TERRORISM IN AVIATION: WHOSE CIVIL LIABILITY

"TERRORISM" IS not a new phenomenon in the world. Its cognisance as a potential danger to society the world over has been taken in various international conferences and conventions since 1934. The League of Nations Council had then laid down in `Convention for the Repression of International Terrorism' that "a duty rested on every state not to encourage or tolerate on its territory any terrorist activity with a political purpose and to do all in its power to prevent and repress terrorist acts of political character and for this purpose to lend its assistance to Governments which request it." Article 4 of `The Draft Declaration on Rights and Duties of States' prepared by the International Law Commission in 1947 sought to cast a duty on a state to prevent within its borders all political terrorist activities directed against another state. Similar duty, though wider and in general terms, was reiterated in `The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States' in accordance with the United Nations Charter, by the General Assembly in 1970. This duty was reaffirmed in `The Convention to Prevent and Punish Acts of Terrorism' by the General Assembly of the Organisation of American States and also by `Helsinki Declaration' adopted on 1 August 1975. All these conventions, declarations and reaffirmations of the duty cast upon a state to prevent terrorism within its own boundaries had found their birth in the desire of various countries the world over to seek respect for their territorial integrity and sovereignty of the nations and also to prevent, as far as possible the outbreak of yet another World War. While the Second World War could not be averted, terrorism has grown unabatedly thereafter, more particularly, in view of the upsurge in religious fanaticism and nationalism. It is likely once again to acquire significant proportions in future in view of the fast political changes taking place in the communist world where 75 years of suppression of liberties of the people with iron hand is getting dismantled, without proper leadership, system, organisation, administration and constant conflicts between the rival parties and groups in various countries the world over.

Terrorism is now widespread and there is hardly any country today which has escaped its wrath. Its object is to overawe, create a sense of fear, insecurity and loss of confidence in the minds of people at large, in the governments established by law on the one hand, and to harass such governments and prevent their smooth functioning on the other hand. The unfortunate aspect is the growth of state terrorism as a substitute of an undeclared war. As a result, some of the terrorist organisations, particularly those which have support of one or the other state keep themselves abreast with advancements in the armour technologies and tend to use these in the terrorist activities. As such, there should be no cause for surprise if terrorist organisations come to use various advanced armour technologies in aviation fields as well. In aviation industry the present facets of

terrorism are 'hijacking', 'bombing' and destruction of aircrafts. Sometimes the acts of terrorism on aircraft are considered as normal hazards of air travel.[1]

Whenever an aircraft gets involved in terrorist activity, there are several states which get affected. These states can be:

(*a*) where the aircraft is registered;
(*b*) from where the aircraft has last taken off for flight;
(*c*) where the aircraft is scheduled to land and its destination;
(*d*) from where the terrorist activity takes place;
(*e*) those to which the passengers and cargo being carried by the aircraft belong;
(*f*) where the underwriters of the aircraft reside and carry on the business;
(*g*) those against which such activity is directed.

These are by way of example but by no means exhaustive.

Every act of terrorism has therefore international ramifications. Two important questions arise and these are:

(*i*) Who is to deal with the criminality involved in the terrorist activity; in other words, who should prosecute and punish the hijackers?
(*ii*) Who should be liable for the civil consequences that flow out of the acts of terrorism on board?

Inspite of the latter question being of vital importance, the question as to who should be burdened with the civil liability has not been dealt with by any of the conventions and/or declarations.

The international community took cognisance of terrorism in aviation industry as early as in the 1960s. This cognisance culminated into a ''Convention'' held on 14 September 1963 at Tokyo known as ''Convention on Suppression of Unlawful Seizure of Aircrafts.'' This was followed by another convention held on 16 December 1970 at the Hague, known as 'Convention on Offences and other Acts Committed on Board Aircraft'. The third convention was held on 23 September 1971 at Montreal known as 'Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation and for Matters Connected therewith.' The 1982 UN Convention on the Law of the Sea has also in the definition of piracy included in its scope:

> Illegal acts of violence or detentions, or any acts of depredation, committed for private ends by the crew or the passengers of a private aircraft and directed against another aircraft or against persons or property on board, such aircraft and/or against aircraft, persons or property in place outside the jurisdiction of any State and/or any act of voluntary participation in the operation of aircraft with knowledge of facts making it a pirate aircraft.

However, all these conventions and declarations have not proved to be a sufficient deterrent to terrorism in aviation particularly state terrorism. It is true that it may not be possible to ally eliminate this but certainly with rigorous and vigorous efforts, it can be contained to a larger extent. There are a few lacunae

1. See, annexure for extent of terrorism in aviation industry since 1963.

in the conventions and there is substantial laxity and convenience in implementing and enforcing them.

One such lacunae relates to extradition of hijackers. During 1968-72, USA had faced the massive problem of hijacking of its aircrafts to Cuba. In 1972 Cuba enacted a law declaring hijacking an offence and also provided for punishment of hijackers but did not make adequate provision for their extradition to USA. Consequently, where the hijacking was motivated either by state terrorism or politics, hijackers were not extradited. Yet another glaring example of the problem of extradition came to the forefront when USA sought extradition of terrorists belonging to Arab Revolutionary Cell responsible for bombing of TWA aircraft on 1 April 1986 on its Rome-Athens route killing several passengers out of 121 on board. This is because the West German Government sought to prosecute the hijackers under its law. Similar problem had arisen in case of hijacking and destruction of an Indian Airlines aircraft to Pakistan in July 1984. On one hand the Pakistan Government became a silent spectator to bombing of the aircraft and on the other, it declined to extradite the hijackers to India. Unless proper provisions are made for extradition of terrorists, they get lenient treatment or go scotfree, as has been in the case of bombing of Pan American (Lockberie) aircraft by a Lybian terrorist group in the year 1988.

A detailed study of terrorist activity in aviation reveals that terrorism is either 'politically motivated' or 'state terrorism'. Nevertheless 'ransom' and 'pranks' have also been a motive for hijacking of aircrafts. On 24 September 1972 Interpol reported that in the previous period there had been 190 successful cases of hijacking of which 80 were pure acts of criminality, 56 cases were politically motivated and the same number undetermined. However, in most of the cases in which ransom was the motive, the hijackers were arrested although in some cases, they were killed or committed suicide, but not before the ordeal, harassment and damage to passengers and aircrafts had been caused.

During 1968-71 terrorism took alarming proportions in American aviation industry. This activity was entirely politically motivated and probably 'State terrorism'. Most of the American airlines were victims of terrorism and their aircrafts were hijacked to Havana, Cuba. Consequently, USA became very much concerned and advocated stringent steps against terrorism. In 1972 terrorism in aviation spread to various other parts of the world. The truth of the saying "one success at blackmail breeds a dozen more attempts" was well established.

Efforts to prevent terrorism were being dealt with *fait accompli* rather than with the crime in progress. Several hijackings of aircrafts have succeeded because demands of terrorists were not being resisted as deserved by those attempts. Once again it became a matter of concern for the entire international community.

In its efforts to halt terrorism in aviation industry USA sought an international agreement that would require return of hijackers to the country owning the aircraft and towards development of a system to detect passengers carrying weapons on their person. It also independently made efforts to persuade Cuba to extradite hijackers to USA to stand trial, but without success. While Cuba initially resisted taking steps to curb terrorist activities, world opinion did at last create pressure upon it to take some legal steps to curb terrorism. It took half-hearted steps. It

enacted a law making hijacking an offence and provided for extradition of hijackers to their country of origin. However, this legislation also empowered the Cuban Government to determine whether the hijacker was a common transgressor or a political refugee. The later provision had nullifying effect.

In the international sphere, USA raised the issue before the UN Security Council and also organised a conference of seventeen nations to consider the issue of hijacking. On 20 June 1972 the Security Council though unanimously, only issued a strongly worded agreement condemning air piracy and called upon the states to take all appropriate measures to deter and prevent acts of terrorism. Later, in the Conference of Seventeen Nations, USA and Canada had maintained that events of previous years underscored fragility of civil aviation network against conspiracies of terrorist groups and assaults of individual hijackers and make obvious need for historic efforts to prevent disaster. Air piracy will cease when doors of welcome are universally slammed on hijackers around the world. USA and Canada had therefore proposed a new international convention that would require signatory nations to suspend air service with any nation that did not punish or extradite hijackers or saboteurs. The USSR opposed the USA-Canadian proposal, based on the ground that it was unwise to permit nations to impose sanctions under machinery separate from the UN Security Council and that it would lead to proliferation of attempts to impose multilateral sanctions against the nations' other problems. It was also contended by USSR that a convention containing mandatory sanctions would have little chance of being universally accepted. UK and France concurred with USSR.

Ultimately the persistent efforts of USA culminated in the "Convention to prevent and punish Acts of Terrorism."

Demand for stringent measures to bring to a halt acts of terrorism in aviation were made by various organisations and airlines, so much so that on 8 June 1972, international airline pilots observed global stoppage of work for 24 hours and later on gave another threat but due to vested interests this was not executed.

It is necessary to put safety before politics or profits. Political and ideological differences amongst nations had unfortunately put politics before safety, the business interests of airlines also tended to relegate safety behind profits.

In the domestic field, USA enacted rules making it mandatory for airlines to screen passengers more closely so as to prevent hijacking and sabotage. While the competitive character of the industry made the airlines slow to accept close security of passengers, the ever increasing terrorist activity made them to yield to the necessity thereof. Several alternate remedies came to be considered, including deputing "Sky Marshals" in the planes. In fact, they came to be appointed on various airlines operating within USA, adding to the already existing heavy costs. To reduce these and avoid their liabilities, some airlines even considered seeking written waiver from every traveller and crew member, waiving all their claims on airlines for payment of compensation in such cases. Some suggested uniform refusal by the airline to pay ransoms. Nevertheless, the consensus view the world over was that the only effective way to halt air piracy was, (*i*) to adopt stricter security precautions at airports; (*ii*) denial of political asylum to hijackers; (*iii*) expeditious trial and maximum penalty such as life imprisonment without bail and

parole. It could not be disputed that prevention is better than cure. Most of the countries the world over, probably without exception, have since then adopted measures to screen passengers, crew, their luggage and cargo before taking them on the aircraft. These measures and methods of screening have also become uniform, although the degree of enforcement varies from country to country. The stricter security management at airports have paid rich dividends, and proved to be an efficient deterrent to terrorism. However, there are several instances when laxity in enforcing these security steps have resulted in occurrence of terrorist activity. It may be possible to attribute intentional laxity in some cases, but these are cases where terrorist activity is backed by the state as in the case of shooting of passengers on board, Pan Am Bombay-New York flight during its halt at Karachi on 6 September 1986.

In formulating and adopting various conventions, the international community has always been concerned with the political and legal aspects of terrorism. These conventions do not deal with civil liabilities. So far, the burden of civil liabilities arising out of terrorist activities has been borne by the airlines. They have paid compensation to passengers, for loss and damage of baggage and cargo, as if this had occurred in an accident. Depending upon the insurance cover, the airlines themselves look forward to their insurers for settlement of claims, including those for damage and loss of the aircraft itself. But like several other indirect losses, the airline has itself to bear the loss of revenue and trade as a result of loss of the aircraft. Equating the loss and damage covered by acts of terrorism, to that caused in an accident is certainly illogical and erroneous. Unlike in an accident, terrorist acts are planned, deliberate and intentional with full knowledge of loss and damage likely to be caused. Terrorist activities are akin to war like activities and not to accidents. Insurance companies are right in seeking to cover such loss and damage under war risk.

Insurance companies providing aviation insurance to passengers, cargo owners and aircraft particularly in USA became concerned with the alarming increase in claims arising out of the acts of terrorism, particularly in view of its spreading in several parts of the world. They, therefore, reacted adversely and began to club the risks arising out of terrorist activities with war and war like risks and thereby excluded these from the insurance cover. Immediate provocation for exclusion of this risk from the scope of insurance cover was Israel's raid on Beirut Airport on 28 December 1968. This raid was in fact in the nature of war like activity but there was no declared war between the two states. Exclusion of terrorist risks from the cover of insurance created a fear amongst airline operators. The airlines were not happy with this exclusion. This dissatisfaction compelled insurance companies to reconsider the provision relating to exclusion of risks of terrorist activities on the analogy of war and war like risks from the insurance cover. Most of the risks, earlier excluded, were soon brought back within the scope of the insurance but with no payment of additional premium or even by separate cover, resulting in multiple insurances. Insurance companies rarely have recourse to reimbursement of the loss suffered by them as a result of settlement of claims. It is either negligible or too cumbersome and costly as compared to such loss.

However, the crucial question that remains to be examined is who should bear

the liability of civil consequences arising out of terrorist activity in case of hijacking and/or bombing and destruction of an aircraft?

The Warsaw Convention as well as the amended convention, stipulate conditions under which a carrier becomes liable for loss and damage that may be suffered by passengers and for baggage and cargo: provisions of both these conventions are identical and the relevant rules read:

17. The carrier is liable for the damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft in the course of any of the operations of embarking or disembarking.

18(1). The carrier is liable for damage sustained in the event of destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

Though the phraseology of the above rules casts an absolute liability and are unlimited in scope, all these rules are conditioned by rule 20. The said rule reads as under:

(1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

It should be appreciated that at the time when the Warsaw Convention and amended convention were drafted the aviation industry was in infancy. The objects of these conventions were:

(*a*) to establish uniformity in the aviation industry with regard to procedure for dealing with claims arising out of international transportation and substantive liability applicable thereto and matters connected therewith;

(*b*) to provide the limits on potential liability of air carriers in the event of an accident.

These conventions had not envisaged claims arising out of terrorist activities. At the relevant time, such activities were more or less unheard of. None of the signatories to these conventions had visualised these activities and extent thereof. Consequently use of the word "accident" in article 17 of the conventions did not cover and was not intended to cover the loss and damage arising out of terrorist activities. In any case, this article has to be read in conjunction with articles 18

to 25 of the conventions. It may true that if article 17 is read in isolation and the word "accident" is interpreted so as to include terrorist activity, the liability of an airline can be absolute but this is not so. This article is certainly circumscribed by article 20 of the conventions. What article 20 envisages is that airlines should take all necessary measures to avoid the damage or that it was impossible for it or them to take such measures. When an airline takes necessary measures to avoid damage arising out of an accident it would necessarily include and imply taking of necessary measures to avoid accident itself as well.

Rule 20 stipulates exclusion of a carrier if, (*a*) it (the carrier) proves, (*b*) it (the carrier) took all necessary measures to avoid the damage or, (*c*) that it was impossible for it (the carrier) to take such measures, or (*d*) it took all necessary measures to avoid the damage.

The excluding rule 20 may appear to be simple but it is not so because "necessary measures" and "impossible to take such measures" are not capable of precise definition. These are vague and bound to vary subjectively from situation to situation. As such they are bound to be interpreted subjectively and invariably with hind wisdom and sympathy for the victim.

The taking of all necessary measures so as to prevent the damage that may be caused by acts of terrorism becomes mandatory because no airline can rule out the possibility of acts of terrorism taking place on its flights while the aircrafts are airborne – it is becoming a normal hazard of travel by air. These phrases can be dilated to an extent that these can be rendered *non est*.

The phrase "necessary measures" would imply those measures which a normal prudent person would take to prevent himself from getting involved in an act of terrorism. However, it would be impossible to define such measures with precision.

What steps can an airline take to prevent an act of terrorism? No airline in any country is armed with legal powers to physically check each and every passenger, his baggage and the cargo it carries and even if it does, it is bound to be considered a hassle or deficiency in the service by passengers, shippers and consignees and thereby come in conflict with its business and commercial interests. As such, it is certainly not possible for any airline by itself to take extensive steps to prevent acts of terrorism on board the flight, not only because of the cost factor, but also for want of legal authority to do so, besides the fear of loss of business.

However, where an airline in conjunction with the statutory authorities of a state concerned with the clearance of an aircraft and passengers before its take-off, have followed the procedure and taken the prescribed steps to physically check all passengers, crew, baggage and cargo it carries, so as to prevent acts of terrorism on the aircraft while it is airborne, the airline should be construed to have taken the "necessary measures" as contemplated by rule 20 of the Warsaw Convention and amended convention and, therefore, get benefit of this rule, *i.e.*, exclusion of its liability under rules 17, 18, and 19 of the conventions. As already stated above, the procedure of physical check of all passengers, crew, baggage and cargo has paid rich dividends and brought terrorist activity on the decline.

Every state owes a duty to protect life, limb and property not only of its own subjects, but also of aliens who come within its boundaries. This duty is corollary

to the recognition of its sovereignty. If a few armed terrorists can defy the might of the state from where piracy is committed, the state and its authorities forfeit their sovereignty, that priceless possession with which civilisation stands and falls. This duty has been recast by various conventions. Consequently, such state should be held liable for civil consequences which flow out of its negligence, failure and or/commission to discharge its duties.

It follows, therefore, that it is ultimately the state, from where an aircraft last takes off prior to occurrence of acts of terrorism on its board while it is airborne, which owes the duty to prevent such terrorist acts. This is in conformity with the spirit behind the 1934 Convention and Tokyo Convention. Therefore, it further follows that it should be such state which should be wholly responsible and liable for civil consequences of acts of terrorism on board the flight and not the airline because in the event of a terrorist activity taking place on an aircraft, a presumption can legitimately be drawn that there had been negligence, omission and/or failure on part of such state in discharging its duty to prevent the commission of acts of terrorism on the aircraft. However, such state should have the first and absolute right to have hijackers extradited and prosecuted. Further, where the state into which the aircraft was forced to fly by the hijackers refuses, neglects and/or avoids for any reason whatsoever, regardless of the motive behind the act of terrorism to extradite the hijackers within a short and reasonably prescribed period to the country from where the aircraft had taken off, it should be held liable to pay compensation and reimburse the loss/damage suffered by the airline and its passengers. It must be remembered that apart from there existing a duty on every state to prevent acts of terrorism on an aircraft which takes off from the territory, it has civil liability since it charges landing, parking and other fees from the airline. If every state is fastened with civil liability arising out of acts of terrorism as aforesaid, it is likely to discharge its legal obligations under various conventions vigorously and rigorously. Terrorism in aviation can thus be contained to a very great extent, if not totally eliminated.

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