'To practise justice and right'[1] – international aviation liability: have lessons been learnt?

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Abstract: This paper focuses on commercial air operations and the development of the aviation liability and compensation framework. It focuses on the efficiency of the international system in respect to liability for third party surface damage and loss of life and compares this against the provisions for second party liability. The paper considers the implications of Lockerbie and 9/11 and whether the industry should have been better prepared from a compensatory perspective. The research asks questions about states' reticence for uniformity. Ultimately, the focus lies on whether the *practise of justice and right* exists fairly to all under the current liability regime. It is concluded that insufficient progress has been made in relation to third party liability for surface damage and that a fragmented and uncoordinated system still exists. Without uniformity in international aviation law there will remain an unequal mechanism, which is contrary to the practise of natural justice.

Keywords: aviation; security; justice; liability; terrorism; compensation; insurance.

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1 Introduction

The former CEO of the International Air Transport Association (IATA) recently commented that 11 September 2001 was 'the day that changed the world', and is an aviation related event that will never be forgotten.[2] Notwithstanding the fact that nearly 3,000 people lost their lives, the consequences of 9/11 to an already struggling industry

were far reaching, throwing into doubt the mechanism to compensate for such acts of terrorism and for war. The early indications and consensus of opinion was that a more unified international and global approach would be needed for the future. The commercial insurance markets alone could not be expected to insure these risks and provide compensation on the scale needed. Perhaps it was to be expected that the terrorist attack would reveal a fragmented system unable to cope with the threats of the 21st century, but in a travel industry which is truly international, was it really about failure to keep pace with developments or a reticence to take action based upon past evidence?

This paper focuses on commercial air operations and the development stages of the respective aviation liability and compensation framework. In particular, it focuses on the efficiency of the international system in respect to liability for third party surface damage and loss of life and compares this against the provisions for second party liability.

The research design is based upon a mixed-methods/cross-disciplinary approach. A legal, primarily quantitative, review is first undertaken, which presents the factual, chronological background, prior to explaining the present compensatory framework. This is tested, applied, demonstrated, and ultimately evidenced (using both inductive and deductive reasoning) to two high profile terrorist attacks, namely the tragedy and events of Pan American flight 103 and 9/11.

A qualitative approach is also used when considering the action taken prior to, in the aftermath and since 9/11 and part of this analysis revisits Lockerbie in order to determine whether lessons have been learnt. And, whether there is now in place an equitable system that compensates all justly.

The paper identifies issues such as prompt and equitable compensation and the balance between the interest of victims, carriers, insurers and governments. The intention is to provide the reader with the background and framework before raising the question of societal and economic responsibilities.

2 Compensatory frameworks

2.1 Insurance

The insurance market is complex and does not employ a standard means of compensation. In the US, the UK, and Canada, for example, the compensation system operates within the common law tort system, whilst, other countries may operate a Civil Code system, or government compensation scheme.[3] Under the common law system, it is necessary to determine fault and this is based on determining the standard of negligence. Broadly defined, negligence is an act or omission that breaches a duty owed by a person to others. A 'reasonable person' standard has normally been applied in order to measure this duty.

The insurance contract defines the parties' responsibilities. In the main, the insurer limits the insured parties' requirement to pay out financial compensation by settling any liability according to the specific risks and exclusions of the policy, or by contesting or defending the insured in litigation.

2.2 Aviation insurance

Aviation insurance works upon the basics defined above but in a somewhat unique market. The industry engages in elaborate reinsurance mechanisms in order to be able to absorb and spread high losses.[4] Simply explained, there are two main areas that are insured, property and persons. The most common forms of insurance in aviation are hull, passenger, third party liability, and airport or fixed base operator (FBO) insurance. Policy limits may be different for each category.

Insurers, in the main, distinguish between liability to passengers and to third parties (persons or property outside the aircraft). Liability insurance protects the insured against claims of passengers and others arising either directly or indirectly from the conduct of the insured. Related damages include, injury, death, and damage to property under common law negligence.[5]

Again, there is a multitude of variance in how insurance is provided and regulated. In the US, for example, the activities of insurance providers are subject to the specific regulations of each state, which may have little or no self-regulation by market groups of individual participants.[6]

Lloyds of London arguably remains the most well-known and respected insurance establishment in the world. Lloyds provide a syndicate system of underwriters and the brokers, agents, and underwriters are largely self-regulated.

Risk coverage is normally sold under specified circumstances for losses due to *ex ante* defined improbable events. Risk assessment relates to understanding the probability, frequency and severity of a 'potential' claim.[7] Insurance involves the application of mathematics and statistics and careful investment of collected premiums in order to comply with the obligations of all parties involved.[8] Insurance provides piece of mind by aiding to transfer risk, however, fundamental risks, such as floods and earthquakes have the potential to see huge losses which insurers are unable to carry the burden of alone. It is for this reason that national governments often implement a compensatory package through social insurance mechanisms and subsidy schemes. The role of the nation state is said to play the part as a potential 'insurer of last resort'. To equate this 'potential' burden, Hurricane Katrina, for example, in August 2005, is reported to be the most expensive weather catastrophe in the US and is estimated to have caused losses of $47.424 billion.[9]

Unsurprisingly, war and warlike acts, hijacking and acts of terrorism are extremely unattractive risks for insurers. War is not deemed to be an insurable risk for the traditional role of insurers and some policies (for example, hull and liability policies) seek to expressly exclude such risks. However, historically, aviation insurance providers have bundled coverage into broad packages that included many elements relating to 'war perils'[10] in order to seek policyholders[11] and, the provision of third party liability insurance for war and terrorist risks was effectively incorporated into the general policy of every company in the aviation sector.[12]

Defining and interpreting war exclusions from policies had previously been an area of contention even prior to 9/11. US courts traditionally allowed the war exclusion to be applied in a situation involving damage arising from a warlike act between sovereign entities. A pivotal case for reinforcing this was the 1974, case of *Pan American World Airways, Inc. v. Aetna Casualty & Surety Company*[13], which saw the court ruling that hijacking and subsequent destruction of an aircraft by a political activist did not constitute an act of war.

Saying that 9/11 changed the world forever is certainly well recognised to be a true reflection of events; and, it is especially true with regards to the provision of insurance coverage for aviation war and terrorism risks from that day on. For the insurance industry, it proved to be the then single most expensive day in history, well over twice the cost of the previously recorded worst hurricane to hit the US.[14] As a consequence, the aviation industry was forced to re-examine the risk of terrorism incidents, both in terms of insurance and related legislation that seeks to provide a framework for compensation caused by aircraft. By 17 September 2001, most companies operating in the transport industry (including airlines and airports) were left with minimal insurance cover of even no cover at all. Prior to 9/11, typical cover related to well over $1 billion for most major airports and airlines.[15]

By 22 September 2001, the EU Member States, took the exceptional decision to provide temporary cover for risks of war and terrorist acts for a period of 30 days. However, this was extended several times when it became clear that preparing for such future eventualities would require initiatives on an international and collaborative level.[16] Countries around the world were also forced to take similar action.

There is no denying the magnitude of 9/11 in terms of loss of life and the consequences of such in relation to financial losses. The forecasting of such a catastrophic event on this scale may have previously been unimaginable, but the fact is that terrorist attacks were not new phenomena to the industry. The 1968 Israeli attack on Beirut airport is recorded as the first major event of that nature and since this date there have been further examples of attacks against the international air transport system.[17]

3 An international framework

There is probably no other area comparable to international aviation in terms of human involvement and activity that would produce such a vast spectrum of conflicts of laws and jurisdiction. Aviation crosses international boundaries and enters territories where different private laws apply. By the very nature of such cross border relations involve the interpretation as to which law should be applied and which court assumed jurisdiction.

A unified system is ultimately the only way to prevent and minimise such conflicts.[18] Unification of law seeks to replace the disparity that exists regarding substantive law and jurisdiction, clarifying mutual rights and obligations whilst providing transparency.

International law is concerned with the political will of states as expressed through treaties or international custom and provides the means by which contracting states stipulate the rules of private law which is then agreed within their national law.

3.1 Historical implications and conventions

Unification of private air law became a priority very early in the history of aviation; however, there was no mechanism in place for the adoption of international conventions. In 1923, the French Government recognised the need for unification of law at an international level when it tried to adopt national law relating to liability in the carriage by air.

October 1925 saw the First International Conference of Air Law but the delegates where uncomfortable with the issues concerning liability and unification of law and felt that a body of legal experts needed to be appointed. This body became the "Comite International Technique d'Experts Juridiques Aeriens" (CITEJA).[19] CITEJA established uniform rules resulting in the 1929 'Warsaw' *Convention for the Unification of Certain Rules Relating to International Carriage by Air*.[20] This was very much the pioneer behind the legal principles for the development of international carriage by air by enabling such risk management through insurance.

The convention has been updated, modified and replaced by successive conventions, which have governed the aspect of second party liability, that is, liability for death, wounding and other bodily injury of passengers, the loss or destruction of baggage and cargo and the liability for delays (Table 1).

During the opening session of the Warsaw Conference, Karol Lutostanski, Dean of the Faculty of Law at the University of Warsaw, stated that the delegates had,

> "gathered in order to improve life, in order to render a legal text that daily life urgently requires. International air carriage is multiplying, international lines are being created, air travelers pass from country to country and even to distant continents .... Common rules to regulate international air carriage have become a necessity. Besides, it is necessary to fix rules of liability rightly considered by the CITEJA as intimately bound up with the problem of transportation."[21]

Limitation of liability, which was written into various conventions, became a contentious issue for decades, and, some of the conventions and amendments were never ratified by all States due to this factor.[22] This led to a disparity of interests arising[23], and a crisis situation, which resulted in the US denouncing the Convention.

Table 1 Table showing a summary of the key developments since the Warsaw Convention[24]

Dates	*Key developments (abbreviated name and cited title)*
1929	Warsaw Convention – for the *Unification of Certain Rules Relating to International Carriage by Air*. Signed at Warsaw on 12 October 1929
	Subsequent amendments and evolution of the Warsaw Convention, which eventually became known as the 'Warsaw Systems'
1955	The Hague Protocol – the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*. Signed at Warsaw on 12 October 1929. The Hague, 28 October 1955[25]
1961	Guadalajara Convention – the *Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*[26]
1966	Montreal Agreement* – *Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol.*
	**Note: Technically not an instrument of international law more of a compromise private agreement between the airlines and the US authorities. This was a negotiated agreement as a result of the Crisis of the 'Warsaw System'*[27], which was to be an interim agreement but lasted for over 30 years.[28]
1971	Guatemala City Protocol – as *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air.* Signed at Warsaw on 12 October 1929 as amended by the Protocol, done at The Hague on 28 September 1955, signed at Guatemala on 8 March 1971.[29]
	* Following the crisis ICAO sought to modernise private international air law but the Guatemala Protocol never came into force as the US did not ratify it.
1975	Montreal Conference – leading to the discussion of four Protocols:
	• 1, 2, 3 and 4
	• *Protocol No. 3 of Montreal, 1975 never entered into force but is significant as being an attempt to modernise the Warsaw System.*
During this 20-year (plus) period there were other notable developments:	
• The Japanese Initiative – 1992	
• The IATA Passenger Liability Agreement – 14 February 1997[30]	
• The EU – Council Regulation (EC) 2027/97 of 9 October 1997 on air carrier liability in the event of accidents[31]	
1999	Montreal Convention – the *Convention for the Unification of Certain Rules for international Carriage by Air, signed at Montreal on 28 May 1999*[32]
	Note: This is a new separate document and independent instrument and is not an amendment of the 'Warsaw System'.

3.1.1 Passengers – second party liability

Much has been written concerning the development of passenger protection, or conversely, protection of the airlines in litigation and liability claims. Determining status as a passenger was a pre-requisite to compensation claims under the Warsaw Convention. It was recognised that a passenger must be a person who had either paid for the carriage on the aircraft or who had been transported freely.[33] The 1999 Montreal Convention reproduces this definition.[34]

The liability for the death of injury to the passenger extends to events not only on board the aircraft but also in the course of embarking or disembarking.

Milde[35] points to the significance of the document of carriage as 'notice' to the relative convention and any liability clause. The Warsaw notice provision also served as means to ensure that air carriers provide passengers with sufficient time to make informed decisions regarding the purchase of additional air travel insurance.[36] With the development of 'ticketless' travel there will always remain the requirement for passengers to be able to access details relating to the contract of carriage.[37] Countless Court cases have been fought based upon the receipt of such information as well as the limitation of liability to fixed maximum monetary amounts, particularly due to the presumption of fault of the carrier.[38] The carrier is only held not to be liable if it is able to prove that all necessary measures to avoid such damage were taken or that it was impossible to take such measures. Regardless, the consensus of opinion has always been that the Warsaw Convention's liability limits resulted in under compensation of passengers involved in international aviation disasters[39], which the Montreal Convention has sought to address.[40]

4 Third party surface damage

Of course, the operation of aircraft stands to impact upon persons that are not party to any contract. One of the earliest references to aviation law is traceable to an event in April 1784, less than a year after the Montgolfier brothers had conducted the first human flight in a hot air balloon.[41] A police officer in Paris issued a directive that balloons required permission prior to operation, this was viewed as a means to protect the safety of persons and property on the ground.[42] The earliest record of a judicial decision in the field of air law is the New York, US case of *Guille v. Swan* (1822).[43] Guille's balloon landed out of control on a vegetable garden belonging to Swan. Both this action and the curious onlookers that rushed to help caused damage to the garden and fence. The Court found that Guille was liable (regardless of fault) for the damage caused by the balloon and also the damage caused by the crowd.

The case did not concern an international perspective, but what if the same scenario was presented due to a foreign aircraft?[44]

Airlines are required to have both passenger and third-party liability insurance in order to receive landing rights and also normally as a condition for leasing purposes.[45] Damage caused on the surface to persons does not fall within the realms of a contractual relationship with the operator of the aircraft. And, given the many contentious issues identified when such a contractual relation does exist – i.e., as identified under the Warsaw system with regard to jurisdiction, financial liability, etc., this scenario is even more fraught with the potential for litigation and dispute.

In 1933 the Conference on Private Air Law in Rome, adopted the *Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface*.[46] This did not however achieve wide acceptance and is now obsolete[47] having been replaced by the 1952 Rome *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*.[48] The first convention is interesting, insomuch as it sought to determine some fundamental principles upon which decisions could be based[49] (Table 2).

Table 2 Fundamental principles established in the 1933 Rome Convention

The 1933 Rome Convention Established the following principles:
Liability:
• is to the operator (not owner) of the aircraft;
• is only able to be exonerated if he proves intervention of a third party;
• is limited to amounts depending upon the weight of the aircraft[50], one third of the compensation is for material damage, two thirds to persons with a limitation set at 200,000 francs per person killed or injured.
Financial guarantee:
• must be obtained by each aircraft operator in international air operations

The limitation was slightly above the 125,000 francs for passengers, as determined by the Warsaw Convention, but the significant difference is that a passenger has willingly accepted the terms and conditions by entering into a contract and has had the opportunity to seek additional insurance cover for risks associated with their choice to travel. The third party on the ground has had no such opportunity and it is therefore difficult to see how they have agreed to share the operator's risk by limiting their right to compensation.

The 1952 Convention again did not achieve wide acceptance and by 2013 there remain only 49 parties to the convention[51], with some earlier parties (Australia, Canada and Nigeria) denouncing it. Fujita cites four reasons predominately for this apathy[52]:

1 the limited amount payable for damages

2 that it is not necessary to introduce international rules because "domestic laws already provide for sufficient limited amount of damages in terms of right of third parties on the surface"

3 the convention does not provide for noise (sonic booms) or nuclear disasters

4 there is no objection against the single jurisdiction (see below).

According to Milde[53], there are noticeable differences to the earlier convention. These are listed as follows:

- the strict liability attached to the operator of the aircraft is subject to the victim on the surface proving entitlement to compensation which has been caused by an aircraft in flight or by any person or thing falling from it
- the liability is guaranteed by comprehensive provisions on security or operator's liability
- the establishment of a single forum for jurisdiction: all claims must be brought to courts in the state where the damage occurred in a consolidated manner for hearing in a single proceeding before the Court
- the judgment from which is to be recognised and enforced in other contracting states.

Within the 1952 Rome Convention, the compensation for death and personal injury has a limit, currently, 500,000 francs, this is only twice the limit that was specified for passengers under the Warsaw/Hague system.[54]

The limitations are again tied to the weight of the aircraft and as Milde[55] identifies, this potentially remains a disproportionate benchmark, given the damage that even a light aircraft may cause in sensitive areas, such as a nuclear plant or an oil refinery. From a terrorist perspective such smaller planes are still not afforded the security protection given to larger aircraft and passenger facilities. Whilst, under the 1999 Montreal Convention, the monetary limits for liability for the death of, or injury to a contracting passenger were redefined[56] to take into account inflation, more rigid limitations still remain in force for third parties on the ground who have no relationship with the operator. These facts alone appear contrary to the practise of natural justice.

4.1 Damage on the ground caused by aircraft – accidents

There have been many recorded incidents of damage on the ground and loss of life as a result of aircraft. Most have occurred close to the proximity of airports and are related to take-off and landings incidents. For example, on 4 October 1992, a Boeing 747 cargo plane, El Al Flight 1862, crashed into two blocks of flats killing 43 persons on the ground.[57] The findings indicated a probable cause attributed to the design and the fatigue of parts, indicating structural failure of the aircraft. There was no suggestion that sabotage had played a part in the crash. However, conspiracy theories and cover-up allegations have persisted, which have been heightened by the fact that the cargo being carried was 'potentially' hazardous and contained depleted uranium which furthermore caused health concerns to bystanders and those near the crash site years after the event.[58]

By its very definition, an 'accident' excludes hostile action, including sabotage, hijacking, terrorism, and military action.[59] The above case exemplifies the complexities and tragedies of accident scenarios involving international aircraft when loss or life, injury or damage is caused to persons or property on the ground. However, when such catastrophic events are not 'accidents,' the situation becomes even more complex.

4.2 Terrorism

It was only in the mid 1980s that the United Nations Security Council referred specifically to the term 'terrorism' within Resolution documentation.[60] This followed a spate of violent attacks the previous year, where aviation was at the forefront.[61] The Resolution however did not define terrorism; and in fact, there has been a consistent 'failure' to define specifically the meaning of terrorism internationally.[62] One definition offered, is that, "terrorism is a violent process of social change involving the premeditated use of criminal techniques by agents of a state or clandestine political organization (sic!) to achieve political ends".[63] Regardless of a definitive definition, 'terrorism' is not a new phenomena[64], but the scale and means to undertake such an attack have certainly increased as have the consequences.

There can be no more a violent undertaking than the terrorist attack in 2001, in the US; and, inevitably this led to societal change. But using a commercial plane in such a manner should not have been totally unforeseen. In 1994, there was perhaps an indicator that such an event was possible, as an Air France airplane had been hijacked with the intention to blow the plane up over the Eiffel Tower or crash the plane into it.[65] In the 9/11 incident, the perpetrators were from outside the US; however, in many ways it was still very much a 'domestic' situation, meaning with little international regulation being called into question. The aircraft involved were registered in the US, were operated by

airlines with their principal place of business also there. The flights were on a domestic route and the claims for compensation did not result in the application of foreign law or the need for an international instrument for the unification of private law. The US Government intervened in ensuring that costs were met. Nevertheless, the violent nature of the attacks and the consequences of such caused a serious rethink of policies, not only in terms of security measures but the means to compensate victims.

4.2.1 Bearing the cost of terrorism and determining responsibility

Ghobrial and Irvin[66] produced a conceptual model of the effects of 9/11 on the aviation industry, which focused on airlines, airports and passengers. However, whoever bears the cost of terrorism, the cost is ultimately borne by the economy, and inevitably society. And in this respect, the jury is still out in deciding where certain responsibilities should ultimately lie. In the aftermath of 9/11 there was topical debate and discussions on this very issue globally.

Aviation and air travel are not in the main the 'real' target but the easy target that is used to make a statement. Terrorist strike for a 'cause' and attacks are aimed at governments and regimes. There is, inevitably, political motivation.

The obvious defendants are the perpetrators, but the possibility of seeking redress from a hijacker or an associated group is highly unlikely in the main. There maybe also be a degree of responsibility attached to the airline. Certainly, there is a significant body of case law concerning second party liability, and, on occasions, terrorist incidents have been dealt with as an 'accident' thus making the airline liable under the 1929 Warsaw and 1999 Montreal Conventions.[67] The airport operator or screening agent may also share a degree of responsibility. And then there is the state: 'when should they step into compensate, either as a potential defendant or due to liability, say, as an '*insurer of last resort*'?

4.2.2 Lockerbie 1988 – were lessons learnt?

In 1988, Pan Am flight 103 exploded over the Scottish town of Lockerbie.[68] The death toll was 243 passengers, 16 crew members and 11 local people on the ground, all were subject to differing rates of compensation. For the crew and passengers there was an obvious contractual link. The passengers were subject to the protection as afforded by the appropriate International Law.[69] But the circumstances differed from 9/11 insomuch as the third party surface damage (loss of life and injury) was not on the soil of the operator, the US. The US is not a signatory to the 1952 Rome Convention. The circumstances of the explosion deemed it not to be an accident but a terrorist attack.[70] An ensuing court case determined that the airline had repeatedly ignored warnings that its security measures were not sufficient for interlining baggage; and thus, Pan Am were deemed to be engaged in wilful misconduct.[71]

There have also been questions raised as to whether the state had a duty to warn of a possible unlawful interference when its intelligence services were aware of such a heightened risk. This was certainly the case presented in respect to Lockerbie where there had been intelligence to show that Pan Am was at risk.[72]

The consequences of *Lockerbie* are critically important, insomuch as it shows only too clearly, the complexities of a terrorist attack with international elements.

In the case of *Lockerbie*, joint investigative operations were conducted by the US and UK authorities, which led investigators to two Libyan nationals.[73] However, there were judicial complications attached to the intended prosecution of the parties. Both the US and UK did not have either formal diplomatic relations or a bilateral treaty with Libya and so informal extradition requests went via the Belgian Embassy to Tripoli.[74] The Libyan Government refused to grant extradition and started its own judicial investigation. As a result of the stalemate situation, the US and UK (joined by France) submitted evidence to the UN Security Council and the General Assembly.[75] *Lockerbie* was the first test case for the rule of law in the international legal order of the United Nations[76] and is significant as it determined that the International Court of Justice takes precedence over any other international agreement, in this case, including the 1971 Montreal Convention.[77] However, *Lockerbie* also too clearly served to demonstrate the conflict of law and politics in international relations.

Although extradition matters were eventually resolved, the other contentious issue related to locality for the trial of the two accused. The Libyan Government remained firm in not accepting Scotland as a suitable venue, and in the end, the compromise agreed was for a trial in the Netherlands by Scottish judges.

It took more then a decade for the suspects to arrive in the Netherlands to stand trial. The associated Court costs were remarkable, for even this element was entering into unchartered waters. The final cost for preparing a Dutch military base as the Court was estimated to be approximately US$200 million and for the cost of the trial it was over 10 million sterling.[78]

Only one of the defendants, Al-Megrahi was found guilty of the bombing; and, in 2008, Libya paid just over £1 bn into a fund for victims of the bombing, which was conditional on the lifting of the UN sanctions.[79] Earlier litigation cases involving Pan Am's insurers had been subject to intense criticism due to the fluctuating offers of payment for those that had lost there lives. Adverse criticism was particularly levied against the settlement offers made to plaintiffs whose children had died at Lockerbie and once again issues of equitable compensation were raised.

5 9/11 – the incentive for modernisation?

Given the complexities arising from the *Lockerbie* terrorist atrocity, there was little concerted movement from an international perspective in trying to address many of these issues. It took the events of 11 September 2001 to again highlight that when something goes wrong the cost can be enormous, both in terms of loss of life and the respective financial consequences.

In the period between *Lockerbie* and 9/11, the 1999 Montreal Convention[80] had been concluded; however, the convention did not enter into force until 4 November 2003.[81] At the current time there are 103 parties to the convention[82], which is more than double the number of parties to the 1952 Rome Convention.[83] One of the main bases of contention has always been the amount of liability specified in the Rome Convention. At the 31st session of the Legal Committee held in Montreal in 2000[84] the Swedish Delegation submitted a proposal, which asked for "Consideration of the Modernization of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface." This was approved, although not subject to any high priority despite the earlier events at Lockerbie. However, before the 33rd Session of the Assembly took place at the end of

September 2001, the events of 9/11 intervened and the subject then became seen as a major issue. The 33rd ICAO General Assembly passed several resolutions[85], as well as Assembly Resolution A33-20 for a "coordinated approach to providing assistance in the field of aviation war risk insurance." Contracting states were urged to work together so as to develop a unified approach in providing assistance in the field of aviation war risk insurance.

A special working group on Aviation War Risk Insurance (SGWI) was established and this led, together with the work undertaken by the Council Study Groups and the Review Group[86], to two draft texts being produced eight years later. In this time the issue had been endlessly discussed. On 2 May 2009, the following conventions were adopted[87]:

1 *Convention on Compensation for Damage Caused by Aircraft to Third Parties*[88]

2 *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*[89]

The first of the two conventions (referred to as the General Risks Convention) deals with liability and compensation where there is no unlawful interference. The preamble clearly refers to "[r]ecognizing the need to modernize" the 1952 Rome Convention. However, there was little enthusiasm for replacing the Rome Convention, which is endorsed by the fact that there are currently only 13 signatures and 1 accession of the convention.[90]

The second of the two conventions (referred to as the Unlawful Interference Compensation Convention) states the following within the preamble:

> "RECOGNIZING the serious consequences of acts of unlawful interference with aircraft which cause damage to third parties and to property;
>
> RECOGNIZING that there are currently no harmonized rules relating to such consequences;
>
> RECOGNIZING the importance of ensuring protection of the interests of third-party victims and the need for equitable compensation, as well as the need to protect the aviation industry from the consequences of damage caused by unlawful interference with aircraft;
>
> CONSIDERING the need for a coordinated and concerted approach to providing compensation to third-party victims, based on cooperation between all affected parties;…."

Finally, the preamble concludes that it is 'CONVINCED' that the International Law approach, by means of the Legal Convention, is the most appropriate means for the collective States to take "action for harmonization and codification of certain rules governing compensation for the consequences of an event of unlawful interference with aircraft in flight through a new convention is the most desirable and effective means of achieving an equitable balance of interests…"

The scope (as stated within Article 2 of both conventions) differs slightly. The General Risks Convention is more limited as it is stated that it applies to damage to third parties that occurs in the territory of a State Party. Whilst, the Unlawful Interference Compensation Convention refers to the same but also adds that it 'shall apply to such damage that occurs in a State non-Party as provided for in Article 28.'

Article 28 refers, with some limitation, to the provision[91] that payment is made from the proposed International Fund in cases where an event occurs in a state that is non-party to the convention.

As within the Rome Convention, both conventions refer to compensation limitations linked to the weight of the aircraft.

Chapter III of the Unlawful Interference Compensation Convention deals extensively with the (proposed) International Civil Aviation Compensation Fund.

After 9/11, ICAO had also attempted to aid the facilitation of an international third party insurance 'mutual fund' as an alternative to commercial insurance for airlines. The ICAO Global Scheme on Aviation War Risk Insurance[92], known as 'Globaltime' was a proposal that was not developed further, mostly because the USA and Japan did not welcome the initiative. The basis was to provide a non-profit insurance entity. Passengers would pay a small premium[93] and any damages caused to third parties on the surface in terrorism related cases would be guaranteed by the reinsuring participating governments. Instead the US Air Transport Association (ATA) developed a plan called 'Equitime', and in parallel, Europe reviewed a similar system, which was derived by the Association of European Airlines (AEA) called 'Eurotime'.[94] Such regional suggested approaches seem contrary to the principle of harmonisation and codification and inevitably would do little to aid the equitable balance of victims.

Similar to the attempt to modernise the 1952 Rome Convention, states have been reluctant to endorse and embrace the Unlawful Interference Compensation Convention. At the 36th Session of the Assembly in 2007, the Unlawful Interference Compensation Convention was received more favourably than the General Risks Convention and yet currently there remain only 10 signatories, and only one state has ratified it.

These two instruments will no doubt never enter into force. According to Milde "they will remain only a monument to good intention that were misdirected."[95] He adds that there was "no convincing reason" for the General Risks Convention pointing to the fact, that unlike the 1999 Montreal Convention, compensation remains too limited. This is a situation however, that remains unresolved by the current 1952 Rome Convention, whereby passengers are liable to less favourable redress by international law. In this respect there is a need to address this balance both in terms of 'accidents' and unlawful interference, and certainly in respect to the latter, there is still a need for a coordinated approach to be adopted.

6 The global flight path ahead

Globalisation is the process of international interaction and integration[96] and there is perhaps no more an international industry than aviation. There are many definitions of economics. Robbins[97] defined economics as a '*science which studies human behaviour as a relationship between ends and scarce means which have alternative uses.*' There is no more valuable commodity than 'life', which is precious and scarce and eventually comes to an end. Putting a value on a person's life has to be one of the most difficult calculations there is. Putting a value on a life lost due to an incident involving an aircraft flying above needs to be resolved.

Aviation global alliances are strategic by nature and other than providing the means to circumvent archaic ownership restrictions, they enable commercial relationships by enhancing advantages collectively, by 'sharing scarce resources' and by linkage and coordinated practises.[98] In the past, alliances have bought group insurance cover and it would seem logical for a mechanism to exist for certain risks, such as war/terrorism, that operate internationally in the same way as the airlines do.

Milde[99] has questioned why the aircraft operator should be held liable at all in the case of a terrorist act when the act is aimed at the state. In the case of *Lockerbie*, there was a finding of wilful misconduct by the airline; and, in many instances of unlawful interference involving aircraft, it would be difficult to envisage a situation when the airline was not partly accountable. Removing the emphasis away from the airline would not necessarily be conducive to implementing high standards and practices to reduce and minimise risk. In the case of passengers, the contract exists between the service provider and the customer but it is the innocent victim on the surface (ground) that still remains inadequately protected particularly in the case of a terrorist act.

Caplan[100] stated that the air transport industry was "outraged by what is believed to be concerted disloyalty and opportunism on the part of the liability insurers" after 9/11, which led to the implementation of exclusion clauses within the policies. As was acknowledged, 9/11 could have resulted in the collapse of the insurance market. Milde continues to express the belief that states should compensate the victims of terrorist attacks in the same way as the US did for the 9/11 attack, regardless of whether aviation is involved or not.[101] He also emphasises that it is important to look at the means to prevent terrorism rather than to calculate how to protect the airlines or the government. The ability to absorb risk is ultimately dependent upon the economy. A number of countries have established their own terrorism risk insurance programs, which have operated successfully but these are limited geographically and financially in many instances also. Such schemes operate in European countries and/or countries that have experienced previous terrorist attacks and differences noticeably exist as to how they operate.[102] For example, the British Government established a mutual reinsurance pool in 1993 as a result of IRA attacks and the government also agreed to act as the reinsurer of last resort, guaranteeing payments above the industry retention. Under this scheme, the primary insurer paid out the entire amount but was then reimbursed out of the central pool for losses in excess of a certain amount per event or per year. But sustained attacks in one country would lead to the depletion of national pools and inevitably to weakening or collapsing economies.

6.1 Where does the solution lie?

Prevention of such terrorist attacks and atrocities is no doubt the most desirable solution, and, if it was ultimately achievable the amount to compensate third-party victims would never be an issue. Levying blame and proportioning such will remain a factor in any incident and especially when it has occurred as the result of unlawful interference with an aircraft in flight.

Given that aviation is a truly globalised industry, the solution must surely lie in a unified International approach. Indeed, this was clearly stated in the preamble to the Unlawful Interference Compensation Convention. International Law[103] provides the 'means' to define the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries. The basic premise is the restatement of existing rules or the formulation of new rules by an international mechanism. However, as Jeremy Bentham[104] identified, this necessitates the acceptance and codification of international law by 'all' nations. International law does not provide for an utilitarian code of law.[105] Providing the 'means' does not equate to the 'will'.

7 Conclusions

Despite the 'honourable' intentions to modernise an out-dated aviation liability and compensation framework, stemming back to the early to mid 20th century, developments have been noticeably slow and has only partly been achieved.

For passengers, there remain contractual obligations within specified terms and conditions as to the undertaking of the journey by air with the identified airline. The earlier conflicts in respect to second party liability, has seen the Warsaw system being superseded by the 1999 Montreal Convention. This has resulted in more signatories than its predecessor, although it should be reinforced that unless it is adopted by every state, inconsistencies will remain. But it is in relation to third party liability and victims on the ground, where it must be concluded that insufficient progression has been made.

Damage caused by foreign aircraft to third parties on the ground in the event of an accident is potentially easier resolved in respect to liability and compensation than when the damage has emanated as a result of unlawful interference. This is due to the fact that the parties involved are easier to identify as some form of relationship exists – i.e., the blame or elements of blame, may be levied against the party responsible for maintenance, the manufacturer or with the air traffic controllers, etc., and inevitably with the airline.

In a terrorist attack, as shown through the *Lockerbie* example, the situation stands to become even more complex involving international parties, where the establishment of blame inevitably leads to a drawn-out process. This results in lengthy litigation to establish not only liability but the fight for equitable compensation.

The events of 9/11 caused a rethink in terms of policies, most noticeably in relation to security and insurance procedures. In respect to both, the airlines have been concerned as to the increase in costs; and for the latter, this has resulted in an increase in liability insurance since the events of 2001. In the immediate aftermath of the attack, acknowledgement was given to the inadequacies of the current compensation framework. As a result of this, consideration was given to the establishment of an international mutual fund mechanism. Honourable intentions were declared in terms of harmonising the rules relating to such consequences by the establishment and the provisions within international law. Eight years of talks transpired during which it was recognised that there was a need to *ensure the protection of the interests of third-party victims*, thus *achieving an equitable balance of interests.*

9/11 has been viewed as an isolated attack.[106] Certainly, the scale of devastation through a coordinated terrorist incident involving several aircraft has never been seen before on the same scale, but that is not to say that it may not be seen again. It is important to remember that terrorist attacks using aircraft are not new (*Lockerbie*, 1988).

There were important lessons to be learnt from both *Lockerbie* and 9/11. And it is questionable whether sufficient lessons have in fact been learnt when third party victims are no better protected, from a compensation perspective, today than they were in 1988.

Imagine a mix of the 9/11 and *Lockerbie* scenarios and introduce further elements of complexity. 9/11 was on a scale 'previously unimaginable.' *Lockerbie* involved international elements, where allies worked together. It involved two affluent and powerful nations, there was a suspect who was brought to trial and the Libyan Government did eventually pay compensation. But what if the international parties had been different, or responsibility had not been claimed? What if the government was not prepared or could not step-in to act as 'insurer of last resort?' Then ask, are the industry and society prepared? Could the imaginable happen?

Solutions offered by single states of differing economies are not sustainable. The reality is that with such differences in economies and differing state provisions in place this would not be a possibility in many instances and certainly not offer an equitable solution. Although there should potentially be an obligation for a government to aid in compensation, this should not detract from the fact, that although the attack may not have been against the airline, the means of delivering the assault still involved an aircraft and therefore a liability factor exists.

The fact remains that until sustainable means exist and until suitable international policies are applied fairly and consistently, it is the totally innocent victims on the ground that will inevitably suffer. The reality is that it will take another major incident involving commercial aviation for further concerted thought to be given to recognising natural and equitable justice in cases of third party damage. And, ultimately this will remain dependent upon political state will!

Notes

1 A loose reference to Proverbs 21:3.

2 Bisignani, G. (2013). *Shaking the Skies*, LID Publishing Ltd., London, UK.

3 El-Kasaby, B., Tarry, S. and Vlasek, K. (2003) 'Aviation insurance and the implementation of the small aircraft transportation system', *Journal of Air Transport Management*, Vol. 9, No. 5, pp.299–308.

4 Flouris, T., Hayes, P., Pukthuanthong-Le, K., Thiengtham, D. and Walker, T. (2009) 'Recent developments in the aviation insurance industry', *Risk Management & Insurance Review*, Vol. 12, No. 2, pp.227–249.

5 El-Kasaby, B., Tarry, S. and Vlasek, K. (2003) 'Aviation insurance and the implementation of the small aircraft transportation system', *Journal of Air Transport Management*, Vol. 9, No. 5, pp.299–308.

6 Wells, A. and Chadbourne, B. (2000) *Introduction to Aviation Insurance and Risk Management*, 2nd ed., Krieger, Florida.

7 Janic, M. (2000) 'An assessment of risk and safety in civil aviation', *Journal of Air Transport Management*, Vol. 6, No. 1, pp.43–60.

8 Njegomir, V. and Morovíc, B. (2012) 'Contemporary trends in the global insurance industry', *Procedia – Social and Behavioral Sciences*, Vol. 44, pp.134–142.

9 Based on estimated insured losses for property coverage and adjusted to dollars (as of 2012). Source: Insurance Information Institute; http://www.iii.org/facts_statistics/hurricanes.html.

10 'Hope Aviation' buyers guide for Aviation Insurance [online] http://www.hopeaviation.com.

11 Nyampong, Y. (2013) *Insuring the Air Transport Industry Against Aviation War and Terrorism Risks and Allied Perils*, Issues and Options in a Post-September 11, 2001 Environment, Springer Publishing.

12 Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council. COD2001/0048.

13 Pan American World Airways, Inc., plaintiff-appellee-appellant, v. the Aetna Casualty & Surety Co. et al., Defendants-Appellants, and The United States of America, Defendant-Appellee-Appellant, and Philip Gaybell Wright et al., Defendants-Appellees, 505 F.2d 989. Nos. 771, 929, 930, Dockets 73-2604, 73-2606, 73-2766, 15 October 1974 [online] https://bulk.resource.org/courts.gov/c/F2/505/505.F2d.989.73-2766.73-2606.73-2604.771.929.html.

See also: Evans, A. (1975) 'Jurisdiction-fugitive offender-forcible abduction Ker-Frisbie rule – treaties-extradition', *The American Journal of International Law*, Vol. 69, No. 2, pp.406–431.

14 Hurricane Andrew in 1992: source – Geneva Association, 2002. Since then the US has been hit by two further costly hurricanes, Sandy in 2012 and the worst one, Hurricane Katrina in 2005, for which the latter estimated property losses exceed that of 9/11.

15 Communication from the Commission to the European Parliament, COD2001/0048.

16 Ibid.

17 Nyampong, Y. (2013) *Insuring the Air Transport Industry against Aviation War and Terrorism Risks and Allied Perils*, Issues and Options in a Post-September 11, 2001 Environment, Springer Publishing.

18 Abeyratne, R.I.R. (1997) 'Regulatory management of the Warsaw system of air carrier liability', *Journal of Air Transport Management*, Vol. 3, No. 1, pp.37–45.

19 The Minutes and Documents of the Conference are available in French via ICAO.

The International Civil Aviation Organization (sic!) Legal Committee and Diplomatic Conference took the role of CITEJA over after the Second World War.

20 Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature October 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 449 U.S.C. § 1502 (1998) (adherence of United States proclaimed October 29, 1934) [hereinafter Warsaw Convention]. The various instruments comprising the Warsaw System are reprinted and collected in the International Air Transport Association's Essential documents on International Air Carrier Liability (1999) [hereinafter IATA].

21 Second International Conference on Private Aeronautical Law, October 4–12, 1929 Minutes (at para. 35).

22 Buff, A. (1996) 'Reforming the Liability Provisions of the Warsaw Convention: does the IATA Intercarrier Agreement Eliminate the Need to Amend the Convention?', *Fordham International Law Journal*, Vo. 20, No. 5, pp.1768–1838.

23 Baden discussing the Japanese 1985 crash of a Japan Air Lines ('JAL') Boeing 747 which killed over 500 people drew attention to the disparity in Japanese airline regulations, is so much as passengers travelling on domestic flights in Japan were entitled to unlimited liability, while passengers with international tickets travelling on the same aircraft were entitled only to limited liability. This led to the Japanese initiative in 1992. Baden, N. (1996) 'The Japanese Initiative on the Warsaw Convention', *Journal of Air Law & Commerce*, Vol. 61, No. 2, pp.438–466.

24 For multilateral air law treaties and the current list of parties see http://www.icao.int.

25 ICAO Doc. 7632. The Protocol was not a stand alone document but necessitated reading alongside the original Convention; however, a new instrument of international law was created by the Hague Protocol – *Warsaw Convention as amended by the Hague, 1955* (Article XIX of the Protocol).

26 ICAO Doc. 8181.

27 The US Government suddenly denounced the Convention dissatisfied by the low limit for passengers' deaths or injury.

28 Airlines agreed to abide by the Agreement on any flights, to through and from the US territory and to renounce the defence within the Convention, agreeing instead to honour a 75,000 USD per passenger limit.

29 ICAO Doc. 8932.

30 IATA adopted the IATA Intercarrier Agreement at its Annual General Meeting held in Kuala Lumpur, Malaysia, in October 1995. This is an umbrella agreement where the parties agree to waive the liability limitations as specified in Article 22(1) of the Warsaw Convention. See also the Agreement on Measure to Implement the IATA Intercarrier Agreement (1996).

31 Official Journal L 285 of 17.10.1997. This Regulation has since been amended by Regulation No. 889/2002 of the European Parliament and of the Council of 13 May 2002 amending

Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents. OJ L 140, 30.5.2002, pp.2–5. This brings the Community arrangements fully into line with the new international rules (Montreal Convention).

32 ICAO Doc. 9740.

33 Article 1(1) states that the Warsaw Convention "shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise."

34 Article 1(1) – "This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."

35 Milde, M. (2012) *Essential Air & Space Law*, 2nd ed., p.283, Eleven International Publishing, London, UK.

36 Weigand, T. (2001) 'Accident, exclusivity, and passenger disturbances under the Warsaw Convention', *American University International Law Review*, Vol. 16, No. 4, pp.891–968.

37 Article 3(1) – "In respect of carriage of passengers, an individual or collective document of carriage shall be delivered containing:

a An indication of the places of departure and destination

b If the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place."

3(2) – "Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved."

3(4) – "The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay."

38 It is unnecessary for the plaintiff to prove fault (e.g., negligence).

39 Weber, L. and Jakob, A. (1996) 'Current developments concerning the reform of the Warsaw Convention', *Annals, Air & Space Law*, Vol. 21, Part. 2, p.303 (referring to the1990's efforts to reform liability limits of the Warsaw System).

40 Article 21.

41 21 November 1783 in Paris.

42 Sand, P., Pratt, G. and Lyon, J. (1961) *A Historical Survey of the Law of Flight, Institute of Air Space Law*, McGill University, Montreal.

43 *Guille v. Swan*, 19 Johns, 381 (N.Y. 1822) The case is also instrumental from the perspective as being a source of law regarding the application of tort.

44 The 1988 Lockerbie disaster is discussed later in this paper.

45 Wilkinson, C. and Hartwig, R. (2011) *Terrorism Risk: A Reemergent Threat*, Insurance Information Institute [online] http://www.iii.org/assets/docs/pdf/paper_Terrorism_042011.pdf.

46 Text, Minutes and Documents in ICAO Doc. 106-CD (in French only).

47 A further Protocol was added to the 1933 Convention (but was only signed by two countries, Brazil and Guatemala) – *Protocol Supplementary to the Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface, Signed in Rome on 29 May 1933, Done at Brussels on 29 September 1938* – (Text, Minutes and Documents in ICAO Doc. 107-CD, available in French only).

48 ICAO Doc. 7364.

49 Milde, M. (2012) *Essential Air & Space Law*, 2nd ed., p.283, Eleven International Publishing, London, UK.

50 Expressed in gold clause (French gold francs).

51 The UK signed the Convention on 23 April 1953.

52 Fujita, K. (2008) 'Some considerations for the modernization of the Rome Convention, in case of unlawful interference', *Korean Journal Air & Space Law*, Vol. 23, p.L.59.

53 Milde, M. (2012) *Essential Air & Space Law*, 2nd ed., p.302, Eleven International Publishing, London, UK.

54 Additionally to note is that this sum may also be reduced if the sum of all claims exceeds the overall limit set.

55 Milde, M. (2012) *Essential Air & Space Law*, 2nd ed., p.303, Eleven International Publishing, London, UK.

56 The 1999 Montreal Convention has a mechanism in place, whereby the limits for liability respond to inflationary trends and are reviewed/readjusted* every five years (*where applicable).

57 Source: "Aircraft accident report 92-11: El Al Flight 1862 Boeing 747-258F 4X-AXG Bijlmermeer, Amsterdam 4 October 1992", Netherlands Aviation Safety Board..

Other records indicate 39 fatalities on the ground
http://aviation-safety.net/database/record.php?id=19921004-2.

58 Uijt de Haag, P., Smetsers, R., Witlox, H., Krüs, H., Eisenga, A. (2000) 'Case study: evaluating the risk from depleted uranium after the Boeing 747-258F crash in Amsterdam, 1992', *Journal of Hazardous Materials*, Vol. 76, No. 1, pp.39–58.

59 Statistical Summary of Commercial Jet Airplane Accidents Worldwide Operations 1959 – 2011 http://www.boeing.com/news/techissues/pdf/statsum.pdf.

ICAO defines an *accident* as follows:

"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, in which:

a A person is fatally or seriously injured as a result of:
- Being in the aircraft, or
- Direct contact with any part of the aircraft, including parts which have become detached from the aircraft, or
- Direct exposure to jet blast, except when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or

b The aircraft sustains damage or structural failure which:
- Adversely affects the structural strength, performance, or flight characteristics of the aircraft, and
- Would normally require major repair or replacement of the affected component, except for engine failure or damage, when the damage is limited to the engine, its cowlings or accessories; or for damage limited to propellers, wing tips, antennas, tires, brakes, fairings, small dents or puncture holes in the aircraft skin; or

c The aircraft is missing or is completely inaccessible."

(Annex 13 – To the Convention on International Civil Aviation, Chicago, 1944).

60 S/RES/579 (1985). Para's. 1 and 5; see also SC President Statement 8 October 1985.

http://www.worldlii.org/int/other/UNSCRsn/1985/20.pdf.

Cited as UN Security Council, *Resolution 579 (1985) Adopted by the Security Council at its 2637th Meeting.*

61 Saul, B. (2005) 'Definition of 'terrorism' in the UN Security Council: 1985–2004', *Chinese Journal of International Law*, Vol. 4, No. 1, pp.141–166.

62 Other states (e.g., Argentina) would argue that terrorism was more specifically defined in A/RES/49/60 84th plenary meeting, December 1994.

63 Wallis, R. (1992) *Combating Air Terrorism*, p.1, Brassey's, McLean, VA, USA.

ISO provide a definition used in property and liability coverage insurance and there are differing definitions provided in various Legislative Acts. In 1996 the Department of Justice offered the following definition,

"*….. the unlawful use of force of violence against persons or property to intimidate or coerce a government, the civilian population, or any segment therefor, in furtherance of political or social objectives*" (Terrorism in the United States, Washington DC).

64 Sinclair, A. (2003) *An Anatomy of Terror. A History of Terrorism*, Pan Books, London.

65 Air France, Flight 8969, BBC World Service radio documentary [online] http://www.bbc.co.uk/worldservice/documentaries/2008/05/080617_age_of_terror_three.shtml.

66 Ghobrial, A. and Irvin, W. (2004) 'Combating air terrorism: some implications to the aviation industry', *Journal of Air Transportation*, Vol. 9, No. 3, pp.68–86.

67 As discussed at the Royal Aeronautical Society Conference (2009) London.

68 Herein referred to as *Lockerbie*.

69 Second party liability as determined by the Montreal Agreement (1966) – and the *Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol* – See Table 1. (Note: later reference is made to the 1971 Montreal Convention – Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Signed at Montreal on 23 September 1971 – ICAO Doc. 8966).

70 It was determined that the cause of the explosion was due to a bomb hidden inside a radio-cassette player within a suitcase.

71 Lockerbie II. 37 F.3d at 804, 812 & 824. Background of the Lockerbie cases is available in 31 ILM (1992) 717, (International Legal Materials).

Article 25 of the Warsaw Convention determined that an airline (or agent appointed to act on its behalf) will lose the benefit of the limited liability provision if it has engaged in willful misconduct (in this case a limit of $75,000).

72 Mendes de Leon (2009) *Conference held at the Royal Aeronautical Society*, London.

73 Abdelbaset Ali Mohmed Al-Megrahi and Al Amin Khalifa Fhimah.

74 Platchta, M. (2001) 'The Lockerbie case: the role of the Security Council in enforcing the Principle Aut Dedere Aut Judicare', *European Journal of International Law*, Vol. 12, No. 1, pp.125–140.

75 UN Doc. A/46/825, S/23306, 31 December 1991. This led to resolution 731 and 748 (1992).

76 Martenczuk, B. (1999) 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' *European Journal of International Law*, Vol. 10, No. 3, pp.517–547.

77 See note 56.

78 Platchta, M. (2001) 'The Lockerbie case: the role of the Security Council in enforcing the Principle Aut Dedere Aut Judicare', *European Journal of International Law*, Vol. 12, No. 1, pp.125–140.

79 This equates to just under 7 million US dollars to the family/next of kin for the 270 people killed.

80 Montreal Convention – the *Convention for the Unification of Certain Rules for international Carriage by Air, signed at Montreal on 28 May 1999.* ICAO Doc. 9740.

81 The US ratified the Convention in September 2003.

82 As of 25 June 2013.

83 *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface.* Signed at Rome on 7 October, 1952, ICAO Doc. 7364, (Entered into force 1958).

84 Between 28 August 2000 and 8 September 2000.

85 ICAO Assembly Res. A33-1, A-33-2, and A33-4. Significantly this related to a Declaration as to the Misuse of Civil Aircrafts as Weapons of Destruction and Other Terrorist Acts Involving Civil Actions.

86 Council Study Group on Aviation War Risk Insurance (CGWI); Council Special Group on the Modernization of the Rome Convention 1952 (SGMR) and the Review Group (SGWI-RG).

87 At the International Conference on Air Law held under the auspices of ICAO at Montréal, from 20 April to 2 May 2009.

88 Signed at Montréal, 2 May 2009 (ICOA Doc. 9919).

89 Signed at Montréal, 2 May 2009 (ICOA Doc. 9920).

90 May 2013.

91 On a 'case-by case basis'.

92 ICAO Doc. C-WP/12003, Appendix A.

93 Estimated to be $0.10 per passenger in 2003.

94 Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council. COD2001/0048.

95 Milde, M. (2012) *Essential Air & Space Law*, 2nd ed., p.309, Eleven International Publishing, London, UK.

96 Globalization 101 (http://www.globalization101.org).

97 Robbins, L. (1932) *Essay on the Nature and Significance of the Economic Science* [online] http://mises.org/books/robbinsessay2.pdf (accessed August 2013).

98 Oum, T., Park, J. and Zhang, A. (2000) *Globalization and Strategies Alliances: The Case of the Airline Industry*, Pergamon, Oxford.

99 Milde, M. (2012) *Essential Air & Space Law*, 2nd ed., p.308, Eleven International Publishing, London, UK.

100 Caplan, H. (2003) 'War and terrorism insurance: plans for long-term international stability and affordability', *The Geneva Papers on Risk and Insurance*, Vol. 28, No. 3, 426–447.

101 Milde, M. (2012) *Essential Air & Space Law*, 2nd ed., p.310, Eleven International Publishing, London, UK.

102 Australia, Austria, Belgium, France, Germany, the Netherlands, Spain, Switzerland, etc.

103 See 3. An International Framework.

104 Bentham, J. (1789) *Introduction to the Principles of Morals and Legislation*, 2007 version, Dover Publication Inc., New York.

105 Ibid. Bentham advocated utilitarianism – that action should be taken so as to produce the best consequences possible.

106 Milde, M. (2012) *Essential Air & Space Law*, 2nd ed., Eleven International Publishing, London, UK.