THE INTERNATIONAL CIVIL AVIATION ORGANIZATION: ITS CONTRIBUTION TO INTERNATIONAL LAW

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After tracing ICAO's background of customary international law and early attempts at international aviation organization, Mr Sassella details the Organization's constitutional structure, its membership and its status as a United Nations' specialized agency. An exhaustive study of ICAO's work, both pre-legislative and quasi-legislative, culminates in an evaluation of its achievements in defining 'scheduled flights' and in providing for the possibility of multi-national airlines within its Convention.

INTRODUCTION

The subject of this article is the contribution to international law made by the International Civil Aviation Organization (hereafter ICAO). ICAO was conceived at the International Civil Aviation Conference held in Chicago in 1944, and began to function on 4 April 1947. Its constitutive instrument is the *Convention on International Civil Aviation* (1944),[1] commonly known as the Chicago Convention. The article will commence with an enquiry into what is regarded as the present international customary law of the air, and will survey the common law and United States' air law for any indication of State practice in this regard. A survey of its historical antecedents will be followed by a consideration of the Organization's constitution and operations, culminating in a discussion of ICAO's influence in shaping general international law.[2]

INTERNATIONAL CUSTOMARY LAW OF THE AIR

An international customary law rule is a constant and uniform usage or State practice felt to be legally obligatory by those who follow it. Thus the principles discussed below derive their status as law from their regular and repeated recurrence in interactions between States, being followed because they are believed to be binding rather than because States have formally established their effect by treaty or convention.

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[1] 15 *United Nations Treaty Series* 295.

[2] The term 'international law' will be read as that body of legal rules which applies to relations between sovereign States and also between such States and other international organizations which have been endowed with international legal personality: *The Lotus* (1927) P.C.I.J. A/9, 18; *Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J. Rep. 174, 179.

(a) *Airspace*

It is generally accepted that airspace over the high seas or land subject to the sovereignty of no State is free.[3] There have been several conflicting theories concerning airspace over land (including airspace over internal and territorial waters).

The first theory was that the air space is free, subject only to the rights of States acquired in the interests of their self-preservation. This theory, championed by Fauchille, was adopted by the Institute of International Law in 1906. It is based on the rationale that air is physically incapable of actual and continual occupation. The editors of Lord McNair's treatise[4] rebut this by pointing out that sovereignty does not really involve continual presence, which is proved by the fact that a State can exercise sovereignty over a huge desert or the summit of an uninhabitable mountain if it has *de facto* control and is in a position to suppress internal disorder and repel external attack. If a State can do this in its claimed airspace it may be said to control that airspace.

The second theory was that, upon the analogy of the maritime belt or territorial waters, there is over the land and waters of each State a lower zone of territorial air space, and a higher, and unlimited, zone of free air space. The third theory was a literal application of the maxim *cuius est solum, eius est usque ad coelum et ad inferos.* According to this theory, a State has complete sovereignty in its superincumbent air space to an unlimited height.

The remaining theory was that a State has complete sovereignty in superincumbent air space to an unlimited height, with a servitude of innocent passage for foreign non-military aircraft. This is an obvious adaptation of the right of merchant ships to innocent passage through territorial waters.

The 1914-18 War awoke States to the importance of air navigation and the dangers it posed for the subjacent State. The third theory, that of complete sovereignty, thus became almost universally adopted, and has come to be regarded as a principle of international customary law.[5] This is so, even though a principle cannot be regarded as a principle of international customary law until it is shown that States adhere to that principle because they recognize it as international law and binding. Mere universality without this requirement being satisfied does not suffice to found a principle of international customary law.[6] Thus it is no idle statement to assert that a principle is part of international customary law.

[3] McNair, *The Law of the Air* (3rd ed. 1964) 4.
[4] *Ibid.* 5.
[5] See Cheng, 'From Air Law to Space Law' (1960) 13 *Current Legal Problems* 228, 229; *Shawcross and Beaumont on Air Law* (3rd ed. 1966) i. 28, which borrows from *Oppenheim on International Law* (8th ed. 1955) i. 325.
[6] *The Lotus* (1927) P.C.I.J. A/9, 18.

In practice the States have mitigated the severity of the principle of absolute sovereignty by affording each other mutual rights in their airspace. The 'El Al Incident' is an instance of such State practice. On 27 July 1955 an Israeli El Al civil aircraft accidentally flying over Bulgarian territory was shot down by Bulgarian forces. Fifty one passengers and seven crew members representing Israel, Austria, Belgium, Canada, France, the Federal Republic of Germany, Sweden, the United Kingdom, South Africa and the U.S.A. were killed. The above nations brought claims[7] for damages against Bulgaria. They claimed on the basis that Bulgaria did not enjoy complete and exclusive sovereignty over its airspace to the exclusion of every other State. They argued that Bulgaria had a duty to take all reasonable steps to control the aircraft or to issue a suitable warning before using force. The Bulgarian Government paid compensation insisting that it paid *ex gratia,* but it seems to have admitted that it was not unfettered in its exercise of sovereignty by its statement in a *Note Verbale* of 4 August 1955:[8]

> *Les forces de la défence anti-aérienne bulgare ont fait preuve d'une certaine hâte et n'ont pas pris toutes les mesures nécessaires pour contraindre l'avion à se soumettre et à atterrir.*[9]

(b) *Jurisdiction*

Jurisdiction of States is a corollary of their sovereign status, and every State has jurisdiction over all persons and things within its territory, including aircraft. A State may also exercise 'extra-territorial' jurisdiction over nationals who travel or reside in a foreign State and over vessels flying its flag on the high seas. Some States exercise criminal jurisdiction over acts committed by their nationals in foreign States, or over acts which prejudice its nationals or national interests.[10] It is at present uncertain, in the absence of a decision by an international tribunal, whether international customary law places limits on the exercise of extra-territorial jurisdiction by States. It is clear that international customary law affords little help in settling the potentially complex questions of jurisdiction in air law. States could claim jurisdiction on the bases of the aircraft's place of registration, substantial ownership by nationals, the commander's nationality, the places of departure, over-flight or arrival and the passengers' nationality.

(c) *State Responsibility*

In the field of State responsibility for damage caused by aircraft of a State, uncertainty again prevails in international customary law. The

[7] *Aerial Incident of 27 July,* 1955 (*Israel v. Bulgaria*) [1959] I.C.J. Rep. 125.
[8] *Aerial Incident of 27 July,* 1955 (*Israel, etc. v. Bulgaria*) [1959] I.C.J. Pleadings 5.
[9] Translation: 'The Bulgarian air defence forces acted rather hastily and did not take all necessary measures to have the aircraft submit to a landing'.
[10] *Shawcross and Beaumont on Air Law.*

Trail Smelter Arbitration[11] stands strictly only for the proposition that a State is under a duty to prevent its territory from being a source of economic injury to another State's neighbouring territory by the escape of noxious fumes. This principle is suspect as customary international law because the adjudicating tribunal was empowered by the agreement which set it up to apply rules of United States law as well as international law, so that one cannot be certain from which source all or part of the above principle came. At the same time, any attempt to apply this principle to air law would demand consideration of the relationship of an aircraft to State territory, whether the 'neighbouring' requirement is satisfied by overhead flight, and whether the harm caused is analogous to that the result of noxious fumes.

(d) *Nationality of Aircraft*

It is generally accepted that the nationality of aircraft is recognized by international customary law. It has been said that '[a]ircraft, like vessels, and unlike railway trains and automotive vehicles, now have that quality of legal quasi-personality in public international law discussed above as *nationality*'.[12] Nationality is described as 'a relationship to a given State somewhat similar to the relationship of an individual to the State to which he owes allegiance'.[13] The editors of Shawcross and Beaumont's book doubt whether aircraft possess 'nationality' in the sense of legal personality, but they concede that 'nationality' in reference to aircraft is hallowed by common usage.[14] They point out the problem of what will be required of a State launching an international claim on behalf of an aircraft. Will the tribunal recognize the capacity of the registering State in every case, or will it require a genuine link between the State and the aircraft? The editors submit that a genuine link would not have to be established.[15] On the other hand, it has been asserted that there is no reason why the rule enunciated by the World Court with regard to individuals cannot be extended to ships and aircraft so as to exclude flags of convenience.[16] In the *Nottebohm Case (Second Phase) (Guatemala v. Liechtenstein)*[17] it was held that a State could refuse to recognize the grant of nationality to an individual by a second State where there is not 'a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[18]

[11] (1941) 3 R.I.A.A. 1905.
[12] Cooper, *Explorations in Aerospace Law* (1968) 215.
[13] *Ibid.* 206.
[14] *Shawcross and Beaumont on Air Law, op. cit.* 30.
[15] *Ibid.*
[16] Cheng, *Law of International Air Transport* (1962) 131.
[17] [1955] I.C.J. Rep. 4.
[18] *Ibid.* 23.

In tracing the history of the concept of nationality of aircraft in international law, the first suggestion of the concept has been attributed to Fauchille in 1901.[19] By the time of the First World War both neutral and belligerent powers recognized that aircraft had acquired a national character and should be dealt with as legal entities. The *Convention Relating to the Regulation of Aerial Navigation* (1919)[20] so embodied the principle of nationality that neutrals of the war were unable to accept the convention because article five forbade air navigation relations with the former enemies. When the Second World War began the protective jurisdiction of the flag State and the responsibility of that State for its aircraft were fully recognized as a principle of international law, independent of any treaty to that effect being in force.[21]

(e) *Common Law of the Use of Air*

Municipal law is of limited use in this area in that it provides some indication of how the laws of individual States regulate, within those States, air matters analogous to those likely to arise in international law.

The correct starting point at common law would appear to be Blackstone, who said

> Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. Cujus est solum, ejus est usque ad coelum, is the maxim of the law, upwards; therefore no man may erect any building, or the like, or overhang another's land. . . . So that the word "land" is not only the face of the earth, but everything under it or over it.[22]

A leading case on this question is that of *Kelsen v. The Imperial Tobacco Coy*[23] in which the plaintiff brought an action in trespass against the defendant company which had erected an advertising sign on its premises in such a way as to cause it to project over the plaintiff's premises. McNair J. found in the plaintiff's favour and issued an injunction. A survey of authorities by the learned judge revealed the following statement by Lord Ellenborough in *Pickering v. Rudd*,[24] 'I do not think it is trespass to interfere with the column of air superincumbent on the close'. However, he also found a consistent line of authority favouring the opposite view, notably *Wandsworth Board of Works v. United Telephone Coy*[25] and *Gifford v. Dent*.[26] From these authorities it appears that at common law an act performed in the airspace above another's land constitutes trespass to land.

[19] Cooper, *op. cit.* 217.
[20] 11 *League of Nations Treaty Series* 173.
[21] Cooper, *op. cit.* 237.
[22] *Blackstone's Commentaries* (1765) ii. 18.
[23] [1957] 2 Q.B. 334.
[24] (1815) 4 Camp. 219, 220.
[25] (1884) 13 Q.B.D. 904.
[26] [1926] W.N. 336.

An interesting problem is that of the consequence of shooting across land—is trespass committed only if the bullet hits the land or does passage through the air over the land suffice? English authority on this question is unclear.[27] For this reason I have selected a Tasmanian case as an illustration of the application of common law principles to the problem. In *Davies v. Bennison*[28] the defendant shot at and killed the plaintiff's cat. The cat was in the plaintiff's yard, while the defendant was at all material times on his own land. Nicholls C.J. saw no merit in the view that if the defendant's bullet hit the cat without touching the land the defendant would not be liable in trespass, but that if the bullet missed the cat and hit the ground he would be so liable.[29] He recognized that the maxim would have to be limited to enable 'free use of beneficial inventions, such as flying machines',[30] and concluded that:

> So far as the ability to use land, and the air above it exists, mechanically speaking, to my mind any intrusion above land is a direct physical breach of the negative duty not to interfere with the owner's use of his land, and is in principle a trespass. At any rate, I can see no doubt whatever that an owner's rights extend to a height sufficient to cover the facts of this case.[31]

There is no common law directly applicable to aircraft, and statute law has been enacted to deal with the matter. The Wrongs Act 1958, sections 30 and 31, is an example of such statutes as have been passed. Section 30 reads

> No action for trespass shall lie in respect of trespass or nuisance by reason only of the flight of an aircraft over any property at a height above the ground which having regard to the wind the weather and all the circumstances is reasonable, or the ordinary incidents of such flight, so long as the provisions of the Air Navigation Regulations are duly complied with.

The Civil Aviation Act 1949 (U.K.) has achieved a similar effect by its section 40, the terms of which are identical to those in the Victorian act.

The editors of Lord McNair's treatise conclude their study of the common law with the proposition that there is nothing in common law to the effect that passage through the air of a vehicle or projectile, at a height and in such circumstances as to involve no interference with the reasonable use of one's subjacent land and structures upon it, and no contact with them, amounts to the tort of trespass.[32] They argue that the maxim should be interpreted to mean, '[w]hosoever owns a portion

[27] See McNair, *op. cit.* 40-1.
[28] (1927) 22 Tas. L.R. 52.
[29] *Ibid.* 56.
[30] *Ibid.*
[31] *Ibid.* 57.
[32] McNair, *op. cit.* 45.

of the surface of the earth, also owns anything below and anything above that portion that may be capable of being reduced into private ownership'.[33] Airspace (as distinct from air) is probably not susceptible to private ownership. Statutory provisions as instanced above have largely produced the situation these editors advocate.

Thus it seems that the common law began with a theory of unlimited sovereignty in the landholder. Progress and the inability of the landholder to effectively use the airspace above a certain reasonable distance rendered that theory an unrealistic obstacle to advancement. The legislatures therefore stepped into abridge the wide operation of the maxim and permit commercial and other use of the airspace.

(f) *Ideas in American Law on Use of the Air*

There has been a tendency in the U.S.A. to move away from common law notions and create new law to meet new problems. The Federal Aviation Act 1958 (U.S.A.) declared all the airspace above a certain height navigable airspace through which there is a public right of transit.

Despite that, many cases have fallen to be determined according to common law principles. An ideal example of such a case, in that it illustrates clearly the treatment of the basic common law in this area by American courts, is *Newark v. Eastern Airlines*.[34]

In this case, which concerned an alleged trespass over the plaintiff's land by the defendant, the court stated the following principle

> There must be evidence not only that the aircraft passed over [the plaintiff's] land from time to time but also that there was unlawful invasion of the immediate reaches of his land; in other words there must be evidence that the aircraft flights were at such altitudes as to interfere substantially with the land-owner's possession and use of the airspace above the surface.[35]

The court here reaches a result somewhat equivalent to that achieved in England by legislation. The courts in the U.S.A. would therefore appear to respect ancient common law teaching to a far lesser extent than is the case in England.

It has no doubt become apparent that what guidance exists in the municipal law of the U.S.A. and England as to the practice of individual States in regulating air matters pertains mainly to the theory of absolute sovereignty and the necessity of its abridgement. This is the most settled area of international customary law.

THE NEED FOR AN INTERNATIONAL CIVIL AVIATION BODY

Between 1900 and the present time air transport has had a growing importance and it has now reached the stage where, in the number of

[33] *Ibid.* 48.
[34] (1958) 159 F. Supp. 750.
[35] *Ibid.* 760.

passengers carried across the North Atlantic, aircraft have already outstripped ships by two to one. In 1960 some 866,000 passengers were carried by sea over the North Atlantic, as against 1,920,000 by air (including 159,000 by charter or special flights). On the world scale the numbers carried in regular air services have risen from 3,600,000 in 1938, 24,000,000 in 1948, and 87,000,000 in 1958 to over 100,000,000 in 1960.[36]

(a) *Early Attempts at International Organization*

The First World War advanced aircraft both numerically and technically to the point where aviation became for the first time an international form of communication and transport. It was recognized that some form of international regulation to help establish understanding and co-operation between States in air navigation matters was advisable, and accordingly the *Convention on the Regulation of Aerial Navigation* (1919)[37] was opened for signature in Paris. Article 34 provided for the establishment of the International Commission for Air Navigation (ICAN). Its constitution gave ICAN legislative, administrative and judicial functions concerned with subjects covered by the Convention. Membership in ICAN was confined to parties to the Convention. Some 38 States became members and many non-members became parties to agreements modelled on ICAN.

ICAN's demise came with the emergence of ICAO, which emerged largely through the instigation of the U.S.A. which was dissatisfied with ICAN. Article 80 of the Chicago Convention required each contracting State to notify its denunciation of the Paris Convention as soon as the Chicago Convention should enter force, which event occurred on 4 April 1947. In October 1946 ICAN prepared a plan for its liquidation, to be completed by 31 December 1947. By this plan ICAN's funds were transferred to ICAO and its last Secretary General became ICAO's first Secretary General.

The International Private Air Law Congress (CIDPA) was a product of ICAN's 1925 session in Paris. ICAN could work in only the field of public international law and it contained as members only parties to the Paris Convention. CIDPA was formed to fill the need felt by many States for a uniform code of private air law. In its turn CIDPA formed an International Technical Commission of Juridical Experts in Air Law (CITEJA) which was to draft conventions. Between 1925 and 1938 CITEJA provided several draft conventions for CIDPA to consider in the few sessions it held. Four international conventions and a protocol emerged. These were the *Convention for the Unification of Certain Rules*

[36] All figures come from Cheng, *Law of International Air Transport* (1962).
[37] 11 *League of Nations Treaty Series* 173.

regarding International Air Transport (1929),[38] the *Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft* (1933),[39] the *Convention for the Unification of Certain Rules relating to Damages caused by Aircraft to Third Parties on the Surface* (1933),[40] the *Convention for the Unification of Certain Rules relating to Assistance and Salvage of Aircraft or by Aircraft at Sea* (1938),[41] and an *Additional Protocol to the 1933 Convention concerning Damages caused by Aircraft to Third Parties on the Surface* (1938).[42]

CIDPA was never officially wound up. However, most States consider that it has been, or should be superseded by the ICAO Assembly, and it no longer exists in practice.

The International Technical Commission of Juridical Experts in Air Law (CITEJA) was a body composed of expert air lawyers appointed by contracting States, with a permanent staff under the Secretary General. CITEJA organized itself into four sub-committees (called commissions), each of which was charged with study in specified subjects. The main committee met annually and the commissions twice each year. CITEJA's functions were assumed by ICAO in May 1947 to be discharged by the Legal Committee. CITEJA at this time passed resolutions to secure its liquidation.

The *Convention on Commercial Aviation* (1928)[43] established a regime as between the Americas to regulate questions between the parties on matters of public international law, much as the Paris Convention had done. By 1937 the parties saw a need for similar regulation of private international law. The Permanent American Aeronautical Commission (CAPA) resulted, composed of government-appointed delegates, mainly jurists and aviation experts. Its functions were a combination of those of ICAN and CIDPA, though its charter made CAPA effective only in 1942. It is believed to have become defunct because article 80 of the Chicago Convention requires parties to the Havana Convention (1928) to denounce that Convention when the Chicago Convention enters force (4 April 1947). It is believed that as the convention which established CAPA's parent body is denounced, CAPA is also denounced.[44]

The preceding account shows the growth of bodies attempting to regulate air transport between States in the time up to 1944. The bodies appeared on an *ad hoc* basis as the need arose, producing an uncoordinated, rather ineffective system. That fact plus the impetus given

[38] 137 *League of Nations Treaty Series* 11.
[39] 192 *League of Nations Treaty Series* 289.
[40] Cmd 5056.
[41] Hudson, *International Legislation* (1931-50) viii. 135.
[42] *Ibid.* 147.
[43] 129 *League of Nations Treaty Series* 223.
[44] Verplaetse, *International Law in Vertical Space* (1960) 174; *Shawcross and Beaumont on Air Law, op. cit.* 52-3.

aviation by the Second World War made the need for, and the advantages of a more orderly venture plain.

(b) *The International Civil Aviation Conference, Chicago, 1944*

After preliminary discussions with the United Kingdom the United States Department of State called the Chicago Conference. All the allied and neutral powers of the Second World War were invited. The invitation mentioned these objectives:

(i) the establishment of provisional world air route arrangements;

(ii) the establishment of an international air interim council; and

(iii) agreement on principles for a permanent aeronautical body and a multilateral aviation convention.

Some 54 States with over 400 delegates attended, and the Soviet Union and Saudi Arabia were the only invitees to absent themselves. The history of the Soviet attitude is interesting. It is said that a Soviet delegation was travelling to the Conference with the blessing of its superiors when it was suddenly recalled without explanation. Since that time the U.S.S.R. has never shown any official interest in adhering to the Chicago Convention.[45] A standard Soviet text[46] on international law claims that the U.S.S.R. is not a member of ICAO because the 1944 Conference was called by the U.S.A. with a view to that State consolidating its supremacy in the field of aviation, and to securing for itself the prerequisites for further expansion in the air. However, the opinion of Sir F. Tymm[47] is that Soviet Russia was quite ready to enter into an agreement with other countries for the operation of air transport services into territories contiguous with the U.S.S.R. where they would connect with Soviet services for carriage of traffic to and from Russia. This unreadiness by Soviet Russia to permit foreign aircraft to fly over its territory was a principal reason for its non-attendance at Chicago, rather than the official explanation that Russia could not attend at a conference where such 'Fascist' States as Switzerland were represented. The same reluctance to grant over-flight rights is perhaps the most likely explanation of the U.S.S.R.'s present stance.

There were four different schemes proposed for the international organization:[48]

(i) the U.S.A. favoured an international body with executive functions in the technical field of civil aviation and advisory functions in the economic field;

[45] Cooper, *op. cit.* 440-1.
[46] U.S.S.R., Institute of State and Law Academy of Sciences, *International Law* (1960) 351-2.
[47] Tymm, 'Freedom of the Air' (1956) 8 *Journal of the Aerospace Society of India* 43, 49-50.
[48] Billyou, *Air Law* (2nd ed. 1964) 260-1.

(ii) the United Kingdom wanted the organization to have the power to fix routes, frequencies and rates of flight;

(iii) the Canadian proposal was somewhat similar in that it would also have granted economic functions such as the power to issue permits for international air transport operators; and

(iv) Australia and New Zealand opted for international ownership and operation of all international air services.

The Australian proposal failed to attract much favour and was rejected in the early discussions. The U.S.A. and United Kingdom were at loggerheads so secret talks were held between them and Canada. A joint plan was agreed upon, into which the proposals of other States were incorporated.[49] This was the foundation of the Chicago Convention.

The Final Act[50] of the Chicago Conference contains twelve resolutions and five Appendices:

(i) the *Interim Agreement on International Civil Aviation;*

(ii) the *Convention on International Civil Aviation;*

(iii) the *International Air Services Transit Agreement;*

(iv) the *International Air Transport Agreement;* and

(v) Drafts of the Technical Annexes.

The *Interim Agreement on International Civil Aviation* (1944) set up the Provisional International Civil Aviation Organization (PICAO) and established rules for international aviation in the period before the commencement of ICAO. It became effective on 6 June 1945 and expired on 4 April 1947. PICAO had organs similar to those of ICAO: the Interim Assembly, the Interim Council, the Secretary General and a Canadian headquarters. PICAO had a potential life span of only three years under Article I, section 3 of the Agreement.

The *International Air Transport Agreement* (1944) was an attempt to provide for a mutual exchange of freedoms of flight between the parties to the Agreement, to cover scheduled services. The Chicago Convention in article 5 provides for the exchange of the right to make flights into or across the territory of other contracting States, and to stop therein for non-traffic purposes, but is limited to non-scheduled flights. The 1944 Agreement (the 'Five Freedoms Agreement') sought the exchange of five reciprocal freedoms:

(i) the privilege to fly over the territory of other parties without landing;

(ii) the privilege to land for non-traffic purposes;

(iii) the privilege to put down passengers, mail and cargo taken on the territory of the State whose nationality the aircraft possesses;

[49] *Ibid.* 261.
[50] Cmd 6614; ICAO Document 2187.

(iv) the privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; and

(v) the privilege to take on passengers, mail and cargo destined for the territory of any other party and the privilege to put down passengers, mail and cargo coming from any such territory.

This particular Agreement attracted few ratifications. The U.S.A. provides an example of a State which accepted the Agreement at first only to denounce it later.[51] As at 1 January 1969 some twelve States were bound by the Agreement:[52] it binds few States and has little practical significance.

The *International Air Services Transit Agreement* (1944) has been favourably received but is much less ambitious than the 'Five Freedoms Agreement'. This provides for a similar exchange of only the first two freedoms in the above list for scheduled services. These two freedoms are very limited, falling short of the freedoms exchanged by article 5 of the Convention for non-scheduled air services. They extend to the fourth of the above five freedoms. There were some seventy four parties to this Agreement on 1 January 1969.[53]

The failure of the Chicago Conference, and of ICAO since that time, to successfully sponsor a multilateral convention for the exchange of at least these five freedoms has meant that States regulate their scheduled services on the basis of bilateral agreements. The failure of multilateralism may be attributed to a hesitancy by the States to support it because of the view that the fostering of their own civil aviation industries is a matter of top priority, and so they will do all in their power to prevent the commercial operation of foreign airlines within their territory.

This, then, is the framework within which ICAO was designed to operate. International civil aviation has a history of organizations with various powers and varying degrees of universal membership. That type of system was no longer of much use. A strong agency was required and ICAO was created. It had its troubles initially with the failure of the 'Five Freedoms Agreement' and the absence of the U.S.S.R. The administrative structure of ICAO, the functions of its various organs, and the Organization's membership and its relationship with the United Nations will now be considered.

THE FUNCTIONS AND STRUCTURE OF ICAO

The functions and activities of ICAO are derived from the aims and objectives of the Organization as listed in article 44 of the Chicago Convention.

> The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

[51] Cheng, *Law of International Air Transport* (1962) 608.
[52] *Shawcross and Beaumont on Air Law* (3rd ed. 1966) ii. Appendix A, 12-7.
[53] *Ibid.*

(a) Ensure 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, air navigational 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) Ensure 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.

Activities of ICAO include the administration of the Chicago Convention,[54] the collection, examination and publication of information regarding the advancement of air navigation and the operation of international air services,[55] the possible financing of air navigation facilities,[56] determination by the ICAO Council of the manner of application of the provisions of the Convention as to nationality of aircraft to aircraft in international operating agencies,[57] and the registration of contracting States' international arrangements.[58]

Its major regulatory function is the adoption and amendment of technical annexes to the Convention.[59] These annexes contain international standards and recommended practices as adopted by the Council.

The Council is given several judicial functions. It may '[c]onsider any matter relating to the convention which any contracting State refers to it',[60] presumably with a view to giving an advisory opinion. Recourse to the Council is mandatory where several contracting States disagree as to the interpretation of the Convention or Annexes, and that disagreement cannot be settled by negotiation.[61] Such a decision by the Council is subject to appeal to the International Court of Justice or an *ad hoc* tribunal.[62]

In the economic field ICAO may only request, examine, publish, and conduct research.[63]

[54] *Chicago Convention* (1944) art. 54, paras (j), (k).
[55] *Ibid.* art. 54, para. (i).
[56] *Ibid.* art. 70.
[57] *Ibid.* art. 77.
[58] *Ibid.* arts 81, 83.
[59] *Ibid.* art. 54, para. (l).
[60] *Ibid.* art. 54, para. (n).
[61] *Ibid.* art. 84.
[62] *Ibid.*
[63] *Ibid.* art. 54, para. (i); art. 55, paras (c), (d), (e); art. 78.

(a) *Membership*

A State becomes a member of ICAO by ratifying or adhering to the Chicago Convention. A State has only to deposit its instrument of ratification with the Government of the U.S.A. in order to ratify. That Government then notifies all signatory and adhering States of the date of deposit.[64] All members of the United Nations, States associated with United Nations members, and Second World War neutrals may adhere to the Convention. The depository Government, the U.S.A., again notifies all contracting States.[65] The Convention entered into force 30 days after ratification or adherence by 26 States.[66] That date was 4 April 1947. Ratifications received since that date take effect 30 days after deposit of the instrument,[67] as do adherences.[68]

Article 93 regulates membership by non-signatories and non-United Nations members. The consent of any State attacked by such a prospective member during the Second World War is required, as is United Nations approval. The ICAO Assembly admits such a State by a four-fifths vote and the Assembly may prescribe conditions on membership.

At the moment ICAO boasts a near universal membership. It has been said that the 48 parties to the Convention in 1948 operated 90 *per centum* of the world's international air transport.[69] ICAO's present membership stands at 119 States,[70] and whether these States still control such a high proportion of world air transport depends largely on the scale of Soviet operations, as the U.S.S.R. is the only major power not a party to the Convention. The only recent statistic I have been able to find which is at all indicative of the present position is one in relation to scheduled passenger flights (which represent only a part of total international air transport). In 1968 the Soviet Union's official carrier, 'Aeroflot', carried 68 million passengers.[71] In the same year ICAO members carried 289 million passengers.[72] This means that the U.S.S.R. accounted for approximately 20 *per centum* of that transport covered by these figures. That is quite a high percentage but the situation may be very different in other sectors of air transport, such as cargo carriage. Nevertheless, even if the figure is accurate, ICAO is still very potent in that it speaks for 80 *per centum* of world air transport.

ICAO possesses the characteristic internal structure of United Nations specialized agencies, comprising an Assembly, a Council, an internal

[64] *Ibid.* art. 91.
[65] *Ibid.* art. 92.
[66] *Ibid.* art. 91, para. (b).
[67] *Ibid.*
[68] *Ibid.* art. 92, para. (b).
[69] U.N. Department of Public Information, *Everyman's United Nations* (1948) 155.
[70] (1970) 25 *ICAO Bulletin* No. 5, 50.
[71] *Ibid.* 22.
[72] *Ibid.* 15.

Secretariat, and a cluster of subsidiary organs. According to article 43 of the Chicago Convention '[a]n organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary'.

(b) *The Assembly*

The Assembly is provided for in Chapter VIII of the Convention. Since the *Protocol Relating to Certain Amendments to the Convention on International Civil Aviation* (1954)[73] came into force on 12 December 1956 it has been provided that '[t]he Assembly shall meet not less than once every three years'. The Council convenes the meetings at a suitable time and place. An extraordinary meeting may be called by the Council or at the request of ten contracting States addressed to the Secretary General.[74] All contracting States have a right to representation at Assembly meetings and all have one vote, and each delegate may be accompanied by one or more technical advisors who may participate in the meetings but cannot vote.[75] A majority of member States is necessary to constitute a quorum and, unless the Convention provides otherwise,[76] all Assembly decisions are taken by a simple majority of votes cast.[77]

The main powers and duties of the Assembly are outlined in article 49. They include the election at each meeting of the President and other officers, election of contracting States to the Council, examination of and action on Council reports, decision on any matter referred by the Council and various talks concerning internal finance and organization. The Assembly also has the power to suspend a State's voting power for failure to discharge its financial obligations to ICAO.[78] The Assembly may lay down rules for the appointment of the Secretary General and other personnel.[79] Assembly approval is required for the Organization to enter into international arrangements with the United Nations in respect to air matters within its competence,[80] and similar approval is required for most arrangements with other international institutions for the facilitation of ICAO's work.[81] Funds for some Council activities depend on Assembly approval[82] and article 75 gives the Assembly final say in a limited instance of Council decision.

[73] ICAO Document 7667 (1956).
[74] *Chicago Convention* (1944) art. 48, para. (a).
[75] *Ibid.* art. 48, para. (b).
[76] *Ibid.* art. 93; art. 94, para. (a); art. 45 as amended by the *Protocol Relating to an Amendment to the Convention on International Civil Aviation* (1954) ICAO Document 7675 (1956).
[77] *Ibid.* art. 48, para. (c).
[78] *Ibid.* arts 62 and 98.
[79] *Ibid.* art. 58.
[80] *Ibid.* art. 64.
[81] *Ibid.* art. 65.
[82] *Ibid.* art. 73.

(c) *The Council*

The ICAO Council, in most ways the most powerful organ of ICAO, is constituted in Chapter IX. Under Article 50[83] the Council is a permanent body of 27 contracting States elected by the Assembly. Council members hold office for three years between elections.

Article 50, paragraph (b) provides that in electing the Council the Assembly is to give adequate representation to

> (1) the States of chief importance in air transport; (2) the States not otherwise included who make the largest contribution to the provision of facilities for international civil air Navigation; and (3) the States not otherwise included whose designation will ensure that all the major geographic areas of the world are represented on the Council.

There has always been a quota assigned to each category, so that when 21 States belonged to the Council eight were chosen under the first category, seven under the second, and six under the third. The present members of the Council are Argentina, Australia, Belgium, Brazil, Canada, Colombia, the Congo (Brazzaville), Czechoslovakia, Denmark, the Federal Republic of Germany, France, Guatemala, India, Indonesia, Italy, Japan, Lebanon, Mexico, the Netherlands, Nigeria, Senegal, Spain, Tanzania, Tunisia, the United Arab Republic, the United Kingdom and the U.S.A.[84] The geographic representation requirement would appear to be satisfied by this wide selection of nations.

The Council elects a President and other officers.[85] The President holds office for a three-year term, and is not eligible to vote. As article 51 provides for 27 voting members to be on the Council, if the President is elected from the Council delegates, his seat is declared vacant and a substitute is selected by the State he represents. The President's duties include the convening of meetings of the Council, the Air Transport Committee and the Air Navigation Commission, service as Council representative, and performance on behalf of the Council of any functions assigned him by the Council.[86] It would seem that the Council President of ICAO has more power than his counterparts in other specialized agencies, and he is also said to be more powerful than the ICAO Secretary General.[87] There could be several reasons for this. The President is a permanent employee elected by the Council every three years. His importance is said to have developed

[83] As amended by the *Protocol Relating to an Amendment to the Convention on International Civil Aviation* (1961), [1962] *Australian Treaty Series* No. 6. This protocol entered force on 17 July 1962.
[84] (1970) 25 *ICAO Bulletin* No. 5, 2.
[85] *Chicago Convention* (1944) art. 51.
[86] *Ibid.*
[87] Larsen, reviewing Erler, *Rechtsfragen der ICAO, Die Internationale Zivilluftfahtorganisation und ihre Mitgliedstaaten* (1967), in (1970) 36 *Journal of Air Law and Commerce* 171.

> partly through practice, and partly because a special position was given him by the Chicago Convention. Curiously the Chicago Convention in Article 54 mentions the ICAO Secretary General as being chief executive officer. Erler calls this a misnomer. A contributory cause to this status in power is that although there have been several Secretary Generals, ICAO has had only two Council Presidents, Edward Warner and Walter Binaghi; both strong personalities.
>
> The office of the Secretary General is secondary to that of the President, and closer to that of a top civil servant who is responsible for the internal operation of the Organization. This situation contrasts sharply with the United Nations Organization.[88]

Any contracting State may participate in consideration by the Council, its commissions and committees of any question especially affecting its interests, but it has no vote.[89]

Among the Council's mandatory functions listed in article 54 are control over ICAO's internal organization, procedure, finances and personnel, the carrying out of the Organization's research work, consideration of recommended technical annexes, and various supervisory functions with regard to breaches of the Convention or of Council determinations. Article 55 provides for a number of permissive functions, including the creation of regional air transport commissions, the carrying-out of research, investigation of matters referred by members and the study of any matters affecting ICAO or international air transport. Certain functions have also been assigned to the Council to improve the safety and efficiency of air navigation facilities, and it may consult with a member whose airports and other air navigation facilities are insufficient, with the ability to take over such facilities at the State's request.[90]

One Council power that will be the subject of greater discussion below is that conferred by article 77 of making a determination of how the provisions of the Convention as to nationality of aircraft are to apply to the aircraft of international operating agencies. The Council may also suggest to members that they form joint organizations to operate air services in any place.[91]

Somewhat related is the Council's major role in the judicial function of dispute settlement. In any dispute between contracting States concerning the interpretation or application of the Convention or Annexes which cannot be settled by negotiation, where one of the States a party to the dispute applies to the Council, the Council may give a final decision.[92] A Council member may not vote if a party to the dispute. An appeal may be had from the Council decision to an *ad hoc* tribunal agreed upon

[88] *Ibid.* 171-2.
[89] *Chicago Convention* (1944) art. 53.
[90] *Ibid.* art. 71, and in this regard note arts 70, 72 and 73.
[91] *Ibid.* art. 78.
[92] *Ibid.* art. 84.

by the parties or to the International Court of Justice. The Council must be notified of the intended appeal within 60 days of its decision. If one or more of the disputants is not a party to the Statute of the International Court of Justice and the parties are unable to agree to the choice of an arbitral tribunal, each party is to name an arbitrator. The arbitrators vote to elect an umpire. Should a State fail to nominate an arbitrator within three months of the date of appeal the Council President is to select one from a list of persons qualified held by the Council. If the arbitrators cannot select an umpire within 30 days the Council President selects one from the same list and he forms the tribunal with the arbitrators. The tribunal adopts its own procedure but the Council may do this if the tribunal delays for a period regarded by the Council as excessive.[93]

The Council has been criticized as a far from ideal organ for use in the settlement of disputes. One reason is that it is a body of government delegates who may well be biased even if the State they represent is not a party to the dispute. The legal expertise of the Council is also questionable as Council delegates are chosen for a knowledge of international air transport.

It was noted earlier that the Council President is more powerful than the Secretary General, and in a similar way the ICAO Council overshadows the Assembly and the Secretariat. This is contrary to the situation in the U.N. where the General Assembly and Secretary General are far more influential and important than the Security Council in the every-day operation of the Organization. Perhaps this can be attributed to the fact that the Chicago Convention predates and differs from the United Nations Charter. Responsibility for ICAO is vested in the Council, whereas the Assembly meets every three years to approve the ICAO budget and establish some basic policy outlines for the organization.

(d) *Secretary General and Secretariat*

The Secretary General, or chief executive officer as he is referred to in the Convention, is appointed by the Council, as are other necessary personnel.[94] Such personnel are to have an international character; that is, they are to be responsible to ICAO rather than to their States of origin. They are to accept or seek no instructions regarding the discharge of their responsibilities from any authority outside ICAO. Contracting States undertake to respect the international character of the personnel and contract not to influence nationals in the performance of their duties.[95]

As with Secretariats of other organizations the ICAO Secretariat concerns itself mainly with day-to-day administrative supervision.

[93] *Ibid.* art. 85.
[94] *Ibid.* art. 54, para. (h).
[95] *Ibid.* art. 59.

(e) *Subsidiary Organs*

(i) AIR NAVIGATION COMMISSION

The first of these subsidiaries is the Air Navigation Commission which was provided for in article 54, paragraph (e) of the 1944 Convention. The Commission is to consider and recommend Council adoption of modifications to technical Annexes to the Convention, to establish technical subcommissions on which any contracting State may be represented if it so desires, and to advise the Council concerning the collection and communication to contracting States of all information it considers necessary and useful for the advancement of air navigation. The Commission was established on 1 February 1949.

There has been controversy over the source of payment of delegates. Article 63 requires the States represented to pay delegates for their services to the Assembly, Council and subsidiary committees and commissions. Even so it was suggested that the Air Navigation Commission should be fully international with ICAO paying its personnel.[96] However it is now clear that each delegate serves under the responsibility of the State which nominates him.[97]

(ii) AIR TRANSPORT COMMITTEE

This Committee, provided for in Article 54, paragraph (d), comprises 12 members from different states selected every three years from a list submitted to the Council by its President. The Committee has used as its frame of reference the functions of the Committee on Air Transport in Article III, section six, sub-section three, paragraph (a) of the *Interim Agreement on International Civil Aviation* (1944).[98] These functions are to

> (1) Observe, correlate, and continuously report upon the facts concerning the origin and volume of international air traffic and the relation of such traffic or the demand therefor, to the facilities actually provided.
>
> (2) Request, collect, analyse and report on information with respect to subsidies, tariffs, and costs of operation.
>
> (3) Study any matters affecting the organization and operation of international air services, including the international ownership and operation of international trunk lines.
>
> (4) Study and report with recommendations to the Assembly as soon as practicable on the matters on which it has not been possible to reach agreement among the nations represented at the International Civil Aviation Conference . . .[99]

[96] ICAO Document 5285, C/652 (1948), 2.
[97] ICAO Document 6443, A3—p/4 (1949), 71.
[98] [1957] *Australian Treaty Series* No. 5.
[99] ICAO Document 4557, C/441 (1947), 12.

(iii) JOINT SUPPORT COMMITTEE

The Committee on Joint Support of Air Navigation Services was established by resolution of the first Assembly.[1] The Council chooses nine delegates to represent nine different States included on the Council. Although the Joint Support Committee was an Assembly creation it is responsible to the Council, and its work is specifically to consider provision of financial and technical aid by the Council.[2]

A major achievement of the Committee has been the *Agreement on North Atlantic Weather Observation Ships* (1946)[3] which, although the work of PICAO under article XI of the Interim Agreement, was adopted by the Committee in a 1954 Agreement.[4] In 1962 there were nineteen North Atlantic Weather Stations manned by 21 vessels from seven States aided by contributions from eleven other States.[5]

(iv) LEGAL COMMITTEE

The first Assembly[6] established the Legal Committee to assume the functions of CITEJA, the body concerned with legal aspects of international civil aviation before the Second World War. As the successor to CITEJA the Legal Committee is not a subsidiary body of the Council but a permanent committee of the Organization.[7] Though any State may be represented on the Committee by as many delegates as it likes, each State is entitled to only one vote.

The Committee's work includes the interpretation of the Convention and the study of matters related to the public international law of the air or to private air law affecting international civil aviation, referred to it by the Council or the Assembly, but its most impressive work has been in the preparation of final drafts of several international air law conventions. The problem of what the Council is to do in providing a 'determination' under article 77 of the Convention has preoccupied the Committee in recent times.

(v) FINANCE COMMITTEE

The first Assembly voted to establish a Finance Committee.[8] This was done by the Council on 24 June 1947. The work of the Committee is purely financial, and the Council chooses the nine States represented on the Council for this Committee. It is interesting to note the increased

[1] ICAO Document 7325, C/852, Resolution A1-7, 241.
[2] ICAO Document 4557, C/551 (1947), 13-4.
[3] PICAO Document 2668, C/313 (1946).
[4] ICAO Document 7510, JS/559 (1954).
[5] (1962) 17 *ICAO Bulletin* 85.
[6] ICAO Document 7325, C/852, Resolution A1-7, 241.
[7] ICAO Document 7669, LC/139, *Constitution of the ICAO Legal Committee*, para. 1.
[8] ICAO Document 7325, C/852, Resolution A1-58, 282-60.

budget with which ICAO has been able to work in recent times. In 1947-48 the Assembly approved a budget of some $US2,600,000.[9] In 1967 the approved budget was some $US7,000,000.[10]

(f) *Relationship of ICAO with the United Nations*

Article 64 of the Chicago Convention allowed for the possibility of ICAO aligning itself to the United Nations which, at the time the Convention was drafted, was not in existence. On 12 May 1947, ICAO became a Specialized Agency, availing itself of articles 57 and 63 of the United Nations Charter to do so. The main benefits to be derived from such a relationship may be seen in the Agreement[11] itself. Under the Agreement the two organizations agree to exchange representatives, agenda items, recommendations, information and assistance.[12]

The United Nations has customarily insisted on the right to have certain States excluded from its Specialized Agencies. In the original draft of the Chicago Convention there was no machinery by which the United Nations could do this. In the mid 1940s Franco Spain was out of favour with that part of the world community constituting the majority of the United Nations General Assembly, yet that State had been represented at the 1944 Chicago Conference and was a member of ICAO. The General Assembly therefore approved the Agreement between ICAO and the United Nations with a proviso that 'the Organization complies with any decision of the General Assembly regarding Franco Spain'.[13] The General Assembly later recommended

> that the Franco Government of Spain be debarred from membership in international agencies established by or brought into relationship with the United Nations . . . until a new and acceptable government be formed in Spain.[14]

As a result the contentious article 93 *bis* was enacted so that the United Nations General Assembly could bring about the expulsion of an ICAO member by a recommendation that the State be debarred from membership in Specialized Agencies or by expulsion of that State from United Nations membership (unless a recommendation that the State be permitted to remain an ICAO member be attached). An alternative to this method was suggested to ICAO. This was that, since Spain was a member of PICAO, that body could accept or refuse the Spanish act of ratification.[15]

[9] U.N. Department of Public Information, *op. cit.* 156.
[10] U.N. Office of Public Information, *The United Nations Yearbook 1967*, 900.
[11] *Protocol Concerning the Entry into Force of the Agreement Between the United Nations and the International Civil Aviation Organization* (1947) 8 *United Nations Treaty Series* 316. Annex B is the Agreement.
[12] *Ibid.* arts III, IV, V, VI, VII and VIII.
[13] 8 *United Nations Treaty Series* 318.
[14] *Ibid.*
[15] Verplaetse, *op. cit.* 176.

Article 93 *bis* failed to come into effect until 20 March 1961 when Article 94, paragraph (a) of the Convention was satisfied. It is effective only as between States ratifying it. ICAO thus had no legal power to expel Spain in 1947, but the Spanish delegation saved embarrassment by voluntarily withdrawing.

In the course of time the Franco Government became acceptable, so much so that the United Nations General Assembly on 4 November 1950 revoked its earlier recommendation. In June 1951 the ICAO Assembly passed a resolution noting the re-establishment of normal relations between the Spanish Government and ICAO.[16]

The status of article 93 *bis* is interesting because, by the terms of article 94 of the Convention and the Protocol[17] of Amendment, after the amendment was ratified by 28 States it came into effect, but only as between those States. Thus if the new Article 93 had entered into force to expel Spain before 1950, Spain would have been regarded as expelled only by the 28 States which had ratified the amendment. Hence Spain would have been a member and a non-member at the same time. This possibility is still open now that the amendment is in force, as the Assembly did not provide for the expulsion of any member failing to ratify within a certain time of the amendment entering force.[18] It seems strange that the Assembly did not use this power as this would appear a prime example of an amendment of sufficient importance. The entire status of ICAO as a Specialized Agency rested on the amendment. A probable reason for not using article 94, paragraph (b) was a desire for membership in ICAO to be as close to universal as possible, a desire likely to be frustrated by the expulsion of up to one-third of ICAO's membership.

As a Specialized Agency ICAO has played an important part in the United Nations Expanded Programme of Technical Assistance for the Economic Development of Underdeveloped Countries[19] (now known as the United Nations Development Programme). ICAO has also acted as executory agency for the United Nations Special Fund since 1960.[20] The 1960 Congo crisis saw ICAO respond to a United Nations request by sending an emergency mission to ensure the safe continuation of air traffic control and ground services.[21]

The membership process of ICAO is also distinctly tied to the United Nations in two ways. Article 11 of the United Nations-ICAO Agreement gives the United Nations a right of veto over applications to join by former enemies of the Second World War. Article 93 of the Convention also

[16] ICAO Document 7148, A5-P/1, 72.
[17] ICAO Document 7570 (1956).
[18] A power available under the *Chicago Convention* (1944) art. 94, para. (b).
[19] (1961) 16 *ICAO Bulletin* 8.
[20] (1962) 17 *ICAO Bulletin* 189; (1965) 20 *ICAO Bulletin* 15.
[21] (1961) 16 *ICAO Bulletin* 15.

requires the approval of the United Nations before States other than those provided for in articles 91 and 92 (that is signatories and adherents, which are members of the United Nations or States associated with United Nations members) are admitted. These 'other States' are admitted if the United Nations approves and if four-fifths of the Assembly votes in favour, subject to any conditions prescribed by the Assembly, and provided that any State invaded or attacked by the prospective member during the Second World War gives assent. The second tie is by virtue of U.S. Department of State practice. This body is the depository of the Chicago Convention. When a newly emerged State applies for admission to membership the Department of State requires that it become a party to the Charter of the United Nations. This leaves it free to adhere to the Convention under article 92.

This close relationship, especially the co-operation in development schemes, between ICAO and the United Nations has helped to ensure ICAO's position as one of the major Specialized Agencies.

THE CONTRIBUTIONS OF ICAO TO INTERNATIONAL LAW

(a) *International Legislative Process*

The feature that differentiates international 'legislation' from municipal enactments is that treaties and international agreements in international law can bind only their signatories and no other international legal persons (though in time adherence to a principle originally enunciated in an international compact by many non-signatory States may engender it international customary law, and so binding on all subjects of international law). This distinction should be borne in mind during the discussion that follows.

ICAO's legislative powers are subject to a two-fold classification. The first, 'quasi-legislative' functions, are so called because, although they are law in the making, they do not bind members against their will. These consist basically of technical regulations promulgated by the ICAO Council. 'Pre-legislative' functions are tasks performed with a view to further legislation, though at that stage no actual change in the legal situation is achieved, as in the drafting of multilateral conventions. However, it seems that in performing these latter functions ICAO is actually creating law in the making, for though such law will not take effect until sufficient States ratify, the terms of the future law as laid down in the convention have been determined by ICAO.

ICAO adopts under article 37 international standards and recommended practices and procedures in relation to aircraft, personnel, airways and auxiliary services. Under this article the Organization is to adopt and amend standards and practices as and when necessary, dealing with the

eleven matters listed in paragraphs (a) to (k). In the main these matters concern navigational aids, flight regulation in the air, personnel licensing, airworthiness of aircraft, the collection and exchange of information, the simplification of procedures, and the safety of aviation. ICAO may also adopt standards, practices or procedures for such other matters concerned with the safety, efficiency and regularity of air navigation as may arise. It is for the Council to adopt these standards and practices under article 54, paragraph (1). For convenience they are to be designated as Annexes to the Convention. The Council also amends the Annexes.[22]

Adoption of Annexes requires a two-thirds vote by the Council at a meeting called for the purpose.[23] The Annexes are then to be submitted to each contracting State and become effective within three months of submission or at the end of a longer period if prescribed by the Council. It is open to the majority of notified States to register their disapproval with the Council, which may prevent the Annex taking effect. Article 90 does not refer to Annexes in its first sentence so Professor Cheng[24] has argued that a special Council meeting need not be called to introduce an amendment, and that two-thirds vote by the Council in favour of an amendment is not necessary. This same sentence refers back to article 54, paragraph (1), which also omits mention of amendments. The second sentence of article 90 does however refer to amendments so that they become binding three months after notified to contracting States unless a longer period is specified by the Council or unless a majority of contracting States register disapproval with the Council, in which case the amendment fails to take effect.

States may depart from international standards and procedures, or amendments thereto, by article 38. A State which finds it impracticable to comply with any standard or procedure in all respects, or which deems it necessary to adopt regulations and practices differing in any respect from those adopted in an international standard is to notify ICAO immediately of such differences. This notification may be given at any time, not necessarily before the Annex is effective under article 90.

Article 38 also governs a State's departure from amended international standards. The State may do this by failing to bring its own regulations or practices into full accord with any amended standard or procedure. In this case it must notify the Council within 60 days of adoption of the amendment or otherwise indicate its proposed action. The Council then immediately notifies all other States of the differences existing between that standard and the State's practice. A literal interpretation of article 38 prevents States departing from an amendment if they fail to notify

[22] *Chicago Convention* (1944) art. 90, para. (a).
[23] *Ibid.*
[24] Cheng, *Law of International Air Transport* (1962) 66.

an intention to do so within 60 days. That 60 days begins to run when the Council adopts the amendment, not when contracting States are actually notified. Article 90 makes immediate notification a necessity only where an Annex is adopted. When an Annex is amended the Council may notify whenever it wishes. The Council could therefore adopt an amendment and, by failing to notify contracting States for more than 60 days, preclude contracting States from validly notifying differences. If it were to do this the Council would be exercising a *de facto* power of binding legislation, not mere quasi-legislation.

One authority has seen the above quasi-legislative procedure as 'a significant attack on some of the most important problems involved in the international legislative process'.[25] Some problems specifically mentioned are the slow and often uncertain ratification procedures which make it difficult to determine how far a multilateral treaty extends, the ever-present possibility of a multitude of reservations which make knowledge of the treaty's substance in any particular relationship difficult, and the difficulty of providing a method of permitting frequent and expert revision of treaties. The delegation of power to formulate Annexes and amendments thereto to the Council (a non-plenary organ) is an interesting variation from the procedure of the World Health Organisation and other organizations. ICAN provided the precedent for an international civil air navigation body to make regulations. However, ICAN's regulations were part of the Paris Convention in status, and so somewhat equivalent to amendments.[26] Changes to regulations were made by the entire Commission, on which all members of ICAN were entitled to representation. Three-quarters of those present, including two-thirds of the States capable of representation, had to vote in favour of the modification. If the modification was passed it bound all members. They could not fail to comply without infringing the Convention. This was legislation (rather than quasi-legislation) but it required a longer prelude than ICAO. It would seem that there should be fewer obstacles to agreement between a 27 member Council than between 119 States, so that the potential for change and development is far greater. Article 90 concerning the adoption of Annexes, where silence by States is taken as approval, is another potent attack on the above problems. The authority recognizes, however, that States do not blindly accept every arrangement imposed upon them by the representative Council, so he is enthusiastic about the long drafting process created by ICAO.[27]

[25] Codding, 'Contributions of the World Health Organization and the International Civil Aviation Organization to the Development of International Law' (1965) 59 *American Society of International Law Proceedings* 147.

[26] *Paris Convention* (1919) art. 34.

[27] Codding, *op. cit.* 150. The vital aspects of this process are there listed.

ICAO's actual legislation through standards, practices and procedures is of great value. Fifteen regulations have been issued under this process. They concern such important matters as personnel licensing, rules of the air, meteorology, aeronautical charts, units of measurement for air-ground communications, airworthiness of aircraft, facilitation of arrivals and departures, aircraft nationality and registration marks, aircraft operation, aeronautical communication, search and rescue, aircraft accident inquiry, and aerodromes.

That the procedures adopted by ICAO are effective may be seen from the fact that none of the Annexes offered by the Council have been rejected by an Assembly majority, and as a general rule derogations to the standards and procedures as notified by member States have not been overly numerous, nor have they dealt with important considerations. The general regulations such as the second Annex dealing with the Rules of the Air have been amended only a few times, but the more detailed technical regulations have been subjected to frequent change. ICAO's modification procedures permit it to keep up with the rapid changes that are taking place in international civil aviation, and at the same time to avoid being bogged down in many of the ordinary time-consuming activities of other international organizations. Perhaps ICAO's major contribution to the development of international law is in the international standards and recommended practices and procedures which permit international air navigation to be carried on with safety, regularity and efficiency.

ICAO has also contributed to the legal aspect of the promulgation of standards and practices by defining their status for the guidance of members. PICAO first framed definitions but ICAO adopted its own in the first Assembly.[28] A 'standard' was defined as

> any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety and regularity of international air navigation and to which Member States will conform in accordance with the Chicago Convention; in the event of impossibility of compliance, notification to the Council is compulsory under article 38 of the Convention.[29]

A 'recommended practice' was defined as

> Any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interests of safety, regularity or efficiency of international air navigation, and to which Member States will endeavour to conform in accordance with the Convention.[30]

These definitions are not really very helpful in that they fail to go beyond a paraphrase of the purport of the Convention itself.

[28] ICAO Assembly Resolution A1-31.
[29] (1947) 1 *ICAO Bulletin*, November, 11.
[30] *Ibid.*

ICAO also formulates Procedures for Air Navigation Services (PANS) which are approved by the Council for universal application. Somewhat related are the Regional Supplementary Procedures (SUPPS) approved by the Council for application in specific regions. Neither PANS nor SUPPS are issued directly under a provision of the Convention, but are merely 'approved' by the Council, and it has been argued that they are not mandatory despite the use of 'shall' in their texts.[31] States are not obliged to notify differences observed in practice but the Council has invited notification where such knowledge is important for the safety of air navigation. The Council does not see fit to elevate them to the status of standards or practices because they consist of operating procedures not regarded as having sufficient maturity for such official adoption, or because material of a more permanent nature is too detailed for incorporation into an Annex or is susceptible to frequent amendment for which the process of the Convention is too elaborate.

It is now proposed to survey the multilateral conventions and other treaties that have been sponsored by ICAO, and which represent a major contribution to international law.

(i) THE HAGUE PROTOCOL ON INTERNATIONAL AIR CARRIAGE RULES

The Hague Protocol[32] has its roots in the Warsaw Convention[33] which had been drafted by CITEJA and CIDPA, and was the only multilateral convention to gain almost universal acceptance before the Second World War. It established uniform rules governing the rights and liabilities of international air carriers, passengers, consignors and consignees of goods in States parties to the Convention.

The carrier was obliged to pay all proven damages to the limit of about $A.7,000[34] in the event of death of, or bodily injury to a passenger, occasioned on the aircraft or in embarking or disembarking.[35] There were also limits set for loss of goods carried by the passenger himself,[36] and for checked baggage or goods.[37] The carrier was also liable for damage occasioned by delay in transport of passengers, baggage and goods.[38] The carrier's defences included proof that he and his agent had taken all necessary measures to avoid the damage,[39] that it was impossible

[31] Verplaetse, *op. cit.* 182.
[32] *Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air* (1955) Cmd 9824.
[33] *Convention for the Unification of Certain Rules relating to International Carriage by Air* (1927) 137 *League of Nations Treaty Series* 11.
[34] *Ibid.* art. 22, para. (1).
[35] *Ibid.* art. 17.
[36] *Ibid.* art. 22, para. (3).
[37] *Ibid.* art. 22, para. (2); art. 18, para. (1).
[38] *Ibid.* art. 19.
[39] *Ibid.* art. 20, para. (1).

for measures to be taken to avoid the damage,[40] (that in the case of transport of goods and baggage) the damage was occasioned by negligent piloting or negligence in the handling of the aircraft or in navigation, and that in all other respects he and his agents had taken all necessary measures to avoid the damage.[41] Proof that the damage was caused wholly or in part by the negligence of the injured party exonerated the carrier wholly or partially.[42] The carrier could not limit his liability, using the Convention, if the damage was caused by the wilful misconduct of the carrier or his agents.[43]

This Convention was regarded as a pressing problem after the Second World War. The ICAO States saw faults in the 1929 draft but were cautious as they feared that a new convention might not achieve the almost universal application of the old. It was felt that the amendments should be confined to significant matters of substance, to be accomplished by a protocol instead of a new convention.

The resulting Protocol has simplified the requirement relating to documents of carriage (that is passenger ticket, luggage ticket, air consignment note).[44] All that is needed in these documents now is an indication of the points of departure and destination, and, if these are in the same State with one or more stopping places in another State, an indication of at least one of these stopping places, and notice to the effect that if the passenger's journey crosses an international boundary the Warsaw Convention applies. The sanction for failure by the carrier to comply was unlimited liability under the Warsaw Convention[45] but under the Protocol that applies only if the passenger embarks without delivery of a ticket and the carrier consents, or if the ticket does not contain the required notice.[46] The carrier's defences have now been changed. They are uniform for passengers, luggage and cargo, with the carrier unable to plead negligent pilotage or negligent handling of aircraft where luggage or cargo are lost or damaged.[47]

The Protocol has raised the limit of liability for death or injury to $A.14,800[48] while the limits for luggage and cargo are unchanged.[49] The carrier's limited liability now ends if it is shown that the damage resulted from an act done 'with intent to cause damage or recklessly and with knowledge that damage would probably result'.[50] This eliminates

[40] *Ibid.*
[41] *Ibid.* art. 20, para. (2).
[42] *Ibid.* art. 21.
[43] *Ibid.* art. 25.
[44] *Hague Protocol* (1955) art. III.
[45] *Warsaw Convention* (1929) art. 3.
[46] *Hague Protocol* (1955) art. III.
[47] *Ibid.* art. X.
[48] *Ibid.* art. XI.
[49] *Warsaw Convention* (1929) art. 22; *Hague Protocol* (1955) art. XI.
[50] *Hague Protocol* (1955) art. XIII.

the old formula of 'wilful misconduct or such default as is considered equivalent to wilful misconduct',[51] which has been interpreted differently in different national courts.[52] The carrier, although deprived of limited liability, still has the defences recognized by the Convention available to him. Carriers' servants are now entitled to recourse to the limits of liability of the carrier and amounts won against both carrier and servant must not exceed in total the maximum available to the plaintiff.[53]

A problem is the relationship between parties to the Warsaw Convention and parties to the Hague Protocol. It was suggested that parties to the latter should denounce the former, but no such provision was included in the Protocol. The Protocol has taken effect and, although parties to both the Protocol and Convention could be said to have assumed inconsistent obligations, most States are bound by at least one agreement, and if a dispute arose the claimant could act under either in an action for damages. As at 1 January 1969 there were 117 parties to the Warsaw Convention, and fifty-six parties to the Protocol.[54] Despite the problems raised by the Protocol it is a valuable and significant piece of air law for which ICAO is responsible.

(ii) THE GUADALAJARA CONVENTION ON INTERNATIONAL AIR CARRIAGE RULES

While the Warsaw Convention provided for damage by successive carriers, each compensating for the damage occurring during his part of the carriage, it did not cover 'sub-contracting' by the agreed carrier to a second carrier. The need for certainty increased as the hire and charter of aircraft became more common so ICAO intervened to have the Guadalajara Convention[55] drafted and presented for signature. Under article 1 the Convention deals with the case where the 'contracting carrier' makes an agreement with a passenger or consignor for carriage governed by the Warsaw Convention (with or without the Hague Protocol), which carriage is performed by another carrier, the 'actual carrier', in whole or in part. Both the contracting carrier and the actual carrier are subject to the rules of the Warsaw Convention (and Hague Protocol, if applicable), the contracting carrier for the whole of the carriage, the actual carrier for the part he performs.[56] The acts or omissions of one carrier are deemed to be those of the other.[57] Complaints or orders

[51] *Warsaw Convention* (1929) art. 25.
[52] Pyman, 'Australia and International Air Law' in O'Connell, *International Law in Australia* (1965) 141, 172.
[53] *Hague Protocol* (1955) art. XIV.
[54] *Shawcross and Beaumont on Air Law* (3rd ed. 1966) ii. Appendix A, 3-8.
[55] *Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air* (1961) [1962] *Commonwealth Acts* (Australia) No. 38, s. 10.
[56] *Guadalajara Convention* (1961) art. II.
[57] *Ibid.* art. III.

to the carrier under the Warsaw Convention have the same effect whether addressed to either carrier.[58] As in the Hague Protocol, servants may avail themselves of the limits of liability applicable to their masters if action against them is successful.[59] A claimant may implead either or both carriers. If one is chosen he may join the other in the proceedings.[60] This Convention is in force and it had twenty-four parties at 1 January 1969.

(iii) GENEVA CONVENTION ON THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT

After the Second World War it was found that the growth of the aviation industry brought with it much importing of aircraft. In many cases these aircraft were obtained on credit terms. The creditors had to be protected where the aircraft and other equipment were situated abroad or where registration was transferred. The ICAO Legal Committee presented a final draft of a convention to deal with this problem to the ICAO Assembly, not a specially convened diplomatic conference. This was the Geneva Convention.[61] The draft was designed to secure that where an aircraft is registered in a State party to the Convention and rights in that aircraft are recorded in a public record in the State of registration, and such rights are valid in that State, other parties to the Convention will recognize those rights and give priority to them over all other rights except salvage claims.[62] Parties are also to set up special machinery for the protection of those rights in the event of an aircraft being sold in execution in satisfaction of creditors' claims.[63] The Convention does not attempt to create a standard form of mortgage and transfer for use in all contracting States, since differences in national conceptions render that impossible. Thus the Convention provides for recognition and enforcement by contracting States of agreed types of charges created in accordance with the municipal law of the State of registration of the aircraft.[64] All recordings relating to a single aircraft must appear in a single record kept by the registering State.[65]

The Convention recognizes four types of charges on aircraft, or rights in aircraft to be recognized by the parties. These are rights of property in aircraft,[66] rights to acquire aircraft by purchase coupled with possession of the aircraft,[67] rights to possession of aircraft under leases of six

[58] *Ibid.* art. IV.
[59] *Ibid.* art. V.
[60] *Ibid.* art. VIII.
[61] *Convention on the International Recognition of Rights in Aircraft* (1948) 310 *United Nations Treaty Series* 151.
[62] *Ibid.* arts I, IV.
[63] *Ibid.* arts V, VI.
[64] *Ibid.* art. I.
[65] *Ibid.* art. II.
[66] *Ibid.* art. I, para. (a).
[67] *Ibid.* art. I, para. (b).

months or more,[68] and mortgages and similar rights in aircraft contractually created or security for payment of an indebtedness.[69] Priority *inter se* of recorded rights depends on municipal law.[70]

Two conditions are required before a right is recognized and enforced. First the right must be constituted according to the law of the contracting State where the aircraft was registered at the time the right is constituted. Second, the right must be recorded in the public record of the contracting State where the aircraft is registered.[71]

Once a valid charge is recorded no other right may have priority over it, except where there is a privileged claim (salvage, for example) under Article IV. A secured creditor is protected by Article IX, as the transfer of an aircraft from the nationality register or record of one contracting State to that of another where his charge may not be recognized is prohibited unless all holders of recorded rights consent to the transfer.

This Convention took effect in 1953 and there were twenty-seven parties as at 1 January 1969. Some commentators have felt that the Convention (to which Australia is not a party) was dominated by the specific legal traditions of a few countries, some of whom were more ambitious than objectively interested in establishing a workable international legal framework.[72] Some major aviation States have ratified, but acceptance is far from universal and universality is necessary for the Convention to achieve its full purpose.

(iv) ROME CONVENTION ON SURFACE DAMAGE CAUSED BY FOREIGN AIRCRAFT

Following meetings between the ICAO Legal Committee and the Legal Commission of the ICAO Assembly between 1948 and 1950 a final draft of a convention on damage caused by foreign aircraft to third parties on the surface was concluded and submitted to a conference on air law in Rome. The Rome Convention of 1952 aims to adequately compensate persons suffering damage and at the same time reasonably limit the operators' liability. It also aims to unify the rules as to liability incurred for such damage in different States.

The Convention is based on strict liability[74] except where the persons injured were contributorily negligent[75] or where the damage results from armed conflict or civil disturbance.[76] The damage for which a claim may

[68] *Ibid.* art. I, para. (c).
[69] *Ibid.* art. I, para. (d).
[70] *Ibid.* art. I.
[71] *Ibid.*
[72] Pyman, *op. cit.* 178.
[73] *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface* (1952) Cmd 8886.
[74] *Rome Convention* (1952) art. 1.
[75] *Ibid.* art. 6.
[76] *Ibid.* art. 5.

be made could result from actual contact, fire, explosion, or a person or thing falling from an aircraft.[77] Damage resulting from flight which interferes with land use or causes damage to livestock by noise, vibration, slipstream or air disturbance, unless the damage results from mere passage of the aircraft through the airspace in conformity with existing regulations, is also recoverable. Liability attaches to the operator or charterer.[78]

Liability is limited by an amount which increases at a progressively lower rate as the weight of the aircraft increases. There is a fixed limit of $A.30,000 in respect of the death or personal injury of a person.[79]

The Convention includes a detailed chapter on insurance,[80] but it is for each State to decide whether it desires to oblige foreign operators to insure against surface damage in that State.[81]

Actions are to be brought in the *forum loci delicti*.[82] This is a convenient rule because in most cases the claimant (the injured party) is a national of that State, so that legal costs are lower and evidence is more easily produced.

This Convention is in force but at 1 January 1969 total ratifications were only twenty. The U.S.A. and the United Kingdom have not ratified and do not appear to intend to. Some governments are said to disagree with the provisions on limitation of liability and the selection of the *forum loci delicti* for commencing actions.[83]

(v) TOKYO CONVENTION ON INFLIGHT OFFENCES

There is little settled international customary law regarding jurisdiction over crimes and other acts committed on board aircraft. When a crime occurs on an aircraft registered in State A, while flying over State B, committed by a national of State C against a national of State D, after which the aircraft lands in State E, all five States may claim jurisdiction, and the aircraft operator, the captain and crew all have particular interests requiring consideration. Under international customary law there may be some similarity between the principles applicable to maritime law and those applicable to air law.

Maritime law limits criminal jurisdiction to the flag State or coastal State (if the ship is docked). Which State has jurisdiction will depend on whether the ship is docked in the coastal State's port and whether the flag State's laws have an extraterritorial operation so as to extend to the ship in question in the circumstances. If the analogy between air law and

[77] *Ibid.* art. 1.
[78] *Ibid.* art. 2.
[79] *Ibid.* art. 11.
[80] *Ibid.* Ch. III.
[81] *Ibid.* art. 15.
[82] *Ibid.* art. 20.
[83] Pyman, *op. cit.* 180.

maritime law is valid, the answer to the question of which State has jurisdiction if the contending States are the national State of the aircraft and the State subjacent to the aircraft at the time the crime is committed will depend on the extraterritorial, or otherwise, operation of the laws of the national State, and whether the aircraft lands in the subjacent State.

In *U.S. v. Cordova*[84] the United States District Court of New York held that no provision of United States law provided for indictment with respect to an act committed on board an American aircraft over the high seas.[85] As a result Congress legislated to provide for federal jurisdiction over crimes committed on board American aircraft while over high seas or land *res nullius*.[86] Through this enactment the subjacent State has jurisdiction unless the aircraft is flying over land *res nullius* or the high seas. This is unrealistic, because the crime will probably be committed while the aircraft is in transit so that the State would, if it decided to take action, have to launch extradition proceedings if the aircraft does not land.

In the United Kingdom the Civil Aviation Act 1949 by its section 62 accords jurisdiction to the Central Criminal Court for any act committed on board a British aircraft, which act would ordinarily be a crime under British law, irrespective of the nationality of the actor or location of the aircraft at the time of the act. The Central Criminal Court had cause to consider this section in *R. v. Martin*,[87] a case concerning drug traffic on a British aircraft between Bahrein and Singapore in contravention of regulation three of the Dangerous Drugs Regulations 1953 enacted in the United Kingdom. The Court held that it lacked jurisdiction in this situation because the act in question was an offence under the Regulations only if done within the United Kingdom. As the law did not have extraterritorial effect the act done on board an aircraft was not an offence under British law, so section 62 could not apply.[88] Five years later that decision was approved by the Central Criminal Court in *R.* v. *Naylor*.[89] In this case, however, the Court was able to claim jurisdiction because the common law offence of larceny was the act in question, and larceny was regarded as a crime which the United Kingdom could prosecute though committed outside Britain because it was regarded as a crime no matter where committed.[90] Thus, it seems that though an aircraft, like a ship, is totally invaded by the territorial law, at least so far as criminal law is concerned the national State has concurrent jurisdiction if it chooses to exercise it.

[84] (1950) 89 F. Supp. 298.
[85] *Ibid.* 303-4.
[86] U.S. Code, Crimes and Criminal Procedure, Title 18, s. 7.
[87] [1956] 2 W.L.R. 975.
[88] *Ibid.* 982-5.
[89] [1961] 2 All E.R. 932.
[90] *Ibid.* 933.

This brief survey illustrates the gaps and uncertainties in the law as it stands at present. The ICAO Legal Committee prepared a draft convention on this topic after the 1962 Assembly in Rome. This draft was submitted to a diplomatic conference in Tokyo in 1963. This Conference adopted the present text and the Convention, known as the Tokyo Convention,[91] was open for signature, ratification and adherence.

The Tokyo Convention covers acts which are penal offences and acts which, though not offences, may or do jeopardize good order and discipline on board.[92] The necessary gravity of penal offences is not clarified by the Convention so that even minor offences may be within the scope of the Convention. Political offences and offences based on racial or religious discrimination are excluded.[93] The act or offence must be committed 'while the aircraft is in flight', which is from the moment when power is applied for take-off until the end of the landing run,[94] and the Convention applies to aircraft on the surface if the aircraft is on the high seas or land *res nullius*. Aircraft used in military, customs or police services are outside the Convention.[95]

Jurisdiction is given to the State of registration which must act to exert jurisdiction.[96] Member States of joint air transport operating organizations or international operating agencies are to nominate a State from their number to be considered the State of registration for the purposes of the Convention.[97] The State of registration is obliged to close gaps[98] in its extraterritorial jurisdiction to prevent any recurrence of the situations of *Cordova*[99] and *Martin*.[1]

The Convention does not solve all problems. The charter of a registered aircraft without its crew and commanded by a foreign company or person does not affect the registering State's obligation to establish jurisdiction, though the national State of the charterer may have a greater interest in exercising jurisdiction. The Convention does not exclude criminal jurisdiction exercised in accordance with national law.[2] No mechanism exists for determining priority between national criminal jurisdiction and jurisdiction by the registering State under the Convention. Article 4 also permits multiple claims to jurisdiction, by enabling a State not the State of registration to interfere with an aircraft in flight to exercise jurisdiction where the offence committed on board affects

[91] *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (1963) Cmnd 2261.
[92] *Tokyo Convention* (1963) art. 1.
[93] *Ibid.* art. 2.
[94] *Ibid.* art. 1, para. (3).
[95] *Ibid.* art. 1, para. (4).
[96] *Ibid.* art. 3, paras (1) and (2).
[97] *Ibid.* art. 18.
[98] *Ibid.* art. 3, para. (2).
[99] (1950) 89 F. Supp. 298.
[1] [1956] 2 W.L.R. 975.
[2] *Tokyo Convention* (1963) art. 3, para. (3).

that State's territory, where the offence has been committed by or against a national or permanent resident of that State, where the offence is dangerous to the security of that State, where the offence consists of a breach of rules or regulations relating to flight or manoeuvre of aircraft in force in that State, or where the exercise of jurisdiction is necessary to ensure that State's observance of any obligation under a multilateral international agreement. States with even remote connections can thus claim jurisdiction so that the offender could be tried and punished by several States.

Chapter III gives the aircraft commander special powers as an instrument of jurisdiction while the aircraft is in flight[3] and otherwise outside the exercisable jurisdiction of the State of registration. These powers include restraint of the offender[4] and may be followed by disembarkation.[5] He may also deliver the offender to the competent authorities in any contracting State in which the aircraft lands.[6]

Article II deals with unlawful seizure of aircraft (commonly known as 'hi-jacking'). When an aircraft is unlawfully seized all contracting States are to take all appropriate steps to restore or preserve the commander's control.[7] A contracting State where the aircraft lands must permit the passengers and crew to continue their journey as soon as is practicable and must return the aircraft and cargo to persons lawfully entitled to possession.[8] This is the only provision for a specific offence in the Convention. It was included at the instigation of the U.S.A. which has a special interest in this matter, what with the high rate of hi-jackings of American civil aircraft to Cuba. Any State which takes delivery or in whose territory an aircraft lands after a hi-jacking must immediately make a preliminary enquiry into the facts.[9] It must report its findings to the State of registration, the State of which the alleged offender is a national, and any other interested State, including a statement of its intention to take or not to take proceedings.[10] If satisfied that the circumstances warrant action the State must ensure the presence of any alleged offender or of any person delivered.[11] Custody or other measures taken must be valid under the State's municipal law and must continue no longer than is reasonably necessary for the institution of extradition or criminal proceedings.[12] Any person taken into custody must be assisted in communicating immediately with the appropriate representative of his national State.[13]

[3] *Ibid.* art. 5.
[4] *Ibid.* art. 6.
[5] *Ibid.* art. 8.
[6] *Ibid.* art. 9, para. (1).
[7] *Ibid.* art. 11, para. (1).
[8] *Ibid.* art. 11, para. (3).
[9] *Ibid.* art. 13, para. (4).
[10] *Ibid.* art. 13, para. (5).
[11] *Ibid.* art. 13, para. (2).
[12] *Ibid.*
[13] *Ibid.* art. 13, para. (3).

These procedural safeguards apply where the alleged offender is delivered, but it is unclear whether they apply to disembarkation.

Despite the faults in this Convention it serves as a significant starting point to the resolution of problems of conflicting jurisdiction over offences committed on board aircraft. The Convention entered force on 4 December 1969, 90 days after deposit of the twelfth instrument of ratification. Thus far it has not proved a popular convention with signatories; however, it has opened the way for work on a draft convention on unlawful seizure by the ICAO Legal Committee. The convention could be implemented as a protocol to the Tokyo Convention.[14]

(vii) DRAFT CONVENTION ON AERIAL COLLISIONS

The most recent draft convention to have emerged from the ICAO Legal Committee is the *Draft Convention on Aerial Collisions* (1964).[15] This draft was presented to the ICAO Assembly and is not the final draft which will be presented to a diplomatic conference. The Convention aims to provide rules and establish limits for the liability of operators of aircraft involved in a collision for damage caused to the other aircraft and passengers and goods thereon.[16]

Collisions between aircraft of the same nationality over the territory of the State of registration are not covered by article 1, which defines the scope of the Convention. 'Collision' includes interference by or with another aircraft, and the Convention applies where collisions occur over a contracting State or wherever they occur if both aircraft are registered in contracting States.[17]

Registration is a fundamental feature of the Convention. Article 21 concerns aircraft operated by multinational airlines not registered on a national basis. These are deemed to be registered on a national basis in each State a party to the agreement establishing the airline, except that if a collision occurs over the territory of any of those States it is deemed to be registered in that State. According to Doctor Mankiewicz[18] a collision is outside the Convention if it occurs over the high seas and involves only aircraft of the multinational airline. This is not surprising when we recall that article 1 excludes 'domestic' collisions.

The collision must occur 'in flight'.[19] Aircraft are deemed to be in flight 'from the moment when power is applied for the purpose of take-off until the moment when the landing run ends' while lighter-than-air aircraft

[14] (1970) 9 *International Legal Materials* 77.
[15] (1964) 30 *Journal of Air Law and Commerce* 385-9.
[16] Mankiewicz, 'The ICAO Draft Convention on Aerial Collisions' (1964) 30 *Journal of Air Law and Commerce* 375, 376.
[17] *Draft Convention on Collisions* (1964) art. 1, para. 1.
[18] Mankiewicz, *op. cit.* 377.
[19] *Draft Convention on Collisions* (1964) art. 1, para. 1.

and 'vertical take-off and landing' aircraft are deemed to be in flight 'from the moment [they become] detached from the surface until [they become] attached thereto'.[20]

State aircraft are included in the Convention unless a State makes the appropriate reservation under article 16 when ratifying or adhering. State aircraft are defined as in the Chicago Convention[21] but aircraft engaged in carriage of passengers, mail or cargo for remuneration or hire, other than those used exclusively for governmental purposes, shall not be deemed to be State aircraft.[22]

The person liable is the operator,[23] although the operator's servants or agents or the owner of the aircraft may be liable.[24] The Legal Committee did not consider the liability of air traffic control agencies, manufacturers or maintenance agencies. Damage for which claims may be made includes damage to other aircraft, personal injuries and death, delay, and damage to property not belonging to the operator.[25] Basically the operator is liable only so far as the damage was caused by his own fault, and he has the faults of his servants and agents acting within the course of their employment imputed to him.[26] Contributory negligence of the injured person may be a partial or complete defence.[27] Similarly, if several operators are at fault the damages shall be borne according to the respective degrees of fault.[28]

Liability is limited to the amounts set forth in Article 10. If claims are made against several operators the aggregate damages must not exceed the maximum allowed by article 10.[29] This also applies if claims are launched against servants.[30]

The claimant may select his forum from amongst the competent court of any contracting State where the act occurred or where the defendant has his domicile or place of business.[31]

(b) *Definition of Scheduled and Non-scheduled Flight*

The effect of article 5 of the Chicago Convention is to give the aircraft of contracting States not engaged in scheduled international air services the right to fly into or over the territory of other contracting States and to make stops for non-traffic purposes (that is, for the

[20] *Ibid.* art. 1, para. 2.
[21] *Ibid.* art. 16, para. 3.
[22] *Ibid.* art. 16, para. 4.
[23] *Ibid.* art. 2.
[24] *Ibid.* art. 12.
[25] *Ibid.* art. 4.
[26] *Ibid.* art. 9.
[27] *Ibid.* art. 6.
[28] *Ibid.* art. 7.
[29] *Ibid.* art. 13, para. 2.
[30] *Ibid.* art. 13, para. 1.
[31] *Ibid.* art. 14.

setting down or taking up of passengers, mail or cargo) without having to obtain prior permission. This right is subject to the observance of the terms of the Chicago Convention, to the right of the subjacent State to require a landing or to prescribe routes and require prior permission if the aircraft is to fly over inaccessible regions or regions without adequate air navigation facilities. Article 5 goes so far as to allow the taking on or discharging of passengers, mail or cargo in any contracting State but that is subject to the right of the State of embarkation or discharge to impose such regulations, conditions or limitations as it considers desirable.

Article 6 denies any such privileges to scheduled international air services unless the State to be flown over gives its permission or authorization. The *International Air Services Transit Agreement* (1944)[32] was drafted to provide some type of similar exchange for scheduled international air services.

Thus the privileges to be accorded an aircraft depend on whether it is engaged in scheduled or non-scheduled air services. The Convention does not define what is a scheduled or non-scheduled air service. The Secretariat of ICAO stated in 1947:

> Up to the Second World War the air services normally referred to as 'scheduled services' formed a class that was so distinct as to need little definition. Any air transport company that wished to attract a substantial amount of business had not merely to run to a schedule, but had to advertise that schedule as widely as possible. Companies running charter or taxi services found little demand and were able to operate only relatively small aircraft at a passenger-mileage charge considerably above the scheduled air service rate . . .
>
> At the present time the picture is less simple; some charter services operate infrequently over any particular route but with aircraft as large as any used by scheduled services; others operate frequently but irregularly on the same route, using both small and large aircraft; others operate frequently and regularly carrying freight, but occasionally carry full or partial loads of passengers . . .
>
> The complexity of this picture is increased by the uncertainty as to whether flights with overlapping or adjoining routes should count as operating on the same route, and by the vagueness of the concept of 'regularity'. This concept of 'regularity' is generally accepted as the distinguishing quality of a 'scheduled' service, but it is difficult to define clearly and impossible to measure.[33]

The ICAO Council set out to arrive at some definition of these terms for the guidance of members. The definition was published in 1952.

> A scheduled international air service is a series of flights that possesses all the following characteristics:

[32] ICAO Document 2187 (1945).
[33] ICAO Document 4522, A1-EC/74 (1947) 15, 17, 18.

(a) it passes through the airspace above the territory of more than one State;
(b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration in such a manner that each flight is open to use by members of the public;
(c) it is operated, so as to serve traffic between the same two or more points, either
  (i) according to a published time-table, or
  (ii) with flights so regular or frequent that they constitute a recognisable systematic series.[34]

'Notes' on the application of the definition were included. They amplify certain matters in the definition. All the elements (a) to (c) of the definition must be present before a service is a scheduled service and the meanings of 'a series' of flights, a 'transport' service, 'remuneration', flights being 'open to use by members of the public', and a 'systematic' series are clarified.

This definition was plainly needed and, even if not binding, provides a reference point for parties interested in ascertaining whether a given service is scheduled. Knowledge of this fact is important in the determination of privileges exchanged by the Chicago Convention as well as to the interpretation of provisions of other international agreements such as the *International Air Services Transit Agreement* (1944),[35] the *International Air Transport Agreement* (1944),[36] and the *Multilateral Agreement on Commercial Rights in Non-Scheduled Air Services in Europe* (1956).[37]

(c) *Nationality of Aircraft—Joint Operating Organizations—International Operating Agencies—Pooled Services*

Chapter III of the Chicago Convention regulates the nationality of aircraft of ICAO member States. Under article 17 registration governs the nationality of an aircraft. Article 18 prohibits dual registration but sanctions the transfer of registration of aircraft. Article 19 provides that the 'registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations'. This would appear to leave the decision as to whether a genuine link is to exist between the State of registration and the flight instrument to be determined by the State of registration. I have discussed the genuine link requirement as applied to aircraft registration earlier in this article, but there has been an argument advanced based on articles 17 and 19.[38]

[34] ICAO Document 7278, C/841 (1952), 3-6.
[35] ICAO Document 2187 (1945).
[36] *Ibid.*
[37] ICAO Document 7695 (1956).
[38] Cheng, *Law of International Air Transport* (1962) 131.

As between parties to the Chicago Convention the combined effect of these two articles may be to preclude any contracting State from questioning the nationality of any aircraft registered in another contracting State in accord with that State's laws and regulations, unless independent of the Convention an 'effective ownership or control' clause applies to relations between the States under survey. It is even possible to argue that the contracting States have recognized the article 17 principle as equally applicable to registrations by non-contracting States so long as they are recognized as sovereign States in international law. However, article 19 is expressly limited to contracting States so that contracting States, while forgoing the requirement among themselves, may require non-contracting States to display a genuine link with aircraft they register before recognizing the apparent nationality of the aircraft.

Article 20 requires every aircraft engaged in international air navigation to bear appropriate nationality and registration marks. ICAO and contracting States are empowered under article 20 to demand information on the registration and ownership of any aircraft registered in any contracting State. ICAO may also make regulations under which contracting States are to furnish reports giving such pertinent data as may be available concerning the ownership and control of aircraft registered in those States and habitually engaged in international air navigation. This data will be supplied to other contracting States on request.

The prohibition on dual registration in article 18 is perhaps difficult to reconcile with provision in article 77 for joint operating organizations, international operating agencies and pooled services in which two or more States are involved and where registration in one State alone would appear impossible. The question of international operating agencies and similar combinations by States is now a live issue with the desire of newly emerging and newly developing States to operate their own international air services in an era of high-cost aircraft. The costs of some popular current aircraft in Australian currency are as follows:

Boeing 707	: $8.7 million
Concorde	: $16.75 million
Lockheed L-500	: $33 million
American Supersonic Transport	: $39 million (an estimate made before its development was cancelled).

Only recently has ICAO made progress on the problems of nationality and operating combinations.

In 1948 the ICAO Assembly decided that the Council should, in accordance with its normal procedures 'promptly formulate and circulate to contracting States its views on the legal, economic and administrative problems involved in determining the manner in which the provisions of the Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies'.[39] Study continued sporadically by the Air Transport Committee to whom the Council referred the question. At that time there were no agencies requiring an article 77 determination so the matter was not regarded as one of high priority. The Committee reported in 1956.[40] Without examining the merits of that study the Council referred the report to the Legal Committee[41] which added the question of the problems of nationality and registration of aircraft operated by international operating agencies to the 'inactive' Part B of its work programme.[42]

The first request for a Council determination on a specific project came in 1959 from the League of Arab States. They proposed the establishment of a Pan-Arab Airline and wished to have a determination of the manner of application of the provisions relating to nationality and registration to the aircraft it intended to operate. The proposed airline was to be established on the basis of a multilateral convention open to adherence by Arab States irrespective of membership in ICAO or the League of Arab States.[43] At that time Saudi Arabia was outside ICAO. The Council set up a Panel of Experts which met in June 1960. The question directed to the Panel was

> Whether, having regard to the provisions of the Chicago Convention, it would be lawful for an aircraft to be registered either with the international operating agency itself or with an international organization authorized by its constituent instrument to register aircraft.[44]

The answer given by the Panel majority was

> Recognition of the legality of such registration would be tantamount to substituting the agency or the organization in place of a sovereign State in so far as concerns the obligations which the Convention imposes on the State of registration of an aircraft. In the opinion of the Panel, the Council cannot, under Article 77, make a determination which would have the effect of substituting the obligations and undertakings of an international operating agency or an international registering authority for those of a sovereign Contracting State.[45]

At the same time the Panel unanimously found that an international operating agency to which Article 77 is to apply must be restricted by its constitution to States parties to the 1944 Convention.

[39] ICAO Document 7670, A2-13 (1948).
[40] ICAO C-WP/2284.
[41] ICAO Document 7763, C/896 (1956), 24.
[42] ICAO Document 7921, LC/143-1 (1956), 145.
[43] ICAO C-WP/3091, Appendices 1-3.
[44] ICAO PE-77/Report (1960).
[45] *Ibid.*

The Council chose to submit the Panel's report to the League and so avoid giving a determination of the case presented.[46] The League was notified that the Council agreed with the unanimous decisions of the Panel (of which the most important was that any proposed agency would have to be restricted in its membership to ICAO States) but the majority decisions were not explicitly endorsed.[47] According to the Council the precedent of the Scandinavian Airlines System (S.A.S.) would satisfy it. S.A.S. is a consortium of airlines of Denmark, Norway and Sweden whose aircraft are registered within each type of aircraft by approximately three-sevenths of each type in Sweden, two-sevenths in Denmark, and two-sevenths in Norway. This has been called 'collective nationalism' rather than 'internationalism'.[48]

In 1962 the Council again referred the subject of 'Problems of Nationality and Registration of Aircraft operated by International Agencies' to the Legal Committee. The Legal Commission of the Assembly, upon whose recommendation the Council acted, asked that the topic be placed in the 'active' part of the Committee's work program.[49] The Assembly resolution also stated that the Council should request the Legal Committee Chairman, if a question concerning the legal aspects of the subject were received, to appoint a subcommittee to study that matter and report thereon to the Legal Committee.

Such a request was received in November 1964 from the *Union Africaine et Malagache de Cooperation Economique.* This union of eleven members had set up a multinational airline and did not wish to use national registration. The United Arab Republic asked the Council to institute a study of the problems related to nationality and registration of aircraft operated by international operating agencies.[50] The Legal Committee Chairman formed a sub-committee at the Council's request. The Sub-committee met twice, in 1965 and 1967. At the outset in 1965 the Sub-committee decided that it would advise the Council, through the Legal Committee, of the manner in which, in pursuance of the last sentence of article 77, the Chicago Convention provisions as to nationality should apply to the aircraft of international operating agencies.[51] The 1967 session of the Sub-committee was held to conclude matters remaining from the first session. I will now attempt to summarize the major findings of both sessions.

Firstly I should go into a matter of definition. In 1960 the ICAO Secretariat stated that although article 77 mentions 'joint air transport operating organizations', 'international operating agencies' and 'pooled

[46] ICAO Document 8124—C/928 (1960), 17, 31-4.
[47] ICAO Document 8106-3-8-9, C/927 (1960).
[48] ICAO Circular 28—AT/4 (1952), 185-7.
[49] ICAO Document 8279, A14-LE/11 (1962), 7.
[50] ICAO C-WP/4115; ICAO Document 8470, C/955 (1964), 19.
[51] ICAO LC/SC Article 77/Report (1965), 2 (para. 4).

services', the second sentence empowers the Council to make determinations only for international operating agencies. The Secretariat concluded that pooled services were clearly outside the second sentence but that the other terms were possibly used interchangeably. To be subject to a Council determination an agency would require an international character, not constitution under the law of any one particular State.[52] This is the only attempt made by ICAO to define what is meant by an international operating agency and to justify the consideration of joint operating organizations in discussions of the last sentence of article 77. The Panel of Experts in 1960 concluded that an international operating agency must be composed of States parties to the Chicago Convention, that the agency must possess an international character and must not be constituted under the law of any particular State. It need not be restricted to contiguous States for the operation of air services between their territories. The 1965 session of the Sub-committee contributed nothing further to this definition but in 1967 it was noted that article 77 mentioned 'contracting States' as distinct from 'a State' in article 79. It saw the admission of a non-contracting State to an Agency as in derogation of the international law principle that a State which is not a party to a treaty cannot claim benefits from its provisions. Thus a contracting State outside the Agency could refuse a non-contracting State within the Agency those benefits or privileges conferred only on contracting States by the Convention. If the Council were to make a determination for such a mixed Agency the contracting States could frustrate it by refusing benefits and privileges to the non-contracting States.[53]

It is respectfully submitted that in speaking so positively about the supposed principle that a State not a party to a treaty cannot benefit from its provisions, the Sub-committee has overlooked certain statements by the Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and Gex*.[54] The Court said of treaties and non-parties:

> It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of the sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.[55]

[52] ICAO PE-77/WD No. 2 (1960), 2 (para. 4).
[53] ICAO LC/SC Article 77/Report (1967), 5 (para. 16).
[54] (1932) P.C.I.J. A/B 46.
[55] *Ibid.* 147-8.

A type of second contract arises between the third State and the parties to the Convention. I would suggest that if this is a correct statement of a principle of international law the Sub-committee should have inquired into the question of whether the parties to the Chicago Convention intended to confer benefits on third States who may become members of mixed agencies. As a matter of fact, I very much doubt that the Sub-committee would have found an answer in the positive but an explanation of a negative answer would have been of value to students of international law.

The Council is to determine in what manner 'the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies'.[56] The scope of the Council determination will depend largely on how it interprets 'the provisions of this Convention relating to nationality of aircraft'. A narrow interpretation would mean that the Council could refer only to Chapter III in making its determination, whereas a wide interpretation would allow consideration of all articles explicitly or implicitly referring to registration and nationality. The Panel of Experts favoured the wide interpretation.[57] The 1965 and 1967 sessions of the Sub-committee confirmed this view and the Legal Committee reported to the Council that 'not only articles 17 to 21 . . . but also all articles of the Convention which either expressly refer to nationality of aircraft or imply it' are the provisions the application of which is to be determined by the Council.[58]

There was at first a reluctance to view the Council determination as binding. The report of the Air Transport Committee to the Council in 1956 could not sufficiently justify a finding that the determination was binding as to the extent of the Convention to make such a finding.[59] The Legal Bureau in 1960 came to the opposite conclusion for four reasons:[60]

(1) Article 77 reads 'the Council shall determine', the grammatical meaning of which is 'the Council shall decide'. If the framers of the convention had intended that the Council 'recommend' they would have said so.

(2) If 'determine' were construed as 'recommend' each State could in fact determine for itself, a function reserved to the Council.

(3) The determination shall bind because the framers chose this procedure in place of the amendment procedure to bind without requiring the concurrence of the party bound.

[56] *Chicago Convention* (1944) art. 77.
[57] ICAO PE-77/Report (1960), 3 (para. 8).
[58] ICAO, 'Report on the Work of the Legal Committee (Sixteenth Session)' (1968) 34 *Journal of Air Law and Commerce* 92, 93.
[59] ICAO C-WP/2284, 11 (footnote).
[60] ICAO PE-77/WD No. 2 (1960), 4-5 (para. 5).

(4) The power of the Council to bind under Article 77 is similar to its power with regard to rules of the air under Article 12.

The ICAO Panel thus construed 'determine' as 'decide'.[61] In its turn the Council informed the League of Arab States that 'a determination made by the Council pursuant to Article 77 . . . will be binding on all contracting States if the determination is made within the scope of the authority given to the Council by that Article'.[62] Enclosed was a statement by the majority of the Panel[63], approved by the Council,[64] that the only lawful manner in which aircraft operated by an international operating agency may be registered is by registration in a contracting State. This deprived the binding force of a determination of much of its importance and could be said to abrogate the need for any determination to be made. The Sub-committee in 1965 restated the view that a Council determination would have binding force if made within the scope of authority accorded by article 77.[65] At the same time the Sub-committee decided by a majority vote that non-national registration was in fact permissible,[66] thus undoing the damage caused by the Panel.

Attitudes to non-national registration have varied over the last decade. In 1960 the majority of the Panel were cautious. They saw it as 'a fundamental principle of the Chicago Convention that aircraft must have a nationality whether or not they are operated by international operating agencies'.[67] Registration with the agency itself or with an international organization was not approved because that would be an extension of the privileges and duties of States under the Convention to the Agency or organization.[68] The Council subscribed to this view and so informed the Arab League.[69] In 1965 the Sub-committee found, by a majority, that without any amendment the provisions of the Convention were not an obstacle to the principle of 'joint international registration' and that article 77 imposes upon the Council a duty to interpret those provisions to permit such registration. The Sub-committee saw such an interpretation as necessary if the second sentence of article 77 was to make sense.[70] By 1967 this majority view was considered respectable and discussion on types of non-national registration proceeded on the assumption that the majority view of 1965 was acceptable.

[61] ICAO PE-77/Report (1960), 3 (para. 9).
[62] ICAO Document 8124, C/928 (1960), 32.
[63] ICAO PE-77/Report (1960), 6 (para. 14).
[64] ICAO Document 8124, C/928 (1960), 32.
[65] ICAO LC/SC Article 77/Report (1965), 3 (para. 7).
[66] *Ibid.* 4 (para. 12).
[67] ICAO PE-77/Report (1960), 5 (para. 13).
[68] *Ibid.* 4 (para. 12).
[69] ICAO Document 8124, C/928 (1960), 32.
[70] ICAO LC/SC Article 77/Report (1965), 4 (para. 12).

The 1965 Sub-committee came to the following conclusions from a study of the provisions of the Convention expressly or implicitly concerning nationality.[71]

(1) The Convention did not require that aircraft must have the nationality of the State in which they are registered; that not being registered in a State they would not have the nationality of a State.

(2) Registration in more than one State at one time was prohibited but not one single registration by a number of States (that is, joint registration).

(3) Joint or international registration would not violate articles 7, 9, 12, 20, 21, 25, 26, 27, 30, 31, 32 or 33 of the Convention which refer to 'contracting States', 'State of registry', or 'nationality'.

No amendment of the Convention was therefore considered necessary. At the end of the 1965 Session the proposition that

> the determination made by the Council under Article 77 has sufficient effect for the international registration in question to be recognized by the other contracting States and for the aircraft so registered to have the benefit of rights and privileges equivalent to those granted by national registration

was not unanimously approved.[72] However, it was agreed that if the Council decision was to embody that proposition it should also state that

(a) The States that constitute the international operating agency shall be jointly and severally bound to assume the obligations which, under the Convention, attach to the State of registry;

(b) The operation of the aircraft concerned shall not give rise to any discrimination against aircraft registered in other Contracting States.[73]

By 1967 a consensus was reached in the Sub-committee that the second sentence of article 77 would apply to joint or international registration only if certain conditions were fulfilled.[74]

The concept of joint registration was introduced in the 1965 session by delegates from the Congo (Brazzaville) and Senegal who spoke for members of *Air Afrique*. By joint registration they meant a system whereby a special register was kept in each participating State on behalf of all the participants. It has been said of this proposal that under it each aircraft is in fact still registered 'in a State' so that article 17 is satisfied and the aircraft is endowed with nationality. It has the nationality of that State keeping that part of the register on which that aircraft is registered, and no Article 77 determination is then required.

[71] FitzGerald, 'Nationality and Registration of Aircraft Operated by International Operating Agencies and Article 77 of the Convention on International Civil Aviation, 1944' (1967) 5 *Canadian Yearbook of International Law* 193, 207.
[72] ICAO LC/SC Article 77/Report (1965), 5 (para. 14).
[73] *Ibid.* 5 (para. 15).
[74] ICAO LC/SC Article 77/Report (1967), 2 (para. 4, subpara. 1).

This contention finds support in the Convention where States are not compelled to have only one registry or nationality mark for all their aircraft. This construction of article 17 to accommodate joint registry ensures that there is always a responsible State under the Convention. This is only a minor argument in its favour, however, because of the device adopted in the Tokyo Convention[75] whereby the parties to a joint operation scheme nominate a State to be responsible for the rights and duties arising under the Convention with respect to a particular aircraft. This argument would appear to have been ignored by the Sub-committee, in view of its work regarding joint registration schemes (it assumes that an Article 77 determination will be necessary for proposed joint registration schemes) and in view of the Secretariat's statement of 1960. The joint registration scheme considered by the Sub-committee in 1967 was basically similar in that the constituent States would establish a single register without there being established an international organization with legal personality for the purposes of registration. The definitive joint registration scheme which reached the Legal Committee for consideration in 1967 was the following:

> (1) The States constituting the international operating agency will establish a joint register for registration of aircraft to be operated by the agency. This will be separate and distinct from any national register which any of those States may maintain in the usual way.
>
> (2) The joint register may be undivided or consistent of several parts. In the former case the register will be maintained by one of the States constituting the international operating agency and in the latter case each part will be maintained by one or other of these States.
>
> (3) An aircraft can be registered only once, namely, in the joint register or, in the case where there are different parts, in that part of the joint register which is maintained by a given State.
>
> (4) All aircraft registered in the joint register or in any part thereof shall have one common marking, in lieu of a national mark.
>
> (5) The functions of a State of registration under the Chicago Convention . . . will be performed by the State which maintains the joint register or, as the case may be, by the State which maintains the relevant part of that register. In any case, the exercise of such functions shall be done on behalf of all the States jointly.
>
> (6) Notwithstanding (5) above, the responsibilities of a State of registration with respect to the various provisions of the Chicago Convention shall be the joint and several responsibility of all the States which constitute the international operating agency. Any complaint by other Contracting States will be accepted by each or all of the States mentioned.[76]

The essential feature of international registration was that an internationally constituted body with a legal personality would be registering authority for the aircraft. This body would be separate from the operating

[75] *Tokyo Convention* (1963) art. 18.
[76] ICAO, *op. cit.* 94.

agency and could be established for the set purpose by the States constituting the international operating agency. Mention was made of ICAO or a body set up by the States at ICAO's initiative as the responsible organization. This was the form of international registration considered by the 1967 Sub-committee[77] and in the Legal Committee[78] report.

The Sub-committee reached a consensus in 1967[79] by which the Council in arriving at an article 77 determination should be guided by certain basic criteria. It would not be obliged to recognize a specific plan of joint or international registration unless these criteria were met. That consensus as approved by the Legal Committee is as follows:

(1) In the case of *joint registration*—

(a) The States constituting the international operating agency shall be jointly and severally bound to assume the obligations which, under the Chicago Convention, attach to a State of registry.

(b) The States constituting the international operating agency shall identify for each aircraft an appropriate State from among themselves which shall be entrusted with the duty of receiving and replying to representations which might be made by other Contracting States of the Chicago Convention concerning that aircraft. This identification shall be only for practical purposes and without prejudice to the joint and several responsibility of the States participating in the agency, and the duties assumed by the State so identified shall be exercised on its own behalf and on behalf of all the other participating States.

(c) The operation of the aircraft concerned shall not give rise to any discrimination against aircraft registered in other Contracting States with respect to the provisions of the Chicago Convention.

(d) The States constituting the international operating agency shall ensure that their laws, regulations and procedures as they relate to the aircraft of the international operating agency shall meet in a uniform manner the obligations under the Chicago Convention and the Annexes thereto.

(2) In the case of *international registration* the States constituting the international operating agency may devise such a system for registration as shall satisfy the Council that the other member States of ICAO have sufficient guarantees that the provisions of the Chicago Convention are complied with. In this connection the criteria mentioned in (a), (c) and (d) above shall, in any event, be applicable.

In making its determination it would appear that the Council is to work in two phases. It must first adopt the general basic criteria listed in the consensus to be applied. Then it must apply these to the particular plan submitted, it being understood that in the case of joint registration described above there is no problem as to the fulfilment of the conditions specified in the criteria. If such a scheme were proposed the determination is a formality but other cases may require different approaches.

[77] ICAO LC/SC Article 77/Report (1967), 3 (para. 8).
[78] ICAO, *op. cit.* 94-5.
[79] ICAO LC/SC Article 77/Report (1967), 6 (para. 18).

By the end of the Sub-committee's 1967 session when the consensus was reached it was felt to be unnecessary to pursue suggestions for amendment of the Convention to accommodate non-national registration.[80]

To conclude, ICAO has gone far in its study of the problem of international operating agencies and their validity under the Chicago Convention. The ICAO Council's Legal Committee has adopted a consensus, reached by its Sub-committee, that the second sentence of article 77 of the Chicago Convention, without amendment, gives the Council full power to determine how the provisions of the Convention relating to nationality will apply to the aircraft of an international operating agency even though they do not have a nationality. This somewhat daring consensus runs counter to the long-held concept that if civil aircraft are to fly internationally, they must have a nationality. Other aspects of article 77 also discussed have included the character of an international operating agency—it is of international character, not constituted under the municipal law of any particular State. The words 'provisions of the Convention relating to nationality of aircraft' found in Article 77 have been given an extensive interpretation, and a Council determination, made under article 77 will be binding on all ICAO members if made within the scope of the authority given to the Council by that article.

It is now for the Council to decide whether it can accept the criteria embodied in the consensus. One may well wonder at the foresight of the drafters of the Chicago Convention in adopting the provisions of Article 77. The Convention was prepared well in advance of the age of expensive commercial jet aircraft; nevertheless, the second sentence of Article 77 may bring about a future in which groups of States now desirous of forming regional airlines, but unwilling to do so with nationally registered aircraft, will be able to enjoy the benefits of such airlines through a Council determination. Thus, Article 77 is seen to contain, at least in the field of civil aviation, the solution for one of the major problems of our time, namely, the transfer of the benefits of modern and expensive technology to developing countries for their enjoyment on an autonomous basis.

CONCLUSION

It has been seen that in the field of quasi-legislation ICAO has done useful work in promoting international uniformity in aeronautical regulations, procedures, standards and practices. These are being followed even by non-members. ICAO is also forging ahead in the pre-legislative field developing private air law conventions, although the leisurely pace adopted by the States in accepting these conventions has severely restricted

[80] *Ibid.* 19 (para. 24).

their effectiveness. ICAO's work in joint financing schemes for the improvement of the infrastructure of international civil aviation, albeit unspectacular, provides scale models of potential achievements in this field through international co-operation. It is really only in the judicial sphere that ICAO could be said to be found seriously wanting.

ICAO has never been able to gain sufficient support to successfully sponsor a multilateral convention for the exchange of commercial rights in air navigation. Instead, States have had to base their dealings on bilateral agreements between them. These treaties are a problem in international law because they serve as instruments of economic discrimination. It has been said that bilateral agreements in this field 'sectionalize the world and make air transport both more expensive and less convenient than it should be'.[81]

The fact that ICAO has made the contribution it has to the law of international organizations and to practice in general international law is sufficient justification for its existence. These material contributions plus the fact that ICAO and its promulgated regulations and other practices are in existence and operation provide a point of reference to all States, members or not, when they are ordering their affairs as regards international civil aviation. They may or may not always follow the direction ICAO indicates or would prefer, but it is submitted that they are more likely to do so if they can see these indications and also know that the vast majority of international air transport is regulated by them. Perhaps this is ICAO's most important contribution to international law.

[81] Billyou, *op. cit.* 271.