Who bears the costs of terrorism?

Allocating the risk under the draft ICAO Unlawful Interference Convention

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**Welcome and Introduction**

**Prof Robert McCorquodale, Director, British Institute of International and Comparative Law**

*Biography:* Professor Robert McCorquodale is the Director of the British Institute of International and Comparative Law. He is also Professor of International Law and Human Rights, and former Head of the School of Law, at the University of Nottingham.

Previously he was a Fellow and Lecturer in Law at St. John’s College, University of Cambridge and at the Australian National University in Canberra. Before embarking on an academic career, he worked as a qualified lawyer in commercial litigation with leading law firms in Sydney and London.

Robert’s research and teaching interests are in the areas of public international law and human rights law. He has published widely on these areas, and has provided advice to governments, corporations, international organisations, non-governmental organisations and peoples concerning international law and human rights issues, including advising on the drafting of new constitutions and conducting human rights training courses.

**SESSION ONE: Terrorism, Civil Aviation and the Unlawful Interference Convention**

**Chairman: Sarah Williams, Dorset Fellow of Public International Law, BIICL**

*Biography:* Sarah is currently the Dorset Fellow in Public International Law at the British Institute of International and Comparative Law. She was a lecturer in law at Durham University, where her teaching and research interests included public international law, international criminal law, legal responses to terrorism and international human rights. As a legal researcher at the Foreign and Commonwealth Office, she appeared before various UN committees and commissions, and advised the British Government on issues of international, foreign and domestic law.

**Existing regimes for second and third party liability for compensation of losses caused by unlawful interference with civil aviation**

**Prof Dr Pablo Mendes de Leon, Director, International Institute of Air & Space Law, Leiden University**

*Synopsis:* Civil aviation has been the target of various acts of unlawful interference, causing substantial damages to persons and goods, both on board aircraft and on the ground. International regimes designed to establish airline liability for compensation of such losses will be discussed. However, more than once recourse has to be taken to national legislation and ad hoc solutions. This conclusion forms an introduction to the question whether an international regime for third party liability is desirable and feasible, the subject of the presentations following.

*Biography:* Pablo Mendes de Leon is Professor of Air and Space Law and Director of the International Institute of Air and Space Law of Leiden University. He maintains a vast range of memberships in organisations that work to combine law and practice of aviation law and policy. For instance, he is President of the European Air Law Association, a honorary judge at the District Court of Haarlem, a Fellow of the Royal Aeronautical Society, Membre titulaire de l’académie de l’air et de l’espace, Toulouse, France, Board Member of the KLM –Air France foundation, a member of the International Faculty of IATA, a Board Member of the magazines Air and Space Law, and Journal of Air Law and Commerce.
The road to Montreal: finalising the text of the draft Convention

Kate Staples, Head of Aviation & Commercial Co-ordination Legal Division, Department of Transport

Synopsis: This session will focus on the development of the draft convention by ICAO in the period 2000 to 2008. The session aims to explain not only why ICAO embarked on its ambitious project to modernise the Rome Convention 1952, but also key milestones along the way that have shaped the debate. In addition, this session will highlight the issues that have generated the most discussion and how the solutions set out in the current draft were identified by the ICAO Council’s Special Group.

Biography: Having trained at Nabarro Nathanson, on qualification Kate took up a position in its construction department. In 1997 she moved to CMS Cameron McKenna, continuing to advise on the resolution of international and domestic disputes in the construction and engineering industries. In January 2003 Kate moved into the Government Legal Service, initially advising on aviation law at the Department for Transport. Since 2006 Kate has headed the Aviation & Commercial Co-ordination Legal Division and in the period 2004-08 Kate was a member of the ICAO Council’s Special Group on the modernisation of the Rome Convention 1952.

Scope of application of the Unlawful Interference Convention

Peter Macara, Senior Associate, Beaumont & Son, Aviation at Clyde & Co LLP
Nick Medniuk, Associate, Beaumont & Son, Aviation at Clyde & Co LLP

Synopsis: This will be a fairly technical presentation dealing with:
- Who is covered by the Convention?
- What triggers liability under the Convention?
- What happens where an event occurs in a state non-party
- What kind of damages may be recovered under the Convention?
- Application of the Supplementary Compensation Mechanism
- Circumstances where additional compensation may be awarded.

Biography: Peter Macara is a Senior Associate at Beaumont & Son - Aviation at Clyde & Co LLP. Prior to joining Beaumont & Son in 1997, Peter worked for British Airways both in operations and the legal department. Peter specialises in aviation law, both contentious and non-contentious, with a particular focus on regulatory. Peter was based in the firm’s Rio de Janeiro office between 2001 and 2005 and has specialist experience of Latin American legal systems and the aviation and insurance market in that region, particularly Brazil.

Biography: Nick started at Beaumont & Son - Aviation at Clyde & Co LLP in 2001 and has worked in the department’s insurance and reinsurance team since 2003. This has involved him in a broad range of liability and coverage disputes arising under aviation policies both in England and other jurisdictions, particularly Mexico. Prior to joining Beaumont’s, Nick gained some experience with an aviation specialist American law firm in New York and Los Angeles, which included working as a research assistant for the 3rd Edition of Margo on Aviation Insurance. Nick also acts as an honorary legal advisor at the RCJ branch of the Citizen’s Advice Bureau and as an advisor in a pilot mediation scheme at Brent CAB.

SESSION TWO: Perspectives on the Unlawful Interference Convention: the three layers and beyond

Giles Kavanagh, Barlow Lyde & Gilbert LLP
Biography: Giles Kavanagh is head of the Aerospace Department at international law firm, Barlow Lyde & Gilbert (BLG). BLG’s work includes: aviation catastrophes; aviation, aerospace and military regulation; commercial and contractual advice; competition law advice, including antitrust advice and representation; commercial litigation and arbitration.

Giles represents airlines and manufacturers in relation to a wide range of contentious and non-contentious issues. Giles is acknowledged as a leader in his field in the Legal 500, Chambers & Partners’ Legal Directory, Legal Experts and the International Who’s Who of Aviation Lawyers. Giles is chairman of the RAeS Air Law Group Committee.

The Industry perspective

Michael Gill, Senior Legal Counsel, International Air Transport Association

Synopsis: IATA has participated in the process of reform of the Rome Convention 1952 since it began in 2000, with a commitment to finding a principled compromise solution to the issue of third party surface damage resulting from acts of terrorism.

Whilst IATA recognises that the proposed structure could serve as the basic framework for a regime in which all victims of aviation terrorism would be treated fairly, the current draft does not contain a fair balance between the interests of all victims.

The Diplomatic Conference is faced with a very clear choice:
1. a Convention which allows for the compensation of innocent third party surface victims and the protection of innocent airline victims of terrorism; and
2. a Convention that does not have the support of the airline industry and the uncertainty which this would entail.

Biography: Michael Gill joined the Legal Department of IATA in May 2007. He deals with a range of EU regulatory matters, industry affairs and airline liability issues. Before joining IATA, he practised as an Avocat in Paris for seven years, acting for airlines and their insurers on a variety of cargo, passenger and major accident claims. He conducted advocacy before all levels of courts in France.

He is qualified as a Solicitor and as a French Avocat. He graduated LLB from King’s College, London and Maîtrise-en-droit from the Sorbonne in Paris and also holds an LLM in Private International Law from the University of Edinburgh.

The Insurance perspective

Sean Gates, Gates and Partners and Legal Adviser to the International Union of Aviation Insurers

Synopsis: The lessons of 9/11 for the aerospace industry have not been learnt. Industry continues to be exposed financially to unacceptable risks. A New Rome Convention protecting industry as well as direct victims is vital but its prospects are threatened by parochial concerns on the part of some States. Diluted protection for industry will create a hybrid monster and must be rejected vigorously whilst striving to preserve the potential benefits of the draft as presently drawn.

The vital elements of a successful Convention from the point of view of industry and Insurers:
1) Predictability
2) Inclusivity of all potential industry parties
3) Single predictable and certain jurisdiction
4) Preservation of rights of recourse of Airlines against other industry participants
5) Equivalent protection for other industry participants as is provided to Airlines in respect of claims by SCM/victims by way of trigger of liability
6) Complete exclusion or strict limitations on liability for mental injury to victims/witnesses/bystanders

**Biography:** After 30 years of experience in defending several of the world’s major aviation cases, Sean Gates established Gates and Partners, a boutique aerospace law firm.

Mr Gates specialises in aerospace insurance, reinsurance and liability issues. He has acted for airlines and their insurers as lead counsel in respect of numerous aviation disasters and regularly represents international carriers and their insurers on a variety of issues. Mr Gates participates as a representative of the International Union of Aviation Insurers (IUAI) at working group meetings under the auspices of ICAO on the proposed replacement for the Rome Convention on Surface Damage. He was the principal observer on behalf of the IUAI at the Montreal Convention in 1999.

Mr Gates was international director of the Aviation Insurance Association from 2006 to 2008, and is a member and past chairman of the Air Law Group of the Royal Aeronautical Society.

**The consumers’ perspective**

**Simon Evans, Chief Executive, Air Transport Users Council**

**Synopsis:** The presentation will consider the extent to which insurance provision for paying compensation to third party victims of terrorist attacks on aviation is a passenger issue. It will look at potential risks to passenger interests of failing to address the possibility of inadequate, or withdrawal of, insurance cover, and will conclude with a commentary on whether the draft Unlawful Interference Convention represents a reasonable outcome for passengers.

**Biography:** After an early career in local government and the Civil Service, Simon changed direction in 1991 by taking a year out to complete an MSc in Air Transport Management at Cranfield University. He joined the Air Transport Users Council immediately afterwards, in 1992, and has been the chief executive there since 2001.

**An independent perspective**

**George Tompkins Jnr, Wilson Elser Moskowitz Edelman & Dicker LLP**

**Synopsis:** Mr Tompkins will present reasons why the ICAO proposed “Unlawful Interference Convention” should not be adopted at the forthcoming Diplomatic Conference convened by ICAO for 20 April–2 May 2009 in Montreal.

**Biography:** George Tompkins Jnr was admitted to practice in the State of New York in 1956. He has served on several arbitration panels appointed by the American Arbitration Association and on referral from United States Courts. Mr Tompkins has been a frequent speaker and lecturer at professional meetings, conferences and law schools on international air law and on trial and appellate practice, throughout the world.
Since 2000 Mr Tompkins has been an annual lecturer in the LLM program at the Institute of Air and Space Law at Leiden University in the Netherlands on the subjects of private international air law, product liability and insurance. He serves as a Board Member of the Institute.

**Concluding Remarks**

**Robert Lawson, Barrister, Quadrant Chambers, London**

*Biography:* Robert Lawson is barrister practising from Quadrant Chambers, London. He is widely regarded as a leading practitioner in relation to aviation law. He has acted in many of the most notable aviation cases fought in England in recent years, including the last two to reach the House of Lords, and was one of the two principal contributors to Halsbury’s Laws of England title ‘Aviation’, Volume 2(3), 4th Edition Reissue (2003).

Robert is a Member of the Royal Aeronautical Society and is currently Vice Chairman of its Air Law Group. He has been appointed a Queen’s Counsel on 30th March.
This afternoon seminar, which was opened by Professor Robert McCorquodale (Director, British Institute of International and Comparative Law), was divided in two sessions. During the first session, presenters explored the current mechanisms for compensation, progress to date with regard to the drafting of the Convention, and the mechanism provided by the Draft Convention. Presenters of the second session explained the views of the airline industry, the insurance industry, as well as the consumers. The conference concluded with an independent perspective on the Draft Convention.

SESSION ONE:
TERRORISM, CIVIL AVIATION AND THE UNLAWFUL INTERFERENCE CONVENTION

1. Existing regimes for second and third party liability for compensation of losses caused by unlawful interference with civil aviation

In his presentation on the existing mechanisms, Professor Dr. Pablo Mendes de Leon (Director, International Institute of Air & Space Law, Leiden University) put in context the multi-dimensional subject matter of this conference, i.e. who has to pay the cost of terrorist interference with an aircraft which causes injury or damage to persons on the ground.

One important question is whether the application of strict liability is appropriate. The Draft Convention suggests channeling the liability through the airline. However, this raises issues of policy, and political questions such as the responsibility and tasks of government, international relations as well as pragmatic concerns, such as the need to compensate the victims. Furthermore, one may also wonder if it is justified to channel liability through a single party.

In fact, various approaches could be taken. The second party liability is based on an international regime, with the 1929 Warsaw Convention and the 1999 Montreal Convention, and the relevant case law. While the Draft Convention is based on third party liability, there are lessons to be learned from this second party liability regime. The recourse to national regimes in third party liability cases, i.e. the 9/11 situation, has also to be taken into account. Thus three elements have to be considered with regard to third party liability: international treaties, national legislation and ad hoc solutions.

Defendants

The possible defendants can be identified as follows:

- The hijacker/interceptor – this appears as the obvious choice but it is not likely that such action would be successful, as the hijacker/interceptor, if alive, would be in prison and would probably have a very limited ability to compensate the victims. The state of international relations may also affect the prospect of a successful action, i.e. the indictment of Osama Bin Laden in a New York court.
- The manufacturer – the manufacturer may have a duty to warn where it is aware of possible equipment failure. While this argument was advanced in the Korean air disaster litigation, it failed. A case against the manufacturer of a Jeppesen chart was also unsuccessful (KE 007, 1983).

1 The Draft Convention is available at: <http://www.icao.int/DCCD2009/docs/DCCD_doc_3_en.pdf>
- The air traffic controller – while this is possibly a viable option, the relationships between various parties and regimes are often complicated, i.e. the 2002 Uberlingen mid-air collision. However note that this case was unrelated to unlawful interference.
- The airport operator/screening agency - faulty security checks could be considered. There has been some discussion of whether security failings at Boston airport were responsible for 9/11. Furthermore, airport employees could themselves be implicated in sabotage.
- The airline – there is a significant body of case law concerning second party liability. In some US cases, terrorist incidents have been regarded as an ‘accident’ for the purpose of making the airline liable under the Warsaw and Montreal Conventions. Such cases may be difficult, i.e. the French case *Epoux Haddad v. Cie Air France* (1982), in which Air France was not held liable on the ground that it had taken ‘all necessary measures to avoid the damage’. The court ruled that Air France could not control airport security in Entebbe, Uganda.
- The state – its liability raises public policy issues. The liability of states has to be distinguished from its responsibility.
  - The state is the primary ‘responsible’ entity, i.e. 9/11 or the Ukraine incident. In the Uberlingen case, which is currently on appeal, the German government has been held liable for the collision at first instance. There is a link between responsibility under Articles 1, 3bis and 28 of the Chicago Convention, whereby the state has ultimate liability for air traffic management and liability.
  - *Ad hoc* treaties between two countries are a solution, i.e. in the 2001 Ukrainian incident where a missile hit a Russian plane causing it to crash in the Black Sea, an *ad hoc* treaty was agreed between the two countries.
  - In any case, the state often acts as the ultimate insurer, i.e. following 9/11.
  - Political compromises may also be reached, i.e. the 2003 agreement in respect of the 1989 Lockerbie disaster, as a result of a trade embargo imposed on Libya. However, such a solution requires a general political pull, which many states lack.
  - Finally, the question of a refusal to pay has to be considered, i.e. the case of the Korean Air disaster in 1983, where Korean Airlines were held liable and had to compensate the victims at the end. However, the USSR did not pay any damages.

**Current international regime**

With regard to second party liability, the 1929 Warsaw Convention has been tested in the context of hijacking but the 1999 Montreal Convention has not yet been tested in this context. As for the third party liability regime of the 1952 Rome Convention, the issue is that this treaty has not been ratified by the important aviation nations and it is also difficult to bring a case using its provisions. Thus the role of international law in relation to third party liability upon a hijacking event has been limited to date. There have been few instances of litigation in respect of third party liability claims even under national law, as the *res ipsa loquitur* principle may apply.

In the example of Uberlingen, the state of Germany will pay compensation and will then have recourse to other parties found to be liable. Most instances are dealt with at the diplomatic level and without recourse to formal dispute resolution mechanisms. Incidents have been dealt with on an *ad hoc* basis, whether at the national (i.e. 9/11) or international level. Concerned parties generally negotiate and find a compromise solution with their insurers.

Dr. Mendes de Leon concluded that the Draft Convention has to be analysed in its broader context. One particular issue to consider is whether the states should have a duty to warn of possible unlawful interference of which a state may be aware through its intelligence services.
Should states have to share vital intelligence with the aviation industry? For example, Dr. Mendes de Leon referred to the Korean Air Disaster and the Lockerbie cases where there were messages from intelligence, including United States intelligence that Pan Am was at risk. This point leads to the question of international state responsibility for the security of its citizens, as well as airlines. Following rules of international law, state responsibility may result into liability of that state.
2. **The Road to Montreal: Finalising the Text of the Draft Convention**

Kate Staples (Head of Aviation and Commercial Co-ordination, Department of Transport)\(^2\) outlined the development of the Draft Convention by ICAO since 2000, explaining why ICAO decided to modernize the 1952 Rome Convention, the key milestones, the issues which shaped the debate and how the solutions set out in the current Draft Convention were arrived out by the ICAO Council’s Special Group.

**Modernization of the Rome Convention**

This process was initiated in 2000, one year after the adoption of the Montreal Convention. This initiative was meant to provide for equal compensation between victims on the ground and passengers, as well as to respond to concerns regarding environmental damage.

While at this stage, there was no concern to distinguish between different causes of air disasters, 9/11 modified the course of this work. After numerous governments had to step in order to bridge the insurance gap, the Special Group on Aviation War Risk Insurance (SGWI) was set up. The SGWI envisaged a set of solutions, including a requirement from states to participate in a fund, known as the globaltime system.

In 2004, the ICAO considered the draft proposal which consisted of an initial layer of strict liability, fault-based liability with the burden of proof on the operator in respect of sums above this, and an aggregate limit. There was, not unpredictably, a lack of state support for the insurance system outlined by the SGWI.

A Special Group on the modernization of the Rome Convention (SGMR)\(^3\) was formed and it struck a balance between the full compensation of third parties and the needs of the air transport system to sustain attacks. In 2006, a compromise including two separate conventions was reached as it became clear that the same document could not respond for both terrorist and general risks. Concepts with regard to the protection of the aircraft operator were also developed in order to reach a balance. In 2007, the SGMR reached further compromises with regard to the cap issue.

Considering the progress made since 2008, some key questions remain, such as the role of the state, the nature of the risk that has to be considered, and the role of a draft convention.

**Role of States**

The failure of the globaltime system has to be detailed with regard to the role of states. States with ICAO contributions equivalent to 45% were willing to participate in the system proposed by the SGWI but 35% of such states placed conditions on their participation:

- that all the major aviation states would also participate;
- that there was a clear exit strategy;
- that the insurance market would not be crowded out by the scheme’s operation;
- that there would be a limit to a state’s exposure.

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\(^2\) Ms Staples joined this process in 2004, and therefore her knowledge of events prior to this is not first hand. Further, the views here expressed are personal, and should not be taken as the views of the Secretary of State.

\(^3\) Kate Staples was a member of this group for two and a half years.
States were concerned that guarantees were linked to contributions rather than the degree of risk attached to their state or the amount of aviation activity there. In fact, the allocation of guarantees is difficult. In addition, this system could jeopardize the viability of the insurance market.
However, the current scheme does not rely on state guarantees as states would only become involved if events were on a catastrophic scale.

Nature of Risk

In incidents of a terrorist nature, it is likely that there will be many more third-party victims than passengers. Therefore the indirect approach of Montreal is ill-suited to this situation as it deals with all types of risk in the same way although, in terrorist attacks, the airline is also a victim and states need aviation to be sustainable. Thus ICAO produced two draft conventions. The liability cap is meant to strike a fair balance.

Nature of Draft Convention

The Draft Convention provides a swift compensation mechanism whilst still protecting the airlines. There is strict liability, but only to a certain degree. The advantage is that there is a certain and quick compensation instead of an uncertain and lengthy litigation. While some states believe that the Draft Convention makes airlines responsible for terrorism, it is not based on any ideas of blame or punishment.
3. Scope of Application of the Unlawful Interference Convention

Nick Medniuk (Associate, Beaumont & Son, Aviation at Clyde & Co LLP) started his presentation on the scope of application of the Draft Convention by highlighting that it is potentially wider in scope than appears to have been originally intended; it serves to compensate victims for more than the classic acts of terrorism.

The Draft Convention imposes strict liability on "operators" with a cap at a maximum of SDR 700m, established by reference to weight categories mirroring those set out in EC Regulation 754/2004. A second tier, the Supplementary Compensation Mechanism provides up to a further SDR 3bn for damages sustained above primary cap. A third tier of compensation above the combined limits may also be payable by the operator where its recklessness or an intentional act or omission contributed to the event, i.e. this is a mechanism for breaking the limits.

Application of Draft Convention

The basic requirements for the application of the Draft Convention, per Article 2, were identified as:

- Damage;
- Suffered by a third party;
- In the territory of a State Party;
- Caused by an aircraft in flight;
- On an international flight;
- As a result of unlawful interference.

Mr Medniuk highlighted a feature of the Draft Convention, curious in light of the significant events of 11 September 2001 that provided impetus to the project, that domestic flights were not automatically covered. However, States Party would have to the option to make a special declaration so that such flights would be covered.

Mr Medniuk proceeded to consider some of fundamental terms of that attempt to give effect to the Draft Convention:

"Unlawful interference" – The Trigger Mechanism


According to Article 1 of 1970 Hague Convention, unlawful interference refers to:

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
(b) is an accomplice of a person who performs or attempts to perform any such act commits an offence.

The 1971 Montreal Convention provides a much longer definition with a list of unlawful activities. Mr Medniuk cited, as an example, Article 1(d) covering damage to or interference with the operation of air navigation facilities, as an example of when damage might arise from non-terrorist based acts, suggesting that it was not difficult to imagine an extension of the facts
stemming from the Lake Constance tragedy, that an ATC employee intentionally damaged the air navigation facilities while drunk or out of spite. However, notwithstanding the strict liability regime, claimants would still have to prove the existence of the requisite intention, a potentially difficult hurdle.

"Third Party" – the Victim

A third party under the Convention has a specific meaning with the purpose of identifying who is a victim. It is defined a ‘person’, which in turn has its own definition to include natural persons, legal persons and states.

The victims must be external to the aircraft and thus may not include the operator, passengers, consignor or consignee of cargo. They are innocent parties involved in a collision.

"Operator" – The Liable Party

The definition of ‘operator’ in the Draft Convention is complex but is basically defined as the persons making use of an aircraft at the time the damage was caused. The difficulty arises in determining who was "making use" of the aircraft at the relevant time. For example, the Draft Convention makes clear that an act of unlawful interference does not release the operator of its status as operator, i.e. if an aircraft is hijacked, the operator is deprived of the argument that he is not "making use of the aircraft" simply because control rests with the hijacker. It is also unclear whether personal use is within the scope of operator. In limited circumstances, aircraft owners could potentially be liable, although it is difficult to assess whether someone owning an aircraft but not flying it would still be considered as its ‘operator’.

Liability and Damage – Article 3

Article 3 provides for strict liability: “[t]he operator shall be liable for damage”. Mr Medniuk noted that such liability arises as a necessary and natural consequence of the public policy behind the Draft Convention, i.e. to ensure, through the operator (most likely the airlines and consequently their insurers) and to the exclusion of other possible defendants, that compensation is made available to victims of aircraft related terrorism.

For damage to be compensable under the Draft Convention, it must be ‘a direct consequence’ of the act of unlawful interference. The types of damage covered include personal injury, mental injury (substantially in the limited form developed through litigation of the meaning of “bodily injury” under the Warsaw Convention) and environmental damage. The latter shows the significance of including states in the definition of a ‘third party’.

The Draft Convention specifically excludes punitive or any non-compensatory damages.

Supplementary Compensation Mechanism (SCM)

Peter Macara (Senior Associate, Beaumont & Son, Aviation at Clyde & Co LLP) followed by initially presenting regarding the SCM, the second tier of compensation created for this Convention. The SCM would be an international body with the same seat as ICAO. The SCM would be made up of a Conference of Parties (COP), consisting of representatives of State parties and a secretariat headed by a director.
The SCM would provide additional compensation up to SDR 3bn per event, payable under the same conditions as the operator's liability, i.e. strict liability for damage caused by an act of unlawful interference. The SCM would be able to make advance payments, and sums received from the SCM would be exempt from tax and the SCM would be generally immune from legal actions with a few limited exceptions.

The SCM would be funded by mandatory amounts collected from passengers and cargo consignors in State parties according to such movements on international flights (Art 12). Information would be given on movements and numbers by State parties. The SCM would determine the period and amount of contributions, which should be uniform and applied in a non-discriminatory fashion towards State parties (Art 14). The mechanism for remittal of contributions by operators and the sanctions in case of non-remittal remain to be established (Art 15 and 16). The Draft Convention leaves open the possibility of a charge on general aviation as well, and the COP may specify an amount payable in respect of it, although the method of calculating any such contribution is not specified (Art 13).

When fixing the contributions, the COP shall take account of specific principles (Art 13):
- Achievement of the objectives of the SCM
- There should be no distortion on competition within the aviation sector and between aviation and other sectors.
- There should be no discrimination between states, passengers, consignors, and consignees on the basis of nationality.

Third Tier

The third tier of compensation has proved somewhat controversial as, under the proposals, the operator, if liable, would have to provide additional compensation where damage exceeds the limits of Articles 4 and 18 (2), i.e. a total of up to SDR 3.7 billion. Article 23 defines the test for additional compensation liability:
- The operator shall be liable if it or its 'senior management' contributed to the event by an act or omission intentionally or recklessly with knowledge damage would probably result which:
  - falls within the regulatory responsibility and actual control of the operator; and
  - is, other than the act of unlawful interference, the primary cause of the event.

This test appears to be a relatively high one for claimants to meet as it would be necessary to prove intent or recklessness with knowledge, which can be difficult depending on the jurisdiction. A potential example of such behaviour could be senior management ignoring an obvious security risk. Furthermore, under the current proposals, the operator would have a defence:
- if the operator had established a system to ensure compliance with regulatory requirements and this system was applied, or
- if the operator’s servant or agent commits the act of unlawful interference, if the operator proves that it had an effective selection process in place for employees, which was applied to this person.

Compensation

The limitation period is 3 years, but commencement of the limitation period will depend on the national law of the court seized of the case (Art 35).
Claims regarding death, bodily injury and mental injury are to be met first, followed by claims for other damage (Art 22).

The SCM may pay damages under Articles 3 and 4 i.e. from the ground up where the COP determines that insurance for the operator is wholly or partly unavailable or only available at a cost incompatible with the continued operation of air transport (Art 18 (3)).

Where the intentional or reckless acts or omissions of the victims cause or contribute to the damage, the operator or SCM may be wholly or partly exonerated (Art 20).

Other Key Provisions

According to Article 25 on assistance in case of events in States not party to the Draft Convention,4 the SCM may provide financial support to an operator based in a State party, but only to the extent that it would have been liable to do so under the Draft Convention if the damage were in a State party and on the condition that the non-party State agrees to be bound by the Convention with regard to the event. The financial support given would not exceed (the maximum compensation payable under Art 18 (2)), SDR 3bn.

If the operator is in financial difficulty, the SCM will only pay compensation under Article 25 where there are 'sufficient arrangements' to protect the operator's solvency.

According to Article 29 (1), a claim may only be brought before the courts of the State party where the damage occurred. Therefore there is limited scope for 'forum shopping'. Under Article 26, the Convention provides an exclusive cause of action, and claims must be brought against the operator and be subject to the Convention. The operator and SCM have rights of recourse (Art 24 and 25) against any person who has committed an act of unlawful interference. Nothing in the Draft Convention shall prejudice the operator’s right of recourse against any other person although such claim may not be enforced until all claims made under Articles 3 and 23 have been completed. However, the operator’s right of recourse is only available to the extent it could reasonable have been covered by insurance and is not available against owners, lessors or financiers retaining title in the aircraft or against manufacturers in respect of an approved design.

The SCM shall have a right of recourse against the operator subject to the same test as Article 23 and against any other person who contributed to the damage with an intentional or reckless act although again only to the extent it could reasonably have been covered by insurance. However, the SCM also has no right of recourse against finance parties or manufacturers to the extent of an approved design.

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4 Note that the numbering used in this section is based on the working paper of the 33rd session.
1. The Industry Perspective

Michael Gill (Senior Legal Counsel, IATA)\(^5\) underlined that under the regime established by the Draft Convention, the aviation industry would be held primarily liable. IATA has reiterated the view that terrorism is aimed at states, not airlines, and thus ideally society as a whole should bear the risk (see Art 17 of the Chicago Convention). No one has suggested that the 9/11 attacks were aimed at American Airlines or United Airlines. Therefore airlines should not be liable in an ideal world.

However, as the states do not appear in favour of guaranteeing to use public funds to ensure compensation to victims, airlines and passengers are the preferred candidates to do so. In the case of 9/11, the United States intervened but it is unclear what would have happened if the airlines had not been American. There is an issue when states would not be able to afford to pay the costs involved.

A substantially unbreakable cap, the SCM and a satisfactory right of recourse against third parties might provide the airlines with a more favourable regime than the current one established by the Rome Convention or other applicable legislation, i.e. national laws. While some airlines still find it very difficult to accept any form of liability for terrorism, IATA has adopted the position of exploring compromises in the Draft Convention rather that to adhere strictly to a principle.

IATA also disagrees with the less fundamental aspects of the proposals, such as the limitation period and the inclusion of mental illness as a harm that can be compensated.

On the fundamental issue, the question is whether or not a fair compromise between the airlines and victims can be achieved. As currently drafted, the carrier’s liability cap is not a fair balance. Airlines can only accept this liability if the cap is strong and virtually unbreakable and limited to the acts of very senior management. If the cap is too easily broken, the regime of strict liability at the national level might well be preferable for the airlines.

There are other unacceptable aspects in the proposals, including the drafting of the safe harbour clause and the potential liability for servants and agents. The ‘safe harbour’ provision, which relates to compliance with industry standards, has been watered down through subsequent drafts and in IATA’s views the current test is almost impossible to meet: if an airline’s compliance system had worked, the terrorist act would not have taken place. The current draft would also lead to uncertainty as it allows states to set the level of regulation.

With regard to the liability for acts of terrorism by mere employees (‘servants and agents’), the current draft means that the airline has to prove that it applied an adequate selection policy to the employee in question. IATA is against this general vicarious liability.

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\(^5\) IATA, which represents 224 airlines and 90% of air traffic, has been involved in the negotiations since 2000, as a permanent observer at ICAO.
In general, IATA does not necessarily oppose the overall scheme. However, if states adopt the Convention as currently worded or another draft less favourable to the industry, IATA members would likely lobby against its ratification. The Draft Convention should not become a means for states to avoid their responsibility. In fact, if the Draft Convention as adopted does not reflect a fair compromise and entails a strict unlimited liability, airlines may become bankrupt as a result of terrorist acts involving their aircraft. That result would not provide satisfactory compensation to victims. The diplomatic conference should aim to achieve a fair compromise and should not choose to go down the punitive route.
2. The Insurance Perspective

Sean Gates (Gates and Partners and Legal Adviser to the International Union of Aviation Insurers), speaking on behalf of insurers and lawyers, viewed the Draft Convention as a political tool for states. The issue is that the invisible third layer is a vital missing element, because if there is no certainty of compensation by states, the system falls apart. With terrorism geared at producing maximum disruption, the amounts proposed would most likely not cover the losses. This would delay compensation as, if funds were insufficient, all the claims would be weighted before any payment were to be made.

Airlines should seize the opportunity presented. States will continue to press for this Convention even if it defies logic. The only persons who should be held liable are the terrorists themselves and, with terrorism being a consequence of state politics, airlines should certainly not be the ones held liable. Airlines are now often subjected to strict liability, but the existing applicable law was not designed for these particular situations. As a result, at the moment, the industry is gambling every time it flies a plane. Another 9/11 would lead to insurers withdrawing their cover and the industry grinding to a halt again until the situation would be sorted. This is a weapon for the terrorists.

For such situations, the French have the most appropriate solution with the provision of a state backed fund to compensate victims of terrorism. The United Kingdom has a similar fund but it is limited.

The general points of agreement do not necessarily reflect the ones elaborated during the debates by the committees but they represent a balance, which is needed amongst all the various interests. More importantly, the balance must be realistic.

The fact that the airlines are also the victims of these terrorists acts should be respected but many states lobby in favour of industry liability.

Lessons of 9/11 have to be learned and a long-term solution has to be developed, including the following elements:

- Predictability of the consequences, such as compensation levels, circumstances in which the cap may be broken, etc;
- Inclusion of all parts of the industry, even manufacturers, in order to reach a comprehensive solution;
- Predictability of a single forum, with the place of accident being the obvious choice. However, this may be an issue when it is in a country ravaged by a civil war, such as Sudan. In such cases where the forum would be unreliable, there shall be a possibility to opt-out.
- Unanimity of the industry is required in relation to rights of subrogation or recourse.
- Mental injury and its real impact, such as for accidents’ witnesses, must be addressed.
- Limitation on the ‘zone of danger’, with the victim being required to prove a genuine injury, otherwise there might be too many people to compensate. Thus there could be a limit for bystanders at 300 yards for example.

The proposition by States that this Draft Convention is a significant step forward for the protection of victims is inaccurate because a well organised terrorist attack would result in damage well in excess of the first and second layers contemplated by the Draft Convention. As such it could be regarded as gesture politics. However, for industry, there is a substantial benefit in having a hard cap on liability which allows the Airline or Airlines affected and industry generally
including all participants to continue working through another crisis. This is a real benefit to industry and society at large and advantage should be taken of it.
3. **The Consumer’s Perspective**

Simon Evans (Chief Executive, Air Transport Users Council) first considered whether there was enough passenger interest in this issue to give a valuable feedback, i.e. if the Draft Convention would be a good outcome for passengers.

Terrorism is an act against the state, but there are many victims, including the airline, passengers and citizens. It can be argued that this shall be a shared risk among society.

In the United Kingdom, which is advanced in terms of security, airlines and passengers have been covering the financial cost of security. Thus the Draft Convention can be viewed as another additional cost of travel. However, as there are many unpredictable risks for this industry, should this particular cost have to be borne?

If the insurance industry withdraws its cover, the industry is brought to a halt. In this sense, terrorism is different to any other risk. If the industry comes to a halt, it is worse for passengers than higher fares and also means a victory for the terrorists. An alternative is for states to provide these funds but the fact that ICAO is discussing this issue means that governments will not agree to cover these costs. Therefore, the Draft Convention is more likely to ensure a continuance of service for passengers in times of higher threat.

It seems fair that passengers fund this even if, arguably, the third parties become victims only because passengers have chosen to fly (an argument questioned by Mr. Evans). According to a cost/benefit analysis, the actual cost to passengers is likely to be low, maybe SDR 1 or 2 per passenger, not a lot of money in comparison with the associated benefits, i.e. the continued operations. Thus, in principle, this is a pragmatic solution from the passenger’s perspective.

The issue of including business aviation in the scope of the Draft Convention has been raised and, as terrorism is a shared risk, business aviation should be included for the purpose of fairness. Some argue that business jets are generally small but so are some passengers’ jets. At the moment, there is a clause in the Draft Convention on this which can be adopted by states but it may be preferable to render this provision mandatory.

Another issue is the long term management of the fund as over time it would accumulate millions if not used for compensation. These financial resources could be used to fund security research and development and if there would not be any incident for an extended period of time, contributions could be halted. In such a case, lessons should be learned from the ATOL scheme, where legislation had to be adopted to have the fund restored.

The Montreal Convention has a per passenger limit, whereas the Draft Convention has a per incident limit. This could lead to a situation where the victims on the ground are compensated in full whereas passengers are not.
4. **An Independent Perspective**

George Tompkins Jnr (Wilson Elser Moskowitz Edelman & Dicker LLP) was not involved in the 9/11 aftermath but he underlined the lack of security screening at Boston as an important factor for the terrorists. Once they were into the system, there were no further security checks.

He also reminded the audience that the ICAO had nothing to do with the adoption of the Montreal Convention other than to provide a venue for and organize the Diplomatic Conference for consideration of the Draft Convention desired by the airlines.

Mr. Tompkins strongly opposes the Draft Convention and wonders why existing laws should be changed following 9/11, which was an unusual event. The United States government realised the need to intervene and that it was not appropriate to rely solely on the existing legal framework. 9/11 was an attack on the United States due to its foreign policy. However, in any case, the question should not be about who should bear the cost, but if the system needs to be changed.

The cost of terrorism is usually borne by the states involved, i.e. the damages resulting from the July 2005 bombings in London were paid for by the United Kingdom and Spain bore the cost of the Madrid bombings. It was never suggested that the users of the underground, trains, nightclubs, etc. should pay. Thus there is no logical reason for saying that the operators or air travelers should bear the cost.

The two Draft Conventions are welded together because they are based on the Rome Convention and its Protocol. These have never been applied in any aviation accident. Local laws have taken care of incidents, such as the ones in Buffalo or Mexico, and aviation insurers have always paid out immediately. The major aviation nations are not parties to the Rome Convention as it has never been necessary. Here, the same principles are being used, so the outcome will not be any different.

Terrorism is a societal problem, not an airline problem. Passengers will pay so that the victims on the ground are compensated for acts of the same person who kills the passenger. It is like a deli owner having to compensate his customers who are shot by an armed robber who kills the deli owner as well.

There seems to be no valid justification for this and such a convention has not been suggested for any other transport method or public facilities. Another example is a natural disaster for which states would compensate the victims. This problem has been around since aviation began. There must be a better solution than the Draft Convention.

There is a case for international co-operation, since terrorism is not confined to aviation. However, unfortunately, at this point, ICAO is the only organisation examining this issue.

Mr. Tompkins concluded by stating that while both Conventions probably will be signed by the United States, he predicted that neither shall be presented to the Senate for ratification or, if they are, neither will be ratified by the Senate.
QUESTIONS

Both sessions led to numerous questions from the audience. After the first panel, the audience asked:

- **If a state could be directly liable for unlawful interference, as in cases of military interception of a hijacked civil aircraft?**
  The panel answered that there might be a right of recourse under the current Draft Convention, although that is a difficult test. In such case, other international legal rules would apply. Attributing responsibility for unlawful interference to a state must be carefully considered and will depend on the context. States have to have civil aircraft (public policy aspect), whereas there may be an international element. Interstate proceedings are not desirable and difficult to organize. Victims may attempt to have their state intervene on their behalf in international liability claims.

- **Given that states are intended to be an invisible third tier according to the preamble to the Draft Convention, and that even SDR 3.7bn is a fraction of what 9/11 cost, who should be liable when a state shoots down a civil aircraft?**
  The concept of an invisible third tier is captured in the preamble. States do not want any such promise enshrined in the Draft Convention, but they do acknowledge their responsibility. Regarding the shooting down example, a small group could not develop an appropriate solution and it is unclear if there should be specific provisions for such rare cases. However, as the Draft Convention creates a liability for operators, there is a good argument to say that a claimant may have a claim against the operator. As the damage is due to a state act, there is a moral responsibility for the state, but no liability. A case, such as when the USSR shot down the Korean aircraft, is only allowed for the purpose of self-defense (Art 3bis of the Chicago Convention and Art 51 of the UN Charter). In the case of the Iran Air 655 where it was the US Navy which shot down the plane in the Persian Gulf, the United States government agreed to pay for the damages. States prefer to agree on an ad hoc basis and to not be bound by a convention.

- **Is there any controversy regarding the forum, such as in cases where a state may be complicit in the incident, i.e. the hijacking of Pan Am 72 at Karachi airport where the Pakistani government was thought to be possibly complicit?**
  During the discussions, it was suggested that limiting the victims to a single forum was unfair. However, if the amount of available compensation is limited, litigating in different forums would lead to a longer and more difficult compensation process. There are benefits for both victims and the industry in having a single forum and reserving the funds for compensation. If there was a genuine issue as to whether the forum could be trusted, the Draft Convention provides an arbitration clause allowing the parties to settle their disputes privately.

- **A parallel can be drawn from Article 23 to ICAO’s policy on safety management where transparency is encouraged and privilege is given to the airlines in relation to this. Could this protection be lost?**
  This article is concerning for carriers but as this Draft Convention is new, we will have to wait and see for the result. The test regarding the mindset of senior management is extremely difficult in order to break the cap. However one should bear in mind that this test is difficult from a British or American perspective, i.e. subjective recklessness. In France or Germany the tests for recklessness are much lower. This issue has been discussed at the previous meetings and it has been argued whether gross
negligence/negligence should be a sufficient test. The Germans want to use a test of gross negligence but it was rejected for being too vague. An agreement in order to narrow the level of fault required to break the cap could not be reached and this issue is still to be debated.

- Isn’t there going to be litigation on the definition of ‘unlawful interference’, i.e. in cases of shooting downs?
  There will be basic points of the Draft Convention that may lead to arguments. The Draft Convention is not perfect at present and issues will have to be raised along the way. At the early stage, there was only one Draft Convention but many states felt that there is nothing wrong with the current general risks regime. The split was designed to ensure a greater number of ratifications of the Draft Convention.

After the second session, the audience asked the following questions:

- Are insurers prepared to cover the part of the Draft Convention which constitutes unlimited liability for the airline? As for the first tier, are insurers proposing to cover this without exceptions?
  Insurers cannot accept unlimited liability. The airline would realistically be extinguished in these circumstances. For the first tier, no additional exceptions have been suggested yet, and so the current exclusions would apply. Most airlines now have a 1-2bn third party insurance cover and the market can accommodate these limits. However, there is no further insurance available.

- Therefore what is the point of having a third tier if sums above this level cannot be paid?
  This amounts to gesture politics. States should pay but they are not prepared to be obliged to do so even if they will ultimately have to. The third level should in fact be the first level. If this level cannot be openly discussed, it is not possible to trust such levels of compensation.

- What if 9/11 had occurred in a less developed country which could not afford to compensate the victims?
  The less-developed nations are not targeted by terrorism. If there is ability but no will to pay, there is a genuine issue. For example, Indonesia has no will to compensate the victims of the Bali nightclub bombings and thus Australia stepped in to compensate Australian nationals where necessary.

- As prevention is better than cure, who bears the cost of preventing terrorism? Currently it is the user, but should there be financial assistance from states?
  This issue is being looked at and there are similar concerns in relation to environmental measures. Airlines are a discretionary mode of transport and as such they should bear their own costs. The EU makes the users pay.

- What is the rationale for treating aviation differently to other modes of transport?
  ICAO wants to play a leading role given the impact of 9/11 and the likely magnitude of damages involving a plane incident in comparison with the bombing of a nightclub for example. In addition, the aviation industry has an international element not present in other modes of transport, such as buses, tubes, trains which are local affairs. There is also less opportunity to use ships for terrorist attacks as they are more difficult to maneuver. In the aviation context, the aircraft itself is used as a weapon of destruction by terrorists.
In the case of spaceships, the launch state would be liable for the damage caused if a part of it would have fallen onto another state's territory.

- **Will the Draft Convention ever be ratified?**
  Mr. Tompkins was of the view that Australia, US, Japan, EU states, etc. will not ratify it and that without them there is no SCM. There is in fact an issue as to whether a realistic fund can be set up. Mr. Gates mentioned that it is also unclear whether the EU will wish to ratify the Convention itself, rather than letting individual member states decide.⁶ But ratification could occur as this could be seen as an opportunity to remove the current level of uncertainty.

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⁶ See addendum on this issue.
ADDENDUM: FOLLOW-UP

Following the conference, Mr. Harold Caplan (Quadrant Chambers) provided an insightful comment regarding the position of the EU. During the question period following the second panel, it was mentioned that if the Diplomatic Conference would not lead to a fruitful result, the EU might consider an initiative of its own. However, Mr Caplan stressed that “the Draft Convention is demonstrably unnecessary in the EU because all of its 27 States are bound to Council Directive 2004/80/EC, which requires the appropriate authority in each State to guarantee fair and appropriate compensation to the victims of intentional violent crime if the offender does not do so. The Council specifically intended that this should apply to terrorism.”

Mr Caplan also communicated that “in the UK the appropriate authority is the Criminal Injuries Compensation Authority [CICA] which is dealing with the 7/7/05 assault on the public in London. The only limitation is that it does not, at present, extend to British citizens if they are injured overseas - hence [as mentioned by Mr. Tompkins] Lord Brenner Q.C. introduced a Bill for this purpose which has been received sympathetically by HMG but not yet acted upon.”

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CONCLUSION

Robert Lawson (Barrister, Quadrant Chambers) concluded this conference with a few remarks.

As a starting point, it is true that terrorists do not usually have great assets, are not keen to face their legal responsibilities or likely to have insurance, and are certainly not keen to face up to their legal responsibilities. Thus, the question of covering such risks elsewhere should be raised. It might be said to boil down to whether the risk should be borne by the airline (and its insurers) or the State concerned. The answer is political rather than legal.

It is relevant to remember that there may be many more victims on the ground than on board an aircraft and that the airline may itself be a victim. Both of these points affect the debate and the justness of the solution.

A compromise is inevitable. The answer given by the Draft Convention is threefold, which can be summarised as:

1) A first tier providing for strict liability on the airline, subject to a financial cap;
2) A second tier providing for a supplementary compensation mechanism; and
3) A third tier providing for liability on the part of the airline in the event that the unlawful interference was the result of an intentional act or subjective recklessness on the part of its senior management.

There are arguments for and against each of these tiers and also the invisible further tier of compensation by the State concerned.

While the current Draft Convention is far from perfect, it may be better than the status quo depending on the perspective from which it is viewed. There is an issue as to whether aviation should be singled out from other industries or modes of transport or natural disasters in relation available compensation for effected third parties. There is also an issue as to whether the Draft Convention is simply ‘gesture politics’: it might be said to seek to divorce financial responsibility and liability to compensate from the moral responsibility and obligations of States, with the result that it excuses States of their responsibility and instead places the burden of compensation:

1) on the effected airline, even though it may itself be a victim - whilst this may be for laudable reasons, it might be said to place a stigma on airlines which, as a victims, they should not have; and

2) on passengers generally, who will be the ultimate source of the funds for the SCM – which could thereby be said to constitute yet another tax on flying.

Finally, the Draft Convention will only have merit if it is both ratified and implemented widely. Without this there can be no legal certainty and international uniformity, which have been the hallmarks of success of the Warsaw and Montreal Conventions concerning liability of airlines to passengers. It remains to be seen whether there the Draft Convention will gather sufficient enthusiasm and momentum to achieve these ends.
Mr. Lawson asked the audience to proceed with two votes: half of the people present voted for the Draft Convention being a good idea, while almost everyone believed that it will not enter into force. The future will be the judge of this forecast.