

Preliminary Report of the Rapporteur of the Legal Committee on the Examination of the Role of the International Explosives Technical Commission under the Convention on the Marking of Plastic Explosives for the Purpose of Detection

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Introduction

In 2020, during the Council's deliberations on the appointment of members to the International Explosives Technical Commission ("IETC" or the "Commission") established under the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, done at Montreal on 1 March 1991 (the "Convention" or "MEX"),¹ several States raised concerns regarding the continuing relevance of the Commission's mandate and the relative priority of its work moving forward.²

Later in 2022, the Council "requested that the Secretariat explore possible legal options for amending the role, functions, and working methods of the IETC and launch a study by a third-party entity to assess the role and relevance of the IETC in connection with the practical and operational activities of detection agents in aviation security."³

Although the Council has recognized the continuing value and significance of the Convention, it has also noted that the objectives of the IETC, as articulated in the existing text of the Convention, have already been achieved. Consequently, on 11 March 2024, the Council invited the Legal Committee ("LC") of the International Civil Aviation Organization ("ICAO") to consider the inclusion of an additional agenda item in its work programme to examine this matter. In doing so, the Council further recommended that the LC consider both the resource implications and the temporal dimensions associated with any proposed course of action.⁴

On 28 June 2024, the 39th Session of the LC decided to include on its work programme an item "Review of the Role of the International Explosives Technical Commission under the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*. The Council later confirmed such decision.

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¹ See *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, done at Montreal on 1 March 1991 (ICAO Doc 9571) [*Convention*], [*MEX*] or [*MEX Convention*].

² See ICAO Letter LE 3/36.1, Terms of Reference for the Rapporteur (on file with the author).

³ See ICAO, C-WP/15558 at 2.

⁴ See ICAO, C-DEC/231/2.

By letter dated 7 May 2025, and pursuant to Article 17 of the *Rules of Procedure for the Legal Committee* (DOC 7669-LC/139/7), Dr. Alice Serpa Braga Della Nina, LC's Chairperson, appointed the author of this Report as Rapporteur until the committee's next session.⁵ The mandate is to review the role of the IETC, as established under the Convention, with particular focus on assessing the IETC's ongoing relevance and determining whether the Convention necessitates an amendment.

This preliminary report, which has been prepared by the rapporteur as a comprehensive background document, is structured into eight sections. Section 1 dissects the Convention, with particular attention to the events preceding its adoption, the preparatory work involved, its objectives, and the principal obligations it imposes on both States Parties and the Council. It also addresses the functions and tasks assigned to the IETC, its role, its procedural rules, and its relationship with the Council. In addition, the section examines the process for introducing amendments to the Convention's Technical Annex—an area in which the IETC plays an active role. Notably, although the Convention lacks a built-in mechanism for introducing amendments, this section details the discussions at the 1991 Diplomatic Conference regarding the incorporation of such clause, a topic that remains highly relevant to this report, particularly given that one proposed course of action involves amending the Convention to redefine the IETC's role or broaden the scope of the Convention.

Section 2 provides a critical evaluation of the Convention, assessing the IETC's ongoing relevance, the Convention's positive contributions, its level of implementation, and its principal shortcomings. Considering the potential need for legal reform, Section 3 comprehensively analyses the international legal framework for amending treaties, ICAO's established practices, and the treaty-making mechanisms employed outside ICAO. This section underscores that, in contrast to newly adopted instruments under other United Nations ("UN") specialized agencies, the Convention lacks a built-in amendment mechanism. As a result, any attempt to amend its provisions is not only more complex and time-consuming but also more costly. Drawing on comparative analyses of other treaties, this section makes recommendations on the types of issues that should be addressed by such amendment clauses.

Section 4 examines a recent report by the UN Secretary-General on the role of technology in shaping modern treaty-making practices. This is highly relevant to the present study, as it underscores recent trends adopted by States and international organizations that leverage technological tools to expedite treaty adoption and related formalities. The report identifies a critical issue within ICAO: the treaty-making process, as it stands, is exceedingly slow, prompting States, industry stakeholders, and the Secretariat to seek alternative mechanisms.

Sections 5 and 6 present proposals for the Council and/or the Organization to consider in deciding whether to terminate the IETC's role, redefine its responsibilities, or amend the Convention's scope. Three options are explored: (i) a Council Decision; (ii) convening a Conference of all States Parties; and (iii) resorting to ICAO's traditional treaty-based amendment procedure. Each option is examined in detail, with its respective pros and cons clearly articulated throughout the report. Section 7 presents additional recommendations for modernizing and accelerating ICAO's treaty formation process, while Section 8 offers preliminary conclusions.

⁵ See ICAO Letter LE 3/36.1 (on file with the author).

This report aims to provide initial observations. It does not seek to draw final conclusions on whether the IETC should be terminated, its role redefined, or the Convention's scope expanded through an amendment. While legal considerations are certainly paramount, technical expertise and careful analysis are equally essential. The Rapporteur, however, does not claim to be a technical expert on explosives, nor does he have an aviation security background.

1. The Convention on the Marking of Plastic Explosives for the Purpose of Detection

1.1. Background

On 21 December 1988, Pan Am Flight 103 disintegrated over the town of Lockerbie, Scotland, resulting in the deaths of all 259 persons on board and 11 individuals on the ground.⁶ The subsequent accident investigation, conducted by the British authorities, concluded that the disaster had been caused by the detonation of plastic explosives concealed within a portable radio cassette player.⁷ Forensic analysis later confirmed that the substance employed was Semtex, a commercially manufactured explosive produced in Semtín, in the district of Pardubice, Czechoslovakia.⁸

The magnitude of the Lockerbie bombing was further underscored by other discoveries. On the very day of Pan Am bombing, British police recovered approximately 48 kilograms of Semtex during a search of a flat in Battersea, London. A portion of this material had already been divided into individual charges and wrapped in adhesive tape, suggesting its preparation for imminent operational use. The seizure also yielded timing devices and power units, indicating that the explosive was intended for assembly into functional bombs.⁹

⁶ See Roderick D. van Dam, "A New Convention on the Marking of Plastic Explosives for the Purpose of Detection" (1991) *Air & Space Law*, Vol 16, Issue 4/5 at 168 [Roderick D. van Dam].

⁷ See J. V. Augustin, "The Convention on the Marking of Plastic Explosives for the Purpose of Detection" 17 *Annals Air & Space L.* 33 (1992) at 33 [Augustin]; K. P. R. Smart, "The Lockerbie Investigation: Understanding of the Effects of the Detonation of Improvised Explosive Devices on Aircraft Pressure Cabins" *Trans Chem E*, Vol 75, Part B, August 1997; Michael Milde, "Draft Convention of the Marking of Explosives" *Annals of Air & Space Law* Vol XV (1990) at 158 [Michael Milde, *Draft Convention*]; Lutando Simphiwe Tswana, "Analysis of the Convention on the Marking of Plastic Explosives for the Purpose of Detection, (1991) Master Thesis, Institute of Air & Space Law, McGill University at 57 [Tswana].

⁸ The earliest documented instance of Semtex being employed in the United Kingdom occurred in March 1972, when an explosive device was placed at the residence of the Jordanian Ambassador in Kensington, London. Semtex was notable for its distinctive properties. Although comparatively lightweight, it possessed a remarkably high explosive yield. Moreover, as a plastic explosive with minimal odor, it was extremely difficult to detect using the technologies available at the time. Semtín Glassworks in Pardubice, Czechoslovakia initially manufactured the explosive. Such enterprise was subsequently renamed the Eastern Bohemian Chemical Works and, later, Synthesia. In the same period, Semtex was also employed in letter bombs sent to the United Kingdom by airmail from various foreign locations, underscoring both its accessibility and its appeal to those engaged in clandestine operations. See A. W. Feraday, "The Semtex-H Story" in Jehuda Yinon (ed.), *Advances in Analysis and Detection of Explosives: Proceedings of the 4th International Symposium on Analysis and Detection of Explosives, September 7-10, 1992, Jerusalem, Israel* (Kluwer Academic Publishers: Dordrecht, 1992) at 67.

⁹ See A. W. Feraday, "The Semtex-H Story" in Jehuda Yinon (ed.), *Advances in Analysis and Detection of Explosives: Proceedings of the 4th International Symposium on Analysis and Detection of Explosives, September 7-10, 1992, Jerusalem, Israel* (Kluwer Academic Publishers: Dordrecht, 1992) at 70.

Pan Am Flight 103 was not the only instance in which plastic explosives were employed with devastating effect against civil aviation.¹⁰ Less than a year later, UTA Flight 772 was destroyed over the Sahara Desert by a device containing similar plastic explosives, again concealed within checked luggage. Both incidents demonstrated the capacity of such materials, when diverted to illicit purposes.¹¹

The destruction of Pan Am Flight 103 and UTA Flight 772 thus represented stark examples of the death and devastation that could result from the unlawful use of unmarked plastic explosives. Together, they highlighted the urgent need for a comprehensive international legal framework to regulate the manufacture, transfer, and detection of such substances to protect the safety and security of international civil aviation and the international community.¹²

Plastic explosives constitute a legitimate and well-established category of materials, with extensive applications in both military operations and civilian industries, including mining, landscaping, and construction. Yet, when diverted for terrorist purposes, these materials assume an acutely hazardous character. Their threat arises not merely from their immense destructive potential, but also from the substantial difficulties that their effective detection continues to present to security authorities.¹³

At the time, there was widespread concern regarding the potential use of plastic explosives by terrorists. Contemporary assessments underscored what was described as “an alarming increase in acts aimed at the total destruction of aircraft in flight resulting in the deaths of all persons on board.” Within the spectrum of threats facing the international aviation sector, the in-flight detonation of such explosives was regarded as the most acute danger, owing to both its catastrophic human consequences and its destabilizing implications for international air transport security. This concern was far from hypothetical. Plastic explosives—most notably SEMTEX—had been employed in terrorist attacks against civil aviation and other high-value targets, thereby demonstrating the practical reality of the threat. These incidents highlighted the vulnerabilities inherent in civil aviation infrastructure and operations, particularly in relation to detection technologies and preventive regulatory measures. They also served to galvanize international attention on the urgent need for a coordinated legal and institutional framework to address the risks associated with the diversion and misuse of plastic explosives.¹⁴

As Milde observes, plastic explosives possess a few distinctive physical and chemical characteristics that make them particularly attractive for both legitimate and illicit uses. They are stable under varying temperatures, waterproof, flexible, and can be hand-moulded into diverse shapes, allowing concealment in seemingly innocuous objects such as letters, books,

¹⁰ For an interesting analysis of various liability issues surrounding the bombing of Pan American Flight 103 see Laurie M. McQuade, “Tragedy as a Catalyst for Reform: The American Way?” (1996) 11:2 Conn J. Int’l L. 325; John P. Grant, “Beyond the Montreal Convention” (2004) 36: Issues 2 & 3 Case W. Res. J. Int’l L. 453.

¹¹ See Marian Nash (Leich) “Contemporary Practice of the United States relating to International Law” 88 Am. J. Int’l L. 89 (1994).

¹² See comments by the United States at the closing of the Diplomatic Conference. See ICAO Doc 9801-DC/4, International Conference on Air Law (Convention on the Marking of Plastic Explosives for the Purpose of Detection), Montreal, 12 February – 1 March 1991, Volume 1 Minutes at 163 [*Montreal Convention Proceedings Volume I*].

¹³ See Michael Milde, *International Air Law & ICAO*, (Netherlands: Eleven International Publishing 2012) at 253 [*Michael Milde, International Air Law*].

¹⁴ See Michael Milde, “Aviation Safety and Security – Legal Management” (2004) 29 Annals of Air & Space Law 1 at 12 [*Michael Milde, Aviation Safety*].

toys, or small household appliances.¹⁵ Moreover, they are generally inert to shock and flame, safe to handle under ordinary conditions, and require a detonator to initiate an explosion. These features, while beneficial in authorized military and industrial applications, simultaneously render plastic explosives highly susceptible to diversion for unlawful purposes.¹⁶

Against this backdrop, the international community came to view existing international security conventions as insufficient to confront the specific dangers posed by plastic explosives. With respect to detection, it was broadly recognized that supplementary and more specialized measures were necessary. This sense of urgency was reinforced by the prevailing perception at the time that significant quantities of unmarked plastic explosives were already in circulation, thereby heightening the potential for their misuse in acts of terrorism, including those targeting civil aviation.¹⁷

1.2.Preparatory work

On 9 January 1989, a few weeks after the Pan Am Flight 103 bombing, ICAO's Committee on Unlawful Interference (UIC) convened to exchange information and to propose the establishment of a group of specialists. On 31 January 1989, the Council adopted a resolution urging States "to expedite research and development on detection of explosives on a security equipment, to continue to exchange such information and to consider how to achieve an international regime for the marking of explosives for the purpose of detection."¹⁸ The Council also created the Ad Hoc Group of Specialists on the Detection of Explosives ("AH-DE"), which held its first meeting from 6 to 10 March 1989.¹⁹ One of AH-DE's main conclusions was that "it was technically possible to mark the plastic explosives by a specific additive that would make them detectable."²⁰

Meanwhile, at the international level, the United Nations Security Council ("UNSC") had adopted Resolution 635 on 14 June 1989, urging ICAO "to intensify its work aimed at preventing all acts of terrorism against international civil aviation, and in particular its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection."²¹

Later that month, on 29 June 1989, the Council approved the AH-DE's recommendation to include the item "Preparation of a new legal instrument regarding the marking of explosives of detectability", as the highest, overriding priority in the LC's Work Programme.

Following this decision, at the 27th Session of the ICAO Assembly held in September–October 1989, the United Kingdom and Czechoslovakia submitted a joint proposal calling for the drafting of an international treaty to address the problem of unmarked plastic explosives.²² In line with this proposal, the Assembly instructed the Council to convene a LC meeting —

¹⁵ See Michael Milde, *International Air Law* at 253.

¹⁶ *Ibid.*

¹⁷ See Montreal Convention Proceedings Volume 1 at 16.

¹⁸ See ICAO C-DEC 126/7.

¹⁹ See Augustin at 33. See also ICAO, C-DEC 126/3.

²⁰ See Michael Milde, *International Air Law* at 253.

²¹ See UNSC Resolution 635 dated 14 June 1989.

²² See ICAO A27-WP/115, EX/37. See also Michael Milde, *International Air Law*, at 254.

preferably in the first half of 1990—for the preparation of a draft international instrument.²³ The objective was its subsequent adoption at a diplomatic conference, in accordance with ICAO procedures set out in Assembly Resolution A7-6.²⁴

Thereafter, on 4 December 1989, the United Nations General Assembly (“UNGA”) adopted Resolution 44/29 “[u]rging [ICAO] to intensify its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection.”²⁵

The LC’s Chairman appointed a Rapporteur, which presented his report in September 1989.²⁶ The Legal Sub-Committee held its session in Montreal from 9 to 19 January 1990. The main purpose of this meeting was to prepare a draft convention. The LC met from 27 March through 12 April 1990.

Subsequently, from 18 to 22 June 1990, the LC and the AH-DE held a joint session.²⁷ On 4 July 1990, the Council decided to convene a Diplomatic Conference,²⁸ scheduled to take place from 12 February to 1 March 1991. To finalize the technical annex to the draft instrument, the AH-DE held another meeting from 26 to 30 November 1990. Finally, on 7 December 1990, the Council endorsed the progress achieved by the AH-DE and reconfirmed the dates of the forthcoming diplomatic conference.²⁹

It is noteworthy that in 1990 alone, ICAO convened at least one meeting of the Sub-Committee, one LC session, a meeting of the AH-DE, as well as a joint session between the AH-DE and the LC. Such an intensive schedule was, and remains, unprecedented. Given ICAO’s budgetary constraints, the convening of so many meetings within a single year would ordinarily have been impossible. This illustrates not only the Organization’s determination to bring the law-making process to a swift conclusion, but also—though less visibly—the considerable exogenous political pressure prevailing at the time.

From 12 February to 1 March 1991, the Diplomatic Conference was convened in Montreal.³⁰ The proceedings were inaugurated with a solemn address by Javier Pérez de Cuéllar, then UN Secretary-General.³¹ Although anecdotal, this episode illustrates the

²³ See ICAO, A27-8. The Assembly also instructed States to expedite research on explosive-detection technologies and to participate actively in developing an international regime for the marking of explosives. See ICAO, A27-9, *Acts of unlawful interference aimed at the destruction of civil aircraft in flight*.

²⁵ See United Nations General Assembly Resolution 44/29 dated 4 December 1989.

²⁶ See Michael Milde, *International Air Law*, at 254.

²⁷ See Montreal Convention Proceedings Volume 1 Minutes at 4.

²⁸ According to Roderick D. van Dam, the Diplomatic Conference engaged in extensive deliberations on a wide range of issues. However, the most contentious matters may be summarized as follows: (i) whether the scope of the Convention ought to be confined exclusively to plastic explosives, given that the instrument addresses matters extending beyond the immediate domain of international civil aviation; (ii) the obligations imposed upon States, particularly with respect to prohibiting and effectively preventing the manufacture within their territories of such explosives, as well as the import and export of unmarked plastic explosives; (iii) the scope of permissible exceptions for the activities of military and police authorities, provided these were not inconsistent with the object and purpose of the Convention; (iv) the modalities and timelines for the disposal of existing stockpiles; (v) the institutional role of the Council; and (vi) the role of the IETC, together with the function of the Technical Annex. See Roderick D. van Dam at 169-170.

²⁹ See Montreal Convention Proceedings Volume 1 at 4.

³⁰ Jennings indicates that a diplomatic conference “is the usual procedure for so-called “law-making” and codificatory conventions.” See Robert Y. Jennings, “Treaties” in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects* (Paris: Martinus Nijhoff Publishers – Unesco, 1991) at 137.

³¹ See Montreal Convention Proceedings Volume 1 at 4.

exceptional significance and political pressure surrounding the law-making process. In the history of ICAO, it remains the only instance in which the UN Secretary-General has personally attended a Diplomatic Conference convened under the auspices of ICAO.

After extensive discussions, on 1 March 1991, the Convention was adopted by consensus. On the same date, 41 States signed the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*. It entered into force on 21 June 1998.³² To date, the Convention has 156 States Parties.³³

The Convention was negotiated and adopted in just over two years, a pace that stands as an exception rather than the rule in the field of international treaty-making.³⁴ No other treaty developed under ICAO's auspices has been concluded in such a short period of time.³⁵ By contrast, most international instruments require between five and ten years to be finalized. For instance, the negotiation process leading to the adoption of the *Protocol to Amend the Convention on Offences and Certain other Acts Committed on Board Aircraft*, done at Montréal on 4 April 2014 extended over five years, while the deliberations culminating in the adoption of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, both done at Beijing on 10 September 2010 spanned nine years.³⁶

1.3.Objectives

The Convention rests on the premise that international law provides a legitimate basis for obligating States to adopt measures ensuring that plastic explosives are marked with chemical detection agents.³⁷ To this end, States Parties are prohibited from manufacturing such explosives within their territories unless they contain the prescribed additive, and are further required to prevent the import and export of unmarked plastic explosives. That said, the Convention does not prohibit the use, production, or development of plastic explosives for their numerous legitimate applications in the military, law enforcement, and industrial sectors.³⁸ The

³² Dr. Kenneth Rattray, Solicitor General and Chief Delegate of Jamaica, served as Chair of the Diplomatic Conference that led to the adoption of the Convention. See Montreal Convention Proceedings, Volume 1 at 34. He would later preside as Chair of the Diplomatic Conference that adopted the *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention of 1999). During the opening discussions of the Diplomatic Conference, one State proposed the adoption of a resolution encouraging manufacturing States to implement the marking of explosives even before the Convention entered into force. See Montreal Convention Proceedings Volume 1 at 39.

³³ See ICAO, *Convention on the Marking of Plastic Explosives for the Purpose of Detection done at Montreal on 1 March 1991*, available online

https://www.icao.int/secretariat/legal/List%20of%20Parties/MEX_EN.pdf. During the opening of the Diplomatic Conference, UN Secretary-General, Javier Pérez de Cuéllar expressed “the hope that all States, in particular those which produce plastic explosives, will become parties to the new instrument and that the convention will enter into force without delay”. See Montreal Convention Proceedings Volume 1 at 17.

³⁴ See Michael Milde, *International Air Law*, at 253-55.

³⁵ At the eighth plenary meeting of the Diplomatic Conference, the United Kingdom observed that, given the complexities of the subject, it was a remarkable achievement to have produced a complete text, agreed by consensus and ready for signature within such a short period. See Montreal Convention Proceedings, Volume I, at 162.

³⁶ See Alejandro Piera, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges* (The Hague: Eleven International Publishing, 2015) at 341-342 [Piera].

³⁷ See Convention, Preamble.

³⁸ See Marian Nash (Leich) “Contemporary Practice of the United States relating to International Law” 88 Am. J. Int'l L. 89 (1994) at 90.

overarching objective of these provisions is the progressive reduction and eventual elimination of the availability of unmarked plastic explosives.³⁹

The rationale underpinning this regime lies in the distinctive threat posed by plastic explosives to civil aviation and public security.⁴⁰ These materials combine considerable destructive potential with acute difficulties of detection in the absence of chemical markers.⁴¹ It was therefore considered that the mandatory marking of plastic explosives would constitute a significant contribution to the prevention of unlawful acts.⁴²

1.4.Scope

As John Augustin notes, “the legal regime is composed of 'two interrelated parts' the body of the Convention proper, which contains the main obligations of States Parties, and a Technical Annex, described as an integral part of the Convention, with the technical elements.”⁴³

At the Sub-Committee discussions, various States supported the idea of a new convention dealing primarily “with marking of plastic and sheet explosives at the production level to make detection of their presence easier and more effective with the use of the available technology.”⁴⁴

During the negotiations leading to the adoption of the Convention, several States also advocated for a broader scope. Some proposed that the instrument should extend to other types of explosives and incorporate additional methods for identifying manufacturers.⁴⁵ One State indicated that “if at some future date there should be a number of serious incidents involving explosives other than plastic or sheet explosives, it should be possible to put in place very

³⁹ The Convention does not primarily concern itself with the creation of international criminal offenses, the punishment of individuals, or extradition arrangements. Rather, its principal focus lies in imposing obligations upon States to ensure the marking and control of plastic explosives, as well as the systematic destruction of unmarked stockpiles. See Christopher C. Joyner, “International Extradition and Global Terrorism: Bringing International Criminals to Justice”, 25 Loy. L.A. Int'l & Comp. L. Rev. 493 (2003) at 527. In advancing his proposal for a draft convention, Rapporteur Mr. A.W.G. Kean recommended the “creation of new international offences, consisting of failing to take those measures or of countering their effect.” He further suggested the inclusion of provisions relating to prosecution and extradition, thereby situating the proposed instrument within a more traditional international aviation security / criminal-law framework. However, both the Subcommittee meeting and the LC session rejected the Rapporteur’s proposal. See Augustin at 38. Furthermore, it was observed during the negotiations that the mere possession of unmarked plastic explosives, in and of itself, was not sufficiently heinous to warrant classification as an international crime. Acts of violence involving the use of such explosives against civil aviation were, moreover, already addressed within the framework of existing international aviation security conventions. As noted by Marian Nash this consideration militated against the creation of new international criminal offences within the scope of the Convention. See Marian Nash (Leich) “Contemporary Practice of the United States relating to International Law” 88 Am. J. Int'l L. 89 (1994) at 90.

⁴⁰ See ICAO, LC/39-WP/3-2.

⁴¹ See Convention, Preamble.

⁴² See At Michael Milde, Aviation Safety at 12. See also Vita Ivashchenko, “International Anti-Terrorist Legal Actions” available online at <https://elar.navy.edu.ua/server/api/core/bitstreams/affbab18-6813-47e3-afd5-701141b653b4/content>; Attila Sipos, “The Dogmatics and Modernization of International Conventions on Aviation Security” (2020) ELTE Law Journal 1at 159; National Research Council, *Containing the Threat from Illegal Bombings*, National Academies Press (1998).

⁴³ See Augustin at 36.

⁴⁴ See ICAO Doc 9801-DC/4 “International Conference on Air Law (Convention on the Marking of Plastic Explosives for the Purpose of Detection) Montreal, 12 February -1 March 1991 Volume II Documents [*Montreal Convention Proceedings Volume 2*] at 11.

⁴⁵ See Tswana at 69.

quickly a legal regime governing those other types.”⁴⁶ Similarly, the International Air Transport Association (“IATA”) underscored that although the “scope was satisfactory as a starting point, but that the door should be left open possibly to cover at a further state other types of explosives that were also used for terrorist activities and sabotage.”⁴⁷

A contrario, the Soviet Union, the United States, Cuba France, Venezuela, Japan, Ethiopia, Côte d’Ivoire, China and Mexico were against expanding the scope of the draft convention.⁴⁸ These States argued that the work of the AH-DE had been directed specifically toward plastic and sheet explosives.⁴⁹ According to them, and all research, experiments, and testing regarding this initiative had been conducted on that basis. Expanding the scope of the convention to other types of explosives risked undermining the progress already achieved.⁵⁰ To fulfill the mandate given by the UNSC, the UNGA, and the Council, it was necessary to limit the Convention to the marking of plastic explosives for detection—an approach likely to secure rapid and broad ratification.⁵¹ Future technological developments identifying other categories of explosives could be addressed through a protocol to the convention.⁵² Augustin says that “it seems that speed of entry into force was deemed more desirable than possibly increase effectiveness in the longer term.”⁵³

The scope of the Convention nonetheless transcends the confines of civil aviation, embodying a more comprehensive commitment to the safeguarding of public security and to the eradication of terrorism in all its forms.

1.5.Obligation of States

The Convention imposes upon States Parties a series of specific obligations designed to control and progressively eliminate the availability of unmarked plastic explosives. These include the following:

- i) States are required to take the necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives within their territories. As Augustin underscores, this obligation necessarily entails the adoption of appropriate domestic legislation, without which States would lack the legal and institutional capacity to ensure compliance with the Convention’s requirements.⁵⁴ States must mark plastic explosives by introducing, during the manufacturing process, one of the detection agents defined in the Technical Annex to the Convention.⁵⁵
- ii) States must aid the IETC in its functions.⁵⁶
- iii) States must prevent the movement of unmarked plastic explosives into or out of their territory, except in cases involving transfers for military or police purposes that are

⁴⁶ See Montreal Convention Proceedings Volume 1 at 38.

⁴⁷ *Ibid* at 30-31.

⁴⁸ *Ibid* at 30-31.

⁴⁹ *Ibid* at 38.

⁵⁰ *Ibid*.

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ See Augustin at 38.

⁵⁴ See Augustin at 37.

⁵⁵ See ICAO, LC/39-WP3-2 at 1.

⁵⁶ See Convention, Art. VIII, paragraph 1.

consistent with the objectives of the Convention.⁵⁷ This would allow, for instance, to move unmarked plastic explosives to another State in the context of a military arrangement.⁵⁸

- iv) With respect to existing stockpiles, the Convention obliges States to ensure that, where such explosives are not held by military or police authorities, they are subject to one of three measures: (i) destruction; (ii) consumption for purposes not inconsistent with the objectives of the Convention; or (iii) marking or permanent neutralization. These actions must be undertaken within three years from the date of the Convention's entry into force for the State concerned.⁵⁹
- v) States are permitted to engage in trade solely with marked plastic explosives and are required to exercise strict control over any existing stockpiles. In addition, they must either consume or destroy their military reserves of unmarked explosives within fifteen years of the Convention's entry into force, while non-military holders are afforded a shorter compliance period of three years. Notably, ICAO does not verify State compliance with these obligations.
- vi) States must "exercise strict and effective control over the possession and transfer of possession of unmarked explosives" manufactured prior the entry into force of the Convention.⁶⁰
- vii) Any unmarked plastic explosives manufactured after the entry into force of the Convention for that State must be destroyed as soon as possible, with two limited exceptions: (i) explosives incorporated, and actually used, as integral parts of military devices within three years of the Convention's entry into force, and (ii) restricted quantities maintained exclusively for purposes of research, testing, training, or forensic science.⁶¹

1.6. The Duties and Functions of the Council under the MEX Convention

The Convention assigns to the Council a series of institutional responsibilities designed to facilitate its effective implementation. First, the Council is required to "take appropriate measures to facilitate the implementation of the Convention, including the provision of technical assistance and measures for the exchange of information relating to technical developments in the marking and detection of explosives."⁶² In addition, it must communicate to all States Parties and relevant international organizations the information submitted by States Parties regarding their implementation of the Convention.⁶³ The Council also bears responsibility for appointing members to IETC,⁶⁴ reporting the findings of that Commission to States Parties,⁶⁵ and transmitting to the Commission any comments received from States with respect to proposed amendments to the Technical Annex.⁶⁶ Furthermore, in consultation with

⁵⁷ According to Marian Nash, these exceptions could be the case of military sales and assistance programs, as well as joint cross-border military exercises. See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994) at 91.

⁵⁸ See Augustin at 38.

⁵⁹ See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994) at 91.

⁶⁰ See Convention Art. IV.

⁶¹ See Marian Nash (Leich) "Contemporary Practice of the United States relating to International Law" 88 Am. J. Int'l L. 89 (1994) at 91.

⁶² See Convention, Art. IX.

⁶³ *Ibid*, Art. VIII, paragraph 2.

⁶⁴ *Ibid*, Art. V, paragraph 1.

⁶⁵ *Ibid*, Art VI, paragraph 2.

⁶⁶ *Ibid*, Preamble.

the Commission, the Council may itself propose amendments to the Technical Annex.⁶⁷ Finally, the Council is tasked with convening sessions of the Commission and with approving its rules of procedure, thereby ensuring the institutional continuity of the Convention's technical regime.⁶⁸

During the discussions held within the Sub-Committee, the LC, and ultimately at the Diplomatic Conference, many States voiced serious reservations as to whether the functions and duties contemplated under the Convention could appropriately be entrusted to the Council. Michael Milde, then serving as Director of the ICAO Legal Bureau and acting as Executive Secretary of the Diplomatic Conference, clarified, however, that no constitutional obstacles stood in the way of the Council's assumption of such responsibilities.⁶⁹

1.7. The IETC

The Convention establishes the IETC, an advisory, though non-permanent body, entrusted with addressing the sensitive technical questions essential to achieving the objectives of the instrument.⁷⁰ More specifically, the IETC's mandate is to evaluate developments in the manufacture, marking, and detection of explosives. In carrying out this function, the IETC is required to transmit its findings, through the Council, to all States Parties as well as to relevant international organizations. Where appropriate, it may also propose amendments to the Technical Annex of the Convention, thereby serving as the principal mechanism through which the treaty can be adapted to evolving technological and security challenges. Put differently, the IETC is vested with the task of identifying and specifying the categories of explosives to which the Convention is to apply.⁷¹ Ideally, the IETC should take decisions by consensus.⁷²

Although the IETC's mandate was essentially confined to making recommendations for amendments to the Technical Annex, at the Diplomatic Conference the United States proposed that its scope be broadened. It suggested that the IETC might be tasked not only with monitoring technical developments relevant to the Convention but also with considering the desirability of additional instruments addressing related issues. This proposal, however, did not gain traction and was ultimately not retained.⁷³

The IETC is composed of between fifteen and nineteen specialists with expertise in the production, detection, or research of explosives. Members are appointed by the Council for three-year terms, with the possibility of reappointment. Under the Convention, the Council is required to convene the IETC at least once annually, either at ICAO Headquarters or at other locations and times, "as directed or approved by the Council."⁷⁴ As the Secretariat has noted, the Council retains broad discretion to determine the place and frequency of sessions.⁷⁵ In other words, it is not strictly necessary to convene sessions annually, nor that such sessions be held in Montreal.

⁶⁷ *Ibid*, Art. VII, paragraph 1.

⁶⁸ *Ibid*, Art. VII, paragraph 2.

⁶⁹ See Milde, Draft Convention, at 175.

⁷⁰ See Augustin at 44.

⁷¹ See Convention, Arts V & VI. See also ICAO C-WP/15167.

⁷² See Convention, Art. VI.

⁷³ See Montreal Convention Proceedings Volume 1 at 67.

⁷⁴ See Convention, Art. 5.

⁷⁵ See ICAO, LC/39-WP/3-2. See also ICAO, IETC/1 "Report of the First Session of the International Explosives Technical Commission" (15/12/1999) at 1-1 [IETC Report 1].

The IETC held its inaugural meeting from 13 to 15 December 1999 and has since met on nine occasions, most recently from 28 to 29 June 2022, which, owing to global circumstances, was conducted virtually. In its early years, the IETC was supported by the AH-DE, a technical advisory body that provided specialized input until its dissolution in 2010.⁷⁶ The AH-DE's functions were subsequently integrated into the Aviation Security Panel's Working Group on Technology, now operating under the title of the Working Group on Innovation in Aviation Security.⁷⁷

1.8.The relationship between IETC and the Council

The IETC functions under the authority of the Council.⁷⁸ In this respect, while serving as Executive Secretary of the Diplomatic Conference, and in the context of clarifying the relationship between the Council and the IETC, Michael Milde emphasized that the Commission was intended to perform an advisory role only.⁷⁹ Its members acted in their individual capacity, and it was never envisaged that the IETC would take final decisions.⁸⁰ Rather, its recommendations required the approval of a policy-making body.⁸¹ At the same time, during the negotiations leading up to the Diplomatic Conference, it was acknowledged that establishing a separate international executive body outside ICAO for this purpose would have been costly, complex, and time-consuming. Considering this, Milde underscored the prevailing consensus that the rule-making authority should be vested in the Council.⁸²

Augustin echoed Milde's assessment but went further, stressing that the IETC's findings were not binding. The Council retained the discretion to accept, reject, or amend any recommendation that the IETC submits. Shortly thereafter, while explaining to the Council the procedure for approving recommendations to the Technical Annex, the ICAO Secretary General noted that the Council would be required to take policy decisions in light of the nature of the proposed amendments, given its authority to determine whether or not such amendments should be transmitted to States Parties.⁸³ Moreover, the Council reserved the right to introduce modifications to any proposal. As Augustin observed, this rationale went unchallenged by any Council member, thereby confirming the non-binding character of the IETC's recommendations and the Council's full autonomy in relation to the IETC's work.⁸⁴

1.9.Amendments to the Technical Annex

As noted above, one of the principal functions of the IETC is to propose amendments to the Technical Annex, which constitutes an integral component of the Convention.⁸⁵ To date, the Technical Annex has been amended only twice. The first amendment, which entered into force on 27 March 2002, removed *ortho*-Mononitrotoluene (o-MNT) from the original list of

⁷⁶ See IETC Report 1. See also ICAO, LC/39-WP/3-2 at 1.

⁷⁷ See ICAO C-WP/15167.

⁷⁸ See Tswana at 84.

⁷⁹ See Montreal Convention Proceedings Volume 1 at 68.

⁸⁰ *Ibid* at 68.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ See ICAO, C-WP/9355.

⁸⁴ See Augustin 45.

⁸⁵ See Convention, Art. X.

detection agents. The second amendment, effective 19 December 2005, revised the minimum concentration level of 2,3-Dimethyl-2,3-dinitrobutane (DMNB).⁸⁶

Under the Convention, the IETC submits proposed amendments directly to the Council, which enjoys full discretion as to whether to transmit them to States Parties. Upon transmission, States are granted a 90-day period—calculated from the date of the Council’s notification—to submit comments.⁸⁷ The Convention further provides that the Council must invite any State Party that has submitted comments or objections to engage directly with the IETC.⁸⁸ In turn, the IETC is obliged to review and consider such feedback and report back to the Council.⁸⁹ Following consultations with the IETC, affected States Parties, and producer States, the Council may circulate the proposal to all States Parties for adoption.⁹⁰ At this stage, if fewer than five States Parties submit written objections within ninety days of notification, the amendment is deemed adopted and enters into force 180 days thereafter, or within such other period as the Council may determine.⁹¹

Should five or more States Parties object, the Council is required to remit the proposal to the IETC for further analysis and reconsideration.⁹² The Convention nevertheless affords a second opportunity for dissenting States. In this respect, a Party that initially objected to an amendment may subsequently express its consent to be bound by depositing an instrument of acceptance or approval.⁹³ The Convention, however, is silent as to the manner in which a State may exercise this option and whether any timeline exists for expressing such acceptance or approval. It may reasonably be inferred that a State can provide its consent by submitting a formal letter to the Secretary General at any time

In addition, where five or more States Parties object to a proposed amendment, the Council retains discretionary authority to submit the matter to a Conference of all States Parties, thereby elevating its consideration to a broader diplomatic forum.⁹⁴

The rationale underlying this procedure was to embed within the Convention a built-in mechanism that would provide the necessary flexibility to adapt to evolving technical developments, encourage consultation between the IETC, States Parties, and ICAO, and prevent the technical dimensions of the Convention from becoming static or obsolete.⁹⁵

1.10. IETC’s Rules of Procedure

⁸⁶ See ICAO C-WP/15167 at 3.

⁸⁷ See Convention, Article VII.

⁸⁸ *Ibid.*

⁸⁹ See Convention, Art. VI.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ See Michael Milde, “27th Session of the ICAO Legal Committee”, Air Law, XV 3 (1990) at 163 [*Michael Milde 27th Session of LC*]. See also Augustin at 36.

The Commission is institutionally accountable to the Council, to which it submits its reports. The Council, in turn, communicates the Commission's findings to the States Parties and to other relevant international organizations.⁹⁶

In terms of internal organization, the Commission is required to elect from among its members a Chairperson and Vice-Chairpersons. These officers hold office for a term of one year, or until their successors are elected, thereby ensuring continuity in the event of procedural delay.⁹⁷ In practice, this has not been achieved, given that the Commission's meeting have not taken place annually. A Secretary, formally designated by the Secretary General, supports the Commission. This function is typically entrusted to a member of the ICAO Secretariat.⁹⁸

The Council exercises extensive authority over the Commission. It is responsible for convening the latter's sessions, approving its work program, and adopting its rules of procedure, together with any amendments thereto.⁹⁹

Participation in the Commission's sessions is circumscribed. Ex officio access is granted to the President of the Council, the Secretary General, Representatives to the Council (or their alternates), and officials of the ICAO Secretariat. The President of the Council may also authorize the attendance of observers, either designated by States or by international organizations. In practice, requests for observer status are typically submitted by States not represented on the Commission. Observers are entitled to participate in deliberations but lack voting rights.¹⁰⁰ They may submit proposals; however, such proposals are only placed before the plenary for discussion if endorsed by at least two members of the Commission.¹⁰¹

The decision-making procedures of the Commission reflect a balance between consensus and majority rule. As a matter of principle, recommendations to the Council concerning amendments to the Technical Annex of the Convention should be adopted by consensus, which underscores the technical sensitivity and political significance of such amendments. Where consensus proves unattainable, decisions require a two-thirds majority of the Commission's members. For matters other than amendments to the Technical Annex, decisions are adopted by a simple majority of members present and voting. Upon the conclusion of each session, the Secretariat prepares a formal report, which is then transmitted to the Council for its consideration and approval.

1.11. Amendments to the Convention

The drafts emerging from both the Sub-Committee and the Legal Committee did not contain a concrete text on the final clauses of the Convention. Nevertheless, extensive discussions were held at both meetings on the provision governing the entry into force.¹⁰² In this context, the United States submitted a proposal on the final clauses, with particular emphasis on the requirements governing the Convention's entry into force. Consideration was

⁹⁶ See ICAO, Rules of Procedure for the International Explosives Technical Commission (IETC) [*IETC Rules of Procedure*]. On 1 March 2000, the Council approved these ICAO IETC Rules of Procedure. See ICAO C-DEC 159/5.

⁹⁷ See IETC Rules of Procedure, Rule 2.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, Rules 3 & 4.

¹⁰⁰ *Ibid.*, Rule 5 & 6.

¹⁰¹ *Ibid.*, Rule 5 & 6.

¹⁰² See Montreal Convention Proceedings Volume 2 at 157-159.

given to the threshold necessary for this purpose, which envisaged a minimum number of ratifying States, including a specified proportion of manufacturing States. The proposal, however, did not explicitly address procedures for introducing an amendment to the Convention itself.

As is standard practice, the Secretariat tabled a working paper at the Diplomatic Conference identifying the subjects to be addressed in the final clauses.¹⁰³ According to the Secretariat, these included: (i) the settlement of disputes concerning interpretation and application of the Convention; (ii) permissible reservations, if any; (iii) the date and place of the opening for signature and subsequent signatures; (iv) the determination of which States may sign the Convention; (v) requirements for ratification, acceptance, approval, or accession; (vi) designation of the depositary; (vii) registration of the Convention with the UN and ICAO; (viii) provisions for denunciation; (ix) procedures for amendment of the Convention; (x) notices to be given to the depositary; and (xi) closing provisions identifying the authentic languages, the number of originals, and the date of signature.¹⁰⁴

More specifically, the Secretariat proposed concrete language to govern the possible amendment of the Convention at a later stage.¹⁰⁵ At that time, the draft text prepared by the Secretariat read as follows:

1. Any proposal for the amendment of this Convention shall be communicated to the Council of the International Civil Aviation Organization which will decide in accordance with its procedures, on the convening of an international conference of States entitled to become party to this Convention.

2. The decisions of an international conference referred in paragraph 1 of this Article shall be taken by the vote of two-thirds of the States present and voting, unless by the same majority the conference decides to apply a different rule.

3. Any amending agreement shall become binding between States which ratify or accede to such amending agreement].¹⁰⁶

Under the Secretariat's proposal, which at the Diplomatic Conference was supported by Venezuela, Tunisia, India, Mali, Algeria, Gabon and Morocco,¹⁰⁷ any amendment to the Convention would have been subject to the Council's oversight. The proposal did not specify

¹⁰³ *Ibid* at 193. The Secretariat even clarified that "a provision on amendment of the Convention [did] not appear strictly necessary. The [previous international aviation security instruments developed under the auspices of ICAO did] not contain any provision on their amendment." *Ibid*. According to the Secretariat, such proposal only paraphrases the principles contained in Vienna Convention on the Law of Treaties of 1969 [VCLT]. *Ibid*.

¹⁰⁴ See Montreal Convention Proceedings Volume 2 at 193.

¹⁰⁵ At the Diplomatic Conference there were extensive discussions on whether the Convention require a built-in amendment mechanism. See Tswana at 98.

¹⁰⁶ See Montreal Convention Proceedings Volume 2 at 197.

¹⁰⁷ For instance, Mali argued that "the [VCLT] only provided a broad outline, thereby granting an opportunity for individual conventions to meet their own special requirements; in this respect, the draft Convention on the Marking of Explosives for the Purpose of Detection dealt with a special subject for which no precedent existed in the annals of ICAO". See Montreal Convention Proceedings Volume 1 at 138. Mali further underlined that States should not "preclude the possible need to amend the document at a future date". *Ibid* at 138.

a minimum number of States required to trigger the process. In theory, one State could have submitted the amendment proposal.

The Council, acting in accordance with its established procedures (for example, ICAO Doc. 7669, ICAO A41-4), would have determined whether to convene an international conference of States Parties for the consideration of the proposed amendment.¹⁰⁸

Although the proposal itself was silent on this point, the reference to ‘in accordance with its procedure’ implied that, should the Council decide to initiate the process of amending the Convention, it would have instructed the LC to include the matter in its work programme. In other words, the Secretariat’s proposal could not be understood as conferring upon the Council the authority to convene a conference of States directly, without the prior involvement of the LC.

This formulation thus preserved the Council’s predominant role in the law-making function but also keeping ICAO’s institutional framework. At such a conference, decisions would have been adopted by a two-thirds majority of the States present and voting, while retaining the possibility for the conference itself to establish alternative voting procedures by the same majority.¹⁰⁹ The proposed mechanism provided that any amendment would become binding only upon those States that chose to ratify or accede to it. In other words, the amendment would not have been subject to a collective entry-into-force threshold; rather, it would have operated exclusively based on individual State consent. The amendment’s effect would have been confined to consenting States.¹¹⁰

At the Diplomatic Conference, the Secretariat nevertheless clarified that an explicit provision on the amendment of the Convention did not appear strictly necessary, noting that previous international aviation security instruments developed under ICAO auspices contained

¹⁰⁸ These States “all favored including an article along the lines of the [proposed text advanced by the Secretariat].” See Montreal Convention Proceedings Volume 1 at 101.

¹⁰⁹ The two-thirds majority requirement represents the standard practice for substantive decisions at ICAO-led Diplomatic Conferences. The Rules of Procedure applicable to the Conference that adopted the Convention provided that “[d]ecisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the Representatives present and voting.” See Montreal Convention Proceedings Volume II at 123. In practical terms, this meant that approval of the final text of the Convention required the support of two-thirds of the delegations of States present and voting at such Diplomatic Conference. In the event, however, the proceedings were characterized by consensus, and most, if not all, substantive issues were resolved without recourse to a vote. This stands in contrast to the 2010 Diplomatic Conference that adopted the Beijing instruments, where numerous substantive issues were subjected to formal voting procedures. Moreover, Milde explains that the “Diplomatic Conference normally takes its decisions by two-thirds majority of the present and voting. Voting “yes” or “no” is always divisive and confrontational and it should be avoided as much as possible. In case of a vote only the positive and negative votes are counted, the abstentions do not count - thus even in a much-divided house the dissenting delegations may abstain or not vote and thus prevent the thwarting of the wishes of other delegations. It would be, of course, much preferable to adopt a new instrument by consensus without a vote - that does not necessarily mean a true “unanimity” but signals that all delegations “can live” with the result with different degrees of enthusiasm. Many international instruments have been adopted this way, and the true consent is expressed in due course by ratification of the instrument.” See Michael Milde, “ICAO Legal Committee and Progress in the Development of International Air Law - The 35th Session of the ICAO Legal Committee Drafts a Protocol on Unruly Passengers” (on file with the author).

¹¹⁰ The VCLT stipulates that the adoption of a treaty text at a diplomatic conference is ordinarily effected by a two-thirds majority of the States present and voting, save where the conference itself, by the same majority, determines to apply an alternative rule of procedure. See Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, United Nations, Treaty Series, Vol. 1155, p. 331, Art. 9, paragraph 2 [VCLT].

no such provisions.¹¹¹ In its view, the proposed clause merely restated the principles already embodied in the *1969 Vienna Convention on the Law of Treaties* (“VCLT”). It is correct that the Secretariat’s proposal merely reflected the standard ICAO practice then in place for the negotiation and approval of instruments amending treaties.¹¹² It would not have introduced any significant innovation. In retrospect, however, and considering subsequent developments, this clarification proved most unfortunate, as it led States to assume that a specific built-in amendment clause was unnecessary in the Convention. Yet experience has demonstrated that a carefully drafted provision addressing the amendment of an international instrument can play a critical role in facilitating its negotiation, adoption, and eventual entry into force.

The United States, Austria, Australia, Chile, Argentina¹¹³, Ecuador and Canada were in favour of deleting any clause from the draft text addressing a procedure to amend the Convention.¹¹⁴ A reading of the minutes of the Diplomatic Conference reflects that there was fear amongst some of the participating States that an express provision governing the potential amendment of the treaty may conflict or create confusion with the ultra-detailed process for the formulation and approvals of amendments to be introduced into the Technical Annex. Similarly, those against any express reference to an amendment procedure cited the fact that none of the previous international aviation security conventions contained specific clauses addressing this issue. Moreover, it was thought that this has already been properly addressed by standard practice at ICAO and the general rules of the VCLT.¹¹⁵

Notwithstanding the foregoing, Japan suggested concrete language that would have retained a built-in mechanism into the Convention to address the process and requirements for introducing potential amendments into the treaty. According to Japan, “[a]ny proposed amendment to this Convention shall be approved by a two-thirds vote of the States Parties

¹¹¹ While this assessment is accurate, it overlooks the fact that, in the absence of a built-in amendment mechanism, any modification to the Convention would necessarily have to proceed through ICAO’s standard practice for treaty adoption. As will be elaborated below, the preparatory stages and negotiations preceding a Diplomatic Conference are inherently protracted, thereby delaying the adoption of any amendment. As it stands, the mechanism serves as a disincentive to adopt or amend any international instrument under the auspices of ICAO.

¹¹² At the Diplomatic Conference some delegations, whilst expressing support for the concept of an express provision dealing with a built-in amendment mechanism in the Convention, had also indicated that there may be a need for modifications to the Convention. On the other hand, other States had expressed the view that they were not in favor of that text. They were not in favor of an express provision in the Convention dealing with that matter as such. During the discussions at the Diplomatic Conference, it had been clearly recognized by all delegations that the draft provided a special regime governing the introduction of changes in the Technical Annex. This was an essential part of the Convention. To avoid any confusion, other changes to other parts of the Convention could be dealt with in the manner prescribed in the VCLT. The Commission of the Whole agreed to adopt the final clauses without any reference to a specific convention amendment procedure. See Montreal Convention Proceedings Volume 1.

¹¹³ At the Diplomatic Conference Argentina favored a provision of the final clauses without any explicit reference to an amendment mechanism in the Convention. Moreover, while acknowledging that although the Technical Annex may be subject to various amendments, Argentina “did not anticipate any future need to amend the convention itself.” According to Argentina, “[t]he establishment of a new amending procedure could moreover give rise to differences in interpretation and would not eliminate the need to convene an international conference”. See Montreal Convention Proceedings Volume 1 at 100.

¹¹⁴ *Ibid.*

¹¹⁵ For example, during the Diplomatic Conference the delegate of the United States observed that the inclusion of the Secretariat’s proposal on the final clauses - particularly with respect to the mechanism for amending the treaty - “would essentially be nothing more than a repetition of the relevant provisions of the Vienna Convention on the Law of Treaties.” See Montreal Convention Proceedings, Volume I at 101. John Augustin writes that “delegates at the Conference believed that the Convention would be amended in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties.” See Augustin at 47.

participating in the international conference.¹¹⁶ Such amendment shall enter into force in respect of States which have ratified, accepted, approved or acceded to the amendment when two-thirds of the States Parties, including five or more producer States, have deposited their instrument of ratification, acceptance, approval or accession, unless by the same majority the Conference decides to apply a different rule.”¹¹⁷

Japan contended that the VCLT, while setting out general principles governing treaty amendment, did not adequately reflect the particularities of specific instruments. In its view, reliance on the VCLT alone risked overlooking the special features and technical exigencies inherent in certain treaty regimes. Japan further recalled that several international instruments recently adopted under the auspices of the UN had incorporated detailed amendment provisions within their own texts, thereby providing tailored mechanisms better suited to their subject matter and institutional framework.¹¹⁸ Germany and the United States strongly opposed the Japanese proposal.¹¹⁹

The rationale underlying Japanese proposal was to incorporate into the Convention a mechanism allowing the instrument to be amended more expeditiously, should circumstances so require. In part, the proposal mirrored the logic of the provision governing the Convention’s entry into force, namely the establishment of a high threshold of ratifications, including the requirement that at least five of the ratifying States be producer States.

Had the Japanese proposal been accepted, the Council would have been excluded from the amendment process. Amendments could have been submitted directly by any number of States to a conference of States Parties, thereby bypassing ICAO’s established procedures for the adoption of international instruments—such as the convening of the Sub-Committee and the LC, or the appointment of a rapporteur. While this mechanism might have accelerated the adoption of amendments, it would also have eliminated the Council’s supervisory role. Substantively, the Japanese proposal required that a proposed amendment be approved by a two-thirds majority of States Parties at the conference. Entry into force, however, was subject to a more stringent twofold threshold: first, ratification, acceptance, approval, or accession by two-thirds of the States Parties; and second, inclusion within that majority of at least five producer States, unless the conference decided otherwise by the same voting majority. This formulation established a high barrier to entry into force, evidently designed to ensure not only broad participation but also the assent of those States possessing industrial and manufacturing capacity.

Several delegations, while supporting in principle the inclusion of an express provision on a built-in amendment mechanism, noted that modifications to the Convention might in fact be necessary over time. Other States, however, opposed the insertion of such a clause altogether, maintaining that no explicit reference to amendment procedures should appear in the text of the Convention. During the Diplomatic Conference, it was generally acknowledged that the draft already established a special regime for introducing changes to the Technical Annex, which constituted an essential element of the Convention. To avoid any overlap or ambiguity, the President of the Diplomatic Conference suggested that amendments to other parts of the Convention could be addressed through the general rules contained in the VCLT. On this basis, the Commission of the Whole decided to adopt the final clauses without

¹¹⁶ See also Montreal Convention Proceedings Volume 2 at 255.

¹¹⁷ See Montreal Convention Proceedings Volume 1 at 136.

¹¹⁸ See Montreal Convention Proceedings Volume 1 at 137.

¹¹⁹ *Ibid* at 136.

including a specific amendment procedure in the Convention itself.¹²⁰ The plenary of the Diplomatic Conference also fully endorsed this proposal.¹²¹

The approach adopted at the Diplomatic Conference with respect to potential amendments to the Convention has not facilitated the introduction of changes to the instrument. It is evident that an amendment of the Convention itself was not regarded as the most urgent concern. Rather, the priority had been to establish a mechanism capable of ensuring that necessary technical updates could be incorporated efficiently, a goal that was achieved through the procedure created for amending the Technical Annex. The situation is less satisfactory, however, regarding modifications to the substantive provisions of the Convention. In this respect, the drafting choices made in 1991 stand in marked contrast to contemporary treaty practice. Most recent multilateral conventions contain express provisions governing amendments, often carefully tailored to balance legal certainty with the need for adaptability. Properly designed built-in mechanisms, considering the nature of the subject matter, the political sensitivities of States, and the relevant legal considerations, can prove indispensable. Such provisions not only streamline the process of reform but also reduce costs and time, thereby facilitating negotiation, adoption, entry into force, and potentially even enhancing the prospects for ratification. As Milde wisely notes “threats to aviation security requires constant updates of the legal regulatory framework.”¹²²

2. A Critical Evaluation of the MEX Convention

2.1. Assessing the Ongoing Relevance of the IETC

In 2020, the Council acknowledged that the IETC had not convened at any point during the preceding decade. This prolonged inactivity prompted the Council to question IETC’s continuing relevance and effectiveness within the institutional framework of the Convention.¹²³ The Council emphasized that the IETC’s role and functions require reassessment particularly considering significant technological advances in detection science and the emergence of new methodologies for identifying unmarked plastic explosives.

A year later, the IETC noted the need to “take into account the threat posed by a wider range of explosives, not only plastic explosives, to international civil aviation”¹²⁴ The IETC proposed the circulation of a survey among States Parties to evaluate both the degree of implementation of the Convention and the effectiveness of existing screening technologies in detecting unmarked plastic explosives. However, the poor quality of the responses precluded the derivation of meaningful conclusions. In response, the IETC advanced a two-fold recommendation to the Council. First, to broaden consultations to include not only States Parties but also manufacturers of explosives and security screening equipment; and second, to commission an independent, comprehensive study to assess the continuing role of the IETC.¹²⁵

¹²⁰ See Montreal Convention Proceedings Volume 2 at 239.

¹²¹ *Ibid* at 263-269, & 271 (text for final approval).

¹²² See Michel Milde, Draft Convention, at 156.

¹²³ See ICAO, LC/39-WP/3-2.

¹²⁴ See ICAO, IETC/9 “Ninth Session of the International Explosives Technical Commission” (IETC) 17-19 May 2021 at 2-1 [*IETC Report 9*].

¹²⁵ See ICAO, LC/39-WP/3-2.

The Council reviewed these recommendations but declined to authorize such a study, citing budgetary constraints and the existence of other organizational priorities.¹²⁶ While the Council acknowledged the usefulness of the Convention, it also observed that the IETC had largely fulfilled its original mandate.¹²⁷ Accordingly, the Council referred the matter to the LC, instructing it to evaluate potential courses of action. These included, on the one hand, a possible amendment to the Convention to redefine the IETC's role and functions, and on the other, the option of terminating the IETC altogether on the basis that its founding objectives had been achieved.¹²⁸

The IETC has acknowledged that the wide array of explosive detection technologies and techniques currently deployed at airports worldwide rely only partially on detection agents. In practice, the ICAO Secretariat has come to depend primarily on the Working Group on Innovation in Aviation Security ("WGIAS"), operating under the AVSEC Panel, as the principal technical advisory body on matters of explosives detection technology. This reflects an implicit recognition that the challenges of aviation security screening extend well beyond the narrow scope of the Convention.¹²⁹ Moreover, the WGIAS currently possesses a sufficiently broad mandate to encompass matters relating to the detection of explosives. In this capacity, it produces tangible outputs, including expert advice and practical recommendations, which are submitted to the Council in the field of explosives detection technology.¹³⁰

Furthermore, since 2005, the IETC has not advanced any substantive recommendations for the amendment of the Technical Annex to the Convention. Instead, its role has been reduced to functioning largely as a forum where States Parties exchange information on technological developments in the field of explosives detection. The Council has noted that this diminished output raises questions regarding the Commission's continued relevance, especially given the rapid pace of innovation in detection science and the shifting threat landscape in civil aviation security.¹³¹

At its most recent meeting, the IETC recognized that if a recommendation to amend the Technical Annex were to arise in the future, it would be essential to carefully assess the operational and financial consequences for States Parties. Such an assessment should consider not only the duties of civil aviation authorities but also the potential impact on non-aviation entities, including military bodies, customs administrations, and police authorities, all of which could be directly affected by the implementation of any amendment.¹³²

Since the Convention's entry into force in 1998, the IETC has been convened only ten times, and on merely two occasions has it issued concrete recommendations to amend the Technical Annex. Owing to the Convention's limited scope—confined exclusively to plastic explosives—many of the broader responsibilities concerning the prevention and detection of explosives have, over time, been assumed by other technical bodies within ICAO. The rigidity and inflexibility of the Convention's institutional design have made it particularly difficult for both the instrument and the IETC to adapt to other contemporary challenges, including the

¹²⁶ *Ibid*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ See ICAO, LC/39-WP/3-2.

¹³⁰ See ICAO, C-WP/15558 at 2.

¹³¹ See ICAO C/MIN 227/3.

¹³² See IETC Report 9 at 3-1.

emergence of new categories of explosives and advances in detection technologies. As a result, the IETC has, in practice, experienced a marked decline in relevance.

It is believed that States and industry have now developed more advanced screening technologies and detection methods to identify unmarked plastic explosives as well as other commercial and homemade explosives. These innovations directly enhance the security of civil aviation.¹³³ Understandably, the Council has expressed concerns with respect to the relevance of IETC's work.¹³⁴

2.2.Positive Contributions of the MEX's Convention

Adopted in less than twenty-seven months, the Convention represented the fastest process of drafting, negotiation, and adoption of any international aviation security instrument under the auspices of ICAO. For this reason, the outcome of the Diplomatic Conference was widely regarded as an outstanding success. Significantly, the Convention was the first global treaty to address specifically the problem of plastic explosives—a regulatory gap made starkly evident by major aviation disasters such as Pan Am Flight 103 and UTA Flight 772.

The Convention establishes binding obligations requiring States to mark plastic explosives with chemical agents, thereby rendering them detectable by conventional screening technologies. It further obliges States to eliminate unmarked stockpiles within prescribed deadlines, whether through destruction or controlled consumption. In addition, the Convention created the IETC, tasked with monitoring technical advances and submitting recommendations to the ICAO Council. Since its adoption, most States engaged in the manufacture of plastic explosives have become parties to the Convention, thereby promoting regulatory harmonization and substantially reducing the volume of unmarked stockpiles. Taken together, these achievements demonstrate that the Convention significantly strengthened international aviation security by closing a critical gap in detection—a gap that, in the past, had directly contributed to some of the most devastating accidents the history of in civil aviation.

2.3.Implementation of the MEX Convention: An assessment

Within ICAO, the success of an international treaty is frequently assessed by reference to the number of States that have ratified it. On this view, broad participation is equated with effectiveness. At present, ICAO counts 193 Member States, of which 156 are parties to the Convention. Measured solely against this benchmark, the Convention might therefore be considered a success. Yet the assessment changes significantly if success is evaluated not by formal adherence but by the degree of actual implementation at the domestic level. It must be recalled that, like other international aviation security instruments, the Convention requires the adoption of national legislation to give effect to the obligations it imposes.

In this respect, ICAO faces a notable informational deficit. The most recent comprehensive data on implementation of aviation security treaties date back to 1999–2000. ICAO's reporting at the time revealed that in 1999 only forty-five States had adopted national legislation to implement these instruments.¹³⁵ By 2000, that number had risen only marginally to fifty States—representing approximately 26 percent of ICAO's membership.¹³⁶ These

¹³³ See ICAO, C-WP/15558 at A1.

¹³⁴ *Ibid* at 2.

¹³⁵ See ICAO, C-WP/11103.

¹³⁶ *Ibid*.

figures provide a clear indication of the limited extent to which international aviation security obligations had been incorporated into domestic legal systems.

The difficulty is particularly pronounced in civil law jurisdictions, where States frequently ratify international aviation security conventions yet fail to enact the requisite domestic legislation to give normative force to the obligations therein. Unlike many human rights instruments, which may operate with a measure of self-executing effect, aviation security treaties presuppose deliberate legislative incorporation. In consequence, ratification often translates merely into the formal designation of certain conduct as a criminal offence, while the absence of implementing measures deprives such provisions of enforceability by leaving them bereft of specific penalties. In such circumstances, the treaty risks being rendered nugatory, a symbolic commitment without juridical consequence. It bears emphasis that these conventions impose upon States a duty not only to define acts as criminal offenses, but also to ensure the effective imposition of sanctions—penal consequences that give tangible expression to the normative prescriptions of the international regime.

In the absence of more recent reporting, and lacking evidence to suggest a significant improvement since 2000, it is reasonable to conclude that the overall level of implementation has remained limited. There is little basis to assume that the MEX Convention constitutes an exception to this trend. On the contrary, the available evidence strongly suggests that its rate of domestic implementation mirrors the broader pattern of under-enforcement.

The MEX Convention was a pioneering response to aviation terrorism, by creating a global standard for marking plastic explosives. Its major achievement was harmonizing State practices and reducing the legal availability of undetectable stockpiles. However, its effectiveness has waned because of its narrow scope, weak enforcement, and failure to adapt to the evolving tactics of terrorist groups. Today, it is often seen as a necessary but incomplete instrument, requiring complementary measures to address modern threats.

2.4. Institutional and normative weakness of the MEX Convention

As mentioned above, the Convention only applies to plastic explosives. Although there were voices at the Diplomatic Conference advocating in favour of a broader scope, the majority made a conscious decision to limit its applications to plastic explosives only. One can only speculate that this policy decision was taken to ensure the rapid adoption of the international instrument, as well as its prompt ratification by the international community. The international pressure was mounting. Less than a year after Lockerbie, there was also another major aircraft accident where plastic explosives were used. ICAO needed to produce results. Expanding the Convention's scope could have delayed its adoption.

To fully apprehend the circumstances and prevailing international climate at the time of the Convention's adoption, it is instructive to revisit the words spoken in the closing remarks of Dr. Kenneth Rattray, President of the Diplomatic Conference. His reflections not only encapsulated the spirit of cooperation that animated the negotiations but also underscored the profound sense of urgency with which States approached the task of fortifying the legal architecture against acts of unlawful interference. Dr. Rattray's statement stands as a testament to the collective will of the international community to transcend political divisions in the pursuit of a universal legal instrument, one that would strengthen the normative framework safeguarding international civil aviation and, by extension, the security of the traveling public.

On the final day of the proceedings, Dr. Rattray captured the historical moment with eloquence and gravity, declaring:

*[The Convention was adopted] “against the background of a world struggling to preserve peace and tranquillity in the shadows of hostilities; against a background of an atmosphere of fear in a world struggling to find a fair solution to the issues of conflicts but, above all, with a resolve that the international community and, in particular, the international aviation community, should not continue to be so vulnerable to acts of senseless and wanton terror.”*¹³⁷

With the benefit of time, the Convention’s limited scope has now proved to be one of its major weaknesses. As it stands, the Convention represents just one element within broader international efforts to prevent terrorists from using explosives against civil aviation. Modern trends have shifted towards improvised explosives devices, made amongst others, dual-use chemicals.

In addition, adding chemical markers to explosives for detection does not solve the problem of existing unmarked stockpiles. These include non-military explosives diverted from commercial channels, unmarked military reserves, and explosives produced or improvised by terrorist groups, which remain inherently unmarked.¹³⁸ The 15-year window for militaries to destroy or use unmarked stockpiles may have been excessively long. Arguably, the shorter 3-year deadline for civilian holders was much stronger, but monitoring and compliance was not necessarily in place.

Another notable limitation of the Convention resides in the absence of an enforcement mechanism. Although its provisions are legally binding, ICAO lacks the authority to conduct factory inspections, monitor stockpiles, or verify the destruction of unmarked plastic explosives. As a result, the effectiveness of the regime is contingent almost exclusively upon the political will and administrative capacity of States to implement their obligations. By contrast, the *Chemical Weapons Convention* (“CWC”) establishes a far more rigorous compliance framework.¹³⁹ In this respect, the Organization for the Prohibition of Chemical Weapons (“OPCW”) is expressly mandated to undertake on-site inspections, thereby providing a robust verification system to ensure adherence to the treaty’s requirements.

The Convention primarily addresses the manufacture, possession, movement, and control of unmarked plastic explosives. Its principal objective is to reduce the availability of such explosives within legitimate markets by imposing obligations on States to regulate and eliminate unmarked stockpiles. Notwithstanding this framework, terrorists’ intent on committing unlawful acts increasingly manufacture, acquire, or improvise their own explosives, often entirely outside formal industrial supply chains. In this respect, the Convention does not extend to the innovative and adaptive methods employed by non-State actors in developing improvised explosive devices. Put differently, when assessed against the contemporary challenges of preventing acts of unlawful interference, the Convention reveals a significant structural limitation: it regulates only one segment of the potential supply chain,

¹³⁷ See Montreal Convention Proceedings Volume at 176.

¹³⁸ See ICAO C-WP/15167 at 3.

¹³⁹ See *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* [Chemical Weapons Convention].

while leaving unaddressed the evolving practices of non-State actors that now represent some of the most pressing threats to civil aviation security.

Another significant shortcoming of the Convention lies in its absence of a built-in mechanism to facilitate the timely introduction of amendments necessary to ensure that the instrument remains responsive to current, emerging, and pressing needs. The Diplomatic Conference thus missed a valuable opportunity to incorporate a flexible amendment procedure that could have enabled the Convention to evolve in line with technological developments and shifting security challenges. In consequence, any proposed modification to the Convention must proceed through the traditional processes of international treaty-making within ICAO—procedures that are inevitably protracted, and resource-intensive.

It would be however manifestly unfair to assess the role and relevance of the IETC and the Convention solely through the prism of contemporary aviation security requirements, whether in the field of explosives detection or in the prevention of acts of unlawful interference against international civil aviation. The global security landscape has undergone profound transformations in the decades since the Convention's adoption. The terrorist attacks of 11 September 2001 ushered in a radically new regulatory environment for aviation security. To suggest that the drafters of the Convention should have anticipated the subsequent evolution of explosives technology and their appalling potential for misuse against civil aviation and the international community at large would be to impose upon them an unreasonable and anachronistic burden of foresight.

It must be recalled that, as originally conceived, the Convention was designed to address a clearly defined and immediate threat. Both prior to and following the bombing of Pan Am Flight 103, a series of attacks had been perpetrated against civilian targets using unmarked plastic explosives. Confronted with this urgent reality, the Diplomatic Conference deliberately chose to craft an instrument that was narrow in scope, single-minded in purpose, and responsive to the exigencies of the moment. The drafters did not possess the luxury of time to elaborate a comprehensive regime encompassing every conceivable dimension of explosives detection and their potential for monstrous use against civilian populations. As is so often the case in international lawmaking, the quest for perfection was subordinated to the imperative of timely action—the recognition that the “perfect” is frequently the enemy of the “good.” The international community was observing closely, demanding swift results. In this sense, the Convention was the right response to the needs of its time. Yet, given these very circumstances, it was almost inevitable that its significance and relevance would diminish with the passage of time and the evolution of global security threats.

3. International Legal Framework to Amend Conventions, ICAO Practice and Treaty Practice outside ICAO

3.1. The VCLT Framework for Treaty Amendment

On the premise that every State possesses the capacity to conclude treaties,¹⁴⁰ it necessarily follows that each State also retains the authority to participate in the amendment of

¹⁴⁰ Robert Y. Jennings says that “the treaty is far and away the most important instrument known to international law and relationships; and it is also, in volume, range, and unicity, the most important source of international

such instruments.¹⁴¹ The VCLT, which codifies “[a]n important part of the custom and case law”¹⁴², indicates that any treaty may be amended by agreement between the parties.¹⁴³ Unless a treaty itself prescribes a specific amendment procedure, the general rules for introducing such amendments are those set out in the VCLT, which may be summarized as follows:

- i) **Notification:** The proposal to amend must be communicated to all States Parties. While the VCLT does not expressly indicate who bears responsibility for this function, in practice it is ordinarily carried out by the treaty’s depositary.¹⁴⁴ The VCLT imposes no threshold as to the number of States that must act jointly to request the amendment of an international instrument.
- ii) **Right of participation:** Each State Party is entitled to take part in the decision-making process regarding the proposed amendment. Although the VCLT provides little detail on this point, the right is generally understood to encompass the prerogative of submitting comments to the depositary or, where applicable, expressing an objection either to the convening of a diplomatic conference or to the introduction of the amendment itself.¹⁴⁵
- iii) **Negotiation and conclusion:** Each State Party is further entitled to participate fully in the negotiation and conclusion of the agreement designed to modify the treaty. Correspondingly, every State Party retains the right to accede to the amended treaty.¹⁴⁶
- iv) **Binding effect:** An amendment agreement does not bind a State that is already party to the original treaty unless that State expressly becomes a party to the amending agreement.¹⁴⁷
- v) **Status of New Parties:** A State that was not a party to the original treaty but subsequently accedes solely to the amending agreement will be regarded as a party to the treaty as amended.¹⁴⁸

3.2.Practice at ICAO

None of the international aviation security conventions establish specific rules governing their amendment.¹⁴⁹ The same observation applies more broadly to other treaties

law.” See Robert Y. Jennings, “Treaties” in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects* (Paris: Martinus Nijhoff Publishers – Unesco, 1991) at 136.

¹⁴¹ In international law, although similar, there is a distinction between an “amendment” and a “modification” of a treaty. Shaw supports the view that an “amendment” refers to the certain changes of the international instrument affecting all party, whereas a “modification” implies an alteration of such instrument but rather affecting particular parties. See M. N. Shaw, *International Law*, 3rd Ed. (Cambridge: Cambridge University Press, 1995) at 581. Jennings writes that “it should be added that this distinction, thought theoretically valid, is not always so clear in practice and the one situation may well change into the other one.” See Robert Y. Jennings, “Treaties” in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects* (Paris: Martinus Nijhoff Publishers – Unesco, 1991) at 149. See also Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1998) at 630-632.

¹⁴² See Robert Y. Jennings, “Treaties” in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects* (Paris: Martinus Nijhoff Publishers – Unesco, 1991) at 136.

¹⁴³ See VCLT Art. 40.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ See *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963, United Nations, Treaty Series, vol. 704, No. 10106; *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970, United Nations, Treaty Series, vol. 860, No.

developed under the auspices of ICAO, including those in which the LC participated in the drafting process leading to their eventual adoption.¹⁵⁰

There are, however, two notable exceptions. The first is the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944 (“Chicago Convention”). Pursuant to its provisions, any proposed amendment may be submitted directly to the Assembly. Such a proposal is adopted if it secures the approval of two-thirds of the States present and voting. The amendment subsequently enters into force for those Contracting States that have ratified it once it has been ratified by the number of States specified by the Assembly, which in any event cannot be fewer than two-thirds of ICAO’s total membership.¹⁵¹ In practice, this means that an amendment to the Chicago Convention can be negotiated and adopted in less than a year. The proposal does not need to go through the ICAO treaty making process.

The second example is the *Convention on International Interests in Mobile Equipment* and the *Protocol on Matters Specific to Aircraft Equipment*, both signed in Cape Town on 16 November 2001 (“Cape Town Convention and Aircraft Protocol”). The Cape Town Convention established the *Review Conferences of States Parties*, which may be convened by the depositary, in consultation with the Supervisory Authority, as necessary. These conferences are empowered to examine whether modifications to the treaty framework or its institutional

12325; *Convention for the Suppression of Unlawful Act against the Safety of Civil Aviation*, signed in Montreal on 23 September 1971, United Nations, Treaty Series, vol. 974, No. 14118; *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, done at Montreal on 23 September 1971*, adopted in Montreal on 24 February 1988, United Nations, Treaty Series, vol. 1589, No. A-1418; *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, done at Beijing on 10 September 2010; *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, done at Beijing on 10 September 2010, *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, done at Montreal on 14 April 2014.

¹⁵⁰ See *Convention on the International Recognition of Rights in Aircraft*, signed at Geneva on 19 June 1948; *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952; *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929*, done at The Hague on 28 September 1955; *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, signed at Guadalajara on 18 September 1961; *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955*, signed at Guatemala City on 8 March 1971; *Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, signed at Montreal on 25 September 1975; *Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, signed at Montreal on 25 September 1975; *Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, signed at Montreal on 25 September 1975; *Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, signed at Montreal on 25 September 1975; *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on 7 October 1952*, signed at Montreal on 23 September 1978; *Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999*; *Convention on Compensation for Damage Caused by Aircraft to Third Parties, signed at Montreal on 2 May 2009*; and *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, signed at Montreal on 2 May 2009*.

¹⁵¹ See Chicago Convention, Art. 94. In 2016, the Assembly approved proposals to increase the Council membership to 40 States and the Air Navigation Commission to 21 members. See *Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 50] (a)*, signed in Montreal on 6 October 2016 and the *Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 56]*, signed in Montreal on 6 October 2016.

arrangements are desirable. Any amendment to the Cape Town Convention must be approved by at least a two-thirds majority of the States Parties participating in the Review Conference and enters into force, for those States that ratify, accept, or approve it, once three States have completed that process. This notably low threshold reflects the approach adopted for the Convention itself, which entered into force upon ratification by only five States. The Cape Town Protocol contains a parallel mechanism, with the sole difference that entry into force of an amendment requires ratification, acceptance, or approval by eight States.¹⁵²

In the absence of a specific provision within an ICAO-sponsored treaty governing amendment procedures, the applicable process is shaped by three elements: i) the long-standing ICAO practice; ii) the *Procedure for Preparation of Draft Conventions* set out in Attachment A of ICAO Doc. 7669-LC/139/7, and iii) Appendix B, *Procedure for Approval of Draft Conventions* of ICAO Assembly Resolution A41-4.

Consistent with ICAO practice, the preliminary stages of treaty-making typically begin outside the immediate domain of the LC.¹⁵³ This is especially true in the context of the negotiation of new instruments, although the same procedure has also been followed with respect to the amendment of existing treaties. Generally, the process is triggered when a particular problem is identified as requiring resolution through international treaty. A small group of States, the Secretariat, or industry stakeholders may recommend the establishment of a working or study group to assess the issue.¹⁵⁴

Where sufficient support for such an initiative exists, the ICAO Council ordinarily approves it. Upon the completion of the group's deliberations, and where the findings recommend either the preparation of a new instrument or further legal study, the Council may then instruct the LC to include the matter in its work program. In some cases, the inclusion of

¹⁵² See *Protocol to the Convention on International Interest in Mobile Equipment on Matters specific to Aircraft Equipment*, signed at Cape Town on 16 November 2001, Art. XXXVI.

¹⁵³ In principle, recourse to international treaty-making is justified only when certain conditions are present. First, the issue in question must be of such magnitude that it warrants regulation through a binding multilateral instrument rather than more limited or *ad hoc* arrangements. Second, the matter must be of an inherently international character, such that it cannot be adequately addressed through the domestic legal systems of individual States. In other words, the problem must transcend the confines of national jurisdiction and call for a coordinated international response. Third, and perhaps most crucially, even at the preliminary stages of negotiation there must exist a demonstrable degree of consensus—whether within the broader international community or among a critical mass of States—that the matter merits collective regulation. International law, at its core, is the expression of the will of States. However well-drafted a treaty text may be, it cannot be imposed upon States absent their consent. Culled from a personal conversation between the author and Prof. Dr. Michel Milde (May 2011).

¹⁵⁴ Pursuant to the LC's Rules of Procedure, working group meetings, subcommittee meetings, and LC sessions require translation and interpretation services. While this requirement is understandable for subcommittee meetings and LC sessions—given the significantly larger number of participants and the risk of disadvantaging States if only one language were used—it may be excessive for smaller bodies such as working or study groups. These smaller groups generally consist of 10–15 members, most of whom are fluent in English. In practice, English is typically used as the working language. Providing interpretation and translation in such settings imposes considerable costs, as language services represent the most significant expense in convening meetings. Indeed, the organization has at times designated certain smaller study groups as “task forces” precisely to avoid triggering the rule, thereby reducing translation and interpretation costs. Accordingly, the rule should be amended to clearly exempt smaller groups, such as working and study groups, from the requirement to provide translation and interpretation services. This adjustment would align the rule with established practice and generate meaningful cost savings for the organization. See ICAO Doc. 7669-LC/139/7, *Legal Committee – Constitution – Procedure for Approval of Draft Conventions - Rules of Procedure*, Rule 44.

the subject matter into the LC's work program may also be done prior to the establishment of the small working group or the task force.

At this stage, the LC proceeds in accordance with the *Procedure for Preparation of Draft Conventions*, which does not operate as a prescriptive code but rather serves as a set of guiding principles for the preparation of draft conventions. The Chairperson of the LC typically appoints a Rapporteur, who prepares a report for submission either to the Sub-Committee or directly to the LC, depending on the Chairperson's instructions and whether a Sub-Committee meeting has been convened. In certain instances, the Rapporteur may also advance a preliminary draft text of a proposed convention. The process usually includes meetings of both the Sub-Committee and the LC, although convening both is not strictly required. Sub-Committee meetings typically involve the participation of 25–35 States, whereas the LC is open to the full ICAO membership. The dual-meeting structure serves two principal purposes: first, to maximize State participation; and second, to build the broadest possible consensus while avoiding the submission of a draft text with excessive unresolved issues to the Diplomatic Conference. Historically, the meetings of small working groups, Sub-Committees, and the sessions of the LC have been conducted predominantly in person. Only on one occasion has ICAO resorted to virtual modalities to conduct an LC session. The potential for expanding the use of virtual meetings therefore warrants further consideration, particularly considering the evolving practices in other international organizations, where such arrangements have increasingly been adopted to enhance efficiency and reduce costs without necessarily diminishing participation.

In practice, for most treaties and their amendments, a single meeting of the Sub-Committee and one session of the LC have sufficed. An exception occurred in the process leading to the adoption of the Beijing Convention and Protocol, which required two Sub-Committee meetings—a deviation from the general rule. Unlike the process that led to the MEX Convention, the Sub-Committee and LC meetings are not usually held within the same year, as evidenced by the procedures followed for the most recent instruments adopted under ICAO auspices.

Once the LC concludes its deliberations and determines that a draft convention is ready for submission to the Member States, it transmits a report to the ICAO Council recommending the convening of a Diplomatic Conference. The LC functions in an advisory capacity, and its recommendations are not binding upon the Council.¹⁵⁵ The Council may either reject the proposal or, alternatively, circulate the draft convention to Member States and relevant international organizations.¹⁵⁶ Should the Council resolve to convene a Diplomatic Conference, the opening date must be set at least six months after the transmission of the draft text.¹⁵⁷ In such cases, the Council may append comments and invite States and organizations to submit written observations within a minimum period of four months.¹⁵⁸

Perhaps one of the most overlooked provisions in the *Procedure for the Approval of Draft Conventions*, as reflected in ICAO Assembly Resolution A41-4, concerns the possibility of convening a Diplomatic Conference in conjunction with a regular session of the Assembly, which is ordinarily held in September–October every three years. In practice, this would allow a Diplomatic Conference to be scheduled immediately prior to the Assembly session. Such an

¹⁵⁵ See ICAO A41-4, Appendix B.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

arrangement could generate cost savings for participating States by consolidating travel and logistical expenses. At the same time, however, it would impose a significantly heavier administrative and workload burden upon the ICAO Secretariat. While this option has seldom been explored in practice, it should not be dismissed out of hand. It is submitted that this option warrants careful consideration, particularly in the context of convening a conference to examine the potential amendment of a convention in circumstances where the issues at stake are not unduly complex and where a significant degree of consensus already exists. In other words, it is not suggested that a diplomatic conference be convened prior to the Assembly, for example, to adopt a new treaty regulating greenhouse gas emissions from international aviation—an issue that remains highly contested and fiercely debated.

In the absence of built-in amendment mechanisms, ICAO's treaty-making process exhibits both notable strengths and undeniable limitations. Among its advantages, the process is highly participatory, encompassing multiple stages of engagement for Member States. The convening of meetings at both the Sub-Committee and LC levels, together with the appointment of a Rapporteur, ensures that issues are subject to extensive debate and technical scrutiny. Moreover, the preliminary establishment of small working or study groups facilitates the identification of matters that genuinely warrant regulation through international treaty-making, while the Council's supervisory role guarantees that the Organization's human and financial resources are allocated in a manner consistent with institutional priorities.

Notwithstanding these strengths, the process suffers from several structural drawbacks. Chief among them is the tendency to treat all international instruments as though having the same degree of complexity, urgency, and importance. For example, introducing limited amendments to the MEX Convention does not present the same level of technical or political difficulty as revising the *Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1991*, an instrument applied daily across nearly the entire world. Yet the same procedural framework is applied in both contexts, irrespective of the magnitude of the issue at stake. The result is a process that is excessively time-consuming, bureaucratic, and costly, thereby discouraging States from viewing international treaty-making as a practical instrument for addressing civil aviation problems with a transnational dimension.

This perception has tangible consequences. For instance, in the context of discussions on the enforcement mechanisms required for the Carbon Offsetting and Reduction Scheme for International Aviation ("CORSIA"), negotiators quickly dismissed the possibility of pursuing an international treaty. The reasons were evident: the procedure was too protracted, the outcome too uncertain, and the ratification process so lengthy that entry into force could not realistically be expected within a useful timeframe.¹⁵⁹

The delays associated with ICAO treaty-making are considerable. Most instruments developed under ICAO auspices have required at least four years for negotiation and adoption, with the notable exception of the MEX Convention, which was concluded within 27 months. This figure does not include the additional years often needed to secure sufficient ratifications for entry into force. Furthermore, the existing procedural rules neither explicitly prohibit nor expressly permit the convening of virtual meetings of the Sub-Committee, the LC, or the Diplomatic Conference. By contrast, other international organizations have already begun to

¹⁵⁹ See Piera at 319-352.

embrace such modalities as a means of expediting treaty-making processes. Examples of these practices will be considered in the following sections of this report.

Another aspect of ICAO's treaty-making procedure that merits reconsideration is the requirement that, once the Council has approved the convening of a Diplomatic Conference, the conference may not be held earlier than six months from the date on which the notification is transmitted to States. While such a delay may have been justified historically—when communications were slower and logistical arrangements more demanding—its rationale appears less compelling in the contemporary context, where instantaneous connectivity and digital coordination are the norm. The strict six-month interval risks impeding the timely adoption of instruments, particularly in circumstances where urgent regulatory or security needs call for an expedited process. A recalibration of this requirement could therefore enhance the responsiveness and effectiveness of ICAO's international law-making function.

3.3. Treaty Practice with Built-In Amendment Mechanisms outside ICAO

The *Convention on the Physical Protection of Nuclear Material* establishes a detailed procedure for the amendment of its provisions. Any State Party may submit a proposed amendment to the depositary, which is then required to circulate the proposal to all States Parties. Should a majority of States Parties request it, the depositary must convene a conference to consider the proposal, with the stipulation that such a conference cannot be held earlier than thirty days following the issuance of invitations. Adoption of an amendment at the conference requires the approval of two-thirds of all States Parties. The amendment enters into force thirty days after two-thirds of the States Parties have deposited their instruments of ratification, acceptance, or approval with the depositary. For any remaining State Party, the amendment enters into force on the date that the respective instrument of ratification, acceptance, or approval is deposited.¹⁶⁰ The *International Convention for the Suppression of Acts of Nuclear Terrorism* likewise adopts a very similar approach with respect to its amendment procedure.¹⁶¹

In a more simplified and less prescriptive fashion, the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* provides that one-third of the States Parties, or ten States Parties—whichever is higher—may submit a request for amendment to the Secretary-General of the International Maritime Organization (“IMO”). The Secretary-General is then obliged to convene a conference to consider the proposal. Unlike more detailed treaty frameworks, this instrument leaves it to the conference itself to determine the applicable procedural and substantive rules governing the amendment process.¹⁶² The *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*¹⁶³ and the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*¹⁶⁴ adopt the same approach with respect to its

¹⁶⁰ See *Convention on the Physical Protection of Nuclear Material*, adopted in Vienna on 26 October 1979, United Nations, Treaty Series, vol. 1456, No. 24631, Art. 20 [Convention on the Protection of Nuclear Material].

¹⁶¹ See *International Convention for the Suppression of Acts of Nuclear Terrorism*, adopted by the General Assembly of the United Nations on 13 April 2005, U.N. Doc. A/RES/59/290, Annex, Art. 26.

¹⁶² See *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done in Rome on 10 March 1988, United Nations, Treaty Series, vol. 1678, No. 29004, Art. 20 [*SUA Convention*].

¹⁶³ See *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on 10 March 1988, Art. 8, United Nations, Treaty Series, vol. 1678, No. 29004.

¹⁶⁴ See *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, signed in London on 14 October 2005, Art. 20.

amendment procedure, leaving the determination of detailed procedural rules to the conference of States Parties.¹⁶⁵

The *International Convention for the Suppression of the Financing of Terrorism* illustrates a particularly interesting interplay between the treaty itself and its Annex, which is central to understanding the procedure for introducing amendments.¹⁶⁶ This Convention establishes a general framework by criminalizing the provision or collection of funds with the knowledge that they are to be used for the commission of terrorist acts.¹⁶⁷ The definition of those acts, however, is not contained in the Convention but rather in its Annex, which, at the time of adoption in 1999, incorporated nine pre-existing international instruments related to the prevention and suppression of terrorism.¹⁶⁸ In this sense, the Annex serves a complementary role: it specifies the underlying conduct that qualifies as an international criminal offense.¹⁶⁹ The instruments listed include treaties addressing, inter alia, unlawful interference with civil aviation, attacks against internationally protected persons, maritime safety, and hostage-taking.¹⁷⁰ With the passage of time, however, the Annex has become increasingly outdated, as a number of new international counter-terrorism instruments have been adopted since 1999.¹⁷¹ To address this, this establishes a mechanism by which the Annex may be amended. Any State Party may submit to the depositary a proposal to update the Annex, but such amendment is limited to the addition of new treaties that are (i) open to participation by all States, (ii) in force, and (iii) ratified, accepted, approved, or acceded to by at least twenty-one States Parties to this Convention. Once these conditions are satisfied, the depositary is obliged to circulate the proposal to all States Parties.¹⁷² Unless one third of the States Parties submit a written objection within 180 days of its circulation, the proposed amendment is deemed to have been adopted.¹⁷³ Nevertheless, even after adoption, the amendment to the Annex enters into force only upon ratification. Specifically, it becomes effective thirty days after the deposit of the twenty-second instrument of ratification, acceptance, or approval, but only for those States Parties that have completed this procedural step.

The *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (“CITES”) constitutes a landmark international agreement designed to regulate trade in specimens of wild animals and plants so as to ensure that such trade does not imperil their survival.¹⁷⁴ By establishing a comprehensive framework of rules governing the import, export, and re-export of listed species, CITES seeks to reconcile the imperatives of conservation with

¹⁶⁵ The *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* follows essentially the same amendment procedure. The only distinction lies in the threshold required to initiate the process: it may be triggered by one third of the States Parties, or by five States Parties—whichever represents the higher figure. See *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, signed in London on 14 October 2005, United Nations, Treaty Series, vol. 1678, No. 29004, Art. 11.

¹⁶⁶ See *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on 9 December 1999, U.N. Doc. A/RES/54/109, Annex, at 23 [*Convention on the Financing of Terrorism*].

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ See *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, signed at Washington on 3 March 1973.

the realities of international commerce.¹⁷⁵ CITES further offers a compelling illustration of a treaty incorporating a built-in amendment mechanism.¹⁷⁶ Under its procedural framework, the initiation of the amendment process requires a request by at least one third of the States Parties to convene a Conference of the Parties for the purpose of considering proposed changes.¹⁷⁷ Such proposal must be submitted to the Secretariat. Any such amendment may only be adopted if it subsequently obtains the approval of a two-thirds majority of the Parties present and voting at the Conference of Parties.¹⁷⁸ This procedural design underscores both the participatory nature of the regime and its aspiration to balance flexibility with broad consensus in the progressive development of its normative framework.

On 19 June 2023, States adopted the *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* (“BBNJ Agreement”).¹⁷⁹ This instrument, which complements the *United Nations Convention on the Law of the Sea* (“UNCLOS”), establishes a legal framework for the protection of marine biodiversity in areas beyond national jurisdiction, while simultaneously promoting equitable access to and sustainable use of such resources. Notably, the BBNJ Agreement incorporates a built-in amendment mechanism. Pursuant to this procedure, any Party may submit a proposed amendment to the Secretariat. Where at least one half of the Parties respond favourably to the request within six months of the communication’s circulation, the amendment is to be placed on the agenda for consideration at the subsequent meeting of the Conference of the Parties.

More recently, on 24 December 2024, the General Assembly adopted, by Resolution 79/243, the *United Nations Convention against Cybercrime*.¹⁸⁰ This instrument represents the first comprehensive global treaty addressing criminal activities committed through information and communications technology systems.¹⁸¹ It equips States with a range of measures to prevent and combat such offenses and, importantly, strengthens international cooperation, particularly in the sharing of electronic evidence related to serious crime.¹⁸² This Convention also establishes a specific framework for its own amendment.¹⁸³ It provides that, five years after the treaty’s entry into force, any State Party may propose an amendment by transmitting it to the Secretary-General of the United Nations.¹⁸⁴ The Secretary-General must then communicate the proposal to all States Parties and to the Conference of the States Parties to the Convention, which is tasked with considering and deciding upon the amendment.¹⁸⁵ The treaty emphasizes consensus-building as the primary method of decision-making. However, if

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ See United Nations General Assembly, A/CONF.232/2023/4, *United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*.

¹⁸⁰ See United Nations General Assembly A/RES/79/243, *United Nations Convention against Cybercrime; Strengthening International Cooperation for Combating Certain Crimes Committed by Means of Information and Communications Technology Systems and for the Sharing of Evidence in Electronic form of Serious Crimes*.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

all efforts to reach consensus fail, the amendment may, as a last resort, be adopted by a two-thirds majority of the States Parties present and voting at the Conference.

Although numerous international instruments addressing the prevention and suppression of terrorism, many of which have been developed under the auspices of ICAO, lack any built-in mechanism for their amendment, contemporary treaty practice reveals a discernible shift.¹⁸⁶ As illustrated above, more recently concluded instruments increasingly incorporate detailed provisions governing the procedures by which they may be amended. This evolution reflects an unmistakable tendency toward enhancing institutional adaptability, ensuring that the constituting instruments remain responsive to emerging challenges. In this respect, the inclusion of explicit amendment rules may be regarded as both a more efficient and a more expedient approach to the progressive development of international law.

3.4.Built-In Amendment Clauses as a Tool for Treaty Adaptability

Any built-in amendment mechanism must be carefully designed to address several procedural and substantive issues. These should include:

- i) the determination of who is entitled to initiate the amendment process, and to whom such a request must be submitted.
- ii) the threshold that must be met for an amendment proposal to proceed to formal consideration.
- iii) the identification of the entity vested with the authority to convene a conference of the Parties or a diplomatic conference.
- iv) the time frame within which such a conference must be held.
- v) the decision-making threshold required at the conference itself for the adoption of an amendment proposal. Customary practice indicates that such proposals must be approved by a two-thirds majority of the States present and entitled to vote; and
- vi) the level of participation—expressed in terms of the number of States—that is required for the amendment to enter into force, together with the procedural act (ratification, acceptance, or approval) by which such consent must be expressed.

4. Treaty-Making in the Digital Age: Insights from the United Nations Report on Technology

¹⁸⁶ See for instance the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on 15 December 1997, U.N. Doc. A/RES52/164, Annex; *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963, United Nations, Treaty Series, vol. 704, No. 10106; *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970, United Nations, Treaty Series, vol. 860, No. 12325; *Convention for the Suppression of Unlawful Act against the Safety of Civil Aviation*, signed in Montreal on 23 September 1971, United Nations, Treaty Series, vol. 974, No. 14118; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on 14 December 1973, United Nations, Treaty Series, vol. 1035, No. 15410; *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on 17 December 1979, United Nations, Treaty Series, vol. 1316, No. 21931; *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, done at Montreal on 23 September 1971*, adopted in Montreal on 24 February 1988, United Nations, Treaty Series, vol. 1589, No. A-1418; *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, done at Beijing on 10 September 2010; *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, done at Beijing on 10 September 2010, *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, done at Montreal on 14 April 2014.

On 10 July 2025, the Secretary-General of the United Nations submitted a report addressing the role of technology in shaping contemporary treaty-making practice.¹⁸⁷ The report underscores that a number of States have already succeeded in concluding negotiations and adopting treaties with the aid of technological tools.¹⁸⁸ One State, in particular, reported that it had relied exclusively on a digital platform for the successful conclusion of a multilateral agreement.¹⁸⁹ Others emphasized the utility of virtual breakout rooms and similar technologies in facilitating online rounds of treaty negotiations. The Organization for the Prohibition of Chemical Weapons (“OPCW”) observed that it has, in fact, employed virtual negotiations since as early as 1997.¹⁹⁰ Several States, however, clarified that their use of virtual meetings remained confined to the preparatory stages of treaty-making, with the final adoption of the instrument continuing to occur in person. Likewise, the act of signature remains anchored in the traditional requirement of a physical, ink-based format.¹⁹¹

What emerges from these developments is a discernible trend: the long-standing reliance on protracted, face-to-face meetings is gradually being complemented—if not partially supplanted—by more efficient virtual sessions. Although the adoption of such practices does not resolve every challenge associated with treaty-making, it nonetheless contributes to greater efficiency and a more rational allocation of both human and financial resources.¹⁹²

The report also highlights a divergence in practice concerning formalities. While several UN specialized agencies acting as depositaries continue to require handwritten originals for multilateral treaties, some States have embraced the use of electronic signatures supported by blockchain or other certification systems.¹⁹³ With respect to electronic notifications, the Food and Agriculture Organization (“FAO”) and the UN Secretary-General permit the submission of electronic copies of instruments of ratification, accession, or approval, with originals to follow.¹⁹⁴ By contrast, other specialized agencies—including the International Labor Organization (“ILO”), the Organization of American States (“OAS”), UNESCO, and ICAO—continue to require upon originals for deposit.¹⁹⁵

Taken together, these experiences suggest that technology offers a remarkable opportunity to broaden participation, enhance transparency, and introduce greater efficiency

¹⁸⁷ See United Nations General Assembly, A/80/132, *Report of the Secretary General on the Role of Technology in Shaping Treaty-Making Practice*.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Virtual meetings are by no means a panacea. While they offer certain clear advantages—such as reduced costs for participants and greater flexibility in scheduling—they also present several well-documented drawbacks. First, in the context of ICAO-convened meetings attended by Member States, the most significant cost element is interpretation, a requirement that remains regardless of whether the meeting is held in person or virtually. Under the Rules of Procedure of the LC, interpretation into all ICAO working languages is mandatory for Sub-Committee meetings, LC sessions, and even meetings of working groups. By contrast, ICAO Secretariat Task Forces and Study Groups are not subject to the same requirement, irrespective of the modality of the meeting. Second, virtual meetings often face logistical challenges arising from the differing time zones of participants’ jurisdictions, which can complicate efforts to find suitable meeting times. Third, experience suggests that maintaining participants’ attention and engagement becomes increasingly difficult in virtual sessions that extend beyond three hours; concentration tends to wane, and deliberations risk becoming less effective as a result. Culled from email exchanges with Mathieu Vaugeois (27 August 2025).

¹⁹³ See United Nations General Assembly, A/80/132, *Report of the Secretary General on the Role of Technology in Shaping Treaty-Making Practice*.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

and cost savings into the treaty-making process. Against this backdrop, it may be timely for ICAO's Legal Affairs and External Relations Bureau ("LEB") to examine the potential integration of technological tools to expedite and streamline the treaty-making process. In the absence of such innovations, States, the Organization, and industry stakeholders may increasingly turn to alternative mechanisms to address legal problems with a clear international dimension.

5. Proposals

As noted above, the preliminary assessment advanced in this report concerning the IETC is that, owing to the limited scope of the Convention and the narrowly defined purpose for which it was adopted, the body—while successfully achieving the objectives envisaged by its drafters—has, over time, experienced a decline in both relevance and standing. Contemporary security imperatives extend well beyond the narrow issue of unmarked plastic explosives and increasingly encompass the broader field of explosives detection.

The Council has requested that this report evaluate potential courses of action: whether the IETC ought to be dissolved on the basis that it has effectively discharged its original mandate, or whether the Convention should be amended to redefine and modernize the IETC's role.

Having undertaken a comprehensive analysis of the circumstances leading to the Convention's adoption, its drafting history, the final text as adopted, and the work of the IETC since the instrument entered into force in 1998, this report now sets forth the alternative courses of action identified below. At the outset, it must be acknowledged that none of these options are without shortcomings; each entails both advantages and disadvantages, viewed from both legal and financial perspectives. Furthermore, considering the Convention's lack of a built-in amendment mechanism—as discussed in detail above—introducing modifications to its original text cannot be expected to be a straightforward process, and would almost certainly prove neither swift nor cost-effective.

5.1. IETC's Termination

Before exercising any of the options outlined below concerning the possible termination of the IETC, it would be prudent for the Council to be provided, whether by the Secretariat, by another specialized aviation security body within ICAO, or by the IETC itself, with authoritative and technically substantiated conclusions affirming that the continuation of the IETC's functions is no longer justified. Such a determination, firmly anchored in specialized expertise, would supply the Council with the requisite evidentiary and institutional foundation upon which to base any subsequent decision regarding the future of the body.¹⁹⁶

¹⁹⁶ Another issue meriting careful consideration concerns the practical consequences for the Convention were the IETC to be terminated. As is well known, the IETC performs a highly sensitive and technically complex function that is central to the fulfilment of the Convention's objectives. In its absence, and absent a substantial redesign of the Convention's institutional framework, it would no longer be possible to incorporate into the Technical Annex newly developed types of plastic explosives. While the obligations of the States Parties, as well as those of the Council, would formally remain in force, the resulting paralysis of the Technical Annex would raise the fundamental question of whether the Convention could continue to serve any meaningful purpose at all. In such

Against this backdrop, this report identifies the following alternatives for the prospective termination of the IETC, namely:

5.1.1. Council's Decision

As outlined in detail above, the IETC functions as the Council's advisory body in matters pertaining to plastic explosives. Its recommendations are not binding upon the Council, and still less upon the States Parties. Rather, the Convention vests in the Council a series of oversight functions and duties in relation to the IETC's work. Among these is the responsibility to review, assess, and determine whether to transmit proposals for amendments to the Technical Annex to the States Parties. In effect, the Council acts as a liaison between the IETC and the States Parties.

On this basis the Council could then decide to terminate the IETC, particularly considering the limited relevance of tasks remaining to be assigned to such an entity. In communicating such a decision to the Member States, the Council might stipulate that the termination would take effect on a specified date, unless five or more States Parties were to object to the proposed course of action. This approach would, in essence, mirror the mechanism established in Article VI of the Convention for the introduction of amendments to the Technical Annex.

It may be argued that this option presents an advantage in its relative ease and speed of execution, while entailing no significant financial cost. Its principal weakness, however, lies in the fact that it would rest on the application of an analogous mechanism and on the attribution of authority to the Council that the Convention does not expressly confer. In other words, it would entail a reconfiguration of the institutional design and a redistribution of prerogatives not contemplated by the Convention's drafters. The inherent risk in such creative interpretation is that it could set a precedent for reinterpreting other international instruments in ways that exceed their original intention, an outcome that could introduce unnecessary legal uncertainty and institutional challenges.

5.1.2. The Conference of Parties

Throughout its text, the Convention refers to the Conference of all States Parties only in the limited context of the mechanism for introducing amendments into the Technical Annex. In this respect, where the Council transmits to the States Parties a recommendation of an amendment formulated by the IETC, but five or more States object, the Convention empowers the Council to convene a Conference of all States Parties. It may reasonably be inferred that this mechanism was incorporated into the treaty as a safeguard against the possibility that a small number of States might arbitrarily or capriciously obstruct the adoption of an amendment—for example, on political rather than technical grounds. Notably, however, the Council has never invoked this procedure.

By analogy, one might envisage the Council convening a Conference of all States Parties for the purpose of considering the termination of the IETC. Such a meeting, scheduled

circumstances, the instrument would risk falling into a state of institutional obsolescence: a treaty that remains legally binding yet is effectively deprived of practical relevance in addressing contemporary challenges.

immediately prior to the ICAO Assembly, could be organized with a concise and clearly defined agenda. Provided that, adequate consultations had been undertaken in advance and consensus largely secured, deliberations at the Conference would not necessarily be protracted or contentious. Notification of the meeting could be circulated six months in advance, thereby ensuring both procedural regularity and sufficient preparation time.

The principal advantage of this option lies in the fact that the decision to terminate the IETC would rest not with the Council alone, but with the collective body of all States Parties. Moreover, the process would likely be relatively swift and less resource-intensive than resorting to the full ICAO treaty-making procedure. Once the Conference of all States Parties reached a decision, it would not appear strictly necessary for each State Party to subject that determination to its domestic ratification process.

The drawback, however, mirrors that of the previous option: the Convention does not expressly confer authority either upon the Council or upon the Conference of all States Parties to undertake such a course of action. Consequently, the same legal and institutional risks associated with creative reinterpretation—namely, the potential for precedents that extend beyond the drafters' original intent—apply with similar force to this alternative.

5.1.3. Traditional ICAO-treaty based amendment

Another alternative for terminating the IETC would be to amend the Convention expressly. As the Convention lacks a built-in amendment mechanism, such a course of action would necessarily require reliance on ICAO's traditional treaty-amendment procedure, as described in detail above. In practice, this would involve placing the matter on the agenda of the Legal Committee, convening at least one of its sessions, obtaining the Council's approval of a draft amendment, transmitting the proposed text to the States Parties, and subsequently convening a Diplomatic Conference no earlier than six months after the circulation of the notification.

To the extent that sufficient consensus were secured in advance, a Diplomatic Conference could, in principle, be convened for a relatively brief duration. In practice, however, the standard pattern has been that such meetings extend over a period of approximately ten days to two weeks. In any event, the text adopted by a Diplomatic Conference would still require subsequent ratification by the States Parties. Recent experience within ICAO demonstrates that achieving a significant number of ratifications within a relatively short timeframe has proven challenging, unless the process is actively championed by influential industry stakeholders or by a coalition of particularly interested States. At present, it is doubtful that an amendment to this Convention would be sufficiently compelling to mobilize such external advocacy, thereby diminishing the likelihood of rapid ratification.

The principal advantage of this option lies in its full conformity with ICAO's long-standing treaty practice. By adhering to orthodox channels, it avoids the interpretive uncertainties inherent in the alternative approaches considered above and guarantees both the legitimacy and the durability of the outcome. The disadvantages, however, are equally clear. Even under the most optimistic scenario, the process would extend over a period of two to three years merely to secure adoption of the amendment, while also imposing substantially greater financial and human resource burdens than the other options available. For an organization already operating under severe budgetary constraints, this inevitably raises the question of

whether recourse to such a cumbersome mechanism is justifiable—either from the standpoint of cost-effectiveness or considering the urgency, or lack thereof, of the need for reform.

6. Amending the MEX Convention

The Council has also requested an exploration of possible alternatives for introducing formal amendments to the Convention, particularly with a view to redefining the role of the IETC and/or broadening the scope of the instrument. Should this course of action be pursued, the only viable avenue would be to invoke ICAO's traditional treaty-amendment procedure, as outlined above. The incorporation of amendments into an international instrument cannot be carried out by means of a Council decision, nor through the convening of a Conference of all States Parties, since neither possesses constitutional authority to undertake such a task.

7. Additional recommendations

Although strictly *obiter dicta*, the research undertaken in preparation for this report—encompassing an examination of the current practices and working methods of other UN specialized agencies, as well as a comparative study of treaties concluded outside the ICAO framework—has revealed various opportunities to introduce incremental improvements into ICAO's treaty-making procedures. None of these suggestions entails drastic or structural changes to the existing framework. Nevertheless, if implemented, they could meaningfully contribute to accelerating and modernizing the process of treaty formation within ICAO. In this respect, the report advances the following recommendations:

- i) Revision of ICAO Doc 7669-LC/139/7 (*Legal Committee – Constitution, Procedure for Approval of Draft Conventions – Rules of Procedure*) with a view to streamlining the process, explicitly recognizing the possibility of convening virtual meetings, and removing the requirement to provide translation and interpretation services for the working groups of the Legal Committee.
- ii) Amendment of Assembly Resolution A41-4 (*Consolidated Statement of Continuing ICAO Policies in the Legal Field*) to enable the Council, in appropriate circumstances, to convene a Diplomatic Conference within a shorter timeframe than the current six-month period following the transmission of the draft convention.
- iii) Inclusion of built-in amendment mechanisms in new treaties to be adopted under ICAO's auspices in the future. This reflects the clear trend in recent international instruments negotiated within the UN system and its specialized agencies. Moreover, the experience of the Chicago Convention—endowed with such a mechanism since 1944—has demonstrated the considerable benefits of enabling swift modifications to the *Magna Carta* of international civil aviation. Furthermore, this report suggests that any built-in amendment mechanism should be designed with careful attention to both procedural clarity and substantive legitimacy. Such a mechanism ought to specify: (a) the actors entitled to initiate the amendment process and the authority to which such requests must be addressed; (b) the threshold that must be met for a proposal to advance to formal consideration; (c) the institutional body empowered to convene a Conference of the Parties or a diplomatic conference; and (d) the time frame within which such a conference must be held. Furthermore, the mechanism should articulate the decision-making threshold for adoption—typically a two-thirds majority of States present and

voting—as well as (e) the level of participation required for the amendment to enter into force, expressed in terms of both numerical support and the procedural act of ratification, acceptance, or approval.

8. Preliminary Conclusions

The Convention emerged as a rapid and pragmatic response to the catastrophic attacks of the late 1980s and early 1990s. Negotiated and adopted in record time, it filled a pressing regulatory gap and stands as a landmark achievement in ICAO's law-making history. Its adoption harmonized State practice, curtailed the circulation of unmarked plastic explosives, and contributed significantly to international aviation security. Yet, with the passage of time, the Convention's strengths have been overshadowed by its inherent limitations. Its narrow scope has constrained its capacity to adapt to the evolving threat environment.

Similarly, the IETC, while instrumental in the early years of implementation, has witnessed a steady decline in relevance. It has convened infrequently, produced limited substantive outputs, and has been eclipsed by other ICAO technical bodies with broader mandates. In this sense, the IETC may be regarded as having discharged its original mandate, but with diminishing utility in today's security architecture. The Council's request to evaluate the IETC's future is therefore both timely and necessary. More specifically, the Council has asked to investigate whether the IETC needs to be terminated or whether its role redefined, for which an amendment of the Convention would be necessary.

To this end, three principal alternatives have been identified: a Council decision to terminate the IETC, the convening of a Conference of all States Parties, or resort to the traditional ICAO treaty amendment procedure. Each presents its own advantages and disadvantages. The first two offer relative efficiency but rely on interpretive creativity that the Convention does not explicitly authorize. The third conforms fully to ICAO's long-standing practice, ensuring legitimacy and durability, but would require years of effort and considerable resources—an onerous prospect for an organization already facing financial and human resource constraints.

Beyond the immediate question of the IETC, this report also underscores broader suggestions for ICAO's treaty-making practice. Comparative analysis with other international instruments reveals the growing importance of built-in amendment mechanisms as tools of adaptability and institutional resilience. It also suggests that ICAO could profitably modernize its procedures by streamlining the Legal Committee's rules, enabling virtual meetings, reducing reliance on costly interpretation services for small working groups, and reconsidering the rigid six-month interval for convening diplomatic conferences. Outdated procedures should not be allowed to hinder the advancement and development of international law.

In light of the foregoing, the central challenge is to strike a balance between fidelity to ICAO's institutional framework and responsiveness to the evolving challenges. The IETC, though a product of its time, has largely fulfilled its historic mission. The choices now before the Council are not without difficulty, but they provide an opportunity to ensure that ICAO's normative framework remains credible, effective, and aligned with contemporary realities. In addressing the future of the IETC, the Organization must not only resolve a technical question of institutional design but also reaffirm its broader capacity to adapt to evolving changes, while maintaining the legitimacy and stability of its treaty regime.

In his closing remarks at the Diplomatic Conference of 1991, Dr. Rattray emphasized that [the adoption and entry into force of international treaties] “must not be seen as a reason for complacency or relaxation of effort but, rather, should serve as a catalyst for intensified efforts through international cooperation.”¹⁹⁷ In a similar vein, Milde has observed that the inherently technical nature of the issues confronting international civil aviation necessitates “continuing evolution and adjustment.”¹⁹⁸ One of the most pressing imperatives for the international aviation community—embracing national regulators, international organizations, and industry stakeholders alike—is to cultivate a dynamic and forward-looking posture, capable of adapting with agility to rapidly changing challenges. Aviation security and international treaty making are no exceptions to this demand.

This preliminary report aspires to contribute to those ongoing deliberations. It underscores the continuing relevance of international treaty-making as a vital instrument for fostering the safe, secure, and orderly development of air transport, ultimately serving the interests of the global community.

¹⁹⁷ See Montreal Convention Proceedings Volume at 176

¹⁹⁸ See Michael Milde, Draft Convention, at 174.