

**INTERNATIONAL AIR LAW CONVENTIONS AND DOMESTIC
AIR LAW OF NEPAL: A COMPARATIVE STUDY**

by

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Shortened version of the thesis title

Int'l air law conventions and domestic air law of Nepal.

ABSTRACT

Nepal had promulgated its first domestic Civil Aviation Act on 12 April 1959, more than a year before it became a member of the International Civil Aviation Organization on 29 July 1960. Since then it has adhered to a number of international air law conventions. But on the domestic front very few regulations have been made under the Act to deal with only certain aspects of civil aviation. This thesis explores Nepal's obligations under the international air law conventions and analyzes the extent of domestic legislation in Nepal.

At first, the study surveys the overall setting of the air transport system and regulations in Nepal. The second part briefly deals with the International Air Law Conventions which Nepal has ratified. Finally, the study examines how Nepalese domestic air legislation compares with its obligations under the international air law conventions. The thesis concludes with the recommendation that a whole new set of rules and regulations should be promulgated as soon as possible to meet the modern trends in air transportation. Also, a restructuring of aviation authorities for the effective implementation of air transport regulation is long overdue.

Résumé

Le Népal a promulgué sa première loi nationale réglementant l'Aviation Civile le 12 Avril 1959, près d'un an avant de devenir membre de l'Organisation Internationale de l'Aviation Civile, le 29 Juillet 1960.

Depuis, le Népal a adhérer à de nombreuses Conventions Internationales portant sur le droit aérien. Toutefois, sur le plan national, à l'exception de certains aspects de l'Aviation Civile, il existe très peu de réglementation.

Cette thèse a pour objet d'étudier les obligations du Népal issues des Conventions internationales portant sur le droit aérien ainsi que d'analyser l'étendue de la législation nationale népalaise.

A cette fin, ce mémoire considère d'abord la structure et la réglementation du transport aérien au Népal. En second lieu, il apprécie brièvement les Conventions internationales de droit aérien ratifiées par le Népal, et enfin, examine la manière dont la législation aérienne népalaise peut être comparée à ses obligations issues des Conventions internationales de droit aérien.

Cette thèse conclue sur une recommandation proposant la promulgation dans les plus brefs délais, d'un système de droit et d'une réglementation entièrement nouveaux, permettant de s'adapter aux développements modernes du transport aérien. Il apparaît de plus indispensable de revoir la structure des autorités aéronautiques si l'on veut offrir une réglementation effective dans ce domaine.

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I would also like to make it clear that the views expressed in this thesis are entirely my own and do not represent or reflect the official views, opinion or policy of His Majesty's Government of Nepal or any of its Ministries or Departments.

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LIST OF ABBREVIATIONS

AASL	Annals of Air and Space Law
ACT	Civil Aviation Act 2015(1959) of Nepal
AIR	Accident Investigation Rules 2024(1967) of Nepal
AMI	Aircraft Manual of India, 1985 ed.
ATCM	Air Traffic Control Manual
ASA	Air Services Agreements
BASA	Bilateral Air Services Agreements
BATA	Bilateral Air Transport Agreements
CAA	Civil Aviation Authority
CMU	Confidential Memorandum of Understanding
DCA	Department of Civil Aviation
DOT	Department of Transport
FIT	Free Individual Traveller
GOI	Government of India
GOP	Government of Pakistan
HMGN	His Majesty's Government of Nepal
IASL	Institute of Air and Space Law(McGill University)
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
IFR	Instrument Flight Rules
JALC	Journal of Air Law and Commerce

NCAR	Nepal Certificate of Airworthiness Requirement
RNA	Royal Nepal Airline
RNAC	Royal Nepal Airline Corporation
RULES	Civil Aviation Rules 2019(1962)
SAR	Search and Rescue
SARPS	International Standards and Recommended Practices
VFR	Visual Flight Rules

TABLE OF CONTENTS

	Page
ABSTRACT	i
RESUME	ii
ACKNOWLEDGEMENTS	iii
LIST OF ABBREVIATIONS	v
 <u>Chapter 1. Air Law of Nepal</u>	 1
Section I. Introduction	1
A. History	1
B. Geography and Climate	3
C. Economy	4
Section II. The Air Transport System	5
A. Early beginning	5
B. Airports and Navigational Facilities	5
C. Department of Civil Aviation	7
D. Royal Nepal Airline	9
Section III. The Legal System	11
A. Legislature	11
B. Legislative Procedure	13
C. Judicial System	14

Section IV. The Domestic Air Law of Nepal	16
A. Civil Aviation Act 2015 B.S. (1959 AD)	16
B. Civil Aviation Regulations under the Act	24
C. Royal Nepal Airline Corp. Act 2019 B.S.	26
D. Bilateral Air Services Agreement	29
ENDNOTES	35

Chapter 2. International Air Law Conventions(Ratified by Nepal): 40

Introduction

Section I. Chicago Convention of 1944	41
Section II. Int'l Air Services Transit Agreements(IASTA)	46
Section III. Aviation Security Conventions	49
Section IV. Warsaw System of Liability	57
ENDNOTES	69

Chapter 3. The Impact of the Int'l Air Law Conventions on

the Nepalese Domestic Air Law. 79

Section I. Obligations under Chicago Convention of 1944	79
A. Chicago Convention and Annexes to it	79
B. Aircraft Nationality and Registration Marks	84
C. Personnel Licensing	88

D. Airworthiness of Aircraft	96
E. Operations of Aircrafts	102
F. Rules of the Air and Air Traffic Services	106
G. Search and Rescue	111
H. Accident Investigation	112
Section II. Obligations under the Aviation Security Conventions	119
Introduction	
A. Definition of offences, aircraft in flight or in service	119
B. Penalty for the offences	124
C. Conditions for the application	125
D. Jurisdiction	126
E. Extradition or Prosecution	127
F. Power to arrest	128
G. Return of seized aircraft and continuation of the flight	130
H. Preventive Measures and other provisions	131
I. Montreal Protocol of 1988	134
J. Convention on Marking of Explosives	135
K. Annex 17 (Aviation Security) and Security Regulation	136
Section III. Obligations under The Warsaw System of Liability	141
Introduction	
A. Scope of the Convention	142
B. Documents of carriage	143

C. Principle of Liability	147
D. Limitation of liability	152
E. Other provisions	155
F. Air carrier's liability in Nepalese law	158
G. Future of the Warsaw System	163
ENDNOTES	168
 <u>Chapter 4: General Conclusions</u>	190
A. Revision and promulgation of Act and Rules	190
B. Privatisation of the Airline Industry	192
C. Need for Autonomous Civil Aviation Authority	193
 BIBLIOGRAPHY	195
 APPENDIX	210
A. Civil Aviation Act 2015(1959 AD)	211
B. Civil Aviation Rules 2019(1962 AD)	247
C. Civil Aviation (Investigation of Accident) Rules 2024(1967AD)	285

Chapter 1. The Air Law of Nepal.

Section I. Introduction.

A) History.

Nepal is a land-locked country squeezed in between the vastness of China to the North and India to the South, East and West. Nepal, as it is known today, came into existence as a Nation in 1768 AD, when Prithvi Narayan Shah, King of the small hilly principality of Gorkha, a district in western Nepal, unified by force many separate feudal principalities and the three kingdoms of the Kathmandu valley.¹ Being a land-locked country, its external relations were limited to China, India and the U.K. during the early period of its history. The reason for its relation with the British was their obvious presence in India. For almost two centuries Nepal had pursued an isolationist policy. The Treaty of Peace with British-India, which it was forced to conclude in 1816, after Nepal's defeat in the Anglo-Nepal war of 1814-1816, was also a cause in its pursuing this isolationist policy.²

The Rana-Oligarchy, which established its power by a cold-blooded massacre in Sept. 1846, ruled the country in the name of the king for 104 years. In 1950, an armed revolution led by the Nepali Congress overthrew this Rana-Oligarchy. In 1951, for the first time Nepal opened its border to foreigners and foreign aid. The Nepali Congress won the first General Election held under a multiparty constitution with overwhelming majority, in 1959. But on, 15 December 1960, King Mahendra dissolved the popularly elected parliament and took over power in a bloodless coup d'état. And

since December 1962, the Partyless Panchayat System, which derived its name from early village council composed of five (Panch) seniors, prevailed in the country for almost three decades.³ A new movement for the restoration of Democracy was launched on 16 February 1990 by the joint progressive forces of Nepal with confrontations. After 50 days of Nepalese Democracy Movement marked by demonstrations, fights and bloodshed, finally, on the night of 8 April 1990, the king announced the abolishment of Panchayat System and the restoration of the multi party system. Since 9 November 1990, Nepal has a new constitution with sovereignty vested in the Nepalese people and a Democratic Constitutional Monarchical System. Now, with this political stability, Nepal's main challenge is the economic development of the country. This was well emphasized by the State Minister of Finance in his budget speech of 1992-93 as follows:

"There is no dispute left in respect of the political structure or system following the transfer of Sovereignty to the people leading to the establishment of Multi-Party Democracy. Now the challenge is mainly that of country's development, reconstruction and alleviation of poverty. Only through overall economic progress can Democracy be safeguarded and the future of all Nepalese people rest secured."⁴

Being a land-locked country with about two-third of the area occupied by hills and mountains, air transportation plays a very vital role not only in respect of its economic development but also in respect of its national unity and integration. To this end, a sound basic legal system to deal with the changing needs of air

transportation is urgently needed. The Nepalese Civil Aviation Act was promulgated in 12 April in 1959. It has been amended only three-times, the last amendment coming in 1977.

B) Geography and Climate.

Nepal has a total land area of 147,181 sq.km. with a rectangular shape running East to West 885 km in length and mean width of 193 km North to South. It lies within Latitudes 26 22' N to 30 27' N and Longitudes 80 4' E to 88 12' E.⁵ Nepal is predominantly a mountainous country. Eight out of the ten highest peaks in the world lie in Nepal, including Mount Everest - the highest peak in the world. Except for a narrow belt of plain area in the south, about two-thirds of its land area is covered by hills and mountains. Its elevation varies from 70 metres to 8848 metres above mean sea level. Because of great varieties of topography, the country has a diversity of weather and climate. It experiences a tropical, mesothermal, micro-thermal, taiga and tundra type of climate. The main rainy season is in the "Monsoon (June to Sept.)" - caused by the differential heating between land and sea, when 60-80% of the annual rainfall falls. In winter, at the higher altitude, most of the precipitation falls in the form of snow. Maximum recorded temperature was 44 C in the year 1983 and extreme minimum temperature of -6 C at Jiri.⁶ Basically, Nepal can be divided into three geographical regions: the southern plain belt, known as Terai where the climate is hot, mid-regions with hills and valleys where the climate

is moderate and pleasant, and the North- Himalayan Region with dry and cold temperatures.

C) Economy.

Nepal is predominantly an agricultural country with a population of 18.5 million in 1991 with a growth rate of 2.08 percent per annum. 90 % of the economically active population is estimated to be engaged in agriculture. Because of topographical constraints, only 18 % of the total land area has been brought under cultivation. The southern plain area - terai belt, alone accounts for 57 % of the cultivated area. Agriculture accounts for 75 % of exports and contributed about 56 % of the GDP (Gross domestic product) in 1990/91.⁷ The GDP at constant price had increased by 5.5 % in 1990/91. Due to high rate of population growth and the low rate of growth of GDP, Per Capita Income (US \$ 180 in 1989) has not been increased appreciably. Most of the people still live below the poverty line. Major focus has to be given to the rural masses to alleviate their poverty and hence agriculture sector still occupies the top priority in the National Economy. Tourism also contributes very significantly to the National Economy as one of the main sources of foreign exchange earnings in the country. A total of 292,995 tourists visited Nepal in 1991 which represents a 15 % increase over 1990 and the gross foreign exchange earning was 58.59 million US \$. Tourists entering by air constituted 91.5 % in 1991.⁸

Section II. The Air Transport System in Nepal.

A) Early beginning:

The history of Air Transportation in Nepal is a very recent one. The first aircraft ever to land in Nepal was a small Bonanza aircraft in May 1949 (2006.1.11 Bickram Sambat) carrying the then Indian Ambassador. It landed on a site known as Gaucher, 6 km east of downtown Kathmandu, which was levelled a year earlier and designated as an airport. Scheduled commercial air services started in October 1950 between Kathmandu and Patna(India) and Calcutta(India) by an Indian carrier (Indian National Air Services)⁹. In 1957, the Department of Civil Aviation was formally established within the Ministry of Transportation and Communication to look after the aeronautical affairs of the country. In the year 1959, the Civil Aviation Act 1959 was promulgated. Before the establishment of a National Airline, Himalayan Aviation Ltd., a private company registered in Nepal, provided domestic air transportation with a leased aircraft from India. On 1 July 1958, the Royal Nepal Airline corporation, a national airline, was established under a separate Act of Incorporation. The government granted it a monopoly to provide scheduled air services within Nepal under the said Act.

B) Airports and Navigational Facilities:

Because of the extreme topographical constraints, it was not easy and expedient to build roads and it was also very expensive. In 1951, there were only 376 km of roads and by 1990, Nepal had 7330 km of roads.¹⁰ Still there are many

hilly and mountainous areas where road transport has not reached. Therefore, as a viable alternative, the Government has given high priority to the development of air transportation. Airport construction in a rugged mountainous country as Nepal was not an easy task. It was very hard to find a flat area suitable for landing aircraft. From 1951 to 1965 altogether 14 airports were constructed and in Kathmandu Airport, a new runway with a length of 2012 metres was added.¹¹ Mostly, those airports were concentrated in the plain terai belts of south. Later, demands to build airports in the Northern hilly and mountainous region increased, due to the increasing local needs as well as political influence. By 1975, ten more airports were constructed.¹² In the meantime, Biratnagar, Bhairahawa and Janakpur Airports were black-topped and the Runway of the Kathmandu Airport was extended to 3048 metres. At present, Nepal has 43 airports (as shown in fig.1) with 4 asphalt runways (Kathmandu, Biratnagar, Janakpur, Bhairahawa, Nepalgunj). Kathmandu Airport, which is called Tribhuvan International Airport, entered a new era of modernization with the operation of an artistically built new terminal complex in 18 Feb. 1990. This new terminal is fully equipped to handle 1060 arrivals and departures per hour. It is expected to cope with traffic demand up to the year 2000 AD. As the only gateway to Nepal by air, this airport has adequate facilities and services required for the International operation. Besides a modern control tower and Air Traffic Control Centres, this airport is equipped with VOR/DME, NDB navigational facilities, PAPI, Runway and Approach Lighting System.¹³ Out of 43 airports, 30 airports are manned by Civil Aviation staff and equipped with communication facilities. Seven

airports provide air traffic control services while rest of the airports provide Aerodrome Flight Information Services (AFIS). Seventeen airports are equipped with NDB's while nine airports also have PAPIs (Precision Approach Path Indicator System). Twenty-one airports are run on solar power. These thirty airports are linked up with each other with domestic AFTN (Aeronautical Fixed Telecommunication Network).

C) Department of Civil Aviation:

Nepal had initiated the institutional development of a transportation in early 1957 with the creation of Transport Department. It was entrusted with the responsibility of developing roadways, ropeways, railways, waterways, along with airways. In the same year, the Department of Civil Aviation was formally established as a separate entity under the Ministry of Works, Communications and Transport. Two years later, the Civil Aviation Act 2015 B.S.(1959 AD) was promulgated with clear cut legal provisions for civil aviation activities. In 1960, Nepal became a member of the International Civil Aviation Organization, a UN-Specialized Agency . At present, the department employs about 1500 people and has 35 offices spread over the different parts of the country. Since 1983, the Department of the Civil Aviation is under the Ministry of Tourism. Very recently(1993), recognizing the importance of aviation, the Ministry's name was changed to Ministry of Tourism and Civil Aviation. As the aeronautical authority of Nepal, its main objectives can be derived from the preamble of the Civil Aviation Act, which is as follows:"Whereas, it is expedient to

control and manage the civil aviation for creating a situation conducive to the development of the civil aviation in order to make optimum benefit to the nation out of the air transport and to maintain law and order as well as the comfort of the people in general.."¹⁴

Along with this, the department regards as one of its main objectives to develop and promote safe and reliable and economical air services in and outside the country. To fulfil these objectives, the Department of Civil Aviation specifically carries out the following activities:

- Develop and construct airports.
- Install, operate and maintain communication and air navigation facilities.
- Enforce the Civil Aviation Act and regulations thereof as well as all international air law conventions to which Nepal is a party.
- Regulate air transport operations in terms of registration, licensing, examination, certification
- Promote and manage Bilateral Air Services Agreements.
- Provide search and rescue services and carry out aircraft accident investigation as directed.
- Develop and promote Air Traffic Services including air routes and air space management.
- Train and develop human resources as required.

Earlier, because of a lack of infrastructure, much attention was focused on the construction and maintenance of airports, and installation and maintenance of communication and navigation equipments. Regulatory and operational aspects seem to have been neglected. At present, with 43 airports and to some extent adequate Com./Nav. facilities in 30 or more airports, the author feels that due attention has to be given to the system development and regulatory tools needed to manage present day air transport problems. Otherwise, one vital aspect of air transport will be limping, which might reflect in the safety of the air transport itself.

D) National Airline:

In the early fifties, before the establishment of the National Airline, internal air transport service was provided by a private Nepali registered company called Himalayan Aviation Limited. Royal Nepal Airline corporation, a national carrier was established on July 1, 1958 by a separate Act of incorporation. It is a fully Government-owned corporation. Its initial Act of incorporation of 1958 was repealed by a new Act of Incorporation in 1963. Initially, it started its service by one D-3, with 97 employees, to 4 domestic points. Now it has a fleet of 17 aircraft serving 39 domestic points and 9 international points in 8 countries with over 2450 employees.¹⁵ From the early days, the from lifting of cranes and bulldozers across the mountains to assist the development of transport, to the present day role as a catalyst for the socio-economic upliftment and trade and tourism development of the country, the role of Royal Nepal Airline cannot be overemphasized. It has linked the

various remote inaccessible parts of the country through its extensive domestic network, thus integrating national unity and harmony. The airlines basic objectives as given in its corporate profile are as follows:¹⁶

- To manage air-transport services inside and outside the Kingdom of Nepal in a safe, efficient, economical and professional manner.
- To ensure optimum profitability while offering services at economical fares as far as possible and
- To continuer diversifying air-transport services.

These are the broad ideal objectives which most airlines may like to achieve. But looking back at the track record of the national airline, it has performed not so badly in the context of world wide gloom and heavy losses in the airline industry. In spite of world wide-economic fluctuations (inflation, oil price hike, recession) RNA has consistently maintained profitability for the last 15 years. In fact, except for a brief period in 1968-72 (1962/63), so far it has always able to maintained profitability.¹⁷ It carried 648,767 passengers (Domestic 309,429 and International 339,338) in 1991/92, a 2.3 % increase over previous year. And in the same year, its load factors were: Domestic 81.3 % and International 60.2 %. Its market share with regard to air passenger traffic to and from Nepal (3rd. and 4th. Freedom traffic only) was 44.3 % in 1991/92.¹⁸ Even with this track record, it has been widely criticised (locally) as very inefficient, ill-managed, overstaffed, etc. Definitely, its progress in the international sector has been very slow. It has not been able to benefit sufficiently from the growth of tourism in the Asia/Pacific Region. One of the main problems this

airline is facing is the capacity constraints. Its fleet of two Boeing B757 is not very suitable for a long sector-route like Kathmandu-Frankfurt-London. Its aged B727 needs replacement as well as replacement of Avro aircraft in domestic sector. Domestic sector needs are to be given careful attention now because of competitions by four Private Domestic Airlines. Keeping in line with liberal economic policy and private participation, last year the Government granted licenses to four domestic airlines. With trimming down unnecessary staff and costs and introducing new marketing strategy such as yield management etc., the airline should be able to achieve higher growth rate and profits than its average slow growth. RNA's long term plan seems to be to construct a cargo complex at Tribhuvan International Airport, Kathmandu and have a flight kitchen for its own use and other incoming airlines and also run its own hotel to provide a complete package service to its passengers.¹⁹ The author feels that these are very ambitious plans and may not be very cost effective for want of expert knowledge, experience and the huge capital investment required.

Section III. The Legal system of Nepal .

A) **Legislature.**

Nepal is an independent, indivisible, Sovereign State and is the only Hindu Kingdom in the world. It has never been subjected to any colonial power. Now, Nepal has a adult franchise, a Parliamentary system of Government, constitutional monarchy and a system of Multi-party Democracy. The new constitution of the kingdom of

Nepal came into force on November 9, 1990, after successful people's movement for restoration of democracy. It was led by united front for Nepali Congress and Communist parties of Nepal. This new constitution has 133 Articles with 3 Schedules. The Legislature is called Parliament and it consists of His Majesty, House of Representatives and the National Assembly. Thus, the legislative system is a Bi-Cameral one consisting of the National Assembly and the House of Representatives. The House of Representatives consists of 205 members elected for a five-year term under the adult franchise system of election.²⁰ The National Assembly which is also known as upper house, consists of sixty members. Ten members are nominated by His Majesty drawn from amongst persons of high reputation who have rendered service in various fields of national life. The National Assembly is a permanent house but one-third of its members are replaced every two years and the vacant seats are filled in the same manner with which the seats of the vacating member were filled. This Bi-Cameralism system insures the presence of at least one house permanently, even if the other house is dissolved due some reason. Quorum for either house of parliament is one-fourth of the total number of the concerned house. These figures are 51 for House of Representatives and 15 for the National Assembly. Either house of parliament decides by a simple majority vote of the members present and voting, except as otherwise provided for in the constitution. Those exceptions are vote of two-third majority of the house of representatives for a approval of proclamation of a state of emergency by His Majesty²¹, vote of two-thirds of its total membership attending for the amendment of the constitution²² two-third majority of the House

of Representatives for removal of Supreme Court Judges for reasons of incompetence, misbehaviour or failure to discharge the duties of office in good faith.²³ Vote of two-thirds of the members present at a joint sitting of both house of parliament are required for ratification of, accession to, acceptance of or approval of treaty or agreement concerning peace and friendship, defence and strategic alliance, boundaries of the Kingdom of Nepal, natural resources and their distribution.²⁴

B) Legislative Procedure.

Normally, a Bill may be introduced in either house of the parliament. Once it is passed it will be sent to the other house for its approval. Once it is approved, it is presented to His Majesty for assent. It becomes an Act, once His Majesty gives his assent. Finance Bill can be introduced only in the House of Representatives. A finance Bill, a Bill concerning the Royal Nepal Army or the Armed Police Force are termed as Government Bills. Prior approval of His Majesty is needed for the introduction for the amendment of such bills.²⁵ The open question is what constitutional recourse is available if His Majesty fails to give approval to introduce such amendment. One possible recourse may be that the Parliament can amend the very Article 68 by following the constitutional amendment procedure. A Bill which is passed by one House but rejected by other house or passed with an amendment, will be sent back to the House where it originated. The House of Representative has overriding authority over the National Assembly, because a Bill rejected or amended

by National Assembly can be passed by the House of Representative in its original form or with amendments and presented to His Majesty for assent. Joint sitting of both houses are needed to pass the Bills which have been passed by the National Assembly and rejected by the House of Representatives or Bills which the House of Representatives fail to pass with the amendments of the National Assembly.²⁶ His Majesty may send back a Bill for further deliberation with his recommendations. But if the Bill is sent back again with or without accommodating his recommendations, His Majesty is bound to give assent to that Bill within thirty days of its presentation.²⁷ There is a provision of the issuance of an Ordinance without prejudicing the constitution by His Majesty in circumstances requiring immediate action but it has to be tabled and passed at the next session of both houses of parliament, otherwise it will ipso facto cease to be effective.

C) Judicial system.

Article 85 of The Constitution provides for three tiers of courts namely - Supreme Court, Appellate Court and District Court in order of hierarchy. These courts administer justice in accordance with the Constitution, the laws and the recognized principles of Justice.²⁸ There is also a provision to establish, by law, special types of courts or tribunals for the purpose of hearing special types of cases but such court or tribunal will not be constituted for the purpose of hearing for particular case.²⁹ The Supreme Court is the highest court in the judicial hierarchy and it can inspect, supervise and give directions to its subordinate courts and other

judicial institutions. An exception to this is the Military court which does not come under the authority of the Supreme Court.³⁰ Judges of the Supreme Court are appointed by His Majesty on the recommendation of the Constitutional Council for the Chief Judge and on the recommendation of the Judicial Council for other judges.³¹ A Judge of the Supreme Court can be removed from his office only if the House of Representative passes a resolution by two-thirds majority of the total number of its members (not total number of members present during the voting) for his removal on the grounds of incompetence, misbehaviour or failure to discharge the duties of his office in good faith and that resolution is approved by His Majesty.³² Retired judges of the Supreme Court are not eligible for appointment to any Government Service and also not entitled to practice law before any office or court.³³ Being the highest court in the country, the Supreme Court has a jurisdiction to declare any law or part thereof void on the ground of inconsistency with the Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by the Constitution or on any other ground.³⁴ The Supreme Court can issue appropriate orders and writs including the writs of **habeas corpus, mandamus, certiorari, prohibition and qua warranto**. These orders and writs can be issued **"for the enforcement of the fundamental rights conferred by the Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of constitutional or legal concern."**³⁵ The Supreme Court has original and appellate jurisdiction as defined by law and may

review its own judgements or final orders subject to the conditions and circumstances prescribed by law. Jurisdiction, powers, establishment and management of Appellate Courts, Districts Courts and other courts subordinate to the Supreme Court are to be determined by law subject to the Constitution.³⁶ There is a judicial council for the administration of judicial persons in Article 93. All are obliged to comply with the orders and decisions made in the course of hearing of a suit by courts and "any interpretation given to a law or any legal principle laid down by the Supreme Court in course of hearing of a suit will be binding on His Majesty's Government and all offices and courts."³⁷ The Constitution of the Kingdom of Nepal guarantees a judiciary system in line with democratic principles for the administration of justice.

Section IV. Domestic Air Law of Nepal.

A) Civil Aviation Act 2015 (1959 AD).

The purpose of the Civil Aviation Act 2015, hereafter referred to as The Act, is well illustrated in its preamble, as follows:

" Where as it is expedient to control and manage the Civil Aviation for creating a situation to the development of the Civil Aviation in order to make optimum benefit to the nation out of the air transport and to maintain law and order as well as the comfort of the people in general."³⁸

It follows that the primary objective of the Act 2015 is to develop civil aviation for the optimum benefit of the nation. The objective of maintaining the law and

order and to look after the comfort of the people was added by Some Nepal Law (Amendment and Re-management) Act 2020 (1964 AD). To look after the comfort of the people is a well accepted objective of the civil aviation, but to maintain law and order, this, in the author's opinion, is the function of the police and army. Civil Aviation should not be mixed up with military aviation. Of course, as a provider of the aviation infrastructure network (civil) in the country, the State can always use these facilities for the sake of maintaining law and order. This type of objective is not found in the objectives of the Aviation Acts of the neighbouring countries namely, India, Pakistan and Bangladesh. India, Bangladesh and Pakistan were a single country during British colonial rule in India. What was known as East Pakistan became Bangladesh after breaking up with Pakistan in 1973. Therefore the Civil Aviation Acts of these countries are similar in essence. The objectives of the Aircraft Act of India and Pakistan are given below for proposes of comparison:

Aircraft Act 1934 (India):

" where as it is expedient to make better provision for the control of the manufacture, possession, use, operation, sale import and export of aircraft..."³⁹.

Ordinance No. XXXII 1960 (Pakistan):

" Where as it is expedient to make better provision for the control of manufacture, possession, use, operation, sale, import and export of aircraft, the control and regulation of air transport services, and the control and development of aerodromes in Pakistan....".⁴⁰

As we see, none of them has the objective to " maintain law and order" in their Acts. The possible explanation of its inclusion in Nepalese Act is to cover various aspects of aviation security which might arise in future. The Act 2015 has been amended thrice: 1st. Amendment in 2023/5/4 (Aug.20,1966); 2nd. Amendment in 2030/5/15 (Aug.31, 1973); 3rd. Amendment in 2034/6/6 (Sept.22,1977) and it has 27 Section with 39 Sub-sections.

1. Scope, Definition and applicability of the Act:

The scope of the applicability seems to be based on the principle of territoriality, personality and universality. The Act shall applies throughout the Kingdom of Nepal, Nepalese citizens residing anywhere and each Nepali registered aircraft wherever they may be and every person on such aircraft. So it covers the national aspect fairly well, no matter where Nepalese citizens or Nepali registered aircraft are, this Act will apply.⁴¹ The only exception of non-applicability is to the private aircraft of His Majesty the King or the aircraft of His Majesty's Government or Royal Nepalese Armed Forces.⁴² According to Article 3 of the Chicago Convention, 1944, the Convention shall not be applicable to State aircraft, State aircraft being aircraft used in military, custom and police services. Hence the criteria used to determine the State aircraft is not the ownership of the aircraft but the functional use of the aircraft. But according the Act 2015, it is the ownership of the aircraft which determines the non-applicability of the Act. At the moment some charter flight are operated by aircraft belonging to His Majesty's Government and Royal Nepalese Army. These are some of the grey areas about the applicability of

the Act 2015. But in the author's opinion, there should be clear-cut demarcation in line with Article 3 of Chicago convention in the Nepalese Civil Aviation Act. There are only five definitions in the Act, namely, for Aircraft, Aerodrome, Import, Export, and Specified boundary. Thus a hovercraft, which moves on the cushion of the air , deriving its lift from the reaction of the air against the earth's surface, will also be considered as aircraft according to the Nepalese definition. Being a land-locked country without having access to the sea, the author fails to see the rational of including such a machine as an aircraft, because this might create some legal problem at a later stage, in case Nepal develops inland waterways with hovercraft.

2. Power to make Rules in General:

In general, His Majesty's Government can make rules as required in the following cases.

- (I). For implementing the objectives of the Act.
- (II). To make provisions to issue licences to non-governmental organizations for the construction, possession or operation of private aerodromes.
- (III). For regulating the manufacture, possession, use, operation, sale, export or import of any aircraft or class of aircraft.⁴³

To meet the specific needs of various aspects of civil aviation, His Majesty's Government can make rules without prejudice to the power to make rules, in above-mentioned cases. Twenty-nine specific aspects of aviation have been identified in subsection 2 of Section 3 of the Act, for which rules can be made. This covers the wide spectrum of the aviation field such as regulation of air transport services,

conditions of using government and non-government aerodromes, various aspects of aircraft such as manufacture, maintenance, operation, registration, regulation of air traffic services and related fields, acquisition and/or restriction on property for the safety of aviation and compensation thereto, fees to be charged for various services, aircraft noises and pollution of environment to be caused by the aircraft, general safety of life, search and rescue operation, communication and alerting services, various requirement for the pilots to receive licences and renewal as well as work. duty, flight-time limitations and leave. Most of the subjects covered have been just broadly mentioned. For example, in clause (r) of sub-section 2 of Section 3 of the Act, it is mentioned, "The ordinary measures to be taken for the purpose of ensuring the safety of life". How do we define ordinary measures and what level of safety? These are the some of the questions to which it is difficult to find answers for, in the Act. One conspicuous subject which seems to be missed by the Section is the Economic Regulation of Civil Aviation Services, including approval, disapproval or revision of air tariffs and related matters, though it may be argued that "regulation of air transport services" clause might be able to cover the whole spectrum of related fields including above mentioned topic.

3. Power to make Specific Rules.

In specific situations, for the sake of public safety and tranquillity, the Government may issue orders to cancel, suspend or impose conditions on the rights and privileges conferred by the Act. The Government may also issue orders to deliver aircraft and related facilities to the specified authority, to be at the disposal of His

Majesty's Government for public services. Of course, there is provision for compensation as determined by His Majesty's Government.⁴⁴ Section 6 of Indian Aircraft Act, 1934, also has the same identical provision. Air power is very crucial to nations in case of emergency, war or natural calamities. In those circumstances all resources have to be pulled up. Hence such provision is essential for emergency or unforeseen situations. The Government has a public duty to protect public health from any infectious contagious disease which might be introduced or spread from incoming aircraft. And if there is an out-break of any dangerous epidemic disease, the Government has to move quickly to control it. Section 7 and Section 8 gives specific powers to the Government to make rules for such circumstances. There is a provision to make rules for the investigation of aircraft accidents in the Kingdom of Nepal, of any aircraft or occurred anywhere of aircraft registered in the Kingdom of Nepal. This is one subject where the Government has already made rules on 21 August 1987 known as Civil Aviation (Investigation of Accident Rules 2024 (1967 AD)).

4 Provision for Aviation Security.

Since the early sixties Aviation Security has been a top priority item in the agenda of ICAO activities. There is no reference to Aviation Security in the Chicago Convention of 1944. But ICAO was successful in convening diplomatic conferences of plenipotentiaries to deal with aviation security matters. The outcome was five international instruments dealing with aviation security, out of which four are already in force. Regarding Aviation Security Conventions, Nepal has adhered to the Tokyo Convention of 1963 on 15/1/1979; the Hague Convention of 1970, and the Montreal

Convention of 1971 on 19/1/1979. Interestingly enough, major provisions of those conventions have been incorporated in the Act by the Second Amendment in 31/8/1973, well before Nepal adhered to those conventions. And those provisions came into force on the date 15/1/2043 (28/4/1987) by notice published in Nepal Gazette. Domestic implementation of these conventions will be discussed in Chapter 3.

5 Penalty for Non-compliance.

There can be imprisonment up to three month or a fine up to one thousand rupees (US \$ 20 approx. @ Rs 50 per \$) or both for the violations of the rules made under Section 3 (various provisions of aviation), Section 6 (power to detain the aircraft), Section 7 (protection of public health in general), Section 8 (protection of public health in special cases).⁴⁵ In case of flying an aircraft in dangerous manner, there is provision for imprisonment up to six months or four hundred rupees (US \$ 8) or both.⁴⁶ Interestingly enough, penalty for entering into the restricted area without permission is just a monetary fine which may extend up to two hundred rupees (US \$ 4). There could be a serious threat to the safety of flight and aviation in general, but the penalty is only a monetary fine and not any imprisonment.⁴⁷ Compared to the seriousness of the offenses, penalties provided in the Act are too soft- up to 3 month imprisonment in one case and up to 6 months in another case and/or monetary fine of few hundred rupees.

6. Other Provisions.

To prevent the aircraft from flying in a dangerous manner, to secure compliance with any of the provision of the Act or to prevent the contravention of any rules regarding air routes or prohibited area (i.e. any rule made under clause (j) or (k) of sub-section (2) of Section 3) an authorized authority may detain the aircraft. But the rules to exercise this authority will be effective only after their publication in the Nepal Gazette.⁴⁸ So far no such rules have been made and published. Hence, for want of such rules, whether the Aeronautical Authority of Nepal, a designated authority to look after civil aviation matter , can detain an aircraft according to Section 6 is a debatable question. One other general provision is the applicability of Nepal Law relating to the customs for import and export of goods by air. This is a basic need to conduct business by air and there seem to be no controversy with regard to application of customs law.⁴⁹

7. Jurisdiction and Procedural Matters

Hearing of complaints and Special Courts: The District Court will hear and decide the cases under this Act. The District Court may issue an order to forfeit the aircraft or articles or both in cases of offenses concerning violation of prohibited area, or carriage of prohibited goods or for the public safety or tranquillity. Regarding offences like hijacking and safety of air navigation, the District court will adopt the procedure laid down in a special court Act, 2031(1974). An appeal can be made to the appellate Court within 35 days of such decision. Therefore aviation security cases have to be given special treatment. According to Section 12(a) of the Act, Special

Court may also be constituted under the Special Court Act 2031(1971) to deal specifically with aviation security cases.⁵⁰

Bar on certain suits: To avoid unnecessary and irrelevant cases of minor consequences due to trespass or nuisance caused simply because of overflying aircraft at reasonable height, civil suit of any such nature is barred from proceeding in the courts. Damage might be caused to old houses or even hearing loss due to low flight by aircraft or supersonic aircraft. If such an event is to occur, this section 14 (Bar on certain suits) alone cannot properly deal with such cases due to lack of definition of reasonable height or ordinary incidents of such flight.⁵¹

His Majesty's Government to be complainant: In cases concerning aviation security, as mentioned earlier, His Majesty's Government will be the complainant. In other words, being taken as criminal cases under Nepalese law, it will be prosecuted by His Majesty's Government.⁵²

Saving for the act done in good faith: Unless one can prove wilful misconduct, no legal proceeding can be brought against any person for anything done in good faith under this Act. Such an unqualified clause, might invite some abuse or misuse of power.⁵³

B) Civil Aviation Regulations under the Act.

So far, His Majesty's Government of Nepal has made the following Rules under the Civil Aviation Act.

- 1). **Civil Aviation Rules 2019(1962)**- published in Nepal Gazette on 2019/4/29 (14 August 1962): These Rules basically deal with various aspects of registration and marking of aircraft, issuing licences to the flight crew, airworthiness of aircraft, operation of aircraft, and the aviation medical board.
- 2). **Civil Aviation (Investigation of Accident) Rules 2024(1967)**- published in Nepal Gazette on 2024/5/5 (21 August 1967): These Rules deal with the investigation of accidents, responsibilities of accident investigation teams, preservation of evidence and other various procedural and legal matters concerning accident investigations.
- 3). **Airport Charges Rules 2038 (1981)**- published in Nepal Gazette on 2038/5/1 (August,1981): Various rules and regulations for rates and fees for landing, housing, parking, and navigational charges are provided for in these Rules. On the non-aeronautical side, they cover rental fees,advertisement, entrance fee, cargo and fuel charges, etc. Payment procedures, late payment charges and penalty for non-payment are also provided for in the Rules. Interestingly, these Rules do not cover the disembarkation tax, which is collected by the airlines for the Ministry of Finance.
- 4). **Aviation Security (Management) Rules 2046(1989)**- published in Nepal Gazette on 2046/3/5 (June, 1989): These Rules basically deal with the establishment of the National Civil Aviation Security Committee and Airport Security Committee. Duties , responsibilities and the authority of these committees are provided for in the Rules.

Details of the above-mentioned Rules are critically analyzed in Chapter 3, while discussing various national obligations under international air law conventions, which Nepal has ratified.

C) Royal Nepal Airline Corporation Act (with amendments) 2019 (1963).

So far only two Acts have been promulgated in Nepal which directly deal with Air Transport. They are the Civil Aviation Act 2015(1959 AD) and RNAC Act 2019 (1963). The National Airline was established in 1958 AD by Royal Nepal Airline Act 2014(1958AD). This was repealed by the present RNAC Act in 1963. Certain functions of the National Airline are very much inter-related with the functions as envisaged in the Civil Aviation Act 1959. Rather than examining the provision for the establishment, capital and management, fund, accounts and audit, it will be relevant to critically analyze the provisions which are directly related with provisions under the Civil Aviation Act 1959. In the RNAC Act, there are two important definitions namely " Air Transport Service" and "Scheduled flight service", which are missing in the Civil Aviation Act 1959. Regulatory authority of His Majesty's Government has to deal with these terms very frequently. The main function of the National Airline is " to operate the concerned air transport services within or outside the Kingdom of Nepal in a safe, efficient, well managed, economical and proper manner and exercise its power for developing air transport services so as to ensure maximum gain and make available such services as cheap fares as far as possible."⁵⁴ One of the main objectives of the Civil Aviation Act is also to develop air transport services and make rules necessary for the regulation of this services. In absence of a clear cut demarcation line there might be overlapping of the activities. Another interesting point is National Airline is supposed to provide air transport services at as cheap fare as far as possible. There might be ambiguity in interpreting " as cheap

fares as far as possible." From the consumer's point of view, it should be the "Break Even Fare" which means cost of operating a flight should be equal to the revenue from that flight. If so, does it mean that RNAC is not allowed to make some profit? Of course the National Airline should not be allowed to charge excessive fares and earn excessive profits. But, at least, it should be allowed to earn reasonable profits to be a commercially viable business organisation. The Air Corporation Act 1953 of India allows such reasonable profit to be earned by the airlines. To quote " ... exercise those powers as to secure that the services are provided at reasonable charges....".⁵⁵

Therefore, in the author's opinion, the word " cheap fares as far as possible " should be replaced by "services at reasonable charges." RNAC is also allowed to manufacture or produce aircraft under the RNAC Act. Generally, an airline is expected to carry out work related to maintenance, repair and overhaul of aircraft. Manufacture and production of aircraft are generally delegated to specialized aircraft manufacturing companies. It seems RNAC is already licensed by the RNAC Act for the manufacture or production of aircraft belonging to itself or any other person. But according to Clause (e) of sub-section (2) of Section(3) of the Civil Aviation Act, it is the Government's prerogatives to issue licences and control the manufacture and the production of aircraft. Therefore, there might be conflict of interest between the two entities on this subject. A compromise solution may be reached by applying provision of Clause (a) of sub-section (3) of Section 13 of RNAC Act, which says " Nothing contained in this Section shall be construed as (a) authorising the disregard by the corporation of Nepal Law for time being in force."⁵⁶

Another interesting provision is, RNAC can allow a third party, who is also engaged in air transport services, to operate air transport services on behalf of or in co-operation with the Corporation.⁵⁷ In other words, RNAC can allow another airline to operate its services. But His Majesty's Government, through bilateral negotiations, acquires the right, to operate in a foreign country, for the designated airline of Nepal. It is the Government who decides and designates the airline in that particular route or sector. If any modification to that regime is to take place, then His Majesty's Government should be involved in the process and give its consent. For the same clause in the Air Corporation Act, 1953 of India, prior approval of the Central Government is mandatory.⁵⁸ RNAC has a monopoly right to operate scheduled air transport services from or to or within the kingdom of Nepal with some exceptions as provided in the RNAC Act. The exceptions are foreign operators allowed by His Majesty's Government under bilateral agreements, technical, test, and instructions flight, relief, ambulance flights, agriculture, joy ride flights.⁵⁹ Though, in general, there can be no competition in domestic air transport service, there is an exception clause by which Government can allow others to operate new air transport service after consulting with the corporation.⁶⁰ The point to note is the Government is required only to consult RNAC but not required to get the consent for granting such permission. The issue came up very recently (1991), when, in line with a liberalized national economic policy, the Government felt the need to introduce competition in domestic air transport services. So the Government formed a high level committee including Managing Director of RNAC to submit policy recommendations to the

Government. Based on the committee's recommendations, the Government has granted licences to four private airlines to operate in the domestic sector.

D) Bilateral Air Services Agreement.

The legal basis for bilateralism in the regulation of air transport is provided for in Article 1 of the Chicago Convention which states "the Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."⁶¹ The provision for scheduled international air services is stipulated in Article 6 of the Chicago Convention. It states that "no scheduled international air services may be operated over or into the territory of a Contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."⁶² This implies that every State requires to obtain permission or authorization from a State before engaging in international air transportation into the latter's territory. The issuance of approval could take any other form besides bilateral arrangements. However, States have, for almost 50 years, opted for the bilateral system in aviation. The popularity of the bilateral regime can be evidenced from the fact that "by 1990, almost 4889 bilateral agreements and arrangements have been registered with ICAO Secretariat in accordance with the Chicago Convention."⁶³ Section 15(a) of the RNAC Act 2019(1963) allows a foreign carrier to operate international air transport services in Nepal according to the provisions of the bilateral agreement between Nepal and the State concerned. So far, Nepal has concluded 17 such bilateral

agreements/arrangements with other States.⁶⁴ Nepalese bilateral air services agreements are basically based on the predetermination of capacity clause and double approval approach for tariff clauses. Article 126 of the Constitution of Nepal specifies that " the ratification of, accession to, acceptance of or approval of treaties or agreement to which the Kingdom of Nepal or His Majesty's Government is to become a party shall be determined by law." According to Nepal Treaty Law 2047 (1991 AD), certain treaties and agreements which are specifically mentioned are to be brought before Parliament for approval. Other forms of agreement can be approved by the executive branch of the Government, which means, in general, the Cabinet. So far to, the author's knowledge, no bilateral agreement has been submitted to the Parliament for approval. Generally, once the agreement is concluded, it will be sent to the Cabinet for approval through sectoral ministry. Notification of fulfilment of legal requirement is exchanged through diplomatic notes. Because of predetermination of capacity clause and double approval approach in tariff clause, bilateral air services agreements of Nepal are restrictive and protective in nature. For the regulation of international non-scheduled air services, "Article 5 of the Chicago Convention allows a State to impose regulations, conditions or limitations on taking on or disembarking of passengers, cargo or mail by such a service in its territory."⁶⁵ One of the main objectives of regulatory devices applicable to non-scheduled air transport services is to ensure an adequate degree of protection for scheduled services and the viability of scheduled carriers operating under public obligation. His Majesty's Government of Nepal had formed a Charter Committee for

the purpose supervision and management of foreign regular charter operation in Nepal and published so-called charter regulation on 6/7/4041(1983 AD) in the Nepal Gazette.⁶⁶ One of the main factors the Charter Committee has to take into consideration, while authorizing regular charter operation in Nepal, is to promote charter operations from such destinations where RNAC has not yet started its services. There are other various conditions and limitations laid down in the charter regulation for the protection of the national airline. Notably among them are the requirement of minimum stay of 7 nights in Nepal, they must be in groups and there must a group leader for every fifteen tourists. In other words, free individual travellers (FIT) are not allowed to travel on such charter flights. They also must spend their expenditures in convertible currencies and return on the same charter flight. And there are various cumbersome administrative and procedural formalities to be completed by the charter flight. One of the main guideline of the third Air Transport Conference (1985) for the regulation of non-scheduled air services is that "State should avoid situations in which overly restrictive regulatory devices may make the operation of no-scheduled (charter) services impossible, inefficient or uneconomic since both, types of services together meet the public demand in various ways."⁶⁷ The present charter regulations are too restrictive in nature and cumbersome in administrative procedures. The regulations are more sound in theory than in practical implementation to meet needs of present fluctuating air transport demand.

Bilateralism has been severely criticized recently. It is labelled as too restrictive and stifling in growth. One commenter states that "The interest of States and their

governments hangs round the neck of bilateralism and cannot be removed without serious consequences. Before a government opts to negotiate with another government for traffic and operational rights for its airline(s) it must be in its economic, political or ideological interest."⁶⁸ Modern trends in air transport regulation show a gradual liberalization of international aviation policies; and increasing de-regulation of the economic side of international air transport; a progressive privatization of the airline industry; cross-border (international) cooperations and equity participation (multi-nationalization). As an alternative to bilateralism, search for viable "multilateralism" is on since the very beginning of Chicago Conference in 1944, though without any success. Mr. Jeffrey N. Shane, Assistant Secretary for policy and international relations, U.S. D.o.T, advocates "open skies" as an alternative and has commented, **"Air transportation is too important to trade, economic development, and the future growth of economies around the world to be compromised by to-day's artificial restrictions. Courage and creative thinking are needed to move from bilateral to a system designed to meet the needs of the modern world."**⁶⁹ Mr. Hans Raben, Special advisor on international policy, for the Kingdom of the Netherlands, highlighted the disadvantages of the bilateralism as follows:

"The price of protection can be high. It tends to foster inefficiency, thus further weakening the competitive strength of the airline. It retards innovation and disregards consumer's interest. It is a cumbersome method. It is virtually; incapable of providing for the

new regulatory needs of the market: anti-trust rules, rules guaranteeing fair competition, rules against the abuse of power and distortions through State aid, etc. Bilateralism tends to obscure the new international reality: the market's maturity, airline's own commercial responsibility, the importance of transport services in international trade relations."⁷⁰

Other experts caution moving towards "multilateralism" and "open skies". Ms.A.Mascarenhas, of Air India, commented: **"It (multilateralism) has nothing to offer smaller countries whose airline may not withstand this free-for-all. Multilateralism, at best, is a theoretical solution which optimizes at the global macro level without addressing the micro realities of national boundaries and balance of payments concerns. Its strongest supporters are the few countries who have strong airlines but limited home markets. There is little prospect of a global multilateral regime for the exchange of traffic rights."**⁷¹ Mr.Susumu Yamaji, Chairman of Japan Airline, while commenting on the same topic, said that **"A system which depends on the 'Law of the jungle' is not acceptable, even though free competition is an ideal form of commercial activity. No country will stand by and see a national carrier forced out of business by unfair, uneven competition."**⁷² **"Between protectionism and freedom of the skies there are, after all, many new formulae for the regulation of international air transportation one can think of ."**⁷³ Bearing in mind those comments, a country like Nepal should be very cautious in moving towards

liberalization in air transportation, towards which she must move to benefit from the global changes taking place in the field of international air transportation.

Endnotes to Chapter 1

1. FOPHUR, "*Dawn of Democracy: People's Power in Nepal*", Nepal, 1990, at p.18.
2. P.Aryal, *Bilateral Air Transport Agreements of Nepal* (LL.M. Thesis, McGill University, 1978) at 1. For the text of the treaty, see A.Hussain, *British India's Relation with the Kingdom of Nepal* (London, 1970) at 384-392.
3. FOPHUR, *supra* note 1, at p.19
4. His Majesty's Government of Nepal, Ministry of Finance, *Budget speech of the fiscal year 1992-93*, Kathmandu, Nepal 1992, at 1.
5. Central Bureau of Statistics, *Statistical Pocket Book of Nepal 1992*, Kathmandu, Nepal, 1992, at 1.
6. *Ibid.* at.89
7. *Ibid.* at.89
8. Department of Tourism, *Nepal Tourism Statistic 1990 and Supplements*, Kathmandu, Nepal, 1990.
9. Aryal, *supra*, note 2 at 29.
10. Central Bureau of Statistics, *supra*, note at 131.
11. Bhairahawa, Bharatpur, Biratnagar, Chandragadi, Dang, Dhangarhi, Gorkha, Kathmandu, Nepalgunj, Pokhara, Rajbiraj, Simra, Surkhet.
12. Doti, Lamidada, Rumjatar, Sanfebagar, Bajhang, Jomsom, Rukum, Syanboche, Taplejung, Tumlingtar.
13. VOR: Very High Frequency Omni Range (Direction Indicator).
DME: Distance Measuring Equipment.
NDB: Non Direction Beacon.
PAPI: Precision Approach Path Indicator.
14. Civil Aviation Act 2015(1959 AD), see preamble.
15. Royal Nepal Airline (RNA), *Corporate Profile 1991*, Kathmandu, 1991
16. *Ibid.*

17. RNA, *Thirty Years of Progress(1958-1988)*, Kathmandu, 1988.
18. RNA, *Operating Plan 1992-93*, Kathmandu,1992.
19. RNA, *supra*, note 17.
20. Law Book Management Board, *The Constitution of the Kingdom of Nepal 2047 (1990 AD)*, (hereafter referred as The Constitution), Kathmandu,1992,see Article 44-45
21. *Ibid.*, Article 115.
22. *Ibid.* Article 116.
23. *Ibid.*,Article 87.
24. *Ibid.*, Article 126.
25. *Ibid.*, Article 68.
26. *Ibid.*, Article 69.
27. *Ibid.*, Article 71.
28. *Ibid.*, Article 84.
29. *Ibid.*, Article 85.
30. *Ibid.*, Article 86.
31. *Ibid.*, Article 87, also see Article 117 for Constitutional Council and Article 93 for Judicial Council.
32. *Ibid.*, Article 87(7).
33. *Ibid.*, Article 87(12).
34. *Ibid.*, Article 88(1).
35. *Ibid.*, Article 88(2).
36. *Ibid.*, Article 89.
37. *Ibid.*, Article 96.
38. HMGN, *supra*, note 14 at see preamble.

39. GOI, *Aircraft Manual India* (30 June 1985 Revised Edition, Government of India Publication) at 1, See Aircraft Act 1934.
40. GOP, *Civil aviation ordinance 1960* (Government of Pakistan 1960) at 12 (of Civil Aviation Authority Publication)
41. HMGN, *supra*, note 14 at sub-section 2 of Section 1.
42. *Ibid.*, Section 16.
43. HMGN, *supra*, note 14 at Section 3.
44. HMGN, *supra*, note 14 at Section 4.
45. HMGN, *supra*, note 14 at Section 9.
46. *Ibid.* Section 10.
47. *Ibid.* Section 10(a).
48. *Ibid.* Section 15.
49. *Ibid.* Section 13.
50. *Ibid.* Section 12(a).
51. *Ibid.* Section 14.
52. *Ibid.* Section 14(a).
53. *Ibid.* Section 15.
54. HMGN, *Royal Nepal Airline Corporation Act 2019(1963 AD)* at Section 13.
55. GOI, *supra*, note 39 at 164, see Section 7(1) of Air Corporation Act 1953.
56. HMGN, *supra*, note 54 at Section 13, Subsection (3), clause (a).
57. HMGN, *supra*, note 54 at Section 13, Subsection (3), Clause (h).
58. GOI, *supra*, note 39 at 165, See Section 7(h).
59. HMGN, *supra*, note 54 at Section 15, Subsection 1(a).
60. *Ibid.* Section 15, Subsection 3.
61. Article 1 of the Chicago Convention.

62. Article 6 of the Chicago Convention.
63. B.D.K.Henaku, *Regionalism in international air transport regulation*, (Koma Publishers Foundation, Leiden, The Netherlands 12993) at 11.
64. So far Nepal has concluded 17 bilateral air services agreements(ASA)/arrangements with the following Countries:

Country -----	Date -----	Remarks
1. Bangladesh	15 Feb. 1983	ASA
2. Bhutan	7 Aug. 1990	ASA
3. Brunei	10 July.1986	ASA
4. China	1 Aug. 1978	ASA
5. Germany(F.R.)	19 Mar. 1987	MOU/ASA(initialled)
6. Hongkong	24 Nov. 1988	CMU (with U.K.)
7. India	26 Nov. 1968	ASA
8. Italy	8 May 1992	ASA (initialled)
9. Japan	27 Feb. 1992	ASA (initialled)
10. Myanmar (Burma)	31 July 1973	MOU/ASA (initialled)
11. Pakistan	24 Aug. 1976	ASA
12. Singapore	15 June 1984	ASA
13. Srilanka	19 Feb. 1977	ASA
14. S.Korea	12 Feb. 1988	MOU/ASA(initialled)
15. Thailand	14 Jan. 1971	ASA
16. U.K.	30 Aug. 1991	CMU/ASA(initialled)
17. U.S.S.R.	5 Dec. 1989	ASA

65. ICAO, *Policy and guidance material on the regulation of international air transport* (ICAO Doc.9587, 2nd.ed.-1992) at 113, see for details Appendix 1:Guidelines for non-scheduled air services.
66. The members of the Charter Committee are as follows:
- a) Director-General, Department of Civil Aviation Coordinator
 - b) Director-General, Department of Tourism Member
 - c) Managing Director, Royal Nepal Airline Corp. Member
 - d) Airport Manager, Tribhuvan Int'l Airport Member
67. ICAO, *supra*, note 65 at .
68. Hanaku, *supra*, note 64 at 11.
69. ICAO, *world-wide Air Transport Colloquium*, WATC-1.14, 6/4/92.
70. *Ibid.*, WATC-1.18, 6/4/92.

69. ICAO, *world-wide Air Transport Colloquium*, WATC-1.14, 6/4/92.
70. *Ibid.*, WATC-1.18, 6/4/92.
71. *Ibid.*, WATC-1.16, 6/4/92.
72. *Ibid.*, WATC-1.12, 6/4/92.
73. H.A.Wassenberg, "International Air Transport:Regulatory Approaches in the Nineties.", 16 *Air & Space Law* (1992) 77.

Chapter 2. International Air Law Conventions (ratified by Nepal)

Introduction:

Nepal pursued the policy of isolation for more than a century. During those days, its external relations were very much limited to its close neighbours India to the south and China to the north. Only during late forties, did it abandon this policy. In 1947, Nepal began to establish diplomatic relations with other countries and finally in 1951 it opened its door to other nations for normal diplomatic and commercial relations. On 29 July 1960, Nepal became a member of the International Civil Aviation Organization¹ - a specialized agency of the UN created "to develop the principles and techniques of International Air Navigation and to foster the planning and development of International Air Transport".² Since adhering to the Chicago Convention, Nepal has ratified a number of other International Air Law Conventions and Agreements.³ In this introductory chapter, a brief historical background and overview of those International Air Law conventions, which have been ratified by Nepal, will be given. They have been grouped together into four sections depending upon the relevancy of the subjects. In the later chapters certain provisions of these conventions will be critically discussed in relation to the provisions of the Domestic Air Law of Nepal.

Section I: Chicago Convention, of 1944:

Even before the Wright Brothers made the first successful flight in 1903, during the era of Balloons and Airships, several international conferences were held in Paris and Brussels between the late nineteenth century and early twentieth century without major success.⁴ A major attempt was made in 1910 to reach agreement on a code of International Air Law. Nineteen European Nations, including the United Kingdom and France met in Paris to discuss the proposed International Air Law Code. It was a diplomatic failure but nevertheless of great historical importance. Though there was no international agreement, the Conference produced a draft Convention of 55 Articles and three Annexes, including such subjects as aircraft nationality, rules of the road and photographic and radio equipment in aircraft.⁵ Many principles agreed on at this conference were to reappear in Paris Convention of 1919 and which in turn influenced the Chicago Convention of 1944.

Since 1902, when Fauchille and Nys introduce their celebrated theory of "Freedom of Air ", there has been basically four categories of publicists of International Air Law namely those in favour of absolute freedom of air, those accepting a vertical limitation, those in favour of absolute State Sovereignty of air , and those accepting a functional limitation by International Law.⁶ By the time the Paris Convention on Aerial Navigation was held in 1919 on the initiative of French Government, the " Free Air Theory " had been overshadowed by the "Principle of complete and exclusive sovereignty over the airspace above State territory."⁷ The basic principles adopted in the Paris Convention included the recognition of exclusive

sovereignty of air space, freedom of innocent passage, provision for the prohibited zone, registration and airworthiness of aircraft and certification of competency and licensing of aircraft. Another important step was the creation of the International Commission for Aerial Navigation(ICAN). This convention, though signed by the United States but not ratified, had world wide sanction and remained the basis for international air law until replaced by Chicago Convention of 1944.⁸

The Second World War significantly changed the world scenario on Aviation. Because of the vast number of aircraft and the great potential for commercial operations, a number of legal and economic issues- like passing of commercial aircraft over another country's air space, air traffic control and safety aspects etc, urgently needed to be addressed. Being aware of these problems, the United States, in consultation with the United Kingdom, on September 11, 1944 invited allied and neutral powers for an international conference to be held at Chicago. The Conference was inaugurated on November 1, 1944 and fifty four States sent more than 400 delegates. At the conference, the United States and the United Kingdom were sharply divided over the issue of freedom of air. The former advocated a very liberal policy for Civil Aviation while the later viewed it from a conservative stand point. They could not reach multilateral agreement on the exchange of commercial rights for international air transport. The International Air Transport Agreement (IATA) and the International Air Services Transit Agreement (IASTA) were the product of the compromise reached during the conference. Besides the Chicago Convention and these agreements, two other agreements, namely the Interim

Agreement on International Civil Aviation and the Standard form of Agreement for Provisional Air Routes were also the product of the conference. The basic foundation of the Chicago Convention is the recognition of exclusive sovereignty over the airspace, which is stated in Article 1 as follows:

" The Contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory."

The scope of the Convention is limited to civil aircraft only. It explicitly excludes State Aircraft- that is aircraft used for military, customs and police purposes.⁹ Here, a noteworthy point is that it is the functional use of the aircraft which determines the applicability of the Convention, not the registration of the aircraft. The Convention prohibits the misuse of Civil Aviation.¹⁰ As for international scheduled air services, prior permission must be obtained.¹¹ For non-scheduled international air services, " the right to make flights into or in transit non-stop across another States territory and to make stops for non-traffic purposes without obtaining prior permission was granted.¹² But in practice, almost all flights need prior permission for reasons of safety or otherwise. THE right to refuse to grant cabotage rights was retained.¹³ Aircraft must have nationality and registration and dual registration is not permitted.¹⁴ Various provisions to facilitate air navigation, like customs and immigration procedures, custom duties, facilitation formalities, assistance to aircraft in distress, and provision for accident investigation were also made.¹⁵ Every aircraft engaged in international air navigation is required to carry its registration certificate, air-worthiness certificate, journey log book, passengers and

cargo manifest.¹⁶ As for the rules of flight, there are provisions for the establishment of prohibited areas, landing at the custom airports, entry and clearance regulation, prevention of spread of disease, airport and similar charges and search of aircraft.¹⁷

The other main achievement of the conference is the establishment of the International Civil Aviation Organization with the aim to develop the principles and techniques of international air navigation and to foster the planning and development of International Air Transport.¹⁸ To achieve its objectives " the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, International Standards and Recommended Practices and Procedures.¹⁹ Every Contracting State is to undertake to secure the highest practicable degree of uniformity in regulations, standards, and procedures. In cases where a State finds it impracticable to comply in all respects or feel it necessary to adopt different regulation or practices it, shall give immediate notification of such to ICAO.²⁰ These Standards and Recommended Practices, which are generally called SARPS are the back bone of the technical legislation of ICAO and deemed essential for the safe and orderly development of air navigation. To this end, so far ICAO has adopted eighteen Annexes covering vast ranges of subjects.²¹ On chapter 3, Section I, Nepal's obligations with respect to this convention and some of the Annexes will be analyzed.

The essence of the Chicago Convention can be summarized as follows, as one prominent author puts it:

" The Chicago Convention has a "dual personality".. In the first place, the Convention is a charter of Public International Law, a broad codification and development of Public International Air Law as it relates to International Civil Aviation. In this sense it is a multi-lateral law-making convention , stipulating rights and duties and functions of Sovereign States in a specialized field of activities. At the same time, the Chicago Convention is a constitutional instrument creating an international body of States, the International Civil Aviation Organization, which became, in 1947, a specialized agency in the United Nations System under the terms of Article 57 and Article 63 of the UN Charter."²²

This Convention reflects the wishes and aspiration of the Contracting States. It shows the balance of interest and compromise reached among differing views. Prof.Dr.Michael Milde opines that " it continues to provide a firm legal basis for cooperation of States in the field of International Civil Aviation and represents an acceptable balance of interest among States."²³ As of 25 June 1993, 180 States have ratified this Convention. Nepal became party to this Convention on 29 July 1960. It has four Parts, twenty two chapters and 96 Articles.

Section II: International Air Services Transit Agreement (IASTA):

The Chicago Conference, though successful on agreeing in uniform operating and safety standards and on the coordination of air navigation aids and communications facilities, nevertheless failed to reach substantial agreement on the commercial aspects of international air transport. Provision to govern the exchange of commercial air transport rights among States was the focal point of discussion during the Conference. The United States was in favour of full freedom of the air.²⁴ It was clear, at that stage that after the war, the US economy and manufacturing ability would suffer little damage and it had also produced long-haul transport aircraft during the war. These aircraft could be easily converted into commercial passenger planes. Contrary to this, Britain and other European States suffered heavy damages during the war, adversely affecting their economies and the manufacturing industries. On top of that, Britain had focused primarily on fighter bomber aircraft. These aircraft are obviously not suitable as passenger planes. Because of this weakness to compete for post war traffic, the British proposal was to place limits on the ability of individual airlines to expand and compete. The U.K. position was characterized by the slogan "order in the air"²⁵. The Canadian proposal was to regulate routes and capacity according to fixed formulas established by the agreement, whereas Australia and New Zealand proposed for international ownership and operation of all civil air services on trunk routes world-wide.²⁶ Mainly because of the two opposing views of the United States and the United Kingdom, the Conference failed to reach

agreement on the commercial aspects of air transport. Therefore, according to Article 6 of the Convention, scheduled air transport services may not be operated without special permission or authorization. For this reason, two multilateral agreements for the exchange of commercial rights in international air transport were proposed, namely the International Air Services Agreement (IASTA) and the International Air Transport Agreement (IATA). The IASTA is generally known as the two freedom Agreement. Parties to this agreement grant one another the first two freedoms of the air i.e. the right to fly across the territory of the grantor State without landing (1st) and the right to land in the territory of the grantor State for non-traffic purposes(2nd). According to Wassenberg, " the consequences of the Transit Agreement may amount to the right of innocent passage which may be claimed as a principle of customary international law.²⁷ The right of this transit agreement is subject to the conditions as spelled out in the Agreement." According Section 2 of the Agreement, the exercise of the privileges shall be in accordance with the provisions of the Chicago Convention of 1944. Until that Convention came into force, the provisions of the Interim Agreement on International Civil Aviation applied. An airline, enjoying the privileges for non-traffic purposes may be required to offer reasonable commercial services at the point at which such stops are made and regarding such requirement there shall not be any discrimination between airlines operating on the same route.²⁸ Also, airlines may be required to follow the designate route and use the designated airports. The airlines may also be required to pay for services for the route Navigation and Airport Facilities.²⁹ The Grantor

State reserves the right to withhold or revoke the privileges, if it is not satisfied with regard to the Substantial Ownership and Effective Control clause in section 5, which states that:

"Each Contracting States reserves the right to withhold or revoke a certificate of permit to an air transport enterprise of another State in any case where it is not satisfied that Substantial Ownership and Effective Control are vested in national of a Contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligation under this agreement."

The last line in this section covers a wide variety of obligations and may include those stemming from the laws and regulations for issuing certificates or permits, filing of schedules, tariffs, taxation, conditions of employment, and regulations under Art.11 and Art.13 of the Chicago Convention.³⁰ Some conflict of jurisdiction might also arise. According to Art. 5 of the Chicago Convention, aircraft on non-scheduled int'l flight may require landing while exercising those two freedoms, whereas in the Transit Agreement, there is no general competence to require landing.³¹ The right to take on or discharge passengers, cargo or mail, free of charge, while landing for non-traffic purposes is not clarified by the Chicago Convention or The Transit Agreement. In practice, this may be defined by the territorial State on a reciprocal basis. This Transit Agreement has enjoyed broad

acceptance. As of March 31, 1993, 99 States have ratified this Agreement. Nepal became party to it on 23 November 1965. IATA which is generally called the Five Freedom Agreement, grants the exchange of all the five freedoms of the air between the parties to this agreement. It had 17 original Signatories and most of them did not ratify it. The United States denounced this agreement on July 25, 1946. Now only 11 States are parties to and it has "very little practical significance except as the source of the five freedoms of the air."³² Nepal is not a party to it.

Section III : Aviation Security Conventions:

The Tokyo Convention of 1963: Aerial piracy or hijacking or Unlawful Interference (ICAO Term) is not a very recent phenomenon. The first recorded hijacking took place on 21 February, 1931, when army rebels of Peru, after an unsuccessful coup attempt, seized Panagra Ford Trimotor of Captain Byron Rickland.³³ The first wave of aerial hijacking by so called "freedom seekers" were from East to West during the Cold War Era. They were mostly political escapee seeking political asylum in the West. They were welcomed in the West on humanitarian grounds. The second wave began, in early 1961, when US-aircraft were hijacked to Cuba. These Cuban hijackers, who were "mostly emotionally disturbed or mentally unbalanced people with very little political or social awareness", were termed as the "Lunatic Fringe" by Edward McWhinney.³⁴ Then there is third group of Hijacking, for which the main motive is instant large scale financial gain for criminal perpetrators. They can be termed as "sky bandits or skyjackers"³⁵ The last

group of hijacking, as Edward Mcwhinney puts it, " essentially confine to Middle-Eastern countries or those nationals.. with the prime motives for the solution or at least continuance of hitherto unresolved international conflicts, by novel or unconventional means."³⁶ They are generally known as international terrorists and the most difficult of all to control. As early as 1902, " the problem of jurisdiction over crimes committed in aircraft and the question which law should apply" were considered by jurist, lawyers and international bodies.³⁷ An example of earlier work of the world community to combat international terrorism is the " Convention for the prevention and punishment of terrorism." This convention was the outcome of "an act of high political assassination,involving the murder of the king of Yugoslavia while on a State visit to France in 1934 and the murder, at the same time, of the French Foreign minister who was officially receiving him in Marseilles."³⁸ This Convention defined the acts of terrorism as " criminal acts directed against a State and intended or calculated to create a State of terror in the minds of particular persons or a group of persons or the general public" (Article 1(2)).³⁹ Then it lists the acts of terrorism which the Contracting States are required to make criminal offenses under their own laws. Although 24 States had signed the Convention in November 1937, it never entered into force. India is the only country who did ratify it.⁴⁰ In 1944, when the Chicago Convention was drawn up, a provision was made in Article 25 to deal with such situations. Article 25 of the Chicago Convention states:

" Each Contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find

practicable, and to permit subject to control by its own authorities, the owner of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. Each Contracting State, when undertaking search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this convention.⁴¹

Though this principle represented one of the older principles of customary international law, according to Edward McWhinney, this can be categorized as International Humanitarian Law.⁴² ICAO undertook the major task of studying and preparing a draft convention on the subject of jurisdiction over crimes on board aircraft. The Legal Committee of ICAO started work in 1950. It held several sessions and the legal sub-committee prepared a number of drafts.⁴³ Finally, the Legal Committee presented its Rome Draft entitled "Draft Convention on Offenses and Certain other Acts Committed on Board Aircraft" to the International Air Law Conference held in Tokyo on 20 August 1963. After certain modifications and the addition of certain provisions, it was adopted and opened for signature on 14 September 1963.

One of the main objectives of this Tokyo Convention⁴⁴, is the unification of the rules on jurisdiction. In Article 3(1), it provides "the State of registration of the aircraft is competent to exercise jurisdiction over offenses and acts committed on board ." This is aimed to ensure that cases like *U.S. v. Cordova*⁴⁵ and

R.V.Martin⁴⁶ will not go unpunished for want of jurisdiction. The scope of the convention is stretched to "the offenses against penal laws and acts, whether or not they are offenses, may do or jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board."⁴⁷ The Convention also applies "to offenses committed or acts done by a person on board any aircraft registered in a Contracting State while the aircraft is in flight or on the surface of the high seas or in any area outside the territory of any State."⁴⁸ Article 3 Para 1, which identifies the State of Registry as a competent authority to exercise jurisdiction, has also established among the Parties the principle of extra-territorial jurisdiction of the State of Registration of the aircraft.⁴⁹ States other than the State of Registry are allowed to interfere with an aircraft in flight in order to exercise their criminal jurisdiction over an offence committed on board only under certain specific cases as mentioned in Art.4 of the Tokyo Convention, 1963. The aircraft commander is authorized to take certain reasonable measures to protect the safety of the aircraft or of persons or property therein or to maintain good order and discipline on board or to enable him to deliver such person to competent authorities or to disembark him.⁵⁰ The Contracting State must take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft and to permit passengers and crew to continue their journey as soon as practicable and to return the aircraft and its cargo to the person lawfully entitled to possession.⁵¹ One of the main drawbacks of the Tokyo Convention is it does not define the offence of unlawful seizure nor does it specifically provide for the

extradition or prosecution of the alleged offender. This is dealt with according to national law. The Convention does not require the Contracting State to punish the offender nor does it provide for the mandatory extradition of the offender.⁵² This Convention entered into force on 4 December 1969. As of 25 June 1993, 145 States have ratified it and Nepal became a party on 15 April 1979.

The Hague Convention of 1970: Hijacking were increasing at an alarming rate in the late 1960's. In 1968 alone, there were more than 30 hijacking rising to 81 in 1969. In response to this epidemic growth of acts of unlawful seizure of aircraft, the ICAO Assembly in its resolution A 16-37 requested the ICAO Council to initiate a measure to cope with the problem. The seriousness of the problem was evident from the fact that hardly more than two years thereafter, a diplomatic conference was convened at The Hague on December 1, 1970 and " **The Convention for the Suppression on Unlawful Seizure of Aircraft**" was unanimously approved by the conference on December 16, 1970.⁵³ This Convention not only defines the offence⁵⁴ but also made the unlawful seizure of an aircraft an international offence, punishable by severe penalties⁵⁵ and established universal jurisdiction. It also attempted to put the legal teeth into the enforcement procedures by expressly incorporating the principle aut dedere, aut judicare and requiring States to make provision for such offenses as extraditable to already existing extradition treaties between States.⁵⁶ The Convention contains detailed provisions on the establishment of jurisdiction by States over the offence and on the taking of the offender into custody. As of 25 July 1993, 148 States have ratified. Nepal became party to it on 11

January 1979.

Montreal Convention of 1971: Sabotaging aircraft by using explosive devices and armed attacks at airports continued to take place at various places in the world throughout the period 1969 to 1970.⁵⁷ While the Tokyo Convention of 1963 deals with offences and certain other acts committed on board aircraft and The Hague Convention of 1970 deals with unlawful seizure of the aircraft (i.e. Hijacking) , there was no effective instrument to deal with such type of sabotaging the aircraft as mentioned earlier. Therefore, an extraordinary Session of ICAO in June, 1970, directed the Council to prepare a draft convention to deal with such matters. Within a very short span of time, the Legal Committee prepared the Draft. A Diplomatic Conference in Montreal adopted the Draft and opened it for the signature on 23 September 1971. This **Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation**⁵⁸ is generally referred to as the Montreal Convention of 1971. It mainly deals with acts other than unlawful seizure of aircraft. The Convention defines a number of Acts such as sabotage, armed attacks, the destruction of an aircraft in service, damage to air navigation facilities, and false communication (such as Bomb Hoax) as unlawful.⁵⁹ Most of the other provisions like offences to be punishable by severe penalties, universality of jurisdiction, aut dedare- aut judicare principle for extradition or prosecution of the alleged offender are essentially identical with the corresponding provisions of The Hague Convention of 1970.⁶⁰ This Convention entered into force on 26 January 1973. As of 25 June 1993, 149 States have ratified this Convention and Nepal became party to this Convention in

18 February 1979.

Montreal Protocol of 1988: In recent years, the indiscriminate killing of innocent travellers at International Airports sickened the world community. The explosion at Narita in June 1985 and the armed attacks at Rome and Vienna Airports in December 1985 are glaring examples of the new types of violence against the safety of Civil Aviation.⁶¹ Strangely enough, these attacks were not covered by the existing Aviation Security Conventions. At the 26th Session of the ICAO Assembly in Sept.-Oct.1986, by ICAO Resolution A26-4, the Council was directed to "develop an Instrument for Suppression of unlawful Acts of violence at Airports Serving International Civil Aviation." A Diplomatic Conference was convened from 9 to 24 February 1988 and adopted unanimously the "**Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation**" (Montreal Protocol of 1988).⁶² This Protocol fills the gaps existing in the present Security Convention concerning acts of violence at international Airports. Article II of this Protocol adds "**acts of violence against a person at an international Airport which causes or is likely to cause serious injury or death or destroys or seriously damages the facilities of an airport serving International Civil Aviation**" in the list of offences in the Montreal Convention of 1971 and paragraph 1 bis in Article 1. Contracting States are required to establish their jurisdiction over these new offences when the alleged offender is present in their territory and the Contracting State does not extradite the offender to the State where the offence was committed. According to Edmund Faller, "**In the history of codification of International Law there is no**

other precedent where a new and important International Instrument was adopted with unanimity in such a record-breaking time." It entered into force on 6 August 1989. As of 25 June 1993, the Protocol is in force for 27 States.⁶³

Convention on the Marking of Plastic explosives, 1991: The disaster of Pan American Flight 103, which crashed over Lockerbie in Scotland on 12 December 1988, was the result of failure to detect explosives substances hidden in the suitcases. That explosion was caused by a plastic explosive called Semtex, concealed in a cassette player radio. These explosives are very difficult to detect by X-rays. The only solution is to add an additive to enhance their detectability. Therefore to find an international legal solution to this problem, "not only by the ICAO Member States, but also by the Security Council and the General Assembly of the United Nations urged ICAO, in Resolution 44/29 of 13 December 1989, to intensify its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection."⁶⁴ The result of this intensified work was the Convention on the Marking of Explosives for the Purposes of detection, which was adopted on 1 March 1991 at a Diplomatic Conference held at Montreal.⁶⁵ The essence of this Convention can be best summarised as follows:

" ... to prohibit and prevent the manufacture in States territory of unmarked explosives, as well as the movement of such explosives out of or into their territory. Within three years, stockpiles of plastic explosives not specifically held for military or police activities, are to be destroyed, used, or rendered ineffective; those used for military or

police functions are to be disposed of within 15 years. An international Explosives Technical Commission, established by the Convention, will assess future developments in plastic explosive manufacturing, marking and detection. The Commission shall keep the International Community informed and propose amendments to the Technical Annex to the Convention."⁶⁶

This Convention will enter into force after ratification by 35 States, provided that no fewer than five of these States are producers of plastic explosives. So far four States have ratified this Convention.

Section IV. Warsaw System of Liability:

Warsaw Convention of 1929: From the early days of regular air services, it has been predominantly international in character. As different countries have different legal system, it was felt essential to have uniformity of laws applicable for carriage by air. In the words of Mr. Goedhuis, **"From the point of view of passengers and shippers of goods as well as from the point of views of air carriers, uniformity of laws governing carriage by air is an absolute necessity of regulating the liability of the air carrier internationally."**⁶⁷ In this regard, the first unsuccessful attempt was made on 17 August 1923 by the French Government to convene a diplomatic conference. The first International Conference on Private Air Law was held in Paris from 27 October to 6 November, 1925, once again under the invitation of the French Government. A draft proposal for a Convention was put forward.⁶⁸ Failure to agree

on a Convention at this Conference may be partly attributed to the nature of the participants. They were mostly diplomats accredited to the French Government and did not have sufficient professional expertise to deal with the highly technical legal text.⁶⁹ However, the conference decided to set up a committee of experts to carry on the work. The committee thus set up was known as " **Comite' International Technique d'experts Juridiques Aeriens (CITEJA)**." In 1928, a draft convention prepared by CITEJA on this subject was distributed by the French Government to the participants of the 1925 conference. A Second International Conference on Private air Law took place at Warsaw from 4 - 12 October, 1929, under the initiative of the Polish Government. This Conference adopted the "**Convention for the Unification of Certain Rules relating to International Carriage by Air**".⁷⁰ The Convention entered into force on 13 February 1933 upon ratification by five States. The principal feature of the Convention was that the carrier assumed liability without proof of fault, in cases of death or bodily injury resulting from an accident during carriage by air. A right of defence was also provided under certain conditions.⁷¹ In exchange for this as a "quid pro quo" (i.e. for the reversal of the burden of proof), the carrier was entitled to limit its liability at a fixed amount by reference to the value of gold. This limitation of liability may be revoked if the damage resulted from wilful misconduct on the part of the carrier or its agent acting within the scope of their employment.⁷² The essence of the Warsaw Convention can be best summarised, as Prof. Michael Milde puts it, as follows:

"a) Definition of International Carriage which determines the scope of

applicability.

- b) Unification of rules concerning the documents of carriage(passenger ticket, baggage check and air waybill) including the particulars to be embodied in each of these documents and including penalties for any irregularities of such documents**
- c) Unification of the rules concerning the liability of the air carrier.**
 - i. the liability is based on fault of the carrier**
 - ii.the fault of the carrier is presumed and the burden of proof is reversed.**
 - iii. the amount of liability is limited, the limits are determined by French Franc Unit, convertible to national currency under the gold clause.**
 - iv. in case of "wilful misconduct " of the carrier, the limit of liability does not apply.**
- d) the rules concerning jurisdiction (determination before which courts an action for damages may be brought) have been unified by the convention.**
- e) the convention contains a specific provision on combined carriage performed partly by air and partly by any other mode of carriage.**
- f) the provisions of the convention are of imperative nature and the parties cannot infringe the rules thereof under the penalty of nullity."**⁷³

This convention is also one of the oldest conventions Unifying "Certain" aspects of private air law and widely accepted in many countries and covers most cases of international carriage by air of passengers and goods.⁷⁴ Dr. Rene H. Mankiewicz termed it as the "**Magna Charta**" of liability of the international air carrier.⁷⁵ As of 25 June 1993, 134 States have ratified this convention. Nepal became party to it on 12 February 1966.

The Hague Protocol of 1955: with the passage of time, there was much criticism brewing up regarding the deficiencies in the Warsaw Convention. Especially targeted was the amount of the limit of liability. It was considered to be too low. Changes were also felt necessary to keep pace with technical advancement, legal and socio-economic changes. There were problems of interpretation regarding the civil law concept of "dol" or a fault equivalent to "dol". In Common Law Systems there is no concept equivalent to this. There was also a problem with the interpretation of gross negligence too. Therefore, the Legal Committee of ICAO, which was created by ICAO Assembly resolution 1-46 (which abolished CITEJA), was intrusted to carry on the work for the revision of the Warsaw Convention. A new draft convention was prepared by the special sub-committee of the Legal Committee in a 1952 Paris meeting. However, the 9th Session of the Legal Committee, which was held in Rio de Janeiro from 25 August to 12 September 1953, favoured limited amendment of the convention by protocol rather than wholesale revision of the convention as proposed by sub-committee. This decision was prompted by doubts that United States, due to political considerations, might not ratify a new convention limiting the

carriers liability.⁷⁶ The text adopted at Rio was submitted to The Hague Diplomatic Conference which was held from 6 to 28 September 1955. The two major issues- "increasing limits of liability and redefining the acts, resulting in unlimited liability, and harmonization of the protocol, which was to be adopted, with the original convention- were deliberated at great length."⁷⁷ Finally, The Hague Conference adopted a Protocol for the amendment of the Warsaw Convention⁷⁸ on 28 September, 1955. The major changes it brought included a doubling of the limit of liability in respect of "persons" to 250,000 Francs.⁷⁹ It also modernized and simplified the documents of carriage.⁸⁰ Article 25 of Warsaw Convention concerning "wilful misconduct" has been revised and the limit of liability does not apply with respect to acts or omissions done with intent to cause damage or recklessly and with knowledge that damage would probably result."⁸¹ A new Article 25A (to the Warsaw Convention) was introduced to extend the limit of liability to a servant or agent of the carrier acting within the scope of his employment.⁸² The United States, though it actively participated in the Hague Conference and signed the Protocol on 28 June 1956, never ratified the Protocol. The U.S. considers that the limit of liability is too low to satisfy the U.S. Public in general. The Protocol came into force on 1 August 1963 after the deposit of the 30th and 31st instrument of ratification. As of 25 June 1993, 121 States have ratified the Protocol and Nepal became party to this on 13 May 1966. One of the important features of the Protocol is Article XIX which states as follows:

" As between the parties to this protocol, the convention and protocol shall be read and interpreted together as one single instrument and

shall be known as the Warsaw Convention as amended at the Hague 1955"

This has created a new separate and distinct international instrument binding only with respect to the parties thereto. Consequently, States which are party to this protocol do not have a convention-based relationship with States-parties only to the original Warsaw Convention.⁸³

Guadalajara Supplementary Convention of 1961: As the modalities of transport developed, carriage by air became more complex. Because of the development of charter operations and freight forwarders, one party enters into contract of carriage with passengers or shippers and another party performs the actual carriage without having any contractual relationship with the passenger or the shippers. The Warsaw Convention of 1929 and Warsaw as amended at the Hague 1955 did not regulate this sort of situation. Therefore it was necessary to bring the actual carrier within the Warsaw Convention to encompass him under the term "Contracting Carrier". For the sole purpose of this, a diplomatic conference was convened by the ICAO Council at Guadalajara, Mexico on 18 September 1961 and adopted a Convention Supplementary to the Warsaw Convention.⁸⁴ This Guadalajara Supplementary Convention entered into force on 1 May 1964. As of 25 June 1993, 113 states have ratified it. Nepal has not yet ratified this supplementary convention.

Montreal Agreement of 1966: In 1966, the United States threatened to withdraw from the Warsaw Convention mainly because of the very low limitation of

liability and hence there arose the possibility of ultimate collapse of the Warsaw System. In fact, the US gave notice of denunciation on 15 November 1965 in a Diplomatic Note addressed to the depository (Government of Poland) which was to take effect on 16 May 1966. The US eventually withdrew that notice just two days before it was to take effect, not because of the efforts of ICAO but because of the efforts of air carrier members of IATA (International Air Transport Association). These carriers filed the so called "**Montreal Agreement of 1966**"⁸⁵ with the US Civil Aeronautics Board (Agreement CAB No.18900). In the agreement, they agreed among the carriers operating passenger transport to, from or via the territory of the United States of America, to raise the limit of liability for passengers to US \$ 75,000 inclusive legal fees and costs or US \$ 58,000 exclusive of legal fees and costs. They also agreed to waive the defence available under Article 20(I) of the Warsaw Convention, which essentially means acceptance of strict liability regardless of fault. Lastly, also agreed upon was to give a new type of notice to passengers, printed in a distinct legal print. Of course , this Montreal Agreement is not an international inter-governmental agreement. It does not have the legal binding force of the conventions. But it becomes mandatory for the carrier to comply with this agreement if it wants to operate to, from, or via United States territory.

Guatemala City Protocol of 1971: The Montreal Agreement of 1966 was supposed to be an Ad Hoc solution only. A new revision of the Warsaw Convention, acceptable to US , was felt necessary and consequently, the ICAO Legal Committee was again instructed to a draft new revision relating to the liability of the air carrier

in case of death or injury to passenger. After much deliberation with the concepts of the Warsaw-Hague System of liability (i.e. based on fault) with a high limit and the principle of strict liability with a limit equivalent to that of Montreal Agreement, finally , the 17th Session of the Legal Committee drafted texts for revision of the Warsaw Convention as amended at the Hague. A Diplomatic Conference was held from 9 February to 8 March 1971 (one of the longest conferences on Air Law) at Guatemala city and adopted the Guatemala City Protocol of 1971.⁸⁶ This Protocol has drastically amended the Warsaw Convention. Some of the main features of this Protocol are as follows:

- i) Simplified documents of carriage with the provision of electronic data processing.⁸⁷
- ii) Principle of strict liability regardless of fault, subject only to contributory negligence of the person claiming compensation.⁸⁸
- iii) Limit of liability for death or personal injury increased to a maximum of 1.500,000 Poincare' Francs (about US \$ 120,000)⁸⁹
- iv) For delay of passengers or baggage, liability based on a rebuttable presumption of fault of the carrier with reverse burden of proof.⁹⁰
- v) Unbreakable limit of liability ⁹¹
- vi) one more jurisdiction has been added, namely the court within which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same State.⁹²
- vii) Provision for supplemental National Insurance Plan to provide extra

protection to passengers.⁹³

- viii) Provision for automatic periodical adjustment of limits of liability.⁹⁴

There is a unique clause for the protocol to enter into force. It has to be **"ratified by 30 States including five States whose total international scheduled air traffic, expressed in passenger-kilometres, according to the Statistics for the year 1970 published by ICAO, represents at least 40 % of the total international scheduled traffic of the airlines of the member States."**⁹⁵ This obviously means that, without ratification by the United States, this Protocol will not enter into force. And because of some other protocols (Montreal Protocols of 1975) and because of the new concept of unit of account in liability (SDR System), this Protocol , probably, will never be ratified by US and hence will never enter into force. So far only eleven countries have ratified it.

The Four Montreal Protocols of 1975: The Guatemala City Protocol 1971 covers only the provisions governing passengers, baggage and delay to them. For cargo, one still has to rely on the old Warsaw System of presumption of fault with reverse burden of proof. This created the necessity of harmonizing with the liability system (strict) with passengers and baggage as provided in the Guatemala city Protocol of 1971. Therefore the International Air Law Conference, which met at Montreal from 3-25 September 1975 adopted the so called Montreal Protocol No.4 to amend the Warsaw Convention of 1929 as Amended by the Hague Protocol, 1955.⁹⁶ This Protocol basically introduced the principle of strict liability in international carriage of cargo by air. Only in cases of loss of or damage to the cargo

resulting from an inherent defect of the cargo, defective packing of that cargo, an act of war or armed conflict or an act of public authority, the carrier may be exonerated from this strict liability.⁹⁷ Another noble provision of the Protocol is liability limit expressed in the Special Drawing Rights (SDR) of the International Monetary Fund. Interestingly enough, The amount of the limit was maintained at 1929 level of the Warsaw Convention.⁹⁸ In addition to this , provision was made for the non applicability of the amended convention to the carriage of postal items.⁹⁹ It was left to be dealt with between the carriers and the Postal Administration. In other words, the carrier is liable only to the Postal Administration according to their contract. The air waybill for the cargo was also very much simplified with the introductions relating to provision of electronic data processing.¹⁰⁰

In the Warsaw Convention, the unit of account for compensation was based on the Poincare' Franc which may be converted into national currencies according to the conversion of one Franc equals 65 1/2 mg. of gold at the standard of fineness nine hundred thousandths. This system of "gold clause" worked well as long as International Monetary values were based on gold. However, after the Bretton-Woods Agreement along with the free market value of gold since 1968, gold was demonetized and hence the "gold clause" in the Warsaw System lost its practical meaning.¹⁰¹ There was much confusion and many suggestions given for the unit of account to be used. Courts have used up to four systems of conversion namely a) the official price of gold b) the market price of gold c) the French Franc d) the SDR. Therefore, at the 1975 Montreal Conference, the SDR System of unit of account was

introduced - as a comparatively more stable and widely acceptable unit of conversion. With this introduction of SDR, it was also necessary to adopt three more protocols: No.1¹⁰², No.2¹⁰³, and No.3¹⁰⁴ to replace gold clause with the SDR Clause in the Warsaw Convention of 1929, in the Warsaw Convention as Amended at the Hague in 1955, and in that Convention as Amended by the Guatemala city Protocol of 1971. Once again, as in earlier cases, Protocol No.3 creates a "separate and distinct instrument to be read and interpreted together."¹⁰⁵ At present, the Warsaw System is very complex, chaotic and no consolidated text exists. The result was a patchwork of the "underlying convention of 1929 amended by a Protocol, thereafter amended by a Protocol to Protocol and eventually amended by a Protocol to Protocol to Protocol."¹⁰⁶ The solution reached in the Guatemala city Protocol of 1971 and the Montreal Protocols of 1975 represents a "genuine balance of interests accepted by a great majority of the ICAO Contracting States". Alternative to this may be denunciation of the Warsaw System, which invariably will lead to a "chaotic conflict of laws, conflicts of jurisdiction, unpredictably high compensation claims and sky rocketing increase in the insurance premiums. A third alternative may be the Italian way, who introduced unilaterally by legislation the regime and limits of Protocol No.3 of 1975 not only on their national air carriers but on all airlines operating to, from or via the national territory of Italy."¹⁰⁷ Even though the future of the Warsaw System will be very much affected by the attitude of US towards the ratification of the Montreal Protocols Nos. 3 and 4, the great majority of ICAO Member States support some form of system of limitation of liability. Without a system of liability

limitation, International Air Transport at present is unthinkable. This in itself, will lead to the survival of the Warsaw System.

Endnotes Chapter 2

1. Materials supplied by ICAO Legal Bureau: State Letters.
2. See Article 44 of the Convention on International Civil Aviation (hereafter referred to as "the Chicago Convention"), signed at Chicago on 7 Dec. 1944, ICAO Doc. 7300/6, 6th ed. 1980 at p.17.
3. List of International Air Law Conventions which Nepal has ratified are as follows:
 1. Convention on International Civil Aviation (Chicago 7/12/44).
 2. International Air Services Transit Agreement (Chicago 7/12/44).
 3. Convention for the Unification of Certain Rules relating to International carriage by air (Warsaw 12/10/29).
 4. Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague 28/9/55).
 5. Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo 14/9/63).
 6. Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague 16/12/70).
 7. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal 23/9/71).
4. 1889: International Aeronautic Congress in Paris created Permanent International Aeronautic Commission.
1899: The first International Peace Conference was held at the Hague.
5. I.A. Vlasic, *Public International Air Law I*, Documents and materials. IASL, McGill University 2nd.ed., 1989, at p.4.
6. McNair, *The Law of the Air*, 3rd.Ed., Stevens & Sons 1964, at p.4-5
7. Convention Relating to the Regulation of Aerial Navigation (Paris Convention 1919), signed at Paris on 13 Oct. 1919. 11 LNTS 173; 1922 UKTS2: (1965) 3 Air Laws and Treaties of the world 3085;
Article 1: The high Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.
8. R.W. Fixel, *The Law of Aviation*, 4th. ed., The Michie Company, Virginia, 1967, at p.32-33.
9. See: Article 3, the Chicago Convention, *supra*, note 3 at p.2
10. *Ibid.* Article 4 at p.2.

11. *Ibid.* Article 6 at p.3.
12. *Ibid.* Article 5 at p.2.
13. *Ibid.* Article 7 at p.3.
14. *Ibid.* Articles 18, 19 at p.8.
15. *Ibid.* Chapter V at 12.
16. *Ibid.* Article 29 at p.12.
17. *Ibid.* Articles 9 to 16 at p.4-7.
18. *Ibid.* Article 44 at p.17.
19. *Ibid.* Article 37 at p.14.
20. *Ibid.* Article 38 at p.15.
21. Following are the lists of the Annexes so far ICAO has adopted:
 - Annex 1: Personnel Licensing. 8th edition, July 1988. Reprinted March 1992, incorporating Amendments 1-159, 82 pp.
 - Annex 2: Rules of the Air. 9th edition, incorporating Amendments 1-29. July 1990, 51 pp.
 - Annex 3: Meteorological Service for International Air Navigation. 11th edition, incorporating Amendments 1-69. July 1992, 112 pp.
 - Annex 4: Aeronautical Charts. 8th edition, incorporating Amendments 1-47. July 1985, 71 pp.
 - Annex 5: Units of Measurement to be Used in Air and Ground operations. 4th edition, July 1979. Reprinted January 1990, incorporating Amendments 1-15. 33 pp.
 - Annex 6: Operation of Aircraft.
 - Part I-International Commercial Air Transport- Aeroplane. 5th edition, July 1990. Reprinted November 1991, incorporating Amendments 1-19. 33 pp.
 - Part II- International General Aviation - Aeroplane. 4th edition, July 1990. Reprinted March 1992, incorporating Amendments 1-14. 38 pp.
 - Part III- International Operations- Helicopters. 2nd edition, incorporating Amendment No.1. July 1990. 87 pp.
 - Annex 7: Aircraft Nationality and Registration Marks. 4th edition, July 1981. Reprinted June 1988, incorporating Amendments 1-4, 10 pp.

- Annex 8: Airworthiness of Aircraft. 8th edition, incorporating Amendments 1-95. July. 50 pp.
- Annex 9: Facilitation. 9th edition, incorporating Amendments 1-14. July 1990, 63 pp.
- Annex 10: Aeronautical Telecommunications.
Volume I (Part I- Equipment and Systems; Part II- Radio Frequencies). 4th edition, April 1985. Reprinted January 1991, incorporating Amendments 1-68, 343 pp.
Volume II (Communication Procedures including those with PANS Status). 4th edition, April 1985. Reprinted January 1991, incorporating Amendments 1-68, 80 pp.
- Annex 11: Air Traffic Services. 9th edition, incorporating Amendments 1-33. July 1990, 62 pp.
- Annex 12: Search and Rescue. 6th edition, March 1975. Reprinted March 1992, incorporating Amendments 1-14. 35 pp.
- Annex 13: Aircraft Accident Investigation. 7th edition, May 1988. Reprinted April 1992, incorporating Amendments 1-8. 35 pp.
- Annex 14: Aerodromes.
Volume I - Aerodrome Design and Operations. 1st edition, July 1990, 171 pp.
Volume II- Heliports 1st edition, July 1990, 51 pp.
- Annex 15: Aeronautical Information Services. 8th edition, incorporating Amendments 1-27. July 1991, 47 pp.
- Annex 16: Environmental Protection
Volume I - Aircraft Noise. 2nd edition, 1988. Reprinted March 1992, incorporating Amendments 1-3, 133 pp.
Volume II - Aircraft Engine Emissions. 1st edition, 1981. Reprinted March 1992, incorporating Amendment No.1, 60 pp.
- Annex 17: Security- Safeguarding International Civil Aviation against Acts of Unlawful Interference. 5th edition, incorporating Amendments 1-8. December 1992, 29 pp.
- Annex 18: The Safe Transport of Dangerous Goods by Air. 2nd edition, incorporating Amendments 1-4. July 1989, 23 pp.
22. M.Milde, " Chicago Convention- 45 years later" 14 *AASL* (1989) 205.
23. M.Milde, "Chicago Convention - after 40 years " 9 *AASL*(1984) 119
24. Following are the basic five freedoms of the air:
- 1st Freedom :** Right to fly, and carry traffic, non-stop over the territory of the grantor State.
- 2nd Freedom :** Right to fly, and carry traffic, over the territory of the grantor State, and to make one or more stops there for non traffic purposes.

- 3rd Freedom :** Right to fly into the territory of the grantor State and there discharge traffic coming from the flag-State of the carrier.
- 4th Freedom :** Right to fly into the territory of the grantor State and there take on traffic destined for the flag State of the carrier.
- 5th Freedom :** Right to fly into the territory of the grantor State for the purpose of taking on, or discharging, traffic destined for, or coming from third State.
- Anterior-point 5th Freedom:** Right to fly into the territory of the grantor State and there discharge or take on traffic coming from, or destined for, a third State situated on the agreed route at a point anterior to the flag-State of the carrier.
- Intermediate-Point 5th Freedom:** Right to fly into the territory of the grantor State and there discharge or take on traffic coming from, or destined for a third State situated on the agreed route between the flag-State and the grantor State.
- Beyond-Point 5th Freedom:** Right to fly into the territory of the grantor State and there discharge or take on traffic coming from or destined for a third State situated on the agreed route at a point beyond the grantor State.

Besides those five freedoms of the Air, three other freedoms of the Air have also made appearance since Chicago Conference as follows:

- 6th Freedom :** Right to fly into the territory of the grantor State and there discharge or take on, traffic ostensibly coming from or destined for, the flag-State of the carrier which the carrier has either brought to the flag-state from a third State on a different service or is carrying from the flag-State to a third State on a different service.
- 7th Freedom :** Right, for a carrier operating entirely outside the territory of the flag State, to fly into the territory of the grantor State and there discharge or take on, traffic coming from or destined for, a third State or third States.
- 8th Freedom (Cabotage):** Right to carry traffic from one point in the territory of a State to another point in the same State.

25. R. Maria, *The Economic Regulation of International Air Transport*, (McFaralan & Company, Inc; Publishers, Jefferson, North Carolina 1989) at 46-47.

26. *Ibid.*
27. H.A. Wassenberg, *Post war International Civil Aviation Policy and the law of the air*, 2nd revd, ed. (The Hague, Martinus Nijhoff 1962) 107-109.
28. *International Air Services Transit Agreement*, Signed at Chicago on 7 December 1944, (hereafter referred as IASTA) 84 UNTS 389; ICAO Doc. 7500; 1957 ATS 5; 1944 CTS 36; 1953 UKTS 8; 59 Stat.1693, EAS 487,3 Bevans 916., See Article 1 Section 3.
29. *Ibid.* See Article 1, Section 3, Section 4
30. P.P.Heller, *The Grant and Exercise of transit rights is respect of scheduled International Air Services*, (LL.M. Thesis, McGill University, 1954) at 164.
31. *Ibid.* at 110
32. Maria, *supra*, note 25 at 49.
33. E.Faller, "Aviation Security: The role of ICAO in safeguarding international civil aviation against acts of unlawful interference", 17 *AASL (Part I, 1992)* 370. Ironically, same captain was hijacked again 30 years later, flying a continental Boeing 707 from Phoenix to El Paso, and forced to land in Cuba.
34. E.Mcwhinney, *Aerial Piracy and International Terrorism: The illegal Diversion of Aircraft and International law*. (2nd.Rev.Ed. Martinus Nijhoff Publishers, 1987, Dordrecht), See: The polycentricity of the Problem-Situation. The different species of Aerial Hijacking. at 8-15.
35. *Ibid.*
36. *Ibid.*
37. S.Shubber, *Jurisdiction over crimes on Board Aircraft*, (Martinus-Nijhoff, The Hague 1973) at 5.
38. Mcwhinney, *supra*, note 34 at 128.
39. Hudson, *International Legislation, Vol. VII* (1941) at 862.
40. Mcwhinney, *supra*, note 34 at 130.
41. The Chicago Convention, *supra*, note 2 at 9, Article 25.
42. Mcwhinney, *supra*, note 34 at 131.

43. 1953: 9th Session at Rio de Janeiro in 1953, the Legal Committee established a Sub-Committee on Legal Status of Aircraft. ICAO DOC 7450 -LC/136 Vol.- Minutes P.XVIII, Para 4(b).
1956: First plenary session in Geneva in 1956, SubCommittee decided to limit its Scope of Study.
1958: The Montreal Draft, 1958, first draft convention on crime on board aircraft. It was entitled " Legal Status of Aircraft"
1959: The Munich Draft, 1959. The Legal Committee renamed the draft as " The Draft Convention of Offenses and Certain Other Acts occurring on Board Aircraft." and it was comprehensive in scope.
1962: The Montreal Redraft, 1962: The draft Convention was redrafted to accommodate the various comments received from States and International Organizations on the Munich Draft, 1959.
1962: The Rome Draft 1962. Finally in its 14th Session at Rome in 1962, The Legal Committee prepared a final draft entitled " Draft Convention on Offenses and Certain other Acts Committed on Board Aircraft."
1963: Tokyo Convention 1963. The Rome Draft was placed before the International Diplomatic Conference on Air Law, held in Tokyo, on 20 August 1963.

For Details see also Shubber, *supra*, note 37 at 6-13.

44. The proper name of the convention is: "*Convention on Offenses and Certain other Acts Committed on Board Aircraft, Signed at Tokyo on 14 September 1963*" 704 UNTS 219, ICAO Doc.8364; 1970 ATS 14; 1970 CTA 5; 1969 UKTS 126; TIAS 6768; 20 UST 2941; (1963)2 ILM 1042.
45. (1950) US AV.R.p.; 87 F.Supp. at 298.
46. 2246.(1956) 2 QB p.272; (1956) 2W.L.R. p.975
47. Tokyo Convention, *supra*, note 44 at Article 2, Para 1.
48. *Ibid.* Article 2, Para 2.
49. Shubber, *supra*, note 37 at 22.
50. Tokyo Convention, *supra*, note 44 at Article 6.
51. *Ibid.* Article 11.
52. E.El-Harudi, *New Developments in the Law of Aviation Security*.(LL.M. Thesis, McGill University, 1989), at 54.
53. *Convention for the Suppression of Unlawful Seizure of Aircraft, Signed at The Hague on 16 December 1970*, 860 UNTS 105, ICAO Doc.8920; 1972 ATS 16;

- 1972 CTS 23; 1972 UKTS 39; TIAS 7192, 22 UST 1641; (1971) 10 ILM 133.
54. *Ibid.* Article 1.
 55. *Ibid.* Article 2.
 56. *Ibid.* Article 7; also see Faller, *supra*, note 33 at 369-381.
 57. JAICA, *Civil Air Law 1989* (hand out distributed in Civil Air Transport Course, 15 June-9 Feb. 1989, Pakistan) at 27.
 58. *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Signed at Montreal on 23 September 1971, 974 UNTS 177; ICAO Doc.8966; 1973 ATS 24; 1973 CTS 6; 1974 UKTS 10; TIAS 7570; 24 UST 564; (1971) 10 ILM 1151.
 59. *Ibid.* Article 1.
 60. *Ibid.* Articles 3, 5, 7.
 61. JAICA, *supra*, note 57 at 29.
 62. *Protocol for the Suppression of unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Done at Montreal on 23 September 1971*, Signed at Montreal 24 February 1988. ICAO Doc.9518; 1990 ATS 39; 1991 UKTS 20; (1988) 27 ILM 627.
 63. Faller, *supra*, note 33 at 378.
 64. *Ibid.* at 379.
 65. *Convention on the Marking of Explosive for the purpose of Detection*, Done at Montreal on 1 March 1991, ICAO Doc.9571.
 66. Faller, *supra*, note 33 at 379.
 67. D.Goedhuis, *National Air Legislations and the Warsaw Convention*, (Martinus Nijhoff, The Hague 1937), at 3.
 68. *Ibid.* at 5.
 69. M.Milde, "ICAO Work on the Modernization of the Warsaw System," 14 *Air Law* (no. 4/5, 1989) 193.

70. *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, signed at Warsaw on 12 October 1929, 137 LNTS 11; ICAO Doc.601; 1963 ATS 18; 1947 CTS 15; 1967 NZTS 11; 1933 UKTS 11; 49 Stat.3000; USTS 876; 2 Bevans 983.
71. *Ibid.* Article 20.
72. *Ibid.* Article 25; Also See: D.A.Kilbride," Six decades of insuring liability under Warsaw." 14 *Air Law*(No. 4/5, 1989) 183
73. Milde, *supra*, note 69 at 194-195.
74. G.Miller, *Liability in International Air Transport*,(Kluwer- Deventer-The Netherlands-1977) at 2.
75. R.H.Mankiewicz, *The Liability regime of the International Air Carrier* (Kluwer, The Netherlands, 1981) at XXV.
76. M.Ngororo, *The Advantages and Disadvantages to the United Republic of Tanzania of ratifying Montreal Protocols Nos. 3 and 4* (LL.M. Thesis, McGill University 1986) at 60.
77. R.H.Mankiewicz, "From Warsaw to Montreal with certain intermediate stops: Marginal Notes on Warsaw System" 14 *Air Law*(No.6,1989) 239.
78. *Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air Signed at Warsaw on October 1929*, Signed at the Hague on 28 September 1955, 478 UNTS 371; ICAO Doc.7632; 1963 ATS 18; 1967 NZTS 11; 1967 UKTS 62.
79. *Ibid.* Article XI.
80. *Ibid.* Article II to IX.
81. *Ibid.* Article XIII.
82. *Ibid.* Article XIV.
83. Milde, *supra*, note 69 at 197.
84. *Convention Supplementary to The Warsaw Convention, for the Unification of certain Rules Relating to International Carriage by Air performed buy a person other than the contracting Carrier*, Signed at Guadalajara on 18 September 1961, 500 UNTS 31; ICAO Doc.8181; 1964 ATS 4; 1969 NZTS 3; 1964 UKTS 23.

85. *Agreement relating to Liability Limitation of the Warsaw Convention and The Hague Protocol*, Signed at Montreal on 13 May 1966, CAB No.18900.
86. *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955*, Signed at Guatemala City on 8 March 1971, ICAO Doc.8932/2.
87. *Ibid.* Article II and III.
88. *Ibid.* Article IV and VII.
89. *Ibid.* Article VIII.
90. *Ibid.* Article IV.
91. *Ibid.* Article IX (amended Article 24 Para 1).
92. *Ibid.* Article XII.
93. *Ibid.* Article XIV (introducing a new Article 35A).
94. *Ibid.* Article XV.
95. *Ibid.* Article XX; also see Midle, *supra*, note 69 at 203.
96. *Montreal Protocol No.4 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955*, Signed at Montreal on 25 September 1975, ICAO Doc.9148.
97. *Ibid.* Article IV.
98. *Ibid.* Article VII.
99. *Ibid.* Article II.
100. *Ibid.* Article III.
101. Milde, *supra*, note 69 at 205.
102. *Additional Protocol No.1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, Signed at Montreal on 25 September 1975, ICAO Doc.9145.

103. *Additional Protocol No.2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975, ICAO Doc.9146.*
104. *Additional Protocol No.3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala city on 8 March 1971, signed at Montreal on 25 September 1975, ICAO Doc.9147.*
105. Milde, *supra*, note 69 at 205.
106. *Ibid.*
107. *Ibid.* at 206; Also see: Italian law of 7 July 1988 on the Limits of Liability in International Carriage of Passengers, *Gazzetta ufficiale della Repubblica Italiana*, Rome, No.168, 19 July 1988.

CHAPTER 3: The impact of the International Air Law Conventions on the Nepalese Domestic Air Law.

Section I: Nepal's obligations under Chicago Convention of 1944:

A) Chicago Convention and Annexes to it.

The Chicago Convention is one of the most widely accepted Public International Air Law Convention, it is second only to the UN Charter. As mentioned earlier, as of 31 March 1993, the Convention has been ratified/adhered to by 175 Contracting States. It is not only a comprehensive codification of Public Air Law but also a constitution of the International Civil Aviation Organization. Under Article 37 of the Chicago Convention, ICAO "adopts and amends International Standards and Recommended Practices (SARPS) to fulfil one of its main objective of "developing the principles and techniques of international air navigation and to foster the planning and development of international air transport". Article 37 (para II) reads as follows:

"To this end International Civil Aviation Organization shall adopt and amend, as may be necessary, international standards and recommended practices and procedures"¹

The Chicago Convention does not define Standards and Recommended Practices, but ICAO Assembly resolution A1-31 defines a "Standard" as:

"any specification for physical characteristics, configuration, materials, personnel, or procedure, the uniform application of which is

recognized as necessary for the Safety or regularity of international air navigation and to which Member States will conform in accordance with the Convention; in the event of impossibility of compliance notification to the council is compulsory under Article 38 of the Convention."²

This resolution was meant "for use by the organization in relation to air navigation matters." ³ For the "Recommended Practice", the same resolution defines as follows:

"any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Member States will endeavour to confirm in accordance with the Convention."⁴

Since matters concerning facilitation for air transport are different in nature than those concerned with air navigation, Standards and recommended practices have been defined in Annex 9 as follows:

"Standard: Any specification, the uniform observance of which has been recognized as practicable and as necessary to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54(l) of the Convention, and in respect of which non-compliance must be notified by States to the council in accordance with Article 38.

Recommended Practices: any specification, the observance of which has been recognized as generally practicable and as highly desirable to facilitate and improve some aspects of international air navigation, which has been adopted by the Council pursuant to Article 54(l) of the Convention, and to which Contracting States will endeavour to conform in accordance with the Convention."⁵

The main difference between Standards and recommended practices is that the former is recognized "as necessary for the safety or regularity of international air navigation or to facilitate and improve some aspects of international air navigation and which Contracting States will conform to these international standards "and the latter is 'recognized as desirable'(for the same purposes) and the Contracting states will endeavour to conform." Compliance with those SARPs which are designated as Annexes for convenience⁶ is spelled out in Para I of Article 37 as follows:

"Each Contracting States undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity facilitate and improve air navigation."⁷

The importance of national implementation of those SARPS is well highlighted by Eugene Pepin by quoting an ICAO Resolution of 13 April 1948: "to free those engaged in international air navigation to the greatest possible extent from the necessity of detailed examination of national laws and regulations upon crossing

international boundaries, and because many of the benefit of the international standardization of practices and of regulatory requirements may be lost through diversity of form and arrangement in the publication through which they are promulgated in the various States."⁸ But the Convention does not provide a mandatory legal obligation to implement or to comply with the provisions of a duly promulgated Annex or Amendment thereto because Article 38 of the Convention contains provision for the Contracting States to file differences as follows:

"Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all others states of the difference which

exists between one or more features of an international standard and the corresponding national practice of that State"⁹

The only exception, in which a Contracting State cannot file differences and hence requires mandatory compliance, is the regulation regarding "rules of the air over the high seas" promulgated under Article 12 of the Convention which states in part " over the high seas, the rules in force shall be those established under this Convention." Annex 2:Rules of the Air is the only Annex promulgated by the Council concerning "rules and regulations relating to flight and manoeuvre of aircraft" under Article 12. The 9th Edition of Annex 2 does not contain any recommended practices and hence compliance with it over the high seas is mandatory to all the member States of ICAO. There is no time limit for the notification of differences from international standards and recommended practices under Article 38. According to Bin Cheng, "a member State may decide at any time not to comply with a given international standard, with the sole exception of rules of the air over high seas, .. the only duty incumbent on a member State is to give immediate notification to the International Civil Aviation Organization of the difference between its own practices and that established by the international standards."¹⁰

The ICAO Council adopts the Annexes according to Article 90 (a) which requires "the vote of two-thirds of the Council" and becomes "effective within three months after its submission to the Contracting States or at the end of longer period of time as the Council may prescribe, unless in the meantime a majority of the Contracting States register their disapproval with the Council"¹¹ So far none of the

Annexes have ever been disapproved by the majority of the Contracting State. There was some controversy over the voting requirement for the adoption of Amendments.¹² The practice of the ICAO Council has been to follow the vote of two-thirds as mentioned in Article 90(a).

Though SARPS do not have the legal binding force of Convention or Treaty, it is often termed as "Soft Laws". In the practical aspects of international air transport, these soft laws are very strong; maybe as strong as the law of gravity. Without uniformity in regulations in the form of those standards and recommended practices, international air transport would be unthinkable. In the foregoing sections , since Nepal is a party to the Chicago Convention, the provisions of Annexes which Nepal has introduced in its national air law , will be examined. The scope of examination will be limited to certain Annexes concerning air navigation.

B) Aircraft Nationality and Registration Marks:

States parties to the Chicago Convention are obliged to have appropriate nationality and registration marks on their aircraft, if it is to engage in international air navigation.¹³ By virtue of registration of an aircraft in a State, it will have the nationality of that State.¹⁴ Dual registration of an aircraft is prohibited under the Chicago Convention, but its registration is allowed to change from one State to another.¹⁵ Detailed rules and regulations regarding the registration or transfer of registration will be governed by the national laws of the Contracting States.¹⁶ On 8 February 1949, pursuant to the provision of Article 37 of the Chicago Convention,

the ICAO Council first adopted minimum international standards required for the display of marks to indicate appropriate nationality and registration which is required to comply with Article 20 of the Chicago Convention. These Standards were designated as Annex 7: Aircraft Nationality and Registration Marks.¹⁷ The fourth edition (published on July 1981) of Annex 7 contains no recommended practices.

Nepal had promulgated "**Civil Aviation Rules 2019(1962)**" on 29/4/2019 (August 14, 1962) to deal with the provisions on nationality of aircraft of chapter III of the Chicago Convention and Annex 7.¹⁸ The Chief engineer (i.e. head of the Department of Civil Aviation) shall keep a register for the registration of aircraft and shall issue certificates after registration subject to these Rules.¹⁹ This is in line with Standard 6 of Annex 7. But the rule lacks does not define "aircraft". Categorization of aircraft is important, in the sense that uniform rules may not be practicable to all types of aircraft. Annex 7 defines eleven different types of aircraft.²⁰ The Aircraft Rules, 1937 of India defined at least fifteen different categories of aircraft.²¹ In line with Article 18 of the Chicago Convention, Rule 3(2) does not allow dual registration. The conditions required, according to rule 3(3), for the registration of aircraft in Nepal are as follows:

- a) **The aircraft should belong to a Nepalese citizen; or**
- b) **The aircraft should belong to a corporate body registered or established and having more than fifty percent members of the Board of Directors as Nepalese citizens.**

Aircraft falling under these two categories will be registered directly by the

Department of Civil Aviation(DCA).²² To register any other aircraft, requires the permission of His Majesty's Government (HMG) of Nepal. It is not clear in the Rules, what other aircraft will be registered by HMG Nepal and under what regulations. The aircraft thus registered under these rules will have Nepalese Nationality.²³ The Registration certificate is not transferable to new owner. In case the aircraft is sold or transferred, details of the new owner and a certificate of registration should be submitted to the DCA.²⁴ A new certificate of registration shall be issued subject to the Rules.²⁵ Nepalese registered aircraft cannot be sold or transferred for use outside Nepal without permission of HMG Nepal. If it is sold or transferred without permission, the transaction shall be invalid. It follows from this that one can sell or transfer the ownership of the Nepalese registered aircraft without permission to anybody if it is to be used within the Kingdom of Nepal. Aircraft belonging to other than Nepalese citizens or Corporate body (as stipulated in rule 3(3)). can be registered provided HMG Nepal gives permission. The issue becomes sensitive with regard to leased aircraft because the leased aircraft do not fall under the category of Rule 3(3). Hence, the DCA is not authorized to register under existing rules without permission from HMG Nepal. Registration will be cancelled if the aircraft is destroyed or permanently withdrawn from use within the Kingdom of Nepal.²⁶ The second situation implies that aircraft has to be not only permanently withdrawn from use within the Kingdom of Nepal but also has to be taken back to other places. The owner of the aircraft has a duty to notify the change of status of the aircraft and accordingly its registration will be cancelled.

Nepal, obviously, complies with the nationality mark (9N) allocated to it by the International Telecommunication Union (ITU). The Nationality mark is followed by a Registration mark consisting of three letters. The first Nepalese registered aircraft will have its Nationality and registration mark as 9N-AAA.²⁷ However, for the "Royal Aircraft", after the nationality mark there will be a mark of two letters RF and at the end of that there will be a number, for example 9N-RF1.²⁸ Once again, there is no definition or explanation of "Royal Aircraft" but in practice, it is that used or belong to His Majesty. In, the author's opinion, there is a conflict of laws. Civil Aviation Rules 2019(1962) was promulgated "in exercise of the power conferred by section 3 of the Civil Aviation Act 2015(1959)".²⁹ Section 16 of this Act explicitly states as follows:

"Non-applicability of the Act: Nothing in this Act or in any order or Rule made thereunder shall apply to the private aircraft of His Majesty the king or the aircraft of His Majesty's Government or Royal Nepalese Armed Forces."³⁰

Therefore the Civil Aviation Rules 2019(1962), which were made under the Act, should not be applicable to Royal Aircraft.

Details of locations and measurement of the nationality and registration marks are given in the Schedule of the rules. This, in general, follows with minor variation the requirements as stipulated in Standards 3,4 and 5 of the Annex 7. But there are few differences. Notably among them are the following:

a) Rule 4(2): the height of marks remained on the wings shall be 30 centimetres (12

inches).

ICAO Std. 4.2.1: the height of the marks on the wings of heavier-than-air aircraft shall be at least 50 cm.

- b) Rule 4(3): The marks on the fuselage shall not reach the outer lines of the fuselage.
- c) Rule 4(4): The marks on the surface of the vertical tail shall be at a distance of at least 5 centimetres(12 inches from the both edges.

The marks mentioned in above clauses (3) and (4) above shall not exceed 15 centimetres (6 inch) in height even if such marks are magnified to the optimum.³¹

ICAO Standard 4.2.2: Fuselage (or equivalent Structure) and vertical tail surface: The height of the marks of the fuselage (or equivalent structure) and on the vertical tail surfaces of heavier-than-air aircraft shall be at least 30 centimetres.³²

The author fails to see the rationale for the departures from the ICAO Standards. Of course, Nepal as a sovereign State, has the right to depart from International Standards and procedures as stipulated in Article 38 of the Chicago Convention but it also has a duty it give immediate notice to the International Civil Aviation Organization of such differences.³³ So far, Nepal has not yet notified its differences.³⁴

C) Personnel Licensing.

One of the main goals of the Chicago Convention is to develop international civil aviation in a safe and orderly manner.³⁵ As a prerequisite to this, every

aircraft of a contracting State, engaged in international navigation, must carry appropriate licences for each member of the crew.³⁶ According to Article 32(a) of the Chicago Convention, the pilot of every aircraft and other members of the operating crew of every aircraft engaged in international navigation must be provided with certificates of competency and licences issued or rendered valid by the State in which the aircraft is registered. The Convention as well as Annex 1³⁷ does not define the phrase **"certificate of competency as well as licences."** But Black's Law dictionary defines licence as **"a permission by competent authority to do an act, without such permission, would be illegal, a trespass or a tort."**³⁸ Annex 1 to the Chicago Convention, which was adopted first on 14 April 1948 and which is entirely devoted to personnel licensing issues, does throw some explanation on these terms. According to this, the term "licence" used throughout the Annex has the same meaning as the expressions "certificate of competency and licence", " licence or certificate" and "licence". Similarly the expression " flight crew member" has the same meaning as the expression " member of the operating crew of an aircraft" and "operating personnel."³⁹ Annex 1 also defines a Flight Crew Member as "a licensed crew member charged with duties essential to the operation of an aircraft during flight time".⁴⁰ Neither the Civil Aviation Act 2015(1959) nor the Civil Aviation Rules 2019(1962), which deal with licensing issues, define the term "licence". The Personnel Licensing and Training Panel (PELTP) of the Air Navigation Commission of ICAO, defined personnel licensing as "the means by which a State authorizes a licence holder to perform specific activities which, unless performed properly, could

jeopardize the safety of international aviation."⁴¹ Rule 8 of the Civil Aviation Rules 2019(1962) empowers the Chief Engineer to issue following types of licences:⁴²

- a) Student Licence and Private Licence.
- b) Provisional Licence or Temporary or Restricted Licence.
- c) Aircraft and aircraft maintenance engineer's licence.
- d) Commercial Pilot's Licence.
- e) Senior Commercial Pilot's Licence.
- f) Air Transport Pilot's Licence.
- g) Flight Engineer's Licence.
- h) Flighty Radio Operator's Licence.
- i) Flight Radio Telephone Operator's Licence.
- j) Flight Navigator's Licence.
- k) To grant rating of more than one type.
- l) to grant Instrument Rating.
- m) To grant the Instructor and Assistant Instructor Rating.
- n) Renew licences and ratings.

Annex 1, para 1.2 recommends the issuance of licences to private pilots, commercial pilots, airline pilots, airline transport pilots for aeroplane and helicopters, glider pilots, free balloon pilots, flight navigators, and flight engineers. In the category of other personnel, it includes aircraft maintenance-technicians, engineers, air traffic controllers, flight operations officers, aeronautical station operators. Since the eighth edition, Annex 1 no longer requires to the senior commercial pilot's licence and the

flight radio operator's licence. It is advisable to delete those from the rules. Conspicuously absent in the rules is provision to issue licences to air traffic controllers and flight operation officers. From the point of view of safety, personnel working in these fields should be competent and properly licensed. The validity period for a licence issued under these rules varies according to the type of licence. The maximum validity period is two years for the student licence and private licence, and the minimum period is four months for the provisional licence and one month for the temporary certificate.⁴³ For a senior commercial pilots licence and air transport pilots licence, the validity period is six months.⁴⁴ This in general follows the requirement of medical fitness as mentioned in para 1.2.5.2 of Annex 1. With regard to aircraft type rating, it will be valid up to the period of the licence relating to which such rating is granted.⁴⁵

The qualification required for receiving the licence and ratings are stated in Rule 10 as follows:

"The knowledge , experience, skill and physical fitness required for receiving the following licences and ratings and the privileges related therewith shall be as specified in the Chapter 2 and 3 of Annex 1 of the Convention."

Hence it follows that Chapter 2 (licences and rating for pilots) and Chapter 3 (licences for flight crew members other than licences for pilots) are part of the domestic law of Nepal. Whether any subsequent amendments (related to chapter 2 and 3) will also becomes part of the domestic law is a debatable. In the author's

opinion, it would be better if specific requirements are spelled out in the form of a Schedule. For example, the Aircraft Rules 1937 of India elaborate its requirements for the licences in Schedule II of the said Rule.⁴⁶ With regard to the age requirement, Rule 8(4) follows the respective provision as stated in chapter 2 of Annex 1.⁴⁷ According to this, minimum age requirement is seventeen years for student and private licences, eighteen years for the commercial pilot's licence, flight radio operator's licence and radio telephone operator's licence, radio maintenance engineer's licence, and twenty one years for a commercial pilot's licence, air transport pilot's licence, flight engineer's licence, flight navigator's licence and aircraft maintenance engineer's licence. In the case of a flight engineer's licence and flight navigator's licence, the required age, according to the Rule, is twenty one years, whereas according to Annex 1 para 3.2.1.1 and 3.3.1.1 the age shall not be less than eighteen years. So Nepalese requirement for age is higher than the minimum age set by the ICAO Annex. There is no categorisation of aircraft maintenance engineers licences in the Rule, whereas Annex 1 grouped them into two categories as Type I and Type II.⁴⁸ As for the qualification required for the restricted commercial pilot's licence and the privileges, Rule 10(2) specified the level of knowledge, experience, skill and physical fitness required and privileges conferred.⁴⁹ The holder of such restricted licence can exercise all the privileges of a private pilot and act as pilot-in-command of an aircraft having an all-up-weight not exceeding five thousand pounds only within the Kingdom of Nepal, relating to the operation of non-scheduled air transport. In other words, he is not authorized to fly as a pilot-in-command in

scheduled air transport operations.

Every flight crew member of an aircraft must have a valid licence either issued or rendered valid by the State in which the aircraft is registered.⁵⁰ The State shall recognize the licence issued by the other contracting State, only **"if the requirement under which such licences were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant this Convention."**⁵¹ According to Article 32(b) of the Convention, each contracting State reserves the right to refuse to recognize the licence granted to any of its nationals by another contracting State. The refusal will be only for the purpose of flight above its own territory.⁵² This is mainly for the situation, where a person may not qualify for a certain type of licence in his country but may qualify for the same licence in some other country where rules might be more relaxed. Therefore, Article 32(b) may be used to prevent such circumventing of the national laws of a country. In line with those Articles, Nepal validates the licences issued by other member States, as stipulated in rule 9(1):

"The Chief Engineer may validate for the remaining period the licence or rating granted by the competent authority of any member State of the International Civil Aviation Organization. In case the Chief Engineer has specified any limit or restriction, while granting the certificate of validation, such licence or rating shall be valid up to that period subject to such limit or restriction."⁵³

There are two points in this Rule which are noteworthy. One is the use of the

word "may", which does not have the mandatory force of the word "shall" as used in Article 32 and 33 of the Convention. Rule 45 of the Aircraft Rules 1937 of India⁵⁴ as well as Rule 73(1) of the Civil Aviation Rules 1978 of Pakistan⁵⁵ also use the word "may" in those relevant section. The other point is the absence of the condition (as stipulated in Article 33) for the recognition of the licence. This is also absent in the Aircraft rule 1937 of India. But, in the case of Pakistan, it has not only mentioned the required condition but also has gone a step further by encompassing the licence issued by "any other country."⁵⁶ The recognition of licences of flight crew members also constitutes a part of the operational provisions of Bilateral Air Transport Agreements (BATAs). These are public international air law agreements concluded between two States for the regulation of commercial air services between their respective territories.⁵⁷ In most of Nepal's BATAs, there is this specific provision for the recognition of licences.⁵⁸ The knowledge and skill required to obtain the flight radio telephone operator's ratings are specified in the Rule 10(3) (a) and(b).⁵⁹ The holder of such licence will have the right to operate the radio-telephone on an aircraft for the purpose of communication or controlling in the flight-route. By use of the word "rating", it may be deduced that the provision applies only for flight crew members, where as in the Aircraft Rules 1937 of India, the provision for "Flight Radio Telephone Operator's licence" is made in Section R of Schedule II of the said rule.⁶⁰ Considering the type of aircrafts used in commercial air transport these days, this type of rating or even licence may not be of very much practical use.

The physical fitness of the flight crew member is very important and directly

related to the safety of the flight. In case of decrease in medical fitness, para 1.2.6.1 of Annex, prescribes that **"Licence holders shall not exercise the privileges of their licences and related ratings at any time when they are aware of any decrease in their medical fitness which might render them unable to safely exercise these privileges."**⁶¹ There are three classes of Medical Assessment, namely Class 1,2,3, depending upon the type of licence required. The details are given in Chapter 6 of Annex 1.⁶² According to the notification published in the Nepal Gazette on 2020/1/9 (April 22,1963), a Medical Board has been constituted for the examination of physical fitness of the flight crew members.⁶³ To be member of the Board, the medical doctor must be recognized as qualified by HMG Nepal.⁶⁴ According to para 1.2.4.4.1 of Annex 1, **"medical examiners shall have had or shall receive, training in aviation medicine."** But the rule does not specify such requirement. Only HMGN must recognize a qualified medical doctor.⁶⁵ This has raised to some controversy on occasion as to whether the medical examiner first should have training before he assesses flight crew members or only training at the earliest opportunity. The assessment will be done according to the Standards specified in Chapter 6 of the Annex 1 and a report of the physical examination will be sent to the Chief Engineer having been signed it by all the members of the Board present there.⁶⁶

In some situations, States may not be in a position to fulfil all the requirements of Annex 1. Therefore a certain amount of flexibility is needed, especially when licence holder is operating in an area distant from designated medical examination facilities. Para 1.2.5.2.3 of Annex 1 allows the Licensing authority to use

certain qualified discretion for the required medical examination. But Rule 11 gives wide discretionary power to Chief Engineer as follows:

"Exemption: In relation to any applicant having been qualified as a flight crew member in any Air Force or having experience and technical knowledge, relating to government recognized flight, in civil aviation, the Chief Engineer, in case he deems necessary to exempt him all or any requirements relating to licence or rating in view of his experience, technical knowledge and skill, and in case the Chief Engineer has observed that he has completed satisfactorily any special examination or test desired by him all or any requirement of licence or rating in relation to such applicant may be exempted."⁶⁷

Competency of flight crew members is very much related to the safety of the aircraft operation. If a State issues a licence or certificate with requirements below the minimum standard set by Annex 1, then according to Article 33, other contracting States are not obliged to recognize such licences. Therefore, while exempting the requirements one must take extreme care that these are not below the minimum standard set by Annex 1. Nepal has not yet filed any differences with respect to Annex 1.

D) Airworthiness of Aircraft:

First of all, in the interest of safety, aircraft, as a mode of air transport, must be fit to fly.⁶⁸ Therefore, an aircraft must be provided with a "certificate of

Airworthiness" i.e. the certificate of fitness to fly. Article 31 of the Chicago Convention obliges each contracting State to ensure that every aircraft engaged in international navigation is provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered.⁶⁹ The certificate of airworthiness issued or rendered valid by other Contracting States shall be recognized as valid only if the requirement under which such licences were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to the Chicago Convention.⁷⁰ The ICAO Council, in 1956, recognized that each Contracting State should establish its own comprehensive and detailed code of airworthiness or select a comprehensive and detailed code established by another Contracting State.⁷¹ The intention of Annex 8, which was first adopted on 1 March 1949, is to set broad international minimum standards "for the recognition by States of certificates of airworthiness for the purpose of the flight of aircraft of other States into or over their territories, thereby achieving, among other purposes, protection of other aircraft, third persons and property."⁷² The provision for issuance or validation of the certificate of airworthiness is provided in Rule 12(1) of the Civil Aviation rules 2019(1962), as follows:

"In Case a certificate of Airworthiness has been issued to any aircraft by the authority of any member State of International Civil Aviation Organization and if the certificate is still valid, and if it is shown to the satisfaction of the Chief Engineer in the airworthiness of such aircraft, he may issue certificate by validating such certificate and if

there has been specified any limit or restriction while issuing such certificate, the certificate of Airworthiness shall be valid to such limit or restriction."⁷³

The reason for such validation is to "facilitate the import and export of aircraft, as well as exchange of aircraft for lease, charter or interchange, and to facilitate operation of aircraft in international air navigation."⁷⁴ Nepal recognized, at the time of promulgation of its rules, its lack of expertise for the development of a comprehensive and detailed code of airworthiness requirements. Hence, a provision was made in rule 12(2) to renew or extend the period of certificate of airworthiness issued by other State, having relation with His Majesty's Government(HMG), as follows:

"Until the Standard of airworthiness to be valid in the kingdom of Nepal is specifies by His Majesty's Government, if the certificate is renewed or extended by the same authority of the State has issued the certificate of airworthiness, for the period of such renewal or extended period or if the Certificate of Airworthiness is issued by the registered air works of any other State and if it is shown to the satisfaction of the Chief Engineer in relation to such airworthiness, he may, renew such certificate or extend its period."⁷⁵

This provision empowers the Chief Engineer to renew or extend period of certificate of airworthiness issued by States (not necessarily a contracting member of ICAO) having relations with HMG Nepal or the registered Air Works of any other

State (not necessary to have relation with HMG Nepal), subject to the satisfaction of the Chief Engineer in relation to such airworthiness. Article 33 of the Chicago Convention provides for recognition of certificates and licences of Contracting States only. There is no mention of certificates of non-contracting States. Rule 50 of the Aircraft Rules 1937 of India, also has a provision to renew or extend the validity of a certificate issued elsewhere.⁷⁶ But rule 24(1) of the Civil Aviation Rules 1978 of Pakistan allows to recognition of the certificate of airworthiness issued by the appropriate authority of another Contracting State only for the purpose of validation or renewal.⁷⁷ The Standard in para. 2.2 of Annex 6 gives the condition of recognition of such certificate as follows:

"A Contracting State shall not issue or render valid a certificate of airworthiness for which it intends to claim recognition pursuant to Article 33 of the Convention on International Civil Aviation, unless the aircraft complies with a comprehensive and detailed national airworthiness code established for that class of aircraft by the State of Registry or by any other Contracting State.....".⁷⁸

Therefore, it seems, the Convention and Annex 6 do not have any provision for the recognition of a certificate issued by a non-contracting State. The purpose of ICAO Standards of airworthiness is not to replace national regulation and national codes of airworthiness, but "to assist States in applying the Standards and in developing their own comprehensive national codes in a uniform manner."⁷⁹ Before the issuance of certificate of a airworthiness, the State must also ensure that the

design, construction and operating characteristics of the aircraft are in compliance with the appropriate airworthiness requirements of the State of Registry. This is evaluated during the type certification of the aircraft. There are separate provisions for the approval of the type certification in the Aircraft Rules 1937 of India⁸⁰ as well as in the Civil Aviation Rules 1978 of Pakistan.⁸¹ Nepal, at present, neither manufactures aircrafts nor its component parts. In the light of this fact, the absence of a provision on type certification in Nepalese law is quite understandable. In the interest of safety, the certificate may need to be revoked, suspended or cancelled, if the operator failed to maintain an aircraft in an airworthy condition as required by the appropriate airworthiness standards.⁸² For example, according to Rule 26 of the Civil Aviation Rule 1978 of Pakistan, the Director-General may suspend or cancel the certificate of airworthiness (with prior approval of the Federal Government), if he has reasonable grounds to believe that the safety of a registered aircraft is in doubt or is satisfied that it is not safe to fly a registered aircraft or is satisfied that a condition set out in or applicable with relation to the certificate of airworthiness has not been complied.⁸³ Rule 55 of the Aircraft Rules 1937 of India also has the same sort of provisions with minor variations.⁸⁴ But there is no such specific provisions in the Civil Aviation Rules 2019(1962) of Nepal. The only provision is the authority to detain the aircraft under the condition as provided in Section 6 and to penalise according to Section 9 of the Civil Aviation Act 2015(1959).⁸⁵ In Rule 12(3), "certificate of recognition" is been mentioned as follows:

"Certificate of recognition should be kept by attaching with the

certificate of airworthiness and such certificate shall be considered as a part of the certificate of airworthiness until the period is expired.⁸⁶

But nowhere has the term "certificate of recognition" has been defined or explained. The only inference that can be drawn from Rule 12, is there be validation of the certificate of airworthiness as mentioned in the rule. The owner or the operator of Nepalese aircraft must be capable of maintaining the aircraft properly according to the required standard. For this he must provide sufficient staff, office, materials and facilities as required for the maintenance of aircraft as approved by the Chief Engineer.⁸⁷ He must also keep a proper record, according to the directives of the Chief Engineer, of each aircraft, its engine, propeller, and machinery and materials relating to it. Only authorized persons, who have an Aircraft Maintenance Engineer's Licence recognized by the Rules or the certificate of qualification as provided under the rules are allowed to certify the airworthiness of the aircraft.⁸⁸ Until arrangement for the issuance of a Nepalese Aircraft Maintenance Engineer's Licence is made, licences issued by the authority of a member State of International Civil Aviation Organization, may be renewed or extended for the remaining period of such licence.⁸⁹ This is in line with Article 33 of the Chicago Convention. Nepal has not fully developed legal provisions for providing Aircraft Maintenance Engineer's Licences, but there are people who are capable of carrying out certain aspects of maintenance of aircraft and its relevant components. To authorize this sort of qualified person for the maintenance work of the aircraft, the Chief Engineer may

issue a "certificate of ability" to such person. The nature and extent of the work and duties authorized to be carried out by such certificate will be specified in the certificate itself.⁹⁰ The provision of this sort of qualified technician or mechanic is also provided in chapter 4 of Annex 1.⁹¹ Detailed technical requirements for the certificate of airworthiness are provided in Part III and Part IV of Annex 8.⁹² Guidance material on this subject is given in the "Airworthiness Technical Manual" published by ICAO.⁹³ Present provisions on airworthiness in the Rules do not cover various other important elements of airworthiness. Nepal has yet to develop a comprehensive and detailed national airworthiness code. The Department of Civil Aviation did prepare a manual called Nepal Civil Aviation Requirement (NCAR) but it has not been published under the Act as a rule. The legal validity of such a document may be questionable. It is being used as guidance for the supervision and inspection of airworthiness.

E) Operation of Aircraft:

The safe operation of an aircraft is the paramount concern of Civil Aviation. To this end, "International Standards and recommended practices for the operation of aircraft for international commercial air transport were first adopted by the ICAO Council on 10 Dec.1948, and designated as Annex 6: Operation of Aircraft."⁹⁴ By amendment 152, Annex 6 is being developed into three parts, Part I: International Commercial Air transport-Aeroplane; Part II: International General Aviation; Part III: International Commercial - Helicopters.⁹⁵ Since the majority of international

commercial air transport is being performed by aeroplane, the provisions for the operation of aircraft in Nepalese air law are analyzed in the light of Annex 6(I) only, though, by definition, the rule will be applicable to other types of aircraft as well. The main purpose of Annex 6(I) is to **"contribute to the safety of international air navigation by encouraging States to facilitate the passage over their territories of aeroplane in international commercial air transport belonging to other States that operate in conformity with such Standards"**⁹⁶ Therefore, the operation of an aircraft must be carried out in accordance with the laws, regulations and procedures of those States in which operations are conducted and the operator is obliged to ensure that.⁹⁷ Rules for the operation of aircraft in Nepal have been sub-divided into two parts- one for Nepalese aircraft and another for non-Nepalese aircraft. To operate Nepalese aircraft, wherever they may be, according to Rule 18(1), the following conditions must be fulfilled:

- a) It must be registered under the Civil Aviation Rules 2019(1962) and there must be Nationality and registration mark prominently displayed on it.
- b) The aircraft must be certified as airworthy and any conditions attached to this certificate or contained in aircraft manuals must be fulfilled.
- c) The aircraft must be well equipped with all necessary machinery and materials.
- d) There must be well qualified, appropriate licences and ratings, and adequate number of flight crew members.
- e) The pilot-in-command must be fully satisfied that the all-up-weight of the

aircraft is safe for the proposed flight, the load has been properly balanced for the safety of the flight and above all, the aircraft is safe for the flight in all respects.⁹⁸

For non-Nepalese aircraft to fly over the Kingdom of Nepal, in addition to fulfilling the requirements of Nationality and registration marks, certificate of airworthiness, properly licensed and adequate number of crew members and other documents for the flight, it also has to comply with any directives given by the Chief Engineer.⁹⁹ Those directives may be in line with Bilateral Air Transport Agreements (BATA's) between Nepal and the concerned State and requirements of compliance with the rules of the air and other technical requirements pertinent to the safety of the flight. These conditions are, in general, in line with Article 29 of the Chicago Convention¹⁰⁰, Documents to be carried in the aircraft and conditions laid down in chapter 3 of Annex 6(I). As the pilot-in-command has the last word with regard to the safety of his aircraft, he must be fully sure that the aircraft is safe and have all the necessary information required for the proposed operation. To fulfil this responsibility, the operator has an obligation to ensure that "all pilots are familiar with laws, regulations and procedures, pertinent to the performance of their duties, prescribed for the areas to be traversed. the aerodromes to be used and the air navigation facilities relating thereto."¹⁰¹ And the aeroplane must be operated with a comprehensive and detailed code of performance established by the State of Registry in compliance with the applicable Standards."¹⁰² The conditions laid down for the operation of aircraft in the Aircraft rules 1937 of India¹⁰³ and the

Civil Aviation Rules 1978 of Pakistan¹⁰⁴ are more explicit and exhaustive. The operators, authorized by the States to conduct international commercial air transport, which includes scheduled international air services as well as non-scheduled international air transport operations for remuneration or hire, must be competent enough to comply with the minimum Standards applicable to the operation of aeroplane.¹⁰⁵ The Air operator certificate signifies the competency of the operator and without this, the operator can not engage in commercial air transport operations.¹⁰⁶ The State of the operator, in general, evaluates the operator in terms of adequacy of organization, method of control and supervision of flight operation, training programme and maintenance arrangements consistent with the nature and extent of the operations specified.¹⁰⁷ It is the responsibility of the operator to develop and operate accordingly, the operation manual¹⁰⁸, maintenance manual¹⁰⁹, training programmes¹¹⁰, flight manuals and other requirements such as inflight procedures¹¹¹, flight recorders¹¹², composition of flight crew and their training¹¹³. The State the operator has an obligation to supervise the compliance with those requirements by the operator authorized by that State. In this regard, Rule 18 of the Civil Aviation Rules 2019(1962) is not explicit enough to encompass those requirements for the operation of an aircraft. Though Section 3 of the Civil Aviation Act 2015(1959) gives authority to HMG Nepal to make rules as required to cover all those areas mentioned above, so far such rules have not been made.¹¹⁴

F) Rules of the Air(RAC) and Air Traffic Services(ATS):

The first aerial regulation was issued by the Paris police on 23 April 1784, by prohibiting balloons to fly without prior special licence.¹¹⁵ The Paris Convention on aerial navigation, in 1919, entrusted the International Commission for Air Navigation (ICAN) to lay down "general rules for air traffic" and compliance with these rules was made mandatory by the States parties to this Convention.¹¹⁶ The Chicago Convention imposes upon each Contracting State two obligations with respect to rules of the air and air traffic services. The first, according to Article 12 of the Chicago Convention, requires the Contracting States to have their national rules and regulations conform to the greatest extent possible, with those established from time to time by the ICAO Council. Article 12 states the following:

"Rules of the Air: Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable."¹¹⁷

It is note worthy to mention here that over the high seas, the rules and regulation applicable are those established by the ICAO Council from time to time. The second obligation is for the provision of air traffic services and air navigation facilities. By incorporating the following provision in Article 28, the Chicago Convention obliges the Contracting States, as far as practicable, to establish and provide necessary facilities for international air navigation:

"Each contracting State undertakes, so far as it may find practicable, to (a) provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;"¹¹⁸

Annex 2:Rules of the Air, which was first adopted on 15 April 1948 by the ICAO Council¹¹⁹, contains a set of internationally agreed rules of the air encompassing General Rules, Visual Flight Rules and Instrument Flight Rules.¹²⁰

"Annex 2-applies without exception over the high seas, and over national territories to the extent that they do not conflict with the rules of the State being overflown".¹²¹ Any aircraft which is in flight or on the movement area of an aerodrome has to comply, in addition to general rules, either with the visual flight rules (VFR) or with the instrument flight rules(IFR).¹²² It is the responsibility of the pilot-in-command of an aircraft to comply with the rules of the air as applicable.

While flying under VFR, the aircraft must able to remain clear of clouds by a

distance of at least 1500 m horizontally and at least 300 m(100 ft) vertically and to maintain a forward visibility of at least 8 Km. VFR flight is not permitted at night or above 6100 m (20,000 ft).¹²³ Aircraft, equipped with suitable instrument and appropriate navigation equipment for the route to be overflown, will be allowed to fly under IFR. Also, when weather condition deteriorate below the weather set for VFR, aircraft must fly under IFR.¹²⁴

During the early days, air traffic control was essentially based on the principle of "see and be seen" or "seen and avoid".¹²⁵ With the advent of jet aircraft and the enormous increase in air traffic, air traffic control services became more complex and very important. Standards and recommended practices applicable for the air traffic services have been laid down in Annex 11 (Air Traffic Services) to the Chicago Convention, which was first adopted on 18 May 1950.¹²⁶ The prime objectives of air traffic services, as defined in Annex 11, are as follows:to

- "a) prevent collisions between aircraft;**
- b) prevent collisions between aircraft on the manoeuvring area and obstructions on that area;**
- c) expedite and maintain an orderly flow of air traffic;**
- d) provide advice and information useful for the safe and efficient conduct of flights;**
- e) notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required."**¹²⁷

Depending upon the specific objectives to be achieved, air traffic services have been divided into three categories namely -air traffic control services (to accomplish objectives a, b, and c above); flight information services (to accomplish objective d) and alerting service (to accomplish objective e). The air traffic control services are further sub-divided into three parts, namely -aerodrome control service, approach control service, and area control service.¹²⁸ Annex 2 and Annex 11 constitute the basic documents of Standards and recommended practices in this field. However, ICAO Doc.4444-Procedures for air navigation services, rules of the air and air traffic services (PANS-RAC), is the most comprehensive document dealing with the technical aspects of air traffic services and is intended for world-wide application.¹²⁹ Regional Supplementary Procedures (SUPPS), developed through the Air Navigation Commission of ICAO, are meant for regional application. Individual countries, based on these annexes and documents and respective national air law, prepare their own manuals on air traffic control (ATCM) for local use. The obligation on the part of each Contracting State to promulgate, to the greatest possible extent, its national rules of the air in harmony with Annex 2, stems from Article 12 of the Chicago Convention.¹³⁰ Article 12 further obliges the Contracting States to insure the prosecution of all persons violating the regulations applicable.¹³¹ As mentioned earlier, Article 28 of the Chicago Convention obliges the Contracting States to provide, as far as it may find practicable, necessary services and facilities to facilitate international air navigation.¹³² Section 3 of the Civil Aviation Act 2015(1959) of Nepal has provisions to make rules for rules of the air

and air traffic services.¹³³ According to Section 9 of the Act, violators of the rules made under the Act will be penalised as follows:

"Any person who contravenes any provision of any rule made under Section 3, Section 6, Section 7 and Section 8 shall be punishable with imprisonment for a period which may extend to three months or with a fine which may extend to one thousand rupees or with both."¹³⁴

So far, Nepal has not yet promulgated the rules specifically dealing with the Rules of the air as mentioned in Annex 2 and also, no specific rule has been made for the provision of air traffic services. However, the Department of Civil Aviation, through its various airports does provide an air traffic control service, a flight information service and an alerting service within the Kingdom of Nepal and also coordinates adjoining air traffic services units for the safe, expeditious flow of air traffic. It has also prepared an air traffic control manual (ATCM) for use within Nepal. In general Nepal does follow standards and recommended practices according to Annex 2 and Annex 11. Nevertheless, clear cut legal provisions to govern those rules are very essential to avoid any controversy in terms of the legal status of rules applicable in Nepal. This can be done by inserting a simple clause for the rules of the air as applicable and detail procedures to be set in the schedules, as in the case of the Aircraft Rules 1937 of India¹³⁵ or by promulgating the detail rules and the procedures as in the case of Civil Aviation Rules 1978 of Pakistan.¹³⁶ No nation can ignore the implications and consequences, especially with regard to flight safety and the legal liability of the air traffic control agencies, that may arise in absence of

specific rules and regulations concerning rules of the air and air traffic services.

G) Search and Rescue(SAR):

Each contracting State has an obligation to provide assistance to aircraft in distress in its territory.¹³⁷ While undertaking a search for missing aircraft, the Contracting States are expected to collaborate in coordinated measures which may be recommended from time to time pursuant to the Convention.¹³⁸ The essence of search and rescue operations is to find survivors of aircraft accidents as rapidly as possible. Success of such SAR operations depends upon well coordinated efforts and cooperation from all concerned. For this purpose the ICAO Council has adopted international standards and recommended practices for search and rescue and designated them as Annex 12 on 25 May 1950.¹³⁹ The first requirement on the part of the Contracting States is to establish an organization responsible for SAR services within their territories and over those portions of high seas or other areas as determined by regional air navigation agreements and approved by the Council of ICAO.¹⁴⁰ Such SAR services should be provided on a 24 hours basis. To provide SAR services effectively, Contracting States need to establish a Rescue Coordination Centre (RCC) in each search and rescue region¹⁴¹, and equip them with suitable means of communication. The States should also designate various public and private services suitably equipped as rescue units for SAR operations and define the relative function of these elements.¹⁴² For efficient conduct of SAR operations, cooperation and coordination between SAR services of neighbouring States is very

essential. Not only are Contracting States required to coordinate their SAR organizations with those of neighbouring countries¹⁴³, but they must also permit the rescue units of other States, subject to such conditions as may be prescribed, immediate entry into their territory for SAR operations.¹⁴⁴ Those requirements should be published and information disseminated.¹⁴⁵ The RCC must have up to date information ¹⁴⁶, and a plan for the conduct of SAR operations within its search and rescue region.¹⁴⁷ "SAR operation is dynamic activity requiring a uniform set of operating procedures."¹⁴⁸ Chapter 5 of Annex 12 deals with the standard operating procedures for such emergencies. Depending upon the seriousness of the emergency situation, three distinct phases are recognized, namely, the uncertainty phase, the alert phase and the distress phase and SAR operation varies accordingly.¹⁴⁹ According to Sub-Section 2(w) of Section 3 of the Civil Aviation Act 2015(1959), His Majesty's Government can make rules for "search and rescue operations".¹⁵⁰ So far, such rules have not been made. On the practical side, the Department has prepared a working manual to deal with SAR operations, and units responsible for air traffic control services also coordinate SAR activities. A legal provision is highly recommended, so that those elements of public or private services suitably equipped for search and rescue, can be effectively and legally mobilized when the need arises.

H) Aircraft Accident Investigation:

"All causes which lead to aircraft accidents must be rapidly identified to

prevent other such accidents."¹⁵¹ The obligation on Contracting States to institute an inquiry into the circumstances of an aircraft accident flows from Article 26 of the Chicago Convention.¹⁵² This mandatory requirement applies only if the accident of an aircraft of a Contracting State occurs in the territory of another Contracting State and it involves death or serious injury or there is indication of serious technical defects in the aircraft or in the air navigation facilities.¹⁵³ So far as national law permits, the investigation of accidents is to be carried out in accordance with the procedures recommended by ICAO.¹⁵⁴ The State of registry of the aircraft will be given an opportunity to send its observers.¹⁵⁵ Annex 13(Aircraft Accident Investigation), which was first adopted on 11 April 1951¹⁵⁶, is applicable only to the investigation of accidents and incidents occurring in the territory of a Contracting State and involving aircraft registered in another Contracting State.¹⁵⁷ To fulfil the obligation imposed by Article 26 of the Chicago Convention, Civil Aviation (Investigation of Accident) Rules 2024(1967) were promulgated on 2024/5/5 (Aug.21, 1967) by HMG Nepal under the power conferred by Section 5 of the Civil Aviation Act 2015(1959).¹⁵⁸ There may be an incident or accident which may not be serious enough to warrant investigation under these investigation rules. Therefore the definition of "accident" is very important for the applicability of the rules. According to Rule 2(b) of the investigation rules 2024, "accident" is defined as follows"

"Accident means the occurrence of any of the following incidents due to any kind of disorder in the aircraft between the time any person boards the aircraft with the intention of flight until such time as all

such persons have disembarked:-

- (1) Incidents causing substantial damage to the aircraft.**
- (2) Incidents relating to the fall or burning of an aircraft or destruction of aircraft by any means.**
- (3) Incidents, in which any person suffers death or serious injury incapacitating while descending or walking from the aircraft or the place of an aircraft accident as a result of being in or upon the aircraft or by direct contact with aircraft or anything attached thereto or due to the situation under the Clause (1) and (2).¹⁵⁹**

Except for some minor variations in the phrasing of words, this definition is quite similar to the one found in Chapter 1 of Annex 13.¹⁶⁰ The essential condition is that the accident has to occur between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked. The definition does not clarify situations where death occurs from natural causes or where fatal or serious injuries are self inflicted or inflicted by another person. Substantial damage to the aircraft is defined, in Rule 2(a) of the investigation rules 2024 as a "damage which necessitates extensive repair or a replacement of the part or machinery of an aircraft." But whether some damages which are localised, for example engine failure, damage limited to engine or to propellers or other areas which do not affect the well being of the persons on board, comes under this definition is not clear. It is noteworthy to mention here that "accident" as defined in Rule 321 of the Civil Aviation Rules 1978 of Pakistan specifically excludes such

situations.¹⁶¹ Investigation rules 2024 do not define the term "incident" which is frequently associated with accident. There need to be clear cut demarcation between accident and incident. Incident is defined as "an occurrence , other than an accident, associated with the operation of an aircraft which affects or could affect the safety of operation."¹⁶² Immediate notification of the accident to the proper authority is very crucial for a timely response to aid the survivors, in any, and for the preservation of evidence for the investigation of such accident. Rule 3 of the investigation rules 2024 obliges every person, who witness an aircraft accident, to inform to the concerned authority as soon as possible and by the quickest means available.¹⁶³ If the accident occurs within the Kingdom of Nepal, the operator or aircraft owner has an obligation to notify the director of such accident by the quickest means.¹⁶⁴ In case the accident occurs anywhere outside the kingdom of Nepal, in addition to the Director, he has to notify the residential diplomatic official in the State concerned, if any.¹⁶⁵ Standard 4.1 of Annex 13 requires the State of occurrence to forward notice with a minimum of delay and by the most suitable and quickest means available to the State of registry, the State of the operator and the State of the manufacturer.¹⁶⁶ But Rule 5 of the investigation rules 2024 requires the Director to give notice only to the State of registry and the residential diplomatic official of such office.¹⁶⁷ The format and the content of notification will be as prescribed by the investigation rule and will be up dated from time to time.¹⁶⁸ Whether the State of the operator and the State of the manufacturer have the legal right to obtain notification according to para 4.1 of Annex 13 depends upon the domestic law of the

country concerned. In Nepalese law, it is not specifically mentioned, The only lee way available is under Rule 6(2) of the investigation rules 2024, which states as follows:

"In case the notice is required to be given to the other foreign State pursuant to Rule 5, the decision taken by His Majesty's Government for the type of investigation of the accident to be carried out shall also be mentioned briefly in the notice and sent it immediately."¹⁶⁹

Responsibility of the State of occurrence for the protection, custody and removal of evidence has been stated in the para 3.2, 3.3, 3.5.¹⁷⁰ The same has been incorporated, with minor variations, without substantially changing the context, in Rule 8, Rule 11, and Rule 12 of the investigation rules 2024.¹⁷¹ Responsibility to investigate into the circumstance of the accident lies with the State of occurrence and which may delegate the whole or any part of such investigation to the State of registry or the State of the operator.¹⁷² Rule 9 of the investigation rule 2024 empowers the Director to conduct investigation himself or appoint an investigator.¹⁷³ Such investigating officer has been given wide ranging authority necessary for the conduct of the investigation, including some quasi-judicial authority like summoning a person for inquiry and entering into any place if necessary. If it is a private house written notice is necessary before entry.¹⁷⁴ These provisions are more or less similar to what has been stated in Chapter 5 of the Annex with regard to responsibility of the State conducting the investigation.¹⁷⁵ His Majesty's Government can constitute an "Accident Investigation Commission" before or after the investigation of the accident pursuant to Rule 9 of the investigation rules 2024.¹⁷⁶ When such commission is

instituted, there will be at least three members and one will be nominated as chairman.¹⁷⁷ The responsibility of the Commission is not only to find out the cause of the accident and other details, but also to recommend "the appropriate steps to be taken by the administrative authority of the civil aviation for the security of the public and the persons working in civil aviation and to make a provision to prevent such accident in the future."¹⁷⁸ The provision for recommendation is very important. Because, more often than not, accident investigation reports becomes very sensitive and hot issues. Lawyers and other concerned parties are always tempted to use then for the apportionment of blame or liability. Therefore, to prevent such controversy, the main purpose of the investigation is clearly stated at the very outset in para 3.1 of Annex 13 as follows:

"The fundamental objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability."¹⁷⁹

Hence, according to Rule 10 and Rule 16 of the investigation rules, the accident investigation report will be only administrative and technical in nature and shall not be produced or submitted as evidence in any civil or criminal case in any court proceeding.¹⁸⁰ In case of an accident of the aircraft registered in another State, "His Majesty's Government may permit the accredited representative and advisors of the registering State to be present in the investigation".¹⁸¹ In what capacity the accredited representative will be permitted to participate is not very clear in the investigation rules. According to Article 26 of the Chicago Convention,

opportunity will be given to the State of registry to appoint observers to be present at the inquiry.¹⁸² Obviously the right is limited to be observers only. But para 4.19 of Annex 13, gives the State of registry and the State of the operator entitlement to appoint an accredited representative to participate in the investigation.¹⁸³ The relationship between Annex 13 and Article 26 of the convention has been clarified by the ICAO Council at its twelfth session on 13 April 1951. According to which **"The accredited representative and the advisers referred to in the Annex together comprise the observers that are given the right to be present at an inquiry under Article 26."**¹⁸⁴ Impartiality of the Commission is very crucial and any conflict of interest should be avoided at all cost. There is also a provision for remuneration to be given to the investigating person if he is not an employee of HMG Nepal.¹⁸⁵ Though in general, the investigation rules incorporate most of the provisions of Annex 13, there is room for improvement by making them more specific and incorporating detailed provisions. Detailed technical guidance and procedures for the investigation of the accidents are given in the ICAO manual of aircraft accident investigation.¹⁸⁶

Section II: Nepal's obligation under the Aviation Security Conventions:

Introduction:

"There is no more pressing problem facing the world aviation community than the problem of aircraft hijacking."¹⁸⁷ States have high obligations, both legally and morally under international humanitarian law, to protection of international civil aviation.¹⁸⁸ ICAO Assembly resolution A29-5 urges the States to become parties to the Aviation Security Conventions and to include relevant provisions in their national legislation.¹⁸⁹ In UN resolution 46/51, the General Assembly urges States "to take all steps necessary to implement the existing international conventions on this subject (aviation security) to which they are parties including the harmonization of their domestic legislation with those conventions."¹⁹⁰ As a member of the international Community and in line with UN and ICAO resolutions, Nepal had already ratified the Tokyo Convention of 1963, the Hague Convention of 1970 and the Montreal Convention of 1971 on Aviation Security in 1979.¹⁹¹ Major provisions of these aviation security conventions were enacted in its domestic legislation in 1973 and came into force on April 28, 1987.¹⁹² In the following sub-sections, provisions related to the scope and definition, jurisdiction, prosecution and extradition, penalties and others will be discussed in the light of international conventions and domestic legislation.

A) Definition of Offenses, aircraft in flight or in service:

The Tokyo Convention of 1963 does not define the offenses of hijacking. This

convention was never conceived as an "aviation security" convention. Its main objective was to establish criminal jurisdiction and to identify the duties and immunities of the aircraft commander.¹⁹³ The Hague Convention of 1970 defines the offence of unlawful seizure of aircraft in Article 1¹⁹⁴ and The Montreal Convention of 1971 included in its definition the acts of sabotage and violence against the safety of civil aviation in Article 1.¹⁹⁵ Sub-section 1 of Section 9A of the Civil Aviation Act 2015(1959) (hereafter referred to as the Act) incorporates both these articles with minor variations as follows:

(1). Any following act shall be the following offence:-

- (a). In case any person who on board an aircraft in flight unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft, commits and offence of unlawful seizure of aircraft and hijacking;**
- (b). In case any act of bloodshed is carried out against any person board an aircraft in flight, and such act is likely to endanger the safety of that aircraft, offence against the safety of air navigation;**
- (c). In case an aircraft in service is destroyed or caused damage to such and aircraft which renders it incapable of flight or which is likely to endanger its safety in flight, offence against the safety of air navigation;**

- (d). **In case any person places or causes to be placed on aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight, commits an offence against the safety of aircraft;**
- (e). **In case any person destroys or damages grounded aircraft or air navigation facilities or interferences with their operation, commits an offence against the safety of air navigation;**
- (f). **In case any person communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight, commits an offence against air navigation.**¹⁹⁶

Above 1(a) Sub-section is identical in content to Article 1(a) of the Hague Convention of 1970. And sub-sections 1(b) to 1(f) above correspond to Article 1 para 1(a) to 1(e) of The Montreal Convention of 1971. By using the words "commits an offence of unlawful seizure of aircraft and hi-jacking"¹⁹⁷ in the Act, it went further than the Hague Convention, by categorically naming the offenses as unlawful seizure of aircraft and hijacking. The Hague Convention did not use the word hijacking at all. Article 1 of the Hague Convention simply says that "a person commits an offence"¹⁹⁸ if he performs certain acts as specified in the article. Similarly Art.1 of the Montreal Convention simply states that "any person commits an offence if he unlawfully and intentionally carries out act or acts" as specified in the article¹⁹⁹

whereas Subsections 1(b),1(c),1(e), and 1(f) of section 9A of the Act define the offence against the safety of air navigation and Subsection 1(d) of the same Section defines the offence against the safety of aircraft. One important factor missing in these definitions (except 1(a) of Section 9A) is the key phrase "**unlawfully and intentionally**" which is found in the Hague Convention and the Montreal Convention. These words are very important and have far reaching implications. It is not hard to imagine a situation where a person might need to commit an act specified in Article 1 of the Montreal Convention "lawfully and/ or unintentionally". In such a case according to the Hague Convention and the Montreal Convention, he does not commit an offence punishable under the said conventions. But in the case of the Nepalese Act, by omitting those key words, it has encompassed all those acts as offences whether done lawfully and or unintentionally or unlawfully and intentionally. This was not the intent of the conventions. This, in the author's opinion, is a serious flaw in the definition incorporated in the Act. This has left hardly any flexibility to the State in dealing with genuinely innocent cases. Another important factor is the division of the offences into certain categories (eg. offences against the safety of air navigation, offences against the safety of aircraft, offences of unlawful seizure of aircraft and hijacking). Offences were not categorized like that in the Conventions. The author fails to see any real advantage in this categorization, but rather fears the complications which might arise from these definitions. An attempt to commit any of the offences mentioned earlier or acting as an accomplice to a person who commits or attempts to commit any such offence, "shall also be considered an offence under

this Section"²⁰⁰. This is line with the provisions of para 2 of Article 1 of the Montreal Convention and Article 2 of the Hague Convention. In above sub-sections 1(b) and 1(c) of Section 9A, the word "commits" is missing before the word "offence". The author takes it as an error in translation; to think it otherwise would require further search for the motive and consequences.

Definition of Aircraft in flight or in service:

The definition of aircraft in flight as stated in Article 3 of the Hague Convention and Article 2(a) of the Montreal Convention is incorporated in Section 9B (a) of the Act in an identical way, which states **"an aircraft is considered to be in flight from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, provided that, in the case of a forced landing, the aircraft shall be deemed to be in flight until the competent authorities take over the responsibility for the aircraft and persons and property on board."**²⁰¹ The rationale behind this definition is that once the aircraft door is closed it is considered a world in itself and there can be little influence from the outside environment. For aircraft in service, the Act states: **"An aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty four hours after landing. The period of service shall, in any event, extend for the entire period during which the aircraft is in flight pursuant to clause (a)."**²⁰² In cases of sabotage of an aircraft, this can be done without the actual presence of the offender and with delayed action by using, for example, timed-devices or radio-controlled

detonation. Therefore, the aircraft is considered to be in service even up to twenty four hours after landing. This definition matches the corresponding definition in the conventions.²⁰³

B) Penalty for the offences:

Article 3 of the Montreal Convention and Article 2 of the Hague Convention, require the States to undertake to make such offences punishable by severe penalties.²⁰⁴ Subsection 3 of Section 9A of the Act provides the very severe penalty for such offences.²⁰⁵ Unlawful seizure and hijacking "**shall be punishable with imprisonment for life**". This is the maximum penalty one can get under the criminal code of Nepal. For the attempt to commit an offence or being an accomplice, one may get life imprisonment or fifteen to twenty years of imprisonment. Regarding offences against the safety of air navigation, the offender shall be punished with imprisonment for life or fifteen to twenty years imprisonment. For the attempt to commit an offence or for being an accomplice, one shall get imprisonment for life or ten to fifteen years imprisonment. But, if there occurs the death of any other person on board the aircraft or the aircraft is destroyed, the offender shall get the life imprisonment, whereas the accomplice may get life imprisonment or fifteen to twenty years imprisonment. The properties of the both, the offender and the accomplice shall be confiscated. In Nepalese criminal code, life imprisonment or twenty years imprisonment is awarded for very serious crimes especially for murder. By making such provision for severe penalty under the Act, Nepal has fulfilled the obligations

under Article 3 of the Montreal Convention and Article 2 of the Hague Convention.

C) Conditions for the application:

The main condition for the application of the Conventions is the presence of a foreign element as stipulated in Article 4 of the Montreal Convention and Article 3 of The Hague Convention, regardless of whether the flight is international or domestic.²⁰⁶ However these Conventions shall not apply to aircraft used in military, customs or police services.²⁰⁷ Section 9A (dealing with offenses) will be applicable to aircraft registered in Nepal regardless of whether it engaged in an international or domestic flight and the offences against air navigation facilities situated in Nepal. In case of aircraft registered in another State, the required condition is: (a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft; or (b) the offence is committed in the territory of a State other than the State of registration of the aircraft. If the said navigation facilities are in foreign countries, such facilities must have been used in international air navigation.²⁰⁸ Article 4 para. 3 of the Montreal Convention states that, with regard to offences mentioned in sub paragraphs (a),(b),(c), and (e) of paragraph 1 of Article 1, the Convention "shall also apply if the offender or the alleged offender is found in the territory of a State other than the State of registration of the aircraft." Section 9B of the Act is silent on this as is the provision of para 4 of Article 4 of the Montreal Convention.²⁰⁹

D) Jurisdiction:

Article 5 of the Montreal Convention, Article 4 of the Hague Convention and Article 3 of the Tokyo Convention obliges the Contracting State to "take such measures as may be necessary to establish its jurisdiction over the offenses." Section 9D of the Act empowers the court of the Kingdom of Nepal to establish jurisdictions in any of the following cases:

- (a) When the offence subject to this Act is committed within the territory of the kingdom of Nepal;**
- (b) When the offence is committed against or on board aircraft registered in the kingdom of Nepal;**
- (c) When the aircraft on board which the offence is committed lands in the territory of the Kingdom of Nepal with the alleged offender still on board;**
- (d) When the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business in Nepal or, if the lessee has no such place of business but has his permanent residence within the kingdom of Nepal.²¹⁰**

This is identical to paragraph 1 of Article 5 of the Montreal Convention. This encompasses all the offenses mentioned in subsection 9A of the Act. For the offences under Section 9A committed anywhere except under the conditions mentioned above (subsection 1 of Section 9D), the court of the kingdom of Nepal shall have

jurisdiction if such alleged offender is present within the kingdom of Nepal and is not extradited to any State pursuant to this Act or any extradition treaty to which Nepal is a party.²¹¹

Section 9D of the Act ensures that once the offence is committed or has been attempted, the offender will not go unpunished for want of jurisdiction, which is also one of the main objectives of the Aviation Security Conventions. The punishment and proceedings with regard to the offences under Section 9A of the Act shall not be considered to exclude or limit the use of criminal jurisdiction under prevailing law.²¹² This is in line with Article 5 para 3 of the Montreal Convention and Article 4 para 3 of the Hague Convention.

E) Extradition or Prosecution:

One of the fundamental issues of the Montreal Convention and the Hague Convention is that the offender should not go unpunished no matter where he is or where he has committed the offence. Therefore State parties to the Conventions are obliged to accept the principle of "**Aut Dedere Aut Judicare.**" This is stipulated in the Article 7 of the Montreal Convention and Article 7 of the Hague Convention.²¹³ Section 9F of the Act incorporates the same principle in milder tone by using the word "may" instead of "shall" as follows:

"9F. The offender or accused may be extradited:(1) Notwithstanding anything contained in the Extradition Act, 2020(1963), His Majesty's Government may extradite the alleged offender committing an offence

pursuant to Section 9A, if he is a non-Nepalese national and if the State in the territory of which the offence is committed or on aircraft registered therein, has demanded the extradition of the offender. In case, the extradition is not carried out in such way, the case shall proceeded in the court of Nepal for the purpose of prosecuting the offender."²¹⁴

The Act does not allow the offence (under Section 9A) to be considered a political offence, no matter what the status of the offender or the purpose.²¹⁵ But this principle "to submit for prosecution or extradition" is not without its loopholes. States are obliged only to submit the case for prosecution if the offender is not extradited. "Actual disposition of the case may be affected by a variety of considerations, including the factor of discretionary-prosecution, defence, and judicial inadequacy of witnesses or essential evidence, defence of temporary insanity, plea bargaining etc."²¹⁶ In some cases not only extradition is refused but the authorities fail to submit the case for prosecution. The tragedy of PanAm 103, which killed 269 people over Lockerbie, Scotland after an explosion on board on 21 December, 1988 "seemed to give impetus to national governments to put real teeth into international provisions for aviation security."²¹⁷

F) Power to Arrest:

Article 8 of the Tokyo Convention empowers the aircraft commander to "disembark in the territory of any State (contracting or non-contracting) in the

territory of which the aircrafts lands, any person who he has reasonable grounds to believe has committed or is about to commit on board the aircraft an act in Article 1, para 1b.²¹⁸ He "may deliver to the competent authorities of any contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft."²¹⁹ In those cases, States are obliged to take into custody the alleged offender for further proceedings. Article 6 of the Hague Convention and Article 6 of the Montreal Convention, which are identical to each other, require the Contracting States to take into custody the offender or the alleged offender, if he or she is present in the territory.²²⁰ The custody should be limited to enable any criminal or extradition proceedings to be instituted. States are to make a preliminary enquiry into the facts immediately and notify immediately the State of registration of the aircraft and indicate whether it intends to exercise jurisdiction.²²¹ The State shall also assist the person in custody to communicate immediately with the nearest appropriate representative of the State of which he is a national.²²² The provisions of these articles are incorporated in Section 9E of the Act. According to this, the aerodrome officials (ie civil servants), crew members, officials of police or Royal Nepalese Armed Forces or any other person may arrest the offender or the accused. The only condition is that he or she should have reason to believe to that an offence under Section 9A has been committed or is likely to be committed by the accused. Immediately after the arrest they must deliver him to the police.²²³ The implication

of the word "any person" is that any Nepali citizen or any foreigner can arrest the offender or the accused. Article 6 para 2 of the Tokyo Convention gives authority to any crew member or passenger to "take reasonable preventive measures, if such action is immediately necessary to protect the safety of the aircraft or of persons or property therein."²²⁴ This is of course limited to acts committed on board aircraft. Whether the term "reasonable preventive measures" can be equated to the "arrest" is a topic of debate. Even if it can be equated, the provision is limited to acts committed on board the aircraft. Whereas the provisions in Section 9E of the Act encompass all the offences mentioned in Section 9A. The other condition is that if the arrestor is some one other than the police or a security official, one has to get permission from the police or security officials if there is a danger to the life of any person or if it is likely to cause great damage to the aircraft or to air navigation. Subsection 3 of Section 9E of the Act corresponds, with minor variations, with the Article 6 para 3 and para 4 of the Hague Convention.²²⁵

G) Return of the seized aircraft and permission for continuation of the flight:

According to Section 9G of the Act, if unlawfully seized or hijacked aircraft land within the Kingdom of Nepal, then the control of such aircraft shall be restored to the commander or the official or the air transport service lawfully entitled to possession. The continuation of the journey of the passengers and crew to the place of embarkation or disembarkation shall be facilitated as soon as practicable.²²⁶

This is, with some minor variation, identical to Article 11 of the Tokyo Convention and Article 9 of the Hague Convention. In some earlier cases of hijacking, passengers and aircraft were unnecessarily held up even after the hijacker had been taken into custody. This provision will facilitate legally the restoration of control of the aircraft to the commander and will enable passengers and crew to continue their journey without any obstacle.

H) Preventive Measures and Other Provisions:

According to para 1 of Article 10 of the Montreal Convention, Contracting States are required **"to take all practicable measures, in accordance with international and national law, for the purpose of preventing the offenses mentioned in Article 1."**²²⁷ Certain preventive measures such as the **"search of body and goods of passengers or any other person"** have been incorporated in Section 10B of the Act. The body and goods of passengers may be searched by authorised persons before or after boarding the aircraft ready for the flight.²²⁸ Aircraft crew and other staff and workers related with the flight may also be searched.²²⁹ Those who refuse to be searched may be prevented from boarding the aircraft or going near to it.²³⁰ If illegal weapons (including sword, khukuri, dagger etc) or explosives (including bomb, grenade, shots, gunpowder) are discovered with a person, then he or she will be delivered to the police for the legal proceedings.²³¹ If the weapons or explosives or fake guns are not illegal but an attempt is made to hide them without giving information upon inquiry about it, the concerned authority may allow carriage of such

weapons or explosives by flight crew or other passenger, if "the offensive intention is not found upon the inquiry made by stopping the passenger or crew."²³² The concerned official may search, without warrant, anybody and his accompanied goods, if an information is received or there is reason to believe that such person has entered or is about to enter into the aerodrome or any restricted area of it with an intention to commit a criminal offense under Section 9A or under other prevailing Nepalese law. If weapons or explosives are found, the person shall be delivered to the police for the proceedings upon necessary inquiry.²³³ The official performing such duties cannot be held legally liable towards anybody for the delay of the flight or any loss suffered due to the consequences of carrying out his duty in good faith.²³⁴ From the foregoing clauses, it is evident that sufficient legal authority has been provided for the officials concerned for preventing unlawful seizure of the aircraft or suppression of unlawful acts against the safety of civil aviation. It is noteworthy that the searching of the body or goods of a passenger or any other person under Section 10B of the Act is not mandatory. The verb used in the above clauses is "may", not the mandatory "shall", whereas in Article 10 of the Montreal Convention, the word "shall" is used in connection with "endeavour to take all practicable measures".²³⁵ Of course, at one extreme, one may argue that there is no practicable measures at all, which in itself will sound absurd. Another point is that there might be confusion regarding authority or overlapping responsibility because there is no single authority responsible for searching: the provision in the Section mentions "chief official of any aerodrome or the employee authorised for such work

or police or security."²³⁶

Other Provisions:

In general, the district court shall have the power to hear and decide the cases under this Act. While doing so, for the offenses contemplated in Section 9A, the district court has to adopt procedures laid down in the Special Court Act 2031(1974).²³⁷ According to Section 12A of the Act, Special Court may be constituted by His Majesty's Government under the Special Court Act 2031(1974) for hearing and deciding the cases relating to offenses committed under Section 9A. His Majesty's Government shall be complainant in the cases under Section 9A. This is understandable, because the offences are criminal offences and in such cases, the State is the complainant.²³⁸

Section 9I stipulates that, if His Majesty's Government becomes party to the Tokyo Convention of 1963, the Hague Convention of 1970 and the Montreal Convention of 1971, then "it may issue an order mentioning the date of commencement of such convention and other matters that may be necessary for implementing such convention in the Kingdom of Nepal and such order shall be published in the Nepal Gazette." The order issued pursuant to subsection (1) shall be considered as a part of this Act²³⁹ This provision was inserted by the Second Amendment of Civil Aviation Act in 2030(1973). Those three conventions became effective for Nepal from 1979.²⁴⁰ Section 9I came into force on 2043/1/15 (April 28,1987). Those three aviation security conventions have become a part of the Civil Aviation Act 2015(1959) since that date.

I) Montreal Protocol of 1988:

The Hague and Montreal Conventions provide legal measures to protect passengers on board aircraft. "Other passengers who were in the process of boarding or disembarking found themselves internationally unprotected by law."²⁴¹ This problem became more serious after the terrorist attack at the Rome and Vienna Airports in December 1985, which left 19 people dead and 112 injured and the bomb explosions at the Frankfurt and Tokyo International Airports in June 1985. This prompted ICAO to adopt resolution A26-4 at its 26th Session of the ICAO Assembly in October 1986, which called upon the Council "to take necessary measures for the preparation of a draft instrument for the suppression of unlawful acts of violence at airports serving international civil aviation for the consideration of the Legal Committee." The result was the Protocol, supplementary to the Montreal Convention of 1971²⁴² which was "adopted on 24 February 1988 by consensus and without a vote, certainly a rare example of the unity of the political will of States in the development and unification of international law in this important field."²⁴³ Article II of this Protocol adds the following to the list of offences in Article 1 of the Montreal Convention, as paragraph 1 bis:

"Any person commits an offence if he unlawfully, using any device, substance or weapon:

- (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death or**

(b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located therein or disrupts the service of the airport, if such an act endangers or is likely to endanger safety at that airport."²⁴⁴

States are obliged to establish their jurisdiction over such offences when the alleged offender is present in their territory; and they do not extradite to the State where the offence was committed.²⁴⁵ This protocol lacks clarity in certain key phrases such as "airport serving international civil aviation" and " facilities of an airport". This protocol is most useful only when perpetrators escape and are found in other country. Otherwise it can be dealt by domestic law of the State. Nepal has not yet ratified it. But nevertheless, since no country is immune from terrorist attacks these days and airports being one of the most vulnerable targets, it is in the interest of Nepal to ratify it as soon as possible.

J) Convention on Marking of Explosives:

International events can trigger the creation international legal instruments. The explosion of PanAm 103 over Lockerbie on 21 December 1988 killing 269 persons on board and on the ground, focused the attention of the world community on the need to tighten the procedures for the detection of explosive substances.²⁴⁶ The result was the adoption of the "Convention on the Marking of explosives for the purpose of detection" on 1 March 1991 in Montreal.²⁴⁷ State parties to this

Convention are required to prohibit and prevent the manufacture in their territory of unmarked explosives as well as movement of such explosives in and out of the country.²⁴⁸ Existing stockpiles, which are not specifically held for military or police activities, are to be destroyed, used or rendered ineffective within three years. Those used for military or police functions, which are not incorporated as an integral part of the duly authorized military devices, are to be disposed of within fifteen years.²⁴⁹ There is a provision for the establishment of an International Explosive Technical Commission (IETC) to supervise future developments in plastic explosives manufacturing, marking and detection.²⁵⁰ Nepal, being neither a country which manufactures the explosives nor a major user of them, has a small role to play. But it might be vulnerable as a transit point for the movement of explosives by terrorist. It is better to join the world community in working for lasting peace and harmony than to stand idle. Therefore, Nepal should study this Convention seriously and move towards its ratification.

K) Annex 17: Security and Aviation Security (Management) Regulation 2046(1989) of Nepal:

Hijackers and terrorists, by definition, are not expected to comply with the international legal instruments dealing with aviation security. It is the preventive measures adopted by the States which will help to stop them from carrying out their inhuman activities. For this purpose, Annex 17 to the Chicago Convention of 1944 was adopted by the Council on March 22, 1974, pursuant to the provisions of Article

37 of the Chicago Convention.²⁵¹ The safeguarding of civil aviation operations and the safety of passengers, crew, ground personnel and the general public are the main aims and objectives of Aviation Security. To this end, each contracting State is obliged to establish an organization, develop plans and implement procedures regarding aviation security.²⁵² Each contracting State is not only required to establish a national civil aviation security programme but is also required to define and allocate the tasks for implementation of it as between agencies of the State, airport administrations, operators and others concerned.²⁵³ In the case of Nepal, this obligation has been fulfilled by Aviation Security (Management) Regulation 2046(1989). It has established the "National Civil Aviation Security Committee" for the purpose of making civil aviation fully safe.²⁵⁴ The duties, responsibilities and authority of this national level Committee are stipulated in Rule 2.3 which is mostly in line with the requirements of Chapter 3 of Annex 17. Rule 2.3 requires the Committee:

1. to develop national policy on aviation security and develop and implement aviation security plans in line with the national security policy;
2. to develop and implement aviation security manual concerning various Standards and Procedures required to implement for aviation security at the airports;
3. to set procedures and implement screening and body search procedures for passengers and their luggage, crew and crew members;
4. to declare prohibited zone around and nearby airport to stop general public

for the safety purpose;

5. to supervise, evaluate and make necessary arrangement for security procedures, required infrastructures and equipments;
6. to comply and implement security measures and procedures adopted and called for ICAO;
7. to provide necessary management of other matters concerning civil aviation security.²⁵⁵

Therefore, this national Committee has overall responsibility for aviation security matters including the implementation of Annex 17. This high level Committee, in practice, concentrates only on the formulation of broad policy aspects. De facto executing and implementing the authority lies with the Department of Civil Aviation and respective airports. Rule 4.3 authorizes the Committee to delegate its authority to members or Committee or officials of the Department of Civil Aviation. According to the wording used in Rule 4.3, it can only delegate authority and not the responsibility.²⁵⁶ The Director General of the Department of Civil Aviation shall act as a focal point for exchange of information related to aviation security with ICAO and its contracting States.²⁵⁷ The responsibility of the Director General seems to be limited only to the exchange of information. Standard.3.2.1 of Annex 17 obliges the contracting States to **"to cooperate with other States in order to adopt their respective national civil aviation security programme as necessary"**²⁵⁸ and also to ensure "that requests from other states for special security measures in respect of specific flights, as far as practicable, are met."²⁵⁹ According to Standard.4.1 of

Annex 17, each contracting State is to establish an airport security programme as well as an airport security committee and must take various measures required for aviation security such as making available necessary resources and facilities, screening procedures and support equipment. Also measures must be taken to prevent unauthorized access to aircraft and to restricted areas of the airport.²⁶⁰ Rule 3.1 of the Security Regulation has provision for the establishment of airport security committees for the airports. Their objective is the same as that of the National Committee, that is to make civil aviation fully safe.²⁶¹ One of their main responsibilities is to implement effectively the guidance and manuals concerning aviation security authorized by the Committee(national level). Their other responsibilities are to implement screening procedures, to keep up to date security equipment and facilities and to safeguard sensitive areas of the airport. Necessary training and security alertness of the officials related to airport security is to be maintained. Overall supervision and coordination of the aviation security aspects of airports are to be carried out effectively.²⁶² This committee is to be established basically at the airport level to carry out aviation security requirements. This is very important in the sense that it works at the actual implementation level, at the airport. As recommended in 3.2.1.1 of the Annex 17, Nepal has included, in almost all of its Bilateral Air Services Agreement, a clause related to aviation security. Nepal generally follows the ICAO Model clause on Aviation Security with minor variations.²⁶³ As in the case of the national committee, this airport committee may also delegate as deemed necessary all or some authority which it derives according

to the security regulation, to members of the airport security committee or another officer of the airport.²⁶⁴

His Majesty's Government can give direction to the national committee and airport committee from time to time as necessary.²⁶⁵ It shall be the duty of the national committee and the airport committee to with comply such direction. For anything missing in the regulation or any future requirements, His Majesty's Government can always give directions to fulfil the requirement. Provisions for the operator's security programme and information and reports concerning unlawful interference, as stipulated in chapter 5 and chapter 6 of Annex 17 respectively, are to be dealt in the security manual. Obviously, national and airport level security plans and manuals are restricted in circulation on need-to-know basis.

At the implementation level of aviation security, airport security services in Nepal are being provided by the Nepal Police Force. Whenever practicable they are given basic airport security training. The role of the airport authority is to provide them with all the equipment (e.g. X-ray machine, metal doors etc.), facilities(CCTV) required for aviation security at he airport. Actual screening and inspections are carried out by them . So far there has not been any major problem, only a very minor incident.²⁶⁶ Nepal, as far as practicable, within its constraints and limitations, is implementing its security obligations under Annex 17. But detailed security plans, procedures, and manuals still need to be developed. Without these, ad-hocism will be the rule of the game for the time being.

Section III: Air Carrier's Liability in Nepal.

Introduction:

The vast majority of international carriage by air is governed either by the "Warsaw Convention of 1929" or "The Hague Protocol of 1955."²⁶⁷ Nepal became party to both the Warsaw Convention and The Hague Protocol on 13/5/1966. Many countries have enacted domestic legislation "to make the rules of the Warsaw System also apply in whole or in part to international air carriage that does not fall under the original or amended Convention as well as to domestic carriage."²⁶⁸ Neither the Civil Aviation Act 2015(1959) nor the Royal Nepal Airline Act 2019(1963) (hereinafter RNAC Act.) has any such specific provision to deal with the liability regime of the carrier. The only provision on liability is the exemption of the personal liability of the employee of the corporation for the damage or loss resulting from the exercise of authority (vested upon them) without ulterior motive or without any irregularity deliberately.²⁶⁹ Though the Warsaw Convention has been amended by 7 Protocols, only the original Convention and The Hague Protocol are applicable to Nepal. Therefore, provisions of Nepalese domestic law as it relates to carriers liability with respect to these Conventions will be analyzed briefly. In this regard, the scope of the Convention, the documents of carriage, the principle of liability, the limitation of liability and other provisions will be discussed in general. Finally the future of the Warsaw system will be discussed in the light of present thinking.

A) The Scope of the Convention:

According to Article 1(1), the Warsaw Convention applies to **"all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft by an air transport undertaking."**²⁷⁰ The meaning of "international carriage" has been explained in para.2 of the same Article, according to which the following conditions must be met to qualify an international carriage:

- (a) There must be a contract made by the parties, and
- (b) The origin and destination must be situated between two Contracting States, whether or not there is a break in the journey, or
- (c) The origin and destination must be situated within the same Contracting State, if there is an agreed stopping place within the territory of another State.²⁷¹

If there are several legs in a journey, it will be considered as a single operation, regardless of whether one travels under a single contract or of a series of contracts as long as the origin and destination of that journey satisfies the criteria of International carriage.²⁷² Article 2(2) excludes the application of the Convention to carriage under the terms of any International Postal Convention.²⁷³ Article II of The Hague Protocol ²⁷⁴ amended this provision making the Convention non-applicable to the carriage of mail and postal packages. It has been further amended by Article II of the Montreal Protocol No.4 of 1975²⁷⁵ which has not yet entered into force. Also excluded from the application of the Convention, is "international transportation by air performed by way of experimental trial by air navigation

enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business."²⁷⁶ This Article has been deleted by Article XVI of The Hague Protocol²⁷⁷, thus making the Convention applicable to such experimental flight as well. The only exception, according to the amended clause is the "provisions of the Convention relating to documents of carriage are not applicable to the cases of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business."²⁷⁸ By way of inference, the Convention does not apply to carriage which is not international as defined in the Convention, to gratuitous carriage performed by other than air transport undertaking. Stowaways and crew members are excluded from the application of the Convention. The former lacks the contract of carriage and the latter is under a contract of service to perform specific duties. There are many questions raised regarding the contract made by the parties, departure and destination points, agreed stopping places, undivided carriage and the cases excluded by the Convention. The scope of this study precludes detailed discussions here.²⁷⁹

B) Documents of Carriage.

One of the major achievements of the Warsaw Convention is the unification of rules relating to documents of carriage in air transportation. These documents are the passenger ticket, the baggage check and the airway bill. The Convention imposes strict formal requirements regarding delivery of the ticket and information contained

therein, for the carrier to be entitled to rely on the limit of liability. As for the passenger ticket "the carrier must deliver a passenger ticket" which shall contain specific information as stipulated in Article 3.²⁸⁰ Furthermore the Article states that "the absence, irregularity or loss of the passenger ticket shall not affect the existence of the validity of the contract of the transportation which is none the less subject to the rules of the Convention."²⁸¹ If the carrier accepts a passenger without having delivered a ticket to him, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.²⁸² This Article 3 has been modified by Article III of The Hague Protocol, which, among other things, states that the passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract. The limitation of liability clause will not be applicable if the ticket does not contain the specific required information.²⁸³ There has been much controversy regarding what constitutes the delivery of the ticket and the particulars to be included in it. It will be necessary to mention a few leading cases to highlight the evolution of thinking on this subject. In *Ross Et Al V. Pan American Airways Inc.*,²⁸⁴ the ticket was laid before the passenger on a table at the airport of departure and this was held to constitute delivery of the ticket under the terms of the Warsaw Convention thus enabling the carrier to take advantage of the Convention's limitation of liability. However, in the case of *Warren V. Flying Tiger*²⁸⁵, the air carrier's delivery of tickets to servicemen at the foot of the boarding ramp to an international military charter flight, which did not afford the servicemen a reasonable opportunity to even read the tickets, much less obtain

additional flight insurance, was not sufficient to constitute delivery of the ticket within the terms of the Warsaw Convention. In another landmark case, *Lisi V. Alitalia*²⁸⁶, the unnoticeable and unreadable small type used for the printed notice indicating the applicability of the Warsaw Convention on the delivered ticket was considered insufficient notice that is required to be given to the passengers. However, in *Ludecke V. Canadian Pacific Airlines*²⁸⁷, the Court held that as long as a ticket is issued, the size of the print of the notice is irrelevant and hence the Convention applies. Finally in the famous case of *Elisa Chan, et al V. Korean Airlines Ltd.*²⁸⁸, the Supreme Court of the United States settled the issue with the following judgement:

"International air carriers do not lose the benefit of the limitation on damages for passengers injury or death provided by the Warsaw Convention if they fail to provide notice of that limitation in the 10-point type size required by the Montreal Agreement. Neither the Warsaw Convention nor the Montreal Agreement prescribes that the sanction for failure to provide the required form of notice is the elimination of the damages limitation. The only sanction in Article 3 of the Warsaw Convention subjects a carrier to unlimited liability if it accepts a passenger without a passenger ticket having been delivered. The non-delivery of a ticket can not be equated with a delivery of a ticket in a form that fails to provide adequate notice of the Warsaw limitation. A delivered document does not fail to qualify as a passenger ticket, and does not cause forfeiture of the damages limitation, merely

because it contains a defective notice. The use of 8-point type instead of 10-point type for the liability limitation notice is not so great a shortcoming as to prevent a document from being considered as a ticket.²⁸⁹

Article 3 of the Guatemala City Protocol drastically altered the requirement of Article 3 of the Warsaw Convention as amended by The Hague Protocol.²⁹⁰ Entirely new forms of tickets, such as can be produced by electronic means, are allowed under this Article and formal delivery of a ticket is no longer required, nor is there any need for the notice of liability limitation to be given to the passenger.²⁹¹ For the carriage of baggage, the carrier must deliver a baggage check in duplicate, one for the passenger and another for the carrier containing the particulars as specified in Article 4(3) of the Convention.²⁹² The delivery of the baggage check is not required for small personal objects of which the passengers takes charge himself. It is to be noted that if the baggage check does not contain the particulars set out in (a), (f), and (h) of Article 4(3) of the Convention, the carrier shall not be entitled to avail himself of those provisions of Convention which exclude or limit his liability. With regard to carriage of goods, according to Article 5(1), every carrier has the right to require the consignor to make out and hand over to him a document called an "Air Waybill". Likewise every consignor also has a right to require the carrier to accept the document.²⁹³ The procedure for the Air Waybill and conditions for the separate air waybill are given in Articles 6 and 7, whereas Article 8 provides the particulars required in the air waybill.²⁹⁴ Article 11(1) of the

Convention provides that the air waybill will constitute prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.²⁹⁵ Therefore once the air waybill is made and handed over to the carrier, that will determine the applicability of the Convention. As in the case of the baggage check, there must not be any omission of certain particulars as set out in Article 8 (a) to (i) and (g), otherwise the limitation of liability or exclusion of it as provided in the Convention will not be applicable to the carrier.²⁹⁶ Article 10 makes the consignor responsible for the correctness of the particulars and statements in the air waybill. He will be liable for the consequences resulting from irregularity, incorrectness or incompleteness of the required particulars and statements.²⁹⁷

C) Principle of Liability:

The principle of liability is deeply rooted into human civilization. In simple terms, he who causes damages to somebody has the obligation to compensate that person. The causal link between the act or omission and the damage or loss is very important in liability. The link may be "**Causa Proxima or Causa Remota**". Generally there are three forms of liability, namely, fault liability - which may arise due to intentional or negligent failure to carry out the required duty; strict liability - which arises regardless of fault, intentional or negligence; and absolute liability - a form of strict liability in which mitigation and exoneration are not permitted. The liability of the carrier in the Warsaw Convention is based on fault liability. Article 17 of the Convention sets out the condition for liability as follows:

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."²⁹⁸

The fault of the carrier is presumed, unless he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.²⁹⁹ For the destruction, loss of or of damage to any checked baggage or any goods, the carrier will be liable if the occurrence which caused the damage so sustained took place during the transportation by air.³⁰⁰ As provided in Article 19, the carrier is also liable for damage caused by delay in the transportation by air of passengers, baggage or goods.³⁰¹ The carrier may be exonerated partly or wholly, in accordance with the provisions of its national law if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person.³⁰² A number of difficulties have arisen regarding the different approaches in interpretation of Article 17. In particular, terms like **"any other bodily injury"**, **"accidents"** (what constitutes accident and did it caused the damage?), the meaning of **"in the course of any of the operations of embarking or disembarking"**, the meaning of **"all necessary measures"** or **"impossible for him to take such measures"**. "Certain of its provisions are still subject to contradictory decisions and interpretation by different courts of the various Contracting States. Some of the divergence emanates from the court's fundamental approach to

interpreting the Convention."³⁰³ Some of the important court decisions, which will be briefly mentioned below, will highlight this point. In *Air France V. Saks*³⁰⁴, an elderly passenger had suffered hearing loss during the aircraft's descent for landing. She had argued that "accident" should be defined as a hazard of air travel and that her injury had indeed been caused by such a hazard. But the Supreme Court of the United States held that "it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone and hence, an airline could not be held liable for a passenger's hearing loss caused by her reaction to normal cabin pressurization changes during normal landing." In *Herman V. Trans World Airlines Inc.*³⁰⁵ and *Husserl V. Swiss Air Transport Co.*³⁰⁶, aircrafts were diverted to a desert location. The U.S. Court interpreted that the damage had been sustained while on board the aircraft during the flight. In the second case the Court stated:

"the drafters of the Convention undoubtedly assumed that the time 'on board the aircraft' included all of the time between embarkation at the origin of flight and disembarkation at a scheduled destination of a flight"³⁰⁷

In clarifying whether the accident occurred in the course of any of the operations of embarking or disembarking, the location of the victim at the time the damage occurred was considered the decisive factor. In *Macdonald V. Air Canada*³⁰⁸, in which an elderly plaintiff fell in the baggage collection area of the terminal. It was argued that the damage she sustained occurred during the operation of disembarkation and therefore the carrier should be liable. It is noteworthy to quote

the decision of the Court of Appeals for the first circuit, which held " **it would seem that the operation of disembarking has terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal...**"³⁰⁹ This location test has been discarded in a number of other cases involving embarking passengers. A new criteria known as the "Day Test" has been applied. This test was formulated in the cases of *Day V. Trans World Airlines Inc.*³¹⁰ and *Evangelinos V. Trans World Airlines Inc.*³¹¹ Both cases, involved the same terrorist attack on passengers in the travel lounge of a Greek airport, who were lining up for a hand baggage check and a physical search conducted by the Greek police prior to boarding. In the *Evangelinos* case, the Court states as follows:

"In our view, three factors are primarily relevant to a determination of the question of liability under Article 17: location of the accident, the activity in which the injured person was engaged, and the control by the defendant of such person at the location and during the activity taking place at the time of the accident alleged to be 'in course of any of the operations of embarking'"³¹²

This tripartite test was found to be satisfied in both cases and hence the airline was held liable for the damages. In *Herman V. Trans World Airlines Inc.*³¹³, the hijacked aircraft remained for a week in a desert location in Jordan, the Court held that the airline was absolutely liable for both physical and emotional injuries sustained by the passengers during international air transportation. The controversy

surrounding whether mental anguish can be recoverable has been settled in a recent U.S. Court decision. In the case "Re Korean Airline disaster of September 1, 1983"³¹⁴, the jury of the U.S. District Court, had earlier awarded 50 million US dollars of punitive damages to the victims. However that decision was overturned on 7 may 1991, by the United States Court of Appeals. It held that the **"Convention disallowed awards of punitive damages. Article 17 of the Convention strongly implied that a carrier's responsibility was compensatory. A finding of wilful misconduct under Article 25 does not create a right to recover punitive damages."**³¹⁵

The Convention does not specify who may bring suit in respect of death or injury or the type of damage recoverable. Courts have simply applied the Lex fori for compensable damages. Therefore there is a considerable difference of attitude in the different courts as far as the calculation of damages is concerned.³¹⁶ The carrier will be liable for registered baggage or goods if the destruction of or loss of or damage occurred during the carriage by air.³¹⁷ The carrier will be liable only during the period when the baggage or goods are "in charge of the carrier." The carrier's responsibility begins when it accepts the consignment note and the goods. According to Article 11(1) of the Convention, "the air consignment note is prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage."³¹⁸ The carrier is considered in charge of the goods until they are delivered it to the consignee or his agent.

The *raison d'être* of air transport is the advantage of its rapidity compare to other modes of transport. Therefore carriers are required to perform their

contractual duty as quickly as possible and are liable for damage occasioned by delay in the carriage by air of passengers, baggage or goods.³¹⁹ But contractual clauses of most carriers (especially IATA member carriers) applicable to the carriage of passengers³²⁰ and the carriage of goods³²¹, makes it almost impossible to establish liability for delay. One commenter comments the principle of liability for delay as follows: **"the actual conditions of carriage do not openly contradict the terms of Article 19, but they deprive the Article of any real meaning. The principle of liability for delay is respected, but the condition precedent to the application of the text i.e the existence of delay, is made unattainable."**³²²

D) Limitations of Liability:

The amounts of the carrier's liability is limited under Article 22 of the Convention. The monetary unit used to express those limits is found in the gold clause (Poincare Francs consisting of 65.5 milligrams of gold of millesimal fineness nine hundred). The limits amount to 125,000 Francs (about US \$ 10,000, according to the last published official price of gold quoted as US \$ 42.22 per troy ounce of pure gold) for each passenger, 250 Francs (about US\$ 20) per kilogram of baggage or goods and 500 Francs (about US\$ 400) for objects carried by the passenger.³²³ This liability limit may be raised to a higher limit of liability by a special contract if the carrier and the passenger agree to that.³²⁴ This is widely practised by the carriers voluntarily or otherwise, especially after the Montreal Agreement of 13 May 1966. The Hague Protocol of 1955 doubled the limit for passengers, but left the other

limits unchanged. The following arguments have been often put forward for the justification for the limitation of liability.

- "a) Analogy with maritime law with its global limitation of the shipowner's liability;
- b) Necessary protection of a financially weak industry;
- c) Catastrophical risks should not be borne by aviation alone;
- d) Necessity of the carriers or operators being able to insure against these risks;
- e) Possibility for the potential claimants to take insurance themselves;
- f) Limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and operator ('quid pro quo');
- g) Avoidance of litigation by facilitating quick settlements;
- h) Unification of the law with respect to the amount of damages to be paid."³²⁵

Most of these arguments are hardly convincing and justifiable at present. Aviation has become a powerful industry with sophisticated risk management through a complex insurance system. As long as gold was the standard basis of the international monetary system, there was no problem in conversion of the compensable amount into national currencies. But, because of demonetization of gold by the International Monetary Fund (IMF) in March 1968, gold ceased to be a firm yardstick of value. This has reduced Article 22 to some extent to a "lottery" depending upon the fluctuation of the price of gold according to supply and demand like the price of any other commodity. The difficulty surrounds the choice of four

alternatives:

- a) The last official price of gold in the United States.
- b) The free market price of gold.
- c) The SDR (Special Drawing Right - a monetary unit of IMF).
- d) The exchange rate of the current French Franc."³²⁶

The supreme Court of United States settled the controversy surrounding the conversion, giving the following decision in *Trans World Airline Inc. V. Franklin Mint Corp. et al*³²⁷:

"The Warsaw Convention cargo liability limits remain enforceable in United States Courts and are not rendered unenforceable by the 1978 repeal of the Par Value Modification Act(PVMA). The repeal of the PVMA was unrelated to the Convention and was intended to give formal effect to a new international monetary system.... The erosion of the international gold standard and the 1978 repeal of the PVMA cannot be construed as terminating or repudiating the U.S. duty to abide by the Convention's liability Limit.. as calculated from the last official price of gold in the United States, is not inconsistent, with domestic law or with the Convention itself. Tying the Convention's liability limit to today's gold market would fail to effect the purpose of the Convention's framers and would be inconsistent with well-established international practice."³²⁸

E) Other Provisions: Wilful Misconduct.

One of the most controversial and most invoked articles of the original Convention is Article 25 concerning wilful misconduct. This is partly because of inherent difficulties in interpretation and application, and partly because it is one of the few openings through which the limits of the carrier's liability in Article 22 of the Warsaw Convention can be overcome and obtain full compensation for damage suffered can be obtained.³²⁹ According to Article 25 of the Convention, a carrier cannot avail himself of the provisions which exclude or limit his liability if " **the damage is caused by his wilful misconduct or by such default on his part as, in accordance with law of the court seized of the case, is considered to be equivalent to wilful misconduct.**"³³⁰ Most of the controversy surrounds the interpretation of whether 'faute lourde' (gross negligence) should be treated as 'dol' (wrong intentionally committed) on the basis of the maxim "**culpa lata dolo equiparatur (i.e. gross negligence is equivalent to dol)**". Some of the following cases will highlight the different interpretations. In *Horabin V. British Overseas Airways Corporation*³³¹, the Court, interpreting the wilful misconduct, directed the jury as follows:

"To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be."

In *Grey El Al V. American Airlines Inc.*³³², the U.S. Supreme Court defined

"wilful misconduct' as a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty." In *Reiner V. Alitalia Airlines*³³³, the New York Supreme Court held that 'the determination of wilful misconduct does not require a single act of horror but may be based upon the cumulative effect of numerous departures from required standards on the part of the defendant or any of its officers, agents or employees." In *Lambert c. Curion*³³⁴, all on board a helicopter were killed in a crash when the pilot flew under the cables of an aerial railway in the Mont Blanc. The Second Chamber of the Cour de Cassation drew inference from the pilot's behaviour and concluded that the pilot had knowledge of the dangers involved and he deliberately and unnecessarily exposed his passengers to it. Plaintiffs in many civil law courts were comparatively in a better situation than those in common law countries. "The reason is that most civil law courts widened the scope of Article 25 by use of notion of *faute lourde*, whilst no similar move was made to resort to 'gross negligence' in common law courts. The divergence appears all the more clearly when it is realized that *faute lourde* and gross negligence are almost identical notions."³³⁵ The Hague Protocol of 1955 redrafted 'wilful misconduct' in Article 25. Now the plaintiff is required to prove " that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result."³³⁶

Jurisdiction:

Article 28 of the Convention covers the question of jurisdiction and provides four fora where a plaintiff may bring suit. those are where the carrier:

- a) is ordinarily resident; or
- b) has his principal place of business; or
- c) has an establishment by which the contract was made; or
- d) before the court having jurisdiction at the place of destination.³³⁷

Questions of procedure are left to the *lex fori*.³³⁸ For the combined carriage performed partly by air and partly by any other mode of carriage, the Convention is applicable only to that portion of the carriage which is performed by air.³³⁹ The provisions of the Convention are of imperative nature and the parties cannot infringe the rules under the penalty of nullity.³⁴⁰ The Warsaw Convention is a very far sighted and successful convention. As one commenter puts it:

"The package of solutions embodied in the Warsaw Convention must be considered to be far-sighted and creative and drafted with profound legal vision. The basic principles of the Convention have survived successfully from the days of infancy of Civil Aviation well into the jet age and the years of supersonic flight."³⁴¹

Though the Warsaw Convention is the most successful and widely accepted international private air law as mentioned earlier, one must not fail to note that it deals with only certain aspects of private law governing international carriage by air. There are a host of other areas where it is salient. "More specifically, it does not deal with the legal capacity of the parties to the contract; the form, validity, cancellation,

voiding, violation and non-execution of the contract; the negotiability of the airway bill; the legal status of the carrier, his agents and servants and the basis of their liability; the gratuitous carriage which is not performed by an air transport undertaking; the rights and obligations of the passenger; and most procedural matters."³⁴²

F) Air Carrier's liability in Nepalese law:

Since Nepal is to the Warsaw Convention and The Hague Protocol, air carriers in Nepal are liable under these Conventions for their international carriage as defined in the Convention. In order to obtain the greatest benefit from the Warsaw System, it is desirable and important to make domestic legislation in harmony with the provisions of the Conventions. Yet, so far it has not been incorporated into domestic legislation. There is no special legislation concerning the air carriage contract or aviation tort in Nepal. Therefore, liability in cases of domestic carriage by air, will be governed by conditions of contract of carriage, general law of contract, and general provisions of tort in the civil code of the country. The national airline is liable only according to the conditions of the contract (the airline ticket being the or document contract of carriage)³⁴³ and acceptance of the ticket constitutes prima facie evidence of the acceptance of the conditions set forth in the ticket.³⁴⁴ The principle of liability is based on fault, but the fault of the carrier is not presumed; it has to be proven, as provided in condition 2(1) of the ticket as follows:

"The Carrier shall be liable for damage to passengers and their

baggage only when such damage takes place on board the aircraft or in the course of embarking on or disembarking from the aircraft and such damage is proved to have been caused by the negligence of the carrier; any contributory negligence of the passenger shall be subject to the applicable law."³⁴⁵

Contrary to the Warsaw System, where fault of the carrier is presumed with the reverse burden of proof, here it is rather the victim, who has to prove that 'damage so sustained has been caused by the negligence of the carrier.'" This puts domestic passengers in a disadvantageous position in relation to passengers on international flights. When a domestic flight becomes an extension of an international flight, local passengers on that flight will be in a disadvantageous position compared with the international passengers on the same flight.³⁴⁶ Any contributory negligence of the passenger will be dealt with in accordance with the applicable law (i.e. *lex fori*). This is in line with Article 21 of the Convention. The liability is limited to the maximum amount equivalent to US\$ 20,000 for passengers, US\$ 20 per KG for registered baggage and US\$ 400 for carry on Articles, in local currency.³⁴⁷ These amounts are approximately equal to the amount prescribed by The Hague Protocol. The carrier's liability can neither be raised nor claimed otherwise. According to condition no.3 of the ticket, unless the *lex fori* determines otherwise, all claims for compensation for injury or damage or loss howsoever caused will be limited to the specification in the ticket only. Condition no.3 states as follows:

"Subject to condition 2 above and unless the applicable law otherwise

requires, the Carrier shall be under no liability to passengers or for their baggage and personal articles and passengers renounce for themselves, their representatives and defendants all claims for compensation for injury (fatal or otherwise) loss, damage or delay howsoever caused whether directly or indirectly to the passengers or their baggage or to persons who, but for this condition, might have been entitled to claims and whether caused or occasioned by the act, neglect or default of carrier and otherwise howsoever and the passengers for themselves and their estates will indemnify the carrier against such claim."³⁴⁸

This condition not only gives no choice to the passenger but also the passenger is forced to renounce the right to all claims of compensation against the carrier for injury, loss or damage howsoever caused, except under the limit set by the carrier or unless the applicable law determines otherwise. In other words, even in cases of wilful misconduct or gross negligence on the part of the carrier, the victim cannot claim otherwise. This is a gross injustice to the passenger and not in line with the provisions of the Warsaw System of liability to which Nepal is a party. The applicable law is not very clear in this regard to determine otherwise. The only recourse the victim may have is to nullify the contract on the ground that this is against the public order and is a forced contract. According to Section 8 of the Contract Act 2033 (1966), " a contract will be 'ipso facto' null and void if it is against public policy or benefit or for an immoral motive."³⁴⁹ According to Section 7 of the same Act, a victim of a

forced contract can petition for the nullification of the contract.³⁵⁰ To bar the victim from exercising the right to seek the compensation for real damages, even in case of wilful misconduct or gross negligence, is against public policy or order. It is a forced contract in the sense that the passengers have no other choice (remote air fields cannot be reached by other modes of transportation). The carrier is always in an advantageous position to dictate the terms and such a forced contract (the French used the term "**contract d'adhesion**"), should always be questionable in the court regarding validity. No provision of the conditions of the contract can be altered or modified or waived by any agent, servant or representative of the carrier.³⁵¹ There is no choice of fora and therefore no conflicts of jurisdiction. According to condition no.9, "the contract of carriage comprised in this ticket shall be construed according to the law of the Kingdom of Nepal."³⁵² The crucial question is whether these conditions of contract are compatible with the Contract Act 2023(1965)³⁵³ of Nepal? Section 2(a) of the said Act defines a contract "as an agreement between two or more parties to act or omit to act for something." Section 4 of the same act provides for the proposal and acceptance of the contract and Section 6 allows conclusion of the contract according to published public notice. Analysing those provisions, the domestic passenger ticket and baggage check can be considered as document of contract. Provision for compensation is provided in Section 15 of the Contract Act, according to which "compensation should be provided according to the specified conditions in the contract, if so specified, and if not so specified, the claimant may be compensated for real damage sustained. Indirect or imaginary

damages shall not be compensated." Since the liability limit has already been specified in the ticket and the ticket constitutes prima facie evidence of conclusion of the contract and acceptance of the conditions set forth, there seems to be no other recourse available to the domestic passenger in Nepal, unless the applicable law determines otherwise. It would be very difficult to seek compensation for damages under the Nepalese Contract Act. There are many vague provisions in the principles of contract. Even after 7 years of enactment, legal principles concerning such term as contract, its scope, cause of the damage, and damage evaluation procedures have not yet been developed. The concept of tort and its provisions are very much underdeveloped. There are no substantial tort laws in Nepal. There are only some scattered provisions of tort. In fact, in *Tunga Samsher V. Indian Airline* case in 2012(1960), the Supreme Court of Nepal had held that compensation for death caused due to an aircraft accident cannot be claimed under Nepal Law.³⁵⁴ Other domestic private airlines of Nepal, for want of any other alternative, have been instructed to follow the suit of national airlines regarding liability limitation. The present de facto liability regime in domestic air transportation is far from being satisfactory. One even wonders whether such a stringent requirement for the passenger to prove the negligence of the carrier and the unbreakable limit of liability, does not constitutes an infringement of the fundamental rights of the people and hence the constitution. Harmony between the liability regime in international carriage and domestic carriage is an essential element for the development of air transportation.

G) Future of the Warsaw System:

The most criticised and controversial aspect of the Warsaw Convention is 'the limitation of liability'. As one commenter puts it as follows:

"By imposing a low limit of liability, the Convention purported to achieve an impossible task: to 'unify' the cost of living in the international community by pretending that the lowest denominator was a 'common denominator' under all circumstances. The economic reality is different and it is not possible to attach one single 'price tag' on loss of life or physical injury everywhere in the world. What may be marginally acceptable as a compensation in a developing country with low cost of living is totally unrealistic for a great number of countries with high cost of living."³⁵⁵

Though the Hague Protocol doubled the limit of liability with respect to persons, the United States-the major aviation country without whose participation success of and continuity of the Warsaw System is very much doubtful, did not consider it satisfactory enough to warrant ratification. Because of the unacceptable low limits of liability, claimants, especially in the United States, used every conceivable avenue to break the Warsaw limit by using shortcomings in the ticket, notice, invoking wilful misconduct or even seeking punitive damages. The growing discontent of this low limit reached its boiling point in 1965, when the United States gave notice to denounce the Convention. The collision course was averted by the so called "Montreal Agreement of 1966"- a private agreement between carriers operating

to, from or via the United States to raise the limit to US\$ 75,000 (inclusive of legal fees and costs) or US\$ 58,000 (exclusive of legal fees and costs) in case of death or bodily injury of a passenger and to waive any defence available under Article 21(1) of the Convention (thereby accepting strict liability regardless of fault). ICAO prepared a package to modernize the Warsaw System with a view to satisfying the needs of the United States. This package was adopted by a diplomatic conference on 8 March 1971 and popularly known as the Guatemala City Protocol. But the Protocol did not enter into force because of failure to ratify it by the United States. This Protocol , which was later modified by the Montreal Protocol No.3 in 1975 to introduce the SDR monetary system, truly reflects the development, modernization and improvement of the Convention. Among other things, it simplified the documents of carriage (opening the way for electronic means of ticketing), introduced the concept of strict liability regardless of fault, raised the limit considerably (e.g. then equivalent to US\$ 100,000 for passengers), added an additional jurisdiction. It could have been the solution to the crisis of the Warsaw System, had it been ratified by the United States. Unfortunately, not everybody agreed with it. Prof.Bin Cheng, the best known scholar in the field of international air law comments as follows:

"The result was the ill-conceived Guatemala city Protocol of 1971 to amend the Warsaw-Hague Convention, ill-conceived insofar as passenger liability is concerned. The Protocol is through and through carrier-oriented. It and its reincarnation MAP3 draped in SDR, have completely messed up the elegant structure and delicate balance of

interests of the Warsaw System."³⁵⁶

He further commented that "if such a regime (i.e. deletion of Article 25: wilful misconduct) were to be found in a contract, instead of a treaty, many systems of law and of conflict of laws, especially in civil law countries, would declare it to be contrary to public policy, violative of ordre public or contra bonos mores- in short null and void."³⁵⁷ The flow of ramifications of Montreal Protocols have been well below expectation and in fact none of these protocols are in force at present. The main obstacle being the delay in ratification by the United States. It was noted recently that the proposal to ratify Montreal Protocol No.3 has run into new difficulties in the U.S.Senate, particularly because of mounting legal and constitutional doubts over the viability of the suggested passenger-paid supplemental plan which forms an indispensable part of the ratification proposal.³⁵⁸ While the debate was going on in the United States, the other parts of the world, especially western Europe started taking unilateral action to increase their limit of liability to the equivalent of 100,000 SDR in their national currencies or directly in terms of the SDR.³⁵⁹ The so called Malta-Group of States also raised the limits of liability towards passengers by simply requiring their airlines to subscribe a special contract.³⁶⁰ In Italy, by Law No. 274 of 7 July 1988, the limit of liability for passengers must not be less than 100,000 SDR³⁶¹ for Italian carriers and others who want to fly to, from or via Italy. In a recent EC Consultation Paper circulated to its member States regarding possible community action to harmonize the limits of passenger liability and to increase the amounts of compensation for international accidents victims in Air Transport³⁶²,

the following elements were suggested for in-depth discussion on the structure and substance of a community system on passenger liability:

- a) Fair compensation, simple and speedy procedures, Transparency - From the point of view of users and third parties.
- b) Controllable/acceptable compensation/insurance costs; equal treatment between different carriers and types of operation; Efficient insurance system - Interests of air carriers and/or aeronautical manufacturers.
- c) Aeropolitical and general public policy considerations - must fit with existing obligations and procedures at bilateral and multilateral level.

To encompass these, three basic policy options were suggested, namely, - Mandatory versus optional rules; unlimited versus limited compensation limits and solution inside or outside the Warsaw System.³⁶³ In Japan, for domestic carriage the liability limit has been unlimited since April 1, 1982 and for international carriage, Japanese Carriers waived the limits effective November 20, 1992.³⁶⁴ Thus the Japanese carriers will accept strict liability for claims up to 100,000 SDR and unlimited liability beyond that, while reserving their defence under Article 20(1) of the Warsaw Convention (i.e. right to prove that the carrier and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures). Prof. Bin Cheng considers this Japanese initiative as a historic landmark in the evolution of the Warsaw System³⁶⁵ and preferred to "tear up" the Guatemala/Protocol No.3 and suggested to "shore up" Warsaw/Hague System by a sort of "Japanese solution" from which "a much healthier Warsaw System will

doubtless emerge."³⁶⁶ The main defects of Guatemala/Montreal Protocol No.3 are the unbreakability of the limit in any circumstances and deletion of Article 25-provision for wilful misconduct. But these can be rectified by a supplementary compensation plan and the victims would be compensated from a source other than the carrier. One cannot easily put aside the collective wisdom and balance of interests reached by 180 member States of ICAO. After all, in an unlimited liability scheme, in the end passenger will foot the bill. As one noted scholar in this field comments as "since there are 'no free lunches' any where in the world, it will eventually as always be the consumer (passenger) who will pay the increased cost of risk management (insurance premiums) and of the settlements which will appear on the balance sheet as an integral part of the operating cost of each airline."³⁶⁷

The dye has been cast and the ball has started rolling. Already 19 States have ratified Protocol No.3³⁶⁸ and 21 States have ratified Protocol No.4.³⁶⁹ Sooner or later, the Protocols will enter into force. One can not afford to be left behind the bandwagon of the world community in these days of interdependence.

Endnotes to Chapter 3

1. See Article 37 of the Chicago Convention, *supra*, note 3 of Chpt.1 at 14.
2. Assembly Res. A1-31, ICAO Doc.4411 (A1-P/45)(1957). Also see T.Buergenthal, *Law-Making in the International Civil Aviation Organization.*,(Syracause, N.Y. Syracuse University Press, 1969), at 58-61.
3. *Ibid.*
4. *Ibid.*
5. ICAO, *Annex 9: Facilitation*(9th ed. July 1990) at vi.
6. See Article 54(1) of the Chicago Convention.
7. Article 37 Para I. of the Chicago Convention.
8. E.Pepin, Eugin, *ICAO and other Agencies dealing with air regulation.* 19 JALC 152 (1952).
9. Article 38 of the Chicago Convention.
10. B.Cheng, *The Law of International Air Transport.*(Stevens & Sons Ltd, london 1962) at 65.
11. Article 90(a) of the Chicago Convention.
12. Buergenthal, *supra*, note 2 at 63.
13. Article 20 of the Chicago Convention.
14. *Ibid.*, Article 17.
15. *Ibid.*, Article 18.
16. *Ibid.*, Article 19.
17. ICAO, *Annex 7: Aircraft Nationality and Registration Marks* (4th.ed. July 1981) at 5.
18. His Majesty's Government of Nepal (HMGN), *Civil Aviation Rules 2019(1962)* (hereafter called rules),(published in the Nepal Gazette on 29/4/2019(August 14, 1962)).
19. *Ibid.*, Rule 3(1).

20. ICAO, *supra*, note 5 at 1., see Definitions.
21. Aircraft Manual India(AMI), 1985 edition, Govt. of India publication, the Aircraft Rules 1937, Rule 3: Definition and interpretation, p.125; e.g. Aerial work aircraft, Aeroplane, Aerostat, Aircraft, Airship, Amphibian, Balloon, Glider, helicopter, Military aircraft, Private aircraft, Public transport aircraft, Sea plane, State aircraft, Subsequent aircraft.
22. HMGN, *supra*, note 18 at Rule 3(3).
23. *Ibid.*, Rule 3(4).
24. *Ibid.*, Rule 4(1).
25. *Ibid.*, Rule 4(2).
26. *Ibid.*, Rule 5.
27. *Ibid.*, Rule 6.
28. *Ibid.*
29. *Ibid.*, see Promulgation statement.
30. HMGN, *The Civil Aviation Act 2015(1959)*, (Published in Nepal Gazette on 2016/1/10(May 24, 1959), at Section 16.
31. HMGN, *supra*, note 18 at Rule 4.
32. ICAO, *supra*, note 17 at 8, Standard (Std) 4.
33. Article 38 of the Chicago Convention.
34. ICAO, *supra*, note 17 at Supplement no.2 to Annex 7 (fourth edition).
35. See Preamble of the Chicago Convention.
36. Article 29 of the Chicago Convention.
37. See *Infra* Note 39.
38. B.Campbell, *Black's Law Dictionary* (fifth ed., St.Paul Minn. West Publishing Co., 1979), at 829.
39. ICAO, *Personnel Licensing- Annex 1 to the Convention on International Civil Aviation* (8th ed., Montreal, ICAO, July 1988) (hereafter referred to as "Annex 1"), see foreword.

40. ICAO, *supra*, note 17 at 1.
41. E.Sweciki, *Legal aspects of licensing of airline transport pilots:International Standards versus Canadian Aviation Safety Regulations* (LL.M. Thesis, McGill University, 1992) at 10.
42. HMGN, *supra*, note 18 at Rule 8, Note: "Chief Engineer" means the Chief Engineer of the Department of Civil Aviation of His Majesty's Government and it also includes the Director in there is Director instead of Chief Engineer. Now, the Department of Civil Aviation is headed by Director-General.
43. HMGN, *supra*, note 18 at Rules 8(2).
44. *Ibid.*
45. *Ibid.*, Rule 8(3).
46. GOI, *supra*, note 21 at 62 (Aircraft Rules 1937).
47. HMGN, *supra*, note 18 at Rule 8(4). Also see ICAO, *supra*, note 39 at para 2.3.1.1, 2.4.1.1, 2.5.1, 4.1.1.1, 4.2.1.1.
48. ICAO, *supra*, note 39 at para 4.1.1.1 and 4.2.1.1.
49. HMGN, *supra*, note 18 at Rule 10(2).
50. Article 32(a) of the Chicago Convention. Also see Para 1.2.1 of Annex 1
51. Article 33 of the Chicago Convention.
52. Article 32(b) of the Chicago Convention.
53. HMGN, *supra*, note 18 at Rule 9(1).
54. GOI, *supra*, note 21 at 33.
55. Government of Pakistan(GOP), *Civil Aviation Rules 1978*, (published in the Gazette of Pakistan, January 20, 1979), see Rule 73(1).
56. *Ibid.*
57. Sweciki, *supra*, note 41 at 17.
58. Example: Air Services Agreement signed with Italy on 8 May 1992.

Article 10

Recognition of licences and Certificates

1. Certificates of airworthiness, certificates of competency and licences issued or rendered valid by one contracting party, shall during the period of their validity subject to the provisions of paragraph 2 of this Article, be recognized as valid by the other Contracting Party.
2. Each Contracting Party reserves the right to refuse to recognize as valid, for the purpose of flight over its territory, certificates or airworthiness, certificates of competency or licence granted to or rendered valid for its own national by the other contracting party or by a third state.
59. HMGN, *supra*, note 18 at Rule 10(3) (a), (b).
60. GOI, *supra*, note 21 at 87.
61. Para 1.2.6.1 of Annex 1.
62. ICAO, *supra*, note 39 at Chapter 6 for details.
63. HMGN, *supra*, note 18 at Rule 16.
64. *Ibid.*
65. ICAO, *supra*, note 39 at para 1.2.4.4.1.
66. HMGN, *supra*, note 18 at Rule 16.
67. HMGN, *supra*, note 18 at Rule 11.
68. ICAO, *The convention on International Civil Aviation : Annexes 1 to 18 (the first 46 years)*. (Feb.1991), at 14.
69. Article 31 of the Chicago Convention.
70. Article 33 of the Chicago Convention.
71. ICAO, *Annex 8: Airworthiness of Aircraft* (8th.ed. July 1988) (hereafter called Annex 8), see foreword for details.
72. *Ibid.* at p.viii.
73. HMGN, *supra*, note 18 at Rule 12(1).
74. ICAO, *supra*, note 66 at 15.
75. HMGN, *supra*, note 18 at Rule 12(2).

76. GOI, *supra*, note 21 at 35, Rule 50(1) states as follows:
Owner or operator of an aircraft may apply to the Director General for the issue or renewal of a certificate of airworthiness in respect of the aircraft or for the validation of a certificate of airworthiness issued elsewhere in respect of the aircraft.
77. GOP, *supra*, note 55 at Rule 24(1) states as follows:
The owner or operator of, or any other person having an interest in, a registered aircraft may apply to the Director-General or an authorized person for the issue or renewal or a certificate of airworthiness in respect of the aircraft or for the validation of a certificate of airworthiness issued by the appropriate authority of a Contracting State in respect of the aircraft.
78. ICAO, *supra*, note 71 at 3, para 2.2.
79. *Ibid.*, at vii.
80. GOI, *supra*, note 21 at 35, see for details Rule 49, 49A, 49B, 49C, 49D.
81. GOP, *supra*, note 55 at Rule 21 to 23.
82. ICAO, *supra*, note 71 at , para 6.1.
83. GOP, *supra*, note 55 at Rule 26.
84. GOI, *supra*, note 21 at 37, Rule 55.
85. HMGN, *supra*, note 30 at Section 6 and 9.
86. HMGN, *supra*, note 18 at Rule 12(3).
87. *Ibid.*, Rule 13(1).
88. *Ibid.*, Rule 13(2), 13(3), 13(4).
89. *Ibid.*, Rule 14.
90. *Ibid.*, Rule 15.
91. ICAO, *supra*, note 39 at 34, Chapter 4.
92. ICAO, *supra*, note 71 at 12, 14, Part III and Part IV.
93. See for details Airworthiness Technical Manual (Doc.9051), 2nd.edition, ICAO 1987, incorporating Amendments 1-9, 290 p.p.

94. ICAO, *Annex 6: Operation of Aircraft Part I (International Commercial Air Transport-Aeroplane)*, 5th.ed. July 1990,(hereafter referred as Annex 6(I)), see foreword.
95. *Ibid.*
96. *Ibid.*
97. *Ibid.* at p.viii/.
98. HMGN, *supra*, note 18 at Rule 18(1).
99. *Ibid.*, Rule 18(2).
100. Article 29 of the Chicago Convention.
101. ICAO, *supra*, note 94 at 5, para 3.2.
102. *Ibid.*, para 5.1.1.
103. GOI, *supra*, note 21 at 19, see part II- General conditions of flying.
104. GOP, *supra*, note 55 at 125, Part X- conditions of flight.
105. ICAO, *supra*, note 94 at viii, see foreword for details.
106. *Ibid.*, para 4.2.1.1.
107. *Ibid.*, para 4.2.1.3.
108. *Ibid.*, para 4.2.2, 11.1.
109. *Ibid.*, para 8.2.1, 11.3.
110. *Ibid.*, para 8.3.
111. *Ibid.*, para 4.4.
112. *Ibid.*, para 6.3.
113. *Ibid.*, para 9.1, 9.3, 9.4.
114. HMGN, *supra*, note 30 at Section 3 for details.
115. N.Matte, *Treatise on Aeronautical law* (McGill University 1981) at 21.

116. M.A.Kader, *Air Traffic Control Liability* (LL.M. Thesis, McGill University, 1986) at 9.
117. Article 12 of the Chicago Convention.
118. Article 28 of the Chicago Convention.
119. ICAO, *Annex 2: Rules of the air* (9th.ed., July 1990),(hereafter referred as Annex 2), see foreword.
120. ICAO, *supra*, note 68 at 3.
121. *Ibid.*
122. ICAO, *supra*, note 119 at 9, para.2.2.
123. ICAO, *supra*, note 68 at 3, for details see Annex 2, chapter 4:Visual Flight rules.
124. ICAO, *supra*, note 119 at 18, chapter 5: Instrument Flight Rules.
125. Kader, *supra*, note 116 at 9.
126. ICAO, *Annex 11: Air Traffic Services* (9th.ed., July 1990) (hereafter referred as annex 11), see foreword.
127. *Ibid.* at 7, para 2.2.
128. *Ibid.* at 7, para 2.3
129. ICAO, *supra*, note 116 at 17.
130. Article 12 of the Chicago Convention.
131. *Ibid.*
132. Article 28 of the Chicago Convention.
133. HMGN, *supra*, note 30 at Section 3 of the Act.
134. *Ibid.*,Section 9 of the Act.
135. GOI, *supra*, note at 22, Rule 16: "Rule 16: Every person shall comply with such rules of the air contained in the schedule IV to these rules as may be applicable to that person and..."

136. GOP, *supra*, note 55 at 112, 115, 135, 137, 140, 141. See for detail following rules: Part IX, Section 4-Air traffic control, Section 5-Flight services, Part XI, Section 1-General, Section 2-Operation on and in the vicinity of the aerodromes, Section 3-Visual Flight Rules, Section 4-Instrument Flight Rules.
137. Article 25 of the Chicago Convention.
138. *Ibid.*
139. ICAO, *Annex 12-Search and Rescue*, (6th.ed., March 1975) (hereafter referred as Annex 12), see foreword.
140. ICAO, *supra*, note 68 at 24.
141. ICAO, *supra*, note 139 at 11, para 2.3.1.
142. *Ibid.* at 11, para 2.5.1.
143. *Ibid.* at 12, para 3.1.1.
144. *Ibid.* at 13, para 3.1.3.
145. *Ibid.* at 13, para 3.3.
146. *Ibid.* at 15, para 4.1.
147. *Ibid.* at 15, para 4.2.
148. ICAO, *supra*, note 68 at 25.
149. ICAO, *supra*, note 139 at 17, para 5.2.
150. HMGN, *supra*, note 30 at Sub-Section 2(w) of Section 3 of the Act.
151. ICAO, *supra*, note 68 at 26.
152. Article 26 of the Chicago Convention.
153. *Ibid.*
154. *Ibid.*
155. *Ibid.*
156. ICAO, *Annex 13- Aircraft Accident Investigation*, (7th.ed., May 1988), (hereafter called Annex 13) see foreword.

157. *Ibid.* at 3, para 2.1.
158. HMGN, *Civil Aviation (Investigation of Accident) Rules 2024(1967)* (hereafter referred as investigation rules 2024) (published in the Nepal Gazette on 2024/5/6 (Aug.21, 1967))
159. *Ibid.*, Rule 2:Definition.
160. ICAO, *supra*, note 156 at 1, Chapter 1.
161. GOP, *supra*, note 55 at 182, Rule 321(a).
162. ICAO, *supra*, note 156 at 1, Chapter 1: Definition.
163. HMGN, *supra*, note 158 at Rule 3.
164. *Ibid.*, Rule 4(1), 4(2).
165. *Ibid.*, Rule 4(3).
166. ICAO, *supra*, note 156 at 5, para 4.1.
167. HMGN, *supra*, note 158 at, Rule 5.
168. *Ibid.* Rule 5 and 6.
169. *Ibid.*, Rule 6(2).
170. ICAO, *supra*, note 156 at 4, para 3.2, 3.3, 3.5.
171. HMGN, *supra*, note 158 at Rule 8, 11, 12.
172. ICAO, *supra*, note 156 at 7, para 5.1.
173. HMGN, *supra*, note 158 at Rule 9.
174. *Ibid.*
175. ICAO, *supra*, note 156 at 7, chapter 5.
176. HMGN, *supra*, note 158 at Rule 13.
177. *Ibid.*, Rule 14.
178. *Ibid.*, Rule 15.
179. ICAO, *supra*, note 156 at 4, para 3.1.

180. HMGN, *supra*, note 158 at Rule 10 and Rule 16.
181. *Ibid.*, Rule 17.
182. Article 26 of the Chicago Convention.
183. ICAO, *supra*, note 156 at 9, para 5.19.
184. *Ibid.*, see foreword for details.
185. HMGN, *supra*, note 158 at Rule 18.
186. ICAO Doc.6920: *Manual of Aircraft Accident Investigation*.
187. M.McClintock, "Skyjacking:Its domestic civil and criminal ramifications." 39 *JALC*(1973) 29.
188. J.Thaker, "Model clause on Aviation Security for Bilateral Air Transport Agreements" 17 *AASL Part II* (1992) 234.
Also see Dr.Assad Kotaite, President of the ICAO Council, ICAO Doc.9467 C/1089, C-Min 115/14 at para 1.7.
189. ICAO, *Assembly Resolution A 29-5*, ICAO Doc.Provisional Ed., October 1992.
190. E.Faller,"Aviation Security:The role of ICAO in Safeguarding International Civil Aviation Against Acts of Unlawful Interference." 17 *AASL Part I*(1992) 372.
191. Aviation Security Conventions: Effective date for Nepal.
 - (a) Convention on Offenses and Certain other Acts Committed on Board Aircraft (The Tokyo Convention of 1963): Effective Date 15/4/1979.
 - (b) Convention for the Suppression of unlawful seizure of Aircraft (The Hague Convention of 1970): Effective Date 18/2/1979.
 - (c) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation: Effective Date 18/2/1979.
192. HMGN, *supra*, note 30 at Aviation Security provisions - Section 9A to 9I, 10A, 10B, 12A, 14A.
193. Articles 3 and 4 of The Tokyo Convention of 1963.
194. Article 1 of The Hague Convention of 1970.
195. Article 1 of The Montreal Convention of 1971.
196. HMGN, *supra*, note 30 at Section 9A, Sub-section 1.

197. *Ibid.*
198. ICAO, *supra*, note 194 at Article 1.
199. ICAO, *supra*, note 195 at Article 1.
200. HMGN, *supra*, note 30 at Subsection 2 of the Section 9A.
201. *Ibid.*, Section 9B
202. *Ibid.*
203. Article 2 of the Montreal Convention and Article 3 of the Hague Convention.
204. Article 3 of the Montreal Convention, Article 2 of the Hague Convention.
205. HMGN, *supra*, note 30 at Subsection 3(a), 3(b), 3(c) of the section 9A.
206. Article 4 of the Montreal Convention, Article 3 of the Hague Convention, Article 1 of the Tokyo Convention.
207. Article 3 of the Montreal Convention, Article 3 para 2 of the Hague, Article 1 para 4 of the Tokyo Convention.
208. HMGN, *supra*, note 30 at Section 9B of the Act.
209. Article 4 of the Montreal Convention of 1971.
210. HMGN, *supra*, note 30 at Section 9D of the Act.
211. *Ibid.*
212. HMGN, *supra*, note 30 at Section 9H of the Act.
213. See Article 7 of the Montreal Convention of 1971 and Article 7 of the Hague Convention of 1970.
214. HMGN, *supra*, note 30 at Section 9F of the Act.
215. *Ibid.*
216. W.Mutz, *Civil Aviation and the Law*, (LL.M. Thesis, McGill University 1981), at 192.
217. P. St.John, *Air Piracy, Airport Security and International Terrorism: Winning war against hijackers*. (Quorum Books, New York 1st. ed.1991),at 172.

- 218. Article 8 of the Tokyo Convention of 1963.
- 219. Article 9 of the Tokyo Convention of 1963.
- 220. Article 6 of the Hague Convention of 1970 and Article 6 of Montreal Convention of 1971, also see chapter V: Power and duties of State of the Tokyo Convention of 1963.
- 221. *Ibid.*
- 222. *Ibid.*
- 223. HMGN, *supra*, note 30 at Section 9E of the Act.
- 224. Article 6 of the Tokyo Convention of 1963.
- 225. HMGN, *supra*, note 30 at Section 9E of the Act.
- 226. HMGN, *supra*, note 30 at Section 9G of the Act.
- 227. Article 10 of the Montreal Convention of 1971.
- 228. HMGN, *supra*, note 30 at Section 10B of the Act.
- 229. *Ibid.*
- 230. *Ibid.*
- 231. *Ibid.*
- 232. *Ibid.*
- 233. *Ibid.*
- 234. *Ibid.* subsection (5).
- 235. Article 10 of the Montreal Convention of 1971.
- 236. HMGN, *supra*, note 30 at Section 10B of the Act.
- 237. HMGN, *supra*, note 30 at Section 12 of the Act.
- 238. HMGN, *supra*, note 30 at Section 14A of the Act.
- 239. HMGN, *supra*, note 30 at Section 9I of the Act.
- 240. Aviation Security Conventions, *supra*, note 191.

241. Faller, *supra*, note 190 at 377.
242. Protocol for the Suppression of unlawful Acts of violence at Airports serving International Civil Aviation, supplementary to the Convention for the suppression of unlawful Act against the Safety of Civil Aviation, Done at Montreal on 23 September 1971, Signed at Montreal on 24 February 1988. ICAO Doc.9518; 1990 ATS 39; 1991 UKTS 40; (1988)27 ILM 627.
243. Faller, *supra*, note 190 at 377.
244. ICAO, *supra*, note 242 at Article II.
245. *Ibid.*, Article III.
246. Faller, *supra*, note 190 at 378.
247. Convention Marking of Explosive for the purpose of detection, done at Montreal on 1 March 1991, ICAO Doc. 9571.
248. *Ibid.* Article II, Article III.
249. *Ibid.* Article IV.
250. *Ibid.* Article V, see also Faller, *supra*, note 190 at 379.
251. ICAO, *Annex 17: Security- Safeguarding International Civil Aviation against Acts of unlawful interference*, (5th.edition,incorporating amendments 1-8, December 1992), 29 p.p.
252. *Ibid.*, Standard(Std.) 2.1
253. *Ibid.* Standard 3.1.
254. Aviation Security(Management) Regulation 2046(1989) (hereafter referred to as security regulation).
 Regulation 2.1 established the Committee as follows:
 2.1.1. For the purpose of making civil aviation fully safe, a national civil aviation security committee was formed with the following members:

1. Hon'ble Minister for Tourism or State Minister	Chairman
2. Attorney-General	Member
3. Zonal Commissioner, Bagmati Zone	"
4. Secretary, Ministry of Tourism	"
5. Secretary, Ministry of Finance	"
6. Secretary, Ministry of Home Affairs	"
7. Secretary, Ministry of Defence	"
8. Secretary, Ministry of Law and Justice	"

- 9. Inspector General, Nepal Police Force „
 - 10. General, Royal Nepalese Army (Headquarters) „
 - 11. Chief Officer, Nepal Public Relation Office* „
 - 12. Director-General, Dept.of Civil Aviation Member-Secretary
- * This office is generally considered as an intelligence gathering office.

255. *Ibid.* Rule 2.3.

256. *Ibid.*

Rule 4.3 Delegation of Authority:

4.3.1. Committee may delegate, as deemed necessary, all or some authority, which it derives according to this regulation, to a member or the committee or committee or officer of the Department of Civil Aviation.

4.3.2. Airport Security Committee may delegate as deemed necessary all or some authorities, which it derives according to this regulation, to member of airport security committee or officer.

257. *Ibid.* Rule 4.1.

258. ICAO, *supra*, note 251 at See Standard 3.2.1.

259. *Ibid.* Standard 3.2.2.

260. *Ibid.*, Chapter 4; Standard 4.1 General.

261. HMGN, *supra*, note 254 at Rule 3.1.

262. *Ibid.*, Rule. 3.2.

263. Aviation Security Clause in the Bilateral Air Services Agreement with Italy, signed on 8th May 1992.

ARTICLE 12

Aviation Security

- (a) Consistent with their rights and obligations under international law, the Contracting Parties reaffirm that their obligation to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of this Agreement. Without limiting the generality of their rights and obligations under international law, the Contracting Parties shall in particular act in conformity with the provisions of the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft,

signed at The Hague on 16 December 1970 and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.

- (b) The Contracting Parties shall provide upon request all necessary assistance to each other to prevent acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft, their passengers and crew, airports and air navigation facilities, and any other threat to the security of civil aviation.
- (c) The Contracting Parties shall, in their mutual relations, act in conformity with the aviation security provisions established by the International Civil Aviation Organization and designated as Annexes to the Convention to the extent that such security provisions are applicable to the Parties; they shall require that operators of aircraft of their registry or operators of aircraft who have their principal place of business or permanent residence in their territory and the operators of airports in their territory act in conformity with such aviation security provisions.
- (d) Each Contracting Party agrees that such operators of aircraft may be required to observe the aviation security provisions referred to in paragraph (c) above required by the other Contracting Party for entry into, departure from, or while within, the territory of that other Contracting Party. Each Contracting Party shall ensure that adequate measures are effectively applied within its territory to protect the aircraft and to inspect passengers, crew, carry-on-items, baggage, cargo and aircraft stores prior to and during boarding or loading. Each Contracting Party shall also give sympathetic consideration to any request from the other Contracting Party for reasonable special security measures to meet a particular threat.
- (e) When an incident or threat of an incident of unlawful seizure of civil aircraft or other unlawful acts against the safety of such aircraft, their passengers and crew, airports or air navigation facilities occurs, the Contracting Parties shall assist each other by facilitating communication and other appropriate measures intended to terminate rapidly and safely such incident or threat thereof.

264. HMGN, *supra*, note 254 at Rule 4.3.2.

265. *Ibid.*, Rule. 4.4.

266. S.K.Ghosh, *Aircraft Hijacking and the Developing Law* (Ashish Publishing House, New Delhi, 1985), at 2 : " On June 10, 1973, three men hijacked Royal Nepal Airline's twin-engine otter plane to Forbesgunj airstrip, seven metre inside the Indian border... The plane was on a scheduled flight from

Biratnagar to Kathmandu. The plane was returned."

267. R.H.Mankiewicz, *The liability regime of the International Air Carrier* (Kluwer law and Taxation Publishers, Deventer/Netherlands, 1981), at 1.
268. *Ibid.* at 2.
269. Section 9 of the RNAC Act.
270. Article 1(1) of the Warsaw Convention of 1929.
271. Article 1(2) of the Warsaw Convention of 1929.
272. Article 1(3) of the Warsaw Convention of 1929.
273. Article 2(2) of the Warsaw Convention of 1929.
274. Article II of The Hague Protocol of 1955.
275. Article II of the Montreal Protocol No.4 of 1975.
276. Article 34 of the Warsaw Convention of 1929.
277. Article XVI of The Hague Protocol of 1955.
278. *Ibid.*
279. G.Miller, *Liability in International Air Transport* (Kluwer-The Netherlands 1977), at 17-25.
 Also see: Mankiewicz, *supra*, note 267 at 27-53.
 - Shawcross & Beaumont, *Air Law* (3rd.ed.1966, London), at 400-419.
 - H.Drion, *Limitation of Liability in International Air Law*, 1954, at 51-69.
280. Article 3 of the Warsaw Convention of 1929.
281. *Ibid.*
282. *Ibid.*
283. Article III of The Hague Protocol of 1955.
284. 2 Avi. 14,911
285. 9 Avi. 17,848
286. 9 Avi. 18,374

- 287. 12 Avi. 17,191
- 288. 21 Avi 18,228
- 289. *Ibid.*
- 290. Article II of the Guatemala City Protocol of 1971.
- 291. Miller, *supra*, note 279 at 91.
- 292. Article 4 of the Warsaw Convention of 1929.
- 293. Article 5 of the Warsaw Convention of 1929.
- 294. Articles 6, 7, and 8 of the Warsaw Convention of 1929.
- 295. Article 11 of the Warsaw Convention of 1929.
- 296. Article 9 of the Warsaw Convention of 1929.
- 297. Article 10 of the Warsaw Convention of 1929.
- 298. Article 17 of the Warsaw Convention of 1929.
- 299. Article 20(1) of the Warsaw Convention of 1929.
- 300. Article 18 of the Warsaw Convention of 1929.
- 301. Article 19 of the Warsaw Convention of 1929.
- 302. Article 32 of the Warsaw Convention of 1929.
- 303. M.Ngoro, *The advantages and disadvantages to the United Republic of Tanzania of ratifying Montreal Protocols No.3 and No.4*, (LL.M. Thesis, McGill University 1986) at 27.
- 304. 18 Avi 18,122 and 18,256
- 305. 12 Avi 17,304 (N.Y.Sup.Ct.1972). In this case a passenger plane was hijacked and diverted to a desert location in Jordan. And it remained there for a week. The passengers claimed damages for fright and distress suffered during that week.
- 306. 13 Avi 17,603 (S.D.N.Y. 1975). In this case, the plane was diverted by hijacking from its normal route and forced to land on a desert strip near Amman, Jordan. The passengers were moved to hotel in Amman after twenty-four hours on board the hijacked aircraft.

- 307. *Ibid.* at 17,607; also see Mankiewicz, *supra*, note 267 at 131-132.
- 308. 11 Avi. 18,029 (1st. Cir.1971).
- 309. *Ibid.* at 18,030.
- 310. 13 Avi. 17,647 (S.D.M.Y.1975), *aff'd*, 13 Avi. 18,144 (2nd.Cir.1975, Cert. Denied, 45 U.S.L.W. 3280 (U.S.Sup.Ct.1976).
- 311. 14 Avi. 17,101 (3rd.Cir.,1976), on rehearing, 14 Avi. 17,612 (3rd.Cir.,1977).
- 312. 14 Avi. 17,613.
- 313. Avi., *supra*, note 305 at 17,304.
- 314. 23 Avi. 17,505.
- 315. *Ibid.*
- 316. Ngororo, *supra*, note 303 at 36.
- 317. Article 18 of the Warsaw Convention of 1929.
- 318. Miller, *supra*, note 279 at 146, also see Article 34 of the Warsaw Convention of 1929.
- 319. Article 19 of the Warsaw Convention of 1929.
- 320. Article X of IATA General conditions of carriage (passengers and baggage).
- 321. IATA Resolution 600b(1), Airwaybill -Conditions of contract, section 5.
- 322. Miller, *supra*, note 279 at 154.
Also see Article 23 of the Warsaw Convention of 1929, which declares null and void "any provision tending to relieve the carrier or liability or to fix a lower limit than that which is laid down in the Convention.
- 323. Article 22 of the Warsaw Convention of 1929.
- 324. *Ibid.*
- 325. H.Drion, *Limitation of liabilities in International Air Law* 1954, see for detail discussion on these arguments at 12-44.
- 326. P.Barlow, "Article 22 of the Warsaw Convention:in a state of limbo " 8 *Air Law*, No.1(1983) 2.

- 327. 18 Avi. 17,778.
- 328. *Ibid.*
- 329. B.Cheng, Bin, " Wilful misconduct: From Warsaw to The Hague and from Brussels to Paris.", 2 AASL(1977) 55.
- 330. Article 25 of the Warsaw Convention of 1929.
- 331. [1952] 2 All E.R. 1916 (Q.B.1952).
- 332. 4 Avi. 17,811.
- 333. 9 Avi. 18,228.
- 334. 29 R.G.A.E. 377, also see Miller, *supra*, note 279 at 208.
- 335. Miller, *supra*, note 279 at 200.
- 336. Article XIII of The Hague Protocol of 1955.
- 337. Article 28 of the Warsaw Convention of 1929.
- 338. *Ibid.*
- 339. Article 31 of the Warsaw Convention of 1929.
- 340. Article 32 of the Warsaw Convention of 1929.
- 341. M.Milde, " ICAO work on the modernization of the Warsaw System", 14 *Air Law* (No.4/5, 1989) 193, at 195.
- 342. Mankiewicz, *supra*, note 267 at 13.
- 343. Conditions of contract for the domestic carriage by national airline is printed on the overleaf of the ticket as follows:

CONDITIONS OF CONTRACT

- 1. This Passenger ticket and Baggage Check is issued by Royal Nepal Airlines Corporation, hereinafter referred to as the "carrier", and accepted by the passenger who hereby agrees to the conditions set forth herein.
- 2. Passengers and their baggage (registered and personal articles) are accepted for carriage upon condition that:
 - (i) The Carrier shall be liable for damage to passengers or their baggage only when such damage takes place on board the aircraft or in the course of embarking on or disembarking from the aircraft and

such damage is proved to have been caused by the negligence of the carrier; any contributory negligence of the passenger shall be subject to the applicable law.

(ii) For death, wounding or bodily injury of a passenger liabilities shall be limited to the maximum amount equivalent to US\$ 20,000 in local currency.

(iii) For loss of or damage to:

(a) registered baggage shall be limited to amount equivalent to US\$ 20 per KG. in local currency.

(b) personal articles retained by the passenger shall be limited to the maximum amount equivalent to US\$ 400 in local currency.

3. Subject to condition 2 above and unless the applicable law otherwise requires, the Carrier shall be under no liability to passengers or for their baggage and personal articles and passengers renounce for themselves, their representatives and dependents all claims for compensation for injury (fatal or otherwise) loss, damage or delay howsoever caused whether directly or indirectly to the passengers or their baggage or to persons who, but for this condition, might have been entitled to claims and whether caused or occasioned by the act, neglect or default of Carrier and otherwise howsoever and the passengers for themselves and their estates will indemnify the Carrier against such claim.
4. The limitation of and exclusion from liability of Carrier referred to in conditions 2 and 3 respectively shall apply to and be for the benefit of agents, servants and representatives of the Carrier and any person whose aircraft is used by Carrier for carriage and its respective agents, servants and representatives.
5. Registered baggage will be delivered to bearer of the baggage check. In case of damage to or loss of baggage complaint must be made in writing to Carrier forthwith in the airport counter of the Carrier after discovery of damage or loss.
6. The ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in Carrier's tariffs, conditions of carriage or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.
7. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.
8. Not agent, servant or representative of Carrier has authority to alter,

modify or waive any provision of this contract.

9. The contract of carriage comprised in this ticket shall be construed according to the law of the Kingdom of Nepal and any action arising therefrom shall be sought only in a Court of the Kingdom of Nepal.

344. *Ibid.*, condition 1.

345. *Ibid.*, condition 2(1).

346. For example, passenger, travelling Frankfurt-Kathmandu-Pokhara (a popular domestic tourist destination) on a ticket bought at Frankfurt with change of plane does not have to prove the fault of the carrier if some accident or incident is to happen in Kathmandu-Pokhara sector. Whereas, on the same domestic flight, a local passenger has to prove the negligence of the carrier.

347. RNAC, *supra*, note 343 at condition 2.

348. RNAC, *supra*, note 343 at Condition no.3 of the domestic ticket.

349. *The Contract Act 2023* (of Nepal), published in the Nepal Gazette on 2023/6/9 (Sept. 1965), at Section 8.

350. *Ibid.* at Section 7 of the Contract Act 2023 of Nepal.

351. RNAC, *supra*, note 343 at Condition 8 of the domestic ticket.

352. RNAC, *supra*, note 343 at Condition 9 of the domestic ticket.

353. Contract Act 2023 (1966) Published in Nepal Gazette on 9/6/2023 (Sept. 1965).

354. T.Bhatt, "Thai Aircraft Crash: question of compensation" - *Gorkhapatra* (a Nepalese daily newspaper) on 14/6/2049 (Sept. 1992).

355. M.Milde, Michael "Warsaw System and limits of liability- yet another crossroad?" - unpublished IASL, McGill University.

356. B.Cheng, "The Warsaw System: Mess up, Tear up or shore up" - a paper presented to 'International Conference on air Transport and space application in a new world.', Tokyo, 2-5 June 1993.

357. *Ibid.*

358. For details see "executive summary of Brise's reports, attached to EC Consultation paper" VII.C.1.-174/92-7, 21.09.1992/ES/LG/MGT.

359. The following European countries (or their Airlines) have increased the limit to 100,000 SDR:
Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and United Kingdom.
Outside Europe: Canada, Japan, Singapore - have also increased to that limit.
For details see "Sven Brise's Report to European Communities, dated 15 Sept. 1991.
360. N.R.McGilchrist, "Special Contract and the Malta Agreements", *Lloyd's Maritime and Commercial law quarterly* (1977), at 366. Also see 1 *Air Law* (1976) 286.
361. Gazzetta ufficiale della Repubblica Italiana, Roma No.168, 19 July 1988.
See for English text: 14 *Air Law* no.4/5 (1989) 180.
362. EC Consultation Paper Ref: VII.C.1-174/92-7; 21/09/1992 ES/LG/MGT.
363. *Ibid.*
364. Kinidiro Hayashido, Kashiwagi & Tazawa, "Jurisdiction and Applicable Law in Aviation Cases in Japan" - a paper presented to the 'International Conference on Air Transport and Space Application in a new world' Tokyo 2-5 June 1993.
365. Cheng, *supra*, note 356 .
366. *Ibid.*
367. Milde, *supra*, note 355.
368. Source: ICAO Legal Bureau.
369. *Ibid.*

Chapter 4. Conclusions:

A. Revision and promulgation of the Act and Rules:

So far, only two Acts, namely -Civil Aviation Act 2015(1959) and Royal Nepal Airline Corporation Act 2019(1963), have been promulgated to deal with air transport matters in Nepal. Under the Civil Aviation Act, four Rules have been made. They are Civil Aviation Rules 2019(1962)- to deal with the registration and marking of aircraft, issuing of licence to the flight crew, airworthiness of the aircraft, aviation medical board; Civil Aviation (Investigation of Accident) Rules 2024(1967); Airport Charges Rules 2038(1981); Aviation Security (Management) Rules 2046(1989). Under the RNAC Act, so far, only two Rules have been made . They are RNAC Employee's Rules 2031(1974) dealing primarily with the regulations and conditions of services for RNAC employees; and RNAC Financial Administrative Rules.

Nature of the regulatory approach to deal with air transportation has been drastically changed in the two decades. Nepal has already embarked on liberalising air transport policy and allowing competition in the domestic sector. Already there are four new domestic airlines operating in Nepal. But the Act has not been revised since 1977. Though there are number of provisions in the Act to make rules, no specific rules and regulations have been made to deal with the present trend in air transport activities. Predatory pricing, price fixing agreements, market manipulation, leveraged buy out (LBO), mergers etc. are distortions of the competitive environment in the air transport industry. There is no specific Act or Rules similar to Anti-trust

law in the U.S.A. and Competition Rules in the EEC.

Another area which needs to be addressed urgently is the Warsaw System of carrier's liability. Nepal has not yet incorporated the Warsaw Convention of 1929 and the Hague Protocol of 1955 into its domestic air legislation. Hence, air carrier's liability for domestic air transportation in Nepal is governed by the conditions of contract. The conditions, as stipulated by the national airline, favour the airline and the rights of the passengers are very much limited and restricted to the extent of being against the public order.

On safety regulation, the Department of Civil Aviation also lacks adequate authority to carry out its functions effectively and efficiently. For example it lacks the authority to issue air navigation orders with legal binding authority essential for the safe operation of flight. Considering the overall responsibility of the Department of Civil Aviation on aviation matters and national obligations arising as a party to the international air law conventions, in the author's opinion, promulgation of Acts, Rules and Regulations on the following subjects are urgently required:

- Rules to regulate air transport services, including competition laws in air transport the operations.
- Rules to regulate air traffic services, including operation of airports and airways.
- Rules to regulate environmental pollution, including aircraft noises, restriction of construction and settlement in the specified areas around airports.
- The promulgation of the Carriage by Air Act to extend the Warsaw System of carrier's liability in domestic air transportation.

- The promulgation of a separate Aviation Security Act.

Therefore, a comprehensive revision of the present Act and Rules should be carried out as soon as possible to encompass above the mentioned subjects.

B. Privatization of the Airline Industry:

The air transport activities of an airline always play a very significant role in the national economy. Because of the need to ensure a regular and reliable provision of air services to all parts of a country at the lowest cost to fulfil the public service obligation of the nation, traditionally, national airlines have been protected from competition and in most of the developing countries, it enjoys a monopoly of the passenger air transport. Most of the national airlines are owned and controlled by the Government. This has led to managerial inefficiency and public deficits. This resulted in a heavy burden on the public exchequer. The modern trend is to introduce progressive privatisation of the airline industry to eliminate the financial commitment of the Government and to increase efficiency and cost-effectiveness. Privatisation also offers relief to the civil service, which is overburdened with involvements in public enterprise matters. Therefore, in the author's opinion, RNA-the national airline, should be progressively privatised and be allowed to function freely in the competitive commercial environment. To protect it from denationalization by way of merger and acquisition from foreign airline industry, equity participation should be limited to 25 percent of the voting share, so that the control of the airline lies with the Nepalese nationals. The Government may also opt for a golden share concept authorising a veto power when the national interest is at stake. The regulatory role of the

Government should be limited to safety, security, assuring a fair competition, protection of the environment, labour interest, consumer interest and the public interest.

C. Need for an Autonomous Civil Aviation Authority:

Most of the regulatory structures of an aviation authority follow one of the following patterns:

1. Airports within a Civil Aviation Administration:

Traditionally, most international airports are operated by a Civil Aviation department, under the guidance from sectoral ministry (usually Ministry of Transport or Civil Aviation). In such cases, operation of an airport is part of the overall functions of the department which include the operation of route facilities and services, inspection of aircraft, issuance of certificates and licences, approval of air carrier's fares and rates, negotiations of bilateral air services agreements etc.

2. Autonomous Airport Authority:

Most of the international airports, especially in Europe and the United States, operate as autonomous airport authorities. The main objective is to meet the needs of the local people and users of the airport. This type of authority, also sometime, operate and manage route facilities. The Civil Aviation Administration mostly looks after the safety regulations and licensing.

3. The Autonomous Civil Aviation Authority:

In a small State, where operation of an international airports constitutes major aviation activity, it will be of little use to have two separate authorities-one for

operating an international airport and other for the administration of aviation regulations. This could result in costly duplication of functions. The other important factor is the potential rivalry between airport authorities and the civil aviation administration, which may have detrimental effects on air transport development. Therefore, in such a situation, a single autonomous Civil Aviation Authority will be more efficient and cost-effective than a separate authority for airport and civil aviation administration.

4.Privatisation of Airports:

A recent trend in the western world is to privatize the airport ownership and operations. Privatisation may relieve the Government from the burden of capital investment. This will also allow the airport the freedom of direct access to open capital markets. But many factors must be considered carefully before privatisation. There must be a guarantee of freedom of access, non-discrimination between different users, compliance of international obligations etc.

Nepalese aviation regulatory structure at present follows a pattern 1 described above. Nepal cannot afford to be a silent spectator of the regulatory changes taking places in the world aviation. The most notable among them is the liberalization and the deregulation of air transport industry. With a fragile economy of limited resources and heavily dependent on the tourism industry, Nepal has to move very cautiously in this direction. Therefore the author strongly recommends the creation of a single Autonomous Civil Aviation Authority, with adequate authority to effectively carry out its responsibilities on civil aviation matters.

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APPENDIX

- A. Civil Aviation Act 2015 (1959 AD)
- B. Civil Aviation Rules 2019 (1962 AD)
- C. Civil Aviation (Investigation of Accident) Rules 2024 (1967 AD)



C I V I L A V I A T I O N A C T , 2 0 1 5
(1959)

English Translation

CIVIL AVIATION ACT, 2015 (1959)

Date of the Royal Seal

2015/12/31 (April 12, 1959)

Date of the publication
in the Nepal Gazette

2016/1/10 (May 24, 1959)

Amendment:

1. Some Nepal Law (Amendment and
Re-management) Act, 2020 (1964) 2020/11/16 (Feb.28, 1964)
2. Civil Aviation (Amendment)
Act, 2023 (1966) 2023/5/4 (Aug.20, 1966)
3. Civil Aviation (Second Amendment)
Act, 2030 (1973) 2030/5/15/6 (Aug.31, 1973)
4. Civil Aviation (Third Amendment)
Act, 2034 (1977) 2034/6/6/1 (Sept.22, 1977)

Act No. 22 of 2015 (1959)

Preamble : Whereas, it is expedient to control and manage the civil aviation for creating a situation conducive to the development of the civil aviation in order to make optimum benefit to the nation out of the air transport* and to maintain law and order as well as the comfort of the people in general,

* Amended by Some Nepal Law (Amendment and Re-management) Act, 2020 (1964).

Purna B. Thapa.

Now, therefore, His Majesty the King has, with the advice of the Cabinet, made and promulgated this Act.

1. Short Title, Extent and Commencement : (1) This Act may be called the "Civil Aviation Act, 2015 (1959)"

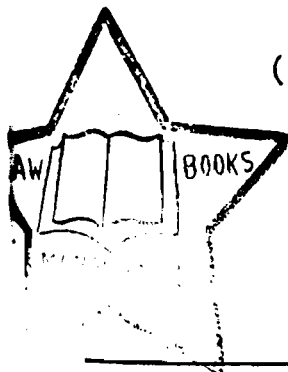
(2) It shall extend throught the Kingdom of Nepal and shall also apply to the following aircrafts and persons :-

- (a) Nepalese citizens residing anywhere, and
- (b) Each aircraft which is registered in the Kingdom of Nepal wherever they may be and every person on such aircraft.

(3) It shall come into force from such dates as His Majesty's Government by a notification published in the Nepal Gazette, may appoint.*

2. Definitions : Unless the subject or context otherwise requires, in this Act -

- (a) "Aircraft" means any machine which can derive support in the atmosphere from the reactions of the air and it also includes balloons, whether fixed or free, airships, kites, gliders and flying machines.



* Commenced from the date 2017/4/13 (July 29, 1960), (Date of notification published in the Nepal Gazettee 2017/4/17 (Aug.2, 1960).

(b) "Aerodrome" means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of the aircraft, and it also includes all the buildings, shades, vessels, piers and other structures thereon or appertaining thereto.

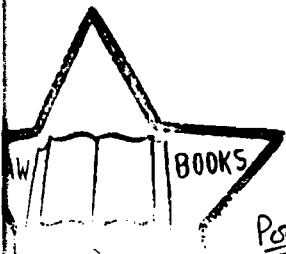
(c) "Specified Boundary" means the place or area within the four point boundary as prescribed by His Majesty's Government by a notification published in the Nepal Gazette.

3. Power to make Rules : (1) His Majesty's Government may make rules as required for implementing the objectives of this Act and to make provisions to issue licence to non-governmental organizations for the construction, possession or operation of the private aerodromes and regulating the manufacture, possession, use, operation, sale, export or import of any aircraft or class of aircraft. Those rules shall be effective only after their publication in the Nepal Gazette.

(2) Without prejudice to the generality of the power conferred by sub-section (1), rules may be made particularly in respect of the following matters :-

- (a) The authorities by which the power conferred under this Act are to be exercised and limitation on exercise of such power;
- (b) The regulation of air transport services, and the prohibition of the use of aircraft in such services except under the authority of and in accordance with a licence authorising the establishment of the service;
- (c) The particulars to be furnished by an applicant for, or the holder of, a licence authorising the establishment of an air transport service to such authorities as may be specified in the rules;
- +(d) The conditions under which aerodrome may be maintained, the licensing of the aerodrome and the fees which may be charged thereat, the inspection of such aerodrome, prohibition or regulation of the use of unlicensed aerodromes, the fees to be charged for using (landing, housing, parking etc.) the government and non-government aerodrome and other facilities therein and for

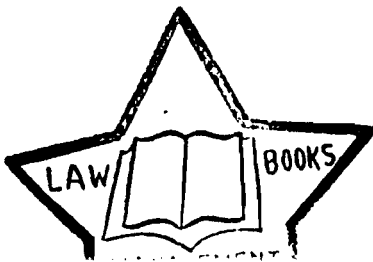
+ Amended by Civil Aviation (Amendment) Act, 2023 (1966)



Poorna B. Jha.

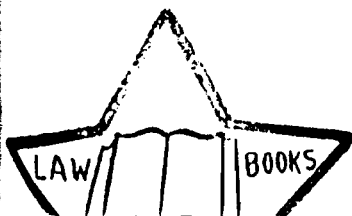
the advertisement of trade and other profession by government and non-government person within the aerodrome, the royalty to be taken on feul or any other matters to be sold within the area of the aerodrome and determining the fees of the government house and lands within the aerodrome;

- (e) The inspection and control of the manufacture, repair and maintenance of the aircraft and of places where the aircrafts are being manufactured, repaired or kept;
- (f) The registration and marking of the aircraft;
- (g) The conditions under which the aircraft may be flown, or may carry passengers, mails or goods, or may be used for industrial purposes and the certificates, licences or documents to be carried by the aircraft;
- (h) The inspection of the aircraft for the purpose of enforcing the provision of this Act and the rules made thereunder and the facilities to be provided for such inspection;



- + (i) The licensing of the pilots of the aircraft, person employed for the repair or maintenance of the aircraft and other ground personnels engaged in the controlling and operation of the air transport;
- (j) The air - routes by which and the conditions under which the aircraft may enter or leave the Kingdom of Nepal, or may fly over the Kingdom of Nepal and places at which the aircraft shall land;
- (k) The prohibition of flight by aircraft over the area specified by His Majesty's Government, either absolutely or at specified times or subject to specified Conditions;
- (l) The supply, supervision and control of air-routes, beacons, aerodrome lights and other lights at or in the neighbourhood of aerodromes or on or in the neighbourhood of air-routes;

+ Amended by Civil Aviation (Third Amendment) Act, 2034 (1977).



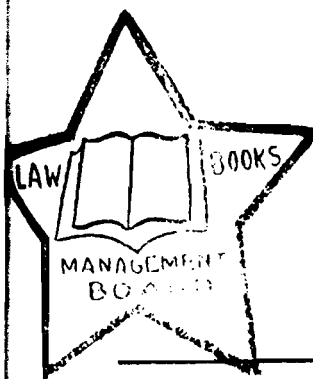
R. Shaha

- (m) The installation and maintenance of lights on the private property in the neighbourhood of aerodromes or on or in the neighbourhood of air-routes by the owners or occupiers of such property, the payment by His Majesty's Government for such installation and maintenance and the supervision and control of such installation and maintenance, including the right of access to the property for such purposes;
- * (n) Specification of terms and conditions to be fulfilled for the construction or set up of any building, house, shade, tower, post etc. in the neighbourhood of the aerodrome or on the air-routes or in the lands within the Specified Boundary or the prohibition of the construction or setting up or increasing the height of the building, house, shade, tower, post, tree or any thing in more than the specified heights or dismantling or pulling up or cutting of such existing building,

* Amended by Civil Aviation (Amendment) Act, 2023 (1966).

house, shade, tower, post, tree etc. absolutely or partially for the removal or any kind of obstacles for the entry of aircrafts in the airodrome;

- =(o) The method and the authority for determining the compensation amount and the provisions for giving compensation to such person whose house, building, shade, tower etc. shall be dismantled absolutely or partially pursuant to the rules published under clause (n);
- (p) The signals to be used for purposes of communication by or to the aircraft and the apparatus to be employed in signalling;
- (q) The prohibition and regulation of the carriage in the aircraft of any article or substance specified by His Majesty's Government;
- (r) The ordinary measures to be taken for the purpose of ensuring the safety of life;



= Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973) and the previous clauses from (n) to (u) are re-arranged as clauses from (p) to (w) respectively.

B. Thapa

- (s) The issue and maintenance of log-books;
- (t) The manner and conditions of the issue or renewal of any licence or certificate under this Act or the rules made there-under, the examinations and tests to be undergone in connection therewith, the form, custody, production, endorsement, cancellation, suspension or surrender of such licence or certificate, or of any log-book;
- (u) The fees to be charged in connection with any inspection, examination, test, certificate or licence issued or renewed under this Act;
- (v) The recognition for the purposes of this Act, of licences and certificates issued elsewhere than in the Kingdom of Nepal relating to the aircraft or to the qualifications of persons employed for the manufacture, operation, repair or maintenance of the aircraft;
- (w) Conducting the rescue operation and the investigation of the aircraft;

■ Amended by Civil Aviation (Second Amendment) Act, 2030 (1973).

■ *Prima B. Thapa*

- :: (w1) Specification of the requirement of aeronautical charts for the visual and instrumental flight, preparation and use of such charts, establishment and operation of communication service and alerting service relating to the flight for giving information relating to the climate for the flight;
- :: (w2) Specification of the unit of measurement to be used relating to the air communication and the provisions and procedures of the exchange of the means relating to such communication to be raised to the specified standard;
- :: (w3) Controlling of the sound of the aircraft and checking of the pollution of environment to be caused by the aircraft;
- :: (w4) Specification of the work, duty, flight time, resting time and leave of the pilots of the aircraft;

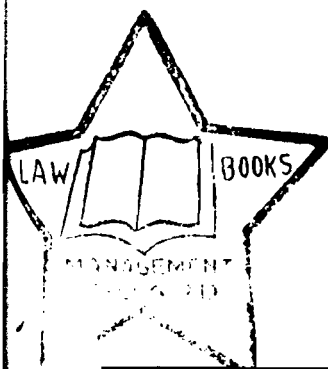
:: (w5) Specification of the minimum requirements relating to the health for receiving the licence and the renewal of such licence pursuant to clause (1);

||| (x) Any matter subsidiary or incidental to the matters referred to in this sub-section.

4. Power of His Majesty's Government to issue orders in special situation : (1) His Majesty's Government may, if it deems necessary for the public safety or tranquility, do as follows by an order published in the Nepal Gazette:-

(a) To cancel or suspend all or any licences issued under this Act, subject to such conditions, if any, specified in such order as His Majesty's Government may have thought fit and if no conditions are specified therein, without any condition;

(b) To prohibit the flight of all or any aircraft or class of aircraft over the whole or any portion of the Kingdom of Nepal subject to such conditions, if any, specified in such

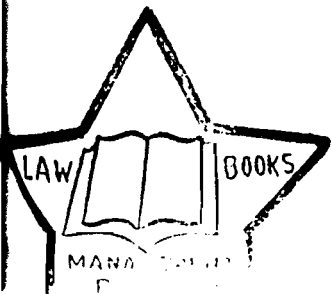


:: Inserted by Civil Aviation (Third Amendment) Act, 2034 (1977).

||| Amended by Civil Aviation (Second Amendment) Act, 2030 (1973).

order as His Majesty's Government may have thought fit and if no conditions are specified therein, without any condition or to regulate in such manner as may be specified in the order;

- (c) To prohibit or regulate either with condition or without any condition, the erection, maintenance or use of any aerodrome, aircraft, factory, flying school or club or place where aircraft are manufactured, repaired or kept or any description thereof;
- (d) To direct that any aircraft or class of aircraft or any aerodrome, aircraft factory, flying-school or club, or place where the aircrafts are manufactured, repaired or kept, together with any machinery, plant, material or things used for the operation, manufacture, repair or maintenance of the aircraft shall be delivered, either forthwith or within a specified time, to such authority and in such manner as may be specified in the order, to be at the disposal of His Majesty's Government for the public service.

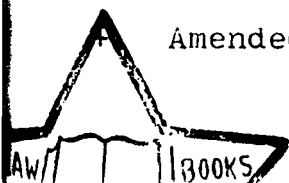


(2) Any person who suffers direct injury or loss by reason of any order made under clause (c) or (d) of sub-section (1) shall be paid such compensation as may be determined by such authority as His Majesty's Government may appoint in this behalf.

(3) His Majesty's Government may take or authorise such steps to be taken to secure compliance with any order issued under sub-section (1) as appear to it to be necessary.

+(4) If any person does not comply with or does any act in contravention of an order issued under sub-section (1) he shall be punishable with imprisonment for a period which may extend to three years or with fine which may extend to five thousand rupees or with both.

5. Power of His Majesty's Government to make rules for investigation of accidents : (1) His Majesty's Government may make rules providing for the investigation of any accident arising out of or in the course of the navigation in or over the Kingdom of Nepal of any aircraft, or anywhere of aircraft registered in the Kingdom of Nepal. Rules shall be effective only after their publication in the Nepal Gazette.



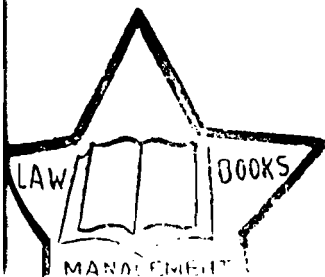
■(2) Without prejudice to the generality of the power conferred by sub-section (1), the following matters may be provided in those rules :-

- (a) Notice to be given of any accident, the format of such notice and the person sending such notice;
- (b) To apply the provisions of the prevailing Nepal Law relating to the investigation of accidents either with or without any modification for the purpose of such investigation of accidents;
- (c) To prohibit pending investigation access to or interference with the aircraft to which an accident has occurred, and to authorise any person so far as may be necessary for the purposes of an investigation to have access to examine, remove, take measures for the preservation of or otherwise deal with any such aircraft;

- (d) To authorise or require the cancellation, suspension, endorsement or, surrender of any licence or certificate granted or recognised under this Act when it appears on an investigation that the licence ought to be so dealt with, and to provide for the production of any such licence for such purpose.

6. Power to detain the Aircraft : (1) The authority authorised in this behalf by His Majesty's Government may detain any aircraft in the following condition :-

- (a) If having regard to the nature of an intended flight there is any doubt that the flight of such aircraft would involve danger to person in the aircraft or to any other persons or to the property of any person, or
- (b) If it is deemed that such detention is necessary to secure compliance with any of the provisions of this Act or the rules applicable to such aircraft; or such detention is necessary to prevent a contravention of any rule made under clause (j) or (k) of sub-section (2) of Section 3.



(2) His Majesty's Government may make rules regulating all the matters incidental or subsidiary to the exercise of the power conferred by sub-section (1). Those rules shall be effective only after their publication in the Nepal Gazette.

7. Power of His Majesty's Government to make rules for protecting the public health : His Majesty's Government may make rules for the prevention of danger arising to the public health by the introduction or spread of any infectious or contagious disease from the aircraft arriving at or being at any aerodrome and for the prevention of the conveyance of infection or contagion by means of any aircraft leaving an aerodrome. Those rules shall be effective only after their publication in the Nepal Gazette.
8. Special Powers for protecting the public health : (1) If His Majesty's Government is satisfied that the Kingdom of Nepal or any part of it is visited by or threatened with an outbreak of any dangerous epidemic disease, and that the ordinary provisions of the prevailing laws are insufficient for the prevention of danger arising to the public health through the introduction or spread of the disease by the agency of the aircraft, His Majesty's Government may take or cause to take such measures as it deems necessary to prevent such danger.

= (2) In order to fulfill the objectives of sub-section (1), His Majesty's Government may issue necessary orders by a notification published in the Nepal Gazette.

9. Penalty for Act in contravention of rule made under this Act : Any person who contravenes any provision of any rule made under Section 3, Section 6, Section 7 and Section 8 shall be punishable with imprisonment for a period which may extend to three months or with fine which may extend to one thousand rupees or with both.

+ 9A. Offence against the security of the aircraft or air navigation and penalty : (1) Any following act shall be the following offence :-

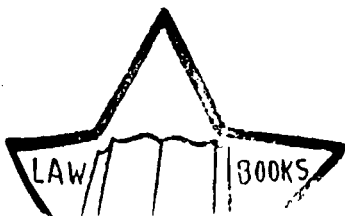
(a) In case any person who on board an aircraft in flight unlawfully, by force or threat

= Amended by Civil Aviation (Third Amendment) Act, 2034 (1977).

+ Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973) and this Section came into force on the date 2043/1/15 (April 28, 1987).

thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft, commits an offence of unlawful seizure of aircraft and hi-jacking;

- (b) In case any act of bloodshed is carried out against any person on board an aircraft in flight, and such act is likely to endanger the safety of that aircraft, offence against the safety of air navigation;
- (c) In case an aircraft in service is destroyed or caused damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight, offence against the safety of air navigation;
- (d) In case any person places or causes to be placed on aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it

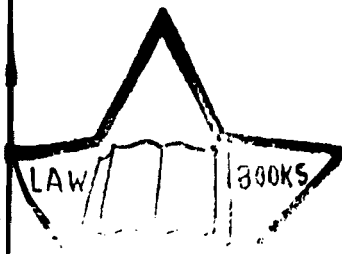


incapable of flight, or to cause damage to it which is likely to endanger its safety in flight, commits an offence against the safety of aircraft;

- (e) In case any person destroys or damages grounded aircraft or air navigation facilities or interferes with their operation, commits an offence against the safety of air navigation;
- (f) In case any person communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight, commits an offence against air navigation.

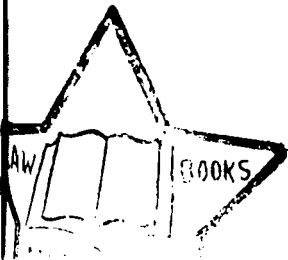
(2) To attempt to commit offence pursuant to subsection (1), to be accomplice in committing or attempting to commit such offence shall also be considered an offence under this Section.

- (3) (a) One who commits the offence of unlawful seizure of the aircraft and hi-jacking



shall be punishable with imprisonment for life, one who attempts to commit or becomes accomplice to such offence shall be punishable with imprisonment for life or with imprisonment for a period which may extend from fifteen to twenty years.

- (b) One who commits the offence against the safety of air navigation shall be punishable with imprisonment for life or with imprisonment for a period which may extend from fifteen to twenty years, one who attempts to commit or becomes accomplice to such offence shall be punishable with imprisonment for life or with imprisonment for a period which may extend from ten to twenty years.
- (c) Notwithstanding any thing contained in clause (a) and (b), in case there occurs the death of any other person on board an aircraft or the aircraft itself is destroyed as a result of the offence, the person committing the offence shall be punishable with imprisonment for life and



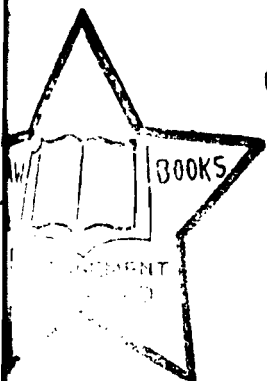
the accomplice shall be punishable with imprisonment for life or with imprisonment for a period which may extend from fifteen to twenty years and the properties of the offender and the accomplice shall also be confiscated.

+ 9B. Aircraft in flight or in service :

- (a) An aircraft is considered to be in flight from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation.

Provided that, in the case of a forced landing, the aircraft shall be deemed to be in flight until the competent authorities take over the responsibility for the aircraft and persons and property on board.

- (b) An aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight and until twenty four hours after landing. The period of service shall, in any event,



+ Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973) and this Section came into force on the date 2043/1/15 (April 28,

extend for the entire period during which the aircraft is in flight pursuant to clause (a).

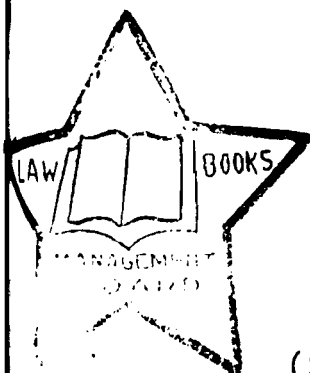
+ 9C. Conditions for the application of Section 9A : Provision of Section 9A shall apply in the following conditions :-

- (1) In the case, the aircraft is engaged in an international or domestic flight,

Provided that, in the case of the aircraft registered in any state other than Nepal, the following conditions should be present :-

- (a) The place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the state of registration of that aircraft, or
- (b) The offence is committed in the territory of a state other than the state of registration of the aircraft.

- (2) In the case of offence committed against the air navigation facilities.

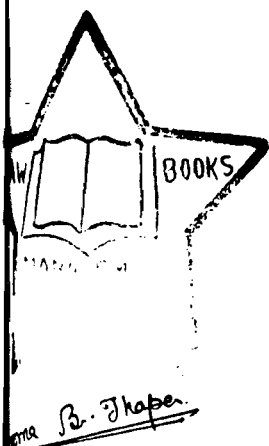


+ Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973) and this Section came into force on the date 2043/1/15 (April 28,

Provided that, if such facilities are in the foreign country, such facilities must have been used in international air navigation.

+ 9D. Jurisdiction : * (1) The court of the Kingdom of Nepal shall have jurisdiction over the offences under Section 9A in any of the following conditions :-

- (a) When the offence subject to this Act is committed within the territory of the Kingdom of Nepal;
- (b) When the offence is committed against or on board aircraft registered in the Kingdom of Nepal;
- (c) When the aircraft on board in which the offence is committed lands in the territory of the Kingdom of Nepal with the alleged offender still on board;
- (d) When the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such



+ Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973) and this Section came into force on the date 2043/1/15 (April 28,

place of business or permanent residence
within the Kingdom of Nepal.

(2) The court of the Kingdom of Nepal shall have jurisdiction over the offences under Section 9A which may be committed anywhere except in the conditions contained in sub-section (1), if such alleged offender is present within the Kingdom of Nepal and is not extradited to any state pursuant to this Act or any extradition treaty to which Nepal is a party.

- + 9E. Power to Arrest : (1) Having reason to be believed or witnessing the offences under Section 9A, which is committed or likely to be committed and the offender or accused being identified, the aerodrome officials, crew members, officials of the concerned air transport service, officials of police or Royal Nepalese Armed Forces, security officials or any other person may arrest the offender or the accused and immediately after the arrest they must deliver him to the police.

Provided that, if there is a danger for life of the passengers or other persons or it is likely to occur great damage to the aircraft or air navigation facilities while

arresting such offender or accused, other persons except police and security official must proceed to arrest only by taking permission of the police or security officials.

(2) The aerodrome officials and police or security officials may call for help to armed police, security officials and Royal Nepalese Armed Forces or other government and nongovernment persons for the arrest pursuant to sub-section (1) and it shall be the duty of all to render help when such help is being called for.

(3) If the offender or accused arrested pursuant to this Section is a national of a foreign state, he shall be assisted in communicating immediately with the nearest appropriate representative of the state of which he is a national. The notice of such arrest and the findings after completing the preliminary inquiry indicating whether it intends to exercise jurisdiction of this Act or not should be promptly informed to the concerning states.

+ 9F. The offender or accused may be extradited : (1) Notwithstanding anything contained in the Extradition Act, 2020 (1963), His Majesty's Government may extradite the alleged offender

+ Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973 and this Section came into force on the date 2043/1/15 (April

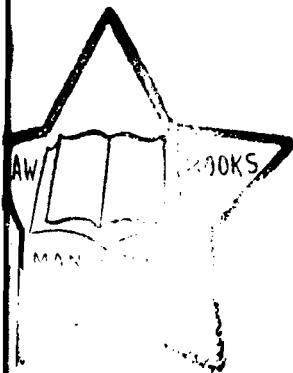
as practicable without any obstacle.

+ 9H. Jurisdiction under other Nepal Law : Notwithstanding anything contained, in relation to the punishment and proceedings of the offences under Section 9A, in this Act, the use of criminal jurisdiction received under prevailing law shall not be considered to be excluded or limited.

+ 9I. Recognition of international Conventions relating to the suppression of unlawful interference in the air service : (1)
In case His Majesty's Government becomes party to any of the following Conventions, it may issue an order mentioning the date of commencement of such Convention and other matters that may be necessary for implementing such Convention in the Kingdom of Nepal and such order shall be published in the Nepal Gazette.

(a) Convention on offences and certain other acts committed on board aircraft, Tokyo, 1963.

(b) Convention for the suppression of unlawful seizure of aircraft, Hague, 1970.



+ Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973) and this Section came into force on the date 2043/1/15 (April 28, 1987).

(c) Convention for the suppression of unlawful acts against the safety of civil aviation, Montreal, 1971.

(2) The order issued pursuant to sub-section (1) shall be considered as a part of this Act.

10. Penalty for flying aircraft in such a manner that may cause danger : Any person who knowingly flies any aircraft in such a manner that may cause danger to any person or property of any person lying on land or water or in the air or in such a manner that may cause obstacle to the army or aircraft of His Majesty's Government, shall be punishable with imprisonment for a period which may extend to six months or with fine which may extend to four hundred rupees or with both.

* 10A. Penalty for entering into the restricted area without taking permission : (1) His Majesty's Government may by a notification published in the Nepal Gazette, declare a specific area of any aerodrome prescribed in the same notification, as a restricted area. After such declaration, it shall be the responsibility of the Chief Official of the

concerned aerodrome to display such notification in the main spots of public movement around the restricted area.

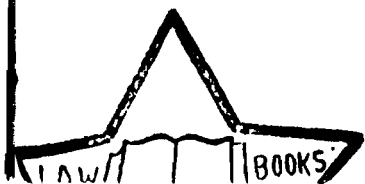
(2) No person shall, without taking permission of the Chief Official of the concerned aerodrome, enter into the area declared as a restricted area pursuant to sub-section (1).

Provided that, in case the Chief Official of the concerned aerodrome, deeming it appropriate, has displayed notification permitting the movement of the public in the restricted area for some period in some time, it shall be considered that the permission is received to enter into such restricted area for that time for the purpose of this sub-section.

(3) Person entering into the restricted area in contravention to sub-section (2), shall be punishable with fine which may extend to two hundred rupees by the order of the Chief Official of the concerned aerodrome.

* 10B. Search of body or goods of passenger or any other person :

* Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973).



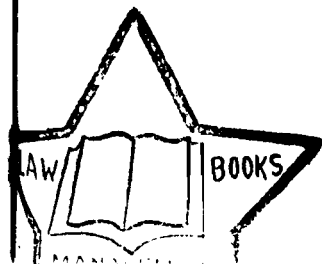
(1) For the prevention of offences under Section 9A the Chief Official of any aerodrome or the employee authorised for such work or police or security official may search the body and goods of the passengers before or after boarding the aircraft ready for the flight, and any scientific means and appliance may be used in such search.

Such search may also be carried out to crew of the aircraft and all workers including officials of the air transport boarding or going near to the aircraft for the purpose of arrangement of such flight.

(2) Any passenger or person denying to be searched pursuant to sub-section (1) may be prevented from boarding the aircraft or going near to it.

(3) In case any gun (of all kinds), gun looking as original or illusive duplicate gun, other injurious weapons (including sword, Khukuri, dagger) or explosives (including bomb, grenade, shots, gunpowder) are discovered upon the search of the passengers and crew pursuant to sub-section (1), following steps shall be taken:-

(a) If such gun or explosives are illegal, such passengers or persons shall be delivered to the police for the legal proceedings.



(b) Even if such gun, duplicate gun, other injurious weapons or explosives are not illegal, if it is tried to hide them without giving information upon an inquiry about it, the Chief Official of the aerodrome or the employee authorised for such work or police or security official may, if he deems it appropriate, permit to carry such original or duplicate gun, injurious weapons or explosives through the Pilot-in-command or give access only to such passenger or crew by preventing such weapons to be carried or give access to such passenger or crew or permit to carry such gun, weapons or explosives, if he is satisfied that the offensive intention is not found upon the inquiry made by stopping the passenger or crew.

(4) If an information is received or there is reason to believe that any person with an intention to commit criminal offences under Section 9A or under other

Prevailing Nepal Law, has been entered or is about to enter into the aerodrome or any restricted area of it carrying any kind of gun, duplicate gun, injurious weapons or explosives, the Chief Official or the employee authorised by him for such work or security official or police or army official stationed therein for the security of the aerodrome may without any warrant search the body and accompanied goods of such person and in the gun, other weapons or explosives are discovered, he shall deliver it to the police for the proceedings upon necessary inquiry.

(5) The official shall not have any legal liability towards any body for the delay of flight time of the aircraft or any loss occurred therein due to preventing or stopping to any person from boarding the aircraft or going near to it or any restricted area of the aerodrome, which he has done in good faith under this Section in order to comply with his duty.

= Explanation : For the purpose of this Section, the word "Crew" shall include Flight Engineer, Radio Officer, Flight Navigator, Air Hostess, Cabin Attendant and Purser.

= Inserted by Civil Aviation (third Amendment) Act, 2034 (1977).

11. Penalty for abetment of offence and attempted offence :

In case any person abets the commission of any offence punishable under this Act or Rules made thereunder or attempts to commit such offence, and in such attempt does any act towards the commission of the offence shall be liable to the punishment provided for the offence.

= 12. Officer for hearing of complaints and procedure for such hearing : (1) The District Court shall have the power to hear and decide the cases under this Act.

(2) The District Court while deciding the cases, may issue an order that the aircraft or article or both related to the offence committed against the Rule made under clause (k) or (q) of sub-section (2) of Section 3 and the Order issued under sub-section (1) of Section 4, shall be forfeited to His Majesty's Government.

OK (3) The District Court shall, in respect of hearing cases relating to the offences under Section 9A, adopt the procedure laid down in + Special Court Act, 2031 (1974).

= Amended by Civil Aviation (Third Amendment) Act, 2034 (1977).

+ Nepal Special Court Act, 2013 (1957) was replaced by Special Court Act, 2031 (1974) from the date 2031/6/20 (Oct.6, 1974).

(4) An appeal shall lie to the Zonal Court against the decision made by the District Court in accordance with sub-section (1) or (2) within thirty five days of such decision.

- + 12A. Special Court may be Constituted : Notwithstanding anything contained in Section 12, His Majesty's Government may constitute Special Court under the Special Court Act, 2031 (1974) for hearing and deciding the cases relating to offences committed under Section 9A.
- 13. Power to apply Nepal Law relating to Custom : His Majesty's Government may, by notification published in the Nepal Gazette, declare that any or all of the provisions of the prevailing Nepal Law relating to the export or import of goods shall with such modifications and adaptations as may be specified in the same notification, apply to the import and export of goods by air ways.
- 14. Bar on certain suits : No civil suit shall be proceeded in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather and all the circumstances of the case is

reasonable, or by reason only of the ordinary incidents of such flight.

14A. His Majesty's Government to be Complainant : His Majesty's Government shall be complainant in the cases under Section 9A.

15. Saving for acts done in good faith : No suits, prosecution or other legal proceedings shall lie against any person for anything done in good faith under this Act.

= 16. Non-applicability of the Act : Nothing in this Act or in any Order or Rule made there^runder shall apply to the private aircraft of His Majesty the King or the aircraft of His Majesty's Government or + Royal Nepalese Armed Forces.

Inserted by Civil Aviation (Second Amendment) Act, 2030 (1973).

= Amended by Civil Aviation (Second Amendment) Act, 2030 (1973).

+ "Royal Nepalese Armed Forces" by the Second Amendment of the Constitution of Nepal.

Note : The following words are substituted by the following words by the Civil Aviation (Third Amendment) Act, 2034(1977):-

"Kingdom of Nepal" in place of "Nepal State".

APPENDIX B.

English Translation



CIVIL AVIATION RULES, 2019
(1962)

Civil Aviation Rules, 2019 (1962)

Date of the publication
in the Nepal Gazette

2019/4/29 (Aug.14, 1962)

Amendment

- | | |
|--|--------------------------|
| 1. Civil Aviation (Amendment)
Rules, 2019 (1962) | 2020/2/27 (Aug.15, 1963) |
| 2. Civil Aviation (Amendment)
Rules, 2021 (1964) | 2021/4/19 (Aug. 4, 1964) |
| 3. Civil Aviation (Second Amendment)
Rules, 2028 (1971) | 2028/9/26 (Jan.10, 1971) |

In exercise of the power conferred by Section 3 of the Civil Aviation Act, 2015 (1959), His Majesty's Government has made the following rules.

CHAPTER - 1

Preliminary

1. Short title and Commencement : (1) These rules may be called the "Civil Aviation Rules, 2019 (1962)"

(2) These Rules shall come into force from the date of their publication in the Nepal Gazette.

2. Definitions : Unless the subject or the context otherwise requires, in these Rules :-

- + (a) "Chief Engineer" means the Chief Engineer of the Department of Civil Aviation of His Majesty's Government and it also includes the Director in case there is Director instead of Chief Engineer.
- (b) "Convention" means the Convention on International Civil Aviation, 1944 signed in Chicago on December 7, 1944.
- (c) "Flight Crew" means a licensed crew member charged with duties relating to the operation of an aircraft.

+ Amended by Civil Aviation (Second Amendment) Rules, 2028 (1971).



CHAPTER - 2

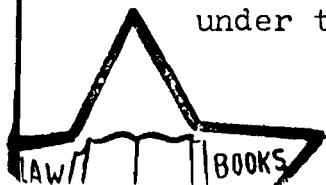
Registration and Marking of Aircraft

3. Registration of Aircraft : (1) The Chief Engineer shall keep a register in his Department for the registration of aircrafts and shall issue certificates after the registration subject to these Rules, in case any owner of aircraft comes therein to register his aircraft.

(2) No aircraft shall be registered under these Rules, which is registered in the other country at the moment.

(3) No aircraft other than the aircraft of Nepalese citizen or corporate body registered or established and having its head office in the Kingdom of Nepal and having more than fifty percent members of the Board of Directors as Nepalese citizen shall be registered under this Rule without the permission of His Majesty's Government.

(4) The aircraft registered issuing a certificate under these Rules shall be considered as Nepalese aircraft.

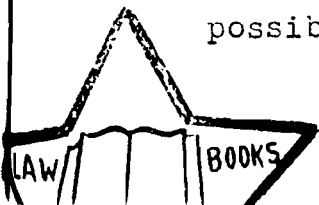


4. Change in ownership : (1) The certificate of the registration of the aircraft shall be invalid in the event of any change in the ownership of the aircraft. The person selling or transferring the aircraft shall, within fourteen days, inform the date of purchase, sale or transfer of the aircraft along with the name and address of new owner and submit the certificate of registration to the Chief Engineer.

(2) Upon the application of the new owner, the Chief Engineer shall register his name as the owner of the aircraft and issue a new certificate.

(3) The owner of Nepalese aircraft shall not sell or transfer his aircraft to be used in other places except in the Kingdom of Nepal without the permission of His Majesty's Government and even if it is sold or transferred, it shall be invalid.

5. Cancellation of Registration : When a Nepalese aircraft has been destroyed or permanently withdrawn from the use within the Kingdom of Nepal and taken back to other places, the owner of the aircraft shall, as soon as possible, notify accordingly and submit the certificate



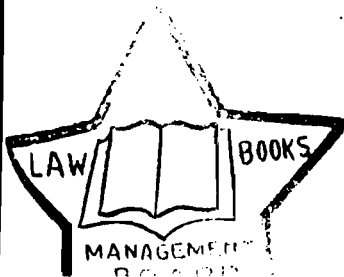
S. Shaha

of registration to the Chief Engineer and upon such submission, the certificate of registration shall be cancelled and necessary particulars thereof shall be mentioned in the aircraft register.

6. Nationality Marks : Nepalese nationality mark of Nepalese aircraft shall be 9N in the figure and letter and after the nationality mark there shall be a hyphen(-) and after that there shall be a registration mark 9N - AAA. The Chief Engineer shall have the power to give such nationality mark and registration mark to the aircrafts.

Provided that, in the Royal Aircraft after the nationality mark there shall be a hyphen(-) and a mark of two letters RF and at the end of that there shall be a figure of one like 9N-RF1.

7. Place for keeping the Marks : The nationality registration marks of the aircraft shall be kept in such place and form as prescribed in the Schedule of these Rules.



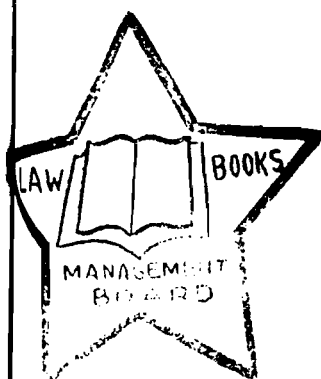
Purna B. Thapa

CHAPTER - 3

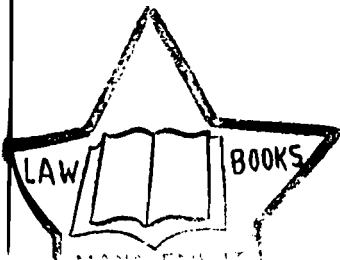
Issuing Licence to the Flight Crew

+ 8. Licence rating and Certificate issuing Power : (1) The Chief Engineer shall have the following power subject to these Rules :-

- (a) To issue the certificate of aircraft registration,
- (b) To transfer the registration of the aircraft,
- (c) To issue the Certificate of Airworthiness,
- (d) To issue the Radio Mobile Licence,
- (e) To issue the Student licence and private Licence,
- (f) To issue the Provisional Licence or Temporary or Restricted Licence,
- (g) To issue the aircraft and aircraft Radio Maintenance Engineer's Licence,



- (h) To issue the Commercial Pilot's Licence,
- (i) To issue the Senior Commercial Pilot's Licence,
- (j) To issue the Air Transport Pilot's Licence,
- (k) To issue the Flight Engineer's Licence,
- (l) To issue the Flight Radio Operator's Licence,
- (m) To issue the Flight Radio Telephone Operator's Licence,
- (n) To issue the Flight Navigator's Licence,
- (o) To grant the aircraft Rating of more than one type,
- (p) To grant the Instrument Rating,
- (q) To grant the Instructor and Assistant Instructor Rating,

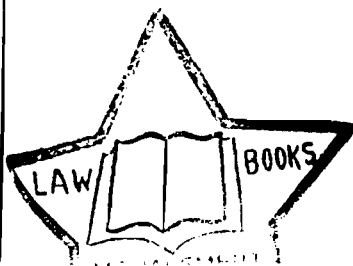


(r) To conduct any type of Technical Examination relating to aircraft,

(s) Renew the Licence, Rating and Certificate mentioned in this sub-rule.

(2) The period of the following licence or certificate to be given under sub-rule (1) shall be as follows:-

- (a) Two years for the licence mentioned in Clause (e),
- (b) One year for the certificate mentioned in Clause (c) and licence mentioned in Clause (d), (g), (h), (k), (l), (m) and (n),
- (c) Six months for the licence mentioned in Clause (i) and (j),
- (d) Among those mentioned in Clause (f), four months for the provisional licence, one month for the temporary certificate and for the restricted licence until the period of such type of licence for



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which type of licence such restricted
licence is received.

(3) In case the period is not specified while
granting rating under this Rule, the period of rating
shall be valid up to the period of the licence relating
to which such rating is granted.

(4) The following licences shall not be issued to
any person without attaining the following ages :-

(a) For the Student pilot's

Licence and private Pilot's

Licence -- -- -- -- -- Seventeen
Years

(b) For the Commercial Pilot's

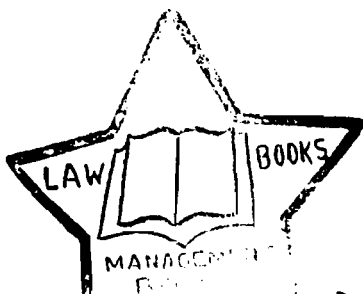
Licence, Flight Radio

Operator's Licence and

Radio Telephone Operator's

Licence and Radio Maintenance

Engineer's Licence -- -- -- Eighteen
Years

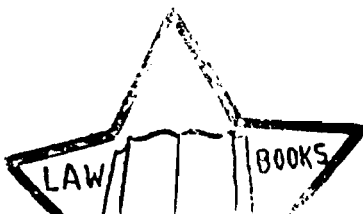


(c) For the Senior Commercial
Pilot's Licence, Air
Transport Pilot's Licence,
Flight Engineering Licence,
Flight Navigator's Licence
and Aircraft Maintenance
Engineer's Licence -- -- -- Twenty-one
Years.

9. Validation of the Licence issued by the Member State :

(1) The Chief Engineer may validate for the remaining period, the Licence or rating granted by the competent authority of any Member State of the International Civil Aviation Organization. In case the Chief Engineer has specified any limit or restriction, while granting the certificate of validation, such licence or rating shall be valid up to that period subject to such limit or restriction.

(2) Certificate of such licence or rating should be kept by attaching with the licence and such certificate shall be considered as a part of such licence or rating up to the valid period.

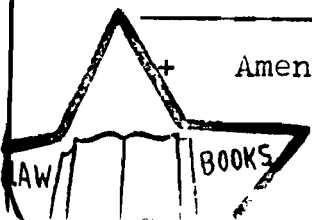


10. Qualifications required for receiving the Licence and Rating : + (1) The knowledge, experience, skill and physical fitness required for receiving the following Licences and Ratings and the privileges related therewith shall be as specified in the Chapter - 2 and 3 of the Schedule - 1 of the Convention :-

- (a) Student Pilot's Licence,
- (b) Private Pilot's Licence,
- (c) Commercial Pilot's Licence,
- (d) Senior Commercial Pilot's Licence,
- (e) Airline Transport Pilot's Licence,
- (f) Flight Engineer's Licence,
- (g) Flight Radio Operator's Licence,
- (h) Instrument Rating.

(2) The qualifications required for receiving the Restricted Commercial Pilot's Licence and the privileges related therewith shall be as follows :-

Amended by Civil Aviation (Amendment) Rules, 2019 (1962).



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(a) Knowledge : Equivalent to that specified for the private pilot,

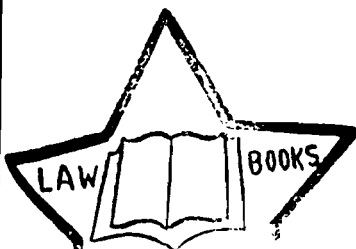
(b) Experience : Experience of at least 200 hours flight time, among which -

(1) Worked as a Pilot-in Command for at least 100 hours flight time,

(2) Worked as a Pilot-in Command in a cross-country flight up to 20 hours flight time having a flight of at least 300 miles.

(3) Having at least 10 hours instrument type, among which have ⁵ hours instrument flight type.

(c) Skill : The applicant shall have demonstrated his competency in general and emergency flying tests on the type of aircraft to which the licence is being requested.



(d) Physical fitness: The physical fitness shall be equivalent to that specified for the Commercial Pilot's Licence.

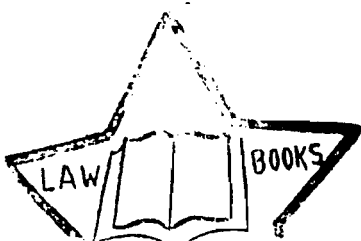
(e) Privileges : The privileges of the holder of a Restricted Commercial Pilot's Licence shall be as follows :-

(1) To exercise all the privileges of a private Pilot, and

(2) To act as Pilot-in-Command of an aircraft having an all-up-weight not exceeding five thousand pounds only within the Kingdom of Nepal, relating to the operation of non-scheduled air transport.

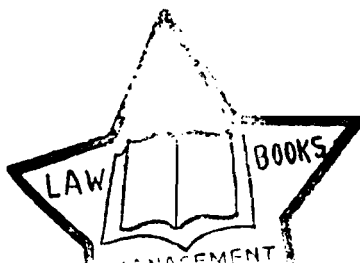
(3) The qualification required for receiving the Flight Radio Telephone Operator's Rating and the privileges related therewith shall be as follows :-

(a) Knowledge : Certified as having full knowledge of the following things from the examination relating to such things:-



M. Thapa

- (1) Civil Aviation Rules, Orders and Directives relating to the work and duty of Flight Radio Telephone Operator,
 - (2) Government recognised informations and publications relating to radio-telephone operating practices and procedure.
- (b) Skill : He must have demonstrated his competency to do the following things :-
- (1) To operate and maintain the controls of aeronautical radio telephone transmitter and receiver,
 - (2) To receive the message sent by speech and to send message by speech.
- (c) Privileges : The holder of a Flight Radio Telephone Operator's Rating shall have the right to operate radio-telephone on an



P. B. Shaha

aircraft for the purpose of communication
or controlling in the flight-route.

11. Exemption : In relation to any applicant having been qualified as a flight crew member in any Air Force or having experience and technical knowledge, relating to government recognized flight, in Civil Aviation, the Chief Engineer, in case he deems necessary to exempt him all or any requirements relating to licence or rating in view of his experience, technical knowledge and skill, and in case the chief Engineer has observed that he has completed satisfactorily any special examination or test desired by him all or any requirements of licence or rating in relation to such applicant may be exempted.



Panna S. Thapa

CHAPTER - 4

Airworthiness

12. Certificate of Airworthiness : (1) In case a Certificate of Airworthiness has been issued to any aircraft by the authority of any Member State of International Civil Aviation Organization and if the certificate is still valid, and if it is shown to the satisfaction of the Chief Engineer in the airworthiness of such aircraft, he may issue certificate by validating such certificate and if there has been specified any limit or restriction while issuing such certificate, the Certificate of Airworthiness shall be valid subject to such limit or restriction.

= (2) Until the standard of airworthiness to be valid in the Kingdom of Nepal is specified by His Majesty's Government, if the certificate is renewed or extended by the same authority of the State having relation with His Majesty's Government, which has issued the Certificate of Airworthiness, for the period of such renewal or extended period or if the Certificate of Airworthiness is issued by the registered Air works of any other state and if it is shown to the satisfaction of the Chief Engineer in relation

to such airworthiness, he may, renew such certificate or extend its period.

(3) Certificate of recognition should be kept by attaching with the Certificate of Airworthiness and such certificate shall be considered as a part of the Certificate of Airworthiness until the period is expired.

13. Maintenance of Aircraft : (1) The owner or operator of Nepalese aircraft should provide or cause to provide staff, office, materials and privileges as required for the maintenance of aircraft as approved by the Chief Engineer.

(2) The owner or operator of Nepalese aircraft shall keep a record of his each aircraft, its engine, propeller, machinery goods and materials relating to it according to the directives of the Chief Engineer.

(3) The Chief Engineer shall determine that whether the provision made for the maintenance pursuant to sub-rule (1) is sufficient or not.

(4) Every person certifying the airworthiness of the aircraft, its engine, materials and machinery to be used



in the aircraft as well as in the air navigation must have received the Aircraft Maintenance Engineer's Licence recognised by these Rules or the certificate of qualification subject to these Rules.

14. (Licensing of) Aircraft Maintenance Engineer : (1) The Chief Engineer may issue a certificate validating an Aircraft Maintenance Engineer's Licence issued by the authority of a Member State of International Civil Aviation Organization for its remaining period and in case the Chief Engineer has specified any limit or restriction in such certificate, such licence shall be valid for its remaining period subject to such limit or restriction, if any.

(2) Until there shall be arrangement by His Majesty's Government relating to the issuance of the Nepalese Aircraft Maintenance Engineer's Licence, if the licence is renewed or extended by the same authority of the Member State of the International Civil Aviation Organization which has issued such licence, the Chief Engineer may renew or extend the period of the certificate of recognition issued in relation to such licence under sub-rule (1) up to the renewed or extended period of such licence.

+Provided that the period of the certificate of recognition shall in no case exceed the period of the licence.

(3) The certificate of recognition should be kept by attaching with the licence and such certificate shall be considered as a part of such licence until the period is expired.

15. Certificate of ability : The Chief Engineer may issue a certificate of ability to a person, who has not received the Aircraft Maintenance Engineer's Licence, but is capable of doing the work and discharging the duty relating to maintenance of aircraft, its engine, materials and machinery to be used in the aircraft as well as in the air navigation.

(2) The nature and extent of the work and duty to be complied by the person receiving such certificate shall be specified in the certificate to be issued under sub-rule (1).

+ Inserted by Civil Aviation (Amendment) Rules, 2019 (1962).



CHAPTER - 5

General

16. Medical Board : (1) His Majesty's Government may constitute and establish a Medical Board for the examination of physical fitness of the persons applying for a licence of flight crew. ~~///~~

(2) Person to be the member of such board shall be qualified medical doctors recognised by His Majesty's Government.

(3) The physical examination shall be carried out according to the standard specified in the Chapter - 6 of Schedule - 1 of the Convention and the report of the physical examination should be sent to the Chief Engineer having signed on it by all the members of the Board present over there.

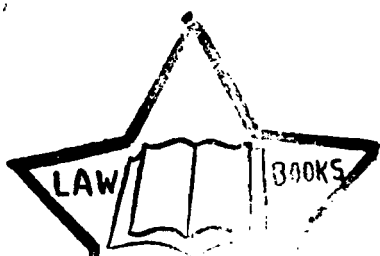
H 17. Fees : (1) The fees for the following certificates, licences and ratings to be issued according to these Rules and their renewal fees shall be as follows :-

~~///~~ Medical Board is constituted according to the notification published in the Nepal Gazette on 2020/1/9 (April 22, 1963).

11 Amended by Civil Aviation (Second Amendment) Rules, 2028 (1971)

<u>Licence or Certificate</u>	Fee for issuing certificates, licence and rating for the <u>first time</u>	Renewal fee for the certificate, licence and <u>rating</u>
	Rs.	Rs.
1. Any type of Student Pilot's Licence	Twenty five	Ten
2. Any type of Private Pilot's Licence	Thirty	Fifteen
3. Any type of Provisional Licence	Thirty	Fifteen
4. Commercial Pilot's Licence	Fifty	Twenty five
5. Senior Commercial Pilot's Licence	Sixty	Thirty

6.	Air Transport Pilot's Licence	Seventy five	Thirty
7.	Flight Engineer's Licence	Thirty	Fifteen
8.	Flight Radio Operator's Licence	Thirty	Fifteen
9.	Flight Radio Telephone Operator's Licence	Thirty	Fifteen
10.	Assistant Instructor's Rating	Thirty	Fifteen
11.	Instructor's Rating	Fifty	Twenty five
12.	Instrument Rating	Fifty	Twenty five
13.	Flight Navigator's Licence	Thirty	Fifteen



14. Registration			
Certificate	Three hundred	Fifty	
15. Certificate of			
Airworthiness	Three hundred	One	
		hundred	
16. Aircraft			
Maintenance			
Engineer's			
Licence	Fifty	Twenty	
		five	

(2) The fees for the transfer of registration of the aircraft shall be rupees one hundred.

(3) The fees for any type of technical examination to be conducted under these Rules shall be rupees fifty.

18. Operation of Aircraft : (1) No Nepalese aircraft shall be operated without fulfilling the following conditions:-

- (a) Registered under these Rules and its own nationality mark and registration mark written by painting or stuck,
- (b) Certified as airworthy and the conditions as specified in the certificate of



Airworthiness or aircraft flight manual are fulfilled,

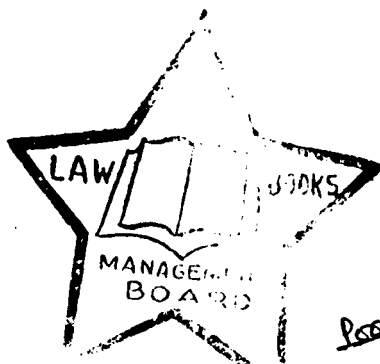
- (c) The aircraft to be operated shall be equipped with all necessary machinery and materials,
- (d) The number and type of the flight crew members have been as required and all such members have received the required licences and ratings,
- (e) The Pilot-in-Command has been satisfied in the following matters :-
 - (1) An all-up-weight of an aircraft is safe for the proposed flight,
 - (2) The goods loaded in the aircraft has been kept by balanced and safe way for the safety of the flight,
 - (3) The aircraft is safe for the flight in all respect.



(2) A non-Nepalese aircraft shall not be flown over the land of the Kingdom of Nepal without fulfilling the following requirements of the country where the aircraft is registered and except in accordance with the directives, if any, given by the Chief Engineer :-

- (a) Nationality Registration Mark,
- (b) Certificate of Airworthiness,
- (c) Number and type of crew members and licences to be hold by them,
- (d) Other documents necessary for the flight.

19. Savings : Any act or certificate, as provided for in these Rules, done or issued before the commencement of these Rules shall be considered to have been done or issued under these Rules.



Pragna B. Thapa

Schedule

Marking in the Aircraft

1. Marking : The nationality and registration marks shall be painted on the aircraft or shall be affixed thereto by any other means ensuring a similar degree of permanency. Such marks shall always be kept clean and visible.
- + 2. Wings : The marks should be kept on the lower surface. So far as is possible the marks should be placed in the middle part at equidistant from the front and posterior part of the wing. The tops of the letters shall be towards the leading edge of the wing.
3. Fuselage and Vertical surface : The marks should be kept on the both side of the fuselage between the surface of wings and tail of an aircraft or on the half leading part of the vertical surface of the tail to be visible. If such marks are kept only on the surface of the vertical part of the surface, such marks should be visible. If such marks to be kept on the verticle part of the multi-verticle tail, they should be written on the exterior part of the surface.

4. Measurement : (1) The direct letters and figures shall be in separate group of marks of equal measurement.

=(2) The height of marks remained on the wings shall be 30 centimetres (12 inches).

(3) The marks on the fuselage shall not reach to the outer lines of the fuselage.

(4) The marks on the surface of the vertical tail shall be at a distance of at least 5 centimetres (12 inches) from the both edges.

Provided that, the marks mentioned in the above Clause (3) and (4) shall not be necessary to exceed to 15 centimeter (6 inch) in height even if such marks are magnified to optimum.

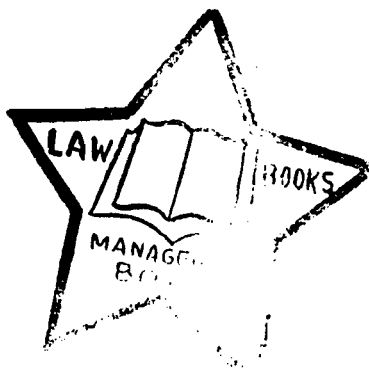
5. Type and Script of the Marks : (1) The letters shall be in capital letters of Roman script without ornamentation and the figures shall be in Arabic script without ornamentation.

(2) The width of each letter and height of the hyphen shall be two-third of such letter except the Roman letter "I" and Arabic figure "1".

(3) Each letter and hyphen shall be formed by solid lines and shall be of a colour contrasting with the background on which they appear. The thickness of these lines shall be one-sixth of the height of a letter.

(4) Each letter shall be separated from the letter which immediately precedes or follows it by a space of not less than one-quarter of the width of the individual letters. Hyphen also shall be regarded a letter for the purpose of this Clause.

6. Other Aircraft except Aeroplane : In case where the parts of the aircraft are not similar to that of an aircraft as in helicopter, the marks mentioned in this Schedule shall be kept in such a manner to be clearly visible.



Purna B. Thapa
2045/1114 (26 April, 1988)
REGION OFFICER

APPENDIX C.



CIVIL AVIATION (INVESTIGATION OF ACCIDENT)

RULES, 2024 (1967)

Civil Aviation (Investigation of Accident)

Rules, 2024 (1967)

Date of the publication
in the Nepal Gazette
2024/5/5 (Aug.21,1967)

In exercise of the power conferred by Section 5 of the Civil Aviation Act, 2015 (1959), His Majesty's Government has made the following Rules:-

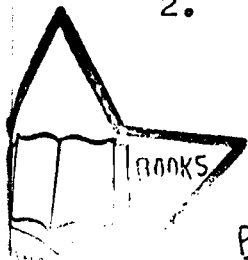
CHAPTER - 1

Preliminary

1. Short Title and Commencement : These rules may be called the "Civil Aviation (Investigation of Accident) Rules, 2024 (1967)"!

(2) These Rules shall come into force at once.

2. Definitions : Unless the subject or the context otherwise requires, in these Rules :-



Purna B. Thapa

(a) "Substantial damage" means damage which necessitates extensive repair or the replacement of the part or machinery of an aircraft.

(b) "Accident" means the occurrence of the following incident due to any kind of disorder in the aircraft between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked:-

(1) Incident causing substantial damage to the aircraft,

(2) Incident relating to the fall or burn of an aircraft or destruction of aircraft by any means,

(3) Incident, in which any person suffers death or serious injury incapacitating for descending or walking from the aircraft or the place of aircraft accident as a



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result of being in or upon the aircraft or by direct contact with the aircraft or anything attached thereto or due to the situation under the Clause (1) and (2).

- (c) "Pilot-in-Command" means the pilot responsible for the navigation, operation and safety of the aircraft during the flight time.
- (d) "Co-Pilot" means a pilot in the aircraft assisting to the pilot-in-command.
- (e) "Aircraft Owner" means the person or organization in whose name the aircraft has been registered.
- (f) "Registering State" means such state in whose register the aircraft is being registered..
- (g) "Director" means the Director of the Department of Civil Aviation of His Majesty's Government.
- (h) "Inspector" means an inspector appointed by the Director in the written form for submitting report of inquiry about the accident and this word shall include a person nominated by other State for investigating the accident relating



CHAPTER - 2

Notification of Accident

3. Notification of Accident : (1) The person or persons witnessing the accident pursuant to sub-clause (2) of Clause (b) of Rule 2 shall immediately notify the nearest aerodrome or police-post or post office or telegram or telephone office or the Office of the Zonal Commissioner about the accident.

(2) Upon the receipt of information or notice or upon the knowledge of an accident by any means within its ward, the Village Panchayat shall immediately make an investigation and the notice shall be sent to the nearest aerodrome, police-post or post office or telegram or telephone office or Office of the Zonal Commissioner as soon as possible and by ^{the} quickest means available.

(3) Immediately after the knowledge of the accident pursuant to sub-rule (1) and (2) or by any means, the place, time and other available particulars (written under the sub-rule (2) of Rule 5) shall be notified to the



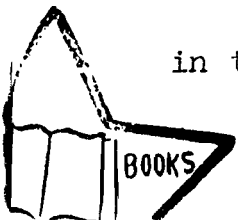
police-post, telegram or telephone or post office, nearest Office of the Zonal Commissioner and the Office of the Zonal Commissioner and aerodrome shall immediately inform the Director by ^{the} quickest means available.

(4) In case an accident occurs within the border area of the aerodrome the Chief Official of the aerodrome or the person in command of the aircraft shall send details of the accident to the Zonal Commissioner and the Director by the quickest means available.

4. Notice to be given by the Operator or Aircraft Owner : (1)
In case an accident occurs within the Kingdom of Nepal, the Pilot-in-Command, Co-Pilot or other operator shall immediately send a notice with technical details to the Director by the quickest means available.

(2) The Aircraft Owner or his representative shall immediately send a notice of aircraft accident to the Director enumerating the particulars written in the sub-rule (2) of Rule 5 as far as possible by the quickest means available.

(3) In case an accident of the aircraft registered in the Kingdom of Nepal occurs anywhere outside the Kingdom



of Nepal, the Aircraft Owner or his representative shall send a notice pursuant to sub-rule (1) and (2) to the residential diplomatic official in the concerning state, if any, and to the Director.

5. Notice to be given by the Director : (1) Upon the receipt of the notification, the Director shall immediately give such notice to His Majesty's Government. In case an aircraft registered in the foreign State involves in an accident pursuant to sub-clause (2) and (3) of Clause (b) of Rule 2, the Registering State and the residential diplomatic official of such State within the Kingdom of Nepal shall also be notified immediately.

(2) In the notification of the Director, the following particulars shall be enumerated as far as possible :-

- (a) The type, nationality and Registration Marks of the aircraft,
- (b) The date, time and place of the accident,
- (c) The name of Pilot-in-Command,
- (d) The name of the owner or the leasee, in case the aircraft is operated in lease,



- (e) The point of departure and the next point of intended landing of the aircraft,
- (f) The geographical description of the place of accident to find out the place of accident easily,
- (g) The number of the persons killed and injured in the accident and their names, if possible.

6. Notifying from time to time : (1) In case the particulars mentioned in Rule 5 relating to the accident are not received at a time, the office, official or the Director sending notice under sub-rule (2) of Rule 3, shall further notify the particulars as and when received.

(2) In case the notice is required to be given to the other foreign State pursuant to Rule 5, the decision taken by His Majesty's Government for the type of investigation of the accident to be carried out shall also be mentioned briefly in the notice and send it immediately.

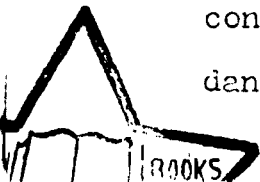
7. Particulars of the accident to be mentioned : While giving the notice, the person giving the notice shall mention the particulars pursuant to subrule (2) of Rule 5 as far as possible.

CHAPTER - 3

Preservation of the Evidence and
Investigation of the Accident

8. Preservation of the Evidence of Accident : The Director shall make necessary arrangements to prevent the further destruction of the damaged aircraft, to prohibit the entrance of the unauthorised person into the place of accident of aircraft, to protect the damaged aircraft and goods, dead bodies and other things on board the aircraft from the theft, destruction or loss and to preserve the evidences relating to the accident in as it is condition and to take, if necessary, the photographs of such evidences for their well preservation.

Provided that, the Director may issue an order to remove the damaged aircraft from the place of accident to such extent as may be necessary for extracting or bringing out the property, dead body and such other precious matters on board the aircraft in order to protect them from fire or other causes or to take them to other place of safety or to continue the air transport or to remove obstruction or danger that may cause to the public.



9. Investigation of accident and power to investigate : (1)

The Director himself may investigate any accident or may appoint an inspector for such work (investigation).

(2) The official investigating pursuant to sub-rule (1) shall be entitled to do the following things:-

- (a) To investigate by entering into the damaged aircraft or the place of accident at any time and cause to keep the aircraft and its any part or machinery in as it is condition without any movement until the completion of the investigation.
- (b) To examine, remove, conduct analytical experiment or cause to keep in as it is condition with safety or cause to do any thing which is necessary relating to the aircraft or any part of it or substance placed therein,
- (c) To cause to submit books, documents, certificates and other articles which he deems to be related with the accident and

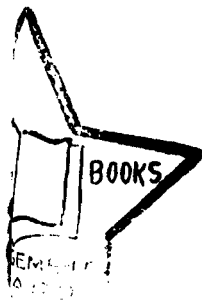


to retain such books, documents, certificates and other evidences until the completion of the investigation.

- (d) To cause to summon a person for inquiry when he deems fit and to take information or statement from him relating to such accident and cause to affix his signature on his statement mentioning his statement to be true,
- (e) To enter into any place, if necessary, for the investigation of the accident,

Provided that, one must enter into a house of some one by giving a written notice only in case the entry into a house in the course of an investigation becomes necessary.

- (f) If any statement has been taken by the Zonal Commissioner or police prior to this, such statement also shall be



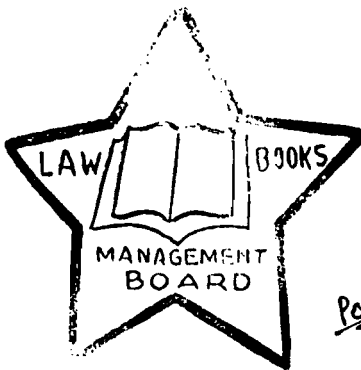
attached and kept in the form of
documentary evidence.

10. Report on Accident : The Investigation Official shall prepare a report after having investigation and enquiry relating to the accident with the detailed particulars and his opinion about the cause of accident based on the collected evidence and logics and with the recommendation along with other things to prevent such accident in the future. This report being an administrative and technical report prepared in relation to an accident shall not be used as an evidence in any civil or criminal cases.
11. Preservation of the Evidence on the request of the Registering State : In case the Registering State has requested to keep the aircraft, the goods therein and the evidences in as it is condition without disturbing them until the inspection by the authorised representative of such State, the Director shall do needful according to the request, if it is appropriate and practical to do so.

Provided that, notwithstanding anything contained above, it shall not be considered to be obstructed by this Rule to do anything pursuant to the proviso of Rule 8.



12. Release of the Aircraft or the Goods : The Director shall give or shall cause to give the aircraft or goods on board the aircraft or any part of the aircraft or machinery by lifting control over it to the Aircraft Owner or a person nominated by him in the case of an aircraft registered in the Kingdom of Nepal and to a person duly nominated by the Registering State in the case of an aircraft registered in other State, if they are not necessary for the investigation of accident or on the completion of the investigation without having any adverse effect to the provisions of Rule 8 and 11.



Poorna B. Shrestha

CHAPTER - 4

Miscellaneous

13. Power of His Majesty's Government to cause the Investigation:

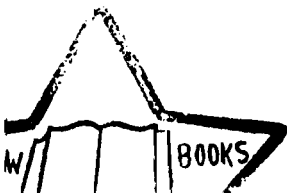
His Majesty's Government may cause to make special investigation, if it deems necessary to have detailed investigation of the accident before or after the investigation of the accident pursuant to Rule 9.

14. Commission for the Investigation of Accident : His Majesty's

Government shall constitute an Accident Investigation Commission if it wishes to have detailed investigation pursuant to Rule 13. There shall be at least 3 members in the said Commission and His Majesty's Government shall nominate the Chairman of the Commission from among them. His Majesty's Government may also depute other specialists as advisors to help the Commission.

15. Duty of the Investigation Commission : The duty of the Investigation Commission shall be to findout all details and causes of the accident as well as to submit report on finding the following particular things:-

(a) Time and place of accident,



- (b) Cause of the accident and the situation in which such accident has been occurred,
- (c) The appropriate steps to be taken by the administrative authority of the civil aviation for the security of the public and the persons working in civil aviation and to make a provision to prevent such accident in the future.

16. Report of the Accident Investigation Commission : The report of the Accident Investigation Commission shall be only administrative and technical. This report shall not be prepared with an object to relate it with any civil or criminal cases and this report shall not be produced or submitted as an evidence in any court proceedings.
17. Accident to an Aircraft Registered in other State : His Majesty's Government may permit the accredited representative and advisors of the Registering State to be present in the investigation of an accident of an aircraft registered in other State except in the Kingdom of Nepal. In case a written request is made by the Registering State to His Majesty's Government for the active participation of such



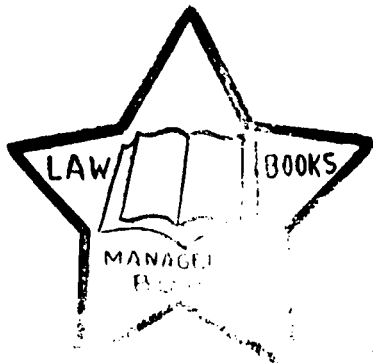
representatives in the investigation, His Majesty's Government may give permission to those representatives to participate actively.

18. Remuneration to be given to the Investigating person : In case other outer persons other than the employees of His Majesty's Government are appointed for the investigation of accident, His Majesty's Government may grant remuneration and other expenses to such persons.
19. Provisions to Search, Protect and Remove the Damaged Goods :
- (1) His Majesty's Government may give necessary privileges to enter into the Kingdom of Nepal to the person duly authorised by the Registering State to search, protect, inquire or repair the aircraft lost or involved in an accident or to preserve the damaged goods.

(2) His Majesty's Government may give privileges subject to prevailing Nepal Law to bring, in the Kingdom of Nepal temporarily, an aircraft, search tools, spare parts and goods, necessary for searching, protecting, investigating and repairing the aircraft involved in an accident and removing the damaged goods without paying costum duty or any other tax and to take back those

things after the completion of the business.

(3) In case any aircrafts, tools, spare parts and goods brought in pursuant to sub-rule (2) and aircraft involved in an accident or its parts and goods loaded on the aircraft are not taken back within 6 months of their entry into the Kingdom of Nepal, costum duty shall be levied on them subject to the prevailing Nepal Law.



Purna B. Shaha.
2045/11/14 (26 April, 1988)

SECTION OFFICER
HIS MAJESTY'S GOVERNMENT OF NEPAL
MINISTRY OF LAW & JUSTICE
LAW BOOKS MANAGEMENT BOARD