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INTERNATIONAL CIVIL AVIATION ORGANIZATION

LEGAL COMMITTEE - 29TH SESSION

(Montreal, 4 - 15 July 1994)

Agenda Item 2: Report of the Secretariat

SECRETARIAT STUDY ON "CIVIL/STATE AIRCRAFT"

(Presented by the Secretariat)

1. BACKGROUND

1.1 During the 26th Session of the Assembly, the International Federation of Air Line Pilots' Associations (IFALPA), presented a paper which recommended that the definition of civil and state aircraft as found in Article 3 of the Chicago Convention warranted the careful consideration of the Legal Committee through inclusion in its Work Programme as a high priority item. IFALPA stated that the matter of civil vs state status of civil air transport type aircraft was of concern to the international airline pilot since there were clear indications of a lack of uniform application of the provisions of Article 3, and outlined the "potential difficulties for the flight crew engaged in flying state aircraft in international civil air transport type operations involving military, police or customs services". The Legal Commission concluded that the submission should be noted for possible future consideration but, pending entry into force of Article 3 *bis* of the Chicago Convention, this item should not be included in the General Work Programme of the Legal Committee. On 18 November 1986, the Council noted the decisions taken by the 26th Session of the Assembly.

1.2 On 22 October 1987, the Air Navigation Commission (ANC) made an initial review of Secretariat proposals for an amendment to Annex 2 to the Chicago Convention and the Airworthiness Technical Manual relating to blue lights for medical aircraft. The Commission requested its Secretary to provide, in consultation with the Legal Bureau, clarification of the meaning of the expression "medical aircraft"; this was duly provided. The legal opinion indicated that a civil or state aircraft may become a medical aircraft depending on the circumstances. Following this information IFALPA recommended in a discussion paper that "the ANC assign to the Secretariat the task of investigating the development of recommendations to the Commission for technical solutions aimed at resolving the long-standing problems related to the determination of the civil or state status of aircraft." In particular, IFALPA proposed amendments to a number of Annexes. The ANC requested its Secretary to consult the Legal Bureau on the matter. The Legal Bureau was of the opinion that the determination of the status of an aircraft was a fundamental legal issue which may involve technical aspects and that consideration by the ANC of "technical solutions to the overall problem of civil/state aircraft before any in-depth legal study has been undertaken would appear premature and might upset the work on this subject in the legal field and any conclusions thereof." The Legal Bureau raised the possibility that the matter might be placed on the General Work Programme of the Legal Committee by the 123rd Session of the Council. As a result of this advice, the ANC was informed that the Secretariat did not suggest that any further action be taken on the proposed technical solution unless the Commission wished to pursue the matter.

1.3 At the 27th Session of the Assembly, IFALPA presented another paper on the same subject, recommending that the "problem of the status of aircraft (civil/state) ... be undertaken by the Legal Committee as a matter of the highest priority." After an extensive discussion, the Legal Commission voted on the proposal by IFALPA which was rejected by 25 votes to 21 with 12 abstentions. On 15 November 1989, the Council noted, *inter alia*, this decision of the Assembly.

1.4 In 1992, for the 29th Session of the Assembly, IFALPA raised the issue again, pointing out that "a situation still continues to exist wherein there is no internationally accepted interpretation of the provisions of ... Article 3 of the (Chicago) Convention ..." IFALPA concluded by urging "the Assembly to request the Council to instruct the Secretary General to study the subject of state vs civil aircraft with a view toward advising the Council as to what consequential Constitutional and related legal matters might arise as well as the associated methodology for addressing them." The Assembly decided to request the Secretary General to undertake a study on the subject of state/civil aircraft, in the light of the discussion that took place and the documents presented. On 18 November 1992, the Council requested the Secretary General to undertake the study.

2. CONSIDERATION BY THE COUNCIL

2.1 During the eighth meeting of its 140th Session on 23 November 1993, the Council considered the Secretariat study on the subject which is reproduced in the **Attachment 1** hereto; the minutes of the Council's discussions are found in **Attachment 2**. The Council noted the study and instructed the Secretary General:

- "i) to transmit the study to Contracting States and international organizations concerned for their comments and views, if any, as well as the minutes of the Council's discussions on this subject;
- "ii) to present the study, together with the views and/or comments expressed by Contracting States and international organizations and the minutes of the Council's discussions, to the Legal Committee for consideration during its next (29th) Session; and
- "iii) to request the Legal Committee to advise the Council with regard to the interpretation of Article 3 (b) of the Convention on International Civil Aviation, for the guidance of Contracting States."

The President of the Council "clarified that the action at sub-paragraph ... iii) above did not request the Legal Committee to advise the Council to adopt an interpretation of Article 3 (b), since the question of whether the Council itself could adopt an interpretation of an Article of the Convention, or whether such interpretation should be adopted by the Assembly, was a matter on which he would appreciate receiving the opinion of the Legal Committee. In referring to the example which the Secretariat study gave, under paragraph 6.1.3 (Interpretation), in respect of the 'Definition of a Scheduled International Air Service' provided by the Council in 1952, the President clarified that this example concerned a definition, which was not the same as an interpretation".

3. **SUBSEQUENT ACTION**

3.1 In compliance with the Council's decision, the study and the minutes of the Council's discussions were transmitted to States and interested international organizations by means of State letter LE 4/50-94/1 dated 25 January 1994, with a request that comments, if any, should reach the Secretary General before 13 May 1994. These comments will be issued as a subdivision of LC/29-WP/2.

4. **ACTION BY THE COMMITTEE**

4.1 The Committee is invited:

- a) to note the Secretariat study;
- b) to note the comments of States and international organizations; and
- c) to decide on the future work to be undertaken on this subject.

ATTACHMENT 1 to LC/29-WP/2-1

SECRETARIAT STUDY ON "CIVIL/STATE AIRCRAFT"

1. INTRODUCTION

1.1 Currently, there are no clear generally accepted international rules, whether conventional or customary, as to what constitute state aircraft and what constitute civil aircraft in the field of air law. Often, particular international air law instruments will in some way make reference to these or similar concepts, either without defining them, or at the most providing very broad general definitions which sometimes vary from one instrument to another. The situation also appears to be the same in the domestic legislation of States, with the meaning of terms such as "public aircraft", "state aircraft", "civil aircraft" or "private aircraft" varying according to the State in question and the object and purpose of the legislation.

1.2 The Convention on International Civil Aviation (Chicago, 1944) stipulates in Article 3:

"(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

(c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft."

1.3 Subparagraphs (a) to (c), which are of particular interest to the study at hand, have never been subject to interpretation by any ICAO body or organ. Article 31 of the Vienna Convention on the Law of Treaties (1969) stipulates that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It is clear that the Convention and its Annexes apply to civil aircraft only, as opposed to state aircraft. It is also obvious that aircraft "used in military customs and police services shall be deemed to be state aircraft." The usage of the aircraft in question is the determining criterion, and not, by themselves, other factors such as aircraft registration and markings, call sign used, ownership (public or private), type of operator (private/state), except insofar as these criteria go towards showing the type of usage. The Article itself does not, strictly speaking, provide a definition *per se* of either civil or state aircraft, merely that certain aircraft are deemed to be state aircraft.

1.4 Three problems have been identified with the wording of Article 3, specifically Article 3 (b):

a) Can certain aircraft used in military, customs or police services be considered to be civil and not state aircraft?

b) Aircraft used in military, customs and police services are deemed to be state aircraft, but the Article does not say whether aircraft used in other governmental services can be so deemed. Services which are often undertaken to fulfil a sovereign function includes the transportation of heads of States and governments, the transportation of diplomatic personnel and other governmental officers, humanitarian assistance, postal services, meteorological services, agricultural services and fire-fighting. The question is whether the listing given in Article 3 (b) is exhaustive, or whether the subparagraph is just informative so that there can be, for the purposes of the Chicago Convention, state aircraft other than those specified.

c) When, or under what circumstances, can an aircraft be considered to be used in military, customs and police services? The Convention offers little or no guidance in this respect.

2. HISTORICAL BACKGROUND

2.1 Pre-Chicago Conference

2.1.1 In the earliest days of this century, jurists divided aircraft into two categories, public and private, with differing applicable legal regimes. The majority of European powers which replied to a questionnaire submitted by the French Government in 1909 agreed that public and private aircraft should be distinguished. The first formal diplomatic conference on air navigation, which met in Paris in 1910, defined public aircraft as "aircraft employed in the service of a contracting State, and placed under the orders of a duly commissioned official of that State." More particularly, a very specific regime to govern military aircraft was outlined. The Conference did not formally adopt a convention, but provisions drafted heavily influenced the Paris Convention of 1919.

2.1.2 The Paris Convention of 1919, generally considered the forerunner to the Chicago Convention, dealt with "state aircraft" in Chapter VII as follows:

"Article 30. The following shall be deemed to be state aircraft:

(a) Military aircraft.

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

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

All state aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.

"Article 31. Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft."

In certain cases, military aircraft were to enjoy the privileges customarily accorded to foreign warships; police and customs aircraft were not entitled to these privileges.

2.1.3 Military aircraft, more than any other kind of aircraft including customs and police aircraft, personifies the public or sovereign power of a State, and several attempts have been made to arrive at an internationally acceptable definition thereof. The Treaty of Versailles (1919) ending World War I, provided that the armed forces of Germany must not include any military or naval air forces, and several attempts were made to distinguish between military and commercial (or civil) aeronautical material. Between 1919 and 1922, the relationship between civil and military aviation was debated at length by three international committees of air experts which met, respectively, in Paris, Geneva and Washington. They concluded

independently that no means could be devised to prevent the conversion of civil aviation to military purposes, which would not at the same time prejudice the development of civil aviation. In 1920, the Supreme War Council of the Paris Peace Conference asked one of these committees, the Aeronautical Advisory Commission to the Peace Conference, which had given its opinion in 1919, to draw up rules to distinguish between civil aviation and the military and naval aviation forbidden by the Peace Treaties. The Commission, referring to its 1919 report, replied that the task was impossible. The Supreme Council insisted that the rules be drawn up; after several months of debates, the Commission submitted what is known as "The Nine Rules" of 1922, for differentiating between military and civil aircraft. The distinction was based on technical criteria such as engine size, speed, "useful load" etc. It soon became clear that many civil aircraft fulfilled these criteria and the Rules were later abandoned.

2.2 Chicago Conference

2.2.1 At the Chicago Conference, a United States proposal of a Convention on Air Navigation provided that the Convention "shall be applicable only to civil aircraft." "Civil aircraft" was defined as "any aircraft other than military, naval, customs and police aircraft of any State or any political subdivision thereof." A Canadian draft repeated, *mutatis mutandis*, the provisions of Chapter VII of the Paris Convention. Air Navigation principles were allocated to Subcommittee 2 of Committee I. The United States draft was used as the primary basis for discussion in Subcommittee 2. On 10 November 1944, the following suggestions were referred to the drafting Committee of Subcommittee 2, chaired by Mr. J.C. Cooper (United States): "(a) that the term 'civil aircraft' be used as suggested, in place of 'private aircraft' as used in the Paris Convention; (b) that a definition of 'military aircraft' be drafted which would cover military, naval, and air forces; (c) that the status of military and state (customs and police) aircraft in relation to the requirements of the Convention be defined in a separate section." On that day, Sweden proposed an amendment which later emerged as Article 3 (d). The drafting Committee examined the issue and responded with what became Article 3 of the Chicago Convention in its final form. The metamorphosis of the relevant provisions of the United States draft into Article 3 (a) to (c) took place entirely in the drafting Committee, and no official record exists of the reasons behind the shift from the Paris Convention or even the U.S. draft. It should be noted that no definition of military aircraft was provided.

3. CERTAIN OTHER AIR LAW INSTRUMENTS

3.1 The Convention on the International Recognition of Rights in Aircraft (Geneva, 1948), the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963), the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1971), all contain a provision that "this Convention shall not apply to aircraft used in military, customs or police services." This appears to be a more simple way to indicate the scope of applicability of these Conventions than the provisions of Article 3 (a) and (b) of the Chicago Convention, although the end result seems to be the same. Furthermore, the clear implication is that all aircraft not so used would be subject to the provisions of the respective Conventions (paragraph 1.4 above refers).

3.2 The Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952) states in Article 26 that, "this Convention shall not apply to damage caused by military, customs or police aircraft." It should be noted that a "military, customs or police aircraft" is not necessarily the same thing as an "aircraft used in military, customs and police services" although again the expression "military, customs or police aircraft" was left undefined. Similarly, other "state" aircraft fall within the scope

of the Convention. However, the 1978 Protocol to amend this Convention reverts to more familiar language; it would amend Article 26 by replacing it with, "this Convention shall not apply to damage caused by aircraft used in military, customs and police services."

3.3 The Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (Rome, 1933) provides that certain categories of aircraft are exempt from precautionary attachment, including aircraft assigned exclusively to a government service, including postal services, but not commercial aircraft. On the other hand, the Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea (Brussels, 1938) "apply to government vessels and aircraft, with the exception of military, customs and police vessels or aircraft ..."

3.4 The Convention for the Unification of Certain Rules Relating to International Carriage By Air (Warsaw, 1929) applies, *inter alia*, to all international carriage of persons, luggage or goods performed by aircraft for reward, regardless of the classification of the aircraft. Article 2 specifically provides that the Convention applies to carriage performed by the State or by legally constituted public bodies, but by virtue of the Additional Protocol, Parties may make a declaration at the time of ratification or accession that Article 2 (1) shall not apply to international carriage performed directly by the State. The Hague Protocol of 1955 to amend this Convention, in Article XXVI allows a State to declare that the Convention as amended by the Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities. Identical provisions are contained, *mutatis mutandis*, in the Guatemala City Protocol of 1971 (Article XXIII) the 1975 Additional Protocol No. 2 (Montreal), the 1975 Additional Protocol No. 3 (Montreal) and in Montreal Protocol No. 4 of 1975. It is submitted that Article 3 (b) of the Chicago Convention has no bearing on the applicability of these instruments of the "Warsaw System" which specify their own scope of applicability.

3.5 This analysis of some international air law instruments illustrates that many post-Chicago air law instruments (Geneva 1948, Tokyo 1963, The Hague 1970, Montreal 1971 and Rome 1952 and as amended in 1978) all have broadly similar provisions to Article 3 (a) and (b) of the Chicago Convention. The private air law instruments of the Warsaw System on the other hand, because of their nature, have adopted different formulae.

4. DIFFICULTIES ENCOUNTERED AS A RESULT OF ARTICLE 3

4.1 On occasion, an aircraft may be operated on the assumption that it is a civil flight under the Chicago Convention, but in looking at all the circumstances surrounding that same flight, one may well conclude that it is in fact a state aircraft. The reverse may also occur, when what would otherwise be a state aircraft can be classified as a civil aircraft for a particular flight.

4.2 The primary concern in the former case is a state aircraft which does not obtain the requisite authorization to overfly (Article 3 (c)), or land in, a certain State, yet proceeds on the assumption that it is a civil aircraft and entitled to exercise of overflight and to make technical stops under Article 5 of the Chicago Convention. The overflown State may well decide that such a flight by a state aircraft is unauthorized and may take action applicable to state aircraft.

4.3 Applicable legal regime

4.3.1 The provisions of the Chicago Convention and Annexes would not apply in a case where a state aircraft is (mistakenly or otherwise) operated on the basis that it is a civil aircraft. Similarly, the Geneva Convention of 1948, the Tokyo Convention of 1963, The Hague Convention of 1970, the Montreal Convention of 1971 and the Rome Convention (1952) as amended in 1978, will also not be applicable where it is determined that the aircraft was "used in military, customs or police services".

4.3.2 The converse, of a civil aircraft being operated on the basis that it is a state aircraft, would theoretically raise the same problems (i.e. legal regimes thought to be inapplicable are in fact applicable). Concern is not often expressed in this regard.

4.4 Insurance coverage

4.4.1 Another frequently mentioned difficulty is claimed to be the loss of insurance coverage in respect of the aircraft (hull), operator, crew and passengers or other parties where the aircraft is in fact state aircraft. The question whether a particular insurance coverage is rendered invalid in such situations is primarily a private law matter of the construction and interpretation of the insurance contract. Unless the contract has an exclusion clause which specifically makes reference to the classification in Article 3 of the Chicago Convention (e.g. loss of coverage where the operation is of a state (or civil) aircraft as defined in the Chicago Convention), then the Convention will have no bearing on the contract, and this issue of the loss of insurance coverage is not germane to this study. Frequently, the policy will exclude usage of the aircraft "for any purpose other than those stated" in a Schedule; among the exclusions would be any use involving abnormal hazards. Nearly every aviation hull and liability policy now excludes losses due to war, invasion, hostilities, rebellion, etc., although insurance to cover such losses can usually be obtained by the payment of a higher premium. However, the instances mentioned do not require a determination of whether the aircraft is considered to be state or civil under the Chicago Convention.

4.5 Application of civil or military laws

4.5.1 A question sometimes asked is whether national civil laws and regulations would apply to civilian flight crews operating what is a state aircraft under the Chicago Convention. Would civil or military investigative and judicial processes be applied, for example, in the case of an accident? The answer would depend largely on the domestic laws of the State concerned. The fundamental principle is stated in Article 1 of the Convention: every State has complete and exclusive sovereignty over the airspace above its territory. Furthermore, subject to the provisions of the Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or the operation and navigation of such aircraft within its territory, shall be complied with by (civil) aircraft of other contracting States, upon entering or departing from or while in the territory of that State (Article 11). *A fortiori*, state aircraft are also subject to the laws of the subjacent State.

4.5.2 In the case of an accident involving state aircraft, States are not bound by Article 26 of the Chicago Convention and Annex 13. They can voluntarily (through their legislation) so apply these provisions. Sometimes, the legislation specifies a different procedure in relation to military aircraft only; all other aircraft, including those used in customs or police services, are treated as civilian in this regard. In the case of other incidents, where for example the requisite overflight permission has not been obtained by a state aircraft, which is then forced to land and charges brought against the crew, again the answer would

depend on the domestic laws of the overflown State and the factual circumstances. It is impossible to give a definitive answer in a vacuum, but it is the view of the Secretariat that the classification of an aircraft as "state" aircraft under the Convention does not necessarily mean that military laws and procedures of a State would apply to that aircraft or its crew. The current or any different classification of aircraft under the Convention would not be determinative whether a particular State, in the exercise of its sovereignty, would make that aircraft and/or its crew subject to civil or military laws and regulations. As a matter of practice States usually apply military rules and processes to military aircraft and personnel only. Paragraph 2.1.3 above shows that at the international level, attempts to arrive at a common, acceptable definition of military aircraft have met with a singular lack of success.

4.5.3 The question posed seems more theoretical than practical in nature: the Secretariat is not aware of any instances where a dispute has arisen between States on this issue.

4.6 Red Cross Conventions

4.6.1 Likewise, queries have been raised in this connection about the status of airline pilots and other crew under the Geneva Conventions of August 12, 1949 for the protection of war victims (the Red Cross Conventions) which apply, *inter alia*, in all cases of declared war or armed conflict between two parties, even if the state of war is not recognized by one of them. The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (No. 1) applies to "persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews ... provided they have received authorization from the armed forces which they accompany" and to "... the crews of civil aircraft of the Parties to the conflict ...". The same provisions are found in Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (No. 2) and the Convention relative to the Treatment of Prisoners of War (No. 3). The Geneva Conventions, and in particular the provisions quoted above, do not link their own scopes of applicability to the determination under the Chicago Convention of the status of an aircraft. The Conventions of 1949 refer to civil and military aircraft, but not to these terms as "defined" under Chicago. Consequently, the provisions of the Chicago Convention does not, and cannot, determine whether and to what extent the flight crew of an aircraft is given protection by these Conventions.

4.6.2 A related problem concerns the concept of "medical aircraft", defined in the First and Second Geneva Conventions of 1949 as aircraft exclusively employed for the removal of the wounded and sick and for the transportation of medical personnel and equipment. Additional Protocol No. 1 to these Conventions, adopted in 1977, defines medical aircraft as medical transportation by air; medical transportation is the conveyance of the wounded, sick, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and the Protocol. Consequently, the qualification of an aircraft as a medical aircraft depends on the purpose for which it is used. Depending on the circumstances surrounding a particular medical flight, it can be regarded as either a state or civil aircraft under Chicago, albeit with a special regime under the above-mentioned Geneva Red Cross Conventions and Protocol. The fact that an aircraft is a medical aircraft under the Red Cross Conventions and the Protocol does not give it a special status *vis-à-vis* the Chicago Convention; an analysis will have to be made, as in the case of any other aircraft, to see if it falls under Article 3 (b).

4.7 Aircraft used by international organizations

4.7.1 Likewise, it is submitted that no special status is accorded by the Chicago Convention for aircraft chartered by, or working in the services of, an international organization such as the United Nations. The same factors have to be taken into account, as in the case of any other aircraft, in determining the state or civil status of such aircraft under the Chicago Convention. Whether such aircraft should be treated any differently, by means of a special classification and accompanying legal regime, seems to require as a preliminary matter a political decision; this subject is complex enough to require separate treatment and is beyond the scope of this study.

4.8 Preliminary observations arising out of this section (Section 4)

4.8.1 The analysis in this section indicates that currently, the only substantial difficulty arising from the lack of an agreed interpretation of Article 3 (a) and (b) seems to be that there may be cases where the application of the instruments listed in paragraph 4.3.1 above, to a particular flight, may be uncertain.

4.8.2 Doubts regarding the status of aircraft under Article 3 (b) of the convention most often arise in the following situations:

- 1) When the aircraft is not used in military, customs or police services but is used in other governmental services (see paragraph 1.4 a) above).
- 2) When otherwise civil aircraft with a civilian crew is used in times of conflict to transport troops, military equipment and similar cargo. The use of civil aircraft for such purposes is common. Many States have specific plans, backed by legislation, enabling civil aircraft and crew to be used as components in a military airlift. "Civil" aircraft has been used in this role in numerous international conflicts.
- 3) Where an aircraft is chartered, either in whole or in part, to carry military, customs or police personnel or equipment/cargo related to these services, not necessarily under the circumstances outlined in subparagraph 2) above (civil reserve fleet). In some circumstances the aircraft may be used on a particular flight for these purposes as well as for the carriage of other passengers and/or cargo for remuneration.
- 4) Aircraft which would otherwise be considered state aircraft (perhaps even with a military crew) being used to carry passengers, mail and cargo for remuneration or hire.

4.8.3 There have been a number of incidents where the status of the aircraft was not obvious, and the parties concerned had to make a determination under Article 3:

- 1) On 10 October 1985, Egypt Air Flight MS 2843 was en-route from Cairo to Tunis when it was intercepted by U.S. aircraft and made to land in Sicily. Among the persons aboard were individuals believed to be connected with the hijacking of the "Achille Lauro". The pilot-in-command considered that it was a civil flight, a "charter VIP flight". The United States Government, in a letter to IFALPA dated 13 November 1985, stated that "it is our view that the aircraft was operating as a state aircraft at the time of the interception. The relevant factors - including exclusive State purpose and function of the mission, the presence of armed

military personnel on board and the secrecy under which the mission was attempted - compel this conclusion."

- 2) On 4 February 1986, a Libyan Arab Airlines aircraft left Tripoli on a non-scheduled flight to Damascus carrying Syrian Government officials. While over international waters, the aircraft was intercepted by Israeli fighter aircraft and made to land. The matter was brought before the Council, where Israel questioned the Council's competence to examine the issue, on the basis that the Libyan aircraft was in fact a state aircraft. Several members of the Council expressed doubts as to whether the aircraft was a civil aircraft. In support of the position that the aircraft was a civil aircraft, the Government of Libya, *inter alia*, produced its Certificate of Airworthiness and its Certificate of Registration, issued by the Civil Aviation Authority of Libya. The Council, on 28 February 1986, adopted a Resolution by which it considered that Israel had "COMMITTED an act against international civil aviation in violation of the principles of the Chicago Convention;" and "CONDEMNS the act of Israel for its interception and diversion of a Libyan Arab Airlines aircraft in flight within international airspace".

These two incidents were selected simply to illustrate some differing factual circumstances which have arisen where the relevant parties have had to make an assessment of the status of an aircraft under the Chicago Convention, and where the answer to that question was perceived differently by parties concerned.

5. CONSIDERATION OF THE PROBLEMS IDENTIFIED IN PARAGRAPH 1.4

5.1 The specified aircraft being considered civil aircraft

5.1.1 The Convention, like the Paris Convention, "deems" certain aircraft to be state aircraft. The Chicago Convention does not say specifically that "aircraft used in military, customs and police services are state aircraft." A number of subsequent instruments (paragraph 4.3.1 above refers) contain a more definitive statement that they do not "apply to aircraft used in military, customs or police services." One view is that the word "deemed" creates a rebuttable presumption i.e. that in some cases, evidence can be adduced to show that particular aircraft used in military, customs and police services are civil aircraft. The Secretariat believes that a more valid reading of Article 3 (b) is that the word "deemed" is just another way of stating that for the purposes of the Chicago Convention, certain aircraft shall be, or be considered to be, state aircraft. If the drafters had intended that some aircraft used in the specified services could still be considered civilian, they would better express their intention by using the phrase "may be deemed" instead of the mandatory "shall be deemed". The drafters of the instruments listed in paragraph 4.3.1 above seemed to have taken the same approach, excluding any possibility that an aircraft used in military, customs or police services would somehow fall within the scope of applicability of the respective instruments.

5.2 Aircraft used in other government services

5.2.1 The issue is whether the list of services given in Article 3 (b) is exhaustive, or whether there can be usage in other services which would render the aircraft a state aircraft, for the purposes of the Convention.

5.2.2 One argument is that the Paris Convention recognized the existence of state aircraft other than military, customs and police aircraft. The drafters of the Chicago Convention must also have been aware that there were state aircraft other than those identified in Article 3 (b). The Convention contains much more detailed provisions as to the regulation of aircraft operations falling under the Convention than did the Paris Convention. The drafters could not therefore have intended that these other categories of state aircraft would be automatically subject to the Convention; States would not be willing to agree to such a provision.

5.2.3 The predominant view is, however, that all such other aircraft would in fact be considered as falling within the scope of the Convention. Firstly, the International Commission on Air Navigation (ICAN) created by the Paris Convention had the power to amend the Annexes to that Convention, which when so amended, would bind all contracting States; there was no opportunity to file a difference, and ICAN in effect had legislative powers. The same is not true of the Chicago system and States would be less hesitant to subject their other "state" aircraft to the Chicago regime. Furthermore, even under the Paris Convention, all state aircraft other than military, customs and police aircraft were treated as private aircraft and subjected to all the provisions of the Paris Convention. Although the Chicago Convention does not explicitly say that all other aircraft shall be treated as civil aircraft and become subject to all the provisions of the Convention, there is nevertheless nothing to indicate that the drafters of Chicago had any intention to depart from the substance of this provision; it is felt that any such intention would have been spelt out unambiguously.

5.2.4 Secondly, of persuasive value are the recollections of the Chairman of the drafting committee for Article 3. In a study published in 1949, he wrote that:

"... the ... Convention is purposely less definite than some of its predecessors. The language used was understood to be vague but was considered a more practical solution than any of the several attempts which had been made in the past to define such classes as, for example, military aircraft. The determining factor ... is whether a particular aircraft is, at a particular time, actually used in one of the three special types of services. If so, it is a 'state aircraft'. Otherwise, it is a 'civil aircraft'."

5.2.5 Finally, the drafters of the 1948 Geneva Convention, the 1963 Tokyo Convention, The 1970 Hague Convention, the 1971 Montreal Convention, and the 1978 Protocol to the 1952 Rome Convention encompass all categories of aircraft, apart from those "used in military, customs or police services" within their respective scopes of applicability. It is arguable that these drafters intended to have scopes of applicability in respect of status of aircraft co-extensive with the Chicago Convention, so these provisions probably reflect their interpretation of Article 3 of the Chicago Convention that all aircraft, apart from those specified in the Article, are deemed to be civil aircraft.

5.2.6 Many of the objections which may be raised against such an interpretation are dissipated when it is realised that the determination that such other "state" aircraft (perhaps other aircraft, owned and/or operated by the State, or used in governmental services) are treated as civil is for the purposes of the Chicago Convention only. This interpretation has no bearing on matters such as sovereign immunities and privileges attaching to state aircraft (as used in the broader sense) or other issues not dealt with in the Chicago Convention.

5.3 The meaning of "used in military, customs and police services"

5.3.1 The drafting history does not indicate that the parties intended to attribute any special meaning to Article 3 (b).

5.3.2 An examination of any number of other possible criteria that may be considered to determine the civil or state classification of aircraft, such as ownership or control, technical factors (e.g. speed, capacity), registration (on civil register or not), markings (civil/military) or kind of operator (state or state entity or not) leads to the conclusion that the functional criterion of usage in particular services adopted by the Chicago convention is the preferable solution. Formulated in general terms, it allows account to be taken of all the facts relevant to a particular case when a determination as to status is being made.

5.3.3 It is submitted that whether an aircraft is "used" in military, customs and police services can only be determined by examining all the circumstances surrounding the flight, and taking into account a number of factors. These could include:

- 1) The nature of cargo carried. Are they supplies or equipment for the military, customs or police services of a State? Article 35 of the Convention recognizes that the mere carriage "of munitions or implements of war" does not by itself make an aircraft a state aircraft.
- 2) Ownership of the aircraft. Is it owned privately or by the State?
- 3) Operation. Degree of control and supervision of the operation of the aircraft by the specified services.
- 4) Passengers or personnel carried. Are they military, customs or police officials, or members of the public at large? Is the particular flight open for use by members of the public?
- 5) Aircraft registration and nationality markings.
- 6) Secrecy of the flight. Will a usual civil (ICAO) flight plan be submitted and the usual air traffic clearances obtained?
- 7) Nature of crew. Are the crew civilian, or are they military, customs or police personnel, or employed by these services?
- 8) Operator. Is the operator a military, customs or police agency?
- 9) Documentation. Are the documents required by the Chicago Convention and its Annexes to be carried on civil aircraft in fact being carried (e.g. certificate of registration, certificate of airworthiness, licences for the crew, journey log book, etc.)?
- 10) Area of operations. Will the aircraft fly to, or over, areas in a situation of on-going or imminent armed conflict?
- 11) Customs clearances. Will the normal clearances be obtained?

This list does not purport to be exhaustive; it is indicative only. Furthermore, depending on the factual circumstances, different weights must be given to different factors.

6. RECOMMENDATIONS

6.1 In paragraph 1.4 above, certain problem areas were identified as a result of the wording of Article 3. An attempt was made to discuss these in Section 5. There are three possible ways of approaching the matter:

6.1.1 No action

6.1.1.1 The first would be to take no action. It could be argued that there have been no grave practical problems in the application of the Article since the Convention was adopted, and that the strength of the Article lies in the fact that its purposely vague provisions allow maximum flexibility of interpretation. The Secretariat does not recommend this approach.

6.1.2 Amendment

6.1.2.1 The second would be to formally amend Article 3. The fourth Session of the Assembly adopted Resolution 4-3 entitled: "Policy and programme with respect to the amendment of the Convention", in which the Assembly concluded:

"...that an amendment of the Convention may be appropriate when either or both of the following tests is satisfied:

- (i) when it is proved necessary by experience;
- (ii) when it is demonstrably desirable or useful;" and that the

"...modification of the Convention should be accomplished by specific amendment only".

6.1.2.2 Quite apart from the satisfaction of these tests, it is the view of the Secretariat that the functional criteria of usage in certain services is probably the most acceptable formula; any amendment therefore would more likely revolve around clarification of wording rather than substance.

6.1.2.3 Furthermore, it is in the nature of definitions that they are subject to interpretation, and a more general or more specific method of classification of "civil" and "state" aircraft will not eliminate grey areas or remove potential disputes. In other words, there is no "magic formula" which will solve the problem. Improvements may be of degree only. The concept of applicability of the Convention to "civil aircraft" is so fundamental to the whole Convention that any amendment might result in, at this stage, unforeseen effects on other provisions.

6.1.2.4 In addition, there is a practical matter deserving careful attention. Any amendment to the Convention shall come into force upon ratification by at least two-thirds of the total number of Contracting States (Article 94 (a)). Currently, as of 1 October 1993 there are 181 Parties to the Convention; any amendment will need at least 121 ratifications for entry into force.

6.1.2.5 There have been two amendments of a substantive nature to the Convention:

- i) the Protocol of Amendment relating to Article 83 *bis* was adopted in 1980, requiring 98 ratifications; it now has 76 (after 13 years);

- ii) the Protocol of Amendment relating to Article 3 *bis* (1984) requires 102 ratifications; it now has 70 (after 9 years).

A requirement of at least 121 ratifications will probably take a longer period for entry into force.

6.1.2.6 As a result of all these considerations, the Secretariat does not propose an amendment of Article 3.

6.1.3 Interpretation

6.1.3.1 Notwithstanding the above, the Secretariat believes that in the light of the issues raised in paragraph 1.4 above and the discussion in Section 5 above, the Council might consider it useful to adopt an interpretation of Article 3 (b) similar to the one adopted in 1952 (and reviewed in 1980) in respect of the "Definition of a Scheduled International Air Service" (Doc 7278/2). If the conclusions arrived at in Section 5 are approved, such an interpretation could contain the following elements:

- i) that all aircraft used in military, customs or police services, shall be considered as state aircraft and outside the scope of applicability of the Chicago Convention (section 5.1 refers);
- ii) that for the purposes of the Chicago Convention, all other aircraft shall be considered to be civil aircraft (section 5.2 refers); and
- iii) that in determining whether an aircraft is used in military, customs and police services, the parties concerned should take into account all the surrounding circumstances including, where applicable, the factors listed in paragraph 5.3.3 above. This could be made applicable also to the Geneva Convention (1948), the Tokyo Convention (1963), The Hague Convention (1970), the Montreal Convention (1971) and the Protocol (1978) to the Rome Convention of 1952.

6.1.4 Possible amendment to annexes and PANS-RAC

6.1.4.1 In DP-2 related to AN-WP/6083, IFALPA proposed that a requirement be established that "in all instances wherein the aircraft is being used as a state aircraft, the fact will be entered in the ICAO flight plan". This idea is linked to the concept that someone other than the pilot-in-command (e.g. aviation authorities of the State of Registry or the operator) should make that determination, and that should an overflown State take any action against the crew, this would offer protection to the crew.

6.1.4.2 As stated in paragraph 4.5.1 above, each State has sovereignty over the airspace above its territory. The making of such a declaration on the flight plan will not bind the overflown State which is free to make its own determination as to status according to its own laws and the crew would not be automatically absolved from blame. Any dispute between the overflown State and the State of Registry, or any other two interested States, could lead to the activation of the dispute settlement procedures under the relevant conventions. However, if it is accepted that someone other than a crew member would make that determination on the flight plan (i.e. that a certain flight is civil), then this may be evidence to show the lack of intention on the part of the crew to fly a state aircraft (perhaps without special authorization from the overflown State), or lack of knowledge that the aircraft is a state aircraft. It may also be that in certain circumstances, an overflown State or any other State which has accepted a civil classification, being in full knowledge of all the facts, could be estopped from later attributing to the aircraft a state status.

6.1.4.3 The ICAO Model Flight Plan (see Doc 4444-RAC/501/12), under Item 8, "Type of Flight", requires "one of the following letters to denote the type of flight when so required by the appropriate ATS authority:

- S if Scheduled Air Service
- N if Non-scheduled Air Transportation Operation
- G if General Aviation
- M if Military
- X if Other than any of the defined categories above."

Thus an "X" can be utilized in the case of state aircraft (other than "military"). Alternatively, a new classification of "aircraft used in customs or police services" can be added. In addition, under Item 18 "Other information", an explanatory note with its stipulated code could specify that the aircraft is a state aircraft under the Chicago Convention. Reference could then be made to the agreement (Article 3 (c)) under which the flight was being conducted.

6.1.4.4 In the same vein it may also be useful to have that determination communicated in the "Advance Notification of Arrival" for certain international general aviation and non-scheduled flights required by Annex 9 (Standard 2.34) or the request for "Special Permission for Operations" (where needed for reasons of safety of flight) in Standard 2.38 of that Annex.

6.1.4.5 The question then arises as to who should make that determination on the Plan and/or in the Advance Notification/Special Permission for Operations. Three alternatives are possible: the State of Registry, the operator and the pilot-in-command. It seems that the entity in the best position to make the classification would be the operator, who would in all likelihood have better command of the pertinent facts than any other party.

6.1.4.6 A decision that the ICAO Model Flight Plan be amended as suggested above, with the Operator making the classification, will necessitate an examination of the provisions of the PANS-RAC and of the relevant Annexes (in particular, Annexes 2, 6 and 9) to see what, if any, amendments are necessary. An additional benefit is that any such amendment will serve as a reminder to the operator about the need to make an Article 3 classification.

6.1.4.7 It is recommended that the subject be entered in the Technical Work Programme of the Organization for consideration by the Air Navigation Commission as to the feasibility of amending the Model Flight Plan, the provisions of the PANS-RAC and/or Annexes to reflect the intent of this subsection.

7. CONCLUSION

7.1 The general nature of the wording of Article 3 (b) gives rise to a number of problems of interpretation, with the resulting uncertainty concerning the applicability of the Chicago Convention and its Annexes, as well as a number of post-Chicago international air law instruments. It is submitted that a proper interpretation of Article 3 (b) would show that no aircraft used in military, customs or police services should be considered to be civilian under the Convention. Conversely, all aircraft used in other than the specified government services should be so regarded. A number of elements should be taken into account in deciding the status of an aircraft. It is suggested that the Council adopt an interpretation of Article 3 (b) for the guidance of Contracting States, and that consideration be given to amending the ICAO Model Flight Plan Form, the PANS-RAC and certain Annexes.

ATTACHMENT 2 to LC/29-WP/2-1

EXTRACT OF THE DRAFT SUMMARY MINUTES OF THE EIGHTH MEETING
OF THE 140TH SESSION OF THE COUNCIL HELD ON 22 NOVEMBER 1993

Subject No. 16: Legal Work of the Organization

Secretariat Study on "Civil/State Aircraft"

1. Tabled for the Council's consideration was a paper presented by the Secretary General (C-WP/9835), to which was attached a Secretariat study on "Civil/State Aircraft". Following a detailed introduction to the paper, provided by the Director of the Legal Bureau, the President invited general comments on the study before proceeding with a section-by-section review.
2. Under general comments, several Representatives expressed their appreciation to the Secretary General and to the Director of the Legal Bureau and his staff for the excellent study which had been prepared. Thanks were also extended to the International Federation of Air Line Pilots' Associations (IFALPA) for its keen interest and persistence in bringing the issue of civil vs state status of aircraft to the forefront. The Representative of Senegal nevertheless observed a certain risk associated with the inclusion of this item on the Council's order of business, since the Council would have to take care, in the course of its debate on this subject, to not assume responsibilities which were rightfully those of the Legal Committee. He observed that it was upon instructions by the Assembly, guided by the Council, that the Secretariat had undertaken the study attached to C-WP/9835, a study which would no doubt give rise to comments and observations. Although the Representative of Senegal would be tempted to make his contribution to the debate, he believed that such a discussion would be more appropriate to the forum of the Legal Committee, a body which had been established by the Assembly and whose membership was open to all Contracting States. His Delegation was therefore in favour of noting the study and instructing the Secretary General to present it as documentation for the 29th Session of the Legal Committee, and requested that the study be referred on a timely basis to the appropriate legal experts from Contracting States of ICAO so that they may be well acquainted with the subject and allow it to progress in the Legal Committee's high-level debates.
3. The Representative of Iceland observed that the issue of civil vs state status of aircraft had been identified very early in the history of aviation and that many efforts had been directed towards resolving it over the years. Article 3 of the Convention, at the time it had come into force, had obviously not been meant to be exhaustive, and developments within the aviation sector had since made the situation even more complicated. In this respect, the Representative of Iceland referred primarily to sections 3 and 5 of the study, which referred to other elements that had an impact on the issue. It was clear, on the one hand, that the usage of an aircraft determined the application of Article 3 of the Convention; on the other hand, every State was given the right to decide on the interpretation of Article 3, and this "open door" gave rise to several different national regulations, which, even if duly published in the national AIPs and other documents, caused the users undesirable problems. The Representative of Iceland therefore welcomed the paper now under consideration and supported the Council action proposed.

Attachment 2

4. The Representative of Japan indicated that in the absence of clear definitions or specified functional criteria of usage on Article 3 of the Chicago Convention, his State, as well as others, faced serious problems related to the determination of the status of aircraft, particularly in carrying out activities under the United Nations framework as well as in other instances involving the carriage of persons and goods for humanitarian purposes by government-chartered aircraft. Although details of these problems were mentioned in paragraph 1.4 of the study, with some concrete examples provided in paragraph 4.8.3, many other cases were to be addressed, both legally and practically. The Representative of Japan was certain that problems of this nature would recur increasingly in the field of transportation for humanitarian and other purposes, as international transport activities by governments would increase, taking into account the needs of the international community. The Representative of Japan therefore expressed his agreement with the main points in the study and his full support for the action proposed by the Secretary General at paragraph 2.1 of the paper.

5. The Representative of Italy was inclined to agree with the Secretariat's recommendation for providing an interpretation of Article 3 (b), as presently written, as the most appropriate solution, on the basis of the three options outlined in section 6 of the study. Commenting on the possible substance of such an interpretation, the Representative of Italy believed that the Council would act wisely in pronouncing itself only after the subject had been duly studied by the Legal Committee. In this respect, he agreed with the Representative of Senegal that due time should be accorded to the experts of the Legal Committee to review the matter in detail. The Representative of Italy could, on this basis, approve the Council action proposed.

6. The Representative of Cameroon considered that Article 3 of the Convention raised problems of interpretation which called for some form of action on the part of the ICAO Council while it awaited the recommendations of the Legal Committee. He observed that an interpretation of Article 3 (b) should not hinder the entry into force of the Protocol of Amendment relating to Article 3 *bis*, and that such clarification would actually buttress the application of the amendment. In referring to the risks and negative consequences associated with the present situation, as outlined in reference document A27-WP/79, the Representative of Cameroon expressed the conviction that the drafting of Article 3 harkened to a time when States were primarily involved with tasks involving sovereignty. The parties involved in its drafting had therefore listed, in a non-comprehensive fashion, those tasks which would come under the sovereignty of States, leading to a field of application which would differentiate between civil aircraft, on the one hand, and State aircraft on the other. The ambiguities of Article 3 had been recognized even at the time of its drafting, and the Representative of Cameroon maintained that such ambiguities should not continue to prevail as the Organization was approaching its 50th Anniversary. He therefore suggested that the Council, while awaiting the outcome of the Legal Committee's studies on this matter, give further thought to the subject in terms of harmonization through Standards and Recommended Practices and procedures. For the Council to abstain from this process would, in his view, be in default of the interests of the international community.

7. The Representative of the United Republic of Tanzania wished to draw the Council's attention to problems relating not only to the interpretation of Article 3 (b) but also to its application. Looking at the practical side, he observed that in many States and in particular developing countries, there existed a very clear regime of management, legislation and infrastructure governing civil aircraft, and a separate, specific regime covering military aircraft; there was, however, no intermediary system to cover other, "state" aircraft, and it was normally very difficult in practice to exclude these aircraft from the group of

civil aircraft. The Representative of the United Republic of Tanzania therefore requested that a further examination of this subject look into the problem of the application of the interpretation of Article 3.

8. While understanding the concerns of the Assembly and Council in striving to minimize the scope of international conflicts, as well as those of IFALPA in seeking proper protection for flight crew engaged in international operations, the Representative of India believed that international affairs would always be subject to the problem of conflicting interpretations and that no detail of clarification could resolve this problem completely. It was clear from Article 3 (b) that it was usage, and not ownership, which determined the status of a flight, and that apart from the three specific types of services mentioned in that Article, others existed which would be subject to the problems identified in paragraph 1.4. The Representative of India saw the wisdom of those who had drafted the Chicago Convention in that they had sought a broader perspective, which reflected a deliberate will on the part of those involved. The Representative of India could accept the arguments which had been put forward in favour of an interpretation, but cautioned against striving to attain mathematical precision in an area where problems of interpretation, to varying degrees, would always remain.

9. The Representative of Saudi Arabia wished to be associated with those speakers who had spoken in favour of referring the study to the Legal Committee. Taking into account the importance of the study, the Representative of Saudi Arabia trusted that it would be translated into Arabic as soon as possible and, in the interest of making the study transparent to a wider readership, he suggested that a brief introduction be incorporated which would identify the problem and clarify the issues at hand. The Representative of Australia also supported the proposal to refer the study to the Legal Committee. Having noted the study's reference to the possibility of amending the ICAO Model Flight Plan, and the reference made by the Representative of Cameroon to the possibility of developing SARPs, the Representative of Australia observed that the Air Navigation Commission would, ultimately, have a significant role to play in this work once the legal aspects had been resolved.

10. In making a general observation on the objectives and interests behind proposals, the Representative of Argentina observed that States had an overriding duty to ensure the common good, whereas associations, while assisting as much as possible in improving matters for international civil aviation, had as their main purpose the protection of their members. The Representative of Argentina observed that Articles 3 and 4, like all of the other articles of the Convention, were integral parts of a very well designed and balanced structure. It was no accident that at the time of the drafting of the Convention, the legislators had judged that this very flexible definition should be included, since the Paris Convention of 1919 had been much more limiting of the concept with regard to its field of application. The Chicago Convention provided a good definition because it left it to the will of States to determine whether an operation was "state" or "civil" in nature. The request being put forward by an association for a definition called, in a sense, for a definition of the problem itself. If the problem was the defence of States, the Representative of Argentina observed that States had an obligation, under the first freedom of the air, to give a right to innocent passage, and that all state aircraft were asked to notify their status through a prior notice document. If civil aviation was not used in the way prescribed by Article 3 of the Convention, the type of situation which had been outlined by IFALPA would arise. The Representative of Argentina believed that the defence of the legal status of operating crews could be more appropriately discussed in the forum of the International Labour Organization. He therefore proposed that ICAO not attempt to innovate the drafting of articles of the Convention and that it not modify its Model Flight Plan, since the latter allowed for the provision of any necessary clarifications under Item 18, "Other information".

11. The Representative of the Russian Federation indicated that the distinction between civil and state aircraft, as interpreted in Article 3 of the Chicago Convention, was of great interest to his State and had a practical significance for assessing the area of applicability of the Chicago Convention in the Russian Federation. One could understand the complications which could arise in the Russian Federation with respect to the definition of "state" and "civil" aircraft when one considered that although the national carrier, Aeroflot, was in a period of transition, all aircraft in its fleet were at present referred to as "state" aircraft. The Russian Federation nevertheless understood the distinction in the sense of the usage of aircraft; since aircraft owned by Aeroflot carried out civil missions, they were for practical purposes considered to be "civil" aircraft and as such all information related to Aeroflot's operations was provided to ICAO. The Representative of the Russian Federation did not wish for individual States to interpret for themselves what constituted "civil" or "state" aircraft, since this could lead to tragic consequences as it had in the past. The Representative of the Russian Federation therefore supported those who had spoken in favour of further examination of this very complex subject in the Legal Committee.

12. The Representative of Germany agreed with speakers who had commented on the need to refer the study to the Legal Committee, and in so doing he wished to emphasize in particular the substantive amendments referred to at paragraph 6.1.2.5, where the Legal Bureau had, in a very sensitive and practical manner, pointed out what the practical difficulties in a long-term perspective might be. The Representative of Pakistan could go along with referring the study to the Legal Committee, but maintained that in so doing, the Council should provide the Committee with some direction in its work. In this respect, the Representative of Pakistan expressed the view that the registration of an aircraft should be the criterion used in determining its classification, with the understanding that any misuse of this classification could be challenged.

13. While welcoming the study and supporting its referral to the Legal Committee, the Representative of Canada recalled that at the 29th Session of the Assembly, the position of his Government had been that the test for Article 3 (b) for distinguishing state aircraft based on use was sufficiently clear, except when applied to flights used in part for civil, and in part for state purposes. The interpretation proposed by the Secretariat in the study attached to C-WP/9835 was generally consistent with the Canadian position. That aircraft used solely for the purpose identified in that Article were state aircraft was not controversial; that all other aircraft were civil aircraft, however, could appear less certain, even bearing in mind that the Secretariat study and determinations were for the purpose of the Chicago Convention only and had no bearing on sovereign immunities and domestic law. The Representative of Canada noted that in paragraph 5.2.4 of the study, the Secretariat appeared to find persuasive value in the recollections of the Chairman of the drafting committee for Article 3. In this respect, the Representative of Canada had consulted later studies published by the same author, and believed that the Chairman's opinion as reflected in the Secretariat study might have subsequently evolved. He therefore suggested that all relevant sources be consulted in referring the study to the Legal Committee.

14. The Representative of Canada indicated that the subject of civil vs state status of aircraft was an issue which his Administration wished to examine in more detail in the months preceding the next Session of the Legal Committee. He observed that the criteria in paragraph 5.3.3 were very interesting and deserved further examination by the Legal Committee. His Administration was not certain, however, as to whether a formal interpretation by the ICAO Council or even by the Assembly on the advice of the Legal Committee was the more persuasive vehicle for resolution of outstanding uncertainties. Canada regarded the study as a very important contribution toward the resolution of the apparent uncertainties surrounding the implication of Article 3 (b). The Representative of Canada reserved his Delegation's

position on legal issues pending a fuller examination in Canada, in consultation with other countries, but supported the presentation of the study to the 29th Session of the Legal Committee. He believed, however, that before being referred to the Legal Committee, the study should be circulated to all Contracting States.

15. The Representative of Ecuador observed that the subject under consideration was regulated by the legislation of each country as well as by the Chicago Convention, and that in this respect, the most important virtue of the Convention was the breadth of its terms, which did not create a legal straitjacket interfering with the sovereignty of States. The Convention remained in force after 50 years because it responded to a rational and appropriate order of international civil aviation, and respected the sovereignty of States and their own social, political and economic realities. The countries of the Santiago rotation agreement had not had any difficulties with the definition in Article 3 (b). The breadth with which the Article had been drafted had made it possible for Contracting States to maintain their sovereignty and classify their aircraft under their own legislation. The Representative of Ecuador believed that to add a Council interpretation of Article 3 (b) would not resolve cases such as those mentioned in the study, but would generate other difficulties in which certain States had created domestic legislation that might be affected by the criteria the Council would put forward in its interpretation. The Representative of Ecuador agreed with those speakers who had observed that the Council should not be the forum for interpreting or recommending changes to the Chicago Convention, and believed that Contracting States should be consulted before the subject was referred to the Legal Committee.

16. The Representative of Trinidad and Tobago noted from the debate that there were a number of misgivings about what constituted state, as opposed to civil, operations. Governments, particularly those of developing countries, undertook numerous endeavours which were not exactly in keeping with either military or civil operations, and insofar as insurance coverage was concerned, such endeavours could be interpreted one way or another. The Representative of Trinidad and Tobago considered it important that States be very clear with respect to the type of operations embarked upon, and, for that reason, fully recommended the action proposed, with the hope that the Legal Committee would consult as many States, both developed and developing, with respect to the scenarios for the types of operations he had referred to. Commenting briefly, the Representative of France agreed with those speakers who had observed that the founding fathers of the Chicago Convention had done excellent work, and that the problem of civil vs state status was as difficult today as it had been at that time, since States had a specific mission insofar as the question of protecting national sovereignty and interests was concerned. The Representative of France supported the referral of the study to the Legal Committee as well as its circulation to Contracting States, provided that in so doing, the Organization did not lose sight of its focus, which was the ratification of Article 3 *bis* of the Convention.

17. To a request for clarification from the Representative of Saudi Arabia regarding the first sentence of paragraph 4.8.3, D/LEB explained that its wording reflected the reference which had been made, in a study presented by the Legal Committee of IFALPA, to some incidents where it had been very difficult to determine the status of the aircraft involved. While noting this clarification, the Representative of Saudi Arabia expressed concern vis-à-vis the possible extraction of what could be viewed as subjective comments from other sources, and emphasized that such sources be faithfully cited and reflected.

18. In taking the action proposed by the President, the Council:

- a) noted the Secretariat study attached to C-WP/9835; and
- b) instructed the Secretary General:
 - i) to transmit the study to Contracting States and international organizations concerned for their comments and views, if any, as well as the minutes of the Council's discussions on this subject;
 - ii) to present the study, together with the views and/or comments expressed by Contracting States and international organizations and the minutes of the Council's discussions, to the Legal Committee for consideration during its next (29th) Session; and
 - iii) to request the Legal Committee to advise the Council with regard to the interpretation of Article 3 (b) of the Convention on International Civil Aviation, for the guidance of Contracting States.

19. The President clarified that the action at sub-paragraph b) iii) above did not request the Legal Committee to advise the Council to adopt an interpretation of Article 3 (b), since the question of whether the Council itself could adopt an interpretation of an Article of the Convention, or whether such interpretation should be adopted by the Assembly, was a matter on which he would appreciate receiving the opinion of the Legal Committee. In referring to the example which the Secretariat study gave, under paragraph 6.1.3 (Interpretation), in respect of the "Definition of a Scheduled International Air Service" provided by the Council in 1952, the President clarified that this example concerned a definition, which was not the same as an interpretation.

- END -