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International Civil Aviation Organization

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Introduction

1. On 27 November 1961 the Council decided that the Chairman of the Legal Committee should be requested to appoint a subcommittee of the Legal Committee to consider the comments received from States and international organizations on the draft convention of offences and certain other acts occurring on board aircraft prepared by the Legal Committee, at its Twelfth Session, held in Munich in 1959.

1.1 Accordingly, the Chairman of the Legal Committee appointed this Subcommittee.

Meetings and Membership

2. The Subcommittee met at the Headquarters of ICAO in Montreal, from 26 March to 5 April 1962. It held eighteen meetings under the chairmanship of Mr. R. P. Boyle (United States of America). The following attended:

- Mr. J. P. Houle (Canada)
- Mr. A. Garnault and Mr. P. Lescure (France)
- Mr. G. Schmidt-Räntsch (Federal Republic of Germany)
- Mr. I. Narahashi and Mr. R. Hirano (Japan)
- Mr. J. P. Honig and Mr. C. E. Cathalina (Netherlands)
- Mr. C. Gómez Jara (Spain)
- Mr. A. W. G. Kean (United Kingdom of Great Britain and Northern Ireland) and
- Mr. R. P. Boyle and Mr. J. H. Wanner (United States of America).

2.1 Mr. K. Sidenbladh (Sweden) and Mr. J. B. Diaz (Philippines), Chairman and Vice-Chairman, respectively, of the Legal Committee, were present as ex-officio members of the Subcommittee.

2.2 Observers in attendance were:

- Mr. N. H. Errecart (Argentina)
- Messrs. J. C. Cooper and J. G. Gazdik (IATA)
- Messrs. R. J. Belec and G. W. Reed (ICPO) and
- Mr. N. J. Logan (IFALPA).

2.3 Members of the Subcommittee who could not attend were:

- Mr. R. Monaco (Italy)
- Mr. E. M. Loaeza (Mexico)
- Mr. C. Berezowski (Polish People's Republic), Vice-Chairman of the Legal Committee and ex-officio member, and
- Mr. F. K. Moursi (United Arab Republic).

Preparation of this Report

2.4 The Subcommittee approved the draft of the present report at its final meeting on 5 April and authorized a Group, composed as follows, to establish the...
Method of Work

3. The Subcommittee agreed that the Munich draft convention should be considered article by article in the light of the comments which had been filed with the Organization by the States and international organizations.

3.1 It was further agreed that the purpose of the Subcommittee was not to prepare a revised draft convention, but rather, in the light of the comments of States and international organizations and its discussions thereon, to present its own comments and recommendations to the Legal Committee concerning the various articles of the draft convention. This procedure would not, however, preclude the Subcommittee from recommending to the Legal Committee redrafts of certain articles of the Munich draft where it was felt that such redrafts were desirable.

3.2 The Subcommittee considered:

(a) the comments made by States and international organizations on the Munich draft convention: these are comprised in Working Drafts Nos. 3, 4, 5 and 6 which accompany this report (Working Drafts Nos. 1 and 2 being respectively the draft convention and the report thereon prepared by the Legal Committee at Munich); and

(b) certain new proposals which were presented to the Subcommittee during its session, namely, those relating to Extradition, "Hijacking" (Unlawful Seizure of Aircraft) and Chartered Aircraft: these are dealt with in paragraphs 34 and 36.3 below.

3.3 With respect to the comments mentioned at (a) in the foregoing sub-paragraph, it should be mentioned that the Subcommittee gave careful consideration to all of them; those comments in respect of which the Subcommittee recommends specific action are particularly mentioned in this report; the other comments are not so mentioned, except in a few cases where opinion within the Subcommittee was equally, or almost equally, divided.

3.4 Attention is called to the fact that while the Subcommittee has in this report expressed its opinions or recommendations on most of the questions examined by it, it has not done so in some instances. Instead it has referred some questions to the Legal Committee, calling its attention to the necessity of finding solutions. The reason for this is that the questions concerned relate to basic issues which the Subcommittee believes require solution by the Legal Committee itself. Some examples of this are: the problems concerning State aircraft (see paragraph 9.1 below); whether it is obligatory or optional for a State party to the proposed convention to enact laws giving it jurisdiction over offences committed on its aircraft outside its territory (paragraph 15 below); extradition (paragraph 34.2); "hijacking" (paragraph 35.2 below); chartered aircraft (paragraph 36.3 below).

Commentary on the Munich Draft Article by Article

Article 1, paragraph 1, introductory part

4. The Subcommittee noted that the words "other acts" found in the introductory part of Article 1(1) were intended to mean "acts" jeopardizing the safety of the aircraft, or persons or property therein, or jeopardizing good order and discipline on board, as specified in Article 5(1). However, the Subcommittee considered that this was not entirely clear under the present text of Article 1(1) and decided to recommend that the words "other acts" be replaced by the formula used in Article 5(1), so that the text of the introductory portion of Article 1(1) would read as follows:

"1. This Convention shall apply in respect of offences and of acts which, whether or not they are an offence, may or do jeopardize
the safety of the aircraft or persons or property therein or which jeopardize good order and discipline on board, when committed or done by a person on board any aircraft registered in a Contracting State, while that aircraft is:.

As a result, consequential drafting changes have been recommended in respect of Articles 5(1) and 6(1) (see paragraphs 23.4 and 26.3 respectively).

4.1 The Subcommittee recognized that, while Article 1(1) spoke of offences and acts "committed or done", Article 5(1) referred, in addition, to anticipated acts, thus: "when the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit . . . an act . . . " (italics supplied). However, the Subcommittee considered that the lack of reference to anticipated acts in Article 1(1) would cause no difficulty in the application of Article 5(1).

4.2 In relation to the words "by a person on board" found in the introductory part of Article 1(1), the question was raised whether or not an offence or an act contemplated in Article 1(1) would fall under the convention if the person who had instigated the offence or act was not on board the aircraft at the time of occurrence. The view of the Subcommittee was that according to the present draft of the convention such person must be on board and that it was for the Legal Committee to decide whether or not the scope of the convention should be extended to include offences or acts occurring on board the aircraft while their author was not on board, e.g., a person who sent a package containing a time bomb.

5. The Subcommittee decided to recommend to the Legal Committee that the word "civil" be deleted from the introductory provision of Article 1(1) in view of the existence of the definition of "State aircraft" found in Article 1(3). If the word "civil" was kept in Article 1(1), there might be a conflict between Article 1(1) and Article 1(3). If the Legal Committee decided to delete the word "civil" from Article 1(1), consideration should be given to including a reference to civil aircraft in Article 1(3) along the lines of the statement included in the first sentence of Article 3(a) of the Chicago Convention, which sentence reads as follows:

"This Convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft."

Article 1, paragraph 1, subparagraphs (a) to (d)

6. The Subcommittee considered that subparagraph (c) should be revised to make it clear that the subparagraph applied not only to an offence committed while the aircraft in question was in flight "in the airspace of the State of registration," but also while it was in flight between two points in the territory of the State of registration even though over the high seas or areas of undetermined sovereignty. Accordingly, the Subcommittee recommends that subparagraph (c) be redrafted as follows:

"(c) In flight between two points in the territory of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board;"

6.1 The Subcommittee considered that subparagraph (c) as thus redrafted placed no limitation on the right of the State of subsequent landing to exercise jurisdiction. Thus, the convention would apply even where the offence concerned had already come to the knowledge of, and been investigated by, the authorities of the State of registration during an intermediate stop of the aircraft in the State of registration.

6.2 The Subcommittee considered that the words "if a subsequent landing is made in another Contracting State with the said person still on board" require...
clarification in future drafting. In particular, the question was raised whether the person concerned must have been continuously on board.

6.3 The Subcommittee noted that, while the English text of subparagraph (c) contained the word "still," no equivalent word was found in the French and Spanish texts. Therefore, it decided to recommend that this discrepancy be corrected by the insertion of the words "encore" and "todavía" in the French and Spanish texts respectively.

**Article 1, paragraph 2**

7. The Subcommittee noted the necessity of so drafting Articles 1(2) and 5(3) as to avoid a conflict between them and to make it clear that the provisions of the latter applied even where the aircraft was not in flight.

**Article 1, paragraph 3**

8. The Subcommittee noted that certain difficulties could arise in the application of the second sentence of Article 1(3). It could conceivably happen that there might be one civil passenger, one piece of civil cargo or one piece of mail on board a military aircraft, and the carriage of any of these for remuneration or hire would be sufficient to attract the application of the convention to the whole aircraft and to all persons on board, even if none of the latter was a civilian. In view of this problem, the Subcommittee considered it to be necessary that the Legal Committee reexamine the questions of the manner and the extent to which the convention would apply to military, customs or police aircraft. In this connection, the Subcommittee was of the opinion that any aircraft, even one owned or operated by a State, should, if used in the carriage of passenger, cargo or mail for remuneration or hire, be covered by the convention at least in so far as civilians on board were concerned.

9. Another aspect of the problem noted by the Subcommittee was that aircraft not owned by the State, but on charter to the State for military, customs or police services, might be considered to be State aircraft under two different hypotheses:

(a) the whole capacity was chartered by military, customs or police services;
(b) only part of the capacity of the aircraft was chartered by military, customs or police services and the balance of the capacity was chartered to private interests.

9.1 The Subcommittee calls attention to the necessity of finding a solution for these problems concerning State aircraft.

**Article 2**

10. After lengthy debate a majority of the Subcommittee decided to recommend the deletion of Article 2 of the Munich draft. In reaching this conclusion the Subcommittee considered the following matters.

10.1 The Subcommittee noted that the purpose of Article 2 of the Munich draft was to define the term "offences" for the purpose of the convention. Here two questions arose:

(a) The exact meaning and effect of the term "offences."
(b) The jurisdiction to which offences must be related in order to come under the convention.

(a) **The meaning and effect of the term "offences"**

11. One opinion voiced in the Subcommittee was that the offences should be listed in classes, such as, offences against the person and offences against property. Another approach would be to exclude the large number of minor offences that might otherwise fall within the convention by restricting Article 2 to offences which were of a serious nature or were extraditable. A further opinion was that
offences subject to the convention should be only those which jeopardize the safety of the aircraft, or of persons or property therein, or which jeopardize good order and discipline on board the aircraft, as in the formula used in Article 5(1) of the Munich draft.

11.1 In regard to another aspect of this question, one opinion was that it should be made clear whether, in the case of Federal States, the penal laws contemplated in that article were those of the Federation or of individual States in the Federation.

(b) The jurisdiction to which offences must be related in order to come under the convention

12. Since Article 2 of the Munich draft provided that the offences subject to the convention were those punishable by the penal laws of a Contracting State competent in accordance with Article 3, the Subcommittee considered the question whether competent jurisdictions under Article 3 of the Munich draft were, on the one hand, merely those of the State of registration of the aircraft and the State in whose airspace the offence was committed, or, on the other hand, any jurisdiction that might be applicable under national law. However, when the Subcommittee had finished its work on Article 3, it became apparent that, if Article 3 was adopted in its new form, Article 2 of the Munich draft would serve no useful purpose. In this regard, it was observed that Article 2 was not needed in order to define anything in Article 3 because the latter article was concerned solely with the question of jurisdiction.

Article 3, paragraph 1 (Introductory Words)

13. The words "Independently of any other applicable jurisdiction" occurring at the beginning of Article 3(1) of the Munich draft raised two difficulties:

1. There was the question whether they meant that there was a general concurrence of jurisdiction of the State of registration of the aircraft with the penal jurisdiction of other States imposed for any other reason or under any other legal theory (e.g., nationality of the offender, nationality of the victim, etc.).

2. There was a possibility that they could be construed as importing into the convention any jurisdiction that might be applicable under national law.

13.1 One argument adduced in favour of retaining the words "Independently . . ." was that to delete them might imply nullifying extraterritorial jurisdiction of a State (not being the State of registration of the aircraft) over its nationals or permanent residents.

13.2 However, it was finally decided to recommend the deletion of those words. At the same time, the Subcommittee decided to recommend that the following text be included in a separate paragraph in Article 3:

"This article does not set aside any basis for criminal jurisdiction which a State might have incorporated into its national laws."

Article 3, paragraph 1 (Second Part)

14. The expression "competent jurisdiction" used in the remaining part of Article 3(1) raised two questions:

1. Was it obligatory or optional for a State to enact laws giving it jurisdiction?

2. Was it obligatory or optional for a State to try offenders and to apply its penal laws to them?

15. The Subcommittee could not agree on an answer to the first question and calls the attention of the Legal Committee to the necessity of reaching a decision on this question.
16. In regard to the second question, the Subcommittee considered that, while it should be recognized that the State of registration was competent to apply its penal law to offences occurring on board its aircraft outside its territory, that State would be under no obligation to try offenders and apply its penal laws to them.

**Article 3, paragraph 2**

17. In relation to Article 3(2), the Subcommittee discussed whether or not Article 3 contained a system of priorities. According to one view, the intent of the Munich draft was that there should be absolute concurrence of jurisdiction since a proposal to have a system of priorities had been defeated during the Twelfth Session of the Legal Committee at Munich by a vote of 14 to 5. However, another view was that Article 3(2) provided, in the cases enumerated in subparagraphs (a) to (e), for a priority of the State in whose airspace the offence was committed. In addition, it was noted that, as drafted at Munich, Article 3(2) contained a direct prohibition against the exercise of jurisdiction by the State in whose airspace the offence was committed except in the cases mentioned therein.

18. On a practical level, the Subcommittee decided that the question of priority would be governed largely by the extent to which extradition treaties existed. After exhaustive debate, it decided that it would not recommend any system of priority to the Legal Committee but that it would recommend revision of Article 3(2) in order to make it clear that this provision dealt solely with the problem of keeping interference with air traffic to a minimum and did not establish any sort of priority.

19. Accordingly, the Subcommittee decided to recommend the deletion of the introductory part in Article 3(2) of the Munich draft and the adoption, in its place, of the principle that the State overflown should not oblige the aircraft to land in order to exercise criminal jurisdiction except in the cases enumerated in subparagraphs (a) to (e) of that Article. This action was stated to be without prejudice to the other rights of States under such international instruments as the Chicago Convention and the International Air Services Transit Agreement.

20. The Subcommittee, therefore, recommends that the following text be substituted for the introductory part of Article 3(2) of the Munich draft:

> “The State in whose airspace the offence was committed, if such State is not the State of registration of the aircraft, may not compel the aircraft to land in order to exercise its criminal jurisdiction, except in the following cases: . . .”

**Article 3, paragraph 3—new paragraph**

21. See paragraph 13.2 above.

**Article 4**

22. The Subcommittee rejected a proposal to delete Article 4, such proposal having been made on the grounds that it was unnecessary and that it was difficult to formulate its principle with accuracy. Among the reasons suggested in favour of retaining the article was that it was necessary in view of the system of concurrent jurisdiction found in the Munich draft convention.

22.1 Although the article was retained, the Subcommittee nevertheless decided to recommend the following amendments to it:

1. substitute the words “convicted in” in place of “prosecuted by the authorities of”;
2. add after the words “national of” the words “or permanently resident in”;
3. include in Article 4 the principle that a sentence or any part thereof already served should, in the case of subsequent conviction for the same act, be deducted in all cases, including that of a national.
22.2 A proposal to add to Article 4 the words: “or the offence was against the national security of such State” was defeated by a tie vote.

22.3 In view of the foregoing decisions, the Subcommittee recommends the adoption of the following text of Article 4:

“Where a final judgment has been rendered by the authorities of one Contracting State in respect of a person for an offence, such person shall not be convicted in another Contracting State for the same act, if he was acquitted or if, in the case of a conviction, the sentence was remitted or fully executed, or if the time for the execution of the sentence has expired, unless he is a national of, or permanently resident in, such State and its laws permit such further trial.” (Note: As indicated above, Article 4 should be completed by the inclusion of the principle concerning deduction for a sentence or any part thereof served abroad.)

Article 5, paragraph 1

23. In view of the decision to include in the introductory part of Article 1(1) the formula taken from the introductory part of Article 5(1) of the Munich draft, the Subcommittee recommends the deletion from Article 5(1) of the words “which, whether or not it is an offence, may or do jeopardize the safety of the aircraft, or persons or property thereon, or which jeopardizes good order and discipline on board,” and the substitution therefor of the words “contemplated in Article 1, paragraph 1.”

23.1 The Subcommittee decided to recommend that the expression “measures of restraint” be amended to read “measures including restraint”, because the existing expression appeared to specify “restraint” as the only measure which could be taken. It also decided to recommend that the word “measures” should be qualified by the term “reasonable.”

23.2 The question was raised whether the expression “which seem necessary” should not be changed so as to provide for a subjective test, namely, “which seem to him to be necessary.” It was decided to place this proposal before the Legal Committee without the Subcommittee taking a decision upon it.

23.3 It was agreed to recommend that the word “disembark” should be added in clause (c) before the words “the person” in place of the word “deliver”; and also to insert the words “or deliver such person” after the words “restrained.” Clause (c), as thus amended, would read as follows:

“(c) to enable him to disembark the person so restrained or deliver such person to competent authorities.”

23.4 In view of the foregoing recommendations, the proposed new text of Article 5(1) would read as follows:

“1. When the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act contemplated in Article 1, paragraph 1, the aircraft commander may impose upon such person reasonable measures including restraint which seem (to him) to be necessary:
   (a) to protect the safety of the aircraft, or persons or property therein; or
   (b) to maintain good order and discipline on board; or
   (c) to enable him to disembark the person so restrained or deliver such person to competent authorities.”

Article 5, paragraph 3

24. The Subcommittee agreed to recommend to the Legal Committee that, in the first sentence of Article 5(3), the words “when embarkation on board has been completed and the moment when disembarkation has commenced” should
be replaced by the words “when the person concerned has embarked and the moment when he disembarks.” Here, it was noted that acts jeopardizing the safety of the aircraft and its contents could occur even if only a single passenger was on board during the period of embarkation or disembarkation. In such a case, even if the doors of the aircraft were open, measures to preserve safety might be so urgently required that crew members could hardly be expected to wait for the intervention of local police.

24.1 In this regard, the Subcommittee invites attention to the comments made in paragraph 7 above.

25. The Subcommittee, therefore, recommends the adoption of the following new text of Article 5(3):

“(3) Such powers of the aircraft commander, crew members and passengers and the powers conferred by Article 6 may be exercised with respect to an act contemplated in Article 1, paragraph 1, when committed between the moment when the person concerned has embarked and the moment when he disembarks if the flight is one of those described in Article 1, paragraph 1. In the case of a forced landing outside an airport, such powers of the aircraft commander shall continue as to acts committed on board until competent authorities take over the responsibility for the aircraft, persons and property on board.”

26. In regard to the first part of this provision, it was pointed out that the aircraft commander might have difficulty in deciding whether or not an act constituted an “offence,” let alone a “serious offence.” This would be so even if he had to make such determination merely by reference to the law of the flag of the aircraft. The difficulty would be compounded if he had, instead, to refer to the penal laws of a wide variety of States. In particular, it was observed that an act which might be a serious offence under the law of one State, might not even be an offence under the law of another.

26.1 The Subcommittee, therefore, agreed that the convention should establish an objective test, i.e., one which would enable the aircraft commander to disembark a person who jeopardizes safety or good order and discipline. Accordingly, it recommends that there be deleted from Article 6(1) the words “has committed a serious offence on board the aircraft, or.”

26.2 In order to be consistent with the amendments recommended in the case of Articles 1(1) and 5(1), the Subcommittee recommends the deletion from Articles 6(1) of the words “which, whether or not it is an offence, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board” and the substitution therefor of the words “contemplated in Article 1, paragraph 1”.

26.3 Consequently the proposed new text of Article 6(1) reads as follows:

“1. The aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1.”

26.4 The next question considered by the Subcommittee was whether the aircraft commander should be empowered to disembark a person in “any” State under the circumstances described in Article 6(1), because this would include non-contracting States. In this regard, it was appreciated that the convention would bind only Contracting States and that it could not impose requirements on a non-contracting State. However, the Subcommittee was of the opinion that it would nevertheless be appropriate for the convention to continue to grant the aircraft commander the power of disembarkation under Article 6(1) in any
State since such a provision, coupled with the provision giving him immunity from suit (Article 9), would protect him in circumstances where disembarkation was necessary in the interest of safety and good order and discipline, irrespective of whether or not the State of landing was willing to permit the person disembarked to remain in its territory.

**Article 6, paragraph 2**

27. In connection with Article 6(2), the Subcommittee considered several problems including the following:

1. Whether the text of the Munich draft was susceptible of the interpretation that the aircraft commander might hold the person concerned in custody while the aircraft was on the ground in a non-contracting State in order to deliver him to the competent authorities of the next Contracting State in which the aircraft landed.

2. Whether the aircraft commander might deliver to the competent authorities of a Contracting State any person on whom he had imposed restraint by virtue of action taken under Article 5.

3. Whether Article 6(2) should be confined to the case where the aircraft commander had reason to believe that the person concerned had committed on board an aircraft an act which, in his opinion, was a serious offence under the penal laws of the State of registration.

27.1 Having examined all of the three problems mentioned above, the Subcommittee adopted and **recommends** the following new text of Article 6(2):

"2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person upon whom he has imposed measures of restraint pursuant to Article 5, if he has reasonable grounds to believe that such person has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal laws of the State of registration of the aircraft."

27.2 In the case of the first problem, it was recalled that the Legal Committee at Munich had taken a clear decision not to permit the onward carriage of the suspected offender under the circumstances described in item (1) above. (ICAO Legal Committee, Twelfth Session, Vol. I (Minutes), page 187.) That being so, the Subcommittee decided to **recommend** that there be no exception which would permit the onward carriage of the suspected offender to a Contracting State from a non-contracting State in which a landing had been made. However, the Subcommittee **calls the attention** of the Legal Committee to the fact that neither the recommended text, nor the Munich text disposes of the possible interpretation mentioned.

**Article 8, paragraph 1**

28. One criticism made of Article 8(1) was that it served no useful purpose, since the State of registration of the aircraft could always require, under its national laws, the kind of reports contemplated by that provision.

28.1 It was indicated that if Article 8(1) had any virtue at all, it was that the provision would serve as a defence under Article 9 of the Munich draft if an action was brought against an aircraft commander for having made a report of the kind contemplated by Article 8(1). However, the Subcommittee felt that this was a situation which persons reporting offences commonly had to face outside the convention, and that there was no need to have a specific provision covering this point.

28.2 In view of the foregoing, it was agreed to **recommend** that Article 8(1) be deleted.
Article 8, paragraph 2
29. The Subcommittee did not adopt a proposal to delete Article 8(2). Instead, it decided to recommend that, under the circumstances described in Article 8(2), some notification should be given to the competent authorities of the State where the aircraft intended to land, but that the obligation to notify should apply only in relation to a case where a person on board was under restraint by virtue of the provision of Article 5. In reaching this decision, the Subcommittee noted that, quite aside from any obligation that the aircraft commander might have to give notifications under the convention, he could, in any event, of his own volition, notify the competent authorities of any State of any occurrences on board his aircraft.
29.1 The Subcommittee adopted the following text which it recommends as a substitute for the provisions of Article 8 of the Munich draft:

“Young the aircraft commander shall, before landing in the territory of a State, with a person on board who is under restraint in accordance with the provisions of Article 5, as soon as practicable, notify the competent authorities of the State where he intends to land of the fact that a person on board is under restraint and of the reasons for such restraint.”

Article 9
30. The Subcommittee decided to recommend the deletion of the word “reasonable” before the words “restraint” and “performance” respectively, and, as previously mentioned in paragraph 23.1 above, to introduce the word “reasonable” before the word “measures” in Article 5(1).
30.1 Doubt was expressed as to whether the words “any proceedings” were sufficient to cover not only civil and criminal proceedings but also, as intended by the Legal Committee at Munich, proceedings of an administrative character such, for example, as any which might lead to revocation of a license of a crew member. The Subcommittee decided that this was a question of drafting which could be considered by the Legal Committee.

Article 10, paragraph 1
31. The Subcommittee decided to call to the attention of the Legal Committee that it appears from the comments of some States that it might be desirable to make it clear that the immigration laws of the State in whose territory a person was disembarked would not be affected by this convention; also that any right of the State of disembarkation, under its national law, to require an airline to carry the unwanted passenger away or to pay for his transportation, would not be affected by the convention.

Article 10, paragraph 2
32. The Munich draft does not deal with the question as to what arrangements may be made by the State in whose territory a person is disembarked or delivered by the aircraft commander but the authorities of which State do not wish to detain him. Comments received from certain States indicated the desirability of adding in Article 10 a provision to solve this question. Therefore, the Subcommittee recommends that a provision along the following lines should be included as paragraph 4 in Article 10:

“At the request of the State in whose territory the person is disembarked or delivered, the State of which he is a national, the State of which he is a permanent resident and the State in which he began his journey shall be obliged to admit him into its territory, unless he is a national of, or permanent resident in, the requesting State.”

1 See the Minutes of the Twelfth Session of the Legal Committee, Vol. I, pp. 194-197.
32.1 While accepting the foregoing, some members wished to expand the principle along the following lines:

(a) that in addition to the States mentioned, the State of destination of the passenger disembarked or delivered should also be obliged to accept him; and
(b) that as amongst the foregoing States, there should be an order of priority established in regard to the obligation to admit such person.

32.2 Another question raised in the comments of some States with reference to paragraph 2 of Article 10 was to the effect that, if the State where a person is delivered by the aircraft commander does not have jurisdiction or does not wish to exercise it, it should nevertheless be obliged, by a specific provision in the convention, to arrest such person provisionally, pending the receipt of a request for extradition in accordance with existing treaties. This would be the case only if the elements of an extraditable offence were disclosed. A specific proposal in this connection was that the convention should provide that the delivery of the person concerned by the aircraft commander should be deemed to constitute a request for provisional arrest in order to set in motion the procedures relevant to extradition. In this way the State would be enabled to detain the person concerned provisionally for a short time. These proposals failed to find a majority in the Subcommittee.

32.3 The Subcommittee decided to recommend that the word “apparent” in the English text before the word “offence” in paragraph 2 should be deleted and replaced by the word “alleged.”

32.4 It appeared to the Subcommittee that the present drafting of paragraph 2 of Article 10 was unclear in that it probably did not fully bring out the intention of the Munich draft that the State in whose territory a person is delivered by the aircraft commander is under no obligation to take him into custody; that it would take him into custody only if its laws so permitted and further only if the circumstances of the particular case warranted that action; and, lastly, that all its national procedures and laws relevant to safeguarding of human rights, such as the maximum period of detention, the right to have counsel, the right to be informed of the specific reasons for his arrest and so on, would be applicable to the case.

Article 10, paragraph 3

33. In the opinion of the Subcommittee, the present language of the opening portion of paragraph 3 is inaccurate in speaking of “the State having custody.” Actually, it might be that the State has refused to take the individual concerned into custody. Therefore, the Subcommittee recommends that the expression “if the State having custody” be replaced by the phrase “if the State to which the person is delivered by the aircraft commander.”

33.1 The Subcommittee decided to recommend that the word “apparent” occurring before the word “offence” in the English text of Article 10(3) should be deleted and replaced by the word “alleged”.

33.2 Accordingly, the Subcommittee recommends the adoption of the following text of Article 10(3):

“If the State to which the person is delivered by the aircraft commander pursuant to Article 6, paragraph 2, has no jurisdiction over the offence or does not wish to exercise such jurisdiction, it shall make a preliminary investigation of the alleged offence and shall report its findings and such statement or other evidence as it may obtain to any State in whose territorial airspace the offence was committed, the State of registration of the aircraft and the State of nationality of the suspected offender.”
Proposed Additional Provisions

Extradition

34. The Subcommittee examined a proposal to introduce the following new article into the convention:

"Nothing in this Convention shall be deemed to create a right to request extradition of any person or an obligation to grant extradition. However, the term "jurisdiction" in any arrangements respecting extradition between States parties to this Convention shall, with respect to an offence to which this Convention applies, be taken to include jurisdiction as specified in Article 3(1) of this Convention."

34.1 The second sentence of the proposal was regarded by some as objectionable, because it would be dangerous to try to modify, by a multilateral treaty, existing bilateral treaties concerning extradition. The exact terms and language of each one of the latter treaties, of which there might be several hundred, would have to be examined and interpreted, before the proposed second sentence of the new article could be accepted and this was impracticable. However it was agreed that it was necessary to consider the problem dealt with by the second sentence.

34.2 In view of the foregoing, the Subcommittee recommends that the draft convention include an article reading as follows:

"Nothing in this Convention shall be deemed to create a right to request extradition of any person or an obligation to grant extradition."; and

(2) calls the attention of the Legal Committee to the problem raised by the second sentence.

"Hijacking" (Unlawful Seizure of Aircraft)

35. A United States proposal (LC/SC "Legal Status 1962" No. 5) was placed before the Subcommittee. In this connection the Subcommittee discussed the problem of the carriage of arms on aircraft.

35.1 There was general agreement that the United States proposal was important. It was noted that this proposal would introduce a description of a particular crime into the draft convention which up till now did not refer specifically to any particular offence.

35.2 The Members of the Subcommittee pointed out that they had not had an opportunity of consulting the authorities in their respective States in regard to the United States proposal because they had received the proposal at a late date. Thus, there had been very little time to consider the important issues arising from the proposal. The Subcommittee considered that the proposal should be examined by the Governments of the Contracting States, so that the Legal Committee, when it met in Rome, on 28 August 1962, would have the views of the Governments before it. It was also the general opinion that, while the proposal could be the subject matter of a separate international agreement, nevertheless it raised questions closely related to the Munich draft convention. Accordingly, the Subcommittee decided to recommend to the Legal Committee to consider the United States proposal in connection with the Munich draft convention.

Chartered Aircraft

36. The Subcommittee considered a suggestion that the convention should include the following provision concerning chartered aircraft:

"An aircraft chartered without a crew to an operator who is a national of a State other than the State of registration of the air-
craft shall, for the purpose of this Convention, be treated as if, for the period of charter, it was registered in the State of which the charterer is a national."

36.1 The Subcommittee was given the example of an offence being committed on board an aircraft leased by the operator of the State of registration to an operator located in a State far removed from the State of registration. Such offence might be committed over the high seas on the other side of the world by a person who did not have the remotest connection with the State of registration of the aircraft. Under these circumstances it would be impracticable to insist that the offender should be taken to the State of registration for trial.

36.2 Some uneasiness was expressed in regard to the proposed text, since the nationality of the operator was not necessarily a good basis for constructive registration of a chartered aircraft. For example, the operator might be a person or entity of dual nationality or even a Stateless person.

36.3 The Subcommittee decided to report to the Legal Committee that the problems dealt with by the above-mentioned proposal is an important matter which requires solution, but that the foregoing proposal had some defects. In any event, the Subcommittee noted that the Council had referred Resolution B of the Guadalajara Conference to the Fourteenth Session of the Assembly, and that this Resolution dealt with a very closely related problem. Consequently, the Subcommittee was of the opinion that whatever work was carried out by the Legal Committee on the question of chartered aircraft in relation to the draft convention on offences and other acts occurring on board aircraft should be consistent with the work which ICAO might carry out with respect to Resolution B of the Guadalajara Conference.

37. In the course of making this report on the comments received from States and international organizations on the Munich draft convention, the Subcommittee has made recommendations for redrafting some of the articles of the Munich draft. For convenience, the recommended redraft of each article of the draft convention is set out in the Appendix hereto, which contains also, for comparison, the Munich text of all the articles.
APPENDIX

Text of the Munich draft convention

Article 1

1. This Convention shall apply in respect of the offences and other acts hereinafter mentioned when committed or done by a person on board any civil aircraft registered in a Contracting State, while that aircraft is:

(a) in flight in the airspace of a State other than the State of registration; or

(b) in flight between two points of which at least one is outside the State of registration; or

(c) in flight in the airspace of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board; or

(d) on the surface of the high seas or of any other area outside the territory of any State.

2. For the purposes of this Convention an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends.

3. This Convention shall not apply to State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft; however, any aircraft engaged in the carriage of passengers, cargo or mail for remuneration or hire shall be subject to this Convention.

Text of redraft proposed by the Subcommittee (Montreal, March-April 1962)

Article 1

1. This Convention shall apply in respect of offences and of acts which, whether or not they are an offence, may or do jeopardize the safety of the aircraft or persons or property therein or which jeopardize good order and discipline on board when committed or done by a person on board any aircraft registered in a Contracting State, while that aircraft is: (see para. 4 of the Report)

(a) No change

(b) No change

(c) in flight between two points in the territory of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board; or (see para. 6 of the Report)

(d) No change

2. No change

3. No change (But see paras. 8 and 9.1 of the Report)
Article 2

Offences, for the purposes of this Convention, are offences punishable by the penal laws of a Contracting State competent in accordance with Article 3.

Article 3

1. Independently of any other applicable jurisdiction, the State of registration of the aircraft is competent to exercise jurisdiction over offences committed on board the aircraft.

2. The criminal jurisdiction of a State in whose airspace the offence was committed, if such State is not the State of registration of the aircraft or the State where the aircraft lands, shall not be exercised in connection with any offence committed on an aircraft in flight, except in the following cases:

(a) if the offence has effect on the territory of such State;

(b) if the offence has been committed by or against a national of such State;

(c) if the offence is against the national security of such State;

(d) if the offence consists of a breach of any rules and regulations relating to the flight and manoeuvre of aircraft in force in such State;

(e) if the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under an international agreement.

3. This article does not set aside any basis for criminal jurisdiction which a State might have incorporated into its national laws. (see para. 13.2 of the Report)
Article 4
Where a final judgment has been rendered by the authorities of one Contracting State in respect of a person for an offence, such person shall not be prosecuted by the authorities of another Contracting State for the same act, if he was acquitted or if, in the case of a conviction, the sentence was remitted or fully executed, or if the time for the execution of the sentence has expired, unless he is a national of such State and its laws permit such further trial.

(Note: As indicated in paragraph 22.1 of the report, Article 4 should be completed by the inclusion of the principle concerning deduction for a sentence or any part thereof served abroad.) (see para. 22.3 of the Report)

Article 5
1. When the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act which, whether or not it is an offence, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board, the aircraft commander may impose upon such person measures of restraint which seem necessary:

(a) to protect the safety of the aircraft; or persons or property therein; or

(b) to maintain good order and discipline on board; or

(c) to enable him to deliver the person so restrained to competent authorities.

1. When the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act contemplated in Article 1, paragraph 1, the aircraft commander may impose upon such person reasonable measures including restraint which seem [to him] to be necessary: (see para. 23.4 of the Report)

(a) No change

(b) No change

(c) to enable him to disembark the person so restrained or deliver such person to competent authorities. (see para. 23.4 of the Report)
2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or persons or property therein.

3. Such powers of the aircraft commander, crew members and passengers and the powers conferred by Article 6 may be exercised with respect to acts, whether offences or not, of the kind described in paragraph 1 of this Article when committed between the moment when embarkation on board has been completed and the moment when disembarkation has commenced if the flight is one of those described in Article 1, paragraph 1. In the case of a forced landing outside an airport, such powers of the aircraft commander shall continue as to acts committed on board until competent authorities take over the responsibility for the aircraft, persons and property on board.

4. For the purposes of this Convention, the aircraft commander is the individual on board an aircraft who is responsible for the operation and safety of that aircraft.

Article 6

1. The aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed a serious offence on board the aircraft, or has committed, or is about to commit, on board the aircraft an act which, whether or not it is an offence, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board.
2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed a serious offence on board the aircraft.

Article 7

The aircraft commander shall transmit to the authorities to whom any suspected offender is delivered pursuant to the provisions of Article 6, paragraph 2, relevant evidence and information which, in accordance with the law of the State of registration of the aircraft, are lawfully in his possession.

Article 8

1. The aircraft commander shall report to the competent authorities of the State of registration of the aircraft the fact that an apparent offence has occurred on board, any restraint of any person, and any other action taken pursuant to this Convention, in such manner as the State of registration may require.

2. The aircraft commander shall, as soon as practicable, notify the competent authorities of any Contracting State in which the aircraft lands of the fact that an apparent offence or an act endangering the safety of the aircraft or persons or property therein has occurred and that the suspected person is on board.

2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person upon whom he has imposed measures of restraint pursuant to Article 5, if he has reasonable grounds to believe that such person has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal laws of the State of registration of the aircraft. (see para. 27.1 of the Report)

Article 7

No change

Article 8

1. Deleted (see para. 28.2 of the Report)

The aircraft commander shall, before landing in the territory of a State with a person on board who is under restraint in accordance with the provisions of Article 5, as soon as practicable, notify the competent authorities of the State where he intends to land of the fact that a person on board is under restraint and of the reasons for such restraint. (see para. 29.1 of the Report)
Article 9

Neither the aircraft commander, other member of the crew, a passenger, the owner or operator of the aircraft nor the person on whose behalf the flight was performed, shall be liable in any proceedings brought in respect either of any reasonable restraint imposed under the circumstances stated in Article 5 or of the reasonable performance of other action authorized by Articles 6, 7 and 8.

Article 10

1. Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 6, paragraph 1.

2. Any Contracting State shall take custody of any person whom the aircraft commander delivers pursuant to Article 6, paragraph 2, upon being satisfied that the circumstances warrant taking such person into custody and the Contracting State assumes such obligation pursuant to its regulations and laws. If the circumstances involve an offence the State having custody shall promptly notify any State in whose territorial airspace the offence was committed, the State of registration of the aircraft and the State of nationality of the suspected offender of the nature of the apparent offence and the fact that the suspected offender is in custody.

3. If the State having custody has no jurisdiction over the offence or does not wish to exercise such jurisdiction, it shall make a preliminary investigation of the apparent offence and shall report its findings and such statements or other evidence as it may obtain to any State in whose territorial airspace the offence was committed, the State of registration of the aircraft and the State of nationality of the suspected offender.

Article 9

Neither the aircraft commander, other member of the crew, a passenger, the owner or operator of the aircraft nor the person on whose behalf the flight was performed, shall be liable in any proceedings brought in respect either of any restraint imposed under the circumstances stated in Article 5 or of the performance of other action authorized by Articles 6, 7 and 8. (see para. 30 of the Report)

Article 10

1. No change

2. No change except that in the English text the word "apparent" before "offence" is to be changed to "alleged". (see para. 32.3 of the Report)

3. If the State to which the person is delivered by the aircraft commander pursuant to Article 6, paragraph 2, has no jurisdiction over the offence or does not wish to exercise such jurisdiction, it shall make a preliminary investigation of the alleged offence and shall report its findings and such statements or other evidence as it may obtain to any State in whose territorial airspace the offence was committed, the State of registration of the aircraft and the State of nationality of the suspected offender. (see para. 33.2 of the Report)
4. At the request of the State in whose territory the person is disembarked or delivered, the State of which he is a national, the State of which he is a permanent resident and the State in which he began his journey shall be obligated to admit him into its territory, unless he is a national of, or permanent resident in, the requesting State. (see para. 32 of the Report)

Article 11

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

Extradition

No provision concerning extradition appears in the Munich draft.

Extradition

Nothing in this Convention shall be deemed to create a right to request extradition of any person or an obligation to grant extradition. (see para. 34.2 of the Report)
At its Munich meeting, the Legal Committee appointed a rapporteur to report on international conventions concerning liability in respect of nuclear materials, in the course of preparation by the Organization for European Economic Cooperation (O.E.E.C.) and the International Atomic Energy Agency (I.A.E.A.). The O.E.E.C. (now replaced by O.E.C.D.) is an organization consisting of seventeen European States, but the United States and Canada have a certain interest as associated States. The I.A.E.A. is associated with the United Nations.

On July 29th, 1960, the O.E.E.C. Convention was signed at Paris. It has been ratified by Spain and Turkey. Though primarily of regional interest because of its geographical application, it is also of wider interest because it deals with problems which may arise in any part of the world. Your rapporteur may therefore be forgiven for examining it in some detail, insofar as it affects civil aviation. To do so may assist in examining the drafts prepared under the auspices of the I.A.E.A. [See 27 J. Air L. & Com. 170-80 (1960) ed.]

The Paris Convention is based on the premise that damage caused by a nuclear incident may be of catastrophic proportions. It is accepted, from inquiries made, that there is a limit to the amount of insurance cover which is available for that kind of damage, and that nuclear insurance will not in practice be available to the general public, as the available cover will be exhausted by insurance taken out by the operators of nuclear installations. Accordingly, the Paris Convention adopts two general principles:

(i) All liability for nuclear damage is channelled to the operator of the nuclear installation, that is to say, the operator of the installation is made liable without proof of fault, and every other person is exonerated from liability, even though at fault. (Articles 3 and 6).

(ii) A limit is placed upon the liability of the operator of the nuclear installation, who is required to carry insurance or make other provision for meeting his liability up to that limit. (Article 7).

The first of these principles is possibly novel in jurisprudence. In relieving negligent persons of liability, it recognizes that the prospect of incurring civil liability is not always an essential incentive to taking care; the consequences of negligence may be so serious as to amount to an incentive in themselves, and penal provisions may further discourage negligent conduct. The principle also recognizes that it is likely to be fruitless to impose civil liability on the negligent person if he is in practice unable to provide financial cover to meet so large a potential obligation. In consequence, the Convention applies the theory of risque to the operator of the nuclear installation, without whose activities there would be no danger of a nuclear incident. It not only saddles him with liability, whether or not he is at fault, but requires him to carry insurance or make other financial provision (e.g. obtain a government guarantee) so as to ensure that he can meet his obligations. Because it is impossible to obtain insurance up to an unlimited amount, the liability of the operator of the nuclear installation, and with it the duty to carry insurance, are limited to 15,000,000 European Monetary Agreement units of account (corresponding to the United States dollar), or such greater or lesser amount as may be established by the law of the Contracting State in which the nuclear installation is situated, having regard to the operator's possibilities of obtaining insurance or other security; but the lowest limit which may be established is the equivalent of U.S. $5,000,000.

Your rapporteur does not propose to restate the many detailed provisions of the Convention, but only to examine those points which appear to be of special interest from the viewpoint of civil aviation. These concern—
(a) the carriage of nuclear substances by air; and
(b) the collision of aircraft with nuclear installations, or with ships, vehicles or aircraft carrying nuclear substances.

The Convention does not deal with the possible development of nuclear-propelled aircraft.

6. The Convention applies to damage to or loss of life of any person, as well as damage or loss of any property, caused by a nuclear incident involving nuclear fuel or radioactive products or waste in, or nuclear substances coming from, a nuclear installation. (Articles 3 and 4). An effect of these provisions, when interpreted with the aid of a somewhat complicated system of definitions (Article 1) is to exclude from the provisions of the Convention radioisotopes outside a nuclear installation which are used or intended to be used for any industrial, commercial, agricultural, medical or scientific purpose. Your rapporteur understands that isotopes of this nature are the principal nuclear substances likely to be carried by air, and that an accident to them is not likely to produce the catastrophic consequences at which the Convention is directed. Radioactive waste, which may involve catastrophic consequences, is in practice excluded from carriage by air because of the great weight of the required shielding, and because of the lack of an economic need for its speedy arrival at its destination. Accordingly, the interest of the Convention for aircraft operators as carriers of nuclear substances is somewhat limited, though it is not excluded.

7. Your rapporteur understands that it is by no means impossible for the collision of an aircraft with a nuclear installation, or with a ship or vehicle carrying nuclear substances, to give rise to damage on a large scale, particularly in case of a fire which disseminates radioactive particles. It is for this reason that the laws of some States regulate the height below which an aircraft may not fly above or near a nuclear installation.

8. The effect of Articles 4 and 6 of the Convention will be to exonerate the operator of the Aircraft from all liability for damage caused by a nuclear incident, and to channel liability solely to the operator of the nuclear installation involved, which, in the case of carriage of nuclear substances by air, will be either the nuclear installation from which they come, or the nuclear installation to which they are consigned. An exception is, however, allowed by Article 4(e) which permits the legislation of Contracting States to substitute the carrier for the nuclear operator as the person solely liable. This, however, may only be done with the carrier's consent. The exception was inserted to meet what was thought to be the not unlikely possibility of the emergence of road carriers who would specialize in the carriage and insurance of nuclear substances. It might conceivably result in carriers by air being subject to pressure to make similar arrangements, but this does not seem to be likely in practice.

9. Article 4 of the Convention includes provisions for determining its application when the carriage is between a nuclear installation in the territory of a Contracting State and a point outside that territory, and in such a case liability is channelled to the operator of the installation in the Contracting State. Under Article 4 the point at which transition to or from the regime of the Convention takes place is the point of loading or unloading in the territory of the non-Contracting State upon the means of transport by which the nuclear substances have been, or are to be, carried to or from that territory. The Convention presumably cannot affect the law of the non-Contracting State, unless as part of the proper law of the contract of carriage. Furthermore, under Article 2 the Convention does not apply to nuclear incidents occurring in the territory of a non-Contracting State or to damage suffered there, unless otherwise provided by national legislation (presumably of the Contracting State whose courts are seized of the case: see Article 14(b) ). Article 2 therefore neutralizes to a great degree the application of the Convention to nuclear substances awaiting unloading, or
which have been loaded, in the territory of a non-Contracting State. These pro-
visions seem difficult to follow.

10. The effect of channelling liability to the operator of the nuclear installa-
tion, and so relieving the carrier of all liability, may be welcome to aircraft
operators, but it will be contrary to the provisions of the Warsaw Convention
where that Convention applies, if indeed nuclear substances are ever carried in
the same aircraft as passengers and other cargo. Similarly, the exoneration of
the aircraft operator may be contrary to the Rome Convention if surface damage
is caused either by a nuclear cargo or by collision with a nuclear installation or
with an aircraft, ship or vehicle carrying nuclear substances. Accordingly, Article
6(b) of the Paris Convention provides that the exoneration conferred by that
Convention is not to affect the application of any international agreement in the
field of transport in force or open for signature, ratification or accession at the
date of the signature of the Paris Convention. The neat device is adopted of
giving the person liable under those Conventions a right of recourse against
the operator of the nuclear installation (Article 6(c)), thereby preventing conflict
with existing Conventions, while at the same time in effect channelling the
liability back to the nuclear operator. His liability will, however, be subject to
limitation, and the aircraft operator will not necessarily recover in full the amount
he has been obliged to pay under existing Conventions. The Guadalajara Con-
vention, signed in September, 1961, is not an existing convention for this pur-
pose, though it may be possible to argue that any liability arising under that
Convention is in truth liability arising under the Warsaw Convention in its
amended form, or as amended at the Hague. There might be some difficulty in
deciding whether, in the peculiar circumstances in which the Guadalajara Con-
vention applies, the air carrier enjoys the right of recourse given by Article 6(c)
of the Paris text against the operator of the nuclear installation.

11. It is of importance to aircraft operators that the Paris Convention grants
them exoneration from liability for nuclear damage even though they or their
servants or agents have been guilty of negligence, the operator of the nuclear
installation being given no right of recourse against other persons except in the
limited circumstances of Article 6(f). These are as follows:

“(i) if the damage caused by a nuclear incident results from an act or
omission done with intent to cause damage against the individual
acting or omitting to act with such intent;
(ii) if and to the extent that it is so provided expressly by contract;
(iii) if and to the extent that he is liable pursuant to Article 7(e) for
an amount over and above that established with respect to him
pursuant to Article 7(b), in respect of a nuclear incident oc-
curring in the course of transit of nuclear substances carried out
without his consent, against the carrier of the nuclear substances,
except where such transit is for the purpose of saving or attempt-
ing to save life or property or is caused by circumstances beyond
the control of such carrier.”

Sub-paragraph (iii) relates to an increase of the limits of liability by virtue of
Article 7(e), which allows a State to subject the transit of nuclear substances
through its territory to an increased limit of its own choosing. In such a case the
operator of the nuclear installation may recover from the carrier the amount of
any additional liability which the nuclear operator has incurred by reason of the
nuclear substances being carried, without his consent, into the territory of a
State imposing higher liability. However, Article 7(e) does not apply to carriage
by air where, by agreement or under international law, there is a right to fly
over or land in the territory of the State concerned. This virtually eliminates
the risk of an aircraft operator being saddled with any part of the liability for a nuclear incident under Article 7(e), though an error in navigation might in certain circumstances produce that result.

12. Attention is particularly drawn to Article 3(b)(ii) and Article 7, which respectively exclude from the strict liability of the nuclear operator damage occurring to the carrying means of transport, and permit that liability to be restored by national legislation so long as the nuclear operator's liability in respect of other damage is not reduced below $5,000,000. This extraordinary provision evidently arises from a fear that damage to a particularly expensive means of transport (whether an aircraft or a ship) might absorb the whole or greater part of the limitation sum, to the detriment of other claimants.

13. Also worthy of note is the benefit which the drafters of the Paris Convention may have inadvertently conferred upon aircraft operators by defining nuclear incident in such a way as to include any occurrence, or succession of occurrences having the same origin, which causes damage, any of which arises out of radioactive properties. If, therefore, the collision of an aircraft with a nuclear installation causes any radioactivity damage, however small, the operator of the nuclear installation will apparently be liable under Article 3 (up to the applicable limits) not only for the radioactivity damage but also for the impact damage caused by the collision to the aircraft, its passengers and cargo; and the operator of the aircraft will be exonerated by Article 6(b) notwithstanding his own negligence or that of his servants or agents. Whenever, however, the Warsaw Convention or the Rome Convention applied in the circumstances, the operator of the aircraft would be primarily liable, but would enjoy a right of recourse against the operator of the nuclear installation. So far as your rapporteur is aware, these benefits were not sought by aircraft operators, and indeed he understands that, with the exception of Sweden, the Governments of the States signatory to the Convention have subsequently declared that it is not their intention to interpret Article 3 in this generous manner. The effect of those declarations may depend upon national law.

14. Article 4(d) of the Convention requires the operator of the nuclear installation to provide the carrier of nuclear substances with a certificate (known as a "green card") stating the name and address of the nuclear operator, and the amount, type and duration of the insurance or other financial security covering the shipment. The certificate must be issued by the insurer or other financial guarantor, and these statements cannot be disputed by him. The certificate is likely to be of value to carriers, as assuring them that the shipment is in fact covered by the required security.

15. Certain reservations made to the Paris Convention are of interest in relation to civil aviation:

(1) The German Federal Republic, Austria and Greece reserved the right to impose liability on persons additional to the operator of the nuclear installation but only if those persons are fully covered by security obtained by the nuclear operator. This reservation, therefore, allows the aircraft operator to be made liable, but the nuclear operator must provide him with insurance or similar cover. Nevertheless, the aircraft operator might suffer detriment if his aircraft were seized in order to enforce his primary liability. This reservation evidently flows from a constitutional or philosophical objection to channelling liability to the operator of the nuclear installation if, for example, the damage has been caused by the negligence of some other person.

(2) Austria, Greece, Norway and Sweden reserved the right to treat as existing international agreements their existing national legislation which includes provisions equivalent to those of international agree-
ments. This would avoid conflict between the Paris Convention and, for example, national legislation applying the principles of the Warsaw or Rome Conventions, even though those Conventions did not in fact apply.

16. It will be evident from this analysis of those parts of the Paris Convention which most closely concern civil aviation that it is a complicated and rather difficult document which applies new principles to a new situation; but that it can only be welcomed by aircraft operators as relieving them of all, or virtually all, liability for damage caused by nuclear incidents. At the same time, the passenger and shipper of cargo, and the person suffering surface damage, will be entitled to recover compensation from the aircraft operator when an existing convention applies (or, under Reservation (2), is to be treated as applying) and in other cases to recover directly from the nuclear operator so long as the limit placed upon his liability is not exceeded. The risk of that limit being exceeded is counterbalanced by the requirement that insurance cover or other security be obtained by the nuclear operator, thereby ensuring that the compensation is actually paid. A Convention supplementary to the Paris Convention is now under consideration at Brussels under the sponsorship of the Six with a view to increasing the limits of liability and providing for governmental and inter-governmental guarantees.

17. A draft International Convention on Minimum International Standards Regarding Civil Liability for Nuclear Damage has also been prepared by the International Atomic Energy Agency, which is associated with the United Nations, and has its seat at Vienna. At the time of writing it is expected that a diplomatic conference will meet early in 1963 in order to adopt this draft.

18. The Vienna draft follows the main principles of the Paris text, with some welcome simplifications of drafting and arrangement. However, some of the simplification is achieved by the sacrifice of principles vital to civil aviation. In particular, in channelling liability to the operator of the nuclear installation, the Vienna draft makes no saving for existing Conventions, with the consequence that both the Warsaw and Rome Conventions will be partially overruled. States which are parties to those Conventions may have difficulty in accepting conflicting obligations, and may take the view that it is undesirable for existing air law Conventions to be amended piecemeal by other Conventions, according to the nature of the damage done. Certain States, it is understood, wish to insert a saving for existing Conventions similar to that in the Paris text, while one State proposes to insert an express provision that existing Conventions are pro tanto superseded.

19. The danger is rendered more acute by the proposal of certain States to confer upon the nuclear operator the right of recourse against a negligent carrier, thereby breaching the principle of channelling liability solely to the nuclear operator. If such a proposal were carried, the limitation of the carrier's liability under the Warsaw Convention would (in the absence of a saving for existing Conventions) be swept away, as would the limitation of liability under the Rome Convention.

20. It is also proposed to write into the Vienna draft the substance of the reservation made by certain States to Article 6(a) of the Paris Convention, thereby enabling Contracting States to impose liability for nuclear damage upon a person other than the operator of the nuclear installation, on condition that that other person is fully covered in respect of his liability by security obtained by the operator of the nuclear installation. This would render general an exception allowed as a concession to the constitutional or other scruples of three States, and would increase the danger that aircraft operators will be involved in litigation concerning nuclear damage and that their aircraft will be attached.

21. The Vienna draft, unlike the Paris text, does not propose to exclude damage to the carrying aircraft from the purview of the Convention. This
would be an advantage to the carrier, and it is significant that an amendment has been proposed by two States to bring the Vienna draft into line with the Paris text on this point. The Vienna draft also does not include the equivalent of Article 7(c)(ii) of the Paris text, which prohibits a State of transit from imposing a higher limit of liability when there is a right to overfly or land in that State by virtue of agreement or international law. This requirement of additional cover would primarily inconvenience nuclear operators rather than carriers, but carriers might find themselves liable to their shippers for an unauthorized diversion into the territory of a State imposing a higher limit (see Article 6(f)(iii) of the Paris text).

22. The conclusion to be drawn from paragraph 18-21 of this report is that there is danger that the Vienna text may create difficulties for civil aviation by interfering with the operation of the Warsaw and Rome Conventions, and that carriers by air may be subjected to new and unnecessary hazards. Your rapporteur therefore recommends that I.C.A.O. should examine these possibilities, and take steps to ensure that this danger is properly met.

23. The problem of conflict between the Paris and Vienna texts remains to be solved, as States may find it impossible to be bound by obligations which in some circumstances are contradictory. The problem will not arise unless and until the Paris Convention has received sufficient ratifications to come into force. It might be resolved if the Vienna draft were to be brought into line with the Paris text (largely by removal of features objectionable from the viewpoint of civil aviation). Alternatively, the parties to the Paris Convention might make appropriate reservations to the Vienna text, which your rapporteur understands is the course now under consideration.