THE REGULATION OF AIR TRAFFIC CONTROL LIABILITY BY INTERNATIONAL CONVENTION

by

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Generally, the thesis relates modern technological developments in air traffic and air traffic control services to their legal regulation. It discusses the possible ways in which the liability of air traffic control agencies could be regulated internationally.

The study is divided into three parts. Part I, called "The Need for Legal Regulation of ATC Liability" describes the problems which improved air technology have created, and how this has resulted in obligatory and expensive air traffic control services. The groups which have an interest in the air traffic control liability issue are described; certain national and regional solutions to the air traffic control liability problem are discussed, and finally, the preparation for an international solution.

Part II, called "A Special Convention on ATC Liability" first relates other kinds of transport law to air law, and then sets forth a blueprint for an international convention to regulate the liability of air traffic control agencies.

Part III, called "Alternatives to a Special Convention on ATC Liability," discusses the desirability of amending other air law conventions, creating a consolidated convention from three existing subject matters, or including ATC Liability within a general convention on state responsibility.

Preface

At the conception of this study, the author intended only to show how technological developments in air transport and air traffic control are being covered by the law, and anticipate which direction that law would take. The subject matter demands more than description, however, and before long it became clear that it would be necessary to declare a position.

Although that position has evolved from a simple "Yea" or "Nay" when a choice needed to be made, the cumulative result may appear to be more definitive, that the author "took sides." In the case of air law, "taking sides" seems oddly enough to mean choosing a coast of the Atlantic. For instance, if you have been legally trained in Europe, you may tend to favor absolute liability, and demand that other systems prove themselves. On the other hand, North Americans may tend to favor unlimited liability, or proof of fault, and feel similarly defensive about an absolute liability system.

The author hopes to have freed himself of that problem, by taking his legal education on both sides of the Atlantic. On the one hand, The Institute of Air and Space Law at McGill University, directed by Dean Maxwell Cohen, provided Ford Foundation funds, and an excellent library, setting the stage for lively legal discussions with colleagues the world over, and the opportunity to attend the ICAO Legal Committee meetings. Among those ICAO delegates, I am especially thankful to Mr. W.A. Crawford of the FAA, for giving an earlier, initial study of the ATC liability problem a thorough critical reading. It was out of the Montreal experience that two of the finest associations came about -- with Prof. Peter Sand who gave me the benefit of his specific knowledge on Warsaw Convention, conflict of laws problems; and with Dr. Gerald FitzGerald of ICAO, who

has always been attentive to my questions, and swift in bringing significant documents to my attention.

This study on ATC liability was continued, then, on the other side of the Atlantic with generous assistance from the von Humboldt-Stiftung. With Prof. Alex Meyer's advice, and using his Institut für Luftrecht und Weltraumrechtsfragen in Cologne as a base, the author was able to investigate European views on liability with the help of such authorities as Dr. W. Guldiman, Prof. H. Drion, Dr. I. Ph. de Rode-Verschoor, Dr. J. Verplaetse, Mr. C. Comez Jara and Prof. L. Tapia Salinas.

Either too limited or too unlimited, like liability itself, the study is now complete, the citations are valid to July 15, 1965. Beyond describing the air traffic scene both technologically and legally, in a broad and sometimes arbitrary manner (for as Drion notes in his preface, one must make a choice between the multitude of national laws[1]) the author has one small hope: that a few of the choices which he made might influence, might encourage the direction of legal regulation of ATC liability, so that while meeting the needs of air technology, we do not specialize ourselves out of the picture, but retain a meaningful place in the large scope of international law.

Margrethesminde, July 15th, 1965

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Abbreviations

Only abbreviations generally used throughout the thesis are listed here. Inclusion of abbreviations stated only once, parenthetically, would put an unnecessary burden on the reader.

Technical Terms

ATC	Air Traffic Control
IFR	Instrument Flight Rule
VFR	Visual Flight Rule

Organizations

ALI	American Law Institute
ASECNA	Convention Relative à la Création d'une Agence Chargée de Gérer les Installations et Services Destinés à Assurer la Sécurité de la Navigation Aérienne en Afrique et à Madagascar, Dec. 12, 1959
COCESNA	Convention Portant Création d'une Société des Services de Navigation Aérienne Pour l'Amérique Centrale, Feb. 24, 1960
Eurocontrol	International Convention Relating to Co-operation for the Safety of Air Navigation, 13 Dec. 1960
FAA	Federal Aviation Agency
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ILC	International Law Commission
UN	United Nations

Conventions

Brussels	International Convention for the Unification of Certain Rules of Law in Regard to Collisions, Sept. 23, 1910

Chicago	The Chicago Convention, Dec. 7, 1944, 61 Stat. 1180
Draft Aerial	Draft Convention on Aerial Collisions, ICAO Doc 8444, LC/151, 19/9/64
Guadalajara	The Guadalajara Convention, Sept. 18,1961
Harvard Draft	The Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l L. 548 (1961)
Hague	The Hague Protocol, Sept. 28, 1955
Rome	Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952.
Warsaw	The Warsaw Convention, Oct. 12, 1929, 49 Stat 3,000

Periodicals

Am.J. Comp. L.	American Journal of Comparative Law
Am.J. Int'l L.	American Journal of International Law
ASDA-SVLR	Bulletin de l'Association Suisse de Droit Aérien
J.Air L. & Com.	Journal of Air Law and Commerce
Rev. Franc. Dr. Aerien	Revue Francaise de Droit Aérien
Rev. Gen. Air	Revue Générale de l'Air
Seq. Jorn. Ib-Am. Der. Aero.	Segundas Jornadas Ibero-Americanas de Derecho Aeronautico y del Espacio
Z. Luftrecht	Zeitschrift für Luftrecht und Weltraumrechtsfragen

Airlines

BEA	British European Airways Corp.
SABENA	S.A. Belge d'Exploitation de la Navigation Aérienne
TWA	Trans World Airlines, Inc.

Introduction

In retrospect, it appears to this writer that his study of international regulation of air traffic control liability has been but a candle carried down a large, dark hall. The shadows which the flame invokes dwarf the flame itself. For example, the issue of liability is no sooner illuminated, than the long shadow of limits rushes forward. When one has determined what the relationship of ATC liability is to other private air law conventions, the shadow of international law swings across the path, and one is forced to ask whether a special convention is too restrictive for our subject.

Among these shadows, there is one which is darker and deeper than others: that of time. The subject matter of air traffic control belongs to science, to technology, where developments are so rapid that obsolesence is a daily plague. The matter of air traffic control <u>liability</u>, however, belongs to law, where obsolesence is not part of the vocabulary, where tradition and caution are masters. Air traffic and law are an odd pair. We are forced to admit the need for legal regulation of the negligence caused by air traffic control, but it is not possible to urge the centuries old treaty-processes into a fast pace: every day we, as lawyers, must be haunted by the thought that tomorrow science may have devised machines of which we have not dreamed, which do not fit within the descriptions and definitions so laboriously agreed upon for convention purposes.

We note that the issue of liability of air traffic control agencies was first debated by the ICAO Legal Committee during its thirteenth session in 1960 in relation to its discussions on the Aerial Collisions Draft Convention,[2] and not until 1962 (fourteenth session) was a subcommittee formed. Not until April 1964 did it meet.[3]

And even then, because its instructions were only "to study the liability of air traffic control agencies," it had to avoid the appearance of beginning the groundwork for a separate convention.

By this time (July, 1965) it seems clear enough that a convention will result, but since the ICAO Legal Committee meets only every two years, and there are other priority matters to be debated, it is unlikely that we will see significant results until the early 1970's.

The fact is beyond criticism. Law is a tested and accepted foundation of our society, and "instant conventions" would undoubtedly not serve us as well as the kind which take time to mature. And so we must strain to see beyond the shadow of time, to outwit science, to hope that our legal definitions will be inclusive enough and our framework both strong and flexible enough to regulate even unforeseeable technological advances.

Part I

THE NEED FOR LEGAL REGULATION OF ATC LIABILITY

The legal problem which the world faces in regard to air traffic control services can be described in this way: commerce must not be unreasonably restricted and swift aerial intercourse between states is favored by international public policy. But, as has been true for all forms of traffic, there must be regulations to make flight through air safe.

Fed by astonishing technical developments, air traffic has raced far ahead of the controls our legal system exercises. We have recognized the dangers, without having had time to enact adequate, encompassing legislation. ATC is today in the hands of separate states, or their regional groupings, with guidelines set forth in the Chicago Convention Annexes.[1]

In this section, under "The Impact of ATC Negligence," we will discuss first such technical air transport problems as speed and size, then the Chicago Convention obligations, and Area Positive Control methods with which we have tried to regulate modern ATC.

The "Participants" section will describe first the polar positions of the aircraft commander and the air traffic controller, then those social groups concerned directly or indirectly with the ATC liability problem.

Under "National Solutions and Regional ATC Groupings," the reader will see how states or organizations in their disparite ways cope with ATC liability problems.

Finally, the need for an effective international solution having been definitely established, we will discuss the preparatory work of the ICAO Legal Committee along those lines.

A. THE IMPACT OF ATC NEGLIGENCE

1. The Problem

The rise in air traffic has increased the accident probability to such an extent that improved air traffic control is a necessity. It follows, then, that we must extend legal protection to ATC services, and to those injured by its negligence.

a. Safety Requires More ATC Investments

Let us consider statistics, the sum of which is a burgeoning of air traffic, with no slack in sight.

A yearly 3-4% increase in all air traffic, general and commercial, has been forecast for the coming years.[2] Airport control towers in the United States handled 32,857,745 aircraft operations in the same year. The sum of operations is continuously growing.[3] Although the ATC in other countries is not as active as in the United States, it is becoming so. Prof. Alex Meyer reports that in 1963, 750,000 aircraft operations were registered in West Germany, 173,000 of them in the Frankfurt ATC district. Often 200 passenger aircraft are hanging in West German airspace at the same time.[4] The magnitude of the ATC problem is clear.

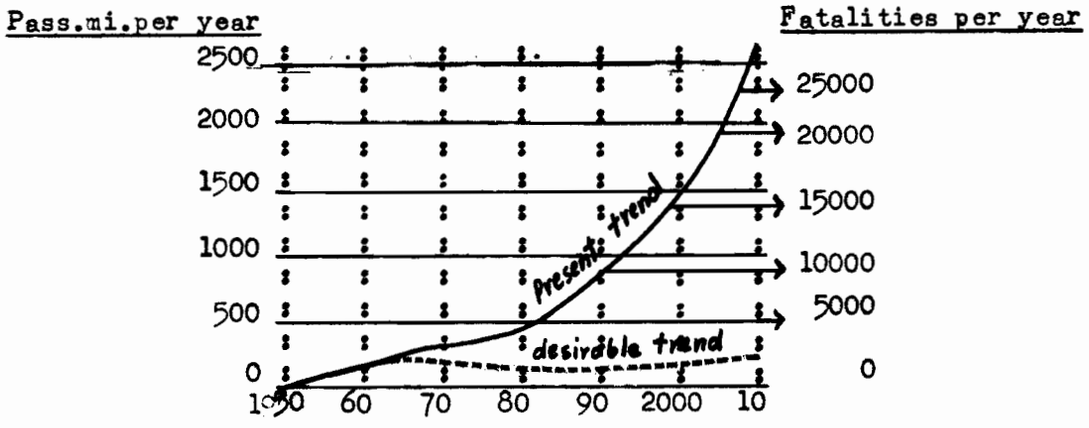
Simultaneously, the world deals with a spectre of increased speed and size. Although the threat of supersonic aircraft may not materialize, and there is some shift toward medium range jets, such as the DC-9, commercial planes have increased their speeds from 500 km. per hour to 1000 km. per hour. The supersonic transport jet would behave much like a projectile, flying on a strictly controlled flight path.

It is questionable that the pilot would be given any leeway to control the plane manually. Instead, navigation would depend on automatic air traffic control all the way. Pilots would not be able to avoid collisions. The minimum 25 seconds which a pilot needs to react and navigate away from such danger would be reduced to 5 seconds. Unless ATC is able to completely assume the pilot's navigational functions, the collision probability will increase evenly with aircraft speed.

Additionally, it is generally acknowledged that the supersonic would have to land as soon as it arrived at an airport, because of its small fuel reserves.[5] At the present time, there is no preferential treatment.

Even a modern jet can of course carry two to three times the number of passengers that could be carried by a propeller driven plane, and that means more lives are involved if the plane crashes.

The accident rate is not declining substantially[6] because, although safety in the air is increasing, it cannot keep step with the faster paced growth in traffic volume.[7] Bo Lundberg,[8] in his Guggenheim lectures on safety in aviation, finds that if the present accident rate continues, 25,000 persons will die annually from aviation accidents, among scheduled carriers alone, in the year 2010.



If general aviation and charter flights are added, then the number of aviation fatalities will jump to 60,000 per year in 2010. This convinces Lundberg that

> ...if flight safety cannot be radically and rapidly improved but instead continues at the present risk level, this will constitute the most serious hindrance conceivable to a sound and rapid growth of civil aviation. It follows that <u>there can be no more efficient means of promoting civil aviation than making it much safer than it is today</u>. This is an unconditional demand if the longterm expansion of civil aviation is not to be severely hampered by lack of public confidence.

The value of aircraft is rising and the risks are greater. A large modern commercial jet costs about 7 million dollars, which is several times the cost of a propeller driven plane. The larger jet can contain a higher payload. The value of a single jet load of passengers may be illustrated by the $900,000 recovery for loss of a single life in <u>Berner v British Commonwealth Pacific Airways</u>.[9] An air carrier's existence may be conditioned upon an avoidance of such large losses, and ideally such a risk should be lower than before jets were introduced.

<u>b. Investments Require Protection by Law</u>

Control services are becoming very costly. Using the Federal Aviation Agency in the United States as an example, we notice that the operating cost of the Agency has risen to $717 million today from 131 million ten years ago. Its Air Traffic Control Service cost has risen from 5.2 cents per mile flown in 1955, to 16.8 cents per mile in 1960.[10] It is becoming increasingly difficult to get legislatures to furnish the tax payers' money for the spiralling cost of air traffic control.

An increasing number of states have tried to meet the cost of such large operations by charging fees for overflight ATC services.[11]

Both the Chicago Convention and the International Air Services Transit Agreement permit the charges, if domestic aircraft are similarly required to pay.[12] The onus is keenly felt. Some airlines believe that they are pressured into payment through required radio contact with air navigation facilities; and some airlines only exist because of free air navigation services.[13]

2. The Consequences

The consequence of these statistics is obligatory ATC with a resultant shift of actual power toward ground control authorities.

a. Obligatory ATC Services

ICAO sets a high minimum standard for ATC services, detailed in the Annexes of the Chicago Convention, including all practicable safety and guidance measures, radio and meteorological services, and of course, aid to foreign aircraft in distress.[14] If a Member State cannot afford to operate all standard navigational aids, it must notify ICAO,[15] and other states will be informed of this difference in standard. Poor countries may agree to have ICAO provide services for a reasonable fee.[16] In fact, however, uniform air regulation is so important for foreign carriers to prevent tangling with different modes of regulation each time they cross a state border, that all contracting states have collaberated to produce similar rules, standards and procedures.

Over the high seas, ICAO has been delegated the duty, through the Convention Annexes, to regulate air traffic and all Contracting States must accept the rules and prosecute offenders.[17] In the North Atlantic Ocean, nine floating air navigation service stations are operated under

an international agreement which is coordinated by ICAO. Nineteen states participate: some provide ships, and others make cash payments. Contributions are proportionally based on the amount of benefits received.[18]

Although large airspaces, as over USSR and Red China, are not directly subject to the Convention, heavy pressure is exerted by the Members, who are a great majority of the world's states, on non-Members to conform to the rule in the air established by them.

The effect of ICAO on standardizing ATC services is excellent as far as it goes. But it cannot require countries with a low air traffic density to enact measures which might be necessary in other states contending with high density traffic. At the moment, each state must attempt to meet its own requirements.

b. Area Positive Control

The United States must handle such dense air traffic that it has had to pioneer new ATC methods.[19] It has established Area Positive Control service[20] above a 24,000 foot air floor throughout the continental United States. The ATC extends substantially beyond the 3 mile limit over the high seas, and the FAA hopes to lower the air floor from 24,000 feet to 18,000 feet.[21]

The positive control service uses a 64 code, 10 channel beacon system. Corresponding to this method of ground radar, the airplanes are equipped with a transponder which responds automatically to the control tower's radar, and can give position reports. If radio communication is lost, the pilot merely activates his transponder, which then indicates emergency on the controller's radar scope, and the controller calls an alert.[22] In fact, the transponder is so intricate that its signal to the ground control not only identifies the plane, but auto-

matically reads its altimeter and reports its changing altitude.[23]

The convenient new system would enable a jet pilot to fly from Washington D.C. to Los Angeles without any position reports, instead of the approximately twenty which were previously required. Naturally, the lessened communication workload frees the pilot and the controller for other duties.

In order to use positive control airspace, a pilot must fly Instrument Flight Rule and be qualified to do so.[24] He must file a flight plan, and must be cleared by ATC before entry into the area. The aircraft must have a 360 channel VHF equipment, or its military equivalent; VOR or TACAN equipment for navigation, and a transponder.[25]

For our discussion of the liability of the ATC agency, it is important to note that in a positive control area, the pilot may not change his IFR flight plan to VFR during his flight. Neither may he operate the plane cantrary to ATC instructions in the positive control area, or in any other area which is subject to ATC. The pilot is forbidden to deviate from his ATC clearance unless an emergency exists, or there is radio failure, in which case an amended clearance can be obtained.[26]

It is estimated that 50% of all passenger miles in the United States will soon be flown in the airspace above 18,000 feet where area positive control will exist.[27]

In the near future, the FAA will outfit its ATC system with computers which will be able to automatically track 4,096 transponder equipped aircraft simultaneously. The computers may be able to detect dangerous situations in the air and alert a controller who has not observed them.[28]

Radar observation permits far better utilization of airspace, but increases the burden of vigilence on the air traffic controller,[29] and certainly the FAA must shudder at the legal responsibility it is assuming by Area Positive Control.

B. PARTICIPANTS

The effect of technological change increasing and mechanizing ATC services to the aircraft, has been to swing power away from the groups headed by the aircraft commander, including the owner and manufacturers, and toward the group headed by the air traffic controller, including the government and its agents. The group headed by the air traffic controller is assuming greater liability for negligence, and those claimants who are losing responsibilities to the ATC agency, are gaining grounds for possible suits.

1. The Basic Bipolar Power Situation: ATC and the Aircraft Commander

The discussion of Area Positive Control leads us directly to a consideration of the aircraft commander's changing position, that is, his growing, obligatory reliance on ground control authorities.

The aircraft commander's position has, since the early history of air law, been considered a direct transfer from the sea captain's position. Specifically, they hold in common exclusive command of their craft.[30] Annex 2 of the Chicago Convention, which states that "The pilot-in-command of an aircraft shall have final authority as to the position of the aircraft while he is in command," has been adopted in the national legislation of most ICAO member states[31] The final authority vested in the aircraft commander is a strong argument for denying liability of an ATC agency, because the commander apparently has the power to accept or reject instructions from the controller.

In reality, however, the aircraft commander's authority is drastically limited by air control regulations. A conflict exists between the provision that he has final authority, and the regulations which state that he does not have final authority in certain situations. The

aircraft commander strongly depends on the controller's instructions; the controller also needs assurance that collision with other aircraft can be avoided. Some types of instructions must be made compulsory.

This is true to such an extent that it is law. Eurocontrol precisely states that the aircraft commander is obligated to comply with air control instructions.[32] FAA regulations prohibit anyone from operating an aircraft contrary to ATC instructions in any area where ATC exists, and makes a violation of any rule, regulation or orders relating to flight safety punishable with a fine of up to $1000.[33] The pilot may not deviate from an ATC clearance unless he has obtained amended clearance. In area positive control the pilot is prohibited from changing his flight plan, he cannot avoid compulsion by changing from IFR to VFR. In case of emergency, however, the commander is given discretion to act.[34] But when a pilot has only seconds to react to an emergency, "ultimate authority" is of little use.

In The Grand Canyon Collision, 1956,[35] the pilots of the TWA Lockheed and United Airlines DC-7 had less than half a minute reaction time to avoid collision. They failed. In a 1960 Collision between a Caravelle jet and a light propeller driven plane in Paris,[36] where the light plane was destroyed and a large hole was torn in the body of the jet, it was estimated that the pilots could not have seen each other until 10 seconds before the accident. Add to this Bo Lundberg's report that it will be impossible for pilots to avoid collisions between supersonic jets because they will have only 5 of the 25 seconds needed to react and to navigate.[37] In fact, the trend in piloting is found in military aviation where the pilot is rapidly being replaced by ground controlled command rockets.

Who, then, is to be held responsible in an ATC-caused collision?

The commander, who has "final Authority," or the controller, whose directions are obligatory?

One might build a system of liability, as does Tancelin, on a sharp division between the situations where the commander is in final authority, and when the ultimate authority is vested in the controller. That reasoining rests heavily on a sea law analogy where the ship captain has authority over maneuverings, but the seaport officials have authority over traffic movements. Thus in air law, the aircraft commander has final authority over traffic movements. The commander may choose whether or not to use air traffic services, but once he chooses them, then the responsibility passes to the controller.[38] He who has ultimate authority shall bear the responsibility for an accident.

In this writer's opinion, it is of little value to build a system of liability on a situation that is still in flux. That is, the commander's final authority is shrinking so rapidly, through positive control and faster aircraft, that we may be discussing a situation which will be rare in 10 years. Although it is theoretically possible to found a liability system on the basis of who is in authority, our legal processes move so slowly, that by the time we have developed related legislation, technology may have passed us again.

It is this writer's belief that a proof of fault system would be much more satisfactory.

Until an appropriate international solution is effected, within which the aircraft commander's position will have to be reconsidered, he remains a curious illustration of our outdated air law system.

2. The Liability Situation: Groups Interested in the Legal Regulation of ATC

The basic issue is the struggle between the defendants headed by the air traffic controller and the claimants headed by the aircraft commander, but there are of course many other groups involved, siding with either, or both, or neither. Governments may have conflicting interests and have to decide between them. Certain groups will respond immediately and effectively, because they are large, well organized and wealthy, whereas individuals such as passengers belong to no special organization which can advertise their position. There are groups of scholarly observers which are attentive to the legal technicalities but not deeply involved in the outcome. Nevertheless, a division of participants into claimants, defendants, and neutrals is useful as a reference to identify international pressure groups.

a. Claimant-Minded Groups

i. THE CREW: Powerful organizations represent the crew, to whom ATC negligence is a matter of life and death.[39] The pilots are organized into a strong trade union which is called The International Federation of Air Line Pilots Association (IFALPA) on the international level, and has sent observers to the ICAO Legal Committee discussions on regulation of ATC liability. The airline navigators are similarly organized into the International Airline Navigators Council (IANC). General aviation pilots, who often own the aircraft which they fly, are represented by the International Council of Aircraft Owners and Pilots Association (ICAOPA).

ii. THE AIRCRAFT OWNERS, THE OPERATOR AND THE AIR CARRIERS: The International Air Transport Association (IATA) is the strong voice of the international airlines at the ICAO meetings on ATC liability. Since IATA headquarters are located next to ICAO headquarters in Montreal, influence on almost any level can be exerted. Although it is a trade organization, IATA has official status and is incorporated in Canada under a special statute.[40] The airlines are of course potential claimants against ATC agencies, like the crew.

Related to their cause are airline supported organizations, such as European Airlines Research Bureau (EARP) and even the European Institut du Transport Aerien (ITA).

Owners of general aviation aircraft can of course be represented by ICAOPA.

iii. THE PASSENGER: This most important person, for whose benefit air transport is created, makes up the ranks of the most poorly organized and least effective group. Since the passenger risks damage when ATC is negligently operated, he is claimant-minded, but he must largely rely on other organizations to represent him. Naturally, a government which tends to have the public interest at heart, is his best defender.

Many passengers buy aviation insurance, however, and The International Union of Aviation Insurers particpates in ICAO Legal Committee meetings through observers.[41]

iv. THE SHIPPERS AND CONSIGNEES OF FREIGHT SENT BY AIRCRAFT: The businesses which send freight by air are not well organized, but do, as a rule, take out insurance. These insurance companies, as well as the freight forwarders, are organized, and interested in protection of goods from ATC negligence.

v. AIRCRAFT MORTGAGE HOLDERS: Banks and large insurance companies which hold mortgages in aircraft, protect their interests through specific groups like the International Union of Aviation Insurers, and general organizations like the International Chamber of Commerce, which are wealthy and effective.

vi. PERSONS HAVING CONTRACTUAL RELATIONSHIPS WITH THE OPERATOR, CONCERNING LATER USE OF THE AIRCRAFT: These persons represent airlines, in which case IATA champions their cause; they may be businesses which have chartered an entire aircraft, in which case there is no real effective pressure group; or they may be travel bureaus, which have chartered planes or perts thereof, in which case the Universal Organization of Travel Agents Association (UOTAA) takes good care to protect them.

vii. PERSONS ON THE SURFACE: Naturally persons on the surface are interested in protecting themselves from damage caused by colliding or crashing planes. Although property owners' associations exist and insurance companies protect their obvious interests, persons on the surface would rely largely on the government to represent the "public interest" in the formation of a convention on ATC liability.

viii. ALL OTHER PERSONS WHO MAY SUFFER DAMAGE CAUSED BY ATC ACTIVITIES: There are more remote participants, people other than crews, who are left unemployed, or are indirectly injured by ATC acts or omissions. The more remote the participation is, the less serious becomes, of course, their interest in regulation of ATC liability.

b. Defendant-Minded Groups

i. AIR TRAFFIC CONTROLLERS: The people who perform the air traffic control will of course seek to protect themselves from liability. Their objective would be inclusion within the protection of a convention on ATC liability, just as servants are included under the Hague Protocol.[42]

On the international level, the air traffic controllers form the still young International Federation of Air Traffic Controllers Association (IFATCA) and it has begun to send observers to ICAO meetings. The aims of IFATCA are those of similar organizations:[43]

> Representation at other international meetings has a number of aspects: Taking part in discussions gives an opportunity to introduce professional ATC knowledge in the deliberations of for instance, Air Line Pilots, Navigators, and manufacturers. At the same time it affords us to hear the other side. In some instances a basis can be found for a common policy to be pursued, which definitely increases chances of realization of policy at ICAO level. The growing number of contacts with international organizations gives an impression of our growing activity and influence. This part of our work is essential for success and we are grateful therefore for the pleasant contacts established with IFALPA, IANC and other international organizations.

IFATCA consists of national air traffic controllers organizations in Austria Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, United Kingdom, with recent affiliations from Canada, Italy and Uruguay.[44]

On the national level, also, the air traffic controllers are usually organized into associations. The United States Controllers are gathered into the strong Air Traffic Controllers Association (ATCA) which is not yet a member of the International Federation of Air Traffic Controllers' Association.

ii. GOVERNMENTS AND THEIR AGENCIES: A variety of interests must be ascribed to governments, including the "public interest" which would involve them in claimant-minded groups. Air Traffic Control is one of

their lesser functions. Defense, education, over-all economy, and prestige are more important than preventing loss in case of injury caused by government ATC. Yet, most of international air traffic control is furnished by governments in a way that makes them liable for ATC-caused injury. Direct payments, such as the $3,000,000 for injury in the Staten Island Collision[45] are felt in the budget.

In this respect, let us regard the FAA. We note that of the 45,473 employees, a majority are directly or indirectly involved with air traffic control. And FAA authorities are a strong part of the American delegation to ICAO, and represent the government at the diplomatic conference where regulation of ATC will be shaped. Since the FAA is concerned with preventing large payments for ATC-caused injuries, this part of the government will tend to be defendant-minded in its attitude. Similar examples can be taken from the other government agencies which actively participate in ICAO deliberations.

iii. LOCAL AGENCIES SUPPLYING ATC: The government of the political subdivisions, such as an independant municipal airport which supplies ATC may be liable for injury caused. This group will also wish to prevent losses caused by ATC acts or omissions.

iv. PRIVATE ATC OPERATORS: Naturally the private ATC operator tries to avoid liability for his acts. In this respect his interest concurs with that of his government, so that he can depend on government support. The private ATC operator is often the operator of the airport, so that associations such as the Air Port Operator's Council, and the American Association of Airport Executives in the United States, would support his cause.

v. INTERNATIONAL ATC AGENCIES: Eurocontrol, ASECNA, and COCESNA are the international ATC organizations.[46] Their interests are closely related to those of the governments which created them, so that they can there seek protection. In addition, the international ATC organizations send observers to discussions of the ICAO Legal Committee.[47]

vi. THE MANUFACTURERS OF ATC EQUIPMENT: This group must be categorized as defendant-minded. They attempt to prevent liability for ATC injuries which can be traced back to defective equipment. They seek the support of the International Chamber of Commerce and national trade groups.

c. Neutral Observers

i. THE INTERNATIONAL LAW ASSOCIATION: Regularly represented at meetings of the ICAO Legal Committee is the International Law Association,[48] which in a scholarly way is interested in the development of international law.

ii. TEACHING AND RESEARCH INSTITUTES: The International Institute for the Unification of Private Law in Rome, seeks to unify the different national air law legislation by adoption of "model" laws. It would be interested in regulation of ATC liability by an international convention.

In addition, there are more specialized groups such as the Institute of Air and Space Law at McGill University and the Institut für Luftrecht und Weltraumrechtsfragen which examine the ICAO Legal Committee's work on ATC Liability.

Keeping in mind these pressure groups, we will move forward to consider how effective national and regional regulation of ATC liability has been, and what disparities in legal systems exist with which an international solution would have to cope.

C. PRESENT NATIONAL AND REGIONAL SOLUTIONS

In order to discover an appropriate international solution, we will investigate how a few main aviation states and regions have coped with the ATC problems. Since aviation problems are most intense in the United States, the bulk of air law is found there. The usual dichotomy between Common Law and Civil Law appears to be rather irrelevant here, and the issue will be clearer if we simply contrast U.S. law with United Kingdom, Germany, France and Spain.

The importance of sovereign immunity, which is discussed only superficially here, must not be forgotten. Since air traffic control is government operated in most states,[49] sovereign immunity may be one of the greatest problems to overcome. A few states still attempt to hold on to the ancient doctrine that "The King can do no wrong."[50]

1. The United States Solution

The United States management of the ATC liability issue can be seen from three vantage points: the way in which sovereign immunity was waived, how the proof of fault system fits the ATC liability situation, and how the U.S. manages ATC services which over-reach its borders.

a. Waiver of immunity

Although it is unlikely that contract would come into question in an ATC law suit, the United States has allowed itself to be sued for breach of contract since the Tucker Act of 1887.[51] More to the point, the United States waived sovereign immunity for torts a year earlier than U.K. Under the Federal Tort Claims Act of 1946[52] suits against the Government for negligence, wrongful act or omission by its employee caused while he was acting within the scope of his employment, are permitted,

if a private person would similarly be liable to the claimant under the laws of the place where the act or omission occurred.

There is an important exception. The Act does not permit suits against employees performing a discretionary function or duty.[53] What is that? Dalehite v United States defines it as an employee's ability to act according to his own best judgement.[54] For a function or duty to be discretionary, there need be more than an initiation of activity. Discretion includes any employment where there is room for policy judgement. Does this apply to air traffic controllers?

Let us consider the following case. A certain air carrier had received clearance at Washington National Airport from the government operated control tower. The approaching plane collided with a foreign airplane while still in flight. The United States was held liable for the negligence of its control tower personnel because the tower failed to inform the two planes of each other's activities and because it gave landing clearance to both for the same runway. The court held that since the government had undertaken to operate a civil airport and control tower, which a private party could have done, it could be held liable for the negligent acts of the air control tower operator. The Federal Tort Claims Act waived immunity. The control tower operator's acts were not discretionary.[55]

Aero Enterprises, Inc. v American Flyers Inc., & United States supports that case.[56] There, the District Court similarly held that the Federal Tort Claims Act had waived governmental immunity.

The writer's conclusion that the United States has waived immunity for the acts of the air traffic controller is supported by recent legal writing. Nagano positively states that the United States is liable

for negligent acts and omissions of air traffic control operators,[57] and Guerreri finds that the discretion exception from the Federal Tort Claims Act does not apply to the air traffic controller who guides and supervises air navigation. He states that the United States will be liable in the same manner and extent as a private employer.[58] The Secretariat Report of the ICAO Legal Committee quotes Guerreri's conclusions approvingly.[59] This writer takes exception to Guerreri's last conclusion, because the United States is not liable under the Federal Tort Claims Act quite like a private individual (after the immunity has been waived): it does not have to submit to a jury trial of its negligence like a private person. It can only be tried by the judge without a jury.[60] This is an important difference, because a jury trial is customarily chosen by the plaintiff in a negligence case in order to obtain a higher award than he believes a judge's fact-finding would have rendered him.

Having disposed of the discretion clause, let us look at the Federal Tort Claims Act from the point of view of the international carrier. Claims arising in foreign countries are exempted, and foreigners are not permitted to bring suit in the United States unless their country grants reciprocal rights to U.S. citizens.[61]

The one other immunity which is significant to us regards ATC operated by municipal airports. These airports can claim government immunity for municipal government functions, that is, acts performed for the common good. However, there is no immunity for airport functions of private or proprietary nature, that is, those performed for the benefit of the airport.[62] Therefore, in a negligence suit, one would try to prove that the ATC services were proprietary.

b. ATC Liability and Proof of Fault

We move now to a discussion of how one determines ATC negligence in the United States. Does the air traffic controller have a duty of care, and if so, what is its standard?

Air traffic rules which indicate the special duties of both the pilot and the air traffic controller exist.[63] The air control agency must exercise reasonable care when it gives instructions which an aircraft commander is legally obligated to obey. The agency is liable if the breach of this duty was the proximate cause of damage to the air carrier.[64]

The issue is simple when the aircraft commander is legally obligated to obey air traffic control instructions; he need only show that he had no choice. Proof of responsibility becomes more difficult if no legal obligation to obey exists. However, legal compulsion is not necessary. ATC services may have been voluntarily demanded by the pilot, in which case the controller will still expect to be obeyed when he gives instructions. If the controller then breaches his duty of care, ATC liability exists.

We conclude that the control tower is liable for negligently given instructions, if they proximately result in accident while the pilot was obeying them. The burden then rests on the air carrier to prove, if requested, that it was not contributarily negligent.

We have spoken of the controller's duty of care. How does the court determine what the standard of care must be? By asking what can reasonably be expected of a controller, by taking into account the conditions under which he works, from his contract to his physical surroundings, including whether the pilot relied, or reasonably should have relied on his instructions.

The basic function of the air traffic control agency is to prevent collisions; it has a duty to separate aircraft.[65] Therefore, if

the agency negligently fails to keep aircraft apart, it can be held liable for the damages caused by collision. That is the usual legal basis for holding ATC responsibile.

A good illustration is United States v Union Trust Company, in which the federal district court held the ATC liable for its negligence in failing to separate two planes which collided as they were both preparing to land at Washington National Airport.[66]

A supporting example is Johnson v United States, wherein the federal district court found that the ATC agency had a duty to determine a safe distance between two planes to prevent collisions.[67]

We can also assume that the U.S. Government tacitly admitted liability of the ATC agency for failing to separate the planes in the Statan Island Collision by agreeing to pay 24% of resulting damages.[68]

Eastman believes that the reliance theory, which is a variation of the ordinary tort basis, is the soundest way to recover from the control agency.[69] When a person gives gratuitous services to another, he is liable for damages caused by his failure to exercise "such competence or skill as he possesses or leads the other reasonably to believe that he possesses."[70] The pilot has a choice: he can either fly visually, or he can fly on instruments and be completely dependant on the agency. If he chooses to fly by instrument, he relies on the ATC controller, who is liable for damage caused by his failure to exercise the skill that he possesses or leads the pilot to believe that he possesses. For instance, the pilot may choose to rely on air traffic control because he believes that to be a safer flight than visual flight. He may also rely on the agency to guide him in the shortest way to his destination so that he need carry less fuel, but can carry more passengers.

Can the air traffic control agency be held responsible for navigation aids? It was held in Finfera v Thomas[71] that the City of Detroit had no duty of reasonable care towards a pilot in operation of light sig-

nals from the control tower; those signals were only an accomodation. This is an old case which does not reflect the present day relationship between the ATC tower and the pilot. Air navigation aids have developed tremendously since then, and the increasing need for safety makes us say that the government should be held to a duty of care in operation of navigation aids. This is particularly true, because the distinction between ATC and navigation aids is fading;[72] the two services are being united into one.

There is also reliable authority found in sea law cases to the effect that the government is liable for negligent maintenance of navigation aids. In Indian Towing Co. v United States[73] the government was held liable for negligent operation of a light house. In Otness v United States[74] the government was held liable for its failure to remove a channel light, and in Somerset Seafood Co. v United States[75] the government was held liable when it failed to put a marker on a wreck which was submerged. Support for this belief is found in Marino v United States[76] in which the control tower was liable for failure to give light signals to a tractor operator on the runway, because he had been led to expect the signals to avoid collision with incoming aircraft.

Is the ATC agency liable for negligently issued meteorological information? Smerdon v United States is partly in point.[77] "The responsibility of determining whether or not a given weather condition is safe for landing" does not dwell on the air traffic control. The duty of analyzing the meteorological information, of deciding if the weather is safe for landing, rests on the pilot. Of help is also McKlenny v United Air Lines[78] in which the air traffic controller's duty to warn of potentially hazardous conditions is discussed, and resolved that as a matter of law there is no duty to so protect the pilot in uncontrolled airspace.

There is, however, no conclusive case law concerning ATC duty to exercise reasonable care in giving meteorological service. This writer suggests that when meteorological information is given, the ATC agency should be under duty of care to the pilot because the meteorological conditions are, after all, related to the safety of flight in the closest way. Dependance on accurate weather information is increasing. Jets have a greater requirement and dependancy on exact weather information than older aircraft, because they burn fuel faster and cannot wait in the air as long. The supersonic jet would have even less reserve time, and depend more upon correct information.

In summary, suits against the ATC in the United States are based on tort. The claimant must prove the defendant's fault, that is, that the controller breached a duty of reasonable care. Recovery in the Federal Tort Claims Act is not limited, but if the particular state in which the action is brought has a limit, that will apply.

c. ADIZ and Interstate Agreements

The high speeds of airplanes necessitate far-reaching control of airspace, which cannot cease at state borders. The Chicago Convention recognizes this, in urging co-operation between neighboring states in air navigation services. The natural step is to form regional ATC organizations. The United States, however, has tried to solve the problem in another way. In a recent agreement between Canada and the United States, each country is permitted to extend its air control service 50 miles on the other side of the border, in the trust that uniformity of ATC regulations will prevent confusion.[79] However, a nice liability problem would be posed if negligent information were given to a foreign plane in an adjoining country causing it to crash there.

In Area Positive Control, and the Air Defense Identification Zone

(ADIZ) which demands immediate identification, location and control of civil aircraft over much of the high seas, the United States has again over-reached its borders. Pilots are required to file flight plans before entering ADIZ and position reports are required of aircraft intending to enter the USA.[80]

CADIZ (Canadian Air Defense Identification Zone) is Canada's slightly stricter complement to North American defense.

2. Other Important National Solutions

a. United Kingdom[81]

The English Crown enjoyed immunity from tort liability until the Crown Proceedings Act of 1947 permitted suits for torts committed by servants or agents of the Crown, if a private employer would similarly be liable for their performance. That also opened the door to legal treatment of indemnity, contribution, joint and several tort feasors, and contributing negligence of the Crown.[82] Suits for breach of contract are permitted by Section 1 of the Act.

In England, one would sue in tort for ATC-caused accidents outside of aerodromes. Since there are no English law cases involving ATC liability, it is difficult to predict exactly how U.K. Courts would decide charges of negligence. If a negligent act or ommission were defined as 'a breach of duty to exercise reasonable care which results in damages to the defendant,' Shawcross and Beaumont believe that air traffic control is liable for failure to issue, or negligent issuance of ATC instructions. Most important, the authors state that this duty is not limited to "the categories of instructions which the recipient is legally bound to obey,[83] but would extend to instructions or advice issued by the controller in the belief that they would be carried through, even though the pilot might have no legal obligation to obey.

There also appears to be a duty to exercise reasonable care in the operation of navigation, approach and landing aids.[84]

Meteorological information and related aid would probably be subject to a similar duty of care in the United Kingdom, but Shawcross and Beaumont are less certain about that rule, unless there is a contractual or statutory duty to provide the services: then there is no doubt that liability for carelessness exists.[85]

A curious feature of U.K. law is that a contract exists between the pilot and the airport owner. If there were liability for malfeasance within the aerodrome, it would be based on contract. However, it is legal for airports to waive their liability. So when ATC services are provided by the airport proprietor, even if that proprietor is the government, there is no basis for suit. All planes are subject to the contractual waiver included in the landing conditions.[86]

We conclude that an ATC agency can be sued in U.K. for failure to exercise reasonable care, and that there is no limitation on liability.

b. Federal Republic of Germany

Air traffic control in Germany is furnished by the federal government. A special state agency has been created for this purpose which is part of the administration; the air traffic controllers are federal employees.

The Basic Law of Germany, Art. 34[87] holds the state liable for violations of official obligations to third parties, but the state retains right of recourse in the case of willful intent or gross carelessness. State liability is further provided for by section 839 of the German Civil Code.[88] Consequently the German federal government is liable for proved fault, attributable to its air traffic controllers, and which

causes the claimant injury.

When foreign claimants are involved, German law[89] requires that the state is permitted to be held liable only if reciprocity of the possibility for recovery exists, that is, the foreign national's state must similarly permit recovery by German nationals in the foreign court.

The author knows of no instances where the federal government has been held liable for negligent exercise of air traffic control services, so that ouside of establishing the state's liability for faulty service by its ATC agency, it is not possible to further distinguish between liability for air traffic control, navigation aids and meteorological services; naturally the proof of fault depends on the nature of the service.

No limitation on the liability of the German government exists. However, Meyer suggests that there might be a need for a limit on liability since today it is conceivable that a state could be sued for computer caused damages which could not be traced back to a human controller.[90]

c. Switzerland

The recent Swiss federal law of 14 March , 1958, on the liability of the federal government, its executive officers and other federal employees, permits state responsibility for the negligent acts of the federal air traffic control.[91] A special government controlled agency, Radio-Suisse, provides all ATC. It is primarily liable, and the state is secondarily liable for damages which the agency itself cannot pay.[92]

The ATC agency can be held responsible if it is shown that the controllers acted contrary to their legal duty. The action would not be based on negligence, but on proof that they did not comply with the law.[93] The law in question is found in those Annexes to the Chicago Convention pertaining to ATC.[94] Therefore anytime the controller acts contrary to the rules laid down in the Annexes, thereby causing injury to the claimant, liability for damages exists.

In addition, there is the rule that it is contrary to law to cause a dangerous situation to happen without doing what is possible to diminish the consequent damages. Specifically, under Art. 1 of the Air Traffic regulations of the Post and Railroad Department, it is the task of ATC to prevent collisions involving aircraft in the air as well as on the ground. On the basis of that, writes Hodel, a Swiss Commentator, "it can be argued the ATC had failed to do its duty and thereby not complied with the law by the mere fact that a collision happened."[95] That is, absolute liability exists.

Swiss law does not provide a limitation on damages.

The airport at Basel-Mülhousen must be distinguished because it is used jointly by France and Switzerland. It is administrated through the French-Swiss Treaty of July 4, 1949. By the treaty, air traffic control, including all navigation aids, is the responsibility of the French government, under French law.[96]

d. France[97]

The French Government permits itself to be sued if its employee has acted within the scope of his employment. It must be a government service-connected fault,[98] or damage caused by public works.[99] However, in the French Civil Law system, the victim must bring suit under a special administrative law formulated by the Council of State. The State cannot be sued like a private citizen.

In a French case, Affaire Genin, Arret du Conseil d'Etat 1° June 1934, the pilot received an erroneous government message relating to navigation. Although the court held that the entire burden to prove government negligence was on the plaintiff, and that she had failed to sustain her burden of proof, the French courts do allow recovery for negligently maintained navigation services.[100]

Savatier states, in conformity with the case mentioned, that the Council of State normally requires a serious government fault before it will permit liability. However, liability might be permitted for an ordinary fault, if that were compatible with the interest of the government. Only in special areas such as public works and riots does the Council of State admit liability without fault.[101] No case has characterized ATC as part of the public works, but it is noteworthy that in one case, it was held that a grant of permission to land was part of the function of a public works, that is, the airport.[102]

We conclude that the Council of State will permit suit if its air traffic controller is very obviously negligent, that the state is not sued like a private person, but under rules promulgated by the Council of State, and that the entire burden of proving his case rests on the plaintiff. It may be added that French law does not provide a limit on recovery of damages.

e. Spain

The development of state liability in Spain has an interesting history. The Spanish Civil Code of 1889 provided that the state would not be liable for the wrongs committed by a civil servant;[103] in fact, civil servants were themselves liable for their acts or omissions.[104] That privileged legal position soon became much criticized,[105] and so the state began slowly to assume liability in limited situations. In a law important to aviation, The Royal Order of December 30, 1926,[106] state liability was permitted for damage caused to property by state aircraft.

A general state assumption of liability is not found until recently when the Expropriation Act of December 16, 1954 granted individuals the

right of recovery for injuries caused by state activities.[107] Therefore, one can now recover from the Spanish government for ATC negligence.

To recover damages for extra-contractual activities such as injury caused by air traffic control, it is necessary to bring the law suit into a special administrative court,[108] which has limited jurisdiction.[109] One could go outside of the courts to present a case directly to the state under the Act of Administrative Proceedings of 1958,[110] in which case the claimant retains his right to later press the claim through the courts.

The liability of air traffic control in Spain is illustrated by one important case so far. A plane was approaching the San Luis (Mahon) airport; although the plane was heavily loaded, gusts of wind blew across the runway and the ATC tower failed to prohibit the plane from landing. Consequently the government was held liable and since a rule of absolute liability exists in Spain, all that the claimant had to prove was the cause and the amount of damages.[111]

In Spain the only defense to the State's absolute liability for ATC negligence is force majeure.[112] Spanish law does not limit the State's liability.

3. Regional ATC Organizations

a. Eurocontrol

Europe constitutes a dense air traffic center. Nationally operated ATC proved impractical. Eurocontrol, an international air control service, was therefore created by agreement between Germany, Belgium, France, United Kingdom, Luxembourg, and the Netherlands, and signed in 1960. It has recently been joined by Denmark, Sweden, Norway and Ireland.

It regulates air traffic in any lower airspace which a Member country may agree to transfer, and in all upper airspace above the Member States, or other states, which may ask for Eurocontrol services.[113]

Eurocontrol requires strict adherence by pilots to its air control instructions, except in case of force majeure, and may enforce infractions of its regulations directly in national courts.[114]

Eurocontrol's liability is governed by Art. 25 of the Convention. The organization does not claim immunity from suit. On the contrary, it permits itself to be held liable on the basis of proof of fault. This right is not affected by claims for compensation under national law. The Convention does not set a limit on liability.

b. ASECNA

ASECNA is a public establishment consisting of 12 African States (as of 1961) which are former French dependencies. Its purpose is to provide "regularity and safety" of air traffic in and over the participating states. ASECNA has independent legal status.[115] Violations of its air traffic control regulations are communicated to national authorities for prosecution.[116] ASECNA permits itself to be held liable for its negligent acts on the basis of proof of fault.[117] No limit on liability exists.

c. COCESNA

COCESNA is a Central American international ATC organization providing all ATC in the contracting states. Like Eurocontrol, it obligates pilots to follow its instructions.[118] It can be sued and held responsible like a public utility company.[119] No limit on liability exists.

Although this section has shown the variety of laws with which any form of international regulation will have to deal, it is encouraging to note that there are established trends towards waiver of government immunity and proof of fault. The great obstacle will be partly surmounted when a majority of states view the same issues (government immunity, reliance of pilot on ATC instructions, etc.) in approximately the same perspective.

D. PREPARATION FOR AN INTERNATIONAL SOLUTION

There are several reasons why an international solution is to be preferred over disparate national ones. ICAO recognizes them and is working towards a solution.

1. Certainty, Safety, Equality and an International Solution

Uncertainty of recovery speaks most loudly against national legislation as the sole means of regulating ATC liability. It is intolerable that, depending on where a plane crashes, the claimant may, or may not, get into court, will base his suit on contract or tort, sometimes applying laws of the place of the tort, and sometimes another law. Swift, far-reaching transportation of passengers, which is the heart of air transport, demands international regulation.

When passengers on international flights are drawn from all over the world, it is not desirable that a foreign litigant should be barred from pressing his claim through courts. That there is a tangible legal responsibility on the international level is shown by Eastern Airlines Inc., v Union Trust Co.,[120] which involved a U.S. carrier and a Bolivian military aircraft. The United States was held to be liable for negligence of its ATC agency. Damages amounted to one million dollars. One can clearly see how much would be accomplished if governments, through a convention, waived their ATC immunity against suits by foreigners.

Increased air traffic and ATC demands greater safety, which an international solution can encourage by making states uniformly liable. As Project Beacon[121] emphasizes, high quality ATC demands continuous measuring and inspection. If we say that liability for negligent ATC

forces the agency to keep its service up to standard, then we must conclude that the principle deserves the widest application.

Finally, one can argue that as long as ATC liability remains outside a convention, it is unjustly favored, and a legal vacuum exists, because the passenger's and shipper's and surface owner's claims against the aircraft operator are regulated and limited.[122]

2. History of ATC in ICAO

The Subcommittee of the ICAO Legal Committee, in its Report,[123] repeatedly concluded that "it would be useful if there were international rules for regulation of the liability of air traffic control agencies, and that such usefulness may be anticipated to increase in the future."

ICAO has not always favored international regulation of ATC liability. Its Council decided as early as 1947[124] that international regulation of ATC liability was not needed. The Legal Subcommittee which met in 1964 also saw impediments.[125] It thought that on the basis of past experience, the use of a convention would be infrequent. It is correct that recorded cases involving foreign parties are few, but since some countries do not permit suits to be brought, and some restrict them, we must search for a better measure. Perhaps that is the amount of litigation initiated. In the United States there are 300 cases pending against the Federal Aviation Agency. Since international air traffic is increasing, and safety is not, and there is continually more dependance on air traffic control services, we can only suppose that in a decade a good percentage of those cases will be pressed by foreign parties.

The ICAO Subcommittee found that the "complex and difficult" issues of ATC liability would complicate drafting a convention.[126] Of course that is true! Defining the scope of the convention is necessarily a new

issue, but not unsurmountable. A system of liability and a decision on whether liability should be limited are not new issues. A wealth of related materials is found appending to other air law conventions.

The subcommittee decided that general acceptance would be necessary in order to justify a convention on ATC liability.[127] In other words, unless many states, including the nations most prominent in aviation joined a convention, it would have no value. Although objections can be removed in the process of drafting, the real test of acceptability does not come until after the convention has been written.

The legal subcommittee could also have considered whether it is best to make organizations which perform socially desirable services liable for their acts. Air traffic control is a non-profit service which functions to insure safety in the air. However, the sheer number of aircraft handlings performed by ATC suggests that it should be subject to the scrutiny of the courts. If it is constantly legally tested, its public service will undoubtedly improve.

It may be all too simple to say that unless there are very good reasons for a convention, it should not come into existence, but it is true that the scales must strongly favor one, before it is drafted. In weighing the pros and contras, the subcommittee decided that the sum of issues clearly favored international regulation for liability of air traffic control agencies.[128] In fact, by an overwhelming majority, the Legal Committee at its 1964 full meeting, decided to continue the study of ATC liability.[129]

Four ways in which this could be accomplished were suggested:[130]

1. By a special convention on ATC liability
2. Incorporation of ATC liability into a consolidated convention which would also regulate liability for damage caused by foreign aircraft to third parties on the surface, and aerial collisions.

3. Combination of ATC liability with the proposed Convention on Aerial Collisions.

4. Amendment of other air law conventions, to include ATC liability.

This writer adds a fifth solution: regulation of ATC liability within a convention on international responsibility of states for injuries to aliens under the auspices of the United Nations.

We will first discuss a special convention in detail, and then compare it to the other alternatives.

Part II

A SPECIAL CONVENTION ON ATC LIABILITY

A. ANALOGIES FROM OTHER KINDS OF TRANSPORT LAW

An investigation of the legal systems for other modes of transport is necessary, in case valuable precedents might be found for the air traffic controller and aircraft commander, and a basis for ATC liability discovered.

The temptation to be avoided is an inappropriate extension of an entire legal system. The lawyer's desire to make an analogy complete and forceful may lead him to imagine similarities where none exist.

In the end, constructing analogies truthfully is rather disappointing. The subject matter yields counter arguments[1] which make much more interesting reading, and perhaps also have value in underlining the ways in which one's own subject is unique.

1. Traffic Control on Highways

Air traffic controllers and automobile traffic police have in common one function: directing traffic. To carry the analogy further is to entangle ourselves in the traffic policeman's unrelated duties, such as arresting criminals. The following glance at air law history shows us that it is a mistake which must consciously be avoided.

Let us first describe the one pertinent aspect of the analogy. An airplane pilot has an obligation to observe air traffic rules and not to unreasonably endanger the activities of others; the driver of a car has the same duty to observe traffic rules and not to expose other people to unreasonable risks. The traffic policeman enforces these rules on the road, and, like the air traffic controller, directs traffic with

light and radio aids. Both systems strive to diminish danger by keeping the traffic moving.

The distinction arises at this point. The traffic policeman can arrest law breakers, but the air traffic controller does not usually have the power to arrest pilots for violations.[2]

The nature of air traffic control has been described as that of an air police,[3] and in the early history of air law, the police in some states did in fact perform ATC services. In France, a Law of 1924[4] placed air traffic under the control and surveillance of the police.

An even more interesting history of air traffic regulation by the police is found in Germany, beginning in 1925. At first their duties were primarily connected with public security, but then police began to assume the power to interfere for traffic reasons. For example, they could forbid planes, which were not airworthy, to take off, and for security reasons they operated an airplane observer service to compile reports of planes passing in the air. Concurrently, the police gave meteorological reports to the pilots.[5]

German law of 1930 increased police aviation duties.[6] For state security reasons, they could order planes to land, prohibit planes from starting, direct all airplane traffic and in fact, police permission had to be obtained before a plane could take off from a public airport.

Today no air traffic control functions are ascribed to the German police; after the collapse of the Third Reich, air navigation systems were reorganized.[7] But the analogy continues to be drawn. Shodruch, a German writer on air traffic control, sees such comparisons between the two services that he advocates giving the air traffic controllers power of arrest in order, for example, to prevent an airplane from leaving an airport.[8]

In this writer's opinion, the only comparison between the traffic policeman and air traffic controller is the obvious: maintaining an orderly flow of traffic. The ways in which they accomplish that, and the vehicles with which they deal, are so different that the comparison falls apart. The traffic policeman directs a higher volume of traffic, usually near the drivers, able to make arrests at once. The air traffic controller is removed from the pilot, managing his traffic problems with intricate, mechanized aids, with more personal responsibility to the pilot, and more valuable craft at his command. There are usually policeman at every airport. If the air traffic controller spots a serious violator, he need only pick up his telephone and report it.

2. Traffic Control on Railroads

Surprisingly, a railroad analogy shows several cogent points: communications systems which can be compared in certain elementary ways; a need for strict control of traffic; and similar negligence liability to third persons.

In early English railroad history, it was thought that the railroad would, like the highway, become free for use by anyone who paid a toll to the owner. The word "toll" is still used for railroad charges in England. But railroad technology developed so rapidly that it became "utterly impossible to divorce ownership from use." An owner-operator monopoly was established instead.[9]

Before creation of a monopoly in the United Kingdom, railroad transport was performed by several companies which often used each others tracks.[10] In the United States, where there is no railroad monopoly,

that practise exists today. Although U.S. railroad companies usually use their own rails, occasionally the owning company does direct traffic for another, making rail traffic control worth considering as an analogy to air traffic control.

Regarding traffic aids, there is extensive use of light signals and beacons in both transport systems. But as we found in the analogy to traffic police, the air traffic control system is more complicated, involving radar and large computers. Both traffic control systems regulate departures and arrivals very strictly in order to avoid collisions. Since the path of a train is limited to the track direction, avoidance of collisions is of greatest concern to railroad companies. The railroad traffic system's duty is to promote safe, orderly and expeditious movement of trains and to render assistance in case of accident. This certainly corresponds to the air traffic controller's duties.

When we study the railroad liability system, we discover that, at least in the United States, liability for injury to third persons (those who are not passengers) is based on proof of negligence. Third persons can recover from an air traffic control agency in an analogous way. In Erie R.R. Co. v Stewart,[11] a watchman had been voluntarily maintained by the railroad company at a certain crossing. There was no legal compulsion to warn motorists of approaching trains, and the practise was discontinued without notice. The claimant, who had relied on the existence of the watchman, was struck by a train. The court held that once the railroad had assumed the practise of guarding the crossing, it could not be discontinued without proper notice to the public. Eastman analogously states that although air traffic control is voluntarily performed, ATC is liable for injury sustained by anyone who acted to his detriment in reliance on both the existence and quality of air traffic control services.[12]

Beyond this point, the dissimilarities in the two transport systems make it futile to extend the legal analogy.

3. Traffic Control on the Seas

The most fascinating and difficult analogy is with sea law, which is invariably used and abused by writers attempting to establish precedents for air law. There appears to be two general categories in sea law which are of some value to a study of air traffic control. The first is the development of uniform rules for navigation. The second, more specific and more dangerous, is a comparison of the aircraft commander to a ship's commander; and the air traffic controller to the ships pilot, or the harbor authorities.

a. Development of Uniform Navigation Rules

Although certain navigation practices have been observed for centuries, some as ancient as the Rhodian maritime law,[13] and gradually became known as customary law of the sea, not until recently were the sea rules codified. The Brussels Convention, signed September 1910, formed the first internationally applicable rules on sea traffic. The newest International Regulations for Preventing Collisions at Sea went into effect in 1954,[14] and have been adopted by almost all sea faring countries. These rules provide for night lighting, signals, radio communications, radar, navigation procedure, and special instructions for fog conditions. The 1958 Convention on the High Seas,[15] obligates contracting states to ensure safety at sea by utilizing signals and maintaining communications; states are obligated to observe international standards (Art. 10) and to come to the rescue of other ships (Art. 12). All of this is broadly

analogous to the uniform establishment of air navigation rules by ICAO.

In addition, the separate states may enact legislation governing the maintenance of lighthouses, lightships, buoys, and navigation aids, and they may employ oceanography and meteorology to produce sea navigation charts. Several of these functions obviously correspond to the air traffic controller's duties.

The liability attaching to negligently maintained sea navigation facilities, if the states have waived sovereign immunity, is an important precedent for similar liability concerning navigation aids in air law. Otness v United States, Indian Towing Co. v United States, and Somerset Seafood Co. v United States[16] illustrate clearly that the responsibility for maintenance should fall on the government.

b. Precedents for the Aircraft Commander and the Air Traffic Controller

The most misleading analogy has been between the ship's captain and the aircraft commander, because there is a similarity. Both the ship and the aircraft leave the home country for extensive voyages abroad. They become isolated little communities which need to have one person in firm control, the captain, or the aircraft commander. But in sea law, the authority of the captain is unchallenged, "le commandant de bord est maitre a bord après Dieu," writes Lemoine.[17] If we claim a similar unchallenged authority of the aircraft commander to navigate his aircraft, a direct conflict with his duty to observe air traffic control regulations and to obey commands in positively controlled airspace, arises. "The pilot-in-command of an aircraft shall have final authority as to disposition of the aircraft while he is in command,[18] is one of the most serious transferences we have made from one system of transportation to another.

A more valuable comparison exists between the aircraft controller and a ship's pilot, because both are employed to control traffic. Let us investigate this a bit further. The captain of a ship may either voluntarily employ a pilot, or he may be compelled to do so. In the first case, the captain does not have to accept the advice of the pilot, who is merely a member of the crew. But if a pilot is legally required, his instructions must be obeyed, he is not just a member of the crew.[19]

The pilot who is legally required to help prevent collisions, expedite orderly flow of traffic, provide information, notify authorities and assist in case of collision, is the one who is valuable to our analogy. Shodruch, a German commentator, finds that the compulsory instructions form a bond between the pilot and captain, similar to that between the air traffic controller and the aircraft commander.[20]

However, the pilot system is regional, and ATC is national and even international in character. The duties of the pilot compare only with ATC functions of a particular airport, not with the national or international ATC system. Detrimental to the pilot - ATC analogy is also that most pilots are privately employed, whereas ATC is usually government operated, and free. The captain must pay for the services of the pilot. Therefore we must make with Shodruch yet another refinement, and consider only the publicly employed compulsory pilot.[21]

Further than that, the methods of traffic control used by the pilot are different from those of the controller. The pilot is physically on board, and personally directs the ship. The ATC controller of course does not get on board the plane, he directs the aircraft commander from the ground by increasingly complicated ATC machinery to the extent that we now are talking about automatic ATC. But with the advent of positively controlled airspace, where the airplane pilot abdicates command to the controller, the pilot-controller analogy is becoming more pertinent.

Tancelin, a French writer on air traffic control, finds his best material for analogy to ATC functions in the navigation rules and instructions of harbor officials who direct ships to dock and depart from harbors in the same way that ATC directs landings and departures of aircraft.[22] Refusal to obey seaport authorities subjects the ship captain to fines or even prison in France. The analogy can be made because both ATC and the instructions of harbor officials constitute control of traffic.

Although an actual adoption or adaption of highway, railroad, or sea law to air law would be a mistake, in that it would imply similarities where none exist, we have noted that out of a similar duty to expedite an orderly flow of traffic, there is a tendency for a similar duty of care to result. The traffic policeman could be held liable for misdirection, the railroad company has a duty to maintain its warning system, and states generally can be held liable if their sea navigation aids have not been maintained. Additionally we note in sea law that when advice becomes compulsory, as is the case with a legally required ship's pilot, then the liability for negligence shifts. These points analogous to air law have some value as precedents, when one wishes to determine to what extent an ATC agency should be liable for negligence.

B. BLUEPRINT FOR A CONVENTION

Of the ten areas discussed in this detailed analysis of the Convention, three can be considered foundation stones: 1) Scope of application, 2) Systems of liability, and 3) Limitations on liability. The other seven areas build the tower upon that base: 4) If limits are desired, what should they be?, 5) ATC forfeiture of limitation, 6) Summary of parties who may bring actions and parties liable, 7) Defenses, 8) Security, 9) Jurisdiction and 10)Period of limitations.

1. Scope of Application

Our task in determining the Convention's applicability is one of drawing boundaries. Are we to take strict, or wide measure? Shall we let the protection of the air traffic control agency rest with the Convention, by limiting the duties for which it can be held responsible, thereby precluding important kinds of suits? Or, shall we let the protection of the agency rest with national courts, forcing the claimant to prove that the controller breached his duty of care, in which case we can place our boundaries farther apart, providing for a greater number of possibilities?

The latter method appears to be the most suitable. There are four areas to be investigated and delimited in that way: a) the problem of defining ATC; b) the type of flight instrumentalities covered; c) general guide lines for determining kinds of damages compensable under the ATC Convention; and d) problems of invoking the Convention, where we ask the claimant's question, "Under what circumstances does the Convention apply to me?"

a. Definition of ATC Covered by a Convention

Our definition of ATC will be in terms of possible liability for the functions which the agency performs, an even wider definition than that in the ICAO Secretariat Report,[23] not making a strict limitation to ATC proper, but including related duties.

Our description will be governed by the ATC objectives outlined in the Chicago Convention: prevention of collision between aircraft, and with obstructions on the ground; arranging orderly plans of traffic; furnishing safety and efficiency information and calling alarm and assisting with emergencies.[24]

We will investigate the ATC related services one by one:[25] i) ATC Proper, ii) Flight Information Service; iii) Air Traffic Advisory Service; iv) Alerting Service, v) Operation and Maintenance of Air Navigation Facilities, vi) Airport Facilities, vii) Meteorological Services; viii) Search and Rescue Service; ix) Military Air Traffic Control Service, x) Military Aircraft Complying with ICAO Requirements, xi) ATC Provided by International Agencies; and xii) Résumé of Definition of ATC.

i. ATC PROPER: The problem in defining ATC Proper, is in drawing its outer limits. Clearly, the greater the amount of control over the pilot which the ATC agency exercises, the more certain will be its liability for negligence. But if an error can only be traced back to a computer, not to a human controller, who shall be held liable? What would form the upper limit.

At the center of ATC Proper are the controller's non-obligatory instructions to pilots under VFR flights, and the issue of "static control."

The bottom limit concerns ATC liability for accidents caused to aeroport crews through negligently issued instructions concerning plane activities.

Before we explore this scale in detail, let us orient ourselves with the Chicago Convention. By ATC Proper, we mean what Annex 11 describes as area and approach control service for IFR flying, and airport control service for all flights.[26]

It is indeed at the airport terminal that ATC is most crucial, because of the intense congestion where IFR and VFR flights are mixed. This caused the authors of the Doolittle Report of 1952 to propose positive ATC control of all areas in the United States handling more than 100,000 aircraft separations per year.[27] It suggested further that pilots should be compelled to use Instrument Landing Systems (ILS) and Ground Control Approach (GCA) where available.[28] The FAA subsequently initiated a successful experimental positive control system at the Atlanta, Georgia Airport, in 1962.[29] Additionally, Area Positive Control[30] was developed above 24,000 ft. over the United States. Thus the mixture of VFR and IFR flights is avoided.

Much of Area Positive Control is handled by machines. This leads us directly to our problem of the upper limit on a definition of ATC Proper. Should there be liability for both human and mechanical failures?[31] We have already decided that the agency should be held liable for its obligatory instructions. Now that there is increased automation such as the FAA plans in completely automatising reports through plane to ground radar by 1970,[32] it is entirely possible that an accident could be traced back to a machine, but not to a human controller. If there is proven failure of the computer, then the government must be held responsible, writes Rinck,[33] for the pilot must be able to rely on the instructions and recommendations emanating from ATC. The responsibility best falls on the agency which issues the ATC service, even if that service is voluntary. If the injury cannot be traced back to any specific cause in the computer, and the claimant can only prove that the computer's instructions

er recommendations were faulty, then the government should still be held responsible.[34]

The center of our ATC Proper scale is the problem of negligent issuance of instruction to VFR pilots who voluntarily ask for them. We determined earlier that if the instructions could not be verified by the pilot, the ATC agency could be held liable for any resultant accidents.[35]

Dynamic air traffic control is the constant directing and correcting of the plane's air course by ATC. That has been our topic until now. Static air traffic control is governed by previously stated flight regulations. Here, the responsibility for compliance and execution in order to effectively separate planes, rests with the pilot,[36] but naturally the ATC agency is liable for its negligence in issuing the flight rules.

Finally, we must decide to what extent there should be liability for damage caused to airport crews and grounded planes and vehicles, if, through negligently issued ATC instructions, a plane collides with them. We imagine, for instance, a maintenance crew crossing a landing strip, when a passenger plane collides due to misinformation from the control tower. Can the injured person on the ground then recover from the ATC agency? It would seem so on the basis of Chicago Convention's Annex 2, Sec. 3.7 which provides that "the movement of persons or vehicles on the maneuvering area of an aerodrome shall be controlled by the aerodrome control tower as necessary to avoid hazard to them, or to the aircraft landing, taxiing, or taking off." The ICAO Subcommittee, however, was anxious to make the distinction that there should be no liability unless an aircraft were involved.[37] That distinction seems a little superficial, since airplanes are always involved at airports.

Control over ground vehicles and persons on the maneuvering area is urgent at all times, since most accidents happen in the process of landing and take-off.[38] The ATC must be constantly aware of movements in the maneuvering area to insure safety of aircraft. This writer recommends that ATC be liable in the Convention for negligence to persons and vehicles obviously legally present on the maneuvering area when the accident occurs.

And now we have drawn the limits to ATC Proper, and must determine whether the following related services can be included with its liability for negligence within a Convention.

ii. FLIGHT INFORMATION SERVICE: The function of this service is to give weather information and related statistics when demanded by the pilot, usually in controlled airspace. Chicago Convention's Annex 11 (para. 2.6) sets up the service on a regional basis in two ways: 1) to be included within existing ATC units; or 2) if there are not ATC units in the region, to be established in separate centers combined with alerting services.

In the first case, flight information is part of ATC Proper, and there is clear liability for negligence.

The only questions might arise in the second case, where the service is disassociated from an ATC unit. However, there is a system which untangles the knotty problems of pilot reliance, verification, and so forth: Proof of Fault. There, the claimant must prove that the one who provided the information breached his duty of care.

Indeed, by their second meeting, the ICAO Subcommittee had decided that if a proof of fault system of liability were adopted, Flight Information Service would be included, along with ATC Proper.[39]

iii. AIR TRAFFIC ADVISORY SERVICE: The purpose of an air traffic advisory service is to provide more reliable information about collision dangers than is given by the Flight Information Service.[40] Air Traffic Advisory Service is a temporary one, pending the establishment of Air Traffic Control. Doc 4444 stating the Rules of the Air warns that it is not to be relied upon by pilots, and that the advisory service should carefully avoid giving appearance of accuracy and completeness.[41] Yet if we include Flight Information Service within the definition of ATC, there seems to be no arguments favoring the omission of Air Traffic Advisory Service. Under a proof of fault system, liability for negligence could be sustained by it.

iv. ALERTING SERVICE: ATC and Flight Information centers provide Alerting Service, meaning that in case of an emergency, they call alert, collect and disseminate information. It is clear that negligence on the part of the ATC and Flight Information Centers could easily heighten an emergency. Therefore, liability for negligent Alerting Service should definitely be included within the convention, if a proof of fault system is adopted,[42] and this reasoning was accepted by the Subcommittee at their second meeting.[43]

v. OPERATION AND MAINTENANCE OF AIR NAVIGATION FACILITIES: The air navigation facilities on the ground give the pilot accurate guidance, so that he is able to fly without reference to landmarks below. They form "a common system of reference between the pilot and the (ATC) controller" enabling them both to decide which route the plane will fly while it receives ATC service. At airports, the navigation facilities may guide

the plane to the runway and on the maneuvering area.[44]

One cannot think of Air Navigation Aids and ATC as being entirely separate, since ATC could not exist "without the navigation element, even if navigation were limited to dead-reckoning."[45] The close relationship is imperative.[46]

It is now the United States policy to create one combined air traffic - air navigation control system, to simplify the pilot's duties.[47] The reasonableness of establishing liability for negligent operation and maintenance is thus evident. Both ATC and Air Navigation Services should be included in the Convention.

The ICAO Subcommittee, with some dissent, understood this close relationship, and came to the same conclusion.[48]

vi. AIRPORT FACILITIES:[49] The issue is whether failure to maintain runways in good repair, to remove snow, to provide sufficient fire fighting equipment, and other proprietary airport functions should be included within a Convention on ATC liability.

In the United States and some other countries, operation of the airport is separate from operation of air traffic control towers. When ATC is operated by the federal government, and airports are operated by local city, county or state authorities, it is reasonable to make a distinction between the two types of activity. The Subcommittee thought it advisable to include only ATC functions within a convention, and to exclude liability for airport functions.

However, this writer believes that the ATC agency should be held liable for failure to <u>inform</u> aircraft about dangerous conditions in airport facilities which might interfere with the orderly flow of traffic.

vii. METEOROLOGICAL SERVICES: The quality of weather information available to pilots lacks much in being dependable. Some phenomenons, like air turbulance and jet streams are still too unknown to be predictable. The meteorological analyses which are possible often reach pilots in conflicting reports through ATC and Flight Service Stations.[50] The information available to general aviation is of a particularly low quality, often too old to be pertinent, hard to obtain, and difficult to understand by pilots who are not trained to decipher it.[51] The problem is the more serious because over one third of the fatal accidents in general aviation are caused by weather conditions.[52]

Liability for negligent weather information must exist somewhere, but the problem is created in our imperfect meteorological techniques. The solution seems to again be a proof of fault basis.

Although the ATC, or Flight Information Service, would not be liable for correctly transmitting weather information which was compiled negligently by another agency such as the Weather Bureau,[53] where the ATC or Flight Information Service itself generates the information, for example negligently misreads a barometer, or negligently fails to inform the plane about low airport ceiling, there should be liability within the scope of the Convention.[54] Since the claimant would have to prove breach of duty of care, the ATC agencies should have no objection to this system.

viii. SEARCH AND RESCUE SERVICES:[55] ICAO chose to place Search and Rescue Services in an Annex separate from that on Air Traffic Services, thereby implying that they are not related.[56]

The ICAO Subcommittee, although not making a decision, expressed doubt that liability for Search and Rescue Services should be included in the Convention, because they are not part of ATC, and because their hu-

manitarian character should exempt them from liability.[57] The latter reason would not be a proper legal excuse. A negligent rescuer can certainly affect the situation of the rescued adversely. It would appear that if there should be liability for the Alerting Service which is as deeply involved in an emergency situation, then liability should also attach to the Search and Rescue Service.

The question of exemption would arise when Search and Rescue was performed by others than air traffic control agencies, that is, navy units, or police, or army, or air force, or civil air patrol. This writer reasons that only Search and Rescue Services performed by ATC agencies should be liable for negligence under the Convention.

ix. MILITARY AIR TRAFFIC CONTROL SERVICE: There is no longer room for separate civil and military ATC, because both types of planes fly in the same airspace. Jets are built to fly economically at high altitudes.[58] In the United States, a single air traffic control was formed by extending civilian ATC to all civil and military planes.[59] Italy established a single ATC system by giving all air traffic control functions to the Ministry of Defense. But some states still maintain separate ATC services.

Should military ATC be included within the Convention? A foreigner might wish to sue a military ATC which supplied service to civilian planes (as in Italy) or because it negligently directed military planes so as to cause damage to the foreign interest.

The majority of the Subcommittee agreed that the Convention should include liability for military ATC supplied to civilian planes, regardless of whether the ATC was provided on a regular basis or only on an emergency basis. The Subcommittee noted that liability for military ATC to civilian planes might make it difficult for some countries to join the

Convention, because of their liability exemptions.[60]

This writer believes that military ATC provided to civilians must be within the scope of the Convention. If it is not, then certain countries could exempt their entire ATC system from liability, and yet receive the benefits of the Convention abroad. No treaty reservation should be permitted by the parties.

The Convention should permit a reservation in regard to Military ATC furnished to foreign military planes, for obvious defense reasons. One country might not wish to permit military authorities of another country to investigate and discover military secrets about conduct of flight. Neither is the matter of compensation so urgent to the armed forces as it is to such groups as air carriers, passengers, and shippers.

x. MILITARY AIRCRAFT COMPLYING WITH ICAO REQUIREMENTS: The difficulty of operating civilian ATC in airspace where military aircraft fly on an alternate system is evident. A unified civilian + military ATC system is one way to encourage uniform regulations for both types of aircraft. The following examples illustrate that military planes can well comply with ICAO's civilian requirements.

Military planes in the United States are outfitted with transponders which can respond to the civilian operated FAA air traffic control system. They will have identification and altitude reporting capabilities in conformity with the new ATC program.[61]

Military aircraft are regulated by Eurocontrol[62] within the airspace of which they comply with ICAO standards, practises and procedures; and they would be able to recover from Eurocontrol for its negligent ATC.[63]

National ATC frequently permits compensation for damage done to

military aircraft by negligent ATC operation.[64]

Sir Richard Wilberforce correctly expresses the present great danger of collision between civil and military aircraft, and the futility of excluding military aircraft from private air law conventions.[65] States must be encouraged to allow ATC liability for negligence towards military planes. Only in a situation where the military administrates a combined civilian-military ATC, and might desire not to be involved in investigations by a foreign state's defense department, should its own military planes be excluded from the convention; Naturally it would be unjust for the controlling state's military planes to recieve compensation abroad, when foreign military planes would not be able to similarly recover from it.

xi. ATC PROVIDED BY INTERNATIONAL AGENCIES: Eurocontrol, ASECNA and COSESNA pose a problem. In order to provide a uniform regime, and the widest possible application, the international ATC organizations will have to brought within the Convention.[66] Since they are not supranational, their inclusion would not in itself bind their component states. However, those states can either amend these regional ATC conventions to permit the organizations to sign a special convention on their liability; or, the individual member states can agree that their signature will bind not only themselves, but also the international air traffic control organization to which they belong.

xii: RÉSUMÉ OF DEFINITION OF ATC FOR THE PURPOSE OF A CONVENTION: The writer believes that his wide definition of ATC will be justified if a proof of fault basis for liability is used. The protection of the ATC agencies then rests with the court, which, in determining the existence of fault and whether the agency breached its duty of care, will consider

vention. [illegible]

the nature of the service offered, the nature of the terrain, the amount of reliance by the pilot, whether he reasonably should have relied, and it will consider all the defenses such as contributory negligence and assumption of risk allowed the ATC agency under a proof of fault system.

The definition of ATC in the Secretariat Report of 1962 was narrower:[67]

> Units which have been established to provide air traffic control service, flight information service and alerting service within control areas, control zones, and at controlled aerodromes, and which if authorized by the establishing authority, may provide flight information service within a flight information region.

It is likely, though, that if a convention is chosen as the solution to the ATC liability problem, and a proof of fault basis selected, the ICAO Subcommittee will make its definition more inclusive.

In summary, then, the author believes that 1) there should be liability for air traffic control supplied in controlled airspace, including movements of aircraft, persons and vehicles on the controlled maneuvering area, and liability for negligent maintenance and operation of ATC equipment. 2) Liability for negligent Flight Information Service in all airspace must exist, and thus there should probably be liability for Air Traffic Advisory Service. 3) There should be liability for the Alerting Services' negligent acts in both controlled and uncontrolled areas. 4) Air Navigation Aids are becoming so identified with air traffic control that they should be subject to the same liability. 5) Only those airport services which are related to air traffic control should be included in the Convention. 6) Meteorological information originating from ATC-related units should be subject to liability. 7) Search and Rescue Services should be included within the Convention to the same extent as Alerting Service, but only in so far as it is performed by air traffic control agencies.

8) There should be liability for military ATC furnished to both civilian and military planes, but with permission to reserve liability for military ATC to foreign military planes. If this reservation is used, it automatically entails exclusion of that country's military planes from protection of the convention abroad.

Finally, we note that liability should extend to private and state and internationally-operated ATC services, in the interests of establishing a uniform regime.

We have now determined for which services the ATC agency would be liable, if negligently operated. We must next decide which flight instrumentalities should be covered by the Convention.

b. The Kinds of Flight Instrumentalities Which Should be Covered by the ATC Liability Convention.

In determining how widely the Convention should apply, the first element we will consider is aircraft. There are three ways to break this factor down, so we can see the boundaries of applicability, and the areas which must be included. The first is "Aircraft classified by its users." The second is, "Aircraft classified by types." The third is, "Nationality of aircraft."

i. AIRCRAFT CLASSIFIED BY ITS USERS: Should the Convention cover scheduled air carriers only, or should it be extended to all civil aircraft, or should it govern both military and civil aircraft?[68]

Since commercial air carriers make by far the greatest use of air traffic control,[69] the ATC Convention will be written much for their benefit.

However, there is certainly no reason to exclude general aviation from the Convention. The number and kinds of lawsuits which general aviation claimants initiate, indicate that it is in the same position in regard to ATC liability as are the commercial air carriers.

Both the amount and kind of general aviation underscores our point. Although these statistics were available only from the United States, it is fair to say that general aviation is congesting more of the world's airspace, and will continue not just to grow, but to multiply amazingly. In 1964 there were about 100,000 general aviation planes in the United States,[70] and in 1975, such planes are expected to perform 67% of all airport terminal operations there.[71] One authority predicts that in about a decade, Europe will contend with the same number of general aviation planes as does the United States today.[72]

More specifically, we can say that general aviation aircraft are being designed for long distance flying in response to the greater use of the Chicago Convention provision (Art. 5) for flight of non-scheduled aircraft across international borders. Indeed, many light planes are being outfitted for IFR. Consider the following chart.[73]

Flights in Millions

	1955	1960	1965	1970	1975	% change 1960-75
General Aviation IFR Flying in the United States	.1	.3	.5	.8	1.1	up 270 %

In 1961, more than 59,000 U.S. general aviation planes were outfitted with two-way radio and VOR navigation equipment.[74]

It seems then that our only real question arises over the inclusion of military aircraft. There are two arguments concerning this problem. The first, is that since the trend in ATC is to form a single system, administrated by either civil or military authorities, it makes little sense to exclude military aircraft from an ATC liability Convention.[75] They form a formidable threat of collision, although it is encouraging to note that military IFR flights in the U.S. are decreasing.[76]

Flights in Millions

	1955	1960	1965	1970	1975	% change 1960-75
Military IFR in the United States (48 contiguous states)	.9	1.1	1.0	.9	.8	Down 25 %

On the other hand, we note that other private air law conventions either exclude military aircraft, or permit states to make exemptions. The Rome Convention does not apply to damage caused by military, customs, or police aircraft (Art. 26). Military transport is included within the Warsaw Convention (Art. 2) but states are permitted to exempt it from the Convention's application.[77] The Aerial Collisions Draft Convention also applies to military aircraft, but similarly permits states to make exemptions, in order that the Convention will be as widely acceptable as possible. (Art. 16).

In this writer's opinion, the ATC liability Convention would be incomplete without application to military aircraft. Only if a state were to reserve from the Convention the general category of "military ATC

to military planes," should that state's own military planes be excluded.

ii. AIR VEHICLES CLASSIFIED BY TYPES: Let us now consider a different classification. Recent aircraft technology has developed planes to such an extent, that types now overlap; that is, at one point in its flight a plane may be subsonic, and later supersonic; or it may be an aircraft which changes to rocket propulsion in space. So there are difficulties in drawing boundaries. The vehicles we will consider for inclusion into the Convention are subsonic fixed wing, supersonic fixed wing, v/stol, helicopters, rockets and space vehicles.

Subsonic fixed wing aircraft should be entitled to the protection of the Convention, because they are used almost exclusively by scheduled air carriers.

Supersonic fixed wing aircraft are presently used by the military and will partially replace the subsonic fixed wing plane in commercial air carriage. This aircraft is so close in use and nature to the subsonic fixed wing that it should also come within the ATC Convention.

V/stol-vertical take-off and landing/short take-off and landing is intended to be used by civil aviation in the 1970's. Several models are being presently tested by the military.[78] Bo Lundberg predicts that the future great volume of V/Stol air traffic around cities involving many take-offs and landings will pose the greatest problem to ATC.[79] The V/stol is a fixed wing aircraft, like the subsonic and supersonic aircraft; it fits into the same general category and should be included within the Convention.

Helicopters are in the same category with the V/Stol, according to Projects Horizon and Beacon.[80] The helicopter is presently used in scheduled air carriage, in general aviation and by the military.

There is case law which illustrates that helicopters form a significant danger to fixed wing aircraft.[81] Project Beacon estimates that

in the congested New York airspace, as many as 50 helicopters may be in the air at the same time by 1965-75, and emphasizes that special flight routes must be reserved for helipopter operation so they can land without delay;[82] they will have to be given preferential treatment by ATC.

IFR flying by helicopters is made possible by the new twin-turbine helicopters like the Sikorsky S-61L and S-61N recently certified by the FAA.[83]

ATC is just as involved with helicopters as with fixed wing aircraft. Since helicopeers are becoming more dependable, form a significant percentage of air traffic at major airports, and now engage in international flights,[84] it is reasonable to include them within the ATC Convention.

Balloons may be rare, but there is no reason to exclude them from the ATC Convention. In fact they are now regulated by national ATC rules.[85]

Rocket and space vehicle activity in the air is steadily increasing to the extent that knowledge and regulation of their movements is necessary to maintain safety. During 1963, FAA began to regulate all unmanned rocket movements which create collision hazard to aircraft. Included within the regulation is a prohibition against rocket firings into clouds, into controlled airspace, within airport bounderies, within 1500 ft. of persons who are not associated with the firing, firings of rockets at night and a notice requirement similar to that found in balloon flight.[86]

Manned rocket flights already do take place, but they have not been subject to ATC control. In fact, governments have not yet attempted to analyze what danger rockets present to general air traffic.[87] If and when ATC takes an active part in dynamic rocket air traffic control, then these vehicles should be given protection by the ATC Convention, but even at the present time, ATC should not entirely escape liability for accidents involving rockets. It seems clear that if the air traffic controller

knows that there is rocket traffic in the area of the plane which it is advising or controlling, he would be liable to the aircraft for negligence in failing to inform the pilot, or separate controlled planes from the danger. No distinction should be made between rockets and other obstructions to air traffic.[88]

However, the Subcommittee has decided not to study the liability of space vehicles since that subject is being regulated by the United Nations Committee for Peaceful Uses of Outer Space, U.N. General Assembly Resolution No. 1962 (XVIII) Dec. 13, 1963, says that:

> Art. 8: Each State which launches or procures the launching of an object into outer space, and each State from whose territory or facility an object is launched, is internationally liable for damage done to a foreign state or to its natural or juridical persons by such objects or its component parts on the earth, in air space, or in outer space

In this writer's opinion, it may be a mistake to rely on U.N. Resolutions governing space activities to regulate the great multitude of smaller rockets launched for meteorological or other purposes, which do not reach outer space.

iii. NATIONALITY OF AIRCRAFT: Finally, we consider whether there should be any limitations on nationality of aircraft, other than the distinction between members and non-members of the Convention. This is primarily anticipation of international registration, which is not yet possible, but is presently in Part A[89] of the Legal Committee's work program. When this situation does arise, those aircraft so registered whould also be included within the Convention. That is, all the member states of the organization owning the internationally registered aircraft would bring their planes within the scope of the Convention to permit recovery.

In summary, we have decided that scheduled air carriers, general aviation, and military aircraft should be included within the ATC liability Convention, with permission to exempt military ATC, if those states doing so accept the fact that their own military planes would thus not be able to recover for damages abroad. These three categories would include subsonic fixed wing, supersonic fixed wing, V/Stol, helicopters, and balloons. Additionally, there should be provision made for the day when ATC may control rocket traffic which does not reach space, and some attempt to correlate the U.N. work on space activities with the ATC liability Convention, in anticipation of the time when space vehicles passing through airspace will constitute a very real danger to general air traffic. We also agreed that internationally registered planes must be made subject, if all of the states belonging to the owning international organization are also members of the ATC liability Convention.

Next we must look at the kinds of damages which might be covered by the Convention.

c. The Kinds of Damages which Should be Covered by the Convention

When we speak of "damages" in this section, we mean only those which can be directly traced to ATC negligence.[90]

Under most systems of liability, we would be compelled to draw strict limited areas within which ATC would be lia le for negligence. We would not be able to provide for the rare case, allowing claimants to recover from the agency for unusual or unforeseeable types of damages. However, if a proof of fault basis is used to determine negligence, we can describe a rather generous circle, with several types of damages radiating toward the ATC hub. The air traffic control agency's protection will then be with the court, which will insist that the claimant prove

breach of duty of care.

Broadly, we note that reparation should be made for personal and property damage occuring both on the planes and on the surface.[91] The defendant should be compensated for bodily or mental harm, loss sustained by death of another, deprivation of liberty, harm to reputation, destruction to, damage to or loss of property, deprivation of use or enjoyment of property, and loss or deprivation of enjoyment of rights under a contract.[92]

Specifically, we will select three areas within which damages could fall, and which illustrate the scope of the problem: aircraft-caused turbulence; delays; and noises and sonic boom. The shades of certainty for ATC liability within these examples will indicate generally what is to be expected in other areas of damages. Finally, we will discuss whether the Convention should provide for apportionment of damages, if a fault is best shared.

i. AIRCRAFT-CAUSED TURBULENCE: Case law and research[93] indicate that aircraft-caused turbulence is a very real danger within airports, and that it should be one factor to be considered in the controller's duty to keep planes separate.

In the following case, ATC had cleared a light plane to land. The landing was made in the wake of a large military jet which was practising instrument landings, and the plaintiff's plane crashed about 800 ft. away from the end of the runway. The claimant alleged that the ATC had been negligent in failing to keep a safe distance between the two planes. The court decided that ATC did have a duty to keep the two planes safely separated, and that it had breached this duty.[94]

An FAA study of ATC reports that

> On days when there is little air movement (ten knots or less), large aircraft leave turbulent vortices trailing from their wingtips. Research by the NASA and the British indicates that the vortices persist up to 160 seconds and can cause violent movements to smaller aircraft transiting the wash.

The study concludes that wingtip vortices are a potential danger, especially at landing and departure of large-sized aircraft and during their flights in lower airspace.[95]

This writer believes that damage resulting from aircraft-caused turbulence should be listed among those damages to be made compensable under the ATC liability Convention. This area is fairly clear. The next area, "delays," is less so.

ii. DELAYS: Whether or not there should be compensation for ATC-caused delays in the airport area is still a matter of controversy. There are two arguments. The first, and the one favored by the ICAO Subcommittee (Second Session) is that a controller may have "good technical reasons" for a delay, and possible liability might cause him to hurry and breach his duty of care.[96] IATA suggests that airport capacity is the limiting factor, rather than ATC inefficiency.[97]

The other argument is that presented in the FAA report: inefficiency in ATC causes excessive delays at many airports which are not overloaded with traffic, like New York International Airport.[98]

Before we draw a conclusion, it is important to decide whether delays present a major difficulty, a real cause to initiate a suit.

In 1961, the following amounts were lost at major U.S. Airports because of failure to arrive at destinations on time.[99]

Chicago Midway	$1,905,000
Los Angeles	534,000
San Francisco	422,000
New York (IDL)	376,000
Atlanta	354,000
Dallas	330,000
New York (LGA)	329,000
Newark (EWR)	307,000
Boston	285,000
Portland Oregon	262,000
Total United States	$14,259,000

It is estimated that "1,380,000 hours of arrival and departure delay at annual cost of $36,000,000 is attributable to the air traffic control subsystem in the terminal area."[100]

Delays happen most often during the departure of aircraft, and it is fair to admit, are concentrated in the high-use airports.[101] Losses are rising because the number of delays has increased, and it is becoming more expensive to keep large jet planes waiting in the air.[102] One may wonder about the effect that delayed landings will have on supersonic aircraft which burn fuel at a very high rate.

This writer recommends inclusion into an ATC liability Convention of Warsaw Convention's Art. 19, to the effect that the ATC agency shall be liable for damage occasioned by delays in the transportation of passengers, baggage, or goods.

iii. ATC LIABILITY FOR NOISES AND SONIC BOOM: This area of damages is one of the most obscure, because we must consider not only today's air traffic noises, but anticipate phenomenons like sonic boom. Our reasoning should probably develop like this: Should there be liability

for sonic boom? Should that liability exist both enroute, and at the airport? If so, should general air traffic noises be excluded from the Convention? Under which cases does the claimant sue the airport, and which the ATC agency?

If liability for noises does exist it is most certain to be found in sonic boom, which is defined as "an explosive phenomenon of the air caused by shock waves at supersonic flight speeds."[103] Supersonic aircraft presently being developed "would cause extremely severe disturbances to and objections from people living in the wide areas affected."[104] To imagine what the scope of sonic boom would be, one must know that most routes over 1500 miles will be served by supersonic jets and that there is no way to avoid sonic boom or to prevent it from hitting the earth's surface.[105] This will be the first time that aviation is likely to inflict serious harm to persons on the surface, says Lundberg.[106] And yet, airlines are planning for supersonic air transportation,[107] and many airlines have already bought options on supersonic jets.

Supersonic airplanes will be required to fly at subsonic speed up to 35,000 feet, where the sound barrier will be broken, and they will decelerate to subsonic speed at the same level on arriving at their destination.[108] ATC will be responsible for directing these planes so that the established procedure is followed. By negligently failing to do so, it could cause damage by sonic booms.

The writer believes that the ATC agency should definitely be liable for negligently causing supersonic jets to break the sound barrier too soon, or in the wrong area, and for not taking into consideration the various regulations that will have to exist, such as the times in which supersonic jets would be allowed to enter and depart from public airports.

The next question we must ask, is whether the ATC should be liable for negligently causing sonic boom both enroute and at the airport. Since supersonic aircraft will be positively controlled, breaking the sound barrier would normally be the responsibility of the ATC controller, not the pilot, at every stage of the flight. Sonic booms are not caused by "mere fact of passage," and could not have been contemplated in 1952 when the Rome Convention was signed.[109] Liability should exist for supersonics enroute.

Within the aerodrome, it is easy to imagine that sonic boom could cause damage to vehicles on the ground, and persons and property in the area. Liability should also exist here.

Having established that ATC should be liable for negligently caused sonic boom, we must decide whether general air traffic noises should be excluded from that liability. There is disagreement here. Some commentators say that noises outside airports must be tolerated as by-products of our modern age.[110] The Rome Convention states that there is no aircraft liability for noises caused simply by aircraft passing in conformity with existing air traffic regulations (Art. 1).

A line of U.S. cases states the law differently:

In Causby v United States,[111] the business of a chicken farmer, who lived close to an airport, was damaged by noises from low-level flights over his property. "As many as six to ten chickens were killed in one day be flying into the walls from fright." The property could no longer be used as a chicken farm. The United States was held liable for damages caused.

In Griggs v Allegheny County,[112] the plaintiff's housing development located 3,250 ft. from the end of a runway was damaged by low

level flights. The country government was held liable.

Thornburg v Port of Portland [113] is subsequent in time to the Griggs Case. The plaintiffs complained of damage caused from noise-nuisance. Their property was located next to the defendant's airport, beyond the end of one runway and directly under the glide path of aircraft using it, and also 1000 ft. to one side of the glide path of jets using another runway. The noise from jet planes lowered the value of the land considerably; the court held that the airport would be liable for noise-nuisance caused not only to property directly under the glide path, but to property next tho this path.

The Thornburg Case recently was supported by a similar case, Martin v Port of Seattle.[114]

These cases affirm that in the United States there is liability for damages caused by aircraft noises outside of airports. In France, aircraft noises outside of airports have also caused liability.[115]

A majority of the Subcommittee believed that the law in this area was not clear. This writer believes, on the contrary, that in view of the case law established, which is one good measure of a need for legal regulation, general air traffic noises should be included with sonic boom as an area of possible ATC liability for negligence. The proof of fault basis should sufficiently protect the controller.

Finally, then, we ask how a claimant is to decide whether the airport, or the ATC agency is to be sued for noise damages. There is a disparity in the precedents set by different states, for sometimes the claimant recovers from the ATC agency, sometimes from the airport, and sometimes even from the airlines. The writer suggests that in the case of sonic boom, the claimant might usually look to the air traffic controller. In the case of general air traffic noises, if the damage is caused

while the plane is within the airport, or on approach patterns, the claimant might properly look to the airport proprietor. But if the damage is caused while the plane is outside the airport, the claimant might first consider the ATC agency.[116]

iv. APPORTIONMENT OF DAMAGES: Now we must consider if there are sufficient reasons for apportionment of damages in an ATC liability Convention.

We can see how the system works in the Draft Convention on Aerial Collision which provides that if damage has been caused by the fault of two or more aircraft operators, each shall be liable to the other operator in proportion to the degree of fault committed by each one; the damages shall be shared equally if the degrees of fault cannot be determined. The Draft Convention requires the responsible operators to contribute their shares.[117]

When large damages are involved, apportionment makes the burden less onerous. Such apportionment is the rule in the law of shipping, stated as early as the 1910 Brussels Convention,[118] but has not been used in the Warsaw, (Hague), Guadalajara[119], or Rome Conventions. Dr. Fitz-Gerald considers apportionment of damages to be one of the most important reasons for the Draft Convention on Aerial Collisions.[120]

Would this principle fit into a Convention for ATC Liability? The same chance for large damages exists.[121] The Convention could only apportion damages among ATC agencies. Since ATC in each state is usually operated by one government ATC service, there would normally be no problem. But in case ATC of several countries are at fault, or in case several private ATC operations were at fault, apportionment would come into question.

It is the writer's recommendation that there is not sufficient cause for apportionment of damages in the ATC liability convention, because the overwhelming majority of ATC is provided by very large organizations in the form of governments and international ATC organizations. We are here not concerned with a multitude of operators who perhaps will go out of business if the damages are not shared in proportion to degree of fault. We are mainly concerned with a few government operators of ATC, whose joint liability very infrequently would come into question.

To summarize this section, it is necessary only to point out that rather than compile an exhaustive list of compensable damages, the author has selected three representative areas, within which there are shades of certainty resembling those which will likely be found in damage suits. We have looked at the issue of damages much as a court would, constructing our theory upon specific cases. Additionally, we determined that apportionment of damages was not necessary in an ATC Liability Convention.

Now we will move on to consider the ways in which the Convention might be invoked.

d. Invoking the Convention

In determining how to invoke the Convention, we will consider six elements which might separately, or in a combined form, be used by claimants.

First let us look at existing private air law conventions, to see if their geographical scope could be adopted to an ATC Convention. The Warsaw Convention applies to international carriage (Art. 1). The Rome Convention applies to surface damage caused in the territory of Contracting States by an aircraft registered in the territory of another Contrac-

ting State (Art. 23). The Draft Convention on Aerial Collisions applies to collisions or interferences 1) occurring in Contracting States where at least one of the aircraft involved is registered in another contracting state, or 2) if the aircraft involved are registered in different contracting states, regardless of where the incident occurred . These bases would have to be modified or changed to fit an ATC Convention.

However, this may be the place to ask whether these conventions could form a wide basis for invoking ATC liability.[122] For example, could the ATC Convention be made applicable where the Warsaw Convention (or the Rome, or Aerial Collisions) applies? It can be seen at once that this idea must be rejected. It is too difficult to correlate conventions of differing memberships, and conceivable that none of the states belonging to the ATC Convention would be members of one of the others.

It seems clear instead that we must establish unique elements for invoking the ATC Convention which take into account its own nature, which in fact justify a separate convention. The ICAO Subcommittee mentioned the following possible factors: 1) the flight plan, 2) the documents of carriage, 3) the nationality or domicile of the person suffering the damage if such nationality or domicile were different from that of the air traffic control agency, 4) the registration of the aircraft, 5) the place (or the places if the functions were performed by more than one agency) where the air traffic control agency performed its function, and 6) the place where the damages occurred. These six possibilities will be considered individually.

i. THE FLIGHT PLAN: Basing the Convention on what is in the flight plan would lead to unwanted complications, states the Subcommittee.[123]

In this writer's opinion it would be undesirable to burden the flight plan with great legal importance. Conceivably, a pilot could incorrectly fill out a flight plan in order to invoke or escape the application of the Convention.

ii. THE DOCUMENTS OF CARRIAGE: In the Warsaw Convention, the statistics forming the documents of carriage indicate whether international transportation, which invokes the convention, is involved. This would not be a desirable basis for ATC liability,[124] because the agency is not a carrier, it has no control over the documents of carriage, and cannot ensure that they are properly filled out.

iii. THE NATIONALITY OR DOMICILE OF THE PERSON SUFFERING THE DAMAGE IF SUCH NATIONALITY OR DOMICILE WERE DIFFERENT FROM THOSE OF THE AIR TRAFFIC CONTROL AGENCY: This proposal is also rejected.[125] The aircraft which was damaged by ATC could be owned by an international organization, such as the United Nations, making it extremely difficult to initiate a suit. In addition, some persons have dual or triple nationality, and would be prevented from suing for damage if one of their nationalities happened to be that of the ATC agnecy involved.

iv. THE REGISTRATION OF THE AIRCRAFT: Registration of aircraft is controlled through the Chicago Convention by ICAO. An aircraft can only be registered in one state.[126] An aircraft of foreign registry might, however, contain crew members or passengers of the same nationality as the defendant, so it should be permissable for a claimant also to invoke the Convention on ATC Liability against the ATC of his own nationality.

The ICAO Subcommittee found the aircraft registration to be a more acceptable element for invoking the Convention than the others mentioned above (i-iii).[127]

v. THE PLACE WHERE THE AIR TRAFFIC CONTROL AGENCY PERFORMED ITS FUNCTIONS, OR THE PLACES IF THE FUNCTIONS WERE PERFORMED BY MORE THAN ONE AGENCY: This would also be a better basis than i-iii above;[128] but it would have to be combined with another criterion, in order to confine the Convention to negligence involving foreign parties. That is, there must be two member states involved, to lift the suit out of the realm of domestic legislation. Therefore, our description would have to insist that the plane be registered in one state, and the ATC located in another member states.[129] It might read like this: "The place where the air traffic control agency performed its functions, if that is different from the state where the aircraft is registered." Naturally, if ATC in two or more places were involved, the Convention could be invoked.

Now we must tackle the very difficult problem of international ATC organizations, like Eurocontrol, ASECNA, and COCESNA. ATC is tending toward regional administration, and these organizations must be brought within the Convention.[130] Are they to be considered as separately representing each of their component states? Or, are these organizations to be thought of as separate entities, capable of being defendants without involving their member states, in fact, capable of being sued under the Convention for damage done to planes registered in their member states?

The least convincing point of view is the first. Under that argument, the ATC organization would represent all and any of the nationalities of its component members. If the state of plane registration,(for instance France), is the same as the state where the international ATC organization performed the function (for instance, Eurocontrol performing

in France) a suit would not be possible through the Convention.

The writer rejects that argument entirely. He believes that the ATC of an international organization should always be subject to the Convention regardless of whether or not the litigants involved are from member states. Thus, the only possibility is to construct a second solution, within which international ATC organizations would hold a position analogous to that of foreign states. Otherwise it would be almost impossible to sue a large international ATC organizations. Under this argument, it is conceivable that an international ATC organization might be sued in one of its member states, but that is not a real problem. Remember that Eurocontrol's liability is presently determinable by national courts of any of the member states.[131] Under this solution an international ATC organization might be held jointly liable with its member states.

Now that we have discovered the best basis for allowing members of international ATC organizations to invoke the Convention, we will ask what happens when two or more planes are damaged by negligence of one ATC organization? If each plane is registered in a different contracting state, and the ATC emanates from yet another contracting state, there is no problem. The Convention can be invoked. If one or some of the planes are registered in the same contracting state as the ATC organization, they would not be able to invoke the Convention, but if any other planes involved in that accident were registered in other contracting states, they could recover.

Finally, we will wrap up some minor problems and definitions under this section. For the purpose of the Convention, the place where the ATC agency performed its function will be the place where the instructions or information was issued. For example, if the instructions are issued to a plane over the high seas, the place where the ATC function is performed

is the place where the instructions are spoken. Collisions or crashes over the high seas will thus be easily traced.

Non-member states do not present a problem. Simply, the Convention would not apply for any state where the plane was registered, or the ATC originated, if that state were not a member of the Convention. However, the Convention does apply to a collision or crash in a non-member state involving aircraft registered in member states, receiving ATC from a member state; but the non-member state receives no rights under the Convention in this situation, because to recover for surface damage, the state where the damage occurs must be a member of the ATC liability Convention.

That brings us to the sixth element considered by the Subcommittee.

vi. THE PLACE OF DAMAGE: This factor should only be included in the Convention in connection with surface damage,[132] which we must consider, but which is, after all the farthest removed from ATC liability problems. Let us say this much: the state where the surface damage occurs must be a member of the ATC liability Convention, in order to invoke it for compensation. It would obviously be unjust to permit a non-member state to benefit from a convention which it had not joined. Under most circumstances we would consider the third person on the surface to be quite removed; he did not choose the plane, as did passengers and shippers; he should rather look for protection from foreign interests, to his own state, where the damage occurred. Therefore, we must insist that he should only have the right to recover under the Convention, if the state where the surface damage occurred was a member state.

It would be undesirable to use the place of the damage as an element in invoking the Convention, for anything besides surface damage. For instance, the Subcommittee mentions how impractical it is to use the place

of damage in deciding whether or not an aircraft operator, or other holders of interest in the aircraft, should be able to recover. Suppose the cause of the damage arose in one state, but occurred in another state.

> Thus, an air traffic control agency might give a misdirection while an aircraft was over the high seas, but the damage resulted only when the aircraft was over the national territory of a state. There was also the case of continuous damage, for example, the case of delay of an aircraft which started in one state, and could continue through several states. It was submitted that it was difficult to make the application of the convention depend upon such ephemeral criterion and that the foregoing demonstrated the weakness of the element of the place of damage in determining the geographical scope of the convention.[133]

vii. RÉSUMÉ: In summary, let us remember that we rejected i) the flight plan, ii) the documents of carriage, and iii) the nationality of the persons suffering the damage if it is different from that of the ATC agency, as suitable bases for invoking a Convention on ATC liability.

We accepted the next three elements in a combined form, so that our conclusion sounds like this: Claimants should be able to invoke the Convention on ATC Liability when the involved aircraft's state of registration is a member, and the place where the air traffic control performed its function is another member. In the case of damage to the surface, if the state where the surface damage occurred is also a member, the Convention can be invoked. The aircraft operator, crew members, passengers, shippers, and other holders of interest in the plane would be grouped in the same category as the aircraft. Counter claims of the employees of the ATC would be grouped within the same category as the ATC agency.

Claimants suing for damage to vehicles and persons on the maneuvering area should be placed in the same category as the plane with which they are connected (for example the plane they are waiting for). ATC employees on the maneuvering areas would be categorized with their ATC

agency. Geographical application is illustrated by the following guide:

		ATC of Members of the Convention				
		A	B	C	Int. Org.	non-member
Planes State of Reg.	A	No	Yes	Yes	Yes	No
	B	Yes	No	Yes	Yes	No
Members	A - B	Yes as to B	Yes as to A	Yes	Yes	No
Non-Members' Planes		No	No	No	No	No
Surf. Damage Member		Yes	Yes	Yes	Yes	No
Surf. Damage non-member		No	No	No	No	No

In a retrospective look at this entire section concerning the Convention's applicability, we note that the delimitations are described in a way making the ATC agency widely responsible in the trust that the difficult court procedure for proof of fault will protect the controller from abuse. We have defined ATC, decided what kinds of aircraft will be included within it, demonstrated how one determines which damages are compensable, and learned how to invoke the Convention.

The second major step is to determine which system of liability is most preferable.

2. System of Liability for Air Traffic Control

The first problem to arise when we attempt to find a suitable liability system, is that of sources. In which direction does one turn? In our case, there are two obvious sources. The first is other systems of transport, and the second is other private air law conventions.

But to what extent will our comparisons be meaningful? We can note that certain terms and practices found in other transportation systems exist also in air law conventions, but not in a uniform way. That is, there seems to be no one preferable liability system tested in land and sea carriage, and adopted into air carriage. On the contrary, land and sea law conventions reflect as many different needs as private air law conventions.

Let us see, for example, how the principle of absolute liability fares in some other areas of law.

The term "common carrier" which we find also in some national legislation on air transport, applies to railroads and road hauling (with the exception of road haulage of goods) in the United Kingdom. Action for damages is always based on negligence, and common carriers are absolutely liable for the safety of goods transported. In regard to passengers, the carriers are "bound to exercise the greatest amount of care and forethought which is reasonably necessary to secure the safety of persons whom they undertook to carry."[134] There is no limitation on liability, unless the parties decide to so limit it by special contract.[135] Drawing our attention back to air law, we note that a principle of absolute limited liability exists in the Rome Convention, but for different reasons. A direct comparison would obviously fail.

Regulation of liability at sea is well expressed in the 1910 Brussels Convention, where negligence is again the base for collision liability, but the claimant must prove fault of the defendant.[136] Absolute liability is not used. Collisions at sea more closely resemble the situation found in the Aerial Collisions Draft Convention, where a mixed system of proof of fault and presumed liability is used; and by extension, it resembles in some ways that found in ATC. Although no limit is found in the Brussels Convention, the contracting states can determine one separately.[137]

However, absolute liability appears again in maritime law, under different circumstances, closer to that used in the Rome Convention, and resembling a system to be preferred in regard to space vehicles. In the 1962 Brussels Convention on the Liability of Operations of Nuclear Ships, the operator is absolutely liable for any nuclear damage upon proof that the damage was caused by the ship's nuclear materials.[138] Liability here is limited to $100,000,000.

It seems, indeed, that analogies to those liability systems suitable for other forms of transportation will not be fruitful, unless we limit ourselves to certain general comparisons. We might theorize, for instance, that when a great range of possibilities for negligence must be provided for, and simultaneously, the defendant needs some protection, a proof of fault system as in the 1910 Brussels Convention may be in point. But when third persons on the ground are involved, who are innocent of risk, or a carrier assumes the risk of transporting highly dangerous material, then absolute liability should probably prevail.

Now let us become more particular, and regard our second source, private air law conventions, in detail. Are there genuine similarities between the ATC agency which is the subject of our Convention, and the

aircraft operator or carrier, which is the subject of the Warsaw, Rome and Aerial Collisions Draft Conventions?

The answer is definitely, yes. Air transportation is the subject matter which they hold in common. Both the carrier or operator, and the ATC agency are part of its infra structure. If we were to remove one or the other, the entire character of air transportation would change.

Beyond that, one is perhaps struck again by their differences. ATC is usually government administered, with no profit motive, whereas even when the air carriage is government controlled, profit and loss are among its major concerns. Further, the ATC agency services only the carrier or operator, whereas the operator is in direct contact with the object carried, the passengers or goods. Finally, the ATC agency services commercial and general aviation, and often the military, whereas the carrier or operator is, of course, just involved with commercial air transport.

Nevertheless, we will keep our private air law conventions at hand, while we determine whether contract or tort (delict) should be the system on which the ATC Convention should base its liability.

The Warsaw Convention is based on the contract of carriage, although in the Anglo-American common law countries, the suit is in tort, unless they, like U.K., have enacted the Warsaw (Hague) Convention as domestic legislation, thus providing a statutory cause of action.

Suits under both the Rome Convention and the Draft Convention on Aerial Collisions must be brought in tort.

a. Contract Basis

United Kingdom reported to ICAO that in U.K. contract could govern the relationship between the aircraft and airport ATC.[139]

To illustrate the contractual relationship, we will draw upon "Report on Accident to Viscount 802 G-AOHU which occurred on 7th January 1960 at London Airport." The airport ATC radioed to this aircraft approaching for a landing, that a fog formation existed at the airport, but high enough to permit safe landing. The ATC service later neglected to inform the pilot when the floor of the overcast cloud and fog formation dropped to 250 yards, making landing so dangerous that a pilot who had been informed of the new measurements, but still landed, would have been subject to criminal liability. The plane crashed on its attempted landing. The ATC should have been liable for its negligence. However, a contract existed between the aircraft operator and the airport, exempting the ATC from liability for its services.[140] Such a clause is permissible under English law, and no recovery from ATC would be possible.

Outside of an express contract between the aircraft and ATC agency, as illustrated by the English case, it is also possible to construe an implied contract between the parties when there is a charge for ATC services. About 25 ICAO members now charge for ATC services, although there is some uncertainty about whether that is legal. In this case, the ATC supplies air traffic control services in exchange for payment. It is not necessary for the terms of a contract to be known, because they may be implied by law, as is the case within property leases.

The relationship between the aircraft and the operator may be construed to be that existing between a consumer and a statutory undertaker.[141] A written contract is not necessary. The contract comes into existence when the customer applies for such services as gas, water, or telephone, and the undertaker supplies.

The contractual relationship is not disturbed by being compelled. Such contracts are frequent, as illustrated by those of the common carrier, which must give transportation services to all comers.

The plaintiff who can sue the ATC agency for breach of contract is in an advantageous position because instead of proving ATC negligence, he merely needs to prove a contractual breach. The ATC agency would then be liable for the natural and probably consequences.[142]

The only real advantage of using contract as the basis for ATC liability is that uniformity with the Warsaw Convention would then exist.

However, it is uncommon to have an express contractual relationship between the ATC and the operator, as shown by the answers to the ICAO questionnaire, in which all answering countries, except U.K., New Zealand and Trinidad-Tobago said that their liability is based on tort.[143] Only a minority of states charge for ATC services, and an implied contract could not always be construed. Liability on a contract basis could entail contractual waiver of liability, as found in U.K., but waiver of liability is against public policy in some states.[144]

The ICAO Subcommittee decided that the system of liability should be based on tort and not on contract.[145]

b. Tort Basis: Absolute, Presumed or Proof of Fault?

In the Warsaw Convention, the carriers, passengers and the shippers are all participants in a joint venture and should all assume some of the risk. Therefore we have presumed liability of the air carrier.[146]

In regard to the Rome Convention, the third party on the ground has no interest in the flight. Therefore he should not carry any part of the risk. This is the reason for the absolute liability of the carrier in that convention.[147]

The Draft Convention on Aerial Collisions has a mixed system of fault liability. The liability of the other operator is determined through claimant's (operator's) proof of fault, but a presumption of fault exists in regard to collision damage suffered by passengers and shippers. The draftsmen of this convention believed that a single system of liability would not be possible.

How can the ATC liability situation be compared to the subject matters of the other private air law conventions? No joint venture, similar to that described in the Warsaw Convention, exists between the ATC Agency and any of its potential victims. Furthermore, the ATC agency has no contract to share risks with any of those potential victims. The third person on the surface is perhaps in a special position in that he has absolutely no interest in the flight. In general, however, we will look for a system which regulates the relationship between independents.

Let us study the debate between Prof. E. Sweeney and Mr. G.W. Orr, relevant to whether presumed or absolute liability is a better system for aviation than is proof of fault.[148]

i. IS A SYSTEM OF PRESUMED OR ABSOLUTE LIABILITY JUSTIFIED IN AVIATION GENERALLY, BECAUSE ACCIDENTS OCCUR MORE FREQUENTLY IN AIR TRANSPORTATION THAN IN OTHER MEANS OF TRANSPORTATION? Both Sweeney and Orr reply that aviation's safety record does not vary substantially from those of other means of transportation which are subject to a proof of fault system of liability. The following chart from 1965 Facts and Figures about Air Transporation illustrates that:[149]

Comparative Transport Safety Record
Passenger Fatality Rate per 100,000,000 Revenue Passenger Miles
(For Selected Years)

	1954	1959	1960	1961	1962	1963	1964
U.S. Scheduled Airlines							
Domestic							
Fatalities	16	209	306	124	121	48	65
Rate	0.09	0.68	0.96	0.38	0.34	0.12	0.14
International & Territorial							
Fatalities	0	59	1	0	0	73	94
Rate	0	0.80	0.01	0.00	0.00	0.58	0.63
Total U.S. Sched. Airlines							
Fatalities	16	268	307	124	121	121	159
Rate	0.08	0.71	0.76	0.30	0.26	0.23	0.26
Motor Buses							
Fatalities	60	100	60	80	90	130	N.A.
Rate	0.11	0.18	0.11	0.15	0.16	0.23	N.A.
Railroads							
Fatalities	23	12	33	20	27	13	10
Rate	0.08	0.05	0.16	0.10	0.14	0.07	0.05
Autos							
Fatalities	22,500	24,800	24,600	24,700	26,800	28,900	N.A.
Rate	2.6	2.3	2.2	2.2	2.3	2.3	N.A.

(N.A. - Not Available)

ATC's safety record in dealing with aircraft is part of the over-all safety record of aviation, and the same conclusion is justified.

ii. DO AN APPRECIABLE NUMBER OF PERSONS INJURED BY AIRCRAFT HAVE NO REDRESS BECAUSE SUCH ACCIDENTS ARE GENERALLY NOT CAUSED BY THE LEGAL NEGLIGENCE OF THE AIRCRAFT OPERATOR? Sweeney[150] replies that the air-

plane is not an ultrahazardous instrument, but that accidents generally are due to the negligence of the aircraft operator.

Orr[151] agrees that aircraft accidents are not usually caused by vis major. Only a few claimants would thus fail to recover damages.

The same reasoning applies to ATC liability. If aircraft accidents do not leave claimants without redress through vis major damages, then neither does ATC legal negligence leave claimants without recovery.

iii. DO PRACTICAL DIFFICULTIES UNDULY HINDER PRODUCTION OF LEGALLY COMPETENT EVIDENCE TO PROVE NEGLIGENCE IN AVIATION SUITS? This question fully relates also to ATC liability. Sweeney[152] states that it is difficult for the claimant to prove negligence involved in the operation of a crashed airplane because the airline is in possession of existing evidence. The airline has lawyers who begin at once to prove that the airline is not negligent. There are often no survivors to testify. There are few other witnesses because the aircraft crashes in remote locations. Law witnesses are not of much value because they know little about aircraft operation. Physical evidence of the crash is often destroyed or too severely damaged to be of use. It is difficult to reconstruct the aircraft's path in the sky. Prof. Sweeney concludes that there are substantial and real difficulties in obtaining evidence of the aircraft operator's negligence and that they justify regulating the burden of proof in favor of the claimant.

Orr[153] examines each of the difficulties in obtaining evidence listed by Sweeney and he argues that none of them exist.

It is generally thought that evidence of ATC negligence is easily

obtainable.[154] The ATC controller will be available. The physical evidence of the ATC negligence is preserved, it remains safe on the ground. Conversations between ATC controllers and the pilot are recorded on tape. In the United States, CAB accident investigation reports are available to both parties for their scrutiny. This is therefore not a reason for establishing a presumption of ATC negligence in favor of the claimant.

iv.DO ADMINISTRATIVE DIFFICULTIES IN THE COMMON LAW SYSTEM OF LIABILITY CAUSE DELAY, AND DOES UNCERTAINTY OF APPLICATION OF COMMON LAW PRINCIPLES AND DEFENSES WORK UNDUE HARDSHIP UPON PLAINTIFFS IN AVIATION CASES?.Sweeney[155] believes that undue hardship is caused through uncertainty about the law governing aviation negligence cases, and that this justifies regulating the burden of proof in favor of the claimant.

Orr[156] voices the opinion that it is no more difficult to recover from an aircraft operator than from a defendant in any other case. He believes that sufficient certainty of the law exists.

Sweeney's view certainly is influenced by the time when it was written. Air law may still have been in a developing stage in 1952, but now it has matured considerably.

The answers to the questionnaires sent by ICAO to member states inquiring about their laws on ATC liability, indicate that there is little uncertainty about the law on ATC liability. Uncertainty of the law, therefore, does not justify a weighting of the burden of proof in favor of claimants in the ATC liability convention.

v.DOES THE EXISTING DIVERSITY OF LIABILITY STANDARDS AMONG SEVERAL STATES HINDER THE DEVELOPMENT OF AVIATION? In the Sweeney-Orr exchange, this question related to the states in the United States of America, but

the same question can be asked in regard to national states.

Sweeney[157] describes a great lack of uniformity of liability rules among the states. Some apply common law principles of liability, others have statutes regulating the liability of aircraft operators; some impose absolute liability, and some states limit the amount recoverable by wrongful death statutes. Sweeney finds that a single standard is recommendable to establish uniformity among these different regimes.

Orr[158] counters, denying that existing diversity in liability legislation creates conflicts. Although there is diversity of laws, each state can adequately determine the liability. There is no need for regulation of liability for the sake of uniformity.

If the opinions are projected onto the international scene, the writer finds that uniformity of ATC liability regulation is desirable, even needed, but not because it is difficult to discover what separate laws apply. That is not true. The separate states' laws on ATC liability are generally well established. Need for uniformity does not argue for presumed or absolute liability.

vi. DOES THE LACK OF LIMIT UPON THE AMOUNT RECOVERABLE CONSTITUTE A CATASTROPHE HAZARD WHICH CREATES A DETERRENT TO THE DEVELOPMENT OF CIVIL AVIATION? Sweeney[159] argues that a catastrophe hazard to civil aviation is created because lack of a limit increases recoveries. Furthermore, a limit may be justified by a quid pro quo reasoning, that is, the claimant is favored by presumed or absolute liability of the defendant; in exchange, the defendant gets a limit on his liability to the claimants.

Orr[160] denies that lack of a limit creates a catastrohpe hazard. In the United States, lack of a limit on recovery has not deterred aviation

in spite of some high awards.

The question of whether a limit on liability is necessary in the ATC Convention will be discussed, and until its necessity is proved, the second question of whether it should be exchanged for ATC operator's presumed or absolute liability does not occur. But we can even reason here that a limitation on damages certainly does not have to accompany presumed or absolute liability.

vii. IS THERE A PUBLIC NEED FOR COMPULSORY AVIATION LIABILITY OR ACCIDENT INSURANCE: Sweeney[161] worries about operators of small planes having no insurance and no property, who are almost "judgement proof" if their aircraft harms others. The damaged plane itself will be of little value. If compulsory liability insurance of all aircraft were required, then payment of claims would be certain.

Orr[162] mentions that there is no proven record of aircraft operator's failure to pay for damages caused by aircraft. The Warsaw Convention does not require insurance. There is no record of foreign aircraft operators failing to pay legitimate claims.

Compelled liability insurance in connection with absolute or presumed liability of the ATC operator only comes into question in regard to the private ATC operator, for the government will have sufficient assets to pay.

Sweeney's argument about those who are "judgement proof" does not exactly apply to the few private ATC operators.[163] Where their activities are not guaranteed by governments, implicit government liability may exist in the delegation of its authority to the private organization to perform ATC services which the government otherwise would be obligated to provide under the Chicago Convention (Art. 28). Furthermore, in case of a damage caused by a private ATC operator's negligence, his assets,

the airport property, still remain. These assets may not satisfy a claimant who has lost a large jet plane with cargo. But private ATC operators do not normally serve large international planes.[164] The issue of insurance for ATC will be further discussed, but it is here stated that none of the ICAO countries, which answered the Legal Committee's questionnaire, required that their ATC operators obtain insurance.

viii. WOULD A SYSTEM OF ABSOLUTE LIMITED LIABILITY SIMILAR TO THE UNITED STATES WORKMEN'S COMPENSATION SYSTEM BE A FAIRER METHOD OF ADJUSTING AVIATION LOSSES THAN A "PROOF OF FAULT" SYSTEM? Sweeney[165] argues in favor of a system for aviation similar to the United States Workmen's Compensation system, which provides for absolute liability, limited recovery, and compulsory insurance.

No one, he says, should engage in aviation activities unless he can pay for the consequences. Under the proposed system, there would be no delay in recovery for the insurance company would pay immediately. The limited liability would protect aviation and would result in lower insurance rates.

Sweeney urges, as a matter of sound philosophy, that it is better to have assured payment of damages to all who have been injured, although the amount is limited, than to have recovery on the basis of proof of fault, where only a small percentage of injured claimants recover damages.

He complains that the proof of fault system does not provide for the situation where neither of the parties are at fault. The Workmen's Compensation-type system of absolute liability could pay for the claimant's injuries in such a case.

Orr[166] succinctly states that to adopt a system like the Workmen's Compensation System would be an admission that the judicial system had failed.

He contradicts Sweeney's statement that lower insurance rates will ensue. In fact, he states, liability based on proof of fault will result in lower insurance rates because the insured will not be liable if he exercises due care.

It is easier to control phoney and excessive claims, he says, under a proof of fault system, because of the great amount of evidence required by the courts.

Orr concludes that presumed or absolute liability generally will result in higher awards.

ix. CONCLUSION: One can begin a summary of the arguments from the standpoint that proof of fault should be the accepted system, unless it can be shown that absolute or presumed liability better suits the ATC subject matter. Then we have first Sweeney's points that evidence is difficult to obtain, there is a need for uniformity, that unlimited liability would create a catastrophe hazard to aviation, that insurance is necessary, and that assured payments are better than are potentially complete but difficult to obtain ones. Mr. Orr, who describes himself as having "directed more litigation involving aviation liability than any other man certainly in this hemisphere,"[167] has, in this writer's opinion, effectively countered that position, if not destroyed it.

At this point we may add Ehrenzweig's significant arguments against a proof of fault system for traffic victims. In general his opinions concur with Sweeney's but he develops them further in two areas: morality and economy.

The moral point is that a proof of fault system does not effectively fix guilt. When one contends with juries and witnesses, it is most difficult to discover "truth."[168] Therefore, one should lift the problem out of a moral frame-of-reference. Absolute liability has the

disadvantage of favoring the victim, but if one concedes that the victim should be favored over the injuror, then it follows that the injuror's "innocence" or "guilt," is less important than reparation to the victim.

Ehrenzweig's economic arguments are that proof of fault causes cases to be brought into courts, instead of settled outside, clogging the court system and causing great delay in recovery, often forcing the victim to settle too easily for too little.[169]

One is forced to note, after relating these arguments to ATC, that the fixing of guilt is not the justification of the proof of fault system, particularly when large corporations or governments are involved, rather than individuals. Guilt pales beside fact -- it is the procedure which brings valuable evidence concerning the negligence, which justifies the proof of fault system. Moreover, in the United States, at least, the claimant would face not a jury, but a judge, in an ATC case against the government

Although there may be delay in the victim recovering within a court, one cannot really say that such injustice outweighs that suffered when a straight settlement is made, which does not take into any great account facts, and is not flexible enough to adjust the award to the injury. Circumventing the courts seems only to substitute difficulties, not to mend them.

It is in the area of unprovable cases where Finn Hjalsted's argument against proof of fault is strongest. He believes that most aviation cases fall in the "gray area" where it is difficult to prove negligence. A proof of fault system then throws the burden on the claimant, leaving him with no possibility of recompense.[170] He believes, with Calkins[171] that the carrier (in this case, the ATC agency) not the individual, should bear the risk from a public policy point of view.

When we relate this to ATC negligence, one cannot help but see an ATC Convention working in concert with other private air law conventions. It does not make up deficits which fall on the fringe of the ATC subject matter, but attempts to cover its own subject well, counting on other conventions to cover their subjects. Thus, if the controller is clearly at fault, his negligence will not be difficult to prove. It his fault is not clear, the presumed and absolute liability systems of the other air law conventions will absorb the "gray" cases.

If we begin from the standpoint that another system must exist unless proof of fault can show its worth, we have the following arguments, considered from the points of view of the states, claimants, defendants, and subjects of other private air law conventions.

In the first place, reference to the ICAO questionnaire[172] shows us that a proof of fault system for ATC liability is what states and regional organizations now have. It would require the least amount of adjustment on their part.

More basically, we must consider the system as those who must use it would. For governments - the potential defendants - the proof of fault system provides maximum protection. It allows the most defenses:[173] 1) that no causal relationship between the ATC agency's act or ommission and the injury existed, 2) Contributory negligence by the plaintiff, 3) Force majeure, 4) waiver of liability by plaintiff; 5) voluntary acting in an emergency, 6) plaintiff's assumption of risk, and 7) violation of terms of the ATC Convention.

Moreover, fewer claims will be initiated, because the difficulty of proving fault will contrast in the claimant's mind with the relative ease of recovery under the Warsaw, Rome or Draft Aerial Collisions conventions. Fewer recourse actions by the ATC agency against the air car-

rier will be initiated, because, similarly, the relatively difficult procedure will discourage claimants from suing the ATC agency in order to recover higher amounts indirectly, forcing the ATC agency to sue the carrier.[174]

Since governments are three times involved: that is, as ICAO delegates, as signers of the convention, and as the very subject matter, we cannot discount the argument that governments will insist on a proof of fault system as the one which provides the maximum protection.

How does the system look to the claimant? He will want the wide definition of ATC services which the proof of fault system allows the drafters to include, because he will want to sue for as many kinds of damages as possible.

Further than that, we can suppose that since damages in aircraft are likely to be severe, the claimant will want to be made "whole," he he will not want a token payment. If that claimant produces good evidence that the ATC agency was at fault, he can recover to his satisfaction. He has an entire national court system within which to show his case to best advantage. If he does not have conclusive evidence of ATC negligence, he retains a reasonable chance of recovering an assured, limited amount from the air carrier, based on the presumption that "someone" was at fault.

The claimant, then gains the advantage of a full satisfactory recovery, while not losing the opportunity to recover from the air carrier under easier procedure.

How would the aircraft operator or carrier who is the potential defendant under other private air law conventions, regard an ATC liability convention based on proof of fault? Undoubtedly more cases would be di-

rected against the air carrier, since claimants who do not have specific evidence of ATC negligence will try to fit their case under the Warsaw, Draft Aerial Collisions, or Rome Conventions.

Another side to that argument, however, is that a proof of fault system will discourage recourse actions, thus encouraging claims to be settled in one action. If fewer claims are initiated and contested, less money will be spent on fringe expenses such as legal fees.

The latest ICAO study of liability systems has been in connection with the Aerial Collisions Draft Convention. There, we find that proof of fault exists as a basic rule.[175] The exception, passengers and shippers of goods, who recover from the negligent airline on a presumed fault system -- seems to arise for the sake of uniformity; that is, it "gives passengers and consignors the same benefit of presumed liability of the operator of the other aircraft -- with whom they would normally have no contractual relationship -- as they would have with respect to their own operator if he were a carrier under a Warsaw contract."[176]

If the exception in the Aerial Collisions Draft Convention exists for the sake of uniformity with the Warsaw Convention, what compelling reasons are there in the Warsaw and Rome Conventions for a system other than proof of fault?

Since the parties covered by the Warsaw are all participants in a "joint venture," the theory is that they should all assume some of the risk, proportioned so that the greatest burden rests on the air carrier and the claimants are a little favored. In the Rome Convention, the third person on the ground has no interest in the flight, therefore, he should assume no risk at all. Absolute liability completely weights the chances for recovery in favor of the claimant.

In an ATC Convention there would be no contractual agreement to share risks between the ATC agency on the one hand, and the air carrier, passengers and shippers on the other hand. First of all the passengers and shippers have a contract not with the ATC agency, but only with the air carrier. Secondly, although the aircraft operator and air traffic controller are often in direct contact, they are not contractual members of a joint venture, but simply two independents mutually interested in the safe completion of a flight.

For the sake of uniformity with the Warsaw Convention, the Draft Aerial Collisions Convention artificially creates a bond in the form of presumed liability between the negligent aircraft operator and the passengers and shippers of the other aircraft. Since no other conventions exist on the subject of ATC, exceptions for uniformity do not come into question.

The only participant for whom an exception might be justified is the third person on the surface. He is truly innocent in that he has no interest in the flight at all. It is reasonable to believe, however, that the third person on the surface will recover under the Rome Convention, unless he desires higher compensation. If he has sure evidence of ATC negligence, he will have little difficulty in recovering under a proof of fault system. Therefore the third person on the surface does not seem to be that compelling reason for an exception.

The writer favors the proof of fault system, and in addition suggests that an adoption of the definition of "fault" found in Art. 3 of the Harvard Draft Convention on the International Responsibility of States for Economic Injuries to Aliens, would be best in the interests of uniformity: "An act or omission attributable to a defendant is a "fault" within the meaning of this convention, a) if, without sufficient justification, it is intended to cause or to facilitate the causing of an injury;

b) if, without justification, it creates an unreasonable risk of injury through a failure to exercise due care."

Now we move forward to the complicated problem of a limitation on liability.

3. Policy Reasons for a Limitation on Liability

In this review of the arguments for a limitation on liability, the secondary problem will be whether or not that limit in question will be one monetary limitation uniform for all the private air law conventions.

Those who champion a limit on liability have compelling supporting arguments. The other group, who deny the value of a limit, cannot refute those arguments, but offer their own equally interesting points of view. That is the curious aspect of the limitation debate. A dilemma exists, it must be solved, but successful refutation of all the arguments on either side is impossible. Whatever choice we make is bound to be uncomfortable.

Let us look in on the debate to illustrate our point. The pro-limitation group argue that states now expect a limit on liability in private air law conventions, and many will rebel if it is not included. Economically impoverished countries cannot pay $900,000 for loss of a single life -- $8,300 (the present Warsaw limit) would be the most they could afford. If the Convention included such a limit, every claimant could hope to recover that amount. Lacking that limit, the foreign claimant would have to contend with such a variety of court standards that his claim might be considered hopeless from the beginning. For example, if the claimant is from a state with an exceptionally high standard of living, and he must press his suit in an economically impoverished

state, he cannot expect to be fully recompensed for his loss, he cannot hope that the judge will appreciate his need for what would there seem unreasonable compensation, he might find his proof of fault suit so difficult that the final award would barely cover court costs. On the other hand, if there is a limit, that same claimant would undoubtedly receive it with much less difficulty, simply because it was established, it was accepted. That states will tend to pay the limit, seems to be substantiated by Warsaw cases. The claimant receives a less, but certain, amount.

Another forceful argument is that uniformity is important to prevent unjust recourse actions, where the ATC agency might be sued for enormous amounts, but might be able to recover only the Warsaw limit in a recourse suit against the airline.

Then, convinced that these arguments have value, we turn to the other side and hear the following points of view: the government ATC agency does not need the economic protection of a limit, when it has a high degree of protection from its national court system, and the proof of fault procedure. Unless the ATC agency has been very obviously negligent, the claimant will try to fit his suit under the Warsaw or Rome Conventions, where the procedure will not be so difficult, and the award will be more certain. Clear-cut cases of ATC negligence will be rare, and the large number of cases in the "gray" area, where the blame is uncertain, favors the ATC agency. The government, of course, has attorneys whose specialty is air law, while the average person may have an attorney whose first acquaintance with air law comes in dealing with the claimant's case. In the United States there is no jury trial for claimants trying to sue the government, and instead of the sympathy of fellow citizens, the claimant must face a knowledgeable and experienced judge.

More persuasively, there is intense difficulty in agreeing on limits. The United States, which handles by far the most air traffic,

would not join a Convention with limited liability, unless the cut-off point were very high, say $60,000 for fatal injuries. Countries with less air traffic, and fewer economic resources, would of course never agree to high limits because foreign claimants might expect those limits to be produced each time.

Certainly, in working this matter out, we should begin from the premise that the need for a limit must be clearly established before we accept it. The two strongest arguments are economic considerations and the need for uniformity. And then the points of sovereign immunity, and security, follow. We will investigate each of these.

a. Economic Considerations in Deciding on a Limitation of Liability

In weighing the economic advantages and disadvantages of a limitation on liability for the ATC Convention, we note a conflict between ideal and pragmatic points of view. When a government undertakes to establish air transporation, including the obligatory aid of ATC, it should certainly be prepared to pay for the consequences of its negligence. Theoretically, we should not have to ask whether a state can afford unlimited liability; we should be able to assume its readiness to pay for its faults and make the claimant "whole" again. Actually, as everybody knows, states may establish air transporation for such unrelated reasons as prestige, and thus incur the obligation to provide ATC, while being unable to pay for the full consequences of its negligence.

If we are pragmatic, we admit a flaw in our legal philosophy, we admit the inability of court systems to make a claimant "whole," and perhaps encourage that inability, by establishing a limit on government liability. If, on the contrary, we insist that the claimant has the right to justly recover damages if he can prove the ATC agency's negligence,

do we flout reality?

The actual division is not so harsh. We can allow the law to establish a standard, which in this case is that governments desiring the benefits of air transportation must be able to pay for damages of their ensuing negligence, and at the same time give those governments such protection, through a proof of fault system, that the chances of their being sued again and again would be so greatly reduced that their resources would be sufficient to pay awards on those few successful claims.

Government protection, which is a major object of a proof of fault system for an ATC Convention, is ensured to such an extent that we can dismiss the argument that impoverished states could not pay awards to claimants from wealthy states.

Instead, we must ask how useful a Convention would be without the inclusion of the United States, which would almost certainly not join a Convention with a limit acceptable to poorer countries, when so much of the world's air traffic is over the North Atlantic and deals with U.S. ATC. To prove that point we need only note that the United States has not joined the unsuccessful Rome Convention, much because of the low limit, and it is thinking about withdrawal from the Warsaw Convention for the same reason.[177]

If a limit were established, couldn't states supplement it with insurance, as Sand persuasively proposes?[178] Indeed, that suggestion has found the support of the U.S. Administration which introduced a bill into Congress to that effect. But the bill has been opposed by the aircraft operators, who after all would be forced to contend with a variety of limits, if the practise spread to foreign states. A Convention is supposed to smooth the difficulties of international flight, not to create new obstacles, in their opinion.

Would a limit encourage states to provide more air traffic control? In the ICAO Subcommittee it was argued that states' major concern in pro-

viding air traffic services was safety rather than liability,[179] and we hope that that is indeed true. Nevertheless, we cannot deny that the high cost of air traffic services is a curb on expansion. It is significant that the U.S. Federal Aviation Agency's budget has risen from 131 Mill. dollars to 717 Mill. dollars in the last decade and that it is becoming increasingly difficult to get legislatures to allow more money for ATC services.[180] Are not the impoverished states the very ones which should be encouraged to produce better ATC services? Definitely.

And yet we cannot rely on the fact that the money which a limit might save an impoverished country would be spent on improving ATC services. There would of course be no way for that state to reckon the difference, and there would be other pressing claims in its budget.

On the contrary, we can employ the primitive argument of deterrence: if a state knows that its liability is unlimited, it may be induced to lessen the chance of negligence by improving its ATC facilities.

However, ICAO sets such a high minimum standard on ATC services for all members of the Chicago Convention, that it is unlikely that a state would be operating facilities which were truly inadequate.

A more powerful argument for a limit on liability is that it avoids litigation by facilitating quick settlements. It is a definite economic benefit if compensation is paid quickly after the damage has been done. "Reduction of litigation by offering an easy basis for settlement,"[181] is one justification for creating a limit. But is is at the same time an admission that our court system is inadequate, that claims inside of courts will not be adjudged within a reasonable amount of time (which in many cases is true) and that a settlement outside of court for an established limit is more just (which is many times untrue). It is senseless to establish a limit so that our courts will be uncluttered, since one function of courts is to determine fair awards, and that reasoning might result in unfair awards.

The final refutation to this, is that in a proof of fault system, the ATC agency would be so protected that it would undoubtedly insist on taking the claim into court. This contrasts with the carriers or operators under the Rome and Warsaw Conventions, who are absolutely or presumed liable, in a way that favors the claimant, so that a settlement out of court actually saves both parties money.

If we accept that reasoning, then we can say that just because parties in Warsaw cases tend to accept the established limit (that the carrier almost automatically pays the full limit to the claimant ouside of court), a precedent is not thus established for ATC liability. Presumed liability and proof of fault are so different, that the ATC agency almost certainly would not pay the full limit unless ordered to do so by a court.

Would a limitation on ATC liability dissuade states from imposing charges for the use of air traffic services?[182] Approximately 25 states are reported by ICAO to charge such fees.[183] It seems to the writer that a limitation would indeed be some deterrence to fees, but that since these charges are not yet clearly legal, and the problem involves a minority of states, that would not in itself be a justification for a limit.

Drion writes that "The better position of the passenger in measuring the risk of his death of injury in excess of the average passenger accident risk" is a justification for a limitation of liability in the Warsaw Convention.[184] In regard to ATC liability, then, if a limit is fixed, the operator, passenger, shipper or surface owner knows the limit on potential liability, and can take out as much insurance in excess thereof as is needed. But certainly it is not a strong reason for establishing a limit, to aid the passenger with his arithmetic, to help him compute his own value.

Limitation of the agency's liability is not needed for the ATC agency to obtain insurance. The governments will in most cases be self-insurers, that is, carry the cost of the ATC services themselves, because the operation is so large and widespread that self-insurance is cheaper. Only for the private ATC operator will insurance come into question, but it is noteworthy that none of the governments reporting to ICAO's questionnaire on their regulation of ATC mentioned that they required compulsory insurance by private ATC operators.[185] Private ATC operators in the United States will usually not serve international flights which have to go to large airports with proper custom and immigration facilities.[186]

The old quid pro quo argument for a limitation, that is, limitation of liability as a counterpart of an aggrevated system of liability, is the most often heard justification. It is a vicious circle, with little meaning, proves Drion.[187] The individual claimant, in fact, suffers, because recovery of all the claimants has been limited as is illustrated by the claimants' frequent attempts to get around the limitation of liability in the Warsaw Convention by alleging willful misconduct. There is no collective user interest in the exchanged limited liability for presumed or absolute liability.

Air traffic control cannot be considered a catastrophe-risk, that is, one cannot suppose that accidents will be the rule through its use. Even if one were to accept this argument, the refutation is that the risk, borne by governments, is neatly distributed to the taxpayers. It is not sustained by small operators, struggling for their existence.[188]

This seems indeed to dispose of the most important arguments favoring a limitation for economic reasons. Let us turn now to another category.

b. Uniformity of Law as a Basis for a Limitation

One cannot favor a limitation on liability for the sake of "uniformity" without having something specific in mind. One must inquire, with what should the ATC Liability Convention be uniform? Conventions on other forms of transportation? National legislation? Other private air law conventions? In our case, those are the only reasonable possibilities.

Since we are dealing with international carriage, automobile and railroad law must be omitted at once.[189] So we turn to shipping. Should the ATC Convention establish a limit on liability in order to conform with states' maritime practise of limiting liability?[190] A ship's liability depends on its size, and a harbor's liability is limited according to a ratio based on its size, and the size of the largest ship using it.[191]

To apply such a solution to ATC, and, for example, try to measure the liability of the ATC agency according to the largest aircraft which it could service,[192] is to presuppose older ATC methods whereby each airport had independent air traffic control services. It does not take into consideration the national and international character of modern ATC. Such a system of limitation on FAA's or Eurocontrol's liability would obviously be impossible.

The nature of the ATC Agency is too different from that of the ship owner, or harbor director, even farther apart than are the ship owner and the air carrier or operator whom Drion finds to be too removed to make such an analogy useful.[193] If the subjects of the Conventions do not resemble one another, any attempt to consciously establish similarities is artificial.

So let us turn to the issue of uniformity with national legislation. One can see at once that two different regimes are often existing concurrently, one inside, and one outside of a convention. For example, there is a deep distinction between Warsaw and non-Warsaw carriage. If a passenger flies on a domestic flight in the United States, he is not subject to the limited liability of the Warsaw Convention, but when he flies on an international flight, although the damage takes place while he is still inside the United States, he is subject to these limits. England, in fact, decided to apply the Warsaw limits to domestic carriage, so obviously some authorities believe that there is a need for uniformity.

Finally we discuss the question of whether there should be uniformity with other private air law conventions. Sir Richard Wilberforce[194] at the 1960 Session of the ICAO Legal Committee said that he could not justify a limitation of the operator's liability <u>vis a vis</u> passengers, when the passenger was not subject to a limitation of his claim against ATC. In other words, Wilberforce thought that ATC liability should be limited in order to conform with the principle of limited liability of other private air law conventions.

The reaction to these arguments can only be to again question the abstract unit "uniformity." Do we want all private air law conventions to have a limitation (any limitation?) on damages? Or do we want those limits themselves to be uniform?

Naturally, we must reply, <u>any</u> limit will not do, it must be a specific one, agreeable to many states. If we have disposed of the necessity for a limitation for economic reasons, then we can scarcely believe that a limitation is justified as an abstract ideal. We must mean that we think the <u>limits</u> themselves should be uniform, so that the courts, the

passengers, the shippers, the carriers - everyone - will know that the amount of probable recompense per claimant is, say $8,300, whether the airline or the ATC agency is being sued, or third persons on the ground are involved.

Of course the argument must break down here, because there is no uniformity of limits in private air law conventions, except for such minor points as baggage and cargo in Warsaw and Aerial Collisions conventions. There is no single norm with which to conform.

Let us suppose that all the existing air law and draft conventions were amended to allow one uniform amount of compensation. What is the use of that? It simply puts a certain monetary value on human life to which no one individual or state would agree, a clear compromise value. The conventions would say, in effect, no matter whom you have lost, no matter where or how within the realm of air transportation, the value of that loss is $8,300. The court knows that is not a true value, the claimant knows it, and the defendant knows it. But there is uniformity. We have simply sacrificed justice for uniformity.

Finally, of course, we can break down the uniformity argument in a way similar to that employed in our comparison with other transporation modes. The subjects of the conventions are not similar in more than a superficial way, the air carrier or operator provides transportation for profit; the ATC agency <u>aids</u> transportation for the public welfare. To establish a similarity at this point, when so few exist at any other point, is artificial.

It is surely clear that our ATC Liability Convention must meet its own needs.

c. Sovereign Immunity and Security Arguments for Limitations on Liability

States which have not yet waived sovereign immunity might be induced to accept limited liability under the ATC Convention.[195] This argument appeared both at the first and the second sessions of the ATC Subcommittee. Some states are so anxious to have an ATC Convention, that they are willing to compromise and to accept a limitation on liability in order to make it more attractive for states which do not now permit themselves to be held liable, to join the ATC Convention.[196] However, it seems doubtful that the few remaining states which practise sovereign immunity would be induced to change if they were offered limited liability for ATC, because the reasons by which those states justify their immunity are seldom economic. They are instead that the king is infallible, or that it is illogical to make the source of laws liable.

One writer suggests that states should not permit their air power to be sapped by unlimited payment of claims, because the combined airpower has important military value.[197] The best way of solving this problem is probably to include a clause in the ATC Convention similar to Chicago Convention's Art. 89 exempting the contracting parties from the obligations of the Convention in case of war or national emergency.

d. Conclusions of the ATC Subcommittee

A questionnaire asking member states whether they, in their domestic laws, imposed limits on the liability of ATC brought back the answers that none of the 28 reporting member states limited ATC liability. Only the United States reported limited liability under the Wrongful Death Statutes

of some states. Neither do the international ATC organizations, Eurocontrol, ASECNA or COCESNA, limit their liability. In spite of the answers to the questionnaire, the majority of the ATC Subcommittee agreed that there should be a limitation of liability in the ATC Convention,[198] some upon the slim basis that they were willing to compromise in this respect in order to make the Convention more attractive to others. Although compromises may indeed be necessary to make conventions work, it is not clear why that middle group did not swing in the other direction. In general, it is odd that a majority of states' international policy would be such a contrast to their national practices and policies.

The writer submits that since the ATC agencies are offered such court protection under a proof of fault system, that it is unfair to further weight the scales against the claimant and make the chances for just recompense so slim, that it is not worth the claimant's time to pursue it.

However, since the ICAO Subcommittee's decision has so far been to establish a limit, it is only fair that a discussion which purports to cover the issues, should include an investigation of what a limit should be, if one were established.

4. What Should be the Limitation on Liability in the ATC Convention if Limits are Desired?

If it is decided that liability should be limited, one must ask more questions: Are any of the limits in existing private air law conventions and draft conventions applicable, or must new limits be established? Should recourse actions of air carriers and operators against the ATC agency be limited? What laws will govern the recourse actions of ATC agencies against the air carriers or operators?

In all of these questions one danger is apparent: Circumvention. The claimant will always try to place his suit under the convention which yields him the most certain return, unless his chances of recovering the higher award are very good. If the ATC liability is limited, he will almost always turn to the Warsaw and Rome Conventions. If ATC liability is unlimited, and the claimant's chances of proving the agency at fault are better than 50%, the claimant may risk the proof of fault procedure in the hope of a higher award. If his suit then succeeds, the chances are that he has produced such conclusive evidence of the ATC agency's fault, that a recourse action by the ATC agency against the private air carrier or operator would not be successful. On the other hand, the private air carrier's and operator's recourse suits against the ATC agency would not involve unreasonable amounts, because they could not hope to recover more than the damage costs originally paid by them to their claimant.

It seems to the writer that the passengers, shippers and third persons on the surface are better served by unlimited ATC liability; their presence in court may thus be worthwhile. The airlines are better protected, because unlimited ATC liability will draw some suits away from them. And the ATC agency is well protected in its proof of fault procedure, where the airline has no better chance of proving the ATC agency at fault in a recourse action than the direct claimant would have had.

This leads us right into the issue of causal relationship. No matter where a claimant places his suit, he must show that the defendant caused the damage to happen. The claimant thus assesses his chances of proving causal relationship. If he has a 25% chance of showing that the ATC agency caused the damage, and 75% chance of showing that the airline pilot caused the damage, he will sue the airline, even though the

ATC Convention has unlimited liability. The airline in a recourse action has only that same 25% chance to show that the ATC agency caused the fault. It is not until the claimant's chance of showing causal relationship are better than 50% that one can suppose he will take the risk of a proof of fault system.

Now we turn our attention to how a choice of limits will affect the ATC Liability Convention.

a. Limits of Existing International Air Law Conventions Directly Applicable, or as a Guide.

The limits found in the Warsaw Convention and the Hague Protocol are (One dollar = approximately 15.15 gold francs) :

	WARSAW (Art. 22)	HAGUE (Art. XI)
Each Passenger:	125,000 gold francs ($8,291.00)	250,000 gold francs ($16,582.00)
Baggage and Cargo:	250 gold francs per kg. ($16.50)	250 gold francs per kg ($16.50)
Objects carried by the Passenger himself:	5,000 gold francs ($331.64)	5,000 gold francs ($331.64)

The limits of the ROME CONVENTION (Art. 11) are:

Each Person Killed or Injured	500,000 gold francs ($33,164.00)
Compensation for Damage to Each Aircraft:	a) 500,000 gold francs ($33,164.00) for aircraft 1,000 kg. or less b) 500,000 gold francs ($33,164.00) plus 400 gold francs ($26.40) per kg. for aircraft 1,000-6,000 kg. c) 2,500,000 gold francs ($165,820.00) plus 250 gold francs ($16.50) per kg. for aircraft 6,000-20,000 kg. d) 6,000,000 gold francs ($397,468.00) plus 150 gold francs ($9.90) per kg. for aircraft 20,000 - 50,000 kg. e) 10,500,000 gold francs ($696,444.00) plus 100 gold francs ($6.60) per kg. for aircraft 50,000 kg. and up.

The AERIAL COLLISIONS DRAFT CONVENTION (Art. 10) has adopted and included the Warsaw limits (Art. 22) as amended by the Hague Protocol (Art. XI):

Each Person Killed, Impaired or Delayed:	250,000 gold francs ($16,582.00)
Objects carried by a Person	5,000 gold francs ($331.64)
Baggage, Cargo, Mail Delayed, Damaged or Lost:	250 gold francs per kg. ($16.50)
Damage to Other Aircraft:	Its "proved value" at time of collision; or cost of repairs, or replacement, whichever is least.
Loss of Use of Other Aircraft	Not more than 10% of "proved value" at time of loss

b. Direct Actions Against the ATC Agency

There are three ways to determine which limits might apply to an ATC liability Convention. In the first place, one can adopt the limits of existing private air law conventions, which have been laboriously agreed upon. In the second place, one can modify those limits with schemes that might interest wealthier states. Thirdly, one can establish new limits.

The advantage of using the old limits[199] is that they have the backing of the majority, though not necessarily the most powerful, states. Significantly, one member of the ATC Subcommittee wanted limits to be four times higher than the present limits in the Hague Protocol, which he considered inadequate.[200] The Hague Protocol is the most updated version, but since its limits are partially found in the Aerial Collisions Draft Convention, one would say that the Draft Convention would apply to: Persons killed, impaired, or delayed (also Hague): objects carried by a person (also Hague); Baggage, cargo, mail delayed, damaged or lost (also Hague); and damage, or loss of use of aircraft. The Rome Convention would apply to surface damage.[201]

Another way of utilizing the old limits is to simply say that the limits of any other air law convention which pertain to the situation, and to which the ATC member state belongs, shall apply.[202] For example, if surface damage were involved, and the state were a member of both the Rome and ATC Conventions, then the Rome limits would apply. The defects of that are too obvious. Depending on which membership a state held, the foreign claimant might or might not be subject to a limit. There would be no certainty.

The major defect in applying old limits, under any guise, is of course that they are too low to be acceptable to certain influential states.

Much of the Subcommittee's discussion at its Second Session concerned a scheme whereby, although states agreed to limitations of liability for the ATC Convention, they would be free to stipulate that they, themselves, would pay more than the limit. This would cause other air law conventions to represent minimum limits. The Subcommittee agreed on this solution.[203] This writer rejects it. States would have no great interest in voluntarily raising the limits on compensation for damages payable to foreign air carriers, operators or third persons on the surface, since their own air carriers, operators and third persons on the surface would be outside the scope of the ATC Convention, and there would be no certainty that their citizens would receive like high compensation abroad. Only nationals using foreign planes, suffering damage from the ATC of their national state would be interested in such a scheme, and passengers do not lobby very effectively.[204]

Entirely new limits[205] would of course cause much dissension and involve new economic surveys, but three conditions might warrant a study of such changes: If the world's, or a substantial part of the world's, economic situation had altered since the last limits were adopted; or if the ATC agency, being government owned, could not be compared to private air carriers or owners; or if the limits should be different because ATC was adopting a proof of fault system.

In the first case, we can say that the Aerial Collisions Draft limits were discussed as recently as 1964, and no majority move was made to change them.[206] So, although one might argue that the standard of living in most western aviation states has improved since 1955, when the Hague limits were set, the argument must continue that the dissatisfaction with the present limits is not world-wide. It is the attitude of a minority of strong states. This did not seem to justify for the other members of the ICAO Legal Committee revision based on a change in the

world's economy.

The second argument, that since ATC is government owned, it can better afford high limits than can private air carriers or operators, may be true. It theoretically has the resources of every tax-payer in the nation (although this doesn't account for how wealthy those individuals may be, or what other claims the budget makes), whereas the private operator is limited to resources from stock holders, mortgage holders, and profits made by efficient operation. However, we can argue that if the carrier cannot pay for its negligence, its existence is against the public welfare.

The better argument is that the private carriers and operators are presumed or absolutely liable, whereas the ATC agency, which is protected by the proof of fault system, will not be liable so often, and will better be able to pay higher claims on the few successful suits.

Ideally of course, the sole test of compensation should be the damages suffered, not the defendant's ability to pay.[207]

Finally, we must conclude that any limit adopted would cause some states to abstain from signing the Convention. It is perhaps a matter of weighing whether the Convention should be attractive to a majority of states, however small their aviation interests may be, or a minority of states which form the hub of the world's aviation activities.

c. Recourse Actions Against the ATC Agency

If direct actions are limited in the Convention on ATC liability, the drafters have a choice of limiting or not limiting recourse actions. Unlimited recourse actions could cause the ATC agency to suffer.[208]

Imagine, for instance, that a foreign non-Warsaw airline crashes over France. If the negligence is not obvious, the passenger may sue the non-Warsaw airline and recover an unlimited amount. The airline, believing that it can prove ATC negligence, sues Eurocontrol, which we imagine to be a member of the ATC Liability Convention, and recovers full (unlimited) compensation. It is the ATC agency which must bear the difference between what it would have paid the passenger in a direct action subject to limits, and what it finally had to pay in an unlimited recourse action.

Therefore it is most reasonable that recourse actions be limited. Does any injustice thus result? Yes, but not to the ATC agency. The situation is just reversed, that is, the passenger, shipper or third person may sue the foreign non-Warsaw airline and recover unlimited compensation. Then the non-Warsaw airline, in a recourse action against the ATC agency, cannot recover the full amount, but is subject to a limit. The non-Warsaw airline must bear a loss for damage which the ATC agency caused. This situation would be rare, for most states are members of the Warsaw Convention.

If the ATC Convention's limits were lower than those of other private air law conventions, the air carrier or operator might suffer in a recourse action. But the possibility of such low limits being established is most unlikely. Thus we can say that if a limit were created for direct actions, it would be most just to similarly limit recourse actions.

d. Recourse Actions by the ATC Agency Against the Air Carrier or Operator

A reverse situation exists when the air carrier's or operator's liability is limited under an air law convention, but the ATC Convention

has a higher limit or no limit at all.[209] One argument is that it is to the advantage of the claimant (passenger, shipper, third person on the surface) to avoid the limit of the other convention by bringing the action against the ATC agency. The ATC agency would then bring a recourse action against the air carrier or operator, thus suffering, by being subject to lower limits. It would have to bear the difference between what it had paid the claimant and what it could recover from the airline.[210]

If a limitation on liability of the ATC Convention were the same as that of the air carrier's or operator's liability, then one could not construct such a problem.

Another solution would be to apply the air carrier's or operator's limitation to potential recourse actions only, in order to avoid the circumvention. Or, to carry the argument further, open the ATC Convention only to recourse actions. This, of course, is highly impractical, for then few suits against the ATC agency would ever be brought to court. For instance, if the ATC agency were clearly at fault, a claimant could not base his suit against the air carrier. He would simply not be able to present his claim anywhere.

But if proof of fault, combined with no limitation on liability, were the system adopted for the ATC Convention, the number of recourse actions would be substantially reduced. The proof of fault system shows its strength here. It throws up a barrier against claims which are potential recourse actions, because it encourages passengers, shippers and third persons on the surface to recover with less difficulty using the presumed liability of the Warsaw Convention and the absolute liability of the Rome Convention. Otherwise, the claimant would have to prove the fault of the ATC agency, and this is not easy. If he succeeds, however,

it is unlikely that the ATC agency would have sufficient cause for a recourse action. Combined with unlimited liability, a proof of fault system avoids conflicts with the limited liability of other conventions by cancelling a claimant's temptation to recover indirectly. It discourages circumvention. It encourages claims to be settled in one action.

A solution to the problem of recourse actions is one prepared by the United States for the Fourteenth Session (1964) of the Legal Committee: a consolidation of air law conventions. In a consolidated air law convention, almost all claims would be in the form of direct actions.[211]

> In regard to recourse actions under such a convention [as the U.S. proposes], we would be interested in the exploration and possible developments of a system without alimitation, in which recoveries would be based on proof of fault, and damages apportioned in relation to the degree of fault of the various tort feasors.

It should be noted, however, that the United States omitted the Warsaw Convention from its consolidation proposal. To diminish recourse actions by consolidations, it is imperative that the Warsaw Convention be included, since its liability limitation would usually be related to recourse actions.

The writer wishes to acknowledge that ATC agencies can be involved in recourse actions against parties such as the Weather Bureau, ATC employees, manufacturers of ATC equipment, which are not governed by other air law conventions; but they fall outside the scope of our discussion.

e. Conclusion

When the subject of limits is introduced, one point leads to another. Each argument is composed of so many variables, that it is difficult to build one idea upon another. The structure may collapse if you remove one brick, change one factor.

Therefore, several problems have not yet been touched. For instance, having made the decision to establish limits, the Subcommittee must deal with their correlation. Should a claimant be able to recover a total of more than the carrier's or operator's applicable limits?[212] That is, should he be subject to a cumulative system of limits? Imagine, for instance, that two different ATC agencies are at fault for a collision in which the claimant lost his wife. Can he sue both agencies in different actions and recover twice, that is, double the limit, for that one loss?[213] A no-limit system of liability of course does not have this stumbling block.

Another question is whether direct actions against ATC should have priority over recourse actions.[214] This situation would probably not occur because any air carrier or operator acting as a claimant in a recourse action against the ATC, would include his own damages, at least the cost of the first action, as a direct claim, together with his recourse claim.

We have here discussed only the most significant issues, to illustrate the nature of the problems which arise with each new argument.

5. ATC Forfeiture of Limitation on Liability

Which of the other international private air law conventions provide the best guide to forfeiture of limitations in the ATC Liability Convention?

The air carrier or operator forfeits limitations of his liability if he fails to comply with the requirements of the Warsaw Convention, or in case of his willful misconduct.[215]

Under the Rome Convention, the limits are forfeited if the plaintiff proves deliberate act or omission by the operator, his servants or agents

with intent to cause damage, or if a person takes a plane wrongfully and uses it without the consent of the persons entitled to use it (Art. 12).

The Aerial Collisions Convention (Art. 11) adopts part of the Hague Protocal,[216] and part of the Rome Convention.[217]

The Hague Protocol provides the best forfeiture clause, writes Prof. Rinck authoritatively,[218] and this writer agrees. If a limitation of liability is placed in the ATC Convention, the limits should be forfeited,[219]

> ...if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Only this forfeiture clause should be necessary.[220]

6. Summary of Parties Which May Bring Actions and Parties Liable

Earlier we discussed in detail the claimant- and defendant-minded groups,[221] and the time has come to take another look at them within the frame of a special Convention on ATC Liability.

Everybody who suffers injury from ATC negligence should be entitled to bring action. This includes a) the crew, b) the passengers, c) the aircraft owners, the operator, and the air carriers, d) the shippers and recipients of freight sent by aircraft, e) aircraft mortgage holders, f) persons on the surface, g) persons having contractual relationships with the operator, concerning later use of the aircraft, and h) other more remote persons who may suffer indirect damage.

In regard to the last claimants, some countries are more permissive than others. It is possible that the ATC Convention may need a

specific limitation on remote claims in order to avoid variance among jurisdictions.[222]

More particularly, claimants should include any injured individual who comes within the scope of the Convention,[223] and anyone claiming through him. For example, if a person has been killed by ATC negligence, possible claimants should include 1) the spouse of the decedent, 2) a parent of the decedent, 3) a child of the decedent, 4) or a relative by blood or by marriage, who is a dependent of the decedent.

Additionally, persons holding shares or having similar evidence of ownership in a juristic person (corporation) which has suffered injury by ATC negligence, may present a claim if the juristic person itself has failed to do so. A claim which occurred before the death of a claimant should be permitted to succeed to his heir, and if a claim has been assigned, then the assignee should be able to present it.[224]

The writer disagrees with the ATC Subcommittee's recommendation that the ATC Convention should not enumerate the parties entitled to bring actions. The states have varying provisions concerning who may bring suit, and since a lawsuit for ATC negligence will always be brought in the state providing ATC, it is necessary for the claimant's protection to provide the local court with rules.

The parties which may be liable are a) governments and their agencies, b) political subdivisions supplying ATC, c) private ATC operators, d) international ATC orgainzations, e) servants of ATC agencies, and operators, and f) the manufacturers of ATC equipment.

The next pertinent question concerns what defenses the parties liable can use.

7. Defenses in Case of Liability Based on Proof of Fault

Each system of liability - absolute, presumed liability, and proof of fault -- would bring its own defenses. We will discuss those connected with Proof of Fault, since that seems to be the system which will probably be adopted.[225]

a. That No Causal Relationship Between the ATC Agency's Act or Omission, and the Injury Existed.

This defense, listed by the Subcommittee, should be refined to read that the ATC agency's act or omission was not the proximate cause of the injury, because the ATC's fault may have been a contributing cause, but not the important, decisive event, as illustrated by Johnson v United States,[226] where the ATC agency's negligence in failing to separate a light plane from the turbulence of a large jet was a cause of the crash, but not the proximate cause, and the ATC agency was not held liable.

If a defendant stated that no causal relationship had been established, he would mean that the injury had been caused by fault of third party. This would be one way of showing lack of causal relationship. The ATC Subcommittee's recommendation that fault of third party not be permitted as a defense, since the ATC can recover in recourse anyway[227] is not well based, both because it would deprive the defendant of a weapon in disproving causal relationship and because it would result in unnecessary recourse actions.

b. Contributory Negligence by the Plaintiff

This is a common defense to fault liability. In some states, as in the U.S.A. where it is a general rule, contributory negligence will destroy the plaintiff's case entirely. In other states, contributory

negligence results in a reduction of the amount to be paid in damages in proportion to the percentage of the damage which was caused by contributory negligence.[228]

It is recommended that Art. 6 of the Rome Convention be adopted. It provides for mitigation of damages in case of contributory negligence. Art. 6, unlike Art. 21 of the Warsaw Convention and Art. 6 of the Aerial Collisions Draft Convention, does not leave the determination of mitigation to national courts, but creates an international standard.

c. Force Majeure

The Subcommittee describes this defense as being that the injury was caused not only by the ATC agency, but also by force majeure. Stated thus, an analogy to maritime practise is drawn, where a master's liability could be reduced in proportion to the amount of the damage which was caused by force majeure.[229]

This defense was rejected by the Subcommittee at its Second Session.[230] The writer would of course allow the complete defense of force majeure, but an apportioned system analogous to sea law is discouraged in conformity with the previous discription of differences between liability of ship owners and ATC. In force majeure the operator is helpless. If the ATC agency complicates an already difficult situation with errors of its own, it would swing the case into the realm of contributory negligence.

d. Waiver of Liability by the Plaintiff

This is the last defense listed by the Subcommittee.[231] If the ATC agency includes a waiver of liability in a contract with the plaintiff, as for example in the United Kingdom, the ATC agency would be released from all future liability.

The United States considers ATC waiver of liability to be against public policy. In Air Transport Associates, Inc. v United States. the ATC agency had negotiated such a release of liability with the aircraft operator. The court held that the release was void because it was against public policy and gave a judgement for the plaintiff.[232] The Warsaw Convention, Art. 23, states that any provision tending to relieve the carrier of liability shall be void.

It is recommended by the writer that waiver of liability not be included in the ATC Convention, as a defense, because it is in direct conflict to the purpose of the Convention, the permission and regulation of liability.

e. Voluntary Acting in an Emergency

The Subcommittee incidentally indicates that this would be an ATC defense. Humanitarian acts by the ATC agency have been mentioned earlier, and we there decided that such negligence should not escape liability.[233] Voluntary acting under emergency situations should therefore not be stated as a defense to ATC liability.

f. Plaintiff's Assumption of Risk

This was not mentioned by the Subcommittee, but should be included as an ATC defense to liability. The plaintiff may, for instance, have known of the negligent operation of an airport beacon, but decided to land anyway. He would thereby have assumed the risk.

g. Violation of Terms of the ATC Convention

This can certainly be added to the Subcommittee's list of permissible defenses to liability, for just as it is true that a member state, within

the jurisdiction of which the plaintiff was claiming, may violate the Convention, the plaintiff himself might fail to comply with the obligations imposed upon him.

8. Security for ATC Liability

A detailed system of security for the operator's liability is found in the Rome Convention (Chapter III) in order to insure payment of surface damage caused by foreign carriers.

Is a system of security necessary to insure that claimants are paid for damages covered by the ATC Convention? Government operated ATC does not need to be so secured, and that removes by far the largest part of the air traffic services from scrutiny. In regard to liability of international ATC organizations, the states which signed those enabling conventions would be secondarily liable.[234] Insurance of security would not be needed in this case, either.

Then we must consider how the private ATC operator will pay damages for liability incurred under the ATC Convention. The Subcommittee repeats its interesting argument that Member States of the Chicago Convention may not escape liability for ATC functions which they have undertaken to provide in compliance with Art. 28.[235]

> It appeared to be arguable whether a state which undertakes under Article 28 of the Chicago Convention vis a vis other states technical responsibility for providing air traffic control servicesin accordance with ICAO procedures could properly avoid under international law legal liability towards private persons in case there was negligence in the performance of the services.

If a member state delegates performance of Art. 28 functions to a private ATC operator, then the state is clearly liable, meaning that no insurance for these delegated duties is necessary.

Remaining, are the private ATC operators which provide ATC functions under license and subject to inspection by their national governments. Should they be required to furnish security? It has been shown that international flights infrequently land at privately owned airports. The few private ATC operators might incur a risk of damage in giving ATC to foreign planes passing above, but it is less justifiable to require insurance or deposit of security of private ATC operators, who may never expect to service a foreign plane, then it is to demand insurance or security from foreign planes.[236]

The lack of urgent need for ATC insurance or security deposits is brought home by the statistics submitted by member states to the ICAO Legal Committee. None of the twenty-eight reporting states require ATC services within their boundaries to furnish security or insurance.[237]

If member states of the ATC Convention were to remain as guarantors of claims against the private ATC operator, or were to permit claimants to sue the state for damage caused by fault of any ATC operator within the state, or were to be required to impose compulsory liability insurance on all ATC operators, the state would be forced to assume additional ATC burdens, the less onerous of which would be enforcing that the ATC operator had liability insurance. That solution would not be popular with the ATC operators who are rarely attempting to reap a profit. Any one of these solutions could, in fact, dissuade a state from joining the ATC Convention.

One may also ask the question of whether insurance of the private ATC operators is at all necessary, whether the risk involved is of any consequence? If the chance of foreign planes landing at private airports is very small, the possibility of negligent control is proportionately small. Faulty information and instructions to passing foreign planes would normally be flight information or air traffic advisory service,

from which it would be difficult to recover under a proof of fault system. The chance of proving the private ATC at fault is even less than the chance of a private ATC agency servicing planes.

On the other side, it can be argued that since a small risk does exist, it is desirable to require liability insurance of the private ATC operator, in order that he may remain a solvent defendant, and also for his own sake, to have his risk widely spread by insurance.

Since the Chicago Convention obligates states to provide air traffic services, Member States reasonably should have some interest in good performance.

The ATC Convention would fail in spirit if it could not insure that ATC-caused damage is paid. It must therefore compel that the damages caused by the private ATC operator are paid by him, and if he cannot pay, then someone else must be found; the logical "someone else" is the ATC operator's national state, which can either assume or guarantee the claim, or compel the ATC operator to insure. Under any circumstances, it remains the responsibility of the national state of the ATC operator.

Since ATC is supplied by government agencies in all the significant aviation states, the states which might be held responsibile for the damage of their private ATC operator, would merely be put on equal footing with the states which themselves supply ATC. In this respect no injustice would occur.

Since proof of fault makes the chance of loss small, the burden on the ATC operator's state would be proportionately small.

Unlimited liability under the ATC Convention would strangely argue in favor of compelling liability insurance, or government guarantee, or government assumption of the entire liability incurred under the Convention.

Other member state's interest would merely be that their claims were paid. It can therefore be left to the individual member states to arrange how this is to be accomplished; but ultimately the state must remain liable.

The writer recommends that a provision be included within the Convention whereby states can guarantee that the agencies which perform ATC services within their national boundaries will be able to pay for the consequences of their negligence.

9. Jurisdiction

A great benefit of an international air law convention on ATC liability is that it would provide a forum where the court cannot refuse to consider the plaintiff's claim.[238]

In weighing which fora should be open for a claimant under the ATC Convention, it is useful to look at its predecessors in private international air law.

The Warsaw Convention (Art. 28) permits the plaintiff four choices of fora:

1) The court of the domicile of the carrier

2) The carrier's principal place of business

3) Where the carrier has a place of business through which the contract of the carriage was made

4) The court at the place of destination.

Alteration of these rules is not allowed.[239]

Art. 20 (1) of the Rome Convention provides only a single forum for the claimant's suit -- the courts of the contracting state where the damage occurred. The parties may agree on a different forum, but the drafters provided the single forum because the wanted to protect the limitations on liability of the Convention. They feared that the overall

limits might be exceeded if the same incident were brought to trial in several fora,[240] where separate courts might not consider themselves bound to adjust awards within the limitations.[241]

The United States declares openly that one of its four objections to joining the Rome Convention is the single forum solution.[242] In Prof. Rinck's opinion, the main reason why the Rome Convention has failed to gain a wider acceptance is the single forum provision,[243] and he recommends that the domicile of the operator at least be included as an approved forum.

Under the Draft Convention on Aerial Collisions, the plaintiff may choose between:

1) A court of any contracting state in which the collision or interference occurred.

2) A court in any contracting state in which the defendant has domicile

3) A court in any contracting state where the defendant has his principal place of business.

The Subcommittee mentioned the following possible fora in which a claimant might wish to bring his suit against an ATC agency.[244]

1) The plaintiff's own domicile

2) The air carrier's or operator's domicile

3) One of the air carrier's places of business

4) The destination of the passenger or freight

5) The place where the damage occurred.

6) The headquarters or domicile of the ATC agency

7) The place where the particular ATC unit in question performed the faulty service.

The claimant's best choice would be the forum where he could join all the defendants. But government operated ATC agencies would be reluctant to permit themselves to be sued in a foreign forum, preferring the place where it has its headquarters or domicile. The Subcommittee thought a government

operated ATC agency might also allow itself to be sued in a foreign state where it has ATC units stationed, particularly if the action were brought in the one foreign state where the ATC unit causing the damage was located. Another serious possibility was the foreign state where the fault of the government ATC agency occurred.

The United States, in a proposal to the Legal Committee, however, discarded the two last choices, and very markedly suggested a single forum. "With respect to the suits against the air traffic control agencies, the plaintiffs might bring their actions before a competent court of the contracting state which provides the air traffic control service concerned."[245]

At the Second Session of the ATC Subcommittee, there was finally agreement to eliminate all proposals except a single forum, that of the state where the ATC agency causing the damage was located.[246] The great danger of a single forum method for the ATC Convention is that no one court may have jurisdiction over all the defendants,[247] but it would be very difficult to persuade states to permit themselves to be sued in a foreign jurisdiction. A single forum solution then results: the domicile of the state's air traffic control agency.

The Subcommittee suggests that private ATC bodies such as municipal, corporate or private ATC agencies might be made subject to suit in foreign jurisdiction.[248] The number of potential actions against private bodies is so negligible that it appears unreasonable to make this exception from the main rule.

In regard to international ATC organizations, the Subcommittee reasoned that they could be considered legally present both in the state of their headquarters and in each member state. Therefore, it should be possible to sue Eurocontrol, ASECNA and COCESNA not only at their headquarters, but also in each Member State, regardless of where the incident took place.[249]

The writer recommends that in order to give the claimant the possibility of suing an ATC agency in a foreign forum when it so agrees, the Rome Convention's provision that the parties may agree to bring the action in the courts of any other contracting state should be adopted.[250]

10. Period of Limitation

A two year period of limitation has been uniformly adopted by the Warsaw Convention (Art. 29), the Rome Convention (Art. 21) and the Draft Convention on Aerial Collisions (Art. 15). It seems reasonable to make the same time limit applicable in the Convention on ATC Liability commencing on the date of the incident which caused the damage.

The grounds for suspension or interruption of the period of limitation should be determined by local law, but should not exceed three years from the date of the incident which caused the damage.[251]

Only the Aerial Collisions Draft Convention has periods of limitation regarding recourse actions.[252] It permits the two and three year periods above to be prolonged so that anyone who wishes to bring a recourse action has six months in which to do so commencing on the date that the Convention permitted him a recourse action. Since recourse actions, both by and against the ATC agencies, are a problem in the ATC Convention, it is also reasonable to adopt this provision.

The ATC Subcommittee also considered whether the periods for notification of claims found in the Rome Convention's Art. 19 be adopted by the ATC Convention.[253] Art. 19 provides for a handicap if the claimant fails to notify the defendant of the claim within six months of the date of the incident which caused the damage. The handicap for failure to give notice is that the priority of the defendant's award is postponed until after all other claims accrued during the six months period.

To this provision, the ATC Subcommittee would consider adding that an additional six months period within which to notify other parties of its intention to file recourse actions, be established. These provisions are not found in the Warsaw Convention. The Hague Protocol, which is subsequent in time to the Rome Convention, did not add them to the Warsaw rules. The Draft Convention on Aerial Collisions, reworked as late as 1964, does not include them. It is convenient to have knowledge of claims in order to make financial preparations. But the handicap of postponed priority of claim is of no consequence in regard to government ATC liability, because governments would rarely be forced into bankruptcy by being held liable for ATC negligence.

It is perhaps better, then, to omit a period for notification of claims, while including the overall two year period of limitation.

Conclusion to Part II: Special Convention on ATC Liability

Before drafting a Convention to regulate liability of ATC agencies, one must make a careful choice of systems.

The writer has urged adoption of a proof of fault system combined with unlimited liability, based on tort.

Additionally, he has suggested that waiver of liability and voluntary acting in an emergency not be allowed as defenses, but that plaintiff's assumption of risk, and violation of the terms of the Convention, be substituted.

The writer believes that states should ultimately be liable for any private agency which performs ATC in accordance with the state's

Chicago Convention Art. 28 obligations, and that it may be useful to provide in the Convention that governments will guarantee awards.

The writer would like to see a large choice of fora, but believes that a single forum may be necessary to encourage states to join the Convention, since governments do not like to be sued in foreign courts. He would, however, urge that a provision be made permitting litigants to agree outside the Convention on another forum.

And finally, the writer favors adoption of the two year limitation on claims, in conformity with the other international private air law conventions.

Now we must lift ourselves out of the special convention frame-of-reference, and consider the possibility of regulating the ATC subject matter in other ways.

Part III

ALTERNATIVES TO A SPECIAL CONVENTION ON ATC LIABILITY

A. AMENDING OTHER AIR LAW CONVENTIONS, OR CHANGING THE AERIAL COLLISIONS DRAFT CONVENTION

Dr. I.H. Ph. de Rode-Verschoor of the University at Utrecht believes that it is simpler and more practical to amend an existing air law convention to include ATC liability, than to embark on a special convention.[1] The suggestion merits our attention.

In order to see which problems are involved, and how serious they would be, we will look separately at the Warsaw, Rome and Draft Aerial Collisions Conventions, using the following method: 1) Will an amendment be necessary to include the subject of ATC liability: If so, what problems will be encountered in adjusting, 2) the separate subjects, 3) the scope of the convention, 4) the system of liability, 5) the limits on liability, and 6) jurisdiction. After thus analyzing each convention, we will decide whether that approach to regulation of ATC liability is usueful.

Rather than compile an exhaustive list of details which would thus be encounted, the writer hopes to use these factors to strike at the heart of the issue of amendment.

1. The Warsaw Convention

Can ATC liability be incorporated without radically altering the Warsaw Convention? The ICAO Subcommittee discussed the possibility of looking at the ATC agency as if it were the servant or agent of the carrier, and in this way obtain the protection of the convention.[2] The idea was correctly not debated for long, because only by employment contract could such a relationship exist. Only in case the air carrier

also operated ground ATC services for its own planes could the liability of the ATC agency fall within the Warsaw Convention. This would not normally be the situation.

Changes in the Warsaw Convention are therefore necessary in order to accomodate ATC liability.

Most significant is the difference in subject matter. Not only is the ATC agency sufficiently different from an air carrier or operator to justify separate conventions, but the role of general aviation is one which is entirely forgotten in considering such an amendment. The Warsaw Convention applies only to "international transportation of persons, baggage, or goods by aircraft for hire," and gratuitous transportation performed by an air transport enterprise. The explosive growth of general aviation IFR flying has been emphasized. The important part which it plays in international aviation has been stressed. It is therefore impossible to exclude from regulation of ATC liability all use of aircraft by corporations, firms, and individuals for their business or pleasure. In the United States, the leader in this field, only about 1/5 of general aviation is flown "for hire."[3] Operation of small aircraft for pleasure and personal transporation forms the most rapidly growing category of flight.

The very scope of the Convention would have to be extended from "international transportation" to include supply of air traffic control services.

The Warsaw system of liability would be affected, for in that Convention there exists a presumption that the carrier is at fault, thus forcing it to prove that all necessary measures have been taken to avoid the damage, or that such measures could not possibly have been taken (Art. 20). However, since it is agreed in the ICAO Subcommittee that ATC lia-

bility should be subject to a system based on claimant's proof of fault,[4] the Warsaw Convention would have to incorporate the additional liability system.

This study has attempted to justify unlimited liability, and although limitation of damages is favored by the ICAO Subcommittee, there exists substantial pressure for limits higher than those of the Warsaw Convention, or even of its amended version, the Hague Protocol.[5] Agreement on the limits of the Hague Protocol is, in fact, so uncertain that establishment of separate limits for ATC liability remain a distinct possibility. That would require yet another amendment of the Warsaw Convention.

In regard to jurisdiction, the Warsaw Convention has four choices of fora where the action for damages can be brought (Art. 28). Since it is possible that the ATC agency could not be joined in a suit in any one of these fora, an amendment of Art. 28 would also be necessary.

This brief examination of the Warsaw Convention indicates that substantial changes are necessary to work in ATC liability. The inclusion of new subject matter and an additional liability system would create undesirable tension among members of the otherwise successful Warsaw Convention. There are clear objections to attaching ATC liability amendments.

2. The Rome Convention

Is surface damage caused by ATC negligence presently recoverable under the Rome Convention? Art. 23 states that "this Convention applies to damage contemplated in Article 1 caused in the territory of a contracting state by an aircraft registered in the territory of another contracting state." Art. 1 merely speaks of causation, not of fault:

> Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention.

Art. 2 makes the operator the object of the Rome Convention; however, "control of navigation" is an element in the definition of "operator," that is, if control of navigation is retained by the person lending or leasing a plane, he is the operator. By stretching the language, it might be argued that if control of navigation is assumed by the ATC agency, as happens more and more frequently, then ATC could be brought within the scope of the Rome Convention as an operator. The definition of operator as "the person who was making use of the aircraft at the time the damage was caused," is sufficiently imprecise to permit this kind of argument. But that position is vulnerable, for it is clear from the language of Art. 2 that the drafters of the Rome Convention did not envisage ground control of manned aircraft.

Since Art. 9 of the Rome Convention does not mention recourse actions, it is arguable whether or not ATC would be subject to its limits in a recourse action by an ATC agency against the carrier or operator, if a third party had recovered in excess of the Rome limits from the agency. Art. 10 of the Rome Convention only regulates the situation when the recourse actions are brought by the operator; it does not regulate recourse actions <u>against</u> the carrier or operator.[6]

If we push all doubts aside, it is clear that at the very least an amendment would be necessary to fit ATC liability into the Rome Convention.

The main subject matter of ATC liability is so different from pure regulation of surface damage, that it would be odd to see the two treated as one. In this writer's opinion, regulation of ATC liability is the more important problem, and should not be dominated by a less important subject.

Not only must the scope be enlarged, but the Rome Convention's system of absolute liability (Art. 1) will have to be augmented to include a proof of fault system for ATC liability, if that is approved by the ICAO Legal Committee. The idea occurs that ATC liability could be split up so that surface damage by an ATC agency could be relegated to the Rome Convention, whereas other claims by the operator, passenger, shipper, etc., could be brought under the Warsaw Convention. Such a solution could easily create injustice: the same negligent act by ATC would be governed by two different liability systems, depending on whether the surface or planes in the air were damaged by the negligent act. Splitting of the subject matter is therefore rejected.

The limits of the Rome Convention would certainly conflict with a regime of unlimited liability and very likely would not agree with any limits chosen for ATC liability.

The jurisdictional problem is even more acute. Actions may only be brought before the courts of the contracting state where the damage occurred (Art. 20 (1)). Since that may be a state where the ATC cannot be joined, additional fora will be mandatory.

The mechanical difficulties of amending existing conventions must also not be underestimated. Although the Rome Convention is slated to be re-examined[7] it is a time consuming process. Fitting new subject matter into existing conventions poses more problems than creation of an entirely new convention.[8] Only if states can agree to adopt the entire legal system of either Warsaw or Rome, would it be in point to include this subject matter of ATC liability.

A third possibility remains: to work ATC liability into the Draft Convention on Aerial Collisions.

3. Combination of the Aerial Collisions Draft Convention and the Subject Matter of ATC liability

The Subcommittee proposed a combination of the two subject matters, as one means of solving the ATC liability problem, but the Legal Committee decided at its 13th Session (Montreal, September, 1960) to separate the subject of ATC liability from Aerial Collisions. The ICAO Council agreed.[9] In 1961, IATA proposed that the two subjects should be studied together, but again the Legal Committee, by decision of its Chairman, kept the subjects apart.[10] Once more during the Legal Committee's discussion of a consolidated convention did the idea arise. Belgium reasoned that the feasability of combining ATC liability with the Aerial Collisions Draft Convention should be studied, before considering a consolidated convention. But the Subcommittee, keeping in mind that the 1960 Legal Committee had already decided to separate the two subject matters, did little more than suggest that whereas it would be difficult to regulate ATC liability by amending the existing conventions, it would be much easier to rewrite the Draft Convention on Aerial Collisions to include ATC liability.[11]

That the ATC subject matter is by nature separate from that of the air carrier or operator, has been emphasized before. ATC is commonly government-operated and involves issues of government immunity; it is a non-profit organization. The air carrier is commonly private or sufficiently detatched from the government to have a separate economic identity. Air carriers are operated for a profit.

Therefore the scope of the Convention would have to be enlarged.

The Draft Convention on Aerial Collisions has a mixed system of liability consisting both of proof of fault and presumption of fault. Liability is limited. ATC liability may very likely be subject to proof

of fault with no limits on liability. It would be difficult, although not impossible, to include differing liability systems within the same convention.

In regard to jurisdiction, the Subcommittee observes that it may be difficult to join an ATC agency as a defendant in all the fora made possible by Art. 14 of the Draft Convention.[12] This will certainly be true if ATC agencies are only permitted to be sued in the state of their domicile.

On the one hand, the Convention on Aerial Collisions might be seriously delayed if it is joined with the subject of ATC liability, because the issue of government immunity is thus involved.[13] Governments which refuse to waive the immunity of ATC agencies would not sign a combined convention on Aerial Collisions and ATC Liability.

On the other hand, the Aerial Collisions Convention is becoming less and less important, whereas the subject matter of ATC liability is growing in importance. The situation has changed greatly since the subject matter of aerial collisions first materialized.[14] The speed of aircraft has made visual flying impossible during high jet flights. More and more planes are flying IFR. The supersonics would increase aircraft speed and aircraft dependance on ATC. It is now possible to land and take-off under low visibility conditions and very soon, planes will be able to do both in dense fog by use of instruments only.[15] It is possible to doubt whether the Draft Convention on Aerial Collisions should be persued any further. It is permissible to believe that in the era of increasing "controlled" and "positive controlled" airsapce, the issue of aerial collisions liability is waining to the extent that the issue of ATC liability has now become more urgent.

The weight of the arguments so far fall in favor of preserving the

vote of the Thirteenth Session of the Legal Committee to separate the subject of ATC Liability from the subject of Aerial Collisions.[16] The writer realizes that since the problem of ATC liability first appeared in the Legal Committee's discussion of Aerial Collisions, that frame-of-reference seems natural. But a fresh approach to the problem may be needed, an approach independent from prior conventions, with due respect to their influence.

B. A CONSOLIDATED CONVENTION OF THE THREE SUBJECT MATTERS: DAMAGE TO THE SURFACE, AERIAL COLLISIONS AND ATC LIABILITY

The 1960 collision between a United Airlines DC-8 jet and a Trans-World Airlines Super Constellation over Staten Island, has resulted in 104 law suits, filed to claim a total of $75 Million dollars. In a settlement of the entire matter, the ATC agency agreed to pay 24% of the damages, and United Air Lines and Trans-World Airlines agreed to respectively pay 61% and 15% of the damages.[17] The Staten Island Collision illustrates that the closely related acts of the operator and the air traffic control agency can easily result in them being co-defendants in the same law suit. The idea is therefore natural that all claims ought to be determined in one law suit governed not by several, but by one integrated convention. Exactly that is what the United States has proposed to the ICAO Legal Committee.[18] It warrants our close attention here.

The three subject matters are Damage to the Surface, Aerial Collisions, and ATC Liability. The Rome Convention applies to surface damage caused in one contracting state by aircraft registered in another contracting state (Art. 23). The Draft Convention on Aerial Collisions would regulate collisions and interference between aircraft from contracting states, and also those involving aircraft of only one contracting state if the event takes place over another contracting state (Art. 1). No draft convention exists yet on ATC liability, but this writer recommends that such a convention be made applicable to negligent acts of ATC by contracting states involving damage to planes registered, and to surface damage, in other contracting states.[19]

Several countries agree that the time is opportune for a consolidated Convention[20]: Aerial Collisions and ATC Liability are not yet in

formal conventions, and the Rome Convention is scheduled for revision. Dissatisfaction with the unsuccessful Rome Convention is, in fact, a major motivation in the United States proposal. It opened for ratification in 1952, but only 18 states have ratified it,[21] and the United States is not one of them.

The air transport world has certainly changed since 1952, providing striking economic, legal and technical arguments for those who urge revision of the Rome Convention. The United States specifically objects to the principle of absolute liability combined with low limits, the single forum clause, and the provision for financial security. The Convention may not be prepared to deal with the technical problems of jet and space vehicles,[22] and there are many minor irritiations such as the impossibility of making exceptions. Consequently, the United States hopes that these matters could be changed in a consolidated air law convention.[23]

The Dutch delegation to the ICAO Legal Committee expressed belief that the Rome Convention should be given more time to prove its viability, and opposed the U.S. proposal.[24] It is true that such a consolidation would raise havoc with the Rome Convention, but it is believed that this Convention has little chance of general adoption in its present form.

How can the three subject matters of surface damage, aerial collisions, and ATC liability be consolidated? There is a choice, Mr. Gomez-Jara remarks, between a consolidated convention which regulates everything according to one system of liability, and on the other hand, grouping of the several subject matters under one "roof," but retaining different systems of liability.[25]

The history of legal regulation of surface damage shows that absolute liability has persistantly been preferred by most states since

the first Rome Convention of 1933. The Aerial Collisions Draft Convention is based on a mixed system, using claimant's (operator's) proof of fault for liability of the other passengers. ATC Liability will most likely be based on proof of fault[26].

The United States approves the "roof" concept, under which different liability systems could be adopted for different claimants. In view of existing hardened opinions maintained by governments regarding regulation of the three subject matters, that seems to be the only proposal which has any possibility of success.

One of the following arrangements would be suitable for a consolidated convention from the U.S. point of view: 1)absolute but limited liability system for regulation of surface damage and aerial collisions passengers, 2) Presumed but limited liability for surfacedamage and aerial collisions passengers, 3) absolute but limited liability for surface damage and presumed liability for aerial collisions passengers. Under all three arrangements, there would be a choice of proving fault combined with unlimited recovery. The United States is not willing to accept anything but a proof of fault system for regulation of ATC liability.[27]

Elimination of recourse actions is an important objective in the U.S. drive for a consolidated convention, which could regulate all claims arising out of an accident by direct actions,[28] that is, all claims could be brought in the same lawsuit, and the court would need only to look to one single convention for rules. Ideally, only one liability system should regulate recourse actions and the United States is interested in "development of a system without limitation, in which recoveries would be based on proof of fault, and damages apportioned in relation to the degree of fault of the various tort-feasors."[29]

It is true that a consolidated convention would <u>diminish</u> the number of recourse actions, since the parties would be subject to the same rules

under one convention. But it would not eliminate recourse actions. For example, a passenger could sue for damages and recover from his air carrier under the Warsaw Convention. The carrier might in turn, in a recourse action against the ATC agency, allege it to be at fault for the accident. And even inside the consolidated convention there would be room for recourse actions. For example, in the case of surface damage, the property owner would sue the air carrier in the state where the damage occurred; the air carrier might then have to bring separate recourse action against the ATC agency in the state where the air traffic control originated, if the ATC refused to be sued abroad.

These illustrations show that to eliminate recourse actions, 1) all the private air law conventions, Warsaw, Rome, Aerial Collisions and ATC would have to be consolidated, and 2) Parties would have to be not only permitted, but compelled, to bring all claims arising out of an accident before the same court in one lawsuit.

The matter of bringing all claims in one court unveils a hurdle in the form of jurisdiction. It will be necessary to do more than to group the three subject matters and their different systems under one "roof." The Rome Convention has only permitted one forum, that of the place of damage. But regulation of ATC liability would limit actions against the ATC agency to a different single forum, the state providing the ATC services.[30] There is only a small chance of reconciliation, and the possibility that an accident may involve surface damage in one state caused by ATC negligence originating in another state is apparent. The United States would be willing to go as far as to permit adoption in the consolidated convention of the jurisdictional provision found in the Aerial Collisions Draft Convention, where actions may be brought "at the option of the plaintiff, before a competent court of any contracting state in which the collision occurred, or in which the defendant has his

domicile or principal place of business." (Art. 14). But where ATC liability suits are involved, the United States wants only the jurisdiction of the court of the contracting state which provides the concerned air traffic control.[31] The gap is not bridged as long as a possibility exists that a recourse action would have to be brought separately in a state different from the one in which the direct action is brought.

The greatest difficulty in the U.S. proposal for consolidation is that the biggest private air law convention, the Warsaw Convention, is omitted.

A motivation for excluding the Warsaw Convention is perhaps the thought that a natural division exists between the contractual air law convention, Warsaw, and non-contractual subject matters, Rome, Aerial Collisions and ATC. That is not the case. One need merely remind that in common law countries, suits under the Warsaw Convention are in torts, not in contracts.

It is also avident that if the Warsaw Convention is left out, then all claims arising from one accident will not be decided by the same court in the same lawsuit. The great number of suits brought, and the large number of cases settled, under the Warsaw Convention, shows that it is the relationship between the air carrier and the passenger or shipper which is most likely to be tested in concurrence with surface damage, aerial collisions and ATC-caused damage.

Therefore, if a consolidation is to take place, it would be desirable, even necessary, to include the Warsaw Convention. But it is also clear that consolidation would be a tremendous task, and great fear of disturbing the one successful convention, the Warsaw, understandably exists.[32] International private air law could easily suffer if the existing regulation of the legal relationship between the passengers and shippers, and the air carriers were disturbed.

Separate air law conventions have been preferred in the past, based on the belief that the smaller the convention, the fewer the objections, and the more the adherents. Although this reasoning is not always true, it seems to be so in regard to the Warsaw Convention, which could easily become less successful if objectionable matters were attached. The United States discounts this argument, by saying that in fact separate air law conventions necessitate signing other air law conventions which might be involved in the same accident, and that therefore there is little benefit in splitting up into separate conventions what naturally coheres into a large unified one.[33] However, the fact that states which have signed the Warsaw Convention have not generally found it necessary to adhere to the Rome Convention, tends to refute this argument. Guldiman adds that it could take decades to work out a consolidated convention, that the prospect of ratification decreases the more complex a convention becomes, and that a state which could accept the international regulation of two subject matters, but not a third, would be left out.[34]

The strain of consolidation is illuminated by the fact that separate legal systems for the three different subject matters of surface damage, aerial collisions and ATC liability are found to be the only solution. Fear of a convention torn inside by conflicting systems of liability is expressed by Dr. de Rode-Vershhoor.[35] And the ICAO Legal Committee does not seem prepared to explore the variables, difficulties (and benefits) of a consolidation.[36] In fact, the time does not seem to be ripe for consolidation even though the three subject matters are presently flexible. The unanswered questions are too many. Might it not be best to bring the Warsaw Convention within the consolidation? Might it be feasible to include traffic other than air transport in the convention, since the same navigation satellites will soon control both sea and air traffic?[37]

Although some decrease in recourse actions would result from the consolidation, that does not seem to provide a substantial motivation to embark on the difficult task of housing different legal systems under one roof. The benefits do not outweigh the difficulties of a consolidation.

By the time a Convention on Air Traffic Control Liability has been developed, the ICAO Legal Committee will be better prepared to assess the proposal for a consolidated convention.

C. GENERAL CONVENTION ON STATE RESPONSIBILITY

Now that we have exhausted possible air law conventions within which ATC liability might be included, we will turn our eyes away from the specialization and rest them on the scope of international law. Could the general subject of state responsibility successfully include air traffic control services?

States have a legal responsibility to comply with their international duties. They cannot unilaterally abolish external responsibility the way domestic liability to their own subjects is avoided, through municipal law. International duty is breached if their own, and alien subjects within their territory, injure other states intentionally, maliciously, or by culpable negligence. However states are not liable for injuries, acts or omissions by private persons against foreign states, if due diligence was exercised and failed as a preventative.[38]

Given this legal framework, states also have a responsibility for injury to aliens occurring inside the state, based not on a direct legal duty to the individual, but towards his home state.

Mr. Guha Roy, in an original and penetrating article on the theory of state responsibility for injury to aliens explains that the traditional reason for the theory is that "every State has a legal right of diplomatic protection of its nationals abroad, so much so that when one of them is injured in a foreign state, it is deemed to be itself injured in the person of its national."[39] Roy's article is an attempt to discredit this theory, and he seeks support in other modern international law writing.[40]

The main attack, however, is not only on the theory of state responsibility for injury to aliens, but on general international law. Although a rule of unity of interest between states and their nationals

abroad has developed by custom among European countries, where international law itself primarily developed, Roy argues that the newly emerging states have no obligation to accept this part of international law, because they never consented to it. In fact, the foundation of the law of responsibility is custom, and it is only binding among the states where it developed and became adopted. It is not a part of international law.[41]

Roy believes that there is no relationship between the claim of the individual alien and that of the state acting on his behalf. In his opinion, aliens should be left to seek redress under national laws on equal footing with citizens. Aliens should not be granted a treatment of preference over the local citizens. His basic feeling is that when a person goes abroad to gain wealth, he must bear the risks involved. He may not be treated locally as he was treated at home, but he must take that chance. He should not be able to appeal to his own state if he suffers abroad. Local laws should apply.

Although Roy professes that his opinion is that of the emerging nations directed against interference into their domestic affairs by foreign "imperialist" states, it is in fact a nationalistic view, not conducive to development of international relations. He fails to see that in modern international law the state responsibility theory exists not to impose the laws of the alien's state on emerging states, but to apply an <u>international minimum standard of justice</u>. This idea is not completely rejected by Roy, who admits that in case of "deplorably" low standards of justice, there may be proper cause for foreign interference to protect the interests of their citizens.[42]

Interference by foreign states in case of an unreasonable departure from the international minimum standard of justice is, in fact, the backbone of the Harvard Draft Convention on International Responsibility of States for Injury to the Economic Interest of Aliens.[43]

The United Nations General Assembly in 1953 asked the International Law Commission to codify the principle of international law on state responsibility.[44] Dr. F.V. Garcia-Amador was appointed rapporteur and submitted six reports on the subject,[45] during 1956-61. Since the Harvard Research on International Law already had, in 1929, prepared a draft convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners,[46] Dr. Yuen-li Liang, Secretary to the ILC, proposed in 1956 that the Harvard Law School update its draft convention for the International Law Commission. However, Harvard Law School decided to prepare a new draft convention which was subsequently written by Professors Louis B. Sohn and R.R. Baxter, assisted by an advisory committee.[47]

The Draft Convention would hold contracting states internationally responsible,

> for an act or omission which under international law is wrongful, is attributed to that state, and causes injury to an alien. A state which is responsible for such an act or omission has a duty to make reparations therefore to the injured alien or an alien claiming through him, or to the state entitled to present a claim on behalf of the individual claimant.[48]

How does this pertain to international regulation of ATC liability? So far it is clear that it places the whole subject within a large international law framework, and no amendment would be needed to include our specific subject. But would this be sufficient? Have we not gone through great difficulty to list all the ways in which ATC is different from other air law subjects? Have we not detailed its special functions, and studied its component parts, and composed complex descriptions? Can we suppose that a convention which never once mentions air traffic control could possibly regulate the subject to any state's satisfaction?

There are two ways of testing the proposition. The first is to apply our special key: Would its 1) scope, 2) definitions, 3) damages covered, 4) manner of invokation, 5) jurisdiction, and 6) system of lia-

bility be compatible with ATC liability regulation? And secondly, we can ask if it in policy and in practice fills a necessary role in international law.

The scope of the convention could scarcely be more inclusive or pertinent. The authors believe that "It is the purpose of the law of State responsibility to extend the protection of international law to those who travel or live abroad and to facilitate social and economic ties between states."[49]

The Draft Convention has a set of careful definitions which would, in this writer's opinion, cover compensable damages caused by ATC negligence. An injurious act or omission is wrongful and actionable if it is done willfully without justification; or if in the absence of sufficient justification it "creates an unreasonable risk of injury through a failure to exercise due care." States may also act upon wrongful arrest and detention, lack of access to judicial or administrative authority, denial of fair hearing, adverse decision or judgement, injury to property, taking of property, loss of ability to earn a living, violation and annulment and modification of contracts and concessions,[50] or if a treaty has been violated.

Thinking in terms of ATC liability, we see that willful and negligent acts by ATC towards foreign air carriers fall well within the draft convention.[51]

The means of invoking the convention could not be more simple. Any national of a member state injured in another member state in the way described in the convention can recover. Corporations are specifically covered by the Harvard draft, and both natural and juristic persons are included within the definition of aliens (Art. 21). Art. 20 (2) (c) even permits a private alien stockhoder to bring a claim for injury to his alien corporation if the corporation has failed to defend his interests.

Where may the claim be brought? The alien himself must first exhaust local remedies (Art. 19-22) provided by the respondent state. After exhaustion of local remedies by the alien, he may have his state present his claim directly to the state which is alleged to be responsible; if not settled within a reasonable time the claim may then be presented by the claimant state to an international tribunal which has jurisdiction over the subject matter and over the parties. The right of the individual alien claimant to bring an action is suspended while his state pursues his claim (Art. 23-25). It should be noted that a state may not bring action on behalf of its national if he has no "genuine link" with the state, and in case of a corporation, if the controlling interest of the corporation is vested in the state alleged to be responsible. This rule is applicable to airline claimants who are under foreign control. If, for example, a U.S. airline is owned by Canadian interests and it suffers injury by negligence of Canadian ATC, the airline cannot recover through U.S. intervention.[52]

It certainly suits the ATC subject matter that governments would only be sued in their national courts, or the International Court of Justice; never would a state-operated ATC agency be sued in a foreign court.

What system of liability would apply? The Draft Convention establishes fault liability without any limitation on damages. But in case of contributory negligence by the alien, reparations can justifiably be denied (Art. 4). The kinds of torts so covered have been described.

When ATC is provided contractually, Art. 12 of the Draft Convention is pertinent. It defines as being wrongful and actionable "the violation through an arbitrary action of the state of a contract or concession to which the central government of that state and an alien are parties."

Factors to be considered in deciding whether an "arbitrary action" esists, are:

1) Whether there is a clear, discriminatory departure from the terms of the contract or from the law governing the contract at the time of violation

2) Whether there is a clear and discriminatory departure from the law of the party-state as the law existed at the time of contracting, if that is the proper law governing the contract.

3) Whether there is an unreasonable departure from internationally recognized principles of governmental contracts.

4) Whether the state has violated a treaty

In like fashion, annulments and modifications of contracts and concessions are wrongful and actionable.

When ATC is supplied by express or implied contract, there would be a remedy under the Draft Convention on State Responsibility when the state ATC arbitrarily violates a contract to supply ATC services.[53]

Not only contracts with states are protected by Art. 12, but contracts between aliens and non-government parties are protected from annulling or modifying such contracts to the disadvantage of the alien if there is clear, discriminatory departure from the law of the contract, or if there is an unreasonable deviation from contract principles generally recognized by the world at large, or if there is a breach of a treaty. This provision protects contracts for ATC services between foreign airlines and private ATC operators from involuntary change of the contract by the government.

A time limitation on bringing claims is provided by the Draft Convention. "Unreasonable" delay in presenting the claim will cause it to be barred.

The greatest disadvantage to including the subject of ATC liability within the Harvard Draft Convention is that private ATC operators would not be specifically covered unless their negligence were criminal.[54]

The primary intention of the Draft Convention is to regulate state, not individual, liability. But since private operators provide a minor and diminishing part of ATC, and state liability for operation of state ATC is the central problem in regulation of ATC liability, the Draft Convention goes far in suiting our subject matter.

It would have the effect of separating ATC from matters now regulated by private air law conventions. The liability of the air carrier or operator for transportation, now regulated by the Warsaw Convention; the air carrier's or operator's liability for damage to the surface now regulated by the Rome Convention; regulation of liability for damages arising out of collisions between aircraft, now the subject of a draft convention are areas which would not be regulated by adoption of the Draft Convention on State Responsibility.

Additionally, states may become more involved in foreign litigation if the Draft Convention on State Responsibility is adopted. They will more often than now be asked by their nationals to intervene on their behalf, and this they may find a nuisance.

It also needs to be emphasized that states are not obligated by the Draft Convention to espouse the causes of nationals; that is, the state might pursue a "public" policy to the detriment of the individual claimant.

The benefits of the Draft Convention on International Responsibility of States for Injuries to the Economic Interests of Aliens may be enumerated article by pertinent article:

1) Waiver of sovereign immunity (Art. 2): Sovereign immunity is perhaps the greatest problem in regulation of ATC liability. Under this Convention, the state could not plead such a defense, and bar the claimant.

2) Negligent acts or omissions (Art. 3): The Draft Convention creates state responsibility for negligence of state ATC. It is the simple solution of fault liability without limitation on damages.

3) Arrest and detention of aliens (Art. 5): Both alien airline personnel and passengers are protected from arbitrary acts by the state.

4) Access to court or administrative authority (Art. 6): This provision secures a basic and necessary civil right; it gets the claimant into court.

5) Fair hearing before a court (Art. 7): An alien airline, passenger, shipper, or other proper claimant is secured a fair trial.

6) Adverse decisions and judgements (Art. 8): In case of discriminatory unjust decisions or judgements, the alien airline, passenger, shipper or other proper claimant is protected. His state can intervene on his behalf to secure his rights under the national law of the responsent state, to secure correction if there is a major departure from justice as recognized in the world generally, or if a treaty right has been violated.

7) Protection of property rights (Art. 9 and 10): The Draft Convention provides for recovery from deliberate and wrongful destruction of the airline's,passenger's, or shipper's property. (Also wrongful taking and deprivation of property is brought within the protection of the Draft Convention).

8) Deprivation of means of livelihood (Art. 11): Existing and established businesses, such as airlines, may not be undùly deprived of their existence without compensation. This benefit illustrates the broad scope of the draft convention. It provides a much wider regulation of air transport interests than does a convention on the limited area of ATC liability.

9) Protection of contract rights (Art. 12): The Draft Convention protects both contract rights involved in ATC, as well as other contract rights related to airline operation abroad.

10) General duty to protect aliens (Art. 13): States have the duty to exercise due diligence in protecting aliens. This of course includes foreign individuals as well as foreign corporations such as airlines. And not only must the state duly protect aliens from state-caused injury, but also from wrongful acts or omissions of non-governmental individuals. Although this protection is only from acts which are criminal under state law, and from acts which are generally considered criminal throughout the world, it would shield the airline passengers, shippers and other proper claimants from criminal negligence by private ATC operators.

The Draft Convention also solves a present obstacle to recovery. Often a state demands that other states permit recovery in their courts to its aliens before it will permit aliens to recover under its laws.[55]

Adoption of the Convention on State Responsibility would, in effect, eliminate the need for bilateral agreements granting reciprocal rights.

Furthermore, the mere existence of a convention on state responsibility to aliens will make states much more likely to grant aliens, including all proper ATC claimants, fair recovery for economic injuries.

Conclusion[56]

Elements of great value to regulation of ATC liability exist in the Harvard Draft Convention on International Responsibility of States for Injuries to the Economic Interest of Aliens.

It lifts the problem of ATC negligence out of the restricted specialization of air law and places it in the right international law perspective.

It shows faith in the local court systems, by compelling the alien to exhaust local remedies before the Convention on State Responsibility comes into effect.[57] Instead of representing interference into another state's activities, it strengthens national courts by giving them the dignity they should merit, by placing the alien on equal footing with citizens.

It shows concern for an international minimum standard of justice. According to Art. 2, if the national regulation falls below a reasonable standard, the alien is entitled to preferential treatment. If, however, the national standard meets, or is better, than the minimum one provided in the Convention, that is the one which the alien will accept.

It provides a proof of fault system with unlimited liability,

which suits our subject very well.

The writer urges that at the very least, the ICAO Legal Committee consult and study the Harvard Draft Convention before embarking on a special convention for ATC liability, or attempting any of its other alternatives.

Footnotes

Preface and Introduction

1. Drion, Limitation of Liabilities in International Air Law (1954).

2. Draft Convention on Aerial Collisions, ICAO Doc 8444, LC/151, 19/9/64 at 19.

3. ICAO, LC/SC/LATC No. 19, 30/4/64, at 1. (First report of ICAO Legal Committee's Subcommittee on the Liability of Air Traffic Control Agencies).

Part I: The Need for Legal Regulation of ATC Liability

1. Chicago Convention, Dec. 7, 1944, 61 Stat. 1180. Annex 2, Rules of the Air; Annex 11, Air Traffic Services; Annex 14, Aerodromes.

2. Aviation Week and Space Technology, Feb. 3, 1964, p.88.

3. FAA Sixth Annual Report, Fiscal Year 1964, at 25.

4. Meyer, Introductory remarks to the May 3, 1965 meeting of Das Rechtsausschuss der Wissenschaftlichen Gesellschaft für Luft- und Raumfahrt. (Unpublished to date).

5. See Geadeau, 22 Rev. Gen. Air 262 (1959); and Lundberg, "Speed and Safety in Civil Aviation," Flygtekniska Forsöksanstalten, No. 96 at 25 (1963).

6. FAA Report, op.cit.supra note 3 at 129 and 131 (figures for U.S.).

7. ICAO, LC/Working Draft No. 667, 13/8/62 at Comments of Switzerland, p.2. (This includes general aviation).

8. Lundberg, op.cit.supra note 5, No. 95 at 15-16.

9. Berner v British Commonwealth Pacific Airways, 8 Avi 17,781 (1964). (On Appeal).

10. FAA Report op.cit.supra note 3 at 116; Aviation Week, op.cit. supra note 2 at 82. But note that the cost per passenger dropped from 1.7 cents in 1951, to 1.6 cents per passenger in 1962.

11. Approximately 25 states now charge fees for ATC services. There is some uncertainty about the legality of services fees for overflights. Canada, for example, has ceased charging while a lawsuit involving U.S. international carriers clarifies the issues.

12. Chi. Con. at Art. 15; International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693 at Art. 4 (2).

13. Stähelin, Rechtsprobleme aus dem Betrieb der Swissair, Sch. Ver. Luft Raumrecht, Bull. No. 2-1963, at 5,6. See also, ICAO Doc 7874, RFC/1-1 (1958) which shows that although ICAO was asked to regulate the problem of payments, little was accomplished by the Conference. Decisions were left to each state. However, it was concluded that no distinction need be made between the charges for navigation facilities provided by one state, and those services supplied by several states jointly.

14. Chi.Con., Art. 28 (a); Art. 22; Art. 25.

15. Chi.Con. at Art. 38. Notification must be within 60 days of adoption of the amendment to the international standard. Verdross, Völkerrecht, (1959) at 466 makes the argument that if states fail within a certain time to give notice of national differences from the annexes, then those annexes become as binding on the Contracting States as the Chicago Convention itself.

16. Chi. Con., Art. 69, 70, 71.

17. Chi. Con. Art. 12.

18. Memorandum on ICAO, 4th ed. (1963) at 29-31.

19. Other countries are moving toward similar control. Meyer, op. cit.supra note 4 reports that the Frankfurt ATC computer can manage 500 aircraft simultaneously. It not only computes information instantly, but detects collision dangers, and suggests counter measures. Frankfurt will soon institute a radar beacon system similar to that found in the U.S.

20. APC provides surveillance and separation of all aircraft operation.

21. Aviation Week and Space Technology, Jan. 20, 1964, p.52;59.

22. Id. at 59.

23. Time, April 23, 1965, p.77, is first report to come to writer's attention that the FAA goal described in its report op.cit.supra note 3 at 38,39, was achieved.

24. Instrument Flight Rule is herinafter known as IFR. Its opposite is Visual Flight Rule (VFR).

25. Aviation Week, op.cit.supra note 21, p.60. VHF is Very High Frequency equipment; VOR is Very High Frequency Omnidirectional Radio Range TACAN is "tactical air navigation" equipment.

26. United States Federal Aviation Regulations, Part 91, Sec. 91.75.

27. Aviation Week, op.cit.supra note 21, p.53. Excepting the automatic position reports of the flights, some pilots have had some difficulty in finding the added benefits of the new system. It has not reduced the delays at airports. Important, however, is the added safety. Danger of collision is substantially reduced in area positive control because here pilots flying IFR find no VFR flights. This dangerous mixture of air traffic is avoided.

28. Id. at 94.

29. Ibid.

30. See generally Knauth, The Aircraft Commander in International Law, 14 J. Air L. & Com. 161 (1947); Guerreri, The Status of the Aircraft Commander in Italian and International Law, LL.M. Thesis, McGill University (1961); Ruhwedel, Die Rechtsstellung des Flugzeugkommandanten im Zivilen Luftverkehr (1964); Tancelin, Le partage de l'autorite entre les differentes categories de personnels participant a la navigation aerienne, Dissertation, University of Paris (1960); Leclerq, Les aides à la navigation aérienne; LL.M. Thesis, McGill University (1959).

31. Chi. Con, Art. 38 and 90 on adoption of Annexes into national legislation, eg. Fed. Avia. Reg, op.cit.supra note 26, Part 90, Sec. 91 (3) (a).

32. "Eurocontrol," International Convention Relating to Co-operation for the Safety of Air Navigation, signed Dec. 13, 1960; Art. 18.

33. United States Federal Aviation Act, 72 Stat. 783 (1958); Sec. 901.

34. Fed. Avia. Reg. op.cit.supra note 26, Part 90, Sec. 91.75.

35. The Grand Canyon Accident, 1956, CAB No. 1-0090; 1957 USCAvR 1.

36. ICAO Digest No. 12 (1963).

37. Lundberg, op.cit.supra note 5, No. 96 at 18-19.

38. Tancelin, op.cit.supra note 30 at 68-74.

39. Although an important member of the crew is its commander, who is given special responsibility for observance of Rules of the Air (Annex 2, 2.3.1) and for conduct of the aircraft while in command, such as restraint of persons who are a danger to the safety of the plane (as provided in The Tokyo Convention, Sept. 14, 1963), none of these functions distinguishes him from the rest of the crew in regard to his interests in ATC liability.

40. IATA, Act of Incorporation, 9-10 George VI, Chapter 51, 1945.

41. ICAO Doc 8444, LC/151, 19/9/64, at 10.

42. The Hague Protocol, Sept. 28, 1955; Art.XIV. It is found as the new Art. 25 A of The Warsaw Convention, Oct. 12, 1929, 49 Stat. 3,000; T.S. 876.

43. The Controller, Vol. 3, No. 4, Oct. 1964 at 15, 45.

44. Id. at 28-29.

45. The Staten Island Collision, Governmental Liability - The December 1960 Air Disaster - Is Executive Settlement Desirable? 30 J.Air L. & Com. 286.

46. "Eurocontrol," op.cit.supra note 32; ASECNA, Convention Relative à la Création d'une Agence Chargée de Gérer les Installations et Services Destinés à Assurer la Sécurité de la Navigation Aérienne en Afrique et à Madagascar, Dec. 12, 1959;COCESNA, Convention Portant Création d'une Société des Services de Navigation Aérienne Pour l'Amérique Centrale, Feb. 24, 1960.

47. ICAO Doc 8444, op.cit.supra note 41 at 10.

48. Ibid.

49. Privately operated air control agencies, which we do not treat in this section can be sued for their torts or breaches of contract. They are liable as private parties under the normal liability laws of their state, for although they are government-certified, as required by the Chicago Convention, they are not government agents, There is no indication that private air traffic control is increasing.

50. eg. Minnesota v United States, 305 U.S. 382 (1938). Also note the public policy reason for government immunity that the sovereign cannot be held responsible for its acts because it is the source of laws, eg. Kawananakoa v Polyblank, 205 U.S. 349 (1906).

51. The Tucker Act of 1887, 28 U.S.C. para. 1346 (a) (2).

52. Federal Tort Claims Act of 1946, 28 U.S.C.A. 921 et. seq.

53. Id.at2674; 2680.

54. Dalehite v United States, 346 U.S. 15 (1953).

55. Eastern Airlines, Inc. v Union Trust Co., 4 Avi 17,546; 1955 USAvR 1. Union Trust Co. v United States, 221 F. 2nd 62 (1955).

56. Aero Enterprises, Inc. v American Flyers, Inc. & United States, 5 Avi 18, 238, 1958 USCAvR 645.

57. Nagano, Liability in Operating Air Traffic Control and Conflict of Laws, Term Paper for McGill University, Institute of Air and Space Law (1962) at 32.

58. Guerreri, Governmental Liability in the Operation of Airport Control Towers in the United States, Term Paper, McGill University, Institute of Air and Space Law (1960), at 10.

59. ICAO LC/Working Draft No. 657, 9/5/62 at 12 (Secretariat Report).

60. U.S. Stat. 28 USC 2402. See op.cit supra note 55.

61. F.T.C. Act op.cit.supra note 52 at 2672; 2502.

62. Marx, Governmental Tort Liability for Operation of Airports, (1959) 26 J. Air L. & Com. 173.

63. Control Zone Accidents -- Allocation of Liability between Air Carrier and Control Towers, 23 J. Air L. & Com. 234 (1956).

64. Prosser, Torts, 3rd Ed., (1964) at 146.

65. Smerdon v United States, 4 Avi 17,840.

66. Union Trust Co. v United States, op.cit.supra note 55.

67. Johnson v United States, 6 Avi 18,111 ; 1960 USCAvR 269.

68. Hearings before the Subcommittee of the Committee on Appropriations, House of Rep. 88th Cong. 2nd Sess. (1964) pt. 1 at 1155. The FAA admitted that on the basis of the evidence, the government might have been held liable, not merely for a percentage of the damages, but for all the damages. Although the CAB Accident Report did not charge ATC negligence as a probable cause of the accident, the Air Line Pilot's Ass. in a separate report (A.L.P.A. Accident Investigation Report, April 4, 1964 at 15) charged the area control center with failure to maintain identification of and to monitor the United Air Lines aircraft and alleged that the control center failed to report correct routing and estimates to Idlewild (now Kennedy) approach control. It stated that the LaGuardia approach control failed to identify the United Air Lines aircraft when it entered into LaGuardia's airspace, i.e. that FAA had failed to separate the planes. FAA witnesses acknowledged some rule book departures, which leads one commentator to say that although rule book departures do not constitute statutory negligence, they can be evidence of negligence and that this apparently prompted the U.S. Att. Gen. to consent to a settlement of the case (op.cit.supra note 45 at 282)

69. Eastman, Liability of the Ground Control Operator for Negligence, 17 J. Air L. & Com. 170 (1950) at 183.

70. A.L.I., Restatement, Torts, (1934), Sec. 323.

71. Finfera v Thomas, 1 Avi 949; 1941 USAvR 1.

72. Infra, pt 54.

73. Indian Towing Co. v United States, 350 U.S. 61 (1955).

74. Otness v United States, 178 F. Suppl. 647 (1959).

75. Somerset Seafood Co. v United States, 193 F. 2d 631 (1951).

76. Marino v United States, 2 Avi 14957; 1949 USAvR 308.

77. op.cit. supra note 65. For other cases stating that the responsibility for having sufficient weather information is on the pilot, not on the ATC Agency, see New York Airways, v United States, 283 F. 2d 496 (1960); 6 Avi 18,260; 1960 USCAvR 393; and Miller v United States 7 Avi 18,244 (1962); 303 F. 2d 703 (1962); cert. den. 371 U.S. 955, CCA 9 (1963).

78. McKlenny v United Air Lines, Inc., 6 Avi 17,690, 1959 USCAvR 221 (1959).

79. Canada-United States Air Agreement of Dec. 27, 1963.

80. Fed. Avia. Reg. op.cit.supra note 26, Part 99, Sec. 99.3; Sec. 99.11; Sec. 99.21.

81. Eurocontrol regulates all upper airspace above the United Kingdom (see Art. 2 (1) and Art. 38), so we are here concerned with the lower airspace not so regulated.

82. Crown Proceedings Act of 1947, 10 and 11 Geo. 6 c. 44; and s.4.

83. Shawcross and Beaumont, Air Law, 2nd Ed. (1951); Sec. 586.

84. Ibid.

85. Ibid.

86. Standard Conditions under which Aircraft may Land, be Parked, Housed, or Otherwise Dealt With on Aerodromes under the Control of the Minister of Aviation, FAL 24 & 25, U.K. "Air Pilot."

87. Das Grundgesetz.

88. Das Bürgerliche Gesetzbuch. According to Sec. 839, para. 1, the State is only liable for ordinary negligence if the claimant cannot receive compensation anywhere else; if the cause of the damage is ATC fault, then the state of course will be liable so that the proof of cause will tend to be determinative.

89. Gesetz über die Haftung des Reichs für Seine Beamten, vom 22 Mai 1910. Para. 7.

90. op.cit.supra note 4.

91. Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördemitglieder und Beamten vom 14.3, 1958; Art. 19.

92. Hodel, Die Haftung für Schäden aus mangelhafter Flugsicherung, ASDA-SVLR No. 1-1964 at 6.

93. Id at 4-7.

94. Particularly see Annexes 2, 11 & 14.

95. Hodel, op.cit.supra note 92 at 7.

96. Id. at 8.

97. Since Eurocontrol regulates all upper airspace above France (Art. 2(1); Art. 38) we are here limiting our consideration to airspace control retained by France.

98. Leclercq, op.cit.supra note 30 at 156.

99. Savatier, Traité de la Responsabilité Civile en Droit Francais (1959) at 548.

100. Leclerq, op.cit.supra note 30 at 171.

101. Savatier, op.cit.supra note 99 at 211, 434. Also note statement by Schwarz, French Administrative Law and the Common Law World (1954) at 302, that the rule of absolute liability is now generally applied by the Council of State. The government will be held responsibile each time its acts have caused damage.

102. Société Atlantique Aérienne, Conseil d'Etat, 23 October 1957.

103. Codigo Civil de 1889, Art. 1903. This article does express the state's secondary liability for its agents who are not civil servants.

104. Id., Art. 1902.

105. There are two interesting critical arguments against the state's immunity. One is that the state was unjustly enriched by its failure to compensate for state-caused damages. The other was based on equality of individuals: if all the people are equal before the law, then individuals should be compensated for injuries which they had suffered through state activities, to encourage the common well being; otherwise the one who was damaged would not share in the common good, he would in fact be left outside of it. Described by Garrido-Falla, Tratado de Derecho Administrativo (1962) Vol. II at 195 et seq; and Royo-Villanova, Elementos de Derecho Administrativo (1955), 24th ed. Vol. II at 926 et.seq.

106. Real Orden de 30 Dec., 1926.

107. Ley de Expropriatión Forzosa, Art. 120; repeated in Ley de Régimen Juridico de la Administración del Estado de 1957.

108. Provided by Ley Reguladora de la JurisdicciónContencioso-Administrativo, de 1956.

109. Contractual claims are brought against the government in the regular civil courts under Art. 41 of the Ley de Régimen Juridico de la Administración del Estado de 1957.

110. Ley de Procedimiento Administrativo de 18 July 1958.

111. Sentencia de 15 de Noviembre de 1962, in Contencioso-Administrativo (Sala 4) Seq. Jorn. Ib-Am. Der. Aero. Esp. (1964) at 68-70. See Napelle, La Responsabilidad del Estado en los Accidentes de Aviacion, Id. at 47.

112. Napelle, Id at 54.

113. Eurocontrol, op.cit.supra note 32, Art. 2 (1); Art. 38.

114. Id. Art 18, Art. 19.

115. ASECNA, op.cit.supra note 46, Art. 1.

116. Rights and Responsibilities Incurred under ASECNA, Art. 9.

117. Art. 17 of Cahier des Charges.

118. COCESNA, op.cit.supra note 46, Art. 10.

119. Id. Art. 3, Art. 5.

120. op.cit.supra note 55.

121. "Project Beacon," FAA Report on Air Traffic Control, 1961, at 99

122. By the Warsaw Convention of 12 Oct. 1929; Rome Convention of 7 Oct. 1952; Guadalajara Convention of 18 Sept. 1961.

123. ICAO, LC/SC/LATC No; 19, 30/4/64. First Report of ICAO Legal Committee's Subcommittee on the Liability of Air Traffic Control Agencies, at 5 and 22.

124. LC/Working Draft No. 657, op.cit.supra note 59 at 1-3.

125. LATC No. 19, op.cit.supra note 123 at 5.

126. Id. at 5 .

127. Id. at 5.

128. Id. at 5 and 22.

129. ICAO Legal Committee, 15th Sess, 21st Meeting, Sept. 14, 1964, at 4. (unnumbered to date).

130. LATC No. 19, op.cit.supra note 123 at 4 (in different order).

Part II: A Special Convention on ATC Liability

1. Tancelin, Le partage de l'autorite entre les differentes categories de personnels participant a la navigation aerienne, Dissertation for the University of Paris (1960) at 5.

2. Schodruch, Die rechtliche Natur der Flugsicherung und ihre Organisation in Deutschland, Dissertation for the University of Cologne (1955) at 59-62.

3. Id. at 84.

4. French Air Navigation Law of 1924, Art. 35, Art. 36.

5. Schodruch, op.cit. supra note 2 at 51-52.

6. Reichgesetzblatt I (1930) at 363.

7. See Federal law concerning the establishment of the federal aviation office of 30 Nov. 1954. Also see Federal law concerning the federal agency for air traffic control of 25 March 1953.

8. Schodruch, op.cit.supra note 2 at 64.

9. Kahn-Freund, The Law of Carriage by Inland Transport, 3rd Ed. (1956) at 36-37.

10. This practise is illustrated by Wright v Midland Ry. Co. (1873) L.R. 8 Ex. 137. The L. and N.W. Ry. Co. had the right to use a small section of the Midland Ry. Co's rails, where the traffic signals were operated by the track proprietor. The claimant, a passenger in a L.& N.W. Ry. Co. car had been injured because the L.&N.W. Ry. Co. had disregarded the signals. The court held that the claimant could not recover from the Midland Ry. Co. for the negligence of another carrier.

11. Erie R.R. v Stewart, 40 F 2d 855 (1930).

12. Eastman, Liability of the Ground Control Operator for Negligence, 17 J. Air L. & Com. 170 (1950).

13. See McDougal, Lasswell, Vlasic, Law and Public Order in Space, (1963) at 587-88.

14. International Regulations for Preventing Collisions at Sea, Annex B of the Final Act of The International Conference on Safety of Life at Sea (1948).

15. The 1958 Convention on the High Seas, 52 Am. J. Int'l. L. 842 (1958).

16. Otness v United States, 178 F. Suppl. 647 (1959); Indian Towing Co. v United States, 350 U.S. 61 (1955); Somerset Seafood Co. v United States 193 F. 2d 631 (1951).

17. Lemoine, Traite de Droit Aerien, (1947) at 237.

18. Chicago Convention, Dec. 7, 1944, 61 Stat. 1180, Annex 2.4.

19. Schadruch, op.cit.supra note 2 at 71.

20. Id. at 75-79.

21. Id. at 73-74; 84.

22. Tancelin, op.cit.supra note 1 at 61-63.

23. ICAO, LC/Working Draft No. 657, 9/5/62 (Secretariat Report) at 7.

24. Chi.Con. Annex 11, Para. 2.2; Annex 2, Ch. 1.

25. In the same order used by the Subcommittee. ICAO LC/SC/LATC No. 19, 30/4/64. First Report of the ICAO Legal Committee' Subcommittee on the Liability of Air Traffic Control Agencies, at 10-13.

26. Chi.Con. Annex 11, para. 2.3.

27. The Airport and its Neighbors, Report of the President's Airport Commission, May 16, 1952 at 68. In positive control zones, compliance with ATC instructions is compelled, whereas in controlled airspace the instructions are not compulsory. In positive control zones, the pilot receives separation from both VFR and IFR flights, whereas in controlled zones he merely receives separation from other IFR flights.

28. Id. at 66.

29. FAA Fifth Annual Report, Fiscal Year 1963, at xiii. The Atlanta experiment extends to a 15 mile radius of the Atlanta airport. It begins at the ground level at the airport but further away it has its floor at 2,000 ft. and its ceiling at 6,000 ft.

30. APC is described infra at 9.

31. The question is also posed by Cheveau, La responsabilité des aides à la navigation, Rev. Gen. Air (1953) No. 3-4 at 218.

32. FAA Rep. op.cit.supra note 29 at 47, 49. Also, Design for the National Airspace Utilization System, FAA (June 30, 1962) at 70-71. Related is Verkehrswirtschaft, Dec. 31, 1964 at 6. Note also that on June 10, 1965, BEA performed automatic landing of a scheduled plane without the knowledge of its 88 passengers. A computer performed the entire landing process, Kölner-Stadtanzeiger, 11 June 1965, p.29.

33. Rinck, Haftung für Versagen automatischer Anlagen in der Flugsicherung, 14 Z. Luftrecht, 185 (1965) at 188, 193.

34. Id. at 193-194. The liability of the manufacturers of the equipment is a collateral issue which is too large to be discussed here. The line of case law following the McPherson v Buick Motor Co. (1916) 217 N.Y. 382; 111 N.E. 1050, would indicate manufacturers liability for negligence.

35. Described infra, at 12.

36. Air Traffic Control System Requirements, Air Traffic Service, FAA (March, 1963) at 19 . Chi.Con. Annex 2 , 3.5.11: "An aircraft shall be operated in compliance with air traffic control clearance received."

37. LATC No. 19, op.cit.supra note 25 at 10.

38. "Project Beacon," FAA Report on Air Traffic Control (1961) at 86.

39. ICAO LC/SC/LATC No. 32. Second Meeting of the ICAO Legal Committee's Subcommittee on the Liability of Air Traffic Control Agencies, at 4.

40. ICAO Doc 4444-RAC/501/1 , Part VII, para. 1.2.1.

41 Id. Part VII, para. 1.2.1.3.

42. Chi. Con., Annex 11, para. 5.1.2-3. By inclusion, all three services listed by Annex 11, para 2.3 would be subject to liability under the convention. The ICAO Secretariat Report for its discussion of ATC liability, included all three services within the term 'air traffic control agencies,' op.cit.supra note 23 at 6,7.

43. LATC No. 32, op.cit.supra note 39 at 4.

44. Design, op.cit.supra note 32 at 57-61

45. ATC System Req. op.cit.supra note 36 at 23.

46. Design, op.cit.supra note 32 at 3.

47. ATC System Req. op.cit.supra note 36 at 24.

48. LATC No. 19, op.cit.supra note 25 at 4.

49. Chi. Con. at Art. 15, 28, 37 (b) and Annex 14.

50. See Design, op.cit.supra note 32 at 61; and "Project Beacon," op.cit.supra note 38 at 97-98.

51. "Project Beacon," id at 98.

52. FAA Rep. op.cit.supra note 29 at 21-23.

53. Liability of this third party is outside the scope of the study.

54. LATC No. 19, op.cit.supra note 25 at 11-12.

55. See Foreword to Chi.Con. Annex 3, at 5, Column 2, regarding responsibility. See also Art. 28,37.

56. ATC is in Chi. Con. Annex 11; Search and Rescue is in Annex 12.

57. LATC No. 19, op.cit.supra note 25 at 12.

58. ICAO, LC/Working Draft No. 667, 13/8/62, Comments of Switzerland at 2.

59. United States Federal Aviation Act, 72 Stat. 749 (1958) Sec. 307; "Project Beacon," op.cit.supra note 38 at 46.

60. LATC No. 19, op.cit.supra note 25 at 12.

61. FAA Sixth Annual Report, Fiscal Year 1964 at 53.

62. "Eurocontrol," International Convention Relating to Co-operation for the Safety of Air Navigation, December 13, 1960, Art. 3.

63. Id. Art. 25.

64. See Eastern Airlines, Inc. v Union Trust Co. 4 Avi 17,546, 1955 USAvR 1; Union Trust Co. v United States, 221 F. 2d 62 (1955).

65. ICAO Legal Committee, 15th Sess., Second Meeting, Sept. 1, 1964, at 4.

66. LATC No. 19, op.cit.supra note 25 at 9.

67. Secretariat Report, op.cit.supra note 23 at 7.

68. LATC No. 19, op.cit.supra note 25 at 14.

69. Increasing from 1.1 Mill IFR flights to 5.0 Mill. flights in 1975, in the United States, compred with a General Aviation increase in the United States from .1 Mill IFR flights in 1955 to 1.1 Mill in 1975, according to "Project Beacon," op.cit.supra note 38 at 9.

70. The Controller, Vol. 3, No. 4, Oct. 1964 at 25.

71. "Project Beacon," op.cit.supra note 38 at 11.

72. Koemans from ICAOPA in The Controller, op.cit.supra note 70.

73. "Project Beacon," op.cit.supra note 38 at 9. See also ATC System Req. note 36 at 1.

74. Design, op.cit.supra note 32 at 30-34.

75. LATC No. 19, op.cit.supra note 25 at 14.

76. "Project Beacon," op.cit.supra note 38 at 19.

77. Warsaw Convention, Additional Protocol with reference to Art. 2. 49 Stat. 3,000; T.S. 876.

78. "Project Horizon," Report of the Task Force on National Aviation Goals, FAA (Sept. 1961) at 80.

79. Lundberg, Speed and Safety in Civil Aviation, Flygtekniska Forsöksanstalten, No. 95 at 24.

80. "Project Horizon," op.cit.supra note 78 at 80-85; "Project Beacon," op.cit.supra note 38 at 82.

81. New York Airways v United States, 283 F 2d. 496 (1960); 6 Avi 18,260; 1960 USCAvR 393.

82. "Project Beacon," op.cit.supra note 38 at 38, 81, 82.

83. Aviation Week and Space Technology, Oct. 12, 1964 at 3.

84. eg. SABENA operates helicopters between The Netherlands, Belgium and Germany.

85. See United States Federal Aviation Regulations, Part 101, which requires owners to give notice to FAA's ATC.

86. Id. Sec. 101.23; Sec. 101.25.

87. For this writer, the National Aeronautics and Space Administration (NASA) made a computer search of technical space materials, which they report to be exhaustive. It showed that absolutely no public concern is being given to the danger which rockets create to aircraft, except that certain areas are designated as special use airspace (Fed. Avia. Reg. Id. Part 73) in order to keep aircraft out of governmental rocket launching areas, and there are the primitive FAA regulation of unmanned rockets and Notices to Airmen issued through ICAO to its member states regarding possible rocket impact areas on the high seas. However, rocket ranges do avoid, as far as possible, conflict with established domestic and international air routes. Letter from Wolf Hahn, Office of General Counsel, NASA, Feb. 12, 1965.

88. LATC No. 19, op.cit.supra note 25 at 15.

89. Part A signifies problems on which the ICAO Legal Committee is currently working.

90. Compare with Art. 14 of The Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l. L. 548 (1961), and Annex B of this paper; and with The Rome Convention, Art. 1(1), Oct. 7, 1952.

91. LATC No. 19, op.cit.supra note 25 at 13.

92. Compare with Art. 14 of Harvard Draft, op.cit.supra note 90.

93. Eg. Design, op.cit.supra note 32 at 55.

94. Johnson v United States, 6 Avi 18,111; 1960, USCAvR 269. Since the proximate cause of the accident was found to be the claimant's improper landing procedure, the ATC was finally absolved of liability.

95. Design, op.cit.supra note 32 at 55.

96. LATC No. 32, op.cit.supra note 39 at 5.

97. IATA, Bull. No. 36 (1964) at 97.

98. "Project Beacon," op.cit.supra note 38 at 70.

99. Design, op.cit.supra note 32 at 189-190.

100. Id. at 190.

101. Ibid.

102. FAA Rep. op.cit.supra note 29 at 29.

103. Roth, Sonic Boom: A Definition and Legal Implications, 25 J.Air L. & Com. 75 (1958).

104. Lundberg, op.cit.supra note 79, No. 96 at 32.

105. Id. at 26.

106. Id. No. 94 at 62.

107. Tipton (Pres. of Air Transport Ass. of America) in Forword to Facts and Figures (1965) at 4.

108. U.S. Congress, House Committee on Science and Astronautics, House Report 2941, 86th Congress, 2nd Sess.(1960).

109. Rinck, Damage Caused by Foreign Aircraft to Third Parties, 28 J.Air L. & Com.408.

110. Lacour, Dommages causes par la circulation aerienne, 10 Rev. Franc. Dr. Aerien 25 (1956) at 25.

111. Causby v United States, 328 U.S. 256; 66 S. Ct. 1062 (1946).

112. Griggs v Allegheny County, 369 U.S. 84 (1962).

113. Thornburg v Port of Portland, 233 Ore. 178, 376 P. 2d 100 (1962).

114. Martin v Port of Seattle, 64 Wash. 2d. 324; 391 P. 2d 540 (1964).

115. As in case before Tribunal de grande instance de Nice, 9 dec. 1964, described in Receuil Dalloz (1965) at 221.

116. The following guide would help to determine liability. The FAA Fifth Annual Report, op.cit.supra note 29 at 81 suggests three ways of abating noises: 1) muffle engine noises, 2) keep the noises away from people through traffic patterns and traffic procedures, 3) move people away from noises. Failure to keep planes on established traffic patterns and procedures would then result in ATC liability.

117. The Draft Convention on Aerial Collisions, ICAO Doc 8444, LC/151, 19/9/64 at 21, Art 7.

118. International Convention for the Unification of Certain Rules of Law in Regard to Collisions, Sept. 23, 1910.("Brussels Convention")

119. The Guadalajara Convention, Sept. 18, 1961.

120. FitzGerald, The Development of International Liability Rules Governing Aerial Collisions, Current Law and Social Problems (1961) at 172.

121. Note Union Trust Case, op.cit.supra note 64, where 1 mill dollars damages were awarded, and Staten Island Collision, 30 J. Air L.& Com. 281, where the claim was for 75 mill. dollars.

122. LATC No. 19, op.cit.supra note 25 at 13.

123. Ibid.; LATC No. 32, op.cit.supra note 39 at 5.

124. Ibid.

125. Ibid.

126. Chi.Con. Art. 18; See Chapter III.

127. LATC No. 19, op.cit.supra note 25 at 13; LATC No. 32, op.cit.supra note 39 at 6.

128. LATC No. 19, id at 13.

129. Chi.Con. Art. 18: "An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another."

130. Eurocontrol has 10 member states now. ASECNA has a membership of 12 African States. COCESNA has a membership of 5 Central American States.

131. Eurocontrol, Art. 25. See Rudolf, Ausservertragliche Haftung der Europäischen Organization zur Sicherung der Luftfahrt (Eurocontrol). Report given at the Sept. 15, 1964 meeting of the Rechtausschuss der Wissenschaftlichen Gesellschaft für Luft- und Raumfahrt.

132. One view discussed by Subcommittee, LATC No. 19, op.cit.supra note 25 at 13.

133. LATC No. 19 op.cit.supra note 25 at 14.

134. Kahn-Freund, op.cit.supra note 9 at 356.

135. Id. at 202.

136. 1910 Brussels Con., op.cit.supra note 118, Art. 3.

137. Note that The International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels, Oct. 10, 1957, has not yet received general acceptance.

138. The 1962 Brussels Convention on the Liability of Operations of Nuclear Ships, 57 Am. J. Int'l. Law 268 (1963), Art. III.

139. Answer to ICAO Questionnaire in LC/SC/LATC No. 4, 22/1/64 at 1.

140. Report on Accident to Viscount 802 G-AOHU which occurred on 7th January 1960 at London Airport, C.A.P. 166. See Standard Conditions under Which Aircraft May Land, be Parked, Housed or Otherwise Dealt With on Aerodromes under the Control of the Minister of Aviation, FAL 24 & 25, U.K. "Air Pilot."

141. See Postmaster General v Wadsworth, 1939 4 all E.R.

142. See generally, Street, Governmental Liability, a Comparative Study (1953) at 106-109; and Larsen, Liability of Air Traffic Control Agencies to Foreign Air Carriers, Anno III, II Trim (1964) at 5, 12-13, 25-28.

143. U.K., op.cit.supra note 139; New Zealand Answer to ICAO Questionnaire LC/Working Draft No. 701, 7/5/64, Addendum No. 8, 17/8/64; Trinidad-Tobago, Answer to ICAO Questionnaire, LC/Working Draft No. 701, 7/5/64, Addendum No. 12, 25/8/64. See Annex A of this paper.

144. eg. Air Transport Associates, Inc. v United States, 4 Avi 17,613/ 1955 USAvR 98.

145. LATC No. 19, op.cit.supra note 25 at 16.

146. Warsaw Con. Chap.III. See Drion, Limitation on Liabilities in International Air Law (1954) at 12.

147. Rome Con., Chap. I. See Drion, id. at 12.

148. Sweeney, Is Special Aviation Liability Legislation Essential? 19 J. Air L. & Com. 166, 317. . Sweeney edited the J. Air L. and Com. from 1947 - 1957, and prepared a Report to the Civil Aeronautics Board of a Study of the Proposed Aviation Liability Legislation, which first appeared in 1941 (typed), and forms the basis for his view. Orr, Fault as the Basis of Liability, 21 J. Air L. & Com. 399 (1954). As Director of Claims, United States Aircraft Insurance Group, Orr expressed opinions often diametrically opposite to those of Sweeney. In view of his capacity, he must be considered as expressing the interest of aviation insurers.

149. 1965 Facts and Figures about Air Transportation, Air Trans. Ass. of America, 26th Ed., at 32.

150. Sweeney, op.cit.supra note 148 at170.

151. Orr, Id.at 410.

152. Sweeney, Id. at 172.

153. Orr, Id. at 411.

154. LATC No. 19, op.cit.supra note 25 at 16; LC/Working Draft No. 657, op.cit.supra note 23 at 3.

155. Sweeney, op.cit.supra note 148 at 173.

156. Orr, Id. at 414.

157. Sweeney, Id. at 173.

158. Orr, Id. at 415.

159. Sweeney, Id. at 175.

160. Orr, Id. at 416.

161. Sweeney, Id. at 176.

162. Orr, Id. at 416.

163. See Chart, Annex A.

164. For instance, private airports in Belgium are not open to international air navigation, as reported in Answer to ICAO Questionnaire, LC/SC/LATC No. 14, 31/3/64. The few (17) private ATC towers in the United States do not regularly serve international flights, according to answer to ICAO Questionnaire LC/SC/LATC No. 8, 14/2/64. One reason is that planes in international flight, when they land, must be cleared by immigration and customs authorities. Only larger airports have these facilities. Neither do privately operated small airports with private ATC normally have sufficient runway length to serve large expensive foreign planes.

165. Sweeney, op.cit.supra note 148 at 179.

166. Orr, Id. at 418.

167. Orr in 21 Ins. Couns. J. 48, 56 (1954).

168. Ehrenzweig, "Full Aid" Insurance for the Traffic Victim (1954) at 4-6.

169 Id. at 5.

170. Hjalsted, Air Carrier's Liability in Cases of Unknown Cause of Damage, 27 J. Air L. & Com. 1 at 14; and 27 J. Air L. & Com.119.

171. Calkins, Grand Canyon, Warsaw and the Hague Protocol, J. Air L. & Com. (1956) at 256.

172. ICAO LC/SC/LATC No. 1-15 and 17; LC/Working Draft No. 701 Addenda No. 1-15.

173. See infra, at 124.

174. See infra at 117.

175. See ICAO Doc 8444, op.cit.supra note 40 at 15 ("Principles of Liability"); and LC/SC/Aerial Collisions No. 72, 25/8/62 at 8.

176. Id.at LC/SC/Aerial Collisions No. 72, at 8-9.

177. Sand, Limitation of Liability and Passengers' Accident Compensation under the Warsaw Convention, 28 J. Air L. & Com. 260 (1962), at 266. (Reprinted in 11 Am. J. Com. L. (1962) 22)

178. Id. at 277.

179. LATC No. 19, op.cit.supra note 25 at 16.

180. FAA Rep. op.cit.supra note 61 at 116.

181. Drion, op.cit.supra note 146 at 142.

182. LATC No. 19, op.cit.supra note 25 at 17.

183. The United States is now working on a payment system for use of air traffic services. In 1963 the President said that the United States must develop a system of user charges which would apply to international carriers, Kennedy, Statement on International Air Transport Policy, April 24, 1964 at 13, and consequently the U.S. Bureau of the Budget is now doing a study of user charges, as described in FAA Fifth Annual Report, op.cit.supra note 29 at 92.

184. Drion, op.cit.supra note 146 at 142.

185. See Annex A.

186. Note Drion, op.cit.supra note 146 at 20 rejects the argument that limitation of liability is needed for ability to insure aviation risks. Only for delays and transportation of goods does he accept that argument.

187. Id.at 29. He excepts goods and delays.

188. See Drion's rejection of this argument for limitation of operator's liability, except for larger planes under the Rome Convention, op.cit.supra note 146 at 17.

189. Carriage by car and rail is predominately domestic.

190. By state legislation, or by international law, such as the 1962 Brussels Con. Nuc. Ships,op.cit.supra note 138; or the 1957 Brussels Con. on Lim. Liab.,op.cit.supra note 137.

191. LATC No. 19, op.cit.supra note 25 at 17.

192. Ibid.

193. Drion, op.cit.supra note 146 at 13.

194. ICAO Doc 8137 - LC/147 - 1, at 174.

195. LATC No. 19, op.cit.supra note 25 at 17.

196. LATC No. 32, op.cit.supra note 39 at 8.

197. Hadjis, Liability Limitations in the Carriage of Passengers and Goods by Air and Sea, LL.M. Thesis for McGill University, Institute of Air and Space Law (1958).

198. Subject to the condition that "Nothing in the Convention should prevent states from stipulating that they would be prepared to pay a higher amount of compensation in respect of damage caused by their ATC Agencies." This, of course, a state would be unwilling to do for foreign litigants, if it had no assurance that its own citizens would be compensated in the same way abroad, LATC No. 32 op.cit.supra note 39 at 10.

199. LATC No. 19, op.cit.supra note 25 at 17.

200. LATC No. 32, op.cit.supra note 39 at 13.

201. If the Rome Convention's limits were adopted for ATC-caused surface damage, an apportionment of compensation for surface damage would be included, because of the Rome Convention's ceiling on total damages in its Art. 14.

202. LATC No. 19, op.cit.supra note 25 at 17.

203. LATC No. 32 op.cit.supra note 39 at 10.

204. Higher domestic limits than those in the ATC Convention are outside the scope of our discussion.

205. LATC No. 19, op.cit.supra note 25 at 17.

206. Doc 8444, op.cit.supra note 40 at 19.

207. Other proposals were for an average between the highest and the lowest national valuation of human life, and for limitation graded on size of the ATC agency similar to a maritime system. The first proposal is rejected because it would be unreasonable to draw such an average between a small poor country where few people fly and a large rich country where many people fly. The second proposal has already been disposed of in our rejection of the uniformity of limitation with shipping.

208. LATC No. 19, op.cit.supra note 25 at 18.

209. Ibid.

210. War. Con. Art. 24: "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Rome Con. Chap. II, and Aerial Col. Con., Art. 8 state that the operator shall not be liable in a recourse action which would result in his liability exceeding the limitation of the convention. In regard to the limitation of liability established by the Aerial. Col. Con., the Subcommittee found that the limits on liability established by the existing Draft Con. on Aerial Col. could be avoided by the ATC agency in a recourse action against the operator. The Subcommittee redommended that Art. 8 be tightened up to make a recourse action by an ATC agency subject to limitation of liability also, LATC No. 19, op.cit.supra note 25 at 7,24; Also see, ICAO LC/SC/LATC No. 2, 16/12/63, Comments of Switzerland at 3. The Legal Committee on Sept. 10, 1964 amended Art. 8 to also limit recourse actions by ATC. See new draft Convention in Doc 8444, op.cit. supra note 40 at 21.

211. ICAO LC/Working Draft No. 710, 5/8/64, at 4.

212. LATC No. 32, op.cit.supra note 39 at 11-13.

213. The Rome Con. prevents that through Art. 14.

214. LATC No. 32, op.cit.supra note 39 at 11-13.

215. Willful misconduct: if he intends to cause damage or acts wrecklessly with knowledge that damage would probably ensue. See Art. XIII of the Hague Protocol which replaces Art. 25 of Warsaw Con.

216. Forfeiture of limit if operator, his agent or servant intends to cause damage, or wrecklessly with knowledge that damage would probably ensue causes it.

217. Forfeiture if a person takes a plane wrongfully and uses it without the consent of the person entitled to use it, Rome Con. Art 12.

218. Rinck, op.cit.supra note 109 at 415.

219. Hague Protocol, Art. XIII.

220. Rinck, op.cit.supra note 109 at 410.

221. Infra, at 11.

222. FitzGerald, op.cit.supra note 120 at 167.

223. Infra, at 48.

224. Compare with Art. 20 of Har. Draft Con., Annex B; Art.27 of War. Con.; Art. 22 of Rome Con.; Art. 20 of Aerial Col.

225. LATC No. 19, op.cit.supra note 25 at 16.

226. Op.cit.supra note 94.

227. LATC No. 32, op.cit.supra note 39 at 15.

228. eg. U.K. since Law Reform Act (Contributory Negligence) 1945; See also Grönfors, Apportionment of Damages in the Swedish Law of Torts (1957).

229. LATC No. 19, op.cit.supra note 25 at 20.

230. LATC No. 32, op.cit.supra note 39 at 15.

231. LATC No. 19, op.cit.supra note 25 at 20.

232. Air Transport Associates, Inc v United States, op.cit.supra note 144; also Conklin v Canadian Colonial Airways, 266 N.Y. 244, 194 N.E. 692 (1935).

233. Naturally the court should take the circumstances, the emergency into consideration in deciding whether negligence existed.

234. LATC No. 19, op.cit.supra note 25 at 20.

235. Id. at 26.

236. See Rome Con, Chap. III.

237. See Chart, Annex A.

238. See Sand, op.cit.supra note 177 at 264, to the effect that national courts may refuse to entertain a claimant's action.

239. Refer to McKenry, Judicial Jurisdiction under the Warsaw Convention, 29 J. Air L. & Com. 205 (1963), and Robbins, Jurisdiction under Article 28 of the Warsaw Convention, 9 McGill L. J. (1963).

240. See FitzGerald, op.cit.supra note 120 at 174; and Toepper, Comments on Art. 20 of the Rome Convention of 1952, 21 J. Air L. and Com 420 (1954) at 421.

241. Drion, op.cit.supra note 146 at 338.

242. ICAO LC/SC/LATC No. 17, 13/4/64, at 4.

243. Rinck, op.cit.supra note 33 at 411.

244. LATC No. 19, op.cit.supra note 25 at 20.

245. LC/Working Draft 710, op.cit.supra note 211 at 4.

246. LATC No. 32, op.cit.supra note 39 at 16.

247. LATC No. 19, op.cit.supra note 25 at 21. "With a single forum solution, a passenger suing his carrier under the Warsaw Convention might find that he could not join the air traffic control agency as a defendant because, for example, none of the jurisdictions available to the claimant under the Warsaw Convention might coincide with the jurisdiction available under the possible new convention." The Subcommittee also mentions the complicated situation when ATC agencies of more than one country are at fault, p.22.

248. Id. at 21.

249. Id. at 21; repeated in LATC No. 32 op.cit.supra note 39 at 16.

250. See Rome Con. Art. 20.

251. As in the Rome Con. and Draft Con. on Aerial Col.

252. Aerial Col. Art. 15 (3).

253. LATC No. 32, op.cit.supra note 39 at 16.

Part III: Alternatives to a Special Convention on ATC Liability

1. de Rode-Verschoor, Questions of Responsibility in Air Law, address to the Alumni Ass. of the Hague Academy, April, 1965 at 13. (Unpublished to date).

2. ICAO LC/SC/LATC No. 19, 30/4/64. First Report of the ICAO Legal Committee's Subcommittee on the Liability of Air Traffic Control Agencies, at 6, regarding Art. 25A (new) of Warsaw Con., Art 17, 1929

3. "Project Horizon," Report of the Task Force on National Aviation Goals, FAA (Sept. 1961) at 99, speaking as of the time of this project.

4. ICAO LC/SC/LATC No. 32, 14/4/65. Second Meeting of the ICAO Legal Committee's Subcommittee on the Liability of Air Traffic Control Agencies, at 4.

5. Id. at 8-13.

6. LATC No. 19, op.cit.supra note 2 at 6-7.

7. ICAO Doc 8444, LC/151, 19/9/64 at 4.

8. LATC No. 19, op.cit.supra note 2 at 8.

9. ICAO Council Meeting on Nov. 21, 1960 (XLI-4).

10. ICAO, LC/Working Draft No. 657, 9/5/62 (Secretariat Report) at 1. Later IATA changed opinion, and now recommends separation of the two subject matters, IATA Bull. No. 32 (1964) at 91.

11. LATC No. 19, op.cit.supra note 2 at 8.

12. Ibid.

13. LC/Working Draft No. 657. op.cit.supra note 10 at 3.

14. The delegate of Columbia mentioned at the 15th Session (Sept. 2, 1964) that air law experts had worked on this subject for about 36 years.

15. ICAO LC/Working Draft No. 711, 21/8/64 at 2, Comments of International Union of Aviation Insurers.

16. Note that the 14th and 15th Session of the Legal Committee did not change this decision.

17. The Staten Island Collision, Governmental Liability - The December 1960 Air Disaster - Is Executive Settlement Desirable? 30 J. Air L. & Com. 281. See also diagram by the Swiss delegate showing near identity between the claimants who may sue the aircraft carrier or operator and those who may sue the ATC operator (LC/SC/LATC No. 15, 15/4/64 at 1-2).

18. U.S. letter of 13/4/64 suggesting a consolidation, was followed by a more detailed letter of 5/8/64 that proposed a study regarding the feasability of a unification of the three subject matters of the Rome Convention, the Aerial Collisions Draft Convention and of ATC Liability. See ICAO, LC/Working Draft No. 710, 5/8/64.

19. See LC/SC/LATC No. 28, 8/4/65 at 1-2.

20. U.S. and U.K. at 15th Sess., 2nd Meeting of the ICAO Legal Committee, Sept. 1, 1964 at 1; Italy at the 3rd Meeting, Sept. 2, 1964, at 3.

21. Compare with successful Warsaw Con., ratified by 75 states.

22. LC/Working Draft No. 708, 30/6/64 at 8.

23. ICAO LC/SC/LATC No. 17, 13/4/64 at 4. As a matter of preference, the U.S. would rather work towards a consolidation than amend the Rome Convention separately.

24. Netherlands at 15th Session, 3rd Meeting of the ICAO Legal Committee, Sept. 2, 1964, at 3.

25. Id. at 2. Since absolute liability is the domestic Spanish system, it is likely that Spain would insist on such a system of liability for a consolidated convention.

26. By recommendation of ICAO Subcommittee LATC No. 28, op.cit.supra note 19 at 2; and LATC No. 32, op.cit.supra note 4 at 7.

27. LC/Working Draft No.710 op.cit.supra note 18 at 2-3.

28. Id. at 2.

29. Id. at 4.

30. LATC No. 32, op.cit.supra note 4 at 16.

31. LC/Working Draft No. 710, op.cit.supra note 18 at 4. .

32. That is also by far the most important private air law convention. All the major air transport countries, including U.S.A., U.K. and U.S.S.R. have ratified this convention.

33. LC/Working Draft No. 710 at 1.

34. Guldiman in ASDA-SVLR Bull. No. 2 (1964) at 9.

35. de Rode Verschoor, op.cit.supra note 1 at 13.

36. Subject was relegated to "inactive" ICAO Legal Committee Work Program, Part B.

37. Not only unmanned, but even manned navigation satellites are planned, Aviation Week and Space Technology, Feb. 1, 1965, p.52.

38. Oppenheim, International Law, 8th Ed (1955) by Lauterpacht; at 330-343; 365-366.

39. Guha Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal Law? 55 Am. J. Int'l L. 863 (1961) at 871.

40. Eg. Brierly, The Law of Nations, An Introduction to the Law of Peace, 5th Ed. (1955) at 218.

41. Roy, op.cit.supra note 38 at 883, 888.

42. Id. at 889.

43. The Harvard Draft Convention on International Responsibility of States for Injury to the Economic Interest of Aliens, Sohn and Baxter, 55 Am. J. Int'l. L. 548 (1961). It should be at once noted that the international minimum standard of justice is minutely stated in an attempted definition, Articles 5-13.

44. U.N. General Assembly Resolution No. 799 (VIII). This request was reiterated by G.A. Res. No. 1765 (XVII)

45. U.N. International Law Com., A/CN/96, 106, 111, 119, 125 and 134.

46. Prof. Edwin N. Borchard was principally responsibile for the draft which was submitted to the First Conference on the Codification of International Law at the Hague, 1930: The Harvard Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, in 23 Am. J. Int'l. L., Spec. Supp. 1929.

47. Sohn and Baxter, op.cit.supra note 43 at 545-546.

48. 1961 Harvard Draft, op.cit.supra note 43 at Art. 1 (1).

49. Sohn-Baxter, op.cit.supra note 43 at 545.

50. These acts are wrongful and actionable if they come within the definitions of the Draft Con. in Art. 5-12.

51. See 1961 Harvard Draft Con. Art. 14. Compensable injuries include a) bodily or mental harm, b) loss sustained by an alien as the result of the death of another alien, c) deprivation of liberty, d) harm to reputation, e) destruction of, damage to or loss of property, f) deprivation of use or enjoyment of property, g) deprivation of means of livelihood, h) loss or deprivation of enjoyment of rights under a contract or concession, i) or loss or detriment against which the alien is specifically protected by treaty.

52. On the other hand, if an alien holds an interest in an airline from the respondent state, he may recover under the convention; for example, if a U.S. citizen holds an interest in a Canadian airline and that airline suffers injury from Canadian ATC, he may benefit from the Convention.

53. "pacta sunt servanda is undoubtedly the basic norm of any system of law dealing with agreements" writes Sohn and Baxter in their notes to Art. 12, but they state that this principle exists on such a high level of abstraction that it does not help in construing concrete contract problems.

54. The problem of security is thus eliminated.

55. See U.S. Federal Tort Claims Act of 1946, 28 USCA 2502; Germany, Reichsbeamtenhaftungsgesetz, para. 7 (Gesetz über die Haftung des Reichs für seine Beamten, vom 22 Mai 1910).

56. The final story of the Harvard Draft Con. has not yet been told, since the International Law Commission is still hard at work on codification of international law relating to state responsibility. One of the authors, Prof. Sohn, in 1961 reported to the Commission on the Harvard Draft 613th meeting, see 56 Am.J. Int'l. L. 355 (1962). When the Commission's original rapporteur on State Responsibility, Dr. F.V. Garcia-Amador, left, it was decided in 1962 to re-evaluate the whole matter, and a subcommittee was created for this purpose. In 1963, the Subcommittee report was presented, United Nations ILC, A/CN. 4/152. The chairman of the Subcommittee, Prof. Ago, was appointed the new rapporteur and was asked to submit a preliminary report in 1965 (A/CN.4/SER; A/1963, p.86). The continued work of the International Law Commission, however, does not detract from the importance of the Harvard Draft Con. the value of which is evident to the reader. It is part of the recognized slow process of codifying and forming international law.

57. 1961 Harvard Draft Con. Art. 1 (2) (a).

Bibliography

Table of Cases

Aero Enterprises, Inc. v United States, 5 Avi 18,238; 1958 USCAvR 645

Affaire Genin, Arret du Conseil d'Etat 1° June 1934.

Air Transport Associates, Inc. v United States, 4 Avi 17,613; 1955 USAvR 98.

Berner v British Commonwealth Pacific Airways, 8 Avi 17,781 (1964). On appeal.

Case before Tribunal de grande instance de Nice, 9 decembre 1964, Receuil Dalloz (1965) p. 221 et.seq.

Causby v United States, 328 U.S. 256; 66 S.Ct. 1062 (1946).

Collision between Caravelle jet and light plane, 1960 Paris; ICAO Digest No. 12 (1963)

Conklin v Canadian Colonial Airways, 266 N.Y. 244;194 N.E. 692 (1935)

Dalehite v United States, 346 U.S. 15 (1953)

Eastern Airlines, Inc. v Union Trust Co., 4 Avi 17,546; 1955 USAvR 1

Erie R.R. Co. v Stewart, 40 F 2d 855 (1930)

Finfera v Thomas, 1 Avi 949; 1941 USAvR 1

The Grand Canyon Accident, 1956, C.A.B. Accident Investigation Report No. 1-0090; 1957 USCAvR 1.

Indian Towing Co. v United States, 350 U.S. 61 (1955)

Johnson v United States, 6 Avi 18,111; 1960 USCAvR 269 (1959).

Kawananakoa v Polyblank, 305 U.S. 349 (1907)

Marino v United States, 2 Avi 14,957; 1949 USAvR 308

Martin v Port of Seattle, 64 Wash. 2d 324; 391 P.2d 540 (1964)

McKlenny v United Air Lines, Inc., 6 Avi 17,690; 1959 USCAvR 221 (1959).

McPherson v Buick Motor Co. (1916), 217 N.Y. 382; 111 N.E. 1050.

Miller v United States, 7 Avi 18,244; 303 F.2d 703 (1962); cert.den. 371 U.S. 955, CCA 9 (1963).

Minnesota v United States, 305 U.S. 382 (1938)

New York Airways v United States, 283 F. 2d 496 (1960); 6 Avi 18,260; 1960 USCAvR 393

Otness v United States, 178 F. Suppl. 647 (1959).

Postmaster General v Wadsworth, [1939] 4 All E.R.

Sentencia de 15 Noviembre de 1962, Contencioso-Administrativo (Sala 4) Seq.Jorn. Ib-Am. Der. Aero. Esp. (1964)

Smerdon v United States, 4 Avi 17,840

Société Atlantique Aérienne, Conseil d'Etat, 23 October 1957

Somerset Seafood Co. v United States, 193 F. 2d 631 (1951)

The Staten Island Collision, A.L.P.A. Accident Investigation Report, April 4, 1964, at 15.

Thornburg v Port of Portland, 233 Ore. 178; 376 P. 2d 100 (1962)

Union Trust Co. v United States, 221 F. 2nd 62 (1955)

Wright v Midland Ry.. Co. (1873) L.R. 8 Ex. 137

Treaties and Agreements

"ASECNA," Convention Relative à la Création d'une Agence Chargée de Gérer les Installations et Services Destinés à Assurer la Sécurité de la Navigation Aérienne en Afrique et à Madagascar, Dec. 12, 1959

"1910 Brussels Convention," International Convention for the Unification of Certain Rules of Law in Regard to Collisions, Sept. 23, 1910

The 1962 Brussels Convention on the Liability of Operation of Nuclear Ships, 57 Am. J. Int'l. L. 268 (1963)

Canada-United States Air Agreement of December 27, 1963

The Chicago Convention, Dec. 7, 1944; 61 Stat. 1180

"COCESNA," Convention Portant Crèation d'une Sociètè des Services de Navigation Aèrienne Pour l'Amèrique Centrale, Feb. 24, 1960

The 1958 Convention on the High Seas, Am. J. Int'l. L., Vol. 52, at 842 (1958)

Draft Convention on Aerial Collisions, ICAO Doc 8444, LC/151, 19/9/64 at 19.

"Eurocontrol," International Convention Relating to Co-operation for the Safety of Air Navigation, 13 Dec. 1960

French-Swiss Treaty of July 4, 1949

The Guadalajara Convention, Sept. 18, 1961

The Hague Protocol, Sept. 28, 1955

The Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l. L. 548 (1961)

Harvard Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, 23 Am.J. Int'l. L. Spec. Supp. 1929

International Air Services Transit Agreement, Dec. 7, 1944; 59 Stat. 1693

The International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, Oct. 10, 1957

International Regulations for Preventing Collisions at Sea, Annex B. of the Final Act of the International Conference on Safety of Life at Sea, 1948

The Rome Convention, Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952

The Tokyo Convention, Sept. 14, 1963

The Warsaw Convention, Oct. 12, 1929; 49 Stat. 3,000 ; T.S. 876.

Statutes, Regulations and Resolutions

Canada, IATA, Act of Incorporation, 9-10 George VI, Chapter 51, 1945

France, loi 1924 (Air Navigation)

Germany, Das Bürgerliche Gesetzbuch (Civil Code of the Federal Republic of Germany)

Germany, Federal Law Concerning the Establishment of the Federal Aviation Office of Nov. 30, 1954

Germany, Federal Law Concerning the Federal Agency for Air Traffic Control, 25 March 1953

Germany, Gesetz über die Haftung des Reichs für seine Beamten, vom 22 Mai 1910 (Law Regarding Liability for Acts of Government Employees)

Germany, Das Grundgesetz (The Basic Law of the Federal Republic of Germany

Germany, Reichgesetzblatt I , law of 1930.

Spain, Código Civil de 1889 (Civil Code)

Spain, Ley de Expropriation Forzosa, 16 Dec. 1954 (Expropriation Act)

Spain, Ley de Procedimiento Administrativo de 18 July 1958 (Act of Administrative Proceedings)

Spain, Ley de Règimen Juridico de la Administración del Estado de 26 July 1957 (Expropriation Act)

Spain, Ley Reguladora de la Jurisdictión Contencioso-Administrativo, 27 Dec. 1956 (Administrative Claims Act)

Spain, Real Orden de 30 Dec. 1926 (Royal Order)

Switzerland, Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördemitglieder und Beamten vom 14.3, 1958 (Federal law)

U.K. Crown Proceedings Act of 1947, 10 & 11 Geo. 6

U.K. Law Reform Act of 1945 (Contributory Negligence)

U.K. Standard Conditions under which Aircraft may Land, be Parked, Housed, or Otherwise Dealt with on Aerodromes under the Control of the Minister of Aviation, FAL 24 & 25, U.K. "Air Pilot"

U.N. General Assembly Resolution No. 799 (VIII)

U.N. General Assembly Resolution No. 1765 (XVII)

U.N. General Assembly Resolution No. 1962 (XVIII)

U.N. International Law Commission A/CN/96, 106, 111, 119, 125 and 134

U.S. Federal Aviation Act of 1958, 72 Stat. 731

U.S. Federal Aviation Regulations, Part 73

U.S. Federal Aviation Regulations, Part 91

U.S. Federal Aviation Regulations, Part 101

U.S. Federal Tort Claims Act of 1946, 28 U.S.C. A. 921 et.seq.

U.S. Tucker Act of 1887, 28 U.S.C. 1346.

Documents, Reports and Hearings

"The Doolittle Report," The Airport and its Neighbors, Report of the President's Airport Commission (May 16, 1952)

FAA Fifth Annual Report, Fiscal Year 1963 (1964)

FAA Sixth Annual Report, Fiscal Year 1964 (1965)

Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 88th Cong. 2nd Sess. Pt. 1 at 1155 (1964).

ICAO Answer to Questionnaire, LC/SC/LATC No. 4, 22/1/64 (U.K.)

ICAO Answer to Questionnaire, LC/SC/LATC No. 8, 14/2/64 (U.S.A.)

ICAO Answer to Questionnaire, LC/SC/LATC No. 14, 31/3/64 (Belgium)

ICAO Answer to Questionnaire, LC/SC/LATC No. 701, 7/5/64, Addendum No. 8, 17/8/64 (New Zealand)

ICAO Answer to Questio naire, LC/SC/LATC No. 701, 7/5/64, Addendum No. 12, 25/8/64 (Trinidad-Tobago)

ICAO Council Meeting, Nov. 21, 1960 (XLI-4)

ICAO Doc 4444 - RAC/501/7, Rules of the Air and Air Traffic Services

ICAO Doc 8137-LC/147-1

ICAO Doc 8444, LC/151, 19/9/64

ICAO LC/SC/LATC No. 2, 16/12/63

ICAO LC/SC/LATC No. 15, 15/4/64

ICAO LC/SC/LATC No. 17, 13/4/64

ICAO LC/SC/LATC No. 19, 30/4/64

ICAO LC/SC/LATC No. 28, 8/4/65

ICAO LC/SC/LATC No. 32, 14/4/65

ICAO LC/Working Draft No. 657, 9/5/62

ICAO LC/Working Draft No. 667, 13/8/62

ICAO LC/Working Draft No. 708, 30/ 6/ 64

ICAO LC/Working Draft No. 710, 5/8/64

ICAO LC/Working Draft No. 711, 21/8/64

ICAO Legal Committee, 15th Sess; 2nd Meeting, Sept. 1, 1964

ICAO Legal Committee, 15th Sess; 3rd Meeting, Sept. 2, 1964

ICAO Legal Committee, 15th Sess; 21st Meeting, Sept. 14, 1964 (unnumbered to date)

"Project Beacon," FAA Report of the Task Force on Air Traffic Control, Oct. 1961

"Project Horizon," FAA Report of the Task Force on National Aviation Goals, Sept. 1961

U.S. Congress, House Committee on Science and Astronautics, House Report 2941, 86th Congress, 2nd Sess. 1960

Books and Pamphlets

A.L.I., RESTATEMENT OF THE LAW OF TORTS (1934)

Aviation Week and Space Technology, Jan. 20, 1964

Aviation Week and Space Technology, Feb. 3, 1964

Aviation Week and Space Technology, Oct. 12, 1964

Aviation Week and Space Technology, Feb. 1, 1965

BRIERLY, THE LAW OF NATIONS, 5th Ed. (1955)

Calkins, Grand Canyon, Warsaw and the Hague Protocol, 1956 J.Air L. & Com. 253

Chauveau, La responsabilité des aides à la navigation, Rev. Gen.Air 1953, No. 3-4, 214

The Controller, Vol. 3, No. 4, Oct. 1964

Control Zone Accidents - Allocation of Liability between Air Carrier and Control Towers, unsigned article, 23 J.Air L.& Com. 234 (1956)

DESIGN FOR NATIONAL AIRSPACE UTILIZATION SYSTEM, FAA (June 30, 1962)

DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW (1954)

Eastman, Liability of the Ground Control Operator for Negligence, 17 J. Air L. & Com. 170 (1950)

EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954).

1965 Facts and Figures about Air Transportation, The Air Transport Ass. of America, 26th Ed.

FitGerald, The Development of International Liability Rules Governing Aerial Collisions, Current Law and Social Problems (1961), 1[illegible].

GARRIDO-FALLA, TRATADO DE DERECHO ADMINISTRATIVO, Vol II (1962)

Geadeau, Les nouvelles exigences du contrôle du traffic aerien, 22 Rev. Gen. Air 262 (1959)

GRONFORS, APPORTIONMENT OF DAMAGES IN THE SWEDISH LAW OF TORTS (1957).

Guerreri, Governmental Liability in the Operation of Airport Control Towers in the United States, Term Paper for McGill University, Insititute of Air and Space Law, (1960)

Guerreri, The Status of the Aircraft Commander in Italian and International Law, LlM. Thesis, McGill University, Institute of Air and Space Law (1961)

Guldiman, ASDA-SVLR Bull. No. 2 (1964)

Hadjis, Liability Limitations in the Carriage of Passengers and Goods by Air and Sea, LlM. Thesis for McGill University, Insitute of Air and Space Law (1958)

Hjalsted, Air Carriers' Liability in Cases of Unknown Cause of Damage 27 J. Air L. & Com.1; 27 J. Air L. & Com 119

Hodel, Die Haftung für Schäden aus mangelhafter Flugsicherung, ASDA-SVLR No. 1-1964

IATA Bull. No. 32 (1964)

IATA Bull. No. 36 (1964)

KAHN-FREUND, THE LAW OF CARRIAGE BY INLAND TRANSPORT, 3rd Ed (1956)

Kennedy, Statement on International Air Transport Policy, April 24, 1964

Knauth, The Aircraft Commander in International Law 14 J. Air L. & Com 161 (1947)

Kölner-Stadtanzeiger, 11 June 1965, p.29

Lacour, Dommages causes par la circulation aérienne, 10 Rev. Franc. Dr. Aerien (1956)

Larsen, Liability of Air Traffic Control Agencies to Foreign Air Carriers Anno III, II Trim, Il Diritto Aereo (1964)

Leclercq, Les aides à la navigation aérienne: organisation et problèmes juridiques soulevés par leur fonctionment, LL.M. Thesis for McGill University, Institute of Air and Space Law (1959)

LEMOINE, TRAITE DE DROIT AERIEN (1947)

Lundberg, Speed and Safety in Civil Aviation, Flygtekniska Forsöksanstalten Vol. 94, 95 and 96 (1963-4)

Marx, Governmental Tort Liability for Operators of Airports, 26 J.Air L. & Com. 173

MCDOUGAL, LASSWELL & VLASIC, LAW AND PUBLIC ORDER IN SPACE (1963)

McKenry, Judicial Jurisdiction under the Warsaw Convention, 29 J.AirL. & Com. 205 (1963)

Memorandum on ICAO, 4th Ed., Sept. 1963

Meyer, Introductory Remarks to the Meeting of the Rechtsausschuss der Wissenschaftlichen Gesellschaft für Luft- und Raumfahrt, in Frankfurt 3 May 1965

Nagano, Liability in Operating Air Traffic Control and Conflict of Laws, Term Paper for McGill University, Institute of Air and Space Law (1962)

Napelle, La Responsabilidad del Estado en los Accidentes de Aviacion, Seq. Jorn. Ib-Am. Der. Aero Esp. (1964)

OPPENHEIM, INTERNATIONAL LAW, 8th Ed. by Lauterpacht (1955)

Orr, Fault as the Basis of Liability, 21 J. Air L.& Com. 399 (1954)

PROSSER, TORTS, 3rd Ed. (1964)

Rinck, Damage Caused by Foreign Aircraft to Third Parties, 28 J.AirL. & Com. 405 (1961-62)

Rinck, Haftung für Versagen automatischer Anlagen in der Flugsicherung, Z. Luftrecht, Vol. 14, No. 3 (1965)

Robbins, Jurisdiction under Article 28 of the Warsaw Convention, 9 McGill L.J. (1963)

de Rode-Verschoor, Questions of Responsibility in Air Law, Address to the Alumni Ass. of the Hague Academy, April, 1965 (unpublished to date)

Roth, Sonic Boom: A Definition and Legal Implications, 25 J. Air L. & Com. 75 (1958)

Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal Law? 55 Am. J. Int'l. L. 863 (1961)

ROYO-VILLANOVA, ELEMENTOS DE DERECHO ADMINISTRATIVO, 24th Ed., Vol. II, (1955)

Rudolf, Ausservertragliche Haftung der Europäischen Organisation zur Sicherung der Luftfahrt (Eurocontrol), Report given at the 15 Sept. 1964 Meeting of the Rechtausschuss der Wissenschaftlichen Gesellschaft für Luft- und Raumfahrt

RUHWEDEL, DIE RECHTSSTELLUNG DES FLUGZEUGKOMMANDANTEN IM ZIVILEN LUFTVERKEHR, (1964)

Sand, Limitation of Liability and Passengers' Accident Compensation under the Warsaw Convention, 28 J. Air L. & Com 260 (1962) and 11 Am.J.Com. L. 22 (1962)

SAVATIER, TRAITE DE LA RESPONSABILITÉ CIVILE EN DROIT FRANCAIS (1959)

Schodruch, Die rechtliche Natur der Flugsicherung und ihre Organisation in Deutschland, Dissertation for the University of Cologne (1955)

SCHWARZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD (1954)

SHAWCROSS AND BEAUMONT, AIR LAW, 2nd Ed. (1951)

Stählin, Rechtsprobleme aus dem Betrieb der Swissair, Schweiz Ver. Luft Raumrecht, Bull. No. 2-1963

Staten Island Collision, Governmental Liability - The December 1960 Air Disaster - Is Executive Settlement Desirable? 30 J. Air L. & Com 286

STREET, GOVERNMENTAL LIABILITY, A COMPARATIVE STUDY (1953)

Sweeney, Is Special Aviation Liability Legislation Essential? 19 J. Air L. & Com. (1952)

Tancelin, Le partage de l'autorite entre les differentes categories de personnels participant à la navigation aérienne, Dissertation for University of Paris (1960)

Time Magazine, April 23, 1965

Tipton, Forword to Air Traffic Facts and Figures (1965)

Toepper, Comments on Article 20 of the Rome Convention of 1952, 21 J.Air L. & Com. 420 (1954)

VERDROSS, VÖLKERRECHT, (1959)

Verkehrswirtschaft, Dec. 31, 1964, p.6

ANNEX A

Answers to ICAO Questionnaire

in Relation to

Liability of ATC Agencies

LC/SC/LATC No. 1-15, 17;
LC/Working Draft No. 701
7/5/64, Addenda No. 1-15

	Body Which Provides ATC Service			LEGAL REGIME System of Liability						
	Gov't	Private	Int'l Agency	Gov't liable as a private party	non-contractual	contract	Presumed or absolute liability	Limitation of damages	Is Security required of ATC?	Period of Limitations
Canada	Yes	Yes	No	Yes	Yes	No	No	No	No	Notice within 7 days
U.K.	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	3-6 yrs.
Philippines	Yes	No	No	No (2)	--	--	--	--	--	--
Australia	Yes	No	No	Yes	Yes	No	No	No	No	3-6 yrs. (1
Spain	Yes	No	No	No (5)	Yes	No	Yes	No	No	1 yr.
U.S.A.	Yes	Yes	No	Yes (4)	Yes	No	No	No (3)	No	2 yrs.
India	Yes	Yes	No	--	Yes	No	No	No	No	1 yr.
Fed.Republic of Germany	Yes	No	Yes	Yes (4)	Yes	No	No	No	No	3 yrs.
France	Yes	No	Yes	No (5)	Yes	No	No	No	No	4 yrs.
Switzerland	Yes (6)	No	No	Yes	Yes	No		Np	No	1-10 yrs.

	Body Which Provides ATC Service			LEGAL REGIME System of Liability						
	Gov't	Private	Int'l Agency	Gov't liable as a private party	non-contractual	contract	Presumed or absolute liability	Limitation of damages	Is Security required of ATC?	Period of Limitations
Mexico	Yes	Yes	No	Yes	Yes	No	--	No	No	2 yrs.
Belgium	Yes	Yes(3)	Yes	No (9)	Yes	No	No	No	No	--
Eurocontrol	--	--	Yes	Yes	Yes	No	No	No	No	--
Rep. of S. Africa	Yes	No	No	Yes	Yes	No	No	No	No	3 yrs.
Jamaica	Yes	No	No	Yes	Yes	No	No	No	No	6 mo.
Sweden	Yes	No	Yes	No (10)	--	--	--	--	No	--
Brazil	Yes	Yes	No	Yes (11)	Yes	No	No	No	No	5-7 1/2 yrs.
Japan	Yes	--	No	Yes (4)	Yes	No	No	No	No	3-20 yrs.
Austria	Yes	No	No	Yes (4)	Yes	No	No	No	No	3-10 yrs.
Poland	Yes	No	No	No (12)	Yes	No	No	No	No	3-10 yrs.

	Body Which Provides ATC Service			LEGAL REGIME System of Liability						
	Gov't	Private	Int'l Agency	Gov't liable as a private party	non-contractual	contract	Presumed or absolute liability	Limitation of damages	Is Security required of ATC?	Period of Limitations
New Zealand	Yes	No	No	Yes	Yes	Yes	No	No	No	2-6 yrs.
Netherlands	Yes	Yes	Yes	Yes	Yes	No	No	No	No	5 yrs.
Kenya	No	No	Yes	Yes	Yes	No	No	No	No	2 yrs.
Tanganyika-Zanzibar	No	No	Yes	Yes	Yes	No	No	No	No	1-2 yrs.
Trinidad Tobago	Yes	No	No	No (13)	No	Yes	No	No	No	4 yrs.
Denmark	Yes	No	Yes	Yes	Yes	No	No	No	No	5 yrs.
Argentina	Yes	No	No	Yes (14)	--	--	--	No	No	1 yr.
Italy	Yes	No	No	Yes	Yes	No	No	No	No	2 yrs.

Notes on Answers to ICAO Questionnaire

1) The usual period of limitations is 6 years for both tort and contract except for actions regarding damages for personal injuries or death, in tort or in contract.

2) Government immunity from suit applies; but the government may be sued for breach of contract and defendant may bring counter claims in a suit instituted by the government; the government may also decide to waive its immunity.

3) Some states provide for limitation on wrongful death actions.

4) If the injured person is a foreign national, reciprocity of recovery must exist. (No jury trial in the United States.)

5) Actions must be brought before special administrative tribunals.

6) ATC Service is provided by Radio-Suisse S.A., which is government controlled. The Swiss Government is only liable if Radio-Suisse cannot pay damages. Radio-Suisse is government controlled.

7) Within a year after claimant becomes aware of the claim; at any rate, the claim must be brought within 10 years after the act happened.

8) Private Aerodromes. But these are not open to international navigation

9) The liability of the state is more restricted than that of a private person.

10) As a rule, Sweden claims immunity. ATC does not come within any special legislation exempting it from immunity

11) Privative court only.

12) State may be held liable if the act is subject to penal or disciplinary action, or if compensation is consistent with principles of social co-existence.

13) Claim can only be brought with <u>fiat</u> of Governor General

14) But an administrative claim must be brought before judicial action can be initiated.

ANNEX B

II

Draft Convention on the International Responsibility of States for Injuries to Aliens *

SECTION A

GENERAL PRINCIPLES AND SCOPE

Article 1

(Basic Principles of State Responsibility)

1. A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien. A State which is responsible for such an act or omission has a duty to make reparation therefor to the injured alien or an alien claiming through him, or to the State entitled to present a claim on behalf of the individual claimant.

2. (a) An alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made.

(b) A State is entitled to present a claim under this Convention only on behalf of a person who is its national, and only if the local remedies and any special international remedies provided by the State against which the claim is made have been exhausted.

Article 2

(Primacy of International Law)

1. The responsibility of a State under Article 1 is to be determined according to this Convention and international law, by application of the sources and subsidiary means set forth in paragraph 1 of Article 38 of the Statute of the International Court of Justice.

2. A State cannot avoid international responsibility by invoking its municipal law.

3. Nothing in this Convention shall adversely affect any right which an alien enjoys under the municipal law of the State against which the claim is made if that law is more favorable to him than this Convention.

SECTION B

WRONGFUL ACTS AND OMISSIONS

Article 3

(Categories of Wrongful Acts and Omissions)

1. An act or omission which is attributable to a State and causes an injury to an alien is "wrongful," as the term is used in this Convention:

(a) if, without sufficient justification, it is intended to cause, or to facilitate the causing of, injury;

(b) if, without sufficient justification, it creates an unreasonable risk of injury through a failure to exercise due care;

(c) if it is an act or omission defined in Articles 5 to 12; or

(d) if it violates a treaty.

2. The wrongfulness of such an act or omission may be the result of the fact that the law of the State does not conform to international standards or of the fact that the law, although conforming to international standards, has been misapplied.

ARTICLE 4

(*Sufficiency of Justification*)

1. The imposition of punishment for the commission of a crime for which such punishment has been provided by law is a "sufficient justification" within the meaning of sub-paragraph 1(a) of Article 3, except when the decision imposing the punishment is wrongful under Article 8.

2. The actual necessity of maintaining public order, health, or morality in accordance with laws enacted for that purpose is a "sufficient justification" within the meaning of sub-paragraphs 1(a) and 1(b) of Article 3, except when the measures taken against the injured alien clearly depart from the law of the respondent State or unreasonably depart from the principles of justice or the principles governing the action of the authorities of the State in the maintenance of public order, health, or morality recognized by the principal legal systems of the world.

3. The valid exercise of belligerent or neutral rights or duties under international law is a "sufficient justification" within the meaning of sub-paragraphs 1(a) and 1(b) of Article 3.

4. The contributory fault of the injured alien, or his voluntary participation in activities involving an unreasonable risk of injury, to the extent that such fault or voluntary participation bars the claim of a person under both the law of the respondent State and the principles recognized by the principal legal systems of the world, is a "sufficient justification" within the meaning of sub-paragraph 1(b) of Article 3.

5. In circumstances other than those enumerated in paragraphs 1 to 4 of this Article, "sufficient justification" within the meaning of sub-paragraphs 1(a) and 1(b) of Article 3 exists only when the particular circumstances are recognized by the principal legal systems of the world as constituting such justification.

ARTICLE 5

(*Arrest and Detention*)

1. The arrest or detention of an alien is wrongful:

(a) if it is a clear and discriminatory violation of the law of the arresting or detaining State;

(b) if the cause or manner of the arrest or detention unreasonably departs from the principles recognized by the principal legal systems of the world;

(c) if the State does not have jurisdiction over the alien; or

(d) if the arrest or detention otherwise involves a violation by the State of a treaty.

2. The detention of an alien becomes wrongful after the State has failed:

(a) to inform him promptly of the cause of his arrest or detention, or to inform him within a reasonable time after his arrest or detention of the specific charges against him;

(b) to grant him prompt access to a tribunal empowered both to determine whether his arrest or detention is lawful and to order his release if the arrest or detention is determined to be unlawful;

(c) to grant him a prompt trial; or

(d) to ensure that his trial and any appellate proceedings are not unduly prolonged.

3. The mistreatment of an alien during his detention is wrongful.

ARTICLE 6

(Denial of Access to a Tribunal or an Administrative Authority)

The denial to an alien of the right to initiate, or to participate in, proceedings in a tribunal or an administrative authority to determine his civil rights or obligations is wrongful:

(a) if it is a clear and discriminatory violation of the law of the State denying such access;

(b) if it unreasonably departs from those rules of access to tribunals or administrative authorities which are recognized by the principal legal systems of the world; or

(c) if it otherwise involves a violation by the State of a treaty.

ARTICLE 7

(Denial of a Fair Hearing)

The denial to an alien by a tribunal or an administrative authority of a fair hearing in a proceeding involving the determination of his civil rights or obligations or of any criminal charges against him is wrongful if a decision or judgment is rendered against him or he is accorded an inadequate recovery. In determining the fairness of any hearing, it is relevant to consider whether it was held before an independent tribunal and whether the alien was denied:

(a) specific information in advance of the hearing of any claim or charge against him;

(b) adequate time to prepare his case;

(c) full opportunity to know the substance and source of any evidence against him and to contest its validity;

(d) full opportunity to have compulsory process for obtaining witnesses and evidence;

(e) full opportunity to have legal representation of his own choice;

(f) free or assisted legal representation on the same basis as nationals of the State concerned or on the basis recognized by the principal legal systems of the world, whichever standard is higher;

(g) the services of a competent interpreter during the proceedings if he cannot fully understand or speak the language used in the tribunal;

(h) full opportunity to communicate with a representative of the government of the State entitled to extend its diplomatic protection to him;

(i) full opportunity to have such a representative present at any judicial or administrative proceeding in accordance with the rules of procedure of the tribunal or administrative agency;

(j) disposition of his case with reasonable dispatch at all stages of the proceedings; or

(k) any other procedural right conferred by a treaty or recognized by the principal legal systems of the world.

ARTICLE 8

(Adverse Decisions and Judgments)

A decision or judgment of a tribunal or an administrative authority rendered in a proceeding involving the determination of the civil rights or

obligations of an alien or of any criminal charges against him, and either denying him recovery in whole or in part or granting recovery against him or imposing a penalty, whether civil or criminal, upon him is wrongful:

(a) if it is a clear and discriminatory violation of the law of the State concerned;

(b) if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world; or

(c) if it otherwise involves a violation by the State of a treaty.

Article 9

(Destruction of and Damage to Property)

1. Deliberate destruction of or damage to the property of an alien is wrongful, unless it was required by circumstances of urgent necessity not reasonably admitting of any other course of action.

2. A destruction of the property of an alien resulting from the judgment of a competent tribunal or from the action of the competent authorities of the State in the maintenance of public order, health, or morality shall not be considered wrongful, provided there has not been:

(a) a clear and discriminatory violation of the law of the State concerned;

(b) a violation of any provision of Articles 6 to 8 of this Convention;

(c) an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; or

(d) an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

EXPLANATORY NOTE

Paragraph 1: The Convention distinguishes a destruction of property or the damaging of property from an uncompensated taking of property or the deprivation of the use or enjoyment of property. The present paragraph comprehends only physical injury to the property through the deliberate action of the State, as contrasted with those takings and interferences with property which form the subject of Article 10. Destruction of property or damage to property which is the consequence of the negligence of an organ, agency, official, or employee of the government does not fall within this Article but is included within the scope of Article 3, dealing in general with categories of wrongful acts and omissions. Examples of destruction of or damage to property which would be wrongful under this Article would be: the deliberate burning by the police of a car owned by an alien; or physical damage to mercantile premises owned by an alien enterprise resulting from the intentional acts of employees of the State, whether such persons were acting under orders of higher authority or on their own initiative but within the scope of their function.

There is excepted from the scope of wrongful destruction of or damage to property such action as was required by circumstances of urgent necessity. The classic example of such destruction or damage is the tearing down of buildings in order to prevent the spread of fire. The destruction of property in actual combat operations during an international conflict or the destruction or damaging of property of an alien in order to interdict

its use by the enemy typify legitimate destruction of property in time of war.

Paragraph 2: The deliberate destruction of property is justified if it is accomplished in pursuance of the judgment of a competent tribunal or in exercise of the police power of the State and is not otherwise unlawful. The justification for destruction of or damage to property which has been inserted in this Article is a more particular application of the justification to be found in paragraph 2 of Article 4. In Article 4, only measures which clearly depart from the law of the respondent State or which unreasonably depart from the principles of justice and of maintenance of public order, health, and morality generally recognized by the principal legal systems of the world fall outside the scope of the justification and restore acts or omissions to the category of wrongful acts or omissions. In paragraph 2 of Article 9, the justification is also rendered inapplicable if there has been a violation of Article 6, 7, or 8 or an abuse of judicial authority or police powers for the purpose of depriving an alien of his property. In this last respect, the paragraph invokes the familiar concept of "abuse of rights."

An exhaustive list could not be provided of the circumstances under which deliberate destruction of or damage to the property of an alien would not engage international responsibility. A few examples may be provided by way of illustration:

An alien could not complain if explosives or arms which were in his possession in violation of the law of the State concerned were destroyed by the police or by the military authorities, whether summarily or upon authorization by a court. It must be recognized as altogether proper that a tribunal should have the power to order the destruction of buildings which have been condemned as no longer suitable for occupancy and have not been torn down by the owner. Should an alien be in possession of narcotics or liquor or apparatus for the manufacture or processing of these goods, no objection could be raised to their destruction if such action were required or authorized by the law of the State. A variety of other circumstances can readily be envisaged in which it would be unwarranted to tie the hands of the authorities of the State and to make it impossible for them to take measures to protect the public order, health, and morality of its population.

The justification of judicial action or the protection of public order is not operative if other circumstances vitiated the force of what would otherwise be a justification. In the first place, the justification is inapplicable if the destruction or damage was clearly inconsistent with the law of the State concerned and discriminated against an alien or aliens (sub-paragraph 2(a)). The police would not be justified in destroying stocks of certain goods illegally in the possession of an alien if there were no authorization of such action under the law of the State. Similarly, if the "judgment of a competent tribunal" is the result of a procedural denial of justice or constitutes in itself a substantive denial of justice, that judgment is not a sufficient justification for destruction of or damage to the property of an alien (sub-paragraph 2(b)). As in the case of the other wrongs dealt with

in this Section, an alleged justification which departs unreasonably from the "principles of justice recognized by the principal legal systems of the world" actually constitutes no justification at all (sub-paragraph 2(c)). A State could not defend the deliberate destruction by State employees of the shops of aliens by invoking a law purporting to authorize such action. Finally, sub-paragraph 2(d) forbids the abusive use of the powers of the State in order to bring about a concealed taking of the property of an alien, forbidden, unless compensation be paid, under paragraph 2 of Article 10. Such an abusive employment of the rights of the State could, for example, be established if a toll bridge owned by an alien were to be destroyed on the ground that it was a hazard to navigation, although the river which the bridge spanned was in fact not navigable. An intention to deprive an alien of his property might likewise be inferred from the destruction of an alien's factory as a fire hazard when an adjoining building owned by a national of the State, which was in even worse condition, was allowed to stand.

Damages: The factors to be taken into account in computing damages for destruction of or injury to property within the meaning of this Article are set forth in Article 31.

ARTICLE 10

(*Taking and Deprivation of Use or Enjoyment of Property*)

1. The taking, under the authority of the State, of any property of an alien, or of the use thereof, is wrongful:

(a) if it is not for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking, or

(b) if it is in violation of a treaty.

2. The taking, under the authority of the State, of any property of an alien, or of the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if it is not accompanied by prompt payment of compensation in accordance with the highest of the following standards:

(a) compensation which is no less favorable than that granted to nationals of such State; or

(b) just compensation in terms of the fair market value of the property or of the use thereof unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of the property in anticipation of the taking; or

(c) if no fair market value exists, just compensation in terms of the fair value of such property or of the use thereof.

If a treaty requires a special standard of compensation, the compensation shall be paid in accordance with the treaty.

3. (a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A "taking of the use of property" includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

4. If property is taken by a State in furtherance of a general program of economic and social reform, the just compensation required by this Article may be paid over a reasonable period of years, provided that:

(a) the method and modalities of payment to aliens are no less favorable than those applicable to nationals;

(b) a reasonable part of the compensation due is paid promptly;

(c) bonds equal in fair market value to the remainder of the compensation and bearing a reasonable rate of interest are given to the alien and the interest is paid promptly; and

(d) the taking is not in violation of an express undertaking by the State in reliance on which the property was acquired or imported by the alien.

5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:

(a) it is not a clear and discriminatory violation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention;

(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

6. The compensation and interest required by this Article shall be paid in the manner specified in Article 39.

7. The term "property" as used in this Convention comprises all movable and immovable property, whether tangible or intangible, including industrial, literary, and artistic property, as well as rights and interests in any property.

8. The responsibility of a State for the annulment or nonperformance of a contract or concession is determined by Article 12.

Explanatory Note

Definition of a taking under the authority of the State: A "taking" may be either a taking of title or a taking only of the use of property. Premises required by the government of a State may be secured through a complete taking by way of expropriation or of eminent domain. Alternatively, a government desiring merely temporary utilization of the premises may demand the use of the property against the payment of rental and with the understanding that the property will be restored to the owner upon the completion of the government's use. Personal property or movables are likewise susceptible of either permanent appropriation or a temporary taking of use, subject of course to the compensation required by this Article.

A "taking" may be accomplished through, *inter alia,* enforcement of legislation or an executive decree, the taking of an administrative measure, or a failure to take an administrative measure.

The expression "under the authority of the State" has reference to the fact that the taking may be effected directly by officials or employees of the State or by the acts of private persons acting under authority conferred upon them by the law of that State, *e.g.,* in case of expropriation of property for a private school.

Indirect "takings of property" through interference with its use are dealt with in paragraph 3 of this Article (*q.v.*). It may merely be observed at this point that, depending upon the circumstances, an unreasonable interference with the use, enjoyment, or disposal of property may constitute either a "taking of property" or a "taking of the use of property" as those concepts are employed in paragraphs 1 and 2.

The criteria of wrongfulness: All legal systems recognize that there are various circumstances under which it is legitimate for the State to obtain property from a private person against the will of that individual. In most legal systems this compulsory acquisition of property, whether the process be referred to as eminent domain, requisition, preemption, expropriation, or nationalization, entails an obligation to pay at least some compensation to the person from whom it was taken. Since this power to take property is regarded as a right of the State, the State commits no wrong thereby, provided it acts in conformity with the governing rules of municipal law. The most important requirement normally laid upon the State is the payment of compensation. If that compensation is made available, no claim by the former owner of the property for its restoration in kind can be entertained.

In light of the general recognition in municipal legal systems of a government's power of compulsory acquisition of property, international law similarly recognizes the power of a State to take the property of an alien—but subject to several important limitations. The first of these is an obligation to pay compensation for the property taken, subject to certain exceptions analogous to those of municipal law which are detailed in paragraph 5 of this Article. On the assumption that all other requirements of law have been met, the taking of title to or the use of property of an alien becomes wrongful only if the necessary compensation is not paid. The essence of the wrong is accordingly not a taking of property but an *uncompensated* taking of property. The appropriate remedy is therefore the payment of damages.

The other general limitation imposed by international law on the taking of property of aliens is that the taking must be for a "public purpose." Within municipal legal systems, the significance of a public purpose varies greatly, and in many countries the term has never been defined with any degree of precision. Even in the economically and politically most conservative countries of the world, recognition is given to the public purpose served by compulsory acquisition of property by the State for transfer to another private person who is regarded as being able to make a socially more productive use of the property than its former owner. It is not without significance that what constitutes a "public purpose" has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be for other than a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public

needs of a nation are and how these may best be satisfied. In view of the fact that there is no precedent—although considerable doctrine—in favor of the restitution in kind of property which has not been taken for a "public purpose," it is only with some hesitation that reference has been made to the concept in this Convention. Because the verbal formula has so often been employed, it was considered unwise to omit it at this point, empty though it may be of any operative legal content. The expression "public purpose" is qualified by the words "clearly recognized as such by a law of general application in effect at the time of the taking" in order to preclude *ad hoc* determinations of public purpose by government officials acting without any express authority in law. The effect of sub-paragraph 1(a) of this Article is thus to require the articulation of the public purpose to be served by a taking before it is actually undertaken.

The only category of cases in which takings of property have been held to be "wrongful" whether or not compensation was paid and in which the restitution in kind of the property has been required by tribunals are those in which there has been a violation of a treaty. The landmark case is the *Case concerning the Factory at Chorzów (Claim for Indemnity)*, P.C.I.J., Ser. A, No. 17 at 47–48 (1928), in which restitution was held, *ceteris paribus,* to be the appropriate remedy for the violation of a treaty forbidding the taking of certain types of property. Changes in the situation of the property which had been taken were, however, considered to preclude its restoration in kind. It must be borne in mind that the applicable treaty, the German-Polish Convention concerning Upper Silesia, expressly authorized expropriation of property under certain defined circumstances and completely excluded the expropriation, even against compensation, of other properties, the "liquidation" of which was forbidden. Although the property was not restored in kind in this case, there have been a substantial number of cases in which property has been restored in kind to the rightful owner by reason of its having been taken by a belligerent in violation of the treaties regarding the conduct of warfare. Having regard to the fact that there is precedent for the restoration of property which has been taken in violation of treaty, it has been thought appropriate to characterize such takings as "wrongful" in the sense that the payment of compensation will not legitimatize the taking.

This Article thus recognizes three types of takings of property as unlawful: (1) those which are uncompensated; (2) those effected other than for a public purpose, even if compensation is paid; and (3) those effected in violation of treaty, even if compensation is paid. The remedies provided are, however, different. In the first instance, damages are the proper reparation for the taking which has been made wrongful by the failure to pay compensation. In the other two cases, restitution is the ordinary remedy. The types of takings are accordingly dealt with in different paragraphs of this Article.

Paragraph 1: As explained above, this paragraph deals with takings of property which are wrongful even if compensation is paid. Paragraph 1 of Article 32 demands that if the taking violates this paragraph, the

property be restored to the owner whenever possible and damages paid for the use of the property. If the owner is tendered compensation for the property taken, he is under no obligation to accept it; if he does accept it, he may be considered to have waived his claim to restitution of the property.

Paragraph 2: The view has not been accepted in this Convention that adverse economic circumstances or a strong national policy may in international law justify the taking of property without compensation. To make the duty to compensate contingent upon such factors would pose insuperable difficulties. If the question of justification for a taking without compensation were to be left to the determination of the State which had taken the property, that State would always be in a position to find a valid national need for the seizure of the property and an equally good reason why no compensation should be paid. If, on the other hand, international law were to require compensation in some cases but not in others, it would be necessary to take account of the internal financial and economic problems of the nation taking the property and its purpose in taking the property. Not only would it be difficult to formulate any international standards on this point, but, even if such standards were available, an international tribunal would also have great difficulty in determining whether the economic circumstances of the nation concerned were such as to permit the payment of the requisite compensation.

A rule requiring the payment of compensation under all circumstances has the positive benefit of stimulating international trade and investment by affording protection to the business activities of aliens in foreign countries. It would be inequitable that a government should at one and the same time seek the economic benefits which foreign trade and investment carry with them, and at the same time call for the adoption of a rule placing such foreign activities at the mercy of the very government which seeks this economic assistance. In terms of social justice, the taking of the property of aliens may create greater hardships to the aliens whose property it is than it brings benefits to the State seizing the property. The events of two World Wars have demonstrated in a tragic fashion that a man may be as effectively killed by depriving him of his property as he can by his being executed. Finally, the provision of compensation to aliens whose property is taken is consistent with that special protection which is given to aliens, even in cases where such protection may place aliens in a privileged position vis-à-vis the nationals of the State concerned.

Account has, however, been taken of the special economic needs of the State for the limited purpose of allowing deferment of compensation under the terms and conditions set forth in paragraph 4. That paragraph does not, it must be emphasized, in any way reduce the total amount of the compensation which must be paid.

Sub-paragraph 2(a) is intended to establish as a minimum a principle of non-discrimination between aliens and nationals in compensating aliens for property which has been taken. The succeeding sub-paragraph 2(b) points, consistently with Article 2, to the existence of an international

standard. This standard is based on the concept of the "fair market value." The possibility exists, of course, that the "fair market value" of the particular property may have been depressed by anticipation of the taking or conversely that the prospect of a taking by eminent domain may actually enhance the value of property. It is required that "fair market value" be established independently of these influences. A State thus cannot profit from a gradual and well-publicized program of nationalization which depresses the value of all property which may be subjected to that nationalization.

Property owned by an alien may be of a distinctive character or of a highly specialized nature for which no market value in the country or area concerned can be established. The value of the sole railroad in an underdeveloped country could not be determined on the basis of the price it would command on the market, since no market for such enterprises would in all likelihood exist within that country. The standard of "fair value" incorporated in sub-paragraph 2(c) allows some latitude in determining what would be an equitable price for the property taken.

Account has also been taken of the possibility that a treaty may prescribe a special standard of compensation, which may be either higher or lower than that required by sub-paragraphs 2(a), 2(b), and 2(c). That a treaty may prescribe a lower measure of compensation than is otherwise provided by this Article is specifically taken into account in Article 25, dealing with the waiver, compromise, or settlement of claims by States.

Subject to the special exception dealt with in paragraph 4, the requirement of "prompt" compensation does not necessarily call for payment in advance but does require that compensation be paid within a reasonable period of time after the taking. Vague assurances at the time of the taking of property to the effect that compensation will be paid in the future are insufficient if action is not taken within a reasonable time thereafter to grant that compensation. While no hard and fast rule may be laid down, the passage of several months after the taking without the furnishing by the State of any real indication that compensation would shortly be forthcoming would raise serious doubt that the State intended to make prompt compensation at all. Except for the special case taken up in the next paragraph, compensation may not be deferred or paid in installments other than with the express assent, freely given, of the injured alien.

Nothing in this Article is intended to preclude the compromise of claims for the taking of property, provided such compromise is not effected through duress, as long as the conditions stipulated in Articles 22 and 24 are complied with.

Paragraph 3: A State which is desirous not to subject itself to liability to pay compensation for property of an alien which it wishes to secure may attempt to accomplish by indirection what it cannot for financial reasons do directly. There are a variety of methods by which an alien natural or juridical person may have the use or enjoyment of his property limited by State action, even to the extent of the State's forcing the alien to dispose of his property at a price representing only a fraction of what its value

would be had not the alien's use of it been subjected to interference by the State.

The measures which a State might employ for this purpose are of infinite variety. A State may make it impossible for an alien to operate a factory which he owns by blocking the entrances on the professed ground of maintaining order. It may, through its labor legislation and labor courts, designedly set the wages of local employees of the enterprise at a prohibitively high level. If technical personnel are needed from outside the country, entry visas may be denied them. Essential replacement parts or machinery may be refused entrance, or allocations of foreign exchange may deliberately be denied with the purpose of making it impossible to import the requisite machinery. Any one of these measures, if done with the requisite intent and if not justified under paragraph 5, could make it impossible for the alien owner to use or enjoy his property. More direct interferences may also be imagined. The alien may simply be forbidden to employ a certain portion of a building which he occupies, either on a wholly arbitrary basis or on the authority of some asserted requirement of the local law. A government, while leaving ownership of an enterprise in the alien owner, might appoint conservators, managers, or inspectors who might interfere with the free use by the alien of its premises and its facilities. Or, simply by forbidding an alien to sell his property, a government could effectively deprive that property of its value.

Whether an interference with the use, enjoyment, or disposal of property constitutes a "taking" or a "taking of use" will be dependent upon the duration of the interference. Although a restriction on the use of property may purport to be temporary, there obviously comes a stage at which an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property. Considerable latitude has been left to the adjudicator of the claim to determine what period of interference is unreasonable and when the taking therefore ceases to be temporary.

The unreasonableness of an interference with the use, enjoyment, or disposal of property must be determined in conformity with the general principles of law recognized by the principal legal systems of the world. No attempt has been made to particularize on the expression used in the text, since the matter seems one best worked out by international tribunals. It would be open to such a tribunal to take account of the justifications referred to in paragraph 5 of this Article as a basis for proceeding by analogy to a definition of reasonableness in the context of interferences with the use of property.

Paragraph 4: A certain economic and legal circularity is frequently found in the nationalization or expropriation of property in furtherance of a "general program of economic and social reform." A State may consider it desirable to resort to these measures because of the poverty of its treasury, the demands of its internal economy, or an adverse balance of payments. These very circumstances make it impossible for the State to pay prompt compensation under the standards laid down in paragraph 2 of

this Article. The State is then faced with the dilemma of a possible breakdown of its economy, which, in its view, only a program of State ownership can cure, or the assumption of an overwhelming financial burden, which it cannot possibly discharge, in making payment for the property so nationalized. There seems to be no alternative but to adopt a *via media,* which will in time afford compensation to the aggrieved alien without imposing upon the State a financial burden which might lead it into bankruptcy. In the practice of States, deferred compensation for the nationalization of large segments of the economy of a country is not without its precedents.

The present paragraph looks to such nationalizations as are directed to land reform, to the taking of industry in general or certain types of industry into State control, and to other takings which are not limited in scope or specialized in nature. Payments may under these circumstances be made in interest-bearing bonds, which must be promptly tendered to the injured alien. The requisite rate of interest would normally be no less than that stipulated for unpaid damages and compensation under Article 38. Should the nationalizing State default on the payment of interest, the entire amount of compensation then remaining unpaid for the taking of the property would become due and payable. The privilege to defer payment exists only so long as interest is paid promptly. Should the bonds not be paid at maturity, the State would be responsible under Article 12 for the non-payment of its debt. The deferment of compensation is not a complete one, since a reasonable part of the compensation must be paid promptly, as stipulated in sub-paragraph 4(b). This might be expected, if the practice of States is accepted as a guide, to be a flat sum which would be paid to each and every injured person or person claiming through him, rather than a percentage of the total amount due. The purpose of such partial prompt compensation is in particular to protect those aliens of limited wealth who might otherwise be left destitute by the taking of all of their property within the territory of the respondent State. The governing principle should necessarily be that an alien must be afforded prompt compensation to the extent of his needs and should not be forced to accept all of his compensation in the form of evidences of debt, even though interest-bearing, which look to payment at some date in the future.

Sub-paragraph 4(a) requires that the "method" and "modalities" of payment to aliens not be less favorable than those to nationals. This requirement reflects the normal rule of non-discrimination between aliens and nationals. In addition to meeting the international standards here prescribed, the State must furnish the alien part compensation and, for the remainder of the compensation, bonds which, as to amount, interest, terms, and so forth, are at least as favorable as those granted to its nationals.

Sub-paragraph 4(d) treats of the special situation in which the respondent State has induced reliance on its promise that it would not take the property in question, whether by way of nationalization, expropriation, confiscation, eminent domain, or otherwise. The undertaking may have been given by treaty or other international agreement, by a contract or

concession with an alien, by the terms of a municipal law which gave a guarantee against taking for a specified period of time, or by some other form of assurance given the alien, whether or not for a countervailing benefit. A State cannot be allowed to take affirmative measures to induce the acquisition or importation of property by an alien, only to take the property against deferred compensation once it has been brought into existence by the alien. Not only is the alien deprived of the property which he was justifiably induced to acquire but he is also, despite assurances to the contrary, put in the position of having to make a forced loan to the government of the respondent State.

Paragraph 5: Were paragraphs 1 and 2 of this Article not to be qualified by the present paragraph, a State would be denied the means of depriving an alien of property, without compensation, under circumstances which are universally recognized as properly calling for such action. Under Article 3, "sufficient justification" may excuse an otherwise wrongful act or omission which is negligent or intentional. That Article is, on the other hand, so drafted that sufficiency of justification is not to be read as a qualification on Articles 5 through 12. What constitutes "sufficient justification" for depriving an alien of his property must accordingly be found within the confines of the present Article alone.

It is recognized, in the first place, that the incidence of taxation may deprive an alien of some of his assets and that a failure to pay taxes may lead to the seizure of the alien's property. A revaluation of the currency of a particular State, if not adopted in a manner which discriminates against aliens individually or collectively, may deprive an alien of a portion of his economic wealth, but the measure is not on that account wrongful. As examples of the taking or deprivation of property of an alien arising out of the action of the competent authorities of the State in the maintenance of public order, health, and morality may be mentioned the confiscation of goods which have been smuggled into a country and the seizure of such articles as narcotics, liquor, obscene materials, firearms, and gambling devices which are unlawfully in a person's possession.

Without wishing to pass a final judgment on the obligation of a belligerent to return to its opponent property which has been seized during hostilities under legislation dealing with trading with the enemy, paragraph 5 recognizes that there is no obligation to pay compensation for such property to the extent that its retention is consistent with international law. Less controversial is the authority of a State to retain, without the necessity of making compensation, not only enemy ships but also neutral vessels and property which have been condemned in prize on account of breach of blockade, carriage of contraband, and unneutral service. The legality of such takings of property would be determined according to customary international law and the treaties bearing upon naval warfare.

By a taking or deprivation of property which is "otherwise incidental to the normal operation of the laws of the State" is meant the carrying out of a judgment of a court in a civil case or a fine or penalty in criminal proceedings.

None of the foregoing conduct can be characterized as a wrongful taking of property unless any one of the elements listed in sub-paragraphs 5(a) through 5(d) is present.

As already mentioned in connection with other Articles, failure of the authorities of a State to comply with the law of that nation will engage the responsibility of the State if injury is thereby caused to an alien. For the purposes of sub-paragraph 5(a), as in other contexts, the violation of the law of the State must be a clear and discriminatory one before the justifications listed in the body of paragraph 5 lose their force.

Sub-paragraph 5(b) demands that the taking of property not be the consequence of a denial of justice under Articles 6 to 8 of the Convention; such a taking would be wrongful, by reason of being proscribed by those Articles, even in the absence of the present sub-paragraph.

National law must, according to sub-paragraph 5(c), conform to an international standard with respect to uncompensated takings.

Finally, sub-paragraph 5(d) requires that the judicial, fiscal, and police powers of the State not be used to cloak an uncompensated seizure of an alien's property. This sub-paragraph would preclude taxes raised to confiscatory levels from being used as means of securing the property of an alien without paying him for it. A State would likewise act wrongfully if it prescribed an unattainably high standard of conduct for aliens (*e.g.*, in the compensation and benefits it accorded to their employees) and then, pursuant to the same law, seized the property of those aliens as a penalty for their wrongful conduct. The sudden imposition of a requirement that large numbers of the employees and directors of alien companies consist of nationals, subject to forfeiture of the company's assets as a criminal penalty for noncompliance, would be a further example of the type of conduct which this final *caveat* is designed to foreclose.

Paragraph 6: This paragraph is merely a cross-reference to Article 39, dealing with the form in which both damages and compensation are to be paid. Its purpose is to ensure the payment of effective compensation, *i.e.*, compensation in a currency which the claimant can freely use and at an exchange rate which is most favorable to him.

It is improper that compensation which has been promptly paid should immediately be frozen by foreign exchange laws which preclude the removal of the compensation from the State granting it. Account has been taken of the fact that property or the proceeds of the sale thereof, which could not under existing laws and regulations have been transferred abroad, may through a taking by the State acquire a transferable character. Under the generality of circumstances, however, it is considered that the giving of transferable character to compensation of this nature is the only effective manner of giving redress to the owner of the property. To this general principle an exception is made under Article 39. By the terms of that Article, for reasons explained in the Explanatory Note thereto, damages or compensation for the taking of property payable to a natural person who had his habitual residence in the territory of the respondent State for an

extended period of time may be paid in the currency of the State taking the property.

Paragraph 7: The term "property" as used not only in this Article but elsewhere in this Convention, is to be interpreted in a broad sense as comprising all movable and immovable property (or personalty and realty in the language of Anglo-American law), whether tangible or intangible, including industrial, literary, and artistic property, as well as all rights or interests, whether legal or equitable, in any kind of property. (*Cf.* Treaty of Peace with Italy, signed at Paris, Feb. 10, 1947, article 78(9)(c), 49 U.N.T.S. 163, 61 Stat. 1245, T.I.A.S. No. 1648.) The term "property" does not include for these purposes, a "means of livelihood," which is dealt with in Article 11, or contracts or concessions, which, as pointed out in paragraph 8 of this Article, form the subject of Article 12. It may be noted that the beneficial interest of an alien shareholder in the property of a corporation in which he holds an interest is protected through the medium of sub-paragraph 2(c) of Article 20 which, under certain specified conditions, gives to that alien the right to prosecute a claim for an injury to the juristic person in which he holds an interest.

Some interests in property will obviously be too remote to be deserving of the protection of this Article. This question of what sort of interest is so remote, uncertain, or contingent as not to constitute "property" within the meaning of this Article must be left to judicial determination, for it would be impossible to draw any precise line of demarcation for the purposes of this Convention.

It has been considered unnecessary to use the term "acquired rights" in this Convention, in view of the broad definition given to property and the separate provisions of the Convention relating to the destruction of property, deprivation of means of livelihood, and violation of contracts and concessions. There do not appear to be any "acquired rights" recognized by international law which do not fall within Articles 9 to 12. On the other hand, since each of the categories of wrongful acts and omissions dealt with in those Articles is treated somewhat differently under positive international law, it would be incorrect to treat all of them uniformly as violations of "acquired rights."

Paragraph 8: The reasons why annulment and nonperformance of contracts and concessions have been treated separately from takings of property are set forth in the Explanatory Note to that Article.

Damages: The factors to be taken into account in computing damages for the uncompensated taking of property and for deprivation of the use or enjoyment of property are dealt with in Article 32.

Article 11

(Deprivation of Means of Livelihood)

1. To deprive an alien of his existing means of livelihood by excluding him from a profession or occupation which he has hitherto pursued in a State, without a reasonable period of time in which to adjust his affairs, by

way of obtaining other employment, disposing of his business or practice at a fair price, or otherwise, is wrongful if the alien is not accorded just compensation, promptly paid in the manner specified in Article 39, for the failure to provide such period of adjustment.

2. Paragraph 1 of this Article has no application if an alien:

(a) has, as a result of professional misconduct or of conviction for a crime, been excluded from a profession or occupation which he has hitherto pursued, or

(b) has been expelled or deported in conformity with international standards relating to expulsion and deportation and not with the purpose of circumventing paragraph 1.

EXPLANATORY NOTE

Paragraph 1: The practice is widespread of reserving many occupations and professions to nationals of the State concerned. The exclusion of aliens from these pursuits has obvious logic in terms of protecting national security, of maintaining professional standards, and of making possible the discipline or regulation of persons engaged in certain professions and occupations. Such restrictions, if operative only as to persons desiring to enter a profession or occupation in the future, are generally unexceptionable from the point of view of international law, and it is not proposed to call them in question here. It may be noted, however, that many international treaties provide for the abolition of such restrictions and that a violation of such a treaty provision on the subject would result in international responsibility.

A situation less clear in terms of law and of policy is created when a State desires to change its law in order to exclude aliens from professions and occupations in which they may already be engaged. On the one hand, it would be intolerable that a State should be denied the power to change its law with respect to those who have already entered upon certain pursuits. If a State has reason to doubt the loyalty of certain aliens, no objection could be made to the State's taking measures to exclude such persons from professions and occupations having to do with the security of the nation. On the other hand, dangers lurk in an unrestrained power to deprive aliens of means of livelihood which they have enjoyed for years. If dictated by the desire to harm foreigners, action of this character may be employed to deprive them of their property and of their means of support as effectively as if their possessions had been confiscated by the State without compensation. Even a measure restricting or prohibiting the pursuit of certain employments, which on its face has application to both nationals of the State and to aliens, may affect only aliens if that employment is one solely or preponderantly that of aliens. For these reasons, the present text has taken the position that an alien who is excluded from his current occupation or profession without a period of time in which to adjust his affairs must be granted compensation, and that failure to provide such compensation is a wrongful act or omission.

The burden of the Article is thus that an alien has a right to a period of time for readjustment if he is to be denied his profession or occupation but

that the State may, consistently with law, take this period of time away from him against the payment of just compensation. The period for readjustment is subject to taking in the same way that property is subject to taking under Article 10. In both cases, it must be emphasized, the wrongful act or omission consists in an uncompensated taking. A State is fully within its powers in denying an alien an occupation or profession immediately upon notice. Its responsibility is engaged only if it fails to pay just compensation for the exercise of this privilege. If a reasonable period of time is granted for the adjustment of the alien's affairs, no obligation to pay compensation can exist.

Several qualifications must be noted to the principle just enunciated. The first of these is that the exclusion must be such as to deprive the alien of "his existing means of livelihood." In this aspect, the provision has an essentially humanitarian character, designed to secure aliens in their human right to means of earning their daily bread. A second qualification is that the Article refers only to the denial of a "profession" or "occupation" and not to businesses themselves. To a certain extent, the concepts of an "occupation" or a "profession" overlap with that of a "business," for the former may entail the conduct of the latter. However, the exclusion of an alien from an interest in a business which is not his "existing means of livelihood" and which does not constitute his profession or occupation does not fall within the scope of this Article. Such action may, however, be a violation of Article 10, relating to the taking of property, if unaccompanied by the measure of compensation demanded by that Article.

The period of adjustment provided before the exclusion becomes effective will vary with the nature of the vocation which the alien is to be denied. If the profession or occupation is of a relatively unskilled character or involves no capital expenditure for the conduct of a "business" or "profession," the adjustment will probably take the form of the alien's shifting to other employment within a relatively short period of time. In the case of professions or occupations which involve business activities as an essential attribute thereof or which are capable of purchase and sale, an opportunity must be provided for the disposal of the business or profession at a fair price. The requirements of a reasonable period of time and of a fair price are designed to protect the alien against a forced sale which will produce less than the fair value of the business or practice. Normally, the period required for this purpose will be longer than that needed for an unskilled individual to adjust his affairs.

Because of the absence of judicial authority on the point, it has not been thought desirable to attempt a definition of what constitutes "just compensation." The matter has accordingly been left to judicial determination. It may be noted, however, that the compensation to which an alien is entitled must take account only of those losses traceable to the denial of the requisite period of adjustment. Thus if an alien doctor excluded from the practice of medicine ought reasonably to be allowed a period of two years for adjustment and is forced to leave his wonted profession at the end of one year, thereby suffering a considerable loss in the price he ob-

tains for his practice, the compensation payable to him would be the difference between his estimated income for the two-year period and the final price for his practice which he would have obtained at the end of two years and what his income over the one-year period and proceeds of sale actually were.

Sub-paragraph 2(a): A State commits no violation of international law if it denies certain vocations to persons, whether nationals or aliens, who are convicted of crimes of such nature as to call for their exclusion from those callings or are otherwise guilty of professional misconduct. An alien doctor cannot complain of his immediate exclusion from the practice of medicine if he has been convicted of having committed an abortion in violation of law. While the determination of the necessity of excluding persons from certain callings on account of certain types of conduct will normally be left to municipal law, there is in this respect, as in others, a minimum international standard to be observed. It thus follows that it would be a wrongful act upon the part of a State to exclude an alien from all gainful employment on account of the commission of some trifling offense.

Sub-paragraph 2(b): In the absence of a special exception, an alien who has been expelled or deported from a country might claim that he was entitled to compensation for the means of livelihood thus denied him or a suspension of his deportation to permit him to adjust his affairs. To impose such requirements would be to place qualifications on the undoubted right of States to deport or expel aliens and would be particularly vexatious when such action was required for the maintenance of public order or for the preservation of the security of the State. It would be ludicrous, for example, to require a State to pay an alien or to suspend his deportation if that alien is being deported for the commission of a crime or because he is unlawfully within the territory of the State.

The exemption of a State from the requirements of paragraph 1 of this Article applies only if the deportation is effected in accordance with international standards, that is, conducted humanely and in conformity with the procedures provided by the law of the country concerned. If the purpose of the deportation or expulsion is actually to deprive the alien, without adequate compensation, of the enjoyment of his property, profession, or occupation, the resulting deprivation of property or period of readjustment would constitute a violation of Article 10 or 11, as the case might be.

Damages: The factors to be taken into account in computing damages for failure to provide the period of readjustment required by this Article are set forth in Article 33.

Article 12

(Violation, Annulment, and Modification of Contracts and Concessions)

1. The violation through an arbitrary action of the State of a contract or concession to which the central government of that State and an alien are parties is wrongful. In determining whether the action of the State is arbitrary, it is relevant to consider whether the action constitutes:

(a) a clear and discriminatory departure from the proper law of the contract or concession as that law existed at the time of the alleged violation;

(b) a clear and discriminatory departure from the law of the State which is a party to the contract or concession as that law existed at the time of the making of the contract or concession, if that law is the proper law of the contract or concession;

(c) an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to governmental contracts or concessions of the same nature or category; or

(d) a violation by the State of a treaty.

2. If the violation by the State of a contract or concession to which the central government of a State and an alien are parties also involves the taking of property, the provisions of Article 10 shall apply to such taking.

3. The exaction from an alien of a benefit not within the terms of a contract or concession to which the central government of a State and an alien are parties or of a waiver of any term of such a contract or concession is wrongful if such benefit or waiver was secured through the use of any clear threat by the central government of the State to repudiate, cancel, or modify any right of the alien under such contract or concession.

4. The annulment or modification by a State, to the detriment of an alien, of any contract or concession to which the alien and a person or body other than the central government of a State are parties is wrongful if it constitutes:

(a) a clear and discriminatory departure from the proper law of the contract or concession;

(b) an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to such contracts or concessions; or

(c) a violation by the State of a treaty.

EXPLANATORY NOTE

Paragraph 1: Contracts and concessions to which applicable: This Article speaks expressly only of a "contract" or a "concession," but the term "contract" is intended to include debts and quasi-contractual obligations as well.

Concessions are, by the express terms of the Article, placed in the same category as contracts. It has on occasion been suggested that a concession constitutes a property right as well as a contract and that in the former aspect it is subject to expropriation or nationalization, provided compensation is paid in the measure stipulated in paragraph 2 of Article 10. The logical consequence of the adoption of such a view would be to place a concession in the category of "property of an alien" within the meaning of Article 10. This theory has, however, been rejected in the present draft, which proceeds instead on the theory that concessions should be treated in the same way as contracts.

It does not appear possible either on logical grounds or in terms of policy to make a distinction between contracts and concessions, for the latter are nothing more than a species of the former. To provide that obligations under concessions and contracts may be terminated against the payment of compensation is to embrace the theory, now discredited, that a promisor

has an option of performing his contract or paying the stipulated price for nonperformance in the form of damages. Such a view suggests that compliance with contracts, including concessions, is a matter of expediency, and that no moral opprobrium attaches to the violation of the promisor's pledged word. In strong contrast stands the power of a State to take property for its own use or for that of other persons—a power which is recognized by the principal legal systems of the world, although the purposes for which it may be exercised may vary from State to State.

Debts: The responsibility of a State for the annulment of or arbitrary failure to pay its debts has been beclouded by the commingling of other issues with that of the responsibility of the State for non-payment of its obligations. Historically, in the classical international law of Grotius, Wolff, and Vattel, the international obligation of a nation to discharge its debts was considered in the context of the reprisals to which resort might be had if the State failed in its duty. In more recent times, the use by powerful nations of armed intervention and other forms of self-help for the collection of debts owed by foreign States to aliens has kept alive the impression that force and international responsibility for a nation's debts march together. The Drago Doctrine, which, although not universally accepted, has received the support of a substantial number of States, and the Hague Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts of October 18, 1907, 3 Martens, N.R.G., 3d ser., 414, represent significant attempts to divorce the two matters. The question of the responsibility of a State for its debts has likewise been complicated by the acute practical problem posed by the bankruptcy of a State and its consequent inability to meet its obligations. But when these extraneous considerations of the use of force, of the taking of reprisals, and of bankruptcy are laid aside, it appears that there is no substantial dissent from the proposition that a State still is responsible for its debts and that it incurs international responsibility in the sense of the present Convention when through "an arbitrary action" it defaults on those debts.

Contract or concession to which the central government of a State is a party: Paragraphs 1 and 3 apply only to concessions and contracts, including debts, of the central government of a State. The contracts and concessions, including debts, of provinces, states, municipalities, and other political subdivisions are not within the scope of this paragraph and are to be treated on the same basis as private obligations. If contracts and concessions of governmental entities other than the central government of a State are annulled or modified by any organ, agency, official, or employee of the State, the act of modification or annulment may be a wrongful one falling within paragraph 4 of this Article if any of the conditions prescribed in that paragraph is fulfilled. In addition, the failure of a province, state, municipality, or other political subdivision to honor its obligations, other than through an annulment or modification of the contract or concession by action of the central government may, if not redressed by the courts of the State concerned, constitute a denial of justice such as to bring the situation within the provisions of Articles 6 to 8.

The distinction between the contracts and concessions of the central government and those of subordinate political entities is not dictated by logic but by history. The differing treatment of the two types of obligations has, however, become so firmly established in law that it does not seem desirable to depart from it in connection with the present codification.

Circumstances under which a violation of a contract or concession is wrongful: No contract or concession exists in a legal vacuum. It draws its binding force, its meaning, and its effectiveness from a legal system, which must be so developed and refined as to be capable of dealing with the great range of problems to which the performance and violation of promises gives rise. *Pacta sunt servanda* is undoubtedly the basic norm of any system of law dealing with agreements, but the principle speaks on such a high level of abstraction that it affords little or no guidance in the resolution of concrete legal disputes relating to agreements. What is *pactum* and when and how and if it is to be *servandum* are questions which must be answered by a system of law capable of reacting in a sophisticated manner to these problems. What that system of law is can be determined by the private international law of the forum, whether national or international. As a general matter, the forum will accept as the proper law of the contract the system of law which has been selected by the parties, although it may, as to such matters as the existence of the agreement, find it necessary to look to some other system of law, such as that of the place of the making of the contract. The law elected by the parties to an agreement between the central government of the State and an alien may be the municipal law of the contracting State, the law of some other State, the principles of law shared by several States, the general principles of law (*ius gentium*), or international law itself. Even when the parties select a particular body of law as being the proper law of the contract, it is normally their understanding that the proper law is not necessarily the law as it existed at the time of the conclusion of the agreement but rather the law in its state at the time of any violation of the agreement which might be alleged.

In determining whether there has been a violation of a contract or concession between the central government of a State and an alien, two extremes must be avoided. The first of these would be to test every alleged breach of a contract or concession immediately and directly by an international standard, notwithstanding any choice of law which the parties might have incorporated in the agreement. If every violation, as determined by an international standard, of a contract or concession between a State and an alien were to be regarded as engaging State responsibility, the contract or concession would in effect be raised to the dignity of a treaty or other international agreement between two States. But the application of such a standard would be in flagrant disregard of the intention of the parties, who had either chosen some other system of law as the proper law of the contract or by remaining silent had indicated that the agreement was to be governed by a system of municipal law to be determined by the application of principles of private international law. Moreover, if contracts were to bind States in every instance as firmly as international agreements—and this

does not appear to be the current state of the law—governments might be reluctant to enter into contractual relationships with aliens, to the resulting prejudice of free economic intercourse between nations.

The opposite extreme would be to treat a contract or concession as being governed exclusively by the municipal law of the contracting State, even though the contract invoked some other legal system as the proper law of the contract. According to this view, the validity of the choice of some foreign system of law as the proper law of the contract would be determined by the law of the contracting State as that law might from time to time provide. This view would leave the alien contractor defenseless against the modification or termination of the contract by the State which was the other party thereto. Legislation adopted in conformity with municipal law and administered by the courts with scrupulous fairness might nevertheless strip the alien of any rights he was to enjoy under the contract or concession as originally concluded. The possibility that the State could by legislative or executive action alter the terms or effectiveness of the contract at will would mean that its obligation would be wholly illusory. Absolute freedom to perform or not to perform would, as in the case of holding the State to a rigid international standard of performance, operate to the discouragement of commercial relations between States and private persons extending across national boundaries.

Doctrine and jurisprudence have attempted to maintain a middle course by limiting State responsibility for a violation of a concession or contract to those cases in which there has been a "denial of justice" in litigation in the courts of the respondent State respecting an alleged breach of the contract and to cases in which the breach of the contract or concession has been characterized as "arbitrary" or "tortious." These highly flexible and indefinite standards suggest that there is a certain amount of discretion in the respondent State to interpret or modify the terms of the agreement in a reasonable and non-discriminatory way but call for a response in damages on the international plane when there has been a violation of certain requirements laid down by international law. What constitutes a departure from these requirements cannot be set down with definiteness or precision. It is for this reason that sub-paragraphs 1(a) to 1(d) of this Article merely lay down certain factors which are to be taken into consideration in determining whether the action of the State has been "arbitrary," that concept being the criterion of wrongfulness. The listing of those respects in which the action of the State is arbitrary is not intended to be exhaustive.

Sub-paragraph 1(a): The proper law of the contract may be either the law of the State which is a party to the contract or concession or some other body of law. In the first case, the state of that law at the time of the making of the contract or concession must also be considered, in accordance with sub-paragraph 1(b) of this Article; in the second case, only the state of the applicable law at the time of the alleged arbitrary action would need to be taken into account.

The proper law may be ascertained by application of principles of private international law or may be that designated by the parties in the instrument. The words "clear and discriminatory" are to be read as one expression. In order to avoid putting an international tribunal in the position of a court of appeal from the courts of the State which is a party to the agreement, a "clear" departure from the proper law of the contract is requisite to the establishment of responsibility. The fact that action of the State is "discriminatory" is one element of establishing that there has been a "clear" departure from the law. What appears to the entity making the decision on the international plane to be a "clear departure" from the law may appear less than clear when account is taken of the fact that the interpretation given the contract is applied on a non-discriminatory basis in all cases, whether or not the plaintiff is an alien. For example, State A, which has an agreement with an alien under which the law of State B is the proper law of the contract, may consistently interpret the law of State B in a manner which the entity making the decision on the international plane might consider to be incorrect. But the readiness of the latter to call in question the view entertained by State A would be considerably diminished if it observed that the interpretation given to the law of State B was consistent and non-discriminatory. Discrimination may be established through proof that the alien was discriminated against personally, as a member of a class of aliens or any other class to which he may belong, or as an alien pure and simple.

Sub-paragraph 1(b): If the proper law of the contract or concession is the law of the State which is a party to the agreement, that State cannot be allowed to change its law in order to obtain for its own advantage benefits which are owed to the alien who is a party to the agreement. It is therefore necessary to provide that the law to be applied in such a case must normally be the law of the State concerned at the time the agreement was concluded. This principle is subject to two exceptions: The first is that if the law of the State which is a party to the contract or concession is changed to the advantage of the alien, the alien would be entitled, under sub-paragraph 1(a), to rely on the later state of the law as so modified to his advantage. The second exception would be called for if the agreement of the State and the alien were to provide that the proper law of the contract is the law of the State as it may exist from time to time. In that exceptional case, the provisions of sub-paragraph 1(a) would likewise apply.

What constitutes a "clear and discriminatory departure" from the law of the State is governed by the same standard as was described above in connection with sub-paragraph 1(a). The necessity that there be such a departure from the law is of even greater importance here, since the courts and other agencies of the State party to the agreement are, if acting in good faith, presumptively the soundest interpreters of the law of that State.

It is not the purpose of this provision to foreclose absolutely any change in the law governing a contract or concession between a State and an alien. A non-discriminatory law terminating for reasons of public morality all

gambling concessions granted to nationals and aliens alike might not be considered to be "arbitrary." A shortening of the period of limitation during which an action might be brought for an alleged violation of the agreement might be regarded as both not "arbitrary" and not a "clear and discriminatory departure" from the proper law of the contract, whether that law be that of the State which is a party to the agreement or some other legal system. A change in the canons of interpretation of contracts, applied on a non-discriminatory basis to all contracts, would not necessarily render action of the State taken in reliance on the changed rule of law either "arbitrary" or a "clear and discriminatory departure" from the law of the State which is a party to the agreement. The evil with which this sub-paragraph is intended to deal is action which is clearly violative of the contract under the state of law existing at the time of its conclusion and which is intended to deprive the alien of the fruits of his contract without any other purpose than the enrichment of the State with which the agreement was made.

Sub-paragraph 1(c): This provision precludes the respondent State from relying on a provision of its own law or of any other system of law constituting the proper law of the contract which falls below the international minimum standard, as, for example, by way of providing only an inadequate substantive remedy to the alien in the event of a breach of the contract or concession by the State which is a party to it.

The types of contracts and concessions which a State may conclude with aliens are manifold. At one extreme are simple contracts of sale. At the other are long-term international development contracts, calling for the expenditure of large sums of money and the performance of many obligations by both the State and the alien. All of these agreements are not governed by a uniform body of law good for all contracts concluded by States. Agreements for the production and sale of military supplies are often governed by provisions of national law calling for renegotiation or termination under certain conditions, whereas other public contracts are not so regulated. This sub-paragraph accordingly provides that the principle derived from the principal legal systems of the world must be one appropriate to the particular type of contract or concession which is in issue.

Sub-paragraph 1(d): If the failure of the State to perform under a contract with an alien is in conflict with a treaty, the breach of the contract would be wrongful for international purposes. An example of such a treaty would be one placing certain contracts or concessions under international guaranty. The fact that the action of the State was consistent with the proper law of the contract and with the international standard referred to in sub-paragraph 1(c) would be irrelevant if a failure to perform the obligation in the manner prescribed by the treaty were to be established.

It remains to say a word or so about the position under the above principles of the debts of a State. Either outright repudiation of, or simple failure to pay the principal of or interest on, a debt of the central government of a State might run afoul of any one or more of the sub-paragraphs of paragraph 1. As in the case of contracts and concessions generally, it

would be no defense to such non-payment that repudiation or failure to pay had been authorized or directed by the municipal law of the State concerned.

The poverty of a country or its asserted inability to pay may not be set up as a defense to international responsibility. As in connection with the taking of property, a State can easily allege that it did not have enough funds for its own governmental purposes and therefore would not be in a position to discharge its obligations to aliens. The acknowledgment of any such defense would involve an international court in those inquiries into the internal affairs of States which have already been discussed in connection with Article 10. Particular difficulties are caused by the fact that there is in the international sphere no bankruptcy procedure in order to discharge a State when it becomes in fact totally unable to meet its obligations. In the absence of any such procedure, the release of a State from its obligations under such circumstances must be left to international negotiation.

A number of States, notable amongst which is the United States, have as a matter of domestic policy refrained from espousing the claims of their nationals arising out of the contracts or debts of foreign States. This unreadiness to act has been the result of internal policy rather than of any restraint laid upon the State by international law, and it accordingly does nothing to deny the validity of the general principle of a State's responsibility for improper conduct with respect to its contracts and debts to aliens.

It is irrelevant for these purposes that at the time of the creation of the debt, through, for example, the issuance of bonds, the State was not aware of the fact that the evidences of indebtedness might eventually find their way into the hands of aliens. A State may guard against this possibility by placing restraints on the negotiation of the instruments to foreigners. The alien may have secured the bond at a low price because of uncertainty about payment of the principal or interest and may thus be in a position to profit by the fact that the obligation originally assumed by the State is enforced in literal terms on the international plane. The fact, however, that the international remedy exists should help to prevent extreme drops in the value of public securities which may lawfully be held by aliens and should thus deprive aliens of windfall profits.

It should be emphasized that the parties to a contract or a concession, a State and an alien, may of course agree to terminate their agreement pursuant to another agreement later arrived at, provided, however, that such agreement is freely entered into and is not secured through the coercion referred to in paragraph 3 of this Article. In this category would fall a proper agreement for the settlement of the debts of a State.

Paragraph 2: A contract or concession frequently conveys to an alien certain property rights, such as mineral rights or title to land. The performance of a contract or the exploitation of a concession may also require that the alien acquire property locally or import it. In either case, the alien enjoys simultaneously property rights as well as those contractual rights to which paragraph 1 of this Article refers. If property acquired

under, or in pursuance to a contract or concession is taken from an alien, that "taking" is governed by Article 10, compensation or damages being payable therefor in addition to any damages which may accrue as the result of the violation of the contract or concession itself.

Paragraph 3: The present paragraph is designed to preclude the exaction of benefits by a State through threats to take yet more drastic action—a principle which follows naturally from paragraph 1 of this Article.

Although this paragraph is little more than a specific application of the principles enunciated in paragraph 1 of this Article, it must be acknowledged that there is virtually no international jurisprudence or doctrine dealing with this problem.

Paragraph 4: Whereas paragraphs 1 and 3 of this Article have dealt with transactions to which there are but two parties—the State and the alien with whom the contract or concession has been made—the present paragraph deals with the relationship of three parties, the two parties to the contract or concession and the organ, agency, official, or employee of the State who purports to annul or modify the terms of a concession or contract.

The present provision is concerned with governmental action, whether by the central government of a State or by a subordinate entity, which terminates or modifies a contract between an alien and a private person or a governmental agency subordinate to the central government of the State. A State may deprive an alien of valuable rights, which are fully as important to the alien as the property dealt with in Article 10, by taking measures to relieve its nationals from contractual obligations to aliens, by importing new terms and conditions into existing contracts, or by adopting new rules relating to the interpretation and performance of such instruments. Notwithstanding these possibilities, it is recognized that some leeway must be left to the State in the regulation of the performance of contracts. In order to place some limitations upon the autonomy of the State, it is provided in sub-paragraph 4(a) that the annulment or modification, to be internationally lawful, must be consistent with local law, but consistent only in the sense that there is no "clear and discriminatory departure" from that law. The following sub-paragraph 4(b) again applies an international standard. According to that standard, it would not be unlawful for a State to take reasonable measures to preserve its foreign exchange position, even though this might involve a partial annulment or a modification of existing contracts with aliens. To particularize further, State action respecting gold clauses in contracts and prohibitions on the transmittal of funds abroad would not necessarily fall afoul of paragraph 4, since the propriety of such measures has by now received general recognition.

Certain issues of jurisdiction and of private international law may be pertinent to the determination whether a State had the power to affect the contract or concession in any way. Such questions are, however, outside the scope of the present codification.

Damages: The factors to be taken into account in computing damages for violation of a contract or concession, the exaction of a benefit not within the terms of a contract or concession, and the annulment or modification of a contract or concession within the meaning of this Article are set forth in Article 34.

ARTICLE 13

(Lack of Due Diligence in Protecting Aliens)

1. Failure to exercise due diligence to afford protection to an alien, by way of preventive or deterrent measures, against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful:

(a) if the act is criminal under the law of the State concerned; or

(b) the act is generally recognized as criminal by the principal legal systems of the world.

2. Failure to exercise due diligence to apprehend, or to hold after apprehension as required by the laws of the State, a person who has committed against an alien any act referred to in paragraph 1 of this Article is wrongful, to the extent that such conduct deprives that alien or any other alien of the opportunity to recover damages from the person who has committed the act.

SECTION C

INJURIES

ARTICLE 14

(Definitions of Injury and Causation)

1. An "injury," as the term is used in this Convention, is a loss or detriment caused to an alien by a wrongful act or omission which is attributable to a State.

2. Injuries within the meaning of paragraph 1 include, but are not limited to:

(a) bodily or mental harm;

(b) loss sustained by an alien as the result of the death of another alien;

(c) deprivation of liberty;

(d) harm to reputation;

(e) destruction of, damage to, or loss of property;

(f) deprivation of use or enjoyment of property;

(g) deprivation of means of livelihood;

(h) loss or deprivation of enjoyment of rights under a contract or concession; or

(i) any loss or detriment against which an alien is specifically protected by a treaty.

3. An injury is "caused," as the term is used in this Convention, by an act or omission if the loss or detriment suffered by the injured alien is the direct consequence of that act or omission.

4. An injury is not "caused" by an act or omission:

(a) if there was no reasonable relation between the facts which made the act or omission wrongful and the loss or detriment suffered by the injured alien; or

(b) if, in the case of an act or omission creating an unreasonable risk of injury, the loss or detriment suffered by the injured alien occurred outside the scope of the risk.

SECTION D

ATTRIBUTION

ARTICLE 15

(Circumstances of Attribution)

A wrongful act or omission causing injury to an alien is "attributable to a State," as the term is used in this Convention, if it is the act or omission of any organ, agency, official, or employee of the State acting within the scope of the actual or apparent authority or within the scope of the function of such organ, agency, official, or employee.

ARTICLE 16

(Persons and Agencies through Which a State Acts)

1. The terms "organ of a State" and "agency of a State," as used in this Convention, include the Head of State and any legislative, deliberative, executive, administrative, or judicial organ or agency of a State.

2. The terms "official of a State" and "employee of a State," as used in this Convention, include both a civilian official or employee of a State and any member of the armed forces or of a para-military organization.

ARTICLE 17

(Levels of Government)

1. The terms "organ of a State," "agency of a State," "official of a State," and "employee of a State," as used in this Convention, include any organ, agency, official, or employee, as the case may be, of:

(a) the central government of a State;

(b) in the case of a federal State, the government of any state, province, or other component political unit of such federal State;

(c) the government of any protectorate, colony, dependency, or other territory of a State, for the international relations of which that State is responsible, or the government of any trust territory or territory under mandate for which a State acts as the administering authority; or

(d) the government of any political subdivision of any of the foregoing.

2. The terms "organ of a State," "agency of a State," "official of a State," and "employee of a State," as used in this Convention, do not include any organ, agency, official, or employee of any enterprise normally considered as commercial which is owned in whole or in part by a State or one of the entities referred to in paragraph 1 if such enterprise is, under the law of such State, a separate juristic person with respect to which the State neither accords immunity in its own courts nor claims immunity in foreign courts.

ARTICLE 18

(Activities of Revolutionaries)

1. In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government.

2. In the event of an unsuccessful revolution or insurrection, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is not, for the purposes of this Convention, attributable to the State.

SECTION E

EXHAUSTION OF LOCAL REMEDIES

ARTICLE 19

(When Local Remedies Considered Exhausted)

1. Local remedies shall be considered as exhausted for the purposes of this Convention if the claimant has employed all administrative, arbitral, or judicial remedies which were made available to him by the respondent State, without obtaining the full redress to which he is entitled under this Convention.

2. Local remedies shall be considered as not available for the purposes of this Convention:

(a) if no remedy exists through which substantial recovery could be obtained;

(b) if the remedies are in fact foreclosed by an act or omission attributable to the State; or

(c) if only excessively slow remedies are available or justice is unreasonably delayed.

SECTION F

PRESENTATION OF CLAIMS BY ALIENS

ARTICLE 20

(Persons Entitled to Present Claims)

1. A claim may be presented, as provided in Article 22, by an injured alien or by a person entitled to claim through him.

2. Injured aliens, for the purposes of this Convention, include:

(a) the alien who has suffered an injury;

(b) in the case of the killing of an alien, another alien who is:

(1) a spouse of the decedent;

(2) a parent of the decedent;

(3) a child of the decedent; or

(4) a relative by blood or marriage actually dependent on the decedent for support;

(c) an alien who holds a share in, or other analogous evidence of ownership or interest in a juristic person which is a national of the respondent State or of any other State of which the alien is not a national, and who suffers an injury to such interest through the dissolution of, or any other injury to, such juristic person, if that juristic person has failed to take timely steps adequately to defend the interests of such alien.

3. Upon the death of an alien who has suffered an injury, such claim as may have accrued to him before his death may be presented by an heir, if such heir is an alien, or by the personal representative of the decedent.

4. If a claim has been assigned, it may be presented by the assignee thereof, provided such assignee is an alien.

ARTICLE 21

(Definition of Alien, National, and Claimant)

1. An "alien," as regards a particular State, is, as the term is used in this Convention, a person who is not a national of that State.

2. A "person," as the term is used in this Convention, is a natural person or a juristic person.

3. A "national" of a State, for the purposes of this Convention, shall be considered to include:

(a) a natural person who possesses the nationality of that State;

(b) a natural person who possesses the nationality of any territory under the mandate, trusteeship, or protection of that State;

(c) a stateless person having his habitual residence in that State; and

(d) a juristic person which is established under the law of that State or of one of the entities referred to in paragraph 1 of Article 17.

4. A member of the armed forces of a State or an official of a State, who does not possess the nationality of that State, is treated as if he were a national of that State as regards injuries incurred by him in the service of that State.

5. A "claimant," as the term is used in this Convention, is a person who asserts that he is an injured alien or a person entitled to claim through such injured alien.

ARTICLE 22

(Procedure)

1. A claimant is entitled to present his claim directly to the State alleged to be responsible.

2. A claimant is entitled to present his claim directly to a competent international tribunal if the State alleged to be responsible has conferred on that tribunal jurisdiction over such claim.

3. Subject to Article 25, a claimant shall not be precluded from submitting his claim directly to the State alleged to be responsible or to an international tribunal by reason of the fact that the State of which he is a national has refused to present his claim or that there is no State which is entitled to present his claim.

4. No claim may be presented by a claimant if, after the injury and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.

5. No claim under this Convention may be presented by a claimant with respect to any injury listed in sub-paragraphs 2(e), 2(f), 2(g), or 2(h) of Article 14:

(a) if prior to his acquisition of property rights or of a right to exercise a profession or occupation in the territory of the State responsible for the injury, or as a condition of obtaining rights under a contract with or a concession granted by that State, the alien to whom such rights were accorded agreed to waive such claims as might arise out of a violation by the respondent State of any of the rights thus acquired,

(b) if the respondent State has not altered the agreement unilaterally through a legislative act or in any other manner, and has otherwise complied with the terms and conditions specified in the agreement, and

(c) if the injury arose out of the violation by the State of the rights thus acquired by the alien.

6. No claim may be presented by a claimant with respect to any of the injuries listed in paragraph 2 of Article 14, if as a condition of being allowed to engage in activities involving an extremely high degree of risk, which privilege would otherwise be denied to him by the State, the alien has agreed to waive any claim with respect to such injuries and if the claim arises out of an act or omission attributable to the State which has a reasonably close relationship to such activities. Such a waiver is effective, however, only as to injuries resulting from a negligent act or omission or from a failure to exercise due diligence to afford protection to the alien in

question and not as to injuries caused by a wilful act or omission attributable to the State.

7. No claim may be presented by a juristic person if the controlling interest in that person is in nationals of the State alleged to be responsible or in an organ or agency of that State. This provision shall not, however, affect the rights of aliens under sub-paragraph 2(c) of Article 20.

8. The right of the claimant to present or maintain a claim terminates if, at any time during the period between the original injury and the final award, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State alleged to be responsible.

SECTION G

ESPOUSAL AND PRESENTATION OF CLAIMS BY STATES

ARTICLE 23

(Espousal of Claims and Continuing Nationality)

1. A State is entitled to present a claim on behalf of its national directly to the State which is alleged to be responsible and, if the claim is not settled within a reasonable period, to an international tribunal which has jurisdiction of the subject matter and over the States concerned, whether or not its national has previously presented a claim under Article 22. If a claim is being presented both by a claimant and by the State of which he is a national, the right of the claimant to present or maintain his claim shall be suspended while redress is being sought by the State.

2. If so provided in an instrument by which a State has conferred jurisdiction upon an international tribunal pursuant to paragraph 2 of Article 22, the presentation of a claim by any other State on behalf of a claimant shall be deferred until the claimant has exhausted the remedies thus made available to him.

3. A State is not entitled to present a claim on behalf of a natural person who is its national if that person lacks a genuine connection of sentiment, residence, or other interests with that State.

4. A State is not entitled to present a claim on behalf of a juristic person if the controlling interest in that person is in nationals of the State alleged to be responsible or in an organ or agency of that State.

5. A State is entitled to present a claim of its national arising out of the death of another person only if that person was not a national of the State alleged to be responsible.

6. A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury.

7. The right of a State to present or maintain a claim terminates, if, at any time during the period between the original injury and the final award or settlement, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State against which the claim is made.

ARTICLE 24

(Waiver, Compromise, or Settlement of Claims by Claimants and Imposition of Nationality)

1. A State is not entitled to present a claim if the claimant or a person through whom he derives his claim has waived, compromised, or settled the claim under paragraph 4, 5, or 6 of Article 22.

2. A State is not relieved of its responsibility by having imposed its nationality, in whole or in part, on the injured alien or any other holder of the beneficial interest in the claim, except when the person concerned consented thereto or nationality was imposed in connection with a transfer of territory. Such consent need not be express; it shall be implied if the law of the State provides that an alien thereafter acquiring real estate, obtaining a concession, or performing any other specified act shall automatically acquire the nationality of that State for all purposes and the alien voluntarily fulfills these conditions. Such a requirement may be applied to both natural and juristic persons, subject to the provisions of subparagraph 2(c) of Article 20.

ARTICLE 25

(Waiver, Compromise, or Settlement of Claims by States)

A State may by a treaty waive, compromise, or settle any actual or potential claim of its nationals accruing under this Convention and may make such waiver, compromise, or settlement binding not only on itself but also on any actual or potential claimant who is a national of such State, even if that person became a national of such State after the waiver, compromise, or settlement was effected.

SECTION H

DELAY

ARTICLE 26

(Claims Barred by Lapse of Time)

If the presentation of a claim is delayed, after the exhaustion of local remedies to the extent provided for in Article 19, for a period of time which is unreasonable under the circumstances, the claim shall be barred by the lapse of time.

SECTION I

REPARATION

ARTICLE 27

(Form and Purpose of Reparation)

1. The reparation which a State is required to make for a wrongful act or omission for which it is responsible may take the form of:

(a) measures designed to re-establish the situation which would have existed if the wrongful act or omission attributable to the State had not taken place;

(b) damages; or

(c) a combination thereof.

2. Measures designed to re-establish the situation which would have existed if the act or omission attributable to the State had not taken place may include:

(a) revocation of the act;

(b) restitution in kind of property wrongfully taken;

(c) performance of an obligation which the State wrongfully failed to discharge; or

(d) abstention from further wrongful conduct.

3. Damages are awarded in order to:

(a) place the injured alien or an alien claiming through him in as good a position, in financial terms, as that in which the alien would have been if the act or omission for which the State is responsible had not taken place;

(b) restore to the injured alien or an alien claiming through him any benefit which the State responsible for the injury obtained as the result of its act or omission; and

(c) afford appropriate satisfaction to the injured alien or an alien claiming through him for an injury suffered by the injured alien as the result of an act or omission occasioned by malice, reckless indifference to the rights of the injured alien, any category of aliens, or aliens in general, or a calculated policy of oppression directed against the injured alien, any category of aliens, or aliens in general.

4. Factors normally to be taken into account in the computation of damages are set forth in Articles 28 to 38, but such enumeration in no wise limits the scope of this Article.

Article 28

(Damages for Personal Injury or Deprivation of Liberty)

Damages for bodily or mental harm, for mistreatment during detention, or for deprivation of liberty shall include compensation for past and prospective:

(a) harm to the body or mind;

(b) pain, suffering, and emotional distress;

(c) loss of earnings and of earning capacity;

(d) reasonable medical and other expenses;

(e) harm to the property or business of the alien resulting directly from such bodily or mental injury or deprivation of liberty; and

(f) harm to the reputation of the alien resulting directly from such deprivation of liberty.

Article 29

(Damages for Death)

Damages in respect of the death of an alien shall include compensation for the expected contribution of the decedent to the support of the persons specified in sub-paragraph 2(b) of Article 20.

Article 30

(Damages for Wrongful Acts of Tribunals and Administrative Authorities)

1. If, as set forth in Articles 6, 7, and 8, in any civil proceeding an alien has been denied access to a tribunal or an administrative authority or an adverse decision or judgment has been rendered against an alien or an inadequate recovery obtained by an alien, damages shall include compensation for the amount wrongfully assessed against or denied such alien and any other losses resulting directly from such proceeding or denial of access.

2. If in any criminal proceeding an alien has been arrested or detained as set forth in Article 5 or an adverse decision or judgment has been rendered against an alien as set forth in Articles 7 and 8, damages shall, in addition to damages otherwise payable under this Section, include

compensation for the costs of defense, litigation, and judgment, and any other losses resulting directly from such proceeding.

ARTICLE 31

(Damages for Destruction of and Damage to Property)

1. Damages for destruction of property under Article 9 shall include:

(a) an amount equal to the fair market value of the property prior to the destruction or, if no fair market value exists, the fair value of such property; and

(b) payment, if appropriate, for the loss of use of the property.

2. Damages for damage to property under Article 9 shall include:

(a) the difference between the value of the property before the damage and the value of the property in its damaged condition; and

(b) payment, if appropriate, for the loss of use of the property.

ARTICLE 32

(Damages for Taking and Deprivation of Use or Enjoyment of Property)

1. In case of the taking of property or of the use thereof under paragraph 1 of Article 10, the property shall, if possible, be restored to the owner and damages shall be paid for the use thereof.

2. Damages for the taking of property or of the use thereof under paragraph 2 of Article 10, or under paragraph 1 of Article 10 if restoration of the property is impossible, shall be equal to the difference between the amount, if any, actually paid for such property or for the use thereof and the amount of compensation required by paragraph 2 of Article 10.

ARTICLE 33

(Damages for Deprivation of Means of Livelihood)

Damages for the deprivation of an existing means of livelihood under Article 11 shall include compensation for any losses caused the alien by failure to accord him a reasonable period of time in advance of such deprivation in which to adjust his affairs. In particular, such damages shall include the difference between the amount, if any, actually received by the alien in connection with such deprivation of means of livelihood and the compensation required by Article 11.

ARTICLE 34

(Damages for Violation, Annulment, or Modification of a Contract or Concession)

1. Damages for the violation, annulment, or modification of a contract or concession under paragraph 1 or 4 of Article 12 shall include compensation for losses caused and gains denied as the result of such wrongful act or omission or compensation which will restore the claimant to the same position in which the injured alien was immediately preceding such act or omission.

2. Damages for the exaction of a benefit not within the terms of a contract or concession or for the waiver of a term thereof under paragraph 3 of Article 12 shall include compensation for the benefit wrongfully exacted.

ARTICLE 35

(Damages for Failure to Exercise Due Diligence)

Damages for any injury sustained as the result of the failure of a State under Article 13 to exercise due diligence to afford protection to an alien or to apprehend or to hold a person who has committed a criminal act shall be computed as if the State had originally caused such injury directly.

ARTICLE 36

(Costs)

The claimant shall be reimbursed for those expenses incurred by him in the local and international prosecution of his claim which are reasonable in amount and the incurrence of which was necessary to obtain reparation on the international plane.

ARTICLE 37

(Subtraction of Damages Obtained through Other Remedies)

Damages which a State is required to pay on account of an act or omission for which it is responsible shall be diminished by the amount of any recovery which has been obtained through local and international remedies. The amount so recovered must be payable in the form specified in Article 39.

ARTICLE 38

(Interest)

1. The amount of any award shall include interest, either by way of inclusion in the lump sum awarded or by the addition of an amount computed from the date of the injury to the date of the award. If, however, the injured alien is dilatory in presenting his claim, such interest may be computed from the date at which he gave notice of his claim to the responsible State.

2. Interest on the amount of the award shall be due for the period from the date of the award to the date of the payment thereof.

3. The rate of interest under paragraphs 1 and 2 shall be that prevailing with respect to obligations of analogous amount and duration at the time of the award in the place in which the injured alien was habitually resident at the time of the injury.

ARTICLE 39

(Currency and Rate of Exchange)

1. Damages shall, except in the case dealt with in paragraph 2 of this Article, be computed and paid in the currency of the State of which the injured alien was a national at the time of the injury or, in the case of claims accruing under Article 12, in the currency specified in the contract or concession. The respondent State may pay the award either in that currency or in any other currency readily convertible to that currency, computed at the rate of exchange prevailing on the date of the award or payment, whichever is more favorable to the claimant. In the case of a multiple exchange rate, the rate of exchange shall be that approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, a rate which is equitable under the circumstances of the case.

2. If, however, the injured alien was a natural person and had his habitual residence in the territory of the respondent State for an extended period of time prior to the injury, damages under Articles 31 to 34 may, in the discretion of that State, be paid in the currency thereof.

3. The provisions of this Article shall apply also to the compensation payable under Articles 10 and 11.

4. Damages and compensation payable under paragraphs 1 and 3 of this Article shall be exempt from exchange controls.

Article 40

(Local Taxes Prohibited)

Neither damages nor compensation shall be subjected to special taxes or capital levies within the State paying such damages or compensation pursuant to this Convention.