Aviation Security Law

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Chapter 2
Principles of Responsibility

A. State Responsibility

There are various offences that can be perpetrated by private individuals or groups of individuals against civil aviation, the earliest common species of which was hijacking of aircraft. Hijacking, in the late 1960s started an irreversible trend which was dramatised by such incidents as the skyjacking by Shiite terrorists of the TWA flight 847 in June 1985. The skyjacking of Egypt Air flight 648 in November the same year and the skyjacking of a Kuwait Airways Airbus in 1984[75] are other early examples of this offence. Aviation sabotage, where explosions on the ground or in mid air destroy whole aircraft, their passengers and crew, is also a threat coming through the past decades. The Air India flight 182 over the Irish Sea in June 1985, PAN AM flight 103 over Lockerbie, Scotland in 1988, and the UTA explosion over Niger in 1989 are examples. Missile attacks,[76] where aircraft are destroyed by surface to air missiles (SAM) have also occurred as early as in the 1970s. The destructions of the two Viscount aircraft of Air Rhodesia in late 1978 / early 1979 are examples of this offence. A re-emerging threat, namely armed attacks at airports, shows early occurrence in instances where terrorists opened fire in congested areas in the airport terminals. Examples of this type of terrorism are: The June 1972 attack by the Seikigunha (Japanese Red Army) at Ben Gurion Airport, Tel Aviv; The August 1973 attack by Arab gunmen on Athens Airport; and the 1985 attacks on Rome and Vienna Airports; Finally, the illegal carriage by air of narcotics and other psychotropic substances and crimes related thereto such as the seizure of or damage to aircraft, persons and property is also a threat that cannot be ignored in the present context, although, like other examples cited, it has been a perennial issue.

The most recent emerging threat to aviation security was reported by the United Kingdom authorities on 10 August 2006. It concerned, an alleged terrorist plot involving components of liquid explosives to be carried on board civil aircraft

[75] Abeyratne (1985, p. 120).

[76] Abeyratne (2005a) (on file with author).

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flying across the North Atlantic, and it emphasized the vulnerability of the global air transport system. This plot revealed a new modus operandi, calling for immediate response. Accordingly, the ICAO Council convened a special session and directed the Aviation Security Panel to consider the wider implications for aviation security. Since technologies are not currently deployable to detect certain liquid explosives, the Council adopted security control guidelines for screening liquids, gels and aerosols, known as LAGs, and these were conveyed to States in December 2006, with an effective date of 1 March 2007. The guidelines recommended that all LAGs should be carried in containers with a capacity not greater than 100 mL each and should be placed in a transparent re-sealable plastic bag of maximum capacity not exceeding 1 L, each passenger being permitted to carry only one such bag. Exceptions are allowed for medications, baby food and special dietary or other medical requirements.

The issue of State responsibility for private acts of unlawful interference against civil aviation was not a contentious issue until the paradigm shift of 11 September 2001, when terrorists engaged in hijacking aircraft with a view to using them as weapons of mass destruction, causing damage to civilians on the ground.[77] The incidents of that day brought to bear serious implications for the continuity of air transport operations worldwide, particularly in the area of insurance of aircraft,[78] the cost of which the airlines had to bear. This prompted the International Air Transport Association (IATA) to raise the issue of State responsibility for the security of aviation within their territories at the 35th Session of the ICAO Assembly which was held in Montreal from 28 September to 8 October 2004. IATA drew the attention of the Assembly to the fact that the aviation underwriting community had announced formally its intention to exclude all hull, spares, passenger and third party liability claims resulting in damage caused by the hostile use of dirty bombs, electromagnetic pulse devices or biochemical materials.[79] IATA contended that such exclusions would place the airlines at risk of breaching state regulations as well as being destitute of access to adequate coverage, which in turn would compel airlines to cease their operations of air services. Recognizing the need for effectively precluding such market failure, IATA urged states to extend government guarantees that would ensure coverage for the categories mentioned above that would be affected by losses arising from state targeted act of terrorism. Furthermore, IATA requested the Assembly to consider the need to establish a legislative structure pertaining to limitation of liability for war and terrorism losses.

The main thrust of IATA's argument in seeking state coverage against losses in this context was that terrorists carried out their inimical acts against States and airlines and the air transport infrastructure were mere pawns or a proxy. As such it

[77]See Abeyratne (2002a, pp. 406–420).

[78]Abeyratne (2002b, pp. 521–533; 2005b, pp. 117–129).

[79]War Risk Exclusions, A35-WP/97, LE/8, 17/08/04, p. 1. See also, Abeyratne (2007, pp. 689–704).

was the responsibility of governments to ensure indemnity of carriers and infrastructure.[80]

Although *ex facie* the claim of IATA – that governments indemnify air carriers and infrastructure against fiscal liability is based on the fact that terrorist attacks are aimed at governments and therefore the governments concerned should make good the losses to airlines and infrastructure – does not directly establish that governments are solely responsible for making aviation secure, it carries a general presumption of State responsibility. However, it must be noted that governments have the difficult and unenviable task of balancing the need for maintaining and encouraging anti-terrorists vigilance while, at the same time, putting in place workable security measures that do not compromise the commercial basis of the air transport sector. This problem is compounded by the fact that huge economic damage can be suffered even when terrorist plots are foiled. There also can be well-founded human rights legislation that might impact negatively across a host of air security issues, from the need for legal statutes, identification and the criminality clearance of airport workers, to legal rulings hindering the deportation of aircraft hijackers. These and other issues must be addressed in order to reconcile security with the efficiency and sustainability of the industry.

In spite of the delicate balance between enforcing security in a transport system which has as its main advantage speed and expediency of carriage of passengers and freight and coping with new and emerging threats that would compromise that advantage, States have, to their credit, taken initiatives that demonstrate their responsibility. A good example is Europe where over the last 40 years, States have followed the philosophy that if compensation does not come from the perpetrators, States would step in to assume that responsibility.[81] A similar approach was taken by the United States consequent to the events of 11 September 2001. The European Union imposed Council Directive 12(2) which, by 1 July 2005 at the latest, all 25 EU Member States should have complied with and required EU member States to ensure that their national rules provide for the existence of a scheme on compensation to victims of violent international crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.

A leading commentator Harold Caplan states that the idea that States have a responsibility to ensure that victims of crime are compensated is not confined to Europe. He observes that the US Department of Justice has long had an Office for Victims of Crime [OVC] which oversees the schemes in individual States,[82] and in collaboration with the State Department, has compiled and updated a Directory of

[80]War Risk Exclusions, A35-WP/97, LE/8, 17/08/04, p. 3.

[81]See 1983 Strasbourg "Convention on the Compensation of Victims of Violent Crime"; and EU Council Directive 2004/80/EC (29 April 2004) relating to compensation to crime victims.

[82]See Crime Victim Compensation Programs Directory 2002 http://www.ojp.usdoj.gov/ovc/publications.

schemes in 35 countries principally for the information of US citizens who travel or reside overseas.[83]

Finally, Caplan states that:

> Disregarding the 9/11 Victim Compensation Fund, none of the known State crime compensation schemes around the world can be said to provide lavish compensation. What is important is that they exist and they demonstrate unmistakable evidence of a widely-accepted principle of State responsibility.[84]

I. Principles of State Responsibility

The fundamental issue in the context of State responsibility for the purposes of this article is to consider whether a State should be considered responsible for its own failure or non-feasance to prevent a private act of terrorism against civil aviation or whether the conduct of the State itself can be impugned by identifying a nexus between the perpetrator's conduct and the State**.** One view is that an agency paradigm, which may in some circumstances impute to a state reprehensibility on the ground that a principal–agent relationship between the State and the perpetrator existed, can obfuscate the issue and preclude one from conducting a meaningful legal study of the State's conduct.[85]

II. The Theory of Complicity

At the core of the principal–agent dilemma is the theory of complicity, which attributes liability to a State that was complicit in a private act. Hugo Grotius (1583–1645), founder of the modern natural law theory, first formulated this theory based on State responsibility that was not absolute. Grotius' theory was that although a State did not have absolute responsibility for a private offence, it could be considered complicit through the notion of *Patienta* or *receptus*.[86] While the concept of *Patienta* refers to a State's inability to prevent a wrongdoing, *receptus* pertains to the refusal to punish the offender.

The eighteenth century philosopher Emerich de Vattel was of similar view as Grotius, holding that responsibility could only be attributed to the State if a sovereign refuses to repair the evil done by its subjects or punish an offender or

[83]Directory of International Crime Victim Compensation Programs 2004–2005.

[84]Harold Caplan, Damage to third parties on the ground caused by aircraft, Some basic issues of policy which re-merit examination in the context of modernization of the 1952 Rome Convention, unpublished Aide Memoire.

[85]Caron (1998, pp. 109, 153–154) cited in Becker (2006, p. 155).

[86]Grotius (1646, pp. 523–526).

deliver him to justice whether by subjecting him to local justice or by extraditing him.[87] This view was to be followed and extended by the British jurist Blackstone a few years later who went on to say that a sovereign who failed to punish an offender could be considered as abetting the offence or of being an accomplice.[88]

A different view was put forward in an instance of adjudication involving a seminal instance where the Theory of Complicity and the responsibility of States for private acts of violence was tested in 1925. The case[89] involved the Mexico–United States General Claims Commission which considered the claim of the United States on behalf of the family of a United States national who was killed in a Mexican mining company where the deceased was working. The United States argued that the Mexican authorities had failed to exercise due care and diligence in apprehending and prosecuting the offender. The decision handed down by the Commission distinguished between complicity and the responsibility to punish and the Commission was of the view that Mexico could not be considered an accomplice in this case.

The Complicity Theory, particularly from a Vattellian and Blackstonian point of view is merely assumptive unless put to the test through a judicial process of extradition. In this Context it becomes relevant to address the issue through a discussion of the remedy.

III. Mechanisms for Extradition of Offenders: The Lockerbie Case

At present, the issue of extradition could be settled through the United Nations and its Organs such as the Security Council[90] and the International Court of Justice (ICJ).[91] Of noteworthy practical relevance with regard to the complicity theory, particularly on the issue of extradition and whether one State can demand the

[87]De Vattel (1916, p. 72).

[88]Blackstone (2001, p. 68).

[89]Laura M.B. Janes (USA) v. United Mexican States (1925) 4 R Intl Arb Awards 82.

[90]The Security Council is the branch of the United Nations charged with the maintenance of international peace and security. Its powers, outlined in the Charter of the United Nations, include the establishment of peacekeeping operations, the establishment of international sanctions, and the authorization for military action. The Security Council's power are exercised through its Resolutions. The Permanent members of the Security Council are the United States of America, United Kingdom, France, the Russian Federation and the Republic of China.

[91]The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. The Court is composed of 15 judges, who are elected for terms of office of 9 years by the United Nations General Assembly and the Security Council. It is assisted by a Registry, its administrative organ. Its official languages are English and French.

extradition of offenders in another State is the opinion given by the ICJ[92] on the explosion over Lockerbie, Scotland on 21 December 1988 of PAN AM Flight 103. The explosion is believed to have been caused by the detonation of a plastic explosive concealed in a portable cassette player/radio. The ICJ was encumbered with the discussion as to whether the Court had jurisdiction over a United Nations Security Council Resolution on the issue.

The United States, in its submission to the ICJ in the Lockerbie case, contended that the Security Council was actively seized of the situation which was the subject of the issue of the offenders from Libya to the United States that therefore the Court should not indicate provisional measures as requested.[93] Judge Oda, Acting President of the Court, observing that Libya instituted proceedings against the United States in respect of the interpretation and application of the Montreal Convention,[94] noted that it was a general principle of international law that no State could be compelled to extradite its nationals and that the State concerned held the prerogative of trying the accused of a crime in its own territory. Judge Oda seems to have recognized two principles in his opinion:

(1) While any State can request extradition, no State can coerce extradition of nationals of another State.
(2) Whether or not a State can compel extradition is a matter for resolution by the general principles of international law and not necessarily those stipulated in the Montreal Convention.

It appears that the question in Judge Oda's mind was therefore whether the Security Council, by its Resolution 748 (1992) which required Libya to extradite its

[92]I.C.J. Reports 1980, 116.

[93]I.C.J. Reports 1980, 122. By letter of 2 April 1992, a copy of which was transmitted to Libya by the Registrar, the Agent of the United States drew the Court's attention to the adoption of Security Council Resolution 748 (1992) the text of which he enclosed. In that letter the Agent for the United States stated:
That resolution, adopted pursuant to Chapter V11 of the United Nations Charter, "decides that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) of 21 January 1992 regarding the requests contained in documents S/23306, S/23308 and S/23309." It will be recalled that the referenced requests include the request that Libya surrender the two Libyan suspects in the bombing of Pan Am flight 103 to the United States or to the United Kingdom. For this additional reason, the United States maintains its submission of 28 March 1992 that the request of the Government of the Great Socialist Peoples' Libyan Arab Jamahiriya for the indication of provisional measures for protection should be denied, and that no such measures should be indicated. See I.C.J. Reports 1980, 125.

[94]*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971, ICAO, Doc 8966. Article 8 of the Montreal Convention stipulates that the offences under the Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between the Contracting States and that States undertake to include these offences as extraditable in any extradition treaty to be concluded by them. Article 11 of the same Convention requires Contracting States to afford one another the greatest measures of assistance in connection with criminal proceedings brought in respect of the offences, stating further that in such instances the law of the State requested shall apply at all times.

nationals either to the United States or to the United Kingdom, had the authority to override an established principle of international law. The answer to this question was, in Judge Oda's view, in the affirmative when he opined:

> I do not deny that under the positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources. There is certainly nothing to oblige the Security Council, acting within its terms of reference, to carry out a full evaluation of the possibly relevant rules and circumstances before proceeding to the decisions it deems necessary. The Council appears, in fact, to have been acting within its competence when it discerned a threat against international peace and security in Libya's refusal to deliver up the two Libyan accused. Since, as I understand the matter, a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened and since it is apparent that resolution 748 (1992) embodies such a decision, the Court has at present no choice but to acknowledge the pre-eminence of that resolution.[95]

Judge Oda was emphatic that the Security Council Resolution had overriding effect over any principle of international law. He observed however, that if the Court appeared to have *prima facie* jurisdiction over a legal issue that was the subject of its consideration, the Court was not precluded from indicating provisional measures applied for, merely because of the absolute preemptive powers of the Security Council Resolution. The learned judge concluded that, in this case, the application of the Libyan Government would have been rejected by the Court in any case, as the application was based on the Montreal Convention and not on the general customary international law principle *aut didere aut judicare*. Judge Oda was also unequivocal in his view that the Security Council Resolution would prevail over any established rule of international law.

Judge Ni on the other hand, observed that the Security Council and the International Court of Justice could simultaneously exercise their respective functions without being excluded by each other. Citing the arbitration that came up before the ICJ in respect of the United States diplomatic consular staff in Teheran, Judge Ni quoted from that judgment:

> . . .it is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important and sometimes decisive factor in promoting the peaceful settlement of the dispute.

This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that:

> In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.[96]

[95] I.C.J. Reports 1980, 129.

[96] I.C.J. Reports 1980, paragraph 40.

Judge Ni also analyzed Article 24 of the United Nations Charter which provides:

> In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security. . . .

The learned judge reasoned the Charter did not confer exclusive responsibility upon the Security Council and observed that the Council has functions of a political nature assigned to it whereas the Curt exercised purely judicial functions. According to Judge Ne therefore, both organs could perform their separate but complementary functions with respect to the same events. On the above reasoning, Judge Ne concluded that since the Court held independent jurisdiction, it could interpret the applicable law, which in this case was Article 14(1) of the Montreal Convention.[97] The ICJ could therefore, according to Judge Ni, by no means be pre-empted by a Security Council resolution, in its exercise of jurisdiction and application of the principles of international law.

Judges Evensen, Tarassov, Guillaume, and Aguila Mawdsley expressed their collective opinion that prior to the adoption by the Security Council of Resolution 748 (1992), The United States and the United Kingdom, although having the right to request extradition, could only take measures towards ensuring such extradition that were consistent with the principles of international law. With the Resolution in force however, the judges concluded that the Court was precluded from indicating provisional measures against the United States.

Judge Lachs, although in a separate opinion declared that the ICJ was bound to respect the binding decisions of the Security Council, seems to have recognized the co-existence of the two institutions, and the right of the Court to render its opinion irrespective of the application of Security Council resolutions. Judge Lachs said:

> The framers of the Charter, in providing for the existence of several main organs, did not effect a complete separation of powers, nor indeed is one to suppose that such was their aim. Although each organ has been allotted its own Chapter or Chapters, the functions of two of them, namely the General Assembly and the Security Council, also pervade other Chapters other than their own. Even the International Court of Justice receives, outside its own Chapter, a number of mentions which tend to confirm its role as the general guardian of legality within the system. In fact the Court is the Guardian of legality for the international community as a whole, both within and without the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction.

Two main organs of the United Nations have the delivery of binding decisions explicitly included in their powers under the Charter: the Security Council and the International Court of Justice. There is no doubt that the Court's task is "to ensure

[97] Article 14(1) of the Montreal Convention requires any dispute between two or more Contracting States concerning the interpretation or application of the Convention which cannot be settled through negotiation to be, at the request of one of them, submitted to arbitration. The provision goes on to say that if within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

respect for international law. . . ."[98] It is its principal guardian. Now, it has become clear that the dividing line between political and legal disputes is blurred, as law becomes ever more frequently an integral element of international controversies. The Court, for reasons well known so frequently shunned in the past, is thus called upon to play an even greater role. Hence it is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony – though not, of course, in concert – and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers. In the present case the Court was faced with a new situation which allowed neither room for further analysis nor the indication of effective interim measures. The order made should not, therefore, be seen as an abdication of the Court's powers; it is rather a reflection of the system within which the Court is called upon to render justice.[99]

Judge Shahabuddeen, recognizing that there is no superior authority to that of the Security Council, added in his opinion that treaty obligations can be overridden by a decision of the Security Council's sanctions. Addressing the critical question whether a decision of the Security Council may override the legal rights of States, Judge Shahabuddeen did not attempt an answer, but merely concluded that such a decision may stand in the way of the legal rights of a State or its subjects being judicially scrutinized. Judge Bedjaoui in his opinion added to the opinion of Judge Shahabuddeen, saying that as a rule, the International Court of Justice does not exercise appellate jurisdiction over the Security Council.[100] The learned judge however, strongly dissented from the views of his colleagues which recognised that a Security Council resolution completely pre empted the jurisdiction of the International Court of Justice and effectively precluded the latter from performing its judicial functions. Judge Bedjaoui stringently maintained that there were two aspects to the problem between Libya and the United States on this issue – political and judicial. In his view, although it was not possible for the Court to override the Security Council Resolution, the Court was by no means precluded from declaring provisional measures, as applied for by Libya, even if such a declaration by the Court was rendered destitute of effect by the Security Council Resolution.[101]

Judge Weeramantry, concurring with Judge Bedjaoui, conceded that although Article 25 of the United Nations Charter required member States of the United Nations to accept and carry out decisions of the Security Council, the Court was not deprived of its jurisdiction in issuing provisional measures as applied for by Libya. Adding that the International Court of Justice and the Security Council were created by the same Charter to fulfil the common purposes and principles of the United Nations, Judge Weeramantry concluded that the two agencies are complementary

[98]I.C.J. Reports 1949, 35.

[99]I.C.J. Reports 1980, 138–139.

[100]I.C.J. Reports 1980, 140.

[101]I.C.J. Reports 1980, 155–156.

to each other, each performing a special role assigned to it. The Court was however, unlike most courts that were vested with domestic jurisdictions, not enabled to sit in review of the executive (which in this context was the Security Council). The dichotomy arose, in Judge Weeramantry's mind, when the principal judicial organ of the United Nations was restrained by decisions of its executive arm when deciding, according to the principles of international law, disputes that are submitted to it. The conclusions reached by judge Weeramantry were based on the Kelsenian observation that the Security Council and the General Assembly were only quasi-judicial organs of the United Nations and that the Security Council was by no means a judicial organ since its members were not independent;[102] and the Court ought to collaborate (emphasis added) with the Security Council if the circumstances so require.[103] Judge Weeramantry therefore emphasised that the Court must at all times preserve its independence, particularly in view of the fact that Article 24(2) of the Charter provides that the Security Council Shall act in accordance with the purposes and principles of the United Nations, which are set out in Article 1(1) of the Charter as being those aims to settle international disputes and situations that might lead to breaches of the peace, according to the principles of justice and international law.

The essence of these views of the learned judges of the ICJ is that the complimentary roles played by the United Nations Security Council and the ICJ would devolve responsibility on States to respect both these organs on the subject of extradition of private offenders who unlawfully interfere with civil aviation.

IV. The Condonation Theory

The emergence of the Condonation Theory was almost concurrent with the *Jane* case[104] decided in 1925 which emerged through the opinions of scholars who belonged to a school of thought that believed that States became responsible for private acts of violence not through complicity as such but more so because their refusal or failure to bring offenders to justice, which was tantamount to ratification of the acts in question or their condonation.[105] The theory was based on the fact that it is not illogical or arbitrary to suggest that a State must be held liable for its failure to take appropriate steps to punish persons who cause injury or harm to others for the reason that such States can be considered guilty of condoning the criminal acts and therefore become responsible for them.[106] Another reason attributed by

[102]Kelsen (1951, pp. 476–477). See I.C.J. Reports 1957 *supra* note 14, 167.

[103]I.C.J. Reports 1959, *Id*., 168.

[104]Laura M.B. Janes (USA) v. United Mexican States (1925) 4 R Intl Arb Awards 82.

[105]*Black's Law Dictionary* defines condonation as "pardon of offense, voluntary overlooking implied forgiveness by treating offender as if offense had not been committed".

[106]Laura M.B. Janes (USA) v. United Mexican States (1925) 4 R Intl Arb Awards 82, at 92.

scholars in support of the theory is that during that time, arbitral tribunals were ordering States to award pecuniary damages to claimants harmed by private offenders, on the basis that the States were being considered responsible for the offences.[107]

The responsibility of governments in acting against offences committed by private individuals may sometimes involve condonation or ineptitude in taking effective action against terrorist acts, in particular with regard to the financing of terrorist acts. The United Nations General Assembly, on 9 December 1999, adopted the International Convention for the Suppression of the Financing of Terrorism,[108] aimed at enhancing international co-operation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.

The Convention, in its Article 2 recognizes that any person who by any means directly or indirectly, unlawfully or, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any act which constitutes an offence under certain named treaties, commits an offence. One of the treaties cited by the Convention is the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.[109]

The Convention for the Suppression of the Financing of Terrorism also provides that, over and above the acts mentioned, providing or collecting funds toward any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in the situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act, would be deemed an offence under the Convention.

The United Nations has given effect to this principle in 1970 when it proclaimed that:

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[110]

Here, the words *encouraging* and *acquiescing in organized activities within its territory directed towards the commission of such acts* have a direct bearing on the

[107]Hyde (1928, pp. 140–142).

[108]International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999.

[109]A/52/653, 25 November 1997.

[110]Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV) 24 October 1970.

concept of condonation and would call for a discussion about how States could overtly or covertly encourage the commission of such acts. One commentator[111] identifies three categories of such support: *Category I* support entails protection, logistics, training, intelligence, or equipment provided terrorists as a part of national policy or strategy; *Category II* support is not backing terrorism as an element of national policy but is the toleration of it; *Category III* support provides some terrorists a hospitable environment, growing from the presence of legal protections on privacy and freedom of movement, limits on internal surveillance and security organizations, well-developed infrastructure, and émigré communities

Another commentator[112] discusses what he calls the *separate delict theory'* in State responsibility, whereby the only direct responsibility of the State is when it is responsible for its own wrongful conduct in the context of private acts, and not for the private acts themselves. He also contends that indirect State responsibility is occasioned by the State's own wrong-doing in reference to the private terrorist conduct. The State is not held responsible for the act of terrorism itself, but rather for its failure to prevent and/or punish such acts, or for its active support for or acquiescence in terrorism.[113] Arguably the most provocative and plausible feature in this approach is the introduction by the commentator of the desirability of determining State liability on the theory of causation. He emphasizes that:

The principal benefit of the causality based approach is that it avoids the automatic rejection of direct State responsibility merely because of the absence of an agency relationship. As a result, it potentially exposes the wrong-doing State to a greater range and intensity of remedies, as well as a higher degree of international attention and opprobrium for its contribution to the private terrorist activity.[114]

The causality principle is tied in with the rules of State Responsibility enunciated by the International Law Commission and Article 51 of the United Nations Charter which states that nothing in the Charter will impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. The provision goes on to say that measures taken by Members in the exercise of this right of self-defense will be immediately reported to the Security Council and will not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The International Law Commission has established that a crime against the peace and security of mankind entails individual responsibility, and is a crime of aggression.[115] A further link drawing civil aviation to the realm of international

[111]Metz (2002).

[112]Becker (2006).

[113]Becker (2006, Chap. 2, p. 67).

[114]Becker (2006, p. 335).

[115]Draft Code of Crimes Against the Peace and Security of Mankind, International Law Commission Report, 1996, Chapter II Article 2.

peace and security lies in the Rome Statute of the International Criminal court, which defines a war crime, *inter alia*, as intentionally directing attacks against civilian objects; attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objects; employing weapons, projectiles, and material and methods of warfare that cause injury.[116] The Statute also defines as a war crime, any act which is intentionally directed at buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.[117]

V. The Role of Knowledge

Another method of determining State responsibility lies in the determination whether a State had actual or presumed knowledge of acts of its instrumentalities, agents or private parties which could have alerted the State to take preventive action. International responsibility of a State cannot be denied merely on the strength of the claim of that State to sovereignty. Although the Chicago Convention in Article 1 stipulates that the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory, the effect of this provision cannot be extended to apply to State immunity from responsibility to other States. Professor Huber in the *Island of Palmas* case[118] was of the view:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. . .Territorial sovereignty. . .involves the exclusive right to display the activities of a State.[119]

Professor Huber's definition, which is a simple statement of a State's rights, has been qualified by Starke as the residuum of power which a State possesses within the confines of international law.[120] Responsibility would devolve upon a State in whose territory an act of unlawful interference against civil aviation might occur, to other States that are threatened by such acts. The International Court of Justice (ICJ) recognised in the *Corfu Channel* Case:

> Every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[121]

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[116]Rome Statute of the International Criminal Court, Article 8.2 (b) (ii), (V) and (XX).

[117]Rome Statute of the International Criminal Court, Article 8.2 (b) (XXIV).

[118]The *Island of Palmas* Case (1928) 11 U.N.R. I.A.A. at 829.

[119]The *Island of Palmas* Case (1928) 11 U.N.R. I.A.A. at 829.

[120]Starke (1989, p. 3).

[121](1949) *I.C.J.R.* 1, 22.

In the famous *Corfu Channel* case, the International Court of Justice applied the subjective test and applied the fault theory. The Court was of the view that:

> It cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that the State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.[122]

The Court, however, pointed out that exclusive control of its territory by a State had a bearing upon the methods of proof available to establish the involvement or knowledge of that State as to the events in question.

Apart from the direct attribution of responsibility to a State, particularly in instances where a State might be guilty of a breach of treaty provisions, or violate the territorial sovereignty of another State, there are instances where an act could be imputed to a State.[123] Imputability or attribution depends upon the link that exists between the State and the legal person or persons actually responsible for the act in question. The legal possibility of imposing liability upon a State wherever an official could be linked to that State encourages a State to be more cautious of its responsibility in controlling those responsible for carrying out tasks for which the State could be ultimately held responsible. In the same context, the responsibility of placing mines was attributed to Albania in the *Corfu Channel* case since the court attributed to Albania the responsibility, since Albania was known to have knowledge of the placement of mines although it did not know who exactly carried out the act. It is arguable that, in view of the responsibility imposed upon a State by the Chicago Convention on the provision of air navigation services, the principles of immutability in State responsibility could be applied to an instance of an act or omission of a public or private official providing air navigation services.

The sense of international responsibility that the United Nations ascribed to itself had reached a heady stage at this point, where the role of international law in international human conduct was perceived to be primary and above the authority of States. In its Report to the General Assembly, the International Law Commission recommended a draft provision which required:

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[122]The *Corfu Channel* Case, ICJ Reports, 1949, p. 4.

[123]There are some examples of imputability, for example the incident in 1955 when an Israeli civil aircraft belonging to the national carrier El Al was shot down by Bulgarian fighter planes, and the consequent acceptance of liability by the USSR for death and injury caused which resulted in the payment of compensation to the victims and their families. See 91 *ILR* 287. Another example concerns the finding of the International Court of Justice that responsibility could have been be imputed to the United States in the *Nicaragua* case, where mines were laid in Nicaraguan waters and attacks were perpetrated on Nicaraguan ports, oil installations and a naval base by persons identified as agents of the United States. See *Nicaragua* v. *the United States*, ICJ Reports 1986, 14. Also, 76 *ILR* 349. There was also the instance when the Secretary General of the United Nations mediated a settlement in which a sum, *inter alia* of $7 million was awarded to New Zealand for the violation of its sovereignty when a New Zealand vessel was destroyed by French agents in New Zealand. See the *Rainbow Warrior* case, 81 *AJIL*, 1987 at 325. Also in 74 *ILR* at 241.

> Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.[124]

This principle, which forms a cornerstone of international conduct by States, provides the basis for strengthening international comity and regulating the conduct of States both internally – within their territories – and externally, towards other States. States are effectively precluded by this principle of pursuing their own interests untrammelled and with disregard to principles established by international law.

The United Nations General Assembly, in its Resolution 56/83,[125] adopted as its Annex the International Law Commission's *Responsibility of States for Internationally Wrongful Acts* which recognizes that every internationally wrongful act of a State entails the international responsibility of that State[126] and that there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State.[127] Article 5 of the ILC document provides that the conduct of a person or entity which is not an organ of State but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of State under international law, provided the person or entity is acting in that capacity in the particular instance.

In the *Pan Am* case, where an aircraft was destroyed over Lockerbie, which has been referred to earlier in this article, the British allegation against Libya's involvement in the act of terrorism was that the accused individuals (Libyan nationals) had acted as part of a conspiracy to further the purposes of the Libyan Intelligence Services using criminal means that amounted to terrorism. The United Kingdom appeared to stress the point in the UN Security Council that Libya had failed to respond to the request for extradition of the implicated Libyan nationals, and arguably as a consequence, the Security Council adopted Resolution 731 on 21 January 1992 which expressed concerns over certain investigations which imputed reprehensibility to officials of the Libyan Government.[128]

The above discussion leads one to conclude that the responsibility of a State for private acts of individuals which unlawfully interfere with civil aviation is determined by the quantum of proof available that could establish intent or negligence of the State, which in turn would establish complicity or condonation on the part of the State concerned. One way to determine complicity or condonation is to establish the extent to which the State adhered to the obligation imposed upon it by international law and whether it breached its duty to others. In order to exculpate itself, the State concerned will have to demonstrate that either it did not tolerate the offence or that

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[124]Report of the International Law Commission to the General Assembly on the Work of the 1st Session, A/CN.4/13, June 9 1949, at 21.

[125]A/RES/56/83, 56th Session, 28 January 2002.

[126]A/RES/56/83, Article 1.

[127]A/RES/56/83, Article 2.

[128]For a discussion on this point see Jorgensen (2000, pp. 249–254).

it ensured the punishment of the offender. *Brownlie* is of the view that proof of such breach would lie in the causal connection between the private offender and the State.[129] In this context, the act or omission on the part of a State is a critical determinant particularly if there is no specific intent.[130] Generally, it is not the intent of the offender that is the determinant but the failure of a State to perform its legal duty in either preventing the offence (if such was within the purview of the State) or in taking necessary action with regard to punitive action or redress.[131]

Finally, there are a few principles that have to be taken into account when determining State responsibility for private acts of individuals that unlawfully interfere with civil aviation. Firstly, there has to be either intent on the part of the State towards complicit or negligence reflected by act or omission. Secondly, where condonation is concerned, there has to be evidence of inaction on the part of the State in prosecuting the offender. Thirdly, since the State as an abstract entity cannot perform an act in itself, the imputability or attribution of State responsibility for acts of its agents has to be established through a causal nexus that points the finger at the State as being responsible. For example, The International Law Commission, in Article 4 of its Articles of State Responsibility states that the conduct of any State organ which exercises judicial, legislative or executive functions could be considered an act of State and as such the acts of such organ or instrumentality can be construed as being imputable to the State. This principle was endorsed in 1999 by the ICJ which said that according to well established principles of international law, the conduct of any organ of a state must be regarded as an act of State.[132]

The law of State responsibility for private acts of individuals has evolved through the years, from being a straightforward determination of liability of the State and its agents to a rapidly widening gap between the State and non State parties. In today's world private entities and persons could wield power similar to that of a State, bringing to bear the compelling significance and modern relevance of the agency nexus between the State and such parties. This must indeed make States more aware of their own susceptibility.

VI. Profiling of Passengers

It is an incontrovertible fact that profiling is a useful tool in the pursuit of the science of criminology. Profiling is also a key instrument in a sociological context and therefore remains a sustained social science constructed through a contrived

[129]Brownlie (1983, p. 39).

[130]Report of the International Law Commission to the United Nations General Assembly, UNGOAR 56th Session, Supp. No. 10, *UN DOC A/56/10*, 2001 at 73.

[131]de Arechaga (1968, p. 535).

[132]Differences Relating to Immunity from Legal Process of a Special Rapporteur, ICJ Reports 1999, 62 at 87.

process of accumulation of single assumptions and propositions that flow to an eventual empirical conclusion. However, profiling raises well reasoned latent fears when based on a racial platform. Jonathan Turley, Professor of Constitutional Law at George Washington University, in his testimony before a United States House of Representatives Committee on Airport Security regarding the use of racial profiling to identify potentially dangerous persons observed:

> [R]acial profiling is to the science of profiling as forced confessions are to the art of interrogation. Like forced confessions, racial profiling achieves only the appearance of effective police work. Racial profiling uses the concept of profiling to shield or obscure a racist and unscientific bias against a particular class or group. It is the antithesis of profiling in that it elevates stereotypes over statistics in law enforcement.

Notwithstanding this telling analogy, and the apprehensions one might have against racial profiling, it would be imprudent to conclude that racial profiling is *per se* undesirable and unduly discriminatory, particularly in relation to profiling at airports which should essentially include some considerations of ethnic and national criteria. This article will examine the necessary elements that would go into effective and expedient airport profiling of potential undesirable passengers. It will also discuss legal issues concerned with the rights of the individual with regard to customs and immigration procedures. The rights of such persons are increasingly relevant from the perspective of ensuring air transport security and refusing carriage to embarking passengers who might show profiles of criminality and unruly persons on board.

VII. Airport Profiling

A legitimate profiling process should be based on statistically established indicators of criminality which are identified through a contrived aggregation of reliable factors. The application of this criterion to airport profiling would immediately bring to bear the need to apply nationality and ethnic factors to passenger profiles. Although one might validly argue that racial profiling would entail considerable social and political costs for any nation, while at the same time establishing and entrenching criminal stereotypes in a society, such an argument would be destitute of effect when applied to airport security which integrally involves trans boundary travel of persons of disparate ethnic and national origins. This by no means implies that racial profiling is a desirable practice. On the contrary, it is a demeaning experience to the person subjected to the process and a *de facto* travel restriction and barrier. It is also a drain on law enforcement resources that effectively preclude the use of proven and conventional uses of enforcement.

The sensitive conflict of interests between racial profiling *per se,* which at best is undesirable in a socio-political context, and airport profiling, raises interesting legal and practical distinctions between the two. Among these the most important distinction is that airport profiling is very serious business that may concern lives of

hundreds if not thousands in any given instance or event. Profiling should therefore be considered justifiable if all its aspects are used in screening passengers at airports. Nationality and ethnicity are valid baseline indicators of suspect persons together with other indicators which may raise a 'flag' such as the type of ticket a passenger holds (one way instead of return) and a passenger who travels without any luggage.

Racial profiling, if used at airports, must not be assumptive or subjective. It must be used in an objective and non discriminatory manner alongside random examinations of non-targeted passengers. All aspects of profiling, including racial and criminal profiling, should as a matter of course be included in the Computer Assisted Passenger Screening System (CAPS) without isolating one from the other. In this context the now popular system of compliance examination (COMPEX) is a non threatening, non discriminatory process which transcends the threshold debate on "profiling" by ensuring a balanced and proper use of profiling in all its aspects by examining "non targeted" passengers as well as on a random basis.

Another critical distinction to be drawn between discriminatory and subjective racial profiling on the one hand and prudent airport profiling on the other is the blatant difference between racism and racial profiling. The former is built upon the notion that there is a causal link between inherent physical traits and certain traits of personality, intellect or culture and, combined with it, the idea that some races are inherently superior to others. The latter is the use of statistics and scientific reasoning that identify a set of characteristics based on historical and empirical data. This brings to bear the clear difference between "hard profiling", which uses race as the only factor in assessing criminal suspiciousness and "soft profiling" which uses race as just one factor among others in gauging criminal suspiciousness.

Article 13 of the *Convention on International Civil Aviation* of 1944 (Chicago Convention), provides that the laws and regulations of a Contracting State as to the admission to and departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State. This provision ensures that a Contracting State has the right to prescribe its own internal laws with regard to passenger clearance and leaves room for a State to enact laws, rules and regulations to ensure the security of that State and its people at the airport. However, this absolute right is qualified to preclude unfettered and arbitrary power of a State, by Article 22 which makes each Contracting State agree to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation of aircraft between the territories of Contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance. Article 23 follows this trend to its conclusion by providing that each Contracting State undertakes, to the extend practicable, to establish customs and immigration procedures affecting air navigation in accordance with the practices which may be established or recommended from time to time pursuant to the Convention.

Annex 9 to the Chicago Convention (Facilitation) in Standard 3.2, recognizes that, in developing procedures aimed at the efficient application of border controls on passengers and crew, Contracting States shall take into account the application of aviation security, border integrity, narcotics control and immigration control measures, where appropriate. This Standard gives States the flexibility of enacting procedures, rules and regulations to ensure the security and integrity of their borders and view passengers with necessary caution.

The aims and objectives of the International Civil Aviation Organization (ICAO), as contained in Article 44 of the Chicago Convention are, *inter alia*, to ensure the safe and orderly growth of international civil aviation; meet the needs of the peoples of the world for safe, regular, efficient and economical air transport; and avoid discrimination between Contracting States. Annex 17 – *Security* to the Chicago Convention, in paragraph 2.1.1, identifies the main aim of aviation security as being the safeguarding of international civil aviation operations against acts of unlawful interference. These aims have been established by the international community with a view to ensuring that security and safety of civil aviation apply not only in the context of individual States, but also of their peoples, in accordance with the distinction made in the Preamble of the Chicago Convention.

The above-mentioned principles and aims make it abundantly clear that the role of ICAO and the international community is to consider the offence of unlawful interference with civil aviation in its entirety, as a generic term encompassing a wide range of offensive activity on the part of the perpetrators. This does not admit of the offence being restricted to a species or other category of offensive activity. It is for the above reason that the ICAO Assembly, at its 33rd Session, held subsequent to the events of 11 September 2001, adopted Resolution A33-2, strongly condemning all acts of unlawful interference against civil aviation wherever and by whomsoever and for whatever reason they are perpetrated. This all-encompassing approach to the offence of unlawful interference with civil aviation effectively precludes parochial assumptions that the offence would be recognizable as such only if it is perpetrated pursuant to or as an act which can only or mostly be perpetrated by a certain type of individual of a certain race, nationality or religious persuasion.

The first issue, that of encompassing aviation security under the umbrella of threats or considering aviation security as being affected only by certain acts, is therefore a critical consideration if a balanced and focussed approach to remedial action on aviation security were to be seriously addressed. Broadly considered, unlawful interference with civil aviation is an offence, which is any wrong that affects the security or well-being of civil aviation, in the context of persons and property, and creates an interest in the public in its suppression. The offence itself should therefore not be confused with a type of conduct or activity.

The second issue, within the purview of the security guidelines of the Chicago Convention, pertains to stereotyping and racial profiling of individuals in the pursuit of ensuring aviation security. In essence, racial profiling is intersectional in nature and may consist of multiple grounds of institutionalized discrimination such as nationality, race, age, gender, socio-economic status, disability, health

status, descent, language, class, culture and religion. At the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa from 31 August to 7 September 2001, the Conference, referring to the International Convention on the Elimination of All Forms of Racial Discrimination, urged States to implement or strengthen legislation and administrative measures prohibiting racial discrimination and related intolerance.

In its Declaration, the Conference urged States "to design, implement and enforce effective measures to eliminate the phenomenon popularly known as 'racial profiling' and comprising the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity".

It becomes important to draw attention to practices of racial profiling involving discrimination during civil aviation operations, at airports at departure and arrival, that have re-emerged, especially after the events of 11 September 2001. Such unacceptable practices, which are diametrically opposed to international tenets and norms of human rights, only succeed in causing insult and injury to individuals discriminated upon, creating rancour, and being totally inconsistent with the fundamental principles of civil aviation as enunciated in the Chicago Convention.

VIII. Profiling and the Right of Privacy

Profiling of airline passengers could be carried out primarily through examination of the passenger's passport. At its 33rd Session, held in September/October 2001, the ICAO Assembly, while acknowledging that new measures should be taken to enhance security, observed that such measures should not impede ICAO's ongoing work in improving border control systems at airports and ensuring the smooth flow of passengers and cargo. Consequently, the Assembly stressed that ICAO's work on these issues should continue on an urgent basis. The machine readable travel document was among specific areas mentioned by the Assembly as requiring urgent continuing work, in keeping with UN Security Council Resolution 1373 of 23 September 2001, which re-affirmed the need for continuing work to ensure the integrity and security of passports and other travel documents. In this context, the Assembly agreed that all contracting States should be urgently encouraged to issue their travel documents in machine readable format and enhance their security in accordance with ICAO specifications, while introducing automated travel document reading systems at their international airports.

These measures of the ICAO Assembly bring to bear the essential link between aviation security and facilitation and the fact that one cannot be ignored while the other is given some prominence, as is the case with aviation security at the present time.

The data subject, like any other person, has an inherent right to his privacy. The subject of privacy has been identified as an intriguing and emotive one. The right to privacy is inherent in the right to liberty, and is the most comprehensive of rights

and the right most valued by civilized man. This right is susceptible to being eroded, as modern technology is capable of easily recording and storing dossiers on every man, woman and child in the world. The data subject's right to privacy, when applied to the context of the machine readable travel document (MRTD) is brought into focus by Alan Westin who says:

> Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information is communicated to others.

There are three rights of privacy relating to the storage and use of personal data:

(1) The right of an individual to determine what information about oneself to share with others, and to control the disclosure of personal data.
(2) The right of an individual to know what data is disclosed, and what data is collected and where such is stored when the data in question pertains to that individual; the right to dispute incomplete or inaccurate data.
(3) The right of people who have a legitimate right to know in order to maintain the health and safety of society and to monitor and evaluate the activities of government.

It is incontrovertible therefore that the data subject has a right to decide what information about oneself to share with others and more importantly, to know what data is collected about him. This right is balanced by the right of a society to collect data about individuals that belong to it so that the orderly running of government is ensured.

The role played by technology in modern day commercial transactions has affected a large number of activities pertaining to human interaction. The emergence of the information superhighway and the concomitant evolution of automation have inevitably transformed the social and personal life styles and value systems of individuals, created unexpected business opportunities, reduced operating costs, accelerated transaction times, facilitated accessibility to communications, shortened distances, and removed bureaucratic formalities. Progress notwithstanding, technology has bestowed on humanity its corollaries in the nature of automated mechanisms, devices, features, and procedures which intrude into personal lives of individuals. For instance, when a credit card is used, it is possible to track purchases, discovering numerous aspects about that particular individual, including, food inclination, leisure activities, and consumer credit behaviour. In similar vein, computer records of an air carrier's reservation system may give out details of the passenger's travel preferences, *inter alia*, seat selection, destination fondness, ticket purchasing dossier, lodging keenness, temporary address and telephone contacts, attendance at theatres and sport activities, and whether the passenger travels alone or with someone else. This scheme of things may well give the outward perception of surveillance attributable to computer devices monitoring individuals' most intimate activities and preferences, leading to the formation of a genuine "traceable society".

A good airport profiling system must originate from a repository of research based on the characteristics of a person evoking criminal suspiciousness. These characteristics must match the automated passenger information of airlines including the

API technology generated prior to a flight. In addition, they must also be consistent with information on travel documents used by passengers. One way of accomplishing this objective is to use the profiles of known or suspected criminals and terrorist categories. Additionally, a diligent and energetic State instrumentality must be established for the purpose of constantly monitoring and ensuring that airport profiling does not discriminate between categories of persons on a subjective basis and that a balanced system of compliance examination is in place.

In the ultimate analysis, the socio-legal relevance of non discrimination in the profiling process lies in the importance of respecting and safeguarding human rights and the rights of certain identified ethnic groups which may form a minority in a particular jurisdiction. Due recognition and active protection of a minority's rights pertaining to racial, cultural and religious issues is the first characteristic of a prudent and balanced profiling process. This feature guarantees freedom from discrimination based on race, language, nationality and national origin or religion. Western democracies, particularly after World War II and the Nuremberg trials which ensured punishment for those responsible for the organized murder of thousands of innocent persons by the commission of atrocities during the war, have been particularly sensitive to the need to ensure human rights. This has led to a gradual evolution where focus on collective rights of national minorities has replaced earlier emphasis on individual rights.

The protection of human rights is the most significant and important task for a modern State, particularly since multi ethnic States are the norm in today's world. Globalization and increased migration across borders is gradually putting an end to the concept of the nation State, although resistance to reality can be still seen in instances where majority or dominant cultures impose their identity and interests on groups with whom they share a territory. In such instances, minorities frequently intensify their efforts to preserve and protect their identity, in order to avoid marginalization. Polarization between the opposite forces of assimilation on the one hand and protection of minority identity on the other inevitably causes increased intolerance and eventual armed ethnic conflict. In such a scenario, the first duty of governance is to ensure that the rights of a minority society are protected.

Racial profiling is an issue related to minority rights and must not be ignored in essence, racial profiling is intersectional in nature and may consist of multiple grounds of institutionalized discrimination such as nationality, race, age, gender, socio-economic status, disability, health status, descent, language, class, culture and religion. At the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa from 31 August to 7 September 2001, the Conference, referring to the International Convention on the Elimination of All Forms of Racial Discrimination, urged States to implement or strengthen legislation and administrative measures prohibiting racial discrimination and related intolerance.

Truth and justice are unhappily mutually exclusive. While in legal terms, legislative parameters will define acts and qualitize their reprehensibility, in truth, speech and conduct that ingratiate themselves to a society have to be addressed politically. This is the dilemma that legislators will face in dealing with racial

discrimination. Racial discrimination primarily erode ethical boundaries and convey an unequivocal message of contempt and degradation. The operative question then becomes ethical, as to whether societal mores would abnegate their vigil and tolerate some members of society inciting their fellow citizens to degrade, demean and cause indignity to other members of the very same society, with the ultimate aim of harming them. Conversely, the question arises as to whether there is any obligation on a society to actively protect all its members from indignity and physical harm caused by hatred. The answer to both these questions lies in the fundamental issue of restrictions on racial hatred and discrimination and the indignity that one would suffer in living in a society that might tolerate such discrimination. Obviously, a society committed to protecting principles of social and political equality cannot look by and passively endorse such atrocities, and much would depend on the efficacy of a State's coercive mechanisms. These mechanisms must not only be punitive, but should also be sufficiently compelling to ensure that members of a society not only respect a particular law but also internalize the effects of their proscribed acts.

The intrinsic value to a society and perhaps to the whole world, of eschewing racial and national discrimination is portrayed in the aftermath of the Holocaust – the defining event of this century. Human rights in our lifetime cannot be comprehended without touching our own conceptual proximity to this and other recent events which marred the dignity of human civilization. The result of the Holocaust was the adoption by the United Nations of the Universal Declaration of Human Rights which has now stood its ground over the past 50 plus years. The Universal Declaration, which has flourished both internationally and nationally, has been supplemented by the International Covenant on Economic, Social and Cultural Rights adopted in 1966. Both the Universal Declaration and the International Covenant have committees established to oversee their implementation. The Universal Declaration of Human Rights is composed of 30 articles which asserts a human being's just rights to civilized and dignified living. In this context, we are traversing a thin line between genuine, acceptable processes of profiling possible criminal elements and the danger of racial and national discrimination.

B. Other Aspects of Responsibility

I. Prelude to the Rome Convention of 1952

Even prior to ICAO's coming into being in 1944, there existed a Rome Convention of 1933[133] which provided that damage caused by an aircraft in flight to persons or property on the surface gave rise to a right to compensation on proof only that

[133]Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, signed at Rome on 29 May 1933. Weishaupt (1979, p. 223).

damage exists and that it is attributable to the aircraft.[134] This included damage caused by an object of any kind falling from the aircraft, including in the event of the proper discharge of ballast or of jettison made in case of necessity and instances where damage was caused to any person on board the aircraft. Exceptions were made in the case of an act unconnected with the management of the aircraft which was committed intentionally by a person other than a crew member and where inability of the operator, his servants or agents to prevent such an act was evident. For purposes of the Convention, the aircraft was deemed to be 'in flight' from the beginning of the operations of departure until the end of the operations of arrival.[135] The operator, on whom liability devolved, was considered to be any person who had the aircraft at his disposal and who made use of the aircraft for his own account. The Convention, although not based on principles of fault liability, mitigated damages if the person injured was found to have contributed to the damage by his own negligence.

Article 12 of the Convention required every aircraft registered in the territory of a high contracting party to obtain insurance coverage relating to flight over the territory of a high contracting party, determined upon liability limits set in Article 8 which made the operator liable for each occurrence up to an amount determined at the rate of 250 francs for each kilogramme of the weight of the aircraft[136] to a limit not less than 600,000 francs, nor greater than 2,000,000 francs.

A mandatory requirement in the 1933 Convention for insurance coverage gave rise to the need to specify provisions regarding legalities. A Protocol was concluded in Brussels in September 1938[137] which linked Article 12 of the 1933 Rome Convention to principles of insurance, giving the insurer the right to invoke a defence (in addition to the defence of contributing negligence) in the event the insurance coverage ceased to have effect; the damage occurred outside territorial limits prescribed in the contract in instances not resulting from *force majeure,* justifiable deviation of the aircraft; negligence in piloting; or if the damage was the direct consequences of international armed conflict or civil disorder.

At the 23rd Meeting of the ICAO Legal Committee, held on 21 January 1950, where the Committee was considering a draft Convention to replace the 1933

[134]Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, signed at Rome on 29 May 1933, Article 2.

[135]The meaning imputed to the words "beginning of the operations of departure until the end of the operations of arrival" is debatable. It is interesting that an earlier treaty, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) signed at Warsaw on 12 October 1929 applies liability for accidents taking place on board the aircraft or any of the operations of embarking or disembarking. The word "on board" has been interpreted judicially in different circumstances. See Abeyratne (2001, pp. 197–198).

[136]The weight of the aircraft was the weight with total maximum load as indicated in the certificate of airworthiness or any other official document.

[137]Protocol Supplementing the Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface (signed at Rome on 29 May 1933) concluded at Brussels, on 30 September 1938. Article 2 of the Protocol provides that the Protocol forms an integral part of the 1933 Convention.

Convention, the Committee observed that the 1933 Convention not only applied to damage caused through contact but also to damage caused through fire or explosion or any person or things falling from the aircraft.[138] The Committee placed on record its view that the 1933 Rome Convention's definition of "in flight" caused considerable difficulty, along with its concern with regard to the double system enforced by the Convention of a ceiling of 2,000,000 francs on liability which was made unlimited for gross negligence or wilful misconduct on the part of the operator or his servants or agents or if the operator has not furnished adequate security in accordance with the Convention to cover his liability.[139] The Legal Committee suggested that a new Convention should raise the liability of the operator to 6,000,000 francs.

The ICAO Air Transport Committee (ATC), at the 14th Session of the Council, in December 1951, considered a draft Convention developed by the Legal Committee at its 7th Session in Mexico City. The ATC noted that the Mexico City Draft Convention, like the original 1933 Rome Convention, attempted to regulate the liability of aircraft operators to persons on the surface who sustained injury, death or property damage as a result of aircraft accidents involving foreign aircraft. The ATC noted that the Legal Committee wished States to balance legitimate interests of aircraft operators engaged in international air transport against those of the general public who may suffer as third parties in accident involving foreign aircraft.[140]

It was recognized that the operator needed protection against the risk of catastrophic loss and the draft Convention (1952) accorded him this protection by providing that in no one accident shall his liability to third on the surface exceed a certain maximum figure. On the other hand, it was also noted that the third party on the surface needed the assurance that in accidents in which he suffered loss, he would be able to recover, with a minimum of litigation, the full amount of his damages. The courts gave him this assurance by:

(a) Allowing him to sue where the damage occurred
(b) In certain cases a right of direct action against the insurer
(c) Taking from the operator the "no negligence" defence and ensuring adequate recompense[141]

Representatives of the aviation insurers expressed the view that the policy suggested in the Draft Convention, of making aircraft operators absolutely liable for damage to third parties on the surface, would likely have resulted in a substantial increase in claims and settlements[142] and therefore the Legal Committee had

[138]Minutes of the 23rd Meeting of the Legal Committee, Annex VIII Appendix D, p. 355.
[139]Minutes of the 23rd Meeting of the Legal Committee, Annex VIII Appendix D, p. 357.
[140]AT-WP/247, 7/12/51, p. 3.
[141]AT-WP/247, 7/12/51, p. 4.
[142]AT-WP/224, 10 October 51 at 10.

definitely decided on recommending for the new Convention unconditional liability except in four cases:

- When an aircraft was made use of without the consent of the owner
- When damage was a direct consequence of armed conflict or civil disturbance
- When the operator was deprived of the use of the aircraft by public authority
- When the injured person was himself responsible for injury due to negligence or other wrongful act[143]

The Committee believed that the limits should not be set so high as to cause the cost of third party insurance to become an excessive burden to the development of air navigation. Furthermore, it was thought that the limits should be set high enough to cover compensation to third parties in all but extremely rare catastrophic circumstances.[144]

The basic issues regarding compensation (in chapter 3 of the Draft Convention) were whether the Convention should include provisions indicating that Contracting States would accept certain specified proof that aircraft wishing to fly over their territory were adequately insured according to the terms of the Convention, proof to the effect that:

(a) The operator was insured for the aircraft in question against his liability under the Convention.
(b) The insurer was financially sound and able to meet his commitments.
(c) Necessary foreign exchange would be made available so that the compensation could be paid in the currency of the third party.[145]

Following the recommendations of the Legal Committee, the ATC presented to the Council some draft comments – which included, *inter alia*, special reduced limits for gliders, since they did not consume fuel, had no weight, making damage caused by gliders minimal.[146]

It was also recommended to the Council the definition of "in flight" as existing in the 1933 Rome Convention was inappropriate in the case of helicopters as they did not have a landing run.[147]

It is worthy of note that the Chicago Conference of 1944 did not make any reference to the Rome Convention of 1933 although the Conference encouraged States to give consideration to the early calling of an international conference on private air law for the purpose of adopting a convention dealing with transfer of title to aircraft and to ratify or adhere to a Convention for the Unification of Certain

[143]AT-WP/224, 10 October 51 at 10.

[144]At that time it was statistically shown that aircraft accidents involving large third party claims occurred infrequently. See AT-WP/247, 10 October 1951, p. 6.

[145]AT-WP/247, 7/11/51, p. 11.

[146]Economic Aspects of the Mexico City Draft Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. AT-WP/248 7/12/51, p. 2.

[147]C-WP/1077, 10/12/51, p. 2.

Rules Relating to the Precautionary Attachment of Aircraft, also done in Rome in 1933. Following the Chicago Conference, the Interim Assembly of PICAO in 1946 also made no mention of the Rome Convention of 1933 relating to damage caused by aircraft to third parties on the surface.

At its first session of the ICAO Assembly in 1947, certain delegates pointed out that their Governments had been advised not to ratify that Convention in view of the changing conditions of air transport. Consequently, task of revising that Convention was placed on a sub-Committee, and thereafter by a Commission and the Plenary of the Assembly itself, which examined the work programme of the Legal Committee which had just been established by that Assembly. A high priority was given to that revision; discussions having followed immediately after the questions of recognition of rights in aircraft, the Warsaw Convention and definitions.

At its first session held in Brussels in September 1947 the Legal Committee appointed a Sub-Committee on the Revision of the Rome Convention.

From that moment the revision of the Rome Convention was continuously under study, firstly by a sub-committee which held three sessions and thereafter by a rapporteur entrusted with the preparation of a draft text, leading finally, during three sessions, to its examination by the Committee itself and the Legal Commission of the Assembly. *Ad hoc* sub-committees were also established from time to time for the consideration of special problems. All these bodies together held a total of 160 meetings, averaging approximately three hours each.[148]

During this phase of the work, the Organization maintained close contact with the Governments and the international organizations concerned. The Governments were consulted six times and not less than 20 States sent detailed answers. The international organizations, and in particular the International Air Transport Association and the International Union of Aviation Insurers, were represented at almost all the meetings. The Committee, the Commission and the various sub-committees had before them numerous studies prepared by the Secretariat.[149]

The result of that work was the adoption by the Legal Committee at its seventh session (Mexico City, January 1951) of a "final draft" which was transmitted to the Council together with a report by the Chairman. The Committee recommended that the Council circulate the draft "with such comments as it deems appropriate".

In accordance with that recommendation and a suggestion of the Chairman of the Legal Committee, the Council, on 6 April 1951, referred the draft Convention to the ATC for consideration and report on the desirability, on economic and policy grounds, of the retention or modification of Chapter III (Security for Operator's Liability) and Article II (Limits of Liability) and on such other economic aspects as the Committee deemed appropriate for comment. The Council also decided not to request Contracting States to provide material to assist the ATC in its study of the two specific questions referred to it; however, on 20 June 1951, a questionnaire was

[148]See Vol. II, page 13 for the details of the meetings.

[149]These studies are listed in Vol. II, page 14.

circulated to States in order to obtain further factual information bearing on the economic aspects of the convention.

The ATC studied the questions referred to it at its session of October–December 1951 during 11 meetings, and reported to the Council, which on 12 December 1951 approved comments on the economic aspects of the draft convention for transmission to States. The Council reserved the possibility of further study of the expression "in flight" and of comment on other points.[150]

II. The Rome Convention of 1952

Even prior to ICAO's coming into being in 1944, there existed a Rome Convention of 1933[151] which provided that damage caused by an aircraft in flight to persons or property on the surface gave rise to a right to compensation on proof only that damage exists and that it is attributable to the aircraft.[152] This included damage caused by an object of any kind falling from the aircraft, including in the event of the proper discharge of ballast or of jettison made in case of necessity and instances where damage was caused to any person on board the aircraft. Exceptions were made in the case of an act unconnected with the management of the aircraft which was committed intentionally by a person other than a crew member and where inability of the operator, his servants or agents to prevent such an act was evident. For purposes of the Convention, the aircraft was deemed to be 'in flight' from the beginning of the operations of departure until the end of the operations of arrival.[153] The operator, on whom liability devolved, was considered to be any person who had the aircraft at his disposal and who made use of the aircraft for his own account. The Convention, although not based on principles of fault liability, mitigated damages if the person injured was found to have contributed to the damage by his own negligence.

Article 12 of the Convention required every aircraft registered in the territory of a high contracting party to obtain insurance coverage relating to flight over the territory of a high contracting party, determined upon liability limits set in Article 8 which made the operator liable for each occurrence up to an amount determined at the rate

[150]No supplementary comment was formulated by the Council.

[151]Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, signed at Rome on 29 May 1933. Weishaupt (1979, p. 223).

[152]Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, signed at Rome on 29 May 1933, Article 2.

[153]The meaning imputed to the words "beginning of the operations of departure until the end of the operations of arrival" is debatable. It is interesting that an earlier treaty, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) signed at Warsaw on 12 October 1929 applies liability for accidents taking place on board the aircraft or any of the operations of embarking or disembarking. The word "on board" has been interpreted judicially in different circumstances. See Abeyratne (2001, pp. 197–198).

of 250 francs for each kilogramme of the weight of the aircraft[154] to a limit not less than 600,000 francs, nor greater than 2,000,000 francs.

A mandatory requirement in the 1933 Convention for insurance coverage gave rise to the need to specify provisions regarding legalities. A Protocol was concluded in Brussels in September 1938[155] which linked Article 12 of the 1933 Rome Convention to principles of insurance, giving the insurer the right to invoke a defence (in addition to the defence of contributing negligence) in the event the insurance coverage ceased to have effect; the damage occurred outside territorial limits prescribed in the contract in instances not resulting from *force majeure,* justifiable deviation of the aircraft; negligence in piloting; or if the damage was the direct consequences of international armed conflict or civil disorder.

At the 23rd Meeting of the ICAO Legal Committee, held on 21 January 1950, where the Committee was considering a draft Convention to replace the 1933 Convention, the Committee observed that the 1933 Convention not only applied to damage caused through contact but also to damage caused through fire or explosion or any person or things falling from the aircraft.[156] The Committee placed on record its view that the 1933 Rome Convention's definition of "in flight" caused considerable difficulty, along with its concern with regard to the double system enforced by the Convention of a ceiling of 2,000,000 francs on liability which was made unlimited for gross negligence or wilful misconduct on the part of the operator or his servants or agents or if the operator has not furnished adequate security in accordance with the Convention to cover his liability.[157] The Legal Committee suggested that a new Convention should raise the liability of the operator to 6,000,000 francs.

The ICAO Air Transport Committee (ATC), at the 14th Session of the Council, in December 1951, considered a draft Convention developed by the Legal Committee at its 7th Session in Mexico City. The ATC noted that the Mexico City Draft Convention, like the original 1933 Rome Convention, attempted to regulate the liability of aircraft operators to persons on the surface who sustained injury, death or property damage as a result of aircraft accidents involving foreign aircraft. The ATC noted that the Legal Committee wished States to balance legitimate interests of aircraft operators engaged in international air transport against those of the general public who may suffer as third parties in accident involving foreign aircraft.[158]

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[154]The weight of the aircraft was the weight with total maximum load as indicated in the certificate of airworthiness or any other official document.

[155]Protocol Supplementing the Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface (signed at Rome on 29 May 1933) concluded at Brussels, on 30 September 1938. Article 2 of the Protocol provides that the Protocol forms an integral part of the 1933 Convention.

[156]Minutes of the 23rd Meeting of the Legal Committee, Annex VIII Appendix D, p. 355.

[157]Minutes of the 23rd Meeting of the Legal Committee, Annex VIII Appendix D, p. 357.

[158]AT-WP/247, 7/12/51, p. 3.

It was recognized that the operator needed protection against the risk of catastrophic loss and the draft Convention (1952) accorded him this protection by providing that in no one accident shall his liability to third on the surface exceed a certain maximum figure. On the other hand, it was also noted that the third party on the surface needed the assurance that in accidents in which he suffered loss, he would be able to recover, with a minimum of litigation, the full amount of his damages. The courts gave him this assurance by:

(a) Allowing him to sue where the damage occurred
(b) In certain cases a right of direct action against the insurer
(c) Taking from the operator the "no negligence" defence and ensuring adequate recompense[159]

Representatives of the aviation insurers expressed the view that the policy suggested in the Draft Convention, of making aircraft operators absolutely liable for damage to third parties on the surface, would likely have resulted in a substantial increase in claims and settlements[160] and therefore the Legal Committee had definitely decided on recommending for the new Convention unconditional liability except in four cases:

– When an aircraft was made use of without the consent of the owner
– When damage was a direct consequence of armed conflict or civil disturbance
– When the operator was deprived of the use of the aircraft by public authority
– When the injured person was himself responsible for injury due to negligence or other wrongful act[161]

The Committee believed that the limits should not be set so high as to cause the cost of third party insurance to become an excessive burden to the development of air navigation. Furthermore, it was thought that the limits should be set high enough to cover compensation to third parties in all but extremely rare catastrophic circumstances.[162]

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(a) The operator was insured for the aircraft in question against his liability under the Convention.
(b) The insurer was financially sound and able to meet his commitments.

[159]AT-WP/247, 7/12/51, p. 4.

[160]AT-WP/224, 10 October 51 at 10.

[161]AT-WP/224, 10 October 51 at 10.

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Following the recommendations of the Legal Committee, the ATC presented to the Council some draft comments – which included, *inter alia*, special reduced limits for gliders, since they did not consume fuel, had no weight, making damage caused by gliders minimal.[164]

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During this phase of the work, the Organization maintained close contact with the Governments and the international organizations concerned. The Governments were consulted six times and not less than 20 States sent detailed answers.

[163]AT-WP/247, 7/11/51, p. 11.

[164]Economic Aspects of the Mexico City Draft Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. AT-WP/248 7/12/51, p. 2.

[165]C-WP/1077, 10/12/51, p. 2.

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The ATC studied the questions referred to it at its session of October–December 1951 during 11 meetings, and reported to the Council, which on 12 December 1951 approved comments on the economic aspects of the draft convention for transmission to States. The Council reserved the possibility of further study of the expression "in flight" and of comment on other points.[168]

C. The Rome Convention of 1952

I. Background

The Rome Convention of 1952[169] entered into force in February 1958 and was ratified by only 46 States Parties, a fact which largely brings to bear its irrelevance to modern day exigencies of liability in air transport. As was stated earlier, the principles of the Convention were conceived by the Legal Committee of ICAO, at its 7th Session in Mexico City, which completed a final draft of the Convention containing principles of liability for damage caused to third parties on the surface by foreign aircraft. The text of the completed draft convention was presented to the ICAO Council for comments.[170] In particular, the Legal Committee requested the

[167]These studies are listed in Vol. II, page 14.

[168]No supplementary comment was formulated by the Council.

[169]Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952. See ICAO Doc 7364.

[170]Volume 7, Minutes and Documents of the ICAO Legal Committee, p. 337.

Council's views on limits of liability contained in Article II and provisions regarding the security for the operator's liability appearing in Chapter III. Although the Legal Committee considered its Mexico City draft as being ripe for submission either to the ICAO Assembly or a diplomatic conference for finalization and opening of signature, the Committee was not entirely convinced that some issues of an economic and policy nature incorporated in the draft showed the considered final without their being examined by the Council.[171]

The Council recognized *in limine* that the Mexico City draft was similar to the Rome Convention of 1933 in that both instruments attempted to regulate and establish uniformity with respect to the liability of aircraft operators to persons on the surface who sustain injury, death or property damage as a result of aircraft accidents involving foreign aircraft. The main thrust of the Council's reasoning behind the recognition of the draft convention's relevance was the need to balance the legitimate interests of aircraft operators engaged in international air transport against those of the general public on the ground who may suffer from accidents involving foreign aircraft.

II. Insurance

The Council recognized that the operator needed protection against the risk of catastrophic loss, which the draft convention afforded him by limiting his liability to a maximum amount in any one instance, regardless of the damage caused except in the case of intentional damage caused by the operator or in an instance where the operator had wrongfully taken possession of an aircraft without the consent of the owner. Furthermore, the instrument afforded additional protection to the operator by placing a special limitation on the amount of his liability for personal injury or death, to any one person. With regard to protection offered to a third party on the surface, the Council noted that in the event of loss or damage, he will be able to recover the full amount of damages with the minimum of litigation. The Convention ensured the abovementioned protection by allowing the person so injured to bring an action in courts of the place where the damage occurred and by denying the operator's defence of "no negligence" which many jurisdictions afforded and, most importantly, by identifying maximum and minimum limits of liability which would assure adequate compensation to the injured.

The Council carefully examined detailed statistics provided to it by States and others with regard to the cost of insurance together with past records of settlement of third party claims in accidents involving aircraft.

In framing comments on the liability limits in the draft convention, two trends of opinion emerged in Council, the one holding that the limits should be substantially increased, the other that they should be retained at approximately the level in the

[171] Volume 7, Minutes and Documents of the ICAO Legal Committee, p. 379.

draft. There was, however, general agreement that the two chief factors to be taken into account in considering the level at which such limits should be set were:

(a) The limits should not be set so high as to cause the cost of third party insurance to become an excessive burden on international civil aviation.
(b) The limits should be set high enough to cover compensation to third parties in all but extremely rare catastrophic accidents.

There was broad agreement also that the influence of the first of these two factors was not strong up to levels of liability limits considerably higher than those under discussion. The disagreement lay chiefly in the evaluation and application of the second factor.

It was noted that the available statistical data indicated clearly that, under existing conditions, the cost of third party insurance under the provisions of the Mexico City draft would generally be a small proportion of total insurance costs for an aircraft operator and an almost negligible part of his total operating costs. Of the rates reported for third party insurance for commercial aircraft in several different parts of the world, none represented more than 0.06 cents (U.S.) per ton-mile available, even for twice the amount of those in the Mexico City draft. Rates for private operators were relatively higher owing to the comparatively small figure of their total operational costs and the low utilization of their aircraft; rates reported to Council for third party insurance costs for private operators varied between 2% and 5% of estimated operating costs for liability limits such as those in the Mexico City draft.

The insurers emphasized that future premium rates for aircraft third party insurance could not be predicted with certainty and that the low rates then current might be increased if a series of accidents occurred involving large payment to third parties. It was impossible to predict the effects on insurance costs of the provisions in the Convention relating to absolute liability, the granting of jurisdiction to the State where the damage occurs, and the right of direct action against the insurers in certain cases. Some insurers believed, however, that these provisions would cause substantial increases in the cost of third party insurance both by increasing the costs of litigation and by tending to raise the amounts of compensation claimed and awarded.

There were, however, other factors tending towards the reduction of the cost of third party insurance for aircraft. In the first place the number of aircraft accidents in relation to the amount of flying done constantly tended to decrease as the quality and efficiency of aircraft construction, maintenance and operation improved. The Council was aware that any decrease in the number of accidents per aircraft would ultimately have produced a decrease in insurance premiums for third party insurance as well as for other forms of aviation insurance. In the second place the growing experience of third party risks gained by the insurers as the volume of flying increases should tend to produce a stabilization of the market and hence to reduce third party insurance rates. Some operators considered the limits proposed in the Mexico City draft as being considerably below the limits of their present third party insurance limits and a premium reduction might result to these operators on this account.

Making due allowance for the effect of these various factors, the Council felt that, it was fairly certain that although the cost of third party insurance under the provisions of the Mexico City draft Convention could have been increased, it still would not have imposed an undue burden on aircraft operators, and that, at least for commercial operators, the liability limits in the Convention might be substantially raised without this part of their operating costs becoming excessive. The cost of third party insurance to private operators of aircraft, however, was a considerably higher proportion of operating costs and an increase in liability limits might impose burdens of cost on this section of aviation that would seriously impede its development.

It was suggested that an increase in the liability limits substantially above those proposed in Article II would have produced overall limits for the larger aircraft so high as to strain the insurance market. It seemed, however, that the insurers did not believe that this would occur as long as existing conditions prevail.

The information in the Appendices submitted to the Council clearly showed that aircraft accidents involving large third party claims occurred infrequently. At that time, out of over 2,000 accidents in the British Royal Air Force, only 124 had caused third party damage or casualties and in the vast majority of cases the damage done was minor. It was also noted that, in 118 of these accidents only property damage was done, and in the remaining six where injury was caused to persons, the casualties were one dead and eight injured. Reports from States concerning 23 accidents that caused substantial third party damage included only two instances in which the claims paid and outstanding exceeded the limits in the medico City draft for the aircraft involved.

This information did not, however, point directly to any exact conclusion as to where the liability limits should be set so as to cover all but rare catastrophic accidents. In the first place, it was possible to disagree as to what constituted a catastrophic accident; in the second place past experience as to the frequency of accidents causing large third party damage was inadequate to predict their incidence in the future. It was clear that at whatever level the liability limits were established, the possibility would still have existed that accidents might have occurred where legitimate compensation for third party damage would have been greater than those limits, that is to say, where the third parties concerned would not have been able to obtain full compensation. It was also clear that the higher the limits were placed the smaller that possibility will become and the more nearly the compensation paid in such cases would approach to the full compensation level. The Legal Committee had raised the limits from those proposed in the original Rome draft of the Convention to those now in the Mexico City draft. The divergence of opinion was as to whether they should be further raised or not. The Council believed that it would have been of assistance to Contracting States to have had a brief analysis of the arguments that cause this divergence of opinion.

Those who favoured increasing the liability limits pointed out that the cost of third party insurance, at least to commercial operators, was very small and would still have been small with much higher limits than those in the Mexico City draft. They believed that the limits should be substantially increased and could have been

so increased without placing an unreasonable insurance burden on aircraft operators or an excessive strain on the insurance market. They pointed out that accidents causing third party damage greater than the limits in the Mexico City draft had occurred in the past; in the case of the two most serious third party accidents which had been brought to the Council's attention, the Mexico City limits, if applicable, would have resulted in grossly inadequate compensation to the damaged third parties, amounting in one case to approximately one-fifth of their losses and in the other case to approximately one-eighth of their losses. They believed that it was only reasonable to assume that such accidents would occur again in the future. They pointed to the rapid growth of large industrial installations that might be destroyed by fire caused by an aircraft accident; to the possibility of an aircraft crashing into a large public audience or other large collection of people; and to the growing recognition of the value of human life as reflected in increasing compensation awarded in cases of death or permanent injury. They felt that States would be mindful of the legitimate demands for the protection of the general public, and that they will not surrender the rights which the citizens of most States had to claim full compensation for losses caused by foreign aircraft, unless a very strong case could have been made that it would have been unfair to ask the operators of those aircraft to pay the necessary insurance premiums to cover full compensation. They believed that aviation had become an accepted medium of transport and that its further development depended less on special privileges, than on its ability to maintain the confidence of the public. They held that it was not in the best interest of international civil aviation to accord to it privileges which could not be justified by sound technical and economic analysis.

The Council found that, on the basis of data available to the Council, the limits proposed in the Mexico City draft were justifiably low and should be increased for all aircraft, except those in the smallest weight class. The Council noted that the Legal Committee had recognized that the smaller types of aircraft could cause personal injury and death, as distinct from property damage, disproportionate to their weights. For this reason they recommended higher per kilogramme limits for the smaller aircraft, and recommended successively decreasing limits per kilogramme for the successively larger weights of aircraft. They proposed that the increase of liability with weight should commence at a lower weight limit (1,000 kg) and thus operate for all aircraft except those of the smallest weight class, i.e., generally the two-seater private aircraft. Recognizing that the burden of insurance costs was heavier for small privately owned aircraft in the smallest weight class, they proposed no increase in the limit of liability applicable to such aircraft.

The Council could see no justification for fixing an absolute upper limit to the liability limits at 10 million francs, a limit which abruptly ceased to bear a fixed relation to the weight of aircraft. Aircraft were being constructed and others would be built during the period in which the Convention was effective which would considerably have exceeded in weight, and therefore in potential destructiveness, would have probably tended to diminish as the weight of aircraft increases beyond that of the largest types then in general use, and it was for this reason that they

recommended a lower rate of increase in the limit of liability per kilogramme for aircraft weighing in excess of 50,000 kg.

The Council appreciated the fact that those who favoured retaining liability limits approximating those in the Mexico City draft considered the proposed Convention as primarily having been designed to establish a fair relationship between operator and third party in given circumstances. Accordingly, cost to the operator was not the first consideration. The nature of the relationship established was the first consideration. In this connection they attached importance to the other provisions of the Convention which affected the conditions in which the liability would be liquidated, such as absolute liability, jurisdiction in the country where the damage occurs, limited defence to the operator, and direct access to the insurers in certain cases. They considered that the limits of liability should not be set unnecessarily high, but at a level which experience and judgment indicated to be adequate to meet all normal cases.

Considerable importance was attached to the information concerning past experience, which in the Council's view, demonstrated the rarity of accidents affecting third parties; that in such accidents it was property, and not persons, which was damaged in the overwhelming majority of instances; and that moreover in all cases of which information was available, save two in North America, the proposed limits would have been more than adequate. They felt also that account should be taken of varying cost levels in different parts of the world. They noted that it was only in North America that there was any evidence of a case in which the proposed limits would not suffice, and in this respect they considered that an equilibrium must be set between the high cost and the low cost areas of the world.

The limits presented an acceptable compromise between the views of various States. They pointed out that the decision taken to raise the limits from those in the original Rome Convention to those in the Mexico City draft had not been unanimous and that some States favoured lower limits than those now in the Mexico City draft. They considered that the economic evidence brought before Council subsequent to the last meeting of the Legal Committee did not justify any modification of the decision reached at Mexico City.

The relating of the liability limits for different types of aircraft to the weight of the aircraft concerned, as proposed in the Mexico City draft, was generally agreed to accord approximately with the potential of each type of aircraft to cause damage to third parties on the surface if an accident occurs. It was recognized, however, that this general rule was subject to certain exceptions. Small and medium aircraft, for example, may cause injury and death, as distinct from property damage, in somewhat greater proportion to their weights. Taking account of this fact, the Council agreed that the proportion of weight to liability limit may vary for different classes of aircraft as it does in the scale of limits proposed in the Mexico City draft Convention, but felt it desirable that the limits should increase without abrupt changes throughout the scale of weights. The introduction of the fixed limit for aircraft weighing more than 2,000 but not exceeding 6,000 kg in paragraph (1) (b) of Article II caused an undesirable discontinuity at the 2,000 kg point. Aircraft just below that weight would have a

liability limit of 500,000 francs, aircraft just above that weight would have a liability limit of 1,500,000 francs although the difference in the ability to cause damage between the two types of aircraft might be small. The Council agreed that this discontinuity should be removed.

In the course of examining the liability limits in the draft Convention, the Council considered a number of specific proposals for modifications of these limits. The following proposals were recommended to States as warranting further study since they illustrated the two trends of opinion mentioned above:

Proposal A

(a) This proposal aimed to retain the general level of limits in the Mexico City draft and merely to eliminate the discontinuity at the 2,000 kg level. It would be achieved by substituting the following for sub-paragraph (b) in paragraph (1) of Article II.
(b) 500,000 francs[172] plus 250 francs per kilogramme over 2,000 kg for aircraft weighing more than 2,000, but not exceeding 6,000 kg.

Proposal B This proposal aimed to eliminate the discontinuity at the 2,000 kg level, to increase the limits substantially for all aircraft except those of less thank 1,000 kg and to permit the limits to rise continuously with weight for the larger aircraft. It would be achieved by substituting for sub-paragraphs (a), (b) and (c) of paragraph (1) of Article II, the following sub-paragraphs:

(a) 500,000 francs for aircraft weighing 1,000 kg or less
(b) 500,000 francs plus 400 francs per kilogramme over 1,000 kg for aircraft weighing more than 1,000, but not exceeding 6,000 kg
(c) 2,500,000 francs plus 250 francs per kilogramme over 6,000 kg for aircraft weighing more than 6,000, but not exceeding 20,000 kg
(d) 6,000,000 francs plus 150 francs per kilogramme over 20,000 kg for aircraft weighing more than 20,000 but not exceeding 50,000 kg
(e) 10,500,000 francs plus 100 francs per kilogramme over 50,000 kg for aircraft weighing more than 50,000 kg

Proposals had been made that the sub-limit of 300,000 francs per person killed or injured in paragraph (2) of Article II should be deleted. The Council recognized the importance of this question but felt that the issues raised by the individual limit of 300,000 francs per person killed or injured were largely legal in their implications and that the Council was not in possession of any information on this point not available to the Legal Committee. The Council therefore decided that it was not in a position to give advice to States as to this limit.

[172]Article I. The franc used in the Convention, and defined in Article II (4) thereof, equalled US $0.66335, as indicated by the International Monetary Fund.

III. Provisions of the Convention

The 1952 Rome Convention provides that, any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by the Convention. Nevertheless, there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.

Article 1 of the Convention provides that, for the purpose of the Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off, until the moment when the landing run ends. In the case of an aircraft lighter than air, the expression "in flight" relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereto.

Article 2 provides that, the liability for compensation contemplated by Article 1 attaches to the operator of the aircraft and that, for the purposes of the Convention, the term "operator" shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority. The registered owner of the aircraft is presumed to be the operator and is liable as such unless, in the proceedings for the determination of his liability, he proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.

If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than 14 days, dating from the moment when the right to use commenced, the person from whom such right was derived is deemed to be liable jointly and severally with the operator, each of them being bound under the provisions and within the limits of liability of this Convention.[173] If a person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has exercised due care to prevent such use, is jointly and severally liable with the unlawful user for damage giving a right to compensation under Article 1, each of them being bound under the provisions and within the limits of liability of the Convention.[174]

Article 5 provides that, any person who would otherwise be liable under the provisions of the Convention is not deemed liable if the damage is the direct

[173] Article 3.

[174] Article 4.

consequence of armed conflict or civil disturbance, or if such person is deprived of the use of the aircraft by act of public authority.

Article 6 of the Convention lays down principles of fault liability as applicable to the person claiming compensation. It provides that, any person who would otherwise be liable under the provisions of the Convention shall not be liable for damage if he proves that the damage was caused solely through the negligence of other wrongful act or omission of the person who suffers the damage or of the latter's servants or agents. If the person liable proves that the damage was contributed to by the negligence or other wrongful act or omission of the person who suffers the damage, or of his servants or agents, the compensation is reduced to the extent to which such negligence or wrongful act or omission contributed to the damage. Nevertheless, there shall be no such exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority.

When an action is brought by one person to recover damages arising from the death or injury of another person, the negligence or other wrongful act or omission of such other person, or of his servants or agents, shall also have the effect provided in the preceding paragraph.

In terms of liability limits, the Rome Convention stipulates that, subject to Article 12[175] the liability for damage giving a right to compensation under Article 1, for each aircraft and incident in respect of all persons liable under this Convention, shall not exceed:

(a) 500,000 francs for aircraft weighing 1,000 kg or less
(b) 500,000 francs plus 400 francs per kilogramme over 1,000 kg for aircraft weighing more than 1,000 but not exceeding 6,000 kg
(c) 2,500,000 francs plus 250 francs per kilogramme over 6,000 kg for aircraft weighing more than 6,000 but not exceeding 20,000 kg
(d) 6,000,000 francs plus 150 francs per kilogramme over 20,000 kg for aircraft weighing more than 20,000 but not exceeding 50,000 kg
(e) 10,500,000 francs plus 100 francs per kilogramme over 50,000 kg for aircraft weighing more than 50,000 kg

The liability in respect of loss of life or personal injury shall not exceed 500,000 francs per person killed or injured. "Weight" means the maximum weight of the aircraft authorized by the certificate or airworthiness for take-off, excluding the effect of lifting gas when used. The sums mentioned in francs in this Article refer to a currency unit consisting of 65.5 mg of gold of millesimal fineness 900.

[175] Article 12 states that if the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, the liability of the operator shall be unlimited, provided that, in the case of such act or omission of such servant or agent, it is also proved that he was acting in the course of his employment and within the scope of his authority. If a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability shall be unlimited.

These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment, or, in cases covered by Article 14, at the date of the allocation.

A Contracting State is given the option of requiring the operator of an aircraft registered in another Contracting State to obtain insurance with respect to his liability for damage sustained in its territory for which a right to compensation exists under Article 1.

The Convention prescribes, in Article 15 that such insurance shall be accepted as satisfactory if it conforms to the provisions of the Convention and has been effected by an insurer authorized to effect such insurance under the laws of the State where the aircraft is registered, or of the State where the insurer has his residence or principal place of business, and whose financial responsibility has been verified by either of those States. If insurance has been required by any State under paragraph 1 of Article 15 and a final judgment in that State is not satisfied by payment in the currency of that State, any Contracting State may refuse to accept the insurer as financially responsible until such payment, if demand has been made.[176]

Notwithstanding the above, the State overflown may refuse to accept as satisfactory insurance effected by an insurer who is not authorized for that purpose in a Contracting State. The Convention also provides that an appropriate cash deposit, a bank guarantee or a guarantee given by a Contracting State may suffice instead of insurance, for the purpose of Article 15. The State overflown may also require that the aircraft carrying the certificate of insurance issued by the insurer certifying that insurance has been affected in accordance with the Convention. Article 20 prescribes that actions under the Convention may be brought only before the courts of the Contracting State where the damage occurred. Exceptionally, however, the parties to an action under the Convention may consensually agree to bring the action in a court of another jurisdiction, provided such option does not impugn or jeopardise the right of the plaintiff to bring the action in a jurisdiction in which the accident occurred.

Perhaps the most significant feature of the Rome Convention of 1952, which currently impacts the modernization process it is going through, is the nature of liability. It will be recalled that at the Rome Conference, the United States made a strong case for basing liability of the operator, on fault liability as accepted by common law to be rebutted by the operator in the absence of fault and not an absolute liability. The United States delegation contended that air transportation, whether commercial or private, served a great public purpose, both national and international. Therefore, it was proper to take every reasonable step to encourage its development bearing in mind that the development of aviation included a proper relation between the responsibility of the operator and the third parties who might be damaged as a consequence of an aviation accident. The opinion of the United States was that there was no necessity of imposing on aviation a heavier burden than

[176]Article 15.

that imposed on other means of transportation. The draft Convention presented to the Conference made the operator liable even if it were evident that he had committed no fault. This principle was in contradiction with the basic principles of common law and seemed to be incompatible with the general principle applicable in civil law countries. The draft Convention provided that once an operator had put an aircraft in the air, if the aircraft crashed on the surface, the operator was liable up to the limits which might be included in the Convention, no matter what the cause of the accident, and that liability would exist no matter how far beyond the control of the operator might be the force which actually caused the accident. In this latter case the operator could not defend himself by proving that he was without fault.

The Delegation of the United States was of the opinion that this system imposed an unwarranted burden on aviation. This burden was not necessary for the proper protection of the public and was not consistent with the status of aviation which was playing an ever-growing part in the life of everyone, and which should be treated on the same basis as other activities of the same nature. Harold Caplan[177] makes the point, referring to modernization of the 1952 Rome Convention, that incredibly the ICAO Working Group is following the analogy of a service to the public (such as a restaurant) with regard to aviation, which is expected to bear its own losses and also pay for the consequences in the event of a terrorist attack.

IV. The Montreal Protocol of 1978

ICAO convened, from 6 to 23 September 1978, an international Conference[178] on private air law at is headquarters in Montreal which resulted in a Protocol to amend the Rome Convention of 1952. The Conference was the direct outcome of a request by the ICAO Council, made in 1964 to the Legal Committee, to study the Convention which showed a marked lack of acceptance. Consequent to several sessions of the Legal sub-Committee in 1965 and 1966, the Legal Committee, in 1967 examined issues arising from the sub-Committee's meetings, particularly regarding the then contentious issue of the sonic boom, and other areas such as nuclear damage and liability. Following the Legal Committee's work, the International Conference on Air Law in September 1978[179] held eight plenary meetings. The main discussions of the Conference ranged from increasing the limits of the Rome Convention; making a clearer pronouncement in the Convention on sonic boom; the single

[177]Caplan (2004, p. 5).

[178]The Conference was attended by delegates from 58 States and observers from four organizations.

[179]See ICAO Doc. 9527. The Protocol opened for signature on 23 September 1978.

forum for litigation of claims; effect of increasing the limits on the cost of insurance; and achieving specificity in definitions.[180]

According to FitzGerald, the International Conference on Air Law of 1978 demonstrated the serious difficulties faced when one attempts to revise existing liability Conventions. He attributed the failure of these difficulties to the inherent differences between States on economic issues.[181]

V. Modernizing the Rome Convention

During the 31st Session of the ICAO Legal Committee in September 2000, a formal proposal made by Sweden calling for the modernization of the 1952 Rome Convention under the aegis of ICAO received the endorsement of the Committee. Inspiration for initiating the modernization process was drawn from the adoption of the Montreal Convention of 1999,[182] which the 30th Session of the Legal Committee in 1997 had initiated and which entered into force on 4 November 2003. The Legal Committee, at its 31st Session had recognized that the Montreal Convention[183] enhanced the rights of claimants in respect of death or bodily injury of passengers, and that such rights should also be given formal recognition through treaty with regard to damage to third parties on the surface. Subsequently, in 2002, the Council considered a Secretariat study on the subject and agreed to establish a study group to assist the Secretariat in future work. The Secretariat developed a draft Convention with the assistance of this Study Group.

The draft Convention is similar in scope to the 1952 Convention and 1978 Protocol, and attributes liability to the State of registration of a foreign aircraft if it causes damage over the Exclusive Economic Zone of a State or over the high seas. A prominent feature of the text is that there are two operative systems of liability, one which introduces a two tier liability structure imposing liability for damages not exceeding 100,000 special drawing rights where liability is absolute and the carrier is expressly precluded from denying or limiting his liability, and one, in Chapter III which stipulates various layers of liability based on the weight of the aircraft causing the damage, in case of acts of unlawful interference. This dichotomy prompted one delegation to the 32nd Session of the Legal Committee (Montreal, 15–21 March 2004) to raise the question as to whether it was not preferable to have one basic system for determining all forms of compensation.[184] It is also

[180]For a detailed discussion of these issues, see Gerald (1979, pp. 29–74).

[181]Gerald (1979, p. 72).

[182]Report of the 31st Session of the Legal Committee, ICAO Doc 9765.

[183]*Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, ICAO Doc 9740. The text of the Montreal Convention is also contained in *Annals of Air and Space Law*, vol. 24, p. 425 (1999).

[184]Legal Committee 32nd Session, Montreal, 15–21 March 2004, Report, Doc 9832-LC/192 at 3-1.

noteworthy that, linked to the absolute liability of the operator regarding the 100,000 SDR limit, is a proviso to the effect that, in instances where liability exceeds the limit, the operator shall not be liable for damages if he proves that it was free from fault (that the damage was not due to its negligence or other wrongful act or omission of that of its servants) or that the damage was solely due to the negligence or other wrongful act or omission of another person.[185] This provision is identical to Article 21 of the Montreal Convention of 1999. Another similarity between the two Conventions is found in Article 6 of the new draft Convention and Article 20 of the Montreal Convention, both of which provide that if the operator proves contributory negligence or other wrongful act or omission of the person claiming compensation or another deriving rights therefrom, as having caused the damage, the operator could exonerate himself wholly or partly from liability to the extent that such actions or omissions caused the damage. There is a similar provision for death or injury of passengers in both the Conventions. This symbiosis between the modernized Rome Convention and the Montreal Convention brings to bear the need to clearly identify the scope of liability of the two regimes. Simply put, there is absolute or strict liability of the operator up to a limit of SDR 100,000. Thereafter, over and about this amount of liability, if the carrier proves no fault on his part, or a wrongful act or omission or contributory negligence on the part of another, he could exculpate himself. In other words, for large sum claims, the onus of proving that the operator is not liable is on the operator based on a no fault theory. The entire theory of liability for claims over SDR 100,000 revolves round the word "negligence" or lack thereof applying equally for both plain negligence and contributory negligence. These are essentially tort law concepts but the essential feature in this instance is that there is seemingly a presumption of negligence on the part of the carrier to prove his innocence. It is an ineluctable principle of tort law that tortuous liability exists primarily to compensate the victim by compelling the wrongdoer to pay for the damage he has done.[186] Theoretical bases of tort liability in air law have repeatedly been aligned to presume fault on the part of the carrier until he rebuts the presumption of liability. An earlier instance in 1929 at the Warsaw Conference leading up to the Warsaw Convention on private liability of the carrier also adopted a similar approach where one of the fundamental deviations from the fault liability principle in the context of the Warsaw Conference was that, instead of retaining the basic premise that the person who alleges injury must prove

[185]Article 3.3(a) and (b). In the context of private air carrier liability under the Warsaw system there are two analogies that are worthy of note. In *Haddad v. Cie Air France* (1982) 36 RFDA 355, where an airline had to accept suspicious passengers who later perpetrated a hijacking, the court held that the airline could not deny boarding to the passengers who later proved to be hijackers. In that instance the airline had found it impossible to take all necessary precautions and was considered sound in defence under Article 20 (1). A similar approach was taken in the case of *Barboni v. Cie Air-France* (1982) 36 RFDA 358, where the court held that when an airline receives a bomb threat whilst in flight and performs an emergency evacuation, a passenger who is injured by evacuation through the escape chute cannot claim liability of the airline since it would have been impossible for the airline to take any other measure.

[186]Fleming (1983, p. 1).

that the injury was caused by the alleged wrong does, the Conference recognized the obligation of the carrier to assume the burden of proof. This was done seemingly to obviate the inherent difficulties which are posed in situations of air carriage where it would be difficult, if not impossible, to determine fault from evidence which is reduced to debris and wreckage after an aircraft accident.

The Conference succinctly subsumed its views on liability through the words of its Rapporteur:

> These rules sprang from the fault theory of the liability of the carrier toward passengers and goods, and from the obligation of the carrier to assume the burden of proof. The presumption of fault on the shoulders of the carrier was, however, limited by the nature itself of the carriage in question, carriage whose risks are known by the passenger and consignor. The Conference had agreed that the carrier would be absolved from all liability when he had taken reasonable and ordinary measures to avoid the damage . . . one restriction on this liability had been agreed upon. If for commercial transactions one could concede the liability of the carrier, it did not seem logical to maintain this liability for the navigational errors of his servants, if he proves that he himself took proper measures to avoid a damage.[187]

Negligence is grounded on the notion of duty of care, and the *love thy neighbor* principle enunciated in the 1932 decision of *M'Alister (or Donoughue)* v. *Stevenson*[188] where Lord Atkin stated:

> The rule you are to love your neighbor becomes in law you must not injure your neighbor; and the lawyer's question, who is my neighbor, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be, likely to injure your neighbor? The answer seems to be: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[189]

This fundamental postulate needs cautious appraisal in the context of the Rome Convention, which calls for a duty of care on the part of the operator toward everyone on the surface, imputing to the scope of air transport an untenably broad focus of foreseeability. Is the operator to foresee damage to every citizen of a State flown over in the event of an act of unlawful interference? If so, how is the operator to exercise due diligence and care to prevent such damage? Since the *Donoughue* decision was handed down, further clarification was provided on the issue of foreseeability in the 1977 House of Lords decision of *Anns v. Merton London Borough Council*[190] where Lord Wilberforce said:

> First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighborhood such that, in

[187]Second International Conference on Private International Law, 4–12 October 1929, Warsaw, Minutes, (translated by Robert C. Herner and Didier Legrez), Fred B. Rottman & Co., New Jersey, 1975, at 21.

[188][1932] A.C. 562 (H.L.) Hereafter *Donoughue*.

[189][1932] A.C. 562 (H.L.), 580.

[190][1978] A.C. 728 (H.L.).

> the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate, or to reduce or limit the scope of duty or the class of person to whom it is owed or the damages to which a breach may give rise.[191]

The foreseeability requirement would particularly be relevant under the Rome Convention when it comes to items dropped from the aircraft while in flight which damage people or property not specifically foreseen as a vulnerable category by the operator, in view of the remoteness of such damage. The case of *Palsgraf* v. *Long Island Railway Co*.[192] created relevant precedent to the aeronautical context. In *Palsgraf*, a person carrying a parcel of fireworks was being assisted to a train by a porter, when the parcel accidently escaped from the defendant's custody and landed on the railroad tracks beneath, exploding and injuring a passerby. The court held that the defendant owed no duty of care to the plaintiff since the plaintiff was beyond the range of the defendant's foreseeability.

There is also the issue of proximity in the law of negligence which would apply in an instance of damage by foreign aircraft caused to third parties on the surface. Proximity involves three elements: legal closeness; factual closeness; and broad policy factors. Legal closeness relates to the extent to which the proposed duty is related to the concept of duty of care in conventional negligence. In tort law, scholars and legislators have called for a more rigorous evaluation of proximity between plaintiff and defendant, aligned to enforcing liability on a more liberal basis than is practiced at present.[193] Factual closeness relates to the nature of the relationship between the plaintiff and defendant. Policy considerations, often referred to as residual policy factors, are macro-considerations concerning the overall needs and interests of a community which is at risk of damage. A modernized Rome Convention would therefore have to involve and consider all three factors: foreseeability; proximity; and policy in the principles of negligence that are envisioned under the scope of the operator's liability.

The exemption given to the operator in instances of the plaintiff's contributory negligence affords the operator an opportunity to prove that the plaintiff failed to take reasonable care for his own safety. Contributory negligence can arise in three scenarios. Firstly, the plaintiff could be the cause of the accident and the damage suffered must be directly linked to the negligence which contributes to such damage. In *Cork v. Kirby Maclean Ltd.,*[194] the court held that a person suffering from epilepsy could not claim that his employer was liable for his fall from his workstation after suffering from an epileptic attack as the employer was not advised by the plaintiff of his illness. The worker was presumed to have known, or ought to

[191][1978] A.C. 728 (H.L.), 751–752. See also the decision of *Neilson* v. *Kamloops (City of)*, [1984] 2.S.C.R. 2 handed down by the Supreme Court of Canada which adopted the principle enunciated by Lord Wilberforce and adopted it consistently from 1984 to 2001.

[192]162 N.E. 99 (N.Y. 1928).

[193]Osborne (2003, p. 68).

[194][1952] 2 All.E.R. 402 (C.A.).

have known the consequences of his working in a high place. Secondly, a person cannot allege liability of a person successfully if he willingly and knowingly puts himself in a position of foreseeable harm. For instance, a person cannot enforce liability on an inebriated driver who offers her a lift, if she knows prior to accepting the ride of the driver's condition. Thirdly, a person cannot avoid being found responsible for contributory negligence if she does not take protective measures in the face of foreseeable danger, such as not harnessing the seat belt in a fast moving vehicle.[195] Of particular relevance to an accident whereby an aircraft injures persons on the surface is the "agony of the moment" principle which allows some leeway for a person's actions which might not be rational due to the stress of the moment. In the 1969 case of *Walls v Mussens Ltd.,*[196] The court refused to recognize the conduct of the defendant as being guilty of contributory negligence even though he had not used a conventional fire extinguisher which he had ready access, to douse a fire but chose to throw heaps of snow at a fuel ignited fire in his business premises.

Article 5 of the draft Convention provides that, in the instance of disruption to insurance coverage of operators caused by acts of unlawful interference,[197] The ICAO Council may recommend to States Parties to suspend their obligations under the convention. This provision, which was the result of a recommendation by the Council[198] brought in some discussion in the Legal Committee with apprehension being voiced by several delegations that such a provision will throw back responsibilities regarding insurance to national legislatures.[199] Concerns were also raised that there was undue focus only on terrorism oriented issues and that victims should not have to face different regimes depending on nationality. The general view of the Committee on this point seemed to be to prefer a suitable substitute for the Rome Convention to address insurance matters.[200]

[195]Under the Warsaw regime there are analogies in contributory negligence. For example, in *Goldman v. Thai Airways International Ltd* (1983) 3 All E.R. 693, it was held that a passenger is not guilty of contributory negligence if he keeps his seatbelt unfastened through the flight and suffers injury when there is no sign given by the aircraft control panel to keep the seat belt on. However, if a passenger removes a bandage or braces that he is required to keep on for an existing injury and he suffers injury in flight due to the removal of the support he would be found to have contributed to the negligence resulting in his injuries.

[196](1969) 2 N.B.R. (2d) 131 (S.C.A.D).

[197]Following the events of 11 September 2001, where civil aircraft were used as weapons of destruction, aviation insurers gave seven days' notice on 17 September that war risk third party liability coverage according to policy terms applying to the write back coverage for war, hijacking and other perils would be withdrawn. The most compelling reason for the cancellations was the emergence of an exposure in terms of third party bodily injury and property damage that was unquantifiable.

[198]See Report of the Special Group on the Modernization of the Rome Convention of 1952, Montreal, 10–14 January 2005, SG-MR/1 at 1&2-4.

[199]See Report of the Special Group on the Modernization of the Rome Convention of 1952, Montreal, 10–14 January 2005, SG-MR/1 at 1&2-4.

[200]See Report of the Special Group on the Modernization of the Rome Convention of 1952, Montreal, 10–14 January 2005, SG-MR/1 at 1&2-5.

With regard to insurance, the new draft Convention contains two significant provisions, the first being Article 5 which has been already discussed, and provides that States rights and obligations may be suspended, at the request of the Council where acts of terrorism or unlawful interference may severely disrupt the availability of insurance. The second is Article 13 which is consistent with the requirement of Article 50 of the Montreal Convention of 1999, providing that States Parties require their Operators to maintain adequate insurance or guarantees in order to cover their liability under the Convention. As regards compensation, in keeping with Article 28 of the Montreal Convention, the new draft Convention, in Article 23, provides for up-front or advance payments to be made by the Operator in the event of death or injury caused to passengers and immovable property which is left uninsured, provided in both instances the national laws provide for such payments. The new draft Convention offers only one jurisdiction for adjudication, which is the territory of a State in which the damage occurred.

Article 25 provides that the Convention shall not apply to damage caused by State aircraft and that aircraft used in military, customs and police services are deemed to be State aircraft. The inclusionary text is similar to that contained in Article 3(b) of the Chicago Convention. The determination as to whether an aircraft is "used" in military, customs or police services is largely determinant upon a multiplicity of factors such as the nature of the cargo carried and whether such cargo comprises military, customs or police equipment; the ownership of the aircraft in terms of private or public/State ownership; persons carried; registration markings of the aircraft; and the purpose of and publicity given to the flight *inter alia*.[201] The draft text in Article 25 implies that no country which has accepted the Convention in a manner consistent with international recognition of a treaty would use civil aircraft for purposes that would erode the aim of the Convention – which is to provide adequate compensation to those injured on the surface by aircraft. By this provision, therefore, the modernized Convention would serve well to protect both the integrity of civil aviation as well as the interests of those who might be injured. Based on this fundamental postulate, a commercial civil airline could object to its aircraft being used for military purposes not only on grounds of safety, but also on the ground that such use would adversely affect the economic interests of the airline concerned.[202]

The draft Convention has shed any connotation of damage caused to persons and property on the surface from its title owing to the fact that Article 9, a new provision, admits of recovery for third parties suffering damage on board aircraft in a mid-air collision from the operator whose aircraft collided with the aircraft in which the aggrieved person was on board. It would be interesting to examine the liability implications and insurance coverage that would address this situation, as

[201]In 1993, the ICAO Secretariat undertook a study on civil/State aircraft with a view to advising the Council on the various determinants that go to differentiate between the two types of aircraft. The results of that study can be found in C-WP/9835, 22/9/93. 3.

[202]See generally, Abeyratne (1997, pp. 1–2).

both the Warsaw Convention and Montreal Convention allow an aggrieved person to claim compensation from the operator of the aircraft in which he was travelling. The introduction of another avenue of claim would, at least theoretically, double the opportunity of recovery. In 1999, the U.S. Supreme Court in *El Al Israel Airlines, Ltd. v. Tseng*[203] ruled that the Warsaw Convention preempts all state law personal injury actions arising from international flights. Therefore, in the United States, Courts have recognized the exclusive application of the Warsaw Convention, relying on the United States Supreme Court's decision in the *Tseng* case, that the Convention preempts statutory discrimination claims as well as common law claims.[204]

At its 174th Session, the ICAO Council was presented with the findings of the meeting of the Legal Committee held in January 2005, whereby certain general principles agreed upon by the Legal Committee were placed before the Council. The Committee started by observing that protection of the victim in terms of compensation for damage should be comparable at least to the extent of being as good as compensation offered under the Montreal Convention of 1999 and that the main aim of the Convention ought to be to address incidents with an international element, although it was not ruled out that provision should not be made in the Convention to cover domestic incidents. A valid consideration in this regard was that damage envisioned under the Rome Convention was not only to the person concerned but also to his property which might offer him shelter and in some instances his livelihood as well. It was also contended that instances of "catastrophic losses" ought to be well considered and provisions for compensation therefore be well thought out. Any compensation must not endanger the financial well being of the operator, which might in turn jeopardize the sustainability of the air transport system. One of the compelling convictions of the Committee was that the system of victim compensation must be sufficiently durable so as to survive catastrophic events that would threaten the viability and continuity of the air transport system worldwide. The Committee also suggested that due consideration be given to the establishment of a supplementary funding mechanism for compensation that would

[203]525 U.S. 155 (1999). In *Gibbs v. American Airlines, Inc*., the Court rejected the plaintiff's argument that his statutory claims under Section 1981 of the Civil Rights Act were not preempted by the Warsaw Convention because they are based on a federal statute and Congress did not intend for the Convention to impede civil rights statutes. In rejecting the plaintiff's argument, the Court relied on the United States Supreme Court's decision in El *Al Israel Airlines, Ltd. v. Tseng* and the decisions of several other district courts that have held that the Convention preempts statutory discrimination claims as well as common law claims. See also Speiser and Krause (1978, Sect. 10.2) for a chapter on mid air collisions in the United States involving domestic air transport.

[204]In *Buchbinder v. American Airlines*, a passenger asserted state law claims against the air carrier and its catering company after becoming ill from a meal consumed on board the aircraft. The catering company filed a motion for summary judgment on the grounds that the plaintiffs' state law claims were preempted. The Court, relying on Tseng decision, held that the Warsaw Convention provided plaintiff's exclusive remedy and dismissed plaintiff's state law claims against the catering company.

succeed in bridging the gap between limits of compensation offered and ensuring protection for the civil aviation sector while maintaining a durable system.[205]

In considering issues relating to the justification for modernizing the Rome Convention, no single issue stands out as much as environmental damage caused to persons and property on the surface by foreign aircraft. The formal proposal made by Sweden at the 31st Session of the Legal Committee with regard to international rules contained in the Rome Convention of 1952, drew the attention of the Legal Committee to the fact that the concept of damage to the environment, including preventive measures and measures of reinstatement, was a factor to be considered and that environmental questions are of great importance. Environmental awareness of carriers and their responsibilities in terms of minimally affecting the environment by their operations was considered a critical issue. The proposal also called for recognition that measures should be in place for the repair and reinstatement of the environment in case of damage. *A fortiori*, the Committee was advised that such measures were already being contemplated in other fora, necessitating a revision of existing principles of liability under the Rome Convention.

At its 35th Assembly, held in September/October 2004, ICAO Contracting States adopted Resolution A35-5 containing a consolidated statement regarding environmental protection which recognized *in limine* that many of the adverse environmental effects of civil aviation activity can be reduced by the application of integrated measures embracing technological improvements, appropriate operating procedures, proper organization of air traffic and the appropriate use of airport planning, land-use planning and management and market-based measures. The resolution also recognizes that other international organizations are becoming involved in activities relating to environmental policies affecting air transport and in fulfilling its role and that ICAO strives to achieve a balance between the benefit accruing to the world community through civil aviation and the harm caused to the environment in certain areas through the progressive advancement of civil aviation.

ICAO has adopted certain goals toward ensuring optimal environmental protection with regard to air transport in the context of the adverse environmental impacts that may be related to civil aviation activity and its responsibility and that of its Contracting States. At the Assembly session, ICAO Contracting States recognized the need to achieve maximum compatibility between the safe and orderly development of civil aviation and the quality of the environment. Therefore, in carrying out its responsibilities, ICAO's goals will be to limit or reduce the number of people affected by significant aircraft noise; limit or reduce the impact of aviation emissions on local air quality; and limit or reduce the impact of aviation greenhouse gas emissions on the global climate.

The Resolution also emphasizes the importance of ICAO's leadership role in all civil aviation matters related to the environment and requests the Council to maintain the initiative in developing policy guidance on these matters, and not leave such initiatives to other organizations; to regularly assess the present and

[205]C-WP/12391, 11/02/05, Modernizing the Rome Convention of 1952, Appendix A.

future impact of aircraft noise and aircraft engine emissions and to continue to develop tools for this purpose; and to disseminate information on the present and future impact of aircraft noise and aircraft engine emissions and on ICAO policy and guidance material in the environmental field, in an appropriate manner, such as through regular reporting and workshops.

States are invited by Resolution A35-5 to continue their active support for ICAO's environment-related activities on all appropriate occasions and to provide, together with international organizations the necessary scientific information to enable ICAO to substantiate its work in this field. They are urged to refrain from unilateral environmental measures that would adversely affect the orderly development of international civil aviation. The Resolution also encourages the Council to pursue co-operative arrangements with the United Nations Environment Programme for the execution of environmental projects financed by the United Nations Environment Fund if and when it deems this desirable.

With regard to aircraft noise the Resolution contains new guidance material on a balanced approach to noise management and on land-use planning and management. On the subject of aircraft engine emissions, there are new guidance material on operational opportunities to minimize fuel use and reduce emissions and to take account of further work undertaken on emission-related levies and emissions trading.

In the context of seeking justification for the modification of the Rome Convention as amended in 1978, the main consideration must be environmental protection and reparation for damage caused by aircraft operations on the environment. The 35th Session of the ICAO Assembly, reviewed the progress that had been made over the years in ICAO's work in the environmental field, on both aircraft noise and the impact of aircraft engine emissions. The Assembly noted that, regarding noise, ICAO had developed new guidance for States on a balanced approach to aircraft noise management consisting of four principal elements: reduction at source; land-use planning and management; noise abatement operational procedures; and operating restrictions. With regard to aircraft engine emissions the Assembly noted that there were concerns about the impact of emissions at the local level, on local air quality in the vicinity of some of the world's airports. There were also concerns about the impact at the global level, on climate change. ICAO's work on emissions is based on three main approaches:

(a) Improving technology and tightening standards so that aircraft produce less emissions. There is a particular focus on oxides of nitrogen (NOx). It is worthy of note that the ICAO Council has reduced the permitted levels of NOx twice, and is currently considering proposals for a further reduction.
(b) Identifying operational measures that will reduce fuel consumption, which results in less emissions. ICAO has recently published guidance to States on this subject.[206]

[206]Circular 303, *Operational Opportunities to Minimise Fuel Use and Reduce Emissions*.

(c) Exploring the possible use of market-based measures. These include voluntary measures, emissions trading and emissions-related levies, which are charges and taxes.[207]

Studies are being undertaken at ICAO to determine whether greenhouse gas charges would be an appropriate approach to market based measures. One of the drawbacks to this approach is that there are a considerable number of outstanding issues on which States' views differ widely. For example, many States question the cost-effectiveness of charges. The Assembly therefore agreed that studies should continue in this area of work. It was understood that States will not introduce greenhouse gas emissions charges internationally during the next three years and the matter will be discussed again at the 36th Session of Assembly in 2007. However, the agreement leaves room for some countries to introduce market based measures amongst themselves under certain circumstances if they wish. It must be noted that some States in Europe have introduced charges at the local level to address problems associated with local air quality in the vicinity of airports. This matter will also be studied more closely by ICAO over the next three years.[208]

In view of its dexterity and flexibility in synthesizing elements of the existing 1952 Rome Convention, its 1978 Protocol and the Montreal Convention of 1999, while adding on new provisions and approaches to liability for damage, a new revised Convention on damage caused to persons and property by foreign aircraft bears promise in providing the much needed balance between economic theory and social justice as well as interests of the public and those of the air transport industry. The advantages offered by an international and globally applicable instrument are clearly evident, particularly in the context of new and emergent threats arising from nuclear devices and chemical and biological weapons, as well as conventionally used terrorist tools, as such would provide an umbrella of regulation particularly to States which are inadequately legislated and carriers who might be under-insured and destitute of liquid assets. A back to back regime provided by the Montreal Convention and the new Convention could supplement each other well in providing coverage in instances of passenger and third party liability, while at the same time looking after the interests of the carrier.

[207]Market based measures are targeted through voluntary measures and emissions trading. With regard to the former, ICAO has developed a Template Agreement – Memorandum of Understanding that States and other parties concerned could use as a basis for voluntary measures. On emissions trading, the Assembly endorsed the further development of an open emissions trading system for international aviation.

[208]See the following working papers for background information: A35-WP/56: Civil Aviation and the Environment (which provides an overview); A35-WP/76: Market-based Measures regarding Aircraft Engine Emissions; A35-WP/77: Updating of Resolution A33-7; and A35-WP/352: Report on Item 15 for some details relating to the outcome of Assembly.

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