THE PROTECTION OF MEDICAL AIRCRAFT
IN TIME OF CONFLICT

by P. de La Pradelle

Last year the International Review *published an article by Général-Major médecin E. Evrard on the legal protection of medical air transports in time of war.*[1] *We now have pleasure in reproducing the text of a preliminary report submitted to the Vth Session of the Medico-Legal Commission of Monaco.*[2] *Indeed, studies must be continued in this sphere in which the provisions of international law are at present inadequate.* (Ed.)

The International Committee of the Red Cross has asked the Medico-Legal Commission of Monaco to prepare draft provisions for the purpose of drawing up, either by revision of the Geneva Conventions or by a special agreement which would be attached to their present texts, a statute of immunity for medical aircraft in time of conflict which is at present inadequately assured and guaranteed by the existing provisions.

This request, which represents for that Commission a token of confidence for the future, coincides with the wishes expressed by a certain number of organizations and writers, who on different occasions have been anxious to place at the disposal of the armed forces' medical services the means, continuously developing, of air transport.

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[1] See *International Review*, July 1966.

[2] This study appeared in the *Annales de droit international médical*, Monaco, 1966, No. 14.

Considered and thought out for many years by military doctors and jurists, amongst whom one should mention Paul des Gouttes who had been Vice-President of the ICRC, the Attorney Charles Louis Julliot and more recently Général médecin Schickele, member of the Medico-Legal Commission of Monaco, the statute on medical aviation according to the letter of the Geneva Conventions has been twice retained but most unsatisfactorily arranged.

In 1929, when the Geneva Convention (known as the Land Convention) was revised at the instigation of the Conference's Secretary-General, Paul des Gouttes who in 1924 had published an essay on the " adaptation of the Geneva Conventions to aerial warfare ", the appearance of aircraft and their employment in safeguarding the wounded and sick in the field was described in an article, hurriedly written and brief, which was far from exhausting the subject and realizing a protective statute.

Article 18 of the Convention of July 27, 1929, for the amelioration of the condition of the wounded and sick in armed forces in the field mentions, without defining their origin (State, private, belligerent or neutral), " aircraft used as means of medical transport ". It lays down their markings and strictly limits their use by prohibiting " in the absence of special and express permission " their flying over the firing line and " generally over all enemy territory or territory occupied by the enemy ". The article also envisages involuntary landing or one imposed by the enemy and the resultant fate reserved to the aircraft and its crew, by restricting itself to placing them under the protection of the Conventions' provisions.

It is evident that the sub-committee charged with drawing up that article adopted a text which was capable of warning belligerents against possible abuses by medical aircraft and not of facilitating their tasks or of developing their employment to the full. No allusion is made in the article to the flight over or access to neutral territory.

From its beginnings, the position of medical aircraft under the Conventions was founded on error, and this was subsequently attacked by General Schickele. Instead of including aircraft amongst any other form of transport vehicle, no doubt moving in a particular element, those responsible for drawing up the article placed it in the

framework of aerial warfare in which, according to his own words, it had no right to be.[1]

In 1929, the Conference had itself admitted the inadequacy of this first attempt at revising the regulation on medical aircraft by inserting in the Final Record the recommendation that " the countries which are parties to the Geneva Conventions should meet in conference at an early date, to draw up detailed regulations governing the use of aircraft for medical purposes in time of war ".

Without going back to the preparatory work which, since the XIVth International Conference of the Red Cross, was to be connected with the implementation of that recommendation it will merely be sufficient to remark [2] that the second official attempt at putting into effect an effective and complete statute on medical aircraft, which should have implemented the promise made in 1929, has resulted in a setback. If the 1929 statute was, as admitted by the Diplomatic Conference, to have merely been a teething stone, the structure erected by the Diplomatic Conference of 1949, originator of the second statute, is far from presenting the desired qualities and from completing the work outlined. Under the appearance of an exhaustive regulation with standard application, the 1949 statute, in fact, presents serious failings.

These gaps and imperfections can be summarized by taking the following points into consideration. These are, in the first place, the *purpose* of the protection to be accorded to medical aircraft, that is to say, the definition of aircraft to be protected, and, secondly, the marking and identification of aircraft. Their conditions of employment must also be considered. This last factor in the statute of medical aircraft is necessarily regulated by the first point, in other words, the treatment of aircraft and their occupants in the event of involuntary or imposed landing, depending on the origin and the assignment of the aircraft concerned.

In various respects, the statute of medical aircraft, drawn up by the 1949 Diplomatic Conference, in spite of its thorough preparation, under the auspices of the International Committee of the Red Cross, presents a certain number of gaps and ambiguities which need filling and clarifying.

[1] See *Revue générale de l'Air*, 1950, p. 848.
[2] See article in *Revue générale de l'Air*, 1949.

1. **The definition of aircraft.**—By describing " medical aircraft exclusively employed for the removal of wounded and for the transport of medical personnel and equipment " article 36 of the First Geneva Convention of 1949 makes use of an ambiguous phrase liable to apply either to *medical aircraft* in the restricted sense of the word, that is to say to aircraft permanently and exclusively assigned to the army medical services, or to designate *operational military aircraft* which could be exceptionally assigned to a temporary medical mission, their normal employment being for purposes of hostilities, notably for the transport of fighting units.

Divergent commentaries which have been made on this paragraph of article 36 tend to accentuate this ambiguity. Some, connecting medical aircraft with hospital ships, tend to restrict application of the text only to the category of aircraft which might be exclusively and permanently assigned to the belligerents' medical services. Others, calling on experience of the last two world wars and subsequent limited conflicts, reserve, on the other hand, definition of the Convention only to aircraft of the armed forces which would thus be liable to serve alternatively for two ends: military operations and transport of the wounded.

Thus, in his study on the legal protection of medical air transports in time of war, Général-Major médecin E. Evrard, raising the question of searching for a realistic statute for medical air transports, does not hesitate to write in a peremptory manner that " medical aircraft do not exist exclusively as such ", but that there is on the other hand the common practice for military air transports developed during the Second World War and the Korean war " of temporarily converting military air transports to medical purposes on their return from missions ". The questions should therefore be raised whether such practice should be confirmed and, if so, a realistic statute for medical aircraft should exclude making similar searches along these lines in forming a medical aircraft park, in the strong sense of the word, which, without condemning the belligerents' practice, would complete it by instituting on a permanent basis for the duration of hostilities a medical air-fleet placed under the control of the belligerents' medical services and which in no case could be used for operations in war.

If such a stationary position can be regarded by its opponents as no longer apposite today, in the light of experience gained in the latest wars, with practical reality, it could however be legally defensible and materially realizable. When supporters of the system of exclusively medical use state that the belligerents, on account of their increasing needs for aerial resources, would never consent to assign, in time of hostilities, a part of their air-park for exclusively medical use, they seem not to take into account a certain number of existing realities. They omit, on the one hand, to take into consideration the future development of civil aviation and more especially passenger transport which will continue to increase in the next decade, either in the form of organized public transport in graded networks on a world level, or as private transport for business or travel which will link and develop inter-town transport from the early days of aviation when no pre-arranged line-flight plans were required.

They also neglect to consider the importance of public and private methods, in liaison with technical advances in aviation, which the *Neutral States* and *International Organizations*, placed by their nature or foundation above conflicts, could be able to make available to belligerents, provided no doubt that they would never be used for military purposes.

Our conclusion on this first weak link in the existing statute will be polyvalent. The definite and precise statute of medical aviation must take into consideration, perhaps as priority, " medical missions " required of operational aircraft of the armed forces. Medical aircraft, especially or exclusively assigned to humanitarian purposes, must furthermore be recognized and widely commissioned.

It is scarcely necessary to say how important we personally consider such recognition and extension of application to be, which in one form or another, either by revision or by an attached protocol, would reinstate the proposals which we submitted to the Geneva Diplomatic Conference, perhaps prematurely in the name of the delegation of Monaco, ably supported by the delegate of Finland. Far from considering, as did the experts in 1947, that the experience of the last war tended to condemn the use of medical aircraft, the Finnish and Monegasque delegates held the view that aviation in conditions of modern warfare offered exceptional

possibilities of ensuring the safety of human lives in peril which the Geneva Conventions obliged to protect. It was therefore urgent to seize the occasion of the Diplomatic Conference of 1949 to implement the recommendations of the Final Record of 1929. The necessity is therefore shown of submitting detailed regulations, for their common purpose, to replace article 29 of the Stockholm draft with the intention of authorizing to the maximum extent the commissioning of medical aircraft on a permanent basis and which would be exclusively assigned to humanitarian missions.

Both Finland and Monaco asked that, independently of public aircraft specially constructed for that purpose which would form a nucleus, private transport, freight or tourist aircraft of the belligerents could be converted, either at the start or during the course of hostilities, into medical aircraft in the strict sense of the term and that neutral private aircraft immobilized for commercial transport, as a result of war, be also offered to the belligerents' army medical services.

The Finland-Monaco amendment submitted to the first Commission (" Wounded and Sick ") on article 29 of the revised Convention of 1929 [1] and then on article 36 of the Maritime Convention [2] were successively rejected. The novelty of such a proposal, lacking adequate preparation, must have had the effect of arousing the mistrust of the majority of delegations who, on the contrary, adopted provisions which evidently had no meaning unless these insisted on solely maintaining the occasional employment for medical purposes of military transport aircraft belonging to operational units. This could also be applied to the rejection, on an amendment submitted by the United States, that aircraft should be painted white as laid down in the 1929 Convention to enable clearer recognition of the protective red cross emblem.

Ambiguity in the definition of article 36 can be dispelled only by firmly adopting the two categories of medical aircraft able to be provided through the increasing growth of air transportation and the disturbing and overwhelming demands of medical missions in time of war, on behalf of military and civilian casualties, which

[1] Final Record of the Diplomatic Conference of Geneva of 1949, vol. II, Section A, p. 85, Sixteenth Meeting, 13 May 1949.

[2] Final Record, vol. II A, p. 89.

will be practically impossible to meet, if aircraft on a large scale are not made available to the medical services.

2. **The marking of aircraft employed for medical purposes.**—A similar ambiguity can be found in the present texts on the question, which is of primary importance, of the marking and identification of aircraft used for medical purposes.

No objection can be made to the Geneva Conventions which stipulate that medical aircraft clearly display on their lower, upper and lateral faces the distinctive protective emblem (red cross, red crescent, red lion and sun). Whatever the development may be in construction techniques and the employment of aircraft and the relativity, according to types of aircraft and the conditions of their use, which methods of recognition on sight may involve, the traditional sign will, in all circumstances, in its use and for belligerents obliged to respect it, preserve a moral symbolic value and the conscious adhesion, in all circumstances, to its maintenance and dissemination. However, it is evident that since the Second World War, guarantees of immunity offered by day by only the visual protective sign at present in force, have shown themselves to be illusionary as regards the new conditions of employing interception aircraft of the armed forces, compelled for tactical reasons to open devastating fire on any unmarked aircraft and presumably suspect once it has been sighted, without putting visual identification into operation and the time involved in doing so would risk being fatal to operational aircraft.

The inadequacy of the traditional emblem and of the sole method of visual identification to ensure the protection of the aircraft against ground or air attack was pointed out at the preparatory Stockholm Conference in August 1948. Article 29, the basis of discussion at the 1949 Diplomatic Conference after referring to the requirements imposed by the historic emblem, added that " they shall be provided with any other markings or means of identification that may be agreed upon between the belligerents upon the outbreak or during the course of hostilities ". To facilitate their identification they would fly " at heights, times and on routes specifically agreed upon between the belligerents concerned ".

If provision was thus made of additional techniques of identification, the means advocated were no less vague and indefinite. Out

of this uncertainty the discussions at the Geneva Conference, held the following year, were to produce a precise but fallacious provision which, under the pretext of seeking efficiency, consisted in transforming the " medical flight plan " into an absolute condition of employment which the Stockholm draft restricted itself to commending in a supplementary capacity.

In Geneva, the system of identification by a flight plan became above all an obligation and, according to the general views of commentators of the 1949 Conventions, the prior agreement between belligerents demanded by the new provisions without discrimination resulted in the impossibility of it being applied.

Since 1949, this shortcoming could be exposed without risk of contradiction. It is sufficient to think of the usual slowness in negotiations between enemies to imagine, in fact, all the difficulties which could be encountered for the conclusion " between all the belligerents concerned " of a prior agreement on either air traffic of a regular character or on occasional traffic by request, not excluding any eventualities in the article suggested in the first part of its amendment [1] by the United Kingdom delegation in Geneva and which was adopted by 14 votes to 1 by the first Committee.[2]

When submitting the Committee's report to the Plenary Assembly confirming this result, Général médecin Lefebvre rightly drew attention to the circumstantial character of that " attempt at improving the distinctive markings on medical aircraft " which, " in the present state of affairs is probably the best calculated to make up for the inadequacy of markings recognizable at sight ". This was an attempt which the rapporteur had shortly before qualified as " a new conception " which had been embodied in the Conventions.[3]

This exigency, however, for the purposes of identification, of a condition impossible to realize has shown itself in fact to be inapplicable and one has the right to ask oneself whether its retention would not indeed prolong an attitude of mistrust towards the humanitarian uses of transport by aircraft. The same Committee which adopted the principle of a plan prior to the temporary

[1] *Final Record of the Diplomatic Conference of Geneva of 1949.* Annex No. 40.

[2] Sixteenth Meeting, Friday 13 May, 1949, *Final Record of the Diplomatic Conference of Geneva of 1949*, vol, II, section A, p. 86.

[3] cf. *Final Record of the Conference*, vol, II, section A, pp. 187 and 197.

opening of medical air routes of all kinds, rejected it for hospital ships on maritime routes . . . " It feared ", reported Général médecin Lefebvre, " that in notifying the enemy of the course they were to follow, this would give valuable information regarding the safety of navigation in certain maritime zones ".[1]

In fact, with the alleged intention of guaranteeing immunity for them by conditions concerning times of flight and altitudes enabling them to be recognized in the air, medical aircraft of all categories are subjected by the Geneva regulation to repressive policing condemning them to inactivity. This was doubtless laid down only for regular operational aircraft, providing the medical services with the means of medical freight facilities on their return journey, after having completed their mission of transporting combatants. A condition of prohibitive exception has thus been substituted for the rule of employment and protection promised in 1929 and attempts at providing safety for medical aircraft operates with a severe restriction on the employment of such aircraft, dependent only on the belligerents' decisions.

This unexpected consequence is all the more regrettable as, by an unusual provision under the Conventions, the hold of the Parties to the conflict over the use of aircraft, either on mission or on medical service, extends to flying over neutral territory, a right which the Diplomatic Conference of Geneva introduced into the 1949 texts. This denotes a certain progress, but the right is only conferred with the permission and under the direct control of the belligerents concerned. These are indeed conditions which, from the point of view of the new provision's effectiveness, are unsatisfactory, whilst from the legal point of view they show unusual misunderstanding of the general rules of public international law, by prescribing the respect for the political independence and territorial integrity of neutral States.

The present article 37 of the First Geneva Convention of 1949 at the end of paragraph 1 contains this inexplicable expression: " They (medical aircraft) will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Powers con-

[1] cf. *Final Record of the Conference*, vol. II, section A, p. 187.

cerned ". This eventual extension of the " medical flight plan " unnecessarily decreases the effectiveness of the system of immunity in force.

Is all hope compromised of improving the distinctive protective markings on aircraft as a result of seeing the failure in making an unbiased examination of this unreal and paradoxical attempt?

A reassuring answer has been given by technicians who had to abandon the unusable " new conception " of recognition based on the medical flight plan in favour of an effective improvement by an immediate and permanent system of identification which, in the conditions of emergency which characterize medical requirements, faced with the rapid development of modern methods of destruction by air-air and ground-air weapons, can alone enable effective application to be made of the principle of immunity accorded by the Geneva Conventions to medical methods of air transport.

It should be for a flying doctor, completely trained, with knowledge based on personal experience and inspired by a feeling of future responsibility, to re-introduce within this context, in humanitarian circles and before public opinion, the classical procedures of the visual identification of medical aircraft by bringing them the indispensable contribution of methods of immediate contact and of very wide range which the excessive limit of modern weapons demands and which is permitted by improved techniques in telecommunications.

Recalling most appositely the reference made in article 36, paragraph 2 of the First Geneva Convention to " any other markings or means of identification " which may be agreed upon between the belligerents, Général-Major médecin E. Evrard advocated [1] the adoption by Conventions concluded already in time of peace of a system of protection of military missions effecting medical evacuations which would add to the affixing of the red cross on military aircraft by electronic and radio-electric equipment enabling the simultaneous recognition and identification of aircraft.

[1] E. EVRARD, the legal protection of medical air transports in time of war, *Annales de Droit International Médical*, No. 12, 1965, p. 11 and following.
This most interesting study, the essential documentary basis of our files, was the main reason for the International Committee of the Red Cross approaching the Medico-Legal Commission of Monaco.

General Evrard was thus suggesting the international adoption of an audio-visual system of identification and protection which would ensure that medical aircraft, in the wide sense of the term, would avoid the risk of being destroyed by enemy interceptor aircraft by employing either simultaneously or separately the three following categories of identification.

a) *Direct visual methods.*—An electronic system of coloured flashes of frequencies and landings to be arranged for use by aircraft to give direct visual indications of its presence in areas in which there could be risk of interception. This system would be valid for all types of aircraft whatever the altitude in flight. This could also be accompanied for short-range purposes by a system of sound identification, already employed by land ambulances.

b) *Indirect visual methods.*—A secondary radar system of the IFF-SIF (Interrogation Friend or Foe-Selection Identification Feature) type selected by the International Civil Aviation Organization for one of the methods used, in principle method 3A common to civilian and military, would enable operational aircraft or a missile base to make immediate identification on the radar screen at very long distances of humanitarian aircraft.

Such a system which can be expected to be effective to an altitude higher than 3000 ft. would be above all valid for medical transporting by aircraft, but would scarcely be suitable for helicopters. It would be easily observable for interceptor aircraft operating under the control of ground stations or for guided missile bases.

c) *Non-visual radio-electric methods.*—The allocation of wave-lengths in high frequency bands, VHF or UHF, and determined by agreement in the framework of the International Telecommunication Union, to medical aircraft could finally provide a radio-electric method, without special equipment, of instant identification for their immunity. The value of this system has been mentioned however as being very inadequate in practice, as its effective functioning presupposes that all radio sets of the enemy capable of doing damage to medical aircraft are permanently listening-in on the reserved wave-length. This method would also only provide incomplete localization of the flight to be protected.

Whilst maintaining definite reservations on the categorical assertion made at the very beginning of his research by Général-Major médecin Evrard of the impossibility of conceiving the creation and maintenance of aircraft for exclusively medical purposes in time of war, we here wish to pay tribute to the practitioner, doctor and jurist who has succeeded in rousing the attention of the guardians of the Geneva Conventions to the advisability and possibility of effectively revising the present system of identification which condemns medical aircraft to remain grounded. Its immunity can henceforth be technically assured.

Released from the stultifying preliminary flight plan agreed upon by the belligerents concerned, will the medical mission be preserved from any other sort of difficulty?

3. *Conditions for the employment of aircraft.*—The immunity of medical aircraft, identified definitely and beforehand, cannot be guaranteed in all places and circumstances. In operational areas, the presence of medical aircraft, whatever their origin, can raise objections and lead to control measures, going so far as prohibition, whose legality can be disputed with difficulty by those who have drawn up a protective statute inspired by the most liberal intentions.

The present conditions of employment laid down by the Conventions relating on the one hand, as regards flying over territory, to a certain number of prohibitions and in the case of landings, to the authorization of measures of immobilization and restraint, affecting the fate of the aircraft and persons transported therein, vary according to whether such landings are involuntary or enforced.

Drawn up solely for the category practically in use of military aircraft employed at the request of the medical services, the regulation in force should evidently be revised to take into account the diverse origins of the medical airpark whereby an increased and selective commissioning of aircraft, in accordance with the rejected, but not discredited, draft of the Finnish and Monegasque delegations at the 1949 Diplomatic Conference, could be envisaged. It is obvious that aircraft of a relief air fleet, registered and outside all effective nationality in the name of a public or privately recognized international organization cannot, as is the case for aircraft of a Party to a conflict, where aircraft of a neutral State placed under

its control, be abandoned to the discretionary power of the State in which landings take place, which in the circumstances cannot be described as being an enemy power.

The actual text of article 36 of the First Geneva Convention, which certainly does not relate to this last category of aircraft, subjects medical aircraft, under the control of a belligerent in the event of landing, to variable rules according to whether this has been effected involuntarily or under imposed summons. In the latter case, the aircraft with its occupants may continue its flight after examination, if any. Involuntarily landing results in harsh treatment, the injustice of which could well be challenged.

By way of general conclusion and to serve as a basis for discussion, we would propose to take the following directives into consideration.

The development of air transport methods enables and encourages research, already in time of peace, into the complete and polyvalent equipping of medical air resources which will ensure, alongside the services on request, at present carried out by the belligerents' military air transport, the regular and permanent functioning of an aircraft park exclusively reserved for medical missions.

The present definition of medical aircraft is ambiguous and should be given precision.

The designation *medical aircraft* should be reserved for aircraft exclusively and permanently allocated to the medical services under the control of a belligerent State (aircraft of national health services, specially constructed or requisitioned for that purpose, civilian or publicly owned aircraft of neutral States placed under the control of a Party to the conflict), or under the direct control of an international organization (aircraft of inter-governmental organizations and specialized agencies of the United Nations, aircraft of the ICRC).

The employment of medical aircraft and of aircraft on medical missions should be released from the obligation, at present laid down by the Conventions, of a flight plan agreed upon by the belligerents concerned.

Medical aircraft and aircraft on medical missions should, in addition to the distinctive emblem of the Geneva Conventions, be

provided with a permanent system of identification at all times and distances enabling them to have their immunity respected.

Unless a special agreement has been concluded, medical aircraft or those on medical missions will not be able to fly over operational areas, enemy territory or enemy occupied territory. In the event of their flying over a prohibited zone, aircraft will not be the subject of attack but may be summoned to land.

In the event of landing, either involuntary or enforced on the above-mentioned territories, medical aircraft, in the strict sense as defined above, cannot be seized unless these are used by the captor for exclusively medical purposes. Aircraft of international organizations should be handed back to the latter together with their crews.

These are the proposals which seem to us to be capable of giving the most effective realization of the fundamental principle of respect and protection of the victims of war which, since 1864, remains the permanent keystone of the Geneva institution.[1]

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[1] The present report is, in part, based on the results of a Working Party comprising: Général médecin VONCKEN, Professor de LA PRADELLE, Mr. Jean PICTET, Général médecin E. EVRARD and Lieutenant-General (Air) VAN ROLLEGHEM.

During its third meeting the Working Party heard the observations of Mr. PUJADE of the ICAO, Mr. PETIT of the ITU, Mr. BOSSELER, Eurocontrol expert in legal affairs, and Mr. ABELS, Eurocontrol expert in operational air control.