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## **The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session**

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THE LAW OF THE AIR AND THE DRAFT ARTICLES CONCERNING THE LAW OF THE SEA ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS EIGHTH SESSION

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Introduction

1. The articles concerning the law of the sea which the International Law Commission (hereinafter called "the Commission") adopted at its eighth session contain many references both explicit and implicit, to the international law of the air currently in force. In addition, the effect of some of the articles is to extend to aircraft and to air navigation certain notions hitherto applied only to ships and to sea navigation.

2. In its commentaries, the Commission points out that it did not "study the conditions under which sovereignty over the airspace [above the territorial sea] . . . is exercised", and that it also "refrained from formulating rules on air navigation" over the high seas, because "the task it set itself in the present phase of its work is confined to the codification and development of the law of the sea".

\* This paper was prepared at the request of the Secretariat of the United Nations but should not be considered as a statement of the views of the Secretariat.

3. In order to enable the Conference which is to consider the draft articles adopted by the Commission (hereinafter called "the draft") to appreciate the relationship between these articles and the law of the air, it may be useful to make a comparative study of the relevant provisions of air law contained in international conventions now in force, in the national legislation of certain countries, in the rules prepared by international organizations or by specialized agencies of the United Nations in pursuance of their powers under international conventions and, finally, in certain rules and practices established by custom.

4. This study will be divided into two parts, corresponding to the two parts of the draft, since there exists between the airspace above the territorial sea and the airspace above the high seas the same essential difference—as noted by the Commission in its commentary to article 1—as between the régime of the territorial sea and that of the high sea.

PART I

The Airspace above the Territorial Sea

I. THE JURIDICAL STATUS OF THE AIRSPACE ABOVE THE TERRITORIAL SEA

5. The principles set forth in articles 1 and 2 of the draft are—as stated by the International Law Commission in its commentary to article 1—those underlying a number of multilateral conventions which constitute the basis of existing air law; the territorial sea is assimilated to other parts of the territory of sovereign State and the State's sovereignty consequently extends to the airspace over the territorial sea.

6. These fundamental principles are stated in article of the Paris Convention relating to the Regulation of Aerial Navigation (13 October 1919):<sup>1</sup>

<sup>1</sup> The report submitted by the Legal, Commercial and Financial Sub-Commission to the Aeronautical Commission of the Peace Conference explains the origin of this article as follows:

"The first question before the Sub-Commission was whether to accept the principle of the freedom of the air or that"

"Article 1. The High Contracting Parties recognize 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."<sup>2</sup>

The same text appears in article 1 of the Ibero-American Convention relating to Air Navigation signed at Madrid on 1 November 1926. The Pan-American Convention on Commercial Aviation, signed at Havana on 20 February 1928, reproduces only the first paragraph and makes no reference to territorial waters.<sup>3</sup>

7. Finally, the Chicago Convention on International Civil Aviation of 7 December 1944, at present in force, contains the following two articles:

"Article 1. The Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

"Article 2. For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."

8. The language of the articles of the various international conventions cited above is generally regarded as showing that the Contracting States expressly recognized a rule of customary international law.<sup>4</sup>

9. According to these texts, the subjacent State's sovereignty is "complete and exclusive", i.e. unrestricted. During the discussion of the draft at the seventh session of the International Law Commission (1955), the question arose, following an observation of the Netherlands Government, whether article 2 should contain a second paragraph similar to that in article 1 ("This sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of inter-

sovereignty over the air. The Paris Convention of 29 June 1910 had not taken any decision on this point. The new text proposes a solution. But whereas the opinion held in the majority of countries before the war favoured the principle of the freedom of the air, the present proposal of the Legal Sub-Commission would make the airspace subject to the complete and exclusive sovereignty of the subjacent territory. It is only where the column of air lies over a *res nullius* or *res communis*, like the sea, that the air becomes free.

"Accordingly, the airspace is subject to the same legal régime as the subjacent territory. Where such territory is that of a particular State, the airspace is subject to the sovereignty of that State. In the case of the high seas, which are subject to no State's sovereignty, the airspace above the sea is as free as the sea itself."

*Recueil des Actes de la Conférence de la Paix*, part VII. A (1) Aeronautical Commission, pp. 428-429).

<sup>2</sup> The Paris Convention and the other Conventions mentioned in paragraph 6 use the term "territorial waters", which the Commission has replaced by the more accurate term "territorial sea".

<sup>3</sup> English versions of these two Conventions appear as annexes C and D to the draft minutes of the extraordinary session of the International Commission for Air Navigation held in June 1929 (ICAN Publications).

<sup>4</sup> Mr. François' first report on the territorial sea (A/CN.4/53), prepared for the fourth session (1952) of the International Law Commission, did not contain any reference to the airspace. After several members had pointed out that the coastal State's sovereignty over the airspace above the territorial sea was acknowledged as a rule of international law by international conventions, article 3 of the first draft (which became article 2 of the present draft) was duly amended. See A/CN.4/SR.165, paras. 57 to 73; A/CN.4/SR.172, paras. 14 to 32.

national law"). After a discussion, the Commission held that there existed in international law no limitation on the sovereignty exercised over the airspace<sup>5</sup> and decided not to add a second paragraph.

10. Article 2 of the draft is therefore fully consistent with existing air law. The commentary to that article nevertheless calls for an observation. The commentary states that "this article is taken, except for purely stylistic changes, from the regulations proposed by the 1930 Codification Conference". In reality, however, the next text introduces a change of terminology which, at least as far as the French version is concerned, is not "purely stylistic".

11. Article 2 of the draft contains the expression *espace aérien* whereas in article 2 of the 1930 draft regulations we find the expression *espace atmosphérique*.<sup>6</sup> The expression *espace atmosphérique* was the one consistently used by the Aeronautical Commission when drafting the 1919 Convention<sup>7</sup> and the one which naturally appears in article 1 of that instrument. The same expression has been used by various States in their national legislations.<sup>8</sup> At the Chicago Conference, the matter was never discussed by the Conference itself and the Drafting Committee, working in English, merely reproduced the English text of article 1 of the Paris Convention with the sole difference that "airspace" was condensed into a single word.<sup>9</sup> No definition of airspace (*espace atmosphérique* or *espace aérien*) can be found in any international convention whatsoever.

12. During the fourth session of the International Law Commission, Mr. Hudson expressed doubts whether the term "airspace" (*espace aérien*) was appropriate in the light of modern developments in the aeronautical field; he added that a United States writer had recently suggested that "airspace" should be replaced by "flight-space" (*espace de vol*). This new term received no support whatsoever.<sup>10</sup>

13. Ever since the attention of jurists was first drawn to the progress made in aeronautics and astronautics, and particularly since the announcement of the launching of man-made satellites and of plans for inter-planetary travel, the term "airspace" (*espace aérien*) has given rise to much controversy and to varying interpretations regarding its upper limit.

14. The term *espace atmosphérique* cannot, of course, indicate accurately the height to which the subjacent State's sovereignty may extend, inasmuch as the upper limit of the atmosphere varies from one part

<sup>5</sup> A/CN.4/SR.295, paras. 22 to 34.

<sup>6</sup> The English texts of article 2 of the draft and article 2 of the 130 draft regulations both use the expression "airspace".

<sup>7</sup> *Recueil des Actes de la Conférence de la Paix*, part VII. A (1), Aeronautical Commission.

<sup>8</sup> E.g., Bolivia, Colombia, Ecuador and Spain.

<sup>9</sup> At Chicago, the only authentic text signed by the representatives was the English text. The trilingual text provided for by the Convention itself has never been drafted. For purposes of publication of the Convention in the *United Nations Treaty Series*, however, the Secretariat prepared a French text using the expression *espace aérien*. This text has since been used, pursuant to a resolution adopted on 19 February 1952 by the Council of the International Civil Aviation Organization (ICAO), for the internal purposes of that organization and in its communications with member States.

<sup>10</sup> A/CN.4/SR.172, para. 31.

of the globe to another and scientists differ in their estimates of its thickness. But the term *espace aérien* is most commonly construed to mean the space extending *ad infinitum*. ICAO itself seems to support this interpretation; its technical rules, adopted by the ICAO Council in pursuance of its powers under the Chicago Convention and called "Annexes" or "Standards and Recommended Practices", contain definitions, applicable to the rules themselves, in which the terms "control zone" and "control area" are defined as "a controlled airspace extending upwards from the surface (or from a specified height above the surface) of the earth".<sup>11</sup> The English text is clearer in this respect than the French.<sup>12</sup> The same idea is to be found in various ICAO publications, especially in the regional plans adopted by the Council which describe the control zones, control areas and controlled airways; the altitude to which control extends is sometimes stated to be unlimited, although the effective exercise of control is obviously dependent on the equipment available.

15. Despite its vagueness, the term *espace atmosphérique* justifies the inference—at least in theory—that above the atmosphere air traffic is free. By contrast, the use of the term *espace aérien*, interpreted as extending *usque ad infinitum*, could hinder the future progress of aeronautics and astronautics. Admittedly, the Chicago Convention applies at present to conventional aircraft only (balloons, airships, aeroplanes and helicopters). The Convention itself does not define the term "aircraft" and the ICAO Council has adopted a definition similar to that contained in the Paris Convention (annex A), viz: "any machine that can derive support in the atmosphere from the reactions of the air". This definition, which appears in various annexes to the Chicago Convention,<sup>13</sup> is not applicable to man-made satellites, to rockets (whether guided or unguided) or to any other device capable of moving through space without requiring support from the reactions of the air; in any event, there are at present no regulations governing the movement of such devices or objects—which are not aircraft within the meaning of the definition adopted by ICAO—even through the atmosphere. Article 8 of the Chicago Convention, which forbids the flying of pilotless aircraft over the territory of a Contracting State without its authorization, is not applicable, since these objects are not aircraft. Two remarks, however, seem pertinent. In the first place, the annexes to the Convention (with one exception which will be noted later in connexion with the high seas) are not binding on States; States may consequently adopt definitions and rules different from those adopted by ICAO provided they give notification to that organization of the departures in question. Secondly, the Council, having the powers to amend any rule or annex, can prepare a new definition of "aircraft" which will include all the other objects and thus make the articles of the Convention, and the annexes thereto, applicable *ipso facto* to such objects.

<sup>11</sup> See chapter 1 (Definitions) of annex 2 (Rules of the Air) and of annex 11 (Air Traffic Services).

<sup>12</sup> *Espaces aériens contrôlés s'étendant verticalement à partir de la surface (ou d'un niveau déterminé par rapport à la surface)*.

<sup>13</sup> Annexes 6, 7 and 8.

16. This is not the solution generally envisaged by jurists, who prefer to suggest a division of the airspace into superimposed zones and a consequent restriction of the extent thereof subject to the absolute sovereignty of the subjacent State. This question, however, which has already been discussed in writing by several authorities,<sup>14</sup> does not appear to be strictly pertinent in connexion with article 2 of the draft, since the draft merely states that the sovereignty of a coastal State over the territorial sea extends also to the airspace above the territorial sea. In any event, it seems that the problems raised by the movement through outer space of various devices used chiefly for purposes of scientific observation—though ultimately also for transport—should be regulated by a convention. Such a procedure appears to have the unanimous support of the jurists who have examined the question. President Eisenhower referred to it in his State of the Union Message of 10 January 1957, and Mr. Henry Cabot Lodge mentioned the question in the disarmament programme submitted to the United Nations on 14 January 1957.

## II. CONDITIONS APPLICABLE TO AIR NAVIGATION ABOVE THE TERRITORIAL SEA

17. The Commission did not examine the conditions governing the exercise of sovereignty over the airspace above the territorial sea. A summary of these conditions, as set forth in the Chicago Convention and its annexes, may therefore be of assistance in the discussion of article 2 of the draft and of other articles of part I, especially those relating to the right of innocent passage.

18. Since the airspace above the territorial sea is wholly assimilated to the airspace above the territory, the movements of aircraft (flight, take-off and landing) in both spaces are subject to identical conditions. Aircraft do not enjoy in the airspace above the territorial sea the right of innocent passage enjoyed by ships in the territorial sea itself.

19. During the discussion of the draft in the Commission, a member asked the Rapporteur whether he might not consider the possibility of extending the right of innocent passage to the airspace. Mr. François replied that the conventions on air navigation did not recognize the principle of innocent passage, and that it had been recognized at the 1930 Hague Codification Conference that there was no customary law on innocent passage through the air above a territory.<sup>15</sup>

20. It is true that the Paris Convention of 1919 stipulated in article 2 that "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

<sup>14</sup> See John C. Hogan, "Space Law Bibliography", in 23 *Journal of Air Law and Commerce* (1956), pp. 317-325; John C. Hogan, "Legal terminology for the upper regions of the atmosphere and for the space beyond the atmosphere" in *American Journal of International Law* (1957), pp. 362-375; Myres S. McDougal, "Artificial satellites: a modest proposal", in *American Journal of International Law* (1957), pp. 74-77. See also the letters addressed to the editor of *The Times* (London) by Mr. John C. Cooper and Mr. Christopher Shawcross, in the issues of 2 and 5 September 1957.

<sup>15</sup> A/CN.4/SR.172, paras. 18, 21 and 22.

laid down in the present Convention are observed". It is also true that the Madrid Convention of 1926 (article 2) and the Havana Convention of 1928 (article 4) contained similar provisions. But all these provisions constituted contractual undertakings between States and not an act of recognition of a rule of international law, as was the case with the provisions on sovereignty over the airspace.

21. None of the articles of the Chicago Convention of 1944 gives a right of innocent passage to aircraft of the Contracting States; the Convention contains, however, numerous provisions concerning the movements of aircraft, especially part I (Air Navigation) and article 68 in part III (route to be followed above the territory of a State). All these provisions imply that the subjacent State enjoys complete and exclusive sovereignty.

22. In the first place, certain categories of aircraft may not fly over the territory of another Contracting State except with its permission or authorization and must comply with the stipulated conditions. The categories of aircraft in question are the following:

(a) State aircraft (military, customs and police aircraft (article 3, para. (c));<sup>16</sup>

(b) Civil aircraft engaged in "scheduled international air services", which are also required, when within the territory of a Contracting State, to follow the route and use the airports designated by that State (article 68);

(c) Pilotless aircraft.

23. Aircraft of Contracting States not engaged in "scheduled international air services" are the only ones which, under article 5 of the Convention, have "the right . . . to make flights into or in transit non-stop across its [a Contracting State's] territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission". This right, however, is made subject to so many conditions and saving clauses designed to safeguard the sovereign rights of States that its value is greatly restricted.<sup>17</sup>

24. Aircraft of all categories, whether or not requiring prior permission for the purpose of entering the airspace of a Contracting State, must also comply with the various conditions laid down in the Convention;

<sup>16</sup> Although article 3, para. (a), states that the Convention shall be applicable only to civil aircraft and shall not be applicable to State aircraft, para. (c) of the same article lays down a rule concerning State aircraft specifically.

<sup>17</sup> Article 5. "Each Contracting State agrees that all aircraft of the other Contracting States, being aircraft not engaged in scheduled international air services, shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each Contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

"Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of article 7, have the privilege of taking on or discharging passengers, cargo, mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

here again, the primary emphasis is on State sovereignty. Aircraft must, as a general rule, observe the laws and regulations of the subjacent State (see in particular articles 11, 12 and 13). They must respect the prohibited or restricted areas which States have the right to establish above their territories for various reasons (article 9).<sup>18</sup> The competent authorities of a State have the right to search aircraft of the other Contracting States on landing and departure, and to inspect the certificates and other necessary documents (article 16). The ICAO Council admittedly has the power, under article 54 (1) of the Convention, to adopt international regulations designated as annexes or international standards and recommended practices but, with one exception to which reference is made later (see para. 33), these regulations are not *ipso facto* binding on States.<sup>19</sup> Various articles of the Convention naturally enjoin each Contracting State to observe them, but only "so far as it may find practicable" (article 28) or "to the greatest possible extent" (article 12); States can consequently depart from the provisions adopted internationally, provided they notify ICAO of the differences between their regulations and the international standards.

## PART II

### The Airspace above the High Seas

25. The articles of the draft regarding the high seas touch upon air law in several different ways. One article seeks to confirm in explicit terms a principle of existing air law which has never yet been formulated in any treaty, namely, the freedom to fly over the high seas. Other articles which contain explicit references to aircraft, air traffic and the airspace tend to establish new rules of air law; this applies to the articles on piracy, hot pursuit, pollution of airspace and the continental shelf. Finally, certain articles which do not themselves refer to the airspace or to aircraft deal with subjects already covered by existing rules of air law which are worth summarizing.

#### I. FREEDOM TO FLY OVER THE HIGH SEAS

26. Neither the Paris Convention, nor the Madrid and Havana Conventions, nor the Chicago Convention, contain any provision confirming the freedom of flight over the high seas.

27. The Aeronautical Commission of the Peace Conference (1919) had, however, stated in the report of its Legal, Commercial and Financial Sub-Commission<sup>20</sup> that "it is only where the column of air lies over a *res nullius* or *res communis*, like the sea, that the

<sup>18</sup> Numerous prohibited or restricted areas are situated above territorial seas, especially around military ports; some of these even extend into the high seas (see para. 40).

<sup>19</sup> This is the difference between the annexes to the Chicago Convention and the annexes to the Paris Convention, the provisions of which, together with any amendments introduced thereto by the International Commission for Air Navigation, were binding on the Contracting States as from the date of their notification.

<sup>20</sup> *Recueil des Actes de la Conférence de la Paix*, part VIII. A (1), Aeronautical Commission, pp. 428-429.

air becomes free . . ." and that "the airspace above the sea is as free as the sea itself".

28. During the discussions in the International Commission for Air Navigation at its extraordinary session of June 1929, the Commission "recognized that flight over the sea, outside territorial waters, is free".<sup>21</sup>

29. The minutes of the Chicago Conference contain no record of any discussion on this subject, but the representatives present seem to have regarded the principle as already established for, under article 12 of the Convention, the right to make rules relating to the flight and manoeuvres of aircraft over the high seas is vested not in the Contracting States but in ICAO; furthermore, the rules established by ICAO are binding on the said States.

30. Article 27 of the draft contains in its second sentence the following statement:

"Freedom of the high seas comprises, *inter alia* :

" . . .

"(4) Freedom to fly over the high seas."

This provision confirms a principle of customary international law, which the Commission itself emphasizes in the first paragraph of its commentary to article 27:

"Freedom to fly over the high seas is expressly mentioned in this article because the Commission considers that it follows directly from the principle of the freedom of the sea."<sup>22</sup>

31. Paragraph (5) of the same commentary to article 27 states:

"Any freedom that is to be exercised in the interests of all entitled to enjoy it must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community."

This statement applies *mutatis mutandis* to the freedom to fly over the high seas.

32. Article 12 of the Chicago Convention (*vide supra*, para. 29) contains a provision governing the flight of

<sup>21</sup> See International Commission for Air Navigation, Extraordinary Session of June 1929, draft minutes, p. 217, annex K, under article 1.

<sup>22</sup> Mr. François' first reports on the high seas contained no reference to the freedom to fly over the high seas. At the Commission's seventh session, however, it was proposed that the draft should contain an enumeration of certain freedoms, including—in second place—the "freedom to fly over the high seas for peaceful purposes". The drafting Committee at the same session maintained that provision, but listed it as the fourth freedom (*see* A/CN.4/SR.293, paras. 43, 44, 45, 52; A/CN.4/SR.320, para. 23). During the examination of the Commission's draft report on the work of the session, the question of including in article 27 the freedom to fly over the high seas was discussed again. The provision was finally maintained after the Rapporteur had stated that the following commentary would be inserted:

"The Commission did not examine the question of freedom to fly over the high seas because that matter will be dealt with when the Commission comes to codify air law."

After some redrafting, the text finally adopted is the one which appears under article 27 (commentary (1)); it reads as follows:

"...the Commission has, however, refrained from formulating rules on air navigation, since the task it set itself in the present phase of its work is confined to the codification and development of the law of the sea."

(*see* A/CN.4/SR.326, paras. 32 to 52, and A/CN.4/SR.329).

aircraft over the high seas. This article provides that "each Contracting State undertakes to adopt measures to ensure . . . that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force . . . Over the high seas, the rules in force shall be those established under this Convention. Each Contracting State undertakes to insure the prosecution of all persons violating the regulations applicable".

33. The rules which the aircraft of Contracting States must observe over the high seas are contained in annex 2 to the Chicago Convention (Rules of the Air). This is confirmed in the ICAO Council's resolutions of adoption of annex 2 (April 1948) and amendment No. 1 to the said annex (November 1951). In any case, the foreword to the annex expressly provides that "over the high seas . . . these rules apply without exception", which means that Contracting States can only enact regulations consistent with them and may not notify ICAO of any departures therefrom.<sup>23</sup>

34. Annex 2 contains some general rules which are of a mandatory nature only in the airspace above the high seas but which could equally well apply—provided they do not conflict with the rules enacted by the adjacent State—in the airspace above land and the territorial sea. It also contains some specific rules concerning operations by aircraft on the surface of the water, including the high seas; these rules are designed to prevent collisions with other aircraft or with ships and the annex expressly extends to aircraft the International Regulations for Preventing Collisions at Sea adopted by the International Conference on the Safety of Life at Sea (1948). Finally, an appendix specifies the lights to be displayed by aircraft on the surface of the water.

35. Other annexes to the Convention which contain provisions on the movement of aircraft above the high seas include the following:

Annex 11 (Air Traffic Services);

Annex 12 (Search and Rescue);<sup>24</sup>

Annex 6 (Operation of Aircraft—International Commercial Air Transport).<sup>25</sup>

36. The only rules so far enacted by the Council of ICAO pursuant to article 12 which are mandatory in the airspace over the high seas are those contained in annex 2, although the documents of the Chicago Conference would seem to indicate that the authors of the Convention had more ambitious intentions. Some of the provisions of annex 2, however, themselves implicitly require strict compliance with other rules of great

<sup>23</sup> Governments generally make these rules compulsory even for their military pilots. *See* Supplementary Flight Information Document (North Atlantic Zone) of the United States Air Force and the Royal Canadian Air Force (section V - A 3 (a)). *See* also the article by Prof. H. Drion entitled "The Council of ICAO as international legislator over the high seas", in the *set* of articles published in honour of A. Ambrosini, Milan, 1955.

<sup>24</sup> This annex provides for the establishment and operation of search and rescue services and reproduces the provisions of the International Convention of 1948 on the Safety of Life at Sea.

<sup>25</sup> This annex, which lays down regulations for the operation of aircraft, contains provisions on flights over water.

importance to the safety of aircraft over the high seas ; thus, for example, the pilot in command of an aircraft must comply with instructions received from the air traffic control services set up by virtue of annex 11.

37. These services, generally set up on the recommendation of ICAO, control aircraft movements not only over the territories of the member States of ICAO, but also over great stretches of the world's seas which fall within the various control regions or control zones or are traversed by controlled airways. This is particularly true over the North Atlantic and the North Pacific,<sup>26</sup> where aircraft are subject to control regardless of the altitude at which they may be flying.

38. The rules contained in annex 2 and the traffic control measures, both of which in effect represent restrictions on the absolute freedom of flight, are all designed to insure the safety of aircraft over the high seas. They are being applied without any difficulty by all the States Parties to the Chicago Convention. They correspond to the regulations which article 34 of the draft requires States to issue with respect to ships.

39. Controversies have, however, arisen with regard to certain rules governing flight over the high seas which States have enacted unilaterally. The controversial issues, which may come up at the Conference, are the following :

(a) The establishment on the high seas of prohibited, restricted or dangerous areas ; and

(b) The establishment of off-shore identification zones, extending into the high seas, wherein every aircraft must identify itself on entry.

40. In certain zones established in various parts of the world, generally near the coasts but also sometimes over parts of the high seas, flight is either restricted or wholly prohibited ; the restriction or prohibition may be permanent or limited to a specified period, specified days or specified hours. These zones are generally used for the training of military pilots or for firing exercises, and sometimes for combined air-naval operations. The notices to airmen announcing the establishment of these zones do not appear to have elicited any protests from other States, any more than notices to mariners regarding naval manoeuvres.<sup>27</sup>

41. The atomic weapons tests conducted in the Pacific since 1947 have, however, given rise to much discussion. After the United States authorities had selected Eniwetok Atoll for these tests, an area of some 30,000 square miles above the high seas was declared to be a danger area for a period of one year ; this period was subsequently extended "until further notice". In 1953, the area itself was extended to include Bikini atoll and increased to 50,000 square miles. Finally, in March 1954, the danger area was further extended to

cover 400,000 square miles. In 1957, the United Kingdom authorities, in their turn, established a danger area around Christmas Island, which is at least as large as the Bikini-Eniwetok area. There has been much controversy among jurists as to whether the establishment of such areas is compatible with the freedom of the seas ;<sup>28</sup> protests have been made, particularly by the Japanese Government, and questions have been asked in the House of Commons in London.<sup>29</sup>

42. In considering these danger areas, we must look into the relevant provisions of the law of the air and the regulations at present governing air traffic. Although the Chicago Convention (article 9) gives each Contracting State the right, for certain purposes, to prohibit or restrict air traffic over some areas of its territory, there are no provisions in this or any other Convention giving States such rights over the high seas. Annex 2, which prescribes flight rules to be observed by aircraft, contains a provision (standard 3-1-6) stating that "aircraft shall not be flown over areas where there are flight restrictions, the particulars of which have been duly published, except in accordance with the conditions of the restriction or by permission of the appropriate authority of the State imposing the restriction". According to the definitions contained in chapter 1 of annex 2, a prohibited area or a restricted area means "a specified area within the land areas of a State or territorial waters adjacent thereto". Annex 2 thus contains no indirect recognition of a right to establish prohibited or restricted areas on the high seas.

43. In the Pacific Ocean, however, the Governments of the United States and of the United Kingdom have not established any prohibited or restricted areas ; they have only established "danger areas", the extent of which has been announced in ordinary notices to airmen. The notion of a "danger area", which is not mentioned in the Chicago Convention, was introduced into the ICAO regulations by the Council, which gave the following definition of the term in chapter I of annex 2 : "A specified area within or over which there may exist activities constituting a potential danger to aircraft flying over it".<sup>30</sup> Since this definition does not specify that such areas must be situated within the limits of a State's land domain or territorial sea, a State is free to establish them also on the high seas. There is, however, no provision in annex 2 which makes it compulsory for aircraft to respect these areas.

44. The protests made in this connexion concentrate not so much on the alleged illegality of the establishment of such areas under international law as on the dangerous consequences of atomic tests : the pollution of the airspace, the contamination of the sea and of the fish, the danger of accidents to persons venturing into

<sup>26</sup> See : ICAO document 7674, Air Navigation Plan, North Atlantic Region, chart ATS 2 and table 1, and ICAO document 7700, Air Navigation Plan, Pacific Region, chart ATS 2.

<sup>27</sup> Thus, a prohibited zone of more than 6,000 square miles, a large part of which extends over the sea, was set up by the Australian Defence Act of 1952 in the region of the Monte Bello Islands (Western Australia) as a site for tests of atomic weapons. Persons entering the zone without permission are liable to penalties as high as seven years' imprisonment. This measure does not seem to have elicited any protest.

<sup>28</sup> See, in particular, two articles which appeared in the *Yale Law Journal* (April 1955, pp. 629-710) : one by Mr. Emanuel Margolis, entitled "The hydrogen bomb experiments and international law" and the other by Prof. Myres S. McDougal, entitled "The hydrogen bomb tests in perspective : lawful measures for security".

<sup>29</sup> See *Parliamentary Debates* (Hansard), House of Commons, vol. 550, col. 29 (12 March 1956).

<sup>30</sup> There are, throughout the world, several hundreds danger areas ; the extent of these and the reasons for their establishment are given in navigation manuals citing the relevant notices to airmen.

such areas, etc. The Commission, in mentioning this subject, merely states in paragraph 3 of its commentary to article 27: "Nor did the Commission make any express pronouncement on the freedom to undertake nuclear weapon tests on the high seas. In this connexion, the general principle enunciated in the third sentence of paragraph 1 of this commentary is applicable"; the principle mentioned is that "States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States".

45. In this connexion, we should point out that, strictly from the point of view of air transport—and leaving aside the consequences of the nuclear tests themselves—the damage caused to aviation by the establishment of these danger areas in the Pacific appears to have been very slight. There are no scheduled airlines in the immediate vicinity of the Christmas Island area. As to the Bikini-Eniwetok area, the route followed by the aircraft of a United States airline between Guam and Wake Island had to be deflected well to the north of the danger area, making it necessary for two or three flights weekly to follow a route fifty miles longer throughout the duration of the 1954 tests.<sup>31</sup>

46. There is also another danger area in the Caribbean and South Atlantic region, which is used as a proving-ground for rockets and guided missiles launched into space from sites in Florida. This vast firing-range, which was established by successive agreements between the United Kingdom and the United States,<sup>32</sup> at first covered only the Bahamas, but was later extended to St. Lucia and finally to Ascension Island. It now extends farther than 4,000 miles from Florida and can be used for tests with inter-continental missiles. Although many airlines of various nationalities cross this zone, it does not appear to have given rise to any protests.

47. The identification zones mentioned in paragraph 39 above also restrict the freedom to fly over the high seas, but it can hardly be said that their purpose is to ensure the safety of air traffic. These zones, known as air defence identification zones, were established in 1950-1951 by the Governments of the United States and Canada off their coasts on both the Atlantic and the Pacific Oceans (the United States zones are now called ADIZ and the Canadian zones CADIZ). The Canadian zones are some 100 nautical miles wide and the United States zones between 200 and 300 miles wide. These zones extend as follows: on the Atlantic side, from 66° North (Baffin Land) to 28° North (Florida); on the Pacific side, from 53° North (north of Vancouver) to 28° North (Mexican frontier) and around Alaska.<sup>33</sup>

<sup>31</sup> See Myres S. McDougal, *op. cit.*, p. 683.

<sup>32</sup> See Agreement of 21 July 1950 (*United Nations Treaty Series*, vol. 97, No. 1351); Agreement of 15 January 1952 (*Ibid.*, vol. 127, No. 1697); Agreement of 24 February and 2 March 1953 (*Ibid.*, vol. 172, No. 2249); Agreements of 25 June 1956 (United Kingdom Command Papers Nos. 9810 and 9811). See also the article in the *New York Times* of 25 March 1957 entitled "Little peril seen in missiles tests".

<sup>33</sup> For a complete description of the United States zone see part 620 of the Civil Aeronautics Regulations (sub-part C); the Canadian zones are described in section 2.11 of the rules published in NOTAM 22/1955.

48. The rules which must be observed by aircraft wishing to enter or present in these zones are set forth in the following documents: as regards Canada, in the Rules for the Security Control of Air Traffic, published in the form of a Notice to Airmen (NOTAM);<sup>34</sup> as regards the United States, in the regulations made by the Civil Aeronautics Administration pursuant to an Executive Order issued by the President in the exercise of his powers under the Civil Aeronautics Act of 1938. Under these regulations, all aircraft about to enter or present in a United States or Canadian air identification zone must inform the competent authorities of their identity and flight plan and comply with a number of formalities. In the Canadian zones identification is compulsory for all aircraft, but in the United States zones it is only required of aircraft bound for United States territory. In the latter case, there are also some exceptions in the case of aircraft flying below a certain altitude or operating at reduced speeds. In Canada, non-compliance with these regulations renders an aircraft liable to interception by military aircraft; in the United States, such breaches are punishable with a fine not exceeding \$10,000 or imprisonment not exceeding one year, or both such fine and imprisonment.

49. The statutory instruments relating, respectively, to the ADIZ and the CADIZ each state that they contain "rules which have been found necessary in the interest of national security to identify, locate and control" all civil aircraft operated within the areas in question.<sup>35</sup> Commentators have endeavoured to justify these rules by invoking the doctrines of necessity and of self-defence; they have tried to prove that the rules in question do not conflict with the Chicago Convention or with any rule of positive international law and that they do not injure the interests of other States.<sup>36</sup> It is doubtful, however, whether they are compatible with the articles of the draft. One commentator describes these zones as "contiguous air space" zones and, in support of his contention defending their lawful character, cites a statement by Professor Gidel.<sup>37</sup> It would nevertheless seem that the air inspection zones

<sup>34</sup> The legality of these rules has been questioned because the powers of the Minister of Transport under the Aeronautics Act (sections 3 and 4) are not exercisable beyond the limits of Canadian territorial waters.

<sup>35</sup> United States Regulations, part 620.1 (b); Canadian Rules section 1.1.

<sup>36</sup> See, especially S/Ldr. John Taylor Murchison, *The Contiguous Air Space Zone in International Law*, a general survey published by the Department of National Defence, Ottawa, December 1955. See also Myres S. McDougal, *op. cit.*, p. 671.

<sup>37</sup> The commentator in question is S/Ldr. Murchison and the passage he cites states:

"The speed of aircraft, the altitude at which they fly and the possibilities of using telephotography for illicit reconnaissance are such that the coastal State must be in a position, in order to safeguard its security, to take in the airspace much more stringent measures of protection than those which suffice in dealing with ships. Consequently, it is not only the air over the contiguous zone, where the coastal State has already introduced measures in the interests of its security, that should be regarded as the "contiguous airspace" in which that State may impose the controls or prohibitions necessary to protect the safety of its land domain or territorial sea against trespassing foreign aircraft; this "contiguous airspace" is something considerably vaster, the extent of which may be determined by the coastal State in terms that forestall the trespass." (Gidel, *Le droit international public de la mer*, vol. 111, book III, p. 461.)



(ADIZ and CADIZ) can hardly be regarded as airspaces connected with the sea areas which the Commission terms "contiguous zones" since, according to article 66 of the draft, the latter areas may not extend beyond twelve miles and the coastal State may only exercise control therein for the purpose of preventing and punishing infringements of its customs, fiscal or sanitary regulations. The Commission clarifies its views on this point in paragraph 4 of its commentary to article 66, when it states:

"(4) The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term 'security' would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations."

The unilateral measures taken by Canada and the United States should consequently be judged in the light of these general principles. We should add that, since their adoption in 1950, these measures have not given rise to any protest.

## II. ARTICLES OF THE DRAFT WHICH REFER TO AIRCRAFT OR TO THE AIRSPACE

### A. Piracy

50. According to articles 38 to 49 of the draft, it is possible for an aircraft to commit acts of piracy in the same manner as a ship and so to become a pirate aircraft, liable to all the resulting consequences.

51. There is, as yet, no treaty provision which mentions the possibility of an aircraft being considered a pirate aircraft. The 1927 report on piracy of the Subcommittee of the League of Nations' Committee of Experts for the Progressive Codification of International Law contains no reference to aircraft,<sup>38</sup> although the Romanian reply to the Committee's questionnaire stated:

"Nevertheless, the word 'aircraft' might be added, especially as it is quite possible that piracy may be practised in the future by means of hydroplanes. Though confined at present to the *high seas and unowned territory*, the notion of piracy by aircraft may find a new application in the future if certain regions of the air above State territory are ultimately to be regarded as free."<sup>39</sup>

References to aircraft can also be found in the articles relating to piracy in the Spanish Penal Code of 8 September 1928 (article 252) and the Mexican Penal Code of 13 August 1931 (article 146).<sup>40</sup>

52. The notion of pirate aircraft was first expressly recognized at the international level in the draft convention on piracy prepared in 1932 by a group of the Harvard Law School Research in International Law under the direction of Professor Joseph Bingham. All the articles refer to ships, which are defined in article 1, para. 5 as follows: "The term 'ship' means any water

craft or aircraft of whatever size". The comment to article 1 adds that "In time aircraft may become the most efficient means of piratical attack".<sup>41</sup>

53. In this sixth report on the régime of the high seas, Mr. François reproduced a part of the Harvard draft convention and extended the notion of piracy to attacks committed in the air or from the air. This extension gave rise to lengthy discussions in the Commission, resulting in the adoption of articles 38 to 45 of the draft and the relevant commentaries. These may be summarized as follows:

(a) Acts of piracy can be committed by aircraft, if such are directed against ships on the high seas;

(b) Acts of piracy committed by an aircraft against a ship on the high seas are assimilated to acts committed by a pirate ship;

(c) Acts committed in the air by one aircraft against another aircraft can hardly be regarded as acts of piracy (the Commission adds: "In any case, such acts are outside the scope of these draft articles");

(d) The definition of a pirate ship applies also to a pirate aircraft;

(e) A pirate aircraft, like a pirate ship, retains its national character, except where the legislation of the State of registration regards piracy as a ground for loss of nationality;

(f) A seizure on account of piracy may only be carried out by warships or military aircraft.

54. This extension to aircraft of the provisions relating to piracy has not yet evoked any observation or criticism on the part of the States to which the draft was submitted.

### B. Right of hot pursuit

55. The right of pursuit, which is not disputed in international law, was the subject of article 11 of the draft adopted by the Second Committee of the 1930 Codification Conference. That article, however, did not elaborate on the nature of the pursuing craft. The first texts prepared by the Rapporteur of the Commission refer to the exercise of the right of pursuit by ships only. The question of pursuit by aircraft was raised at the Commission's eighth session, by the Governments of Iceland, Norway and the United Kingdom.<sup>42</sup> It was pointed out that many countries at present used aircraft to patrol their territorial seas, particularly for fishery protection purposes, that when they spotted an offender, the aircraft normally summoned surface craft to carry out the pursuit and that such use of aircraft was gradually becoming widespread.

56. After lengthy discussions,<sup>43</sup> the Commission adopted a text (article 47, para. 4 of the draft) stipulating that the right of hot pursuit may be exercised not only by warships or other ships on government service specially authorized to that effect, but also by military aircraft or other aircraft on government service with the same authority. The Commission notes, in paragraph 2 (d) of the commentary to article 47, that it

<sup>38</sup> Ser. L.o.N.P. 1927.V.1, pp. 116-119.

<sup>39</sup> *Ibid.*, p. 211.

<sup>40</sup> See the texts of these articles in *American Journal of International Law*, October 1932, section 2, pp. 780 and 1009.

<sup>41</sup> *Ibid.*, p. 768.

<sup>42</sup> See *Yearbook of the International Law Commission* (1956), vol. I (A/CN.4/SER.A/1956), p. 52, para. 35.

<sup>43</sup> *Ibid.*, pp. 52-58.

“dealt with the right of hot pursuit of a ship by aircraft” and that “in spite of the dissenting opinions of some of its members, it felt able to recognize the lawfulness of such a practice, provided it is exercised in accordance with the principles governing its exercise by ships”.

57. The provisions relating to the lawful exercise of the right of hot pursuit by an aircraft are contained in article 47, paragraph 5. The ship pursued must have been ordered to stop while it was still in the territorial sea or the contiguous zone (depending on the nature of the suspected offence) and the aircraft must have been in a position to give a visible and comprehensible signal to that effect, signals by wireless being barred. This question of the signal to be given is one on which international agreement is especially desirable, in order to avoid confusion with the signals which civil aircraft are required to give in conformity with ICAO rules. The commentary also recommends (para. 2(e)) that the aircraft should establish the position of the ship pursued at the moment when hot pursuit commences and mark that position by physical means—for example, by dropping a buoy.

58. Finally, aircraft are not merely granted a general authority to co-operate with ships of the same State in the pursuit of a ship which has committed an offence or is suspected of having committed one; the aircraft giving the order to stop is also expressly required actively to pursue the ship until a ship of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship (article 47, para. 5(b)).

### C. Pollution of the airspace

59. No comment is necessary, from the point of view of air law, on the recommendation, contained in article 48, paragraph 3, that all States should co-operate in drawing up regulations with a view to the prevention of pollution of the airspace above the seas, resulting from experiments or activities with radioactive materials or other harmful agents.

60. In preparing such regulations, the possible effects of the pollution of the airspace on the safety of aircraft must no doubt be taken into account.

### D. Continental shelf

61. Articles 67 to 73 of the draft, particularly articles 69, 71 and 73, also raise issues of air law. Article 69 expressly refers to the airspace above the superjacent waters of the continental shelf; article 71 deals with installations constructed on the continental shelf by the coastal State, the safety zones around them and the measures necessary for their protection; and article 73 provides for the settlement of disputes that may arise concerning the interpretation or application of the preceding articles.

62. In the course of the discussion on Mr. François' second report on the régime of the high seas,<sup>44</sup> in 1951, the Commission decided that it would be desirable, although not strictly indispensable, to indicate that there

must be no interference with the freedom of the air in the airspace above the superjacent waters of the continental shelf. On the proposal of Mr. Hudson, the following text was adopted:

“The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the airspace above the superjacent waters.”

This text became article 4 of the draft articles on the continental shelf contained in an annex to the Commission's report on the work of its third session;<sup>45</sup> the text was accompanied by the following commentary:

“The object of article . . . 4 is to make it perfectly clear that the control and jurisdiction which may be exercised over the continental shelf for the limited purposes stated in article 2 [exploitation and exploration of its natural resources] may not be extended to . . . the airspace above them [the superjacent waters].”

63. At its fifth session (1953), after consideration of the comments of Governments, the Commission adopted<sup>46</sup> a slightly amended text. Then, at its eighth session, the text was again revised and became article 69 of the present draft:

“The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas or that of the airspace above those waters.”

The following commentary explains the full significance of article 69:

“Article 69 is intended to ensure respect for the freedom of the seas in face of the sovereign rights of the coastal State over the continental shelf. It provides that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas or of the airspace above the superjacent waters. A claim to sovereign rights in the continental shelf can only extend to the sea bed and subsoil and not to the superjacent waters; such a claim cannot confer any jurisdiction or exclusive right over the superjacent waters, which are and remain a part of the high seas. The articles on the continental shelf are intended as laying down the régime of the continental shelf, only as subject to and within the orbit of the paramount principle of the freedom of seas and of the airspace above them. No modification of or exceptions to that principle are admissible unless expressly provided for in the various articles.”

64. The text of article 69 thus confirms that the régime of the airspace above the high seas is that recognized implicitly in the Chicago Convention.

65. Article 71 provides for certain exceptions to the general principle laid down in article 69. It states that “the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources, and to establish safety zones at a reasonable distance around such installations and take in those zones measures necessary for their protection”. Paragraph 3 specifies that such installations do not possess the status of islands and have no territorial sea of their own, while paragraph 4 adds that the State concerned must

<sup>45</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858)*, p. 18.

<sup>46</sup> See A/CN.4/60 and *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*. During the fifth session, Mr. Cordova pointed out that the Inter-American Juridical Committee had recently made a study of the subject of the continental shelf and had produced a draft recognizing that the sovereignty of the coastal State extended to the continental shelf and to the elements above and below

<sup>44</sup> A/CN.4/L.42.

give due notice of any such installations constructed and maintain permanent means for giving warning of their presence.

66. Article 71, paragraph 5, and the relevant commentary, make it clear that the exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, and that neither the installations themselves nor the safety zones around them may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation. In the opinion of the Commission, safety zones should not exceed a radius of 500 metres. Neither article 71 nor its commentary, however, refer to air traffic and, consequently, a safety zone established around installations situated on the surface of the sea can presumably include part of the superjacent airspace. Such a safety zone or space may thus be assimilated to a prohibited, restricted or danger area, depending on the regulations enacted by the State concerned, and may even have no upward limit. We saw above that, on the high seas, such areas have been established in practice although there is no treaty provision authorizing their existence.

67. Naturally, the provisions of paragraph 5 should apply equally to air navigation, and safety zones extending upwards above the installations on the continental shelf should not interfere with recognized air routes.

68. Finally, we should mention the current construction, about 150 miles off the United States coasts, of a chain of radar towers, called "Texas towers", which resemble the oil installations in the Gulf of Mexico; the first of these towers is now in place. These structures, affixed to the sea bed, are not intended for the exploration or exploitation of the resources of the continental shelf and cannot therefore be assimilated to the installations referred to in article 71 of the draft. Neither are they islands within the meaning of article 10, since the commentary to that article states that technical installations built on the sea bed are not considered islands.<sup>47</sup>

69. Article 73 makes provision for the settlement of disputes that may arise concerning the interpretation or application of the articles relating to the continental shelf, that is to say articles 69 and 71 discussed above. Such disputes are to be submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement. Certain disputes concerning air navigation may thus fall outside the competence of the ICAO Council, which is only entitled to act in connexion with disputes arising out of the interpretation and application of the Chicago Convention and its annexes; the parties can, of course, voluntarily refer the dispute to the Council, such reference being "another method of peaceful settlement".

<sup>47</sup> See the article by Mr. Cacopardo on the international legal status of radar islands in *Rivista Aeronautica*, November 1955, pp. 1201-1214.

### III. OTHER ARTICLES OF THE DRAFT

70. As far as the other articles of the draft are concerned, those relating to penal jurisdiction in matters of collision,<sup>48</sup> the slave trade, the right of visit, fishing and submarine cables and pipelines are solely concerned with the law of the sea. On the other hand, the provisions of the articles relating to the nationality of ships, the immunity of warships and other government ships, and the duty to render assistance, have their corresponding provisions in air law.

#### A. Nationality

71. The Chicago Convention contains provisions concerning the nationality of aircraft which are similar to those of article 29 of the draft: aircraft have the nationality of the State in which they are registered, and registration must be made in accordance with the national legislation of the State concerned (articles 17 and 19). Unlike article 31 of the draft, however, article 18 of the Chicago Convention provides that an aircraft cannot be validly registered in more than one State, which means that it cannot possess more than one nationality.

#### B. Immunity of warships and of other government ships

72. Article 32 of the Paris Convention of 1919 stipulated that a military aircraft authorized to fly over the territory of another Contracting State enjoyed in principle, in the absence of special stipulation, the privileges customarily accorded to foreign warships. No similar provision is contained in the Chicago Convention, but the question is usually covered by bilateral arrangements.

#### C. Duty to render assistance

73. In accordance with article 25 of the Chicago Convention, each Contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable.<sup>49</sup> Article 25 adds that "each Contracting State, when undertaking search for missing aircraft, will collaborate in co-ordinated measures which may be recommended from time to time pursuant to this Convention". Since the signing of the Chicago Convention, ICAO has set up a vast network of search and rescue services covering not only the territories of the Contracting States but also the high seas.

74. Finally, as a result of the work of the International Technical Committee of Aerial Legal Experts (CITEJA), a Convention for the Unification of Certain Rules relating to Assistance and Salvage of Aircraft or by Aircraft at Sea was signed at Brussels on 29 September 1938. The provisions of this Convention, which are similar to those of the first part of article 36 of the draft, read as follows:

<sup>48</sup> A draft convention on collisions between aircraft has been prepared by the Legal Committee of ICAO; one of its articles deals with jurisdiction in cases of collision on the high seas. See ICAO document LC/Working Draft 544 (article 10).

<sup>49</sup> The Paris Convention of 1919 merely provided that "with regard to the salvage of aircraft wrecked at sea the principles of maritime law will apply, in the absence of any arrangement to the contrary".

“Any person exercising the functions of commanding officer aboard an aircraft shall be bound to render assistance to any person who is at sea in danger of being lost, in so far as such person may do so without serious danger to the aircraft, her crew, her passengers, or other persons.

“Every captain of a vessel shall be bound... to render assistance to any person who is at sea in danger of being lost on an aircraft or as the consequence of damage to an aircraft.”

Unfortunately, this Convention never came into force.<sup>50</sup>

75. There is no doubt that article 36 of the draft

applies to any person found at sea in danger of being lost aboard an aircraft or in distress as a result of an air accident.

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<sup>50</sup> In 1948 and 1949, the Legal Committee of ICAO, at the request of the ICAO Council, resumed the study of the problem with a view to the preparation of a new convention; a report was submitted to the Council, but no action was taken. For a summary of the discussions, see ICAO document LC/Working Draft 106, pp. 2-5.