

# AIR TRANSPORT AND WORLD ORGANIZATION

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## I

AIR transport, because of certain interrelated legal, economic, and political fundamentals, is itself essentially international, and must be so considered in any realistic plan for world organization. The conflicts between national and international interests inherent in these fundamentals, as shown below, have not been resolved.

### LEGAL

Every State has complete and exclusive sovereignty over the airspace above its territory. It has, therefore, full right to exclude or admit such foreign aircraft as it may determine, and to that extent can unilaterally control international air trade routes.

### ECONOMIC

Every State, by such exclusion or admission into its territory of foreign aircraft engaged in international commerce, directly affects world trade and the economic position of itself and of others.

### POLITICAL

Every State, in the exercise of its sovereignty, has the moral right to develop its air transport to the extent needed by its domestic and foreign commerce and other legitimate objectives. However, world organization may well require sufficient international control so that air transport does not become an instrument of unfair nationalistic competition or aggression and, thus, the source of serious international misunderstanding and dangerous ill-feeling.

## II

These three fundamentals are closely related. It is impossible to give sound consideration to the economic and political questions of international air transport without a clear understanding of what is included in the legal concept of "sovereignty over the airspace." From this concept spring most of the practical problems of air transport as an element of international relations.

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Prior to World War I, no agreement existed either between jurists or between statesmen as to the extent of national sovereignty in the airspace. Between 1901 and the outbreak of World War I in 1914 the question was actively discussed. Various theories were brought forward. These included: complete sovereignty through the whole airspace over national territory, with resulting political control of flight in national airspace; no sovereignty, with consequent complete freedom of flight; differing zone systems, generally with the upper airspace free and a lower stratum next the earth's surface under national control; variants of these. Questions of national security, rather than economic problems, were the basis of most of these early discussions.<sup>1</sup>

An ambitious international conference held in Paris in 1910, after careful diplomatic preparation, adjourned without reaching any decision on the primary problem—to what extent should international air navigation be free of political control by the State flown over.<sup>2</sup>

With the outbreak of World War I, military considerations immediately forced general acceptance of the sovereignty of each nation over its airspace. Air boundaries, as well as land boundaries, were promptly closed for security reasons. Belligerent aircraft flying over neutral territory were forced to land and their crews interned exactly as if surface boundaries had been crossed.<sup>3</sup>

At the close of World War I, the Aeronautical Commission of the Peace Conference was directed to prepare an air navigation convention. The purpose of this convention was to provide, for the first time, international rules to govern air navigation in time of peace. The United States took an active part in the preparation of this Convention but did not ratify it. The Convention was accepted by the other Allied and Associated Powers, and was adhered to by many neutrals. As the now celebrated "Air Navigation Convention of 1919," usually called the Paris Convention, it became the basis for much of the modern international law of the air.<sup>4</sup>

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1. HAZELTINE, *THE LAW OF THE AIR* (1911) 1-53; GARNER, *RECENT DEVELOPMENTS IN INTERNATIONAL LAW* (1925) 141-188; LYCKLAMA A NIJEHOLT, *AIR SOVEREIGNTY* (1910) 1-21; HENRY-COÛANNIER, *ÉLÉMENTS CRÉATEURS DU DROIT AÉRIEN* (1929) 1-25; COLEGROVE, *INTERNATIONAL CONTROL OF AVIATION* (1930) 42; 1 HYDE, *INTERNATIONAL LAW* (2d rev. ed. 1945) 585; Fauchille, *Le Domaine Aérien et le Régime Juridique des Aérostats* (1901) 8 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 414; Fauchille, *La Circulation Aérienne et les Droits des Etats en Temps de Paix* (1910) 17 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 55; Baldwin, *Law of the Airship* (1910) 4 *AM. J. INT. L.* 95-108; Kuhn, *The Beginnings of an Aerial Law*, *id.* at 109-132; McNair, *The Beginnings and the Growth of Aeronautical Law* (1930) 1 *J. AIR L.* 383; Bogert, *Problems in Aviation Law* (1921) 6 *CORN. L. Q.* 271.

2. COLEGROVE, *op. cit. supra* note 1, at 48; BLACHERE, *L'AIR, VOIE DE COMMUNICATION ET LE DROIT* (1911) 129-211; SPAIGHT, *AIRCRAFT IN PEACE AND THE LAW* (1919) 5; SLOTEMAKER, *FREEDOM OF PASSAGE FOR INTERNATIONAL AIR SERVICES* (1932) 12.

3. SPAIGHT, *op. cit. supra* note 2, at 8.

4. For the best account of the origins of the Paris Convention see ROPER, *LA CON-*

Article I states:

"The High Contracting Parties recognize that every power has complete and exclusive sovereignty over the airspace above its territory. For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto."<sup>5</sup>

With the passage of the Air Commerce Act of 1926,<sup>6</sup> later amplified by the Civil Aeronautics Act of 1938,<sup>7</sup> the United States definitely asserted, by federal statute, its sovereignty in the airspace over its territory. A similar position was taken by treaty. In the Pan American Convention on Commercial Aviation, signed at Havana in 1928 by the United States and various American republics, and later ratified by the United States and others, it is provided in Article I that:

"The high contracting parties recognize that every state has complete and exclusive sovereignty over the airspace above its territory and territorial waters."<sup>8</sup>

Flowing from national sovereignty of the airspace, each State has complete control, for political purposes, of the airspace over its territory and territorial waters. In practice it has been universally admitted since World War I that the aircraft of one State can enter the airspace over the territory and territorial waters of another State, in time of peace, only when authorized. This authorization may be by multilateral convention among several States concerned, by bilateral convention between two States only, or by permit issued by one State to a particular airline or a particular aircraft of another State. In every case, however, the authority to operate into the national airspace, or to land, either for refueling or to discharge or pick up cargo, must be granted by direct license of the State concerned.

The Paris Convention, in Article 2, provided that each contracting State should undertake in time of peace to accord "freedom of innocent passage" above its territory to the aircraft of other contracting States. In Article 15 it also provided that every aircraft of a contract-

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VENTION INTERNATIONALE DU 13 OCTOBRE 1919 (1930). Dr. Roper, now Secretary-General of the Provisional International Civil Aviation Organization, Montreal, took part in drafting the Paris Convention. See also COLEGROVE, *op. cit. supra* note 1, at 53-65; TOMBS, *INTERNATIONAL ORGANIZATION IN EUROPEAN AIR TRANSPORT* (1936) 42.

5. International Convention Relating to the Regulation of Aerial Navigation, October 13, 1919, reproduced from Official Bulletin No. 26, Dep't of State Publication 2143 (1944); COLEGROVE, *op. cit. supra* note 1, at 149.

6. 44 STAT. 568 (1926), § 6, 49 U.S.C. § 176 (1939).

7. 52 STAT. 973 (1938), 49 U.S.C. §§ 401-682 (1938).

8. DEP'T OF STATE TREATY SER. 840 (1931); COLEGROVE, *op. cit. supra* note 1, at 173.

ing State should have the right to cross the airspace of another State without landing, following the route fixed by the State flown over, with an additional proviso that the State flown over might require the aircraft to land for security reasons.

To that extent the Paris Convention provided by multilateral agreement among its member States for certain transit privileges. These privileges were, however, of no importance to international air transport as they applied only to private and other occasional flights. The last clause of Article 15, as finally amended and clarified, limited the rights of air transport, stating:

"Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."<sup>9</sup>

This provision gave to each State flown over unilateral power to determine whether world air trade routes might cross its territory with or without landing.

The Havana Convention of 1928 also contained provisions for the innocent passage of aircraft of member States. This was again of no particular importance in solving the transit problem. Few world routes were involved, as the only ratifying States, in addition to the United States, were Mexico, the Dominican Republic, and certain of the Central and South American States. Also, the rights of innocent passage, so far as scheduled air transport operations are concerned, have been construed as if the Convention contained a requirement for special license for such operations.<sup>10</sup>

As a result of the rights of route control flowing from the doctrine of sovereignty of the airspace, many bilateral agreements for the establishment of air trade routes were entered into before World War II, and franchises and licenses were issued directly to international air line operators.<sup>11</sup> Certain States, however, did not hesitate to withhold or severely limit the issuance of transit privileges. Neither Turkey nor China granted such permits to foreign air transport. The United States maintained exclusive control of trans-Pacific aviation. It granted no permits for scheduled foreign flights through Alaska,

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9. TOMBS, *op. cit. supra* note 4, at 60; ROPER, *Recent Developments in International Aeronautical Law* (1930) 1 J. AIR L. 395; SLOTEMAKER, *op. cit. supra* note 2, at 37, 105; 4 HACKWORTH, DIGEST INT. LAW, 359-362; INTERNATIONAL CONVENTION RELATING TO THE REGULATION OF AERIAL NAVIGATION, OCTOBER 13, 1919, DEP'T OF STATE PUBLICATION 2143 (1944).

10. 4 HACKWORTH, *op. cit. supra* note 9, at 366; 1 HYDE, *op. cit. supra* note 1, at 600; LATCHFORD, *The Right of Innocent Passage in International Civil Air Navigations Agreements*, 11 DEP'T OF STATE BULL. (1944) 19.

11. TOMBS, *op. cit. supra* note 4, at 100-121; LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY (1942) 373-402.

Hawaii, Midway, Wake, or Guam, nor through the Philippines during the period of its political control. Security reasons undoubtedly entered into some, if not all, of these decisions.

Across the North Atlantic were two practical air routes. One of these was controlled by Great Britain through its sovereignty over Newfoundland, an almost necessary stopping-place when safe range of aircraft was considered. The other route was via British-controlled Bermuda and via the Portuguese-controlled Azores to Lisbon. Portugal had authorized the use of the Azores for one British and one American operating company, but required that Lisbon be the first and last port of call in Europe when the Azores were used in trans-Atlantic service. Great Britain had permitted only American operations through Newfoundland and Bermuda (in addition to its own proposed operation), and such American operations were limited by the permit to two round trips per week. The United States reciprocally granted to a British company a permit for two trans-Atlantic weekly landings in United States territory. Other examples could be cited.

The International Civil Aviation Conference held at Chicago in 1944 again considered the entire question. Present were members of the United Nations (except Russia) and certain neutrals. The Conference adopted a new Convention on International Civil Aviation which, it is hoped, will soon come into force in substitution for both the Paris and the Havana Conventions. In Article 1 of the Chicago Convention, it is again asserted that:

"The contracting States recognize that every State has complete sovereignty over the airspace above its territory."

Territory, as defined in this Convention, includes territorial waters, following the earlier precedents.<sup>12</sup>

On many points the Chicago Conference failed to agree. But no one challenged the doctrine of sovereignty of the airspace. It may certainly now be accepted as the primary rule of the international law of the air, and must be so considered by any world organization. Any change in this doctrine can come into effect only if the States concerned agree to surrender part of their recognized sovereignty.

The Chicago Convention, in Article 5, gives certain limited rights of transit to the aircraft not engaged in scheduled international air services and to that extent is a multilateral transit agreement. The

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12. *International Civil Aviation Conference, Chicago, 1944, Final Act and Related Documents*, DEP'T OF STATE CONFERENCE SER. 64 (1945) 59; Convention transmitted by President Roosevelt to U. S. Senate, Message from the President of the United States—Convention on International Civil Aviation, 79th Cong., 1st Sess., Senate, Executive A, March 12, 1945; Convention favorably reported by Committee on Foreign Relations, U. S. Senate, 79th Cong., 2d Sess., SEN. EXEC. REP. No. 8, June 19, 1946; ratification by U. S. Senate approved July 25, 1946.

same Convention, however, restates, in Article 6, in the strongest possible terms, the rights of each State as to scheduled services:

"No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

The Chicago Conference also prepared and opened for signature two agreements known respectively as the "International Air Services Transit Agreement"<sup>13</sup> and the "International Air Transport Agreement"<sup>14</sup>, to be discussed later. They are legally multilateral permits under Article 6 of the Chicago Convention, authorizing, in the Transit Agreement, certain privileges, not rights, of flight over and landing for refueling in the territory of accepting States and, in the Transport Agreement, certain added commercial privileges. Any State accepting either agreement may renounce it on one year's notice. Fundamentally, therefore, the legal position since the Chicago Conference and World War II continues as before.

Any State, except during the time that it is committed otherwise by the Transit or Transport or other special Agreements, is still fully authorized to take advantage of its own political position and bargaining power, as well as the fortunate geographical position of its homeland and outlying possessions, and unilaterally determine (for economic or security reasons) what foreign aircraft will be permitted to enter or be excluded from its airspace, as well as the extent to which such airspace may be used as part of world air trade routes.

### III

The legal position of air transport as thus developed poses serious economic problems to any world organization. The decision of a State to admit or exclude foreign aircraft engaged in international commerce, either in transit elsewhere or for the purpose of discharging and picking up cargo, directly affects world trade and the internal economy of the State taking such action and that of other States.

Air transport has become an inseparable part of the complicated fabric of world transport. It is fast taking its place today beside ocean shipping as one of the great economic factors in the development of international commerce. Both serve the public—both are instruments of national transport and communication policy—both enter foreign territory to compete with local services for international trade. But the right of a State to control the use of these two world economic forces has in certain respects developed very differently.<sup>15</sup> Any State

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13. *International Civil Aviation Conference, op. cit. supra* note 12, at 87.

14. *Id.* at 91.

15. LISSITZYN, *op. cit. supra* note 11, at 403-405.

may refuse to allow the entry of aircraft of a second State, but it would be guilty of an almost unfriendly act if it refused the entry of merchant vessels of that State. In other respects the international rights and privileges of air transport and ocean shipping, as they affect world economy, are very similar—much more so than is indicated by popular discussion of “freedom of the air” and “freedom of the seas.” A brief statement of some of the historic background of the development of world transport may be useful.

The name of Hugo Grotius, the great Dutch lawyer and scholar, will always be linked with the rights now enjoyed by ocean shipping on the high seas. His arguments must today be reconsidered as applicable to world transport. It will be recalled that in the early years of the 17th Century claim was made in the name of the Portuguese (although really on behalf of Spain) that the Portuguese had exclusive control of parts of the high seas and the Indian Ocean on the trade route between Europe and the East Indies, that the Portuguese had sole right to navigate these seas and to trade with the Indies, that the Dutch must withdraw from this trade. On behalf of his countrymen, Grotius prepared his celebrated dissertation: “The Freedom of the Seas or the Right which belongs to the Dutch to take part in the East Indian Trade.”<sup>16</sup> He denied the right of the Portuguese, or anyone else, to claim sovereignty of the high seas or exclusive right to their navigation, and asserted the right of the Dutch to proceed to and trade with the Indies. He based his argument, as he states, on “the following most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it.”<sup>17</sup>

To sustain his first proposition, *the right to travel*, Grotius insisted in unanswerable terms on the inequity if not impossibility of national sovereignty over any part of the high seas and the consequent freedom of navigation open to all. In support of his second proposition, *the right to trade*, he claimed: first, that the Portuguese had no sovereignty over the Indies and that, as third parties, they had no right to interfere with the desire of the Dutch and the people of the Indies to trade with each other; and, second, that under the Law of Nations, no State or ruler “can debar foreigners from having access to their subjects and trading with them.”<sup>18</sup> In concluding Chapter I of his dissertation, he summarizes his position as follows:

“It follows, therefore, that the Portuguese, even if they had been sovereigns in those parts to which the Dutch make voyages, would

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16. GROTIUS, FREEDOM OF THE SEAS (Magoffin's Trans. 1916) Introductory Note.

17. *Id.* at 7.

18. *Id.* at 8.

nevertheless be doing them an injury if they should forbid them access to those places and from trading there.

"Is it not then an incalculably greater injury for nations which desire reciprocal commercial relations to be debarred therefrom by the acts of those who are sovereigns neither of the nations interested, nor of the element over which their connecting high road runs? Is not that the very cause which for the most part prompts us to execrate robbers and pirates, namely, that they beset and infest our trade routes?"<sup>19</sup>

To apply his argument more easily to present day conditions, it may be restated as follows:

- (1) No State has sovereignty over the high seas, and its navigation is free to all.
- (2) No State, whose sovereignty is not affected, has the right to interfere with reciprocal trading arrangements between two other States.
- (3) No State has the right to limit or control the entry into its territory for trading purposes of the transport of another State.

On his first contention the verdict of history is with Grotius. It is no longer disputed that the high seas are free to the commerce and navigation of all nations. No State would now be allowed to claim or to exercise rights of sovereignty over the high seas. In the language of Oppenheim: "The term 'Freedom of the Open Sea' indicates the rule of the Law of Nations that the open sea is not, and never can be, under the sovereignty of any State whatever."<sup>20</sup> This is the true doctrine of "Freedom of the Seas."

International air transport enjoys exactly the same "freedom of the air." As no State has or can exercise sovereignty over the high seas, similarly it can exercise no sovereignty in the airspace above the high seas. Every State has equal right to navigate in the airspace over the high seas without obtaining the consent of any other State.<sup>21</sup> This common right was formally acknowledged for the first time in Article 12 of the Chicago Convention. Under this provision States bound thereby agree that "over the high seas, the rules in force shall be those established under this Convention."<sup>22</sup> In other words, no single State can adopt such rules binding on the others, but the parties to the Convention as among themselves may properly agree to the rules which they will accept in the airspace over which none of them can claim sovereignty.

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19. *Id.* at 10.

20. 2 HACKWORTH, *op. cit. supra* note 9, at 654.

21. 1 GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER* (1932) 517; LISSITZYN, *op. cit. supra* note 11, at 403.

22. *International Civil Aviation Conference, op. cit. supra* note 12, at 62.

On his second contention, namely, that the Portuguese were not in fact sovereigns of the East Indies and could not, therefore, interfere with Dutch trading arrangements with the peoples of those islands, Grotius was fully sustained in his own time by the facts, and is now by the law. What he then asked is fully enjoyed today by both shipping and air transport. Arrangements between States under which they agree to the conditions and terms governing the entry into their territories of their respective aircraft are fully recognized under the doctrine of national sovereignty of the airspace. No State would be heard to claim a right to interfere in the trade route between the other States, unless the airspace sovereignty of this third State became involved. If only the high seas are between two States, they may agree as they alone wish as to the trade between them, whether it be by ocean shipping or air transport.

Grotius' third position, is, however, not so clear, either as a legal or economic proposition—that the Dutch should be entitled to trade with the people of the Indies even though the Portuguese held rights of sovereignty over the islands and objected to the entry of the Dutch ships. This assumes that there is a recognized right under international law for ocean shipping to pass through such territorial waters as it sees fit and to enter and trade in such national ports as may be desired, irrespective of the will of the State holding sovereignty over the territorial waters and ports thus entered. It also assumes that world economics and world trade will benefit if a State may unilaterally and against the will of the second State control the amount of trade between the two States so far as entry of the transport of the first State into the territory of the second is concerned.

No such technical legal right seems to exist. To the extent that a similar practice now exists as to ocean shipping, it would appear to result from various conditions quite apart from the doctrine of "freedom of the seas." National sovereignty over seaports is still fully recognized. In theory a State may open or close its ports as it desires. But the international right to exert this sovereignty by keeping all the ports of any country closed became, during the 19th Century, a very open question. Under international custom, developed in the first half of the 19th Century, merchant ships do enter foreign ports without special license, provided such ports have been opened to international commerce. This privilege has been variously ascribed to the existence of some type of implied license—also to the existence and indirect effect of various treaties of navigation and commerce, which reciprocally authorized the commercial entry of merchant ships into the ports of the States concerned. These treaties (together with the most-favored nation clauses in other treaties) created a situation which made it most difficult for any State, without good reason, to regulate the terms of entry, including freights to be charged, or to bar entirely

foreign merchant vessels of another State from entering one of its ports open to the foreign commerce of others.<sup>23</sup>

This historic process seems to have been initiated largely by a change in British shipping policy. Mance.<sup>24</sup> quotes as follows from a British Board of Trade Departmental Committee of 1918:

"The commercial treaties which govern our maritime relations cover a period of more than 250 years, during which our policy has gradually changed from the mercantilism of the Navigation Laws to the freedom of more recent times. Most of these treaties are relatively modern, but some, especially those with the old maritime Powers such as Sweden, Denmark, Spain and even France, Holland and the United States, go far back and bear the impress of the policy underlying them. Since the middle of the last century the navigation policy of this country has been based on the great ascendancy of the British mercantile marine and the widespread character of our trades, which made protection both unnecessary and undesirable. Our object was to obtain free access to the ports and the trade of foreign countries. It was therefore inexpedient to give British shipping privileged treatment at home since such action could only have afforded foreign countries an excuse for similarly differentiating in favor of their own vessels. In view of its relative size the British mercantile marine stood to gain more from free access to foreign countries than foreign flags stood to gain from free access to British ports; and conversely a policy of mutual restriction would for the same reason have caused more harm to British than to foreign shipping."

The present legal position as to shipping seems, therefore, to be about as follows: a State retains sovereignty over its ports and may in theory close them to others. However, by treaty and custom, there now exists what amounts to a general license, under which maritime States accord to shipping a privilege of passage through territorial waters adjacent to the high seas and of entry into ports to refuel or to discharge and pick up cargo. So far as shipping is concerned, Grotius is, under present practice, winning his last point—but not on the basis of a recognized international law *right* of access and trade.

But such is not the situation in the air. When the Paris Convention

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23. This generalization is that of the author of this article, not based on any single authority. For consideration of this difficult subject, see: 2 GIDEL, *op. cit. supra* note 21, at 9-58; 2 MOORE, INT. L. DIGEST (1906) 269-272; 5 *id.* 736-742; 2 HACKWORTH, *op. cit. supra* note 9, at 206-208. As to very limited indirect extent (except in time of war) of government control of ocean freight rates in foreign trade, see: Sanderson, *Wartime Control of Ocean Freight Rates in Foreign Trade, A World Survey*, BUREAU OF FOREIGN AND DOMESTIC COMMERCE TRADE PROMOTION SER. 212 (1940); Sanderson, *Control of Ocean Freight Rates in Foreign Trade, A World Survey*, BUREAU OF FOREIGN AND DOMESTIC COMMERCE TRADE PROMOTION SER. 185 (1938).

24. MANCE, INTERNATIONAL SEA TRANSPORT (1944) 73.

was being drafted, aviation security questions, not commercial problems, were still uppermost in the minds of men. Aircraft flying over cities and into the interior posed problems quite different from those of the entry of merchant shipping into coastal ports. Today, with the emergence of new airborne weapons of mass destruction, these security questions seem even more important. When the law of the air became fixed and national sovereignty of the airspace was accepted, the license to enter national territory for trading purposes, claimed by Grotius and historically developed for merchant shipping, was denied to air transport. Control was retained by the State flown over. It follows that:

- (a) Any maritime State may (with its ocean ship operators) unilaterally determine the volume and cost to the public of ocean shipping under its flag engaged in international trade to and through the open ports of a second State, irrespective of the economic effect on the latter or on world trade.
- (b) The second State, at the same time, may unilaterally determine the volume of the air transport of the first State which it may allow to enter its territory and may fix any conditions or limitations on such entry, irrespective of the economic effect on the first State or on world trade.

The international conflicts resulting from this situation are clear. They must be faced by any world organization.

As to the economic advantages of the free right to trade claimed by Grotius under his view of the Law of Nations, the present writer is not at all certain that the economically uncontrolled right of entry of foreign merchant vessels into national ports has always been a source of ultimate advantage to world economy. It may approach treason to make such a suggestion, but the world is in a state of transition, and it might be advantageous to reconsider world transport, both ocean shipping and air transport, as a single economic unit.

When a merchant vessel, for example of British registry, enters a foreign port, for example American, and discharges its cargo and then offers for sale its available load capacity for the carriage of outbound American cargo, the British vessel is actually offering for sale in the American port a British product in direct competition with a similar American product (the load capacity of American vessels) and without the price protection of a protective or other tariff. The British vessel was probably constructed in British shipyards under British costs. It is certainly manned by British seamen paid under British wage scales. It is operated under British regulations. The freights which it will charge are based on these conditions and costs. The capacity which it has to take on cargo in the American port is as much a British

export as would be an automobile transported from Great Britain and unloaded for local sale in an American port. Under international practice, the United States has no direct government control of the rate at which the British ship offers its available capacity in the American port, nor has it retained control of when or how often the British ship or others of British or other foreign registry enter the same port.

This is the unlimited "right to trade" for which Grotius contended. In practice in our own times and because of national ship-operating cost differentials, it has contributed toward the necessity for mounting government ship subsidies.

These and other economic problems of world shipping must not be overlooked in any final determination of the position of air transport and its national and international control. The sale of aircraft capacity to the public in a foreign airport does not seem to differ in economic theory or effect from the sale of ocean shipping capacity. Both provide competition with local services.

At the same time the present arbitrary right of any State to control world trade and trade routes insofar as is possible by barring or admitting foreign aircraft, irrespective of the effect on other States, is difficult to defend except when local national security and economic conditions are directly and vitally affected. Unjustified control and regulation, whether it be by a single State or an international body, must be kept to a minimum and the needs of the public for adequate transportation must always be in the forefront of any discussion. At some point, by some process, and through some international procedure not yet determined, the right to trade by air must be fostered, but at the same time controlled, so that world trade and the internal national economy of the States concerned is not at the mercy of the unilateral action of any one State, whether it be the State dispatching its aircraft in world trade or the State through or to which they will fly. These are international questions and must be decided accordingly.

#### IV

International air transport involves political problems equally as difficult as the economic questions discussed above. In any State, civil as well as military aviation is an instrument of national air power and must be so recognized.

"Air power," as the present writer has stated elsewhere, "is the ability of a nation to act through the airspace, in other words, to use controlled flight—such for instance, as the flight of aircraft. It is part of national power, to be used at home or abroad, in peace or in war. Though its uses are various, both military and civil, it is basically indivisible. The armed air forces represent but one use of the nation's

air power. Civil and commercial aviation are supported by and spring from the same basic national elements." 25

To the extent that any State consents to control or limitation of its civil air transport by the act of any other State or any international body, it foregoes one development of its potential air power. Every State has legitimate national objectives. Within the bounds of international comity it is entitled to bend its efforts to attain these objectives through such activities and instrumentalities as it may choose. In the exercise of its sovereignty, it has the right to develop its air transport to the extent needed by such legitimate objectives.

In the United States this has been recognized by federal statute. In the Civil Aeronautics Act of 1938, the public interest is held to include "the encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." 26

These are the objectives to which air transport, as part of the air power of the United States, has been dedicated. Its government and people are moved by the conscious and unconscious national desire for commerce, communications, and defense.

Such national incentives must always be included among the long range elements of national air power which contribute to its development. 27 They are the driving forces which spur the State and its people to action. National defense is such an incentive in every State. Air transport, though developed for civil purposes, is a vitally necessary part of the equipment for military operations, as the experience of World War II demonstrated far beyond further argument. Aircraft need not be armed or carry bombs to take part in war. Witness the parachute troops, the troop carrier commands, the air transport services of both army and navy. The aircraft used in war for such purposes are designed and used in time of peace for foreign and domestic commerce, as are civil air transport routes both national and international. When a State's freedom of action in time of peace in activities such as these is limited, its air power is directly affected.

Other national incentives in the development of air power are equally as important as that of military defense. The United States has recognized the development of its foreign and domestic commerce and communications as a national need. Other States have tacitly indicated similar incentives. The British, the Germans, the Dutch, the French, the Swedes, the Japanese—all of the great trading nations

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25. COOPER, *Air Power and the Coming Peace Treaties* (1946) 24 FOREIGN AFFAIRS 442.

26. 52 STAT. 973 (1938); 49 U.S.C. § 402 (1941).

27. Cooper, 1 AIR AFFAIRS (1946), No. 1, at 80.

of our time, were driven to develop air transport by the need for foreign commerce and communications. In parts of Canada, China, Australia and Russia air transport was the only practical mode of reasonably rapid domestic transport—built up in those cases by the national desire and demand for internal economic and political unity and trade. In the great colonial powers—Great Britain, France, the Netherlands, Italy, Belgium—an additional incentive appeared—the need to tie together through rapid air routes politically disintegrating empires.

Other incentives (toward objectives perhaps legitimate to the States concerned, though not in the eyes of the world) give much cause for concern. German foreign air transport, for example, was pushed far afield—particularly in South America—with the obvious desire of extending political and ideological infiltration. In the Pacific, supposedly civil air routes to Korea, Manchuria and the originally mandated islands were used by the Japanese to bind together an empire seized through violence and disregard of international commitments.

But it is not alone in such clearly improper cases that the development of international air transport may come into conflict with world interests. In the race for foreign commerce and national expansion, subsidy wars may develop; local air service of smaller and weaker nations may be forced to discontinue; national economy of other states may be seriously affected. Many things may occur that, in the meaning of the United Nations Charter, would create a "situation which might lead to international friction." While this possibility may be still debated by some, it is wise to recall that it was directly admitted by the Chicago Conference. The Preamble of the Convention on International Civil Aviation states that "the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and the peoples of the world, yet its abuse can become a threat to the general security."<sup>28</sup>

As stated earlier, any State in the exercise of its sovereignty has the right (as well as the duty to itself) to develop its air power, as represented in part by its air transport, to the extent needed by its domestic and foreign commerce and other legitimate objectives. But somewhere an impartial forum must exist in which the legitimacy of these objectives can be challenged by other States directly concerned. The development of national air transport of one State may injuriously affect another or cause a dangerous dispute. Again there must be a forum and machinery to remedy such a situation. World organization may well require sufficient international control so that air transport does not become an instrument of unfair nationalistic economic competition or political aggression and thus the source of serious international

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28. *International Civil Aviation Conference, op. cit. supra* note 12, at 59.

misunderstanding and dangerous ill-feeling.<sup>29</sup> But such regulation and interference with national action by any international body must, as stated earlier, be kept at a minimum. The needs of the public for adequate transportation must be always in the forefront of any discussion or decision. World commerce must never be unduly retarded.

## V

Such are the fundamental and difficult problems of international air transport. The machinery of inter-government world organization now available to meet these problems may perhaps be readjusted to become effective. It is ineffective today. The existing machinery includes: the United Nations Assembly, with the Security Council, the Economic and Social Council and its proposed Transport and Communications Commission; the Provisional International Civil Aviation Organization (PICAO), located in Montreal, with its Assembly and Council—to be succeeded by the permanent International Civil Aviation Organization (ICAO).

In August 1944 the United States issued invitations to member States of the United Nations and certain neutral States for an international civil aviation conference, referred to earlier in this article as the "Chicago Conference." It had before it two main objectives—first, to provide an organization to set up uniform technical and safety standards for world wide air navigation, as successor to the International Commission for Air Navigation organized under the Paris Convention of 1919; second, and at least of equal importance, to determine how and to what extent air transport could be subjected to international economic and political control. This conference succeeded in its first objective. It made progress towards its second objective but without final success.

The Conference drafted and opened for signature four international agreements: the Convention on International Civil Aviation;<sup>30</sup> an Interim Agreement<sup>31</sup> to continue in effect until the Convention becomes itself effective; the Transit<sup>32</sup> and the Transport Agreements,<sup>33</sup> previously mentioned in this article.

Under the Convention the permanent International Civil Aviation Organization (ICAO) includes an Assembly on which each member State is represented, and a Council elected by the Assembly. Under the Interim Agreement, a similar temporary organization (PICAO) is now actively functioning.

29. MANCE, *INTERNATIONAL AIR TRANSPORT* (1944) 103.

30. *International Civil Aviation Conference, op. cit. supra* note 12, at 59.

31. *Id.* at 44.

32. *Id.* at 87.

33. *Id.* at 91.

ICAO (and temporarily PICAQ) is fully authorized to adopt any necessary international standards for world wide unification of the technical and safety procedure so vital to every phase of international air navigation. No further world organization is needed to meet these problems.

In the economic and political fields the need for international organization remains unsatisfied. The Convention has given ICAO very limited economic powers, and these are largely of an administrative and advisory character, such as: research; study of operation of international air transport, including ownership of international services on trunk routes; investigation of situations appearing to present avoidable obstacles to development of air navigation; collection and publication of information, including cost of international operations and subsidies from public funds. Under certain circumstances ICAO may provide and administer airports and facilities required by international air services. But ICAO has no power to fix or control rates, allocate routes, or control operating frequencies or capacity. Nor can it require any State to admit into its territory air transport operations of another State. The legal unilateral ability of any State to control world air trade routes, as discussed earlier in this article, and the ability of any State to affect world economy by excluding or admitting to its territory the scheduled air transport of other States, have not been affected by the Convention.

In approaching the economic regulatory problem at Chicago, three diverse plans, or theories, were urged. Australia and New Zealand, fearing the political effect of international competition, wished to have all main international air transport operations owned by a single world authority with local lines under national flags. Great Britain and Canada proposed separate but fundamentally similar plans for economic control through an international organization having definite powers to fix and allocate international routes, frequencies, capacity, and rates. The United States opposed economic or political control by an international organization and favored wide freedom of operation. No agreement was reached.<sup>34</sup>

At the end of the Conference, the Transit and Transport Agreements were separately brought forward to cover the economic control problems omitted from the permanent Convention. Had the provisions of either the Transit or the Transport Agreements been included in the main Convention, certain States would not have signed it.

These separate Agreements are based on the so-called "Five Free-

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34. For an account of the Chicago Conference and particularly the position taken by the United States delegation, see *Blueprint for World Civil Aviation—The Chicago International Civil Aviation Conference of 1944 as viewed by Four Members of the United States Delegation in Recent Magazine Articles*, DEP'T OF STATE CONFERENCE SER. 70 (1945).

doms of the Air," as originally defined by Canada. As stated by Assistant Secretary of Commerce for Air, William A. M. Burden, in an article appearing shortly after the Chicago Conference:

"These freedoms . . . are really privileges, since every country reserves the sovereignty of its air space."<sup>35</sup>

As stated in the Transport Agreement mentioned above:

"Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

- "1. The privilege to fly across the territory of a contracting State without landing.
- "2. The privilege to land for non-traffic purposes.
- "3. The privilege to put down passengers, mail, and cargo taken on in the territory of the State whose nationality the aircraft possesses.
- "4. The privilege to take on passengers, mail, and cargo destined for the territory of the State whose nationality the aircraft possesses.
- "5. The privilege to take on passengers, mail, and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail, and cargo coming from any such territory."

The first two "freedoms" cover privileges of air navigation and the last three privileges of commercial trade. The Transit Agreement includes the first two and the Transport Agreement all five.

If the Transit Agreement were universally accepted in more permanent form, it would largely solve the difficulties caused by the legal right of any State to prevent the establishment of world air trade routes through its territory. In addition to the privilege of transit, the Agreement also authorizes any State flown over to require the international operator to land and offer reasonable commercial services; it meets the security problem by allowing each State to designate the route and airports to be used in its territory; it gives added powers to ICAO by authorizing any State, which deems that action by another State is causing injustice or hardship under the Agreement, to request ICAO to investigate; and authorizes ICAO to suspend the guilty State if corrective action is ordered and not taken.

The Transit Agreement, however, is not now an adequate part of world organization. It has been accepted by twenty-eight States, including the United States and Great Britain, but not yet by certain other important world route States such as Brazil, Egypt and Portugal.

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35. *Id.* at 21.

As it can be denounced on one year's notice by any one State, it is not a basis for permanent routes. Its acceptance by the United States, as well as that of the Transport Agreement, has been attacked as illegal, it being contended that they are not valid as Executive Agreements, and that their subject matter required execution and submission to the United States Senate for ratification as treaties.<sup>36</sup> The right of the United States to sign them as Executive Agreements has been as vigorously defended.<sup>37</sup>

For quite other reasons the Transport Agreement cannot now be considered as part of a permanent world organization. Vigorously sponsored by the United States at the Chicago Conference, it covers the so-called five "freedoms" listed above, including both navigation and commercial privileges. It contains no provision for rate control, or limitation of capacity and frequencies, but does include other limitations. These are: the route and airports to be used in national territory may be designated by the State flown over, as in the Transit Agreement; in the operation of through services "due consideration shall be given to the interests of the other contracting States so as not to interfere unduly with their regional services or to hamper the development of their through services"; any State may refuse to accord the so-called Fifth Freedom privilege, that is to say, refuse the right of other States to take on and discharge traffic destined to or coming from the territory of a third contracting State,—the Fifth Freedom, traffic itself, is limited to traffic between contracting States; the Third, Fourth, and Fifth Freedom privileges (the commercial privileges) are applicable only to "through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses"; and the agreement may be denounced on one year's notice.

The Transport Agreement is obviously provisional in character. It is less liberal in certain respects than present international ocean shipping practice. But many of the objections to its acceptance, so the present writer understands, have been based not on this, but because, on the contrary, it is said to go too far in relinquishing economic control by the State flown over. The Agreement has been ac-

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36. Wiprud, *Some Aspects of Public International Air Law* (1945) 13 GEO. WASH. L. REV. 264-275; *International Commercial Aviation*, Resolution of the Committee on Commerce, SEN. DOC. NO. 173, 79th Cong., 2d. Sess. (1946), (Transport and Bermuda Agreements); N. Y. State Bar Ass'n, *Agreements on International Aviation*, LAWYER SERVICE LETTER No. 100 (1946) 408

37. *Concerning Acceptance of Aviation Agreements as Executive Agreements—Exchange of Letters between Senator Bilbo and Acting Secretary Grew*, 12 DEP'T OF STATE BULL. (1945) 1101; also, Article by Stephen Latchford, at 1104; Letter of June 18, 1946 to Secretary of State from Attorney-General Clark quoted p. 6 of U. S. Sen., 79th Cong., 2d Sess., EXECUTIVE REPORT No. 8 (1946) *Convention on International Civil Aviation*.

cepted by comparatively few States of great importance to world air transport. Those accepting include the United States, Sweden, and the Netherlands, but not Great Britain. For reasons discussed below, the Agreement has now been renounced by the United States.

At the end of the Chicago Conference, the various proposals for future economic control were referred to PICAQ for study. In May, 1946, when the first Assembly met in Montreal, its agenda included the draft of a new permanent multilateral convention prepared by the PICAQ Council to meet the economic problems unsolved at Chicago, and differing in many respects from the Transport Agreement. When this proposed new convention was presented for consideration at Montreal, the United States delegation, through its chairman, Mr. Burden, urged that it be not then acted upon, that no multilateral convention be then adopted, and that the whole problem of economic control be fully discussed and referred back for future study and action at a later Assembly. The United States did not, however, insist that the Transport Agreement be accepted as a permanent solution—quite the contrary. In presenting the United States proposal, which was adopted, Mr. Burden stated:

“A year and a half ago the United States assumed the responsibility of initiating a multilateral agreement, known as the Air Transport Agreement. The passage of time and further study of the problem by many nations led them to reject it for a variety of reasons. In fact it has been accepted by such a small number of countries that it can no longer be considered as the basis of a worldwide scheme for international civil aviation.”<sup>38</sup>

Prior to the Montreal meeting, certain bilateral agreements had come into force on the North Atlantic quite inconsistent with the basic theory of the Transport Agreement. These may point the way toward a possible compromise pattern for future general international control. The most important is that between the United States and Great Britain, concluded at Bermuda on February 11, 1946.<sup>39</sup> In this “Bermuda Agreement,” the United States for the first time conceded a certain measure of control of economic questions, including international rate regulation by the governments concerned (with a reference to PICAQ or its successor for an advisory opinion in case of dispute), and Great Britain waived its prior insistence on direct international

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38. Statement on behalf of the United States by William A. M. Burden, Chairman of the United States Delegation, on the REPORT OF THE AIR TRANSPORT COMMITTEE OF THE INTERIM ASSEMBLY on the matters on which it was not possible to reach agreement among the Nations represented at the Chicago Conference. Provisional International Civil Aviation Organization Doc. 1733, EC/21 (1946).

39. Final Act of the Civil Aviation Conference held at Bermuda, January 15 to February 11, 1946, U. S. TREATY SER. 1507 (1946); also (1946) 14 DEP'T OF STATE BULL. 584.

control of traffic and frequencies and capacities. Certain important principles were included in the Agreement by which each government is to be bound in providing service. The routes to be used were definitely agreed on. The Bermuda Agreement does not constitute a general "right to trade" by air as between the two countries. Similar agreements have since been concluded between the United States and France, and between the United States and Belgium. In view of the new diplomatic approach to international air transport evidenced by these agreements, few were surprised when the State Department on July 25, 1946 announced that the United States was giving notice of its withdrawal from the Transport Agreement. While the withdrawal cannot take effect for one year, it ends any possibility that the Transport Agreement will be the basis for worldwide economic understanding.

In the Bermuda Agreement reference is made (in connection with inter-government control of rates) to the rate-making conference procedure of the International Air Transport Association (IATA). This Association, organized after the Chicago Conference, now includes in its membership practically all of the important international air transport operators in the world.<sup>40</sup> Through regional rate traffic conferences, somewhat similar to steamship rate conferences, IATA is seeking to stabilize traffic conditions and prevent rate wars. Under the Civil Aeronautics Act of 1938 the Civil Aeronautics Board is authorized to approve rate and other intercarrier agreements when United States air carriers are involved. When approved, such agreements are free from the onus of the anti-trust acts. The Civil Aeronautics Board has approved for one year the rate conference machinery set up by IATA,<sup>41</sup> but has disapproved its first proposed North Atlantic rates.<sup>42</sup> New conference agreements have been submitted to the Board for approval. The existence and utility of the IATA rate conference machinery, thus recognized in the Bermuda Agreement, may prove to be a useful indirect asset in future world economic control.

Remaining for consideration is the status of international air transport under the Charter of the United Nations. In this respect it must be recalled that the preamble of the Chicago Convention admits that through abuse international civil aviation "can become a threat to the general security."

Among the purposes of the United Nations are:<sup>43</sup> (Article 1) ". . . to take effective collective measures . . . for the suppression of acts

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40. Hildred, *International Air Transport?* (June 1946) *WORLD REVIEW* 46; Cooper, *IATA—League of Airlines*, (1946) 4 *AIR TRANSPORT* No. 1, at 29.

41. Civil Aeronautics Board Order Serial 4525, decided Feb. 19, 1946; *Agreement CAB No. 493, IATA Traffic Conference Resolution*.

42. Civil Aeronautics Board Order Serial 4748, decided May 8, 1946; *Agreement CAB 586, Resolutions of North Atlantic Traffic Conference*.

43. *Charter of the United Nations*, DEP'T OF STATE CONFERENCE SER. 74 (1945).

of aggression . . . and to bring about by peaceful means . . . settlement of international disputes or situations which might lead to a breach of the peace;" also "to achieve international cooperation in solving international problems of an economic . . . character."

It follows that the United Nations must consider the status of international air transport whenever it presents a case of aggression threatening general security, or a problem in international economic cooperation.

The General Assembly (Article 13) is directed to initiate studies and make recommendations for the purpose of promoting international cooperation in the political field, and also international cooperation in the economic field. The Security Council (Article 34) may investigate any dispute or any situation which might lead to international friction; (Article 39) determine the existence of any threat to peace or act of aggression; and (Article 41) may decide what measures not involving the use of armed force are to be employed to give effect to decisions, including "complete or partial interruption of economic relations and of . . . air . . . and other means of communications."

The Economic and Social Council (Article 60) is responsible under the authority of the General Assembly for economic problems; (Article 62) may make or initiate studies and reports with respect to international economic matters and make recommendations on such matters to the General Assembly; (Article 63) may enter into agreements with specialized agencies established by inter-government agreement and having wide international responsibility in the economic field; (Article 64) may take appropriate steps to obtain reports from such specialized agencies and communicate its observations on these reports to the General Assembly; (Article 65) may furnish information to the Security Council and shall assist the Security Council upon its request.

The Economic and Social Council in recognition of its responsibilities (Article 68) set up a "Temporary Transport and Communications Commission." On May 25, 1946 this temporary Commission filed its first report with the Economic and Social Council.<sup>44</sup> This report states that the Commission has made a preliminary general survey of the inter-governmental organizations in the field of transport and communications; has noted among other things the existence of certain organizations, including "the recently created Provisional International Civil Aviation Organization (to be superseded by the definitive International Civil Aviation Organization);" has also noted that inter-governmental agreement and organization in the transport fields dealt with were concerned principally with cooperation in administration and technical matters concerning effectiveness or safety of service, but that inter-governmental agreement on commercial questions such

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44. UNCIO, Economic and Social Council, Doc. E/42, (May 25, 1946).

as rates, routes, subsidies, etc., is a much more difficult question; that "these matters are regulated to some degree by unofficial international organizations of operators, such, for example, as IATA in the field of aviation." The Commission indicated that inter-governmental agencies in the field of transport and communications dealing with security matters had existed only in wartime and that "The question now arises of permanent arrangements to implement decisions which may be taken by the Security Council to impose sanctions."

In its recommendations, the Commission includes the suggestion that PICAQ be brought into relation with the Economic and Social Council as one of the specialized agencies contemplated by Article 57 of the Charter; also that the Commission be authorized to enter into contact with certain unofficial bodies, for the purpose of exchanging documents, observers, etc., including IATA. At the Montreal meeting of the PICAQ Assembly in May, 1946, its Council was authorized to enter into a working agreement with the United Nations. It is therefore assumed that some arrangement will be worked out between the Economic and Social Council of the United Nations and PICAQ for future cooperation—the nature and extent of which have not yet been determined.<sup>45</sup>

It is hoped that this complicated machinery can be made effective so that many vital questions may be answered. If PICAQ, or its successor ICAQ, fails to adopt and have ratified a multilateral convention providing permanent and acceptable world economic control of international air transport, is the United Nations, through the Economic and Social Council or otherwise, authorized to do so, and if so, in what manner? If the United Nations should determine that international air transport is being used as a means of dangerous aggression which may threaten world security, or if it determines that world economic conditions otherwise require remedial action from some situation growing out of the use of international air transport by one or more States, what specific machinery will be put into effect to meet the situation? If rate wars and subsidies threaten international discord, who will stop them, and how? If the Security Council determines on the necessity of sanctions to be applied by stopping civil air communication with one or more States, how is this very difficult situation to be handled?

Admittedly serious difficulties are ahead in answering these and many other questions. Russia is a powerful member of the United Na-

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45. United Nations Economic and Social Council has now adopted Resolution of June 21, 1946 (UNCIO, Docs. E/58/Rev. 1 and E/84, par. 2, both as amended by the Council) to make permanent the Transport and Communications Commission and authorized negotiations with PICAQ "for the purpose of bringing it into relationship with the United Nations." *JOURNAL OF THE ECONOMIC AND SOCIAL COUNCIL*, (July 13, 1946) 515.

tions, but declined an invitation to attend the Chicago Conference and is not a member of PICAQ, nor has Russia even been represented by observers. Certain neutral nations (including Spain, Portugal, Ireland, Switzerland and Sweden) are members of PICAQ but are not members of the United Nations. No provision has been made for control of air transport in the Axis States or the extent to which they will be allowed to exercise airspace sovereignty in the future.

World air transport must be dealt with as a single problem through one cohesive international agency. The respective powers and functions of the United Nations, of its Security Council, of its Economic and Social Council, and also of PICAQ and its successor ICAQ, must be coordinated if world wide economic and security problems are to be met. Aviation is a dynamic force. World air transport is its most important instrumentality in time of peace. Such a dynamic force cannot long await the final decision of political discussions.