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ICAO's AVIATION SECURITY PROGRAMME POST 9/11:

A LEGAL ANALYSIS

BY

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ABSTRACT

Unlawful interference with civil aviation has become a major concern for the world aviation community. The misuse of aircraft as a weapon of mass destruction has created new challenges. Air terrorism has moved from hijacking or unlawful seizure of aircraft to an in-flight explosion caused by sabotage and finally to September 11, 2001, to the use of a civil airplane as a weapon of destruction.

The events of September may be the biggest security challenge ever faced by the aviation industry. The impact of this tragic event on the global economy has been very harsh. The events have tended to obscure the fact that civil aviation continues to be an inherent safe mode of transport.

Great efforts are being made at the national and international levels to create a security net which is global in nature and so tight that not one further potential act of unlawful interference can slip through. However, the fact remains that, in weaving the net and designing measures with the objectives of preventing, combating and eradicating acts of terrorism involving civil aviation, it is prudent to be imaginative in assessing the threat, which could come from new directions and in new forms.

This thesis explores the implications of the 11 September 2001 events. A global strategy is initiated by ICAO and endorsed by the States, with the aim of protecting lives, restoring public confidence in air travel, and promoting the financial health of air transport. I will therefore examine the measures initiated by ICAO in response to the new challenges in aviation and which form the basis of the aviation security action plan. The perspective is that the events of 11 September have changed the world, and changed irrecoverably. Nothing will be the same for the aviation industry.

RÉSUMÉ

L'intervention illicite dans l'aviation civile est devenue une préoccupation majeure pour la communauté mondiale de l'aviation.

L'usage indu de l'avion comme arme de destruction massive a créé de nouveaux défis.

La piraterie aérienne est passée du détournement ou de la capture illicite des avions à l'explosion en vol causée par le sabotage, et enfin le 11 septembre 2001, à l'utilisation de l'avion civil comme arme de destruction.

Les événements du 11 septembre ont probablement engendré le plus grand défi en matière de sécurité que l'industrie de l'aviation ait jamais eu à relever. L'impact de ces événements tragiques sur l'économie mondiale a été majeur. Ces événements ont eu tendance à occulter le fait que l'aviation civile demeure en soi un mode de transport sûr.

Des efforts considérables sont déployés aux niveaux national et international pour créer un filet de sécurité mondial si serré qu'aucun autre acte potentiel d'intervention illicite ne puisse passer à travers. Cependant, le fait demeure qu'en tissant ce filet et en concevant des mesures destinées à prévenir, à combattre et à éliminer les actes de terrorisme impliquant l'aviation civile, il est prudent de faire preuve d'imagination lors de l'évaluation de la menace, qui pourrait provenir de nouvelles directions et se manifester sous de nouvelles formes.

La présente thèse explore les conséquences des événements du 11 septembre 2001. Une stratégie mondiale a été conçue par l'OACI et entérinée par les États. Celle-ci vise à protéger les vies humaines, à rétablir la confiance du public dans le

transport aérien et en promouvoir la santé financière. J'examinerai donc les mesures prises par l'OACI pour répondre aux nouveaux défis de l'aviation qui constituent la base du Plan d'action pour la sécurité de l'aviation. .

Les événements du 11 septembre ont changé le monde, et ce de façon irréversible. Rien ne sera plus pareil dans l'industrie de l'aviation.

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INTRODUCTION

The history of air travel has many landmark events: the Wright brothers' first flight in 1903; the introduction of the DC-3 in 1936; the start of jet travel in 1958; the U.S.A. Congress's decision in 1978 to end government fare and route controls through deregulation. To these dates can now be added the September 11 incident, which virtually crippled the airline industry.

Although unlawful acts against the safety and security of aviation is not a new phenomenon, acts of unlawful interference have grown in severity in recent years. These acts have caused loss of life, injuries to innocent persons and costly damage to property and equipment.

If one who has not heard of the September 11 incident were to read the following text culled from an article by Grunwald in the 12th Sept 2001 Washington Post:

On September 11, 2001, nineteen persons of non-U.S. nationality boarded four U.S. Commercial passenger jets (two in Boston and one each in Newark, and Washington), hijacked the aircraft minutes after takeoff, and crashed them into the World Trade Centers in New York, the Pentagon in Northern Virginia, and Pennsylvania. Some three thousand persons were killed in the incidents, the heaviest casualties experienced in the history of civil aviation arising from one event or closely related events.¹

The reaction could have been it is fiction as no one in the right frame of mind would have imagined that such a thing is possible.

If the September 11 event was not a defining moment in the history of humankind, it certainly has been to this generation. The event was an atrocity of extraordinary proportions.

Prior to September 11, civil aviation was synonymous to economic growth. It built economies, tied the world together and improved our quality of life. However, within seconds this symbol of prosperity and good living turned into a nightmare when the instrument of unity became a weapon of destruction. The events have altered the nature of civil aviation.

¹ See Michael Grunwald, "Terrorist Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead," Wash. Post, Sept. 12, 2001, at A1; David Firestone & Diana Canedy, F.B.I. Documents Detail the Movements of 19 Men Believed to Be Hijackers, N.Y. Times, Sept. 15, 2001, at A3.

It could be argued that September 11 is neither the first nor the beginning of aggression in the history of civil aviation. The first hijacking took place as far back as 1931. However, the aftermath of September 11 is unprecedented. It exacerbated an already difficult economic situation; consumer and business confidence in the air transport industry weakened and consequently had a negative impact on airline traffic.² The effects of decline in the demand for air transport services in the North trickles down to the South as most developing countries especially in the African region heavily depend on the tourism industry. For these States, aviation-related terrorist acts could seriously undermine their economies.³

The September 11 incident has, forced the ICAO contracting States and other members of the international community to search for a more responsive and efficient way of ensuring air transport safety. During its 33rd Session, the ICAO General Assembly adopted Resolution A33-1 (8),⁴ which calls for an international high-level ministerial conference to be held to develop measures for “preventing, combating and eradicating acts of terrorism involving civil aviation”.

From February 19 to 20, 2002, aviation leaders from around the world met at the ICAO headquarters and endorsed a global strategy for strengthening aviation security worldwide. The Action plan developed by the ICAO Secretariat and approved by the Council includes a program of mandatory audits of the security system in place in all 188 ICAO Member States.

The remedial actions taken at the international and national levels after 11 September have helped improve the situation of the air transport industry and also demonstrated the critical role and the vulnerability of the industry. It also becomes clear that enhanced security requirements will eventually have a substantial impact on various key elements of air transport regulation and the way international air transport business will be conducted in the coming years.

The purpose of this thesis is to examine the implications of September 11 and the responses initiated by ICAO, which form the basis of the new ICAO Aviation Security Plan of Action including the audit program and the means by which ICAO

² See ICAO, “Airline Traffic After 11 September” (2002) 57: 2 ICAO J. 6.

³ See ICAO, High-level Ministerial Conference on Aviation Security (February 19-20) AFCAC presented a working paper: “Africa Terribly Hit by the Consequences of Terrorist Acts Against Civil Aviation” AVSEC–Conf.02.IP.014.en.wpd (8/2/02).

⁴ See ICAO Res. A33-1, ICAO Doc. 9790, Assembly Resolution in Force (as of October 2001) VII-I; See also ICAO online: < <http://www.icao.int/icao/en/assembly/a33/index.html>> (date accessed: 15 August 2002).

will assist States in the rectification of identified deficiencies. This represents a departure from the normal *modus operandi* of ICAO, but could be reconciled with principles of international law as will be demonstrated in the subsequent chapters. The thesis presents two sets of conclusions: the first having to do with emerging trends in global aviation regulation post-September 11; and the second draws out an analysis of the new global security regime.

A. Trends

1. There has been a shift in the willingness and capacity of the International Civil Aviation Organization (ICAO) to involve itself directly in domestic regulation, and consequently, a parallel shift in the reach and application of the Chicago Convention.
2. The generalized use of private security services at airports and for airlines has given way to a new emphasis upon public provision of security services, which in some measure runs counter to what has been a dominant trend toward privatization in the aviation sector.

B. The new global security regime

3. The inauguration of security audits, drawing on the experience of safety audits, represents a step forward in moving the Annex 17 International Standards and Recommended Practices (SARPs) from pious statements of principle to norms that States implement to govern security practices. However, the open question remains, what will be done with findings of non-compliance that emerge through the audit process? How will the international community address the reasons why States are unable to comply with the standards being verified through security audits? The absence of an adequate answer remains the most significant defect in the new security regime.
4. In particular, there is as yet no fund or other mechanism to provide for the rectification of deficiencies identified through safety audits. Insofar as these deficiencies are of concern to the international community as a whole, the next stage in the development of a global security regime will require the creation of a funding mechanism, complete with requisite checks and balances to ensure that Member States are themselves taking all necessary and possible measures.

5. As the new security audit system is implemented, there ought to be coordination with the existing safety audit process, both so as to draw on the accumulated experience gained through safety audits and to avoid unnecessary duplication of limited resources.
6. It would be relevant to define or clarify the relationship of the Universal Mandatory Security Audit Programme to the existing individual State or regional regulatory bodies such as the FAA and JAA. If the fundamental objective of air transport of safety and security is to be accomplished, it is important for ICAO to be recognized as the "Senior Auditor."
7. The establishment of the security audit programme is a laudable venture and should be integrated in the ICAO regular programme like that of the safety oversight audit.
8. The ICAO Security Audit Program is currently limited to Annex 17. However, the Programme should be expanded, at an appropriate time, to include the Security Conventions and provisions of other Annexes, which relate to security of civil aviation.

The major limitation of the study include time, limited access to relevant government documents and data relating to the September 11 incident and global strategy for strengthening aviation security by individual countries.

CHAPTER ONE

THE IMPACT OF SEPTEMBER 11

ON THE AVIATION INDUSTRY

The September 11 event has forever changed our perspective of how the aviation industry needs to be regulated. To respond to the new challenges posed by these events, the problem and its implications on the industry need to be analysed. On the basis of this analysis, measures could be taken to counter and resolve the problem.

In this chapter, I shall highlight the economic impact of the incident on the aviation industry, which led to the international community and ICAO to initiate measures to respond to this challenge.

I will also discuss the impact of these events on civil aviation with a view to providing background information as to why the international community and ICAO responded to the attacks on the World Trade Centre and the Pentagon in the United States of America, on September 11, 2001. Although the airlines involved in the attack were domestic flights, and the incident occurred within the sovereign territory of the United States of America, the impact had a rippling effect beyond the frontiers of North America. The events diminished the confidence of the public in the aviation industry as a whole. As a result of its international impact, an international solution has to be found.

The steepest declines in air traffic occurred in September and October 2001, each with global air passenger traffic of about 15 percent less than the previous year. Cargo volumes suffered double -digit declines in both months as well. Data for November and December 2001, while slightly more encouraging, still showed traffic to be well below the levels of the previous year.⁵ Since the end of World War II, the first time world airline traffic recorded an annual decrease occurred in 1991, following the 1990 Gulf War. However, the events of September are unparalleled in the history of civil aviation. Although both the aircrafts, operated by American Airlines and United Airlines, used as weapons of destruction on September 11 were of US nationality, all the world's air carriers felt immediate repercussions.⁶ Only

⁵ See ICAO J., *supra* note 2.

⁶ See C. Saunders, "2001 was a Disastrous Year for Airlines, But 2002 does not have to be", online: http://www.airlines.net/articles/read.main?id=18&read_comments= (date accessed: 3 June 2002).

regional and low cost niche carriers seem to have been less affected and, benefited by taking traffic away from the higher cost carriers.⁷

The air transport industry experienced significant growth in the last decades as an important tool of economic and social development. However, the year 2001 will always be remembered as being the turning point in the Aviation history. This Year was the most catastrophic year ever for commercial airlines. More money was lost in 2001 than air carriers have ever made as profit since 1919. The industry ended the year with a total loss of US\$12 billion on international scheduled traffic. The estimated loss for 2001 if domestic traffic is calculated is in the order of US\$18 billion.⁸

The events of September 11 in the United States of America worsened an already bad situation by reducing airline yield. Although September 11, has contributed immensely in the economic downturn and the related decline in business and consumer confidence, particularly in the United States, the year 2000 did not start well either.

Global airline traffic measured in terms of passenger-kilometres performed (PKP) grew moderately by about 1.5 percent during the first eight months of 2001 compared with the same period in 2000.⁹ The load factors on passenger services declined by approximately 1 point, on average, while the capacity offered in terms of available seat -kilometres (ASK) increased by almost 2.5 percent. Freight tonne kilometres performed (TKP), a lead indicator of the world economy experienced a decline of six percent during the first eight months of 2001.¹⁰ The onset of the economic downturn reduced demand raised operating expenses and led to over capacity, which, in turn, produced increased competition in certain markets. It is estimated that the operating losses on international scheduled services had reached almost US \$3 billion dollars by the end August 2001.

A bad situation became worse on September 11, after a weak eight months of the year. It triggered an unprecedented decline in airline traffic both for the United

⁷ *Ibid.*

⁸ See ICAO Secretariat Report: "State of Air Transport Industry" to the High-level Ministerial Conference on Aviation Security (February 2002), AVSEC-Conf/02-WP3 (15/1/02); see also ICAO J., *supra* note 2; see also IATA World Wide Air Transport Statistic, online: <http://iata.mondosearch.cocgi_bin/MSMFIND.exe?query+statistics&NO-DL=X> (date accessed: 17 September 2002).

⁹ *Ibid.*

¹⁰ *Ibid.*

States and other airlines in the Trans Atlantic, Trans Pacific and North- South/Central America markets. The four day shutdown of United States air space, had world wide repercussions due to economic concerns, uncertainty and collapse of the public confidence in air travel.¹¹

The primary focus of economic change due to the attack has been found within the aviation industry with major rippling effects for travel and tourism, public transportation, airports and the airlines themselves. As the world economy slowed, business travellers stopped flying, and travel dropped off so much so that several airlines are in danger of collapse.¹²

After September 11, airlines in general were not able to meet their break-even levels of tickets sold versus cost of travel. Serial bankruptcies loomed while frantic efforts are made to cut costs by renegotiating labour contracts, reducing aircraft lease and debt payments, and scaling back flight schedules. Swiss Air, and its subsidiaries Sabena, Air Liberte and AOM were on the brink of bankruptcy, and in fact became bankrupt, a path that Ansett and Canada 3000 soon followed and United States Airways also filed for Chapter 11 Protection.¹³

Besides the effects observed among aircraft manufacturers, services suppliers and maintenance providers,¹⁴ there has been a retraction in air transport demand. This is fundamentally due to the perception of aviation users of the risks associated with air transportation resulting in them postponing, and even cancelling, business and leisure trips.

Some of the other consequences have been drastic reduction in travel due to lack of confidence in the security of air transport, discontinuation of war risk insurance,¹⁵ significant cuts in capacity followed by massive reductions in staff in the aviation sector. Civil aviation is now confronted with a different category of threat than previously experienced, which obviously needs to be dealt with in an effective, but also efficient manner. The attacks broke an almost uninterrupted 50-year trend of

¹¹ *Ibid.*

¹² See Saunders, *supra* note 6.

¹³ *Ibid.*

¹⁴ See ICAO J., *supra* note 2 at 8.

¹⁵ On September 17, 2001 a notice was given by London Insurance Market that third party war risk coverage was to be withdrawn. It took effect on 24 September 2001 at 11.59p.m.GMT. Aviation war risk insurance has since returned at an exceeding high premium, which the vast majority of airlines cannot afford. ICAO has proposed a special cooperation to provide insurance that will be guaranteed by ICAO member States.

passenger and cargo growth.¹⁶

The airlines found that they were operating nearly empty aircraft when North American airspace was reopened to commercial traffic,. The demand for air travel decreased at the same time as aviation security and insurance costs soared. The immediate effect was global airline passenger traffic (PKP) decline of 17 percent in September 2001 and a capacity decline (ASK) of 9 percent, with the passenger load factor consequently down by about 6 points. The freight traffic for the month of September declined by 16 percent year.¹⁷

Declines in traffic varied considerably among different regions and route groups following September 11. The capacity in the United States domestic market was cut by about 20 per cent, passenger traffic in September fell by about 32 percent and the load factor declined by some 20 points. Also hit, particularly hard were the North Atlantic, Transpacific, North-South/Central America and Europe to Asia/Pacific markets. Although complete data were not available for all markets and regions at the time of writing, there is no doubt that there has been a significant negative impact in all regions worldwide.¹⁸

The following figures illustrate the impact on some of the various areas and route groups for which sufficient data are presently available.¹⁹

¹⁶ See ICAO J., *supra* note 2. See also *supra* note 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

TABLE A

MONTHLY PASSENGER TRAFFIC BY TAFFIC FLOW

(Year-on-year percentage change in PKPs)

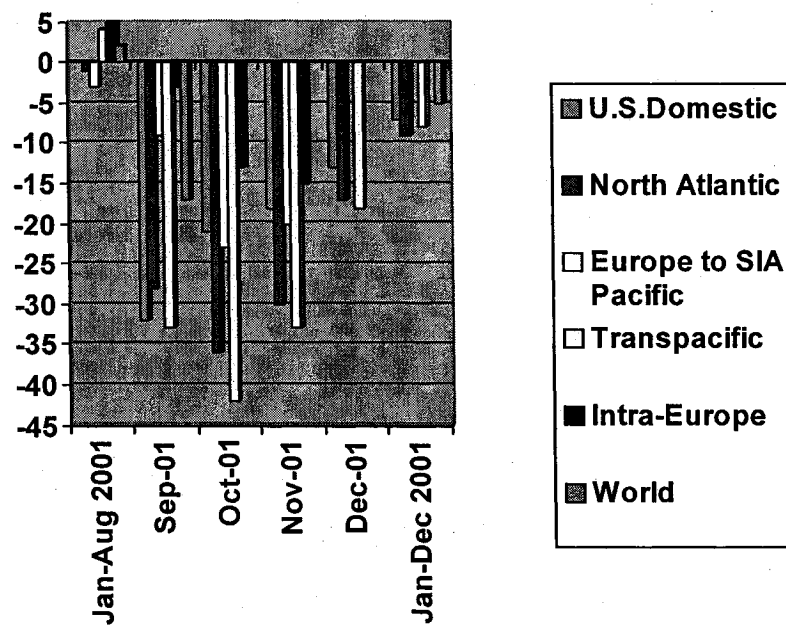
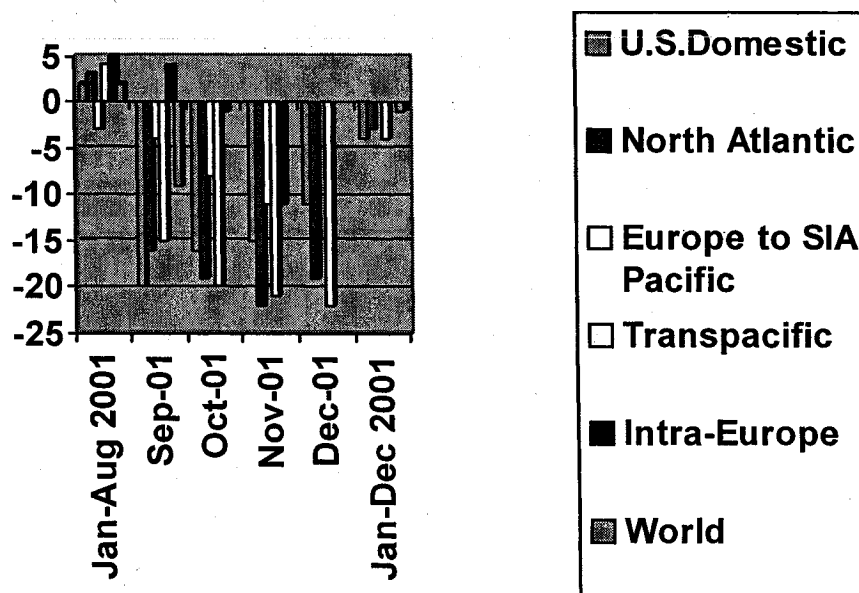


TABLE B

MONTHLY PASSENGER CAPACITY BY TAFFIC FLOW

(Year-on-year percentage change in ASKs)



In 2001, it was estimated that global passenger traffic (PKP) decreased by 5 percent and global freight traffic (TKP) fell by 8 percent in comparison to 2000 traffic levels. These percentage declines represent approximately 60 million passengers and two million tonnes of freight carried.²⁰

The above figures indicate that the events of September 11 caused a steep decline in air traffic, increased costs and worsened an already weak climate for air transport. As a result airlines tried to kick start air travel wherever possible by trying to contain losses by using strategies such as reduced frequencies, capacity and staff. This meant that one hundred and twenty thousand employees lost their jobs, modification of ticket and marketing incentives such as deep discount fares and generous incentives for frequent flyer members. Non-profitable routes were reduced, or eliminated altogether; facilities on-board were either reduced or closed. Some airlines went as far as parking some aircraft or accelerating the retirement of older aircraft, and or deferred delivery of new aircraft. The financial situation of some airlines became so serious that they declared bankruptcy.²¹

The ramifications of the event went beyond the airlines into other areas of civil aviation as a whole and the support industries, including aircraft and engine manufactures, and other suppliers of services were amongst those affected. Prior to 11 September, approximately 2,500 new aircraft were scheduled for delivery during the 2001-02 periods. As airline demand for new equipment evaporated, the impact of deferred deliveries had a domino effect on the aircraft and engine manufactures and their suppliers. Cutbacks on production by major manufacturers spread along the production chain. Industry reports indicate that, some 170,000 layoffs were announced by the aerospace industry worldwide. Aerospace manufactures estimate a total loss of \$7.5 billion through to the end of 2002.²²

The events of September 11 greatly affected airports and air navigation service providers²³ financially through the loss of income from aeronautical user charges

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ See ICAO, AVSEC Conf./02- WP/33, Report: Airport Council International to the High-level Ministerial Conference on Aviation Security (Feb 2002).

(mainly landing, parking and air navigation charges) as a result of reduced aircraft movements, passenger service charges and non-aeronautical revenues resulting from reduced passenger traffic. On the cost side, both the airline industry and airports face similar insurance coverage and premium crisis.²⁴ An immediate impact for many airports has been the additional cost of security measures. The two put together; the revenue and cost impacts will flow through on many balance sheets of service providers and affect credit ratings and, therefore, borrowing costs, especially for autonomous and privatised entities, depending on their responses to the changed circumstances. In the long term, airport terminal planning facilities and capacity will be affected by the increased security emphasis.²⁵

Airports and air navigation service providers also undertook some measures to mitigate the economic impact. In North America and Europe in particular, the emphasis is on cost-reduction and cost-avoidance, debt rescheduling and a review and deferral of capital expenditures and expansion plans. In Greenland and Iceland, the single user charge per civil aircraft crossing was maintained in 2002 at the same level of 2001. In general, airports were reducing user charges or postponing planned increases in order to stimulate traffic and provide relief for air carriers. There were also a number of instances of charge increases on air navigation services to compensate for the traffic and revenue shortfall. Governments introduced additional charges or levied taxes to offset additional expenses incurred in the implementation of enhanced security measures. In the Asia/Pacific region some airports, including few fully autonomous ones, substantially increased their landing, take-off and parking charges in order to make up for the shortfall caused by the loss of income.²⁶

Air transport is a driver of economic development, producing catalytic effects through business, trade and tourism in particular. Many customers whose businesses were not even directly affected by the terrorist attacks have had their property and casualty insurance rates increased dramatically. Hotels, insurance companies, telecommunications and transportation have been strongly affected by the events, while insurance companies are looking to recover their losses from September 11 through increased premiums.²⁷

The prospect for growth in air traffic remains uncertain and gloomy. Based on

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ See ICAO AVSEC Conf., *supra* note 8.

schedules for 2002, submitted by the world's airlines at the end of November 2001, it is anticipated that the capacity of aircraft movements' worldwide will be about 7-8 percent below that of the 2001 level. It may be assumed that the effect of September 11 on the economic cycle will be minimised with a recovery boosted by government stimulus and softer monetary policies. On the cost side, airlines have not only faced increases in, for example, security and insurance, but per unit costs have often been increased through retained overheads against reduced services. Fuel prices, which are a key component of operating costs, are currently relatively low but will probably rebound with the economy.²⁸

Both the financial and the overall longer-term impact are difficult to predict with any accuracy at present as all depends on the extent to which consumer confidence is restored as well as policies put in place by States, the political situation, the cost of fuel and third party war risk insurance. However, the additional cost of security, and higher premiums faced by airlines for insurance against third party liability may lead to upward pressures on fares and downward pressures on airline yields. Consumers may also face additional costs for their travel in the form of new or increased security charges. It is possible that when consumers regain confidence in air travel, the long-term demand for air travel will reach the growth levels experienced prior to September 11, 2001.

Governments all over the world have been affected either directly or indirectly. States have been obliged to implement increased security measures to protect their airports and aircraft against acts of unlawful interference and to mitigate the impact of such attacks on the air transport industry as a whole. The remedial actions include implementation of enhanced security measures at airports by tightening passenger and baggage screening in addition to other security procedures, as well as the deployment of more advanced airport security equipment and increased security measures on aircraft.

Following the events of September 11, 2001, and after a seven-day notice when underwriters cancelled existing coverage for airline operators and other service providers against losses and damages arising from acts of war, hijacking and other related perils (war risk insurance) globally effective September 24, 2001, a number of governments around the world took action to indemnify their carriers against such

²⁸ICAO J., *supra* note 2.

risk.

A number of States have provided financial assistance to their air transport industries, including direct financial assistance and indirect support in terms of loan guarantees, liability protection, restructuring of loans on low interest rates, optimisation of taxation, extension of unemployment and health insurance coverage, grants for retaining, bridging loans to avoid immediate collapse, etc.²⁹ United States airlines received a US \$15 billion financial assistance package including a \$5 billion grant; airlines in 15 European States were cleared by the European Commission to receive compensation for damage suffered during the four days when U.S. airspace was closed. Preliminary financial estimates indicate that, even after such aid, scheduled airlines may have lost more than \$10 billion in 2001.³⁰

The government subsidies granted to airlines to indemnify them sets a poor precedence unless similar financial assistance is provided to other air carriers on a proportional basis and in a non-discriminatory and transparent manner. The government aid raises concern about distortion of competitive conditions in international markets, notably on the transatlantic and Pan-American routes. Concerns also exist in other regions, particularly among developing countries, that do not have the same financial means to provide such aid.³¹

In a competitive liberalised environment, conferral of State support in the form of such financial or other benefits by a government for its own air carrier(s) (but which are not available to competitors in the same international markets) can potentially distort trade in international air services. In the absence of universally agreed-upon general quantitative guidelines, there exist difficulties in accurately measuring the distorting impact of specific actions of State support on particular international markets. However, States should ensure that their actions aimed at providing aid to their own air transport industry are fully transparent and do not adversely impact other competing air carriers, or that such adverse impact is minimised.

The current financial structure of the industry results from the deregulation phenomenon that took place in the late 1970's. Airlines face a Darwinian process that

²⁹*Ibid.*

³⁰Robert Samuelson, "Why Governments should not Rescue the Airlines" online: <<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&conter>> (date accessed: 15 July 2002).

³¹ See ICAO AVSEC Conf., *supra* note 8.

favours re regulation, a process for which government ought to revisit the aviation policy. The airline industry was in trouble even before September 11, and it has become worse ever since. Airlines used the attacks as justification to receive large government subsidies. The attacks of September 11 should have caused a mere ripple in the airline industry's cash flow and thus, in its prosperity. Instead, it has sunk a very big boat in very shallow water. Airlines might well be compensated for their losses while airports were forced to close for a few days after the attacks. Perhaps, the bail out plans will work, but unless the airlines shape up, the economic picture for the entire industry is quite grim. Government aid to airlines indicates that carriers are at a fundamental inflection point that is more akin to the upheaval of deregulation than the impact of September 11.

While deregulation and security policy are not directly related, they are indirectly related. It can be argued that deregulation created incentives for airlines and, indeed, airports (competing as hubs) to reduce costs associated with maintaining a security system. Thus, the fact that there were low-paid, poorly qualified personnel in charge of security until the recent reforms can in some measure be blamed on the economic environment created by deregulation.

The events of September 11 did not give rise to an isolated domestic issue, but had an international impact on air transport services and this, therefore, necessitates a global solution.

The shock of September 11 was felt throughout the world. First, and foremost, was the loss felt in New York, Washington and Pennsylvania of more than three thousand innocent lives. The impact spread beyond the U.S. and millions around the world were affected in their work places, touching their personal lives and sense of well-being. Perhaps no industry has suffered more than air transport, not only because aircraft were used to carry out this violence, but also because of the loss of thousands of aviation-related jobs and the long-term decline in the confidence in air travel. The economic impacts were widespread across the globe, and the security problem revealed by the events required remedial action on the part of all countries. The role of the State as a guardian of security was re-emphasised after an era of deregulation and market solution, and the need for a strengthened international regime was made painfully obvious. It is the last point that is the focus of the subsequent chapters, which describe how ICAO responded and analyse the implications of unresolved problems posed by that response. In order to evaluate ICAO's response, the next

chapter explains ICAO's historical role in air transport security and what measures it had undertaken prior to September 11.

CHAPTER TWO

LAW MAKING UNDER THE CHICAGO CONVENTION

A. Introduction

The theme to be discussed in this chapter is the International Civil Aviation Organisation's (ICAO)'s indirect broadening of the application of the International Standards and Recommended Practices (SARPs) to domestic civil aviation operation. The chapter will also highlight the legislative functions of ICAO. The objectives of the Convention on International Civil Aviation also referred to as the Chicago Convention³² and the international efforts made under the auspices of ICAO to combat unlawful acts against the security of civil aviation will be briefly discussed as well.

B. The Law Making Function of the International Civil Aviation Organization (ICAO)

The International Civil Aviation Organization was established in 1947 as a specialized agency of the United Nations whose purpose and functions are outlined in its constituent instrument, the Convention on International Civil Aviation. ICAO facilitates the development of international civil aviation by promoting the creation and preservation of alliances, helping to avoid friction by promoting co-operation between nations, since the peace and security of the world depends on these factors. With the task of harmonizing different interests, but above all, meeting the needs of the people for safe, secure, regular and efficient air transport, the law making function of ICAO is a special tool for achieving this goal.

One of the main functions of ICAO's is the adoption of International Standards, Recommended Practices and Procedures within the different fields of aviation. This function is strongly articulated in Articles 37 and 54(1) of the Chicago Convention. In article 37 contracting States undertake "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

³² See Convention on International Civil Aviation, opened for Signature at Chicago on December 7, 1944, entered into force on 4 April 1947, ICAO Doc. 7300/6 [*Chicago Convention*].

matters in which such uniformity will facilitate and improve air navigation". Also under the same article, ICAO has the authority to adopt and amend from time to time, as maybe necessary, international standards and recommended practices (SARPs) on eleven enumerated subjects:

- a) Communications systems and air navigation aids, including ground making;
- b) Characteristics of airports and landing areas;
- c) Rules of the air and air traffic control practices;
- d) Licensing of operating and mechanical personnel;
- e) Airworthiness of aircraft;
- f) Registration and identification of aircraft;
- g) Collection and exchange of meteorological information;
- h) Log books;
- i) Aeronautical maps and charts;
- j) Custom and immigration procedures;
- k) Aircraft in distress and investigation of accidents;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.³³ This last clause gives the Organization an open-ended authority to adopt regulations on all matters falling within the general field of air navigation that it considers appropriate for international regulation.

The ICAO Council has a mandatory function under article 54 (l) to adopt international standards and recommended practices and for convenience, designate them as Annexes to the Chicago Convention and then notify all contracting States of the action taken. This is a unique feature that this Council Possesss among all organisations of the United Nations over the years. Over the years, the Council has developed and adopted 18 Annexes pursuant to Articles 54, 37 and 90 of the Chicago Convention. It is worth noting that these Annexes are supplemented by a wide range of ICAO Technical Manuals and other publications, such as the Manual on Aircraft Accident Investigation, the Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference, the Airworthiness Technical Manual, among others. The adoption of the SARPs requires a two-thirds majority vote of all Council Members and they come into force unless there is "disapproval" by a majority of the contracting States of ICAO. It is worthwhile to note that such disapproval has never taken place

³³ *Ibid.*, art. 37.

Civil aviation could not have evolved without worldwide uniformity in regulations, standards, and procedures in relation to air transport, in particular, airport security operations and procedures. According to Michael Milde, the elaboration and regular updating of the standards are “the real gravity of ICAO’s work and give to ICAO a unique position and responsibility in the world.”³⁴

In 1947, in the absence of a concise definition of what an “International Standards” or “Recommended Practices” meant in the Chicago Convention, the ICAO Assembly formulated the requisite definitions “for use by the Organisation in relation to air navigation matters.”³⁵ Resolution A1-31 defines “Standard” as:

Any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognised as necessary for the safety or regularity of international air navigation and to which contracting 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.

The same resolution defines “Recommended Practice” as:

Any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognised as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the convention.

Since the foregoing resolution applies only to “air navigation matters”, the ICAO Council elaborated corresponding definitions for the SARPs relating to air transport when it adopted Annex 9, which deals with the facilitation of international air transport. These definitions are as follows:

Standard: Any specification, the uniform observance of which has been recognised as practicable and as necessary to facilitate and improve some aspects of international air navigation, which has been adopted by the Council pursuant to Article 54(1) of the Convention, and in respect of which non-compliance must be notified by States to the Council in accordance with Article 38.

³⁴ Michael Milde, “Enforcement of Aviation Safety Standards- Problems of Safety Oversight” (1996) 45 ZLW L J. 3 at 4.

³⁵ See ICAO, Res. A1-31, ICAO Doc. 4411 A1-P/45 (1947); see also Res. A 32-14 Appendix A (II-2), ICAO Doc. 9730: Assembly Resolutions in force (as of October 1998) at II-2.

Recommended Practice: Anyway specification, the observance of which has been recognised as generally practicable and as highly desirable to facilitate and improve some aspects of international air navigation, which has been adopted by the Council pursuant to Article 54(1) of the Convention.

In recommending the above definitions for adoption by the Council, the Air Transport Committee noted that the nature of the facilitation provisions appeared to require that the Standards and Recommended Practices be based on the general concept of ‘uniformity’ [which] will facilitate and improve air navigation, as stated in the opening words of Article 37, rather than on the more specific items of ‘safety, regularity and efficiency’ mentioned towards the conclusion of Article 37.

Corresponding definitions were made by the 33rd Session of the ICAO Assembly in relation to the amendment of Annex 17. Resolution A33-14, in defining “Standard” and “Recommended Practices” adopted the definitions contained in Resolution A1-31.

These definition(s) clearly distinguish the different status of standards and recommended practices. All these aforementioned definitions, however, remain in force today. The preamble of Resolution A1-31 clearly indicates that the Assembly took the step to provide the contracting States with a “uniform understanding of their obligations under the convention with respect to International Standards and Recommended Practices to be adopted and amended from time to time...” The prevailing view is that only standards are of legally binding nature, subject, however, to the right of any member State to file differences. With respect to recommended practices, while their uniform application may be desirable from a policy point of view, they cannot be considered as legally binding.

1. The Law Making Process

Much of what has been written about ICAO’s legislative process bears little resemblance to the actual practice of the organisation. In recent years its legislative process is moving progressively further from the governing provisions of the Chicago Convention. There seems to be little or no consistency in ICAO’s legislative practice. This begs the question as to what is the actual practice of ICAO’s legislative process, and what is the broad interpretative improvisation needed to justify its legislative practice. What may eventually be necessary is an amendment of the Convention to

bring it in line with its current legislative process.

The Air Navigation Commission, is responsible for the air navigation SARPs, and while the Air Transport Committee, is responsible for SARPs dealing with the facilitation of international air transport. They are both entrusted with the task of developing and formulating ICAO Annexes and amendments thereto.³⁶ These two bodies have various sub-committees (divisions) whose activities they coordinate and their aim is to establish and convene international fora for the formulation and review of SARPs.³⁷ The final drafts of the SARPs are then submitted to the Council for adoption.

The reasons for assigning the power to adopt and amend the SARPS to the Council are not expressly stated in the published proceedings of the Chicago Conference. The Assembly has nevertheless exercised a certain role in relation to this activity in its capacity as the most representative organ of the Organisation with the responsibility for overseeing the activities of the Organisation and its Council.

Article 90(a) stipulates that the adoption of an Annex requires “*the vote of two-thirds of the Council at a meeting called for that purpose*”. The phrase has been interpreted by the Council to mean the vote of two-thirds of the total membership of the Council.³⁸ This interpretation was however, made at the time when the Council was composed of 21 States. Since then, its membership has increased to 33. There are, however, various interpretations of Article 90(a) that are relevant for our discussion. The language of Article 90(a) is relevant here:

The adoption by the Council of the Annex described in Article 54, subparagraph (1), shall require the vote of two-thirds of the Council... Any such Annex or any amendment to an Annex shall become effective within three months after its submission to the contracting States.³⁹

According to Ingrid Detter, Article 90(a) only deals with the adoption of Annexes and therefore, the adoption of amendments to the Annexes requires no more than a simple

³⁶See *Chicago Convention*, *supra* note 32, art. 56 and 57. See also Sheffy, ‘*The Air Navigation Commission of the International Civil Aviation Organization*’ (1958) 25 J. of Air L. at 281.

³⁷See ICAO, *Rules of Procedure for the conduct of Air Navigation Meetings and Directives to Divisional-Type Air Navigation Meetings*, ICAO Doc. 8143 AN/873 (1961).

³⁸ICAO, Proceedings of the 3rd Session of the Council, ICAO Doc. 7310 C/846 (1952) 27.

³⁹See *Chicago Convention*, *supra* note 32, art. 90 (a).

majority vote of the Council.⁴⁰ Thomas Buergenthal maintains a different position, arguing that:

considering... that an amendment to an Annex could result in a complete revision of an Annex, it is obvious that the requirement of a two-thirds vote applicable to Annexes maybe easily circumvented if the view of [for the simple majority] were to be accepted.⁴¹

The position ICAO took was in line with the latter view, and ICAO has proceeded on the assumption that the adoption of an amendment to an Annex is governed by the same voting requirements that apply to Annexes.⁴²

Article 90 of the Convention requires the adoption of an Annex to be notified immediately to all member States. Thus, the Council must notify States of amendments of an Annex subsequent to their adoption in order not to deprive member States of reasonable time to give notice of their decision not to follow the amendment within the sixty-day period.⁴³

Article 38 prescribes specifically that:

In 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.⁴⁴

A literal interpretation of this Article, suggested by Cheng, leads to the conclusion that member States would be precluded from the option of not following any amendment to an international standard, if they had not given notice of their intention of doing so within the sixty-day period.⁴⁵

Article 90(a) of the Convention accordingly provides that after its adoption by the Council:

Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting

⁴⁰ Ingrid Detter, "Law Making by International Organizations (Stockholm: P.A. Norstedt & Sonners Forlag, 1965) at 250; See also Bin Cheng, *The Law of International Air Transport* (London: Stevens & Sons, 1962) at 65.

⁴¹ Thomas Buergenthal, *Law Making in the International Civil Aviation Organization*, 1st ed. (New York: Syracuse University, 1969) 64.

⁴² See ICAO, Action of the Council-48th Session, ICAO Doc.8351 C/946 (1963) 16.

⁴³ See Cheng, *supra* note 40 at 67.

⁴⁴ *Chicago Convention*, *supra* note 32, art. 38.

⁴⁵ See Cheng, *supra* note 40 at 67.

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.

In other words, an Annex or amendment to it adopted by the Council becomes effective only after the expiration of the period set for the notification of disapproval.⁴⁶ Thus, it could be concluded that when the Chicago Convention speaks of “minimum standards, which may be established from time to time pursuant to this Convention,”⁴⁷ these standards do not bind the contracting States until they have become applicable.

2. Implementation of ICAO SARPs

The process of implementation of ICAO regulatory material begins before the decision of the Council to adopt the material becomes applicable. This is so because of the opportunities given to the contracting States to participate at the different stages in the process of developing the SARPs.

Notwithstanding the fact that the Council has a “unique” authority to legislate,⁴⁸ its lawmaking function is considered to be quasi-legislative. The adopted SARPs are not binding on the contracting States against their will. The obligation upon the State to adopt SARPs is not absolute; States have accepted a legal obligation to collaborate in securing the highest practicable degree of uniformity of standards and recommended practices.⁴⁹ When a State finds it impracticable to comply in all respects with any international standard and recommended practices, it has a duty to give notification to ICAO of the differences between its own practice and that established by the international standard under Article 38 of the Convention.

In turn, the ICAO Council is to give immediate notification to all other member States of any differences filed in an effort to provide States with a timely warning of compromised standards that might otherwise seriously jeopardise flight safety of foreign aircraft.

There are instances when States fail to honour the obligation to file a

⁴⁶ The usual period allowed by the Council for the registration of disapprovals has ranged in the past from three and a half months to four and half months. See also Buergenthal, *supra* note, 41 at 66.

⁴⁷ See e.g. Article 33 of the Chicago Convention.

⁴⁸ Michael Milde, *supra* note 34.

⁴⁹ See *Chicago Convention*, *supra* note 33.

difference and the absence of such filings does not necessarily imply universal compliance with a particular SARP. The sole authority in a position to determine what is practicable is the State itself even though the ability of a State to “opt out” of the obligation to comply with international standards comes at a high cost as a non-complying State cannot effectively participate in international civil aviation. SARPs represent hard law and the freedom to disregard a SARP may not be worth the trouble/price.

One may conclude that the law making function of ICAO is a unique mechanism for achieving the objectives of the Chicago Convention and also meeting the needs of the public for a safe, efficient and economic air transport.⁵⁰

This description of the ICAO legislative process indicates the extent to which contracting States are consulted in the development of the SARPs. This function is undisputedly of utmost importance in the area of aviation security, and is also of particular contemporary and global relevance in view of the unfortunate events of September 11, 2001.

C. Legal Implications of Amendment 27 to Annex 6 and Amendment 10 to Annex 17

Recently, we have been witnessing a remarkable metamorphosis in the development and practice of international law as regards the safeguarding of international air transport. What is now emerging is a novel application and interpretation of international air law without any formal amendment process of the underlying legal instruments. As air transport is a global activity, the concern for its security is also a global concern.

The ICAO Assembly during its 33rd Session in October 2001, one month after the September 11 incident, adopted a number of resolutions of which is Resolution A33-1. This resolution calls for at the earliest possible date, an international high-level ministerial conference, to develop measures for “preventing, combating and eradicating acts of terrorism involving civil aviation”.⁵¹ This resolution also calls for a full review of international aviation security conventions and Annex 17 (*Safeguarding International Civil Aviation Against Acts of Unlawful*

⁵⁰ See *Chicago Convention*, *supra* note 32, art. 44(d).

⁵¹ See ICAO, Res.A33-1, ICAO Doc. 9790: Assembly Resolutions in Force (as of October 5, 2001) VII-1.

Interference) to the Convention on International Civil Aviation, ICAO's charte, Annex 17 and related guidance material contain the internationally approved Standards and Recommended Practices and Procedures (SARPs) on aviation security as they apply to international flights.⁵² Furthermore, the 33rd General Assembly directed the Council to seek ways to shorten the process for the approval and adoption of SARPs considered to be of key importance for the safety and security of civil aviation, whenever deemed necessary.

Following the decision of the 33rd Session of the Assembly, the Council urgently convened the twelfth meeting of the Aviation Security Panel [*hereinafter referred to as the AVSEC Panel*] in November 2001⁵³ in order to consider specific proposals for inclusion in Amendment 10 to Annex 17. The AVSEC Panel unanimously recommended the following issues to be included in Amendment 10:⁵⁴

1. applicability of Annex 17 to domestic operations;
2. international cooperation relating to threat information;
3. certification of screeners;
4. access control relating to air crew and airport personnel;
5. in-flight security personnel and protection of the cockpit;
6. joint response to acts of unlawful interference; and
7. definition of aircraft security check and security restricted area.

The High-level Ministerial Conference, when it met in February 2002, recommended the applicability of Annex 17 to domestic operations.⁵⁵ The Ministerial Conference also directed ICAO to strengthen security related provisions in the Annexes to the Chicago Convention, using expedited procedures where warranted to overall safety considerations, with emphasis on protecting the flight deck from

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Dominique Antonini, "Annex 17 Standards will be the primary Focus of Forth Coming Security Systems Audits", (2002) 57:5 ICAO J. 12. See ICAO, AVSEC Panel, online: <http://www.icao.int/cgi/goto_atb.pl/icao/en/atb/avsec/overview.htm;avsec> (date accessed: 15 July 2002). See also AVSEC Panel meeting, online: http://www.icao.int/icao/en/jr5608_up.htm (date accessed: July 15, 2002).

⁵⁵ *Ibid.*

intruders.⁵⁶

Some might argue that the Ministerial Conference was unaware of the dichotomy of international and domestic law and aviation regulation. However, the position advocated in this paper is that they knew what they were doing.

In accordance with the “fast track” procedure for the development and adoption of SARPs set forth in Appendix A to Assembly Resolution A33-14, the Council adopted, on December 7, 2001, Amendment 10 to Annex 17.

Chapter 2, paragraph 2.1.3 of Amendment 10 to Annex 17, states that each contracting State shall ensure that principles governing measures designed to safeguard acts of unlawful interference with international civil aviation are applied to domestic operations to the extent possible.

Although it is formally a standard, the wording “to the extent possible”, in practice, makes it a recommendation. States are therefore urged to apply the principles or measures designed to safeguard against acts of unlawful interference with civil aviation to domestic operations.

In addition, the Council also adopted Amendment 27 to Annex 6- Operation of Aircraft. Chapter 13, paragraph 13.2.1 (*amendment 27*) of Annex 6 provides that in all airplanes equipped with a flight crew compartment door, that this door be capable of being locked and means be provided by which cabin crew can discreetly notify the flight crew in the event of suspicious activity or security breaches in the cabin. Chapter 13 also includes a recommendation in paragraph 13.1 that “international standards and recommended practices set forth in this chapter also be applied by all Contracting States in the case of domestic operations”. Thus, the said paragraph 13.2.1 is a recommended practice to be applied to domestic air services.

The issue that arises therefore is whether it is within the jurisdiction of ICAO to recommend the application of SARPs whether as a “Standard” or recommended Practice” to domestic civil aviation operations.

The applications of Amendment 27 of Annex 6 and Annex 17 to domestic aviation seem to be predicated on the notion of “fundamental inseparability of certain critical elements of domestic and international aviation operations”. Fundamental inseparability has become more apparent due to the practice of many airlines known as “hub-and-spoke” operations, and alliances and code-share arrangements among

⁵⁶ See ICAO, “Historical Conference Agrees on Strategy for Strengthening Aviation Security” (March 2002) 57:2 ICAO J. at 5.

carriers, in which domestic feeder services are directed to a major hub to feed international flights. It is now evident that the distinction between what constitutes a domestic and an international flight is being narrowed down. Although recent practice in ICAO's legislative function may have been prompted by the specific facts of September 11, it is contrary to the function assigned to it by the Chicago Convention.

It is stipulated in the Chicago Convention Article 44 that the aims and objectives of ICAO are "to develop the principles and techniques of *international [emphasis added]* air navigation and to foster the planning and development of [international] air transport". In light of this, it is permissible to interpret Article 37 to the effect that it does preclude the applicability of the SARPs to domestic operations {*provided that such applicability is required to fulfil the objectives of the Convention*}. Article 96 of the Chicago Convention provides that: 'International air service' means air service which passes through the air space over the territory of more than one State.

The term "air service" is defined by Article 96 of the Chicago Convention as "any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo". A reading of Article 96 reveals that, even though an air service may include a service performed by several aircraft, the first/last segment of the service carried out by a domestic operator within its home territory cannot constitute international air service under the Chicago Convention. For example, if a passenger having one single contract of carriage from Boston to Canada was carried by a domestic operator from Boston to New York and subsequently, carried by another airline from New York to Canada, the whole journey could not be regarded as a single international air service, even though the intentions of the passenger is to purchase international carriage. The domestic Boston-New York leg falls outside the scope of the Chicago Convention and the jurisdiction of ICAO, despite the fact that the passenger may reasonably be entitled to expect that his whole flight will be subject to the same level of security.

The application of Chapter 13 Standards (Annex 6) to domestic flights is not in conformity with the Convention on International Civil Aviation. While lacking that legal competence, the Air Navigation Commission [*hereinafter referred to as ANC*] formulated Recommendation 13.1 whereby the SARPs contained in Chapter 13 would also be applied to domestic flights. Therefore *strictu sensu*, ICAO cannot legislate laws for domestic civil aviation operation. In doing so, the General Assembly and

ICAO have acted *ultra vires* the Chicago Convention. In the absence of a definition of the term “international air service”, the ICAO Council has extended the applicability of the SARPs to domestic aviation.

Even though ICAO in trying to ensure the safety and security of passengers and civil aviation have recommended the application of these SARPs to domestic aviation, the following sequence of actions is required for their implementation:

- (a) Proper changes made by the States in good time in their domestic legislation, regulations and instructions. This involves:
 - (i) The embodiment of the SARPs in domestic legislation and regulations;
 - (ii) The preparation of Manuals or operating instructions under enabling legislation;
 - (iii) Distribution of the relevant ICAO texts for use at installations.
- (b) The practical application and enforcement by States of any such legislation, regulations and instructions.

It is however, up to each contracting State to decide whether to comply with, give effect or file differences to the SARPs adopted under the Chicago Convention. This is the condition of “practicability”

In the alternative, the Council could send letters to States indicating that it would be desirable for them to consider having flight doors locked on domestic flights or have the General Assembly pass a resolution encouraging States to have flight doors locked on domestic flights, just as it had done in 1992, with respect to the ban of smoking on all international flights.⁵⁷ Although the resolution would not be binding, it could have been effected as a number of States had already indicated their intentions to lock cockpit doors on their domestic flights.

In adopting Amendment 10 to Annex 17, the Council prescribed 15 April 2002 as the date on which it would become effective, except for any part that the majority of Contracting States have registered disapproval prior this date. In addition, the Council resolved that Amendment 10, to the extent that it becomes effective,

⁵⁷ See ICAO, Res. A29-15, *supra* note 4 at I-48.

would be applicable on July 1, 2002,⁵⁸ independent of the common applicability date, November 28, 2002, for amendments to all Annexes.

When Amendment 27 to Annex 6 Chapter 13, paragraph 13.2.1 becomes effective on November 28, 2002, it will be mandatory for international operations and recommended for domestic operations that a flight crew compartment door be capable of being locked except in those States which have filed a difference. The Council concluded, "it is compatible with the Chicago Convention to recommend that the new paragraph 13.2.1 be applied to domestic operations. Consequently, recommendation 4.1 of the High-Level Ministerial Conference may be applied to domestic operations in the form of a recommended practice". Notwithstanding that it is only a recommendation and, therefore, not binding, at the same time, it carries significant weight in terms of policy persuasiveness, moral force and expert value especially in light of the mandatory security audits.

The provision on the locking of the cockpit doors was "fast-tracked", with the ANC having developed it in a very short-time frame and with States not having been consulted.

The "fast track" concept could be said to be embodied in Assembly Resolution A33-14 (*Consolidated Statement of ICAO Continuing Policies and Associated Practices related Specifically to Air Navigation*). However, there is no guidance in that resolution regarding the basis on which the procedure should be implemented.

Resolution A33-14 has granted the Council a *carte blanche*, including the liberty to amend the provisions of the Annexes to the Convention⁵⁹ "whenever deemed necessary," without going through the formal amendment process that occurs through consultation of States before the Council takes action. If this practice continues to be employed in the adoption of subsequent amendments to Annexes, the consultative rights of the States will gradually fade away⁶⁰ and eventually the role of States reduced.

While the intervention of the Assembly into such matters may give rise to conflict with the policy of the Council, it should be noted that the Assembly's action has generally resulted from the submission of these questions to it by the Council and has been based in some measure upon the documentation approved by that body. The

⁵⁸ ICAO J., *supra* note 54.

⁵⁹ ICAO Res. A 33-1, *supra* note 4.

⁶⁰ *Supra* note 50.

Council was at that time working under very particular circumstances on a high priority amendment that would impact on rebuilding the confidence of the public in air transport, an issue that was forefront in the minds of governments, the public in general and the media.⁶¹

Now that the Council has implemented the High Level Ministerial Conference's conclusions and recommendations, it is nonetheless, free to take any decisions it considers appropriate to minimise the conflict of laws and State practice. It is important that ICAO does what it can to ensure that problems are addressed whenever and wherever they arise.

This desire on the part of the Council to give the Assembly, at least formally, a policy making role in respect of the procedure of elaboration of the Annexes and their implementation can be explained as an attempt to provide a more universal basis for the application in the Organisation of the general policies involved. The competence of the Assembly in this regard may be found in Article 49(c) of the Convention, which requires the Assembly to examine and take action on the reports of the Council and decide on any matter referred to it by the Council.

Although ICAO does not have the formal power to legislate on domestic aviation operations, the provisions contained in both Annex 17 and Amendment 27 to Annex 6 promote the objectives of the Chicago Convention.⁶² When an international organ like ICAO has been granted power by contracting States to deal with domestic civil aviation operations or adopt or revise rules without Member States involvement in the formulation and development of SARPs,⁶³ it then becomes possible to speak of a 'radical transformation of the law making function and process of ICAO'. Thus, the application of the Annex 17 and Amendment 27 to Annex 6 implies a deliberate attempt to or by implication to alter some of the provisions of the Convention.⁶⁴ On the other hand, it indicates the flexibility of the law making process and the collective resolve of the international community to create a security net, which is global and so tightly knit that not a single act of unlawful interference can slip through. In short, the international community has come to recognise that security breaches on domestic

⁶¹ See ICAO, Proceedings of the 165 Session of the Council, ICAO Doc. 9802-C/1141 (2002) 163.

⁶² See *Chicago Convention*, *supra* note 32, the Preamble, art. 37 and 44.

⁶³ See Rules of Procedure for the conduct of Air Navigation Meetings and Directives and Directives to Divisional-Type Air Navigation Meetings, ICAO Doc. 8143 (AN/873), P.6 (1961); ICAO Assembly, Report of the Economic Commission, 14th Session, Doc. 8286 (A14-EC/38); See Buergenthal, *supra* note 41 at 240.

⁶⁴ Chicago Convention, *supra* note 50.

flights undermine the security of global civil aviation. That was, after all, the case of September 11 itself.

It is evident that individual States owe their citizens and the world at large a responsibility for maintaining aviation security. The obligation to conform to the SARPs now transcends certain limited aspects of national sovereignty and the national desire of an individual State to conform to an international obligation

It is to be noted that the Ministerial conference cannot be a decision-making body within the ICAO constitutional structure, but an advisory body of experts and politicians concerned with civil aviation security. While the conference had no law-making power, its unanimous recommendations carried important weight as *opinio iuris ac necessitatis* as expressed by aviation experts responsible for the national administration of civil aviation of the Contracting States. It in fact formulated, by implication, a principle that matters of aviation security are a subject of international concern and that the international community could now verify the national implementation of the security standards and procedures.

While the recommendation of the conference of Ministers and Resolution A33-1 are not *per se* a source of international law, the ensuing implementation of the programme by ICAO in full collaboration with States confirms that ICAO has been invested with elements of a supra-national power to enforce the implementation of aviation security standards with the express support of the international community and without any formal amendment of the constitutional basis of the Organisation.

One can safely conclude that security “audits” are consistent with the existing constitutional framework of ICAO. It is a mandatory function of the Council “to request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services”. Failure of a State to file a difference where such a difference in fact exists, under article 38 of the Convention could be considered as an infraction of the Convention. Furthermore, the Council has a mandatory obligation to “report to the Assembly any infraction of the Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of infraction”. The Council also has a discretionary power “to conduct research into all aspects of air transport and which are of international importance”.

Thus, the ICAO Council has all the necessary constitutional powers to enhance and effectively regulate international security standards and procedures and

to ensure complete clarity and transparency in their implementation. Resolution A33-1 and the directives of the Ministerial conference only outline a new approach to the implementation of the existing constitutional functions. This is a significant development in international law. After more than 50 years of ICAO's existence, the international community has moved to the position that certain matters of civil aviation safety and security do not belong exclusively to domestic jurisdiction, but are a legitimate matter of international concern effectively falling within ICAO's jurisdiction. This, it is submitted, is a significant change.

CHAPTER THREE

CHALLENGES RELATING TO AVIATION SECURITY BEFORE SEPTEMBER 11, 2002

In this chapter, international efforts by ICAO aimed at halting aircraft hijacking, terrorism, and other forms of unlawful interference with commercial aviation will be reviewed. The historical evolution of the civil aviation security problem and the international legal instruments on unlawful interference with civil aviation will be examined. We would establish by the end of this chapter that international law alone has not been successful in preventing unlawful interference against civil aviation. What is therefore needed is close collaboration in reinforcing and implementing aviation security measures worldwide.

A. General

The Chicago Convention prohibits the use of Civil Aviation for any purpose inconsistent with the aims and objectives of the Convention. One of the main objectives of the Convention⁶⁵ is to “insure the safe and orderly growth of international civil aviation throughout the world” and to “meet the needs of the peoples of the world for safe ...air transport”.⁶⁶ The ICAO technical aviation security programme attempts to assure the safety of passengers, personnel and the general public by first attempting to deny offenders access to aircraft. Safety is an overriding element that has attracted primary attention in the unification and codification of international air law and in the quasi-legislative function of ICAO. Law, at best, offers only a method for general prevention and represents only one of the tools for the management of overall security. Nonetheless, one must not underestimate the importance of sound, appropriate and efficient law making.

For the past 50 years, States have relied on ICAO to develop measures aimed at protecting civil aviation from acts of unlawful interference. ICAO has been

⁶⁵ *Chicago Convention*, *supra* note 32, art. 4.

⁶⁶ *Ibid.*, art. 44.

addressing the issue of unlawful interference with civil aviation for many years and has adopted a series of preventive measures. In 1970, a comprehensive Aviation Security Programme was launched, based on a new Annex 17 to the Chicago Convention, to which other security-related provisions of other Annexes were also added. ICAO has expanded these tools throughout the years.

B. The Evolution of Civil Aviation Security Issues

Unlawful interference with international civil aviation has existed almost as long as commercial aviation. According to the online Hijacking Database, the first recorded incident of aerial piracy was when the rebels of Peru hijacked a Pan American flight in 1931, in order to flee their country.⁶⁷ S.K. Ghosh, also states that hijackings constitute the highest percentage of all unlawful acts against civil aviation⁶⁸.

However, it was not until 1947 when the wave of hijackings escalated. The threat to civil aviation could be classified under three eras. During the early 1970s, the plane and passengers were traded in exchange for a change in flight destination, prisoner release, monetary payoffs, or the broadcast of a political statement. One of the responses to a series of hijackings that took place in Cuba in the 1960s was the use of manometers and x-ray machines to detect firearms. In the late 1970s and the first half of the 1980s, hijackings were conducted in an attempt to promote political objectives relating to existing international conflicts and these hijackings have constituted more than two-thirds of hijackings worldwide.⁶⁹

Consequently, a need to construct airports using a new design focusing on improving security was embraced. However, the hijacking of civil aircraft and converting them into weapons of mass destruction were never envisaged.

The 1990s, ushered in a third era and new dimensions in the history of hijackings: destructive potential was combined with target salience, the objective being to maximise the “other’s” pain while demonstrating one’s own moral superiority through a martyr’s death.⁷⁰ The first attempt to convert a hijacked aircraft

⁶⁷ See Aviation Safety Network, Hijackings Database, online:

<<http://www.aviation-safety.net/database/hijackings>> (date accessed: 10 June 2002).

⁶⁸ S.K. Ghosh, *Aircraft Hijacking and the Developing Law* (New Delhi Ashish Publishing House, 1985)

⁶⁹ Ibid.

⁷⁰ Ibid.

into a weapon, a prequel to September 11 was the Christmas Eve 1994 hijacking of a French Airbus by a four-man team from the Algerian terrorist movement GIA with the intention of crashing the plane into the Eiffel Tower. After September 11, it has become quite evident that civil aircrafts can now serve as a weapon of destruction. The tragic event reveals the vulnerability of the air transport industry, and brought to light that its security chain link is far weaker than have been previously realized.⁷¹

C. International Aviation Security Legal Instruments under the Auspices of ICAO

This section looks at International laws dealing aviation security and unlawful interference against international civil aviation. It is worth highlighting that these international legal instruments were drafted under the auspices of ICAO. For the purpose of this study we will be limited to the following documents, which will be examined and discussed subsequently:

- 1) *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo in 1963
- 2) *Convention for the Suppression of Unlawful Seizure of Aircraft*
- 3) *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at the Hague in 1970
- 4) *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal in 1988 and
- 5) *Convention on the Marking of Plastic Explosives for the Purpose of Detection* signed at Montreal in 1991.

⁷¹See Aviation Safety Network, Accident Description, online:
<<http://www.aviation-safety.net/database/1994/941226.htm>> (date accessed: July 18, 2002).

1. The Tokyo Convention of 1963

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, of 1963⁷² addresses mainly jurisdictional issues in connection to the hijacking of an aircraft.

Article 3 of the Tokyo Convention vests jurisdiction in the State of registry although it does not prohibit any other third-party State from exercising jurisdiction under its domestic law. It provides that acts, which endanger the safety of civil aircraft or passengers while the aircraft is in flight, are unlawful.⁷³

The provisions of the Tokyo Convention that have direct bearing on aerial hijacking are contained in Article 11.

Article 11(1) provides that “when a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, a contracting State shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft”.

This means that a State where a hijacked aircraft lands is required to facilitate the onward journey of the passengers and also return the aircraft to the State of registry. As contained in the convention, a contracting State can only detain offenders until such time as is reasonably necessary for criminal or extradition proceedings to be instituted.

⁷² Convention on Offences and Certain other Acts Committed on Board Aircraft, Signed at Tokyo, on September 14, 1963, ICAO Doc. 8364.

⁷³ *Ibid.*, art.1.

⁷⁴ *Ibid.*, art.11.

⁷⁵ See Paul Dempsey, “Aviation Safety and Security: International and Domestic Law as a Deterrent to Aerial Terrorism”, Opening Address of Director of the McGill Institute of Air and Space Law, Delivered at the 50th Anniversary of the McGill Institute of Air and Space Law (20 April 2002) (Montreal: McGill University, 2002).

Even though critics of the Tokyo Convention have pointed out its failure to create a clear obligation for State parties to prosecute or extradite hijackers⁷⁴, like Professor Dempsey demonstrated in his article, the Tokyo Convention seemed adequate as it served as a legal foundation for subsequent more specifically targeted international Conventions⁷⁵.

2. The Hague Convention of 1970

The increase in the number of unlawful acts against commercial aircraft in the late 1960's, tied to international conflicts, prompted ICAO to adopt the Hague Convention of 1970⁷⁶. These incidents highlighted the limited effectiveness of the Tokyo Convention and it became apparent to Member States that it was time to agree on a definition of what constitutes an unlawful act against civil aviation and formulate a concrete statement as to what appropriate penalties are required. For the purpose of this study, we will be examining the following Articles of this Convention: Articles 1, 2, 4, 6, 7 and 8.

Article 1: definition of the offence of unlawful seizure of aircraft:

“Any person who on 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”

Article 2: Contracting States are obliged to make the offence of unlawful interference with international civil aviation punishable by severe penalties

Article 4: A contracting State is also required to establish legal jurisdiction over unlawful seizures of aircraft and any other act of violence against passengers or crew committed in the course of hijacking or unlawful interference with international civil aviation.

⁷⁶ Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, ICAO Doc.8920.

Article 6: Each contracting State is obliged to arrest an offender and take him into custody for purposes of judicial proceedings.

Article 7: The State that has custody of the suspect, if it does not extradite the suspect is obliged- “without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for prosecution. This provision seems to render into treaty form the obligation *aut dedere, aut punire* in the case of hijacker.”⁷⁷

Article 8(2): Any contracting States may, at its option, consider the Hague Convention as the legal basis for extradition in response to a request from another State.

The Convention makes it a crime for a person to unlawfully seize or take control of an aircraft or assist one who performs such an act. The decrease in the in the number of hijackings could be attributed to the adoption of the Hague Convention of 1970. One of its successes is the signing of a United States-Cuba agreement to prosecute hijackers destined for Cuba.⁷⁸ The Hague Convention, attempts to create a uniform system of deterrence since prosecution or extradition is mandatory. The Hague Convention, therefore, represents the first meaningful development in ICAO’s effort to deter hijacking. As fewer States provide refuge for suspects, international law regarding the enforcement of penalties upon hijackers will become a reality.

3. The Montreal Convention of 1971

Written documents are usually overtaken by events and the Hague Convention is no exception. It failed to foresee or anticipate and deter aircraft sabotage. Whereas the number of aircraft hijackings declined in the 70s, the incidents of acts of sabotage and unlawful interference in airport ground facilities increased⁷⁹

⁷⁷ Edward McWhinney, *Aerial Piracy and International Terrorism: The Illegal Diversion of Aircraft and International Law*, 2nd ed. (Boston: Martinus Nijhoff Publishers, 1987) p43.

⁷⁸ See Paul Dempsey, *supra* note 75.

⁷⁹ *Ibid.*

The new trend of crime not treated in the Hague Convention prompted the international community to adopt the Montreal Convention of 1971.⁸⁰ Although similar in content with the Hague Convention, it emphasized airport security. The Convention focused on the prevention of sabotage and acts of violence. The Montreal Convention provides as unlawful:

- (a) acts of violence likely to endanger the safety of an aircraft,
- (b) destruction of, or serious damage to, an aircraft or air navigation facilities, and
- (c) communication of false information which endangers the safety of an aircraft.⁸¹

Article 1(2) of the Convention makes “an attempt to commit” any of the offences provided in the said Convention a crime and punishes both the offender and the accomplice for committing or attempting to commit an offence.

4. The Montreal Protocol of 1988

The bomb explosions at the Frankfurt and Tokyo airports in June 1985 and attacks at the Rome and Vienna airports in December 1985 exposed the loop holes of the previous conventions as these did not cover unlawful acts against persons at airports serving international civil aviation. Consequently, in 1988, a Diplomatic conference was convened by the ICAO during which the “*Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*” was adopted.⁸² The Protocol therefore, filled the gap, which existed concerning acts of violence at international airports.

⁸⁰ Convention For the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Signed at Montreal on 23 September 1971, ICAO Doc. 8966.

⁸¹ *Ibid.*, art 1.

⁸² Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on February 24, 1988, ICAO Doc. 9518.

5. The Montreal Convention of 1991

It is regrettable that it takes a tragedy for State parties to act or react to a given situation. It was only after the Pan Am 103 explosion over Lockerbie, Scotland, that the Montreal Convention of 1991 was adopted.⁸³ This convention requires parties to undertake to prevent the manufacture and distribution of unmarked explosives and to also destroy any of their existing stockpiles.

D. Findings

The international community in a bid to combat unlawful acts against the security of international air transport have produced a significant number of conventions relating to unlawful interference against international civil aviation.

It has come to light, from our readings and reviews of existing documents that ICAO's success at formulating multilateral conventions on matters of safety, efficiency and development of civil aviation is primarily dependent on the contracting States. A significant number of international legal instruments addressing the safety and security of air transport have been adopted under the auspices of the Organization. However, the principal objective of these multilateral agreements which is to deter crimes against international civil aviation is yet to be achieved.

ICAO needs to be commended for its efforts as the conventions cover the major issues surrounding international hijackings. A number of factors however, contribute in frustrating ICAO's efforts to deter aircraft hijacking. Primary among these is the reaction of a State to an act of unlawful seizure or interference with an aircraft is influenced by the political motives of the suspects.⁸⁴ As long as offenders could expect to escape punishment by seeking refuge in a State sensitive to their cause, unlawful interference against civil aviation must be expected. Like Professor Dempsey said in his article,

It is apparent that the reason underlying the failure of the ICAO's efforts is the often political nature of the offense. Resolving political and ideological differences has always been a difficult task for international organizations, and

⁸³ Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal, on March 1, 1991, ICAO Doc. 9571.

⁸⁴ See Paul Dempsey, *supra* note 75.

*the ICAO has proven to be no exception. Thus, political differences seem to have prevented the ICAO from drafting a more stringent convention on air security enforcement*⁸⁵.

It is worth noting that all the above mentioned conventions have in common that contracting Parties are obligated to punish the described offences by “severe penalties taking “such measures as are necessary” to establish their jurisdiction over the offence and offenders. However, Paul Dempsey, amongst others criticizes the Hague and Montreal Conventions for their ambiguity.⁸⁶ The failure of the Conventions to define the term “severe penalties” has created the opportunity for some States to avoid inflicting severe punishment on offenders deemed to be political refugees⁸⁷.

These international legal instruments impose the principle of *aut dedere aut judicare*, an obligation on ICAO Contracting States to either punish or extradite an offender to the State where the crime was committed or to his State of origin. Michael Plachta subscribes to the theory that recent practices of the requested State delivering the suspect to a third State, thus, adding a third alternative to the traditional principle of *aut dedere aut judicare-aut transfere*.⁸⁸ The delivery of the person to a third State could be regarded as a de facto extradition, if viewed from the perspective of the requested State and its domestic law. Assuming then, that the ‘delivery’ is a substantial new element, there may be a need for ICAO to amend the security conventions to bring them in line with current State practice.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Michael Plachta, “The Role of the Security Council in Enforcing the Principle: Aut Dedere Aut Judicare” (2001) 12 E.J.I.L. 125.

C. Amendments, Resolutions and Others

1. Article 3bis: An Amendment to the Chicago Convention

On September 1, 1983, Korean Air Flight KE 007 was intercepted by a Soviet fighter aircraft and shot down.⁸⁹ In the aftermath of the KE 007 disaster, the ICAO Council in order to avoid a repetition of such a tragedy adopted a Resolution deploring the destruction of civil aircraft.⁹⁰ This Resolution prohibits the use of armed force against international civil aviation as this is incompatible with the norms governing international behaviour and the Chicago Convention. Article *3bis* as it is commonly referred to, is a broad attempt to define in detail the legitimate means which States may use to ensure respect for the sovereignty of their airspace. States are required to refrain from using weapons against civil aircraft and when an interception is made, the lives of persons on board must not be endangered. Article *3bis* also reaffirms the condemnation of the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity.⁹¹

It is our belief that during all these years, the focus of all aviation security measures clearly has been the protection of passengers and the aircraft crew. The event of September 11, 2001, has forever transformed the way the aviation industry views security. It has changed the principal notion of security of passengers and the aircraft crew to include the protection of the public from acts of unlawful interference with civil aviation. As demonstrated on September 11, when the aim of terrorists is to kill themselves together with all others on board, as well as people on the ground, the rescue of the persons on board such aircraft may be almost an impossible task. If we look at a particular case in point:

On September 11 a Korean jumbo jet was diverted to Whitehorse with a U.S. fighter jet escort after it sent a distress signal. Ottawa allowed U.S. fighters into Canadian airspace it became clear that Canadian CF-18s

⁸⁹ See Michael, Milde, "Legal Aspects Of Aircraft Accident Investigation" (KE 007-Ten Years Later), (2001) in Professor Milde & H. Khadjavi, eds., *Public International Air Law: Course Materials* (Montreal: McGill University, 2001) 351.

⁹⁰ See ICAO Proceedings of the Extraordinary Session of the Council, ICAO Doc. 9416-C-Min. Extraordinary (1983).

⁹¹ See Urs, Haldiman, *Enhancing Security: "11 September Underscores Need for Regular and Continuous Development of Strategy"* (2002) 57:5 ICAO J. 8.

from Inuvik could not get to the airliner quickly enough. The jumbo jet landed safely in Whitehorse. The distress call turned out to be a miscommunication.⁹²

In a subsequent interview, the Prime Minister of Canada, Jean Chrétien stated that if he did authorise the shooting down of that aircraft, he would have been “responsible for killing 300 people”.⁹³

If an aircraft is slow in responding to the interceptors, or does not respond due to technical faults in the communication system or refuses to respond, there will probably not be sufficient time to evaluate whether the lack of response is due to technical problems or to a terrorist attack. Such an aircraft, therefore, runs the risk of being shot down despite Article 3*bis*.

Is there then a reasonable and practicable alternative remaining? The time for weighing the risk is always extremely short and the responsibility for such a decision would always lie with the person in charge and needs a careful analysis of the situation.

Despite the event of September 11, the security measures adopted by ICAO are to a certain degree still valid. However, it is necessary to consider the best way to handle the new forms of aggression. In this arena, improvements may lie less in the adoption of new rules and revision of old ones than in the implementation of and compliance with such rules by States. Aerial intrusions are likely to continue, however, the best that can be done is to reduce the number and consequences of such incidents.

To conclude, it appears that acts of unlawful interference with international civil aviation and laws to combat these acts are engaged in a fierce war of words. International law alone cannot effectively solve the problem as the event of September 11 has shown. The international community is faced with a broad range of challenges and the global aviation security regime will always have to be on the alert as offenders adapt to a changing environment and seek to exploit unanticipated vulnerabilities.

⁹²Interview of the Prime Minister of Canada, Jean Chrétien,
Online:http://cbc.ca/stories/2002/09/12chretien_jumbo_020912(date accessed:10 September 2002).

⁹³ *Ibid.*

2. Annex 17

Annex 17, entitled “*Standards and Recommended Practices-Security-Safeguarding International Civil Aviation Against Acts of Unlawful Interference*”, adopted by the ICAO Council in pursuance to Clause 3 of the ICAO Assembly Resolution A17-10, became applicable in February 27, 1975.⁹⁴ It sets minimum standards for aviation security and deals mainly with preventive and responsive measures for acts of unlawful interference against civil aircraft, airports, passengers, baggage, cargo and mail.

Every contracting State is required to enact regulations to safeguard civil aviation, establish a national civil aviation security programme and a security training program. While Annex 17 is the principal SARPS dealing with security, Annexes 6, 9, 13, 14 and 18 also addresses aviation security.

Annex 6: it provides for aircraft crew members to have training programs on unlawful interference. It also requires that the flight crew compartment door must be capable of being locked.

Annex 13: Where an aircraft is subject to unlawful interference, annex 13 provides that a contracting State where the incident occurs is to notify the aviation security officials of the State of the concerned State.

Annex 18: deals with the transportation of dangerous goods by air.

The SARPs have been regarded as “secondary legislation” and their relevance is often underestimated. It is evident however, that Annex 17 plays a prominent role in the field of aviation security by providing specific and mandatory security guidelines.

3. Security Manual

The ICAO General Assembly in June 1970, adopted Resolution A17-70 which directed the Secretary General of ICAO to “develop a security Manual” for safeguarding civil aviation against acts of unlawful interference. The Manual, which was

⁹⁴ See *Chicago Convention*, *supra* note 32, Annex 17, (March 1986).

first, published in November 1971 is designed to promote the safety of operations through the application of security measures with emphasis on prevention and deterrence. The Manual is distributed as a restricted document, available only to those persons with a need for such knowledge in the performance of their official duties.

The 33rd meeting of the General Assembly recognises the importance of promoting safety operations through the application of security measures with emphasis on prevention and deterrence and the need for contingency plans for dealing with occurrences if, and when, they occur. It adopted Resolution A33-1 directing the Council to immediately address new and emerging threats to international civil aviation and in particular, review the adequacy of the security Manual and other security related documents.

4. Model Clause on Aviation Security

The inclusion of a model aviation security clause into bilateral and multilateral agreements reaffirms and reinforces the obligation of contracting States to comply with ICAO SARPs relating to security and multilateral security legal instruments. The objective is to protect civil aviation against acts of unlawful interference. It also creates the opportunity for parties to co-operate in their efforts to prevent unlawful acts against the security of international civil aviation.

The adoption of Resolution A33-2 by the 33rd Session of the Assembly, urging each Member State to include in their bilateral agreements on air transport, a model clause related to aviation security is yet another step to protect international civil aviation against acts of unlawful interference.

5. ICAO Assembly Resolutions

A Resolution⁹⁵ on unlawful interference with international civil aviation and its facilities was adopted by the ICAO Assembly, in April 1969. The resolution provides for the creation of a Committee on Unlawful Interference to develop preventative measures and procedures to safeguard international civil aviation from

⁹⁵ See ICAO, Proceedings of the 66th Session of the Council: Minutes of twenty-sixth meeting, ICAO Doc. 8796C/983-26 (June 2, 1969).

unlawful interference.⁹⁶ A series of practical measures, which might be useful in the prevention of unlawful interference on the ground and in-flight, has been adopted by the committee.⁹⁷

The 26th Session of the ICAO Assembly in October 1986, adopted Resolution A26-7 as a consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference.⁹⁸ The appendices attached to this resolution consolidate and updates all previous resolutions concerning aviation security.

The 33rd Session of the ICAO Assembly condemned the use of aircraft as a weapon of mass destruction and stated that it contravenes Articles 4 and 44 of the Chicago Convention on International Civil Aviation. The international community was urged to investigate, prosecute offenders and punish severely those who misuse civil aircraft as weapons of destruction and ensure that they “find no safe haven anywhere...”⁹⁹

The 33rd Session of the Assembly, in Resolutions A33-1 and A33-2, also directs the Council to continue to take all necessary measures for the prevention of acts of unlawful interference and to prepare recommendations for strengthening measures to suppress such acts.¹⁰⁰

⁹⁶ See ICAO Doc. 8849-c. 990.4, 4th ed., (April 1987) at 2. Resolution A26-7 superseded resolutions A17-5, A17-6, A17-7, A17-9, A17-10, A17-11, A17-13, A17-14, A17-16, A17-17, A17-23, A20-2, A21-9, A22-16, A22-17, A23-21, A23-22, A24-18, and A24-19.

⁹⁷ This resolution has been subsequently amended. *Ibid.* the resolution was amended in March 28, 1973; December 3, 1985; and December 8, 1986.

⁹⁸ See ICAO Doc. 8849-C.990.4, *supra* note 91 at 11.

⁹⁹ See ICAO 33rd General Assembly Meeting, online: <<http://icao.int>> (date accessed: 15 July 2002).

¹⁰⁰ See ICAO, Res. A33-1 & A33-2, *supra* note 4.

CHAPTER FOUR
INTERNATIONAL CIVIL AVIATION
ORGANISATION'S RESPONSE TO THE SECURITY
CHALLENGES OF SEPTEMBER 11, 2001

This chapter will examine the steps taken by ICAO in addressing the enormous challenges created by the events of September 11. While it is arguable that there is no complete and definitive answer to the question as to how the incident of September 11 occurred, the possibility that it happened as a result of the varying degrees of States' preparedness to embrace and implement ICAO SARPs could be put forward. The ensuing discussions reveal that there is a general consensus that security audits and assistance by ICAO to assessed States is an equally important factor. A truly effective security audit programme cannot be realised without first identifying the problems and then taking all the measures to resolve them. In this chapter, a critical assessment of the new security audit regime, emphasising that the adoption of the ICAO Strategic Action Plan, the Security Action Plan, the AVSEC mechanism and the Security Audit Programme ensure that the Chicago Convention remains a sound basis for the future of aviation security and air transportation. Also, that ICAO maintains its position as the standard setting body for international civil aviation.

ICAO plays a key role in formulating international security standards as well as assuming the global leadership role in ensuring that States implement these new Standards. States' obligations under the Chicago Convention is the desire to promote and conduct safe and regular aircraft operations through the development and implementation of internationally acceptable standards and recommended practices.

ICAO is changing its image from being the accepted authority for the development of civil aviation security standards to becoming the recognised worldwide auditor. The chapter presents an overview of the objectives of the Strategic Action Plan. The security plan of action and the AVSEC Mechanism together form the basis in discussing the transition undertaken by ICAO to the establishment of the universal mandatory security audit programme. This background provides a better understanding of not only the reasons of the action and the mechanism of its programme, but also for the response to the events of September 11.

A. Background

1. The Strategic Action Plan

In the early 1990's, recognising the new and rapidly evolving challenges faced by civil aviation and the need to ensure the effectiveness of the ICAO safety oversight mechanism, the 27th and 31st Sessions of the ICAO Assembly directed the ICAO Council to develop a global strategy looking beyond the traditional programming process. This plan was to be implemented systematically, drawing from the finances and human resources of the organisation.¹⁰¹ The Council, in response, drafted a Strategic Action Plan of Implementation Priorities for the economic, technical and legal fields for the next decade.

On February 7, 1997, the Council for the first time evaluated and adopted a Strategic Action Plan¹⁰² [hereinafter referred to as the SAP]. The 1997 SAP, designed to guiding Civil Aviation into the 21st Century", is to be implemented within the framework of the Chicago Convention.¹⁰³ This is to ensure that the Organisation responds to the major challenges facing civil aviation in the coming years and meets the needs of all its member States, which have grown from 52 in 1944 to 188 today.

The SAP was designed to breach the gap and continuing divergence among contracting States in the level of implementation and conformity with the SARPs, which have potential global implications for the safety, regularity and efficiency of civil aviation.

The SAP is intended to ensure that ICAO maintains its position as the main standard-setting body for international civil aviation and encourages national ratification of instruments of international air law and implementation of ICAO Standards and Recommended Practices (SARPs) to the greatest extent possible in order to maintain a common aviation system worldwide.

The following Statement made by the President of the Council of ICAO, Dr. Assad Kotaite, in January 2000, sheds light on the aims and objectives of the

¹⁰¹ See ICAO, Annual Report of the council-1993: Projects given special attention during 1993, ICAO Doc. 9622 at 32. See also, Strategic Action Plan online:

<<http://www.icao.int/applications/search/Results.cfm>>. (date accessed: 15 August 2002).

¹⁰² See ICAO, Launch of the Strategic Action Plan, online:

<<http://www.icao.int/applications/search/results.cfm>>; also see online

<http://www.icao.int/icao/en/strat_txt.htm> (date accessed: 15 August 2002).

¹⁰³ See *Chicago Convention*, *supra* note 32.

Organisation's blueprint:

At the crossroads of two centuries, we are beginning to understand the forces that are shaping our future. Fundamentally, everything is becoming interconnected. Issues are global, whether economic, social, humanitarian or environmental. The Convention on International Civil Aviation of 1944 remains a sound flight plan for the future of air transport. The words of its inspiring Preamble can guide us in other endeavours: *"International civil aviation can greatly help to create and preserve friendship and understanding among nations and peoples of the world"*. This is a call to humanise the globalisation process we have embarked upon, to allow for worldly pursuit while caring for humans and the planet that supports us.¹⁰⁴

The objectives of this SAP are to further the safety, security and efficiency of international civil aviation and promote the principles enshrined in the Convention on International Civil Aviation. It develops a vision for harmonious development of international civil aviation on a national and regional basis and reflects this vision in global planning, by creating and fostering the implementation of common aviation standards and practices. It further encourages the economic design and operation of aircraft and aviation facilities while avoiding discrimination between contracting States and optimizing the utilisation of human, technical and financial resources.

Dr. Assad Kotaite, reiterated during the official launching of the Strategic Action Plan, the importance of empowering ICAO to oversee the implementation of aviation safety and security standards globally. He said ICAO is already the accepted authority for the development of civil aviation security and safety standards. Its goal was now to become the recognised worldwide auditor of safety and security standards for international civil aviation".¹⁰⁵

This constitutes a quantum leap forward in identifying security shortcomings in the field of air transport. This new focus signifies, in particular, a changing emphasis on the role of the Organisation, from development to implementation.

The Strategic Action Plan focuses on eight major objectives to further the safety, security and efficiency of international civil aviation:

¹⁰⁴ See ICAO, Message from the President of the Council of ICAO, Dr, Assad Kotaite, January 2000, online: <[http://www.icao.int/cgi/goto.pl?icao/en/pres 2000.htm](http://www.icao.int/cgi/goto.pl?icao/en/pres%2000.htm)> (date accessed: August 15, 2002).

¹⁰⁵ See ICAO, Address by the President of the Council of ICAO, Dr. Assad Kotaite, on the Occasion of the Launch of the Strategic Action Plan, May 1997, Online <<http://www.icao.int/cgi/goto.pl?icao/en/strategy.htm>> (date accessed: July 15, 2002).

- To foster the implementation of ICAO Standards and Recommended Practices (SARPs) to the greatest extent possible world-wide;
- To develop and adopt new or amended Standards, Recommended Practices (SARPs) and associated documents in a timely manner to meet changing needs;
- To strengthen the legal framework governing international civil aviation by the development of new international air law instruments as required and by encouraging the ratification by States of existing instruments;
- To ensure the currency, co-ordination and implementation of regional air navigation plans and provide the framework for the efficient implementation of new air navigation systems;
- To respond on a timely basis to major challenges to the safe, secure and efficient development and operation of civil aviation;
- To ensure that guidance and information on the economic regulation of international air transport is current and effective;
- To assist in the mobilization of human, technical and financial resources for civil aviation facilities and services;
- To ensure the greatest possible efficiency and effectiveness in the operations of the Organisation, to *inter alia* meet the above objectives.¹⁰⁶

This initiative is a milestone in the history of the Organisation's mission since the signing of the Chicago Convention. The objectives of the SAP represent traditional and fundamental activities, such as the development and enhancement of aviation Standards, as well as new challenges, namely the need to assist member States in carrying out their responsibility for implementing these standards. (*See the subsection: The Universal Mandatory Security Audit Programme, 2003*). For each of the eight objectives, the Council has defined key activities and a program of implementation that reflect the core program of the Organisation. The SAP also identifies issues that need to be addressed in the evolution of these key activities.

¹⁰⁶ This is reproduced from the Description of the Plan, Adrianus D. Groewege, *Compendium of International Civil Aviation*, 2nd ed. (Canada: International Aviation Development, 1998) 46.

ICAO's ability to adopt a modern, forward looking plan illustrates the flexibility of the Chicago Convention and represents a renewed commitment by ICAO, on behalf of all member States, that the Organisation will continue to discharge successfully both the traditional and new responsibilities required of it in a rapidly changing world aviation environment. The challenge for the future is to ensure that the objectives of the SAP are fully implemented.

The conclusion is that the fundamental character of the common purposes declared more than 50 years ago has not changed; rather, it is the understanding that there is a need for a change in attitude toward, and the means of, ensuring them. The chapter reaches the conclusion that, after September 11, every participant in the world aviation scene should share the responsibility for security, and support and pursue the principles of cooperation, co-ordination and harmonisation through ICAO, which is the recognised international regulator in civil aviation. After all, this is what the 50 year old Chicago Convention is all about.

2. Aviation Security Mechanism (AVSEC)

In 1989, the General Assembly adopted a resolution recognising the need for the establishment of a mechanism to assist States in the strengthening of implementation and co-operation in the field of aviation security. Hence the Council at the twenty-sixth meeting of its 126th Session, considered the creation of a Mechanism for financial, technical and material assistance to States. The Council requested the Secretary General to take the necessary action to set up a funds-in-trust agreement for this purpose.¹⁰⁷

Subsequently, the Assembly, at its 27th Session, endorsed the establishment of such a Mechanism and requested the Council of ICAO to present to the next ordinary session of the Assembly a progress report on its implementation. Accordingly, the 29th and 31st Sessions of the Assembly received reports on the progress made in the implementation of the Mechanism. During its 32nd Session, the Assembly, reviewed the progress report on the implementation of this Aviation Security (AVSEC)

¹⁰⁷ See ICAO, AVSEC Mechanism, online:

<<http://www.icao.int/cgi/gotoatbl?icao/en/atb/avsec/overview.htm;avsec>> (date accessed: 15 August 2002).

Mechanism, endorsed this programme until the end of 2001.¹⁰⁸

Prior to September 11, the mechanism was funded on the basis of voluntary contribution. Over forty States contributed financially or in kind to the AVSEC Mechanism during the past triennium. The main components of the programme are training assistance, technical evaluations and organisation of full-scale exercises.¹⁰⁹

The Council, at the seventh meeting of its 161st Session, again reviewed the implementation progress, renewed the objective of the Mechanism, renamed the programme the Mechanism for effective implementation of Standards and Recommended Practices (SARPs) contained in Annex 17 and extended it to 2004.¹¹⁰

The overall objective of the Mechanism is now to assist States, upon request, to achieve in achieving compliance with Annex 17 through:

- the provision of advice to States, on aviation security organisation and techniques;
- the conduct of international aviation security surveys and assessments on a confidential basis, and recommend methods for the introduction of aviation security measures to meet the requirements of Annex 17;
- the co-ordination of an aviation security training programme, providing on-the-job counterpart training and the staging of ICAO-sponsored, topic-focussed workshops and regional training seminars;
- the provision of aviation security equipment, training aids and other equipment appropriate for the enhancement of aviation security; (in fully justified and selected cases, subject to supply by donor States) and
- recently, the conduct of international aviation security audits on a voluntary basis with a view to assessing the level of implementation of Annex 17.

Voluntary contributions under the AVSEC Mechanism during the past triennium were approximately US\$3 million per triennium. Following the adoption of Resolution A33-23, some contracting States contributed about 1.2million. The financial resources available in the AVSEC funds are approximately US\$1.7 million and about US \$0.5 million is from the AVSEC Mechanism funds. In the regular

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

programme budget for 2002-2004 allocates US\$2 million was allocated for the AVSEC Programme, which covers the Regular Programme.¹¹¹

So far, 140 States have requested for assistance under this programme, 112 States have been visited for comprehensive technical evaluations and 35 States have received follow-up missions.

In the wake of the tragic events of September 11, 2001, the 33rd Session of the ICAO Assembly, held in Montreal from September 25 to October 5, 2001, considered a report on the continuing implementation of the AVSEC Mechanism and expressed its strong support for this programme. In order to permit longer-term strategies for enhancing the implementation of the SARPs contained in Annex 17, the Assembly decided that the Mechanism should become a permanent and mandatory programme involving all contracting States.¹¹²

With the full support of contracting States, ICAO has been providing advice and guidance through the AVSEC Mechanism to member States concerning the implementation of aviation security standards and procedures contained in Annex 17.

B. The ICAO Security Action Plan

Following the decisions of the 33rd Session of the Assembly¹¹³ and the High-level Ministerial Conference, ICAO adopted a Global Aviation Security Plan of Action which includes the following elements:

- The identification, analysis and development of an effective global response to new and emerging threats, integrating timely measures in specific fields including airports, aircraft and air traffic control systems;
- The strengthening of security-related provisions in the annexes to the Chicago Convention, using expedited procedures where warranted and subject to overall safety considerations, including the protection of the flight deck from intruders;
- The implementation of regular, mandatory, systematic and harmonised aviation security audits to evaluate security in place in all Contracting

¹¹¹AVSEC-Conf/02-WP/9, *supra* note 8.

¹¹²See ICAO Res. A33-1, *supra* note 4.

¹¹³*Ibid.*

States at the national level as well as security arrangements at sample airports for each State.

This action plan calls for close coordination and coherence between the ICAO security audit programme and security audit programmes at the regional and sub-regional levels. The findings of security audit results processed in a manner that reconciles confidentiality and transparency.¹¹⁴

The plan endorsed the concept of an aviation security follow-up programme which would provide States with assistance in improving security by correcting the deficiencies identified by an audit.

ICAO was called on to adopt the plan of action, which will cost US \$17 million for the initial phase of 2004, not later than 14 June 2002, and to implement it within the shortest feasible time frame. The conference declaration called on ICAO member States and relevant international organisations to participate fully in implementing the plan, with the goal of achieving concrete results at the earliest possible date. Most funding for the action plan is to come from donor States, (*on a voluntary basis*). The objective of the ICAO Action Plan is to promote the principles enshrined in the Chicago Convention in the most efficient manner so that the challenges posed by modern exigencies of civil aviation are met.

The AVSEC Action Plan is expected to achieve the following:

- ensure that aviation security measures are implemented by ICAO in an objective and non discriminatory manner ;
- carry out a detailed study of the adequacy of the existing aviation security conventions and other aviation security-related provisions with a view to developing measures to close any existing gaps and remove the inadequacies;
- enhance Annex 17 security Safeguarding International Civil Aviation against Acts of Unlawful Interference to the Convention on International Civil Aviation;
- reinforce the AVSEC Mechanism in the preparation of security audits and undertake immediate or urgent assistance to States;
- expedite work on Machine Readable Travel Documents (MRTDs), biometric identification and travel document security and improving

¹¹⁴ *Ibid.*

border security systems;

- review certain procedures for Air Navigation Services (PANS);
- the revision of relevant ICAO manuals and other guidance material; and
- ensure the further development of Aviation Security Training Packages (ASTPs), training programmes, workshops, seminars, as well as assistance to States through ICAO's technical co-operation programme.

Unlike safety-related SARPs designed to prevent accidents and unintentional incidents, security SARPs are designed to counter the evolving *modus operandi* and changes in the level of sophistication and technologies used by offenders in deliberately targeting civil aviation. Civil aircraft are vulnerable to unlawful interference when within the airport environment. Adapting to changes in security threats requires a State to employ varying methods and practices unique to the environment of each airport in achieving international Standards. It should be noted that following the events of September 11, the travelling public is now keenly aware of security at airports, and in order to increase their confidence in air travel, we must recognise that their concern is with the integrity of the security system that processes them as passengers and ensures that their aircraft are secure.

C. The Mandatory Universal Security Audit Programme

"The success in preventing future acts of terrorism is vital, because global air transport is a driver of economic development, a catalyst for business and tourism, and a vehicle for social and cultural development worldwide."¹¹⁵ These words of Assad Kotaite following the events of September 11 launched an appeal for the reform of global aviation security. The preclusion of any further critical breaches of security prompted ICAO to develop measures to meet the challenges faced.

The 33rd Session of the ICAO Assembly that opened on September 25, 2001 dealt extensively with security concerns and delegates representing contracting States, as well as observers representing international organisations expressed strong support for the implementation of a worldwide security auditing process. The meeting called

¹¹⁵ See ICAO, Opening address, by President of the Council, Dr. Assad Kotaite: High- Level Ministerial Conference on Aviation Security (February 19-20, 2002).

for an international high-level ministerial conference to develop measures for “preventing, combating and eradicating acts of terrorism involving civil aviation.”¹¹⁶

The High-level Ministerial Conference on Aviation Security, which met in Montreal on February 19 and 20, 2002, responded to the issues raised by the events of September 11. It agreed on a comprehensive global aviation security strategy and action plan for strengthening aviation security worldwide. At the heart of the global strategy is the introduction of security audits, which will evaluate compliance with ICAO standards.¹¹⁷

1. Security Audit Program

Having the desire to ensure that ICAO standards and recommended practices (SARPs) are implemented effectively through national security systems and at airports around the world, Resolution A33-1¹¹⁸ also called for ICAO to consider establishing a universal security oversight audit programme. This audit programme is to be set up using the successful universal safety oversight audit programme (USOAP) model which was launched by ICAO in January 1999. It was also recommended that the programme take inspiration from the system of regular safety or security audits introduced recently by the European Civil Aviation Conference (ECAC).¹¹⁹ In addition, ICAO was directed to address the new and emerging threats to civil aviation, and to review the inadequacy of the existing aviation security conventions.¹²⁰

The Assembly in discussing the development of an aviation security audit programme often include the term “oversight,” whereas the Ministerial Conference endorsed an “audit programme”. The usage of the term “oversight” in connection with security audits has presented some confusion in interpreting the meaning of the phrase “universal security oversight audit programme”. The term “security audit programme” may refer to the role with which ICAO has been charged (i.e., audit of the status of implementation of security measures worldwide). By contrast, the security oversight audit programme includes the determination of whether a State is capable of

¹¹⁶ See ICAO, Res. A33-1, *supra* note 4.

¹¹⁷ See ICAO J., *supra* note 2 at 5.

¹¹⁸ See ICAO, Res. A33-1, *supra* note 4; see also ICAO: (November/December 2001) 56:9 ICAO J. 5.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* at 6.

overseeing the implementation and enforcement of SARPs in its sovereign territory.

2. Program Objectives

The specific objective of the ICAO aviation security audit programme is to ascertain the effective implementation of SARPs contained in Annex 17 by member States.¹²¹ The effective application of enhanced uniform security measures commensurate with the threat will help to restore confidence in air transport. The establishment of an ICAO universal, mandatory and regular aviation security audit programme would, therefore, enable ICAO to assess the level of implementation by States of the SARPs contained in Annex 17 and would serve as a catalyst to enhance the provisions of appropriate training, the development of guidance material and assistance tools, as well as, further improvement of Annex 17 itself. The objective is to further enhance aviation security by identifying potential deficiencies in States' aviation security systems.

The Assembly and ministerial decisions represent the basis for the ICAO policy for conducting security audits by giving authority to the Council to establish the program. The recently completed security audit manual reflects the aims of Resolution A33-1.¹²² The manual provides information to ICAO security auditors and contracting States with standard auditing procedures. The extension of the safety-oversight audit to security issues, while unprecedented, is not surprising, not only because it is a reaction to the post-September 11 reality, but also because regulation of aviation safety includes regulation of aviation security.

The lessons learnt about the effective regulation of international safety standards in air navigation through the evolution of the ICAO safety-oversight audit program could be used as a guide in the implementation of the security audits. Resolution A33-1 and the decision of the High-level Ministerial Conference have similar objectives as the safety oversight audit, "to identify deficiencies and correct deficiencies in the implementation of applicable standards".¹²³ In implementing the recommendations laid down by the Ministerial Conference, experiences gained in the implementation of the safety oversight audit programme could be useful guide in

¹²¹ See ICAO J., *supra* note 56; see also ICAO Res. A33-1, *supra* note 4.

¹²² See ICAO, Res. A33-1, *supra* note 4.

¹²³ *Ibid.*

formulating the elements and procedures for conducting the security audit.

Based on the experience of the USOAP, the Security Audit Programme includes the following the primary objectives:

- Determine the degree of conformance of the State in implementing ICAO security Standards;
- Observe and assess the State's adherence to ICAO Recommended Practices, associated procedures, guidance material and safety related practices;
- Determine the effectiveness of a State's implementation of the SARPs and related documents through the establishment of legislation, security system and the auditing capability;¹²⁴ and
- Provide the Member States with advice as how to improve their internal audit capability.

Since the management of the program is conferred to ICAO,¹²⁵ ICAO trained and certified audit teams, to be supervised by an ICAO staff member could be engaged for the audit process. All personnel assigned to an ICAO security audit duty are required to satisfy a predetermined qualification criteria and training requirements. Experts from both developed and developing States could be hired to serve in the audit team.

In developing the framework for a security audit programme, proven and successful concepts used in viable programs already developed by ICAO, ECAC, FAA (IASA), and other States could be reviewed. Certain concepts are fundamental to an acceptable, universal programme. They include the following principles:¹²⁶

Sovereignty - The principle of States' sovereignty over the airspace above its territory is recognised in Article 1 of the Chicago Convention. ICAO should fully respect the sovereign State's responsibility and authority for security audits, including its decision-making powers with respect to implementing corrective actions related to audit findings.

Universality - The mandate given to ICAO explicitly requires the Organisation

¹²⁴ See ICAO AVSEC Ministerial Conference, Consolidated Conclusions, Recommendations and Declaration, AVSEC – Conf/02 at 5. See also ICAO online:

<<http://www.icao.int/icao/en/atb/avsec/avsecconf2002/index.html>> (date accessed: 15 July 2002).

¹²⁵ *Ibid.*

¹²⁶ See ICAO, Security Audit Manual, ICAO Doc.9807. The Security Manual is one of the series of documents prepared in pursuant to the ICAO Security Audit Programme.

to conduct the audit on all ICAO member States.¹²⁷ Therefore, the security audits are to be conducted on all contracting States in accordance with an audit program established by ICAO and agreed upon by the contracting States, otherwise global security will be compromised. Aviation security is an international concern, since it is the weakest link that defines the strength of the chain, and this is particularly salient in international air transport.

Transparency and Disclosure - The audit reports are to be confidential and made available to the audited State.¹²⁸ Recalling the emphasis placed by the Council on keeping completed audit information confidential to ensure the vulnerabilities of an airport are not made known to terrorist elements, audit reports are to be shared with the audited State only, and ICAO Headquarters is the official repository for the reports, where they can be appropriately safeguarded. The sharing of audit information with other States is to be accomplished on a bilateral or multilateral basis.¹²⁹

Timeliness - The results of the audits are to be produced and submitted on a timely basis in accordance to a pre-determined report preparing and submitting schedule.¹³⁰

All Inclusive - The ICAO Security Audit Program is currently limited to Annex 17.¹³¹ However, this could be expanded, at an appropriate time, to include the implementation of the Security legal instruments and other Annexes related to security of civil aviation. Guidance materials and manuals for the auditors have been developed under the guidance of the AVSEC panel to ensure that audit teams determine whether appropriate national laws and regulations are in place and assess the implementation of the national civil aviation security program through on-site audits of airports.

Systematic and Uniform - It is important to have a standardisation and uniformity in scope,¹³² depth and quality of audits. This is assured through an initial and refresher training of all auditors, the provision of guidance material and the implementation of an audit quality control system within the Security Audit Unit. ICAO has developed the technical requirements and guidance materials needed to

¹²⁷ See ICAO, ICAO Res.A33-1, *supra* note 4.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

administer the audits within the framework described above, as well as a quality assurance program to maintain standards of performance.

Appropriate Composition - The composition of the teams reflects the fair, objective, and unbiased foundation of the auditing system. As with other inspectorate programs, the pool of auditors consist of aviation security experts who are trained and certified by ICAO. Additionally, an ICAO staff member supervises all teams. Team members from the audited State are not included; and that a State has no more than one member at a time on any given team.¹³³ These requirements are achieved by using a rotational roster of qualified team members and ICAO staff members. The roster is held and controlled at the ICAO headquarter.

Fairness - The audits are to be conducted in a manner such that member States are given the opportunity to monitor, comment and respond to the audit process, but within an established time frame.

Quality - The Security audits are conducted by appropriately trained and qualified auditors, and in accordance with recognised auditing quality concepts. The initial training of auditors is administered by the Headquarters element of ICAO using mobile teams of instructors in order to provide training at facilities located in the regions.¹³⁴

The transition of the character of the Program from “Voluntary Evaluation” to a “*Universal Mandatory*” Audit indicates a delegation of authority of a completely different nature.¹³⁵ The core issue here is whether the transition is justified. In my opinion, it is, if one also considers the necessity of restoring public confidence in air travel after September 11, the fact that the main objective of ICAO is to develop air transport, “so as to insure the safe and orderly growth of international civil aviation throughout the world” and that contracting States parties to the Chicago Convention expressed their agreement on certain principles and arrangements “in order that international civil aviation may be adopted in a safe and orderly manner...”¹³⁶

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ According to Oscar Schachter, whether a designated requirement is to be regarded as obligatory depends on part whether those who have made it are regarded by those to whom it is addressed (“the target audience”) as having been endowed with the prerequisite competence or authority for that role. The fact that “divergent” political and ideological views have been harmonized in an agreed draft, is widely treated as persuasive evidence that the draft has an enhanced authority; “Schachter, Towards a Theory of International Obligations” in S.M. Schwebel, *The Effectiveness of International Decisions* (New York: Oceana, 1971) at 16ff.

¹³⁶ *Chicago Convention*, *supra* note 32, art.44.

According to Oscar Schachter,

When an organ applies a charter principle or any other rule of law, to a particular set of facts, it is asserting, as a matter of logic, a new rule of a more specific character. This is a law creative act even though the members of the organ maintain (as they often do) that their decision is confined to the specific facts and they do not intend to establish a precedent. It may be that the “rule” of that case will not be followed in other situations and that its applicability will prove to be limited. But the contrary may also prove true, since once an authoritative body renders a decision it enters into the stream of decisions that will normally be looked to as a source of law. Consideration of equity and equal treatment will tend to favour its application in “equivalent” situations; moreover the reasons which impelled its adoption in the one case are likely to influence in other cases.¹³⁷

3. The Program in Operation

ICAO contracting States are formally notified at least six months prior to the commencement of an audit through a letter signed by the Secretary General of ICAO. The State in question confirms its agreement with the scheduled audit period and return a signed Memorandum of Understanding (MOU) to ICAO. This form is returned to the State as an attachment to the formal confirmation. The latter confirms to the audited State that the Security audit will be conducted in accordance with the terms specified therein.¹³⁸ The MOU in itself raises questions, worth mentioning even though they go beyond the scope of this paper. The question is whether the MOU is a necessary authorisation for ICAO to conduct an audit since the legal basis for the ICAO mandate is Assembly Resolution A33-1. Comparing the MOU under the AVSEC Mechanism (voluntary) and the mandatory program, the question now is whether a State has a right to refuse to sign the MOU.

a. Audit Findings

The Conference recommended that all States be notified of a completed audit and in this regard all audit findings,¹³⁹

¹³⁷ Oscar Schachter, “The Quasi-Judicial Function of the General Assembly and the Security Council” (1964) 58 Am. J. Int’l L. 960 at 964.

¹³⁸ See ICAO, Security Audit Manual, ICAO Doc.9807, *supra* note 126.

¹³⁹ Audit Finding could be defined as ‘the determination with respect to the conformance and /or adherence to Annex 17, related security SARPs, procedures and good aviation security practices’. See, also ICAO, Security Audit Manual, *ibid.*, chapter 7.

- are to be recorded on standardized audit findings and recommendation forms, with reference made to the relevant ICAO SARPs for which the finding is made.
- that identify lack of compliance or implementation of ICAO SARPs could be recorded as “non-compliance.”¹⁴⁰ A copy of the form on which the findings are recorded by the audit team and including the recommendations for corrective action, are provided to the State at the end of the audit.
- that specify lack of adherence to ICAO Recommended Practices, procedures, security related guidance material and recognised aviation security practices could be recorded as “non- adherence or observation”¹⁴¹ on the ICAO auditing form.

b. Post-audit De-briefing

At the end of the audit, the team leader is to have a meeting with the State’s authorities, personnel and staff, as appropriate¹⁴² to de-brief them on the audit findings and recommendations. The de-briefing is to be conducted in such a way as to ensure that State authorities clearly understand the situation as audited by the ICAO team and are able to commence working on a corrective action plan. The audit team is also to inform the State on the follow-up activities, critical dates for the expected availability of the interim, and final and summary reports.¹⁴³

c. Final Audit Report

The final audit report represents the official and actual report of the audit. The structure of the contents of the final report is similar to the interim audit report, with

¹⁴⁰ Non-Compliance could be defined as a ‘deficiency in procedure and /or documentation, which does not meet the requirements of an ICAO standard’.

¹⁴¹ Non-Adherence could be defined as a “deficiency in characteristic, documentation or procedure, which does not meet the requirements of a recommended practice, procedure, guideline or good aviation security practice”.

¹⁴² Staff could include the Minister of Transport, Chief Executive of the State’s CAA, Head of a State’s national security and those responsible for security at the airport. This aspect should not be predetermined. Each State functions in its own peculiar manner.

¹⁴³ See ICAO, Security Audit Manual, *supra* note 126 section 7.12.

the exception that, the final one would include an analysis of the corrective plan submitted by the audited State, information on the progress made by the audited State on the implementation of the latter, and information on any remedial deficiencies and outstanding differences to ICAO SARPs. The final report is made available only to the audited State¹⁴⁴ and the State reserves the right to disclose its contents or its corrective action plan unilaterally or on a bilateral or multilateral basis.¹⁴⁵

d. Summary of the Final Audit Report

The reports are confidential and only the audit activity report would be disclosed. The sole purpose of keeping the report confidential seems to be for aviation security reasons. Therefore the audit activity report should be prepared in such a way as to enable ICAO contracting States to make their own determination regarding the status of security procedures in the audited State, without causing any negative impact on the audited State.¹⁴⁶

e. A State's Corrective Action Plan

The State's corrective action plan is a response to the audit findings and recommendations by proposing actions to promote the State's conformity or adherence with the ICAO SARPs, procedures, and security-related guidance material and good security procedures and practices. The action plan provides detailed information of action to be taken, including a time frame for the beginning and completion of each action. It is usually signed by an authorised CAA Chief Executive or a Government Official, as appropriate. In addition, however, an audited State could seek assistance from ICAO in preparing the corrective action plan and in rectifying identified deficiencies through medium or long-term technical cooperation.¹⁴⁷

f. Follow-Up Audit

A follow-up is conducted within two years following an audit to determine the

¹⁴⁴ *Ibid.*, section 7.14

¹⁴⁵ *Ibid.*

¹⁴⁶ Recommendation (h), *supra* note 124.

¹⁴⁷ See ICAO, Security Audit Manual, *supra* note 126 section 7.13.

progress with respect to the implementation of the recommendations or the corrective action plan. However, there is no provision yet in ICAO for the continuation of audits beyond the phase of the stipulated period of 2003-4. These future plans will be subject to appropriate funding, which should be made available for its realisation.

Equally important to the act of auditing is the analysis of the information used to determine the results. It is the close examination and analysis of information that allows the AVSEC Mechanism to increase the effectiveness of the program. Essential elements of information would ensure the continuity of the programme until such time as States are in full conformity with Annex 17. Contracting States should increase their donations to the AVSEC Mechanism and/or identify potential resources that may be contributed in the way of operational or technical expertise for use by the Mechanism.

The continued and active participation of competent aviation security regional organisations to the ICAO security audit programme will be vital to the success of the programme. Such regional bodies can provide to States necessary assistance, training, resources, and expertise so that compliance with Annex 17 is achieved and sustained.

Following the events in the United States on September 11, 2001, the 33rd ICAO Assembly adopted Resolution A33-1, urging all ICAO contracting States to intensify their efforts to achieve full implementation of relevant international Conventions, as well as, SARPs on aviation security. The same Resolution directs the ICAO Council to develop proposals and take appropriate decisions for a more stable funding of ICAO activities in the field of aviation security, including appropriate remedial action.

In updating its new policy on technical co-operation, the ICAO Assembly adopted Resolution A33-21, reaffirming that the Technical Co-operation Bureau is one of the main instruments of ICAO to assist States in remedying deficiencies identified through ICAO's assessment and audit activities.

D. Aviation Security Audit Programme of Other Entities

The enforcement of aviation security standards might have been motivated by September 11. Prior to September 11 as prior to this event, security evaluations under the AVSEC Mechanism were voluntary.

Even though there is the consensus that effective measures for security must

be international in scope, the first initiative towards enforcement of security standards did not come from ICAO but from the United States Federal Aviation Administration (now TSA). Disparity of the economic and technical progress of different States should reflect the lowest common denominator, but in practice, it is not so. The technologically advanced States exercise leadership in matters of safety and security of civil aviation and other States, although not ready to meet such enhanced requirements, or sometimes even not understanding them, find it impossible to object.

The United States established the International Aviation Assessment of Foreign Airports¹⁴⁸ to determine whether aviation security measures at those airports meet minimum international standards. This program is a critical element of the FAA's efforts to protect the travelling public using air transportation. The Programme focuses on the foreign States ability (not individual carrier) to adhere to Annex 17 and other ICAO security related documents. The International Security and Development Co-operation Act, passed in 1985, significantly expanded the FAA's role in aviation security. Specifically, it directed the assessment of the effectiveness of security measures maintained at certain foreign Airports. These foreign airports are:

- those served by U.S. airlines,
- those from which a foreign airline serves the U.S.,
- those that pose a high risk of introducing danger to international travel, and
- Other airports considered appropriate by the Secretary of Transportation.

This assessment is measured against the minimum standards and recommended practices established by ICAO under Annex 17. The results of each assessment are shared with the host government.¹⁴⁹

When the Secretary of Transportation determines that effective security measures are not being maintained at a particular airport, there are several options available, depending on the gravity of the situation. Typically, host government authorities are informed of the specific deficiencies and provided a period of up to 90 days to remedy the situation. The Secretary normally offers technical assistance aimed at the airport of concern during this period. Most difficulties have been resolved in

¹⁴⁸ See IASA Security Program, online: < <http://cas.faa.govt/faap.htm>.> (date accessed: 18 August 2002).

¹⁴⁹ *Ibid*.

this way. Other options available to the Secretary include:

- notification of the identity of the airport to the public,
- suspension of U.S. airline service to that airport,
- suspension of foreign airline service between that airport and the U.S., and
- revocation or limitation of airline operations specifications.

Similar assessments have also been conducted on a bilateral and regional basis by the Joint Aviation Authorities (JAA) in Europe and by the European Civil Aviation Commission (ECAC).

Nevertheless, we now witness a visible trend towards the “empowerment” of ICAO to conduct security audits of States, a program going far beyond the concept of security evaluation on a voluntary basis. There is now an emerging consensus that matters of aviation security and safety are not matters belonging exclusively to domestic jurisdiction, but are a matter of international concern. With the establishment and implementation of the ICAO Universal Security Audit Programme under which it becomes mandatory for all ICAO Member States to comply with Annex 17 and other security related provisions, it may no longer be necessary for the FAA and JAA audits to exist in parallel with the ICAO audits. At least there should be more direct and formal coordination among auditing agencies.

By becoming party to the Chicago Convention, all 188 member States agree that the principal function of ICAO is safety and security in aviation. Without the exercise of this function international air transport would be chaotic. When a Member State determines that the security standards of another member State do not meet the minimum security requirements and standards of ICAO, the matter should be brought to the attention of ICAO in accordance with the dispute resolution procedures set forth in Articles 84, 85, 86, and 87 of the Chicago Convention.

No Member State, should take upon itself to unilaterally become the self-appointed policeman of the world in matters affecting security in international aviation. Some might argue that the JAA and the FAA had this thrust upon them by virtue of their superior resources. ICAO was established for this purpose 50 years ago, therefore, as long as a nation remains a party to the Chicago Convention, the enforcement of the ICAO minimum-security standards should be pursued through ICAO.

The main focus should not be on confrontation and condemnation, especially when the "United States" is the acknowledged leader of aviation to which every developing, and even some highly developed, aviation nations are looking up to for guidance and direction in formulating, adopting and implementing aviation principles that will meet the minimum ICAO standards.¹⁵⁰ The *quid pro quo* for extending its "standards" to other States should be investment in the human resources, capacity and infrastructure to bring the audited State up to its standards. The course of action of a true leader is to enthusiastically support and pursue the principles of multilateralism through ICAO. After all, that is what the 50-year-old Chicago Convention is all about.

On the other hand, it could be argued that the extra-territorial application of the United States policy could be justified under the Chicago Convention. The unilateral action was taken within US jurisdiction under Articles 1 and 11 of the Convention, in conformity with Article 33, and in the best spirit of Articles 37 and 38, and even more so, within the frame-work of existing bilateral agreements on air services.¹⁵¹

According to Michael Jennison, a fundamental aspect of sovereignty is the right and duty of each State to protect its inhabitants from threats to their safety. Moreover, a State clearly has authority under international law to regulate conduct that has so direct a potential impact on its residents and its territory as unsafe air carrier operations.¹⁵²

Now that a global mechanism would appear to be established, all efforts could be invested in making the ICAO security audit Programme a success. ICAO should be given the necessary resources to perform the task.

The continuing existence of the individual State audits after the commencement of the ICAO audit programme could arouse a great deal of criticism within the international aviation community. It may be seen as a stumbling block to market access and the successful liberalisation of the air transport industry.

The fact that the FAA acknowledges itself as leader of aviation safety and security, to whom developing and developed countries are looking for guidance and direction,

¹⁵⁰ George Tomkins, Jr., "Enforcement of Aviation Safety Standards" (1995) XX-I Ann. Air & Sp. L. 319 at 322.

¹⁵¹ See Milde "Enforcement of Aviation Safety Standards", *supra* note 34 at 11.

¹⁵² See Michael Jennison, "The Chicago Convention and Safety after Fifty Years" (1995) XX-I Ann. Air & Sp. L. 289 at 293.

suggests that, rather than pointing fingers, analyse the problem instead, and through cooperation, co-ordination and harmonisation achieve optimal levels of safety and security in air transport. The United States and European Union initiatives may give rise to criticism as “strong arm tactic,” although it is carried out with the consent and co-operation of the States concerned.

E. The Legal Implications of the Universal Mandatory Aviation Security Audits Programme

Since September 11, we have witnessed governments taking over operation of security from the airlines. This obligation could result to potential tort lawsuits against governments, such as the Ministry of Transport, Security Intelligence or the security Services and the civil aviation authority.

The Warsaw System and the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 1952 and the Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 1978, deal with the liability of airline operators to the victims of airline disasters. They do not address liability matters in respect of other defendants, such as governments and civil aviation authorities. In the absence of international law dealing with government and civil aviation authority liability and compensation to victims and survivors, the applicable law will be the domestic legislation of the respective States as judicially interpreted.

Claimants could sue the governments and civil aviation authorities for negligence i.e. for breach of a duty of care. For civil liability purposes, the aviation security legislation in place at the time of an incident of unlawful interference with civil aviation would be relevant for determining standards of conduct and finding evidence of a private law duty of care. The issue that arises is, in determining the standard of care will the courts apply the obligation of a State to comply with the Chicago Convention, Annexes and other security conventions, or domestic security regulation? We may eventually see that the SARPs play a significant role in the determination of the duty of care. The SARPs and domestic legislation could be merely admissible as evidence of a specific statutory standard of care upon which the court may rely. A second issue is, will the courts in the determination of the potential liability of a defendant use the Security Audit Report for determining liability or as

prima facie evidence of negligence? In some jurisdictions, such suits may not be possible. Assuming that a court would allow a claim against a particular State, the new security audit could play into claims where failure to implement is related to the breach which ultimately led to the occurrence of an incident which caused or contributes to the harm. Only time will tell whether the confidentiality of the audit reports will be undermined by the due process of law. However, a programme, which does not address prior to its commencement, the legal issues which may arise will only serve to create further confusion and discord in an environment where unified action is essential.

The next chapter will briefly examine the funding mechanisms available within ICAO to assist States to correct the deficiencies identified in the aviation security audit report.

CHAPTER FIVE

FOLLOW-UP PROGRAMME

It is open secret that the aviation sector is facing a variety of challenges and that there is urgent need to find a plausible means of ensuring aviation safety and security. Audits conducted under the aegis of ICAO in member States specifically in developing countries reveal a number of deficiencies. The required amount of funds to correct the identified deficiencies in developing countries far exceeds the financial means of their weak economies. Therefore if the enormous safety gaps between the developed and developing States are to be bridged, the provision of technical and financial support to those affected needy member States for the rectification of identified deficiencies is one possible means of addressing the situation. As the developing countries lack the means of mobilising the huge amount of funds needed to satisfy the demand for the correct implementation of SARPs, the burden now rests on the international community to solicit for the needed resources in a bid to bridge the gap and avoid further catastrophe.

The financing of aviation security services at national levels is generally covered by public funds and or user charges and the focus is always on cost recovery. However, in the new aviation security environment, States may wish to explore alternative sources beyond the traditional approaches particularly when paying for new aviation security requirements.

Securing adequate funding for the realization of a State's obligation under the Chicago Convention is a prerequisite for a successful, safe and orderly development of international civil aviation. Countries have developed different approaches to tackle this issue and the most widely used funding mechanisms are cross-subsidies, aeronautical and airport user charges, taxes and license fees. Although funding for international civil aviation can be inspired by domestic experience, it is necessary to emphasize that the issues and mechanisms involved are, nonetheless, distinct.

In relation to the above mentioned situation, a follow-up programme that will focus on the need to obtain adequate human and financial resources for international civil aviation development is proposed. This chapter discusses member States need for assistance from ICAO in the mobilization of resources for the implementation of ICAO SARPs, audit-related recommendations and corrective actions plans, as well as

the rectification of identified deficiencies. Also, different-funding mechanisms will be discussed, including an establishment of the International Financial Facility for Aviation Safety (IFFAS) as an alternative source of funding and the viability of its expansion to aviation security. It is quite interesting to have a scheme at the international level for ICAO to develop SARPs, and undertake audit functions. Equally important is an international mechanism to ensure adequate financial resources to permit the implementation of the international standards.

In this chapter, we will also highlight the Technical Cooperation Programme activities of ICAO within which technical assistance and mobilization of resources for States for remedial action and for aviation security development projects could possibly be financed.

The second part of this chapter calls for the establishment of a Universal Common Fund for Aviation Security (UCFAS) as a mechanism to subsidize the efforts in the implementation of the security SARPs and the rectification of deficiencies identified in the security audit of developing countries. The proposal would demonstrate that a preferential treatment approach is needed to provide a soft landing for developing countries on a transitional basis. It calls for reevaluation of the role of official development assistance in aviation security [and safety]. The assumption is that treating the implementation of the SARPs and the safety and security of international civil aviation as a global public good provides a new intellectual framework for revitalizing the role of official development aid. Inspired by the global public goods doctrine, it highlights a financing method for the fund for global international civil aviation security and an effective and fair security audit programme. The fund that is being proposed is an international financial institution resembling the Global Environmental Fund (GEF).

A. Technical Co-operation Programme

The Technical Assistance Bureau of ICAO, now the Technical Cooperation Bureau, was established in 1952 to implement the objectives of the Technical Cooperation Programme.¹⁵³ The Bureau provides advice and assistance to contracting States, including the mobilization of resources, for the implementation of technical cooperation projects in the field of civil aviation. The requests for assistance,

¹⁵³ AVSEC CONF/02-IP3, *supra* note 8.

however, may vary from one country to another, being influenced by such factors as the size and topography of the national territory, including whether it is particularly dependent on air transport because it is land locked or an island State, the degree of development of the surface transportation and communications network, the amount and quality of the existing technical work force, the budgetary and other financial resources available to their civil aviation services, and the importance of tourism as a sizeable source of national revenue.¹⁵⁴

The aviation security follow-up activities of ICAO's Technical Cooperation Programme highlights the requirements of many States for the rectification of aviation security, legal, organisational, technical and human resources shortcomings, as well as training deficiencies, in order to achieve full compliance with relevant international legal instruments, SARPs, and adhere to ICAO guidance material. Requests from States for ICAO assistance are expected to increase with the establishment of the ICAO Aviation Security Audit Programme. The remedial actions in aviation security required by States may resemble those in flight safety, albeit involving more disparate organisational entities and additional technical resources.

Much of the assistance provided by ICAO in the form of expert services has been of an advisory nature although some projects have called for assistance of an operational nature, involving the actual discharge of executive functions within the departments of civil aviation. In recent years, a significant increase in assistance in both the amount and services has been noted.¹⁵⁵ Training and procurement of equipment are other main components of technical cooperation projects. The Technical Cooperation Programme activities are heavily dependent on external sources of funding, namely:

1. United Nations Development Programme (UNDP)

The United Nations Development Programme for Civil Aviation Co-operation Projects- Technical Assistance to developing countries for economic development was initiated at a United Nations Conference held at Lake Success, New York, in 1950.¹⁵⁶ The fund made available by the UNDP initially represented the main source

¹⁵⁴ *Ibid.*, at 300.

¹⁵⁵ *Ibid.*, at 301.

¹⁵⁶ *Ibid.*, at 299.

of funding entrusted to the ICAO Technical Cooperation Bureau for the execution of civil aviation projects in developing countries.¹⁵⁷ In the last decade there has been a decline in UNDP funding for civil aviation, which has led to a drastic change in the way ICAO Technical Co-operation Programme is implemented. Fortunately, this decline in UNDP funding has been progressively balanced by an increase in funds provided by governments to finance their own civil aviation development and also trust funds provided by other governments, donors, financing institutions, and industry and service providers.

2. Contributions from Governments

This is the most common form of funding under the Technical Cooperation Programme. In fact about 90% of the projects are funded by the States themselves. The major reason for this is that, with few exceptions, directly or indirectly the providers of airport and air navigation services are governments. In many States, however, revenues from their operation are insufficient to cover the total costs, including depreciation and cost of capital.¹⁵⁸

3. External Funding

In addition to technical assistance financed through the UNDP and national governments, ICAO has signed agreements with certain governments that are able and willing to deposit funds with the Organisation to finance technical assistance requirements of developing countries in the field of civil aviation. The contributions may be advanced by foreign governments, or through bilateral or multilateral aid institutions. Another important source of external funding are the contributions from various development banks and financing institutions, and to a limited extent, industry and service providers.

¹⁵⁷ The total value of cooperation activities implemented by ICAO was US \$55.8 million in 1996, compared with US\$55.8 in 1995. See Adrianus D. Groeewedge, *Compendium of International Civil Aviation*, 2nd ed. (Canada: International Aviation Development, 1988).

¹⁵⁸ *Ibid.*

4. The ICAO Objectives Implementation Funding Mechanism (ICAOOIFM)

The 31st Assembly of ICAO endorsed the establishment of the ICAO Objectives Implementation Funding Mechanism in 1995,¹⁵⁹ emphasising global implementation of the SARPs. The aim of the mechanism is to grant additional resources to the Technical Co-operation Programme for follow ups on ICAO's regular programme activities. These resources are to be applied to technical co-operation projects supporting the implementation of SARPs, including aviation security. The 33rd ICAO Assembly in September/October 2001 in its Resolution A33-21¹⁶⁰ encouraged States and other development partners to contribute to this mechanism, which allows them to participate in the implementation of ICAO's civil aviation development projects.

The ICAOOIFM includes a variety of funding modalities that suit particular donors' requirements and provides a framework for flexible arrangements for project implementation. Besides these funds, donations are granted by States and other public or private sources in the form of voluntary contributions in kind, such as scholarships, fellowships and training equipment. Funding and operation of this mechanism has been established, *inter alia*, in accordance with the following methods:

- (i) for the Technical Co-operation Programme of ICAO: States or other donors may wish to participate in the mechanism by donating for a general purpose, such as the improvement of aviation security in contracting States; and
- (ii) for an aviation security project for a specific State or group of States: States or other donors may advise ICAO of their desire to support the improvement, for instance, of aviation security and their willingness to finance a specific technical co-operation project under the Mechanism.

Since 1995, ICAOOIFM has received contributions from contracting States and industry totalling more than US \$6 million. Whereas the AVSEC Mechanism enables ICAO's regular programme to carry out aviation security activities, including technical evaluations or audits of contracting States, preparation of training courses

¹⁵⁹ AVSEC CONF/02-WP/11, *supra* note 8.

¹⁶⁰ ICAO Res. A33-21, *supra* note 4.

and provision of short-term immediate assistance on an urgent basis, the ICAOOIFM gives States the possibility to carry out remedial action as required for the implementation of SARPs including Annex 17- security, with the assistance of ICAO's Technical Co-operation Programme, on a long-term basis.

Even though there is a proliferation of funding mechanisms for the development of international civil aviation, none of them provide adequate funding to assist States in the implementation of the SARPs including remedial action in aviation security. Thus, the creation, successful establishment, and expansion of the International Financial Facility for Aviation Safety (IFFAS) to include aviation security could be a beacon of good hope for the safe and orderly development of the air transport industry. This is the subject to which we turn next. How can ICAO contracting States be facilitated to rise up to the challenge of aviation security in order to fulfil their obligations under relevant international legal instruments, Standards and Recommended Practices of Annex 17 and related provisions of other Annexes?

B. International Financial Facility for Aviation Safety (IFFAS)

Over the past years, ICAO has recognised and demonstrated through an extensive study carried out by the Secretariat in 1998, that there exists a need to finance safety-related projects in certain areas of the world. There was no an existing funding mechanism or collection modalities within the existing aviation system to provide funding for the needs of certain States.¹⁶¹ The concept for an International Financial Facility for Aviation Safety (IFFAS) first emerged at the 31st Session of the ICAO Assembly of 1995, where some member States presented a proposal for establishing an International Aeronautical Monetary Fund which would provide financial resources needed to meet the most pressing needs of States for the construction and modernisation of airport infrastructure, air traffic services and navigational aids. The concept was endorsed by the Directors General of Civil Aviation Conference on a Global Strategy for Safety Oversight (1997) and the Worldwide CNS/ATM Systems Implementation Conference (1998). Subsequently, in 1998, the 32nd Session of the Assembly noted the progress on this project and

¹⁶¹ ICAO website, online:

<http://www.icao.int/cgi/goto_atb.pl?icao/en/atb/iffas/IFFAS_Article.pdf;iffas> (date accessed: 15 August 2002); See also ICAO Res. A33-10, *supra* note 4.

endorsed plans for further work on the fund.¹⁶²

The 33rd Session of the Assembly, by Resolution A33-10, [*Establishment of an International Financial Facility for Aviation Safety (IFFAS)*],¹⁶³ endorsed the concept of the IFFAS, and requested the Council to pursue the establishment of an IFFAS as a matter of priority early in the 2002-2004 triennium, having due regard to the applicable laws of Contracting States. This request implied the formulation of appropriate management, administrative and legal strategies toward the initial implementation of the IFFAS within the 2002-2004 triennium.

The major objective of the IFFAS is to provide financial support geared towards enhancing and achieving aviation safety through the implementation of the necessary measures identified by the Universal Safety Oversight Audit Programme (USOAP) for the rectification of identified deficiencies. IFFAS is also to finance safety-related projects for which States cannot otherwise provide or obtain the necessary financial resources. IFFAS's role therefore, is to identify and prioritise financial support where it is most needed. In this regard, the USOAP Audits would be an effective tool in identifying the needs of participating States. Participation to the IFFAS shall be voluntary, and eligibility for benefits by a State shall be dependent on contributions to it, financial or otherwise. Resolution A33-10 refers to a transparent and simple management mechanism with, *inter alia*, measures to assure quality control and to assess effectiveness and efficiency at all levels.

The Assembly in passing Resolution A33-10 requested the Council to ensure that the management strategy of the IFFAS is developed on the principles of, and in conformity with, the existing ICAO legal regimes, although completely independent from the ICAO budget. Therefore, adequate provision for the auditing of accounts and some of the elements of the joint financing arrangements including other legal regimes outside of ICAO could be utilised in setting up the IFFAS.¹⁶⁴

The appropriate legal basis for the IFFAS, in accordance with the above-mentioned principles of Resolution A33-10, is enshrined in Chapter XV of the

¹⁶² See ICAO Website, *ibid*.

¹⁶³ See ICAO Res.A33-10 (clause 2 a) *supra* note 4.

¹⁶⁴ ICAO has over the years, acquired considerable experience in the field of joint financing, initially in the context of the administration of the Danish and Icelandic Joint Financing Agreements relating to the provision of certain air navigation facilities and Services in Greenland and Iceland and, more recently, in the context of the administration of the Arrangement on the Joint Financing of a North Atlantic Height Monitoring System and of the provision of support services under the Agreement on the Sharing of Costs of the Satellite Distribution System for Information relating to Air Navigation (SADIS).

Chicago Convention, particularly Articles 69 and 70. Council involvement in the IFFAS can also be culled from Resolution A33-10, clause 7, where the Council is requested to report to the Assembly on the progress of the IFFAS.

While noting the general agreement was that the IFFAS should be used to enhance aviation safety, in particular, by providing funding to States for the rectification of deficiencies identified during safety oversight audits conducted under the aegis of ICAO's Universal Safety Oversight Audit Programme, it is submitted that IFFAS should also be used to fund remedial action relating to deficiencies identified during the envisaged aviation security audit programme. Safety and Security are the key elements of international civil aviation and therefore have to be examined and enhanced concurrently.

The possible nexus between funding both the safety-related projects and remedial actions in aviation security was addressed by the 33rd Session of the ICAO Assembly, under the subject of mobilization of funds for civil aviation. In adopting Resolution A33-10 on the establishment of the IFFAS, the Assembly acknowledged the need to mobilize financial resources for improvement of international civil aviation safety and security and considered it worthwhile for the ICAO Council to give further consideration during the current triennium toward expanding the IFFAS mandate to cover funding for remedial action in the field of aviation security. The High-Level Ministerial Conference on Aviation Security had, pursuant to the mandate given to it by the 33rd Session of the Assembly in operative clause 8 of Assembly Resolution A33-1, recommended that the scope of the IFFAS be expanded to include the funding of projects to remedy aviation security-related deficiencies.¹⁶⁵ The President of the Council, Dr. Assad Kotaite, in summarising an earlier discussion on the IFFAS, said: "There was a common ground.... Which recognised the noble purpose of the proposal, i.e. to assist and further enhance the safety of civil aviation".¹⁶⁶

The words "noble purpose" is as relevant today as they were when they were first uttered a year ago. In acknowledging that the creation of an IFFAS is a laudable and indeed valuable venture undertaken by ICAO, there is still the need for a more targeted approach.

¹⁶⁵ See ICAO, Res.A33-1, *supra* note 4.

¹⁶⁶ See ICAO, Proceedings of the 165th Session of the Council, ICAO Doc. 9802-C/1141, C-Min. 165/I-13 (2002) at 163.

C. Universal Common Fund for Aviation Security

1. Creation of a Universal Common Fund for Aviation Security

The General Assembly in trying to rise to the challenges of aviation security passed Resolution A33-10 which brought IFFAS into being. However, there is opposition to the IFFAS particularly from the developed world and some States are still trying to postpone its establishment. Therefore, an alternative source of funding could be created for aviation security only, and for the purpose of this paper, be referred to as the Universal Common Fund for Aviation Security (UCFAS).

This section seeks to highlight the importance of creating a funding mechanism to assist member States and in particular, developing countries, to rectify deficiencies identified during security audits. It is contended that, in acknowledging that the new security audit is a laudable gesture, the international approach to dealing with these challenge cannot afford to rely solely on the existing funding mechanisms in ICAO. The proposal for the creation of the UCFAS and its funding mechanism is not intended to undermine the sovereignty of States rather it seeks to enhance and retarget what is already at hand, towards the development of international aviation security. The essence of the proposal is to suggest among other things that part of the revenues collected at the national level as security charges continue to subsidize the international efforts of developing States which satisfy a set needs criteria.

This proposal, together with the existing funding mechanisms discussed above, would not only ensure a fair and effective security audit programme but also the realization of the goals of the Chicago Convention. The UCFAS proposal is the hook necessary to hold the chains of a global aviation security together, for the chain is as strong as its weakest link.

The message being conveyed here is that the growing importance of private financing should not entirely eclipse the importance of funds channelled through development assistance. It will not be possible to have a fair and effective security audit programme on blind faith that developing countries' needs can be satisfied exclusively by the normal working of the market and a total disengagement of the public sector from aviation projects. Increased foreign direct investment and increased aid are not necessarily mutually exclusive. A case can be made that, in many

instances, increased foreign aid is a necessary precondition for improving the environment to attract private activity in a particular sector. The current level of official assistance for aviation projects, and the whole official assistance regime, leaves much to be desired and suffers from both quantitative and qualitative shortcomings. If a significant change in the civil aviation landscape is to be achieved, there is need to revitalize official development assistance. This issue is now high on the agenda both in current development literature and international organizations.

In the last few years, a new conception of development assistance has started to take shape in the development community, which has produced the need for a fundamental re-evaluation of the development agenda to meet the challenges of the 21st century. To cite an example, a high level forum on financing for development was convened by the United Nations General Assembly in Monterrey, Mexico in March 2002 in which the World Trade Organisation, the World Bank, the International Monetary fund, as well as developed and developing countries and members of civil society participated. This conference was acclaimed as a “unique and long waited opportunity.” Strengthening the role of official development assistance stood out as a major item on the conferences agenda. The concept of global public goods as a renewed rationale for development assistance seems to have attracted the attention of many development specialists.¹⁶⁷ It has proved particularly influential with environmentalists. In the process of preparing for the 2002 World Summit for Sustainable Development or Rio plus ten Summit held in South Africa in 2002, numerous contributions highlighted the importance of the concept to achieve sustainable development.

If one looks at safety and security from a global public good standpoint, the focus on implementation of SARPs and the correction of audit deficiencies goes beyond the direct benefits to specific recipient countries to benefits that would be felt on a global level. A globally safe, secure and reliable air transport service provides benefit to all of humankind. Funding for the follow-up aviation security programme should, therefore, not be conceived simply as funding for those who are gaining access in developing countries, but also as funding for those who are gaining access to developed countries. Embracing a global public goods approach promises enhancement of traditional modes of assistance, both by legitimizing additional flows

¹⁶⁷ Inge Kaul, Isabelle Grunberg & Marc Stern, *Global Public Goods: International Cooperation in the 21st Century*, (Oxford: Oxford U. Press, 1999).

to the air transport sector (which should not be conceived as trading off against other purely local development priorities) and by ensuring improved aid effectiveness by giving developed countries a stake in spending outcomes.

Ensuring aid effectiveness in the aviation sector requires a strong partnership between donors and recipients in order to tackle complex issues, especially in regulatory matters. Also to ensure aid effectiveness and the effective contribution of aid programs to bridging the gap, donors could contribute their aid to UCASF rather than directly to the recipients. This would provide institutional safeguards on the implementation of international standards and narrow the gaps between the developed and developing countries' aviation industry. It would address donor countries' continuous concern and ensure targeted use for their aviation aid.

The UCFAS could be funded from the charge levied on airport or airline charges per international passenger, as in the aftermath of September 11, 2001, States and airport authorities have introduced a security charge for each passenger. For each international passenger, a one-dollar contribution could be set aside by the airlines or airport for a global common fund (UCFAS). States could be asked to contribute at least 25% from these funds into the common fund (UCAS). After all they both have the same objective of ensuring the safe and orderly development of international civil aviation. The fee could be collected at the national level where the flight originates. However, an international mechanism would be needed to monitor the regime and to ensure equitable collection and distribution of revenues. Calling for a global uniform fee does not necessarily imply that countries would lose their sovereignty over user fee issues. Recalling an old principle of public international law, consent remains a central corollary of State sovereignty. In this case, parties would need to adopt the proposal at a conference and take the appropriate action to indicate their intent to be bound by the new measure. Even if such an agreement were to contain enforcement and sanction measures, respect of sovereignty is not be an issue if members to the agreement freely negotiate and agree to the enforcement mechanism. As long as the fee is negotiated and agreed upon by governments multilaterally, and not unilaterally imposed by a few countries the agreement establishing the fee could specify the fee rate, the procedure for collecting the fee, as well as the formula for allocating revenues.

Although it may look like a ground-breaking proposal, a common user charge can be justified for at least two reasons. The first takes the global public goods

approach (safety and security) and the second seeks to internationalize the national practice of levying fee for air transport services so as to generate a common fund.

If it is agreed that a safe and secure international civil aviation is a global public good, then calling for a fee-based approach to financing a global common fund to enhance such safety and security would fall within the purview. In this case, the monies are targeted to create a public good rather than to prevent a global public bad. In the wake of September 11, 2001, attitudes have changed and aviation safety and security are front and centre for the international community.

2. Modalities for the Universal Common Fund for Aviation Security

This section proposes modalities for the functioning of the UCFAS drawing upon lessons learnt from the global environmental governance. The application of lessons learnt from the global environmental governance context to other global public goods has been defended by many advocates of the global public goods doctrine. The establishment of an environment financial assistance for developing countries came to being when developing countries expressed their inability to comply with costly international environmental obligations. In 1987, the Brundtland Report, "Our common future." Proposed a financial mechanism for environmental obligations. This report provoked intense political debate but in 1991 and the Global Environmental Facility (GEF)¹⁶⁸ was finally created as a pilot project limited to 3 years. Negotiations on restructuring the GEF started in 1992 and culminated in the creation of a permanent environmental financial institution in 1994.

The GEF is governed by a tripartite agreement which specifies the respective roles of the three implementing agencies of the facility namely the World Bank, the UNDP and the United Nations Environmental Program (UNEP). The Facility provides funding for the incremental costs of developing countries' effort in four areas: climate change, loss of biodiversity, depletion of international water resources and ozone depletion areas considered to require increased international cooperation. The success of the pilot phase, proved that the role of the Facility needed to be preserved and enhanced, especially in view of the huge investment needed to respond to the Rio de Janeiro Earth Summit agenda. The permanent institution preserved the

¹⁶⁸ See Global Environmental Fund, online: <<http://www.gefweb.org>> (date accessed: 20 August 2002).

major characteristics of the pilot project with slight changes to accommodate transparency and participation. The Facility has Membership of 150 representing the participating countries, a Council of 32 Members to which the implementing agencies are accountable, a Secretariat, and a scientific and a technical advisory panel.

It offers the international community a prototype institution combining political balance, flexibility and constructive cooperation between international organizations to serve a global cause. Since its inception, the GEF has provided US\$ 3 billion to finance 680 projects in 154 countries. While a total replication of the system in air transport matters is not advisable, an UCFAS can benefit from the experience of the GEF.

The creation of a common trust fund to tackle follow-up projects is worth replicating. The trust fund is an old common law creation with an increased application in international settings and the advantage is that it can provide a single structure where different sources of aviation development can be grouped including funds contributed by private parties. Traditional international financing relies heavily on shrinking government contributions and the trust fund approach provides a novel institutional arrangement for gathering financial sources from different sources possibly including taxes and user fees as described in the earlier section. The trust fund therefore provides the opportunity to consolidate different sources of aviation security development assistance for the purpose of creating new and additional grants and concessional funding for aviation security projects in developing countries. The main advantage of a trust fund is that it provides a targeted approach to aviation security development, given that its resources are governed by the law of trusts and cannot be diverted to other competing priorities within the organizational entity.

The second important lesson to be drawn from the GEF is the innovative informal procedure and more flexible mechanisms. The procedure led to what has been labelled an "autonomous institutional arrangement". During the preparation of the agreement, participants expressed a clear belief that there was no need to create another international bureaucracy to address the financing needs of developing countries. The same argument could be invoked in the case of UCFAS. The Fund could be created as an ad-hoc autonomous institution either within ICAO by a decision of the Council or Assembly, or within the World Bank by a decision of its Board of Governors. To give the institution a higher degree of legitimacy, the institution would need to be endorsed by the other organizations called to cooperate

with each other for the functioning of the Fund. In the case of the GEF, the institution was created by a decision from the World Bank, followed by mandatory endorsement by the United Nations Environmental Program and the United Nations Development Program.¹⁶⁹

The first question to be asked is whether an international organization such as ICAO could be entrusted to create a quasi-autonomous body. Arguments put forward in international institutional law literature uphold this possibility, subject to certain conditions. The creation of a quasi-autonomous institution by an international organization, even in the absence of clear constitutive instruments could be based on the broader issue of interpretation of treaties that serve as the constituent instruments of international organizations. Through an extensive analysis of ICJ jurisprudence relating to the interpretation of constituent instruments, Sato indicates clear preference of the teleological approach of interpretation. Sato demonstrates that this approach has resulted in an expansion of powers of international organizations beyond the plain language of the constituent instrument. This method delimits the requirements, inherent to the implied power doctrine; namely, that activities that are not covered by the strict language of the constitution need nonetheless be within the scope of the organization's activities embodied in its constitution. A close relationship needs to be established between the mandate of the autonomous institution and the goals and objectives of the concerned organization.

Although neither ICAO's constitution, (Chicago Convention) nor the World Bank's Articles of Agreement contain a specific provision allowing the organization to establish a trust fund, applying the implied power doctrine, one could argue that both ICAO and the World Bank are possible candidates for the creation and administration of UCFAS. In the case of ICAO, the possible legal authority to create a trust Fund would fall under Article 44(d), 69, 70, and 71 of the Chicago Convention. The ICAO Council is mandated in Article 69 to ensure the realization of the objectives of the Convention embodied in Article 44 which are to "...foster the planning and development of international air transport so as to meet the needs of the people of the world for safe, regular, efficient and economical air transport", and Articles 70 and 71 set up the mechanism to do so.

¹⁶⁹ *Ibid.*

Applying the same rationale invoked to justify the creation of the GEF, the possibility for the World Bank to initiate the creation of the UCFAS falls within the implied powers of the World Bank to administer resources contributed by others. In the case of the GEF, a close relationship could be established between the objective of the GEF as related to the protection of the global environment and the Bank's development mandate. It was argued that, although the environmental dimension was not taken into account during the drafting of the World Bank's Articles of Agreement, it is presently well established that protection of global environment is an indispensable dimension of sustainable economic development. In the case of a UCFAS, the World Bank could use the same implied power of administering resources entrusted to it in order to support aviation development purposes. In this case, the relationship between the UCFAS, which is aimed at enhancing aviation security, mainly through the rectification of deficiencies identified during an audit, and the implementation of the SARPs to ensure a safe and secured international air transport system, and the World Bank's mandate is obvious because of the intimate relationship between civil aviation and economic and social development.

Although theoretically both the World Bank and ICAO can establish and administer the trust Fund, practical considerations seem to favour the creation and administration of the Fund by a financial development institution, that is the World Bank, but with a close involvement of ICAO in the day-to-day activity of the Fund and in its investment decisions. The reasons for this preference are related to the ICAO's limited financing expertise. The experience of the ICAO in the area of financing has been restricted to technical cooperation matters, such as advising its Members on how to approach financing decisions and how to conduct financing studies.

Although, ICAO has 50 years of expertise in administering funds entrusted to it by donors, development banks and national governments, for financing technical cooperation projects through trust funds, MSAs, government sharing, UNDP etc, entrusting the World Bank with the task of establishing and administering the fund seems to be a more straightforward approach in light of the accumulated experience of the World Bank in handling aviation financing through IDA, and in grant financing through the UNDP program, as well as its long experience handling specialized trust Funds, especially in the environmental area. Making use of this accumulated experience is a sensible choice because experience in areas such as mobilizing

resources, financial management, disbursement of funds and monitoring of actual funding are key ingredients for the success of any international financing institution.

The proposal is not advocating giving the World Bank a complete hand in managing the UCFAS. The role of ICAO as regulator and auditor in general, and with respect to the operation of the UCFAS in particular, should be emphasized. The proposal is mainly motivated by the importance of institutional partnership between both organizations to ensure a global development of international civil aviation. Also, the GEF provides a successful precedent for collaboration and partnership among international agencies for the benefit of global environmental projects. In the case of the GEF, Annex D of the Instrument establishing the Facility specifies the respective roles of the World Bank, UNDP and UNEP, each in its particular sphere of competence, for the successful operation of the Fund. The issue of institutional complementarities has emerged as a prominent subject lately in many areas of international relations. This issue is spurred by the emergence of cross-sect oral issues that were unforeseen during the creation of many international institutions. The need for institutional complimentary between ICAO and the World Trade Organization (WTO) to ensure the successful liberalization of transportation services under the GATS has been defended by Richard Janda.¹⁷⁰ This cooperation is particularly necessary in the case of a global common fund in light of the limited institutional capacity of both the World Bank and the ICAO to respond to globalization and liberalization of the air transport industry.

The proposed UCFAS is best described as an ICAO/World Bank joint venture. The World Bank would contribute its long established expertise in financing matters, playing the role of fiduciary of the UCFAS along the lines of its role as a fiduciary for a GEF. Regarding the actual functioning of the Fund, ICAO should have a very important role in the operation of the Fund. The role of the ICAO needs to be preserved especially in the areas of determining beneficiaries of funding, project priorities, as well as in updating project priorities in accordance with technological and market development. ICAO would also need to cooperate closely with the World Bank in monitoring the financing process and in making sure that the funds are being used for their intended purposes and not diverted to other causes. The role of ICAO in

¹⁷⁰ Richard Janda, "GATS Regulatory Disciplines Meet Global Public Goods: The Case of Maritime and Aviation Services" [forthcoming in OECD monograph].

this area would also extend to ensuring that a constructive relationship exists between national authorities and investors, and that local requirements are being met.

It is important to have safeguards to ensure the proper effective and efficient application of funds. Depending on the availability of funds, the UCFAS could possibly be extended in the future to finance any project that is expected to improve aviation security. Understanding the real challenge of the necessity to develop civil aviation in a safe and orderly manner is perhaps the most important ingredient when determining funding priorities.

The basic philosophy of the UCFAS involves identifying the most demonstrated need requiring financial support from the facility. In this regard, the audits would be an effective tool in identifying the specific shortcomings and requirements of participating States.

This chapter has sought to shed light on important international institutional developments needed to accommodate the global goal of connectivity. It has called for the creation of the UCFAS. The Fund should be a single international institution for gathering all possible resources from different sources to finance the follow-up programme to aviation security audits. The Fund would work as a supplement to existing sources of government funding by subsidizing security-related projects in countries unable under regular market conditions, to attract the investments needed to fulfil their obligations under the Chicago Convention.

On the other hand, the concept of an international financial facility for aviation safety (IFFAS), which will possibly be extended to security in the long-term, has raised positive expectations among many States that are having difficulty in meeting ICAO safety and security standards. IFFAS has the potential to help address the problems associated with developments and challenges of the industry.

The compelling requirement for continuing assistance to States to meet their safety and security challenges has now reached full maturity. However, a clear distinction needs to be drawn between the roles of each institution, namely: IFFAS as a financial facility; or UCFAS as a mechanism to provide financial support to States; and the Technical Co-operation Bureau, as responsible for providing assistance to States in the development and implementation of technical co-operation projects, as well as in the mobilization of funds.

Contracting States have the option of implementing technical co-operation projects themselves, through ICAO, (through the Technical Co-operation Bureau) or

by any third party including development banks, bilateral/multilateral institutions, lending institutions or any other development partner. As long as a technical co-operation project document of a participating State is approved, the State may request financial support from the IFFAS or UCFAS, notwithstanding who the party responsible for the management and implementation of the said project may be, as described above. Such funds may also be used in conjunction with available State funds or any other resources provided by donors.

CONCLUSION

On September 11, in the space of a few minutes, the world was thrown into a new and frightening reality that would forever change the way we look at aviation security. For the very first time in history, civil aircraft were used as weapons of destruction. This is, indeed, a totally new threat and one that eventually had an international impact. The events of September 11 have taught us a number of lessons, including that the reconstruction of a safe and secure worldwide aviation system depends on renewed international attention and commitment in the international law that constitutes the system.

The attitude towards security in air transport since the wake of September 11, 2001 events may now be summarised: international air law is not, in itself, a self-regulating legal system. In the light of this theory of international obligation it may be argued that in the era of globalisation, there are grounds to reconsider the responsibilities of States under the Chicago Convention.

ICAO's regulatory function is a fascinating example of international law making. The legislative process illustrates not only ICAO's position as the main standard-setting body for international civil aviation, but also indicates the extent to which contracting States are consulted in advance in the development of SARPs. The threats against unlawful interference with civil aviation, the responsibility of the international community for security and the need to meet the challenges of the new century have resulted in the beginning of a new attitude in ICAO toward ensuring States' responsibility for security.

Respecting the principles of the Chicago Convention, and ensuring that it continues to meet the needs of the peoples for safe, regular, efficient and economic air transport, ICAO is manifesting a strong desire for change in its role. The adoption of the Strategic Action Plan, the Aviation Security Plan of Action and its component the Mandatory Universal Security Audit Program, ensure that the Chicago Convention remains in a sound flight plan for the future of air transportation, and that ICAO will maintain its position as the main standard-setting body for international civil aviation. The new focus of ICAO signifies a changing emphasis on the role of the Organisation from development to implementation, that is, from being the accepted authority for the development of civil aviation security standards to becoming the recognised

worldwide auditor.

The international multilateral level is not the only forum where action has been taken with respect to ensuring compliance with security-related standards. Reference has been made of the FAA's IASA Program and the Joint Aviation Authorities (JAA) Programme (*an associated body of the European Civil Aviation Conference (ECAC), representing the civil aviation regulatory authorities of a number of European countries*) to develop and implement common security regulatory standards and procedures among its member States; this cooperation is intended to provide high and consistent standards of security and a level playing field for competition in Europe.

There are three security regulatory measures (ICAO, FAA, JAA) that have emerged and that will play a role in meeting the challenges of the new situation created by the attacks of September 11, 2001. This assumes that a mechanism is needed for their co-ordination and implementation in order to ensure that the most fundamental objective of air transport, which is the safety and security, is accomplished. ICAO has set its light aglow with the adoption of the Aviation Security Plan of Action and the establishment of the Security Audit Program, and this light illuminates a new attitude towards security in air transport on the worldwide level. However, the ICAO Security Audit Program is currently limited to include Annex 17. This should be expanded to include the international legal instruments related to the security of civil aviation.

The new challenge created by the incidents of September 11 and its impact on the aviation industry, requires a new attitude from all participants; security has to be the pro-occupation of everyone involved in air transport. Adherence to security standards by developing States will be directly co-related to the level of available funding. The creation of an International Financial Facility for Aviation Safety (IFFAS) in order to assist States in need of resources to correct deficiencies identified through the USOAP safety oversight audits is a positive development in this regard. This funding mechanism to support the implementation of the security SARPs would contribute to the overall battle against unlawful interference against civil aviation if the international community welcomes the expansion of its scope to encompass the rectification of aviation security deficiencies.

The creation of a Universal Common Fund for Aviation Security (UCFAS) would be another vital step. The implementation of the SARPs and the development

of a safe and secure air transport system are defined as a concept of 'a global public policy goal that implies an international support mechanism to implement the set standards in member States that are not able on their own and under normal market conditions to reach these goals'. The ultimate goal of UCFAS is to insure that international civil aviation is developed in a safe and orderly manner and remains the safest mode of transport for the public.

We are on the verge of a quantum leap in the global fight against unlawful interference with civil aviation, which goes beyond traditional methods, as good as they may have been in the near past. Because the rules of engagement have changed so much, or have simply disappeared, we see the creation of a new global security culture. This new culture recognises and uses past achievements, while integrating new approaches. The international community should continue to accord aviation safety and security the highest priority in its work programme and the ICAO Council should also continue to enhance the level of implementation of the ICAO safety and security programmes on a worldwide basis.

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ANNEX

Doc. 9790

**CERTAIN RELEVANT RESOLUTIONS
ADOPTED AT THE 3rd SESSION OF
THE ASSEMBLY**

2001

INTERNATIONAL CIVIL AVIATION ORGANISATION

ANNEX

CERTAIN RELEVANT RESOLUTIONS ADOPTED AT THE 33RD SESSION OF THE ASSEMBLY

A33-1: Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation

Witnessing the abhorrent terrorist acts which occurred in the United States on 11 September 2001 resulting in the loss of numerous innocent lives, human suffering and great destruction;
Expressing its deepest sympathy to the United States, to the more than seventy other States worldwide which lost nationals and to the families of the victims of such unprecedented criminal acts;

Recognizing that such terrorist acts are not only contrary to elementary considerations of humanity but constitute also use of civil aircraft for an armed attack on civilized society and are incompatible with international law;

Recognizing that the new type of threat posed by terrorist organizations requires new concerted efforts and policies of cooperation on the part of States;

Recalling its Resolutions A22-5, A27-9 and A 2-22 on acts of unlawful interference and terrorism aimed at the destruction of civil aircraft in flight; *Recalling* United Nations General Assembly Resolution 55/158 on *measures to eliminate international terrorism* and United Nations Security Council Resolutions 1368 and 1373 on *condemning and combating international terrorism*;

The Assembly:

1. *Strongly condemns* these terrorist acts as contrary to elementary considerations of humanity, norms of conduct of society and as violations of international law;

Solemnly

2. *Declares* that such acts of using civil aircraft as weapons of destruction are contrary to the letter and spirit of the *Convention on International Civil Aviation*, in particular its preamble

and Articles 4 and 44, and that such acts and other terrorist acts involving civil aviation or civil aviation facilities constitute grave offences in violation of international law;

3. *Urges* all Contracting States to ensure, in accordance with Article 4 of the Convention, that civil aviation is not used for any purpose inconsistent with the aims of the *Convention on International Civil Aviation*, and to hold accountable and punish severely those who misuse civil aircraft as weapons of destruction, including those responsible for planning and organizing such acts or for aiding, supporting or harbouring the perpetrators;

4. *Urges* all Contracting States to strengthen cooperation in order to assist in the investigation of such acts and in the apprehension and prosecution of those responsible and to ensure that those who participated in these terrorist acts, whatever the nature of their participation, find no safe haven anywhere;

5. *Urges* all Contracting States to intensify their efforts in order to achieve the full implementation and enforcement of the multilateral conventions on aviation security, as well as of the ICAO Standards and Recommended Practices and Procedures (SARPs) relating to aviation security, to monitor such implementation, and to take within their territories appropriate additional security measures commensurate to the level of threat in order to prevent and eradicate terrorist acts involving civil aviation;

6. *Urges* all Contracting States to make contributions in the form of financial or human resources to ICAO's AVSEC mechanism to support and strengthen the combat against terrorism and unlawful interference in civil aviation; *calls on* Contracting States to agree on special funding for urgent action by ICAO in the field of aviation security referred to in paragraph 7 below; and *directs* the Council to develop proposals and take appropriate decisions for a more stable funding of ICAO action in the field of aviation security, including appropriate remedial action;

7. *Directs* the Council and the Secretary General to act urgently to address the new and emerging threats to civil aviation, in particular to review the adequacy of the existing aviation security conventions; to review the ICAO aviation security programme, including a review of Annex 17 and other related Annexes to the Convention; to consider the establishment of an ICAO Universal Security Oversight Audit Programme relating to, *inter alia*, airport security arrangements and civil aviation security programmes; and to consider any other action which it may consider useful or necessary, including technical cooperation; and

8. *Directs* the Council to convene, at the earliest date, if possible, in the year 2001, an international high-level, ministerial conference on aviation security in Montreal with the objectives of preventing, combatting and eradicating acts of terrorism involving civil aviation; of strengthening ICAO's role in the adoption of SARPs in the field of security and the audit of their implementation; and of ensuring the necessary financial means as referred to in paragraph 6 above.

A33-2: Consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference

Whereas the development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security;

Whereas the threat of terrorist acts, unlawful seizure of aircraft and other acts of unlawful interference against civil aviation, including acts aimed at destruction of aircraft, as well as acts aimed at using the aircraft as a weapon of destruction, have a serious adverse effect on the safety, efficiency and regularity of international civil aviation, endanger the lives of persons on board and on the ground and undermine the confidence of the peoples of the world in the safety of international civil aviation;

Whereas it is considered desirable to consolidate Assembly resolutions on the policies related to the safeguarding of international civil aviation against acts of unlawful interference in order to facilitate their implementation and practical application by making their texts more readily available, understandable and logically organized;

Whereas in Resolution A32-22 the Assembly resolved to adopt at each session a consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference; and *Whereas* the Assembly has reviewed proposals by the Council for the amendment of the consolidated statement of continuing ICAO policies in Resolution A32-22, Appendices A to H inclusive, and has amended the statement to reflect the decisions taken during the 33rd Session;

The Assembly:

1. *Resolves* that the Appendices attached to this resolution constitute the consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference, up to date as these policies exist at the close of the 33rd Session of the Assembly.
2. *Resolves* to request the Council to submit at each ordinary session for review a consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference; and
3. *Declares* that this resolution supersedes Resolution A32-22.

APPENDIX A

General policy

Whereas acts of unlawful interference against civil aviation have become the main threat to its safe and orderly development;

Recognizing that all acts of unlawful interference against international civil aviation constitute a grave offence in violation of international law; and

Endorsing actions taken so far by the Council, in particular by adopting new preventive measures, strengthening the means available to the Organization and assuming functions related to the implementation of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*;

The Assembly:

1. *Strongly condemns* all acts of unlawful interference against civil aviation wherever and by whomsoever and for whatever reason they are perpetrated;
2. *Reaffirms* the important role of the International Civil Aviation Organization to facilitate the resolution of questions which may arise between Contracting States in relation to matters affecting the safe and orderly operation of international civil aviation throughout the world;
3. *Reaffirms* that aviation security must continue to be treated as a matter of highest priority by the International Civil Aviation Organization and its Member States;
4. *Notes* with abhorrence acts of unlawful interference aimed at the destruction in flight of civil aircraft in commercial service including any misuse of civil aircraft as a weapon of destruction and the death of persons on board and on the ground;
5. *Calls upon* all Contracting States to confirm their resolute support for the established policy of ICAO by applying the most effective security measures individually and in cooperation with one another, to suppress acts of unlawful interference and to punish the perpetrators of any such acts; and
6. *Directs* the Council to continue its work relating to measures for prevention of acts of unlawful interference.

APPENDIX B

International legal instruments for the suppression of acts of unlawful interference with civil aviation

Whereas the protection of civil aviation from acts of unlawful interference has been enhanced by the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo, 1963), by the *Convention for the Suppression of Unlawful Seizure of Aircraft* (The Hague, 1970), by the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal, 1971), by the *Protocol for the Suppression of Unlawful Acts of Violence*

at *Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, (Montreal, 1988) as well as by the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (Montreal, 1991) and by bilateral agreements for the suppression of such acts;

The Assembly:

1. *Calls upon* Contracting States which have not yet done so to become parties to the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo, 1963), to the *Convention for the Suppression of Unlawful Seizure of Aircraft* (The Hague, 1970), to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal, 1971), and to the 1988 Supplementary Protocol to the Montreal Convention;
2. *Urges* all States to become parties as soon as possible to the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (Montreal, 1991);
3. *Invites* States not yet parties to the 1991 *Convention on the Marking of Plastic Explosives for the Purpose of Detection* to give effect, even before ratification, acceptance, approval or accession, to the principles of that instrument and calls upon States which manufacture plastic explosives to implement the marking of such explosives as soon as possible;
4. *Directs* the Secretary General to continue to remind States of the importance of becoming parties to the Tokyo, the Hague and Montreal Conventions, to the 1988 Supplementary Protocol to the Montreal Convention and the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* and to provide assistance requested by States encountering any difficulties in becoming parties to these instruments;
5. *Condemns* any failure by a Contracting State to fulfil its obligations to return without delay an aircraft which is being illegally detained or to extradite or submit to competent authorities without delay the case of any person accused of an act of unlawful interference with civil aviation;
6. *Calls upon* Contracting States to intensify their efforts to suppress acts of unlawful seizure of aircraft or other unlawful acts against the security of civil aviation by concluding appropriate agreements for the suppression of such acts which would provide for extradition or submission of the case to competent authorities for the purpose of prosecution of those who commit them; and
7. *Calls upon* Contracting States to continue to assist in the investigation of such acts and in the apprehension and prosecution of those responsible.

APPENDIX C

Action by States

a) Enactment of national legislation and bilateral agreements

Whereas deterrence of acts of unlawful interference with civil aviation can be greatly facilitated through the enactment by Contracting States of national criminal laws providing severe penalties for such acts;

The Assembly:

1. *Calls upon* Contracting States to give special attention to the adoption of adequate measures against persons committing acts of unlawful seizure of aircraft or other acts of unlawful interference against civil aviation, and in particular to include in their legislation rules for the severe punishment of such persons; and
2. *Calls upon* Contracting States to take adequate measures relating to the extradition or prosecution of persons committing acts of unlawful seizure of aircraft or other acts of unlawful interference against civil aviation by adopting appropriate provisions in law or treaty for that purpose or by strengthening existing arrangements for the extradition of persons making criminal attacks on international civil aviation.

b) Information to be submitted to the Council

The Assembly:

1. *Reminds* States parties of their obligations under Article 11 of The Hague Convention and Article 13 of the Montreal Convention, following occurrences of unlawful interference, to forward all relevant information required by those Articles to the Council; and
2. *Directs* the Secretary General, within a reasonable time from the date of a specific occurrence of unlawful interference, to ask that States parties concerned forward to the Council in accordance with their national law all relevant information required by those Articles concerning such occurrence, including particularly information relating to extradition or other legal proceedings.

APPENDIX D

Technical security measures

Whereas the safety of the peoples of the world who benefit from international civil aviation requires continued vigilance and development and implementation of positive safeguarding action by the Organization and its Contracting States;

Whereas a clear need exists for the strengthening of security to be applied to all phases and processes associated with the international carriage of persons, their cabin and checked baggage, cargo, mail, courier and express parcels;

Whereas the responsibility for ensuring that security measures are applied by government agencies, airport authorities and aircraft operators rests with the Contracting States;

Whereas the safety of persons and property at airports serving international civil aviation requires continued vigilance, development and implementation of positive safeguarding actions by the International Civil Aviation Organization and all States to prevent and suppress unlawful acts of violence at such airports; and

Whereas the implementation of the security measures advocated by ICAO is an effective means of preventing acts of unlawful interference with civil aviation;

The Assembly:

1. *Urges* the Council to continue to attach high priority to the adoption of effective measures for the prevention of acts of unlawful interference commensurate with the current threat to the security of international civil aviation and to keep up to date the provisions of Annex 17 to the Chicago Convention to this end;

2. *Requests* the Council to complete, in addition to the International Explosives Technical Commission (IETC) mandate as prescribed by the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, studies into methods of detecting explosives or explosive materials, especially into the marking of those explosives of concern, other than plastic explosives, with a view to the evolution, if needed, of an appropriate comprehensive legal regime;

3. *Urges* all States on an individual basis and in cooperation with other States to take all possible measures for the suppression of acts of violence at airports serving international civil aviation, in particular, those required or recommended in Annex 17 to the *Convention on International Civil Aviation*;

4. *Calls upon* Contracting States to intensify their efforts for the implementation of existing Standards, Recommended Practices, and Procedures relating to aviation security, to monitor such implementation, and to take all necessary steps to prevent acts of unlawful interference against international civil aviation;

5. *Further calls* on Contracting States, while respecting their sovereignty, to substantially enhance cooperation and coordination between them in order to improve such implementation;

6. *Requests* the Council to ensure, with respect to the technical aspects of aviation security, that:

a) the provisions of Annex 17 and Annex 9 – *Facilitation* are compatible with and complementary to each other provided the effectiveness of security measures is not compromised;

b) when considered necessary, the agenda of ICAO meetings include items dealing with

aviation security which are relevant to the subject of such meetings;

c) regional aviation security seminars are convened by ICAO after consultation with or at the request of States concerned;

d) the ICAO Training Programme for Aviation Security comprising Aviation Security Training Packages (ASTPs) for use by States continues to be developed; and

e) ICAO assumes the coordination role, in collaboration with aviation security Mechanism donor States, of the aviation security training centres (ASTCs) to ensure training standards are maintained and sound levels of cooperation are achieved.

7. *Urges* Contracting States which have not already done so to implement the Standards, Recommended Practices and Procedures on aviation security measures, and to give appropriate attention to the guidance material contained in the *ICAO Security Manual*; and
8. *Directs* the Secretary General to continue to update and amend at appropriate intervals the *Security Manual* designed to assist Contracting States in implementing the specifications and procedures related to civil aviation security.

APPENDIX E

Action of States with respect to unlawful seizure of aircraft in progress

Whereas acts of unlawful seizure continue seriously to compromise the safety, regularity and efficiency of international civil aviation;

Whereas the Council has adopted Standards and Recommended Practices on aviation security in accordance with ICAO policy;

Whereas the safety of flights of aircraft subjected to an act of unlawful seizure may be further jeopardized by the denial of navigational aids and air traffic services, the blocking of runways and taxiways and the closure of airports; and

Whereas the safety of passengers and crew of an aircraft subjected to an act of unlawful seizure may also be further jeopardized if the aircraft is permitted to take off while still under seizure;

The Assembly:

1. *Recalls* in this regard the relevant provisions of the Chicago, Tokyo and The Hague Conventions;
2. *Recommends* that States take into account the above considerations in the development of their policies and contingency plans for dealing with acts of unlawful seizure;
3. *Urges* Contracting States to provide assistance to an aircraft subjected to an act of unlawful seizure, including the provision of navigational aids, air traffic services and permission to land;

4. *Urges* Contracting States to ensure that an aircraft subjected to an act of unlawful seizure which has landed in its territory is detained on the ground unless its departure is necessitated by the overriding duty to protect human life; and
5. *Recognizes* the importance of consultations between the State where an aircraft subjected to an act of unlawful seizure has landed and the State of the operator of that aircraft as well as notification by the State where the aircraft has landed to the States of assumed or stated destination.
6. *Urges* Contracting States to cooperate for the purpose of providing a joint response in connection with an act of unlawful interference, as well as utilizing, if necessary, the experience and capabilities of the State of the operator of an aircraft, the State of manufacture and the State of registration which has been subjected to an act of unlawful interference while taking measures in their territory to free the passengers and crew members of that aircraft.

APPENDIX F

Assistance to States in the implementation of technical measures for the protection of international civil aviation

Whereas the implementation of technical measures for prevention of acts of unlawful interference with international civil aviation requires financial investment and training of personnel;

Whereas, notwithstanding assistance given, some countries, in particular developing countries, still face difficulties in fully implementing preventive measures due to insufficient financial, technical and material resources; and

Whereas aviation security is vital to all Contracting States for the proper operation of their airlines all around the world;

The Assembly:

1. *Invites* developed countries to give assistance to the countries which are not able to implement programmes of suggested technical measures for the protection of aircraft on the ground and, in particular, in the processing of passengers, their cabin and checked baggage, cargo, mail, courier and express parcels;
2. *Invites* Contracting States to bear in mind the possibility offered by the Mechanism for effective implementation of Standards and Recommended Practices (SARPs) contained in Annex 17, the United Nations Development Programme and the Technical Co-operation among Developing Countries to meet their technical assistance requirements arising from the need to protect international civil aviation;
3. *Urges* all States that have the means to do so to increase technical, financial and material

assistance to countries in need of such assistance to improve aviation security through bilateral and multilateral effort, in particular, through the ICAO Mechanism for effective implementation of Standards and Recommended Practices (SARPs) contained in Annex 17;

4. *Urges* all Contracting States to take advantage of the availability of ICAO aviation security training centres (ASTCs) for the purpose of enhancing training standards; and

5. *Urges* the international community to consider increasing assistance to States and enhance cooperation amongst them, in order to be able to benefit from the achievement of the aims and objectives of the *Convention on the Marking of Plastic Explosives*, in particular through the International Explosives Technical Commission (IETC).

APPENDIX G

Action by the Council with respect to multilateral and bilateral cooperation in different regions of the world

Whereas the rights and obligations of States under the international conventions on aviation security and under the Standards and Recommended Practices adopted by the Council of ICAO on aviation security could be complemented and reinforced in bilateral cooperation between States;

Whereas the bilateral agreements on air services represent the main legal basis for international carriage of passengers, baggage, cargo and mail;

Whereas provisions on aviation security should form an integral part of the bilateral agreements on air services; and

Whereas Annex 17 to the *Convention of International Civil Aviation* contains a recommendation that each Contracting State should include in its bilateral agreements on air transport a clause related to aviation security;

The Assembly:

1. *Notes* with satisfaction the strong support of States for the model clause on aviation security, elaborated by the Council and attached to the Council Resolution of 25 June 1986;
2. *Notes* the wide acceptance by States of the model agreement on aviation security for bilateral or regional cooperation adopted by the Council on 30 June 1989;
3. *Urges* all Contracting States to insert into their bilateral agreements on air services a clause on aviation security, taking into account the model clause adopted by the Council on 25 June 1986;
4. *Recommends* that Contracting States take into account the model agreement adopted by the Council on 30 June 1989;
5. *Recommends* that the Council continue to:
 - gather the results of States' experience in cooperation to suppress acts of unlawful

interference with international civil aviation;

— analyse the existing situation in the fight against acts of unlawful interference with international civil aviation in different regions of the world; and

— prepare recommendations for strengthening measures to suppress such acts of unlawful interference.

APPENDIX H

Cooperation with international organizations in the field of aviation security

The Assembly:

1. *Invites* the International Criminal Police Organization (ICPO/INTERPOL), the Universal Postal Union (UPU), the International Air Transport Association (IATA), Airports Council International (ACI), and the International Federation of Air Line Pilots' Associations (IFALPA) to continue their cooperation with ICAO, to the maximum extent possible, to safeguard international civil aviation against acts of unlawful interference.

A33-3: Increasing the effectiveness of ICAO (to face new challenges)

Whereas the present situation created by the tragic events of 11 September 2001 imposes on ICAO the need to respond quickly and without delay to the new threats and demands in order to ensure that it makes an effective contribution to the safety, security and efficiency of flights worldwide;

Whereas ICAO has bodies of experts that deal continuously with the issues of safety and security, advising and working close to the Council;

Whereas this Organization has in the Council a resident deliberative body elected representing all regions of the world, a fact that enhances further its legitimacy;

Whereas the ICAO Council is a political body with internationally recognized legitimacy to deal with international civil aviation matters; and

Whereas Contracting States could exercise their sovereignty in the light of the Council's authority through a mechanism that can permit them to request a review of newly introduced SARPs;

The Assembly:

Directs the Council to seek ways to shorten the process for the approval and adoption of SARPs considered of key importance for the safety and security of civil aviation, whenever deemed necessary.

A33-4: Adoption of national legislation on certain offences committed on board civil aircraft (unruly/disruptive passengers)

The Assembly:

Recognizing that, under the Preamble and Article 44 of the *Convention on International Civil Aviation*, one of the aims and objectives of the Organization is to foster the planning and development of international air transport so as to meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

Noting the increase of the number and gravity of reported incidents involving unruly or disruptive passengers on board civil aircraft;

Considering the implications of these incidents for the safety of the aircraft and the passengers and crew on board these aircraft;

Mindful of the fact that the existing international law as well as national law and regulations in many States are not fully adequate to deal effectively with this problem;

Recognizing the special environment of aircraft in flight and inherent risks connected therewith, as well as the need to adopt adequate measures of national law for the purpose of enabling States to prosecute criminal acts and offences constituting unruly or disruptive behaviour on board aircraft;

Encouraging the adoption of national legal rules enabling States to exercise jurisdiction in appropriate cases to prosecute criminal acts and offences constituting unruly or disruptive behaviour on board aircraft registered in other States;

Therefore:

Urges all Contracting States to enact as soon as possible national law and regulations to deal effectively with the problem of unruly or disruptive passengers, incorporating so far as practical the provisions set out in the Appendix to this Resolution; and

Calls on all Contracting States to submit to their competent authorities for consideration of prosecution all persons whom they have a reasonable ground to consider as having committed any of the offences set out in the national laws and regulations so enacted, and for which they have jurisdiction in accordance with these laws and regulations.

APPENDIX

Model Legislation on Certain Offences Committed on Board Civil Aircraft

Section 1: Assault and Other Acts of Interference against a Crew Member on Board a Civil Aircraft

Any person who commits on board a civil aircraft any of the following acts thereby commits an offence:

- (1) assault, intimidation or threat, whether physical or verbal, against a crew member if

such act interferes with the performance of the duties of the crew member or lessens the ability of the crew member to perform those duties;

(2) refusal to follow a lawful instruction given by the aircraft commander, or on behalf of the aircraft commander by a crew member, for the purpose of ensuring the safety of the aircraft or of any person or property on board or for the purpose of maintaining good order and discipline on board.

Section 2: Assault and Other Acts Endangering Safety or Jeopardizing Good Order and Discipline on Board a Civil Aircraft

(1) Any person who commits on board a civil aircraft an act of physical violence against a person or of sexual assault or child molestation thereby commits an offence.

(2) Any person who commits on board a civil aircraft any of the following acts thereby commits an offence if such act is likely to endanger the safety of the aircraft or of any person on board or if such act jeopardizes the good order and discipline on board the aircraft:

- (a) assault, intimidation or threat, whether physical or verbal, against another person;
- (b) intentionally causing damage to, or destruction of, property;
- (c) consuming alcoholic beverages or drugs resulting in intoxication.

Section 3: Other Offences Committed on Board a Civil Aircraft

Any person who commits on board a civil aircraft any of the following acts thereby commits an offence:

- (1) smoking in a lavatory, or smoking elsewhere in a manner likely to endanger the safety of the aircraft;
- (2) tampering with a smoke detector or any other safety-related device on board the aircraft;
- (3) operating a portable electronic device when such act is prohibited.

Section 4: Jurisdiction

1. The jurisdiction of (*Name of State*) shall extend to any offence under Sections 1, 2, or 3 of this Act if the act constituting the offence took place on board:

- (1) any civil aircraft registered in (*Name of State*); or
- (2) any civil aircraft leased with or without crew to an operator whose principal place of business is in (*Name of State*) or, if the operator does not have a principal place of business, whose permanent residence is in (*Name of State*); or
- (3) any civil aircraft on or over the territory of (*Name of State*); or
- (4) any other civil aircraft in flight outside (*Name of State*), if
- (a) the next landing of the aircraft is in (*Name of State*); and

(b) the aircraft commander has delivered the suspected offender to the competent authorities of (*Name of State*), with the request that the authorities prosecute the suspected offender and with the affirmation that no similar request has been or will be made by the commander or the operator to any other State.

2. The term “in flight” as used in this section means the period from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

A33-5: Confirmation of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

Whereas the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organization was adopted on 21 March 1986 by a conference convened by the General Assembly of the United Nations;

Whereas Article 83 of said Convention provides that it is subject to ratification by States and to acts of formal confirmation by international organizations;

Whereas the Convention was signed on behalf of ICAO by the President of the Council on 29 June 1987;

Whereas by Resolution 53/100 (United Nations Decade of International Law) the General Assembly of the United Nations, inter alia, encouraged States to consider ratifying or acceding to the Convention, international organizations that have signed the Convention to deposit on act of formal confirmation, and other organizations entitled to do so to accede to it at an early date; and

Whereas this Assembly considers that the Convention would provide additional clarity and certainty as to the legal regime to govern treaty relationships between ICAO and States or between ICAO and other international organizations parties to the Convention, and would therefore enhance the functioning of the Organization;

The Assembly:

1. *Decides* that ICAO should formally confirm the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986);

2. *Authorizes* the President of the Council to sign an act of formal confirmation of the said Convention for deposit on behalf of ICAO; and

3. *Urges* States which have not yet done so to ratify the Convention so that it would enter into force as soon as possible.

A33-10: Establishment of an International Financial Facility for Aviation Safety (IFFAS)

Whereas under Article 44 of the Chicago Convention the aims and objectives of ICAO *inter alia* are to foster planning and development of international air transport so as to ensure the safe and orderly growth of international civil aviation, meet the needs of the people of the world for safe, regular and economical air transport, and promote safety of flight in international air navigation;

Whereas under Article 69 of the Chicago Convention, if the Council is of the opinion that the airports and air navigation facilities of a Contracting State are not reasonably adequate for the safe, regular, efficient and economical operation of international air services, the Council shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose;

Whereas in pursuance of Resolution A32-11, the Council has brought into effect, from 1 January 1999, a Universal Safety Oversight Audit Programme, and the results of the initial audits of almost all Contracting States under that Programme have been received;

Whereas these audits have revealed that a number of Contracting States have to draw on scarce resources from other national priorities in order to implement effective safety oversight and that these States will require various degrees of assistance to meet their safety oversight responsibilities;

Whereas most developing States experience difficulties in gaining access to many financial market sources, particularly foreign capital markets, for funding their airport and air navigation services infrastructure, including safety-related components of that infrastructure;

Whereas the 31st Session of the Assembly requested the Council to study a proposal submitted by a group of States for the establishment of an international aeronautical monetary fund to finance investments in airports and air navigation services infrastructure under conditions that would be more flexible and less onerous than the conditions usually applicable in financial markets;

Considering the study conducted in the present triennium on an International Financial Facility for Aviation Safety (IFFAS) and a survey of Contracting States on the results of this study, which demonstrated *inter alia* the existence of a real need for funding which may not, in many cases, be available from established sources and the strong support of Contracting States for the establishment of an IFFAS;

Considering that an IFFAS would provide financial support towards achieving the objectives of improving aviation safety, through the implementation of the necessary corrective measures identified in the ICAO Universal Safety Oversight Audit Programme (USOAP);

The Assembly:

1. *Expresses appreciation* to the Council and the Secretary General for the progress made in studying and developing an International Financial Facility for Aviation Safety (IFFAS);
2. *Endorses* the concept of an IFFAS with:
 - a) the objective of financing safety-related projects for which States cannot otherwise provide or obtain the necessary financial resources, with the principal area of application being safety-related deficiencies identified through the ICAO Universal Safety Oversight Audit Programme (USOAP) as an element of the Global Aviation Safety Plan (GASP); and
 - b) application of the following principles with regard to development, establishment and operation:
 - 1) voluntary participation by States;
 - 2) eligibility for benefits by a State dependent on contributions or other participation by that State;
 - 3) definition of a framework of common guidelines and operating rules at the global level to ensure consistency, with flexibility for implementation left to the discretion and initiative of regional groups of States;
 - 4) complete independence from ICAO's Programme Budget; and
 - 5) provision of any administrative or other services by ICAO only upon request of participating States and on a cost-recovery basis.
3. *Requests* the Council to pursue the establishment of an IFFAS as a matter of priority early in the 2002-2004 triennium, having regard to the applicable laws of Contracting States and on the basis of:
 - a) an administrative charter or memorandum for signature by participating parties;
 - b) a structure including:
 - 1) a governing body incorporating adequate representation from amongst the States and other contributing parties; and
 - 2) staffing to support this body and to cover daily executive and administrative functions;
 - c) a management strategy developed on the principles of, and in conformity with, the existing ICAO legal regime;
 - d) a transparent and simple management mechanism with special attention paid to:
 - 1) clear administrative guidelines;
 - 2) clear guidance as to how overall financial requirements are to be estimated and budgeted for each year;
 - 3) clear criteria and procedures for the granting of loans and conducting any other financial transactions, including: consistency with ICAO Standards and Recommended Practices,

Procedures for Air Navigation Services, Air Navigation Plans and ICAO's policies on charges and taxes; accounting system requirements; presentation of business cases; and prioritization of projects;

- 4) safeguards to ensure the proper, effective and efficient application of funds;
- 5) measures to assure quality control and to assess effectiveness and efficiency at all levels; and
- 6) provisions for the auditing of accounts; and
- e) initial implementation within the 2002-2004 triennium;

4. *Requests* the Council to remain available to advise Member States with respect to proposals for

financing their voluntary contributions to the IFFAS and to ensure that such proposals are in conformity with the Chicago Convention and ICAO policies;

5. *Encourages* Contracting States to consider:

- a) voluntary contributions to finance the preparatory work in development of the IFFAS;
- b) voluntary participation in the IFFAS; and
- c) to the extent their national policy permits, contribution of capital to the IFFAS by crediting any amount of their share of any distributable surplus from the ICAO Programme Budget to the IFFAS account which will be held in trust by ICAO;

6. *Encourages* international organizations (private and public) having association with international aviation, airlines, airports, providers of air navigation services, manufacturers of airframes, engines and avionics, other members of the aerospace industry, and civil society, to make voluntary contributions to the IFFAS; and

7. *Requests* the Council to submit to the next ordinary session of the Assembly a report regarding

IFFAS activities, including performance assessment and audited financial statements.

A33-11: A global design code for aircraft

Whereas Article 33 of the Convention requires recognition by States of certificates of airworthiness issued by States of registry provided that the requirements under which they were issued are equal to or above the minimum standards established pursuant to the Convention;

Whereas the ICAO Council in 1972 agreed that the international airworthiness Standards adopted by the Council are recognized as being the complete international code necessary to bring into force and effect the rights and obligations which arise under Article 33 of the Convention;

Whereas the ICAO Council further agreed that national codes of airworthiness containing the full scope and extent of detail considered necessary by individual States are required as the basis for the certification by individual States of airworthiness of each aircraft;

Recognizing that the cost of repetitive certifications imposed on aircraft manufacturers and operators to meet the requirements of many different national aviation authorities could be significantly reduced by avoiding such duplications;

Recognizing that the joint efforts of the United States Federal Aviation Administration and the European Joint Aviation Authorities has brought together many of the major States of design in an effort to establish a globally harmonized design code and to study the feasibility of a harmonized aircraft certification process;

The Assembly:

1. *Endorses* the effort to establish a globally harmonized design code and to study the feasibility of a harmonized aircraft certification process;
2. *Urges* all States of design and other Contracting States to participate in the international harmonization projects as initiated by FAA/JAA;
3. *Urges* the Secretary General to ensure ICAO participation in the harmonization projects to the extent practicable; and
4. *Requests* the Secretary General to bring this resolution to the attention of all Contracting States.

A33-21: Update of the new policy on technical co-operation

Whereas transitional measures towards a new technical cooperation policy have been applied and A32-21 directed the Council to prepare for its consideration a consolidated Resolution regarding all technical cooperation activities and programmes;

Whereas Contracting States increasingly call upon ICAO to provide advice and assistance to implement SARPs and develop their civil aviation through the strengthening of their administration, the modernization of their infrastructure and the development of their human resources;

Whereas funding institutions expect from those implementing the projects they finance, expedient and effective project execution as well as detailed and real-time information on project activities and finances;

Whereas UNDP funding is directed to other development sectors (education, health, government reforms, etc.), and its financial contribution to civil aviation activities has

decreased to a level where it represents less than 5 per cent of the ICAO Technical Co-operation Programme;

Whereas civil aviation administrations of Least Developed Countries are, in particular, those who need the most support while, at the same time, they must rely on financial institutions and sector industry to fund their technical cooperation projects;

Whereas, over the 1996-1998 and 1999-2001 Trienniums, integration of the Technical Co-operation Bureau and the implementation of the core staff concept have been pursued and the financial position of the Technical Co-operation Bureau has consequently improved;

Whereas there is a need for remedial follow-up action of the ICAO Universal Safety Oversight Audit Programme (USOAP) on an urgent basis for providing remedial support functions in addressing the identified deficiencies and shortcomings;

Whereas initial funding provided to the Technical Co-operation Programme from extra-budgetary resources has begun to assist in carrying out flight safety follow-up and remedial activities with States;

The Assembly:

1. *Reaffirms* that the Technical Co-operation Programme is a permanent priority activity of ICAO that complements the roles of the Regular Programme in providing support to States in the effective implementation of SARPS and ANPs as well as in the development of their civil aviation administration infrastructure and human resources;
2. *Reaffirms* that the Technical Co-operation Bureau is one of the main instruments of ICAO to assist States in remedying the deficiencies identified through ICAO's assessment and audit activities;
3. *Affirms* that further integration of ICAO's activities should be achieved through clear delimitation of each Bureau's mandate and activities, enhanced cooperation and coordination of their respective activities and avoidance of duplication and redundancy;
4. *Affirms* that, within the existing financial means, the ICAO Technical Co-operation Programme should be strengthened, at Regional Office and field level, in order to allow the Technical Co-operation Bureau to play its role more efficiently and effectively;
5. *Recognizes* that, by providing funds from extra-budgetary resources, ICAO will allow the Technical Co-operation Programme to continue and expand its services to States in relation to safety, security and efficiency in civil aviation, thus further contributing to the implementation of SARPs and PIRG's recommendations;
6. *Resolves* that ICAO should develop a concept for quality assurance as a function which could be offered by ICAO for supervision of projects being carried out by States, and on a costs recovery basis;
7. *Confirms* Council Decision (160/13), which states that the integration into the Regular

Programme Budget of the 15 staff members working in Finance and Personnel Branches and currently funded by the Administrative and Operational Services Cost (AOSC) Budget should proceed in a progressive way with some staff absorbed in the 2002-2004 triennium and others during the following triennium;

8. *Encourages* the Council and the Secretary General to adopt a structure and implementation mechanism for the Technical Co-operation Bureau that would use commercially oriented practices to allow fruitful partnerships with funding partners and recipient States;

9. *Appeals* to UNDP to give priority to the development of the air transport sub-sector in developing countries and requests the President, the Secretary General and the Secretariat to intensify their contacts with UNDP to increase its contribution to ICAO's Technical Co-operation projects.

10. *Encourages* States and other development partners to contribute to the ICAO Objectives Implementation Funding Mechanism which allows them to participate in the implementation of ICAO's development projects;

11. *Approves* that, in case of a budget shortfall, the Regular Programme budget will continue to augment the support cost income earned from projects to support the Technical Co-operation Programme according to the proposal contained in the Programme Budget for the Organization for 2002, 2003 and 2004;

12. *Directs* the Council to report to the next ordinary session of the Assembly regarding the plan and the measures taken to implement this Resolution and to prepare for its consideration a consolidated Resolution regarding all technical cooperation activities and programmes; and

13. *Decides* that this Resolution replaces and supersedes Resolution A32-21.