquitur* are collected.

³⁸ See 14 J. AIR L. AND COMM. 87 at 101, note 21 (1947).

certainly seem to be a much more equitable figure than the present one. The suggestion, however, was never accepted and this and other suggested revisions of the convention were put off for further study. The American Bar Association has recommended upward revision of this amount.³⁹ Other interests, however, in the form of Airline Companies and the aviation insurance underwriters have, so far, successfully resisted change and the United States official position is one of opposition to any change in the \$8,291.87 limit. The airlines have their trade Association's General Counsel on the ICAO Legal Committee studying this convention as one of the three official representatives of the United States government. So long as our government is represented directly by this airline representative little hope can exist for increasing this inadequate amount, for he can kill all such suggestions "from the inside" in his official "governmental" capacity. It is suggested that the equitable thing for the government to do is to place someone from the other side on the United States delegation so that the viewpoint of an increase in this presumptive liability will get adequate representation—such representation certainly does not exist at present. The United States is the major nation in the international air transportation field and its views carry great weight. It is unfortunate that it has taken the "do nothing" attitude now expressed on those damage limitations.

The provisions of the convention limiting the liability of the carrier apply only to the carrier's passengers⁴⁰ and, therefore, an injured crew member must have recourse to more usual remedies such as workmen's compensation or a common law negligence action. The latter may provide interesting problems in conflict of laws, as, for example, when a crew member has been injured in an airplane accident in a foreign country and sues the carrier in his home country. Numerous questions arise as to what law governs as to the amount of damages he may recover, as to the time within which the suit must be brought, and similar matters.

I give you one case as an illustration. In *McBride v. T.W.A.*, a death claim filed in the United States District Court for the Eastern District of Virginia by the widow of a flight engineer killed in a recent crash at Shannon Airport, the airline first defended on the ground that the employee was a "Missouri" employee and Missouri Workmen's Compensation Act barred the claim. The airline further claimed that

³⁹ 72 A.B.A. REP. 164 (1947).

⁴⁰ Article 17, U.S. TREATY SER., No. 876, p. 6 (1934).

the widow was limited to \$15,000 as a Virginia statute places that ceiling on death claims. The Missouri Compensation law by its own terms was inapplicable to employees earning the \$6,000 earned by the deceased in that case, so the airline shifted its defense to a claim that the employee was based in Virginia and the Virginia Compensation Act applied. After the judge ruled that the \$15,000 limit was inapplicable, the case was settled, so no decision was ever made on the Virginia Compensation Act problem.

Even when the injured passenger, or in the event the passenger was killed, his personal representative, must rely upon the Warsaw Convention it should be noted that such questions in conflict of laws do not entirely disappear. For, since the courts have held that the convention does not create a right of action for damages for the death of a passenger,⁴¹ the action must be brought under the wrongful death act, or its equivalent, of the country in which the death occurred. For example, if suit is brought in the United States to recover damages for the death of a passenger killed in Country X while in "international transportation," and such suit is governed by the liability limitations of the Warsaw Convention such a suit can, under the decisions cited, only be brought under the wrongful death statute of country X. Furthermore, the court of the place where the suit is brought must apply its conflicts of law rules so as to determine whether the law of country X or the law of the forum shall determine the proper party to bring the suit, the time within which the suit must be brought, the manner of distribution of recovery, and so forth.

We have spoken of the Warsaw Convention as limiting the amount the passenger or his personal representative may recover for injury or death in international air transportation to \$8,291.87. I have mentioned the exception which exists; namely, where the carrier is shown to have been guilty of "willful misconduct" or its equivalent and such "willful misconduct" is shown to have been the cause of the accident which occasioned the passenger's injury or death. Here the limitation of \$8,291.87 is removed and the carrier's liability will be the amount of damages that may be proven. Much has been written concerning this phase of the convention, and in particular, concerning what is

⁴¹ *Wyman v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S. (2d) 420 (1943), *affd.*, 267 App. Div. 947, 48 N.Y.S. (2d) 459 (1944); *affd.*, 293 N.Y. 878, 59 N.E. (2d) 285 (1945), *cert. den.*, 324 U.S. 882, 65 S.Ct. 1029 (1945). *Choy v. Pan American Airways Co.*, (D.C. N.Y. 1941) 1 *Avi.* 946, 1941 U.S. *Av. Rep.* 10, 1942 U.S. *Av. Rep.* 93.

embraced by the term "willful misconduct" or its equivalent. Actually the problem goes beyond that. The Warsaw Convention was drawn up in the French language and the French version is the official text. Article 25 provides that the carrier shall not be entitled to avail himself of the provisions of the convention which exclude or limit his liability if the damage is caused in "dol." The controversy has centered about the proper translation of this word "dol," which is generally said to mean "willful misconduct."

It would unduly prolong this paper were I to attempt to discuss the positions taken by various studies of the convention on the proper meaning of "dol" as reflecting the intent of those who drafted the convention.⁴² Suffice it to say that the problem is an extremely practical one to a claimant seeking recovery under the convention from a carrier for injuries received during international transportation. Imagine the task confronting such a claimant were he, in attempting to avail himself of the provisions of the convention which remove the carrier's liability limitation, obliged to show that the carrier willfully and intentionally planned to inflict the very injury complained of. And yet it is precisely this meaning which some would ascribe to the word "dol."⁴³

A somewhat more reasonable position was taken very recently by a United States district court in the case of *Ulen v. American Airlines, Inc.*⁴⁴ The plaintiff there sought damages from the carrier for injuries sustained as the result of an accident which occurred in Virginia in 1945. As the claimant was, at the time of the accident, traveling from the United States to Mexico under a ticket which by its terms incorporated the Warsaw Convention, the carrier's liability was held to be governed by the provisions of that convention. The alleged cause of the accident was the carrier's planning and operation of the flight at an altitude less than that required by applicable Federal Civil Air Regulations and that such violation caused the airplane to strike a mountain on its course and crash. This violation of the Civil Air Regulations was the basis of the plaintiff's contention that the accident was occasioned by the "willful misconduct" of the carrier. On this issue, the court instructed the jury: "... if the carrier, or its employees or agents, willfully performed any act with the knowledge that the performance of that

⁴² See RHYNE, AVIATION ACCIDENT LAW 267 (1947).

⁴³ See GOEDHUIS, NATIONAL AIR LEGISLATION AND THE WARSAW CONVENTION (1937).

⁴⁴ United States District Court for The District of Columbia, May, 1948.

act was likely to result in injury to a passenger, or performed that act with reckless and wanton disregard of its probable consequences, then that would constitute willful misconduct; and if the result of that willful misconduct was injury to Mrs. Ulen, then her recovery would not be limited by this sum of some eight thousand dollars."

And with respect to the violation of civil air regulations the court charged: "... the mere violation of . . . one or more of these rules or regulations, even if intentional, would not necessarily constitute willful misconduct, but if the violation was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be willful misconduct, and likewise, if it was done with a wanton and reckless disregard of the consequences." The jury returned a verdict for the plaintiff for \$25,000 plus \$2,500 for plaintiff's husband for loss of services. The *Ulen* case marks the first time that a case which is governed by the Warsaw Convention has been submitted to a jury to determine whether the carrier was guilty of willful misconduct in causing an airplane accident. An appeal is pending in this case so that a final clarification of the "willful misconduct" issue as presented in it must await the determination of the appellate court.

C. *Property Rights in Aircraft.* One of the most difficult and most complicated legal problems which arises out of international air transportation involves the protection of property rights in aircraft. Simply stated, the problem is as follows. If international operators are to secure the necessary financing to enable them to purchase large and costly aircraft necessary for their international operations, those who finance such purchases for the operators must be assured that their interests in these aircraft will be afforded protection while the aircraft are being operated in any given country. Without such an international agreement as would insure that a security interest created in State *A* in an aircraft would be recognized in State *B*, whether the interest be in the nature of a chattel mortgage, equipment trust or other form, aircraft financing in the international field would be at best an uncertain thing.⁴⁵

A hypothetical case which presents the problems with which we are concerned is as follows:

"Airline *X*, incorporated under the laws of Delaware, desires to purchase a fleet of ten new aircraft, manufactured in Cali-

⁴⁵ See Calkins, "First Meeting of the Legal Committee of the International Civil Aviation Organization," 18 DEPT. OF STATE BUL. 506 (1948).

fornia, in order to conduct its operations from the United States to England, France, Italy, and beyond. A New York Bank is consulted, and agrees to furnish the necessary funds, provided that it can be given a valid purchase-money security on each of the new aircraft, together with a secured interest equal to twenty-five per cent of the total purchase price of the new fleet on its existing fleet of six unencumbered aircraft as additional security.

"The Bank further insists, with respect to the 'new' fleet, that every airplane is to constitute joint security for the entire loan, and that every airplane in the 'old' fleet is to constitute joint security for the additional twenty-five per cent, until the last of the new airplanes is paid for. Assume, further, that it is decided to employ a mortgage as the security device in both cases.

"If we assume that at the time of the 'closing' of the transaction, none of the 'new' fleet has been delivered to the airline, and that two of the 'old' fleet are in France, one in England, one in New York and two over the high seas between Ireland and the United States bound in opposite directions, we have a situation which has limitless possibilities for confusion. First of all, what will be the situation with regard to an aircraft of the 'new' fleet abroad after it has been turned over to the airline? Would the lien of the mortgage be valid as against an attaching creditor in England, where chattel mortgages as such are not recognized for domestic purposes? To what extent would it be recognized in France, where mortgages though permitted, can cover only single units? What would be the subsequent status in the United States of the aircraft of the 'old' fleet which at the time the mortgage was made were in France, England, and over the high seas?"⁴⁶

The difficulty in this field stems in part from the widely different treatment accorded such security interests by the laws of various countries. Fundamental differences in basic concepts inherent in the varying legal systems of the world seemed at times to offer insurmountable obstacles to consummation of a convention acceptable to most nations. For example, a mortgage interest validly created and recognized in the United States might not be recognized in some other countries so that one who held such a mortgage interest would stand the risk of having his entire security wiped out. Security interests in movables generally are considered contrary to public policy in many countries following the Roman Law.

An attempt to create the desired uniformity was inaugurated by

⁴⁶ Calkins, "Creation and International Recognition of Title and Security Rights in Aircraft," 15 J. AIR L. AND COMM. 156 at 156-157 (1948).

CITEJA as early as 1931, through the adoption of a draft convention on the subject. Subsequently the work was taken up by a Commission of the Assembly of PICAO in 1946. Finally, the Legal Committee of ICAO, meeting at Brussels, in 1947, formulated a draft convention which was submitted to the Second Assembly of ICAO in June, 1948. ICAO approved this convention and fourteen of the forty-nine ICAO members including the United States, signed it.

The proposed convention is designated to bring international air carriers much needed assistance in their arrangements for the financing of aircraft purchases. The convention is short and, in view of the nature of the subject matter, admirably free from technical details. By it each contracting state agrees (1) to recognize rights of property in aircraft; (2) to recognize rights to acquire aircraft by purchase coupled with possession of the aircraft; (3) to recognize the rights to possession of aircraft under leases of six months or more; and (4) to recognize mortgages and similar rights in aircraft which are contractually created as security for the payment of an indebtedness.⁴⁷ These rights will be entitled to recognition only when they have been recorded in conformity with the law of the state in which the aircraft is registered. The only rights which are given priority over those required to be recorded are those arising from compensation due for salvage of the aircraft or from extraordinary expenses indispensable for the preservation of the aircraft. Added recognition is given these rights since those obtaining such charges should be compensated for thus having preserved the security value of the aircraft.

Other provisions of this proposed convention, which is referred to as the "Convention on the International Recognition of Rights in Aircraft" relate to the so-called "purge" doctrine and to the rights of third parties. Under the "purge" doctrine, the purchaser of an aircraft at a judicial sale acquires a title unencumbered by prior secured interests, with the result that one holding an interest prior in rank to that of the attaching creditor has his only recourse in the proceeds of the sale, with the possibility that these proceeds may not be sufficient to insure his complete repayment. The proposed convention solves this problem by providing that no judicial sale may be effected unless all charges having priority over that of the executing creditor are covered by the proceeds of the sale or are assumed by the purchaser.

In order that prior secured interests might not be favored to the

⁴⁷ See 14 J. AIR L. AND COMM. 500 (1947) for text of the proposed Convention.

extent of barring any possibility of recovery through judicial sale of the aircraft by third persons for injuries sustained on the surface, the convention provides that, as to such persons, local law may provide that these prior secured interests shall not be set up to an extent greater than 80 per cent of the sale price of the aircraft taken in execution. An exception is provided in cases where the injury or damage is adequately insured by a state or with an insurance undertaking in any state. The 80 per cent limitation is especially significant in cases of fleet mortgages, whereby each single aircraft in a fleet of aircraft is encumbered with an indebtedness much larger than its individual value as each aircraft of the fleet constitutes security for the entire loan rather than the proportionate part of the debt attributable to it.

This convention comes into effect, as between them, ninety days after ratification by any two nations.

D. *The Status of the Aircraft Commander.* Another of the current problems of a legal nature affecting international air transportation concerns the status of the commander of aircraft engaged in international flight. Of the drafts of proposed conventions turned over to the Legal Committee of ICAO by CITEJA, the convention on this subject is currently the most active.

The chief concern of the operator, the passenger and the shipper is that the aircraft may reach its destination with the least possible delay. To this end the employees of the operator on board the aircraft must be vested with authority to act for the operator when contingencies arise in foreign countries which would impede the progress of the flight.

If repairs are to be made to the aircraft, passengers and cargo are to be cared for during extended and unforeseen delays or landings and necessary purchases are to be made, one of the carrier's employees on board the aircraft must have sufficient authority to commit the credit of the carrier to a degree which will permit such activities to be performed. Equally as necessary as the authority vested in the carrier's employee is the assurance on the part of those with whom the employee must deal in foreign countries that the employee has, in fact, such authority, and that no difficulty will arise when reimbursement is sought from the carrier for services performed or goods sold. It is in connection with these and related matters that the status of the aircraft commander in international air transportation becomes of vital importance.

As early as 1930 CITEJA began the attempt to bring uniformity to this subject through the drafting of a convention which would define the status of the aircraft commander in a manner acceptable to as many

states as possible.⁴⁸ More recently, in 1946, the same body adopted such a draft convention and reported it to the PICAQ at Montreal. Consideration is presently being given to the convention by the Legal Committee of ICAO, and it is expected that it will be ratified in final form in the near future.

As reported to the Legal Committee of ICAO, the draft convention provides that all aircraft engaged in international carriage (the convention does not apply to military, customs or police aircraft) shall have on board a person vested with power of commander, such person to be chosen by the operator of the aircraft. An order of succession to the position of commander is established among the remaining members of the airplane's crew in the absence of the designated commander or in cases where he is unable to perform his duties. The proposed convention recognizes the paramount responsibility of the senior officer on board for the safety of his passengers, crew and aircraft by granting him the authority to direct the actions of the crew and passengers to the extent necessary to insure the safe operation of the aircraft, including the power to put off, for serious cause, any member of the crew or any passenger at an intermediate stop. In what is the heart of the convention, the aircraft commander is authorized (1) to make purchases necessary for the completion of the flight; (2) to secure repairs necessary for the prompt resumption of the flight; (3) to incur any expense necessary for the safety of his passengers and crew and for the preservation of the cargo; (4) to borrow money necessary for the execution of the above authority granted to him; and (5) to hire personnel indispensable for the completion of the flight. In addition, he is granted the right of access to the consuls of the states of which those aboard are nationals, of the states of which shippers are nationals and of the state in which the aircraft is registered.

VIII

CONCLUSION

The foregoing review of international law and air transportation reveals much progress in freeing the air lanes of the world of the many impediments to full utilization of travel by air. The remarkable progress of PICAQ and ICAO indicates that much can be accomplished by mutual cooperation in this field. While most of the progress has been on technical subjects, the successful experience of working to-

⁴⁸ Knauth, "The Aircraft Commander in International Law," 14 J. AIR L. AND COMM. 157 (1947).

gether on such subjects augurs well for future results in the economic and political fields.

An instrument so revolutionary in human affairs as the airplane appears at rare intervals in world history. It has reduced the globe to manageable size and required fundamental revisions in the thinking of man. As indicated herein, much of that thinking by aviation's leaders in recent years has been directed toward peacetime realization of the great wartime promise of global air transportation. Real progress has been made toward making the airplane a peacetime instrument of rapid international transportation. Through full realization of its peacetime promise the airplane should be a most effective instrument for peace, and for peace under law—as experience is proving that rules of law on which many nations agree can be formulated to govern worldwide air travel. From the cooperative efforts of nations in drafting these legal rules for international aviation, there may grow up an air lane of mutual understanding which will help prevent future resort to the airplane as an instrument of war.