

**LEGAL ASPECTS OF AVIATION SECURITY MEASURES TAKEN  
AT AIRPORTS**

By

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## **Abstract**

Aviation and the internet are two conveniences without which the modern world would almost grind to a halt given our current dependence levels (on them). If both were to suddenly vanish, mankind would be thrown back to the late 19<sup>th</sup> century reminiscent of a world which *was* once a smaller place.

Aviation plays a critical role in our daily life transporting man and material over vast distances in a relatively short period of time. A vital cog in this wheel is the airport that ‘facilitates’ the safe loading, unloading, take-off and landing of aircraft.

For some time now, aircraft have been the target of various terrorist groups and militant factions seeking to make a point to the world in the most dramatic fashion possible. To maintain the security of civil aviation, laws have been promulgated (both nationally and internationally) to ensure that the perpetrators (of the crime) when caught, will be adequately punished and in a manner that will deter others from committing crimes against civil aviation. However this law-making process (in large part initiated by the International Civil Aviation Organization) has not sufficiently addressed airports and the security therein.

This paper seeks to examine- and in some cases suggest improvements to- aviation security laws at large, with a specific emphasis on airports. It is believed that a more comprehensive set of laws governing aviation security would result in greater efficacy of airport security procedures thus reducing the need for prospective judicial intervention and concomitant lengthy court proceedings.

## **Résumé**

Il est très probable que le monde tel que nous le connaissons aujourd'hui ne serait plus le même si l'aviation et l'internet cessaient d'exister. Sans ces deux inventions nous nous retrouverions à la fin du 19<sup>ème</sup> siècle qui rappelle l'époque où le monde de commerce occupait des proportions bien plus minuscules.

L'aviation a un rôle très important au quotidien puisqu'elle permet le transport des biens et des personnes de manière très rapide et sur de longues distances. De même, l'aéroport constitue un des éléments clefs de ce commerce parce qu'il facilite le chargement, le déchargement, le décollage et l'atterrissage des avions en toute sécurité.

Récemment, les avions ont été la cible de plusieurs groupes terroristes qui ont voulu se mettre en avant de la manière la plus dramatique possible. Afin d'assurer et maintenir la sécurité de l'aviation civile, il y existe des lois pénales nationales et internationales qui permettent la punition des coupables retrouvés, d'une manière exemplaire, afin de prévenir tout attentat futur. Cependant cette législation initiée essentiellement par l'Organisation de l'Aviation Civile Internationale ne traite pas suffisamment de la question de la sécurité des aéroports.

Ce mémoire a pour objectif d'examiner- et dans certains cas y proposer des améliorations- les lois relatives à la sécurité de l'aviation en générale, et en particulier à la sécurité dans les aéroports. Il est probable que des lois plus compréhensives relatives à la sécurité des aéroports assureraient des procédures plus efficaces dans les aéroports, réduisant le besoin de l'intervention juridique et ses procédures tribunaux prolongés.



## **Prolegomenon**

The era of sustained controlled powered flight began a little more than a hundred years ago, in 1903. Since then, the civil aviation industry has grown into a sector of immense proportion and importance. As flight trajectories and planes themselves took on more complex character, airports too had to evolve to accommodate the growing number of destinations and flights served, and passengers imposed upon them. Later, when aircraft started becoming targets of terrorist attacks, law makers sought their solution in mandating security procedures at airports. However, as security levels increased, perpetrators of aviation related offences only found newer and more ingenious ways to defeat the system.

This 'little game' (between the law makers and the law breakers) continued until the tragic events of September 11<sup>th</sup> 2001,<sup>1</sup> which questioned, as no other event had, the adequacy of airport security in North America.<sup>2</sup> The consequent effect on other air faring nations was profound: nations were forced to reexamine the security at their own airports and speculate on the probability of threat to their home territories. The events of 9/11 clearly highlighted the inadequacy of the various laws and systems that had previously been enacted and designed to prevent such events from occurring.

Such systems often served to detect and weed out 'sky criminals', before they could board an aircraft, at a number of 'check points' by different personnel and equipment. However, such preventive strategies were not as well defined, nor developed, as the domestic and international laws that had continually been enacted and tightened so as to serve as deterrence measures.

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<sup>1</sup> [9/11], where two aircraft, piloted as missiles, flew into the World Trade Centre in New York.

<sup>2</sup> For an overview of the US security regime at airports before and after 9/11, see Paul Stephen Dempsey, "Aviation Security: The Role of Law in the War Against Terrorism" (2003) 41:3 Colum. J. Transnt'l L. 649 at 719-726 [Dempsey, Aviation Security].

In 1944, nations of the world gathered in Chicago to enact a Convention on International Civil Aviation.<sup>3</sup> The Chicago Convention, 1944, created<sup>4</sup> the International Civil Aviation Organization<sup>5</sup>. According to Art. 44 of the Chicago Convention, 1944:

The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- (a) Insure the safe and orderly growth of international civil aviation throughout the world;
- (b) Encourage the arts of aircraft design and operation for peaceful purposes;
- (c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
- (e) Prevent economic waste caused by unreasonable competition;
- (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between contracting States;
- (h) Promote safety of flight in international air navigation;
- (i) Promote generally the development of all aspects of international civil aeronautics.

However, the Chicago Convention, 1944, contained no article specifically relating to acts of unlawful interference with civil aviation. Such acts were extensively dealt with when Annex 17<sup>6</sup> came into existence. From 1944 to the enacting of Annex 17<sup>7</sup> and beyond, various instruments of international law have come into being to specifically address aspects of aviation security.

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<sup>3</sup> *Convention on International Civil Aviation* signed in Chicago in 1944, ICAO Doc. 7300/8 [Chicago Convention, 1944].

<sup>4</sup> *Ibid.* at Art. 43.

<sup>5</sup> [ICAO], for a discussion of the role of the ICAO, see Assad Kotaite, "Security of International Civil Aviation- Role of ICAO" (1982) VII Ann. Air & Sp. L. 95.

<sup>6</sup> Annex 17, *infra* note 73.

<sup>7</sup> *Ibid.*

This paper seeks to examine those various laws regulating aviation security, with a particular emphasis on airports. It is believed that if security at airports is accorded the highest priority, there would be less of a need to have the impressive and cumbersome number of aviation security laws that exist today.

The discussion begins with a section aimed at clarifying the definitions of certain key terms related to the world of aviation security.

The next chapter contains a detailed study of the various international laws which regulate aviation and airport security. This is followed by an analysis of the mechanisms embodied in the international standards and recommended practices under the Chicago Convention, 1944. Furthermore, since no study of law can be complete without an examination of domestic responses to international situations, this chapter also analyses the legislative reactions of the US, UK and India in combating the imminent threat to aviation and airport security.

Chapter three examines extant practices with respect to airport security measures and techniques. This chapter also features suggestions which might provoke stringent airport security procedures.

The concluding chapter features a proposal for enhancing airport security, which, if implemented successfully, could eliminate the need for any further legislation with regard to aviation security.

It must be kept in mind that this paper examines security at passenger and not cargo/freight airports. Further, the airports mentioned herein are those that handle scheduled flights. Owing to the vastness of the topic, areas of airport security dealing with airport complex construction and perimeter security have been omitted. This paper thus limits its focus to the laws and procedures existing and required with respect to the movement of passengers and their luggage to, from, and within the airport complex.

# **CHAPTER 1**

## **Definitional Discourse**

Given the nature of this exercise, where various similar meaning words are used; or, where it is easy to confuse and even replace one word with another; or, due to differences in the perception of what a word specifically means, it becomes imperative to provide definitions that will help put things in perspective and clarify the parameters within which one wishes to be understood.

A workable definition is always needed as a primary step in commenting about any aspect- especially with the law. A clear definition can enable policy makers to formulate pragmatic and operational concepts and help them develop effective legal controls and mechanisms of deterrence. Admittedly, this approach appears appropriate when dealing with issues affecting the world order and having foreign policy significance.

While it is hoped that the definitions set forth below will help in clarifying to the reader, the boundaries of this commentary, one has or makes no pretensions as to their definitiveness. Yet, it is hoped that these definitions sufficiently provide for a framework that adequately reflects the paradigm within which one wishes to be understood. It may therefore be safe to label the definitions that follow as '*working definitions*'. One must hasten to add that these definitions may be most apt for an aviation law/industry setting.

**1.1 Aerodrome/Airport:** A defined area on land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft.<sup>8</sup>

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<sup>8</sup> *International Standards and Recommended Practices: Rules of the Air; Annex 2 to the Convention on International Civil Aviation*, 9th ed. July 1990, Chapter 1- Definitions. *International Standards and Recommended Practices: Meteorological Service for International Air Navigation; Annex 3 to the Convention on International Civil Aviation*, 15th ed. July 2004, Chapter 1- Definitions. *International Standards and Recommended Practices: Aeronautical Charts; Annex 4 to the Convention on International Civil Aviation*, 10th ed. July 2001, Chapter 1- Definitions. Annex 6, *infra* note 93 at Chapter 1- Definitions. *International Standards and Recommended Practices: Air Traffic Services; Annex 11 to the Convention on International Civil Aviation*, 13th ed. July 2001, Chapter 1- Definitions. Annex 14, *infra* note 97 at Chapter 1- Definitions. Annex 17, *infra* note 73 at Chapter 1- Definitions.

However, the term 'airport' has been distinguished from an 'aerodrome' by defining it as "an aerodrome at which facilities are provided for the shelter, servicing or repair of aircraft and for receiving or discharging passengers or cargo".<sup>9</sup> The same source lists an 'aerodrome' as "a defined area on land or water, including any buildings or installations normally used for the take-off and alighting of aircraft".<sup>10</sup>

The above distinction notwithstanding, this paper will treat the terms 'aerodrome' and 'airport' alike and will uniformly employ the latter, ascribing it the meaning accorded in the Annexes to the Chicago Convention, 1944.<sup>11</sup>

Examining select statutes from select geographies, in the US, under the Federal Aviation Act, 1958, an 'airport' means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.<sup>12</sup>

In the UK, the term 'airport' being more common than 'aerodrome' signifies the whole undertaking involved in the use of an organized permanent place for landing and departure of aircraft, and the embarking and disembarking of passengers, rather than the piece of land used for the purpose. The Airport Act, 1986 under sec. 82(1) defines an 'airport' as, "the aggregate of the land, buildings and works comprised in an 'aerodrome' within the meaning of the Civil Aviation Act, 1982".

Under the Civil Aviation Act, 1982 an 'aerodrome' means any area of land or water designed, equipped, set apart or commonly used for affording facilities for the landing and departure of aircraft and includes any area or space, whether on the ground, on the

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<sup>9</sup> AGARD *Aeronautical Multilingual Dictionary*, 1960, s.v. "airport".

<sup>10</sup> *Ibid.* at Aerodrome.

<sup>11</sup> But see Federico N. Videla Escalada, *Aeronautical Law* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979) at 83-84 where the terms 'airport' and 'aerodrome' are not accorded the same meaning, but a distinction is drawn between them. It is interesting to note that one of the differences between the US and UK translations of the authentic French text of the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* signed in Warsaw in 1929 is that while the former uses the term 'airport', the latter uses 'aerodrome'.

<sup>12</sup> *Federal Aviation Act*, 1958, Sec. 101 (9).

roof of a building or elsewhere, which is designed, equipped or set apart for affording facilities for the landing and departure of aircraft capable of descending or climbing vertically.<sup>13</sup>

In India, an 'airport' means "a landing and taking off area for aircraft, usually with runways and aircraft maintenance and passenger facilities and includes 'aerodrome' as defined in clause (2) of section 2 of the Aircraft Act, 1934".<sup>14</sup>

## **1.2 International standards and recommended practices: [SARPs]**

The Chicago Convention, 1944, does not define the terms 'standards' and 'recommended practices'. The ICAO Assembly formulated the requisite definitions in Assembly Resolution A1-31.<sup>15</sup> A 'standard' is defined as:

Any specification for physical characteristics, configuration, materiel, performance, personnel, or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Member States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under article 38 of the Convention.<sup>16</sup>

A 'recommended practice' is defined as:

Any specification for physical characteristics, configuration, materiel, performance, personnel, or procedure the uniform application of which is recognized as desirable in the interest of safety, regularity, or efficiency of international air navigation, and to which Member States will endeavour to conform in accordance with the Convention.<sup>17</sup>

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<sup>13</sup> *Civil Aviation Act 1982* (U.K.), 1982, Sec. 105(1).

<sup>14</sup> *Airports Authority of India Act, 1994*, Sec. 2(b). Under sec. 2(2) of the *Aircraft Act, 1934*, 'aerodrome' means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and other structures thereon or appertaining thereto.

<sup>15</sup> ICAO, *Definition of "International Standards" and "Recommended Practices"*, Assembly Resolution A1-31, ICAO Doc. 4411.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

These definitions are still in use today although Assembly Resolution A1-31 is no longer in force.<sup>18</sup> These definitions are reproduced in the foreword to every Annex to the Chicago Convention, 1944.

However, it is instructive to note that under Annex 9, the definition of a 'recommended practice' is at variance to the one set forth above and reads as under:

Any specification, the observance of which has been recognized as generally practicable and as highly desirable to facilitate and improve some aspect of international air navigation which has been adopted by the Council pursuant to Article 54 (1) of the Convention, and to which Contracting States will endeavour to conform in accordance with the Convention.<sup>19</sup>

It is apparent from the above that, although both international standards and recommended practices are considered not to be binding rules as that concept is traditionally understood,<sup>20</sup> notification of differences in respect of international standards is compulsory for non-complying states. No such obligation exists with respect to recommended practices, which are, at best, only considered to be advisory in nature.

### **1.3 Safety and Security:**

In the personal view of this author, 'safety' is a condition (or state) where action is taken as a prophylactic measure to prevent damage or destruction to an object or person sometimes erroneously used with relation to an institution or country. An example of this could be the 'safety' of a realm.

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<sup>18</sup> ICAO, *Assembly Resolutions in Force (as of 5th October 2001)*, ICAO Doc. 9790.

<sup>19</sup> Annex 9, *infra* note 101 at vii. In July 2005, a 13<sup>th</sup> edition to Annex 9 was issued.

<sup>20</sup> Thomas Buergenthal, *Law Making in the International Civil Aviation Organization* (New York: Syracuse University Press, 1969) at 77 [Buergenthal].

In an aviation sense, ‘safety’ could be a condition in which the risk of harm or damage is limited to an acceptable level. The ICAO considers that ‘safety’ is essentially related to the avoidance of damage caused by extra human activity.<sup>21</sup>

Lexically, ‘safety’ is the condition of being safe from undergoing or causing hurt, injury, or loss; or to protect against failure, breakage or accident. However, this does not resolve the impending definitional dilemma. People often confuse and even substitute-erroneously, the terms ‘safety’ and ‘security’ for each other and assume all is well. As will be indicated below, while the two terms are not like east and west, certainly, *ne’er the twain shall meet*.

On the other hand, ‘security’ is the protection provided to a person, institution or country to ensure “its” *safety*. The word (‘security’) is also used loosely to refer to a feeling of non-anxiety over the prospect of one’s future where nothing can (or should) go wrong.

According to the dictionary, ‘security’ is the quality or state of being secure as in free-from danger, fear or anxiety. It can also mean the measures taken to guard against espionage, sabotage, crime, attack or escape.

‘Aviation security’ is a combination of measures and human and material resources intended to safeguard civil aviation against acts of unlawful interference.<sup>22</sup>

ICAO considers that ‘security’ is essentially related to the avoidance of damage caused by human activity.<sup>23</sup>

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<sup>21</sup> Based on the personal observations of Ruwantissa I.R. Abeyratne (Coordinator- Air Transport Programs, ICAO). January 2005.

<sup>22</sup> Annex 17, *infra* note 73 at Chapter 1- Definitions.

<sup>23</sup> Based on the personal observations of Ruwantissa I.R. Abeyratne (Coordinator- Air Transport Programs, ICAO). January 2005.



### **1.3.1 Safety and security compared and contrasted from an aviation perspective:**

Safety/Aviation safety <sup>24</sup>	Security/ Aviation security <sup>25</sup>
Entails the protection of individuals from unintentional acts.	Entails the protection of individuals from intentional acts of other individuals. The <i>actus</i> that one is trying to protect oneself or another from is actually an <i>actus reus</i> backed by a very compelling <i>mens rea</i> .
Attempts to secure individuals from mostly natural (or non man made) phenomena.	Attempts to secure individuals from events that are the direct (and in some cases indirect) result of someone's action or inaction.
Necessarily factors in and is contingent on the design, planning, positioning (location), shape or structure of a product. In other words the inherent characteristics of a product need to be considered while evaluating this concept.	The inherent characteristics of a product do not have too great a bearing on the security of a system.
Terms like 'negligence' and 'fault' may be used when safety is absent.	The absence of security has more to do with criminal or malicious actions or intent rather than negligence or fault.
Comfort, convenience, economy and efficiency are promoted by safety. Safety can be demonstrated in the design of airport luggage carts such that they pose minimal risk to children who might occasion to be in their vicinity.	Examples of security might include ensuring that only authorized individuals are allowed access to certain portions of the airside of an airport.

<sup>24</sup> See generally Michael Milde, "Aviation Safety and Security- Legal Management" (2004) XXIX Ann. Air & Sp. L. 1 at 2-7 [Milde, Aviation Safety].

<sup>25</sup> See generally *ibid.* at 7-17.

While the goal of both- safety and security- are similar the method to approach them (both) is different. Safety and security are not government functions. The government merely oversees and monitors these two aspects to ensure public policy objectives are met and to save and protect lives, health and property.

On a concluding note- it might be imprudent to assume aviation safety and aviation security to mean the same thing. The emphasis of this thesis is on *security* (or the lack thereof) at airports and it is crucial that the same be kept in mind.

**1.4 Terrorism:** The international community has struggled, particularly in the years since 9/11, to come up with a universally accepted legal definition of ‘terrorism’. Most attempts at definitions share the following elements<sup>26</sup>:

- a. A violent act or acts with the potential of causing serious loss of life or economic damage;
- b. Committed by non-military combatants or civilians who are not officially acting on direct orders of a state government (though they may be funded by states);
- c. Perpetrated against non-military targets or civilian populations;
- d. In an effort to destabilize the targeted population; and
- e. To advance a political, criminal, ideological, or religious objective.

For one reason or another, all of the definitions to date have been inadequate and unable to achieve global (universal) acceptance and use. The problem is typically one of over-inclusiveness (of the definition). In the absence of a universally recognized definition, some commentators have resorted to the very imprecise and subjective test that is also often heard when trying to legally define ‘obscenity’ and ‘pornography’ saying simply, “I know it when I see it.”<sup>27</sup>

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<sup>26</sup> Jarom Britton, “Roads from Montréal do not Lead to Rome: Criticism and Alternatives to the Draft Convention on Third Party Liability” [unpublished article] [Britton].

<sup>27</sup> *Ibid.*

If one looks to documents pertaining to aviation law, the situation is no better. The Draft Convention on Damage Caused by Foreign Aircraft to Third Parties employs the phrase ‘*act of unlawful interference*’ and points to two other aviation treaties:

‘An act of unlawful interference’ means an act which constitutes an offence as defined in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at the Hague on 16 December 1970, or the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montréal on 23 September 1971, or any amendment or Protocol thereto which is in force.<sup>28</sup>

Under Art. 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in the Hague in 1970, acts of unlawful interference against the operation of aircraft are defined as:

1. Any person who on board an aircraft in flight:
  - a. unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
  - b. is an accomplice of a person who performs or attempts to perform any such act commits an offence (hereinafter referred to as “the offence”).

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed in Montréal in 1971, under Art. 1 includes the following definition for an act of unlawful interference:

1. Any person commits an offence if he unlawfully and intentionally:
  - a. performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
  - b. destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
  - c. places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft,

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<sup>28</sup> Draft Convention on Damage Caused by Foreign Aircraft to Third Parties, in *Draft Assembly Working Paper on Item 34 – Progress Report on the Modernization of the Rome Convention of 1952*, app. A, ICAO Doc. C-WP/12258 Art. 1(h), 2004.

- or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
  - d. destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
  - e. communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.
2. Any person also commits an offence if he:
- a. attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
  - b. is an accomplice of a person who commits or attempts to commit any such offence.

The aforementioned definitions refer to more than just 'terrorism' but the drafters believe that they fully encompass 'acts of terrorism' in their scope. For instance, while neither definition mentions that acts of unlawful interference must be aimed at advancing a political, criminal, ideological, or religious objective (one of the criteria often associated with a legal definition of 'terrorism'), there is nothing indicating that such motivations would prevent a particular act with that quality from falling within the scope of the definitions.<sup>29</sup>

In the US, 'terrorism' is the premeditated, politically motivated violence against noncombatant targets by subnational groups or clandestine agents usually intended to influence an audience.<sup>30</sup>

In the UK, under sec. 1(1) of the Terrorism Act, 2000:

In this Act "terrorism" means the use or threat of action where-

- a) the action falls within subsection (2),
- b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
- c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

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<sup>29</sup> Britton, *supra* note 26.

<sup>30</sup> Title 22 USC Sec. 2656f(d).

In India, terrorism is dealt with under the Terrorist and Disruptive Activities (Prevention) Act, 1987. According to sec. 3(1):

Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.

There is no dearth of literature on terrorism. The offence of terrorism according to Nechayev is one caused by any serious act of violence or threat thereof by an individual, whether acting alone or in association with other persons, which is directed against internationally protected persons, organizations, places, *transportation or communication systems* or against members of the general public, for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organizations, causing loss, detriment or damage to such places or property; or of interfering with such *transportation or communication systems* in order to undermine friendly relations among states or among the nationals of different states, or to extort concessions from states.<sup>31</sup>

As is evident from the above (note the *italicized* phrases) Nechayev's definition of terrorism implicitly recognizes transportation and therefore aviation as a potential instrumental target.

One must remember that terrorism has a singular goal. That singular goal is not the killing of innocent people or a show of strength- a weaker persuasion does not exist. The

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<sup>31</sup> Ruwantissa I.R. Abeyratne, "The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order" (1995) 22 Transp. L.J. 449 at 460.

singular goal of terrorism is, simply put, to cause terror and to create fear. Death is only a by product of terrorism. The fear created by terrorism is vital in undermining faith in an establishment. It weakens the enemy from within- causing unrest amongst the masses. Terrorism is not an expression of rage. It is a political weapon working to remove a government's (or organization or institution's) façade of infallibility and its people's faith.<sup>32</sup>

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<sup>32</sup> Dan Brown, *Angels and Demons* (New York: Pocketstar Books, 2001) at 173-174.

## **CHAPTER 2**

### **Aviation and Airport Security Laws**

This chapter will examine the responses of international law making bodies and local legislatures with respect to aviation and airport security. Developments in aviation and airport security laws on the international stage will be noted, followed by an analysis of the response of the US, UK and India in this regard.

#### **2.1 International (Multilateral) Conventions, Resolutions and Declarations**

This section examines the manner in which the international community has attempted to tackle the myriad issues surrounding aviation security by creating laws to strengthen the same. International law seeking to regulate aviation security is based on, *inter alia*, a clutch of conventions, protocols and declarations drafted outside the framework of the Chicago Convention, 1944, but under the auspices of the ICAO. Analyzing the various instruments of international law in this regard in a chronological manner:

##### **2.1.1 Convention on Offences and Certain Other Acts Committed on Board Aircraft signed in Tokyo in 1963<sup>33</sup>**

The Tokyo Convention, 1963, is frequently referred to as the first legal step<sup>34</sup> to combat unlawful interference with civil aviation. It was not intended to address hijacking. The delegates were focused instead on other offences committed on board aircraft. The issue of unlawful seizure of aircraft was added as an afterthought in Art. 11.<sup>35</sup>

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<sup>33</sup> *Convention on Offences and Certain Other Acts Committed on Board Aircraft* signed in Tokyo in 1963, ICAO Doc. 8364 [Tokyo Convention, 1963].

<sup>34</sup> But see R.I.R. Abeyratne, *Legal and Regulatory Issues in International Aviation*, (New York: Transnational, 1996) at 392 [Abeyratne], where the author does not endorse this view and adduces evidence to the contrary, which one does not find entirely compelling or convincing.

<sup>35</sup> As revealed by Dr. Milde in a conversation. January 2005. Accord Michael Milde, "Law and Aviation Security" in Tanja L. Masson-Zwaan & Pablo M.J. Mendes de Leon, eds., *Air and Space Law: De Lege Ferenda*, (Dordrecht: Martinus Nijhoff, 1992) 93 at 94 [Milde, De Lege Ferenda]. Accord Dempsey, *Aviation Security*, *supra* note 2 at 663. Accord Paul Stephen Dempsey, "Airline and Airport Security: Law as a Deterrent to Aerial Terrorism" (2002) XXVII Ann. Air & Sp. L, 167 at 179 [Dempsey, Airline and Airport Security].

Under the Tokyo Convention, 1963,<sup>36</sup> the contracting State in which a hijacked aircraft lands is obligated to “take all appropriate measures to restore control of the aircraft to its lawful commander” and to “permit its passengers and crew to continue their journey as soon as practicable”.<sup>37</sup> This Convention was the first effort to assert formal international control over the criminal acts of hijackers though it does not provide for means of prosecution of the hijacker, as the Convention fails to declare hijacking as an international crime.<sup>38</sup>

The Convention prohibits acts that jeopardize the safety of commercial aircraft or passengers while the aircraft is in flight.<sup>39</sup> Jurisdiction over the offence is vested in the State of registry, irrespective of the location of the aircraft,<sup>40</sup> although third-party States may assert jurisdiction under certain circumstances (as laid out in Art. 4 of the Tokyo Convention, 1963).

Cheng notes that the Tokyo Convention, 1963, “was primarily a reaction to the discovery in cases such as *USA v. Cordova*<sup>41</sup> and *R v. Martin*<sup>42</sup> that aircraft, when they are flying abroad, especially over the high seas, were often literally oases of lawlessness, where no law was applicable”.<sup>43</sup>

The Tokyo Convention, 1963, has attracted a fair amount of criticism and perhaps for good reason. The Convention fails to create a definitive obligation on behalf of its

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<sup>36</sup> For a succinct description of the objectives of the Tokyo Convention, 1963, See Abeyratne, *supra* note 34 at 403-404.

<sup>37</sup> Tokyo Convention, 1963, *supra* note 33 at Art. 11.

<sup>38</sup> Dempsey, Aviation Security, *supra* note 2 at 664. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 179-182. Accord Paul Stephen Dempsey, *Law and Foreign Policy in International Aviation*, (Dobbs Ferry: Transnational, 1987) at 353-355 [Dempsey, Law and Foreign Policy].

<sup>39</sup> Tokyo Convention, 1963, *supra* note 33, Art. 1.

<sup>40</sup> *Ibid* at Art. 3.

<sup>41</sup> *USA v. Cordova*, 3 Avi. 17, 309.

<sup>42</sup> *R v. Martin*. [1956] 2 QB 272.

<sup>43</sup> Bin Cheng, “International Legal Instruments to Safeguard International Air Transport: The Conventions of Tokyo, the Hague, Montréal, and a New Instrument Concerning Unlawful Violence at International Airports” (Paper presented to the International Conference on Aviation Security, January 1987) [unpublished] [Bin Cheng, International Legal Instruments].



signatories to prosecute or extradite an individual.<sup>44</sup> In fact, the Convention explicitly provides that it creates no duty to extradite a hijacker.<sup>45</sup>

It must be noted that the Convention's applicability is confined to unlawful acts committed on-board the aircraft that may jeopardize the safety of the aircraft, persons, or their property.<sup>46</sup> The relevant time period commences from the moment "all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation".<sup>47</sup> Hence, an act of sabotage occurring before the aircraft departs does not fall within the scope of the Convention. Moreover, the Convention only applies to international and commercial (and not domestic, military, customs or police) flights.<sup>48</sup>

The Tokyo Convention, 1963, succeeded in identifying the problems which threaten the security of an aircraft, but it has been criticized for not providing a satisfactory framework for resolving those problems. It has also been criticized for its failure to declare hijacking an international crime. At the time of its drafting, the Convention appeared adequate; however, with terrorist attacks associated with current international conflicts and an increased frequency of such attacks, its limited effectiveness became apparent. The Convention has nonetheless served as a legal foundation for subsequent international conventions.<sup>49</sup>

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<sup>44</sup> Anonymous, "Recent Developments" (1978) 19 Harv. Int'l L.J. 1011 at 1040.

<sup>45</sup> Tokyo Convention, 1963, *supra* note 33, Art. 16(2).

<sup>46</sup> *Ibid.* Art. 1.

<sup>47</sup> *Ibid.* Art. 5(2).

<sup>48</sup> *Ibid.* Art. 1.

<sup>49</sup> Dempsey, Aviation Security, *supra* note 2 at 666. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 181-182. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 354.

### **2.1.2 Convention for the Suppression of Unlawful Seizure of Aircraft signed in the Hague in 1970<sup>50</sup>**

The increasing number of terrorist attacks against aircraft throughout the 1960s accentuated the need for a definition of unlawful acts against aircraft and a more definitive statement as to appropriate penalties. The ICAO's response to this need was the Hague Convention, 1970.

The Hague Convention, 1970, became the first meaningful step taken to define the law of international hijacking, as it declared the hijacking of an aircraft to be an international "offence"<sup>51</sup> and developed clear legal policy and enforcement procedures to deal with this crime.<sup>52</sup> Art. 6 of this instrument is important as it allows a State to conclude that if "the circumstances so warrant", it must take the "offender or the alleged offender" into custody or take other measures that will ensure his presence, but only for such time as is necessary to enable the institution of criminal or extradition proceedings. This instrument reiterates the Tokyo Convention, 1963, by requiring prompt notification to the offender's nation<sup>53</sup> and a preliminary inquiry into facts.

According to Art. 7, if the State does not extradite the "offender or the alleged offender", it must prosecute him in the same manner as it would for any offence of a serious nature occurring within the State itself. By requiring mandatory prosecution or extradition, the Hague Convention, 1970, sought to encourage nations to initiate criminal proceedings against hijackers. The problem with this scenario lies in the fact that States will apply their domestic laws to try cases. Given the diversity in legal systems across the world, the situation would spawn an environment of inconsistent punishments. To this extent, the effort to create a uniform system of punishment cannot be realized.

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<sup>50</sup> *Convention for the Suppression of Unlawful Seizure of Aircraft* signed in the Hague in 1970, ICAO Doc. 8920 [Hague Convention, 1970].

<sup>51</sup> Dempsey, *Aviation Security*, *supra* note 2 at 666. Accord Dempsey, *Airline and Airport Security*, *supra* note 35 at 182. Accord Dempsey, *Law and Foreign Policy*, *supra* note 38 at 355.

<sup>52</sup> Hague Convention, 1970, *supra* note 50 at Art. 1.

<sup>53</sup> *Ibid.* Art. 6(4).

A lacuna in the Hague Convention, 1970, lies in the wording of a phrase in Art. 2, under which States undertake to make offences punishable by “severe penalties”. Unfortunately, the term “severe penalties” goes without elaboration.

It has been noted that this instrument fails to- (a) address acts of terrorism preceding a flight; (b) precisely define the circumstances under which prosecution is required; and (c) identify the penalties that are required. It also does not apply to a situation where a hijacker commandeers an international flight and has it land in the country of its departure.<sup>54</sup>

Cheng feels that a weakness with the Hague Convention, 1970, lies in “the discretion, albeit carefully circumscribed, that remains with the prosecution authorities whether or not to prosecute”.<sup>55</sup>

### **2.1.3 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation signed in Montréal in 1971**<sup>56</sup>

The Hague Convention, 1970, failed to address the issue of aircraft sabotage, and by 1970, incidents of terrorism in airport ground facilities had increased. Moreover, the sabotage of aircraft, using bombs designed to explode during flight, had become much more prevalent.<sup>57</sup>

The perceived deficiencies in the Hague Convention, 1970, prompted the drafting of the Montréal Convention, 1971. While in many respects the Montréal Convention, 1971, is

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<sup>54</sup> Dempsey, Aviation Security, *supra* note 2 at 668. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 183-184.

<sup>55</sup> Bin Cheng, International Legal Instruments, *supra* note 43.

<sup>56</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* signed in Montréal in 1971, ICAO Doc. 8966 [Montréal Convention, 1971].

<sup>57</sup> Dempsey, Aviation Security, *supra* note 2 at 669. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 184. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 357.

repetitious of the Hague Convention, 1970, the former does address issues of airport security and aircraft sabotage prior to flight.

The Hague Convention, 1970, declares it an “offence” for an individual to unlawfully seize or otherwise obtain control of an aircraft or to assist one who performs such an act.<sup>58</sup> Under Art. 1(1) of the Montréal Convention, 1971:

Any person commits an offence if he unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
- (b) destroys the aircraft in service or causes damages to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
- (d) destroys or damages air navigation facilities or interferes with their operations, if any such act is likely to endanger the safety of aircraft in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Under Art. 1(2) of the same convention any attempt to commit one or more of the acts listed above, or acting as an accomplice, constitutes an offence. Beyond these definitions, the two conventions are extremely similar.

It is pertinent to note that under both conventions, contracting parties are obliged to punish the described offences by “severe penalties”<sup>59</sup>, take “such measures as are necessary” to establish their jurisdiction over the offence and its parties<sup>60</sup>, take the individual into custody<sup>61</sup>, make a preliminary inquiry into the facts<sup>62</sup> and notify the

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<sup>58</sup> Hague Convention, 1970, *supra* note 50 at Art. 1.

<sup>59</sup> Hague Convention, 1970, *supra* note 50 at Art. 2; Montréal Convention, 1971, *supra* note 56 at Art. 3.

<sup>60</sup> Hague Convention, 1970, *ibid.* at Art. 4; Montréal Convention, 1971, *ibid.* at Art. 5.

<sup>61</sup> Hague Convention, 1970, *ibid.* at Art. 6(1); Montréal Convention, 1971, *ibid.* at Art. 6(1).

<sup>62</sup> Hague Convention, 1970, *ibid.* at Art. 6(2); Montréal Convention, 1971, *ibid.* at Art. 6(2).

perpetrator's state of nationality.<sup>63</sup> Additionally, the provision regarding prosecution<sup>64</sup> appears stringent, at least *prima facie*.

Like the Tokyo Convention, 1963, the Hague Convention, 1970, and the Montréal Convention, 1971, provide that disputes between contracting States be resolved first by negotiation, then by arbitration and, on appeal, by the International Court of Justice.<sup>65</sup> Contracting States are required to promptly report to the ICAO, information regarding the circumstances of offences, actions taken to return the aircraft and to facilitate continuation of the passengers' journey, and results of any extradition or other legal proceeding taken.<sup>66</sup>

The Hague Convention, 1970, and the Montréal Convention, 1971, have been criticized for their ambiguity.<sup>67</sup> Provisions regarding sanctions for hijacking and other unlawful offences do not actually require prosecution or extradition; rather, they impose an obligation only to present the case to the appropriate authorities, who decide, at their discretion, whether prosecution is appropriate.<sup>68</sup> There is no uniformity in state actions regarding prosecution or extradition<sup>69</sup>, and the failure of both conventions to define the term "severe penalties" has enabled several States to avoid rigorous punishment of hijackers, particularly those persons deemed to be political refugees.<sup>70</sup> This allows States to comply with the literal requirements of the conventions, while doing little to discourage the proscribed offences.<sup>71</sup>

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63 Hague Convention, 1970, *ibid.* at Art. 6(4); Montréal Convention, 1971, *ibid.* at Art. 6(4).

64 Hague Convention, 1970, *ibid.* at Art. 7; Montréal Convention, 1971, *ibid.* at Art. 7.

65 Hague Convention, 1970, *ibid.* at Art. 12(1); Montréal Convention, 1971, *ibid.* at Art. 14.

66 Hague Convention, 1970, *ibid.* at Art. 11; Montréal Convention, 1971, *ibid.* at Art. 13.

67 Dempsey, Aviation Security, *supra* note 2 at 672. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 187. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 358.

68 *Ibid.*

69 Dempsey, Aviation Security, *ibid.* at 672-673. Accord Dempsey, Airline and Airport Security, *ibid.* at 187.

70 Dempsey, Aviation Security, *ibid.* at 673. Accord Dempsey, Airline and Airport Security, *ibid.* at 187. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 358.

71 *Ibid.*

One case which illustrates the practical deficiencies of the Montréal Convention, 1971, is *Libya v. United States*,<sup>72</sup> brought by Libya against the US on grounds that the US had breached the requirement for arbitration of disputes arising under the Montréal Convention, 1971. Since the case is not entirely pertinent to the issue of airport security, the same will not be elaborated upon.

#### **2.1.4 Annex 17 to the Chicago Convention, 1944,<sup>73</sup> with references to other Annexes**

Apart from incorporating several requirements of the Tokyo Convention, 1963, the Hague Convention, 1970, and the Montréal Convention, 1971, Annex 17 requires (a) each member State to establish a governmental institution to regulate security and establish a national civil aviation security program that prevents weapons, explosives or other dangerous devices on board aircraft; (b) checking and screening of aircraft, passengers, baggage, cargo and mail; and (c) security personnel be subjected to background checks, qualification requirements and adequate training.<sup>74</sup>

Annex 17, captioned “Safeguarding International Civil Aviation Against Acts of Unlawful Interference”, addresses aviation security. It addresses preventive measures for aircraft, airports, passengers, baggage, cargo and mail, as well as standards and qualifications for security personnel and responsive measures to acts of unlawful interference.<sup>75</sup>

Annex 17 requires that each member State “have as its primary objective the safety of passengers, crew, ground personnel and the general public in all matters related to safeguarding against acts of unlawful interference with civil aviation.”<sup>76</sup> It binds

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<sup>72</sup> *Libya v. United States*, 31 I.L.M. 662 (1992).

<sup>73</sup> *International Standards and Recommended Practices: Security; Annex 17 to the Convention on International Civil Aviation*, 7d ed. April 2002, [Annex 17].

<sup>74</sup> Dempsey, Aviation Security, *supra* note 2 at 659. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 176.

<sup>75</sup> Dempsey, Aviation Security, *ibid.* at 677-678. Accord Dempsey, Airline and Airport Security, *ibid.* at 191.

<sup>76</sup> Annex 17, *supra* note 73 at § 2.1.1.

member States to establish a national civil aviation security program<sup>77</sup> and to create a governmental institution dedicated to aviation security that would develop and implement regulations to safeguard aviation.<sup>78</sup> Contracting States are also required to develop a security training program.<sup>79</sup> They must also share aviation threat information,<sup>80</sup> and otherwise cooperate with other States on their national security programs.<sup>81</sup>

Contracting States must take action to prevent weapons, explosives or other dangerous devices which might be used to commit an act of unlawful interference from being introduced into aircraft.<sup>82</sup> During flight, unauthorized personnel must not be allowed to enter the cockpit.<sup>83</sup> Aircraft, passengers and their baggage, cargo and mail, must all be checked and screened.<sup>84</sup> Beginning 2006, each State must ensure that originating hold (as opposed to carry-on) baggage is screened prior to being loaded onto an international aircraft.<sup>85</sup> Airports must establish security restricted areas.<sup>86</sup> Persons performing the security function must be subjected to background checks and selection procedures,<sup>87</sup> hold appropriate qualifications for the position and be adequately trained.<sup>88</sup>

Reaffirming the requirements of the Tokyo Convention, 1963, the Hague Convention, 1970, and the Montréal Convention, 1971, specific procedures have been mandated to

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<sup>77</sup> Annex 17, *ibid.* at § 3.1. Airports and aircraft operators must also establish security programs (*ibid.* at §§ 3.2.1, 3.3.1).

<sup>78</sup> Annex 17, *ibid.* at §§ 2.1.2, 3.1.2 – 3. States must also establish a national aviation security committee that coordinates security activities between various governmental institutions (*ibid.* at § 3.1.6).

<sup>79</sup> Each contracting State must establish a security training program. Annex 17, *ibid.* at § 3.1.7. They are also obliged to cooperate with other States in the development and exchange of training program information (*ibid.* at § 2.3.3).

<sup>80</sup> Annex 17, *ibid.* at § 2.3.4.

<sup>81</sup> Annex 17, *ibid.* at § 2.3.2.

<sup>82</sup> Annex 17, *ibid.* at § 4. Weapons brought on board by law enforcement and other authorized persons must have special authorization in accordance with the State's domestic law (*ibid.* at §§ 4.6.4 – 6).

<sup>83</sup> Annex 17, *ibid.* at § 4.2.3.

<sup>84</sup> Annex 17, *ibid.* at §§ 4.2 – 4.6.

<sup>85</sup> Annex 17, *ibid.* at § 4.4.8. Until then, States are **recommended** to conduct hold baggage screening (*ibid.* at § 4.4.9).

<sup>86</sup> Annex 17, *ibid.* at § 4.7.1.

<sup>87</sup> Annex 17, *ibid.* at § 3.4.1. Those granted unescorted access to security restricted areas of airports are subject to similar background checks (*ibid.* at § 4.7.2). It is also **recommended** that security checks be reapplied on a regular basis (*ibid.* at § 4.7.6).

<sup>88</sup> Annex 17, *ibid.* at § 3.4.2.

deal with acts of unlawful interference.<sup>89</sup> A State must provide for the safety of passengers and crew until their journey can be resumed.<sup>90</sup> It must detain an unlawfully seized aircraft that has landed on its territory, unless its departure is necessitated by the duty to protect human life.<sup>91</sup> It must promptly notify ICAO and the State of registry that its aircraft has been unlawfully seized, as well as the State whose citizens suffered fatalities or injuries, were detained as hostages, or whose citizens were aboard the aircraft.<sup>92</sup>

Annex 17 is the principal Annex addressing aviation security directly. Over time, it has been amended and expanded in significant ways to keep pace with the evolving trends in the aviation industry. Other Annexes address issues of aviation security peripherally.

Annex 6 requires that the flight crew compartment door be capable of being locked.<sup>93</sup> Unlawful interference training programs must be available for aircraft crew members.<sup>94</sup> Annex 13 requires that if an aircraft is subject to unlawful interference, a contracting State must notify the aviation security officials of the concerned State.<sup>95</sup> Annex 14<sup>96</sup> **recommends** that the airport be fenced and lit, that security facilities have an independent power source and that an isolated aircraft parking position be established.<sup>97</sup> Annex 18 addresses the transportation of dangerous goods by air.<sup>98</sup>

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<sup>89</sup> Annex 17, *ibid.* at Ch. 5.

<sup>90</sup> Annex 17, *ibid.* at § 5.2.1.

<sup>91</sup> Annex 17, *ibid.* at § 5.2.4.

<sup>92</sup> Annex 17, *ibid.* at § 5.2.5.

<sup>93</sup> *International Standards and Recommended Practices: Operation of Aircraft; Annex 6 to the Convention on International Civil Aviation*, 8th ed. July 2001, at § 13.1 [Annex 6].

<sup>94</sup> *Ibid.* at § 13.3.1.

<sup>95</sup> *International Standards and Recommended Practices: Aircraft Accident and Incident Investigation; Annex 13 to the Convention on International Civil Aviation*, 9th ed. July 2001, at § 5.11 [Annex 13].

<sup>96</sup> It is pertinent to note here that Annex 14, *infra* note 97 titled “Aerodromes” does not deal so much with security at airports as it does with technical aspects such as planning, engineering and construction. The nomenclature therefore might be a little misleading prompting the uninitiated to believe that airport security is dealt with under this rubric.

<sup>97</sup> *International Standards and Recommended Practices: Aerodromes; Annex 14 to the Convention on International Civil Aviation*, 4th ed. July 2001, [Annex 14].

<sup>98</sup> *International Standards and Recommended Practices: The Safe Transport of Dangerous Goods by Air; Annex 18 to the Convention on International Civil Aviation*, 3d ed. July 2001, [Annex 18].



Annex 9 is particularly important in the context of security, as it attempts to balance the important, but sometimes conflicting, goals of aviation security with passenger convenience and airline efficiency. Also, Annex 17 includes a **recommendation** that:

Each Contracting State should whenever possible arrange for the security controls and procedures to cause a minimum of interference with, or delay to the activities of civil aviation provided the effectiveness of these controls and procedures is not compromised.<sup>99</sup>

Among other things, Annex 9, titled “Facilitation”, addresses the expeditious entry and departure of aircraft, people, cargo and other articles at international airports. According to Groenewege, the essence of Annex 9 is reflected in provisions which state that “...clearance...shall be applied and carried out in such a manner as to retain the advantage of speed inherent in air transport”.<sup>100</sup>

However, there no longer are provisions in Annex 9<sup>101</sup> that state the above. Groenewege’s view was apt when placed in the context of the 10<sup>th</sup> edition of Annex 9 released in 1997.

Annex 9 goes on to state that contracting States shall take necessary measures to ensure that “optimal levels of security, and compliance with the law, are attained”.<sup>102</sup> In developing procedures aimed at the efficient clearance of entering or departing aircraft, contracting States shall take into account the application of aviation security and narcotics control measures where appropriate.<sup>103</sup> Border regulations must be applied so as to prevent unnecessary delay.<sup>104</sup> In order to ensure that facilities and services support expeditious handling of passengers, baggage and mail, they must be flexible and capable

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<sup>99</sup> Annex 17, *supra* note 73 at § 2.2.

<sup>100</sup> Adrianus D. Groenewege, *Compendium of International Civil Aviation* 2d ed. (Montréal: International Aviation Development Corporation, 1998-1999) at 672.

<sup>101</sup> *International Standards and Recommended Practices: Facilitation; Annex 9 to the Convention on International Civil Aviation*, 11<sup>th</sup> ed. July 2002, [Annex 9].

<sup>102</sup> *Ibid.* at § 1.2 (d).

<sup>103</sup> *Ibid.* at § 2.2.

<sup>104</sup> *Ibid.* at §§ 2.1, 3.1.

of expansion to meet the needs of enhanced security measures during high threat periods.<sup>105</sup>

Many recommended practices are contained in Annex 9. One of these pertains to the examining of passengers for purposes of security clearance, where maximum use should be made of specialized equipment so as to reduce the number of people and baggage to be examined by other means.<sup>106</sup>

A subsequent segment of this chapter will examine the mechanism of SARPs in greater detail.

#### **2.1.5 The Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference**<sup>107</sup>

To build on the foundations of Annex 17, ICAO has come out with a restricted document titled ‘Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference’.

Under this document, aviation security in each state is the responsibility of a national civil aviation security committee composed of representatives of the government agencies concerned with aviation, law enforcement, immigration, customs, postal inspection and foreign affairs as well as representatives of airlines, airport administrators and, where possible, aviation employees’ organizations.<sup>108</sup>

Due to the diversity of the international aviation operations the Security Manual does not attempt to seek uniform measures among ICAO’s contracting States. Each state and

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<sup>105</sup> *Ibid.* at § 6.1.

<sup>106</sup> *Ibid.* at § 6.21. The use of radiological technology on human beings should be avoided. Privacy should be accorded those passengers subjected to physical search.

<sup>107</sup> ICAO, *Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference* 6<sup>th</sup> ed. 2002, ICAO Doc. 8793 [Security Manual].

<sup>108</sup> Paul Sheppard and Eugene Sochor, “Setting International Aviation Security Standards” in Yonah Alexander and Eugene Sochor, eds., *Aerial Piracy and Aviation Security* (Dordrecht: Martinus Nijhoff, 1990) 3 at 10-11 [Sheppard *et. al.*]. Accord, Security Manual, *ibid.* at Chapters 2 and 3.

airport administration must make an assessment and decide upon the plan or combination of plans best suited to its needs. Much emphasis is placed on the exchange of information among states and international bodies concerned with aviation security.<sup>109</sup>

As a restricted document<sup>110</sup>, it is available only to national agencies and persons directly responsible for implementing security provisions.<sup>111</sup> A study of the Security Manual reveals that it amplifies technical specifications, measures and procedures laid out in Annex 17. The Security Manual provides states with detailed guidance in a vast spectrum of security precautions- from the protection of the airport perimeter<sup>112</sup>, over the techniques of passenger screening and searching<sup>113</sup> to the security identification of persons entitled to access certain areas or facilities<sup>114</sup>.

For the purposes of this paper, it is pertinent to mention that the Security Manual also contains sections dealing with, *inter alia*, airport security programs<sup>115</sup>, airport security coordination<sup>116</sup>, airport and terminal security<sup>117</sup> and detection technologies and equipment<sup>118</sup>.

The appendix to the Security Manual features texts on, Model National Civil Aviation Security Program<sup>119</sup>; National Aviation Security Legislation<sup>120</sup>; Model Clause on Aviation Security and Bilateral or Regional Model Agreement on Aviation Security<sup>121</sup>;

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<sup>109</sup> Sheppard *et. al.*, *ibid.* at 11.

<sup>110</sup> As noted by Milde, "this voluminous document is distributed only on the basis 'should know' and is not available to the general public". Milde, Aviation Safety, *supra* note 24 at 13.

<sup>111</sup> However, one has had limited access to the document and much of the observations contained herein are based on a copy of the table of contents, which one possesses.

<sup>112</sup> Security Manual, *supra* note 107 at Part I Chapter 4.12.

<sup>113</sup> *Ibid.* Part I, Chapter 4.2.

<sup>114</sup> *Ibid.* Part I, Chapter 4.10.

<sup>115</sup> *Ibid.* Part I, Chapter 3.10.

<sup>116</sup> *Ibid.* Part I, Chapter 3.12.

<sup>117</sup> *Ibid.* Part I, Chapter 4.1.

<sup>118</sup> *Ibid.* Part III.

<sup>119</sup> *Ibid.* Appendix 1.

<sup>120</sup> *Ibid.* Appendix 2.

<sup>121</sup> *Ibid.* Appendix 3.

Guidance on Recruitment, Selection, Training, and Certification of Airport Security Staff<sup>122</sup>; Airport Security Program (Model Outline)<sup>123</sup>; and Airport Security Identification Permit Systems<sup>124</sup>, among others.

#### **2.1.6 European Convention on the Suppression of Terrorism signed in 1977**<sup>125</sup>

The European Convention, 1977, encourages extradition between contracting States and limits the political offence justification for refusing extradition. By doing so, it seeks to ensure that the perpetrators of acts of terrorism do not escape prosecution and punishment.<sup>126</sup> Art. 1 lists several offences, including those within the scope of the Hague Convention, 1970, and the Montréal Convention, 1971, which will not be considered political offences for the purposes of extradition. However, Art. 5 softens this stance (indicated in Art. 1) by permitting a requested State to refuse extradition if it has ‘substantial grounds for believing’ that the extradition request has been made in order to punish a person on account of, amongst other things, his political opinions, race, religion or nationality.<sup>127</sup> Arts. 6 and 7 tend to repeat the basic obligations of a State as set forth in the Hague Convention, 1970, and the Montréal Convention, 1971.<sup>128</sup>

As noted by Dempsey<sup>129</sup>, there are four major defects that limit the efficacy of the European Convention, 1977. First, only a handful of States initially signed the instrument. Second, it does not authorize any collective action by those States against non-contracting States. Third, Art. 13 allows a State, at the time of signing or ratifying,

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<sup>122</sup> *Ibid.* Appendix 6.

<sup>123</sup> *Ibid.* Appendix 9.

<sup>124</sup> *Ibid.* Appendix 21.

<sup>125</sup> *European Convention on the Suppression of Terrorism* signed in 1977, 15 I.L.M.1272 (1975) [European Convention, 1977].

<sup>126</sup> Dempsey, Aviation Security, *supra* note 2 at 681. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 194. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 366.

<sup>127</sup> Dempsey, Aviation Security, *ibid.* at 681. Accord Dempsey, Airline and Airport Security, *ibid.* at 194. Accord Dempsey, Law and Foreign Policy, *ibid.* at 367.

<sup>128</sup> Dempsey, Aviation Security, *ibid.* at 681-682. Accord Dempsey, Airline and Airport Security, *ibid.* at 194. Accord Dempsey, Law and Foreign Policy, *ibid.* at 367.

<sup>129</sup> Dempsey, Aviation Security, *ibid.* at 682. Accord Dempsey, Airline and Airport Security, *ibid.* at 194-195. Accord Dempsey, Law and Foreign Policy, *ibid.* at 367.

the right to refuse extradition with respect to any of the offences mentioned in Art. 1, which it unilaterally considers to be politically inspired. Fourth, four<sup>130</sup> of the fourteen States that originally signed the Convention made such a reservation at that time.

It is instructive to note that the European Convention, 1977, contains no enforcement mechanism beyond the submission of disputes to arbitration.<sup>131</sup> Nevertheless, the Convention represents an improvement over the Hague Convention, 1970, and the Montréal Convention, 1971, albeit one of rather limited scope.<sup>132</sup>

#### **2.1.7 Joint Statement on International Terrorism signed in Bonn in 1978**<sup>133</sup>

The Bonn Declaration, 1978, is a non-binding international agreement imposing no legal obligations on its signatories. This does not mean that the Bonn Declaration, 1978, is without significance. It means that while there can be no damages or judicial remedy for its breach, the same is a sign to the rest of the world that the 'West' is serious about curbing and reacting to hijacking.<sup>134</sup>

The text of the Bonn Declaration, 1978, is as follows:

The heads of state and government, concerned about terrorism and the taking of hostages, declare that their governments will intensify their joint efforts to combat international terrorism.

To this end, in cases where a country refuses extradition or prosecution of those who have hijacked an aircraft and/or do not return such aircraft, the heads of state and government are jointly resolved that their governments should take immediate action to cease all flights to that country.

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<sup>130</sup> France, Italy, Norway and Portugal.

<sup>131</sup> European Convention, 1977, *supra* note 125 at Art. 10.

<sup>132</sup> Dempsey, Aviation Security, *supra* note 2 at 682. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 195. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 367.

<sup>133</sup> *Joint Statement on International Terrorism* signed in Bonn in 1978, 17 I.L.M.1285 [Bonn Declaration, 1978].

<sup>134</sup> James J. Busuttil, "The Bonn Declaration on International Terrorism: A Non Binding International Agreement on Aircraft Hijacking" (1982) 31 I.C.L.Q. 474 at 487 [Busuttil]. Accord Dempsey, Aviation Security, *supra* note 2 at 682-685. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 195-198. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 367-370.

At the same time, their governments will initiate action to halt all incoming flights from that country or from any country by the airlines of the country concerned. The heads of state and government urge other governments to join them in this commitment.

The Bonn Declaration, 1978, was first 'invoked' against Afghanistan in 1981, when the nation purportedly violated the principles of the declaration. In March 1981, a hijacked Pakistan International Airlines aircraft landed in Afghanistan and its hijackers were given refuge by the Babrak Karmal government. Such conduct was found to be in flagrant breach of Afghanistan's international obligations under the Hague Convention, 1970.<sup>135</sup> Consequently, the heads of states<sup>136</sup> proposed to suspend all flights to and from Afghanistan as per the Bonn Declaration, 1978, unless the Afghan government acted to comply with its obligations.

By November 1981, the Afghan government gave no indication of compliance with the aforementioned obligations thus compelling France, Germany and United Kingdom (the 'signatories' to the Bonn Declaration, 1978 that had air service arrangements with Afghanistan) to suspend their air service agreements (with Afghanistan).

Since the denunciation required one year to take effect (as mentioned in their respective agreements), it was not until November 1982 that air services were effectively terminated.<sup>137</sup>

The Bonn Declaration, 1978, was reportedly used again to apply diplomatic pressure on South Africa in an action initiated by Seychelles and supported by the US. South Africa subsequently yielded to the pressure and reversed its initial decision not to prosecute 45 white mercenaries who had hijacked a plane from Seychelles after a failed coup attempt

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<sup>135</sup> "Ottawa Economic Summit Conference Statement on Terrorism" (July 1981) 20 I.L.M. 956 (1981).

<sup>136</sup> Canada, France, Germany, Italy, Japan, United Kingdom and United States of America.

<sup>137</sup> Dempsey, Aviation Security, *supra* note 2 at 684.

there.<sup>138</sup> It is interesting to note that South Africa had formally associated itself with the Bonn Declaration, 1978, during its signing. In this case, South Africa would have risked international embarrassment if it had harbored the hijackers.<sup>139</sup>

At the 1986 Tokyo Economic Summit, the leaders of Canada, France, Germany, Italy, Japan, United Kingdom and United States of America issued a joint statement condemning international terrorism, reaffirming the principles of the Bonn Declaration, 1978, and encouraging collective countermeasures against terrorism and those supporting it.<sup>140</sup>

**2.1.8 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Montréal Convention, 1971, signed in Montréal in 1988<sup>141</sup>**

The Montréal Protocol, 1988, effectively extends the principal provisions of the Montréal Convention, 1971 to airports, prohibiting acts of violence at airports and the destruction or damage of airport facilities. In essence, airport security is added to the international regime.

There are perceived limitations to this instrument as noted by Milde, who states that, “unlawful acts of violence committed at airports serving international civil aviation are clearly localized in the territory of a particular state, and there is no vacuum in the substantive criminal law or the rules of jurisdiction which could not be solved otherwise than by an international instrument. Thus, the real practical purpose of the Protocol would be limited to the rare marginal case when a perpetrator of an act of violence at an

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<sup>138</sup> Busuttil, *supra* note 134 at 474-475. Accord Dempsey, Aviation Security, *supra* note 2 at 685. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 197. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 369.

<sup>139</sup> Busuttil, *ibid.* at 475.

<sup>140</sup> Dempsey, Aviation Security, *supra* note 2 at 685-686. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 198. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 370.

<sup>141</sup> *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Montréal Convention, 1971*, signed in Montréal in 1988, ICAO Doc. 9518 [Montréal Protocol, 1988].

international airport would escape and be eventually apprehended in another state; that state would be obliged under the Protocol to prosecute or extradite such an offender. The likelihood of such an event is rather remote and the Protocol is more a symbol of political determination of states to take every possible step to prevent and suppress acts against the safety of civil aviation, rather than a true advancement of international law”.<sup>142</sup>

#### **2.1.9 Convention on the Marking of Plastic Explosives for the Purposes of Detection signed in Montréal in 1991**<sup>143</sup>

The essential feature of the Montréal Convention, 1991, is the duty imposed upon States to effectively prohibit and prevent the manufacture, in their territories, of plastic explosives not marked by a defined marking agent, which enhances their detectability. States must also prohibit and prevent the movement, into or out of their territories, of unmarked plastic explosives. The text stops short of prohibiting possession of such explosives and of any transactions therewith. It also refrains from making punishable any act in violation of the instrument. Further, the text does not contain any penal provisions. Thus, the Montréal Convention, 1991, serves not as a panacea, but as a small addition to the general mosaic of the general legal preventive measures. The utility of the Montréal Convention, 1991, will be tested, not when all plastic explosives are properly marked for the purpose of detection, but when affordable and efficient detection equipment is available at all airports.<sup>144</sup>

#### **2.1.10 Miscellaneous Instruments**

Apart from the instruments discussed above, the UN and the ICAO have been active by way of decisions, declarations, meetings, recommendations, reports, resolutions and sessions in condemning acts of terrorism against civil aviation. Since many of these

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<sup>142</sup> Milde, De Lege Ferenda, *supra* note 35 at 95-96.

<sup>143</sup> *Convention on the Marking of Plastic Explosives for the Purposes of Detection* signed in Montréal in 1991, ICAO Doc. 9571 [Montréal Convention, 1991].

<sup>144</sup> Milde, De Lege Ferenda, *supra* note 35 at 96.



initiatives by the UN and the ICAO deal broadly with security issues and not airport security, it is not pertinent to elaborate on them.<sup>145</sup>

## **2.2 International Standards and Recommended Practices under the Chicago Convention, 1944**<sup>146</sup>

Towards the end of World War II, at the invitation of the US government, representatives from nations around the world gathered in Chicago to discuss the future of the burgeoning international aviation industry.<sup>147</sup> The conference culminated, *inter alia*, in the adoption of the Chicago Convention, 1944, and the creation of the ICAO.<sup>148</sup>

The goal of the Convention “was to achieve a system of uniform regulation of matters affecting international aviation.”<sup>149</sup> Accordingly, Art. 37 enjoins contracting States to “collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.”<sup>150</sup>

Art. 37 vests the ICAO with the authority to adopt and amend SARPs dealing with, among other things, communications systems and air navigation aids, including ground

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<sup>145</sup> But see Dempsey, Aviation Security, *supra* note 2 at 687-691; But see Dempsey, Airline and Airport Security, *supra* note 35 at 199-202; But see Dempsey, Law and Foreign Policy, *supra* note 38 at 355 for an elaboration under this heading.

<sup>146</sup> In this section 2.2 and all its sub parts, unless indicated otherwise, the following terms have their corresponding meanings ascribed to them:

**Annex(es) XX:** Annex(es) XX to the Chicago Convention, 1944.

**Art. XX:** Art. XX of the Chicago Convention, 1944.

**Convention:** The Chicago Convention, 1944.

**Council:** ICAO Council.

**SARPs:** International standards and recommended practices developed under the auspices of the Convention and adopted by the ICAO.

<sup>147</sup> Michael Gerard Green, “Control of Air Pollutant Emissions from Aircraft Engines: Local Impacts of National Concern” (1999) 5:2 *Envtl. Law*. 513 at 530.

<sup>148</sup> Chicago Convention, 1944, *supra* note 3 at Art. 43.

<sup>149</sup> Heather L. Miller, “Civil Aircraft Emissions and International Treaty Law” (1998) 63 *J. Air Law & Com.* 697 at 706.

<sup>150</sup> Chicago Convention, 1944, *supra* note 3 at Art. 37.

markings,<sup>151</sup> rules of the air and air traffic control practices,<sup>152</sup> aircraft in distress and investigation of accidents,<sup>153</sup> and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.<sup>154</sup> The SARPs adopted under Art. 37 are, for convenience,<sup>155</sup> designated as Annexes to the Chicago Convention, 1944.<sup>156</sup> Between 1948 and 1953, 15 Annexes were adopted.<sup>157</sup> At present, there are 18 Annexes.<sup>158</sup>

### **2.2.1 The Making of SARPs**

Under Art. 54(1) the responsibility for the adoption of SARPs by the ICAO is cast upon the Council as one of its mandatory functions. With regard to the development of SARPs the Council is assisted by the Air Navigation Commission<sup>159</sup> in technical matters, the Air Transport Committee<sup>160</sup> in economic matters and the Committee on Unlawful Interference in aviation security matters.<sup>161</sup>

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<sup>151</sup> *Ibid.* at Art. 37(a).

<sup>152</sup> *Ibid.* at Art. 37(c).

<sup>153</sup> *Ibid.* at Art. 37(k).

<sup>154</sup> *Ibid.* at Art 37 final paragraph. This provision is an omnibus residuary clause intended to cater to the adoption of SARPs to meet the growing needs of civil aviation. However, it is limited to matters concerning the safety, regularity and efficiency of air navigation.

<sup>155</sup> The opinion is widely held among authors that the use of the term 'for convenience' means that Annexes do not form an integral part of, and possess the same legal force as, the Chicago Convention, 1944. See *infra* note 170.

<sup>156</sup> Chicago Convention, 1944, *supra* note 3 at Art. 54(l).

<sup>157</sup> Buergenthal, *supra* note 20 at 60.

<sup>158</sup> International Civil Aviation Organization, online: <http://www.icao.int/icao/en/pub/memo.pdf> (date accessed: 1 August 2005). Personnel Licensing (Annex 1); Rules of the Air (Annex 2); Meteorological Service for International Air Navigation (Annex 3); Aeronautical Charts (Annex 4); Units of Measurement to be Used in Air and Ground Operations (Annex 5); Operation of Aircraft (Annex 6); Aircraft Nationality and Registration Marks (Annex 7); Airworthiness of Aircraft (Annex 8); Facilitation (Annex 9); Aeronautical Telecommunications (Annex 10); Air Traffic Services (Annex 11); Search and Rescue (Annex 12); Aircraft Accident and Incident Investigation (Annex 13); Aerodromes (Annex 14); Aeronautical Information Services (Annex 15); Environmental Protection (Annex 16); Security-Safeguarding International Civil Aviation Against Acts of Unlawful Interference (Annex 17); and The Safe Transport of Dangerous Goods by Air (Annex 18).

<sup>159</sup> The Air Navigation Commission is a body comprising 15 experts in the science and practice of aeronautics, nominated by contracting States and appointed by the Council. Its duties include the consideration and recommendation to the Council for adoption of Annexes. See Chicago Convention, 1944, *supra* note 3 at Arts. 54(e), 56 and 57. Traditionally, the Air Navigation Commission has focused on technical matters.

<sup>160</sup> The Air Transport Committee is appointed from among representatives of the members of the Council, to which it is responsible. According to Art. 54(d), the Council also defines the duties of the Air Transport

Upon receipt of a proposal, the Council entrusts the task of developing and formulating SARPs on the subject to the relevant Commission or Committee or such other body as the case may be. Each of these bodies in turn coordinates the activities of various sub-committees, working groups or international conferences convened by them to help formulate and review different SARPs.<sup>162</sup>

These groups then report back to the relevant body, which conducts a preliminary review of their work.<sup>163</sup> The original recommendations for core SARPs, along with any alternative proposals developed by the relevant body, are then submitted to contracting States and selected international organizations for comment.<sup>164</sup> The comments of States and international organizations are analyzed by the Secretariat and a working paper detailing the comments and the Secretariat's proposals for action is prepared. The relevant body undertakes the final review of the recommendations and establishes the final texts of the proposed amendments to the SARPs. These amendments are then presented to the Council for adoption.<sup>165</sup>

Under Art. 90(a), the adoption of an Annex requires the vote of two thirds of the Council at a meeting called for that purpose. This requirement has been interpreted as the vote of two thirds of the total membership of the Council.<sup>166</sup>

It is vital to note the role of contracting States in this procedure. States are free to participate in the deliberations of the sub-groups. More importantly, the proposals for

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Committee. The Air Transport Committee has focused on matters of economic concern, such as facilitation of international air transport and security.

<sup>161</sup> Making an ICAO Standard, online: [http://www.icao.int/cgi/goto\\_m.pl?icao/en/anb/mais/index.html](http://www.icao.int/cgi/goto_m.pl?icao/en/anb/mais/index.html) (date accessed: 1 August 2005) [Making an ICAO Standard].

<sup>162</sup> Buergenthal, *supra* note 20 at 62.

<sup>163</sup> Making an ICAO Standard, *supra* note 161. This review is normally limited to the consideration of controversial issues which, in the opinion of the Secretariat or the relevant body require examination before the recommendations are circulated to States for comments.

<sup>164</sup> *Ibid.* Traditionally, States are given a period of three months within which to review these proposals and to submit their comments. See Buergenthal, *supra* note 19 at 63.

<sup>165</sup> Making an ICAO Standard, *supra* note 161.

<sup>166</sup> Buergenthal, *supra* note 20 at 63.

SARPs must be submitted to States for comment after the preliminary review of the Secretariat.<sup>167</sup> As noted by Buergenthal, "...this consultative process reduces the likelihood that any SARPS will be adopted to which a significant number of the contracting States are opposed."<sup>168</sup> However, since the membership of ICAO consists of the most advanced industrial nations of the world as well as the most underdeveloped ones, it may be assumed that the use of the consensus-oriented procedure outlined above would inevitably result in the adoption of compromise and watered-down legislation that fails to optimally address the all issues concerned.<sup>169</sup>

### **2.2.2 'Becoming Effective' and 'Coming into Force' of SARPs**

Art. 90 of the Chicago Convention, 1944, provides:

(a) The adoption by the Council of the Annexes described in Article 54, subparagraph (1), shall require the vote of two-thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each contracting State. Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council.

(b) The Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto.

The Convention does not define the phrases 'become effective' and 'come into force' as used in Art. 90. Neither is there any indication as to when an Annex is deemed to have come into force within the meaning of Art. 90(b), although the Council is required immediately to notify all contracting States of this event. These observations, coupled with the fact that SARPs adopted by the Council are designated as Annexes to the Chicago Convention, 1944, only for the sake of convenience and, as such, do not form an

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> Yaw Otu Mankata Nyampong, *The Regulation of Aircraft Engine Emissions from International Civil Aviation* (LL.M. Thesis, McGill University, 2005) [unpublished] [Yaw].

integral part of, and possess the same legal force as, the Convention,<sup>170</sup> raise serious doubts about the legal status and effect of SARPs.

In the opinion of Buergenthal, at least three interpretations of Art. 90(b) are possible.<sup>171</sup> The language used in the provision might imply (1) that, an Annex which has become effective under Art. 90(a) requires a further legislative act before it is deemed to have been formally enacted; or (2) that, the expression ‘coming into force’ that appears in Art. 90(b) is used as a synonym for the expression ‘becoming effective’ as appears in Art. 90(a); or (3) that ‘coming into force’ was used in Art. 90(b) to describe not one but two distinct concepts traditionally associated with this phrase: ‘to be enacted’ as well as ‘to become applicable’.<sup>172</sup> Since the Convention offers no clues, one has no other option but to consider the practice of ICAO in order to ascertain the meaning of Art. 90.

In 1948, the Council interpreted Art. 90, albeit only by implication, when it promulgated the ‘Standard Form Resolution for the Adoption of Annexes’.<sup>173</sup> Paragraph 2 of the aforementioned Resolution provides a period of 120 days following the adoption of the Annex within which contracting States must register their disapproval of the Annex. On the said 120<sup>th</sup> day, the Annex shall become effective provided a majority of contracting States have not registered their disapproval to it. Paragraph 6 of the same Resolution provides that the Annex shall come into force and be implemented on the 365<sup>th</sup> day following its adoption, and under paragraph 7, states are to be notified forthwith of the becoming effective as well as of the date of coming into force of the Annex.<sup>174</sup>

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<sup>170</sup> Chicago Convention, 1944, *supra* note 3 at Art 54(l); Bin Cheng, *The Law of International Air Transport* (New York: Oceana, 1962) at 64 [Bin Cheng]; Roderick D. van Dam, “Regulating International Civil Aviation: An ICAO Perspective” in Tanja L. Masson-Zwaan & Pablo M.J. Mendes de Leon, eds., *Air and Space Law: De Lege Ferenda*, (Dordrecht: Martinus Nijhoff, 1992) 11 at 13 [van Dam]; Detter, *infra* note 192 at 248 where she notes that unlike the Technical Annexes to the Paris Convention, 1919, which formed part of, and had the same force as the Convention (Paris Convention, 1919), the Annexes to the Chicago Convention, 1944, do not have the same compulsory force as the Convention (Chicago Convention, 1944). They are placed on a more voluntary basis, being subject to a number of safeguards.

<sup>171</sup> Buergenthal, *supra* note 20 at 69. He notes further that the legislative history relating to Art. 90 of the Chicago Convention, 1944, is, at best, inconclusive on this point.

<sup>172</sup> Buergenthal, *ibid.* at 69.

<sup>173</sup> *Ibid.* at 70.

<sup>174</sup> ICAO, *Proceedings of the Third Session of the Council, 1948*, ICAO Doc. 7310 C/846 at 24-25 [Proceedings III]. See also *ibid.* at 69-76 for a comprehensive outline of the discussions within the Council before and after the adoption of the ‘Standard Form Resolution for the Adoption of Annexes’.

Though not a formal amendment of Art. 90, the use of the phrase ‘shall come into force and be implemented’ in paragraph 6 of the ‘Standard Form Resolution for the Adoption of Annexes’ raised concerns for some members of the Council in 1951 during the adoption of Annex 14 (Aerodromes).<sup>175</sup> It was argued that if implementation meant carrying out the provisions of the Annex, the Council was acting in contravention of the spirit of the Convention by fixing an implementation date because of the heavy burden it would place on states if they had to implement the standards with respect to all their airports on one specified date.<sup>176</sup> These arguments made it abundantly evident to the Council that states had no clear understanding of their obligations under the Convention and that this confusion was compounded by the language used in the ‘Standard Form Resolution for the Adoption of Annexes’. Contracting States did not have an idea of what was meant when the Convention spoke of the ‘becoming effective’ or the ‘coming into force’ of SARPs contained in Annexes adopted by the Council.

The ensuing debates in the Council eventually led to the adoption of a ‘Revised Form of Resolution of Adoption of an Annex’ in 1953.<sup>177</sup> Paragraph 1 of the ‘Revised Form of Resolution of Adoption of an Annex’ announces the adoption of SARPs by the Council and the date of adoption of the Annex in which they are contained. The date on which the SARPs contained in the said Annex shall become effective is prescribed expressly in paragraph 2, subject to the right of states to register their disapproval. Paragraph 3 reads: “The council resolves that those standards and recommended practices that have become effective shall become applicable in accordance with Chapter... [Chapter on Applicability] of the Annex.”<sup>178</sup> The ‘Revised Resolution of Adoption of an Annex’ has remained in effect since its adoption in 1953.

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<sup>175</sup> Buergenthal, *ibid.* at 71.

<sup>176</sup> *Ibid.*

<sup>177</sup> ICAO, *Proceedings of the Eighteenth Session of the Council, 1953*, ICAO Doc. 7361 C/858, Appendix A at 199 [Proceedings XVIII]. The relevant parts of the ‘Revised Form of Resolution for the Adoption of an Annex’ are reproduced in Buergenthal, *ibid.* at 74.

<sup>178</sup> *Ibid.*

In the opinion of Buergenthal, an analysis of the ‘Revised Form of Resolution of Adoption of an Annex’ and the debates preceding its adoption indicates that the Council had always proceeded on the assumption that “an Annex, which has ‘become effective’ in accordance with the provisions of Art. 90(a), has acquired the status of a duly enacted legislative act.”<sup>179</sup> “Furthermore, by settling on ‘shall become applicable’ in its ‘Revised Form of Resolution of Adoption of an Annex’ instead of retaining ‘shall come into force and be implemented’, the Council clearly intended to dispel the erroneous assumption that the contracting States were under an obligation to implement an Annex as soon as it had entered into force.”<sup>180</sup> Thus, ‘become effective’ as used in Art. 90(a) means that the Council has duly enacted the Annex, and ‘coming into force’ as used in Art. 90(b) means that the Annex has become applicable.<sup>181</sup>

It then follows that until the SARPs contained in an Annex have come into force, or become applicable, they do not create legal obligations as far as the member States of ICAO are concerned,<sup>182</sup> although they may have become effective (i.e. they may have been duly enacted as laws). It will be seen below (in the subsection- ‘Notification of Differences by States’) that this position results in an absurd situation in relation to the duty of contracting States to notify ICAO about differences between their national regulations and practices and the SARPs enacted by the Council. This author suggests that an amendment of the necessary and relevant provisions along the lines of the ‘Revised Form of Resolution of Adoption of an Annex’ would bring about some clarity and certainty as regards the legal effect of SARPs adopted by the Council.

One issue that emerges from the provisions of Art. 90 is that SARPs are not binding on contracting States against their will. Art. 90(a) permits a majority of the contracting States, after the Council has notified them of the adoption of an Annex and before the

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<sup>179</sup> Buergenthal, *ibid.* at 74-75.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.* at 75.

<sup>182</sup> *Ibid.* at 76.

Annex becomes effective, to register their disapproval of the said Annex<sup>183</sup> or any part thereof.<sup>184</sup> If a majority of the contracting States so indicate their disapproval of the Annex, it does not attain the status of being enacted and fails accordingly. However, this situation has never occurred in practice.<sup>185</sup>

### **2.2.3 Notification of Differences by States**

Under Art. 38, contracting States have no legal obligation to implement or comply with the provisions of a duly enacted Annex unless they find it practicable to do so, and they so notify ICAO.<sup>186</sup> In other words, the SARPs prescribed in an Annex are not binding legislative enactments as that concept is traditionally understood.<sup>187</sup> Art. 38 provides:

Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.

By necessary implication, Art. 38 entrusts each contracting State with the discretion to decide whether or not to comply with a given SARP promulgated by the Council. By requiring the notification of differences in all those instances in which a contracting State might conceivably depart from an international standard, Art. 38 inherently recognizes

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<sup>183</sup> Bin Cheng, *supra* note 170 at 64.

<sup>184</sup> Buergenthal, *supra* note 20 at 66-69.

<sup>185</sup> As revealed by Dr. Milde in a conversation. January 2005.

<sup>186</sup> *Ibid.* at 76.

<sup>187</sup> *Ibid.* at 77.



that states are free not to adhere to the SARPs.<sup>188</sup> The only duty incumbent upon a contracting State deciding to depart from a SARP is to give immediate notification to the ICAO of the differences between its own regulations or practices and those established by the international standard in question.<sup>189</sup>

It has been argued by some authors that this discretion may be exercised by a contracting State in respect of an existing SARP at any time.<sup>190</sup> Thus, a contracting State may notify ICAO of differences between its own regulations and practices and those established by some existing SARPs although that state might have previously adhered to them. To support of this assertion, Buergenthal notes that "...this result follows from the notification requirement prescribed in Art. 38 for differences that arise whenever a state 'deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard,' for if a state must give notice whenever it enacts legislation in conflict with a standard to which it may or may not have adhered, it is at any time free to take this action so long as it complies with the necessary formalities."<sup>191</sup>

Detter however, makes a contrary argument. Commenting on Art. 38, she placed emphasis on the words 'shall give immediate notification' as used in Art. 38 and disagreed with any interpretation of Art. 38 that would suggest that "a State 'at any time' can avoid to be bound by Standards; ...and there would be no legal obligation." She argued instead that, "...the practice shows that all Standards indicate a time-limit for reservations",<sup>192</sup> but failed to cite the practice to which she was referring. It appears that Detter could not make a distinction between the right of states to register their disapproval with an Annex prior to its becoming effective, as provided in Art. 90, and the right of states to notify ICAO of differences between their regulations and practices and

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<sup>188</sup> *Ibid.* at 77-78.

<sup>189</sup> Bin Cheng, *supra* note 170 at 65.

<sup>190</sup> Buergenthal, *supra* note 20 at 78.

<sup>191</sup> *Ibid.* at 79.

<sup>192</sup> Ingrid Detter, *Law Making by International Organizations* (Stockholm: P.A. Norstedt & Söners Förlag, 1965) at 251 [Detter].

those established by the SARPs, after the SARPs have become effective, as provided in Art. 38.<sup>193</sup> Such being the case, the views of Buergenthal on this issue are more persuasive and are thus to be preferred.

The obligation of contracting States to notify ICAO of differences under Art. 38 is two pronged. Immediate notification by the state is required whenever the practices or regulations of a state do not conform to or depart from those 'established' by an international standard. On the other hand, notification by the state needs to be made within sixty days of the 'adoption' of an amendment to an international standard whenever a contracting State does not intend to conform its practices or regulations to the provisions of the amendment.<sup>194</sup> According to Buergenthal's opinion, "...the ostensibly unambiguous language of Art. 38 raises certain problems, because the terminology used in this provision does not correspond to the legislative scheme prescribed in Art. 90 for the adoption and promulgation of international standards."<sup>195</sup>

As noted above, Art. 38 requires the notification of differences by contracting States immediately after a standard has been established. It is however not very clear whether the establishment of a standard refers to its becoming effective (enactment) or its coming into force (becoming applicable) as provided in Art. 90.<sup>196</sup> This textual discrepancy between Arts. 38 and 90 is even more befuddling when one considers the obligation of a contracting State to notify ICAO of differences between its national practices or regulations and those required by amendments to an international standard. Art. 38 requires in this case that the notification be made within sixty days of the adoption of the

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<sup>193</sup> Detter states, "Only a relatively small number of States have disapproved of the Annexes. On 15<sup>th</sup> September 1948, the last day for reservations, the disapproval of eight states had been registered to Annexes I and II, whereas no reservations had been made to Annex V. To the other Annexes, reservations had only been made to a limited extent." See *ibid.* Apparently Detter was referring to disapprovals rather than notification of differences when she used the word 'reservations'. Indeed, whereas Art. 90 indicates a time limit of three months for the entry of disapprovals by contracting States, no such time limit is indicated in Art. 38 for the notification of differences, except in the case of amendments to Annexes.

<sup>194</sup> Buergenthal, *supra* note 20 at 88-89.

<sup>195</sup> *Ibid.* at 89.

<sup>196</sup> *Ibid.*

amendment.<sup>197</sup> It will be recalled that under Art. 90(a), upon its adoption by the Council, an Annex or an amendment thereto does not become effective until after three months, provided that within that period, a majority of states do not register their disapproval with the Annex or amendment thereto. Since the sixty day period prescribed in Art. 38 for the notification of differences begins upon the adoption of the amendment to the international standard, the deadline for the notification of differences would expire thirty days before it would be known whether the amendment has in fact become effective.<sup>198</sup> The situation therefore is quite ridiculous.

Once again, ICAO has attempted to resolve this inconsistency through its own internal mechanisms but without recourse to a formal amendment of the Convention. In 1948, in its 'Standard Form Resolution for the Adoption of Annexes'<sup>199</sup>, the Council prescribed that an Annex, or an amendment thereto, shall become effective 120 days after its adoption by the Council unless it had in the meantime been disapproved by a majority of the contracting States.

On the issue of notification of differences, paragraph 7 of the 'Standard Form Resolution for the Adoption of Annexes' requires that on or before the 270<sup>th</sup> day following the adoption of an Annex or an amendment thereto, each contracting State should notify ICAO of any differences that will exist between its national regulations or practices and those contained in the said Annex or amendment upon the coming into force of the latter so as to enable ICAO to notify all contracting States thereof; and that any difference which occurs after the coming into force of the Annex or amendment shall be immediately notified to ICAO.<sup>200</sup> This formulation thus provides states some reasonable

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<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.* at 89-90. Buerghenthal attributes the extremely poor draftsmanship exhibited in Arts. 38 and 90 to the fact that the framers of the Convention had initially assumed that the Annexes would be drafted at the time of the Convention and would therefore form an integral part of the Convention. However, due to the paucity of time, the attempt to adopt the final set of Annexes at the same time as the conclusion of the Convention was abandoned. This necessitated last-minute adjustments to the text of the Convention, which were probably not very carefully examined, thus leading to the absurd results we have here.

<sup>199</sup> Proceedings III, *supra* note 174 at 24-26. See also Buerghenthal, *supra* note 20 at 90-91.

<sup>200</sup> *Ibid.*

time period, after the becoming effective of an Annex or amendment thereto, to notify ICAO of differences.

The formulation above was carried over into the 'Revised Form of Resolution for the Adoption of an Annex'<sup>201</sup>, adopted by the Council in 1953 with a minor addition. Under paragraph 4(ii)(b) of the Revised Form, each contracting State is required to notify ICAO, before the dates on which the standards will become applicable, of the date or dates by which it will have complied with the provisions of the standards.<sup>202</sup> In keeping with the comments made with respect to Art. 90, it is suggested that a formal amendment of Art. 38 along the lines of the approach adopted in the 'Revised Form of Resolution for the Adoption of an Annex' would bring about clarity and certainty so far as the obligations of contracting States in that regard are concerned.<sup>203</sup>

Another issue arising from the provisions of Art. 38 relates to the legal consequences that flow from the failure of a contracting State to notify ICAO of differences after an Annex has become applicable. Arguably, the Council has power under the Convention to impose sanctions against contracting States that fail to report differences.<sup>204</sup> However, the Convention is silent as to whether or not the Annex in question is binding on a contracting State that fails to notify ICAO of any differences between its national practices and regulations and those established by the Annex.<sup>205</sup>

To address the above dilemma, some authors assert that if states do not file differences between their own regulations and practices and those established by the Annex, they are bound by the standards and are deemed to have implemented them.<sup>206</sup> Cheng and

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<sup>201</sup> Proceedings XVIII, *supra* note 177.

<sup>202</sup> *Ibid.* at paragraph 4(ii)(b). See also Buergenthal, *supra* note 20 at 92.

<sup>203</sup> Yaw, *supra* note 169.

<sup>204</sup> Chicago Convention, 1944, *supra* note 3 at Arts. 54(j), 54(k), 84, 85, 86, 87 and 88.

<sup>205</sup> Yaw, *supra* note 169.

<sup>206</sup> Jacques Ducrest, "Legislative and Quasi-Legislative Functions of ICAO: Towards Improved Efficiency" (1995) XX:I Ann. Air & Sp. L. 343 at 355 [Ducrest]; George A. Coddington, "Contributions of the World Health Organization and the International Civil Aviation Organization to the Development of International Law" (1965) Proceedings of the American Society of International Law 147 at 149. Coddington notes "...any regulation thus adopted 'becomes effective'... three months after its submission to the

Ducrest have gone to the extent of stating that a contracting State which fails to notify a difference is internationally liable to another contracting State, or the nationals thereof, which suffers damage as a result of a mistaken belief that the lack of notification meant compliance with the international standards.<sup>207</sup>

Buergenthal holds a different opinion altogether, one that seems more acceptable. He cites the practice of ICAO in support of the view that ICAO does not presume failure by a contracting State to notify differences as indicating compliance with the provisions of the Annex in question.<sup>208</sup> He notes that, "...in the early years of ICAO's existence, the Council, when adopting an Annex or amendments thereto, often stipulated in the preamble to the resolution of adoption that each contracting State 'is presumed to have complied with the provisions of an Annex on the date on which it came into force unless, prior to that date, it had notified the Organization of any differences between its national regulations and practices and the international standards contained in the Annex.' By 1953 this clause had fallen into disuse."<sup>209</sup>

He notes further that the Council began to request each contracting State to notify ICAO, before the dates on which the standards would become applicable, of the date or dates by which it will have complied with the provisions of the standards.<sup>210</sup> By formally requesting notification of compliance, ICAO may be deemed to have determined that no presumption of compliance attaches to the failure to notify differences under Art. 38. "It

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contracting states or within some other time limit established by the Council, unless the majority of contracting States register their disapproval with the Council. Silence, therefore, means approval."; Charles Henry Alexandrowicz, *The Law Making Functions of the Specialised Agencies of the United Nations* (London, UK: Angus & Robertson, 1973) at 46. Alexandrowicz makes this point, albeit indirectly, when he states: "While standards are not binding in international law on member States..., the duty of notification of departure from a standard (passed by the Council) is a legal duty, for all member States must know to what extent a standard is uniform and to what extent there are deviations..."

<sup>207</sup> Bin Cheng, "Centrifugal Tendencies in Air Law" (1957) 10 Curr. Legal Probs. 200 at 205-06; Ducrest, *supra* note 206 at 355.

<sup>208</sup> Buergenthal, *supra* note 20 at 99; See also van Dam, *supra* note 170 at 14-15. Van Dam argues that, although it is tempting to conclude that no news is good news and no reaction by a state means full adherence to a standard (as Art. 38 only requires action in case of a difference), it would be incorrect to assume that non-responsive states have fully implemented the relevant standards.

<sup>209</sup> Buergenthal, *ibid.* at 99.

<sup>210</sup> On this point, Buergenthal cites the 'Revised Form of Resolution of Adoption of an Annex' adopted by the Council in 1953.

is thus readily apparent that ICAO itself no longer assumes that silence denotes compliance.”<sup>211</sup>

## **2.3 US laws**

This section examines the manner in which the US has attempted to tackle the myriad issues surrounding aviation security by creating laws to strengthen the same.

### **2.3.1 Antihijacking Act, 1974**<sup>212</sup>

The Antihijacking Act, 1974, implements the Hague Convention, 1970. It imposes penalties for carrying weapons or explosives on board an aircraft and a penalty of twenty years imprisonment or death if a passenger is killed during a hijacking. It also empowers the US President to suspend the landing rights of any nation known to harbor hijackers.<sup>213</sup>

### **2.3.2 Air Transportation Security Act, 1974**<sup>214</sup>

The Air Transportation Security Act, 1974, authorizes the screening of passengers and baggage for weapons. As a consequence, US airports have been equipped with magnetometers to check passengers and X-ray machines to check luggage.<sup>215</sup>

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<sup>211</sup> Buergethal, *supra* note 20 at 100.

<sup>212</sup> *Antihijacking Act, 1974*, Pub. L. 93-366, tit. I 88 Stat. 409 (1974).

<sup>213</sup> Dempsey, Aviation Security, *supra* note 2 at 697. Accord Dempsey, Aviation Security, *supra* note 2 at 699-700. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 207-209. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 372-373.

<sup>214</sup> *Air Transportation Security Act, 1974*, Pub. L. 93-366, tit. II 88 Stat. 415 (1974).

<sup>215</sup> Dempsey, Aviation Security, *supra* note 2 at 701-702. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 209-211.

### **2.3.3 Aircraft Sabotage Act, 1984**<sup>216</sup>

The Aircraft Sabotage Act, 1984, implements the Montréal Convention, 1971. It imposes penalties of up to US \$100,000 or twenty years imprisonment, or both, for the hijacking, damage, destruction or disabling of an aircraft or air navigation facility.<sup>217</sup> The most significant effect of this statute was the establishment of “criminal jurisdiction over certain aircraft-related offences, including extraterritorial jurisdiction over some offences, including aircraft or air navigation facilities of other countries that are not a party to the Montréal Convention, 1971, if the perpetrator is found in a signatory country”.<sup>218</sup>

### **2.3.4 International Security and Development Cooperation Act, 1985**<sup>219</sup>

The International Security and Development Cooperation Act, 1985, authorizes expenditure for enhancing security at foreign airports.<sup>220</sup>

### **2.3.5 Air Traveler Protection Act, 1985**<sup>221</sup>

The Air Traveler Protection Act, 1985, amends the Federal Aviation Act, 1958<sup>222</sup> and directs the Secretary of Transportation to assess the efficacy of security measures at foreign airports which serve US carriers or from which foreign air carriers serve the US.<sup>223</sup>

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<sup>216</sup> *Aircraft Sabotage Act, 1984*, Pub. L. 98-473, tit. II, Ch. XX, pt. B, 98 Stat. 2187 (1984).

<sup>217</sup> Dempsey, Aviation Security, *supra* note 2 at 697. Accord Dempsey, Aviation Security, *supra* note 2 at 702-703. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 211. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 373-374.

<sup>218</sup> 1984 US Code Cong. & Ad. News 3682.

<sup>219</sup> *International Security and Development Cooperation Act, 1985*, Pub. L. 99-83, tit. V, pt. A, 99 Stat. 219 (1985).

<sup>220</sup> Dempsey, Aviation Security, *supra* note 2 at 697. Accord Dempsey, Aviation Security, *supra* note 2 at 703-705. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 211-213. Accord Dempsey, Law and Foreign Policy, *supra* note 38 at 374.

<sup>221</sup> Dempsey, Aviation Law and Foreign Policy, *ibid.* at 374-376.

<sup>222</sup> *Federal Aviation Act, 1958*, Pub. L. No. 85-726, 72 Stat. 731.

<sup>223</sup> Bill Summary and Status for the 99<sup>th</sup> Congress, online: <http://thomas.loc.gov/cgi-bin/bdquery/z?d099:HR02796:@@L&summ2=m&> (date accessed: August 1<sup>st</sup>, 2005).

### **2.3.6 Foreign Airport Security Act, 1985**<sup>224</sup>

The Foreign Airport Security Act, 1985, requires the US Department of Transportation<sup>225</sup> Secretary to assess security at foreign airports and notify the public or suspend service if a foreign airport fails to correct a security breach. This enactment also requires that foreign airlines serving the US adopt and implement security procedures prescribed by the US government.<sup>226</sup>

### **2.3.7 Aviation Security Improvement Act, 1990**<sup>227</sup>

The Aviation Security Improvement Act, 1990, mandates background checks for airline and airport employees and imposes additional training, educational and employment standards upon them. It also requires deployment of bomb-detection technology for baggage.<sup>228</sup>

### **2.3.8 Federal Aviation Administration Reauthorization Act, 1996**<sup>229</sup>

The Federal Aviation Administration Reauthorization Act, 1996, requires passenger profiling, explosive detection technology, procedures for passenger-bag matching, and certification for screening companies.<sup>230</sup>

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<sup>224</sup> *Foreign Airport Security Act, 1985*, Pub. L. 99-83, tit. V, pt. B, 99 Stat. 222 (1985).

<sup>225</sup> Hereinafter "DOT".

<sup>226</sup> Dempsey, Aviation Security, *supra* note 2 at 697. Accord Dempsey, Aviation Security, *supra* note 2 at 705-707. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 213-217.

<sup>227</sup> *Aviation Security Improvement Act, 1990*, Pub. L. 101-604, 104 Stat. 3066 (codified as amended in scattered sections of 22 U.S.C.; 26 U.S.C.; 49 U.S.C.).

<sup>228</sup> Dempsey, Aviation Security, *supra* note 2 at 697-698. Accord Dempsey, Aviation Security, *supra* note 2 at 707-708. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 217.

<sup>229</sup> *Federal Aviation Administration Reauthorization Act, 1996*, Pub. L. 104-264, 110 Stat. 3213 (1996).

<sup>230</sup> Dempsey, Aviation Security, *supra* note 2 at 698. Accord Dempsey, Aviation Security, *supra* note 2 at 708-710. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 217-222.



### **2.3.9 Omnibus Consolidated Appropriations Act, 1997**<sup>231</sup>

The Omnibus Consolidated Appropriations Act, 1997, authorizes the purchase of advanced screening equipment for baggage.<sup>232</sup>

### **2.3.10 Airport Security Improvement Act, 2000**<sup>233</sup>

The Airport Security Improvement Act, 2000, requires fingerprinting and background checks of airport and airline security personnel at Category X airports<sup>234, 235</sup>

### **2.3.11 Aviation and Transportation Security Act, 2001**<sup>236</sup>

The Aviation and Transportation Security Act, 2001, federalizes the airport screening function and establishes the new Transportation Security Administration<sup>237</sup> under the DOT, to regulate security in all modes of transportation. The legislation also enhances baggage screening procedures and imposes more stringent personnel qualifications on security employees.<sup>238</sup>

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<sup>231</sup> *Omnibus Consolidated Appropriations Act, 1997*, Pub. L. No. 104-208, 570(f)(2), 110 Stat. 3009 (1996).

<sup>232</sup> Dempsey, Aviation Security, *supra* note 2 at 698. Accord Dempsey, Aviation Security, *supra* note 2 at 710-711. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 223.

<sup>233</sup> *Airport Security Improvement Act, 2000*, Pub. L. 106-528, 114 Stat. 2517 (codified as amended in scattered sections of 49 U.S.C.).

<sup>234</sup> Category X airports consist of the nineteen highest risk airports, such as John F. Kennedy international airport in New York, Dulles international airport in Washington D.C. and Los Angeles international airport.

<sup>235</sup> Dempsey, Aviation Security, *supra* note 2 at 698. Accord Dempsey, Aviation Security, *supra* note 2 at 711. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 223.

<sup>236</sup> *Aviation and Transportation Security Act, 2001*, Pub. L. 107-71, 15 Stat. 597 (codified in scattered sections of 5 U.S.C.; 26 U.S.C.; 31 U.S.C.; 42 U.S.C.; 49 U.S.C.).

<sup>237</sup> Hereinafter “TSA”.

<sup>238</sup> Dempsey, Aviation Security, *supra* note 2 at 698. Accord Dempsey, Aviation Security, *supra* note 2 at 712-717. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 226-234.

### **2.3.12 Air Transportation Safety and System Stabilization Act, 2001**<sup>239</sup>

The Air Transportation Safety and System Stabilization Act, 2001, is one of two statutes spawned by the events of 9/11. This statute does not address aviation security *per se* though it attempts to ameliorate the devastating legal and financial impact of the events of 9/11.<sup>240</sup>

### **2.3.13 Homeland Security Act, 2002**<sup>241</sup>

The Homeland Security Act, 2002, consolidates twenty-two agencies, including the TSA, into a new cabinet level Department of Homeland Security. This agency is conferred jurisdiction over, *inter alia*, transportation security, customs, immigration and agricultural inspections.<sup>242</sup>

### **2.3.14 Federal Aviation Regulations**

Federal Aviation Regulations are designed to ensure the security of airports serving scheduled air carriers required to have screening programs. In other words, air carriers have the responsibility to prevent and deter carriage of weapons and explosives aboard their aircraft by potential hijackers. Conversely, airports serving the applicable air carriers are responsible for preventing and deterring unauthorized access to the air operations area and for providing law enforcement support at passenger screening stations.<sup>243</sup>

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<sup>239</sup> *Air Transportation Safety and System Stabilization Act, 2001*, Pub. L. 107-42, 115 Stat. 230 (codified in scattered sections of 15 U.S.C; 19 U.S.C; 42 U.S.C; 49 U.S.C).

<sup>240</sup> Dempsey, Aviation Security, *supra* note 2 at 712. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 226.

<sup>241</sup> *Homeland Security Act, 2002*, Pub. L. 107-296, 116 Stat. 2135 (codified as amended in 3 U.S.C; 5 U.S.C; 6 U.S.C; 7 U.S.C; 8 U.S.C; 10 U.S.C; 14 U.S.C; 15 U.S.C; 18 U.S.C; 19 U.S.C; 20 U.S.C; 21 U.S.C; 26 U.S.C; 28 U.S.C; 31 U.S.C; 37 U.S.C; 38 U.S.C; 40 U.S.C; 41 U.S.C; 42 U.S.C; 44 U.S.C; 49 U.S.C; 50 U.S.C).

<sup>242</sup> Dempsey, Aviation Security, *supra* note 2 at 698. Accord Dempsey, Aviation Security, *supra* note 2 at 717-719. Accord Dempsey, Airline and Airport Security, *supra* note 35 at 237-238.

<sup>243</sup> Lawrence E. Gesell, *Aviation and the Law*, 3rd ed. (Chandler: Coast Aire, 1998) at 179.

Federal Aviation Regulations Parts 107, 108 and 109 provide for the safety of persons and property against acts of criminal violence and air piracy.<sup>244</sup>

Part 107 provides for the control of access to air operations areas by unauthorized persons and ground vehicles. No person may enter a sterile area without submitting to the screening of his or her person and property in accordance with the procedures being applied by the airport to control access to that area.<sup>245</sup>

Part 108 is designed to prevent or deter the carriage aboard airplanes of any explosive, incendiary or a deadly or dangerous weapon on or about each individual's person or accessible property, and the carriage of any explosive or incendiary in checked baggage. Under part 108, the airlines are to prohibit unauthorized access to their airplanes; to ensure that baggage carried aboard their aircraft is checked-in by an identified agent; to prohibit unauthorized access to cargo and checked baggage; and to conduct security inspections of their airplanes.<sup>246</sup>

Part 109 (Indirect Air Carrier Security) provides additional protection against criminal activity. This part prescribes aviation security rules governing each air carrier, including air freight forwarders and cooperative shipping associations, engaged indirectly in air transportation of property. Each indirect air carrier is required to have a security program designed to prevent or deter the unauthorized introduction of explosives or incendiary devices into any package cargo intended for carriage by air.<sup>247</sup>

### **2.3.15 Other Instruments Seeking to Reaffirm US Commitment to Aviation Security**

A protocol between the US and Belgium relating to air transport signed in Brussels in 1978, reaffirms under Art. 12, the commitment of both governments to act under and

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<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

constantly with the Tokyo Convention, 1963, the Hague Convention, 1970, and the Montréal Convention, 1971.<sup>248</sup>

Similarly, the US' current model 'open skies' agreement released by the Bureau of Economics and Business Affairs of the US Department of State reaffirms under Art. 7, the commitment of both parties to act under and constantly with the Tokyo Convention, 1963, the Hague Convention, 1970, the Montréal Convention, 1971, and the Montréal Protocol, 1988.<sup>249</sup>

Further, a multilateral agreement on the liberalization of international air transportation signed by the Asia Pacific Economic Cooperation members in Washington DC in 2001, reaffirms under Art. 7, the commitment of parties to act under and constantly with the Tokyo Convention, 1963, the Hague Convention, 1970, the Montréal Convention, 1971, and the Montréal Protocol, 1988.<sup>250</sup>

## **2.4 UK laws**

This section examines the manner in which the UK has attempted to tackle the myriad issues surrounding aviation security by enacting laws to strengthen the same.

### **2.4.1 Aviation Security Act, 1982**

The Aviation Security Act, 1982, is a statute consolidating certain enactments relating to aviation security.<sup>251</sup> Part I deals with offences against the safety of the aircraft and addresses the issue of hijacking, *inter alia*, and prescribes the form and nature of trial and punishment.

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<sup>248</sup> 30 U.S.T. 217, T.I.A.S. # 9903.

<sup>249</sup> Current Model Open Skies Agreement Text, online:  
<http://www.state.gov/e/eb/rls/othr/19514.htm> (date accessed: August 1<sup>st</sup>, 2005).

<sup>250</sup> Multilateral Agreement on the Liberalization of International Air Transportation, online:  
<http://www.maliat.gov.nz/other/index.shtml> (date accessed: August 1<sup>st</sup>, 2005).

<sup>251</sup> *Aviation Security Act 1982* (U.K.), 1982, Preamble.

Apropos airport security, the statute addresses “offences relating to security at aerodromes etc”.<sup>252</sup> Secs. 21A through 21E of the statute deal with topics such as false statements relating to baggage and cargo<sup>253</sup> and identity documents<sup>254</sup>; unauthorized presence in a restricted zone<sup>255</sup> and on board aircraft<sup>256</sup>; and offences relating to unauthorized persons<sup>257</sup>.

The aforementioned sections lack details about the subject they are addressing and are merely used as enforcement mechanisms **after** the offence has been committed and in some cases, plausibly, as a deterrent. These sections, while *prima facie* substantive and procedural, are in fact punitive.

#### **2.4.2 Airports Act, 1986**

Although the Airports Act, 1986, pertains to airports in the UK, the enactment is not authoritative in terms of the law with respect to airport security. The closest it comes in this regard is under a section titled “Directions to airport operators in the interests of national security”.<sup>258</sup>

#### **2.4.3 Aviation and Maritime Security Act, 1990**

The Aviation and Maritime Security Act, 1990, is a UK legislation to give effect to the Montréal Protocol, 1988.<sup>259</sup> Like its predecessor enactments (discussed above) this legislation is substantive, procedural and punitive in nature and borrows in part from the Aviation Security Act, 1982, notably from its sections 21A through 21E.

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<sup>252</sup> *Ibid.* at Sec. 21A to 21E.

<sup>253</sup> *Ibid.* at Sec. 21A.

<sup>254</sup> *Ibid.* at Sec. 21B.

<sup>255</sup> *Ibid.* at Sec. 21C.

<sup>256</sup> *Ibid.* at Sec. 21D.

<sup>257</sup> *Ibid.* at Sec. 21E.

<sup>258</sup> *Airports Act 1986* (U.K.), 1986, Sec. 30.

<sup>259</sup> *Aviation and Maritime Security Act 1990* (U.K.), 1990, Preamble.

#### **2.4.4 Terrorism Act, 2000**

The Terrorism Act, 2000, was enacted to provide for terrorism, to make temporary provision for the prosecution and punishment of certain offences and for the preservation of peace and the maintenance of order in Northern Ireland.<sup>260</sup> It may be instructive to note the contents of Sec. 53 read with Schedule 7<sup>261</sup> of the said legislation as they collectively deal with, *inter alia*: the power to stop, question and detain; searches; detention of property; embarkation and disembarkation; carding and provision of passenger information.

#### **2.4.5 Aviation (Offences) Act, 2003**

The Aviation (Offences) Act, 2003, was enacted to make provision for the enforcement of 'certain offences' related to aviation.<sup>262</sup> While it does not squarely address airport security related crimes, this author feels it may be used in a supplementary fashion when and where the need arises to fill any lacunae in the existing laws.

### **2.5 Indian laws**

This section examines the manner in which India has attempted to tackle the myriad issues surrounding aviation security by enacting laws to strengthen the same.

#### **2.5.1 Aircraft Act, 1934**

The Aircraft Act, 1934, is regarded as the basic constitutional law of aviation in India.<sup>263</sup> While it appears that this status was acquired due to it being the first statute to regulate

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<sup>260</sup> *Terrorism Act 2000* (U.K.), 2000, Preamble.

<sup>261</sup> Port and Border Controls.

<sup>262</sup> *Aviation (Offences) Act 2003* (U.K.), 2003, Preamble.

<sup>263</sup> S.Bhatt, "A Survey of Current Air Law in India" in S.Bhatt, V.S. Mani, V.Balakista Reddy, eds., *Air Law and Policy in India* (New Delhi: Lancer Books, 1994) 53 at 54 [Bhatt].

civil aviation in India,<sup>264</sup> this statute, on closer scrutiny, fails to address certain key issues<sup>265</sup> of importance to civil aviation today. One might excuse these omissions in light of the fact that the issues in question were not matters of import in 1934. However, this statute covers most other aspects of civil aviation by vesting/granting power in/to authorities/bodies to make laws governing civil aviation in India.

The purpose of the Airport Act, 1934, is to make better provision for the control of the manufacturing, possession, use, operation, sale, import and export of aircraft.<sup>266</sup> This said, the concept of aviation security, let alone airport security, is not once mentioned. However, it is noteworthy that for the *security* of India and to *secure the safety* of aircraft operations, it does make provision:

The Director-General of Civil Aviation or any other officer specially empowered in this behalf by the Central Government may, from time to time, by order, issue directions, consistent with the provisions of this act and the rules made thereunder, with respect to any of the matters specified in clauses (b), (c), (e), (f), (g), (h) and (m) of sub-section (2) of section 5, to any person or persons engaged in aircraft operations or using any aerodrome, in any case where the Director-General of Civil Aviation or such other officer is satisfied that in the interests of the security of India or for securing the safety of aircraft operations it is necessary so to do.<sup>267</sup>

### **2.5.2 Aircraft Rules, 1937**

The Aircraft Rules, 1937, contain rules that apply to the operation and use of aircraft as well as rules of the air relating to the public order in air space.<sup>268</sup> Part XI (Rules 78 through 92) deals with airports (management aspects), but here again airport security does not seem to feature on the drafters' agenda.

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<sup>264</sup> The Indian Aircraft Rules, 1920 (Rules 53 through 63) predate the Aircraft Act, 1934. However, they seem to apply only to aircraft arriving or departing from India and are applicable customs rules. *Ibid.* at 70.

<sup>265</sup> Airport security, biometric testing, facilitation, insurance, machine readable travel documents, terrorism to name but a few.

<sup>266</sup> *Aircraft Act, 1934*, Preamble.

<sup>267</sup> *Ibid.* at Sec. 5(a).

<sup>268</sup> Bhatt, *supra* note 263 at 58.

### **2.5.3 International Airports Authority Act, 1971; National Airports Authority Act, 1985; and Airports Authority of India Act, 1994**

These laws share common ground in that all are concerned with the administration and management of airports in India. However, like the other Indian laws discussed above, none of these has any bearing on the aspect of airport security. Nevertheless, they do vest authorities created under them with the power to make rules and regulations to deal with, *inter alia*, “securing the safety of aircraft, vehicles and persons using the airport *or civil enclave* and preventing danger to the public arising from the use and operation of aircraft in the airport *or civil enclave*”.<sup>269</sup>

### **2.5.4 Tokyo Convention Act, 1975**

The Indian law makers did not perform any feat of originality as they enacted this statute to give effect to the Tokyo Convention, 1963, in India. Portions of the Tokyo Convention, 1963, were incorporated into this statute *mutatis mutandis*. Chapter III (Secs. 3 through 8) of the Tokyo Convention Act, 1975, contains the substantive provisions and details the offences that are to be considered. Since the Tokyo Convention, 1963, has already been discussed, it shall not be addressed further.

### **2.5.5 Anti-Hijacking Act, 1982**

This law was enacted on the lines of the Tokyo Convention Act, 1975. It gives effect to the Hague Convention, 1970, in India. Chapter II (Secs. 3 through 6C) of the Anti-Hijacking Act, 1982, contains the substantive provisions and details the offences that are

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<sup>269</sup> *National Airports Authority Act, 1985*, Sec. 38(2)(h); *Airports Authority of India Act, 1994*, Sec. 42(2)(h). *International Airports Authority Act, 1971*, Sec. 37(2)(g). It must be noted that the *International Airports Authority Act, 1971* under sec. 37(2)(g) does not include the *italicized* part of the text (“*or civil enclave*”) being referenced here.



to be considered. Since the Hague Convention, 1970 has already been discussed, it shall not be addressed further.<sup>270</sup>

### **2.5.6 Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982**

Similar to the previous two Indian laws under discussion, this law was given currency by the Indian law makers so as to give effect to the Montréal Convention, 1971, in India. Chapter II (Secs. 3 through 5D) of this legislation contains the substantive provisions and details the offences that are to be considered. Since the Montréal Convention, 1971, has already been discussed, it shall not be addressed further.

### **2.5.7 Statutory Notifications Affecting Aviation in India**

The Aircraft Manual of India contains important notifications issued by the Government of India under the Aircraft Act, 1934, affecting civil aviation in India.

A notification of 1966 authorizes certain officers of the Directorate General of Civil Aviation to exercise powers under the Aircraft Act, 1934, and the Aircraft Rules, 1937.<sup>271</sup>

A 1981 notification confers power on an officer, under rule 8A of the Aircraft Rules, 1937, for security check of persons boarding aircraft.<sup>272</sup>

## **2.6 Concluding Observations**

As is evident from the examination of the existing laws in UK and India, there are few if none which directly regulate airport security. The US, however, is somewhat more

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<sup>270</sup> It may be interesting to note that the Indian drafters, in all their wisdom of the English language, have decided to *redefine* (maybe even *redraft*) the concept of 'hijacking' when they, in the Table of Contents to the Anti-Hijacking Act, 1982, spell hijacking as 'highjacking [sic]'. High-ly amusing!

<sup>271</sup> Bhatt, *supra* note 263 at 83.

<sup>272</sup> *Ibid.*

advanced in this respect, but one might argue that such advancement is more as a result of genuine paranoia and that some statutes were created reactively and not proactively, after events had transpired that necessitated their creation. The US in some senses needed a metaphorical 'shot in the arm' before it could swing into action and one hopes other countries do not wait till they fall- themselves, before picking themselves up. Sometimes, it may seem prudent to learn from another's 'mistakes' rather than enjoying the luxury of one's own (mistakes).

Looking to the fabric of laws that have been woven to depict the tapestry of aviation security, it may well be questioned whether this piecemeal and purely reactive approach is the best way to tackle international problems in general and (international) terrorism in particular. It is opined that what governments really do, is solely or largely a mere public relations exercise in order to show that something has been done and that some response has been made. After all the fanfare has died down, in terms of legal obligations, no more than a mouse is born.

With regard to international treaties and instruments of like nature, there are lacunae that need to be addressed there too. While a universally applicable (in some senses 'ubiquitous') panacea might be hard to achieve, nations must not shirk from trying to create one.

## **CHAPTER 3**

### **Extant Airport Security Procedures**

This chapter will detail some of the prevalent practices with regard to airport security procedures. Given the highly technical nature of the subject under discussion, an effort will be made to keep the information simple.

#### **3.1 Airport Security Procedures**

Common passenger screening technologies across airports can be broadly categorized as imaging technologies, trace detection technologies and non imaging electromagnetic technologies.<sup>273</sup>

Imaging technologies can detect metallic and non metallic objects in varying degrees of concealment using the same principles as an X-ray machine.<sup>274</sup>

Trace detection technologies are based on the direct chemical identification of either particles of explosive materials or vapor containing explosive material. The primary distinguishing feature between trace detection technologies and the other technologies is that in the former, a sample of the explosive material must be transported to the detection instrument in concentrations that exceed the detection limit. Trace detection technologies cannot be used to detect the presence of metallic weapons.<sup>275</sup>

Non-imaging electromagnetic technologies are commonly found in, *inter alia*, libraries and stores. This technology functions as a metal detector to detect theft. For airport use, a potential improvement would be necessary to make these technologies specifically

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<sup>273</sup> U.S., National Research Council, *Airline Passenger Security Screening* (Washington DC: 1996) at 13-21.

<sup>274</sup> *Ibid.* at 14.

<sup>275</sup> *Ibid.* at 16.

sensitive to weapons.<sup>276</sup> In the nine years since this report was presented, it would be surprising if the technological advancement being spoken of here has not been achieved.

A good airport security system employs one or more of the following for screening passengers and/or cargo:<sup>277</sup>

- a. Common X-ray machines. These machines have, in larger airports, given way to thermal neutron analysis<sup>278</sup>. X-Ray machines have traditionally been used at airports to screen baggage and cargo.
- b. Explosives detectors and metal detector gateways
- c. Primitive body search, wandering and sniffer dog searches
- d. Airline staff are trained in methods of psychological screening where they are exposed to the psychological profiles of hijackers. Staff are trained on identification techniques and if their suspicions are aroused, they notify airport security officials who then conduct a thorough search of the suspect.

In case of airports that are financially well off and where the daily traffic would justify the investment, quadrupole resonance devices seem to be an advancement on the traditional X-ray machines. Quadrupole resonance devices, which are a variant of the magnetic resonance imaging used in hospitals, are now being used for the purposes of baggage scanning. The technology operates under the principle that a magnetic resonance signal can be detected from explosives without applying a large external magnetic field.<sup>279</sup>

Biometric testing is another trend becoming popular in the aviation industry. Biometric security systems consider unique physical characteristics (fingerprints, voices, retinas)

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<sup>276</sup> *Ibid.* at 19.

<sup>277</sup> Laurie Taylor, "Aerial Piracy- A pilot Viewpoint" in Yonah Alexander & Eugene Sochor, eds. *Aerial Piracy and Aviation Security* (Dordrecht: Martinus Nijhoff, 1990) 33 at 44-48.

<sup>278</sup> This process, analyzes the gamma rays emitted by bombarding luggage with neutrons. During the analysis, if large amounts of nitrogen are detected, then there is a strong likelihood of the presence of an explosive.

<sup>279</sup> Kathleen M. Sweet, *Terrorism and Airport Security* (Lewiston: Edwn Mellen Press, 2002) at 479.

before confirming the identity of an individual.<sup>280</sup> This way, impersonating another individual becomes impossible.

Effective airport security involves planning, anticipation and the ability to outthink the terrorist. It also involves close cooperation between agencies that can work together to effectively block all security loopholes. Most successful models of airport security today consider the following facets<sup>281</sup>:

- a. Physical layout and design of the airport
- b. X-Ray and sniffer technology
- c. Qualified security personnel
- d. Airport's human communities
- e. Emergency response teams and policing
- f. Shared jurisdictions- airlines, airports and governments
- g. Role of the airport manager

As far back as 1967, the International Air Transport Association working with security chiefs of major airlines formed what was called the Security Advisory Committee. It is interesting to note that this committee came up with eight rules that it felt were necessary to ensure safe and secure skies. The specific conditions (which are valid even today) that the committee called for were<sup>282</sup>:

1. A sterile area for the boarding of all flights. Passengers and their hand baggage needed to be screened before entering this area. All other persons and items entering the area needed to be authorized to do so and would be subjected to security control measures.

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<sup>280</sup> *Ibid.* at 482.

<sup>281</sup> Peter St. John, *Air Piracy, Airport Security and International Terrorism*, (New York: Quorum Books, 1991) at 78.

<sup>282</sup> Rodney Wallis, *How Safe Are Our Skies?: Assessing the Airlines' Response to Terrorism* (Westport: Praeger, 2003) at 70.

2. Direct and discrete communication systems to link the passenger screening points and other access points to an airport control centre capable and designated to act quickly in cases of unlawful action.
3. Duly authorized law enforcement officers armed and equipped to conduct patrols within the airport complex and be readily available to assist in cases of suspected or actual unlawful interference with civil aviation operations.
4. Areas of restricted access to be adequately enclosed preventing unauthorized entry to the airside of the airport.
5. Positive airport identification displayed at all times by all staff working in the airside of the airport.
6. Physical barriers to be installed separating public areas from all baggage, cargo and mail (after their acceptance for carriage) and for facilities to exist to enable the screening of such items.
7. Aircraft parking areas to be adequately policed.
8. All public observation view points overlooking the airside to be adequately protected to ensure security.

### **3.2 Points to Ponder**

This author wishes to offer the reader the following thoughts that have struck him apropos airport security and expects that the law making bodies have already taken cognizance of the same and are currently working on them.

1. Airline and airport staff must be trained to broadcast seemingly innocuous messages on the public announcement system while trying to draw the attention of law enforcement

officers. This ensures that the person being scrutinized will not know that authorities have already summoned help, and might as a result, keep his guard down.

2. Airline and airport authorities must plant decoys trained in emergency services, first aid, martial arts and other like disciplines in the 'extra sterile' area of the airport under the guise of cleaners, electricians, hospitality representatives etc. This way, without attracting too much attention on themselves, the decoys can observe the activities of waiting passengers and act promptly if they note anything suspicious. In this manner, the advantage of the element of surprise, will vest in the authorities.

3. Given the current practice at airports in India (and maybe elsewhere too), where passengers are subject to more than one security check before boarding the aircraft, and where each security check is conducted by a different agency, one may wonder about the importance, thoroughness and validity of each. It is likely that by having more than one security check, each repetition of procedure will tend to undermine the credibility of its predecessor. Airport authorities must guard against this when drawing up a plan to establish a sound security check procedure.

4. While screening passengers, no form of preferential treatment must be accorded to dignitaries, diplomats, heads of state and other high ranking officials. In the eyes of airport authorities, all passengers must be equal irrespective of their age, category of travel, gender and race.

## **CHAPTER 4**

### **Conclusions**

Undeniably, laws play a vital role in ensuring the safety and security of civil aviation. However, their mere presence is not enough; rather, they must be complemented by sound procedures which have been tested for loopholes, ease of universal application, efficacy and feasibility. Unilateral action by states (such as the US) to require additionally high levels of security for incoming flights and a correspondingly lower level for outbound (international) flights is not a panacea.<sup>283</sup> To help bridge this perceived gulf, the following proposal may hold promise.

#### **4.1 A Model for Improving Check-In Procedures at Airports and Thereby Enhance Security**<sup>284</sup>

The airport complex is not a shopping mall. While admittedly a place of commerce, its true purpose should not be diluted by an inundation of merchant establishments.<sup>285</sup> The sterile areas of an airport should remain just that- sterile- and efforts must be channeled in this direction to minimize the number of people, other than legitimate passengers, accessing it.

It is proposed that the airport complex be made accessible only to legitimate passengers and the work force required to staff it. Friends, relatives and an assortment of other visitors who now have access to it, ostensibly to see off or receive their acquaintances,

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<sup>283</sup> The security procedures for flights into Washington DC's Reagan National airport (DCA) is far higher than those departing from it or into nearby Baltimore Washington International (BWI). A reason for this could be the vulnerability of the White House due to its proximity to DCA. One may argue, though, that the lives of those in the vicinity of BWI are equally precious as those found inhabiting the White House, thus calling for a standard level of security across *all* airports.

<sup>284</sup> This proposal is made while keeping a medium sized airport in mind. For larger or smaller airports with increased or reduced volumes of passengers and traffic, this proposal may be used *mutatis mutandis*.

<sup>285</sup> However, it would be foolish to ignore the substantial revenue airports generate from the merchant establishments they host- not just from the rent paid but also from the 'last minute' sales in which air passengers indulge. With flight cancellations and delays, passengers often require facilities within the airport complex itself to help them tide over their hunger, thirst and the most natural concomitant of flight cancellations and delays- ennui.



should be kept out of the airport complex thus rendering the number of people to an accountable and manageable level.<sup>286</sup> Only those people who *must* be there should be granted access.

In an attempt to deter inessential frequenting to the airport complex, it would be prudent to efface expansive parking facilities. It is proposed that there exist a centre located at a reasonable distance from the airport complex, at which passengers could be dropped off by their guests, and then be transported to the airport complex by the appropriate authorities and/or airlines. This system would likely cause a marginal rise in operational costs, but one which could reasonably be considered a very small price to pay for enhancing airport (and as a consequence aviation) security.<sup>287</sup>

Once a passenger reaches the airport complex, all check-in baggage should be thoroughly screened.<sup>288</sup> When the airport security official handling this operation is satisfied that the bag is safe and 'clean', a tamper proof seal should be affixed to it, and the bag returned to the passenger.<sup>289</sup>

The passenger would then proceed, with his bags, to the check-in counter to obtain his boarding card. Once the airline representative is satisfied with the credentials and identification documents of the passenger and has noted that the check-in baggage has been cleared for acceptance, the passenger should be relieved of such baggage, issued a baggage acceptance receipt and boarding card and given instructions to submit himself and his carry-on baggage for security clearance.

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<sup>286</sup> An added benefit of this move would be a decrease in the possibility of terrorist activities at the airport complex itself.

<sup>287</sup> While the elimination of parking facilities would reduce revenues generated from parking fees, the move would significantly reduce the incidence of terrorists planting vehicle bombs targeting airport facilities.

<sup>288</sup> The advantages of screening check-in baggage in the presence of the passenger are two fold. First, it would increase confidence in the passenger that his belongings were not tampered with. Second, should the airport security official so require, he could request the passenger to open his bags thus vitiating the need to break open locks.

<sup>289</sup> Opening the bag at any time after this security procedure is complete must render the seal invalid thus alerting airport security officials to the fact that another security check on the bag is required. Upon arrival, if a passenger discovers a tampered seal, his ability to make a claim against the airline would be simplified. Of course, this last issue may be considered controversial and may require fine tuning in order to avoid vexatious and false claims.

At this point, the computer system should correlate the advance passenger information and the passenger name record with details on 'no fly' and similar other lists to alert airline security staff of any potential threat posed by a particular passenger. Any positive response to this computer generated query should then be communicated to the airport security officials<sup>290</sup> who would proceed to scrutinize such a passenger and his baggage (check-in and carry-on) more closely before allowing him to access the aircraft.

When the passenger has obtained security clearance, he would be admitted to an 'extra sterile' pre-boarding waiting area, one with little or no external contact, such that he cannot accept any additional (and potentially hazardous) items to take on board.

Airport authorities should ensure that this 'extra sterile' area is equipped with sufficiently screened commercial establishments stocking products which are legitimately permitted on board aircraft.<sup>291</sup>

Further, this area should be staffed with individuals who have been subject to extensive and exhaustive background checks, decreasing the possibility of an 'accomplice' acquired or known to be in this 'extra sterile' area.

Once the passenger is asked to board his flight and the airline takes note of his having boarded the aircraft, computer systems should alert baggage handlers that a passenger-bag match has taken place and that his checked-in baggage may safely be loaded onto the aircraft. This process would not only ensure that the passenger accompanies his baggage, but would also reduce the chance of misplaced luggage.

It is also suggested that the procedure described above be applied to transit passengers as well. Should this procedure gain universal acceptance and application, air faring nations

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<sup>290</sup> The airline staff should be in a position to inform airport security officials in a discrete and innocuous manner without arousing unnecessary anxiety or suspicion.

<sup>291</sup> Swiss army knives, cigarette lighters and souvenirs that could potentially be used as weapons on board aircraft are some of the items which should be proscribed.

would likely be more confident in the security of flights to and from other countries and could then devote their efforts to other, more productive, aspects of civil aviation.

#### **4.2 Final Remarks**

As has been noted in the course of this study, there is no shortage of laws aimed to handle situations after an aircraft has been made the victim of a terrorist act. Moreover, international organizations such as the UN and the ICAO have made numerous public condemnations of terrorist acts and those behind them. Political leaders, too, get swept into this momentum and easily fall upon the now trite clichés that have become the unofficial anthem of many nations. Then, when the voices finally become exhausted from their fruitless ululation, nations begin clamoring for more stringent laws to punish the unknown offenders and to act as a deterrent for future crimes of similar suit.

The point is clear: nations, alongside international organizations, must realize that laws made reactively are of little consolation to those who have already suffered grief and loss. There is little solace in securing the metaphorical stable door after the horse has bolted. What nations and international organizations must focus on is the formulation of stringent laws, procedures and requirements applicable at an inchoate stage, mitigating harm from penetrating a higher level. For the civil aviation industry, the inchoate stage is the airport.

If airport security laws, procedures and requirements were tightened and rigorously monitored for consistency and continuity, then much time, effort and money could be saved—resources currently being expended on enacting, implementing, enforcing and interpreting *new* aviation security laws. It is hoped that ideas of a similar frequency to those contained in the model proposed above will perhaps resonate at a more efficacious location and inspire those in power to sit up and take note.

While it may be naïve to expect that all airport security staff are avid opera goers, the following excerpt from Gilbert and Sullivan's opera<sup>292</sup> would perhaps be a pragmatic piece of poetry to keep in mind while screening passengers and their baggage:

*Things are not what they seem,  
Skimmed milk masquerades as cream,  
Black sheep lurk in every fold,  
All that glitters in not gold.*<sup>293</sup>

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<sup>292</sup> HMS Pinafore (The Lass That Loved a Sailor), Act II, 1878, online:  
<http://math.boisestate.edu/gas/pinafore/pinafore.doc> (date accessed: 1 August 2005)

<sup>293</sup> The original lines read:

*"Things are seldom what they seem,  
Skim milk masquerades as cream;  
Highlows pass as patent leathers;  
Jackdaws strut in peacock's feathers  
Black sheep dwell in every fold;  
All that glitters is not gold;  
Storks turn out to be but logs;  
Bulls are but inflated frogs."*

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