

**AN ALTERNATIVE PROPOSAL TO MODERNIZE
THE LIABILITY REGIME FOR SURFACE
DAMAGE CAUSED BY AIRCRAFT TO ADDRESS
DAMAGE RESULTING FROM HIGHJACKINGS
OR OTHER UNLAWFUL INTERFERENCE**

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On-going efforts within the International Civil Aviation Organization (ICAO) to modernize the liability regime for surface damage caused by aircraft in flight (aka the Rome Convention system) have become bogged down over treatment of the so-called “terrorist risk”—i.e., “the liability of the carrier [under the Rome Convention] arising from terrorist attacks, e.g. bombings, sabotage, rocket attacks of aircraft resulting in damage to third parties on the ground.” This paper proposes a new treaty to address the “terrorist risk” modeled on the system for imposition of international liability and dispute resolution and compensation agreed to by Contracting States to the 1972 Convention on International Liability for Damages Caused by Space Objects (commonly referred to as the Liability Convention). The thesis of the paper is that a new Rome-type treaty modeled on Liability Convention’s no-fault, state-liability scheme for damage on the surface caused by space objects

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would afford States and individual victims an alternate source of compensation for the potentially massive, otherwise uninsurable damages that could result from terrorist use of aircraft as weapons of mass destruction in their territory, while addressing other shortfall's in existing international and domestic legal regimes, as well.

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I. PREFACE

At the 2004 Worldwide Conference on Current Challenges in International Aviation,¹ a panel of distinguished experts addressed the question of whether the liability regime for surface damage caused by

1. Held in Montreal, September 24-26, 2004.

aircraft in flight, embodied in the 1952 Rome Convention² and the associated 1978 Montreal Protocol,³ should be updated.⁴ Much of this dialogue centered on the on-going efforts within the International Civil Aviation Organization (ICAO)⁵ to modernize the Rome Convention system.⁶ Notably, liability for the intentional infliction of damage through wrongful taking of aircraft was identified as the single greatest cause of debate. Several factors were behind this polemic, including carrier objections to liability for criminal acts, victim group opposition to liability caps, and concern among all constituencies, but especially aviation insurers over the potential magnitude of another “unbounded event” like the terrorist attacks of September 11, 2001.⁷ Thus, one panelist aptly observed that endeavoring to deal with the issue within the confines of the current modernization initiative might well produce an “unratifiable result.”⁸

More recently, Dr. Ruwantissa Abeyratne, a senior ICAO official, noted that primarily “[a]s a result of various security measures taken by the international community following the events of 11 September 2001 to strengthen aircraft against attacks, attacks against aircraft . . . are not as prolific.”⁹ Nevertheless, he identified the hijacking and use of aircraft as weapons of destruction as a continuing threat to civil aviation.¹⁰ ICAO

2. Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, ICAO Doc. 7364 [hereinafter Rome Convention].

3. Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on 7 October 1952, Sep. 23, 1978, ICAO Doc. 9257 [hereinafter 1978 Montreal Convention].

4. Should the Liability Rules for Surface Damage Be Updated?, Session of the Worldwide Conference on Current Challenges in International Aviation (Sep. 26, 2004) (papers and presentations on file with author), available at <http://www.law.mcgill.ca/aviationconference/agenda-en.htm>.

5. ICAO is a specialized agency of the United Nations dedicated to promoting safe and equitable international civil aviation and linked to the U.N. Economic and Social Council (ECOSOC).

6. See Report of the Rapporteur on the Modernization of the Rome Convention of 1952, ICAO, Legal Committee, 32d Sess., ICAO Doc. LC/32-WP/3-3 (2004) [hereinafter ICAO Legal Comm. Report on Rome Modernization].

7. “[U]nlawful interference driven by the intent to cause maximum possible damage on the surface through the use of the aircraft itself as a weapon aimed at symbols of wealth and military power,” like that which took place on September 11, 2001, is “an example of what insurance officials refer to as ‘an unbounded event.’” *Id.* at 3. In other words, “[b]efore [September 11th], insurance carriers could calculate potential liability risks on the basis of foreseeable, if extreme, events like the collision of two wide-body jets over a concentrated urban area. Afterward, they could not.” *Id.* at 4.

8. Michael Jennison, Revision of the Rome Convention of 1952, Remarks at the Worldwide Conference on Current Challenges in International Aviation (Sep. 26, 2004) (on file with author).

9. Ruwantissa Abeyratne, Has the Rome Convention Adequately Responded to Security Concerns? What of MANPADS?, Proceedings of the American Bar Association Forum on Air & Space Law, Annual Meeting and Conference, (Sep. 2005) (on file with author).

10. *Id.* at 3.

likewise sees the specter of the 9/11 nightmare scenario as undermining public confidence in the industry and posing grave implications for its safety, efficiency and regularity, while endangering the lives of potentially thousands of persons, both in the air and on the ground.¹¹ ICAO member States have thus advocated expeditious reform of the Rome Convention system, while highlighting the imperative need for an “efficient, just and realistic” result with respect to third-party liabilities.¹²

With this in mind, it is worth considering whether an altogether different approach to a modernized Rome regime might provide a more viable solution for addressing the intentional infliction of damage on the surface by terrorists. Indeed, a study conducted by the ICAO Secretariat to outline the main features of a revised Rome system found that a majority of States favored a specialized treatment of the so-called “terrorist risk”—*i.e.*, “the liability of the carrier [under the Rome Convention] arising from terrorist attacks, *e.g.* bombings, sabotage, rocket attacks of aircraft resulting in damage to third parties on the ground.”¹³ In this regard, the *corpus juris spatialis*, and more specifically the system for imposition of international liability and dispute resolution and compensation agreed to by Contracting States to the 1972 Convention on International Liability for Damages Caused by Space Objects (commonly referred to as the Liability Convention),¹⁴ could prove useful as a framework for a stand-alone convention for compensating victims of catastrophic terrorist events that would, at the same time, advance States’ efforts to bolster “the financial survivability of the civil air transportation industry, and [help] assure its future insurability.”¹⁵

II. AN ALTERNATIVE TO ROME

The distinctive feature of this proposed treaty is that it would make States, as opposed to operators, answerable for damage caused on the surface of the earth by aircraft as a result of hijacking or other unlawful interference. Of course, holding governments pecuniarily liable for aircraft

11. ICAO, *Consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference*, Assembly Res. A35-9 (2004), compiled in *Assembly Resolutions in Force*, at VII-3, ICAO Doc. 9848 (Oct. 8, 2004).

12. See, *e.g.*, ICAO, *Proposed Aviation Insurance War Risk Exclusions (Presented by the United Kingdom)*, ICAO Doc. A35-WP/280 LE/25 (2004), available at <http://www.icao.int/cgi/a35.pl?ab;LE> [hereinafter U.K. Proposal on War Risk Exclusions].

13. Ludwig J. Weber, *Modernization of the Liability Regime for Surface Damage*, Remarks at the Worldwide Conference on Current Challenges in International Aviation (Sep. 26, 2004) (on file with author); see also, *e.g.*, U.K. Proposal on War Risk Exclusions, *supra* note 12.

14. Convention on International Liability for Damages Caused by Space Objects, U.S.-U.K.-U.S.S.R., Mar. 29, 1972, 24 U.S.T. 2389 [hereinafter Liability Convention].

15. See, *e.g.*, ICAO Legal Comm. Report on Rome Modernization, *supra* note 6, at 4.

hijackings and terrorism is not in-and-of-itself a novel idea. For example, at the International Conference on Aviation Security held at The Hague in 1987, Professor Andreas F. Lowenfeld introduced a program of accountability that would have employed automatic or semi-automatic sanctions against States that promote terrorist attacks.¹⁶

Though Professor Lowenfeld's plan never enjoyed broad support on the international stage,¹⁷ the concept of making state-perpetrators answerable for payment of damages to victims of airborne terrorism or their survivors unquestionably found acceptance in U.S. law with the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").¹⁸ The AEDPA, *inter alia*, created a limited exception to the sovereign immunity defense enjoyed by foreign States in U.S. courts pursuant to the Foreign Sovereign Immunities Act of 1976 ("FSIA").¹⁹ This exception allows U.S. nationals to sue foreign States for money damages resulting from state-sponsored acts of terrorism.²⁰

One could argue that the force of the AEDPA was successfully brought to bear in August 2003, when the Libyan government agreed to settle lawsuits surrounding the destruction of Pan American Airlines' flight 103 over Lockerbie, Scotland in 1988²¹ and admit responsibility for the terrorist

16. Andreas F. Lowenfeld, *Liability of Airlines for Injury Caused by Terrorism*, in AIR AND SPACE LAW: DE LEGE FERENDA 83, 83-84 (T.L. Masson-Zwaan & P.M.J. Mendes de Leon eds., 1992) (*citing* Andreas F. Lowenfeld, Some Suggestions for Attaching Meaning to the International Responsibility of States for Terrorism, Proceedings of the Conference on Aviation Security (Jan. 1987); *see also, e.g.*, Case Concerning the Factory at Chorzow (Pol. v. Ger.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sep. 13) (recognizing the principle of international law which holds that reparation for unlawful conduct "must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed.").

17. Lowenfeld, *supra* note 16, at 83.

18. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 221(a), 110 Stat. 1214, 1241 (codified at 28 U.S.C. § 1605).

19. *Id.* *See generally* 28 U.S.C. §§ 1602-1611 (2006).

20. 28 U.S.C. § 1605(a)(7) (2006). Federal courts can only assume jurisdiction under this exception if the foreign State has been designated as a State sponsor of terrorism and either the victim or claimant is a U.S. national. Plus, if the act of terrorism occurred in the foreign states' territory, the plaintiff must first attempt arbitration in accordance with international rules.

21. *E.g., Smith v. Socialist People's Libyan Arab Jamahiriya*, 866 F. Supp. 306 (1995) (dismissing plaintiff's action for damages arising out of the destruction of Pan Am Flight 103 and the resulting loss of life due to lack of subject-matter jurisdiction under the FSIA as enacted prior to its amendment in 1996), *aff'd*, 101 F.3d (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (1998) (new action commenced after passage of the AEDPA by plaintiffs seeking essentially the same relief as sought in *Smith v. Socialist People's Libyan Arab Jamahiriya*, *supra*; defendant's motions to dismiss denied), *aff'd*, 163 F.3d 748 (1998), *cert. denied*, 527 U.S. 1003 (1999); and *Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, 1999 WL 33589331 (D.D.C. Sept. 23, 1999) (denying defendant's motion to dismiss action brought by insurers of Pan American World Airways, Inc., Alert Management Systems, Inc., and their

act, for the promise of normalized relations with the United Nations (U.N.) and the United States.²² Nevertheless, looking to governments involved in carrying out or promoting terrorism to compensate its victims is, to say the least, problematic. Most obviously, there is the question of whether a claimant can realistically be expected to recover against the offending State.²³ In the United States, for example, the terrorist exception to the FSIA only allows suits against those countries designated as state-sponsors of terrorism by the State Department. Currently, seven nations are so designated: Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria;²⁴ however, this is not necessarily an exhaustive list.²⁵ Indeed, some contend that these particular States have merely been singled out for policy reasons.²⁶

Plus, even in cases where victims or their successors have secured judgments against duly designated States, the vast majority of the damage awards remain unpaid.²⁷ For, although U.S. law expressly permits attachment of certain foreign State property to satisfy judgments rendered

reinsurers to recover money spent in defending and settling claims for death or personal injury paid to the passengers of Pan Am Flight 103 and their families).

22. See S.C. Res. 1506, U.N. Doc S/RES/1506 (Sept. 12, 2003) (lifting sanction measures set forth in Security Council Resolutions 748 (1992) and 883 (1993)).

23. See Lowenfeld, *supra* note 16, at 84.

24. 31 C.F.R. § 596.201 (2005).

25. See, e.g., Keith Sealing, "State Sponsors of Terrorism" is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11, 38 TEX. INT'L L.J. 119, 135-41 (2003) (arguing that some countries on the list no longer deserve that status, while other countries not on the list do belong there).

26. See Lowenfeld, *supra* note 16, at 83 (noting that the State Department's list of states that sponsor terrorism is manipulated to support U.S. foreign policy strategies); see also Sealing, *supra* note 25, at 135-41 (questioning the methodology used to designate State-sponsors of terrorism); see also Peter G. Danchin, *Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 115 (2002) (noting that countries designated State-sponsors of terrorism correspond closely with those viewed as being of "particular concern" for religious freedom).

27. Compare, e.g., *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997) (awarding plaintiffs compensatory and punitive damages totaling \$187,627,911 against Cuba and the Cuban Air Force stemming from the deaths of three Americans killed when the two unarmed civilian Cessna 337 aircraft they were flying while searching for Cuban refugees in the Florida straits were intentionally shot down over international waters by Cuban fighter aircraft), and *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1, 16, (D.D.C. 1998) (awarding \$247,513,220 in compensatory and punitive damages against Iran, its intelligence service, and three of its high-ranking officials, for their participation in the suffering and "extrajudicial killing" of a twenty-year-old American student in terrorist attack on a tourist bus in Gaza), *abrogation recognized by Haim v. Islamic Republic of Iran* 425 F. Supp. 2d 56, 71 (D.D.C. 2006) (court recognized that case law had eliminated punitive damages since *Flatow*), and *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001) (awarding \$18,823,289 in compensatory damages arising out of the kidnapping, false imprisonment and torture of four Americans in Iraq), with Sealing, *supra* note 25, at 125-26, 128-30 (noting that none of the almost half-a-billion dollars in damages awarded against Cuba, Iran and Iraq in these three cases have actually been collected).

under the terrorism exception to the FSIA,²⁸ the President retains authority to block such attachments in the interests of national security.²⁹ Thus, opposition from successive Administrations to “what some in the foreign policy community derisively call ‘diplomacy through litigation’”³⁰ has led the U.S. State and Justice Departments to fight many, if not all, attempts to enforce such judgments.³¹

Notably, the inadequacy of domestic regimes’ handling of intentionally inflicted damage on the surface involving foreign aircraft is a long-recognized defect of the air law regime.³² Hence, the treaty envisaged here would employ a state-liability scheme modeled on the Liability Convention’s innovative “no-fault” methodology for damage caused on the surface of the earth by space objects.³³

A number of factors favor application of a strict liability standard to the “terrorist risk” over the traditional approach to State responsibility and liability focused on the conduct and intent of the injury-causing State.³⁴ First and foremost is the prevailing view that the injured victims should “not

28. 28 U.S.C. § 1610 (2006).

29. Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, Pub. L. No. 105-277, Title I, § 117(d), 112 Stat. 2681-491 (1998) (codified as amended at 28 U.S.C. § 1610(f)(3)); *see also* Act of Nov. 26, 2002, Pub. L. No. 107-297, § 201(a)-(b), 116 Stat. 2322 (2002).

30. Anthony J. Sebok, *Libya, Lockerbie, and the Long Delayed Settlement*, FINDLAW LEGAL NEWS & COMMENTARY, Sept. 8, 2003, at <http://writ.findlaw.com/sebok/20030908.html>; *see also, e.g.*, 63 Fed. Reg. 59,201 (Oct.21., 1998) (Pres. Determination No. 99-1); 65 Fed. Reg. 66,483 (Oct. 28, 2000) (Pres. Determination No. 2001-03).

31. Anthony J. Sebok, *Libya, Lockerbie, and the Lawyers: What Precedent Will be Set by a Possible Pan Am Flight 103 Settlement That Also Involves Lifting Sanctions*, FINDLAW LEGAL NEWS & COMMENTARY, Jun. 25, 2002, at <http://writ.findlaw.com/sebok/20020625.html>; *see, e.g.,* *Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1327-34 (S.D. Fla. 1999) (considering post-judgment Statements of Interest filed by the Justice Department opposing writs of garnishment against AT&T and nine other telecommunications related entities for \$187,627,911 allegedly owed Cuba under their telecommunications service agreements), *vacated, Alejandre v. Telefonica Larga Distancia, de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999), *reh'g and reh'g en banc denied, Alejandre v. Republic of Cuba*, 205 F.3d 1357 (1999); *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999) (quashing writ of attachment against U.S. Treasury funds); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (1999) (quashing writs of attachment parcels of real estate owned by the Islamic Republic of Iran, including the former Iranian embassy).

32. E.T. Nunneley, *Report of the Chairman of the United States Delegation to the International Conference Held at Rome, Italy, September 9-October 7, 1952*, 20 J. AIR L. & COM. 89, 89-92 (1953).

33. *Cf.* Ram Jakhu, *Legal Issues Relating to the Global Public Interest in Outer Space*, 21 (prepared as part of the Advanced Methods of Cooperative Security Program at the Center for International Security Studies at Maryland, 2005), available at <http://www.cisss.umd.edu> (“State liability for damage caused by the space objects of its private persons is a new principle of international law.”).

34. *See* Joni S. Charne, *Transnational Injury and Ultra-Hazardous Activity: An Emerging Norm of International Strict Liability*, 4 J.L. & TECH. 75, 76 (1989).

bear the cost of harm.”³⁵ In the aftermath of the 9/11 terrorist attacks, aviation insurance coverage for third-party liability for war risks (encompassing terrorist acts), which traditionally had limits as high as \$2 billion U.S. dollars for each insured for each individual occurrence, was capped at \$50 million U.S. dollars for all third-party bodily injury and property damage claims in a given year.³⁶ Moreover, even with the additional layered coverage offered by some insurers above the \$50 million limit, it is unusual for an aircraft to be covered for anywhere near previous amounts, and it is rare to see insurance reach even as high as \$750 million to \$1 billion U.S. dollars.³⁷ And yet, even this would be but a small fraction of the over \$20 billion in third-party bodily injury and property damage estimated to have been caused by the attacks of September 11, 2001.³⁸ A treaty for damage caused by terrorists using aircraft as weapons of mass destruction modeled on the Liability Convention could thus offer targeted States and, more importantly, individual victims, another, perhaps more viable source of compensation.

Beyond simply imposing liability on legal entities possessing substantial financial resources, a case can be made that holding States strictly liable for aircraft damage on the surface that is intentionally caused by terrorists is also consistent with the “customary rule of international law which holds States accountable for damages caused to other States through acts committed within their jurisdiction, particularly where those acts are committed with a high degree of state participation or supervision....”³⁹ An underlying presumption of this rule is that States act pursuant to their self-interest, so in theory:

[w]here a state recognizes that proof of causation alone will suffice to establish liability, presumably that State will adjust its conduct in accordance with an analysis designed to mitigate the likelihood of consequential harm. The recognized possibility of certain liability will presumably compel a State to assess the burden of

35. *Id.*; see also ICAO Legal Comm. Report on Rome Modernization, *supra* note 6, at 11 (“[V]ictims in the Rome situation have not consented to participate in the air transportation process and have no contractual relation to the carrier.”).

36. ICAO, *Proposed Aviation Insurance War Risk Exclusions* (Presented by the International Union of Aviation Insurers (IUAI)), ICAO Doc. A35-WP/126 LE/12 (2004), available at <http://www.icao.int/cgi/a35.pl?ab:LE> [hereinafter *IUAI War Risk Exclusions*].

37. *Id.* at 3; Ruwantissa Abeyratne, *Synergies and Problems in Outer Space Insurance and Air Transport Insurance*, 30 *TRANSP. L.J.* 189, 202 (2003).

38. Abeyratne, *supra* note 37, at 200.

39. Carl Q. Christol, *International Liability for Damage Caused by Space Objects*, 74 *AM. J. INT’L L.* 346, 352 (1980) quoting STAFF OF SENATE COMM. ON AERONAUTICAL AND SPACE SCIENCES, 92D CONG., 2D SESS., REPORT ON CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS, ANALYSIS AND BACKGROUND DATA 44 (Comm. Print 1972); see also Charne, *supra* note 34, at 76 (“States that operate and benefit from a given activity must also shoulder the disadvantages of the activity. . .”).

potential liability against the advantages of maintaining the status quo, with the result being at least a potential amelioration of overall safety.⁴⁰

Under the Liability Convention, for example, the “act” that provides the nexus for state-liability is the launching of space objects.⁴¹ For present purposes, however, the pivotal undertaking is not the conduct of civil aviation *per se*, but, rather, state participation in and/or authority over aviation security activities.⁴² The prospect of strict liability would, therefore, presumably foster the propagation of more robust, more effective aviation security measures and greater cooperation among State-parties in their enforcement.

In addition to potentially bolstering the overall stringency and efficacy of international aviation security, the imposition of strict liability is further justified by the potential evidentiary and national security implications of litigating liability in a post-9/11 scenario.⁴³ As with outer space activities, government activities in the areas of aviation security and counter-terrorism are “often subject to domestic laws of state secrets and national security.”⁴⁴ Thus, “[e]fforts to gather evidence relating to the circumstances surrounding the incident at issue may very well be barred by internal laws of national

40. Charme, *supra* note 34, at 76.

41. Christol, *supra* note 39, at 353.

42. See e.g., Abeyratne, *supra* note 9, at 3:

To counter the present day threats to aviation, States have adopted stringent measures of pre-board screening, background checks, biometric identification methods and fail safe verifications systems such as the Public Key Directory, enhanced assessments of potential threats to aviation, [and] easing of congestion at check in counters.

43. See, e.g., David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1753 (2004) (“In the wake of the terrorist attacks of September 11, [U.S.] Attorney General John Ashcroft announced a campaign of aggressive preventive detention. . . . As of January 2004, the government had detained more than 5000 foreign nationals through its antiterrorism efforts. . . . [O]ver seven hundred of the arrests remain secret to this day; and more than six hundred detainees charged with immigration violations were tried in secret. . . .”); Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 73 (2004) (arguing that U.S. military commissions are more suited than civilian criminal judicial courts to try al-Qaeda or Taliban detainees held at Guantanamo Bay, Cuba, in part, because such commissions can better protect classified evidence about on-going investigations into continuing national security threats and classified U.S. intelligence communications, sources, identities, capabilities, and gathering methods); Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 321-26 (2002) (discussing the U.S. Immigration and Naturalization Service’s use of “secret evidence” in deportation actions against Arab or Muslim non-citizens deemed to be national security risks).

44. Charme, *supra* note 34, at 77.

security, and thus outside the purview of the claimant State or even an impartial international tribunal.”⁴⁵

Notably, at the 35th Session of the ICAO Assembly (September 28 to October 8, 2004), the International Air Transport Association (IATA) likewise advocated a state-liability approach. Citing a proposal by the aviation underwriting community to withhold coverage for hull, spares, passenger and third-party liability damages claims caused by hostile use of “chemical, biological, radioactive (‘dirty bombs’), and electromagnetic weapons”,⁴⁶ IATA urged states to extend government guarantees to ensure coverage for the aforementioned damages arising from acts of terrorism and asked the Assembly to consider limitations of liability for war and terrorism losses.⁴⁷ According to Dr. Abeyratne, “[t]he main thrust of IATA’s argument in seeking coverage against losses in this context was that terrorists carried out their inimical acts against States and airlines and the air transport infrastructure were mere pawns or a proxy.”⁴⁸

Of course, the decision to attribute liability for surface damage from 9/11-type attacks to States is ultimately a matter of policy. One author, seemingly critical of the concept of state-liability, summarizes the debate as follows:

Should [the objective of Rome modernization] be to see what might be done to shield air transport from the financial consequences of terrorism to the greatest extent possible? Or is the public interest better served by requiring aircraft operators to assume basic, but limited financial responsibility towards the innocent public following a terrorist attack?⁴⁹

However, this is an oversimplification. Indeed, one could argue that the Rome Convention, by its terms, does not apply to damage resulting from terrorists’ use of civilian aircraft as weapons of destruction in an avowed “holy war.”⁵⁰ Plus, it ignores the antithesis; *i.e.*, whether governments, which are arguably better positioned than airlines to implement and enforce aviation security measures, should rightfully bear the pecuniary brunt of

45. *Id.*

46. *See IUAI War Risk Exclusions*, *supra* note 36, at 4.

47. Abeyratne, *supra* note 9, at 17-18 (citing ICAO War Risk Exclusions (Presented by the International Air Transport Association (IATA)), ICAO Doc. A35-WP/97 LE/8, available at <http://www.icao.int/cgi/a35.pl?ab:LE>).

48. *Id.* at 18.

49. Harold Caplan, *Post 9/11-Air Carrier Liability Towards Third Parties on Land or water as a Consequence of War or Terrorism*, 30 AIR & SPACE L. 5, 8-9 (2005).

50. *E.g.*, Rome Convention, *supra* note 2, art. 5. Article 5 states: “Any person who would otherwise be liable under the provisions of this Convention shall not be liable if the damage is the direct consequence of *armed conflict* or civil disturbance, or if such person has been deprived of use of the aircraft by act of public authority.” (emphasis added); *see also* NICHOLAS M. MATTE, TREATISE ON AIR-AERONAUTICAL LAW, 519 (1981).

security lapses. Regardless, the view of damage on the surface deliberately inflicted by terrorists as a risk inherent to aerial navigation for which the aircraft operator may be held liable to third parties under a quasi-contract-like theory⁵¹ seems more a function of historical inertia than reasoned deliberation of policy. Thus, a reexamination of the issue and possible alternative courses of action is both timely and appropriate.

III. THE 1972 LIABILITY CONVENTION

The gravity of the issue of liability for damage on the surface caused by space objects was perhaps first brought to the attention of international community at large in the early-1960s. Specifically, at a September 1962 meeting of the U.N. Committee on the Peaceful Uses of Outer Space (COPUOS), the U.S. delegate dramatically called for early consideration of the problem as he produced and placed on the table in front of him a piece of metal weighing about fourteen pounds, which was believed to have been part of *Sputnik IV* (launched by the Soviet Union in May 1960), but which had fallen to earth and landed in a street in Manitowoc, Wisconsin earlier that month.⁵² In the ensuing decade, a number of equally illustrious incidents served to underscore the pressing need for an agreement on the subject. On one such occasion in 1970, the United States was again showered with Soviet space vehicle fragments, one of which weighed in excess of 650 pounds!⁵³

Fortunately, no serious injury or damage resulted from any of these incidents and, in March 1972, the Liability Convention at last opened for signature.⁵⁴ From conception to actually coming into force, culmination of the Liability Convention ultimately took just over ten years (1962-72). But the prescience of the accord was soon amply demonstrated when, on January 6, 1978, *Cosmos 954*—a Soviet nuclear-powered satellite—fell from orbit, reentered the earth's atmosphere, and broke up over Canada, scattering radioactive debris across its Northwest Territories. This incident

51. MATTE, *supra* note 50, at 504 (“The incapacity, even legal prohibition, of third parties on the surface to prevent the overflight of aircraft above their domains, must have as a corollary the obligation to be reimbursed for any harm from aerial navigation.”); *see also* ICAO Legal Comm. Report on Rome Modernization, *supra* note 6, at 11 (“[V]ictims in the Rome situation have not consented to participate in the air transportation process and have no contractual relation to the carrier.”).

52. See BIN CHENG, *The 1972 Convention on International Liability for Damage Caused by Space Objects*, 1 *MANUAL ON SPACE LAW* 83 (Nandasiri Jasentuliyana & Roy S.K. Lee eds., 1998), *reprinted in* *STUDIES IN INTERNATIONAL SPACE LAW* 286, 286-7 (Clarendon Press 1997) [hereinafter *STUDIES IN SPACE LAW*].

53. *Id.* at 287.

54. Convention on International Liability for Damage Caused by Space Objects, G.A. Res. 2777, U.N. GAOR, 26th Sess., Supp. No. 20, at 25, U.N. Doc. A/8420 (1971) *available at* http://www.unoosa.org/oosa/SpaceLaw/gares/html/gares_26_2777.html.

resulted in the first claim to be made and then resolved pursuant to the agreement.⁵⁵

The 1972 Liability Convention was born out of articles III and VII of the 1967 Outer Space Treaty (OST).⁵⁶ OST, article III makes general principles of international law (*lex generalis*)—including rules of customary law—and the U.N. Charter⁵⁷ applicable to outer space.⁵⁸ Pursuant to OST, article VII, each State from whose territory or facility a space object is launched, as well as each State that actually launches or procures the launching of an object into space, is internationally liable for damage caused by the object, whether such damage occurs on the Earth, in outer space, or on the moon or other celestial body. The Liability Convention, in turn, specifies the conditions under which liability is to be accessed and compensation paid for damage caused by space objects and formalizes a process whereby claims may be considered and determined.⁵⁹

Article I of the Liability Convention enumerates four types of harm for which damages are recoverable: loss of life, personal injury, other impairment of health, and loss of or damage to property. By virtue of the inclusion of the terms “other impairment of health,” recovery under the treaty can be had for essentially all injuries to persons, to include damages for purely mental or psychological injuries.⁶⁰ The Liability Convention’s decidedly pro-victim approach in this regard stands in marked contrast to

55. Claim against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954, 18 I.L.M. 899, 901 (1979) (“The claim of Canada for compensation for damage caused by the Soviet Cosmos 954 Satellite is preferred against the Union of Soviet Socialist Republics in accordance with the international practice of States and the provisions of the 1972 Convention on International Liability for Damage Caused by Space Objects.”); Protocol on Settlement of Canada’s Claim for Damages Caused by “Cosmos 954,” Apr. 2, 1981, Can.-U.S.S.R., 20 I.L.M. 689 (1981); *but compare* Ram Jakhu, *Legal Issues Relating to the Global Public Interest in Outer Space*, prepared as part of the Advanced Methods of Cooperative Security Program at the Center for International Security Studies at Maryland, 21 (Oct. 2005), available at <http://www.cissm.umd.edu/> (“there has been . . . one claim brought under this [treaty]”); with James A Beckman, *Citizens Without a Forum: The Lack of an Appropriate and Consistent Remedy for United States Citizens Injured or Killed as the Result of Activity Above the Territorial Air Space*, 22 B.C. INT’L & COMP. L. REV. 249, 273 (asserting Canada that never “formally invoked” the Liability Convention, but merely used its rules as “guiding principles.”).

56. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410; *see also* Christol, *supra* note 39, 351-52.

57. Charter of the United Nations, Jun. 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 [hereinafter U.N. CHARTER].

58. *See* Ivan A. Vlasic, *Space Law and the Military Applications of Space Technology*, in PERSPECTIVES ON INTERNATIONAL LAW 385, 394 (N. Jasentuliyana ed., 1995); and BESS C.M. REIJNEN, THE UNITED NATIONS SPACE TREATIES ANALYSED 102 (Editions Frontières 1992).

59. CARL Q. CHRISTOL, THE MODERN INTERNATIONAL LAW OF OUTER SPACE 91 (Pergamon Press 1982).

60. *See* Christol, *supra* note 39, at 360.

that generally taken in the private international air law arena, where the notion of liability for damages solely attributable to what is commonly termed mental or emotional distress has historically been rejected.⁶¹ Controversy does exist over the extent to which recovery may be had, if at all, for indirect or consequential damages under the Liability Convention's remuneration provisions.⁶² However, inasmuch as articles II and III of the Convention both specify that the harm must be "caused by" the space object of a launching State for damages to be recoverable, there presumably must be at least a "causal connection" between the accident and the damage claimed.⁶³

As OST, article VII portends, liability under the Liability Convention rests with the "launching State," which though sometimes used interchangeably with "launching authority," is defined more comprehensively by article I of the treaty to mean: (1) a State which launches or procures the launching of a space object; or (2) a State from whose territory or facility a space object is launched.⁶⁴ Here again, the Liability Convention's approach is at odds with that generally taken in air law and by the Rome Convention system, in particular, whereby liability is imposed on the "operator of the aircraft," who, absent proof to the contrary,

61. See *e.g.*, *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530 (1991) (the Supreme Court analyzed Article 17 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3014, T.S. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 40,105 (entered into force in the United States in 1934) [the Warsaw Convention], pursuant to which international air carriers are liable for damage sustained by passengers as a result of an "accident" on board the aircraft or during embarkation or disembarkation, and held that carriers could not be held liable for mental injuries unaccompanied by physical injury); see also *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004) (holding that passengers cannot hold carriers liable in accordance with the Warsaw Convention for mental injuries that accompany, but are not caused by bodily injury); but cf. Paul Stephen Dempsey, *International Air Cargo & Baggage Liability and the Tower of Babel*, 36 GEO. WASH. INT'L L. REV. 239, 258-59 (2004) (noting that the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955, Mar. 8, 1971 [the Guatemala Protocol], reprinted in Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 369 (2000), *inter alia*, amended article 17 of the Warsaw Convention, substituting "personal" for "bodily" injury in the definition of damage, thereby "arguably including mental or emotional injury" (citing Michael Milde, "Warsaw" System and Limits of Liability-Yet Another Crossroad?, 18 ANNALS AIR & SPACE L. 201, 215 (1993)).

62. See Christol, *supra* note 39, at 360-62; but compare STAFF OF SENATE COMM. ON AERONAUTICAL AND SPACE SCIENCES, 92D CONG., 2D SESS., REPORT ON CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS, ANALYSIS AND BACKGROUND DATA 24 (Comm. Print 1972): "[The Convention] holds a launching State liable for damage traceable directly to the launching, flight and re-entry of a space object or associated launch vehicle but does not cover what some delegations earlier called remote or indirect damage and for which there is only a hypothetical causal connection with a particular space activity."

63. Christol, *supra* note 39, at 361-62.

64. Liability Convention, *supra* note 14, art. I.

is presumed to be the aircraft's registered owner⁶⁵ and, as such, is more likely to be a nongovernmental entity.⁶⁶ Once again, assigning liability to launching States is justified under customary international law, which generally holds States liable for damages incurred within their jurisdiction by other States and caused by activities with significant state participation or supervision, such as the launching of space objects.⁶⁷

Notably, there are no territorial or geographic limits on the application of the Liability Convention; however, the operative standard of liability varies based upon where the damage occurs. Specifically, under article II, the launching State is "absolutely liable" for "damage caused by its space objects on the surface of the Earth or to aircraft in flight"; for damage elsewhere, launching State liability is fault-based.⁶⁸ Thus, while the Rome system and the Liability Convention differ with respect to *whom* is held liable, they are consistent in imposing strict or "no-fault" liability for damage on the surface of the Earth.⁶⁹

On the issue of limitation of damages, however, air and space law regimes are once more divergent. Again, the Rome system holds aircraft operators liable for damage on the surface caused by "aircraft in flight."⁷⁰ But to help ensure this potential liability does not threaten the commercial viability of civil aviation, Rome generally seeks to apportion operators' risks and cap their legal exposure at insurable levels.⁷¹ Conversely, to drafters of the Liability Convention, space activities were needed due to their inherent importance, and, therefore, extra encouragement in the form of limited liability was unnecessary.⁷² Consequently, launching State liability for damage on the surface caused by space objects is unlimited.

With the primary aim of ensuring prompt and adequate recovery of damages for victims, the Liability Convention also establishes formal

65. Rome Convention, *supra* note 2, art. 2.

66. See e.g., Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, art. 50, S. TREATY DOC. NO. 106-45 (States Party to the Convention are required by this Article to require that their carriers are insured sufficiently to cover their potential liability under the Convention) [hereinafter the 1999 Montreal Convention]; and Weber, *supra* note 13, at 4 (noting that a modernized Rome-regime would apply the same principle as in Article 50 of the 1999 Montreal Convention).

67. Christol, *supra* note 39, at 352.

68. Liability Convention, *supra* note 14, art. III.

69. Compare Rome Convention, *supra* note 2, art. 1(1), with Liability Convention, *supra* note 14, art. II; see also CHENG in STUDIES IN SPACE LAW, *supra* note 52, at 326.

70. Rome Convention, *supra* note 2, art. 1, 2.

71. MATTE, *supra* note 50, at 504, 509; see also Rome Convention, *supra* note 2, art. 12 ("If a person wrongfully takes and makes use of an aircraft without consent of the person entitled to use it, his liability shall be unlimited.").

72. Christol, *supra* note 39, at 367; see also W.F. Foster, *The Convention on International Liability for Damage Caused by Space Objects*, 1972 CAN. Y.B. INT'L L. 137, 150-54 (1973).

mechanisms for the assessment and payment of liability.⁷³ Pursuant to the treaty, claims for compensation must be submitted through diplomatic channels (or through the U.N. Secretary-General) to the launching State, by one of three categories of potential claimant States.⁷⁴ First, in order of priority, are States whose “natural or juridical persons” suffer damage. But if the victim’s State of nationality (*loci patriae*) does not present a claim, the State in whose territory the victim sustained their injuries (*loci delicti commissi*) may do so. Lastly, if neither of the two aforementioned States submits a claim, the way is clear for the victim’s State of permanent residence (*loci domicilii*) to petition the launching State for relief.⁷⁵

Per article X of the treaty, claims must be brought within one year of the occurrence of the damage or the identification of the liable launching State. In the event the claimant State does not know of the existence of the damage or the identity of the launching State, the one year time limit for submission of claims runs from the date the claimant State could reasonably have discovered the damage through the exercise of due diligence. Also, the claimant State must submit its claim within the prescribed one year limit even if the full extent of the damage is not known at the time, with the proviso that the claim may later be revised as more information comes to light.

A claimant State need not exhaust local remedies available to it, or to natural or juridical persons it represents, as a prerequisite to submitting a claim under the Liability Convention.⁷⁶ Nor, on the other hand, may a claimant State pursue compensation under the treaty and simultaneously maintain an action in another administrative, juridical, or international forum.⁷⁷ For claims brought pursuant to the Liability Convention, the treaty provides for an obligatory negotiation period that runs for one year from the date of submission of the claim.⁷⁸ If a settlement is not reached within one year, however, either party may “request” establishment of a Claims Commission to adjudicate the matter and, if requested, its establishment is mandatory.⁷⁹

73. See Herbert Reis, *Some Reflections on the Liability Conventions for Outer Space*, 6 J. SPACE L. 125, 126 (1978) (noting that throughout the formulation of the Liability Convention, the United States maintained that the objective of the treaty “must be to restore a claimant to the condition existing prior to the injury.”); see also Christol, *supra* note 39, at 351 (“particularly because of the 1972 Liability for Damages Convention, . . . [spatial liability law] is now regarded as victim or claimant oriented”).

74. Liability Convention, *supra* note 14, art. VIX.

75. *Id.*, art. VIII.

76. *Id.*, art. XI.

77. *Id.*

78. *Id.*, art XIV.

79. *Id.*; see also Foster, *supra* note 72, 174 n.122 (“Article XIV provides that ‘. . . the parties concerned shall establish a Claims Commission at the request of either party.’” (emphasis in original)).

The Claims Commission is composed of three members no matter what the number of claimant States or launching States is: one appointed by the claimant State(s), a second appointed by the launching State(s), and a third, the Chairman, appointed by agreement of the parties.⁸⁰ The parties must make their appointments within two months of the request to establish the Commission, and have four months to reach an agreement on their choice for a Chairman.⁸¹ If consensus on a Chairman cannot be reached, either party may request the U.N. Secretary-General make the appointment within an additional two month period.⁸² Plus, neither party can frustrate the establishment of a Claims Commission by failing to make its appointment, since the treaty authorizes the Chairman to sit as a single-member Claims Commission if this were to occur.⁸³ Once established, the Claims Commission itself determines the location where it will sit, its procedures, and all other administrative matters.⁸⁴

The Commission is charged with deciding the merits of a claim and determining the amount of damages payable to the claimant State, if any.⁸⁵ The treaty's "compromise formulation on applicable law,"⁸⁶ which a former COPUOS Legal Sub-Committee Chairman called the "heart of the Convention,"⁸⁷ states that the amount of damages payable

shall be determined in accordance with international law and the principles of justice and equity, in order to . . . restore the person, . . . State or international organization on whose behalf the claim is

80. Liability Convention, *supra* note 14, art. XV.

81. *Id.*

82. *Id.*

83. *Id.*, art. XVI, XVII.

84. Liability Convention, *supra* note 14, art. XVI.

85. *Id.*, art. XVIII.

86. See Christol, *supra* note 39, at 369; see also Van C. Ernest, *Third Party Liability of the Private Space Industry: To Pay What No One Has Paid Before*, 41 CASE W. RES. 503, 523 (1991):

Belgium sought to apply the national law of the injured party, France favored adopting the law of the place of injury, and the Soviet Union advocated applying the law of the launching State. The resulting compromise eliminated all reference to national law.

(citing E. Van Bogaert, *Aspects of Space Law* 173 (1986)); and Marc S. Firestone, *Problems in the Resolution of Disputes Concerning Damage Caused in Outer Space*, 59 TUL. L. REV. 747, 755-59 (1985) (discussing the numerous proposals submitted on the choice of law problem).

87. Ernest, *supra* note 86, at 523 (citing *Recent Treaties and Statutes, Space Law – Convention on Liability – Procedure Established to Enforce Liability for Damage Caused by Space Objects*, 6 VAND. J. TRANSNAT'L L. 262, 267 n.41 (1972) see also CHENG, *supra* note 52, at 355 (referring to the treaty's provision on applicable law as "the blood stream of the Convention.")).

presented to the condition which would have existed if the damage had not occurred.⁸⁸

Decisions of the Commission are by majority vote (except, in the case of a single-member Commission),⁸⁹ but are binding only to the extent that the parties so agree.⁹⁰ Otherwise, Commission rulings serve as recommendations, which the parties are treaty-bound to consider in good faith.⁹¹ Either way, the treaty requires that Claims Commission decisions be made public.⁹²

Finally, article XIX requires that the Claims Commission render its decision within one year of the date of its establishment. Thus, even allowing for the full six month allotment to assemble the Commission provided for under article XV, the Liability Convention's recovery scheme affords a claimant the possibility of complete and final adjudication of its claim and award of damages within 30 months of its submission.⁹³

Critics of the Liability Convention point out that its provisions are untested and, therefore, there are no indicia of the adequacy, reliability, or consistency of its rules.⁹⁴ Professor Foster has further noted that while submission of a dispute to a Claims Commission is mandatory at the option of either party, decisions and awards of the Commission, though final (*i.e.*, not subject to appeal), are not binding on the parties in the absence of an agreement to the contrary.⁹⁵ For this reason, according to Foster, "the Convention cannot be said to lay down an effective procedure under which disputed claims are definitely settled—at best it ensures a claimant State a reasonable prospect of the payment of compensation."⁹⁶ For him, this

88. Liability Convention, *supra* note 14, art. XII.

89. *Id.* art. XVI.

90. *Id.* art. XIX.

91. *Id.*

92. *Id.*

93. The Claims Commission may extend the period for a decision as it deems necessary; plus, in cases where a participating international organization is liable the process may take an additional six months. *Id.* art. XIX, XXII; *see also* Ernest, *supra* note 86, at 522 (noting that in order to benefit from expeditious adjudication under the Convention and avoid the extensive time periods normally associated with complicated international litigation, claimants must forfeit valuable discovery rights afforded under municipal law, especially if the launching State is the United States).

94. *See* Richard Berkley, *Intellectual Property Issues in East Asia Proceedings of the 1997 Symposium: Article and Comment: Space Law Versus Space Utilization: The Inhibition of Private Industry in Outer Space*, 15 WIS. INT'L L.J. 421 (1997); *see also* Ram Jakhu, *Legal Issues Relating to the Global Public Interest in Outer Space*, prepared as part of the Advanced Methods of Cooperative Security Program at the Center for International Security Studies (Oct. 2005), available at <http://www.cissm.umd.edu/> ("[T]he burden of absolute liability has actually not yet been very heavy on the space-faring nations because there has been only one claim under this provision"); *see also* Beckman, *supra* note 55, at 273; and Ernest, *supra* note 86, at 523-26.

95. Foster, *supra* note 72, at 175.

96. *Id.*

renders the Liability Convention “seriously defective” and, thus, of questionable value.⁹⁷

Yet, Professor Foster himself concedes that, in the final analysis, given the absence of any coercive power, the efficacy of even a final binding decision would ultimately depend (as it does under the Liability Convention) upon the good faith of the responsible launching State.⁹⁸ What is more, in as much as the concept of good faith is not only a keystone of the international legal order, but a fundamental principle of *all* law, that the treaty assumes a prevailing good faith can hardly be deemed a major defect.⁹⁹ Other critics likewise acknowledge that, despite its possible problems, the Liability Convention provides a solid working foundation for international cooperation in outer space and represents a step forward in the legal regulation of space activities.¹⁰⁰

The Liability Convention was clearly not intended to deal with all of the possible situations in which harm might result from activities in space.¹⁰¹ As Professor Christol discerned, “[h]ad negotiations moved in this direction, . . . it is most unlikely that the Liability Convention would ever have been completed.”¹⁰² Nevertheless, all things considered, the treaty’s substantive principles, rules, and procedures for settling international claims for damages resulting from malfunctioning of space objects effectively satisfy its stated goal of providing prompt and adequate compensation to injured parties.¹⁰³ And, assuming good faith and a modicum of good will among the parties, the Convention may, indeed, actually turn out, in practice, to be “more effective than some of its critics would give it credit for.”¹⁰⁴

97. *Id.*

98. *Id.* at 175-76.

99. See J. F. O’CONNOR, GOOD FAITH IN INTERNATIONAL LAW *passim* (1991); see also Christol, *supra* note 39, at 370 (noting that “such concepts may not be overly precise when it comes to identifying compensable harm and making monetary awards, but this should not be considered a serious defect in the present law”); cf. U.N. CHARTER, *supra* note 57, art 2(2) (“All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill *in good faith* the obligations assumed by them in accordance with the present Charter.” (emphasis added)); and Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 (Article 31(1) provides: “A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” (emphasis added)).

100. Ernest, *supra* note 86, at 523 n.140; see also CHENG, *supra* note 52, at 355 (regarding the Liability Convention: “[L]ike the case of a dog that dances on its hind legs, [the remarkable thing] is not how well it performs, but that it exists at all.”).

101. Christol, *supra* note 39, at 368; see also Abeyratne, *supra* note 37, at 192-99 (discussing the “risk factors” associated with the launch and operation of spacecraft).

102. Christol, *supra* note 39, at 369.

103. *Id.*; see also CHENG, *supra* note 52, at 355.

104. CHENG, *supra* note 52, at 355-56.

IV. OVERVIEW OF THE DRAFT CONVENTION¹⁰⁵

A. Principles

1. Article 1 (1), Definition of “Aircraft in Flight.”

The Draft Convention’s definition of “aircraft in flight” is the same as that found in the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641 (1970 Hague Convention), and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sep. 23, 1971, 24 U.S.T. 564 (1971 Montreal Convention), as well as in the 1952 Rome Convention. The new treaty would thus extend the aviation security conventions’ approach of connecting criminal jurisdiction to the opening and closing of the aircraft doors to liability. Notably, though the United States is not party to the Rome Convention, it is party to both the 1970 Hague and 1971 Montreal Conventions.

2. Article 1 (2), Definition of “Damage”

The definition of “damage,” though similar to article I of the 1972 Liability Convention, differs in one significant respect: the Liability Convention language of “loss of life, personal injury or other impairment of health” is replaced by “physical harm or death.” The latter mirrors the language of the Title IV of the U.S. Air Transportation Safety and System Stabilization Act,¹⁰⁶ titled the “September 11th Victim Compensation Fund of 2001,” and is thereby intended to exclude recovery for purely mental or emotional injury.¹⁰⁷ In this way, the proposed treaty would steer clear of the controversy over the verifiability of mental injuries, expansion of the pool of potential claimants to include persons who merely witness the terrorist events second-hand or from a distance, or the increased possibility of fraudulent claims, which has plagued recent efforts to modernize the Rome Convention system.¹⁰⁸

105. The text of this is notional treaty, entitled a *Draft Convention on International Liability for Damage on the Surface Caused by Aircraft Due to Hijacking or Other Unlawful Interference*, is incorporated herein as Appendix 1 [hereinafter Draft Convention].

106. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

107. *But see* Dempsey, *supra* note 61, at 258-59 (discussing the Guatemala City Protocol, where personal injury includes mental or emotional injury).

108. *See* ICAO Legal Comm. Report on Rome Modernization, *supra* note 6, at 14.

3. Article 1 (3), Definition of “State of Embarkation”

Once again, this proposed regime utilizes the Liability Convention’s innovative “no-fault” state-liability scheme;¹⁰⁹ here, however, “State of embarkation” replaces the outer space the concept of “launching State” as the focus of liability.

4. Article 1 (4), Definition of “Aircraft”

The Draft Convention would not apply to State aircraft, employing essentially the same definition of “aircraft” as the 1944 Convention on International Civil Aviation (the Chicago Convention).¹¹⁰ Thus, “aircraft used in military, customs and police services” are excluded from its coverage; however, as under the Chicago Convention,

[A]ircraft owned and operated by governments for official use, *other* than military, customs and police services, are ‘civil aircraft’ for purposes of the [Draft] Convention. Moreover, aircraft owned and operated by government authorities, in countries with State-run economies, which provide civil aviation services (especially scheduled services), are also to be regarded as civil aircraft.¹¹¹

5. Article 2, Definitions of “Hijacking” and “Unlawful Interference”

The Draft Convention’s definitions of “hijacking” and “unlawful interference” are adapted from the descriptions of “offenses” set forth in article 1 of the 1970 Hague Convention and Article 1 of the 1971 Montreal Convention, respectively. However, the Draft Convention *does not* deal with damage on the surface caused by “aircraft in service,” which, under Article 2 of the Montreal Convention, encompasses the period “from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing.” Therefore, the Draft Convention’s concept of “unlawful interference” is narrower than the totality of “offenses” covered by the term under the 1971 Montreal Convention.

6. Article 3(1), Scope, Domestic Flights

The focus of the Draft Convention is compensation for damage on the surface in the territory another Contracting State, without regard to whether the originally scheduled destination of the flight was domestic or

109. See *supra* text accompanying notes 33-42.

110. Convention on International Civil Aviation, Dec. 7, 1944, T.I.A.S. No. 1591, 3 Bevens 944.

111. MATTE, *supra* note 50, at 139 (emphasis in original).

international. However, per article 7, the Draft Convention would not apply with respect to the liability of a State of embarkation to its own nationals.¹¹²

7. Article 3(2), Scope, “Basic Risk” Damages

The Draft Convention is intended to establish a separate, stand-alone regime for redressing damage arising from acts of unlawful interference (i.e., the “terrorist risk”). Surface damage arising from the “basic risk” (i.e., related to safety) would presumably continue to be covered by applicable international conventions, such as the Rome Convention system or its eventual successor, or, in the case of states not party to such conventions, by existing domestic regimes.¹¹³

8. Article 3(3), Scope, Nuclear Damage

As with the Rome system, the Draft Convention would not apply to damage regulated by certain other international conventions relating to nuclear damage.

B. Liability Provisions

1. Article 4, Liability of the State of Embarkation

Under the Draft Convention, liability attaches to States, rather than to the operator of the aircraft, as under the Rome Convention. Once again, the goal is to install an absolute liability regime reminiscent of the Liability Convention. There are two bases to affix liability to a State of embarkation under the draft Convention. First, liability attaches to the State of embarkation if persons committing and/or devices or substances used in the commission of the offense were on board the aircraft when it departed its territory or facility. Alternatively, in the case of an offense carried out from the ground,¹¹⁴ liability attaches to the State of embarkation if the devices or substances used in the commission of the offense are launched, employed, or remotely controlled from within its territory. As in the case of the Liability Convention, liability is unlimited.

2. Article 4(2), Liability of the State of Embarkation, Bracketed Language

Were an aircraft to again be employed as a weapon in a deliberate attempt to produce damage on the surface, *à la* September 11, 2001, military engagement of the aircraft in flight may be necessary to defend against the attack and could also serve to mitigate the potential damage. In view of this,

112. See *infra* text accompanying note 119.

113. Weber, *supra* note 13, at 3 (on file with author).

114. E.g., an attack carried out with Man Portable Air Defense System (or “MANPADS”) missiles. See generally Abeyratne, *supra* note 9, at 5-6 (on file with author).

liability of States of embarkation under the draft Convention, as proposed, extends to damage caused on the surface of the territory of a Contracting State when, consistent with international norms governing the resort to armed force, an aircraft being used as a weapon is shot down.¹¹⁵ However, as noted in a 1994 U.S. Department of State memorandum dealing with use of weapons against civil aircraft, “mistakes are likely to occur under any policy that contemplates the use of weapons against civil aircraft in flight”;¹¹⁶ thus, this approach would no doubt engender significant controversy. Accordingly, removing the bracketed language would likely produce amore universally acceptable agreement.

3. Article 5(1), Joint and Several Liability

As in the case of multiple launching States under the Liability Convention, liable States of embarkation are joint and severally liable for damages covered by the draft Convention.

4. Article 5(2), Apportionment of Liability

To promote cooperation in the establishment and enforcement of aviation security measures among State Parties and avoid divisive debates over each liable State of embarkation’s degree of culpability, damages shall be apportioned equally among them. What’s more, the Draft Convention imposes a rebuttable presumption that the persons who committed and/or devices or substances used in the commission of a hijacking or other unlawful interference were on board the aircraft when in left its original embarkation point, so that all States of embarkation for a given flight are presumptively liable.

5. Article 5(3), International Agreements on Apportionment of Damages

Adapted from Article V(2) of the Liability Convention, this provision gives States the freedom to enter into agreements with respect to apportioning the damages for which they may become liable as a State of embarkation among themselves. States may thus, for example, consider such damages when negotiating bilateral air service agreements.

115. For example, when necessary and proportionate to respond to an armed attack, as provided for in U.N. CHARTER art. 51.

116. Memorandum from Alexander F. Watson, Assistant Secretary of State for Inter-American Affairs, U.S. Department of State, to Warren M. Christopher, Secretary of State 5 (May 10, 1994) (on file with author); *see also, e.g.*, S.C. Res. 1067, U.N. SCOR, 51st Sess., 3683rd mtg., U.N. Doc S/RES/1067 (1996) (condemning use of weapons against civilian aircraft).

6. Article 6, Exoneration from Liability

The Draft Convention assigns liability for the willful misconduct of individuals to States of embarkation, not based on any specific act or omission of the States *per se*, but rather as a matter of policy. The aim is to (a) ensure prompt and adequate recovery of damages by victims and (b) encourage the utmost cooperation among State Parties in aviation security and counter-terrorism and, thereby, minimize the risk that terrorist attacks and other acts of unlawful interference pose to parties on the ground. Therefore, fewer perpetrators of hijackings or other lawful interference (or their State-sponsors) will be, in effect, rewarded for their misdeeds. Per Article 6, States of embarkation are able to gain exoneration in whole or in part to the extent they can show that the damage is, in fact, the result of an act, omission, or gross negligence of the claimant State or of “natural or juridical persons” on whose behalf the claimant State is presenting a claim.¹¹⁷ Unlike the Liability Convention, which covers *all* damage caused on the surface of the Earth by space objects, the scope of the Draft Convention is limited to damage caused on the surface of the Earth by aircraft in flight *due to* hijackings or other lawful interference. Therefore, the Liability Convention’s provision for denying liable States exoneration from liability where damage results from activities violative of international law (including the U.N. Charter)¹¹⁸ has no applicability and is, thus, omitted.

7. Article 7, Exclusion of Nationals

As mentioned previously, the Draft Convention does not apply with respect to the liability of a State of embarkation to its own nationals. This provision recognizes the basic principle that, under normal circumstances, international law refrains from dealing with relations between a State and its nationals.¹¹⁹

117. Discussing article VI, paragraph 1, of the Liability Convention, upon which article 6 of the draft Convention is based, Professor Cheng notes that the phrase “natural or juridical persons [the claimant State] represents” is subject to two interpretations. The first is that it refers to all persons for whom, under Article VI of the 1967 Space Treaty, a claimant State may be responsible. The second and, according to Professor Cheng, more accurate interpretation, is that it refers only to natural or juridical persons on behalf of whom the claimant State is presenting a claim under the Convention. CHENG, *supra* note 52, at 328.

118. Liability Convention, *supra* note 14, art. VI(2); *see also* Christol, *supra* note 39, at 366-67 (Commenting on Article VI, paragraph 2, of the Liability Convention, Professor Christol notes that refusing to exonerate a launching State due to its failure to comply with international law would necessitate a finding of malice tantamount to that which is needed to justify an award of punitive damages).

119. *See* ICAO Legal Comm. Report on Rome Modernization, *supra* note 6, at 12 (discussing “the jurisdiction and sovereignty of States in determining what liability regime ought to apply to domestic aviation”).

8. Article 7(2), Exclusion of Nationals, Bracketed Language

Virtually the same provision was included in draft versions of the Liability Convention, but was ultimately deleted because it was thought to be duplicative of language similar to that set forth here in article 7(1).¹²⁰ It is included in the Draft Convention to preclude a claimant State from presenting a claim for damage caused to a foreigner whose permanent State of residence is a liable State of embarkation, not to his own State (which is precluded by article 7(1)), but to a “co-State of embarkation” of which the victim is not a national.¹²¹

C. Presentation and Third-Party Settlement of Claims

Save for the substitution of “State of embarkation” for “launching State” throughout, articles 8 through 27 of the Draft Convention mirror the corresponding provisions of the Liability Convention (articles VIII-XXVII, respectively). Thus, like its precursor, the Draft Convention presents the possibility of expeditious adjudication of claims and a reasonable prospect of the payment of compensation (*at best*, according to some critics). At the same time, the Draft Convention assumes whatever foibles or defects may be seen as intrinsic to the Liability Convention’s mechanisms for the assessment and payment of liability, to include its reliance upon the good faith of Contracting States.

V. CONCLUSION

Inspired by recent success in modernizing what ICAO official dubbed “the long-suffering passenger liability regime” (formerly known as the Warsaw System) with the coming into force of the 1999 Montreal Convention, ICAO has undertaken modernization of the Rome Convention system for damage on the surface involving foreign aircraft. But, as desirable as this might be, there is an apparent lack of urgency among effected states with respect to fashioning a new liability scheme for accidental or “basic risk” damages. As a result, carrier liability for the so-called “terrorist risk” has become the central issue in the Rome modernization endeavor. In this regard, the attacks of September 11, 2001 not only revived the longstanding debate about the inadequacy of domestic regimes’ treatment of damages on the surface resulting from intentional acts involving aircraft, but also demonstrated the potential for such damages to be of vastly greater scale than can be covered by the insurance market. Thus, not surprisingly, a majority of ICAO States are calling for innovative solutions for the “terrorist risk.”

120. CHENG, *supra* note 52, at 308-09.

121. *Id.* at 309.

A new Rome-type treaty modeled on Liability Convention's no-fault, state-liability scheme for damage on the surface caused by space objects would afford States and individual victims an alternate source of compensation for the potentially massive, otherwise uninsurable damages that could result from terrorist use of aircraft as weapons of mass destruction in their territory. It might also help to alleviate the evidentiary impediments and diplomatic and national security concerns that have plagued past efforts to obtain compensation for victims of terrorism through domestic legal regimes (*e.g.*, civil litigation under the AEDPA) and would likely hamper future victims' recovery in this arena, as well. What is more, the mere prospect of strict liability could spur more robust and effective aviation security measures and increased international cooperation in their enforcement.

However, the Draft Convention put forward here is by no means offered as a finished product, nor is it intended to be a panacea. There is obviously likely to be controversy, if not outright revulsion, among many over the mere suggestion of holding states strictly liable for damages resulting from the inimical and criminal acts of individuals, who in some cases may be sworn enemies of the liable state. The notional treaty raises other, perhaps equally contentious issues, as well; such as, for example, the lawfulness of using of armed force against civil aircraft even when it may be consistent with the inherent right of states to self-defense. In addition, given the scale of damage associated with terrorist use of aircraft as weapons of mass destruction, limitations on liability along the lines of those applied to civil liability for nuclear damage may garner consideration. Hopefully, this proposal can nevertheless generate constructive dialogue about the need for international cooperation in areas of aviation security and counter-terrorism and, thereby, be considered a step forward—however small—toward an agreement on the “terrorist risk.”

*Appendix 1***DRAFT CONVENTION ON INTERNATIONAL LIABILITY
FOR DAMAGE ON THE SURFACE CAUSED BY AIRCRAFT DUE
TO HIJACKING OR OTHER UNLAWFUL INTERFERENCE**

Article 1

For the purposes of this Convention:

1. An aircraft is considered to be in flight at any time when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until competent authorities take over the responsibility for the aircraft and for person and property on board.

2. The term “damage” means loss of life or physical harm; or loss of or damage to property of states or of persons, natural or juridical, or property of international intergovernmental organizations.

3. The term “State of embarkation” means:

(a) A Contracting State whose territory or facility is the place of departure for an aircraft;

(b) A Contracting State other than the originating place of departure in whose territory or facility an aircraft stops to take on or discharge passengers, cargo, or mail;

(c) A Contracting State other than the originating place of departure in whose territory or facility an aircraft stops for non-traffic purposes.

4. The term “aircraft” means civil aircraft, and shall not apply to aircraft used in military, customs, or police services.

5. An aircraft is considered to have departed from a State of embarkation when all its external doors are closed following embarkation.

Article 2

1. Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act,

commits an offense of “hijacking.”

2. Any person who unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in flight or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight,

(e) attempts to commit any of the offenses mentioned in this paragraph or is an accomplice of a person who commits or attempts to commit any such offense,

commits an offense of “unlawful interference.”

Article 3

1. This Convention shall apply irrespective of whether the aircraft is engaged in an international or domestic flight.

2. This Convention shall not apply to damage caused on the surface of the earth by an aircraft in flight which is not due to a hijacking or other unlawful interference.

3. This Convention shall not apply to nuclear damage.

Article 4

[1.] A State of embarkation shall be absolutely liable to pay compensation for damage caused by an aircraft in flight or by any person or thing falling there from on the surface of the territory another Contracting State as a direct consequence of a hijacking or other unlawful interference if:

(a) persons committing and/or devices or substances used in the commission of the offense were on board the aircraft when it departed from the State of embarkation; or

(b) in the case of an offense carried out from the ground, the devices or substances used in the commission of the offense were launched, employed, or remotely controlled from within the territory of the State of embarkation.

[2. Liability of a State of embarkation under paragraph 1 of this article shall extend to damage caused by an aircraft in flight or by any person or thing falling there from on the surface of the territory another Contracting State, where, consistent with the relevant rules of international law, including the Charter of the United Nations, a State resorts to the use of weapons against said aircraft, which by means of hijacking or other unlawful interference, is itself used in a deliberate attempt to produce damage on the surface.]

Article 5

1. Whenever two or more States of embarkation for the same aircraft are liable pursuant to Article 4, they shall be jointly and severally liable for any damage covered by this Convention.

2. A State of embarkation which has paid compensation for damage shall have the right to present a claim for indemnification to other States of embarkation for the same aircraft. As between States of embarkation, the following rules for apportioning the burden of compensation shall apply:

(a) The burden of compensation shall be apportioned equally among States of embarkation from which the aircraft departed with any person who committed and/or any devices or substances used in the commission of a hijacking or other unlawful interference on board.

(b) In the absence of proof to the contrary, the State of embarkation where persons who committed and/or devices or substances that were used in the commission of a hijacking or other unlawful interference first came on board the aircraft shall be presumed to be the originating place of departure for the aircraft and the burden of compensation shall be equally apportioned between all States of embarkation from which the aircraft departed.

3. Contracting States may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable as States of embarkation. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the States of embarkation which are jointly and severally liable.

Article 6

Exoneration from absolute liability shall be granted to the extent that a State of embarkation establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.

Article 7

[1.] The provisions of this Convention shall not apply to damage caused by an aircraft to nationals of the liable State of embarkation.

[2. No claim may be presented under this Convention to a State of embarkation in respect of nationals of that State.]

Article 8

1. A State which suffers damage, or whose natural or juridical persons suffer damage, may present to a State of embarkation a claim for compensation for such damage.

2. If the State of nationality has not presented a claim, another State may, in respect of damage sustained in its territory by any natural or juridical person, present a claim to a State of embarkation.

3. If neither the State of nationality nor the State in whose territory the damage was sustained has presented a claim or notified its intention of

presenting a claim, another State may, in respect of damage sustained by its permanent residents, present a claim to a State of embarkation.

Article 9

A claim for compensation for damage shall be presented to a State of embarkation through diplomatic channels. If a State does not maintain diplomatic relations with the State of embarkation concerned, it may request another State to present its claim to that State of embarkation or otherwise represent its interests under this Convention. It may also present its claim through the Secretary-General of the United Nations, provided the claimant State and the State of embarkation are both Members of the United Nations.

Article 10

1. A claim for compensation for damage may be presented to a State of embarkation not later than one year following the date of the occurrence of the damage or the identification of the liable State(s) of embarkation.

2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the liable State(s) of embarkation, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

3. The time-limits specified in paragraphs 1 and 2 of this article shall apply even if the full extent of the damage may not be known. In this event, however, the claimant State shall be entitled to revise the claim and submit additional documentation after the expiration of such time-limits until one year after the full extent of the damage is known.

Article 11

1. Presentation of a claim to a State of embarkation for compensation for damage under this Convention shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents.

2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a State of embarkation. A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a State of embarkation or under another international agreement which is binding on the States concerned.

Article 12

Subject to the provisions of Article 5, the compensation which the State of embarkation shall be liable to pay for damage under this Convention shall

be determined in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred.

Article 13

Unless the claimant State and the State from which compensation is due under this Convention agree on another form of compensation, the compensation shall be paid in the currency of the claimant State or, if that State so requests, in the currency of the State from which compensation is due.

Article 14

If no settlement of a claim is arrived at through diplomatic negotiations as provided for in Article 9, within one year from the date on which the claimant State notifies the State of embarkation that it has submitted the documentation of its claim, the parties concerned shall establish a Claims Commission at the request of either party.

Article 15

1. The Claims Commission shall be composed of three members: one appointed by the claimant State, one appointed by the State of embarkation and the third member, the Chairman, to be chosen by both parties jointly. Each party shall make its appointment within two months of the request for the establishment of the Claims Commission.

2. If no agreement is reached on the choice of the Chairman within four months of the request for the establishment of the Commission, either party may request the Secretary-General of the United Nations to appoint the Chairman within a further period of two months.

Article 16

1. If one of the parties does not make its appointment within the stipulated period, the Chairman shall, at the request of the other party, constitute a single-member Claims Commission.

2. Any vacancy which may arise in the Commission for whatever reason shall be filled by the same procedure adopted for the original appointment.

3. The Commission shall determine its own procedure.

4. The Commission shall determine the place or places where it shall sit and all other administrative matters.

5. Except in the case of decisions and awards by a single member Commission, all decisions and awards of the Commission shall be by majority vote.

Article 17

No increase in the membership of the Claims Commission shall take place by reason of two or more claimant States or States of embarkation being joined in any one proceeding before the Commission. The claimant States so joined shall collectively appoint one member of the Commission in the same manner and subject to the same conditions as would be the case for a single claimant State. When two or more States of embarkation are so joined, they shall collectively appoint one member of the Commission in the same way. If the claimant States or the States of embarkation do not make the appointment within the stipulated period, the Chairman shall constitute a single-member Commission.

Article 18

The Claims Commission shall decide the merits of the claim for compensation and determine the amount of compensation payable, if any.

Article 19

1. The Claims Commission shall act in accordance with the provisions of Article 12.

2. The decision of the Commission shall be final and binding if the parties have so agreed; otherwise the Commission shall render a final and recommendatory award, which the parties shall consider in good faith. The Commission shall state the reasons for its decision or award.

3. The Commission shall give its decision or award as promptly as possible and no later than one year from the date of its establishment, unless an extension of this period is found necessary by the Commission.

4. The Commission shall make its decision or award public. It shall deliver a certified copy of its decision or award to each of the parties and to the Secretary-General of the United Nations.

Article 20

The expenses in regard to the Claims Commission shall be borne equally by the parties, unless otherwise decided by the Commission.

Article 21

If the damage caused by an aircraft presents a large-scale danger to human life or seriously interferes with the living conditions of the population or the functioning of vital centers, the States Parties, and in particular the State of embarkation, shall examine the possibility of rendering appropriate and rapid assistance to the State which has suffered the damage, when it so requests. However, nothing in this article shall affect the rights or obligations of the States Parties under this Convention.

Article 22

1. The provisions of this Convention shall not affect other international agreements in force in so far as relations between the States Parties to such agreements are concerned.

2. No provision of this Convention shall prevent States from concluding international agreements reaffirming, supplementing or extending its provisions.

Article 23

1. This Convention shall be open to all States for signature. Any State which does not sign this Convention before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Convention shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of [], which are hereby designated the Depositary Governments.

3. This Convention shall enter into force on the deposit of the fifth instrument of ratification.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Convention, the date of its entry into force and other notices.

6. This Convention shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

Article 24

Any State Party to this Convention may propose amendments to this Convention. Amendments shall enter into force for each State Party to the Convention accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party to the Convention on the date of acceptance by it.

Article 25

Ten years after the entry into force of this Convention, the question of the review of this Convention shall be included in the provisional agenda of the United Nations General Assembly in order to consider, in the light of past application of the Convention, whether it requires revision. However, at any time after the Convention has been in force for five years, and at the request of one third of the States Parties to the Convention, and with the

concurrence of the majority of the States Parties, a conference of the States Parties shall be convened to review this Convention.

Article 26

Any State Party to this Convention may give notice of its withdrawal from the Convention one year after its entry into force by written notification to the Depositary Governments. Such withdrawal shall take effect one year from the date of receipt of this notification.

Article 27

This Convention shall be deposited in the archives of the Depositary Governments. Duly certified copies of this Convention shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.