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# RECENT ADDRESSES

## ICAO AND THE MAJOR PROBLEMS OF INTERNATIONAL AIR TRANSPORT

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**I**N SPEAKING to you of ICAO and the major problems of international air transport, I will outline the principal problems in the economic field with which it has tried to deal. In order, therefore, to focus the discussion, I shall try to approach most of the problems from a single point of view. I think that the prospective operator of an air service feels the impact of the problems most keenly, so that I shall try to put myself in his place for discussing most of them, although I shall occasionally have to step out of that role. After discussing our problems generally, I shall conclude by trying to give some idea of the particular aspects that become prominent when the problems are considered in their European setting.

To start out then with a few words about the International Civil Aviation Organization. This is an international organization formed by a Convention drawn up at the International Civil Aviation Conference which took place in Chicago from 1 November to 7 December 1944. ICAO has now 59 member States, most of which are also members of the United Nations of which the Organization itself is a specialized agency.

The activities of ICAO can perhaps be classified in two main fields. First, the technical field of air navigation. The second main field of ICAO's work, of which I have the honour to be in charge insofar as the Secretariat is concerned, is that relating to the economic and financial problems of international aviation, that is to say, the air transport problems. This field represents a new endeavour in international collaboration, since ICAO is the first international aviation organization empowered to deal with questions of this sort. At the time of the creation of the International Commission for Air Navigation in 1919, the problems in this field had hardly taken shape. Not only are the problems in the economic field probably more difficult to solve, or even to define, than those in the air navigation field, but we lack here the extremely valuable precedent of ICAN's work.

Every three years, the Assembly, the supreme governing body of ICAO, reviews all of the Organization's activities. 1953 is such a year, and many of the matters which I am going to mention will be debated next month at our Assembly in Brighton.<sup>1</sup> The Council is a permanent body elected by the Assembly every three years and comprising 21 contracting States, including Italy. The Council confides most of its economic problems to its Air Transport Committee. This Committee, working with the Secretariat and on the basis of research and analysis, is the workshop in which the problems that we are discussing this evening are processed in the first instance.

### PROBLEMS OF THE INTERNATIONAL OPERATOR—COMMERCIAL RIGHTS

We turn now to the operator and his problems, the first and perhaps the greatest of which is to secure the rights necessary to operate internationally. There is no freedom of the air analogous to the freedom of the seas, so that

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<sup>1</sup> For a report of this Assembly see 20 JOUR. OF AIR LAW & C. 308.

the right to make any sort of an international flight must be granted, in some form or another, by the foreign country or countries to be flown over. The ICAO Convention confers this right to fly on all civil aircraft of its member States, unless they are engaged in scheduled services. This, of course, covers all non-commercial (generally called "private") flights, and it also covers non-scheduled commercial flights into foreign territories unless traffic is to be put down or taken on. Our further discussion will be limited to commercial operations, since these constitute "air transport."

In the field of commercial aviation, two main considerations affect the rights of the operator. The first consideration is whether he contemplates operating a *scheduled* service, for if he does the Convention specifically provides that he may not operate over or into the territory of any foreign contracting State except with the special permission or other authorization of that State. The distinction between a scheduled international air service and a non-scheduled commercial operation is not always easy to draw, and the need for clarification on this point has prompted the Organization to spend considerable time in developing a definition of a scheduled service. It would take too long to give you the complete text of this definition. I will simply say that it contains two essential elements: in order to be "scheduled," the service must be both accessible to the public and performed with systematic regularity.

The second main consideration is whether the operator contemplates making a stop for traffic purposes in a foreign territory, for it is generally true that rights to operate non-stop or with stops for technical purposes only are accorded with considerably more freedom than traffic rights.

#### COMMERCIAL RIGHTS, NON-SCHEDULED OPERATORS

Now, if the operator is non-scheduled by reason of not falling within the definition to which I have referred, he has the right under the Convention to operate into or in transit non-stop across the territory of contracting States, and also to make stops for non-traffic purposes, all without the necessity of obtaining prior permission. However, if he desires to take on or discharge passengers, cargo or mail in any particular State, his right to do so is subject to the right of the State to impose such regulations, conditions or limitations as it may consider desirable.

The ICAO Convention gives no hint of what may be the nature of such regulations, conditions or limitations. Furthermore, there is a considerable divergence among national practices in the framing and application of these regulations. These divergencies have placed a severe handicap on the non-scheduled commercial operators. Perhaps the most irritating and frequently burdensome condition imposed is that of having to obtain prior permission for a given flight. The administrative difficulties connected with obtaining such permission may often be such as to nullify the prime advantage of the airplane as a carrier, namely, its speed. There are a number of lines along which the regulations for non-scheduled operators might be liberalized on a common basis. To name only a few of many possible points, it might be feasible to arrange for freedom for flights carried out purely on the business of the person owning the aircraft, for flights where an aircraft (particularly a small one) is wholly chartered by one person or undertaking without resale of space, or where the procurement of return loads might be facilitated. It does not seem too difficult to reach agreement, and the ICAO Council is inclined to the view that a satisfactory basis for agreement may exist. It has, therefore, advised the Assembly that if the latter shares this view the Council will give urgent consideration to the advisability and practicability of calling a conference during 1954 to discuss suitable measures of liberalization, standardization and interpretation of regulations covering this subject.

## COMMERCIAL RIGHTS, SCHEDULED OPERATORS

If, on the other hand, the operator proposes to run a scheduled service, his task under the Convention is much more complicated, for there he runs into the specific provision that no scheduled international air service may be operated over or into the territory of a contracting State except with the special permission of that State. Under prevailing practice, such rights would not be obtained directly by the operator himself, but would be negotiated on his behalf by his government. Any sort of scheduled operation is subject to this limitation, regardless of whether traffic is to be taken on or not. The framers of the Chicago Convention had tried long and earnestly to find a formula by which the exchange of commercial rights in international air transport could be written into the Convention, and international civil aviation thereby brought nearer to its ultimate goal of unrestricted service on a world-wide basis. This attempt had failed, but the Chicago Conference had instructed that the work be carried on by the Organization, and the Air Transport Committee accordingly set to work on the problem with enthusiasm.

Before recounting the history of these efforts, it will be useful to pause and refer to the nomenclature usually used in the classification of commercial rights, namely, the so-called "five freedoms":

The first freedom is the right to fly over a foreign State without landing.

The second freedom is the right to land for non-traffic purposes.

The third freedom is the right to set down traffic originating in one's own country.

The fourth freedom is the right to take on traffic destined for one's own country.

The fifth freedom, and the one that has caused most controversy and trouble, is the right to carry traffic between two foreign countries situated on one's route.

This fifth freedom is of particular importance to countries with long-distance services, say, in excess of 4,000 or 5,000 kilometers, where, as traffic is deposited by an outbound aircraft at various stages along its route, the payload progressively decreases unless other (i.e., "fifth freedom") traffic can be picked up to replace it. This is stating the problem in overly simple terms, but I believe we do not need to enter into the details here. Obviously this traffic, which is fifth freedom as to the long-distance operator we are considering, is the third and fourth freedom traffic of the local or regional air transport enterprises with whom the long-distance operator may be competing. Many countries consider competition from fifth freedom traffic offers a considerable danger to their own air services.

Fortunately for international air transport, the Chicago Conference did, however, succeed in drawing up the so-called "International Air Service Transit Agreement," which has now been signed by some 41 States. This Agreement grants to all signatory States, on a multilateral basis, the right for scheduled airlines to over-fly each other's territory and to make stops for non-traffic purposes, i.e., the Transit Agreement grants the first and second freedoms. Thus, the airlines of the respective signatory States can traverse each other's territory en route to the places where they have obtained commercial privileges without having to negotiate separate agreements for each country traversed.

In the three years following the Chicago Conference, the Air Transport

Committee attempted to reach an all-embracing multilateral agreement.<sup>2</sup> This work culminated in the creation of a Special Commission open to all member States which was convened in Geneva in November, 1947. This Commission failed to achieve its main objective, but it elaborated a new text of a possible multilateral agreement and suggested that member States study it and make use of certain of its elements in agreements of more limited scope.

Since then, ICAO has kept the problem under consideration but has not judged it worthwhile to exert another full-scale effort due to lack of promise of success. However, the forthcoming Assembly of ICAO will again have the matter before it and will examine the possibilities of a multilateral agreement on a basis other than the universal one previously attempted. Among the possibilities mentioned are approaches based on the concept of a region, such as Europe or South America, of a route, such as the North and South Atlantic routes, and of particular categories of traffic, such as cargo and mail.

In the present state of affairs, commercial privileges are still dependent on bilateral negotiations between the States concerned. These agreements require complicated negotiations into which often are injected considerations having little to do with aviation. Some 340 such bilateral arrangements linking most of the important countries of the world are now known to exist. The theoretical total of possible agreements is of course much higher, but the present network nevertheless offers a good basis for international air transport. It is interesting to note that, among the twelve countries of Western Europe where some 66 bilateral agreements are theoretically possible, some 57 pairs of countries are now linked by approximately 70 air services. This is one of the hopeful signs for this region of the world.

#### JOINT OWNERSHIP AND OPERATION

The formidable obstacles that the search for a multilateral agreement has encountered have led ICAO and its member States to cast about for other methods of achieving the desired result. As early as the Chicago Conference, it was realized that conflicting national interests and diversity of ownership were among the main factors that raised the problems, and that if a community of ownership of international air transport could be achieved then all questions of operating rights in the various participating countries should disappear. If, for instance, all the world's airlines grouped themselves into a joint air transport operating organization in which the various States would have interests, the question of commercial rights to be granted to the various national companies could hardly exist, for each State would be interested in granting the maximum of operating rights to such an organization. Moreover, it has been realized that the trend of world opinion is moving steadily in the direction of international cooperation in other fields, as witness the Schumann Plan for pooling of iron and coal resources. It has often been declared that air transport must be in the forefront of such a trend.

However, here too difficult problems of a special nature arise. Internationalization of air transport might easily be found to require the internationalization of the manufacture of aircraft and ground equipment. Differing business and accounting procedures would have to be standardized, and the language problem, difficult even where business is transacted

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<sup>2</sup> See, Cooper, "The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport," 14 *JOUR. AIR LAW & C.* 125, and McClurkin, "Geneva Commission on a Multilateral Air Transport Agreement," 15 *JOUR. AIR LAW & C.* 39.

between two parties, would prove much more difficult among employees in a world organization.

It is worth citing one notable achievement in this field that has come to fruition. This is the achievement of the Scandinavian countries in finding a workable means of consolidating their respective scheduled international aviation enterprises into a single operating entity, with the full cooperation of the three airlines and three governments concerned.<sup>3</sup> The characteristics of this arrangement are a consortium that operates to all intents and purposes as a single enterprise under the control of one head office, with the various countries participating therein to a stated extent (Sweden, 3/7, Norway and Denmark, 2/7 each). Under this arrangement, the combined enterprise has shown a financial profit in each of the first two years of its existence, and appears to be on the road to a stable and prosperous future, whereas, prior to the combination, operating deficits had been the rule.

A notable feature of the arrangement is that the three Scandinavian countries have in fact become a single territory for air transport purposes, the consortium operating between them without restriction and running also the internal services. The extent to which the apparent success of the SAS cooperative undertaking points the way to similar ventures on the part of other groups of countries is, however, a difficult question. There can be little doubt that one of the outstanding elements in the success of SAS has been the peculiar common heritage of the Scandinavian peoples, their habits of cooperation in other fields, and the similarity of their languages. Another factor no doubt is the size of the undertaking in relation to the size of the population affected. The total population of Scandinavia is of the order of 15 million, almost half of which is Swedish. The population of each of the three countries, and in particular that of Norway and Denmark, would seem somewhat small to afford sufficient traffic for a long-distance scheduled international airline. It therefore appears that in this case we have the combination of an airline of workable size serving a territory with a population adequate to provide the necessary traffic. The fact that the consortium resulted in the complete liberty of SAS to operate within all of Scandinavia as if it were a single country has no doubt been of considerable financial advantage.

No doubt there are situations where the combination of operations in a single airline would improve efficiency, notably by eliminating undesirable competitive situations and by standardizing flight equipment. As against this, however, it must be recognized first that there are many types of competition that are desirable rather than the reverse, and that it is often difficult to distinguish clearly between the desirable and undesirable features. In the second place, much can be accomplished without consolidation by pooling and other cooperative arrangements, both in the financial and technical fields.

#### POOLING AND SIMILAR ARRANGEMENTS

In Europe especially, one result of the airline operators' constant search for methods of avoiding the undesirable effects of competition has been the development of "traffic pooling" arrangements between air services of different airlines operating along the same routes.<sup>4</sup> Pooling arrangements for traffic, revenues and various reciprocal services have long been

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<sup>3</sup> See, Nelson, "Scandinavian Airlines System Cooperation in the Air," 20 *JOUR. OF AIR LAW & C.* 178.

<sup>4</sup> See, Wager, "International Airline Collaboration in Traffic Pools, Rate-Fixing and Joint Management Agreements—Part I," 18 *JOUR. OF AIR LAW & C.* 192 and Part II, 18 *JOUR. OF AIR LAW & C.* 299.

a characteristic of the European scene, and particular attention has been given to the extent to which these might be developed.

The typical revenue pools, which flourished in Europe before the last war, are apparently on the wane. Under these, it used to be common practice for services on a given route to be operated in designated proportions by the members of the pool, and revenues and sometimes also expenses apportioned accordingly. It has been estimated that in 1935 the proportion of pooled traffic within Europe was about 60%, whereas the same source estimates that it is now only about 20%. The growth of tourist services has provided a new competitive feature that may have had something to do with the shrinkage of pooling arrangements. Several cases, however, are known to exist where countries have apportioned routes between their territories, the airlines of one country operating one route and those of the other country operating another. Cooperative pooling arrangements seem to have been used hardly at all for the new long-distance services that were inaugurated after the war.

On the other hand, there seems to be a growing measure of cooperation in the more mechanical features of finance and operation. The IATA Clearing House has enormously simplified inter-company billings where a ticket sold by one line is used in part for carriage over another. Moreover, ticket selling agency agreements are general. Many instances exist where the ground handling of aircraft of all airlines at a particular airport is performed by a single company. The same is true of the operation of communications facilities, where operating agencies jointly owned by several airlines are becoming increasingly active. There is also in existence at least one common equipment purchasing agency.

#### OTHER PROBLEMS—BORDER FORMALITIES

In another field, one of the most troublesome problems that confronts an international operator, as distinct from an internal operator, is that of border-crossing formalities.<sup>5</sup>

The customs, immigration and public health procedures that have grown up over the centuries have been modeled essentially to accommodate the surface operator. One important distinction between the surface operator and the aircraft operator is that the former usually has time to complete the necessary documents on board en route; if necessary, formalities may be completed in the physical presence of the government officials concerned. This is not so with the airplane which arrives at great speed from a distance. Time consumed in filling out the necessary documentation before departure or on arrival is, moreover, relatively much more important in air transport than in surface transport. An hour and a half consumed at each end of a twelve-hour trans-Atlantic flight adds 25% to the actual travel time, whereas it would add only 2% to the time of a six-day sea voyage. Moreover, the airplane is still subject to various weather and other hazards that may compel it to turn up in a place other than its intended destination, with the possibility that all its documentation may be inapplicable.

In an effort to alleviate the difficulties caused by cumbersome border procedures, ICAO has sponsored a comprehensive set of basic documentation deemed to be sufficient to meet the legitimate requirements of the authorities of all States concerned, and has adopted Standards officially sanctioning these requirements, with the understanding that they should be maxima and that any State that can do with less documentation should come below even these relatively modest maxima. Thus, a single basic

<sup>5</sup> See, Wager, "Airline Frontier Formalities and Customs—Free Airports," 20 *JOUR. OF AIR LAW & C.* 416.

document has been developed, the filing of which by the operator is designed to take the place of the several dozen different documents that he was formerly required to furnish in many cases.

Provisions are also established for facilitating the passage of traffic that is merely in transit; for standardizing visa requirements and permitting crew members to use their licenses as identity documents for temporary admission into a State; for procedures to be taken when landings have to be made elsewhere than at international airports; for the provision of monetary exchange facilities at international airports; and for the facilitation of search, rescue and salvage operations. A new and important recommendation is that airlines be permitted to import necessary ground equipment to be used in connection with their services free of customs duties, which should help to avoid repairing and servicing delays at points of call during international flights.

#### TAXATION—LIABILITY—INSURANCE—RATES

Like the operator of any business enterprise, the international air transport operator must face the problem of taxation. This may fall on his income, his property, his turn-over, or may take the form of special taxes levied, e.g., on fuel. In view of the importance of this problem the Council of ICAO has recommended:

First, that airlines should only be taxed on their turn-over and flight equipment by their country of domicile;

Second, that the fuel used for international flights should not be subject to national taxes.

In undertaking revision of the Rome and Warsaw Conventions, ICAO has itself become keenly interested in the establishment of limits of liability for international transport. In this very city, the Rome Convention on damage caused to third parties on the surface by foreign aircraft was revised as the result of a diplomatic conference held in the autumn of 1951. ICAO has also recommended that if insurance to cover liability is required, this requirement shall be satisfied by insurance issued within any State.

The question of rates does not come within ICAO's field of action; it is the operators through the instrumentality of their own organization, The International Air Transport Association (IATA), who fix these by mutual agreement and with government approval as far as passengers and cargo are concerned. Rates for the transportation of mail, however, are fixed by States, but where transportation concerns mail carried by the airline of State A for the postal administration of State B, the rates are fixed by the Universal Postal Union. This Union has requested ICAO's collaboration in furnishing statistical and other data to be used in fixing such rates, and figures furnished by ICAO were used last year by the Universal Postal Congress of Brussels.

#### PROVISION OF AIR NAVIGATION FACILITIES—GOVERNMENT PROBLEMS

Let us now pass to two questions which are primarily of governmental concern. These both deal with the vastly complicated and financially very important problem of how to provide funds for the great network of air navigation facilities that is necessary for the operation of the air transport services of the world. Under the ICAO Convention, the primary duty to provide the necessary facilities devolves upon the State within whose territory they are to be situated. It often develops, however, that the needed facilities are either in regions of undetermined sovereignty, such as the high seas, or in remote or sparsely populated territories where the provision of the facilities at national expense would work an undue hardship



on the government concerned. In such cases, the Convention authorizes ICAO to arrange for the necessary provision of the stations through international financing. At present, ICAO can point to three major achievements in this field. By far the most important of these is the international agreement sponsored by ICAO whereby ten weather stations are maintained at various points in the North Atlantic, served in rotation by 25 ships operated by six different countries and financed in part by cash contributions from seven additional countries. These ships provide, besides periodic meteorological observations, important navigation aids and standby services for search and rescue. During their period of operation, they have saved almost 100 persons from the sea, besides lending invaluable aid to the efficient planning of trans-Atlantic flights through improved knowledge of wind and weather conditions. The other two arrangements concern air navigation services maintained in Greenland and the Faroes by Denmark, and in Iceland by the Government of that country. Altogether existing schemes under ICAO sponsorship probably involve an expenditure of about 18 million dollars per year. Several additional arrangements are pending.

The provision of air navigation facilities, whether financed nationally or internationally, is in a sense a public aid to air transport, and many governments feel that the provision of such aid should be apportioned so that the users of the services pay for at least some part thereof. ICAO has had this matter under consideration for several years, but the subject has endless ramifications. One of the first questions that arises is the *extent* to which the burden can be shifted from the providers to the users, and here it is immediately obvious that international air transport would be crippled if it were made to bear the whole burden. The method adopted by ICAO has been to study what might be done to rationalize user charges, but solution of the general problem rests in the future.

#### SPECIAL FEATURES OF AIR TRANSPORT PROBLEMS IN THEIR EUROPEAN SETTING

The twelve Western European States<sup>6</sup> comprise a total area of 3 million square kilometers, with a maximum span between important centers of population of approximately 3,000 kilometers, and with a population of approximately 260 millions. These countries are linked by an internal network operated by 29 scheduled airline companies. 15 of these companies also operate to countries beyond Europe and North Africa. If the particular routes or services operated were counted instead, the numbers would of course be multiplied several times. The services linking Europe with the outside world will not be considered, as they should be no different in principle from any long-distance operation, whether operated by a European or non-European enterprise.

Within the European Continent, however, the services have certain noteworthy features, especially when compared with operations in other large areas where common operating conditions prevail—usually as a result of single sovereignty—such as, Australia, Brazil, Canada and the United States. The density, i.e., frequency of service over particular routes in Europe, is lower than between comparable centers of population elsewhere. Fares are relatively high, but the most striking feature is the extremely low volume of service per capita rendered to the public. The average European, for instance, travels only 25 kilometers per year by air, whereas his Australian and American counterparts travel 180 and 160 kilometers, respectively. The difference would be still more striking if we only considered flights wholly within the regions concerned. One is tempted to think that

<sup>6</sup> Belgium, France, West Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Scandinavia (considered as a single State for this purpose), Spain, Switzerland and the United Kingdom.

a certain amount of consolidation both of operating entities and of national airspaces along the lines of what was done in Scandinavia should produce marked improvements.

The difficulties, of course, would be enormous, but the trend towards a solution along these lines is already marked. As early as May of 1951, the Italian Foreign Minister, Count Sforza, placed before the Council of Europe his plan for European air unification, by which it was proposed that a common airspace be created by combination of the various national airspaces, within which space the contracting States would have the right to operate freely under the supervision of a common supra-national authority. This authority, within the framework of provisions established by ICAO, would have the task of assuring liberty of air traffic; of determining provisions regulating this liberty; of granting the authority for exercising the traffic rights after having established that the financial, technical and legal conditions were satisfied; of coordinating ground facilities; and of organizing a center of study and research. The plan also proposed that a European air transport consortium be established combining the airlines of the contracting States in the first instance for the regional services, and later perhaps for the long-distance lines as well.

Not long afterwards, some half-dozen of the leading European air transport companies combined to set up a so-called Air Research Bureau—originally situated in Brussels and now moved to Stockholm—to study the whole subject of Europe's regional network, its overlappings and the ways in which it could be improved and costs cut down.

These governmental and industry measures appear to be moving on parallel lines and to be nearing fruition. A landmark was passed with the adoption by the Council of Europe, in March of 1953, of a resolution inviting ICAO to convene a European conference to arrive at methods of improving commercial and technical cooperation between the participating countries and the possibility of securing closer cooperation by the exchange of commercial rights between these European countries. Pursuant to the expressed desire of the European governments, the ICAO Council is considering ways and means of calling such a conference, at which conference we may hope to witness the beginning of a train of events that will result in an orderly air transport regime for this part of the world. If we succeed here, the results may lead by stages to the rational solution on a world-wide basis of the problems that I have attempted to sketch, problems on which ICAO has already done much work and to whose solution our experience, accumulated during the eight years of the Organization's existence, may contribute materially.