Freedom of passage for international air services

FREEDOM OF PASSAGE FOR INTERNATIONAL AIR SERVICES

L. H. SLOTEMAKER

FREEDOM OF PASSAGE FOR INTERNATIONAL AIR SERVICES

PROEFSCHRIFT

TER VERKRIJGING VAN DEN GRAAD VAN DOCTOR IN DE RECHTSGELEERDHEID AAN DE RIJKSUNIVERSITEIT TE UTRECHT, OP GEZAG VAN DEN RECTOR-MAGNIFICUS, DR. L. S. ORNSTEIN, HOOGLEERAAR IN DE FACULTEIT DER WIS- EN NATUURKUNDE, VOLGENS BESLUIT VAN DEN SENAAT DER UNIVERSITEIT TEGEN DE BEDENKINGEN VAN DE FACULTEIT DER RECHTSGELEERDHEID TE VERDEDIGEN OP VRIJDAG 27 MEI 1932, DES NAMIDDAGS TE 4 UUR

DOOR

MR. LAMBERTUS HENDRIK SLOTEMAKER

GEBOREN TE ZWOLLE

A. W. SIJTHOFF'S UITGEVERSMIJ N.V., LEIDEN

CONTENTS

INTRODUCTION.

The course of evolution of the latest means of communication is being accomplished with remarkable rapidity. During the flight made in 1906 by Santos Dumont, a speed of 41 kilometres per hour was reached; 25 years later, in the Schneider Trophy Competition a speed of about 635 kilometres per hour was achieved. In 1905 a distance of 38 kilometres was flown without landing; at present the record long-distance-flight is from New-York to Stamboul, a distance of 8050 kilometres.

We are now faced with the second period of evolution of 25 years. In this the technique, based upon the experience obtained thus far, will make tremendous strides in advance, and will give to air traffic still greater advantage compared with the means of communication which are bound to the earth. At present an aircraft already has twice the speed of an express train, and is at least three times as rapid as one of the great ocean-liners. Further it has the advantage of an unlimited sphere of action, and is not bound to definite courses, straits and channels, nor is it checked by other natural boundaries, such as mountains and deserts. On the contrary it can move quite unhampered and with great rapidity throughout the ocean of air encircling the earth.

Hence air navigation opens up new possibilities for international trade, and will create a new source of prosperity.

Air traffic, owing to its speed and freedom of movement, is of a pre-eminently international character. It has established itself in all the 5 continents and even now a commencement has been made with the institution of intercontinental airlines; a universal airnet will be created within a measurable distance of time. Therefore, upon a further consideration of this means of traffic, an international point of view should be adopted.

As a rule the legal regulations follow the circumstances; the rapid development of air navigation, however, calls for other requirements. Here, even before it has come to its full achievement, rather as a necessary condition to arrive at it, a universal, living and supple legal regulation should be effected, which must be directed towards guaranteeing free traffic to the exclusion of unreasonable obstacles, and which by preference should precede national legislation.

The difference with overland traffic makes it desirable that with respect to air traffic other requirements should be made, and different rights should be allotted to those existing for the other means of communication. Any detailed adaptation of the law of the air to the regulations in force for other means of transport is less desirable; rather new legal regulations should be called into being, though in these some basic principles may be adopted from the laws of traffic already prevailing. In any case the desire to hamper as little as possible the natural freedom of movement of this traffic should be considered of paramount importance.

The international character of air traffic necessitates an international co-operation and regulation. "Civil aviation, when it shall have reached its full development, will be one of the most important means of bringing the peoples of the world together; distances will be reduced more and more, so that civil aviation by enabling the different nations to maintain ever-closer mutual relations will contribute largely towards the maintenance of good international relations and the preservation of the world peace", such was the statement in 1927 of the "Committee of Experts on Civil Aviation" (Sub-Commission B of the Preparatory Commission for the Disarmament Conference). Therefore this international co-operation and regulation should be directed in the first place to as free a development as possible. It should be borne in mind that the Continents occupy only $\frac{1}{4}$ of the surface of the earth, the area of which, for the rest, is formed by the great oceans, where a general freedom of traffic prevails. Such a freedom — here, however, within the limits of sovereignty — should also be recognised with respect to the ocean of air above the Continents.

CHAPTER I.

History of the international law of the air.

§ 1. Different theories before 1914. Freedom of the air or sovereignty over the air.

Particularly during the years preceding the great war many jurists occupied themselves with the question concerning what rights the States have with respect to the air space above their territories.

There were those who were of opinion that the State has absolute sovereignty over the air space extending over its territory; this theory is generally placed on the analogy of the principle of private law: *"Qui dominus est soli, dominus est cæli et inferorum"*. Consequently the State can close or open such air space arbitrarily, and, in the latter case, lay down such conditions and restrictions as it may consider necessary. It need hardly be said that under such a regime there cannot be any question of a free development of air navigation while moreover any uniform regulation of such traffic with its pre-eminently international character is out of the question.

Diametrically opposite to this is the view that the air surrounding the earth is entirely free and not submitted to any State-authority; in compliance with this theory the underlying States have no rights whatsoever regarding the air space above their territories, so that the air, just as the high seas, by right is open to all traffic. How entirely different, however, are the relations between maritime navigation and the riparian States from those between air navigation and the underlying areas. Complete freedom, if only from the fact that measures concerning public security and health could not be enforced, would bring the States into an untenable position. Hence such a point of view found practically no support, and very soon fell into

the background. Therefore a solution was sought in many directions by which the rights of the States would be guaranteed sufficiently on the one hand and, on the other, allowance was made for the interests of air navigation for the proper safeguarding of which as great a freedom of movement as possible is a primary requirement.

An apparently obvious compromise is effected when sovereignty is recognised, but only up to a certain height, or, starting from the principle that "the air is free" (in the sense of being withheld from the authority of the States below), by admitting the desirability of a territorial zone being subject to the authority of the underlying States; here a parallel is drawn with the maritime belt. Flights within this territorial zone can be entirely prohibited (with the exception regarding taking-off and landing), or can be made subject to restrictive regulations; here complete sovereignty prevails.

Whereas, however, the territorial waters might be considered as a protective area [1]), the law of gravity prevents the aerial zone from exercising any corresponding function.

The air space above the territorial air column was at first considered as not being subject to any State-authority. But just the natural difference between the maritime belt and the air zone was the reason for that consideration having to give way to the view that certain rights of preservation ("droits de conservation") should be allotted to the underlying States even as regards such free air space.

With regard to the territorial zone there arises almost immediately the question, difficult of solution, to what height should that zone extend and from where should that height be measured ?

Taking these objections into consideration the idea of a territorial air zone is incapable of being put into practical effect [2]).

Another solution consists in the recognition of sovereignty,

---

[1]) Amedeo Giannini speaks of "une sorte de tampon" (La souveraineté des États sur l'espace aérien).

[2]) Nevertheless Peru — although signatory to the Convention — proclaims freedom of aerial navigation in the airspace above the height of 3000 metres (Decree of November 15th 1921).

restricted, however, by a servitude of free and innocent passage. Besides this there are again others who, adopting the principle of freedom, would grant such rights to the underlying State as are required for its defence and security.

Regarding this, Babey observes [1]: "Applying the principle of sovereignty with concessions or that of free passage with restrictions, the results are the same". It is, however, not to be doubted that the juridical system of concessions to be granted to air navigation by the State having authority over the air column will have a more restrictive effect than the system of limitations of the principle of freedom, and that consequently more benefit will be derived by air traffic from the latter system [2].

At present—especially since the Air Navigation Convention of 1919 lays this down emphatically in article 1—it is almost generally accepted that the State has complete and exclusive sovereignty over the air space above its territory, the conflict being thus confined principally to the question in how far, within the limits of such sovereignty, innocent and unhampered traffic, especially as regards international air services, is to be made possible. With respect to this, two views are discernible: on the one hand the view prevails that the State can impose all such restrictions upon air traffic as it thinks fit (inasmuch these are not prohibited by any treaty); on the other hand, with an appeal to article 2 of the Paris Convention—by which the High Contracting Parties undertake to accord freedom of innocent passage above their territory to each other's aircraft in times of peace, provided that the conditions laid down in the Convention are observed—it is considered that the imposition of restrictions and prohibitions is only permissible provided these are justifiable and reasonable.

After the ample considerations devoted in the earlier liter-

---

[1]) Souveraineté aérienne (Revue juridique internationale de la locomotion aérienne, February 1924).

[2]) See also p. 12.

ature to the question of sovereignty[1]) it is, in my opinion, superfluous to revert to it again in detail; therefore a few brief remarks may suffise.

Those who advocated freedom have adopted—referring to one of the arguments put forward by Grotius with regard to the freedom of the sea—the thesis that the air, owing to its nature, is not susceptible to sovereignty; in this connection it has been pointed out that it is impossible for a State to enclose the air column above its territory within clearly defined limits and to exercise an exclusive right of possession thereof.

Fauchille for example argues[2]): "qu'une chose n'est susceptible de propriété, privée ou publique, que si elle se prête à une certaine appropriation et qu'il ne saurait en être ainsi en ce qui concerne l'air, qui, par son immensité et sa fluidité, résiste à toute détention".

As against this it may be said that a column of air, since humanity is not living in a plain, is indispensable for a State. If the right of authority of the State is really to be of effect, sovereignty over the territory should be linked up with that over the air space above that area, this being also needed to enable the State to secure its territory and the inhabitants thereof in a due and proper manner.

That definite boundaries cannot be fixed and complete occupation is impossible need not form an obstacle to the prevalence of a right of authority. As a matter of fact this is also allotted as regards the territorial sea and the deserts. The State only must possess the ability to enforce eventually its rule in the airspace and this requirement is enforced by artillery and military or other State-aircraft.

On the other hand, the parallel with the maritime belt gives rise to the observation that it is the very nature of this particular object of authority that led to the query whether,

---

[1]) Anzilotti, Baldwin, von Bar, Bielenberg, Bluntschli, Collard, Désouches, Despagnet, Fauchille, Ferber, Fleischmann, Giannini, Grünwald, Hazeltine, Henry-Coüannier, von Holtzendorff, d'Hooghe, Julliot, de Lapradelle, von Liszt, Lycklama à Nyeholt, Mérighnac, Meurer, Meyer, Nys, Perrone, Pittard, Pradier-Fodéré, Rivier, Rolin, Spaight, Spiropulos, von Ullmann, de Visscher, Volkmann, Warschauer, Wegerdt, Westlake, Zitelmann.

[2]) Domaine aérien et le régime des aérostats, 1901.

as regards the territorial sea, there is any question at all of sovereignty, and whether it is not rather a number of various separate riparian rights with which we have to deal here. This thesis is defended f. i. by de Lapradelle who expressed himself as follows: "L'État souverain, qui n'est pas propriétaire ni souverain de la mer territoriale, a seulement le droit d'imposer au souverain de la mer: la Société des États, des restrictions basées sur les nécessités de sa protection personnelle" [1]).

Those favouring the latter view are, on the one hand, of the opinion that the institute of the maritime belt—considered as a sea strip subject to the sovereignty of the riparian States —is an infringement on the principle of the freedom of the seas but recognise, on the other hand, that the State is to have a coastal zone at its disposal in the interests of security, control of traffic and prosperity. Hence this theory does not recognise a full sovereignty, but will only grant a number of rights of authority kept within strictly defined limits.

The objection to such an enumeration is that either too few, or too many rights (unjustifiable under all circumstances) may be granted. This was felt by the "Institut de Droit International" which in 1894 allotted to all riparian States "*un* droit de souveraineté" regarding the maritime belt. That statement, however, was annulled at Stockholm in 1928: art. 1 of the draft regulations regarding the territorial sea in times of peace lays down that "les États ont *la* souveraineté sur une zone de la mer qui baigne leurs côtes dans l'étendue et sous les restrictions déterminées ci-après". Also the Codification Conference of 1930 followed this line of thought.

With respect to the said column of air, article 1 of the Paris Convention recognises that the States have complete and exclusive sovereignty over the air space above their territories. A possible conflict concerning the legal character of the authority of the States over the air, as was evolved regarding the territorial sea, has now been removed from the beginning. This does not alter the fact that the point from which that conflict emanated (viz. that the extent of the actual right of authority is closely connected with the nature

---

[1]) Le droit de l'État sur la mer territoriale, p. 56.

of the object over which it is being exercised and that in this way sovereignty acquires another nuance according to the possibility of exercising this authority being greater or smaller) is of a far greater effect as regards the air space. Sovereignty over the air consequently has another, and, speaking figuratively, more airy character than that over the territorial area.

In another respect too State-authority over the air and the maritime belt differs from that over the ground territory.

The territorial sea and the air space are no independent areas of sovereignty, but only conceivable as secondary parts of the State territory. On the acquisition of new littorals, f.i. by accretion, or the protrusion of new islands in the coastal sea, the maritime belt subject to State authority and with this also the air space of the State become automatically enlarged; an independent extension or modification of one of the two is generally not possible nor is a separate transfer of the sovereignty over the territorial sea or air column to another State consistent.

Since thus the comprehension of sovereignty when applied to the air is, so to say, of an inferior order to sovereignty over the ground territory, it is the more astonishing that as a right of free entrance to the seaports and a right of free passage via the international waterways is guaranteed for ships, and as there also exists a large freedom of transit by land, with respect to regular international air services the freedom of transit still has to be fought for.

Also to the air column subject to State-authority finally is applicable what by the theory of the law of nations is recognised as being the principal basis of the freedom of traffic on the high seas viz. that the passage of one does not prevent that of all the others, and that it is an equally indispensable means of communication for all States.

§ 2. Evolution before the Great War.

How the ideas sketched in the foregoing have developed as regards air navigation may appear from the following historical review.

An international regulation has only been of effect since 1919. Before the world war efforts were confined to the laying down of some general principles. On making a study of these, the extremely remarkable fact is observed that, contrary to the history of the evolution of the freedom of the seas, the idea of freedom prevailed from the very beginning as regards the air space, and that it was only later that the doctrine of State sovereignty was defended.

That in the beginning the principle of freedom occupied the foreground is probably to be attributed to the fact that, equipped with the experience acquired during the fight conducted with regard to maritime navigation, it was desired to exempt air navigation, of which great expectations were entertained, from such difficulties. Further, in the first years of this century, aviation had but slight significance, and the possible dangers which the new means of conveyance might entail for national and public security (espionage) had not then become manifest.

One of the foremost champions of the principle of freedom was Fauchille; in 1901 he published: "Le domaine aérien et le régime juridique des aérostats". In this it is argued, in the first place, that the air space is only susceptible to ownership under civil law up to a certain altitude. As a matter of course it is impossible to take possession of the immeasurable and unstable air space; this is only of effect in so far as fixed constructions can be erected on the ground; even then, however, the owner of the ground below is rather the owner of the object erected than of the column of air occupied by it. The Eiffel Tower being at that time the highest construction, Fauchille came to the following conclusions:

1. The air space above 300 m. is not susceptible to ownership.
2. Up to 300 m. such is the case only in so far as actual possession can be acquired.

Fauchille further asks whether the air, though not susceptible to ownership, may nevertheless be subjected to the sovereignty of the State lying below. He gives a negative reply, because no definite standard prevails for the query to what height such sovereignty must extend; the range of a gun as well as the field of vision of the eye form but very variable

and unequal means of measurement. Finally the gun and human vision are only means of maintaining a sovereignty already acquired but no means of acquiring this sovereignty. Fauchille, however, shrank from adopting absolute freedom; by appealing to the principle of international law by which a "droit de conservation" is granted to the States[1]) he arrives at the conclusion that in times of peace a protective zone of 1500 m. (above which height, in 1901, no photographs could be successfully taken) should be closed to air navigation; aircraft should only be allowed to be within that zone for taking-off and for landing or in cases of emergency; above this zone full freedom is allowed, though, even there, the "droits de conservation" may be exercised, f.i. by fixing traffic regulations. These ideas have been inserted in article 7 of the Code[2]) drawn up by Fauchille in which it says that "the air is free; in times of peace and war the States have only such rights as are necessary for their preservation; these rights relate to the prevention of espionage, customs and sanitary regulations and to the necessities of defence".

In 1906 Fauchille's views were adopted by the "Institut de droit international" which expressed itself as follows: "L'air est libre. Les États n'ont sur lui, en temps de paix et en temps de guerre, que les droits nécessaires à leur conservation". Hence, but for this restriction, the air is not subject to any authority.

In judging the ideas formulated by Fauchille, it should be borne in mind that at that time aviation had not outgrown its incipient stage; dirigible balloons did not then exist and it was only later that aeroplanes were developed; further the possibilities of photography were much slighter than at present.

Thus it appears that with the advance of evolution ideas

---

[1]) "Ce principe, base du droit lui-même et dont le fondement gît dans la raison naturelle aussi bien que dans la pratique des nations, est celui qui reconnaît aux États en vertu de leur existence propre le droit de se conserver. Ce droit de conservation comprend tous les droits incidents essentiels pour sauvegarder l'intégralité de l'existence tant physique que morale des États" (p. 427).

[2]) This draft was elaborated in detail; article 18 f.i. contained provisions with regard to the nationality of children born on board aircraft.

change and Fauchille himself was one of the first to adapt himself to the altered situation. In 1910 an article appeared from his hand in the "Revue juridique internationale de la locomotion aérienne", entitled: "La circulation aérienne et les droits des États en temps de paix"; in this, after having submitted the various systems to an investigation, he abides by his conclusion that the air is free and cannot be the object of State-authority, except as regards the rights due to a State for its preservation and defence; he, however, reduces the protective zone to 500 m., as at that time any higher limit would make air navigation impossible; further the State, as a measure of protection against espionage, may close certain zones to air navigation up to an unlimited height (this in conjunction with the increased possibilities of photography[1]), whereas flying over the territory may be entirely forbidden for foreign military aircraft.

Fauchille explained his views anew in a report submitted to the meeting of the Institute of International Law which took place in Madrid in 1911; thereupon that Institute made the following statement: "La circulation aérienne internationale est libre, sauf le droit pour les États sous-jacents de prendre certaines mesures à examiner en vue de leur propre sécurité et de celle des personnes et des biens de leurs habitants"[2]).

This statement differs from that of 1906 upon a point of principle; reference is no longer made to a free *air space* ("l'air est libre") but to free *navigation*; the latter, however (a free use of the air space) is also possible under the principle of sovereignty and thus forms a sort of compromise. At that

---

[1]) These possibilities are still constantly increasing. At the moment very clear photographs can be taken from an altitude of 10.000 metres; the record of photography of distant objectives has been raised to 267 miles, flying at a height of 6000 metres.

[2]) That statement was substituted, in 1927, during the Lausanne session, by the following: "Il appartient à chaque État de régler l'usage de l'air au-dessus de son territoire, en tenant compte, d'une part, des nécessités de la circulation aérienne internationale (atterrissage compris) et d'autre part des nécessités de la sécurité nationale tant au point de vue militaire, douanier, sanitaire qu'au point de vue de la protection des personnes et des biens de ses habitants. Les règles établies à cet égard seront appliquées sans distinction de nationalité".

time the term was made use of to satisfy not only the supporters of the free air but also those of sovereignty.

Meanwhile, in other quarters, further reaching consequences were drawn from the rapid evolution of aviation (particularly in the military sphere) by which the possibilities but also the menaces to security and defence (espionage) attached to this new means of conveyance came more clearly to the front. Thus in 1910, the "Congrès juridique international pour la réglementation de la locomotion aérienne" recognised the sovereignty of the State regarding the air space above its territory, though, on the other hand, free passage was allowed to aviation in that area, subject only to measures of security for the protection of public and private interests.

The complete and exclusive sovereignty was defended in a talented manner in the same year by Lycklama à Nyeholt [1]). The result of her considerations is that the ground-State's rights and interests both plead for full sovereignty, and that this sovereignty has to be recognised on legal as well as on physical grounds.

Gradually a sharp antithesis arose between the supporters of the doctrine of sovereignty, and those who did not desire to see the air subjected to any State-authority. The parties were opposed to each other in such an unreconcilable manner that when, at the invitation of the French Government, an International Air Navigation Conference met in Paris in May 1910, having for its purpose the drafting of an international aviation treaty, the organisers thereof endeavoured by all means in their power to prevent the question of sovereignty being brought forward; nevertheless this antithesis manifested itself principally during the debate on the proposed article 21 ("L'établissement de lignes internationales de communications aériennes dépendra de l'assentiment des États intéressés") in such a manner that the Conference, although it met again in November after having been adjourned on June 21st, did not come to any definite conclusion. [2])

---

[1]) De luchtvaart in het Volkenrecht and Air Sovereignty.

[2]) This certainly is a proof that the point of view adopted by Babey was not correct. (See p. 5.)

It was especially the English delegation that was opposed to the doctrine of freedom, not only at the Paris Conference (where one of the delegates advocated the view that a right to close their aerial frontiers, whenever they considered this necessary, should be left to the States) but also on the occasion of the Congress of the Comité Juridique International de l'Aviation (which met in Paris in 1911), when that delegation proposed the following text: "The States shall be entitled to absolute sovereignty over the air space above their territorial areas and territorial waters. Each State shall have the right to establish, at its own discretion, police, fiscal and other regulations regarding aerial navigation." The Congress nevertheless was not in accord and confirmed the statement of the Institute of International Law omitting, however, the word "internationale". Within its own country, however, England embodied its views in the Aerial Navigation Act of 1911 ("to provide for the protection of the public against the dangers arising from the navigation of aircraft") which opened up the possibility of a complete prohibition of flying over certain areas; in 1913 that provision was extended, and applied to a much greater extent [1]). On reviewing that regulation Henry-Coüannier observes that it would have been more explicit to state that the flight of foreign aircraft over English territory was completely forbidden.

As the significance of air navigation became greater, other States followed England's example (f.i. Austria and Germany). France even followed suit: article 3 of the Decree of October 24th 1913 laid down that the passage of aircraft might be prohibited throughout the entire territory. Sovereignty was also accepted in 1913 by the International Law Association; in addition, however, a right of free passage was allowed.

Though the Comité Juridique International de l'Aviation which met in Frankfort-on-Main in 1913 embodied in the draft international air code its statement of 1911 [2]), it may be observed that on the eve of the great war the prin-

---

[1]) After 1919 England revised its attitude; the Air Navigation Order of 1923 does not even make the acquiring of an authorisation for the institution and working of an international airline a necessity.

[2]) At that time, however, no intention prevailed in favour of the principle of freedom; see p. 11.

ciple of sovereignty was recognised in most countries in such a way that air navigation enjoyed but a slight degree of freedom.

§ 3. Evolution since the Great War.

I. The Convention relating to the regulation of aerial navigation of 1919.

During the war, it is needless to say, when even the freedom on the seas became an illusion, both the belligerents and the neutral nations fully asserted their rights of sovereignty and the air space was closed to all foreign air traffic [1]).

As a matter of course the policy then followed affected the discussions with respect to the regulations to be adopted regarding air navigation which took place after the war. On the other hand, however, the technique of air navigation made extremely great progress during the war; not only had the reliability and the rapidity of aircraft increased, but had the loading capacity steadily become greater; the institution of a wide-spread civil air traffic might thus be looked forward to within a comparatively short time; this new international means of communication opened up unlimited possibilities, provided the necessary freedom of movement was accorded. The English Government especially saw in this a powerful means of drawing the various sections of the British Empire more closely together. From practical consideration and imbued with the desire to occupy a leading position in aviation it became converted

---

[1]) For completeness' sake, the remarkable attitude adopted by the English Government in its reply to the Swiss protest regarding flights, in November 1914, of British aircraft over Swiss territory should be mentioned; after having expressed its regret and having stated that the pilots had been given instructions to avoid neutral territory, the English Government added that these expressions of regret and these instructions were not to be interpreted as a recognition by the Government of the prevalence of a sovereignty of the air. In all probability that reply arose from the opinion that the Government could not recognise a right which, although it was adopted for its own country, was not recognised by international law. Notwithstanding this the Government adopted a paradoxical attitude; in its reply the Swiss Government stated that, as international law does not recognise any limitation of sovereignty of the air, the Federal Council must claim this to its full extent.

from an ardent advocate of its unlimited rights of sovereignty to a champion of the idea of freedom, though within the limits of sovereignty.

The "Convention relating to the regulation of aerial navigation" of 1919 arose from these two lines of thought.

a. The original text.

Upon the initiative of the French Government an "Inter-allied Aviation Committee" was established in 1917 which, after the commencement of the Peace Conference, was changed into the "Aeronautic Commission of the Peace Conference"; it was entrusted *inter alia* with the drafting of an air navigation treaty [1]).

As early as at one of the first sessions (March 17th 1919) some questions of principle were brought forward; on the proposal of the American delegation the principle of sovereignty was adopted, whilst, besides this, upon the initiative of the English representatives, the necessity of allowing international air traffic the utmost possible freedom was acknowledged, in so far as this would be compatible with public security, the application of requirements regulating the admittance of the aircraft of the High Contracting Parties and the internal legislation. It was also recognised that the regulations concerning the admission of aircraft, once the utmost possible freedom was granted, should not embody any excessive impediments.

Two draft conventions were submitted, one by the English and the other by the French Government. With respect to international air communications, the French draft did not lay down any explicit requirements; the English one, in its articles 1 and 2, allowed the utmost possible freedom that could be restricted only in the interests of security and in connection with the application of national legislation (this however, would have to be the same for national and foreign aircraft) [2]).

---

[1]) America, the British Empire, France, Italy, Japan, Belgium, Brazil, Cuba, Greece, Portugal, Rumania and the United Kingdom of the Serbs, Croats and Slovenes were represented upon it.

[2]) Sovereignty was recognised in art. 1 and free traffic was also allowed, provided that the requirements to be made by the State to be flown over were complied with. "Such regulations will permit the free navigation of

Upon the grounds of these two proposals a draft convention was drawn up, and was placed before the Peace Conference on July 3rd 1919; after some amendments had been introduced, it was submitted for signature on October 13th 1919 as "Convention relating to the regulation of aerial navigation" concluded between the 32 Allied and Associated Powers.

What then was the tendency of that Convention which, owing to its provisions having been adopted in most of the bilateral treaties and national legislation, impressed its stamp upon the regulations for national and international air navigation?

As has already been said, two courses of thought dominated the completion of the Convention, and are given expression to in its contents. The principle of sovereignty which had become customary law during the war years was embodied in article 1; by this the High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. Moreover (art. 2), each State undertakes *in time of peace* to accord freedom of innocent passage above its territory to the aircraft of the other contracting States provided that the conditions laid down in the Convention are observed [1]). An important compromise was

---

foreign aircraft except in so far as restrictions appear to the State to be necessary in order to guarantee its own security or that of the lives and property of its inhabitants and to exercise such jurisdiction and supervision as will secure observance of its municipal legislation. These regulations shall be imposed without discrimination of nationality". — Art. 2 stipulates that restrictions by way of reservation or otherwise with respect to public conveyance of persons and goods may not be imposed on a foreign aircraft, where such aircraft is proceeding from one point to another within the territory of the contracting State either for the purpose of:

a. landing the whole or part of its passengers or goods brought from abroad;
b. taking on board the whole or part of its passengers or goods for a foreign destination;
c. carrying between the two points passengers holding through-tickets or goods consigned for through traffic to or from some place outside the territory of the contracting State.

[1]) The expression "in time of peace" is somewhat large and defeats the object to be attained, for it makes it possible to put an end to all air traffic not only when one of the States concerned is engaged in war, but also when such is the case with some third party; up till now, however, an abuse of this provision has not occurred.

thus effected here: recognition of sovereignty, but, besides that, free air traffic in times of peace, within the limits of sovereignty.

It cannot be denied, that the first mentioned principle stands out much more strongly in and outside the Convention than the principle of freedom. Sovereignty is *recognised* in the Convention as an ascertained basis whereas the parties *undertake*, by accepting a voluntary restriction with regard to the group of the other contracting parties, to allow innocent passage; further the principle of sovereignty is generally applied in international law.

On the other hand, however, it may be taken that those who drafted the Convention had the intention of allowing, within the limits of sovereignty, the utmost possible freedom of movement to international air traffic (at all events to that between the High Contracting Parties). This is repeatedly expressed in the minutes of the Juridical Sub-Commission that drew up the articles 1 and 2 out of the points of principle adopted by the Aeronautic Commission, and is confirmed later on by several statements made during the sessions of the C.I.N.A. Thus at the 14th session held in Geneva in June 1928, Flandin, head of the French delegation, who in 1919 was a member of the Aeronautic Commission, said that "a reading of the discussions in the course of which the Convention was evolved, clearly indicates that a hearty collaboration and the opening up of the air, without reservations and limits, was the line of thought of the draftsmen of the Convention". The preamble ("Desiring to encourage the peaceful intercourse of nations by means of aerial communication") and also some articles of the Convention indicate this. Thus art. 24 stipulates that every aerodrome in a contracting State which is open to public use by its national aircraft, shall likewise be open to the aircraft of all the other contracting States; although article 3 stipulates that every State shall be entitled, for military reasons or in the interest of public safety, to close certain areas to aerial navigation, on the other side (subject to a single exception) no distinction may be made between national and foreign aircraft. Finally art. 16 provides that every State may establish reservations and restrictions in favour of its *national*

aircraft in connection with the carriage of passengers and goods between two points in its own territory; arguing to the contrary it may be said that a liberal regime should prevail for the regular *international* air lines.

Hence it is all the more to be regretted that this intention was not in any way expressed in article 15, paragraph 3, which is very important for commercial navigation. As a matter of fact, while paragraph 1 of that article in conjunction with what is laid down in art. 2 gives, without requiring any previous general or special permission, any aircraft of the High Contracting Parties the right to cross the air space of another State without landing (provided it follows the route which the underlying State may possibly determine, and lands, should—for reasons of general security—a signal be given to do so), paragraph 3 says: "The establishment of international airways shall be subject to the consent of the States flown over" [1]). This wording lacks any indication concerning the important question as to why any such permission may be withheld and in how far, upon the granting of permission, restrictive provisions may be attached. The consequences hereof did not hold off; this provision can be interpreted as well in a restrictive way (by an appeal to article 1) as in a more liberal sense (by adopting the principle laid down in article 2). Further there is the fact that, previous to the effecting of the amending protocol of June 1929 (concerning which more will be said later), the text in itself gave rise to confusion.

The original text proposed by the Juridical Sub-Commission read: "The establishment of international airlines shall be subject to the consent of the States flown over". [2])

The British delegation presumed that under "lines" certain defined airlines, kept within narrow limits, (in the sense of routes) must be understood, and was of opinion that this paragraph should be deleted; considering that, as a matter of fact, paragraph 1 of the same article gave an aeroplane the right to fly over a State without landing, such aeroplane should

[1]) "L'établissement des voies internationales de navigation aérienne est subordonné à l'assentiment des États survolés."

[2]) "L'établissement des lignes internationales de communications aériennes est subordonné à l'assentiment des États survolés."

also be entitled to select the shortest or best route, either in the geographical sense or in connection with the prevailing weather conditions; if, however, to the term "lines" should be given the significance of wide zones that would enable aircraft to select as favourable a route as possible, the difficulty would be solved. Upon the proposal of the French delegation the word "lines" was then substituted by "ways" which expression, it is true, met the English objection by widening "lines" to "ways"; it did not, however, remove the misunderstanding, as paragraph 3 certainly had in view the institution of *airlines* in the sense of airservices [1]). This proves *a contrario* from the explanation of the Juridical Sub-Commission on par. 1 of art. 15, pursuant to which an aeroplane is entitled to cross the airspace of another State without landing; nevertheless it is bound to follow the route determined by the State flown over. Here the Juridical Sub-Commission observed that this was of effect for casual flights as well as for regular air services; the explanation reads: "Qu'il s'agisse de voyages isolés ou de lignes régulières, le trajet peut être compris de telle manière que l'aéronef étranger se propose de franchir sans arrêt le territoire d'un État contractant" .... "Le désir d'encourager le développement de la navigation aérienne internationale conseillait à la Sous-Commission de reconnaître à l'aéronef étranger, *desservant une ligne internationale régulière*, la faculté de survol, sans atterrissage forcé, de frontière à frontière".

From this and from the requirement of par. 2 (the obligation to land at certain aerodromes indicated for that purpose) it follows that already in the first two paragraphs of art. 15 the competence of the underlying State to determine certain air routes also with regard to the *aircraft of regular international services* has been laid down. Hence par. 3 cannot have reference to "routes", but must refer to "services".

Another, very important conclusion to be drawn from these minutes is, that the first paragraph of art. 15 was not, as has

---

[1]) See also Roper (La Convention internationale du 13 octobre 1919): "Il est visible que l'accord résultait d'un malentendu et que la difficulté subsistait toute entière".

been supposed up to the present, solely of force for casual flights, but also for the aircraft of regular air lines. Hence it was the initial intention of the draftsmen of the Convention not to make it a requirement for international air lines that they should have previous permission for flights over a State in case no intermediary landing on the territory of that State was effected [1]). Regarding this it should be mentioned that a similar statement had already been made at the first Northern Air Traffic Conference, held on April 26th 1918 at which Sweden, Norway and Finland were represented. Here sovereignty was recognised; at the same time, however, it was stated that—unless military reasons or public security require such—no State has the right to prohibit innocent passage of aircraft, provided no intermediary landing should be made. As regards the Convention, since June 1929 previous permission is also expressly required for flights over a territory in the course of which no intermediary landing is made. [2])

In the draft submitted to the Peace Conference the American representatives drew attention to the indistinctness of the text, in the meantime stating that, although they were in accord with the principle laid down in par. 3, they considered that paragraph as being superfluous (it being a consequence resulting from the principle of sovereignty).

Nevertheless the text was maintained; it is true that in 1922 the interpretation thereof was again discussed; nobody, however, dared to draw up a more distinct wording; so it was decided to leave the matter open, in anticipation of its application in practice. It was not until 1929 that the question was again taken in hand; before going more deeply into this, it is necessary to explain, very briefly, the history of the evolution of the Convention.

---

[1]) See also the basic principle of the Aeronautic Commission of the Peace Conference: "Reconnaissance du *droit de transit sans atterrissage* pour le trafic international entre deux points placés en dehors du territoire d'un État contractant, sous réserve du droit de l'État traversé de pouvoir se réserver son propre trafic commercial aérien et de pouvoir obliger à atterrir, à l'aide de signaux convenus, tout aéronef le survolant", in which no special exception with regard to regular international air services is made.

[2]) See also p. 80.

b. The Protocols of 1922 and 1923.

The Convention was first signed by 26 of the 32 Allied and Associated Powers. Afterwards the number was amplified by 3.

Pursuant to article 41, the countries that had remained neutral were invited to accede, while the States which had taken part in the war, but had not signed the Convention, might only become parties, provided they were members of the League of Nations or if adhesion took place with the approval of the original signatories.

It was very soon proved that the inclination to proceed to ratification was not great among the signatories; besides this none of the neutral States responded to the invitation to become parties to the Convention.

Especially among these latter great objections prevailed regarding the articles 5 and 34.[1]) The first mentioned article prohibited the contracting Parties from allowing any passage over their territory of aircraft lacking the nationality of any one of the contracting States unless this was effected by virtue of a special authority of a temporary nature. That article was aimed directly against the vanquished countries; needless to say that the neutral States which desired to maintain air communications with the Central Powers could not agree to such a stipulation. For the rest, by acceding to the Convention, they would be at a disadvantage as regards the Allied and Associated Powers who by the Versailles Treaty (*inter alia* art. 313) and the other peace-treaties had reserved to themselves the right of free passage for their civil aircraft above the territory of their late enemies in addition to the use of the public aerodromes; this was of effect till January 1st 1923.

Article 34 instituted a central air navigation organisation, the "International Commission for Air Navigation" (C.I.N.A.), placed under the direction of the League of Nations and charged with the carrying out of the duties allotted to it by the Convention, viz. the giving of advice on questions which the

[1]) Moreover other objections were adduced, though less of a nature of principle, *i.a.* against the lack of any worked out regulation of air traffic in wartime and of a regulation for flying at night.

States may submit for examination, the introduction of amendments in the annexes A—G, the publication of information of all kinds regarding international air navigation or regarding wireless telegraphy and meteorology, etc. This article now contained such a distribution of voting power in the C.I.N.A. that the 5 great Powers (the British Empire, the U.S.A., France, Italy and Japan) would always have a majority of 1 vote. It was considered hardly possible to give States with but slightly developed or totally undeveloped air traffic the same rights as those countries, where such traffic had developed very greatly.

Thus amendments proved to be necessary and were introduced by the protocols of May 1st 1920, October 27th 1922 and June 30th 1923. As a consequence of this, the admittance of aircraft of States, non-parties to the Convention, was possible provided an agreement had been entered into with such States, the provisions of which were to be conform to the rules laid down by the Convention and its annexes [1]). Further a more reasonable distribution of votes would be effected in the C.I.N.A., though the five great Powers remained notwithstanding this in a privileged position. This privilege too, however, has been removed by the amendment adopted by the Protocol of June 15th 1929; finally it should be stated that the text of art. 34 again was revised by the Protocol of December 11th 1929, as a result of which the Dominions and India obtain besides a representative of their own (whom they already had) the right of voting.

Meanwhile the Convention came into effect on July 11th 1922; 14 States had then deposited their instruments of ratification, reserving, however, the right to deviate from the application of the provisions of art. 5, with respect as well to the States that had signed but not yet proceeded to ratification as to the ex-neutral powers.

Had this reserve not been made, the result would have been

---

[1]) Art. 5 was again modified by the Protocol of June 1929 in consequence of which the special conventions, concluded with non-contracting States, shall not—in so far as may be consistent with their objects—be contradictory to the general principles of the Convention.

that, in connection with the original article 5 [1]), they would have had to close their air space to the aircraft of the States mentioned in the reservation which, as a matter of fact, could not be considered as contracting Parties. This also explains why it was some years before the depositing of instruments of ratification was proceeded to. For should this have happened immediately by the very few countries that were prepared to do so, and such without the reservation mentioned above, traffic between these countries and the States that had not yet adhered would have had to cease. Hence the depositing of ratification-instruments had to be delayed till a proper number of ratifications might be relied upon, whereas for the rest the reservation removed the prevailing difficulties [2]).

c. The Protocol of June 1929.

When the Protocols of 1922 and 1923 came into force on December 14th 1926, many other signatories besides part of the ex-neutrals [3]) soon followed. Holland deposited its instrument of ratification on August 22nd 1928.

Several countries, however, assumed a reserved attitude (such as Germany, Austria, Hungary, Norway and Switzerland), or became united in other groups, formed by the Ibero-American and Pan-American Air Navigation Conventions. Hence there was a great danger that the purpose of the Convention of 1919 viz. the creation of a widely applied international regulation should not be effected. Gradually voices were now heard to clamour for a revision of the Convention that would meet the objections of the States that had not yet acceded, f.i. at the Air Navigation Congress which met in Rome in 1927 and in the General Conference of Communications and Transit which took place in the same year.

---

[1]) "No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State".

[2]) This matter is handled in detail by Roper, *op. cit.* pp. 70-76.

[3]) At present, Australia, Belgium, Bulgaria, Canada, Chili, Czechoslowakia, Denmark, Finland, France, Gt. Britain and Northern Ireland, Greece, India, Iraq, Irish Free State, Italy, Japan, Netherlands, New Zealand, Norway, Persia, Poland, Portugal, Rumania, Saar-territory, Siam, Sweden, Union of South Africa, Uruguay and Yugoslavia have adhered.

Very interesting in this connection is the article published in October 1928 by Dr. Alfred Wegerdt (a high official of the German Ministry of Communications) entitled "Germany and the Air Navigation Convention of Paris of October 13th 1919" in which a series of proposals was made for revising the Convention, in order to remove the objections that had arisen for the German Government; those considerations made all the greater impression when the Government semi-officially declared itself in accord with the tendency thereof. It would be going too far to look into this interesting publication in detail; it should only be mentioned that Dr. Wegerdt agreed to the principle embodied in the third paragraph of article 15, but desired some elucidation of the text in the spirit adopted by the "Comité Juridique International de l'Aviation" at its session in May 1928 in Madrid [1]).

Dr. Wegerdt's observations were the direct cause for the convening of an extraordinary session of the C.I.N.A. to which were invited not only the contracting Parties but also those States which had not yet acceded; 43 countries (among which 17 non-parties) were represented in Paris from June 10th to June 15th 1929.

The nucleus of interest was the provision of art. 15, par. 3. It was agreed that a more distinct text was desirable; this immediately called forth the old antithesis of those who desired for air traffic the utmost possible freedom within the limits of sovereignty and those who would not allow the—owing to the incomplete text—powerful weapon of the previous permission being required in all cases, to go out of their hands.

In the first place it was put to the vote whether freedom or a previous permission, to be granted by the underlying States, was desired [2]). This point was decided to the disadvantage of freedom by 27 votes to 4. Those against were America, the British Empire, Holland and Sweden.

---

[1]) "L'installation et l'exploitation de lignes régulières de navigation aérienne du territoire d'un État contractant dans le territoire d'un autre État contractant ou au-dessus de celui-ci, avec ou sans atterrissage intermédiaire, doivent faire l'objet d'un accord spécial entre les États contractants intéressés".

[2]) The delegations were asked to vote to indicate their tendencies by pronouncing either the word "freedom" or the word "authorisation".

After that vote the said four opposing delegations declared themselves ready to co-operate towards the drafting of a text which would take the attitude assumed by the majority into account, but which would not, in the future, form any obstacle for the application of the principle of freedom.

Upon this a new text was unanimously adopted in substitution for the third paragraph; by the insertion of a new provision in article 15, this text now forms the *fourth* paragraph and reads: "Every contracting State may make conditional on its prior authorisation the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory". This text was inserted into the Protocol of June 15th 1929.

Three important conclusions may be drawn from the new text.

In the first place the necessity of previous permission is not explicitly required; the underlying State *may* require this; on the other hand it is free to assume a more generous attitude, by admitting the air traffic above its territory without restrictions. Such freedom which may be taken as having prevailed also under the earlier text has now been inserted in so many words in par. 4.

Further an end was put to the controversial point as to what exactly is to be understood by "international airways"; the new text presents the opportunity to make the establishment of *airways* as well as the creation of *air services* dependent upon previous authorisation. As has already been explained at p. 19, the mention of airways is not necessary in every respect, since the first two paragraphs of art. 15 place the determination of routes in the power of the underlying State; hence if it be desired to institute a new route, generally (for the underlying State may leave such institution free) the consent of that State will have to be obtained in advance. That the institution of airways has nevertheless been inserted in the new 4th paragraph finds its explanation in the fact that it was desired to remove, once and for all, the indistinct nature of the old text and for this reason both interpretations were placed side by side.

Finally it has not yet been pointed out upon what

grounds such permission can be refused or what conditions can be made for the granting thereof. That such was not done is deeply to be regretted, as by this omission the evolution of air navigation is in a great measure hampered, the institution of air services being submitted to all kinds of unreasonable and unjustifiable conditions. It is, however, certain that a more definite text could not have acquired a consensus of opinion.

Interesting in this connection is the proposal of the English delegation, viz. to add to par. 4: "This authorisation can only be refused on reasonable motives".

That proposal was rejected by 19 votes against 11; those in favour were: America, Belgium, Brazil, the British Empire, Chili, Finland, France, Greece, Holland, Norway and Sweden. If only the votes of the affiliated nations are counted, the proportion of votes is 10 to 7, which shows that within the bosom of the C.I.N.A. itself there existed the inclination for a better defined text.

Nevertheless among the opponents of this proposal there also prevailed a tendency for greater freedom which is proved by the unanimous adoption—immediately after the decision on art. 15—of the following recommendation:

"The Commission decides to draw the attention of the Governments of the contracting Parties to the spirit in which the Conference drew up the new text of the fourth paragraph of article 15 and to recommend these Governments not to refuse the authorisation referred to in that paragraph otherwise than upon reasonable grounds".

Probably because there was not much enthusiasm for leaving the answer to the question, whether an eventual refusal were reasonable or not, to the interpretation of the International Court (pursuant to article 37 of the Convention), that provision was not inserted in article 15 itself. For the rest the fact that the recommendation was adopted unanimously forms a worthy opposition to any unreasonable refusal or restriction of the authorisation. In addition to this there is the fact that a similar current made itself felt in the "Commission Consultative des Communications et du Transit" of the League of Nations, at which, on the proposal of the "Comité de Coopération entre Aéronautiques Civiles", and principally at the insti-

gation of the Dutch delegation, a wish was expressed that the Governments might find means to give more freedom to international air communications, and that they should examine with the utmost benevolence the applications for the establishment of such communications.

In the light of the foregoing the recommendation cannot be considered as entirely without value.

Concerning this, Prof. Dr. J. A. van Hamel, in his paper read to the Dutch section of the International Law Association ("Freedom of air traffic and regular international air services", n° 18 of May 1931) observes as follows: "What has thus been achieved is a text juridically not binding, but of moral significance. What is exactly the value to be attached to this ? This is a question not immediately answerable. Any definite procedure cannot be conducted regarding this; any particular appeal to a legal instance is out of the question. It must, however, again be observed, that matters go otherwise with civil contracts than with international regulations. Sometimes in the law of nations formulas which juridically have no binding force may still be used very adequately by effective policy or ingenious negotiatory tactics. This is a question of practice and its many possibilities.

These assertions do not mean to say, that with the foregoing bare recommendation little or nothing has been achieved. The only question is how it will be used eventually by the Governments concerned. It lies within the range of possibility that occasionally, when it comes to protecting the freedom of international air traffic from obstructions by another Government which are considered unreasonable, the recommendation may turn out to be a strong and useful argument.

There is a permanent contact between the representatives of the several Governments and in consequence such statements frequently afford a strong argument of which those practised in the art of negotiation can avail themselves."

It is possible that some should be doubtful concerning the spirit intended by those responsible for the Convention; but by the text of the recommendation it has now been determined that the present wording of art. 15, par. 4 is

meant to be based upon the intention of according freedom of air traffic within reasonable limits. This, however, does not remove the objection to the new wording of the fourth paragraph, viz. that arbitrariness is not by any means excluded.

According to the Explanatory Memorandum on the draft-Bill for ratification of the Amending Protocol, the Dutch Government considered the requirement as not being very satisfactory and would have given preference to a stipulation which granted air traffic companies a greater freedom [1]).

In the Preliminary Report [2]) the new text met with serious opposition: "A step in the wrong direction was seen in the fact that there was a further limitation of the freedom of the air space and the new 4th paragraph was considered very objectionable in its tendency; this provision was looked on as being contrary to the principle of freedom of passage laid down in art. 2".

Thereupon the advice was obtained from the Advisory Commission for questions relating to the Law of Nations [3]), *inter alia* on the question as to whether reasons existed for the withholding of the ratification; for, pursuant to article 34, any modification of the articles of the Convention must be formally adopted by the contracting States before they become effective. The Commission thereupon recommended the ratification, because from any other line of conduct, in its opinion, success could hardly be expected.

Meanwhile the national air traffic company which strongly advocated as great a freedom as possible, had not been idle, and Prof. Dr. J. H. W. Verzijl had been invited to give his opinion; this was brought to the knowledge of the Government and tended to the non-ratification of the Protocol containing "a possibility of an unreasonable influence upon the wholesome freedom of air traffic".

This caused the Government to appeal again, while submitting Prof. Verzijl's advice, to the Advisory Commission for questions relating to the Law of Nations.

---

[1]) Proceedings of the Second Chamber 1929/'30, N° 284,3.

[2]) Proceedings of the Second Chamber 1929/'30, N° 284,4.

[3]) Commissie van Advies voor Volkenrechtelijke Vraagstukken.

A short time before this (in September 1930) the matter was put forward in the fifth Air Navigation Congress held at The Hague. More particularly with reference to a very interesting report of Amedeo Giannini, an ample discussion took place. Giannini finally made the following proposals:

"Le Congrès confirmant le principe de la souveraineté des États sur l'espace aérien, émet le vœu:

1. que la liberté de passage inoffensif par air en temps de paix soit adoptée comme une déclaration des États;
2. que soit consacré l'article 15 de la Convention de Paris dans la rédaction adoptée dans le protocole du 15 juin 1929".

Against this a proposal was made by me in which a new wording for paragraph 4 of art. 15, taken from Prof. Verzijl's report, was suggested, viz. to amplify the prevailing text with:

"Cette autorisation ne pourra être refusée que pour des raisons de sécurité ou d'ordre publics. Si l'État survolé croit devoir subordonner son autorisation à des conditions, celles-ci ne pourront regarder que les intérêts de la sécurité, de l'hygiène ou de l'ordre publics, ou la police générale ou douanière".

The first section of Giannini's proposal was adopted unanimously; the second part (to maintain the present wording of art. 15) by 11 versus 7 votes.

In this connection it should also be mentioned that on December 3rd 1930 the Sub-Commission on Air Law of the International Chamber of Commerce adopted the following resolution:

"The International Chamber of Commerce, whereas it would result in placing air navigation enterprises in a position of legal insecurity to leave the refusal or withdrawal of the requisite authorisation to the discretion of the administrative authorities, urges the Governments to lay down definitely by law the reasons for which the authorisation to operate an air transport service may be refused or withdrawn".

On December 30th 1930 the second advice of the Commission for questions relating to the Law of Nations came out; this too embodied the conclusion that ratification might not

be refused, though, on the other hand, the value of the arguments adduced by Prof. Verzijl was by no means denied. The Commission, however, considered that since June 1929 the atmosphere had not become more favourable for any greater freedom; for that reason it was thought useless to endeavour to obtain a modification of article 15 before ratification should take place [1]).

In the Answering Memorandum the Government agreed to the point of view adopted by the Commission, and moreover drew attention to the fact that, by a refusal to ratify, the other advantages contained in the Protocol, *i.a.* the absolute equality of the States as regards the right to vote, would fail to come into force whilst, besides this, the purpose of the amendments, viz. to promote, by the removal of some objections, the adhesion of new States, would be foregone; the Government, however, also stated that, in its opinion, Holland could, in the end, not be satisfied with the situation thus created and would be obliged to continue making all possible efforts—at the proper place and time (first of all in the C.I.N.A. itself)—to promote a more liberal conception of regular air traffic [2]).

Though the Preliminary Report gave every reason to anticipate on a debate of principle at the public discussion, no such debate took place. The Act of July 9th 1931 (State Journal n° 298) authorised the Crown to the ratification.

It was already pointed out that a short time before the discussion in the Second Chamber, viz. in June 1931, the subject "Freedom of air navigation and regular international air services" was brought forward in the Dutch Section of the International Law Association, with reference to a paper by Prof. Dr. J. A. van Hamel. On the grounds of this the following resolution was adopted:

"The Association expresses a desire that in the international legal regulations for international air services, the principle of freedom will be brought to the fore, so that the

---

[1]) The advices of the Commission have not been published; the tendency of these has been inserted in the Answering Memorandum. (Proceedings of the Second Chamber, Session 1930-1931, N° 36, p. 1).

[2]) Proceedings of the Second Chamber, Session 1930-1931, N° 36, p. 1 and 2.

several Governments will make the authorisations to be granted dependent on motives based solely upon the interest of air traffic itself, and will limit to a minimum eventual impediments, with a reservation for what is inevitably required in the interests of public security".

The Protocol has now been ratified by 22 nations; the number of those who became signatories to it was 24.

II. The Ibero-American and Pan-American Conventions of 1926 and 1928.

In the foregoing it has already been pointed out that besides the Convention of 1919 some other groups had been formed; the members of those various groups had, moreover, concluded separate treaties among themselves. Before proceeding to the practical adaptation of the principles determined in the Convention and elsewhere, it is advisable to give a review of what has been achieved apart from the Convention.

In the first place should be mentioned the "Convenio Ibero-Americano de Navigación Aérea", concluded in 1926 during a Congress convened by Spain to which Portugal and all South American States were invited [1]). This is, first of all, a consequence of the objections existing against the Paris Convention, especially against the arts. 5 and 34. Moreover, at that time, Spain had just withdrawn from the League of Nations; in conclusion it desired to give evidence of the ties that existed between the Iberian Peninsular and the Latin American States.

The Iberian Treaty follows, almost literally, the text of the Convention of 1919; only no relations with the League of Nations have been created. It is laid down in art. 5 that the contracting Parties shall be perfectly free to admit or not the traffic of aircraft belonging to non-affiliated States, while, finally, besides some other modifications of minor importance, absolute equality regarding the right of voting is granted by

[1]) 21 States participated in that Congress, i.e. Spain, Portugal, Argentina, Bolivia, Brazil, Chili, Columbia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay and Venezuela.

art. 34. The text of par. 3 of art. 15 as it read before June 1929 has been adopted without alteration.

Up to the present time the Iberian Treaty has only been ratified by 5 States [1]; hence it appears that but little influence will emanate from this side. For the rest, uniformity with respect to air traffic regulations will not be endangered by this Convention; in addition art. 43 lays down that signature is not by any means identical with the abrogation of earlier agreements concerning the same subject.

In the second place the Pan-American Convention relating to commercial aviation, prepared in Washington and signed in Havana on February 20th 1928, should be recorded. This treaty was signed by the greater part of the Latin American States that had also become parties to the Iberian Convention as well as by the United States of America. Some of these had also acceded to the Paris Convention or had signed same [2]. The initiative to this was taken by the American Government for the purpose of effecting a regulation for air traffic between North and South America.

The contents of the Convention deviate in many respects from those of the Convention of 1919, though the latter had formed the basis for the preparations. It may perhaps be sufficient to say that, on the one hand, the contents of arts. 1 and 2 of the Paris Treaty have been adopted, but that, on the other, a provision such as that contained in par. 3 of art. 15 of the latter Convention is lacking; in exchange, art. 21 gives full freedom to commercial air navigation between the contracting Parties, provided such be not contrary to any legal regulations; these must be the same for national and foreign aircraft.

Roper [3], however, is of opinion that "les divergences ne sont pas d'une importance telle que l'on puisse considérer comme compromise l'unité du droit aérien".

---

[1]) Spain, Costa Rica, Dominican Republic, Mexico and Paraguay.

[2]) The signatories were: United States of America, Argentina, Bolivia, Brazil, Chili, Columbia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay and Venezuela.

[3]) *Op. cit.*, p. 104.

The Pan-American Air Navigation Convention too has so far only been ratified by a few States [1]).

Owing to the difficulty that might arise from the circumstance that a State is also party to the Convention of 1919 or the Iberian Treaty, or to both, art. 30 stipulates in par. 2 that "no provision of the present Convention shall affect the rights and obligations established by treaties in force."

III. Bilateral Treaties.

Moreover a great number of bilateral treaties were concluded after 1919. This is to be attributed, in the first place, to the fact that the Paris Convention, though dating from October 13th 1919, only came into effect on July 11th 1922, whereas the need of a regulation had been felt by several States long before that time.

This led to the conclusion, by various signatories, of mutual treaties in anticipation of final ratification of the Convention; these as a matter of course expired after the parties had definitely acceded (*e.g.* Belgium with England and France).

Besides bilateral treaties were brought about between those States which had not taken part in the establishing of the Paris Convention and which, for the reasons already mentioned, were not desirous to adhere either; these concluded treaties either mutually (*e.g.* Denmark with Norway; Sweden with Norway) or with the States that were parties to the Convention or at least had signed same (*e.g.* Holland with Belgium, England and France).

A third group was formed by treaties between countries that did not wish to accede to the Convention and the ex-Central Powers that could only become parties under certain conditions [2]) (*e.g.* Holland-Germany), or between these latter themselves (*e.g.* Germany-Austria).

The agreements concluded between members and non-members of the Convention were, pursuant to art. 5 (that was also

---

[1]) Guatemala, Mexico, Nicaragua and Panama.

[2]) Viz. upon becoming members of the League of Nations, or, till January 1st 1923, with permission of all the Allied and Associated Powers that had signed; after that date a $\frac{3}{4}$ majority was required.

amended by the Protocol of June 1929), necessarily in conformity with the provisions of the Convention; for the greater part these have all been renounced in the course of years, as a consequence of the fact of the countries concerned having acceded to the Paris Treaty. But also the treaties concluded among themselves by non-signatories differed from the same only on points of minor importance.

IV. National legislation.

In conclusion a few words may be said concerning national legislation.

The Dutch Air Navigation Act [1]) in art. 11 requires—in so far as it shall not have been agreed otherwise by treaty [2])—for companies occupying themselves solely or partly with the transportation of passengers and goods by aircraft, either between two or more points within the Kingdom or to a point within the Kingdom as point of departure, terminal or intermediary station, an authorisation from the Minister of Public Works, should the seat of the Board of the company be outside the Kingdom; conditions may be attached to such authorisation. Should the seat of the Board be within the Kingdom, a concession will be required. "It looks very much as if" (it says in the Answering Memorandum) "air traffic when it comes to be fully developed will occupy such an important place as compared with the railways, the telegraph and the telephone, for which, in so far as they are not already being operated by the State, a concession is also required, that a concession for

---

[1]) Act of July 30th 1926, State Journal N° 249, to regulate Air Navigation.

[2]) All treaties concluded up to now between Holland and other countries (many of which in the meantime have been renounced after the ratification of the Paris Convention by Holland) accord to the aircraft of the other contracting Party freedom of innocent passage, provided that the stipulations of the agreement are observed; the greater part also contain the provision, that the carriage for hire of persons and goods can be made subject to special regulations.

In practice before the beginning of new (winter- or summer) services, authorisation is required by the concerned air traffic company via the official administration of its country for the line(s) to be run, against presentation of the time tables, the tariffs, a schedule of the aeroplanes, etc.

air traffic cannot be dispensed with. In the event of a foreign air navigation company running a service to this country, without establishing its seat here, the requiring of a concession has but little significance" [1]).

The Dutch Government here adopted the attitude that with the maintenance of the principle of sovereignty the free development of international air traffic ought to be promoted as much as possible, but that, besides this, the interests of the ground-State must not be affected. The refusal of a permission or the attaching of restrictive conditions thereto may only be proceeded to in so far as the aerial safety or public order require such. This attitude stands out distinctly in the Answering Memorandum [1]), in which, in respect to art. 5 of the Convention, it is said:

"Moreover that requirement is incompatible with the fundamental principle which is, it is true, not expressed in the draft in so many words, but is nevertheless openly admitted therein. What is meant is the principle that air navigation, subject to the legal restrictions thereof in the public interest, shall be free; a principle that, without detracting from the idea also underlying the stipulations of this Bill, viz. the idea of an absolute domination of the Dutch State over the airspace above its territory, cherishes the traditional freedom of traffic and does justice to the requirements of the international community".

And in another place:

"In the event of a foreign air traffic company running a service to our country without establishing its seat here, the requirement of a concession is of minor importance. However, it is then necessary *in the interest of general security*, that supervision shall prevail also concerning the running of that service to our country".

It would be going too far to go into details concerning the national legislations in other countries. Many of those laws lay down regulations without formulating expressly the principle of sovereignty which in actual fact is adopted; nor has the stipulation of art. 2 of the Convention been laid down; this

---

[1]) Proceedings of the Second Chamber, Session 1923/1924, N° 40, p. 9.

is for example the case in Denmark (Act of May 1st 1923), Finland (Act of May 25th 1923), Sweden (Act of February 24th 1922), Portugal (Act of April 27th 1927) and the Sovjet Republic (Decree of January 17th 1921).

Others again explicitly mention the principle of sovereignty: United States of America (Act of May 20th 1926), England (Act of December 26th 1923), Italy (Act of August 20th 1923), Hungary (Act of February 22nd 1924) and Czecho-Slovakia (Act of July 8th 1925).

In conclusion some legislations contain, within the limits of sovereignty, the principle of freedom of traffic, e.g. Germany (Act of August 1st 1922), Austria (Act of December 10th 1919), France (Act of May 31st 1924), Bulgaria (Act of July 23rd 1923), Yugo-Slavia (Act of June 15th 1926) and Switzerland (Act of January 27th 1920); in almost all of these acts restrictions are made, while, more especially for international communications, a previous permit is required. Thus the French Act requires in art. 19: "Les aéronefs peuvent circuler librement au-dessus du territoire français, sous réserve des dispositions de l'article 8". Article 8 lays down that foreign aeroplanes may only fly above French territory provided that right has been determined in a treaty or is based upon a special and temporary authorisation; in this no distinction is made between regular international services and occasional flights.

Even though in the various legislations the formula differs slightly, the principle of sovereignty is always, though not in all cases in so many words, adopted and, generally speaking, a previous authorisation is required for the establishment of an international regular air service.

The line of conduct followed by the various States regarding the granting or not of such authorisation and the conditions attached to it will be dealt with in the second chapter.

CHAPTER II.

Regular Air Services (art. 15 of the Convention of 1919).

§ 1. Different Interpretations.

As has already been stated, it is greatly to be regretted that the requirement of article 15, paragraph 4 — which has also been inserted in the greater part of the bilateral treaties and national regulations [1]) — says nothing whatsoever concerning the question what considerations must prevail when granting or withholding a permission and attaching conditions thereto. Consequently a further interpretation of that paragraph is necessary.

During the discussions [2]) of the Aeronautic Commission of the Peace Conference frequently an inclination prevailed to allow air navigation as much freedom as possible. Hence that Commission, after recognising the principle of sovereignty, adopted the two following principles:

„1. Under reservation of the principle of sovereignty, recognition of the necessity of according to international air navigation *the utmost possible freedom compatible with the security of the State*, the application of the regulations concerning the admission of the aircraft of the contracting Parties (which regulations consequently should not be excessive) and the internal legislation of the country.

2. With respect to internal regulations concerning the admission and treatment of the aircraft of the contracting Parties, recognition of the principle of the *total absence of discrimination based upon nationality.*"

---

[1]) In Europe this is the case with the aviation regulations of Austria, Belgium, Czecho-Slovakia, Denmark, France, Germany, Holland, Hungary, Italy, Norway, Poland, Rumania, Spain, Sweden, Switzerland and Yugoslavia.

[2]) See also p. 17.

That primary line of thought has also found expression in the Convention; in article 1 the contracting States recognise each other's absolute sovereignty over the airspace above their territories, undertaking by article 2, to accord each other freedom of innocent passage, provided that the conditions laid down in the Convention are observed.

The second principle adopted by the Commission has also been worked out in various clauses; art. 2, par. 2, for example, lays down that the regulations made by a contracting State as to the admission over its territory of the aircraft belonging to the other contracting Parties shall be of application without distinction of nationality, while art. 24 stipulates that every aerodrome in a contracting State which upon payment of charges is open to public use by its national aircraft shall likewise be open to the aircraft of all the other contracting States [1]).

The principle, also adopted by the Commission, to accord the utmost possible freedom, *compatible with the security of the State* is found in art. 3, giving the right to set up prohibited zones for *military reasons*, or in *the interest of public safety;* in art. 15, par. 1, containing the obligation to land for *reasons of general security*, and in art. 28 by which, for *reasons of public safety*, the carriage of goods may be subjected to restrictive provisions.

In the third (now the fourth) paragraph of article 15 that principle has not been worked out; hence it soon proved that the wording, vague as it is, is susceptible to interpretations diametrically opposite to each other. This is all the easier, because no legal interpretation by the Permanent Court of International Justice, as provided for in art. 37, has so far been given.

Up to June 1929, three tendencies could be distinguished; by the Protocol of June 15th 1929 an end was put to one of these, viz. the English interpretation.

Many nations did not consider themselves bound regarding the granting of permission, in any way whatsoever; in this they have based their attitude upon the provision of art. 1 and

---

[1]) See further arts. 3 and 29 and p. 79.

upon the literal text of art. 15, being of opinion that they are at liberty to exercise the rights of sovereignty allotted to them. Here the requirement of art. 15 is made use of for the submitting of the creation and operation of foreign airlines to all kinds of hampering restrictions, going much further than would be necessary with a view to public order and security; it has even occurred that the establishment of an airline was refused without any reason being given.

This attitude is based upon reasons of a very varying nature.

In most cases it may be explained by the desire to protect national aviation which, in nearly all countries, receives subsidies from the Government, the consequence of which is that air navigation often becomes a question of national prestige. Rivalry may lead to the air traffic of a foreign country becoming too important and superseding that of the national company, which, as a matter of course, will result in more substantial State-aid. Hence governments that look upon such free competition as a danger, frequently avail themselves of art. 15 to put obstacles in the way of the creation of any international airline.

Further the condition that a permission has to be applied for beforehand, often leads to the setting aside of the applicant's wishes for the furthering of interests of their own. Thus a certain route may be insisted upon — in order to include important places in the air net — or for the purpose of demanding a share in the working thereof, by requiring that the service to be instituted shall be run by the applicant and the national company jointly; in addition it occurs that a share in the revenue is required; then the condition is made that Government officials or a certain quantity of mail shall be carried gratis. It has also been required that the foreign company shall itself and at its own expense erect aerodromes; here military, rather than traffic requirements were taken into account. Military considerations (fear of espionage) moreover are frequently the cause of unfavourable routes being fixed for the traffic by air and landing at certain aerodromes being prohibited, owing to which the safety may be in jeopardy.

This summary of the motives for restricting freedom is not by any means complete; in this respect there exists a great diversity.

Also national envy, fear of pacific penetration and the desire to proceed to reprisals, has in some instances affected the attitude of a government; further the necessity of previous permission is resorted to for compelling the foreign aviation company to grant certain advantages to the national company on an entirely different route, and even to exercise pressure upon matters bearing in no way upon aviation.

In Chapter I it was already argued that such an application of the fourth paragraph of article 15 does not correspond with the initial intention of the Convention, all the more since in June 1929 the C.I.N.A. unanimously recommended the Governments not to refuse the authorisation asked for except on reasonable grounds. Thus it might be said that the government which makes use of the provision of art. 15 in one of the ways mentioned above and consequently acts contrary to the Recommendation may render itself guilty of "détournement de pouvoir". For here a given power is used in order to further another end than has been laid down in the prescription, and an act is performed which is seemingly lawful, but in reality is based upon condemnable motives. Politis [1]) has pointed out that States will always remain part of the international community. "A ce titre ils sont tenus de certains devoirs. Ils doivent, avant tout, obéir aux exigences du droit international, qui ne leur permet d'user de leur liberté qu'en conformité du but social dans lequel il la leur a reconnue." That, for the rest, the conception of "détournement de pouvoir" is possible in the international relations appears from the fact that the committee charged with the drafting of the Statute of the International Court mentioned this conception as an example when giving a definition of the principles of international law which together with the conventional and customary regulations should guide the jurisdiction of the Court.

[1]) Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux (Académie de droit international, 1925, t. 6, p. 88.)

Other nations, on the contrary, give a more generous interpretation to art. 15, either because they aim at as great an evolution of national air traffic as possible or because they aim at instituting communications by air with the colonies and dominions, passing over many countries, and do not wish these purposes to be hampered by way of reprisal; the greatest possible freedom is considered to be of such importance, that any possible disadvantages attaching to the principle of reciprocity, necessarily connected with this system, are readily accepted. Economic reasons may also be at the bottom of such a point of view; as a matter of fact the advantages of air traffic increase according to the distances covered; the more widely starting point and destination are removed from each other, the more obvious is the advantage over the means of communication by land and water and the more attractive the use of the connection by air will be for such as have an interest in quick transport.

Among those who give such an interpretation to art. 15, England took an exceptional position. It has been seen (p. 19) that in 1919 in the original wording of paragraph 3 the words "international airways" were substituted for "international airlines" upon the proposal of the English delegation.

The English interpretation was that each nation is entitled to fix certain routes for aircraft, and may submit the determining of new routes to previous permission; hence the word "airway" has a purely geographical significance, viz. a route with the aerodromes annex. When such a route has been established, any aircraft is free to make use of it, no matter whether it belongs to a regular international air service or not; without the permission of the country concerned, however, no new routes and aerodromes may be instituted.

With this an appeal is made in the first instance to the amendment of the text made by the Aeronautic Commission. It is further adduced that the word "lines" is not used in any single article of the Convention, nor is any special reference made regarding regular commercial air services. It is solely in art. 16 that mention is made of the carrying of passengers and merchandise as a commercial undertaking within the territory of a country. Hence it is said there was no

intention of making any difference between the various kinds of private aircraft, with the exception of what is laid down in art. 16; all such planes would have to receive equal treatment and thus be entitled without discrimination to the freedom of innocent passage granted by article 2.

Consequently, according to the English view, the intention of art. 15 is that:

1. All privately owned aircraft of the contracting Parties shall be entitled, without discrimination, to fly over the territory of the other contracting Parties without landing there, provided they follow any route that shall have been fixed.
2. All privately owned aircraft of the contracting Parties, without distinction, shall be entitled to proceed from one country to another, provided, should the regulations require such, they land at a specified aerodrome.
3. No route shall be instituted or followed without the previous consent of the State to be flown over.
4. Upon the grounds of arts. 2 and 15, pars. 1 and 2, any State which should be unable to grant its approval to flights via a certain route requested by a foreign company, shall have to indicate another route at its own discretion; to such indication an obligation to land at a definite aerodrome may be attached, whereas — except so far as concerns commercial air traffic between two points in one State — no distinction can be made between the private aircraft, either commercial or not [1]).

An argument against this attitude are the proceedings, already mentioned, when drafting the text of the third paragraph; the Italian text too ("L'impianto delle linee aeree internazionali") is hardly compatible. The English interpretation was fully discussed at the 14th session of the C.I.N.A. which took place in Geneva, June 1928. It was generally held that the words "ways" and "lines" were synonymous; as a matter of course, so it was argued, the institution of a route with the aerodromes belonging to it requires the permission of the country concerned; this need not be determined separately;

[1]) Concerning the English point of view see: K. M. Beaumont, Freedom of the Air and the Paris Convention of 1919.

consequently par. 3 of art. 15 would have no significance, should it bear on geographical routes solely. A member of the Italian delegation expressed himself particularly strongly by saying that if on amendment they had to adopt the English attitude regarding art. 15, such an amendment would not be a modification, it would be a revolution. The deliberations then carried on yielded no result. The C.I.N.A. stated that an interpretation of art. 15 was not within its province; for the rest it was considered that as yet the time had not come for such interpretation.

Though England advocated a more generous view in the C.I.N.A., it was not always put into practice. In justification of this an appeal was made to the temporary prevalence of exceptional circumstances arising from military considerations, or in connection with the maintenance of public order.

Anyhow, the matter was definitely cancelled by the new text adopted in June 1929, by which the establishment of international airways as well as the creation and operation of regular air services may be made subject to previously obtained permission.

For a more generous interpretation an appeal is made preferably to the provision of art. 2 by which the freedom of innocent passage is guaranteed in times of peace, and art. 24 which makes the aerodromes, open to public use by the national aircraft, also accessible, under the same conditions, for aircraft belonging to the other contracting Parties. Besides, reference is made to what has been quoted in the foregoing as the initial attitude of the Aeronautic Commission, viz.: "to grant the utmost possible freedom compatible with the security of the State" and finally to the Recommendation adopted by the C.I.N.A. in June 1929. For these reasons, in judging the question whether a request for permission shall be granted or not (and if so, under what conditions) a State should take into consideration only reasonable motives, in themselves justifiable, and having reference solely to the air line to be instituted. In this connection no other motives should be considered as justifiable but those concerning the

interests of public health and security, or being within the sphere of customs and police.

Though, in my opinion, this interpretation, particularly in conjunction with art. 2, is the correct one, in practice the opinion prevails that art. 15 of the Convention or the corresponding provisions in national legislation or in other treaties can be interpreted as a requirement that does not in any way impose any restriction on a country as regards the treatment of foreign air services conducted over its territory.

To what extent a free and favourable evolution of air traffic is impeded consequently and the way paved for the imposition of unreasonable conditions may be seen from the following examples.

§ 2. The Practice.

In 1929 the English Aviation Company, Imperial Airways, instituted the Cairo airconnection; shortly afterwards this was extended as far as India; the projected route was via Genoa—Naples—Corfu—Tobruk—Alexandria. About 7 years previous to this, an Italian air traffic company conceived the plan of running the line Italy—Egypt with hydroplanes; for three years, however, England refused to grant a licence for flying over Egyptian territory.

When the British Government later requested the permission of the Italian authorities to fly over Italy, such permission was granted upon condition that half of the proposed flights between Genoa and Alexandria should be carried out by an Italian concern; further an intermediary descent was to be made in Tobruk which meant a delay of half a day. This was agreed to; but it soon proved that the traffic became concentrated on the English aeroplanes; the condition was then made that either half the passengers should be carried by Italian planes or half the proceeds accruing from the stretch Genoa—Alexandria should be handed over to the Italian company. This demand was declared non-acceptable; consequently the route was led via Central Europe which was highly detrimental to the regularity of the service, owing to the

weather conditions prevailing there during the winter season [1]).

England had to overcome difficulties on the further route to India as well. Thus it had to wait for more than a year before permission was granted to fly over the Persian coast. This permission was granted for a period of three years only and there is a possibility that in future it will be required for the route to be diverted via Teheran; if only from an operational point of view this is impossible of acceptance, because in that case the flights would have to be laid over the inaccessible and scarcely known Persian highlands which offer but little opportunity for landing.

Finally Imperial Airways, for political reasons, were unable to run the service in India under their own name, the planes being chartered from the British company by the "Indian State Airway".

Another instance — apart from the Convention, however, — by which a concern was compelled to change its route, was the following:

Articles 313—319 of the Versailles Treaty granted the utmost possible freedom to the privately owned aircraft of the Allied and Associated Powers for flying over and landing on German territory. Pursuant to article 320 those privileges were to be maintained till January 1st 1923; immediately after the lapse of that date, by a decree of January 8th 1923, a special licence was required for such civil airplanes, if they wanted to fly over German territory.

When shortly afterwards the Ruhr province was occupied, that requirement was made more stringent, in such a manner that the German Government informed the French authorities that aircraft owned by civil aviation companies were prohibited to land in Germany, whereas no weather-forecasts would be given to them.

At that time the Compagnie Franco-Roumaine was operating the Paris—Prague and Paris—Budapest lines via Germany.

---

[1]) At present another agreement with Italy has been concluded and the route via that country is being used.

After that prohibition the company continued its services and consequently had to fly a distance of 600 kilometres without any intermediary landing, which, at that time, was a performance of outstanding merit. After this had been accomplished no fewer than 84 times without any mishap, an emergency landing had to be made near Nuremberg, upon which the pilot was arrested and the plane seized. The same thing took place several times; the pilot was led across the frontier; the seizure, however, was not rescinded.

The French company was therefore compelled to change the route and to fly via Basle—Constanz—Linz—Vienna which is a considerable roundabout way. It was only in May 1926 that aviation relations were restored between Germany and the Allied and Associated Powers and it was possible for the Compagnie Franco-Roumaine — which had, in the meantime, been converted into the "Compagnie Internationale de Navigation Aérienne" (C.I.D.N.A.) — to follow again the route via Germany [1]).

Dutch aviation too has repeatedly met with difficulties owing to the fact that a great many nations still take up such an ungenerous attitude towards aerial traffic over their territories. More particularly on the route to the Dutch East Indies hampering conditions have frequently been made, or at all events taken into consideration, by the countries to be flown over. Some of these countries were parties to the Convention of 1919; such as had not become parties thereto, for the greater part adopted the requirement of art. 15 in their national legislation.

Some examples of the conditions made on granting a licence for flying over a country are given below.

One of the European nations which had granted a provisional permission, inserted, *inter alia*, the following requirements in a draft concession:

---

[1]) For a comprehensive description of these occurrences see Henry-Coüannier, Eléments créateurs du droit aérien, pp. 29—39.

The Company was obliged

a. to land at the aerodrome in the capital of that country;
b. to carry mail tendered there;
c. to convey a certain number of officials free of charge.

Such conditions are non-acceptable, especially for a transit-connection.

The principal purpose of the Amsterdam—Batavia service is to carry the cargo taken in at the point of departure as quickly as possible to the terminus. As a matter of fact a definite course of flight which has already been instituted will be observed as far as possible, but on the European route especially, with its varying weather conditions, compulsory landings would seriously disturb the regularity of the service [1]); in connection with those weather conditions, it must be possible to effect a change of route. Therefore during the past winter season, on the day before departing for the Indies a decision was taken whether the flight should be made via Marseille—Rome—Brindisi, or via Budapest—Athens, all according to the available weather-forecasts. Any compulsory landing might very well hamper this scheme, and also create a dangerous precedent.

The latter is also of effect for the carrying of passengers and mails. As a matter of course an endeavour is made to obtain as much cargo as possible, and consequently the carrying of foreign mails is furthered; however, account has to be taken of the available loading capacity which at present, amounts from 500 to 900 kilogrammes for the various types of aircraft [2]). This loading capacity is entirely at the disposal of the Dutch postal authorities, who in their turn give an opportunity to foreign postal authorities for their mails to be carried.

Up till now, however, no obligation could theoretically [3]) be entertained to carry the foreign mail, as the loading capacity did not always allow of this, while this condition would, moreover, entail compulsory landings at certain aerodromes fixed for this purpose. A requirement such as has been made by another

---

[1]) Here the crews are free in their choice of route.

[2]) From October 1932: 750 to 1000 kilogrammes.

[3]) In practice it has nearly always proved possible to accept all the cargo (at any rate all the mail) offered at the various points; further especially in Asia, most towns are always done on every flight.

country for conveyance free of charge of a certain quantity of mail is absolutely wrong in principle. The requirement to allow a number of free passages to Government-officials also falls outside the sphere of reasonable conditions. This signifies a direct and considerable loss of revenues for the aviation company which is authorised to avail itself of the loading space, not occupied by the postal authorities, for the carrying of passengers and goods. Officials desirous of making use of this right will only do so, as a rule, for short flights — mostly within the boundaries of their own country — owing to which they will occupy the passengers accommodation which is desired by passengers who wish to go from Amsterdam to the Indies and who would have to pay the full fare; free-tickets for Government-officials over distances of any importance would certainly be an unreasonable requirement.

In addition — and this cannot be too greatly emphasised — there is the fact that so long an airline as that to the Indies, crosses dozens of countries, a condition which for practical considerations might in itself be acceptable, and consequently accepted in favour of one nation, might lead, as regards the other nations, to consequences which would render the working of an international airline, leading over many territories, impossible both from a commercial and a technical point of view.

Success was attained, by negotiations to get the Government in question to withdraw these three requirements; this does not alter the fact that in the second draft concession *inter alia* the following conditions were made:

a. Time tables, fares and freight conditions shall be subject to approval in advance [1]).

Now this is purely a matter to be left to the decision of the aviation company concerned, and, in consequence of the subsidy-agreement, of its own government. Such prescription, in principle wrong, would in practice lead to non-acceptable consequences, should other countries make the same stipulations; furthermore the transit character of the air connection concerned is entirely lost sight of.

---

[1]) Omitted in a later draft.

b. The following of a definite route.

From what has already been observed regarding compulsory landing, it appears that this requirement may also produce difficulties; for the successful operation of the air line it is imperative that, as has already been done in some instances, it should be permissible to cross the frontiers at any point; further there is still the possibility — *e.g.* upon the strength of art. 3 of the Convention — of closing certain areas for military reasons; there is no objection to this latter regulation, provided it be reasonably applied.

c. The obligation for the establishment of a branch, of which the manager, as well as 60 % of the staff, must be nationals of the country to be flown over, notice of any change of the staff to be given to the authorities and for the engagement of new officials permission to be required [1]).

This intervenes directly in the organisation of the company concerned. The Royal Dutch Air Lines (K.L.M.) have, as a matter of course, appointed agents in those places that are regularly called at; where it is as a rule only twice a week a plane passes through, the agent works not only for the Royal Dutch Air Lines, but has other activities as well. In some places the K.L.M. is represented by the local aviation companies; other agents are connected with commercial concerns, desirous of interesting themselves in aviation. The necessity of sending out members of its own staff has so far not been felt, more particularly as the entire route is navigated by the same crew and plane. When in some places crews and planes are changed, as on the routes flown by the English Company, Imperial Airways (England—India and England—South Africa), the Company must be represented by a staff of their own. The aviation company concerned is its own judge in this case; any obligation imposed by a foreign Government to set up an expensive organisation of their own, subject to certain regulations, would be going too far, especially in this instance in which, as in the greater part of the European countries, the agency is in the hands of the national aviation company, closely connected with the authorities.

For completeness' sake it should be added that in more than

[1]) Omitted in a later draft.

one country the aviation company is to be registered. Although in consequence a number of formalities are to be gone through which takes a considerable time, yet, where national legislation requires it, no objection can, reasonably, be raised to such registration provided both formalities and expenses are not excessive.

All of the abovementioned objections have been submitted to the Government concerned; in anticipation of the effecting of any definite agreement, permission has to be previously requested for every individual flight, stating the names of the crew, the registration marks of the planes, etc. Though permission has been granted thus far, it goes without saying that such requirements, especially when demanded by a number of countries, place the working of an international air service upon an unstable basis.

Obligatory carriage, in a more stringent form, was, as has been referred to, also made a requirement elsewhere, *inter alia* in the form of gratis conveyance of official mail, up to a maximum of 15 English pounds (this weight could originally be raised to 25 pounds, if, in the opinion of the Government, the development of the air communication should warrant such an addition); besides this the granting of a reduction of 10 % of the fares on behalf of officials on official journeys was desired. Another country made the condition of the gratis carriage of 1 K.G. of official mail and demanded 2 free tickets *per annum* for controlling officials on service trips (besides these gratis flights, a place had to be reserved in every plane for an official who would pay the full fare, provided 48 hours' notice was given). The arguments brought forward in the foregoing are still more strongly of effect for these conditions which are made by way of compensation.

Worthy of mention is also the condition on which the cargo (passengers, goods and mail or mail only), bound for the territory to be flown over, must be delivered at the aerodrome nearest to the frontiers for further conveyance by the national aviation company which evidently comes to a purely protectionist attitude. In one country an exception

was made, provided an agreement was concluded with the national company, that had yet to be established; the subsequent arrangement further required the Government's approval. This also had the effect of securing advantages for the national company in question, though in this instance postal interests run no risks to be pushed into the background. That this occurs occasionally is obvious when it is said that the aforesaid requirement is also applicable to cargo bound for places not connected by an air line nor even by rail with the aerodrome nearest to the frontiers.

An extremely exceptional requirement, only proposed on one occasion and not accepted, was that the national aviation company should be entitled, if it should wish to make use of the prerogative, to purchase K.L.M.-shares to a maximum of 10 % securing the right to vote, whilst the latter company was to be granted a similar option. The attitude adopted here is, that flights over its own territory are a national concern's due; if a foreign company should be allowed to do so, the Government must have a certain degree of participation in the management of such company. Considering that acceding to such conditions would create a precedent, they could hardly be accepted.

Another Government (a party to the Convention) gave such an interpretation of art. 15, that a separate agreement, worked out in detail, should be concluded with the company in question for each and every international airline.

In the draft-concession under consideration it was stipulated that in some of the instances mentioned therein Government officials would have to be carried gratis; further that the flying personnel were to be Dutch nationals, or subjects of the country concerned; in the event of mobilisation the foreign Government reserved the right to itself to requisition the material that might then be within its territory; any cargo either coming from or consigned to any of the neighbour countries was forbidden. Originally the stipulation was

likewise made that from the time when an aviation company should be established in the country itself, the Royal Dutch Air Lines should have to hand over their mail to such company which should deal with it within its territory so far it could do so by its regular air net; the Royal Dutch Air Lines, however, should be entitled to carry the mails, provided they compensated the national concern at a figure based upon the international postal rates and calculated according to the distance covered within the country's frontiers. However, negotiations to get these extremely unreasonable demands cancelled were crowned with success.

Something similar is met with in a requirement prevailing elsewhere in the national legislation and entered into the concession, to the effect that a transit-due of $\frac{1}{2}$ % [1]) of the actual value of the goods, increased by the insurance premium and freight, had to be paid, the proceeds of which would come to the benefit of the State.

Considering that it is mainly expensive articles that are forwarded by air and that the freight-charges are generally higher than those of other means of conveyance, it becomes perfectly clear that such a requirement cannot but have a detrimental effect upon the development of freight traffic; this would make itself felt all the more severely should other nations follow a similar course.

It is evident — the aviation companies have never protested against it — that charges should be made for making use of aerodromes and hangars, as is the case, in the way of dock dues, with shipping; but just as with the latter, aviation must not, over and above, have all kinds of burdens imposed upon it which have nothing whatsoever to do with the airline proper.

A point of view, decidedly contrary to the text of the Convention, was that of an affiliated country when it stated that it could not allow military aerodromes to be used by *foreign* companies for commercial services. Since use of a certain military aerodrome was a *conditio sine qua non* for the

---

[1]) Now lowered to 0,1 %.

Royal Dutch Air Lines, flights had to cease for a considerable time. This attitude, on the other hand, presupposes the fact that national companies may avail themselves of military aerodromes. Article 24, however, lays down that the airports open to national aeroplanes shall also be accessible, under the same conditions, to the planes of the other contracting Parties [1]).

The consequence of the abovementioned attitude would be that every foreign aviation service might be shut out if only few airports (or even one), indispensable for conducting that service, should be viewed as military aerodromes which would, in any case, be contrary to the intention of the Paris Convention.

In most concessions the provision of art. 16 of the Convention has been inserted, enabling a State, if desired, to retain internal traffic for the national aircraft. Frequently it is a matter of considerable trouble to obtain permission to carry cargo (passengers and goods) destined for or coming from abroad, even if such cargo is in transit. Thus there is one country that at first refused to admit any through traffic of passengers and goods, but allowed mail-transport only. Afterwards the prohibition was withdrawn, provided that upon every flight with passengers and goods in through traffic a separate permission was applied for in advance [2]).

Not only the Royal Dutch Air Lines, but other companies also experienced great difficulty in extending their air nets towards the East. Frequently hampering conditions had to be accepted into details of which it is unnecessary to go deeply ;

---

[1]) Further art. 3 grants the right, for military reasons, or in the interest of public security, to close certain areas under the reservation that in such cases no distinction shall be made between the State's own private aircraft and that of the other contracting Parties.

Since the Protocol of June 1929 — which did not prevail at the time, nor is it in force yet — a State may nevertheless, under certain conditions, withdraw that prohibition as regards its national aircraft.

[2]) Cancelled in the final agreement.

a considerable number of the requirements made have already been summarised in the foregoing. It may be sufficient to state briefly that with one country agreements had to be entered into in which foreign concerns were compelled to build hangars, workshops, test-benches and slipways, which after the lapse of twenty years were to be the property of the country to be flown over; in war time these fixtures would be taken possession of, whilst intermediary appropriations might be effected at 80 % of their value; further spare planes and engines were to be available together with a quantity of spare parts sufficient for two years; a spare plane might never be taken into service if not replaced by another [1]); in conclusion, foreign companies were to bear the expense of training subjects of the country flown over as airpilots and afterwards to take them into their service.

In Europe the K.L.M. also met with difficulties to which it is necessary to refer.

For some years, during the summer months, a service was run by a plane chartered by a foreigner especially for this purpose; that service had neither its starting point nor its terminus on Dutch territory but abroad; nor was the route flown over that territory. When for a succeeding year application was made for a permit, it was refused, unless either starting point or terminus was laid in Holland. It was at first argued that the national company was itself able to carry out the commission; later on it appeared that the authorities were still inclined to grant a permission, provided the K.L.M. should be prepared to come to an agreement with the national company in a matter which was — to all appearances — in no way whatever connected with the prospective service.

Apart altogether from the query whether the line referred to would fall under the provision of art. 15 [2]) — a point that is extremely doubtful, as this was only a matter of certain goods being carried at irregular times by a plane chartered by

[1]) This was not even allowed when a spare plane had to assist a plane that had had to make an emergency descent on the high seas.

[2]) This matter is further dealt with in Chapter 3, pp. 81 and 82.

a foreigner, in consequence of which any public, regular service was out of the question — apart from that query, the requirement to come to a previous agreement on an entirely different matter is unacceptable. The granting or refusal of such permission would no longer be dependent upon the views of the Government concerned, but would be subject to the affability of the national company; hence the working of a line would become extremely unsettled.

More in the nature of principle was what was experienced by the K.L.M. when intending to establish a regular public and international airline by which, as in the foregoing instance, neither the point of departure nor the terminus were upon Dutch territory, no more was the route over that territory. Permission was refused by one of the Governments concerned upon the ground that two companies were already working the line and that there was no room for a third enterprise; it was feared that owing to the inevitable competition the losses would increase considerably which would in the end affect the subsidies granted by the Government concerned; the desirability of greater frequency was not denied; preference, however, was given to this service provided for by the two companies then operating which would in this way have an opportunity of improving their financial results to the benefit of the national exchequer.

The question whether the arguments brought forward in the foregoing are justified will be fully dealt with in Chapter III.

A very remarkable instance occurred in Portugal. Towards the end of 1919 the monopoly was granted to a Portuguese (actually a foreign) concern, regarding the running of certain airconnections, *inter alia* that with the Azores, Madeira and the Cape Verde-islands. In the concession, the Government bound itself in anticipation to refuse all further requests to be allowed to work those lines, no matter whether this might be for internal or through traffic. Only if the holder of the concession as well as the Government might be of opinion that it should be more advantageous or necessary for the better development of the concern that such a licence were granted,

the company would be in a position to enter into negotiations and make its conditions. The Government, however, reserved to itself the right to take steps regarding international aviation apart from the concession; it is, however, doubtful whether the purport of the contract concluded can be nullified by such steps.

Though no objections prevail concerning the reservation of internal traffic by air, this is entirely otherwise as regards through-traffic; in the instance under consideration this is all the more obvious since the Azores are an indispensable base for any future Atlantic aviation service. By creating a monopoly for one nation the establishment of universal air lines would be hampered extremely [1]).

The granting of most-favoured-nation-treatment (regarding all matters affecting aircraft and upon condition of reciprocity) as has sometimes been proposed or done with regard to certain concessions, should also be averted. It is also an obstacle to as free an air navigation as possible. Further obligations are then accepted for the future, the purport of which is not known by the parties concerned at the moment the contract is entered into; hence the impossibility of forming a correct idea of such a clause. In conclusion it should also be observed that, according to art. 2, par. 2 of the Convention,

---

[1]) Holland, Spain and the U.S.A. had protests lodged against this with the Portuguese Government (see Het Vaderland, evening edition, November 19th 1930, p. 1 B).

Portugal is not the only country where a tendency to the creation of monopolies prevails. Article 3 of the Belgian decree of May 11th 1931 stipulates that the organisation and the exploitation of international air transport can be made a monopoly. This monopoly will be granted for a limited space of time and can be made subject to special conditions. Further the French Government, in the explanatory memorandum on the treaty concluded on June 25th 1930 between France and Czechoslovakia and relating to aerial navigation, in particular to the airlines Paris—Prague, Prague—Constantinople and Prague—Moscow, said that ratification should be the more desirable as the treaty assured to the French company a privileged commercial situation by constituting a real and very enviable monopoly. Finally it is reported that the Government of Iceland intends to grant a concession to an American air navigation company by which to this company the exclusive right to fly over Iceland, as far as flights to the United States are concerned, is accorded for a period of 15 years.

such a clause is invalid, as this paragraph requires that the regulations regarding the admission of the aircraft of the contracting Parties shall be applied without distinction of nationality; this requirement, amended by the Protocol of June 1929, is also of effect regarding contracts concluded by parties to the Convention with nations that are not parties thereto.

Now some other conditions should be mentioned that are entered into the greater part of the authorisations and which, provided they are kept within reasonable bounds, are acceptable.

Thus, generally speaking, the carriage of arms and munitions is forbidden, which is self-evident [1]). On the other hand, the crew should be armed with a view to possible landings in places far removed from the civilized world. Permission of the Government concerned is always granted in this case.

A prohibition also prevails for the carrying of photographic or cinematographic apparatus [1]) and the taking of photographs without previous permission. For military reasons too, it is often forbidden to fly above certain areas; in this, however, generally no distinction may be made between national and foreign planes. Such a prohibition can be a great obstacle for air navigation; sometimes the shortest route is cut off and a route which is unfavourable owing to meteorological conditions has to be followed; a prohibition to land on military aerodromes may, in some instances, have a hampering effect. Not much, however, can be said against these restrictions, provided they are applied in a reasonable way.

In the interests of public health, certificates of health are sometimes required to which proofs must be attached that crew and passengers have been made immune from various diseases. In this respect too the limits of what is reasonable should be observed, nor must it occur, as happened on one

---

[1]) For the parties to the Convention this prohibition already prevails by virtue of the articles 26 and 27.

occasion to a foreign aeroplane, that passengers and crew were put into quarantine, because it did not appear from the certificate of health that the cotton waste had been disinfected.

Some countries lay down the condition that aviation companies shall be insured as regards all damage accruing from the carrying out of air services to persons and property not being carried by such aircraft; to this the requirement is sometimes added of a passenger-insurance against accidents at definitely indicated amounts.

The first requirement may be considered acceptable; the second, however, affects too greatly the company's independence. In most cases, however, such a risk has already been covered; the air transporter's liability as regards passengers (and consignors of merchandise) has now been regulated internationally by the Warsaw treaty of 1929, the provisions of which will be inserted within a short time in all carrying conditions; this will eliminate the latter requirement probably in the future.

Mostly the provision of art. 16 of the Convention, granting to each contracting State the right to make reservations and restrictions in favour of its national aircraft with respect to the carrying of passengers and goods for hire between two points within its territory, is also worked out in such manner that this traffic can be entirely reserved for these aircraft, or is actually so reserved. In the latter case, however, it frequently occurs that the possibility of dispensation is left open.

But little objection can be raised against this latter limitation, also prevailing in the maritime navigation, particularly as long as the limits of rentability have not yet been reached, provided only the expression "between two points on its territory" be given the sole meaning of inland traffic, so that for example transport between the motherland and colonies is exempted from it as well as a through-connection between two points on a territory.

The question of how the term "territory" should be interpreted was brought forward in 1931 in the Juridical Commission of the C.I.N.A.; upon an appeal to articles 1 and 40 of the Convention the opinion prevailed that the requirement of art. 16 really bore upon transport between motherland and colonies, or between the colonies mutually.

Here again, by this interpretation, maritime navigation has an advantage over air navigation; in its report the Commission itself observes that the idea "cabotage aérien" had a considerably wider meaning than the coastal trading in shipping. Recently the Commission, upon a decision of the C.I.N.A., looked into this matter a second time and came to the conclusion that it was recommendable to restrict the idea of "cabotage aérien"; some suggestions were made, *inter alia* to have the requirement of art. 16 bearing only upon a "closed" territory or to allow reservations and restrictions only if an intermediary landing on foreign territory is not made.

The reservations and restrictions of article 16 may be established in favour of the national *aircraft*; the possibility that the national enterprise runs a line within the territory with the aid of foreign chartered planes is not taken into account. As on the other hand it certainly was the intention to authorise the States to reserve, if desired, all traffic within their territory, and it has sometimes happened that foreign aircraft were chartered [1]), it is recommendable to complete — as well in the Convention as in national regulations — the words "national aircraft" with "national air traffic companies" [2]).

From the examples referred to in this chapter it appears very distinctly that generally there exists in practice but little freedom of navigation for international aviation and that, on the contrary, in many instances the rights of sovereignty allotted to the State have been abused.

Though the redrafting of art. 15, introduced in the Protocol of June 1929, of itself does not signify any progress for those who desire the utmost possible freedom of traffic, it has on the other hand the advantage of making a more liberal application possible:

---

[1]) The Danish company f.i. chartered, during a period of severe frost, when all traffic by water had come to a standstill, planes of the K.L.M. for the carriage of mail and victuals.

[2]) See also the Resolution of December 3rd 1930 of the International Chamber of Commerce: "Recommande aux Gouvernements, dans la mesure où leurs législations respectives réservent le cabotage à la navigation aérienne nationale, de faire porter cette réserve sur les entreprises aéronautiques et non sur les aéronefs".

a previous consent is not compulsory; it is made optional. The only question, however, is whether the opportunity opened up by the new text will be taken advantage of.

A very interesting reply to this is given by Albert Roper [1]) who has been Secretary General to the C.I.N.A. since its inception. Mr. Roper says that in 1929 only 4 nations adopted the view that for international air navigation freedom of traffic must be possible; that number will gradually grow until, in the end, of necessity, a majority has been reached, as air navigation is pre-eminently an international matter; hence without freedom of movement it cannot develop. Forcing this, however, is an impossibility; of themselves the Governments will adopt a policy of "laissez-passer", when once the regularity and activities of air navigation warrant this. Here too, just as in other matters, time will act a leading part. Finally Mr. Roper expresses himself thus: "This crisis cannot be but transient; as soon as air lines will be regularly traversing the airspace above the continents and especially that above the high seas, operating with security, by day and night; as soon as the first great international companies shall have made their appearance; as soon as it shall appear that government-subsidies shall be required no longer, the situation will certainly change. The nations favouring the cause of freedom, conscious of their number, will be in a position to grant the facilities they now must refuse, under pain of being duped; the others will then have to hasten to follow their lead for fear of being left behind. Without doubt rival nations will then endeavour to get the great international air lines to change their courses via their territories."

The process of development advocated by Roper will be undoubtedly realised; as it says, however, in the Introduction, air navigation has its own claims and these should be acknowledged, even before the full and complete accomplishment of them, in a universal and supple regulation, according as great a freedom as possible.

In the succeeding chapter the way in which this freedom of traffic should be regulated within the limits of sovereignty, will be dealt with.

[1]) *Op. cit.* pp. 198—200.

CHAPTER III.

Suggestions for further development.

For the development of air navigation with its international character and its many possibilities, it would be extremely favourable naturally, if the air were freely accessible. When taking into consideration that principally with regard to long distance traffic, where the advantages of air traffic are pre-eminently shown, a great evolution is possible, even a further reaching conclusion may be drawn, and it may be said that for this a complete freedom, eventually tempered by preferably uniform conditions for security, is a necessity.

But we have seen that, however much this principle may have been advocated in the beginning, the Paris Convention broke away from it by admitting in art. 1 the complete and exclusive sovereignty of the States regarding the airspace above their territory. This has been entered into practically all national legislations and mutual treaties; nowhere any restriction whatsoever in the way of territorial zones or limits of height has been attached to it [1]).

That the principle of sovereignty has now been accepted in international law generally, is quite understandable. It is obvious that traffic by air yields much greater dangers for the underlying States than that upon the open seas for the riparian countries and that therefore a legal ground must exist for protection against these dangers [2]). These occurred in

[1]) With the exception of Peru; see foot-note on p. 4.

[2]) See Fernand de Visscher: "Du seul fait que le passage d'aéronefs étrangers peut mettre en danger sa securité, celle de ses habitants et de leurs biens, gêner sa circulation interne, etc., on peut conclure que tout État doit posséder dans la zone atmosphérique, qui domine son territoire, des droits remarquablement larges. Pour marquer l'indépendance avec laquelle l'État les exerce vis-à-vis des autres États on peut qualifier ces droits de souverains" ("Le droit international de la navigation en temps de paix", Revue de droit international et de législation comparée, t. 8, 3e série 1927, p. 182).

their most acute form during the Great War, when technique developed very rapidly; a logical consequence of it was that in 1919 the difficulty was solved and the bone of contention "freedom or sovereignty" was decided in favour of the last mentioned principle. All this, however, does not go to prove that the rights of sovereignty would render free traffic impossible; on the contrary, the contracting Parties adopted in art. 2 of the Convention itself the obligation of according freedom of innocent passage in times of peace.

This basic right granted to air navigation is, however, insufficiently guaranteed as regards the international lines and requires further regulation urgently.

In this chapter the question, how, more particularly with a view to regular international air services, this freedom of traffic can be regulated within the limits of sovereignty, will be dealt with. Then the way in which this matter has been solved as regards other means of communication will have to be looked into first of all.

§ 1. A PARALLEL DRAWN WITH OTHER MEANS OF TRANSPORT.

As has been stated before, even if only for reasons of a practical nature, a parallel with the freedom of the high seas is out of the question; a solution will moreover have to be found while admitting the principle of sovereignty. This is why first of all attention should be given to the passage through territorial waters, the traffic via waterways and railways, and the touching at seaports. It can then be made sure that here much greater freedom is enjoyed than aviation does.

As early as at the Congress of Vienna of 1815, freedom of traffic via the international rivers as well as equality of treatment was established; later on, this was further worked out in various treaties. Since here, however, a comparison will be made with air navigation, it is preferable to study exclusively the history of evolution after the war, however interesting the history previous to this may be.

Article 23e of the League of Nations' Covenant imposes upon the League the task of making provisions to secure and

maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the League.

This principle has been further worked out, more particularly in the Statute of Barcelona on freedom of transit (April 20th 1921). Worth mentioning is the preamble of the accompanying convention; in this the High Contracting Parties recognise "that it is well to proclaim the right of free transit and to make regulations thereon as being one of the best means of developing co-operation between States, without prejudice to their rights of sovereignty or authority over routes available for transit". Pursuant to art. 2 of the Statute the States shall facilitate free transit, both by rail- and waterway, regardless of nationality; through traffic via the territorial waters shall be allowed, in accordance with the customary conditions and reserves [1]). The restrictions that may be imposed have been inserted in the Statute, principally in arts. 5 and 7. The article first referred to lays down that no contracting State shall be bound by the Statute "to afford transit for passengers, whose admission into its territories is forbidden, or for goods of a kind of which the importation is prohibited, *either on grounds of public health or security, or as a precaution against diseases of animals or plants*", and further entitles each of the contracting States "to take reasonable precautions to prevent *the safety of the routes and means of communication* being endangered". In addition article 7 stipulates that the measures "which a State is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may in exceptional cases, and for as short a period as possible, involve a deviation from the provisions of the articles of the Statute; *it being understood that*

[1]) "Subject to the other provisions of this Statute, *the measures taken by contracting States* for regulating and forwarding traffic across the territory under their sovereignty or authority *shall facilitate free transit* by rail- or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit, or destination, or on any circumstances relating to the ownership of goods or vessels, coaching or goods stock or other means of transport. In order to ensure the application of the provisions of this article, the *contracting States will allow transit* in accordance with the customary conditions and reserves *across their territorial waters*".

the principle of freedom of transit must be observed to the utmost possible extent". In conclusion it should be mentioned that article 3 stipulates that "traffic in transit shall not be subject to any special dues in respect of transit (including entry and exit). Nevertheless, on such traffic in transit there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such dues must correspond as nearly as possible with the expenses which they are intended to cover, and the dues must be imposed under the conditions of equality."

The Convention and Statute on the regime of navigable waterways of international concern, established at Barcelona on the 20th, respectively the 19th of April 1921 point the same way. The preamble of the Convention reiterates, though in a somewhat different wording [1]), that of the Transit-Convention. In the Statute it is laid down that each State shall accord *free exercise of navigation* to the vessels flying the flag of any one of the other contracting States on those parts of navigable waterways as are specified in the Statute (art. 3). In the exercise of navigation, the nationals, property and flags of all contracting States shall be treated in all respects *on a footing of perfect equality*; no exclusive right of navigation shall be accorded to any companies or private persons (article 4). Besides the possibility of a reservation, principally in accordance with that of article 16 of the Air Navigation Convention 1919 (carriage between two points of one and the same territory, art. 5), each State maintains its right to enact the stipulations and to take the *measures necessary for policing the territory and for applying the laws and regulations relating to customs, public health, precautions against the diseases of animals and plants, emigration or immigration, and to the import or export of prohibited goods*; it being understood that such stipulations and measures *must be reasonable,* must be applied on *a footing of absolute*

[1]) "Recognising in particular that a fresh confirmation of the principle of freedom of navigation in a Statute, elaborated by forty-one States belonging to the different portions of the world constitutes a new and significant stage towards the establishment of co-operation among States without in any way prejudicing their rights of sovereignty or authority".

equality between the nationals, property and flags of any one of the contracting States (including the State which is their author) and *must not without good reason impede the freedom of navigation*" (art. 6). Article 7 is similar to article 3 of the Transit Statute, article 7 of which is repeated in article 19 of the Waterways Statute. According to article 10 "each riparian State is bound on the one hand to refrain from all measures likely to prejudice the navigability of the waterway, or to reduce the facilities for navigation, and on the other hand, to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation. If such navigation necessitates regular upkeep of the waterway, each of the riparian States is bound to take such steps and to execute such works on its territory as are necessary for the purpose as quickly as possible . . . ."

The Additional Protocol opens up the prospect of applying the principles of freedom and equality laid down in the Convention also to all navigable waterways which are not considered as of international concern, and which are accessible to ordinary commercial navigation to and from the sea (eventually with the reserve that these must be naturally navigable), and also in all the ports situated on these waterways on condition of reciprocity.

Several more recommendations were drawn up in Barcelona ; relative the international regime of railways it was recommended, *inter alia*, that the various States should adopt all possible measures which will facilitate the international transport of passengers, baggage, and goods over the railways under their sovereignty or authority [1]).

With respect to the seaports placed under an international regime some general provisions were recommended, *inter alia*, that the nationals, property and flags of all nations shall enjoy complete freedom in the use of the port, and shall be treated upon a footing of absolute equality ; that there shall be no restrictions on the free use of the port, other than those arising from stipulations concerning customs, police, public health,

---

[1]) Recommendations relative to the international regime of railways, 1 and 2.

emigration or immigration, or the import and export of prohibited goods. Such regulations must be reasonable and uniform, and must not, without good reason, impede traffic [1]).

Equality of treatment concerning free access to seaports is laid down in article 2 of the Seaport Statute of Geneva (1923). Pursuant to art. 17 some restrictions may be made; these amount to about the same as those provided for by article 5 of the Transit Statute; the provision of article 7 of the latter Statute is embodied in article 16.

In conclusion article 4 of the Statute on the international regime of railways, drawn up in the same year in Geneva, reads: "Recognising the necessity of granting sufficient elasticity in the operation of railways to allow the complex needs of traffic to be met, it is the intention of the contracting States to maintain unimpaired full freedom of operation while ensuring that such freedom is exercised without detriment to international traffic". For the rest in articles 29 and 30 similar restrictions are inserted that have already been described above.

§ 2. Conditions to be made with regard to an authorisation of passage.

The foregoing regulations have been somewhat fully dealt with, as two important conclusions are to be deduced from them. It appears, in the first place, that, even though the principle of sovereignty be adopted, free traffic is very well possible. Further it has to be stated that, while with respect to through traffic via the maritime belt, along the rivers and with regard to the touching at seaports as great a freedom as possible prevails on which only reasonable and definite restrictions can be imposed, with respect to international air communications yet many States do not hesitate to make all kinds of unreasonable conditions, although for this very traffic freedom of movement is a primary vital condition.

In justification of this difference it might be argued that an international air line bears another character than, for

---

[1]) Article 1 of the General Provisions; Recommendations relative to ports placed under an international regime.

instance, an international shipping line. The dangers, more particularly in the military sphere, attaching to an air line, are considerably greater; the control of the police authorities and customs' officials cannot be exercised to so high a degree; for example, we can just fancy how easy it is to drop contraband upon a distantly situated spot. Further it is argued that, generally speaking, measures will have to be taken by the State to be flown over which will be much more far-reaching than those required for shipping lines; for example, fully equipped aerodromes as well as a series of emergency landing grounds will have to be made; a wireless service will have to be instituted, and a night light installation should be erected.

As against this latter it may be observed that the construction and maintenance of seaports are also accompanied by great expenses, and that this moreover applies to coast-lights and light-ships; that shipping requires wireless services as well which, in addition, may likewise be used on behalf of air traffic; and finally that, contrary to any means of communication by land and railways, the creation of the airway itself does not entail any expense whatsoever.

There remain the objections in the sphere of customs and police, as well as those affecting public health and security. With regard to the latter, it should be pointed out that each State has reserved to itself the right to prohibit at any time, for military reasons or in the interests of public security, any flying above certain areas of its territory. Though it is admitted that by this control the danger of espionage cannot be altogether eliminated, it is nevertheless very well possible to make important strategical points invisible from the air; moreover, it is generally forbidden to carry cameras or to take pictures with these without permission. Finally these objections equally apply to all aircraft, whether belonging to a regular air service or making incidental flights; nevertheless the Convention requires a previous authorisation for the operation of regular air lines only.

Hence it is open to doubt, whether air navigation is indeed in such an exceptional position that the requirement of a previous permission for the institution and operation of an international air line is justifiable.

Since there is no denying that a State should be empowered to take the required measures for its safety — which will be all the more reasonable when air navigation shall have arrived at its full development — the requirement of previous permission for international air lines may be put up with for the present [1]). For the rest this system has already struck root so deep in practice that there is little chance of proposing successfully any modification in favour of air navigation in the near future. So far, the possibility opened up by the new text of art. 15, viz. to renounce the requiring of a previous consent, has not been taken advantage of.

It must be expressly laid down, however, that on the granting of a permission and the attaching of conditions, only justifiable and reasonable considerations bearing solely upon the connection proper, can point the way.

The possibility of making conditions which have for their object, *inter alia*, the requiring of part of the traffic, or part of the revenue accruing from it; the following of a certain route, conformably to national interests; the acquiring of material advantages; the extorting of promises in a different sphere, etc. should be eliminated.

However, it is permissible that restrictions should be made for military reasons, in the interests of safety and health, or as regards customs and police, provided that what is required shall be reasonable and shall be applied without distinction of nationality, whereas the transit character of an international air line should not be lost sight of.

It has been stated before that the Convention, and in consequence many other treaties and national laws, know of such restrictions.

The second paragraph of article 2, for example, lays down that the regulations made by a contracting State as to the admission over its territory of aircraft belonging to the other contracting States shall be applied *without distinction of nationality*.

---

[1]) In the distant future, however, these measures of safety will be embodied in general regulations, so that, with regard to this, previous permission will no longer be necessary (see page 88).

Pursuant to article 3, par. 1, each State is entitled to issue a prohibition regarding flying over certain areas, but *solely for military reasons and in the interest of public safety*, whilst with this, unless as a great exception and then in the interest of public safety, no distinction may be made between its private aircraft and that of the other contracting States. Further, pursuant to par. 1 of art. 15, *for reasons of general security*, an airplane may be compelled to land. The transport of explosives and of arms and munitions of war is forbidden; each State may prohibit or regulate the carriage or use of photographic apparatus (arts. 26 and 27). Finally, *for reasons of public security*, the carrying of other objects but those referred to in arts. 26 and 27 may be subjected to restrictive regulations (art. 28).

As regards public health, with a view to epidemics, for example, landing at certain aerodromes may be prohibited (art. 3 and art. 15, new par. 3). The chances of unreasonable restrictions being made in this respect will lessen considerably when the draft treaty, made on May 14th 1931 by the Office International d'Hygiène Publique, "pour la réglementation sanitaire de la navigation aérienne" will have come into force. An international, uniform regulation will then be in force with which the various States will be bound to comply, and which will on the whole take the interests of air navigation sufficiently into account.

In the restrictions and conditions to be imposed with a view to customs and police, however, difficulties are likely to be encountered. It is true that a certain uniformity does already exist, owing to some customs' regulations having been inserted in annex H of the Convention, while in Western Europe, on the working out of these, the suppleness required for air navigation has been aimed at. On the other hand some customs' regulations, principally in Eastern countries, have an extremely hampering effect. The number of copy-manifests that every individual plane that leaves Holland for the Indies, has to carry for the satisfaction of the customs' authorities of the several countries, runs into tens; this too holds good for the visas to be obtained for such flights; add to this the short period the validity of a visa often covers. The regulations

laid down by the customs' authorities with respect to fuel frequently cause a great deal of trouble and expense. Particularly in this respect the transit character of an international air service is not seldom lost sight of. Nevertheless it stands to reason that restrictions *re* customs and police — provided they are made and applied within reasonable bounds — should be respected.

The question now arises whether refusal or restriction of an authorisation for protectionist reasons, may be considered justifiable and plausible.

It is not to be denied that there are good grounds upon which a State may apply the requirement of previous permission to prevent, or at all events to restrict, foreign concerns from flying over its territory, such in favour of the national company.

Generally speaking, the air navigation business for the present is not profitable in a financial way and frequently great losses have to be neutralised by means of Government subsidies. Consequently competition of two or more national companies will certainly not be tolerated in any country, as it may lead to greatly increased debit balances. Hence it will be seen that in most countries air navigation is placed in the hands of one company which, pursuant to the subsidy contract, is dependent upon the Government in many respects ; sometimes air navigation is even being run by the State concerned directly. If more companies are established in one country, the authorities see to a fair distribution of activities, which eliminates mutual competition.

Since competition by foreigners may also occasion an increase of losses and in consequence a higher Government subsidy, it is not altogether inconceivable that some States (in particular the States whose national company is either insufficiently organised or has but slight possibilities of extension) should decline any such competition, considering that by the existing air navigation services the necessities of the situation are fully met.

Yet there are a number of factors which advocate free traffic under these circumstances, and consequently plead against

refusals or restrictions concerning international air lines on protectionist considerations.

In the first place most companies do not confine their activities to an internal net ; the character of air navigation is such that as great an expansion as possible to foreign countries is being sought. Now it cannot be denied that the longer an air line is, the sooner the limit of rentability will be reached. In the very first place, as the distance to be covered becomes greater, the advantages offered by air transport increase, a factor that will thus be reflected in the revenue arising from the carriage of passengers, goods and mail. Further, the adaptation of employees and material can be effected in a more economic way ; actually, on the one hand, frequency upon short routes cannot be increased to an unlimited degree in the present circumstances ; on the other hand, a certain minimum of employees and material has to be available which may be in excess of the needs of the traffic ; by a longer communication, however, an effective distribution will be possible, by which short and long traffic will supplement each other in a well balanced manner. This is especially the case in the European countries, where, as a consequence of weather conditions, air navigation is practically a seasonal industry for the present ; an intercontinental air service, on the contrary, runs through sub-tropical and tropical climates, owing to which an exploitation throughout the year has become possible. Hence it may be seen that while traffic between Holland and the surrounding countries is at present limited to some few lines during the winter-period and only fully develops from spring to autumn, the East-Indies service is run throughout the year. That this affects the cost-price per unit of transport favourably, is self-evident.

Since then the chances of rentability increase with the length of an air line and the claims on public funds decrease, freedom of movement is desirable for through traffic precisely for economic reasons and the States, with a view to the principle of reciprocity, should grant that freedom in their own interest.

On the other hand, it cannot but be considered fair that — at least till the rentability of air traffic has been reached

— another point of view is adopted with regard to internal routes. The possibility of acting conformably to this point of view is founded on article 16 of the Convention, pursuant to which a State is entitled to make reservations and restrictions in favour of the national aircraft as regards transport between two points on its territory. This provision has been embodied in practically all other air navigation regulations.

Though mentioned in Chapter I, it may be repeated here that with respect to internal traffic only the Convention recognises and allows restrictions of such a nature; arguing *a contrario* it may be said that the requirement of art. 15 was not intended to be taken advantage of in that sense with respect to international airways.

More reasons, however, are to be advanced for the point of view that with the granting of an authorisation no protectionist considerations ought to prevail.

Though at first the air navigation concerns competed keenly with each other on the various routes, gradually a consolidation effected mostly by the parties themselves, is noticeable. This was brought about by a pooling of interests by which the revenue is distributed in proportion to the number of kilometres covered and the loading capacity available; time tables and tariffs are also fixed with mutual agreement.

There was no escaping such a collaboration seeing that the establishment of a private commercial and technical organisation in all landing places is too costly for a company; the consequence of this is that such an organisation is made dependent on the foreign concern established there which now regulates the booking of passengers and freight for any company touching at such ports and even for those which were rivals on the same lines. The latter parallel of interests induced in some instance one or other of the rival exploitants to enter into a contract with the local representative, which resulted n partial bookings highly detrimental to the interests of the other. Collaboration solved the difficulty, here too, in due course. Where competition stood its ground the time tables were not seldom found to be alike; this often resulted in two planes, each with half the loading capacity occupied, leaving at about the same time, because a certain connection had to be made,

or because that hour of departure was most suitable for passengers or consignors. A collaboration now makes it possible to distribute the hours of departure and arrival over the whole day, to the convenience of the public and to the advantage of the exploitation. Owing to this the general organisation can be effected much more simply and cheaply. Thus competition is mostly confined to routes that are run by some pool concerns.

Such combinations are found in Holland on the lines to Paris, London, Copenhagen, Malmö and Cologne—Basle—Geneva. In other countries too this system is getting more and more the usual style of working (Paris—London, Paris—Cologne—Berlin). Concerning the intercontinental lines a wish to collaborate in such a way is not distinctly noticeable yet, and it is still uncertain whether the system will be followed here in the near future as readily as has been done on the shorter lines, since at present the principal purpose is evidently transport from point of departure to terminus. However, the reciprocal performing of the technical organisation, the exchange of agencies, etc. point, here too, in the direction of co-operation.

However desirable the abovementioned evolution may be, a compulsion on the part of the Government to come to any agreements of this nature must be declined at all events. This also applies to the tendency that has recently manifested itself, viz. to distribute through the intermediary of the Governments concerned the air routes — especially those of Western and Central Europe — over the various companies. Concerning night mail services the arrangement cannot be objected to, but at the Colonial Congress, held in Paris in October 1931, and at the session of the Sub-Committee "pour l'étude d'un réseau principal de routes aériennes permanentes" (Comité de coopération entre aéronautiques civiles de la Société des Nations), held in November 1931, and finally from the proposals of the French delegation to the Disarmament Conference (February 1932) it appeared that the wish to go further into this matter prevailed. This policy may be comprehensible from the standpoint of the subsidising Governments and with regard to a satisfactory limitation of air armament, but it cannot but work retardingly upon the development of air

navigation. By such a distribution, as a matter of course, it is not pure and simple the air navigation interests that will act a decisive part; the political element cannot be eliminated either. Great areas developed in the course of years with difficulty and considerable expense, will have to be renounced; the advantage of having been the pioneer and having obtained a great experience upon a certain route will suddenly be brushed aside. Moreover the possibilities of extending the air net and thus developing new and perhaps profitable fields of action no longer exist, whereas local interests which can be judged only by the country concerned, will not properly be taken into account. Such a method checks the natural progress of air navigation and creates precedents, which are sure to entail injurious consequences, when one day air navigation shall have become a paying affair in spite of it [1]).

The pursuance of such a policy will be all the more injustifiable now that the companies themselves are taking steps to arrive at a condition of equilibrium of their own accord. Such stability is not found solely in the effecting of pooling contracts, but also by laying down rules for the distribution of traffic and revenue. Supposing a Dutch-German combination should run the route Amsterdam—Nuremberg—Budapest, each company making a flight to and fro daily, an agreement might be drawn up on the strength of which passengers and goods hailing from Budapest and destined for Amsterdam and further should be carried by the Dutch line, and those bound for Nuremberg or other German towns, connected with Nuremberg by air line, with the German service.

Besides, there are circumstances that may render it profitable, both for a State and its national air navigation company, to propagate air traffic as much as possible.

The motto "traffic brings prosperity" need not be emphasised here; attention, however, should be drawn to the great advantage of the considerable number of rapid postal communications.

Postal interests may even be injured by a "luftverkehrsfeindliche" policy. If, for example, permission for a foreign night mail service should be refused, with a view to reserve

---

[1]) See also p. 94.

this line for the national company though the latter is at the moment in no way capable to apply for same, the route may possibly be shifted on to a neighbouring country; though in this case the shortest route cannot be followed, it need not signify an irretrievable loss of time to the quickest means of traffic. The danger may arise that the routine, thus acquired in despatching mail, may result in the day mail being sent along the same route.

Intensive traffic further enhances the revenues of the airports, the exploitation of which is mostly in the hands of the authorities. The hangar- and landing-fees constitute one of the principal sources of income; a great rise of these will considerably help to cover the cost of running. Extensive traffic is advantageous to the national company, for, as has been stated before, the commercial and ground organisation is mostly in its hands. Consequently its revenues accrue from the agency commission, from commission on the supply of fuel and other services rendered, whilst the organisation can be conducted upon a more economic basis, for example by combining motor-bus services from and to the aerodrome. Even though this should require a larger staff, a better and more effective division can then be effected, apart from the fact that reciprocal representation means curtailing the really considerable expenses of an organisation abroad.

Considering the above, in my opinion the conclusion may be drawn that (whereas all sorts of restrictions may be made concerning the inland traffic), it is not desirable to allow considerations of a protectionist nature to have much influence, when an application is handed in for the establishment of an international air line, as the free admission of such connections will be advantageous both for the State to be flown over and its national air navigation company.

§ 3. Redrafting of Article 15.

If we now return to our point of issue viz. that it must be expressly stated that the granting or not of an authorisation and the conditions subjoined must be based solely upon justifiable and reasonable grounds regarding only the air line

to be instituted, the question has now to be considered how such a requirement is to be established.

Regarding this we may confine ourselves to the drafting of a new text for the 4th paragraph of art. 15 of the Convention of 1919. This treaty must by all means be considered as the kernel of public air navigation law, its provisions having in general been introduced into other similar regulations. Pursuant to article 5 — as has been pointed out before — it has been made obligatory for agreements to be entered into by a State affiliated to the Convention and another State, that is not a party, to conform to the rules laid down by the Convention and its Annexes [1]).

The fourth paragraph of art. 15 stipulates — at the coming into force of the Protocol of June 1929 — that any State may make conditional on its prior authorisation the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory.

For the redrafting of this paragraph in the sense indicated above, there is the alternative of a more general circumscription or a summary of the reasons for which such authorisation may be refused or restricted.

A general circumscription is found in the supplement, proposed by the English delegation during the C.I.N.A.-meeting of June 1929, by which *permission can only be refused upon reasonable grounds*; that amendment was rejected by 19 votes to 11.

In his paper read to the Dutch Section of the International Law Association [2]), van Hamel considered that such a text has its advantages over a summary of the reasons for refusal and restrictions, which he words as follows: "Perhaps the general formulation itself may, in some respect, be somewhat more successful than the special summary, such as "demands of public security, fear of infectious diseases", etc. Anyone who remembers for example, how frequently in commercial

[1]) Pursuant to the Protocol of June 1929 such special conventions in so far as may be consistent with their objects shall not be contradictory to the general principles of the Convention.

[2]) *Op. cit.* pp. 12 and 13.

policy between various countries "fear for the transfer of diseases of animals or plants" has served as a pretext for what in reality meant measures for the prohibition of trade, cannot accept terms by virtue of which foreign air services may be encumbered with all kinds of restrictions causing injury to the commerce of others, or which are advantageous solely to the country which imposes them, or put pressure in any shape whatever on foreign companies.

Hence the rule that the refusal must be based upon "reasonable motives" is self-evident. True, "reasonable" is certainly somewhat vague, and is open to various interpretations; in its generality, however, the expression very sharply accentuates how matters stand. It sets aside an ingenious evasion and makes a really acceptable motive obligatory in each case."

The introduction of an element of reasonableness tells in its favour. On the other hand the vagueness of the expression has to be admitted. It is true that the English delegation argued that the term "reasonable" represents, in English law, a well defined idea; however, in other countries such is not the case and this was very strongly felt at the C.I.N.A.-session of June 1929. Though this term may make ingenious evasion somewhat difficult, abuse cannot be averted since the views regarding the question of what is reasonable or not, are apt to deviate occasionally. Besides such a vague expression may keep the parties concerned from an appeal to jurisdiction.

A special summing up has been inserted in the treaties concluded in Barcelona, in the first place in arts. 5 and 7 of the Transit Statute. As reasons of restriction it mentions: public health or security and precautions against diseases of plants or animals. Reasonable precautions may also be taken "to ensure that persons, baggage and goods, particularly goods which are subject of a monopoly, and also vessels, coaching and good stock and other means of transport, are really in transit, as well as to ensure that passengers in transit are in a position to complete their journey, and to prevent the safety of the routes and means of communication being endangered." Furthermore measures may be taken "in pursuance

of general international Conventions, particularly Conventions concluded under the auspices of the League of Nations, relating to the transit, export or import of particular kinds of articles, such as opium or other dangerous drugs, arms or the produce of fisheries, or in pursuance of general Conventions intended to prevent any infringement of industrial, literary or artistic property, or relating to false marks, false indications of origin or other methods of unfair competition". Deviations from these provisions are only allowed "in case of an emergency affecting the safety of the State or the vital interests of the country, it being understood that the principle of freedom of transit must be observed to the utmost possible extent".

Article 6 of the Waterways Statute allows the enacting of stipulations and the taking of measures "necessary for policing the territory and for applying the laws and regulations relating to customs, public health, precautions against the diseases of animals and plants, emigration or immigration, and to the import or export of prohibited goods, *it being understood that such stipulations and measures must be reasonable*, must be applied on a footing of absolute equality between the nationals, property and flags of any one of the contracting States, including the State which is their author, and must not without good reason impede the freedom of navigation."

With respect to the Air Navigation Convention, as regards article 15, a supplementary text of enumeration was proposed by Prof. Verzijl, reading as follows: "Cette autorisation ne pourra être refusée que pour des raisons de sécurité ou d'ordre publics. Si l'État survolé croit devoir subordonner son autorisation à des conditions, celles-ci ne pourront regarder que les intérêts de la sécurité, de l'hygiène ou de l'ordre publics, ou la police générale ou douanière."

It cannot be denied that a summing up may be incomplete and thus does not ensure the exercising of the powers due to a State, whereas, on the other hand, it may be too detailed and thus defeat its own object; further the chances of abuse are not eliminated; with an appeal to security, for example upon the ground of the allegation that the aerodromes are not fit to be used, an undesired service can easily be checked.

It is satisfactory, however, to state that several of the abovementioned ideas are taking a more defined form. We have already referred to the draft convention concerning sanitary control of air navigation, to the customs' regulations in Annex H of the Convention of 1919, while in Annex D the general traffic regulations are inserted. Further a summing up is certainly less vague than just the notion of reasonableness. In conclusion, expressions such as public order and public security are already come across in several articles of the Convention.

Upon these grounds, in my opinion, a special summary is preferable, provided the conception of reasonableness pervades it; such a combination is found, for instance, in article 6 of the Waterways Statute. In this way the application of restrictions in the sphere of public health and safety, as well as in that of customs and police, is again kept within the limits of reasonableness; the advantages of both systems are combined and the chances of abuse are considerably reduced.

The contents of article 6 of the Waterways Statute need not, however, be adopted to their full extent in the fourth paragraph of article 15.

The principle "treatment upon the basis of equality" has already been laid down in the second paragraph of art. 2 of the Convention (admission to the territory of aircraft belonging to the other States); art. 3 (prohibition of flying over certain areas); art. 24 (landing on public aerodromes and application of tariffs) and art. 29 (application of restrictions with regard to the carriage of goods), whereas, pursuant to art. 36, "special regulations as between State and State in respect of Customs, police, posts and other matters of common interest in connection with air navigation" must be brought into line with the principles of the Convention. The provision that the measures to be taken "must not, without good reason, impede the freedom of navigation" is already met by the obligation — entered into in article 2, par. 1 of the Convention — to accord freedom of innocent passage, and further by the introduction of the term "reasonable". Finally the various measures to be taken may be combined; hence no further working out of some ideas need be proceeded to.

The expression "public order" is, in its generality, dangerous;

here it is desirable to introduce a limitation and just to mention safety and health; since further articles 3 (prohibited zones), 15, par. 1 (obligation to land if ordered to do so) and 28 of the Convention (possibility of submission to restrictions of the transport of goods), and besides these many national laws and regulations, give ample opportunity for taking measures for the protection of *public safety*, satisfaction may be felt here with the expression "aerial safety", verifying at the same time the intention that only measures regarding the air connection itself are being considered.

Military interests are also sufficiently protected by arts. 3 (prohibited zones), 26 (no transport of explosives, arms or munitions) and 27 (no carriage or use of photographic apparatus without permission.)

It may be expedient here to deal with the provision, inserted in the new fourth paragraph of art. 15, viz. that authorisation may be required for the creation and operation of air lines *with or without landing*. A route that runs over a certain country without making an intermediary landing certainly yields but little ground for any restriction or condition. Measures in the realm of customs and police are practically unnecessary and the same holds good for public health. Article 15, par. 1, recognises this more or less by laying down that the aircraft of one of the contracting States has the right to cross the airspace of another State without landing. The more so as the same paragraph prescribes that the plane is bound to follow the route which may possibly have been fixed by the State over whose territory it flies and where moreover for reasons of general security it may be compelled to land, it seems to me reasonable and justifiable that the provision of the fourth paragraph shall not be applied in the event of no landing being made and on this account to cancel the words "or without".

In that sense a member of the Dutch delegation tendered his opinion at the meeting of the C.I.N.A. in June 1929, pointing out emphatically that in the absence of any intermediary landing "creation and operation on the territory" can hardly be spoken of.

Finally, it was indeed the primary purpose of the Convention that for the aircraft of regular international airlines no previous permission should be required to fly over a country without landing there; par. 1 of art. 15 has reference not only to casual flights but also to that category of aircraft; this appears from the minutes of the Juridical Sub-Commission referred to in Chapter I, p. 19; hence the actual text is not in keeping with said purpose.

On working out the foregoing, there results the following new text of the fourth paragraph of article 15:

"Every contracting State may make conditional on its prior authorisation the establishment of international airways and the creation and operation of regular international air navigation lines with landing on its territory. Such authorisation shall only be refused or withdrawn on reasonable grounds based upon public health or aerial safety. In the event of a contracting State desirous to make conditions and restrictions in respect to said authorisation, these shall refer exclusively to public health or aerial safety and the laws and regulations relating to customs and general police, it being understood that such conditions and restrictions must be reasonable."

The question now arises what must be understood by a "regular international air navigation line".

As early as in the first session of the C.I.N.A. an opinion was given concerning this. Upon the request of the Belgian delegation an investigation was set on foot by the sub-commission of exploitation concerning the interpretation of par. 3 of art. 15. Without binding itself to any definite interpretation, the sub-commission submitted its view regarding the question what must be understood by "mise en exploitation d'une ligne aérienne", viz. "l'ouverture d'un service régulier de transports publics avec fixation des horaires et des tarifs." That view was adopted by the C.I.N.A.

To be reasonable it must be admitted that this expression is somewhat narrow. By not proceeding, for example, to the fixing of tariffs and time tables, the provision of article 15

can be evaded. Now it is nothing exceptional that time tables are not fixed. A striking example of this is certainly the line Amsterdam—Batavia. Only day and hour of departure from these two cities have been fixed; further a travel scheme has been outlined, that is adhered to, subject to it being practicable; many circumstances, however, may occur necessitating a deviation. This is proved by practice; the average duration of the trips made from January 1st 1931 till December 31st 1931 was 10 to 11 days; among these figures a flight of 7 days, one of 8 days and one of 16 days. The transit character of such communications is, at present, strongly pronounced, but in the near future, when more transport on the intermediary stretches shall be effected and the speed of the aircraft increased, a fixed time table will undeniably be established and kept up. In fact, matters are already tending in this direction; while the pilots were at first only bound to a total duration of the journey Amsterdam—Batavia or back, now definite day-routes (except in Europe) have been fixed from which, however, in special circumstances, deviations may be made.

Do trial flights fall under the above mentioned category? Certainly not to the letter. On the other hand it does occur that a trial service acquires a very regular character. Since here, however, every instance will have to be considered individually, it is hardly possible to lay down any general rule; that matter is rather a subject left to the view of the applicant and in the end of the State concerned. Guidance will have to be sought principally in the question of what is being aimed at by the trial flight(s); if the object is to set up a regular service gradually, it will be wise to be assured of permission prior to it.

Now a few words may be said concerning the term "authorisation". This may assume the meaning of "concession" and thus may entail State control being instituted over the route, the time tables, the tariffs, in short, the entire exploitation. The term, however, may also be understood to be a permission granted once and for all, thus not implying any posterior intervention. In the 14th session of the C.I.N.A.

(Geneva, June 1928) a lively debate took place concerning the question. The view prevailed that the interpretation first described was antagonistic to the spirit of the Convention ; that a decision concerning this, however, was not within the competence of the C.I.N.A., but, pursuant to art. 37, within that of the Permanent Court of International Justice.

Permission has to be granted by the Government of the State to be flown over. Should the application be made by the Government of the country where the air navigation company is established, or by the latter itself ?

It is preferable that in general the matter should be dealt with by the Government concerned, *i.e.* that the Government should apply for the required authorisation and not, as is sometimes the case thus far, that the application, drawn up by the company, is forwarded by the Government.

It may naturally be expected that more attention shall be paid to a request coming from a foreign Government than to that from a private company. Moreover in the first instance, the diplomatic organisation may eventually come into action, whereas in case the application is made by the company contact will be obtained, at best, with the Air Department, but mostly with a Department that has been charged with the management of air navigation affairs as a subsidiary matter, *e.g.* the Ministry of Public Works, of Traffic, or of Post and Telegraphs ; the looking after the interests of the running concern — eventually by exercising a certain pressure — by the diplomatic representatives of the foreign Government will then take place in a roundabout way only and book a less favourable result in consequence.

On the other hand the private character of an air navigation company guarantees, in most instances, a greater pliancy as to the preparations of the negotiations concerning the permission to be granted.

Hence it is not desirable to lay down *imperatively* that it is only the Governments that are competent in this respect.

In the session of June 1929, however, in some quarters

the inclination prevailed to prescribe emphatically that the permission should be granted to the State that had applied for it. Something similar had been inserted in the very text drafted by the "Comité Juridique International de l'Aviation" (session of May 1928, Madrid); in this a special agreement between the States interested was required. Though but little enthusiasm was felt in the bosom of the C.I.N.A. for such a provision seeing that, according to national legislations, ratification is frequently required for similar agreements (a factor that might cause considerable delay), some delegates thought it desirable to make the application and the grant of the permission a matter for the authorities, so that it would never be doubtful but the plan of the company concerned was sanctioned by its Government. An argument against it was that authorisation would only be granted by a State, provided it is cognizant of the application being approved of by the Goverment of the company concerned; on this point certainty can always be required. Consequently it was considered that making the intervention on the part of the authorities, as described in the foregoing, obligatory, was not necessary. This point of view was in due course adopted by the C.I.N.A.

§ 4. Settlement of Disputes.

Now the question of who is to judge of the application of art. 15 has to be dealt with.

Art. 37, par. 1 lays down that "in the case of a disagreement between two or more States relating to the interpretation of the Convention, the question in dispute shall be determined by the Permanent Court of International Justice to be established by the League of Nations, and until its establishment, by arbitration."

Seeing the Court had meanwhile been established this paragraph was redrafted in the Protocol of June 1929 and now reads: "In the case of disagreement between two or more States relating to the interpretation of the present Convention, the question in dispute shall be determined by the Permanent Court of International Justice. Provided that, if one of the States concerned has not accepted the Protocols relating to

the Court, the question in dispute shall, on the demand of such State, be settled by arbitration."

Still the Convention prescribes in one case decision by arbitration: whereas (pursuant to par. 4 of art. 37) "disagreements relating to the technical regulations annexed to the present Convention, shall be settled by the decision of the International Commission for Air Navigation by a majority of votes", par. 5 of the same article stipulates that "in the case the difference involves the question whether the interpretation of the Convention or that of a regulation is concerned, final decision shall be made by arbitration as provided for in the first paragraph of this article." As the text of the fifth paragraph has not been modified together with that of the first paragraph in the Protocol of June 1929, in this instance we have to do with an obligatory arbitration.

For completeness' sake it should be further stated that up to the present no single dispute has been submitted to the Court.

In connection with the heavy procedure before the full Court, another solution for adjudication of differences has been sought and in some quarters the system of arbitration has been advocated. A quicker procedure was expected of this, a factor that is eminently desirable in many cases. As a matter of fact slow procedure may cause considerable damage. It might be imagined, for example, that an air navigation company running a line traversing many countries and which has obtained the necessary permits, finds itself suddenly faced with the fact that one of those States, forming a necessary link in the connection, suddenly withdraws or does not extend the permission for motives which, in the company's opinion, are unreasonable. The company in question, as a matter of course, has the greatest interest to obtain a decision as promptly as possible and in a case like this the procedure before the full Court is not so recommendable. Beside this, it was pointed out that, as regards air navigation, but little stability exists; the number of fixed legal rules and customs is still small; for these reasons too, so it was argued, arbitration is preferable. Finally the Court was not considered suitable for the settlement of disputes of a nature in which the parties desire to effect a compromise.

Nevertheless I am of opinion that here the system of arbitration is not recommendable. In the first place proceedings before the Court are, in principle, provided for by the Convention; a similar principle has been inserted in article 22 of the Waterways Statute and Article 13 of the Transit Statute of Barcelona [1]). Further a more prompt handling is not by any means guaranteed by arbitration. In practice the weakest side of that institute has been very distinctly brought to the front, viz. the formulating of the protocol of arbitration which frequently takes much time. After this the arbiters and the umpire have to be chosen, a circumstance that has caused difficulties on many occasions. Finally the course of procedure to be followed has to be regulated. Discussing these preparatory activities, Loder [2]) observes: "Que de soucis, que de précautions, que de mesures! La bonne Thémis est figurée les yeux bandés; mais la déesse anonyme de l'arbitrage les a grandement ouverts".

On the other hand the Statute of the Permanent Court contains many provisions which weaken the force of the arguments in favour of arbitration. A unilateral writ is possible under certain conditions; no choosing of judges is any longer necessary and the course of procedure has already been determined. With regard to the objection that but few conventional and customary rules exist in the air navigation sphere, article 38 of the Statute lays down in its last paragraph that the Court shall not only apply the international conventions, the customary law and the general principles of law, but may also decide a case *ex aequo et bono*, if the parties agree thereto. Moreover, pursuant to article 27, cases relating to transit and communications shall be heard and determined by a special chamber of 5 judges, if the parties so demand. In this case the judges may be assisted by technical assessors, when desired by the parties or decided by the Court, while the Court may sit elsewhere than at The Hague (art. 28). In this way special

---

[1]) That decision by arbitration has been inserted in the Ibero-American and Pan-American Air Navigation Treaties, is explained by the fact that it was desired to drop all contact with the League of Nations.

[2]) La différence entre l'Arbitrage international et la Justice internationale, p. 16.

treatment is made possible. Finally the Statute provides as well for the obtaining of as prompt a decision as possible: article 29 stipulates that with a view to the speedy despatch of business, the Court shall annually form a chamber composed of three (later on: of five) judges, who, at the request of the contesting parties, may hear and determine cases by summary procedure. In this manner speedy adjudication will be possible an instance of which is the question *re* the interpretation of the Treaty of Neuilly (Bulgaria—Greece; 1924), the first instance of a recourse to the summary procedure. Parties filed with the Registrar on July 31st 1924; judgment was given as early as September 12th 1924. This procedure which can therefore take place when parties request it, appears to me to be very suitable for disputes arising from the interpretation of article 15.

§ 5. How to promote freedom of passage in future.

If the modification described in the foregoing should be introduced into article 15 of the Convention freedom of traffic for international air services would be guaranteed more satisfactorily than is the case at present; besides, the possibilities of the development of air navigation would be greater; nevertheless, the States would be able to exercise the rights due to them and quit the obligations imposed upon them and even where these two interests might clash, article 37 opens the possibility of a prompt decision.

Such a regulation, however, would only have to be considered as a first step in the right direction. For even then there are three more factors that may impede freedom of air traffic. In the first place the States reserve the right to make conditional on their prior authorisation the creation and operation of regular international air lines; secondly, the provision embodied in article 2 is of a conventional nature and not declarative; finally the new regulation would be confined to the working sphere of the Convention of 1919.

As pointed out before (p. 68) the institution of previous permission has become deeply rooted. Some countries even go

the length of not only asking for a previous permission for regular air lines, but, though not obliged to it, for single flights as well. For the time being, however, no success will be booked by efforts of putting an end to it. If, however, the new text, proposed here for article 15, should come into effect, the question whether the permission applied for shall be granted or not and if so, upon what conditions, will be restricted to the sphere of public health and safety, police and customs. But more especially in connection with the steadily increasing air traffic the expectation is justified that gradually the various stipulations, attached at present to every individual permission, will make way for more general regulations equally effective for all traffic, containing, if need be, conditions especially bearing upon international lines. Then there would be little or no point in requiring a previous permission and the States may chance — on realising it — to refrain from imposing such requirement. This is all the more desirable as, though the text may be limited in itself, the chance of an argument in the sphere of public health or safety being used as a pretext for the endeavour to eliminate an undesired air service is not totally excluded, even though that possibility, owing to the element of reasonableness, has been largely rendered inoperative.

As regards the second point, it has already been indicated that the right of sovereignty is *recognised* in article 1 of the Convention while in article 2 the States *undertake* to allow freedom of innocent passage in favour of the contracting Parties. Hence article 1 is declarative whereas article 2 only contains a conventional provision, in other words a privilege in favour of the co-signatories.

This provision then is a considerable retrogression with respect to the statements of the Institut de Droit International of 1906 and 1911: "L'air est libre" and "La circulation aérienne internationale est libre" [1]) which contain a general declaration of freedom of the air and of free use of the air-space respectively.

---

[1]) See p. 10 and p. 11.

Attention is especially drawn to this by Fernand de Visscher [1]) who, arguing that the States have joint interests and that, in the end, an equilibrium is bound to come into being between those joint interests and the special rights and interests of each of them, comes, discussing article 2, to the conclusion that: "Cette forme conventionnelle d'ailleurs répond mal à l'universalité et à l'importance devenue vitale du droit de circulation aérienne. Elle y contredit même par ce que toute convention a d'exclusif à l'égard de non-contractants. A la forme conventionnelle nous opposons celle de la déclaration, reconnaissance pure et simple d'une règle objective de droit international, s'imposant à tous les États sans distinction aucune".

De Visscher has embodied his views in a draft regulation from which we take the two following points:

1. La circulation aérienne internationale est libre. Il appartient aux Etats sous-jacents d'en régler l'usage dans la mesure nécessaire à leur sécurité, à celle des personnes et des biens de leurs habitants et à l'observation de leur législation douanière. Les règles établies à cet égard seront appliquées sans distinction de nationalité.
   La liberté de la circulation aérienne internationale comporte le droit d'atterrissage.
2. Tous aéronefs affectés au transport de personnes et de biens bénéficient du régime de libre circulation internationale. Chaque Etat peut néanmoins soumettre à son consentement préalable l'organisation d'un service public et régulier de communication internationale avec un point quelconque de son territoire.

It is indeed highly recommendable that the right of free traffic should be put in a declarative form, instead of its being considered as a kind of concession of the principle of sovereignty.

This freedom should be recognised by as many States as possible and in this connection we come to the third point

---

[1]) Le droit international de la navigation aérienne en temps de paix (Revue de Droit International et de législation comparée, 1927, N° 3).

viz. the effective sphere of the Convention. This has now been ratified by 22 States; hence a general international regulation does not yet exist.

On the other hand we have seen that the Ibero-American treaty in a general way follows the Convention of 1919, the contents of which having been adopted in nearly all national regulations and bilateral treaties. Finally, for the purpose of promoting the accession of new members, an extraordinary meeting of the C.I.N.A. was convened in June 1929 at which 17 non-parties assisted. In the Protocol drawn up there, which will shortly come into effect, several amendments have been introduced, by which the objections prevailing for those States have been made provision for.

Hence the expectation is justified that within a reasonably short time the number of members will greatly increase.

CONCLUSION.

In the preceding pages the attention has repeatedly been directed towards the inadequate wording of article 15 of the Paris Convention; it was not the intention to criticise the other provisions of this treaty. On the contrary, respect is due to the draftsmen of it, particularly when realising that the Convention has been drawn up in a period when civil aviation was in its infancy. In many respects the special requirements of the new means of communication have been taken into account, and those who immediately after the Great War proved to have an open eye for these requirements cannot be admired sufficiently. This not only refers to the articles of the Convention, but also — and not in the last place — to the provisions of the voluminous annexes. Needless to say that, should the matters which are dealt with in these 8 annexes (such as registration-marks, certificates of airworthiness, pilots' licences, traffic regulations, meteorological service and particularly customs' questions) have been left to the discretion of national legislation, a chaos might have been created and many obstacles might have hindered the development of civil aviation.

Thus the Paris Convention may be considered as the codification of public air law.

Only in one respect — as we have mentioned in the foregoing chapters — the intention of the draftsmen has been inadequately stated, for insufficient guarantees are given with regard to a free air traffic so far as regular international air services are concerned. This is the more to be regretted, as actually this freedom is — even to a far greater extent than is the case with respect to the other means of transport — an indispensable condition for the existence of air traffic.

Against freedom of passage the argument is very frequently put forward that the air traffic business is kept alive by government support and that therefore too heavy financial losses which might arise from an unrestrained competition should be avoided. From the following, however, it may appear that the purpose of government subsidy, as it is generally nowadays, viz. to place air traffic on a purely commercial basis, can be realised only by granting such freedom.

The very character of the subsidy has undergone a change as aerial navigation developed. It cannot be denied that when, immediately the Great War was over, civil aviation was taken in hand, many Governments readily supported the enterprise from purely military considerations and so national motives played the most important part. Things changed gradually : the view that subsidy must not be made subservient to military purposes emanated distinctly from the discussion of the Committee of Experts on Civil Aviation (Subcommission B of the Preparatory Commission for the Disarmament Conference of the League of Nations) ; in the final report the following statements have been inserted :

"The Committee desires to state at the outset that civil aviation must in itself be regarded as one of the most important factors of civilisation, and it is desirable that its free development should not be hampered by any consideration unconnected with the importance which that development possesses from the point of view of scientific, economic and social progress and of the improvement of communications between peoples."

and further on :

"It must further be recognised that hitherto the development of civil aviation in some countries has been closely bound up, as regards both technique and organisation, with the requirements and development of military aviation. It would therefore be desirable that every effort should be directed towards differentiating more and more clearly between civil and military aviation ; in this way, civil machines will become capable of a maximum economic return and will become less and less useful for military purposes and the activities of civil aviation can be developed in full freedom without being

subordinated in any way to the military requirements of the different countries.

The committee therefore submits the following suggestions as being calculated to afford practical means of attaining the above mentioned results:

1. It is desirable, that the development of civil aviation should be directed solely towards economic ends, and should remain outside the sphere of military interests;

(2 — 6 . . . . . .)

7. The committee desires to point out the undesirable effects which may result from the direct or indirect encouragement by Governments of civil air transport lines for military rather than for economic or social purposes".

Although these recommendations are generally acceptable, the same cannot be said with respect to the proposals submitted to the Disarmament Conference by the French Government in February 1932 in so far as they refer to civil aviation. Considering that the aircraft which run the great international connections might be converted into bomb-carriers in times of war, the French Government proposed to internationalise civil aviation under a regime to be organised by the League of Nations.

This internationalisation was to include:

a) The undertaking by the contracting parties not to permit their nationals to construct (with the exception of orders placed in accordance with the conditions fixed in paragraphs b, c and d hereafter) or to employ machines capable of military use. The maximum unladen tonnage of authorised aircraft will be to this end and in accordance with the advice of their experts, limited by the contracting parties to a tonnage to be fixed later on.

b) The creation of an international civil air transport service entrusted to continental, inter-continental or inter-colonial organisations, to operate air transport under the auspices of the League of Nations, which alone will have the right to build and to use machines of greater tonnage than indicated in the preceding paragraph.

c) The right to create lines between the home country and colonial territories representing particular interest for one or more of the contracting parties, provided always that they undertake to bear the costs if requested to do so by the League of Nations, and that they submit to the League for its approval the number, the type and the unladen tonnage of the machines to be used.

d) The fair distribution, according to their capacity, between the aviation industries of the different countries, of orders for material for international civil aviation, in accordance with conditions to be fixed in an annexed convention.

e) The exclusive, permanent and inalienable right for the League of Nations to requisition all machines for the international civil air service.

Thus a proposal purposing a new organisation of civil aviation is submitted which is based on considerations connected with the — in itself desirable — limitation of armaments and not in the first place on the desire to develop commercial air navigation as much as possible. This is in flat contradiction to the statement also formulated in 1927 by the above mentioned Committee of Experts that "in any limitation of air-armaments it is essential to avoid hampering the development of civil aviation"; further the declaration adopted on September 26th 1927 by the Assembly of the League of Nations "that it is desirable that the development of civil aviation shall be directed solely to economical purposes, outside the sphere of military interests", is not taken into account.

Without going into the French proposal in detail attention has to be paid to some of the disadvantages which it might entail for civil aviation. In the first place there is a danger that commercial interests have to give way for considerations of a political character, in particular with regard to the establishment of the international airnet; this is the more undesirable as each country can best judge for itself which air traffic is most appropriate for local interests. Further the energy and spirit of enterprise of the constructors and the development of technique will be checked by the League of Nations distributing all orders for aircraft and the material to be used on the lines to the colonies being submitted to the

previous control of the League. But also the enterprise of the exploitants and hence a rapid and prosperous development of air traffic will be disadvantageously affected by this proposal, the right and the possibility of extending the airnet on all sides being cut off. In this way the exploitation will be frozen and the possibility of testing new methods will be eliminated or at least greatly lessened.

In consequence of all these factors commercialisation sinks into the background whereas precisely in the general interest as well as in that of aerial navigation every effort should be made to place air lines on a paying basis.

It is not impossible that one day such an internationalisation shall be achieved; but — apart from the present political situation which would make it undesirable if not impossible — air traffic is only in an early stage of its development at present and what it will come to cannot be forecast with any certainty. Moreover internationalisation should not be imposed from above — and certainly not in connection with any scheme of disarmament — but should be the result of a natural development and a mutual collaboration, on a commercial basis, of the exploitants themselves who are the most competent authorities in this matter [1]).

Moreover other measures than those inserted in the French proposal, favouring a limitation of air armament may be taken with regard to civil aviation. In the first place there are the recommendations of the above mentioned Committee

---

[1]) On this subject the "Comité de Coopération entre Aéronautiques Civiles" of the League of Nations adopted in July 1930 the following declaration: "Considérant que le système actuel de la coopération des entreprises aériennes internationales par le moyen de "pools" a pris un développement satisfaisant, le Comité:

estime que l'état actuel de la législation et des conditions économiques et politiques dans lesquelles se développe l'aéronautique civile rend difficilement réalisable une forme plus évoluée de la collaboration;

recommande aux Gouvernements et aux Compagnies d'approfondir et de perfectionner le système actuel par des accords bilatéraux ou plurilatéraux, afin d'éviter des concurrences superflues, d'augmenter le rendement économique du service aérien international et de développer entre les diverses entreprises cet esprit d'entente qui prépare le terrain pour une collaboration plus intime et plus confiante".

of Experts on Civil Aviation [1]) ; further the following measures might be considered : the prohibition of constructing and using aircraft which technically and constructively are suitable for military purposes ; the prohibition of subsidising aviation industries ; the requirement that the number of personnel and the quantity of aircraft is based on a purely economical basis and is not influenced by considerations of a military nature, etc. ; in short such measures as are apt to prevent the States from creating a military reserve out of civil aviation. The observance of the foregoing should be put under the control of an international organisation, for instance under the direction of the League of Nations. Finally the provision sub e of the French proposal might be adopted in a restrictive way, viz., that in abnormal circumstances the League of Nations is entitled in some cases to requisition the aircraft used on the international lines.

Returning to the statements made in 1927 at Brussels it may be said that at the moment most countries have complied with same, the purpose of government subsidy being directed principally towards placing air traffic on a purely commercial basis in order to create a new source of prosperity whilst for the greater part any military considerations are set aside. And "civil aviation is not only a new source of prosperity for the countries of great resources, but a necessity for all countries that have either scanty resources or great, though undeveloped ones. Civil aviation has tremendous opportunities in those countries of inadequate competitive business. For example probably the first commercial air transport company to operate without a financial loss was the company operating on the Magdalena river in Columbia, where the only competing

---

[1]) These contain — besides those already mentioned — *inter alia* that State organs intervening in civil aviation undertakings should be quite separate from the organs dealing with military aviation ; — that, as regards personnel and, in particular, pilots, it would be desirable that civil aviation undertakings of all kinds should not require such personnel to have received a military training or give preference to those who have received such training ; — that civil aviation should be organised on autonomous lines, and every effort should be made to keep it separate from military aviation.

means of transport is a steamship service taking ten days to cover the route against eight hours by seaplane. Great cities of the past were built around splendid harbours. Airports in a measure will minimise the disadvantages that cities have suffered in the past because of the lack of great harbours." [1])

If, however, air traffic shall come up to these ends, then indeed an international development should be promoted and for this a reasonable freedom of movement is essential. In the realisation of their plans the Governments themselves meet with difficulties arising from the absence of this factor.

Let us now consider — in the light of the foregoing — the opinion, repeatedly put forward on different sides, that such a freedom of movement may lead to overproduction and unsound and unchecked competition (to the detriment of the public treasury), and may thus cause complete anarchy.

It must be admitted here that the circumstances prevailing at present, now that on all sides trade-barriers have been (and will continue to be) erected, hold out little hope for a successful pleading for freedom of passage. But for the very reason why the development of aerial navigation makes rather rapid progress, here, in my opinion, a broader point of view should be taken, and a greater space of time should be surveyed.

By doing so it cannot be denied that since the Great War a tendency has become more and more discernible towards international collaboration, not only with regard to the Governments (for instance, League of Nations, Permanent Court of International Justice, Bank of International Settlements), but also amongst private enterprises (collaboration in the form of pools, etc.) ; by an efficient division of work an economical production is striven after. It is rather remarkable that aerial navigation has experienced, at the very outset, the need and the necessity of such a collaboration, for even before there was any comparatively developed civil aviation, the different companies founded the "International Air Traffic Association".

---

[1]) Declaration of Mr. H. F. Guggenheim (U.S.A.) before the meeting of the Committee of Experts on Civil Aviation (see above).

What may be expected when freedom of passage is generally accorded to international air navigation ?

In the beginning this will by no means benefit an economical exploitation ; immediately a keen competition on the different airlines will raise its head. Some enterprises which are now kept alive by their Governments with the utmost care, may disappear ; and more especially the minor companies will be driven from their air nets, insignificant though they may be. For government support has its limits, and cannot be relied upon infinitely.

The question, however, which State is capable and willing to give the greatest support to air navigation is not all dominant, for the enterprises with a large airnet — and these need not be established at any rate in the larger countries — harbour a much greater vitality and are for this reason not under the necessity to fall back on the public treasury at once. In this connection there is another circumstance. In Europe up to now comparatively little capital has been invested in the air-navigation-business (the Dutch company founded by the private enterprise of certain bankers and shipping companies being an exception ; here government support was only granted later). This investment is affected disadvantageously not only by the fact that air transport does not yet pay, but also by the uncertainty now prevailing with regard to the freedom of passage which to a great extent causes a state of instability ; one single country is — by withdrawing its authorisation — in a position to stop the exploitation of a great transit connection. Once the desired freedom guaranteed, this unstable situation will come to an end and capital will be invested with more confidence.

Finally the big concerns which both technically and in their organisation are able to do so will fully develop under the regime of freedom. For civil aviation cannot disappear completely by mutual competition and lack of money ; during the few years of its existence it has acquired too important a place in the world organisation. Even if all the States, compelled by necessity, should stop their subsidies, even then all air traffic would not be put an end to at once, although a temporary collapse would be sure to follow.

The contest expected when freedom of passage on the great international lines is accorded, will cause a survival of the fittest. But those which survive, will prove their capability of founding a commercially sound business; the possibility of their extending their routes in all directions and the progress of technique will prove to be extremely helpful to lessen gradually the need of any government subsidy, till in the end the companies will actually be self-supporting. Then a strong and independent air traffic will be born quite capable of holding its own. The requisite private capital will come forward in the country itself and the path towards rationalisation can be safely pursued; air traffic will be a more attractive investment when it no longer requires any subsidy, for it can, to some considerable extent, then be exempted from government control and will in this stage be subject to political influences in a far lesser degree. At the same time interference in the internal management of the companies should be relinquished on the part of the authorities; this interference, however, — which in some countries goes rather far and which is necessarily subsequent on the system of subsidising — will not disappear entirely on the abolition of this system that has kept aerial navigation going for years together. However, its influence will gradually weaken; to this a steadily growing participation of private share-holders with increasing power in the company concerned will materially contribute.

In this way the exploitation of aii traffic will grow up on its own account, and it is the very international character of this form of transport which will further such development. Then by mutual collaboration — not imposed from above, but accomplished by the participating companies themselves — and with the aid of the international money-market an equilibrium together with a rational and economical world-airnet will be achieved.

ANNEX

CONVENTION

RELATING TO THE REGULATION OF AERIAL NAVIGATION DATED 13TH OCTOBER 1919

(N.B. : The articles modified by the Protocol of June 15th 1929—arts. 3, 5, 7, 15, 34, 37, 41 and 42—are placed to the right of the corresponding articles now in force.)

CHAPTER I

GENERAL PRINCIPLES

Article 1

The High contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.

Article 2

Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

Article 3

Each contracting State is entitled for military reasons or in the interest of public safety to prohibit the aircraft of the other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other

Each contracting State is entitled for military reasons or in the interest of public safety to prohibit the aircraft of the other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other

contracting States, from flying over certain areas of its territory.

In that case the locality and the extent of the prohibited areas shall be published and notified beforehand to the other contracting States.

contracting States, from flying over certain areas of its territory.

Each contracting State may, as an exceptional measure and in the interest of public safety, authorise flight over the said areas by its national aircraft.

The *position* and extent of the prohibited areas shall be *previously* published and *shall be* notified, *as well as the exceptional authorisations issued under the last preceding paragraph,* to *all* the other contracting States *as well as to the International Commission for Air Navigation.*

Each contracting State reserves also the right in exceptional circumstances in time of peace and with immediate effect temporarily to restrict or prohibit flight over its territory or over part of its territory on condition that such restriction or prohibition shall be applicable without distinction of nationality to the aircraft of all the other States.

Such decision shall be published, notified to all the contracting States and communicated to the International Commission for Air Navigation.

Article 4

Every aircraft which finds itself above a prohibited area shall, as soon as aware of the fact, give the signal of distress provided in Paragraph 17 of Annex D and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State unlawfully flown over.

CHAPTER II

NATIONALITY OF AIRCRAFT

Article 5

No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State unless it has concluded a special convention

(*To be inserted as the last article of Chapter I*)

Each contracting State *is entitled to conclude special conventions* with *non-contracting States.*

The stipulations of such special

with the State in which the aircraft is registered. The stipulations of such special convention must not infringe the rights of the contracting Parties to the present Convention and must conform to the rules laid down by the said Convention and its Annexes. Such special convention shall be communicated to the International Commission for Air Navigation which will bring it to the knowledge of the other contracting States.

conventions shall not infringe the rights of the contracting Parties to the present Convention.

Such special conventions in so far as may be consistent with their objects shall not be contradictory to the general principles of the *present* Convention.

They shall be communicated to the International Commission for Air Navigation which will *notify them to* the other contracting States.

Article 6

Aircraft possess the nationality of the State on the register of which they are entered, in accordance with the provisions of Section I (*c*) of Annex A.

Article 7

No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.

No incorporated company can be registered as the owner of an aircraft unless it possess the nationality of the State in which the aircraft is registered, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfils all other conditions which may be prescribed by the laws of the said State.

The registration of aircraft *referred to in the last preceding Article shall be made in accordance with the laws, and special provisions of each contracting State.*

Article 8

An aircraft cannot be validly registered in more than one State.

Article 9

The contracting States shall exchange every month among themselves and transmit to the International Commission for Air Navigation referred to in article 34 copies of registrations and of cancellations of registrations which shall have been entered on their official registers during the preceding month.

Article 10

All aircraft engaged in international navigation shall bear their nationality and registration marks as well as the name and residence of the owner in accordance with Annex A.

CHAPTER III

CERTIFICATES OF AIRWORTHINESS AND COMPETENCY

Article 11

Every aircraft engaged in international navigation shall, in accordance with the conditions laid down in Annex B, be provided with a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses.

Article 12

The commanding officer, pilots, engineers and other members of the operating crew of every aircraft shall, in accordance with the conditions laid down in Annex E, be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses.

Article 13

Certificates of airworthiness and of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses, in accordance with the regulations established by Annex B and Annex E and hereafter by the International Commission for Air Navigation, shall be recognised as valid by the other States.

Each State has the right to refuse to recognise for the purpose of flights within the limits of and above its own territory certificates of competency and licences granted to one of its nationals by another contracting State.

Article 14

No wireless apparatus shall be carried without a special licence issued by the State whose nationality the aircraft possesses. Such apparatus shall not be used except by members of the crew provided with a special licence for the purpose.

Every aircraft used in public transport and capable of carrying ten or more persons shall be equipped with sending and receiving wireless apparatus when the methods of employing such apparatus shall have been determined by the International Commission for Air Navigation.

This Commission may later extend the obligation of carrying wireless apparatus to all other classes of aircraft in the conditions and according to the methods which it may determine.

CHAPTER IV

ADMISSION TO AIR NAVIGATION ABOVE FOREIGN TERRITORY

Article 15

Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.

The establishment of international airways shall be subject to the consent of the States flown over.

Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

No aircraft of a contracting State capable of being flown without a pilot shall, except by special authorisation, fly without a pilot over the territory of another contracting State.

Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.

Every contracting State may make conditional on its prior authorisation the establishment of international airways *and the creation and operation of regular international air navigation lines, with or without landing, on its territory.*

Article 16

Each contracting State shall have the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory.

Such reservations and restrictions shall be immediately published, and shall be communicated to the International Commission for Air Navigation, which shall notify them to the other contracting States.

Article 17

The aircraft of a contracting State which establishes reservations and restrictions in accordance with Article 16, may be subjected to the same

reservations and restrictions in any other contracting State, even though the latter State does not itself impose the reservations and restrictions on other foreign aircraft.

Article 18

Every aircraft passing through the territory of a contracting State, including landing and stoppages reasonably necessary for the purpose of such transit, shall be exempt from any seizure on the ground of infringement of patent, design or model, subject to the deposit of security the amount of which in default of amicable agreement shall be fixed with the least possible delay by the competent authority of the place of seizure.

CHAPTER V

RULES TO BE OBSERVED ON DEPARTURE WHEN UNDER WAY AND ON LANDING

Article 19

Every aircraft engaged in international navigation shall be provided with :

(a.) A certificate of registration in accordance with Annex A ;
(b.) A certificate of airworthiness in accordance with Annex B ;
(c.) Certificates and licences of the commanding officer, pilots and crew in accordance with Annex E ;
(d.) If it carries passengers, a list of their names ;
(e.) If it carries freight, bills of lading and manifest ;
(f.) Log books in accordance with Annex C ;
(g.) If equipped with wireless, the special licence prescribed by Article 14.

Article 20

The log books shall be kept for two years after the last entry.

Article 21

Upon the departure or landing of an aircraft, the authorities of the country shall have, in all cases, the right to visit the aircraft and to verify all the documents with which it must be provided.

Article 22

Aircraft of the contracting States shall be entitled to the same measures of assistance for landing, particularly in case of distress, as national aircraft.

Article 23

With regard to the salvage of aircraft wrecked at sea the principles of maritime law will apply, in the absence of any agreement to the contrary.

Article 24

Every aerodrome in a contracting State, which upon payment of charges is open to public use by its national aircraft, shall likewise be open to the aircraft of all the other contracting States.

In every such aerodrome there shall be a single tariff of charges for landing and length of stay applicable alike to national and foreign aircraft.

Article 25

Each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of its territory and that every aircraft wherever it may be, carrying its nationality mark, shall comply with the regulations contained in Annex D.

Each of the contracting States undertakes to ensure the prosecution and punishment of all persons contravening these regulations.

CHAPTER VI

PROHIBITED TRANSPORT

Article 26

The carriage by aircraft of explosives and of arms and munitions of war is forbidden in international navigation. No foreign aircraft shall be permitted to carry such articles between any two points in the same contracting State.

Article 27

Each State may, in aerial navigation, prohibit or regulate the carriage or use of photographic apparatus. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to the other contracting States.

Article 28

As a measure of public safety, the carriage of objects other than those mentioned in articles 26 and 27 may be subjected to restrictions by any contracting State. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to the other contracting States.

Article 29

All restrictions mentioned in Article 28 shall be applied equally to national and foreign aircraft.

CHAPTER VII

STATE AIRCRAFT

Article 30

The following shall be deemed to be State aircraft :—

(a.) Military aircraft.

(b.) Aircraft exclusively employed in State service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.

All State aircraft other than military, customs and police aircraft shall be

treated as private aircraft and as such shall be subject to all the provisions of the present Convention.

Article 31

Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.

Article 32

No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorisation. In case of such authorisation the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph.

Article 33

Special arrangements between the States concerned will determine in what cases police and customs aircraft may be authorised to cross the frontier. They shall in no case be entitled to the privileges referred to in Article 32.

CHAPTER VIII

INTERNATIONAL COMMISSION FOR AIR NAVIGATION

Article 34

There shall be instituted, under the name of the International Commission for Air Navigation, a permanent Commission placed under the direction of the League of Nations and composed of:

Two Representatives of each of the following States: The United States of America, France, Italy and Japan;

One Representative of Great Britain and one of each of the British Dominions and of India;

One Representative of each of the other contracting States.

Each State represented on the Commission (Great Britain, the British Dominions and India counting for this purpose as one State) shall have one vote [1]).

There shall be instituted, under the name of the International Commission for Air Navigation, a permanent Commission placed under the direction of the League of Nations.

Each contracting State may have not more than two representatives on the Commission.

Each State represented on the Commission (Great Britain, the British Dominions and India counting for this purpose as one State) shall have one vote [1]).

The International Commission for Air Navigation shall determine the rules of its own procedure and the place of its permanent seat, but it shall be free to meet in such places as it may deem convenient.

[1]) The text of the third paragraph as modified bij the Protocol of December 11th 1929 reads: "Each State represented on the Commission shall have one vote". (See also Art. 40)

The International Commission for Air Navigation shall determine the rules of its own procedure and the place of its permanent seat, but it shall be free to meet in such places as it may deem convenient. Its first meeting shall take place at Paris. This meeting shall be convened by the French Government, as soon as a majority of the signatory States shall have notified to it their ratification of the present Convention.

The duties of this Commission shall be :

(a.) To receive proposals from or to make proposals to any of the contracting States for the modification or amendment of the provisions of the present Convention, and to notify changes adopted ;

(b.) To carry out the duties imposed upon it by the present Article and by Articles 9, 13, 14, 15, 16, 27, 28, 36 and 37 of the present Convention ;

(c.) To amend the provisions of the Annexes A-G ;

(d.) To collect and communicate to the contracting States information of every kind concerning international air navigation ;

(e.) To collect and communicate to the contracting States all information relating to wireless telegraphy, meteorology and medical science which may be of interest to air navigation ;

(f.) To ensure the publication of maps for air navigation in accordance with the provisions of Annex F ;

(g.) To give its opinion on questions which the States may submit for examination.

Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three fourths of the total possible votes which could be cast if all the States were represented. Such modification shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States.

Any proposed modification of the Articles of the present Convention shall be examined by the International Commission for Air

The duties of this Commission shall be :

(a.) To receive proposals from or to make proposals to any of the contracting States for the modification or amendment of the provisions of the present Convention, and to notify changes adopted ;

(b.) To carry out the duties imposed upon it by the present Article and by Articles 9, 13, 14, 15, 16, 27, 28, 36 and 37 of the present Convention ;

(c.) To amend the provisions of the Annexes A-G ;

(d.) To collect and communicate to the contracting States information of every kind concerning international air navigation ;

(e.) To collect and communicate to the contracting States all information relating to wireless telegraphy, meteorology and medical science which may be of interest to air navigation ;

(f.) To ensure the publication of maps for air navigation in accordance with the provisions of Annex F ;

(g.) To give its opinion on questions which the States may submit for examination.

Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three fourths *of the total votes of the States represented at the Session and two thirds* of the total possible votes which could be cast if all the States were represented. Such modification shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States.

Any proposed modification of the Articles of the present Convention shall be examined by the International Commission for Air

sented : this majority must, moreover, include at least three of the five following States : the United States of America, the British Empire, France, Italy, Japan. Such modification shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States.

Any proposed modification of the Articles of the present Convention shall be examined by the International Commission for Air Navigation, whether it originates with one of the contracting States or with the Commission itself. No such modification shall be proposed for adoption by the contracting States, unless it shall have been approved by at least two-thirds of the total possible votes.

All such modifications of the Articles of the Convention (but not of the provisions of the Annexes) must be formally adopted by the contracting States before they become effective.

The expenses of organisation and operation of the International Commission for Air Navigation shall be borne by the contracting States ; the total shall be allocated in the proportion of two shares each for the United States of America, the British Empire, France, Italy and Japan and one share each for all the other States.

The expenses occasioned by the sending of technical delegations will be borne by their respective States.

Navigation, whether it originates with one of the contracting States or with the Commission itself. No such modification shall be proposed for adoption by the contracting States, unless it shall have been approved by at least two-thirds of the total possible votes.

All such modifications of the Articles of the Convention (but not of the provisions of the Annexes) must be formally adopted by the contracting States before they become effective.

The expenses of the International Commission for Air Navigation shall be borne by the contracting States in *the* proportion *fixed by the said Commission.*

The expenses occasioned by the sending of technical delegations will be borne by their respective States.

CHAPTER IX

FINAL PROVISIONS

Article 35

The High contracting Parties undertake as far as they are respectively concerned to co-operate as far as possible in international measures concerning :

(a.) The collection and dissemination of statistical, current, and special

meteorological information, in accordance with the provisions of Annex G ;

(b.) The publication of standard aeronautical maps, and the establishment of a uniform system of ground marks for flying, in accordance with the provisions of Annex F ;

(c.) The use of wireless telegraphy in air navigation, the establishment of the necessary wireless stations, and the observance of international wireless regulations.

Article 36

General provisions relative to customs in connection with international air navigation are the subject of a special agreement contained in Annex H to the present Convention.

Nothing in the present Convention shall be construed as preventing the contracting States from concluding, in conformity with its principles, special protocols as between State and State in respect of customs, police, posts and other matters of common interest in connection with air navigation. Any such protocols shall be at once notified to the International Commission for Air Navigation which shall communicate this information to the other contracting States.

Article 37

In the case of a disagreement between two or more States relating to the interpretation of the present Convention, the question in dispute shall be determined by the Permanent Court of International Justice to be established by the League of Nations, and until its establishment by arbitration.

If the parties do not agree on the choice of the arbitrators, they shall proceed as follows :

Each of the parties shall name an arbitrator, and the arbitrators shall meet to name an umpire. If the arbitrators cannot agree, the parties shall each name a third State, and the third States so named shall proceed to designate the umpire, by agreement or by each proposing a name and then determining the choice by lot.

Disagreement relating to the technical regulations annexed to the present Convention, shall be settled by the decision of the International Commission for Air Navigation by a majority of votes.

In case the difference involves

(First paragraph)

In the case of a disagreement between two or more States relating to the interpretation of the present Convention, the question in dispute shall be determined by the Permanent Court of International Justice. *Provided that, if one of the States concerned has not accepted the Protocols relating to the Court, the question in dispute shall, on the demand of such State, be settled* by arbitration.

the question whether the interpretation of the Convention or that of a regulation is concerned, final decision shall be made by arbitration as provided in the first paragraph of this Article.

Article 38

In case of war, the provisions of the present Convention shall not affect the freedom of action of the contracting States either as belligerents or as neutrals.

Article 39

The provisions of the present Convention are completed by the Annexes A to H which, subject to Article 34, shall have the same effect and shall come into force at the same time as the Convention itself.

Article 40

The British Dominions and India shall be deemed to be States for the purposes of the present Convention [1]).

The territories and nationals of Protectorates or of territories administered in the name of the League of Nations, shall, for the purposes of the present Convention, be assimilated to the territory and nationals of the Protecting or Mandatory States.

Article 41

States which have not taken part in the war of 1914-1919 shall be permitted to adhere to the present Convention.

This adhesion shall be notified through the diplomatic channel to the Government of the French Republic, and by it to all the signatory or adhering States.

Any State shall be permitted to adhere to the present Convention.

This adhesion shall be notified through the diplomatic channel to the Government of the French Republic, and by it to all the signatory or adhering States.

Article 42

A State which took part in the war of 1914-1919 but which is not a signatory of the present Convention, may adhere only if it is a member of the League of Nations or, until January 1, 1923, if its adhesion is approved by the Allied and Associated Powers signatories of the Treaty of Peace concluded with the said State. After January

(*Deleted*)

[1]) Deleted bij the Protocol of December 11th 1929.

1, 1923, this adhesion may be admitted if it is agreed to by at least three-fourths of the signatory and adhering States voting under the conditions provided by Article 34 of the present Convention.

Applications for adhesions shall be addressed to the Government of the French Republic, which will communicate them to the other contracting Powers. Unless the State applying is admitted *ipso facto* as a Member of the League of Nations, the French Government will receive the votes of the said Powers and will announce to them the result of the voting.

Article 43

The present Convention may not be denounced before January 1, 1922. In case of denunciation, notification thereof shall be made to the Government of the French Republic, which shall communicate it to the other contracting Parties. Such denunciation shall not take effect until at least one year after the giving of notice, and shall take effect only with respect to the Power which has given notice.

THE PRESENT CONVENTION shall be ratified.

Each Power will address its ratification to the French Government, which will inform the other signatory Powers.

The ratifications will remain deposited in the archives of the French Government.

The present Convention will come into force for each signatory Power, in respect of other Powers which have already ratified, forty days from the date of the deposit of its ratification.

On the coming into force of the present Convention, the French Government will transmit a certified copy to the Powers which under the Treaties of Peace have undertaken to enforce rules of aerial navigation in conformity with those contained in it.

DONE at Paris, the thirteenth day of October nineteen hundred and nineteen in a single copy which shall remain deposited in the archives of the French Government, and of which duly authorised copies shall be sent to the contracting States.

The said copy, dated as above, may be signed until the twelfth day of April nineteen hundred and twenty inclusively.

In FAITH WHEREOF the hereinafternamed Plenipotentiaries whose powers have been found in good and due form have signed the present Convention in the French, English and Italian languages, which are equally authentic.

BIBLIOGRAPHY

This list only contains works consulted with regard to the present volume ; for a complete bibliography on air law see : André Henry-Couannier, « Eléments Créateurs du Droit Aérien », pp. 299—338.

ACREMENT, Dr. ALBERT, La procédure dans les arbitrages internationaux (1905).

BRÉGI, CHRISTIAN, The freedom of the air. (World Trade no. 11 ; 1931.)

DOERING, Dr. HERMANN, Das internationale Recht der Privatluftfahrt. (Radetzki, Berlin 1927.)

FACHIRI, A. P., Permanent Court of International Justice (1925).

FAUCHILLE, PAUL, Le domaine aérien et le régime juridique des aérostats. (Revue Gén. de Droit International Public, part. VIII ; 1901.)

——, La circulation aérienne et les droits des États en temps de paix. (Pédone, Paris ; 1911.)

FRASER, HENRY S., La mer territoriale. (Revue de Droit International, tome III ; 1929.)

GIANNINI, AMEDEO, La Souveraineté des États sur l'espace aérien. (Droit Aérien no. 1, 1931.)

GRÜNWALD, Das Luftschiff in völkerrechtlicher und strafrechtlicher Beziehung. (Hellwing, Hannover ; 1908.)

VAN HAMEL, Prof. Mr. J. A., Vrijheid van luchtvaart en vaste internationale vliegdiensten. (Mededeelingen Nederlandsche Vereeniging voor Internationaal Recht, no. 18 ; 1931.)

HAZELTINE, HAROLD D., The law of the air. (University of London Press ; 1911.)

HENRY-COUANNIER, ANDRÉ, Les excès de la réglementation aérienne anglaise. (Revue Juridique de la Locomotion Aérienne IV ; 1913.)

——, L'aviation sur les eaux territoriales. (Revue Juridique de la Locomotion Aérienne IV ; 1913.)

——, Eléments Créateurs du Droit Aérien. (Per Orbem, Paris ; 1929.)

——, Examen de principe de la Convention Internationale portant réglementation de la Navigation Aérienne. (Edition Aérienne, Paris.)

d'HOOGHE, EDUARD, Droit Aérien. (Dupont, Paris.)

HOSTIE, JEAN, Le Domaine Maritime. (Revue de droit international et de législation comparée, tome 8, no. 3 ; 1927.)

DE LAPRADELLE, A., Le droit de l'État sur la mer territoriale (1898).
——, La loi internationale de l'air. (L'Europe nouvelle, no. 442 ; 1926.)
VON LISZT, FRANZ, Völkerrecht (1925).
LODER, Dr. B. C. J., La différence entre l'arbitrage international et la justice internationale (1923).
LYCKLAMA À NYEHOLT, Dr. J., De Luchtvaart in het Volkenrecht. (Dorsman, Noordwijk ; 1910.)
DE MAGYARY, GÉRA, La Juridiction de la Cour permanente de Justice Internationale (1931).
MARTIN, HEIN, Die Stellung des Hafens und Küstenmeers im Völkerrecht. (Steinebach, München ; 1918.)
MEILI, Dr. F., Das Luftschiff im internen und Völkerrecht. (Füssli, Zürich ; 1908.)
MEURER, Dr. CHRISTIAN, Luftschiffahrtsrecht. (Schweitzer, Berlin ; 1909.)
MEYER, ALEX, Le Code de l'Air. (Revue Jur. Int. de la Locomotion Aérienne I ; 1910.)
MITROVITCH, Dr. A., L'aviation au point de vue économique et juridique. (Drag Gregoritch, Belgrade.)
MORRISON BISHOP, CRAWFORD, International Arbitral Procedure. (King Bros., Baltimore ; 1930.)
OPPIKOFER, Dr. HANS, L'aéronautique commerciale internationale et l'administration nationale. (Série de publications de la Société des Nations, II, Communications et Transit 1930, VIII, 6.)
PITTARD, EDMOND, Dominium Cœli. (Zeitschrift für das gesamte Luftrecht, Band 1 ; 1926.)
POLITIS, N., Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux. (Académie de Droit International I, vol. 6 ; 1925.)
ROPER, ALBERT, L'origine de la Convention Aérienne du 13 octobre 1919, son extension progressive de 1922 à 1928 et le problème de sa révision. (Revue de droit international et de législation comparée, tome III ; 1929.)
——, La Convention Internationale du 13 octobre 1929 ; son origine — son application — son avenir. (Sirey, Paris ; 1930.)
SANDEMAN, Sir JOHN ALLEN, General Report presented on behalf of the Coordination Committee of the Transport and Communications Group. (Int. Chamber of Commerce, no. 15 ; 1931.)
SPAIGHT, J. M., Aircraft in Peace and the Law. (MacMillan, London ; 1919.)
SPERL, Prof. Dr. HANS, Die Luftfahrt vom Standpunkte der Rechtswissenschaft. (Hoernes, Buch des Fluges, Band III.)
SPIROPULOS, J., Der Luftraum integrierender Teil des Staatsgebietes. (Rossberg, Leipzig ; 1921.)

TACHI, S., La souveraineté et le droit territorial. (Revue gén. de droit international public, no. 4, tome V ; 1931.)
DE VISSCHER, FERNAND, Le droit international des communications (1923).
——, Le droit international et la navigation aérienne en temps de paix. (Revue de droit international et de législation comparée, tome 8, no. 3 ; 1927.)
——, Le régime juridique de l'espace atmosphérique et la question de la nationalité des aéronefs. (Zeitschrift für das gesamte Luftrecht, Band 2, Heft 1 ; 1928.)
VOLKMANN, Dr. KURT, Internationales Luftrecht. (Dümmler, Berlin ; 1930.)
WEGERDT, Dr. ALFRED, L'Allemagne et la Convention de Navigation Aérienne de Paris du 13 octobre 1919. (Zeitschrift für das gesamte Luftrecht, Band 2, Heft 1 ; 1928.)
WEILER, JOSEPH, Das Gastrecht der Schiffe in den Häfen zur Friedenszeit. (Staudenraus, Würzburg ; 1926.)

STELLINGEN

I

De drijvende eilanden, welke in den Atlantischen Oceaan en elders zullen worden verankerd, dienen een onder internationale contrôle gesteld gebied te vormen.

II

Als scheepstoebehooren, bedoeld in het derde lid van art. 309 W.v.K., moet ook het aan boord van het schip opgestelde catapultvliegtuig worden beschouwd.

III

Bij het treffen van regelen inzake misdrijven en overtredingen, gepleegd aan boord van luchtvaartuigen boven vreemd grondgebied, dient op den voorgrond te staan, dat in het algemeen de wetten van het land, welks nationaliteit het luchtvaartuig bezit, toepassing vinden.

IV

Het is gewenscht in het desbetreffend ontwerp-verdrag de aansprakelijkheid voor schade, toegebracht door luchtvaartuigen aan personen en goederen, welke zich op een openbaar luchtvaartterrein bevinden, te beperken in dien zin, dat de exploitant van het luchtvaartuig bevrijd is, wanneer hij aantoont, dat hij en zijn ondergeschikten alle maatregelen, welke ter vermijding van de schade redelijkerwijze verwacht konden worden, genomen hebben, of dat het hun onmogelijk was deze te nemen.

V

In tegenstelling met de bepaling van artikel 32, tweede lid van het Luchtvaartverdrag van Parijs dient ook een militair luchtvaartuig, hetwelk door overmacht gedwongen is zonder voorafgaande vergunning op vreemd grondgebied te landen, in beginsel de voorrechten, welke gewoonlijk aan vreemde oorlogsschepen worden toegekend, te genieten.

VI

Het ware gewenscht een internationale regeling inzake beslag op in geregelden dienst gebezigde luchtvaartuigen te treffen, welke eenerzijds het leggen van beslag uitsluit en anderzijds voldoende, door bemiddeling van de betrokken Regeeringen te verschaffen waarborgen inhoudt.

VII

Bij onroerend goed is legaat niet als een wijze van eigendomsverkrijging doch als titel van levering te beschouwen.

VIII

Bij verkoop van een verzekerd goed gaat de verplichting tot premiebetaling op den kooper over, tenzij deze weigert de verzekering over te nemen.

IX

Een enkel nummer, ingeslagen in een onderdeel van een motor, kan zijn een geschrift in den zin van art. 225 W.v.S. (Anders H.R. 15 Juni 1931, W. 12351. 1.)

X

Het gemeentebestuur treedt in zijn functie van zelfbestuur op als orgaan van het Rijk of de provincie, niet als orgaan van de gemeente.