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# Aviation in Crisis

Ruwantissa I.R. Abeyratne

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*For Vishesh, success in high school.*

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# Foreword

This work, the latest in a series of impressive treatises by Dr Abeyratne, will not fail to enlighten any lawyer or executive concerned with the current challenges facing the international airline industry. Focusing, from a primarily regulatory and aeropolitical perspective, on the crisis facing the airline industry, both before and after 11 September 2001, Dr Abeyratne has drawn together, in typical thoroughness and eloquence, a broad diversity of topics of *fundamental significance to the industry*. These *include the implications* of the depressed state of the industry for security, commercial transactions (including leasing and financing), insurance, environmental issues and air carrier liability.

Since the response of the world community to the crises in airline security, commercial transactions and insurance has been largely voiced through the medium of the International Civil Aviation Organization (ICAO), Dr Abeyratne's vantage point, as a senior legal officer in ICAO, makes him peculiarly qualified to address the *topics considered in this work*.

The reader will be impressed by the ability of the author to write with first-hand knowledge and experience on matters of both public and private international law, while at the same time considering the issues in numerous municipal jurisdictions, including the United Kingdom, United States and Canada.

This carefully researched and well-written book, which draws on the author's vast experience in the airline industry at both the governmental and private levels, represents a significant contribution to the literature in the field. I commend it to all who have an interest of any kind in the legal issues affecting the airline industry.

*Rod D. Margo*
*Los Angeles*

# Preface

The events of 11 September 2001 defy modern economic theory when addressed in aviation terms. Economic theory would suggest that, once the impact of such events are a thing of the past, and economies are restored to their *status quo ante*, a rise in the gross domestic product of states to earlier levels would almost inevitably result in increased consumption. This in turn would mean that the demand for air travel would rise to earlier proportions and consumption in terms of air transport services would be restored to normality. However, the September attacks on United States property introduced a unique characteristic through the fear factor that directly effects the future development of air transport. As a result, the grim task of restoration of passenger confidence stands in the way of economic revival of the air transport industry.

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

Any study of present-day aviation would incontrovertibly involve viewing issues from both an economic and a legal perspective in addition to other relevant factors. In the field of aviation security, these two disciplines are intertwined with the regulatory regime, calling for a wide discussion of legal and regulatory regimes in the role played by states in ensuring security in aviation within their territories. In a parallel dimension, the importance of economic issues can be viewed as predominant in the field of insurance, particularly in the inquiry as to whether states should be establishing an aviation reinsurance pool to support airlines in crisis, thus giving states much more control over the running of their national airlines. Therefore, in an overall sense, the question arises as to whether increased state involvement in both security and insurance issues would not bring back rigid state control over national carriers. If this question were to be answered in the affirmative and day-to-day state control made a comeback, one would unavoidably have to inquire into the continued validity of gradual liberalization of market access, bringing the commercial angle into play and forming an interlinked triangle. When

this phenomenon occurred, the necessary corollary – the question as to whether absolute competition would no longer be a collective goal among states, and whether the need for added capacity would therefore no longer arise in the volumes earlier required – would inevitably obviate the earlier compelling necessity for airlines to order new aircraft. They could continue using aircraft already in use to their maximum capacity. This added dimension would introduce environmental considerations, making the entire study a complex fabric woven with different but symbiotic threads.

This book not only addresses issues in a rigid post-September 2001 context but also analyses issues past and present, with the intent of looking at the future. This will be attempted by taking four major areas into consideration which were in crisis but are truly affected by the events of September 2001. These areas relate to crises in the commercial, security, insurance and environmental protection fields. Of these the first and fourth areas are inextricably intertwined, as aircraft noise regulations in various states have a direct impact on aircraft financing, which in turn is linked to demand for air services. A drop in demand for air services would essentially mean that the demand for lease or purchase of new aircraft would drop. When this occurred, air transport enterprises would be more inclined to cut costs and therefore concentrate on using the aircraft already at hand, upgrading them to conform to the more demanding noise and emissions regulatory standards. It therefore becomes necessary to view all these factors separately, in the multitude of issues they provide, with a view to understanding the course which the air transport industry will be taking in the future.

The purpose of this book is to view the overall picture of an aviation industry – comprising air transport and other aviation-related industries – in crisis, through issues that continue to affect the economic viability of air transport, particularly as a result of the events of 11 September 2001.

*Ruwantissa Abeyratne*

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# Chapter 1

# Introduction

At best, the air transport industry's fortunes have been irregular. The airline industry, despite its glamour and perceived commercial power, has experienced marginal profitability and cyclical fiscal growth in the long term, with periods of growth and profit being watered down by less successful periods that follow. One of the reasons for this fluctuating pattern is that the airline industry is driven by variable factors such as operational and technological changes as well as regulatory control. To add another dimension of unlawful interference with civil aviation to this list would almost certainly break the industry's back.

It is an incontrovertible fact that the sad and tragic consequences of the events of 11 September 2001 affected first and foremost the victims of those terrible attacks, and their families. It is equally unchallengeable that the second casualty in this horrendous series of events was aviation. Aeronautically speaking, aviation paid the irrecoverable cost of having aircraft used as weapons of vast destruction. Commercially speaking, the closure of airspace, as an immediate measure throughout the United States and some parts of Europe, and its subsequent opening amidst restricted commercial activity of airlines, not only affected the air transport industry during the first few days of the catastrophe, but also continues to portend grave commercial implications for the airline industry in the years to come. This chapter will outline these implications, with particular focus on insurance and security considerations which were considered in some depth by the 33rd Assembly of the International Civil Aviation Organization, which concluded its deliberations on 5 October 2001.

## AERONAUTICAL IMPLICATIONS

The International Civil Aviation Conference, convened at the initiative of President Roosevelt of the United States, was held in Chicago, Illinois from 1 November to December 1944. The delegates at this conference, in the words of President Roosevelt, 'met in a high resolve that ways and means be found, and rules may be evolved, which shall permit the healing processes of peace to begin their work as rapidly as the interruptions resulting from aggressive war can be cleared away'.[1] The resultant consensus, the Convention on International Civil Aviation,[2] begins by stating that the development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security.[3]

The Chicago Convention identifies its scope as being applicable to international civil aviation, thus presumably leaving us with the assumption that at least technically, the Convention may not apply to local or domestic aviation. If this were to be accepted without further debate, one could argue that the attacks on the United

States, carried out with aircraft flying domestic routes within the country, would not come within the purview of the Chicago Convention. The situation, however, is not that simple or straightforward. The Chicago Convention does not state anywhere that the Convention will apply only to international civil aviation. On the contrary, the Convention, in Article 4 provides: 'Each Contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.'

Although the provision itself is contextually irrelevant to the events of 11 September 2001, the use of the words 'civil aviation' links domestic or local aviation to the Chicago Convention and therefore to the work of the international aviation community, in pursuing safe and orderly development of international civil aviation. The ICAO Council, at its 141st Session in 1994, in addressing the subject of aircraft accident investigation, noted that, although Article 26 of the Chicago Convention, which requires a state to institute investigations upon an aircraft of another state which meets with an accident in the territory of the first state, and that what was seemingly described by Article 26 was an accident occurring during international air transport, the Foreword to Annex 13 specifies that the annex may also deal with accidents of a kind which do not fall within the purview of Article 26. Accordingly, the Council, in 1944 considered an amendment to the annex which ensured some uniformity in investigation procedures regardless of whether an accident involved an international or domestic flight.[4]

Annex 13[5] has incorporated the above-mentioned amendment by stating in its Foreword:

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

The annex defines an 'accident' as an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flying until such time as all such persons have disembarked.[6] The definition does not mention that the accident has to occur during an international flight.

Annex 17 to the Chicago Convention,[7] on the subject of aviation security, defines 'security' as a combination of measures and human and material resources intended to safeguard international civil aviation against acts of unlawful interference. This would mean that any measure taken, including one following the occurrence of an accident caused as a result of domestic aviation, would, if such an event affects or threatens to affect international civil aviation, fall within the provisions of Annex 17.

## INSURANCE IMPLICATIONS

Following the events of 11 September 2001, the international insurance market gave notice on 17 September that, effective from 24 September, third party war risk liability insurance, covering airline operators and other service providers against

losses and damages resulting from war, hijacking and other perils, would be cancelled.[8] As an immediate response to this measure, the President of the ICAO Council, Dr Assad Kotaite, issued a State Letter[9] to all ICAO contracting states, requesting that they take effective measures to preclude aviation and air transport services from coming to a standstill. This letter also appealed to contracting states to support airline operators and other relevant parties, at least until the insurance market stabilized, by committing themselves to cover any risks to which airline operators and others might become exposed by the cancellation of insurance cover.

The 33rd Session of the ICAO Assembly, held in Montreal from 25 September to 5 October 2001, considered as an urgent priority the insurance issue by adopting Resolution A33-20.[10] This resolution, while recognizing that the tragic events of 11 September had adversely affected the operations of airline operators globally as a result of war risk insurance cover no longer being available at levels which are practical and accessible to airline operators, prima facie urges contracting states to work together to develop a more enduring and coordinated approach to the important problem of providing assistance to airline operators and other service providers. The resolution, basing itself on the fundamental premise enunciated in Article 44 of the Chicago Convention, which refers to the objective of ICAO to ensure safe, regular, efficient and economical air transport, directs the Council of ICAO to establish urgently a Special Group to consider issues emerging from action taken in the insurance market regarding third party war risk insurance coverage.

One must of course appreciate that war and associated risks, including hijacking and acts of terrorism, pose an extremely high risk exposure to insurers. Aviation hull and liability policies therefore usually contain an express exclusion in respect of such risks. The war risk exclusion used in the London market, known as AVN 48B,[11] excludes the risks of war, invasion, hostilities, civil war, rebellion, revolution, insurrection, martial law, hostile detonation of atomic weapons, strikes, riots, civil commotions or labour disturbances, acts of a political or terrorist nature, sabotage, confiscation, nationalization, seizure and hijacking.

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

Many contracting states, following the State Letter of the President of the ICAO Council, stepped in to address issues regarding cancellation of insurance. It is therefore relevant to discuss steps taken by these various ICAO contracting states in responding almost immediately to the difficulties posed to their airline operators and other service providers. In the United States, the administration proposed a plan to have taxpayers cover most of the losses that insurance companies would suffer in future terrorist attacks. The administration viewed its proposal as an alternative to legislation drafted by lawmakers from both parties in Congress at the behest of the

insurance industry. The industry plan recommends a new government-backed insurance company that would manage a pool of premiums and payouts for terrorism policies. Once losses exceeded the amount of money in the pool, the government would cover the difference – which could total much more than taxpayers stand to pay under the administration's proposal. The administration was wary of the industry approach, fearing the creation of a new federal bureaucracy that is insensitive to costs.[12]

The White House was reported as planning to propose that the federal government relieve insurance companies of 80 per cent or more of the cost of damages from any terrorist attacks over the next year. The proposal would leave the government vulnerable to huge losses if there were large-scale attacks, but administration officials said they thought it was the most workable plan at a time when the industry and others that depend on insurance need a quick fix. Experts estimate that about 70 per cent of the insurance contracts covering terrorist attacks will expire by the end of the year, and reinsurers, who essentially offer insurance to the insurers, have said they plan to drop such coverage.[13]

In Europe, the member states of the European Union recognized that the terrorist attacks exposed the vulnerability of the air transport sector, with damage exceeding all rational estimates. The EU member states have asked the Commission to draw up guidelines to ensure an efficient and coherent response in such cases. Possible responses could include the establishment of a 'mutual fund' for risks in order to avoid the cost of national measures. In addition, the Commission proposes harmonizing the amounts and conditions of insurance required for the issue of operating licences.[14]

The European Commission announced, on 10 October 2001, that it would allow member states to help European airlines recover from the turmoil after the attacks on 11 September. The Commission, which in the past has been critical of government assistance to airlines, was urging governments to extend compensation to cover the rise in premiums until the end of 2001, and has proposed setting up a fund to cover the higher premiums.[15]

In the context of European States, it must be borne in mind that the European Civil Aviation Conference (ECAC) had, during a special Plenary Meeting held in Paris on 13 December 2000, adopted a resolution[16] setting certain third party liability limits for airline accidents involving carriers of ECAC member states. The action of the European Union of 10 October 2001 would be presumed to apply, at least temporarily, notwithstanding the earlier ECAC resolution.

Japan's government stepped in to help the struggling airline industry as companies tried to cope with rising insurance costs and falling demand in the aftermath of the suicide attacks on the United States. The Ministry of Land, Infrastructure and Transport said the government would guarantee third party insurance up to $2 billion for Japan's airline carriers to cover any shortfall in claims after insurers reduced coverage to $50 million following the September 11 attack.[17]

Colombia's airlines pleaded for government aid on 3 October 2001, after their insurance costs rose by 6300 per cent, to $32 million, following the 11 September attack in the United States. Colombia's Association of Colombian Air Transporters (ATAC) said the Andean nation was hit especially hard, since it had already faced a high premium due to its 37-year guerrilla war. Colombia's government stated that it

would authorize an increase in passenger ticket prices to help offset the added costs, but did not offer further details.[18]

Almost immediately after the withdrawal of coverage, Singapore gave the assurance that it will extend third party war risk liability coverage to various approved aviation service providers for their operations in the city state. The government had earlier decided to provide third party war risk liability coverage to Singapore Airlines, SilkAir, SIA Cargo and the Civil Aviation Authority of Singapore. 'A commercial charge will be levied for this insurance cover but this will be waived for the first 30 days,' the statement said.[19]

Royal Air Maroc (RAM)'s insurance has almost quadrupled, from 28 million dirhams to 120 dirhams, since 11 September. The government of Morocco agreed to offer RAM war insurance guarantees following the insurance companies' decision to cap airlines' third party war and terrorism insurance at $50 million in the expectation of potential record payouts.[20]

Hong Kong's Civil Aviation Department on 4 October 2001 gave the green light for 15 airlines to levy insurance surcharges on passengers on Hong Kong routes. The 15 airlines that have secured approval from the Civil Aviation Department to impose insurance surcharges include the two locally based passenger carriers, Cathay Pacific Airways Ltd and Hong Kong Dragon Airlines Ltd (Dragonair). Table 1.1 lists the 15 airlines and the proposed surcharges.[21]

Air Transat joined its Canadian rivals on 5 October 2001 by announcing it would charge passengers C$3 extra per one-way trip to cover soaring insurance costs following the 11 September attacks on the United States. The company said that the surcharge would be applied on all its domestic, transborder and international fights, starting on 8 October 2001.[22] Air Transat is the last major Canadian carrier to impose such a surcharge. Air Canada, the country's dominant carrier, and no-frills airlines WestJet and Canada 3000, each imposed a C$3 fee.

KLM said, on 22 September 2001, that it had reopened bookings for that week after the Dutch government agreed to grant war risk insurance.[23] KLM announced it was adding a US$5 a flight surcharge to fares immediately to help cover the cost of additional safety procedures being taken since the US aircraft attacks. 'It's a safety surcharge; we have taken a lot of measures to boost safety, and that incurs costs,' said a KLM spokesman.[24]

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

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

In face of the dramatic recession of insurance coverage, states began to take

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

**Table 1.1**

| Airlines | Proposed insurance surcharges |
|---|---|
| Cathay Pacific | US$4 per flight coupon |
| Dragonair | US$4 per air segment |
| Asiana Airlines | US$1·25 per sector |
| KLM Royal Dutch | US$5 per ticket coupon |
| Gulf Air | US$5 per sector |
| Singapore Airlines | US$1·25 per sector |
| Emirates Airline | HK$39 per sector |
| Philippine Airline | US$6 per sector |
| Thai Airway International | US$1·25 per flight coupon |
| Korean Air | HK$10 per flight sector |
| Myanmar Airway | C$1·25 per flight sector |
| Air New Zealand | US$3·10 per flight coupon |
| Malaysian Airlines | US1·25 per flight sector |
| Air Canada | C$3 per one way |
| China Airlines | US$2·50 per flight sector |

More recently, insurers in the United States envisaged an insurance pool along the lines of Britain's 'Pool Re', a government-backed, mutually-owned company, set up in 1993 after the planting of a series of bombs in mainland Britain by Northern Irish terrorists. Through such a scheme, insurers collect premiums for terrorism insurance and the government promises to chip in if claims exceed the pool's premiums plus reserves. So far, there have been no settlements by the government, although the important feature was the guarantee that it would have honoured its commitment if a situation calling for settlement had arisen. This proposal has not been accepted by the American administration, which takes the position that the insurance industry will meet the first $10 billion of a terrorist loss and the federal government will pick up 90 per cent of larger losses, up to $100 billion in the first year. The insurers would not be required to repay the government.

Action taken by ICAO contracting states in responding to the insurance crisis has legal legitimacy in two international conventions: the Rome Convention of 1952[25] and the Montreal Convention of 1999.[26] Article 15 of the Rome Convention provides that any contracting state may require that the operator of an aircraft registered in another contracting state shall be insured in respect of his liability for damage sustained in its territory for which a right to compensation exists. The operative clause, in the context of indemnities offered by the several ICAO contracting states as discussed earlier, is contained in Article 15.4 of the Rome Convention which provides that, instead of insurance, inter alia, a guarantee given by the contracting state where the aircraft is registered, shall be deemed satisfactory if that state undertakes that it will not claim immunity from suit in respect of that guarantee.[27] The Montreal Convention of 1999, which is yet to come into force, provides in Article 50 that states parties shall require their carriers to maintain adequate insurance covering their liability under the Convention. This provision further stipulates that a carrier may be required by the state party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under the Convention.

## SECURITY IMPLICATIONS

Integral to implications for air transport of enhanced security measures are issues of privacy and the rights of the airline passenger. Simplified Passenger Travel (SPT) is a process introduced largely to alleviate the usual long-drawn-out process of passenger clearance at airports that has become characteristic of air travel. The system anchors itself on the use of a smart card holding relevant information of the passenger, that can be swiped through a machine, giving instant clearance.[28]

Hand-in-hand with the smart card is the practice of the exchange of Advance Passenger Information (API), which has already proved the usefulness of providing immigration and customs authorities of a state in whose territory a passenger disembarks with that passenger's information in advance of his arrival, particularly to be used for deciding whether that passenger would be admissible to the state concerned or not. The notion of an API system was conceived and introduced by the customs services of certain states. They identified the need to address the increased risk posed by airline passengers in recent years, especially in regard to drug trafficking and other threats to national security. It was pointed out in compelling

terms that in some locations this need to enhance controls, combined with the growth of air passenger traffic, had begun to place a severe strain on the resources of customs and immigration authorities, resulting in unacceptable delays in the processing of arriving passengers at airports. A system in which identification data on passengers could be sent to the authorities while the aircraft was in flight, to be processed against computer databases before the passengers arrived, was therefore envisioned as a means of addressing the twin objectives of better compliance and faster clearance of low-risk passengers.

The regulatory foundation of customs and immigration clearance lies in Article 29 of the Chicago Convention,[29] which requires every aircraft engaged in international navigation to carry certain documents, including, for passengers, 'a list of their names and places of embarkation and destination'. Annex 9 to the Convention, on facilitation of air transport, specifies, in Standard 2.7, that *presentation* of the passenger manifest document shall not normally be required, and notes that, if the *information* is required, it should be limited to the data elements included in the prescribed format; that is names, places of embarkation and destination, and flight details.

This standard contemplates the passenger manifest as a paper document which would have to be typed or written and delivered by hand. Nonetheless, the concept of a limitation on the amount of information to that which is essential to meet the basic objectives of safety, efficiency and regulatory compliance is applicable to modern electronic data interchange systems such as API, in which additional (but not unlimited) data may be transmitted to the authorities in exchange for a more efficient clearance operation. It is widely recognized that, in any system involving the exchange of information (automated or not), it is the collection of data which is the major expense. Increases in data collection requirements should result in benefits which exceed the additional costs.

As the airlines and control authorities progress in their refinement of the system and improvement of the system performance, passenger clearance times for trans-oceanic flights (which, prior to use of API, frequently involved delays in excess of two hours) have been reduced to averages well below the recommended goal of 45 minutes, stipulated in Annex 9. In addition to this improvement in productivity, the control authorities have realized an enhancement of their enforcement efforts, owing to the fact that receipt of information in advance gives them more time to process the information on the passengers and make better decisions regarding their inspection targets and the appropriate level of control.

The data included in the transmissions between the airlines and the immigration and customs authorities of recipient states consist of details contained in the machine-readable zone of a passport of the passenger concerned,[30] plus specific data concerning the inbound flight, such as airports of departure/arrival, flight number and date. An Electronic Data Interchange for Administration, Commerce and Transport (EDIFACT) message format is used to transmit the data by electronic data interchange (EDI). The system works well but is very demanding in terms of requirements for high levels of completeness and accuracy of data provided. Unlike cargo shipments, each of which is processed for clearance on its own track, passengers must pass through immigration customs as a 'flight' and are interdependent with respect to the time it takes to clear them. If data on too many

passengers are missing, the whole group is slowed down, and so are the flights of passengers arriving behind them.

There is currently a tug-of-war between the airlines and immigration/customs over airline system performance standards versus short clearance times (facilitation benefits) provided by the authorities. But the reality is that, the higher the data quality, the faster the clearance can be accomplished. So the airline has to meet a certain standard in order to get 'blue lane' treatment. One of the issues that emerge as important in the API process is that the data required must be collectable by machine or already contained in the airline's system. Manual collection and data entry at the check-in desk for a scheduled flight is time-consuming and prone to errors, and therefore is not acceptable. Most travellers now hold machine-readable passports (MRPs); as a result, manual input need only be done on an exception basis. Participation in API must be compensated with a measurable improvement in facilitation. The authorities concerned must also aim at achieving improvements in the ensuring of security with the use of these measures.

At its 33rd Session, held in September/October 2001, the ICAO Assembly, while acknowledging that new measures should be taken to enhance security, observed that such measures should not impede ICAO's current work on improving border control systems at airports and ensuring the smooth flow of passengers and cargo. Consequently, the Assembly stressed that ICAO's work on these issues should continue on an urgent basis.[31] The machine-readable travel document was among specific areas mentioned by the Assembly as requiring urgent continuing work, in keeping with UN Security Council Resolution 1373 of 23 September 2001, which reaffirmed the need for continuing work to ensure the integrity and security of passports and other travel documents.[32] In this context. the Assembly agreed that all contracting states should be urgently encouraged to issue their travel documents in machine-readable format and enhance their security in accordance with ICAO specifications, while introducing automated travel document reading systems at their international airports.[33]

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

## COMMERCIAL IMPLICATIONS

In broad terms, an immediate, if not short-term, recession and a drop in the gross national product of States is a probable consequence of the attacks on America. With regard to the airline industry, the first few days of inactivity and following weeks, if not months, of reduced operations, coupled with delays caused by security enforcement, would be devastating. 'Downsizing' and layoffs would be common not only among the smaller operators, but also among the major international operators, including domestic airlines in states whose air carriers operate air services in Europe and the Americas in particular.

*Code sharing*, which is a prolific commercial tool used by air carriers to maximize market access and make full use of providing capacity to meet demand, presents

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

Recent events have brought to bear the threat of risk transfer from one airline to another. In other words, if one airline were to carry a greater risk of damage than others in a code share (or other airline alliance situation), the risk would be shared by all partners to the agreement. Specific instances that may cause delays could well include the following: a passenger needing to be off-loaded from a code-shared flight where that passenger had been accepted earlier according to the security procedures of another carrier under a code share agreement; the carriage of escorted prisoners in various sectors involving code share flights; carriage of security sensitive personages such as VIPs in several sectors of code-shared flights; and the challenges of information sharing between code share partners with a disruptive passenger.

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

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

Enhanced costs incurred by carriers, both in providing for improved and more stringent security measures and in absorbing delays caused by the implementation of such measures, may have to be met, one way or another. Increased airfares could be one mode of recovery. The imposition of security charges on passengers could be another. Guidance with regard to the imposition of security charges is already available in documentation of the International Civil Aviation Organization.[34]

The bilateral requirement of *substantial ownership and effective control*, which is based on the fundamental postulate that a majority ownership provision would effectively preclude foreign ownership from taking major control of a national carrier, has not been easy to enforce or put into practice in all situations. Although a blanket provision might require majority national ownership and control, airlines

and states have had to contend in many instances with complex issues of nationality of members of a board of directors, the powers of a board and the powers of directors of such boards.[35] Often states have attempted to circumvent these difficulties by establishing a safeguard to ensure for the government concerned a 'golden share' which accords the owner government a greater voice in the decision-making process on issues of importance and significance to the carrier concerned.[36]

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

Both the United States and member states of the European Union have protected their domestic markets from external operators by preserving these markets for their flag carriers or at least carriers that were owned by the state concerned or nationals of that state. In the European Union, in keeping with Article 4 of Court Regulation 2407/92, national authorities are vested with the power of granting operating licences based on the criteria that the principal place of business of the carrier applying for the licence must be located in the licensing member state; the carrier must be involved in air transport as its main occupation; the holder of the licence must be under direct or majority ownership of nationals of the European Union; and the licencee must be effectively controlled by such nationals. Effective control essentially means the power and ability to exercise a decisive influence on an air transport undertaking, including but not limited to the use, enjoyment and alienation of movable and immovable property of that undertaking. One of the reasons, at least from the perspective of the European Union, for retaining the ownership and control criteria within its territory is to safeguard the interests of the member states of the Union and to preclude carriers of non-EU states from capitalizing on a liberalized European Union Market.

United States law too contains explicit requirements pertaining to nationality in terms of management of airlines,[37] in some contrast to Regulation 2407/92 of the EU, which does not expressly address issues regarding nationality of management. Arguably, the EU addresses external control by stockholders of a company, and not particularly, as envisaged by the United States law, management control of the administration and running of the air transport enterprise. Be that as it may, both the United States and the European Union have shown, by their legislation, that the issue of ownership and control still remains for them a critical consideration in the overall picture of liberalization of and competition in air transport. Under the present circumstances, both the United States and the European Union may wish to review their positions on whether it would now be prudent to retain existing standards of ownership and control.

One of the most critical issues in the ownership and control equation is the impact of commercial civilian airlines on military interests. As an example, one can cite the Civil Reserve Air Fleet Programme (CRAF) of the United States, where US carriers

have pledged a substantial number of their aircraft to the United States Department of Defense for defence purposes. If any other state were to have a similar system, the issue of foreign nationals' ownership and/or control of aircraft that may be used for defence purposes could be a critical one which the state concerned would be compelled to consider.

From a regulatory perspective, it is worthy of note that ICAO's Worldwide Air Transport Conference (Montreal, 1994), which examined the present and future regulation of international air transport, recommended that ICAO proceed with studies and develop recommendations on a number of important issues, including the review of the traditional air carrier ownership and control criteria with a view to their broadening. Following this trend, ICAO's Air Transport Regulation Panel has noted that, at the conference, the principal objections to broadening the traditional airline ownership and control criteria for the use of market access by using a criterion based on 'headquarters, central administration or principal place of business' were its possible use as an unacceptable means of gaining market access, abuse from differing interpretations of the terms involved, and the fact that it might lead to 'flags of convenience' with lack of regulatory control and social 'dumping'. The panel concluded that a criterion based on a combination of 'principal place of business' and 'permanent residence' could be used to further broaden the traditional ownership and control criteria, thereby providing a third option to those two involving groups of states which had been adopted at the conference. In the panel's view, the principal place of business/permanent residence criterion would result in a firm link to the designating state which would not result in a degradation of safety, while meeting the concerns expressed at the conference. The panel recommended that states wishing to accept broadened criteria for air carrier use of market access in their bilateral and multilateral air services agreement agree to authorize market access for a designated air carrier which has its principal place of business and permanent residence in the territory of the designating state; and has and maintains a strong link to the designating state.

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

At the time of writing, ICAO was receiving responses from contracting states to a questionnaire sent to them by the organization seeking their views on and details of practices of ownership and control of airlines in their territories. It will be interesting to find out, once all responses are received, whether states have veered towards more state control of air carriers, particularly in terms of the element of control a state would retain in such areas as employment of trained public servants in ensuring security at airports and in the sky and overall government shareholding in airline companies. Trends in ownership and control will be a critical issue to be addressed at the ICAO 5th Air Transport Conference to be held in Montreal in March 2003.

## THE ROLE OF CIVIL AVIATION IN SECURING PEACE AMONG NATIONS

The attacks of 11 September 2001 inevitably highlighted the strategic position of civil aviation both as an industry vulnerable to attack and also as an integral tool in ensuring peace and security in the world. The modernist view of civil aviation, as it prevailed when the Convention on International Civil Aviation[38] was signed at Chicago on 7 December 1944, was centred on state sovereignty[39] and the widely accepted postwar view that the development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security.[40] This essentially modernist philosophy focused on the state as the ultimate sovereign authority which can overrule considerations of international community welfare if they clashed with the domestic interests of the state. It gave way, in the 1960s and 1970s to a post-modernist era of acceptance of the individual as a global citizen, whose interests at public international law were considered paramount over considerations of individual state interests.

### Civil aviation in the modernist era

In 1944, at the height of the modernist era of social justice and commercial interaction, the Chicago Convention was drafted within 37 calendar days[41] and was the result of consensus reached only by 52 states which attended the Chicago Conference. However, as Milde says: 'It is in the first place a comprehensive codification/unification of public international law, and, in the second, a constitutional instrument of an international inter-governmental organization of universal character.'[42] Be that as it may, the real significance of the Convention, particularly as a tool for ensuring political will of individual states, lies in the fundamental philosophy contained in its Preamble. If one examines the Preamble carefully, the Convention enunciates a message of peace through aviation. It makes mention of the future development of international civil aviation being able to help preserve friendship and understanding among the nations of the world, while its abuse (that is abuse of future development of international civil aviation) can become a threat to 'the general security'. By 'general security' the Chicago Conference presumably meant the prevention of threats to peace. These words have been interpreted in the widest possible sense by the Assembly of the International Civil Aviation Organization (ICAO) to cover instances of social injustice such as racial discrimination as well as threats to commercial expediency made possible by civil aviation. For example, the 15th session of the ICAO Assembly adopted Resolution A15-7 (Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa) which urged South Africa to comply with the aims and objectives of the Chicago Convention, on the basis that apartheid policies constitute a permanent source of conflict between the nations and peoples of the world and that the policies of apartheid and racial discrimination are a flagrant violation of the principles enshrined in the Preamble to the Chicago Convention.[43]

The Preamble was also quoted in Resolution A17-1 (Declaration by the Assembly) which requested concerted action on the part of states towards suppressing all acts which jeopardize safety and orderly development of international civil aviation. In Resolution A20-2 (Acts of Unlawful Interference with Civil Aviation) the Assembly reiterated its confidence that the development of international civil aviation can be an effective tool in bringing about friendship and understanding among the peoples of the world.

When one looks at the discussions that took place during the Chicago Conference, one gets a general view of the perspectives of each state, particularly in terms of what they expected out of the Convention concerning the role to be played by civil aviation with regard to ensuring peace, security and economic development in the world in the years to come.

*The Chicago Conference and peace initiatives*

The Chicago Conference was initiated on 11 September 1944, when the government of the United States of America, on its own initiative, sent a letter of invitation to 53 states and two dignitaries[44] whose governments were in exile, inviting them to a conference that would lead to the development of international air transport as a post-war measure. This letter also informed the invitees that the United States had conducted numerous bilateral discussions with states who had shown a special interest in this measure, especially in the fields, inter alia, of rights of aircraft in transit and non-traffic stops, the non-exclusivity of international operating rights, the application of cabotage to air traffic and the use and operation of airports and facilities. The letter stated:

> The approaching defeat of Germany, and the consequent liberation of great parts of Europe and Africa from military interruption of traffic, sets up the urgent need for establishing an international civil air service pattern on a provisional basis at least, so that all important trade and population areas of the world may obtain the benefits of air transportation as soon as possible, and so that the restorative processes of prompt communication may be available to assist in returning great areas to processes of peace.[45]

The US government suggested that the proposed international conference consider, inter alia, the establishment of provisional world route arrangements by general agreement which would form the basis for the prompt establishment of international air transport services by the appropriate countries. There was also a suggestion to set up a permanent international aeronautical body, and a multilateral aviation convention dealing with the fields of air transport and air navigation, including aviation technical subjects.[46]

Over the past 50 years the Chicago Convention has proved to be one of the most intrepid international agreements adopted by man, rendering immeasurable service to international civil aviation, which is undoubtedly one of the most vital and dynamic human endeavours in international relations. Milde, in assessing the significance of the Chicago Convention at its fortieth anniversary, said of the Convention:

> The fortieth anniversary of the adoption of the Chicago Convention is a good opportunity to draw a balance sheet. The Organization (ICAO) has accomplished

> remarkable achievements in the technical, economic and legal fields; the technical activities, the regulatory work in the adoption of standards and recommended practices and their implementation on regional and national levels through regional plans and technical assistance represent the true backbone and *raison d'être* in the life of the Organization. Throughout the years, the Convention proved to be a reliable and suitable legal framework for the work of a technical agency performing practical work of immediate practical application by States. Even after forty years, the Chicago Convention continues to provide a firm legal basis for cooperation of States in the field of international civil aviation and represents an acceptable balance of interests among States.[47]

After 55 years of its being in force, the Convention, through ICAO, still serves to ensure collaboration between states and international harmony through issues pertaining to civil aviation. The Chicago Conference was inaugurated with the reading of a message to the Conference from the president of the United States. In his message, President Roosevelt, referring to the Paris Conference of 1919 which was designed to open Europe to air traffic, but unfortunately took years to be effectively implemented, stated:

> I do not believe that the world today can afford to wait several years for its air communications. There is no reason why it should.
>
> Increasingly, the aeroplanes will be in existence. When either the German or Japanese enemy is defeated, transport planes should be available for release from military work in numbers sufficient to make a beginning. When both enemies have been defeated, they should be available in quantity. Every country has its airports and trained pilots; practically every country knows how to organize airlines.
>
> You are fortunate to have before you one of the great lessons of history. Some centuries ago, an attempt was made to build great empires based on domination of great sea areas. The lords of these areas tried to close the areas to some, and to offer access to others, and thereby to enrich themselves and extend their power. This led directly to a number of wars both in the Eastern and Western Hemispheres. We do not need to make that mistake again. I hope you will not dally with the thought of creating great blocs of closed air, thereby tracing in the sky the conditions of future wars. I know you will see to it that the air which God gave everyone shall not become the means of domination over anyone.[48]

Thus President Roosevelt urged states to eschew protectionism, while encouraging them to avoid dominance over one another. Ever since, the fate of economic regulation of international air transport has been relegated to the status of an obdurate dilemma which posed the question as to how states could avoid dominance by others without protecting themselves. The elusive delicate balance between the two is still being vigorously sought, as will be seen in discussions to follow.

The chairman of the Conference, Adolf A. Berle Jr, endorsed the president's comments by observing:

> There are many tasks which our countries have to do together, but in none have they a clearer and plainer common interest than in the work of making the air serviceable to mankind. For the air was given to all; every nation in the world has access to it. To each nation there is now available a means of friendly intercourse with all the world, provided a working basis for that intercourse can be found and maintained.[49]

At the Conference, the United States took the position that the use of the air and the use of the sea were both common in that they were highways given by nature to all men. They were different in that man's use of the air is subject to the sovereignty of nations over which such use is made. The United States was therefore of the opinion that nations ought to arrange among themselves for its use in such manner as would be of the greatest benefit to all humanity, wherever situated. The United States further asserted the rule that each country has a right to maintain sovereignty of the air which is over its lands and its territorial waters. There was no question of alienating or qualifying this sovereignty. This absolute right, according to the United States, had to be qualified by the subscription by states to friendly intercourse between nations and the universal recognition of the natural rights of states to communicate and trade with each other. This right could not be derogated by the use of discriminatory measures.[50] The fact that the United States required states to exchange air traffic rights reciprocally is clearly evident in the statement: 'It is therefore the view of the United States, that, without prejudice to full rights of sovereignty, we should work upon the basis of exchange of needed privileges and permissions which friendly nations have a right to expect from each other.'[51]

The privilege of communication by air with friendly countries, according to the United States, was not a right to wander at will throughout the world. In this respect, it was contended that traffic by air differed materially from traffic by sea, where commerce need have no direct connection with the country from which the ship may have come. The air routes were analogous to railroad lines and the right to connect communication links between states was to establish a steady flow of traffic, thereby opening economic routes between countries. According to the United States, it was too early to go beyond this concept, and states should accept the fact that what the Chicago Conference would accomplish was to adopt a Convention that would establish communication between states.[52]

With regard to the establishment of an international organization, the United States was of the view, that in the purely technical field, considerable power could be wielded by such an organization, while in the economic and political fields only consultative, fact-gathering and fact-finding functions should be performed by this organization. The United States concluded:

> the United States will support an international organization in the realm of air commerce having power in technical matters and having consultative functions in economic matters and the political questions which may be directly connected with them under a plan by which continuing and collected experience, widening custom, and the growing maturity of its counsel may establish such added base as circumstances may warrant for the future consideration of enlarging the functions of the consultative group.[53]

It is worthy of note that, in 1944, the United States government had envisioned greater scope for the proposed international organization in economic issues.

The United Kingdom, in its statement of position, strongly advocated a plan that would provide the services needed between states, serve the interests of the travelling public and would be fair between states. It was further recognized that each state had a fair share in the operation of air services and carriage by air of traffic, giving as an example the prewar proposals by the United Kingdom and the

United States of opening a transatlantic service on a fifty–fifty basis. The United Kingdom further contended:

> While recognizing national interests we want to encourage enterprise and efficiency which are indeed themselves a national as well as an international interest. And we want therefore to encourage the efficient and to stimulate the less efficient; only by common action on some such lines as indicated can we reduce and gradually eliminate subsidies, thereby putting civil aviation on an economic footing and incidentally very considerably relieving the tax payer. Unrestricted competition is their most fruitful soil.[54]

The United Kingdom seemed to have adopted a balanced approach that supported the establishment of air services to serve the needs of the travelling public, while not unduly affecting the rights of states to have a fair share of traffic for themselves.

Canada suggested the establishment of an international air authority to plan and foster the organization of air services internationally. This authority would, according to Canada, ensure inter alia that, so far as possible, international air routes and services were divided freely and equitably between the various member states, and afford every state the opportunity of participating in international airline operations, in accordance with its need for air transportation service and its industrial and scientific resources.[55]

India, while believing that it was essential for air services to develop rationally, with a certain degree of freedom of the air being the inherent right of every state, went on to say:

> We believe that the grant of commercial rights – that is to say, the right to carry traffic to and from another country, – is best negotiated and agreed to on a universal reciprocal basis, rather than by bilateral agreements. We think that only such an arrangement will secure to all countries the reciprocal rights which their interests require. But the grant of any such freedoms and rights must, in our opinion, necessarily be associated with the constitution of an authority which will regulate the use of such freedoms. It will be the function of such authority ... to ensure that the interests of the people, both of the most powerful and of the smaller countries, are secured.[56]

India's position, therefore, has been to recommend a liberal approach of universal reciprocity within the parameters of control by an authority which could ensure that the smaller nations were protected from being swamped by larger states.

France, too, strongly supported the establishment of an international organization which could act as a 'watchdog' against predatory practices by states in the operation of international air services. In its statement of position, France stated:

> As the President of the United States of America recommended yesterday in his message, we must endeavour to avoid the future formation of rival blocs.
>
> To escape this danger, of which we were so justly warned, all the nations invited here must have a reasonable share in air transportation. The international organization, which we are to consider, seems to us the only means of reaching this goal and of affording to international air transportation the unlimited development to which it is entitled.[57]

The incontrovertible fact that emerges from the views of the states that were discussed above is that there had been general consensus that competition for air traffic rights, based on the concept of state sovereignty, should be fair and equitable. It is for this reason that some states even went to the extent of suggesting the creation of an 'umpire' to determine and rule on whether fair competition was being practised when states commenced seriously operating commercial air services between each other's territory.

As a first measure, the contracting states to the Convention recognize the complete and exclusive sovereignty of every state over the air space above its territory,[58] a pre-eminent tenet of international air law that had been recognized from the time of the Roman Empire[59] and carried over to the Paris Convention of 1919.[60] While each contracting state agrees that aircraft of the other which are not engaged in scheduled international air services shall have the right, subject to the observance of the terms of the Convention, to make flights into or in transit non-stop across its territory and make stops for non-traffic purposes without having to obtain permission of the grantor state for such operations, such aircraft are also generally given the right of taking on or discharging passengers, mail and cargo, provided the aircraft are engaged in the carriage of such traffic and the rights of a state concerned are not derogated by such operations.[61]

The most significant modernist construction of the role of civil aviation in securing world peace and security comes from language used in the letters of invitation issued by the United States to the participant states to the Chicago Conference, to the effect that, consequent to the war, the restorative processes of prompt communication may greatly facilitate the return to the processes of peace, However, the conscious awareness of the parties to the Convention, that in securing this peace, prudent economic and business principles must not be compromised, should not be forgotten, particularly in the context of the discussion to follow, on the role of civil aviation in the post-modern era.

## Civil aviation in the post-modern era

Post-modernism was a characteristic of the 1960s and 1970s which progressed steadily towards the twenty-first century. Post-modernist thinking was geared to accepting that human culture, as we knew it from a social and economic perspective, was reaching an end. This school of thought associated itself with the momentum of industrial society, drawing on an image of pluralism of cultures and a multitude of groups. The interaction between political modernism, which brought to bear the globalization of nations and deconstruction of separatism of human society, while at the same time ascribing to the individual rights at international law that transcended natural legislation parameters and civil aviation, has been symbiotic and essentially economic. In the post-modernist era, the fundamental modernist philosophy of state sovereignty and peace gave way to an industrial culture that emphasized economic coexistence for the betterment of the global citizen.

In view of the importance of globalization and economic integration, civil aviation went through a metamorphosis in regulatory approaches to commercial aviation in the 40 years leading to the twenty-first century. Peace and understanding

among nations was achieved through the post-modernist imperative of citizens' needs.

*Emphasis on commercial and economic issues*

The commercial bottleneck created by arguably the most contentious provision of the Chicago Convention – Article 6 – where a scheduled international air service may not operate air services into the territory of a contracting state, except with the special permission or other authorization of that state, and in accordance with the terms of such permission or authorization, became a stumbling block to globalization of air transport, which was the essence of post-modernist thought. As a response to this impasse, commercial competition transcended the past era, where dominant markets protected their established market shares. Most mega commercial activity was then the purview of governmental control under instrumentalities of state which were mostly cumbersome bureaucracies at best. Perhaps the best analogy is the biggest commercial market – the United States – which had, until recently, extensively regulated larger commercial activities pertaining to energy, transport and telecommunications.

The modernist trend towards achieving mutual understanding through economic globalization of the air transport industry has its genesis in the Chicago Conference, where several delegates underscored the importance of international harmony through economic symbiosis. Ever since President Roosevelt, in his letter of invitation to States, urged them to eschew protectionism, while encouraging them to avoid dominance over one another, the fate of economic regulation of international air transport has been relegated to the status of an obdurate dilemma which posed the question as to how states could avoid dominance by others without protecting themselves.

*Issues of security and peace*

Economic integration was not the only concern of post-modernist aviation in its quest for peace among nations. A series of unlawful acts against civil aviation in the 1960s and 1970s left the aviation world in urgent need of unification of law to find common ground between nations in eradicating the spate of offences committed against aircraft and those on board. The international aviation community took cognizance of the fact that the maintenance of international peace and security is an important objective of the United Nations,[62] which recognizes one of its purposes as being, inter alia:

> To maintain international peace and security, and to that end: take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[63]

It was clear that the United Nations had recognized the application of the principles

of international law as an integral part of maintaining international peace and security and avoiding situations which may lead to a breach of the peace.[64] Under the aegis of the International Civil Aviation Organization, three international conventions were adopted to combat this series of offences. The first – The Tokyo Convention of 1963 on Offences and Certain Other Acts Committed on Board Aircraft – referred to any offence committed or act done by a person on board any aircraft registered in a contracting state, while the aircraft is in flight or on the surface of the high seas or of any other area outside the territory of such state. The aircraft is considered to be in flight from the moment power is applied for the purpose of take-off until the moment when the landing run ends.[65] In addition, the Tokyo Convention mentions acts of interference, seizure of or other wrongful exercise of control of an aircraft, implying its concern over hijacking.[66]

The Hague Convention of 1970[67] which followed, in Article 1 identifies any person who, on board an aircraft in flight, unlawfully by force or threat or by any other form of intimidation seizes or takes control of such aircraft, or even attempts to perform such an act, as an offender.[68] Anyone who aids such an act is an accomplice, and is included in the category of the former.[69] It is clear that the Hague Convention by this provision has neither deviated from Article 11 of the Tokyo Convention nor offered a clear definition of the offence of hijacking. It merely sets out the ingredients of the offence: the unlawful use of force, threat or any other form of intimidation and taking control of the aircraft. The use of physical force, weapons or firearms or the threat to use such modes of force are imputed to the offence in this provision. The words 'force', 'threat' or 'intimidation' indicate that the element of fear would be instilled in the victim. It is an interesting question whether these words would cover an instance where the use of fear as an implement to execute the offence of hijacking covers non-coercive measures such as the drugging of food or beverages taken by the passengers or crew. The Hague Convention does not ostensibly cover such instances. In this context, many recommendations have been made to extend the scope of its Article 1.[70] It is also interesting that the Convention does not envisage an instance where the offender is not on board the aircraft but remains on the ground and directs operations therefrom after planting a dangerous object in the aircraft. According to Article 1, the offence has to be devoid of a lawful basis albeit that the legality or illegality of an act is not clearly defined in the Convention.

It is also a precondition in Article 1 that the offence has to be committed in flight, that is while all external doors of the aircraft are closed after the embarkation of the passengers and crew.[71] The mobility of the aircraft is immaterial. Furthermore, Article 1 is rendered destitute of effect if an offence is committed while the doors of the aircraft are left open.

The Convention for the Suppression of Unlawful Acts Against The Safety of Civil Aviation, signed at Montreal on 23 September 1971,[72] also fails to define in specific terms the offence of hijacking, although it circumvents barriers placed by Article 1 of the Hague Convention.[73] For instance, it encircles instances where an offender need not be physically present in an aircraft; includes instances where an aircraft is immobile, its doors open; and even draws into its net any person who disseminates false information which could endanger an aircraft in flight.[74] None of the three conventions, however, have succeeded in identifying the offence of hijacking or advocating preventive measures against the offence itself.

The failure of all attempts at identifying the offence of hijacking and formulating

a cogent system of preventive criteria attains its culmination in a political terrorist act. Such offences underscore the significant fact that, not only is political terrorism treated subjectively under different social and political contexts, but also that so far the only attempts at recognizing the threat of terrorism have been made on an intrinsic approach, more to condemn the offence than to find a cure for the deep-seated social and political factors which form the permanent breeding grounds for terrorism. The inevitable continuity of the commission of this offence cannot be stopped if serious consideration is not given to

a) the reasons for the perpetration of terrorist acts,
b) the universal definition of such acts,
c) the fact that such acts transcend national boundaries and affect the entirety of the civilized world, and
d) the fact that every act of terrorism brings a political advantage to certain nations.

## Civil aviation in a neo-post-modernist era

Until 11 September 2001, the link between civil aviation and world peace was somewhat conceptual and intellectual. However, when four civilian aircraft on US domestic services were destroyed by terrorist acts, and crews, hundreds of passengers and thousands of innocent victims in buildings located in New York City and Washington, DC were killed, civil aviation ceased to be isolated from the world peace efforts and became immediately inextricably linked to overall endeavours of the world community towards achieving peace and economic sustainability.

The neo-post-modernist era for civil aviation was signalled by United National Resolution A/RES/421(XIV) which referred to the immediate consequences of the attacks of 11 September 2001 as the closure of civil airports in the United States and disruptions of air services. The Resolution also referred to A/RES/145(V) which concerned the safety of civil aviation in relation to tourism. The new era brought about by the paralysis experienced in terms of world trade brought in both states and their instrumentality, together with the private sector to join in finding solutions to keep the trade machine of the world functioning.

### *Sustainability of air transport*

It is incontrovertible that the most critical challenge facing international civil aviation at the present time is to sustain the air transport industry and assure its consumers of continuity of air transport services. The Air Transport Association (ATA), in its 2002 State of the United States Airline Industry Statement, advises that, in the United States, the combined impact of the 2001 economic downturn and the precipitous decline in air travel following the 11 September 2001 attacks on the United States has resulted in devastating losses for the airline industry which are likely to exceed $7 billion and continue through 2002.[75] Of course, the overall picture, which portends a certain inevitable gloom for the air transport industry, is not the exclusive legacy of US carriers. It applies worldwide, as was seen in the abrupt decline of air traffic globally during 2001. The retaliation by the world community against terrorism,

which is a continuing feature of world affairs, has increased the airline passenger's fear and reluctance to use air transport. In most instances in commercial aircraft purchasing, air carriers have cancelled or postponed their new aircraft requisition orders. Many carriers, particularly in developing countries, are re-examining their cost structures and reducing their human resource bases.

The ripple effect brought to bear on the aviation insurance industry, which has compounded airlines' operational costs, is a critical issue to contend with. To counteract problems, the US and European governments have pumped subsidies of billions of dollars into their national carriers notwithstanding the fact that most of these carriers are private entities. The rationale behind these state subsidies is that air transport is strategic and vital to the economy of every country. However, state subsidies and aid are not a permanent solution to the sustainability crisis faced by the global airline industry in the present context. A wider, more profound approach is necessary, calling for a reconsideration of overall air transport policy. Of course this does not mean that states, particularly those in the developing category, need coerce their carriers to run head on towards privatization, participate in alliances or enter into regional agreements on a multilateral basis. A certain sustained but restrained strategy appears to be the most prudent approach.

The operative phrase which binds civil aviation to world peace and security still remains in the Preamble to the Chicago Convention which recognizes that the abuse of the development of civil aviation can become a threat to the general security. The critical words in this phrase pertain to the reference to the abuse of the development of civil aviation, imputing importance to economic and commercial aspects of the industry. When the events of 11 September 2001 are placed in perspective, the offences concerned were not only aimed at destruction of human life and property, but were also calculated to disrupt global commercial activity. This link brings to bear a compelling and intrinsic role which civil aviation can play as a key consideration for self-defence by the world community within the parameters of the United Nations umbrella.

### *Civil aviation and the United Nations Charter*

The Preamble to the Chicago Convention unequivocally imparts to civil aviation sufficient status as a key consideration that could be vulnerable in being the target of disruption of world peace and security. The Tokyo, Hague and Montreal conventions already referred to are some tools that have been introduced in this regard. United Nations Security Council Resolution 1269,[76] adopted by the Security Council on 19 October 1999, reflects the concern of the world community with regard to the increase in international terrorism which endangers the lives and well-being of individuals worldwide as well as the peace and security of all states. The resolution goes on to condemn all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, and in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security. With this declaration, the United Nations Security Council has widened the scope for combating terrorism, particularly to encompass such instances as the 11 September events, which could expand to economic paralysis of global commercial activity through attacks aimed at the aviation industry.