



FACILITATION (FAL) DIVISION — TWELFTH SESSION

Cairo, Egypt, 22 March to 2 April 2004

Agenda Item 2: Facilitation and security of travel documents and border control formalities

PROFILING FOR RISK ASSESSMENT PURPOSES – REGULATORY ISSUES

(Presented by the Secretariat)

1. INTRODUCTION

1.1 Profiling is an issue related to minority rights and must not be ignored. In essence, profiling is inter sectional in nature and may consist of multiple grounds of institutionalized discrimination such as nationality, race, age, gender, socio-economic status, disability, health status, descent, language, class, culture and religion. This, by no means, implies that racial and other forms of profiling are necessarily desirable practices.

1.2 Profiling may raise well reasoned latent fears when based on a particular platform. In a general sense, it would be imprudent to conclude that profiling is *per se* undesirable and unduly discriminatory, particularly in relation to profiling at airports which should essentially include some considerations of criteria based on an established pattern of conduct of offenders. A legitimate profiling process should be based on statistically established indicators of criminality which are identified through a contrived aggregation of reliable factors.

1.3 The sensitive conflict of interests between racial profiling *per se*, which at best is undesirable in a socio-political context, and airport profiling, raises interesting legal and practical distinctions between the two. Among these, the most important distinction is that airport profiling is very serious business that may concern lives of hundreds if not thousands in any given instance or event. Profiling should therefore be considered justifiable if all its aspects are used in screening passengers at airports. Valid baseline indicators characterizing suspect travelers, together with other indicators which may raise a 'flag', such as the type of ticket a passenger holds (one way instead of return) and a passenger who travels without any luggage, are being used by some authorities in their efforts to prevent instances of unlawful interference with civil aviation.

1.4 Profiling, if used at airports, must not be assumptive or subjective. It must be used in an objective and non discriminatory manner alongside random examinations of non-targeted passengers. All aspects of profiling should, as a matter of course, be included in the Computer Assisted Passenger Screening (CAPS)¹ system without isolating one from the other. In this context the now popular system of compliance examination (COMPEX) is a non threatening, non discriminatory process which transcends the threshold debate on “profiling” by ensuring a balanced and proper use of profiling in all its aspects by examining “non targeted” passengers as well as on a random basis.

2. REGULATORY PERSPECTIVES

2.1 The *Convention on International Civil Aviation* of 1944 (Chicago Convention)², which established the regulatory framework for international civil aviation, underscores the fundamental aim of States with regard to civil aviation to exchange privileges which friendly nations have a right to expect from each other. The Chicago Convention embodies in its Preamble the need to create and preserve friendship and understanding among the nations and peoples of the world, and cautions Contracting States that the abuse of this friendship and understanding can become a threat to general security.

2.2 Article 13 of the Convention provides that the laws and regulations of a Contracting State, as to the admission to and departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs and quarantine, shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State. This provision acknowledges that a Contracting State has the right to prescribe its own internal laws with regard to passenger clearance and leaves room for a State to enact laws, rules and regulations to ensure the security of that State and its people at the airport. However, this right is qualified to preclude unfettered and arbitrary power of a State, by Article 22 which makes each Contracting State agree to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation of aircraft between the territories of Contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance. Article 23 follows this trend to its conclusion by providing that each Contracting State undertake, to the extent practicable, to establish customs and immigration procedures affecting air navigation in accordance with the practices which may be established or recommended from time to time pursuant to the Convention.

2.3 Annex 9 to the Chicago Convention (*Facilitation*) in Standard 3.2 recognizes that, in developing procedures aimed at the efficient application of border controls on passengers and crew, Contracting States shall take into account the application of aviation security, border integrity, narcotics control and immigration control measures, where appropriate.³ This standard gives States the flexibility of enacting procedures, rules and regulations to ensure the security and integrity of their borders and view passengers with necessary caution.

¹ The CAPS system was adopted in 1994 by Northwest Airlines to single out high risk passengers. After the TWA flight 800 disaster in July 1996, the Clinton Administration appointed the Al Gore Commission to study aviation security. The Commission recommended that all airlines use the CAPS system provided profiling did not rely on material of a constitutionally suspect nature such as race, religion or national origin of United States citizens. The CAPS system focused more on profiling such persons as those who bought one way tickets, paid cash and did not carry luggage.

² Convention on International Civil Aviation, signed on 7 December, 1944 in Chicago (called the Chicago Convention), ICAO Doc 7300/8, Eighth Edition, 2000.

³ Annex 9 to the Convention on International Civil Aviation, Eleventh Edition, July 2002. The Annexes to the Chicago Convention contain two types of provisions - Standards and Recommended Practices. Standards use the word “shall” implying a higher degree of compliance required from States, whereas Recommended Practices use the word “may” implying a recommendation.

2.4 The role of ICAO and the international community is to consider the offence of unlawful interference with civil aviation in its entirety, as a generic term encompassing a wide range of offensive activity on the part of the perpetrators, not restricted to a species or other category of offensive activity. It is for this reason that the ICAO Assembly, at its 33rd Session, held subsequent to the events of 11 September 2001, adopted Resolution A33-2, strongly condemning all acts of unlawful interference against civil aviation wherever and by whomsoever and for whatever reason they are perpetrated. This all-encompassing approach to the offence of unlawful interference with civil aviation effectively precludes parochial assumptions that the offence would be recognizable as such only if it is perpetrated pursuant to or as an act which can only or mostly be perpetrated by a certain type of individual of a certain race, nationality or religious persuasion.

2.5 A good airport profiling system must originate from a repository of research based on the characteristics of a person evoking criminal suspiciousness. One way of accomplishing this objective is to use the profiles of known or suspected criminals and terrorist categories. Additionally, a diligent and energetic State instrumentality must be established for the purpose of constantly monitoring and ensuring that airport profiling does not discriminate between categories of persons on a subjective basis and that a balanced system of compliance examination is in place.

3. ACTION BY THE DIVISION

3.1 The Division is invited to consider the contents of this paper in its deliberation of Agenda Item 2.

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