

Ludwig Weber* and Hans Holderbach**

News from International Organizations International Civil Aviation Organization (May 1999 to May 2000)

I. International Conference on Air Law

A Diplomatic Conference on the modernization of the 'Warsaw System' took place at ICAO Headquarters in Montreal from 10 to 28 May 1999. The Conference was attended by Delegates from 122 States and 11 international organizations, and adopted by consensus, the *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montreal on 28 May 1999. The new instrument, which will be known as the Montreal Convention of 1999, modernizes and consolidates the system of air carrier liability established by the various instruments of the 'Warsaw System'.

A major feature of the new legal instrument is the concept of unlimited liability in case of death or injury to passengers. Whereas the Warsaw Convention of 1929 sets a limit of 125,000 Gold Francs (approximately USD8,300), the Montreal Convention introduces a two-tier system. The first tier includes strict liability up to 100,000 special drawing rights (SDR) (approximately USD135,000), irrespective of a carrier's fault. The second tier is based on presumption of fault of a carrier and has no limit of liability.

The Montreal Convention also includes the following elements:

- (a) in cases of aircraft accidents, air carriers are called upon to provide advance payments, without delay, to assist entitled persons in meeting immediate economic needs; the amount of this initial payment will be subject to national law and will be deductible from the final settlement;
- (b) legal action for damages resulting from death or injury of a passenger may be filed in the country where, at the time of the accident, the passenger had his or her principal and permanent residence, subject to certain conditions,
- (c) incorporation of the modifications introduced

by Montreal Protocol No. 4 with respect to cargo and facilitation of the use of modern electronic ticketing as far as passengers are concerned; (d) air carriers must submit proof of insurance, thereby ensuring the availability of financial resources in cases of automatic payments or litigation.

To date, 64 States and one Regional Economic Integration Organization (the EC) have signed the Convention and one State, Belize, has ratified it. The Japanese administration has indicated that it is close to ratifying the new Convention and the United States has initiated the ratification process. Expressing its support for the Montreal Convention, the Commission of the European Community has recommended its Member States to take swift action to ratify the new instrument. In order to enter into force, the Convention requires ratification by 30 States.

II. Developments Regarding the Work Programme of the Legal Committee

The General Work Programme of the Legal Committee, as decided by the Council on 1 December 1999, consists of the following subjects in the order of priority indicated:

- 1) Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS), of the establishment of a legal framework;
- 2) Acts or offences of concern to the international aviation community and not covered by existing air law instruments;

* Director, Legal Bureau, ICAO.

** Legal Adviser, Legal Bureau, ICAO.

- 3) International interests in mobile equipment (aircraft equipment);
- 4) Review of the question of the ratification of international air law instruments;
- 5) United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments.

1. Consideration, with regard to CNS/ATM Systems Including Global Navigation Satellite Systems (GNSS), of the Establishment of a Legal Framework

The Secretariat Study Group on Legal Aspects of CNS/ATM Systems held three meetings in Montreal, on 7-8 April 1999, 20-21 October 1999 and 10-12 May 2000.¹ An interim framework for the short-term regarding the operation of GNSS systems had been established by the 32nd ICAO Assembly through the adoption of the *Charter on the Rights and Obligations of States Relating to GNSS Services*.² On this basis, the Study Group has been tasked to assist the ICAO Secretariat, *inter alia*, to consider the elaboration of an appropriate long-term legal framework to govern the operation of GNSS systems, including consideration of an international convention for this purpose, and to present proposals for such a framework in time for their consideration by the next ordinary session of the Assembly in 2001.

The Study Group examined institutional and legal issues relating to CNS/ATM systems, including liability, and universal accessibility and continuity of GNSS services. A further meeting of the Study Group is scheduled to be held later in 2000.

2. Acts or Offences of Concern to the International Aviation Community and not Covered by Existing Air Law Instruments

The Secretariat Study Group on Unruly Passengers held three meetings in Montreal, on 25-26 January 1999, 19-20 August 1999 and 10-11 February 2000.³ The Group focussed on three major subjects, namely: (a) the establishment of a list of specific offences for inclusion in national law; (b) the extension of jurisdiction over such offences; and (c) the appropriate mechanisms for addressing them. Considering that there appears to be a large increase in the number of incidents involving unruly passengers, the Study Group expressed the view that more effective

enforcement measures on the part of Governments are necessary to deal with the problem. By State letter dated 14 April 2000, the Secretary General sent a questionnaire on this matter to all 185 Contracting States, in order to obtain additional information regarding the factual side of the problem, and to seek feedback in relation to the proposed list of offences and jurisdictional clause. The texts of the list of offences and of the jurisdictional clause are set out in the Annex below. It is envisaged that a further meeting of the Study Group will take place in August 2000.

3. International Interests in Mobile Equipment (Aircraft Equipment)

A Sub-Committee of the Legal Committee had been established for the purpose of considering, jointly with a Committee of Governmental Experts of the International Institute for the Unification of Private Law (Unidroit), two draft instruments: a draft Convention on International Interests in Mobile Equipment, and a draft Protocol on Matters Specific to Aircraft Equipment. The latter had been developed by a working group consisting of the Secretariats of ICAO and Unidroit with the participation of the International Air Transport Association (IATA) and the so-called Aviation Working Group (AWG), an industry group comprising aircraft manufacturers and financing institutions.

The Legal Sub-Committee and the Unidroit Committee of Governmental Experts held three Joint Sessions in 1999: a first Joint Session in Rome from 1-12 February 1999, a second Joint Session in Montreal from 24 August to 3 September 1999, and a third Joint Session from 20-31 March 2000 which took place in Rome. The texts prepared by the Joint Sessions are intended to be presented to the next Session of the Legal Committee in August 2000 and thereafter to a Diplomatic Conference.

1. The Study Group was established by the Council pursuant to ICAO Assembly Resolution A32-20 and to a decision taken by the Council during its 154th Session.

2. ICAO Assembly Resolution A32-19.

3. The Study Group was established pursuant to a decision taken by the Council during its 151st Session.

4. United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago Convention, its Annexes and Other International Air Law Instruments

Upon decision by the Council, ICAO participated in the 69th Session of the Maritime Safety Committee (MSC) of the International Maritime Organization (IMO). ICAO voiced its concerns regarding the safety of international air navigation raised by the IMO's draft General Provisions on Ships Routing for the adoption, designation and substitution of archipelagic sea lanes. MSC/69, convened in London from 11-20 May 1998, eventually adopted amendments to the provisions which, *inter alia*, recognized the exclusive jurisdiction of ICAO with respect to international ATS routes, including those over archipelagic sea lanes.

III. Adoption and Entry Into Force of Certain International Air Law Instruments

1. Article 3bis

The *Protocol Relating to an Amendment to the Convention on International Civil Aviation* (Article 3bis), signed at Montreal on 10 May 1984, entered into force during the 32nd Session of the Assembly on 1 October 1998. The Protocol which was adopted by consensus on 10 May 1984, deals with the problems of interception of and other enforcement measures with respect to a civil aircraft in flight. Article 3bis has codified the existing general international law with respect to the following elements: (a) the obligation of States to refrain from resorting to the use of weapons against civil aircraft in flight; (b) the obligation, in case of interception, not to endanger the lives of persons on board and the safety of aircraft; (c) the right of States to require landing at a designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of the Convention.

2. Montreal Protocol No. 4

Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw

on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975, entered into force on 14 June 1998. Ratification of this Protocol by any State which is not a Party to the *Warsaw Convention* or by any State which is not a Party to the *Warsaw Convention* as amended at The Hague, 1955, shall have the effect of accession to the *Warsaw Convention* as amended at The Hague, 1955, and by *Montreal Protocol No. 4*.

The main amendments introduced by *Montreal Protocol No. 4* are the following: (a) documentation relating to cargo has been considerably simplified with a view to enabling electronic or computerized data processing; (b) the Protocol introduced strict liability in international carriage by air; under this system, the carrier is liable irrespective of fault and he may be exonerated only under limited circumstances (e.g. an inherent defect of the cargo); (c) the Protocol replaces the currency unit of the *Warsaw/Hague* system mentioned in paragraph 5 of Article 22 of the *Warsaw Convention*, the 'gold clause', by the SDR without increasing the limit of liability from its 1929 level (17 SDR per kilogram, corresponding to 250 francs).

3. Convention on the Marking of Plastic Explosives

The Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991, entered into force on 21 June 1998.

This Convention requires each State Party to prohibit and prevent the manufacture in its territory of unmarked plastic explosives. Plastic explosives will be marked by introducing during the manufacturing process any one of the four detection agents agreed upon by the Conference and defined in the Technical Annex to the Convention. The Convention also requires each State Party to prohibit and prevent the movement into or out of its territory of unmarked explosives and to exercise strict and effective control over the possession of any existing stocks of unmarked explosives. Stocks of plastic explosives not held by authorities performing military and police functions are to be destroyed or consumed for purposes not inconsistent with the objectives of the Convention, marked or rendered permanently

ineffective, within a period of three years from the entry into force of the Convention in respect of the State concerned.

The Convention assigns specific functions to the Council of ICAO with respect to, *inter alia*, the appointment of members to an International Explosives Technical Commission (IETC) established by the Convention, the procedure regarding amendments to the Annex and measures to facilitate the implementation of the Convention. Pursuant to decisions by the Council, the President of the Council appointed 16 experts in the field of manufacture or detection of, or research in, explosives nominated by ICAO Contracting States for membership to the Commission. The Commission will evaluate technical developments relating to the manufacture, marking and detection of explosives, report its findings, through the Council of ICAO, to all States Parties and international organizations concerned, and propose amendments to the Technical Annex to the Convention, as required. The Commission, which shall convene at least once a year, held a first Session in December 1999.

4. Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Ground

The *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface* signed at Rome on 7 October 1952, signed at Montreal on 23 September 1978, entered into force on 3 October 1999. To date, the Protocol has been ratified by 6 States. The basic features of the Protocol are the following: (a) a substantial increase of the limits of liability stipulated in Article 11 of the *Rome Convention*; (b) the limits of liability are expressed in the terms of Special Drawing Rights (SDR) but the reference to the 'monetary unit' is preserved for those States which are not members of the International Monetary Fund; (c) the provisions of Chapter III of the *Rome Convention* relating to security for the operator's liability have been substantially simplified; d) the scope of applicability of the Convention as amended was redefined so as to encompass also the case of aircraft leased, chartered or interchanged whose operator has his principle place of business or his permanent residence in a Contracting State.

5. Other Instruments

The *Protocol on the Authentic Six-Language Text of the Convention on International Civil Aviation (Chicago, 1944)*, setting forth the text of the Chicago Convention in the Chinese language, was signed in Montreal on 1 October 1998 together with the related Protocol of amendment to the Chicago Convention (Final Clause). The latter Protocol adds Chinese as authentic language of the Convention.

On 17 August 1999, the *Protocol relating to an Amendment to the Convention on International Civil Aviation* [Final clause, Russian text], signed at Montreal on 30 September 1977, entered into force for those States which have ratified it. Thirty days thereafter, on 16 September 1999, the *Protocol on the Authentic Quadrilingual Text of the Convention on International Civil Aviation (Chicago 1944)*, setting forth the text of the Chicago Convention in the Russian language, entered into force for those States which have accepted it and ratified the aforementioned Protocol. The *Chicago Convention* is now equally authentic in the English, French, Russian and Spanish languages. A revised edition of ICAO Doc 7300, setting forth the amended text of the Convention in all four authentic languages, is presently under preparation.

IV. Settlement of Disputes between Contracting States

On 19 June 1998, the Council endorsed a settlement agreement mediated by the President of the Council in a dispute between Cuba and the United States over the right of Cuban-registered aircraft to overfly the United States on flights to and from Canada. The settlement agreement brought an end to formal dispute settlement proceedings before the ICAO Council under Article 1, paragraph 2 of the *ICAO Rules for the Settlement of Differences*, which were initiated in 1996 by a Cuban complaint based on Article II, Section 1 of the *International Air Services Transit Agreement* (Chicago 1944). The Air Services Agreement requires Contracting States to grant to other Contracting States the right of overflight of commercial aircraft subject to certain conditions.

Recently, on 14 March 2000, the United States filed an application for dispute settlement under Article 84 of the *Convention on International*

Civil Aviation and the ICAO *Rules for the Settlement of Differences* against 15 Member States of the European Union, seeking a decision of the Council regarding European Council Regulation (EC) No. 925/99 on the EU's non-addition, or 'hushkit' rule. In its application, the United States alleges that the EC Regulation violates Article 11, 15, 38 and 82 of the Chicago Convention as well as its Annex 16 in that it limits the registration and operation within the EU of aircraft that are modified in order to comply with noise standards set out in Chapter 3 of Annex 16 to the Convention. The Council is expected to deal with this matter during its 161st Session later this year.

ANNEX 1

ICAO ASSEMBLY RESOLUTION A32-19: Charter on the Rights and Obligations of States Relating to GNSS Services

Whereas Article 44 of the *Convention on International Civil Aviation*, signed on 7 December 1944 (the 'Chicago Convention'), mandates the International Civil Aviation Organization (ICAO) to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport;

Whereas the concept of the ICAO communications, navigation and surveillance/air traffic management (CNS/ATM) systems utilizing satellite-based technology was endorsed by States and international organizations at the ICAO Tenth Air Navigation Conference, and was approved by the 29th Session of the Assembly as the ICAO CNS/ATM systems;

Whereas the Global Navigation Satellite System (GNSS), as an important element of the CNS/ATM systems, is intended to provide worldwide coverage and is to be used for aircraft navigation;

Whereas GNSS shall be compatible with international law, including the Chicago Convention, its Annexes and the relevant rules applicable to outer space activities;

Whereas it is appropriate, taking into account current State practice, to establish and affirm the fundamental legal principles governing GNSS; and

Whereas the integrity of any legal framework for the implementation and operation of GNSS requires observance of fundamental principles, which should be established in a Charter;

The Assembly:

Solemnly declares that the following principles of this Charter on the Rights and Obligations of States Relating

to GNSS Services shall apply in the implementation and operation of GNSS:

1. States recognize that in the provision and use of GNSS services, the safety of international civil aviation shall be the paramount principle.
2. Every State and aircraft of all States shall have access, on a non-discriminatory basis under uniform conditions, to the use of GNSS services, including regional augmentation systems for aeronautical use within the area of coverage of such systems.
3. a) Every State preserves its authority and responsibility to control operations of aircraft and to enforce safety and other regulations within its sovereign airspace.
b) The implementation and operation of GNSS shall neither infringe nor impose restrictions upon States' sovereignty, authority or responsibility in the control of air navigation and the promulgation and enforcement of safety regulations. States' authority shall also be preserved in the co-ordination and control of communications and in the augmentation, as necessary, of satellite-based air navigation services.
4. Every State providing GNSS services, including signals, or under whose jurisdiction such services are provided, shall ensure the continuity, availability, integrity, accuracy and reliability of such services, including effective arrangements to minimize the operational impact of system malfunctions or failure, and to achieve expeditious service recovery. Such State shall ensure that the services are in accordance with ICAO Standards. States shall provide in due time aeronautical information on any modification of the GNSS services that may affect the provision of the services.
5. States shall co-operate to secure the highest practicable degree of uniformity in the provision and operation of GNSS services.
States shall ensure that regional or subregional arrangements are compatible with the principles and rules set out in this Charter and with the global planning and implementation process for GNSS.
6. States recognize that any charges for GNSS services shall be made in accordance with Article 15 of the Chicago Convention.
7. With a view to facilitating global planning and implementation of GNSS, States shall be guided by the principle of co-operation and mutual assistance whether on a bilateral or multilateral basis.
8. Every State shall conduct its GNSS activities with due regard for the interests of other States.
9. Nothing in this Charter shall prevent two or more States from jointly providing GNSS services.

ANNEX 2

DRAFT LIST OF OFFENCES COMMITTED ON BOARD CIVIL AIRCRAFT

(Prepared by the Secretariat Study Group on Unruly Passengers)

1. *Assault and Other Acts of Interference against a Crew Member on Board a Civil Aircraft*

Any person who commits on board a civil aircraft any of the following acts is guilty of an offence:

- (1) assault, intimidation or threat, whether physical or verbal, against a crew member, where such act interferes with the performance of the duties of the crew member or lessens the ability of the crew member to perform those duties;
- (2) refusal to follow a lawful instruction given by the aircraft commander, or on behalf of the aircraft commander by a crew member, for the purpose of securing the safety of the aircraft and of persons or property carried thereon, or the safety, efficiency or regularity of air navigation.

2. *Assault and Other Acts Endangering Safety or Jeopardizing Good Order and Discipline on Board a Civil Aircraft*

- (1) Any person who commits on board a civil aircraft an act of battery, sexual assault or child molestation is guilty of an offence.
- (2) Any person who commits on board a civil aircraft any of the following acts, if such act is likely to endanger the safety of the aircraft or of any person on board, or if such act jeopardizes the good order and discipline on board the aircraft, is guilty of an offence:
 - (a) assault, intimidation or threat, whether physical or verbal, against another person;
 - (b) intentionally causing damage to, or destruction of, property;
 - (c) consuming alcoholic beverages or drugs resulting in intoxication.

3. *Other Offences Committed on Board a Civil Aircraft*

Any person who commits on board a civil aircraft any of the following acts is guilty of an offence:

- (1) smoking in a lavatory or elsewhere in a manner likely to endanger the safety of the aircraft;
- (2) tampering with a smoke detector or any other safety-related devices installed on board the aircraft;
- (3) operating a portable electronic device when such act is prohibited.

ANNEX 3

REVISED DRAFT JURISDICTIONAL CLAUSE

(Prepared by the Secretariat Study Group on Unruly Passengers)

1. (*Name of State*) shall have jurisdiction over any act constituting an offence under Articles of this Act (the List of Offences) if the act took place on board:

- (1) any civil aircraft registered in (*Name of State*); or
 - (2) any civil aircraft leased without crew to a lessee whose principal place of business is in (*Name of State*) or, if the lessee does not have a principal place of business, whose permanent residence is in (*Name of State*); or
 - (3) any civil aircraft on or over the territory of (*Name of State*); or
 - (4) any other civil aircraft in flight outside (*Name of State*), if
 - (a) the next landing of the aircraft is in (*Name of State*); and
 - (b) the aircraft commander has
 - (i) delivered the suspected offender to the competent authorities of (*Name of State*) pursuant to Article 9 of the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963; and
 - (ii) requested (*Name of State*) to prosecute the suspected offender; and
 - (iii) affirmed that no similar request has been or will be made by the commander or the operator to any other State.
2. The term 'in flight' as used in this section means the period from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.