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NATIONAL STATUS OF AIRCRAFT*

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INTERNATIONAL air law is concerned with two major problems: First, the legal status of those areas of space above the earth's surface usable as a medium for the flight of self-propelled and man-controlled or man-operated instrumentalities, including aircraft; and, second, the legal status of such flight instrumentalities themselves.

The first problem (the legal status of usable space) involves a determination of the relation of the several States to such usable space — here called flight-space — particularly the right of each State to use or control flight-space over its land and water territories and over the high seas or other areas not subject to the territorial sovereignty of any State. The second problem (the legal status of flight instrumentalities) involves the determination (a) in public law, of the relationship between the State and such flight instrumentalities, and (b) in private law, the relationship between such flight instrumentalities themselves and those persons who furnish supplies or services for their operation or maintenance or suffer damage or other wrong by reason of such operation.

This study assumes that the problem of the legal status of flight-space has been settled insofar as those areas are concerned ordinarily called "airspace" in which "aircraft" normally operate. In the language of Article 1 of the Chicago Convention of 1944, each State has "complete and exclusive sovereignty over the airspace above its territory," such territory including both land areas and territorial waters adjacent thereto. This study also assumes that no State has sovereignty in any part of space over the high seas or over other areas on the surface of the earth not part of the territory of any State.

This study does not deal with nor make any assumptions as to the legal status of those areas of space above the "airspace," even though

*[NOTE—This article has been condensed by the author from a much longer and more detailed study of the same subject matter prepared for the Air Law Committee of the International Law Association (London).]

such areas are today usable for such flight instrumentalities as guided missiles. Nor does this study deal with the legal status of any type of flight instrumentality except "aircraft" capable of being used for the carriage of men or cargo.

Aircraft are instrumentalities of transport. Transport, in its broadest sense, is the movement of men or cargo from a determined point of departure to or toward a desired destination. It involves: first, motion; second, a medium on or through which such motion takes place; and, third, instrumentalities or means used through such medium to effectuate the transport. The four principal self-propelled instrumentalities of transport, in the order of their historic development, are (1) vessels, (2) railway trains, (3) automotive vehicles such as buses, trucks and automobiles, and (4) aircraft. The first three use areas on the earth's surface as mediums of transport. With the discovery of the art of human flight, space above the earth took its place as an entirely new transport medium. New legal problems immediately arose. To understand the resulting difficulties in the determination of the legal status of aircraft, an historic analysis of the development of the legal status of the older forms of transport instrumentalities is useful and perhaps necessary.

1. VESSELS

Centuries of international custom have invested vessels with a status of legal quasi-personality. In public law a vessel may be said to have the quality of *nationality*, indicating a relationship to a given State somewhat similar to the relationship of an individual to the State to which he owes allegiance. In private law, a vessel may be said to have the quality of *responsibility*, indicating that the vessel itself, irrespective of the responsibility of the owner or operator, is accountable as an individual would be for services and supplies furnished it, as well as for damages and injuries resulting from its use in maritime transport. These two attributes of a vessel are quite distinct, although they have at times been unnecessarily confused.

A. Nationality — Nationality has been stated to be "the status of a natural person who is attached to a state by the tie of allegiance."¹ A vessel is an inanimate object, a movable thing, but it is "a thing of a very particular kind and which from several points of view may be compared to a person."² Like persons, vessels are said to possess a nationality. "Such a statement," says Hyde, "implies the existence of a relationship between a vessel and a State of such distinctive closeness and intimacy that the latter may fairly regard the vessel as belonging to itself rather than to any other country."³

¹ Harvard Research in International Law—Nationality, in: *American Journal of International Law*, Vol. 23, 1929, Supplement, pp. 13, 22.

² Gilbert Charles Gidel, *Le Droit international public de la mer*, Chateauroux, Les établissements Mellottée, 1932-34, Vol. 1 (1932), p. 72.

³ Charles Cheney Hyde, *International Law . . .*, 2d rev. ed., Boston, Little Brown, 1945, Vol. 1, Sec. 243A, p. 809.

The possession by a vessel of nationality is "the basis for the intervention and protection by a State" and "it is also a protection for other States for the redress of wrongs committed by those on board against their nationals."⁴ On the concept that vessels belong each to a determined State, they are submitted to its control, are exposed to its sanctions in case of disobedience, and have at the same time a guarantor (from the international point of view) of the manner in which they will use the seas, and a protector against the abuse which they might be compelled to suffer on the part of vessels of other States. This quality of guarantor and protector given to the State whose flag the vessel carries has in modern times led to the valid conclusion that the nationality of a vessel "is the primary condition for the peaceful utilization of the high seas."⁵

The nationality of a vessel is that of the flag rightfully carried by her. The State concerned accepts the authority and responsibility resulting from the vessel's nationality.⁶

Public vessels are not ordinarily registered. Merchant vessels, according to the laws of most States, must however be registered. Each State determines for itself the political conditions as to ownership, where the vessel was built, or otherwise, which will authorize registration. With the basis to be applied by any State as a condition of nationality and subsequent registration, international law in the absence of special agreement or convention is not concerned.

The fact that vessels have the nationality of the State of the flag has led to complicated problems affecting the jurisdiction of such State and other States over such vessels, over those on board, and over crimes or other occurrences there. These problems are concerned, among other things, with the legal distinction between public and private vessels, also with the difference existing between the competence of the flag State and other States dependent on whether the vessel is in its home waters, on the high seas, or in foreign waters. Any adequate statement of these questions is quite beyond the scope of this study, except to the extent that any necessary analogies to be drawn between the situation of vessels and of aircraft will be covered hereafter when discussing the nationality of aircraft.⁷

⁴ Alexander Pearce Higgins and C. John Colombos, *The International Law of the Sea*, London/New York/Toronto, Longmans Green, 1943, p. 189.

⁵ Gidel, *op. cit.* Vol. 1, pp. 73-74.

⁶ John Westlake, *International Law—Part I, Peace*, Cambridge, Cambridge Univ. Press, 1910, p. 169.

⁷ For some of the basic problems, see: Harvard Research in International Law—Jurisdiction with Respect to Crime, in: *American Journal of International Law*, Vol. 29, 1935, Supplement, pp. 508-519; Higgins and Colombos, *op. cit.* Chaps. 7 & 8, pp. 164-222; Lassa F. L. Oppenheim, *International Law: A Treatise*, 7th ed., London/New York/Toronto, Longmans Green, 1948, Vol. 1, Secs. 260-264, pp. 545-549, Secs. 450-451, pp. 764-767; *The S.S. Lotus (France v. Turkey)*, Permanent Court of International Justice, Judgment 9, Sept. 7, 1927, Ser. A, No. 10—also in: Manley O. Hudson, *World Court Reports*, Washington, Carnegie Endowment for International Peace, 1934-43, Vol. 2, pp. 20-92; Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, New York, Jennings, 1927, p. 191.

B. Responsibility — A natural person is responsible for goods sold to him and services performed for his benefit with his authority. He is also responsible to compensate for damages negligently or wrongfully caused an injured person.

In customary maritime law a vessel has been considered to have such legal quasi-personality as to make it similarly responsible under circumstances well known to the maritime law. The responsibility of the vessel is enforceable in the admiralty courts by proceedings in rem against the vessel itself. Salient features of the "maritime lien" thus enforced are that such lien is not dependent upon the possession by the lienor of the vessel; that the lien is not cut off by a sale even to a bonafide purchaser except by proceedings in an admiralty court; and that the vessel may be responsible in rem even if the owner is not responsible in personam.

Maritime liens are generally now recognized for certain services to the ship including seamen's wages, towage, wharfage, necessary repairs and supplies, claims arising from a bottomry bond, salvage, general average, and perhaps some others.

Even more striking is the responsibility of the vessel for the tort damages which it causes. As was said by Justice Story in a leading case: "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or the responsibility of the owner thereof. . . . The ship is . . . by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."⁸

As stated in a later leading case: "According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come."⁹

The responsibility of the vessel for both contractual or tort claims is subject to a well-known exception. Ordinarily public vessels are considered immune. As Justice Holmes said: "The personality of a public vessel is merged in that of the sovereign."¹⁰ Unless the sovereign consents to be sued, war vessels and other public vessels in the service

⁸ *The United States v. The Cargo of the Brig Malek Adhel*, (1844), 2 Howard (43 U.S.) 210, pp. 233-234.

⁹ *The China* (1868), 7 Wallace (74 U.S.) 53, p. 68. See also: *The Bold Buccleugh*, 7 Moore, P.C.C. 267.

¹⁰ *The Western Maid* (1922), 257 U.S. 419, p. 433.

of a State appear to be immune from the direct responsibility which other vessels in like circumstances would incur.

From the foregoing it is apparent that vessels have both nationality in public international law and responsibility in private law within the admiralty jurisdiction. As instrumentalities of international transport they are under the protection of the State whose flag they carry and that State is the guarantor to other States of their international conduct. For the supplies, services, and wrong-doings recognized as the bases of maritime liens they are responsible as if they were legal persons.

2. RAILWAY TRAINS AND AUTOMOTIVE VEHICLES

A. Nationality — No suggestion has ever been made that railway trains should have "national character" in international law. However, as to automotive vehicles some confusion has existed. Certain international conventions have been adopted to cover international circulation of motor vehicles.¹¹ A careful analysis of these conventions demonstrates, however, that they provide nothing more than a means of identifying the vehicle as having been registered and licensed in a particular State, without investing the vehicle with the true international law characteristic of nationality. These conventions do not impute to the State that degree of responsibility for the conduct abroad of the registered vehicle which is characteristic of the nationality of vessels. Under such conventions, a contracting State will certainly not consider itself responsible to protect the vehicle as a legal entity while in foreign territory, apart from its owner or operator, as the same State would protect its national vessels on the high seas or in foreign ports.

B. Responsibility — Neither railway trains nor automotive vehicles have individual international responsibility for services and supplies furnished or for damages caused. If by local law a lien exists for supplies or services, it is ordinarily lost by surrender of the possession of the thing to which the lien attaches. Separate responsibility does not exist beyond the responsibility of the owner. Even though the railway train or the automotive vehicle may under some systems of law be classed as dangerous instrumentalities, making the owner responsible for damages caused by them irrespective of negligence, nevertheless the responsibility is that of the owner or operator and not that of the

¹¹ See: (1) Convention with Respect to the International Circulation of Motor Vehicles, Paris, October 11, 1909, in: U.S. Dept. of State, *Treaty Information Bulletin*, No. 13, October 31, 1930, pp. 25-36; *Br. and For. St. Papers*, Vol. 102, p. 64;

(2) International Convention Relative to Motor Traffic, Paris, April 24, 1926, in: *Treaty Information Bulletin*, *op. cit.* pp. 36-55; Manley O. Hudson, *International Legislation*, Washington, Carnegie Endowment for International Peace, 1931, Vol. 3, pp. 1859-1872;

(3) Convention on the Regulation of Automotive Traffic, Washington, October 6, 1930, in: *Treaty Information Bulletin*, *op. cit.* pp. 20-24; Hudson, *International Legislation*, *op. cit.* Vol. 5, pp. 786-792;

(4) Convention on Inter-American Automotive Traffic, Washington, December 15, 1943 (Treaties and Other International Acts Series 1567).

vehicle itself, as distinguished from the rule of responsibility applicable to vessels.

3. AIRCRAFT

Aircraft, like vessels, and unlike railway trains and automotive vehicles, now have that quality of legal quasi-personality in public international law discussed above as *nationality*. But unlike vessels, and like railway trains and automotive vehicles, aircraft are not yet considered as having the quality of *responsibility* in private law. The legal status of aircraft thus places them in a class apart from other instrumentalities of transport and requires separate consideration. Analogies to the status of either vessels or railway trains and automotive vehicles may lead to inaccurate results.

A. Nationality — The term "aircraft" as here used includes both balloons and airplanes. The first balloon flight took place in 1783, but it was not until about the beginning of the twentieth century that international law assigned the quality of nationality to flight instrumentalities. Even in the agreement entered into in 1898 between Germany and Austria-Hungary (the first known international air navigation agreement) the States concerned did nothing more than grant reciprocal authority for military aviation officers to cross the frontiers in military balloons while in training — the balloons involved appeared to have been considered merely as incidental vehicles.¹² Nor can The Hague declaration of 1899, prohibiting for a term of five years the launching of projectiles or explosives from balloons,¹³ be considered as assuming national status in the balloons themselves irrespective of the personnel on board.

The first statement that aircraft should have nationality like that of vessels was made by Fauchille in 1901.¹⁴ He clarified it in 1902 in his proposals to the Institute of International Law¹⁵ and repeated it in his 1910 report.¹⁶ Between 1902 and 1910 other writers on international law and participants in learned conferences discussed the necessity that aircraft have nationality somewhat like that of vessels when used in international commerce.¹⁷

¹² Text of this agreement is given in Erwin Riesch, "Das erste Luftfahrtabkommen der Welt," *Archiv für Luftrecht*, Vol. 10, 1940, p. 41.

¹³ James Brown Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford Univ. Press, London/Toronto et al., H. Milford, 1915 (Carnegie Endowment for International Peace, Division of International Law, Washington, D. C.).

¹⁴ Paul Fauchille, *Le Domaine aérien et le régime juridique des aérostats*, Paris, A. Pedone, 1901. Also in: *Revue générale de droit international public*, Vol. 8, 1901, pp. 414-485. Text at p. 471.

¹⁵ *Annuaire de l'Institut de droit international*, Vol. 19, 1902, pp. 19-86.

¹⁶ *Ibid.* Vol. 23, 1910, p. 305.

¹⁷ Karl Hilty, "Die völkerrechtlichen Gebräuche in der atmosphärischen Zone," *Archiv für öffentliches Recht*, Vol. 19, 1905, pp. 87-94; Friedrich von Grote, *Beiträge zum Recht der Luftschiffahrt*, Borna-Leipzig, R. Noske, 1907, pp. 22-23; Alex Meyer, *Die Erschliessung des Luftraumes in ihren rechtlichen Folgen*, Frankfurt a. M., Gebrüder Knauer, 1908, pp. 26-33; Friedrich Meili, *Das Luftschiff im internen Recht und Völkerrecht*, Zurich, O. Füssli, 1908, pp. 10-52; Edgar Daus, *Die Luftschiffahrt in staats- und völkerrechtlicher Hinsicht*,

By 1909 governments had informally recognized that balloons and other aircraft had something resembling national status. In that year Clemenceau, as Minister of the Interior of France, issued a circular directing that "foreign balloons" landing in France be held for duty.¹⁸ In the same year the French Government issued invitations to the first formal diplomatic conference of European States ever held to discuss questions of air navigation, asking the invited States, among other things, whether they felt that public and private aircraft should be distinguished and whether aircraft should have nationality.¹⁹

The diplomatic conference called in 1909 met at Paris in 1910. Its importance in the development of international air law has been consistently underestimated. Emphasis has been given to the failure of the conference to agree on the final terms of an international convention. Too little has been said of what the conference accomplished. In the matter of determining whether aircraft should be classified as public and private and whether all aircraft should have nationality, the discussions and decisions at the 1910 conference were determinative of many subsequent developments.

The scope of this study will not permit a detailed examination of the discussions at Paris in 1910. The result of these discussions appear in the proposed international convention (complete except for Articles 19 and 20 regarding the freedom or control of the circulation of aircraft) as agreed upon when the conference adjourned.²⁰ Chapter I, which may be briefly examined, was entitled "Nationality and Regis-

Erlangen, E. J. Jacob, 1908, p. 16; Friedrich Gründwald, *Das Luftschiff in völkerrechtlicher und strafrechtlicher Beziehung*, Hannover, Helwing, 1908, pp. 37-45. (See also his: "Standesamliche Beurkundung von Todesfällen und Geburten auf Luftschiffen," *Archiv für öffentliches Recht*, Vol. 24, 1909, pp. 478-483); Arthur K. Kuhn, "Aerial Navigation in its Relation to International Law," *Proceedings of American Science Association*, 5th annual meeting, 1908, p. 85; Ernst Zitelmann, "Luftschiffahrtrecht," *Zeitschrift für internationales privat- und öffentliches Recht*, Vol. 19, 1909, pp. 458-496; Christian Meurer, *Luftschiffahrtrecht*, Munich/Berlin, J. Schweitzer, 1909, pp. 21-27; Chapter 2 (b) of "Le Code de l'air" of the Comité juridique international de l'aviation in: *Revue juridique internationale de la locomotion aérienne*, Vol. 1, 1910, p. 45; and recommendations by German and French subcommittees at pp. 171 and 174 respectively; Proposal by von Bar before the Institute of International Law, in: *Annuaire de l'Institut de droit international*, Vol. 23, 1910, p. 317; Antonio Brunetti, "Lineamenti d'una legislazione sulla proprietà dei veicoli aerei," at the Congresso giuridico internazionale per il regolamento dalla locomozione aerea, Verona, 31 maggio—1-2 giugno, 1910, in: *Atti e relazioni*, Verona, Società tipografica cooperativa, 1910, pp. 48-55; "Views" adopted by the Verona conference, in: *Atti e relazioni*, *op. cit.* p. 142 and *Revue juridique internationale de la locomotion aérienne*, Vol. 1, 1910, pp. 181, 185.

¹⁸ *Revue juridique internationale de la locomotion aérienne*, Vol. 1, 1910, p. 24.

¹⁹ Conférence internationale de navigation aérienne, Paris, 1910, *Exposé des vues des puissances d'après les memorandums adressés au gouvernement français*, Paris, Imprimerie nationale, 1909, p. 9.

²⁰ Conférence internationale de navigation aérienne, Paris, 1910, *Procès-verbaux des séances et annexes*, Paris, Imprimerie nationale, 1910, pp. 188-205. For French text of the proposed convention, see also: Albert Roper, *La Convention internationale du 13 octobre 1919 . . .*, Paris, Sirey, 1930, pp. 212-225. For an English translation, see: *Reports of the Civil Aerial Transport Committee . . .*, Presented to Parliament by Command of His Majesty, London, H.M. Stationery office, 1918, (Cd. 9218), pp. 25-35.

tration of Aircraft." Article 2 of this chapter provided that only those aircraft which possessed the "nationality" of a contracting State were governed by the convention, and that none of the contracting States should permit a free balloon or airship to fly over its territory unless it complied with the above conditions, although special authorization might be granted. Article 3 stated that nationality of aircraft should be based, by the legislation of each contracting State, on the nationality or domicile of the owner in the State's territory. Article 4 required that when the aircraft possessed the nationality of one contracting State, no other State could confer nationality upon it. Other articles provided that aircraft be entered on the register of the State conferring nationality, such entry containing a description and identification mark of the aircraft; also that each aircraft should bear its nationality mark and registration number and should carry a certificate of navigability issued by the national State.

Public Aircraft Defined

In a later chapter public aircraft were defined (Article 40) as "the aircraft employed in the service of a contracting State, and placed under the orders of a duly commissioned official of that State." The provisions applicable to determination of nationality and registration were not to apply to such public aircraft. The distinctive national mark to be borne by military aircraft (Article 42) would be "the Sovereign emblem of their State"; the departure or landing of military aircraft of a contracting State in the territory of another State would be allowed (Article 44) only with the latter's authorization, and each contracting State might forbid or regulate the passage of military aircraft of other contracting States over its territory. But military aircraft (Article 46), when legitimately within or above the territory of a foreign State, should "enjoy the privilege of extraterritoriality," as also the members of the crew wearing uniform while forming a distinct unit or carrying out their duties.

The principle of nationality of aircraft as thus accepted by the 1910 conference was carefully explained in the proceedings. In the report filed on behalf of the First Commission of the conference by Fauchille (serving as reporter and one of the French delegates), it was pointed out that the delegations of Switzerland and of the Netherlands had considered that aircraft should be treated in a manner similar to automobiles and needed only identification,²¹ but that the other States had adopted the view that an aircraft was more like a vessel than an automobile — that it constituted a kind of legal entity — that it should have its own nationality. The majority of the States present felt that aircraft should be thus under the control of a particular State, responsible for it to other States, and that the aircraft itself should be entitled to the protection of such State. It was recognized that this responsi-

²¹ *Ibid.* p. 73.

bility and right of protection constituted, between that State and the aircraft, a relationship analogous to that existing between a vessel and the State whose flag it carries, called (as stated in the report) "the nationality of the vessel." It was made clear, however, that the State of the flag of the aircraft would not thereby be responsible in private law for damages caused by force majeure or resulting from fault or negligence of the aviators, nor would the national character of aircraft prejudice the solution of questions of conflict of laws and jurisdiction which air navigation might raise in civil and penal matters.²²

Nothing that has occurred since 1910 detracts from the soundness of the explanation of nationality of aircraft as then accepted. In public international law the nationality of vessels and the nationality of aircraft indicate the responsibility of the flag State to other States for the conduct of the vessel or aircraft in question and the right of such vessel or aircraft to international protection by such State.

Following the 1910 conference the application of the concept of such nationality to aircraft was rapidly accepted both in doctrine and in practice. At the meeting of the Institute in April 1911 at Madrid it was decided that aircraft should be classified as public and private; that each aircraft should have nationality, and that this should be that of the country where the aircraft was registered.²³

British and French Practice

In 1911 the first British Aerial Navigation Act (1 & 2 Geo. 5) was adopted, granting to a Secretary of State wide powers to prohibit by order the navigation of aircraft over such areas as might be prescribed in the order. The power to differentiate between national and foreign aircraft was implicit in the Act.

A French decree later in 1911 provided that no aircraft could be put in service in France without a navigation permit, unless it satisfied the conditions foreseen by international conventions. As no international convention had been entered into, this meant that no aircraft could be flown in France unless a French permit were issued. The details included in this decree were clear adaptations into national practice of the principles accepted at the 1910 Paris conference differentiating between public and private aircraft, and providing for registration of the latter and separate flight regulations and nationality provisions applicable to the two classes. It also recognized the difference between national and foreign aircraft.

The concept of nationality was further clarified in practice by the British "Aerial Navigation Act, 1913," amending the Act of 1911, and specifically providing for the issuance of orders prescribing "the areas

²² *Ibid.* p. 74.

²³ *Annuaire de l'Institut de droit international*, Vol. 24, 1911, p. 346. Similar conclusions were reached at the first congress organized by the Comité juridique international de l'aviation held in Paris, May 31, 1911. See: *Revue juridique internationale de la locomotion aérienne*, Vol. 2, 1911, pp. 201-202.

within which aircraft coming from any place outside the United Kingdom are to land and the other conditions to be complied with by such aircraft. . . ." The orders thereafter issued under this Act recognized the principle of nationality both for public and private aircraft.

In the same year an international arrangement was made between France and Germany by an Exchange of Notes dated July 16, 1913, under which French aircraft might fly into and over Germany and German aircraft might fly into and over France subject to very strict conditions.^{23a} On December 13, 1913 a new presidential decree was issued in France replacing the 1911 decree regulating air navigation.²⁴ The new decree continued in effect and amplified most of the old provisions. In the order implementing this decree, attention was directed to the fact that no aircraft could fly in France without a permit except in accordance with international conventions, and calling attention to the arrangement between Germany and France concluded earlier in the year.²⁵ Again the principle of nationality was full accepted and recognized.

With the outbreak of World War I the actions of both neutral and belligerent powers recognized that aircraft had acquired national character and should be dealt with as legal entities.²⁶ But the privilege of asylum and temporary sojourn for repairs, usually accorded to war vessels in international law, was not accorded to belligerent aircraft.²⁷ In Fauchille's proposed international convention, submitted to the Institute in 1911, provisions had been inserted permitting belligerent military aircraft to leave any neutral territory within twenty-four hours after entry, and that in general the Hague Convention of October 18,

^{23a} For text of this agreement, see: Roper, *op. cit.* pp. 246-251; *Revue juridique internationale de la locomotion aérienne*, Vol. 4, 1913, pp. 240-242. See also: John C. Cooper, *The Right to Fly*, New York, Henry Holt, 1947, pp. 20-22.

²⁴ *Revue juridique internationale de la locomotion aérienne*, Vol. 5, 1914, pp. 9-20.

²⁵ *Ibid.* pp. 20-23.

²⁶ For neutral treatment of belligerent aircraft, see: Netherlands decree of August 3, 1914, which prohibited airships not belonging to the Netherlands' forces from crossing its land frontiers [Francis Deák and Philip C. Jessup, eds., *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries*, Washington, Carnegie Endowment for International Peace, 1939, Vol. 2, p. 807]; Swedish law of September 7, 1914, which authorized the king by order to prohibit air traffic over Swedish territory except to aircraft of the Swedish State or engaged in its service [*British & Foreign State Papers*, Vol. 110, p. 560; Deák and Jessup, *op. cit.* p. 964]; and proclamation of same date by King of Sweden prohibiting such air traffic [Deák and Jessup, *op. cit.*, p. 975] and amendment to this prohibitory order to apply it to "airplanes other than those belonging to Sweden" [Deák and Jessup, *op. cit.* p. 975]; ordinance of the Federal Council of Switzerland dated August 4, 1914 which provided that balloons and aircraft not belonging to the Swiss army could not rise and navigate in airspace over Swiss territory except with special permission, and that passage of all balloons and aircraft coming from abroad was forbidden [Deák and Jessup, *op. cit.* p. 1008]; proclamation by the United States of America on November 13, 1914, relating to the neutrality of the Panama Canal Zone, which forbade by Rule 15 "aircraft of a belligerent power, public or private" from descending or rising within the jurisdiction of the United States at the Canal Zone or to pass through the airspace above the lands and waters within such jurisdiction [Deák and Jessup, *op. cit.* p. 1205].

²⁷ James Molony Spaight, *Aircraft in Peace and the Law*, London, Macmillan, 1919, p. 9.

1907, applicable to rights of neutrals in naval warfare, should be applied to air warfare.²⁸ In practice the principle of twenty-four hour asylum was not accepted. When, on August 29, 1914, the German Government protested to the Dutch Government against the seizure of a German naval airplane in a Dutch port, the Dutch Government replied that aircraft could not be treated as warships due to their liberty of action and the facility with which they could carry out reconnaissance and escape from all control, and that aircraft must therefore require special treatment.²⁹ The nationality of aircraft was thus recognized, but certain privileges in time of war accorded to war vessels were denied. It may be said here that this rule of international air law, pursuant to which belligerent aircraft are treated as being *sui generis* and, upon entering neutral territory, must be interned by the neutral State together with the crew, has by custom of World War I and World War II become a recognized and generally accepted principle.³⁰

Nationality in Western Hemisphere

While World War I was being fought in Europe, the concept of nationality of aircraft began to receive general recognition in the western hemisphere. For example, at the unofficial Pan American Aeronautic Conference held at Santiago, Chile, in March 1916 recommendations were adopted which included rules that all aircraft should have nationality — public aircraft to be that of the State to which they belonged, and private to be that of the owner — and that all aircraft should carry a distinctive national emblem.³¹ Also, in the project for the regulation of maritime neutrality adopted by the American Institute of International Law in 1917, the nationality of aircraft was tacitly recognized by the provisions of Article 20, stating that airplanes, dirigibles, or aircraft of belligerent countries were not permitted to fly over the territory or the jurisdictional sea of neutral powers.³²

Work of Aeronautical Commission at Peace Conference After World War I

When at the end of World War I the Aeronautical Commission of the Peace Conference was established in March of 1919 and directed to prepare a convention on international air navigation in time of peace, two draft conventions had already been prepared — one by Great Britain and the other by France. The Commission also had

²⁸ *Annuaire de l'Institut de droit international*, Vol. 24, 1911, p. 117.

²⁹ Spaight, *op. cit.* p. 203.

³⁰ James Molony Spaight, *Air Power and War Rights*, 3d ed., London/New York/Toronto, Longmans Green, 1947, pp. 420-428.

³¹ Henry Woodhouse, *Textbook of Aerial Laws . . .*, New York, Stokes, 1920, p. 12; Brower V. York, "International Air Law in the American Republics," *Journal of Air Law and Commerce*, Vol. 3, 1932, p. 415.

³² Institut Américain de droit international, *Acte final de la session de la Havane, 22-27 janvier 1917, Résolutions et projets*, New York et al., Oxford Univ. Press, 1917, p. 92.

available the work of the 1910 Paris Conference. At one of its first sessions the Commission adopted certain principles to govern its work, including the following: "4. The recognition that every aircraft must possess the nationality of one contracting State only, and that every aircraft must be entered upon the register of a contracting State, the nationality of which it possesses."³³

When the Legal Subcommittee reported to the Aeronautical Commission, it discussed the question of nationality.³⁴ Having first decided that the proposed convention should be based on the principle that each State has sovereignty in the airspace over its territory and having then discussed the question of innocent passage for aircraft of contracting States in the airspace over other contracting States, the Subcommittee said, in substance, that access into airspace being open to aircraft of contracting States, the first question logically presenting itself was that of "nationality." Reasons were then stated as to why the Subcommittee recommended that aircraft could be registered only in the State of which its owner was a national. The general effect of nationality does not seem to have been fully discussed, at least so far as available records of the actual proceedings indicate. But the text reported to the Commission, and adopted by the Commission, and ultimately incorporated into the final convention of 1919, leaves no doubt that nationality was considered as having the characteristics in international law contemplated in the 1910 conference. The analogy to the nationality of seagoing vessels and the similarity of the language of the 1919 convention and the 1910 draft convention leaves little doubt of the correctness of this assumption.

The Paris convention as finally signed in 1919 provided, among other things: (Art. 5) that no contracting State should, except by special authorization, admit flight over its territory by aircraft not possessing "nationality of a contracting State"; (Art. 6) that aircraft possess the nationality of the State where registered; (Art. 7) that no aircraft should be registered unless it belongs wholly to nationals of such State, with special provisions as to aircraft owned by an incorporated company; (Art. 8) that aircraft cannot be validly registered in more than one State; (Art. 15) that every aircraft of a contracting State has the right to cross the airspace of another State without landing, (thus indicating that aircraft were considered as legal entities representing their national State); (Art. 25) that each contracting State undertook to ensure that every aircraft flying above its territory and that every aircraft wherever it might be carrying its nationality mark should comply with the regulations under the convention, (thus indicating that each contracting State assumed the responsibility for the conduct abroad of aircraft having its nationality).

³³ Conférence de la paix, 1919-1920, *Recueil des actes de la conférence, Partie VII, Préparation et signature des traités et conventions divers, A—Conventions générales entre alliés*, (1) Commission de l'aéronautique, Paris, Imprimerie nationale, 1933, pp. 14, 143; *La Paix de Versailles: aéronautique*, Paris, Les Editions internationales, 1934, pp. 20, 129.

³⁴ Conférence de la paix, *op. cit.*, p. 429; *La Paix de Versailles, op. cit.* p. 499.

When the Paris Convention was discussed at the meeting of the International Law Association at Portsmouth in 1920, Hazeltine, certainly one of the greatest experts on international air law then living, pointed out the analogy in the convention between the nationality and registration of aircraft and existing international law as to the nationality and registration of seagoing vessels.³⁵ This principle that each aircraft shall have nationality and be registered was also incorporated into the Ibero-American Convention Relating to Air Navigation³⁶ signed at Madrid in 1926 and in the Pan American Convention on Commercial Aviation³⁷ signed at Havana in 1928. However, Article 8 of the Pan American Convention abandoned the requirement that contracting States must be governed by the nationality of the owner of the aircraft when authorizing registration and adopted the generally understood international rule as to vessels by which each State determines for itself the basis on which it will allow its flag to be carried. Accordingly the Pan American Convention provided that "the registration of aircraft . . . shall be made in accordance with the laws and the special provisions of each contracting State." This principle was also accepted by an amendment to Article 7 of the Paris Convention in 1929, bringing even closer the analogy with international maritime law. The principle became thus generally accepted that each State is the sole judge of the basis on which aircraft may be registered and thereby assume the nationality of the State in question.

Proposed Aerial Warfare Rules

Several important doctrinal discussions between World War I and World War II further clarified the principle of nationality. The "Proposed Rules for the Regulation of Aerial Warfare" drafted by the Commission of Jurists at The Hague in 1923, although never adopted as an actual international convention, have always had great weight as a sound statement of the rules of international air law applicable in time of war.³⁸ These rules provided for a distinction between public and private aircraft, and also between military aircraft and others employed in public service. They further provided that aircraft should carry external marks to show nationality and that "no aircraft may possess more than one nationality." The rules themselves have a striking resemblance to certain of the accepted practices of naval warfare, except that Rule 40 stated that "belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State," and Rule 42 stated that "a neutral government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and

³⁵ International Law Association, *Report of the 29th Conference, Portsmouth, 1920*, London, Sweet & Maxwell, 1920, p. 396.

³⁶ Hudson, *International Legislation, op. cit.*, Vol. 3, pp. 2019-2032.

³⁷ *Ibid.* Vol. 4, pp. 2354-2369.

³⁸ For text of The Hague air rules of 1923, see: Kenneth W. Colegrove, *International Control of Aviation*, Boston, World Peace Foundation, 1930, Appendix VI, pp. 211-223; Spaight, *Air Power and War Rights, op. cit.* pp. 498-508.

the passengers, if any." Similarly, in the exhaustive study on "Rights and Duties of Neutral States in Naval and Aerial War" made by the Harvard Research in International Law,³⁹ and in the draft convention prepared as the result of its study, the nationality of aircraft was accepted as the basis for the proposed rules so far as "aerial war" was concerned. In an earlier study made by the Harvard Research in International Law, dealing with "Jurisdiction with Respect to Crime," the conclusion reached was that "a State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character."⁴⁰ As to the status of aircraft, the comment on this provision says that "ships and aircraft are not territory" — that "it is recognized, nevertheless, that a State has with respect to such ships or aircraft a jurisdiction which is similar to its jurisdiction over its territory."⁴¹ The commentary further notes that "it is of course true that most aircraft are much less self-contained than seagoing vessels at the present time" — that "it seems, however, that in their legal relations to their own State and to foreign States they have many points of resemblance and that they may well be regarded, for present purposes, in substantially the same way."⁴²

The Institute of International Law reviewed its position on international air navigation at its meeting at Lausanne in 1927, and again held that every aircraft should have one nationality and one only, and that this nationality should be that of the country where the aircraft is registered.⁴³ Again, in 1937, when considering the question of conflict of laws on board "private aircraft," the Institute accepted nationality of aircraft as an existing status, using such language as "the State of the nationality of the aircraft."⁴⁴

World War II and The Chicago Convention

With the outbreak of World War II aircraft became primary international carriers. The normal method of crossing both the Atlantic and Pacific Oceans, except for mass troop movements, was by air. The nationality of aircraft was accepted into customary international law as fully as the nationality of merchant vessels. The protective jurisdiction of the State of the flag and the responsibility of that State were fully recognized, whether the State of the flag of the aircraft was or was not a party to the Paris Convention or the Havana Convention (the Madrid Convention never having had actual international importance).

The Convention on International Civil Aviation, signed at Chicago in 1944, provides for classification, nationality and registration of

³⁹ *American Journal of International Law*, Vol. 33, 1939, Supplement, pp. 167-817.

⁴⁰ *Ibid.* Vol. 29, 1935, Supplement, p. 508.

⁴¹ *Ibid.* p. 509.

⁴² *Ibid.* pp. 516-517.

⁴³ *Annuaire de l'Institut de droit international*, Vol. 33 (3), 1927, p. 338.

⁴⁴ *Ibid.* Vol. 40, 1937, p. 276.

aircraft. Certain of its provisions are a compromise between the draft convention submitted by Canada,⁴⁵ and that submitted by the United States.⁴⁶ The Canadian draft followed almost exactly the language of the Paris Convention with respect to nationality. Included in its provisions was an article providing that military aircraft in foreign territory should enjoy, in principle, the privileges accorded to foreign ships at war. The United States draft covered only "civil aircraft."

Article 3 of the Chicago Convention, as signed, reads in part as follows:

"(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

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

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

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

While there may be some seeming ambiguity between the provisions of subparagraph (a) of Article 3 and the subparagraphs (c) and (d) of this article, it was certainly intended to mean that the convention as a whole, with the exception of subparagraphs (c) and (d), should be applicable only to "civil aircraft."⁴⁷ The terms "public" and "private" are not used in the convention in the classification of aircraft. The convention is therefore applicable to all aircraft, whether owned and operated by a State, unless such aircraft are actually "used in military, customs and police services" by a contracting State. Due to the fact that the convention is primarily concerned with international civil air transport, no provision is made (as it was in the Paris convention) to define the privileges to be accorded in foreign territory to military aircraft as distinguished from other State aircraft.

The articles applicable directly to nationality of aircraft include:

"Article 17. Aircraft have the nationality of the State in which they are registered.

"Article 18. An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

"Article 19. The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.

⁴⁵ See: *Canadian Revised Preliminary Draft of an International Air Convention* [Chicago Conference Document 50], reprinted in: U.S. Dept. of State, *Proceedings of the International Civil Aviation Conference*, Chicago, Illinois, November 1-December 7, 1944 [Dept. of State Pub. No. 2820], Vol. 1, pp. 570-591.

⁴⁶ See: *United States Proposal of a Convention on Air Navigation* [Chicago Conference Document 16], reprinted in: *ibid.* Vol. 1, pp. 554-566.

⁴⁷ The writer of this study was chairman of the drafting committee which reported out parts of the convention, including Article 3, and therefore has no hesitation in criticizing and taking some responsibility for the draft.

"Article 20. Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks."

It will be noted that the Chicago Convention adopts the principle that each State will decide for itself the basis on which it will permit aircraft to be registered. Article 17, providing that aircraft have the nationality of the State in which they are registered, accepts the principle of Article 6 of the Paris Convention that "aircraft possess the nationality of the State of the register on which they are entered." This is a rule as between contracting States, but it certainly does not mean that "state aircraft" of all States and civil aircraft of non-contracting States are without nationality. By the time the Chicago Convention was drafted, customary international air law had so completely accepted the concept of nationality of aircraft that no question could possibly exist as to the fact of nationality of any aircraft lawfully carrying national insignia of a particular State.

Registration does not create nationality. It is simply an evidence of nationality, and nothing in the Chicago Convention should be read to the contrary.

State Is Protector of Aircraft and Guarantor of Its Conduct

The Chicago Convention assumes that aircraft are legal entities and directly recognizes the State as the guarantor of the conduct of aircraft possessing its nationality, as well as the protector of such aircraft. For example, Article 5 is a direct commitment of each contracting State to accord to "all aircraft of the other contracting States" certain transit and non-scheduled traffic privileges. If an aircraft has the nationality of a contracting State, it has the privileges contemplated under this article, and the State of its flag may proceed against any other State to enforce these privileges in international law for the benefit of its aircraft. Such aircraft are dealt with in the article directly as objects of international law. The resulting general position is quite analogous to that created since the fourteenth century by those international maritime law commercial treaties which accorded to merchant vessels of one contracting State the privilege of entering the ports and harbors of another contracting State.⁴⁸ The nationality of the operator is immaterial.

The status of an aircraft as a legal entity is further emphasized by such provisions as Article 11, providing that the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation or navigation of such aircraft while within its territory "shall be applied to the aircraft of all contracting States without dis-

⁴⁸ See, for example, treaties between England and various other countries described in: David Macpherson, *Annals of Commerce, Manufactures, Fisheries, and Navigation* . . . , London, Nichols, 1805, Vol. 1, p. 551, 617, 631, 713, Vol. 2, p. 8.

inction as to nationality and *shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.*" [italics supplied] Under this article the State of the nationality of the aircraft will be entitled to protect its aircraft in case of discrimination, but will also be responsible to guarantee the conduct of its aircraft as to compliance with the local rules.

Article 12 provides that each contracting State "undertakes to adopt measures to ensure . . . that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force." The same article contains an entirely new principle in international air law to the effect that over the high seas the rules in force shall be those established under the convention. Each State therefore guarantees that aircraft having its nationality will comply, while over the high seas, with the rules set up under the convention, and, when in national territory of another State, will comply with the rules there applicable.

Considering the present text of the Chicago Convention and the history which preceded it, we can hardly deny that aircraft, like sea-going vessels, and unlike railway trains and automotive vehicles, now have that quality of legal quasi-personality in public international law known as "nationality." The development of air law, both by custom and international legislation, has demonstrated the soundness of the statement used in the report of the First Commission of the 1910 conference.⁴⁹ No one today can question the basic theses: (1) that an aircraft, to engage in international flight, should be placed under the control of a State which would be responsible to other States for the conscientious exercise of such control; (2) that setting off the obligations imposed on the aircraft in such international flight are the rights accorded to it, and that to enforce these rights the aircraft may need the protection of a State which, within the limits of international law, may intervene in its interest; (3) that this role belongs naturally to the State charged with control of the aircraft; (4) that the responsibility and right of protection joined in the hands of one and the same State constitute between that State and the aircraft a tie analogous to that existing between a vessel and the State whose flag it carries and which is called "the nationality of the vessel."

Major Problems Created by Acceptance of Nationality for Aircraft

But the acceptance into international air law of the principle that every aircraft must have nationality and that this nationality is at least similar to that of vessels has created cognate problems some of which still require settlement. These problems are of two general classes: (a) the rights of state aircraft, and (b) the respective jurisdiction and competence of the State of the flag of the aircraft and of other States,

⁴⁹ See note 22 *supra*.

in whose territory the aircraft may be, to deal with matters occurring on board the aircraft. These questions must be resolved before it can be said that the legal status of aircraft has been finally determined for all places and for all conditions arising in international flight.

The Chicago Convention, as stated earlier, divides aircraft into two classes: state aircraft and civil aircraft, abandoning the older use of the terms "public" and "private." The provisions of Article 3 (b) and 3 (c) quoted above raise two questions. First, *is the definition of state aircraft adequate?* Second, *in the absence of special terms in the authorization contemplated by Article 3 (c), are military, customs and police aircraft to be treated alike when in foreign territory?*

As to the first of these questions it must be said that the Chicago Convention is purposely less definite than some of its predecessors. The language used was understood to be vague but was considered a more practical solution than any of the several attempts which had been made in the past to define such classes as, for example, military aircraft. The determining factor under the Chicago definition is whether a particular aircraft is, at a particular time, actually used in one of the three special types of services. If so, it is a "state aircraft." Otherwise, it is a "civil aircraft." This solution leaves for settlement, under the facts of a particular case, such difficult problems as those arising when aircraft operated by the armed services carry non-military passengers and cargo. These questions the governments affected must settle from time to time.

The second question, as to the status of state aircraft, is more difficult. The Paris Convention provided that in the absence of special stipulation military aircraft, when authorized to fly over the territory of another contracting State or to land therein, should enjoy "the privileges which are customarily accorded to foreign ships of war," but that these privileges should in no case be enjoyed by police and customs aircraft. It was felt that military aircraft had the same character of a political organ removed from every intervention by another sovereign power as had a foreign warship in a national port.⁵⁰

Although the Chicago Convention is silent in the matter, the present writer feels that the rule stated in the Paris Convention is sound and may be considered as still part of international air law. But if it is desired that police and customs aircraft should enjoy similar exemption in the absence of stipulation to the contrary in the authorization given them to proceed to a foreign country, such exemption must be covered by an amendment to the Chicago Convention or by other international legislation.

The general and most important question still unsettled involves the respective competence and jurisdiction of the State of the flag of the aircraft and other States to deal with the matters occurring on board the aircraft. In the draft of the Paris Convention, as prepared by the

⁵⁰ Conférence de la paix, *op. cit.* pp. 433-434; *La Paix de Versailles, op. cit.* pp. 503-504.

Aeronautical Commission, this matter was proposed to be dealt with by the following article:

"Article 23. All persons on board an aircraft shall conform to the laws and regulations of the State visited.

"In case of flight made without landing from frontier to frontier, all persons on board shall conform to the laws and regulations of the country flown over, the purpose of which is to ensure that the passage is innocent.

"Legal relations between persons on board an aircraft in flight are governed by the law of the nationality of the aircraft.

"In case of crime or misdemeanor committed by one person against another on board an aircraft in flight the jurisdiction of the State flown over applies only in case the crime or misdemeanour is committed against a national of such State and is followed by a landing during the same journey upon its territory.

"The State flown over has jurisdiction:

1. With regard to every breach of its laws for the public safety and its military and fiscal laws;
2. In case of a breach of its regulations concerning air navigation."⁵¹

But before the Paris Convention was actually signed, this article was omitted nor does any article in the Chicago Convention cover the same subject matter except to the very limited extent of Article 13 which is as follows:

"Article 13: The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State."

In an effort to provide for settlement of the possible conflict in competence of the courts and applicability of the laws of the State of the flag and the State of the territory where the aircraft might be, in case they were not the same, the International Law Association drafted an international convention containing the following provisions:

"(a) *Civil Jurisdiction:*

ART. 1

"The airship which is above the open sea or such territory as is not under the sovereignty of any State is subject to the laws and civil jurisdiction of the country of which it has the nationality.

ART. 2

"A public airship which is above territory of a foreign State remains under the exclusive jurisdiction of the State of which it has the nationality.

"A private airship which is above the territory of a foreign State is subject to the laws and jurisdiction of such State only in the following cases:

1. With regard to every breach of its laws for the public safety and its military and fiscal laws.

⁵¹ Conférence de la paix, *op. cit.* p. 155.

2. In case of a breach of its regulations concerning air navigation.
3. For all acts committed on board the airship and having effect on the territory of the said State.

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

"(b) *Criminal Jurisdiction:*

ART. 3

"If at the commencement or during the progress of any flight of any aircraft passing over any State or States or their territorial waters or over the high seas without landing, any person on board such aircraft commits any crime or misdemeanour, the person charged shall forthwith be arrested if necessary. Such felony or misdemeanour may be enquired into and the accused tried and punished in accordance with the Rules given under Art. 2. The State of the place where such aircraft lands shall be bound to arrest the accused if necessary and to extradite him to the State which has jurisdiction over him.

ART. 4

"Acts committed on board a private aircraft not in flight in a foreign State shall be subject to the jurisdiction of such State, and any person or persons charged with the commission of such act shall be tried and, if found guilty, punished according to the laws of such State."⁵²

This draft convention, prepared twenty-five years ago, still stands as the position of the International Law Association. The subject matter which it covers has not been included in any international legislation, nor have sufficient cases arisen to assume that the questions covered are settled as part of customary international law. The problem is still open. It can be settled only by an international convention which should be promptly adopted. Conflicts already exist between the statute laws of certain States.⁵³ As Lemoine has well said:

"The determination of the law applicable to events occurring and acts performed on board an aircraft is a complex and difficult problem. It is only fragmentarily settled by positive law and the different national systems do not furnish altogether consistent solutions."⁵⁴

⁵² International Law Association, *Report of the 33rd Conference, Stockholm, 1924*, London, Sweet & Maxwell, 1925, pp. 117-118.

For other proposals on the same subject, see: (1) "Chapitre VI, Code international de l'air," 5th Congress, Comité juridique international de l'aviation, Prague, 1922; (2) Articles 1-7 of proposal as to crimes committed on board aircraft, 9th Congress, CJIA, Budapest 1930; (3) Harvard Research draft convention on Jurisdiction with Respect to Crime, Article 1 (d), 3, 4, published in *American Journal of International Law*, Vol. 29, 1935, Supplement, pp. 439-635; Convention proposed by Institute of International Law, Luxembourg, 1937, in: *Annuaire de l'Institut de droit international*, Vol. 40, 1937, pp. 276-278; proposals of Dr. Alex Meyer in 1946 contained in "Crimes et délits a bord des aéronefs, *Revue générale de l'air*, IXannée (nouvelle série), 1946, pp. 544-558, 614-632.

⁵³ Harvard Research in International Law—Jurisdiction with Respect to Crime, *op. cit.* p. 515; Meyer, *op. cit.* p. 619.

⁵⁴ Maurice Lemoine, *Traité de droit aérien*, Paris, Recueil Sirey, 1947, p. 201. For a general discussion of conflicts of law affecting aircraft, see: Fernand de Visscher, "Les Conflits de lois en matière de droit aérien," Hague, Académie de droit international, *Recueil des cours*, Vol. 48, 1934-II, pp. 279-385.

B. *Responsibility of Aircraft.* As stated earlier in this study, aircraft unlike vessels and like railway trains and automotive vehicles are not yet considered as having the quality of responsibility in private law. As instrumentalities of international transport, aircraft are not directly responsible as are vessels for supplies, services and wrongdoings recognized as the bases for what are ordinarily known as maritime liens. Aircraft, like other chattels generally, may be held for the debts of the owner or, under certain local statutes, may be held for the satisfaction of specific liens. But such claims against an aircraft do not have the characteristics of a maritime lien for which a vessel is responsible, in many cases irrespective of the responsibility of the owner, nor does international law recognize (in the absence of a statute or convention) the validity of claims against an aircraft when the aircraft has passed into the hands of a bona fide purchaser without notice of the prior claim.

It has been held, for example, that a lien for repairs performed on a seaplane in a shop on land is not a maritime lien and does not have precedence over a penalty government lien which accrued later in time. Without deciding what would have been the case if the repairs had been performed on the seaplane while it was in the water, the court held that the claim for repairs "is no better than a lien against an ordinary airplane," thereby holding that there is no claim generally recognized in international air law for a lien for repairs against an airplane as there would be in maritime law against a vessel.⁵⁵

As to supplies furnished an aircraft, it may be noted that Article 25 of the Pan American Convention provided that "the commander of an aircraft shall have rights and duties analogous to those of a captain of a merchant steamer," but this provision was not repeated in the Chicago Convention. While it might have been argued that under the Pan American Convention the aircraft commander could obligate the aircraft in a foreign port for repairs and supplies as the captain of a merchant vessel may do, this provision is no longer in force even as between those States which were parties to the Pan American Convention. In fact, the draft convention "on the Legal Status of the Aircraft Commander" (originally drafted by CITEJA and now before the Legal Committee of the International Civil Aviation Organization)⁵⁶ does authorize the aircraft commander to buy items necessary for the

⁵⁵ *United States of America, Libellant of one Fairchild Seaplane, etc., appellant, v. Northwest Air Service, Inc., appellee*, U.S. Circuit Court of Appeals, 9th Circuit, December 20, 1935, 80 F. (2d) 804, cited in: *U.S. Aviation Reports*, 1936, pp. 148-149.

See also: *Andrew Foss v. Airplane Crawford Bros. No. 2*, U.S. District Court, Western District of Washington, June 27, 1914, 215 Fed. 269, cited in: *U.S. Aviation Reports*, 1928, pp. 1-3; Arnold D. McNair, *The Law of the Air*, London, Butterworth, 1932, Chap. 8, pp. 144-151.

The statements in 1921 by Judge Cardozo in *Reinhardt v. Newport Flying Service Corporation, et al.*, [232 N.Y. 115, cited in: *U.S. Aviation Reports*, 1928, pp. 4-7] to the effect that a hydroplane moored in navigable waters is a vessel was, in the judgment of the present writer, dicta and not necessary to the determination of the issues presented.

⁵⁶ International Civil Aviation Organization, Document No. 5190, LC/88, March 2, 1948, p. 3.

completion of the trip and to have repairs made which are necessary to enable the aircraft to proceed promptly. But the terms of the draft convention make it clear that this power given the aircraft commander is a power to obligate the owner and not to bind the aircraft itself. Further, Article 4 states definitely that "the Commander may not, without special authority, sell the aircraft, or, by any contractual act, mortgage or subject it to any similar claim." This draft convention appears to be a repudiation of any suggestion that the aircraft, irrespective of special authority from the owner, is responsible as a vessel would be for supplies and repairs in a foreign port.

Responsibility of the Aircraft for Salvage and Collision Claims

The characteristic responsibility of vessels for salvage services has been held not to apply to aircraft in the absence of special statute. This was held in a leading case in which it was determined that even a seaplane does not satisfy the definition or description of a ship or a vessel, and that the British Air Navigation Act of 1920 (10 & 11 Geo. 5, c. 80) was restricted to British and foreign aircraft within the limits of British territorial jurisdiction and to British aircraft all over the world, but they did not apply to salvage claims against a foreign aircraft or its cargo.⁵⁷ Section 11 of this Act had provided that the law relating directly to salvage of life or property should apply to aircraft on or over the sea or tidal waters as it applies to vessels. But this area was held to be insufficient to cover salvage by British vessels on the cargo of an American seaplane wrecked on the coast of Greenland. After the *Watson* case was decided, the British Air Navigation Act of 1936 (25 Geo. 5, & 1 Edw. 8, c. 44) sought to extend the provisions of British law to cover salvage claims against foreign aircraft and claims for salvage services generally outside the limits of British territorial waters. But irrespective of how these new provisions may be construed, obviously they are statutory provisions and not statements of existing international law. This is further borne out by the fact that the convention signed at Brussels entitled "The Salvage of Aircraft at Sea Convention, 1938" provides for an indemnity payable by the operator of the aircraft assisted, and for remuneration in case of salvage also payable by the operator of the aircraft, but no provision is included giving a lien against the aircraft such as would exist in maritime law against a vessel for which salvage services had been rendered.⁵⁸

As further indication that international air law has developed in the general direction of denying that aircraft are responsible in private law as are vessels, it should be noted that Article 23 of the Paris Convention provided that with regard to the salvage of aircraft wrecked

⁵⁷ *Thomas Watson v. R.C.A. Victor Company, Inc.*, Great Britain, Aberdeen Sheriff Court, October 31, 1934, 50 Ll.L.R. 77, cited in: *U.S. Aviation Reports*, 1935, pp. 147-156.

⁵⁸ For text of the Brussels aircraft salvage convention, see: Hudson, *International Legislation*, *op. cit.* Vol. 8, pp. 135-147; Christopher N. Shawcross and Kenneth M. Beaumont, *Air Law*, London, Butterworth, 1945, Secs. 794-810, pp. 405-409; *U.S. Aviation Reports*, 1938, pp. 253-273.

at sea "the principles of maritime law will apply in the absence of any agreement to the contrary," and in the Pan American Convention it was provided that "the salvage of aircraft lost at sea shall be regulated, in the absence of any agreement to the contrary, by the principles of maritime law."⁵⁹ But the Chicago Convention omits any reference to salvage. If it be said that Article 23 of the Paris Convention and Article 26 of the Pan American Convention indicated an intent to adopt the general principles of salvage, including a lien against the aircraft or cargo which had been salvaged, the omission of these provisions from the Chicago Convention and the signature at Brussels in 1938 of a specific convention applicable to salvage omitting any claim for lien against the aircraft is adequate evidence that no such lien now exists in international air law.

The characteristic lien against a vessel for damages caused by it when in collision with another vessel also does not apply to aircraft. As authoritatively stated by McNair, collisions between aircraft are governed by principles applicable to torts generally.⁶⁰ Even in the case of damage to a ship caused by an aircraft, though the admiralty court might have jurisdiction, no maritime lien would attach to the aircraft. The action "on behalf of the ship against the person responsible for the aircraft would be *in personam* and could not lie *in rem*."⁶¹ In the draft convention "for the Unification of Certain Rules Relating to Aerial Collisions,"⁶² now pending before the Legal Committee of the International Civil Aviation Organization, provision is made for the payment of an indemnity by the operator of the aircraft responsible in case of collision between aircraft. No provision is made for a lien against the aircraft itself irrespective of the indemnity due by the operator. The principle of responsibility of the aircraft as a legal quasi-personality is entirely absent in the draft convention on collision just as it is also absent in the salvage at sea convention applicable to aircraft signed at Brussels in 1938 and discussed above.

The Convention on "the International Recognition of Rights in Aircraft" signed at Geneva in 1948 provides the first recent (and very limited) international legislation for what might be called responsibility of aircraft. In Article 4 of that convention it is provided that in the event that any claims in respect of compensation for salvage or extraordinary expenses give rise "under the law of the Contracting State where the operations of salvage or preservation were terminated, to a right conferring a charge against the aircraft, such right shall be recognized by Contracting States and shall take priority over all other rights in the aircraft." Such rights may be noted on the record within three months and shall not be recognized by other contracting States

⁵⁹ For the possible effect of these two conventions, had they remained in force, see: Arnold W. Knauth, "Aviation and Salvage: The Application of Salvage Principles to Aircraft," *Columbia Law Review*, Vol. 36, 1936, p. 234.

⁶⁰ McNair, *op. cit.* p. 99.

⁶¹ *Ibid.*, p. 102.

⁶² International Civil Aviation Organization, Legal Committee, Sub-committee "Rome," Working Draft No. 27, May 27, 1949, p. 17.

after expiration of the three months period unless the right has been noted on the record and the amount has been agreed upon or judicial action on the right has been commenced.⁶³ It would appear that this convention will give international force to compensation due for salvage or preservation services if the State in which such operations are completed creates a lien against the aircraft for such charges, and provided the claimant carries out the technical requirements of recording the claim in the State of the registry of the aircraft and proceeds to enforce it as required by the convention. The inclusion of these provisions seems conclusive proof that international air law generally does not recognize responsibility of the aircraft for such claims.

4. CONCLUSIONS AND RECOMMENDATIONS

From the foregoing it is submitted that aircraft, like vessels, and unlike railway trains and automotive vehicles, now have that quality of legal quasi-personality in public international law discussed above as *nationality*, but that unlike vessels, and like railway trains and automotive vehicles, aircraft are not yet considered as having the quality of personal *responsibility* in private law. The legal status of aircraft is therefore *sui generis* and places them in a class apart from other instrumentalities of commerce.

Resulting from the acceptance into international air law of the nationality of aircraft, certain cognate problems require solution. As to the first of these — whether the distinction between state and civil aircraft in the Chicago Convention is sufficient — it is submitted that the solution there presented should be allowed to stand unless and until international practice indicates that confusion has resulted. No such evidence is at this time available. As to the treatment to be accorded State aircraft when in foreign territory, it is likewise submitted that no additional international legislation is at this time needed. The Chicago Convention provides that no state aircraft, whether military, customs or police, may enter foreign territory except under special authorization. No good reason seems to exist as to why such authorizations cannot from time to time determine the extent to which such state aircraft may be exempt from local jurisdiction when entering such foreign territory, although this question deserves further study.

But the general question as to the conflict of competence of the courts and applicability of laws of the State of the flag of the aircraft and other States does require solution. This must be found in new international legislation.

⁶³ For text of the convention and an excellent analysis of the difficult problems created by these provisions, see: Nathan G. Calkins, Jr., "Creation and International Recognition of Title and Security Rights in Aircraft," *Journal of Air Law and Commerce*, Vol. XV, 1948, pp. 156-181, and Text of the Convention at page 348 of Vol. XV. Richard O. Wilberforce, "The International Recognition of Rights in Aircraft," *International Law Quarterly*, Vol. 2, 1948, pp. 421-458.

Some of these matters may be discussed at the meeting of the International Law Association to be held in Copenhagen in August 1950. In preparation for that meeting, the American Branch of the Association has adopted, among others, the following recommendations:

- a) that the question of the legal status of aircraft and international law problems arising therefrom be the subject of further study by the International Law Association and its Committee on Air Law;
- b) that this study include the question of whether or not the Chicago Convention should be amended so as to provide a uniform basis internationally for the registration of aircraft, or whether the convention should be left as now drafted so that each State may determine for itself the conditions and legal requirements to be fulfilled by aircraft registered in such State—such conditions as to the status of persons applying for registration;
- c) that this study include the question as to whether agreements should be made internationally as to the status of aircraft operated by international agencies or other “stateless aircraft”;
- d) that an international convention should be drafted and adopted to cover conflicts arising in the jurisdiction of courts and the law applicable to occurrences on board aircraft;
- e) that the draft convention recommended by the International Law Association at Buenos Aires in 1922 and at Stockholm in 1924 be used as the basis for the preparation by the International Law Association of a modernized draft;
- f) that the International Law Association call to the attention of the International Civil Aviation Organization the need for such a convention and offer to cooperate in its final preparation.