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Crisis Management toward Restoring Confidence in Air Transport- Legal and Commercial Issues

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CRISIS MANAGEMENT TOWARD RESTORING CONFIDENCE IN AIR TRANSPORT-LEGAL AND COMMERCIAL ISSUES

Ruwantissa Abeyratne*

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I. INTRODUCTION

THE EVENTS OF September 11, 2001 defy modern economic and management theory when addressed in aviation terms. These theories would suggest that, once the impact of such events has lessened, and economies are restored to their *status quo ante*, a rise in the gross domestic product of States to earlier levels would almost inevitably result in increased consumption and restoration of the business. The natural assumption would be that the demand for air travel would rise to earlier proportions and consumption in terms of air transport services would be restored to normalcy. However, the September 11 attacks introduced a unique characteristic through the fear factor that directly impacts the future development of air transport. As a result, the grim task of restoring passenger confidence stands in the way of the economic revival of the air transport industry.

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Returning passenger confidence to previous levels is also critical to aviation crisis management.

In re-establishing confidence in air transport services, aviation management should essentially target three disciplines: commercial, insurance, and security. Risk management measures have already been taken by States. These measures include offering indemnities and guarantees toward air carriers' third party war risk liability, and initiating action on aviation security and insurance worldwide. These measures should form the starting point of a sustained and integrated management program requiring considerable financial and human resources investment. In order to assess the requirements for such an investment, and to justify it, a carefully considered study of the magnitude of the crises involved in aviation has to be undertaken by States.

Aviation has been in constant crisis. The air transport industry, even prior to September 11, although seemingly a glamorous, exciting, and prosperous business, never enjoyed sustained periods of profitability. Even among the large carriers, a short bout of profitability would inevitably be followed by a period of downturn in real income. There is nothing arcane about this situation. It is simply that this fluctuation in fortune is an ineluctable characteristic of air transport, whose fortunes are dictated by rigid regulation, competition, and technological change. For this reason, it would be doing the air transport industry an injustice if an analysis of the situation it faces should be strictly bifurcated into pre- and post- September 2001 segments. However, this by no means suggests that the tragic events of September 11 did not gravely aggravate the fortunes of an industry already operating at a disadvantage. The events of September 11 placed issues in a strictly realistic perspective, making one conclude that, if a sustained analysis were to be made of air transport, plain economic theory would no longer be the exclusive discipline for consideration. Rather, all relevant factors would have to be taken in context, and emerging issues would have to be analysed as possible threats to the economic well-being of the air transport industry.

Any study of investment in present day aviation management incontrovertibly involves viewing issues from both an economic and legal perspective. In the field of aviation security, these two disciplines are intertwined with the regulatory regime, calling for a wide discussion of legal and regulatory schemes in the role played by States in ensuring security in aviation within their ter-

ritories. The importance of economic issues can be viewed as predominant in the field of insurance, particularly in the inquiry as to whether States should be establishing an aviation re-insurance pool to support airlines in crisis, thus giving States much more control over the running of their national airlines. Therefore, in an overall sense, the question arises as to whether increased State involvement in both security and insurance issues would not bring back rigid State control over national carriers. If this question were to be answered in the affirmative and day-to-day State control makes a comeback, one would have to inquire into the continued validity of gradual liberalization of market access, bringing the commercial angle into play and forming an interlinked triangle. If this phenomenon were to occur, the necessary corollary would inevitably emerge; that is whether absolute competition would no longer be a collective goal among States, and whether the need for added capacity would no longer arise in the volumes earlier required.

This article will primarily address issues in a post-September 2001 context, particularly with regard to the need for investment in order to revive a flagging aviation industry. It will also analyze issues past and present, with the intent of looking at the future. This will be attempted by considering three major areas, which were already in crisis but were further impacted by the events of September 2001. These areas relate to crises in the commercial, security, and insurance fields. It will also view the overall management philosophy of an aviation industry in crisis - comprising air transport and other aviation related industries - through issues that continue to impact the economic viability of air transport, particularly as a result of the events of September 11, 2001. These analyses will be carried out with a view toward assessing the quality of investment required for reviving the aviation industry.

II. AERONAUTICAL IMPLICATIONS

It is an incontrovertible fact that the events of September 11, 2001 primarily impacted the victims of those terrible attacks and their families. It is equally unchallengeable that the second casualty in this horrendous series of events was the aviation industry in general. The aviation industry paid the irrecoverable cost of having aircraft used as weapons of vast destruction. Commercially speaking, the closure of airspace, as an immediate measure throughout the United States and some parts of Europe, and its subsequent opening amidst restricted commercial activ-

ity of airlines, not only impacted the air transport industry during the first few days of the catastrophe, but also continues to portend grave commercial implications for the airline industry in the years to come.

The International Civil Aviation Conference, convened at the initiative of President Roosevelt of the United States, was held in Chicago, Illinois in November and December 1944. The resultant consensus, the Convention on International Civil Aviation,¹ begins by stating in its Preamble that the "development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security."²

The Chicago Convention identifies its scope as being applicable to international civil aviation, thus leaving one with the assumption that, at least technically, the Convention may not apply to local or domestic aviation.³ If this were to be accepted without further debate, one could argue that the attacks on the United States, carried out with aircraft flying domestic routes within the Country, would not come within the purview of the Chicago Convention. The situation, however, is not that simple or straightforward. The Chicago Convention does not state anywhere that it will apply only to international civil aviation. On the contrary, the Convention, in Article 4, provides: "Each Contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention."⁴

Although the provision itself is contextually irrelevant to the events of September 11, 2001, the use of the words "civil aviation" links domestic and local aviation to the Chicago Convention and therefore to the work of the international aviation community, in pursuing safe and orderly development of international civil aviation.

The ICAO Council, at its 141st Session in 1994, addressed the subject of aircraft accident investigation. The Council noted that Article 26 of the Chicago Convention, requires a State to institute investigations upon an aircraft of another State which meets with an accident in the territory of the first State.⁵ The

¹ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter "Chicago Convention"].

² *Id.* at preamble.

³ *Id.*

⁴ *Id.* at art. 4.

⁵ *Id.* at art. 26.

Council further noted that while Article 26 seemingly describes accidents occurring during international air transport, the Foreword to Annex 13 specifies that the Annex may also deal with accidents of a kind which do not fall within the purview of Article 26.⁶ Accordingly, in 1944 the Council considered an amendment to the Annex, which ensured some uniformity in investigation procedures regardless of whether an accident involved an international or domestic flight.

Annex 13 has incorporated the abovementioned amendment by stating in its Foreword:

Article 26 does not preclude the taking of further action in the field of aircraft accident investigation and the procedures set forth in this Annex are not limited solely to an inquiry instituted under the requirements of Article 26, but under prescribed circumstances apply in the event of an inquiry into any "aircraft accident" within the terms of the definition herein.⁷

The Annex defines an "accident" as "an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked."⁸ The definition does not mention that the accident has to occur during an international flight.

Annex 17 to the Chicago Convention, on the subject of aviation security, defines "security" as "a combination of measures and human and material resources intended to safeguard international civil aviation against acts of unlawful interference."⁹ This would mean that any measure taken, following the occurrence of an accident caused as a result of domestic aviation would fall within the provisions of Annex 17.

III. WAR RISK MANAGEMENT

The international insurance market gave notice on September 17 that, effective September 24, third-party war risk liability insurance, covering airline operators and other service providers against losses and damages resulting from war, hijacking and

⁶ *Id.*; see also Aircraft Accident and Incident Investigation, Annex 13 to the Convention on International Civil Aviation, at v (9th ed. 2001) [hereinafter "Annex 13"].

⁷ Annex 13, *supra* note 6, at v.

⁸ *Id.* at 1-1.

⁹ Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference, Annex 17 to the Convention on International Civil Aviation, at 1-1 (7th ed. 2002) [hereinafter "Annex 17"].

other perils, would be cancelled. Underwriters subsequently reinstated partial coverage for war risks with drastically reduced limits at considerably higher premiums. As an immediate response to this measure, the President of the Council of the International Civil Aviation Organization (ICAO), Dr. Assad Kotaite, issued a State Letter to all ICAO Contracting States, requesting that they take effective measures to preclude aviation and air transport services from coming to a standstill. This letter also appealed to Contracting States to support airline operators and other relevant parties, at least until the insurance market stabilized, by committing themselves to cover any risks to which airline operators and others may become exposed by the cancellation of insurance coverage.¹⁰

The 33rd Session of the ICAO Assembly, held in Montreal from September 25 to October 5, 2001, considered as an urgent priority the insurance issue by adopting Resolution A33-20.¹¹ The Resolution, while recognizing that the tragic events of September 2001 have adversely affected the availability of war-risk insurance coverage to the operations of airline operators globally, urged Contracting States "to work together to develop a more enduring and coordinated approach to the important problem of providing assistance to airline operators and other service providers."¹² The Resolution, basing itself on the fundamental premise enunciated in Article 44 of the Chicago Convention, which refers to the objective of ICAO to ensure safe, regular, efficient and economical air transport, directs the Council of ICAO to urgently establish a Special Group to consider the issues emerging from action taken in the insurance market regarding third party war risk insurance coverage.¹³

One must of course appreciate that war and associated risks, including hijacking and acts of terrorism, pose an extremely high-risk exposure to insurers. Aviation hull and liability policies therefore usually contain an express exclusion in respect of such risks. The war risk exclusion used in the London market, known as AVN 48B, which was a clause introduced by the London insur-

¹⁰ State Letter EC 2/6-01 (Sept. 21, 2001), ICAO: Montreal.

¹¹ Coordinated Approach in Providing Assistance in the Field of War Risk Insurance, ICAO Res. A33-20 (provisional), ICAO Assembly 33rd Sess. (Sept. 25 – Oct. 5, 2001), *available at* <http://www.icao.int/icao/en/assembly/a33/index.html> [hereinafter "A33-20"].

¹² *Id.*

¹³ See A33-20, *supra* note 11, at 2; *see also* Chicago Convention, *supra* note 1, at art. 44.

ance market after the Israeli raid on Beirut Airport on December 28, 1968, applies as a war and hijacking risk exclusion clause, and is now included in every aviation hull and liability policy. This clause covers a wide range of eventualities including damage caused as a result of any malicious act or act of sabotage, but excludes the risks of war, invasion, hostilities, civil war, rebellion, revolution, insurrection, martial law, hostile detonation of atomic weapons, strikes, riots, civil commotions or labour disturbances, acts of a political or terrorist nature, sabotage, confiscation, nationalization, seizure, and hijacking.¹⁴

In practical terms, war risk insurance is required to cover three eventualities: to protect an airline operator from potential financial liability that could jeopardise its existence; to justify operations into territories of States by appeasing those States that they and their citizens would be financially compensated in the event of damage; and to protect the financial interests of airlines, their owners, financiers and lessors. It is usual for an aircraft, depending on its type, to be covered for any amount from US\$750 million to US\$1 billion on aggregate (as against per single occurrence). Against this figure, it is significant that the underwriters permitted coverage for only up to US\$50 million aggregate, consequent upon their issuing notice of withdrawal of third party war risk insurance on September 17, 2001.

Many Contracting States, following the State Letter of the President of the ICAO Council, stepped in to address issues regarding cancellation of insurance. It would therefore be relevant to discuss steps taken by these various ICAO Contracting States in responding almost immediately to the difficulties posed to their airline operators and other service providers.

In the United States, the Bush administration proposed a plan to have taxpayers cover most of the losses that insurance companies would suffer in future terrorist attacks. The administration viewed its proposal as an alternative to legislation drafted by lawmakers from both parties in Congress at the behest of the insurance industry. The industry plan recommends a new government-backed insurance company that would manage a pool of premiums and payouts for terrorism policies. Once losses exceeded the amount of money in the pool, the government would cover the difference - which could total much more than taxpayers stand to pay under the administration's proposal. The administration was wary of the industry's approach, fearing the

¹⁴ *Id.*

creation of a new federal bureaucracy that is insensitive to costs.¹⁵

The White House reportedly planned to propose that the federal government relieve insurance companies of 80 percent or more of the cost of damages from any terrorist attacks over the next year. The proposal would leave the government vulnerable to huge losses if there were large-scale attacks, but administration officials said they thought it was the most workable plan at a time when the industry and others that depend on insurance need a quick fix.¹⁶

Experts estimate that about 70 percent of the insurance contracts covering terrorist attacks will expire by the end of the year, and reinsurers, who essentially offer insurance to the insurers, have said they plan to drop such coverage.¹⁷

The member States of the European Union recognized that the terrorist attacks exposed the vulnerability of the air transport sector, with damages exceeding all rational estimates. The EU Member States have asked the Commission to draw up guidelines to ensure efficient and coherent responses in such cases. Possible responses could include the establishment of a "mutual fund" for risks in order to avoid the cost of national measures. In addition, the Commission proposes harmonising the amounts and conditions of insurance required for the issue of operating licences.¹⁸

On October 10, 2001, the European Commission announced that it would allow member states to help European airlines recover from the turmoil after the September 11 attacks. The Commission, which in the past has been critical of government assistance to airlines, is now urging governments to extend compensation to cover the rise in premiums until the end of the year, and has proposed setting up a fund to cover the higher premiums.¹⁹

In the context of European States, it must be borne in mind that the European Civil Aviation Conference (ECAC) had, during a special Plenary Meeting held in Paris on December 13,

¹⁵ See Jennifer Loven, *Bush Admin. Readying Insurance Plan*, ASSOCIATED PRESS (Oct. 13, 2001).

¹⁶ *Id.*

¹⁷ Stephen Labaton, *White House Said to Have Relief Plan for Insurers*, N.Y. TIMES, Oct. 13, 2001, at B6.

¹⁸ Full EU Statement on Airline Aid, BBC NEWS (Oct. 10, 2001), at <http://news.bbc.co.uk/1/hi/business/1591283.stm>.

¹⁹ *Id.*

2000, adopted a Resolution²⁰ setting certain third-party liability limits for airline accidents involving carriers of ECAC Member States. The action of the European Union of October 10, 2001, presumably would apply, at least temporarily, notwithstanding the earlier ECAC Resolution.

Japan's government stepped in to help the struggling airline industry as companies tried to cope with rising insurance costs and falling demand in the aftermath of the suicide attacks on the United States. The Ministry of Land, Infrastructure and Transport said the government would guarantee third-party insurance up to \$2 billion for Japan's airline carriers to cover any shortfall in claims after insurers reduced coverage to \$50 million following the September 11 attacks.²¹

Colombia's airlines pleaded for government aid on October 3, 2001, after their insurance costs rose 6,300 percent to \$32 million following the September 11 attacks in the United States. Colombia's Association of Colombian Air Transporters (ATAC) said the Andean nation was hit especially hard, since it had already faced a high premium due to its 37-year guerrilla war. Colombia's government stated that it would authorize an increase in passenger ticket prices to help offset the added costs, but did not offer further details.²²

Almost immediately after the withdrawal of coverage, Singapore gave the assurance that it would extend third party war risk liability coverage to various approved aviation service providers for their operations in the city state. The government had earlier decided to provide third party war risk liability coverage to Singapore Airlines, SilkAir, SIA Cargo and the Civil Aviation Authority of Singapore. The official statement of Singapore is reported to have stated that a commercial charge would be levied for this insurance cover, with an initial waiver for the first 30 days.²³

Royal Air Maroc (RAM)'s insurance practically quadrupled from 28 million dirhams to 120 million dirhams since September 11. The government of Morocco agreed to offer RAM war insurance guarantees following the insurance companies' deci-

²⁰ Resolution on Minimum Level of Insurance Cover for Passenger and Third Party Liability, Res. ECAC/25-1, European Civil Aviation Conference (Dec. 13, 2000), at <http://www.ecac-ceac.org/uk/documents/pr167e.pdf>.

²¹ See Daisuke Wakabayashi, REUTERS (Oct. 5, 2001) (on file with author).

²² See Javier Mozzo, REUTERS (Oct. 3, 2001) (on file with author).

²³ See REUTERS (Oct. 4, 2001) (on file with author).

sion to cap airlines' third-party war and terrorism insurance at \$50 million in the expectation of potential record payouts.

Hong Kong's Civil Aviation Department on October 4, 2001 gave the green light for fifteen airlines to levy insurance surcharges on passengers on Hong Kong Routes. The fifteen airlines that have secured approval from the Civil Aviation Department to impose insurance surcharges include the two locally based passenger carriers - Cathay Pacific Airways Ltd and Hong Kong Dragon Airlines ("Dragonair") Ltd.

Given below is a table of the fifteen airlines and the proposed surcharges.

Airlines	Proposed Insurance Surcharges
Cathay Pacific	US\$4 per flight coupon
Dragonair	US\$4 per air segment
Asiana Airlines	US\$1.25 per sector
KLM Royal Dutch	US\$5 per ticket coupon
Gulf Air	US\$5 per sector
Singapore Airlines	US\$1.25 per sector
Emirates Airline	HK\$39 per sector
Philippine Airline	US\$6 per sector
Thai Airway Intl	US\$1.25 per flight coupon
Korean Air	HK\$10 per flight sector
Myanmar Airway	1.25 per flight sector
Air New Zealand	US\$3.10 per flight coupon
Malaysian Airlines	US\$1.25 per flight sector
Air Canada	C\$3 per one way
China Airlines	US\$2.50 per flight sector

Air Transat joined its Canadian rivals on October 5, 2001 by announcing it would charge passengers C\$3 extra per one way trip to cover soaring insurance costs following the September 11 attacks on the United States. Air Transat said that the surcharge would be applied on all its domestic, transborder and international flights, starting October 8, 2001. Air Transat is the last major Canadian carrier to impose such a surcharge. Air Canada, the country's dominant carrier, and no-frills airlines WestJet and Canada 3000 each imposed a C\$3 fee in recent weeks.

KLM said on September 22, 2001, that it had reopened bookings for this week after the Dutch government agreed to grant war risk insurance.²⁴ KLM announced it was adding a US\$5 a flight surcharge to fares immediately to help cover the cost of additional safety procedures being taken since the US aircraft attacks. KLM was reported to have claimed this as a safety surcharge and that the airline had taken a lot of measures to boost safety, incurring costs.²⁵

The Spanish government and domestic airlines agreed to implement the Ecofin accord, in which Insurance Compensation Consortium (ICC) will pay insurance premiums for the airlines' risk against war and terrorism for a period of one month.

On September 28, 2001 IATA hosted a meeting of air carriers, financiers, national governments, freight forwarders, insurers and other industry participants to review the current war risk insurance situation and discuss proposals for dealing with the current difficulties resulting from the September 24, 2001 withdrawal by insurers of third party war risk insurance coverage. IATA proposed that the participants from this meeting should encourage States to use model or uniform text with respect to the provision of indemnities or guarantees, and that such guarantees must be for a period greater than 30 days, preferably in the order of 90 days.

In the face of the dramatic recession of insurance coverage, States began to take measures to provide excess insurance coverage to carriers, in most cases up to previous policy limits, for war-and terrorism-related third party risk. Provision of such coverage meant that at least some air carriers would not be in violation of domestic and international regulations and lease covenants respecting war risk cover. However, there was concern expressed with the fact that a considerable number of countries in Latin America, Asia and Africa, while having taken steps necessary to ensure continued coverage, have not provided the necessary guarantees and indemnities in the same amount as States in Europe and North America.

More recently, insurers in the United States envisaged an insurance pool along the lines of Britain's "Pool Re," a government-backed, mutually-owned company, set up in 1993 after a

²⁴ Air Letter No. 14,835, WORLD AVIATION, SPACE & DEFENCE DAY BY DAY, Sept. 25, 2001.

²⁵ Air Letter No. 14,835, WORLD AVIATION, SPACE & DEFENCE DAY BY DAY, Sept. 26, 2001.

series of bombs in mainland Britain by Northern Irish terrorists. Through such a scheme, insurers collect premiums for terrorism insurance and the government promises to chip in if claims exceed the pool's premiums plus reserves. So far, there have been no settlements by the government, although the important feature was the guarantee that it would have honoured its commitment if a situation calling for settlement were to arise. This proposal has not been accepted by the United States, which takes the position that the insurance industry will meet the first \$10 billion of a terrorist loss and the federal government will pick up 90% of larger losses, up to \$100 billion in the first year. The insurers would not be required to repay the government.²⁶

Action taken by ICAO Contracting States in responding to the insurance crisis has legal legitimacy in two international Conventions, the Rome Convention of 1952²⁷ and the Montreal Convention of 1999.²⁸ Article 15 of the Rome Convention provides that any Contracting State may require that the operator of an aircraft registered in another Contracting State shall be insured in respect of his liability for damage sustained in its territory for which a right to compensation exists.²⁹ The operative clause, in the context of indemnities offered by the several ICAO Contracting States as discussed earlier, is contained in Article 15.4 of the Rome Convention which provides that, instead of insurance, *inter alia*, a guarantee given by the Contracting State where the aircraft is registered, shall be deemed satisfactory if that State undertakes that it will not claim immunity from suit in respect of that guarantee.³⁰ The Montreal Convention of 1999, which is yet to come into force, provides in Article 50 that "States Parties shall require their carriers to maintain adequate insurance covering their liability under [the] Convention."³¹ This provision further stipulates that a carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under the Convention.³²

²⁶ *The Risk That Nobody Wants*, THE ECONOMIST, Nov. 17, 2001.

²⁷ Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, 310 U.N.T.S. 181 [hereinafter "Rome Convention"].

²⁸ Convention for the Unification of Certain Rules for International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000 (*reprinted at* 49 U.S.C. § 40105 (2002)) [hereinafter "Montreal Convention"].

²⁹ Rome Convention, *supra* note 27, at art. 15.

³⁰ *Id.* at art. 15.

³¹ Montreal Convention, *supra* note 28, at art. 50.

³² *Id.*

Coverage provided by airline insurance policies regarding perils other than third party liability for war risks have not been affected by this cancellation. War and allied perils coverage with regard to passengers have been left unchanged but the uncertainty created by the events have made it essential to circumscribe coverage for third party losses at a maximum of US\$50 million. Although already increasing due to a sustained period of unprofitable trading in the insurance market, the events themselves triggered accelerated premium increases, both in order to help markets to recover from the bout of unprofitable trading and to create an adequate premium base for future exigencies of the nature of the catastrophes of September 2001.

In general terms, the price to be paid to revive or reinstate adequate coverage for third party was risk coverage would cost the airlines an additional premium of US\$1-25 per passenger carried. If airlines were to purchase coverage for limits of US\$950 million in excess of the already available US\$50 million they would have to pay US\$1.85 per passenger carried. In view of the fact that airports, re-fuellers, ground handlers and other service providers in the aviation industry contribute to an accumulation of risk, since many of them may serve a particular airline at one location, underwriters were disinclined to offer coverage for these providers. However, many insurers have shown willingness to extend coverage for an additional US\$100 million over the US\$50 million coverage already provided.

Both the International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA) have stringently (and correctly) maintained that there is an inherent role to be played by governments in the event of war risk claims. IATA has justifiably claimed, in a well-reasoned argument, that a new international regime must provide for governments to agree to act as a multilateral guarantor covering terrorist actions against airlines in any part of the world.³³ IATA has requested that any solution to the insurance crisis be widely available to international aviation shareholders, be reasonably affordable, provide for long term stability even in the event of terrorist acts, and recognize the inherent role of governments in the event of war risk claims.

³³ Comments of IATA, Special Group on Aviation War Risk Insurance, ICAO SGWI/1, at 2 (2001), at http://www.icao.int/icao/en/conf/mt/sgw1/sgw11_report.pdf (last visited June 4, 2002).

The above remarks were made at the First Meeting of the ICAO War Risk Insurance Working Group, held in Montreal in December 2001. This working group was appointed by the ICAO Council in response to ICAO Assembly Resolution A33-20,³⁴ adopted at the 33rd Session of the Assembly in September/October 2001. This resolution urges Contracting States to work together to develop a non-enduring and coordinated approach to the important problem of providing assistance to airline operators and to other service providers in the field of aviation war risk insurance. To achieve this objective, the Assembly directed the Council to urgently establish a Special Group to consider the issues referred to above and to report back to Council with recommendations as soon as possible. The resolution also broadens ICAO's mandate by inviting the Council and the Secretary General to take any other measures considered necessary or desirable.

At the second meeting of the Working Group, held in Montreal in January 2002, the London Market Brokers Committee (LMBC) presented a medium term scheme to cover airlines from war risk liabilities. The scheme envisions the formation of a company, the board of directors of which shall include representatives of participating States, ICAO and participating aviation and insurance industries. The company would offer third party war risk liability coverage up to US\$1.5 billion in excess of US\$50 million per insured. This cover will be non-cancellable, apply per occurrence and per aircraft where multiple aircraft are involved. The insurance coverage to be provided by the company would be available to the entire aviation sector and include domestic and international operations as well as equipment lessors, financiers and manufacturers of each State that joins the scheme.

The scheme so outlined offers a continuous coverage of aviation war and other perils based on clauses AVN52D and AVN52F (which generally exclude coverage of war risk liability with a write back possibility). The scheme also admits of a full review by participating Contracting States, to be undertaken at its fifth anniversary, with an option to cancel or suspend the scheme 90 days thereafter.

Participating States would act as guarantors or "reinsurers of last resort" through a legal agreement with the insurance company. In the event of a claim, the contributions of participating

³⁴ A33-20, *supra* note 11.

States would be pro-rated based on their ICAO assessments. Each State's maximum liability under the scheme would be capped. The total cap, if all ICAO States participate in the scheme, is expected to be US\$15 billion (by way of example, if only 50% of ICAO Contracting States participate, the total cap would be US\$ 7.5 billion). The maximum exposure of each State, in any given instance, would be its ICAO assessment percentage of the total cap as it may apply, depending on the participation of States in the scheme, as outlined above.

Premiums will be collected from the insured in order to build a reinsurance pool to meet claims under the policies. This pool will obviate the need for participating States to make cash contributions to the company in the event of a claim. The total amount of premiums to be collected in the first year is targeted at US\$850 million (equivalent to 50 cents per passenger segment based on total passenger segments of 1.7 billion). The premiums for subsequent years would be kept at approximately the same level, provided there were no losses.

Although some members argued that the 50 cents per passenger charge was not an equitable measure for the collection of the premium (as the numbers carried per flight may differ and smaller aircraft may not necessarily be considered as much a threat as weapons of destruction as the larger aircraft which have larger capacity), the Group decided to work on the basis of 50 cents per passenger as this was considered to be the only workable means of premium funding.

A. STATE INVOLVEMENT IN INVESTMENT IN AIR TRANSPORT INSURANCE

The principle of State responsibility in supporting their air carriers' war risk third party insurance coverage commitments pervades the argument that liability for third party damage, be it personal or regarding destruction of property, is not a commercial issue under war risk coverage. Where this reasoning is applied to the events of September 2001, where persons who had been cleared for carriage by air by a security system for which the State was responsible, it becomes clear that an air carrier should not technically be held responsible for events such as those of September 11.

At the First Meeting of the ICAO Working Group on War Risk Third Party Insurance, the International Coordinating Council of Aerospace Industries Associations (ICCAIA) proposed a draft convention on losses and damages to third parties and property

caused by unlawful seizure, terrorism or war.³⁵ Article 5 of this draft addresses issues of State security responsibility, and provides that following a hostile act against aviation causing loss or damage to any third party or third party property, the State with security responsibility shall pay to a reinsurance fund an amount equal to that payable by the fund in connection with that act. The draft Convention also provides for joint responsibility in this region if more than one State is involved.

B. INSURING AIR TRANSPORT

In the context of these discussions, it is necessary to examine the nature of insurance and the manner in which it fits into the regulatory regime governing air transport. Insurance, in general terms, is primarily designed to protect the insured against loss or damage caused by unforeseen or unexpected future events, which cannot be predicted or otherwise guarded against.³⁶ This definition is equally applicable to air transport, where liability insurance protects the insured against liability arising from loss or damage, including injury or death to passengers and third parties.³⁷ In view of the extremely high risk posed by war and associated risks which encompass hijacking and acts of terrorism, an express exclusion is usually incorporated in the insurance policy of a carrier, which is known as "AVN48B"³⁸ as used in the London insurance market. Certain risks excluded by this clause, however, can be "written back" into the policy in return for an increased or additional premium. In the case of liability insurance, all excluded rules may be written back with the exclusion of hostile detonation or explosion of a nuclear weapon.

It is arguable that when applying the above definition, insurance can be identified as a commercial or economic exigency affecting the air carrier as a reimbursement of a loss incurred. On this basis one can ask the question as to whether insurance coverage or lack thereof directly affects the operators of a carrier, particularly in the context of a war situation.

³⁵ SGW1/1-WP/3 Appendix.

³⁶ Rod D. Margo, *Aspects of Insurance in Aviation Finance*, 62 J. AIR L. & COM. 423 (1996).

³⁷ *Id.* at 429.

³⁸ AVN48B excludes risks of war, invasion, hostilities, civil war, rebellion, resolution, insurrection, martial law, hostile detonation of atomic weapons, strikes, riots, civil commotions or labour disturbances, acts of a political or terrorist nature, sabotage, confiscation, nationalization, seizure and hijacking.

The Preamble to the Convention on International Civil Aviation reflects agreement on the Contracting States for the development of international air transport in a safe and orderly manner and its operation soundly and economically.³⁹ Article 4 of the Convention acknowledges each Contracting State's agreement not to use civil aviation for any purpose inconsistent with the aims of the Convention.⁴⁰ In the specific context of this article, two issues emerge: (1) whether there is an implied obligation on the part of Contracting States to ensure that civil aviation is not used for any purpose inconsistent with the aims of the Convention, and (2) what the aims of the Convention are. At the Chicago Conference of 1944 which gave rise to the Convention, Article 4 was originally intended to read as follows:

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the member States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any member State which declares a state of national emergency and notifies the fact to the Council.⁴¹

This draft did not survive the Conference. However, it gives an indication of the general approach taken by the pioneers of regulation, that in a war situation a Contracting State may not be obligated to honour the aims of the Convention, which are that civil aviation may be developed in a safe and orderly manner and international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.

If one were to argue that the Chicago Convention imposes an implicit obligation on Contracting States to ensure that insurance coverage be maintained, as a part of the overall obligation to ensure that air transport services are operated soundly and economically, what happens in a war situation?⁴² Could States absolve themselves of this obligation as per the original approach taken in Article 4 of the Convention? If, on the other hand, taking literally the current text of Article 4 that States should ensure the civil aviation should not be used for any pur-

³⁹ See Chicago Convention, *supra* note 1.

⁴⁰ *Id.* at art. 4.

⁴¹ U.S. Dep't of State, Proceedings of the International Civil Aviation Conference, at 661 (1948) (detailing the proceedings in Chicago, Illinois, on Nov. 1 – Dec. 7, 1944).

⁴² For insurance purposes, a formal declaration of war is not an absolute necessity. See, e.g., *Kawasaki Kissen Kaisha of Kobe v. Bantham Steamship Co. Ltd.*, 2 K.B. 544, 556 (1939).

pose inconsistent with the aims of the Convention, should States ensure the security of aircraft? Additionally, if a State is found to be responsible for an event which violates the principle enshrined in Article 4, should that State be held responsible for the continued operation of air services by the carrier affected?

The problem of "misuse of civil aviation," "improper use of civil aviation," "undue use of civil aviation," or "criminal use of civil aviation" was raised by several delegations at the 25th Session (Extraordinary) of the ICAO Assembly in April/May 1984. It was also mentioned by several Representatives on the Council during discussions on the proposed amendment of Annex 2 to the Convention on International Civil Aviation with respect to interception of civil aircraft. The problem to be addressed is essentially how to reconcile the protection of civil aircraft in situations of interception with the protection of the law and order of States concerned and with the enforcement of such applicable laws. The scope of the problem encompasses the concern of several States as to whether Article 3 *bis* of the Chicago Convention and the amended Annex 2 leave sufficient safeguards for States to prevent, prosecute and punish the deliberate use of civil aircraft for unlawful purposes.

Article 3 *bis* provides *inter alia* that every State must "refrain from" resorting to the use of weapons against civil aircraft in flight.⁴³ The term "refrain from" does not provide the necessary strength to the provision as it does not explicitly prohibit the use of weapons against aircraft in flight.

Article 4 of the Chicago Convention is the only provision in the Convention explicitly using the words "misuse of civil aviation;" even there, however, the expression is used only in the heading and not in the substantive text of the Article.⁴⁴ The first paragraph of the Preamble to the Convention refers to "abuse" of international civil aviation without any attempt at a definition of that term.⁴⁵

Article 4 of the Convention has never been the subject of or involved in a decision or interpretation made by either the Assembly or the Council. The drafting history of this Article indicates that the underlying intent of Article 4 was to prevent the use of civil aviation by States for purposes, which might create a threat to the security of other nations. The intent of Article 4

⁴³ Chicago Convention, *supra* note 1, at art. 3.

⁴⁴ *Id.* at art. 4.

⁴⁵ *Id.*

originated in the Canadian "Preliminary Draft" which stated as one of the purposes of ICAO as "averting the possibility of the misuse of civil aviation creating a threat to the security of nations and to make the most effective contribution to the establishment and maintenance of a permanent system of general security." In the further drafting development ("the Tripartite Proposal" presented to the Conference by the Delegations of the United States, United Kingdom, and Canada) the wording was changed to read: "Each member State rejects the use of civil air transport as an instrument of national policy in international relations." This wording practically repeated the text of the Treaty for the Renunciation of War of 27 August 1928 (commonly known as the Briand-Kellogg Pact) in which the signatories renounced war "as an instrument of national policy in their mutual relations." The words "purposes inconsistent with the aims of this Convention" in Article 4 therefore essentially mean "threats to the general security."

Article 4 does not offer any solution to the problem of "misuse of civil aviation" within the scope of the status of an aircraft, which is used for criminal or other unlawful purposes. The Chicago Convention does not contain any provisions that anticipate the specific situations when an aircraft is used for or involved in criminal activities or other activities violating the law and public order of the State. However, there are numerous provisions in the Convention which offer effective safeguards to States that their applicable laws and public order are observed by foreign aircraft (with respect to aircraft of its own registry, the State concerned has unrestricted jurisdiction).⁴⁶ Articles 11, 12 and 13 of the Convention in essence confirm the rule of general international law that foreign aircraft, its crew, passengers and cargo do not enjoy any "extraterritorial" status while in the airspace or on the ground of another State; such aircraft are fully subject to the applicable laws of the State concerned.⁴⁷ Under the Convention, the State may require the landing of a foreign aircraft involved in non-scheduled flight (Article 5), may prohibit or restrict foreign aircraft from flying over certain parts of its territory or over the whole territory (Article 9), may require landing of foreign aircraft at a designated customs airport (Article 10), may search the foreign aircraft (Article 16) and may regulate or

⁴⁶ See Chicago Convention, *supra* note 1.

⁴⁷ *Id.* at arts. 11, 12, 13.

prohibit the carriage of certain articles in or above its territory (Article 35 (b)).⁴⁸

It is submitted that all States possess within the existing framework of the Chicago Convention full jurisdiction in the application of their respective laws to prevent or prohibit the use of civil aircraft for unlawful purposes. The practical problem therefore does not arise in terms of choice-of-law, but in the field of practical enforcement of such laws with respect to aircraft, particularly aircraft in flight.

In the case of criminal acts, the practical enforcement of legal obligations involves a procedure which includes the arrest and taking into custody of the suspected offender, collection and presentation of pertinent evidence, judicial evaluation of the evidence and evaluation of the points of defence, judicial conviction, sentencing and execution of the judgement. All aspects of such legal procedure are governed by *lex fori*, i.e. the domestic law of the court seized of the case. That law would determine *inter alia* what degree of force (including the possible use of weapons) may be legally employed in the process of arrest of the suspected offender. As a rule, that level of force is to be proportionate and adequate to the level of public danger created by the suspected offender and by the level of force used by the suspected offender in resisting arrest.

The only legal provision available in terms of international treaty law on the subject of responsibility for third party liability of air carriers is contained in the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in Rome in 1952, Article 15 of which provides that any Contracting State may require that the operator of an aircraft registered in another Contracting State shall be insured in respect of this liability for damage sustained in its territory for which a right to compensation exists by means of insurance up to the limits applicable according to the relevant requirements of the Convention.⁴⁹ There is provision in the Convention that, instead of insurance, one of the securities acceptable would be a guarantee given by the Contracting State where the aircraft is registered, if that State undertakes that it will not claim immunity from suit in respect of that guarantee.⁵⁰

⁴⁸ *Id.* at arts. 5, 9, 10, 16, 35(b).

⁴⁹ Rome Convention, *supra* note 27, at art. 15(4)(c).

⁵⁰ *Id.*

C. RESPONSIBILITY OF STATES

States have clearly assumed responsibility for the operation of air services by their national carriers and the circumstances, rules, and regulations under which they are carried out. This is evidenced in the bilateral air services agreements signed by and between States laying down principles and conditions of operations. States are also responsible for the provision of security within their territories. Arguably, States should then be responsible for the clearance of passengers for air carriage when such passengers embark within their territories. If such were the case, air carriers should not be required to face fiscal responsibility for breaches of security that impend their aircraft, injuries to third parties, and property damage on the ground as a result of such breaches.

The applicable legal procedure is determined by the sovereign State and “the general principles of law recognized by civilized nations” as reflected in Article 38, 1 (c) of the *Statute of the International Court of Justice*.⁵¹ These are elements of the general international law, including the general concept of human rights and specifically the protection of human life, and presumption of innocence in criminal procedure. The principles of modern general international law in this field reflect the requirement of “due process” in the procedure for the enforcement of laws.

Problems of interception of and other enforcement measures with respect to a civil aircraft in flight are directly addressed in Article 3 *bis* of the Chicago Convention,⁵² adopted by unanimous consensus on May 10, 1984 by the 25th Session (Extraordinary) of the ICAO Assembly. The drafting history of this Article supports the conclusion that Article 3 *bis* is declaratory of the existing general international law with respect to the following elements:

- a) obligation of States to refrain from resorting to the use of weapons against civil aircraft in flight;
- b) obligation, in case of interception, not to endanger the lives of persons on board and the safety of aircraft; and
- c) right of States to require landing at a designated airport of a civil aircraft flying above its territory without authority or if

⁵¹ Stat. of the Int'l Ct. of J., June 26, 1945, 59 Stat. 1031, art. 38, 1(c) (entered into force Oct. 24, 1945).

⁵² Chicago Convention, *supra* note 1, at art. 3.

there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of the Convention.

While Article 3 *bis* accepted in paragraphs (b) and (d) the terminology "for any purpose inconsistent with the aims of the Convention" as it is used in Article 4 of the Convention, the drafting history indicates conclusively that the scope of the phrase is different in Article 3 than in Article 4. At the 25th Session (Extraordinary) of the Assembly this phrase was meant to cover not only violations of the "aims" of the Chicago Convention as spelled out in the Preamble to the Convention and in its Article 44 (which deals with the aims and objectives of the Organization rather than the Convention), but any violation of the law and public order of the State concerned. In the Assembly discussions, specific references were made to transport of illicit drugs, contraband, gun running, illegal transport of persons, and other crimes.

It should be stressed that the scope of applicability of Article 3 *bis* is subject to significant restrictions; the protection of this Article is reserved only to:

- a) "civil aircraft;" consequently, "state aircraft" would not enjoy the same protection; and
- b) civil aircraft "in flight;" while the Convention does not define the concept "in flight," it is likely that this phrase will be interpreted in harmony with Article 1, paragraph 2 of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952 and Article 1, paragraph 3 of the Tokyo Convention of 1963. An aircraft shall be deemed to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends. Consequently, aircraft which are not "in flight" do not enjoy the special protection of Article 3 *bis*.

It is also submitted that the protection of Article 3 *bis* is reserved to "foreign" aircraft and does not include aircraft of the State's own registration. After discussions in the Executive Committee of the Assembly, the reference to aircraft "of the other contracting State" was dropped for the specific reason that the protection was to be recognized as mandatory with respect of aircraft, whether belonging to contracting or non-contracting States. At no stage to the deliberations and drafting did the Assembly (in the Plenary, in the Executive Committee or in the Working Group) contemplate regulation of the status of an aircraft in relation to the State of its own registration, as this would have exceeded the scope of the Convention, which limits it to

international civil aviation. Again, the purpose of the Chicago Convention is to establish conventional rules of conduct in the mutual relations of sovereign States but not to govern matters of their exclusive domestic jurisdiction. Consequently, Article 3 *bis* will not apply to the treatment of aircraft by the States of their registration. This conclusion does not imply that a State is free to treat aircraft of its own registration without regard to any rules of international law; other sources of international law, such as the International Covenants on Human Rights, may be relevant for the conduct of States to ensure the protection of the right to life, requirement of due legal process, and the presumption of innocence.

When requiring a civil aircraft that is flying above its territory to land, or when issuing other instructions to the aircraft to put an end to a “violation,” contracting States may resort to any appropriate means consistent with relevant rules of international law, including the Chicago Convention and, specifically, paragraph (a) of Article 3 *bis*. Consequently, Article 3 *bis* does not exclude enforcement against foreign aircraft in flight and does not rule out the use of adequate and proportionate force and does not rule out interception as such. Any act of interception or other enforcement measure not involving the use of weapons against civil aircraft in flight and not endangering the lives of persons on board and the safety of flight is acceptable. Any interception procedures consistent with the applicable Standards and Recommended Practices adopted by the Council of ICAO pursuant to Articles 37, 54(1) and 90 of the Chicago Convention would be “consistent with relevant rules of international law.”⁵³

Two additional provisions of Article 3 *bis* are likely to deter the occurrences of “misuse” of civil aviation.

First, civil aircraft are unconditionally obliged to comply with an order to land or other instruction; contracting States are accepting, under paragraph (c) of Article 3 *bis*, an obligation to establish all necessary provisions in the national law or regulations to make such compliance mandatory for aircraft of their registration or operated by an operator having his principal place of business or permanent residence in that State.⁵⁴ Contracting States are also accepting an obligation to make violation of such laws or regulations punishable by severe penalties and to

⁵³ Chicago Convention, *supra* note 1, at art. 37, 54(1), 90.

⁵⁴ *Id.* at art. 3.

submit the case to their competent authorities.⁵⁵ This provision may offer a practical safeguard that no violators would go unpunished; even if they were to escape from the jurisdiction of the State where the unlawful act was committed, they should be prosecuted and punished by the State of the registration of the aircraft; in practical application this provision may be reinforced by existing or future arrangements for extradition of offenders.

Second, all contracting States are accepting an unconditional obligation to take appropriate measures to prohibit any deliberate "misuse" of any civil aircraft of their registration or operated by an operator having his principal place of business or permanent residence in that State. Legislative implementation of such a prohibition will no doubt be accompanied by appropriate penalties.

States can exercise criminal jurisdiction over foreign aircraft in flight over their territory as well as over the territory not subject to sovereignty of any State, such as the high seas, as set forth in the Tokyo Convention of 1963.⁵⁶ Article 4 of that Convention permits "interference" with an aircraft in flight in order to exercise criminal jurisdiction over an offence committed on board in the following cases:

- a) the offence has effect on the territory of such State;
- b) the offence has been committed by or against a national or permanent resident of such State;
- c) the offence is against the security of such State;
- d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State; and
- e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.⁵⁷

Since the Tokyo Convention has been accepted by many of ICAO's Contracting States, this provision represents an important additional clarification to Article 3 *bis* of the Chicago Convention with respect to the interpretation of the term "any purpose inconsistent with the aims of this Convention." It is submitted that any offence foreseen in Article 4 of the Tokyo Convention gives right to the State concerned to "interfere," such as requiring the aircraft to land or giving the aircraft other

⁵⁵ *Id.*

⁵⁶ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219.

⁵⁷ *Id.* at art. 4.

instructions or resorting to proportionate and adequate use of force against such aircraft. The United Nations Convention on the Law of the Sea does not foresee the right of hot pursuit of aircraft; the target of hot pursuit may be exclusively a ship but the procedures of hot pursuit may be affected by an aircraft.

The study of the problem of "misuse" of civil aviation and of its consequences for law enforcement with respect to civil aircraft in flight leads to the following conclusions:

- a) Although the term "misuse of civil aviation" is a legally imprecise term which has no firm basis in the Convention on International Civil Aviation apart from the title of Article 4, it still reflects the overall threat posed by unlawful interference with civil aviation.
- b) The phrase "any purpose inconsistent with the aims of this Convention" has historically a different meaning in Article 4 of the Convention and in paragraphs (b) and (d) of Article 3 *bis*.
- c) The concept of "misuse of civil aircraft" should best be referred to as "deliberate use of civil aircraft for unlawful purposes."
- d) The Chicago Convention contains effective provisions safeguarding full jurisdiction of States to prevent or prohibit the use of foreign aircraft for unlawful purposes in their territory.

The above conclusions may be drawn upon to use the relevant provisions of the Chicago Convention as a base to interpret other legal documents that would enforce more stringent control over this offence. Some recommendations in this regard are discussed *infra*.

The provisions of the Chicago Convention, as is any international treaty, are binding on contracting States to the Convention. The International Court of Justice (ICJ), in the *North Sea Continental Shelf Cases*,⁵⁸ held that legal principles that are incorporated in treaties, such as the "common interest" principle, become customary international law by virtue of Article 38 of the 1969 Vienna Convention on the Law of Treaties.⁵⁹ Article 38 recognizes that treaty rules are binding upon a third State, if it is generally recognized as such by the States concerned. Obligations arising from *jus cogens* are considered applicable *erga omnes* which would mean that States using space technology owe a duty

⁵⁸ *North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.)* 1969 I.C.J. 3 (Feb. 20).

⁵⁹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 38, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

of care to the world at large in the provision of such technology. The ICJ in the *Barcelona Traction Case* held:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis a vis* another State in the field of diplomatic protection. By their very nature, the former are the concerns of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁶⁰

The International Law Commission has observed of the ICJ decision:

[I]n the Courts view, there are in fact a number, albeit limited, of international obligations which, by reason of their importance to the international community as a whole, are- unlike others - obligations in respect of which all States have legal interest.⁶¹

The views of the ICJ and the International Law Commission, which has supported the approach taken by the ICJ, give rise to two possible conclusions relating to *jus cogens* and its resultant obligations *erga omnes*:

- a) obligations *erga omnes* affect all States and thus cannot be made inapplicable to a State or group of States by an exclusive clause in a treaty or other document reflecting legal obligations without the consent of the international community as a whole; and
- b) obligations *erga omnes* preempt other obligations which may be incompatible with them.

Some examples of obligations *erga omnes* cited by the ICJ are prohibition of acts of aggression, genocide, slavery and discrimination.⁶² It is indeed worthy of note that all these obligations are derivatives of norms which are *jus cogens* at international law.

International responsibility relates both to breaches of treaty provisions and other breaches of legal duty. In the *Spanish Zone of Morocco Claims* case, Justice Huber observed:

[R]esponsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.⁶³

⁶⁰ *Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3, 32 (Feb. 5).

⁶¹ *Fifth Report on State Responsibility*, A/CN.4/291 and Add.1 and 2, Y.B. INT'L L. COMM'N, Vol II, Part One 3, 29 (1976).

⁶² *Barcelona Traction*, 1970 I.C.J. at 32.

⁶³ *Spanish Zone of Morocco (U.K. v. Spain)*, 2 R.I.A.A. 615, 641 (1925).

It is also now recognized as a principle of international law that the breach of a duty involves an obligation to make reparation appropriately and adequately. This reparation is regarded as the indispensable complement of a failure to apply a convention and is applied as a premise that need not be stated in the breached convention itself.⁶⁴ The ICJ affirmed this principle in 1949 in the *Corfu Channel* case by holding that Albania was responsible under international law to pay compensation to the United Kingdom for not warning that Albania had laid mines in Albanian waters which caused explosions, damaging ships belonging to the United Kingdom.⁶⁵ Since both the treaty provisions of liability and the general principles of international law endorse the liability of States to compensate for damage caused by space objects, there is no question that damage caused by the use of nuclear power sources in outer space would be compensated.

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 stated:

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.⁶⁶

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 within their territories and towards other States. States are effectively precluded from pursuing their own interests with disregard to principles established by international law.

State responsibility is accepted as an established principle of public international law. This principle is based on both substantive rules of law and the imputability to a State of acts and omissions of that State that may be categorized as legally reprehensible or illegal by reference to established norms and rules

⁶⁴ *Chorzow Factory (Jurisdiction)*, 1927 P.C.I.J.(ser. A) No. 9, at 21.

⁶⁵ *Corfu Channel Case*, 1949 I.C.J. 4, 23 (Apr. 9).

⁶⁶ *Report to the General Assembly on the Work of the First Session*, A/CN.4/13, Y.B. INT'L L. COMM'N (1949).

identifying rights and duties.⁶⁷ The notion of *culpa* is often used to denote blameworthiness predicated upon reasonable foreseeability or foresight without consequences. *Culpa* is generally not a condition of liability *per se*, but in certain contexts it may be imputed to a State whose officials are negligent in not foreseeing the consequences of their acts or omissions. In such instances, a causal nexus has of necessity to be established between the act or omission and the result. In the *Lighthouse* arbitration, which was undertaken in 1956 by the Permanent Court of International Justice, the Court held that damage should be a foreseeable and normal consequence of an act or omission.⁶⁸ In instances where a State engages in lawful practices, responsibility may be attributed to a State for lack of diligence.⁶⁹ This principle is born out by the fundamental judicial acceptance that the State bears an international responsibility for all acts committed by its officials or its organs which are delictual or tortuous according to principles of public international law.⁷⁰ In order that this objective criterion of responsibility be applied, it is important to determine that officials act as authorized officials or instrumentalities of State, or that in so acting or omitting to act they use powers or measures appropriate to their official character.

In the event of localized violence or mob attacks, contrived and substantial neglect to take the necessary and reasonable precautions to avoid damage or prevent injury would be tantamount to official indifference and will create responsibility for damage to persons and property, particularly if interests are vested in foreign hands.

The aviation industry needs its credibility to be restored with the insurance industry at least partially, if not totally. The cost of achieving this challenge to airlines may be considerable. The civil aviation sector is of considerable dimension, and the airlines are integrated from an information technology (IT) standpoint to airports, ground handling, avionics and engineering, air traffic control, and maintenance in their daily operations. This means that the IT requirements of each of these sectors, however varied and multifarious, have to mesh together for se-

⁶⁷ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (4th ed. 1992).

⁶⁸ *Lighthouses* (Fr. v. Greece), 12 R.I.A.A. 155, 23 I.L.R. 659 (1956).

⁶⁹ *In re Rizzo*, 22 I.L.R. 317, 322 (1955).

⁷⁰ *Caire* (Fr. v. Mex.), 5 R.I.A.A. 516, 530 (1929).

curity and safety purposes so that airlines may perform their task of carrying passengers and freight without mishap.

Aviation insurers will certainly be concerned as to how their insured are going to handle the credibility challenge. Any flaw in the preparation of the insured airlines in fixing the problem has direct potential ramifications on the insurance industry, which will have to pay up claims resulting from safety-related incidents and accidents involving aircraft.

It is a high possibility that the insurance industry will require States to show that they exercised due diligence or, in other words, adequately dispensed with the duty of care they owed to the consumer in addressing and solving their security problems. In this context, legal principles applicable to States and their instrumentalities responsible for providing preventive measures to ensure security would be analogous to those applicable to professionals who profess special skills such as medical doctors and the diligence and care required of such a category would be objectively assessed at a higher level than that which is required of the common man. At common law, therefore, the jurisprudence related to medical malpractice would be a distinct analogy and the principles enunciated therein would serve as a yardstick in instances where State responsibility is assessed.

Under English law, the burden of proving negligence rests on the plaintiff. The plaintiff has to prove that the defendant was negligent and that such negligence resulted in the loss or injury alleged. English law knows no sharp categories of care. A defendant must exercise the degree of care and diligence that corresponds to the degree of negligence for which he is responsible,⁷¹ and the defendant must do what is reasonable in the circumstances. A good example is the case of *Marshall v. Lindsay*,⁷² which held that a defendant who is charged with professional negligence can clear himself if he shows that he acted in accordance with general or approved practice. A 1953 decision held that the competent practitioner would know when a case is beyond his skill and thereupon it would become his duty either to call in a more skilled person or to order removal of the patient to a hospital where skilled treatment is available.⁷³ The case had also held that when a consultant takes over the responsibility for the treatment of a patient, it is a defence in favor of

⁷¹ *Giblin v. McMullen*, 2 L.R.-P.C. 317, 337 (1868).

⁷² *Marshall v. Lindsay*, 1 K.B. 516, 540 (1935).

⁷³ *Pudney v. Union Castle Mail S.S. Ltd.* Lloyd's Rep. 73 (1953).

that consultant to show that he had acted on the specific instructions given to her by another consultant. This principle would indeed be persuasive authority in the case of computer consultants hired by the aviation industry to correct the millennium problem.

It can also be observed that, in strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission; it properly connotes a breach of duty, which causes damage to the person to whom the duty owed. However, a doctor failing to diagnose a disease cannot excuse himself by showing that he acted to the best of his skill if a reasonable doctor would have diagnosed it.⁷⁴ The civil liability of medical professionals towards their patients is compendiously stated in *R. v. Bateman*⁷⁵ as follows:

[I]f a person holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned. If the patient's death has been caused by the defendant's indolence or carelessness, it will not avail to show that he had sufficient knowledge; nor will it avail to prove that he was diligent in attendance, if the patient has been killed by his gross ignorance and unskillfulness. . . . As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man. There may be recklessness in undertaking the treatment and recklessness in the conduct of it. It is, no doubt, conceivable that a qualified man may be held liable for recklessly undertaking a case which he knew, or should have known, to be beyond his powers, or for making his patient the subject of reckless experiment. Such cases are likely to be rare.⁷⁶

⁷⁴ M. Brazier, *STREET ON TORTS* 205 (7th ed. 1982).

⁷⁵ *R. v. Bateman*, 94 L.J.K.B. 791 (1925); see *Akerele v. The King*, A.C. 255 (1943); see also Linden, *The Negligent Doctor*, 11 *OSGOODE HALL L.J.* 31 (1973).

⁷⁶ *Id.* at 798.

The primary question therefore is whether in all the circumstances the defendant acted with the skill and competence to be expected from a person undertaking the particular activity and professing his specific skill.

One of the difficulties that may be encountered in the determination of professional negligence is whether there are specific established norms within a particular jurisdiction on what constitutes proper professional practice. The classic statement of the governing principles is to be found in the jury instruction given by McNair in *Bolam v. Friern Hospital Management Committee*.⁷⁷

[W]here you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art . . . [T]here may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent . . . a mere personal belief that a particular technique is best is no defense unless that belief is based on reasonable grounds . . . a doctor is not negligent if he is acting in accordance with . . . a practice (accepted as proper by a responsible body of medical men skilled in that particular art), merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pigheadedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion."⁷⁸

The *Bolam* test has been applied to every exercise of professional skill and judgement. The courts have rejected attempts to categorize professional tasks by subdividing them for the purpose of ignoring the *Bolam* case in particular contexts.⁷⁹ The test is not merely confined to cases relating to highly technical skills.⁸⁰ The *Bolam* case has received the approval in Parliament,⁸¹ the House of Lords⁸² and the Privy Council.⁸³

⁷⁷ *Bolam v. Friern Hosp. Mgmt. Comm.*, 1 W.L.R. 582, 586-87 (1957).

⁷⁸ *Id.*

⁷⁹ *Gold v. Haringey Health Auth.*, 1 Q.B. 481, 489 (1988).

⁸⁰ *Alchemy (Int'l) Ltd. v. Tattersalls Ltd.*, 2 E.G.L.R. 17 (1985).

⁸¹ Congenital Disabilities (Civil Liability) Act 1976, ch. 28 § 1.

The House of Lords in *Whitehouse v. Jordan*,⁸⁴ rejected the idea that mere errors of judgement cannot amount to negligence.⁸⁵ Lord Fraser observed:

[A]n error of judgement may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonable competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent.⁸⁶

It is generally recognized that in determinations of negligence on the part of medical practitioners, the defendant must exhibit the degree of skill which a member of the public would expect from a person in his position. Pressures on her for which he is in no way responsible will not detract from guilt for an error on his part.

Moral responsibility and incompetence are generally considered mutually exclusive from negligence. In *Wilsher v. Essex Area Health Authority*, a baby was blinded when the hospital's staff negligently administered too much oxygen.⁸⁷ The plaintiff was an infant child who was born prematurely suffering from various illnesses, including oxygen deficiency. His prospects of survival were considered to be poor and he was placed in the 24-hour special care baby unit at the hospital where he was born. The unit was staffed by a medical team consisting of two consultants, a senior registrar, several junior doctors and trained nurses. While the plaintiff was in the unit, a junior and inexperienced doctor monitoring the oxygen in the plaintiff's bloodstream mistakenly inserted a catheter into a vein rather than an artery but then asked the senior registrar to check what he had done. The registrar failed to see the mistake and some hours later, when replacing the catheter, did exactly the same thing himself.

Mustill L.J. observed:

⁸² *Sidaway v. Bethlem Royal Hosp.*, 1 W.L.R. 480 (1985); *Maynard v. West Midlands Reg. Health Auth.*, 1 W.L.R. 634 (1984); *Whitehouse v. Jordan*, 1 W.L.R. 246 (1981).

⁸³ *Chin Keow v. Gov't of Malaysia*, 1 W.L.R. 813 (1967).

⁸⁴ *Whitehouse v. Jordan*, 1 W.L.R. 246, 258 (1981).

⁸⁵ *Id.* An argument to this effect had been put forward by Lord Denning in the Court of Appeal. Lord Denning was concerned that there might be an explosion of medical malpractice claims if the courts did not reduce the standard of care applicable to professional persons.

⁸⁶ *Id.*

⁸⁷ *Wilsher v. Essex Area Health Auth.*, 1 Q.B. 730 (1987).

This appeal raises three questions of law relating to the allegation that the defendants are liable for breach of duty. (1) What is the nature of the cause of action on which the plaintiff relies? (2) What standard of care was demanded of those members of the medical and nursing staff who are said to have been negligent? (3) On whom rests the burden of proof in relation to the allegation of negligence?⁸⁸

His Lordship also quoted with approval the *Bolam* case:

A doctor who adopts a practice accepted as proper by a responsible body of medical men skilled in the relevant branch of medicine is not to be taken as negligent merely because there is a contrary view. Although this principle may have some bearing on the later episodes, it can have nothing to do with the first episode, for, although there were witnesses who regarded it as excusable in a young doctor not to know about the significance of the loop and its absence, there was no body of medical opinion which could regard it as appropriate to overlook the indications given by the X-rays as to the position of the catheter. The doctors made a mistake, although not necessarily a culpable one.⁸⁹

Errors of judgement are often the fundamental basis for negligence at English law. In *Whitehouse v. Jordan*,⁹⁰ the plaintiff who was born in 1970 with severe brain damage brought an action against, *inter alia* the first defendant, a senior registrar at the time of his birth, and the hospital authority, claiming that the damage had been caused by the first defendant's professional negligence. The principal allegations of negligence were that in the course of carrying out a "trial of forceps delivery" the first defendant had pulled too long and too strongly on the plaintiff's head, thereby causing the brain damage. At the trial, the mother of the plaintiff said that, when the forceps had been applied, it had felt like a deadened electric shock that lifted her hips off the [delivery] bed. Both the first defendant and the doctor who had assisted him denied that she had been lifted off the bed or that the first defendant had pulled violently with the forceps. The first defendant denied that the plaintiff's head had been wedged or stuck.

Lord Wilberforce observed:

First, it is necessary, in order to establish liability of, and to obtain an award of compensation against, a doctor or a hospital that

⁸⁸ *Id.*

⁸⁹ *Bolam*, 3 All. E.R. 801, 812 (1986).

⁹⁰ *Whitehouse v. Jordan*, 1 W.L.R. 246 (1981).

there has been negligence in law. There is in this field no liability without proof of fault. Secondly, there are strict limitations upon this power of an appeal court to reverse the decision of the judge on an issue of fact.⁹¹

A significant consideration relating to the plaintiff's burden of proof of the defendant's negligence is that if the evidence is equally balanced so that there is no balance of probability in favor of the plaintiff's contention of negligence, his action fails. In other words, if it is not clear whether the injury complained of may have occurred without carelessness on the part of the defendant, the plaintiff will not be considered as having discharged his burden of proof. The 1983 case of *Ashcroft v. Mersey Regional Health Authority* concerned a case where the plaintiff submitted herself to an operation on her left ear.⁹² It was performed by a surgeon of long experience, great skill, and the highest reputation. The operation proved to be disastrous, for the plaintiff was left with a partial paralysis of the left side of the face, an injury for which she claimed damages alleging that the operation was carried out negligently. The paralysis was caused by damage to the facial nerve. Judge Kilner Brown observed:

Where an injury is caused which never should have been caused, common sense and natural justice indicate that some degree of compensation ought to be paid by someone. As the law stands, in order to obtain compensation an injured person is compelled to allege negligence against a surgeon who may, as in this case, be a careful, dedicated person of the highest skill and reputation. If ever there was a case in which some reasonable compromise was called for, which would provide some amount of solace for the injured person and avoid the pillorying of a distinguished surgeon, this was such a case.⁹³ The proposition that an error of judgement by a medical man is not negligence is an inaccurate statement of the law. It may be; it may not. The question for consideration is whether on a balance of probabilities it has been established that a professional man has failed to exercise the care required of a man possessing and professing special skill in circumstances which require the exercise of that special skill. If there is an added burden, such burden does not rest on the person alleging negligence; on the contrary, it could be said that the

⁹¹ *Id.* at 258.

⁹² *Ashcroft v. Mersey Reg'l Health Auth.*, [1983] 2 All E.R. 245, *aff'd* [1985] 2 All E.R. 96.

⁹³ *Id.* at 246.

more skilled a person is the more the care that is expected of him.⁹⁴

As has been previously discussed, when a professional lacks the skill and experience to deal with a particular case, or the professional realizes the possibility of his client being adversely affected by that professional's work, he should refer the matter to someone who is competent to deal with it. In the 1952 case of *Payne v. St. Helier Group Hospital Management Committee*, Donovan J. held that a medical officer who incorrectly diagnosed a disease was negligent in that he had failed to refer the patient to a consultant medical practitioner.⁹⁵

However, the above principle is tempered by the premise that if a professional acts in accordance with general and approved practices of the profession, that would indeed constitute a good defense to a claim in negligence. In the Canadian Case of *Vancouver General Hospital v. McDaniel*, the Privy Council reversed the decision of the Court of Appeal of British Columbia which imputed negligence to a hospital for allowing a small group of patients to be in a room with the plaintiff - a diphtheria patient who contracted small pox thereafter.⁹⁶ The Privy Council held:

[A] defendant charged with negligence can clear his name if he shows that he has acted in accordance with general and approved practice. The appellants, in his Lordship's opinion, even if the onus rested on them of doing this, have in this case done so by a weight of evidence that cannot be ignored.⁹⁷

The 1955 case of *Hunter v. Hanley* established three criteria which determine a doctor's deviation from normal practice.⁹⁸ They are:

- a) it must be proved that there is a usual and normal practice;
- b) it must be proved that the defendant had not adopted that practice; and
- c) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.⁹⁹

A proper examination of the patient, particularly if the patient had not been seen earlier by a doctor for the ailment com-

⁹⁴ *Id.* at 246-47.

⁹⁵ *Payne v. St. Helier Group Hosp. Mgmt. Comm.* [1952] C.L.Y.B. 2442.

⁹⁶ *Vancouver Gen. Hosp. v. McDaniel*, [1935] 152 L.T.R. 56.

⁹⁷ *Id.* at 57-58.

⁹⁸ *Hunter v. Hanley*, [1955] S.L.T. 213.

⁹⁹ *Id.* at 216.

plained of, is a basic responsibility which would fall in the first category of usual and normal practice.¹⁰⁰ A wrong diagnosis, if proved, or a failure to refer a patient to another physician where necessary, would fit into the third category. Caution must be exercised, however, in determining whether the doctor could have, according to her skill, knowledge and experience, diagnosed a disease correctly, as in the case of *Sadler v. Henry*.¹⁰¹ In that case, the court held that the defendant medical practitioner was not negligent in failing to diagnose localized meningitis, since there were no signs or symptoms which could reasonably have led him to suspect that condition.

Of comparative interest to the legal liability of the aviation industry would be the area of tortuous liability relating to medical malpractice in the United States. Malpractice is defined as bad or unskillful practice on the part of a physician or surgeon resulting in injury to a patient¹⁰² or the failure of a physician to exercise the required degree of care, skill and diligence; or the treatment by a surgeon or physician in a manner contrary to accepted rules and with injuries resulting to a patient. The law relating to malpractice is based on three elements:

- a) the professional relationship of physician and patient;
- b) departure of the physician from some professional duty that he owed the patient; and
- c) the link of such departure of duty to the proximate cause of injury.¹⁰³

In an instance where the physician is a specialist, she is bound to exercise a degree of skill and knowledge which is usually possessed by similar specialists. Such skill and knowledge is expected to be of a higher level than that which is possessed by the general practitioner. Where the doctor is a specialist she is bound to exercise that degree of skill and knowledge which is ordinarily possessed by similar specialists, and not merely the degree of skill and knowledge of a general practitioner.¹⁰⁴ This rule is well stated in *Corpus Juris Secundum*:

A physician holding himself out as having special knowledge and skill in the treatment of a particular organ, disease or type of

¹⁰⁰ See *Barnett v. Chelsea & Kensington Hosp. Mgmt. Comm.*, [1969] 1 Q.B. 428; *Kavanaugh v. Abramson*, [1964] 108 S.J. 320.

¹⁰¹ *Sadler v. Henry*, [1954] 1 B.M.J. 1331.

¹⁰² CHARLES KRAMER & DANIEL KRAMER, *MEDICAL MALPRACTICE* 6 (4th ed. 1976).

¹⁰³ See *id.*

¹⁰⁴ *Beach v. Chollet*, 166 N.E. 415 (Ohio 1928).

injury is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who devote special study and attention to the treatment of such organ, disease or injury, regard being had to the state of scientific knowledge at the time.¹⁰⁵

Similarly, a general practitioner who undertakes to treat a case which clearly lies within the field of a special branch of medicine will be held liable for failure to use skill equal to that of a specialist.¹⁰⁶

The fundamental principle of professional conduct in the United States is that the physician is in a position of trust and confidence with regards to his patient, and it is his duty to act with the utmost good faith toward the patient. If she knows that she cannot accomplish a cure or that the treatment adopted will probably be of no benefit, it is her duty to advise her patient of these facts.¹⁰⁷ In *Waltuck v. Poushter*, it was held incorrect to dismiss the complaint where the proof was that the defendant was called to the decedent's home and treated her for complaints of malaise, head pains, elevated temperature and blood in her left ear.¹⁰⁸ He was called *later* that day and advised that her condition had *worsened*. Yet he made no effort at treatment or to contact a specialist to evaluate her symptoms. She then died of meningitis. It was held that a jury could find that his professional knowledge should have alerted him to the possible consequences of his failure to treat the complaints or perceive the seriousness of the plaintiff's condition.

¹⁰⁵ 70 C.J.S. *Physicians and Surgeons* § 41 (2002).

¹⁰⁶ HERZOG, MEDICAL JURISPRUDENCE 157 (1931); GORDON, TURNER & PRICE, MEDICAL JURISPRUDENCE 121 (1953); *Monahan v. Devinny*, 229 N.Y.S. 60 (N.Y. 1928) (The defendant chiropractors treated the plaintiff unskillfully, as a result of which he became paralysed. The court held that the defendants were illegally practising medicine in violation of the Education Law so that "in an action of this kind they must be held to the same standards of skill and care as prevail amongst those who are licensed.")

¹⁰⁷ REGAN, DOCTOR, PATIENT & THE LAW 34 (1950); *Benson v. Dean*, 133 N.E. 125 (1921); LLOYD STRYKER, COURTS & DOCTORS 9 (1932) ("The relationship of patient and physician is to the highest possible degree a fiduciary one, involving every element of trust and confidence." The American Medical Association, Principles of Medical Ethics, paragraph 8 provides, "A physician should seek consultation upon request, in doubtful or difficult cases, or whenever it appears that the quality of medical service may be enhanced thereby"); see also Annot, *Duty to Send Patient to Specialist*, 132 A.L.R. 392 (1949).

¹⁰⁸ *Waltuck v. Poushter*, 344 N.Y.S.2d 369 (N.Y. 1973).

It is a fundamental duty of a physician to make a skilful and careful diagnosis of the ailment of a patient, and if she fails to bring to that diagnosis the proper degree of skill and care and makes an incorrect diagnosis, she may be held liable to the patient.¹⁰⁹ Furthermore, the physician must inform himself by the proper tests and examinations of the condition of her patient to undergo a proposed treatment or operation, so that she may intelligently exercise the skill of his calling.¹¹⁰ The duty of exercising reasonable skill and diligence includes not only the diagnosis and treatment, but also the giving of proper instructions to her patient in relation to conduct, exercise, and the use of an injured limb.¹¹¹

Another area of common law which brings to bear an interesting analogy in the law of negligence and due diligence is the Roman-Dutch law. Under Roman-Dutch law negligence falls within the purview of the ancient *lex Aquilian* concept of "culpa" which is established objectively. The question for the courts is not what a tortfeasor was thinking or not thinking about; expecting or not expecting; but whether his behavior was or was not such as is demanded of a prudent person under given circumstances. Negligence, therefore, may be defined as conduct which involves an unreasonable risk of harm to others.

The notion of duty of care is essentially an English common law principle, and Roman-Dutch jurist McKerron cites with approval the dictum of Lord McMillan in *Bourhill v. Young*:¹¹²

The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.¹¹³

In the 1934 case of *Perlman v. Zoutendyk*,¹¹⁴ the court delivered a watershed decision which established the essence of professional negligence. In this case, a sworn appraiser had issued a certificate of valuation with the knowledge that it would be used to induce someone to lend money on the property valued. The Court held:

¹⁰⁹ 61 AM. JUR. *Physician and Surgeon and Other Healers* § 230 (1981).

¹¹⁰ *Id.*

¹¹¹ *Pike v. Honsinger*, 49 N.E. 760, 762 (1898).

¹¹² *Bourhill v. Young*, [1942] 2 All E.R. 396, 402.

¹¹³ R.M. MCKERRON, *THE LAW OF DELICT* 26 (7th ed. 1971).

¹¹⁴ *Perlman v. Zoutendyk*, 1934 C.P.D. 151.

[I]n Roman Dutch law the duty to exercise reasonable care arises wherever the defendant whose act is complained of should reasonably have foreseen probability of harm being caused by his act to another person, except, perhaps in those cases in which the act complained of can be said to be justified or exercised.¹¹⁵

The above dictum in the *Pertman* case, when compared with that of *Bourhill v. Young* above, reflects that duty of care is a common feature in both the Roman Dutch law and English common law. Roman-Dutch law requires two distinct questions to be answered:

- a) what was the standard of care required of the tortfeasor at the time the alleged tortuous act was committed; and
- b) did the conduct of the tortfeasor comply with that standard?

One method courts employ in answer these questions is to place themselves, as nearly as they can, in the position of the tortfeasor at the time the act was committed and judge whether ordinary care which can reasonably be expected from a reasonable person under all circumstances was shown by the tortfeasor.¹¹⁶ It is therefore arguable that this fundamental premise would be extended by jurisdictions which follow the Roman-Dutch law in situations of professional negligence.

One of the most significant principles of Roman Dutch law principles regarding professional negligence is the maxim *imperitia culpa adnumeratur*, which establishes that negligence is not determined by the lack of skill of the tortfeasor but in his undertaking work without skill. Therefore, when a person engages in a profession which calls for special skill, the degree of skill which is required is that reasonably to be expected of a person engaged in such profession or occupation. Chief Justice Innes observed:

[T]he Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.¹¹⁷

Under Roman-Dutch law, the burden of proving negligence - a preponderance of probability - rests with the plaintiff. Proof must be adduced not only to show the defendant's negligence, but also to draw a casual link between the defendant's negligence and the harm. Whenever direct evidence of the defen-

¹¹⁵ *Id.* at 154.

¹¹⁶ *S.A.R. v. Bardekber*, 1934 A.D. 473, 480 (1934).

¹¹⁷ *Van Wyk v. Lewis*, 1924 A.D. 438, 444 (1924).

dant's negligence is not available, negligence may be established by inference of facts. Moreover, the plaintiff need not demonstrate his case; the court is entitled to act on a balance of probabilities.

Therefore, under the Roman-Dutch law, as in English law and American law, negligence is defined as conduct which involves an unreasonable risk of harm to others. Negligence is the failure in given circumstances to exercise that degree of care which the circumstances demand. A requisite of liability in negligence is the breach of duty to the plaintiff.

IV. SECURITY MANAGEMENT

At the 33rd Session of the Assembly, the ICAO adopted Resolution A33-1 entitled "Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation."¹¹⁸ This Resolution singles out for consideration the terrorist acts which occurred in the United States on September 11, 2001, and, *inter alia*, recognizes that the new type of threat posed by terrorist organizations requires new concerted efforts and policies of cooperation on the part of States. The Resolution urges all Contracting States to intensify their efforts to achieve the full implementation of the multilateral conventions on aviation security, as well as of the ICAO Standards and Recommended Practices and Procedures (SARPs) relating to aviation security, to monitor such implementation, and to take within their territories appropriate additional security measures commensurate to the level of threat in order to prevent and eradicate terrorist acts involving civil aviation.¹¹⁹ The Resolution also urges Contracting States to contribute, in the form of financial or human resources, to ICAO's aviation security mechanism in order to support and strengthen the combat against terrorism and unlawful interference in civil aviation; calls on Contracting States to agree on special funding for urgent action by ICAO in the field of aviation security referred to in paragraph 7 below; and directs the Council to develop proposals and take appropriate decisions for a more stable funding of ICAO

¹¹⁸ Declaration of Misuse of Civil Aircraft as Weapons of Destruction and other Terrorist Acts Involving Civil Aviation, ICAO Res. A33-1 (provisional), ICAO Assembly 33rd Sess. (Sept. 25 – Oct. 5, 2001), *available at* <http://www.icao.org/icao/en/assembly/a33/resolutionsa33.pdf>.

¹¹⁹ *Id.* at 5.

action in the field of aviation security, including appropriate remedial action.¹²⁰

Resolution A33-1 directs the Council to convene, at the earliest date possible, an international high-level, ministerial conference on aviation security with the objectives of preventing, combating and eradicating acts of terrorism involving civil aviation; of strengthening ICAO's role in the adoption of SARPs in the field of security and the audit of their implementation; and of ensuring the necessary financial means to strengthen ICAO's AVSEC Mechanism, while providing special funding for urgent action by ICAO in the field of aviation security.¹²¹

The effects of this resolution can be seen in certain concerted efforts made both in the United States and Europe to take immediate measures to strengthen aviation security. The European Transport and Telecommunications Council, at its meeting in Luxemburg on 16 October 2001, welcomed the proposal by the Commission for a Regulation establishing common rules in the field of civil aviation security¹²². The Council invited Member States and the European Commission to contribute to the preparation of the ICAO High Level/Ministerial Conference as referred to in Resolution A33-1.

In the United States, Ms. Jane Garvey, FAA Administrator, stated on October 17, 2001, at a meeting in Washington, that the United States will start using new technology called the "Computer Assisted Passenger Pre-screening System," which would introduce new technologies to detect plastic weapons. Ms. Garvey further added that Transportation Secretary Mineta had created a \$20 million dollar fund to explore new technologies to improve aircraft security. These grants could be used to test any new technology that leads to safer, more secure aircraft.¹²³

At its meeting of October 1, 2001, the Rapid Response Team on Airport Security, formed under Department of Transportation of the United States, recommended the following measures for reforming the nation's aviation security system:

- Establishment of a new federal security agency, housed within the Department of Transport;

¹²⁰ *Id.* at 6.

¹²¹ *Id.* at 8.

¹²² Transport and Telecommunications Council, Luxemburg (Oct. 16, 2001).

¹²³ See Jane F. Garvey, *The New World of Aviation*, Speech at the National Press Club (Oct. 17, 2001), available at <http://www.faa.gov/apa/speeches/2001/1017spjg.htm>.

- Integration of law enforcement and national security intelligence data with airline and airport systems, including passenger reservation.
- Designation by all airlines and airports of a senior-level security officer who possesses a security clearance required to act on sensitive intelligence information;
- Adoption of new technologies for the positive identification of passengers, airport workers and crews, detection of explosives, and more effective passenger and baggage screening to be incorporated in airport security programs as soon as practicable;
- Establishment by the FAA of an Aviation Technology Consortium.
- Application of the Computer Assisted Passenger Pre-screening System (CAPPS) to all passengers.¹²⁴

These enhanced security measures implicate issues of privacy and the rights of the airline passenger. Simplified Passenger Travel (SPT) is a process introduced largely to alleviate the usually drawn out process of passenger clearance at airports that has become characteristic of air travel. The SPT system anchors itself on the use of a smart card that holds relevant information about the passenger, and that can be swiped through a machine to provide instant clearance.¹²⁵

The practice of exchanging Advance Passenger Information (API) goes hand-in-hand with use of the smart card. API has already proven the usefulness of providing immigration and customs authorities of a State in whose territory a passenger disembarks, with that passenger's information in advance of his arrival. This information is particularly useful in deciding whether that passenger would be admissible into the State. The notion of an API system was conceived and introduced by the Customs services of certain States. These states identified the need to address the increased risk posed by airline passengers in recent years, especially with respect to drug trafficking and other threats to national security. It was pointed out in compelling terms that in some locations this need to enhance controls, combined with the growth of air passenger traffic, had begun to place a severe strain on the resources of Customs and Immigration authorities, resulting in unacceptable delays in the process-

¹²⁴ See Dep't of Transp., Meeting the Airport Security Challenge: Report of the Secretary's Rapid Response Team on Airport Security (Oct. 1, 2001), at http://www.afa66.org/SAFETY_ALERT.htm.

¹²⁵ Ruwantissa I.R. Abeyratne, *The Automated Screening of Passengers and the Smart Card - Emerging Legal Issues*, 23 ANNALS AIR & SPACE L. 3, 3-7 (1998).

ing of arriving passengers at airports. A system in which identification data on passengers could be sent to the authorities while the aircraft was in flight, to be processed against computer data bases before the passengers arrived, was therefore envisioned as a means of addressing the twin objectives of better compliance and faster clearance of low-risk passengers.

As the airlines and control authorities progress in their refinement of the system and improvement of the system performance, passenger clearance times for trans-oceanic flights (which, prior to use of API, frequently involved delays in excess of two hours) have been reduced to averages well below the recommended goal of 45 minutes. In addition to this improvement in productivity, the control authorities have realized an enhancement of their enforcement efforts, due to the fact that receipt of information in advance gives them more time to process the information on the passengers and make better decisions regarding their inspection targets and the appropriate level of control.

The data included in the transmissions between the airlines and the immigration and customs authorities of recipient states consists of details contained in the machine readable zone of a passport of the passenger concerned,¹²⁶ plus specific data concerning the inbound flight – e.g. airports of departure/arrival, flight number and date. An Electronic Data Interchange for Administration, Commerce and Transport (EDIFACT) message format is used to transmit the data by EDI. The system works well but demands high levels of completeness and accuracy of data provided. Unlike cargo shipments, each of which is processed for clearance on its own track, passengers must pass through immigration Customs as a “flight” and are interdependent with respect to the time it takes to clear them. If data on too many passengers is missing, the whole group is slowed down, and so are the flights of passengers arriving behind them.

There is an ongoing tug-of-war between the airlines and immigration/Customs over airline system performance standards versus short clearance times (facilitation benefits) provided by the authorities. The reality is that the higher the data quality, the faster the clearance can be accomplished. So the airline has to meet a certain standard in order to get “blue lane” treatment.

¹²⁶ Ruwantissa I. R. Abeyratne, *The Development of the Machine Readable Passport and Visa and the Legal Rights of the Data Subject*, 27 ANNALS AIR & SPACE L. 1, 1-31 (1992).

An important issue that emerges in the API process is that the data required must be collectable by machine or already contained in the airline's system. Manual collection and data entry at the check-in desk for a scheduled flight is time-consuming and prone to errors, and thus, unacceptable. Since most travelers now hold machine readable passports (MRPs) manual input is only necessary on occasion. The concerned authorities must aim to achieve improvements in security with the use of these measures.

At its 33rd Session, held in September/October 2001, the ICAO Assembly acknowledged that new measures were needed to enhance security, but 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.¹²⁷ 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 September 2001, which re-affirmed the need for continuing work to ensure the integrity and security of passports and other travel documents.¹²⁸ In this context, the Assembly agreed that all contracting States should be 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.

On February 19 and 20, 2002, a high level ministerial conference on aviation security was held at the Headquarters of the International Civil Aviation Organization in Montreal. In the words of Dr. Assad Kotaite, President of the ICAO Council who opened the Conference (and later served as the Chairman of the Conference), the Conference was being held "at a critical

¹²⁷ See Consolidated Statement of Continuing ICAO Policies Related to the Safeguarding of International Civil Aviation Against Acts of Unlawful Interference, ICAO Res. A33-2 (provisional), ICAO Assembly 33rd Sess. (Sept. 25 – Oct. 5, 2001), available at <http://www.icao.int/icao/en/assembl/a33/index.html>.

¹²⁸ S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., at 1, U.N. Doc. S/RES/1373 (2001).

junction for civil aviation and for society at large” and the conference would review and develop global strategy for strengthening aviation security with the aim of protecting lives both in the air and on the ground, restoring public confidence in air travel and promoting the health of air transport in order that it can renew its vital contribution to the world economy.”¹²⁹

At this Conference, attended by Member States of the International Civil Aviation Organization, some 714 participants from 154 Contracting States and observers from 24 international civil aviation organizations endorsed a global strategy for strengthening aviation security worldwide and issued a public declaration at the conclusion of their two-day meeting.

Dr. Kotaite called upon all members of the world aviation community to give their full and unconditional support to the Plan of Action and to all elements of our global strategy, in terms of human and financial resources, so that air transport remains the safest and most efficient mode of mass transportation there is. The Plan of Action includes:

- Identification, analysis and development of an effective global response to new and emerging threats, integrating timely measures to be taken in specific fields including airports, aircraft and air traffic control systems;
- Strengthening of the security-related provisions in the Annexes to the Convention on International Civil Aviation, using expedited procedures where warranted and subject to overall safety considerations, notably to provide for protection of the flight deck;
- Close coordination and coherence with audit programmes at the regional and sub-regional level;
- Processing of the results by the ICAO in a way which reconciles confidentiality and transparency; and a follow-up program for assistance to rectify identified deficiencies.¹³⁰

The Declaration adopted at the conclusion of the Conference reaffirms condemnation of the use of civil aircraft as weapons of destruction wherever and by whomsoever and for whatever reason they are perpetrated, while being mindful of the need for strengthening measures to prevent all acts of unlawful interference with civil aviation. It emphasizes the vital role which civil aviation plays in economic development; stresses the preemi-

¹²⁹ See Assad Kotaite, Opening Address and Overview by the President of the Council of the ICAO (Feb. 19, 2002), available at <http://www.icao.int/icaonet/chfirst/avsecont2002/PRES-en.pdf>.

¹³⁰ See *id.*

nence of safety and security as underlying fundamentals in civil aviation which need global address; and reaffirms the responsibility of States for the security and the safety of civil aviation, irrespective of whether the air transport and related services concerned are provided by Government, autonomous or private entities.

One of the salient features of the Declaration is that it notes the significant improvements in aviation security recently initiated in a large number of States; recognizes that a uniform approach in a global system is essential to ensure aviation security throughout the world and that deficiencies in any part of the system constitute a threat to the entire global system; and affirms that a global aviation security system imposes a collective responsibility on all States. The Declaration also notes that the additional resources which will be required to meet enhanced aviation security measures may create an undue financial burden on the already limited resources of developing countries.

Through the Declaration, the States participating in the Conference commit to achieving full implementation of the multilateral conventions on aviation security and the ICAO Standards and Recommended Practices (SARPs) and Procedures for Air Navigation Services (PANS) as well as ICAO Assembly Resolutions and Council Decisions relating to aviation security and safety; applying within national territories appropriate additional aviation security measures to meet the level of threat; fostering international cooperation in the field of aviation security and harmonize the implementation of security measures; ensuring that security measures are implemented in a most cost effective way in order to avoid undue burden on civil aviation; ensuring to the extent possible that security measures do not disrupt or impede the flow of passengers, freight, mail or aircraft; ensuring that security measures are implemented in a manner which is objective and non-discriminatory on the basis of gender, race, religion or nationality; enhancing the quality of human resource functioning within aviation security, including application of sustained education and training; and restore public confidence in air travel and revitalize the air transport industry.¹³¹

Several States pledged financial and human resource assistance toward the implementation of the ICAO's proposed action plan. The Conference was a singular success, not only

¹³¹ See *id.*

because it achieved its objective of reaching consensus among 154 States as to the compelling need for an aviation security oversight audit program to be conducted on Contracting States by ICAO, but also because it proved to be an exemplary attempt at a global proclamation against acts of terrorism that threaten the security of the world community. The Conference underscored the need for an integrated management structure that could combat unlawful interference with exigencies of day to day social and commercial intercourse.

Perhaps the most significant message sent out by the February 2002 High Level, Ministerial Conference is that the world community must establish a carefully synchronized and thoughtfully orchestrated plan of action and system of progressing toward achieving substantial enforcement of aviation security.

The outcome of the Conference was clear evidence that although nations can be shaken by acts of unlawful interference, the foundations of a "family" of nations and their civilized discourse on solidarity and comity can never be destroyed. Also evident was that long term resolution was an essential supplement to short term retaliation, if an enduring solution were to be pursued against terrorism. In this case, there is no room for the rhetoric of war, as there are no boundaries to encroach and no soldiers to fight. Global terrorism transcends frontiers of State authority.

In achieving the aforementioned management objectives, the aviation community should start by attaining a full appreciation of the potential social and economic advantages of restoring confidence in air travel worldwide. The starting point should ineluctably be in the area of regulatory management, where the ICAO should be called upon to identify and analyze new emerging and potential threats to civil aviation and formulate appropriate practical strategy to address the threats. Once threat identification is completed, effective management follow through should involve modular application of technological tools. Available technology, such as biometric identification equipment and machine readable travel document readers should be put to wider and more effective use. Management databases containing personal information relevant to ensuring safety should also be used extensively on the basis that the international use of these databases in providing advance passenger information is essential as a preventive management tool.

With regard to State responsibility, the Conference sent a clear message that States should reaffirm their responsibility for

effective security management. They should ensure integrated management, through partnerships between aviation and other authorities, between government and industry, spreading out to global, regional and inter regional cooperation. Critical to this exercise would be the conduct by ICAO of aviation security audits, along the lines of aviation safety audits already carried out by the Organization. Procedures for assisting States in taking remedial action have to be in place with the necessary follow up and technical assistance. It is only then that an effective preventive security management system could be developed.

V. COMMERCIAL MANAGEMENT

Code sharing, which is a prolific commercial tool used by air carriers to maximize market access and make full use of providing capacity to meet demand, presents special challenges from the perspective of aviation security. A code share is not successful from a marketing point of view if there is no "seamless" customer service. Thus, code share partners have to ensure that security measures adopted by all partners are consistent and smooth flowing. This would particularly prove to be a challenge in the present context, where governments may issue mandatory standards for security on their airlines which may not necessarily be consistent with standards imposed on those airlines' code share partners by the latter's governments. In addition, an air carrier itself may, in view of its particular exigencies, impose security measures on its passengers that cannot be enforced on another carrier's passengers. The difficulty of arriving at a common security system in code sharing essentially lies in the fact that, while the "operating" carrier is ultimately responsible for security of a flight, the "marketing" carrier who sells a passenger his air ticket implicitly warrants that the passenger would be assured of the quality of security usually applied by the marketing or selling carrier.

Recent events have brought to bear the threat of risk transfer from one airline to another. In other words, if one airline were to carry a greater risk of damage than others in a code share situation (or other airline alliance situation), the risk would be shared by all partners to the agreement. Specific instances that may cause delays could well be when a passenger needs to be off loaded from a code shared flight where that passenger had been earlier accepted according to the security procedures of another carrier under a code share agreement; the carriage of escorted prisoners in various sectors involving code share flights: carriage

of security sensitive personages such as VIPs in several sectors of code shared flights; and the challenges of information sharing between code share partners of a disruptive passenger.

Outsourcing of services, another entrenched commercial practice in the airline industry, would also come under special scrutiny from a security perspective. Airlines would have to give serious consideration to the quality of services they receive from private entities offering security services. Carriers would, as of necessity, be compelled to rethink their quality assurance systems in security, with particular emphasis on security training and evaluation of implementation.

Security audits, imposed either by government or other entities which have governmental approval, may be a mandatory feature for airlines in the future with consistent requirements for the real assessment and comparative "note sharing" with other carriers. These measures would indeed have an impact on the timely despatch of aircraft, requiring passengers to lengthen their check in times and procedures.

Enhanced costs incurred by carriers, both in providing for improved and more stringent security measures and in absorbing delays caused by the implementation of such measures, may have to be met, one way or another. Increased airfares could be one mode of recovery. The imposition of security charges on passengers could be another. Guidance with regard to the imposition of security charges is already available in documentation of the International Civil Aviation Organization.¹³²

The bilateral requirement of substantial ownership and effective control, which is based on the fundamental postulate that a majority ownership provision would effectively preclude foreign

¹³² ICAO Assembly Doc. 9082/6, *ICAO's Policies on Charges for Airports and Air Navigation Services* (6th ed. 2001). The document addresses security charges specifically in paragraph 29 and in Appendix 1. This policy was originally recommended by the 1981 Conference on Airport and Route Facility Economics, modified slightly by the 1991 Conference on Airport and Route Facility Management, and as such reaffirmed by the Conference on the Economics of Airports and Air Navigation Services (ANSCoF 2000); see also ICAO Assembly Doc. 9562, *The Airport Economics Manual* (2001). The manual contains various guidance on financial and organizational aspects of airport security. This is covered generally, together with other issues, in different parts of the manual and specifically addressed in, for example, Chapter 1 - ICAO Policy on Airport Charges, paragraph 1.14; Chapter 2 - Organizational Structures of Airports, paragraph 2.46; Chapter 3 - Airport Financial Control, paragraphs 3.39 and 3.72; Chapter 4 - Determining the Cost Basis for Charging Purposes, paragraph 4.53; and Chapter 5 - Charges on Air Traffic and Their Collection, paragraphs 5.26 to 5.28.

ownership from taking major control of a national carrier, has not been easy to enforce or put into practice in all situations. Although a blanket provision might require majority national ownership and control, airlines and States have had to contend in many instances with complex issues of nationality of members of a board of directors, the powers of a board and the powers of directors of such boards.¹³³ Often States have attempted to circumvent these difficulties by establishing a safeguard to ensure for the government concerned a "golden share" which accords the owner government a greater voice in the decision making process on issues of importance and significance to the carrier concerned.

Airline alliances may offer a way around circumscriptions of the market access constraints that may be presented by bilateral air services agreements. Such alliances however, are not usually effective against the inhibiting qualities of the traditional ownership and control provisions of the typical agreement, particularly in the context of facilitation of cross border investment, which is essentially regulated by the bilateral air services agreement. In order to find a practical and legitimate way out of this seemingly impossible situation, the ICAO devised a pro active approach based on making the "principal place of business" and "permanent residence" of the carrier the operative criteria for purposes of devolution of control.

Both the United States and member States of the European Union protected their domestic markets from external operators by preserving these markets for their flag carriers, or at least carriers that were owned by the State concerned or nationals of that State. The European Union, pursuant to Article 4 of Court Regulation 2407/92, vests national authorities with the power to grant operating licences based on particular criteria 1) the principal place of business of the carrier applying for the license must be located in the licensing member State; 2) the carrier must be involved in air transportation as its main occupation; 3) the holder of the license must be under direct or majority ownership of nationals of the European Union; and 4) the licensee must be effectively controlled by such nationals. Effective control essentially means the power and ability to exercise a decisive influence on an air transport undertaking, including but not limited to the use, enjoyment and alienation of movable and

¹³³ See Ownership and Control, Report of the Think Tank - World Aviation Regulatory Monitor, at 4 (Sept. 7, 2000).

immovable property of that undertaking. One of the reasons, at least from the perspective of the European Union, of retaining the ownership and control criteria within its territory, is to safeguard the interests of the member States of the Union and to preclude carriers of non-EU States from capitalizing on a liberalized European Union Market.

United States law also contains explicit requirements pertaining to nationality of airline management,¹³⁴ with some contrast to Regulation 2407/92 of the EU, which does not expressly address issues regarding nationality of management. Arguably, the EU addresses external control by stockholders of a company, and not particularly, as envisaged by the United States law, management control of the administration and running of the air transport enterprise.

Be that as it may, both the United States and the European Union have shown, by their legislation, that the issue of ownership and control still remains a critical consideration in the overall picture of liberalization of and competition in air transport. Under the present circumstances, both the United States and the European Union may wish to review their positions as to whether it would now be prudent to retain existing standards of ownership and control.

One of the most critical issues in the ownership and control equation is the impact of commercial civilian airlines on military interests. As an example, under the Civil Reserve Air Fleet Program (CRAF), United States carriers have pledged a substantial number of their aircraft to the United States Department of Defense. If any other State were to have a similar system, the issue of foreign nationals ownership and/or control of aircraft that may be used for defence purposes could be a critical one which the State would be compelled to consider.

From a regulatory perspective, it is worthy to note that ICAO's Worldwide Air Transport Conference (Montreal, 1994), which examined the present and future regulation of international air transport, recommended that the ICAO proceed with studies and develop recommendations on a number of issues, including the review of the traditional air carrier ownership and control criteria with a view to their broadening. Following this trend, ICAO's Air Transport Regulation Panel has noted that at the Conference, the principal objections to broadening the traditional airline ownership and control criteria for the use of mar-

¹³⁴ 49 U.S.C. § 40102 (a)(15) (1994).

ket access by using a criterion based on "headquarters, central administration or principal place of business" were its possible use as an unacceptable means of gaining market access, abuse from differing interpretations of the terms involved, and that it might lead to "flags of convenience" with lack of regulatory control and social "dumping." The Panel concluded that a criterion based on a combination of "principal place of business" and "permanent residence" could be used to further broaden the traditional ownership and control criteria, thereby providing a third option to those two involving groups of States which had been adopted at the Conference. In the Panel's view, the principal place of business/permanent residence criterion would result in the firm link to the designating State, which would not result in a degradation of safety, while meeting the concerns expressed at the Conference. The Panel recommended that States wishing to accept broadened criteria for air carrier use of market access in their bilateral and multilateral air services agreement agree to authorize market access for a designated air carrier which has its principal place of business and permanent residence in the territory of the designating State and has and maintains a strong link to the designating State.

In judging the existence of a strong link, States should take into account elements such as the designated air carrier establishing itself, and having a substantial amount of its operations and capital investment in physical facilities in the designating State, paying income tax and registering its aircraft there, and employing a significant number of nationals in managerial, technical, and operational positions. Where a State believes it requires conditions or exceptions concerning the use of the principal place of business and permanent residence criterion based on national security, strategic, economic or commercial reasons this should be the subject of bilateral or multilateral negotiations or consultations, as appropriate. The above guidelines were approved by the Council on May 30, 1997 for the guidance of States.

At the time of this writing, ICAO was receiving responses from Contracting States to a questionnaire sent to them by the Organization seeking their views on and details of practices of ownership and control of airlines in their territories. It will be interesting to find out, once all responses are received, whether States have veered toward more State control of air carriers, particularly in terms of the element of control a State would retain in such areas as employment of trained public servants in ensur-

ing security at airports and in the sky and overall government share holding in airline companies. Trends in ownership and control will be a critical issue to be addressed at the upcoming ICAO 5th Air Transport Conference to be held in Montreal in March 2003.

VI. CONCLUSION

Any investment in crisis management calculated to revive an ailing aviation industry should be heavily weighted toward funding much needed management resources. On the insurance side, a reinsurance pool, initiated by States and contributed to by States would be a first step toward funding training and resource management. To strengthen aviation security, voluntary contributions from all ICAO Contracting States form a practical approach to buttressing regulatory management in both the adoption of Standards and Recommended Practices and the provision of aviation security training. In commercial aviation, investment should be geared toward enhanced commercial cooperation between carriers and the optimising and sharing of existing resources such as aircraft fleets and slots for departure and arrival.

There is no room for any doubt that in international civil aviation management, international and domestic civil aviation should not be considered in mutual exclusivity when it comes to matters of security. The world community must establish a carefully synchronized and orchestrated plan of action and system of progressing toward achieving substantial enforcement of aviation security as a whole, and investment toward improving aviation security should not be bifurcated into domestic and international aviation. With regard to commercial implications, the air transport industry has undergone a substantial metamorphosis following the recent attacks on America, not only through the attacks themselves, but also through the portentous threat against the liberalization of air transport and maximization of commercial opportunity. Indeed, these new events have given the air transport industry new perspective, and a new impetus to rethink aviation policy through cautious but visionary regulation on the one hand and prudent economic policy on the other.

On a more short term level, and of no less critical importance, the aviation community must address the insurance and security implications that have been slated for urgent discussion. Both resolutions on insurance and security have called upon the

ICAO to initiate work of an urgent nature. The working group on insurance should make recommendations as to how States can assist air transport operators and service providers in providing some financial protection. These actions would essentially have to be implemented with full international accord and cooperation. Implementation of these actions, through sustained and experienced management, would require investments to be carefully calculated toward obtaining the best available human resources and other services.

It is also important that, in order to achieve the above mentioned management objectives, the aviation community should start by attaining a full appreciation of the potential social and economic advantages of restoring confidence in air travel worldwide. The starting point should ineluctably be in the area of regulatory management, where ICAO should be called upon to identify and analyse new emerging and potential threats to civil aviation and formulate appropriate practical strategy to address the threats. Once threat identification is completed, effective management follow through should involve modular application of technological tools. Available technology, such as biometric identification equipment and machine readable travel document readers should be put to wider and more effective use. Management databases containing personal information relevant to ensuring safety should also be used extensively on the basis that the international use of these databases in providing advance passenger information is essential as a preventive management tool.

With regard to State responsibility, States should reaffirm their responsibility for effective security management. They should ensure integrated management, through partnerships between aviation and other authorities, between government and industry, spreading out to global, regional and inter regional cooperation. Critical to this exercise would be the conduct by ICAO of aviation security audits, along the lines of aviation safety audits already carried out by the Organization.¹³⁵ Procedures for assisting States in taking remedial action have to be in place with the necessary follow up and technical assistance. It is only then that investments made toward building an effective preventive security management system could be justified.

¹³⁵ Ruwantissa I.R. Abeyratne, *The Regulatory Management of Safety in Air Transport*, 4 J. AIR TRANSPORT MGMT 25-36 (1998).

It is incontrovertible that responsibility for the provision of security in municipal and international human activity lies within the State which has control over that activity. In ensuring aviation security, this responsibility devolves upon the State, both through the public international law of treaties and through other established legal principles as demonstrated earlier in this article. Although there has been no explicit nexus drawn between a requirement for a State to provide insurance coverage for an activity in order that it may keep going, there is certainly room for persuasive argumentation that airlines cannot be expected to provide for insurance against war risks over which they may not have sufficient control. As to how far States are responsible to provide indemnities to air carriers against grounding of aircraft owing to non existence of coverage, it is a subject that needs qualification on a more empirical basis.

