

ROMANIAN **JOURNAL OF INTERNATIONAL LAW**

ISSN 2559 – 3846

International Law Perspectives on the Evolution of Civil Aviation Security

Viorel CHIRICIOIU

RJIL No. 16/2016

Pages 124-143

Contribuția doctorandului și masterandului/ Ph.D. Candidate's and Master Student's Contribution

International Law Perspectives on the Evolution of Civil Aviation Security

*Viorel CHIRICIOIU**

Abstract: *The international legal provisions regulating civil aviation security have been constantly evolving, mostly adopted as the direct response of the international community to various accidents and incidents. The main international actor in this field is ICAO, contributing a great deal to the improvement of the security regulations, chiefly through the adoption of the major conventions dealing with international criminal law in civil aviation. The UN Security Council also offers other valuable resources, while the International Court of Justice itself has also dealt with a number of relevant cases. However, even though we are witnessing the adoption of new, up-to-date regulations covering, preventing and criminalising the most various threats, there is no effective enforcement mechanism and, as such, international cooperation is essential in order to prevent further aviation tragedies.*

Key-words: *aviation, security, safety, ICAO, terrorism*

I. Introduction

The present paper seeks to analyse the evolution of Public International Law rules in the field of civil aviation security (“AVSEC”), arguing these rules have been continuously developing as the direct consequence of various aviation incidents and accidents.

Following a review of the early legal provisions regulating AVSEC, the paper will analyse some of the main issues threatening civil aviation: hijackings, aircraft bombings, airport attacks and aerial shoot downs. Within each of these sections, the events are treated in a chronological and critical manner, based on a “cause-and-effect” template – each important event is followed by the legal instruments adopted in direct response thereto. The purpose is to argue how International Law has been evolving in order to react and respond to the various threats in a continuing effort to close any existing loopholes.

The paper will also explore the impact the events of 11 September 2001 and how the international legal framework had to be modified and revised in their immediate aftermath.

The essay will conclude with an analysis of the most recent international legal instruments in the field of AVSEC – the 2010 Beijing Convention and Beijing Protocol and the 2014 Montreal Protocol.

II. Early regulations and the role of ICAO

Air travel and its strict restrictions form such an important part of our lives nowadays that it might be difficult to imagine these rules have not always been in

existence. The numerous regulations in place today have been constantly developing over the decades in order to reflect and respond to the latest threats to civil aviation.¹

The first international document addressing international aviation regulations was the Paris Convention of 1919,² concluded under the League of Nations. Although representing a vast improvement at the time by internationally unifying the various local and regional aspects already in force, it had little to say about security, limiting itself to placing restrictions upon the transport of “explosives and of arms and munitions of war” (Article 26).

States with different legal systems had different views regarding the exercise of jurisdiction over unlawful acts committed aboard aircraft: common law States had a tendency of relying exclusively on territorial jurisdiction, without including aircraft in this category,³ while civil law States were inclining to use the active personality principle as well, including acts committed by their nationals wherever they were.

The Convention on International Civil Aviation⁴ was signed at Chicago in 1944 and it entered into force in 1947, establishing the International Civil Aviation Organization (“ICAO”). Today, 191 States are Parties to the Convention.⁵

Whilst the Preamble of the Chicago Convention recognized the unlawful use of aviation might very well “become a threat to the general security”⁶ and safety was set as a main objective,⁷ there was little original development upon that remark, as the Convention did not deal with security issues. Rather, its content focused on jurisdictional issues such as States’ sovereignty over their airspace, on the nationality of aircraft, as well as on the structure and organization of ICAO.

The only security-related provision (and even this marginally so)⁸ was Article 4, prohibiting States from using civil aviation in any way incompatible with the scope of the Convention. This is consistent with the State-centric approach characterizing International Law at the time, where individuals were seen as legal objects rather than subjects. As such, it was natural for legal provisions to address only the rights and duties of States, which had to “insure the prosecution” of those acting in violation of the Convention.⁹

ICAO has also presented various Standards and Recommended Practices (“SARPs”) to the international community (the so-called “Annex 17 to the Chicago Convention”), these being the direct result of major aviation incidents. They were first adopted in 1974, as an additional attempt to prevent and respond to any unlawful acts committed against civil aviation, with the latest Amendment coming into force in November 2014.¹⁰

III. The unlawful seizure of aircraft (Hijackings)

* *Viorel Chiricioiu has an LLM (University College London), LLB (University of Bucharest). The opinions expressed in this article are solely the author’s and do not engage the institution he belongs to.*

The present paper represents an abridged version of the author’s dissertation for his LLM programme at University College London.

¹ Christopher C Joyner and Robert A Friedlander, ‘International Civil Aviation’ in Mahmoud Cherif Bassiouni (ed), *International Criminal Law* (Vol I, 3rd edn, Martinus Nijhoff 2008) 831.

² Convention Relating to the Regulation of Aerial Navigation (signed 13 October 1919, entered into force 11 July 1922) 11 LNTS 173 (Paris Convention).

³ James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 466.

⁴ Convention on International Civil Aviation (done 7 December 1944, entered into force 4 April 1947) 15 UNTS 295, ICAO Doc 7300/9 (Chicago Convention).

⁵ ICAO List of Parties to the Chicago Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf, accessed 24 October 2015.

⁶ Chicago Convention, Preamble (first recital).

⁷ *Ibid*, Article 44.

⁸ Ruwantissa Abeyratne, *Aviation Security Law* (Springer 2010) 198.

⁹ Chicago Convention, Article 12.

¹⁰ ICAO, ‘Annex 17’ <http://www.icao.int/Security/SFP/Pages/Annex17.aspx>, accessed 24 October 2015.

Hijacking incidents can be divided into two categories: (i) acts done for material gain, such as transporting the hijackers to a certain place or for pecuniary purposes (ransom, extortion etc.); (ii) hijackings committed for political purposes.¹¹

Several early acts of hijacking were committed in the beginning of the Cold War, as individuals from the Eastern Bloc sought refuge or asylum in the West. One of the world's first hijackings of a passenger flight took place in Romania in 1947, with an aircraft forcibly diverted to Turkey in an attempt to flee the newly-instituted Communist regime. A similar incident occurred in 1950, with three Czechoslovakian aircraft simultaneously hijacked to West Germany.

Besides more and more States ratifying the Chicago Convention, no other international legal measures were adopted in response to these early incidents. The few laws criminalising violence directed against aircraft were domestic in nature.¹²

However, the international community thought of drawing a connection between air hijackings and the hijacking of maritime vessels – also known as piracy. Piracy *jure gentium* had long been established as an international crime, drawing upon universal jurisdiction¹³ and the pirate being considered “an enemy of all mankind”.¹⁴

As such, one of the first attempts to regulate aerial hijackings was to include them in the same context with maritime piracy. This was done through the 1958 Geneva Convention on the High Seas,¹⁵ whose Article 15 defines piracy as “illegal acts of violence” directed against ships or aircraft. States also have a right to exercise universal jurisdiction (including enforcement jurisdiction) over any aircraft taken over by pirates.¹⁶ The Convention on the High Seas was thus intended to apply equally to both maritime and aerial hijackings.¹⁷

It was quickly determined the provisions of the Convention on the High Seas would not apply to these incidents of aerial hijacking for several reasons.¹⁸

Firstly, not all hijackings were committed for private ends (as required by the Geneva Convention) – more and more such acts started to be undertaken for political purposes. Furthermore, Article 15 of the Geneva Convention describes piracy as committed by persons onboard a vessel against another vessel, which evidently excludes the typical situation where an aircraft is hijacked by one of its passengers. Lastly, most hijackings are committed simply through threats; the actual use of violence (another requirement set by the Geneva Convention) remains rare.

Noting, in consequence, the inapplicability of the rules set out in the Convention on the High Seas, the international community – through ICAO – proceeded to conclude a series of treaties in response to the growing threat, the first of which was the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.¹⁹

The object and purpose of the Convention are to protect and maintain the security of civilian aircraft and civil aviation in general, through a range of powers bestowed upon the commander of the aircraft, the other members of the flight crew and even upon passengers themselves (Article 6). The latter are also authorized to take preventive measures by themselves on reasonable grounds.

¹¹ Robert T Holden, ‘*The Contagiousness of Aircraft Hijacking*’ (1986) 91-4 American Journal of Sociology 874, 878.

¹² Joyner and Friedlander (n 1) 832.

¹³ *Re Piracy Jure Gentium* [1934] AC 586.

¹⁴ *The Case of the S.S. “Lotus” (France v Turkey)* PCIJ Rep Series A No 10 [1927], 70.

¹⁵ Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962), 450 UNTS 11.

¹⁶ *Ibid*, Articles 14 and 19.

¹⁷ Henry Reiff, *The United States and the Treaty Law of the Sea* (University of Minnesota Press 1959) 6.

¹⁸ Abeyratne (n 8) 216.

¹⁹ Convention on Offences and Certain Other Acts Committed on Board Aircraft (signed 14 September 1963, entered into force 4 December 1969) 704 UNTS 219, ICAO Doc 8364 (Tokyo Convention).

Restraining measures may also be taken against persons who have committed – or are about to commit – offences or unlawful acts onboard, including arresting, disembarking and handing them to the competent authorities (Articles 8–9).

Article 10 of the Convention grants immunity to the persons acting in order to preserve security onboard, as a natural corollary to the above-mentioned powers²⁰. This immunity is not absolute and should be analysed on a case by case basis, as discussed by an Israeli court in *Zikry*.²¹

Although primary jurisdiction over any offences committed onboard is awarded to the State of registration of the aircraft, the Tokyo Convention also grants concurrent jurisdiction to various other States based on objective territoriality, the protective principle, as well as on the active and passive personality principles.²² This ensured no incident occurring on board an aircraft would be left outside the scope of law and at least one State (the State of registration) would be able to exercise jurisdiction.²³ Jurisdiction exercised according to each State's own domestic law is not excluded, meaning the rules set in the Convention are subsidiary.²⁴

The Convention has a very limited scope of application, as it only governs acts committed by persons onboard an aircraft which is “in flight”, defined as “from the moment when power is applied for the purpose of take-off until the moment when the landing run ends” – thus excluding any act of sabotage or hijacking committed with the aircraft parked or taxiing. A secondary definition is provided only insofar as the powers of the commander are concerned, those being enforceable from the closing of all external doors until the opening of any such door.²⁵

The Tokyo Convention also refers to the unlawful seizure of aircraft, however in an incomplete way,²⁶ not providing for any particular rules except for the landing State to “take all appropriate measures” to bring the lawful commander back to the control of the aircraft and allow passengers and crew to continue their journey (Article 11).

States have the duty to allow commanders to disembark passengers in exercise of their powers, take delivery and, if the circumstances so require, take custody of them (Articles 12–13). They also have an obligation to make an inquiry over the facts of any disembarkation.

For extradition purposes, the Tokyo Convention treats offences committed on board an aircraft registered in a State Party as also being committed within that State's territory. Unless affecting the safety of the aircraft, political offences are excluded from extradition, due to concerns of divergence over what would constitute the political nature of such an offence.²⁷ Last but not least, there is no mechanism to extradite or prosecute (*aut dedere, aut judicare*) in the Convention, which was also perceived as a major lack thereof.²⁸

Initially, States were slow to ratify the Tokyo Convention because they considered aerial incidents were rare events which did not require their governmental involvement.²⁹ However, in response to the extensive wave of hijackings occurring in the following period of time and which will be discussed below, numerous States hurriedly ratified it and it entered into force in 1969. At present,³⁰ 186 States are parties to it.

²⁰ ICAO Legal Committee ‘Annual Report of the Council to the Assembly for 1963’ (April 1964), ICAO Doc 8402, A15-p/2, 95.

²¹ *Zikry v Air Canada*, Civil File 1716/05 A, Magistrates Court of Haifa (2006).

²² Tokyo Convention, Articles 3–4.

²³ Allan I Mendelsohn, ‘*In-flight crime: The international and domestic picture under the Tokyo Convention*’ (1967) 53 *Virginia Law Review* 509, 515.

²⁴ Isabella H Ph Diederiks-Verschoor, *Introduction to Air Law* (9th edn, Wolters Kluwer 2012) 395

²⁵ Tokyo Convention, Articles 1 and 5(2).

²⁶ Joyner and Friedlander (n 1) 833.

²⁷ Robert P Boyle, ‘*The Tokyo Convention on offences and certain other acts committed on board aircraft*’ (1964) 30 *Journal of Air Law and Commerce* 305, 333.

²⁸ *Ibid.*, 320.

²⁹ Abeyratne (n 8) 219.

³⁰ ICAO List of Parties to the Tokyo Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Tokyo_EN.pdf, accessed 24 October 2015

Hijacking acts committed for political purposes by extremist guerrillas were particularly widespread during the 1960s and 1970s. As such, El Al Flight 426 (a Boeing 707) was hijacked in 1968 by members of the PFLP (“Popular Front for the Liberation of Palestine”) and diverted to Algiers. After weeks of negotiations, the passengers were released. Flight 426 remains the only successful hijacking in El Al’s history, as air marshals were immediately instituted on their flights.

Concerned by the growing number of hijacking incidents, the ICAO Assembly adopted in 1968 Resolution A16-37, inviting States to ratify the Convention and enforce the principles therein, as well as requesting the development of other legal measures.³¹

States formally asked the United Nations to take legal measures to combat air piracy in October 1969 by means of a memorandum.³² Consequently, the UN General Assembly adopted Resolution 2551 (XXIV), expressing concerns over the unlawful seizure of aircraft and urging all States to continue their cooperation in the fight against these incidents. The Resolution referred particularly to adopting relevant legal measures and ratifying or acceding to the Tokyo Convention in order to combat the “forcible diversion of civil aircraft in flight”.³³

The events of the following year would prove instrumental in the adoption of international legal measures in aviation security. On 31 March 1970, Japan Airlines Flight 351, a Boeing 727, was hijacked by members of a Japanese Communist movement. After forcing the aircraft to Seoul (where the passengers were released), the hijackers flew to Pyongyang.

One of the most complex incidents was represented by the so-called “Dawson’s Field hijackings”, carried out by the PFLP in 1970. On 6 September, TWA Flight 741 and a Swissair Flight 100 were hijacked and flown to an abandoned airstrip in Jordan. On the same day, PFLP fighters hijacked a Boeing 747 flying for Pan Am and flew it to Cairo. Three days later, a Vickers VC10 operating BOAC Flight 775 was also hijacked and flown to Dawson’s Field.

In immediate and direct response to this, the UN Security Council adopted Resolution 286 (1970) on the same day, calling for the urgent release of all passengers and appealing to States to adopt new legal measures in order to prevent both further hijackings and other dangerous incidents and preserve the safety of civil aviation worldwide.³⁴

The UN General Assembly reacted as well by adopting Resolution 2645 (XXV), which “condemns without exception whatsoever” any acts of unlawful interference with the safety or security of flights, calling for further international measures in order to prevent and combat the growing phenomenon.³⁵ While reflective of the international community’s intent, the Resolution was not legally binding and carried no enforcement effects.³⁶

The series of hijackings and the UN Resolutions led ICAO to draft and adopt the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,³⁷ now having 185 States Parties,³⁸ with an intention to cover the deficiencies of the Tokyo Convention. It was very quickly ratified by ICAO Member States, entering into force on 14 October 1971.³⁹

The Hague Convention has a vastly greater scope of application by establishing aircraft hijacking as a separate international crime punishable by States

³¹ ICAO Assembly Resolution A16-37 on Unlawful Seizure of Civil Aircraft (19 September 1968).

³² UN Doc A/7656 (1969).

³³ UNGA Res 2551 (12 December 1969) UN Doc A/RES/2551(XXIV).

³⁴ UNSC Res 286 (9 September 1970) UN Doc S/RES/286(1970) adopted without vote.

³⁵ UNGA Res 2656 (25 November 1970) UN Doc A/RES/2656(XXV).

³⁶ Joyner and Friedlander (n 1) 834.

³⁷ Convention for the Suppression of Unlawful Seizure of Aircraft (signed 16 December 1970, entered into force 14 October 1971) 860 UNTS 105, ICAO Doc 8920 (Hague Convention).

³⁸ As of October 2015.

³⁹ ICAO List of Parties to the Hague Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Hague_EN.pdf, accessed 24 October 2015.

Parties (Article 2). There is no specific *mens rea* requirement, but the acts must be committed forcefully or through intimidation. The Convention also regulates the threat to hijack an aircraft (limited to threats made on an aircraft during its flight), as well as attempts to do so and acts committed by accomplices (Article 1).

States have an obligation to criminalise hijacking within their domestic systems⁴⁰, provide each other with complete assistance over any criminal proceedings undertaken and report any relevant information to the ICAO Council. States must also take action to restore the aircraft to its lawful commander and ensure the passengers and crew continue their journey (Articles 9–11).

The list of States able to exercise jurisdiction was also expanded over that from the Tokyo Convention in order to reflect the emerging trend of leasing aircraft, by including the State of nationality of the lessee in case of a dry lease, *i.e.* a lease of an aircraft without any crew (Article 4).

The Hague Convention includes the States' obligation to extradite or prosecute the suspects (*aut dedere, aut judicare*),⁴¹ which also constitutes an improvement over the Tokyo Convention.⁴² In effect, the Convention grants to its Parties universal jurisdiction.⁴³

Despite its improvements over the Tokyo Convention, several limitations have been identified regarding the provisions of the Hague Convention:⁴⁴ just like the Tokyo Convention, it only applies to offences committed “in-flight” (although slightly expanded to cover the time frame between the closing of all external doors and the opening of any such door),⁴⁵ therefore it still did not cover acts of sabotage committed on the ground, nor any hijackers or accomplices thereof who do not board the aircraft. Other acts of unlawful interference with civil aviation, such as those directed against air navigation facilities, airports or radio communications were left outside the ambit of the Convention.⁴⁶ There was also no effective obligation for States to prosecute.⁴⁷

Probably the most notorious extortion hijacking took place on 24 November 1971 aboard Northwest Orient Airlines Flight 305. In that incident, a man known as “D. B. Cooper” threatened the aircraft with a bomb concealed in his suitcase, demanded \$200,000 in ransom and later parachuted mid-flight using a deployed staircase of the Boeing 727. The man has never been found or identified. In November 1972, three persons hijacked a Douglas DC-9 operating Southern Airways Flight 49. They demanded ransom of \$10 million by threatening to crash the aircraft into a nuclear reactor, after which they flew to Havana.

As a direct legal consequence of these incidents, the screening of all passengers and carry-on baggage was instituted by the FAA on 5 January 1973.⁴⁸ The Federal Aviation Administration measures were not adopted by the rest of the world too quickly, so the hijackings did not stop, as proved by the remaining years of the decade filled with various incidents.

As such, Lufthansa Flight 649 was hijacked in 1972 by PFLP members who demanded a ransom in exchange for the passengers and were later released without any charges by South Yemeni officials. The Belgian national airline Sabena was also the target of a hijacking committed by members of the Black September organisation. A rescue operation was carried out by Israeli commandos on the grounds of the Tel Aviv (then Lod) airport.

In 1976, an Airbus A300 operating Air France Flight 139 was hijacked by revolutionary fighters who diverted the flight to Entebbe, Uganda, demanding the release of imprisoned militants; the airport was stormed by Israeli commandos on 4

⁴⁰ Martin Dixon, *Textbook on International Law* (6th edn, OUP 2007) 172.

⁴¹ Crawford (n 3) 470.

⁴² Hague Convention, Article 7.

⁴³ Joyner and Friedlander (n 1) 835.

⁴⁴ Abeyratne (n 8) 236.

⁴⁵ Hague Convention, Article 3.

⁴⁶ René H Mankiewicz, ‘*The 1970 Hague Convention*’ (1971) 37(2) *Journal of Air Law and Commerce* 201, 206.

⁴⁷ Diederiks-Verschoor (n 24) 404.

⁴⁸ 49 US Code §44901 (Screening passengers and property).

July. The UN Security Council failed to adopt a Resolution on the matter of “Operation Entebbe”.

A Boeing 737 operating Lufthansa Flight 181 was hijacked in 1977 and flown to Rome, Larnaca, Bahrain, Dubai, Aden and finally Mogadishu by militants demanding the release of imprisoned Red Army Faction leaders. The incident ended with a very successful counter-terrorist operation carried out by the German GSG 9 forces.

It is interesting to note that despite the grave character of most incidents, they did not receive any direct international legal response *per se*. The only reaction to these was the Declaration on International Terrorism⁴⁹ issued by the Governments of the G7 after their 1978 summit in Bonn.

“The Bonn Declaration”, as it is known, only considers terrorism by means of aircraft hijacking and is therefore inapplicable to any other forms of terror attacks.⁵⁰ The issuing Governments expressed their concerns over these incidents and declared their intention to take measures against States refusing to comply with their international obligations in this respect (refusal to extradite or prosecute, or refusal to return the aircraft to its lawful owners, pursuant to the Tokyo and the Hague Conventions). These measures implied ceasing all flights to and from those States. Consequently, the Declaration is addressed to States and not to individuals.⁵¹

Commentators have pointed out the Bonn Declaration is a non-binding international instrument⁵² and it cannot be legally enforced. However, it represents an unequivocal statement of the international will to combat and prevent hijackings. The Bonn Declaration was called upon in 1981, in the aftermath of the hijacking of a Pakistan International Airlines Boeing 720 by Pakistani extremists. The G7 Governments condemned Afghanistan for assisting the hijackers and proposed the suspension of all flights to and from it in order to persuade the Afghan Government to comply with its obligations under the Hague Convention.⁵³

Hijacking incidents were drastically reduced during the 1990s, before culminating with the events of 9/11 – the aftermath of which also constituted the peak of safety measures and regulations,⁵⁴ such as improved passenger and luggage screening, restricted access to the flight deck and the maintenance of watch lists pursuant to Annex 17.

IV. Aircraft bombings and sabotage

At first, bombs were simply stored in passenger luggage, as no screening existed to identify the presence of explosives. Numerous incidents directly led to the improvement of security measures through the adoption of new international regulations.

On 21 February 1970, an altitude-triggered bomb went off in the cargo compartment of a Convair CV-900 operating Swissair Flight 330 to Tel Aviv, causing the aircraft to crash shortly after takeoff and killing everyone onboard. The same day, another bomb was detonated aboard a Caravelle operated by Austrian Airlines, which was able to land safely.

Aware the Hague Convention would not be applicable to other acts of sabotage and unlawful interference with civil aviation besides hijacking, the ICAO

⁴⁹ Bonn Economic Summit Conference, ‘*Joint Statement on International Terrorism*’ (17 July 1978) 17 *International Legal Materials* 1285.

⁵⁰ James T Busuttill, ‘*The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking*’ (1982) 31 *The International and Comparative Law Quarterly* 474, 476.

⁵¹ Abeyratne (n 8) 247.

⁵² Busuttill (n 50) 486.

⁵³ Montebello Economic Summit, ‘*Statement on Terrorism*’ (21 July 1981) 20 *International Legal Materials* 956.

⁵⁴ Joyner and Friedlander (n 1) 831.

Assembly adopted Resolution A18-9 in 1971,⁵⁵ calling for the adoption of a new legal instrument in response to those threats.

The 1971 Montreal Convention,⁵⁶ now with 188 States Parties,⁵⁷ was the next step taken by ICAO, criminalising other unlawful acts that had so far been left unregulated. These acts are defined in a broader manner, by using the term “aircraft in service” (defined as the period between any preflight preparations and until 24 hours after landing and including the actual flight time).⁵⁸ This covered those situations where the offender would not actually be onboard the aircraft.

The list of unlawful acts is greatly expanded, including violence against persons, destruction or damage brought to aircraft, damage directed against international air navigation facilities or the intentional communication of false information – Article 1(1).

By defining and enumerating the offences, in a way which was considered “novel” at the time,⁵⁹ the Convention also encompasses any dangerous devices or substances placed on an aircraft before the beginning its flight. All the listed acts are considered offences only if committed under the dual requirements of unlawfulness and intent and if they are “likely to endanger” the safety of the flight (Article 1).

In a similar manner to the Hague Convention, States Parties to the Montreal Convention also undertake to make the respective offences punishable under their own domestic laws and assist each other to the greatest extent (Articles 3 and 11).

In practice, the two Conventions often overlap, since hijackings are mostly done through acts of violence or even through the threat of using explosives. The Montreal Convention, by contrast to the Hague Convention, does not cover threats to carry out unlawful acts, though it does regulate attempts and complicity in Article 1(2).

The jurisdictional provisions are taken from the Hague Convention, with the addition of a new one: jurisdiction is also granted to the State on whose territory the offence was committed (Article 5). The *aut dedere, aut judicare* mechanism is the same as in the Hague Convention and there have been criticisms that since neither of the two Conventions provides for mandatory prosecution, States may decide not prosecute a suspect at all.⁶⁰

Furthermore, the wording of Article 1(1)(e) referring to the communication of false information which endangers the aircraft’s safety is somewhat deficient as false bomb alerts may be left unpunished, since they do not actually affect the safety of the flight.

The deadliest airline bombing incident to date⁶¹ remains Air India Flight 182 from Montreal to London Heathrow, on 23 June 1985. Although the piece of baggage containing the hidden bomb was loaded, the passengers never boarded the plane. The bomb exploded just as the aircraft finished its Atlantic crossing and was approaching the Irish coast.

Despite airport security being increased in response, another incident would lead to a drastic improvement in legal measures and regulations.

The detonation of Pan Am Flight 103 over Lockerbie, Scotland on 21 December 1988 was one of the most serious pre-9/11 terrorist attacks. The aircraft, a Boeing 747, had taken off from London Heathrow and was flying to New York’s JFK

⁵⁵ ICAO Assembly Resolution A18-9 (7 July 1971).

⁵⁶ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed 23 September 1971, entered into force 26 January 1973) 974 UNTS 177, ICAO Doc 8966 (Montreal Convention).

⁵⁷ ICAO List of Parties to the Montreal Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf, accessed 24 October 2015.

⁵⁸ Montreal Convention, Article 2(b).

⁵⁹ Gerald F Fitzgerald, ‘*Toward legal suppression of acts against civil aviation*’ (1971) 585 International Conciliation 42, 71.

⁶⁰ Declan Costello, ‘*International terrorism and the development of the principle Aut Dedere Aut Judicare*’ (1975) 10 Journal of International Law and Economics 483, 488.

⁶¹ Aviation Safety Database <http://aviation-safety.net/database/dblist.php?Event=SEB>, accessed 24 October 2015.

airport. All passengers and crew, as well as several inhabitants of Lockerbie, were killed. The bomb had been concealed inside a portable radio cassette player and the passenger who had checked in the baggage did not board the plane.

The American and British Governments requested Libya to hand over the Libyan citizens suspected under the provisions of the Montreal Convention. Upon meeting the refusal of the Libyan State, the Security Council itself requested the surrender of the individuals concerned⁶² and eventually imposed sanctions upon Libya.⁶³

In 1992, Libya instituted proceedings before the International Court of Justice against the US and the UK regarding the interpretation and application of the Montreal Convention. It also requested provisional measures by arguing the defendant States had breached their obligations under the Montreal Convention, which were rejected.⁶⁴

The trial of the two suspects took place in 2000 in a Scottish High Court of Justiciary sitting in Camp Zeist, The Netherlands as part of a deal with Libya. One of the two defendants, Mr Fhimah, was acquitted, while his co-defendant Mr al-Megrahi was convicted of murder.⁶⁵

The aftermath of the incident saw the prohibition of passengers and their bags from travelling separated; this also instituted a 100% screening of baggage, passengers and staff.

After the Lockerbie incident, ICAO proposed an eight-point security plan immediately meeting universal adoption, becoming the basis for all future measures in aviation safety and security. The plan included such measures as the complete screening of all passenger baggage and cargo, passenger-baggage reconciliation, restricting carry-on items, improved detection of explosives and regulating access to security-sensitive parts of airports.

The bombing of Philippine Airlines Flight 434 in 1994, which resulted in one casualty, was a “test-run” for the al-Qaeda planned *Bojinka* plot to simultaneously destroy multiple American airliners over the ocean. A nitroglycerin bomb hidden underneath one of the Boeing 747’s seats was detonated. The bomb had been assembled in the lavatory from items concealed in shoe heels, since metal detectors in existence at the time were not able to scan that low. The explosive nitroglycerin itself was disguised as contact lens fluid.

The case was brought to trial before US courts, which discussed, *inter alia*, jurisdiction over the defendant.⁶⁶ Thus, the Court of Appeals showed that even though the case did not fall under the universality principle (as had been argued by the District Court), US courts still had jurisdiction in application of the domestic provisions implementing the Montreal Convention. Furthermore, jurisdiction could also be established pursuant to the customary protective principle of international law since Yousef intended to target US-flagged airliners in the *Bojinka* operation.

In August 2006, British law enforcement agents foiled a plot reminiscent of the 1994 Philippine Airlines incident regarding the simultaneous detonation of bombs on transatlantic jets using liquid explosives concealed as carry-on items. The target flights would have departed London Heathrow for the US, which led to the temporary grounding of all flights at the airport.

Immediately following this, severe restrictions were instituted on the carrying of liquids, aerosols and gels (“LAGs”). For the first few days, no carry-on items were allowed at all. Although gradually relaxed subsequently, the restrictions in place were

⁶² UNSC Res 731 (2 January 1992) UN Doc S/RES/731(1992).

⁶³ UNSC Res 748 (31 March 1992) UN Doc S/RES/748(1992).

⁶⁴ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, p 9; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1998, p 115.

⁶⁵ *Her Majesty’s Advocate v Abdelbaset Ali Mohamed al-Megrahi and Al-Amin Khalifa Fhimah*, High Court of Justiciary at Camp Zeist, Case No 1475/99, Judgment of 31 January 2001.

⁶⁶ *United States v Yousef*, 327 F.3d 56 (2d Cir. 2003).

still stricter than before – LAGs had to be placed inside transparent plastic bags, carry-on items were to be thoroughly scanned and all passengers had to be hand searched.⁶⁷

The scope of the regulations soon grew from domestic (within the UK) to regional (throughout the EU) and eventually to international – through an ICAO State Letter from 1 December 2006 recommending the universal adoption of security restrictions on LAGs.⁶⁸

The failed bombing attempt of Northwest Airlines Flight 253 on Christmas Day 2009, an Airbus A330 flying from Amsterdam to Detroit, led to an even higher set of security measures, such as restrictions on carry-on bags and the implementation of full-body scanners.⁶⁹

V. Airport attacks

The 1970s and the 1980s saw a wave of terrorist attacks directed against airports. The 1972 Lod (Tel Aviv) Airport massacre was committed by members of the Japanese Red Army who had concealed their weapons inside violin cases.

Due to a lack of consensus regarding a proper legal response, the UN Security Council was only able to produce a statement expressing its concern over the incident, recalling its previous Resolution 286 (1970).⁷⁰

New York's LaGuardia Airport was the site of a bombing attack in 1975, with a bomb being hidden inside a locker in the terminal area. In 1982, a bomb was detonated inside the Esenboğa International Airport in Ankara, Turkey, followed by the perpetrators opening fire on the staff and passengers. A bomb also exploded in 1984 at Heathrow's Terminal 2, without killing any persons and without anyone claiming responsibility for the act.

The year 1985 was particularly notable in this sense. On 19 June, a bomb killed 3 people and injured 32 at Frankfurt Airport. On 23 June (the same day as the downing of Air India Flight 182 and allegedly as part of the same plot), a bomb exploded at Tokyo's Narita Airport. The bomb had been hidden inside a piece of luggage which was intended for an Air India flight. On 27 December, the Rome-Fiumicino and Vienna International Airports were simultaneously attacked by terrorists targeting the El Al check-in counters and passengers boarding the respective flights to Tel Aviv.

In response to these attacks, 1988 saw the conclusion of a Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.⁷¹

As its title says, the Protocol supplements the 1971 Montreal Convention by extending its scope of application over those offences directed against persons at airports and airport facilities, as well as aircraft not in service⁷². The Protocol, now with 173 States Parties,⁷³ also established the *aut dedere, aut judicare* principle.⁷⁴

VI. Aerial shootdowns

⁶⁷ United Kingdom Department for Transport, 'Transport strategy: Airline security' (2006).

⁶⁸ ICAO State Letter of 1 December 2006, ICAO Doc AS 8/11-06/100 (Confidential).

⁶⁹ US 111th Congress 2nd Session CRA10376, 'Securing Aircraft From Explosives Responsibly: Advanced Imaging Recognition Act of 2010' ("SAFER AIR Act of 2010").

⁷⁰ UNSC Dec (20 June 1972) UN Doc S/10705(1972).

⁷¹ 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 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474, ICAO Doc 9518 (Montreal Protocol 1988).

⁷² Montreal Protocol 1988, Article II.

⁷³ ICAO List of Parties to the 1988 Montreal Protocol http://www.icao.int/secretariat/legal/List%20of%20Parties/VIA_EN.pdf, accessed 24 October 2015.

⁷⁴ Montreal Protocol 1988, Article III.

The first aerial shootdown incident to provoke a strong legal response took place on 1 September 1983, when a Boeing 747 operating Korean Air Lines Flight 007 was shot down by a Soviet Sukhoi Su-15 interceptor over the Sea of Japan. All 269 persons on board were killed.

The flight had departed Anchorage, Alaska for Seoul and the flight crew mistakenly kept the aircraft on a fixed magnetic heading, not remembering (or not succeeding) to intercept the proper course. As a consequence, KAL 007 ended up more than 350 nautical miles off its course, flying over the Kamchatka Peninsula and over Sakhalin Island, which was prohibited Soviet airspace.

The USSR believed the aircraft to be on an enemy spying mission (as they considered no civilian flight would normally be in that area), decided to intercept it and eventually ordered it shot down with air-to-air missiles. The aircraft crashed into the Sea of Japan.

An emergency ICAO meeting was held, adopting a resolution calling for an international investigation into the incident. At the same time, a draft resolution condemning the shootdown and demanding an enquiry was negotiated within the Security Council,⁷⁵ but it did not pass owing to a negative veto of the Soviet Union. Thus, whilst the US strongly affirmed sovereignty “neither required nor permitted” shooting down an aircraft, the USSR contended this was included in every State’s sovereign right to protect its territory, including its airspace.⁷⁶

ICAO found the violation of the prohibited Soviet airspace had been accidental, due to a “lack of situational awareness”⁷⁷ by the flight crew.

As a direct consequence of the Korean 007 incident, ICAO Member States unanimously adopted a Protocol in 1984 amending the Chicago Convention⁷⁸ by introducing Article 3*bis*. This Article calls for States to refrain from using force against civil aircraft and from endangering the safety of the passengers and of the aircraft itself in case of interception.

Should a State have “reasonable grounds” to believe an aircraft is flying in its airspace without authorization or for unlawful purposes, that State is entitled to order the aircraft to land at a designated airport or to give it any other instructions as deemed necessary. At the same time, all civilian aircraft must comply with such orders or face penalties.⁷⁹ Article 3*bis* does not prejudice any provisions of the UN Charter, respectively the right of States to use force against a civilian aircraft in self-defence pursuant to Article 51.⁸⁰

On 3 July 1988, a civilian Airbus A300 operating Iran Air Flight 655 from Bandar Abbas to Dubai was shot down over Iranian internal and territorial waters with surface-to-air missiles by the USS *Vincennes*, a US cruiser stationed in the Persian Gulf, killing all 290 people on board.

ICAO investigated the incident and reported the aircraft had been within its usually assigned airway and within its regular schedule, information available to the *Vincennes*.⁸¹ The A300 was also transmitting a civilian identification code (“squawk”), picked up by the US cruiser, and it was climbing to its assigned cruising altitude when it was struck by the two missiles.

Iran brought the matter before ICAO, seeking the condemnation of the United States for their actions. On 17 March 1989, the ICAO Council limited itself to “deplore the tragic incident”, “express its profound sympathy and condolences” and ask for the rapid ratification of Article 3*bis* to the Chicago Convention.⁸² In response to this, Iran

⁷⁵ UNSC Official Records, 38th year, 2476th meeting (12 September 1983) UN Doc S/PV.2476.

⁷⁶ UNSC Statements (6 September 1983) 22 ILM 1121.

⁷⁷ ICAO News Release, ‘*ICAO Completes Fact-Finding Investigation*’ (16 June 1993).

⁷⁸ Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 3*bis*] (signed 10 May 1984, entered into force 1 October 1988) ICAO Doc 9436.

⁷⁹ Chicago Convention, Article 3*bis*(c).

⁸⁰ Anthony Aust, *Handbook of International Law* (2nd edn, CUP 2010) 326.

⁸¹ ICAO, Report of the ICAO Fact-Finding Investigation (November 1988), para 2.8.3.

⁸² ICAO News Release, ‘Decision Taken by ICAO Council on IR 655 Tragedy’ (17 March 1989) PIO 4/89.

instituted proceedings before the ICJ, appealing the ICAO decision.⁸³ Iran argued the US had violated the Chicago and the Montreal Conventions.

The incident was recognized as an error on behalf of the USS *Vincennes* crew, who had mistakenly thought the aircraft was an attacking Iranian F-14 Tomcat fighter. This was followed by extensive negotiations which ended with the conclusion of a Settlement Agreement. The US had to pay a settlement amount to Iran and the Court removed the case from its list.⁸⁴

In February 1996, two civilian US-registered Cessna aircraft were shot down by a MiG-29 belonging to the Cuban Air Force. The incident led the UN Security Council to adopt Resolution 1067, condemning the unlawful use of force and urging Cuba to ratify the Protocol introducing Article 3*bis*, which it regarded as codifying customary international law.⁸⁵

In November 2002, two surface-to-air missiles were fired at a Boeing 757 belonging to Arkia Israeli Airlines as it was taking off from Mombasa. Carried out by al-Qaeda sympathizers using “MANPADS” (man-portable air-defence systems), the shots missed the plane, which eventually landed safely in Tel Aviv. In response, a resolution was adopted by the UN Security Council condemning the attack⁸⁶ and reaffirming the implementation of Resolution 1373 in the context of the international fight against terrorism.⁸⁷

In September 2007, ICAO adopted Resolution A36-19 regarding the threat posed to civil aviation by MANPADS, urging States to take effective measures in order to control them and co-operate in restricting their manufacture and unauthorized usage.⁸⁸

On 17 July 2014, a Boeing 777 operating Malaysia Airlines Flight 17 (“MH17”) from Amsterdam to Kuala Lumpur crashed in the Donetsk Oblast of Eastern Ukraine, an area engulfed in civil war. The Report of the Dutch Safety Board, issued on 13 October 2015, indicated the aircraft had been shot down by a surface-to-air missile which caused an in-flight break-up of the 777. The Report also recommended urgent improvements to airspace management by all interested parties (ICAO, IATA, airlines etc.), in order for flight routes to avoid passing over conflict areas.⁸⁹

On 21 July 2014, the UN Security Council unanimously passed Resolution 2166, reaffirming the rules of international law prohibiting violence against civilian aviation, condemning the incident and urging full international co-operation in order to prevent any further such acts.⁹⁰

VII. Post-9/11 international legal framework

On 11 September 2001, al-Qaeda terrorists hijacked four civilian passenger airplanes and used them as weapons against targets situated on the ground. American Airlines Flight 11 and United Airlines Flight 175 (both Boeing 767s) were deliberately flown into the Twin Towers of the World Trade Centre in New York City; American Airlines Flight 77 (a Boeing 757) was crashed into the Pentagon building in Virginia, whilst United Airlines Flight 93 (also a 757) crashed in Pennsylvania after the passengers fought with the hijackers.

⁸³ *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)*, Application instituting proceedings, 17 May 1989.

⁸⁴ *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)*, Order of 22 February 1996, ICJ Reports 1996, p 9.

⁸⁵ UNSC Res 1067 (26 July 1996) UN Doc S/RES/1067(1996).

⁸⁶ UNSC Res 1450 (13 December 2002) UN Doc S/RES/1450(2002).

⁸⁷ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373(2001).

⁸⁸ ICAO Assembly Resolution A36-19, ‘Threat to civil aviation posed by man-portable air defence systems (MANPADS)’ (28 September 2007).

⁸⁹ Dutch Safety Board, ‘Report – Crash of Malaysia Airlines flight MH17’ (13 October 2015).

⁹⁰ UNSC Res 2166 (21 July 2014) UN Doc S/RES/2166(2014).

As an immediate and direct consequence of the attacks, ICAO called for its 33rd Session of the Assembly, which resulted in the adoption of Resolution A33-1.⁹¹ This recognized the possibility of using aircraft *not only as targets, but also as weapons*, in a manner contrary to international law in general and the Chicago Convention principles in particular. The Assembly called for all States to cooperate in implementing the existing security measures (including the SARPs) and developing new ones in order to prevent such incidents from ever happening again.

States are to cooperate in order to adopt the SARPs and allow ICAO to implement the necessary measures by means of regular and mandatory audits.⁹² These audits are meant to identify the weaknesses in each State's security framework and provide assistance to the respective Governments in improving them.⁹³

As the events of 9/11 had an unprecedented negative effect on international aviation, the cooperation of all States was deemed to be essential. The implementation of the AVSEC Plan was, consequently, a responsibility shared by all States.

The International Air Transport Association ("IATA") has also been working to improve security measures while avoiding economic disruptions. In June 2002, as a response to 9/11, IATA adopted a Security Resolution calling for the implementation of effective security programs throughout its member airlines, in order to comply with the ICAO requirements.⁹⁴

VIII. The Beijing instruments 2010 and the Montreal Protocol 2014

In 2009, ICAO considered a series of amendments to the 1971 Montreal Convention in order to better reflect and respond to the contemporary and emerging threats to aviation security.⁹⁵ States were, however, unable to reach a consensus on these amendments due to concerns of affecting their economies and it was agreed further analysis was required.⁹⁶

The following year, States negotiated and eventually adopted the Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation,⁹⁷ as well as the Beijing Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft⁹⁸ (collectively referred to herein as the "Beijing instruments"). These have the purpose of modernising the international legal framework and mechanisms of aviation security⁹⁹ in response to "the new types of threats against civil aviation".¹⁰⁰

⁹¹ ICAO Assembly Resolution A33-1, 'Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation' (5 October 2001) ICAO Doc 9790.

⁹² ICAO, High-Level Conference on Aviation Security, '*Principles Governing International Aviation Security Co-operation*' (20 July 2012) HLCAS-WP/31.

⁹³ ICAO, '*The Universal Security Audit Programme Continuous Monitoring Approach and its Objective*' <http://www.icao.int/Security/USAP/Pages/default.aspx>, accessed 19 July 2015.

⁹⁴ Joyner and Friedlander (n 1) 850.

⁹⁵ ICAO Legal Committee 34th Session, '*Draft Protocol to the Montreal Convention*' (31 July 2009) LC/34-WP/2-2.

⁹⁶ Ruwantissa Abeyratne, '*The NW 253 Flight and the Global Framework of Aviation Security*' (2010) 35(2) *Air and Space Law* 167, 170.

⁹⁷ Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (done 10 September 2010) ICAO Doc 9960 (Beijing Convention).

⁹⁸ Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (done 10 September 2010) ICAO Doc 9959 (Beijing Protocol).

⁹⁹ ICAO, Administrative Package for Ratification of or Accession to the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation http://www.icao.int/secretariat/legal/Administrative%20Packages/Beijing_Convention_EN.pdf, accessed 29 July 2015.

¹⁰⁰ Beijing Convention and Beijing Protocol, Preamble (second recital).

The Beijing Convention, not yet in force,¹⁰¹ is intended to prevail over the Montreal Convention and its 1988 Protocol, by having consolidated and revised provisions (Article 24).

In response to the 9/11 events and as a consequence of the lengthy discussions which followed, the Beijing Convention directly criminalises the act of using aircraft as weapons, as well as the illegal discharge or transport of biological, chemical and nuclear (“BCN”) weapons. Notably, the Convention is also the first international law instrument to criminalise cyber attacks on air navigation systems and facilities in Article 1(1).

The Beijing Protocol, not yet in force either,¹⁰² revises and updates the 1970 Hague Convention. Its applicability is thus expanded to multiple forms of aircraft hijacking, including hijacking through technological means (Article II).

Threats of unlawful acts directed against the safety of civil aviation are also criminalised by the two Beijing instruments, as are acts constituting assistance, agreement, contribution to or directions of such offences.¹⁰³ They also allow States to hold legal entities, not only individuals, criminally responsible.¹⁰⁴ Provisions regarding the offenders’ *mens rea* are included in both instruments: the required mental element is intent.¹⁰⁵

The Beijing instruments also provide the provisions thereof affect no other international rights, duties and responsibilities of both States and individuals (marking the current shift in international law to a more individual-focused perspective by expressly recognizing their rights and obligations), such as those under the UN Charter, the Chicago Convention and International Humanitarian Law.¹⁰⁶ Furthermore, their scope does not cover activities undertaken by armed forces during an armed conflict governed by International Humanitarian Law, nor by a State’s military forces in the lawful exercise of their official duties.

Insofar as jurisdiction is concerned, the Beijing instruments require States Parties to establish their jurisdiction on the basis of the nationality of the offender (active personality), whilst also allowing them to do so based on the victim’s nationality (passive personality).¹⁰⁷ By contrast to the provisions of the Tokyo Convention, the Beijing instruments do not allow for exceptions to extradition on the ground of the act being a political offence.¹⁰⁸

Because of an alarming growth in the numbers of unruly passengers aboard aircraft between 2007 and 2013,¹⁰⁹ a Diplomatic Conference was held in 2014 at the request of IATA to discuss updating the Tokyo Convention. The topic of unruly passengers had been on ICAO’s active list of research since 2010.¹¹⁰ The main causes for violent behaviour are abuse of drugs or alcohol, the feeling of being in a confined space for a prolonged period of time, as well as the prohibition of smoking aboard commercial flights.¹¹¹

¹⁰¹ ICAO List of Parties to the Beijing Convention http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Conv_EN.pdf, accessed 24 October 2015.

¹⁰² ICAO List of Parties to the Beijing Protocol http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Prot_EN.pdf, accessed 24 October 2015.

¹⁰³ Beijing Convention, Article 1(2)-(5); Beijing Protocol, Article II.

¹⁰⁴ Beijing Convention, Article 4; Beijing Protocol, Article IV.

¹⁰⁵ Beijing Convention, Article 1(1); Beijing Protocol, Article II.

¹⁰⁶ Beijing Convention, Article 6; Beijing Protocol, Article VI.

¹⁰⁷ Beijing Convention, Article 8; Beijing Protocol, Article VII.

¹⁰⁸ Beijing Convention, Article 13; Beijing Protocol, Article XII.

¹⁰⁹ IATA, ‘Policy – Unruly Passengers’ <https://www.iata.org/policy/pages/tokyo-convention.aspx>, accessed 21 July 2015.

¹¹⁰ ICAO Assembly, 37th Session, ‘Supplementary Report on Activities of the Organization in the First Half of 2010’ (August 2010) Doc 9921 Supplement.

¹¹¹ Diederiks-Verschoor (n 24) 413.

In legal response to this, the Conference adopted the Montreal Protocol 2014,¹¹² which closes some of the legal loopholes identified in the Tokyo Convention over the past decades causing most offenders to escape prosecution or sanctioning.

The legal loopholes are determined mostly by lack of jurisdiction or lack of relevant provisions in domestic criminal law systems. The usual practice is for the flight crew to hand over the unruly passenger to the State of landing authorities, who may find themselves without jurisdiction. At the same time, the authorities of the State of registration (deemed to have jurisdiction under the Tokyo system) might fail to adopt appropriate measures due to a lack of proper connection to the incident in question.

One of the early cases which discussed the mentioned lack of jurisdiction over unruly passengers was *Cordova and Santano*, where two passengers got into a fight onboard a flight from Puerto Rico to New York, even attacking members of the flight crew. The Court found Mr Cordova guilty, but he was released from custody and left unpunished due to the lack of a proper Federal jurisdiction.¹¹³

Through the provisions of the Montreal Protocol, if an offence is committed onboard an aircraft, mandatory jurisdiction is additionally granted to the intended State of destination, taking into consideration proportionality (endangering the safety of the aircraft or the good order therein) and legal certainty (the offence should be regarded as such in the respective State).¹¹⁴ The State of the operator (most relevant today in the large context of aircraft leasing operations) also has mandatory jurisdiction. Third States (where an aircraft lands in case of diversion) have discretionary, not mandatory, jurisdiction (Article IV).

The Protocol also amends the general definition of “in-flight” offered by the Tokyo Convention, replacing it with the improved one provided by the Hague, Montreal and Beijing Conventions (between the closing of all external doors and the opening of any such door).¹¹⁵

Furthermore, the notion of “unruly” behaviour is formally recognised and expanded to include physical assaults against members of the flight crew and refusal to follow safety instructions given by them (Article X). Legal recognition is also granted to “in-flight security officers” (sky/air marshals), who may be authorised by commanders to take necessary measures to protect the safety of the flight and they also may take preventive measures if deployed according to an international agreement (Article VII).

The Protocol also introduces a right of recourse, previously unavailable under the Tokyo Convention, to recover any damages caused by unruly passengers (Article XIII). This was introduced as a direct response to the concerns expressed by airlines over the difficulties of obtaining reparation in those situations.¹¹⁶

As of October 2015, the Montreal Protocol is not in force, having been ratified by only one State (Congo).¹¹⁷

IX. Conclusions

This paper has set the argument that the rules of International Law are particularly dynamic and responsive when it comes to AVSEC regulatory measures. The main international legal mechanisms, the AVSEC Conventions concluded under

¹¹² Protocol to Amend the Convention on Offences and Certain other Acts committed on board Aircraft (done 4 April 2014) ICAO Doc 10034 (Montreal Protocol 2014).

¹¹³ *United States v Cordova (and Santano)*, US District Court, Eastern District of New York, 17 March 1950, 89 F. Supp. 298.

¹¹⁴ Montreal Protocol 2014, Article VII.

¹¹⁵ Ibid, Article II.

¹¹⁶ ICAO International Conference on Air Law, ‘Comments on the Right to Recourse presented by IATA’ (13 March 2014) DCTC Doc No 22, para 2.2.

¹¹⁷ ICAO List of Parties to the 2014 Montreal Protocol http://www.icao.int/secretariat/legal/List%20of%20Parties/Montreal_Prot_2014_EN.pdf, accessed 24 October 2015.

the auspices of ICAO, were all created in direct response to certain incidents in attempts to close the existing loopholes.

One of the most notable security issues facing civil aviation is the perceived lack of any effective international enforcement mechanism, since it ultimately falls down on each individual State to take the appropriate measures.

The recent updates brought to the Conventions still have to be ratified by States in order to take effect. An uneven process of ratification or accession might lead to an uneven application of these legal instruments, particularly in an age where air travel is more widespread than ever.

The ICAO SARPs, though usually followed and complied with by most States, remain in essence what their name suggests – recommendations. ICAO can continue appealing to States to assist each other and accede to the Conventions, but it has no enforcing actions at its disposal.

All in all, the effectiveness of international law in combating and preventing crimes against aviation security depends on the political actions of States to implement and enforce the existing instruments, cooperate in the prosecution or extradition of perpetrators, implement new security standards and actively engage in discussions for their permanent improvement without waiting for new accidents to occur and thus preventing thousands of deaths in tragedies which have been, and still are, writing the rules of international aviation security.

Bibliography

Doctrine

- R. Abeyratne, *Aviation Security Law* (Springer 2010)
- A. Aust, *Handbook of International Law* (2nd edn, CUP 2010)
- J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012)
- I. H. Ph. Diederiks-Verschoor, *Introduction to Air Law* (9th edn, Wolters Kluwer 2012)
- M. Dixon, *Textbook on International Law* (6th edn, OUP 2007)
- C. C. Joyner and R. A. Friedlander, 'International Civil Aviation' in M. C. Bassiouni (ed), *International Criminal Law* (Vol I, 3rd edn, Martinus Nijhoff 2008)
- H. Reiff, *The United States and the Treaty Law of the Sea* (University of Minnesota Press 1959)

Articles

- R. Abeyratne, 'The NW 253 Flight and the Global Framework of Aviation Security' (2010) 35(2) *Air and Space Law* 167
- R. P. Boyle, 'The Tokyo Convention on offences and certain other acts committed on board aircraft' (1964) 30 *Journal of Air Law and Commerce* 305
- J. T. Busuttil, 'The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking' (1982) 31 *The International and Comparative Law Quarterly* 474
- D. Costello, 'International terrorism and the development of the principle *Aut Dedere Aut Judicare*' (1975) 10 *Journal of International Law and Economics* 483
- G. F. Fitzgerald, 'Toward legal suppression of acts against civil aviation' (1971) 585 *International Conciliation* 42
- R. T. Holden, 'The Contagiousness of Aircraft Hijacking' (1986) 91-4 *American Journal of Sociology* 874

- R. H. Mankiewicz, '*The 1970 Hague Convention*' (1971) 37(2) *Journal of Air Law and Commerce* 201
- A. I. Mendelsohn, '*In-flight crime: The international and domestic picture under the Tokyo Convention*' (1967) 53 *Virginia Law Review* 509

International and regional instruments

- Convention relating to the Regulation of Aerial Navigation (signed 13 October 1919, entered into force 11 July 1922) 11 LNTS 173
- Convention on International Civil Aviation (done 7 December 1944, entered into force 4 April 1947) 15 UNTS 295, ICAO Doc 7300/9
- Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962), 450 UNTS 11
- Convention on Offences and Certain Other Acts Committed on Board Aircraft (signed 14 September 1963, entered into force 4 December 1969) 704 UNTS 219, ICAO Doc 8364
- Convention for the Suppression of Unlawful Seizure of Aircraft (signed 16 December 1970, entered into force 14 October 1971) 860 UNTS 105, ICAO Doc 8920
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (signed 23 September 1971, entered into force 26 January 1973) 974 UNTS 177, ICAO Doc 8966
- Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 3bis] (signed 10 May 1984, entered into force 1 October 1988) ICAO Doc 9436
- 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 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474, ICAO Doc 9518
- Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (done 10 September 2010) ICAO Doc 9959
- Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (done 10 September 2010) ICAO Doc 9960
- Protocol to Amend the Convention on Offences and Certain other Acts committed on board Aircraft (done 4 April 2014) ICAO Doc 10034

Case Law

- The Case of the S.S. "Lotus" (France v Turkey)* PCIJ Rep Series A No 10 [1927]
- Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)*, Application instituting proceedings, 17 May 1989
- Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)*, Order of 22 February 1996, ICJ Reports 1996, p 9
- Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, p 9
- Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1998, p 115

Domestic cases and decisions

Re Piracy Jure Gentium [1934] AC 586

United States v Cordova (and Santano), US District Court, Eastern District of New York, 17 March 1950, 89 F. Supp. 298

Her Majesty's Advocate v Abdelbaset Ali Mohmed al-Megrahi and Al-Amin Khalifa Fhimah, High Court of Justiciary at Camp Zeist, Case No 1475/99, Judgment of 31 January 2001

United States v Yousef, 327 F.3d 56 (2d Cir. 2003)

Zikry v Air Canada, Civil File 1716/05 A, Magistrates Court of Haifa (2006)

United Nations documents

UN Doc A/7656 (1969)

UNGA Res 2551 (12 December 1969) UN Doc A/RES/2551(XXIV)

UNSC Res 286 (9 September 1970) UN Doc S/RES/286(1970) adopted without vote

UNGA Res 2656 (25 November 1970) UN Doc A/RES/2656(XXV)

UNSC Dec (20 June 1972) UN Doc S/10705(1972)

UNSC Statements (6 September 1983) 22 ILM 1121

UNSC Official Records, 38th year, 2476th meeting (12 September 1983) UN Doc S/PV.2476

UNSC Res 731 (2 January 1992) UN Doc S/RES/731(1992)

UNSC Res 748 (31 March 1992) UN Doc S/RES/748(1992)

UNSC Res 1067 (26 July 1996) UN Doc S/RES/1067(1996)

UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373(2001)

UNSC Res 1450 (13 December 2002) UN Doc S/RES/1450(2002)

UNSC Res 2166 (21 July 2014) UN Doc S/RES/2166(2014)

ICAO documents

ICAO Legal Committee 'Annual Report of the Council to the Assembly for 1963' (April 1964), ICAO Doc 8402, A15-p/2

ICAO Assembly Resolution A16-37 on Unlawful Seizure of Civil Aircraft (19 September 1968)

ICAO Assembly Resolution A18-9 (7 July 1971)

ICAO, Report of the ICAO Fact-Finding Investigation (November 1988)

ICAO News Release, 'Decision Taken by ICAO Council on IR 655 Tragedy' (17 March 1989) PIO 4/89

ICAO News Release, 'ICAO Completes Fact-Finding Investigation' (16 June 1993)

ICAO Assembly Resolution A33-1, 'Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation' (5 October 2001) ICAO Doc 9790

ICAO State Letter of 1 December 2006, ICAO Doc AS 8/11-06/100 (Confidential)

ICAO Assembly Resolution A36-19, 'Threat to civil aviation posed by man-portable air defence systems (MANPADS)' (28 September 2007)

ICAO Legal Committee 34th Session, 'Draft Protocol to the Montreal Convention' (31 July 2009) LC/34-WP/2-2

ICAO Assembly, 37th Session, 'Supplementary Report on Activities of the Organization in the First Half of 2010' (August 2010) Doc 9921 Supplement

ICAO, High-Level Conference on Aviation Security, 'Principles Governing International Aviation Security Co-operation' (20 July 2012) HLCAS-WP/31

ICAO International Conference on Air Law, 'Comments on the Right to Recourse presented by IATA' (13 March 2014) DCTC Doc No 22

Online resources

ICAO List of Parties to the Chicago Convention
<http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf>

ICAO List of Parties to the Tokyo Convention
<http://www.icao.int/secretariat/legal/List%20of%20Parties/Tokyo_EN.pdf>

ICAO List of Parties to the Hague Convention
<http://www.icao.int/secretariat/legal/List%20of%20Parties/Hague_EN.pdf>

ICAO List of Parties to the Montreal Convention
<http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf>

ICAO List of Parties to the 1988 Montreal Protocol
<http://www.icao.int/secretariat/legal/List%20of%20Parties/VIA_EN.pdf>

ICAO List of Parties to the Beijing Convention
<http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Conv_EN.pdf>

ICAO List of Parties to the Beijing Protocol
<http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Prot_EN.pdf>

ICAO List of Parties to the 2014 Montreal Protocol
<http://www.icao.int/secretariat/legal/List%20of%20Parties/Montreal_Prot_2014_EN.pdf>

ICAO, 'Annex 17' <<http://www.icao.int/Security/SFP/Pages/Annex17.aspx>>

ICAO, 'The Universal Security Audit Programme Continuous Monitoring Approach and its Objective' <<http://www.icao.int/Security/USAP/Pages/default.aspx>>

ICAO, Administrative Package for Ratification of or Accession to the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation
<http://www.icao.int/secretariat/legal/Administrative%20Packages/Beijing_Convention_EN.pdf>

IATA, 'Policy – Unruly Passengers' <<https://www.iata.org/policy/pages/tokyo-convention.aspx>>

Aviation Safety Database <<http://aviation-safety.net/database/dblist.php?Event=SEB>>

Other sources

49 US Code §44901 (Screening passengers and property)

Bonn Economic Summit Conference, '*Joint Statement on International Terrorism*' (17 July 1978) 17 International Legal Materials 1285

- Montebello Economic Summit, '*Statement on Terrorism*' (21 July 1981) 20
International Legal Materials 956
- US 111th Congress 2nd Session CRA10376, '*Securing Aircraft From Explosives
Responsibly: Advanced Imaging Recognition Act of 2010*' ("SAFER AIR Act of
2010")
- United Kingdom Department for Transport, '*Transport strategy: Airline security*'
(2006)
- Dutch Safety Board, '*Report – Crash of Malaysia Airlines flight MH17*' (13 October
2015)