Will the New ICAO–Beijing Instruments Build a Chinese Wall for International Aviation Security?

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ABSTRACT

The last 6 years have seen an unprecedented level of activity in the field of international aviation law, with the adoption of three new conventions and one new protocol. This is a testament to ICAO's leadership role and its ongoing relevance, particularly in the field of aviation security.

The tragic events of 9/11 highlighted some weaknesses in the international law regime and were the impetus behind the nine-year process that led to the adoption of the 2010 Beijing Convention and Protocol. This Article reviews the historical background to the new treaties, including the journey taken through the ICAO process. It also analyzes in detail the provisions of the new treaties, assesses the views expressed in support as well as in opposition of their adoption, and considers the important perspective of the airline industry. Finally, the key question of whether or not the Beijing instruments will lead to improvements in aviation security is addressed.

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I. INTRODUCTION

Aviation security enjoys a unique position in international aviation law. The International Civil Aviation Organization (ICAO) has now developed seven international conventions in the field—five of which enjoy almost universal acceptance and "have served as valuable precedents for other conventions in the [UN] family."[1] In fact, ICAO was the first UN specialized agency to adopt three international instruments related to the prevention and suppression of acts of international terrorism.[2]

The first international treaty on aviation security was the Tokyo Convention.[3] This focused primarily on jurisdictional issues of offenses against penal law that are committed on board aircraft, as

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1. *See* Int'l Civil Aviation Org., *Draft Report on the Work of the Legal Committee During Its 34th Session* ¶ 2.1, (ICAO, LC/34-WP/4, Sept. 10, 2009) [hereinafter ICAO, LC/34-WP/4] (Opening Address of Mr. Roberto Kobeh Gonzalez, President of the ICAO Council).

2. These instruments are the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 10106 (entered into force Dec. 4, 1969) [hereinafter Tokyo Convention]; the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 12325 (entered into force Oct. 14, 1971) [hereinafter Hague Convention]; and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *concluded on* Sept. 23, 1971, 974 U.N.T.S. 14118 (entered into force Jan. 26, 1973) [hereinafter Montreal Convention]. For the full list of the UN–sponsored international conventions on this field, see UNITED NATIONS, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (2008). As of April 1, 2013, 185 states were party to the Tokyo Convention and the Hague Convention, and 188 states were party to the Montreal Convention. *See Current List of Parties to Multilateral Air Law Treaties*, INT'L CIVIL AVIATION ORG. [ICAO], http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx (last visited Dec. 26, 2013).

3. Tokyo Convention, *supra* note 2.

well as those acts that may jeopardize the safety, good order, and discipline of an aircraft or of persons therein.[4] In addition to establishing the powers of the aircraft commander and the duties of states involved, the Tokyo Convention also adopted the expression "unlawful seizure of aircraft" to denote "aircraft hijacking" or the "wrongful exercise of control of an aircraft."[5] The Tokyo Convention did not, however, expressly make the "unlawful seizure of an aircraft" an offense.[6] In fact, as one commentator noted, the Tokyo Convention "was never intended" to be an aviation security convention.[7]

This explains why 7 years later ICAO adopted the Hague Convention to try to address this type of criminal behavior.[8] Given that the Hague Convention did not tackle acts of sabotage against civil aviation,[9] ICAO adopted the Montreal Convention just eleven months later.[10] In 1988, this instrument was further expanded to cover unlawful acts of violence at international airports.[11]

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4. *See id.* at art. 1 (Scope of the Convention).

5. *See id.*, at art. 11 (Unlawful Seizure of Aircraft); *see also* Michael Milde, *Law and Aviation Security*, *in* AIR AND SPACE LAW: DE LEGE FERENDA 93, 95 (Tanja L. Masson-Zwaan & Pablo M.J. Mendes de Leon eds., 1992) [hereinafter Milde, *Law and Aviation Security*] ("[The Tokyo Convention] coined, in the English version, the term 'unlawful seizure of aircraft' . . . .").

6. The preparatory work that led to the adoption of the Tokyo Convention mainly focused on issues relating to the legal status of aircraft. It was only in 1962 that the United States and Venezuela jointly tabled a proposal to make specific reference to aircraft hijacking. Under that proposal, the state of first landing should facilitate the restoring of the aircraft and should also permit the aircraft, crew, and passengers to continue on their journey. *See* EDWARD MCWHINNEY, AERIAL PIRACY AND INTERNATIONAL TERRORISM: THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW 36 (2d rev. ed. 1987).

7. *See* Michael Milde, *The International Fight Against Terrorism in the Air*, *in* THE USE OF AIRSPACE AND OUTER SPACE FOR ALL MANKIND IN THE 21ST CENTURY 141, 146 (Chia-Jui Cheng ed., 1995) [hereinafter Milde, *International Fight Against Terrorism*] (discussing the original purposes of the Tokyo Convention and stating that the mention of "unlawful seizure of aircraft" was an "afterthought" dealing only with the duties of states to restore possession of the aircraft and release passengers).

8. *See* Hague Convention, *supra* note 2, at art. 1 (defining the following as offenses, unlawfully seizing or exercising control of an aircraft by force, threat of force, or intimidation; attempting to perform such an act; and being an accomplice to a person who performs or attempts to perform any such act).

9. *See* PAUL STEPHEN DEMPSEY, PUBLIC INTERNATIONAL AIR LAW 243 (2008) ("One inadequacy of the Hague Convention was its failure to address the issue of aircraft sabotage.").

10. *See* Montreal Convention, *supra* note 2, at art. 1 (defining the following as offenses, unlawful and intentional acts of sabotage likely to damage, destroy, or endanger the safety of an aircraft; attempting to perform such acts; or being an accomplice to a person performing or attempting to perform such acts).

11. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, *concluded on* Feb. 24, 1988, 1589 U.N.T.S. 14118 (entered into force Aug. 6, 1989) [hereinafter Airport Protocol]. As of April 1, 2013, 172 states are party to the Airport Protocol. *See Current List of Parties to Multilateral Air Law Treaties*, *supra* note 2. The Airport Protocol was negotiated and adopted over a process of less than fifteen months. *See* Philippe Kirsch, *The 1988 ICAO and IMO*

The destruction of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988, where it is alleged that the plastic explosive Semtex was detonated,[12] prompted another stand-alone international instrument on the marking of plastic explosives.[13]

ICAO and the aviation community can rightly be proud to have been at the forefront of international lawmaking for the prevention and suppression of acts of international terrorism.[14]

Yet, more recently, acts of unlawful interference against civil aviation "[have] taken unexpected forms."[15] None more unexpected, one might say, than the events of September 11, 2001.[16]

In the words of a political leader at the time, the implications of 9/11 were vast:

> If the terrorists could have killed more, they would have. If instead of 3,000 it had been 30,000, they would have rejoiced. For world leaders wondering and worrying where the next hostility would come from, the contemplation not only of what had happened but what might happen was continuous, urgent and nerve-racking.[17]

Reports of incidents of unlawful interference have not gone away since 9/11. ICAO notes a yearly average of twenty incidents from 2007 to 2010.[18] Although incidents dropped below that level to only five in 2011 and nine in 2012, the problem still persists.[19]

Conferences: An International Consensus Against Terrorism, 12 DALHOUSIE L.J. 5, 8 n.16 (1990) (outlining the timeline of the proposal, preparation, review, revision, submission, and adoption of the Airport Protocol between September 1986 and December 1987).

12. *See* R.I.R. Abeyratne, *The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order*, 22 TRANSP. L.J. 449, 480 (1995) (discussing the Pan Am 103 explosion and the reaction of ICAO).

13. *See* Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 2122 U.N.T.S. 36984 [hereinafter Plastic Explosives Convention]. As of March 10, 2013, 147 states are party to the Plastic Explosives Convention. *See Current List of Parties to Multilateral Air Law Treaties*, *supra* note 2.

14. *See* MCWHINNEY, *supra* note 6, at 36 (discussing the specific suggestions made in 1962 to incorporate aircraft hijacking into "the proposed new Convention on the Legal Status of Aircraft"); NANCY DOUGLAS JOYNER, AERIAL HIJACKING AS AN INTERNATIONAL CRIME 122–24 (1974) (discussing the study, proposal, and adoption of the Tokyo Convention by ICAO as the first international action on aircraft hijacking).

15. SHAWCROSS & BEAUMONT: AIR LAW, at ch. 33 (J.D. McClean et al. eds., LexisNexis Butterworths Issue 132, 2012).

16. *See generally* Brian R. Johnson, Christine A. Yalda & Christopher A. Kierkus, *Property Crime at O'Hare International Airport: An Examination of the Routine Activities Approach*, 5 J. APPLIED SEC. RES. 42, 43 (2011).

17. TONY BLAIR, A JOURNEY: MY POLITICAL LIFE 356 (2010).

18. Int'l Civil Aviation Org., Aviation Security Panel, *Acts of Unlawful Interference in 2008* app. C at 7, 8 (ICAO, Working Paper No. AVSECP/20-WP/9, Mar. 5, 2009) [hereinafter ICAO, AVESELP/20-WP/9] (identifying twenty-three acts of unlawful interference in 2007); Int'l Civil Aviation Org., *Report on Acts of Unlawful Interference for 2008* ¶ 2.1 (ICAO, Working Paper No. C-WP/13269, Jan. 13, 2009), *in* ICAO, AVSECP/20-WP/9, *supra*, at app. A (identifying twenty-four acts of unlawful interference in 2008); Int'l Civil Aviation Org., *Report on Acts of Unlawful Interference*

In the immediate aftermath of 9/11, the ICAO Assembly (Assembly) directed the ICAO Council (Council) to review the adequacy of the existing aviation security conventions to deal with new and emerging threats to civil aviation.[20] This was conducted in parallel with the initiative to reform the 1952 Rome Convention,[21] a process that led to the adoption of the two Montreal Conventions in 2009.[22]

The review of the aviation security conventions culminated at the Beijing Diplomatic Conference with the adoption on September 10, 2010, of two new international treaties: the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention) [23] and the Protocol Supplementary to the

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for 2010 (ICAO, Working Paper No. C-WP/13683, Dec. 21, 2010) (noting twenty-three acts of unlawful interference in 2009 and fourteen acts in 2010).

19. *See* Int'l Civil Aviation Org., Acts of Unlawful Interference in 2011 (Oral Report presented by the Director of the Air Transport Bureau, 195th Council Session) (2012). These five incidents of unlawful interference included two attempted seizures, one sabotage, an attempted sabotage, and an in-flight attack. *Id.*; *Acts of Unlawful Interference Database*, INT'L CIVIL AVIATION ORG. (Apr. 1, 2013), https://portal3.icao.int/auid/pages/AUIOfPast12Months.aspx.

20. *See* Int'l Civil Aviation Org., *Declaration on Misuse of Civil Aircraft As Weapons of Destruction and Other Terrorist Acts Involving Civil Aviation*, Assemb. Res. A33-1 (2001), *compiled in Assembly Resolutions in Force* ¶¶ 7–8 (ICAO Doc. 9958, Oct. 8, 2010) [hereinafter ICAO, Resolution A33-1]; *see also* Int'l Civil Aviation Org., *Consolidated Statement on the Continuing ICAO Policies Related to the Safeguarding of International Civil Aviation Against Acts of Unlawful Interference*, Assemb. Res. A36-20 (2007), *compiled in Resolutions Adopted by the Assembly — 36th Session* ¶ 2 (provisional ed. Sept. 2007). ICAO defines *new threats* as "acts that make use of methods, actions or objects not previously considered to pose a serious threat to civil aviation," whereas *emerging threat* relates to "those existing methods, actions or objects that could conceivably be used in an act of unlawful interference which have not yet been employed or documented for use against civil aviation." Int'l Civil Aviation Org., *Study on Legal Measures to Cover the New and Emerging Threats to Civil Aviation* ¶ 2.1 (ICAO, Working Paper No. A35-WP/88, 2004) [hereinafter ICAO, Study].

21. *See* Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, *opened on* Oct. 7, 1952, 310 U.N.T.S. 4493 (entered into force Feb. 4, 1958) [hereinafter 1952 Rome Convention] (promulgating a multilateral convention to "ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of the liabilities incurred for such damage in order not to hinder the development of international civil air transport").

22. *See* Convention on Compensation for Damage Caused by Aircraft to Third Parties, *adopted* May 2, 2009, ICAO Doc. 9919 [hereinafter General Risks Convention] (moderniz[ing] the 1952 Rome Convention); Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, *adopted* May 2, 2009, ICAO Doc. 9920 [hereinafter Unlawful Interference Convention] (outlining compensation principles for third parties for damage by aircraft due to unlawful interference).

23. *See* Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, *opened on* Sept. 10, 2010, ICAO Doc. 9960 [hereinafter Beijing Convention] ("Strengthen[ing] the legal framework for international cooperation in preventing and suppressing unlawful acts against civil aviation."). At the time of writing, thirty states are signatories to the Beijing Convention and there have been five ratifications and three accessions. The instrument is not yet in force. *See*

Convention for the Suppression of Unlawful Seizure of Aircraft (Beijing Protocol).[24]

Thus, the last 4 years or so have seen unprecedented activity in the field of international aviation law, with the adoption of three new conventions and one new protocol within less than eighteen months.[25] Interestingly, that process was preceded by a similarly unusual amount of domestic legislation in this field in a number of countries.[26]

In addition to consolidating certain provisions, the Beijing Convention expands on both the Montreal Convention and the Airport Protocol.[27] But, with the creation of a number of new criminal offenses, the Beijing Convention seeks to address new types of behavior that pose threats to international civil aviation. In the same way, the Beijing Protocol supplements the Hague Convention.

Whilst each of these new treaties is a stand-alone international instrument and although most controversial issues apply to both, the majority of new criminal offenses were introduced in the Beijing Convention.[28] Where the term *Beijing instruments* is used in this Article, any comments should be taken to refer to both the Beijing Convention and the Beijing Protocol.

This Article has four objectives. First, it will seek to trace the process that finally led to the adoption of the Beijing instruments. This should allow a better understanding of the predominant influence of the models on which the instruments were based and the main drivers behind this laudable initiative. Second, the Article will

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List of Parties to Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Done at Beijing on 10 September 2010, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Conv_EN.pdf (last visited Dec. 21, 2013).

24. *See* Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, *opened on* Sept. 10, 2010, ICAO Doc. 9959 [hereinafter Beijing Protocol] (supplementing the Hague Convention, *supra* note 2). At the time of writing, thirty-two states are signatories to the Beijing Protocol and there have been five ratifications and two accessions. The instrument is not yet in force. *See List of Parties to Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft Done at Beijing on 10 September 2010*, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Prot_EN.pdf (last visited Dec. 21, 2013).

25. General Risks Convention, *supra* note 22; Unlawful Interference Convention, *supra* note 22; Beijing Convention, *supra* note 23; Beijing Protocol, *supra* note 24.

26. After 9/11, various countries passed legislation to empower their armed forces to use force against civil aircraft that are presumed to have been hijacked. This also includes the authorization to shoot down such aircraft. *See*, *e.g.*, Norberto E. Luongo, *"Shooting-Down Laws": A Quest for Their Validity* (unpublished LL.M thesis, McGill University, Montreal, Dec. 2008), *available at* https://www.mcgill.ca/iasl/alumni/thesisllm#L1.

27. Beijing Convention, *supra* note 23.

28. *See id.* at art. 1 (defining the following as offenses: performing acts that endanger the safety of aircraft; using a device, substance, or weapon to endanger to safety of an airport; making a threat of any of the former; or attempting, organizing, being an accomplice to, or otherwise aiding any of the former).

seek to analyze the main features of the new instruments and their most controversial provisions.[29] In particular, it digs into some old diplomatic incidents brought to the consideration of ICAO in order to examine whether they could somehow explain the unwavering position of states on some of the most controversial clauses during the instruments' negotiation process. Third, the authors will consider whether or not the controversial issues discussed and the fact that a vote was required by the Diplomatic Conference to adopt these instruments may have weakened their prospects of ratifiability. Finally, this Article examines whether more international lawmaking will, in fact, provide for improved aviation security or whether ICAO and the international community should better employ their respective energies elsewhere.

II. THE LONG ROAD TO BEIJING: A NINE-YEAR PROCESS

Going as far back as June 3, 1996, the Council decided to include the issue of acts or offenses of concern to the international aviation community not covered by the existing law instruments in the Legal Committee's work program.[30] However, that item referred to the legal aspects of unruly and disruptive passengers, which was ICAO's main concern at the time.[31] As a result of circumstances unforeseen and, in many people's eyes, unforeseeable at that time, the focus shifted after 9/11.

In October 2001, less than a month after the 9/11 incidents, the Thirty-third Session of the Assembly responded with a comprehensive resolution on aviation security.[32] This resolution directed the Council

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29. This Article does not purport to give a comprehensive overview of the Hague Convention and Montreal Convention regimes on aviation security.

30. Int'l Civil Aviation Org., *General Work Programme of the Legal Committee* ¶ 3.2 (ICAO, Working Paper No. C-WP/11655, Oct. 22, 2001).

31. Before the 9/11 events, ICAO's Legal Committee work program covered the following issues:

> i) Consideration on establishing a legal framework for CNS/ATM;
> ii) "Acts or offences of concern to the international aviation community" not covered by the existing international air law regime;
> iii) International interests in mobile equipment (what later came to be known as the Cape Town Convention);
> iv) Modernization of the Rome Convention 1952 (which later culminated with the adoption of the General Risks and Unlawful Interference Conventions);
> v) "Review of the question of the ratification of international air law instruments; and"
> vi) Implications of the application of the United Nations Convention on the Law of the Sea for the Chicago Convention.

Id. ¶ 2.1.

32. *See* ICAO, Resolution A33-1, *supra* note 20.

and the secretary-general to "act urgently to address the new and emerging threats to civil aviation, in particular to review the adequacy of the existing aviation security conventions; to review the ICAO aviation security programme, including a review of Annex 17 and other related Annexes to the Convention." [33] It has been suggested that the direction was "symptomatic of the frantic search for any conceivable prevention that would protect aviation against the repetition of a similar tragedy."[34] The resolution also instructed the Council to convene a high-level, ministerial conference on aviation security (AVSEC-Conf/2).[35] AVSEC-Conf/2, which took place in March 2002, concluded that "gaps and inadequacies appear to exist in international aviation security instruments with regard to new and emerging threats to civil aviation."[36] The conference recommended that ICAO "carry out a detailed study of the adequacy of the existing aviation security conventions and other aviation security-related documentation with a view to proposing and developing measures to close the existing gaps and remove the inadequacies."[37] It also noted that there was a need for ICAO to develop an Aviation Security Plan of Action and called upon the Council to do so.[38] Later in 2002, the Council approved the ICAO Secretariat's action plan that included a legal component—namely, Project 12, which addressed a "review of existing legal instruments in aviation security so as to identify gaps and inadequacies as to their coverage in relation to the new and emerging threats."[39]

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33. *Id*. ¶ 7.

34. MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 256 (2008) [hereinafter MILDE, INTERNATIONAL AIR LAW]. More recently, Milde has also noted that "[n]obody claims that the tragedy of 9/11 was contributed to by a void in international law or by any inadequacy or shortcomings in codified international instruments. It was a single event targeting the territory, airlines and airports of one single State." Michael Milde, *The Beijing Convention and Beijing Protocol Adopted at the International Conference on Air Law Held under the Auspices of the International Civil Aviation Organization at Beijing, 30 August to 10 September 2010*, 60 GERMAN J. ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT 1, 60 (2011) [hereinafter Milde, *Beijing Convention*].

35. The term *new and emerging threats* may include "improvised explosive devices, unconventional terrorist attacks on airports and aircraft facilities, cyber attacks on aviation systems, including air traffic management systems, and threats concerning general and other forms of aviation." Int'l Civil Aviation Org., *Review of the Report of the Twentieth Meeting of the Aviation Security Panel*, at app., ¶ 1.2, (ICAO, Working Paper No. C-WP/13338, Mar. 27, 2009) [hereinafter ICAO, Working Paper No. C-WP/13338].

36. Int'l Civil Aviation Org., *Outcome of the High-Level, Ministerial Conference on Aviation Security*, at A-3 (ICAO, Working Paper No. C-WP/11786, Feb. 27, 2002).

37. *Id*. at A-4.

38. *Id*. at A-11.

39. Int'l Civil Aviation Org., State Letter from the ICAO Secretariat to ICAO Contracting States 1 (State Letter No. LE 4/65-05/45, Mar. 25, 2005) [hereinafter State Letter No. LE 4/65-05/45] (accompanying a questionnaire circulated to members states to ascertain the need and possibility of amending the then-existing aviation security conventions).

As part of this action plan, in 2004, the Secretariat presented the ICAO study to the Thirty-fifth Session of the Assembly.[40] This highlighted the fact that while "[t]he existing five aviation security conventions have been widely accepted by States as useful legal instruments for combating unlawful interference against civil aviation," they should be updated in several instances to respond to new and emerging threats,[41] such as:

i) misuse of civil aircraft as a weapon;
ii) use of civil aircraft to unlawfully spread biological, chemical, and nuclear (BCN) substances;
iii) attacks against civil aviation using such substances;
iv) electronic attacks using radio transmitters or other devices that may jam or alter signals used for air navigation;
v) computer-based attacks to destroy data essential for operation of the aircraft;
vi) the unlawful and intentional delivery, placing or discharging of a lethal device at an airport or on board aircraft; and
vii) the threatening of the use of a lethal device.[42]

Interestingly, the ICAO aviation security instruments do not provide a specific definition of what constitutes an act of unlawful interference.[43] Rather, they qualify certain types of conduct as criminal offenses against international civil aviation.[44] Annex 17 to the Chicago Convention qualifies acts of unlawful interference as

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40. *See* ICAO, Study, *supra* note 20. The ICAO Study was presented to the Thirty-fifth Session of the Assembly as an information paper. This means that the Assembly was not required to take any decision on the matter but simply to "note" the content of the paper.

41. *Id*. at A-9, ¶ 6.1.

42. *Id*. at A-1, A-10.

43. Hague Convention, *supra* note 2; Montreal Convention, *supra* note 2; Airport Protocol, *supra* note 11; Beijing Convention, *supra* note 23; Beijing Protocol, *supra* note 24.

44. *See* Hague Convention, *supra* note 2, at art. 1 (defining the following as offenses, unlawfully seizing or exercising control of an aircraft by force, threat of force, or intimidation; attempting to perform such an act; and being an accomplice to a person who performs or attempts to perform any such act); Montreal Convention, *supra* note 2, at art. 1 (defining the following as offenses, unlawful and intentional acts of sabotage likely to damage, destroy, or endanger the safety of an aircraft; attempting to perform such acts; or being an accomplice to a person performing or attempting to perform such acts); Airport Protocol, *supra* note 11, at art. 2 (defining the following as an offense, unlawfully and intentionally using a device or weapon to perform acts endangering or likely to endanger safety at an airport); Beijing Convention, *supra* note 23, at art. 1 (defining the following as offenses, performing acts that endanger the safety of aircraft; using a device, substance, or weapon to endanger to safety of an airport; making a threat of any of the former; or attempting, organizing, being an accomplice to, or otherwise aiding any of the former); Beijing Protocol, *supra* note 24, at art. 2 (defining the following as offenses, unlawfully and intentionally seizing or

> acts or attempted acts such as to jeopardize the safety of civil aviation, including but not limited to: unlawful seizure of aircraft, destruction of an aircraft in service, hostage-taking on board aircraft or on aerodromes, forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility, introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes, use of an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment, communication of false information such as to jeopardize the safety of an aircraft in flight or on the ground, of passengers, crew, ground personnel or the general public, at an airport or on the premises of a civil aviation facility.[45]

The ICAO study went on to say that existing public international air law governing acts of unlawful interference focused on persons *actually* committing illegal acts, either on board an aircraft or at an airport, but not attempts to do so.[46] Furthermore, there were no specific provisions tackling the issue of persons organizing and directing others in the commission of such offenses,[47] a point already identified by the ICAO Secretariat back in 1999.[48]

Thus, under the existing regimes, certain ancillary acts falling under the notion of "conspiracy" may not constitute a primary offense, but acts that include the planning, facilitating, or contributing to the commission of a primary offense that are recognized by the international legal regime may be included.[49] In the ICAO study, the ICAO Secretariat recognized that the current international regime

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exercising control of an aircraft by force or coercion or by credible threat; or attempting, organizing, being an accomplice to, or otherwise aiding in any of the former).

45. Convention on International Civil Aviation, Annex 17, *Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference* 1-1 (9th ed. Mar. 2011) [hereinafter Annex 17].

46. *Cf.* ICAO, Study, *supra* note 20, at A-3 (noting that "some of these instruments are also applicable to attempted offences and accomplices" but "the existing aviation security conventions focus on the penal aspects relating to unlawful interference"). As I. H. Ph. Diederiks-Verschoor notes, the existing legal regime did not cover, for instance, a false bomb alert. *See* I. H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 304 (8th rev. ed. 2006).

47. *See* ICAO, Study, *supra* note 20, at A-3 ("[The conventions] do not, however, expressly and specifically refer to persons organizing or directing others to commit the offences.").

48. *See* Int'l Civil Aviation Org., *International Convention for the Suppression of Terrorist Bombings* (ICAO, Working Paper No. C-WP/11065, Mar. 10, 1999).

49. *See* Int'l Civil Aviation Org., *Draft Protocol to the Montreal Convention – Conspiracy or 'Association de Malfaiteurs' Offence* 1 (ICAO, Legal Comm. Working Paper No. LC/34-WP/2-1, July 31, 2009) [hereinafter ICAO, Legal Comm. Working Paper No. LC/34-WP/2-1] (proposing the addition of a conspiracy offense to the Montreal Convention to "ensure that acts which do not constitute the primary offence but which include planning, facilitating or contributing to the primary offence are recognized as international crimes and are subject to the mutual assistance and international cooperation provisions of the Convention").

did not provide legal tools to punish offenders for their involvement in the commission of such ancillary offenses.[50]

Taking 9/11 as an example, the regime existing at the time would have criminalized the hijacking of the four aircraft involved and any acts of violence committed against airline crew or other passengers on board.[51] However, it would not have criminalized the very use of the aircraft itself as a weapon, nor the preparation for and organization of those hideous crimes.[52]

On December 15, 2004, the Council was informed that a questionnaire would be circulated to Member States to determine whether the ICAO study's conclusions merited further work.[53] By a state letter dated March 24, 2005, the ICAO secretary-general circulated the ICAO study and that questionnaire.[54] The questionnaire sought to find out if Member States thought that new and emerging threats, such as the misuse of aircraft as weapon or chemical and biological attacks, needed to be criminalized in an international air law instrument.[55] On the basis of responses to this survey, the ICAO

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50. It is noteworthy that both the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism not only criminalize the conduct of those persons who participate as accomplices in the commission of the offense, but also that of those who organize or direct others to commit the offense and contribute in any other way to the commission of one or more offenses by a group of persons acting with a common purpose. This would cover the actions of the mastermind behind the offense. *See* International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, 2149 U.N.T.S. 37517 [hereinafter Terrorist Bombings Convention] (defining the following as offenses, the act of placing or detonating of an explosive, the attempt to so act, being an accomplice to the act, organizing or directing others to so act, or contributing to the commission of such an act); International Convention for the Suppression of the Financing of Terrorism art. 2, § 5, Dec. 9, 1999, 2178 U.N.T.S. 38349 [hereinafter Financing of Terrorism Convention] (stating that any person commits an offense who participates as an accomplice, organizes or directs others to carry out, or intentionally contributes to the commission of an offense).

51. *See* Hague Convention, *supra* note 2, at art. 1 (defining the following as offenses, unlawfully seizing or exercising control of an aircraft by force, threat of force, or intimidation; attempting to perform such an act; and being an accomplice to a person who performs or attempts to perform any such act); Montreal Convention, *supra* note 2, at art. 1 (defining the following as offenses, unlawful and intentional acts of sabotage likely to damage, destroy, or endanger the safety of an aircraft; attempting to perform such acts; or being an accomplice to a person performing or attempting to perform such acts).

52. The misuse of aircraft encompasses various concomitant offenses, such as "the unlawful seizure of the aircraft in flight and the intentional destruction of an aircraft in service, as well as misusing aircraft as weapons to cause death, injury and damage on the ground." ICAO, Study, *supra* note 20, at A-3, ¶ 4.1.2. The ICAO study recommended further examination on whether the misuse of aircraft as a weapon should be criminalized as a separate offense under international law. *Id.* at A-4, ¶ 4.1.4.

53. Int'l Civil Aviation Org., *General Work Programme of the Legal Committee* ¶ 3.3.2 (ICAO, Working Paper No. C-WP/12326, Feb. 12, 2004).

54. State Letter No. LE 4/65-05/45, *supra* note 39.

55. *Id.*

Secretariat prepared a report to the Council.[56] Initially only fifty-seven states responded to the questionnaire[57]—less than 30 percent of ICAO's membership. Although ICAO stressed that 92.5 percent of the total responses were in favor of a new international legal instrument to address new and emerging threats, the responses actually represented less than 30 percent of ICAO Member States.[58] On January 20, 2006, ICAO issued a second state letter on this issue,[59] and, in 2007, ICAO reported to the Thirty-sixth Session of the Assembly that eighty-four states had responded to the survey.[60]

With the survey report, the ICAO Secretariat proposed that the Council convene a meeting of a subcommittee of the Legal Committee to prepare the text of an appropriate international legal instrument.[61] However, during discussions in the Council, it became evident that there was some discomfort with the proposal. For instance, Pakistan expressed disappointment on the low number of responses to the ICAO survey.[62] The United Kingdom indicated that, given the low number of responses, it was premature to convene a subcommittee.[63] And Austria opposed the Secretariat's proposal outright.[64]

As a compromise, the Council formed a Secretariat study group to lay the foundations for proposed texts for later consideration by the full membership of the ICAO Legal Committee.[65]

The Secretariat study group held three meetings and concluded again that the existing legal regime should be updated to criminalize new categories of unlawful interference with international civil aviation.[66] Furthermore, there was consensus amongst the members

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56. ICAO, Working Paper No. C-WP/12326, *supra* note 53, ¶ 3.3.2.

57. Int'l Civil Aviation Org., *Summary Minutes of the Twelfth Meeting* ¶ 19 (ICAO, C-MIN 176/12, Jan. 24, 2006).

58. *See* Int'l Civil Aviation Org., *Report on the Survey Concerning the Need to Amend Existing International Air Law Instruments on Aviation Security* 3, ¶ 2.8 (ICAO, Council Working Paper No. C-WP/12531, Nov. 4, 2005) ("Based on this understanding, it may be concluded that fifty States, representing 92.5 percent of the total replies, have been supportive of a new international legal instrument, either in the form of an amendment or a separate convention.").

59. State Letter No. LE 4/65-05/45, *supra* note 39.

60. *See* Int'l Civil Aviation Org., *Acts or Offences of Concern to the International Aviation Community and Not Covered by Existing Air Law Instruments* 2, ¶ 1.1 (ICAO, Working Paper No. A36-WP/12, Aug. 14, 2007) ("Eighty-four out of 189 Member States replied [to the questionnaire], with an overwhelming majority affirming the need to review and amend the Conventions.").

61. *See* ICAO, Council Working Paper No. C-WP/12531, *supra* note 58, at 3, ¶ 3.2(c) (proposing future work "to convene a meeting of a Legal Sub-Committee to prepare a text of an international legal instrument to cover the new and emerging threats to civil aviation").

62. ICAO, C-MIN 176/12, *supra* note 57, ¶ 20.

63. *Id.* ¶ 22.

64. *Id.* ¶ 32.

65. *Id.* ¶ 41.

66. The final report suggested that the following acts, regardless of motive, should be criminalized in an international treaty:

of the Secretariat Study Group that the existing conventions did not contain sufficient measures relating to cooperation between law enforcement agencies, extradition, and prosecution of offenses against civil aviation security.[67] However, other recommendations were discarded, such as a potential amendment to the Tokyo Convention to cover acts of violence performed by unruly and disruptive passengers and the criminalization of the mere transport of certain prohibited material on board aircraft.[68]

On March 7, 2007, the Council instructed the then chairman of the ICAO Legal Committee[69] to convene a meeting of a Special Sub-Committee (SSCLC) in order to draft proposals to address new and emerging threats.[70] The SSCLC met in Montreal, Canada, for the

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i) use of civil aircraft as a weapon;
ii) use of civil aircraft to unlawfully spread biological, chemical and nuclear substances; attacks against civil aviation using biological, chemical, and nuclear substances;
iii) acts of organizing or directing offenses;
iv) wilful contribution to an offense even in those cases where the actual commission thereof might have not taken place; and
v) credible threat to commit an offense.

Int'l Civil Aviation Org., *Final Report Relating to the Secretariat Study Group on Aviation Security Conventions* 2–3 (ICAO, Working Paper No. C-WP/12851, Dec. 20, 2007); ICAO, Working Paper No. A36-WP/12, *supra* note 60, at 2-3, ¶ 2.1.2.1 (highlighting acts identified by the study group for criminalization through treaty provisions, independent of motive).

67. ICAO, Working Paper No. C-WP/12851, *supra* note 66.

68. The majority view within the Council was that legal issues involving unruly and disruptive passengers were "of a somewhat different nature." Int'l Civil Aviation Org., *Summary Minutes of the Ninth Meeting* ¶ 53 (ICAO, C-MIN 180/9, Mar. 5, 2008). Criticism that the Beijing instruments do not address air rage ignores the fact that the new and emerging threats initiative post 9/11 was never really intended to introduce amendments into the international regime in that area. *See* Ruwantissa Abeyratne, *The Beijing Convention of 2010: An Important Milestone in the Annals of Aviation Security*, 36 AIR & SPACE L. 243, 254 (2011) (identifying the noninclusion of air rage as one of the instrument' shortcomings). Incidentally, in 2011, ICAO re-established its special study groups on unruly and disruptive passengers. This group was tasked with examining whether the international regime—namely, the Tokyo Convention—merits further amendments. The group recommended that the organization should embark in a holistic modernization of the instrument and on November 9, 2011, the ICAO Council decided to convene a SSCLC. That SSCLC met on May 22–25 and December 3–7, 2012. *See* Int'l Civil Aviation Org., *Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention Including the Issue of Unruly Passengers* (ICAO, Report No. LC/SC-MOT, May 2012). Further regarding the work of the SSCLC, the Council recommended that the Thirty-fifth Session of the Legal Committee be convened. *See* Int'l Civil Aviation Org., *Report of the Second Meeting of the Special Sub-Committee of the Legal Committee to Review the Tokyo Convention* ¶ 4.1 (ICAO, Working Paper No. C-WP/SC-13931, Feb. 2, 2013). That meeting took place place May 6–17, 2013.

69. Gilles Lauzon QC (Canada).

70. Int'l Civil Aviation Org., *Summary of Decisions of the Tenth Meeting* ¶ 4 (ICAO, C-DEC 180/10, Mar. 9, 2007); Int'l Civil Aviation Org., *Special Sub-Committee of the Legal Committee for the Preparation of One or More Instruments Addressing New*

first time in July 2007.[71] At that meeting, the Australian delegate, serving as rapporteur,[72] proposed two draft protocols to amend the Hague Convention[73] and the Montreal Convention, as amended by the Airport Protocol, respectively.[74] The rapporteur noted that the proposals were in large part inspired by the previous work of the International Maritime Organization (IMO), giving strong consideration to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)[75] and the 2005 Protocol.[76] Thereafter, the Council convened a second meeting of the SSCLC from February 19 to 21, 2008. Following those two meetings, the SSCLC agreed on two draft protocols as proposed by the rapporteur.[77] That second meeting of the SSCLC also produced a second report, approved by the Council at the sixth meeting of its

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and Emerging Threats (ICAO, Working Paper No. C-WP/13032, Nov. 13, 2007) [hereinafter ICAO, Working Paper No. C-WP/13032].

71. Terry Olson (France) chaired the meetings of the SSCLC.

72. ICAO, LC/34-WP/4, *supra* note 1, ¶ 2.3; Int'l Civil Aviation Org., *Summary Minutes of the Eighth Meeting* ¶ 13 (ICAO, C-MIN 182/8, Nov. 28, 2007) [hereinafter ICAO, C-MIN 182/8].

73. Under the Hague Convention, the criminal offense has three basic elements. First, it involves an act that is unlawful. Second, there is a degree of force or threat of force that has been used. Third, the offense consists of a seizure of aircraft, exercise of unlawful control, or an attempt against such aircraft. DIEDERIKS-VERSCHOOR, *supra* note 46, at 299.

74. *See* Int'l Civil Aviation Org., *Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats* ¶ 74 (ICAO, Working Paper No. LC/SC-NET-WP/2, July 6, 2007) ("The development of the two Protocols, one to the Hague Convention and one to the Montreal Convention, will update those Conventions by criminalising acts which affect not only the safety of the aircraft but also of persons and property on board and outside of the aircraft.").

75. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *concluded* Mar. 10, 1988, I-29004 U.N.T.S. 1678 (entered into force Mar. 1, 1992) [hereinafter SUA Convention] ("[A]dopting effective and practical measures for the prevention of all unlawful acts against the safety of maritime navigation."). As of December 2, 2013, 161 states were party to the SUA Convention. *See* Int'l Maritime Org., *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions*, 421 (Dec. 2, 2013), *available at* http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf.

76. *See* Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Oct. 14, 2005 [hereinafter SUA Protocol]. As of December 2, 2013, only twenty-four states were party to the SUA Protocol. *See* Int'l Maritime Org., *Status of Multilateral Conventions*, *supra* note 75, at 446.

77. *See* Int'l Civil Aviation Org., *Report of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats* (ICAO, Report No. LC/SC-NET-2, Feb. 2008) [hereinafter ICAO, *Legal Sub-Committee Second Report*] ("[R]efin[ing] certain provisions of the two draft texts developed at its first meeting.").

184th Session.[78] The Council also decided to convene the Thirty-fourth Session of the Legal Committee (LC/34).[79]

Sixty-four ICAO Member States and six international organizations[80] attended LC/34,[81] which took place in Montreal from September 9 to 17, 2009.[82] LC/34 achieved significant and considerable consensus on the fact that the existing treaties needed to be amended to address the emerging threats to international civil aviation.[83] But a number of controversial issues remained where no agreement w reached, in particular the so-called military exclusion clause and the inclusion of the transport offense.[84]

Nonetheless, the Council approved LC/34's report and decided to convene a Diplomatic Conference—the culmination of a nine-year process.[85]

The Beijing Diplomatic Conference, the first meeting of its kind in the People's Republic of China, took place from August 30 to September 10, 2010.[86] Seventy-six ICAO Member States and four international organizations were represented at the conference.[87] The Conference elected Xia Xinghua from China as its president, but the

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78. Int'l Civil Aviation Org., *Summary Minutes of the Sixth Meeting* ¶¶ 30–40 (ICAO, C-MIN 184/6, June 23, 2008).

79. Int'l Civil Aviation Org., State Letter from Secretary-General to Member States, LM 2/19.1-09/27, at 1 (Apr. 9, 2009).

80. Airports Council International (ACI), Latin American Air & Space Law Association (ALADA), International Air Transport Association (IATA), European Union (EU), EUROCONTROL, and the United Nations Office on Drugs and Crime (UNODC). *See generally* Int'l Civil Aviation Org., *List of Delegates No. 2 to the Thirty-fourth Session of the Legal Committee* (ICAO, Doc. No. 9926-LC/194, Sept. 2009) [hereinafter ICAO, *List of Delegates No. 2*] (listing delegates); Int'l Civil Aviation Org., *Report of the 34th Session of the Legal Committee* ¶ 5.1 (ICAO, Doc. No. 9926-LC/194, 2009) [hereinafter ICAO, Report, Doc. No. 9926-LC/194] (providing attendance information).

81. In the absence of Henrik Kjellin (Sweden), Michael Jennison (United States) chaired LC/34.

82. ICAO, *List of Delegates No. 2*, *supra* note 80, at 1.

83. *See* ICAO, LC/34-WP/4, *supra* note 1, ¶ 2.4 (providing the opening address of the acting chairman of the legal committee in which he "emphasized the urgent need to amend the existing conventions to cover the new and emerging threats to civil aviation").

84. *See* Int'l Civil Aviation Org., *Draft Report on the Work of the Legal Committee During Its 34th Session*, Report ¶¶ 2:125–36 (ICAO, LC/34-WP/5-2, Sept. 16, 2009) [hereinafter ICAO, LC/34-WP/5-2] (reporting on the Council's discussion concerning the "military exclusion" language); *see also id.* ¶ 2:1158 (highlighting that "[s]ome delegations reiterated . . . opposition to the inclusion of the transport offence").

85. *See* Int'l Civil Aviation Org., State Letter from Secretary General Raymond Benjamin to Member States, LM 1/16.1-10/10, at 1 (Feb. 5, 2010) [hereinafter ICAO, State Letter LM 1/16.1-10/10] (announcing the Diplomatic Conference and inviting participation).

86. Int'l Civil Aviation Org., *Report on the Diplomatic Conference on Aviation Security (Beijing, 30 August to 10 September 2010) and the Related Action of the 37th Session of the Assembly* ¶ 1.1 (ICAO, Working Paper No. C-WP/13660, Oct. 29, 2010).

87. *Id.*

Commission of the Whole, under the chairmanship of Terry Olson from France, dealt with the most problematic issues.[88]

By way of comparison, 106 states attended[89] the Diplomatic Conference that led to the adoption of the Montreal Convention 1999.[90] Delegates from sixty-eight states and observers from fourteen international organizations[91] attended the Diplomatic Conference convened under the joint auspices of ICAO and the International Institute for the Unification of Private Law to adopt the Cape Town Convention[92] and its Protocol 2001.[93] Finally, eighty-one states and sixteen international organizations attended the Diplomatic Conference that led to the adoption of the Montreal Conventions 2009.[94] Participation at the Beijing Diplomatic Conference might suggest a rather moderate level of interest from Member States.[95]

III. THE NEW REGIME

A. *Temporal Scope*

The Hague Convention criminalizes the unlawful "seizure" of an aircraft.[96] The convention only applies once the "aircraft [is] in flight,"[97] which means that the offense may only be committed once

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88. *See* Int'l Conference on Air Law (Diplomatic Conference on Aviation Security) Held Under the Auspices of the International Civil Aviation Organization, Final Act (Beijing, Aug. 30, 2010–Sept. 30, 2010) [hereinafter Int'l Conference on Air Law, Final Act]. The Conference also elected the following officers: Terry Olson (France), First Vice-President; Hisham El-Zimity (Egypt), Second Vice-President; Levers Mabaso (South Africa), Third Vice-President; David Sproule (Canada), Fourth Vice-President; Cesar Fernando Mayoral (Argentina), Fifth Vice-President. Siew Huay Tan (Singapore) was elected chairperson of both the Drafting and Preambular and Final Clauses Committees. *See* ICAO, Working Paper No. C-WP/13660, *supra* note 86.

89. Int'l Civil Aviation Org., *International Conference on Air Law* ¶ 2, 3 (ICAO, Doc. 9775-DC/2, May 1999).

90. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 39917 [hereinafter Montreal Convention 1999].

91. Int'l Civil Aviation Org., *Report on the Outcome of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol* ¶ 1.1 (ICAO, Working Paper No. C-WP/11654, Nov. 27, 2001).

92. *See* Convention on International Interest in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 41143 [hereinafter Cape Town Convention].

93. *See* Protocol to the Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2011 [hereinafter Cape Town Protocol].

94. Int'l Civil Aviation Org., *Report on the International Conference on Air Law (20 April – 2 May 2009)* ¶ 1.1 (ICAO, Working Paper No. C-WP/13341, May 25, 2009).

95. Milde, *Beijing Convention*, *supra* note 34.

96. *See* Hague Convention, s*upra* note 2, at art. 1 (defining as an offense, unlawfully seizing or exercising control of an aircraft by force, threat of force, or intimidation).

97. *See id.* at art. 1 (defining the following as offenses, when "any person who on board an aircraft in flight" seizes or exercises control of that aircraft by force, threat,

all the aircraft doors are closed and only until the moment when they are opened after disembarkation.[98] This differs from the concept adopted in the earlier Tokyo Convention, where—following the precedent established by the Rome Convention 1952[99]—an aircraft is deemed to be in flight "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends."[100]

The Montreal Convention opted for a dual system. For certain offenses such as assaults on persons aboard,[101] destruction of or interference with air navigation facilities,[102] and transmission of false information endangering safety,[103] the convention applies from the moment the aircraft is in flight.[104] However, the convention also expanded the temporal scope to "aircraft in service" for offenses such as the destruction of the aircraft making it incapable of flying[105] and the introduction of devices or substances that may destroy the aircraft.[106] An aircraft was deemed to be in service "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."[107]

The Beijing Protocol adopted the concept of "aircraft in service," leaving aside the notion of "aircraft in flight" adopted by the Hague Convention.[108] This expanded temporal scope will apply to behavior such as the unlawful seizure of an aircraft. The Beijing Convention followed the Montreal Convention's dual system, retaining the same distinction for existing offenses and applying to the new criminal

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or intimidation; attempts to perform such an act; or is an accomplice to a person who performs or attempts to perform such an act).

98. *See id*. at art. 3, § 1 (defining when an aircraft is considered to be "in flight" for purposes of the convention).

99. Robert P. Boyle & Roy Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. AIR. L. & COM. 305, 331 (1964).

100. Tokyo Convention, *supra* note 2, at art. 1(b), § 3; *see also* Rome Convention, *supra* note 21, at art. 1, § 2. The drafters of the Hague Convention were doubtless of the view that it did not make much sense to follow the Tokyo Convention's approach with regard to the temporal scope, given the fact that there might be cases where the unlawful seizure of an aircraft may be committed after the boarding process but before the pilot applies power to the aircraft's engines.

101. Montreal Convention, *supra* note 2, at art. 1, § 1(a).

102. *Id*. § 1(d).

103. *Id*. § 1(e).

104. *See id*. §§ 1(a), (d), (e) (referring to acts that "endanger the safety of aircraft in flight").

105. *Id*. at art. 1, § 1(b).

106. *Id.*

107. *Id*. at art. 2(b).

108. *See* Beijing Protocol, *supra* note 24, at art. 5, § 1 (replacing Hague Convention Article 3(1)–"aircraft in flight"–with the following language: "an aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing . . . .").

behavior discussed below—such as the use of an aircraft as a weapon of mass destruction,[109] release of BCN weapons or explosive radioactive materials from an aircraft,[110] and the use of BCN weapons against an aircraft[111]—once the aircraft is in service.[112]

An aircraft that is not in service but is used to perpetrate an offense would fall outside the scope of the Beijing instruments. Domestic law would govern those cases, because before an aircraft is in service, it carries very little, if any, transnational component. The Beijing instruments are not intended to cross the boundaries of domestic law.

In addition, the Beijing Convention incorporates those offenses set forth by the Airport Protocol, such as the use of devices, substances, and weapons to carry out acts of violence against persons at, or the facilities of, international airports.[113] Here, the Beijing Convention does not provide for a specific temporal scope.[114] The instrument will apply as long as the offense is carried out against persons or facilities of such airports.[115]

B. *Physical Scope of Application*

Just like its predecessor, the Beijing Convention applies to offenses involving aircraft, air navigation facilities, and airports

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109. *See* Beijing Convention, *supra* note 23, at art. 1, § 1(f) (defining the following as an offense, "us[ing] an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment").

110. *See id*. § 1(g) (defining the following as an offense, "releas[ing] or discharg[ing] from an aircraft in service any BCN weapon or explosive, radioactive, or similar substances in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment").

111. *See id*. § 1(h) (defining the following as an offense, "us[ing] against or on board an aircraft in service any BCN weapon or explosive, radioactive, or similar substances in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment").

112. The Beijing Convention's definition of the term *aircraft in service* remains unaltered from that adopted by the Montreal Convention. *Id.* at art. 2(b).

113. Specifically, Article 1, § 2 states:

> Any person commits an offence if that person unlawfully and intentionally, using any device, substance or weapon: (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport.

Id. at art. 1, § 2.

114. *Id.*

115. *See id*. ("Any person commits an offence if that person unlawfully and intentionally, using any device, substance or weapon [performs certain acts] . . . if such an act endangers or is likely to endanger safety at that airport.").

serving international civil aviation.[116] With regard to the offenses committed from an aircraft in flight, against or with an aircraft in service, the instrument applies to three different scenarios.[117]

First, it applies when the aircraft's actual or intended place of takeoff or landing is in a state other than the state of registry of the aircraft. [118] The word *actual* captures a situation in which the aircraft is forced to divert from its route, landing in most cases in a place other than its original destination.[119] *Intended* refers to the planned itinerary.[120]

Second, it applies where the offense takes place in the territory of a state other than the aircraft's state of registry.[121] In these two scenarios, it is immaterial whether the aircraft in question is engaged in an international or domestic flight.[122] The instrument could be applicable to an entirely domestic operation to the extent that the aircraft involved is diverted and forced to land in a state other than its state of registry.[123] This is so because when an aircraft engaged in a purely domestic operation is hijacked, it is simply impossible to establish where that aircraft will end up landing.[124] The instrument also applies to domestic flights where the operator "dry leases" the aircraft.[125] In this situation the aircraft is, in most cases, registered in another state.[126] Here, both the state where the offense was

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116. *See id*. at art. 1 (including offenses involving aircraft, as well as interfering with aircraft operation by destroying or damaging navigation facilities); *id*. § 2 (including offenses endangering the safety of an airport).

117. *See id*. at art. 5 (outlining when the Convention applies).

118. *Id*. at art. 5, § 2(a); Beijing Protocol, *supra* note 24, at art. 7.

119. Beijing Protocol, *supra* note 24, at art. 5, § 5; Beijing Convention, *supra* note 23, at art. 5, § 2(a).

120. Beijing Convention, *supra* note 23, at art. 5, § 2(a).

121. *Id*. at art. 5, § 2(b).

122. *See id*. at art. 5, § 2.

123. JACQUES DE WATTEVILLE, LA PIRATERIE AERIENNE [AIRCRAFT PIRACY] 83 (1978).

124. *See* Int'l Civil Aviation Org., *Options Paper for Amendment of Article 4 of the Montreal Convention* 3, ¶ 4.1 (ICAO, DCAS Doc No. 5, July 15, 2010) ("It was considered that where aircraft are hijacked it is impossible to determine where they might land and that the Convention should apply where the aircraft lands in another State even though the flight was scheduled as a domestic flight at the point of take-off.").

125. *See* Beijing Convention, *supra* note 23, at art. 8, § 1(d) (requiring parties to take measures to establish jurisdiction over Article 1 offenses "when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State").

126. A dry lease involves a leasing arrangement where the lessor provides the aircraft and the lessee is in charge of securing the crew to operate it. The lessee is responsible for making the necessary arrangement to secure the crew. *See* ICAO, DCAS Doc. No. 5, *supra* note 124, at 5–6, n.9 (defining dry-lease aircrafts).

committed and the state of registration of the aircraft would have jurisdiction.[127]

Third, the instrument also applies where the alleged offender is found in a state other than the aircraft's state of registry.[128]

In each of these scenarios, it is worth noting that the instrument speaks about "State[s]," not "State[s] Part[y]."[129] This was done to avoid safe havens in states that do not adhere to the convention, because the adoption of *State Party* would have limited the instrument's scope of application only to those states that ratify or accede to the convention. In other words, even if one assumed that France had ratified, but Germany had not, the instrument would still apply to an incident taking place on board a German-registered aircraft within two points in France. It would also apply if the alleged offender was found in Germany.

With regard to the offenses such as damaging or destroying air navigation facilities, the instrument will be applicable to the extent that such facilities are used for international air navigation.[130] Given that these facilities are in most cases used interchangeably for domestic and international operations, an entirely domestic, terrorist attack against, for instance, an air traffic control center, where all offenders and victims are nationals of the state in whose territory the act took place, may very well trigger the application of the instrument.[131]

The Beijing Convention is silent as to the scope of offenses against airport facilities or persons located in such facilities.[132] Just like the Airport Protocol, the Beijing Convention does not provide a definition of "an airport serving international civil aviation".[133] Although a definition was considered, the Twenty-fourth Session of the ICAO Legal Committee opted to leave the term undefined.[134] One may therefore infer that the Beijing Convention should apply to the extent that these offenses take place at international airports.[135]

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127. During the Beijing Diplomatic Conference, an unsuccessful attempt was made to carve out from the application of the instrument entirely domestic flights when the aircraft is subject to a dry lease. *Id.* at 5, ¶ 5.8.

128. Beijing Convention, *supra* note 23, at art. 5, § 3.

129. *Id.* at art. 5.

130. *Id.* at art. 5, § 5.

131. *Id.*

132. *See id.* (referencing Article 1(1)(d), which makes it an offense to destroy air navigation facilities but does not include an explanation of what this might entail).

133. *Id.* at art. 1, § 2(a).

134. Int'l Civil Aviation Org., *Legal Opinion on Application of AVSEC-CONF/2 Recommendation 4.1 (Locking of Flight Deck Doors) to Domestic Flights* ¶ 3.3.3 (ICAO, Working Paper No. C-WP/11795, May 14, 2002); Kirsch, *supra* note 11, at 10–11 ("In the end the Legal Committee decided to dispense with both the definition and the designation of airports serving international civil aviation . . . .").

135. The offense reads:

Thus, the tragic suicide-bombing attack at Moscow Domodedovo International Airport on January 24, 2011, where thirty-seven people were killed and another 180 were severely injured, would have fallen under the Beijing Convention.[136] The acts of accomplices, organizers, and those who attempt to commit offenses from an aircraft in flight; acts against or with an aircraft in service; and acts involving air navigation facilities and international airports are also subject to the above rules.[137]

Following the long-standing precedent set by the Chicago Convention, neither of the Beijing instruments applies to aircraft used in military, customs, or police services.[138]

C. *The New Principal Offenses*

The Diplomatic Conference incorporated most of the new offenses in the Beijing Convention. These are:

-the use of an aircraft as a weapon of mass destruction;
-the release of BCN weapons; and
-the transport offense.

The Beijing Protocol added the offense of hijacking by coercion or technological means.[139]

Both the Beijing Convention and the Beijing Protocol criminalized a number of ancillary offenses, including the offense of concealment.[140] Each is examined further below.

1. Use of an Aircraft as a Weapon

The most novel aspect of the Beijing Convention is the creation of a new criminal offense of using an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to

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> Any person commits an offence if that person unlawfully and intentionally, using any device, substance or weapon: (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport.

Beijing Convention, *supra* note 23, at art. 1, §§ 2(a)–(b).

136. Alexei Anishchuk, *Suicide Bomber Kills 35 at Russia's Biggest Airport*, REUTERS (Jan. 24, 2011, 6:40 PM), http://www.reuters.com/article/2011/01/24/us-russia-blast-airport-idUSTRE70N2TQ20110124.

137. Beijing Convention, *supra* note 23, at art. 5, § 6; Beijing Protocol, *supra* note 24, at art. 4.

138. Beijing Convention, *supra* note 23, at art. 5, § 1; Beijing Protocol, *supra* note 24, at art. 6, § 2.

139. Beijing Protocol, *supra* note 24, at art. 2.

140. *See id.* at art. 2 (referencing generally that there are ways other than affirmative means to commit the offense of hijacking).

property or the environment.[141] This new offense is a very obvious response to the factual scenario that arose on 9/11,[142] but it also addresses the fact that a terrorist's use of an aircraft as a weapon of mass destruction contravenes the spirit of the Chicago Convention.[143]

Previous proposals that had emerged from the SSCLC included the wording "in a manner that causes or is likely to cause"[144] damages rather than "for the purpose of," and indeed, that proposal resurfaced in the course of the Diplomatic Conference.[145] In light of the fact that "the use of an aircraft is not in itself, as is the case with dangerous substances, likely to cause the required damage"[146] and in order to align the proposal with the 2005 SUA Protocol, LC/34 had rejected that proposal.[147] At the Diplomatic Conference, the point was also made by a number of states[148] that if the offense referred to the manner in which an aircraft is flown, this might inadvertently bring acts of criminal negligence or mere operational errors and similar concepts within the scope of the offense, going well beyond the intention of the original proposals and the consensus reached at the previous stages of the process.

The inclusion of environmental damages was also a contentious issue.[149] Some delegations were of the view that such damages should not be included in a treaty of this nature and deserved separate treatment.[150] However, by the time of the Beijing Diplomatic Conference, those reservations had disappeared and most states favored the retention of "the reference to the environment, considering that it serves the purpose of covering indirect damage to persons or property."[151]

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141. Beijing Convention, *supra* note 23, at art. 1, § 1(f).

142. ICAO rapidly condemned these events as "terrorist acts contrary to elementary considerations of humanity, norms of conduct of society and as violations of international law." ICAO, Resolution A33-1, *supra* note 20, at VII-1.

143. Convention on International Civil Aviation arts. 3–4, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention]; *see* ICAO, Resolution A33-1, *supra* note 20, at VII-I, ¶ 3 ("Urges all Contracting States to ensure, in accordance with Article 4 of the Convention, that civil aviation is not used for any purpose inconsistent with the aims of the Convention on International Civil Aviation . . . .").

144. *See* Int'l Civil Aviation Org., *Draft Report on the Work of the Legal Committee During Its 34th Session*, Report 2-2, ¶ 2:9 (ICAO, LC/34-WP/4-1, Sept. 15, 2009) [hereinafter ICAO, LC/34-WP/4-1] (providing an overview of the discussion regarding intentionality).

145. At the Beijing Diplomatic Conference, Germany tabled this proposal from the floor, and this was supported, at least initially, by Canada and Sweden. (authors own notes).

146. ICAO, Report, Doc. No. 9926-LC/194, *supra* note 80, at 2-2.

147. *Id*.

148. This was raised by South Africa, Singapore, Uganda, and New Zealand. (authors' own notes).

149. *See* ICAO, LC/34-WP/4-1, *supra* note 144, at 2-2, ¶ 2:9 (highlighting one delegate's belief that environmental damages should not be a focus of the Convention).

150. *Id.*

151. *Id.* at 2-2, ¶ 2:10.

2. Release or Discharge of BCN Weapons

The Beijing Convention creates the new criminal offenses of releasing or discharging any BCN weapon[152] or explosive, radioactive, or similar substance from an aircraft in service.[153] The instrument also criminalizes using such weapons or substances against another aircraft or on board an aircraft in service.[154] Those in favor of including this offense argue that international civil aviation must also address the potential use of an aircraft for proliferation purposes.[155] During LC/34 discussions, however, a numbers of states expressed serious concerns on expressly referring to BCN weapons.[156]

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152. Drawing inspiration from the 2005 SUA Protocol, Article 2(h) of the Beijing Convention defines a BCN weapon as follows:

> (a) biological weapons, which are:
> (i) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
> (ii) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.
> (b) chemical weapons, which are, together or separately:
> (i) toxic chemicals and their precursors, except where intended for:
> a. industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; or
> b. protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; or
> c. military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; or
> d. law enforcement including domestic riot control purposes, as long as the types and quantities are consistent with such purposes;
> (ii) munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (b) (i), which would be released as a result of the employment of such munitions and devices;
> (iii) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b) (ii)
> (c) nuclear weapons and other nuclear explosive devices.

Beijing Convention, *supra* note 23, at art. 2(h).

153. Beijing Convention, *supra* note 23, at art. 1(g).

154. *Id.* at art. 1(h).

155. *See* International Conference on Air Law, Aug. 30–Sept. 10, 2010, *Transport of Certain Materials Offence and the Use of Civil Aircraft for Proliferation Purposes* 1 (ICAO, DCAS Doc. No. 10, May 8, 2010) [hereinafter ICAO, DCAS Doc. No. 10] ("To ensure that international civil aviation is not used for any purpose inconsistent with the Convention on International Civil Aviation (Chicago Convention), we must address the use of civil aircraft for proliferation purposes.").

156. *See* ICAO, LC/34-WP/4-1, *supra* note 144, at 2-2 (documenting various state concerns regarding BCN weapons).

In the end, LC/34's plenary session retained the definition, which was later incorporated unaltered by the Beijing Diplomatic Conference.[157]

3. Hijacking by Coercion or Technological Means

The Hague Convention made it an offense to seize or exercise control of an aircraft in flight unlawfully by force or other form of intimidation. [158] The Beijing Protocol creates a new principal offense[159] if the unlawful and intentional seizure or exercise of control of an aircraft in service is carried out by "coercion or by any technological means." [160] This new concept tries to capture the possibility that, for instance, "control [of the aircraft] could be obtained by a person on the ground jamming the [air navigational] signals without seizing [it] physically."[161]

It will be interesting to see whether the increasing instances of pointing or shining laser signals into aircraft cockpits will fall under this offense.[162] Obviously, a prosecutor would still need to establish the perpetrator's intent to commit such an offense.[163]

4. Transport Offense

One of the most controversial aspects of the Beijing Convention relates to the "transport offense"—the creation of a new substantive criminal offense of unlawfully and intentionally transporting, causing to transport, or facilitating the transport on board an aircraft of:

i) any explosive or radioactive material (knowing that it is intended to be used to cause death or serious injury or damage);[164]
ii) any BCN weapon, knowing it to be so;[165]
iii) source material (including fissionable material);[166] and

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157. *See id.* at 2-2, ¶ 2:11 ("At the end, it was decided to retain the reference to BCN weapon without square brackets and refer these provisions to the Drafting Committee.").

158. Hague Convention, *supra* note 2, at art. 1(a).

159. Or, strictly speaking, expands the scope of the existing offense under the Hague Convention.

160. Beijing Convention, *supra* note 23, at art. 2, § 1.

161. Int'l Civil Aviation Org., *Draft Report on the Work of the Legal Committee During Its 34th Session*, 2-14, ¶ 2.99 (ICAO, LC/34-WP/5-2, Sept. 16, 2009).

162. Shining laser pointers at aircraft is a rising phenomenon. In the United States, this type of behavior is subject not only to fines up to $250,000 but also up to 5 years of federal imprisonment. Tom Fontaine, *Feds Get Tough on Laser Pointer Aircraft Attacks*, TRIB LIVE (Feb. 28, 2012), http://www.pittsburghlive.com/x/pittsburghtrib/news/s_783830.html.

163. *See* Beijing Convention, *supra* note 23, at art. 1 (placing emphasis on the term *intentionally*).

164. *Id.* at art. 1(i)(1).

165. *Id.* at art. 1(i)(2).

iv) any equipment, materials or software, or related technology that significantly contributes to the design, manufacture, or delivery of a BCN weapon.[167]

In general terms, the transport of such materials will constitute a criminal offense if done unlawfully and with knowledge or intent to cause damage. Discussions at LC/34 and the Diplomatic Conference demonstrated consensus that the criminalization of this offense is "not intended to capture ordinary operational behaviour."[168] Those who supported the notion of the transport offense have often said that its inclusion was justified because the IMO had already set a precedent with the SUA Protocol.[169] Failure of ICAO to follow might "result in greater reliance upon civil aircraft by proliferators to transport material thereby even further compromising the objectives of ICAO and the operation of civil aircraft for peaceful purposes."[170] This argument is based on the (arguably incorrect) presumption that, before deploying an attack, terrorists make an assessment of the existing legal framework and that the decision to pick one mode of transport over another depends on the legal gaps that they have identified. But surely terrorists are more practical than academically oriented. They would strike where they identify flaws in screening systems or security checkpoints. It is hard to imagine the applicable legal framework as being a decisive factor—far from it. As it will be explained below, the airline industry also expressed very significant concerns on the practical implications of this new offense for air carriers.[171]

The inclusion of the transport offense was merely a legal hiccup at LC/34 but constituted a major barrier at the Diplomatic Conference. [172] Although the majority of delegations at LC/34 supported its inclusion, a significant number of states expressed

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166. *Id*. at art. 1(i)(3). The text that came out of the SSCLC's second meeting criminalized the unlawful and intentional transport of "source material" and "special fissionable material," but did not provide for a definition of these terms. ICAO, *Legal Sub-Committee Second Report*, *supra* note 77, at A4-2. The Russian Federation argued that these terms require definitions and that such definitions should follow those found in Article XX of the Statue of the International Atomic Energy Agency. *See* ICAO, LC/34-WP/2-6, *supra* note 49, at 2, ¶ 2.2 (affirming the IAEA's definitions of *source material* and *special fissionable matter*). The Diplomatic Conference retained that suggestion in square brackets and the Diplomatic Conference finally adopted those definitions. Beijing Convention, *supra* note 23, at art. 2(j) (providing the definitions of *source material* and *special fissionable matter*).

167. Beijing Convention, *supra* note 23, at art. 1(i)(4).

168. ICAO, LC/34-WP/4-1, *supra* note 144, at 2-2, ¶ 2:10.

169. *See id*. at 2-2 (referencing comments that favored the SUA Protocol inclusion of "transport offense").

170. ICAO, DCAS Doc. No. 10, *supra* note 155, at 4, ¶ 4.5.

171. *See infra* Section 4.

172. ICAO, LC/34-WP/4-1, *supra* note 144, at 2-3 to 2-4 (noting that "the definition of the transport offences itself was a cause for concern").

serious concerns.[173] Such was the opposition to this offense that Egypt not only firmly opposed its inclusion in the final text but had also managed to force a voting process on this issue at LC/34.[174] This had not happened in quite some time in a meeting of this kind, where delegates most often strive to achieve results by consensus, following long-standing ICAO practice.[175] Egypt's motion to vote on the inclusion of the offense halted discussions for a couple of hours. Initially, LC/34's chairman was hesitant to call for a vote, although that possibility is set out in the rules of procedures of ICAO's Legal Committee.[176] However, after extensive consultation, the chairman did call for a vote on the issue.[177] In the end, the motion from Egypt was defeated, although that was not expressly recorded at all in the LC/34 report. There were considerable legal and political hurdles on display at LC/34, arising from the issue of the transport offense that were not resolved prior to the Beijing Diplomatic Conference.[178]

Reflecting this disparity of positions, the text that was submitted to the Diplomatic Conference included the offense only between square brackets.[179] In Beijing, Australia,[180] Azerbaijan,[181] Saudi Arabia,[182] China,[183] India,[184] and the International Air Transport

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173. *Id.*

174. ICAO, Report, Doc. No. 9926-LC/194, *supra* note 80, ¶ 2:160.

175. *See* ICAO LC/34-WP/5-2, *supra* note 161, at 2-12 (noting that if delegations did not have a consensus, they were not adopted).

176. Legal Committee, Int'l Civil Aviation Org., Rules of Procedure 16 (ICAO, Doc. No. 7669-LC/139/5, 1998).

177. ICAO, Report, Doc. No. 9926-LC/194, *supra* note 80, ¶ 2:160.

178. *Id.* ¶ 2:25.

179. *Id.* at D-1; Int'l Civil Aviation Org., *Draft Consolidated Text of the Montreal Convention of 1971 as Amended by the Airports Protocol of 1988 with Amendments Proposed by the Legal Committee* 2, (ICAO, DCAS Doc. No. 3, Feb. 2, 2010).

180. ICAO, DCAS Doc. No. 10, *supra* note 155, at 1.

181. *See* International Conference on Air Law, Beijing, Aug. 30–Sept. 10, 2010, *Proposals*, (ICAO, DCAS Doc. No. 12, Aug. 11, 2010) [hereinafter ICAO, DCAS Doc. No. 12] (identifying Azerbaijan as a presenter of a working paper submitted to the Beijing Diplomatic Conference).

182. *See* International Conference on Air Law, Beijing, Aug. 30–Sept. 10, 2010, *Essential Corrections and Additions to the Draft Texts Prepared by the Legal Committee*, (ICAO, DCAS Doc. No. 11, Aug. 16, 2010) [hereinafter ICAO, DCAS Doc. No. 11] (identifying Saudi Arabia as a presenter of a working paper submitted to the Beijing Diplomatic Conference).

183. *See* International Conference on Air Law, Beijing, Aug. 30–Sept. 10, 2010, *Comments on the Draft Protocols to the 1971 Montreal Convention and the 1970 Hague Convention*, (ICAO, DCAS Doc. No. 15, Aug. 27, 2010) [hereinafter ICAO, DCAS Doc. No. 15] (identifying China as a presenter of a working paper submitted to the Beijing Diplomatic Conference).

184. *See* International Conference on Air Law, Beijing, Aug. 30–Sept. 10, 2010, *Proposal for Deletion of Article 4 Ter of the Montreal Convention of 1971 as Amended by the Airports Protocol of 1988, with Amendments Proposed by the Legal Committee*, (ICAO, DCAS Doc. No. 14, Aug. 30, 2010) [hereinafter ICAO, DCAS Doc. No. 14] (identifying India as a presenter of a working paper submitted to the Beijing Diplomatic Conference).

Association (IATA)[185] submitted working papers that dealt with this issue.

Australia argued strongly that ICAO was indeed the correct forum for this issue because it was the guarantor of the operation of aircraft for peaceful purposes.[186] It referred to the view of the UN Security Council, which made a clear link between the proliferation of dangerous substances and the growth of terrorism.[187] That view was supported by a number of states, including France, the Netherlands, Japan, and the United Kingdom.

Its opponents argued that its inclusion in an ICAO treaty was unnecessary because its objective was already covered by other international treaties and does not fall within ICAO's remit.[188] Such was the level of disagreement that the matter was referred to a Special Working Group, which ultimately produced a compromise text.[189] This formed part of the compromise package that the Diplomatic Conference ultimately adopted, albeit not without controversy.

One might consider that the recourse to the voting procedures at LC/34 on the transport offense set something of a precedent, which was seen again at the Diplomatic Conference. And, although the Diplomatic Conference ultimately incorporated the transport offense into the Beijing Convention, given such tremendous opposition, one may certainly wonder whether its inclusion may eventually hinder the instruments' chances of widespread ratification.

The term *transport* is not defined.[190] Instead, both LC/34 and the Diplomatic Conference decided to describe the conduct that constitutes the offense.[191] In order to ensure that the new offense

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185. *See* International Conference on Air Law, Beijing, Aug. 30–Sept. 10, 2010, *The Views of the International Air Transport Association (IATA) on the Proposed Instruments to Address New and Emerging Threats to Civil Aviation*, (ICAO, DCAS Doc. No. 13, Aug. 19, 2010) [hereinafter ICAO, DCAS Doc. No. 13] (identifying IATA as a presenter of a working paper submitted to the Beijing Diplomatic Conference).

186. *See* ICAO, DCAS Doc. No. 10, *supra* note 155, at 1 ("This paper sets out exactly why a prohibition on the use of the civil aircraft to intentionally and unlawfully transport biological, chemical and nuclear (BCN) weapons . . . is . . . entirely consistent with ICAO's objectives.").

187. *See id.* at 2 (discussing the UN Security Council's statement of affirmation regarding the existence of a link between terrorism and the proliferation of dangerous substances).

188. ICAO, LC/34-WP/4, *supra* note 1, at 2-3 to 2-4, 2-11 (highlighting the issue's divisiveness).

189. International Conference on Air Law, Beijing, Aug. 30–Sept. 10, 2010, *Informal Group on Transport Offences*, (ICAO, DCAS Flimsy No. 3, Sept. 7, 2010) [hereinafter ICAO, DCAS Flimsy No. 3].

190. *See* ICAO, Legal Committee Working Paper No. LC/34-WP/2-1, *supra* note 49, ¶ 4.1 ("The term 'transport' is not defined in the Draft Protocol"); Beijing Convention, *supra* note 23, at art. 1(i) (outlining the types of transport that would be criminalized, but not exclusively defining the word *transport*).

191. ICAO, Legal Committee Working Paper No. LC/34-WP/2-1, *supra* note 49, ¶ 4.1; *see* Beijing Convention, *supra* note 23, at art. 1(i) (describing the conduct that

covers the full range of possible criminal actions involved, the acts of "transporting, causing to transport, or facilitating transport on board an aircraft" were each criminalized.[192] That solution is not unusual in the aviation field.[193] The drafters of the Montreal Convention 1999 also struggled to find a definition for the term *transport*[194] and simply adopted the term *carriage by air* without further definition.[195]

Instead of extending the scope of the transport offense to all cases, some states had proposed at LC/34 an opt-in or opt-out approach that would allow states the flexibility to decide whether they wished to incorporate this concept into their domestic legal systems.[196] In the absence of any similar precedent in other UN counterterrorism conventions, the majority of states at LC/34 thought that this was not appropriate in the context of an international treaty dealing with criminal law, and the proposal was abandoned.[197]

For an act to constitute a criminal offense, it must be carried out "unlawfully" and "intentionally."[198] However, those terms are defined nowhere in the texts. Some states raised this concern at LC/34 and again at the Beijing Diplomatic Conference.[199]

One observer noted at LC/34 that these terms may appear redundant, but they are the standard language originating from the criminal law of the common law systems.[200] The Hague Convention only used the qualification "unlawful,"[201] whereas the Montreal Convention and the Montreal Protocol 1988 used both.[202] And with a

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would constitute the offense); Beijing Protocol, *supra* note 24, at art. 2 (noting not only that the term transport is not defined but also that it is not used).

192. *See, e.g.*, Beijing Convention, *supra* note 23, at art. 1(i) (outlining a range of items and materials that are prohibited from being transported on board an aircraft); ICAO, Legal Committee Working Paper No. LC/34-WP/2-1, *supra* note 49, ¶ 4.1.

193. International Conference on Air Law, Montreal, Can., May 10–28, 1999, *Minutes and Documents*, (Doc. 9773-DC/1) [hereinafter ICAO, Doc. 9773].

194. *Id*.

195. *See* Montreal Convention 1999, *supra* note 90, at arts. 1, 18 (highlighting examples in which the term *transport* has been redefined as "carriage by air").

196. *See* ICAO, LC/34-WP/4-1, *supra* note 144, at 2-4, ¶ 2:24 ("A few delegations supported the idea of exploring the merits of an opt-in/opt-out approach in relation to the transport offences.").

197. *See id*. at 2-4, ¶ 2:31 (explaining that the "preponderance of views" was not to accept this proposal).

198. Beijing Convention, *supra* note 24, at art. 1, § 1; Beijing Protocol, *supra* note 24, at art. 2, § 1.

199. ICAO, LC/34-WP/4-1, *supra* note 144, at 2-6, §§ 2:46, 2:47.

200. *Id.*

201. *See* Hague Convention, *supra* note 2, at art. 1(a) ("Any person who on board an aircraft in flight: (a) unlawfully . . . seized, or exercises control of that aircraft . . . .").

202. *See, e.g.*, Montreal Convention, *supra* note 2, at art. 1 ("Any person commits an offence if he unlawfully and intentionally . . . ."); Airport Protocol, *supra* note 11, at art. 2 ("1 *bis*. Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon . . . .").

few exceptions,[203] most other international conventions also use both terms.[204] LC/34 opted to maintain those terms unaltered, and ultimately the new treaties mirrored the Hague and Montreal regimes to impose the double requirement of unlawful and intentional.[205] Michael Milde takes the view that "'unlawful' [means that the act] must be contrary to a general duty imposed by law."[206] Thus, Milde argues it would not be unlawful, for instance, "if a qualified person were to take over the control of the aircraft for an incapacitated crew member."[207] The word *intentional*, on the other hand, encapsulates the *mens rea* concept that the act cannot simply involve a degree of negligence on the part of the wrongdoer.[208]

5. From the Transport of Fugitives to Concealment

The first meeting of the SSCLC had considered an Australian proposal to criminalize the intentional and unlawful transport of fugitives.[209] This would have made an offense of the act of knowingly transporting on board an aircraft in service a person attempting to evade criminal prosecution for offenses set out in a number of other

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203. The Financing of Terrorism Convention requires the conduct to be carried out "unlawfully and wilfully." *E.g.*, Financing of Terrorism Convention, *supra* note 50, at art. 2, § 1. Likewise, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, and the Convention on the Physical Protection of Nuclear Material opted for the word *intentional* only. *See* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents art. 2, Dec. 14, 1973, 1035 U.N.T.S. 15410; Convention on the Physical Protection of Nuclear Material art. 7, Oct. 26, 1979, 1456 U.N.T.S. 24631.

204. *See, e.g.*, SUA Convention, *supra* note 75, at art. 3 (exemplifying an international treaty that uses both the terms *unlawfully* and *intentionally*); International Convention for the Suppression of Acts of Nuclear Terrorism art. 2, Apr. 13, 2005, 2445 U.N.T.S. 44004 ("Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally;"); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf art. 2, Mar. 10, 1988, 1678 U.N.T.S. 29004 ("Any person commits an offence if that person unlawfully and intentionally;"); Terrorist Bombings Convention, *supra* note 50, at art. 2 ("Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers . . . ."); SUA Protocol, *supra* note 75, at art. 4 ("Any person also commits an offence within the meaning of this Protocol if that person: (a) unlawfully and intentionally . . . ."); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf art. 4, Oct. 14, 2005 ("Any person commits an offence within the meaning of this Protocol if that person unlawfully and intentionally . . . .").

205. ICAO, Report, Doc. No. 9926-LC/194, *supra* note 80, ¶ 2:62.

206. MILDE, INTERNATIONAL AIR LAW, *supra* note 34, at 231.

207. *Id.* at 223.

208. *Id.*

209. *See* Int'l Civil Aviation Org., *Report of the Special Sub-Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats* 2-2 to 2-12 (ICAO, Report No. LC/SC-NET, 2007) (explaining that the rapporteur of the Legal Committee, Ms. J. Atwell (Australia), had submitted a proposal to criminalize the unlawful and intentional transport of fugitives).

international treaties, not only those related to international civil aviation.[210]

The original proposal was to follow the SUA Protocol, creating a criminal offense or alternatively developing standards within the context of Annex 18[211] of the Chicago Convention.[212] During the SSCLC discussions, a number of states expressed strong reservations with regard to the proposed offense.[213] From the outset, the proposed language was extremely unclear and the element of "knowledge," which was required, did not necessarily remove that vagueness.[214] The SSCLC also noted the potential liability for airlines.[215] There was no agreement within the first meeting of the SSCLC, so the issue was submitted to the Council for consideration because it was thought that the inclusion of such an offense was a matter of policy.[216] The Council opted to include this offense for consideration at the second meeting of the SSCLC, which took place from February 19 to 21, 2008.[217]

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210. *See id*. at 2-3 (discussing the "intent" aspect of the offense).

211. *See* INT'L CIVIL AVIATION ORG., ANNEX 18 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION–THE SAFE TRANSPORT OF DANGEROUS GOODS BY AIR (3d ed. 2001) [hereinafter ANNEX 18] (providing a description of the Annex 18 standards).

212. ICAO, Working Paper No. C-WP/13032, *supra* note 70.

213. *See* ICAO, LC/SC-NET, *supra* note 72, at 2-12, § 10.12.4 ("A number of members expressed serious reservations and/or declined to take a premature position on the mere transport issue given its technical, legal and political complexity and need for further research and discussion.").

214. *Id.*

215. *Id.*

216. ICAO, Working Paper No. C-WP/12851, *supra* note 66.

217. ICAO, C-MIN 182/8, *supra* note 72, ¶ 18. The original wording of the offense reads:

> Any person commits an offence if that person unlawfully and intentionally . . .
>
> (j) transports, causes to be transported, or facilitates the transport of another person on board an aircraft knowing that the person has committed an act that constitutes an offence set forth in the treaties listed in the Annex, and intending to assist that person to evade criminal prosecution.

Id. See ICAO, LC/SC-NET, *supra* note 209, at A4-2 (showing the amendments to Article 1 proposed by the SSCLC). The Annex would have included reference to the following international instruments: i) Hague Convention 1970; ii) Montreal Convention 1971; iii) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Adopted by the General Assembly of the United Nations on 14 December 1971; iv) International Convention Against the Taking of Hostages, Adopted by the General Assembly of the United Nations on 17 December 1979; v) Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979; vi) Protocol for the Suppression of Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on 24 February 1988; vii) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixes Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; viii) International Convention for the Suppression of Terrorist Bombings, Adopted by the General Assembly of the United Nations on 15

On November 28, 2009, the Council reexamined the SSCLC's final report and the proposed offense was the subject of heated debate.[218] Those in favor argued that this offense closed the gap of having civil aircraft used to assist fugitives to evade criminal prosecution for security-related acts. [219] Strongly supporting its inclusion, Australia contended that since the IMO had already adopted the SUA Protocol, "it was ICAO's responsibility to address [such an] offence [because it is] entirely consistent with ICAO's objectives." [220] Furthermore, Australia advised that "a failure by ICAO to work towards prohibiting said offense in the aviation context could only be considered as a failure to encourage the operation of civil aircraft for peaceful purposes."[221]

Member States who supported this proposal also indicated that the criminalization of the transport of fugitives is in line with UN Resolution 1373.[222] Whilst one cannot but fully support the spirit of UN Resolution 1373 to prevent and suppress the financing of terrorist acts, there is no express reference in that resolution to the transport of fugitives. [223] Its aims can be best achieved by multilateral cooperation arrangements to prevent and suppress terrorist attacks and the enhancement of effective border controls.

Sounding a note of caution, Japan warned that "careful consideration should be given to the differences between maritime and air transportation." [224] Aviation differs significantly from the maritime environment, particularly with respect to the security controls that are in place to gain access to vessels.[225] Indeed, it can be argued that security controls in air transport are noticeably more rigorous than in other modes of transport.[226]

France noted that since the issue involved other considerations, such as extradition and legal cooperation, the transport of fugitives was not directly linked to the safety of international civil aviation.[227] It also noted that ICAO's approach had always been to criminalize those acts that endanger the safety of international civil aviation.[228]

December 1997; and ix) International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations on 9 December 1999. *See id*. at A4-2, n.2.

218. ICAO, Working Paper No. C-WP/13032*, supra* note 70.

219. *Id.*

220. ICAO, C-MIN 182/8, *supra* note 72, at 70.

221. *Id.*

222. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

223. *See id.* (noting that the term *terrorists*, rather than fugitives, is used).

224. *See* ICAO, WP/12851, *supra* note 66, at 4, ¶ 2.2.1 (highlighting concerns that existed regarding air transportation and maritime law).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

Brazil and Italy were equally skeptical on the inclusion of the offense of the transport of fugitives.[229] And, expressing its own discomfort, Germany noted that the SUA Protocol had attracted an insignificant number of ratifications.[230]

However, the offense was nevertheless included in the draft text submitted to LC/34 and the Beijing Diplomatic Conference.[231]

In this context, the offense arguably does not add anything to the overall initiative that the Beijing Diplomatic Conference considered. In practice, it is almost impossible for an airline to make a reasonable assessment to establish:

i) that a person has committed an offense; and
ii) that such person intends to evade criminal prosecution.

For instance, a reservation, ticket, or gate agent may be found to have "facilitated" the transport of the fugitive and therefore be criminally liable. At LC/34, one delegation suggested that it was necessary to include objective criteria that airlines could rely upon.[232] Other delegations highlighted the fact that since this offense did not clarify the duty of care imposed on airlines, the offense should be dropped because of the potential negative repercussions on the industry.[233]

One may well question the benefit of creating this offense when in practice a number of measures are already in place, such as no-fly lists, to prevent the transport of those suspected or convicted of illegal activities.[234] The wording of the offense also makes cross-reference to other international instruments, which are well beyond the scope of international civil aviation.[235] This creates discomfort because some states may be parties to some but not all of the instruments listed in the offense.[236] It was for these reasons that at LC/34 and indeed at the Diplomatic Conference, the airline industry suggested the complete deletion of any language that would attempt to criminalize the transport of fugitives.[237]

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229. ICAO, C-MIN 182/8, *supra* note 72, at 77–78.

230. *Id.*

231. *See* ICAO, *Legal Sub-Committee Second Report*, *supra* note 77, ¶ 2.14 (opting not to delete the offense but noting "that a large majority at the meeting did not favour the inclusion of the transport of fugitives offence").

232. ICAO, LC/34-WP/4-1, *supra* note 144, ¶ 2:36.

233. *Id.* ¶ 2:37.

234. *Id.* ¶ 2:40.

235. *Id.*

236. *Id.*

237. *See* Int'l Civil Aviation Org., *The Views of the International Air Transport Association (IATA) on the Preparation of One of More International Instruments Addressing New and Emerging Threats* 6, ¶ 2.4.8, (Working Paper No. LC/34-WP/2-3, Sept. 9, 2009) [hereinafter ICAO, Working Paper No. LC/34-WP/2-3] ("In light of the foregoing arguments, IATA would respectfully suggest the complete deletion of any language that would attempt to criminalize the transport of fugitives.").

Discussions at LC/34 had reached no consensus on the need to criminalize the transport of fugitives.[238] In an attempt to bridge this divide, LC/34's chairman had decided to form a small working group.[239] Because that group's composition weighed heavily in favor of those states who supported the criminalization of the transport of fugitives, Egypt declined to participate and reserved its position.[240] During the work of this group, Argentina proposed replacing the offense of transporting fugitives with the introduction of the offense of "concealment," a civil law equivalent of the common law notion of "accessory after the fact." [241] This would only criminalize the assistance provided to a person who has committed an offense and tries to escape investigation, prosecution, or punishment. [242] This proposal was immediately supported by Canada, who enhanced the language of the original Argentinean proposal. [243] Thus, it was proposed to make it a criminal offense to give assistance to a person who intends to evade investigation, prosecution, or punishment, knowing that such person has committed an act that constitutes a criminal offense.[244]

Although the Argentinean proposal—as enhanced by Canada—was presented as the final recommendation of the small working group to LC/34's plenary, to the surprise of many, Australia and Saudi Arabia presented a separate "flimsy." [245] The supporting language of the flimsy was more in line with the SUA Protocol because it would criminalize the transport of a fugitive wanted for criminal prosecution by law enforcement authorities who had committed an offense as set forth in one of the treaties listed.[246]

Needless to say, the presentation of a separate proposal just when consensus seemed to be around the corner greatly confused all participants. Regrettably though, Argentina's flimsy did not form part of LC/34 report, which is rather surprising given that Australia and Saudi Arabia's proposal does appear in the report.

After extensive discussions, LC/34 finally accepted Argentina's proposal, and the draft going into the Beijing Diplomatic Conference included the offense of concealment. [247] The original Argentinean

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238. ICAO, LC/34-WP/4-1, *supra* note 144, ¶ 2:42

239. This small working group was composed of Argentina, Australia, Canada, China, Egypt, Germany, India, Japan, Lebanon, the Russian Federation, South Africa, and the United States. *Id.* ¶ 2:43.

240. *Id.*

241. ICAO, Report, Doc. No. 9926-LC/194, *supra* note 80, at D4.

242. *Id.*

243. *Id.*

244. *Id.*

245. A "flimsy" is a term used in ICAO to refer to a paper that is of a rather descriptive nature.

246. ICAO, Report, Doc. No. 9926-LC/194, *supra* note 80, at E-1.

247. *See* ICAO, DCAS Doc No. 3, *supra* note 179, at art. 1 *ter* ("Any person also commits an offence if that person makes a credible threat or unlawfully and

proposal was to criminalize assistance provided to a person to evade investigation, prosecution, or punishment knowing that: i) such person has committed an offense or been convicted of an offense as set forth in the convention; or ii) law enforcement authorities require such person for criminal prosecution.[248]

At the Beijing Diplomatic Conference, the offense was once again subject to extensive discussions. Again, the airline industry proposed deletion of the offense.[249] In order to reach consensus and agree on a final text, a special working group composed of the Netherlands, China, Argentina, Australia, and Egypt was established. The group maintained the basic elements of the original proposal but introduced editorial changes that significantly enhanced its wording.[250] The group also very wisely suggested including the words *unlawfully and intentionally* in order to avoid unintended criminal liability.[251]

The Commission of the Whole accepted the working group's recommendation and the transport of fugitives offense finally became the Beijing instruments' offense of concealment.[252] To be punishable, the offense requires two concurrent elements.[253] First, the person being transported would need to have been convicted of a crime.[254] Second, the accused would need to knowingly assist that convicted

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intentionally causes any person to receive a credible threat to commit any of the offences in subparagraphs (a), (b), (c), (d), (f), (g), and (h) of paragraph 1 or an offence in paragraph 1 *bis*.").

248. *See* International Conference on Air Law, Aug. 30–Sept. 10, 2010, *Introduction of the Offense of "Concealment" [Encubrimento] to Replace the Offense of "Transporting Fugitives"* ¶ 5 (DCAS Doc. No. 7, July 15, 2010) [hereinafter ICAO, DCAS Doc. No. 7] (explaining the details of Argentina's alternative proposal).

249. *See* ICAO, DCAS Doc. No. 13, *supra* note 185, ¶¶ 2–2.1.3 ("For this reason, the potential criminal liability of an airline and its employees should be excluded in certain limited circumstances as discussed below.").

250. *See* International Conference on Air Law, Aug. 30–Sept. 10, 2010, *Proposed Amendment Regarding Article 1, Paragraph 2(D) ("Concealment Provision")* ¶ 2.1 (DCAS Flimsy No. 2, Sept. 7, 2010) [hereinafter ICAO, DCAS Flimsy No. 2] (proposing three major changes to the "concealment" provision).

251. *See id.* ¶ 4.1 (suggesting including the language *unlawfully and intentionally* in order to avoid unintended criminal liability).

252. The final text of the offense now reads: "Any person also commits an offence if that person: . . . (d) unlawfully and intentionally assists another person to evade investigation, prosecution or punishment, knowing that the person has committed an act that constitutes an offence set forth [in the convention], or that the person is wanted for criminal prosecution by law enforcement authorities for such an offence or has been sentenced for such an offence."

Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 1, § 3(d).

253. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

254. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

person to evade prosecution.[255] The offense does not require that the convicted person be prosecuted. [256] In fact, the act of assistance is, of itself, a criminal offense.[257]

From a practical perspective, the prosecution would likely have to establish four criteria.[258] First, the accused would need to have transported the convicted person. [259] Second, the accused would require knowledge of the convicted person's status. Third, a warrant or its equivalent would need to have been issued.[260] Finally, the accused would need to have had the intention to assist the fugitive with knowledge of his or her status and with knowledge that a warrant had been issued for such fugitive to escape criminal prosecution.[261]

Both the Beijing Convention and Beijing Protocol now incorporate this offense.[262] This is a welcome outcome, for it removed the uncertainties and potential abuses that the transport of fugitives offense might have given rise to. The new offense provides much clearer objective criteria,[263] which, one might hope, will ease the discomfort expressed by a large number of states. This should enhance the instruments' chances of ratification.

D. *Ancillary Offenses*

The Hague Convention and Montreal Conventions already contained the ancillary offenses of attempting to commit an offense or being an accomplice in the commission of an offense.[264] However, one of the novelties of the Beijing instruments is also the creation of ancillary offenses that relate specifically to the newly created

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255. *See* Int'l Civil Aviation Org., *Draft Protocol to the Montreal Convention – Transport Offences* 3, ¶ 2.8.2 (ICAO, Working Paper No. LC/34-WP/2-2, July 31, 2009) [hereinafter ICAO, Working Paper No. LC 34-WP/2-2] ("This act of assistance is a criminal act of itself.").

256. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

257. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

258. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

259. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

260. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

261. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

262. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

263. Beijing Convention, *supra* note 23, at art. 1, § 4(d); Beijing Protocol, *supra* note 24, at art. 2.

264. Montreal Convention, *supra* note 2, at art. 1, §§ 2(a)–(b); Hague Convention, *supra* note 2, at art. 1 §§ (a)–(b).

principal offenses against civil aviation. These will be examined below.

1. Making a Credible Threat to Commit an Offense or Unlawfully and Intentionally Causing Any Person to Receive Such a Threat

It is now an offense to make a credible threat to commit any offense against civil aviation (including those new offenses created by the Beijing instruments) or to unlawfully and intentionally cause any person to receive such a credible threat.[265] The concept of "credible threat" merits further examination. This language constitutes a significant advance on existing international law on aviation security. The Hague Convention is silent on this issue.[266] The Montreal Convention makes it an offense "[to communicate] information which [the alleged offender] knows to be false, thereby endangering the safety of an aircraft in flight."[267] Similarly, the Airport Protocol criminalizes the disruption of "the services of the airport, if such an act endangers or is likely to endanger safety at that airport."[268] Both of these behaviors do not expressly address a credible threat, such as a hoax bomb, and are subject to the fact that the act in question must endanger the safety of an aircraft in flight or an airport. This is a rather broad and vague concept, never desirable when codifying criminal law. In this context, the new offense that is now captured in the Beijing instruments represents a significant advance.

Nonetheless, the use of the qualification *credible* has been subject to some criticism, for it may also be considered vague, subjective, and prone to conflicting interpretations. Suggesting that a definition was needed, China also underlined that some jurisdictions do not criminalize simple threats that do not lead to the actual commission of an offense.[269] Determining whether someone's conduct meets the elements of a credible threat will depend on the facts of the case. It will be interesting to see, however, how national courts apply this provision.

2. Organizes or Directs Others to Commit an Offense

This new offense criminalizes the conduct of a person who "organizes or directs others to commit an offence," finds its source in the United Nations Convention on Transnational Organized

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265. Beijing Convention, *supra* note 23, at art. 1, §§ 3(a)–(b); Beijing Protocol, *supra* note 24, at art. 1, §§ 2(a)–(b).

266. Hague Convention, *supra* note 2, at art. 1.

267. Montreal Convention, *supra* note 2, at art. 1(e).

268. Airport Protocol, *supra* note 11, at art. 2(b).

269. *See* ICAO, DCAS Doc. No. 15, *supra* note 183, ¶ 5.1 (suggesting "that a definition or a clarification provision for 'credible threat' be introduced into the draft Protocol").

Crime,[270] and "does not require the primary offence to have been commenced or completed."[271]

The chairman of the SSCLC has remarked that "although some jurisdictions may not recognise either offence, it is essential that the [Beijing instruments criminalize] any concerted action."[272] All previous ICAO studies highlighted the gap that existed in aviation security with regard to this type of conduct.[273] Its inclusion, to a great extent, responds to the scenario that gave rise to the 9/11 incidents, where the existing ICAO instruments would not have caught the conduct of those who masterminded those terrorist incidents.[274] This may explain why this issue was not subject to much controversy.

3. Agreeing with One or More Other Persons to Commit an Offense

Under the Beijing instruments, an agreement to commit an offense and the intentional contribution in any way to the commission of an offense, with the purpose of furthering the general criminal activity of a group or with the knowledge of the intention of the group to commit such offense, shall itself constitute an offense.[275] That applies regardless of whether or not an offense has actually been committed or attempted.[276]

The concept of "agreement" intends to capture the notion of conspiracy in common law jurisdictions, where this type of participation is punishable in itself,[277] whereas that of "contribution" reflects the principle of *association de malfaiteurs* that exists in French and other civil law jurisdictions.[278] As Australia noted, the latter "requires the commission of a preparatory act . . . to carry out the group's purposes in order to give rise to criminal liability."[279]

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270. Beijing Convention, *supra* note 23, at art. 1, § 4(b); Beijing Protocol, *supra* note 24, at art. 1, §§ 2(a)–(b). This offense has also been incorporated in the Terrorist Bombings Convention. *See* Terrorist Bombings Convention, *supra* note 50, at art. 2, § (3)(b).

271. ICAO, LC/34-WP/2-1, *supra* note 49.

272. ICAO, LC/34-WP/4-1, *supra* note 144, ¶ 2:55.

273. *Id*.

274. *Id*. ¶ 2:57.

275. Beijing Convention, *supra* note 23, at art. 1, §§ 3(a)–(b); Beijing Protocol, *supra* note 24, at art. 1, §§ 2 (a)–(b).

276. Beijing Convention, *supra* note 23, at art. 1, §§ 3(a)–(b); Beijing Protocol, *supra* note 24, at art. 1, §§ 2 (a)–(b).

277. Beijing Convention, *supra* note 23, at art. 1, §§ 3(a)–(b); Beijing Protocol, *supra* note 24, at art. 1, §§ 2 (a)–(b).

278. *See* ICAO, LC/34-WP/2-1, *supra* note 49 ("The proposed text incorporates two alternative provisions, one to address the crime of conspiracy in common law jurisdictions . . . . [A]nd one to encapsulate the concept of 'association de malfaiteurs' in civil law jurisdictions . . . .").

279. *Id*. at 2.

E. *Military Exclusion Clause*

The so-called military exclusion clause was the single most controversial issue of the entire negotiations from their beginning through to the instruments' adoption by the Beijing Diplomatic Conference.[280]

The Beijing instruments contain a provision whereby, under certain circumstances, any activities of armed forces against civil aviation during an armed conflict are excluded from the scope of the new regime.[281] In other words, conduct that would otherwise constitute an offense under existing international aviation security treaties would not be amenable to prosecution if carried out by armed forces during an armed conflict. The latter would fall under the rules of international humanitarian law.[282]

1. Objectives

The military exclusion clause pursues three objectives.

First, it confirms that the new regime does not alter the rights, obligations, and responsibilities of Member States and individuals under international law—namely, the Charter of the United Nations, the Chicago Convention, and international humanitarian law.[283] One might argue that this objective is in itself superfluous because those obligations and responsibilities exist whether or not they were expressly retained in the new regime.

Second, the clause seeks to exclude not only those actions that armed forces carry out during an armed conflict but also the actions of military forces of a state in the exercise of its official duties, to the extent that such conduct is governed by international humanitarian law.[284] This means that, under certain circumstances, certain acts of military forces during times of peace may also fall outside of the new regime.

In the discussions that preceded the Beijing Diplomatic Conference, this objective caused significant discomfort in some

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280. *Id*.

281. Beijing Convention, *supra* note 23, at art. 6, § 2; Beijing Protocol, *supra* note 24, at art. 3 *bis*.

282. *See generally* M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711 (2008) ("The United Nations has established a number of commissions to investigate or assess violations of international humanitarian law in different conflicts.").

283. Beijing Convention, *supra* note 23, at art. 1, §§ 3(a)–(b); Beijing Protocol, *supra* note 24, at art. 3 *bis*, § 1.

284. Beijing Convention, *supra* note 23, at art. 1, §§ 3(a)–(b); Beijing Protocol, *supra* note 24, at art. 3 *bis*, § 2.

quarters.[285] Some states categorically stated their unwillingness to accept a clause that completely exempts actions of military forces even during peacetime.[286] Other states asserted that there should be a distinction between "a military conflict and an act of military aggression, as well as between a military conflict during a time of peace and a military conflict during a time of war."[287] Still other states said that the clause should only apply "in case of formal declaration of war by a State against another, as formal declaration of war brings the conflict into the ambit of other international treaties."[288] If the clause is applicable even in those cases where there is no formal declaration of war, these states contend that the aggressor state is not "subject to any international accountability."[289] Similarly, as the SSCLC noted, the reference to international humanitarian law may be confusing, and it may be difficult to integrate it with civil aviation regulations.[290]

Finally, the clause aims to make it clear that it does not purport to legitimize acts that otherwise would be unlawful or to preclude in any way the possibility of prosecution.[291]

2. Rationale

As the rapporteur to the Diplomatic Conference noted, the military exclusion clause finds its origins in the Terrorist Bombings Convention, the Nuclear Terrorism Convention, and the SUA Protocol.[292] Its inclusion in those conventions is justified by the fact that, in the view of some states, it addresses conduct already covered under international humanitarian law, which deals with issues such as a state's right to resort to the use of force (*jus ad bellum*) and what

285. *See* ICAO, LC/34-WP/4-1, *supra* note 144, ¶¶ 2:74–2:78 (highlighting various delegations' perspectives on the proper scope of the military exclusion provision).

286. *See* Int'l Civil Aviation Org., *Report of the Legal Commission for the General Section of Its Report and on Agenda Items 7, 8, 45, 46, 47 & 48* ¶¶ 46.2–46.3 (ICAO, Report A36-WP/341, Sept. 25, 2007) (believing that such "an exemption would constitute a violation of the principles set out in the preambles of The Hague and Montreal Conventions").

287. ICAO, C-MIN 182/8, *supra* note 72, ¶ 21.

288. ICAO, DCAS Doc No. 11, *supra* note 182, at 3.

289. *Id*. (discussing the military exception clause).

290. *See* ICAO, LC/SC-NET, *supra* note 209, at 2-9 (discussing action by other ICAO bodies).

291. Beijing Convention, *supra* note 23, at art. 6, § 3; Beijing Protocol, *supra* note 24, at art. 3 *bis*, § 3.

292. *See* ICAO, LC/34-WP/4, *supra* note 1, at 2 (reporting on the work done by the *legal committee* during the session); *see* also Terrorist Bombings Convention, *supra* note 50, at art. 19 (discussing which aspects of international law the Convention governed).

is acceptable in using such force (*jus in bellum*).[293] Thus, the clause is not an exclusion of international criminal liability, but rather a qualification of the applicable field of international law.[294] Perhaps the discomfort of some states with this clause was due to the fact that—as many commentators have pointed out—terrorism poses significant challenges to international humanitarian law and it is not precisely clear where its boundaries lie.[295]

Those in favor of inclusion of the military exclusion clause contend that most recent counterterrorism conventions adopted under the auspices of the United Nations now contain this clause, which makes it clear that military activities are not within those conventions' scope of application.[296] Its inclusion in the Beijing instruments arguably preserves the status quo, simply reflecting "established practice."[297] Those in favor also claim that ICAO's aviation security conventions have been "commonly understood not to apply to military activities, which are governed by other laws."[298]

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293. *See* Int'l Civil Aviation Org., *Summary Minutes of the Sixth Meeting* ¶ 10 (ICAO, MIN-188/6, Nov. 19, 2009) ("[I]n time of war, military activities were covered by international public law, namely, the UN Charter, which addressed . . . the issues of the prohibition of force and a State's right to self-defense, and international humanitarian law, which addressed . . . the issues of jus ad bellum (when it is right to resort to armed force) and jus in bello (what is acceptable in using such force), etc.").

294. ICAO, LC/34-WP/4-1, *supra* note 144, ¶ 2:74.

295. *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 760 (2004) ("The law of armed conflict as it currently exists is the product of decades of evolution and substantial international consensus . . . ."); Louise Arimatsu, *Territory, Boundaries and the Law of Armed Conflict*, 12 Y.B INT'L HUMANITARIAN L. 157 (2009) (explaining that "the primary intent is to examine how contemporary law of armed conflict (LOAC) is framed by pre-conceptions of our spatial environment and the consequences that this territorialised viewpoint evokes"); Allan Rosas & Par Stenback, *The Frontiers of International Humanitarian Law*, 24 J. PEACE RES. 219 (1987); Alex J. Bellamy, *When Is It Right to Fight? International Law and* Jus ad Bellum, 8 J. MILITARY ETHICS 231 (2009) (discussing "a renewed interest in the normative issues prompted by contemporary forms of armed conflict, in particular questions related to pre-emptive and preventive self-defence and humanitarian intervention"); Olivier Dürr, *Humanitarian Law of Armed Conflict: Problems of Applicability*, 24 J. PEACE RES. 263, 263 (1987) ("As there is no supranational jurisdiction, respect for these fundamental rules protecting the human being must be implemented through a stronger sense of responsibility on the part of the international community."); K.J. Riordan, *Shelling, Sniping and Starvation: The Law of Armed Conflict and the Lessons of the Siege of Sarajevo*, 41 VICTORIA U. WELLINGTON L. REV. 149, 156 (2010) ("Siege warfare is not per se an unlawful method of combat. It is not proscribed in any convention, nor is it prohibited by customary international law.").

296. *See* Michael Jennison, *The Beijing Treaties of 2010: Building a "Modern Great Wall" Against Aviation Related Terrorism*, 23 AIR & SPACE L. 9, 11 (2011) ("[Some delegations] wanted to apply the criminal provisions of counterterrorism instruments to what they called 'state terrorism'.").

297. *Id.* (noting that deleting the provision "would have been a radical departure from established practice").

298. *Id.* at 12 (pointing out that "although no such provision appears in the 40-year-old underlying conventions, those conventions have never been applied to military forces").

Some Council decisions and certain state practices, which will be examined further below, do not necessarily confirm that point of view.

Given the different nature of the aviation security conventions, it could be argued that the fact that the military exclusion clause has been incorporated in other international counterterrorism conventions should not be viewed as sufficient justification. Although it has been said that it is only of a declaratory nature,[299] given the previous history of incidents of the activities of armed forces involving civil aircraft and infrastructure, a military exclusion clause can play a much more striking role, for it excludes numerous actions that would otherwise be considered unlawful.

Throughout the negotiation process of the Beijing instruments there were a number of attempts to introduce significant amendments to the military exclusion clause.[300] Nonetheless, the final wording of the clause remained almost unaltered throughout the whole process since the first meeting of the SSCLC.[301]

3. Scope

The key question is whether or not acts committed by armed forces of a given state that satisfy the different elements of the offenses defined in the Beijing instruments fall within their scope.[302] Yet, establishing which conducts fall within or without the regime may be particularly difficult. In many situations, a thin line separates what falls under the ICAO regime from what is governed by other fields of international law, such as the rules of armed conflict.

The following questions may best exemplify the complexity of the problem at hand:

i) Would the destruction of an international airport by armed forces constitute an act of unlawful interference under the Beijing instruments or rather a justified act of self-defense?
ii) Would the seizure of a civil aircraft by a newly formed state's secret service agents be covered by the Beijing instruments or would it instead constitute the legitimate expression of the right of self-determination?

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299. *See* ICAO, A36-WP/12, *supra* note 60, at 3 ("Comparable UN counter-terrorism conventions concluded after 1997 contain a military exclusion clause, which expressly specifies that the conventions do not govern the activities of armed forces during an armed conflict, and the activities undertaken by military forces of a State in the exercise of their official duties.").

300. During the Diplomatic Conference, for instance, Azerbaijan proposed to include a reference to human rights. ICAO, DCAS Doc No. 12, *supra* note 181.

301. ICAO, Report, Doc. No. 9926-LC/194, *supra* note 80, at G-3.

302. *See generally* KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM: PROBLEMS AND PROSPECTS (2011) (defining terrorism and examining regimes of state responsibility).

iii) Is military aggression against civil aviation in times of peace, as opposed to self-defense, captured by the military exclusion clause?
iv) Should the activities of armed forces against civil aviation during an armed conflict be recorded as acts of unlawful interference against international civil aviation?
v) Where do the NATO bombings of Libyan airports that took place in the summer of 2011 fall?[303]
vi) If those bombings do not fall within the scope of the ICAO aviation security instruments, why then has the Assembly repeatedly condemned "all acts of unlawful interference against civil aviation whenever and by whomsoever and for whatever reason they are perpetrated"?[304]

The above statement by the Assembly does not distinguish between actions carried out by military forces and those that are standard acts of unlawful interference. If the Assembly unanimously condemns all such acts, regardless of the nature of the aggressor, one is certainly entitled to ask why attacks of armed forces against civil aviation would not also constitute acts of unlawful interference. And although the answers to the above questions would inevitably depend on the specific facts of each case, they illustrate that there is no one-size-fits-all approach.

It may well be the case that a state, or its organs or agents, carry out (unlawful) acts that meet all of the elements required for the commission of an offense, yet given that such actions fall within the scope of other legal regimes (such as international humanitarian law), they are not in fact prohibited.[305] These other regimes may establish the basis for other justifications not provided in the ICAO aviation security conventions. This will certainly be the case for lawful acts of war, such as self-defense.[306] Clearly, if for instance, military forces bomb civil aviation infrastructures, the belligerent state will not be under an obligation to extradite or prosecute the

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303. As part of its bombing operations in Libya, in July 2011, NATO forces bombed Tripoli's international airport. *See Libya: NATO Continues to Bomb Civilian Targets*, GLOBAL RESEARCH (Oct. 14, 2013, 7:00 AM), http://www.globalresearch.ca/libya-nato-continues-to-bomb-civilian-targets/25841.

304. *See* Int'l Civil Aviation Org., A37-17, *Consolidated Statement on the Continuing ICAO Policies Related to the Safeguarding of International Civil Aviation Against Acts of Unlawful Interference*, app. A, General Policy ¶ 1, at 29 (2010) [hereinafter ICAO, Resolution A37-17] (endorsing "the ICAO Comprehensive Aviation Security Strategy and its seven strategic focus areas, as adopted by the Council on 17 February 2010").

305. *See* TRAPP, *supra* note 302, at 148 (noting the coordinators "approach to regime interaction").

306. *See id.* at 119 (discussing obligations to prevent and punish acts of international terrorism).

offenders, for their actions fall outside the scope of ICAO's aviation security conventions.[307]

The activity of military forces will fall within the scope of the ICAO aviation security instrument to the extent that such actions are not carried out in the exercise of official duties.[308] Likewise, where the activities of armed forces are carried out beyond the context of the rules of armed conflict, such actions will not be subject to the military exclusion clause, and, if they satisfy the elements of the Beijing instruments, they will be subject to that regime.[309]

Another interesting question is whether acts of military forces against civil aviation, carried out in furtherance of a particular struggle for self-determination, fall within the scope of the Beijing instruments or whether the military exclusion clause captures those acts and makes them subject to other rules of international law. This is probably one of the most difficult hypothetical questions to resolve. Of course, it would depend on the fact pattern involved. Kimberley Trapp suggests that those acts would only be excluded from the Beijing instruments "to the extent [that they are] committed in the course of an armed conflict by an organized group subject to command responsibility."[310]

One can certainly question if the actions of nonmilitary state officials, such as those of secret service or counterintelligence agents, would be covered by the military exclusion clause or whether such conduct would be covered by ICAO's aviation security instruments.[311] Strictly speaking, the military exclusion clause refers to "military forces of a State in the exercise of their official duties."[312] This wording makes it very difficult to categorize where the acts of these agents fall. Here, it would be crucial to establish the linkage between the agent committing the (unlawful) act and the state.[313] Those agents may or may not be members of their states' military forces.

In some countries, such agents are part of the military, and in those situations, one would assume that it would be rather easy to attribute the acts of the agents as being those of "military forces in

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307. *See id*. at 118 ("Bombings that are excluded from the scope of the Terrorist Bombing Convention will not be subject to a prosecute or hand over obligation under the Geneva Conventions or API . . . .").

308. *See id*. at 151 (explaining that the second basis of exclusion "requires only that the conduct of a state's armed forces be in exercise of their official duties *and* governed by other rules of international law").

309. *See id*. at 24 (recognizing the possibility of state-sponsored terrorism).

310. *Id*. at 121.

311. *See id*. at 172 ("The TSCs with express military exclusion clauses very clearly do not apply to military operations—even when those operations meet the material elements of the terrorist offences defined therein.").

312. Beijing Convention, *supra* note 23, at art. 6, § 2; Beijing Protocol, *supra* note 24, at art. 3 *bis*, § 3.

313. *See generally* MALCOLM N. SHAW, INTERNATIONAL LAW 488 (3d ed. 1991).

the exercise of official duties."[314] In that scenario, the military exclusion clause would remove the agents' actions from the scope of the ICAO aviation security instruments.

In other countries, however, these agents operate in a completely unconnected manner from the state's armed forces, most often through undercover operations. They may have no relation at all with military forces. If the agents' actions cannot be attributed to the armed forces in the exercise of official duties, one would suppose that the Beijing instruments would not exclude liability for such conduct. Commentators rightly point out that when states engage in a form of terrorism, such activity will most likely be executed by secret service agents, as opposed to military forces.[315] According to that rationale, and despite the lack of clarity over the military exclusion clause, the potential application of the ICAO aviation security instruments to these types of activities would still remain quite large.[316]

4. The Positions of Different States

From the outset, the United States made it clear that it would not countenance discussing proposed amendments to the existing international aviation security regime without the inclusion of the military exclusion clause.[317] In the United States' view, the well-established rules of international humanitarian law of both the Hague[318] and Geneva Conventions[319] should govern states' use of

314. Beijing Convention, *supra* note 23, at art. 6, § 3; Beijing Protocol, *supra* note 24, at art. 3 *bis*, § 3.

315. This Article does not seek to comprehensively address the issue of state responsibility for sponsoring acts of terrorism. For an excellent analysis of the issue of state responsibility involving acts of terrorism, see Vincent-Joel Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2005).

316. TRAPP, *supra* note 302, at 173.

317. *See* ICAO, C-MIN 182/8, *supra* note 72, ¶ 38 ("The Representative of the United States averred that . . . ICAO would be derelict if it did not update the said conventions by incorporating the standard provisions on military exclusion.").

318. *See* Annex to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295, 205 Consul. T.S. 277; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215; Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (agreeing upon the listed provisions as a result of the damage done to cultural property as a result of armed conflict); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflicts, Mar. 26, 1999, 38 I.L.M. 769, 2253 U.N.T.S.172 (listing the terms agreed upon by the high contracting parties).

319. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Additional Protocol I to the Geneva Convention of 12

armed forces against civil aviation.[320] Closer examination of previous international incidents involving the use of force by military forces against civil aviation may shed some light on the United States' unyielding position.[321]

During Council discussions, Canada and Romania expressed serious concerns to the contrary.[322] Canada even noted that the issue of the military exclusion clause remained unresolved in the negotiations of the draft Comprehensive Convention on International Terrorism.[323] In those circumstances, the Canadian representative felt that the text was not ready for submission to the Diplomatic Conference.[324] Similarly, Spain cautioned that this posed a risk to the successful conclusion of the Diplomatic Conference.[325] Others, including Saudi Arabia, Egypt, Lebanon, Greece, Cuba, Venezuela, and Nigeria, had warned much earlier that the inclusion of the military exclusion clause in the draft was premature.[326]

Although the Diplomatic Conference eventually retained the clause without a single amendment to the draft that came out of LC/34, such was the strength of some opposing states that they successfully managed to force a vote.[327] The discontent with the inclusion of this clause is self-evident. Rightly or wrongly, for some states, the military exclusion clause is seen as a carte blanche, which may immunize the conduct of states in a wide range of circumstances. One cannot help but wonder if the convenience of pushing its inclusion was achieved at the expense of endangering its ratifiability.

5. A Redundant Clause?

It may be argued that, given the nature of the offenses prescribed in the Beijing Protocol, the inclusion of the military exclusion clause would presuppose, for example, that the seizure to exercise control could only take place inside of the aircraft. It is unlikely then that the conduct of a state, or that of its servants and agents, could meet the elements of the offense because in most cases

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August 1949 Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977; Additional Protocol II to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977; Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940.

320. ICAO, C-MIN 182/8, *supra* note 72, ¶ 38.
321. *Id.*
322. *Id.* ¶¶ 19–20.
323. *Id.*
324. *Id.*
325. *Id.* ¶ 42.
326. *Id.* ¶ 21.
327. *Id.* ¶ 47.

such state conduct takes place outside of the aircraft (e.g., intercepting and forcing the diversion of civil aircraft).[328]

That reasoning overlooks the fact that one of the new enhancements of the Beijing Protocol is that it expressly captures a situation in which the aircraft is seized not only by the use of force but also by any technological means.[329] It was intended to catch potential cyber attacks where offenders could gain control and seize the aircraft through computer equipment or other technological means from remote locations but without the use of force at all.[330] In theory, at least, a state's military forces or agents thereof could launch a cyber attack to gain control of an aircraft without the use of force. Some years ago, ICAO's Aviation Security Panel already concluded that the "threat of cyber-attacks is real and cannot be ignored."[331] In that context, the application of the military exclusion clause to the Beijing instruments may not be superfluous after all.

6. Previous International Incidents

An examination of recent incidents involving the activities of military forces and civil aviation, where ICAO has been asked to take a stance, is most revealing in seeking to interpret the conduct of Member States.[332] In addition, these historical precedents may indirectly have led to the inclusion of the military exclusion clause in the Beijing instruments.

On February 21, 1973, an Israeli fighter aircraft shot down a Libyan civil aircraft that had lost its course over the occupied Egyptian territory of Sinai, which resulted in 108 fatalities. Following this incident, the Nineteenth Session of the Assembly instructed the secretary-general to institute a thorough investigation.[333] When examining the investigation's report, the Council found no justification for Israel's actions and urged Israel to comply with the aims of the Chicago Convention.[334]

Later that year, on August 10, 1973, Israeli military aircraft allegedly violated Lebanon's airspace in order to force the diversion

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328. *See* TRAPP, *supra* note 302, at 171 ("The Hague Convention defines the relevant offences as acts committed *inside* the aircraft . . . .").

329. Beijing Protocol, *supra* note 24, at art. 1, § 1.

330. ICAO, Working Paper No. C-WP/13338, *supra* note 35.

331. *Id.*

332. *See* Int'l Civil Aviation Org., A19-1, *Shooting Down of a Libyan Aircraft by Israeli Fighters on 21 February 1973* [hereinafter ICAO, Resolution A19-1] (directing "the Council to instruct the Secretary General to institute an investigation in order to undertake fact findings and to report to the Council at the earliest date"); *see also* UNITED NATIONS, JURIDICAL YEARBOOK 37, 59 (1973) (reviewing ICAO's settlement of disputes between contracting states).

333. ICAO, Resolution A19-1, *supra* note 332.

334. *Id.* ("Condemning the Israeli action which resulted in the loss of 106 innocent lives.").

and seizure of a Lebanese-registered civil aircraft leased to Iraqi Airways.[335] Twenty days later, at its Twentieth Session, the Assembly passed a resolution strongly condemning Israel's actions as constituting an act of unlawful interference in violation of the Chicago Convention.[336]

Similarly, on February 4, 1986, Israeli military aircraft intercepted and forced the diversion of a Libyan Arab Airlines aircraft flying over the high seas.[337] Shortly thereafter, the Council again condemned Israel's actions as a violation of the principles of the Chicago Convention.[338]

In 1988, ICAO condemned acts of sabotage perpetrated against a Cuban aircraft, CU-T 1201, which killed seventy-three people.[339] Likewise, when in 1990, Iraqi armed forces plundered Kuwait International Airport and later seized and removed to Iraq fifteen aircraft belonging to Kuwait Airways, the Assembly firmly condemned the violation of the sovereignty of Kuwait's airspace.[340]

In all of these cases, either the Council or the Assembly has condemned the acts of an infringing state's armed forces against international civil aviation as being contrary to the principles of the

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335. *See* UNITED NATIONS, JURIDICAL BOOK, *supra* note 332, at 37, 59 ("On 20 August, the Council, meeting in Extraordinary Session, condemned Israel for violating Lebanon's sovereignty and for the diversion and seizure of a Lebanese civil aircraft on 10 August . . . .").

336. *See id.* at 60 ("On 30 August, . . . the Assembly strongly condemned Israel for violating Lebanon's sovereignty, for the forcible diversion and seizure of a Lebanese civil aircraft and for violating the Chicago Convention on International Civil Aviation . . . ."); Int'l Civil Aviation Org., A20-1, *Diversion and Seizure by Israeli Military Aircraft of a Lebanese Civil Aircraft* ¶¶ 1–3 [hereinafter ICAO, Resolution A20-1]. It is noteworthy that the UN Security Council also condemned Israel's actions involving the diversion and seizure of this aircraft. *See* S.C. Res. 337, U.N. Doc. S/RES/337 (Aug. 15, 1973). Similarly, in 1968, before the adoption of both the Hague and Montreal Conventions, the UN Security Council had condemned Israel's attacks on the Beirut International Airport, which resulted in the destruction of thirteen commercial aircraft that were on the tarmac. *See* S.C. Res. 262, U.N. Doc. S/RES/262 (Dec. 31, 1968).

337. Int'l Civil Aviation Org. Council, 117th Session, Resolution Adopted 28 February 1986, ICAO Doc. 9485-C/1094 (1986); *see* Press Release PIO 1/86, Int'l Civil Aviation Org., Council Condemns the Act of Israel for Its Interception of Libyan Arab Airlines Aircraft (Feb. 28, 1986) (condemning Israel for its interception and diversion of a Libyan–Arab aircraft within international airspace).

338. *See* Press Release PIO 1/86, *supra* note 337 (considering that Israel "committed an act against international civil aviation in violation of the principles of the Chicago Convention").

339. Int'l Civil Aviation Org., A22-5, *Sabotage and Destruction of a Cuban Civil Aircraft on Scheduled Service in the Caribbean with the Loss of 73 Passengers and Crew* (1977).

340. Int'l Civil Aviation Org., A28-7, *Aeronautical Consequences of the Iraqi Invasion of Kuwait* (1990); *see* Michael Milde, *Aeronautical Consequences of the Iraqi Invasion of Kuwait* XVI, 16 AIR L. 63 (1991) [hereinafter Milde, *Iraqi Invasion*] (noting that "international civil aviation has become one of the first victims of this act of aggression").

Chicago Convention.[341] None of these ICAO pronouncements made a single reference to the Hague or the Montreal Conventions, let alone declared that acts of military forces were contrary to those instruments.[342] This would tend to suggest that ICAO's practice has always been to exclude acts carried out by military forces from the scope of aviation security conventions.

The Council seemed to reinforce that idea through a working paper presented to the Thirty-sixth Session of the Assembly that stated that at ICAO "it has been widely understood that the aviation security instruments which criminalise certain acts are not applicable to military activities."[343] This (apparent) ICAO approach would seem in line with that of the IMO, where terrorist-suppression conventions such as the SUA Convention or the SUA Protocol "have not generally been invoked to condemn a state's military activities against the safety of civil maritime navigation."[344]

If it is implicit that the existing ICAO aviation security conventions do not apply to acts of armed forces, Why did several states, such as the United States, repeatedly request that the exclusion be made explicit in the new regime?[345] After all, one may certainly argue that ICAO does not have jurisdiction over the activities of a state's armed forces.[346] Why does it appear that some states conditioned their signing up to the Beijing package on the inclusion of the military exclusion clause? If this in fact has been ICAO's practice, Why did the Beijing instruments need specifically to incorporate the military exclusion clause? The determination

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341. The shoot down of civil aircraft off Cuba is another interesting case where ICAO was required to deal with armed forces taking action against civil aviation. On February 24, 1996, whilst within the Havana "flight information region," a Cuban MiG-29 military aircraft shot down two U.S.-registered private civil aircraft that had deviated from their original "visual flight rule" plans. *See* Press Release PIO 6/96, Int'l Civil Aviation Org., ICAO Council Concludes Consideration of the Report on the 24 February 1996 Shootdown of Civil Aircraft of Cuba (June 28, 1996). ICAO instituted a formal investigation, whose final results were brought to the attention of the Council. What is most interesting about this case is the fact that, although the Council ultimately decided to adopt a resolution, it refrained from condemning Cuba's actions as contrary to international law. The resolution nonetheless restated general principles, such as "the condemnation of the use of weapons against civil aircraft in flight." *See* Int'l Civil Aviation Org. Council, 148th Session, Resolution Adopted 27 June 1996, ICAO Doc. PIO 6/96 app. A (1996) [hereinafter ICAO, Resolution Adopted 27 June 1996].

342. ICAO, Resolution Adopted 27 June 1996, *supra* note 341.

343. *See* ICAO, A36-WP/12, *supra* note 60, at 3 (discussing the integration of specific provisions that are common in some recent UN counterterrorism conventions).

344. *See* TRAPP, *supra* note 302, at 163 ("While the use of military force against merchant ships . . . is very unusual, incidents involving such uses of force are dealt with as a matter of general maritime law and the *jus ad bellum*.").

345. ICAO, C-MIN 182/8, *supra* note 72, ¶¶ 37–38.

346. *Id*.

demonstrated by some states on this issue is not without precedent and the incidents below may shed further light.[347]

In 1999, the Democratic Republic of Congo (DRC) requested the involvement of the Council after a Congolese Airlines aircraft was shot down at Kindu Airport on October 10, 1998, presumably by Rwanda and Burundi military forces. [348] Given insufficient information to adopt a resolution, and, following the organization's long-established practice of condemning actions of military forces against civil aviation, on March 10, 1999, the Council opted to pass a more general declaration urging Member States to be "guided by the principles" of the Chicago Convention and the aviation security conventions. [349] While acknowledging that both the Hague and Montreal Conventions have enhanced "the protection of civil aviation from acts of unlawful interference," [350] the declaration only called upon states to refrain from the use of weapons against civil aircraft. [351] Although the declaration mentions the ICAO aviation security conventions,[352] such a reference does not form a sufficient legal basis to establish the unlawfulness of the use of armed forces against civil aviation.

On December 4, 2001, Israeli military forces heavily bombarded Gaza International Airport, destroying all air navigation facilities, runways, and taxiways.[353] The attack rendered the airport completely inoperative.[354] Just when Palestine had nearly completed repairs to the damage, on January 11, 2002, (roughly a month before the convening of ICAO's Second Aviation Security Conference (AVSEC-Conf/2)) Israeli armed forces again launched a heavy bombing attack

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347. *Id*.

348. Press Release, PIO 03/99, Int'l Civil Aviation Org., ICAO Adopts Declaration on Unlawful Acts Against Civilian Aircraft (Mar. 12, 1999).

349. *Id*.

350. Int'l Civil Aviation Org. Council, 156th Session, Declaration Adopted at the Ninth Meeting on 10 March 1999, ICAO Doc. PIO 03/99, app. A (1999) [hereinafter ICAO, Declaration Adopted 10 March 1999]; Int'l Civil Aviation Org., *Summary Decisions of the Tenth Meeting* (ICAO, C-DEC 156/10, Mar. 3, 1999) [hereinafter ICAO, C-DEC 156/10].

351. *See* ICAO, Declaration Adopted 10 March 1999, *supra* note 350 ("States must refrain from the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity."); ICAO, C-DEC 156/10, *supra* note 350.

352. *See generally* ICAO, Declaration 10 March 1999, *supra* note 350 ("A specialized agency of the United Nations, [ICAO] sets international standards and regulations necessary for the safety, security, efficiency and regularity of air transport and serves as the medium for cooperation in all fields of civil aviation among its 185 Contracting States.").

353. *See Historical Background*, GAZA INT'L AIRPORT, http://www.gazaairport.com/history.html ("The airline . . . was forced to move to El Arish International Airport in December 2001, after destruction by Israeli military forces of the runway at its previous base . . . .") (last visited Jan. 3, 2014).

354. *Id*.

on the airport, making the aeronautical infrastructure unserviceable.[355]

This prompted Member States of the Arab Civil Aviation Commission (ACAC) to lodge a formal complaint at AVSEC-Conf/2.[356] Arab states argued that Israel's attacks constituted a flagrant violation of international law.[357] What is interesting about this complaint is the fact that they invoked not only the principles of the Chicago Convention but also made reference to those of the Hague and Montreal Conventions.[358] Despite the fact that Palestine was not a Member State of ICAO, the Arab states expressly requested that AVSEC-Conf/2 "strongly condemns Israel for the destruction of Gaza International Airport and its air navigation facilities."[359]

Since this issue was not already on the agenda for the AVSEC-Conf/2 meeting, the written presentation was astutely labeled as an information paper, as opposed to a working paper, which meant that AVSEC-Conf/2 was not required to take any action on it, despite ferocious calls for it to do so.[360] AVSEC-Conf/2 noted its content and decided to refer it to the Council for consideration.[361] One of the Council's mandatory functions is to precisely examine any Chicago Convention issue that a Member State may wish to refer to its attention.[362] The Council discussed this issue on March 11 and 13, 2002,[363] and both Israel and Palestine were invited as observer states to plead their respective cases.[364]

Palestine argued that Israel's acts contravened the Chicago Convention, the Hague Convention, the Montreal Convention, and

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355. *See id.* ("On January 10th 2002, the 60 million USD runway was completely destroyed by the Israeli army, shattering hopes for the resumption of flights to the airport in the foreseeable future.").

356. Int'l Civil Aviation Org., *Destruction of Gaza International Airport* (ICAO, Information Paper No. AVSEC-Conf/02-IP/29, Feb. 18, 2002).

357. *Id.* at 2.

358. *Id.*

359. *Id.* at 3.

360. At AVSEC-Conf/02, ACAC states petitioned that the conference i) strongly condemn Israel for the attack on Gaza International Airport; ii) reaffirm the aviation community's condemnation of all acts of unlawful interference; iii) call on Israel to respect international law; and iv) call upon the Council to strive to develop measures to prevent further acts of unlawful interference against airports and air navigation infrastructure. *Id.* at 3–4.

361. *See* Int'l Civil Aviation Org., *Destruction of Gaza International Airport* (ICAO, Working Paper No. C-WP/11790, Mar. 5, 2002) (presented by the president of the Council).

362. *See* Chicago Convention, *supra* note 143, at art. 54(n) (outlining the mandatory functions of the Council).

363. Int'l Civil Aviation Org. Council, 165th Session, *Summary Minutes of the Ninth Meeting* (ICAO, C-MIN 165/9, Mar. 22, 2002) [hereinafter ICAO, C-MIN 165/9]; Int'l Civil Aviation Org. Council, 165th Session, *Summary Minutes of the Tenth Meeting* (ICAO, C-MIN 165/10, Mar. 13, 2002) [hereinafter ICAO, C-MIN 165/10].

364. ICAO, C-MIN 165/9, *supra* note 363; ICAO, C-MIN 165/10, *supra* note 363.

the Montreal Protocol 1988.[365] Israel was a State Party to these instruments, but Palestine was not.[366]

Israel claimed that ICAO had neither the authority nor jurisdiction to address this issue.[367] Moreover, Israel contended that Gaza International Airport was being used to support terrorist activities against it. Thus, Israel was in a state of war, and its actions were in self-defense.[368] In hindsight, these facts would certainly place Israel outside the scope of the Beijing instruments. On the other hand, Palestine said that the aggression took place during a time where both countries were at peace.[369] The determination of whether Israel's actions on Gaza International Airport satisfied the rules of international law governing armed conflict would have most likely depended on the facts of the case. Given its intrinsically technical nature, one may question ICAO's genuine ability to conduct such an assessment.

All four Arab countries on the Council at the time[370] invited the Council to "accept its responsibilities and solemnly condemn the unlawful act perpetrated by Israel" for the destruction of Gaza International Airport and its air navigation facilities.[371] During Council discussions, some states supported Palestine's view that Israel's actions at Gaza International Airport represented flagrant violations of the Chicago Convention, Hague Convention, and Montreal Convention.[372] Others, such as the United States, the United Kingdom, and Australia, contended that, given its complexity, the issue should have been best handled by the UN Security Council.[373] Right after the first meeting, the president of the Council circulated a proposal for a draft resolution.[374] After extensive discussions, the Council passed the resolution with twenty-four states

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365. ICAO, C-MIN 165/9, *supra* note 363, at 6.

366. Palestine's political complaint against Israel before the ICAO Council poses some intriguing legal questions from the perspective of public international law. For instance, does the respondent state (Israel) owe the applicant (Palestine) a duty to fulfill international obligations under the Chicago, Hague, and Montreal Conventions, given that the applicant is not a party to any of these instruments but the respondent is? If adhesion to these instruments was not an issue, one may infer that parties assumed that these obligations form part of customary international law—at least in the case of the Chicago Convention.

367. ICAO, C-MIN 165/9, *supra* note 363 at 3.

368. *Id.* at 8, 15.

369. *Id.*

370. Algeria, Egypt, Lebanon, and Saudi Arabia.

371. *See* Int'l Civil Aviation Org., *Destruction of Gaza International Airport* 2, ¶ 3.1 (ICAO, Working Paper No. C-WP/11791, Mar. 8, 2002) (presented by Algeria, Egypt, Lebanon, and Saudi Arabia).

372. ICAO, C-MIN 165/9, *supra* note 363, at 8.

373. *Id.*

374. *See* ICAO, C-WP/11791, *supra* note 371. At the time, Mr. Assad Kotaite (Lebanon) was president of the Council.

in favor, two against, and seven abstentions.[375] The United States expressly requested that the president put the resolution to a vote.[376] Examinations of Council meetings' minutes unambiguously reveal that Australia, the United States, and the United Kingdom did not support ICAO's involvement on this issue.[377] Not surprisingly, those three states were also the most forceful supporters of the inclusion of the military exclusion clauses in the Beijing instruments.[378]

This is most unique in the sense that it is the only ICAO resolution, emanating either from the Assembly or the Council, which expressly spells out that acts of armed forces against international civil aviation infrastructure, such as airports and air navigation facilities, are contrary to the principles of the Hague and the Montreal Conventions, as well as the Montreal Protocol 1988.[379] Notwithstanding the foregoing, it is also true that when condemning Israel's unlawful actions, the operative clause of the resolution only made reference to the Chicago Convention.[380] The resolution, which urged Israel to comply with the Chicago Convention's aims and objectives and to take necessary measures to restore the aeronautical infrastructure, did not per se establish that the infringing state's acts were a violation of ICAO's international aviation security instruments.[381] Be that as it may, one can certainly infer from the vigorous Council debates that some states firmly believed that ICAO had stepped beyond its competence with the adoption of this resolution.[382] Yet, one can reasonably suppose that the Gaza International Airport incident and its subsequent ICAO resolution played a rather decisive role in the approach that some states

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375. Int'l Civil Aviation Org. Council, 165th Session, *Summary of Decisions of the Tenth Meeting* ¶ 8 (ICAO, C-DEC 165/10, Mar. 13, 2002). At the time, the ICAO Council was composed of thirty-three members. With the adoption of the Chicago Convention's Article 50 (a) amendment of October 26, 1990, which entered into force on November 28, 2002, membership was extended to thirty-six states. *See* Protocol Relating to an Amendment to the Convention on International Civil Aviation art. 50 (a), May 10, 1984 (entered into force Oct. 1, 1998), *available at* http://www.icao.int/secretariat/legal/List%20of%20Parties/3bis_EN.pdf [hereinafter Article 3 *bis*].

376. ICAO, C-MIN 165/10, *supra* note 363, at 11, ¶ 38.

377. *Id*.

378. *Id*.

379. *See* Int'l Civil Aviation Org., Resolution Strongly Condemning the Destruction of the Gaza International Airport and Its Air Navigation Facilities, pmbl., ¶ 4 (Mar. 13, 2002), *available at* http://unispal.un.org/UNISPAL.NSF/0/4C7354F26BB24F1685256B8000612610 [hereinafter ICAO, Gaza Resolution] (stating that "acts of violence jeopardizing the safety of airports" violate the Montreal Convention and the Montreal Protocol); *see also* ICAO, C-MIN 165/10, *supra* note 363.

380. *See* ICAO, Gaza Resolution, *supra* note 379, ¶ 4 ("Urg[ing] Israel to fully comply with the aims and objectives of the Chicago Convention."); *see also* ICAO, C-MIN 165/10, *supra* note 363, at 15.

381. ICAO, Gaza Resolution, *supra* note 379, ¶ 4.

382. ICAO, C-MIN 165/9, *supra* note 363, at 10–11; ICAO, C-MIN 165/10, *supra* note 363, at 2–14 (highlighting the lengthy debate).

adopted with regard to the inclusion of the military exclusion clause in the Beijing instruments.

Leaving the DRC and Gaza International Airport incidents aside, while ICAO has predominantly relied on the Chicago Convention to condemn the use of military force against civil aviation, for the most part, individual state practice has been the opposite.[383]

Thus, in the context of international dispute settlements before the International Court of Justice (ICJ), states have most often invoked ICAO's aviation security conventions.[384] Such was the case with the DRC on the downing of the Congolese Airlines' aircraft in 1998,[385] where the DRC filed a complaint with the ICJ against Rwanda and Burundi.

Similarly, Iran also invoked both the Chicago and Montreal Conventions when it brought proceedings before the ICJ against the United States for the downing of Iranian Airlines flight 655 on July 3, 1988.[386]

Generally, applicant states have contended that the Montreal Convention is applicable to attacks perpetrated by military forces against civil aviation.[387] On the other hand, respondent states, such as the United States, have always argued that the downing of an aircraft is governed by the rules of armed conflict.[388] Unfortunately, the ICJ has, thus far, never ruled on whether the activities of military forces against civil aviation fall within the scope of ICAO's aviation security instruments. The DRC complaint was dismissed on procedural grounds, and in the Iran case the parties later settled their dispute.[389] Likewise, in the Lockerbie case, when demanded to hand over the alleged perpetrators of the bombing of Pan Am Flight 103, Libya claimed that such a request posed difficulties of compliance with the Montreal Convention: that is, the prosecution of the alleged offenders in Libya.[390] Conversely, the United States and the United Kingdom have emphatically argued that acts involving

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383. *Id*.

384. *See* TRAPP, *supra* note 302, at 165 (explaining that "states have invoked the ICAO TSCs as a source of legal obligation (and ICJ jurisdiction) in [international] disputes regarding state responsibility for military activities").

385. *Id*. at 169 ("The DRC equally invoked the Montreal Convention (alongside the Chicago Convention) in its suits against Uganda, Rwanda and Burundi before the ICJ . . . .").

386. *See* Memorial of Iran, Aerial Incident of 3 July 1988 (Iran v. U.S.), 1990 I.C.J. Pleadings 1, 112–29 (July 24) (discussing the ICJ's jurisdiction under the Montreal and Chicago Conventions).

387. *See id*. at 172–77 (explaining the applicability of the Montreal Convention to military actors).

388. *See* TRAPP, *supra* note 302, at 165 (explaining that, though states typically rely on the Chicago Convention instead of the Montreal Convention, states that have applied the Montreal Convention have used it to condemn "Israeli uses of force against civil aircraft and airports").

389. Memorial of Iran, 1990 I.C.J. Pleadings at 123.

390. *Id*.

state terrorism fall outside the scope of the Montreal Convention.[391] This is consistent with the position that both countries took with regard to the military exclusion clause throughout the whole negotiation process of the Beijing instruments.

7. Assessment

The dichotomy between what appears to be ICAO's views and the practice of some states may explain why a significant number of states at the Beijing Diplomatic Conference were of the firm belief that the military exclusion clause was a *sine qua non* requisite for the success of the Beijing instruments.[392] Much more than mere historical anecdotes, the incidents mentioned above also explain the defensive mode various states adopted. Arguably, given these precedents, the inclusion of the highly politically charged military exclusion clause sought not only to provide some additional clarification but also to very clearly draw the line of what falls within ICAO's jurisdiction and what does not.

F. *Liability of Legal Entities*

As a result of a proposal jointly presented at the Beijing Diplomatic Conference by Algeria, Canada, India, Singapore, and the United Kingdom, the Beijing instruments create the liability of a legal entity "when a person responsible for management or control" commits, in that capacity, an act that constitutes an offense under the new regime.[393]

This innovation finds its roots in the Financing of Terrorism Convention and the SUA Protocol.[394] No similar provision is found in either the Hague or the Montreal Conventions.[395] The threshold test

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391. *See id*. at 174 (explaining that when the International Law Association debated State Terrorism, "[i]t acknowledged . . . that the kind of acts which are prohibited by the Montreal Convention are performed by people; and even government officials might become liable by virtue of authorizing or ratifying such acts").

392. *See id*. at 197–205 (discussing international law and precedent regarding military actions and the doctrine of self-defense).

393. Int'l Civil Aviation Org., Aug. 30–Sept. 10, 2010, *Diplomatic Conference on Aviation Security, Proposed Amendments to Deal with the Notion of "Person" Under the Montreal Convention,* (ICAO DCAS Flimsy No. 1, Sept. 1, 2010) [hereinafter ICAO, DCAS Flimsy No. 1] (proposing that legal entities within a state be held liable for violations of the Convention).

394. *See* Financing of Terrorism Convention, *supra* note 43, at art. 5 (stating the liability of legal entities under the International Convention for the Suppression of the Financing of Terrorism); SUA Protocol, *supra* note 76, at art. 5 (providing that states shall "establish . . . jurisdiction over the offences . . . by a national of that State").

395. *See* Montreal Convention, *supra* note 2, at art. 1 (establishing liability for persons); Hague Convention, *supra* note 2, at art. 2 (specifying that the liability applies to "any person" under the Hague Convention).

here is that the wrongdoer's actions are carried out in the context of a managerial function.

Without prejudice to the criminal liability of individuals who have committed a principal offense, this provision creates a form of corporate liability, be it criminal, civil, or administrative in nature. Indeed, this is the only provision in the Beijing instruments that speaks about forms of liability other than criminal liability.[396] The rationale behind this is that a number of jurisdictions do not recognize the notion that corporate entities can incur criminal liability because a corporation cannot have the "intent" to commit a criminal offense.[397] Those states have the option to impose civil or administrative liability. On the other hand, for those states that do recognize criminal liability for corporate entities, sanctions are likely to be monetary in nature.[398]

In order for a state to be able to pursue a legal entity, the entity in question must either be located in its territory or registered under its laws.[399] This would suggest that the legal entity must have some sort of physical presence in the state where it is being prosecuted, either by virtue of having a domicile or by having been organized under the laws of that state.

It will be interesting to see if this wording will be sufficient to catch legal entities that, without a physical presence in the state where an offense is committed, may nonetheless sponsor its execution, harbor those who ultimately carry out the offense, or simply manage matters from a distance.

Given the wording of the provision, it is doubtful that the state where the offense was committed will be able to prosecute, for there is no physical attachment. However, under the nationality jurisdiction principle, one may argue that the state where such a legal entity is

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396. *See* Beijing Protocol, *supra* note 24, at arts. 4, 2 *bis* (indicating that a legal entity can "be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence" and that "[s]uch liability may be criminal, civil or administrative"); Beijing Convention, *supra* note 23, at art. 4 (stating that liability for a legal entity "may be criminal, civil or administrative" and that "[s]uch liability is incurred without prejudice to . . . criminal liability").

397. *See* Beijing Protocol, *supra* note 24, at arts. 4, 2 *bis* (establishing that a legal entity can be held civilly, criminally, or administratively liable for violations of the Protocol); Beijing Convention, *supra* note 23, at art. 4 (discussing the availability of criminal, civil, and administrative liability for legal entities).

398. *See* Beijing Protocol, *supra* note 24, at art. 4 (indicating that "[e]ach State Party . . . may take the necessary measures" to hold a legal entity liable under criminal, civil, or administrative laws); Beijing Convention, *supra* note 23, at art. 4, § 3 (indicating that "sanctions may include monetary sanctions").

399. *See* Beijing Protocol, *supra* note 24, at art. 4 (providing that a state will establish liability for "a legal entity located in its territory or organized under its laws"); Beijing Convention, *supra* note 23, at art. 4, § 1 ("Each State Party, in accordance with its national legal principles, may take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable . . . .").

registered may assert its jurisdiction and prosecute the offense,[400] provided that the prosecution is able to determine nationality. For this to happen, it will be necessary to show that, since the legal entity is registered in that state, it is also a "national of that State." The latter are the exact words used in the Beijing instruments.[401]

Under the Beijing instruments, the liability of legal entities is not mandatory but discretionary, in contrast to the Financing of Terrorism Convention and the SUA Protocol.[402]

Although it would have been preferable to make the provision mandatory, this approach was necessary because this provision was only proposed at the Beijing Diplomatic Conference, very late in the negotiation process.[403] Given the novelty of the concept, it seems that its proponents might have thought that by making it optional, states would be more inclined to accept it. The decision to impose some sort of liability on legal entities will be fruitless, unless states adopt implementing legislation when ratifying the Beijing instruments.

G. *Severe Penalties*

The texts that emerged from LC/34 did not specify the penalties to be imposed on persons found guilty of having committed one of the proposed offenses. On this point, the Diplomatic Conference changed nothing, and the Beijing instruments remain faithful to the previous language adopted in both the Hague and Montreal Conventions where States Party simply undertake to make the offenses punishable by "severe penalties."[404] The use of the word *undertake*

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400. *See* Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 1(e) (providing that "[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction . . . when the offence is committed by a national of that State"); Beijing Convention, *supra* note 23, at art. 8, § 1(e) (stating that States Party shall establish jurisdiction "when the offence is committed by a national of that state").

401. Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 1(e); Beijing Convention, *supra* note 23, at art. 8, § 1(e).

402. *See* Beijing Protocol, *supra* note 23, at arts. 4, 2 *bis* (indicating that states "may take the necessary measures to enable a legal entity . . . to be held liable"); Beijing Convention, *supra* note 23, at art. 4, §§ 1, 3 (stating that "[e]ach State Party . . . may take the necessary measures to enable a legal entity . . . to be held liable"); SUA Protocol, *supra* note 76, at art. 5 (providing that states shall "establish . . . jurisdiction over the offences . . . by a national of that State"); Financing of Terrorism Convention, *supra* note 43, at art. 5 (stating that signatory states "shall take the necessary measures" to hold "legal entities located in [their] territory[ies] or organized under [their] laws" liable for violations of the Convention).

403. *See* ICAO, DCAS Flimsy No. 1, *supra* note 393, ¶¶ 2–3 (recommending that the Convention "make the extension of liability to legal persons optional").

404. *See* Paul Stephen Dempsey, *Aerial Piracy and Terrorism: Unilateral and Multilateral Responses to Aircraft Hijacking*, 2 CONN. J. INT'L L. 427, 437 (1986) (explaining that "[u]nder each Convention, Contracting Parties are obligated to punish the described offenses by 'severe penalties '"); George B. Zotiades, *The International Criminal Prosecution of Persons Charged with an Unlawful Seizure of Aircraft*, 23 REVUE HELLÉNIQUE DE DROIT INT'L 12, 22 (1970) (commenting that this requirement

has been criticized as imposing a rather soft obligation on states.[405] This provision could have been made mandatory by stating that "[s]tates shall make the offenses punishable by severe penalties," but in reality, states will always wish to retain some discretion in this area.

Another option would have been to use a widely accepted formulation of other UN conventions: "punishable by appropriate penalties which take into account their grave nature."[406] This wording seems to give more discretion to states, and one might argue that it would potentially be subject to diverse national interpretations. However, would that have been any less effective than the final wording that was adopted?

The exact type of penalty for each given offense will be established in accordance with the domestic law of the court hearing the case. The rationale for this may be explained by the fact that the degree of penalty applied will vary considerably from jurisdiction to

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imposes an obligation "upon States not only to provide for the penal prosecution of the offenders and their accomplices but also to carry severe penalties commensurate with the gravity of such offences"). Other international instruments, such as the Terrorist Bombings Convention, only require that states adopt measures "to make . . . offences punishable by appropriate penalties which take into account the grave nature" thereof. Terrorist Bombings Convention, *supra* note 50, at art. 4(b).

405. *See* Abeyratne, *The Beijing Convention of 2010*, *supra* note 59, at 253–54 (comparing the ordinary meanings of "shall" and "undertake" to conclude that undertake is less obligatory than shall).

406. *See* SUA Protocol, *supra* note 76; International Convention for the Suppression of Acts of Nuclear Terrorism, *supra* note 204, at art. 5(b) (indicating that states will make violations of the Convention "punishable by appropriate penalties which take into account the grave nature of these offences"); Financing of Terrorism Convention, *supra* note 43, at art. 4(b) (providing that Member States shall "make offenses punishable by appropriate penalties"); Terrorist Bombings Convention, *supra* note 50, at art. 4(b) (indicating that "[e]ach State Party shall adopt such measures as may be necessary . . . [t]o make those offences punishable by appropriate penalties which take into account the grave nature of those offences"); Convention of the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 5, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter Maritime Navigation Convention] (indicating that states "shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences"); SUA Convention, *supra* note 75, at art. 5 ("Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offenses."); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, *supra* note 204; Convention on the Physical Protection of Nuclear Material, *supra* note 203, at art. 7, § 2 (indicating that the offenses established under the Convention shall be made "punishable by appropriate penalties which take into account their grave nature"); International Convention Against the Taking of Hostages art. 2, Dec. 17, 1979, 1316 U.N.T.S. 205 [hereinafter Hostages Convention] (stating that signatories "shall make the offences . . . punishable by appropriate penalties which take into account the grave nature of those offences"); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 203, at art. 2, § 2 ("Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.").

jurisdiction. This is an area where there is a complete lack of uniformity in international law, and it leaves domestic legal systems with complete discretion to interpret what constitutes severe penalties. Indeed, during the Beijing Diplomatic Conference some states, such as Tanzania, recommended defining the term *severe penalties*.[407] Can the Beijing instruments truly be said to create "international" offenses since there is no common, international standard of punishment to fit the enormity of the crimes involved? This Article will further analyze the requirement to adopt implementing legislation to precisely establish such "severe penalties."

H. *Political Offense Exclusion Clause*

In the past, it was not uncommon for certain states to deny an extradition request on the basis that the extraditable offense in question was categorized as a "political offence."[408] That exception was contemplated in most bilateral extradition treaties.[409] Tensions escalated when Venezuela ratified the Montreal Convention because it also filed a reservation stating that it "will take into consideration clearly political motives and the circumstances under which offences described in . . . [the] Convention are committed, in refusing to extradite or prosecute an offender, unless financial extortion or injury to the crew, passengers, or other persons has occurred."[410]

Although one may argue whether or not a reservation reinterpreting (or indeed rewriting) an international instrument should be allowed, the fact is that the reservation sought to expand Venezuela's discretion when considering whether or not to extradite an alleged offender. This obviously created some uneasiness amongst other States Party.[411] The United Kingdom and Italy, for instance, filed counter-reservations expressly declaring that they considered Venezuela's reservation as being invalid because it sought to limit its obligations under Article 7 of the Montreal Convention—namely, "without exception whatsoever and whether or not the offence was

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407. Int'l Civil Aviation Org., *Comments on the Proposed Amendments to the Montreal Convention, 1971 as Amended by the Airports Protocol of 1988*, at art. 3 (DCAS Doc. No. 9, July 15, 2010).

408. *See* John P. McMahon, *Air Hijacking: Extradition as a Deterrent*, 58 GEO. L.J. 1135, 1138 (1969) (explaining that "the political offence exception . . . excludes offenses that are primarily political in nature").

409. *See id.* ("The greatest obstacle against the use of the present system of bilateral extradition treaties to effectively deter hijacking through certain extradition, however, is the political offense exception . . . .").

410. Montreal Convention, *supra* note 2, at 5.

411. *See* Hague Convention, *supra* note 2, at art. 7 (providing the United Kingdom and Italy's statements that the Venezuelan reservation was not valid).

committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."[412]

As a remedy to these types of episodes, the offenses of the Beijing instruments cannot be regarded as political offenses for the purposes of extradition or mutual legal assistance.[413] In other words, an offense will be prosecuted, irrespective of the perpetrator's political motives.[414] This also purports to remove some of the discretion that states have when deciding whether to extradite an alleged offender.

I. *Fair Treatment Clause*

Continuing the pattern established by a number of other international conventions,[415] the Beijing instruments wisely introduce the principle that "any person who is taken into custody . . . shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present."[416] The aim of this provision is to impose an additional obligation on states to ensure (greater) respect for human rights.[417] Given the divergence in

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412. *Id.*

413. *See* Beijing Protocol, *supra* note 24, at arts. 12, 8 *bis* (stating that "[n]one of the offences . . . shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence"); Beijing Convention, *supra* note 23, at art. 13 ("None of the offences set forth in Article 1 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence . . . .").

414. *See* Int'l Civil Aviation Org., *International Convention for the Suppression of Terrorist Bombings* 3 (ICAO Working Paper No. C-WP/11065, Mar. 10, 1999).

415. *See* SUA Protocol, *supra* note 76, at art. 9; International Convention for the Suppression of Acts of Nuclear Terrorism, *supra* note 204, at art. 12 (guaranteeing "fair treatment" for "[a]ny person who is taken into custody" for violating this Convention); Financing of Terrorism Convention, *supra* note 43, at art. 17 (stating that "[a]ny person who is taken into custody" in relation "to this Convention shall be guaranteed fair treatment"); Terrorist Bombings Convention, *supra* note 50, at art. 14 (stating that "[a]ny person who is taken into custody . . . shall be guaranteed fair treatment"); SUA Convention, *supra* note 75, at art. 10, § 2 (stating that "[a]ny person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 3 shall be guaranteed fair treatment"); Convention on the Physical Protection of Nuclear Material, *supra* note 203, at art. 12 ("Any person regarding whom proceedings are being carried out in connection with any of the offenses set forth in article 7 shall be guaranteed fair treatment at all stages of the proceedings."); Hostages Convention, *supra* note 406, at art. 8, § 2 ("Any person regarding whom proceedings are being carried out in connexion with any of the offences set forth in article 1 shall be guaranteed fair treatment at all stages of the proceedings . . . ."); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 203, at art. 9 (stating that anyone subjected to proceedings under the Convention "shall be guaranteed fair treatment at all stages of the proceedings").

416. Beijing Protocol, *supra* note 24, at arts. 10, 7 *bis*; Beijing Convention, *supra* note 23, at art. 11; Financing of Terrorism Convention, *supra* note 43, at art. 17.

417. *See* ICAO, Report No. LC/SC-NET, *supra* note 209, at 2-11, ¶ 10.9.1 (explaining that "Article 6 . . . reflects the comparable clauses in the more recent UN

Member States' human rights records, Will offenders be comforted by the additional wording of "applicable provisions of international law, including international human rights law"?[418] Or is the addition of the clause simply wishful thinking in the context of highly politically charged offenses, such as acts of unlawful interference involving civil aviation?

J. *Contracting States or States Party?*

Both the Hague and the Montreal Conventions use the term *Contracting States*.[419] Following the trend of recently adopted ICAO instruments, the Beijing instruments decided to adopt the term *States Parties*.[420]

The Vienna Convention on the Law of Treaties establishes a very subtle difference between the two terms.[421] The former refers to a state that has consented to be bound by a treaty that has yet to enter into force. The latter refers to a state that has consented to be bound by a treaty that is already in force.[422]

Given that treaty obligations will, for the most part, only apply once the Beijing instruments enter into force, it does indeed seem more sensible to use the terms *State Party* and *States Parties*.

K. *To Extradite or to Prosecute: That Is the Question!*

The Beijing instruments maintain unaltered the extradition and prosecution mechanisms of the Hague and Montreal Conventions.[423]

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conventions for the purpose of ensuring respect for human rights and for the rule of law").

418. Beijing Protocol, *supra* note 24, at arts. 10, 7 *bis*; Beijing Convention, *supra* note 23, at art. 11.

419. *See* Montreal Convention, *supra* note 2, at art. 3 (referring to participating states as "Contracting State[s]"); Hague Convention, *supra* note 2, at art. 2 ("Each Contracting State undertakes to make the offence punishable by severe penalties.").

420. *See* Beijing Protocol, *supra* note 24 (referring to signatories as "State Parties"); Beijing Convention, *supra* note 23 (referring to signatories as "State Parties").

421. *See* Vienna Convention on the Laws of the Treaties art. 2 (f)–(g), May 22, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (defining a "contracting state" as "a state which has consented to be bound by the treaty, whether or not the treaty had entered into force" and "party" as "a State which has consented to be bound by the treaty and for which the treaty is in force").

422. *Id*.

423. *See* Beijing Protocol, *supra* note 24, at arts. 11, 8, 12, 8 *bis*, 13, 8 *ter*, 15, 10 (indicating the Beijing Protocol's procedures for extradition and prosecution); Beijing Convention, *supra* note 23, at arts. 10, 12–14, 17 (describing extradition and prosecution procedures under the Beijing Convention); Montreal Convention, *supra* note 2, at arts. 6–8, 11 (explaining the procedures for extradition and prosecution of offenders); Hague Convention, *supra* note 2, at arts. 7–8, 10 (discussing the extradition and prosecution of offenders).

In those instruments, States Party undertook the obligation either to extradite the offender found in their territory or "submit the case to its competent authorities for the purpose of prosecution,"[424] thus applying the Roman law principle *aut dedere aut judicare*.[425] This wording leaves states with wide discretion to extradite or prosecute the offender.

Furthermore, there is no clear priority given between the options to extradite or prosecute.[426] Which comes first? The Hague Convention sought to create, so far as possible, a degree of universal jurisdiction that would in turn prevent the existence of "safe havens."[427] In discussions during the Diplomatic Conference that led to the adoption of the Hague Convention, the United States, the Soviet Union, and Israel strongly advocated unconditional extradition to the state of registration of the aircraft.[428] African states were against that idea because of the apartheid regime in South Africa.[429] They feared extradition of their citizens to South Africa.[430] In addition, Arab states were not particularly fond of the idea of having their nationals extradited to Israel.[431] Some commentators have also indicated that in the past Western states have refused to grant extradition to alleged offenders, particularly those wanted in Eastern European countries.[432] A compromise was reached by granting the flexibility permitted by the aut dedere aut judicare principle.[433]

However, what appears to be an unambiguous text may in fact give rise to a real international dispute. The Montreal Convention did not envisage "situations in which a state is complicitous in a terrorist action."[434] The Pan Am 103 case best illustrates the complexity of

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424. Montreal Convention, *supra* note 2, at art. 7.

425. Following the precedent set by the Hague and the Montreal Conventions, the 1988 International Convention of the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, as well as other instruments that later followed, incorporated this principle. *See* David Freestone, *The 1988 International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 3 INT'L J. ESTAURINE & COASTAL L. 305, 311 (1998) (explaining that "[l]ike the ICAO Conventions the principle of *aut dedere aut judicare* (extradite or try) underpins the philosophy of the 1988 Convention").

426. MILDE, INTERNATIONAL AIR LAW, *supra* note 29, at 226.

427. *Id*. at 224.

428. *Id*.

429. *Id*.

430. *Id*.

431. *Id*.

432. *See* NICOLAS MATEESCO MATTE, TREATISE ON AIR-AERONAUTICAL LAW 372 (1981) ("It is to be noted that despite the confirmed willingness to fight against hijacking, Western countries tend to refuse extradition of fugitives from Eastern Europe.").

433. MILDE, INTERNATIONAL AIR LAW, *supra* note 29, at 227.

434. *See* Jonathan A. Frank, *A Return to Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action*, 30 DENV. J. INT'L L. & POL'Y 535

that issue.[435] When requested to extradite the alleged terrorists involved in the Lockerbie bombing, Libya refused extradition on the basis of the customary international law principle of aut dedere aut judicare[436] but expressed a willingness to prosecute the accused if provided with relevant evidence.[437] The Montreal Convention is silent on extradition of a national from his or her own state when that state has sponsored terrorist activities, a scenario that had allegedly taken place in the Lockerbie case.[438] In the absence of bilateral extradition treaties, there is no customary rule of international law imposing a duty to extradite.[439]

In the face of the mounting international pressure, the UN Security Council passed a resolution requesting Libya to cooperate.[440] Libya failed to do so and economic and diplomatic sanctions were imposed shortly thereafter.[441] These sanctions were finally lifted in 2003 after extensive diplomatic negotiations.[442] Although it would have been appropriate to include language to impose more stringent rules on the extradition mechanism, precisely to avoid the situation of a state refusing to prosecute the alleged offender in its own courts, the reality is that states are not yet willing to move beyond the

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(2002) ("The Montreal Convention simply does not address situation in which a state is complicitous in a terrorist action.").

435. *See* DIEDERIKS-VERSCHOOR, *supra* note 46, at 306 (describing the numerous laws applicable to the extradition, transfer, and trial of the defendants in the Pan Am 103 case and the "solution to the problems raised by the '*aut dedere, aut judicare*' principle of the Montreal Convention [that] was quite unprecedented").

436. *See* Donna E. Arzt, *The Lockerbie Extradition by Analogy Agreement: Exceptional Measure or Template for Transnational Criminal Justice*, 18 AM. U. INT'L L. REV. 163, 175 (2002) (explaining that Libya "contended that it was not required to extradite and stated that, in accordance with the customary international law principle of *aut dedere aut judicare* ('extradite or prosecute'), it would conduct its own prosecution").

437. *See id*. (noting that Libya offered to "conduct its own prosecution of its two accused nationals pursuant to the Montreal Convention").

438. *See id*. at 176, n.47 (explaining that "the Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie").

439. *See id*. at 172–73 ("Under international law, the duty to extradite depends on the existence of a bilateral or multilateral treaty . . . .").

440. *See* S.C. Res. 731, ¶¶ 3–5, U.N. DOC. S/RES/731 (Jan. 21, 1992) ("Urg[ing] the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism.").

441. *See* S.C. Res. 748, ¶¶ 4–10, U.N. DOC. S/RES/748 (Mar. 31, 1992) (listing and explaining the sanctions imposed on Libya).

442. *See* Frank, *supra* note 434, at 536–38 (describing the process through which Libya "eventually capitulated to a long-debated plan to have the alleged terrorists extradited" in lieu of paying sanctions).

already well-established aut dedere aut judicare principle.[443] The Beijing instruments confirm that view.[444]

L. *Jurisdiction*

There is no mandatory obligation to establish jurisdiction since the Beijing instruments require only that a State Party "take[s] such measures as may be necessary to establish its jurisdiction."[445] Just like the Hague and Montreal Conventions, the drafters of the Beijing instruments decided not to include mandatory language along the lines of "States shall establish jurisdiction."[446] In fact, for the most part, it is fair to say that the Beijing instruments did not introduce substantive variations into the international law regime.

What then is the extent of a state's duty with regard to establishing jurisdiction on a given offense?

One could reasonably argue that the words "take such measures . . . to establish jurisdiction" could be assimilated to a "best efforts" obligation by virtue of which a state is only obliged to carry out certain duties, such as an inquiry into the facts, taking custody of the offender, and turning him or her over to the authorities.[447] Based on the specific circumstances of the case, the prosecution will decide whether or not to press charges. There may well be situations in which the prosecution does not believe that it is in a position to do so. This would be, for instance, when the offender is accidentally found in such a state but all the evidence and elements associated with the offense are situated elsewhere. This flexibility would allow the state in question to refrain from asserting its jurisdiction but at the same time extradite the offender to another state with more connecting elements to the case. Arguably, the Beijing instruments do not impose an obligation to prosecute either.[448]

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443. *See* Beijing Protocol, *supra* note 24, at arts. 13, 8 *ter* (indicating that "[n]othing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance"); Beijing Convention, *supra* note 23, at arts. 10, 12 (setting forth the Convention's extradition procedures).

444. *See* Beijing Convention, *supra* note 23, at arts. 10, 12 (demonstrating that States Party agreed to keep the aut dedere aut judicare principle).

445. Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 1; Beijing Convention, *supra* note 23, at art. 8, § 1.

446. *See* Dionigi M. Fiorita, *Aviation Security: Have All the Questions Been Answered*, XXII ANNALS AIR & SPACE L. 69, 71–75 (1995) (comparing the jurisdictional requirements of the Hague, Montreal, and Tokyo Conventions).

447. *See* NARINDER AGGARWALA, MICHAEL J. FENELLO & GERALD F. FITZGERALD, AIR HIJACKING: AN INTERNATIONAL PERSPECTIVE (1971), *reprinted in* INTERNATIONAL CONCILIATION No. 585, 73–74 (1971) ("Initially, as provided by Article 5(1), there is an undertaking of each contracting state to take necessary measures to establish its jurisdiction over offenses . . . .").

448. *See contr*a S.K. GHOSH, AIRCRAFT HIJACKING AND THE DEVELOPING LAW 32 (1985) (arguing that the Hague Convention "obligates contracting parties to prosecute the offender").

The instruments nonetheless recognize the following grounds for jurisdiction:

i) State where the offense is committed;[449]
ii) State of registration of the aircraft;[450]
iii) State of landing where the offense is committed on board an aircraft and the alleged offender is still on board;[451]
iv) State of lessee;[452] and
v) State of nationality of the offender.[453]

A state may also decide to establish jurisdiction on the basis of the nationality of the victim or on the basis of habitual residence of a stateless person in that state.[454] If a state finds an alleged offender in its territory, but it is unwilling to extradite that person, such a state

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449. *See* Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 1(a) (providing that states will establish jurisdiction "when the offence is committed in the territory of that State"); Beijing Convention, *supra* note 23, at art. 8, § 1(a) (encouraging states to establish jurisdiction "when the offence is committed in the territory of the State").

450. *See* Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 1(b) (establishing that a state has jurisdiction "when the offence is committed onboard an aircraft registered in that State"); Beijing Convention, *supra* note 23, at art. 8, § 1(b) (indicating that a state will establish jurisdiction "when the offence is committed against or on board an aircraft registered in that State").

451. Following the precedents set by the Hague and Montreal Conventions, the Beijing instruments incorporate the "State of Landing" jurisdiction. This is of utmost importance when the alleged offender that commits an offense aboard, arrives in a state other than the aircraft's state of registry. This is precisely one of the major shortcomings of the Tokyo Convention. *See* Alejandro Piera & Michael Gill, *Unruly & Disruptive Passengers: Do We Need to Revisit the International Legal Regime,* XXXV pt. I ANNALS AIR & SPACE L. 355, 358–62 (2010) (discussing the various shortcomings of the Tokyo Convention in relation to onboard offenses); Alejandro Piera, *ICAO's Latest Efforts to Tackle Legal Issues Arising from Unruly/Disruptive Passengers: The Modernization of the Tokyo Convention 1963*, 37 AIR & SPACE L. 231 (2012).

452. *See* Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 1(d) (indicating that a state has jurisdiction "when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business or . . . permanent residence is in that State"); Beijing Convention, *supra* note 23, at art. 8, § 1(d) (providing that a state will establish jurisdiction "when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business or . . . permanent residence is in that state").

453. Some delegations cautioned that establishing jurisdiction (solely) on the basis of the nationality of the offender may be quite problematic, in particular for those states that adhere to a territorial approach. *See* Int'l Civil Aviation Org., *Drafting Proposal for the Establishment of Jurisdiction Based on Nationality of the Offender* ¶ 2, (DCAS Doc No. 8, July 15, 2010).

454. *See* Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 2 (indicating that a state "may also establish its jurisdiction . . . when the offence is committed against a national of that state," "when the offence is committed by a stateless person whose habitual residence is in the territory of that State," or both); Beijing Convention, *supra* note 23, at art. 8, § 2(b) (explaining that a state can establish jurisdiction "when the offence is committed by a stateless person whose habitual residence is in the territory of that state").

must take measures to establish jurisdiction.[455] This would mean submitting the case to its authorities for prosecution.[456]

In any event, the Beijing instruments do not in any way exclude the criminal jurisdiction of local courts.[457]

M. *Format: The Chinese Proposal*

Since the first meeting of the SSCLC, amendments to both the Hague Convention and the Montreal Convention were intended to be effected by two separate protocols.[458] At the Beijing Diplomatic Conference, China suggested that the Hague Convention could be updated through a protocol, given that it had not been amended before and that the proposed changes were not of a substantive nature.[459] Similarly, China recommended that the more substantial amendments to the Montreal Convention and the Montreal Protocol 1988 be implemented through a completely new convention that would be known as the Beijing Convention.[460] This was thought to be a more user-friendly approach to establishing the format of the new regime, given that using a protocol to amend a protocol would have been quite confusing for all concerned.

The plenary of the Beijing Diplomatic Conference accepted China's proposal without much opposition.[461]

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455. *See* Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 3 (providing that a state shall also establish jurisdiction when "the alleged offender is present in its territory and it does not extradite that person"); Beijing Convention, *supra* note 23, at art. 8, § 3 (explaining that a state will also "take such measures as may be necessary to establish its jurisdiction . . . in the case where the alleged offender is present in its territory and it does not extradite that person").

456. *See* Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 3 (indicating that a state will "take such measures as may be necessary to establish its jurisdiction . . . in the case where the alleged offender is present in its territory and it does not extradite that person"); Beijing Convention, *supra* note 23, at art. 10 ("The State Party in the territory of which the alleged offender is found shall, if it does not extradite that person, be obliged . . . to submit the case to its competent authorities for the purpose of prosecution.").

457. *See* Beijing Protocol, *supra* note 24, at art. 7, art. 4, § 4 ("This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."); Beijing Convention, *supra* note 23, at art. 8, § 4 (explaining that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with national law").

458. ICAO, Report, Doc. No. 9926-LC/194, supra note 80, ¶ 2.2.

459. *See* Int'l Civil Aviation Org., *Possible Forms of Instruments to be Adopted at the Diplomatic Conference on Aviation Security* ¶ 3.1 (DCAS Doc No. 16, Aug. 31, 2010) [hereinafter ICAO, DCAS Doc. No. 16] (explaining that "[t]he Hague Convention . . . has never been amended, and would therefore not have the complications of multiple protocols . . . and . . . the proposed amendments to The Hague Convention, while important updates, are less in scope than those proposed for the Montreal Convention and would seem to be more appropriate for a protocol").

460. *See id.* ¶ 2.2 (proposing the creation of the Beijing Convention to consolidate existing conventions, existing protocols, and new amendments).

461. *Id.* ¶ 1.1.

N. *Official Languages*

Given that both the Hague and the Montreal Conventions, at the time of their adoption, were only drafted in English, French, Russian, and Spanish, [462] one of the ICAO Secretariat's most daunting challenges was to make the Beijing instruments available in the organization's six official languages. [463] This was a burdensome administrative task, since there were no authentic Chinese or Arabic versions of the original instruments and the Beijing Diplomatic Conference worked from translations prepared for this purpose.[464]

During the drafting exercise, some delegations spotted a number of linguistic deficiencies in both of these texts. [465] That is why, following long-standing practice of ICAO-sponsored conferences,[466] the president of the Beijing Diplomatic Conference assigned the Secretariat the duty of removing all linguistic inaccuracies within a period of ninety days from the date of adoption of the instruments on September 10, 2010.[467] This was done to bring the six different texts into conformity with one another[468] and to produce six texts that are equally authentic.[469]

An international instrument's authenticity in all six of the organization's working languages is particularly important when it comes to judicial interpretation. For example, the Warsaw

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462. *See* Montreal Convention, *supra* note 2, at art. 16, § 2 (indicating that the three original copies of the Convention would be "drawn up in four authentic texts in the English, French, Russian and Spanish languages"); Hague Convention, *supra* note 2, at art. 14, § 2 (stating that the text would be "drawn up in four authentic texts in the English, French, Russian and Spanish languages").

463. These are English, French, Russian, Spanish, Arabic, and Chinese. *See* ICAO, DCAS Doc. No. 16, *supra* note 459, ¶¶ 2.1–.2, 3.1, 6.1.

464. *See* Beijing Protocol, *supra* note 24, at art. 18 ("The tests of the Convention in Arabic and Chinese languages annexed to this Protocol shall, together with the texts of the Convention in English, French, Russian and Spanish languages, constitute texts equally authentic in the six languages."); Beijing Convention, *supra* note 23, at art. 25 (indicating that the Convention would be published "in the English, Arabic, Chinese, French, Russian and Spanish languages").

465. For instance, Saudi Arabia's comments on the Arabic text. *See* Int'l Civil Aviation Org., *Essential Corrections and Additions to the Draft Texts Prepared by the Legal Committee* ¶¶ 1.2–2.1.6 (ICAO, DCAS Doc No. 11, Oct. 16, 2010).

466. *See* ICAO, DCAS Doc No. 16, *supra* note 459, ¶ 6.1 (discussing ICAO's language verification practice).

467. Milde, *Beijing Convention*, *supra* note 29, at 13.

468. *See* Int'l Conference on Air Law, Final Act, *supra* note 88, at 6 ("The texts of the said Convention and Protocol are subject to verification by the Secretariat of the Conference under the authority of the President of the Conference within a period of ninety days from the date hereof as to the linguistic changes required to bring the texts in the different languages into conformity with one another.").

469. *See* Beijing Protocol, *supra* note 24, at art. 25 (stating that "all texts [in the English, Arabic, Chinese, French, Russian and Spanish languages are] equally authentic"); Beijing Convention, *supra* note 23, at art. 25 (stating that the Convention would be published "in the English, Arabic, Chinese, French, Russian and Spanish languages").

Convention 1929[470] has always been notoriously challenging for non-French speaking courts, given that French is the instrument's only official language.[471] By making the Beijing instruments available in all six official languages, the Beijing Diplomatic Conference sought to avoid that type of inconvenience and to facilitate national implementation.

O. *Settlement of Disputes*

The Beijing instruments include a built-in dispute settlement mechanism, applicable to any dispute over the instruments' interpretation or application.[472] Under this provision, states must first engage in and exhaust an arbitration proceeding.[473] If unsuccessful, the dispute may then be referred to the ICJ.[474]

However, some states are notorious for not recognizing the jurisdiction of the ICJ,[475] and it is noteworthy that states may file a reservation declining to be bound by the ICJ's jurisdiction when ratifying or acceding to the instruments.[476] Given that twenty-five states had filed reservations in the Hague Convention[477] and twenty-

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470. *See* Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 36, Oct. 12, 1929, 137 L.O.N. 11 (indicating that "[t]he Convention is drawn up in French in a single copy").

471. Beijing Protocol, *supra* note 24, at arts. 18, 25; Beijing Convention, *supra* note 23, at art. 20, § 1.

472. *See* Beijing Convention, *supra* note 23, at art. 20, § 1 (explaining that "[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration"); Beijing Protocol, *supra* note 24.

473. *See* Beijing Convention, *supra* note 23, at art. 20, § 1 (stating that "[i]f within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of thos Parties may refer the dispute to the International Court of Justice"); Beijing Protocol, *supra* note 24.

474. *See* Beijing Convention, *supra* note 23, at art. 20, § 1 (explaining that if parties are not able to "agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice"); Beijing Protocol, *supra* note 24.

475. For instance, in *Sanchez-Llamas v. Oregon*, the Supreme Court of the United States underscored that while decisions from the ICJ must be given "respectful consideration" they are certainly not binding on U.S. courts. *See* 548 U.S. 331, 331, 353 (2006) ("Although the ICJ's interpretation deserves 'respectful consideration,' we conclude that it does not compel the Court" and that "[n]othing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U.S. courts").

476. *See* Beijing Convention, *supra* note 23, at art. 20, § 2 (stating that "[e]ach State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph"); Beijing Protocol, *supra* note 24.

477. The following countries filed a reservation under the Hague Convention's compromissory clause: Algeria, Bahrain, Belarus, Brazil, China, Cuba, Egypt, Guatemala, India, Indonesia, Malawi, Mozambique, Oman, Papua New Guinea, Peru, Qatar, Romania, the Russian Federation, Saudi Arabia, South Africa, the Syrian Arab Republic, Tunisia, Ukraine, and Vietnam. *See Convention for the Suppression of*

six in the Montreal Convention,[478] it is likely that a number of states will also exercise that prerogative under the Beijing instruments,[479] which would perhaps indicate a certain unwillingness to submit their disputes to the ICJ automatically. During the Beijing Diplomatic Conference, Uruguay expressed serious concerns on the convenience of establishing an opt-out mechanism through reservations to the settlement of disputes. [480]

P. *Relationship Between Instruments*

Although the Beijing Convention seeks to supplant both the Montreal Convention and the Airport Protocol in the long run, the three instruments will continue to co-exist.[481] The Beijing Convention will prevail over the Montreal Convention and the Airport Protocol.[482] This means that for states that are parties to each of those instruments, the rules of the Beijing Convention trump any potential dispute.[483]

In addition, if a state which is not party to the Hague Convention ratifies or accedes to the Beijing Protocol, that state also accedes and becomes a party to the Hague Convention as amended by the Beijing

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Unlawful Seizure of Aircraft Signed at the Hague on 16 December 1970, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/Hague_EN.pdf (last updated Sept. 30, 2009) (listing reservations made to the Hague Convention).

478. The following countries filed reservations with regard to paragraph 1 of Article 14 of the Montreal Convention: Afghanistan, Bahrain, Belarus, Brazil, China, Cuba, Egypt, Ethiopia, France, Guatemala, Indonesia, Malawi, Mongolia, Mozambique, Oman, Papua New Guinea, Peru, Poland, Qatar, Romania, the Russian Federation, Saudi Arabia, South Africa, Syrian Arab Republic, Tunisia, and Ukraine. *See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation Signed at Montreal on 23 September 1971*, INT'L CIVIL AVIATION ORG., http://www.icao.int/ secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf (last updated Sept. 30, 2009) (listing reservations made to the Montreal Convention).

479. Right after the fall of the Berlin wall, Poland, Bulgaria, and Hungry withdrew their original reservations. *See id*. at 1–6 (indicating that Poland withdrew its reservations on June 23, 1997, Bulgaria withdrew its reservations on May 9, 1994, and Hungary withdrew its reservations on January 10, 1990).

480. Uruguay suggested that the dispute settlement provision should mirror Article 33 of the Charter of the United Nations. *See* Int'l Civil Aviation Org., *Draft Consolidated Text of the Montreal Convention of 1971 as Amended by the Airports Protocol of 1988, with Amendments Proposed by the Legal Committee* art. 14, ¶ 2 (ICAO, DCAS Doc. No. 6, Aug. 16, 2010). Regrettably, the Beijing Diplomatic Conference did not give much thought to this very interesting proposal.

481. *See* Beijing Protocol, *supra* note 24, at art. 19 (indicating that "the Convention and this Protocol shall be read and interpreted together as one single instrument and shall be known as The Hague Convention as amended by the Beijing Protocol, 2010").

482. *Id*.

483. *Id*. at arts. 19, 22.

Protocol.[484] This is standard ICAO practice when amending previous international legal instruments.[485]

Q. *Cooperation Amongst States*

Building upon the provisions of both the Hague and Montreal Conventions, [486] the Beijing instruments not only establish the obligation to "afford [amongst States Party] the greatest measure of assistance" with regard to the offenses listed in those treaties but also require that states share any relevant information on such offenses with other states that may be affected. [487] Recognizing that combatting acts of unlawful interference requires a concerted effort from the international community, this provision should foster cooperation amongst States Party.

R. *Signature and Entry into Force*

In order for a state to sign the instrument being adopted at a diplomatic conference, customary practice requires that the state in question grants a letter of credentials and full powers.[488] Thus, its representatives are authorized and given full powers to sign, on behalf of the state, the international legal instrument or instruments that the diplomatic conference may adopt.[489] The head of the state or the ministry of foreign affairs issues this document. [490]

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484. *Id*. at art. 21, § 2.

485. *See, e.g.*, Hague Protocol to the Warsaw Convention art. 21, § 2, Sept. 28, 1955, 478 U.N.T.S. 371 (indicating that "[r]atification of this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol").

486. *See* Montreal Convention, *supra* note 2, at art. 11 (stating that "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings"); Hague Convention, *supra* note 2, at art. 10 (explaining that "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings"). The Hague Convention only required that states grant assistance, whereas the Montreal Convention went a step further by addressing the sharing of relevant information to the extent possible under national laws.

487. *See* Beijing Protocol, *supra* note 24, at arts. 15–16 (providing that "States Parties shall afford one another the greatest measure of assistance" and "shall . . . furnish any relevant information in its possession"); Beijing Convention, *supra* note 23, at arts. 17–18 (explaining that "States Parties shall afford one another the greatest measure of assistance" and "furnish any relevant information in its possession").

488. *See* ICAO, State Letter LM 1/16.1-10/10, *supra* note 85, at app. A (outlining the procedures for submitting credentials and full powers required by Rule 2 of the Provisional Rules of Procedure).

489. *Id.*

490. *Id*.

Most delegates attending the Beijing Diplomatic Conference did not have this letter.[491] This may explain why on the last day of the conference only eighteen states signed the Beijing Convention and nineteen states signed the Beijing Protocol.[492] Unlike its predecessors, which required only ten ratifications,[493] each of the Beijing instruments requires twenty-two ratifications or accessions to enter into force.[494]

At the time of writing and over three years after its adoption, thirty states have signed the Beijing Convention[495] and thirty-two have signed the Beijing Protocol.[496] But only eight states have ratified or acceded to the Beijing Convention and seven to the Beijing Protocol.[497] Although the number of signatures thus far is significantly higher than those of the General Risks and Unlawful Interference Conventions 2009,[498] they are still much lower than those of the Montreal Convention—one of ICAO's most successful

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491. *Id*.

492. The following states signed both instruments at the Beijing Diplomatic Conference: Brazil, China, Costa Rica, Cyprus, the Dominican Republic, Gambia, Indonesia, Mali, Mexico, Nepal, Nigeria, Paraguay, the Republic of Korea, Senegal, Spain, Uganda, the United Kingdom, and the United States. Most notably, India and Zambia signed the Beijing Protocol but not the Beijing Convention. *See Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation Done at Beijing on 10 September 2010*, INT'L CIVIL AVIATION ORG., http://www.icao.int/ secretariat/legal/ List%20of%20Parties/Beijing_Conv_EN.pdf (last visited Jan. 4, 2014) [hereinafter Parties to the Beijing Convention] (listing parties to the Beijing Convention); *Protocol Supplementary to the Suppression of Unlawful Seizure of Aircraft Done at Beijing on 10 September 2010*, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/ legal/List%20of%20Parties/Beijing_Prot_EN.pdf (last visited Jan. 4, 2014) [hereinafter Parties to the Beijing Protocol] (listing parties to the Beijing Protocol).

493. Montreal Convention, *supra* note 2, at art. 15, § 3; Hague Convention, *supra* note 2, at art. 13, § 3.

494. Beijing Protocol, *supra* note 24, at art. 23; Beijing Convention, *supra* note 23, at art. 22, § 1.

495. *See* Parties to Beijing Convention, *supra* note 492, at 1 (noting that, as of 2013, the Convention had "30 signatures, 5 ratifications, [and] 3 accessions").

496. *See* Parties to Beijing Protocol, *supra* note 492, at 1 (indicating that, as of 2013, the Protocol had "32 signatures, 5 ratifications, [and] 2 accessions").

497. Angola, Cuba, the Czech Republic, the Dominican Republic, Guyana, Mali, Myanmar, and Saint Lucia in the case of the Convention; Cuba, the Czech Republic, the Dominican Republic, Guyana, Mali, Myanmar, and Saint Lucia in the case of the Protocol. Parties to Beijing Convention, *supra* note 492; Parties to Beijing Protocol, *supra* note 492, at 1–2.

498. At the time of writing, only thirteen states have signed the General Risks Convention and eleven states have signed the Unlawful Interference Convention. *See Convention on Compensation for Damage Cause by Aircraft to Third Parties Done at Montreal on 2 May 2009*, INT'L CIVIL AVIATION ORG., http://www.icao.int/ secretariat/legal/List%20of%20Parties/2009_GRC_EN.pdf (last visited Jan. 4, 2014); *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft Done at Montreal 2 May 2009*, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/2009_UICC_EN.pdf (last visited Jan. 4, 2014). Only Montenegro has acceded to both of those Conventions.

international instruments to date,[499] except for the Chicago Convention itself.[500] This is indicative of the level of interest that these instruments have so far generated within ICAO's membership.

If one bears in mind that that it took the Montreal Convention more than 4 years to reach the thirty ratifications it required in order to enter into force,[501] one might be tempted to predict that the Beijing instruments will take at least 8 years to enter into force, if not considerably longer.

S. *Depositary*

Like almost all recently adopted conventions under the auspices of ICAO, the Beijing instruments delegate the role of depositary to the secretary-general.[502] Both the Hague and the Montreal Conventions had multiple states exercising this sensitive function, but that can be explained by the historical context in which they were adopted. At the peak of the Cold War, the Soviet Union, the United Kingdom, and the United States were designated as "depositary governments."[503] Today, politically, there is not such a need for a multiple-depositary system.[504] And it goes without saying that a single depository is much more efficient and transparent.

T. *What Drove the Adoption of the Beijing Instruments?*

To a great extent, the adoption of the Beijing instruments is the result of the remarkable and tireless efforts of three states in particular that drove the process all the way from its early beginnings

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499. *A contrario*, 104 states are parties to the Montreal Convention 1999. *See Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999*, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (last updated June 25, 2013) [hereinafter Parties to the Montreal Convention].

500. At present, 191 states are parties to the Chicago Convention. *See Convention on International Civil Aviation Signed at Chicago on 7 December 1944*, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf (last updated Oct. 11, 2011).

501. *See* Parties to Montreal Convention, *supra* note 499, at 1 (indicating that "[t]he Convention entered into force on November 2003").

502. *See* Beijing Convention, *supra* note 23, at art. 21, § 2 ("The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the International Civil Aviation Organization, who is hereby designated as the Depositary."); Beijing Protocol, *supra* note 24, at art. 21, § 1.

503. Hague Convention, *supra* note 2, at art. 13, § 2; Montreal Convention, *supra* note 2, at art. 15, § 2. R.H. Mankiewicz argues that a three-depositary system was established "[i]n order that states not parties to the Chicago Convention may easily ratify and adhere to the [Hague and Montreal Conventions]." R.H. Mankiewicz, *The 1970 Hague Convention*, 37 J. AIR L. & COM. 195, 209 (1971).

504. *See* ICAO, DCAS Doc. No. 16, *supra* note 459, ¶ 5.1 ("The Hague and the Montreal Conventions respectively have three depositaries, which may not be necessary today.").

to the conclusion of the Beijing Diplomatic Conference: Australia, the United Kingdom, and the United States. It is simply unimaginable that this initiative would have come to fruition without the active involvement of these states. This included direct engagement throughout the whole drafting process as well as lobbying before, during, and after the Beijing Diplomatic Conference.

In the case of the United States, it is striking to compare its leading role on this initiative with its more measured approach on the Modernization of the Rome Convention process. Whether either of these two quite separate international law codification initiatives will ever see the light of day relies heavily on the degree of U.S. involvement. At this stage, and despite considerable opposition, the health of the Beijing instruments seems to be in a much better condition, for they rank high on the U.S. agenda.

U. *ICAO Assembly Declaration*

At the Thirty-seventh Session of the Assembly, which took place from September 27, 2010 to October 8, 2010, the United States, along with other states,[505] tabled a proposed stand-alone resolution to the Legal Commission urging Member States to support "the universal adoption" and ratification of the Beijing instruments.[506] Endorsing the recommendation of the Legal Commission, the Assembly adopted Resolution A37-23 unanimously.[507] The resolution directed the secretary-general to provide all necessary assistance in the ratification process.[508] In September 2013, at the Thirty-eighth Session of the Assembly, the United States retabled this resolution.[509]

Although some states had in the past proposed the passage of stand-alone resolutions,[510] normal ICAO practice would simply have been to include the Beijing instruments in the standard resolution on

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505. These states included Argentina, Australia, Canada, China, the Czech Republic, France, Mexico, Nigeria, South Africa, Uganda, and the United Kingdom. *Assembly – 37th Session: List of Delegates*, INT'L CIVIL AVIATION ORG., http://legacy.icao.int/Assembly37/docs/DOCS_List_of_Delegates.html (last visited Jan. 4, 2014).

506. Int'l Civil Aviation Org., *Agenda Item 59*, at app. A (ICAO, Working Paper No. 290).

507. Int'l Civil Aviation Org. Assembly, 37th Session, Resolution A37-23, *Promotion of the Beijing Convention and Beijing Protocol of 2010* (2010).

508. *Id*.

509. Int'l Civil Aviation Org., *Agenda Item 46*, at app. A (ICAO, Working Paper No. 109, Oct. 15, 2013).

510. *See* Frank E. Loy, *Some International Approaches to Dealing with Hijacking of Aircraft*, 4 INT'L L. 444, 449 (1970) (commenting that, at the Sixteenth Assembly, the United States tabled a stand-alone resolution recommending states to ratify the Tokyo Convention).

the ratification of all ICAO-related international conventions.[511] This is indicative of the level of interest that the Beijing instruments generate for some states.

IV. THE VIEWS OF THE AIRLINE INDUSTRY

The airline industry supported "the thrust of the initiative to further extend" criminal liability for certain acts that may unlawfully and intentionally interfere with international civil aviation.[512] Clearly, the use of an aircraft as a weapon of mass destruction (WMD) or to disperse WMDs poses a serious threat to international civil aviation, and the possibility that aircraft may again be used to create a mass-casualty event persists.[513] However, the industry was concerned with the practical implications and operational repercussions that the new regime might present.[514] Industry representatives warned against the law of unintended consequences placing unnecessary burdens on an already weakened airline industry.[515] In particular, the airline industry felt that the broad scope of the requirement of unlawful and intentional conduct to trigger the application of the offense would give significant discretion to state prosecutors over the categories of parties against whom they may decide to open criminal investigations. Thus, "innocent airlines and their employees will almost certainly find themselves embroiled in costly and time consuming defences to criminal investigations for matters that arise out of the normal course of their operations."[516]

But the industry received some comfort. At LC/34 discussions, France noted that "[air] carrier[s] must act unlawfully, intentionally and with certain knowledge before its liability can be incurred under the [Beijing instruments]."[517] Similarly, the delegate from Australia noted that the transport offense would not capture "recklessness as to the contents of air cargo or the status of a passenger and would not

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511. *See* Int'l Civil Aviation Org. Assembly, 37th Session, Resolution A37-22, *Consolidated Statement of Continuing ICAO Policies in the Legal Field,* at app. C (2010) (commenting on the ratification process of ICAO international instruments).

512. *See* ICAO, DCAS Doc No. 13, *supra* note 185, ¶ 1.2 ("The airline industry naturally supports the thrust of the initiative to further extend the scope of the criminal law to certain categories of acts that unlawfully interfere with international civil aviation.").

513. *Id.*

514. *Id.* ("IATA is concerned with the practical implications and operational repercussions that may arise from the proposed amendments.").

515. *Id.* ¶ 1.4 ("IATA would urge the diplomatic conference to guard against the unintended consequences of the proposed amendments that would place unnecessary and undesirable financial operational burdens on the airline industry.").

516. *Id.* ¶ 2.1.2.

517. ICAO, LC/34-WP/4-1, *supra* note 144, ¶ 2:41.

apply to a carrier who unintentionally transports an item or person in a prohibited manner."[518]

A. *Carriage of Dangerous Goods—End Use*

Airlines already transport certain categories of dangerous goods[519] on a daily basis. "Most explosives . . . are restricted to cargo aircraft, although some may be shipped on passenger aircraft as well. In this context, the transport of these commodities is not at all uncommon."[520]

Although airlines were "sympathetic to the intent of the proposed changes to the existing conventions," there was concern that "in trying to stop criminal activities, the legitimate and lawful transport of these items [would be] negatively impaired."[521]

Of particular importance was the carriage of radioactive materials in the medical industry, "where there are already problems with 'denial of shipments.'" [522] This occurs "when shipments of radioactive materials, that are in complete compliance with the applicable transport regulations are [either] i) denied entry to a country or port" or ii) prevented from being transported on a timely basis "due to additional layers of non-transport regulations that delay their movement."[523] "'Denial of shipment' is a particular problem that the International Atomic Energy Agency (IAEA), the IATA, ICAO, manufacturers, and transporters of radioactive materials have been working to address for a number of years." [524] "These regulated radioactive materials are a perishable commodity widely used in medicine for the diagnosis and treatment of diseases and any additional regulatory requirements imposed on the transport of these materials will only further aggravate the problems in achieving their transport by air."[525]

There is already a requirement for a mandatory acceptance check of almost all dangerous goods.[526] The airline verifies that the

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518. ICAO, Working Paper No. LC 34-WP/2-2, *supra* note 255, ¶ 2.2.

519. Amongst others, these include infectious pathogens, microbial and biological agents, "toxic materials, explosives, and radioactive materials (including fissile material)." *See* ICAO, LC/34-WP/2-3, *supra* note 237, ¶ 2.2.1.

520. *Id*.

521. *Id*. ¶ 2.2.2.

522. *Id*. ¶ 2.2.3.

523. *Id*.

524. *Id*.

525. *Id*

526. ICAO defines the term *dangerous goods* as "[a]rticles or substances which are capable of posing a risk to health, safety, property or the environment and which are shown in the list of dangerous goods in the Technical Instructions or which are classified according to those Instructions." *See* Int'l Civil Aviation Org, *Annex 18: The Safe Transport of Dangerous Goods by Air*, *in* THE CONVENTION ON INTERNATIONAL CIVIL AVIATION, at ch. 1, 1 (3d ed. July 2001).

document and the exterior appearance of the package comply with the regulatory requirements.[527] But the airline has no way of determining the so-called end use. This aspect is—thus far—not covered by the safety regulations.[528]

Airlines are required to follow the provisions set out in the *ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air* when transporting such materials.[529] For the most part, airlines also use the IATA's *Dangerous Goods Regulations* (DGR), which are recognized as the "field guide" for the transport of dangerous goods by air.[530] The provisions in these regulations require that the shipper of such goods "classify, pack, mark, label, and document" such goods as set out in the regulations.[531] Airlines then have an obligation to complete an acceptance checklist, with some small exceptions, for all dangerous goods consignments.[532]

"[W]hen accepting dangerous goods for transport, airlines do not know, and are never provided with, the intended end use for the materials," and "indeed, the end use is not a condition of transport."[533] "Provided that the goods are presented in a condition that complies with domestic and international [dangerous-goods] regulations, they meet the safety conditions for transport."[534]

For example, an airline could transport goods that are intended to be used for hostile purposes, but it would have no knowledge of that intended use.[535] Should this be the case, it would make sense that the person who prepared and shipped such goods be held criminally liable but certainly not the airline or its employees acting within the context of their employment activities. If the requirements set out in the DGR are satisfied, airlines and their employees should not be held criminally liable for having accepted the transport of such goods. The industry argued strongly that the new international regime should affirm this concept.

At the Beijing Diplomatic Conference, the IATA proposed language whereby the operator would have been conclusively deemed not to have committed one of the transport offenses, when such operator has complied with the requirements of the ICAO *Technical Instructions for the Safe Transport of Dangerous Goods* by Air in force

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527. *See* ICAO, DCAS Doc. No. 13, *supra* note 185, ¶ 2.2.4 (describing regulation requirements concerning the shipping details of packages containing dangerous goods).

528. *Id.* ¶ 2.2.5 ("[A]irlines do not know, and are never provided with, the intended end use for the materials.").

529. *See* Int'l Civil Aviation Org., *Technical Instructions for the Safe Transport of Dangerous Goods by Air*, (ICAO, Doc. 9284-AN/905, 2010) (providing the text of the regulation).

530. ICAO, DCAS Doc. No. 13, *supra* note 185, ¶ 2.2.4.

531. *Id.*

532. *Id.*

533. *Id.* ¶ 2.2.5.

534. *Id.*

535. *Id.* ¶ 2.2.6.

at the time of the alleged offense.[536] The conference was not persuaded by this proposal, and despite a number of statements from states giving a certain degree of comfort, the issue remains one of concern for the industry.[537]

B. *Transport of BCN Weapons*

At the present time, there is no reasonable, cost-effective method to ensure that air carriers do not transport BCN weapons.[538] Most of the screening technologies available at airports throughout the world—be they x-ray machines or Explosive Detection Systems (EDS)—are able to detect explosive devices that might be associated with BCN weapons but not necessarily stand-alone BCN weapons themselves.[539] Although there is already technology available that can detect a stand-alone BCN weapon, it is extremely expensive.[540] By making the transport of BCN weapons a criminal offense, the industry argued that the new legal regime should not create additional regulatory requirements for airports and aviation security authorities to deploy devices with technological capabilities to screen and detect them.[541] Such requirements would be exorbitantly costly for the aviation industry. That concern had previously been noted at LC/34 when one delegation underscored "that there should be no requirement [in place] to detect biological, chemical or nuclear material in baggage,"[542] and the point was repeated at the Diplomatic Conference.[543]

In addition, a situation may arise where a state that was not involved in the approved transport of BCN weapons, or components thereof, considers such transport as an offense under its national legislation, since the BCN weapons or components thereof were later used to cause death or serious damage in its territory. This may arise, for instance, in the context of countries involved in a conflict where a party used BCN weapons to inflict damage.[544]

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536. *Id.*

537. *See id.* at A-2 (setting out the "specific revisions to the proposed amendments to the Conventions").

538. *See id.* ¶ 2.3.4 ("Not only are such screening operations outside the competency of the airline industry but they would, in any event, give rise to exorbitant costs for the industry as a whole.").

539. *See id.* ¶ 2.3.3 ("[T]he detection of BCN materials is extremely complex, requires advanced technology and is extremely expensive to implement.").

540. *Id.*

541. *Id.*

542. ICAO, LC/34-WP/4-1, *supra* note 144, at 2-3. Another delegation went even further by saying that these matters should not be criminalized at all. *Id.*

543. ICAO, DCAS Doc. No. 13, *supra* note 185, ¶ 2.3.3.

544. *See id.* ¶ 2.4.1 (explaining how an airline could be guilty of an offense as a result of transporting military components later used to inflict damage during an armed conflict).

For these specific situations, the IATA had argued that language should be included to avoid the air carrier being held responsible for an approved, declared transportation of BCN weapons or components thereof.[545] Airlines should be blameless for WMD attacks using their assets, provided they have observed state security programs. Although seconded by two states, LC/34 decided not to adopt this recommendation,[546] and this was also the outcome of the Beijing Diplomatic Conference.[547]

C. *The Air Carrier's Dilemma When Transporting Military Equipment*

In certain cases, governments lease, wholly or partly, an aircraft to transport weapons (including BCN weapons) for military purposes. [548] Typically, these transactions involve a wet-lease arrangement where the airline provides the aircraft and the crew.[549] "The airline may be an all-cargo carrier, a consolidator, or a passenger airliner with cargo operations."[550] Since the carriage of such weapons is for military purposes, the airline in question "knows" that the materials being transported may be used to inflict "serious injury or damage for the purpose of intimidating a population."[551] This also poses the question of whether an aircraft completely leased by a government agency is considered to be in use for "military services." All previous ICAO international instruments exclude state aircraft—that is "aircraft used in military, customs, or police services."[552]

This raises a number of questions:

1. Would the application of both Beijing instruments be excluded in these types of situations?
2. If the aircraft were a commercial airliner transporting passengers and cargo and only part of its cargo capacity was leased by a government agency to transport explosive materials or weapons for military purposes, Would that aircraft be considered in use for military services as well?

These situations are not uncommon at all.[553] As clearly noted in an ICAO Secretariat comprehensive study on "Civil/State Aircraft"

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545. *Id.* ¶ 2.4.3.
546. ICAO, LC/34-WP/4-1, *supra* note 144, ¶ 2:12.
547. *Id.*
548. ICAO, DCAS Doc. No. 13, *supra* note 185, ¶ 2.4.1.
549. *Id.*
550. *Id.*
551. *Id.*
552. *See* Beijing Protocol, *supra* note 23, at art. 3, § 2; Beijing Convention, *supra* note 22, at art. 5, § 1; Chicago Convention, *supra* note 143, at art. 3 (a)–(b).
553. *See* Int'l Civil Aviation Org., *Agenda Item 2: Report of the Secretariat: Secretariat Study on "Civil/State Aircraft"* 11 (ICAO, Report No. LC/29-WP/2-1, 1994)

back in 1994, whether an aircraft is considered as civil or military aircraft, either within or outside the scope of international civil aviation, will depend on "all the circumstances surrounding the flight, and taking into account a number of factors."[554] Such factors include:

i) nature of the cargo carried;
ii) ownership of the aircraft;
iii) type of operation;
iv) passengers or personnel carried;
v) aircraft registration and national markings;
vi) potential secrecy of the flight;
vii) customs clearances;
viii) documentation; and
ix) type of crew.[555]

With these background factors in mind, one may argue that if an aircraft is dry leased to a military entity to transport military equipment, it should be considered a military aircraft. Here, the degree of military control over the aircraft's operation would appear to be high. Arguably, therefore, the Beijing instruments would not apply.

The issue is more complex in those cases where the aircraft wet leases civilian crew. If the aircraft is solely devoted to military operations, there would certainly be more chances to categorize that aircraft as being used for military services. Yet this may not be the case where, as mentioned above, the aircraft is a scheduled commercial airliner whose cargo compartments are only partially devoted to transport military arsenal. In any case, the issue may be subject to conflicting interpretations and applications.

One alternative to address this problem would have been to include language so that the transport of explosives, radioactive materials, and BCN weapons were excluded from the scope of the Beijing instruments in cases where a government agency intervenes in its capacity as a shipper, consignee, or both.

At the Beijing Diplomatic Conference, the IATA proposed that the military aircraft clause be amended to also exclude those commercial aircraft being used for military activities when the lessee of the aircraft or the consignor or consignee of cargo is a state entity.[556]

(describing observations and doubts regarding aircraft status under the Chicago Convention).

554. *Id*. at 14.

555. *Id*.

556. *See* ICAO, DCAS Doc. No. 13, *supra* note 185, ¶ 2.4.3 (proposing to "include drafting so that the transport of . . . BCN weapons is excluded from the application of both protocols where a government agency intervenes in its capacity as a shipper, consignee or both").

Although at LC/34, some delegations, including Canada and the United States, acknowledged "that this matter merited further consideration."[557] By completely ignoring it, the Beijing Diplomatic Conference missed a clear opportunity to shed some light on a rather obscure operational and legal issue.

V. IS THE SUA PROTOCOL THE CURE OF ALL EVILS?

Much—if not all—of the effort undertaken to amend the existing international conventions on aviation security to deal effectively with new and emerging threats was based on the SUA Protocol.[558] In fact, at the time of writing only twenty-three states had ratified or acceded to the SUA Protocol.[559] This may indicate the reluctance of the international community to codify these proposed offenses in international law.

Surprisingly, many if not all of those countries that were enthusiastic about the proposed amendments in the aviation security field and that drew inspiration from its wording have yet to ratify the SUA Protocol.[560] As it is widely known, the United States has strongly pushed for the development of this instrument.[561] Although the U.S. Senate already gave consent for ratification, at the time of writing, Congress has yet to pass the necessary implementing legislation.[562] Will the Beijing instruments experience the same result?

Critics of the SUA Protocol indicate that, although it may foster international maritime security, it does not "create a strong-enough defense against maritime terrorism."[563] The instrument is a reactive response to what should otherwise be a mechanism to encourage preventive measures.[564] Others have said that, "there is no

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557. ICAO, LC/34-WP/4-1, *supra* note 144, ¶ 2:25.

558. *International Maritime Organization Status of Conventions by Country*, INT'L MARITIME ORG., http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx (last visited Dec. 27, 2013). The SUA Protocol entered into force on July 28, 2010. *Id.*

559. *Id.*

560. *Id.*

561. *See* Caitlin A. Harrington, *Heightened Security: The Need to Incorporate Articles 3BIS (1) (A) and 8Bis (5) (E) of the 2005 Draft SUA Protocol into Part VII of the United Nations Convention on the Law of the Sea*, 16 PAC. RIM L. & POL'Y J. 107, 120 ("The United States strongly pushed for the development of the 2005 Draft Protocol.").

562. Michael A. Becker, *International Law of the Sea*, 43 INT'L L. 915, 924 (2009).

563. Harrington, *supra* note 561, at 109.

564. *See* Helmut Tuerk, *Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIAMI INT'L & COMP. L. REV. 337, 365 (2007) (commenting on criticism of the instrument as reactive rather than preventive).

guarantee that [it] will impact enough nations to be truly effective."[565]

Throughout the history of the negotiation of the Beijing instruments, the SUA Protocol was often cited as the role model to follow.[566] Where states struggled with any new concepts, the SUA Protocol was used as the precedent that had already been accepted by the international community.[567] This is particularly true with regard to the inclusion of the transport offense and the military exclusion clause.

But that reliance on the SUA Protocol forgets that the drafting history of that instrument was extremely controversial.[568] Even the IMO, as well as commentators, has recognized that the Diplomatic Conference that led to the adoption of the SUA Protocol was one of the "most politically charged conferences in [the organization's] history." [569] One delegation remarked that a number of states have filed reservations with regard to the SUA transport offenses, reflecting a clear lack of "international endorsement."[570] Others noted that the instrument "[does] not focus on safety of transport in the strict sense, but rather [it is] aimed at serving many [other] objectives [way beyond the restricted confines of international maritime activities], such as the non-proliferation of nuclear weapons."[571] Strict and, to an extent, blind faithfulness to the SUA Protocol may not necessarily be the cure of all evils.

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565. Harrington, *supra* note 561, at 129.

566. *See* ICAO, LC/SC-NET-2, *supra* note 72, ¶ 2.3 ("Consequently, the majority of members preferred to follow the precedent of the SUA Convention.").

567. *Id.*

568. *Id.*

569. *See* Int'l Maritime Org., *International Conference on the Revision of the SUA Treaties: Closing Statement by Mr. E. E. Mitropoulos, Secretary-General* 2 (IMO, LEG/CONF.15/INF.5, Oct. 21, 2005) ("This Conference will go down in the annals of IMO History as possibly the one most politically charged."); *see also* Ticy V. Thomas, *The Proliferation Security Initiative: Towards Relegation of Navigational Freedoms in UNCLOS? An Indian Perspective*, 8 CHINESE J. OF INT'L L. 657, 666 (2009) (describing the SUA Protocol as "widely regarded as the most politically charged conference in the history of the IMO"); Tuerk, *supra* note 564, at 357 (noting that the conference resulting in the SUA Protocol was "one of the most politically charged conferences in the history of the Organization").

570. *See* ICAO, DCAS Doc No. 11, *supra* note 182, at 2 ("Many states made reservations on criminalization of the transport of these materials, consequently the text lacks the international endorsement and support required to insert it into the texts of the Montreal Convention.").

571. ICAO, LC/34-WP/5-2, *supra* note 161, ¶ 2:147.

VI. ARE THE BEIJING INSTRUMENTS THE SOLUTION TO SAFER CIVIL AVIATION SECURITY?

Most in the international community have wholeheartedly praised the adoption of the Beijing instruments.[572] ICAO's secretary-general called them a "landmark achievement in the areas of civil aviation law and security."[573] Some commentators have also labeled these instruments as "landmark against new and emerging threats to civil aviation," [574] "a quantum leap for global civil aviation security," [575] and "a step forward in the right direction." [576] The chairman of LC/34 has written that the Beijing instruments "will shape the aviation security framework for the rest of the century."[577]

ICAO itself recently said that the Beijing instruments "will strengthen the capacity of States to prevent the commission of these offences, and to prosecute and punish those who commit such offences."[578]

One wonders if that optimism is misplaced. The idea that the Beijing instruments will facilitate prosecution and the punishment of offenses is conditional upon widespread ratification, adoption into domestic legislation, and the will of states in complying with new international obligations. However, some doubt must remain as to the extent to which the new regime will make any contribution to the prevention side of the equation. Can one seriously contend that the existence and entry into force of such instruments serves as a strong deterrent against the commission of terrorist acts? Is it really likely that terrorists scattered around the world carry the United Nations' *corpus juris International Instruments Related to the Prevention and Suppression of International Terrorism* to establish how, when, and where to launch their next awful attacks?[579]

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572. *See* Abeyratne, *The Beijing Convention of 2010*, *supra* note 68, at 246 (describing the Beijing Convention as a "landmark to new and emerging threats to civil aviation").

573. Raymond Benjamin, *Establishing a New Era of Consensus and Action on Global Aviation Security Priorities*, 66 ICAO J. 1, 3 (2011).

574. Abeyratne, *The Beijing Convention of 2010*, *supra* note 68, at 246.

575. Jennison, *supra* note 296, at 11.

576. Ruwantissa Abeyratne, *Cyber Terrorism and Aviation – National and International Responses*, 4 J. TRANSP. SEC. 337, 343 (2011).

577. Jennison, *supra* note 296, at 12.

578. Int'l Civil Aviation Org., *Administrative Package for Ratification of or Accession to the Convention on the Suppression of Unlawful Acts Relation to International Civil Aviation (Beijing Convention, 2010)*, at 1 (ICAO, State Letter LE 3/44, LE 3/45-1153, June 30, 2011).

579. *See, e.g.*, Lisa M. McCartan et al., *The Logic of Terrorist Target Choice: An Examination of Chechen Rebel Bombings from 1997-2003*, 31 STUD. CONFLICT & TERRORISM 60, 62 (2008) (noting that "terrorists choose very specific targets that will demonstrate a regime's inability to protect its people").

The Beijing instruments demand that states criminalize a number of new criminal offenses. [580] Unlike human rights conventions, international criminal instruments are not self-executing—regardless of whether the state in question adheres to the monist or dualism theories of international law.[581] That is to say that states will inevitably have to pass domestic legislation to internalize the treaty obligations. To ensure its effectiveness, states will need to enact national-implementing legislation, incorporating "severe" punishments for persons committing such offenses.[582]

Furthermore, none of the UN instruments on the prevention and suppression of international terrorism sets penalties. [583] Within certain guidelines set out in the international instruments, these are obligations left to the discretion of the state. If states fail to adopt adequate penalties, the international instrument's effectiveness, to a great extent, is moot. So notwithstanding the ratification of the treaty, a local judge will not be able to sentence a terrorist, unless there is domestic legislation internalizing the implementation of obligations set forth in the international legal instrument. It should come as no surprise then that each Assembly urges Member States to internalize into their national legislation severe punishments for the commission of offenses against civil aviation.[584]

One could even go so far as to question the real effectiveness of ICAO's current aviation security conventions, all of which have enjoyed widespread acceptance from the international community.

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580. *See* ICAO, A37-WP/290, *supra* note 506, at 2 ("The Beijing Convention and Beijing Protocol of 2010 will require parties to criminalize a number of new and emerging threats to the safety of civil aviation, including using aircraft as a weapon and organizing, directing and financing acts of terrorism.").

581. *See* Giovanni Marchiafava, *La Convenzione di Pechino del 10 Settembre 2010 sulla Repressioni di Atti Illeciti Relativi All'Aviazione Civile Internazionale* (Sept. 14, 2011) (unpublished paper, on file with the authors).

582. *See* Abeyratne, *The Beijing Convention of 2010*, *supra* note 68, at 253 ("Article 3 of the said Convention . . . states that each State party undertakes to make the offences discussed above punishable by severe penalties.").

583. *See* International Convention for the Suppression of Acts of Nuclear Terrorism, *supra* note 204, at art. 5(b) (emphasizing that Member States bear the obligation to make crimes stipulated in the international instrument "punishable by appropriate penalties which take into account their grave nature"); *see, e.g.*, Terrorist Bombings Convention, *supra* note 50, at art. 4(b); Financing of Terrorism Convention, *supra* note 50, at art. 4(b); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, *supra* note 204, at art. 1 (making cross reference to the SUA Convention's obligation to make offenses punishable); Convention on the Physical Protection of Nuclear Material, *supra* note 203, at art. 2; International Convention Against the Taking of Hostages, *supra* note 406, at art. 2; SUA Convention, *supra* note 75, at art. 5(1); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 203, at art. 2, § 2.

584. *See* ICAO, A37-17, *supra* note 304, at 29 (calling upon contracting states to con`m their support by enacting appropriate punishments).

A 1999 ICAO progress report on the implementation of Assembly Resolution A32-22 indicated that forty-five Member States had national legislation in place implementing the organization's aviation security instruments.[585] In 2000, the same report noted that the number of states rose to fifty,[586] but a year later when providing another report, this time on the implementation of Assembly Resolution A33-22, the number had dropped to forty-six states.[587] In the best-case scenario, the numbers correspond to roughly 26 percent of ICAO's membership.[588] Leaving inaccuracies aside, these numbers may be indicative of the level of Member States' implementation of ICAO's aviation security conventions. Although no data more recent than 2001 is available, nothing would suggest that a significant improvement has recently taken place in this respect. It is unlikely that the Beijing instruments will escape the same fate. It will just not be enough to ratify them. The adoption of national implementing legislation is essential.[589]

It is clear that in the post-9/11 landscape, acts of unlawful interference against civil aviation are a major threat to the orderly development of international air transport.[590] The Beijing instruments are the result of a predominant belief that there is "an urgent need to strengthen the legal framework [in pursuit of a significant improvement in] international cooperation."[591] Arguably, international law may play a (limited) role in shaping certain elements in enhancing aviation security.[592] In a way, the Beijing

585. *See* Int'l Civil Aviation Org., *Progress Report on the Implementation of Assembly Resolution A32-22*, at app. A, (ICAO, C-WP/11103, 1999); *see, e.g.*, Int'l Civil Aviation Org., *Report of the Rapporteur of the Special Sub-Committee on the Preparation of an Instrument to Modernize the Convention on Offenses and Certain Other Acts Committed Onboard Aircraft of 1963*, at 19 (ICAO, LC/SC-MOT-WP/1, May 25, 2012) (commenting on the little progress made among Member States toward enacting appropriate supportive national legislation).

586. *See* Int'l Civil Aviation Org., *Progress Report on the Implementation of Assembly Resolution A32-22: Consolidated Statement of Continuing ICAO Policies Related to the Safeguarding of International Civil Aviation Against Act of Unlawful Interference*, at app. A, (ICAO, C-WP/11445, Oct. 10, 2000).

587. *Id.*

588. *Id.*; *see Member States*, INT'L CIVIL AVIATION ORG., http://www.icao.int/MemberStates/Member%20States.English.pdf (last updated Oct. 10, 2013) (showing that, at present, 191 states are members to ICAO).

589. *See* Gerald F. Fitzgerald, *Aviation Terrorism and the International Civil Aviation Organization*, 25 CAN. Y.B. INT'L L. 219, 240 (1987) ("ICAO has constantly pointed out the need for full implementation of these conventions through the adoption of appropriate national legislation, the application of that legislation and the willingness of all states to discharge effectively their obligations under the Conventions.").

590. *See* Abeyratne, *The Beijing Convention of 2010*, *supra* note 68, at 245 (describing the connection between the development of the Beijing instruments and the events of 9/11).

591. Beijing Convention, *supra* note 23, at pmbl.

592. *See generally* Abeyratne, *The Beijing Convention of 2010*, *supra* note 68, at 245 (praising the role of American law in its "war on terror").

instruments, just like the SUA Protocol, demonstrate the "perception that terrorism is an international crime that can only be tackled successfully by concerted international action."[593] The new treaties would seem to be the logical response to best achieve this objective. Yet codification of international law is far from being the Holy Grail to resolve the pressing day-to-day challenges in aviation security.

The Beijing instruments are also the response of the international community (or a part thereof) to those who argue that terrorism is not a global problem but rather an issue that only affects a handful of states whose foreign affairs policies are deplored in some corners of the world. In other words, terrorism is the consequence of tit-for-tat strategies adopted by some governments, and those outside the boundaries of international controversy should not bear the cost. However, the 2011 Norwegian attacks reminded us that terrorists may strike when least expected.[594] One could hardly say that these attacks are the direct result of Norway's foreign affairs policies. The engagement and participation of the international community in the sharing of information becomes paramount in the prevention of these acts. This cannot be done without interaction.

A number of terrorist incidents suggest that aviation security should focus elsewhere than on the adoption of international legal instruments. For instance, on August 24, 2004, terrorist suicide bombers detonated explosive devices on board two Russian aircraft killing ninety people.[595] The incident of December 25, 2009, when a Nigerian passenger on board Northwest Flight 253 attempted to detonate an explosive device containing pentaerythritol tetranitrate while the aircraft was in flight from Amsterdam to Detroit reminds us of the fragility of screening controls.[596] The alleged terrorist successfully passed through two different screening checkpoints in two different states.[597] Furthermore, the bomb attack at Moscow

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593. Tuerk, *supra* note 564, at 366. *See* Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TUL. MAR. L.J. 1, 24 (2006) (highlighting the recognition of terrorism as an international problem requiring "international will" to effectively combat).

594. *Norway Attacks: Breivik Charged with Terror Attacks*, BBC EUROPE (Mar. 7, 2012), http://www.bbc.co.uk/news/world-europe-17286154.

595. *See* Int'l Civil Aviation Org., *A35-1 Acts of Terrorism and Destruction of Russian Civil Aircraft Resulting in the Deaths of 90 People Passengers and Crew Members* 1 (ICAO, A35-1, provisional ed. 2004) (describing the event and the reactions of ICAO).

596. *Unsuccessful Attempt to Detonate a Bomb on Northwest Flight 253 near Detroit*, AIR SAFE.COM NEWS (Apr. 1, 2013), http://www.airsafenews.com/2009/12/unsuccessful-attempt-to-detonate-bomb.html.

597. *E.g.*, Pierre Thomas & Huma Khan, *Nigeria Was Being Prepared for Terror Plot*, ABC (Dec. 30, 2009), http://abcnews.go.com/GMA/Politics/security-failure-us-aware-nigerian-prepared-terror-obama/story?id=9447061. According to ICAO's security audits, Africa scores the lowest compliance rate with international aviation security standards. This will be analyzed further below. It should not be then a surprise that

Domodedovo International Airport on January 24, 2011, is another unforgettable example of the "vulnerabilities [that] airport installations and facilities" around the world are subject to every day.[598] More recently, on June 23, 2011, a U.S.-naturalized stowaway successfully cleared security control checkpoints at John F. Kennedy International Airport in New York and managed to board a Virgin American flight to Los Angeles.[599]

More treaty law would not necessarily have prevented these incidents. Rather than being the result of gaps in the existing international regime, it could be argued that most, if not all, unlawful interference events are due to the lack of effective implementation of the provisions of Annex 17.[600] The dreadful attacks of 9/11 are the perfect example. As one experienced commentator has put it, "[I]nternational civil aviation requires a high level of physical protection by searching and screening passengers and baggage to prevent the introduction of potential weapons on board."[601] And even 25 years ago, it was noted that "none of the written provisions [of the aviation security international conventions] will be effective unless the necessary trained personnel and equipment are in place."[602] The Beijing instruments represent an ex post facto[603] response to what it should otherwise be an *ex ante* approach to aviation security.[604]

Arguably, ICAO's activities should be geared toward ensuring that Member States fully comply with standards related to aviation security. Member States ought to rapidly improve their ability to oversee and manage aviation security issues.[605] A much higher level of implementation of Annex 17 standards and recommended practices—as well as stringent observance of guidance material, such

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alleged terrorists sought to exploit the weakness of the aviation security system in that region.

598. Int'l Civil Aviation Org., *Review of the Report of the Twenty-Second Meeting of the Aviation Security Panel* ¶ 1.1.1.1 (ICAO, Working Paper No. C-WP/13724, Apr. 7, 2011).

599. *Suspected Flight Stowaway in Los Angeles Pleads Not Guilty*, CNN TRAVEL (Apr. 1, 2013), http://www.cnn.com/2011/TRAVEL/07/18/flight.stowaway.plea/.

600. *See* Int'l Civil Aviation Org., *Council 186th Session: Report on Acts of Unlawful Interference for 2008* ¶¶ 1.1, 1.2, (AVSECP/20-WP/9, Jan. 13, 2009) (citing Int'l Civil Aviation Org., *Report on Acts of Unlawful Interference for 2007* (ICAO, Working Paper No. C-WP/13103, Feb. 11, 2008)).

601. MILDE, INTERNATIONAL AIR LAW, *supra* note 34, at 228.

602. Fitzgerald, *supra* note 589, at 241.

603. Abeyratne, *The Beijing Convention of 2010*, *supra* note 68, at 255.

604. *See* Fiorita, *supra* note 446, at 89 ("[T]he development of legal deterrents resulted from a reactive process rather than a pro-active one.").

605. *See* Int'l Civil Aviation Org., *Report on the Implementation of the Universal Security Audit Programme (USAP)* ¶ 2.4 (ICAO Working Paper No. C-WP/13725, Apr. 1 2011) (explaining that while the USAP indicated progress, "a number of States continue to experience difficulties").

as the ICAO *Security Manual*—is needed. The Thirty-seventh Session of the Assembly echoed that sentiment.[606]

Recent results of ICAO's Universal Security Audit Programme (USAP)[607] would seem to confirm that the road to improved aviation security does not necessarily require more international law. In fact, the roughly 129 audits conducted under USAP's second cycle revealed a global 32.28 percent lack of effective implementation of the eight critical elements[608] of a state's aviation security oversight program.[609] Previous reports indicated that the global average compliance with Annex 17 "Aviation Security" standards was only 59 percent.[610] Although 93 percent of states have established a single organization in charge of aviation security, audits have evidenced that in 43 percent of states, the authority in question does not have sufficient resources to implement its assigned duties.[611]

The level of noncompliance in Member States is stunning if one considers that the lack of effective implementation of the security aspects of facilitation is 45.65 percent;[612] quality control functions, 49.60 percent;[613] response to acts of unlawful interference, 26.69 percent;[614] cargo, catering, mail, and security, 34.35 percent;[615] passenger and baggage security, 35 percent;[616] and training of aviation security persons, 39.34 percent.[617]

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606. *See* Int'l Civil Aviation Org., *Assembly, 37th Session, Executive Committee Declaration on Aviation Security*, at app. A, (ICAO A37-WP/75, Aug. 16, 2010) (urging Member States to "strengthen and promote the effective application of ICAO Standards and Recommended Practices, with particular focus on Annex 17").

607. Before the occurrence of the 9/11 attacks, ICAO did not have an audit program for aviation security. ICAO's USAP stems from the High Level Ministerial Conference on Aviation Security's recommendation to Council when it was suggested that the organization establish an audit program to foster compliance with aviation security standards.

608. *See* Int'l Civil Aviation Org., *Universal Security Audit Program: Analysis of Audit Results, Reporting Period: January 2008 to December 2011*, at 13 (4th ed. 2012) [hereinafter ICAO, USAP Results 2012] (presenting critical elements that touch upon the following key areas: i) aviation security legislation; ii) aviation security programs and regulations; iii) state appropriate authority for aviation security and its responsibilities; iv) personnel qualifications and training; v) provision of technical guidance, tools, and security-critical information; vi) certification and approval obligations; vii) quality control obligations; and viii) resolution of security concerns).

609. *Id*. at 15.

610. Int'l Civil Aviation Org., *Universal Security Audit Program: Analysis of Audit Results, Reporting Period: January 2008 to December 2010*, at 5 (3d ed. 2011) [hereinafter ICAO, USAP Results 2011].

611. ICAO, USAP Results 2012, *supra* note 608, at 29.

612. *Id*. at 41.

613. *Id*. at 38.

614. *Id*. at 40.

615. *Id*.

616. *Id*. at 39.

617. *Id*. at 37.

Moreover, more than half of the audited states do not possess a mechanism to oversee the training needs of personnel.[618] Deficiencies in the procedures for certification of security screeners were also detected in 56 percent of the audited states.[619] The audits also show that almost half of the states do not have procedures in place for the screening of persons other than the passenger.[620] This is quite worrisome. One can certainly expect that terrorists would opt for ways other than the standard passenger x-ray screening process to break through the aviation security chain. They will exploit the weakest points. The international community may witness more creative forms of terrorism.

Furthermore, 46 percent of audited states struggled with implementing technical guidance, tools, and security-critical information.[621] USAP also shows the tremendous difficulties that Member States routinely face with respect to a myriad of different aviation security issues, such as not developing guidance material for:

i) passengers and cabin baggage screening (62 percent of audited states);[622]
ii) originating hold baggage screening (54 percent of audited states);[623]
iii) hold baggage reconciliation (41 percent of audited states);[624]
iv) cargo and mail security controls (47 percent of audited states); and
v) perimeter protection (56 percent of audited states).[625]

In addition, it is worrisome that 46 percent of the audited states do not ensure that airport security programs are reviewed and approved.[626] It is also noteworthy that "a number of [member] States have not participated fully in, or responded appropriately to, ICAO's aviation security audit processes."[627] As ICAO's Secretariat has already recognized, USAP "results [undisputedly] indicate that,

618. Id. at 35.
619. *Id*. at 33.
620. *Id*. at 34.
621. *Id*. at 31.
622. *Id*.
623. *Id*.
624. "Hold baggage reconciliation" refers to the match that aviation security inspectors make before flight departure to make sure that the baggage is that of the passenger on board the aircraft. Hold baggage reconciliation became mandatory in the mid-1990's, as one of the lessons learned from Pan Am flight 103. *See* Barry James, *Airlines Lack Common Security Rules*, N.Y. TIMES (July 25, 1996), http://www.nytimes.com/1996/07/25/news/25iht-secure.t_3.html.
625. ICAO, USAP Results 2012, *supra* note 608, at 32.
626. *Id*. at 35.
627. Int'l Civil Aviation Org., *Assistance Strategy for Working with States Regarding Shortcomings with Aviation Security-Related SARPs* ¶ 3.5 (ICAO, Working Paper No. C-WP/12907, Apr. 5, 2007).

despite the overall progress states have made in addressing deficiencies identified through the first [and second] cycle[s] of audits, a number of states continue to experience difficulties, particularly relating to meeting their aviation security oversight obligations and to increasing their level of compliance with the relevant ICAO Standards and security-related provisions."[628] Yet, one of the more enlightening results of ICAO's USAP is that only 15.92 percent of the audited states reported deficiencies with aviation security legislation.[629] In fact, this is one critical element of the audits that states do better at.[630] Clearly, the problem is not insufficient legislation, but rather implementation, compliance, and oversight. Although ICAO's USAP has been extremely successful, if one takes into account where the program started from, there is still significant room for improvement.[631]

One cannot help but wonder at the convenience of embarking on a nine-year international law codification process instead of focusing on what could be seen as a more pressing need. That political question is relevant for a UN-specialized agency such as ICAO with very limited financial and human resources and an annual budget of just $100 million.[632] Although the Beijing instruments are a laudable response—reflecting Member States unquestionable moral obligation to combat acts of terrorism against civil aviation—ICAO's USAP results might suggest where the organization's focus on aviation security should truly lie if we are ultimately seeking practical, meaningful, and lasting results to prevent the occurrence of such atrocious terrorist acts.[633] However, this can only be achieved with strong political will. This does not fall only to ICAO or its Secretariat but is rather the collective responsibility of Member States.

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628. ICAO, C-WP/13725, *supra* note 605.

629. The level of compliance with aviation security legislation requirements is the highest amongst the eight critical elements of ICAO's USAP. In fact, 78 percent of audited states have promulgated primary aviation security legislation, and 81 percent have addressed the unrestricted access of aviation security inspectors to aircraft and airport and aviation facilities. *See* ICAO, USAP Results 2012, *supra* note 608, at 27.

630. *See* Ludwig Webber, *Enhancement of the Legal Framework for Aviation Security with Specific Reference to the Asia-Pacific Region* (May 24, 2010) (unpublished paper, on file with the authors) (noting that "further significant efforts are required to ensure that the aviation security framework will be rendered adequate").

631. *See* LUDWIG WEBER, INTERNATIONAL CIVIL AVIATION ORGANIZATION: AN INTRODUCTION 92–93 (2007) (providing the terms of the audit program and its use from 2004 to 2007).

632. *See* ICAO, *Budgets for 2011, 2012 and 2013*, at 88 (ICAO A37-26, 2010) (providing annual budget and spending reports for 2011, 2012, and 2013) (explaining how ICAO has developed a database on findings from yearly audits that "will assist in addressing deficiencies").

633. *See* Dempsey, *supra* note 404, at 458 (emphasizing airport security screening as one of the ways to prevent the occurrence of acts of unlawful interference).

VII. CONCLUSION

Acts of unlawful interference present a daunting and serious challenge for international civil aviation. ICAO has warned that "[t]he threat to civil aviation continues to evolve and has become more challenging to predict. All facets of civil aviation, including, but not limited to, passenger aircraft, airport terminals and cargo facilities are at risk."[634]

In this context, the adoption of the Beijing instruments represents a notable effort on the part of the international community to address terrorism involving civil aviation. The instruments are of paramount importance to engage the international community in a more cooperative mode. International cooperation and cooperation between government and industry is the only way forward. The Beijing instruments may contribute to achieve that end. They also remove ambiguity in a number of key areas and contribute to removing any sense of lawlessness in this field.[635] In addition, they constitute a valuable contribution of the international legal community to the area of aviation security.[636]

It has also been apparent that throughout 9 years of tough negotiations, the Beijing instruments managed to generate discomfort with some states. Almost 30 percent of states participating in the Beijing Diplomatic Conference voted against the adoption of the texts.[637] The wording of the final act hardly does justice to the agonizing lobbying behind the scenes that led to the final adoption of the texts:

> The Commission of the Whole approved the text of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* with 55 votes in favour, 14 votes not in favour. It approved the text of the *Protocol Supplementary to the Convention for the*

634. ICAO, USAP Results 2012, *supra* note 608, at 45.

635. *See* R.L. Smith McKeithen, *Prospects for the Prevention of Aircraft Hijacking Through Law*, 9 COLUM. J. TRANSNAT'L L. 60, 80 (1970) (commenting on the contribution of the Tokyo Convention and the 1970 Montreal Draft Convention).

636. Gerald F. Fitzgerald, *Development of International Legal Rules for the Repression of the Unlawful Seizure of Aircraft*, 7 CAN. Y.B. INT'L L. 269, 296–97 (1969) (highlighting the important role of lawyers in formulating an international multi-disciplinary response to terrorism).

637. Int'l Conference on Air Law, Final Act, *supra* note 88. Although states clearly prefer reaching some degree of consensus, voting was not at all uncommon in the adoption of all the international aviation security instruments. A number of issues in the Tokyo, the Hague, and the Montreal Conventions, as well as the Airport Protocol, were voted upon. Fitzgerald, *supra* note 636, at 287 (describing how "many of the decisions embodied in the draft [of the Tokyo Convention] were taken by majority vote"); Philippe Kirsch, *The 1988 ICAO and IMO Conferences: An International Consensus Against Terrorism*, 12 DALHOUSIE L.J. 5, 29 (1990) (noting that the adoption of these three international instruments was subject to a vote).

> *Suppression of Unlawful Seizure of Aircraft* with 57 votes in favour, 13 votes not in favor.[638]

Indeed, during discussions that led to the Council convening the Diplomatic Conference, Russia and Venezuela had already voiced their concerns that efforts should be made to avoid the situation whereby this process of revisiting the existing legal regime on aviation security instruments attracted such a low number of signatory states.[639] This is also a concern regarding both the General Risks Convention[640] and the Unlawful Interference Convention,[641] which, at the time of writing, have only received one ratification each and are some way off from entering into force.

In light of the uneasiness of some states with the proposed reforms pursued by the initiative, one may certainly question whether the Beijing instruments will ever achieve the same degree of widespread ratifications enjoyed by their predecessor treaties. The discontent of a large number of states would suggest the contrary. However, given U.S. impetus, one may anticipate that the Beijing instruments will—some day—enter into force. But, this may take a number of years.

Yet, even if these instruments achieve widespread ratifications, the question mark remains over implementation at the national level. Will the majority of states that eventually decide to ratify the Beijing instruments adopt implementing legislation? Only time will tell. Once the instruments enter into force and once states adopt implementing legislation, a high level of commitment to comply with the international obligations will also be necessary.[642] In any event, aside from encouraging ratification, there is a clear need for ICAO to go one step further and develop guidance material to educate states on the need to adopt implementing legislation.

The military exclusion clause was by far the most controversial and tough-fought issue throughout the negotiating history of these instruments. At this stage, it is hard to assess whether its inclusion was appropriate or not. By thoroughly analyzing previous ICAO pronouncements, both of the Assembly and the Council, this Article has tried to understand why this clause was a *sine qua non* requisite for some states and why it was so strongly opposed by others. After

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638. Int'l Conference on Air Law, Final Act, *supra* note 88.

639. *See* ICAO, C-MIN 188/6, *supra* note 293, ¶ 20 (noting the shared concern of Venezuela and Russia "regarding the low number of signatures of the two Conventions adopted at the recent Diplomatic Conference on Compensation for Damage").

640. General Risks Convention, *supra* note 22.

641. Unlawful Interference Convention, *supra* note 22.

642. *See* Peter Martin, *Aviation Security in International and UK Law*, *in* NICOLAS MATEESCO MATTE, LIBER AMICORUM 204 (1989) ("The efficacy of international legislation against crimes depends not only upon the extent of the application of the conventions in the Contracting States' municipal law but also on the will of states to meet their obligations.").

all, in most cases states behave like rational actors.[643] The Gaza International Airport incident clearly explains the conflicting positions of states.

As Milde points out, "Further proliferation of the legal instruments [may] not appear to offer an effective safeguard of aviation security and the energy of States within ICAO should be rather geared to prevention of the criminal acts."[644] In other words, more international law may not necessarily be the right deterrent for the execution of acts of terrorism involving and against international civil aviation.[645]

ICAO should continue to place an emphasis on the prevention of unlawful interference with international civil aviation. Strengthening and expanding ICAO's USAP is crucial in this regard, as is facilitating compliance with Annex 17 standards. An incremental and comprehensive approach is required to ensure that the horrors of 9/11 are never repeated. But in order to achieve this, ICAO needs the political commitment of its Member States. ICAO is often, and incorrectly, blamed for its inability to quickly react and adopt the changes required to respond to civil aviation's pressing needs, aviation security being one notable example. But such a criticism forgets that ICAO is nothing but the unequivocal reflection of the "will" of its Member States. In the absence of that will, there is not much that ICAO can do.

Last, but certainly not least, aviation security's primary goal should not only be to "close the gaps and inadequacies"[646] in the international legal regime but to prevent acts from happening. The legal regime is one, arguably minor, component of the equation. Perhaps the most effective approach to the problem of countering international terrorism is to adopt a systemic, multidisciplinary stance, including a basket of measures such as those listed in UN Resolution A/RES/60/288, calling for the creation of a global counterterrorism strategy.[647] Despite its significant achievement in

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643. *See* Oona A. Hatahaway, *Why Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935, 1944 (2002) (noting that states "calculate the costs and benefits of alternative courses of action in the international realm and act accordingly").

644. MILDE, INTERNATIONAL AIR LAW, *supra* note 34, at 258.

645. As Michael Milde noted more than 20 years ago, "The present and future challenge is to implement preventive security measures. Implementation requires sound professional management, and law is only one of the tools of management." Milde, *Law and Aviation Security*, *supra* note 5, at 97; Sakeus Akweenda, *Prevention of Unlawful Interference with Aircraft: A Study of Standards and Recommended Practices*, 35 INT'L & COMP. L.Q. 413, 444 (1986) (arguing that "emphasis must also be laid on the effective implementation of existing programs").

646. ICAO, Working Paper No. C-WP/11786, *supra* note 36, at A-3.

647. *See* Luongo, *supra* note 26, at 115–18 (describing how UN resolutions can be, and have been, used to pressure states into conforming to an international strategy).

international lawmaking, the Beijing instruments by themselves will not build a Chinese wall for aviation security. That will always be the collective responsibility of all states.