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AVSEC Conventions: beyond Chicago, until Beijing

Annex 17 to the Chicago Convention, sometimes referred to as The Security Annex, is the most famous of all the international legal instruments designed to counter the threat of the aviation industry being targeted by those with criminal intent. Yet the Chicago Convention is not the only document worthy of note. Diana M. Stancu reviews the impact of The Hague, Tokyo and Montreal Conventions and associated Protocols, and considers their aims and objectives whilst evaluating to what extent amendments are necessary. She also highlights the latest legal instruments which were agreed in Beijing this September yet await ratification.

Prior to 1960, most of the collective action to combat international terrorism was undertaken by the United Nations or its predecessor, the League of Nations. Although the League of Nations made cohesive efforts to create an international criminal court to deal with acts of international terrorism by drafting a Convention to Combat International Terrorism in 1937, this Convention never came into force as it was signed by only 13 states and ratified by only one.

Shocked by the rising trend of aircraft hijacking in the early 1960s and the failure of the 1958 Geneva Convention on the High Seas to offer rules applicable to the offence of hijacking of aircraft, the international community considered adopting, under the aegis of the International Civil Aviation Organisation (ICAO), the 1963 Tokyo Convention on offences and certain other acts committed on board aircraft, followed by the 1970 Hague Convention for the suppression of unlawful seizure of aircraft and the 1971 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation.

The 1963 Tokyo Convention

The first action taken by the international community to combat unlawful acts on board aircraft was the Tokyo Convention of 1963. The studies leading to the adoption of the 1963 Convention involved a detailed examination of all the matters relating to the legal status of aircraft and in particular to important aspects like crimes and offences committed on board aircraft, jurisdiction relating to such crimes and the resolution of jurisdictional conflicts.

Over the years, several drafts of the Convention were revised with a final text being presented by the Legal Committee of ICAO to the ICAO Council for submission to a diplomatic conference, convened in Tokyo from 20 August to 14 September 1963, for the purpose of further consideration, finalisation, adoption and opening for signature of the final draft of the Convention. 61 states and five international organisations were represented at the conference.

The Tokyo Convention emerged in its present form on 14th September 1963, thus consolidating the efforts of ICAO since 1950 on the subject of crimes on board aircraft. The Convention came into force six years later, on 4 December 1969. It is claimed that the rationale behind this slow ratification process was the fact that the Convention was drafted prior to the series of hijackings in the late 1960s and that it was not implemented with due haste by most states. The complicated legal and political issues facing many states at the time of the adoption of the Convention was another reason for the late implementation. Although states were slow in ratifying or in acceding to the Convention, it is worth mentioning that, within one year (1969-1970), 80 states ratified the Convention, probably in response to the spate of hijackings that occurred during that period.

The Convention aims to provide safety to aircraft, protection of life and property on board aircraft and generally to promote the security of civil aviation. A wide range of powers are granted to the aircraft commander, members of the crew and passengers with the sole aim to constitute international unified rules which would give the commander of every aircraft in the world the power to preserve good order and discipline on board the aircraft and to take all preventive measures or measures of restraint necessary to that end.

This power can be considered as a means to secure the maintenance of law and order on board the aircraft: the power to arrest, disembark and deliver to competent authorities of contracting states, any person committing or attempting to commit an offence or any act which jeopardises the safety of aircraft, persons or goods on board, or threatens to create disorder on board. As a corollary, the Convention grants a limited measure of immunity to the persons acting under the circumstances and conditions described in the Convention. The drafters of the Convention thought that "it would be difficult to impose upon an aircraft commander responsibility for maintenance of law and order on board his aircraft, without at the same time giving him protection from possible criminal liability to which he might be subjected in the event he should impose restraint upon an individual who had committed a crime

"...the contracting state in whose territory the alleged offender is found shall, if it does not extradite him, be obliged to submit the case to its competent authorities, for the purpose of prosecution..."

on his aircraft". Therefore, this protection was given in order to encourage the crew of an aircraft to fight the unlawful acts and offences considered by the Convention.

Through the various stages of the drafting history of the Tokyo Convention, the participants had been aware of its intended purpose to create a uniform law applicable to offences on board aircraft. This purpose could not possibly be achieved if the state of the victim, the state of the offender, the state of first landing and so forth, were not also recognised as being competent to exercise jurisdiction in addition to the state of registration of the aircraft. Hence, it is submitted that the Convention recognises the jurisdiction of the state of registration of the aircraft to the exclusion of all others, except the territorial state, under certain conditions where jurisdiction may be concurrent, although this is not expressly stated in the Convention. The Convention does not prescribe specific offences but rather relies upon offences as codified under national law and it applies to acts which, whether offences or not, affect the in-flight safety of persons or property or jeopardise the discipline on board a civil aircraft.

"...any hijacking initiated or attempted before the closing of the doors of the aircraft after embarkation, or after the opening of the doors for disembarkation, is not covered..."

Although the Convention does attempt to cover unlawful seizure of aircraft specifically in Article 11, not all forms of unlawful seizure of aircraft are covered, nor does it provide for a specific response other than an obligation on states to "take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft."

Even though there is a requirement for states parties to take delivery of a person whom the aircraft commander delivers because he has reason to believe the person has committed a serious offence according to the penal law of the state of registration of the aircraft, the Convention lacks proper extradition arrangements enabling effective prosecution of hijackers. The Convention does not oblige a contracting state to punish an alleged offender upon his disembarkation or delivery. Actually, the state of landing must set him free and let him proceed to the destination of his choice as soon as practicable if it does not wish to extradite or prosecute him. Contracting states may extradite the offenders, if at all, only under the provisions of other treaties between the affected states. The failure to provide machinery for mandatory extradition, if prosecution was not pursued in the landing state, is considered a major deficiency of the Tokyo Convention.

The 1970 Hague Convention

The inadequacy of the Tokyo Convention and the increase in the number of hijackings resulted in the need to define the act of hijacking and recognise it as an international offence, led the ICAO Assembly adopting a resolution on the subject matter and to seek an appropriate legal framework to deal with the offence. As result, the ICAO Council by its resolution of December 1968, referred legal aspects of the problem of unlawful seizure of aircraft to the Legal Committee. On 1 December 1970 a draft Convention was submitted to an ICAO conference at The Hague, attended by 77 States, and was adopted on 16 December 1970.

This Convention made significant contributions to the effort of the international community to curb the unlawful seizure of aircraft and to remove the threat caused to international civil aviation. It covers both international and domestic flights; it gives a specific definition of hijacking of aircraft and it includes as well the threat to undertake such an act as an offence, although this is limited to a threat made on board an aircraft in-flight.

Another important development was that the number of states competent to exercise jurisdiction over a hijacker was enlarged and a new basis for the exercise of jurisdiction by the state where the charterer of an aircraft has his/her principal place of business or permanent residence was introduced. Moreover, the Convention grants every contracting state the power to exercise jurisdiction over a hijacker if such states are affected by an offence committed under the Convention, thus making it impossible for the hijacker to escape the normal process of the law.

The Convention obliges states to include hijacking in extradition treaties to be concluded between them; those who do not have such treaties, but make extradition conditional on a treaty, can regard this Convention as the legal basis for extradition. At the diplomatic conference which discussed the draft of the Convention, the drafters rejected the proposal to apply compulsory prosecution or extradition. Automatic extradition, though probably the best deterrent, was considered too severe a commitment by most of the negotiating states. However, they accepted that the contracting state in whose territory the alleged offender is found shall, if it does not extradite him, be obliged to submit the case to its competent authorities, for the purpose of prosecution. This provision together with certain other requirements was designed to ensure that states either prosecute or extradite offenders in their territory. There was extensive debate over these provisions, particularly over the issue of hijacking for political motive and the discretion of states to prosecute in those circumstances with the intention to preclude political motive as a reason for not extraditing where prosecution of an offender does not occur.

Notwithstanding its efficiency in some areas, the Convention has a series of weaknesses. The offence must be committed by a person on board an aircraft "in-flight" and thereby it excludes offences committed by persons not on board such as saboteurs who remain on the ground. The Convention provides that the aircraft is deemed to be in-flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such doors are opened for disembarkation. Therefore, any hijacking initiated or attempted before the closing of the doors of the aircraft after embarkation, or after the opening of the doors for disembarkation, is not covered. Whilst the Convention includes an accomplice offence, an accomplice only falls within the ambit of the Convention if the assistance is provided whilst on board the aircraft in-flight. Furthermore, it does not cover the unlawful interference with air navigation facilities and services such as airports, air traffic control and radio communications.

The 1971 Montreal Convention

Since both the Tokyo and The Hague Conventions dealt only with unlawful seizure and offences committed on board aircraft, due to the increased number of acts of violence committed on board aircraft and on airport ground facilities, the drafters of the Montreal Convention decided to remedy these lapses and to criminalise such acts.

The Convention repeats some of the provisions of The Hague Convention but it was considered a breakthrough in combating terrorism against air transport as it pioneered a new series of offences which can be committed without the offender being on board the aircraft by defining them broadly in order to cover all possible acts that might occur.

The definition of an aircraft "in service" is introduced, a term used in the offence concerning placement of a device or substance on an aircraft in service which is likely to destroy that aircraft. This offence and the definition of 'in service' ensure that a device or substance placed on the aircraft prior to an aircraft being considered in-flight is covered by the Convention.

The Montreal Convention is limited to offences which affect the safety of the aircraft 'in service' or 'in-flight'. This limitation was addressed to some extent by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988, which specifically provided for offences against a person at an airport as well as the destruction or damage of facilities of an airport or an aircraft not in service where such acts endanger or are likely to endanger safety at that airport. Another limitation of the Montreal Convention is that it does not make it an offence to threaten to commit the offences in the Convention, unlike The Hague Convention which specifically criminalises a threat to unlawfully seize an aircraft, although this is limited to persons on board the aircraft in-flight.

Despite the efforts of some delegations during the diplomatic conference for its adoption, the Convention failed to provide a mandatory system of prosecution in case of denial of extradition requests. Notwithstanding its value in some areas, the Convention remains, like the 1963 Tokyo Convention and the 1970 Hague, weak and short of real effect.

What has been done after the entry into force of these Conventions?

As a direct effect of the failure of the international community to provide effective legal machinery for combating acts of unlawful interference of air transport, threats to civil aviation have constantly become more alarming and serious. Under the auspices of ICAO, action has attempted to address the new and emerging threats to civil aviation, in particular to review the adequacy of the existing aviation security conventions.

At the beginning of 1970s, ICAO published the Security Manual designed to assist states in taking measures to prevent acts of unlawful interference against civil aviation or to minimise their effects and established standards for screening of passengers and carry-on luggage as Annex 17 of the Chicago Convention.

"...the Beijing Convention 2010 will prevail over The Montreal Convention 1971..."

In February 2002 member states of ICAO endorsed a global strategy for strengthening aviation security worldwide. A central element of the strategy is an ICAO Aviation Security Plan of Action, which included among other elements, the review of existing legal instruments in aviation security so as to identify gaps and inadequacies as to their coverage in relation to new and emerging threats.

During 2005-2008 ICAO conducted a survey of its member States which revealed that certain threats, such as the use of aircraft as weapons, suicide attacks, electronic and computer-based attacks, chemical, biological and radioactive attacks, were not adequately covered by the existing air law instruments. Furthermore, these legal instruments focus on the persons actually committing the punishable acts, mainly on board an aircraft or at an airport, without specific provisions addressing the issue of persons organising, directing and financing the commission of the unlawful interference against civil aviation.

At its 34th session in 2009, the ICAO Legal Committee addressed the initiative to amend the 1971 Montreal Convention and debated and revised the amendments drafted by its special sub-committee. The main concerns of states attending were that the proposed changes could hamper trade and development, wrongly criminalise the actions of citizens, or require expensive monitoring equipment. The committee was not able to finalise wording for the amendments.

From 30 August to 10 September this year (2010) a diplomatic conference held in Beijing, comprising of representatives from 77 States, adopted two new air law instruments: *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.*

These new legal instruments "criminalise the act of using civil aircraft as a weapon, and of using dangerous materials to attack aircraft or other targets on the ground. The unlawful transport of biological, chemical and nuclear weapons and their related material becomes now punishable; directors and organisers of attacks against aircraft and airports will have no safe haven. Making a threat against civil aviation may also trigger criminal liability". After entry into force, the Beijing Convention 2010 will prevail over The Montreal Convention 1971 and its Protocol signed in Montreal 1988.

Until then, despite their shortcomings, these other Conventions have been widely accepted as the legal instruments for combating unlawful interference of civil aviation. Today, 185 states have ratified the 1963 Tokyo Convention, 185 the 1970 Hague Convention and 188 the 1971 Montreal Convention. Nonetheless, the international community must acknowledge the fact that the existing air law instruments reflect the focus of states at the time of their adoption and that now there is a need to update them to respond to new and emerging threats, either in the form of a new international instrument or as an amendment.

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