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TOWARDS A UNIFORM INTERPRETATION OF THE PRIVATE AIR LAW CONVENTIONS

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THE "Warsaw" Sub-Committee, which in 1951 was established by the Legal Committee of ICAO for the revision of the Convention of Warsaw,¹ drafted in January 1952 a new text of a convention "for the unification of rules relating to liability of the carrier in international carriage by air," which in Article 25 contains the following provision:

"Contracting States shall co-operate to secure, as far as possible, a uniform interpretation of this Convention."

The present Warsaw Convention does not contain a similar provision, nor do the other air law Conventions.

The desirability of uniform interpretation of the international conventions for the unification of private law does not need much arguing. Only those who think that a good law will always offer clear and simple answers when applied to any fact situation which may arise under it—if such persons have ever existed—might feel that the question of uniform interpretation is of little importance for the primary purpose of the private law conventions: unification of the law.

Even if one steers far away from the extreme point of view taken by some adherents of the realistic school with respect to the judge's task, no modern student of law can deny the creative element in judicial activity. Nor is it still possible to maintain that that element could be reduced to nil by a regular revision of the law. There may exist a difference of views as to where the realm of the judge in moulding the law to the body of real life ends, and where the task of the legislator begins, but in view of the necessarily slow movement of the legislative organs, it is difficult to maintain that by periodical revision of the law the needs of society for certainty and uniformity could be satisfied. This is even more true when speaking of international conventions which, with the necessity of diplomatic conferences and ratifications, need a much longer period of gestation. It is probably not too pessimistic and, as soon as major problems are involved, rather too optimistic to say that a period of eight years is the minimum time needed for elaborating a revised convention and having it signed and

¹ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on the 12th of October, 1929.

ratified by a sufficient number of States. A revision which touches upon major principles, such as the revision of the Warsaw Convention now undertaken by the Legal Committee of ICAO, will even under the most favorable circumstances probably not come into effect much earlier than 1960.²

That the various private air law conventions are open to multiple interpretations on a number of points can hardly be denied. The fact that the instances where courts of different countries have adopted different views with respect to specific provisions of the private air law conventions, so far have been rare, should not lead one to think that these conventions offer little opportunity for different interpretations. The truth is rather that for obvious reasons the airlines generally prefer to settle their disputes out of court, especially where the question turns on a purely legal point. But that does not mean that the need for certainty and uniformity would not be as great as is the case where the decision of a court is actually asked for.

The Warsaw Sub-Committee which adopted the above quoted text of Article 25 certainly can not be accused of having made a too ambitious approach to this important problem. The solution it proposes, if solution it can be called, is merely an appeal to the various contracting states to promote uniform interpretation "as much as possible." In view of the well known lack of interest of many judges and practising lawyers as regards anything foreign to their own legal system, often combined with a comfortable superiority complex, such appeal is certainly not superfluous. It may be feared, however, that the suggested text if it is not corroborated by some practical device for promoting uniform interpretation, will remain a pious vow.

The proposed wording apparently should not be taken too literally, in a sense that the Contracting States actually should ensure uniform interpretation by instructing their courts that where a certain interpretation of some provision has been adopted by a foreign jurisdiction such interpretation should always be followed. There is no doubt that such action would be "possible" but it is also obvious that no State would be willing to go that far. Therefore, "as far as possible" should be taken in the colloquial sense amounting to: "do what you can," with the mental reservation that one is allowed to take into account one's own desires and prejudices.

The footnote which the Sub-Committee has added to this provision states that "the Sub-Committee considered the desirability of inserting another paragraph in this article to provide for the submission of questions of interpretation of this Convention to the International Court of Justice, through the Council of ICAO, since some members of the Sub-Committee thought that such a system might facilitate uniform

² Cf. The report of G. Gidel for the 1936 meeting of the Institute of International Law "La Clause Jurisdictionelle Dans les Conventions d'Union Notamment Cellas Relatives à la Propriété Industrielle et à la Propriété Artistique. et Littéraire," 39 *Annuaire de l'Institut de Droit International* (Bruxelles 1936) I 246 at 262.

interpretation of the Convention. The majority, however, considered that such a provision would have little, if any, value because it is unlikely that cases arising under this Convention would become the subject of disputes between States."

In order to prevent the solution discussed at Paris from being forgotten³ before its merits have been studied more thoroughly than it was possible to do on that occasion, the possibility of asking advisory opinions of the Court of International Justice on the interpretation of private air law Conventions will be studied in the present paper.

Before doing so it may be useful, however, to offer a short survey of the earlier attempts which have been made in this connection, and of some solutions suggested in this and in related fields.

PROPOSALS OF CITEJA

In 1933 the Third International Conference on Air Law in Rome which established the texts of two private air law Conventions,⁴ prompted by a French proposal, adopted the following resolution:

"The Conference—considering the interest for all users of aviation from time to time to be enlightened on the texts established by the International Conferences on Private Air Law—requests the CITEJA (Comité International Technique d'Experts Juridiques Aériens) to examine, in view of the Fourth Conference on Private Air Law, if, to what extent and in what manner, it may offer its advice on the interpretation of the texts made by the International Conventions of Private Air Law, in case it will be requested to do so by a public Administration or an international organization, without affecting the rights of the judiciary seized of a dispute."

The First Commission of the CITEJA, following this request, worked out a draft⁵ which after first having been adopted almost unanimously, was afterwards rejected by a small majority, so that Mr. Lapradelle, in 1939, had to report to the full Committee that in view of certain objections it was premature to hope for a speedy adoption of a text concerning the interpretation by the CITEJA of the air law Conventions.⁶

The question was again taken up after the war, when the First Commission adopted with some slight amendments the proposals of the Reporter Mr. Charlier. These proposals, if adopted, would have granted to the CITEJA the power to give advisory opinions on the

³ No formal minutes of the Meetings of the Warsaw Sub-Committee have been made.

⁴ The "Convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface," and the "Convention for the Unification of Certain Rules Relating to the Attachment of Aircraft."

⁵ The discussions on this subject can be found in the minutes ("comptes rendus") of the 1934, 1936, 1937 and 1938 meetings of the First Commission of the CITEJA (Documents 239, 298, 334 and 362).

⁶ A review of the prewar discussions and papers of the CITEJA on the problem can be found in The Reports to the First Commission of the CITEJA by De Lapradelle (1937 Doc. Nr. 286 reprinted in Doc. 298) and by Charlier (1946, Doc. nr. 487).

interpretation of international air law provisions, if requested to do so by any State, any international body, any interested public authority or any interested person. Such opinions would be only advisory and would have no binding force. The proposals were not discussed in the last full (Cairo) meeting of the CITEJA, nor has the problem of interpretation been on the agenda of the Legal Committee of ICAO which in 1947 took the place of the CITEJA.

The principle of interpretation by the CITEJA was felt by the American and English delegates as an encroachment on the functions of either the diplomatic conference which alone would have the power to give an authoritative interpretation of international conventions, or of the judge who alone could take into account the facts and needs of each situation when applying the international rules. The English delegate, moreover, objected on account of the British views as to the irrelevance of the drafting history when construing legal texts,⁷ and the American delegate stressed the American prejudice against "advisory opinions" generally.⁸

The question of whether the CITEJA was an appropriate agency for construing the private air law conventions which it had itself prepared is now only of historical value, as this permanent Committee of experts was liquidated in 1946 and replaced by a Committee of national delegations, functioning as a Legal Committee of the International Civil Aviation Organization.

One of the main arguments for making use of the CITEJA for the interpretation of the private air law conventions had been CITEJA's inside knowledge of the drafting of these texts. It might, therefore, be supposed to be in the best position for determining what they meant. This argument had been answered before the war by the fact that even at that time two of the experts who had taken an active part in the drafting of the Warsaw Convention were not on the Committee anymore. In view of the different organization of the Legal Committee which is no longer primarily a group of experts taken from various countries, but a permanent conference of national delegations speaking for their respective governments, the continuity of its members is even less guaranteed than with the CITEJA. Moreover, it must be doubted whether the persons who have taken part in the preparation of legal texts are most fit to construe these texts, once they are to be applied to often unforeseen situations.⁹

However that may be, few people will find that the Legal Com-

⁷ CITEJA, *Compte rendu des Réunions de la Première Commission*, Berlin 1934, Document No. 239, p. 26.

⁸ CITEJA, *Observations de la Délégation Américaine sur l'interprétation des Conventions*. 1936, Document No. 293.

⁹ Cf. The remark by the Dutch Delegate at the meeting of the First Commission in Berlin, 1934: "ni l'organisme qui a préparé, ni l'organisme qui a arrêté une règle, ne doivent être qualifiés pour en donner une interprétation. Il n'est pas bon s'il se produit un certain flottement sur l'interprétation d'un mot ou d'une phrase, que cet organisme ait l'air d'un juge, c'est-à-dire donne son opinion sur la signification exacte d'une certaine orientation." (CITEJA, Document No. 239, p. 19.)

mittee of ICAO would be an appropriate body for a more or less authoritative interpretation of air law conventions. The Committee being composed of delegations having mandates from their countries, its members certainly do not have the independent status desirable for this quasi-judicial activity. Also it is too large and unwieldy for the kind of discussion which would be required, leaving aside the difficulties created by the fact that three languages are spoken by its members. Finally it is not unfair to say that the Legal Committee, especially after it has willingly accepted a more dependent position in regard to the Council of ICAO, has not the authority necessary to give its interpretation the desired unifying effect. This does not amount to saying that the Committee could not play a useful part in the promotion of uniform interpretation, as will be suggested below.

WORLD AIR LAW COURT

The ideal solution probably would be to create an international Air Law Court, to which parties could appeal from decisions of national courts, and which thus could play the unifying part of a World Supreme Court on air law. The creation of an international private law court to which private parties would have access has frequently been advocated.¹⁰ At the 38th Conference of the International Law Association (Budapest, 1934) a formal proposal to that effect was made by Professor de Lapradelle.¹¹ More limited *ratione materiae* was the proposal worked out by the Reporters E. Roguin and A. Darras to the 1895 and 1897 Conferences of the International Law Institute ("Institut de Droit International").¹² This proposal provided for International Tribunals for the interpretation of the "conventions internationales d'union," such as the Berne Conventions on copyright, industrial property and continental railways, and the postal union conventions. It has never been discussed and the subject was dropped by the Institute for some 36 years.¹³

A far less ambitious project has been suggested by Professor Cleveringa in a report to the second Conference of The International Bar Association.¹⁴ In view of the strong resistance against creating a private law court which would rank above the courts of sovereign states, Professor Cleveringa thinks that the first step to be made should not go further than the creation of a standing court of arbitration to which parties could, of their own free will and in common agreement, submit any dispute in the field of maritime and air law. An award by this

¹⁰ Cf. Ch. Carabiber, *les juridictions internationales de droit privé*. Neuchatel, 1947, especially pp. 297-309. Also the Report by Gidel. (See note 2) pp. 265 to 279.

¹¹ Report of the Conference at p. 71-75.

¹² *Annuaire* 1895 and 1897 (XVI) 106.108.

¹³ Cf. Gidel (*l.c.* see note 2) at 248.

¹⁴ R. P. Cleveringa, *An International Maritime and Aeronautic Law Court*, 2d Conference of The International Bar Association, The Hague, 1948. The same idea, but limited to maritime law cases had already been the subject of a lecture delivered by him in 1947 to The Anglo-Netherlands Society in London (published in I, Britain and Holland (1948), 15-25).

court would be binding in all countries having adhered to its statute. The decision of the court would in the course of time receive the authority flowing from its standing and the quality of its judges.

It may be doubted whether in the field of private air law parties would frequently avail themselves of this opportunity. Under the present air law conventions persons who have a claim against an aircraft operator or an air carrier are granted the privilege of a favorable *forum* or of a choice of *fora*. They would have little advantage in submitting their claim to an international court of arbitration, the proceedings of which in all probability would not be less if not more costly than the proceedings in an ordinary court of their choice.

It is worth noting that the scheduled airlines associated in the International Air Transport Association have not yet made any use of the possibility offered to them under Article 33 of the Warsaw Convention. This article allows them as far as carriage of goods is concerned to insert in their Conditions of Carriage an arbitration clause, provided the place of arbitration would be situated in one of the countries of competent jurisdiction enumerated in Article 28 of the Convention.¹⁵

INTERNATIONAL COURT OF JUSTICE

Instead of instituting a new Court for the purpose of uniform interpretation of international private law it is natural that the solution of making use of the experience and authority of the International Court of Justice has also been advocated. This could be done in two different ways. Disputes as to interpretation of conventions can be submitted for decision by the Court, or an advisory opinion thereon can be requested from the Court.

Clauses granting exclusive jurisdiction to the International Court of Justice (or to its forerunner the Permanent Court of International Justice) for the interpretation of private law conventions were adopted in 1928 (interpretation of the so-called Hague Treaties on international private law)¹⁶ and in 1948 (interpretation of the Berne Convention on copyrights).¹⁷ Prewar attempts to adopt a similar provision for the interpretation of the Paris Convention on the protection of industrial property failed, largely due to the resistance by the United States which at that time was not a party to the Statute of the then Permanent Court of International Justice.

Under article 36 paragraph 2 of the Statute of the International Court of Justice, the States parties to the Statute "may at any time

¹⁵ The Conditions of Carriage established in 1938 by the prewar International Air Traffic Association only contained a provision limiting the jurisdiction where actions could be brought. The present IATA conditions of carriage do not even contain such provision.

¹⁶ Protocole pour reconnaître à la Cour Permanente de Justice Internationale la Compétence d'interpréter les Conventions," drawn up at The Hague Conference of 1928, signed by 17 continental states in 1931 and ratified by Belgium, Netherlands, Estland, Portugal, Norway, Denmark, Sweden and Finland. Cf. Gutzwiller in *Annuaire Suisse de Droit International* 1945 II, p. 71.

¹⁷ In the Brussels Conference of 1948 a new Article 27bis to this effect was inserted in The Berne Convention. Cf. G. Beguin in *Annuaire Suisse de Droit International* 1949 (VI) 289-292.

declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning the interpretation of a Treaty." Nearly all states which have adhered to the Statute of the International Court of Justice have accepted the general jurisdiction of the Court under this provision¹⁸ which means that any disputes between these states concerning the interpretation of private air law treaties such as the Warsaw, Rome and Geneva Conventions, can already be submitted to the Court.

In 1929 the International Law Institute, following proposals by its Reporter Mr. Strisower, adopted in New York a resolution by which it recommended that any dispute as to the interpretation of a treaty provision—which would pre-suppose that some interpretation had been given by the legislature or by a final court decision or by an administrative authority of some State—would be submitted for decision to the Permanent Court of International Justice. The Resolution went further than the compulsory jurisdiction clauses contained in the Hague Protocol and the Berne Convention, in that it recommended that the decision by the Court would bind all Contracting States, parties to the proposed convention.¹⁹

It seems doubtful to the highest degree whether any State will ever raise a formal dispute on a mere question of interpretation of private law conventions dealing with private interests. So far the opportunity existing under the Hague Protocol of 1928, under article 27 bis of the Berne Convention on copyrights and under article 36 of the Statute of the Court has never been used. The idea that some State party to the Warsaw Convention might sometime e.g. raise a dispute with Great Britain on the interpretation of article 1 of that Convention as adopted by the House of Lords and might submit that dispute to the International Court, is obviously sheer illusion. The principle of promoting uniform interpretation by accepting compulsory jurisdiction of the International Court of Justice may be theoretically correct, but in practice it simply does not work and therefore must be rejected as a suitable means to achieve the desired unification.

If the proposal made at the Paris meeting of the "Warsaw Subcommittee" concerning the interpretation by the International Court of Justice would have aimed at submitting questions of interpretation to the ordinary jurisdiction of the Court, the statement in the above cited footnote—"that such provision would have little, if any, value because it is unlikely that cases arising under this Convention would become the subject of a dispute between States"—would hold good. Actually, however, one of the main advantages of the suggested solution was that by making use of the advisory jurisdiction, no formal disputes between states would be required.

¹⁸ Yearbook of the International Court of Justice 1950-51. Leyden, 1951, 192.

¹⁹ XXXV Annuaire (1929) II, 305.

THE COURT'S ADVISORY JURISDICTION

This brings us to the real object of this article: the possibility of promoting uniform interpretation by way of advisory opinions of the International Court of Justice.²⁰ From its birth the Court has possessed the powers to give advisory opinions. These powers were rooted in article 14 of the Covenant of the League of Nations stating that the Court may also give advisory opinions.²¹ When the Permanent Court of International Justice became the International Court of Justice it retained its advisory jurisdiction which now is based on article 96 of the Charter of the United Nations and on articles 65 to 68 of the Statute of the Court. One most important innovation, however, was adopted—not without discussion—at the instance of the United Kingdom delegates. Whereas under the old Statute of the Court advisory opinions could only be requested by the Council of the League of Nations, Article 96 of the United Nations Charter now provides that besides the General Assembly and the Security Council, the other organs of the United Nations and specialized agencies—which may at any time be so authorized by the General Assembly may also make use of the Court's advisory jurisdiction.²²

Nearly all of the specialized agencies have been granted such rights under the Agreements with the United Nations by which they were constituted as its specialized agencies. The Agreement with the International Civil Aviation Organization which became effective on May 13, 1947 by approval of the Assembly of ICAO²³ contains the following provisions in its Article X:

- “(2) The General Assembly of the United Nations authorizes the ICAO to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the ICAO and the United Nations or other specialized agencies.
“(3) Such request may be addressed to the Court by the Assembly or the Council of the ICAO.

²⁰ The use of advisory opinions by some International Committee of legal experts has been suggested at various occasions in relation to the Berne Convention on Copyrights, i.a. by Grünebaum-Ballin in 1928 at the Rome Conference for the revision of said Convention. Cf. Gidel *l.c.* (note 1a) at 266.

²¹ The French text reads: “la Cour donnera,” which would seem to impose a duty on the Court to give advisory opinions when requested to do so. Cf. the Memorandum of 1922 by John B. Moore, Judge of the Court, published in Series D, no. 2, Annex 58a (p. 383) of the Publications of the Permanent Court of Justice.

²² Article 96 of the Charter reads:

“1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

“2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.” The British proposal and the subsequent discussions can be found in Vol. XII of the Documents of The United Nations Conference on International Organization at San Francisco 1945 (New York/London, 1945 etc.) pp. 88-90. See also on advisory jurisdiction vol. XIII *passim*.

²³ Cf. Article XXII of the Agreement.

"(4) When requesting the International Court of Justice to give an advisory opinion, the ICAO shall inform the Economic and Social Council of the request."²⁴

It would be difficult to maintain that promoting uniform interpretation of the private air law Conventions would not fall within the scope of the activities of ICAO. This means that ICAO is authorized to request advisory opinions from the Court on any provisions of the Warsaw or other air law conventions which are subject to different interpretation.

The organs of ICAO by which such requests are to be addressed to the Court are the Assembly and the Council. The question might be raised as to whether requesting advisory opinions of the International Court would fall within the scope of the functions which the Chicago Convention has assigned to the Council. The enumeration of functions in articles 54 and 55 of said Conventions could not easily be construed to include such activity. However, it is submitted that by approving the Agreement with the United Nations which authorizes both Assembly and Council of ICAO to approach the International Court for advisory opinions, the Assembly of ICAO has utilized its power "to delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization."

Thus with the existing legal apparatus, and without any new international Convention or Agreement being required, it is possible already now to have advisory opinions from a legal body which possesses the greatest international authority in legal matters.

It is true that the Courts will not be bound to follow the opinions of the International Court of Justice unless their own national legislation would oblige them to do so. It is one of the essential differences between the ordinary jurisdiction of the Court and its advisory jurisdiction that the latter is not binding upon the States and therefore still less upon the national courts. If this difference has been denied or belittled by some authors²⁵ it was with a view to the Court's opinions relating to "disputes" ("differends") as distinguished from "legal points" ("points"), a distinction having its roots in Article 14 of the Covenant. The Court itself during the first ten years of its activity has done much to reduce the distance between its advisory opinions and its judgments when dealing with actual disputes between States. In 1927 a Commission appointed by it to report on Article 31 of the Statute stated: "In reality *where there are in fact contending parties*, the difference between contentious cases and advisory cases is only nominal" (italics supplied).²⁶

²⁴ The full text of the Agreement can be found in the Yearbook of the United Nations 1946-47, pp. 741-745.

²⁵ N. Politis in the Official Journal of The League of Nations, Special Suppl. nr. 65, p. 47. Cf. Ch. de Visscher in 26 Recueil des Cours de l' Académie de Droit International (1929) at 23-51.

²⁶ Permanent Court of International Justice. Series E. no. 4, p. 76. Cf. the dissenting opinion of Mr. Justice Krylov in the case of the interpretation of the Peace Treaties with Bulgaria, Hungary and Rumania. Reports I. C. J. 1950, 65 at 107.

Mr. Justice Hudson has warned against the assimilation of the ordinary and advisory jurisdiction. Speaking of a statement by Politis to that effect, he has written in a postwar article: "such statements are not harmless exaggerations; they may be positively mischievous in their influence both on the Court and on the popular appreciation of its contributions. Advisory opinions are precisely what they purport to be: they are advisory. Not legal advice in the ordinary sense, not views expressed by counsel for the guidance of clients, but pronouncements as to the law applicable in given situations formulated "after deliberation by the Court."²⁷

Though the advisory opinions of the International Court of Justice consequently are not binding this does not mean that they do not have great authority. In his recent book on International Law Schwartzberg goes so far as to say that "for all practical purposes their value as persuasive authority must be considered as being equal to that of the Court's judgments."²⁸ Even if one would hesitate to go that far, it is safe to agree with Goodrich and Hambro that the advisory opinions of the International Court of Justice "are not likely to be lightly disregarded;"²⁹ far less likely, in any case, than the judgment of a national court might be disregarded by the courts of other countries. Indeed, it is difficult to imagine a national court ignoring an advisory opinion of the International Court of Justice on the interpretation of some private air law convention, except where a contrary binding authority on the point would already happen to exist in that country.

Great persuasive authority, but without a binding force which would be unpalatable to so many national sensibilities: it is submitted that more can not be achieved in the present stage of international development for the purpose of arriving as near as possible at uniform interpretation of the existing international rules for the unification of private air law.

There should be no illusion that even this modest approach would not encounter strong opposition, which psychologically will have its roots in the inborn distrust of many lawyers of anything international in the field of private law. Even in so international a climate as that of private air law the sovereignty of the national state exercises a power on the minds which it has long since lost where interests are at stake affecting infinitely more deeply the sovereignty of the States. Only by mentioning the words "International Court" one is apt to create an atmosphere of hostility which—as it is difficult in the present time still to belittle the value of international approach—will shroud itself in so-called "realism." It is not so long ago that the majority of men

²⁷ M. O. Hudson, *The Effect of Advisory Opinions of the World Court*, 42 *American Journal of International Law* (1948), 630. See also the very clear statement of the Court on its advisory jurisdiction in its advisory opinion of March 30, 1950 (see note 26) at 71.

²⁸ G. Schwartzberger *International Law* 2d ed. (London, 1949), II, 487.

²⁹ L. M. Goodrich and E. Hambro, *Charter of the United Nations*. (Boston, 1949), 487.

found the idea of starting scheduled air services most unrealistic. How unrealistic does this kind of realism sound now! In aviation, more than anywhere else, today's realism is the joke of tomorrow. This applies also to the legal aspects of aviation.

POSSIBLE OBJECTIONS

If it is difficult to fight the psychological inhibitions working against international solutions such as the one proposed here, it is more easy to answer the practical objections which may be raised against it:

The advisory jurisdiction itself has for a long time been a thorn in many American eyes. The opposition against it was led by John Basset Moore, himself a judge of the Court, who has repeatedly argued that giving advisory opinion is contrary to the character of the judicial function.³⁰ This thesis has been successfully refuted by Mr. Justice Hudson who has pointed to the numerous examples of advisory jurisdiction exercised by state courts including American and Canadian Courts.³¹

Nevertheless the objection was used in 1925 as one of the main arguments by the isolationists when fighting against the United States becoming a party to the Statute of the Permanent Court of International Justice.³² Whatever one's personal feelings may be on this subject, it is clear that by signing the Charter of the United Nations or otherwise adhering to the Statute of the International Court of Justice the States have accepted the advisory jurisdiction of the Court to the same extent and under the same terms as they accepted its ordinary jurisdiction, and no local views or prejudices could any longer raise an obstacle against the use of either of these two activities of the Court whenever such use could be beneficial.

The objection against the proposed procedure of requesting advisory opinions on the interpretation of private air law Conventions could be made more specific by pointing to the abstract nature of the questions involved which by supposition would not necessarily be the subject of an actual dispute between States. The question of whether abstract issues may be submitted to the Court for an advisory opinion has been frequently discussed.³³ In 1922 a proposal to add to the Rules of the Court a provision to the effect that the Court reserves the right to refrain from replying to questions which require an advisory opinion

³⁰ Cf. his Memorandum of 1922 in the Publications of the Permanent Court of International Justice, Series D, No. 2 Annex 58a (at p. 383), also 22 *Columbia Law Review* (1922) 507. Other opponents against the advisory jurisdiction of the Court are listed by Hudson in his course for the *Académie de Droit International de la Haye* (see following note) at p. 406.

³¹ *Les Avis Consultatifs de la Cour Permanente de Justice Internationale*, 8 *Recueil des Cours de l'Académie de Droit International de la Haye* (1925), 341, 382-400.

³² D. F. Fleming, *The United States and The World Court* (New York, 1945), 52-67. See also Ch. de Visscher in 26 *Recueil des Cours de l'Académie de Droit International* (1929) at 66-73.

³³ Cf. M. O. Hudson, *Permanent Court of International Justice 1920-1942* (New York, 1943), 497.

on a theoretical case, was rejected.⁸⁴ Whatever the Court's rights in this respect, it can hardly be denied that the interpretation of an international convention is an appropriate issue to be submitted to the Court since Article 36 of the Statute itself mentions as the first item in the so-called "facultative clause" the interpretation of a Treaty.

Now it is clear that the character of a question of interpretation does not change if it is submitted to the Court in the form of a request for an advisory opinion instead of a formal dispute between two States.⁸⁵ Therefore, there can be no doubt that questions of interpretation of air law conventions fall within the advisory jurisdiction of the Court. This is confirmed by the past history of the Court's activity. Of the 27 advisory opinions delivered by the Court before the war 10 were not related to existing disputes between States.⁸⁶

If the above-quoted footnote to the Draft of a Revised "Warsaw Convention" gives a correct statement of the reason which prompted the "Warsaw Sub-Committee" not to insert in its Draft a provision dealing with the possibility of requesting advisory opinions of the International Court,⁸⁷ it is submitted that that majority must have been laboring under a misconception as regards the character of advisory opinions.

Another question which may be raised is whether the International Court of Justice is an appropriate court to consider problems of private law. At various occasions the importance of the Court's activity in the field of private law has been stressed.⁸⁸ It has even been said that where the Statute of the Court speaks of "general principles of law recognized by civilized nations" as one of the main rules of law to be applied,⁸⁹ the general principles of private law are among the most important of these general principles.⁴⁰ Speaking more specifically of advisory opinions Schwartzberger has stated that "the request for an advisory opinion need not be limited to a question of international law, but may turn upon an issue involving exclusively the interpretation of municipal law."⁴¹

⁸⁴ Publications of the Permanent Court of Justice Series D, no. 2, at 161 and 308.

⁸⁵ Cf. The broader statement by President Coolidge in his Annual Message to Congress of 1925: "Deciding the question involved upon issues submitted for an advisory opinion does not differ materially from deciding the question involved upon issues submitted by contending parties." (Quoted by D. F. Fleming, in his note 32 cited work, at p. 55).

⁸⁶ L. M. Goodrich, Nature of the Advisory Opinions of the Permanent Court of International Justice. 32 *American Journal of International Law* (1938), 738 at 744-745.

⁸⁷ The pertinent phrase reads: "The majority, however, considered that such a provision would have little, if any, value because it is unlikely that cases arising under this Convention would become the subject of disputes between States."

⁸⁸ A. Hammarskjöld, *La Cour Permanente de Justice Internationale et le Droit Internationale Privé*, in his collected essays *jurisdiction internationale*, (Leiden, 1938), 257-282; G. Ripert in 44 *Recueil des Cours de l'Académie de Droit International de la Haye* (1933) 565-664.

⁸⁹ Article 38, para. 1. sub c.

⁴⁰ Ripert (see note 38) at p. 579.

⁴¹ *International Law* 2d ed. (London, 1949) II, 481.

It is interesting to note in this connection that the past career of many of the judges of the Court points to a thorough experience in matters of private law, either as judges or as professors of civil law or as authors of treatises on questions of private law. It would indeed be difficult to hold that the judges of the national courts would be in a better position or more able to construe the air law conventions than are the judges of the International Court, with their vast international experience, their unbiased state of mind, and with the excellent library of the Court and of the Peace Palace at their disposal, offering one of the most complete collections of comparative law. Some experiences with decisions of national courts construing the Warsaw Convention seem to prove at least that the ability of the national courts does not offer such safeguards against doubtful interpretations that an experiment with the International Court of Justice would not be warranted. As had been pointed out before, the jurisdiction of the Court for the interpretation of private law conventions has been accepted at various occasions by the States and nobody has ever denied the Court's competence in this respect.

Is there any danger — and this would be a more practical objection — that by submitting from time to time questions of interpretation of private air law conventions to the Court, the Court's docket would be too heavily burdened? This question has been strongly denied by the Legal Advisor of the International Labour Office in his plea for a more liberal use of the advisory jurisdiction of the Court by the specialized agencies of the United Nations.⁴² Fear for overburdening of the courts, moreover, is seldom a sound argument when the advancement of justice is involved.

In order to alleviate the additional task which would be imposed upon the Court when the procedure here proposed were to be adopted, the Court might consider the possibility of applying Article 26 of the Statute. Under this Article "the Court may from time to time form one or more chambers, composed of three or more judges for dealing with particular categories of cases; for example, labor cases and cases relating to transport and communications."

It is true that in order to have an air law chamber functioning for the purpose here suggested, the Court would have to adopt an amendment to its present Rules which provide that advisory opinions are to be given by the full Court.⁴³ However, the Court is empowered to

⁴² C. W. Jenks, *Status of International Organizations in Relation to the International Court of Justice* 32 *Transactions of the Grotius Society* for 1946 (1947), 1-42, at 16.

⁴³ Rule 84: "Advisory opinions shall be given after deliberation by the full Court, etc."

(It is to be noted that the text offered in the publications of the International Court of Justice Series D, no. 1 leaves out the word "full," whereas the French text has retained the words "en séance plénière"). The requirement of a full court for advisory opinions was adopted in 1922 (Publications of the Permanent Court of Justice, Series D, No. 2 at p. 98) not without some discussion (i.c. at p. 395). The requirement was defended by Mr. Justice D. Negulesco on the ground that otherwise not all legal systems would be necessarily represented (i.c., at 476).

change its own Rules at any time it deems fit.⁴⁴ It is believed that the creation of a Chamber on Air Law could be an important step forward in the international development of private air law.

One real difficulty should yet be considered. There are still a number of States which are not party to the Statute of the International Court of Justice, but which have signed and ratified the Warsaw Convention.⁴⁵ The list of States which are members of the International Civil Aviation Organization without having adhered to the Statute is even greater.⁴⁶ Could these States reasonably be supposed to support a scheme, based on the assumed authority of a Court which they have not recognized?⁴⁷

Before giving an answer to this question two things should be kept in mind. In the first place it is the essence of the proposed procedure that no States will be bound by the advisory opinions of the International Court; not the States which are party to the Statute, and still less the States which have not adhered to it. The opinions being advisory the States are free to grant them as much authority as they deem appropriate.

In the second place the reason why States do or do not adhere to the Statute of the International Court is chiefly of a political character; it is largely due to the last war that a number of the States, party to the Warsaw or Chicago Convention, still have not yet adhered to the Statute of the International Court of Justice. The question of the uniform interpretation of private law conventions has little, if anything, to do with such political considerations. By agreeing to the International Court of Justice playing some part in the uniform development of international private law, a State would not prejudice its position as to the Court's jurisdiction with respect to the legal relations between States.

Nevertheless the "Warsaw Sub-Committee" which met in Paris in January 1952 feared that by inserting a reference to the International Court of Justice in its Draft the acceptability of the new text for those States which are not party to the Statute of the International Court of Justice might be endangered.⁴⁸ It was also pointed out that the provision was not necessary in order to follow the suggested procedure. It is difficult to deny the strength of this argument. The sole purpose served by having an express reference to the International Court in

⁴⁴ Cf. Article 30 of the Statute.

⁴⁵ The following States having ratified the Warsaw Convention are not a party to the Statute of the International Court of Justice: Bulgaria, Germany, Hungary, Ireland, Italy, Portugal, Rumania and Spain. Neither are Austria and Japan which signed but did not ratify the Warsaw Convention.

⁴⁶ The following States listed in March 15, 1951 by the U. S. Department of State as parties to the Chicago Convention are not a party to the Statute of the Court: Austria, Ceylon, Finland, Ireland, Italy, Jordan, Portugal and Spain.

⁴⁷ The difficulty is more serious where the interpretation of a multilateral convention is subjected to the ordinary jurisdiction of the Court. Cf. Gidel (note 2) at 281-283.

⁴⁸ If the author's personal recollections are correct this was the reason why the Sub-Committee decided not to adopt the proposed paragraph which would have referred to the advisory jurisdiction of the Court.

the Warsaw and other private law conventions would be to reinforce the influence of the Court's advisory opinions on the uniform interpretation of private air law. It must be seriously doubted, indeed, whether this advantage would not be outweighed by the disadvantage of the new text becoming less acceptable to a number of States.

Having dealt with the various objections which may be raised against the proposed procedure it is time to come now to a more positive discussion of it. The following suggestions are made in a tentative way and are subject to modifications without the central idea being affected thereby.

This central idea could be thus summarized: On the one hand there exists an undeniable need for uniform interpretation of the private law conventions in order to let them have a unifying effect which does not only exist on paper. On the other hand we possess already in the present stage of international development an apparatus consisting of (1) a standing committee of experts in air law representing the views of the different countries and legal systems as to problems of air law: the Legal Committee of ICAO; (2) an international body which is able to judge on the political, economic or technical questions involved in the interpretation of the private air law conventions; and finally (3) an international court of recognized authority.

The international rules of law necessary to make use of this apparatus for the sake of promoting the desired uniform interpretation are also ready without any new agreement or convention being required. Once admitted that advisory opinions by the International Court of Justice on private air law provisions which lend themselves to double interpretation would at least to a certain extent advance the uniform interpretation of such provisions, the conclusion seems inescapable that the international bodies which are created "to promote the development of all aspects of international civil aeronautics" would fall short in their duties if they fail to make use of all means which are offered to them for the performance of this task.

SELECTION OF QUESTIONS

The first step to be taken would be for the Legal Committee of ICAO to consider—subject to approval by the Council—which questions of interpretation are appropriate to be submitted to the International Court of Justice for an advisory opinion. Not all problems discussed in textbooks or law reviews are of a nature that a request for an advisory opinion would be warranted. The International Court of Justice is not an academic institute and it should not be worried with theoretical problems which either do not arise in practice or else do not offer an actual danger of multiple interpretation. "It is fortunate that the twelve requests for advisory opinions which so far have been made did not present an hypothetical or abstract character and were related to actual problems requiring an immediate and practical solution. The

Court has not been made the professor of the Council. No legal problems of the future have been submitted to it, only current problems."⁴⁹

The following questions deserve consideration when the Legal Committee will have to decide upon the conditions which are to be fulfilled in order that a problem of interpretation may be deemed appropriate for submission to the Court:

1. Will it be necessary that there be disagreement between two or more states as to the correct interpretation of some provision of one of the private air law conventions? The answer, obviously should be "yes" in a sense that where there exists unanimous agreement, the presumed problem is not an actual "problem." However, the fact of all members of the Legal Committee being of one mind on a certain issue does not offer such general agreement as to insure uniform interpretation. In fact, where the unanimous opinion would go against the decision rendered by some national court, it would rather point to a great probability of future court decisions going against the one previously rendered. So much can be said, however, that where the unanimous opinion of the Legal Committee is in conformance with the only decision or decisions rendered on the point, if any, there is no reason for submitting the question to the International Court of Justice.

2. Should it be a prerequisite that the questions to be submitted to the International Court must have been the subject of a judgment of some national Court? The problem is a difficult one. It certainly would be a gross simplification to say that the lack of a court decision proves that the question has no actual importance. This may be illustrated by an example taken from that most frequently applied air law convention, the Warsaw Convention. Article 22, which itself is among the most frequently invoked provisions of this Convention, limits the Carrier's liability for lost or damaged baggage or freight to 250 French gold francs *per kilogram*. To my knowledge there does not yet exist one court decision as to how this rule has to be construed in case of partial loss or damage. Three answers are possible:

- (1) the limit should be calculated on the basis of the weight of the entire shipment (or all baggage carried under one baggage check respectively), or
- (2) the limit should be calculated on the basis of the weight of that piece of freight or baggage in which the loss or damage occurred, or
- (3) the limit should be calculated on the basis of the weight of the lost or damaged article itself.⁵⁰

It is evident that the amount of compensation will greatly depend upon the answer to be given to this question. There does not even seem to exist a uniform practice among the largest airlines. Here is clearly a situation where an advisory opinion of the International Court of Justice would be

⁴⁹ M. O. Hudson in 8 *Recueil des Cours* (1925), 341 at 409 (in French).

⁵⁰ The "Warsaw" Sub-Committee has chosen the second solution in its Draft of January 1952. Article 15, para. 4 of this Draft reads as follows: "For all claims arising from the loss of, damage to or delay of registered baggage or cargo, the liability of the carrier shall be limited to a maximum sum representing (250) francs per kilogram of the gross weight of such piece or pieces of the registered baggage or cargo as are actually lost, damaged or delayed; provided that, where the loss or damage of one piece of registered baggage or cargo affects the value of other pieces included in the same baggage check or airway bill, the gross weight of such pieces shall also be taken into account for determining the limits of liability."

most useful in promoting uniform interpretation of a provision which is so vitally important to both the air carriers and their customers.

It is, therefore, suggested that it would be unwise to exclude formally all issues which have not been the subject of a court decision. This does not mean, of course, that the Legal Committee should not be very careful in accepting questions for submission to the International Court which would not meet the "actuality test" of having been already the issue of some litigation.

3. If, contrary to this suggestion, the foregoing question were to be answered in the affirmative (i.e., that there should exist already one or more judgments of national courts on the issue), another question arises: should the required judgment have to meet certain conditions e.g., that it was delivered by a Court of a Contracting State, or that it was a judgment of the highest court in the State, or that the judgment was final according to the law of the country where it was rendered.

It is clear that the argument offered above against requiring some previous judgment of a national court, applies more strongly if one would require moreover that such judgment should meet certain conditions.

4. The most extreme condition would be to require two contradictory decisions rendered previously by two courts of Contracting States on the same question of interpretation.

5. Should there be a limitation *ratione materiae* of the questions to be submitted to the Court?

No general rule separating the important from the unimportant issues would seem possible except that preference should be given to the interpretation of such provisions which are more frequently applied. This means that questions of interpretation of the Warsaw Convention generally should have preference over questions of interpretation of the other private air law conventions.

In view of the purpose of the proposed procedures which is not to get advisory opinions on specific cases but rather to promote the uniform interpretation of provisions which lend themselves to various interpretations, no questions should be submitted to the Court which are so tied with the facts of each specific case that it would be asking the impossible to request an opinion *in abstracto*. This would exclude, for example, the request for an advisory opinion as to the meaning of "wilful misconduct" as used in Article 25 of the Warsaw Convention.

General opponents of the system of advisory opinions might say that questions of interpretation of legal texts are always too closely connected with the facts to which they are to be applied that an opinion on a question of interpretation *in abstracto* can never be given. This absolute and rather dogmatic point of view is refuted by the facts. A few examples taken from the Warsaw Convention may suffice. The question of whether the words "High Contracting Party" in Article I of the Convention should be taken to include those Signatory States which did not ratify the Convention has nothing to do with the facts of the individual cases, nor has the question of how the limit of the carrier's liability for lost or damaged baggage or freight should be computed under Article 22 of the Convention.

SUGGESTED PROCEDURE

On the basis of the foregoing observations the following procedure is tentatively suggested. Either the Council of ICAO or any Member State may propose to the Legal Committee that a question of interpretation be considered for submission to the International Court of Justice. Proposals of States which are party to one of the air law conventions without being a member of ICAO should be addressed to the Council.

Any such proposals should be circularized well in advance of the meeting of the Legal Committee at which they will be discussed, so that the States will have sufficient time to send in their remarks and the Legal Bureau of ICAO will have time to prepare a comment. Discussion of all proposals made, if any, should be a standing item on the agenda of the Legal Committee. The normal rules of procedure of the Legal Committee should apply. This means that in order to be discussed the proposal should be supported by at least one other represented State.

At this stage the Legal Committee can do one of three things. It may reject the proposal, either because it holds the question involved to be not of a controversial nature, or because it finds that the question has no actual importance, or because the question is too much connected with the facts of the individual cases. If it rejects the proposal on the first ground, the Committee should clearly indicate its unanimous opinion as to the correct interpretation of the provision concerned. If the proposal is not rejected, the Committee can at once decide that the Council will be asked to request an advisory opinion thereon. In this case it will appoint a person who on behalf of the Committee, and assisted by the Legal Bureau, will give such explanations as may be asked by the Council.

Finally the Committee may decide that the question be referred first to a Reporter, who will investigate all aspects involved and who will report and advise on it at the following Session of the Legal Committee. The Legal Committee can then take its final decision as to the desirability of submitting the question to the International Court of Justice. As has already been pointed out, the Legal Committee itself has no power to request advisory opinions of the Court. Such requests should be made by the Assembly or by the Council of ICAO. Obviously the Assembly is not an appropriate body to take a decision on the technical legal questions which would be involved. This does not mean that the Council could not find it desirable to have a decision of the Assembly as to the principle of requesting advisory opinions on these matters of interpretation. But once the Assembly has expressed its general agreement with the procedure, it should be left to the Council whether any specific request should be passed on to the Court.

The Council will have to show the greatest restraint in exercising its discretionary powers in these matters. It is difficult to see how—the principle of the suggested procedure having been accepted—specific

questions of interpretation of the existing private air law conventions could be so complicated by political or economic aspects that the legal interest of uniform interpretation might be overshadowed thereby.

The tentative character of the procedure as worked out above is once more emphasized. The main reason for concluding these remarks by the outline of a procedure, is to make it very clear that by accepting the general idea advocated in this article, one would in no way make the International Court of Justice an academic forum for all kinds of theoretical legal questions. It would be the task of the Legal Committee to prevent other problems of interpretation than those having an actual and practical interest, from going to the Court.

It is respectfully submitted that the Legal Committee and the Council of ICAO should thoroughly consider the possibility of promoting uniform interpretation of international air law conventions, which has been discussed here. The importance of interpretation for the unification of air law cannot be overestimated. In fact it might be argued with good reasons that a clear and uniform interpretation of the existing Warsaw Convention is even of greater practical interest to civil aviation than the drafting of new conventions which takes so much of the present time of the Legal Committee.

UNIFORM INTERPRETATION AND REVISION

When Major K. M. Beaumont in his Report to the Legal Committee of February 28, 1951,⁵¹ stated his case for an entirely new convention on the air carrier's liability to replace the present Warsaw Convention, he listed all points where in his opinion the present Convention is deficient, arguing that it would have no sense to introduce such a long list of amendments by way of a Protocol.

It is interesting to note that the majority of points raised by him involve questions where the language of the Convention is ambiguous or at least open to more than one interpretation, all points, therefore, where a uniform interpretation established by a well advised Court of recognized authority would take away most of the need for revision. The Legal Committee has now already devoted two or three meetings and one meeting of a Sub-Committee to the revision of the Warsaw Convention, with other meetings still to follow. The practical results of this work—accepting an optimistic estimate—will not be seen before 1960, when the new Convention, assuming that it will be adopted, may have been ratified by a sufficient number of States. There is no reason to be discouraged by this. Everybody familiar with international private law conventions knows that the mills of international legislation grind slowly. But if it is true that part of the deficiencies spotted by those who fight for a full scale revision could be cured in less time and with no risk of endangering wide acceptance of the Convention, it would be regrettable if the Legal Committee and the Council of ICAO should fail to grasp the opportunity offered to them by the present state of interna-

⁵¹ ICAO Document LC/WD 317, 19-3-51.

tional organization, while pursuing its work on the drafting of a new Convention. It may bear repetition that such a new Convention in the course of time will show other deficiencies and ambiguities, probably even before it became effective. The need for uniform interpretation will remain.

In a Resolution of November 14, 1947 the General Assembly of the United Nations "considering that it is a responsibility of the United Nations to encourage the progressive development of international law" and "that the International Court of Justice is the principal judicial organ of the United Nations," has recommended "that organs of the United Nations and the specialized agencies should from time to time review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled and should refer them to the International Court of Justice for an advisory opinion."⁵²

It is true that some of the "considerations" of this Resolution seem to indicate that the General Assembly most probably was primarily thinking of questions of international public law, but the Recommendation itself is worded in general terms and hardly allows a restrictive interpretation. It is suggested that this clear advice of the supreme organ of world cooperation should not be lightly set aside by those entrusted with international cooperation in the legal field.

⁵² United Nations, General Assembly, Official Records of the Second Session, Resolutions, Doc. A/519, p. 103.