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SOME LEGAL ASPECTS OF FLIGHT INFORMATION REGIONS

by

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of MASTER OF LAWS.

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 March 1990

ISBN 0-315-63726-9

To Anastácio Filinto

ABSTRACT

This thesis broadly seeks to present some relevant legal aspects concerning Flight Information Regions (FIRs) and to analyze State responsibility vis-à-vis FIRs, as well as liability incurred by States on acccunt of acts and omissions while discharging their responsibilities.

The first part of this thesis is a presentation of the international rules and regulations applicable to FIRs, their legal implications and the extent to which they create obligations for States.

Some relevant problems (accidents, airspace congestion, unlawful interference) likely to present an additional challenge for the discharge of responsibilities with regard to FIRs are also considered.

Settlement of differences between States deserves special attention and is discussed in the light of the judicial machinery provided under the Chicago Convention 1944.

Finally, the liability of States is analyzed and the need for a strict liability regime and a policy of risk management is considered.

RESUMÉ

Cette thèse présente certains aspects légaux pertinents concernant les regions d'information de vol (FIRs) et leur rôle et obligations vis-à-vis les FIRs.

La première partie de cette thèse présente les règles applicables aux FIRs, leurs implications légales et les obligations qu'elles créent pour les États.

Certain problèmes pertinents (accidents, encombrement de l'espace aérien, actes d'intervention illicite) susceptible de poser un défi supplémentaire à la décharge de responsabilités, en ce qui concerne les FIRs, sont également considerés.

La résolution de disputes entre États mérite une attention spéciale et est analysée à la lumière des méchanismes judiciaires fournis par la Convention de Chicago (1944).

Finalement, la responsabilité des États est analysée et le besoin d'un régime de responsabilité stricte de même qu'une politique de gestion des risques est considerée.

ACKNOWLEDGMENTS

I wish to express my gratitude to Dr. Michael Milde, for supervising this thesis and for his precious and useful advice and guidance.

I also wish to thank Mr. John N. Bradbury, Chief RAC/SAR, Mr. Christian Eigl, Chief Regional Affairs Office, Mr. Legesse Mammo, Chief Fellowships Section and the staff of the ICAO Legal Bureau for their help and kindness.

TABLE OF CONTENTS

Page

Page

CHAPTER I

PRELIMINARY CONSIDERATIONS

1. INTRODUCTION

As for any other form of transportation, there is an inherent need to provide certain services to air traffic so that it can be conducted in a safe and orderly manner in accordance with the wording of the Preamble of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (hereinafter referred to as the Chicago Convention or the ICAO Convention).

These services to air traffic are referred to in Article 28 of the said Convention. This provides that each Contracting State undertakes, so far as it may find practicable, to provide in its territory, airports, radio services and other navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time pursuant to the Convention.

The first part of the above-mentioned provision is of a permissive nature; it is up to the States to decide whether they will provide the services or not, in their own territory and, if they decide to do so, to what extent. In

the latter case, however, i.e. in case a State decides to provide the services in question, it should do so in accordance with the provisions established under the Chicago Convention.

To ensure adequate and uniform regulation in the provision of services necessary for safe and regular international air navigation, the International Civil Aviation Organization (ICAO) has adopted, through its Council,[1] specific "standards" and "recommended practices" and grouped them in an Annex 11 to the Chicago Convention, designated "Air Traffic Services".

Annex 11 defines "air traffic services" (ATS) as a generic term meaning, variously, flight information service, alerting service, air traffic advisory service, air traffic control service, area control service, approach control service or aerodrome control service.[2] The types of ATS provided vary in the various portions of the airspace which, for that purpose, are designated in relation to the ATS that are to be provided:[3]

> Flight Information Regions - those portions of the airspace where it is deter-

1. Chicago Convention, Articles 37, 54(1) and 90.

2. "Air Traffic Services" - Annex 11 to the Convention on International Civil Aviation, 8th ed. (Montreal: ICAO, July 1987), Chapter 1 - "Definitions".

3. Ibid., Chapter 2, 2.5.2.1 and 2.5.2.2.1.

mined that flight information service and alerting service will be provided.

Control areas and control zones - those portions of the airspace where it is determined that air traffic control service will be provided to IFR[4] flight.

In this work, our interest will be concentrated on "flight information regions" (FIRs) and their relevant aspects, namely those elements which are of important legal significance, and especially those which have some bearing on matters concerning responsibility and liability of States. Our purpose is to point out some relevant legal aspects related to FIRs and to analyze the States' responsibilities as well as States' liability on account of acts and omissions while discharging their duties.

In the course of this work, reference will be made to basic technical information essential for the comprehension of the problems relating to FIRs. However, the technical information will not be referred to in an exhaustive fashion, but only for illustration of the aspects relevant to the purpose of this study.

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4. Instrument Flight Rules.

2. ICAO REGULATIONS

2.1. Legal Status of ICAO Regulations

The purpose of this work is to analyze some relevant legal aspects concerning FIRs and to analyze the States' responsibilities vis-a-vis FIRs, as well as the States' liability on account of acts and omissions while discharging their responsibilities.

The first step towards achieving the above aim is to analyze the international regulations applicable to FIRs in order to establish the responsibility of States. Bearing in mind that FIR is a concept created and developed by ICAO,[5] it is consequently regulated by rules adopted by that organization.

A study of ICAO regulations, and in particular their legal nature, their binding force and the extent to which States are compelled to observe them is essential for the determination of the sources of the responsibilities of the States. In doing so, however, it should be remembered that ICAO rules and provisions do not bind non-Contracting

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5. The term "Flight Information Region" replaced "Flight Safety Region", originally employed by the then Provisional International Civil Aviation Organization (PICAO) - ICAO Doc. 2010/RAC/104, Feb. 1946, p. 16, para. 2.1.16.

States. In accordance with the principle pacta tertiis nec nocent nec prosunt, ICAO authority is confined to member States and does not bind non-members.

The term "FIR" is not mentioned in the Chicago Convention. ICAO regulations concerning FIRs are embodied: in standards and recommended practices (SARPS) contained in the Annexes to the Chicago Convention; in Procedures for Air Navigation Services (PANS); and in Regional Supplementary Procedures (SUPPS). These ICAO enactments have different legal status and, to understand how they create obligations for the ICAO member States, a reference to the regulatory powers of ICAO is indispensable.

ICAO's authority to adopt technical regulations derives from the Chicago Convention itself (Art. 37). The question is then to establish whether this regulatory authority can be considered: (a) legislative; or (b) "quasi-legislative".

The legislative function of any international body is assessed by its competence to enact international legislation. International legislation is made by virtue of the legislative principle, which means that amendments or regulations when adopted by a certain majority, are binding

on all members, dissenting members included.[6] This is not the case with the "quasi-legislative" authority, in which the "consent principle" is applied. This principle means that amendments and regulations, when adopted by a certain majority (as a rule a two-thirds majority), are not binding on dissenting members.[7] The "consent principle" deprives the regulatory bodies of true legislative competence and reduces their regulations to the status of mere recommendations.

As for most of the specialized agencies, ICAO also adopts the "consent principle" with regard to the promulgation of its regulations. As a result, member States are free to adopt the regulations at their discretion and they can only be bound if they so wish. This "quasi-legislative" competence applies to the majority of ICAO international regulations and, more precisely, to all the regulations concerning national airspace. With regard to the airspace over the high seas, the provisions of Art. 90 in conjunction with Art. 12 of the Chicago Convention make ICAO regulations effective without approval by the member States. In this unique case, ICAO does, therefore, have a true

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6. Erler, Jochen, "The Regulatory Functions of ICAN and ICAO: A Comparative Study", Thesis, McGill (1964), p. 12.

7. Ibid., p. 10.

legislative competence. Over the high seas, ICAO "Rules of the Air" are binding ipso jure upon all member States, as stated in Art. 12: "Over the high seas, the rules in force shall be those established under this Convention."

Three types of regulations are provided for in the Chicago Convention: standards, recommended practices and procedures (Art. 37). None of these terms is defined in the Convention itself. The standards and recommended practices (SARPS), which are embodied in the Annexes to the Chicago Convention, were first defined by the Interim Council of PIC[8] and redefined afterwards in the first Assembly of ICAO.[9] The current definitions, as recently stated in the 27th Session of the ICAO Assembly read:[10]

> Standard - any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting 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;
>
> Recommended Practice - any specification for physical characteristics, configura-

8. Ibid., p. 127.

9. Ibid., p. 128.

10. "Consolidated statement of continuing policies and associated practices related to air navigation", ICAO Assembly Resolution A27-10, (1989), Appendix A.

> tion, 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 Contracting States will endeavour to conform in accordance with the Convention.

In spite of the similar wording, there are crucial differences between standards and recommended practices: (a) the uniform application of standards is recognized as necessary, whereas recommended practices are only desirable; (b) only recommended practices relate to the efficiency of air navigation; (c) Contracting States are required to conform to standards, but only to "endeavour to conform" to recommended practices; and (d) in the case of standards, Contracting States are under the obligation to notify the Council of ICAO in the event of impossibility of compliance. No such obligation is expressed in the case of recommended practices.

A standard contains a main statement specifying an obligation by the use of the word "shall".[11] A recommended practice contains the same elements as a standard but the word "should" is used instead of the word "shall" in the main statement specifying the recommendation. The word

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11. Wijesinha, Samson S., "Legal Status of the Annexes to the Chicago Convention", Thesis, McGill (1960), p. 126.

"Recommendation" is used to introduce the text of a Recommended Practice.[12]

Recommended practices are, as their name indicates, recommendations deprived of any legal force. By their very nature, they are non-binding on member States and create no obligation for the member States to notify the ICAO Council in the event of impossibility of compliance. The situation is quite different with regard to standards. Although the Chicago Convention sets forth, for both standards and recommended practices, that Contracting States undertake to provide ATS in accordance with both standards and recommended practices, this obligation applies only so far as States may find practicable. The obligation concerning the notification of differences has no such escape clause. This obligation is expressed in Article 38 of the Chicago Convention and reads:

> "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 amend-

12. Ibid.

> ments 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 difference which exists between one or more features of an international standard and the corresponding national practice of that State."

The wording of this Article may lead to some confusion as to whether the mandatory notification of differences refers only to standards, or to procedures and practices as well, since these are mentioned in the same provision along with the standards. The solution is found outside the Chicago Convention, in the definition of standards and recommended practices. As seen earlier, it is only in the case of standards that the notification is compulsory.

It can be concluded that standards have a higher status than recommended practices since they are susceptible of creating obligations for Contracting States unless the latter depart from them under the terms of the Chicago Convention. Here the question arises as to whether the silence of a Contracting State with respect to a standard may be regarded as a tacit acceptance to be bound. Some authors might answer in the affirmative,[13] and the word-

13. Ibid., p. 119.

ing of Art. 90 of the Chicago Convention seems to support this conclusion. However, ICAO itself has expressed the view that the "...practice of accepting non-notification of difference as evidence of compliance with an Annex...as unsound...."[14] We share the opinion of those who contend that the non-notification of departures from international standards means either approval of the standards or non-fulfillment of the obligation to notify the ICAO Council of departures. The silence of a Contracting State is a presumption of that State's intention to be bound, but this presumption is of a juris tantum nature, i.e. it admits proof to the contrary. A Contracting State's failure to notify ICAO could very well be caused by its lack of effective administrative machinery and trained personnel. Other reasons could also be related to exceptional problems such as war, turmoil, catastrophes, etc. Whatever the case may be, the non-notification of differences constitutes a breach of the Chicago Convention (namely Article 38), and in this case the Council can, under Art. 54(j) and (k), report to the Contracting States the infraction committed. The ICAO Assembly can then decide under Art. 49(c) on the measures to be taken with relation to the State in breach.

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14. Quoted in Sheffy, Menachem, "The Air Navigation Commission of the International Civil Aviation Organization", Thesis, McGill (1954), p. 102.

However, in spite of the legal power of the ICAO Assembly, punitive measures should be used only as a last resort. In cases where breaches were related to lack of trained personnel and adequate administrative machinery, ICAO has set up special programmes to provide technical assistance to Contracting States.

2.1.1. Annexes

Standards and recommended practices are, for convenience, designated as Annexes pursuant to Art. 54(1) of the Chicago Convention. However, the SARPS, once approved and accepted, do not acquire the same status as the provisions of the Convention. The adoption of Annexes is a unilateral act of the Council which, in doing so, is exercising a mandatory function imposed upon it by Art. 54(1) of the Chicago Convention.

As for the legal status of the Annexes, it has to be said that, with one exception, Annexes are quasi-legislative instruments; they are adopted by the Council through a two-thirds majority of its members and can only bind member States if they so consent. Unlike the Convention, they are not open for signature and ratification by States, which are free not to comply with the Annexes and to

adopt regulations or practices differing from them.[15] In the latter case, however, notification of any differences are compulsory under Art. 38 of the Chicago Convention. The only exception to the quasi-legislative character of Annexes is that made by virtue of Art. 12, which specifies that the Rules of the Air in force over the high seas shall be those established under the Convention. Thus, the action of the Council in adopting Annex 2 and any amendments thereto becomes a legislative one, Annex 2 being concerned with Rules of the Air.[16]

The separation of the SARPS from the Convention makes it easier to adopt and update international regulations without having to comply with the cumbersome process of ratification or amendment set forth in the Convention. The flexible process applicable to Annexes is the best for achieving the necessary uniformity in measures for the safety, regularity and efficiency of civil aviation.

The differentiation between standards and recommended practices in the Annexes is made both in the letter in which they are expressed and in the wording used. Most of

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15. FitzGerald, Gerald F., "The International Civil Aviation Organization - A Case Study in the Law and Practice of International Organization", Copyright (1986), Lecture 9, pp. 9-10.

16. Ibid., pp. 9-13.

the elements concerning SARPS have already been mentioned. We will now refer to the remaining content of Annexes: Appendices, Definitions Notes, Forewords, Introductions, Attachments.

> Appendices form part of the Standards and Recommended Practices to which they refer and are always subject of an enabling clause within the Standards or Recommended Practices.
>
> An Appendix is drafted to conform to the enabling Standard or Recommended Practice. If the enabling specification is a Standard, the associated appendix is phrased throughout in mandatory form although alternatives to the verbs "shall" and "shall not" are also used. If an enabling specification is a Recommended Practice, the associated appendix does not include any clauses that are not capable of being expressed in terms of "should" or "should not".
>
> Definitions were included in Annexes to facilitate concise phraseology in the text, to eliminate repetition and to assist in the interpretation of particular technical terms used in the Standards and Recommended Practices that have no independent status but are an essential part of each Standard or Recommended Practice in which they are employed.
>
> Notes were not intended to alter the meaning of Standards and Recommended Practices but were included wherever it was necessary to clarify an intention, to stress a particular point, or to indicate that a certain question was under study. They give factual information or references bearing on the corresponding Standards or

Recommended Practices of which they do not form a part.[17]

Forewords comprise historical and explanatory material based on the action of the Council ano including an explanation of the obligations of States with regard to the application of the Standards and Recommended Practices ensuing from the Convention and the Resolution of Adoption.[18] Introductions comprise explanatory material introduced at the beginning of parts, chapters or sections of the Annex to assist in the understanding of the application of the text.[19] Attachments comprise material supplementary to the Standards and Recommended Practices, or included as a guide to their application.[20]

2.1.2. PANS and SUPPS

Under Art. 37 of the Chicago Convention, the Council of ICAO has the competence to adopt "procedures" in

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17. Wijesinha, S.S., op. cit, supra, note 11, pp. 127, 128.

18. Explanation provided in all Annexes to the Chicago Convention.

19. Ibid.

20. Ibid.

addition to standards and recommended practices. Given that Art. 54(1) only refers to SARPS as the content of the Annexes to the Chicago Convention, the procedures are not included in these Annexes. They are hierarchically inferior to the Annexes and contain regulatory material that, for one reason or another, is not fit for inclusion in an Annex.[21] ICAO issues two sets of procedures: Procedures for Air Navigation Services (PANS) and Regional Supplementary Procedures (SUPPS). PANS are approved by the Council for world-wide application. They comprise, for the most part, operating practices as well as material considered too detailed for SARPS; PANS often amplify the basic principles in the corresponding SARPS contained in Annexes to assist in the application of those SARPS.[22]

PANS are promoted to SARPS and incorporated in the Annexes as soon as they have become sufficiently stable.[23] They do not have the same status as SARPS.

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21. Buergenthal, T., "Law-Making in the ICAO", (1969), pp. 114-115.

22. Rules of Procedure for the Conduct of Air Navigation Meetings and Directives to Divisional-Type Air Navigation Meetings, Part II, Rule 3.1, ICAO Doc. 8143-AN/873 (1983).

23. Buergenthal, T., op. cit., supra, note 21, p. 115.

While the latter are adopted by the Council in pursuance of Article 37 of the Chicago Convention, subject to the full procedure of Article 90 (two-thirds majority vote of the Council) of the Chicago Convention, the PANS are approved by the Council and recommended to Contracting States for world-wide application.[24] Furthermore, PANS do not come under the obligation imposed by Art. 38 of the Convention to notify differences in the event of non-implementation. Nevertheless, States are invited to notify differences between the ICAO approved PANS and national regulations and practices.[25]

SUPPS establish operating procedures to be applied in specific air navigation regions. They are recommended to Contracting States for application in the groups of flight information regions to which they are relevant.[26] Since PANS are intended for world-wide application, they do not contain procedures or specifications that regional operational requirements may demand. This need is met by the

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24. See FitzGerald, G.F., op. cit, supra, note 15, pp. 9-13.

25. Ibid., pp. 9-14.

26. ICAO Doc. 7030, 4th ed. (1987), Foreword, p. V, para. 2.

operating procedures outlined in SUPPS, which are promoted to world-wide "Procedures" as soon as they have eliminated procedural differences between various Regions,[27] and have been found suitable for classification as PANS for universal application.

PANS and SUPPS are not mentioned in the Chicago Convention. Unlike the Annexes which are adopted, PANS and SUPPS are simply approved by the Council; they are thus mere recommendations with no legally binding force. The one significant consequence of this status is that PANS and SUPPS relating to the Rules of the Air, because they are not incorporated by reference into Annex 2, are not governed by Article 12 of the Convention and thus cannot be deemed to be binding over the high seas.[28] As in the case of PANS, SUPPS do not come within the obligation to notify differences, although States are invited to do so in practice.

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27. Sheffey, M., "The Air Navigation Commission of the International Civil Aviation Organization", 25 J. Air Law & Com. 438 (1958).

28. Buergenthal, T., op. cit., supra, note 21, p. 116, 117.

2.2 ICAO International Legislation

2.2.1 High Seas

It has already been said that the only case where ICAO has a truly legislative competence is that of its regulation of flights over the high seas. In regard to the airspace over the high seas, the provisions of Article 90, in conjunction with Article 12 of the Chicago Convention, make ICAO's regulations effective without need for additional approval by the member States. This combination of majority rule and biding force upon all member States makes the ICAO an international legislature in respect of the "Rules of the Air" for civil aviation over the high seas.[29] Article 12, coupled with Art. 90(a), which permits the adoption of regulations by vote of a qualified majority, make the rules of flight and manoeuvre of aircraft over the high seas as established by ICAO binding on all member States. These rules are those established in Annex 2 (Rules of the Air), in the Foreword of which the Council of ICAO included the following:

> Flight over the high seas - It should be noted that the Council resolved, in adopting Annex 2 in April 1948 and Amendment 1 to the said Annex in November 1951, that the Annex constitutes Rules relating to

29. Erler, J., op. cit., supra, note 6, p. 14.

> the flight and manoeuvre of aircraft within the meaning of Article 12 of the Convention. Over the high seas, therefore, these rules apply without exception.[30]

It can then be concluded that over the high seas, compliance with Annex 2 is compulsory and no departures are permitted.

FIRs encompass vast portions of the high seas. It is, therefore, easy to understand the importance of the binding force of the "Rules of the Air" for FIRs, not only from the legal point of view, but also from the technical point of view. Member States are under the absolute obligation to comply with the rules in question within portions of FIRs over the high seas, and reasons related to technical or economical ability cannot be submitted to justify non-compliance.

2.3. Conclusions

The above considerations on ICAO regulations and their status have provided the necessary legal understanding of the .egulations which constitute the basic source of FIRs. In the course of this study, reference to ICAO Annex-

30. Rules of the Air - Annex 2 to the Convention on Interantional Civil Aviation, 8th ed. (Montreal: ICAO, July 1986).

es and procedures will often be made, since they are material which deal directly with FIRs.

The analysis of the ICAO regulations leads to the conclusion that, except in the special case of the high seas, these regulations have to be regarded as mere recommendations which can only create obligations for member States if they so consent. Furthermore, it should be kept in mind that according to the principle "pacta tertiis nec nocent nec prosunt", embodied in Art. 34 of the "Vienna Convention on the Law of Treaties" (1969), ICAO regulations can legally bind only Contracting members.

When it comes to matters concerning FIRs, the legal status of the applicable ICAO regulations is extremely important for they are decisive in determining the nature of the rules applicable to FIRs, as well as the degree and the extent of the responsibility of the Contracting States.

CHAPTER II

FLIGHT INFORMATION REGIONS

1. DEFINITIONS

The term FIR is not mentioned in the Chicago Convention. The concept was developed for practical reasons, i.e. with the objective of achieving the maximum efficiency in the provision of ATS to aircraft, with an emphasis on safety.[1] The term "FIR" is thus found in Annex 11[2] to the Chicago Convention, in which it is defined as follows: Flight Information Region - an airspace of defined dimensions within which information service and alerting service are provided.

The above services are also defined in Annex 11: Flight Information Service - a service provided for the purpose of giving advice and information useful for the safe and efficient conduct of flights; Alerting Service - a

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1. Park, W., "The Boundary of the Airspace and International Law", Thesis, McGill, (1987), p.3 2.

2. Air Traffic Services - Annex 11 to the Convention on International Civil Aviation Organization, 8th ed. (Montreal: ICAO, July 1987) - Chapter 1 - "Definitions".

service provided to notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required.

1.1 Control Areas and Control Zones

The distinction between FIRs and the two other major divisions of the airspace (control areas and control zones) is made in Annex 11:[3] control areas and control zones designate those portions of the airspace where it is determined that air traffic control service will be provided in IFR[4] flight. The difference, as far as types of services are concerned, is clear. Within FIRs, the services provided are flight information service and alerting service. This does not, however, preclude the possibility of control areas within a FIR, but in the latter case, air traffic control (ATC) service is limited to the boundaries of the control area. As a matter of fact, the scope of ATC is much wider in comparison with that of the services provided for flight information and alerting purposes only. ATC service bears much more responsibility and is conse-

3. Chapter 2, 2.5.2.2.

4. Instrument Flight Rules.

quently more often and in a heavier way subject to liability.

The flight information service and the alerting service, as already explained, are aimed respectively at providing advice and information useful for the safe and efficient conduct of flights, and at notifying appropriate organizations regarding aircraft in need of such services, as required. The burden on ATC service is quite heavier. It comprises three types of services (area control service, approach control service and aerodrome control service) provided for the purpose of (1) preventing collisions between aircraft, and on the manoeuvring area, between aircraft and obstructions; (2)expediting and maintaining an orderly flow of air traffic.[5]

Another distinction which has direct consequences on liability issues is that flight information service and alerting service are concerned with any type of flight: VFR[6] flights and IFR flights, whereas in control areas, the distinction between the two types of flight is of utmost importance. The nature of the flight determines the final liability, or at least the apportionment of liability. It is well known that the status of the pilot-in-command in a

5. Annex 11, Chapter 2, 2.2.

6. Visual Flight Rules.

VFR flight has played a major role in a large number of cases in the discharge of the responsibility of those who provide ATC service. The situation is different when it comes to alerting service and flight information service; the responsibility of those who provide these services is lighter. It is clearly reminded in Annex 11 that flight information service does not relieve the pilot-in-command of an aircraft of any of his responsibilities, and he must still make the final decision regarding any suggested alteration of the flight plan.

1.2. Delineation

Annex 11 contains standards stating that FIRs shall be delineated to cover the whole of the air route structure to be served by such regions; that it shall include all airspace within its lateral limits, except as limited by an upper flight information region (UIR);[7] and that where a flight information region is limited by an upper flight information region, the lower limit specified for the upper flight information region shall constitute the upper vertical limit of the flight information region and shall coin-

7. Upper Flight Information Region (UIR). This concept came into existence with the appearance of jet aircraft and the Super Sonic Transport.

cide with a VFR cruising level of the Table in Appendix C to Annex 2.

ICAO recommends[8] that the delineation of airspace, wherein ATS are to be provided, be related to the nature of the route structure rather than to national boundaries. Although this represents clear evidence that an attempt has been made to discourage delineation of portions of airspace (such as FIRs) on other than technical considerations, we are nevertheless dealing with a mere recommendation which States can perfectly disregard. The same may be said about the content of ICAO's "Air Traffic Services Planning Manual",[9] in which it is recommended that FIRs encompass airspace over the territory of a State, and that adjacent FIRs be contiguous and, if possible, be delineated so that operations considerations regarding the route structure encompassed by them take precedence over their alignment over national borders. The Manual goes on recommending: the size of the State concerned, and their route structure extending over that State determine whether one or more FIRs have to be established in order to cover the airspace over a State; the number of FIRs is also determined by the topography of the State concerned, as well as by cost—

8. Annex 11, Chapter 2, 2.7.1.

9. ICAO Doc. 9426-AN/924, p. I-2-3-1, para. 3.2.2.

effectiveness considerations and the need to keep management problems of the ATS units to manageable portions.

ICAO recommendations, albeit technically ideal, to not always meet the interests of Contracting States, especially when confronted with the very primary principle of international law expressed in Art. 1 of the Chicago Convention; "Every State has complete and exclusive sovereignty over the airspace above its territory."[10] It follows that every State can therefore have its own FIR, and in some cases, to give up this right for the sake of technical considerations, is absolutely not viable. This is the case when the political boundaries do not lend themselves to being operational dividing lines between areas of responsibility of adjacent national ATS services.[11] The need for an ideal technical delineation is in reality sacrificed in many cases. The example of newly independent States provide a good illustration. Based on the same sacred principle of sovereignty, strongly approved and practiced by the international community, those States claim the right to have their own FIR. In other cases, the question of delineation of FIR boundaries can adversely affect national security - a most

10. Chicago Convention, Art. 1.

11. ICAO Doc. 9426-AN/924, "Air Traffic Planning Manual", p. I-2-1-2, para. 1.3.1.

sensitive issue which States are not likely to compromise on. To which principle should priority then be given - the technical one deriving from a recommendation but essential to the safety of air traffic, or the legal principle based on the first rule of international law and essential for the survival of States?

Practice seems to prove that the legal principle is preferred by States whenever a compromise cannot be reached between the two principles. If, in addition, we take into consideration that delineation of FIRs is dealt with by Annex material and procedures, which States are free to adopt at their discretion, we may conclude that this discretionary power is bound to be used in the interest of States. Although Contracting States are under the statutory obligation to adopt and put into operation standards and practices established or recommended by ICAO, under the terms of Art. 28 of the Chicago Convention, it is this same Convention that, in Art. 38, gives the member States the discretionary power to depart from its regulations.

As regarding the high seas, ICAO's policy is that the delineation of FIR boundaries be established under regional air navigation agreements and be based on the existing and expected air route structure as well as on the ability of selected provider States to furnish the required

services without undue efforts.[12] Here again, no presumption of extension of sovereignty is expected on the part of States. However, either in the case of the high seas or in the case of areas of undetermined sovereignty, to which the same principles of delineation apply, some States have considered FIRs as implying an extension of their sovereign jurisdiction. This tendency is found in some ICAO documentation.[13] In doing so, however, States find no support in any provision of international law. When interests of States collide over the high seas or areas of undetermined sovereignty, only agreements seem to solve the conflicts in a peaceful fashion.

1.3. Identification

It is recommended in Annex 11[14] that a FIR be identified by the name of the unit having jurisdiction of such airspace, e.g., Sal Oceanic FIR, Hanoi FIR, Singapore FIR, etc. Jurisdiction in this case cannot be understood to

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12. ICAO Doc. 9426-AN/926, p. I-2-3-1 and 1-2-3-2, para. 3.2.3.

13. Report on Asia/Pacific Regional Meeting, 1973, Honolulu, 5-28 Sept., ICAO Doc. 9077, p. 7.2, para. 7.3.1 and 7.3.2.

14. Chapter 2, 2.8.3.

be sovereign jurisdiction except for the airspace above the territory under the sovereignty of a State.

1.4. Types of Services Provided

Two types of services are provided in a FIR: flight information service and alerting service. ICAO guidelines concerning the first service are expressed in the "Air Traffic Services Planning Manual":[15]

> 2.2.1.1 In general, the flight information service (FIS) is intended to supplement and update during the flight, information on weather, status of navigation aids and other pertinent matters (exercises, airspace reservations, etc.) the pilot received prior to departure from the meteorological (MET) an aeronautical information service (AIS) so as to be fully aware at all times of all relevant details regarding matters influencing the safe and efficient conduct of his flight. The fact that FIS has been entrusted to ATS, even though the information emanates or is generated by other ground services (airport operators, the MET and communications (COM) services is due to the fact that ATS is the ground service which is most in communication with the pilot. For this it follows that, while ATS is responsible for the transmission of that information, the responsibility for its initiation, accuracy, verification and timely transmission to ATS must rest with its originators.

The question concerning responsibility for the generation of the information, on one side, and for the

15. ICAO Doc. 9426 AN/924, p. I-2-2-1, para. 2.2.1.1.

transmission of this information on the other side, is not divested of importance. When it comes to apportionment of liability, tnese are elements which cannot be disregarded.

Alerting service is provided for: all aircraft provided with air traffic control service; in so far as practicable, to all other aircraft having filed a flight plan or otherwise known to the air traffic services; and to any aircraft known or believed to be the subject of unlawful interference.[16] Here again, it is relevant to distinguish between the obligation and the accuracy of the originators of the information, and the timely transmission to the persons in need.

1.5. Criteria for the Establishment of FIRs

While the Chicago Convention specifically recognizes the sovereignty of each State within the airspace over its territory, ICAO also recognizes that the provisions of air navigation services should primarily be dictated by operational considerations inherent in air navigation.[17] This statement is in complete accordance with ICAO objectives and nature which are primarily technical.

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16. Annex 11, Chapter 5, 5.1.1.

17. ICAO Doc. 9426-AN/924, p. I-2-1-2, para. 1.3.1.

As far as ICAO regulations are concerned, no political or sovereignty considerations constitute the basis for the establishment of a FIR. The organization of the airspace depends prima facie on the need for services and it should be arranged so that it corresponds to operational and technical considerations only.[18] Whether the criteria are always met is questionable. Whenever interests related to sovereignty intervene, States become reluctant to give priority to technical considerations. Such reluctance is further supported by the fact that the provision in Annex 11 which reads that airspace organization is to be related to the route structure rather than national boundaries is only a recommendation.[19]

2. PROCEDURES

The establishment of a FIR within the airspace under the sovereignty of a State is the responsibility of that State. This is a recognition of the primary rule of international law as codified in Art. 1 of the Chicago Convention, which reads: "The contracting States recognize that every State has complete and exclusive sovereignty over

18. Ibid., p. I-2-3-1, para. 3.1.1.

19. Annex 11, Chapter 2, 2.7.1.

the airspace above its territory." This provision reflects the rule cujus est solum ejus est usque ad coelum, strongly and unanimously approved by States in matters concerning the airspace.

As for the high seas and territories of undetermined sovereignty, regional air navigation agreements are required by ICAO.[20] These agreements are understood to be those approved by the Council of ICAO normally on the advice of regional air navigation (RAN) meetings[21] under which air navigation plans are developed. The essence of air navigation plans is technical and operational and as far as delineation of airspace is concerned (including FIRs), it has already been said that those principles (technical and operational) fully apply, according to ICAO regulations and recommendations. Regional Plans set forth the facilities, services and Regional Supplementary Procedures to be provided or employed by the Contracting States pursuant to Art. 28 of the Chicago Convention;[22] they constitute ICAO Council recommendations setting out the requirements for

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20. Annex 11, Chapter 2, 2.1.2.

21. Ibid., Note 1.

22. "Consolidated statement of continuing policies and associated practices related specifically to air navigation", ICAO Assembly Res. 27-10, (1989) Appendix K.

adequate air navigation facilities and services in the nine regions established by the Organization.[23] Regional

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23. Buergenthal, T., op. cit., supra, Chapter I, note 21 at 118. The nine regions established by ICAO are:

    (a) AFRICA-INDIAN OCEAN (AFI) REGION: The area embracing Africa and associated oceanic areas and land masses between 25°W and 75°E and south to the South Pole.

    (b) ASIA (ASIA) REGION: The area south of the Asian part of the USSR territory, and embracing Pakistan, Japan and New Zealand, and associated oceanic areas and land masses eastward from 75°E to 175°W, to the South Pole.

    (c) CARIBBEAN (CAR) REGION: The area embracing Mexico, Central America, the Bahamas and the West Indies.

    (d) EUROPEAN (EUR) REGION: The area embracing Europe and the Asian part of the USSR territory, north to the North Pole, and including Turkey.

    (e) MIDDLE EAST (MID) REGION: The area embracing that part of Asia west of Pakistan, but including Turkey and USSR territory.

    (f) NORTH AMERICAN (NAM) REGION: The area embracing the United States and Canada and north to the North Pole.

    (g) NORTH ATLANTIC (NAT) REGION: The North Atlantic area not covered by the NAM, CAR, SAM, EUR and AFI Regions, and north to the North Pole.

    (h) PACIFIC (PAC) REGION: The Pacific area not covered by the NAM, CAR, SAM and ASIA Regions, and south to the South Pole.

    (i) SOUTH AMERICAN (SAM REGION: The area embracing Soth America and the associated oceanic areas and land masses between 25°W and 90°W and south to the South Pole.

    Source: ICAO Doc. 8144-AN/874/5, 5th ed. (1987) p. 24.

Plans must be in conformity with standards and recommended practices and procedures, and their purpose is to serve international air navigation within the region.[24] The Regional Plan recommendations provide governments in the region with the necessary guidance to assure "...that facilitates and services furnished in accordance with the plan will form with those of other States an integrated system and will be adequate for the foreseeable future."[25]

Regional Plans are formulated at the respective Regional Air Navigation Meetings, and are approved by the Council; after the approval, these plans assume the status of Council recommendations with which Contracting States are not even required to report non-compliance.[26]

When it becomes apparent that Regional Plans are no longer consistent with current and foreseen requirements of international civil aviation, these plans have to be amend-

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24. Sheffy, M., op. cit., "Air Navigation Commission of the International Civil Aviation Organization" Thesis, McGill, (1957), p. 80.

25. Ibid. See also ICAO A10-WP/17, TE/3(20.3.56), para. 2, p. 2.

26. Ibid.; see Sheffy, op. cit., p. 81.

ed.[27] These amendments are made either by a Regional Air Navigation Meeting or by following the amendment procedure described below:

> If...any Contracting State (or group of States) of a Region wishes to effect a change in the approved Plan for that Region it should propose to the Secretary General, through the Regional Office accredited to that State, an appropriate amendment to the Plan, adequately documented; the proposal should include the facts that lead the State to the conclusion that the amendment is necessary ... (This procedure does not preclude a State having previous consultation with other States before submitting an amendment proposal to the Regional Office).
>
> The Secretary General will circulate the proposal adequately documented, with a request for comments to all States of the Region except those which obviously are not affected, and, for information and comments if necessary, to international organizations which may be invited to attend suitable ICAO meetings and which may be concerned with the proposal. If, however, the Secretary General considers that the amendment conflicts with established ICAO policy, or it raises questions which the Secretary General considers should be brought to the attention of the Air Navigation Commission, he will first present the proposal, adequately documented, to the Commission. In such

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27. Assembly Resolution A27-10, "Consolidated statement of continuing policies and associated practices related specifically to air navigation", ICAO Assembly Res. A27-10 (1989), Appendix K.

cases, the Commission will decide the action to be taken on the proposal.[28]

If no objection is raised, the proposal of amendment can then be submitted to the President of the Council for approval. If, however, any State objects to the proposal, the matter has to be analysed by the Air Navigation Commission[29] which will present appropriate recommendations to the Council.

An illustration of the procedure described above is provided by the case concerning the alignment of ATS routes within FIRs Athinai and Beograd (Athens and Belgrad). A proposal was originated by Greece, with the agreement of Yugoslavia, for amendment of the Air Navigation Plan-European Region, concerning alignment of ATS routes G18/UG18 and B1/UB1 within FIRs Athinai and Beograd.[30] The proposal was the subject of consultations with States and international organizations and discussions within the European Air Navigation Planning Group (EANPG) and at European informal meetings. Turkey objected to the proposed alignment of ATS route G18/UG18 across the Aegean Sea within

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28. "Procedure for the Amendment of Approved Regional Plans", contained in the ICAO Doc. 8733 - Amendment No. 4, E O-2, para. 3.1 and 3.2.

29. Ibid., para. 3.3. and 3.4.

30. For information on the matter, see ICAO Doc. C-Min. 114/14 (20 March 85) and C-Min. 114/15 (22 March 85).

FIR Athinai, immediately upon its circulation in June 1981.[31] Turkey also protested the fact that the new route structure, which included portions of ATS route G18/UG18 over the high seas, was implemented by Greece and Yugoslavia in July 1981 prior to approval of the necessary amendment to the air navigation plan. The ICAO Secretariat advised Greece and Turkey of ICAO's concern over non-observance of the procedure approved by the Council.[32]

As repeated consultations did not result in the settlement of the question of the proposed re-alignment of ATS route G18/UG18, the matter was documented for consideration by the Air Navigation Commission[33] which, after careful study, made the necessary recommendations to the Council.

The example given above does not happen always. In the case of proposals agreed upon by the States concerned, the Secretary General may also initiate the procedure which, in this case, will obviously be more simplified. As a matter of fact, this is the ideal process: no conflicts, more possibilities that the technical criterion is met and,

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31. Ibid.

32. Ibid.

33. Ibid.

consequently, more potential that better services will be provided.

The second option for amending air navigation plans is through regional air navigation (RAN) meetings. Contracting States entitled to participate in these meetings as members are strictly those located:[34] (a) partially or wholly within the area to be considered by the meetings; or (b) outside the area, but which provide facilities and services affecting the area, or which have notified ICAO that aircraft in their register or aircraft operated by an operator whose principal place of business or permanent residence is located in such States, operate or expect to operate into the area.

Participating States are, therefore, those directly involved with the matter; and because their interests do conflict in some cases, the meeting may take a tortuous rather than a straight forward path towards its technical aims. Decisions of the meeting are expected to be made through unanimous agreement[35] but this fails not only because States may have different opinions as to technical matters, but also because political considerations to play a

34. "Directives to Regional Air Navigation Meetings and Rules of Procedure for their Conduct", ICAO Doc. 8144-AN/874/5, Part 1, para. 6.1.

35. Ibid., Part III, 14.

role and participants are obliged to follow the instructions given by their sovereign countries instead of being bound by strictly technical factors. Disputes over FIRs provide a good example of the conflicting views of the States involved.

When the meeting fails to find a solution acceptable to the States concerned, decisions are then taken by a simple majority of votes. The Council of ICAO specifically recommends[36] that the objections of States should not prevent the meetings from maintaining the recommendation if a majority of the members agree that it is essential to the Regional Plan. The Plan, as finally developed by the meeting, is entered into the report of the meeting as a set of recommendations to the Council. At this point, the role of the Air Navigation Commission has to be stressed. The Council has authorized the Commission to examine the "... recommendations emanating from the meeting; the Commission then submits those parts of the regional report requiring action by the Council accompanied by its own recommendations.[37]

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36. Ibid.

37. ICAO Doc. C-WP/2040, Appendix 'A', para. 3.5, quoted in Sheffy, op.cit., note 27 p. 66; see ICAO Doc. 8143.

Any Contracting State interested in dealing with matters concerning FIRs in RAN meetings should not overlook the role of the Air Navigation Commission. The Commission can determine the scope and structure of a RAN meeting through its power to approve the agenda of the meeting,[38] as well as the geographical area to be covered by the meeting; the Commission issues instructions regarding the documentation needed for the meeting, and directives for the conduct of meetings additional to the standing directives approved by the Council.[39] The Commission has a great deal of influence on the decisions concerning the need for, and the convening of, a RAN meeting. A State willing to insert any subject concerning a FIR in the agenda of a RAN meeting may be dependent upon the Commission as regards the decision for the convening of a meeting, and the approval of an agenda which includes the subject proposed by that State. Delays from the part of ICAO in including the subject in the agenda of an early meeting can result in disadvantages due to the eventual occurrence of subsequent

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38. Ibid., p. 71. See also ICAO Doc. 8144-AN/874/5, Part I, 4.1, C-WP/2040, Appendix A.

39. Ibid., p. 72. See also ICAO C-WP/2040, Appendix A, para. 3.

circumstances (technical, political, etc.) concerning the State in question.

The role of the Commission is even more important as to the meetings' recommendations. Although the meeting is under duty to submit its report to the Council,[40] it is the Commission that examines it prior to deliberations in the Council. The Commission may take action on the report only with respect to those parts for which it was authorized to do so by Council.[41] Although the Commission has an advisory capacity only, the significance of its role can be well assessed if we consider that Art. 54(m) makes it mandatory upon the Council to consider recommendations of the Air Navigation Commission. In this case, the question immediately arises whether these recommendations are really independent. The Commission has a peculiar status in the Organization, not being a subsidiary body of the Council, and yet extensively under its control.[42] The Council controls has the power to approve the work programme of the Commission.[43] The terms of reference and the Rules of

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40. Sheffy, ibid. See also ICAO Doc. 8144-AN/874/5, Part II, 1.1.

41. Sheffy, op. cit., p. 72.

42. Sheffy, op. cit., note 27, p. 32.

43. ICAO Doc. 8229-AN/876/2, 2nd ed. (1975), Section V, Rules 10 and 11.

Procedure are also controlled by the Council which may suspend or amend them at any time.[44] The overall control which the Council has over the Commission is indicated by the very fact that the Commission is primarily not an action-taking body, but an advisory organ. The Commission is under duty to "... report direct and exclusively to the Council, except when otherwise determined by the Council."[45]

The status of the Commissioners is also rather interesting. The Convention is silent as to whether the members of the Air Navigation Commission are national representatives or act in an individual capacity. Although it is submitted that the ICAO Council appoints the national nominees to serve, not as representatives of their States, but as qualified individuals appointed by an international body,[46] there has been an argument against this view, supported by a representative of one of the leading aviation powers, the United States. According to this representative, the Commissioners act as representation of their

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44. ICAO Doc. 8229-AN/876/2, Section XI, Rule 25.

45. Sheffy, op. cit, p. 33. See also ICAO Doc. 8229-aN/876/2, Section I, Rule I.

46. Sheffy, op. cit., p. 30. See also ICAO Doc. 7177-7, C/828-7(16/10/51), p. 110, para. 78 and ICAO Doc. 7037-4, C/814-4(22/9/50), p. 50, para. 21.

respective States. In fact, one cannot ignore that Commissioners do not cease to be nationals of their respective countries. It would be difficult to expect Commissioners to detach themselves from national interests.[47] This does not mean that the recommendations of the Air Navigation Commission always incorporate some national connection. However, the possibility of the existence of such connotation, although rare, is a reality.

The fact that the Commissioners are appointed by the Council and the extensive control which this body exercises over the Air Navigation Commission are likely to create some delicate situations. An example can be provided by any case of a Contracting State which, not being a member of the Council and not having a national citizen nominated as a Commissioner, is faced with a question concerning the alignment of ATS routes over a FIR disputed against another country which itself is a member of the Council of ICAO. The only hope for the first country lies in the fact that the composition of the Council is meant to be, under the terms of Art. 50 of the Chicago Convention, representative of, as much as possible, all the Contracting States.

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47. Sheffy, op. cit., p. 31.

3. AUTHORITY

Since the airspace organization must provide for an equitable sharing of its use by all those having a legitimate interest in it, the allocation of the specific portions of the airspace to the parties concerned becomes a matter of high relevance and, in the case of FIRs, a source of, at times, grave conflicts.

Under Annex 11[48] to the Chicago Convention, each Contracting State determines, for the territory over which it has jurisdiction, those portions of the airspace where ATS will be provided. (This statement is but a recognition of the sovereignty principle.) The State may, thereafter, either provide the services itself or, by mutual agreement, decide to delegate to another State (hereinafter referred to as the "providing State") the responsibility for part or the whole (FIRs; control areas and control zones) of the airspace under its sovereignty.

An important aspect of the delegation mentioned above is that it is done without any derogation from the national sovereignty of the delegating State. The providing State's responsibility is limited to technical and operational considerations and does not extend beyond those

48. Chapter 2, 2.1.1.

pertaining to the safety and expedition of aircraft using the concerned airspace. It is also specified that both the delegating State and the providing State may terminate the agreement between them at any time.[49]

With regard to airspace of undetermined sovereignty, or those portions over the high seas where it has been concluded that ATS will be provided, ICAO recommends[50] that they be determined on the basis of regional air navigations agreements, and the provision of ATS therein is carried out by the State which has accepted responsibility to do so. In this case, it has to be said that the States participating in a Regional Air Navigation Meeting are under statutory obligation to contribute to the promotion of air navigation, under the terms of Art. 28 of the Chicago Convention. However, this obligation is imposed only in so far as the State may find it practicable, i.e. the State has the discretionary power to decide whether to be bound or not by the ICAO recommendations.

The situations which may arise in respect of the establishment and provision of ATS to either part or the

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49. Ibid. - Note.

50. Annex 11, Chapter 2, 2.1.2.

whole of an international flight are listed in Annex 11:[51]

> Situation 1: A route or portion of a route, contained within airspace under sovereignty of a State establishing and providing its own air traffic services;
>
> Situation 2: A route, or portion of a route contained within airspace under sovereignty of a State which has, by mutual agreement, delegated to another State, responsibility for the establishment and the provision of air traffic services;
>
> Situation 3: A portion of a route contained within airspace over the High Seas or in airspace of undetermined sovereignty for which a State has accepted the responsibility for the establishment and provision of air traffic services.

For the purpose of Annex 11, and in regard to the situations listed above, the State which designates the authority responsible for establishing and providing the air traffic services is:

> In Situation 1: the State having sovereignty over the relevant portion of the airspace;
>
> In Situation 2: the State to whom responsibility for the establishment and provision of air traffic services has been delegated;
>
> In Situation 3: the State which has accepted the responsibility for the establishment and provision of air traffic services.[52]

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51. Ibid., Chapter 2, 2.1.3., Note 2.

52. Ibid.

4. STATES' OBLIGATIONS

The responsibility of Contracting States vis-a-vis FIRs stems primarily from the Chicago Convention. By ratifying the Convention or adhering thereto, States become bound by its provisions. The statutory obligations created thereafter only terminate under the terms established by Art. 95 of the Chicago Convention. Any treaty entered into by a State following the Chicago Convention or its regulations can also be terminated under the terms of this treaty or through the principle of rebus sic stantibus.[53]

The provision of the Chicago Convention dealing most directly with matters having bearing on FIRs is Art. 28, under which terms States have not only the obligation to provide ATS, but also to do so in accordance with the standards and practices established or recommended by the Convention. However, this obligation is not absolute. Art. 28 provides for an escape clause, which is also expressed in several articles of the Convention. Contracting States are free to adopt all practicable measures to facilitate and expedite air navigation (Art. 22) to the extent that they

53. See "Vienna Convention on the Law of Treaties", Art. 62.

may find practicable (Arts. 23 and 37) or again insofar as their laws permit (Art. 26).[54] The Contracting States have, therefore, a discretionary power regarding the obligations related to the provision of ATS. The escape clause provided by the Convention can be explained by the fact that in reality, States would not be able to comply with all the ICAO requirements. In an organization such as ICAO, where the most developed and underdeveloped States coexist, it would have been impossible to have such a large participation of States if the requirements were more stringent. This is also the reason why, as already explained, the standards and recommended practices can only create obligations through the consent of the State concerned. Recommended practices, by their own nature, create no binding obligations. Standards, however, enjoy a higher legal status since they are susceptible of creating obligations unless a State files a difference with the Council of ICAO.

The notification of departures from international standards is compulsory and constitutes an obligation without any escape clause, i.e. an absolute obligation, as can be deduced from the wording of Art. 38 of the Chicago Convention. In fulfilling the obligations which are incumbent

54. Matte, Nicolas Mateesco, Treatise on Air Aeronautical Law, (1981), ICASL, McGill, p. 195.

upon a Contracting State responsible for the management of a FIR, this State is bound by the ICAO provisions mentioned above. As a result, non-compliance with such provisions - either regarding the observance of standards or the duty to notify departures from them - would result in breach of such international obligations and would, therefore subject the violating State to sanctions under the Chicago Convention, and, possibly, to liability under public international law as well as, very often, under private international law.

The obligation to notify departures from international standards in order to avoid the presumption of the intention to be bound is expressed in Art. 38 of the Chicago Convention. The wording of this provision does not, however, shed any light as to when that notification should be effected; the article only refers to "immediate notification", an expression which, from its vagueness, does not give a precise reference. The need for a solution was recognized by the Council of ICAO which decided to establish an additional date; the date of applicability of the standards and recommended practices included in the Annexes.[55] The date of applicability became then the reference to which the sixty days time limit mentioned in Art. 38 applies.

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55. Sheffy, op.cit., supra, note 27, p. 99.

Linked with the above is also the question of when States become bound, i.e. when the obligation to comply with the standards begins. Art. 90 of the Chicago Convention states, in paragraph (a), that an Annex "shall become effective", while paragraph (b) refers to the "coming into force of any Annex". The question of this semantic discrepancy was analysed by ICAO which finally considered the expressions as identical,[56] discarding the expression "coming into force" and using "become effective".

4.1 Allocation of Responsibility in a FIR

Flight information service and alerting service within a FIR are to be provided by a flight information centre, unless the responsibility for providing such services is assigned to an air traffic control unit having adequate facilities for the exercise of such responsibilities.[57] It is also accepted that certain elements of flight information service be delegated to other units.

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56. Ibid.

57. Annex 11, Chapter 2, 2.6.1.

5. IMPLEMENTATION

The management of a FIR is a complex task. It requires capacity and ability on the part of the State providing the services needed. The establishment of the competent centres and units is also essential.

Given that the provision of ATS cannot be dissociated from the overall situation of civil aviation, there is a prioritary need to set up a plan which takes into account all the aspects of aviation. The planning for and the execution of ATS is therefore a complex process and essentially a national responsibility aimed at ensuring the safe, orderly and expeditious movement of both national and international aircraft. A State providing ATS has to be able to meet the basic operational requirements[58] in order to satisfactorily discharge its duties. This involves possessing the right technical equipment and the qualified personnel to operate the system, as well as the adoption of legal and administrative regulations and a supporting system (aeronautical publication, facilities, etc). The provision of ATS in a timely and efficient manner also demands a certain degree of co-ordination as to the types of users (civil and military) of the airspace, or even the creation

58. See ICAO Doc. 9426-An/924, p. 1-1-1-1, para. 1.1.2(b).

of an integrated ATS system to provide for both civil and military needs. The co-ordination and, furthermore, the cooperation between civil and military users not only avoid many problems created by the co-existence of the two elements, but also contribute to an efficient sharing of the airspace. It also gives the possibility of having a useful counterpart to help in important matters such as search and rescue operations, and collection of information relevant to air navigation.

Another question which cannot be disregarded when considering a State's responsibility and capacity to provide ATS is the economic potential of that State. In spite of the possibility of establishing user charges for ATS, the overall cost of these services and of the implementation of the necessary facilities is not to be overlooked, under penalty of hampering States' national policy, as in the cases where attraction of traffic is pursued.[59]

The question of responsibility is of great importance. When it comes to assessing liability, for example, the duties of the States in terms of ATS as well as their

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59. Several reasons can be pointed out. Attraction of traffic may be sought as a source of indirect revenue, political convenience, national development, national unity.

performance and their failure when providing ATS, are the elements to be analysed with the highest priority.

In conclusion, it can be said that once a State accepts to be bound by the provisions of an Annex, it is under the obligation to implement them. However, the willingness of States to accept ICAO regulations is not always translated into implementation. Reasons related to the lack of economical and human resources can explain such difficulty which, it is submitted, is extremely detrimental to the sound technical progress of civil aviation. This is true for several matters concerning civil aviation, and the obligations of a State concerning a FIR are not an exception. In spite of the desire and even the need to fully assume its responsibility as to a FIR, a State may find itself in a position of being unable to do so. Hence, the existence of agreements for delegation of responsibility in some cases and the efforts of ICAO to give assistance to Contracting States through the Regional Offices.

CHAPTER III

SOME RELEVANT PROBLEMS CONCERNING FIRs

1. INTRODUCTION

The management of a FIR is not an easy task. To ensure the safe and orderly flow of air traffic, technical and operational requirements must be met. In addition, the occurrence of all kinds of hazards and failures need to be investigated and the responsibility for their consequences assumed.

Problems related to accidents, airspace congestion, common use of airspace by civil and military aircraft, use of weapons and unlawful interference against civil aircraft are topics of utmost interest in dealing with FIRs.

Disputes between States also constitute another source of problems. In many cases, States strongly disagree as to the allocation of the responsibility for the management of a FIR. At times, they also plead for an extension of their own FIR. Their claims are generally based on sovereignty considerations, historical reasons or even security (defence) reasons. There are very sensitive issues with which ICAO has tried to deal on a technical basis, but

without being able to impede the strong political element in them.

1.1. Accidents

Of utmost importance to civil aviation is the question of accidents. Taking as examples the data (excluding the USSR)[1] concerning the years 1986, 1987, and 1988, it can be seen that:[2]

> 1986 - "Safety
> Scheduled operations
> ...there were 16 fatal aircraft accidents in 1986 involving 330 passenger fatalities in scheduled services, a considerable improvement over the 1985 record of 22 fatal accidents...
>
> Non-scheduled commercial operations
> ... in 1986 there were 18 fatal accidents with 194 passenger fatalities compared to 32 fatal accidents with 520 passenger fatalities in 1985.
>
> General Aviation
> Complete statistical information is not available... In 1985, it is estimated that general aviation aircraft were involved in some 900 fatal accidents and the number of fatalities ... was about 1850 ..."

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1. Data not available due to lack of information.

2. Data available to ICAO; see Annual Reports of the Council, ICAO Docs. 9506 (1986), pp. 34-36; 9521 (1987), pp. 32-34; and 9530 (1988), pp. 32-37.

1987 - "Sheduled Operations
... there were 25 fatal aircraft accidents in 1987 involving 887 passenger fatalities ... The number ... 100,000 aircraft hours flown increased to 0.12 in 1987 from 0.09 in 1986 ...

Non-scheduled commercial operations
... in 1987 there were 11 fatal accidents with 47 passenger fatalities compared to 17 fatal accidents with 1985 passenger fatalities in 1986 ...

General Aviation
Complete statistical information ... not available ... In 1986, it is estimated that general aviation aircraft were involved in some 800 fatal accidents and the number of fatalities ... was about 1800 ...".

1988 - "Scheduled operations
Preliminary information ... shows about the same number of fatal accidents and a significant decrease in the number of passenger fatalities in 1988 over 1987 ... there were 27 fatal aircraft accidents in 1988 involving 735 passenger fatalities ... compared to 26 fatal accidents and 901 passenger fatalities in 1987 ...

Non-scheduled commercial operations
... in 1988 there were 21 fatal accidents with 178 passenger fatalities compared to 11 fatal accidents with 47 passenger fatalities in 1987.

General Aviation
Complete statistical information ... not available ... In 1987, it is estimated that general aviation aircraft were involved in some 900 fatal accidents and the number of fatalities in these accidents was about 1650..."

Numerous factors may constitute the cause of accidents, but as expressly recognized, the human factors' influence is manifested in a majority of the accidents (in

the order of 70 per cent).[3] The significant number of accidents (despite the general decrease noted by ICAO) and the fact that most of them are caused on account of human factors have serious implications as to liability. As a matter of fact, one is led to conclude that in many accidents, an act or an omission of a servant/ATS provider is the proximate cause.

The above situation is not very likely to change in the near future. As one author puts it:[4]

> "Safety is usually one of the expressed justifications for system improvement; but, let us face facts - such improvements are really made mainly to enhance utilization of the airspace. Some of these so-called improvements have actually made the system more, not less vulnerable to human error. Although their reliability is greatly increased, the greater mass and size of modern jet airlines have made their operation more critical than was the case with their piston-driven predecessors. Certainly, the negative consequences of human error are much increased in the big commercial jets."

Accidents are often the outcome of the problems listed below: airspace congestion; unlawful interference against civil aircraft; lack of co-ordination between civil and military aircraft; use of weapons against civil

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3. ICAO Assembly Resolution A26-9.

4. Melton, Carlton E., "Human Error in Aviation can be Deliberate, Inadvertent or Reflect Expertise", ICAO Bulletin Vol. 43, Oct. 1988, p. 25.

aircraft, disputes between States - all contribute to accidents.

1.2. Airspace Congestion

To guarantee the safe and orderly flow of air traffic, the provision of ATS must be prompt, efficient and timely.

Being a relatively easy task when the flow of air traffic is reasonably low, it becomes quite difficult with a heavy volume of traffic. The present reality is that "the rapid growth of air traffic places heavy demands on airports and air navigation systems and causes serious congestion problems in some areas of the world."[5] In congested airspace, the prompt and efficient provision of ATS is, without any doubt, adversely affected. This problem, although more acute in some areas of the world than in others, has become a world-wide concern. The subject was put on the Agenda of the 27th Assembly of ICAO, which adopted Resolution A27-11 that, inter alia, urges States to take measures that have positive effects on airport and airspace capacity, in consultation with users and airport

5. ICAO Assembly Res. A27-11, "Airport and Airspace Congestion".

operators and without prejudice to safety.[6] These measures include technical improvements such as the implementation of Future Air Navigation Systems (FANS) 1 Microwave Landing Systems (MLS), and other likewise extremely expensive improvements.[7] International cooperation and co-ordination is also called upon. Facilitation, that is, the rapid processing of passengers and cargo, would largely contribute to reducing the congestion, but it is submitted that it has to be confined to cautious limits given the demands of security needs in the present age of acts of increasing violence.[8]

The problem is, therefore, extremely delicate and FIRs are implicitly connected with it. In congested airspace, there is a much greater need to provide ATC service and, consequently, to create controlled areas within a FIR. At the same time, the burden on the providers of FIS and alerting service is much heavier. As a result, providers of ATS become more likely to fail or to err and, therefore, more likely to become subject to liability.

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6. Ibid.

7. Ibid.

8. "The African Civil Aviation Commission (AFCAC)": 11th Plenary Session, Blantyre, Malawi, ICAO Bulletin Vol. 44, June 1989, pp. 27, 28.

1.3. Unlawful Interference

General security is nowadays a matter of grave concern. Threats from criminal activity such as hijacking and sabotage over the past 20 years have led ICAO member States and governments to regard aviation security as a matter of highest priority. Acts of unlawful interference have greatly endangered and continue to endanger the safe and orderly development of international civil aviation and, in spite of their reduction as a result of the strict measures adopted, the situation has worsened in some aspects. In its 27th Session,[9] the ICAO Assembly noted "... with abhorrence what appears to be the emergence of a growing trend in acts of unlawful interference aimed at the total destruction in flight of civil aircraft in commercial service and the death of all on board."[10] The tremendous losses caused by such acts are evident. In addition to the economic loss of the aircraft, the loss of the confidence in the air transport mode, and the amounts spent in damages, there is, most of all, the loss of the most precious element; that of invaluable human lives.

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9. September-October 1989.

10. ICAO Assembly Res. A27-7.

Before this horrifying situation, ICAO could not and did not remain inactive. Despite the fact that most acts of unlawful interference are perpetrated by or with the support of ICAO Contracting States themselves, ICAO tries its best to remain faithful to its basic technical nature, without dealing with sovereignty matters, and proving its weakness when it comes to exercising its powers regarding the settlement of disputes. Recognizing this does not, however, imply overlooking the great effort of ICAO as to its important role in dealing with acts of unlawful interference.

ICAO's specific policy to that effects, as recently updated, is expressed in the Assembly Resolution A27-7, entitled: "Consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference". In addition to recognizing that acts of unlawful interference have become the main threat to international civil aviation and constitute a great violation of international law, the above resolution repeatedly and strongly condemns such acts and confers the highest priority to aviation security. States are urged to become parties to international conventions, adopted under the auspices of ICAO, which deal with acts of unlawful interference. Under the Tokyo Convention 1963, the Hague Convention 1970, and the Montreal Convention

1971,[11] the responsibilities of the States parties to them are defined, allowing them to intervene in the investigation and prosecution of unlawful acts, accordingly.

More recently, another international legal instrument was open for signature by States: the "Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, which was signed at Montreal on 24 February 1988 and supplements the Montreal Convention 1971.

To ensure the highest effectiveness in dealing with the acts in question, Resolution A27-7 also encourages States to, inter alia: (a) enact national criminal laws providing severe punishment (and/or extradiction of respective authors) of acts of unlawful interference; (b) adopt technical security measures and implement security providing vigilance, detection of explosives, inspection/ screening of passengers and their baggage on international air transport, etc.; and (c) ensure the observance of Standards and Recom-

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11. The full titles of the Conventions are: "Convention on Offences and Certain other Acts Committed on Board Aircraft" signed at Tokyo on 14 Sept. 1963; "Convention for the Suppression of Unlawful Seizure of Aircraft" signed at The Hague on 16 Dec. 1970; "Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation", signed at Montreal on 23 Sept. 1971.

mended Practice adopted by the Council of ICAO in accordance with the policy of the Organization.

In spite of all the above measures, and the adoption by the Council of ICAO of Annex 17 dealing specifically with security, acts of unlawful interference still occur (although fewer in number at present) in many parts of the world and in the various stages of the flight, inclusive within a FIR. Hence the need to establish the responsibility of each State faced with such acts within a FIR, in order to establish and assess the corresponding liability for non-compliance with the applicable rules.

2. CONCLUSION

The problems presented above had to be presented given that their existence is likely to present an additional challenge for the discharge of responsibilities with regard to FIRs.

As to the differences between States on matters concerning FIRs, the subject will be dealt with in the next chapter.

CHAPTER IV

DIFFERENCES OVER FIRs - THE ICAO JUDICIAL MACHINERY

1. SOME DIFFERENCES OVER FIRS

1.1. Greece and Turkey

When we studied the procedures for the amendment of Air Navigation Plans,[1] we mentioned a proposal made by Greece in 1981 for the amendment of the Air Navigation Plan - European Region, concerning the alignment of ATS routes G13/UG18 and B1/UB1 within FIRs Athinai and Beograd (Athens and Belgrade). The objective of this proposal was to alleviate the severe traffic congestion problems in the single routing existing at the time.

Turkey objected to the amendment immediately upon the circulation of the proposal of Greece, and maintained its position mainly on the grounds that the proposed alignment adversely affected its ability to safely conduct naval and air exercises in the Aegean Sea.[2] Despite the

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1. Supra, Chapter II, 2.

2. ICAO Doc. 9461-C/1087, C-Min. 114/14, p. 120, para. 3.1.

repeated efforts of ICAO agreement could not be reached between Greece and Turkey. On 20 March 1985, the Council began consideration of this matter and heard statements of special representatives of both countries.[3] On 22 March 1985, the Council completed its examination of the report of the Air Navigation and took the following action recommended by the Commission:

(a) approve an amendment to the Air Navigation Plan for the European Region, Part 3-ATS routes and associated navigation means, Table ARN-1, to re-align ATS route G18/UG18 (in both lower and upper airspaces) as follows: Kumanovo-Fiska-Mesta-Larki-Rodos;

(b) request the Government of Greece to: (1) review, as a matter of urgency, technical and operational aspects related to the re-alignment of ATS route G18/UG18 as in (a) above, with a view to early implementation; (2) pending implementation of the re-aligned ATS route G18/UG18 as in (a) above, continue to provide air traffic control service along the current alignment of this route via limnos; and

(c) urge the Governments of Greece and Turkey to examine and strengthen their co-ordination procedures to

3. Ibid., C-Min. 114/14.

ensure safe, regular and expeditious operation of international civil aviation over the Aegean Sea.[4]

The Council decision was not, however, promptly followed. During the period of 9-14 February 1986, Council President Dr. Assad Kotaite visited Turkey. His discussion with Turkish authorities covered, inter alia, implementation of the Council decision of 22 March 1985.[5] In a Council Meeting in 1989 the President of the Council informed the members "of the progress made concerning the ATS route network arrangements in the Aegean Sea", indicating his intention to continue his efforts with the parties concerned to reach a solution to this matter.[6]

1.2. Japan and Korea

In September-October 1962 a Regional Air Navigation Meeting (PAC-RAN) held in Vancouver established boundaries for the Tokyo and Taegu Flight Information Regions, which were not acceptable to the States concerned (Japan and

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4. Ibid., C-Min. 114/15, p. 137, para. 1.4.
5. ICAO Bulletin Vol. 41, March 1986, p. 33.
6. ICAO Doc. C-Dec. 127/21 (7/7/89) p. 3, para. 12.

Korea).[7] The matter was finally settled by negotiation in 1963 before the date established for the new Plan.

1.3. Cape Verde and Senegal

In the CAR/SAM Regional Air Navigation Meeting held in Lima, Peru, between 5-28 October 1976, Cape Verde requested the re-establishment of Sal Oceanic FIR. This FIR was first established following the recommendation of the first SAM/SAT Regional Air Navigation Meeting held in Buenos Aires, Argentina in October-November 1951. The responsibility for the provision of ATS was assigned to Portugal, of which Cape Verde was then a colony.

A few years after the establishment of the Sal Oceanic FIR, and at the request of Portugal, the FIR was suppressed and the corresponding area included in Dakar Oceanic FIR effective 1st October 1959.

The request for the reestablishment of Sal Oceanic FIR in 1976 was analysed by the ICAO Council which decided to promote consultations of the parties concerned (Cape Verde and Senegal) in order to obtain a conciliatory solution. A compromise solution, involving the suppression of

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7. Ibid.

approximately half of the area proposed by Cape Verde, was, in effect, reached.[8]

As can be concluded from the above examples, the interests of States in matters concerning FIRs do not always coincide. In certain cases, the prevailing principle underlying the determination of airspace boundaries is not confined to technical considerations only. Economical, political and security reasons are very often the cause of disagreements over FIR matters, and may explain why States are sometimes eager to extend their FIR boundaries.[9] The user fees received for the provision of ATS can mean (although this reason is not officially submitted) attractive financial gain. This advantage is further increased if a State has substantial air traffic, both domestic and international, in which case an extended FIR would result in significant savings in fees which would otherwise be paid to another State.

An examination of the cases cited in this Chapter leads to a common point: in all cases, ICAO exercised a

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8. See ICAO Docs. 9194, CAR/SAM, pp. 6-5, 6; 9237-C/1040 C-Min. 91/1-20; C-Min. 91/1; C-Min. 91-2; C-Min. 91-3; C-Min. 91-4. Cape Verde has already returned to the question of the remaining portion of the original Sal Oceanic FIR. See Regional Air Navigation Meeting-CAR/SAM, May 1989, see ICAO Doc. 9543, CAR/SAM p. 5-5 to 5-6, paras. 5.1.16 and 5.1.17.

9. See Park, op. cit., supra, Ch. II, pp. 40, 41.

conciliatory role, settling the differences through negotiations between the parties and thus preventing those differences from assuming the character of disputes. Had this happened, i.e., had the cases evolved into disputes, ICAO would then have had to use its powers and prerogatives under Chapter XVIII of the Chicago Convention (Disputes and Default).

Although as of today only three cases have been considered under Chapter XVIII, there is always the possibility of other cases being brought to the ICAO Council, in its judicial capacity.

The role of ICAO as a judicial body has been subject to much criticism, mainly on the grounds that the ICAO Council, to whom the competence to "judge" in the first instance is assigned, is a political body. The veracity of this assertion will be commented on. In order to do so, however, there is a preliminary need to describe the judicial machinery in question.

Some cases concerning FIRs will be presented, although the limitation of the sources (due to the confidential nature of certain documents and unwillingness on the part of States and ICAO to disclose some facts) represented an obstacle which this work considerably regrets.

2. THE ICAO JUDICIAL MACHINERY

Article 84 of the Chicago Convention stipulates that any disagreement between two or more Contracting States relating to the interpretation or application of the Convention and its Annexes, which cannot be settled by negotiations, shall, on the application of any State concerned in the disagreement, be decided by the Council. This judicial function is mandatory and constitutes one of the most important functions of the ICAO Council.

In addition to the Chicago Convention, two other Chicago instruments entrust the Council with the settlement of differences related to their interpretation or application, and which cannot be settled by negotiation. These instruments are the "International Air Services Transit Agreement" and the "International Air Transport Agreement". The two Agreements provide that Chapter XVIII of the Chicago Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the Chicago Convention.[10]

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10. Art. II, Section 2 of the International Air Services Transit Agreement, signed at Chicago on 7 Dec. 1944; Art. IV, Section 3 of the International Air Transport Agreement, signed on 7 Dec. 1944.

The Council may also be called upon to consider "complaints" which may arise under the above-mentioned agreements.[11] A complaint could originate in an "action" taken under the Agreement by a State party to any of those Agreemen. id which another State party to that Agreement deems to cause injustice or hardship to it.[12]

The reference to the ICAO machinery for the settlement of differences is also found in innumerable bilateral agreements. Some of these agreements recognize the exclusive competence of the ICAO Council; others allow the parties a choice between the Council and an arbitral tribunal, another dy or person. Still other recognize the competence of the Council only after failure of the parties to agree on the choice of an arbitral tribunal, body or person.[13] The competence of the ICAO Council in such cases is not, however, constitutional. The Chicago Convention makes no specific provision for the settlement of

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11. Art. II, Section 1 of the International Air Services Transit Agreement, Art. IV, Section 2 of the International Air Transport Agreement.

12. Kakkar, G.M., "The Settlement of Disputes in International Civil Aviation", Thesis, McGill (1968), p. 111.

13. Ibid., p. 112.

disputes arising from bilateral agreements.[14] Thus, on the basis of the Convention, the ICAO Council would not be competent to consider disputes based on bilateral agreements.[15] On the other hand, the Convention does not seem to preclude such possibility, and it must have been with this assumption that the ICAO Assembly adopted a Resolution[16] authorizing the Council to act as an arbitral body in any difference arising among Contracting States relating to international civil aviation matters submitted to it, when expressly requested to do so by all parties to such differences.[17] However, this Resolution has never been applied, given that no single State has ever addressed ICAO for the purposes of the Resolution.

Other agreements and multilateral conventions which also refer to the ICAO machinery for the settlement of differences are: Agreement on the Joint Financing of Certain Air Navigation Services in Iceland (Geneva, 1956); Agreement on the Joint Financing of Certain Air Navigation Services in

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14. Ibid., p. 120.

15. Milde, M., "Dispute Settlement in the Framework of the International Civil Aviation Organization", in "Settlement of Space Law Disputes", Vol. 1 (1980), Karl-Heinz Bockstiegel, Germany.

16. A1-23, ICAO Doc. 9275, pp. 1-8 and 9.

17. Milde, op. cit., p. 88.

Greenland and the Faroe Islands of the same date; the Paris Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe.

2.1. Disagreements, Complaints, Representations

The conventions and agreements which refer to the ICAO judicial machinery mention "disagreements" among Contracting States or parties, as the case may be, to be submitted to the ICAO Council. This reference to "disagreements" is in full accordance with the wording of the Chicago Convention which exclusively mentions disagreements. However, as already explained, the two other Chicago instruments, i.e. the International Air Services Transit Agreement and the International Air Transport Agreement, in addition to referring to disagreements, also call upon the ICAO Council to consider "complaints" which may arise under such Agreements.

Disagreements and complaints are dealt with by the ICAO "Rules for the Settlement of Differences"[18] under specific parts.[19] The first distinction to be made

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18. The Rules were adopted by the ICAO Council on 9 April 1957 and amended on 10 November 1975. See ICAO Doc. 7782/2, 2nd ed.

19. Disagreements - Part I; Complaints-Part II.

between the two terms is that disagreements concern the interpretation and application of the Chicago Convention and its Annexes (Art. 84), or of the International Air Services Transit Agreement and the International Air Transport Agreement. Complaints are not related to the Chicago Convention, which makes no reference to them; they are related to the two other Chicago instruments. Complaints do not arise out of a violation of the two Chicago instruments; they are lodged when a State deems that an action by another State is causing injustice or hardship to the complaining State. Another distinction is that, unlike in the case of disagreements under the terms of Art. 84, the Council is under no obligation to make a decision as to complaints. In the latter case, the Council is free to make recommendations in respect of complaints or not, the only obligation in these cases being to call the States into consultation.[20] The recommendations are not binding on the parties which may accept them or not.[21] Furthermore, the Council's findings regarding the complaints are not appealable, as in the

20. ICAO Doc. 7782/2 - see Art. 26 of the Rules for the Settlement of Differences.

21. The subsequent action of the Council is, however, a different question, specially when the Council makes reference of the Assembly, in which case Art. 54(j) of the Convention applies.

case of disagreements which, under the terms of Art. 84 of the Chicago Convention are subject to appeal.

The Chicago Convention (Art. 15), the International Air Services Transit Agreement and the International Air Transport Agreement (Art. I, Section 4 and Art. I, Section 5(2), respectively) make reference to "representations" made by any interested Contracting State to the ICAO Council for the purpose of reviews, by the Council, of charges imposed by another Contracting State for the use of airports and other facilities. It is, under Art. 15 of the Convention, mandatory for the Council to report and make recommendations thereon for the consideration of the State or States concerned.

As for the causes of disagreements and complaints, it can be concluded from the above analysis that the most common cause of disagreements mentioned in any convention or agreement concerns the interpretation or application of any provision thereof, or of its Annexes, as in the case of the Chicago Convention (Art. 84). Complaints are lodged, under the terms of the International Air Services Transit Agreement (Art. II, Section I) and of the International Air Transport Agreement (Art. IV, Section 2), as a result of an action taken under any of the said Agreements by a State party to that Agreement, and which another State party to

the same Agreement deems to cause injustice or hardship to it.

2.2. The ICAO Council: The Rules for the Settlement of Differences

The ICAO Council is the organ entrusted with the settlement of disputes which arise under the terms of Art. 84 of the Chicago Convention. In deciding under Chapter XVIII of the Convention, the Council follows the Rules for the Settlement of Differences, approved by it (Council) on 9 April 1957.

The Rules are divided in three parts. Part I deals with "Disagreements" Part II with "Complaints", and Part III with General Provisions, which includes general provisions applicable to both disagreements and complaints. The general principles which were followed in drafting the Rules can be summarized as follows:[22] (a) that a continuous possibility of encouraging negotiations between the parties be provided; (b) that cases be handled by smaller groups of the Council whenever and to the extend possible; (c) that oral proceedings be avoided as far as possible; and (d) that

22. FitzGerald, op. cit., p. 15-5 and 15-6.

the application of the Rules be made flexible in order to meet different circumstances.

The Rules make the distinction between disagreements and complaints which are given separate recognition and treatment therein. Provisions prescribing procedures regarding appeals are not included in the Rules, except for the specification (Art. 18(2)) that appeals from decisions rendered on cases submitted under Art. 1(1),(a) and (b) shall be notified to the Council through the Secretary General within sixty days of receipt of notification of the decision of the Council.[23]

The procedure to be followed by the Council under the Rules is a rather strict, formalistic and legalistic one which would be appropriate for any court of law.[24] The Council has the right to decide (in limine) on any preliminary objection questioning the jurisdiction of the Council to handle the matter (Art. 5). The Rules contain detailed provisions concerning the conduct of the proceedings, the format of the Application and Memorial, Counter-memorial, Reply and Rejoinder, on the evidence, oral arguments,

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23. FitzGerald, op. cit., p. 15-5.

24. Milde, M., op. cit., p. 88.

procedure before the Committee of the Council, intervention and on the decision itself.[25]

The Rules allow for "intervention" (Art. 19) on the part of all States parties to the particular instrument, the interpretation or application of which is in question and which are directly affected by the dispute, subject to any such intervening State undertaking to be equally bound by the resulting decision of the Council. The advantages of intervention are submitted to be: (a) reduction of risk of contradictory decisions in relation to the same controversy; (b) consolidation of disagreements.

Subject to agreement of the parties, the Council may suspend or amend the Rules of Procedure if, in its opinion, such act would lead to a more expeditious or effective disposition of the case (Art. 32).

Being a set of judicial proceedings the Rules embody, nevertheless, a provision which clearly departs from the strict judicial nature that normally characterizes rules of this kind. Article 14 of the Rules reads:

> (1) The Council may, at any time during the proceedings and prior to the meeting at which the decision is rendered as provided in Article 15(4), invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the

25. Ibid.

issues through negotiations have not been exhausted.

(2) If the parties accept the invitation to negotiate, the Council may set a time-limit for the completion of such negotiations, during which other proceedings on the merits shall be suspended.

(3) Subject to the consent of the parties concerned, the Council may render any assistance likely to further the negotiations, including the designation of an individual to act as a conciliator during the negotiations.

(4) Any solution agreed through negotiations shall be recorded by Council. If no solution is found the parties shall so report to Council and the suspended proceedings shall be resumed.

This recourse to negotiations clearly justifies the assertion that "Le Conseil ne doit intervenir qu'en tout dernier ressort, quant vraiment les oies de règlement politique auront echoué."[26]

In settling disputes under Chapter XVIII, the decisions of the Council have to be taken by the majority of its members (Art. 53 of the Chicago Convention). It is stated in Art. 84 (and 53) that no member may vote in the consideration of a dispute to which it is a party. However,

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26. Diallo, S., "Le Règelement Pacifique des Differends Internationaux relatifs à l'Aviation Civile Internationale· La Competence de l'Organization de l'Aviation Civile Internationale" Thesis, McGill, (1985), p. 131.

any Contracting State may participate, without a vote, in the consideration of any question which specifically affects its interest (Art. 53).

2.3. Appeal

The decision of the Council may be appealed to an ad hoc arbitral tribunal agreed upon by the parties, or to the International Court of Justice (ICJ).[27] Article 85 states that any Contracting State which has not accepted the Statute of the ICJ can resort to an arbitral tribunal. In practice, however, it happens that since all States members of the United Nations are ipso facto parties to the Statute of the ICJ, the jurisdiction of the ICJ becomes obligatory.[28]

Decisions of the Council are final and binding, except if appealed. Article 86 states that unless the Council decides otherwise, any decision by the Council on whether an international airline is operating in conformity with the provisions of the Convention shall remain in effect

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27. Although Art. 84 and 85 of the Chicago Convention refer to the Permanent Court of International Justice, it has to be understood as the International Court of Justice, following Art. 37 of the Statute of the ICJ.

28. Milde, M., op. cit., p. 89.

unless reversed on appeal. On any other matter, decisions of the Council shall, if appealed from, be susoended until the appeal is decided. The decisions of the ICJ or of an arbitral tribunal are final and binding.

2.4. Default

The Chicago Convention sets forth sanctions for cases of default under the provisions of Chapter XVIII. Article 87 states that each Contracting State undertakes not to allow the operation of an airline of a Contracting State through the airspace above its territory, if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with article 86. Non-compliance on the part of a Contracting State is punishable under Art. 88, which imposes the suspension of the voting power in the Assembly and in the Council of any Contracting State found in default under the provisions of Chapter XVIII.

2.5. Non-Judicial Proceedings

In addition to resorting to Chapter XVIII to decide on disagreements, Contracting States may also resort to

other provisions of the Chicago Convention, pursuant to which differences may be brought before the Council. These provisions are Article 15, 54(j), (k), (n), and 55(e).

Under the terms of Art. 15, the ICAO Council shall, upon representation by any interested Contracting State, review the charges imposed for the use of airports and other facilities. The Council shall then report and make recommendations thereon for the consideration of the State or States concerned. An example of recourse to this article is provided by the Council's intervention, which occurred in 1958, when the Government of Jordan asked the Council to review the charges imposed by Syria for the use of aeronautical facilities and services in its territory.[29] The matter was rather serious given that Syria had apparently imposed charges in respect solely of the right of transit,[30] which represented a fragrant violation of Art. 15 of the Chicago Convention. The Council considered the matter on two occasions, each time calling for further

29. Kakkar, op. cit., pp. 147, 148.

30. See Diallo, op. cit., p. 142.

information.[31] The matter was not submitted to the Council for review again.[32]

Art. 54(j), (k) and (n) also represent a means for bringing disagreements before the ICAO Council. A famous case under Art. 54(n) was the request made by the United Kingdom in 1967 to the ICAO Council for consideration of a declaration by the Government of Spain of its intention to establish a prohibited area in the vicinity of Gibraltar. The issue was debated at some length, but no Council action was taken.[33]

The recourse to Art. 54(n), or even Art. 15 represents "a favoured short-cut to bring before the Council disagreements short of invoking the judicial machinery under Chapter XVIII of the Chicago Convention.[34] As a matter of f' ', Art. 54(n) is rather ineffective if the purpose is to set a ruling of the ICAO Council. Under this provision, the Council is not obliged to make a decision, but rather to consider the matter submitted to it. The same can be said in relation to Art. 54(j), (k) and Art. 55(e), under which

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31. Kakkar, op. cit., p. 148.

32. ICAO Docs. 7960 A12-P/1, p. 60; 2661 (26.3.58); 2688 (8.5.58).

33. FitzGerald, op. cit., p. 15-14.

34. Milde, op. cit., p. 92.

terms the Council is not obliged to make a decision, but only to report or to investigate.

3. THE EFFECTIVENESS OF THE ICAO JUDICIAL MACHINERY

The effectiveness of the ICAO judicial machinery can be properly assessed by the following comment, made in 1980 by the actual Director of the ICAO Legal Bureau but which is still valid:

> "In thirty-two years of ICAO experience the judicial machinery of Chapter XVIII has been invoked only three times... Even more significant is the fact that in none of these three cases did the Council take any action on the merits of the case."[35]

And yet, the judicial machinery under Chapter XVIII, coupled with the Rules for the Settlement of Differences, provide a set of legal rules and procedures fairly acceptable for any court of law. This machinery possesses three main characteristics, as described by one author:[36]

> "1. Le différend porte sur l'interprétation et l'application d'une règle de droit;
>
> 2. Il est porté devant un organe préétabli: le Conseil;

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35. Ibid., p. 90.

36. Diallo, op. cit., p. 100.

> 3. La decision rendue est en principe définitive, sauf appel, strictement réglementée; elle est également obligatoire et son inobservation peut être génératrice de sanctions."

Concerning the first characteristic, there is not much to be explained. As stated in Art. 84 of the Chicago Convention, the disagreements dealt with under the scope of Chapter XVIII are those relating to the interpretation or application of the Chicago Convention and its Annexes. The second characteristic, however, deserves careful attention.

Chapter XVIII entrust the ICAO Council with the settlement of differences under the terms of the Convention. There is not a priori anything anomalous with it, had the Council not been a political body. As stated in Art. 50(a) of the Chicago Convention, the Council is a permanent body, responsible to the Assembly and composed of the representatives of thirty-three Contracting States elected by the ICAO Assembly every three years. In electing the members of the Council, the Assembly is under the obligation (Art. 50(b) to give adequate representation to (1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; (3) the States not otherwise included whose designation will insure that all the major geographic areas of the world are represented on the Council.

The members of the Council are, consequently, member States and not individuals acting independently. The member States, once elected to the Council, designate their own representatives. The Convention does not require that these representatives possess any kind of expertise. It is left for the member States to nominate, at their discretion, their own representatives.

Nominated and renumerated by the countries which they represent, the delegates of the States members of the Council act in accordance with the instructions of their own governments. These representatives are bound by such instructions. It would be naive to expect these delegates to detach themselves from national interests. Those who lay chief stress on the judicial capacity of the representatives in the Council[37] make the assumption that these representatives, when exercising their functions under Chapter XVIII, cease to be nationals of their own countries, and act as independent and impartial judges. Nothing could be more misleading. The Council representatives are, by all means, "ambassadors" of their countries to ICAO and unless they act accordingly, their mission is likely to be simply terminated. As Dr. Milde[38] asserts:

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37. See Cheng, B., "The Law of International Air Transport" (1962), p. 101.

38. Director of the ICAO Legal Bureau.

> "The Council cannot be considered as a suitable body for adjudication in the proper sense of the word, i.e. settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of States* (not independent individu 's) and its decisions would always be based on policy and equity considerations rather than on purely legal grounds."[39] (* in italics in the original text)

It can then be concluded that impartiality, a fundamental principle for a judicial body, is difficult to observe in the Council. Although the Convention provides that no member may vote in the consideration of a dispute to which it is a party (Art. 84 and 53), such precaution cannot assure total impartiality.

As for the Rules for the Settlement of Differences, it has already been pointed out that they are suitable for any court of law. However, there is one lement embodied in Art. 14, concerning negotiations, which deprives the Rules of the complete judicial characteristics normally expected in such rules. The emphasis on negotiations leads us to fully agree that "les Etats en cause doivent rechercher le règlement de leur différend par des ngociations diplomatique et n'ont le droit de porter l'affaire devant l'Organisation internationale que si celles-ci ont échoué. C'est le

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39. Milde, op. cit., p. 90.

classique schéma de la primauté de la procédure politique sur la procédure jurisdictionnelle."[40]

The recourse to negotiations does not, however, prevent subsequent judicial proceedings. In fact, negotiations represent an attempt to avoid friction and a wise step towards achieving the "understanding and cooperation among the nations and peoples of the world", as expressed in the Preamble of the Chicago Convention. The ICAO Council has always understood so and, for the sake of truth, it has to be said that the Council has been using it to exhaustion while, on the other hand, it has always avoided making a final decision.

As already mentioned, the judicial machinery of Chapter XVIII has been used only three times throughout the existence of ICAO. The first case was brought by India against Pakistan on account of prohibited zones established by Pakistan along its western borders with Afghanistan, to the detriment of Indian flights from India to Kabul over Pakistani territory. India accused Pakistan of violating Arts. 5 and 9 of the Chicago Convention. The second case was brought by the United Kingdom against Spain because the latter established a prohibited zone allegedly in violation of Art. 9 (of the Chicago Convention) in the vicinity of

40. Diallo, op. cit., p. 101.

Gibraltar, thus preventing safe landing and take-off manoeuvres to and from the airport of Gibraltar. The third case was two-fold, i.e. it consisted of two cases in one: Case I - Application under Art. 84 of the Convention and Section II of Art. II of the International Air Services Transit Agreement; Case II - Complaint under Section I of Art. I of the same Agreement. The case was brought by Pakistan against India based on the latter's suspension of all overflights of Indian territory by Pakistani aircraft, thus interupting viable economic air links between west and east Pakistan, at the time.

In none of the three cases did the Council make a final decision. In the first one, the good offices of ICAO were used to help settle the disagreement. In the second one, after some negotiation and following the request of both parties, the matter was deferred sine die. In the last case, following an appeal by India to the ICJ in which this Court confirmed the Council's findings on the jurisdiction on the case, the matter was left untouched for some time. Meanwhile, the two sides finally settled their differences themselves.

The recourse to negotiations and good offices can be underlined in all cases dealt with by the ICAO Council either under Chapter XVIII or under Art. 5(j), (k), (n), and Art. 55(e) of the Chicago Convention. In some cases concern-

ing FIRs, for instance, the Council has used its good offices through its President or otherwise, in order to settle differences or reach a compromise. When Turkey expressed its opposition to the amendment of the Air Navigation Plan-Euroean Region, proposed by Greece in 1981, it was a result of the parties' disagreement. The Council then decided to promote negotiations between the two countries and proposed a solution of compromise. The President of the Council was personally involved in the negotiations and visited the countries concerned for that purpose. The same can be said about the Sal Oceanic FIR. Senegal's unwillingness to give up a portion of Dakar Oceanic FIR was clear. On the other hand, Cape Verde, a country which recently became independent, could not afford to accede to regional political pressure in order to withdraw its aspiration. The only solution found by ICAO was to reach a compromise, leaving both parties in "half-happiness" of "half-sadness", before a stage of disagreement or confrontation was reached.

The emphasis on negotiations is such for ICAO that the Council has very often postponed its decision if it saw that the negotiations were not successful. Such was the case with the protest of Nigeria against Portugal in December 1967 concerning fights allowed by Portugal from the then Portuguese territory of Sao Tomé Islands to Port

Hartcourt, in Nigeria (Biafra) without this country's permission. About two years later, the Council still had the matter under consideration. Meanwhile, the Portuguese flights had stopped and the matter was deferred sine die.

It seems that the Contracting States themselves are, to a certain extent, satisfied with the ICAO machinery and the Council's behaviour. At least, they seem to be understanding the facts and political reality. After all, Contracting States which ratified or adhered to the Chicago Convention, should amend it under Art. 94 if they feel the need to do so.

It can be affirmed that the proceedings of the Rules of the Settlement of Differences are likely to be translated in practice into a considerable number of non-judicial or "para-judicial" situations. These shortcomings must have been foreseen by the Chicago Convention legislators who provided a very wise solution, that is, the possibility of appeal. As one author states:

> "La jurisdiction du Conseil n'est cependant qu'une jurisdiction de première instance; les Etats impliqués peuvent faire appel de sa décision. C'est la seule voie de recours prévue par la Convention. Tout excès de jurisdiction, toute ereur de droit seront donc relevée par le tribunal d'appel....[41] Le pou-

41. Pépin, G., "Le Conseil de l'Organization de l'Aviation Civile Internationale" Thesis, McGill, (1961), p. 351.

> voir du Conseil de trancher en première instance les différends rélatifs à l'interpretation et à l'application des accords de Chicago marque, croyons-nous, le couci qu'ont eu les délégués d'établir une jurisdiction internationale spécialisée, sous contrôle cependant d'un organe plus objectiv."[42]

Finally, we have to consider the possible imposition of sanctions foreseen by Arts. 87 and 88, as a mandatory duty upon the Assembly, in cases of default. It is doubtful, however, whether the Assembly, being composed of Contracting States, will not resort to policy considerations. Would any State be prepared to suspend the operation of another State's airline, on account of the latter country's infraction which does not affect the first State? The answer is bound to involve the political and economical, rather than only juridical aspects of the case.

The judicial machinery provided for under the Chicago Convention can only work if it meets the needs and interests of the Contracting States. In many cases, the disputes presented to the Council were in fact only aviation aspects of an underlying major policy or political difference of larger scale.[43] How would ICAO be able to tackle issues which represent only the tip of the iceberg, when the underlying major difference is such that it remains outside

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42. Ibid., p. 354.

43. Milde, op. cit., p. 90.

the scope of judgement of the Organization? Very often, disputes primarily arise out of a matter which, by international law, is solely within the domestic jurisdiction or the so-called "reserved domain" of a State. In the case of Turkey, to which we alluded above, security reasons were put forth. In the case of Cape Verde and Senegal, the portion of the FIR in question meant economical and political consequences which could only be assessed by each State concerned. No doubt, it is submitted, occasion comes to every State when it finds in the existence of the "reserved domain" a convenient juridical basis for some act of national assertiveness which injures the interests of its neighbours, or offends the common sense of right among nations.[44] But the fact is that when it comes to matters of "reserved domain", the State is the only judge.

States think in terms of interests rather than of legal principles and they have to feel that the law sufficiently protects their vital interests. If one does not expect justice among individuals to be on the basis of fiat justitia, pereat mundus, it is not logical to expect the international community to practice justice in abstracto. Justice is not a logical value, but a vital equation. The

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44. Brierly, "The Basis of Obligations in International Law", (1958), p. 72.

conception of an abstract justice to be applicable to the concrete facts of reality is a metaphysical attitude which does not meet the needs of the international community. As one author states:

> "Only to a small extent, and hardly at all in international law, can a society be confined within a legal mold that does not meet its needs, or what its prevailing opinion conceives to be its needs; and when we find, as we do, that in spite of widespread aspiration towards a better international order, every State still shrinks from committing its more important interests to the arbitrarment of international law, it is surely permissible to inquire whether all the fault lies on the side of States, or whether it may not partly lie in the quality of the law that they are invited to accept."[45]

The judicial machinery provided for under the Chicago Convention had to be translated in practice, into more realistic attitudes of conciliatory nature in order to meet the needs and cope with the reality of the ICAO Contracting States.

The answer is, in conclusion, to make the law more responsive to the needs of the international community.

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45. Ibid.

CHAPTER V

LIABILITY

1. INTRODUCTION

The management of a Flight Information Region implies, for any ICAO Contracting State, the compliance with the obligations imposed primarily by the Chicago Convention. These obligations include the provision of air traffic services, under the broad terms of Art. 28 of the Convention:

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

Two conclusions can be drawn from this article: (a) the obligation to provide the services is not absolute: its permissive nature gives each Contracting State the discretionary power to decide, as to its own territory, whether to provide air traffic services or not and, in case it decides in the affirmative, to what extent; and (b) once a Contracting State decides to provide air traffic services, it is

under the obligation to do so in accordance with the standards and practices established or recommended pursuant to the Convention.

In respect of air traffic services to be provided within Flight Information Regions, the applicable standards and practices are embodied in Annex 11 to the Chicago Convention, which imposes upon the ATS providers the responsibility for: (1) preventing collisions between aircraft; (2) expediting and maintaining an orderly flow of air traffic; (3) providing advice and information useful for the safe and efficient conduct of flights; (4) notifying appropriate organizations regarding aircraft in need of search and rescue aid, and assisting such organizations as required.

We may, therefore, conclude, for the purpose of our study, that once a Contracting State decides to provide ATS within a FIR, either in full or partial compliance (provided, in the latter case, the differences have been filed as stated in Art. 38) with ICAO regulations, this State is under the obligation to: (a) provide the types of ATS it has decided to provide within the specific FIR; (b) provide the services in accordance with the regulations by which it has accepted or chosen tc be bound; and (c) ensure the safe, orderly and expeditious flow of air traffic within the FIR.

In addition, any damage caused by the ATS provider in the course of the provision of such services, either as a result of negligent omission of clearance or advice, as well as from a negligent or incorrect provision of such services, subjects the ATS provider to consequent liability.

The types of services to be provided in a FIR, as enumerated in Annex 11, are flight information service and alerting service. In practice, however, the types of services provided in FIRs are not limited to flight information service and alerting service. The demands of air traffic made it necessary to create control areas and control zones within Flight Information Regions, in which air traffic control service is provided with the objective of preventing collisions between aircraft as well as expediting and maintaining an orderly flow of air traffic. In effect, air traffic control quite likely represents the most vital part of the ATS needed to ensure the safe and orderly flow of air traffic.

The importance of air traffic control service is stated in Annex 11 which provides that, when air traffic services units provide both flight information service and air traffic control service, the provision of air traffic control service shall have precedence over the flight information service whenever the provision of air traffic

control so requires.[1] In practice, the organ to which the authority for providing air traffic control is entrusted also has, in many cases, the responsibility for providing flight information and alerting services. Such a complex task places on ATS providers heavier burdens as to the duty of safety and increases considerably their likelihood of being subject to liability.

The question of liability concerning the provision of ATS has been, over the years, object of much study and analysis. It has been dealt with and regulated at the national level and attempts have been made from the CITEJA[2] to the present ICAO days to regulate the matter at the international level. At the judicial level numerous court cases in the United States as well as in many other countries provide a considerable number of examples in which liability is the major question.

Nowadays, the matter has not lost its importance. On the contrary, although the number of accidents seemed to have stabilized at the end of the past decade, the number of accidents in which the aircraft and all on board have been

1. Annex 11, Chapter 4, 4.1.2.

2. Comité international d'experts juridiques aériens (Paris, 1925).

killed has grown at an alarming rate.[3] Furthermore, problems concerning airspace congestion, due to the proliferation of aircraft and imposition of curfews on account of noise restrictions, coupled with the increasing technical sophistication of civil aviation, constitute serious challenges for the liability of ATS providers.

2. STATE LIABILITY

In most cases, when a State undertakes to provide ATS, it usually discharges such a responsibility itself, either directly or through a corpor tion owned by it. In some areas, a traffic control service is provided by an organization which has been jointly set up by a number of States, eg., ASECNA, COCESNA and EUROCONTROL.[4] It can, therefore, be inferred that in most cases, the liability of the governmental services will ultimately involve the liability of the State which, for the present time, is

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3. See supra, Chapter III, 1 "Accidents".

4. ASECNA - "Agence pour la Securité de la Navigation Aérienne en Afrique et à Madagascar", 1959.
COCESNA - "Corporacion Centro-americana de Servicios de Navigacion Aerea" (Central American Air Navigation Services)", 1957.
EUROCONTROL - "European Convention for the Safety of Air Navigation", 1960.

governed by the legal principles of public law of each State.[5]

The question of State liability, however, presents some difficulties. The reluctance of the States to allow suits against them on the same basis as private individuals, i.e. without claim of immunity, is one of such difficulties.

The doctrine of sovereign immunity, as adopted in common law countries, originated in the ancient anglo-saxon principle that "the king can do no wrong", the consequence of which being that the king could not be sued in his own courts. This doctrine prevailed in common law countries which, for many years, absolutely barred any suits in damages against the State arising from common law torts. This situation has changed over the years since the trend to limit the rule of State immunity has spread throughout the world.

Nevertheless, in some cases, a complete waiver of immunity has not been adopted. For example, in the case of the United States, the adoption of the "Federal Tort Claims Act" (FTCA) of 1946 represented a general waiver of State immunity but it did, nonetheless, provide for a considerable

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5. Sasseville, H., "The Liability of Air Traffic Control Agencies", thesis, McGill University, 1987 (Introduction).

number of exceptions, i.e. situations to which the waiver of immunity would not be applicable. One of the important, if not the most important, of these exceptions which has been put forward in many cases concerns the discretionary function, i.e., situations of policy duty where the State acts in a discretionary manner. In such cases, the State does not act as a private entity (functional duty) and cannot therefore be sued.

The decision to provide air traffic services is an example of the exercise of this discretionary function and in this case the State is under the protection of sovereign immunity. However, any act of a State's agent or servant, after the system to provide ATS has been set up, does not fall under the category of discretionary function and is consequently subject to liability.

In civil law jurisdictions, the State is liable for negligence of its employees. This rule stems from ordinary general enactment. There is no need for a specific rule creating State liability and the specific rules enacted only modify certain aspects of liability (as to limitation, for example). Nevertheless, one should not ignore some of the hurdles which may be encountered by persons suing a civil law State, such as: (1) the doctrine that the courts should not, or should only marginally censure acts of the State within the framework of its discretionary power, such acts

being subject to political control only; (2) the doctrine that liabi..ty of the State is only conceivable in situations where State servants have committed an error; and (3) the provisions that the State will be liable only when there are no other means available to obtain compensation.[6] In addition, certain procedural aspects also have to be taken into account, e.g., (1) the Dutch rule that all claims against governmental bodies become time-barred after five years as opposed to the "normal" thirty years for tort actions; and (2) the French and Spanish rules that action against the State can only be entertained by special administrative courts (precluding the possibility to sue all potentially liable parts in the same court).[7]

The basis of State liability lies on the principle that when furnishing a public service or acting within a private sphere, the State should be responsible as any other subject conducting similar activities. Even in countries where it has been difficult to accept the principle of State liability, it is accepted that the State should pay indemnities in cases of negligence on the part of its servants. The act or omission of a servant is generally accepted as

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6. Du Perron, A.E., "Liability of Air Traffic Control Agencies and Airports Operators in Civil Law Jurisdictions", Air Law X, p. 206, 207 (1985).

7. Ibid., p. 207.

being the first element to be taken into account when assessing the negligence of the servant and the ultimate liability of the State.

In most jurisdictions, actionable negligence consists of a duty, a violation thereof and consequent injury.[8] Three main reasons may be put forward to justify the acceptance of the liability of ATS providers: first, the need to establish services for the protection of flight, as aviation cannot be conceived without such aids; secondly, the decisive role of such services in air navigation; and thirdly, the charges being made for the furnishing of the services.[9] A few reasons of a general nature based on Civil Law such as the obligation for every one to compensate for damage caused by his own fault, may be added.[10] This obligation stems from the maximum neminem laedere.

At this point, it is worth clarifying that the majority of States assume only civil responsibility for the acts of their servants, following the principle of respondeat superior and vicarious liability. Criminal responsi-

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8. Sasseville, op. cit., supra, note 4, p. 31.

9. Videla Escalada, F., "Aeronautical Law", Sijthoff & Noordhoff (1979), USA, p. 637.

10. Ibid.

bility is personal, i.e. it only concerns the wrongdoer which, in most cases, is considered guilty on account of acts of "dol" (Civil Law) or wilful misconduct (Common Law). Although criminal responsibility is outside the scope of this work, there are certain situations which raise some doubts as to whether they should be classified under civil responsibility or should be punished under penal laws. Assuming a situation where, for instance, a carrier complains of unnecessary delays in the granting of clearance by the ATS providers, it would be a delicate task to determine, without a careful and meticulous analysis of all the circumstances, whether the ATS providers are being technically negligent or whether they are using their privileged positions in order to, for instance, be granted or regain certain privileges from some airlines. The damage (extra fuel consumption, delay, monetary loss, etc) to the carrier caused by the action of the ATS providers is a fact, but criminal responsibility can only be established after the unequivocal proo. of the intention of the ATS provider, and provided that the principle nula poena sine lege has not been violated.

Certain other particular aspects and circumstances related to the provision of ATS within Flight Information Regions are also to be considered, when dealing with liability. We will hereinafter examine such aspects.

3. VFR AND IFR FLIGHTS

The services provided in Flight Information Regions are flight information and alerting services. These services are furnished to any type of flight, VFR or IFR[11] and do not relieve the pilot-in-command of any of his responsibilities.[12] He has, therefore, to make the final decisions and is consequently fully responsible for damage caused by the aeronautical operation.

The ATS provider has a more complex responsibility with regard to control areas and control zones. Bearing in mind that, where designated within a specific FIR, control areas and control zones form part of that FIR, the responsibility of the ATS provider, with regard to the specific FIR, includes not only the provision of flight information and alerting service but also air traffic control service. In control areas and control zones the distinction between IFR and VFR flights is of extreme importance. Referring to the assessment of responsibility with regard to VFR flight one author comments:

> "Nowhere is the theory of "primary responsibility of the pilot" more strictly applied as in VFR conditions. The courts have always held the pilot to a much higher standard of care and were always

11. Annex 11, Chapters 4 and 5.

12. Annex 2, Chapter 4, 4.1.1 - note.

> much more reluctant to impose liability on the controller when the case involved planes flying under visual flight rules. The main reason for this is the traditional rule of "see and be seen" or "see and avoid" by which each pilot is supposed to look out for obstacles and aircraft on the ground and in the air, maintain his own separation and insure his own safety and that of his passengers. Another reason is the "control" theory devised by the courts by which they try to assess who, pilot or controller, had the ultimate power of decision at the moment the accident occurred. The pilot has been held to retain full control of his aircraft in VFR conditions whereas in IFR conditions he has to rely on the control tower to a degree.[13]

The principle of the primary responsibility of the pilot-in-command is still valid but there is, at the same time, a recognition of the "concurrent" or "reciprocal" duty of the controller to warn of known dangers. This new approach places the burden of ensuring the safety of the aircraft on both the pilot and the air traffic controller. The concurrent or reciprocal theory assumes nowadays a great interest. It has a direct bearing on the liability of ATS providers in general, which can no longer fully rely on the rule of "primary responsibility of the pilot" to be completely relieved from liability.

As to IFR flights within FIRs, the situation is quite different. In such a case, the pilot has to rely on the air traffic controller to a considerable degree. In IFR

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13. Sasseville, op. cit., p. 56.

conditions the ATS providers are under the specific obligation of providing services for the purpose of preventing collisions and expediting and maintaining an orderly flow of air traffic. In such cases, the pilot-in-command has the duty of observing the instructions issued by the air traffic control provider which is consequently solely responsible for facts occurring on account of such instructions. Of course, it can not be forgotten that the aircraft commander maintains his power of decision and may not follow the instructions. Hence, a possibility exists of switching the burden of liability which, in this case, could not fall upon the air traffic services.[14]

4. UNLAWFUL INTERFERENCE

As pointed out earlier in this work,[15] acts of unlawful interference constitute one of the most serious preoccupations of ICAO given that they represent a grave threat to the safety of international civil aviation. Such acts occur in the various portions of the airspace, including Flight Information Regions, and constitute situations of recognized emergency. The ATS providers may, therefore,

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14. Videla Escalada, op. cit., supra, note 9, p. 638.

15. See supra, Chap. III, 3.

find themselves in the position of having to make a decision on the required action.

Annex 11 contains a specific standard (5.1.1.(3)) which prescribes the duty (on the part of ATS providers) to provide alerting service to any aircraft known or believed to be the subject of unlawful interference. The only Contracting State which has filed any difference to this specific standard is France, which added the expression "in so far as practicable".[16] It can, nevertheless, be affirmed, for the purpose of our study, that a duty exists for the ATS providers stemming from the standard in question. Furthermore, "the overriding duty" to act in the interest of safety recognized in the court case of Furumizo v. United States[17] creates a duty for the ATS providers to give first priority to the safety of crew and passengers. This priority is believed to be translated, in practice, by a priority for landing in cases of unlawful interference.[18]

Our belief is that, although no specific court case is available as support, when it comes to matters related to

16. Supplement to Annex 11 (8th ed.), see France, p. 2.

17. Furumizo v. United States, 381, Federal Reporter 968 (1967).

18. See Sasseville, op. cit., p. 81.

unlawful interference, the State is often aware of the implications and, therefore, considers all the political factors (especially its own security factors), together with the safety demands of civil aviation and the action to be taken. For these reasons, the decisions of the ATS providers in some cases, are more than likely the decisions of the State itself and any conclusion on the negligence of the servant providing ATS may, as in a case where a priority for landing has not been granted, represent a de facto negligence on the part of the State. In such cases the servant should not be subject to any liability resulting from the decision per se. In such instances, the State should be primarily and fully liable without any considerations to vicarious liability or respondeat superior.

5. LIABILITY REGIME

5.1. The Contribution of ICAO

Over the years ICAO has given a great deal of attention to air traffic control liability. The question was first analysed by ICAO in 1960 at the 13th Session of the Legal Committee where it was pointed out that a large number of aerial collisions were the result of acts or omissions of air traffic control services. The need for uniform international rules to govern air traffic control liability

was recognized[19] and the subject was given priority at the 14th Session of the ICAO Assembly in 1962.

Between 1962 and 1967 two questionnaires were sent to Contracting States, the first in 1963[20] and the second in 1964.[21] Twenty-seven States replied to the first questionnaire[22] and forty to the second.[23] The replies of the Contracting States revealed that: (a) all the States which responded to the questionnaires were directly or indirectly responsible for the position of air traffic control services and none of them had specific legislation concerning ATC liability; (b) the majority of the governments had waived immunity with respect to negligent acts or omissions of ATC employees; (c) the majority of States were in favour of, should a convention on ATC be considered, a system of liability based on fault, with limits of compensation (except for situations of failure or breakdown of equipment where a strict liability system would apply).

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19. ICAO Doc. 8137-LC/147-1, p. 171.

20. ICAO Doc. LC/SC/LATC, No. 1 (25.11.63).

21. ICAO Doc. LC/SC/LATC, No. 21 (20.11.65).

22. ICAO Doc. 8582-LC 1153-2, LC/SC/LATC 3-14 (1964).

23. ICAO Doc. LC/SC/LATC No. 32 (14.4.65), Appendix A, p. 19.

Despite the consensus that an international convention to govern ATC liability was needed, the subject remained untouched in the Legal Committee for a whole decade due to other priorities in the legal Work Programme.[24]

In 1979, during the 23rd Session of the Assembly, the Legal Committee had its General Work Programme reviewed, and it was considered that the Work Programme should reflect the needs of international civil aviation in the 1980's[25] and that only problems of sufficient magnitude and practical importance would be given priority.[26]

As a result, a new questionnaire was sent in 1980 to the Contracting States with a view to establishing the priority of the question of ATC liability. Thirty-seven States replied (Argentina even included a draft convention), although only twenty-two of them arrived in time to be analysed by the Panel of Experts set up for this purpose.[27] Surprisingly, States no longer supported the need for a new convention on ATC matters. The majority of the States which replied to the questionnaire stated that

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24. See ICAO Doc. 9314, A23-LE (1980), p. 9.

25. Ibid., p. 44, para. 9(c).

26. ICAO Doc. C-WP 7314 (17.8.81), p. 1, para. 2.1.

27. ICAO Doc. LC/26-WP/6-1 (5/2/87).

they had not encountered any practical problems as to air traffic control liability.[28]

Although the result of the 1980 survey has to be regarded with some reservations given its limited scope (from the then total membership of 148 States, only 32 replied to the questionnaire) the replies received led ICAO to consider the matter with lower priority. In fact, in subsequent ICAO Assemblies, it was often reiterated that the subject of ATC liability could be better dealt with under national laws.

The reference to the ICAO efforts regarding ATC liability is of considerable relevance for this study since the conclusions reached by ICAO may be easily applicable to the provision of air traffic services in general.

5.2. Liability Based on Fault v. Strict Liability

With regard to the liability regime chosen by ICAO Contracting States concerning the provision of ATS, it seems safe to assert that a large number of States would still support that their liability be based on fault. AS one author puts it:

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28. ICAO Doc. C-WP/7314 PE/PLC - Report (17.6.81), p. 12, para. 8.8.

> At first glance, a proof of fault system seems to tip the scales considerably in favour of the defendant especially, as States recommend,when it is associated with limitations of liability. It is therefore not surprising that Member States of ICAO, all of them providers of ATC services for their country, favour it so strongly.... Having just recently, and in some cases only partially, renounced the benefits of sovereign immunity, they are understandably reluctant to let the pendulum swing too far the other way.[29]

States readily accept that the liability of ATS providers, which is ultimately their liability, be based on fault. ASECNA, COCESNA and EUROCONTROL also adopted this liability regime in their respective conventions.[30]

The principles applicable to negligence can be found in the law of torts, since all the requisites which constitute the tort of negligence can be found therein (a legal duty to take care, a breach of it by the defendant,

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29. Sasseville, H., "Air Traffic Control Agencies: Fault Liability vs. Strict Liability", Annals of Air and Space Law, McGill, X (1985), p. 243.

30. ASECNA, "Convention relative à la création d'une agence chargée de gérer les installations et services destinés à assurer la navigation aérienne en Afrique et à Madagascar", 12 Dec. 1959 (see Matte, op. cit., Chap. II, p. 264.
COESNA "Corporacion Centroamericana de Services de Navegacion Aéreo - Convenio de 26 de Febrero de 1960" - See Salinas, Luis T., "Curso de Derecho Aeronautico", p. 242.
EUROCONTROL, "The International Convention for the Safety of Air Navigation" Brussels (13 Dec. 1960). See Matte, op. cit., p. 261.

consequent damage to the plaintiff). The primary duty of the ATS providers as to FIRs is to exercise reasonable care in ensuring the safe, expedite and orderly flow of air traffic. A duty of care is owed by the ATS providers not only to the pilot, but also to the crew, passengers, owners of aircraft and cargo. and persons on the ground. As to the burden of proof, it is incumbent upon the plaintiff who alleges it, in accordance with the law of torts. When accidental harm is done, and if a judicial action is brought, it is not for the doer to excuse himself by proving that the accident was inevitable and not due to negligence on his part; it is for the person who suffers the harm to prove affirmatively that it was due to the negligence of the wrong-doer. He must prove not only that the defendant was negligent, but also that the defendant's negligence was the cause of the accident (proximate cause). This rule fully applies to VFR flights, but new elements have to be taken into account for IFR flights. The causes of the accident might be unknown to the pilot and the State operator may be required to establish that the accident could have been caused by circumstances other than the negligence of his servants. It would, in this connection, be open to the operator of the aircraft as well as to the plaintiff to attempt to establish that the accident was caused by the negligence of the ATS providers. The court

might as well invoke the rule of res ipsa loquitur (prima facie evidence) to such cases. The defendant ATS provider has in his favour a great number of defences: non-existance of causal relationship between the ATS providers's act or omission and the damage, contributory negligence of the plaintiff, force majeure or act of God, plaintiff's waiver of liability or his assumption of the risk.

In civil law jurisdictions, an act of a person can be considered as delictual provided that it has caused an injury which has affected material or non-material rights of another person. A person only commits the delictual action if this person is bound by some duty (provided for in a statute) and infringes it by non-performance. Fault is a firmly recognized principle of liability and it can result from an intentional or negligent action or omission. A causal relation between delictual action and injury or damage is absolutely necessary for the establishment of liability, and the defendant can use several statutory defences: self-defence, tate of distress, consent of the injured person, force majeure.

The advantages of a proof of fault system for the defendant are enumerated by one author as follows: (a) it allows the greatest number of defences ...; and (b) the difficulty of providing fault will make recourses under other conventions more attractive, even when the amount of

recovery might be lower because of limitations, thus keeping the number of actions against governments lower."[31]

These advantages which led States to choose such a system some twenty years ago, are believed by some authors[32] to be nowadays more theoretical than real. The cause of accident can, at present, more easily be established, owing to the increasing standardization and efficiency of accident investigation procedures. In this context, contributory negligence of the passenger would hardly occur.

Another great disadvantage of this system is the difficulty of defining the exact nature and scope of ATC (and ATS, for that matter) duties, since the standard of care that applies to them necessarily changes, following developments in aeronautical engineering and ATC technology.[33] Proving fault relating to a given standard of care becomes more complicated. The failure of the system to give adequate economic compensation to victims of aircraft accidents has also become an evident disadvantage, recognized worldwide. In addition, it was also felt that the defence of "all necessary measures" (put often forward by

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31. See Sasseville, op. cit., supra, note 29, p. 243.

32. Sasseville, op. cit., supra, note 29, p. 243.

33. Ibid., p. 245.

the defendant)[34] was increasingly difficult to use and the wide application of the rule res ipsa loquitur by the courts created in practice a system of strict liability.

A case of res ipsa loquitur raises a presumption that the negligence of the defendant caused the accident. If the defendant calls no evidence related to the issue of negligence, it is sufficient foundation for finding liability against him; the plaintiff has discharged his burden of proof by his evidence of the accident and its surrounding circumstances.[35]

The system of strict liability was, in effect, adopted in many cases, namely in some instruments concerning carriage by air (e.g. "Montreal Agreement", 1966, "Guatemala

34. Art. 20 of the Convention for the Unification of Certain Rules Relating to International Transport by Air (Warsaw Convention) (1929), "Principal Instruments of the Warsaw System", 2nd ed., IATA (1981).

35. Fenston, J., "Res Ipsa Loquitur", Thesis, McGill, (1953) p. 65.

City Protocol", 1971)[36] and concerning liability to third parties on the surface (Rome Convention, 1959). The objective liability system resorts to the element of risk for the attribution of liability, i.e., the assumption that liability exists regardless of the fault. The underlying obligation was considered as "une obligation de résultat", as stated in French Law.

Those who are in favour of the regime of strict liability contend that the fault system, by focusing solely on the conduct of the defendant in order to find the cause of accidents, is especially inadequate in that it often prevents us from investigating technical features and equipment which would help diminish the number and costs of these accidents.[37] They further advocate that it becomes necessary to accept that technological advance diminished the role of compensation based exclusively on moral principles and also that mechanization - which is ever-

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36. The full titles of the instruments are: "Interim Agreement Between Different International Air Transport Companies" (The Montreal Agreement 1966), Matte, op. cit., supra, Ch. II, p. 468. "Protocol to amend the Convention for the Unification of certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955" (Guatemala City Protocol 1971). For the texts see "Principal Instruments of the Warsaw.

37. Sasseville, op.cit., supra note 29, p. 247.

increasing - leads to the fact that accidents should be caused by very complex and inter-related causes where, sometimes, the behaviour of man is only of secondary importance.[38]

While these scholars are strong advocates of the objective liability system, others firmly insist on the subjective system with regard to the provision of ATS. The latter base their views on the nature of the ATS liability which they consider to be extra-contractual since "in no case does an agreement exist devoted to governing the economic aspect between the parties; the essence of a contract is therefore lacking.[39] The contention that objective liability should not be adopted is mainly based on considerations related to risk. According to one author:

> "The absence of a created risk is an important element for favouring this position - undoubtedly, the infrastructure agencies do not raise any risks - as well as the lack of a beneficial risk for, although charges are imposed they are assigned to the functioning of a public service rather than for profit purposes and, consequently, the classical theory of liability based on fault is maintained.
>
> Moreover, damage is not caused by the agency directly, but by an aircraft even though, in the last instance, it may be

38. See Fragali, M., "Lezioni...", 1939, No. 20, p. 47; Savoia, C., quoted in Videla Escalada, op. cit., note 9, p. 552.

39. Videla Escalada, op. cit., p. 639.

> possible that the latter should have caused the damage as a result of a defective operation by the agency.[40]

The above arguments are then concluded with the following statement:

> "It suffices to evaluate the following practical possibility: should strict liability be adopted, air traffic control agencies would be the first to be liable for all damage caused by an aviation accident by the mere fact of furnishing the aids indispensable to air navigation.[41]

5.3. Limitation of Liability

As to the question of limitation of liability, different views can be put forward. From the ICAO survey, already presented in this Chapter, it can be concluded that, at least at the time of the said survey, the majority of the replies from the Contracting States was in favour of a proof of fault system with a limitation of liability. This position does not merit our support. Should the negligence of the State servant and, ultimately of the State itself, be proven, compensation should be paid in full. It is already a heavy and cumbersome burden for the claimant to deal with the intricate problems of proving fault; the least he should be able to expect, after the damage suffered and the

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40. Ibid.

41. Ibid.

struggle to establish the defendant's fault, is to be fully compensated for the said damage.

The rule of restitutio ad integrum is also supported by some authors on the grounds that: (a) there is no really satisfactory criterion for establishing maximum limits of liability; therefore, the choice of a limitation would raise another serious problem affecting the equity of solutions and the security of the rights of the interested parties;[42] (b) conversely, it is important to secure the right of the injured parties to receive compensation and, for such reasons, it would be advantageous to establish a system of compulsory insurance to cover this liability.[43]

5.4. Liability and Risk Management

We firmly believe that a system of strict liability is the one which best meets the demands of modern times. We also believe that there should be no limitation of liability and that victims of damages caused by ATS providers should be entitled to full recovery. In practice, however, the situation is not so simple. The international community

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42. Ibid., p. 640.

43. Ibid.

includes the most developed, as well as the most underdeveloped countries. For a developing country, the move towards a strict liability system is as delicate as it was for the now developed countries when these were in their primary stages of development. The factors to be weighed when deciding on the choice of a system of liability are numerous and must be assessed both individually and in an inter-related manner. One of the first elements to be taken into account is the economic situation of the State concerned, i.e. its solvency ability. It would be useless to take any step towards a system of strict liability if the State's ability to provide compensation for damages is in doubt. In this case, the best liability system would be liability based on the proof of fault which allows the greatest number of defences and which forces victims to deal with the difficult task of establishing fault on the part of the defendant ATS provider. These were the reasons which led the substantial majority of ICAO member States to choose the proof of fault system when replying to the ICAO's questionnaires on the question of ATC liability.[44] Other elements to be taken into account when choosing a system of liability, especially with regard to a FIR, are linked to the volume and nature of the traffic within the specific

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44. See supra, Chapter V-1, "The Work of ICAO".

FIR. The volume of traffic determines the existence and number of control areas and control zones within a FIR and the consequent level of demands from the ATS providers especially in congested areas. The nature of the flight (VFR or IFR) also account for the establishment of responsibility. In a FIR where the flights are predominantly IFR, the burden on the ATS provider (in spite of the recognition of the "concurrent duty" principle)[45] is undoubtedly higher than in case of VFR flights where the aircraft commander carries a heavier responsibility. In the former case, i.e., in FIRs where VFR flights are predominant predominant, a proof of fault system might be preferred by ATS providers. The national or international character of the traffic may imply dealing with foreign airlines and aircraft operators and foreign passengers. The percentage of the national and the foreign element has to be duly assessed and balanced. A predominance of the foreign element may force the State responsible for the FIR to adopt a liability regime which is acceptable for the foreign airlines and passengers, in case such a policy contributes to attraction of traffic and consequent revenues. In this case, if the safety records are not encouraging, the adoption of a strict liability system might actually be translated into a flood

45. See supra, p. 107.

of foreign currency to other countries from which the airlines and the passengers originate. The costs of compensation in foreign currency become even higher if the standard of living of the passengers to be compensated is considerably high (especially if "lucrum cessans" and "damnum emergens" are considered). On the other hand, if the majority of passengers are nationals of the State concerned, the latter has to decide whether to give priority protection to its citizens through a system of strict liability, or rather to take a more archaic approach and adopt a proof of a fault system to protect the State's ultimate liability for the provision of ATS. As for the regime governing the relations between ATS providers and carriers, the substantial equality existing between the parties makes it advisable to adopt a liability system which does not favour the carriers to the detriment of ATS providers, i.e., proof of fault system.

A major concern when adopting a liability system is the assessment of the accident records as well as the probabilities of accidents with relation to the FIR in question. For a FIR in which there exists no control areas, or in which the flow of traffic is fairly smooth with low or no records of collisions, a strict liability regime would represent no danger. On the other hand, for a FIR in which accidents were due to factors other than those linked with

the acts of ATS providers, a strict liability system might just make it more attractive for the victims to recover damages for ATS providers rather than from carriers.

The factors presented above, as already said, cannot be considered in isolation. An overall and global analysis is indispensable. Of course, other elements, in addition to technical factors, have to be considered when choosing a system of liability. The social element, important in a large number of countries and still embryonic in some States, is of extreme importance and may be considered as directly responsible for the move towards strict liability.

The adoption of a proof of fault system is regarded as no longer compatible with the reality of modern society. In addition to the arguments already presented against such a system, our view is that the social demands of today's society make it necessary to adopt a liability system which is above all dedicated to the immediate and full reparation of damages suffered by citizens on account of any aviation activity. The adoption of a proof of fault system does not meet such demands.

The maturity of the modern citizen, resulting to a great extent from communication means and cultural interaction in which aviation plays a major role, is not compatible with the archaic proof of fault system. It is true

that governments are expected to represent the will of their respective peoples and it may be submitted that the adoption of such a liability system is, at the last instance, in the interest of the citizens. However, we contend that being subject to damage is hardly in the interest of citizens. It is understandable that citizens may be subject to hardsnips, e.g., be deprived of a certain standard of living in order to overcome periods of recession. We firmly disagree, however, with the contention that damages caused to citizens on account of activities carried out by governments are justifiable. Except in the case of damages caused by virtue of "force majeure" or in cases where vital (security) interests are at risk, any damages caused to citizens must be fully compensated. Governments owe to their citizens an overriding duty of protection and this duty is better discharged by the adoption of a strict liability system.

A strict liability system, coupled with proper insurance, is more advantageous and more adapted to the modern demands of the aviation reality, in general, and to those of the users of FIRs, in particular. In case of a country faced with some economic shortcomings, the solution is to adopt a strict liability system coupled with proper insurance.

This system should be guaranteed by taking out insurance either through the international aviation insurance market or, even better, through the adoption of a

self-insurance system. The latter option can be achieved by setting up a special insurance fund in order to cover a satisfactory amount of "predictable damages". The insurance fund could be considered part of FIR operating costs and could be obtained by increasing the charges to be imposed on FIR users. This perfect solution has, however, a great disadvantage. In case the policy of the State concerned is attraction of traffic through low FIR charges, the State would have to resort to a policy of subsidies for the department in charge of ATS provision. The attraction of traffic through reduced charges is only justified if consequent revenues are obtained either because the number of the FIR users may increase, or on account of indirect revenues brought by the circulation of goods and persons.

The recourse to the international aviation insurance market is only economical for an overall "blanket coverage" of all aviation risks, thereby lowering the overall insurance premiums.[46] For countries with serious economic difficulties, we would recommend a self-insurance system which greatly diminishes the exporting of foreign currencies, so vital for those States. On the other hand,

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46. For the same reasoning see Tobolewski, Aleksander, "Monetary Limitations of Liability - Legal, Economical and Socio-Political Aspects", Montreal, 1986, at p. 253.

given that, in the international aviation insurance market, each accident is likely to aggravate the premiums paid individually, the adoption of a self-insurance system is advisable in order to avoid paying the accidents which do not directly concern the country in question.

CHAPTER VI

CONCLUSIONS

Flight Information Region is, first of all, a technical concept created by ICAO. However, notwithstanding their primarily technical character, FIRs raise important legal questions which have to be necessarily considered in order to establish the responsibilities of the States involved with the management of FIRs.

Such responsibilities concern the provision of air traffic services within FIRs and stem primarily from the Chicago Convention and its Annexes, as well as from the Regional Air Navigation Plans approved by the ICAO Council. An analysis of the ICAO regulations applicable to FIRs leads to the conclusion that, except in the special case of the high seas, these regulations have to be regarded as mere recommendations which can only create obligations for ICAO member States if they so consent. However, once a State chooses to be bound, it is under the obligation to comply with the regulations, the breach of which may then subject the violating State to penalties under the Chicago Convention. Non-compliance with ICAO standards and recommendations is mainly due to lack of technical or financial ability to provide the required ATS within a specific FIR.

In certain cases, however, political and economical reasons may be submitted. Such is the case with the questions of delineation and allocation of FIRs to States. In spite of ICAO recommendations that such matters be decided on operational and technical basis only, in reality the situation is quite different. In many cases, the control of a FIR represents a vital element for the protection of sovereign integrity or for military purposes. In addition to these security reasons, economical advantages could also be pointed out. Such vital interests explain why States are sometimes eager to assume the responsibility for a given FIR and why they may get involved in fierce differences over a proposed alignment concerning a specific FIR. The settlement of such differences constitutes a serious preoccupation for the ICAO Council which has tried, over the years, to solve the questions through direct negotiations of the parties involved.

Differences over FIRs, which in most cases can be considered only aviation aspects of an underlying major policy or political difference of a larger scale,[1] the solution of which remains outside the scope of judgement of ICAO - coupled with the fact that the ICAO Council is composed of States' representatives and not of independent

1. Milde, op. cit., supra, Chap. IV, p. 90.

judges, explain why ICAO's competence under Chapter XVIII of the Chicago Convention is translated, in practice, into a conciliatory, rather than a strictly judicial role.

A question of major relevance with respect to FIRs is the liability of States. When providing ATS, a State's servants may cause damages by their acts or omissions, for which they become liable. In most cases, their liability is ultimately the liability of the State responsible for the FIR. Consequently, it is necessary to choose a liability regime which would be the most suitable for the States, providers of ATS, and victims of damage. Our view is that a strict liability system without limits of compensation and coupled with proper insurance is more advantageous and more adapted to modern aviation, in general, and to the needs and demands of the users of FIRs, in particular. Aviation is nowadays a highly developed industry and an unquestioned means of mass transportation; its social importance is evident. As a result, when a State decides to provide ATS within a FIR it has to be ready to assume the necessary responsibilities and consequent risks. This conclusion is valid even for States faced with some economic shortcomings in which particular case we recommend that the strict liability regime be coupled with self-insurance system.

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