

Evolving threat to civil aviation is countered by legal instruments as well as new technology

Beginning with the signing of the Tokyo Convention in 1963, the world's aviation community has adopted, under ICAO auspices, five legal instruments which are designed to bolster aviation security.

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SAFEGUARDING international civil aviation against unlawful interference is a matter of grave concern to governments, the United Nations and ICAO. ICAO's first response to acts of unlawful interference with civil aviation was to establish legal procedures by taking part in the development of five legal instruments. These instruments deal with the unlawful seizure of aircraft as well as other civil aviation security matters, and have become the basis for international law. The fact that the four aviation security-related instruments currently in force continue to rank among the most widely accepted international conventions demonstrates the importance that is attached to aviation security.

The problems of crime aboard aircraft in the late 1950s and early 1960s called for an international solution, as the complications associated with such acts ranged from political issues, such as extradition and the right of asylum, to the practical problem of keeping unruly persons in custody aboard aircraft or at airports. With these particular issues in mind, the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* was signed at Tokyo on 14 September 1963. The Convention is concerned not only with crimes but also all "acts which, whether or not they are offences, may or do jeopardize the safety of aircraft or of persons or property therein, or which jeopardize good order and discipline on board."

As for unlawful seizure of aircraft or interference with aircraft, the Tokyo Convention attempted for the first time to address this issue. In fact, however, it deals only with the duties of States to restore control of the aircraft to its lawful commander and to take into custody the alleged

offender, as well as the requirement to permit passengers and crew to continue their journey as soon as practicable.

The Tokyo Convention has a number of limitations. It does not define unlawful seizure of aircraft as an international offence, does not make unlawful seizure a crime under principles of international law, and does not oblige States to make unlawful seizure a crime under their domestic law. Moreover, it excludes unlawful seizure of a political or religious nature unless the safety of the aircraft is affected, and does not create an obligation to submit alleged offenders to the competent authorities for prosecution unless their extradition is requested. Nevertheless, the Convention's contribution to the development of the principles of public international air law, particularly with respect to the establishment of criminal jurisdiction and the powers of the aircraft commander, should not be overlooked.

As a result of a dramatic increase in aircraft hijackings in the late 1960s, a second legal instrument was adopted under the auspices of ICAO: the *Convention for the Suppression of Unlawful Seizure of Aircraft*. Signed at The Hague on 16 December 1970, it defined for the first time the act of unlawful seizure of aircraft as an offence. Essentially, there must be use or attempted use of force, the aircraft must be in flight and the offence must be aboard the aircraft.

Some Contracting States are obliged to establish their jurisdiction: this can be the State of aircraft registration, the State in which the aircraft lands when the offender is on board or, when leased aircraft are involved, the State of the principal place of business. The State where an offender is found must establish its jurisdiction if there is no extradition treaty with any of the States identified above. The case must be submitted to the respective State's authorities for prosecution.

The key element of The Hague Conven-

tion that constituted a significant improvement over previous international law is that it established universal jurisdiction among Contracting States and required them to make unlawful seizure of aircraft a serious offence under their domestic law. It provides no exceptions for political offences and introduces the principle of "extradite or prosecute." The Convention made unlawful seizure an international offence and created a legal situation under which the offender cannot find a safe haven anywhere and cannot go unpunished. While the Convention is a useful tool for combating acts of unlawful seizure, its degree of success depends upon a resolve to prevent any State from providing a safe point of landing and asylum for offenders.

With the emergence of a new type of danger to civil aviation in the form of acts of sabotage, the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* was signed at Montreal on 23 September 1971. Its aim is to prevent and discourage acts of sabotage and acts of violence directed at aircraft in particular and at civil aviation in general. This Convention defines acts of unlawful interference with civil aviation, particularly sabotage. It states that any person commits an offence if he or she unlawfully and intentionally:

- performs an act of violence against a person aboard an aircraft in flight if that act is likely to endanger the safety of the aircraft;
- destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or is likely to endanger its safety in flight;
- places or causes to be placed on an aircraft in service a device or substance which is likely to destroy the aircraft or cause damage which renders it incapable of flight or is likely to endanger its safety in flight;
- destroys or damages air navigation facilities or interferes with their operation, if

any such act is likely to endanger the safety of aircraft in flight; or

- communicates false information knowingly, thereby endangering the safety of an aircraft in flight.

The Convention attempted to resolve the problem of unlawful interference with aircraft by carefully defining the offence, by extending the authority of States under international law to exercise jurisdiction over offenders, and by providing for prompt prosecution, extradition and punishment. Like The Hague Convention, the Montreal Convention does not provide a system of priority in exercising jurisdiction. However, the State of landing, if the offender is still aboard the aircraft, may exercise its jurisdiction. The Contracting State in which the perpetrator is found, if it does not extradite, is obliged to submit the case to its authorities for prosecution.

The endeavour to take all practicable measures for the purpose of preventing the offences as defined by the Convention could serve as a basis for requiring Contracting States to implement physical security measures at airports and aboard aircraft. Attacks at Tokyo Narita, Rome and Vienna airports in December 1985 led to the adoption of the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*. The Protocol, signed at Montreal on 24 February 1988, supplements the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* by adding the following acts to its definition of the offence: an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; destruction or serious damage to the facilities of an airport serving international civil aviation or aircraft not in service; or the disruption of airport services, if such an act endangers or is likely to endanger safety.

The States which are party to the Protocol are obliged to establish jurisdiction over such offences when the offender is present in their territory and they cannot extradite to the State where the offence was committed. This instrument complements the legal framework for the prevention and suppression of unlawful acts against civil aviation and documents the political will of States to take all necessary measures to protect international air transport.

The tragedy of Pan Am Flight 103 over Lockerbie, Scotland in December 1988, and the explosion aboard a UTA aircraft over Niger in September 1989, prompted preparation of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, which was adopted unanimously at the International Conference on Air Law, held in Montreal in early 1991. The Convention requires signatories to prohibit and prevent the unauthorized manufacture, export or import of unmarked plastic explosives and, where stocks of unmarked explosives are held, to destroy or render them permanently ineffective within a specified period.

In recognition of the rapidly changing

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technologies for detecting explosives, the Convention is accompanied by a technical annex. This describes explosives to which the Convention applies and lists agents that may be used to "mark" the explosives. The annex has a different amendment procedure than the Convention. The procedure will essentially involve the International Explosives Technical Commission (IETC), a body which will be formed upon entry into force of the Convention. The IETC will evaluate technical developments relating to the manufacture, marking and detection of explosives and subsequently will recommend annex amendments to the ICAO Council.

The Montreal Conference of 1991 adopted a resolution which invited the ICAO Council to assume the functions assigned to it in the Convention as well as to maintain, pending the entry into force of the Convention, the Ad Hoc Group of Specialists on the Detection of Explosives in order to keep the technical annex to the Convention up to date. The group's mandate was expanded to include further studies on methods to detect non-plastic explosives

which are not readily detectable and which may be used in acts of sabotage.

The resolution urges States to take prompt action to become party to the Convention and to implement the marking of plastic explosives manufactured in their jurisdiction. It also urges the international community to consider increasing technical, financial and material assistance to those States that require such assistance in achieving the objectives of the Convention. The Convention requires States depositing instruments of ratification, acceptance, approval or accession with ICAO to declare whether they are producer States. This is of the utmost importance because the entry into force of the Convention is contingent upon ratification by 35 States, no fewer than five of which shall have identified themselves as producer States.

The Convention is open for signature at ICAO Headquarters until its entry into force. Any State which does not sign the Convention may accede to it at any time. To date, the Convention has been signed by 50 States and ratified by 34, 11 of which have declared themselves to be producer States.

These five aviation security-related legal instruments adopted under the auspices of ICAO, of which four have entered into force, are a substantial contribution to the development of new principles of international law responding to the challenges of today.

A resolution adopted in 1995 at the ICAO 31st Assembly — a consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference — called upon 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."

This resolution reaffirmed previous declarations that aviation security must be treated as a matter of the highest priority, and called on States which have not yet done so to become parties to the international legal instruments for the suppression of such acts — in particular the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*. □

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