Legal management of aviation security after 911

Professor Dr Michael Milde[1]

Safety, regularity and efficiency are the fundamental aims of 189 States forming the International Civil Aviation Organization.[2] Among these aims the overriding priority is accorded to safety. The concept of safety encompasses also the concept of security – i.e., safety from man-made (criminal) acts against international civil aviation. Statistically, aviation is the safest means of transport but remains vulnerable to acts of unlawful interference.

There seems to be a wide-spread perception whipped by the media that, after the horrible events of 11 September 2001, we are facing a major crisis of international aviation security and that the international community must take new unprecedented preventative and suppressive actions, inter alia in the legal field. It would be wrong to underestimate in any way the dangers of unlawful interference with civil aviation but it would be also equally harmful to overreact and take any hasty unilateral and uncoordinated steps that could in themselves undermine the confidence of the travelling public in civil aviation. Sober evaluation of facts will conclude that we are not facing a new crisis of aviation security but evolving facets of the criminal threat and of the criminal methods applied while the overall number of incidents tends to diminish.

---

1) McGill University, Montreal

2) Preamble and Article 37 of the Convention on International Civil Aviation, Chicago, 1944, ICAO Doc 7300/8

Unlawful acts against the safety of civil aviation have a long history and the responses of States have evolved over the time. The first recorded act occurred in 1931 in Peru. Shortly after World War II there was a wave of "hijacking" (correctly known as "unlawful seizure of aircraft") by refugees from the oppressive regimes behind the Iron Curtain - many of them welcomed with applause and offered "red carpet" treatment; in the 1960s there was an epidemic of such acts to and from Cuba. In1970s there were acts of sabotage of aircraft leading to a total destruction of the aircraft in flight and death of all on board - most devastating among them being the 1983 PANAM 103 disaster over Lockerbie, Scotland killing 270 persons, 1985 explosion on Air India flight 182 over the Irish Sea with 329 fatalities,, destruction of UTA aircraft in Niger in 1984, destruction of the Korean Air flight 858 over the Andaman Sea in 1987 with 115 fatalities., etc.

The events of 11 September 2001 in New York and Washington represent an unprecedented horror. It took just 45 minutes of terror on 11 September 2001 - in this span of time four wide-bodied and fully fuelled aircraft in the USA were unlawfully seized in a well-arranged scenario by 19 perpetrators - some of whom were proficient in piloting the aircraft to a precise target. The intended targets were the "icons" of the USA status in the commercial, military and governmental fields. The North and South WTC Towers were hit with great precision, the Pentagon was hit less than precisely and the attack against the fourth target (either the White House or Capitol) was thwarted by heroic resistance and self-sacrifice of the passengers.

Passengers and crew of all four aircraft were killed, as were almost 3 000 persons on the ground - the worst single man-made disaster in US history and the first direct hostile attack on US territory since the Pearl Harbour[3] that promptedthe US government to enter the WWII.

3) In the Japanese attack on Pearl Harbour on 7 December 1941 the US suffered 2 388 fatalities.

AllflightsinUS air space grounded for 3 days, hundreds of planes were rerouted to Canada, all war rooms went on alert, and thousands of people normally travelling by air within the US found no alternative transportation…

There were shockwaves in the aftermath, in particular in the United States – it was a "wake-up call" after a relative lull in unlawful acts against civil aviation. For the previous 10 years not a single US aircraft had been attacked or hijacked; there was no loss of life on US aircraft due to any accidents in 1999 and 2000 and again in 2002 – that was conducive to decreased alertness for security, in particular on domestic routes.

Some specific aspects of "911" should be noted: two aircraft of American Airlines and two of United were on a domestic flight and there was no international element in their operation. Again, the airlines were not the real ultimate target of the attack – their aircraft were seized to be used as "guided missiles" against prominent US targets, the United States themselves were the real target.

The US authorities admit that there had been a profound and fatal failure of intelligence and preventative security– the synchronized attack on four aircraft required long time of preparation, logistics and money, international connections and communications– yet there was no leak contrary to the adage that "a secret can be kept if only two people know about it and one of them is dead". Relevant fragments of available intelligence were not effectively evaluated and coordinated. It has to be admitted that there was a fatal and total failure of ground security - the security screening at the airports was performed superficially by unqualified and underpaid staff, cockpits of the aircraft were left open and accessible- contrary to well established international and domestic rules- and the hijackers were ruthless and brutal, well trained and determined killers bent on suicide, and they managed with primitive but deadly effective weapons (box-cutters) to take over the

command of the aircraft. The attackers had no respect for human life, including their own. The main line of defence – the ground security – failed in a deplorable manner.

For the first time the term "terrorism" was openly used in the UN and ICAO[4] discussion - a term avoided so far due to a lack of a political consensus on the meaning of "terrorism". There have been political obstacles advocating exceptions or justifications for "national liberation movements" and other "just" causes. According to such arguments G. Washington, N. Mandela, F. Castro, J. Kenyatta, Sukarno, etc, were labelled, in the time of their struggle, as terrorists only to emerge as national leaders.

Yet, in the consciousness of the international community the term "terrorism" is well understood: it represents indiscriminate and cruel acts of violence against innocent targets to create fear, destabilisation, to undermine the existing social order and to cause substantial harm to the social status quo.

Politologs seem to agree that terrorism is a tool of those who have only limited access to weapons and explosives and cannot match any army in a real battle or open conflict. They are typically motivated by emotions of hostility, frustration, hatred, violence and fanaticism. This phenomenon is not restricted by geography, religion or philosophy and is widespread in all civilizations and it would be a most serious error to point a finger to any particular part of the world.

International terrorism is a new phenomenon that appeared in the 20thcentury. It is generally represented by loosely internationally based groupings or alleged groupings of dedicated individuals or cells waging their violent battles internationally, based on common ideologies or misrepresented and distorted religious concepts: Red Army faction in

---

4) UN General Assembly Resolution 55/158, UN Security Council Resolutions 1368 and 1373, ICAO Assembly Resolution A33-1

Italy and Japan, Baader-Meinhof, Shining Path, Al-Quaida are the main examples The targets of international terrorists were not only in the USA but also in Europe, Asia, Africa and Latin America. (attacks at airports, restaurants, clubs, embassies, hotels - in Buenos Aires; Paris shops and underground, Tokyo underground, Bali hotel/club, Mombassa hotel and ElAl aircraft).

Aviation is an easily vulnerable target and with minor means large damage and wide publicity can be achieved against this vital international service.

Are we facing a new crisis in aviation security after 9/11? Or is the journalistic pathos, shock of the events and some level of common hysteria whipping up public opinion and motivating politicians and lawmakers? Is law the essential weapon to prevent and suppress the violent acts against civil aviation and its misuse against the targets on the surface? Do we need more laws, better laws, new international conventions and better conventions to prevent and suppress the violent acts against civil aviation and misuse of aviation?

A sober analysis will lead us to a conclusion that the events of 9/11 are an unprecedented and so far isolated act of international terrorism introducing a new and so far unknown danger - a suicidal and murderous use of the aircraft itself as a weapon of mass destruction against terrestrial targets. However, civil aviation has been experiencing over the years a vast spectrum of other criminal interference - hijackings, sabotage of the aircraft, armed attacks at the airports, attempted use of "manpads"[5] - all of them representing a deadly danger to the safety. Again, by far not all of these acts could be attributed to "terrorism" and the less so to "international terrorism". Many of the acts are attributable to criminal acts of extortion for pecuniary gain or political concessions (e.g., release of prisoners), to

5) ICAO Doc C-WP/12238, 13/4/04

refugees seeking transport out of a particular territory and also to mentally unbalanced or confused persons seeking prominence and attention. Briefly, the attacks against civil aviation have various underlying causes and motivations, not all of them could be attributed to "international terrorism" and their prevention and suppression requires differentiated approach. It should be also noted that the acts of unlawful interference against civil aviation are not restricted to any particular geographic area - in fact, there is not one single State whose aircraft, airport or citizens have not been victimized by such acts. It also must be recognized that the security of the global international aviation is only as strong as the weakest link in the security systems. It is of little value to have the strongest possible security system at one airport while that airport receives flights from points of departure where security measures are lax or non-existent.

The first line of defence of the international community against the acts of unlawful interference with civil aviation has been sought in the legal field and resulted in the adoption of national laws defining such acts as criminal offences and establishing jurisdiction of the national courts of law. That was followed by an unprecedented harmonized political will of states to adopt a pleiad of international instruments relating to aviation security; these instruments now belong to the widest accepted unification of law in the international sphere

The 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft[6] has been so far ratified by 182 States and may be considered part of the general international law. Its importance is that it, for the first time in international law, established the criminal jurisdiction of the State of registry of the aircraft over offences and other acts committed on board an aircraft in flight. Moreover, it gave an important jurisdiction to the aircraft commander to restrain, to disembark and to "deliver" the alleged offender.

---

6) ICAO Doc 8364.

Specifically on the act of unlawful seizure of an aircraft ("hijacking") the Convention stipulates the duty of the State of landing to restore the control of the aircraft to its lawful commander and to facilitate the continuation of the journey of the aircraft and its passengers. The Convention thus filled serious gaps in international law as to jurisdictions, rights of the aircraft commander and the aftermath of an act of hijacking. However, the weakness of the Convention is that it does not define any specific criminal act, does not compel the State of registry to actually exercise its jurisdiction and provides only a weak basis for the extradition of the alleged offender to another country.

The 1970 **The Hague Convention for the Suppression of Un lawful Seizure of Aircraft**[7] has been ratified by 182 States and also must be considered part of the general international law. In spite of all tensions and differences marking, by 1970, the Cold War international relations, the Diplomatic Conference held under the auspices of ICAO reached a remarkable unity of the political will of States to take strong measures for the protection of civil aviation. The Convention defines the act of unlawful seizure of aircraft as an "offence" that is subject to severe penalties in all contracting States as an "ordinary" offence of serious nature (i.e., not a "political" offence that could possibly secure the right of asylum). The jurisdiction of the Courts of law is actually universal - apart from the State of registry of the aircraft, the State of the landing of the aircraft with the alleged offender still on board, state of the operator of a leased aircraft - any State where the alleged offender is found has the duty to detain him and either extradite him to the State of registry of the aircraft or to submit the case - without any exception whatsoever - the case to its authorities for the purpose of prosecution. The delicate balance between prosecution or extradition was a necessary compromise, while many delegations would have favoured unconditional extradition: African countries were opposed to

7) ICAO Doc 8920

unconditional extradition, e.g., to the racist apartheid regime of the then South Africa, Arab countries found it unacceptable to be forced to extradite an Arab to the State of Israel and many States argued that their constitutional provision would prevent them to extradite their own citizen to a foreign country. Thus, a compromise was found in the Roman law maxim aut dedere aut iudicare – either extradite or assume jurisdiction. The main achievement of The Hague Convention is that there should be no "safe haven" for the perpetrators and anywhere in the world they would face either prosecution or extradition. The Convention also provides for international cooperation among States in the prevention and suppression of unlawful seizures of aircraft and the duty to keep the ICAO Council informed of any acts and the results of the prosecution or extradition.

The 1971 **Montreal Convention for the Suppression of Unlawful acts against the Safety of Civil Aviation**[8] is currently binding for 185 States and represents general international law. The Convention defines as an "offence" punishable by severe penalties any act of violence on board, destruction or damage to aircraft, placing on board any substance or device capable of causing damage to that aircraft, destruction or damage of air navigation facilities and also the communication of a false information ("hoax") that can cause damage to aircraft in flight. Universal jurisdiction was accepted by the Convention and it keeps the same delicate balance between extradition and prosecution as was adopted in The Hague Convention of 1970.

The 1988 **Montreal Protocol to the Montreal Convention of 1971**[9] has been ratified by 160 States and it expands the applicability of the 1971 Montreal Convention to acts of violence committed at airports serving international civil aviation and to attacks against aircraft on the ground that are "not in service". In was adopted in response to violent

---

8) ICAO Doc 8966
9) ICAO Doc 9158

attacks in the terminals of airports in Rome, Vienna, Athens and Tel Aviv that resulted in considerable loss of lives. It may be argued that there was not an urgent need for this instrument since such acts are fully "localized" in the territory of one State and there are no "international elements" as to jurisdiction or applicable law necessitating an international regulation. However, the Protocol would become relevant if the alleged offender escapes the country where the act was committed since it would grant universal jurisdiction to any State where the offender would be found and thus the Protocol is a valid contribution to the mosaic of legal instruments dealing with aviation security.

The 1991 **Montreal Conventionon the Marking of Plastic Explosives for the Purpose of Detection**[10] so far obtained 130 ratifications. ICAO undertook the preparation of this instrument at the specific request of the UN Security Council after the plastic explosives(SEMTEX, C4 and similar substances) were used not only against civil aviation but also in terrorist acts against other targets. It was recognition that the ICAO law-making system was efficient and prompt. Plastic or "sheet" explosives are the most devastating explosives short of nuclear devices, they are inexpensive, stable, waterproof, malleable, have a low density so that they cannot be identified by x-rays and have low vapour pressure making their detection impossible by sniffing dogs or technical detection devices that are currently available. Yet, the plastic explosives could be made detectable if, during the process of their manufacture, a minuscule quantity of a common explosive or other additive is added to them as a "marker". The Convention imposes a simple obligation on the contracting States: prohibit and prevent the manufacture in their territory of plastic explosive unless they have been marked by the defined additive and prohibit and prevent the import and export of the plastic explosives unless they have been marked. This Convention goes

10) ICAO Doc 9571

beyond the protection of civil aviation and could assist in preventing terrorist acts against any other targets.

Based on the principles of these international instruments, all States have adopted specific national laws dealing with unlawful acts against the safety of civil aviation, defined the respective "offences", provided for the jurisdiction of their courts of law and provided for prosecution or extradition of the alleged offenders. It may be safely said that there is no place in the world where the perpetrators of criminal acts against civil aviation would find a safe haven, succour and protection.

The question may arise whether there is any proven need, after 9/11, to elaborate new laws, better laws and additional international instruments? The answer may safely be in the negative as far as issues of criminal law and jurisdiction are concerned. Again, it must be admitted tha criminal law in not apanacea (a "cure-it-all)" and by itself will not prevent the criminal acts. Over its history the States have developed perfect laws penalizing murder, assault, rape or robbery - yet these acts continue to occur, often with alarmingly growing trend. Criminal law - both domestic and international - can serve only as an instrument of general prevention, signalling that any defined act will be subject to prosecution and a severe penalty. However, that by itself will not deter the determined attackers who do not respect the value of the human life, including their own.

The general legal prevention has to be complemented by specific technical prevention, by technical measures preventing the would-be attackers from coming close to their intended target, from introducing on board aircraft weapons, explosives or other dangerous devices.

States have resorted to various steps in the technical prevention of attacks against civil aviation some 30-35 years ago when the first wave of seizure and sabotage of aircraft occurred. Prompted by Assembly resolutions A17-10

and A18-10, the ICAO Council exercised its constitutional prerogative

in law-making and prepared, in 1974, a set of international Standards and Recommended Practices that were grouped in Annex 17to the Conventionon International Civil Aviation under the title ***Security.*** These international Standards are legally binding on all 189 contracting States of ICAO, unless they file with the Council a difference that they are unable to comply. Under these Standards States are obliged to establish a national aviation security program and to require such a program from their airport authorities and air operators. These programs include, in addition to preventative technical specifications, a program for the training and testing of the personnel involved. The Standards further specify the requirements for the security screening of passengers, crew and their baggage, for the reconciliation of the baggage with the passengers actually boarded, prevention of unauthorized access to the cockpit of the aircraft, etc. The technical specifications, measures and procedures are further amplified in the *ICAO Security Manual* that gives to States detailed guidance in a vast spectrum of securityprecautions - from the protection of the airport perimeter, over the techniques of passenger screening and searching to the security identification of persons entitled to access certain areas or facilities.After 911 Annex 17 was updated and modernized and made applicable also to domestic flights – a major departure from the ICAO practice that is generally restricted to international air navigation.

The experience of 9/11 indicates that the passenger screening was inadequate since it did not discover potentially dangerous instruments; moreover, the cockpits of all four aircraft involved remained accessible, contrary to existing regulations, and enabled the perpetrators to take over the command and control of the aircraft. Since that time the airlines are required to install fully lockable and bullet proof door to the cockpit - a major investment for the airlines, in some cases subsidized by the governments. The intelligence services also failed to get advance knowledge of the potential threat and to share with other

services the patent alarming signals. New technical prevention is being developed mostly on a reactive basis - experience leads to the need for new measures - and it is to be admitted that the criminal mind evolves faster than such reactive measures in applying new methods and procedures for the violent acts and in finding loopholes in the existing security systems. Solid criminal intelligence and international exchange of information on possible threats and their methods is indispensable.

The events of 9/11 were without a precedent and caused horrifying consequence. However, that should not lead to an "overreaction", at least not in the field of the legal regulation. There is definitely no urgent need for the drafting of any new international instruments dealing with criminal matters; the existing instruments offer a sufficient legal framework. The regulation of the preventative technical measures haveto be constantly updated both on the domestic and international level and the existing regulation has to be firmly implemented and enforced. Implementation and enforcement of such measures requires a constant oversight and verification. It is a welcome development that the ICAO launched, in July 2002, in response to the call of the ICAO Assembly and of the High-level Ministerial Conference on Aviation Security the ICAO Aviation Security Plan of Action[11]. The central element of this plan are regular, mandatory, systematic and harmonized audits to enable evaluation of aviation security in place in all 189member States of ICAO in order to identify and correct any deficiencies in the implementation of ICAO security-related standards. The plan is called ICAO Universal Security Audit Program (USAP). This is a remarkable and unprecedented development in international law and policy - 189States gave unanimous consensus to empowering

11) ICAO Doc C-WP/11800, Doc 9800 High Level Ministerial Conference 19-20 February 2002

ICAO to conduct audits of their compliance with security standards and gave to ICAO elements of supranational authority! Such audits - conducted by independent and neutral experts- contemplate not only the identification of any shortcoming but also a follow-up program that should provide States with assistance in correcting any deficiencies. This approach adopted by ICAO confirms that aviation security is a global problem requiring global and harmonized approach throughout the world. Aviation security will globally be only as strong as the weakest link in the chain of the system and that requires harmonized global approach to the problem and the international audits will safeguard uniform application of the security standards. By the end of 2006 ICAO performed 53 such security audits and the work continues.

In the wake of 9/11 someStates have hurriedly adopted more stringent aviation security laws and regulations some of which purport to have extraterritorial effects. Aircraft departing from foreign airports are required to comply with the security standards of the place of destination - an understandable and legitimate requirement since, under the Convention on International Civil Aviation aircraft must comply with the laws of the State whose air space they enter[12] Civil Aviation. Moreover, some States have resorted, in the screening of passenger, to "profiling" that has led in some cases of overzealous application to complaints of racial discrimination. Authoritative personal identification by biometric methods (fingerprinting or reading of the iris matched with a data base) is gradually being introduced and the air carriers are required in some places to provide Advance Passenger Information (API) giving the identities of inbound passengers, their points of origin and final destination, their passport data, etc. API may speed up the

12) Articles 1,11 and 13 of the Convention on International Civil Aviation

processing of inbound passengers at the destination and single out only some of them for a closer scrutiny. This practice may give rise to objections for a perceivedintrusion into privacy but the international community may have to accept this development as a minor price for the prevention of a common danger. In any case, most of such data have been always available to the airline from the moment when the passenger books his flight.It is important that the preventative measures should not be imposed unilaterallywithout international coordination; moreover, any such measures should not be applied in a discriminatory manner against persons of a particular racial "profile"disregarding particular cultural traditions and sensitivities. There is no evidence that the intrusive information gathering and databases of "undesirables" yielded one single success in eliminating a possible danger; however, there have been reports of complaints that completely innocent persons were mistaken in the database for potential terrorists and excluded from transport. An effective and flawless system of prevention has not yet been found. There is an open difference of view on the API between the US and the States of the European Union and a very tentative agreement is bound to expire in July 2007.

The United States – the only direct victim of the "911" attack – adopted in the wake of the events the following important legislation

- October 2001 Patriot Act: Uniting and Strengthening America by providing appropriate tools required to intercept and obstruct terrorism. This act has been criticized as over-reacting and encroaching on the civil liberties. It contained a "sunset clause" and on 9 March 2006 was considerably modified by a reauthorization act

- The Aviation and Transportation Security Act of 2001[13] established Transportation Security Administration, later consolidated with other agencies
- 2002 Homeland Security Act created a new US federal agency and introduced federalization of the aviation security services.[14]

Unity of international approaches has not been reached also in the matter of armed air marshals on board and of arming the flight crew with guns, yet the USauthorities may require that some incoming flights must use air marshals to be admitted to a US destination. The international standards so far do not deal with these issues and the practice of States differs. Some States have been placing armed air marshals (usually disguised as ordinary passengers) on board for many years. Others raise objections or doubts that any shootout on board an aircraft in flight could hurt innocent passengers, possibly lead to depressurization of the aircraft or damage some vital operational components of the aircraft. The legal issue of potential liability have not been studied with any firm conclusions. Similarly, some vocal objections have been raised by pilots'associations against the idea of arming the flight crew. On the other hand, there is a firm international consensus that the door to the cockpit must be effectively locked and fully resistant to any intrusion.

Another point of confusing practices was introduced by summer 2006 when the British intelligence uncovered terrorist plans to use potentially harmless liquids that, in combination with other liquids, could produce an explosion. Airlines without any coordination introduced prohibition to

---

13) Pub. L. 107-71,15 Stat 597
14) Pub.L. 107-296, 116 Stat. 2135

carry any liquids, gels or creams in hand luggage on board aircraft –a measure that resulted sometimes overzealous seizures of miniature bottles of perfumes, toothpastes, not to say duty-free bottles of liquor legitimately bought at the airports. The practice of airlines differed and what was tolerated by one airline was not accepted on transfer to another flight. ICAO recommendation based on the advice of international experts in explosives introduced some modicum of harmony in the practice of carriage of liquids on board[15] and would permit containers with a capacity not exceeding 100 ml and placed in a transparent re-sealable plastic bag of a maximum capacity of one litre and also recommended exemption for liquids (perfumes or liquor) purchased in the airport duty-free shops or on board the aircraft andpacked in tamper-evident plastic bag with a proof of purchase dated on the day of the flight... Yet, there is no uniformity in the practice – there have been reports that the duty-free purchases of passengers were not recognized as legitimate on transfer to another flight...

Further uniformity has to be established as to search of shoes, laptops, appliances wit batteries, etc. There is no end to potential dangers –the British terrorist planners in summer 2006 intended to use ordinary "chapatti" flour with hydrogen peroxide as a potent explosive. Again, a person well proficient in marshal arts could be as dangerous with his bare hands as another person with a hand gun –where do we stop? A cartoonist once suggested that on a perfectly safe flight the passengers should have no luggage, no clothes and should be handcuffed...

There must be some sensible limits in the screening of passengers and their hand luggage, limits that would respect the dignity of the

---

15) Press Release PIO 17/06 of 11 December 2006

traveller and not expose him to hostile and adversarial attitudes and humiliation so frequently seen at international airports. The confidence of the public in air transport would be seriously compromised if we continue seeing hysteric scenes when a small bottle of perfume is found in the handbag of an old lady or when an old man does not remove the belt of his pants fast enough. In the preventative aviation security we must not lose sight of the human element –the passengers and their dignity. Respect for the different cultural traditions should be stressed – e.g., fingerprinting of passengers may be culturally unacceptable for some persons; insistence on a wide spectrum of personal data of passengers may be felt as intrusion into privacy and open to misuse; basic respect and civility in the process of personal screening of passengers should be common at all airports...

At present aviation is much safer than it was in 2001 but the passenger may have been forgotten along the way. According to IAT A[16] the airlines of the world and their passengers are paying US$5.6 billion per year since 2001 for security that they consider time consuming, uncoordinated and inefficient. Aviation is the only industry that is forced to pay for its own security – it should be included in the global national security. Again, some Governments make airport security into a profitable business – thus between 2002 and 2005 Canada collected CS1.25 billion from the air travellers but spent only C$820 million on aviation security. The IATA chief executive said: "I will be polite and characterize this skyway robbery as very unfair to the passengers"[17]

16) Speech by G. Bisignani on 12 March 2007 in Vancouver; <www.iata.org/ pressroom/ speeches/2007-03- 12. htm>
17) Idem

While the issues of aviation terrorism and its prevention are very much in the focus of the public attention, some economic and legal consequences of 9/11 attract little scrutiny. The aftermath of the events of "911" has thrown the airlines of the world into an unprecedented crisis threatening the future viability of the entire industry. According to the IATA calculation the industry lost over 40 billion dollars since "911". Many States had to bail out their national airlines from the brink of bankruptcy by massive cash and loan subsidies. The situation has been aggravated by the steep increase in the price of fuel that counted for 13% of the airlines'operating costs prior to "911" and presently exceeds 26%! Intrusive and time-consuming preventative measures, insensitive searches and screenings coupled with often intimidating attitude of the security officers turn potential passengers away from air transport or from some destinations.

The US Governmentput a liability cap for the American Airlines and United (whose four aircraft were directly targeted on 911) to the amount of the insurance coverage available to them at the time of the tragedy since a full compensation of the human and material damage was far beyond the means of the airlines or their insurers the Government itself assumed the duty to compensate the victims. This seems only logical in equity - the airlines themselves were the victim of the terrorist act, no fault or negligence could be attributed to them and the real target of the attack was the USA itself.

A major economic and legal problem for the future arises from the aftermath of 9/11 for the risk management in similar events. Airlines insure their liability risks with insurance companies who, in turn, reinsure their risk on the reinsurance market. The typical insurance policy in the past used to include, for a surcharge of some 10% of the

premium, a "war and terrorism"clause covering the airlines for such (hardly quantifiable) catastrophic risks. However, after 911 the insurers invoked the often overlooked "seven-day" clause in the policies and cancelled, as of 23 September 2001, all war and terrorism clauses from the aviation insurance policies. Later they re-introduced such a clause but for a maximum of $50 million per event. The insurance market, under funded and overexposed over many years, would itself have completely collapsed in the situation of overexposure to risk.

The lack of available insurance for third-party risk would have grounded many airlines that could not possibly face the risk. In many States the Governments accepted a governmental guarantee substituting the war and terrorism insurance coverage for a temporary period but lasting in many cases till the present time. This practice amounts in substance to a "subsidy" to the airline and distorts the "level playing field"of a fair competition but a public interest in the viability and stability of the air transport justified such practice.

ICAO stepped into the issue of availability of insurance with the - so far unsuccessful- effort to find an alternative to commercial insurance for the airlines. The planned scheme of "ICAO Global Scheme on Aviation War Risk Insurance" - generally known as "Globaltime"[18] - would set up a non-profit Insurance Entity collecting some premiums paid by the passenger and any pay-out for the damage caused to third parties on the surface in cases of aviation terrorism would be guaranteed by the participating Governments. The scheme would become operational when agreement on participation is reached from States responsible for 51% of the contributions to the ICAO budget. Although the original deadline for the subscription of the program has elapsed, only 45.9% of the contribution commitments have

18) ICAO Doc c-WP/12003, Appendix A

been received and the largest potential contributors (USA and Japan) have not joined. The problem of risk management in the wake of 911 remains open and threatens the future viability both of the aviation industry and the insurance and reinsurance markets.

The risk management issues in the aftermath of 911 have also triggered in ICAO a new interest in the 1952 Rome Convention[19] - a very outdated instrument that is currently in force for only 46 countries. The effort to modernize this Convention by a 1978 Protoco l[20] was half-hearted, unconvincing and essentially failed. The subject of the Convention - damage caused to third parties on the surface - offers some relevance in matters analogous to the 9/11 disaster and the vast human and material damage it caused by the impact of aircraft on the surface. However, an international Convention can address only social relations containing a "foreign element" - a *foreign aircraft* in this case - and its principles would not be applicable in a purely "domestic" case.

TheRome Convention attaches the liability to the aircraft operator and that liability is strict - i.e., regardless of fault. However, the liability is limited to amounts that are absolutely out of touch with the current economic realities.

How could the Rome Convention be modernized to permit a realistic insurance in cases of terrorism comparable to 9/11? It seems hardly acceptable in the current legal culture to remove the strict liability of the aircraft operator and to replace it by the fault-based liability permitting the operator to be exonerated if he proves absence of his

19) ICAO Doc 7364, Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome, on 7 October 1952
20) ICAO Doc 9257

fault (negligence). Again, it appears hardly acceptable to set a low limit of liability with respect to the victims on the surface when the recent 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air imposes strict liability on the air carrier in the first tier up to SDR 100.000 and unlimited liability in the second tier with the reversed burden of proof on the carrier that he and his servants and agents were not negligent. The 1999 Montreal Convention offers this rather favourable regime of liability to passengers - i.e., persons who knowingly, willingly and on the basis of a contract participate in the carriage by air and its possibly associated risk. It would appear absolutely inappropriate to offer lesser protection to innocent victims on the surface who are in no contractual relation with the aircraft operator. It would appear equitable in any modernization of the Rome Convention to offerto the victims of aviation terrorism on the surface in the first tier a higher limit of liability than that applicable in respect to passengers (say, SDR 200.000) based on strict liability and no limit in the case of negligence or contributory negligence of the aircraft operator. It is still to be seen whether and to what degree such a new Convention would facilitate the availability of acceptably priced insurance coverage.

ICAO currently considers a modernization of the Rome Convention at the level of a Secretariat Study Group and the subject waspresented to the session of the ICAO Legal Committee in March 2004. The Committee failed to prepare a mature draft Convention or Protocol and the 35th session of ICAO Assembly in September-October 2004 maintained this subject with high priority on the Work Program of the ICAO Legal Committee[21]. Any such new instrument would appeal to

21) ICAO Doc C-WP/12759, 16/11/06

States if it deals not only with the liability aspects of damage attributable to terrorist acts but also with the general spectrum ofliability to third parties on the surface caused by physical impact of an aircraft or parts thereof and also with damage caused by noise or sonic boom.

Conclusions:

1. "911" was not aimed against airlines but against the United States. The US authorities quite correctly assumed substantial responsibility for the compensation of victims
2. "911" revealed considerable weaknesses in the USground security, airline security and the intelligence services.
3. Aviation security has considerably improved since "911" – at a great cost to the airlines and passengers.
4. There is no proven need for the elaboration of further international instruments for the prevention and suppression of unlawful acts against civil aviation – the existing instruments are satisfactory and should be meticulously implemented.
5. The technical prevention of unlawful acts must have its centre of gravity and main line of defence on the ground – in accordance with ICAO Annex 17 and the ICAO Security Manual.ICAO has to keep these documents up to date. Any defence in the air (air marshals) is still a matter of controversy and should not be unilaterally required.
6. Aviation security must be jointly addressed by the Governments, airlines and airports and its cost should not be imposed only on the airlines and passengers.

7. Unilateral actions by states are undesirable and disruptive. Any new preventative measures should be internationally harmonized, "humanized" and should take account of different cultural traditions and financial resources.
8. A revision of the Rome Convention does not appear to be urgent or mature.