

AN HISTORICAL SURVEY OF INTERNATIONAL AIR LAW BEFORE THE SECOND WORLD WAR*

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EDITOR'S NOTE: *This article is the first of a two-part series dealing with the development of international air law from its very beginnings until the present time. The second and concluding article, which will be an historical survey of international air and space law between the end of World War II and recent times, is under preparation and will appear in a subsequent issue of the Journal.*

INTRODUCTION

The aim of this article is to present an historical outline of the more interesting and important aspects of air law from its beginning to the year 1944. There is a vast amount of literature dealing with aviation and it may be convenient to interested readers to have some of the more important events relating to the development of air law compressed into a comparatively short treatise. In doing this, however, the authors realize that features which are deemed important by some jurists may have been omitted.

Chapter I

AIR LAW PRIOR TO 1919

Air law has been described as the "last born of juridical notions."¹ Its very origin, however, can be traced back to classical Roman Law² when the basic problem of rights in the airspace was first noted. The maxim "Cuius est solum, eius est usque ad coelum" (who owns the land, owns even to the skies) has provoked legal discussion ever since, in the fields of both municipal and international law:—from the case of *Bury v. Pope* (1586, Cro. Eliz. 118) in the Common Law to the codes of the Civil Law adopted in the 19th and 20th century;³ from Grotius's "De iure belli ac pacis"⁴ and Danck's "De iure principis

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¹Le Goff, Marcel, *The Present State of Air Law*, The Hague (Nijhoff 1950) 24.

²Pampaloni, Muzio, *Sulla condizione giuridica dello spazio aereo e del sottosuolo nel diritto romano e odierno*, *Archivio Giuridico* 48 (1892), 35; Lardone, Francesco, *Airspace Rights in Roman Law*, *Air Law Review* 2 (1931), 455; Cooper, J. C., *Roman Law and the Maxim "Cuius est solum" in International Air Law*, Montreal, (McGill, 1952.)

³See French Civil Code (1804), art. 552; Austrian Civil Code (1811), section 297; Italian Civil Code (1866), art. 440; Quebec Civil Code (1866), art. 414; German Civil Code (1900), section 905; Swiss Civil Code (1907), art. 667.

⁴(1625); see Book II, Chapter 2, Sec. 3(1).

in aereo"⁵ in the 17th century, to the Chicago Convention of 1944. "Air Law" has been retained as a general term for what is essentially "Aviation Law" today. It is in this respect that Air Law can be considered as a "young law".⁶

I. DOMESTIC AIR LAW BEFORE 1919

Decrees and Statutes

It is generally agreed that the first air law promulgated was an ordinance of one Lenoir, a "lieutenant de police" in Paris, prohibiting balloon flights⁷ without special permits as from April 23, 1784. This was one year after the first aircraft, a hot-air balloon constructed by the Montgolfier Brothers, had left the ground. In the same year as the Paris ordinance, the City Council of Ypres in Belgium, promulgated a similar enactment concerning balloon flights, as did the Council of Namur in 1785, and the Senate of Hamburg in 1786.⁸

The first regulation for safety in air navigation was made in 1819 by Count d'Anglès, Police Prefect of the Seine Department, requiring balloons to be equipped with parachutes, and prohibiting aeronautic experiments during the harvest.⁹

In 1908, the Council of Kissimee City (Florida) enacted the first air traffic regulation which stated that the airspace subject to the legal control of the city extended upward to a limit of twenty miles. The enactment contained further provisions for the regulation of aerial traffic above the city and recommended that the Council should "as soon as practicable purchase an aeroplane to enable them to properly enforce the provisions of the ordinance".¹⁰

The first customs regulations for aviation were introduced in 1909 by a circular of the French Prime Minister, Clemenceau, imposing duties on balloons from abroad.¹¹

⁵Danck, Johann-Stephan, Thesis, Frankfurt-on-Oder (1687); S. Strykii opera, 5, Florence (1838), 1190; Nys, *Une dissertation du XVIIe siècle sur le droit aérien*, *Revue de Droit International et de Législation Comparé*, 43 (1911), 323-325; Cooper, *op. cit.*, 25-26.

⁶Riese, Otto, *Luftrecht*, Stuttgart (Koehler, 1949), 10.

⁷Shawcross and Beaumont, on *Air Law*, London (2nd ed. Butterworth 1951), 3; some authors date this ordinance back to 1724, which appears to be a mistake: see Le Goff, Marcel, *Manuel de droit aérien*, Paris (2nd ed. Dalloz, 1954), 49; Hamilton, Eduardo, *Manual de derecho aéreo*, Santiago de Chile (1950), 29.

⁸Litvine, Max, *Précis élémentaire de droit aérien*, Brussels (1953), 21; Troitzsch, *Archiv für Luftrecht*, (1940), 119, note 8.

⁹Hotchkiss, H. G., *A Treatise on Aviation Law*, New York (2nd ed. Baker-Voorhis 1938), 4.

¹⁰"Ordinance regulating the status and the employment of airships within the town of Kissimee City"; Lycklama, Johanna F. à Nijeholt, *Air Sovereignty*, The Hague (Nijhoff 1910), 43.

¹¹March 12, 1909; *Bulletin Officiel du Ministère de l'Intérieur*, March, 1909, 127; *Revue Juridique Internationale de la Locomotion Aérienne*, 1 (1910), 20 (cited hereinafter as RJLA).

In 1910, U.S. Congressman Sheppard introduced the first bill relating to the carriage of air mail.¹²

From 1910 to 1914, aviation decrees were enacted in Brandenburg, Prussia,¹³ Great Britain,¹⁴ Connecticut,¹⁵ Pennsylvania, California,¹⁶ France,¹⁷ Austria, Serbia, Germany, Massachusetts, Russia, Switzerland, and Italy.¹⁸

The first air navigation company had been incorporated in New York by one Dr. Andrews, in 1865.¹⁹ In 1910, an air-transportation company, organized by Count Von Zeppelin, began a scheduled dirigible service between Friedrichshafen and Dusseldorf (Germany).²⁰ In 1914, an air transport service was opened between St. Petersburg and Tampa (Florida); the first regular air mail service started in the spring of 1918, between New York and Washington. At the same time, scheduled air transportation was attempted in Italy and Austria-Hungary.²¹

Court Decisions

The first reported case in the Common Law referring to air navigation was *Pickering v. Rudd*, decided in 1815. Lord Ellenborough expressed a doubt as to whether an aeronaut would be liable "to an action of trespass *quære clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage".²²

In January, 1822, the first case of a tort committed by an aviator was decided by the New York Supreme Court.²³ A balloonist had made a forced descent upon the plaintiff's land and attracted large crowds who trespassed

¹²"A bill for an investigation to determine the practicability and cost of an aeroplane or airship mail route", H.R. 26833, 45th Congress (June 14, 1910).

¹³August 10, and October 22, 1910; RJILA 1 (1910), 221; Henry-Couannier, André, *Eléments créateur du droit aérien*, Paris (Per Orbem 1929), 16.

¹⁴"Aerial Navigation Act," June 2, 1911; repealed in 1913.

¹⁵June 8, 1911; Fixel, Rowland W., *The Law of Aviation*, Charlottesville, Va. (3rd ed. Michie 1948), 28.

¹⁶"Statute on registration and control of aeroplanes in California"; see D'Hooghe, Edouard, *Droit aérien*, Paris (Dupont 1912), 100-103; RJILA 2 (1911), 78, 245.

¹⁷November 11, 1911; repealed December 17, 1913; see Henry, *op. cit.* 19, 20.

¹⁸See Henry, *ibid.*; Fixel, *op. cit.*, 28; Riese, *op. cit.*, 22.

¹⁹The Aerial Navigation Company Inc., built and flew motor-less dirigibles; (1942) U.S. Av.R. ii; Shawcross, *op. cit.*, 3.

²⁰*Deutsche-Luftschiffahrt AG (DELAG)*; during the four ensuing years the company operated a number of Zeppelins for a total distance of approximately 100,000 miles and carried more than 17,000 passengers; see Speas, Dixon R., *Technical Aspects of Air Transport Management*, New York (Maple 1955), 1.

²¹See Lissitzyn, Oliver J., *International Air Transport and National Policy*, (New York Bidwell 1942), 1.

²²*Pickering v. Rudd* (1815), 4 Camp. 219; 1 Stark 56; 16 R.R. 777; see Kuhn, Arthur K., *The Beginnings of an Aerial Law*, Am. J. Int'l L. (1910), 109-132.

²³*Guille v. Swan* (1822), 19 Johns. (N.Y.), 381; (1928) U.S. Av.R., 53; CCH Av. Cas. 1 (1947), 1.

thereon and caused damage. It was held that the defendant was liable in trespass.

In 1852, a similar factual situation was the subject of the first Civil-Law decision on air navigation.²⁴ The French Cour de Cassation in a criminal case came to the conclusion that, as the defendant balloonist had been crying out for help, his descent was unintentional (*force majeure*), and that, therefore, the charge against him should be dismissed.

The first English case of damage caused by aviation was *Scotts Trustees v. Moss*,²⁵ in which a parachute descent attracted crowds on to the plaintiff's land, so that his property was damaged. The organizer of the spectacle was held liable in damages, but it is not clear from the report on what grounds.

Doctrine

From 1891 to 1896 the first treatises dealing with the legal aspects of aviation were published in Italy, France and Germany.²⁶ In 1898, the first doctorate thesis on the subject was written.²⁷

Paul Fauchille's classic article "*Le domaine aérien et le régime juridique des aérostats*", in 1901,²⁸ and the Wright Brothers' first authenticated flight in a motor-driven heavier-than-air machine, in 1903, marked the beginning of a flood of publications. Although air navigation itself was still at a rather primitive level, many of the legal problems involved could be foreseen, discussed, and resolved by jurists before the advance in the technical aspects of aviation had made them pressing.²⁹

In 1910, the first lectures on air law were given at the "Ecole Supérieure d'Aéronautique" in Paris and at King's College in London.³⁰ In the same year the first air law periodicals were published: the "Revue Juridique Internationale de la Locomotion Aérienne" and the "Air Law Review".³¹

In consequence of the international character of air navigation, it soon became evident that most of the legal problems could not be resolved on a purely national basis. International regulation was necessary.

²⁴Cour de Cassation, (Ch. crim) (August 14, 1852); RJIJA 1 (1910), 19.

²⁵*Scotts Trustees v. Moss* (1889), 17 R. (Ct. of Sess.), 32.

²⁶Manduca, *La responsabilità penale dei reati commessi nello spazio aereo e la giurisdizione istruttoria*, Rome (1891); Pampaloni, *op. cit.*; Wilhelm, *De la situation juridique des aérostats en droit international*, *Journal du Droit International Privé*, 18 (1891), 440; Jurisch, Konrad W., *Über deutsches Luftrecht*, Berlin (1896).

²⁷Erythropel, Hermann, *Das Recht am Luftraum*, Göttingen Univ. (1898).

²⁸*Revue Générale de Droit International Public*, 8 (1901), 414.

²⁹Meyer, Alex., *Freiheit der Luft als Rechtsproblem*, Zurich (Air-Ed. 1944), 23.

³⁰Henry, *op. cit.*, 3; Hazeltine, *The Law of the Air*, London (Univ. Press 1911), 1; Pépin, Eugène, *L'enseignement du droit aérien dans le monde*, Montreal (McGill 1958), 3.

³¹See Pépin, *ibid.*, note 10; Shawcross, *op. cit.*, 4. In the same year, Laude, E. gave the first definition of Outer Space Law: *Comment s'appelleront le droit qui régira la vie de l'air*, RJIJA 1 (1910), 18.

II. INTERNATIONAL AIR LAW PRIOR TO 1919

Work of International Juridical Societies

The main international discussion on air law took place among the members of the Institute of International Law (Institut de Droit International). At the Brussels session in 1902, Fauchille and Nys introduced the celebrated theory of "freedom of the air".³² Since this date, publicists of international air law can be classified into four categories: authors in favour of absolute freedom of air navigation,³³ those in favour of absolute State sovereignty in the air,³⁴ those accepting a vertical limitation ("zones") to sovereignty,³⁵ and those accepting a functional limitation by international law.³⁶

The Institute of International Law discussed various drafts of an "International Code of the Air" during its sessions at Ghent, 1906, Florence, 1908, and Paris, 1910. At the Madrid session in 1911, it adopted certain rules governing aircraft, the fundamental principles of which are generally retained today in the written international law on this subject.³⁷

At the same time, various other international societies dealt with air law problems:

The International Aeronautic Congress in Paris, in 1889 created a Permanent International Aeronautics Commission which subsequently held meetings in Paris, 1900, Milan, 1906, Brussels, 1907, and Nancy, 1909.³⁸

The "Comité juridique international de l'aviation", established in Paris, 1909, prepared a draft "International Code of the Air" through its national committees and held meetings in Paris, 1911, Geneva, 1912, and Frankfurt-on-Main, 1913.³⁹

The "Congresso giuridico internazionale per il regolamento della locomozione aerea" took place in Verona, in June, 1910.⁴⁰

³²*Annuaire de l'Institut de Droit International*, 19 (1902), 19, 86.

³³Advocated prior to 1919, e.g., by Meili, Nys, Pradier-Fodéré, Stephan, Stranz, Wheaton.

³⁴E.g.: Baldwin, Collard, Gemma, Grünwald, Hazeltine, Von Liszt, Lycklama, Von Ullmann, Zitelmann.

³⁵E.g.: Bluntschli, Bonnefoy, Fauchille, Despagnet, Merignhac, Oppenheim, Rolland, Von Holtendorff.

³⁶E.g.: Anzilotti, Corsi, Hilty, Meurer, Meyer, Pietri, Rivier, Von Bar, Westlake. This group appears to have been the dominant one, although it widely differed on the question of the degree of limitation. The Institute of International Law in 1911 only recognized certain rights of protection for the States, without limiting air circulation itself; Anzilotti and Westlake advocated a right of innocent passage as a limit to sovereignty; Meyer accepted limitation by international agreement.

³⁷Fixel, *op. cit.*, 29.

³⁸See Roper, Albert, *La convention internationale du 13 octobre 1919 portant réglementation de la navigation aérienne*, Paris (Sirey 1930), 20; Pépin, Eugène, *Le droit aérien*, Paris (Rec. des Cours), 71 (1947 II), 481.

³⁹Fixel, *op. cit.*, 28; Roper, *op. cit.*, 21.

⁴⁰May 31 - June 2, 1910; *Atti e relazioni*, Verona (Società tipografica cooperativa, 1910); RJILA 1 (1910), 175.

The International Law Association formed an Aerial Law Committee at its 1912 session in Paris, and discussed air law problems in Madrid, 1913.⁴¹

The Pan-American Aeronautic Federation held a meeting in Santiago (Chile), 1916, which recommended that the American republics should make their national aviation legislation uniform with a view to the formation of an International Air Code.⁴²

The Nordic Aviation Conference in Stockholm, 1918, and the Budapest Air Law Conference in 1918 also considered the international unification of the law relating to aviation.⁴³

Diplomatic Documents and International Conferences

The first diplomatic document concerning international aviation law dates back to the Franco-German War of 1870-71, in which balloons were used on both sides, especially during the siege of Paris. A letter dated November 19, 1870, addressed by Bismarck to the French government through the American ambassador Washbourne, declared that aeronauts overflying the territory occupied by the German troops would be treated as persons operating behind the battle lines.⁴⁴ This first claim to sovereign rights in the airspace caused considerable protest by jurists.

The First International Peace Conference at the Hague, in 1899, came to a temporary agreement on aerial warfare:

"The contracting powers agree for a term of 5 years to forbid the discharge of projectiles and explosives from balloons or by other new methods of a similar nature".⁴⁵

This declaration was not renewed, however, at the Second Hague Conference in 1907. The International Naval Conference in London, 1907, included aircraft in its discussions on the legal status of war instruments.⁴⁶

At these diplomatic conferences, international control of air navigation had only been considered from a military standpoint. By 1910, however, the French Government had become concerned about the number of peaceful but unregulated international flights that were taking place. Balloons frequently took off from one State and landed in another or wherever they might drift.

⁴¹International Law Association, 28th Report (1913), 533; De La Pradelle, *Revue Générale de Droit Aérien* (1932), 539; Henry, *op. cit.*, 15; Litvine, *op. cit.*, 24.

⁴²Fixel, *op. cit.*, 32.

⁴³Haupt, *Der Luftstraum*, Breslau (1931), 49; Meyer, *op. cit.*, 43; Schiffer, Walter, *Notes on the Nordic Aviation Conference*, Stockholm (1918), 77.

⁴⁴Nys, *Annuaire de l'Institut de Droit International*, 19 (1902), 109; Henry, *op. cit.*, 187; Riesch, R., *Revue Générale de Droit Aérien* (1932), 817.

⁴⁵Tombs, Lawrence C., *International Organization in European Air Transport*, New York (Columbia 1936), 3; Fixel, *op. cit.*, 26.

⁴⁶"*Les aérostats et les appareils d'aviation*"; see Litvine, *op. cit.* 24; Kuhn, *op. cit.*, 123.

In 1908, for example, at least ten German balloons crossed the frontier and landed in France carrying over 25 aviators, most of whom were German officers. Blériot took off from "Les Barraques" on his trip across the Channel to Dover on July 25, 1909, without any thought of the legality of his entry into English territory. Fearing a disagreeable incident, the French Government invited the European powers to hold a conference in 1910 on the regulation of air navigation.⁴⁷ The 19-state conference which followed, though technically a diplomatic failure,⁴⁸ was of great historical importance. When the conference met, there existed no acceptable plan for international flight regulation. When the conference adjourned, it had completed a draft convention of 55 articles and 3 annexes, including such subjects as aircraft nationality, registration, rules of the road and photographic and radio equipment in aircraft. The conference agreed on the following principles which were to reappear in the Paris Convention of 1919 and which influenced the Chicago Convention of 1944: the subjacent State may set up prohibited zones above which no international flight was lawful; cabotage traffic may be reserved for national aircraft; the establishment of international airlines will depend upon the assent of interested States. In Professor Cooper's opinion, the conference first evidenced general international agreement that usable space above the lands and waters of a State is part of the territory of that State.⁴⁷ Thus, the cause of failure of the conference was not, as generally supposed, the impossibility of reaching agreement as to the legal status of airspace. The real causes of breakdown were political. Were the restrictions imposed by each State on freedom of flight to be applied equally to national aircraft and to aircraft of all other contracting States? When the conference adjourned, never to be reconvened as originally intended, only one legal point stood between the United Kingdom on the one hand, and Germany and France on the other, and this concerned the legal status of private property rights in airspace. Germany and France thought that each State should make changes in its local laws to permit foreign aircraft to enjoy the flight privileges granted by such State without interference from landowners. The United Kingdom finally suggested that it would take the practical measures necessary to make its local laws conform with the proposed convention and thus compromise would almost certainly have been reached. An attempt by an "International Committee of Aeronautic Law" in Brussels, to resume the work of the Paris conference through the Belgian Government in 1913, was a failure.⁴⁹

Thus the problems of international aviation were left to bilateral agreement. The first bilateral agreement of this kind was the convention of 1898 between

⁴⁷*Conférence Internationale de Navigation Aérienne, Procès-Verbaux*, Paris (Imprimerie Nationale 1910), Cooper, J. C., *The International Air Navigation Conference in Paris 1910*, (1952) 19 *J. Air L. and Com.*, 12.

⁴⁸Baller, Maurice, *L'air et le droit*, Lyon (Bosc 1927), 31.

⁴⁹Litvine, *op. cit.*, 24.

Austria-Hungary and Germany on the legal status of military balloons overflying the frontier. It was concluded by a simple exchange of notes.⁵⁰

In 1910, the United States began bilateral negotiations on the regulation of air navigation with Mexico and Canada.⁵¹ In 1913, President Wilson declared flights across the Panama Canal illegal. Any such flight was subject to a fine of 1,000 dollars and one year in prison.⁵²

In the same year, France and Germany concluded a bilateral air convention. Like the Austro-German agreement of 1898, it simply consisted of two letters, dated July 26, 1913, signed by the French Ambassador, Cambon, and the German Secretary of State, Von Jagow.⁵³ The convention, which resulted from several aerial frontier incidents, established a distinction between military and civil aircraft, uniform entrance requirements for foreign aircraft, and special prohibited zones. It can be considered as an implicit recognition of the principle of State sovereignty in the air.⁵⁴

World War I interrupted diplomatic negotiations on civil aviation. The tremendous development of military aviation, however, brought about a decisive change in governmental attitudes towards air transport. Great Britain, which had been extremely hostile to an international convention in Paris, 1910,⁵⁵ created a Civil Aerial Transport Committee in 1917 for the study of post-war civil aviation problems.⁵⁶ Similar studies were carried out in France.⁵⁷

Moreover, an Inter-allied Aviation Committee (Comité Interallié d'Aviation) established in 1916 by France, Great Britain, Italy and the United States in order to coordinate aircraft fabrication, and to standardize aeroplanes, motors and other material, stressed the necessity of cooperation in post-war international aviation.⁵⁸

⁵⁰June 8, and November 2, 1898; see Riesch, R., *Das erste Luftfahrtabkommen der Welt*, *Archiv für Luftrecht* (1940), 41; Meyer, *op. cit.*, 24, note 1.

⁵¹RJILA 1 (1910), 222.

⁵²Henry, *op. cit.*, 141; Litvine, *op. cit.*, 43.

⁵³*Journal Officiel de la République Française* (August 12, 1913); *Reichsgesetzblatt* 48 (1913), 601, Roper, *op. cit.*, 246; Rolland, Louis, *L'accord franco-allemand du 26 juillet 1913 relatif à la navigation aérienne*, *Revue Générale de Droit International Public* 20 (1913), 697.

⁵⁴Ballet, *op. cit.*, 39.

⁵⁵In 1910, civil aviation practically did not exist in England. In August 1914, the British flying corps possessed some 150 machines; by November 1918, 22,000 machines; see Sykes, F. H., *Aviation in Peace and War*, London (1922), 17, 43-44; Tombs, *op. cit.*, 7, note 8; Shawcross, *op. cit.*⁴

⁵⁶May 22, 1917; British Parliament Cmd. No. 9215 (1918); Cooper, J.C., *The Right to Fly*, New York (Holt 1947), 22.

⁵⁷Pépin, Eugène, *Géographie de la circulation aérienne*, Paris (Gallimard 1956), 26.

⁵⁸Pignochet, Anne, *La commission internationale de navigation aérienne*, Paris (Editions Internationales 1935), 24.

International Practice

The first major international aerial incidents occurred at the Russian-German border, in 1904 and 1910.

In August 1904, Russian guards shot down the German balloon "Tschudi". The affair caused great excitement among jurists, because the aircraft, at the time of the shooting, had been flying outside Russian territory.⁵⁹

Six years later, in August 1910, the Russian guards again manifested their concept of State sovereignty by firing at aeronauts who had passed over the frontier.⁶⁰

Practice during World War I clearly affirmed State sovereignty in the air. On August 3, 1914, the Netherlands prohibited flights over their territory.⁶¹ During the war, the Dutch Government protested several times against violations of its national airspace and shot down foreign aircraft which did not comply with the interdiction.⁶²

Switzerland sent a note to France and the Central Powers on August 8, 1914, announcing the prohibition of flights over Swiss territory by "any aircraft from abroad".⁶³ The declaration was not contested by the belligerents. Indeed it was generally respected.⁶⁴

Denmark, Sweden, Norway, Greece, and Spain, Italy, Roumania, Bulgaria and China, while still neutral, also protested by words or acts, or both, against every violation of their airspace by foreign aircraft.⁶⁵ It is, therefore, generally agreed that international practice prior to 1919 evidenced a recognition of the principle of State sovereignty in the air.⁶⁶

⁵⁹See Lycklama, *op. cit.*, 43; Kroell, Joseph, *Traité de Droit International Public Aérien*, Paris (Ed. Int. 1934) I, 36.

⁶⁰See Lycklama, *ibid.*

⁶¹Royal decree, State Bulletin (1914), 354; Goedhuis, Daniel, *Handboek voor het luchtrecht*, The Hague (Nijhoff 1943), 32; Spaight, J. M., *Aircraft in Peace and the Law*, London (1919), 203-217; Hotchkiss, *op. cit.*, 6.

⁶²See Spaight, J. M., *Air Power and War Rights*, Aberdeen (3rd ed. 1947), 422; *cf.* Kroell, *op. cit.*, 37, and personal experience, Rosevear, A. B., Q.C., Director, Institute of Air and Space Law, McGill University.

⁶³*Journal Officiel de la République Française* (August 10, 1914); on March 21, 1916, the prohibition was put into effect by the establishment of an "air frontier zone"; Swiss Federal Instruction to the military authorities, see Kroell, *op. cit.*, 73.

⁶⁴A British note in 1914, however, whilst expressing its regret for a violation of Swiss airspace by British aircraft, added that this "should not be interpreted as a recognition by His Majesty's Government of the existence of an air sovereignty"; see Kroell, *op. cit.*, 37, note 4.

⁶⁵See Hackworth, *Digest of International Law*, Washington (Dept. of State 1943), VII, 549-553. Spaight, J. M., *Air Power and War Rights*, *op. cit.*, 420; Wine, Joseph R., *Aerial Warfare and International Law*, Thesis, Montreal (McGill 1954), 22.

⁶⁶*Cf.* Volkmann, Kurt, *Internationales Luftrecht*, Berlin (1930), 48; Kroell, *op. cit.*, 35, 38; Hotchkiss, *op. cit.*, 6; Goedhuis, *op. cit.*, 32.

Chapter II

AIR LAW BETWEEN THE WORLD WARS

I. PUBLIC INTERNATIONAL AIR LAW

A. *The Paris Convention, 1919*⁶⁷

During the 1914-1918 War, aircraft were used for many purposes and increased in great numbers. Great Britain, for example, possessed only twelve military aircraft in 1914. By the end of the War, she possessed twenty-two thousand⁶⁵ This increase in aircraft together with the commencement of the first regular service for international transport on March 22, 1919⁶⁸ and the first flight across the Atlantic by Alcock and Brown between June 14 and 15 of the same year, rendered apparent the urgent need for some kind of international regulation of aviation. On the initiative of the French Government, a conference of thirty-eight States was held in Paris and as a result of their deliberations the First International Convention on Air Navigation was opened for signature on October 13, 1919. This Convention contains provisions which were taken from the opinions of early writers, such as Fauchille and those who took part in the 1910 Conference on international air law. Their farsighted work now bore fruit. The main principles of the Convention may be stated as follows:

- i) The recognition that every State has complete and exclusive sovereignty over the airspace above its territory, (Article 1).

It will be seen that Article 1 of the Paris Convention gives recognition to the principle supported by State practice before the First World War. The exponents of the "free air" theory had been defeated. Any further discussion by them on this subject could now only be directed to inducing the States of the world to change or amend this principle.

- ii) The freedom of innocent passage of aircraft of contracting States over the territory of other contracting States and the right to use the public aerodromes of that State (Article 2).

It is important to realize that this freedom was granted as a privilege and was not conceded as a natural right. Thus, although there must be equality in the treatment of all contracting States, a State could make regulations as to the admission of aircraft over its territory and permission to cross territory always had to be sought. Article 15 supplements Article 2 by conceding that every aircraft has the right to cross the airspace of another State without landing, the route to be fixed by the State over which the flight takes place. Whether this obligation included the obligation to permit the establishment of regular lines across the territory of the States, gave rise to considerable controversy and

⁶⁷Tombs, *op. cit.*, p. 42; Pépin, *op. cit.*, 485.

⁶⁸Between Paris and Brussels by air balloon.

hindered the development of international air transport. States realized the economic value of the airspace above their territory and were unwilling to give up a rich source of revenue. Thus, in practice, the establishment of international airways and lines continued to be a matter of negotiation, or rather hard bargaining, between States.

- iii) For military reasons or in the interest of public safety, aircraft may be prohibited from flying over certain areas of a State's territory, no distinction being made between its own and a foreign aircraft (Article 3).

This latter clause was removed by protocol in 1929. The removal of the clause and the prohibition itself exemplifies the check on international air transport imposed by the principle of sovereignty. An example of the abuse of this article occurred when Italy prohibited flight over its entire Northwest, North and Northeast frontiers just before the Second World War. There were, in addition, twelve other Italian prohibited areas.⁶⁹ Again, just before the Second World War, flight across territory close to the Franco-German borders became practically impossible because of these prohibited areas.

- iv) Aircraft of non-contracting States were not to be permitted to enter the airspace of contracting States.

This was soon modified by a protocol of the 27th of October, 1922, as many States were refusing to ratify the Convention on account of the limitation this article imposed on their bargaining power.

- v) Uniform and obligatory regulation of air navigation to ensure safety, was imposed.
- vi) Other legal questions dealt with by the convention included registration of aircraft, certificates of airworthiness, certificates of competency and licences to be issued to aircraft personnel, and cabotage, to name but a few.

Probably the most important achievement of the convention was the creation of an International Commission for Aerial Navigation, commonly known as C.I.N.A. Its main functions were: the preparation of amendments to the convention for submission to States for ratification; the elaboration and revision of the safety and technical regulations; the interpretation of these regulations and the circulation of information respecting air navigation. At its first meeting on July 11, 1922, the same day on which the convention itself came into force, seven sub-commissions were set up to facilitate the study of technical questions. These were the Operational, Legal, Wireless, Meteorological, Medical, Maps and Materials Commissions. C.I.N.A. possessed administrative, legislative, executive and judicial powers as well as being an advisory body and a centre of documentation. The work of C.I.N.A. and its subcommissions proved to be very helpful in the drafting of the technical annexes to the Chicago Convention of 1944.

⁶⁹See Tombs, *op. cit.*, p. 86.

The importance of this Convention cannot be over-emphasized. Its provisions became part of the national legislation of the contracting States and it proved an inspiration to the development of national air law in Europe, which up to that time was very limited. The Ibero-American Convention, signed at Madrid in 1926, covered the same ground, and even the Pan-American Convention, signed at Havana in 1928,⁷⁰ reproduced a number of its essential provisions although, whereas the Paris Convention dealt exclusively with public air law, the Havana Convention took up certain questions of private air law as well.⁷¹

B. The Ibero-American Convention, 1926

The "Convencion Ibero-Americana de Navigacion Aérea" referred to above was signed on November 1, 1926. Spain had declined to ratify the Paris Convention because she would not have been granted a voting power equal to that accorded to France and Italy within C.I.N.A. She now invited all Latin American States to send delegates to a conference to be held at Madrid between the 25th and 30th of October, 1926. The resulting convention almost reproduced the text of the Paris Convention, although all States were to have equal voting rights in C.I.A.N.A., the equivalent of C.I.N.A. Only seven States ever ratified the Convention and C.I.A.N.A. never became a really effective body.

C. The Pan-American Convention, 1928

At the Fifth Pan-American Conference held in Santiago in 1923, an Inter-American Commercial Aviation Commission was established to draft a legal code on civil aviation. The draft convention was submitted to the Sixth Pan-American Conference which met in Havana on January 1, 1929. After minor modification, it was signed by the representatives of the States present. Sixteen States had ratified it by 1944 when the Chicago Convention resulted in its denunciation. The Convention was modelled on the Paris Convention, although the material contained in the annexes to the latter convention was included among the main provisions of the Havana Convention. The Convention also dealt with some aspects of private air law.

D. The International Sanitary Convention, 1933

This Convention was signed at the Hague on April 12, 1933. It contains numerous regulations consisting of measures to prevent the spread of plague, cholera, yellow fever, typhus and smallpox. Some of its provisions have been amended by the Sanitary Convention signed at Washington, December 15, 1944, together with a protocol to the latter Convention signed on April 23, 1946. One of the more important provisions is to the effect that passengers travelling through certain areas must be possessed of certificates of vaccination to be shown to the immigration authorities at the port of entry.

⁷⁰Latchford, (1931), 2, J. Air L. and Com., 207.

⁷¹E.g., Article XXV concerning the rights and duties of the aircraft owner.

II. PRIVATE INTERNATIONAL AIR LAW

Shortly after the First World War, a number of aeronautical organizations expressed concern at the lack of uniform regulation governing private air law. Every State had its own laws on the subject and these varied considerably from one state to another. A uniform system of regulation similar to that established by the Paris Convention in the field of public air law was felt to be necessary.

In June 1923, the French Government submitted to the National Assembly a bill regarding the liability of the carrier in air transport. Realizing that this question could only be solved satisfactorily by international agreement, the Government invited a number of States to take part in a conference whose main aims would be to draw up a convention on the liability of the aerial carrier and to decide whether it was desirable to pursue the study of the international unification of private air law. Thus the First International Conference on Private Air Law was held in Paris from October 27 to November 6, 1925. Forty-four States were officially represented, with observers from the United States, Japan and Hungary also present. At the conclusion of the Conference, a draft convention on the liability of carriers in international transport was approved by the delegates and a resolution was adopted setting up a committee of experts, to be known as CITEJA,⁷² which was to continue the work of the Conference. The first questions for study by CITEJA were:

- i) Damage caused by aircraft to goods and persons on the ground.
- ii) Compulsory insurance.
- iii) Establishment of aeronautical registers, ownership of aircraft, vested rights and mortgages.
- iv) Seizure.
- v) Renting of aircraft.
- vi) Aerial collisions.
- vii) Legal status of aircraft commander.
- viii) Bill of lading (air consignment note).
- ix) Uniform rules for the determination of the nationality of an aircraft.⁷³

The proposed committee was to be a purely advisory and completely independent organization both in its methods of work and its operation. This was to ensure the preservation of each State's "complete sovereignty in all matters affecting possible change in internal legislation."⁷⁴

CITEJA met for the first time in Paris on May 17, 1926 and began the study of the first questions submitted to it by the Conference of 1925. Twenty-eight nations appointed representatives to attend the meeting. The committee met

⁷²*Comité International Technique d'Experts Juridiques Aériens*; see Ide (1932) 3 J. Air L., 27.

⁷³*Conférence internationale de droit privé aérien*. Issued by French Ministry of Foreign Affairs, 1936: p. 90-91.

⁷⁴See *Idc. op. cit.* p. 31.

regularly up to the commencement of the Second World War and the result of its work up to that time consisted in the preparation of four conventions and a protocol which were submitted to, and opened for signature at, three subsequent international conferences on private air law.

*The Warsaw Convention, 1929*⁷⁵

The Second International Conference on Private Air Law took place at Warsaw from October 4 to 12, 1929. A draft convention prepared by CITEJA for the unification of certain rules relating to international carriage by air was submitted to the conference and, at its conclusion, opened for signature. The Convention was a direct result of the study by CITEJA of the draft convention on the liability of the air carrier approved at the 1925 conference and of the supplementary questions of traffic documents and liability in the case of non-performance of international carriage. Thirty-three States were represented at the conference and the resulting convention has been widely accepted.

The convention applies to the international transportation of persons, baggage and goods performed by aircraft for remuneration or hire, as well as to gratuitous transportation by aircraft performed by an air transportation enterprise.⁷⁶ International transportation means transportation in which the place of departure and place of destination are situated within the territories of two High Contracting Parties or within the territory of one Contracting Party if there is an agreed stopping place within the territory of another power, whether a contracting party or not.⁷⁷ The carrier is required to issue tickets for the transportation of passengers, and baggage, other than small objects of which the passenger takes charge himself. A carrier of goods may require the consignor to make out and hand over a "waybill", *i.e.*, an air consignment note. Similarly, the consignor may require the carrier to accept this document.⁷⁸ The carrier is liable to pay all provable damages up to a limit of 125,000 French gold francs⁷⁹ in the event of the death of or bodily injury suffered by a passenger if the accident causing the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.⁸⁰ Similarly, the carrier is liable up to a limit of 250 gold francs per kilogram in the case of checked baggage and goods, 5,000 gold francs in the case of objects of which the passenger takes charge himself⁷⁹ in the event of the destruction, loss of, or damage to these goods, if the occurrence causing the damage took place during

⁷⁵See Goedhuis, *National Air Legislations and the Warsaw Convention*; The Hague (Nijhoff, 1937).

⁷⁶Art. 1(1).

⁷⁷Art. 1(2); see *Grein v. Imperial Airways* [1937] 1 KB 50; [1936] ALLER 1258; [1936] USAvR, 211.

⁷⁸See Arts. 3-16 inclusive which contain detailed provisions as to the form and legal effect of these transportation documents.

⁷⁹Art. 22.

⁸⁰Art. 17.

the transportation by air which comprises the period during which the goods are in the charge of the carrier.⁸¹ The carrier is also liable for damage occasioned by delay in the transportation by air of passengers, baggage and goods.⁸² It would seem that the effect of these provisions is to create a presumption of liability against the carrier when loss or damage occurs, the injured party not having to show negligence or fault of any kind.⁸³ Certain defences are open to the carrier however. He is not liable if he can prove that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.⁸⁴ Further, in the case of the transportation of goods and baggage, he will not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation, and that in all other respects he and his agents have taken all necessary measures to avoid the damage.⁸⁵ Again, if the carrier proves that damage was caused wholly, or in part, by the negligence of the injured person, he may be exonerated wholly or partly from his liability.⁸⁶ On the other hand, if the damage is caused by the wilful misconduct⁸⁷ of the carrier or his agents, he cannot avail himself of the provisions of the convention excluding or limiting his liability.⁸⁶ An action must be brought in the territory of one of the contracting parties, either before the court of the carrier's domicile or of his principal place of business or where he has a place of business through which the contract was made or before the court at the place of destination.⁸⁷

This convention has been ratified by between fifty-five and sixty States up to the present time and most of them have incorporated its provisions into their national laws.⁸⁸ It was the most widely accepted convention drafted by CITEJA on private air law. The Legal Committee of ICAO prepared a protocol to the Warsaw Convention, which was signed at the Hague in 1955, and which introduced some important amendments.

The Rome Conference, 1933

The Third International Conference on Private Air Law was held at Rome from May 15 to 29, 1933. Two draft conventions prepared by the CITEJA were examined and, after amendment, were opened for signature at the conclusion of the conference. The first convention relates to the precautionary attachment of aircraft. "Precautionary attachment" is defined as every act whereby an aircraft is arrested in pursuit of a private interest by the agency of

⁸¹Art. 18.

⁸²Art. 19.

⁸³Art. 20.

⁸⁴Art. 21.

⁸⁵"Dol ou faute . . . équivalente au dol" in the French text.

⁸⁶Art. 25.

⁸⁷Art. 28.

⁸⁸E.g. *Carriage by Air Act*, 1932, 22 and 23 Geo. 5, c. 36, in U.K.

judicial or public authorities on behalf of a creditor or the owner or the holder of a lien on the aircraft.⁸⁹ Aircraft exclusively employed in state service, aircraft actually in service on a regular line of transport, including essential reserve aircraft, and every other aircraft appropriated to the carriage of goods or passengers for reward where the aircraft is ready to depart are immune from precautionary attachment.⁹⁰ Where attachment is permitted or exemption is not claimed, the giving of sufficient security shall give a right to immediate release.⁹¹ Where wrongful attachment occurs, there is liability according to the law of the forum.⁹² The convention has no application where an aircraft is attached either in cases of insolvency or breach of customs, penal or police regulations,⁹³ or in the case of an arrest by an owner dispossessed by an unlawful act,⁹⁴ or in the case of execution of an immediately enforceable judgment.⁹⁵

The second convention adopted at the conference was that for the *Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface*. While the Warsaw Convention relates to the liability of the carrier where there is a contractual relationship between the passenger and the carrier, this convention relates to liability of the carrier to persons with whom he has no contractual relationship. It is based upon the principle of absolute but limited liability, with the right to a defence of contributory negligence. The operator of an aircraft is liable on proof by the injured person that damage exists and is attributable to the aircraft.⁹⁶ The operator is any person who has the aircraft at his disposal and makes use of it on his own account.⁹⁷ The convention applies to all cases where damage occurs in the territory of one contracting State by an aircraft registered in the territory of another contracting State.⁹⁸ Liability is limited to 250 francs for each kilogramme of the weight of the aircraft but this limit must not be less than 600,000 francs and not more than 2,000,000.⁹⁹ As under the Warsaw Convention, liability is unlimited if the damage is due to the gross negligence or wilful misconduct of the operator and his agents, except where he proves negligence in pilotage, handling or navigation of the aircraft or where he proves that he personally has taken all possible measures to prevent the damage.¹⁰⁰ Originally, the CITEJA intended the convention to end there, but several members refused to advise their Governments to accept it unless the convention should be completed by

⁸⁹Art. 2(1).

⁹⁰Art. 3 (1).

⁹¹Art. 4 (1).

⁹²Art. 6 (1).

⁹³Art. 7.

⁹⁴Art. 3 (2).

⁹⁵Art. 2 (1).

⁹⁶Art. 1.

⁹⁷Art. 4.

⁹⁸Art. 20 (1).

⁹⁹Art. 8 (3).

¹⁰⁰Art. 14 (a).

guarantees on behalf of their citizens. Thus, provisions for compulsory insurance are included. Every aircraft registered in the territory of a contracting State must be insured when flying over the territory of another party to the convention.¹⁰¹ The sanction in the event of non-insurance is unlimited liability. A guarantee or security in the form of a deposit with a State institution or a bank is permitted instead of insurance.¹⁰¹ The amount of the deposit or guarantee must equal the operator's liability in respect of the aircraft concerned and there must be an official certificate of insurance or guarantee on board the aircraft.¹⁰²

The claimant may proceed in the courts of the country where the operator has his ordinary place of residence or in the courts of the country where the damage was caused.¹⁰³ Proceedings must be commenced within one year of the date of the damage.

Thirteen States have ratified the Precautionary Attachment Convention. Only six have ratified the Third Party Convention. There are various reasons for this. The United Kingdom, for example, would not ratify it because the limit of liability in money was considered too low. Other States refused to ratify because they did not agree with the principle of absolute liability. It has now been revised and modified by a convention signed at Rome in 1952. Article 29 of the new convention states that upon its entry into force it will supersede the 1933 convention as between contracting Parties who have also ratified the latter convention.

*The Brussels Conference, 1938*¹⁰⁴

The Fourth International Conference on Private Air Law took place in Brussels from September 19 to 30, 1938. Submitted to the conference were two draft conventions and certain recommendations on aviation insurance which had been prepared by CITEJA.

It is only necessary to consider very briefly the two draft conventions. The first, after much amendment, was signed by fifteen States, none of which have as yet ratified it. It has to do with the assistance and salvage of aircraft or by aircraft at sea. If the law comes into force, it will apply to all parties when either the ship or aircraft rendering salvage or the ship or aircraft salvaged is registered in the territory of one of the contracting States.¹⁰⁵ The aircraft commander is bound to give help to any person in danger of being lost at sea if he can do so without seriously hazarding the aircraft, crew or passengers.¹⁰⁶ The master of a vessel is in a similar position.¹⁰⁷ The obligation only arises

¹⁰¹Art. 12.

¹⁰²Art. 13.

¹⁰³Art. 16.

¹⁰⁴Latchford, *Brussels Air Law Conference*, (1939) 10 J. Air L. and Com., 147.

¹⁰⁵Art. 17.

¹⁰⁶Art. 2 (1).

¹⁰⁷Art. 2 (2).

when the aircraft or ship is on voyage or ready to depart.¹⁰⁸ The convention contains provisions relating to limitation of liability, remuneration for salvaging ships or aircraft, and limitation of actions, to mention but a few. The ICAO Legal Committee has made a study of the convention to ascertain the reasons for non-ratification and to make recommendations concerning its revision, but due to lack of interest among States, discussions have been discontinued.

The second draft convention on aerial collisions was not even adopted by the conference. The main stumbling block was the proposal that liability should be based on fault and that, where both aircraft were to blame, liability should be divided in proportion to the degree of fault. In air collisions there will be, more often than not, no evidence on which apportionment of fault could be based. The subject of this convention is now being studied by the ICAO Legal Committee with the purpose of preparing a more acceptable draft convention on collision.

In addition to consideration of the above two conventions, the conference adopted an insurance protocol to the convention of Rome. Difficulties had arisen at the previous private air law conference as to whether or not the insurance provided for in the Rome Convention should be of an unconditional nature and whether or not the insurer should be permitted certain defences against the payment of insurance claims. The protocol, which forms an integral part of the Rome Convention,¹⁰⁹ allows the insurer to avoid liability under the policy in respect of the convention liability only on certain grounds, *viz.* that the damage occurred after the termination of the insurance, that the damage occurred outside the territorial limits of the contract of insurance and that the damage was caused by international armed conflict or civil disorders.¹¹⁰ Statements in the certificate of insurance or in the aircraft documents in respect of the duration and territorial limits of the insurance take precedence over the policy where there is a discrepancy between the two.¹¹¹

This conference marked the end of a series. CITEJA met once more in January 1939, before the outbreak of the Second World War interrupted its work on the gradual unification of regulations governing private air law. After the War the commission ceased to exist following the creation of the Legal Committee of ICAO, which deals with problems of both public and private air law.

*International Air Traffic Association*¹¹²

No outline of air law between the two world wars would be complete without mention of the International Air Traffic Association. This body was

¹⁰⁸Art. 2 (4).

¹⁰⁹Art. 2 (1).

¹¹⁰Art. 1.

¹¹¹*Ibid.*

¹¹²See Cohen, IATA, *the First Three Decades* (Montreal, 1949).

formed at the Hague on August 25, 1919, the first year of domestic and international air service. It was and is an association of airline operators. Six companies were represented at the Hague meeting; two only had commenced operations, three others had just been organized and one was in process of formation. The airlines had formed IATA "with a view to cooperate to mutual advantage in preparing and organizing international aerial traffic". The idea was to establish unity in the operation of air routes. IATA was to be non-political and its members were to be entirely autonomous. By 1929, the six original members had been increased to twenty-three, and on the eve of the Second World War there were thirty members. At each semi-annual meeting of IATA, every airline would submit reports which resulted in the general exchange of technical and commercial information, the admission of statistics and the basis for co-ordination of schedules and timetables. As the organization became larger and busier, it became necessary to establish committees to study and prepare reports. By 1939, there were six of them: the Legal, Postal, Radio-telegraphic, Cash Examination, Combined Transport¹¹³ and Unification of Documents¹¹⁴ Committees. Legal problems faced by IATA involved the difficult question of liability. Even after the Warsaw Convention, it was necessary to study constantly its interpretation by the courts of the contracting states. It was also necessary to formulate IATA policy towards new conventions governing other phases of air transport which were being drafted by CITEJA. It was IATA, for example, which was responsible for the insertion of a definite limitation of liability among the provisions of the Rome Convention. On the outbreak of war, IATA was in the process of studying CITEJA's draft conventions on salvage, aerial collisions, the legal status of operating personnel and of proposals for treaties on registration and mortgage of aircraft, and the legal status of the aircraft commander.

IATA ceased to function officially during the Second World War. It was resuscitated at Chicago in 1944 under the name of the International Air Transport Association.

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This concludes the outline of air law between the world wars. The advance had been considerable. Three conventions on public air law and four on private air law had been signed. The aviation industry was organized and fast becoming the most legally regulated industry in the world. There was a long way still to go, however, but mankind had to wait five years before any further progress could be attempted.

¹¹³Disappeared in 1937.

¹¹⁴Merged with Traffic Committee in 1937.