THE LEGAL STATUS OF THE AIRCRAFT COMMANDER

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DEDICATION

This paper is dedicated to all the Saudi Arabian pilots, both past and present, who have served their carrier, Saudia, so well.

ABSTRACT

The aircraft commander is responsible by law for the safety of all individuals and cargo carried aboard an aircraft. He is a prime target of terrorist attacks.

While carriers are protected by the provisions of the Warsaw Convention, or by the Warsaw Convention as amended by the Hague Protocol, the position of the aircraft commander is not as certain. Thus, damage claimants who wish to avoid the limits of liability or the time limitations in the Warsaw Convention may bring suit against the aircraft commander.

This paper attempts to discuss many of the aspects of the aircraft commander's legal personality, his liability, his responsibilities and his authority, as well as the need for an international instrument which would encompass all of the existing provisions which are, at this time, scattered about in various international agreements and many other international regulations.

SOMMAIRE

Le commandant d'aéronef est responsable, en droit, de la sécurité des personnes et des biens transportés à bord de l'appareil. Les terroristes en ont fait une cible de choix.

Alorsque la Convention de Varsovie et sa version amendée par le Protocole de La haye protègent les transporteurs, la position du commandant d'aéronef est assez incertaine. Ainsi, ceux qui subissent des dommages pourront le poursuivre directement pour éviter l'effet de la limite de responsabilité imposée par le système varsovien.

Cette thèse traite de plusieurs aspects juridiques concernant le commandant d'aéronef, comme sa responsabilité et son autorité. Elle discute aussi de la necessité d'établir un instrument international englobant toutes les règles existantes qui sont aujourd'hui dispersées dans de nombreux accords et règlements internationaux.

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INTRODUCTION

Since the dawn of civilization, the commander or guide has occupied a special place amongst the travellers, because a safe arrival to the final destination depends on his knowledge, courage and wisdom; his responsibility as the head of a small, isolated community remains the same, whether the isolation takes place in the middle of the desert, on the high seas, or in the air.

Therefore, it is no wonder that a comparison is made between the aircraft commander and the captain of a ship; in fact, there is a great similarity between their main tasks. But the speed of an aircraft and, consequently, the shorter time period of the trip, marks some differences between them. This comparison influenced the early studies on the aircraft commander's legal status.

CITEJA, following the Paris Conference of 1925, worked on the draft convention of the aircraft commander's legal status during a period that was extended over 25 years, during which the CITEJA experts were convinced that there was a need for such a convention. When their draft convention was not submitted to a diplomatic conference, as they had requested, its provisions were dismantled, and scattered over the existing international conventions. However, the Annexes to the Chicago Convention got the largest share.

In my opinion, the question which needs an answer is not whether there is a practical need for an international system of regulations or instrument covering the legal status of the aircraft commander, but whether there is a need to sort out all the provisions related to the aircraft commander from the Annexes and to gather them in an international convention, which may serve better the purpose of uniformity.

Thus, the legal status of the Annexes to the Chicago Convention need to be discussed in detail, along with the aircraft commander's liability and his major responsibilities and authority.

CHAPTER ONE: THE ORIGINS

A Glance Back at the History of the Legal Status of the Aircraft Commander

The first study of the subject of the legal status of the aircraft commander was an article published in 1891 on "la situation juridique des aeronautes en droit international" (1). In the ninety years following the publication of that article and more particularly since CITEJA began its work in the area over fifty-five years ago (in 1926) to produce a draft convention on the subject, many things have happened.

For the sake of convenience, this long span of time may be divided into three phases: 1) the early phase (pre-CITEJA); 2) the CITEJA phase; and finally, 3) the ICAO phase. Naturally, each phase deals with a certain period of time or span of years but it is difficult to point to a specific date for the beginning and final years of each phase (except for the CITEJA phase) because of developments outside of this specific area in aviation law. Historical events as well as the development of aviation technology, along with developments in public and private international law, have combined to give each of the three phases certain distinctive characteristics. The one issue which runs throughout the ninety or so span of years is

the central and dominant question of whether there is a need for a convention or international agreement on the subject of the legal status of the aircraft commander.

a) The Early Phase

This phase covers the dawn of aviation technology and the period of pre-infancy of aviation industry. Realizing the potential aviation technical development, the legal experts, in order to find solutions for expected legal problems, undertook studies in the form of a "construction juridique a priori". These studies were a "pure spéculation savante et subtile" (2), and were largely based on maritime law (3). Despite this attitude on the part of these legal experts there was little need for legal regulation especially before human flight had become subject to some degree of control (4). The legal regulations began to emerge only after the control of flight had been achieved (5). Lycklama à Nijeholt, one of the early writers, said in 1910:

> " So long as there were available only undirigible balloons, dangerous and expensive, absolutely unfit for regular traffic, aerial navigation was therefore necessarily confined to some very infrequent ascents, such as attractions at exhibitions, for pleasure trips or scientific excursions and most occasionally for military purposes, it did not create situations and relationships demanding the immediate attention of the legislator...Recent years have proved such

splendid success for aeronautics that really it seems justifiable for law to begin to take its share in the aerial labour." (6)

The most important events in aviation technology during this period were the Wright brothers' first flights in 1903 and Blériot's first international flight across the English Channel in 1909. The year 1919 is a very important one in aviation history, because in that year the first international air agreement--the Paris Convention--was concluded and the first air transport companies were formed (7).

The first international air agreement recognized the need of having an aircraft commander on board an aircraft as a leader of the aircraft community. Besides mentioning the aircraft commander in Article 12 of this Convention as the first member of the crew, its Annexes contained several provisions which covered some aspects of his legal status. These technical Annexes were considered as part of the Convention and were designed to assure uniform regulation wherever the Convention was in effect.

Under Article 25 of the Havana Convention of 1928, the aircraft commander had wider authority than that set out in the Paris Convention because under the former his authority was analogous to that of the captain of a merchant steamer, according to the respective laws of each state provided that the contracting state had not extablished appropriate regulations.

b) CITEJA Phase

The main feature of this phase is the interest in private air law. Fearing chaos due to a threatened plethora of national laws on private air law, the international organizations in 1924 passed resolutions calling upon national governments to formulate a uniform system of regulations (8). The First International Conference on Private Air Law was held at the Ministry of Foreign Affairs in Paris, from October 27 to November 6, 1925, on the initiative of the French government.

The legal basis for the existence of the International Technical Committee of Aerial Legal Experts was a motion adopted by the Paris (1925) Conference. The Conference passed a resolution which enumerated the first questions for study by the Committee. One of those questions was the "legal status of commanding officers of aircraft (9)

It was difficult for the "Comité International Technique d'Experts Juridiques Aeriens"--CITEJA--to discuss and study the problems of private air law on its agenda as one committee, therefore the problems were divided among four commissions. Besides the problem of the legal status of the commanding officer and crew the fourth commission had to study the problem of the law governing acts committed on board aircraft which has a close relation to the aircraft commander's legal status (10). The close relationship which exists between the aircraft

commander and the offences committed on board aircraft as well as the linking of the aircraft commander's legal status to the legal status of flying personnel are not artificial, but they affected negatively the process of codifying the status of aircraft commander in an international convention. During twenty-two years of activity, from the time of its formation in 1926 until its liquidation and incorporation into ICAO in 1947, CITEJA did a great deal of very important work concerning the legal status of aircraft commanders in private law (11).

The Draft Convention had to wait until 1931 when it was discussed at the 6th plenary assembly of CITEJA where it was provisionally, "à titre provisoire", adopted (12). The reason behind this reservation was not because of the material content of the draft but because it was thought desirable to contact the International Labour Organization (which also had an interest in this project) before formally submitting the Draft Convention to the French government (13).

The aftermath of the close relationship between the aircraft commander and flying personnel appeared immediately before the outbreak of World War II. Besides the Draft Convention on the legal status of the aircraft commander, (adopted provisionally), there was a Draft Convention on the status of flying personnel, for which the preliminary studies were almost finished. The idea of combining the two

drafts had been suggested but no decision had been taken (14). This idea was approved immediately after the war in CITEJA's first meeting in 1946, and it was decided also to revise the Draft Convention relating to the aircraft commander in the light of technical developments which had occurred since the adoption of the draft (15). Because of serious American and British objections against the combination of the two drafts, it was resolved, at the meeting of the Fourth Commission held in Paris during July of 1946, that the status of the aircraft commander should again be treated separately (16).

At the 13th Session held in Cairo in 1947, CITEJA decided to:

> "Charge son Secrétaire Géneral de transmettre aux Etats adhérents au Comité, et à l'O.P.A.C.I., le Projet de Convention International relatif au Statut Juridique du Commandant d'Aéronef adopté lors de la présente Session; Emet le Voeu que le dit Projet soit soumis a l'approbation d'une Conférence de Droit International Privé Aérien convoquée par les soins de l'O.P.A.C.I."(17)

Thus, CITEJA adopted the Draft Convention. It is true that CITEJA took a long time to reach this point, but it achieved its task and arrived to the natural end of its efforts.

c) ICAO Phase

The ICAO phase began when CITEJA decided, at its 16th and final Session (which took place in Montreal in May of 1947), to liquidate itself and to transfer the archives to the Legal Committee of ICAO (18). CITEJA decided before its ultimate liquidation to hand over the Draft Convention of the legal status of the aircraft commander

to ICAO (19).

An ad hoc Committee of ICAO (February, 1947) revised the text of CITEJA and gave birth to the actual text (20). The project was put on the agenda of the first General Assembly of ICAO. It was not discussed, however, and the Assembly resolved to place it on the working programme of the Legal Committee. The ICAO Legal Committee puts items on its work programme in two sections according to their priority (A and B), that is, items of great need and which required immediate decisions were placed in section A; items with less priority and which could be decided upon at a later time were put in section B and it was the destiny of the legal status of aircraft commanders to be divided into two items: the "legal status of aircraft" and the "legal status of aircraft commanders", and to be originally placed as items 4 and 5 on the work programme (21), only to float back and forth between the two parts of the work programme.

A progress report was presented to the 7th Session of the Legal Committee in Mexico (22). The Committee considered that prior to further study it would be desirable to obtain the views of the Council on:

1) the need for a convention on the legal status of the aircraft commander;

2) the technical or economic aspects of the problem. (23)

On completion of this study, comments were received from IATH, IFALPA and the United Kingdom (24).

At its 10th Session (Caracas, June/July, 1956), the Assembly decided to include the question of the legal status of the aircraft commander in Part A of the General Work Programme of the Legal Committee (25). The Subcommittee of the Legal Committee then considered the subject again. Despite that, this Subcommittee considered the question of the legal status of the aircraft commander, it recognized that it would be appropriate for it to also examine those aspects of the legal status of the aircraft commander which pertain to offences committed on board aircraft. At its 12th Session (Munich, August/September, 1959), the Legal Committee considered the matter (26). This work led to the preparation of a draft convention on offences and certain other acts committed on board aircraft.

During the 14th Session of the Assembly (Rome, August/September, 1962) when the Legal Committee had finished its work on the draft convention on offences and other acts occurring on board aircraft, the Legal Commisssion decided that the subject "legal status of the aircraft commander" be moved from Part A to Part B of the General Work Programme (27).

It is worth mentioning that the Tokyo Convention's contents, like the draft convention of aircraft commander legal status, had been

a matter of discussion for more than fifty years (28). The Toyko Convention on Offences and Certain Other Acts Committed on Board Aircraft was signed on September 14, 1963. It deals with the conflicts of jurisdiction which arise when a crime is committed on board aircraft in international flight as well as with the powers and responsibilities of the aircraft commander. Chapter III (Articles 5 to 10) deals with the powers of the aircraft commander with respect to offences against penal law and other acts jeopardizing the safety of the aircraft or of person or property thereon or good order and discipline on board. The aircraft commander may exercise his jurisdiction under these provisions when the aircraft is in "in flight" as defined in paragraph 2 of Article 5 or, in the case of a forced landing, until the competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board.

This originally secondary portion of the Convention eventually became its focal point due to the failure to achieve agreement with regard to resolution of the problem of jurisdictional conflicts (29).

Between the years 1970-1973 the Ibero American Institute of Air and Space Law, in co-operation with the IFALPA Legal Study Group, prepared a draft convention which dealt in a comprehensive manner with the legal status of the aircraft commander. The final draft was adopted in the Spanish language in September 1973 at the VIIth Congress in Seville (30).

The legal status of aircraft commanders returned to take its place in Part A of the General Work Programme of the Legal Committee according to its decision at the 20th Session of the Legal Committee (Montreal, January, 1973) (31). IFALPA became more active and sent comments on the subject to the 22nd Session of the Legal Committee (Montreal, October/November, 1976) with a proposal for early action towards the development of an international convention defining the legal status of the aircraft commander (32).

The Council considered (at its 92nd Session in November, 1977) a proposal for the amendment of Annex 6, Part 1, relating to the authority and responsibility of the pilot-in-command subjected to acts of unlawful interference. The proposal was presented by the Union of Soviet Socialist Republics. The text of the proposal was as follows:

> "13.5--Responsibility of the Pilot-in-command During Flight: The pilot-in-command shall apply the operator's programme to ensure protection against acts of unlawful interference with civil aviation until such as the appropriate authorities of the State where the aircraft is located assume responsibility for the aircraft and for the persons and property on board.
> During this period any decision taken by the pilot-in-command to safeguard the aircraft and the persons and property on board against acts of unlawful interference shall be final." (33)

The Council decided to refer the proposal to the Air Navigation Commission for study and report on the technical elements of the problem. After studying the proposal during its 86th Session in

December, 1977, the Air Navigation Commission noted that the proposal extended the authority and scope of the responsibility of the pilot-in-command (during and beyond flight time) to areas which were not of a technical nature and agreed that the existing specifications, as contained in Annexes 2 and 6, adequately covered the authority and responsibility of the pilot-in-command for all technical matters (34).

At its 93rd Session in March, 1978, the Council decided to refer the proposal to the Committee on Unlawful Interference for further study. As a result of examining the report of the Committee on Lawful Interference at its 94th Session on June 29, 1978, the Council decided to refer to the Legal Committee the question of the authority and responsibility of the pilot-in-command of an aircraft during acts of unlawful interference. It was further agreed to request that the Legal Committee study this item within the framework of Item 6, Part A. of its Work Programme and to decide on its priority (35). After recognizing that the subject of the "legal status of the aircraft commander" had the highest priority among the legal studies of the ICAO, the Legal Committee, at its 24th Session in May, 1979, placed the subject as item I in Part A of the Work Programme (36). Having considered the study prepared by the Secretariat at its request, the Council decided, at its 28th Session on November 28, 1979, to establish a Panel of Experts in the operational and legal fields with the terms of reference:

(a) to study the subject: Legal Status of the Aircraft Commander on the basis of the Secretariat study and in the light of comments from States and International Organizations;

(b) to prepare a list of operational and legal problems related to this subject which, in the opinion of the Panel, requires a solution; and

(c) to suggest any specific solutions for further consideration by the appropriate bodies of ICAO. (37)

The Panel met at Montreal from April 9 to 22, 1980. The majority of the Panel held the view that there was no practical need for the legal regulation, in the form of a new international instrument, of the legal status of the aircraft commander, nor did the Panel identify any specific operational or legal problems related to the legal status of the aircraft commander which, in its view, required a solution. However, three members of the Panel, among 14, felt that future study of this question in the forum of the Legal Committee might reveal that there was a need for such an international regulation (38). At its 100th Session on June 16, 1980, the Council considered the Panel of Experts' report and decided to defer a decision on the further course of action pending the review of the work programme in the legal field by the 23rd Session of the Assembly. The Council also decided that the operational aspects of the Panel of Experts' report be referred to the Technical Commission of the 23rd

Session of the Assembly (39). After a lengthy discussion by the Legal Commission, distinguished by a deep split between the delegate members, especially the Delegate of the United States and the Delegate of the U.S.S.R., the latter believed that the legal status of aircraft commanders was still the first in the order of priority while the former believed that a priority could not be assigned to a problem before it had become clear whether it in fact existed (40).

The 23rd Session of the Assembly decided:

> "(a) to retain the subject legal status of the Aircraft Commander as an important item in the General Work Programme of the Legal Committee;
> (b) that the Report of the Panel of Experts should be forwarded to Contracting States and International Organizations;
> (c) that Contracting States and International Organization be requested by the Council to reply to a detailed and precise Questionnaire which would elicit a statement of legal problems of sufficient magnitude to require urgent action, together with an indication of possible solutions." (41)

Paragraph 36 of the Report of the Panel of Experts had been specifically noted by the Assembly (42). The paragraph reads:

> "Nevertheless, the Panel also agreed that the Council, taking into consideration the competence of the States, the role of the operators, the airport authorities and others, may wish to consider whether there is a need to clarify in the appropriate Annexes and any other relevent ICAO documents the role of the pilot-in-command in determining that the flight cannot be made safely because of the lack of security and safety measures." (43)

Having considered the specific instruction and directives approved by the 23rd Session of the Assembly with respect to the work programme in the legal field, the Council at its 101st Session

(December 1980) decided to establish a Panel of Experts on the General Work Programme of the Legal Committee (44).

The Panel met in Montreal between June 8-17, 1981, the task of the Panel as approved by the Council was:

> "(a) to study and analyze the replies from States and international organizations to the Questionnaires, States' comments on the Report of the Panel of Experts on the legal status of the Aircraft Commander and the views of States concerning any subject that might be added to or deleted from the General Work Programme of the Legal Committee;
> (b) to make recommendations to the Council on the General Work Programme of the Legal Committee in the light of the Assembly decisions and comments from States, including recommendations on the relative priority of the subjects in the General Work Programme." (45)

After a lengthy discussion, the Panel recommended that the legal status of the aircraft commander should be deleted from the General Work Programme of the Legal Committee. One expert disagreed with this recommendation and suggested that it would be advisable for the Secretariat to prepare guidance material describing in full detail the rights, obligations and responsibilities of the aircraft commander as they are set forth in international conventions and in the Annexes to the Chicago Convention of 1944 (46).

The Practical Need for A Convention

Since its early beginning the draft convention on the legal status of the aircraft commander has traditionally been plagued with two major problems. First, the question of States' sovereignty, which constitutes a difficult hurdle to any convention. Secondly, the question of practical need, which is also a common hurdle for all international conventions, which the draft convention on the legal status of the aircraft commander failed to overcome.

The predictability factor in the realm of aviation is very poor. When man first conquered the air, only a handful of individuals could foresee all the implications involved in such an act. Within less than half a century, flight became as common as any other medium of transportation, with almost unlimited potentialities (47). Thus, it is difficult to decide that there is no practical need to regulate certain aviation problems on an international basis for the next decade. Those who decided that there was no practical need for an international instrument to regulate the status of the aircraft commander have left the door ajar by speaking about its prematurity (48).

While the unification and uniformity of international rules is not necessarily self-justifying in itself (49) such standardization or homogeneity is most desirable in the aviation industry. The existing

diversity of regulation, as it exists between different States, tends to complicate and deter the efficient conduct of air transport (50). Such a lack of uniformity forces the aircraft commander to familiarize himself with a disparate series of national laws while performing a single international flight (51).

To have an international convention which deals with international air law, ratified or adhered to by most of the global States and especially by those States who are considered as nations with important aviation interests, two conditions must be fulfilled: positively, the need for the instrument must be felt by the international community; and negatively, obstacles and resistance must not be prohibitive.

On the other hand, the ratification of nations with important aviation interests is necessary for the successful application of any convention (52). In fact, without the ratification of countries which are the major providers of air traffic, of whose geographic location is such that a heavy volume of flights traverse their airspace, a convention can have only limited success as an instrument of international legislation, and will join the ranks of the several other aviation treaties which are in force between only a few geographically isolated States (53).

The Panel of Experts, I assume, took this into consideration when deciding that there was no need for the legal regulation, in the

form of a new international instrument, on the legal status of the aircraft commander (54).

An international convention which failed to fulfill the previously mentioned requirements would be stillborn, that is, it would not have received the necessary ratification to come into force.

Some practical examples may be illustrative. The need to regulate the carrier's liability and the documents of carriage convinced States to sign and ratify the Warsaw Convention of 1929 which achieved a universal success for quite an extended period of time.

Essentially, the main concern of the Tokyo Convention of 1963 was the legal status of the aircraft and of the aircraft commander respectively. At the Tokyo diplomatic conference, the provisions on the unlawful seizure of aircraft were introduced by the United States.

Before proceeding any further in our discussion it would be worthwhile to mention that IATA objected to having an international convention on offences committed on board aircraft and the legal status of the aircraft commander. IATA, to justify its position, stated that:

> "The Legal Committee of IATA has given long consideration to the question and has consulted members of the Associations to determine the factual background. The replies received from IATA Members have indicated forcefully that the actual experience of international airlines, up to the present, does not appear to warrant the drafting of an international convention to regulate the status of aircraft in relation to crimes committed thereon, or the obligation of the aircraft commander in that respect. In many countries the common and statute law would seem to provide adequate authority for protection of passengers and the safety of equipment. Any reasonable action taken by pilots in command to

> comply with requirement under Annex 6 of the Chicago Convention, para. 4.5.1., might well be held to be justified under national laws, without recourse to a further international convention." (55)

In spite of IATA's objection, the records of the Tokyo Conference reveal that any portion of the Tokyo Convention is considered by any State to contain a fatal flaw of sufficient magnitude to render the convention unacceptable (56).

The Tokyo Convention was adopted in August/September, 1963, but it did not come into force until December 4, 1969, when a wave of hijacking in the late 1960s prompted ratifications which brought it into force.

The Rome Convention of 1952 (on damage caused by foreign aircraft to third parties on the surface) has not yet received a very impressive number of ratifications, because surface damage caused by foreign aircraft is neither frequent nor is the resulting legal situation as complex as the one connected to air carriers' liability towards their clients (57).

Is the Draft Convention on the Legal Status of the Aircraft Commander doomed to an unkind fate as another example of failure? From the history of the Draft Convention two facts may be deduced:

1) Despite the fact that the Draft Convention has been discussed by CITEJA and on several occasions by ICAO, it has never been submitted to a diplomatic conference. The reason given for this is

that there is no practical need for such an international instrument;

2) Even though the Draft Convention is presently under a cloud because of its impracticality, it must be noted that for fifty years and more the issue was appreciated and treated as an important subject worthy of some discussion and consideration.

Writers, who support having an international convention on the legal status of the aircraft commander, tried to justify the slow progress of the Draft Convention with three reasons (58):

(i) Officially, CITEJA could only deal with questions of private law, and yet it was soon discovered that the status of the aircraft commander is also a matter of public law which was growing ever more important, and therefore CITEJA was put in a difficult position;

(ii) CITEJA decided to combine the status of the aircraft commander with the regulations concerning the conditions of employment of flying personnel in general, a controversial subject on which agreement has not yet been reached. This decision may have been formally correct, but it meant that the draft relating to the aircraft commander was left lying for many years;

(iii) The outbreak of the second world war caused unavoidable interruption at the end of which the draft had to be re-adopted to the changed circumstances then prevailing, while the status of CITEJA itself was also uncertain for some time. The appearance of several

important subjects on the Legal Committee's agenda (revision of the Warsaw Convention, the new Rome Convention) deprived the Draft Convention of authoritative support and it was put aside.

IATA's opposition to the Draft Convention succeeded in preventing any progress on the problem, and meant Ifalpa had lost the battle. In 1951, the whole situation had been analyzed as follows:

> "The actual desirability of such a convention probably lies about halfway between the opinions expressed by those two organizations (IATA and IFALPA) and would be best appraised from the viewpoint of individual non-scheduled operators...Freelance pilots engaged in proffering their services for hire to non-scheduled operators would likewise be more prone to be objective in their attitude towards such a convention and the real needs for it than would employees of the large corporations." (59)

However, FAI, which represents the general aviation pilots was of the opinion that the Draft Convention:

> "applies only to commanders of public transport aircraft and not to pilots of private or tourist aircraft, which are in a position similar to that of drivers of private motor cars travelling in a foreign country." (60)

Many authors have referred, in various ways, to the desirability of having an international convention on the legal status of the aircraft commander (61). The absence of a formal international instrument does not mean that the subject of the legal status of the aircraft commander remains untouched by any legislation or regulation nor does it imply that there is no need for an international rubric. The mere fact that many States have provided some regulation in their national laws has been interpreted by some States and certain

members of the international community as indicative of a need for an international instrument. Besides these national laws, the international community has, since 1947, only partly begun to cover the issue through international regulation. These international regulations relating to the status of the aircraft commander are scattered about many international conventions and agreements but the majority of these regulations are to be found in the Annexes to the Chicago Convention.

Therefore, the Panel of Experts did not specifically state that there was no practical need for some international regulation of the matter but it did state that there was no practical need for any formal legal regulation in the shape of a new international instrument, specifically dealing with the subject of the legal status of the aircraft commander (62).

In my opinion, it looks as if the Panel of Experts had come to this conclusion even before they began their examination of the different aspects of the problem when they decided not to disturb the existing international instruments including the Annexes to the Chicago Convention. The Panel also determined that the existing provisions contained in national laws should not be over-looked since many facets of the issue are governed by national legislation (63).

Therefore, the question now is whether the Annexes to the Chicago Convention are the proper place to set out the provisions

related to the aircraft commander's legal status.

The Legal Status of the Annexes to the Chicago Convention

Throughout the history of aircraft commanders' legal status, the importance of the (64) Annexes to the Chicago Convention gradually increased and reached its peak during the discussions of the Panel of Experts on the legal status of aircraft commanders which met at Montreal from April 9 to 22, 1980. As a consequence of this the 23rd Session of the Assembly decided that the ICAO Secretariat should prepare a comprehensive compilation of all the provision in the Annexes and international conventions relating to the legal status, functions and duties of the aircraft commander to facilitate the task of the States in replying to the Questionnaire which was sent in December, 1980. Some States in their comments on the Questionnaire discussed the Annexes' legal status (65).

However, during the Panel discussion it was stated that specific aspects of an operational nature were already dealt with by the Annexes to the Chicago Convention and that it would not be proper to sort them out from the Annexes in order to produce a single instrument. In addition, the Panel of Experts in its report pointed out that the solution to many of the problems discussed already exist-

ed in the provisions of various Annexes to the Chicago Convention and as a result of this decided that there was no need for an international convention. Nevertheless, the legal status of the Annexes was the subject of some controversy because some members pointed out that the validity of the solution provided by these Annexes depended to a large degree on the general acceptance of such specifications by States (66). Other members stated that it would be desirable to set out international treaty regulations since the existing standards set out in the Annexes do not constitute a firm legal basis for international recognition of the authority and responsibility of aircraft commanders, especially in view of the provisions laid down in Articles 37 and 38 of the Chicago Convention (67). Also four Panel members did not consider the Annexes to the Chicago Convention as a suitable place for the incorporation of rules for long term use and they expressed the view that it would be more advisable to adopt additional international legal rules which would reflect the legal status of the aircraft commander (68). However, the majority of the members felt that the development of a new international instrument would not give the same flexibility for future amendments as is now the case in respect to the Annexes (69). The States in their comments expressed contradictory opinions. Some States believed that what was needed was only to up-date Annexes 2, 6 and 17 which, to a large

measure, already covered most of the problems involving the authority and responsibility of the aircraft commander. These States believed also that this would give the added advantage of flexibility for future amendments as and when the need arose (70). Some States expressed the view that the validity of the solutions provided by the Annexes largely depended on the general acceptance by States of such provisions. It was also stated that:

> "While the most desirable and appropriate solution may be to draft a new international convention which would deal with the problem in all its dimensions and which would have worldwide acceptance, an immediate alternative could consist of preparing an Annex to the Chicago Convention. This Annex would resolve the problem of having widely scattered SARPS on the subject as well as having to up-date and amend some of these in order to identify clearly the problems requiring a solution." (71)

It is obvious that all the States' previous opinions had not discussed the binding force of the Annexes, but Finland, in its comments, raised the problem of the Annexes' binding force:

> "However, taking into account the provisions of Articles 37 and 38 of the Convention one can argue that the Annexes do not constitute a legally firm basis for international recognition of authority and responsibility of the aircraft commander." (72)

In dealing with current questions related to the legal status of the aircraft commander, the U.S.S.R. experts presented the following opinion:

> "It is also essential to bear in mind that the status of ICAO Standards and Recommended Practices concerning this question enables States to adopt the position that suits them best, as well as methods and time

> frames for their implementation. A careful analysis of all these Standards and Recommendations should show which of them ought to be upgraded to provisions of international agreements." (73)

These comments reveal the following three points:

(i) The destiny of the legal status of the aircraft commander depends on the Standards and Recommended Practices contained in the Annexes to the Chicago Convention;

(ii) The legal status and the usefulness of the Annexes are the subject of some controversy whether between experts or States;

(iii) It is premature to deal with the practical need for an international regulation of the aircraft commander's legal status before discussing the legal status of the Annexes themselves.

Therefore, it would be most appropriate to examine the legal status of the Annexes to the Chicago Convention.

a) Generalities

No doubt that to a certain extent the aircraft commander needs to be sure that certain technical aspects are uniform and standardized to allow him to perform his task in the best possible manner. For, within the space of a few hours, one can fly across several national frontiers, and it would be a dangerous and untenable state of affairs if the aircraft commander repeatedly had to cope with widely varying instructions, procedures and situations in the course of a flight.

It is essential for any international flight that the pilot of the aircraft may rely upon the fact:

--that meteorological reports and information are drawn up in the same code in all the countries which are members of the International Civil Aviation Organization;

--that the charts to be used by the aircraft commander satisfy certain minimum requirements;

--that the dimensions and construction of airfields, as well as the airfield equipment and infrastructure fulfill minimum specifications;

--that the instructions from the control tower will be given in a standard manner;

--that all pilots in the air observe the same traffic rules and have a certain minimum degree of experience;

--that aircraft and the components of the aircraft, no matter where they are manufactured, provide for a minimum degree or guarantee of safety.

This list is not exhaustive but does give some indication of the complexity of the problem. The Standards and Recommended Practices (SARPS) contained in the Annexes to the Chicago Convention are the best means to secure uniformity in many different fields connected with the execution of a flight (74). So, the main feature of the

of the Annexes to the Chicago Convention is that the provisions contained in those Annexes are to a large extent confined to highly technical problems of a non-political or of a non-economical character. In fact, the ultimate goal of the Annexes is largely determined by the technical advances in aviation; therefore, there is little room for serious policy disagreements (75). In general, one of the major objectives of the Chicago Convention is, as stated in the preamble, to agree on "certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner."

b) General Characterization

The formulation and adoption of International Standards and Recommended Practices (SARPS) is the most important legislative function performed by ICAO. Article 37 of the Convention provides for the adoption of the SARPS as follows:

> "Each contracting State 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 will facilitate and improve air navigation.
>
> To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:
>
> (a) Communications systems and air navigation aids, including ground marking;
>
> (b) Characteristics of airports and landing areas;
>
> (c) Rules of the air and air traffic control practices;

(d) Licensing of operating and mechanical personnel;
(e) Airworthiness of aircrafts;
(f) Registration and identification of aircraft;
(g) Collection and exchange of meteorological information;
(h) Log books;
(i) Aeronautical maps and charts;
(j) Customs and immigration procedures;
(k) Aircraft in distress and investigation of accidents; and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate."

The international standards and recommended practices which ICAO is empowered to adopt under Article 37 are for convenience designated as "Annexes" to the Convention. To date, the Organization has promulgated seventeen such annexes dealing with the following subjects: Personnel Licensing (Annex 1); Rules of the Air (Annex 2); Meteorology (Annex 3); Aeronautical Charts (Annex 4); Units of Measurement to be Used in Air-Ground Communications (Annex 5); Operation of Aircraft, International Commercial Air Transport (Annex 6, Part 1); Operation of Aircraft, International General Aviation (Annex 6, Part 2); Aircraft Nationality and Registration Marks (Annex 7); Airworthiness of Aircraft (Annex 8); Facilitation of International Air Transport (Annex 9); Aeronautical Telecommunications (Annex 10); Air Traffic Services (Annex 11); Search and Rescue (Annex 12); Aircraft Accident Investigation (Annex 13); Aerodromes (Annex 14); Aeronautical Information Services (Annex 15); Aircraft Noise (Annex 16) and Security (Annex 17). The Organization is developing a new comprehensive set of specifications for the safe transport of dangerous goods (76).

To meet the growing needs of international civil aviation, Annexes are subject to amendment. Since their initial adoption, each Annex has been more or less extensively amended. Each different field of air navigation has a separate Annex, but at one time there was a trend to combine all Annexes into an integrated system of regulations (77). For matters concerning the aircraft commander, Annexes 2, 6 and 17 covered most of the problems involving his authority and responsibility. Attachment A to this work contains references to parts or sections of other Annexes which have a direct or indirect bearing on the responsibilities, authorities, rights, and duties of the aircraft commander.

In 1947 the ICAO Assembly defined "International Standards" and "Recommended Practices" because the Convention does not provide any definition for them. The Assembly formulated the definition for use by the Organization in relation to air navigation matters and to provide the contracting States and their representatives to ICAO meetings with a "uniform understanding of the obligations of the contracting States under the Convention with respect to International Standards and Recommended Practices to be adopted and amended from time to time" (78). By definition, Standards and Recommended Practices are of different standing, although both of them are applicable in the same manner and call for the same procedures of adoption and

amendment. However, Resolution A1-31 defines a "Standard" as:

> "Any specification for physical characteristics, configuration, material performance, personnel, or procedures, 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."

The same Resolution describes a "Recommended Practice" as:

> "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 conform in accordance with the Convention."

Thus, a Recommended Practice may be viewed as of somewhat lesser importance than a Standard, though both categories of specifications are embodied in one Annex.

Besides the Standards and Recommended Practices each Annex contains Appendices comprising material grouped separately and Tables and Figures which add to or illustrate a Standard or Recommended Practice, all of which form part of the associated Standard or Recommended Practice and have the same status. But Notes included in the Annex text, where appropriate to give factual information or references bearing on the Standards or Recommended Practices in question, do not have the same status, nor do they constitute part of the Standards or Recommended Practices. The Definitions of terms used in the Standards

and Recommended Practices which are not self-explanatory in that they do not have accepted dictionary meanings are also found in the Annexes. A definition does not have independent status but is an essential part of each Standard and Recommended Practice in which the term is used, since a change in the meaning of the term would affect its specification (79).

The Council had differently defined Standards and Recommended Practices when it adopted Annex 9, which deals with the facilitation of international air transport.

c) The Development, Adoption, and Amendment of Annexes

Essentially, the task of developing and formulating ICAO Annexes and the making of amendments thereto is entrusted to the Air Navigation Commission, which is responsible for the air navigation SARPS, and to the Air Transport Committee for SARPS dealing with the facilitation of international air transport, but their functions have been increasingly taken over by air navigation conferences and special panels of experts (80).

If ICAO is responsible for the development of the SARPS, the member States are not isolated from the development process. The participation of the member States is desirable in order to reduce the likelihood that any SARPS will be adopted to which a significant number of the contracting States are opposed. The contracting States

participate at two different stages in the process. First, each contracting State is free to participate in the divisional meetings and conferences; second, all proposals for SARPS, or amendments thereto must be submitted to the contracting States for their comments after they have been reviewed by the Air Navigation Commission.

In general, the Annexes are developed and adopted through a process of meticulous and lengthy deliberations and examinations, frequently imposing costly economic and administrative burdens on contracting States (81). To sum up, an Annex is a product of careful and prolonged efforts on the part of several of the deliberative bodies of the Organization (82). It requires constant coordination between divisions wherein Annexes normally originate--the Commission, the contracting States, the Secretariat--and, finally, the adoption and modification of international Standards and Recommended Practices comprising an Annex are the responsibility of the ICAO Council (83). Article 90(a) prescribes that, for the adoption of Annexes, the calling of a special meeting of the Council for that purpose, as well as a two-thirds vote of the Council, is required. In 1952, the Council decided that the vote:

> "required under Article 90 for the adoption of an Annex should be interpreted as the vote of two thirds of the total membership of the Council. In other words, fourteen affirmative votes would be needed for adoption of an Annex." (84)

Since the Council's membership has been increased to thirty-three, the adoption of an Annex to the convention requires twenty-two affirmative votes.

The Chicago Convention is silent on this issue of the number of votes required for the adoption of amendments to the Annexes. It is therefore arguable that a simple majority vote by Council members would be appropriate and valid and that a special meeting of the Council need not be called for the adoption of the amendments (85). A conflicting opinion has stated that (86):

> "an amendment to an Annex may amount to a complete revision of the Annex in all but form. It is obvious that the requirement of a two-thirds vote applicable to Annexes could be easily circumvented if this view were to be accepted."

However, the Council adopted the two-thirds majority vote system in amending the existing Annexes on the assumption that the adoption of an amendment to an Annex is governed by the same voting requirements that apply to Annexes (87). In justifying the Council's decision, it was regarded as more in conformity with the constitution of the Organization (88).

To complete the development process of an Annex or amendment thereto, a two step process must be effected. Article 40 states that:

> "any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval."

Thus, a majority of the contracting States have the right to disapprove, by registering their displeasure or disapproval, any Annex or amendment to an Annex which was passed by the Council after the contracting States have been notified by the Council of the Annex or amendment thereto. In other words, if the period for the notification of disapprovals passes without the registration of the required number of disapprovals, an Annex or amendment to an Annex will come into effect.

A question has been raised whether a State, in exercising its right of disapproval, has the right to disapprove certain parts of an Annex or amendment of an Annex (89). Despite the silence of Article 90(a) the Council has ruled that the contracting States have the option to disapprove of an Annex either in whole or in part (90). In fact, this decision is a significant factor in reducing even further the likelihood that a majority of the member States will exercise their power of disapproval.

After providing in Article 90(a) for that an Annex or amendment thereto "shall become effective the Convention prescribes in Article 90(b) in that:

> 'the Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto.'"

A lack of defining as to when an Annex or an amendment to one is coming into force leaves Article 90(b) subject to more than one

interpretation. To overcome this problem, the Council adopted two dates:

(i) Effective date: This is the date by which the Annex becomes effective unless in the meantime the majority of the contracting States have indicated their disapproval.

(ii) Date of applicability: This is the date by which the contracting States are to be ready to implement the International Standards contained in the Annex.

d) Notification of Differences

In accordance with the obligation imposed by Article 38 of the Convention:

> "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 other States of the differences which exist between one or more features of an international standard and the corresponding national practice of the State."

Each contracting State is obliged to notify the Organization of any differences between their own national practices and regula-

tions and those prescribed in an international standard. Whenever a State does not conform to or departs from the practices or regulations "established" by international standard, this State is requested to notify ICAO immediately of such differences. This notice must be given within sixty days of the "adoption" of an amendment to an international standard whenever a contracting State does not intend to conform to it and adapt its practices or regulations to the provisions of the amendment.

In ascertaining whether a State has met its obligation in notifying differences resulting from a State's decision not to conform its national practices or regulations to the amendments of an international standard, a clear textual discrepancy between Article 38 and 90 appears. Whereas Article 38 provides for the notification of differences immediately after a standard has been "established", Article 90 speaks of the "becoming effective" and "coming into force" of an Annex; therefore, it is difficult to say that a contracting State has to give the notice required under Article 38 as soon as the Annex containing the international standards has become effective or as it has come into force.

Articles 38 and 90 are the result of extremely poor draftsmanship which can probably be attributed to the fact that the framers of the Chicago Convention had initially assumed that the Annexes would

be drafted at the Chicago Conference and would form an integral part of the Chicago Convention (91). The Committee on Technical Standards and Procedures of the Chicago Conference (Technical Committee II) in its resolution adopted on November 18, 1944, stated the following as one of its whereas clauses:

> "Whereas considerable progress has been made, during the discussion of the present Conference, in the development of codes of practice agreed upon as proper by the technicians participating in the discussions, but the time has been too limited and number of personnel able to participate discretely too small to permit carrying the discussions to the final conviction of adequacy or correctness of certain of the determinations here made." (92)

Article XLV of the Canadian Revised Preliminary Draft of an International Air Convention (93) thus provided that "the provisions of the present convention are completed by the Annexes...which shall have the same effect and shall come into force at the same time as the Convention itself."

However, the ICAO Council overcame this problem by deciding to:

(1) Establish a date, normally ninety days after the date of submission by the Council, after which States may no longer notify disapproval under Article 90.

(2) Establish a further date by which International Standards and Recommended Practices shall be applied by contracting States.

(3) Establish a date prior to which States unable to comply are expected to give notification to that effect. This date shall be

sufficiently in advance of the date set for application of the Standards to enable notification of non-compliance to reach ICAO from the States concerned and to be circulated by ICAO to other contracting States, and to be circulated by contracting States to those concerned (94).

It is difficult for some developing States to realize the difference between their national practices and regulations and the adopted or amended International Standard, therefore, the view has been expressed that there is a need to develop detailed guidance material on the reporting of differences, preferably in the form of clear criteria enabling States to determine readily whether or not their individual practices constitute differences (95). An early step in this direction was taken as long ago as 1950 when the Council adopted a set of principles governing the reporting of differences from ICAO Standards, Practices and Procedures.

Nevertheless, Article 38 of the Chicago Convention does not impose an obligation on the contracting States to notify the Organization of the differences between their national regulations and practices and any corresponding Recommended Practices contained in an Annex, but the contracting States are invited to make such notification when the knowledge of such differences is important for the safety of air navigation.

It was assumed, for a short while after the adoption of the first Annexes in 1948 and 1949, that member States which did not

notify the differences from the Standards in the Annexes applied them on the required date. But, in 1950, the Working Group of the Air Navigation Commission stated that the:

> "presumption of compliance when no differences were reported was unsound, and that lack of information regarding the extent of compliance seriously handicapped the Organization in its efforts to disseminate differences effectively." (96)

Thus, it had become apparent that this assumption was not justified and that many member States from whom notification had not been received were not fully implementing the Standards in the Annexes.

The failure by States to notify the Organization of their non-compliance with the International Standards creates a legal problem. The aftermath of this problem is the subject of controversy among the legal writers. In interpreting the States' silence as tacit acceptance Ros concludes that:

> "la volonté favorable de la majorité des Etats est nécessaire pour rendre effective l'annexe. Ils complètent sur le plan international la création de la norme. Le silence même d'un Etat, du moment qu'il est considéré dans un sens au l'autre, est un manifestation tacite de sa volonté. Le travail fait par l'OACI est donc de preparation de la norme et tout le systeme de l'article 90 est destiné à faciliter l'acceptation de cette regle international par tous les Etats members." (97)

Furthermore, Dr. Cheng (98) believed that failure to give immeditate notification of non-compliance was a breach of an obligation imposed by the Chicago Convention.

However, the Organization formally requested notification of compliance which means that Article 38 has undergone a de facto amend-

ment. In Burgenthal's opinion this amendment has transformed:

> "what was intended to be a "contracting out" provisions into a hybrid procedure that has both "contracting-out" and "contracting-in" characteristics...one very important legal consequence of the transformation which Article 38 has undergone is that as a general proposition no State or pilot can justifiably rely on the absence of reported differences as indicia that a particular standard established in an Annex is in force in or being complied with by a State which has not filed the notice requred by Article 38." (99)

Thus, the notification of differences, in itself does not constitute a rejection of a Standard, but serves more as a point of information, enabling State and the Organization to learn to what extent uniformity exists and where, geographically, departures occur (100).

e) Implementation of International Standards and Recommended Practices

Without implementation by contracting States, SARPS are meaningless and thus, unable to achieve their major objective which is the elimination of the multitude of conflicting national aeronautical regulations, though the domestic implementation of the regulatory prescribed in the Annexes. Therefore, ICAO, from its very inception, has been preoccupied with the necessity for effective implementation of its regulatory material in the technical field. So, in 1948, the ICAO Council adopted a resolution urging the contracting States "in complying with ICAO Standards which are of a regulatory character, to introduce the text of such standards into their national regulation, as nearly as possible, in the wording and arrangement employed by ICAO." (101). It was difficult for contracting States to transpose

the texts of the Annexes as the resolution required; therefore, the Council abandoned this policy.

There are some hurdles which prevent the implementation of International Standards. These hurdles or difficulties differ from one country to another. Due to a lack of skilled personnnel, the newly independent and developing nations faced many difficulties in establishing national aviation legislation, some of them even remaining without any such legislation. Economic difficulties constitute another hurdle. The services of civil aviation came at the tail end of the economical priority list of developing nations, and they were unable to provide trained personnel and equipment. Besides these major problems there is the necessity of translating the highly technical language of the regulatory material from the ICAO texts (in English, French, or Spanish) into the local language or languages of the implementing State, as well as the inability of States to cope with frequent amendments to ICAO regulatory documents due to the frequency and sophisticated nature of the amendments (102).

To cope with this situation ICAO has dispatched its Technical Assistance Missions to various contracting States utilizing some of the funds made available to it under U.N. economic and technical development programs. One of the tasks of their missions is to help the host States with the implementation of international Standards

and Recommended Practices (103). In relation to the amendments, ICAO faces a dilemma because on the one hand the less developed nations need stability in the Annex materials, while at the same time, ICAO documents must keep up with the most advanced developments and techniques to serve high density and complex traffic situations. (104). However, the ICAO Assembly decided to encourage and assist the contracting States in the implementation of SARPS and PANS by all available means (105). To facilitate the contracting States' task in implementing SARPS, the ICAO Assembly adopted the following clauses:

> "SARPS and PANS shall be amended as necessary to reflect changing requirements and techniques and thus, inter alia, to provide a sound basis for regional planning and the provision of facilites and services.
>
> Subject to the foregoing clause, a high degree of stability in SARPS shall be maintained to enable the contracting States to maintain stability in their national regulations. To this end amendments shall be limited to those significant to safety, regularity and efficiency and editorial amendments shall be made only if essential.
>
> SARPS and PANS shall be drafted in clear, simple and concise language." (106)

f) Rules of the Air

Article 12 of the Chicago Convention gives ICAO broad legislative powers with respect to air navigation over the high seas. It reads as follows:

> "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 maneuver 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."

The language of Article 12 leaves no doubt that the rules applicable over the high seas are to be complied with by the civil aircraft of contracting States without possible deviations in contrast with International Standards. Naturally, one needs to define "rules" as mentioned in the third sentence of Article 12 of the Convention. The third sentence refers to rules established under the Convention. What the Organization is authorized to adopt are international Standards, Recommended Practices and Procedures according to Article 37(c) of the Convention. Which one of the three is within the meaning of Article 12? The matter is disputed in the literature, but the most likely opinion is that of Dr. Carroz, who argues that a Recommended Practice lacks by its very nature the mandatory character which the application of Article 12 presupposes, therefore only international Standards can be "rules" within the meaning of Article 12 (107). Nevertheless, this opinion is supported by the Organization's practice, for Annex 2, which sets out the Rules of Air, has not contained Recommended Practices since September 1, 1952 (108).

So "rules established under the Convention" comprise all rules established under the Convention which are capable of application over the high seas, or only the Standards established in Annex 2? Any analysis of Article 12 of the Convention reveals this problem, so long as Article 12 falls short of giving any specification as to the substance of the "rules...established under the Convention".

When adopting Annex 2 in April,1948, and Amendment 1 to the said Annex in November,1951, the ICAO Council resolved that the Annex constitutes Rules relating to the flight and maneuver of aircraft within the meaning of Article 12 of the Convention. Therefore, these rules apply over the high seas without exception. Also when adopting Amendment 14 to Annex 2 relating to authority over aircraft over the high seas, on November 15, 1972, the Council emphasized that the amendment was intended solely to improve the safety of flight and to ensure adequate provisions for air traffic services over the high seas. The amendment in a way affects the legal jurisdiction of States of Registry over their aircraft or the responsibility of contracting States under Article 12 of the Convention for enforcing the Rules of the Air (109).

Despite the validity of the opinion which considers that the ICAO Council can designate any rules as the rules and regulations relating to flight and maneuver of aircraft, the Council decided

against making the rules prescribed in Annex 2 mandatory over the high seas (110).

However, the Foreword of Annex 2, Rules of the Air, mentioned the following:

> "The Standards in this document together with the Standards and Recommended Practices of Annex II, govern the application of the 'Procedures for Air Navigation Services--Rules of the Air and Air Traffic Services' and the 'Regional Supplementary Procedure--Rules of the Air and Air Traffic Services'." (111)

g) Legal Force of Annexes

No one can deny that there is a significant difference between the legislative power of the International Civil Aviation Organization and that of the International Commission for Air Navigation, under the terms of the 1919 Paris Convention on the Regulation of Aerial Navigation. The latter's legislative power exceeds that of the ICAO Council. Under Article 14 of the Paris Convention of 1919, ICAN could amend the Annexes to the Convention, except Annex H, with binding effect on all the members, by a three fourths majority of the total possible votes which could be cast in the Commission if all the States were present. The Annexes formed an integral part of, and had the same force and effect as, the Convention itself (Article 39).

There is unanimity in the literature with respect to the legal status of the Annexes to the Paris Convention of 1919 and the function of ICAN, which was considered as a good example of how

the contracting States delegated legislative authority to an international organization (112). Therefore, most commentators conclude that the legislative scheme of the Chicago Convention is a retrograde step.

But, to conclude a comparison between the Chicago Convention and the Paris Convention, the different circumstances surrounding the genesis of each must be taken into consideration. The Chicago Convention was drafted twenty-five years after the Paris Convention. This time difference is very important, because during those twenty-five years the aviation technology took a big step forward, especially through wartime developments. The global applicability of the Chicago Convention is much wider than that of the Paris Convention; therefore, the former has a more diverse membership. Thus, expenditures for facilities and services were considerably increased and regulations were more complex in 1944. The logical response for all of these factors was greater flexibility. Dr. Warner (113) explained the "flexibility" that needed to be built into the Convention:

> "In consideration of the recognized need for the utmost flexibility in the adoption and amendment of Annexes, in order that they may be kept abreast of the development of the aeronautical art, the Convention leaves the Council with a free hand for future action. No Annex is specifically identified in the Convention; and there is no limit to the adoption by the Council of any Annexes which may in future appear to be desirable. On the other hand and in fact as a necessary consequence of that flexibility, the Annexes are given no compulsory force." (114)

Many States would have stayed out of ICAO, if the Chicago Convention had adopted the legislative scheme of the Paris Convention, because some States have domestic constitutional obstacles which prevent them from providing the required delegation of legislative power. When States knew that the Annexes had compulsory force, they would scrutinize them or any amendment to them. This would have complicated the amendment process.

However, drafters of the Chicago Convention believed that by allowing flexibility in the adoption and amendments of Annexes, they were not sacrificing the required unanimity. For they believed that practicability and flexibility would maintain an absolute world uniformity in many respects, and a very high degree of uniformity in other matters upon which the Annexes may touch (115).

The practicability is the key to an understanding of the general legal force of the Annexes. In general, the Chicago Convention does not impose a strong legal obligation on contracting States. Professor Cheng described this feature:

> "the obligation laid upon contracting parties are all of a fairly tenuous character, couched in terms which are calculated not to affect the contracting States' freedom of action and future cushioned by a variety of 'escape' clauses, phrases or words." (116)

In examining the Convention's most vital four Articles, relating to the Annexes and specific Standards and Recommended Practices, in particular the area of international air navigation, the "prac-

ticability" appears as the key escape valve (117). So, Article 37 sets forth the general obligations of contracting States in respect to the Annexes as an undertaking "to collaborate in securing the highest practical 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 will facilitate and improve air navigation." Articles 23 and 28 impose an obligation on each contracting State to "undertake so far as it may find practical" to provide air navigation facilities and to adopt standard air navigation systems and customs and immigration procedures. The contracting States may depart from an International Standard or procedure adopted by ICAO in the case that these States "find 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."

But, if the obligations imposed on the contracting States in the previous four Articles has been mitigated by practicability, there are another four provisions of the Convention that impose obligations on contracting States without such mitigation.

Thus, the third sentence of Article 12, as it has been discussed above, imposes the implementation of the Rules of the Air over

the high seas. In fact, this obligation is the most important, and the only one that seems to have been noted. Article 21 lays down an obligation concerning the registration of aircraft. This obligation has not yet been tested by the Organization (118).

The second sentence of Article 25 of the Chicago Convention provides that "each contracting State, when undertaking a search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this Convention". Lemin believes (119) that the term "recommended" is not used here in its usual sense, since members have a positive obligation to collaborate in the search for missing aircraft in accordance with the measures referred to.

Finally, Article 34 obliges all members to comply with any Standards prescribed by the Council concerning the form in which the journey log books of their aircraft are to be kept.

However, the legal writers have different opinions concerning the legal force of the Annexes. Kamminga and Yoru Koglu, in studying the legal status of aircraft commanders, have discussed the legal force of the Annexes. Kamminga believes that the Annexes achieve incompletely and with a great deal of delay the process of international unification (120). In his opinion:

> "The Annexes do not have immediate binding force but the States are bound to take the necessary steps to put them into effect.

> This obligation, however, is limited by expressions such as 'so far as it may be found practicable', 'to greatest possible extent', 'the highest practicable degree of uniformity', etc." (121)

In YoruKoglu's opinion:

> "D'autre part, l'O.A.C.I. n'a pas un pouvoir legislatif. Et selon d'article 38 de la Convention de Chicago, les Etats contractants ne sont pas obligés d'accepter les regles des Annexes, mais seulement d'introduire ces dispositions dans leurs legislation s'ils trouvent que les modifications a ce sujet sont necessaires." (122)

Without providing any qualification some writers concluded that the Annexes were binding in some measure upon member States (123). Other writers considered the Annexes as recommendations to member States, who are free to implement them or not, although they are obliged to notify the Organization of differences if they fail to do so (124).

Conclusion

ICAO has succeeded in developing a complex and sophisticated code, which consists of the ICAO International Standards and Recommended Practices, with almost no opposition from the contracting States. The Convention's built in flexibility is a major factor in the realization of such an achievement. The flexibility is responsive to the great and swift progress in aviation and air navigation. But, the Annexes, with their doubtful legal force, fall short of being a suitable

place for provisions designated to cover the legal status of the aircraft commander.

* * *

NOTES

(1) Wilhelm, "De la situation juridique des Aéronautes en droit international", Journal du Droit International Privé, (1891), p. 440.

(2) Machino, "la condition juridique du Personnel Aérien", p. 43.

(3) M.S. Kamminga, "The Aircraft Commander in Commercial Air Transportation", Hague (1953), p. 117. Herein after cited as Kamminga.

(4) J.C. Cooper, "Explorations in Aerospace Law", edited by J.V. Vlasic, Montreal, (1968), p. 5.

(5) Ibid.

(6) Quoted by Cooper, Ibid, pp. 5-6.

(7) Kamminga, p. 117.

(8) J.J. Ide, "The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)", 3 Journal of Air Law, (1932), p. 27.

(9) Ibid., p. 31.

(10) Ibid., p. 33.

(11) Henry Beaubois, "Le statut juridique du commandant d'aéronef", Revue Française de Droit Aérien 9 (1955), p. 224.

(12) Ibid.

(13) Kamminga, p. 120.

(14) Compte Rendu de la 13e Session, p. 20

(15) Compte Rendu de la 14e Session, p. 96.

(16) Rapport et avant-projet de Convention par M. Garnault, Doc. No. 451, p. 2.

(17) Compte Rendu de la 15e Session, Resolution No. 161, p. 92.

(18) Compte Rendu de la 16e Session, p. 36.

(19) Kamminga, p. 122.

(20) O. Yoru Koglu, le statut juridique du commandant de bord, ed. nouvelle bibliothèque de droit et de jurisprudence, Lausanne (1961), p. 236. The actual text of the draft convention on the legal status of the aircraft commander is found in ICAO Doc. 2879 LG (Paris).

(21) N.M. Matte: "Treatise on Air Aeronautical Law", (1981), p. 283.

(22) ICAO Doc. 7157 LC/130.

(23) Minutes and Documents, Legal Committee's 7th Session, Doc. C-WP/980, p. 1.

(24) ICAO Doc. C-WP/980 and Doc. C-WP/899.

(25) ICAO Doc. 7712, A10-LE 15, p. 19.

(26) ICAO Doc. 8111-LC/146-2.

(27) ICAO Doc. 8279, A14-LE/11.

(28) Juan J. Lopez Gutierrez, "Should The Tokyo Convention of 1963 Be Ratified?", 31 Journal of Air Law and Com., p. 1. According to Gutierrez there are other conferences related to the Tokyo Convention, such as the Conference for international criminal law, Premier Congrés International de Droit Penal, Avant-projet du code de droit penal, Bruxelles, 1926, 637 (Paris, 1927); Deuxieme Cong. Int. Dr. Penal Bucarset, 1929, 187, 269 (Paris, 1930); Trois Cong. Int. Dr: Penal Pulermo, 1933, 955 (Rome, 1935); Quatre Cong. Int. Dr. Penal Paris 1937, 440 (Paris, 1939); and Cing Cong. Int. Dr. Penal, Geneve 1947, 157 (Paris, 1952).

(29) Ibid., p. 2.

(30) ICAO Doc. PE/AIRO-WD/2. The text of the draft is presented in ICAO Doc. PE/AIRO WD/2, Attachment (in English).

(31) ICAO Doc. 9050, LD/169-2.

(32) ICAO Doc. 9222-LC/177-2.

(33) ICAO Doc. C-WP/6636.

(34) Ibid., supra note 30, at p. 5.

(35) Ibid., supra note 30, at pp. 6-7.

(36) ICAO Doc. 9271, LC/182.

(37) ICAO Doc. C-Min 98/9-10.

(38) ICAO Doc. PE/AIRCO-Report at p. 18.

(39) ICAO Doc. PE/PLC-WD/5.

(40) ICAO Doc. A23-Min. LE/3 at pp. 24-31.

(41) ICAO Doc. 9314, A23-LE at p. 8.

(42) ICAO Doc. PE/PLC-WD/5.

(43) ICAO Doc. PE/AIRCO-Report at p. 19.

(44) ICAO Doc. PE/PLC-WD/7. The members of the Panel were nominated by Chile, Egypt, France, Hungary, Indonesia, Italy, the Ivory Coast, Japan, Spain, Sweden, Tanzania, USSR and the U.S.A, the United Kingdom and Canada, with IATA and IFALPA as observers.

(45) Ibid., at p. 2.

(46) Ibid., PE/PLC-Report, p. 9 and p. 23.

(47) Sheffy, "The Air Navigation Commission of the International Civil Aviation Organization", 25 Journal of Air Law and Comm. 281 and 428 (1958), at p. 281.

(48) Kamminga, supra note 3, at p. 125.

(49) Guldiman, "International Air Law in the Making", Current Legal Problems, (1974), vol. 27, p. 281.

(50) Sheffy, supra note 47, at p. 282.

(51) Ibid.

(52) Boyle and Pulsifer, "The Tokyo Convention on Offences and Certain Other Act Committed on Board Aircraft", 30 Journal of Air Law and Comm. 305 (1964), at pp. 305-306.

(53) Ibid.

(54) ICAO Doc. PE/AIRCO Report, p. 18.

(55) ICAO Doc. LC/SC Legal Status, WD No. 38, 9/9/58.

(56) Pulsifer, supra note 52, at pp. 305-306.

(57) Guldiman, supra note 49, at p. 235.

(58) Kamminga, supra note 3, p. 123.

(59) ICAO Doc. C-WP/980, 26/6/51.

(60) ICAO Doc. D-WP/1367.4, 9/11/52.

(61) Kamminga, p. 125.

(62) ICAO Doc. PE/AIRCO Report, p. 18.

(63) See the Report of the Panel of Experts, ICAO Doc PE/AIRCO Report.

(64) Herein after cited as "Panel".

(65) See ICAO Doc. PE/PLC-WD/6-6; PE/PLC-WD/6-34, PE/PLC-WD/6-24.

(66) ICAO Doc. PE/AIRCO-Report at p. 15.

(67) ICAO Doc. PE/AIRCO -Report at p. 7.

(68) ICAO Doc. PE/AIRCO-Report at p. 11.

(69) Ibid, supra note 67.

(70) Ibid.

(71) ICAO Doc. PE/PLC-WD/6-20, at p. 3.

(72) ICAO Doc. PE/PLC-WD/6-24.

(73) ICAO Doc. PE/PLC-WD/6-34, at p. 2.

(74) Kamminga, supra note 3, p. 2.

(75) Burgenthal, T., "Law-making in the International Civil Aviation Organization", (1969), p. 57.

(76) ICAO Doc., "The Convention on International Civil Aviation...the first 35 Years", published by the Public Information Office of ICAO, Montreal,

(77) ICAO Doc. AN-WP/MIN-IX.9, para. 13, p. 41.

(78) Assembly Res. A1-31, ICAO Doc. 4411 (AI-P/45).

(79) Annex 6, Part II, p. 8.

(80) Burgenthal, supra note 75, p. 62.

(81) Sheffy, supra note 47, at p. 435.

(82) ICAO Doc. 7215, AN/858 (1951), Introduction, p. 1.

(83) Chicago Convention Articles 37, 54(l) and (m), and 70.

(84) ICAO Doc. 7310 (c1846), p. 27.

(85) Cheng, B., "The Law of International Air Transport", London, (1962) pp. 65-66.

(86) Burgenthal, supra note 75, at pp. 64-65.

(87) ICAO Doc. 7328-17 C/853-17, p. 195, also Doc. 7328-12 C/853-12, p. 130.

(88) Cheng, supra note 85, at p. 66, footnote 5.

(89) ICAO Doc. 5159 (C/641), p. 11.

(90) ICAO Doc. 5290 (C/656), p. 7.

(91) Burgenthal, supra note 45, at p. 89.

(92) Proceedings of the International Civil Aviation Conference, vol. I, p. 712.

(93) Ibid., at p. 588.

(94) ICAO Doc. 6808 (C/791), pp. 34-36.

(95) Fitzgerald, F., "The International Civil Aviation Organization--A case study in the Implementation of Decisions of a Functional International Organization", Schwebel, Stephen M., ed, the Effectiveness of International Decision (Sijthoff Coeana 1971), p. 176.

(96) ICAO Doc. AN-WP 1419, p. 1.

(97) Ros. E., "le pouvoir legislative international de l' O.A.C.I. et ses modalites", Revue général de l'air, vol. 6 (1953), p. 25.

(98) Cheng, supra note 85, at pp. 145-146.

(99) Burgenthal, supra note 75, at p. 100.

(100) Sheffy, supra note 47, at p. 433.

(101) ICAO Doc. 7310 (C/846), p. 26.

(102) Fitzgerald, supra note 95, at p. 174.

(103) ICAO Doc. A12-WP/7 (EX/5).

(104) Fitzgerald, supra note 95, at p. 175.

(105) Resolution A18-13.

(106) Ibid.; See also resolution A22-18 and A23-16/1 (1980).

(107) Canoz, "International Legislation on Air Navigation Over the High Seas", 26 Journal of Air Law and Comm., pp. 166-168.

(108) Annex 2, sixth edition, September, 1970, foreword at 5.

(109) Ibid at p. 6.

(110) Burgenthal, supra note 75, p. 83.

(111) Ibid, supra note 109.

(112) Ros, supra note 97, p. 25.

(113) An United State's delegate and the Reporting Delegate of Committee II, on Technical Standards and Procedures.

(114) Ibid, supra note 90, p. 92.

(115) Ibid.

(116) Burgenthal, supra note 75, p. 145.

(117) Ibid., p. 146.

(118) Yemin, E., "Legislative Powers in the United Nations and Specialized Agencies", p. 148.

(119) Ibid.

(120) Kamminga, supra note 3, p. 16.

(121) Yoru Koglu, O., "Le status juridique du commandant de bord", Lausanne (1961), p. 54.

(122) Ibid.

(123) Garnault, A., "Le Convention et Resolution de Chicago", Revue Française de Droit Aerien, vol. 1 (1947); Malintoppi, A., "Sa fonction 'normative' de l'O.A.C.I.", Revue général de l'air, vol. 13 (1950), p. 1053.

(124) For difference of opinion among Legal Writers see Yemin, supra note 118, p. 119 et seg. See also Cheng, "Centrifugal Tendencies in Air Law", 10 C.L.P. (1959), p. 203 et seg.

CHAPTER TWO: LIABILITY

The Aircraft Commander's Liability

It is submitted that the very nature of a pilot's and especially an aircraft commander's employment makes them liable to cause injury to persons or damage to property in the course of their work. Accordingly, a civil action may be brought against them by the victims. It is a generally accepted principle of law that if one must harm another without justification and that if by act or omission he has so harmed another by bodily injury or damage to property that harm must be fully made good. This principle which is of universal application, means that where a worker has caused injury or damage by negligence in the course of his employment, whether to his employer, to fellow employees, or to persons unconnected with the undertaking for which he works, he is personally liable to compensate for that injury or damage (1).

Consequently, the aircraft commander seeks protection from civil liability as he seeks safety in flight. But the aircraft commander's liability is a controversial subject, therefore it was completely omitted from the Draft Convention of the legal status of the aircraft commander because of the difficulty of reaching any agree-

ment. However, the issue raises more than one problem. First, it is essential that the victims should in all cases receive due compensation for any injury sustained. Secondly, the protection afforded the aircraft commander clearly should not extend to every kind of tortious act. Finally, the question of the civil liability of an aircraft commander depends on many factors.

One of these factors is the distinction between the liability of the carrier and the aircraft commander's liability. It is difficult to distinguish the carrier from the community of persons whose joint activity is the carrier's activity (2). This may lead one to consider the carrier as the only person liable by law, and to force him to appoint experienced and careful commanders. It is better for the public that a heavy responsibility should be imposed on the carriers rather than on the commanders, since the latter are usually financially incapable of paying the large sums which may be involved in accident claims. It is a rule of many legal systems that an employer is liable for any wrongful act committed by his employee in the course of employment. This liability exists alongside the liability of the employee for his own acts. Moreover, many systems of law place upon the shoulders of the owner of a means of transport, an absolute liability to compensate for injury or damage caused by it to outsiders (3).

In general, the most important reason behind holding the employer liable is the feeling that a person who employs others to advance his own economic interest should, in fairness, be placed under a corresponding liability for losses incurred in the course of the enterprise and that the employer is a more promising source for recompense than his servant, and that the employer is a most suitable channel for passing tort losses on through liability insurance and higher prices (4). But there are circumstances in which the employee may be left to carry the full financial consequences of his act.

Initially, regulations concerning the aircraft commander's liability were regarded as part and parcel of the legal status of the aircraft commander (5). The history of the Draft Convention of the legal status of the aircraft commander indicates that there was a tendency to consider the commander's liability as apart from the carrier's liability, yet within this tendency some people preferred to impose a severe liability burden on the commander. Thus, Thieffry's draft, which appeared in 1927, included the following provisions: "...toutefois le capitaine est garant de ses fautes même légères dans l'exercice de son mandant" (6). This article met with strong opposition, because within CITEJA other commissions were drafting a limitation of the liability of the carrier.

The aircraft commander's liability had not been rejected

completely, but it was thought preferable to limit his liability.

Thus, the French delegate, M. Ripert, strongly opposed the idea of making the aircraft commander liable without limit and observed:

> "Ce qui parait très grave, c'est de dire qu'an commandant d'aéronef, pour le salaire qu'il recevra, prendra la responsabilité personnelle de tous le voyageurs, de toutes les marchandises pour la moindre faute, sans que sa faute soit absorbée par les risques de la navigation qui jouent en faveur du transporteur. Il n'a pas les bénéfices de l'exploitation et il prend toute la charge de la responsabilité!" (7)

To avoid this authoritative criticism, the rapporteur, Mr. Balimski, introduced the following Article in his project:

> "En ce qui concerne la responsabilité du commandant de l'aéronef envers les passagers, les chargeurs et, en général toute tierce personne, il n'est tenu personnellement qu'an cas de faute volontaire délictuelle; s'il s'agit d'une faute de fonction c'est la responsabilité du propriétaire et non la sienne qui se trouve engagée" (8).

In confining the liability to the carrier or in restricting the aircraft commander's liability to willful misconduct, there is a possibility that the commander will not behave in the same careful manner as when he is fully responsible. The fear was expressed by the Swedish delegate:

> "C'est presque le dol çela; ce n'est pas assez et il est dangereux de limiter la responsabilité du commandant au cas de dol. C'est dangereux parce que le commandant doit être très prudent. Il doit avoir un règlement qui le rende aussi prudent que possible. Si on borne sa responsibilité au dol, on aboutira au resultat contraire. Il se dira: je ne suis pas responsable, je puis faire ce que je veux!" (9)

The British delegate suggested that the aircraft commander's liability should be settled by the national legislature (10). However, at the 6th meeting of CITEJA, which was held in 1931, the article on liability was rejected by 13 votes to 1, with 1 abstention (11).

The Applicability of the Unamended Warsaw Convention

Since the Draft Convention on the legal status of the aircraft commander is hitherto a mere draft, the alternative place to look for the issue of the aircraft commander's liability is in the Warsaw Convention. But the Warsaw Convention, since its adoption, has been amended several times. Among these amendments, the Hague Protocol is the the most important because it has been ratified by most of the States which ratified or adhered to the Warsaw Convention. The discussion of the situation under the unamended Warsaw Convention is important because there are still some important countries such as the U.S.A., which have not ratified the Hague Protocol.

However, the question which stands out is whether the Warsaw Convention's limitation of liability provisions are applicable to servants, employees and agents, or in other words and more pre-

cisely, whether the term "carrier" refers only to the corporate carrier or to other entities as such, or also includes the employees and agents acting on the carrier's behalf.

Not only are the doctrinal opinions divided, but the few decisions on the matter are also split on the issue of whether servants and agents could be protected by the provisions of the Warsaw Convention. Before dealing with this problem, it would be worthwhile to mention that both the commentators and the courts considered it important that, if the carrier's employees and servants are not covered by the provisions of the Warsaw Convention, then the entire character of international air disaster litigation would be radically changed and the liability limitations of the Convention could then be circumvented by the simple device of a suit against the aircraft commanders and/or other employees (12). Recognizing the possibility that its members would be sued for unlimited amounts, IFALPA required the carriers to sign agreements holding the pilots blameless and to insure against their liability (13). Such requirements were also imposed by governments (14). Nevertheless, most of the carriers feel morally obliged to indemnify their servants against unlimited liability claims. This eventually affects aviation costs in general (15).

a) The Commentators' Opinions

Due to the equality of the arguments for and against the

coverage issue, it is by no means susceptible to a clear and entirely confident answer. Thus, the French jurist, Lemoine, based his interpretation of the Convention on the principle of identification of the carrier with his servants (16). Throughout the text of the Convention, acts of the carrier and of his servants are considered in a unified context. The French Air Navigation Act of May 31st, 1924, does not allow the carrier to avoid liability for his own acts but does enable him to shut off vicarious liability. How then, argues Lemoine, can it be that under the Convention, a carrier's liability is limited but his servants are exposed to unlimited liability, when unlike the French Act, there has been no attempt to draw a distinction between a carrier's acts and those of his servants. Oddly, he refers to Article 20 (2) to emphasize his point of view.

Along the same lines suggested by Lemoine, a more fully articulated position was proposed by Professor H. Drion which was supported by a strong argument (17). This argument lays stress on Article 24 of the Convention which provides that, in the cases envisaged by Articles 17, 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits provided in the Convention. Drion believes that:

> "What the drafters did intend to do was to prevent the provisions of the Convention from being avoided by claiming outside the Convention, especially with an action in tort. When Article 24 speaks of limits, it clearly refers to the limits of Article 22, and this

> Article only limits the liability of the carrier. This does not mean, however, that an action for unlimited damages against any person other than the carrier could be said to be brought 'subject to the limits of the Convention' for the more reason that these limits do not apply to such persons. It is believed that a sound interpretation, based on the spirit of Article 24 and not conflicting with its letter, leads to the conclusion that any action brought against the carrier's enterprise as such, or against members of it who can be considered part of the enterprise, are to be brought subject to the limits of Article 22." (18)

Three points must be noted: first, Drion does not claim that the provisions of Article 24 directly cover or were initially intended to cover the liability of servants and employees. In other words, his conclusion, a mere presumption, rests completely upon the spirit of Article 24; secondly, Articles 17, 18 and 19, to which Article 24 expressly refers, only state that the "carrier is liable"; thirdly, the limits which Article 24 speaks about are those of Article 22 and do not include the provisions of Articles 28 and 29 of the Convention, which deal with the issues of jurisdiction and time limitation (19). In addition to Lemoine and Drion, other jurists have expressed the opinion that the limitation of liability in favour of the carrier is extended to his servants (20).

But the majority of the authors hold opinions to the contrary (21). The first and most important argument is that in the Warsaw Convention, no attempt was made specifically to cover the liability of servants or agents of the carrier for their individual tortious

acts. The history of the Convention affirmatively supports this argument. The report of Henry de Vos, when submitting the CITEJA draft text of the Convention to the Warsaw Conference, includes the following material:

> "Before examining the articles of the draft, it is necessary to bring out the fact that in this field, international agreement cannot be obtained unless it is limited to certain determined problems. Therefore, the text only applies to the contract of carriage--first with respect to its external forms, and second in the legal relationships which are established between the carrier and the persons carried or the shipper. It does not govern any other questions which the exploitation of the carriage may bring out." (22)

This clear description of the scope of the Warsaw Convention leaves no doubt that the drafters did not intend to extend the Convention's provision to the servants and the agents of the carrier. There is nothing in the history or preamble of the Warsaw Convention to indicate a contrary intention (23). Accordingly, the provisions of Articles which establish the principle of the liability (17, 18 and 19) and also the provisions of Article 22 which lays down the limits of this liability speak only about the carrier and not his servants or agents. In other Articles, such as Articles 20 and 25, the carrier's servants are mentioned. But Kamminga believes that:

> "Art. 25 is worth nothing in this connection since the first paragraph deals with cases where the carrier has been guilty of willful misconduct or equivalent default, while the second paragraph gives an identical ruling for cases where the carrier's servants have been similarly guilty within the scope of their employment. This contradicts the theory that the servants are covered by the term 'the carrier' elsewhere in the Convention and leads us to infer that the rules of liability set out in the Convention do not apply to the aircraft commander." (24)

Thus, under the terms of Article 20 (2), in certain circumstances a carrier may be wholly or partly exonerated from liability for damage attributable to an error in navigation (25). Courts have actually held this in both French and American jurisprudence (26).

b) French Jurisdiction

Having seen the opinions of the jurists about the problem, it is worthwhile for us to look at French and American judicial attitudes. As we will see, there is an essential difference between the two legal systems concerning the liability of the carrier's servants.

The question of whether servants and agents can avail themselves of the liability limitations has not been specifically considered by the French courts. Thus, the case of Cie le Languedoc contre Sté Hernu-Peron (27) leaves no doubt that the carrier's servants and agents cannot be sued under the terms of the contract. The absence of any contractual relationship between the plaintiffs and the carrier's agent was the main argument used by the court to justify its conclusion (28). For a better understanding of this decision, it must be clear that the French courts do not consider the carrier's servants as parties to the contract of carriage which the Warsaw Convention regulates. Therefore, they can neither claim the benefit of its provisions nor be held liable on that same basis (29).

The Provisions of Article 25A of the Warsaw Convention as amended by the Hague Protocol were not enough, in the previous case, to persuade the French court of the possibility of suing servants and agents in an action governed by the Convention. The court believed that the consignor or consignee cannot have a direct right (action directe) against the carrier's agent derived from the provisions of Article 25A because in the French legal system nothing of the sort existed before (30).

Previously, this stand had been indicated by the Billet case (31). Thus, Miller concluded that:

> "In France servants and agents are until now outside the scope of the Convention's provisions. Accordingly, they can neither be made liable on the basis of Articles 17, 18 and 19, nor be protected by provisions that apply to the Warsaw defendant, such as the liability limitations (Article 22) and the rules governing the action in relation to jurisdiction (Article 28) and time limitation (Article 29). This has not been altered by Hague Protocol because the text does not create a right of action against servants and agents but simply governs the actions that may be allowed by the relevant municipal law. French law does not allow such an action and Article 25A does no apply because there is no action it could apply to." (32)

c) American Jurisdiction

As previously stated (33), the American courts have split over the issue of whether servants and agents could be protected by the provisions of the Warsaw Convention. A few isolated cases were decided between 1949 and 1964. These cases can be grouped together. Some of them considered the servants protected by the provisions of the Warsaw Convention and some of them denied such

protection. Others dealt with the carrier's agents and one group deals with the carrier's servants. Finally some cases discuss the time limitation while others speak about the liability limitations. It appears, therefore, that these cases touch upon more than one issue and deal with many parties.

Thus, in Wanderer vs. Sabena (34), the plaintiff, while a passenger on an aircraft owned and operated by Sabena, was injured in an accident near Gander, Newfoundland, en route from Brussels to New York. Two years after instituting suit against Sabena, the plaintiff served a supplemental summons and amended complaint on Pan-American Airways, Inc., naming that corporation as an additional defendant in the action. The complaint alleged that Pan-American controlled the operations of the defendant Sabena at Gander Airport and that when the airplane crashed, it was under the control of both defendants. Furthermore, the complaint charged Pan-American with negligence in failing to instruct the pilot to proceed to another airfield where weather conditions were more favourable than those at Gander at the time of the accident. Pan-American Airways moved to dismiss the complaint against itself on the grounds that the cause of action did not accrue within the time for commencement of suit as provided in Article 29 of the Warsaw Convention. The plaintiff, on the other hand, contended that this two years limitation was in-

applicable because Pan-American was not the carrier under the contract of transportation. The court held that the plaintiff's cause of action was governed by the Warsaw Convention, reasoning that the provisions of the Convention, where applicable, apply to the agencies employed to perform the carriage as well as the carrier itself. Therefore, failure to institute an action against Pan-American Airways within the time prescribed by the Convention extinguished the plaintiff's claim against Pan-American. This case has been severely criticized but mainly on the grounds that, in the particular circumstances, Pan-American Airways should not have been considered as the agent of Sabena (35).

In Chutter vs. KLM Royal Dutch Airlines (36), the plaintiff, after boarding the plane but while the plane was still stationary, decided to wave a farewell to her daughter. She stepped through the open airplane door expecting to descend from the plane on the same boarding ramp she had used to enter the plane. Unfortunately, the ground service company had already removed the ramp and the plaintiff fell to the ground. More than two years after the accident a suit was filed against both the airline and the company. The court in Chutter held that the service company, which was acting as an agent for KLM at the time of the accident, could claim the benefit of the time limitation set out in the Convention as:

> "It is impractical to distinguish the carrier from the community of persons whose joint activity is the carrier's activity. In selling a ticket to the plaintiff, the air carrier obviously assumed the obligation of affording her a means of entrance and egress from the aircraft; in delegating the function of ramp handling to the defendant aviation service company, the carrier made it the agency by which a part of the contract of transportation was to be fulfilled. It seems immaterial whether the service company be regarded technically as an agent or an independent contractor." (37)

According to this reasoning, any person who contributes to the performance of the contract of carriage can avail himself of the Convention's provisions even if he is not an agent or employee of the air carrier; that is, the Convention is extended to encompass persons who have no contractual relationship with the passenger or consignee and who is considered as completely independent of the air carrier.

However, the court supported its decision by drawing a favourable analogy to two U.S. Circuit court cases (38) which involved the related industry of water transportation and were governed by the Carriage of Goods by Sea Act (39). In these two cases, the limitation provisions of the Act were held to inure to the benefit of a stevedore, independently contracted for by the carrier. The court in Chutter thought that the analogy of the Carriage of Goods by Sea Act was made even more persuasive by the fact that the "Carriage of Goods by Sea Act merely refers to the liability of the carrier while the Warsaw Convention, in Article 24, refers to an action for

damages (for passenger bodily injury) however founded" (40).

A few years later, the U.S. Supreme Court overruled the previous two decisions in Herd and Co. vs. Krawill Machinery Corp. (41). This was a shipping case where a stevedore sought to limit his tortious liability towards the shipper to the amount applicable to the carrier. The Supreme Court held in part that the limitation provisions in the Carriage of Goods by Sea Act do not extend to stevedores and that as he was neither a party to the contract of carriage between the shipper and the carrier, nor a beneficiary of that contract, his liability could not be limited by it (42).

It is obvious that the central issue was the time limitation as defined in Article 29 of the Warsaw Convention and its applicability to the carrier's servants and agents. In Hoffman vs. British Overseas Airways Corp. (43), the applicability question did not change but the limitation issue was exchanged for the forum limitations contained in Article 28 of the Convention. Like the Chutter case, the defendant in this case is a company who was responsible for the operation of the portable stairway and was working as an agent for the air carrier. The injuries took place, as in Chutter, while the plaintiff deplaned from the aircraft. The court in Hoffman had to determine whether the defendant could claim the benefit of the forum limitations contained in Article 28; the court referred to Chutter vs. KLM and decided:

> "that irrespective of whether the restrictions embodied in other provisions of the Warsaw Convention inure to the benefit of defendant...the prescriptions in Article 28 delineating the forum in which plaintiff-passenger may institute an action against the airline company must be confined to the parties to the contract. To interpret this provision otherwise would constitute an inordinate extension of language and would foreclose, as a pragmatic reality, the vindication of any rights which plaintiff might have against this defendant." (44)

Thus, it appears that the court made a distinction between this case and Chutter on the basis that the latter case dealt with the time limitations and with the forum limitation, and decided the issue differently.

Since Herd and Co. vs. Krawill Machinery Corp. (45) overruled the precedent on which the Chutter case had relied, it had had an immediate impact on carriage by air and its reasoning directly influenced Hoffman vs. B.O.A.C. (46).

In Pierre vs. Eastern Airlines, Inc. (47), the problem differs from the three previous cases, as it is neither related to the time limitation of Article 29 nor the forum limitation of Article 28 and it does not deal with the issue of a carrier's agent. Instead, it deals with the carrier's employees and the monetary limitation of Article 22. A conclusion similar to that in Hoffman vs. B.O.A.C. was reached in Pierre vs. Eastern Airlines, Inc., where the District Court for New Jersey ruled that the Article 22 liability limits did not apply to carriers' employees. The Court used the fact that the Hague Protocol had to expressly extend the monetary limitation

of liability to servants and agents of the carrier as indicating that the limitations were not applicable to them under the unamended Convention.

In a Canadian case, the court raised the question of the Warsaw Convention's applicability to servants and agents but the question was not answered in Stratton vs. Trans Canada Airlines (48). The trial court stated in its dicta that there was nothing in the Warsaw Convention that even remotely suggests that the word "carrier" is to be interpreted as including employees of carriers (49).

The problem had to wait until 1977, where a completely different line was adopted in the landmark case of Reed vs. Wiser (50). This case, at the trial level, before it was reversed, was followed in subsequent decisions (51).

On September 8, 1974, a Trans-World Airlines flight from Tel Aviv to New York crashed into the Ionian Sea west of Greece, killing all seventy-nine passengers and nine crew members aboard. Instead of suing T.W.A., whose liability would have been limited under the Convention, as modified by the Montreal Agreement to $75,000 per passenger, the personal representatives of nine of the deceased brought suit against the president and staff vice-president of audit and security of T.W.A. The plaintiffs alleged that the crash was due to the explosion of a bomb shortly after takeoff from Athens, and

that the defendants, in their respective capacities at T.W.A., were responsible for the institution and maintenance of a security system sufficient to prevent the placing of explosives on the aircraft, and that the defendants' negligent failure to institute or maintain a satisfactory security system was the proximate cause of the disaster.

To reverse the lower court's decision, the Appellate Court went on to discuss, point by point, the factors which led the lower court to reach an opposite conclusion. The Appellate Court began its discussion by pointing out the importance of the employees' liability to international air disaster litigation.

Hitherto, victims of international air disasters restricted themselves to seeking damages from the air carrier owning or operating the aircraft involved, or from the manufacturer of the aircraft. But this does not mean the pilot and other employees are immune from being held liable for their negligence. In common law, under the res ipsa loquitur doctrine, the pilot may be held liable for damages caused by his operation of the aircraft. In civil law, the pilot may be held liable since he is controlling the aircraft. The situation of the other employees does not differ greatly from that of the pilot. Leaving the carrier's employees without the Convention's coverage will make them subject to litigation in international

disaster instead of the carrier and:

> "the liability limitations of the Convention could then be circumvented by the simple device of a suit against the pilot and/or other employees, which would force the American employer, if it had not already done so, to provide indemnity for higher recoveries as the price for service by employees who are essential to the continued operation of its airline. The increased cost would, of course, be passed on to passengers." (52)

The court considered the text of the Convention and particularly Articles 17, 22 and 24, in both the authentic French version and the official English translation. Was the term transporteur (carrier) limited to the corporate entity of the carrier, or was it intended to embrace the group or community of persons actually performing the corporate entity's functions? The court noted that the Convention contained no definition of "carrier" (53), but the court did not mention that the terms agents and servants "préposé" were defined by CITEJA as follows:

> "Tout personne ayant un lien avec l'employeur en vertu d'un mandant quelconque, le plus général possible, agissant au nom et pour le compte du transporteur." (54)

The definition is wide enough to encompass many persons as agent and servant of the carrier "préposé", but it does not integrate agents and servants into the carrier. Instead, it distinguishes the carrier as a different person from its "préposé". Mr. Garnault, the French delegate to Rio de Janeiro's Conference of 1953, excluded the president of an air carrier from being a "préposé":

> "The French expression was incomplete for it would give the benefit of the limitation to the "préposés", but not the persons associated with the company as mandatories. According to French legislation, the chairman of the board or the director general of a company was not a "préposé" (servant or agent) but a mandatory. But members of the board were also mandatories and such persons could, under certain circumstances, participate in the negligence which caused the damage." (55)

Thus, the T.W.A. President is not a "préposé", but a "mandatory" whom the Convention does not mention, nor does the Hague Protocol of 1955 speak of it as Article 25A only speaks of "préposé" in the authentic French version (56).

The Appellate Court agreed with the lower court that the liability of the wrongdoing agent is a separate and clear source of redress, distinct from and logically prior to that of the principal. Acknowledging the impossiblity of finding what the position was in over one hundred member States, the Appellate Court was satisfied that, at least in some jurisdictions, the language of Article 22(1) would have the effect of limiting the liability of the carrier's employees as well as that of the carrier (57).

The Appellate Court relied heavily on the statements of Professor Ambrosini of Italy and of other delegates, made at the Hague and Guadalajara Diplomatic Conferences on Private International Air Law, to support its conclusion. But a careful reading of Professor Ambrosini's statements reveals that Ambrosini believed that the Warsaw Convention regulates the liability of the servants and

agents on the assumption that they constitute one and the same person as the carrier. Therefore, what is applicable to the carrier is applicable to them, and he agreed with other delegates (58) that the Convention contained no provision concerning the liability of servants or agents; he stated:

> "Besides, the Convention dealt with the liability of the carrier and not with the liability of the servants or agents, it being understood that the carrier was liable for the acts and omissions of his servants and agents.
>
> In order to solve this extremely complex question, he would prefer to have included in the Convention a special provision laying down a general rule to solve all questions which might arise concerning the liability of servants or agents." (59)

Then the Appellate Court turned to the translation of Article 17 and 24 and noted that the word "cas" appearing in Article 17 was translated into "event" whereas the same word as used in Article 24(1) and (2) was translated into "cases" (60). The Appellate Court stated that a more accurate, less ambiguous translation would use, instead of "cas" (in a nonjuridicial sense), "event" uniformly throughout because ordinarily "cas" is not used to refer to a lawsuit (61). The court's interpretation of Article 24 would read:

> "(1) In the events anticipated in Articles 18 and 19, any action for damages, however founded, can only be brought subject to conditions and limits set out in this Convention.
> (2) In the events covered by Article 17, the provisions of the preceding paragraph shall also apply..." (62).

The Appellate Court contended that the legislative history of the Convention did not affirmatively or expressly support the

Court's interpretation of Article 24 and the court added that the Conventions contained nothing indicating a contrary intention (63). But besides that, at the Paris (1925) and at the Warsaw (1929) Conferences no discussion about the subject were recorded. The Convention's text was intended to be limited to the two purposes of the Convention, which are providing uniform rules relating to air transportation documents, and limiting the air carrier's liability for accidents associated with air travel (64).

The appellees argued that the conferences, by referring the issue of the "legal status" of the captain of the aircraft and of the personnel to the International Technical Committee of Aerial Legal Experts (CITEJA), deliberately set aside the question of the employee's liability and the counter-argument must be rejected. The court disagreed with this and stated:

> "Examination of draft produced by CITEJA shows that by "legal status" the members of the Warsaw and Paris Conferences meant the power of the aircraft commander and the succession to that position by other aircraft personnel in the event of his inability to perform his duties." (65)

The history of the draft convention on the legal status of the aircraft commander completely contradicts this statement (66). The attempt to insert an article in the draft convention on the aircraft commander to regulate his liability by the successive rapporteurs indicates that the common belief held by the CITEJA experts

was that the aircraft commander was not covered by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, which is now known as the Warsaw Convention.

The trial court relied heavily upon the United States' refusal to ratify the Hague Protocol which contained, among other items, Article 25A. Observing that the history of attempted ratification of the Hague Protocol makes it clear that the only reason for the refusal to ratify was dissatisfaction with the low level of the carrier's liability limitations, and not the other provisions of the Protocol, the Appellate Court considered the trial court's reliance upon this refusal as "misplaced" (67). The Appellate Court also noted the otherwise supportive comments of Federal Aviation Administrator Haloby to the Senate Foreign Relations Committee as well as the fact that the notice of the denunciation of Warsaw was withdrawn after the Montreal Agreement was signed (68).

Thus, the Appellate Court's opinion is identical to that of the United States Delegation to the Rio de Janeiro Conference of 1953 who believed:

> "It might happen that the pilots would require to be insured against their possible negligence--and this was not contrary to public policy--and that the premiums might be paid by the carriers. If the liability of the pilot were unlimited, he could require the carrier to insure him for an amount, perhaps ten times as high as the limit of liability established by the Convention...that any increase in the limits should be a real one, but that the carrier should be

> protected. Therefore, it was ready to accept a separate proposal giving only the navigating personnel the benefit of the protection of the limit of the liability established by the Convention, on condition that it could get some measure of satisfaction on the raising of the limits." (69)

Generally, a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (70). But the textual approach should not lead to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty (71). However, the trial court noted correctly that in the absence of an unequivocal message from the language and history of the Warsaw Convention, the question of policy (purpose) would prevail (72). The Appellate Court contended that a treaty, whether construed strictly or liberally, should be interpreted to effectuate its evident purposes (73).

Despite the agreement between the two courts on considering the purpose of the Convention as the decisive factor in its interpretation, they disagreed over the delineation of that purpose. So, while the Appellate Court stated:

> "It is beyond dispute that the purpose of the liability limitation prescribed by Article 22 was to fix at a definite level the cost to airlines of damages sustained by their passengers and of insurance to cover such damages...The history of the Convention from the point of adherence by the United States to the present indicates no change in this fundamental purpose." (74)

The trial court did not consider that such a goal is the purpose of the Convention; instead, it considered the goal as a means which led to the purpose which was the protection of the aviation industry in its infancy:

> "The Warsaw Convention policy limiting liability, defendants' strongest support, had the well understood aim to protect infant air carriers from what were feared to be potentially fatal burdens of compensation to people injured or left bereaved while efforts to fly safely were proceeding." (75)

There is agreement between the two courts on the extension of the Convention's coverage to the employees and agents and that that would be inconsistent with the Convention purpose as each one saw it. Thus the trial court stated:

> "It would be consistent with that policy to extend the protection to employees and agents who might otherwise press for insurance or other forms of indemnity. And it is somewhat at odds with that policy to hold otherwise." (76)

Considering the maturity of the airline industry, the trial court thought that the original policy had lost a great deal of its persuasive force (77). In accordance to the trend established by Day vs. Trans World Airlines (78), the trial court looked for another purpose to reflect the current situation, which is a powerful national policy favouring compensatory damages from tortfeasors who cause personal injury (79).

In Hautman's (80) opinion the Appellate Court followed established principles of treaty interpretation in reaching its

decision, but the vague language of the Convention and the strong U.S. policy against limiting the recovery of tort victims may persuade other less exacting courts to reach a contrary result (81).

In criticizing the Appellate Court's decision, it has been said that, previously, airline insurers had settled the suit against an airline and its employees for amounts in excess of $75,000 because they feared a court might rule that Article 22 did not protect carrier employees and the court's decision would probably affect the settlement amounts in such cases (82). It also has been said:

> "the court fell victim of two of the dangers inherent in any enquiry into foreign law, i.e., an incomplete access to proper sources of information and a misunderstanding of foreign law material taken out of context. Not only was its attention not drawn to the judicial developments on the question which had just taken place in France, but, in ascertaining the civil law position, it limited itself to statements of some civil law delegates to the diplomatic conferences revising the Warsaw Convention. This was extremely risky because there is no guarantee that such statements exactly reflect the law of the countries concerned." (83)

The principles of Reed vs. Wiser have been followed by the recent case of Julius Young Jewelry Mfg. Co. vs. Delta Airlines, (1979, 1st Dept.) (84) where it has been stated that the liability limitations of the Warsaw Convention applied to an air carrier's agent performing functions the carrier could or would otherwise perform itself.

No doubt that a strong sense of justice was behind the court's decision in Reed vs. Wiser, because it is inconceivable that one may, on the one hand, limit the carrier's liability while, on the other, leave the liability of agents and employees unlimited. If the carrier interfers in one way or another to protect his employees and agents, the Warsaw Convention will be in great danger, without extending the Convention provision to the carrier's employees and agents. But the strongest critique of this case is that it may lead to a deviation from the Convention's principle and then the carrier's employees and agents, including the aircraft commander, will be in a very critical situation.

However, the American courts handled the problem of the liability of agents and employees of the carrier from three different aspects, namely: the time limitation--Article 29; the forum limitation--Article 28; and the liability limitation--Article 22, as it appears in the previously discussed cases.

The deviation from Reed vs. Wiser will be difficult with respect to the liability limitation set out in Article 22; but, can such deviation occur with respect to the time and forum limitations? To answer this question, one must remember that the Reed court was intent on not circumventing the Convention's purpose of providing definite limits to the air carrier's obligations. The court's fears

are well founded in the case of not extending the provisions of Article 22 of the Warsaw Convention to the carrier's employees and agents, but there is no place for such fears in the case of the time and forum limitations. Thus the deviation may occur, especially if one takes into consideration the principles of Eck vs. United Arab Airline and Day vs. Trans World Airline.

In Day, the court contended that although the Montreal Agreement had not altered the language of Article 17 of the Warsaw Convention, its adoption in 1966 was particularly instructive in divining the purposes of the Warsaw Treaty and this adoption provided decisive evidence of the goals and expectations currently shared by the parties to the Warsaw Convention (85). The court also stated:

> "These expectations can, of course, change over time. Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787." (86).

Nevertheless, the Third Circuit took a different position in Evangelinos vs. Trans World Airlines (87) on what are the modern goals of the Warsaw Convention. The court does not question the soundness of these goals, but it believes that the Warsaw Convention's goals and policies were reaffirmed by the signing of the Montreal Agreement in 1966 (88). The court supported this conclusion by saying:

> "Had the signatories to the Convention wished to amend it in order to reflect modern developments in American tort law, they could have affirmatively acted in 1966 when the monetary damage limitation was increased and the airline's due care defense eliminated. Their failure to do so should not be disregarded, particularly if we keep in mind that this is an international agreement." (89)

Regardless, the dispute between the Day court and the Evangelinos court over the current goals of the Convention, the principles of interpretation as stated in Eck vs. United Arab Airlines and quoted by the Reed court can be used as an excellent argument in the deviation from the principles set out in the Reed decision. The Second Circuit in Eck said:

> "A court faced with this problem of interpretation, or another problem like it, can well begin with an inquiry into the purpose of the provision that requires interpretation. The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry but it should never become a "verbal prison". Other considerations, such as the court's sense of the conditions that existed when the language of the provision was adopted, its awareness of the mischief the provision was meant to remedy, and the legislative history available to it, are also relevant as the court attempts to discern and articulate the provision's purpose." (90)

Thus, the deviation from the Reed principles can be described as advancing the Convention's modern goal, while at the same time giving effect to its original purposes (91).

But, it may be argued that the term liability limitation encompasses the time and the forum limitations according to the provision of Article 3(2) of the Convention which reads:

> "...if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability."

So, the question to be answered is whether Articles 28 and 29 of the Convention exclude or limit liability within the meaning of Article 3(2). An affirmative answer leads one to say that the contract of carriage must contain notice of the provisions of these two Articles and the absence of such notice would make the carrier subject to unlimited liability. However, the landmark case of Lisi vs. Alitalia Linee Aeree Italiane (92), which dealt with the notice problem, held only that Articles 20 and 22, which provide for limitations of the amount of damages recoverable against an airline under the Convention, are provisions excluding or limiting liability under Article 3(2) (93). It has also been consistently held that Article 25, which provides that the "carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct" applies to the Articles of the Convention which exclude or limit monetary damages, namely Articles 20 and 22 (94).

In Molitch vs. Irish International Airlines (95), the court established the principle that the two year limitation was applicable even though the passenger ticket did not notify the passenger of the two year limitation. The court stated:

> "It is our view however, that Article 29(1) is not a provision excluding or limiting liability under Article 3(2)., An extension of Lisi to cover Article 29(1) would be unwarranted...notification of a two year limit on bringing on action would have no such effect...extension of the requirement of notice of the statute of limitation would be both meaningless and unjustified." (96)

It is submitted that Article 29(1) of the Convention is a limitation and does not constitute a condition precedent (97). In general, the statutes of limitations are applicable without any requirement of notice in contracts or otherwise because they are designed primarily for lawyers who are assumed to be aware of them (98).

In Joel Tames vs. Yugoslav Airlines (99), the court ruled that the Warsaw Convention, as supplemented by the Montreal Agreement did not require that a passenger ticket give notice of the Convention's two year statute of limitation because the Montreal Agreement did not change the substance of the Convention.

If the American courts deviate from the Reed vs. Wiser principles with respect to the time and forum limitations, their positions will be close to the provision of Article 25A of the Warsaw Convention as amended by the Hague Protocol.

The Hague Protocol: Article 25A

On September 28, 1955, twenty-six countries signed the Hague Protocol. This Protocol contained indispensable amendments to the Warsaw Convention, from the legal and practical point of view. Among these amendments was the insertion of Article 25A into the Warsaw Convention. The Article reads as follows:

> "1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.
> 2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.
> 3. The provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

The Article is the result of a very lengthy discussion in the diplomatic conferences which preceded the signature of the Protocol. The discussion reflected the deep differences between the delegates of States concerning the provision of this Article. An immediate and practical need was behind the formulation of Article 25A. Therefore, the statements of delegates in the diplomatic conferences do not reflect the compromise formula of Article 25A and cannot constitute a reliable source in interpreting this Article.

In other word, the court cannot rely on one or a few statements as a decisive factor in construing the Article. The most one can get from these statements is a better understanding of the Article's provisions.

However, the Hague Protocol is not the only international treaty which limits the liability of transport workers in respect to civil claims arising out of their employment to the same extent as their employer's liability. The European Convention on the Contract for International Carriage of Goods by Road signed in Geneva on May 19, 1956, contains an Article similar to Article 25A (100).

Regardless of the dispute among the delegates on whether the provisions of Article 25A merely affirmed the pre-existing position in the Warsaw Convention or not, there are some legal writers who believe that the provision of Article 25A closes a potential loophole in the Warsaw Convention and:

> "If one accepts the principle of the Convention, then it is a good thing. On the other hand, if one believes that the Convention is an evil, and is very harmful to American passengers, the closing of this possible loophole makes the Convention that much worse." (101)

In fact, there is no difference between the reasons on which the court in Reed vs. Wiser relied to render its decision and those which justified the inserting of Article 25A in the Convention. The Hague Conference considered these two reasons in adopting Article 25A:

> "(a) Because of the limitations of liability available to the carrier in most cases, pressures will be built up to sue the individual employee under usual principles of negligence law, with the hope that if negligence can be proved, a substantial recovery may be had against the pilot or other negligent servant. Thus, the presence of a limitation of liability may tend to encourage suits against the servants in cases where customarily the operator alone would be called upon to defend.
>
> (b) Secondly, in order to protect themselves against such potential liability, pilots, and other employees, through their bargaining agents, will be astute to see to it that their contracts of employments contain clauses to hold them harmless, in the event they are so sued. This has the effect of circumventing the limitation of liability provided in the Convention." (102)

But, despite these reasons the purpose of Article 25A is only to make the same limits of liability available to the servant which are also available to the carrier. No cause of action whatsoever is provided by the Convention for a suit against the servant or agent (103). While aware that this question was subordinate to the main purpose of the Convention, the Conference expressly refrained from making a "Convention within a Convention" applicable to the liability of servants and agents of international carriers (104).

One of the important points to be noted is that in paragraph 3 of Article 25A, the provisions do not apply if it is proved that the damage resulted from an act or omission of the servant or agent, done with intent to cause damage or recklessly and with knowledge that damage would probably result. The provisions of this paragraph have been criticized by Nicolas Mateesco Matte:

> "...the situation provided by the new Article 25A, paragraph 3 will be difficult to plead in cases of an accident or damage caused to persons. It may only be possible to allege that the agent was ready to commit suicide through negligence. On the other hand, if the pilot error was intentionally made in order to avoid other forms of damage, it does not seem possible that unlimited liability may then be imposed upon him." (105)

Also, it has been said that the extension of the coverage of the liability limit to servant and agent would make it more difficult to obtain a judgment against the servants and agents than against the carrier himself, because the burden of proof would, in this case, fall on the claimant (106).

Besides the previous conditions, the servant or agent cannot avail himself of the limits of liability which the carrier himself is entitled to invoke under Article 22 unless he proves that he acted within the scope of his employment.

Article 25 as amended by the Hague Protocol provides that:

> "The limits of liability specified in Article 22 shall not apply if it is proved 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; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

The reading of this Article with Article 25A reveals the fact that the carrier is better protected than the servants or agents, for according to the provisions of the two Articles one may face three situations:

a) The carrier and his servant or agent would be liable without limits, if the servant or agent acted within the scope of his employment, but committed an act of willful misconduct;

b) The servant or agent would be liable without limits while the carrier's liability would be limited, if the servant or agent acted outside the scope of his employment and committed an act of willful misconduct;

c) Also, the servant or agent would be liable without limits while the carrier's liability would be limited, if the servant or agent acted outside the scope of his employment, but did not commit an act which amounted to a deliberate act.

Thus, unlimited liability would be imposed on the servant or agent as a penalty simply because he had acted outside the scope of his employment (107). In this case, the servant or agent is in an exceptionally severe position, especially if one takes into consideration that the Protocol does not define the term "the scope of his employment".

It is clear that the Hague Protocol deals with the carrier and his servant or agent as two completely different persons because according to its provisions their liability was not coincided.

In fact, the key provision of Article 25A puts the carrier's servants and agents under the umbrella of Article 22 of the Conven-

tion, but the wording and the history of Article 25A leaves no doubt that the Article refers only to the provision of Article 22 of the Convention. Therefore, the servants and agents cannot claim the coverage of Articles 28 and 29. The wording of Article 25A clearly conveys this meaning because the term "limits of liability" is used and restricted to Article 22 only.

Besides this unequivocal language, the history of the Article supports this interpretation. The comments of the delegates at the Rio de Janeiro Conference pointed to a certain confusion as to the exact scope of the term "limitation of liability". A number of delegates thought that this provision probably referred only to Article 22, but not to Articles 28 and 29. Other delegates believed that the provisions of the Convention should be applicable to any action brought against the servant or agent. In other words, if an action were brought against a servant or agent, he would be entitled to invoke the limits of liability as well as the defences that would be open to the carrier in similar circumstances (108).

Thus, there were three opinion expressed. Mr. Ambrosini, the Italian delegate, believed that the Convention as a whole should always be applied; therefore, he suggested the following wording:

> "If an action for liability for the damage provided for under this Convention is brought against the servants or agents of the carrier, such action may be brought only subject to the conditions and limits of this Convention." (109)

Mr. Drion, the Netherlands delegate, believed that the term "limitation of liability" includes, besides Article 22, Articles 28 and 29, because in his opinion:

> "...it was not clear what was meant by "the rules with respect to the limitation of the liability of the carrier". It might very well be held by the court that that only referred to the rules of Article 22, and that would not be a just restriction. When a claimant had forgotten to bring an action in the time provided in Article 29, he should not have the freedom to bring an action against the servant or agent in order to get around the provisions of Article 29. Similarly, the claimant should not be permitted to avoid the provisions of Article 28 by bringing an action before a court which might be more favourable to him. Therefore, he proposed to make express reference to Articles 22, 28 and 29." (110)

To avoid such criticism, the Guadalajara Convention used the term "the limits of liability" without any restriction to any Article. Guadalajara provides that, in relation to carriage performed by the actual carrier, "any servant or agent of that carrier or of the contracting carrier shall, if he proves that he acted within the scope of his employment, be entitled to avail himself of the limits of liability which are applicable under this Convention to the carrier whose servant or agent he is" (111). The 1971 Guatemala Protocol takes the same line and allows a servant or agent of the carrier acting within the scope of his employment to "avail himself of the limits of liability which that carrier is entitled to invoke under this Convention" (112).

To leave the term "limits of liability" without any definition is not the right solution, in my opinion, because the whole

situation may end up like the provisions of the Hague Protocol's Article 25, as seen above (113). Besides, determining which are the provisions of the Convention which exclude or limit liability may be a difficult task, particularly in relation to Articles 28 and 29 (114).

The Pilot's Error

Usually, the investigator finds himself faced with inherent difficulty in determining the cause of an accident and it sometimes happens that the cause of the accident cannot be established by positive proof because frequently after a crash, the crew is dead, the aircraft itself is in a million pieces, and there are no witnesses alive to describe what had happened. Thus, the proximate cause of an accident depends on a myriad of factors. But, in a high percentage of cases, the finger is pointed directly at the aircraft commander because, typically, that individual constitutes the final authority over all aspects of the operation of the aircraft (115).

The issue of liability involves determining whether a pilot's actions fell short of a specific standard of care or responsibility

while operating an aircraft, and the issue of defining the required standard of care. Since this standard has not comprehensively been defined as of yet, these are the two problems which traditionally plague the law surrounding aircraft accident cases (116).

Therefore, the definition of "pilot error" is extremely important for the carrier and the pilot himself. Pilot error or negligence may consist in a maneuver just after take-off in banking to an excessive degree in turning--also at an excessive degree--before the airplane has attained the altitude and the speed required to support such a maneuver; also, in flying with the wing flaps not down nor extended--thus increasing the risk of stalling (incapacity of lift on wings to sustain aircraft in flight) as a result of the stall-inducing bank and turn at that altitude and speed (117). However, the National Transportation Safety Board (NTSB) (118) through its report list many categories of aircraft commander's errors. These categories are typified by the following: attempted operation beyond experience or ability level; becoming lost or disoriented; continued flight into adverse weather conditions; attention diverted from the operation of aircraft; failure to extend landing gear and and failure to see and avoid other aircraft or ground obstructions (119). Pilot error has sometimes been the sole proximate cause of commercial airline crash disasters (120).

Cockpit discipline is an extremely important aspect of flying safety and the lack of it is inexcusable (121).

However, after an aircraft crash, the parties who may be held responsible try to establish their lack of responsibility for the crash. The efforts of such parties to protect their special interests complicate the investigative process and make it subject to many errors (122). In defending the pilot's position, it is necessary to consider the mechanics of flying a modern aircraft, because it would be unjust to equate pilot error with any degree of fault. In the case of a malfunction of an engine or of any part of the guidance equipment, the speed of a modern aircraft leaves the pilot with very little time to think and to make a reasonable decision of the remedial action to be taken. In fact, his training is aimed at having him react automatically, to any signal of his instruments, or to any incident, which indicates the malfunction of an engine, or mechanism or instrument. It is no longer the pilot who dominates the machine but it is the machine that triggers his reactions (123). It also has been said, in defending the pilot's position:

> "Pilot error may, and often does, exist without legal responsibility of the pilot for the accident, because every act of the pilot contributing to the accident although unavoidable or completely justifiable, is called 'pilot error'. The accident analyst must attribute the accident to aircraft structure, power plant, pilot, other personnel, etc., and he is not concerned with whether the pilot's action was justified or wrong in either a moral or legal sense." (124)

This view of pilot error was approached by the court in Chapman vs. United States (125) which found that a pilot may not have exercised the best judgment in an emergency but that it was not a sufficient fact in order to charge him with negligence. With both style and sympathetic understanding the court points out the overwhelming problem that runs through airplane cases:

> "The last critical moments of the flight, as time and tide go in a plane which, though still airborne, is in desperate plight, must, however, remain forever shrouded behind the impenetrable curtain which death has drawn. This curtain neither investigators, nor boards, nor even judges can pierce, except by speculation and conjecture, and these may not take the place of proof. Since knowledge must precede understanding, and understanding must precede judging, and we cannot know, we cannot judge what was done by the pilot that he ought to have done, what was done by the pilot that he ought not to have done, what was left undone by him that he ought to have done, its is, we think, fatal to plaintiffs' claim that they were unable to discharge their burden of proof by presenting evidence as to what in those critical moments was happening to and within the plane." (126)

Depending upon the circumstances, an error in judgment on the part of the pilot of an airplane might or might not be negligence. Unless the pilot, by negligent or careless conduct, created a situation requiring the exercise of his judgment, a carrier might not be liable for an error in judgment on the part of the pilot (127). The basic premise that the pilot must be in command and control may rebound to the benefit of the air carrier, particularly where the shock or the aftermath of an accident results in suits for damages (128).

It is difficult to decide whether the pilot committed an error without having an idea about the standard of care imposed on him. This raises more than one issue, but the most important question is whether more competence should be expected of the pilot with an advanced rating (129) or whether the culpable standard of care should depend on the level of the flight certificate and whether the required standard of care is a high or an ordinary one.

The opinion of the majority on these key questions of common law is, unless there is a statute defining the standard of care, the pilot is required to use ordinary care (130). A minority believes that the highest degree of care should be required because:

> "The nature of the conveyance and the great danger involved would seem to require the utmost practical care and prudence for the safety of passengers." (131)

The high degree of care required from a pilot, according to the opinion of the minority, is similar to the care required in the medical and legal professions, because a high standard of pilot's responsibility would be likely to encourage more vigilance in training and flight operations. It is argued, however, that the pilot's level of attainment has effect in determining the requisite standard of care in the particular circumstances (132). Student pilots, who are not permitted to carry passengers, for instance, might be held to a less stringent standard, with progressively more stringent requirements demanded of private and commercial pilots. One of the

highest standards should be expected of the flight instructor and the airline transport pilot (133).

Having discussed the requisite standard of care, it is important to know which party is to be held liable under such a standard. The standards contained in Annex 2 offer some guidance in this regard. The Annex provides that the aircraft commander is responsible for the operation and safety of the aircraft during flight time (134), and shall have final authority as to the disposition of the aircraft while he is in command (135). It also provides that the aircraft commander shall, whether manipulating the controls or not, be responsible for the operation of the aircraft (136). Thus, the aircraft commander is responsible even if he is operating the aircraft with another rated pilot occupying the front seat of an aircraft equipped with functioning dual controls. But, the situation is different because the aircraft commander is the one who by regulation "may log as pilot in commmand time only that flight time during which he is the sole manipulator of the controls of an aircraft... or when he is the sole occupant of the aircraft..." (137). Thus, an implied definition of an aircraft commander is offered (138) while the regulations define the aircraft commander as "the pilot who is directly responsible for and is the final authority as to the operation and safety of an aircraft during flight time." (139). There-

fore, it has been noted:

> "a question may arise regarding who actually is the pilot in command when two rated pilots occupy the front seat of an aircraft equipped with functioning dual controls. Accordingly, it has been held that pilot identity may be proven by merely a preponderance of the evidence." (140)

This difference between the provisions of Annex 2 to the Chicago Convention and the U.S.A. regulations may create some difficulties, since the Annex 2 standards are applicable over the high seas.

Nautical Fault Under the Warsaw Convention

Article 20(2) of the Warsaw Convention provides that:

> "In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation (faute de pilotage, de conduite de l'aeronef ou de navigation) and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."

This Article is derived from the term "the nautical fault" as it is known in the maritime rules (141). The basic premise of this idea is the distinction between the nautical and commercial fault (142). The carrier is only responsible for the second type of fault.

It is obvious that Article 20(2) makes a clear distinction between the carriage of passengers and that of goods and luggage.

In case of error in piloting, in the handling of the aircraft, or in navigation, it does not exempt the carrier from liability with respect to the carriage of passengers. The draft adopted in Paris, 1925, did not make a difference between the carriage of passengers and the carriage of goods and exempted the carrier in both cases. The German delegate at the Warsaw Conference of 1929 suggested the distinction between the two types of carriage be made because, in his opinion, the damage usually took place, in the case of passenger transportation, because of error in piloting, while in the case of the transportation of goods, the damage most often occurred because of the improper packing of the merchandise, and if the carrier was permitted to exempt himself from liability, for the carriage of passengers, because of an error in piloting the aircraft, there would be very few cases in which the carrier would be liable (143). The Warsaw Conference then adopted this suggestion.

a) Fault as Defined by Article 20(2)

Using the terms "error in piloting, in the handling of the aircraft, or in navigation", the Article excludes the error in packing, loading and maintaining goods, which is called commercial fault, "faute commerciale".

The provisions of the Article include every error which takes

place while landing, during take-off and flight time, as well as such errors which arise in handling the aircraft equipment or in receiving a weather radio message. Thus, the test is in the nature of the fault and not the person who committed the fault (144).

An error in packing or in loading goods cannot be an error in piloting, even if it is the cause leading to the crash of the aircraft (145), because packing and loading take place while the aircraft is on the ground, and both of these particular activities bear relation to the piloting of the aircraft. Article 20(2) is applicable to cases of damage due to delay (146).

b) Burden of Proof

Article 18's provisions make the carrier liable:

> "for damage sustained in the event of the destruction or loss of, or of damage to, any checked luggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air."

Thus, the burden of negative proof is laid on the carrier who has to prove that the damage was caused by an error in piloting.

It is not enough for the carrier to prove that the damage took place because of error in piloting, for he must also prove that he and his agent or employees have taken all necessary measures to avoid damage. Therefore, he is responsible for any error in piloting committed by an unqualified pilot appointed by him (147).

In American Smelting and Refining Co. vs. Philippine Airlines, Inc. (148), four boxes which contained bars of gold were sent from Oakland, California to Hong Kong on or about January 17, 1947. In attempting to land, the aircraft which was carrying the gold boxes crashed just outside Kai-Tak Airport. As a result of the crash, Philippine Airlines was unable to find and deliver part of the shipment of gold bars to the consignee. The court stated:

> "The proof adduced upon the trial conclusively establishes that defendant took all possible precautions to insure the safety of the flight, and to avoid the crash of its aircraft. The record shows that defendant properly equipped, loaded and fueled the plane, supplied an air-worthy and duly licensed aircraft, a licensed and qualified pilot and crew who were given all necessary maps, charts...The credible evidence proves that the crash of defendant's plane was caused by a combination of factors, including negligent piloting, faulty and erroneous instructions from the Kai-Tak Airport control tower, possible failure of the pilot to obey instructions from the control tower and/or to follow defendant's established landing procedures, poor weather conditions and a dangerous landing field and surrounding terrain. These factors entitle defendant to exclusion from all liability pursuant to the foregoing provisions of Article 20 of the Warsaw Convention." (149)

c) A Discussion of the Position of the Warsaw Convention

To justify the Warsaw Convention's position in exempting the carrier from an error in piloting, some legal writers have said that the risks of aviation should not be carried by the carrier alone (150), and as both the captain of a ship and the aircraft commander are away from the carrier's control, the carrier should not be responsible for his activities. If a marine carrier can be

exempted from liability because of an error in piloting, a fortiore the air carrier should obtain the same benefit because the risks in aviation are greater (151).

Making the carrier responsible for an error in piloting would increase the cost of the transportation and, consequently, the rate charged. Therefore, it is better to leave the decision to the shipper's discretion, whereby he may seek additional protection by insuring his shipment (152).

Some legal writers are of the opinion that an error in piloting exempts the air carrier from responsibility, not only for the transportation of luggage and goods but also for the carriage of passengers because the reasons which justify the giving of such a benefit to the carrier for the transportation of goods, are the same for the carriage of passengers (153).

These arguments are not supported by the analogy between carriage by air and carriage by sea. In transportation by sea the captain and crew stay away from the carrier's control for a long time. Usually, a ship takes weeks to complete one journey, but an aircraft requires only a few hours to complete its itinerary, during which the aircraft commander is in constant contact with the carrier by means of the radio (154).

According to the rules of vicarious liability, the carrier must be responsible for an error in piloting for the transportation

of both goods and passengers, especially if we take into consideration the fact that the crew committed this error while performing their duties (155), and the aircraft commander is merely an employee of the carrier (156).

It is held that Article 20(2) is the misapplication of a marine rule. The result is that, if the carrier furnishes the proof required under paragraph 2, he automatically deprives himself of the chance of proving his non-liability under paragraph 1 (157).

Because of strong criticism, the Hague Protocol omitted paragraph 2 of Article 20. Thus, the Convention discarded this absurd difference.

The Rome Convention

A "Convention on damage caused by foreign aircraft to third parties on the surface" was signed at Rome, on October 7, 1952. This Convention supercedes the Convention "for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface", which was signed at Rome on May 29, 1933, as contracting States ratified both Conventions (158). The Rome Con-

vention of 1952 came into force on February 8, 1958, after five ratifications (159). The two main purposes of the Rome Convention of 1952 are: first, to encourage and protect the development of international civil air transport by limiting, in a reasonable manner the extent of the liabilities incurred for damage caused on the surface by foreign aircraft; secondly, "the need for unifying to the greatest extent possible, through an international convention, the rules applying in the various countries of the world to the liabilities incurred for such damage" (160). These two purposes are similar to the original main purposes of the Warsaw Convention as they were discussed by the court in Reed vs. Wiser (161).

It is submitted that the Rome Convention of 1952, despite its poor acceptance, has assisted in developing private international air law, because the Hague Protocol (1955) and the Guadalajara Convention (1961) merely take up and apply the principles of the Rome Convention of replacement of the "dol" and "fault equivalent to dol" notions by the act of "willful misconduct", while increasing the limits of liability amounts, and extending the liability limitation to the agents and servants of the carrier (162).

However, the measure of support the Convention received is less than was initially expected. One possible reason is the unsatisfactory nature of the limits of liability which are based upon the

weight of the aircraft, a factor which may be quite unrelated to the extent of the damage (163).

The Rome Convention of 1952 has not been ratified by the countries which play a major role in international air traffic. The United States of America abstained from ratification because of the adoption of the principle of strict and limited liability (164). While the eastern European nations studied and considered the Convention without adhering to it, western European states refused to ratify it because of Article 12 (165). Although almost all the points of the Rome Convention's text are fuller and clearer than the text it replaces, only twenty-nine States have ratified or adhered to it. After its denunciation by Canada, which took effect on December 29, 1976, twenty-eight States remain parties to the Convention (166). Despite the fact that the Convention remains under review within ICAO, there is a reluctance to attempt a revision which might prejudice the present limited acceptance (167).

The idea underlying the Convention is that any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by the Convention, but,

> "there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto,

> or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity existing air traffic regulations." (168)

Like Article 22 of the Warsaw Convention, Article 11 of the Rome Convention of 1952 sets limits to the liability which may arise under the Convention. If, however, the person who suffers damage proves that it was caused by a deliberate act or omission on the part of the operator, his servant or agent, or was done with intent to cause damage, the liability of the operator will be unlimited (169).

a) The Aircraft Commander's Liability Under the Rome Convention

In order to protect the interests of the victims, paragraph 1 of Article 2 of the Convention attaches the liability, for the compensation contemplated by Article 1, to the operator of the aircraft, and paragraph 2(b) of the same Article holds the aircraft operator liable for incidents caused by his servants or agents, even outside the scope of their authority. But the Convention does not leave the aircraft operator without any protection, as it gives him a right of recourse against any person (170).

In accordance with the definition of the "operator" provided by Article 2, paragraph 2(a) the aircraft commander may at the same time be the operator. These are cases where the person piloting the aircraft owns it or it is under his control by a lease contract, but in most cases the aircraft commander and the operator are com-

pletely different individuals.

Article 9 is the most pertinent with respect to the aircraft commander's liability. It reads as follows:

> "Neither the operator, the owner, any person liable under Article 3 or Article 4, nor their respective servants or agents, shall be liable for damage on the surface caused by an aircraft in flight or any person or thing falling therefrom otherwise than as expressly provided in this Convention. This rule shall not apply to any such person who is guilty of a deliberate act or omission done with intent to cause damage."

In Kamminga's opinion, this Article provides that the airline can only be held liable in accordance with the rules of the Convention, unless there is willful misconduct involved, and the aircraft commander can never be sued by third parties, except in the event of willful misconduct or unlawful use of the aircraft. He believes that the Convention supports this conclusion by stating that the only parties who may be held liable are the operator and, under certain circumstances, the owner or person who "wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it" (171). But all the benefits which the aircraft commander gets from these rules can be circumvented by the provision of Article 10. Therefore, any future Convention on the legal status of the aircraft commander has to deal with this subject (172).

Article 9 of the Rome Convention, unlike Article 25A of the Hague Protocol, does not confine its provisions to servants

or agents, in fact, it includes all persons who may be held liable under the terms of the Convention. Instead of referring to a certain Article or Articles of the Convention, it states that liability has to be determined in accordance with the provisions of the Convention.

Article 8 of the Convention gives all persons referred to in paragraph 3 of Article 2 and in Articles 3 and 4 the right to benefit from all the defences which are available to an operator under the provisions of the Convention, but it excludes servants and agents from its provisions. This exclusion may be justified by the immunity of servants and agents from being sued by third parties.

Thus, the protection provided by the Rome Convention of 1952 to servants and agents differs from that provided by the Warsaw Convention as amended by the Hague Protocol.

* * *

NOTES

(1) "The Protection of Transport Workers Against Civil Law Claims Arising out of their Employment", 26 Journal of Air Law and Com. (1959), p. 90.

(2) Drion, p. 158.

(3) Ibid, supra note 1, p. 91.

(4) John, G.Fleming, "The Law of Tort", (1977) p. 355.

(5) Kamminga, at p. 158.

(6) Avant-projet Convention par Mr. Thieffry, (1927), Article 2.

(7) Compt Rendu des Réunions de la 4ieme Commission, Doc. 2, p. 11.

(8) Rapport par Mr. Babinski, Doc. 17, Art. 17.

(9) Compte Rendu des Réunions de la 4ieme Commission, Doc. 37, p. 49.

(10) Compte Rendu des Réunions de la 4ieme Commission, Doc. 84, p. 40.

(11) Compte Rendu de la 6ieme Session, Doc. 162, p. 92.

(12) Reed vs. Wiser, 555 Fed. 1074 (1977), 14 Avi, 17,841. See Pratt, Carriage by Air Act, 1952, Limitation of Air Carrier's Liability--Whether Servants of Carriers are also Protected, 41 Can. B. Rev 124 (1963).

(13) ICAO Doc. A4-WP/154. See also, Resolution of IFALPA, 5th Conf., Brussels, 1950.

(14) See, e.g. Swiss Federal Air Navigation Act, 1948, art. 70 (2) which provides that the carrier must cover by insurance the liability of persons charged with any services on board it for damage, caused in the course of their employment, to third parties.

(15) Ibid, supra note 12.

(16) M. Lemoine, "Traité de Droit Aérien", (1947) p. 558.

(17) H. Drion, "Limitation of Liability in International Law", (1954), pp. 152-158.

(18) Ibid, p. 158.

(19) See further discussion of this point below, pp. 85, 92.

(20) Ambrosini, Italian delegate at the Hague Conference, ICAO Doc. 7686-LC/140, 1, 220; Litvine, "Précis elementaire de droit aerien", Bruxelles, 1953; Guy de Montella, "Principios de derecho aeronautice", Buenos Aires, 1950, p. 560.

(21) Kamminga, "The Aircraft Commanders in Commercial Air Transportation", (1953) p. 90; Bucher, "le statut juridique du personnel navigant de l'Aéronautique", p. 36; Maschimo, "la condition juridique du personnel navigant de l'aéronautique", p. 125; Beaumont, "Need for Revision and Amplification of the Warsaw Convention", JAL, 1949, p. 395.

(22) Calkins, "Grand Canyon, Warsaw and Hague Protocol", (1956), 23 J. Air Law and Com., p. 253 and p. 267.

(23) Kamminga, ibid, supra note 21, at p. 91.

(24) Ibid.

(25) Art. 20(2) has been deleted by the Hague Protocol.

(26) Mathon, Mourier et Nijaij vs. Brutschy et Société Caudron, RGDA (1937), p. 148 and (1938), p. 91. American Smelting and Refining Co. vs. Philippine Airlines, Inc., 4 Avi, 17,413.

(27) 1976 30 R.F.D.A., 109 (C.A.Paris, November 17, 1975).

(28) Ibid, at pp. 113-114.

(29) G. Miller, "Liability in International Air Transport", (1977), p. 277.

(30) Ibid, supra note 27, at p. 114.

(31) (1964), 27 R.G.A.E. 257. The Cour de Cassation affirmed the decision of the Court of Appeal which had condemned the pilot to compensate the plaintiffs C.D.S. (1970), pp. 81-82.

(32) Ibid, supra note 29, pp. 277-78.

(33) See hereinabove at p. 61.

(34) (1949) U.S. Av Rep. 25 (N.Y. sup, ct, 1949).

(35) Shawcross and Beaumont on Air Law, 2nd ed., London, (1951), with suppl. 1952, No. 362, footnote 14. Lacombe, "Jurispredence, Court Supreme de l'Etat de New York, 12 Rev. Gen. de l'Air 821 (1949); Le Goff, "La Jurisprudence des Etats Unis sur d'Application de la Convention de Varsovie", 20 Rev. Gen. de l'Air, 352, 354 (1957).

(36) 132 F. Supp 611 C.S.D.N.Y. (1955); 4 Avi 17,732.

(37) 4 Avi, at 17, 134.

(38) A.M. Collins and Co. vs. Panama R. Co., 197 f. 2nd 893 (5th Cir., 1952); United States vs. the South Star, 210 f. 2nd 44 (2nd Cir., 1954).

(39) 46 U.S.C.S. 1300 et seq. (1970).

(40) Ibid, supra note 37.

(41) 359 U.S. 297 (U.S. Sup. Ct., 1959).

(42) At p. 308.

(43) 9 Avi, 17,180 (N.Y. Sup. Ct., 1964).

(44) At 17,181.

(45) Ibid, supra note 41.

(46) Ibid, supra note 29, at p. 278.

(47) 152 F. Supp. 486 (D.N.J., 1957); 5 Avi, 17,517.

(48) 27 D.L.R. 2nd 670, 674 (B.C. Sup. Ct., 1961) aff'd 32 D.L.R. 2nd 736 (B.C. Ct. App., 1963).

(49) Ibid, at p. 674 (D.L.R.).

(50) 414 F. Supp. 863 (1976); 17 Avi. 18,426 C.S.D. n.g), rev'd 515 F 2nd 1079 (1977); 14 Avi 17,841 (2nd Cir. 1977). For comments on this case see: Kenneth J. Hautman, "Treaties Warsaw Convention--Airlines Employees are Entitled to Assert as a Defense The Liability Limitation of the Warsaw Convention as Modified by the Montreal Agreement", Na J. Int. L 18:580-1978; Victoria A. Steffen, "Warsaw Convention Limitation of Air Carrier's Liability--Whether Employees of Carrier Also Protected", Int'l Trade L.J. 4:275-81 Sum 74; Stuart W. King, "Warsaw Convention--Liability Limitations--The Warsaw Convention's Liability Limitation Extends to Air Carrier Employees as well as the Corporate Carrier in an Action Brought for Damages Resulting from an International Air Crash", J. Air L. 44:175 89 78; G. Miller, supra note 24 at pp. 279-82; L.S. Kreinoller, "Aviation Accident Law", Matthe Bender, New York, at pp. 11-39; 11-40; S. Speiser and F. Krause, "Aviation Tort Law", 1978, at pp. 428-732.

(51) Karras CSD ny, 76 (iv90) and Argyropoulos CSD ny 75 (iv4561) vs. Trans World Airlines Inc. in 1976, where the same individual officers were parties defendant, but where in the court refused to certify the cases as appropriate for an interlocatory appeal under 18 U.S.C.S. 1292 (6) because such certification had already been granted in the Reed case. Another case involving also these individual defendants is Lowe vs. Trans World Airlines Inc., (1975, SDny) 396 F. Supp. 9.

(52) Ibid., supra note 50, at p. 1082.

(53) 414 F. Supp. at 865, "The treaty language includes separate, distinguishing references to carriers and their agents. There is no indication, however, of deliberate attention to the question now confronted."

(54) Compte Rendu de la 3ieme Session du CITEJA, 84.

(55) Minutes of ninth Session of the ICAO Legal Committee at Rio de Janeiro, 1953, Doc. 7450-LC/136 at p. 148.

(56) Article 25A, the Hague Protocol.

(57) 515 R. and, at p. 1083.

(58) Comments of Mr. Alten of Norway, 1st International Conference on Private Air Law, the Hague, September, 1955, Minutes 214: "The preamble of the Warsaw Convention provided that the Convention had been adopted in order to secure a uniform regulation of the conditions of carriage in regard to the documents used for such carriage and the liability of the carrier. The Convention contained no provision concerning the liability of servants or agents...The servants as agents of the carrier were not parties to the contract of carriage"; Comments and Proposals of the German Federal Republic, in 2nd International Conference on Private Air Law, The Hague, September, 1955, Documents 224; cf. Comments of Mr. Pedreisa of Portugal, 1 International Conference on Private Air Law, The Hague, September, 1955, Minutes 221 C: "a principle limiting the liability of servants or agents was useful and just, for the servant or agent deserved the same protection as the carrier"; Comments of Mr. Booth of Canada, id at 218: "the absence

of such a clause would permit a complete evasion of the provisions of the Convention in regard to the limits of liability of the carriers".

(59) Ibid., supra note 55, at p. 150.

(60) 555 R2nd, at p. 1084.

(61) Ibid.

(62) Ibid.

(63) 555 F2nd, at p. 1085.

(64) See hereinabove, pp. 12-13.

(65) Ibid., supra note 63.

(66) See hereinabove, pp. 4-7.

(67) 555 F2nd, at p. 1087

(68) Ibid.

(69) Ibid., supra note 55, at pp. 149-150.

(70) See Vienna Convention on the Law of Treaties, Art. 31, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 63 Am. J. Int'l L. 875,885 (1969). See also L. McNair, "The Law of Treaties", 366 (1961) and I. Brownlie, "Principles of Public International Law, 1979, pp. 624-630.

(71) Ibid, Vienna Convention, Art. 32 and Brownlie at 629.

(72) 414 F.Supp., at p. 865.

(73) 515 R2nd, at p. 1088, see Eck vs. United Arab Airlines, 360 F2nd, 804.

(74) 555 F2D, at p. 1089.

(75) Ibid., supra note 72.

(76) Ibid.

(77) Ibid.

(78) 528, F2nd 31,35 (2nd Cir. 1975).

(79) Ibid., supra note 72.

(80) Ibid., supra note 50, at 18.4.

(81) Ibid. To reach this conclusion, he described the process of the appellate interpretation as following: "In interpreting the Warsaw Convention in light of its original purposes, the Reed court paid little heed to the Convention's modern goal of assuring adequate passenger protection, a goal announced in the Second Circuit only two years earlier in Day vs. Trans World Airlines, Inc. In Day, however, the Second Circuit was able to advance the Convention's modern goal while at the same time effectuating its original purposes. In Reed, advancing the Convention's modern goal would have required the court to rule that Article 22 did not limit a carrier employee's liability; such a ruling, however, would have effectively undermined the Convention's original purposes...Thus, in Reed, the Second Circuit has demonstrated

that it will not advance the Convention's modern goal at the expense of its original purposes."

(82) Ibid.

(83) G. Miller, Ibid., supra note 50.

(84) 67 App. Div. 2nd 148, 414 NYS 2nd, 528, 15 Avi 17568.

(85) Day vs. Trans World Airlines, 13 Avi 18,145 at 18,148.

(86) Ibid.

(87) 14 Avi, 17,612.

(88) Ibid, at 17,618-17,619.

(89) Ibid, at 17,619.

(90) Eck vs. United Arab Airlines Inc., 360 F2nd, 804,812 (2nd Cir. 1966).

(91) See footnote (81).

(92) 370 F. 2nd 508; 9 Avi 18,374.

(93) See also Mertens vs. Flying Tiger Line, Inc., 341 F. 2nd 851, 856-57 (2nd Cir.); 9 Avi 18,374.

(94) See Berner vs. British Commonwealth Pacific Airline Ltd., 346 F. 2nd 532, 9 Avi 17,681; Leroy vs. Sabena Belgian World Airlines, 9 Avi 17,488; 344 F. 2nd 266 (2nd Cir.); Grey vs. American Airlines Inc., 4 Avi 17,811; 227 F. 2nd, 282 (2nd Cir., 1955).

(95) 436 F.2nd 42 (2nd Cir.); 11 Avi, 17,893. See also Kahn vs. Trans World Airlines, Inc., 12 Avi, 18,032; Eleven Fifty One Company vs. Swissair, 14 Avi, 17,420; Lewin vs. Air Jamaica 14 Avi, 17,251; Goldberg vs. El Al Israel Airlines, Ltd., 13 Avi, 18,191.

(96) 11 Avi, 17,893, at 17,894.

(97) Egan vs. Kallsman Instrument Corp., 9 Avi, 17,281.

(98) Joel Tomes vs. Yugoslav Airlines, 13 Avi, 18,228.

(99) Ibid.

(100) "The Protection of Transport Workers Against Civil Law Claims Arising Out of their Employment", (1959), 26 J. Air L. and Com., pp. 95-96.

(101) L.S. Kreindler, "Aviation Accident Law", at 12,02(3).

(102) G. Nathan Calkins, "Grand Canyon, Warsaw and The Hague Protocol", 23 J. of Air. L. and Com., p. 267.

(103) Ibid.

(104) Ibid.

(105) Nicolas Mateesco Matte, "Treatise On Air Aeronautical Law", Montreal, (1980) p. 440.

(106) Ibid., supra note 55 at 143.

(107) Ibid., supra note 55, at 298.

(108) Ibid., supra note 55, at p. 237.

(109) Ibid., at p. 236.

(110) Ibid., at p. 235.

(111) Article V.

(112) Article XI.

(113) See above, pp. 85-86.

(114) Ibid., supra note 50, at p. 275.

(115) W.G. Abbott, "Pilot Error and Comparative Negligence: A Suggested Approach to Determining Relative Fault", Detroit College of Law Review, (1980) p. 1123.

(116) Ibid.

(117) Zaninovich vs. American Airlines, Inc., (1966) 26 App. Div. 2nd 155, 271 NYS 2nd 866, 9 Avi, 18,251. Companion case, see Kirkeby vs. American Airlines, Inc., (1965, NYSup. Ct.) 154 NYLJ issue No. 13, p. 9, 9 Avi 17,722.

(118) The National Transportation Safety Board (NTSB) is charged with determining the probable cause of transportation accidents, and reporting the relevant facts, conditions, and circumstances, 49 C.F.R. 800.2(e) (1979).

(119) For additional categories, see Copeland, "Liability of General Aviation Airports, in Small Aircraft Accident Litigation", 59.62 (1975).

(120) American Airlines, Inc. vs. United States (1969), AA5 Tex) 418 F2 nd 180, 11 Avi, 17,156.

(121) Re: Aircrash Disaster at Boston (1976, DC Mass.) 412 F. Supp. 959 (stressing lack of discipline where cockpit voice recorder showed that captain of an airliner that crashed in attempting to land had twice undertaken to imitate the sound of a bugle).

(122) McFarland, Ross A., "Human Factors in Air Transport Design", New York, 1946, at p. 567.

(123) R.H. Mankiewicz, "Difficulties with the Montreal Agreement and the Future of Air Carrier's Liability", Dissitto Aereo, no. 28, at p. 370.

(124) Flight Safety Foundation Accident Prevention Bulletin 50-20, August 28, 1950.

(125) 194 F. 2nd 974 (5th Cir., 1952) cert. denied 344 us 821 (1952).

(126) Ibid.

(127) Jackson vs. Stancil, 6 Avi 18,281 (NC Supp. Ct., 1960); Conklin vs. Flying Service, US Avi Rep. 188 (1930); Rubinsky vs. Eastern Airlines, Inc., 9 Avi 17,888 (SDNY 1965), an action brought by a passenger against an airline for injuries allegedly caused by negligence of the pilot in landing. Plaintiff contended that the pilot miscalculated the speed and distance of descent and struck a curb at the end of a runway at the airport, with the result

that the impact of landing was severe and caused him injury. However, the affidavit submitted by the pilot stated, inter alia, that the plane was brought down in a reasonable and careful manner and that the accident was caused by a slight miscalculation of distance, which was not negligence. Held, there were genuine issues of material fact to be determined, including whether the defendant had used reasonable care to avoid the accident, what was the proximate cause of plaintiff's injuries and whether unexplained circumstances justified an inference or conclusion of negligence. Plaintiff's motion for summary judgment was denied.

(128) Aleman vs. Pan American World Airways, Inc., (1958 ACZ NY) 259 F. 2nd 493, 5 Avi 18,205 (Death on High Seas Act case).

(129) The holder of an instrument rating, for example, must have a total of at least 200 hours of pilot flight time. 14 C.F.R.S. 61.129. An applicant for an airline transport pilot certificate must have at least 1500 hours of flight time as a pilot. 14 C.F.R.S. 61.155 (6) (2).

(130) Heitman vs. Luhrs 152 Neb. at 100, 40 N.W. 2nd at 531. The court observed: "In the absence of statutes...every (pilot) shall use ordinary care not to injure another...An aviator is under no duty to use the highest degree of care...but bound only to use ordinary care...under the circumstances."

(131) Berg vs. Seitz, 1 Avi 262 (D.C. Kan., 1931).

(132) The foundation for recommending that the culpable standard of care should depend on the level of flight certificate attained resides in the observation that responsibility should accompany level of attainment. The potential for harming others is greater for the airline pilot than for the student.

(133) Ibid., supra note 115, at pp. 1142-1143.

(134) Annex 2, Chapter I, Definitions, (10/8/78.

(135) Annex 2, Chapter 2, 2.4.

(136) Ibid., 2.3.1.

(137) 14 C.F.R.S. 61.51 (c) (2) (i).

(138) In Lange vs. Nelson-Ryan Flight Serv., Inc., 259 Minn. 460, 464, 108 N.W. 2nd 428-432 (1961) the pilot in command was defined as "the pilot responsible for the operation and safety of the aircraft during flight time."

(139) 14 C.F.R.S. 91.3 (a) (1980).

(140) Ibid., supra note 115, at p. 1144.

(141) See 11ieme Conférence internationale de droit privé aerien 4-12 October, 1929, Warsaw, p. 29.

(142) The provisions of the Warsaw Convention are nearer to those of the Brussels Convention of 1924 in this concern.

(143) Ibid., supra note 141, at p. 30.

(144) See Lemoine, "Traité de droit Aerien", Paris, 1947, S847; Lacombe, Jacques, "La Responsabilité du Transporteur Aerien Pour Dammages aux Passagers et aux Marchandises", thése, Paris, 1947, p. 221; Litvine, Max, "Précis Elementaire de droit Aerien", Bruxelles, 1953, p. 185; Chauveau, Paul, "Droit Aérien", paris, 1951, p. 184; Goedhuis, D., "La Convention de Varsovie pour l'unification de certaines régles relatives au transport aerien international", La Hage, 1933, p. 191.

(145) Ibid., Goedhuis.

(146) Sack, "International Unification of Private Law Rules on Air Transportation and The Warsaw Convention", Air Law Review, 1933, p. 345, at 370.

(147) Lemoine, supra note 144, at S848.

(148) 4 Avi, 17,413.

(149) Ibid., at 17,415-416.

(150) Blanc, Dannary, "la Convention de Varsóvie et les Régles du Transport Aerien International", thése, Paris, 1933, p. 54.

(151) Ibid., see also Riper, Georges, "La responsabilité du Transporteur aerien d'aprés la conférence international de Paris 1925", in Revue Juridique International de Locomation Aérienne, 1926, p. 1. Goedhuis, supra note 144 at p. 187; Litvine, supra note 144 at p. 184.

(152) Krauth, "Some note on the Warsaw Convention of 1929", 14 J. of Air L. and Comm., 1947, p. 44. Litvine, supra note 144 at p. 186.

(153) Chauveau, supra note 144, at pp. 183-184; Blanc, Dannary, supra note 150; Ripert, Georges, supra note 151.

(154) Coquez, Raphael, "Le Droit Privé International Aerien", thése, Paris, 1953, p. 135.

(155) Lacombe, supra note 144, at p. 224.

(156) Mazet, "conclusions devant le tribunal civil seine 24 avril 1952", in Revue Française de Droit Aérien, 1959, p. 202; Juglart et chassériause commentaire in Revue Trimestrielle de Droit Commercial, 1953, p. 753.

(157) Beaumont, "Need for Revision and Amplification of the Warsaw Convention", J. of Air L. and Comm., 1949, at p. 395.

(158) Article 29, Rome Convention of 1952.

(159) Article 33, Para. 1, Rome Convention, 1952. The States which ratified are: Canada, Egypt, Pakistan, Luxembourg, Spain.

(160) The Preamble of the Rome Convention, 1952.

(161) See hereinbefore, p. 79.

(162) Ibid., supra note 105 at pp. 514-515.

(163) Shawcross and Beaumont, "Air Law", 4th Ed., London, 1977, Para. 560.

(164) See 1953 U.S. Dept. of State Bulletin 28:221.222.

(165) E.G. Brown, "The Rome Convention of 1933 and 1952: Do They Point a Moral?", JALC, 1961, p. 418.

(166) Ibid., supra note 105, at p. 514.

(167) See the report of the sixteenth session of the Legal Committee, 1967; ICAO Doc. 8787-LC/156.

(168) Rome Convention, 1952, Art. (1).

(169) Rome Convention, 1952, Art. (12).

(170) Rome Convention, 1952, Art. (10).

(171) Kamminga, supra note 5, at pp. 96-97.

(172) Ibid.

CHAPTER THREE: THE AIRCRAFT COMMANDER'S AUTHORITY AND RESPONSIBILITIES

The authority and responsibilities vested in the aircraft commander by national legislation, by international agreements or by other sources of law, represent an important part of the aircraft commander's legal status.

There is no doubt that the operation and safety of the aircraft, and the safety of all persons on board during flight time are the primary and most important responsibilities of the aircraft commander, especially if one takes into consideration the capacity of a modern wide-body aircraft with more than 250 passengers.

In the following pages we shall discuss the important authority and responsibilities of the aircraft commander, especially those which raise practical difficulties. Most of the responsibilities and authority will be in public law.

We shall consider the CITEJA draft as a basis for studying the aircraft commander's authority and responsibilities; likewise, it will be appropriate to also take into consideration the provisions of other Conventions, which deal with the functions, powers and obligations of the aircraft commander. The Chicago and Tokyo Conventions contain clauses pertinent to the aircraft commander's

authority and responsibilities, but the majority of these are covered by Annexes to the Chicago Convention.

Condition of Appointment of an Aircraft Commander: Duration of his Authority and Responsibility

The position of the aircraft commander does not constitute a stable category independent of the profession of pilot. Most national regulations agree on this point of view. In other words, the function of the aircraft commander is not defined or determined by the acquisition of a special rank or qualifications different from that of a pilot (1).

Since the aircraft commander's position is not an independent category, two major questions need to be answered: 1) who appoints the aircraft commander?; 2) and is there a possibility of appointing a person other than the pilot who is at the controls?

It was thought that, with the increase in tonnage of transport aircraft, the command of an aircraft could be entrusted to a person other than the pilot who is at the controls. ICAO considered the possibility of establishing a category called "aircraft commander", the incumbent of which would not pilot the aircraft himself and would not take part in the other tasks carried out by the other crew members, but would have a supervisory function with complete

control over the other crew members (2). There is a suggestion to fill the rank of aircraft commander by former pilots, who have retired because of age or disability (3).

Objections were raised against such a suggestion on grounds of safety:

> "...il arrivera que dans un cas difficile, dans une situation critique, le pilote sera obligé de manoeuverer rapidement, et ses manoeuvers seront génées par les responsibilités qu'il aura. Dans ces cas, il import qu'il y ait un commandant; il y a intérêt à ce que celui qui responsable de la manoeuvre ne soit pas celui qui l'exécute. Ceci est tout à fait important. Il faut que le pilote soit une machine à qui on dit: Faites ceci! Faites cela!, sans qu'il ait la responsabilité de la manoeuvre." (4)

In addition, IFALPA stated that it was hardly probable that ICAO would permit a person without very practical experience in piloting to exercise this command function. IFALPA, in the resolution adopted in April 1950, stated categorically that, whatever might be the simplification of controls of an aircraft, the command of the aircraft should always remain the responsibility of the pilot (5). The PEL Division decided unanimously that the creation of a category of "aircraft commander" should not be recommended (6).

a) Aircraft Commander: Appointment

A person cannot be appointed as an aircraft commander unless he possesses the relevant technical and legal qualifications and

conditions. As we have seen, he has to be a pilot, that is, a flight crew member. But,

> "a person shall not act as a flight crew member of an aircraft unless he holds a valid licence issued by the State of Registry of that aircraft or issued by any other contracting State and rendered valid by the State of Registry of that aircraft." (7)

However, the conditions and requirements for appointment as an "aircraft commander" are matters for the individual States acting in accordance with the Annexes. Sometimes, national legislation imposes different or additional conditions and requirements other than those provided by Annexes 1 and 6 (8).

The need for an aircraft commander prevails where there are persons on board; therefore, the principle behind his appointment is that the miniature community on board an aircraft requires the leadership of a person vested with statutory authority (9).

There are some arguments against giving the carrier the right to appoint the aircarft commander. It was feared that political considerations (or even nepotism) might influence the giving of the command, as well as the brass stripes, to some personal or family favourite who is unqualified or less qualified than the chief or first pilot or other individuals on board. therefore, it is suggested that the choice of aircraft commander must be made among the fully qualified and certificated men on board (10).

Paragraph 2 of Article 1 of the Draft Convention on the Legal Status of the aircraft commander and standard 4.2.9.1. of Annex 6 state that the operator has the right to designate an aircraft commander for each flight.

But, has he the obligation to do so? According to Article 1, paragraph 2, of the Draft Convention, "the right to designate the commander belongs to the operator of the aircraft". This wording does not impose any obligation on the operator (11). Despite this, the Tokyo Convention of 1963 does not directly impose such an obligation for, all the provisions of Chapter 3 (Powers of the Aircraft Commander), were drafted on the assumption of the existence of an aircraft commander. Therefore, in my opinion, the contracting States of the Tokyo Convention have to impose a duty on the operator to appoint a commander. In practice, the carrier appoints an aircraft commander for each flight.

The Draft Convention does not define the operator, while Annex 6 defines him as "a person, organization or enterprise engaged in or offering to engage in an aircraft operation" (12).

The draft is silent on the manner of appointment; therefore, the commander can be designated either verbally or in writing, and an entry in the log books is unnecessary according to the draft (13). Such an entry is compulsory according to the provisions of Article

34 of the Chicago Convention.

Regardless of this, in the labour contract which usually sets out the legal relationship between the aircraft commander and the operator, the appointment is a unilateral decision; in other words, the operator has discretionary authority.

b) Aircraft Commander: Successors

Since there is a great need for a commander, on each international flight, there is equally a need for provisions to regulate the order of succession in the absence of any such designation by the operator or in the case where the commander is prevented from performing his duties. Since the commander is invested with important authority whether by international conventions or national regulations, the question remains--can the commander totally or partially delegate his authority to others?

Paragraph 3 of Article 1 of the Draft Convention states:

> "In the absence of any commander so designated, or in case the latter is prevented from performing his duties, and if no successor has been designated by the operator, the commander's duties will be carried out by the other members of the crew in the following order: pilots, navigators, engineers, radio operatos and stewards. The order of succession within each category shall be determined in accordance with the rank assigned by the operator."

It is interesting to note that this paragraph was inserted in the draft at the suggestion of the American delegates, in order to insure the existence of some individual who is vested with the

statutory powers of an aircraft commander in the event of unforeseen circumstances (14). Some people were against such insertion on the basis that an international convention is not the appropriate place for detailed rules of this nature (15).

The aircraft commander is authorized, by Article 6, paragraph 2 of the Tokyo Convention, to delegate some of his power not only to the other crew members, but also to passengers. In fact, this authorization is confined to the restraint of persons whom the commander himself is entitled to restrain. The main purpose of this delegation of authority is to allow the commander to have whatever assistance he deems necessary and to extend the exemption of liability provided by the Tokyo Convention to persons so delegated.

However, the Panel of Experts agreed that no international solution was required for the transfer of responsibility of the aircraft commander in case of his incapacitation. Any practical problems could be solved in national legislation and in the operations manual (16).

c) Duration of Authority and Responsibility

Besides the Draft Convention, the Rome, Tokyo and Montreal Conventions tried to define the duration of the flight and subsequently define the beginning and the end of the period during which

the commander maintains his authority and responsibilities. The Draft Convention and the other three Conventions each adopted completely different methods to accomplish this task. It is easy to correlate the different methods with the different purposes of each Convention, because the method adopted in each Convention best serves the purposes of the Convention.

Thus, in the Rome Convention of 1952, paragraph 2 of Article 1 defines the duration of the flight, but it clearly states that the definition is made to serve the purpose of the Convention. However, according to the provisions of this Article, "the aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends". This definition may serve the purposes of the Rome Convention, but it is not the definition required to solve the problem of the duration of the aircraft commander's authority and responsibilities, because the aircraft commander begins exercising his authority before the actual take-off.

The definition set out in the Tokyo Convention is more felicitious than that found in the Rome Convention. The Tokyo Convention adopts two different sets of parameters to define the period during which an aircraft is considered to be in flight. The first definition is found in paragraph 3 of Article 1 of the Convention and is similar

in scope to that found in the Rome Convention. The definition is designed to serve the purposes of the Convention as a whole. The second definition is found in the second paragraph of Article 5 and reads as follows:

> "Notwithstanding the provisions of Article 1, paragraph 3, an aircraft shall for the purpose of this Chapter, be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board."

This definition is formulated to meet the needs of Chapter 3 of the Convention, which is totally devoted to the powers of the aircraft commander and is therfore of great interest for our discussion. The door-closed, door-opened formula was adopted to cover a longer period during which the aircraft commander may exercise his authority. Thus, for the purposes of Chapter 3 of the Tokyo Convention, the aircraft need not be airborne for the aircraft commander to take the measures necessary to preserve the safety of his aircraft and its passengers. His authority exists during the period the aircraft is taxiing on the apron, or while waiting clearance to enter or depart the apron area, or while awaiting clearance to take-off. In these last three cases substantial periods of time may be involved.

Before reaching its final destination, the aircraft, for one reason or another, may make a forced landing. Should the aircraft commander cease exercising his authority, the provisions of paragraph 2 of Article 5 give him the right to continue performing his duties and exercising his authority with respect to offences and acts which have been or are committed on board the aircraft until the competent authorities of a State arrive to take over this responsibility.

The provisions of Article 3 para. 1 of the Convention for the Suppresssion of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971, does not differ from the Toyko and Hague Conventions in defining the notion "aircraft in flight". But it adds the notion "aircraft in service". Thus, Article 2, para. 6 of the Montreal Convention defines the notion of "aircraft in service" as following:

> "an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for specific flight until twenty-four hours after any landing, the period of service shall, in any event extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this Article."

In fact, the notion of "aircraft in flight" by its very nature cannot be extended to cover a larger period of time than what is already covered by the provisions of the Tokyo and Hague Con-

ventions. The notion of "aircraft in service" is wide enough to embrace the notion of the "aircraft in flight" and provides coverage for a longer period during which the aircraft commander may exercise his responsibilities and authority, especially his authority over the other members of the crew and matters relating to the security of the flight. The period of twenty-four hours is intended to cover the turn-around of an aircraft.

The Draft Convention adopted a completely different formula to define the duration of the aircraft commander's authority and responsibilities. Instead of defining the notions of "aircraft in flight" and "aircraft in service", it makes a distinction between the authority and responsibility of the aircraft commander over the crew and over the passengers and the cargo. Another important feature of this formula is that it leaves the operator to define the duration of the commander's authority over the crew. There was some dispute over this issue between the delegates while discussing the Draft Convention. A few delegates wanted the aircraft commander to retain full authority at all of the stopping places en route (17), while other delegates raised objections to that concept (18). The compromise worked out by the CITEJA experts and which was accepted by the legal writer (19) is found in Article 5 of the Draft Convention, which states:

> "(1) The beginning and the end of the period during which the Commander maintains disciplinary control over the crew may be fixed by the operator. In any case he is entitled to exercise such control as soon as the crew embarks. At all stopping places, including the end of the trip, he continues to be so entitled at least until the formalities of arrival are completed or until his command is taken over by another person.
> (2) The powers of the Commander over the aircraft, the passengers and the cargo on board come into force as soon as the aircraft, with passengers and cargo, are handed over to him at the beginning of the trip. They expire at the end of the trip when the aircraft, the passengers and the cargo have been respectively handed over to the operator's representative or other qualified authority."

The Union of Soviet Socialist Republics' proposal related to the commander's authority partially dealt with the duration problem when it suggested that the commander authority continued until such time as the appropriate authorities of the State where the aircraft is located assume responsibility for the aircraft and for the persons and property on board (20).

In November, 1976, IFALPA raised the problem of the commencement and termination of the responsibility and authority of the aircraft commander. In its suggestion for solving the problem, IFALPA distinguished between the commencement and termination. For commencement the definition of Article 5, para. 2 of the Tokyo Convention was followed, but this does not prevent the commander from assuming authority and responsibility in a number of areas, prior to the doors being closed. For the termination, the suggestion considered three aspects of termination:

a) Normal termination of authority and responsibility;

b) Abnormal termination of authority, etc.; and

c) Termination in the event of unlawful interference with the operation of the aircraft (21).

But, in May, 1949, IFALPA modified its suggestion and asked that any future instrument had to consider the periods before and after the flight, since they were not covered by the Tokyo Convention. IFALPA referred to the formula in the Montreal Convention (22).

In my opinion, the solution to this problem can be found in both the Montreal Convention and the Draft Convention. The notion of "aircraft in flight" covers the period during which the commander has authority over the aircraft, the passengers and the cargo. The notion of "aircraft in service" covers the period during which the commander has authority over the other members of the crew.

Six members of the Panel of Experts stated that the determination of the point in time at which the authority and responsibility of the aircraft commander begins and ends raised considerable problems which deserved careful attention from the Panel at a later stage (23).

The Aircraft Commander's Authority and Responsibilities as an Agent of the State and as an Agent of the Operator

Usually, the aircraft commander's authority and responsibilities as an agent of the State and as an agent of the operator are discussed separately. The reason for this division of the topic is that the latter legal relationship is a matter of private law while the former is a matter of public law. In many and varied situations and circumstances the aircraft commander is called upon to fulfill a role where a hetrogeneous mixture of rights and obligations, both public and private, contractual as well as legal, give his authority and responsibility a cast, which is, by its very nature, functionally complex (24). My purpose in discussing the two topics under one heading is to accentuate this functional complexity for the aircraft commander, as a legal personality of more than one facet (25).

a) The Aircraft Commander as an Agent of the State

There is no denying that there are difficulties in considering the aircraft commander as a true agent of the State when he is carrying out his functions. The reasons for this problem are as different and as varied as the situations in which the aircraft commander may find himself. Most of the airlines of the developed

nations are privately owned companies or enterprises, which means that the commercial, private and temporary nature of the appointment of the aircraft commander may be a major reason which prevents him from assuming the responsibilities of an agent of the State (26). In less developed countries, the same problem exists as in the developed nations with the added difficulty that usually many of the pilots of the national airline of the less developed countries are nationals of the State of registration of the aircraft under their command or authority, but are nationals of some other State.

In many countries, but particularly in many less developed nations, the national airline is a government agency, and the appointment of pilots, who are nationals of the country, is usually, of a public and permanent nature (27), and who may easily represent their countries as agents of the State.

A difficulty might arise in the case of the lease, charter and interchange of aircraft where the aircraft commander is not a national of the State of registry. Problems could occur in the situation referred to in the proposed amendment to the Chicago Convention, Article 83 bis (28).

The appointment of the aircraft commander as an agent of the State, (as a peace officer, for example), is a matter for the State concerned (29). States, if they so desired, could, by legis-

lative provision, set out the specific duties and functions which are vested in the aircraft commander by virtue of the Tokyo Convention, in order to give the aircraft commander the status of an agent of the State in particular circumstances (30).

However, in order to exercise his authority as a State agent, the aircraft commander has to make difficult decisions. The difficulties arising from the fact that certain restrictions are imposed on him with regards to the exercise of his authority, though the limitations are not defined in the same manner for all of the powers granted to him (31). There is no doubt that the decisive factors in the formulation of the commander's decisions are survival and safety. However, it is suggested that the aircraft commander act with discretion and exercise his authority only where he knows that a serious offence is being committed or is about to be committed, or where the safety of the flight or of the persons on board the aircraft is being jeopardized, because of the danger of legal action against the commander or his employer in the case of the wrongful exercise of authority, and because of the unfavourable "public relations" or publicity which this could entail (32).

b) The Aircraft Commander's Legal Status as a Custodian of the Diplomatic Bag

There is a dispute in relation to the responsibilities of the aircraft commander for diplomatic bags. While at least one party

believes that one of the commander's duties is to act as a custodian of the diplomatic bags (33), another individual believes that the commander is not a diplomatic courrier to handle such a responsibility (34).

It is submitted that the aircraft commander's responsibility for the operation and safety of the aircraft and for all persons on board is incompatible with his responsibility with respect to the diplomatic bags. Therefore, the Ibero-American Institute of Air, Space and Commercial Aviation Law suggested reducing the commander's responsibility in this matter (35).

The relation between the aircraft commander and the diplomatic bag brings Article 27 (7) of the Vienna Conventions on Diplomatic Relations into play. Hence, it is debatable whether ICAO is the appropriate body to carry out an examination of a matter that has already greatly been discussed during the preparation for the Vienna Convention.

Not only is it difficult for the aircraft commander to be responsible for the diplomatic bags but it is also a problem for the purser on the aircraft. Some airlines have added another individual to the crew complement who is an employee responsible for the diplomatic bags and other valuable shipments. This individual is called a load master or load agent (36). In practice, this employee

is considered to be a member of the crew as he must obey the instructions and commands of the aircraft commander. However, according to the definition of "flight crew member" as set out in Chapter 1 of Annex 1 to the Chicago Convention, this individual cannot be considered as a member of the flight crew because his duties are limited to the period before and after the time of flight.

c) The Aircraft Commander's Functions and Duties With Respect to Occurences on Board

During a flight, some situations are clearly uncontrollable, such as births and other events which are an "in extremis" position (marriages or wills prior to a death). The occurence of births and deaths are likely, as the first case of childbirth in the air reportedly took place in 1889 on board a balloon (37).

The questions which may be raised are whether the aircraft commander possesses the power to act as a registrar in such circumstances and if so, which law if applicable. Article 7 of the Draft Convention states:

> "1) Births and deaths occuring on board the aircraft shall be recorded in the journey log-book by the commander, who shall issue extracts to the parties interested. He shall as soon as possible transmit certified extracts to the competent authority of the State in which the aircraft is registered and to that of the place of first landing, if so requested by the local authorities."

The first thing which should be noted about this draft Article is that it does not mention marriages or wills. This is because the delegate from the United States was opposed to giving

the aircraft commander any power to perform marriages or to act as a notary (38). There was some dispute during the meetings between those who wanted the aircraft commander to be able to draw up a simple report of the incident, and others who wanted to include a power to make out an official certificate (39).

The jurisdiction awarded to the aircraft commander by virtue of Article 7 of the Draft Convention is of a probative nature. Dr. Matte noted a difference between the French and English versions of Article 7 and states (that):

> "...the English version of the draft which states that these events 'shall be recorded' seems to be more appropriate than the French version 'sont enregistrés'. This distinction between rights 'registered' relating to the aircraft (public law) and rights 'recorded' (private law) is clearly made in the United States of America." (40)

As the extremely controversial issue of the nationality of a child which is born on board an aircraft is not mentioned in the Draft Convention and since the matter of the right of drawing up and issuing a legally recognized document is left to the competent legal authorities, it is correct to say that the aircraft commander should merely have to ascertain and record the events which take place on board of the aircraft (41).

Nevertheless, Article 34 of the Chicago Convention, when read in conjunction with Standard 4.55 and Recommendation 11.5.1. of Annex 6, in my opinion, imposes an obligation on the aircraft commander

to record all incidents which take place on board of an aircraft engaged in international flight. Article 34 provides:

> "Journey Log Books
>
> There shall be maintained in respect of every aircraft engaged in international navigation a journey log book in which shall be entered particulars of the aircraft, its crew and of each journey, in such form as may be presecribed from time to time pursuant to this Convention."

This obligation is particularized by the provisions of Recommendation 11.5.1. of Annex 6, which prescribes the form and the items which the form must contain, including incidents and observations, if any, as well as Standard 4.5.5. of the same Annex which makes the aircraft commander responsible for the Journey Log Book or the General Declaration containing the information contained in Recommendation 11.5.1.

The Panel of Experts noted that Annex 6 was silent on the issue of the publication of log-book entries or of extracts therefrom and recommended that log-books be open for inspection. The Panel agreed that the aircraft commander could act in some instances on behalf of the State of Registry but that the regulation of the functions should be left to national legislation. It was also felt that there was no need for any international regulation. States could be requested to provide ICAO with information on practical difficulties, if any, which were encountered in this area. States could also be asked to indicate any provisions in their national legislation, if any, which dealt with the subject. This information could then be

used by ICAO to assist States or to provide guidelines for them for future use (42).

d) The Aircraft Commander as the Operator's Agent

From the very beginning, the cornerstone of the Draft Convnetion was the authority and responsibility of the aircraft commander as an agent of the operator in the private law field with respect to passengers, baggage, and cargo, as well as commercial transactions with respect to the aircraft and its servicing.

Article 3 of the Draft Convention entrusts the aircraft commander, without special authority, with wide powers:

> "a) to buy any items necessary for the completion of the trip;
> b) to have any repairs made which are necessary to enable the aircraft to proceed promptly on its trip;
> c) to make any arrangements and to undertake any expenditure which may be necessary for securing the safety of the passengers and crew and the preservation of the cargo;
> d) to borrow the sums required for the accomplishment of the measures mentioned in Parts a, b and c of this Article;
> e) to engage, for the duration of the trip, in replacement of members of the crew who cease to be available for any reason, such personnel as is essential for the completion of the trip."

Since the beginning, IATA has opposed vesting the aircraft commander with this power. This opposition is based on three points:

1) the personnel to be entrusted with the function of commander often lack the necessary general education for them to be given such far-reaching powers;

2) the communication facilities now available make such powers superfluous in the majority of cases;

3) agents or representatives of the airlines are to be found at practically every stopping place along the air routes (43).

The wording of Article 3 of the Draft Convention makes it impossible for the aircraft commander to practice such powers, because, according to the wording of the Article, the need which allows the commander to exercise his rights must be necessary and urgent. Dr. Beaubois said:

> "Les pouvoirs ainsi conférés au commandant de bord ne doivent pas, semble-et-il bien, etre interpretés largement. Ils ne sont en effet accordis que pour les dépenses indispensables répondant a des besoins urgents. Seuls ceux de ces besoins qui interessent la continuation du voyage et la souvegarde du chargement legitiment des emprents...Le commandant ne se trouve plus dans ls situation prévue par les textes ci-dessus mentionnis." (44)

In fact, the immense development in aviation technology and airlines organization eliminate such necessity and urgency.

On the other hand, Dr. Matte believes that the problems that lead to such urgency and necessity still exist, and "the aircraft commander has, or should have, a tacit mandate from the aircraft operator in order to defray costs resulting from any exceptional situation in which the aircraft may sometimes find itself" (45).

The majority of the Panel of Experts expressed the opinion that there was no practical need for international regulations (46).

The Aircraft Commander's Authority/Responsibility to Persons and Goods on Board

The ultimate purpose of any flight is to transfer persons and goods from one certain place to another. The aircraft commander's responsibility is to make this transportation safe and secure and as such, this responsibility gives him rights over persons and goods on board.

Thus, the aircraft commander has the right to maintain constant supervision and control over persons and goods on board. There are three categories of persons on board: the crew, the passengers and persons in custody. The commander has different rights over each category.

a) The Crew

It is submitted that the commander has the greatest authority over the crew and this authority starts before the time during which the aircraft considered is in flight and lasts after that.

It is the duty of the operator to ensure that the crew members are properly instructed in their particular duties and responsibilities and the relationship of such duties to the operation as a whole (47). The operator must also assign each flight crew member, (for each type of airplane) the necessary functions he is to

perform in an emergency or a situation requiring emergency evacuation (48).

During the flight, can the aircraft commander assign to a crew member a function or duty other than his original function and duty? Article 2, paragraph (d) of the Draft Convention permits the aircraft commander, in case of necessity, to assign temporarily any member of the crew to duties other than those for which he is engaged.

Certain specialized international organizations suggested that it was possible to assign a function to a crew member which differs from the one for which he was engaged, whether or not he has a license which permits him to perform such a function (49). Given the fact that the aircraft commander is the final authority as to the disposition of the aircraft while he is in command (50), this question may be considered as superfluous (51).

Article 2, paragraph (d) of the Draft Convention gives the aircraft commander "disciplinary power" over the members of the crew, within the scope of their duties.

The aircraft commander may require or authorize the assistance of other crew members to restrain any person whom he is entitled to restrain (52).

b) The Passengers

The aircraft commander has the right of surveillance over the passengers, because he is responsible for maintaining order on board

the aircraft. The carrier, and, subsequently, the aircraft commander and other crew members, may be "required to exercise the highest degree of care, foresight, prudence, and diligence reasonably demanded at any time by the conditions or circumstances then affecting the passengers and the carrier" (53).

Besides paragraph (d), discussed above, Article 2 of the Draft Convention contains another three paragraphs which give the commander police power to maintain order on board of the aircraft. Thus, the commander:

> "(a) shall be in charge of the aircraft, the crew, the passengers and the cargo;
> (b) has the right and the duty to control and direct the crew and the passengers to the full extent necessary to ensure order and safety;
> (c) has the right, for good reason, to disembark any number of the crew, or passengers at an intermediate stop." (54)

In comparing the provisions of this Article of the Draft Convention and Chapter 3 of the Tokyo Convention, Chapter 3 is an elaboration of the provisions of Article 2 of the Draft to respond to the developments in aviation during the period from February, 1947 (the finalizing of the Draft Convention) to September, 1963 (the signing of the Tokyo Convention). The international community's need for these provisions existed since the finalizing of the Draft Convention (55).

Article 6 of the Tokyo Convention describes the powers of the aircraft commander over persons on board his aircraft, and, thus,

when he thinks that a person may threaten the safety of the aircraft, he can impose restraint upon such a person provided that he has reasonable grounds to believe that the person in question has committed such an act or is about to commit it. Therefore, the aircraft commander has a wide discretion to make decisions and take whatever measures he deems reasonable and necessary to accomplish three specific purposes:

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

b) to maintain good order and discipline on board;

c) to enable him to deliver such person to competent authorities or to disembark the individual in accordance with the provisions of this chapter of the Convention.

Since the aircraft commander is not a judge (56), the mere presence of a known criminal on board an aircraft vests no authority in him to take any form of police action, nor is he made responsible for such action (57).

As well as requiring or authorizing the assistance of other crew members, the aircraft commander may request or authorize, but not require, the assistance of passengers. While appreciating the complete preoccupation of the aircraft commander with the operation of the aircraft on the flight deck, and his unawareness of what is

transpiring in the passenger cabin, the Convention empowers any crew members or passengers to take whatever reasonable and necessary preventive measures without authorization of the aircraft commander. Such a crew member or passenger has to rely upon his own judgment whether there is a need for immediate action to protect the safety of the aircraft or persons or property therein.

In a suit for wrongful restraint, the crew members and the passengers could advance as a defence the subjective test, while the aircraft commander cannot use this defence because, with his presumably greater technical knowledge of the possible danger to the aircraft, he could reasonably be obliged to comply with the higher standard found in the objective test which he has to meet (58). In a second opinion, the pilot of an air carrier is not required by law, under the doctrine of sudden emergency , to exercise a higher standard of care than "ordinary care"--that of a reasonably prudent manner under similar circumstances (59).

However, the wide authority of the aircraft commander permits him to restrain anyone who is physically or mentally ill, or who goes insane during the flight and constitutes an imminent danger to the safety of the aircraft (60).

In a normal situation, the duration of measures of restraint which an aircraft commander may have imposed upon a person on board his aircraft should not be continued beyond the first point of landing

following their imposition. Under certain circumstances, measures of restraint may have to be continued beyond the point of first landing where:

a) the first State of landing, being a non-contracting State, will not allow the person under restraint to be disembarked, or restraining measures have been taken by the commander in order to deliver such person to the competent authorities;

b) the aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities;

c) the person in question agrees to onward carriage under restraint (61).

In order to allow the State in whose territory the aircraft commander intends to land with a person on board who has been placed under restraint to make necessary arrangements, he is bound, as soon as practicable and if possible before landing, to notify the authorities of that State, whether it is a contracting State or not, of the fact that a person on board is under restraint and of the reasons for such restraint (62).

Article 8 of the Tokyo Convention provides the aircraft commander with the authority to disembark, in the territory of any State, any person about whom he has reasonable grounds to believe has committed, or is about to commit, one of the offences or acts

to which the Convention applies. Paragraph 2 of the same Article imposes an obligation upon the aircraft commander to report to the authorities of the State in which he disembarks any person, the fact of, and the reason for, such disembarkation.

Naturally, the aircraft commander cannot disembark any person without the consent of the State where the disembarkation is intended to take place; therefore, Article 12 of the Tokyo Convention imposes an obligation on every contracting State to allow the commander of an aircraft registered in another contracting State to disembark any person pursuant to Article 8, paragraph 1.

The contracting States cannot fulfill this obligation unless their airport officials are made aware of the duties and obligation which have been undertaken by the State. The airport officials are on the spot, as it were, and must often make a quick decision on the request of the aircraft commander to disembark an individual. Airport authorities may omit to consult some higher authority for want of time or may deliberately make such an omission. Therefore, IFALPA and ICAO have tried to impress upon the States, which have ratified the Tokyo Convention, the need for continual attention to be given to the implementation of the provisions of the Convention (63). Moreover, IFALPA underlined its position by pointing to an incident which occurred on November 26th, 1974 at Miami, where United States

officials refused to allow the aircraft commander of Aeromexico's flight 451 to disembark two unruly passengers who were causing a disturbance on board (64).

Does the right of disembarkation granted by the Tokyo Convention to the aircraft commander vest him with the power to refuse to embark a person. Does he have the right to disembark such a person? The answer to this question is in the affirmative. However, the IATA General Conditions of Carriage give to the operator, and to the aircraft commander as his agent, the right to refuse carriage, when in the exercise of his reasonable discretion, the aircraft commander decides that such action is necessary for reasons of safety or to prevent violation of any applicable laws, regulations, or orders of any State or country to be flown from, into or over. The aircraft commander may face some difficulty in refusing to embark an individual which the carrier has accepted as fit for carriage, but since the commander is the final authority over the aircraft in flight he can refuse to carry the person in question (65).

Article 9 of the Tokyo Convention grants the aircraft commander the right not only to disembark a person who, in his opinion, committed a serious offence, but also to deliver him to the competent authorities. The acts which permit the aircraft commander to take this severe action are those acts which constitute serious offences

according to the penal law of the State of registration of the aircraft. The authority to deliver can only be exercised in contracting States in order to protect the individual so delivered and to assure the protection of his civil liberties provided for in later Articles of the Convention (66). The wording of Article 9 does not vest the aircraft commander with the power to deliver persons who have committed crimes in places other than on board the aircraft (67).

The serious nature of the offence is left to the aircraft commander's assessment, because the ICAO Legal Committee did not define the expression "serious offences" due to the impossibility of making a choice from the many definitions proposed (68).

Finally, Article 10 of the Tokyo Convention exonerates the aircraft commander of any liability--civil, penal, or other--on account of proceedings that a person who has undergone such treatment may take against him. This protection gives the aircraft commander a chance to take decisive action without hesitation.

c) Persons in Custody

What is the aircraft commander's responsibility for persons who do not board the aircraft willingly or deportees or other persons in or subject to custody when they are carried on board an aircraft? IFALPA defined a "person in custody" as a person required under any law to be taken from one place to another or any other person re-

quiring any form of supervision or control (69). IFALPA does not consider the aircraft commander responsible for the "person in custody" and requests that such a person should be accompanied by an escort qualified for the task and who is satisfactory in the opinion of the aircraft commander and who is aboard exclusively for that task. However, the following persons are excepted from the escort requirement:

a) children under 12 years of age who are in custody on a protective rather than an arrest basis;

b) deportees under the control of but not physically restrained by the Department of Immigration;

c) services personnel absent without leave who have voluntarily surrendered themselves and are being returned to their units (70).

Various opinions have been expressed during the discussion of this problem by the members of the Panel of Experts. Some Panelists considered that the carriage of persons in custody was a matter of concern to the operator, air carriers and national governments and not to the aircraft commander. Furthermore, one member stated that this matter was very close to the sovereignty of States (71). Another member recalled the work of ICAO in that field, in particular the proposed amendment to Annex 17 which had been sent to States for comments. The proposed amendment to be inserted in Chapter 6 (Operators) reads as follows:

> "613 Recommendation. Each contracting State should require the operators of aircraft of its registry to include in their security programme, measures and procedures to ensure safety on board aircraft when persons are being carried in custody of law enforcement officers, or other authorized persons." (72)

It appears that the Panel members are convinced that the problem of persons in custody is more a matter of concern to the operator than to the aircraft commander. In my opinion, the aircraft commander is the individual most concerned as long as persons in custody are on board and the aircraft is in flight according to the Tokyo Convention's definition.

d) Carriage of Goods

A distinction has to be made between goods and dangerous goods which, by their very nature, constitute a danger for the safety of the aircraft.

Moreover, the legal writers agree that the aircraft commander should have the authority to dispose of cargo on board the aircraft, if necessary, for the safety and preservation of the aircraft or of the persons on board (73). In an analogy with the provisions of maritime law, the aircraft commander may consult the other members of the crew before deciding to dispose of the cargo. The aircraft commander has to take into consideration more than one factor in order to determine whether he will jettison the cargo (74).

The Draft Convention does not directly authorize the aircraft commander to jettison cargo. It appears that there is a division of

opinion as to the insertion of an Article in any Convention dealing with the legal status of aircraft commanders, which grants the aircraft commander the right to dispose of cargo and mail in case of emergency. While some authors believe that this provision is necessary (75), another author feels that its insertion would be superfluous, as situations where such an emergency would exist will not arise very often, if at all, and that the aircraft commander is already in control of the cargo under the terms of paragraph (a) of Article 2 of the Draft Convention (76).

Annex 2 to the Chicago Convention states that, "nothing shall be dropped or sprayed from an aircraft in flight except under conditions prescribed by the appropriate authority and as indicated by relevant information, advice and/or clearance from the appropriate air traffic services unit" (77). In Dr. Matte's opinion:

> "...this is not a relevant recommendation, since in some cases, dropping cargo from the plane may save human lives. Damages may well be caused to owners of the jettisoned cargo, whether to consigner or consignee, as well as to third parties on the surface. But these persons will be covered by the operator's liability, the amount of which is known in advance or may be determined judicially." (78)

Despite this Article 2, para. (c) of the Draft Convention gives the aircraft commander the right to disembark passengers, and crew members, but there is no mention of hazardous materials (79). The subject of the rights and duties of the aircraft commander in respect of the carriage of dangerous goods was raised at the meeting

of the Panel of Experts in 1980. The discussions produced some divergent points of view. One panelist stated that it was doubtful that responsibility of the aircraft commander was at issue, rather that the parties specifically concerned with the matter were the shippers and the aircraft operators. Another expressed the view that the problem should be emphasized in light of the lack of clarity in the attitude of aircraft commanders with respect to the carriage of dangerous goods. Finally, it was suggested by yet another panelist that although the matter is of some importance, it would be premature to consider it at the meeting in view of the forthcoming detailed Annex 18 on the Carriage of Dangerous Goods which contained a series of technical instructions (80).

There is no doubt that "dangerous goods" are essential for a wide variety of global industrial, commercial, medical and research requirements and processes. Therefore, more than half of the cargo carried by all modes of transport in the world is dangerous cargo (81). Naturally, a great deal of this dangerous cargo is carried by aircraft because of the advantages of air transport (82).

Article 35, paragraph (b) of the Chicago Convention gives each contracting State the right to regulate or prohibit the carriage in or above its territory of articles which are considered as dangerous for public order and safety. Annex 6 makes the carriage of dangerous goods subject to the approval of the State of Registry (83).

However, legal problems relating to the carriage by air of dangerous goods deal with injury, actual or potential, by air freight or cargo rather than injury to or loss of the freight (84). As the individual responsible for the safety of persons on board, the aircraft commander must not only receive information concerning the presence of hazardous materials in the aircraft but must also be given assurance by a competent expert that the packing complies with regulations and is sufficient to neutralize any danger (85).

The Authority and Responsibility of the Aircraft Commander With Respect to Authorities Outside the Aircraft

This section deals with the cooperation between the aircraft commander and authorities outside of the aircraft. Many areas fit in under this heading. To name but a few: emigration and immigration; sanitary and medical regulation; the concurrent overlapping authority of the air traffic control; the unlawful seizure and interference with the aircraft.

a) Unlawful Seizure, Interference

The aircraft which is subject to an unlawful seizure is

de facto "in distress". In accordance with Article 25 of the Chicago Convention, once the aircraft commander has declared his aircraft "in distress", each State should provide "such measures of assistance to aircraft in distress in its territory as it may find practicable". Furthermore, under Article 11 of the Tokyo Convention, each State should,

> "take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft"
>
> and,
>
> "permit its passengers and crew to continue their journey as soon as practicable and...return the aircraft and its cargo to the persons lawfully entitled to possession."

Paragraph 3.1.2. of Annex 17 states that "each contracting State shall establish a civil aviation security programme". It was suggested that the process of coordination between the aircraft commander and authorities outside the aircraft would be worked out within the suggested national civil aviation security programme (86).

However, despite their obligation under the international Convention, some States used to close their runways, by physical obstructions or otherwise, in order to prevent the operation of aircraft subject to unlawful seizure. Examples of such incidents are manifold and well-documented (87).

Do the principles of national sovereignty give a State the right to force an aircraft commander to make an unscheduled landing

in its territory for reasons of surveillance? From the legal point of view, what is the difference between a State's interference while the aircraft is flying in the airspace of that State and while the aircraft is flying over the high seas?

Two incidents of this kind have taken place. In 1971, a BOAC aircraft carrying over 100 passengers was forced by Libyan authorities, under threat of being shot down, to land at Benina, where two passengers--senior members of a new Sudanese regime--were removed from the aircraft. On August 10, 1973, Israeli fighters, while outside of Israeli airspace, intercepted a Lebanese civil airliner shortly after its take-off from Beirut airport, and ordered it to land at one of the Israeli airports (88).

IFALPA suggested that:

> "State authorities shall not require an aircraft to make an unscheduled landing in their territory at aerodromes which the pilot-in-command considers unsuitable and a landing at which might compromise the safety of his aircraft and the persons on board." (89)

Another type of interference is illustrated by the 1979 "Ballerina Incident", at New York. As reported in the New York Times, in August 1979, United States Government Officials delayed the departure of a Soviet Aeroflot aircraft from New York's Kennedy Airport to determine if a Soviet ballerina was returning to the U.S.S.R. of her own free will. The grounding of the aircraft with the ballerina aboard lasted for three days, as the climax of an incident where the ballerina's husband

defected to the United States. An automobile was used to prevent the aircraft from taking off until such time as the American authorities were able to interview the ballerina and determine that she was not coerced into leaving the United States. Although the issue of the legality of the detention of this aircraft by American officials has not, as of yet, been fully determined, this incident is as serious or as dangerous as the Libyan and Israeli incidents discussed above.

The three incidents described above are examples of the kinds of situations which are not covered by existing international rules and which are situations where an aircraft commander is often caught in the middle of a dispute with no international regulatory provisions to guide him and to help him to determine what his rights and obligations are, as well as the scope of his authority and responsibility in such cases.

b) Air Traffic Control

It is submitted that the relation between the aircraft commander and air traffic units are very important to the safety of the aircraft and persons on board. Air Traffic Services comprise the flight information services, alerting services, air traffic advisory services, and approach control services or aerodrome control services (90). The objectives of air traffic services are (to):

(1) prevent collisions between aircraft;

(2) prevent collisions between aircraft on the maneuvring area and obstructions on that area;

(3) expedite and maintain an orderly flow of air traffic;

(4) provide advice and information useful for the safe and efficient conduct of flights;

(5) notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required (91).

The distinction between instrument flight rules (IFR), where the flight is conducted solely with reference to instruments, and visual flight rules (VFR), where the flight is conducted with reference to points on the ground, is very important in the relationship between aircraft commanders and air traffic controllers. The aircraft commander needs the appropriate air traffic control unit's authorization to conduct the flight under visual flight rules and, the air traffic unit has to give its authorization according the applicable rules and regulations (92). This distinction is also important inasmuch as when the pilot is flying under instrument flight rules he may be unaware of certain facts he needs in order to operate his aircraft safely and effectively, while, when he is operating under visual flight rules he may be in the same

situation as the air traffic controller (93).

The era of the jumbo jets adds another task to the air traffic controllers' duties and that is to warn about wake turbulance. This warning is important because frequently, the pilot of a light aircraft will be unaware of the presence of the heavier vortex-generating aircraft which may have left the runway area before the light aircraft reaches it (94). This atmospheric phenomenon which sometimes emanates from a thunderstorm is now being blamed for the many recent accidents and has taken the place of pilot error as the "numero uno" scapegoat (95).

In weighing the aircraft commander's authority against that of the controller, one can say that the growing volume of air traffic, expecially over crowded airports, and the development of aviation technology, such as the improvement of on board instrumentation and improvements in the system of communications with traffic services, have increased the controller's authority at the expense of the authority of the aircraft commander (96).

However, the aircraft commander is "responsible for the operation of the aircraft" and has "final authority as to the disposition of the aircraft while he is in command" (97); therefore, the aircraft commander is primarily the person responsible for the safety of the flight and he is liable in the event of an accident.

This statutory approach has been adopted by courts as a basis for judicial decisions (98).

The principle of "sovereign immunity" under common law had protected the controllers from liability for aircraft accidents, but in Eastern Airlines vs. Union Trust Company (99), the United States government was primarily held liable for the acts of an air traffic controller who cleared two aircraft to land on the same runway at approximately the same time. The importance of this decision lies in the fact that the court held that the discretionary function exception of the Federal Tort Claims Act (100) did not apply to air traffic control activities.

The case of American Airlines vs. United States provides us with four standards of care for pilots and air traffic controllers (101). These are:

(1) the pilot is in command of the aircraft, is directly responsible for its operation, and has final authority as to its operation;

(2) before a pilot can be held legally responsible for the movement of his aircraft he must know, or be held to have known those facts which were then material to a safe operation. Certainly, the pilot is charged with that knowledge which in the exercise of the highest degree of care he should have known;

(3) the air traffic controller must give the warnings specified in the manual; and

(4) the air traffic controller, whether required by the manual or not, must warn of dangers reasonably apparent to him, but not apparent in the exercise of due care to the pilot (102).

The task of air traffic control is different from that of operational control in regard to the conduct of a flight. The operational control of a flight is a system of control and management during the flight, which is developed and exercised by the airlines themselves.

* * *

NOTES

(1) ICAO Doc. PE/AIRCO-WD/27. See also Omer YoruKogly, "le Statut Juridique du Commandant de Bord", Lausanne, 1961, p. 32. He said, "La qualité de commandant est un emploi et non un grade. Il n'existe pas de diplome de pilote de ligne, de réception, d' essais ou de pilot professionnel de différent classe peut être désigné comme commandant."

(2) Minutes and documents of the Legal Committee's 9th Session, Rio de Janeiro, 1953 (Doc. 7450-LC/136). Mr. André Garnault's Progress Report, p. 324.

(3) Krauth, "The Aircraft Commander in International Law", J.A.L.C., 1947, p. 157, at p. 161.

(4) Vivent in compte Rendu des Réunions de la 4ieme Commission, May, 1930, Doc. 37, p. 11.

(5) Ibid., supra note 2.

(6) Final report of the Personnel Licensing and Training Practices Section, 3rd Session, Doc. 5408-PEL535, p. 20.

(7) Annex 1, 1.2.1., 2/1/75.

(8) M. S. Kamminga, "The Aircraft Commander in Commercial Air Transportation", Hague, 1953, at pp. 41-42.

(9) Ibid., at p. 133.

(10) Ibid., supra note 3, at pp. 160-161.

(11) Ibid., supra note 8, at p. 133. See otherwise, Charlier, "Le Commandant d'Aeronef en Droit Privé", R.G.D.A., 1947, p. 21.

(12) Annex 6, Chapter 1 (Definition), 27/11/80.

(13) Kamminga, supra note 8, at p. 134.

(14) M. Krauth, "Compte Rendu des Réunions de la 4ieme Commission", Doc. 493, p. 42.

(15) Rapport et Avant-projet de Convention par M. Garnault, Doc. 434, p. 59.

(16) ICAO Doc. PE/AIRCO-Report, p. 12.

(17) The Netherlands, Norwegian, Swiss and Egyptian delegates, see Compte Rendu des Réunions de la 4ieme Commission, Do. 496, p. 24.

(18) Cooper, Doc. 496, p. 25: "...pendant les escales c'est-a-dire que lorsque cet equipage s'en va en ville, le capitaine n'a pas un pouvoir sur l'equipage, etant donné qu'un avion civil n'est pas un avion militaire et n'est pas soumis aux memes regles."

(19) Kamminga, supra note 8, at p. 147.

(20) ICAO Doc. D-WP/6636.

(21) ICAO Doc. PE/AIRCO-WD/2, pp. 20-21.

(22) Ibid., at p. 38.

(23) ICAO Doc. PE/Report, at p. 7.

(24) ICAO Doc. PE/AIRCO-WD/27, p. 3.

(25) H. Beaubois, "Le Statut Juridique du Commandant d'Aéronef", R.F.D.A., 1955, p. 221, at pp. 227-229.

(26) N.M.Matte, "Treatise on Air Aeronautical Law", Montreal, 1981, p. 293.

(27) In Saudi Arabia, the Saudi pilots are not contractual employees, unlike the pilots from other nations, but rather are considered as a "public employee".

(28) Ibid., supra note 26; see Resolution A23-13/1 Amendment of the Chicago Convention regarding transfer of certain functions and duties, Article 83, bis.

(29) ICAO Doc. PE/AIRCO-Report, p. 8. The sub-section (e) of Section 2 of Canadian Criminal Code, amended in 1972, defines the "peace officer" as "the pilot in command of an aircraft: (1) registered in Canada under regulations made under the Aeronautics Act; or (2) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft registered in Canada under those regulations while the aircraft is in flight."

(30) Ibid.

(31) Kamminga, supra note 8, at p. 136.

(32) J.T. Keenan, "The Legal Status of the Canadian Aircraft Commander", published by Canadian Airline Pilots Association, p. 9.

(33) ICAO Doc. PE/AIRCO-WD/13.

(34) ICAO Doc. PE/AIRCO-WD/9, p. 2.

(35) Ibid., supra note 33.

(36) Such a position exists in the Saudi Airlines.

(37) Kamminga, supra note 8, at p. 20 F.IV.5.

(38) Compte Rendu des Réunions, Doc. 493, p. 75.

(39) Compte Rendu des Réunions de la 4ieme Commission, Doc. 2, p. 21.

(40) Matte, supra note 26, at p. 284.

(41) Kamminga, supra note 8, at p. 153.

(42) ICAO Doc. PE/AIRCO-Report, at p. 8.

(43) Kamminga, supra note 8, at pp. 140-43. See also Omer YoruKoglu,"Le Statut Juridique du Commandant de Bord", 1961, pp. 206-207.

(44) Beaubois, supra note 25, at p. 249.

(45) Matte, supra note 26, at pp. 319-320.

(46) ICAO Doc. PE/AIRCO- Report, at. p. 9.

(47) Annex 6, Chapter 4, 4.2.2., 1/3/71.

(48) Annex 6, Chapter 9, 4.2., 1/3/73.

(49) ICAO Doc. LC/WP 237, p. 2.

(50) Annex 2, Chapter 2, 2.4., 27/2/75.

(51) YoruKogul, supra note 43, at p. 93.

(52) Tokyo Convention, Article 6, para. 2.

(53) Whitman vs. Red Top Sendan Service Inc., 218 So. 2nd 213, 216 (Fla. App. 1969); cited by Brad Kizzia, "Liability of Air Carriers for Injuries to Passengers Resulting From Domestic Hijackings and Related Incidents", 46 J.A.L.C., 147, 1980, at p. 180.

(54) Draft Convention, Article 2, para. a, b, c.

(55) For the history of the Tokyo Convention and ICAO efforts to regulate the commander's authority, see Matte, supra note 26 and Bogie and Pulsiffer, "The Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft", 30 J.A.L.C., 305, 1964.

(56) Matte, supra note 26, at p. 341.

(57) Bogie and Pulsiffer, supra note 55, at p. 339.

(58) G.F. Fitzgerald, "The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft", The Canadian Yearbook of International Law, 1963, p. 229 at 232; see also Massato vs. Public Sew. Co-ordinated Transp., 71, N.J. Super. 39, 176 A2nd 280, 284 (1961). Carrier's duty of high care is not diminished in case of sudden emergency.

(59) Brad Kizzia, supra note 53;"McClintock Aircraft Hijacking: Its Civil and Criminal Ramifications", 1971.

(60) Matte, supra note 26, at p. 342.

(61) Tokyo Convention, Article 7, para. 1.

(62) Tokyo Convention, Article 7, para. 2.

(63) ICAO Doc. PE/AIRCO-WD/2, p. 19.

(64) Ibid.

(65) J.M. Corrigan, "The Right of the Air Carrier to Refuse Carriage", Annals of Air and Space Law, Vol. III, p. 25, at p. 38.

(66) Bogie and Pulsiffer, supra note 55, at p. 342.

(67) Ibid.

(68) Fitzgerald, supra note 58, at p. 245.

(69) ICAO Doc. PE/AIRCO-WD/6.

(70) Ibid.; also IFALPA suggested that an aircraft commander, while carrying "persons in custody" may, at his discretion, impose any or all of the following restrictions:

a) that each "person in custody" carried in the aircraft and that person's escort shall be excluded from service of alcoholic beverages;

b) that "persons in custody" and their escorts shall be boarded prior to all other boarding passengers and disembark following all others;

c) that "persons in custody" shall not be placed in aisle seats, next to emergency exits, or next to other passengers;

d) that "persons in custody" and their escorts shall accompany each other when utilizing rest rooms, or any other similar restriction that he considers essential to the safety and well- being of his passengers and crew members.

(71) ICAO Doc. PE/AIRCO-WD/30, p. 13.

(72) Ibid.

(73) Matte, supra note 26, at p. 308; YoruKoglu, supra note 43, at p. 103; Kamminga, supra note 8, at p. 137.

(74) Matte, ibid.; YoruKoglu, ibid.

(75) Ibid.

(76) Kamminga, at p. 137.

(77) Annex 2, Chapter 3.3.1.4., 10/8/78.

(78) Matte, supra note 26, at p. 308.

(79) Kamminga, supra note 8, at p. 137.

(80) ICAO Doc. PE/AIRCO-WD/30.

(81) ICAO Doc., "The Convention on International Civil Aviation, the First 35 Years", p. 35.

(82) Ibid.

(83) Annex 6, Chapter 3.3.5. provides:

Explosives and other dangerous articles other than those necessary for the operation or navigation of the aeroplane or for the safety of the personnel or passengers on board shall not be carried in an aeroplane, unless the carriage of such articles is approved by the State of Registry of the aeroplane and they are packaged and labelled in accordance with the regulation approved by that State.

Note 1--Flammable liquids or solids, oxidizing materials, corrosive liquids, flammable or non-flammable compressed gas, poisonnous liquid or solid, or tear gas and radioactive materials are, inter alia, considered dangerous articles; certain articles may become dangerous when in proximity to other articles.

(84) See Kappelmann vs. Delta Airlines, Inc., (1975, DC Dirt Col) 13 Avi 17,919.

(85) ICAO Doc. PE/AIRCO- WD/13, pp. 9-10.

(86) ICAO Doc. PE/AIRCO-WD/9, p. 2.

(87) ICAO Doc. PE/AIRCO-WD/2, p. 21.

(88) See ICAO Council Resolution of August 20, 1973, and U.N. Security Council Resolution 337 (1973).

(89) ICAO Doc. PE/AIRCO-WD/6, p. 5

(90) Annex 11, Chapter 1 (Definition), 10/8/78.

(91) Annex 11, Chapter 2 2.2, 10/8/78.

(92) See Annex 2, Chapters 4 and 5. See also Smerdon vs. United States, 135 F. Supp. 929 (D Mass., 1955); in this case, a pilot crashed while attempting to execute a VFR landing in IMC conditions. The pilot heard a favourable weather report for another airport and had mistakenly believed that it applied to the airport he intended to land in. He professed an ability to see the airport, and requested and was granted clearance to land. Inspite of encountering fog half a mile from the end of the runway, he continued his approach and crashed into Boston harbour. The plaintiff alleged in his negligence claim that when the controller authorized a VFR landing when the weather conditions were below VFR minimum he breached his duty to assist the pilot in executing a safe landing. While absolving ATC from liability, the court established that a controller's

duties are limited to controlling and preventing aircraft collisions. The importance of this dictum appears when we take into consideration that according to Para. 2.2 of Annex 11, the providing of advice and information useful for the safe and efficient conduct of flights is one of the controller's duties.

(93) Troncoso and Feldman,"Wake Turbulance and the Jumbo Jets: Whose Responsibility, Pilot or Controller?", Annals of Air and Space Law, Vol III, p. 269, at p. 273.

(94) Ibid., at p. 270.

(95) Ibid., at p. 271; see also J.M. Corrigan, "Legal Aspect of Airport Operations in Canada", LL.M thesis (unpublished) Institute of Air and Space Law, McGill University, p. 142.

(96) Kamminga, supra note 8, at p. 50.

(97) Annex 2, Chapter 2. 2.4, 27/2/75.

(98) Dames Ficher et al vs. Sabena (May 6, 1950) RFDA (9150), p. 423; Brock vs. U.S. (1977) 14 Avi. 18,246; Churchill Falls Ltd., V.R. (1974) 53 D.L.R. (3rd) 360; Crossman vs. U.S. (1974) 13 Avi. 17,160; once air traffic control warns a pilot of a hazard, it has no obligation to guide him around it; Ozark Airlines vs. Delta (1975) 14 Avi. 17,221; crew not listening to radio frequency--ground collision; Hartz vs. U.S. (1965) 9 Avi. 18,125 (1968) 10 Avi. 18,204; pilot is to conduct the take-off in the safest possible manner; United States vs. Schultetus, 277 F. 2nd 322 (5th Cir, 1960), cert. denied 364 U.S. 828 (1960); the primary responsibility, at least in visual flight weather, to avoid a collision, is on the pilot, and not on the control tower.

(99) 221 F. 2nd 62 (D.C. Cir., 1955).

(100) 28 U.S.C.S. 2680.

(101) 418 F. 2nd 180 (5th Cir., 1967).

(102) Ibid., at p. 193; Hamilton vs. United States (1974, CA9 Cal) 12 Avi. 18,454: (recognizing that "the duty to exercise due care is a concurrent one, resting on both the control tower personnel and the pilots."); Spaulding vs. United States (1972, CA9 Cal) 12 Avi. 17,240: (stating that) "the standard of due care is concurrent, resting upon both the airline pilot and ground aviation personnel. Both are responsible for the safe conduct of the aircraft...Before the pilot is held legally responsible for his aircraft, he must know those facts which are material to the operation of his plane. An important source of this information is tower personnel, air traffic controllers, and service station personnel."

CONCLUSION

It is submitted that the purpose of any convention is the cornerstone of its interpretation. Obviously, each convention has different purposes; therefore, the scattered provisions with respect to the aircraft commander's legal status are lacking this one purpose which is to harmonize the interpretation of the regulations.

In Reed vs. Wiser, the court extended the limitation of liability protection to the employees and servants of the carrier because such an extension, in the court's opinion, served the purpose of the Warsaw Convention. This extension only includes those provisions which exclude or limit the carrier's liability. In Molitch vs. Irish International Airlines, the court stated that Article 29 was not a provision excluding or limiting the carrier's liability. Thus, the American Court's position in this area is similar to the provisions of Article 25A of the Hague Protocol. Therefore, the carrier's servants and agents are not protected by the Warsaw Convention's time limitation, neither under the Warsaw Convention itself, nor under the Warsaw Convention amended by the Hague Protocol.

Whenever a study is conducted about the legal status of the aircraft commander there is the question of whether there is a practical need for an international instrument which contains all provisions related to the legal status of the aircraft com-

mander. However, the Panel of Experts heavily relied on the Annexes to the Chicago Convention as a substitute for an international instrument. But, it must be noted that States can easily deviate from the Annexes' provisions. Therefore, the Annexes to the Chicago Convention are not the suitable place for the provisions related to the status of the aircraft commander.

Given the fact that there is no desire on the part of States for an international convention on the issue and since the present Annexes to the Chicago Convention are not suitable with respect to the legal status of the aircraft commander, a solution may be found in a new Annex to the Chicago Convention which would be binding on all contracting States. Such a solution would require the amendment of the Chicago Convention, whereas there would be two kinds of Annexes to the Convention. The existing Annexes are less binding and more flexible and contain more technical provisions, and the one I have proposed would be binding and less flexible and contain the legal technical provisions with respect to the legal status of the aircraft commander, as well as for other subjects and regulations which would require such mandatory or obligatory enforcement.

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ATTACHMENT A

PE/AIRCO - WD/3
20/2/80

PANEL OF EXPERTS ON THE LEGAL STATUS
OF THE AIRCRAFT COMMANDER

(Montreal, 9 - 22 April 1980)

OPERATIONAL REFERENCES

(Presented by the Secretariat)

1. General

1.1 During the deliberations of the Council on 13 June 1979 it was stressed that the subject of the legal status of the aircraft commander had wider implications than purely legal ones. Moreover, future work on this subject should permit a delimitation of the operational and legal aspects.

1.2 Attachment A to this paper lists references from the appropriate ICAO technical Annexes to the Chicago Convention which have a direct or indirect bearing on the:

a) responsibilities;
b) authority;
c) rights; and
d) duties

of the pilot-in-command. The term pilot-in-command has been chosen as it is defined in the various ICAO technical Annexes, whereas the term "Aircraft Commander" is used as a reference in the Secretariat study in PE/AIRCO - WD/2.

Note.- The contents of Attachment A should not be regarded as exhaustive. Moreover, it is recognized that material contained in other ICAO documents (PANS-OPS, PANS-RAC, etc.) may contain related information.

ATTACHMENT A

Authority	Responsibility	Rights	Duties
	ANNEX 1 - PERSONNEL LICENSING		
Definition pilot-in-command 1.2.1 2.6.1	Definition pilot-in-command 1.2.4.1 1.2.4.2.1 1.2.5 (cf 12.1) 1.2.6.2 2.6.1 (example only, also applicable to other licences)	1.2.3	Definition 8.1 c 2.6.1 (Chapter 6)
	ANNEX 2 - RULES OF THE AIR		
Chapter 2, para 2.4	Definition pilot-in-command para 2.3.1 para 2.3.2 Compliance with chapters 3, 4, 5 and Appendices	Definition pilot-in-command Chapter 2, para 2.4	para 2.5
	ANNEX 3 - METEOROLOGICAL SERVICE FOR INTERNATIONAL AIR NAVIGATION		
Definition pilot-in-command	Chapter 5	Definition pilot-in-command	Chapter 5
	ANNEX 4 - AERONAUTICAL CHARTS		
	Knowledge of charts used throughout Annex		Respect of limitations of the charts and particularly Chapters 7 and 8
	ANNEX 5 -- UNITS OF MEASUREMENT TO BE USED IN AIR AND GROUND OPERATIONS		
	Compliance		

NO PAGE. 2

Authority	Responsibility	Rights	Duties
	ANNEX 6 - OPERATION OF AIRCRAFT PART I - INTERNATIONAL COMMERCIAL AIR TRANSPORT		
Definition pilot-in-command para 3.4 Chapter 4	Chapter 3 Chapter 4 Chapter 5 Required knowledge (operations manual or other sources) Chapter 6 Compliance Chapter 9 Compliance Chapter 11 Knowledge and compliance Chapter 12 Compliance Chapter 13 Knowledge and compliance Attachment A Compliance	Definition pilot-in-command para 3.4 Chapter 4	Chapter 3 Chapter 4 Chapter 5 To comply with requirements at all times Chapter 6 Compliance Chapter 9 Compliance Chapter 11 Knowledge and compliance Chapter 12 Compliance Chapter 13 Knowledge and compliance Attachment A Compliance
ANNEX 6 - OPERATION OF AIRCRAFT PART II - INTERNATIONAL GENERAL AVIATION As listed for Part I and applicable to General Aviation (see definition of G.A. - Definitions in Part II)			
	ANNEX 8 - AIRWORTHINESS OF AIRCRAFT		
	Chapter 1.3 Knowledge of and compliance with certification weights, speeds, etc. Chapter 3.2 as above Chapters 4, 5, 6 and 7, indirectly concerned in most. Chapter 9 Knowledge		Chapters 1.3, 2.2, 3.2 Chapter 9 Knowledge

Authority	Responsibility	Rights	Duties
	ANNEX 9 - FACILITATION		
Definition pilot-in-command Chapter 7 Chapter 8 (particularly "B" and "C")	Chapters 2 and 3 Compliance Chapter 6, Part V - Knowledge "C" Chapter 6, Knowledge para 7.4.4		Compliance with and knowledge of Chapter 2 Chapter 3, Part VI
	ANNEX 10 - AERONAUTICAL TELECOMMUNICATIONS VOLUME II (COMMUNICATION PROCEDURES INCLUDING THOSE WITH PANS STATUS)		
By inference (PIC) the "Aircraft Operating agency" Definition	Compliance especially in respect of Chapters 5 and 6		Knowledge of Chapters 5 and 6
	ANNEX 11 - AIR TRAFFIC SERVICES		
Pilot-in-command definition	Compliance	Pilot-in-command definition	Respect of contents
	ANNEX 12 - SEARCH AND RESCUE		
Pilot-in-command definition	Compliance and knowledge of Chapter 5	Pilot-in-command definition	Compliance (e.g. paras 5.9 and 5.10)
	ANNEX 13 - AIRCRAFT ACCIDENT INVESTIGATION		
No particular references to pilots HOWEVER: - i) para 3.1 - objective of the investigation and ii) para 5.12 - disclosure of records would seem to need legal reconciliation.			

Authority	Responsibility	Rights	Duties
	ANNEX 14 - AERODROMES		
	General knowledge of aerodrome characteristics affecting operations:- e.g. aerodrome data, physical characteristics, obstacle clearance, lighting, rescue and fire-fighting facilities, etc.		
	ANNEX 15 - AERONAUTICAL INFORMATION SERVICES		
	Compliance with requirements of Annex 6.		
	ANNEX 16 - AIRCRAFT NOISE		
	No direct reference to pilot-in-command but a knowledge of the relevant noise levels, procedures and restrictions are necessary at each aerodrome.		
	ANNEX 17 - SECURITY		
	Again no direct reference to pilot-in-command but the term "operator of an aircraft" would seem to englobe the intent; responsibilities and duties are required of this annex together with: Annex 6 Annex 9 Annex 10 Annex 11 Annex 13 Annex 14		

- END -