TERRORISM AND STATE ACCOUNTABILITY —
THE AVIATION PERSPECTIVE

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Abstract: Terrorism, one of the most heinous threats to security, is a multidimensional and immoral evil involving crimes against society. Aviation has proved to be a vulnerable target where any act of terrorism against it attracts global attention towards the terrorist. The destruction of Malaysian Airlines Flight MH17 in July 2014 and Metrojet in October 2015 resonates a regular trend where aviation continues to be susceptible to acts of terrorism. Terrorist acts against aviation destabilise States, threaten to obviate communications between States and unhinge the economic viability of States that depend on tourism. This brings to bear the role of the State as the ultimate organ accountable for protecting people from terrorism on the basis that accountability is the natural progression of responsibility.

This article cuts across the legal obstacle at international law which effectively precludes the holding of States accountable for a breach of responsibility in the face of the dichotomy between State sovereignty and the perceived impotence of international law as a punitive mechanism. It examines international jurisprudence applicable to the accountability of States, with a focus on aviation and highlights the fact that in the context of prevention of threats to national security a new paradigm can be recognised.

Keywords: State sovereignty; State responsibility; terrorism; counter terrorism; aviation security; Tokyo Convention; Hague Convention; Montreal Convention; principles of state accountability

I. Introduction

A. The current problem of terrorism

Change is the defining feature of our times. Information technology and development have changed our world and made our lives easier. However, they have facilitated the work of those who intend to pursue their own agendas even at the expense of human life. There are no longer looming superpowers that breed terrorism. Now, it is weaker States that give rise to evil ambition among groups no longer happy with a decaying status quo. A whole new paradigm is required if modern day terrorism is to be effectively restrained. This requires not mere State responsibility but also

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a global understanding that States need to be held accountable for preventing the spread of terrorism.¹

In this regard, one of the most vulnerable modes of human interaction and communication is air transport. At the time of writing, the victim of the most recent air transport disaster was the Russian airline Kogalymavia, commonly known as Metrojet, where an aircraft operating an international chartered passenger flight disintegrated above the northern Sinai on 31 October 2015 following its departure from Sharm el-Sheikh International Airport, Egypt, en route to Pulkovo Airport, Saint Petersburg, Russia. The Airbus A321-231, aircraft was reported to have broken up in flight, killing all 217 passengers and seven crew members. Shortly after the crash, the Islamic State of Iraq and the Levant (ISIL)’s Sinai branch, previously known as Ansar Bait al-Maqdis, claimed responsibility for the incident.

Although in 2013 President Obama made a statement to the effect that al-Qaeda, the then most dreaded terror group, which was responsible for the 9/11 attacks, was on the path to defeat the modern face of terrorism is far from extinct. The extraordinary comeback of the jihadists and their allies could be seen in the increasing recruitment campaign of al Shabab and al Qaeda’s own increasing strength in the west of Afghanistan. While the United States is concentrating in its own territory on the so-called lone wolf attacks, the worrying reality that many returning jihadists will take their training and expertise gained in terrorist cells in the Middle East back to their homelands and use terrorism in the west seems to elude most administrations.² That aviation security will be a casualty in this scenario is an incontrovertible reality.

There are many loopholes in State security that have to be plugged if aviation security were to be ensured at a reasonable level. The first is cooperation among States. To give just one example, after the heinous attacks in Paris on 13 November 2015, where attackers killed 130 people, including 89 at a rock concert, where, after the various simultaneous attacks at Paris venues, the terrorists, who had also taken hostages, had wounded 368 people, 80 to 99 seriously, France complained that one of the attackers, who fled to Syria, had been wanted by the Belgian police but no one had forewarned France of this fact. The lack of sharing of security information between countries is a blatant inadequacy in international cooperation,³ prompting the interior ministers of Europe to introduce a renewed measure of share

² See “The New Face of Terror” The Economist 28 September 2013, p.11.
³ The earlier instance of the disappearance of Malaysian Airlines Flight MH370 is a case in point. Both the International Civil Aviation Organization (ICAO) and the International Criminal Police Organization (INTERPOL) failed to advise both States (Malaysia and China — the origin and destination States of the flight) and airlines of the existence of a database at INTERPOL on forged or fraudulent passports. See Ruwantissa Abeyratne, “Integrity of Travel Documents: The Wakeup Call from Flight MH 370” (June 2014) 63 Zeitschrift für Luft-und Weltraumrecht (ZLW) (German Journal of Air and Space Law) 238–249.
within Europe Passenger Name Record (PNR)\(^4\) data for all travellers, in addition to sharing information about inflows and outflows of fighters from their countries into the troubled Middle East, especially Syria.

If these realities are not enough to threaten aviation security, cyber terrorism looms over our heads as a genuine threat which may be used by the terrorist against air transport in the near future.\(^5\) Aviation is a prime target, as it will destabilise States, threaten to obviate communications between States, and threaten the economic viability of States that depend on tourism. As a first step, therefore, attacking Internet and cyber connectivity of terrorist groups becomes a State’s priority. States should imperatively mobilise communities to achieve this objective. Protecting a nation from terrorism therefore becomes a State’s responsibility for which it should be held accountable.

Arguably, the most important factor in terrorism in the context of State accountability today is the Internet and the protection of data which the terrorist can access. Digital warfare is becoming common as the tool for the terrorist to wage psychological warfare. It is reported that the so-called Islamic State relies on the digital sphere with this aim in mind.\(^6\) This brings to bear two major issues: encryption and decryption of data and privacy of the individual. Consequent upon Edward Snowden’s revelations that European data stored by US companies was not safe from surveillance which would be illegal in Europe, the European Court of Justice ruled that the transatlantic Safe Harbour agreement, which lets American companies use a single standard for consumer privacy and data storage in both the US and Europe, is invalid. This decision of the highest court in Europe brought to bear three salient points: (1) individual European countries can now set their own regulation for US companies “handling of citizens” data, vastly complicating the regulatory environment in Europe; (2) countries can choose to suspend the transfer of data to the US, thereby forcing companies to host user data exclusively within the country and (3) the Irish data regulator will examine whether Facebook offered European users adequate data protections, and it may order the suspension of Facebook’s transfer of data from Europe to the United States if so.\(^7\)

The Court held inter alia that the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in art.8 of the European Convention for

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\(^5\) *The Economist* of 4 November 2014 speaks of “cyberjacking”, a phenomenon that refers to the equivalent of hijacking an aircraft with the use of cyber technology. This could happen from outside the aircraft or from the inside. The catalyst in this instance is the increasing popularity with passengers of internet connectivity on board for work, games, movies and so on. See generally, Abeyratne, “Aviation Cyber Security: A Constructive Look at the Work of ICAO” (n.1), pp.25–40.


the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law. Therefore, it was held that the approximation of such laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the community.

A related problem to the collection of data and their safe storage is encryption, which various terror groups use in their communications with new recruits. Encryption has caused tangible problems for State security machinery. One example is where the Belgian Interior Minister Jan Jambon claimed just a few days before the Paris attacks of November 2015 that terrorists were communicating through internet gaming consoles. Immediately after the Paris attacks of 13 November 2015, senior security officials of Europe advised the press that France’s ability to prevent attacks such as the massacre of November is now challenged by the increasing ability of Islamic State in Iraq and Syria to operate under the radar, as a squad of jihadi cybergeeks train would-be terrorists how to keep their electronic communications secret.

Security experts have advised States that the threat of encryption could be countered by a four-pronged attack: (1) there should be laws forcing the compliance of technology firms in storing messages their clients send through their devices across networks so that government authorities could enlist the services of their experts in cracking encrypted codes; (2) tech companies should be obligated by law to crack any codes they sell when presented with a court authorised warrant; (3) the selling of computer programmes capable of encryption should be banned if the provider of such programmes cannot break the codes used in such programmes and (4) companies should be required by law to incorporate tools in their programmes where law enforcement authorities can break the codes themselves.

B. State responsibility and accountability

The above discussion goes to show that the responsibility of a State in sensibly countering the modern terrorist threat does not lie merely in reacting to the violent means adopted by pockets of cells of terrorists who operate on their own in attacking through sporadic outbursts of violence against groups of citizens gathered together at social events, but also in identifying the enemy and its use of modern technology in spreading psychological warfare. This should be the key criterion in determining State accountability whether prospective or retrospective. An objective evaluation of a State’s accountability in countering terrorism today involves determination whether the State has graduated from merely removing regimes that sponsored terrorism — which was the hallmark of the “war on terrorism” after the events of

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8 Signed in Rome on 4 November 1950.
V. Conclusion

It must be pointed out that, although there are two Annexes to the Chicago Convention, Annex 9 (Facilitation) and Annex 17 (Security), which have various Standards and Recommended Practices (SARPs) calculated to direct Contracting States towards preventing terrorism and acts of unlawful interference with civil aviation, none of the SARPs contained in the two Annexes has the legal effect of holding States accountable for non-adherence to them, as SARPs are subject to art.38 of the Chicago Convention which specifies that Contracting States, if they are unable to comply with SARPs, may merely advise ICAO of the fact.83

The issue of State accountability in aviation therefore falls within the purview of treaty law84 and practice and, boils down to a determination of accountability of States for non-compliance with provisions of the treaty to which they are contracting parties. A State party becomes a contracting party because it has, by ratifying a treaty, given its consent to be bound by it. This ascribes to a Contracting State accountability for adherence. The fact that a Contracting State has the right to record its reservation85 to a particular provision of a treaty it otherwise ratifies (unless the treaty expressly prohibits the recording of reservations)86 is an indicator that a Contracting State is answerable and accountable if it does not adhere to a treaty or provision thereof which it has ratified without reservations.

The basic principle of State accountability is that States cannot observe treaty obligations, or any particular treaty obligation only when it is in their interest to do so.87 With regard to reparation as a consequence of State accountability, the International Law Commission, in its Draft Articles on State Responsibility, provides that the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. Such compensation would cover any financially

83 Article 38 provides inter alia that any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to ICAO of the differences between its own practice and that established by the international standard.
84 A treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. See Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, No 18232, 1155 UN Treaty Series 331, art.2(1)(a).
85 A reservation to a treaty is a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty. Vienna Convention, ibid., art.2(1)(d).
86 In recent years several multilateral conventions of importance have included provisions that prohibit the marking of reservations to provisions therein. One reason given is that such a provision is necessary because treaties are legislative in character and effect.
assessable damage including loss of profits insofar as it is established. This provision is deemed applicable only to instances where States found accountable for their wrongful act do not rectify the wrong with restitution. This principle has had judicial approval of the ICJ which has said that there is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. The International Law Commission goes on to recommend that the State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. Satisfaction would not be out of proportion to the injury and may not take a form humiliating to the responsible State.

There has been a trend to obfuscate the legal legitimacy of State accountability by the misconceived use of the concept of State sovereignty. However, in the context of prevention of threats to national security, a new paradigm can be recognised. The supremacy of State sovereignty now lies in State responsibility and international cooperation aimed at ensuring the safety and security as well as the general welfare of the people, rather than State prerogative. As the then Secretary General of the UN said in 1999: “State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalization and international cooperation”. States are now widely understood to be instruments at the services of their peoples and not vice versa.

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88 See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (n.15), art.36.
89 In a dispute between Hungary and Slovakia over the construction and operation of dams on the river Danube, which found both States in breach of their legal obligations, the ICJ called on both countries to carry out the relevant treaty between them while taking account of the factual situation that has developed since 1989. See http://www.icj-cij.org/docket/index.php?pr=267&p1=3&p2=1&case=92&p3=6.