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Leiden
The Netherlands

Aviation safety and ICAO

Huang, J.

Citation
Huang, J. (2009, March 18). *Aviation safety and ICAO*. *Meijers-reeks*. Kluwer Law International, Alphen aan den Rijn. Retrieved from https://hdl.handle.net/1887/13688

Version:	Not Applicable (or Unknown)
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Note: To cite this publication please use the final published version (if applicable).

Aviation Safety and ICAO

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

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ISBN-13 9789041131157

The commercial edition of this book, with certain revisions, will be published by Kluwer Law International as volume 5 in the Aviation Law and Policy Series: HUANG Jiefang, Aviation Safety through the Rule of Law

This edition is available from Kluwer Law International
Postal address:
PO Box 316
2400 AH
Alphen aan den Rijn
The Netherlands
Phone: +31 (0) 172 64 1500
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Printed in International Civil Aviation Organization, Montreal, Canada

Aviation Safety and ICAO

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op woensdag 18 maart 2009
klokke 15.00 uur

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Acknowledgements

I would like to express my most profound gratitude to Professor Peter P.C. Haanappel, Professor of Air and Space Law at the International Institute of Air and Space Law, Leiden University, who has guided my study in air law twice in my life at both McGill University and Leiden University. Without his enthusiastic motivation, invaluable supervision and kind assistance, it would not have been possible to complete this thesis.

My deep appreciation is conveyed to Mr. Denys Wibaux, Director of the Legal Bureau of ICAO, for sharing his vast experience in international law and for his unfailing support of my work; to Mr. John Augustin, Senior Legal Officer of ICAO, for inspiration given through his thesis and for reading some of my manuscript; and to other colleagues in ICAO for a constant exchange of ideas. Of course, the views expressed in the thesis are those of the writer, and I myself shall be solely responsible for all errors and weaknesses which may be found in it.

Special indebtedness is owed to Dr. Niels van Antwerpen, corporate legal counsel for the legal department of KLM ROyal Dutch Airlines, for sharing his previous experience in Leiden's Ph.D programmes and for translating my summary of the thesis into the Dutch language.

My sincere thanks also go to Ms. Marla Weinstein and Ms. Arlene Tyo of ICAO as well as Mr. Yaw Nyampong of McGill University for proofreading my manuscript and providing editorial assistance in the English language; to Ms. Tatiana Koukharskaia of the ICAO Legal Bureau for rechecking the entire manuscript; to Ms. Lydia Nawfal of the same bureau for formatting a part of the electronic version of the manuscript; to Ms. Paula van der Wulp, Office Manager of the International Institute of Air and Space Law of Leiden University for all administrative assistance; and to Ms. Karin van Heijningen of the E.M. Meijers Institute and Ms. Anne-Marie Krens for assisting the publication.

I could not forget to mention the loyal support of my wife, LEI Min (雷敏), who has unilaterally shouldered the entire family obligations and burden over the years to allow me to concentrate on my work. As a small token of my appreciation, I managed to complete the draft of the thesis exactly by her birthday. I also remember the love, support and encouragement given by my parents, Mr. HUANG Ing Hui (黄永晖) and Madame CHAN Ching Mui (陈静梅), and by my brother, WONG Wai Hung (黄卫红).

I wish to register my thanks to the Government of the Kingdom of the Netherlands for making the educational system in Leiden University available to me. I also record my life-time gratitude to the Government of the People's Republic of China for providing me with a scholarship to study abroad, when foreign currencies were still scarce resources in the country.

HUANG Jiefang Montreal, 4 November 2008

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List of Abbreviations and Acronyms

AASL	Annals of Air and Space Law
ACAC	Arabic Civil Aviation Commission
AFCAC	African Civil Aviation Commission
AJIL	American Journal of International Law
ANC	Air Navigation Commission
ASECNA	L'Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar
ATM	Air Traffic Management
BYIL	British Yearbook of International Law
C-Dec	ICAO Council Decision
Chicago Convention	Convention on International Civil Aviation
Chinese JIL	Chinese Journal of International Law
C-Min.	ICAO Council Minutes
CNS/ATM	Communications, Navigation, Surveillance/Air Traffic Management
COCESNA	Central American Corporation for Air Navigation Services
CYIL	Canadian Yearbook of International Law
DGCA	Directors General of Civil Aviation
EASA	European Aviation Safety Agency
EC	European Community
ECAC	European Civil Aviation Conference
EJIL	European Journal of International Law
EU	European Union
EUROCONTROL	European Organisation for the Safety of Air Navigation
FAA	Federal Aviation Administration of the United States
FANS	Future Air Navigation Systems
FIR	Flight Information Region
FUA	Flexible Use of Airspace
GNSS	Global Navigation Satellite System
ICAN	International Commission for the Air Navigation
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
JAA	Joint Aviation Authority
JALC	Journal of Air Law and Commerce
LACAC	Latin American Aviation Commission
LJIL	Leiden Journal of International Law

LNTS	League of Nations Treaty Series
MEX Convention	Convention on the Marking of Plastic Explosives for the Purpose of Detection
Montreal Convention	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
Montreal Supplementary Protocol	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
OJ	Official Journal of the European Union
PICAO	Provisional International Civil Aviation Organization
PKD	Public Key Directory
RdC	Recueil des cours de l'Académie de droit international de la Haye (Collected Courses of the Hague Academy of International Law)
SAFA	Safety Assessment of Foreign Aircraft
SARPs	International Standards and Recommended Practices
SUPPS	Regional Supplementary Procedures
The Hague Convention	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
Tokyo Convention	Convention on Offences and Certain Other Acts Committed on Board Aircraft
UN	United Nations
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
US	United States of America
USAP	Universal Security Oversight Audit Programme
USOAP	Universal Safety Oversight Audit Programme
ZLW	Zeitschrift fur luft und Weltraumrecht

Introduction

In November 1944, towards the end of the Second World War, representatives from fifty-four nations gathered in Chicago to design a blueprint for the world-wide regulation of post-war international civil aviation.[1] The Conference resulted in the adoption of the *Convention on International Civil Aviation* (Chicago Convention) on 7 December 1944 and the establishment of the International Civil Aviation Organization (ICAO) on 4 April 1947, when the Convention came into force.[2] The main mission of ICAO is to "insure the safe and orderly growth of international civil aviation throughout the world".[3] Accordingly, since the date of its birth, ICAO has been closely linked with aviation safety.[4]

More than sixty years have passed. Has ICAO lived up to the expectations of its founders? Some believe that it is "one of the most effective international organizations in the United Nations system";[5] others, while praising the work of its first 50 years, mention that it has been "losing ground" in the past decade.[6] Without any doubt, ICAO is confronted with huge challenges. If it does not fare well, its constituents may bid farewell to it. If it does not wish to retire at the same age as a natural person normally does, it needs to re-juvenate itself.

The purpose of the current study is to explore, from a legal point of view, the safety mandate of ICAO in the context of international civil aviation. The

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1 Haanappel, P.P.C., *The Law and Policy of Air Space And Outer Space: A Comparative Approach* (The Hague and New York: Kluwer Law International, 2003) at 17. Fifty two States signed the Final Act of the Chicago Conference. See *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948). See also *infra* Ch.1.2.

2 *Id.* See ICAO Doc 7300/9 *Convention on International Civil Aviation*.

3 Art. 44 *a)*, Chicago Convention. The Preamble also mentions that the undersigned governments have agreed on certain principles and arrangements in order that international civil aviation "may be developed in a safe and orderly manner".

4 See *infra* Ch.1, 1.2 to 1.4. Throughout the present study, the term "safety" or "aviation safety" refers to the safety of international civil aviation. It does not deal with the use of aircraft for military services, or the law of air warfare, except to the extent that they have impact on the safety of international civil aviation.

5 Broderick, A. J., & Loos, J., "Government Aviation Safety Oversight – Trust, But Verify" (2002) 67 *JALC* 1035 at 1036.

6 Onidi, O., "A Critical Perspective on ICAO" (February 2008) xxxiii/1 *Air & Space Law* 38 at 38 and 41. It is said, among other things, that dramatic growth in air traffic and technical complexity of aviation have made ICAO's role of maintaining a satisfactory safety system worldwide virtually unsustainable.

author intends to present, in retrospect, the major contributions of ICAO to the global safety framework. At the same time, on the basis of the lessons learned in the past, certain proposals will be made to rationalize the safety framework in order to enhance aviation safety through the rule of law.

Chapter 1 begins with the analysis of the concept of aviation safety, in view of the growing concern of the global aviation community on this matter. Commencing with a survey of different views about the definition of safety, it will try to focus on what safety means from a legislative point of view. Then the development of safety regulations in the history of civil aviation will be briefly reviewed, underlining the trend to move from national to international regulation. Following that is the demonstration of strong demands in the contemporary world for the improvement of safety, as well as the heavy responsibility put on ICAO in this respect.

The next three chapters cover the three major dimensions of safety concerns. Chapter 2 mainly addresses technical regulations of aviation safety. It describes the safety oversight function of States and the ICAO framework for the adoption of technical standards to deal with the natural or inherent hazards of aircraft operations, such as mechanical failure, bad weather or human errors. The more recent initiatives of ICAO to audit its member States for their compliance with ICAO provisions, as well as their legal basis, will be analyzed.

Chapter 3 considers the relations between military activities and aviation safety, as well as the work of ICAO in this respect. While military activities represent legitimate interests of States, they may present man-made dangers to civil aviation, if they are not properly coordinated. Interfaces between military activities and civil aviation sometimes present difficult issues, which require a careful study.

Chapter 4 deals with terrorist and other unlawful acts, which represent the most serious man-made dangers to civil aviation. The pioneering efforts of ICAO since 1960s in this area will be analyzed in the context of the new trend in the legislation against terrorism.

Chapter 5 will be the focus of the present undertaking. To meet with its new challenges, ICAO should learn from the past and muster for the future. If the organization is mandated to police aviation safety in the world, it must first and foremost be able to police itself. The past experience of ICAO has left abundant food for thought for its institutional reform, including a number of basic but crucial issues. What is the normative value of ICAO regulatory material? Is there any system of hierarchy for these norms? Are there any grounds to put safety considerations above some other considerations? How should ICAO stand vis-à-vis powerful States or regional organizations? What are the appropriate mechanisms for checks and balances in the ICAO's decision-making process? While the answers to these questions may not be readily available, efforts should be made to tackle them with a view to enhancing the rule of law.

1 Defining Aviation Safety in view of the Global Interest

Aviation safety is the concern of the whole world. Its importance is unanimously recognized. While air transportation is by far the safest mode of travel, as measured by the ratio between the number of accidents and that of passenger/kilometers,[1] it is susceptible to inherent risks of flight, the use of force, and, more dangerously, terrorist acts. From time to time, when major aviation-related accidents or tragic events take place, the whole world is shaken.[2] Consequently, aviation safety has been and will be a matter of vital importance for governments, industry, the academic community and the traveling public. It is also the *raison d'être* of ICAO, a global, inter-governmental organization which became a specialized agency of the United Nations in 1947.

1.1 The Concept of Aviation Safety

While everyone agrees that aviation safety is important, opinions vary when an attempt is made to define the term "safety".[3] The Oxford Dictionary defines

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1 ICAO, Report of Accident Investigation and Prevention (AIG) Divisional Meeting (1999) at ii-4. The accident rate (measured in passenger fatalities per 100 million passenger-kilometers) was approximately 0.025 in 2000 and 0.02 in 2006). *ICAO News Release*, PIO 5/02, 9 April 2002 and ICAO Doc 9876, *Annual Report of the Council* (2006), at 27.

2 The most obvious example is the media coverage of the tragic events on 11 September 2001, in which four aircraft were hijacked in the United States, two of which were used for suicidal attacks to destroy the World Trade Center, then the highest buildings in New York, killing thousands of innocent people and causing immeasurable damage to the world economy. See, for example, *New York Times*, 12 September 2001. Aside from these big events, even relatively minor aircraft accidents or incidents may also occupy the front page in local newspapers. See, for example, "Tragic end to vacation, 6 Quebecers die in Cuban crash", *The Gazette* (published in Montreal, Canada), 16 March 2002. For analysis of the reasons for public reaction to aircraft accidents, see *infra* notes 39 to 47 and accompanying text.

3 See Miller, C.O., "State of the Art in Air Safety" (1957) 34 *JALC* 343 at 347, where 18 perceptions of safety are mentioned. Some of them are:
The Public: Safety is restrictive: don't do this, don't do that ...
Federal Aviation Administration: Standards have been issued. … It is the FAA's duty to enforce those standards. All FAA work pertains to safety.
National Transportation Safety Board: Senator Magnuson called NTSB the "Supreme Court of Transportation safety"...
Airline Pilot Association: Pilot's opinion must be followed ...
American Bar Association: Punishment or threats thereof represent deterrents to accidents.

"safety" as "freedom from danger or risks". It also means "the state of being protected from or guarded against hurt or injury".[4] Clearly, if aviation must be free from any dangers or risks, it will not exist at all. Flight is inherently a risky venture, carried out in a hostile environment at great speed. The only way to assure risk-free flight is never to allow the airplane to leave the gate. Accordingly, some commentators tend to link the concept of safety with accident prevention. They consider "safety" as meaning "no (avoidable) accidents", or more realistically, "as few accidents as possible".[5]

From a micro and operational point of view, this definition is helpful since much of the safety concern is related to accident prevention. From a macro and policy-oriented point of view, "accident prevention" is too tight a strait-jacket to coat the much broader policy consideration underlying the safety issues. Aviation safety includes but is not limited to operational flight safety. The tragic events of 11 September 2001, which constituted not only the most serious threat but also unprecedented damage to aviation safety, have conclusively demonstrated that aviation safety goes beyond accident prevention from a technical point of view and extends to more profound political, strategic and legal dimensions. It includes preventive, remedial and punitive measures. Accordingly, safety is not limited to accident prevention, but should be considered in a broader term as risk management.[6] After a period of study, the ICAO Air Navigation Commission defined "aviation safety" as "[t]he state of freedom from unacceptable risk of injury to persons or damage to aircraft and property".[7] Risks could be at a lower or higher level. Depending on the risks involved, the scope of the aforementioned management may range from routine suspension of a license of an unqualified pilot to the temporary grounding of all civil aircraft at the time of a crisis. Sometimes, a particular safety standard is very attractive from a technical point of view, but it may not be cost-effective or may even be economically prohibitive to implement. In that case, a careful policy judgement is needed to determine what standard should be imposed. Consequently, aviation safety requires a multidisciplinary approach: technical, economic, managerial, and, obviously for the purposes of the present study, legal.

Safety is also a dynamic rather than static concept. It has a strong temporal sense. What was considered safe or unsafe yesterday may not be so today. In 1919, when two British airmen, Captain John Alcock and Lieutenant A. W. Brown, made the first flight across the Atlantic non-stop from Newfoundland

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4 *The Concise Oxford Dictionary*, 9th ed. (Oxford University Press, 1995).

5 Wassenbergh, H., "Safety in Air Transportation and Market Entry" (April, 1998) XXIII:2 *Air and Space Law* 83.

6 Lofaro, R.J. and Smith, K.M., "Rising Risk? Rising Safety? The Millennium of Air Travel" (1998) 28 *Transportation Law Journal* 205 at 216, see also, Isaac, F. M., "Is it Safe Up There?" (1998) 28 *Transportation Law Journal* 183.

7 ICAO Working Paper AN-WP/7699, "Determination of a Definition of Aviation Safety", 11 December 2001 at para. 2.2.

to Ireland, the aircraft used was a twin-engine Vikers *Vimy* biplane.[8] Subsequently, due to the development of aviation technology and safety requirements, twin-engine aircraft were not allowed for cross-ocean flights for a long period of time. In 1984, however, this rule was again changed.[9] Nowadays, twin-engine aircraft are commonplace in cross-ocean flights. This example demonstrates the close relationship between the advance of technology and law-making activities as well as the dynamic concept of safety.

Safety also includes security. In ICAO terminology, a distinction is made between "safety" and "security". The former is related to the operational safety of aircraft, including personnel licensing and airworthiness, whereas the latter means "safeguarding civil aviation against acts of unlawful interference".[10] While this distinction may be convenient, it should nevertheless be pointed out that aviation security is but one important aspect of aviation safety. No matter how airworthy an aircraft is, and how competent its crew members are, air travel will not be safe if it is subject to terrorist attacks, which have become the most serious threat to the safety of civil aviation.

Safety requires, first and foremost, technical expertise. However, it is not the exclusive domain of the technical profession. It has a policy and legal dimension. As Wassenbergh observes: "Safety in civil aviation is a technical and operational matter, to begin with. It becomes a matter of public law as soon as the public is involved and private people participate under government control."[11]

Having regard to the temporal, multidisciplinary nature of aviation safety, it may be asked how safe is safe. Who will actually decide the standards of safety, or the threshold of acceptable risk? It has been said that safety, like beauty, is in the eyes of the beholder. Speaking from the perspective of the United States, Isaac, a former officer of the Federal Aviation Administration, writes:

> While 100 people may have 100 different answers to that question, our democratic system itself provides the answers. In my opinion, the Congress of the United States has the greatest influence on the level of safety, or acceptable risk under which we operate. Congress, of course, writes the laws that govern the operation and development of the national aviation system. Congress also controls the budget of the Department of Transportation and, in turn, the Federal Aviation Administration.[12]

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8 Freer, D. W., "A Convention is signed and ICAN is born? 1919 to 1926" (May 1986) 41(5) *ICAO Bulletin* 44.

9 Mortimer, L.F., "New ICAO Rules Considered for Long-Range Twin-Engine Aeroplane Flights" (April 1984) 39(4) *ICAO Bulletin* 74.

10 Annex 17 to the Chicago Convention, 8th ed., April 2006.

11 See *supra* note 5.

12 Isaac, F. M., *supra* note 6 at 185.

It may be concluded, therefore, while aviation safety is a multidisciplinary matter, the legislator of a sovereign State may, subject to its international obligations imposed by the Chicago Convention and other sources of international law, determine how safe is safe for aviation within its areas of competence, such as aircraft registered or operated in its territory, personnel licensed in its country and airports as well as air traffic service agencies under its jurisdiction. From this perspective, it may not be difficult to argue that aviation safety is ultimately a matter of law, namely, a matter of legislation and its implementation.

While the discussion above may provide an answer with respect to aviation safety at the national level, a further question may be asked as to who is determining aviation safety from an international perspective. This question is of considerable significance since civil aviation is virtually international by its nature. Its optimal benefit could not be realized if it were confined to national boundaries. At the same time, its risks are also shared globally. While every State retains its sovereignty within its territory, it is unable to regulate the safety of international civil aviation without the cooperation of other States. A State may ensure the quality of aircraft registered in its country and airports located therein, but it may not do so for aircraft registered and operating in other countries and airports located therein, which may also impact aviation in the former State. In a nutshell, the risks incurred by civil aviation are global in nature. Global risks require global management and call for international concerted action. As demonstrated below, the history of civil aviation has crystallized into the establishment of ICAO. The current reality has also confirmed the ongoing need for ICAO. It is submitted that ICAO, as the specialized agency of the United Nations responsible for aviation, is the guardian of the safety of international civil aviation, the global manager of risks relating to civil aviation, and the worldwide decision-making body on behalf of sovereign States with respect to aviation safety.

1.2 Historical Development of Aviation Safety Regulations

The history of aviation is the history of improving safety. Review of the scientific and technical developments, which have been the driving force for enhancing safety, is beyond the scope of the present undertaking. From a legal perspective, the starting point of safety regulations could be traced back to the period of the infancy of aviation. The earliest legislation on record focused more on aircraft impact on the ground, rather than safety on board.[13] Thus,

13 As Colegrove points out: "It seems as if legislators feared a sinister element in the navigation of the air, born of ancient superstition, and sought to safeguard the people from some diabolical power attacking the human race from the heavens." Colegrove, K.W., *International Control of Aviation* (Boston: World Peace Foundation, 1930) at 2.

five months after the first circuit flight took place on 21 November 1783 on board a balloon invented by Mongolfier brothers, the first aerial regulation was promulgated on 23 April 1784. In this regulation, the Paris police introduced a law forbidding balloons to fly without a special license.[14] Although this regulation may have been promulgated due to the concern that aircraft could present safety implications on the subjacent ground, it also introduced the concept of licensing for aviation, which is still applicable today. In 1819, France enacted a law which required that man-flight balloons be equipped with parachutes,[15] thus extending the scope of its law-making activities by covering not only safety on the ground but also safety on board aircraft.

It was soon unanimously realized that government regulation of aviation was necessary in order to ensure public safety. Few would deny the wisdom of the State in requiring aircraft to be inspected in order to test their airworthiness, to be registered in order to establish their ownership and ensure the responsibility thereof, and to require pilots to be examined and licensed in order to safeguard citizens from the danger of inexperienced or negligent pilots.[16] However, the diversity of national regulations almost immediately became apparent, which led to inconvenience as soon as aircraft crossed the boundary lines of States. A movement for international codification started. In 1889, the first international aeronautical congress was convened in Paris by France, in which Brazil, France, Mexico, the United Kingdom and the United States participated.[17] A number of legal issues relating to aviation safety were discussed, including aeronauts' certificates, the liability of aeronauts towards passengers, the public and landowners, salvage, and the use of aircraft in war.[18]

The year 1910 witnessed the first international air law conference, which marked the serious attempt to provide a global regulatory regime for civil aviation. The delegations of 19 States gathered in France for six weeks from 18 May to 29 June to prepare the first multilateral air law convention. The conference did not end with the adoption of a convention because the participating States could not agree on whether they should offer equal treatment to foreign and national aircraft with respect to the freedom of overflight.[19] Nevertheless, the contribution of the conference to the future of safety regulation should not be underestimated. With the exception of Articles 19 and 20

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14 Colegrove, *id.* at 3. See also, Shawcross & Beaumont, *Air Law* (London: LexisNexis Butterworths, 1983, loose leaf version) Vol. 1 at I 1; Matte, N.M. *Treatise on Air-Aeronautical Law* (Toronto: Carswell Co. Ltd., 1981) at 21.

15 Shawcross & Beaumont, *id.* at I 1, citing Hatchkiss, *The Law of Aviation*, 2nd ed. (New York: Baker, Voorhis & Co., 1938) at 4.

16 Colegrove, *supra* note 13 at 4.

17 Pépin, E., "Le droit aerien" (1947:II) 71 *RdC* 481.

18 *Id.*

19 Freer, D.W., "An aborted take-off for internationalism? 1903 to 1919" (April 1986) 41(4) *ICAO Bulletin* 23 at 26.

in the draft convention dealing with admission of air navigation in foreign territory, which were never completed, 41 Articles were excellently crafted and were truly remarkable for their foresight.[20] Many important safety related issues, such as the nationality and registration of aircraft, airworthiness and personnel licensing, were covered by these provisions, which were inherited in both substantive content and drafting style by the 1919 Paris Convention[21] and the 1944 Chicago Convention. The draft convention also contained three annexes dealing respectively with nationality and registration marks of aircraft, characteristics of aircraft relating to airworthiness and the rules of air traffic. The conference also adopted statements to declare a number of important principles, which, *inter alia*, affirmed that rules of the air in free airspace should be established by international agreements. Indeed, the conference had established a basic framework for the regulation of aviation safety, which paved the way for future development in this respect.

The significance of the conference was further demonstrated by the fact that as a follow-up to the conference, an Exchange of Notes between France and Germany was signed on 26 July 1913,[22] which is generally believed to be the first bilateral air agreement in history. By authorizing non-military airships to fly over the territory of the other party on the basis of reciprocity, the agreement affirmed the safety rules that an airship must be provided with a certificate of airworthiness and the pilots must be licensed by the competent authority of one party. It was stipulated that this agreement would apply provisionally "pending the conclusion of an agreement on the subject between a greater number of States".

Due to the First World War, the contemplated agreement "between a greater number of States" did not come into existence until 13 October 1919, when the *Convention on the Regulation of Aerial Navigation* was signed in Paris. The Paris Convention, which was part of the Versailles Peace Treaty, represented the first successful multilateral endeavour to set up a global regulatory regime for aviation.[23] In addition to the declaration that every State has complete and exclusive sovereignty over the airspace above its territory, the Convention established an international legal framework to ensure the safety of international civil aviation through the following provisions:

- common rules for aircraft registration in order to determine its nationality and the related jurisdiction of the State of registration (Chapter 2);
- regulations for certificates of airworthiness of civil aircraft and mutual recognition of such certificates by contracting States (Chapter 3);

20 *Id.*

21 The *Convention on the Regulation of Aerial Navigation*.

22 For the text of the Exchange of Notes, see 8 *AJIL* 214 (1914) Supplement.

23 Kuhn, A., "International Aerial Navigation and the Peace Conference" (1920) 14 *AJIL* 369. Lupton, G.W., *Civil Aviation Law* (Chicago: Callaghan and Company, 1935) at 18.

- international rules of the air, including international rules for signals, lights and the prevention of collisions, as well as the undertaking by States to enforce them (Article 24);
- application to aircraft of the principles of maritime law governing salvage (Article 23).

Eight Annexes to the Convention were developed to implement the provisions mentioned above. Other subjects relating to aviation safety, such as aeronautical maps and ground markings, log books, as well as collection and dissemination of meteorological information, were also covered. The Annexes formed an integral part of the Convention. Their amendments, while adopted by ICAN, were binding on all member States. This structure displayed the lack of flexibility and proved to be one of the weaknesses of the framework established by the Convention.

The Paris Convention also established an International Commission for Air Navigation (ICAN), which comprised representatives of States parties to the Convention. Over the years, ICAN established itself as a focal point for government and industry co-ordination and as a recognized aviation authority among international organizations with an interest in air navigation. On its own initiative, ICAN convened or sponsored many conferences and meetings relating to the safety of air navigation.[24]

The safety framework laid down by the Paris Convention was subsequently inherited by the 1944 Chicago Convention with modifications. The latter remains valid today with its much more flexible system of Annexes, which has overcome the weakness of its predecessor. Another weakness of the Paris Convention is that it did not achieve universal acceptance, which is a desirable goal from the point of view of aviation safety. While 32 States eventually ratified or acceded to the Convention,[25] two major powers, the United States and the Soviet Union, never became parties. Furthermore, two groups of States decided to conclude respectively the *Ibero-American Convention Relating to Air Navigation* (Madrid, 1926)[26] and the *Pan-American Convention on Commercial*

24 See Freer, *supra* note 8 at 46.

25 As at 31 August 1931: Argentine Republic, Australia, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Estonia, Finland, France, Great Britain and Northern Ireland, Greece, India, Iraq, Ireland (Eire), Italy, Japan, Latvia, Norway, Netherlands, New Zealand, Peru, Poland, Portugal, Roumania, Siam, Spain, Sweden, Switzerland, Union of South Africa, Uruguay, Yugo-slavia. See *Shawcross and Beaumont on Air Law* (London: Butterworth & Co. (Publishers) Ltd., 1945) at 689.

26 According to Lupton, the Madrid Convention was ratified by only five of the twenty-one signatories, namely, Costa Rica, Dominican Republic, Mexico, Paraguay and Spain; see Lupton, *supra* note 23 at 25. Shawcross and Beaumont included Argentina and Salvador as additional parties; *id.* at 14. The Madrid Convention has generally been regarded as "a dead letter" (Shawcross and Beaumont). Therefore, Art. 80 of the Chicago Convention only mentions that the Convention supersedes the Conventions of Paris and Habana, without making any reference to the Madrid Convention.

Aviation (Habana, 1928),[27] thereby creating further disunity to the system of the Paris Convention.

On 12 October 1929, an important convention in the sphere of private international air law, namely, the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, was concluded in Warsaw. This Convention, which primarily deals with the contractual liability of air carriers, has been the subject of long-standing and intensive discussion in the aviation community. Numerous attempts have been made to amend or modernize this Convention.[28] While the primary focus has so far been on the Convention's limits of liability, its historical contribution to the promotion of aviation safety should not be ignored. By imposing a presumption of fault on the carrier in the case of an accident causing death or injury to a passenger, the Convention has placed a heavy responsibility on the carrier to do its utmost to protect the safety of the passengers. Since the pilots and engineers have to testify before the court that they have taken all necessary measures to prevent the accident, this will lead them to exercise more care in their work, and to discover and cure the mechanical defects and human errors. Consequently, the safety record of the carrier will be improved.

December 7, 1944 was a milestone for the international aviation community. The Chicago Conference successfully ended with the adoption of the *Convention on International Civil Aviation*. The Conference immediately established the Provisional International Civil Aviation Organization (PICAO) which was succeeded by ICAO in 1947 when the Chicago Convention came into force. While there were different views at the Chicago Conference with respect to the issues of transit and traffic rights for international air transport, there was no controversy on the safety issue. It had been the intention of the United States, one of the main architects of the Chicago Convention, to consider the need for a world organization to handle such matters as safety standards and other technical matters as well as economic problems such as competitive subsidies and rates.[29] At least the first part of this vision, namely, safety standards and other technical matters, has been realized, since the activities of ICAO during the past 60 years have been focused on safety-related matters. While the Chicago Convention undoubtedly benefits from the previous experience of the Paris Convention, its achievement is more remarkable than its predecessor's, due to its universal acceptance. There are currently 190 States

27 Signed on 20 February 1928, and ratified by 11 States: Chile, Costa-Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, and United States. See Shawcross and Beaumont, *id*. at 689.

28 The most recent attempt to modernize the Convention resulted in the conclusion of a convention bearing the same title, signed in Montreal on 28 May 1999, which came into force on 4 November 2003. It had 87 parties as of 25 November 2008.

29 *Foreign Relations of the United States (1944)* at 2:403, 404 and 420.

parties to the Chicago Convention and ICAO has a Secretariat of approximately 800 staff members as compared to the eight-member Secretariat of ICAN.[30]

Concurrent with developments under the Chicago Convention, bilateral air service agreements have also been flourishing since the end of the Second World War. While these agreements have been primarily used to resolve "economic problems such as competitive subsidies and rates",[31] they have also been used, particularly in more recent years, to regulate safety matters, including aviation security.[32]

As international civil aviation developed, new safety issues emerged, which had not been foreseen in 1944. To cope with the new situation, certain amendments to the Chicago Convention were made, including Article 83 *bis*, which permits the transfer of certain functions from the State of registry of aircraft to the State of the operator, and Article 3 *bis*, which prohibits the use of weapons against civil aircraft in flight.

Since the 1960s, civil aircraft have become the prime targets of terrorist attacks. In order to combat hijacking, sabotage and other acts of unlawful interference against civil aircraft, a number of legal instruments were concluded under the auspices of ICAO.[33] Fights against terrorism have become a new dimension of safety considerations.

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30 See Freer, *supra* note 8 at 46. ICAO has adopted18 Annexes to the Chicago Convention which are predominantly related to safety: Annex 1 – Personnel Licensing, Annex 2 – Rules of the Air, Annex 3 – Meteorological Service for International Air Navigation, Annex 4 – Aeronautical Charts, Annex 5 – Units of Measurement to be Used in Air and Ground Operations, Annex 6 – Operation of Aircraft, Annex 7 – Aircraft Nationality and Registration Marks, Annex 8 – Airworthiness of Aircraft, Annex 9 – Facilitation, Annex 10 – Aeronautical Telecommunications, Annex 11 – Air Traffic Services, Annex 12 – Search and Rescue, Annex 13 – Aircraft Accident Investigation, Annex 14 – Aerodromes, Annex 15 – Aeronautical Information Services, Annex 16 – Environmental Protection, Annex 17 – Security, and Annex 18 – The Safe Transport of Dangerous Goods.

31 See *supra* note 29 and *infra* note 53. Bilateral agreements have been the main instruments dealing with economic issues. For more discussions, see Cheng, B., *The Law of International Air Transport*, (London: Stevens & Sons Ltd., and New York: Oceana Publications Inc., 1962); Haanappel, P.P.C., *Pricing and Capacity Determination in International Air Transport: A Legal Analysis* (Deventer: Kluwer Law and Taxation Publishers, 1984), "Bilateral Air Transport Agreements – 1913-1980" (1980) 5 *The International Trade Law Journal* 241, and *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (The Hague and New York: Kluwer Law International, 2003).

32 In addition to the model aviation security clauses widely used in bilateral air services agreements, the ICAO Council recommended in June 2001 a set of model safety clauses to be incorporated into such agreements. For details, see *infra* Ch.2, note 44 and 227, Ch.5, note 121 and accompanying text.

33 *The Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963 (Tokyo Convention) (ICAO Doc 8364), *the Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970 (The Hague Convention) (ICAO Doc 8920), *the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971 (Montreal Convention)

Another important phenomenon which has emerged since the Second World War has been the strengthening of regional arrangements in the aviation community. While regional conferences existed as early as 1918,[34] permanent regional institutions are of a more recent origin. In response to the need for international cooperation, a number of regional civil aviation organizations were established, assuming certain important roles relating to aviation safety. Some of these organizations undertake overall responsibility on civil aviation matters in close coordination with, and receiving assistance from, ICAO, such as the European Civil Aviation Conference (ECAC) established in 1954,[35] the Arab Civil Aviation Council (ACAC, now called the Arab Civil Aviation Commission) established in 1967,[36] the African Civil Aviation Commission (AFCAC) established in 1969, and the Latin-American Civil Aviation Commission (LACAC) established in 1973. Some organizations have specialized mandates, such as EUROCONTROL established in 1960 by the *International Convention for the Safety of Air Navigation*, ASECNA (L'Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar) established by an agreement in 1959 which was replaced in 1974 by the *Convention relative à la création d'une agence chargée de gérer les installations et services destinés à assurer la sécurité de la navigation aérienne en Afrique et à Madagascar*, COCESNA (Central American Corporation for Air Navigation Services) established in 1961 by the *Convention for the Establishment of the Central American Air Navigation Services Corporation*, and the Joint Aviation Authorities (JAA) which originated in the early 1970s.[37] The latter has been gradually phased out and will be completely replaced in 2009 by the European Aviation Safety Agency (EASA), which is "the centrepiece of the European Union's strategy for aviation safety."[38] As a result of these initiatives, safety regulation at the regional level has become more institutionalized and forms an important and integral part of the global efforts to promote aviation safety.

Looking back several hundred years at mankind's efforts and experiences in the achievement of flight, one notices that the material scope of safety

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(ICAO Doc 8966), *the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971*, signed at Montreal on 24 February 1988 (Supplementary Protocol, 1988) (ICAO Doc 9518), *the Convention on the Marking of Plastic Explosives for the Purpose of Detection*, done at Montreal on 1 March 1991 (MEX Convention) (ICAO Doc 9571).

34 Shawcross and Beaumont, *supra* note 14 at I 3.

35 *Id*. at II 63 B.

36 Agreement on the Civil Aviation Council of Arab States, 1967. See, Said, E.S., The Arab Civil Aviation Council, ACAC, Master's Thesis, McGill University, October 1988, AS42 M3 1989 S25, at 65.

37 For the evolution of the JAA, see Balfour, J., *European Community Air Law* (London: Butterworth, 1995) at 107 *et seq.*

38 EASA Website, http://www.easa.eu.int/ws_prod/g/g_about.php, date of access: 10 May 2008. *See* also, *infra*, Ch.5.4.2.

regulations has been expanded along with aviation development. Regulations began by focusing on the safety impact of aviation on the ground, then extended to airborne activities themselves, such as in-flight operation, and subsequently covered ground activities which impact safety in the air, such as air traffic services and airport security screening procedures. As for the geographical scope of the regulations, history has demonstrated a trend to move from national regulation to international regulation. One valuable consideration to be drawn is the importance of achieving universal participation and representation in international civil aviation. The divergent systems illustrated by the Paris, Madrid and Havana Conventions did not survive the test of time, whereas the flag of universality carried by ICAO is still waving today.

1.3 Renewed Importance of Aviation Safety in Contemporary Society

As mankind enters the third millennium, concern over aviation safety is stronger than ever. Such concern relates to the public perception of aviation safety, which is shaped essentially by news reports of aircraft accidents and other tragic events.[39] The media tend to spotlight and give more headline coverage to fatal accidents or incidents involving aviation than to accidents involving other modes of transportation. An Air Navigation Commissioner in ICAO drew a comparison between a rail car accident and an aircraft accident to illustrate differences in public reaction. In the former case, the accident involved a public vehicle on rail with a single readily inspectable structural unit. The implementation of safety measures could have been relatively simple and the accident was easily preventable. However, it caused very little media concern and no investigation was undertaken. In the case of the aircraft accident, it involved thousands of parts operating in a hostile environment. Despite the full commitment of the industry to impose much more stringent standards than those used for other modes of transportation, the aircraft accident could hardly escape from the eyes of the media and the general public. Obviously, accidents in civil aviation raise much more public anxiety than other transportation accidents.[40]

Several factors are responsible for such a perception. First of all, there is an inherent fear of traveling in a hostile environment. Reports from academic study demonstrate that roughly one fifth of adults in the general population experience varying degrees of fear of flying.[41] When passengers confine them-

39 ICAO Working Paper, DGCA97 – WP/1 "Safety Oversight Today", 1 October 1997.

40 Torkington, C., "Aviation Safety in an International Environment", in Soekkha, H., (ed.) *Aviation Safety* (Utrecht: VSP BV, 1997) 545 at 552.

41 For more details, see van Gerwen, L., *Fear of flying*, Doctoral Dissertation at Leiden University, ISBN 90-9018180-6.

selves to a limited space in the sky at the mercy of the aircraft operator, there is a natural sentiment to seek far more guarantees of safety. Secondly, the degree of fatality associated with aircraft accidents further intensifies such a fear. As pointed out by the White House Commission on Aviation Safety and Security in its report: "We fear a plane crash far more than we fear something like a car accident. One might survive a car accident, but there's no chance in a plane at 30,000 feet."[42] In other words, the loss of life is massive. The combined effect of all these statistics and factors makes the safety issue a prime focus of public attention.

In addition to the psychological feeling of the public, a renewed emphasis on aviation safety has emerged due to the important position which civil aviation has achieved in contemporary society. Today, aviation is no longer reserved for the privileged class. It has become a daily means of mass transportation. It is a fundamental feature of today's society. In all of modern history no other human accomplishment has contributed so much to the movement of individuals throughout every part of the world for both business and leisure. The world has become a global village partly because civil aviation provides global accessibility in a matter of hours.[43] The statistics of ICAO indicate that the total number of passengers carried in international and domestic flights reached 1,647 millions in 2000 and 2,105 millions in 2006,[44] as compared to 39 millions in 1951.[45] The industry is growing rapidly and it would not be surprising to see that the number of passengers carried in 2000 will double in 2010. If the rate of accidents remains unchanged, the world will probably witness a much greater number of accidents, which would not be socially acceptable in the eyes of the general public.[46]

The vital role of civil aviation also makes it an attractive target for terrorists. Enhancing safety is important because civil aviation not only has to deal with natural or inherent hazards of flights, such as technical failures or human errors, but also has to deal with the threat of premeditated, organized and sophisticated attacks by terrorists. The industry may have successfully carried billions of passengers and their baggage, but its takes only one hijacker or

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42 White House Commission on Aviation Safety and Security, Final Report to President Clinton, 12 February 1997. (http://www.fas.org/irp/threat/212fin~1.html) Ch.3. Date of access: 17 October 2008.

43 Opening Address and Overview by the President of the Council of the International Civil Aviation Organization (ICAO), Dr. Assad Kotaite, to the High-level, Ministerial Conference on Aviation Security, Montreal, 19 February 2002.

44 62 *ICAO Journal* (No. 1, 2007) at 5.

45 "Annual Civil Aviation Report, 2000", 56 *ICAO Journal* 10; ICAO Doc. 7270. A6 – P/1, *Report of the Council to the Assembly on the Activities of the Organization in 1951*, Montreal, May 1952, at 1.

46 The Final Report of the Commission on Aviation Safety and Security refers to the projection by Boeing that unless the global accident rate is reduced, by the year 2015, an airliner will crash somewhere in the world almost weekly. See the report referred to in *supra* note 42 at 8.

one of the billion pieces of baggage containing an explosive to shake the public confidence in air travel, to undermine its global accessibility and consequently, to produce catastrophic effects on economic development directly or indirectly driven by air transport. As Dr. Assad Kotaite, then the President of the ICAO Council, stated: "The shadowy and elusive nature of an adversary with potential to wreak great destruction will warrant all the efforts and resources that we can muster."[47] In this sense, aviation safety is paramount in order to protect human lives and to ensure aviation as the means of global accessibility.

All of these factors have further elevated aviation safety from a national community concern to the concern of the global community. It is hardly surprising, therefore, that the ICAO Assembly has time and again confirmed that "the primary objective of ICAO continues to be that of ensuring the safety of international civil aviation."[48] As stated by today's Secretary General of ICAO, Dr. Taïeb Chérif, ICAO's first priority, as always, must be safety.

1.4 AVIATION SAFETY: THE *RAISON D'ÊTRE* OF ICAO

In view of its paramount importance, aviation safety has been the *raison d'être* of ICAO. Under the Chicago Convention, in line with the principle that every State has complete and exclusive sovereignty over the airspace above its territory,[49] each contracting State is responsible for safety oversight within its territory. The same also applies to the aircraft registered therein. It should be noted, however, that the principle of complete and exclusive sovereignty, which remains a cornerstone of contemporary international air law, is not the invention of the Chicago Convention, and therefore could not be considered as its achievement. The principle had been established in the 1919 Paris Convention and Article 1 of the Chicago Convention is thus purely declaratory.[50] The Chicago Conference as well as the Convention concluded thereat would have been unnecessary if the goal of the Conference had been limited to the reaffirmation of the principle of sovereignty. In fact, the Conference had greater aspirations and higher aims arising from the interest of the international

47 *Supra* note 43.

48 ICAO Doc 9848, *Assembly Resolutions in Force (as of 8 October 2004)*. Resolutions A32-11: "*Establishment of an ICAO Universal Safety Oversight Audit Programme*" at I-56; A33-9 "Resolving deficiencies identified by the Universal Safety Oversight Audit Programme and encouraging quality assurances for technical cooperation projects" at I-58 and A35-6; *"Transition to a comprehensive systems approach for audits in the ICAO Universal Safety Oversight Audit Programme (USOAP)*" at I-57.

49 Art. 1, the Chicago Convention. See also *infra* Ch. 2.1.

50 It is worthy of note that Art. 1 of the Chicago Convention refers to "every State" instead of "every contracting State" which has sovereignty. The principle is therefore applied not only to the mutual relations between the contracting parties but also to other States which are not parties. *Cf.* Cheng, *supra* note 31 at 120.

community,[51] namely, to ensure that "international civil aviation may be developed in a safe and orderly manner". As the then President of the United States, Franklin Delano Roosevelt put it, the goal of the Conference was for all nations to "work together, so that the air may be used by humanity, to serve humanity..."[52]

Many of the founders of ICAO may have envisioned a blueprint which would go beyond safety regulation. Indeed, there was a serious attempt in 1944 to develop a multilateral economic mechanism for determining routes, capacities and fares in an equitable manner and thereby to turn ICAO into an international economic regulatory body. The history of ICAO has demonstrated that it is not such a regulatory body.[53] With respect to safety regulation, the vision of Chicago in 1944 has proven to be successful.

First and foremost, the Chicago Conference laid down a legal framework for safety regulation, which is still operating today. Safety considerations permeate the whole Convention. In addition to the Preamble and Article 44, there are numerous other provisions which are designed to enhance aviation safety. One notable example is Article 3, paragraph d), which provides that the contracting States undertake, when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft. Since State aircraft include military and police aircraft, regulation of these aircraft may be regarded as core elements of sovereign rights which a State will jealously guard against interventions from outside. Despite this, the parties to the Convention were able to recognize at an early stage in the development of international civil aviation that the freedom to exercise sovereign rights in domestic affairs may be subject to certain limitations. Safety considerations for civil aircraft could constitute such a limitation.

One important feature of the framework under the Chicago Convention is the emphasis on uniformity of standards, which will enhance aviation safety. An innovative system was wisely designed by the drafters of the Convention, under which international standards could be adopted by the ICAO Council, and become applicable to all member States, unless they notify ICAO that they

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51 For more discussion of the interest of the international community, see Ch. 5.1.

52 Cited by the *Presentation by the President of the Council of the International Civil Aviation Organization (ICAO), Dr. Assad Kotaite, of the Annual Report for the Council for 1998, 1999, and 2000, and the Supplementary Report for the First Six Months of 2001 during the 33rd Session of the Assembly.*

53 At the 50th anniversary of ICAO, Freer wrote: "The organization's other challenge of daunting dimension is to finally establish a multilateral, if not universal, mechanism for ensuring equity in allocating routes, setting fares and rates and assigning capacities for different airlines, where necessary. However desirable such a mechanism may be in furthering international civil aviation, more than a few States still view it as an unwanted impingement on sovereignty or an unwarranted intrusion in a competitive economic arena. ... Thus, the philosophical dilemma which so troubled the Chicago Conference has not yet been fully resolved." Freer, D. W., "ICAO at 50 Years: Riding the Flywheel of Technology" (September 1994) 49 *ICAO Journal* 19 at 32.

could not comply with them. This system, which aims at uniformity while permitting certain flexibility, has overcome the weakness of the Paris Convention and proven to be a very valuable asset of ICAO.[54]

In addition to the legal framework for safety regulation, the Chicago Conference had also established an institutional framework, namely, ICAO. Creation of machinery is as important as the substantive issue.[55] ICAO not only provides a forum for its member States to take concerted action on safety issues, but also provides institutional mechanisms to fulfill the aims and objectives of the Chicago Convention. The institutional structures of ICAO include a plenary body, the Assembly; a permanent body responsible to the Assembly, the Council; and the Secretariat headed by the Chief Executive Officer of the Organization, the Secretary General.[56] The ICAO Council is somehow unique in the United Nation system, since its members, particularly its President, reside all the year round in the place where ICAO has its headquarters to oversee the overall daily activities of the organization. One of the mandatory functions of the Council relating to safety is the adoption and amendment of the Annexes to the Chicago Convention, which contain international standards and recommended practices. The Annexes are constantly reviewed and amended to keep pace with new development and advanced technology. When ICAO celebrated its 50th anniversary, the number of amendments to the Annexes had reached nearly 800.[57] As mentioned before, ICAO has also taken initiatives to strengthen the protection of civil aircraft in flight from certain military operations. It also led pioneering efforts in the adoption of international conventions to combat unlawful interference against civil aviation.[58]

The Chicago Convention has stood the test of time and is capable of providing a suitable framework for the promotion of aviation safety.[59] On

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54 Kotaite, A., "Sovereignty under great pressure to accommodate the growing need for global cooperation" (December 1995) *ICAO Journal* at 20. For more details of discussion relating to uniformity, see *infra* Ch.2.2.2 and 2.2.4. See also *supra* the text preceding note 25.

55 Vallat, "The Competence of the United Nations General Assembly" (1959) 87 *RdC* 203 at 228. See also Skubiszewski, K., "The General Assembly of the United Nations and its Power to Influence National Action", in Falk, R.A. and Mendlovitz, S. H., (ed) *The Strategy of World Order*, Vol. III, *The United Nations* (New York: World Law Fund, 1966) 238 at 240.

56 Arts. 48, 50, 54 *h)* of the Chicago Convention. In practice, the Assembly only meets every three years, while the Council meets three times a year. Extraordinary sessions for the Assembly and the Council may also be held. For more details of ICAO's structures and their functions, *see* Cheng, B, *supra* note 31at 37 *et seq*. For more updated information, see Haanappel, *supra* note 31, *The Law and Policy of Air Space And Outer Space: A Comparative Approach*, in Ch. 3.

57 Freer, *supra* note 53 at 28.

58 See *supra* note 33.

59 The statistics of ICAO indicate that in 1960, in scheduled air services worldwide, a quarter of a million safe landings took place for every one fatal accident. In 2000, more than a million safe landings were made for every one fatal accident. See, Kotaite, A., *supra* note 54 at 3. See also, *supra* note 1 and the statistics therein.

the other hand, the acceleration of globalization and growing interdependence among sovereign States have presented to ICAO new challenges on safety issues.

The structure of the international civil aviation community has undergone tremendous changes since the conclusion of the Chicago Convention in 1944. When the Chicago Convention entered into force on 4 April 1947, there were 26 contracting States to the Convention. Today, in 2008, ICAO has 190 contracting States. The expansion of the ICAO family is a positive factor since this has made the organization truly universal, as compared to its predecessor, ICAN, which was somewhat concentrated on Europe. On the other hand, the increasing number of contracting States has also presented an enormous task for ICAO with respect to the uniform implementation of international safety standards. At one end of the spectrum, due to the different degree of economic and technological development, a significant number of developing countries do not have adequate means and expertise to comply with the ICAO standards. Consequently, a new agenda item before ICAO is how to ensure global rather than national implementation of such standards. At the other end of the spectrum, ICAO has witnessed strong national and regional initiatives to reinforce the safety regime for civil aviation. The higher standards imposed in certain States or regions serve as an impetus to improve safety, but at the same time place a heavier burden on ICAO for maintaining a global equilibrium of standard-setting. Despite all this, there is still broad consensus that the matter of safety is global in nature, and that ICAO should remain the world regulatory authority for the safety of civil aviation.[60]

In contrast with what may be referred to as horizontal diversification of the membership of ICAO, there are profound vertical changes in the airline industry which indicate a trend toward transnational integration. An airline, especially a flag carrier, was regarded as a national symbol. States used to, and some still do, subsidize their airlines to operate as their mobile ambassadors rather than profitable commercial entities. Following the process of deregulation, privatization and liberalization in the last two decades of the 20th century, the mainstream airlines, and indeed other aviation infrastructures such as airports and air traffic services, are operating more and more on the basis of commercial principles. While the preliminary data indicate that safety is not negatively affected by this trend, it does present new implications for safety.[61] Firstly, the privatization or corporatization process has raised an issue regarding the effective supervision and control by States with respect to safety requirements. Instead of operating airlines, airports and air traffic services directly and implementing safety standards on its own, a State will need to implement the safety requirements indirectly through private or

60 See Onidi, *supra* note 6 in Introduction. See also *infra* note 268 in Ch.5 and accompanying text.

61 ICAO Council Working Paper C-WP/12480 "Report on the Study on the Safety and Security Aspects of Economic Liberalization", 11 May 2005.

corporatized entities. This will involve a transition from managing operational activities to assuming regulatory control and supervision.

Given the pressure of market forces, which requires the aviation industry to produce "more with less" in order to remain economically viable, it is important to ensure that safety requirements will not be compromised by the consideration for profit. Secondly, liberalization has been accompanied by the burgeoning of airline alliances, code-sharing and franchising, as well as the outsourcing of such activities as aircraft repair and maintenance, flight operations and crew administration, and ground handling. An Austrian airline may operate code-share flights with a Belgian carrier to Canada, while the aircraft is leased from a company in Denmark, which is in turn controlled by a trustee in Estonia. The aircraft may be operated by a pilot from France, subject to regular maintenance in Germany, beneficially owned by the nationals of Hungary and registered in Ireland.[62]

Consequently, it will be difficult to confine the regulatory framework within the boundaries of a single country. Harmonization of national regulations or formulation of international regulations becomes all the more necessary. Competition in the market also requires airlines to be cost-efficient, thereby calling for simplification and unification of certain regulatory procedures.

The globalization process is also accelerated by the development of new technology, such as satellite-based navigation systems.[63] As we all know, aircraft could not fly safely without air traffic services. Provision of such services is organized on the basis of flight information regions assigned by ICAO, which are more or less aligned with national boundaries. Therefore, traditionally, air traffic services, including air navigation aids by radar, are provided on a national basis. The introduction of the satellite-based systems will make it possible to provide service coverage which far exceeds national boundaries. Consequently, "the full implementation of an integrated global satellite-based navigation system is bound to infringe on States' sovereignty".[64] For the purposes of achieving efficiency and economy, States will be inclined to display certain flexibility in the exercise of sovereign rights by jointly providing air traffic services with neighbouring countries.

Last but not least, the catastrophic effects of terrorist attacks and other acts of unlawful interference against civil aviation could not be confined to a territory or to citizens of a particular country. Combat against terrorism has been globalized. Preventive measures must be as globally uniform as possible.

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62 See Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach*, *supra* note 31 at 147 *et seq.*; Lyle, C., "Economic liberalization and globalization have implications for safety regulation" (2001) 56 *ICAO Journal* 5 at 6.

63 For more discussion of the satellite-based systems which have come to be known as the ICAO communications, navigation and surveillance/air traffic management (CNS/ATM) systems, see *infra* Ch. 2.2.1, note 63 *et seq.*

64 Kotaite, A., *supra* note 54 at 21.

Otherwise, sophisticated criminal groups could target the weakest element in the chain of protection.

In view of all these, ICAO is confronted with more complicated tasks. The new millennium has imposed new safety requirements and may expect ICAO to take a more dynamic approach to promote the safe and orderly development of international civil aviation.

1.5 Concluding Remarks

Safety in civil aviation is not a purely technical matter; it involves a complex law-making process for determining and managing acceptable risks. Safety matters are also international by their nature. From the history of civil aviation, one could observe the clear and continuous movement from national to international regulation. Due to the changes which have taken place since the conclusion of the Chicago Convention, including the expansion of the international civil aviation community, the liberalization of the aviation industry, the introduction of new technology, and the existing as well as the new and emerging threats by terrorism, aviation safety has already become a global issue and could not be adequately and effectively addressed within the limits of national boundaries. Confronted with this challenge, ICAO, as the worldwide governmental organization for international civil aviation, needs to take a more proactive role in enhancing aviation safety, as demonstrated in the following chapters.

2 Regulation of Aviation Safety by Means of a Technical Safety Code

Global aviation is a large industry comprising various essential elements such as aircraft, air crew and airports. While these three elements could form the basic classical prerequisites for the conduct of flights, modern aviation is much more complex and requires even more components. For instance, due to the great number of aircraft flying at the same time, an air traffic control and management system is indispensable to avoid collision and to ensure orderly arrival and departure of these aircraft. In addition, an aircraft also needs meteorological information, communication devices and other services and facilities to ensure its safe flight. The provision of all these elements requires harmonized cooperation between numerous people from different jurisdictions with different levels of expertise. Obviously, it is practically impossible for ICAO to be physically responsible for the safety of each stage of every flight. Within the framework of the Chicago Convention, ICAO promotes the technical and operational safety of civil aviation on a worldwide basis through a number of mechanisms: the establishment of safety oversight responsibility on the part of sovereign States; the adoption of international standards, recommended practices and other related material; and more recently, through the establishment and implementation of safety oversight and security audit programmes for verifying State compliance with international standards and recommended practices.

2.1 Establishment of Safety Oversight Responsibility

Safety oversight may be defined as "a function by means of which States ensure effective implementation of the safety-related Standards and Recommended Practices (SARPs) and associated procedures contained in the Annexes to the *Convention on International Civil Aviation* and related ICAO documents".[1] In accordance with the principle of State sovereignty, a fundamental premise has been established that safety oversight responsibility rests with the contracting States to the Chicago Convention. In its Resolution A29-13 of 1992, the ICAO Assembly reaffirmed the widely held position that each "individual

1 ICAO Doc 9734, AN/959, 2nd ed. (2006), *Safety Oversight Manual*, Part A, The Establishment and Management of a State's Safety Oversight System, para. 2.1.1.

State's responsibility for safety oversight is one of the tenets of the Convention".[2] The basis for the exercise of this responsibility by States is twofold: the nationality/registration or flag jurisdiction of a State over the aircraft concerned; and, territorial jurisdiction of the relevant State.

2.1.1 Responsibility of the State of Registry and/or the State of the Operator

Article 17 of the Chicago Convention proclaims a fundamental principle: "Aircraft have the nationality of the State in which they are registered." Article 18 prohibits registration of an aircraft in more than one State, thereby completely ruling out the possibility of "double nationality" of an aircraft. The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.[3]

While the act of registering an aircraft *per se* may not be a safety issue, such an act may trigger a number of safety-related obligations.[4] The concept of registration implies responsibility of the State of registry.[5] For instance, under Article 12 of the Chicago Convention, each contracting State undertakes to adopt measures to ensure that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Any violation of these "rules of the air" will be subject to prosecution.[6] Also, under Article 31, it is the responsibility of the State of registry to issue or render valid a certificate of airworthiness for every aircraft engaged in international navigation. In the same vein, Article 32 requires that the pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered. Article 30 requires licensing by the State of registry for the installation, operation and use of aircraft radio transmitting apparatus.[7] All these provisions set out mandatory duties for the State of registry unless it delegates its responsibility

2 ICAO Doc 9848, *Assembly Resolutions in Force (as of 8 October 2004)* at I-56. See *infra* note 207 and accompanying text.

3 Art. 19, Chicago Convention.

4 ICAO Doc 9734, *supra.* note 1, para.2.3.4.1.

5 ICAO Circular Cir 295 LE/2, Guidance on the Implementation of Art. 83 *bis* of the Convention on International Civil Aviation (2003) at 4.

6 Art. 12, Chicago Convention. See also, ICAO Circular, *supra* note 5 at 4.

7 Through the interpretation of Art. 30, ICAO has in fact loosened the requirement of licensing for certain radio equipment not used for air navigation purposes. See Brisibe, T., *International law and regulations of aeronautical public correspondence by satellite*, Ph.D thesis at Leiden University, ISBN 10: 90-77596-25-9, ISBN 13: 978-90-77596-25-8, at 71 *et seq.* For the effect of interpretation of, or *de facto* amendment to the Chicago Convention, see *infra* note 111 in Ch.5.2.1.

pursuant to the relevant provisions of the Chicago Convention, such as Article 83 *bis*.

In addition to the foregoing mandatory duties, the State of registry is also subject to a number of permissive safety-related functions. For instance, the State of registry may provide assistance to an aircraft in distress which is on its registry,[8] and participate in the inquiry of accidents in which such aircraft is involved. Furthermore, although not expressly stipulated in the Chicago Convention, the State of registry is also competent to exercise jurisdiction over offences and acts committed on board aircraft registered in such State.[9]

In view of the important safety oversight functions of the State of registry, a question arises as to whether a "genuine link" is required between the State and aircraft registered therein. In other words, can a member State of ICAO decide, according to its laws and regulations, to grant "flags of convenience" to a particular aircraft? Cheng, citing the "link theory" derived from the decision of the International Court of Justice in the *Nottebohm Case*, states that "(t)here appears to be no reason why the rule enunciated by the Court with regard to individuals cannot be extended to ships and aircraft so as to exclude flags of convenience."[10] On the other hand, the editors of *Shawcross and Beaumont Air Law* believe that this argument disregards the fact that the criteria adopted by the court in the *Nottebohm Case* were "characteristic of human beings, but quite irrelevant for an inanimate object", and the fact that the Chicago Convention specifically calls upon each State to set its own rules for registration.[11]

The notion of a "genuine link" as enunciated in the *Nottebohm Case* refers to "a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[12] As early as 1958, the *Convention on the High Seas* had already prescribed the following rule with respect to the nationality of ships in its Article 5, paragraph 1:

> Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

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8 Art. 25, Chicago Convention.

9 See *infra* Ch.4.1 in the context of the Tokyo Convention.

10 Cheng, B., The Law of International Air Transport (1962, London: Stevens and Sons Ltd.) 131. Nottebohm Case (Second Phase), Judgement of April 6th, 1955, [1955] ICJ Reports 4.

11 *Shawcross and Beaumont Air Law* (London: LexisNexis Butterworths, 1983, loose leaf version), Vol. I at V 8.

12 *ICJ Reports*, *supra* note 10 at 23.

The 1982 *United Nations Convention on the Law of the Sea* inherited this provision in its Articles 91 and 94. From this, it would be safe to conclude that the requirement of a genuine link between a ship and its flag State has been deeply embedded in the law of the sea.

Over time, there has also been a clear indication that the genuine link requirement does not necessarily require that the ship must be owned by a national of the flag State. In the *MV Saiga (No.2)* case, the ship in question was owned by a company in Cyprus, managed by a company in Scotland, chartered to Switzerland with a crew of Ukrainian nationality, but registered in Saint Vincent and the Grenadines. Despite all these, the International Tribunal for the Law of the Sea concluded that the evidence adduced was not sufficient to justify a finding that there was no "genuine link" between the ship and Saint Vincent and the Grenadines at the material time.[13] On the contrary, the Tribunal stated as follows:

> The purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.[14]

Thus the general consensus in the maritime sector is that the objective and purpose of the "genuine link" requirement is to assure "the ability of the flag State to effectively exercise its jurisdiction over ships flying its flag".[15]

In similar fashion, Article 19 of the Chicago Convention reserves the right to fix the conditions for registration of aircraft exclusively to sovereign States. Although the Chicago Convention, unlike the treaties relating to the law of the sea, does not specifically mention the requirement of a "genuine link", there is no doubt that, in the general context of the Convention, "a social fact of attachment" must exist between an aircraft and its State of registry. For instance, the owner of an aircraft owes a duty to the State of registry to comply with its airworthiness standards, which, pursuant to Article 33 of the Chicago Convention, shall be equal to, or above the minimum standards established by ICAO. In return, the owner may benefit from the assurances of the State that the certificate of airworthiness of the aircraft issued by it will be recognized as valid by any other member State of ICAO. Clearly, there is a genuine connection of interests together with the existence of reciprocal rights and duties.

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13 Judgement of International Tribunal for the Law of the Sea, 1 July 1999, available at http://www.itlos.org/start2_en.html, date of access: 26 July 2008.

14 *Id*. at para. 83.

15 UN Doc A/61/160, Report of the Ad Hoc Consultative Meeting of Senior Representatives of International Organizations on the "Genuine Link", 17 July 2006.

Consistent with the maritime practice mentioned above, the fact that an aircraft is not owned by a national of the State of registry does not necessarily deprive it of a genuine link with that State. The central concern is whether the State of registry would be able to effectively exercise its safety oversight function to assure that the aircraft complies with ICAO standards. In this connection, it should be mentioned that ownership and control in the context of the registration of aircraft should be distinguished from the ownership and control requirements with respect to airlines designated in air services agreements.[16] The latter relates to economic regulation of airlines, whereas the former relates to safety regulation of aircraft. The Chicago Convention is principally concerned with the nationality of aircraft, but not particularly concerned with the nationality of airlines.[17] With respect to airlines, the requirements relating to ownership and control may be lessened due to emerging trends in the liberalization of air transport policy. With respect to aircraft, the nationality of the owner does not seem to present any problems. Control by the State of registry over safety aspects of aircraft should, however, be maintained or even reinforced.

The grave consequences which may result from the lack of a "genuine link" between aircraft and their States of registry were illustrated by the situation in Liberia around 2000. Due to the lack of domestic supervision system, the civil aviation authority of Liberia had lost control of many aircraft in its registry, which had created a situation that enabled arms trafficking networks to camouflage their operations through fake registrations, document fraud and the setting up of a mystery airline.[18] The arms trafficking resulting from these practices contributed to the instability in the region and drew the attention of the UN Security Council. A Panel of Experts was established to investigate the situation. In its report, the Panel observed:

> Because of its lax licence and tax laws, Liberia has for many years been a flag of convenience for the fringe air cargo industry. Liberia also has lax maritime and aviation laws that provide the owners of ships and aircraft with maximum discretion and cover, and with minimal regulatory interference. A schedule of Liberian-registered aircraft provided to the Panel by the government listed only 7 planes. No documentation was available on more than 15 other aircraft identified by the

16 For the issue of the ownership and control of airlines, see Haanappel, P.P.C., *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (The Hague and New York: Kluwer Law International, 2003) 145 *et seq*.

17 *Id.* at 47 and 146.

18 UN Doc S/2001/1015, Letter dated 26 October 2001 from the Chairman of the Security Council Committee established pursuant to resolution 1343 (2001) concerning Liberia addressed to the President of the Security Council, 26 October 2001 at 10, para. 143.

> Panel. Many aircraft flying under the Liberian flag, therefore, are apparently unknown to Liberian authorities, and are never inspected or seen in the country.[19]

Consequently, the UN Security Council decided, in accordance with Chapter VII of the UN Charter, to ground all Liberian-registered aircraft operating within its jurisdiction until it updated its register of aircraft pursuant to Annex 7 to the Chicago Convention, and provided to the Council the updated information concerning the registration and ownership of each aircraft registered in Liberia.[20] In this case, not only did the lack of oversight by the civil aviation authority present safety issues; it also had implications for the overall peace and security of the world.

Safety oversight responsibility is not limited to the initial certification and licensing of aircraft and crew but also includes further action to ensure the continuous airworthiness of the aircraft and continuous competence of the crew. Without a genuine connection to the aircraft and its crew, it would not be possible to carry out this follow-up function. In fact, when ICAO conducts a safety oversight audit in any of its member States, one of most important areas of concern is to verify whether the audited State has the capability to carry out the safety oversight function mentioned above. In the event of a negative finding, a recommendation to rectify the situation will be given to the State, failing which the deficiency (which is considered significant) will be reported to other member States. One situation that may trigger a negative finding is a scenario in which a State has an excessive number of large-transport aircraft on its registry, which are well beyond its capability for safety oversight.[21]

The issue as to whether or not the requirement of a "genuine link" excludes the practice of "flags of convenience" in civil aviation has received close attention in ICAO over the years, but there appears to be no clear definition of the term "flags of convenience". In its Working Paper C-WP/12480, the ICAO Secretariat referred to it as "a term derived from the maritime industry which denotes a situation in which commercial vessels owned by nationals of a State, but registered in another State, are allowed to operate freely between and among other States".[22] This definition varies from the definitions provided by a number of reputable publications in international law. For instance, the *Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute, defines the term as "the registration of merchant ships under the flags of a number of States. … Such ships are usually bene-

19 UN Doc S/2000/1195, Note by the President of the Security Council: Report of the Panel of Experts established by resolution 1306 (2000) on the situation in Sierra Leone, 20 December 2001 at 10, para. 25.

20 UN Doc S/RES/1343, 7 March 2001.

21 See *infra* Ch.5.3.1 note 202 and accompanying text.

22 ICAO Council Working Paper C-WP/12480 "Report on the Study on the Safety and Security Aspects of Economic Liberalization", 11 May 2005, App., para. 2.2.3.1.

ficially owned or controlled by non-nationals of the flag State, and the ships rarely if ever visit their port of registry."[23] It appears from this definition that while foreign ownership may "usually" be the case, it is not an adequate or essential condition for a ship to attain the flag of convenience. *Black's Law Dictionary* defines the term as "practice of registering a merchant vessel with a country that has favourable (i.e. less restrictive) safety requirements, registration fees, etc."[24] Again, in this definition, foreign ownership of the vessel is not the determining factor, since the owner may be tempted to register it in his or her own country if the conditions therein are less restrictive.

The classical "flag of convenience" status, as defined by the Max Planck Institute, has been prohibited for civil aircraft due to the effect of Article 18 of the Chicago Convention and, therefore, has no place in the ICAO system.[25] The newer definition referred to in the ICAO working paper mentioned above unnecessarily requires foreign ownership and does not entirely capture the essence of the concept of flags of convenience (i.e. the evasion of restrictive requirements, in many cases safety requirements). From the perspective of the Chicago Convention, the crux of the issue is not whether a State registers aircraft owned by foreigners,[26] but whether it exercises safety oversight on the aircraft in its register, no matter who owns them. By comparison, the definition provided by *Black's Law Dictionary* appears to reflect the current concern of the international community.

Accordingly, the practice of ICAO has been not to focus on foreign ownership of aircraft but, rather, on the safety oversight capabilities of the States which register foreign-owned aircraft.[27] This is consistent with recent maritime

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23 Ignarski, J.S., Flags of Convenience, in: Bernhardt, R., (ed.), *Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the Direction of Rudolf Bernhardt, Vol. II (Amsterdam-Lausanne-New York-Oxford-Shannon-Tokyo: Elsevier Science B.V., 1995) at 404. It is further explained that a ship "that sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities asserted and may become a ship without nationality." Caron, D.D., Flags of Vessels, *id*. 406; see also Wang Tieya, *China Legal Dictionary: International Law*, in Chinese (Beijing: China Prosecutor Press, 1994) at 127.

24 *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 638.

25 *Supra* note 3 and its preceding text.

26 Many countries which vigorously exercise safety oversight functions in civil aviation still allow foreign owned aircraft to be registered therein, subject to certain prescribed conditions. United States law allows the registration of an aircraft which is "owned by a corporation (other than a corporation which is a citizen of the United States) lawfully organized and doing business under the laws of the United States or any State thereof so long as such aircraft is based and primarily used in the United States", 14 CFR Ch. 1 (1-1-99 Edition), Section 47.3. In China, Art. 3 of the Regulations Concerning the Nationality and Registration of Civil Aircraft (CCAR-45AA, 2 December 1990, in Chinese) also allows the registration of an aircraft if its "right of operation" belongs to State organs, State enterprises or other groups and organizations lawfully formed by the nationals of the People's Republic of China.

27 *Cf*. ICAO Council Working Paper, C-WP/13133, "Progress Report on the Issue of Flags of Convenience", 20 February 2008.

practice focusing on "the ability of the flag State to effectively exercise its jurisdiction over ships flying its flag" as the objective and purpose of the "genuine link" requirement.[28] The "social fact of attachment" is not necessarily reflected in the ownership of the aircraft by nationals, but in the close supervision by the State of registry regarding safety standards over aircraft on its registry.

ICAO has strengthened the implementation of Article 21 of the Chicago Convention as a means of promoting the maintenance of this "social fact of attachment" between an aircraft and its State of registry. Article 21 requires a member State to supply to another member State or ICAO, "on demand", information concerning the registration and ownership of "any particular aircraft" registered in the former State. It further requires every member State to furnish reports to ICAO, "under such regulations as the latter may prescribe", giving such pertinent data as can be made available concerning the "ownership and control of aircraft registered in that State and habitually engaged in international air navigation." Since no regulations in this respect were prescribed by ICAO until 2006, this provision had been largely dormant for a long time, save in those cases where information was supplied "on demand". In 2005, however, ICAO undertook a study on the implementation of Article 21.[29] Following the study, and for the first time in ICAO's history, the Council approved in principle the *Rules for the Provision of Pertinent Data Concerning Aircraft Registered in a State Pursuant to Article 21 of the Convention on International Civil Aviation*[30] in December 2006.

As a result of this initiative, the provision of pertinent data concerning aircraft registration is no longer occasional, i.e., "on demand", but on a regular and ongoing basis. Under the Rules, all aircraft registered in a member State of ICAO are deemed to be "habitually" engaged in international air navigation, except those specifically limited to domestic operations by the State civil

28 *Supra* note 15.

29 ICAO Working Paper AN/WP 8113, "Review of a Proposal for the Provision of Data Concerning Aircraft Registered in a State, in accordance with Art. 21 of the Chicago Convention", 16 February 2006. See, also, ICAO ANC Minutes, AN Min. 169-1, 18 April 2005. In the Report of the Panel of Experts pursuant to Security Council resolution 1343 (2001) concerning Liberia (S/2001/1015, 26 October 2001), the Panel found illegally registered aircraft "an endemic problem" and felt that "ICAO's response was inadequate to deal with this growing problem". It recommended that:

- ICAO proactively educates its members on the dangers of illegal registrations;
- ICAO's member States computerize their registration lists and centralize them on the ICAO website so that users could check the situation and status of each aircraft;
- ICAO's Safety Oversight programme should place greater emphasis on aircraft registration.

30 ICAO Council Working Paper C-WP/12697, "Proposal for the Implementation of a System for the Provision of Pertinent Data Concerning Aircraft Registered in a State Pursuant to Article 21 of the Chicago Convention", 27 November 2006; ICAO Doc 9003-C/1155 C-Min. 179/1-20, *Council – Special Session (August 2006), Council – 179th Session, Summary Minutes with Subject Index* (2007) at 246.

aviation authority. The information to be provided under the Rules shall include, *inter alia*, the name and address of the owner of the aircraft, the name of its operator, and the State of the operator if it is not the same as the State of registry. Data shall be updated on a monthly basis and shall be accessible by other member States. The Rules further require that the data submitted and updated shall include the name of the civil aviation authority official responsible for reporting the data to ICAO. A list of States which have neither reported nor updated their data shall be maintained on the ICAO website.[31] These provisions are clearly intended to strengthen the link between an aircraft and its State of registry, and to curtail the use of flags of convenience for avoiding safety oversight in aviation.

In summary, while the aircraft registered in a member State of ICAO do not have to be owned by nationals of that State, there ought to be a "genuine link" between the aircraft and the State of registry in the form of close supervision or oversight by the State of registry over such aircraft, in the vital interest of aviation safety.

When a State of registry finds itself unable to discharge adequately the functions and duties assumed under the Chicago Convention, certain mechanisms exist for the transfer of such duties and functions to other States, or probably to an international organization. At the time the Chicago Convention was negotiated, its architects had envisaged the possibility of two or more contracting States establishing joint air transport operating organizations or international operating agencies, or pooling their air services on any routes or in any regions. Based on this foresight (which may have significant implications in the era of liberalization of air transport in the 21st century), the second sentence of Article 77 of the Chicago Convention mandates the ICAO Council to determine in what manner the provisions of the Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies. In the 1960s, ICAO Legal Committee spent a number of years systematically exploring the possibility of registering aircraft operated by international operating agencies on an international rather than a national basis.[32] Some believed that international registration was incompatible with the provisions of Articles 17 to 19 of the Chicago Convention, according to which aircraft must have one nationality, must be registered in a State, and must have the nationality of the State of registry. It was felt that if international registration was to be allowed, it would *de facto* amend the Chicago Convention.[33] Others

31 *Id.*

32 See, for more details, FitzGerald, G, "Nationality and Registration of Aircraft Operated by International Operating Agencies and Article 77 of the Convention on International Civil Aviation, 1944" (1967) *CYIL* at 193. See also Cheng, B. "Nationality and Registration of Aircraft – Article 77 of the Chicago Convention" (1966) 32 *JALC* 551; El Hussainy, K., "Registration and Nationality of Aircraft Operated by International Agencies in Law and Practice" (1985)10 *Air Law* 15.

33 *Shawcross and Beaumont Air Law, supra* note 11 at V 21.

believed that Article 77 gave the ICAO Council the duty and thus the power to interpret the provisions of the Convention so as to permit international registration. If joint registration or international registration is not permitted at all, the second sentence of Article 77 would have no meaning.[34] In 1967, a legal sub-committee established specifically to deliberate on this issue arrived at a consensus that the second sentence of Article 77 would be applicable to cases of joint registration or international registration of aircraft only if certain conditions were fulfilled. The key point of those conditions was the fulfillment of obligations relating to aircraft so registered. Several scenarios were presented:

> A. The States constituting the international operating agency shall be jointly and severally bound to assume the obligations which, under the Convention, attach to a State of registry.
> B. The States constituting the international operating agency shall identify for each aircraft, as between the States constituting the agency, an appropriate State which shall be primarily responsible for receiving and replying to representations made by other contracting States to the Convention. This identification shall be without prejudice to the joint and several responsibility assumed by each of the participating States in the agency, the duties assumed by the State so identified being exercised on its own behalf and on behalf of all the other participating States.
> C. In lieu of B above, the States constituting the international operating agency may devise such other system (for example, registration with a public international organization, with legal personality, established for this purpose by the States constituting the international operating agency) as shall satisfy the Council that the other contracting States of the Convention have equivalent guarantees and that the provisions of the Convention are complied with.[35]

Based on this conclusion, on 14 December 1967, the Council adopted a resolution setting out the conditions to be fulfilled in such cases.[36] As of now, due to the lack of major examples of international operating agencies, the issue of international registration of aircraft has remained an academic rather than a real issue, although it may re-emerge in the future. From the point of view of this study, however, what may be considered significant is that during discussions on this issue, there was general consensus that the obligations attached to the State of registry under the Chicago Convention must be fulfilled, regardless of whether the aircraft in question are registered on national basis or otherwise. While the door may be open for transferring those obligations to an international organization, there must be "equivalent guarantees" that the provisions of the Chicago Convention will be complied with. In other

34 FitzGerald, *supra* note 32 at 206.
35 *Id.* at 209 and 211. See also Report of the Sub-Committee (1967) at 2 (para.4.1).
36 ICAO Doc 8707-C/974, *Council –Sixty Second Session, Minutes with Subject Index*, August 1969 at 68.

words, there is a strong conviction in the minds of ICAO member States which may sufficiently establish *opinio juris*, that there must be a "genuine link" between an aircraft and its State of registry, since the act of registration is inevitably accompanied by the responsibility to exercise a safety oversight function over such aircraft.

The drafters of the Chicago Convention did not address the issue concerning the transfer of functions and duties from the State of the registry to the State of the operator, since the need for such a transfer was not apparent at the time. As modern aviation technology developed, aircraft have become larger, more sophisticated and more expensive, thereby giving rise to the need for international financing. Gradually, the practice of leasing, charter or interchange of aircraft has become popular. Very often, a special purpose entity registers an aircraft in one State only for financing purposes, but the aircraft so registered is operated by another entity in a different State, and probably has never landed in the State of registry. Under such circumstances, the State of registry may experience difficulties in ensuring compliance with safety standards since it has practically lost any control it might have had over the aircraft. A major difficulty may arise particularly with the supervision of maintenance requirements and therefore the State of registry may not find itself in a good position to renew the certificate of airworthiness when required.[37]

To cope with this new situation, Article 83 *bis* of the Chicago Convention was adopted under the auspices of ICAO, and it came into force on 20 June 1997 with respect to the States which have ratified it. Under this new article, notwithstanding the provisions of Articles 12, 30, 31 and 32(a), when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties under Articles 12, 30, 31 and 32(a) in respect of that aircraft. The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.

Article 83 *bis* may be regarded as one of the few lawful exceptions to the requirement of a "genuine link" between an aircraft and its State of registry. The said article imposes certain conditions for the transfer of responsibility. Firstly, as pointed out in the guidance material prepared by ICAO, "Article 83 *bis* is an umbrella provision, the ratification of which does not entail the automatic transfer of functions and duties from the State of Registry to the State of the Operator; it requires that such a transfer be expressly arranged through an agreement between the States concerned".[38] Secondly, Article 83

37 ICAO Circular 295 *supra* note 5 at 4.

38 *Id*. at 5. A model of such an agreement is provided in the guidance.

bis delineates the limits of transferable responsibility, namely: matters relating to the rules of the air (Article 12); radio licensing (Article 30); airworthiness of aircraft (Article 31); and, crew licensing (Article 32(a)).[39] The transfer is further limited to aircraft which are identified in the transfer agreement. Thirdly, the transfer will be recognized by third-party States which have ratified Article 83 *bis* only when the latter has been officially informed of the transfer through direct communication between the relevant States, or through the registration of the transfer agreement with ICAO under Article 83 of the Chicago Convention, which, in turn, is required to make it public.

To date, Article 83 *bis* has been ratified by 156 States.[40] However, this number is still smaller than the total number of 190 contracting States to the Chicago Convention. As regards those States which have not ratified Article 83 *bis*, the responsibility which would otherwise be transferable under the Article remains with the State of registry. As between the States parties to it, "Article 83 *bis* is a discretionary and flexible instrument available to those that ratify it, but unless functions and duties are clearly identified and reassigned by a transfer agreement, they continue to rest with the State of Registry".[41]

The amendment to the Chicago Convention through Article 83 *bis* reinforces the principle that the concept of "flags of convenience" has no place within the ICAO system. The rationale behind Article 83 *bis* is that "the State having the closest ties with the operator concerned will have the necessary supervisory authority to carry out effective safety oversight of the aircraft and its crew in accordance with the requirements of the relevant Annexes to the Convention."[42] Had "flags of convenience" been acceptable, it would not have been necessary for ICAO to spend several decades in negotiating and adopting Article 83 *bis* and to bring it into force. The vigorous requirements of the conclusion of a transfer agreement and notification of such an agreement further demonstrate that Article 83 *bis* is an exception which proves the existence of the rule that the State of registry must exercise supervisory or oversight function over the aircraft registered therein.

2.1.2 Responsibility of States in their Respective Territories

The responsibility to exercise safety oversight does not only rest with the State of registry and the State of the operator of aircraft, but, to a certain extent, also with the State in whose territory the aircraft operates. For instance, under Article 12 of the Chicago Convention, a contracting State undertakes the same

39 Other functions and duties, such as those under Art. 25 relating to aircraft in distress, and Art. 26 concerning inquiry of accidents, remain with the State of registry.
40 As of 21 July 2008.
41 ICAO Circular 295 *supra* note 5 at 5.
42 *Id.* at 6.

responsibility as the State of the registry to ensure that every aircraft flying over or maneuvering within its territory shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Article 25 requires each contracting State to provide such measures of assistance to aircraft in distress in its territory as it may find practicable. Article 26 imposes an obligation upon a contracting State to investigate an accident involving an aircraft of another contracting State which occurs in its territory if such an accident involves death or serious injury, or indicates serious technical defects in the aircraft or air navigation facilities. In many cases, the State in which the accident occurs has to incur certain expenditures in conducting the investigation even if the accident does not have a significant impact on it. The acceptance of this obligation is another significant indicator that aviation safety is a matter which goes beyond the concern of only one State and requires international cooperation.

Under Article 16, each contracting State has the right, without unreasonable delay, to search aircraft of other contracting States upon landing or departure, and to inspect the certificates and other documents prescribed by the Convention. While this provision does not impose an obligation on the part of the searching State, it has been invoked as a legal basis to support the acts of certain States to strengthen safety measures.[43] In 2001, the ICAO Council adopted a resolution recommending a model clause on aviation safety to be included in agreements on air services, which specifically mentions the applicability of Article 16.[44] The scope of the search provided for under the recommended model clause extends beyond the list of documents required under Article 33 of the Convention. That article exclusively addresses aircraft certificates of airworthiness and flight crew certificates of competency and licenses, whereas the model clause covers other additional documents such as air operator certificates. In a 2007 resolution of the ICAO Assembly, Article 16 was again referred to, and member States were reminded of the need for surveillance of all aircraft operations, including foreign aircraft within their

43 See, for example, the Safety Assessment of Foreign Aircraft (SAFA) programme, *infra* Ch.5.4.2, note 230.

44 ICAO Doc 9785-C/1139, C-Min. 163/1-22, *Council – 163rd Session, Summary Minutes with Subject Index* (2001) at 93. The model provision relating to Art. 16 reads as follows: "Pursuant to Article 16 of the Convention, it is further agreed that, any aircraft operated by, or on behalf of an airline of one Party, on service to or from the territory of another Party, may, while within the territory of the other Party be the subject of a search by the authorized representatives of the other Party, provided this does not cause unreasonable delay in the operation of the aircraft. Notwithstanding the obligations mentioned in Article 33 of the Chicago Convention, the purpose of this search is to verify the validity of the relevant aircraft documentation, the licensing of its crew, and that the aircraft equipment and the condition of the aircraft conform to the Standards established at that time pursuant to the Convention."

territory, and for appropriate action to be taken when necessary to preserve safety.[45]

Moreover, Article 28, paragraph 1 of the Chicago Convention stipulates that each contracting State undertakes, so far as it may find practicable, to provide, in its territory, airports, radio services, meteorological services, and other air navigation facilities to facilitate international air navigation in accordance with the standards and practices recommended or established form time to time pursuant to this Convention.

The undertakings provided in Article 28 are obviously vital for ensuring the safety of air navigation. On the other hand, a number of commentators have noted the escape-valve nature of the phrase "so far as it may find practicable" included in this article.[46] It has been pointed out, for instance, that "the obligations undertaken by the contacting States are subject to limitations and safeguards which make it impossible for a State to be compelled to take action against its will".[47] Indeed, the existence of the escape-valve is one of the features of the Chicago Convention and its effect needs to be evaluated.[48] As far as Article 28 is concerned, experience has shown that ICAO may, through its institutional regimes, reduce or minimize the negative impact of this escape-valve.

In practice, ICAO and its member States implement Article 28 through regional air navigation plans. The plans are ICAO documents established by the Council, which set forth in detail the facilities, services and procedures required for international air navigation within specified regions. Such plans constitute recommendations for States to follow in programming the provision of their air navigation facilities and services, with the assurance that facilities and services furnished in accordance with the plan will, together with those of other States, form an integrated system adequate for the foreseeable future.[49]

In their material scope, the plans describe the required facilities and services in the fields of aerodromes, air information services, air traffic services, communications, meteorology, and search and rescue. In their geographical scope, the plans are usually related to one or more ICAO air navigation regions. Traditionally, a regional air navigation plan was prepared or amended by a regional air navigation conference, subject to the approval of the ICAO Council.

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45 Assembly Resolution A36-2: *Unified strategy to resolve safety-related deficiencies*, in ICAO Doc 9902 *Assembly Resolutions in Force* (as of 28 September 2007) at I-92.

46 Buergenthal, T., *Law-Making in the International Civil Aviation* (Syracuse University Press, 1969) at 76. Cheng, *supra* note 10 at 146.

47 *Shawcross and Beaumont Air Law*, *supra* note 11 at VI [4].

48 See *infra* note 141 and accompanying text.

49 ICAO Doc 7754, *Air Navigation Plan – European Region*, 23rd Edition (1985), in Introduction 1.1.

Recent practice in ICAO, however, allows the amendment of a plan through the circulation of the draft amendment without convening a conference.[50]

With respect to the legal status of regional air navigation plans, some commentators consider that they have the status of a Council recommendation, similar to the one mentioned in Article 69 of the Chicago Convention, under which the Council may make recommendations to a member State if its facilities are considered inadequate, but no State shall be "guilty of an infraction" of the Convention if it fails to carry out these recommendations.[51] Within ICAO circles, there is a feeling that member States are generally scrupulous in honouring their undertakings contained in the plans. This may be the reason why Milde states that most States believe, or are made to believe, that a regional air navigation plan has binding force. However, he questions the constitutional basis of the planning authority of the regional air navigation conferences.[52] In the view of this writer, regional air navigation plans form a part, and probably the major part of the "regional air navigation agreements" referred to in paragraph 2.1.2 of Annex 11.[53] They represent commitments made by the member States involved in the plans with respect to the degree of practicability of providing services within their respective territories under Article 28. The plan-formulation process is less formal than the treaty-making process, but is still safeguarded by certain procedures. Regional air navigation plans may not be strictly binding legal obligations in the sense of their enforceability in courts, but, in practice, they determine the way in which States act. While the provisions in the plans are classified as "recommendations", the term might signal more than one would expect from a literal reliance on that word.[54] They supplement the otherwise flexible obligations stipulated under Article 28 and make them more definitive. Since the facilities and services set forth in the plans "should be adequate for at least approximately the next five years",[55] it is submitted that States which withdraw the facilities

50 *Id.*

51 Buergenthal, *supra* note 46 at 117 and 118. For more discussions on this issue, see van Antwerpen, N., *Cross-border provision of Air Navigation Services with specific reference to Europe: Safeguarding transparent lines of responsibility and liability* (Alphen aan den Rijn: Kluwer Law International, 2008) at 154-162.

52 Milde, M., "Chicago Convention at Sixty – Stagnation or Renaissance" (2004) (unpublished) at 12-13, cited by van Antwerpen, *supra* note 51 at 160.

53 Para. 2.1.2 reads: "Those portions of the airspace over the high seas or in airspace of undetermined sovereignty where air traffic services will be provided shall be determined on the basis of regional air navigation agreements. A Contracting State having accepted the responsibility to provide air traffic services in such portions of airspace shall thereafter arrange for the services to be established and provided in accordance with the provisions of this Annex."

54 See *infra* Ch.5.2.2 regarding the concept of quasi-law, particularly notes 159 and 164.

55 ICAO Doc 8144-AN/874/6 *Directives to Regional Air Navigation Meetings and Rules of Procedure for their Conduct*, 6th ed. (1991) at 4.

or services before the end of the five-year term should, to say the least, have the burden of providing justification.

By its ordinary meaning, Article 28 unequivocally requires contracting States to "provide" facilities and services "in accordance with the standards and practices recommended established from time to time" pursuant to the Convention. Stated differently, in addition to the "regulatory burden" imposed upon contracting States to ensure compliance with standards and recommended practices, Article 28 also prescribes an "operational burden" to provide facilities and services.[56] Today, while there might still be instances in which governments are virtually omnipresent and omnipotent in aviation activities, the noticeable trend is that more and more operational activities are carried out by privatized or corporatized entities.[57] Very often, these autonomous entities operate on the basis of commercial principles, remain financially independent, and do not form a part of traditional governmental structures.

The need to pool expertise and resources, the rapid advancement of technology, and the nature of certain cross-border activities have also prompted certain States to delegate some of the functions stipulated under Article 28 to international agencies or other States. Examples of these agencies are ASECNA, COCESNA and EUROCONTROL in the area of air traffic services.[58] As new technology develops, international joint efforts will be intensified.

The practice of States and international agencies inside and outside ICAO has led to the consensus that Article 28 of the Chicago Convention does not prevent a contracting State from delegating its functions thereunder to a non-governmental entity, another State or an international agency.[59] For instance, paragraph 2.1 of Annex 11 to the Chicago Convention, which is an international standard, provides that "a State may delegate to another State the responsibility for establishing and providing air traffic services in flight information regions, control areas or control zones extending over the territories of the former".[60] The note inserted to the Annex immediately after this standard explains further:

> If one State delegates to another State the responsibility for the provision of air traffic services over its territory, it does so without derogation of its national sovereignty. Similarly, the providing State's responsibility is limited to technical and operational considerations and does not extend beyond those pertaining to the safety and expedition of aircraft using the concerned airspace.

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56 van Antwerpen, *supra* note 51 at 140.

57 ICAO Circular 284 AT/120, *Privatization in the Provision of Airports and Air Navigation Services* (March 2002) at 5.

58 See *supra* note 35 in Ch.1 and accompanying text.

59 ICAO Circular 284 *supra* note 57 at 13; See also ICAO Assembly Working Paper A35-WP/75, "Report of the Establishment of a Legal Framework with Regard to CNS/ATM systems Including GNSS", 28 July 2004.

60 Annex 11, *Air Traffic Services*, 13th ed. July 2001.

As indicated in the foreword of each Annex, "notes" included in the Annexes give "factual information or reference" bearing on the standards and recommended practices in question, but not constituting part of the standards or recommended practices.[61] Accordingly, the "responsibility" of the providing State mentioned in the note should be construed as a factual rather than a legal responsibility. Article 28 clearly places primary responsibility on the State(s) in whose territories the services are provided. An international standard in the Annex or for that matter a note to a standard which attempts to alter this principle would be patently *ultra vires*. The agreement between the delegating State and the providing State may be binding *inter se* but does not create rights and obligations for third parties. In the absence of a provision similar to Article 83 *bis*, it will be difficult to assert against a third-party State that the responsibility of the delegating State has been legally transferred to the providing State.

The same principle will apply when a State delegates its functions under Article 28 to a non-governmental entity. While a contracting State's obligation to provide air navigation facilities under Article 28, paragraph (a) of the Convention is qualified by the phrase "so far as it may find practicable", a contracting State cannot escape from this obligation on the ground that its air navigation facilities have been privatized and are no longer under the direct control of the government. On the contrary, it is ICAO's policy that contracting States are "responsible for meeting their obligations under the Chicago Convention to ensure aviation safety, regardless of the status accorded to airport operators and providers of air navigation services in their respective territories".[62] The responsibility rests with the contracting States to supervise those operators and providers. This is of particular importance in view of the fact that a great number of airports and air traffic control agencies enjoy a strong, sometimes monopolistic, position in the market. Care should therefore be taken to ensure that these non-governmental entities will not abuse naturally monopolistic powers, e.g., to deny access or to charge discriminatory or unreasonably high fees, etc. If that happens, the contracting State responsible for the non-governmental entities may be considered as not having fulfilled its obligations or even committing an infraction under Article 15 of the Convention, which establishes the principle of non-discrimination.

The possibility of channeling or transferring State responsibility under Article 28 of the Chicago Convention was discussed in the context of the implementation of the Communication, Navigation and Surveillance/Air Traffic Management (CNS/ATM) systems. An attempt was made to follow the precedent of Article 83 *bis* to amend Article 28 through the introduction of an Article

61 *Id.* in the Foreword.

62 ICAO Doc 9779-C/1138, C-Min. 162/1-13 *Council – 162nd Session, Summary Minutes with Subject Index* (2001) at 88.

28 *bis* or some other similar provisions, but it was not successful.[63] The CNS/ATM systems are satellite-based systems which ICAO has promoted since the 1990s with the view to providing safety-critical services for aircraft navigation.[64] They have been identified as "the only viable solution" for overcoming the shortcomings of the traditional terrestrial system based on line of sight and for fulfilling the requirements of future aviation.[65] The key element of the systems is the Global Navigation Satellite System (GNSS), which is a worldwide positioning and time determination system, including elements such as satellite constellations, aircraft receivers, and system integrity monitoring, augmented as necessary to support the required navigation performance for the actual phase of aircraft operation. At present, only the United States and the Russian Federation are capable of providing the constellation of satellites needed for primary GNSS signals. A new system in Europe, called Galileo, is under development.[66] In view of this oligopoly, it has been realized that if the CNS/ATM systems are implemented on a global scale, most States will have to rely on primary signals provided by others. A fundamental question which then arises is: how will a State assume safety responsibility (including oversight responsibility) for the navigation facilities under Article 28 of the Chicago Convention when it does not have any control over the crucial elements of the facilities? A "link" is considered necessary between a State responsible under Article 28 and another State or an entity which provides the GNSS signals. Starting from the early 1990s, various ICAO legal bodies have been pondering over this issue for more than a decade. The majority of member States have indicated a preference for an international convention to establish this "link". At a conference held on the subject in Rio de Janeiro in 1998, a delegate from Jamaica, Dr. Kenneth Rattray, stated:

It is absolutely essential that the foundation of GNSS on a world-wide basis be constructed on pillars of political confidence, financial confidence, and technical and technological confidence. The three pillars must be anchored and secured by legal and institutional foundations which can only be provided

63 ICAO Council Working Paper C-WP/11386, "Report of the Third Meeting of the Secretariat Study Group on the Legal Aspects of CNS/ATM systems", 22 November 2000, para. 2.1.

64 ICAO Assembly Resolution A35-3: *A Practical Way Forward on Legal and Institutional Aspects of Communications, Navigation, Surveillance/Air Traffic Management (CNS/ATM) systems*, in ICAO Doc 9848 *supra* note 2 at V-6. See also *supra* Ch. 1, note 63 and accompanying text.

65 *Towards Acceptable Institutional Arrangements for the Continued Provision of GNSS for Civil Aviation*, ICAO Doc FANS (II) 4-WP/9 (7 July 1993), para. 1.2.1. For instance, the use of satellite technology may improve air traffic services in mountainous and oceanic areas, which are difficult to reach by the radar system. It may also facilitate the reduction of separation minima of aircraft, thereby improving capabilities to deal with congestion in the skies.

66 See Haanappel, *supra* note 16 at 163 and the citations therein. See also ICAO Assembly Working Paper A35-WP/75, *supra* note 59 in App., para.1.4.

by an international convention which spells out in detail the fundamental principles governing the implementation of GNSS.[67]

His voice was echoed by more than one hundred States from Africa, Asia, Europe and South America, but there was no consensus. The United States pointed out:

> Just as some countries have *unwritten* constitutions, the aviation community might well assure itself that legal and institutional issues can be resolved satisfactorily without a GNSS-specific multilateral agreement. Thus, a legal framework, in the sense referred to in the Legal Committee's work program need not be a single multilateral agreement. A new multilateral agreement could require many years to negotiate, and many more to come into force. In an area characterized by fast-moving technological developments, a new convention would almost surely be rendered technically obsolete before it could be implemented.[68]

After the Rio Conference, the widely-supported view at the Conference did not result in any GNSS convention,[69] mainly because the view was not shared by States "whose interests are specially affected".[70] After eleven meetings, the Secretariat Study Group on Legal Aspects of CNS/ATM systems has concluded that for the implementation of CNS/ATM systems, no amendment to Article 28 of the Chicago Convention is warranted at the present time. Consequently, States, having undertaken to provide air navigation facilities

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67 Address at the World-wide CNS/ATM systems Implementation Conference, held from 11 to 15 May 1998 in Rio de Janeiro. See also, Amaleboba, P., "Consideration of International Convention", ICAO SSG-CNS/9-WP/1, 13 June 2003. Amaleboba stated that "the only way to secure confidence is by committing the providers to accept certain international responsibilities in a form of a binding legal instrument." See, also, Schubert, F.P., "An International Convention on GNSS Liability: When Does Desirable Become Necessary?" (1999) XXIV *AASL* 245.

68 Working Paper Presented by the United States in the Rio Conference, WW/IMP WP/74, "Information – Legal Implications of CNS/ATM", 11 May 1998.

69 ICAO Assembly Working Paper A35-WP/75, *supra* note 66. The culminating point that ICAO reached in this respect was the adoption by the ICAO Assembly in 1998 the *Charter on the Rights and Obligations of States Relating to GNSS Services* in the form of Resolution A32-19. The Charter embodies fundamental principles applicable to the implementation and operation of GNSS, including the safety of international civil aviation; universal access to GNSS services without discrimination; preservation of States' sovereignty, authority and responsibility; continuity, availability, integrity, accuracy and reliability of GNSS services; compatibility of regional arrangements with the global planning and implementation process, and the principle of co-operation and mutual assistance. Regarding the normative status of the Charter, some hold the view that it was not binding. Others believe that the legal value of the Charter should not be underestimated. A Charter adopted unanimously in the form of an Assembly resolution is not devoid of all legal effects. The key factor is the willingness of States to agree on standard of conduct, rather than the form of such standards. See A35-WP/75, *id.* App., at para. 2.5 and *infra* Ch.5.4.4.

70 The concept was mentioned by the International Court of Justice in the *North Sea Continental Shelf, Judgment* [1969] *ICJ Reports* 3 at 42 and 43. See further discussion on this matter in Ch.5, *infra* note 259 *et seq* and accompanying text.

in their territory, remain responsible under Article 28, whether they provide the services by using their own signals, services or facilities, or by procuring their provision by other States.[71] Based on this, the ICAO Assembly has in Resolution A35-3 reaffirmed the position that "there is no need to amend the Chicago Convention for the implementation of CNS/ATM systems".[72]

Correlated with the issue of responsibility, an interesting question is whether "responsibility" includes "liability". The issue becomes more complicated because only one word exists in many languages for these two words in English.[73] The Study Group mentioned above, after a long debate, stated the following in its final report:

> The Group also pointed out that responsibility under Article 28 should not be seen to be the same as liability. From the point of view of international law, Article 28 regulates the relationship between States only and does not give a cause of action to private persons to claim compensation for damage. Such claims should rather be handled at the level of the applicable domestic law.[74]

In its own court, and subject to its own domestic law, a State may be held liable if it is negligent in providing air navigation facilities or services. Thus, in *Ingham* v. *Eastern Airlines Inc.*, when a plane crashed due to the failure of an FAA controller to inform the pilot that visibility had dropped from one mile to three quarters of a mile, the US Court of Appeal held that

> When the government undertakes to perform services, which in the absence of specific legislation would not be required, it will nevertheless be held liable if these activities are performed negligently…In light of this reliance, it is essential that the government properly perform those services it has undertaken to provide albeit voluntary and gratuitously…[75]

Similarly, following the mid-air collision on 1 July 2002 of a Tupolev TU 154 operated by Bashkirian Airlines and a Boeing 757 freighter of DHL International Ltd. in Überlingen, Germany, the German District Court of Konstanz held that Germany as a State is liable according to German law, despite the fact that the air navigation services were provided by the Swiss-based Sky-

71 A35-WP/75, *supra* note 59 in para. 2.2.2 and 2.2.5.

72 Resolution A35-3, *supra* note 64.

73 For example, in French, the two words "responsibility" and "liability" are expressed as "deux genres de responsabilité". See *supra* note 59, the French version of Working Paper A35-WP/75, App. para. 2.2.6. The International Law Commission always refers to state "responsibility". See, for example, draft articles on "Responsibility of States for internationally wrongful acts", annexed to UN A/RES/56/83.

74 ICAO Assembly Working Paper A35-WP/75, *supra* note 59, App., para. 2.2.6.

75 *Ingham* v. *Eastern Airlines*, 373 F. 2d 227 at 236 (2nd Cir., 1967). See also Henaku, B.D.K., *The Law of Global Air Navigation by Satellite, A Legal Analysis of the ICAO CNS/ATM System* (Leiden: AST, 1998) 197.

guide.[76] It is interesting to note for the purpose of the present study that the Court based its decision solely on German law. While the Court examined international agreements, it did not address the issue under Article 28 of the Chicago Convention. Moreover, the complaint was lodged by a Russian-based carrier, Bashkirian Airlines, in a domestic court in Germany. The Russian Federation as a member State of ICAO did not file any application in ICAO concerning the effect of Article 28. In fact, in the history of ICAO, no State has ever initiated any legal proceeding within the framework of ICAO alleging liability under Article 28. Accordingly, the current State practice seems to be in line with the conclusion of the Study Group mentioned above. This does not preclude any new evolution in the future. Theoretically, it appears plausible for a member State to hold another accountable if the latter fails to exercise the duty of care in the provision of navigation facilities and services. Whether or not this accountability would include monetary compensation is not very clear. In the preliminary view of this writer, the criterion of "practicability" as the escape-valve in Article 28 would probably be used as a defence against such compensation.

In summary, according to *lex lata*, a member State of ICAO may delegate its functions and duties under Article 28 of the Chicago Convention to a non-governmental entity, another State, an international organization, or a supra-national organization. However, such delegation, which may be binding as between the delegating and delegated parties *inter se*, does not alter the ultimate responsibility of the delegating State with respect to other member States of ICAO which are not parties to the delegation agreement or arrangement. In other words, unlike the transfer under Article 83 *bis*, delegation of the functions assumed under Article 28 does not relieve the delegating State of the responsibility attached to the functions so delegated. However, Article 28 does not give a cause of action to private persons to claim compensation for damage. Moreover, there is no precedent in ICAO in which one member State claims compensation from another on the basis of Article 28.

2.1.3 Critical Elements of the Safety Oversight System

How should a State ensure that it has fulfilled its safety oversight responsibility? According to ICAO practice, member States need to consider the critical elements for safety oversight in their efforts to establish and implement an effective safety oversight system. Essentially, critical elements are the safety

76 *Bashkirian Airlines* v. *Bundes republik Deutschland*, (2006) with the District Court of Konstanz (Landgericht Konstanz 4. Zivilkammer) under Case No. 4 O 234/05 H. At the time of writing, the case is still under appeal. In that case, it is believed that the collision was caused by the errors of the air traffic controller of Skyguide. For a more extensive analysis of the case, see van Antwerpen, *supra* note 51 at 6 *et seq*.

defence tools of a safety oversight system which are required for the effective implementation of safety-related policies and associated procedures.[77] Eight critical elements have been identified: primary aviation legislation; specific operating regulations; the civil aviation authority's structure and safety oversight functions; technical guidance; qualified technical personnel; licensing and certification obligations; continued surveillance obligations; and, resolution of safety issues.[78]

Primary aviation legislation is understood as a national legislative enactment which is often known as "civil aviation code" or "civil aviation act". It is normally adopted by a legislative branch of a contracting State, such as the parliament or its equivalent, and it differs from secondary legislation or regulations promulgated by the executive branch of a government. The Chicago Convention does not specifically require a contracting State to promulgate "primary aviation legislation".[79] It follows from the principle of sovereignty that a State is free to enact aviation law in whatever form it prefers, provided that the enactment is compatible with its international obligations under the Chicago Convention and other applicable rules of international law. The requirement of "primary aviation legislation" as a critical element could thus be regarded as a new requirement created or initiated by ICAO.

Specific operating regulations normally refer to legal instruments which specify and implement the requirements emanating from the primary aviation legislation, and provide for standardized operational procedures, equipment and infrastructure, in conformity with the Annexes to the Chicago Convention. Regulations should be sufficiently comprehensive, detailed, and current with respect to changes in technology and the operating environment to ensure that satisfactory compliance will result in an acceptable level of safety.[80]

The civil aviation authority's structure and safety oversight functions contemplate the establishment of a civil aviation authority or its equivalent, which will be assigned with the responsibilities inherent in safety oversight. The size and internal organizational structure of the civil aviation authority are to be internally determined by each State, based on its aviation activities, but the audits carried by ICAO will normally enquire whether it has appropriate

77 ICAO Doc 9735 AN/960, *Safety Oversight Audit Manual*, 2nd Edition (2006), Appendix C.

78 There are some variations in ICAO documents regarding the presentation of critical elements. Cf. ICAO Doc 9735, *id.* and Appendix 5 to Annex 6, *Operation of Aircraft,* Part I, International Commercial Air Transport – Aeroplanes, 8th Edition, July 2001. The presentation here follows the format of Annex 6.

79 Boteva, M., *A New Century and a New Attitude towards Safety Oversight in Air Transportation*, unpublished Master's Thesis, McGill University, November 2000. For different modes of implementation of international obligations, see *infra* Ch.5.4.1.

80 Cf. ICAO Doc 9735, App. C, *supra* note 77 and Annex 6 – *Operation of Aircraft.* For implementation of Annexes to the Chicago Convention at the national and regional level, see *infra* Ch.5.4.

and adequate technical and financial resources to effectively discharge the responsibilities assumed by the State.

As one of the critical elements of the safety oversight system, technical guidance requires a contracting State to provide technical guidance material, tools and safety-critical information, as applicable, to the technical personnel to enable them to perform their safety oversight functions. It also includes the provision of technical guidance by the oversight authority to the aviation industry.[81]

Qualified technical personnel means the establishment of minimum knowledge and experience requirements for the technical personnel performing safety oversight functions, and the provision of appropriate training to maintain and enhance their competence at the desired level. The training should include initial and recurrent training.

Licensing and certification obligations relate to the implementation of processes and procedures to ensure that personnel and organizations performing an aviation activity meet the established requirements before they are allowed to exercise the privileges of a licence or certificate.

Continued surveillance obligations require a contracting State to put in place a system, such as inspections and audits, to proactively ensure that aviation licence or certificate holders continue to meet the established requirements.

Resolution of safety issues means that a member State is required to use a documented process to take appropriate corrective actions, up to and including enforcement measures, to resolve identified safety issues.[82]

Critical elements of a safety oversight system encompass the whole spectrum of civil aviation activities, including areas such as aerodromes, air traffic control, communications, personnel licensing, flight operations, airworthiness of aircraft, accident/incident investigation, and transportation of dangerous goods by air.[83] Effective implementation of these critical elements is regarded as a good indication of a State's capability for safety oversight.

2.2 Formulation of Technical Regulations

Establishing the safety oversight responsibility of the member States of ICAO represents only one of many steps in the building of a robust safety system for air navigation. A considerable number of provisions of the Chicago Convention expressly oblige contracting States to fulfill their various responsibilities: "in accordance with the procedure which may be recommended" by ICAO;[84]

81 ICAO Doc 9735, *supra* note 77 at C-2.
82 Annex 6.
83 ICAO Doc 9735, *supra* note 77 at C-1.
84 Art. 26, Chicago Convention.

"in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention"; or, "in such form as may be prescribed from time to time pursuant to this convention".[85] It is obvious from the foregoing that the Chicago Convention mandates ICAO to establish certain benchmarks or yardsticks against which State performance of those obligations can be measured. International standards and recommended practices (SARPs) are the primary mechanisms used by ICAO for this purpose. The Chicago Convention itself does not provide definitions for standards and recommended practices. The first ICAO Assembly defined a standard as "any specification for physical characteristics, configuration, material, performance, personnel, or procedures, the uniform application of which is recognized as *necessary* for the safety or regularity of international air navigation and to which member States will *conform*; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention". (Emphasis added). A recommendation is any such specification, the uniform application of which is recognized as "*desirable* in the interest of safety, regularity, or efficiency of international air navigation and to which member States will *endeavor to conform* in accordance with the Convention".[86] (Emphasis added).

In addition to SARPs, ICAO also develops Procedures for Air Navigation Services (PANS), Regional Supplemental Procedures (SUPPS), regional air navigation plans,[87] and related manuals, circulars and guidance. Together, all these documents constitute a comprehensive technical safety code for civil aviation. By joining ICAO, States undertake to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in all matters in which such uniformity will facilitate and improve air navigation.

85 Arts. 28 and 34, *id.*

86 ICAO Doc 7670 *Resolutions and Recommendations of the Assembly 1st to 9th Sessions (1947-1955)*, Montreal, Canada, 1956, Assembly Resolution A1-31 "Definition of International Standards and Recommended Practices", now consolidated into Resolution A36-13: *Consolidated Statement of ICAO policies and associated practices related specifically to air navigation*, in Doc 9902, *Assembly Resolutions in Force* (as of 28 September 2007) at II-3.

87 PANS comprise, for the most part, operating practices as well as material considered too detailed for SARPs. PANS often amplify the basic principles in the corresponding SARPs to assist in their application (ICAO Doc 8143-AN/873/3, *Directives to Divisional-type Air Navigation Meetings and Rules of Procedure for their Conduct*, Part II, para. 3.) SUPPS supplement PANS in certain regions. For "regional air navigation plans", see *supra* note 49 *et seq* and the accompanying text.

2.2.1 Subject Matters Addressed by SARPs

SARPs adopted by the ICAO Council in accordance with the provisions of Chapter VI of the Chicago Convention are, "for convenience",[88] designated as Annexes to the Convention. To date, eighteen annexes have been adopted.[89] The scope of their multi-disciplinary content extends beyond the comprehension of any single profession. To borrow the statement of Buergenthal made almost forty years ago, which, *a fortiori*, applies today, "[i]t is impossible, of course, for a lawyer with no aeronautical training to pass judgement on the content of ICAO legislation or on its technical quality and efficacy".[90] The current study will refer to the Annexes only for the limited purpose of providing certain illustrations of the safety regulation processes of ICAO.

2.2.1.1 Personnel Licensing (Annex 1)

Licensing is the act of authorizing defined activities which should otherwise be prohibited due to the risk inherent in such activities if performed without proper training, proficiency and fitness.[91]

Article 32 of the Chicago Convention only requires the licensing of the members of the operating crew of an aircraft engaged in international navigation.[92] Due to the development of technology and the rapidly changing environment in which the aviation industry operates (including increasing traffic density, airspace congestion, highly complicated terminal area patterns, and more sophisticated equipment), Annex 1 to the Chicago Convention contains not only SARPs for the licensing of flight crew members (i.e., pilots, flight engineers, flight navigators,and flight radiotelephone operators), but also SARPs relating to the licensing of air traffic controllers, aeronautical station operators, maintenance technicians and flight dispatchers. The SARPs describe the competence, skills, fitness and other requirements for such personnel.

Since pilots and other air and ground personnel are indispensable for the conduct of international air transport,[93] continued maintenance of their competence, skills and fitness remain essential for the safe operation of aircraft.

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88 Art. 54 *l)*, Chicago Convention.

89 See *supra* note 30 in Ch.1 for the list of annexes.

90 Buergenthal, *supra* note 46 at 57.

91 The material of the Federal Aviation Administration Executive Management Training, Beijing, China, 13 to 17 March 2006 (unpublished).

92 In ICAO practice, the expression "flight crew member" has the same meaning as the expressions "member of the operating crew of an aircraft". Similarly, the expression "license" used throughout Annex 1 has the same meaning as the expressions "certificate of competency and license", "license or certificate" or "license" used in the Convention. See, http://www.icao.int/cgi/goto_m_anb.pl?anb/fls/flsannex1.html. Date of access: 29 July 2008.

93 Art. 8 of the Chicago Convention prohibits pilotless aircraft without special authorization of the overflown State.

By virtue of the provisions of Article 33 of the Convention, the minimum standards prescribed in the Annexes must be complied with in order to achieve recognition by other States of the licenses of operating crew members issued or rendered valid by a contracting State.

The Annex also prescribes training requirements which reflect dynamic progression of technology in the field of aviation. For instance, the current version of the Annex contains provisions relating to the use of flight simulators,[94] something which did not exist 60 years ago.

In addition to the licensing and training requirements, Annex 1 also prescribes norms relating to licensees' upper age limits, the state of their medical condition, and prohibitions upon the use of psychoactive substances by licensed personnel. The issue concerning the upper age limits of pilots, for example, is not a simple licensing issue. It has raised grounds for legal or even constitutional challenges under domestic law on the basis of discrimination on the grounds of age. After a careful balancing process, ICAO came to a compromise solution by extending the age limit of a pilot-in-command from 60 to 65 years, subject to the condition that after the age of 60, a pilot-in-command must undergo regular medical examinations every six months and should be accompanied in flight by at least one pilot whose age is below 60.[95]

2.2.1.2 Rules of the Air (Annex 2)

Like any mode of traffic on the surface, air traffic requires traffic rules to ensure safety. Annex 2 to the Chicago Convention contains a set of internationally agreed rules of the air. They consist of general rules, visual flight rules (VFR), and instrument flight rules (IFR). Flight under VFR is permitted only under certain prescribed conditions. Most aircraft engaged in commercial operations fly by IFR at all times.

Annex 2 contains standards mostly; so far there are no recommended practices included therein.[96] Due to the provisions of Article 12 of the Convention, the standards contained in this Annex are mandatory over the high seas and contracting States do not have the right to file differences as they do with other SARPs. As such, the ICAO Council is the sole legislative body which has power to enact the rules of the air over the high seas on behalf of the international community.

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94 Defined in Annex 1 as an apparatus in which flight conditions are simulated on the ground, which provides an accurate representation of the flight deck of a particular aircraft type to the extent that the mechanical, electrical, electronic, etc. aircraft systems control functions, the normal environment of flight crew members, and the performance and flight characteristics of that type of aircraft are realistically simulated.

95 ICAO Council Working Paper C-WP/12615, "Adoption of Amendment 167 to Annex 1", 23 February 2006.

96 Annex 2, *Rules of the Air*, 10th ed. July 2005, Foreword, at (vi).

Under the Annex, a flight plan must be filed with air traffic services units for all flights that will cross international borders and for most other flights that are engaged in commercial services. The flight plan provides information on the aircraft's identity and equipment, the point and time of departure, the route and altitude to be flown, the destination and estimated time of arrival, and the alternate airport to be used should landing at the destination be impossible. The flight plan must also specify whether the flight will be carried out under VFR or IFR. However, regardless of the type of flight plan filed, the pilot is ultimately responsible for avoiding collisions when in visual flight conditions, in accordance with the "see-and-avoid" principle.[97] Flights operating under IFR are either kept sufficiently separated by air traffic control units or provided with collision hazard information.[98] Annex 2 also contains rules relating to interception of civil aircraft.[99]

2.2.1.3 Airworthiness of Aircraft (Annex 8)

Although it is essential to have qualified personnel whose knowledge of the rules of the air is kept up to date for purposes of ensuring the safety of aviation, this alone is by no means sufficient. They must also be equipped with reliable machines and tools. Accordingly, aircraft, defined as "any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface",[100] must be airworthy. Annex 8 prescribes the minimum airworthiness standards which form the basis for mutual recognition by contracting States of a certificate of airworthiness under Article 33 of the Chicago Convention.

Some of the provisions of Annex 8 are very specific. For instance, paragraph 1.2 of Chapter 1 provides that an aeroplane shall have not less than two power-units.[101] Some provisions are general and provide only the objective sought to be achieved, e.g., "Crashworthiness shall be taken into account in the design of aeroplanes to improve the probability of occupant survival".[102] It is therefore recognized and accepted that those ICAO airworthiness standards containing broad provisions need to be supplemented by national codes of airworthiness to form the basis for the certification of individual

97 Annex 2, *id*., see section 3.2; ICAO Circular 213, *Pilot Skills to make "Look-out" more effective in Visual Collision Avoidance*.

98 Annex 2, Sec. 5.2 and 3.6. See also, the material of the Federal Aviation Administration Executive Management Training, Beijing, China, 13 to 17 March 2006 (unpublished).

99 Annex 2, Attachment A.

100 The Chicago Convention *per se* does not define the term. Its Annexes use the definition above. See, for example, Annex 8 – *Airworthiness of Aircraft*, 10th ed., April 2005. Some writers believe that this definition has become part of international customary law, see Shawcross & Beaumont, *supra* note 11 at V/1.

101 Annex 8, *id*., at Part III A-I-1.

102 *Id*., Part III B, Sub-part I, para. I.1, at IIIB-I-1.

aircraft. Each State is thus obliged either to establish its own comprehensive and detailed airworthiness code or to select and implement a comprehensive and detailed code established by another contracting State or a group of contracting States.[103] To assist its member States in the implementation of Annex 8, ICAO has published the *Airworthiness Manual* (Doc 9760).

A notable feature of Annex 8 is that it imposes obligations on the State of registry to develop or adopt requirements and procedures to ensure the continuing airworthiness of the aircraft during its service life, including requirements to ensure that the aircraft continues to comply with the appropriate airworthiness requirements after modification, repair or installation of a replacement part. It further lays down requirements for the exchange of mandatory continuing airworthiness information between the State of design and the State of registry of the aircraft.[104] These obligations naturally require the State of registry to maintain a close link with the aircraft and consequently impose constraints on the State of registry, thereby reducing the possibility of "flags of convenience".

2.2.1.4 Operation of Aircraft (Annex 6)

Annex 6 contains the minimum standards applicable to the international operation of aircraft. It consists of three parts dealing respectively with commercial air transport, general aviation, and helicopters. One of its purposes is to contribute to the safety of international air navigation by providing criteria for safe operating practice.[105] Unlike Annexes 1, 2 and 8, which separately address the quality and licensing of personnel, the rules of the air, and the airworthiness of aircraft, Annex 6 provides regulations which address the interface between the personnel, the aircraft and the rules in real time and space. It provides criteria as to how qualified personnel, governed by certain rules, must control aircraft in given situations.

Annex 6 spells out the responsibility of States in supervising their operators. Appendix 5 to the Annex specifies eight critical elements of safety oversight of air operators.[106] Paragraph 4.2.2 requires each operator to provide an operation manual, which must address matters such as the responsibility of the flight crew, the maximum limits of flight time and flight duty periods, and the list of equipment on board aircraft.

Given the importance of human performance in the operation of aircraft, Annex 6 provides that from 1 January 2009, States shall, as part of their safety

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103 *Id.*, Foreword. In EU, it is done collectively through the JAA, now through EASA. See Ch. 5.4.2.

104 Annex 8, para. 4.2.

105 Annex 6, 8th ed. (2001), Foreword.

106 See *supra* notes 78 to 82 and accompanying text concerning the details of eight critical elements.

programme, require that operators implement a safety management system acceptable to the State of the operator. In simple language, a safety management system takes a proactive approach to anticipate and address safety issues before they materialize and lead to incidents or accidents. Instead of using simple enforcement and disciplinary measures, the new approach encourages States to develop the ability to identify safety issues and deal effectively with accidents and incidents so that valuable lessons learned therefrom can be applied to improve overall safety and efficiency.[107]

2.2.1.5 Other Annexes

In addition to the Annexes identified above, there are other Annexes which, to varying degrees, provide safety regulations for air navigation. Some Annexes deal with the facilities and services to be provided by contracting States, such as meteorological services (Annex 3), aeronautical telecommunications (Annex 10), air traffic services (Annex 11), aerodromes (Annex 14), and aeronautical information services (Annex 15). Some others aim at the establishment of uniform common systems, such as aeronautical charts (Annex 4), units of measurement (Annex 5), and registration marks (Annex 7). Some Annexes provide for measures and procedures in the event of distress (Annex 12 – Search and Rescue), or accidents (Annex 13 – Aircraft Accident Investigation). Some address matters relating to transport of passengers and goods (Annex 9 – Facilitation, Annex 18 – The Safe Transport of Dangerous Goods by Air). Finally, Annex 16 addresses matters of environmental protection, and Annex 17 covers aviation security.

2.2.2 Criteria for Safety Regulations: Uniformity, Reliability and Affordability

There are certain policy considerations which underlie the legislative process within ICAO in the formulation of SARPs. Some of the criteria are not necessarily documented but can be deduced from the practice of ICAO. The most significant among these criteria are uniformity, reliability and affordability.

The uniformity of international standards is one of the most important criteria governing the ICAO legislative process. As a prime objective, safety of international civil aviation may be achieved only if States agree upon a certain degree of worldwide compatibility in aviation rules and regulations. As pointed out by the United States delegation at the Chicago Conference:

> It is generally agreed that it is true, in the purely technical field, a considerable measure of power can be exercised by, and indeed must be granted to, a world body. In these matters, there are few international controversies which are not

107 ICAO Doc. 9859, The Safety Management Manual (SMM).

> susceptible of ready solution through the counsel of experts. For example, it is essential that the signal arrangements and landing practice at the Chicago Airport for an intercontinental plane shall be similar to the landing practice at Croydon, or LeBourget, or Prague, or Cairo, or Chungking, that a plane arriving at any of these points, whatever its country of origin, will be able to recognize established and uniform signals and to proceed securely according to settled practice.[108]

The drafters of the Chicago Convention were unequivocal in reflecting this principle in Article 37 of the Convention when they stated: "Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation". To this end, the Convention mandates ICAO to adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures. Article 12 of the Chicago Convention further specifies that with respect to the rules and regulations relating to the flight and manoeuvre of aircraft, each contracting State "undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention". While the term "to the greatest extent possible" probably gives to contracting States some reasonable amount of flexibility, the principle of good faith has to be followed in bringing domestic regulations relating to flight and manoeuvre of aircraft in line with the standards established by ICAO. The common interests in achieving global safety are at stake and the uniformity of the rules in this respect is essential, regardless of any territorial boundaries. "As transport aircraft speed through the sky, crossing half a dozen small countries in a dozen hours, it is necessary that there be universal agreement on certain technical matters. Obviously, it would be confusing and unsafe to require, for instance, an international airline to circle to the left before landing on an airport of one country, and to the right before landing in the next".[109] The provisions of Article 12 illustrate that international uniformity as required in the interest of aviation safety may override the otherwise complete freedom of a sovereign State to prescribe traffic regulations at will in its own territory.

In practice, however, the importance of uniformity has not always been appreciated. There has been a wide-spread belief that ICAO standards are only minimum requirements, and that sometimes, States are encouraged to go

108 *Proceedings of the International Civil Aviation Conference*, Vol. 1 (United States Government Printing Office, Washington: 1948) at 59.

109 Schenkman, J., *International Civil Aviation Organization*, (Geneva: Librairie E. Droz, 1955) at 257-258.

beyond existing ICAO standards and impose more stringent requirements.[110] This impression probably originates from a common misapprehension of the provisions of Article 33 of the Chicago Convention, which refer to "minimum standards" established pursuant to the Convention. A closer look at Article 33 indicates however that it is limited in scope to certain Annexes only, mainly Annex 1 – *Personnel Licensing* and Annex 8 – *Airworthiness*. It does not even cover air operator certificates issued pursuant to Annex 6 – *Operation of Aircraft*. Also, many provisions of the other Annexes, such as those relating to units of measurement, rules of the air, as well as nationality and registration marks, are aimed at establishing common uniform systems. They represent *uniform* rather than *minimum* requirements. Even with specific regard to the standards in Annex 6, which have been proclaimed as the minimum standards,[111] it is arguable that some of them were designed with the objective of uniformity in mind rather than as mere minimum requirements. For instance, paragraph 2 of Appendix 1 to Annex 6 essentially requires that a red light be projected on the left side of the aeroplane and a green light on the right. If a State really considers this standard as the "minimum", it may impose more stringent standards by requiring two lights or more, but it still can not change the colours of the lights to frustrate the uniform lighting system.

The importance of attaining uniform international regulations was demonstrated when the ICAO Council considered the issues relating to the "Hatch Amendment", i.e., the amendment to the 1996 *Antiterrorism and Effective Death Penalty Act* of the United States, as proposed by Senator Hatch.[112] On 23 November 1998, the Federal Aviation Administration of the United States (FAA) published the Notice of Proposed Rulemaking (NPRM) concerning the "Hatch Amendment". In essence, the effect of the proposed new rule would have been to impose on foreign carriers the requirement of security measures "identical" to those imposed on the U.S. carriers, whereas the then existing rule only required "similar" measures. While on the face it appeared to offer equal treatment to all carriers flying to and from the U.S., the proposed rule was perceived to be likely to cause difficulty to foreign airlines. For example, one of the new measures would have limited air carriers to accepting baggage only inside the terminal building for flights to the United States. Its implementation may have required additional terminal capacity necessary to accommodate

110 For example, see ICAO Doc 9734 AN/959 *Safety Oversight Manual*, Part A, The Establishment and Management of a State's Safety Oversight System, 2nd ed. (2006), which states in para. 2.1.1: "Safety oversight also ensures that the national aviation industry provides a safety level equal to, or better than, that defined by SARPs."

111 Annex 6, 8th ed., July 2001, Foreword (x).

112 See, ICAO Council Working Paper C-WP/11030, "Ramifications of the Notice of Proposed Rulemaking (NPRM) relating to Security Provisions to be Applied to Foreign Air Carriers by the United States", 3 February 1999.

the checked baggage which till then had been handled outside the airport terminal.[113]

More importantly, the imposition on foreign air carriers of requirements which differ from, or are more exacting, than the SARPs in Annex 17 — *Security* (or other Annexes) could seriously damage the multilateral framework within which international civil aviation has developed and operates. Thus, the ICAO Secretariat has noted:

> The rationale behind the uniformity aspect of Article 37 and the desirability of achieving such uniformity through the Chicago Convention system is clear if one considers the chaos which could potentially result if States require foreign aircraft flying to their territory to comply with their own national security provisions where these differ from Annex 17. Bearing in mind that the State of departure in the exercise of its sovereignty would also have security provisions to be adhered to by aircraft leaving its territory, this could lead to a situation where the operator would have to comply with different and possibly conflicting security provisions when these differ from Annex 17. For example, if an air carrier flies to 20 different States from State A, it would have to comply with the requirements of State A as well as these 20 other States.[114]

In view of this situation, the ICAO Council adopted a resolution on 5 February 1999 at the first meeting of its 156th Session, requesting contracting States to refrain from imposing their own aviation security provisions unilaterally upon foreign airlines even if they believe that the technical provisions adopted by ICAO are either insufficient or are not being properly implemented. The resolution further called upon each contracting State to utilize the multilateral mechanism of ICAO where it believes that changes to the content or level of implementation of the standards and recommended practices in the Annexes are necessary or desirable.[115] It should be noted that the Council resolution does not limit itself to Annex 17, but is applicable to all Annexes and their implementation. The emphasis on uniformity does not in anyway prejudice or discourage any efforts aimed at enhancing or improving the technical standards of ICAO. It has been a concurrent goal of ICAO to reach as high a level of standards as possible in order to ensure the reliability of the global aviation system. All the resolution requires is that efforts to enhance the standards must not be unilateral but must be undertaken within the multilateral framework of ICAO.

In addition to the aspect of uniformity, the reliability of the aviation system is another important consideration that applies to the ICAO legislative process. Reliability refers to an acceptable level of confidence placed in the aviation

113 *Id.*

114 *Id.*

115 ICAO PRESS AK/651, 24 March 1999. See also, ICAO Doc 9738-C/1127, C-Min. 156/1-16, *Council – 156th Session, Summary Minutes with Subject Index* (1999) at 12.

system or any of its element, as tested by various means, including records of past performance of the system or the element. The degree of reliability is determined by the state of aviation technology, which is the most dynamic factor in the promotion of safety. Something which was regarded as reliable in 1944 will not necessarily be so in 2004. One important mandate of ICAO is to update the SARPs to reflect the state of the art of modern technology in order to achieve the highest level of safety. A previous ICAO decision regarding twin-engined aircraft may be cited to illustrate this point.

As mentioned above in Chapter 1, twin-engined aircraft was not allowed to be used in long-range operations. In 1980s, there was a proposal to change the rule. An ICAO panel studied the matter and went over a mass of statistical data on engine reliability. The study revealed that the chances of both engines failing independently in the same hour were estimated at 10 billion to one. Based on this and other considerations, twin-engined aircraft were allowed to operate on long, over-water routes. However, ICAO has taken a prudent approach by setting a safety threshold and attaching certain conditions to the use of twin-engined aircraft on long routes.[116]

Although it is incontrovertible that ICAO should take reliability into account in developing and adopting SARPs, questions remain in specific instances as to what is reliable and what is not. In particular, when different types of technological means or products compete for ICAO endorsement, both subjective perceptions and objective assessments could affect the judgement regarding the preference of one particular technology or product over another.[117] It is therefore desirable to develop certain mechanisms to establish a due process with checks and balances aimed at ensuring that the evaluation of competing products or technology for reliability is based, to the largest extent possible, on fair and objective criteria.

Considerations of uniformity and reliability discussed above are both aimed at enhancing aviation safety. However, "affordability", which refers to the degree of availability of financial and technical resources for designated purposes, often places practical constraints on safety standards. The notion of affordability is not explicitly mentioned as an applicable criterion in any of the ICAO formal documents, but it is an implied consideration based on the

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116 Sochor, E., *The Politics of International Aviation* (Iowa City: University of Iowa Press, 1991) at 71. See also Mortimer, L.F., "New ICAO Rules Considered for Long-Range Twin-Engine Aeroplane Flights" (April 1984) *ICAO Bulletin* at 19 *et seq*.

117 Sochor provided several instances in which he believed that political considerations influenced the selection of products. In 1970s, the ANC considered the adoption of one of several proposed micro wave landing systems (MLS) as the standard equipment for airports by the end of century. The final decision was made in a technical meeting of all States to recommend the US-Australian scanning-bean system over the British Doppler system. Sochor observed: "Since many experts concluded that the British Doppler system was at the time more advanced and could have been more rapidly implemented, one must view the decision as being primarily a political choice. See Sochor, *id.* at 70.

reality of life, which has important and sometimes decisive effects upon the law-making efforts of ICAO. As many technical experts have noted, there is no one hundred percent guarantee for safety. It could only be achieved within the available economic and technical constraints. The different levels of economic development in different parts of the world predetermine that the member States of ICAO are not on the same level with respect to their individual financial capacity to implement safety standards. Aircraft which have been retired in a certain region or State may still be used for active services in another region or State. Corresponding to the economic disparity among nations, their respective capacities to introduce and absorb technical know-how also contrasts sharply. Consequently, the ICAO SARPs are always subject to the consideration of affordability.

From time to time, the consideration of affordability counter-balances the efforts to achieve uniformity and reliability of international safety standards. What is reliable is not always economically feasible, and therefore it is even more difficult to achieve its uniform implementation. Accordingly, the legislative process within ICAO is by itself a risk management process requiring delicate balancing acts. Careful assessments and wise judgements are always required to harmonize the balance between the aspects of uniformity, reliability and affordability. A safety standard will stand the test of time only if it strikes a delicate balance among these three important considerations.

2.2.3 Processes for Formulating Technical Regulations

Under Articles 54 *l)* and *m)*, and 90 of the Chicago Convention, the Council of ICAO has a mandatory function to adopt or amend international standards and recommended practices by a two-thirds majority of its members.[118] After the adoption, the Council is required to submit the adopted text to each contracting State. The adopted text shall become effective within three months after its submission or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council. If not disapproved, the text will become effective on the date determined by the Council.[119] This does not mean that it becomes immediately applicable. In the resolution for the adoption

118 The wording of Art. 90 once gave rise to the interpretation that the adoption of an Annex would require two-thirds majority whereas the amendment would only require a simply majority. For detailed discussions, see Buergenthal, *supra* note 46 at 64-66; Cheng, *supra* note 10 at 63-65. The ICAO Council has always adopted an amendment to an Annex by two-thirds majority.

119 There was an intensive debate in ICAO concerning the meaning of the phrases "become effective" and "come into force". The debate was summarized in *Buergenthal*, *supra* note 46 at 69-76. Suffice to mention here that ICAO no longer uses the term "come into force" in this context.

of an Annex or its amendment, the Council will usually specify the date of applicability of the new SARPs so adopted, which is normally several months later than the effective date.

Given the possibility of disapproval by the majority of the contracting States, the Council cannot be said to have full and unqualified legislative power. Cheng describes this function as "quasi-legislative".[120] On the other hand, in the history of ICAO, there has not been a single instance in which an Annex or amendment thereto has been disapproved by the majority of member States. Since the number of contracting States has reached 190 in 2008, it will be procedurally very difficult, if not impossible, in the future to obtain the disapproval of at least 96 contracting States within the normal prescribed period of several months. If there is a well-supported reason for exercising the power of disapproval by contracting States, such an attempt will most likely be made during the consultative process prior to the adoption of the Annex or its amendment. Accordingly, *de jure*, the power to disapprove continues to exist and may be used under extraordinary circumstances; *de facto*, however, the Council has almost unqualified legislative power for the adoption of SARPs, subject to the right of a contracting State to file differences under Article 38.

When the Chicago Convention was ratified by the 26th State and entered into force on 4 April 1947, it provided for 21 members of the Council, representing 80.7% of the total number of the contracting States. As the number of contracting States kept growing, the Council has been expanded several times and presently has 36 members. This number represents only 19% of the total of 190 contracting States. As the adoption of an Annex or its amendment requires the vote of two-thirds majority of the Council, it implies that 24 States or 12.7% of the total number of contracting States may exercise the power to adopt technical regulations for all contracting States.

The Council generally does not draft or prepare amendments to the Annexes by itself. Article 54 *m)* of the Chicago Convention mandates the Council to "consider recommendations of the Air Navigation Commission (ANC) for amendment of the Annexes". Consequently, most preparatory work for amendments to most of the Annexes is carried out by the ANC,[121] which consists of 19 members appointed by the Council from among persons nominated by contracting States.[122] Members of the ANC must have suitable qualifications and experience in the science and practice of aeronautics.

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120 See Cheng, *supra* note 10 at 64. Furthermore, the right of each contracting State to file a difference under Art. 38 also indicates that the Council does not have a full legislative power.

121 Annexes 9 and 17 are basically not within the responsibility of the ANC but are respectively dealt with by the Air Transport Committee and the Unlawful Interference Committee of the Council.

122 Art. 56 of the Chicago Convention, amended on 6 October 1989, which entered into force on 18 April 2005.

Under Article 57 *b)* of the Chicago Convention, the ANC shall establish technical sub-commissions on which any contracting State may be represented, if it so desires. In practice, the ICAO Council has interpreted the reference to sub-commissions as meaning divisional air navigation meetings.[123] The primary objective of a divisional-type Air Navigation Meeting is to make recommendations for new SARPs, PANS, and guidance material, or for amendments thereto.[124] In addition to the right to participate in divisional meetings and to express their views, contracting States are entitled to receive all draft texts of the Annexes circulated by ICAO and to provide comments thereon for consideration by the ANC or any other relevant committees of the Council, before such text is finalized and submitted to the Council for adoption.[125]

Although divisional meetings are still held from time to time, the trend that has emerged since the 1980s is that much of the preparatory work for the amendments to the Annexes is carried out by panels of experts. The use of panels has evolved from the need to bring together the best available experts to examine specialized problems and to find technically feasible solutions acceptable to contracting States as a whole.[126] Most Annexes today contain the input from panels when amendments are introduced.[127] With respect to the most recent ICAO Annex, namely, Annex 18 – *The Safe Transport of Dangerous Goods by Air*, its first enactment and all subsequent amendments have been based on the work of the Dangerous Goods Panel.[128] It is an undeniable fact that panels play an indispensable role in the development and adoption of amendments to the Annexes.

As compared to divisional meetings, panels may be characterized as small, informal and personal. The size of a panel normally does not exceed 15 members. They are expected to conduct their business in an atmosphere of informality, through correspondence, working groups or panel meetings. Members of panels participate in their personal capacity and not as representatives of

123 ICAO Doc 9369-C/1067, C-Min. 105/1-20 *Council – 105th Session, Minutes with Subject Index* (1982) at 54.

124 ICAO Doc 8143-AN/873/3, *Directives to Divisional-type Air Navigation Meetings and Rules of Procedure for their Conduct* (1983) para. 1.1.

125 ICAO C-WP/7389, "Review of Paras. 5.2 and 5.3 of Doc 7984/4 (Directives for ANC Panels)", 30 November 1981, para. 3.2.

126 Para. 1.1, *Directives for Panels of the Air Navigation Commission*, ICAO Doc 7984/4 (1980). While most panels are technical groups formed by the ANC, there are also some panels dealing with Annexes 9 and 17, or addressing other legal or economic issues, which are not formed by, and therefore not reporting to the ANC.

127 See, for example, Table A of Annex 8. The first 84 amendments were originated from the sessions of the Airworthiness Division, the 85th amendment was introduced by the Third Air Navigation Conference in 1956. Starting from the 95th amendment in 1988, the proposals for amendment were discussed by panels or study groups. The Air Navigation Conferences would still be convened, but tend to focus on policy issues rather than the preparation of an Annex or its amendment.

128 Annex 18, Table A, at vii and viii.

the States or organizations nominating them. They are therefore required to express their professional opinions rather than the established policies or points of view of their nominating States or international organizations.[129] The concept of panels has its origin in "the desire to reduce the frequency of large international technical meetings".[130]

While panels are considered to be a more efficient means of initiating amendments to the Annexes, two drawbacks are apparent: first, they restrict wide participation of States in the rule-making process; and, secondly, they tend to enlarge the disparity between the developed and developing countries. Due to the small size of a panel, as compared to a divisional meeting, the majority of the member States of ICAO are excluded from participating in its work. Originally, panels did not even include persons having the status of "observers". It was only after numerous interventions at the Assembly and a long debate in the Council that the Directives were amended to allow admission of observers, and even then, upon the condition that their number should not become so large as to adversely affect the effectiveness of a panel meeting.[131] Even with the participation of observers, the fact remains that only a handful of States can send nominees to the panels. The balance between efficiency and democracy is therefore not easy to maintain.

More acute problems exist concerning the representation of developing countries on the panels. Despite tremendous efforts aimed at achieving equitable geographical distribution in the composition of the panels, the most developed countries inherently have greater influence in these highly technical bodies. The more sophisticated the expertise required, the less likely the developing countries could ever get involved. Even if some qualified experts from developing countries find their way to the panels, they are not backed by the same financial resources and technical support as those who are nominated by the developed countries. Unlike the forum afforded by the Assembly or other large-scale conferences, where developing countries are usually able to flex the muscle of the majority, their nominees are very often overwhelmed in the technical panels.

To offset these drawbacks, a principle has been established and it ensures that panels do not take final decisions on technical matters, but merely develop recommendations for the consideration of the ANC. As such, technical advice provided by panels is subject to subsequent review by the ANC, and the usual practice is that the ANC in turn refers panel recommendations to all contracting States for comment. In some instances, the panel recommendations are also considered by a world-wide ICAO meeting.[132] Undoubtedly, these procedures do provide certain safeguards to prevent domination of the rule-making

129 ICAO Doc 7984, *supra* note 126 at para. 6.2.
130 Statement of the President of ICAO Council, C-Min 105/1-20, *supra* notes 123 at 51.
131 ICAO Doc 7984/4, *supra* note 126, Amend. No. 1, 12 March 1982; C-Min, *id*. at 42-44, 50-56.
132 C-WP/7389, *supra* note 125.

process by a small minority of States. However, experience also demonstrates that when a subordinate technical body presents a package for the consideration by the superior policy body, it is practically not easy for the latter to overturn the package and re-invent the wheel. Moreover, since only 10% of the total number of member States comprises the ANC, and 19% constitutes the Council, the risk that the rule-making process may be controlled by a small number of contracting States always exists. Safeguards should therefore be developed by ICAO to ensure that the elected minority will legislate for the benefit of all member States and in the interest of safety of international civil aviation.

Unlike SARPs, the formulation of other regulatory provisions, such as PANS, SUPPS, regional air navigation plans, and some guidance material requires the approval of, instead of adoption by, the Council. This typically means that only an affirmative vote of a simple majority of the Council, namely, 19 States, is required to promulgate such provisions.[133]

In some instances, study groups established under the auspices of the ICAO Secretariat also contribute some valuable input to the process of amending Annexes. In terms of their composition and the procedures for the conduct of business, the study groups are even less formal than panels. As the President of the Council has pointed out, in principle, the work of study groups should not be the subject of reports to the Council as the purpose of such groups is to provide assistance to the Secretariat; they do not have the same status as panels or Council committees.[134]

2.2.4 Juridical Nature of Technical Regulations

More than 60 years after the conclusion of the Chicago Convention, the legal status of the SARPs in the Annexes is still, and probably will continue to be, subject to various interpretations.[135] Some commentators believe that with certain exceptions, the contracting States have no legal obligation to implement or to comply with the provisions of a duly promulgated Annex or amendment thereto, unless they find it "practicable" to do so.[136] In contrast, some others consider that an international regulation adopted by virtue of an international

133 Cf. Art. 52 of the Chicago Convention, which states that decisions by the Council shall require the approval by a majority of the Council, and Art. 90, which states that the adoption of the Annexes shall require the vote of two-thirds of the Council.

134 ICAO Doc 9779 – C/1138, C-Min 162/1-13, *Council – 162nd Session, Summary Minutes with Subject Index* (2001) at 56.

135 For more recent discussion, see Abeyratne, R.I.R., "The Legal Effect of ICAO Decisions and Empowerment of ICAO by Contracting States" (2007) XXXII *AASL* 517 at 520 and 521.

136 Buergenthal, *supra* note 46at 76.

convention becomes an international agreement, and that a State's departure from such a regulation constitutes a reservation to this agreement.[137]

The drafters of the Chicago Convention clearly did not intend the Annexes to be an integral part of the Convention. Article 54(l) refers to SARPs as Annexes to the Convention only "for convenience". In presenting the report of Committee II to the Chicago Conference, Dr. Edward Warner made the following statement which has been published as part of the preparatory work of the Conference:

> No Annex is specifically identified in the Convention; and there is no limit to the adoption by the Council of any Annexes which may in future appear to be desirable. On the other hand and in fact as a necessary consequence of that flexibility, the Annexes are given no compulsory force. It remains open to any State to adopt its own regulations in accordance with its own necessities.[138]

Furthermore, under Article 38, a State may depart from a standard adopted by the Council by giving notification to ICAO of the differences between its own practices and that established by the international standards. This may also lend support to the argument that the Annexes have no compulsory force of law.

In spite of the foregoing, however, the legal significance of international standards could hardly be denied. Their legal nature should be viewed and understood in the context of the object and purpose of the entire Chicago Convention. The preamble to the Convention describes it as an agreement on "certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner". Article 37, as mentioned above, underlines the importance of "securing the highest practicable degree of uniformity".[139] Furthermore, Article 38 reads:

> Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In

137 Saba, H., "Quasi-Legislative Activities of the Specialized Agencies of the United Nations", (in French) (1964) 111 *RdC* 607 at 678.

138 *Proceedings of the International Civil Aviation Conference*, *supra* note 108 at 92.

139 See *supra* note 108 *et seq* and accompanying text.

> any such case, the Council shall make immediate notification to all other States of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.

Reading all these provisions together, one cannot help but conclude that the primary focus of these provisions is the achievement of uniformity of international standards, and not the freedom of action of the contracting States to file differences. Except in case of war or national emergency as mentioned in Article 89, the only legitimate way for a contracting State to decline compliance with an international standard is to file a difference pursuant to Article 38. Nothing in the text of the Chicago Convention or the preparatory work preceding it indicates that an international standard which has become effective is not binding on contracting States which do not file any differences to it. On the contrary, concerning the adoption and amendment of Annexes, the terms "become effective" and "coming into force" used in Article 90 could only demonstrate the intention of the drafters of the Convention to give binding force and effect to international standards vis-à-vis those contracting States which do not file any differences. As Kotaite observes:

> The structure put in place by ICAO's founders is a watertight system: either States comply with the standards or they file differences. The Convention does not allow for a situation where States do not comply and do not file differences. It is a measure of the importance of aviation safety that the Council of ICAO is required, on the one hand, to help States and, on the other hand, to bring infractions of the Convention to the notice of Contracting States and the Assembly.[140]

Accordingly, the earlier quoted statement of Dr. Warner to the effect that the Annexes are given no compulsory force could only be properly understood as permitting contracting States to retain their freedom of action through the notification of differences under Article 38.

What effect then should be given to the term "impracticable to comply" in Article 38? The terms "practicable" or "impracticable" appear not only in Article 38 but also in Articles 9(c), 22, 23, 25, 28, and 37, and as such deserve careful study. According to Buergenthal, while the contracting States have an obligation to act in good faith in determining what for them is "practicable", this, realistically speaking, does not constitute an obligation at all, for a State can always find the necessary "practical" reason to justify non-compliance with, or deviation from, international standards.[141] In other words, a State will be its own ultimate judge on this matter, and the provision concerning the term "practicable" belongs to the so called "auto-interpretative international

140 Kotaite, A., "Sovereignty under great pressure to accommodate the growing need for global cooperation" (December 1995) 50 *ICAO Journal* 20 at 20.

141 Buergenthal, *supra* note 46 at 78.

law".[142] On the other hand, the practice of member States of ICAO appears to indicate a modest move from the "auto-interpretative" stage towards the "justiciable" stage of international law. When a State accepts the entry of an ICAO audit team into its territory, one wonders whether the term "practicable" could be auto-interpreted as freely as it used to be.[143] In this connection, reference should be made to the most recent ICAO Assembly Resolution concerning the implementation of SARPs, in which the following new sentence was added:

> If a Contracting State finds itself unable to comply with any SARPs, it should inform ICAO of the reason for non-implementation, including any applicable national regulations and practices which are different in character or in principle.[144]

This associated practice is another indicator that the burden may have shifted onto those States which do not comply with standards to provide some justifications. Although the justifications may still be given on a discretionary basis, the transparency expected in the Resolution may serve as a means to prevent or reduce arbitrariness in the filing of differences.

A further question may be raised as to whether the right to file differences is applicable to all standards in the Annexes without exception. Some standards are of such fundamental importance that the departure from them may not be tolerated. For instance, paragraph 4.1 of Annex 17 – *Security* requires each contracting State to prevent unauthorized weapons or explosives from being introduced on board an aircraft engaged in international civil aviation. It would be inconceivable if a State could file a difference from this standard and then allow any weapons or explosives to be placed on board aircraft departing from its territory for another State. In today's environment, if that happened many States would probably react by imposing a ban on entry of any such aircraft coming from that State. From this, it may be argued that certain standards have either become customary rules or emerged as the fundamental norms dictated by the vital interests of the aviation community. Although they still retain the status of standards, they may have become binding rules which could not be subject to the filing of differences.

In summary, whereas some writers are of the view that contracting States have no legal obligation to comply with international standards under Article 37, unless they find it "practicable" to do so, others believe that con-

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142 Cheng classified international law into three different grades: judicial international law, arbitrable or justiciable international law, and auto-interpretative international law. The latter is the lowest level of the three, in which each party to a dispute is able to take advantage of the polysemous character of the law and insist on the interpretation which best suits its interests. See Cheng, B., "On the Nature and Sources of International Law" in *International Law: Teaching and Practice* (London, 1982) at 203-213.

143 See *infra* 2.3 regarding the audit activities of ICAO.

144 Assembly Resolution A36-13, *supra* note 86 at II-3.

tracting States are, in principle, obliged to comply unless they find it "impracticable" to do so. The difference in opinion results from the different perspectives from which the provisions are viewed. The former position leans towards the principle of State sovereignty and the freedom of action of States; whereas the latter position leans more on international uniformity and the safe and orderly development of international civil aviation. The general context of the Chicago Convention as a whole and the practice of States seem to indicate that contracting States are generally willing, except in case of war or national emergency,[145] to restrict their sovereignty and freedom of action to a reasonable extent, in order to promote the safe and orderly development of international civil aviation. Against this backdrop, one may conclude that the duty to comply with international standards remains the general rule, while the right to file differences is an exception to the rule. In some cases, due to the overarching vital interests of the community, certain provisions originally promulgated as international standards may have acquired binding effect *erga omnes*, irrespective of their continuing status as standards.

By the ordinary meaning of the term, recommended practices, unlike international standards, are not binding although Article 90 refers to the "coming into force" of an Annex, which may also include recommended practices. It is difficult to understand how a non-binding recommendation could become effective or come into force. The irreconcilable conflict between the terms "recommendation" and "coming into force" might probably be due to hasty drafting at the Chicago Conference, as Buergenthal has repeatedly pointed out.[146] The definition of recommended practice adopted by the first Assembly of ICAO points out that their uniform application is considered "desirable",[147] suggesting that they are not primarily obligatory in nature. This definition remains applicable today and has never been challenged. The preparatory work and doctrinal writing also suggest that State compliance with recommended practices is optional, implying non-existence of obligation.[148] It may therefore be concluded that recommended practices do not have legally binding status as traditionally understood. Contracting States which do not follow recommended practices are therefore not required to file differences under Article 38.

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145 Art. 89, Chicago Convention.

146 See Buergenthal, *supra* note 46 at 58, 69 *et seq*. See, for example, the confusing use of the terms "effective" and "coming into force".

147 See the definition of SARPs at *supra* note 86.

148 *Proceedings of the International Civil Aviation Conference*, *supra* note 108 at 708, where Committee II states: "A particular problem of status is that of recommended practice [sic]. The committee believes that in certain branches of regulatory action some subjects should be fully standardized, while upon others the internationally agreed documents should present only recommendations implying no obligations." See Carroz, "International Legislation on Air Navigation over the High Seas" 26 *JALC* 158 (1959) at 166-168; Buergenthal, *supra* note 46 at 78 and 81.

It should be noted, however, that subsequent ICAO Assembly resolutions have tended to blur the distinctions between standards, recommended practices and PANS. Over the years, emphasis has been placed on the elimination of those differences "that are important for the safety and regularity of international air navigation or are inconsistent with the objectives of the international standards", regardless as to whether they are differences pertaining to SARPs or PANS. The term "important" as used here has not been defined.[149] Clearly, the effect of these Assembly resolutions will require further analysis.[150]

In addition to SARPs, ICAO has developed abundant guidance material which is published in the form of attachments to ICAO Annexes, as ICAO manuals, or in other appropriate forms. Guidance material provides detailed advice to States concerning the implementation of SARPs and is updated progressively.[151] For example, the *Manual of Procedures for Operations Inspection, Certification and Continued Surveillance* (Doc 8335) provides comprehensive guidance to States in all aspects of air operator certification relating to the implementation of the standard in Annex 6, Part I, paragraph 4.2.1.3.

Many of the provisions in the Annexes set out the objectives of the standards and are therefore formulated in broad terms, requiring specification, illustration, or supplementation. As mentioned above, Annex 8, *Airworthiness of Aircraft*, contains very general standards. They are presented as broad provisions stating the objectives, rather than the means, of realizing these objectives. Consequently, national airworthiness codes containing detailed regulations addressing the full scope and extent of the standards are required as the basis for individual State certification of airworthiness of each aircraft. To assist States in applying the standards of Annex 8 or in developing their own national codes in a uniform manner, detailed guidance material has been developed. To illustrate the foregoing, paragraph 8.4.1 of Annex 8 lays down the requirement of anti-collision lights for aeroplanes, but it only provides a broad standard that in the design of such lights, due account shall be taken of the conditions under which they may reasonably be expected to perform their functions. The detailed specifications for exterior lights for aeroplanes are prescribed in the Airworthiness Manual,[152] which is guidance material. Clearly, in the absence of such guidance material, it would be difficult to implement this standard uniformly.

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149 See Assembly Resolution A36-13, *supra* note 86 at II-5 and *infra* Ch.5, "Recommendatory Resolutions". As Buergenthal observes, since 1950 the requirement for filing differences has been applied not only to recommended practices, but to PANS and SUPPS as well. The Assembly has lumped these regulatory materials together in setting guidelines for their formulation and implementation. See Buergenthal, *supra* note 46 at 117.

150 See *infra* Ch.5, particularly "Recommendatory Resolutions" and "ICAO Enforcement and Implementation Functions".

151 ICAO Council Working Paper C-WP/11526 "Updating the Annexes to the Convention International Civil Aviation (Doc 7300)", 6 March 2001.

152 Doc 9760 AN/967, *Airworthiness Manual*, 1st Edition – 2001.

However, the guidance material has no formal legal status and lacks mandatory effect. While many States voluntarily follow guidance material on the basis of its professionally persuasive value, a question may be raised as to whether there will be no uniformity if other States do not follow the guidance material.

Lying somewhere between SARPs and guidance material, the *Technical Instructions for the Safe Transport of Dangerous Goods* seem to have a *sui generis* status. These instructions do not constitute SARPs since they are not designated as such and were not adopted by a two-thirds majority of the Council. They are not purely guidance material either, because they are reflected in a standard under paragraph 2.2.1 of Annex 18 – *The Safe Transport of Dangerous Goods by Air* by way of reference:

> Each Contracting State shall take the necessary measures to achieve compliance with the detailed provisions contained in the Technical Instructions for the Safe Transport of Dangerous Goods by Air (Doc 9284), approved and issued periodically in accordance with the procedure established by the ICAO Council. Each Contracting State shall also take the necessary measures to achieve compliance with any amendment to the Technical Instructions which may be published during the specified period of applicability of an edition of the Technical Instructions.

Unless a contracting State registers differences with this standard, it is obliged to respect it by complying with the detailed provisions contained in the Technical Instructions. Consequently, the Technical Instructions "amplify" the broad provisions in Annex 18 and contain all the detailed instructions necessary for the safe international transport of dangerous goods by air.[153] When paragraph 2.2.1 in draft Annex 18 was debated in the Council, it was considered as an innovative legal technique representing a deviation from the normal procedure.[154] The Representative of France felt that this type of legal form should not have the validity of setting a precedent. The Representative of the United States proposed that paragraph 2.2.1 should be downgraded to a recommended practice since he was not in a position to ensure mandatory compliance with all of the detailed provisions of the Technical Instructions due to the domestic law requirement that regulations must be promulgated. The United States would have had to file a difference with paragraph 2.2.1 if it became a standard and indeed did so when the provision was so adopted.[155] Some other States expressed the view that it is innovative and constructive to give the Technical Instructions the force of standards, and that this did not exclude

153 See ICAO Doc 9284-AN/905, *Technical Instructions for the Safe Transport of Dangerous Goods by Air*, Foreword, at (iii). See also Annex 18, 3rd edition, July 2001, Foreword.

154 ICAO Doc 9347-C/1063 C-Min. 103/1-19, *Council – 103rd Session, Summary Minutes with Subject Index* (1981) at 14, 20 and 21.

155 *Id*. at 22. As of January 2007, the United States remains to be the sole country which has registered a difference with respect to para. 2.2.1. See Supplement to Annex 18 (3rd ed.).

the possibility that it would be taken as a precedent. After long deliberations, the Council adopted paragraph 2.2.1 in virtually the same language as contained in the first sentence of that paragraph as it stands today. The underlying reason is explained by the ANC as follows:

> The Technical Instructions contain myriad mandatory and relatively dynamic detailed instructions (estimated to change about 10% annually) which are necessary for the standardized implementation of the annex provisions and essential for the safe and orderly transport of dangerous goods by air. Thus, the proposed annex and the Technical Instructions are very closely related and are both of regulatory character. However, the Commission wishes to draw attention to the fact that the 18-24 month amendment procedure which is normally required in ICAO for regulatory documents is not compatible with the requirements of the Technical Instructions which is an operational document and needs to be updated and published in a relatively short time period. In this regard, the comments of States indicated acceptance of the requirement that the Technical Instructions need to have the character of Standards and also require special arrangements for timely amendments, which would of necessity be different from the procedure used for annex amendments.[156]

Consequently, ICAO has two sets of regulations concerning the safe transport of dangerous goods, which are promulgated using two different procedures, and are subject to two different mechanisms concerning notification of differences or variations. The provisions in the Annex are *adopted* by the Council by the vote of a two-thirds majority of the Council, whereas the provisions in the Technical Instructions are *approved* by the Council by a simple majority. Regarding the systems of notification, if a contracting State is unable to comply with the Technical Instructions in general, it is obliged to file a notification of *differences* with the standard in paragraph 2.2.1 under Article 38 of the Chicago Convention, and such a notification will be recorded in Annex 18. If a contracting State accepts to comply with the Technical Instructions in general, but its regulations differ from the specific provisions of the Technical Instructions, it is only required to notify ICAO of the *variations* from the Technical Instructions.

Paragraph 2.2.1 of Annex 18 has been applicable for more than two decades, but the pros and cons thereof have not been subject to any in-depth analysis. Should it be regarded as setting a precedent? Can the Council develop some sort of "secondary legislation" in addition to the Annexes, or even delegate the power to make such legislation to a subordinate body? Is there any limit on the power to incorporate into an Annex an external document by way of reference? Does the special case of *Technical Instructions for the Safe Transport of Dangerous Goods* have any applicability in another set of circum-

156 ICAO Council Working Paper C-WP/7261, "Adoption of Annex 18 – The Safe Transport of Dangerous Goods by Air", 31 March 1981 at page 4, para. 4.

stances? For instance, in the context of aviation security, will a similar situation arise where regulatory material needs to be constantly updated to cover new and emerging threats? Answers to the foregoing questions appear not to be readily available and they may well depend on the development of future practice. But paragraph 2.2.1 of Annex 18 provides abundant food for thought that needs to be digested further.

2.2.5 Scope of Application of Technical Regulations

As mentioned above, while there are 18 Annexes to the Chicago Convention today, they do not by any means exhaust the full scope of matters that could be addressed in the Annexes. The last portion of Article 37 leaves a broad discretion to ICAO to adopt SARPs and procedures dealing with "such matters concerned with safety, regularity, and efficiency of air navigation as may from time to time appear appropriate". As noted by Dr. Edward Warner during the Chicago Conference, no Annex is specifically identified in the Convention; and there is no limit to the adoption by the Council of any Annexes which may in future appear to be desirable.[157]

When the ICAO Council adopts a new Annex or amends an existing one to cover a new item, queries occasionally arise concerning the competence of the Council to do so. One common ground for such queries is whether ICAO could or should traverse the domain of national jurisdiction, or should stay, as its name suggests, strictly within the four corners of international civil aviation.

When Annex 18 was initiated in 1981, the Representative of Egypt to the Council, who later became the Chairman of the ICAO Legal Committee, questioned the competence of the Council to adopt an Annex on the safe transport of dangerous goods in view of Article 35(b) of the Chicago Convention, which provides that each contracting State reserves the right to regulate or prohibit the carriage in or above its territory of articles other than munitions and implements of war. The explanation given to him was that States had not questioned the validity of adopting a new Annex on the carriage of dangerous goods during the five years of study on the subject. Furthermore, the right reserved to States in Article 35(b) did not prevent the adoption of a multilateral regulation acceptable to States.[158] As a result, Annex 18 was adopted even though Article 37 does not specifically mention the safe transport of dangerous goods as one of the issues upon which SARPs may be adopted. It appears that safety considerations and pragmatic approach prevailed over the sentiments of sovereignty.

157 Statement of Dr. Edward Warner, *supra* note 138.
158 ICAO Doc 9347-C/1063, *supra* note 154 at 7.

From time to time, when the subject matter of a provision of an Annex is clearly within ICAO's mandate, an issue may arise as to whether ICAO could extend the application of this provision to domestic civil aviation operations. Throughout its history, ICAO has been cautious in this respect since its jurisdiction is generally confined to matters concerning international civil aviation.[159] However, despite the extensive search by this writer, a definition of "international civil aviation" could not be found in any ICAO document.[160] Consequently, no clear demarcation exists between international and domestic civil aviation. On some occasions, ICAO had to determine whether or not a provision of an Annex should be applicable to domestic civil aviation operations. For instance, paragraph 2.3 of Annex 18 – *The Safe Transport of Dangerous Goods by Air* provides that in the interests of safety and of minimizing interruptions to the international transport of dangerous goods, contracting States should also take the necessary measures to achieve compliance with the Annex and the Technical Instructions for domestic civil aircraft operations. In this instance, the relevant provision of Annex 18 is a recommended practice.

After the abhorrent terrorist acts on 11 September 2001, the Council on 7 December 2001 adopted Amendment 10 to Annex 17 – *Security*. This amendment introduced a new paragraph 2.1.3, now renumbered as paragraph 2.2.2 of Annex 17, which provides that each contracting State shall ensure that principles governing measures designed to safeguard against acts of unlawful interference with international civil aviation are applied to domestic operations to the extent practicable. When the draft amendment was considered by the Council, the Representative of Australia was "unsure" whether ICAO had the authority to impose as a standard the application of Annex 17 provisions at the domestic level.[161] He was supported by several other representatives, including the Representative of the United Kingdom, who stated that ICAO was beginning to trespass outside the bounds of its limits in terms of legal-

159 ICAO Council Working Paper, C-WP/11795, "Legal Opinion on Application of AVSEC-Conf/2 Recommendation 4.1 (Locking of flight deck doors) to Domestic Flights" 14 May 2002.

160 In 1987, in the preparation of the instrument which was subsequently adopted as the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971*, there was an extensive debate in the 26th Session of the Legal Committee regarding the need for defining the term "airport serving international civil aviation". One proposal was to qualify the term "airport" by the words "if the act interferes with the services provided for international civil aviation, or has an effect on, or is linked with an international flight from or to the airport concerned". Eventually, the Committee had to resort to a vote to resolve this issue, and it decided to work on the presumption that there was no need for a further qualification of the words "airport serving international civil aviation". ICAO Doc 9502-LC/186, *Legal Committee, 26th Session, Report* (1987) at para. 4:44. See *infra* Ch.4, note 99.

161 ICAO Doc 9796-C/1140, C-Min. 164/1-12, *Council – 164th Session, Summary Minutes with Subject Index* (2002) at 113.

ity.[162] On the other hand, the Representative of Nigeria considered the new provision in paragraph 2.1.3 to be a "crucial element" in the amendment, and felt that it was "ironic" that those provisions were to be applied to domestic operations only "to the extent practicable", given that the tragic events of 11 September 2001 had affected domestic aviation. Others were of the opinion that the wording proposed in paragraph 2.1.3 had been discussed at length at the panel level and represented the "best possible compromise". Eventually, the standard in paragraph 2.1.3 was adopted unanimously as drafted, including the affirmative votes by those States who had questioned its legality.[163]

The issue resurfaced again when a High-level, Ministerial Conference held in February 2002 recommended immediate action to lock flight deck doors. On 6 March 2002, the Council decided to seek a legal opinion regarding the possible application of the said recommendation to domestic flights, to be presented in May 2002.[164] Nine days later, on 15 March, 2002, the Council, without waiting for the conclusion of the legal opinion, adopted Amendment 27 to Annex 6 – *Operation of Aircraft*, Part I – *International Commercial Air Transport – Aeroplanes*.[165] The amendment was contained in paragraph 13.2.1, of Chapter 13 (Security) and it provided that, in all aeroplanes which are equipped with a flight crew compartment door, this door shall be capable of being locked, and means shall be provided by which cabin crew can discreetly notify the flight crew in the event of suspicious activity or security breaches in the cabin. It also included a "Recommendation" in paragraph 13.1 of Annex 6 that "International Standards and Recommended Practices set forth in this Chapter should be applied by all Contracting States also in case of domestic commercial operations (air services)".

In view of this decision of the Council, it would have been unnecessary to present a legal opinion on this matter. Nevertheless, a legal opinion was presented on 4 May 2002,[166] endeavouring to provide legal justifications for the "fait accompli". The opinion concluded that it is compatible with the Chicago Convention for ICAO to recommend that the new paragraph 13.2.1 of Annex 6 be applied to domestic commercial operations (air services). This conclusion was based on the concept of "fundamental inseparability of certain critical elements of domestic and international aviation operations". It was advocated that such fundamental inseparability had become more apparent due to the practice of "hub-and-spoke" operations engaged in by many airlines, in which regional and domestic feeder services are directed to a major hub

162 *Id.* at 115.

163 *Id.* at 115 – 117.

164 ICAO Doc 9802-C/1141 C-Min. 165/1-13 *Council – 165th Session, Summary Minutes with Subject Index* (2002) at 60, para. 40.

165 *Id.* at 163. See also ICAO Council Working Paper C-WP/11757, "Adoption of Amendment 27 to Annex 6 – *Operation of Aircraft*, Part I – *International Commercial Air Transport – Aeroplanes*", 28 February 2002.

166 C-WP/11795, *supra* note 159.

to feed long-haul international flights. Under such circumstances, international regulations would not be effective unless they are at the same time equally applicable to domestic feeder operations.[167]

While the notion of "fundamental inseparability" had enormous appeal to some representatives in the Council, there were strong objections to the suggestion that the domestic segment of an international air service could be viewed as being "international". Whether an operation is international or domestic should not be characterized by the state of mind of an individual passenger.[168] Eventually, the Council agreed with the conclusion of the opinion, without endorsing the underlying principles and analysis. It indicated that the theoretical issue could be revisited if circumstances made it appropriate, bearing in mind the interests of passengers.[169]

Based on the foregoing, it may be concluded that the Council believes that it can, if the circumstances justify, extend the applicability of certain recommended practices in the Annexes to domestic civil aviation operations. It may do the same with respect to a standard provided that States are given the discretion to apply it "to the extent practicable". The theoretical basis for such applicability is left to be revisited in the future.[170]

2.3 Auditing of State Compliance with Technical Regulations

The technical regulations formulated by ICAO will be useful only when they are implemented. In order to verify the status of the implementation of these regulations, ICAO has established two audit programmes, one is the Universal Safety Oversight Audit Programme and another is the Universal Security Audit Programme.

2.3.1 Universal Safety Oversight Audit Programme

During the first half-century of its existence, ICAO focused mainly on the adoption and amendment of SARPs and related regulatory material, leaving the implementation of these technical regulations wholly in the hands of its member States. ICAO also expected that its member States would file notifications pursuant to Article 38 of the Chicago Convention, if they could not comply with the international standards.

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167 *Id.* para. 3.5.

168 ICAO Doc 9802-C/1142, C-Min. 166/1-14 (2002), *Council – 166th Session, Summary Minutes with Subject Index* at 52-53.

169 *Id.* at 55-56.

170 *Cf*, Ch.5, in particular, 5.5.2 "Checks and Balances in ICAO Quasi-Legislative Activities".

In reality, the picture was much less rosy than what was presumed in theory. Over the years, only a relatively small number of States communicated with ICAO to indicate whether or not they were able to comply with ICAO standards. Many contracting States did not fulfil the obligation they had assumed to notify ICAO of differences between the international standards adopted by ICAO and their own national or domestic standards.[171] In some cases, certain developing countries did not even have adequate expertise fully to appreciate the contents of the Annexes, let alone the capability to determine whether there were differences to be filed with ICAO. Consequently, there was no reliable information concerning the implementation of the standards. This situation gave rise to a major safety concern. Milde, a former Director of ICAO Legal Bureau, used the metaphor of the "Emperor's new clothes" to describe the implementation of ICAO standards: while everybody was praising the clothes, the Emperor was actually naked.[172]

The alarm finally sounded in 1997, during a Conference on a Global Strategy for Safety Oversight, attended by Directors General of Civil Aviation of ICAO member States (DGCA Conference).[173] The Conference recommended, *inter alia*, that regular, mandatory, systematic and harmonized safety audits be introduced, and that greater transparency and increased disclosure be implemented.[174] Based on these recommendations, the ICAO Assembly established a Universal Safety Oversight Audit Programme (USOAP) during its 32nd Session in 1998, and directed the Council to bring it into effect as from 1 January 1999.[175]

The objective of the programme is to promote global aviation safety through auditing member States on a regular basis to determine their capability for safety oversight. The audits are carried out essentially by way of assessing the effective implementation of the critical elements of a safety oversight system and the status of States' implementation of safety-relevant ICAO SARPs, associated procedures, guidance material and safety-related practices.[176]

The audits are conducted by audit teams composed of ICAO officials and sometimes including experts seconded by regional aviation organizations or contracting States other than the audited State. Before an audit takes place,

171 Kotaite, *supra* note 140 at 20.

172 Milde, M., "Enforcement of Aviation Safety Standards – Problems of Safety Oversight" (1996) 45 *ZLW* 3 at 9.

173 ICAO Doc 9707, *Directors General of Civil Aviation Conference on a Global Strategy for Safety Oversight -Report* (1997).

174 DGCA Conference Report, *id.* at 2-5; *ICAO Safety Oversight Audit Manual,* ICAO Doc. 9735, AN/960 at 2-1.

175 Assembly Resolution A32-11: *Establishment of an ICAO Universal Safety Oversight Audit Programme*. See also Milde, M., "Aviation Safety Oversight Audits and the Law" (2001) XXVI *AASL* 165; Weber, L., "Convention on International Civil Aviation – 60 Years" (2004) 53 *ZLW* 298.

176 ICAO Doc. 9735, *supra* note 77 at 3-1.

a memorandum of understanding is signed between ICAO and the audited State, in which the latter agrees to the conduct of a safety oversight audit by an ICAO audit team. The memorandum also sets out other terms and conditions relating to the audit.[177] In addition to the review of documents and records, the audit team performs on-site activities in the audited State. All the eight critical elements of a safety oversight system identified above are covered.[178] Upon completion of the audit, an interim report containing all the audit findings and recommendations is transmitted to the audited State, on the basis of which the State is required to prepare a corrective action plan. Then, the Final Safety Oversight Audit Report is issued, which is similar to the interim report, but includes an analysis of the corrective action plan submitted, comments, and information on any progress made by the audited State on the implementation of the corrective action plan.[179]

During the first cycle of audits, States were audited on the basis of their implementation of the SARPs contained in Annexes 1, 6, and 8 only. Subsequently, the scope of the audit programme was further expanded to include the safety-related provisions contained in all safety-related Annexes.[180] One hundred and eighty one member States were audited during the first circle, seven were not.[181] In early 2006, the ICAO Secretariat reported that significant progress had been achieved in the implementation of State corrective action plans. At the global level, the lack of effective implementation of the critical elements of a safety oversight system had declined from an average of 32.6 per cent when all initial audits were completed, to an average of 17.5 per cent when the follow-up audits of 162 contracting States were completed. Moreover, ICAO was able to obtain first-hand information from its member States regarding their compliance with standards. Even the most developed aviation nations found out during the audit process that there were some differences between their national regulations and ICAO standards, which had not been filed with ICAO.[182]

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177 *Id*. App. B to this Manual contains Generic Memorandum of Understanding.

178 See *supra* notes 78-82 and accompanying text.

179 *Supra* note 77 at 6-3.

180 ICAO Assembly Working Paper, A32-WP/6, "Transition to the ICAO Universal Safety Oversight Audit Programme" 6 July 1998. See also, ICAO Assembly Resolution A35-6: *Transition to a comprehensive systems approach for audits in the ICAO Universal Safety Oversight Audit Programme (USOAP*), in ICAO Doc 9848, *supra* note 2 at I-57.

181 ICAO Working Paper DGCA/06-WP/3, "The Status of Safety Oversight", 9 January 2006. Seven States, namely, Afghanistan, Burundi, Iraq, Liberia, Sierra Leone, Solomon Islands and Somalia were not audited during the first cycle, primarily for security reasons. At that time ICAO had 188 member States. Timor-Leste joined ICAO on 5 August 2005 to become its 189th member. Montenegro became the 190th member on 12 February 2007.

182 See, for example, the audit reports or their summaries of France, Japan, the United Kingdom and the United States, which are available at ICAO website: http://www.icao.int, at Flight Information Exchange.

2.3.2 Universal Aviation Security Audit Programme

Immediately after the notorious events of September 11, 2001, the 33rd Session of the ICAO Assembly adopted Resolution 33-1, which, *inter alia*, directed the Council and Secretary General to consider an ICAO Universal Security Oversight Audit Programme.[183] Pursuant to this resolution, a High-level, Ministerial Conference on Aviation Security held in February 2002 recommended that ICAO should establish a comprehensive programme of universal, regular, mandatory, systematic and harmonized aviation security audits, with implementation beginning in 2003, based on a final work plan established by the Council.[184] The audit programme was included in the Aviation Security Plan of Action adopted by the Council,[185] and was subsequently designated as the Universal Aviation Security Audit Programme (USAP).[186]

The USAP represents an important initiative in ICAO's strategy for strengthening aviation security worldwide and for attaining the commitment of member States in a collaborative effort to establish a global aviation security system. The objective of the USAP is to promote global aviation security through the auditing of States on a regular basis to assist States in their efforts to fulfil their aviation security responsibilities. The audits identify deficiencies in each State's aviation security system, and provide recommendations for their mitigation or resolution.[187]

Generally, USAP audits follow the methodology of the safety oversight audits, but two fundamental differences should be noted. First, security audits are conducted at the national and airport levels concerning the concerned State's compliance with Annex 17 and other aviation security related provisions contained in other Annexes.[188] During the first cycle, it was considered insufficient to audit States only with respect to their security "oversight" arrangements. It was felt that *in situ* installations and equipment, namely, those located at the major airports of each member State, should also be included in the audits.[189] As a result, the term "oversight" does not appear as part of the name of the audit programme although it was originally suggested by

183 ICAO Doc 9848, *supra* note 2 at VII-1.

184 ICAO Council Working Paper C-WP/11786, "Outcome of the High-level, Ministerial Conference on Aviation Security", 27 February 2002, Appendix, A-5.

185 ICAO Council Working Paper C-WP/11799, "Aviation Security Plan of Action" 17 April 2004; see also, ICAO Doc 9809-C/1142 C-Min. 166/1-14, *Council – 166th Session, Summary Minutes with Subject Index* (2002) at 182; Kotaite, Aviation Safety and Security – Two Sides of the Same Coin. Keynote Address to the Aviation Study Group at Linacre College, Oxford University, 27 June 2003 at 2-3.

186 See ICAO website: http://icao.int at "Aviation Security"; see also Assembly Resolution A35-9, Appendix E, in ICAO Doc. *9848*, *supra* note 2 at VII-6.

187 ICAO website, *id*.

188 C-WP/11786, *supra* note 184 at A-5.

189 Weber, *supra* note 175 at 307.

Assembly Resolution A33-1.[190] Secondly, USAP audits strictly comply with the principle of confidentiality. The sensitive nature of security information is such that the principle of confidentiality is of the utmost importance to the USAP. Unlike safety issues, the unauthorized disclosure of any security vulnerability of a State could have an adverse effect on security within the State concerned. Consequently, all USAP reports receive a security classification; they are subject to rigorous physical controls; and, no State other than the audited State is provided with any information contained therein, unless otherwise agreed to on a bilateral basis. The only information made available to any other party apart from ICAO staff on a 'need to know' basis, is the name of the State and the airport(s) audited.[191]

In spite of the foregoing, it should be noted that in 2007, the 36th Session of the ICAO Assembly decided to introduce a policy of a "limited level of transparency" for the security audits.[192] The purpose of the policy is to balance the desirability for information sharing among member States and the need to prevent the sensitive information from going to the wrong hand. Specific implementing measures for this policy still need to be developed. There is also a tendency that rather than limiting security audits to particular Annexes, they will be based on "critical elements" criteria, similar to those used in the conduct of safety oversight audits.

2.3.3 Legal Issues Arising from ICAO Audits

The two ICAO audit programmes described in the foregoing paragraphs are considered as having set a milestone in the effort towards establishing a new and effective air safety regime for international civil aviation.[193] Much has been written about these programmes,[194] but there is still the need to analyse their legal basis, as well as their value in the theory and practice of international law.

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190 Compare with *supra* note 175 and 183.

191 ICAO Council Working Paper, C-WP/11912, "Audit Functions of ICAO", 21 October 2002, in Appendix.

192 ICAO Assembly Resolution A36-20: *Consolidated Statement on the continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference*, in ICAO Doc 9902, *supra* note 86 at VII-11.

193 Weber, *supra* note 175 at 304.

194 See Milde, *supra* note 175, Weber, *id*.; Abeyratne, R.I.R., *Aviation in Crisis* (Burlington: Ashgate, 2004) at 34-42. Belai, H., "Expanding programme to adopt systems approach to future audits" (2003) 58:9 ICAO Journal 4.

2.3.3.1 The Principle of Consent and the Mandatory Nature of Audits

Both audit programmes of ICAO are designed and intended to be implemented as "regular, mandatory, systematic and harmonized" audits. These terms were first used in the 1997 recommendations of the DGCA Conference[195] and they appeared again in the recommendations of the High-Level, Ministerial Conference on Aviation Security in 2002.[196] The first Conference did not provide any standardized definitions for these terms. It somehow appears from the record of deliberations during and after the Conference that in using the terms "regular" and "systematic" participants envisaged "a long-term programme which would go well beyond the three- and six-year cycles". Accordingly, the audit programme should not be "a one-time evaluation of all Contracting States".[197] Further, the *Safety Oversight Audit Manual* published by ICAO provides that ICAO safety oversight audits will be conducted in a systematic, consistent and objective manner. Standardization and uniformity in the scope, depth and quality of audits will be assured through an initial and refresher training of all auditors, the provision of guidance material, and the implementation of an audit quality control system within the Universal Safety Oversight Audit Programme. Moreover, during deliberations in the first Conference, the term "harmonised" or "harmonization" was used together with standardization to refer to an approach which would "instill confidence in the safety oversight system, provide safeguards against its abuse, and preclude any possibility of discrimination."[198]

The most controversial term, which has been the basis of much debate and which is also the focus of the present inquiry, is the term "mandatory". Originally, ICAO's safety oversight programme was designated as a Safety Oversight Assessment Programme. Approved by the Council in June 1995 and endorsed by the 31st Session of the Assembly in the same year, this Programme was a voluntary assessment of a State's implementation of the ICAO SARPs, and assessment-related reports were provided only to the assessed States. Other contracting States were provided with a summary report on differences identified by the assessment team.[199] In June 1997, when the Council had another

195 ICAO Doc 9707, *supra* note 173 at 2-5, para. 2.1 b).

196 ICAO Council Working Paper C-WP/11786 "Outcome of the High-level, Ministerial Conference on Aviation Security" 27 February 2002, in Appendix, A-5, at para. 6.1: The Conference recommends that "ICAO establish a comprehensive programme of a universal, regular, mandatory, systematic and harmonized aviation security audits, with implementation beginning in 2003 based on the final work plan established by the Council." The term "universal" was not used in the Conference of Directors General in 1997, but it was clearly intended that the safety oversight audit programme would be "universal", which should "include all Contracting States". See ICAO Doc 9707, *id*.

197 ICAO Doc 9712-C/1124, C-Min. 153/1-16 *Council – 153rd Session, Summary Minutes with Subject Index (*1998) at 101.

198 ICAO Doc 9707, *supra* note 173 at 1-5.

199 ICAO Doc 9735 *supra* note 77 at 2.1.1.

opportunity to discuss the possibility of audits by ICAO, the Representative of Senegal queried whether the mandatory nature of the audits would be contradictory to the principle of sovereignty enshrined in the Chicago Convention. The opinion provided by the Legal Bureau implied that the audits could be carried out upon the initiative of ICAO, but always with the audited State's consent, as the principle of sovereignty had to be fully respected. It was suggested that an Assembly resolution approving the audit program, supplemented by bilateral expressions of consent, would provide a proper legal basis for such a programme.[200]

If the Safety Oversight Audit Programme is based on the consent of the audited States, how could it be branded as "mandatory"? In fact, the original agenda item under which this matter was discussed at the 1997 DGCA Conference was "regular safety oversight audits". The term "mandatory" did not appear in the agenda.[201]

During the Conference, the deliberations concerning the mandatory nature of audits related mostly to the issue of full disclosure of audit information. Some States were ready to accept full disclosure but only on the condition that the programme would become harmonized and systematic, and would involve all contracting States. Thus, the programme as envisaged would no longer be based on purely voluntary participation.[202] Based on the tenor of views expressed at the Conference, the Chairman summarized that "delegates were in favour of regular, systematic and mandatory safety audits", and that "[s]pecial emphasis had been given to the need for a harmonized approach to safety oversight and for training for aviation safety inspectors".[203] This was the basis for the Conference's recommendation of "regular, mandatory, systematic and harmonised safety oversight audits",[204] which the Assembly unanimously endorsed through Resolution A32-11.

Can Resolution A32-11 impose a mandatory audit upon member States? The effect of ICAO Assembly resolutions is similar to that of UN General Assembly resolutions, which has been the subject of a lengthy debate.[205] In its advisory opinion in the case concerning *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice noted that "General Assembly

200 ICAO Doc 9704-C/1122, C-Min. 151/1-15, *Council – 151st Session, Summary Minutes with Subject Index* (1997)at 94-95, 101; see also ICAO Council Working Paper C-WP/10612, "Possible Enhancement of the Implementation of ICAO Annexes on Aviation Safety and Security", 4 June 1997, at para. 2.3.

201 The full text of the agenda is as follows: Topic 3.3: *Regular safety oversight audits.* The Council of ICAO has agreed, in principle, with the concept of safety audits carried out upon the initiative of ICAO, with the audited State's consent, as an essential component of a global strategy for safety oversight. The conference will have an opportunity to review this concept and recommend appropriate actions. See ICAO Doc 9707, *supra* note 173 at iv-4.

202 *Id.* at 1-6.

203 *Id.* at 1-6, paras 3.7 and 3.8.

204 *Supra* note 174.

205 See *infra* Ch.5.2.1.

resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[206] Analyzing Resolution A32-11 in the light of the criteria set forth by the Court, it would appear that the statement "ultimate responsibility for safety oversight rests with contracting States, who *shall* continuously review their respective safety oversight capabilities" (emphasis added) may arguably be considered as the expression of *opinio juris*, namely, the belief that the law requires States to act in that way. This responsibility has been repeatedly affirmed by a series of Assembly resolutions over the years, and no objection has ever been recorded.[207] The resolution also urges "all Contracting States to agree to audits to be carried out upon ICAO's initiative, but always with the consent of the State to be audited, by signing a bilateral Memorandum of Understanding with the Organization, as the principle of sovereignty should be fully respected". It is clear from the above that the *opinio juris* reaffirms the principle of consent.

Accordingly, in order to ensure that audited States consent to the conduct of ICAO audits, more than 180 bilateral memoranda of understanding have been concluded, all based on the single model approved by the Council. Most States accepted the standard text prepared by ICAO, whereas some requested certain amendments. The unwritten but firm policy of ICAO has been not to deviate substantially from the model, in order to safeguard uniformity.

The conclusion of the memoranda of understanding has fulfilled the requirement of consent, alleviated the concern of the more skeptical minds, and has provided legal justification for the audits carried out by ICAO. From a doctrinal point of view, the question may be asked whether, in practice, a contracting State which ICAO seeks to audit may refuse to conclude a memorandum of understanding with ICAO. Aside from the moral pressure and persuasive force associated with the Assembly resolution, States which are reluctant to accept ICAO's audits may not find it worthwhile to refuse them. This is because such States risk the ever present possibility of creating an unfavorable impression of themselves in the international aviation community, and being *de facto* blacklisted by other States as a result. Accordingly, the memorandum of understanding is only a formality. Behind it is the commitment to go along with the community expectation, despite the initial reluctance of certain States.

ICAO's implementation of audits in the territories of its member States received a second round of affirmation when the Universal Security Audit

206 Advisory Opinion [1996] *ICJ Reports* 226 at 254 (para. 70).

207 See, Resolutions A29-13, in particular resolving clause 1: "Reaffirm that individual State's responsibility for safety oversight is one of the tenets of the Convention. See also, Resolutions A33-9 and A35-6 in ICAO Doc 9848, *supra* note 2. In *Nuclear Weapons*, the ICJ also mentioned that "a series of resolutions may show the gradual evolution of the *opinio juris*", see *id*.

Programme was implemented. The cooperation so far received from the audited States during safety and security audits has demonstrated that not only have the member States accepted the audits by ICAO in their words; they have also accepted the audits by their subsequent deeds. With this in mind, one may venture to conclude that the ICAO audit practice has customarily developed into a *mandatory* safety regime in the true legal sense of the word.

2.3.3.2 Confidentiality and Transparency

Confidentiality was regarded as a cornerstone in the voluntary safety oversight assessment programme introduced in 1996. The model memorandum of understanding used at that time provided in paragraph 10 that "safety oversight interim and final reports will be confidential".[208] Access to information relating to the assessment was restricted to persons within the ICAO Secretariat on a need-to-know basis. The same paragraph of the memorandum of understanding provided, however, that a summary of the final report would be made available to States through ICAO, upon request.[209]

Confidentiality of audit information was one of the core issues debated during the 1997 DGCA Conference. The majority emphasized that, *vis-à-vis* access to information, the interests of the travelling public was the paramount consideration in addressing the subject of confidentiality. While the sovereignty of individual States and their legitimate right to fair treatment should continue to be respected, as much information as possible should be made publicly available on safety deficiencies. On the other hand, it was felt that the audit programme needed to move incrementally from the stage of full confidentiality and voluntary subscription to one of mandatory assessment with full disclosure.[210] Consequently, it was recommended that greater transparency and increased disclosure be implemented by way of expanding upon the information in the summary reports. In the standard memorandum of understanding for the first cycle of the audits, the clause concerning confidentiality was therefore maintained.

When ICAO introduced the comprehensive approach to safety oversight audits covering all safety-related provisions in the Annexes, greater transparency was promoted. In 2004, the 35th Session of the Assembly recognized the fact that transparency and sharing of safety information are fundamental tenets of a safe air transport system. This marked the beginning of the era in which ICAO would make available the full reports of comprehensive audits to its member States.[211]

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208 See the Appendix to the ICAO Working Paper, DGCA/97-WP/4, "Dealing with Confidentiality and Sovereign Issues", 2 October 1997.

209 *Id.*

210 DGCA Conference Report, *supra* note 173 at 1-4, para. 2.

211 ICAO Doc 9848, *supra* note 2, Assembly Resolution 35-6.

At another DGCA Conference held in March 2006, an even bolder attempt was made to set up a system of disclosure of the audit results, not only to the member States, but also to the aviation industry at large and the general public. One of the working papers introduced at the Conference referred to transparency as "the corner stone of aviation safety",[212] demonstrating a significant shift from the previously held view that "confidentiality is a corner stone" of the previous safety oversight assessment programme. However, while the sharing of safety information among member States was fully supported, concerns were expressed about the full disclosure of information to the public.[213] At the end of the Conference, 66 member States indicated their willingness to authorize ICAO to release information from their safety oversight audits. By July 2008, all ICAO member States audited under the USOAP had given their consent for ICAO to release the results of audits conducted in their respective countries.[214] It took a decade for ICAO to transit from a regime of confidentiality to one of transparency. With respect to the security audits, transparency has not been given the same level of prominence since the overarching need to prevent terrorists and other people with malicious intents from identifying the deficiencies of the security system has been considered to be more important.

2.3.3.3 Implications for International Law and Practice

ICAO's successful implementation of safety oversight audits for the past 11 years and of security audits for the last 7 years presents a number of implications for the theory and practice of international law as traditionally understood. In particular, it provokes new thinking with respect to the relationship between a United Nations Specialized Agency responsible for civil aviation and its members who are sovereign States.

The Chicago Convention, which includes the constitution of ICAO, is founded on the principle of complete and exclusive sovereignty of States. This principle generally implies that a State has supreme authority in its territory. When the concept of safety audits was introduced and debated in the Council, which was then composed of 33 States, ten members of the Council, representing different regions, different legal systems and different schools of thought, jointly expressed the following view:[215]

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212 ICAO Working Paper DGCA/06-WP/5, "Transparency and Sharing of Safety Information", 9 January 2006 at para. 3.1.

213 DGCA/06-SD/2 Summary of Discussion, 21 March 2006.

214 ICAO News Release, PIO 04/08, "All Audited States Now Authorize ICAO to Post Audit Results on Public Website", 16 July 2008.

215 ICAO Council Working Paper C-WP/10832, "Safety Oversight Programme – Implementation in 1999-2001 Triennium" (Presented by Angola, Australia, Bolivia, Canada, Egypt, India, Indonesia, Mexico, Pakistan and Saudi Arabia), 18 February 1998. It should be noted that while members in the Council are fully entitled to present working papers, it is not their

> The primary role of ICAO, as established in the Chicago Convention, is the adoption and amendment of SARPs. The Convention does not, in any way, give the Organization an executive function in ensuring compliance by States with the SARPs; the filing of differences is the explicit responsibility of the States. The development of a more robust safety oversight programme must respect these basic competencies.

In support of this viewpoint, China added that ICAO should not leave the impression that in the field of flight safety and security, it was acting as the police. France considered the new proposal as being tantamount to changing the relationship between the organization and its member States, which would necessitate the modification of the organization's charter.[216] Indeed, according to the classical theory of international law, restriction of State sovereignty must not be presumed.[217] One of the key features of sovereignty is that a State is not subject to any external authority. Safety oversight by an international team, as Milde has pointed out, may be potentially perceived as "intrusive" and offending the sensitivities of sovereign States.[218]

Nevertheless, despite all the scepticism and controversy, it is now an undeniable fact that ICAO is exercising certain powers relating to safety and security audits, and there has been no recorded instance in which such audits have been refused by a contracting State. Why and how could ICAO obtain such powers "without any formal amendment of the constitutional basis of the Organization"?[219] The answer lies in the commitment of the entire international community to protect the safety of international civil aviation.

By its very nature, civil aviation is predominantly international. ICAO statistics show that international traffic represents approximately two-thirds of the world total revenue air traffic.[220] Numerous aviation activities cross international borders and involve crews, passengers and supporting staff of different nationalities. It follows therefore that the performance or non-performance of the safety oversight function of one State will have impacts upon other States. "When safety standards and procedures are involved on international flights, one cannot even take the position that non-compliance by a sovereign State affects only the citizens of that State. Any other State that receives flights of aircraft registered in the non-complying State has every reason to be con-

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frequent practice to do so. Most of the Council working papers are prepared and presented by the Secretary General of ICAO.

216 ICAO Doc 9704-C/1122, *supra* note 200 at 97 and 101. See also the Statement of Senegal, *supra* note 200.

217 *Lotus* Case, 7 September 1927, *P.C.I.J. Reports*, Series A, No.10 at 18.

218 Milde, *supra* note 172 at 14.

219 Milde, *supra* note 175 at 175.

220 For example, in 1996, the total tonne-kilometres performed for scheduled traffic was approximately 341 billions, 225 billions of which were performed internationally (ICAO Doc 9700, *Annual Report of the Council 1997*, at A – 42). In 2006, the figure was 545.07 billions for the total, and 369.35 for international traffic. ICAO Doc 9898, *Annual Report of the Council* 2007, at App.1.

cerned about whether international standards and procedures are in fact being followed with respect to such aircraft and crews".[221] Safety of civil aviation requires not only uniform safety regulations, but also universal compliance with such regulations. Gradually, the international community has come to the realization that a universal system for monitoring State compliance with international standards is necessary if civil aviation is to develop in a safe and orderly manner.

In this connection, the assessment programme launched in August 1992 by the United States deserves positive mention.[222] Dissatisfied with the practice of certain "rent-a-flag" foreign airlines, which were virtually subject to no safety oversight by any State, the Federal Aviation Administration of the United States (FAA) decided to conduct, on a cooperative and reciprocal basis, assessments of foreign airlines flying to the United States, and to classify them in accordance with the degree to which they were found to be in compliance with ICAO Standards according to established categories. In the worst case, foreign carriers which did not comply with ICAO standards were denied the right to operate flights into the United States.[223]

The foreign carrier assessment programme carried out by the US has triggered certain adverse reactions. For example, Tompkins, an experienced U.S. lawyer, has described the action of the FAA as "circumventing" the overriding safety function of ICAO, an act which he considers to be "contrary to the commitments undertaken by the United States in the Chicago Convention".[224] Despite these criticisms, the unilateral initiative of the U.S. did play an important role in paving the way for the establishment of the ICAO audit programme. As the FAA has pointed out: "The FAA often uses unilateral and multilateral approaches simultaneously, or uses the threat of unilateral action to spur a multilateral initiative".[225] The airlines of many States could not afford to lose the lucrative markets offered by their established air routes to and from the U.S. Faced with unilateral safety assessments conducted by the FAA, States were more inclined to submit to the more neutral solution or the lesser evil: the universal, systematic and harmonized audits conducted by ICAO, a neutral international organization.

Aside from the national initiative of the United States, the European Civil Aviation Conference (ECAC) and other European bodies have also taken regional initiatives to address safety issues, including the establishment of the SAFA programme,[226] and the introduction of a model bilateral clause on

221 Kotaite, *supra* note 140 at 20.
222 Jennison, M., "The Chicago Convention and Safety after Fifty Years" (1995) XX *AASL* 283 at 293.
223 *Id.* at 297.
224 Tompkins, G., "Enforcement of Aviation Safety Standards" (1995) XX AASL 319 at 333.
225 As quoted by Tompkins, *id*. at 334.
226 See *infra* Ch. 5.4, "Implementation at the National and Regional Level".

safety for insertion into bilateral air services agreements concluded in the European region.[227] These efforts also accelerated the initiative of ICAO to embark on the audits.

Step by step, other States also came to the realization that the issue of aviation safety is of global concern and, as such could not be properly addressed in exclusive domestic jurisdictions. All these factors eventually contributed to the consensus which was attained at the DGCA Conference in 1997. As noted above, the Conference recommended regular, mandatory, systematic and harmonized safety audits to be carried out by ICAO, which should encompass all contracting States. Accordingly, Milde has hailed it as a significant development in international practice and international law despite his lingering doubts about the legal status of the Conference:[228]

> While the Conference had no law-making power, its unanimous recommendations carried important weight as *opinion iuris ac necessitatis* expressed by the aviation experts of the world responsible for the national administration of civil aviation. It in fact formulated, by implication, a principle that matters of aviation safety are subject of international concern and that the international community should be empowered to verify the national implementation of safety standards and procedures.

It may be further argued that the shift from considering safety matters as being exclusively within national jurisdiction to the international domain represents a significant movement which would place the duty of safety oversight for civil aviation as an obligation *erga omnes*.[229] In this sense, ICAO may be properly considered as an agent of the international community for purposes of verifying whether such a duty has been fulfilled.

It is also significant from the point of the international law-making process that ICAO could successfully achieve a novel means of implementing international regulations without amending its constitutional instrument. The establishment of the ICAO audit programmes passed through three stages in the decision-making process: a recommendation from a conference of States; endorsement by an Assembly resolution; and, conclusion of bilateral memoranda with States, with intervening decisions of the Council at different stages.[230] When the concept of safety audits to be carried out by ICAO was

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227 See Statement by Representative of Denmark on the ICAO Council, ICAO Doc 9704-C/1122, *supra* note 200 at 94. See also *supra* note 44.

228 Milde, *supra* note 175 at 175.

229 Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, [1970] ICJ Report 3 at 32. See infra Ch.5.1.1 on obligations *erga omnes*.

230 In the case of the Universal Security Audit Programme, the Assembly, in an immediate response to the events on 11 September 2001, initiated the request through Resolution 33-1 and endorsed, through Resolution 35-9 the security audit programme established by the Council.

introduced, several options were proposed as the means of obtaining the required consent from States. These included bilateral agreements, an Assembly resolution or declaration, a multilateral instrument, or combination of the foregoing.[231]

Bilateral agreements would have been convenient to trigger an initial project, but this would have resulted in a piecemeal approach, which, in turn, would have required a considerable amount of time to crystallize into a global framework. An amendment to the Chicago Convention would have had to wait for at least 15 years in order to receive sufficient ratifications to bring it into force. If a new treaty outside the Chicago Convention were to be negotiated, it could have been less time-consuming, but it would still not be able to secure the level of universal acceptance required to implement it within a few years. To cope with the rapidly changing nature of circumstances characteristic of modern day civil aviation, ICAO opted for an innovative short cut: a top-down approach through an Assembly resolution approving the audit programme, followed by a bottom-up approach through individual memoranda of understanding between ICAO and each of the audited States.[232] It may be too early to judge whether this type of norm-making process may set a precedent for the future and stand the test of time, but the practice in ICAO indicates the possibility that an institutional regime applicable to member States could be developed within the framework of a United Nations specialized agency without the necessity of concluding a multilateral treaty.

2.4 Concluding Remarks

Individual States' responsibility for safety oversight in civil aviation is one of the tenets of the Chicago Convention. Safety oversight by a State applies to aircraft on its national registry as well as civil aviation activities carried out within its territory. Registration of an aircraft is a sovereign act of discretion, but it entails the responsibility to maintain a genuine link with such aircraft in order to ensure its continuous compliance with safety standards. This responsibility rests with the State of registry unless it is transferred according to the specific criteria provided by law. The notion of "flags of convenience", used for purposes of avoiding safety regulations, is incompatible with this responsibility. The responsibility of a State also extends to the provision of air navigation facilities and services within its territory in accordance with ICAO standards. While the operation of the facilities and services may be delegated to another party, the responsibility of the State remains unaffected under Article 28 of the Chicago Convention. Currently, the prevailing view is that Article 28 does not give a cause of action to private persons to claim

231 C-WP/10612, *supra* note 200 at para. 2.5.1. c).
232 *Id.*

compensation for damage. Moreover, there is no precedent in ICAO in which one member State claims compensation from another on the basis of Article 28

In an effort to assist States to fulfil this important responsibility, ICAO has developed international standards and recommended practices as well as other related regulatory material encompassing virtually the entire spectrum of aviation activities with a view to achieving uniformity of safety regulations. In doing so, ICAO has relied on a rather flexible approach without the usual legalistic rigidity. The resulting sophisticated aviation safety code comprises different kinds of regulatory material, some having binding force, and others being purely guidance material. The implementation of this safety code has been strengthened since the end of the 20th Century through the establishment of the audit programmes, which give ICAO an important, albeit limited authority, external to the sovereign powers of its member States. This practice has broken new ground in international law. Underlying it is the consensus of the international community that aviation safety is a matter of global concern, and therefore should not be left within the exclusive domain of domestic jurisdictions.

ICAO is also confronted with challenges. While the tenet remains that States are responsible for safety oversight, "there is a growing trend today towards regionalism, with its piece-by-piece surrender of sovereignty to a larger entity, as well as simultaneous trend toward the dissolution or diminution of once federated or unified States, with a splintering into smaller sovereign entities".[233] The different stages of development of civil aviation in different countries have placed a heavy task on ICAO with respect to the uniform development and implementation of safety standards. There is also the continuing tendency that legislative power within ICAO will be more and more concentrated in the hands of the minority which possesses advanced aviation systems. Certain issues also exist in ICAO concerning the exact scope of its competence and the legally binding force of its regulatory material. For example, there is no clear guideline as to whether ICAO should or should not regulate purely domestic aviation operations. As the institutional power of ICAO is likely to grow in the future, it may be necessary to regularize the regulatory functions of ICAO in order to ensure justice and fairness in its decision-making process.

233 Kotaite, *supra* note 140 at 20.

3 Protecting Aviation Safety from Military Operations

Airspace used for civil aviation is also used for military purposes. Military activities undoubtedly present safety implications for civil aviation. On the one hand, many military activities are carried out for legitimate purposes; they are essential for self-defence, an inherent right under Article 51 of the Charter of the United Nations. In this sense, they represent a fundamental value of the principle of sovereignty. On the other hand, military activities may also be associated with unlawful acts, such as a deliberate act of aggression or an unintended act of destroying civil aircraft in flight. The work of ICAO in this area is aimed at maintaining equilibrium between the safety of civil aviation and legitimate military activities. From time to time, when the circumstances so require, ICAO also takes action against unlawful military acts for the purpose of protecting the safety of civil aviation. ICAO activities are subject to its constitutional constraint that the Chicago Convention does not apply to aircraft used in military, customs and police services (Article 3, paragraph a) of the Convention). A further constraint lies in the provision of Article 89 of the Convention which states that in case of war, the Convention does not affect the freedom of action of any of the contracting States affected.

3.1 Prohibition of the Use of Weapons against Civil Aircraft in Flight

Historically, the greatest risk posed by military activities to civil aviation has been demonstrated by occurrences of civil aircraft being shot down deliberately or by mistake, causing numerous fatalities. For example, on 27 July 1955, an aircraft of El Al Israeli Airlines Ltd. entered into Bulgarian airspace and was shot down, causing the death of all 58 persons on board.[1] On 21 February 1973, a Boeing 727 belonging to Libyan Arab Airlines was shot down by Israeli air forces over the Israeli-occupied Sinai Peninsula, resulting in the death of 110 persons.[2] On 31 August/1 September 1983, a Boeing 747 of Korean Airlines (Flight 007) deviated from its planned route into the airspace of the Soviet

1 ICAO Circular 50-AN/45: *Aircraft Accident Digest No. 7*, No. 35 at 146. See also, Augustin, J., *ICAO and the Use of Force against Civil Aerial Intruders*, Master's Thesis, Institute of Air and Space Law, McGill University, 1998, at 34.

2 ICAO Working Paper C-WP/5764, "Report concerning the Libyan Arab Boeing 727-224:5A-DAH (Sinai-21 February 1973)" 1 May 1973, Attachment, paras. 1, 2, and 8.

Union and was shot down by the latter, killing 269 persons on board.[3] On 3 July 1988, an Iranian aircraft, an Airbus A300, was shot down by the navy of the United States while flying from Bandar-Abbas in Iran to Dubai in the United Arab Emirates, and all 290 persons on board perished.[4] On 10 October 1998, a Boeing 727 aircraft of Congo Airlines was shot down, resulting in the loss of 41 lives.[5]

3.1.1 Article 3 *bis* and Customary International Law

As early as 1955, the General Assembly of the United Nations was aware of incidents involving attacks on civil aircraft innocently deviating from fixed plans in the vicinity of, or across, international frontiers. Realizing that the problem is "a matter of general international concern", the General Assembly adopted a resolution calling upon all States to take the necessary measures to avoid such incidents and inviting the attention of the appropriate international organizations to this matter.[6] In response to this resolution, ICAO commenced its own study of this issue. According to a working paper presented by the Secretary General in 1956, national laws of several States contained provisions that aircraft would be intercepted and shot down without warning, or "may be fired upon", or would be subject to danger or "sanction in an attempt to bring them to the real course", if they had not obtained air traffic control clearance, had deviated from corridors, or had entered a prohibited area. Some States believed it was contrary to international law to shoot down a civil, unarmed aircraft under any circumstances, while others denied the existence of this principle.[7] Discussions on this issue dominated ICAO for a long time and, after the destruction of Korean Airlines Flight 007 in 1983, culminated in the adoption Article 3 *bis* of the Chicago Convention in 1984, which reads as follows:

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3 ICAO, Memorandum dated 2 September 1983 from the President of the Council to the Representatives on the Council, Attachment 1.

4 ICAO Pres AK/165, Memorandum from the President of the Council to the Representatives on the Council, 4 July 1988. Attachment 1-4.

5 Statement of the Delegate of the Democratic Republic of the Congo, reproduced in ICAO Doc 9738-C/1127, C-Min. 156/1-16, *Council – 156th Session, Summary Minutes with Subject Index* (1999) at 94 and 95.

6 UNGA Resolution 927, Question of the safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers, UNGA Official Records, 10th Sess. Supp. No. 19 at 14.

7 ICAO Working Paper C-WP/2153, "Safety of Commercial Aircraft Flying in the Vicinity of, or Inadvertently Crossing, International Frontiers" (13 April 1956) at para. 5.

Article 3 bis

a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph *a)* of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

c) Every civil aircraft shall comply with an order given in conformity with paragraph *b)* of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph *a)* or derogate from paragraph *b)* and *c)* of this Article.[8]

Since the adoption of the Chicago Convention, there have been only two substantive amendments to it, one is Article 83 *bis*, which has been discussed in Chapter 2, and the other is Article 3 *bis*.[9] In view of the lengthy and burdensome process for amending the constitution of ICAO,[10] these two successful amendments must be considered to represent the strong commitment of the member States of ICAO to the matters covered therein. Article 83 *bis* was

8 ICAO Doc 9436, *Protocol relating to an Amendment to the Convention on International Civil Aviation* [Article 3 *bis*], signed at Montreal on 10 May 1984. This protocol came into force on 1 October 1998 in respect of States which have ratified it. It had 138 parties on 16 July 2008 (http://www.icao.int/icao/en/leb/3bis.pdf).

9 Other amendments to the Chicago Convention are related to organizational structures, such as the increase of the members in the Council.

10 An amendment to the Chicago Convention will take some 15 years or longer to enter into force, because it requires the ratifications by not less than two-thirds of the total number (currently 190) of the contracting States (Article 94).

adopted to ensure the effective exercise of the important safety oversight function; whereas Article 3 *bis* was adopted in response to the worldwide appeal for the prohibition of the use of weapons against civil aircraft in flight.

Long before the adoption of Article 3 *bis*, abundant state practice had developed regarding the treatment of intrusions of civil aircraft. The classical principle of "elementary considerations of humanity" as enunciated by International Court of Justice in the *Corfu Channel* case has been repeatedly invoked to denounce the disproportionate use of force against the intruding civil aircraft. In that case, British warships incurred loss and damage in the territorial waters of Albania due to the failure of the latter to give warning regarding the existence of the minefield therein. In affirming that Albania had incumbent obligations to notify the existence of the minefield and to warn the British warships of the imminent danger posed by it, the Court stated: "Such obligations are based … on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[11] In the context of the aerial intrusions, the same elementary considerations of humanity would require a State to give warning to the intruding civil aircraft regarding the dangers it faces before resorting to the use of force. Coincidently, none of the States which shot down civil aircraft claimed that they had an unqualified right to do so without any warning.[12] Based on state practice prior to 1984, a number of commentators who were involved with the drafting of Article 3 *bis* were of the view that its paragraph a) is "not a new rule of law", but the recognition of "the existence of a prior rule binding on all parties and prohibiting the use of weapons against civil aircraft in flight";[13] it is declaratory of the principle of general international law, which "had its independent existence separate from the written (codified) text of Article 3 *bis* a)".[14] This is also evident from the text of paragraph a) of Article 3 *bis*, where the words "recognize" and "every State"

11 *Corfu Channel* Case, *Merits, Judgement of April 9th 1949* [1949] *ICJ Reports* 14 at 22.

12 See *supra* notes 1 to 5. See also "Documents Concerning the Korean Air Lines Incident – United Nations Security Council Consideration" (1983) 22:5 *International Legal Materials* at 1115-1116; ICAO Doc 9073-C/1011, C-Min. 79/1-14, *Council - Seventy-Ninth Session, Minutes with Subject Index* (1973) at 38-47.

13 Guillaume, G., "The Destruction on 1 September 1983 of the Korean Airlines Boeing (Flight KE 007)", ITA Magazine No. 0-18, September 1984 at 34; Milde, M., "Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)" (1986) XI *AASL* 105 at125.

14 Milde, *id.* at 113. See also, FitzGerald, G.F., "The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident" (1984) *CYIL* 291 at 305. See also ICAO Doc 9647-C/1089, C-Min. 115/1-19, *Council – 115th Session, Minutes with Summary Index* (1986) at 154.

were deliberately chosen to indicate that the effect of the provisions is not limited to contracting States.[15]

While there is a virtual consensus that paragraph a) of Article 3 *bis* reflects existing law, such reflection could not possibly reach the photographic accuracy thereof. This is partly due to the imprecise nature of customary international law and partly due to the nature of the treaty-making process, which tends to combine both the element of the codification of existing law and the progressive development of law.[16] Augustin, after study of the state practice and the relevant rules of the international law prior to the adoption of Article 3 *bis*, came to the conclusion that "paragraph a) of Article 3 *bis* does not coincide with the customary international law before 10 May 1984, in the sense that it seems to lay an obligation not to use weapons in circumstances where the pre-existing law would allow it".[17] In his view,

> customary international law did provide for the possibility of use of force against civil aircraft when important security interests were threatened, appropriate instructions and warnings had been given and ignored, and the requirement of proportionality was met. Importantly, the customary international law permitted the possibility of the use of force, *even lethal*, in circumstances where activities of the aircraft were not sanctioned by a State (i.e. private in nature) and where an armed attack had not taken place, provided nevertheless that important security interests were threatened.[18]

On the other hand, under paragraph a) of Article 3 *bis*, "the prohibition on the use of weapons and endangerment of aircraft and their occupants is subject to the right of self-defence as set out in Article 51 of the UN Charter. It is this reference to the UN Charter which imposes a stricter obligation on the subjacent State than did the principles of customary international law in 1984."[19] To illustrate, Augustin cites two examples in which a pilot privately decides to take for sale photographs of important military installations in a subjacent State or to deliberately incite or incur rebellion in that State. In both cases, the customary international law would not prohibit the State from the use of weapons against the pilot provided that warning is given and the use of force is proportionate. Under Article 3 *bis*, since these two cases do not involve an armed attack and therefore a right of self-defence would not exist, the use of weapons under these circumstances would not be permitted.[20]

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15 See Augustin, *supra* note 1. In the original drafting, the term "undertakes to refrain" was used. It was subsequently replaced by the term "recognize that every State must refrain".
16 See *infra* Ch.5.2.1.1 relating to "Declaratory Resolutions".
17 Augustin, *supra* note 1 at 213.
18 *Id.*
19 *Id*. at 212.
20 *Id*. at 213.

Accordingly, the principal contribution of ICAO through the adoption of Article 3 *bis* is to achieve in times of peace a complete ban on the use of weapons against civil aircraft in flight.[21] "The prohibition of the use of force against civil aircraft in the amendment is more restrictive of the discretion of the territorial sovereign than was the customary law in 1984."[22] Consequently, the freedom of action by States is further restricted in the interest of aviation safety.

It should be noted that Article 3 *bis* prohibits the use of weapons rather than the use of force. Paragraph a) expressly allows interception, provided that the lives of persons on board and the safety of aircraft are not endangered. Paragraph b) further confirms the right of interception and the resort to any appropriate means consistent with relevant rules of international law. At the same time, out of safety considerations, it requires each contracting State to publish its regulations in force regarding the interception of civil aircraft. Paragraphs c) and d) impose certain obligations to the State of registry and the State of the operator of civil aircraft. Traditionally, a State had no duty to ensure that its nationals in a foreign country comply with the laws in that country. In the interest of safety, Article 12 of the Chicago Convention deviates from this tradition by obliging the State of registry of an aircraft to ensure that the aircraft shall comply with the rules of the air "wherever such aircraft may be".[23] Article 3 *bis*, paragraph c) further requires the State of registry and the State of the operator to declare punishable under its national law the act of non-compliance with the order given by a foreign country in conformity with paragraph b). Paragraph d) also imposes the obligation to prohibit the deliberate use of any civil aircraft for any purpose inconsistent with the aims of the Chicago Convention.

The drafters took great care to state that paragraph d) shall not affect paragraph a). In other words, the obligation under paragraph d) is not *qui pro quo* for the rule under paragraph a); even if the State of registry or the State of the operator fails to fulfil its obligation under paragraph d), this does not justify other States in using weapons against its civil aircraft in flight. As paragraph a) refers to "every State" and paragraph d) only mentions "contracting States", it may be argued that the former is intended to have universal

21 Richard wrote in 1984: "while existing law and practice give paramount importance to the safety of civil aviation, they may not confer the absolute character to the ban on the use of weapons against civil aviation that is contemplated in Article 3 *bis*." See Richard, G., "KAL 007: The Legal Fallout" (1984) IX *AASL* 147 at 154. Augustin also tends to believe that the ban on the use of weapons under Article 3 *bis* is absolute in nature, since the exception concerning the right of self-defence will not arise with regard to civil aircraft. Once an aircraft is used in a State-sanctioned armed attack, it would no longer be considered as civil aircraft and therefore would fall outside the Chicago Convention, including Article 3 *bis*. *Id.* at 212. For more discussions, see *infra* note 57 *et seq* and accompanying text.

22 Augustin, *id.* at 259.

23 See *supra* note 6 in Ch.2.

effect, whereas the latter is binding only on the contracting parties. On this basis, it may be concluded that the safety of civil aircraft is the predominant consideration underlying Article 3 *bis*.

3.1.2 Reactions of ICAO to the Use of Weapons against Civil Aircraft

Each of the incidents mentioned above concerning the shooting down of civil aircraft has triggered heated debates in ICAO. In the case of the Korean airliner (Flight 007), when the Security Council of the United Nations was not able to take action due to the veto of the Soviet Union, the ICAO Council was able to adopt a resolution on 6 March 1984 which "[c]ondemns the use of armed force which resulted in the destruction of the Korean airliner and the tragic loss of 269 lives".[24]

Long before that, in the case of the Libyan aircraft shot down by Israel in 1973, the ICAO Assembly made the most unequivocal statement "[*c*]*ondemning* the Israeli action which resulted in the loss of 106 innocent lives", even before it directed the Council to institute an investigation.[25] As Augustin observes, "[i]n none of the other instances examined above did the Assembly or Council condemn by name the State which shot the aircraft, much less before the investigation was completed."[26] The observer from Israel commented afterward:

> The action of my country was condemned – condemnation unparalleled in any international institution, to my knowledge, in that the condemnation was issued before any investigation of the facts. The judge passed sentence and then proceeded to hear witnesses.[27]

With respect to the Iran Air incident on 3 July 1988, the Council spent some time debating whether the term "condemn" or "condemnation" should be used in the resolution. The observer from Iran stated that an "act of violence, irrespective of who or which country the perpetrator might be, will not be left unaccounted." He called for "condemnation of the shooting down" and a recognition of the responsibilities of the United States.[28] The Council was

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24 Frowein, J. A., "Reaction by Not Directly Affected States to Breaches of Public International Law" (1994:V) 248 *RdC* 345 at 419-420. ICAO Doc 9441-C/1081, C-Min, 111/1-18, *Council – 111th Session, Minutes with Subject Index* (1984) at 106.

25 Resolution A 19-1: *Shooting down of a Libyan civil aircraft by Israeli fighters on 21 February 1973*, in ICAO Doc 9848, *Assembly Resolutions in Force* (as of 8 October 2004) at I-27.

26 Augustin, *supra* note 1 at 155.

27 ICAO Doc 9073-C/1011, C-Min. 79/1-14, *Council – Seventy-Ninth Session, Minutes with Subject Index* (1973) at 38. See also Augustin, *id*. at 154.

28 ICAO Doc 9744-C/1129, C-Dec. 126/1, 2, 4, 7-17, 21-26, C-Min. 126/3, 5, 6, 18-20, C-Dec. 127/1-33, C-Dec. 128/1-21, *Council – 126th, 127th and 128th Sessions, Summary Decisions and Minutes with Subject Index* (1999) at 147 and 148.

divided on this issue, and it entrusted its President to hold informal discussions with a view to preparing a consensus text. After "a slow rate of progress in his consultation", the President reported to the Council that he was not able to present such a text.[29] Subsequently, the United Kingdom presented on behalf of nine States a draft resolution, which did not satisfy Iran.[30] The USSR and Czechoslovakia then proposed to amend the sixth clause of the draft to read:

> CONDEMNS the use of armed force against civil aviation, including the act which resulted in the tragic destruction of an Iran Air airliner and the loss of 290 lives, while noting the accidental sequence of events and errors in the identification of the aircraft.[31]

The United Kingdom stated that the co-sponsors of the draft resolution "did not think that condemnation was appropriate to these particular circumstances", since the "mistake had been acknowledged, responsibility had been accepted and action had been taken to ensure that such a tragic event did not recur".[32]

The United States was strongly opposed to the amendment introduced by the USSR and Czechoslovakia. In its view, one incident might differ from another. It would be a far greater risk to ICAO credibility if "all uses of force against civil aircraft in flight deserved equal condemnation, without due regard to the particular facts and circumstances surrounding individual cases". Its government "had created a new precedent in the degree to which it had co-operated with the Organization" and had offered *ex-gratia* compensation. It would be "unconscionable for the ICAO Council to impose its greatest censure 'condemnation'."[33]

Contrary to this view, Kenya observed that the Council "when considering a similar incident in the past had 'condemned' that act". Kenya argued that the Council should be consistent and should not be "influenced by political considerations". If it failed to do so, "the Organization stood to lose its credibility."[34]

Eventually, the proposed amendment by the USSR and Czechoslovakia was put to vote and defeated. In the final text adopted, the word "condemn" is retained. But instead of condemning the "act", the Council reaffirms "its policy to condemn the use of weapons against civil aircraft in flight without prejudice

29 *Id.* at 173.
30 *Id.* at 181. See also ICAO Council Working Paper C-WP/8821 "Draft Resolution", presented by Australia, Canada, France, the Federal Republic of Germany, Italy, Japan, Spain, Switzerland and the United Kingdom, 16 March 1989.
31 *Id.* at 180.
32 *Id.* at 181.
33 *Id.* at 182.
34 *Id.* at 182.

to the provisions of the Charter of the United Nations".[35] Sochor, a former officer of ICAO, pointed out that "the ICAO response was surprisingly mild", in view of the "magnitude" of the blunder of the United States.[36] Augustin, another ICAO officer, while agreeing with the point that one incident might differ from another, was also of the view that the United States' explanation of the Iran Air incident "bears many similarities" to the arguments advanced by Israel in the Libyan airliner incident:

> Both Israel and the United States expressed their sorrow over the incident in which they were respectively involved, described it as an unfortunate error, promised *ex gratia* compensation, urged the Council to focus on taking measures to avoid a repetition of similar tragedies in the future, and facilitated the ICAO investigation. Both States described what they considered to be mitigating circumstances.

Yet, as Augustin observes, "the two responsible parties were treated differently by ICAO."[37]

ICAO is obviously linked to international politics. The claim that ICAO should only focus on technical issues is at best wishful thinking. A glance at the records of the deliberations within ICAO on the issue of the use of weapons against civil aircraft in flight will convince one that the parties therein engage in political negotiation more than the settlement of legal disputes. Very often, the division of views corresponds to the line of political blocs. To illustrate, "some of the States which favoured condemnation of Israel before the investigation was completed, in later incidents argued strongly that no decision should be taken before an investigation was finalized."[38] There is no magic formula to depoliticize ICAO; but promotion of the rule of law with an appropriate system of checks and balances would perhaps reduce legally unsustainable political considerations.

While the wheels of justice sometimes move slowly, there are still reasons to be optimistic since the rule prohibiting the use of weapons against civil aircraft in flight has survived conflicting political considerations. On numerous occasions, States condemned the shooting down of civil aircraft as "heinous",[39] "barbaric"[40] "atrocious",[41] "uncivil"[42] and "inexcusable"[43] acts, "a blatant

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35 *Id*. at 186.
36 Sochor, E., *The Politics of International Aviation* (Hamphire: Macmillan, 1991) at 141.
37 Augustin, *supra* note 1 at 154.
38 Augustin, *id*. at 155.
39 Egypt, in ICAO Doc 9061, A19-Res., Min., *Assembly – Nineteenth Session (Extraordinary), Resolutions and Minutes* at 31. United States, in ICAO Doc 9681-C/1119, C-Min. 148/1-21 *Council – 148th Session, Summary Minutes with Subject Index* (1996) at 160-161.
40 Soviet Union, in ICAO Doc 9541-C/1106, C-Min. Extraordinary (1988)/1 and 2: *Council – Extraordinary Session (Montreal, 13 and 14 July 1988), Minutes* at 26-27
41 Iran, *id*. at 3-4.
42 Sierra Leone, in ICAO Doc 9415, A24-Min. P/1-15, *Assembly – 24th Session, Plenary Meetings, Minutes* (1983) at 43.

disregard for the principles of international law",[44] which could not be justified "under any circumstances"[45] and "could only be deeply deplored by reasonable people everywhere."[46] The rule, reflecting a fundamental right to life, has been irreversibly and deeply embedded into the conscience of the international community.

3.1.3 Freedom of Action in Times of War or National Emergency

While it may be claimed that in times of peace Article 3 *bis* contemplates the "absolute" ban on the use of weapons against civil aircraft in flight,[47] the situation is not as clear in times of war or national emergency. Article 3 *bis* was adopted in the form of a protocol which is subject to a separate ratification process from the Chicago Convention. It could have been drafted as a treaty independent from the Chicago Convention, but its architects chose to incorporate it into the body of the latter. As a result, its application is subject to other provisions in the Chicago Convention, in particular Article 89, which reads:

> In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principles shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.

It may be argued, therefore, in case of war or national emergency, any member State of ICAO may choose not to be bound by any provision of the Convention, including Article 3 *bis*. This does not mean, however, that States are not bound by customary international law independent of Article 3 *bis*. Moreover, they are also bound by the law of war or international humanitarian law.

The practices of States in the forum of ICAO do not provide a clear indication of the criteria to determine what would constitute war or national emergency. On the occasion of the adherence of Israel to the Chicago Convention, Egypt wrote a letter to ICAO advising that "in view of the considerations of fact and of law which still affect Egypt's special position with regard to Israel, and in pursuance of Article 89 of the above Convention," Israeli aircraft

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43 Ghana, in ICAO Doc 9061, *supra* note 39 at 39. The Republic of Korea, in ICAO Doc 9415, *id*. at 40.

44 Papua New Guinea, in ICAO Doc 9415, *supra* note 42 at 32.

45 Nigeria, in ICAO Doc 9676-C/1118, C-Min. 147/1-16: *Council – 147th Session, Summary Minutes with Subject Index* (1996) at 79. Germany, in ICAO Doc 9416-C/1077, C-Min. Extraordinary (1983)/1-4: *Council – Extraordinary Session (Montreal, 15 and 16 September 1985) Minutes* at 16-17.

46 Canada, ICAO Doc 9061, *supra* note 39 at 57.

47 Richard, *supra* note 21.

may not claim the privilege of flying over Egyptian territory. When the ICAO Council decided that the letter "should not be accepted as a notification of a state of national emergency under Article 89", Egypt replied on 6 December 1950 that its letter did not refer to national emergency but to "the state of war existing since 14 May 1948, the date of outbreak of hostilities in Palestine".[48]

On 28 November 1962, due to its conflicts with China, India informed ICAO that "a state of grave emergency existed and the Government of India may not find it possible to comply with any or all provisions of the Convention."[49]

In December 1971, both India and Pakistan notified ICAO of the existence of a grave emergency due to hostilities having broken out between the two countries which might result in the two countries not finding it possible to comply with any or all provisions of the Chicago Convention.[50] There were also other instances in which Honduras and Iraq, respectively, informed ICAO of the state of emergency in their respective countries.[51]

In these instances, except the initial reaction to Egypt, ICAO acted more or less as a mail distributor forwarding the relevant communications to its member States without passing its judgement on the merits. It also appears that there was no clear distinction between the situation of war and national emergency. The reports of States, whatever they said, were taken at face value. In some cases, a situation which might be considered as war was not so reported, but reported as an emergency.

In other cases subsequently considered by ICAO, the criteria were not made clearer. When an Airbus A300 (IR 655) of Iranian Air was shot down by the *U.S.S. Vincennes* on 3 July 1988, the Representative of the United States on the Council of ICAO mentioned that the incident had taken place in the context of the war between Iran and Iraq, but did not invoke Article 89 of the Chicago Convention to claim that the freedom of action of his country is not affected by the provisions of the Convention.[52] The debates in the Council on this matter also frequently confirmed the applicability of the Chicago Convention, notwithstanding Article 89.[53] The Council directed the Secretary General to institute an immediate fact-finding investigation of the incident, thereby affirming the competence of ICAO even in the situation of war.

Similarly, when the Council considered the request of the Democratic Republic of the Congo in March 1999 to condemn the act of shooting down a civil aircraft of Congo Airlines, it was clear in the context of the case that

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48 ICAO Doc 8900/2, *Repertory – Guide to the Convention on International Civil Aviation*, 2nd ed. 1977. Article 89 at 1 and 2.

49 *Id.*

50 *Id.* at 3.

51 *Id.*

52 ICAO Doc 9541-C/1106, *supra* note 40 at 9 and 10.

53 For example, Czechoslovakia condemned the action of the U.S. as a "gross violation" of the Chicago Convention. *Id*. at 15; Mexico stated that unconditional compliance with the postulates in the Chicago Convention and its Annexes must be guaranteed. *Id.* at 22-23.

the country was in the situation of armed conflict. The Representative of the United States specifically raised the question how Article 89 of the Chicago Convention applied to this situation. In his reply, the President of the Council indicated that the Council had not received any notification as required in accordance with the last sentence of that article.[54] The issue relating to Article 89 was therefore not addressed. It should be noted, however, that the requirement of notification in the last sentence of Article 89 only applies to the situation of national emergency. In case of war, Article 89 does not require any notification. This is the plain meaning of the provision. From the facts presented before the Council, one could not readily conclude whether the Democratic Republic of the Congo was in a situation of war or national emergency. Accordingly, it appeared premature to indicate that a notification was required.

From the above, it appears that ICAO and its member States have not provided a clear precedent concerning the exact mode of application of Article 89. Several factors may account for this. Article 89 allows but does not obligate States to retain freedom of action. In other words, States may decide to continue to apply some or all provisions of the Chicago Convention in the situation contemplated in Article 89, and they in fact have done so in practice. Moreover, from the instances cited above, a State may, for example, invoke Article 89 to close its airspace and prohibit all flights for a limited period of time in the state of emergency;[55] but there has been no single precedent in the history of ICAO where a member State invoked Article 89 to justify its act of shooting down a civil aircraft. In view of the declaratory nature of Article 3 *bis*, paragraph a), even if States have expressly invoked Article 89, it is seriously questionable whether their freedom of action could be exercised to such extent as allowing them to shoot down civil aircraft unconditionally.[56] From this point of view, one may tentatively trace the sign of "*opinio juris*" from the subsequent practice of States that Article 89 could not exclude the application of Article 3 *bis*, paragraph a) as a customary rule, although it may exclude the application of some other provisions of the Chicago Convention. Finally, the understanding of the concept of war today might be different from what was understood when the Chicago Convention was drafted against the background of the Second World War. The global scale of that war rendered many international organizations, including the League of Nations, virtually

54 ICAO Doc 9738, *supra* note 5 at 111.

55 For example, in the case of 11 September 2001, the Federal Aviation Administration of the United States issued an order to close completely the airspace of the United States to any civil aircraft, in view of the state of emergency. This action, which would have been incompatible with certain provisions of the Chicago Convention, such as Article 5 concerning the right of non-scheduled flights into the territory of contracting States, is justifiable under Article 89.

56 During the debates concerning the shooting down of civil aircraft, many delegations stated that the use of weapons against civil aircraft in flight could not be justified "under any circumstances". See *supra* note 45 and accompanying text.

dysfunctional. In the contemporary world, wars are generally limited to certain geographical areas and do not directly affect civil aviation activities elsewhere. Historically, more often than not, even the "belligerent" States came to ICAO to debate their disputes, and therefore implicitly acknowledged that the Chicago Convention continued to apply, at least those provisions concerning the functions of ICAO. The effect of Article 89 is thus limited, and its provisions should not be invoked to exclude the application of Article 3 *bis*, paragraph a), although it would have been clearer had the drafters of Article 3 *bis* inserted a clause of "notwithstanding Article 89" in the text.

3.1.4 Revisiting Article 3 *bis* in the Context of 11 September 2001

The events of 11 September 2001 presented a serious and difficult question: in a similar situation, can a subjacent State use weapons to shoot down a civil aircraft which is presenting imminent danger and will cause devastating catastrophe? As mentioned above, the ban on the use of weapons against civil aircraft in flight under Article 3 *bis* is considered as having absolute character, subject only to the exception that it shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations. Another possible built-in exception under the Chicago Convention is Article 89 which allows States not to comply with the provisions of the Convention in case of war or national emergency. Based on the scenario of 11 September 2001, the issue can be divided into four sub-issues:

1 Will attacks similar to those conducted on 11 September give rise to the right of self-defence?
2 When a civil aircraft is misused as a weapon of destruction, will it become a non-civil aircraft?
3 Can Article 89 be invoked under these circumstances by the relevant State to justify its non-compliance with Article 3 *bis*?
4 Can Article 3 *bis*, paragraph a) be considered as inapplicable to the relationship between the aircraft in question and the State of its registry?

An affirmative answer to any of the four questions may provide grounds for the use of weapons against the perpetrators misusing civil aircraft in the scenario of 11 September.

With respect to the right of self-defence, there was a proposal during the negotiation process of Article 3 *bis* to include in the text a direct reference to Article 51 of the United Nations Charter, which provides that nothing in the Charter shall impair the inherent right of individual or collective self-defence

if an armed attack occurs against a member of the United Nations.[57] Views were expressed, however, that such reference is not justified because Article 51 is not applicable in this context.[58] Finally the deliberations settled for the general reference to the rights and obligations under the Charter. The discussion was clear that this reference was related to the right of self-defence.[59] Even so, commentators were of the unanimous view that reference to the UN Charter seems superfluous or even misconceived.[60] Firstly, the right of self-defence is inherent irrespective of its reference or non-reference in Article 3 *bis*, or even in the UN Charter itself. Secondly, self-defence could only be exercised when there is an armed attack. If an aircraft is used for an armed attack, it may no longer be considered as a civil aircraft and therefore is out of the scope of Article 3 *bis*.

The concept of "armed attack" is therefore crucial in determining whether the right of self-defence exists under the scenario of 11 September. According to ICAO Assembly Resolution A33-1: *Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation*, adopted in October 2001, the terrorist acts on 11 September "are not only contrary to elementary considerations of humanity but constitute also use of civil aircraft for an armed attack on civilized society and are incompatible with international law".[61] While the term "armed attack" is used, it is submitted that the term is not used strictly within the meaning of Article 51 of the UN Charter. The International Court of Justice, as the principal judicial organ of the United Nations, has interpreted the term in a number of cases. In the *Nicaragua* case, the Court states:

> …an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein".[62]

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57 ICAO Doc 9438, A25-EX, Assembly 25th Session (Extraordinary), *Executive Committee, Report, Minutes and Documents* (1984) at 94 and 164. See also Augustin, *supra* note 1 at 194.

58 *Id*., the statements of delegations, for example, France at 8, Syria at 52, the United States at 44, the USSR at 15.

59 Augustin, *supra* note 1 at 194 and 213.

60 Augustin, *id*. at 194. Cheng, B., "The Destruction of KAL Flight KE 007, and Article 3 *bis* of the Chicago Convention", in van's Gravensande, J.W.E. S., and van der Veen Vonk, A., ed., *Air Worthy – Liber Amicorum Honouring Professor Dr. I.H.PH. Diederiks-Verschoor* (Deventer: Kluwer Law and Taxation, 1985) 47 at 70. Hailbronner, "Topical Problems of International Aviation Law" (1973) 8 *Law and State* 96 at 102.

61 ICAO Doc 9848, *supra* note 25 at VII-1.

62 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment* [1986] *ICJ Reports* 14 at para. 195.

In its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court affirms this position:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.[63]

While the concept in customary law may undergo dynamic changes,[64] it may be concluded that according to *lex lata*, an "armed attack" within the meaning of Article 51 of the UN Charter does not cover non-State actors. Unless it could be established that the attacks on 11 September were acts of or on behalf of a State, they could not be considered as armed attacks which give rise to the right of self-defence. The sole exception provided by Article 3 *bis* is not applicable.

Based on the conclusion that an armed attack must be an act of a State, one may further argue that when a civil aircraft is misused by non-State actors as a weapon of destruction, such an act is not the act of a State and does not turn the aircraft into a state aircraft. As it remains a civil aircraft, the ban on the use of weapons against civil aircraft under Article 3 *bis* continues to apply. In fact, during the negotiation of Article 3 *bis*, Peru had pointed out that some civil aircraft were used to carry out certain activities "incompatible" with the Chicago Convention, "such as the spraying of areas with bacteriological contaminants, the transport of drugs, contraband, gun running, the illegal transport of persons …" It requested the ICAO Assembly to go more deeply into this matter and to answer the question of what the government of a State should do with these aircraft.[65] This concern was not adequately addressed in the final text of Article 3 *bis.* Accordingly, shortly after the adoption of Article 3 *bis*, Cheng acutely observed that the new amendment may lead to a strange situation that if a helicopter were to be used by criminals to rescue a convict from a prison, the law enforcement officers may use weapons against the helicopter while it is on the ground but could not do so when it is deemed

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63 Advisory Opinion, [2004] *ICJ Reports* 136 para. 139.

64 See, the separate opinion of Judge Kooijmans: Resolutions 1368 and 1373 recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence. *Id.* at para. 35.

65 ICAO Doc 9438, *supra* note 57 at 84 to 85.

to be "in flight".[66] If Article 3 *bis* does not allow the use of weapons against aircraft engaged in jail breaking and drug trafficking, it may present similar implications for the use of weapons against the aircraft used to commit suicide attacks.

As for the possibility to invoke Article 89, it has been discussed previously that due to the effect of customary international law, even if a State declares that the provisions of the Chicago Convention do not apply in times of war or national emergency, it does not mean that it automatically has the right to shoot down a civil aircraft. While customary international law permits a State to resort to the use of weapons against civil aircraft on the basis of necessity and proportionality, it is questionable whether the elementary considerations of humanity would allow a State to shoot down a commercial airliner and deliberately end innocent lives on board.

With respect to the question whether Article 3 *bis* is applicable to the relationship between an aircraft and the State of its registry or its operator, answers among commentators differ. Article 3 *bis* refers to "civil aircraft in flight", without distinguishing their nationalities or the States of operators. This provision was developed from the Austro-French draft, which used the term "to refrain from resorting to the use of force against aircraft of the other contracting State".[67] It was said that the words "of the other contracting State" were deleted because "the protection is to be extended not only to aircraft of other State parties to Article 3 *bis* or members of ICAO but to aircraft of all States".[68] However, the deletion has created confusion. As Cheng points out:

> …one unexpected result of this deletion is that Article 3 *bis* is now applicable not only to all foreign registered aircraft, but also to aircraft of a State's own registration. Such a provision, one which involves no foreign or international element, is most unusual in international agreements even nowadays. It has been suggested that this very unusualness would preclude the article from being interpreted as being applicable also to national aircraft. Such an interpretation is not tenable in view of the very explicit wording of the provision.[69]

Milde, on the other hand, believed that the protection "is reserved to 'foreign' aircraft and does not include aircraft of the State's own registration". Being one of the participants in the deliberations and drafting of the provision, he noted that the Assembly did not contemplate regulation of the status of an aircraft in relation to the State of its own registration, since "such regulation would have exceeded the scope of the Convention which deals with international civil aviation."[70] The purpose of the Convention is "to establish

66 Cheng, *supra* note 60 at 66.
67 Draft proposed by Austria and France, in ICAO Doc 9438, *supra* note 57 at 164.
68 Augustin, *supra* note 1 at 188.
69 Cheng, *supra* note 60 at 63.
70 Milde, M., *supra* note 13 at 126.

conventional rules of conduct in the mutual relations of sovereign States but not to govern matters of their exclusive domestic jurisdiction."

While Milde's argument is jurisprudentially sound and convincing, one may recall the several instances in which the ICAO Council decided to apply the provisions of ICAO Annexes to domestic operations.[71] Moreover, in the absence of the definition of international civil aviation, it is not easy to determine whether a particular aircraft has an international element or not. In today's environment, it may not be realistic to claim that Article 3 *bis,* paragraph a) is inapplicable to the relationship between an aircraft and its State of registry. To give a hypothetical example, an Australian airline, Qantas, may lease an aircraft registered in Brazil and use it for commercial air services between the two countries. In that case, can Brazil shoot down that aircraft by contending that Article 3 *bis*, paragraph a) does not apply to its relationship with the aircraft on its registry? In a reversed case, when the aircraft is used by Qantas for domestic air services within Australia, should the latter apply Article 3 *bis* to such flights because a "foreign" aircraft is involved? Obviously, the concept of the State of the operator needs to be taken into account. There is no doubt that the drafters of Article 3 *bis* were aware of this concept, since they explicitly referred to it in paragraphs c) and d). They certainly could have provided a better drafting for paragraph a) to avoid the confusion mentioned above, bearing in mind that their entire exercise was supposed to provide written law which could "remove the uncertainties" of the customary law and give "precision to abstract general principles, the practical application of which have not previously been settled."[72]

On the assumption that Article 3 *bis* does not apply to the relationship between the aircraft in question and its State of registry or the State of its operator, one still needs to examine whether the domestic law of the relevant State would permit the use of weapons by such a State against civil aircraft in flight in its territory. After 11 September 2001, Germany adopted in January 2005 Section 14.3 of the Aviation Security Act *(Luftsicherheitsgesetz – LuftSiG)*, which authorizes the armed forces to shoot down aircraft that are intended to be used as weapons in crimes against human lives.[73] However, the Federal Constitutional Court in its judgment of 15 February 2006 declared that the legislation is incompatible with the Basic Law and hence void.

According to the press release, the Court distinguished between two cases: in the first case, the use of weapons is aimed at a pilotless aircraft or exclusively at persons who want to use the aircraft as a weapon in a crime

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71 See *supra* Ch.2.2.5 "Scope of Application of Technical Regulations".

72 Opening Address of the Acting President of the Extraordinary Assembly adopting Article 3 *bis*, citing the statement of the UN Secretary General. ICAO Doc 9437, A25-Res., P-Min., *Assembly – 25th Session (Extraordinary), Plenary Meetings, Resolutions and Minutes* (1984) at 20.

73 Press Release, No. 11/2006 of 15 February 2006, to be found in http://www.bundesverfassungsgericht.de/bverfg_cgi/pressemitteilungen/bvg06-011en.html.

against the lives of people on the ground; in the second case, the use of weapons would kill all persons on board the aircraft, including passengers and crew who are not participants in the crime. In the former case, the use of weapons is justified since the principle of proportionality is complied with:

> The objective to save human lives which is pursued by § 14.3 of the Aviation Security Act is of such weight that it can justify the grave encroachment on the perpetrators' fundamental right to life. Moreover, the gravity of the encroachment upon their fundamental rights is reduced by the fact that the perpetrators themselves brought about the necessity of State intervention and that they can avert such intervention at any time by refraining from realizing their criminal plan.[74]

With respect to the latter case, the Court is vehemently clear that it is not compatible with the right to life in conjunction with the guarantee of human dignity. The passengers and crew members can no longer influence the circumstances of their lives independently from others in a self-determined manner:

> Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the State, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.[75]

In the view of the Court, "it is absolutely inconceivable to intentionally kill persons who are in such a helpless situation on the basis of a statutory authorisation." The assessment that the persons affected are doomed anyway "cannot remove from the killing of innocent people in the situation described its nature of an infringement of these people's right to dignity. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being."[76]

While the decision of the Court only involves domestic law, its reasoning will nevertheless influence the practice of international law by Germany, and probably by other States.[77] The right to life is universally recognized as a fundamental human right and must be fully respected.

The judgement of the German Constitutional Court mentions the possibility of the lawful use of weapons against a pilotless aircraft or exclusively persons

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74 *Id*. para. 3.
75 *Id*. para. 2.
76 *Id*.
77 Cf., however, a similar decree in Switzerland: "Verordnung ueber die Wahrung der Lufthoheit" (decree concerning the maintenance of sovereignty over the airspace), which is in force since 1 May 2005. This decree has not yet been subject to the constitutional review. The author wishes to thank Mr. Maximilian Huttel for his assistance in translating certain portions of the decree.

who want to use the aircraft as a weapon in a crime against the lives of people on the ground. Will such use be considered lawful under Article 3 *bis*? Although the current text of Article 3 *bis* does not seem to provide an ideal solution, there is no need to amend Article 3 *bis* or enlarge the concept of "self-defence" solely for this purpose. Terrorists using civil aircraft as a weapon of murder and destruction must be regarded as *hostis humani generis*, the enemies of the entire human race. "They are scorners of the law of nations" and therefore "find no protection in that law",[78] including Article 3 *bis*.

To conclude, international law does not justify the use of weapons against a civil aircraft in flight if there are innocent passengers and crew members on board, even in the situation where such an aircraft is misused by a gang of criminals as a weapon of destruction, as witnessed on 11 September. In the future, one could not rule out the possibility that when a similar event takes place, the relevant State authorities might be forced to choose one of the two evils at this critical juncture: either to destroy the aircraft in flight and deprive the innocent passengers and crew of their lives in order to protect innocent lives and vital interests on the ground, or to accept the untold catastrophe on the ground. While the judgement call may be governed by the balance in favour of the protection of more vital interest, it would be extremely difficult to arrive at consensus beforehand regarding the appropriate legal solution for this crisis.

3.2 Coordination of Potentially Hazardous Activities to Civil Aircraft

From time to time, States conduct certain activities such as missile firings, rocket launches and satellite recovery in or over the high seas. Sometimes, the activities are directly carried out underneath or very close to busy air lanes, creating a potential hazard to civil aircraft and requiring the re-routing of traffic or even temporary closing of vital airspace. Lack of coordination for these activities with the relevant air traffic services authorities may have an impact on aviation safety. In view of this, the ICAO Council introduced into Annex 11 to the Chicago Convention certain provisions concerning coordination of these activities, which became effective on 4 March 1981. The current Annex 11 contains the following standards in paragraph 2.17:

> 2.17.1 The arrangements for activities potentially hazardous to civil aircraft, whether over the territory of a State or over the high seas, shall be coordinated with the appropriate air traffic services authorities. The coordination shall be effected early enough to permit timely promulgation of information regarding the activities in accordance with the provisions of Annex 15.

78 See *infra* note 166 in Ch.4 and accompanying text.

> 2.17.2 The objective of the coordination shall be to achieve the best arrangements which will avoid hazards to civil aircraft and minimize interference with the normal operations of such aircraft.

Since then, ICAO has consistently applied these standards when it is aware of potentially hazardous activities. The purpose of the coordination is to determine the site, time period and airspace reservations needed for the activities and to enable the States providing air traffic services to carry out their obligations of issuing Notices to Airmen (NOTAMs). The ICAO Secretariat has also developed the *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations* (Doc 9554) to provide guidance for coordination. In many cases, coordination has been successfully completed but there have been instances in which concern was expressed for lack of coordination. For example, on 31 August 1998, an object propelled by rockets was launched by a member State and a part of it hit the sea in the Pacific Ocean off the coast of Sanriku in northeastern Japan. The impact area of the object was in the vicinity of the international airway A590 which is known as composing the NOPAC Composite Route System, a trunk route connecting Asia and North America where there are approximately 180 flights of various countries every day. The matter was debated in the ICAO Assembly, which considered that the launching of such an object was done in a way "not compatible with the fundamental principles, standards and recommended practices" of the Chicago Convention. Accordingly, the Assembly adopted Resolution A32-6 in September 1998, urging all member States to reaffirm that air traffic safety is of paramount importance for the sound development of international civil aviation and to strictly comply with the provisions of the Chicago Convention, its Annexes and its related procedures, in order to prevent a recurrence of such potentially hazardous activities.[79]

Despite this resolution, the Democratic People's Republic of Korea (DPRK) carried out multiple launches of ballistic missiles on 5 July 2006, which were condemned by the UN Security Council in Resolution 1695. The President of the ICAO Council wrote a letter on 6 July 2006 to the Director General of the General Administration of Civil Aviation of DPRK, pointing out that the initial investigation indicated that the missiles had crossed several international air routes over the high seas. Furthermore, when extrapolating the projected paths of some of the missiles, it appeared that they could have interfered with many more air routes both over Japan and in the airspace of the North Pacific Ocean. The President referred to Assembly Resolution A32-6 and the provisions of Annex 11 mentioned above, and asked the Director General to provide information "concerning your adherence to the requirements of Annex 11 related

79 ICAO Doc 9848, *supra* note 25 at I-30.

to the need to coordinate, with those States affected, the missile firings which are clearly hazardous to civil aviation."[80]

The Director General of the General Administration of Civil Aviation of DPRK replied on 8 July 2006, attaching a statement of a spokesman for the DPRK Foreign Ministry. The statement mentioned that the launches were part of the routine military exercises staged by the Korean People's Army to increase the nation's military capacity for self-defence. The Army "will go on with missile launch exercises as part of its efforts to bolster deterrent for self-defence in the future". Regarding the prior notice of the launches, the statement reads:

> It would be quite foolish to notify Washington and Tokyo of the missile launches in advance, given that the U.S., which is technically at war with the DPRK, has threatened it since a month ago that it would intercept the latter's missile in collusion with Japan.
>
> We would like to ask the U.S. and Japan if they had ever notified the DPRK of their ceaseless missile launches in the areas close to it.[81]

The President of ICAO Council stated that the reply from DPRK "neither addresses my concerns, nor provides any assurances that measures would be taken to protect civil aviation from such acts in the future." He wrote another letter to the Director General on 11 July 2006, which contains the following passages:

> Attached to your letter was a statement made by a spokesman for the Ministry of Foreign Affairs … You state that the statement reflects the details concerning the missile launches; however, in my letter of 6 July 2006, I referred to the requirements of ICAO Annex 11 – *Air Traffic Services*, concerning the need for coordination of activities potentially hazardous to civil aircraft, and I asked specifically for information concerning your adherence to those requirements.
>
> May I therefore, take this opportunity, once again, to remind you of the obligations of your State in respect of the *Convention on International Civil Aviation* (Doc 7300) and its Annexes and request that you provide me with information on any measures taken, or that will be taken, to protect civil aviation from any activities which may be hazardous to civil aviation, in accordance with the above requirements.[82]

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80 The letter of the President of the Council was circulated in ICAO under the cover of the Memorandum of the President of the Council to the Representatives of the Council, PRES AK/1241, 6 July 2006.

81 The letter of the Director General and its attachment are reproduced in the Memorandum of the President of the Council to the Representatives of the Council, PRES AK/1246, 19 July 2006.

82 PRES AK/1246, *id.* No further reply from the DPRK is found in the ICAO records.

The missile launches by the DPRK involved complicated issues, some of which were beyond the scope of civil aviation. The approach of ICAO on this matter was clearly focusing on the safety of civil aircraft, leaving the issues of peace and security, such as the proliferation of nuclear weapons, to the UN Security Council and other related bodies. From this example, it is clear that civil aviation is not in vacuum. Issues of peace and security may have an impact upon it. The main focus of ICAO, however, was to ensure the adherence to the requirements of the Chicago Convention and its Annexes concerning the coordination of potentially hazardous activities, without commenting on the legality or propriety of the activities themselves.

The provisions relating to coordination are contained in Annex 11. They are standards but not treaty provisions of the Chicago Convention *per se*. The DPRK does not file any difference to these standards and therefore is bound by them. Would the situation be the same had they filed differences? The Convention does not prohibit a member State from filing a difference. Nevertheless, could it be argued that certain standards, due to their special nature, are not susceptible to the filing of differences? In this instance, notification and coordination of potentially hazardous activities over one or more international trunk routes are essential to the safe operation of civil aircraft. If one or more States could render the relevant standards inapplicable by filing differences, the entire system of coordination would collapse and the purpose of the standards would be completely defeated. Accordingly, as pointed out before, while certain standards are only put in the Annexes, they actually have more weight than annex provisions and have acquired a binding effect *erga omnes*.[83]

To put the matter in a broader perspective, one may recall that in the *Corfu Channel* case, it was established that a State is under obligations to notify, for the benefit of shipping in general, the existence of a minefield in its territorial water and to warn approaching ships of imminent danger to which the minefield exposes them.[84] Based on this reasoning, it is submitted that the duties of notification and warning apply *a fortiori* over the high seas, an area which is not subject to the sovereignty of any State but open for common use of all nations. It would be inconceivable if a State was allowed to do something over the high seas which it could not do in its own territorial waters. While a State enjoys certain freedoms over the high seas, Article 87, paragraph 2 of the *United Nations Convention on the Law of the Sea* provides that these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas. From this perspective, it may be argued that the duty to notify potentially hazardous activities exists irrespective of the provisions of Annex 11.

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83 See *supra* note 144 and accompanying text in Ch.2.

84 See *supra* note 11.

The DPRK did not invoke Article 89 of the Chicago Convention but mentioned that it was technically at war with the United States. This again may give rise to the issue concerning the effect of Article 89. In the *Corfu Channel* case, the ICJ refers to "elementary considerations of humanity, even more exacting in peace than in war". This will leave ample room to claim that even in times of war the duty to notify potentially hazardous activities cannot be totally dispensed with.

Another more general issue to be considered from this instance relates to the effect of ICAO Assembly resolutions. The letters of the President of the Council are part of the action taken to implement the relevant resolution. In the event that the resolution and its reminder go unheeded or produce little effect, what further course of action can be taken by ICAO? If ICAO is to fulfil its safety mandate effectively, it should more vigorously police the compliance and implementation of the provisions of the Chicago Convention and its Annexes.[85]

3.3 General Relations between Civil and Military Aviation

The issue relating to the missile launches may be acute but it is only the tip of the iceberg of the work on the relations between civil and military aviation. Airspace is a resource which is becoming increasingly limited as civil and military aviation activities continue to increase. Coordination between them is essential for aviation safety. According to the ICAO Secretariat's report, the tragic destruction of an Airbus A300 of Iran Air with the loss of 290 lives was partly attributable to "the absence of adequate co-ordination by certain military units operating in the Gulf area with the civil units responsible for provision of the air traffic services in the airspace concerned".[86] Accordingly, civil/military coordination for the purpose of air traffic management is a part of daily aviation activities for many countries. Surprisingly, in this respect, legal literature in academic circles is extremely scarce, probably due to the political sensitivity and technical complexity of the matter.[87]

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85 For more discussions of the implementation function of ICAO, see Ch.5.

86 ICAO Doc 9743 – C/1128, *Council*, *123rd-124th-125th* Session, 1988 (published in 1999), C-Min. 125/12 at 202.

87 As one of the few exceptions, see Schubert, F., "The Role of Civil/Military Coordination in Respect of ANS Performance", presentation at the International Conference on Contemporary Issues, New Delhi, India, 21-25 April 2008. See also Shawcross and Beaumont, *supra* note 14 in Ch.1 at VI [6] and non-legal publications cited therein. Certain material is available in the official websites of ICAO and EUROCONTROL. See, for example, http://www.eurocontrol.int/airspace/public/standard_page/1410_Civil_Military_Coordination.html. See also, ICAO Asia and Pacific Office, Summary Report of the Civil/Military Coordination Seminar, Bangkok, Thailand, 14-17 December 2004, http://www.icao.int/icao/en/ro/apac/2004/Civil_Military_Coord/CivilMilitaryFinalRpt.pdf.

In Europe, civil/military coordination is conducted not only at the national level, but also at the regional or Community level. One of the missions of EUROCONTROL is "to strengthen the cooperation between its Member States with the aim of efficiently organising and safely managing the airspace for both civil and military users".[88] At the highest institutional level, its General Assembly is composed of the Ministers of Transport and the Ministers of National Defence. The Civil/Military Interface Standing Committee, composed of civil and military representatives at senior executive level from all the EUROCONTROL Member States, provides advice to the EUROCONTROL Council, which supervises the Agency's work.[89] Since 1996, the issue of civil/military coordination has been discussed in conjunction with the implementation of the flexible use of airspace (FUA) concept. With the application of the concept, airspace should no longer be designated as either purely civil or military, but rather considered as one continuum and allocated according to users' requirements. The FUA concept provides Air Traffic Management (ATM) with the potential to increase the capacity of the air traffic system. It allows the maximum joint use of airspace through appropriate civil/military coordination. Its application also ensures, through the daily allocation of flexible airspace structures, that any necessary segregation of airspace is temporary, based on real usage within a specified time period.[90] This concept, when implemented, will alleviate the congestion of the skies over Europe and promote safety. On 23 December 2005, the European Commission adopted *Regulation (EC) No 2150/2005 laying down common rules for the flexible use of airspace*,[91] which sets out a number of principles to govern the implementation of the FUA concept. One of the principles in Article 3 provides that

> [C]oordination between civil and military authorities shall be organized at the strategic, pre-tactical and tactical levels of airspace management through the establishment of agreements and procedures in order to increase safety and airspace capacity, and to improve the efficiency and flexibility of aircraft operations.[92]

88 EUROCONTROL website, *id*.

89 *Id*.

90 http://www.eurocontrol.int/airspace/public/standard_page/1488_FUA_Reference_Material.html. Date of access: 6 October 2008. See also, Report, Status of Civil-Military Co-ordination in Air Traffic Management, Phase 1, Fact-finding, Joint study PRU-Agency, EUROCONTROL, October 2001.

91 OJ L 342 342/20, 24 December 2005 at 20-25.

92 *Id*. The first level (Strategic Airspace Management) relates to the high level definition of the national airspace policy and the establishment of airspace structures; the second level (Pre-tactical Airspace Management) relates to day-to-day allocation of airspace according to user requirements; the third level (Tactical Airspace Management) consists of the activation, de-activation or real-time reallocation of the airspace allocated at Level 2, and the resolution of specific airspace problems and/or individual traffic situations between civil and military traffic flights. See, Report, *supra* note 90 at 14-16.

Article 6 of the regulation further lays down obligations in the context of the tactical level, which relate to establishment of civil-military coordination procedures and supporting systems to facilitate the exchange of airspace data, their modification, and the direct communication between the civil and military air traffic service units for resolving specific traffic situations. From the point of view of international civil aviation, it is interesting to observe that Article 6, paragraph 5 requires that in the case of cross-border activities, a common set of procedures for management of specific traffic situations and for real-time airspace management be agreed among the relevant civil and military authorities.

The European regulation, which is innovative, proactive and future-oriented, may serve as a useful point of reference for ICAO. The global situation is not, however, comparable to that of the Europe. The member States of ICAO as a whole do not have the same political, economic and social affinity as the European States do, but at least the principle of coordination should be affirmed. The main difference between the European regulation and the current provisions of ICAO is that civil/military coordination is mandatory in the former but recommendatory in the latter. Certain ICAO regulatory material deals with coordination in limited aspects, such as the coordination of potentially hazardous activities[93] and coordination relating to strayed or intercepted aircraft,[94] but there is no specific provision imposing a general obligation for coordination, particularly concerning airspace organization and management. The ICAO Assembly resolves in Resolution A36-13 that the common use by civil and military aviation of airspace "shall be arranged so as to ensure the safety, regularity and efficiency of international air traffic", and that the member States "shall ensure" that the operations of their state aircraft over the high seas "do not compromise the safety …", but it is short of saying that civil/military coordination "shall be organized". The same resolution further provides that "Contracting States should as necessary initiate or improve the coordination between their civil and military air traffic services …"[95] Clearly, in addition to the weaker term "should", the words "as necessary" further weaken the need to initiate or improve the coordination. This is hardly in line with the observations at the Asia/Pacific regional seminar on civil/military coordination, in which the participants "urged States not to be complacent in regard to existing national provisions relating to civil/military coordination".[96]

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93 See *supra* 3.2.

94 See, for example, paragraphs 2.23.1 and 2.23.2, Annex 11.

95 A36-13: Consolidated Statement of continuing ICAO policies and associated practices related specifically to air navigation, ICAO Doc 9902, Assembly Resolutions in Force (as of 28 September 2007) at II-17, Appendix O.

96 Summary Report, *supra* note 87.

The root cause of the hesitancy of ICAO on this matter may be traced back to the earlier controversy and uncertainty concerning the competence of ICAO in dealing with state aircraft. The Chicago Convention deals with "civil" aviation, and its Article 3 provides that it "shall not be applicable to state aircraft" including aircraft used in military services. In 1983, Canada presented a proposal for a convention on the interception of civil aircraft, which may have contained provisions applicable to aircraft used for military services,[97] but the Special Legal Sub-Committee established for this purpose "unanimously came to the conclusion that the question of drafting an instrument on the interception of civil aircraft can best be considered only after the entry into force of Article 3 *bis* …" As of October 2008, Article 3 *bis* has been in force for a decade, but no further action on the convention relating to the interception of civil aircraft has been taken by ICAO. Regulatory material relating to interception is mainly embodied in Annex 2 – *Rules of the Air*. The key provision is paragraph 3.8.1 which reads as follows:

> Interception of civil aircraft shall be governed by appropriate regulations and administrative directives issued by Contracting States in compliance with the Convention on International Civil Aviation, and in particular Article 3(d) under which Contracting States undertake, when issuing regulations for their state aircraft, to have due regard for the safety of navigation of civil aircraft. Accordingly, in drafting appropriate regulations and administrative directives due regard shall be had to the provisions of Appendix 1, Section 2 and Appendix 2, Section 1.[98]

When this paragraph was tabled in the Council in 1985, the Representative of the United States was opposed to its adoption because it would "clearly violate the Chicago Convention by going beyond the legal parameters which it provided". In his view, since Article 3 of the Chicago Convention clearly provides that the Convention shall not be applicable to state aircraft, the adoption by the Council of this paragraph as a Standard "would be ultra vires, i.e. beyond the legal authority of ICAO and therefore of no legal effect."[99] Probably because of this position, the United States did not file any difference

97 ICAO Doc 9415, A24-Min. P/1-15: Assembly – 24th Session, Plenary Meetings, Minutes at 7-10. For further details, see Augustin *supra* note 1 at 227 *et seq*.

98 Appendix 1, Section 2 deals with signals used during the interception, whereas Appendix 2, Section 1 lists the principles to be observed in the interception, which, for example, include the following: a) interception of civil aircraft will be undertaken only as a last resort; b) if undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome.

99 ICAO Doc 9479-C/1091, C-Min. 116/1-31: *Council – 116th Session, Minutes with Summary Index* (1985) at 32-33. This view was shared by a number of States, including the Soviet Union. For further details, see Augustin, *supra* note 1 at 240 *et seq*.

to paragraph 3.8.1 when it was adopted as a Standard by the majority of the Council.

This debate presents two interesting issues. Firstly, if the Council is alleged to be *ultra vires* in adopting a Standard, who will be the judge that decides this issue? The Council could not be its own judge. The Assembly, by virtue of Article 49 k) of the Chicago Convention, can deal with matters "not specifically assigned to the Council". Since the adoption of Standards is a mandatory function assigned to the Council by Article 54 l) of the Convention, the matter is not within the competence of the Assembly. The only practical alternative is to have a body for judicial or quasi-judicial review, which will be discussed in Chapter 5.

Secondly, what is the scope of ICAO's competence in dealing with civil and military interface in aviation? The argument that ICAO could not deal with state aircraft seems to be outdated in view of the fact that Article 3 *bis* of the Chicago Convention was adopted under the auspices of ICAO and has become an enforceable treaty provision for 138 States. It would lead to "a result which is manifestly absurd or unreasonable"[100] if one were to conclude that Article 3 *bis* is not applicable to state aircraft. While the use of weapons against civil aircraft in flight was often, but not necessarily resorted to by state aircraft, the act of interception, as specifically addressed by Article 3 *bis*, would most likely be carried out by state aircraft. Therefore, it may be argued that the Chicago Convention, as amended by Article 3 *bis,* does apply to state aircraft, at least to the extent that is defined in that article.[101]

Moreover, Article 3, paragraph d) of the Chicago Convention provides that the contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft. When ICAO considered paragraph 3.8.1 of Annex 2 mentioned above, the Legal Bureau observed:

> [The] purpose of drafting new provisions on interception of civil aircraft did not necessarily mean drafting provisions relating to military aircraft; the real legislative purpose would be to draft provisions pertaining to the safety of international civil aviation which was a legitimate constitutional purpose of the Organization. In the past, the Organization never refrained from adopting decisions and regulations dealing with the safety of international civil aviation even if that meant interfacing or coordination with the operation of state aircraft…While Article 3(d)… was not a source of legislative authority of the ICAO Council, it did not constitute an obstacle

100 Article 31, paragraph (3) of the *Vienna Convention on the Law of Treaties*, 23 May, 1969, 1155 UNTS 331.

101 For those States which have not ratified Article 3 *bis*, they may continue to argue that the Chicago Convention does not apply to state aircraft. However, since Article 3 *bis* was unanimously adopted by the ICAO Assembly, States participating in that Assembly are under an obligation not to defeat the object and purpose of the amendment even before they ratify it. See *infra* Ch.5.2.1.3.

> to adoption of Standards relating to the safety of civil aviation in the situations of interception.[102]

It is clear from this passage that the determining criterion for the competence of ICAO is whether the contemplated matter pertains to the safety of international civil aviation. If it does, the competence of ICAO should be presumed even if that may affect military activities directly or indirectly, including the operations of aircraft used in military services. To illustrate, when safety so requires, ICAO could even regulate the marking of the plastic explosives used for military purposes, as demonstrated in the following chapter of this study. The competence for interfacing with military activities is of course limited by the extent to which the safety of international civil aviation so requires. Moreover, the term "due regard for the safety" in Article 3 d) should be interpreted with a dynamic perspective. Its parameters may be different from time to time. "Due regard" in 1984 or even earlier may have dictated the requirement not to shoot down a civil aircraft in flight. Today in 2008, it may further require coordination in the management of increasingly congested airspace. In this respect, the work programme of ICAO in the legal field should not only be reactive,[103] but also be proactive in order to enhance the future safety of international civil aviation, since the true task of law "must also be aimed at regulation *a priori*, far-sighted looking ahead, in order to make facts move toward law, not law towards facts."[104]

3.4 Concluding Remarks

The relations between civil aviation and military activities represent a crucial aspect of aviation safety, one which generally requires a delicate balance. While ICAO's mandate is limited to civil aviation, the paramount consideration of safety inevitably gives rise to the need for certain interface with military activities. Safety requirements not only restrict some freedom on the high seas, but also impose limitations on the sovereign right of a State to use weapons against civil aircraft in flight in its territorial airspace. In both cases, elementary considerations of humanity prevail over freedom of action by sovereign States.

In the former case, the considerations require a State to provide notice when it engages in activities potentially hazardous to civil aircraft. This principle,

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102 Milde, *supra* note 13 at 109. See also Augustin, *supra* note 1 at 241.

103 See, for example, the adoption of Article 3 *bis* as a reaction to the shooting-down of Korean airliner (Flight 007), and other events leading to the adoption of aviation security conventions as mentioned in Ch.4.

104 Dauses, M.A., "The Relative Autonomy of Space Law" (1975) XVIII *Colloquium on the Law of Outer Space* 75 at 79.

which has been long established in the *Corfu Channel* case as being applicable to territorial seas, applies *a fortiori* to the high seas.

In the latter case, elementary considerations of humanity have led to a complete ban, in times of peace, on the use of weapons against civil aircraft in flight, as stipulated in Article 3 *bis* of the Chicago Convention. State practice also indicates that even in times of war or national emergency, when States retain complete freedom of action under the Chicago Convention, they have refrained from claiming any unqualified right to endanger the safety of civil aircraft in flight. State practice has moved a long way from national law provisions stating that intruding aircraft "may be fired upon"[105] to the prohibition of the use of weapons against civil aircraft in flight. The decision of the German constitutional court, as an illustration of state practice, demonstrates that the use of armed force against civil aircraft in flight is incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects innocent persons on board the aircraft. Clearly, the international community has awarded the highest stake to the protection of the fundamental right to life, which is the rationale underlying Article 3 *bis*.[106] Shooting down a civil aircraft in flight is regarded "as a transgression from the basic concept of humanity",[107] and goes against the "highest dictate of conscience".[108]

On the basis of the foregoing, one may have some reasons to argue that the safety consideration, to the extent that it has imposed prohibition on the use of weapons against civil aircraft in flight, has been given peremptory status in international law.

In other areas where civil and military aviation activities interface, the principle of safety is still developing. Coordination between civil and military authorities is essential for maintenance of the safety of international civil aviation. In determining ICAO competence in this respect, safety should prevail over other considerations.

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105 *Supra* note 7.

106 ICAO Assembly Resolution A25-1 adopting Article 3 *bis* mentions in the fifth paragraph of the preamble: "*Having noted* that in keeping with elementary considerations of humanity the safety and the lives of persons on board civil aircraft must be assured." ICAO Doc 9848, *supra* note 25 at I-6.

107 Statement of Canada, in ICAO Doc 9415, *supra* note 42 at 7-9.

108 Statement of the Republic of Korea, in ICAO Doc 9415, *id*. at 32.

4 Strengthening Aviation Safety against Unlawful Interference

Civil aviation needs to overcome not only the hazards and safety deficiencies intrinsic to its own system in areas such as personnel, equipment and facilities, but must also resist extrinsic threats and dangers, such as the man-made threats of terrorists or other actors of unlawful interference. Consequently, in addition to its efforts to formulate technical regulations or safety codes, ICAO has developed a number of treaties and other instruments to combat terrorism and other acts of unlawful interference. ICAO has become an avant-garde in this frontier. Out of thirteen global treaties against terrorism adopted by the United Nations system which are in force, there are five which have been adopted under the auspices of ICAO.[1] These "international air law instruments", to use ICAO's lexicon, have received wide or even virtually universal acceptance by States.[2] The contents of the instruments have been the subject of comprehensive coverage in widely circulated legal literature.[3] It is not necessary to repeat this exercise here. The purpose of this study is to evaluate the contribution of these instruments to the safety regime of international civil aviation, and to the safety-related functions of ICAO.

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1 For the complete list of these five treaties, see supra note 33 in Ch.1.

2 As of 16 July 2008, the numbers of states parties to the five aviation security conventions and protocol are as follows: the Tokyo Convention: 183, The Hague Convention: 183, the Montreal Convention: 186, the Montreal Supplementary Protocol: 165, the MEX Convention: 138.

3 See, for example, Boyle, R.P., & Pulsifer, R., "The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft" (1964) 30 *JALC* 305; Cheng, B., "International Legal Instruments to Safeguard International Air Transport: the Conventions of Tokyo, The Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports", in *Conference Proceedings, Aviation Security*, January 1987, Peace Palace, The Hague, published by International Institute of Air and Space Law, University of Leiden; McWhinney, E., *Aerial Piracy and International Terrorism*, 2nd revised ed. (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers,1987); Guillaume, G., "Terrorisme et Droit International" (1989:III) 215 *RdC* 287; Abeyratne, R.I.R. Aviation Security – *Legal and Regulatory Aspects* (Ashgate, Aldershot, 1998). Zhao, W., *International Air Law* (Beijing: Publications for Treatises of Social Sciences, 2000, in Chinese) at 419-482.

4.1 The Tokyo Convention

The Tokyo Convention is the first multilateral treaty adopted by the international community to combat hijacking.[4] Since numerous acts of hijacking were carried out by terrorists, the Convention is also regarded as the first worldwide treaty on counter-terrorism.[5] In fact, its significant contributions to aviation safety go beyond the realm of counter-terrorism.

The Tokyo Convention not only applies to "offences against penal law", but also to "acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board."[6] The terms "safety", "good order" and "discipline" are clearly not just aimed at terrorism, but are also broadly designed to maintain law and public order on board civil aircraft. To fulfill this purpose, the Convention clarifies the issue of the jurisdiction of the State of "registration"[7] and empowers the aircraft commander with certain authority on board aircraft.

The existence of jurisdictional vacuum or lacunas on board aircraft may compromise aviation safety, as demonstrated by the facts of *US v. Cordova*. In that case, two drunken passengers started a fight on board an aircraft during a flight from Puerto Rico to New York, with other passengers crowding aft to watch them, causing the plane to become tail heavy and to lose balance. The pilot tried to intervene, but Cordova bit him on the shoulder and struck another crew member. When Cordova was prosecuted, a US Federal Court declared that it had no jurisdiction over the offence alleged to have been committed on board a US registered aircraft flying over the high seas. Judge Kennedy stated in his judgement that the acts of Cordova "were vicious in the extreme". "He jeopardized the lives of others on the plane, including a considerable number of infants." However, "as current law stands, acts like those committed by Cordova will go unpunished". He strongly felt that the government should review this case and take action for correction of jurisdiction.[8]

Article 3 of the Tokyo Convention was intended to close this type of jurisdictional gap. Paragraph 1 of the Article provides that the State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board. This clause was regarded as "probably the most important aspect of the Convention" by Boyle, who had been the Chief of the

4 Abeyratne, *id*. at 144; Sarkar, A.K., "International Air Law and Safety of Civil Aviation" (1972) 12 *Indian Journal of International Law* 200.

5 Cf. Guillaume, *supra* note 3 at 311-312. The Convention on the Prevention and Suppression of Terrorism, signed in Geneva on 16 November 1937, never came into force.

6 Art. 1, para. 1.

7 This term is different from the term "registry" in the Chicago Convention, but there is no reason why the two could not be used interchangeably.

8 See, 3 *CCH Aviation Cases* 3 (1950-1953) at 17,306.

United States Delegation to the Tokyo Conference adopting the treaty.[9] Milde also considers it as a "contribution to international law", because it has established "a principle that has evolved over centuries in the maritime field but was not internationally established with respect to aircraft".[10] Cheng, on the other hand, draws a distinction between the international law aspect of state jurisdiction and its municipal law aspect. Under international law, a State "is entitled to quasi-territorial jurisdiction over all aircraft bearing its nationality and all persons and objects on board wherever they may be."[11] However, some States "have simply omitted to exercise that jurisdiction in their domestic laws in not extending their laws and the jurisdiction of their courts to their aircraft, when they are outside the national boundaries, and to all persons and objects on board."[12] This has been illustrated in *Cordova* mentioned above and in another case, *R.* v. *Martin*.[13] For this reason, Cheng believes that it would be wrong to view Article 3 as "a conferment by the treaty on the contracting parties of a right which the contracting parties did not previously possess".[14]

From this perspective, the important contribution of the Tokyo Convention is not just the recognition of the competence of a State to exercise jurisdiction over offences and acts committed on board aircraft bearing its registration, but the commitment of the States parties under Article 3, paragraph 2 to establish such jurisdiction.[15] It is this provision that has sealed the loophole demonstrated by such cases as *Cordova* and *Martin*, and ensured that aircraft flying over the high seas are not to become "oases of lawlessness".[16] From a safety perspective, it is significant that the State of registry is not only required to exercise safety oversight over its aircraft, but is also obliged to establish jurisdiction over offences and acts on board such aircraft, which may or do jeopardize the *safety* of the aircraft or of persons or property on board.

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9 Boyle & Pulsifer, *supra* note 3 at 329.

10 Milde, M., "The International Fight against Terrorism in the Air" in Cheng, C.J., ed. *The Use of Airspace and Outer Space for All Mankind in the 21st Century* (The Hague and London: Kluwer Law International, 1995) 141-158 at 147.

11 Cheng, *supra* note 3 at 26.

12 *Id.*

13 [1956] 2 Queen's Bench 272.

14 Cheng, *supra* note 3 at 27.

15 The exact provision of Art. 3, para. 2 is as follows: "Each Contracting State shall take such measures as may be necessary to establish its jurisdiction …", which might leave some ambiguity regarding the strictness of the obligation. However, it is clear from the records of the Conference that the Drafting Committee was instructed to "reflect the principle that, while each State is obliged to establish jurisdiction over offences committed on board aircraft registered in that State. each State has power to define the precise offences over which jurisdiction is to be asserted and to decide whether to enforce its jurisdiction". See, ICAO Doc 8565-LC/152-1, *International Conference on Air Law, Tokyo, August-September 1963, Volume 1, Minutes* (1966) at 97. See also Boyle & Pulsifer, *supra* note 3 at 355.

16 Cheng, *supra* note 3 at 25.

Such duty further confirms a genuine link between an aircraft and its State of registry and militates against the concept of the "flags of convenience".

When an aircraft is flying above the territory of a State other than that of its registry, the offences on board are subject to the concurrent jurisdiction of the flag State and the subjacent State. According to the study of Cheng, in many cases, the jurisdiction of the State of registry to enforce must give way to the same jurisdiction of the State in which the aircraft is found.[17] In the Tokyo Convention, the enforcement power of the subjacent State is restricted by Article 4. The article provides that a "Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board", except in the cases where the offence has effect on its territory, is committed by or against its national or permanent resident, is against its security, is a breach of the rules of the air, or is an offence over which the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement. The reason for such a restriction, according to FitzGerald, who was one of the secretaries of the Tokyo Conference, is "to preserve the safety of air navigation".[18] Milde, another veteran of ICAO, believes that this provision "appears to derogate from the general provisions of the Chicago Convention (Articles 11-13), according to which a foreign aircraft is subject to the laws and jurisdiction of the State in whose territory it is found."[19]

The observation of Milde presents a very interesting issue for the study of the relationship between the two treaties, particularly in view of Article 82 of the Chicago Convention, which provides that the contracting States undertake not to enter into any obligations or understandings which are inconsistent with its terms. If the derogation would be regarded as being inconsistent with the terms of the Chicago Convention, it would lead to a result which is "manifestly absurd or unreasonable",[20] since it would implicate 183 States parties to the Tokyo Convention for committing, under the auspices of ICAO, an infraction under Article 82 of the Chicago Convention. On the other hand, since the terms of Article 4 of the Tokyo Convention appear to restrict the freedom of a State to exercise territorial jurisdiction in accordance with its laws, and therefore deviate from Articles 11 to 13 of the Chicago Convention, it must be explained how it could be regarded as being consistent with the terms of the latter. The most logical interpretation is that while such a

17 Cheng, B., Air Law, in Bernhardt (ed), *supra* Ch.2, note 23 at 69.

18 FitzGerald, G. F., "Offences and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963" (1964) 2 *CYIL* 191 at 195. See also Art. 17 which provides that in exercising their jurisdiction, the Contracting States shall pay due regard to the safety and other interests of air navigation.

19 Milde, *supra* note 10 at 147.

20 The terms used in Art. 32 (b), *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 *UNTS* 331 at 332.

deviation may be considered as derogating from the specific textual provisions of the Chicago Convention, it is justifiable by the quintessential principle underlying that Convention, namely, the paramount consideration of safety. In this sense, one may even raise the question as to whether safety considerations could have some overriding effect in the system of ICAO or even lead to a *de facto* amendment to the Chicago Convention.[21]

Another contribution of the Tokyo Convention to the legal order on board aircraft is the establishment of the authority of the aircraft commander over flights which contain international elements as defined in Article 5, paragraph 1.[22] For the first time in history, the aircraft commander is expressly granted certain police power on board aircraft by a worldwide treaty:

> The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:
> a) to protect the safety of the aircraft, or of persons or property therein; or
> b) to maintain good order and discipline on board; or
> c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.[23]

As mentioned above, the offences or acts contemplated in Article 1, paragraph 1 are "offences against penal law", and "acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board". Article 6 makes it clear that one of the purposes for imposing reasonable measures, including restraint, is "to protect the safety of the aircraft, or of persons or property therein." The maintenance of good order and discipline on board is also a prerequisite condition for the safety of flights, as demonstrated in the facts of *Cordova* above. To deliver or disembark a person is not an end in itself. Accordingly, the ultimate end of Article 6 is the safety of aviation.

The terms "disembark" and "deliver" represent two different concepts, which contemplate two different courses of action, exercised on two different bases and leading to two different consequences. The aircraft commander may disembark a person in the territory of any State in which the aircraft lands,

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21 For more discussions, see *infra* Ch.5.1.2 relating to *Jus Cogens*.

22 Under Art. 5, the provisions concerning the power of the aircraft commander do not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the state of registration or over the high seas or any other area outside the territory of any state unless the last point of take-off or the next point of intended landing is situated in a state other than that of registration, or the aircraft subsequently flies in the airspace of a state other than that of registration with such person still on board.

23 Art. 6, the Tokyo Convention.

if he has reasonable grounds to believe that such a person *has committed or is about to commit*, on board the aircraft an *act* which, whether or not it is an offence, may or does jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.[24] Once the person is disembarked, no further action by the authorities of the place of disembarkation is contemplated. In the case of delivery, the aircraft commander must have reasonable grounds to believe that the person so delivered *has committed* on board the aircraft an act which, in his or her opinion, is a *serious offence* according to the penal law of the State of registry of the aircraft.[25] Obviously, the threshold required for delivery is much higher and the person so delivered would be subject to further legal process of the State taking delivery. Article 13 of the Tokyo Convention not only obligates each contracting State to take the delivery of such a person, but also requires the State to immediately make a preliminary inquiry, and, if the circumstances so warrant, take custody or other measures to ensure the presence of such a person for any criminal or extradition proceedings.

The power granted to the aircraft commander is very broad. For instance, the aircraft commander may impose certain measures, including restraint, if he or she has reasonable grounds to believe that a person is about to commit an act contemplated in Article 1, paragraph 1.[26] The term "reasonable grounds" gives the aircraft commander a certain discretion and does not require that his or her judgement be proven as correct. Moreover, it would be irrelevant if the person did not actually commit the act, or if the act did not actually jeopardize safety. To ensure that the aircraft commander would not be blamed for his or her possible mistake, Article 10 provides a blanket immunity for the aircraft commander and for other persons who have taken action, from any responsibility in any proceeding on account of the treatment undergone by the person against whom the actions were taken. This presumption is in favour of safety and of the persons who have acted to preserve the safety of the aircraft. Accordingly, in one United States case, a court held that the action taken by the aircraft commander to disembark a passenger was completely justified when the passenger made the statement that he planned to hijack the aircraft. The court went on to state that the aircraft commander "did not have to tempt fate so that the prospect of hijacking became reality."[27]

The broad power and extraordinary protection granted to the aircraft commander had been a subject of intense debate during the Tokyo Conference. It had been said that the aircraft commander was neither a lawyer nor a police

24 Arts. 8 and 12, *id*.

25 Art. 9, *id*.

26 Art. 6, *id*. See also *supra* note 6 and accompanying text.

27 *Zervignon* v. *Piedmont Aviation, Inc.*, 558 F. Supp. 1305 (S.D.N/Y.), cited by Ginger, S.R., "Violence in the Skies: The Rights and Liabilities of Air Carriers when Dealing with Disruptive Passengers" (1998) XXIII *Air and Space Law* 106 at 116.

officer, that he or she could not determine if there had been an offence, and that the immunity clause conflicted with the principle that no one can be wholly freed from responsibility for his actions. In the end, the paramount consideration of safety prevailed. States not only recognized the power of the aircraft commander but also demonstrated a spirit of cooperation in facilitating his or her functions by allowing the aircraft commander to disembark any person in accordance with the provisions of the Convention,[28] by taking any person delivered by the aircraft commander,[29] and by taking all appropriate measures to restore control of the aircraft to its lawful commander in the event of hijacking or other acts of unlawful interference.[30]

In addition to the power of the aircraft commander to impose certain measures, any crew member or passenger may also take reasonable preventive measures when he or she has reasonable grounds to believe that such action is immediately necessary to protect the safety of aircraft or of persons or property therein.[31] These crew members and passengers are also protected by Article 10 and shall not be held responsible for actions taken.[32] Again in this case, safety was the central concern.

As the first global convention on aviation security, the Tokyo Convention also contains certain weaknesses. The Convention has basically been anchored to the notion of the State of registry, while deliberately ignoring that of the State of the operator. For instance, the decision to deliver a person to a State of landing is based on the opinion of the aircraft commander that such a person has committed "a serious offence according to the penal law of the State of registration of the aircraft".[33] If the aircraft commander, who is not a lawyer, has difficulty in understanding the penal laws of his home, he will be confronted with even more serious problems when the aircraft operated by him is registered in a foreign State on which he has never set foot. As FitzGerald pointed out before the conclusion of the Tokyo Convention,

> an aircraft registered in State A (located in the Far East) could be chartered without crew by an operator of State B (located in Europe) for use in flights between State B and State C (also located in Europe). The aircraft commander might be from State B, might never have visited State A and could hardly be expected to have any knowledge of the penal laws of the latter State.[34]

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28 Art. 12, *id*.
29 Art. 13, *id*.
30 Art. 11, *id*.
31 Art. 6, para. 2, *id*.
32 Art. 10, however, is not intended to take away the right of an innocent third party to institute legal proceedings. Such a party could be a passenger on board the aircraft whose camera might have been damaged in a scuffle between a crew member and a person who was endangering the safety of the aircraft. See FitzGerald, *supra* note 18 at 198.
33 See *supra* note 25 and accompanying text.
34 FitzGerald, "The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft" (1963) 1 *CYIL* 230 at 246.

The Diplomatic Conference in Tokyo was aware of this issue, but decided not to incorporate the notion of the State of the operator, mainly based on the consideration that criminal jurisdiction is a serious matter and should not depend upon a mere contract of lease between one airline and another.[35] In the 1970s, when the amendment to the Chicago Convention through Article 83 *bis* was considered, ICAO revisited the possibility of incorporating into the Tokyo Convention a clause similar to Article 83 *bis*, but the 23rd Session of the Assembly decided in 1980 not to pursue this further, based on the argument that it would be "undesirable to disturb the widely ratified Tokyo Convention with respect to hypothetical problems which had never given any practical difficulty".[36] It was further believed that Article 3, paragraph 3 of the Tokyo Convention, which stipulates that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law, could provide a solution to the issue relating to the jurisdiction of the State of the operator.

The Conference in Tokyo and the 23rd Session of the Assembly may have made wise decisions on the basis of the prevailing circumstances at that time. The drafters of the Tokyo Convention focused on the confirmation of the competent jurisdiction of the State of registry, as well as mandatory establishment of such jurisdiction. At that time, a parallel introduction of the notion of the State of the operator would have been inopportune and probably counter-productive. Similarly, the 23rd Session of the Assembly may also have had its reasons to exercise the utmost caution in order to preserve the hard-earned results of the Tokyo Convention. On the other hand, one could hardly ignore that a quarter of a century has passed since the 23rd Session of the Assembly, while 45 years have lapsed since the Tokyo Convention was adopted. The world of aviation has changed. The leasing of aircraft has become the norm in aircraft financing activities, and the notion of the State of the operator, as distinct from the State of registry, has evolved into a solid legal concept entrenched in the Chicago Convention and its relevant Annexes. The functions and duties of the operator, and those of its corresponding State, are no longer a matter of a mere private contract of lease but have become an important component of the safety oversight system.

Furthermore, the issues concerning the jurisdiction of the State of the operator are no longer "hypothetical problems". For instance, since 11 September 2001, it has become the regular practice of many States to deploy air marshals, or, to use ICAO's term, "in-flight security officers" on board aircraft. Under the Tokyo Convention, these officers would logically fall under the jurisdiction of the State of registry, since they have certain law enforcement

35 FitzGerald, *supra* note 18 at 203.

36 FitzGerald, "The Lease, Charter and Interchange of Aircraft in International Operations – Article 83 *bis* of the Chicago Convention on International Civil Aviation" (1981) 6 *AASL* 49 at 61-63.

power. However, in the event that an aircraft is registered in an off-shore island State for financial purposes and leased to an airline operated in another State, it would be inconceivable if the island State, as the State of registry in this case, could decide to place in-flight security officers on board the aircraft, without the consent of the State of the operator.

This issue came to ICAO and, after a long debate in an expert panel and a committee of the Council, the Council finally decided to incorporate into Annex 17 to the Chicago Convention a provision to the effect that the imposition of in-flight security officers will require double authorization of the State of registry and the State of the operator, if they are not the same State.[37] This has for the time being resolved the issue relating to the authority for the deployment of air marshals but has not clarified which country's penal law the relevant law enforcement officers should enforce, particularly when there is a conflict between the law of the State of registry and that of the State of the operator. Although there is a tendency to view the State of the operator as replacing the State of registry for certain practical purposes, the debate in ICAO mentioned above concerning Annex 17 clearly indicates the lack of consensus for such replacement. Ideally a provision similar to Article 83 *bis* of the Chicago Convention should be introduced to allow the transfer of jurisdiction over the offences and acts on board aircraft from the State of registry to the State of the operator.

The Tokyo Convention is also widely perceived by academic writers to have another weakness, since it neither specifically criminalizes any act endangering the safety of civil aviation, nor does it create an obligation for extradition.[38] In fact, Article 11 of the Convention was hastily introduced to address the issue of unlawful seizure of aircraft and other wrongful acts, but the Article's focus was restricted to the restoration of lawful control of aircraft and the continuous journey of passengers and crew. The Convention failed to declare that wrongful acts were internationally punishable. Overall, the Convention covers offences against penal law, and acts which may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board. In this author's view, while this is a wide coverage, the enforcement measure is minimal and non-obligatory. The net is wide, but the hole is big; the mouth is large, but there are no teeth.

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37 The requirement of double authorization is reflected in the definition of "in-flight security officer", which the Council agreed on 20 November 2006 to include in the next amendment to Annex 17. At the time of this writing (October 2008), this definition had not yet been published in Annex 17.

38 Milde, M., in Cheng, *supra* note 10 at 147; Zhao, *supra* note 3 at 446; Abeyratne, *supra* note 3 at 154-155.

4.2 THE HAGUE CONVENTION

The weaknesses of the Tokyo Convention were acknowledged by its drafters even at its conclusion[39] and by the ICAO Assembly soon afterward.[40] The Convention entered into force on 4 December 1969. In that year, the total number of hijackings of aircraft was 82, with 70 of them successful.[41] In the first nine months of 1970, 86 aircraft had been hijacked and more than 8000 passengers were affected,[42] the most notorious event being the hijacking of four aircraft at the same time in September 1970.[43] International civil aviation was in crisis.

It was in this stormy climate that the International Conference on Air Law was held from 1 to 16 December 1970 in The Hague. The safety of aviation was at stake and clearly preoccupied the minds of the delegations at the Conference. His Excellency, the Minister of Justice of the Kingdom of the Netherlands, Dr. Karl Polak stated in his opening speech:

> The safety and smooth running of international civil aviation is a matter of prime and common concern to countries and peoples throughout the world. All States, however different their interests may be, share the same basic interest in the preservation and promotion of international air transport. Modern society cannot function properly without it. Yet today, no airline, no air passenger, no country, can feel secure against the unlawful seizure of an airplane.[44]

Other delegations echoed his voice by stating that "safety in flight was a primordial issue",[45] which was of "supreme importance".[46] Air safety "could

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39 FitzGerald wrote: "None of its authors would pretend that it is a perfect instrument; but, whether perfect or not, it does represent yet another stone added to the edifice of international law that has been so long abuilding." *Supra* note 18 at 204.

40 ICAO Assembly Resolution A16-37 noted that Art. 11 of the Tokyo Convention provides certain remedies for the unlawful seizure of civil aircraft, but was of the opinion "that this Article does not provide a complete remedy". ICAO Doc 8779 A16-RES, *Resolution Adopted by the Assembly and Index to Documentation,* Sixteenth Session (1968) at 92. See also Abeyratne, *supra* note 3 at 157.

41 Cheng, *supra* note 3 at 27. Cheng mentioned that between 1930 and 1967, the highest number of hijackings in any given year was six. In 1968, the number jumped to 38, 33 of which were successful.

42 Statement of His Excellency, the Minister of Justice of the Kingdom of the Netherlands, Dr. Karl Polak, on 1 December 1971, at the opening of the International Conference on Air Law in The Hague, recorded in ICAO Doc 8979-LC/165-1, *International Conference on Air Law*, The Hague, December 1970, Volume I, Minutes (1972) at 1.

43 As cited by Cheng from 17 *Keesing's Contemporary Archives* (1969-70) at 24203-9, the four aircraft were a VC-10 of BOAC, a DC-8 of Swissair, a Boeing 747 of Pan American and a Boeing 707 of TWA. Although hundreds of passengers were released as part of the deal, all four aircraft were destroyed. See Cheng, *supra* note 3 at 33.

44 *Supra* note 42 at 1.

45 Statement of the Delegate of the People's Republic of Bulgaria, *id*.at 13.

46 Statement of the Delegate of Jamaica, *id*. at 13.

only be re-established if all States imposed severe sanctions on hijackers."[47] "The grave dangers inherent in the strange antisocial phenomenon of hijacking, whose effects reached across national frontiers, must be eliminated through repressive international legislation."[48] "Hijackers should be regarded as enemies of the human kind and consequently be punishable by all."[49] Indeed, the Conference demonstrated solidarity of States to set aside political, social and economic differences in favour of the vital common interests of aviation safety. One remarkable example of this solidarity was that the then Union of Soviet Socialist Republics and the United States of America, while representing each of the duopoles in the Cold War, displayed strikingly similar views concerning the need to severely punish hijackers.[50]

The Conference successfully concluded The Hague Convention, which Cheng considers "a remarkable milestone in the development of what is sometimes loosely called international criminal law".[51] Unlike the Tokyo Convention which casts a wide net but leaves big loopholes, The Hague Convention criminalizes only one act, namely, the act of hijacking, but at the same time provides an undertaking to make the offence punishable by severe penalties.[52] Article 1 of The Hague Convention reads:

> Any person who on board an aircraft in flight:
> a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
> b) is an accomplice of a person who performs or attempts to perform any such act commits an offence (hereinafter referred to as "the offence").

While the acts mentioned here are clearly related to "hijacking", the term does not appear throughout the Convention because it was considered to originate from a slang word and no equivalence could be found in any other official language of ICAO. In the statements at the Conference in The Hague, the terms "hijacking" and "hijacker" were constantly used and well understood by the delegations.[53]

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47 Statement of the Delegate of Hungary, *id*. at 12.
48 Statement of the United Nations Observer, *id*. at 9.
49 Statement of the Delegate of Thailand, *id.* at 19.
50 For more discussion, see *infra* note 60 *et seq* and accompanying text.
51 Cheng, *supra* note 3 at 28.
52 Art. 2, The Hague Convention.
53 See *supra* notes 47 *et seq* and accompanying text. Sometimes, The Hague Convention is informally referred to as the Hijacking Convention, in order to distinguish it from other conventions concluded in The Hague. The term "unlawful seizure of aircraft" in the title of the Convention appears more elegant and less colloquial than the term "hijacking", but carries a certain degree of impreciseness. As has been pointed out, it fails to clarify which proper law will serve as a basis for the determination of unlawfulness. See Zhao, *supra* note 3 at 448.

The most significant contribution of The Hague Convention is the establishment of the legal principle of *aut dedere aut judicare*, which is widely understood as "extradition or prosecution". This principle is expressed in Article 7 as follows:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.
>
> These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

The formula of *aut dedere aut judicare* is adapted from the legal maxim by Grotius: *aut dedere aut punire*.[54] To roughly paraphrase the concept of the great founder of international law, a State usually does not permit another State to send armed personnel to its territory to pursue criminals it wishes to punish. It will therefore do one of the following: It will either itself punish the culpable person upon the requisition of another State, or it will return the culpable person to the latter State for punishment as the latter considers appropriate.[55] This concept, which originated almost four hundred years ago, found its expression in multilateral treaties only recently. According to Zhao, prior to The Hague Convention, there was only one global convention, namely, the *Single Convention on Narcotic Drugs*, which had genuinely incorporated the concept and imposed the obligation of extradition or prosecution.[56] However,

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54 Guillaume, *supra* note 3 at 354. Zhao, *supra* note 3 at 450.

55 Based on the French translation by Barbeyrac in 1724 as provided by Guillaume. The original text of Grotius is cited as follows: "Cum vero non soliant civitates permittere ut civitas alteras armata intra fines suas poenae expedentae nomine veniat, neque id expediat, sequitur ut civitas, apud quem degit qui culpae est compertus, alterum facere debeat, ut ipsa interpellata pro merito puniat nocentem aut ut cum permittat arbitrio interpellantis; nec enim illud est dedere, quod in historiis saepissime accurit." *Id*.

56 Art. 36 of the Convention, 520 *UNTS* 204 [1964]. See also Zhao, *supra* note 3 at 451. Moreover, the four Geneva Conventions on international humanitarian law come close in this respect. For instance, Art. 146 of *the Convention (IV) relative to the Protection of Civilian Persons in Time of War* (Geneva, 12 August 1949) provides that each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. There might be different views and interpretations as to whether Art. 7 of The Hague Convention imposes a stricter obligation than this provision. In the view of this writer, at least in the matter of extradition, The Hague Convention does impose a stricter obligation. In the Geneva Conventions, extradition is an option but not an obligation. Even if a State party does not bring the alleged offenders before its own courts, there are no grounds for other States to request extradition.

he pointed out that the Narcotics Convention is much less politically sensitive than The Hague Convention. Accordingly, The Hague Convention may be considered a successful modern implementation of the Grotius maxim. Further, the formula of The Hague Convention has been followed as a successful precedent by a series of international conventions.[57] In view of this, The Hague Convention may be said to represent the pioneering efforts of ICAO not only in the protection of aviation safety, but also in the development of general international law.

The safety of international civil aviation dictates the need to have effective measures to curb hijacking activities. To provide the necessary deterrence, any sanctuary should be eliminated. Ideally, an effective legal system of deterrence should require unconditional extradition or mandatory prosecution of hijackers, coupled with universal jurisdiction of this offence and application of severe penalties.

Extradition is defined as "the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the State of residence to the authorities of another State for the purpose of criminal prosecution or the execution of a sentence".[58] Under customary international law, a State has no obligation to extradite an alleged offender to another State. Such an obligation normally arises from a treaty, which often provides a list of extraditable offences. Extradition is further restricted by the exception of political offences. Consistent with territorial supremacy, each State may provide political asylum to a foreigner[59] and may refuse to extradite to another State any person alleged to have committed a political offence. Consistent with personal supremacy under international law, a State may also refuse to extradite its own nationals to another State.

At the Conference in The Hague, there was a widely supported proposal to consider hijacking as a non-political offence in order to prohibit States from refusing the extradition of an alleged hijacker on the ground of the political offence exception. The United States proposed that the draft convention "should contain an unequivocal statement that hijacking was not considered to be a political offence and should be treated as any other grave, common and criminal offence."[60] The USSR went further to state that any attempt to divert aircraft in flight could lead to an accident and therefore constitutes "clearly an act of a criminal nature and a breach of the principles concerning the safety of lives", and should be recognized "as a crime against humanity".[61]

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57 See, for example, some UN treaties referred to in *infra* notes 147 and 148. See also, *supra* note 3, Guillaume, at 313; Cheng, at 28, Zhao 420; van den Wyngaert, "Aviation Terrorism, Jurisdiction and its Implications", in *Conference Proceedings, Aviation Security*, *supra* note 3 at 137.

58 Stern, T., Extradition, in Bernhardt, R. (ed.), *supra* note 23 in Ch.2 at 327.

59 Liang Xi, *International Law* (Wuhan University Publications, 1995, in Chinese) at 251.

60 ICAO Doc 8979, *supra* note 42 at 10.

61 *Id*. at 64.

It therefore proposed that "a person committing an act of unlawful seizure of aircraft should be extradited to the State of registration of the aircraft regardless of his motives. People seeking territorial political asylum must not be allowed to endanger the lives of innocent passengers."[62] Consequently, the following text sponsored by 26 States was adopted by 46 votes to 10, and 13 abstentions:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, whatever the motive for the offence and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. These authorities shall take their decision in the same manner as in the case of any other ordinary offence of a serious nature under the law of that State.[63]

The text, by putting "unlawful seizure of aircraft" in parallel with "any other ordinary offence", may give rise to the reasonable interpretation that hijacking would be considered as an ordinary rather than a political offence. The term "whatever the motive for the offence" also arguably supports such an interpretation. However, despite the majority support, the text did not find its way to Article 7 in its original form. Following a lengthy debate and consultation in the German Embassy among "the representatives from the leading nations",[64] a last minute deal was struck at 4 o'clock in the morning on the day when the Conference was scheduled to have its closing ceremony. As a result of the compromise, "whatever the motive for the offence" was replaced by the term "without exception whatsoever", and the word "other" was deleted from the phrase "any other ordinary offence", suggesting that hijacking may not necessarily be an "ordinary offence" and opening the door for the application of the political offence exception to hijackers.[65] Boyle, who was one of the delegates of the United States at the Conference, explained later that some States did not want any interference with their sovereign right to permit political asylum in some form for whatever purposes, despite the gravity of the offence. He considered this as "a serious weakness in the Convention", which "stands in the way of an effective international solution to hijacking."[66]

One may wonder why the majority of States did not insist on the already adopted text of Article 7, but decided to soften their position and to water down the provision. According to Zhao, it is because they were driven by the intention to achieve a wider acceptance of the Convention. The fewer States

62 *Id*.
63 ICAO Doc 8979, supra note 42 at 136, and at Vol. II, Documents, at 131. SA Doc No.72.
64 Cheng, *supra* note 3 at 31.
65 See Zhao, *supra* note 3 at 460.
66 Boyle, R.P. "International Action to Combat Aircraft Hijacking", cited by Abeyratne, *supra* note 3 at 162.

accept the Convention, the more sanctuaries are likely to exist for hijackers.[67] After a careful balancing act, the Conference opted for a lower pitched convention with a higher degree of ratifiability.

With respect to "prosecution", what was agreed in The Hague is also far less than mandatory. While many States pressed for the strengthening of the obligation to prosecute, the final outcome of the key phrase in Article 7 remains the same as it was originally drafted: "to submit the case to its competent authorities". Most writers acknowledge that a certain discretion exists for a State not to prosecute. The reasons are numerous. For example, Boyle said that the State having the hijacker may not have available to it proof of a crime, since the act was committed in a distant State;[68] Cheng noted that sometimes a State has to negotiate with the hijacker in order to secure the freedom of hundreds of passengers.[69] In a nutshell, despite the need to protect aviation safety, not all States were prepared, at the time The Hague Convention was concluded, either to abandon their sovereign right to grant political asylum or their prerogative power of prosecution.[70] On the other hand, the discretionary power of the competent authorities of a State is not unlimited. The last sentence of Article 7 provides that "[t]hose authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." While the term "under the law of that State" may allow certain flexibility, good faith still requires that a State maintain a consistent standard. Moreover, as subsequently illustrated in the Lockerbie case, the prerogative of a State may still be challenged under certain circumstances.[71]

The Hague Convention also made a breakthrough on jurisdictional issues. In addition to traditional grounds of jurisdiction, such as the jurisdiction of the State of registry, the Convention also includes the jurisdiction of the State of the operator and that of the State of landing when the alleged offender is still on board.[72] More significantly, the Convention obligates each contracting State to establish its jurisdiction when the alleged offender is present in its territory and it does not extradite him. Some writers consider that these jurisdictional clauses amount to "universal jurisdiction", which go even further than the jurisdiction over the crime of piracy in the law of the sea, since the latter "only created the possibility for States to exercise universal jurisdiction, without however obliging them to do so".[73] Others classify it as "quasi-universal jurisdiction".[74] Despite these different views in academic discussions, it

67 Zhao, *supra* note 3 at 459.
68 Boyle, cited by Abeyratne, *supra* note 3 at 161.
69 Cheng, *supra* note 3 at 32.
70 Subsequent to The Hague Convention, a number of treaties on counter-terrorism expressly excluded the political offence exception. For details, see *infra* notes 150 and 151.
71 See *infra* 78 for the discussion of the case.
72 Art. 4, The Hague Convention.
73 van den Wyngaert, *supra* note 57 at 142.
74 Zhao, *supra* note 3 at 465.

is the clear intention of The Hague Convention to cast the net as wide as possible, so that the culprits of hijacking could not take advantage of jurisdictional loopholes, at least from a strictly legal point of view. As van den Wyngaert observes: The Hague Convention has "developed rules that aim at being comprehensive, in order to ensure that 'aviation terrorists' do not go unpunished. The system is probably as comprehensive as it can possibly be in the political circumstances of the present international scene."[75]

Another contribution of The Hague Convention, which is not often discussed in the academic literature, but is important to the safety mandate of ICAO, is the establishment of the reporting requirement under Article 11, which reads:

> Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:
> (a) the circumstances of the offence;
> (b) the action taken pursuant to Article 9;
> (c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

The obligation to report to an international organization represents a relatively new feature which was uncommon in traditional international law. The terms "in accordance with its national law" gives a Contracting State a high degree of latitude to determine the content of the report, but its national law should not be construed to the effect that no information should be provided to ICAO. Otherwise, the purpose of Article 11 would be defeated. Article 9 basically repeats Article 11 of the Tokyo Convention concerning the duty to restore control of the aircraft commander and to facilitate continuation of the journey. The reporting requirements concerning action taken under Article 9, as well as other requirements under Article 11 of The Hague Convention, will assist the ICAO Council to be aware of situations critical to the safety of aviation and to take international action, if necessary. It therefore gives potential power to the Council for monitoring the implementation of the Convention.

The remarkable achievements of The Hague Convention do not mean that there is no room for improvement. The Convention is strictly applicable to offenders on board an aircraft in flight. It does not cover those accomplices on the ground, let alone the directors, organizers or financial backers who are the masterminds of the offence but never set foot on board the aircraft. Neither does the Convention cover the seizure of aircraft through bribery of, conspiracy with or deceit against, the aircraft commander.[76] Last but not least, the Convention only covers one offence; it does not cover other crimes, such as sabotage

75 *Supra* note 57 at 138.
76 Zhao, *supra* note 3 at 449.

of aircraft. This explains why the Montreal Convention was needed nine months later.

4.3 THE MONTREAL CONVENTION

Even before the conclusion of The Hague Convention, it was realized that hijacking was not the only crime against the safety of civil aviation; sabotage, very often through detonation of explosives on board aircraft, became a growing concern. Consequently, the Montreal Convention was adopted in 1971.

The aim of the Montreal Convention is clearly expressed in its title: the suppression of unlawful acts against the "safety of civil aviation". Its preamble repeats almost verbatim the preamble of The Hague Convention, underlining the "grave concern" of the States parties for the unlawful acts against the safety of civil aviation, and highlighting the urgent need to provide appropriate measures to deter such unlawful acts. Obviously, suppression of unlawful acts is not an end in itself, but is one of the means to bolster the confidence of the peoples of the world in the safety of civil aviation.

The Convention of 1971 goes further than The Hague Convention by criminalizing at treaty level a number of acts against the safety of civil aviation. It has also filled the gap left by the Tokyo Convention, which does not provide adequate enforcement measures for offences committed on board aircraft. The offences listed under the Montreal Convention include, *inter alia*, acts of violence against a person on board an aircraft in flight, destruction of an aircraft in service, causing damage to an aircraft rendering it incapable of flight, placing or causing to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, destruction of or damage to air navigation facilities or interference with their operation, and communication of information which is knowingly false. In most cases, these acts would be considered as offences only when they are "likely to endanger the safety of aircraft in flight".[77]

To illustrate, Article 1, paragraph 1 (a) of the Montreal Convention provides that any person commits an offence if he unlawfully and intentionally "performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft." According to this provision,

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77 See the preparatory work in support of this point, in ICAO Doc 9081-LC/170-1, *International Conference on Air Law, Montreal*, September 1971, Vol. 1 Minutes (1973) at 27 to 30. In particular, the Delegate of the People's Republic of the Congo stated that the protection of human life would have to be related to the safety of air navigation. If there was no relationship to aviation, then he would question whether the Conference was acting competently. Supporting this view, the Delegate of Spain mentioned that the purpose of the provision was not the individual protection of the person on board but the safety of the flight. After the discussion, the President indicated that all had been in agreement on the principle to include acts of violence likely to endanger the safety of aircraft in flight.

the likelihood of endangering the safety of an aircraft in flight forms an integral part of the *actus reus*, the physical part of the offence, in the absence of which the act of violence itself does not constitute the offence. In other words, the Convention does not punish a simple act of violence, but an act of violence which is likely to endanger the safety of flight. The legislative intent is to protect aviation safety. In the case of communication of information which is known to be false, the mere likelihood of endangering safety would not in and of itself constitute an offence; Article 1, paragraph 1 (e) requires that the act must be "endangering the safety of an aircraft in flight". Consequently, the act of communicating a hoax that an aircraft will be bombed would not constitute an offence unless it led to the actual result of endangering the aircraft in flight.

Subparagraphs (b) and (c) of Article 1, paragraph 1 in the Montreal Convention contemplate certain situations in which the offences do not contain the element of "endangering the safety of an aircraft in flight" in the *actus reus*. This is the case when the aircraft subject to the offences is in service but not in flight. Under Article 2 paragraph (b) of the Convention, an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing. Since this notion of "in service" is broader than the notion of "in flight", destroying or damaging an aircraft in service does not necessarily endanger the safety of flight of such an aircraft, because the flight may not have yet started or may have terminated. Nevertheless, even in the cases of destruction or damage to aircraft which are not in flight, these offences still present serious threats to the safety of aviation in general, although they may not necessarily endanger the specific flights. From this perspective, the Montreal Convention is not merely a criminal law treaty, but constitutes a treaty for the protection of aviation safety.

Aside from enlarging the scope of offences against the safety of civil aviation, the Montreal Convention basically mirrors The Hague Convention, including the famous principle of *aut dedere aut judicare*. The subsequent application of the Montreal Convention, particularly in the Lockerbie case,[78] provides enlightening experience concerning this principle, giving rise to interesting topics for discussion.

On 21 December 1988, a Boeing 747 of Pan American Airlines (Pan Am Flight 103) exploded over Lockerbie, Scotland, killing all 256 persons on board

78 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States) Provisional Measures, Order of 14 April 1992*, [1992] *ICJ Reports* 114. On 31 October 2008, BBC reported that Libya paid 1.5 billion US dollars to compensate the victims of Lockerbie and UTA 772. http://news.bbc.co.uk/1/hi/world/americas/7703110.stm. For UTA 772, see ICAO Circular 262-AN/156, *Aircraft Accident Digest*, No 36, 1989 and "UTA 772: The forgotten flight" in the BCC above website.

and 11 persons on the ground. In November 1991, the Lord Advocate of Scotland charged two Libyan nationals alleging, *inter alia*, that they had caused a bomb to be placed aboard that flight, which bomb had exploded causing the aeroplane to crash. Following on the charges, the United Kingdom and the United States declared on 27 November 1991 that Libya must:

> surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials; disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers; pay appropriate compensation.[79]

The subject of the declaration by the UK and the US was subsequently considered by the United Nations Security Council, which on 21 January 1992 adopted resolution 731 (1992), strongly deploring the fact that the Libyan Government had not yet responded effectively to the above requests contained in the declaration and urging the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism.[80]

Libya took the position that it had fully complied with the 1971 Montreal Convention by submitting the case to its competent authorities for the purpose of prosecution, and therefore was not obliged to extradite the alleged offenders. Furthermore, Libyan law prohibits the extradition of Libyan nationals. On 3 March 1992, Libya instituted proceedings in the International Court of Justice against the UK, seeking, *inter alia,* the declaration that it had fully complied with the Montreal Convention, and provisional measures to enjoin the United Kingdom from taking any action against Libya calculated to coerce or to compel Libya to surrender the accused individuals to any jurisdiction outside of Libya.

On 31 March 1992, three days after the close of the hearing of the case and before the Court rendered its decision, the Security Council adopted resolution 748 (1992) expressing deep concern that the Libyan Government had still not provided a full and effective response to the requests in its resolution 731 (1992) of 21 January 1992, and imposing sanctions on Libya under Chapter VII of the United Nations Charter.

On 14 April 1992, the Court, by 11 votes to 5, found that the circumstances of the case were not such as to require the exercise of its power under Article 41of its Statute to indicate provisional measures. The Court cited the Security Council resolution 748 (1992) as the sole ground for its order: "both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance

79 *Id.* at 122.
80 *Id*. at 123-124.

with Article 25 of the Charter". "[T]he Court, which is at the stage of proceedings on provisional measures, considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992)"."[I]n accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention."[81]

The Court stated, at the same time, that this decision in no way prejudged any other questions raised by the parties, and left unaffected the rights of the parties to submit arguments in respect of any of the questions. Thus, despite the rejection of provisional measures, the proceedings continued. Subsequently, the Court, in two judgements rendered on 27 February 1998, dismissed the preliminary objections of the United Kingdom and the United States, which challenged the jurisdiction of the Court. It found, *inter alia*, that the objection raised by them on the ground that the Security Council resolutions would have rendered the claim of Libya without object did not, in the circumstances of the case, have an exclusive preliminary character.[82]

In the meantime, negotiations were taking place between the parties. In April 1999, Libya agreed that the two suspects be delivered to the Netherlands for a trial before a Scottish court composed solely for this purpose at Camp Zeist in Utrecht, the Netherlands. On 31 January 2001, the special court found one suspect guilty and sentenced him to life imprisonment, with a minimum of 20 years in jail. The other suspect was acquitted.[83] On 9 September 2003, all parties discontinued the proceedings before the ICJ.[84]

From the order of 14 April 1992 of the ICJ, it may be concluded that the Security Council may override the treaty rights and obligations of States, including the applicability of the principle *aut dedere aut judicare* in The Hague-Montreal system, when it decides to take action under Chapter VII of the UN Charter. The Court did not have the opportunity in the Lockerbie case to address the contentious issue as to whether the validity of the Security Council's decision could be challenged, because the case had been discontinued by agreement and the merits of the case have never been examined. Theoretical debates among scholars permeate the literature in international law, but tend

81 *Id.* para. 42.

82 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment,* [1998] *ICJ Reports* at 115, as well as the corresponding judgement in *Libyan Arab Jamahiriya* v. *United Kingdom.*

83 "Secretary-General Expresses Hope that Healing Process Can Begin Following Lockerbie Verdict", UN: SG/SM/7694, 31 January 2001. See also CNN report "Lockerbie trial: Quotes of the day", 31 January 2001, available in http://archives.cnn.com/2001/WORLD/europe/01/31/lockerbie.quotes/index.html. Date of access: 8 August 2008.

84 See Order of 10 September 2003, *ICJ*, in http://www.icj-cij.org/docket/files/89/7247.pdf.

to concentrate on the analysis of the relationship between the Security Council and the International Court of Justice.[85]

For aviation lawyers, it would also be worthwhile to understand the implications of the Lockerbie case upon the relationship between the Security Council, as one of the bodies of the United Nations, and ICAO, as one of the UN specialized agencies. While academic discussions may continue regarding what the *lex ferenda* would be, the *lex lata* clearly indicates that it is possible to depart from the principle *aut dedere aut judicare* in The Hague-Montreal system, if the Security Council wishes to do so. This development presents both positive and negative implications.

On the positive side, the above-mentioned development arguably addresses the deficiencies of The Hague-Montreal system by providing better assurances for punishing hijackers or saboteurs. The system has long been subject to criticism for its ineffectiveness. In theory, it is *aut dedere aut judicare*; in reality, it is neither extradition nor prosecution.[86] The conventions do not contain the clause excluding the political offence exception.[87] They do not provide a clear answer as to whether States may refuse, on political grounds, to extradite suspects in crimes of hijacking and sabotage. The duty to prosecute, as mentioned above, is also far from being absolute. Even if the alleged offender is prosecuted and eventually found guilty, the "severe penalties" under national laws could be as low as two years' imprisonment.[88] Prior to the Lockerbie case, ICAO had convened another diplomatic conference in 1973 to consider the adoption of a new treaty with a view to providing sanctions against a State for non-compliance with The Hague and the Montreal Conventions. Nevertheless, "the Conference terminated without having adopted any instrument".[89]

Through the Lockerbie case in the early 1990s, the UN Security Council to certain extent succeeded in compelling a State to surrender the alleged offenders. Its measures of sanctions have thrown new light on the possibility of severe and effective penalties against offenders. They provide powerful

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85 See, for example, Gowlland-Debbas, V., "The Relationship Between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case" (1994) 88 *AJIL* 643; Alvarez, J. E., "Judging the Security Council" (1996) 90 *AJIL*.1; David, M., "Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court" (1999) 40 *Harvard International Law Journal* 81 at 128; Cronin-Furman, K.R.,"The United Nations Security Council: Rethinking a Complicated Relationship" (2006) 106 *Columbia Law Review* 435.

86 See Sochor, E., *The Politics of International Aviation* (Iowa City: University of Iowa Press, 1991) at 174.

87 See *supra* note 65 *et seq* and accompanying text.

88 Sochor, *supra* note 86 at 170.

89 The Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Rome from 28 August to 21 September 1973. ICAO Doc 9225-LC/178, *International Conference on Air Law, Rome, August-September 1973* (1978).

deterrence to prospective offenders and strong discouragement to those who would otherwise harbour them, and consequently protect aviation safety. The Security Council also conveys the message that sabotage against the safety of aviation could under certain circumstances be considered as a threat to the peace or a breach of the peace. In view of its importance, the Security Council may apply Chapter VII of the UN Charter and legitimately encroach upon the sovereign domain jealously guarded by States, including the discretionary power for prosecution. Moreover, the action taken is supported by a treaty provision which is of overriding nature, namely, Article 103 of the UN Charter. Indirectly, it gives rise to the prospect that aviation safety, which has become the common concern of the world community, may have overriding effect against other considerations, especially when it is linked to international peace and security.

On the negative side, the Lockerbie case raises an important issue with regard to maintaining the integrity of the legal system. The rule of law requires a certain degree of stability, certainty and transparency. It would create difficulties and confusion if a State, which has in good faith complied with the requirements of a treaty, is subsequently told that the treaty has been overridden by a decision of a higher hierarchy, which decision is beyond the control of such a State. The international community had opted to establish the UN as a general organization and ICAO as a special body for international civil aviation, which subsequently became one of the UN specialized agency. This implies that they have different competencies, which should not overlap. Article 13 of the Montreal Convention clearly spells out that each contracting State has a duty to report to the ICAO Council any information concerning "the measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings". It seems that these avenues should first be exhausted before a case is presented to the Security Council as the last resort. This does not by any means imply that the latter could not act if the case has indeed presented a threat to international peace and security. In his dissenting opinion in Lockerbie,[90] Judge Bedjaoui, while recognizing that the Security Council may discretionally characterize a situation as likely to threaten international peace and security, went on by quoting the dissenting opinion of Judge Fitzmaurice in another case:

> Limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally

90 Dissenting Opinion of Judge Bedjaoui, *supra* note 78 at 143 *et seq*, para.20.

> intended ... [There was] no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes."[91]

Judge Bedjaoui further pointed out that "no small number of people may find it disconcerting that the horrific Lockerbie bombing should be seen today as an urgent threat to international peace when it took place over three years ago".[92] "Whatever the legitimate indignation that this detestable outrage may have aroused, its perpetrators must be brought to book only in strict conformity with international legality."[93] Judge Ajibola also underlined the importance of the issue of the validity of the Security Council's decision, which "will be resolved one way or the other", but preferred to "let sleeping dogs lie" at that moment.[94]

Since the resolutions of the Security Council prevail over the Montreal Convention, the alleged offenders may be exposed to multiple prosecutions. The Montreal Convention provides for concurrent jurisdiction without indicating the priority, which already carries the risk of double jeopardy. However, Article 7 of the Convention only applies *aut dedere aut judicare* to the "alleged offender". It may be argued that there is no obligation to extradite the offender or to submit the case for prosecution if that offender is no longer "alleged" but "convicted" by any country. When the Security Council intervened, the situation might have been different since the Montreal Convention may be inapplicable. The wording of the Security Council's Resolutions seems to require unconditional surrender of the two suspects, whether they had been previously convicted or not. While double jeopardy did not actually occur in the judgements of the special Scottish Court, such a possibility could not be completely ruled out in any future case when the Security Council intervenes. Of course, any court or tribunal seised of the case may take into account any previous conviction or judgement. However, due to the divergent legal systems, such as the difference in evidentiary rules and statutory penalties, an alleged offender who has been acquitted or given a light sentence in one jurisdiction might be found guilty or given a heavier sentence in another jurisdiction, if the alleged offender goes through another trial. In that case, the situation might not be compatible with the principle of *non bis in idem*.[95]

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91 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, [1971] *ICJ Reports* 16 at 294 para. 116.

92 *Supra* note 90 at para. 21.

93 *Id*. para.1.

94 Dissenting Opinion of Judge Ajibola, *supra* note 78 at 196.

95 Derived from the Latin maxim *nemo bis vexari pro una et eadam causa* meaning "a man shall not be twice vexed or tried for the same cause". For more discussion of the principle, see Daniels, R. N., "Non Bis in Idem and the International Criminal Court" (2006) in bepress Legal Series, Year 2006 Paper 1365. Available at http://law.bepress.com/cgi/viewcontent.cgi?article=6282&context=expresso. Date of access: 9 August 2008.

It should be noted further that the UN Charter is not the only international treaty which contains an overriding clause such as that provided in Article 103. Although ICAO belongs to the United Nations system, it is governed by a different constitutional instrument, namely the Chicago Convention. Article 82 of this Convention also contains a similar overriding clause:

> The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings.

From a strict legal point of view, both the UN Charter and the Chicago Convention are international treaties duly accepted by their respective parties and one does not have superior legal status over another. Moreover, although the Chicago Convention was concluded in 1944 before the UN Charter, it entered into force in 1947 after the entry into force of the UN Charter. Technically, an argument could be made that the later law prevails over the earlier law. In the event that the UN Security Council wishes to override the provisions of the Chicago Convention, the reasoning that the UN obligations prevail over others would not appear as convincing as in the case of Lockerbie. More cogent and elaborative arguments might be needed, probably through the invocation of the concept of *jus cogens* (peremptory norms). Eventually, "the sleeping dog" mentioned by Judge Ajibola will wake up and bite. To resolve the conflicts between the two equally ranked treaties containing overriding clauses, a judicial intervention would be inevitable.[96]

In view of the importance of the rule of law, the scope of competence of each organization should be clearly defined. In times of peace, matters of civil aviation could be left to the ICAO system. In case of war and emergency conditions, the Chicago Convention, the constitution of ICAO, provides in Article 89 that the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. This will allow the UN bodies, such as the Security Council, wide latitude in their action.

4.4 The Montreal Supplementary Protocol

As the baseline of reasoning, The Hague and Montreal Conventions clearly focused on the safety of aircraft. Although the Montreal Convention criminalizes the acts of destroying or damaging air navigation facilities, and the act of communicating false information, the purpose of such criminalization, as already discussed above, is to protect "the safety of aircraft in flight". With respect to the safety of airports, it had been considered as forming part of the

96 See *infra* Ch.5, particularly 5.1.2 relating to *jus cogens* and 5.5 relating to checks and balances.

domestic affairs of the State of location, falling within its territorial jurisdiction. Subsequently, it was realized that the actors of unlawful interference did not limit their attacks to aircraft but targeted airports as well. A general feeling gradually emerged that airports serving international aviation would also need international protection. This feeling was amplified by the simultaneous machine gun and grenade attacks at the airports in Rome and Vienna in December 1985.[97] On 8 October 1986, the 26th Session of the ICAO Assembly, upon the initiative of Canada, adopted a resolution calling for a new instrument for the "suppression of unlawful acts of violence at airports serving international civil aviation". Eventually, the Montreal Supplementary Protocol was adopted in 1988, which extends the application of the Montreal Convention to cover two additional offences, namely, an act of violence against a person at an airport, and an act of destroying or seriously damaging the facilities of an airport or aircraft not in service or disrupting the services of the airport. To constitute an offence, it is a prerequisite that the act in question "endangers or is likely to endanger safety at that airport".[98] Again, the primary focus is aviation safety.

A special reference should be made to the concept of "an airport serving international civil aviation" introduced by the Montreal Supplementary Protocol. The concept represents the international element or elements on which the Protocol is based. The legislative intention was made clear that the instrument is applicable only to airports serving international civil aviation. Domestic airports which do not have any international element are within the exclusive domain of the State where the airports are located, and will continue to be regulated by domestic law. There were discussions as to whether the term "an airport serving international civil aviation' should be further defined when the draft protocol was tabled at the ICAO Legal Committee. The majority of delegations were of the view that any definition or qualification would be to the detriment of the necessary flexibility in the application of the instrument. They emphasized that it should be a matter of fact to be determined by the State concerned or by the judge in the proceedings whether an airport in fact served international civil aviation and that the answer may be different at different times.[99] The Diplomatic Conference subsequently decided to keep the term as it was. From the discussion, it transpired that "an airport serving international civil aviation" would at least include the following: 1. an airport designated as a customs airport under Article 10 of the Chicago Convention; 2. an airport designated under Article 68 of the Chicago Conven-

97 Wallis, "Prevention of Aviation Terrorism, the Airlines' Point of View", in *Conference Proceedings, Aviation Security*, *supra* note 3 at 75.

98 Art. II, the Supplementary Protocol.

99 ICAO Doc 9823-DC/5, *International Conference on Air Law (Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,* Montreal, 9-24 February 1988, Minutes and Documents (2003) at 161. See also *supra* note 160 in Ch.2.

tion for the use by any international air service; and 3. an airport not designated under 1 or 2 but which is in fact used as an alternate airport by an international flight. It remains to be seen to what extent flexibility will be applied in the interpretation of the term by the competent authorities. For instance, if a group of international passengers are attacked at a feeder or "spoke" airport, while they intended to fly to a "hub" airport for a connection of a long-haul international fight, would the feeder airport be considered as "serving international civil aviation"? One may argue that in this case the feeder airport contains sufficient international elements for the purpose of the application of the Protocol, while another may argue that the feeder airport is merely a domestic airport and the flight of those passengers is a domestic flight. While interpretations may differ, it is arguable that the safety of these passengers forms an integral part of the safety of international civil aviation. The confidence of the traveling public would be affected if they are not protected by uniform international rules when they are on feeder flights. From this perspective, an airport where feeder flights for an international hub are provided might under certain conditions be considered as "an airport serving international civil aviation".

Another issue relating to the scope of the applicability of the Protocol is whether it covers the acts of States. The 1971 Montreal Convention provides in its Article 4 that the Convention shall not apply to aircraft used in military, customs or police services. Based on this provision, if an aircraft used for military services is hijacked, the alleged hijacker will not be covered by the Convention. However, does the Convention or its Protocol apply to a person who uses a military aircraft to destroy or damage air navigation facilities or airports serving international civil aviation, if the act of such a person is likely to endanger the safety of aircraft in flight or the safety of airports? This issue became a hot topic of debate when 18 States of the Arab Civil Aviation Commission presented an information paper to the High-level, Ministerial Conference on Aviation Security held in Montreal on 19 and 20 February 2002. The information paper reported the following:

> On 4 December 2001, Israeli military forces attacked the Gaza International Airport, destroyed the air navigation facilities and bombarded runways and taxiways until the airport became unserviceable. When the Palestinian Authority attempted a repair on 11 January 2002, the Israeli military forces bombarded once again the airport and its facilities by aircraft, artillery and tanks, thereby destroying the runway, the taxiways and all facilities.[100]

The 18 States cited the preambles of the Chicago Convention and the 1971 Montreal Convention, and considered the act of Israel as "disrespect of inter-

100 ICAO Information Paper AVSEC-Conf/02-IP/29, "Destruction of Gaza International Airport", 18 February 2002, at para. 2.1.

national laws [*sic*], including the conventions on civil aviation security".[101] They called for "strong condemnation by the aviation community of all acts of unlawful interference against civil aviation wherever and by whomsoever and for whatever reason they are perpetrated".[102]

The ICAO Council, after lengthy debate, adopted a resolution by 24 votes in favour, two against and with seven abstentions,[103] which reads, in part:

> THE COUNCIL,
>
> *Having considered* the fact that Gaza International Airport facilities were destroyed by Israeli military forces on 4 December 2001 and 10 January 2002 so as to render the airport inoperable;
> ...
> *Noting* that such action is a violation of the principles enshrined in the *Convention on International Civil Aviation* (Chicago Convention, 1944);
> *Noting* that such action is contrary to the principles of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal Convention, 1971) and the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation,* Supplementary thereto (Montreal Protocol, 1988), which considers that unlawful acts of violence jeopardizing the safety of airports disturb the safe and orderly conduct of civil aviation for all States;
> …
> 1. *Strongly condemns* all acts of unlawful interference against civil aviation, wherever, by whomever and for whatever reasons they are perpetrated;
> 2. *Strongly condemns* the destruction of Gaza International Airport and its air navigation facilities;
> 3. *Reaffirms* the important role of the International Civil Aviation Organization to facilitate the resolution of questions which may arise between Contracting States in relation to matters affecting the safe and orderly operation of international civil aviation throughout the world;
> 4. *Urges* Israel to fully comply with the aims and objectives of the Chicago Convention; …

The resolution demonstrates that the destruction of an international airport within a contracting State could be "a matter of grave concern to the international community".[104] Military activities clearly have direct implications for the safety of civil aviation, and it is within the competence of ICAO to address the concern in this respect in accordance with its constitution.[105] What is not clear is why the 1971 Montreal Convention and its Supplementary

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101 *Id.* para. 2.4 to 2.7.
102 *Id.* para. 4.1 b).
103 ICAO Doc 9802-C/1141 C-Min. 165/1-13, *Council -165th Session, Summary Minutes with Subject Index* (2002), C-Min 165/10, 13 March 2002 at 125 and 129.
104 *Id.* at 129.
105 See *supra* Ch.3 for discussions of military use of airspace and its relation with aviation safety.

Protocol of 1988 were referred to in this resolution. The statement that the action to destroy Gaza airport facilities "is contrary to the principles" of the Montreal Convention and its Protocol would give the impression that the military action of a State may also be covered by the Convention and the Protocol, which does not seem to be the case.

The preparatory work of the Montreal Convention and its Protocol does not indicate that the drafters envisaged the possibility of applying the offence provisions to the official actions of State military forces.[106] The history which triggered the adoption of these instruments, as briefly mentioned above, tends to demonstrate that the instruments were aimed at non-State actors, such as the actors of aircraft sabotage that occurred in Europe on 21 February 1970 respectively against Swissair and Austrian Airlines, and actors participating in the attacks on the Rome and Vienna airports.[107]

The safety of civil aviation would require the prevention and suppression of all acts of unlawful interference against it, "wherever, by whomsoever and for whatever reasons they are perpetrated".[108] On the other hand, the rule of law also requires the precise application of an international instrument. On previous occasions, when ICAO dealt with the acts of States which endangered the safety of aviation, it usually referred to the Chicago Convention, but did not mention The Hague Convention, the Montreal Convention or the Supplementary Protocol.[109] For instance, in a resolution adopted on 20 August 1973, the ICAO Council condemned Israel for violating Lebanon's sovereignty and for the diversion and seizure of a Lebanese civil aircraft, and considered that the actions by Israel "constitute a violation of the Chicago Convention", but did not refer to The Hague and Montreal Conventions.[110] On the contrary, the Council specifically recommended to the Diplomatic Conference to be held 8 days later in Rome that "it make provision in the conventions for acts of unlawful interference committed by States."[111] This may be considered as evidence that the Council was of the view at that time that there was no treaty provision for acts of unlawful interference committed by States. Had The

106 ICAO Working Paper, SSG-ASC/3-WP/2, "The Importance of Including Military Exclusion Clauses in any Amendments to the ICAO Aviation Security Instruments", presented by Stephen Pomper, 30 January 2007.

107 See *supra* notes 41, 42 and 97 and accompanying text. See also, *id*. SSG-ASC/3-WP/2.

108 The Council Resolution, *supra* note 103.

109 See, for example, Assembly Resolution A20-1: *Diversion and seizure by Israeli military aircraft of a Lebanese civil aircraft*, A24-5: Extraordinary Session of the Council, A28-7: *Aeronautical consequences of the Iraqi invasion of Kuwait*, all reproduced in ICAO Doc 9848, *Assembly Resolutions in Force (as of 8 October 2004)*, I-27 to I-29. See also the resolution of the Council on 16 September 1983 regarding the tragic incident which occurred on 1 September 1983 to Korean Airlines Flight 007, in ICAO Doc 9416-C/1077, *Council – Extraordinary Session, Minutes*, 1983 at 59.

110 ICAO Doc 9225-LC/178, *International Conference on Air Law*, Rome, August-September 1973, Minutes and Documents (1978) at 385-386.

111 *Id.* at 386.

Hague and Montreal Conventions been applicable to acts of unlawful interference by States, there would have been no need for the Council to make such a recommendation. Coincidently, the Diplomatic Conference in Rome did not result in any amendment to the then existing conventions,[112] strongly indicating that the international community was not ready to extend The Hague and Montreal Conventions to the acts of unlawful interference by States. The Montreal Protocol of 1978 did not change this *status quo*, and therefore the *lex lata* remains the same: the offence provisions in these conventions and protocol do not apply to the acts of States.

From a jurisdictional point of view, it would also be inconceivable that these conventions and protocol could be applicable to the acts of unlawful interference by States, since this would have implied that a State would be subject to the jurisdiction of the criminal court of another State, which is inconsistent with the principle of sovereign equality.

To conclude, the Montreal Supplementary Protocol does not go beyond the scope of The Hague and Montreal Conventions. It is not applicable to acts of unlawful interference by States, and consequently has not reached the stage of punishing "all acts of unlawful interference against civil aviation, wherever, by whomever and for whatever reasons they are perpetrated".[113] This task should probably be left to the UN and its Security Council, particularly with respect to the acts of States. However, the Protocol has moved one step further from the previous conventions in protecting the safety of aviation. The Hague Convention focuses only on the safety of civil aircraft, the Montreal Convention extends the protection to air navigation facilities, and the Supplementary Protocol further enlarges the scope of protection to the safety of airports serving international civil aviation. The Protocol was considered as "filling an important gap left by the unamended Montreal Convention".[114]

With hindsight, it would be quite easy almost 40 years later to say that The Hague Convention could have included the specific offences listed in the Montreal Convention and its Supplementary Protocol under one umbrella. Instead of consolidating all issues into one international legal instrument, ICAO has opted to have three diplomatic conferences for three instruments in the course of 18 years. Cheng has questioned whether this piecemeal and purely reactive approach is the best way to tackle international problems in general and international terrorism in particular. At the same time, he also realizes that "the hope for any comprehensive approach, however desirable in itself, is probably, apart from its inherent difficulties, not very realistic."[115] Rome was not built in one day. There may not have been the momentum in 1970 to establish comprehensive coverage for crimes against the safety of civil

112 *Id.* the Final Act at 443 to 446.
113 The Council Resolution, *supra* note 103.
114 Zhao, *supra* note 3 at 473.
115 Cheng, *supra* note 3 at 38.

aviation. On the contrary, given the fact that the delegations in The Hague were negotiating the drafting of the instrument until the last minute, it may have greatly risked not having The Hague Convention today had the Conference been more ambitious in its goal. Even after 18 years, the Supplementary Protocol did not constitute the last stepping-stone towards aviation safety. As long as aviation remains the primary target of terrorism or other acts of unlawful interference, law-making efforts in ICAO will continue, with a view to minimizing the adverse impact of terrorism on aviation safety.

4.5 THE MEX CONVENTION

Another major effort of ICAO to curb unlawful interference was the adoption of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, done at Montreal in 1991 (the MEX Convention). Unlike The Hague Convention, the Montreal Convention and its Supplementary Protocol, which criminalize certain acts, the MEX Convention has shifted from a repressive to a preventive approach. The importance of preventive measures has long been recognized. The system of criminal law may bring the perpetrators to justice, but will not cure/remedy the damage caused by their criminal activities. In view of this, ICAO has since its early days undertaken a proactive approach toward prevention. In 1974, ICAO initiated the adoption of Annex 17 to the Chicago Convention, which contains specific technical measures to prevent terrorists and other offenders from bringing weapons, explosives and any other harmful devices and substances on board aircraft or even to airports. In 1988, the catastrophe in Lockerbie again highlighted the need to take preventive measures through modern technology, since it was determined that the destruction of the Pan Am aircraft was caused by a small amount of SEMTEX, a hard-to-detect, high performance explosive.[116] Consequently, the objective of the MEX Convention is to establish a uniform international system, under which certain explosives will be marked by one of the detection agents specified in the Convention, in order to enhance their detectability by certain equipment.

From a law-making perspective, the MEX Convention presents a number of innovative features which warrant further discussion. The subject-matter of the Convention goes beyond the traditional competence of ICAO, since the impact of plastic explosives is not limited to the civil aviation sector. The mandate to develop the Convention was given to ICAO by the UN Security Council, which, in its Resolution 635, urged ICAO "to intensify its work … on devising an international régime for the marking of plastic or sheet explosives for the purpose of detection". Once again, it was demonstrated that the safety

116 Augustin, J., "The Role of ICAO in Relation to the Convention on the Marking of Plastic Explosives for the Purpose of Detection" (1992) XVII *AASL* 33 at 33.

of aviation was not simply a technical matter but may have profound implications for international peace and security. Furthermore, as Augustin observes:

> [E]ven without the involvement of the United Nations, it would have been proper, and within ICAO's constitutional framework, for the instrument to be adopted under its auspices. The Chicago Convention, in its preamble, speaks of the "undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner …" Article 44 of the same Convention refers to the aims and objectives of the Organization as being, *inter alia*:
> a. to insure the safe and orderly growth of international civil aviation;
> b. to meet the needs of the peoples of the world for safe, regular, efficient and economic air transport; and
> c. to promote safety of flight in international air navigation.
> The motives underlying the adoption of the new instrument fit squarely within these objectives.[117]

Obviously, the Convention represents the concerted efforts of States to limit their own freedom of action for the sake of common safety. The regulation of plastic explosives is closely related to the military and police functions of States, touching the core elements of State sovereignty. On the other hand, the Convention is not an arms control or disarmament treaty. It does not restrict or prohibit the manufacture of plastic explosives *per se*. It merely prohibits the manufacture of unmarked plastic explosives. The purpose is to prevent these explosives from being diverted to the unlawful use against the safety of aviation, or that of other public facilities. The object of the law-making is not arms control, but the protection of safety. To strike a balance between the common interests of safety and the legitimate use of explosives by the authorities performing military and police functions, the terms of the Convention were carefully crafted to allow certain flexibility for such use. For instance, Article IV of the Convention imposes certain obligations upon the States parties to destroy the unmarked explosives within a certain period of time, but such obligations do not extend to the unmarked explosives which have been incorporated as an integral part of duly authorized military devices.

The regime of the Convention only applies to certain explosives as defined in the Technical Annex. The list of detection agents to be used to enhance the detectability of explosives is also provided in the Annex. While the Technical Annex forms an integral part of the Convention,[118] its amendment procedure differs from the body of the Convention proper. The Convention does not contain any provision concerning the amendment to the main body of the Convention. It is presumed that the general rules in the *Vienna Convention of the Law of Treaties* will apply. According to one of the rules, the amendment

117 *Id.* at 51 to 52.
118 Art. X of the Convention, *supra* note 33 in Ch. 1.

will bind any State which has expressed the consent to be bound by it.[119] As for an amendment to the Technical Annex, the architects of the Convention were certainly inspired by the amendment procedure applicable to the Annexes to the Chicago Convention.[120] The amendment does not require the express consent of any State party. Instead, the ICAO Council has been given a crucial role in the amendment process. Simply stated, the Council may, upon the recommendation of an expert body called the International Explosives Technical Commission, propose an amendment to States parties for adoption. If the amendment has not been objected to by five or more States parties within ninety days from the date of notification of the amendment by the Council, it shall be deemed to have been adopted and becomes binding on all States parties which do not object to it.[121] This procedure has been designed to cope with the requirements of rapid technical changes which need to be incorporated into the Technical Annex promptly, without going through the lengthy process of ratifications of a treaty amendment. At the same time, it has granted the ICAO Council new legislative power, subject to a veto right by five or more States. While the threshold for veto is very low, States parties are generally cautious in exercising their veto rights. Since the conclusion of the MEX Convention in 1991, the Technical Annex has been amended twice, and none of the amendments has been objected to by any State party. The International Explosives Technical Commission, consisting of fifteen to nineteen experts, generally represents various geographical regions and different schools of thought. In formulating its recommendations, it has already taken the different views into account. Before the Council proposes the amendment for adoption, States parties also have opportunities to comment and to participate in the consultation process. This will minimize the need to raise a formal objection to the amendment as a last resort. For States which do not have sufficient expertise in this respect, it is difficult to come up with a well-reasoned objection within 90 days on a well-informed basis. They tend to base their respective decisions upon the credibility and expertise of ICAO. This attitude tends to reinforce the central role of the ICAO Council on this matter.

In addition to the legislative power mentioned above, Article IX of the Convention further provides:

> The Council shall, in co-operation with States Parties and international organizations concerned, take appropriate measures to facilitate the implementation of this Convention, including the provision of technical assistance and measures for the

119 Arts. 11 and 40, *Vienna Convention on the Law of Treaties*, 1155 *UNTS* 331.

120 Report of the Rapporteur on the Subject of the Preparation of a New Legal Instrument Regarding the Marking of Explosive for Detectability, reproduced in ICAO Doc 9801-DC/4, *International Conference on Air Law (Convention on the Marking of Plastic Explosives for the Purpose of Detection)*,1991, Vol. II Documents (2002) 27 at 30 and 31.

121 Arts. VI and VII, *supra* note 118.

exchange of information relating to technical developments in the marking and detection of explosives.

This provision is based on the consideration that in aviation security, the chain is only as strong as its weakest link. "Many developing countries can ill-afford existing security equipment, and may be unable to finance the purchase and maintenance of new detection equipment, or the training of staff needed to man the equipment. Consequently, in the interests of safety of the whole aviation community, there is a recognized need in this area for assistance to developing countries."[122] The provision "recognized the central co-ordinating role of the Council, but did not mandate the Council nor commit the budget of ICAO."[123]

A question has been raised whether the ICAO Council is legally competent to assume these functions, since "there is nothing in Articles 54 (Mandatory functions of Council) and 55 (Permissive functions of Council) of the Chicago Convention which specifically mandates or permits the Council to assume the functions assigned to it by the Plastic Explosives Convention".[124] When the issue was debated at the Legal Committee, some delegations believed that the Chicago Convention had to be amended before the Council could perform these functions; others considered that it was a primary duty of the Council to implement the decisions of the Assembly, since the latter had given highest priority to the preparation of the MEX Convention.[125] In the end, the latter view prevailed.

Article 49 *k)* of the Chicago Convention specifies that the Assembly may deal with "any matter within the sphere of action of the Organization not specifically assigned to the Council". The Assembly may also delegate to the Council under Article 49 *h)* "the powers and authority necessary or desirable for the discharge of the duties of the Organization". From the broad terms of these provisions, it is not *ultra vires* for the Council to assume the functions assigned by the MEX Convention, since any of these functions "would simply be a practical means of fulfilling the specific mandate given by the Assembly's directive on aviation security."[126] To be on the safe side, the Council, when accepting the invitation of the Diplomatic Conference to assume these functions, decided to seek the endorsement of the Assembly, which the latter gave in its 29th Session held in September-October 1992.[127]

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122 Augustin, *supra* note 116 at 48.

123 *Id*.

124 *Id*. at 55.

125 ICAO Doc 9556-LC/187, Report of the 27th Session of the Legal Committee at 3-13. See also Augustin, *id*.

126 Augustin, *id*.

127 ICAO Doc 9746-C/1131 C-Dec 132/1-21, 133/1-22, 134/1-26 *Council – 132nd, 133rd and 134th Sessions, Summary Decisions with Subject Index*, 1991, C-Dec 134/6 at 242. See also Assembly Resolution A29-6, ICAO Doc 9600, A29-RES.

In view of the foregoing and given previous and subsequent practice, there seems to be no constitutional obstacle to the ICAO Assembly directing the Council to perform certain functions even if such functions are not specified in the Chicago Convention, provided the Assembly itself is acting within its own competence.[128] It has also been well established in the theory and practice of international law, that the General Assembly of the United Nations, or its counterpart in the UN specialized agencies, may decide, with binding effect, on internal institutional matters of the relevant organization, including the competence of the subordinated bodies, and other "house-keeping" matters.[129]

It is another matter whether the Assembly may take a decision which may affect the treaty rights and obligations of the States parties rather than those of the Organization *per se.* This issue arose when the International Explosives Technical Commission recommended in June 2002 an amendment to the Technical Annex by increasing the minimum concentration of 2,3-Dimethyl-2,3-Dinitrobutane (DMNB) from 0.1 to 1.0 per cent by mass.[130] The increase of the concentration of this detection agent was expected to enhance the detectability of the plastic explosives. However, there were already plastic explosives in the stocks, which were manufactured according to the then existing standard, with the lower concentration of the detection agent. When the new amendment entered into force, these existing explosives became incompatible with the new legal requirement of the higher concentration. As the Convention requires that explosives be marked "in accordance with the Technical Annex",[131] these existing explosives could be regarded as "unmarked", simply because they no longer complied with the provisions of the Technical Annex. A question was raised whether these previously marked explosives, which had become unmarked due to the amendment to the Technical Annex, should be destroyed, consumed for purposes not inconsistent with the objectives of the Convention, marked according to the new standard, or rendered permanently ineffective within the applicable period prescribed by Article IV, paragraphs 2 and 3 of the Convention. The International Explosives Technical Commission recommended, in essence, an affirmative answer to this ques-

128 Augustin has cited some examples in this respect, including Resolution A1-23 authorizing the Council to "act as an arbitral body on any differences arising among Contracting States relating to international civil aviation, when expressly requested to do so by all parties to such differences." See supra note 116 at 56-59. There were also other more recent instances, where the Council accepted to assume certain functions under multilateral treaties. For example, the Council agreed to act as the supervisory authority for the registry established under *the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment* (Cape Town, 2001), ICAO Doc 9794.

129 See *infra* Ch.5.2.1.4 "Directive Resolutions".

130 ICAO Assembly Working Paper A35-WP/62, "Interpretation of Art. IV of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*", 12 July 2004.

131 Art. I, para. 3, the MEX Convention.

tion.[132] Some States expressed doubt as to whether the imposition of such an obligation would be in conformity with the principle of non-retroactivity of law.[133]

The relevant provisions of the MEX Convention indicate that the duty of a State party to ensure the destruction of the explosives within the prescribed periods exists only with respect to the "unmarked explosives which have been manufactured in or brought into its territory *prior to the entry into force of this Convention* in respect of that State."[134] The duty is not extended to unmarked explosives manufactured in or brought into its territory *prior to the entry into force of any amendment to the Technical Annex.* To illustrate, the MEX Convention entered into force on 21 June 1998 and the amendment to the Technical Annex concerning DMNB entered into force in 2005. For a State which is bound by the Convention and the amendment on these respective dates, it is clear that it has an obligation to destroy or otherwise dispose of within the specified period the unmarked explosives which existed prior to 21 June 1998. However, it is not clear whether it has an obligation to take the same action with regard to the unmarked explosives manufactured or brought into its territory between 21 June 1998 and 2005, if these explosives complied with the law in force at that period. Arguably, the law enacted in 2005 should not be retroactively applied to the explosives manufactured before that year and States parties have a vested right to be protected regarding these explosives. While paragraphs 4 and 6 of Article IV of the Convention impose additional duties on States parties to take necessary measures to ensure the destruction of these explosives, they only require States parties to do so "as soon as possible", without the deadline of three years or 15 years as mentioned respectively in paragraphs 2 and 3.

Nevertheless, it was considered highly desirable, in the interests of aviation safety, to maintain a uniform regime for the explosives detection system, particularly after the amendment to the Technical Annex. Otherwise, the coexistence of different explosives marked in accordance with different criteria would require multiple checking systems at airports, which are difficult to implement. To resolve this problem, three options were referred to the ICAO Legal Committee for advice. The first option was to amend the Convention to achieve the full applicability of the amended Technical Annex, even with some elements of retroactivity. This option was quickly dismissed since it would be "using a hammer to strike a fly"; it was not considered worthwhile and efficient to resolve this issue through a diplomatic conference and the lengthy ratification process.[135] The second option was to incorporate the requirements into the Technical Annex. While this option would be expedient,

132 A35-WP/62, *supra* note 130 at 2.
133 *Id*. at para. 1.4.
134 Art. IV, paras. 1, 2 and 3, emphasis added.
135 The statement of the French Delegation. See also A35-WP/62 at para.1.4.

a clear majority of the Legal Committee considered that the Technical Annex was not the proper place for such action, since the mandate of the International Explosives Technical Commission was strictly limited to technical matters. The third option was to adopt an Assembly resolution to state that Article IV of the Convention should be applied *mutatis mutandis*, without amending either the Convention or its Technical Annex. This option was recommended by the Legal Committee.

In September/October 2004, the ICAO Assembly adopted Resolution 35-2, which *urges* the States parties to the Convention to apply Article IV in their mutual relations in the manner specified in the four operative paragraphs of the Resolution.[136] In a nutshell, when the amendment increasing the concentration of DMNB enters into force, each State party bound by the amendment shall take the necessary measures to ensure that the explosives in its territory which do not comply with the amendment are destroyed, or otherwise disposed of in accordance with Article IV within a period of three years from the entry into force of the amendment, if these explosives are not held by its authorities performing military or police functions. In the case that the explosives are held by its authorities performing military or police functions and are not incorporated as an integral part of duly authorized military devices, the time limit is 15 years instead of three years. The resolution further provides that the same approach applies *mutatis mutandis* to any future amendment to the Technical Annex unless any contracting State notifies all others and the Council that it does not agree to such application.

This resolution presents a number of legal implications. One implication relates to its legal effect. The member States of ICAO, instead of choosing the long road of a diplomatic conference to amend the Convention, opted for a short cut through an Assembly resolution to clarify the mode of application of the provisions of a treaty. While the term used by the Assembly is "urges", which is generally considered as non-binding, the resolution still represents a collective declaration by States, to be honoured in good faith. It would be difficult for a contracting State which supported or even sponsored the resolution to declare afterward that it would not follow its urging, without giving any reason. On the other hand, the language employed in the resolution does not reach the threshold of a binding declaration as defined by the ICJ in the *Nuclear Tests* case.[137]

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136 ICAO Doc 9848, *supra* note 109 at VII-11, reproduced in Doc 9902, *Assembly Resolutions in Force (as of 28 September 2007)* at VII-16.

137 *Nuclear Tests (New Zealand* v. *France) Judgment,* [1974] *ICJ Reports* 457 at 472 para. 46. According to the Court, "[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration."

Alternatively, the resolution may be considered as evidence of "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31, paragraph 3 of the *Vienna Convention on the Law of Treaties*. The resolution was carefully negotiated and drafted by legal experts of various contracting States. It is submitted that its significance should not be considered less than the unwritten acquiescence by States. On the other hand, the States participating at the 35th Session of the ICAO Assembly were not exactly the same as those who are parties to the MEX Convention, although there is a high degree of overlap between the two groups. For States which were both participants at the 35th Session of the Assembly and parties to the MEX Convention, Resolution A35-2 may be considered as their common understanding of certain provisions of the Convention. For those States which were not parties to the Convention, a theoretical question may be raised as to why they should have been involved with the interpretation of the Convention. From a strictly legal point of view, it would have been more appropriate if a conference of the States parties would have been held concurrently with the 35th Session of the Assembly to formulate and adopt such a resolution, rather than involving non-States parties.

A further question may be asked as to whether the States parties which did not participate at the 35th Session of the Assembly may claim that they are not bound by the resolution. This issue should be addressed by taking into account the specific situation of the case at hand. As a matter of principle, since a State party may denounce a treaty, it has *a fortiori* the right to deviate from an Assembly resolution, particularly if it did not participate in the formulation of the said resolution. From a broader perspective, a member State of ICAO has an implied duty to cooperate with its organization. Accordingly, in this writer's view, a State which did not participate in the Assembly and wishes subsequently to challenge the Assembly's decision should at a minimum provide a reason for its absence.

Finally, Resolution A35-2 does not limit itself to the current amendment concerning DMNB, but also prescribes the course of conduct for future amendments to the Technical Annex. In this respect, it adopts the approach of "approval by default", which is in vogue in ICAO: if States do not give notification, they will be deemed to agree with the application of the resolution. The adoption of this approach appears to confirm that Resolution A35-2 has gone beyond the level of purely persuasive value by acquiring certain mandatory elements. Had the Resolution been considered as purely persuasive in nature, there would not have been any resulting requirement for States to notify others for not following it.

Among the five international air law instruments on security adopted under the auspices of ICAO, the MEX Convention is the only one not dealing with criminal matters. It is designed for the prevention rather than the suppression of terrorist and other unlawful acts. In retrospect, it is somehow regrettable that while a regime of marking plastic explosives has been established, there

is not yet a treaty which makes it mandatory for States to install equipment at their airports for the purpose of detecting the marked explosives. Consequently, the benefit of the marking system has not been fully materialized. This gap could still be filled by Annex 17 to the Chicago Convention, which is the main instrument containing SARPs relating to aviation security. As a matter of fact, the experience of ICAO has shown that it would be much more convenient to deal with the matter of prevention in SARPs or other less binding material. An instrument in the form of a treaty is more cumbersome to adopt and could not promptly address the rapidly changing modes of terrorist and other threats. For example, following the attempted attack using man-portable air defence systems (MANPADS) against a civil aircraft taking off from Mombasa, Kenya, in November 2002, there was a debate whether a treaty for controlling MANPADS should be developed within the auspices of ICAO.[138] It was subsequently decided that ICAO would not develop such a treaty but would participate in the work of the United Nations to negotiate an international instrument to enable States to identify and trace illicit small arms and light weapons.[139] At the same time ICAO had developed SARPs and procedures that incorporated preventive measures on the ground, which were accessible on the secure ICAO AVSEC website.[140] All these were developed within two years, which would be considered too short for the adoption of a treaty.[141]

In summary, the MEX Convention has contributed to the protection of aviation safety by adopting a preventive approach against unlawful interference, by demonstrating the important link between aviation safety and international peace and security, and by establishing an international regime for the detection of plastic explosives. Its provisions, as well as the subsequent practices relating to their application, have also provided valuable experience

138 See ICAO Council Working Paper C-WP/12238, "International Legal Instrument Dealing with Man-Portable Air Defence Systems (MANPADS)", 13 April 2004.

139 See Statement of ICAO at the United Nations Second Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects, (11 to 15 July 2005) in http://www.un.org/events/smallarms2005/regional-intlorg-pdf/ICAO.pdf. Eventually, the UN itself did not adopt a treaty but "an international instrument of a political character". See UNGA A/60/88 "Report of the Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons", 27 June 2005 at para.26.

140 See UN Press Release DC/2977 (12 July 2005), statement of Jiefang Huang on behalf of ICAO, in http://www.un.org/News/Press/docs/2005/dc2977.doc.htm.

141 There are numerous other instances in which ICAO resorted to non-treaty material to address the issue of prevention. The issue of unruly passengers was dealt with by a resolution of the Assembly, despite the earlier call to conclude a treaty; see *infra* note 119 in Ch.5. The establishment of the Public Key Directory, a computer system facilitating the identification of travel documents, is wholly based on a memorandum of understanding which is not a treaty; see ICAO Assembly Working Paper A36-WP/18, "Progress Made in Implementing Resolution A35-18, Appendix D, Section III: International Cooperation in Protecting the Security and Integrity of Passports", 28 June 2007.

regarding the functions of the ICAO Assembly and the Council in implementing the regime. This regime could have been more beneficial to aviation safety, had it been supplemented by a mandatory requirement to equip major international airports with the devices to detect the explosives which have been marked in accordance with the Convention.

4.6 Addressing New and Emerging Threats after 11 September 2001

The five aviation security treaties mentioned above are valuable legal instruments for combating unlawful interference against civil aviation. However, with the passage of time and changes of circumstances, there are new and emerging threats which are not adequately covered by these treaties. The abhorrent terrorist attacks on 11 September 2001 have provoked the rethinking of the need to strengthen the international legal framework to protect the safety of aviation. Immediately after the event, the ICAO Assembly adopted in September/October 2001 Resolution A33-1 – *Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation*, which, among other things, called for the review of the adequacy of the existing aviation security conventions. Pursuant to this resolution, the Secretariat of ICAO completed a study and a survey on legal measures to cover new and emerging threats to civil aviation and drew a preliminary conclusion that the conventions could be updated in several instances.[142] This preliminary conclusion was confirmed by an ICAO Study Group composed of more than ten experts from different countries.[143] A special Sub-Committee of the ICAO Legal Committee has prepared draft texts to amend The Hague and Montreal Conventions, which will be submitted to the Legal Committee in 2009 for further consideration.[144] The salient features of the draft texts include punishment of the act to use civil aircraft in flight as a weapon, explicit criminal responsibility of the directors and organizers of the crimes, prohibition of the use of certain dangerous substances, exclusion of political offence exception, and criminalization of certain credible threats.

One unforgettable lesson learned on 11 September is that civil aircraft, which have become one of the essential means of transportation in modern society, may be misused and diverted by terrorists to become weapons of mass destruction. The attacks on 11 September were the aggregation of various offences, such as the unlawful seizure of an aircraft in flight, the intentional

142 ICAO Information Paper A35-WP/88 EX/29, "ICAO Aviation Security Plan of Action, Project 12: Legal", 24 September 2004.

143 ICAO Council Working Paper C-WP/12851, "Final Report Relating to the Secretariat Study Group on Aviation Security Conventions", 20 February 2007.

144 ICAO Council Working Paper C-WP/13111, "Report on the Second Meeting of the Special Sub-Committee of the Legal Committee on the Preparation of One or More Instruments Addressing New and Emerging Threats", 14 May 2008.

destruction of an aircraft in service, acts of violence on board aircraft, murders, and other criminal acts causing injuries and damage. While the provisions of the existing aviation security instruments cover various components of these offences in a somewhat piecemeal fashion,[145] they do not cover all aspects of the misuse of aircraft as weapons. For instance, the use of civil aircraft as a weapon to cause death, injury and damage on the ground is not specifically criminalized under the existing conventions. Moreover, using a hijacked aircraft to murder innocent people in the air or on the ground constitutes a criminal act of immense gravity which is utterly different from a simple hijacking for immigration purposes without causing death or injury. The aggravated aspect of the former is not specifically reflected in the existing conventions.

The existing conventions focus on the persons actually committing the punishable acts, mainly on board an aircraft or at an airport, without specific provisions addressing the persons organizing and directing the commission of the offences. In the case of suicidal attacks similar to those on 11 September, the attackers on board the aircraft perished during the attacks and could no longer be held accountable under criminal law.[146] It has become much more important to pursue the directors and organizers behind the scene. While the culprits on board aircraft may perish after their suicidal attacks, their masterminds on the ground should not be allowed to have any safe haven. In this connection, it should be mentioned that the more recent U.N. conventions, such as the *International Convention for the Suppression of Terrorist Bombings*,[147] and the *International Convention for the Suppression of the Financing of Terrorism*,[148] specifically extend the offence provisions to a person who (a) participates as an accomplice in an offence, (b) organizes or directs others to commit an offence, and (c) in any other way contributes to the commission of one or more offences by a group of persons acting with a common purpose. It is highly desirable, if not imperative, for ICAO to follow the same.

There are also other new and emerging threats to civil aviation which are not covered or fully covered by the existing ICAO instruments, such as the act of using biological, chemical and nuclear substances for the purposes of attacks on board or against a civil aircraft in service, or using civil aircraft to unlawful-

145 For example, the unlawful seizure of aircraft is listed as an offence under Art. 1 of The Hague Convention; destruction of aircraft is covered by Art. 1, para. 1(b) of the Montreal Convention; an act of violence on board may be covered by Art. 1, para. 1(a) of the Montreal Convention.

146 The same result occurred when suicide bombers destroyed two Russian civil aircraft on 24 August 2004. See Assembly Resolution A35-1: *Acts of terrorism and destruction of Russian civil aircraft resulting in the deaths of 90 people – passengers and crew members*, in ICAO Doc 9848, *supra* note 109 at I-30.

147 Adopted by the General Assembly of the United Nations on 15 December 1997, available at http://untreaty.un.org.

148 Adopted by the General Assembly of the United Nations on 9 December 1999, available at http://untreaty.un.org.

ly spread these substances for such purposes. It is noted that the use of these substances may cause serious injury to passengers on board aircraft or at the airports without necessarily endangering the safety of the aircraft or the airports themselves. As a result, this act may not be covered by Article 1, paragraph 1(a) of the Montreal Convention or Article II of the Supplementary Protocol, which respectively provide that the act in question "is likely to endanger" the safety of the aircraft or airport. This is particularly true when the substances are discharged on board an aircraft or at an airport without explosive consequences but having a delayed adverse effect against the permanent health of the persons on board aircraft or at the airports. For this reason, a suggestion has been made to criminalize this type of act in a new legal instrument.[149] From this, one could also perceive that the attention of the law-making bodies has been extended to cover not only the safety of aircraft and airports, but also directly the safety of persons on board aircraft and at airports.

As most of the ICAO instruments were concluded decades ago, they did not and could not possibly include the provisions which reflect the more recent developments in international law. It may be recalled that during the negotiations of The Hague Convention, the efforts to exclude the political offence exception were not quite successful, and the possibility of pardoning a hijacker on political offence grounds could not be ruled out.[150] As the campaign against international terrorism developed, the international community gradually became more receptive to the concept that terrorist acts should be treated as ordinary rather than as political offences. A number of the more recent international treaties specifically exclude the political offence exception. For instance, Article 11 of the Terrorist Bombings Convention reads:

> None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.[151]

This provision, representing the progressive development of international law, should also be incorporated into the existing aviation security conventions.

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149 See ICAO Working Paper LC/SC-NET-WP/2, "Report of the Rapporteur on the Development of New Legal Instruments for the Suppression of Unlawful Acts against the Safety of Civil Aviation", 7 June 2007 at para. 46. See also Report of the Secretariat Study Group on Aviation Security Conventions – Third Meeting (Montreal, 31 January to 2 February 2007) at para. 3.3.1.3.

150 See *supra* note 65 *et seq* and accompanying text.

151 *Supra* note 147.

It may provide additional deterrence to unlawful acts against the safety of civil aviation.

In addition to the gaps or lacunae identified above, the ICAO Study Group was of the view that the time has arrived for criminalizing a credible threat to commit an offence specified in the aviation security conventions. The existing conventions only criminalize commission of certain acts, but not the threat to commit such acts. However, as pointed out by the Study Group, "a threat to commit an act, without the actual commission of the act contemplated, may cause grave adverse consequences to civil aviation."[152] One example in this respect is the threat to use chemical or biological substances and other lethal devices to seriously disrupt air transport, which may create chaos and endanger the safety of aviation in general, without their actual use.

The aviation security conventions concluded under the auspices of ICAO have provided a classical and valuable legal framework. This framework has served as a model for others and represents the pride of its architects. Nevertheless, with the passage of time, this classical framework may require certain revamping to reflect the state of the art of the contemporary world if it is expected to protect the safety of civil aviation continuously and effectively.

4.7 Characterization of Crimes against the Safety of Civil Aviation

Among five international air law instruments adopted under the auspices of ICAO, three instruments, namely, The Hague and Montreal Conventions and the Supplementary Montreal Protocol, prescribe certain acts as offences. These acts are commonly referred to in ICAO's terminology as "acts of unlawful interference".[153] The term is used to avoid the reference to "terrorism" or "a terrorist act", which has created long-standing controversies regarding its definition.[154] This term had been well understood in ICAO, until the ICAO Council introduced in Annex 17 to the Chicago Convention the following definition:

> Acts of unlawful interference. These are acts or attempted acts such as to jeopardize the safety of civil aviation and air transport, i.e.:
> · unlawful seizure of aircraft in flight,

152 C-WP/12851, *supra* note 143 at para. 2.1.2.7.

153 *See*, for example, the Report of the 33rd Session of the Legal Committee, Attachment D, which defines an act of unlawful interference as "an offence in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970, or the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971, and any amendment in force at the time of the event."

154 *See*, for example, "Agreed Definition of Term 'Terrorism' Said to be Needed for Consensus on Completing Comprehensive Convention Against it", UN General Assembly GA/L/3276, 7 October 2005.

- unlawful seizure of aircraft on the ground,
- hostage-taking on board aircraft or on aerodromes,
- forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility,
- introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes,
- communication of false information such as to jeopardize the safety of an aircraft in flight or on the ground, of passengers, crew, ground personnel or the general public, at an airport or on the premises of a civil aviation facility.

This definition has been criticized as being inaccurate, since it is over-exclusive in some aspects and over-inclusive in others.[155] It is over-exclusive because it does not capture a number of the relevant offences under existing treaties. For instance, the definition does not cover the destruction or damage of air navigation facilities, which is an offence under Article 1, paragraph 1(d) of the Montreal Convention. On the other hand, the definition is also alleged to be over-inclusive because it goes beyond the scope of the existing aviation security conventions. For instance, the reference to the "introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes" is overly broad. The current treaties adopted under the auspices of ICAO do not contain any general prohibition on the introduction on board an aircraft or at an airport of a weapon or other device where the "criminal purposes" have no nexus to aircraft or airport safety.[156] A person using a knife to cut through another person's bag at an airport to steal valuables may be considered as introducing a weapon "for criminal purposes", but such a person is not punishable under the treaties.

The definition was clearly introduced impromptu with haste, without careful consideration of its implications. It demonstrated that the ICAO Council, like everyone else, is not necessarily always correct and therefore may also require checks and balances. It also raises the issue whether the term "unlawful interference" is the best description for the offences listed in the three treaties mentioned above. Indeed, the word "unlawful" may actually beg rather than answer the question regarding what is lawful or unlawful. The word "interference" in the context of Annex 17 may have a wider connotation than the offences listed in the three treaties. Perhaps all the offences under the treaties may be considered as "acts of unlawful interference", but not all "acts of unlawful interference" constitute crimes under the treaties. For instance, a mentally unstable person could climb the perimeter fence of an airport and therefore "unlawfully interfere" with aircraft operations; but his act may not amount to a crime prescribed by the treaties. A robbery of a large shipment of diamonds at an airport is a serious crime which may be considered as

155 The statement of the United States in one of the ICAO meetings relating to aviation security.
156 *Id.*

"unlawful interference", but it will not come within the purview of the treaties unless it endangers or is likely to endanger the safety at that airport.

In view of this, there seems to be a need to distinguish two types of offences. One type includes those cardinal offences endangering the safety of international civil aviation, which are subject to the specific treaty regimes, including the principle of *aut dedere aut judicare*. Another type includes those offences, and perhaps some acts, which are not subject to the specific treaty regimes, but still have security implications. From the point of view of Annex 17, the latter type also needs to be covered for the purpose of preventing or minimizing security risks. When a particular incident takes place on board an aircraft or at an airport, it might be difficult to determine at first sight whether the act in question will constitute one of the cardinal crimes regulated by the three treaties. For the purpose of prevention, the coverage of Annex 17 should necessarily be wider than that of the three treaties. The fundamental character of the offences established under these three treaties is that they target the safety of civil aviation. This is very clear from the Montreal Convention and its Supplementary Protocol. The offences mentioned therein contain the common element that the relevant act endangers or is likely to endanger the safety of the aircraft in flight or safety at the airport.[157] In The Hague Convention, its operative part does not specifically mention that an act of unlawful seizure of an aircraft must endanger or be likely to endanger the safety of the aircraft in flight, but such a prerequisite seems to be implicit as the preamble of the Convention states that "unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation". Accordingly, the offences under the three treaties are not simply "acts of unlawful interference", but should be characterized as crimes against the safety of civil aviation.

As recognized by the preambles of the three treaties, crimes against the safety of civil aviation are a matter of grave concern to the international community. Could they be regarded as akin to crimes against humanity? After the abhorrent attacks on 11 September 2001, numerous statesmen and commentators considered the attacks as crimes against humanity. As Cassese observes:

> The terrorist attack of 11 September has been defined a crime against humanity by a prominent French jurist and former Minister of Justice, Robert Badinter, by the UN Secretary-General Kofi Annan, as well as by the UN High Commissioner for Human Rights, Mary Robinson. Distinguished international lawyers have taken the same view. Indeed, that atrocious action exhibits all the hallmarks of crimes against humanity: the magnitude and extreme gravity of the attack as well as the

157 *See supra* notes 77 and 98 and accompanying text.

> fact that it has targeted civilians, is an affront to all humanity, and part of a widespread or systematic practice.[158]

Accordingly, there seems to be a prevailing view that large-scale acts exhibiting the atrocious elements of the 11 September attacks, or similar attacks, fall within the notion of a crime against humanity, so long as they meet the requirements of that category of crime.[159]

There are of course cases in which crimes against the safety of civil aviation do not reach the magnitude of 11 September and therefore may not fulfil the "widespread or systematic" requirement of crimes against humanity. In those cases, can these crimes also be considered as "an affront to all humanity"? There have been suggestions from early on that hijackers be treated as airborne analogues of pirates and characterized as "*hostis humani generis*", enemies of the human race.[160] Undeniably, piracy, hijacking and other serious crimes covered by international law share similar features in their treatment, such as wide jurisdiction over the offences, severe punishment of the offenders, and strong reaction by the international community as a whole to the serious threats presented by the offences.

The existence of universal or quasi-universal jurisdiction may be considered as one of the indicators of the seriousness of the crime in question. Piracy has been subject to universal jurisdiction by international customary law. While the term "universal jurisdiction" is not used in The Hague Convention, the wide jurisdictional grounds provided by the Convention, coupled with the provision that "this Convention does not exclude any criminal jurisdiction exercised in accordance with national law",[161] suggest that universal jurisdiction is not prohibited. As pointed out by Judge Oda in his dissenting opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*:

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158 Cassese, A., "Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law" (2001)12 *EJIL* 993 at 994**.** According to Cassese**,** Badinter and Annan have made statements to the French radio and CNN respectively. For the statement of Robinson, see *UN Daily Highlights*, 25 September 2001, http://www.un.org/News/dh/20010925.htm.

159 Cassese, *id*. Arnold, R., "The Prosecution of Terrorism as a Crime Against Humanity", 64 ZaöRV 979 (2004); Ratner, M., "A Crime against Humanity and not War: Making Us Safer at Home and Stopping Carnage Abroad" (2001) HeinOnline -- 58 Guild Practitioner 131; Mallat, C., "The original sin: 'Terrorism' or 'crime against humanity'?" (2002) 34 *Case Western Reserve Journal of International Law* 245. Opinions are still divided whether such a crime may be prosecuted under the current Statute of the International Criminal Court or not. Moreover, Cassese is of the view that in considering the attacks of 11 September as a crime against humanity, no special account should be taken of one of the specific features of terrorism, namely, the intent to spread terror among civilians.

160 Joyner, N. D., *Aerial Hijacking as an International Crime* (Leiden: A. W. Sijthoff, 1974).

161 Art. 4, para. 3 of The Hague Convention and Art. 5, para. 3 of the Montreal Convention.

> From the base established by the Permanent Court's decision in 1927 in the "Lotus" case, the scope of extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc. Universal jurisdiction is increasingly recognized in cases of terrorism and genocide.[162]

In fact, the jurisdiction under The Hague Convention, and also that under the Montreal Convention is broader than the jurisdiction under the Genocide Convention, since the latter only refers to "a competent tribunal of the State in the territory of which the act was committed" and an "international penal tribunal".[163] The Hague and Montreal Conventions are also comparable to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[164] Arguably they even go beyond the traditional jurisdictional ground for piracy since the latter authorizes but does not oblige States to

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162 [2002] *ICJ Reports* 3 at 51.

163 *Convention on the Prevention and Punishment of the Crime of Genocide*, New York, 9 December 1948, 78 *UNTS* 277. Art. VI of the Convention provides: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." For the jurisdiction of The Hague Convention, see *supra* notes 73 and accompanying text.

164 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 10 December 1984, 1465 *UNTS* 85. Art. 5 of that Convention reads:

1.Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:

1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
2. When the alleged offender is a national of that State;
3. When the victim was a national of that State if that State considers it appropriate.

2.Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in Paragraph 1 of this Article.

3.This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

The wording and even the structure of this article follow the pattern of Art. 4 of The Hague Convention, except its para.1, subparas. 2 and 3 concerning the new grounds of jurisdiction based on active and passive nationalities. With respect to these new grounds of jurisdiction, they are not reflected in The Hague and Montreal Conventions but are reflected in Art. 7 of the *International Convention for the Suppression of the Financing of Terrorism*, to which The Hague and Montreal Conventions are annexed as its integral part. The ICAO Legal Sub-Committee has also proposed to amend The Hague and Montreal Conventions to include these jurisdictional grounds. See *supra* note 144, the Report of the Second Meeting of the Special Committee on the Preparation of Legal Instrument(s) Addressing New and Emerging Threats (June 2008), Appendices 4 and 5. Based on this widespread and representative practice, it may be argued that there is emerging *opinio juris* that the jurisdiction on the basis of active and passive nationalities in the context of The Hague and Montreal Conventions have been accepted as customary rule independent of any provision of a treaty.

exercise the jurisdiction.[165] On the basis of this, it seems safe to conclude that as far as jurisdiction is concerned, the international community has given at least the same serious treatment to aircraft hijacking, as well as to other crimes against the safety of civil aviation, as it does to such international crimes as piracy, genocide and torture.

The severity of punishment regarding hijacking and other crimes against the safety of civil aviation is also comparable to piracy and other international crimes. Piracy is a criminal act which every State is authorized to punish. Crimes against the safety of civil aviation are declared by both The Hague and Montreal Conventions as "punishable by severe penalties". Arguably, the reference to "severe penalties" is stronger than "to provide effective penalties" in Article V of the Genocide Convention and "punishable by appropriate penalties which take into account their grave nature" in Article 4 of the Torture Convention.

Last but not least, piracy and hijacking represent serious threats to the international community as a whole and call for global concerted action to suppress them. Gentili wrote in 1612: 'Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they find no protection in that law.'[166] The same applies to hijackers and other similar attackers against the safety of civil aviation. Their vicious attacks on humanity transcend individual States to become the grave concern of the international community. They are "common enemies" and "scorners of the law of nations". Accordingly, global concerted action is required so that "they are attacked with impunity by all".

In view of the foregoing, there are good reasons to argue that hijacking, as well as other crimes against the safety of civil aviation under the Montreal Convention have been ranked by the international community as serious international crimes having similar status as the crimes against humanity, piracy and torture. They constitute an affront to all humanity and are punishable by all.

4.8 Concluding Remarks

From the treaty-making activities of ICAO concerning the protection of civil aviation against acts of unlawful interference, one could discern a clear trend which is moving in the direction of strengthening the paramount consideration of aviation safety, and limiting the scope of the traditional freedom of action by States. In its efforts to curb terrorism and other acts of unlawful interference,

165 See *supra* note 73.

166 Alberico Gentili, De Iure Belli Libri Tres (1612) 423 (John C. Rolfe trans., William S. Hein & Co., Inc., 1995).

the international community has expanded, step by step, the scope of treaty protection for civil aviation operations. At the initial stage, the protection by treaties was extended to aircraft *in flight*, as provided in the Tokyo and The Hague Conventions; at a later stage, treaty protection was extended to aircraft *in service* and to air navigation facilities under the Montreal Convention; it was later extended to airports serving international civil aviation and to aircraft *not in service* under the Supplementary Protocol. There are also ongoing efforts to extend the protection directly to persons on board aircraft and at airports by criminalizing certain acts of using biological, chemical and nuclear substances. Moreover, efforts have been made to apply the treaty provisions not only to those persons who actually commit the acts of hijacking, sabotage, and other acts against the safety of international civil aviation, but also to the masterminds of such acts, such as directors and organizers. The international community has gradually progressed from its initial reluctance to deny political asylum to aerial hijackers, to the predominant, if not the unanimous view, that the political offence exception should not apply to this type of perpetrator. There is, to say the least, an emerging consensus that abhorrent terrorist acts such as those committed on 11 September 2001 constitute crimes against humanity and therefore the perpetrators should not be allowed to find any safe haven. The firm determination of the international community to suppress and prevent these acts, the wide jurisdictional grounds for the offences and the exclusion of the political offence exception all point to the conclusion that like pirates, perpetrators of hijacking and sabotage against civil aviation must be declared as *hostis humani generis*, an enemy of all mankind.[167] Parallel to this development, it has also been recognized that preventive action is more important then punitive action *ex post facto*. Consequently, international regulation has been extended to such areas as the manufacture of plastic explosives. This exercise, coupled with the universal security audit programme initiated by ICAO, demonstrate the increasing presence of international authority in the traditionally exclusive domain of sovereign States, thereby reinforcing the belief that the safety of international aviation is a common concern. It should be pointed out, however, using a new treaty for preventive action appears to be an exception to the rule, since most preventive measures are embodied in the SARPs and other less binding regulatory material, whereas the treaty regimes are reserved for more serious crimes.

167 See *infra* note 83 in Ch.5.

5 Enhancing Aviation Safety through the Rule of Law

5.1 Safety Obligations and Fundamental Norms

5.1.1 Safety and Obligations *Erga Omnes*

As demonstrated in earlier chapters, the main connotations of safety obligations include the duty to provide safety oversight, the duty to refrain from the use of weapons against civil aircraft in flight, and the duty to punish certain criminal acts endangering the safety of civil aviation. Further analysis is necessary as to the nature of these obligations. Are they obligations *inter se* on the basis of reciprocity or obligations toward the international community as a whole, namely, obligations *erga omnes*? Determination of this issue may have a bearing upon the enforcement of these obligations and ICAO's present and future role in the aviation community.

According to Simma, now a judge in the International Court of Justice, traditional international law is essentially "bilaterally minded"; it "does not generally oblige States to adopt a certain conduct in the absolute, *urbi et orbi*, as it were, but only in relation to the particular State or States (or other international legal persons) to which a specific obligation under treaty or customary law is owed."[1] In the words of the International Court of Justice in its *Reparation for Injuries* opinion, "only the party to whom an international obligation is due can bring a claim in respect of breach".[2] As Simma further observes, "an injured State may also renounce such a claim unilaterally. In this case, third States will have no possibility to object to such a course of action."[3]

The development of contemporary international law has gone beyond traditional bilateralism and focused more on community interest. In its advisory opinion in the *Reservations to the Genocide Convention* case, the ICJ pointed out that in such a convention, "the contracting States do not have any interests of their own; they merely have, one and all, common interest, namely, the

1 Simma, B., "From Bilateralism to Community Interest in International Law" (1994:IV) 250 *RdC* 217 at 230.

2 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, [1949] *ICJ Reports* 174 at 181.

3 Simma, *supra* note 1, at 231.

accomplishment of those high purposes which are the *raison d'être* of the convention"[4] In the *Barcelona Traction* case, the Court manifestly referred to this type of obligation as obligation "*erga omnes*" (towards all) in the following *obiter dictum*:

> … an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character.[5]

Since then, the concept of obligations *erga omnes* has been a fascinating subject repeatedly discussed in the judgements of the ICJ,[6] in the reports of the International Law Commission, and in innumerable publications.[7] While its legal

4 Advisory Opinion, [1951] *ICJ Reports* 15 at 23. See also, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, in UN General Assembly A/CN.4/L.682, 13 April 2006 at 195 (hereinafter referred to as "ILC Study").

5 *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain) Judgement*, [1970] *ICJ Reports* 3 at 32.

6 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) Merits, Judgement* [1986] *ICJ Reports* 14 at 100-101 para. 190; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] *ICJ Report*s 136 at 155 (hereinafter referred to as "the Wall case").

7 ILC Study, *supra* note 4; Seiderman, I. D., *Hierarchy in International Law: The Human Rights Dimension* (Antwerpen: Intersentia, 2001) at 123; Allott, P., *Eunomia. New Order for a New World* (Oxford: Oxford University Press, 1990) at 324; Weil, "Towards Relative Normativity in International Law?" (1983) 77 *AJIL* 413, Tams, C. J., *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005).

significance is still hotly debated,[8] the concept itself "has been deeply rooted in international practice".[9]

5.1.1.1 Obligations towards "the International Community as a Whole"

One of the characteristics of obligations *erga omnes* is their universality and non-reciprocity, i.e., they are obligations of a State "towards the international community as a whole", which are "the concern of all States". The corresponding rights to these obligations "have entered into the body of general international law" or "are conferred by international instruments of a universal or quasi-universal character."

The reference to "international community as a whole" in the *Barcelona Traction* case could hardly be a pure coincidence, if one recalls that one year before that judgement, the *Vienna Convention on the Law of Treaties* (the Vienna Convention) defined the "peremptory norm (*jus cogens*)" as "a norm accepted and recognized by the international community of States as a whole".[10] Subsequently, the term has been used in various fora "in an almost inflationary way".[11] Nevertheless, "the concept denotes an overarching system which embodies a common interest of all States and, indirectly, of mankind."[12] It is the prioritization of common interest as against the egoistic interests of individuals that distinguishes a "community" from its components.[13] Based on this priority, some commentators tend to consider obligations *erga omnes* as "non-reciprocal" or "non-bilateralisable", in the sense that they exceed the reciprocal legal relations between pairs of States, and all States have a legal

8 For the views expressing certain reservation, see, for example, the separate opinion of Judge Higgins, as she then was, in the *Wall* case, in which she stated that "[t]he Court's celebrated dictum in *Barcelona Traction* … is frequently invoked for more than it can bear. Regrettably, this is now done also in this Opinion … That dictum was directed to a very specific issue of jurisdictional *locus standi*. … It has nothing to do with imposing substantive obligations on third parties to a case." She added: "That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of *'erga omnes'*. … The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*." [2004] *ICJ Report* at 1009 (separate opinion of Judge Higgins) paras. 37 and 38, see also, ILC Study, *supra* note 4 at 201.

9 ILC Study, *supra* note 4 at 193.

10 Article 53, Vienna Convention on the Law of Treaties. May 23, 1969, 1155 UNTS 331, 8 International Legal Materials (1969) 679.

11 Simma, *supra* note 1 at 244. See, for example, UN General Assembly resolution ES-10114 adopted on 8 December 2003 at its Tenth Emergency Special Session, which underlines the "unanimous opposition by the international community" to the construction of the wall in the occupied Palestinian territory, as cited in the *Wall* case, *supra* note 6 at 140. For other examples, see Dupuy, R. J., *La communauté internationale entre le mythe et l'histoire* (Paris: Economica, 1986) at 15. Allott, *supra* note 7.

12 Tomuschat, C., "Obligations Arising for States without or against their Will" (1993) 241 *RdC* 209 at 227.

13 Dupuy, *supra* note 11at 15.

interest in their observance.[14] These obligations "are grounded not in an exchange of rights and duties but in an adherence to a normative system".[15]

The Chicago Convention was adopted in 1944, when the bilateral or reciprocal mode of operation was prevailing in inter-State relationships, and the concept of *erga omnes* was not yet proclaimed. There is evidence, however, that certain safety obligations "are grounded not in exchange of rights and duties but in an adherence to a normative system".[16] One of the most important aims and objectives of ICAO, as pronounced in Article 44 of the Chicago Convention, is to insure "the safe and orderly growth of international civil aviation throughout the world". The underlying rationale clearly "denotes an overarching system which embodies a common interest of all States and, indirectly, of mankind."[17] To illustrate, according to Article 33 of the Chicago Convention, certificates of airworthiness and certificates of competency and licenses must at least meet the minimum standards established under the Convention. If a member State does not impose the minimum standards in the issuance of the certificates or licenses, other member States may refuse to recognize the validity of certificates and licenses issued by the non-complying State but could not take retaliatory action by, for example, reducing their own requirements for the certificates of airworthiness for aircraft flying to that State. The non-complying State, on the other hand, could not legally refuse to recognize the validity of certificates and licenses issued by other States, solely on the ground that the latter States have refused to recognize the validity of the certificates and licenses issued by the former. The safety standards laid down within the framework of the Chicago Convention are designed to protect the common interests of the international civil aviation community and to enhance the global normative system for the safety of civil aviation. They are not pronounced on the basis of *quid pro quo*, under which States could derogate from obligations *inter se.* A State is obliged to comply with the requirement irrespective of how other States may have behaved. In other words, States are not pursuing their national, individual interests. Instead, they had a "common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention".[18] The obligations are therefore incurred

14 Annacker, C., "The Legal Regime of Erga Omnes Obligations under International Law" (1994) 46 *Austrian Journal of Public International Law* 131. She stated that "The distinguishing feature of an obligation *erga omnes* is its non-bilateral structure." See, also, the summary of Tams concerning the structural approach, *supra* note 7 at 130 *et seq*.

15 Provost, R., "Reciprocity in Human Rights and Humanitarian Law" (1994:IV) 65 *BYIL* 383 at 386.

16 See Provost, *id*.

17 See Tomuschat *supra* note 12.

18 A statement in *Reservations to the Convention on Genocide, Advisory Opinion, supra* note 4 at 23. See also ILC Study, *supra* note 4 at 195.

toward the international community as a whole or at least towards all of the member States of ICAO.[19]

Even before the pronouncement of the celebrated dictum in the *Barcelona Traction* case, Fitzmaurice, who later became a judge at the ICJ, already mentioned that certain obligations are in the nature of *jus cogens*, compliance with which is "not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal *vis major*".[20] He specifically mentioned, for example, the obligation to maintain certain standards of safety of life at sea and emphasized that "no amount of non-compliance" on the part of other States "could justify a failure to observe" the obligation. This remark applies, *a fortiori*, to the obligation to maintain certain standards of safety of life in the air, since civil aviation is not only essentially international by its nature, but is also more vulnerable than maritime transport. "When safety standards and procedures are involved on international flights, one cannot even take the position that non-compliance by a sovereign State affects only the citizens of that State. Any other State that receives flights of aircraft registered in the non-complying State has every reason to be concerned about whether international standards and procedures are in fact being followed with respect to such aircraft and crews."[21] For this reason, the ICAO Assembly recognizes that a primary objective of ICAO is to ensure the safety of international civil aviation "worldwide", and that member States also have this responsibility "both collectively and individually".[22] In a nutshell, certain safety obligations, such as those under Article 33 of the Chicago Convention, are not designed for reciprocal purposes, but for higher aims. They are grounded "in an adherence to a normative system", namely, a normative system for promoting the safe and orderly development of international civil aviation.

5.1.1.2 "The Importance of the Rights Involved"

The obligations owed to the international community could acquire *erga omnes* status only "[i]n view of the importance of the rights involved".[23] While the Court does not indicate the criteria for determining the degree of importance,

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19 It may be argued that the obligations arising from the Chicago Convention are obligations among the parties to that treaty. However, since the Chicago Convention has 190 parties, it would most likely meet with the criteria of "international instruments of a universal or quasi-universal character" as mentioned in *Barcelona Traction* case. For all practical purposes, it may be argued that the 190 States parties to the Chicago Convention do represent the international community as a whole.

20 Fitzmaurice, G., "The General Principles of International Law" (1957:II) 92 *RdC* 1 at 120.

21 Kotaite, A., *supra* note 221 in Ch.2.

22 Assembly Resolution A35-7; the 1st and 2nd paras, in ICAO Doc 9848, *supra* Ch.1, note 48 at I-60.

23 *ICJ Reports, supra* note 5; see also Tams, *supra* note 7 at 136.

it does state that obligations *erga omnes* may derive "from the principles and rules concerning basic rights of the human person, including the protection from slavery and racial discrimination".[24] A significant number of scholars appear to agree that obligations *erga omnes* reflect "certain overriding universal values", such values include "a sense of humanity" and "respect for human rights".[25] In its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court mentions that a great many rules of humanitarian law applicable in armed conflict are fundamental to the respect of the human person and "elementary considerations of humanity". These rules "incorporate obligations which are essentially of an *erga omnes* character."[26] From this, it could be deduced that "elementary considerations of humanity" is one of the core values underlying the concept of obligations *erga omnes*.

Aviation safety is directly linked to the most important basic human right, the right to life. As pointed out by Ramcharan, "[t]here can be no issue of more pressing concern to international law than to protect the life of every human being from unwarranted deprivation."[27] A threat to aviation safety is a threat to life. According to a psychological study, safety is one of the few "basic human needs like food, shelter and health".[28] The need for safety is even more obvious in the context of aviation. As stated in a working paper presented by the Kingdom of the Netherlands: "Aviation takes place in a hostile environment, unfriendly to human beings, in which a passenger has no control and is enclosed in a vulnerable cocoon, outside of which human life cannot be supported."[29] Under these circumstances, it is of paramount importance to offer protection against threats to life.

The link between aviation safety and elementary consideration of humanity is convincingly demonstrated in cases relating to shooting-down of civil aircraft as well as terrorist attacks on civil aviation. When the ICAO Assembly adopted,

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24 *Id.*

25 For more discussion on obligations *erga omnes* and "universal values", see Gowlland-Debbas, V., "Judicial Insights into Fundamental Values and Interests of the International Community", in Muller, A.S., et al (eds.), *The International Court of Justice. Its Future Role after Fifty Years* (The Hague, Kluwer, 1977) at 335-342; Tam, *supra* note 7 at 3; ILC Study, *supra* note 4 at 195 para. 385. For the influence of universal values on international law, see Schrijver, N., "The Changing Nature of State Sovereignty" (1999) 70 *BYIL* 65 at 89, where he mentions that in addition to international peace and security, other universal values include a sense of humanity, respect for human rights, sustainable development of all countries, alleviation of poverty and environmental conservation.

26 *ICJ Report*s, *supra* note 8 at 199 (para. 157).

27 Ramcharan, B.G., "The Concept and Dimensions of the Right to Life" in Ramcharan, B.G.. ed. *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1985) 1 at 2.

28 ICAO Working Paper, DGCA/97-IP/5, "Safety Oversight, An International Responsibility", 20 October 1997 at para. 5.5.

29 *Id.* at para. 5.5.

on 10 May 1984, Article 3 *bis* to the Chicago Convention, prohibiting the use of weapons against civil aircraft in flight, the Assembly declared that the safety and the lives of persons on board civil aircraft must be assured in "keeping with elementary considerations of humanity".[30] As mentioned previously, the case decided by the constitutional court of Germany further emphasizes that the right to life as such should not be deprived of.[31] Moreover, reacting to the abhorrent terrorist acts on 11 September 2001, the ICAO Assembly strongly condemned such terrorist acts as "contrary to elementary considerations of humanity".[32] In summary, aviation safety, in the final analysis, is rooted in the elementary considerations of humanity.

5.1.1.3 Concern of All States

The very nature of obligations *erga omnes* determines that such obligations are the concern of all States. Consequently all States can be held to have a legal interest in their protection. "What this probably means is that it is only through being a member of this community that an individual State requires a legal interest in the protection of such norms. …Only if the community of States is entitled to demand fulfillment of an obligation we are [sic] in the presence of a true rule with effect *erga omnes.*"[33] While obligations *erga omnes* do not deprive an individual State of the capacity to react to the breach of an obligation, their distinct character is reflected in the capacity of other States which are not directly injured to take counter-measures against the State which is in breach of such obligations.

In the context of civil aviation, two instances have been cited by commentators as examples of counter-measures against the breach of *erga omnes*.[34] The first relates to the "Bonn Declaration on Air-Hijacking" of 1978,[35] in which the seven heads of State or government of the economic summit (G7) undertook to act in concert against any country harbouring hijackers. In 1981, when Afghanistan provided refuge to the hijackers of a Pakistani aircraft, these seven States proposed to suspend all flights to and from Afghanistan and called upon all States which share their concern for air safety to take appropriate action to compel Afghanistan to honour its obligations under The Hague Convention. The non-punishment of hijackers is therefore regarded as "a violation of an

30 Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 3 *bis*], ICAO Doc 9436.

31 See Ch. 3, in particular 3.1.3 "Revisiting Article 3 *bis* in the Context of 11 September 2001".

32 ICAO Assembly Resolution A33-1: "Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation" at the third paragraph, in ICAO Doc 9848, *supra* note 22 at VII-1.

33 Simma, *supra* note 1 at 298.

34 Frowein, J. A., "Reaction by Not Directly Affected States to Breaches of Public International Law" (1994:V) 248 *RdC* 345 at 417-420. Tam, *supra* note 7 at 217 and 225.

35 17 *ILM* (1978) at 1285.

obligation for the safety of international air traffic."[36] The action taken by the seven States implicitly recognized, at least from their point of view, that States are under an obligation *erga omnes* to refrain from providing safe haven for hijackers. When such an obligation is breached, even States which are not directly injured may take counter-measures against the violating State.

The second example of counter-measures relates to the aerial incident involving the Korean airliner, Flight 007, which was shot down on 1 September 1983 by the Soviet Union. In this case, despite the fact that they were not directly injured by the act of the Soviet Union, certain States still took action to suspend the landing rights of Soviet civil aircraft in their territory. Moreover, the ICAO Council adopted a resolution on 6 March 1984, pointing out that such use of armed force "constitutes a grave threat to the safety of international civil aviation" and "is incompatible with the norms governing international behaviour and elementary considerations of humanity."[37] This seems to support that the prohibition of the use of weapons against civil aircraft in flight is an obligation *erga omnes*. The breach of such an obligation will entitle any State to take counter-measures whether or not it has suffered any individual injury.

While there is still controversy on the issue of third party intervention, the above-mentioned actions of third parties lend some support to the argument that the outlawing of hijacker-harbouring and the prohibition of the use of weapons against civil aircraft in flight may be considered as rules reflecting obligations *erga omnes.* With respect to the duty to provide safety oversight, further analysis is required because such a duty involves positive prescriptions. Some doubts have been expressed in academic circles whether positive obligations may acquire *erga omnes* status.

5.1.1.4 Positive Prescriptions of Obligations Erga Omnes

The examples of obligations *erga omnes* cited by the International Court of Justice, such as the outlawing of acts of aggression and of genocide, are viewed as negative obligations rather than positive obligations.[38] A negative obligation commands its bearer to abstain or refrain from performing certain acts, whereas a positive obligation commands its bearer to do or perform certain acts.[39] Since obligations *erga omnes* in international law are considered analogous to public law obligations or public policy in domestic law,[40] views have been

36 Frowein, *supra* note 34 at 418.
37 ICAO Doc 9416, C/1077, C-Min, Extraordinary, *Minutes* (1983) at 59. See also *supra* Ch.3, note 24.
38 Ragazzi, M., *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997) at 133.
39 Austin, Lectures on Jurisprudence at 346.
40 ILC Study *supra* note 4 at 200 para. 395.

expressed that all rules of public policy "are merely disabling", in the sense that they can do no more than prohibit "anything contrary to the supreme interests of international society."[41] Moreover, "the implementation of positive prescriptions depends on the particular circumstances, which may or may not allow a positive prescription to achieve its stated aim."[42] Consequently, some writers are inclined to hold the view that obligations *erga omnes* must have a prohibitory content.[43]

If this reasoning is followed, the duty to provide safety oversight will not qualify as an obligation *erga omnes*. Nevertheless, even if the examples cited in the famous *orbiter dictum* of the *Barcelona Traction* case may be considered as only encompassing negative obligations, it does not mean the ICJ has foreclosed the possible existence of obligations *erga omnes* in positive prescriptions. On the contrary, there are some instances in which the Court refers to positive rules in the context of obligations *erga omnes*, since negative obligations will also give rise to corresponding positive action.[44] In its Advisory Opinion in the *Wall* case, the Court, in affirming that the right of peoples to self-determination has an *erga omnes* character, refers to the provision of the UN General Assembly resolution 2625 (XXV) that "[e]very State *has the duty to promote*, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and *to render assistance* to United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . ."(emphasis added).[45] From this, it may be perceived that the right of self-determination, which has an *erga omnes* character, also carries with it certain positive obligations.

International law in general has long evolved from "an essentially negative code of rules of abstention to positive rules of cooperation".[46] Ramcharan observes:

> [I]n its modern sense, the right to life encompasses not merely protection against intentional or arbitrary deprivation of life, but also places a duty on the part of each government to pursue policies which are designed to ensure access to the

41 Schwarzenberger, G., "International Jus Cogens?" at 469, cited by Ragazzi, *supra* note 38 at 151.

42 Ragazzi, *supra* note 38 at 152.

43 *Id.* at 153.

44 In the *Corfu Channel* case, the prohibition of unnotified mining will give rise to the positive obligation to give notice, see *supra* note 11 in Ch.3. In the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*) *Judgment of 27 February 2007* [2007] *ICJ Reports* 1 at 44 et *seq.* at paragraphs 155-179, the prohibition of genocide, which could be characterized as a negative obligation, entails the positive obligation to prevent and punish the acts of genocide.

45 *Supra* note 6, at paragraph 150.

46 Friedmann, W., The Changing Structure of International Law (New York, 1964) at 62.

> means of survival for every individual within its country. If, after its best efforts, in good faith, a government is unable to meet the survival requirements of its own people, then a residual duty vests upon the international community to assist through appropriate forms of international cooperation.[47]

In international civil aviation, numerous legal obligations involve both negative and positive prescriptions. For instance, the obligation to refrain from resorting to the use of weapons against civil aircraft in flight may be regarded as a negative prescription, but the corresponding and incidental obligation to have due regard for the safety of navigation of civil aircraft when issuing regulations for aircraft used in military and police services is of a positive nature.

In the context of the obligations to prevent unlawful interference against civil aviation, positive prescriptions are not limited to undertakings corresponding or incidental to prohibitive prescriptions, but have been developed into a system which is predominantly composed of positive principles and rules. To illustrate with the Montreal Convention of 1971, when outlawing certain acts of sabotage against the safety of civil aviation, the Convention also lays down certain correspondent obligations, such as the famous obligation to extradite the alleged offenders or submit the case to competent authorities for the purpose of prosecution, as well as the obligation to provide assistance in criminal proceedings. The Convention goes even further than that by providing that the contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in the Convention.[48] Moreover, beyond the Montreal Convention, Annex 17 to the Chicago Convention requires member States of ICAO to establish a national aviation security programme, while the MEX Convention imposes obligations upon its State parties regarding a detection system against plastic explosives. All these form the international system of positive prescriptions, without which the global concern for aviation safety would not be adequately addressed.

With respect to the positive prescriptions of obligations relating to safety oversight, the main issue is how to measure a State's compliance. Unlike prohibitive rules which have the virtue of binding in absolute terms, "the implementation of positive prescriptions depends on the particular circumstances, which may or may not allow a positive prescription to achieve its stated aim."[49] The implementation of safety oversight obligations will depend upon available financial and technical means. Due to differing stages of development, not all States will achieve the same results from their respective safety oversight functions. However, this does not mean that positive prescriptions regarding safety oversight could not find their place in obligations *erga omnes*.

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47 Ramcharan, *supra* note 27 at 6.
48 Article 10, para.1.
49 Ragazzi, *supra* note 38 at 152.

As mentioned above,[50] the obligation to promote the realization of the right of self-determination does not prevent the principle of self-determination from obtaining the *erga omnes* status. Similarly, the existence of positive prescriptions concerning the duty of safety oversight should not present obstacles to its being categorized as an obligation *erga omnes*.

There has been consensus in ICAO that member States "collectively and individually" assume the responsibility for "ensuring the safety of international civil aviation".[51] By virtue of this conviction, member States are required to do something to promote aviation safety. They certainly do not have the right to do nothing. This obligation does not require a State to guarantee that there is no aerial accident in its jurisdiction, but it does require the State to take all necessary measures to implement the safety standards, or at least to demonstrate that it is impossible to take such measures. A practical question may arise concerning how to evaluate the extent and specificity of the obligation. "In this area, the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance."[52] The ICAO audit process may provide means to verify whether a particular State has fulfilled the obligation of safety oversight under particular circumstances. In this connection, it should be noted that Ragazzi, while generally favouring the argument that obligations *erga omnes* must have a prohibitive content, does indicate that "the identification and enforcement of positive obligations *erga omnes* would require, in practice, a high degree of cohesion within the international community".[53] The initiatives of ICAO in establishing audit programmes, and their follow-up, may be considered as one stepping stone toward the realization of such cohesion within the international civil aviation community.

In summary, safety obligations are laid down not for the interest of an individual State, but for a higher purpose: the safe and orderly development of international civil aviation. These obligations "are grounded not in an exchange of rights and duties but in an adherence of a normative system."[54] In essence, they are intrinsically linked to elementary considerations for humanity. Such considerations become important in an aviation context with the rapid growth of this mode of transportation and with the increase of terrorist activities. This concern transcends territorial boundaries and nationalities, and has become the concern of the international community as a whole. One can find some evidence to demonstrate that when aviation safety is jeopardized due to such acts as hijacking or the use of weapons against civil

50 *Supra* notes 6 and 45, the *Wall* case.

51 Assembly Resolution A35-7, *supra* note 22, superseded by Resolution A36-2 of the same title, in ICAO Doc 9902, *Assembly Resolutions in Force* (as of 28 September 2007) at I-91.

52 Judgement of the *ICJ* in the case *Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* note 44 at para. 430.

53 Ragazzi, *supra* note 38 at 153.

54 ILC Study *supra* note 4 at 198, note 552; Provost, *supra* note 15 at 386.

aircraft in flight, the reaction of third parties which are not directly injured could come forward. To that extent, outlawing of hijacking and similar acts of sabotage, as well as the prohibition of the use of weapons against civil aircraft in flight, may have acquired or are in the process of acquiring an *erga omnes* character. As for the duty to provide safety oversight, doctrinal commentators have not yet reached consensus whether a positive duty to act could form an obligation *erga omnes*. However, there seems to be no legal obstacle to prevent such a duty from becoming an obligation *erga omnes*, particularly in view of its intrinsic link with the right to life.

5.1.2 Safety Obligations and *Jus Cogens*

Analysis of the relations between aviation safety and obligations *erga omnes* would be incomplete without any reference to the concept of a peremptory norm (*jus cogens*), since obligations *erga omnes* are "generally regarded as just another name for rules of *jus cogens* focusing on a different, but equally important and unavoidable element of these rules".[55] *Jus cogens* is defined in the Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[56]

The similarities between the concept of *jus cogens* and the concept of obligations *erga omnes* have been recognized by numerous writers.[57] Simma called them two sides of the same coin, namely, that of the existence of certain rules of international law which are, in the words of the ICJ, "the concern of all States".[58] Both concepts lay emphasis on the international community "as a whole"; the examples of obligations *erga omnes* given in the *Barcelona Traction* case largely coincide with the examples of peremptory norms mentioned by the International Law Commission during the drafting of the Vienna Convention.[59] However, the study of the International Law Commission has pointed out the difference between them: *jus cogens* norms have to do with the norm-

55 Von der Dunk, F. G., "Jus Cogens Sive Lex Frerenda: Jus Cogendum", in *Air and Space Law: De Lege Ferenda*, Essay in honour of Henri A. Wassenbergh (Dordrecht: Martinus Nijhoff, 1992) at 226. Frowein, *supra* note 34 at 364.

56 Article 53, *Vienna Convention on the Law of Treaties*, *supra* note 10.

57 Ragazzi, *supra* note 38 at 72. See also Von der Dunk, *supra* note 55, Wang, X., "The New Development of International Law in Environmental Field" (in Chinese), in *The Contemporary International Legal Issues*, edited by Shao, S. and Yu, M., (Wuhan University Publisher, 2002) at 288, Gomez Robledo, A., Le ius cogens international: sa genèse, sa nature, ses fonctions (1981:III) 172 *RdC* 9 at 158. Tams, *supra* note 7 at 140.

58 Simma, *supra* note 1 at 300.

59 Ragazzi, *supra* note 38 at 72.

ative "weight" of a norm, obligations *erga omnes* with its procedural "scope".[60] With respect to the "scope", obligations *erga omnes* give rise to a legal interest of all States, including those States which are not directly affected by the breach of the obligations. With respect to the "weight", *jus cogens* norms enjoy a higher legal rank than other norms and no derogation from them is allowed. Under Article 53 of the Vienna Convention, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Certain developments after the Vienna Convention also indicated that *jus cogens* may also render conflicting customary rules invalid. The same applies to a conflict between *jus cogens* and resolutions of international organizations, or unilateral acts of a State.[61] It should be further pointed out that all *jus cogens* create obligations *erga omnes*, but not all obligations *erga omnes* possess the non-derogatory character of *jus cogens*. According to Kadelbach, *jus cogens* "are of a peremptory nature from which no exception may be made, not even by consensus."[62]

Given their peremptory or non-derogative character, it is of paramount importance to be able to identify what norms constitute *jus cogens*. However, this has been proven to be a most controversial issue. There is no single authoritative list of *jus cogens*, nor any agreed criteria for determining what constitutes *jus cogens*. According to one school of thought, and in line with the terms of the Vienna Convention, the constitutive element of *jus cogens* is the consent or acceptance of States. Consent or acceptance is required not only for a norm to become a norm of international law, but also for a norm to gain the peremptory character. This is the so-called "double consent" requirement which consists of both *opinio juris* and *opinio juris cogentis*.[63]

The double consent requirement has been subject to criticism due to a "disturbing circularity" about it. "If it is the point of *jus cogens* to limit what may be lawfully agreed by States – can its content simultaneously be made dependent on what is agreed between States?"[64] "Some norms seem so basic, so important, that it is more than slightly artificial to argue that States are legally bound to comply with them simply because there exists an agreement

60 ILC Study, *supra* note 4 at 185 para. 367. See also *supra* note 83, the judgement of the International Criminal Tribunal for the former Yugoslavia in *Prosecution* at 260 para. 153.

61 See the remarks of Sir Elihu Lauterpacht, *infra* note 283.

62 Kadelbach, S., "*Jus Cogens*, Obligations *Erga Omnes* and other Rules – The Identification of Fundamental Norms", in Tomuschat, C., & Thouvenin, J., ed. *The Fundamental Rules of the International Legal Order – JUS COGENS and Obligations ERGA OMNES* (Leiden/Boston: Martinus Nijhoff Publishers, 2006) 21 at 29.

63 van Hoof, G.J.H., Rethinking the Sources of International Law (Deventer, 1983) at 164; Rozakis, C.L., *The Concept of Jus Cogens in the Law of Treaties* (Amsterdam, 1976) at 54.

64 ILC Study, *supra* note 4 at 190, para. 375. See Koskenniemi, M., *From Apology to Utopia. The Structure of International Legal Argument* (Reissue with a new Epilogue, Cambridge: Cambridge University Press, 2005) at 323-325.

between them to that effect".[65] In other words, *jus cogens* "involve not only legal rules but considerations of morals and of international good order".[66] They "consecrate values which are not at the disposal of individual States (any more)".[67]Non-compliance with them "would shock the conscience of mankind and be contrary to elementary considerations of humanity".[68]

This is reminiscent of the dichotomy between positivist and naturalist schools. According to positivists, represented by van Bynkershoek in early days, the sole origin of law is "the will of the State". "International law can *in logic* be reduced to a system of rules depending for their validity only on the fact that States have consented to them."[69] According to naturalists represented by Pufendorf, States submit to international law because their relations are regulated by the higher law – the "law of nature".[70] The concept of the "law of nature" denotes "the ideal law founded on the nature of man as a reasonable being, the body of rules which Nature dictates to human reason."[71] For practical purposes, each view has its own merit. On the one hand, States do not accept and recognize *jus cogens* at random, by accident or in a vacuum. They are guided by their judgement of values in their acceptance and recognition. In this sense, *jus cogens* are indeed value oriented. On the other hand, any value, no matter how important it is, will not be embodied in and elevated to *jus cogens* until it is accepted by at least the major components of the international community of States. Once it is accepted as a peremptory norm, no State can anymore derogate from it until the international community as a whole agrees to modify the existing norm with another norm having the same character.

The judgment of values may also be subject to change as the international community evolves. For instance, there were times when hijackers of civil aircraft could expect "a hero's welcome",[72] but today this is no longer the case. Not only have the acts of hijacking been declared serious criminal offences under the applicable treaty regimes, consensus has also been achieved to condemn "all acts of unlawful interference against civil aviation wherever

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65 Koskenniemi, M., "The Pull of the Mainstream [review article on T. Meron, Human Rights and Humanitarian Norms as Customary Law]" (1990) 88 *Michigan Law Review* 1946 at 1952.

66 Fitzmaurice, G., (1958) 2 Yearbook of International Law Commission, at 40 to 41.

67 Simma, *supra* note 1 at 292.

68 Koskenniemi, *supra* note 65 at 1952.

69 Starke, J.G., *An Introduction to International Law* (London: Butteworth & Co. (Publishers) Ltd., 1958) at 21; Steiner, H.J., "International Law, Doctrine and Schools of Thought in the Twentieth Century", in Bernhardt, R., (ed.), *Encyclopedia of Public International Law*, Vol II (1992) 1216, *supra* note 23 in Ch.2 at 1224; Ago, R., "Positivism", in Bernhardt, *id.* Vol. III at 1072.

70 Starke, *id.* at 10 and 19.

71 *Id.* at 19.

72 Faller, E., "Aviation Security: The Role of ICAO in Safeguarding International Civil Aviation against Acts of Unlawful Interference" (1992) XVII-I *AASL* 369 at 381.

and by whomsoever and for whatever reason they are perpetrated."[73] Whether a particular norm has at the particular juncture been elevated to a peremptory norm by the international community as a whole is a matter requiring careful analysis based on the available evidence of State practice. In this respect, as Von der Dunk points out, the ICJ would be the forum most suited and authorized to define what specific norms have to be considered as norms of *jus cogens*.[74] So far, the ICJ has been cautious. Reference to *jus cogens* is usually found in separate or dissenting opinions. In the *Wall* case, the Court refers to the rules of humanitarian law applicable in armed conflict as the rules incorporating "obligations which are essentially of an *erga omnes* character",[75] but avoids calling them "*jus cogens*" as many academic writers may have done.[76] In doing so, it "opens the floor for speculation as to whether *jus cogens* and *erga omnes* norms coincide."[77]

In the context of civil aviation, certain elements of safety obligations have been referred to as having the status of *jus cogens*. In the *Lockerbie* case, Judge Weeramantry quoted Bassiouni's statement that the widespread use of the formula *aut dedere aut judicare*, as stipulated in certain aviation security conventions, "attests to the existing *jus cogens* principle".[78] As previously mentioned, Fitzmaurice considers that the obligation to maintain certain standards of safety of life in the sea is in the nature of *jus cogens*.[79] The same rationale may apply to the obligation to maintain certain standards of safety of life in the air. There is even an argument, albeit questionable, that the duty to comply with the international standards and recommended practices under the Chicago Convention has become *jus cogens*.[80]

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73 ICAO Assembly Resolution A35-9: Consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference. Appendix A, General Policy, para. 1, in ICAO Doc 9848, supra note 22 at VII-4.

74 Von der Dunk, *supra* note 55 at 225. Referring to Article 66(a) of the Vienna Convention, under which a dispute concerning the application or the interpretation of the provisions relating to peremptory norms may be submitted to the ICJ, he is of the view that the ICJ has authority in questions of interpretation of international law, although the majority of States do not accept its compulsory jurisdiction. Refusal to accept jurisdiction only prevents those interpretations from being involved in specific cases.

75 *Supra* note 6 at para. 157.

76 Kadelbach, *supra* note 62 at 30-36.

77 *Id.* at 36.

78 *ICJ Reports* (1992) at 163. See Bassiouni, M. C., *International Extradition: United States Law and Practice* (1987) at 22; Gowlland-Debbas, V., "Judicial Insights into Fundamental Values and Interests of the International Community" in Muller, A.S., Raiè, D., & Thuránszky eds. *The International Court of Justice. Its Future Role after Fifty Years* (The Hague: Martinus Nijhoff Publishers, 1997) 327 at 335.

79 Fitzmaurice, G., "The General Principles of International Law" (1957:II) 92 *RdC* 1 at 120.

80 Abeyratne, R.I.R., "The Legal Status of the Chicago Convention and its Annexes" (1994) 19 Air Law 113. *Contra*, van Antwerpen, N., *Cross-border provision of Air Navigation Services with specific reference to Europe* (2007), doctoral thesis at Leiden University, ISBN 13 – 9789041126887, at 38.

The principle *aut dedere aut judicare* is applicable to the offences of hijacking of civil aircraft or sabotage against civil aviation. In earlier days, these offences were mentioned as "aerial piracy" in academic publications, borrowing the analogy of the concept of piracy in the law of the sea.[81] While international lawyers have not reached agreement on the list of *jus cogens*, there seems to be little controversy in regarding the prohibition of piracy as a peremptory norm.[82] The International Criminal Tribunal for the former Yugoslavia quoted the following statement of a court of the United States in *Filartiga v. Pena-Irala*, "the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind".[83] Compared with piracy, there is at least equal if not more revulsion in the contemporary world against hijacking and sabotage. As previously discussed, perpetrators of hijacking and sabotage against civil aviation, like pirates, should be declared as *hostis humani generis*.[84] Accordingly, the prohibition of hijacking and sabotage against civil aviation could be supported as a candidate for a peremptory norm.

The prohibition of the use of weapons against civil aircraft in flight may be considered as a norm of *jus cogens*. This norm is the natural and specific application of the norm of the prohibition of the use of force, which is widely regarded as *jus cogens.*[85] As demonstrated above, the paramount consideration of the right to life has rendered the statutory authorization to shoot down civil aircraft null and void.[86] Furthermore, if international humanitarian law prohibits hostilities directed at civilian populations in times of war,[87] the elementary considerations of humanity, which are "even more exacting in peace than in war",[88] will apply *a fortiori* to outlaw the use of force against civil aircraft in flight in times of peace.

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81 McWhinney, E., *Aerial Piracy and International Terrorism*, 2nd revised ed. (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1987).

82 Brownlie, I., *Principles of Public International Law*, (Oxford, 1992) at 513. He cites several the least controversial examples of *jus cogens*, including the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slave and piracy. See also Wang T., *International Law – Introduction*, in Chinese (Beijing University Publishers, 1998) at 242; Alexidze, L.A., "Legal Nature of *Jus Cogens* in Contemporary International Law" (1981:III) 172 *RdC* 219 at 262; Whiteman, M. M., "*Jus Cogens* in International Law with a Proposed List" (1971) 7 *Georgian Journal of International and Comparative Law* 625.

83 *Prosecutor v. Anto Furund_ija*, Judgement of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, 121 ILR (2002) 260, para.147. See *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980).

84 See *supra* Ch.4, note 158 *et seq*.

85 Brownlie, supra note 82 and other writers cited therein. See also von de Dunk, *supra* note 74 at 236.

86 *Supra* note 73 *et seq.* in Ch.4.

87 This rule is also widely regarded as *jus cogens*, See ILC Study *supra* note 4 at 189, para. 374.

88 The *Corfu Channel* case, [1949] *ICJ Reports* at 22. See *supra* note 11 *et seq.* in Ch.3.

As regards the positive prescriptions to promote aviation safety, it would be more difficult to find sufficient evidence to support their status as *jus cogens*. The notion of *jus cogens*, which "has undoubtedly been influenced by domestic laws that provide for the nullity of agreements conflicting with *order public* or pubic policy objectives",[89] seems to inherently carry with it prohibitive elements. The essence of the notion is to prohibit States from contracting out or opting out the requirements of the norms. Accordingly, the duty to comply with international standards and recommended practice under Article 37 of the Chicago Convention falls short of the status of *jus cogens* since Article 38 of the Convention specifically allows States to opt out such compliance.

Article 40 of the Chicago Convention contains another provision for contracting out certain obligations, which reads as follows:

> No aircraft or personnel having certificates or licenses so endorsed shall participate in international navigation, except with the permission of the State or States whose territory is entered.

The term "endorsed" is used in Article 39 of the Convention to denote cases which do not meet the standards established by ICAO. Consequently, as a general rule under Article 40, aircraft and personnel so endorsed could not participate in international navigation. An exception could be made if the flown State or States so permit. This arrangement may give rise to the impression that the issue concerning airworthiness and personal licensing could be "bilateralized", namely, handled by the relevant States *inter se* without the involvement of the international community. As long as the flown State has no objection, aircraft and personnel which fail to satisfy ICAO minimum standards are not the concern of other States. However, such interpretation is acceptable only when the following two conditions are fulfilled: firstly, the aircraft or the person holding the license does not carry nationals of any third State; and secondly, the flight so conducted does not involve the airspace of any third State or international air space. If these two conditions are not fulfilled, the matter is not simply a matter *inter se* but may affect the interests of other States. Safety requirements today are different from those of the time when Article 40 was drafted. Even at that time, the derogation clause was an exception rather than the rule. In the interest of the international community, restrictive interpretation may and should be given to this derogation clause with a view to limiting it to isolated cases. Nevertheless, derogation from the standards is still possible. Based on this, it is difficult to support the conclusion that the duty to comply with ICAO standards has become *jus cogens*.

From the point of view of *lex ferenda*, a question may be raised whether the concept of "safety first" may be elevated to an overriding principle similar to constitutional rules in national jurisdictions. Unlike domestic law which

89 ILC Study *supra* note 4 at 182, para. 361.

is "organized in a strictly hierarchical way, with the constitution regulating the operation of the system at the higher level",[90] international law is far from being settled with its system of constitution. The notion of *jus cogens* may offer one possible way for organization of such a system. Attempts have been made in the present study to identify phenomena in which safety considerations did prevail over other considerations. The provisions of Article 4 of the Tokyo Convention "derogate from the general provisions of the Chicago Convention (Articles 11-13)" in order "to preserve the safety of air navigation".[91] The importance of certain ICAO standards has outweighed the right of individual States to file differences.[92] Further reference could be made to Article 2 of the Tokyo Convention which provides that "[w]ithout prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination." On the basis of this provision, when the safety of the aircraft or of persons or property on board so requires, the Convention could be interpreted as authorizing action "in respect of offences against penal laws of a political nature". Viewed in the context of the later development in which the political offence exception yields to the need to punish hijackers and saboteurs,[93] one could perceive that safety considerations have been given overriding priority by international law-makers.

Are these legal phenomena demonstrating the willingness of the international civil aviation community to upgrade the concept of "safety first" to the status of *jus cogens*? It appears premature to jump to a positive conclusion. While States may agree that safety considerations may override certain specific rules under certain circumstances, overall endorsement of the status of *jus cogens* is not yet apparent. Moreover, there is also the need to define the exact scope and connotation of the concept of "safety first". For this purpose, it would be indispensable to have a judicial body similar to the constitutional courts in domestic jurisdictions, which could at the first instance apply the concept to specific facts. But the concept may be useful, since it may assist to provide solutions for some of the issues currently surrounding ICAO. For example, it may be used to resolve the issue regarding the protection of safety information, particularly information obtained in the course of investigations of aircraft accidents. In principle, safety information should be used for safety-related purposes, namely, to ensure that proper and timely preventive actions can be taken and aviation safety improved. Nevertheless, there have been instances in which safety information was used for disciplinary and enforce-

90 ILC Study, *supra* note 4 at 166, para. 324.
91 *Supra* notes 18 and 19 in Ch.4.
92 *Supra* notes 144 in Ch.2 and 83 in Ch.3.
93 *Supra* note 151 in Ch.4.

ment action and admitted as evidence in judicial proceedings. This may compromise the continued availability of information. If the concept of "safety first" is recognized as a constitutional principle having a sort of "peremptory" status, it may provide an opportunity to apply this principle to render certain requirements under domestic law inoperative.

In this connection, it may be recalled that Article 82 of the Chicago Convention provides that the contracting States accept this Convention as abrogating all obligations and understanding between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understanding.[94] Unlike *jus cogens* which render a conflicting treaty void at the time of its conclusion, the Chicago Convention obliges contracting States to abrogate inconsistent obligations. The practical effects are similar in the sense that they override the inconsistent obligations. While it is impossible to claim that every term of the Chicago Convention has become *jus cogens*, it may be argued that Article 82 contains the seed of "constitutionalism" of ICAO, which may one day sprout if conducible climate and fertile soil are given.

5.2 Safety and ICAO's Regulatory Function

As mentioned at the beginning of the current study, ICAO has been subject to both praise and criticism.[95] Past records do not necessarily imply future performance. In the third millennium, to cope with the new challenges arising from more stringent safety requirements, ICAO should strengthen its two hands, one being its regulatory function and the other its implementing or enforcement function.

ICAO has performed certain regulatory functions for the global aviation community over six decades, but the nature of its regulatory power has not been completely clarified. Is it similar to parliamentary law-making function, but limited to the sphere of civil aviation? While ICAO has served as a forum for its member States to negotiate and adopt treaties relating to civil aviation, States are the ultimate decision-makers to adopt the treaties and to accept them as binding. The ICAO Council possesses the power to adopt international standards and recommended practices, but except in relation to the rules of the air over the high seas, member States generally retain a high degree of freedom to deviate from the standards, let alone recommended practices. ICAO has also developed other forms of regulatory material, such as Assembly

94 Article 103 of the Charter of the United Nations contains the similar provisions. For the analysis of these provisions and their possible application, see *supra* notes 81 and 96 in Ch.4 and *infra* note 244.

95 See *supra* notes 5 and 6 in Introduction. See also Zhao, *supra* note 3 in Ch.4; See also, Alvarez, J.E., *International* Organizations *as Law-makers* (Oxford: Oxford University Press, 2005) at 589.

resolutions, PANS, SUPPS, regional air navigation plans, model clauses or model legislation; and guidance material; but the legal effect of these regulatory materials has not been precisely and systematically characterized. Certain inconsistencies or confusions may even be found in practice. As mentioned above, while one of the earliest Assembly resolutions distinguishes recommended practices from standards and specifies that their compliance is merely desirable, later resolutions tend to deemphasize the distinction between standards and recommended practices.[96] Since in both instances, the authoritative pronouncements originated from the Assembly resolutions rather than from the Chicago Convention, it is necessary to clarify the effect of the Assembly resolutions.

Assembly resolutions deserve further consideration because they are often used as the vehicle to carry other forms of regulatory material, such as draft treaties, model legislation and model clauses. For this reason, Assembly resolutions will be the focus of the analysis. On the basis of this, the nature of ICAO regulatory power will be further explored.

5.2.1 The Legal Effect of ICAO Assembly Resolutions

The legal effect of ICAO Assembly resolutions is considered to be similar to that of the UN General Assembly resolutions.[97] There is consensus that organizations within the UN system have the power to make binding "internal rules", such as rules concerning their structure, functioning or procedures.[98] Views become diverse regarding the effect of "external" resolutions, i.e., resolutions directly addressing member States. At one end of the spectrum, there are those who believe that resolutions have no legal effect at all.[99] At the other end, there are strong opinions that resolutions are tantamount to legislation binding

96 See *supra* note 147 in Ch.2 and *infra* note 137. See Resolution A36-13: Consolidated Statement of continuing ICAO policies and associated practices related specifically to air navigation, ICAO Doc 9902, *Assembly Resolutions in Force* (as of 28 September 2007) at II-7.

97 ICAO Council Working Paper C-WP/12979 "Draft Assembly Working Paper – The Role and Effect of Assembly Decisions and Resolutions", 25 May 2007, at para. 3.2. See also Augustin, J., "ICAO and the Use of Force against Civil Aerial Intruders", *supra* note 1 in Ch.3 at 219.

98 Separate Opinions of Judges Klaestad and Lauterpacht in the *South-West Africa-Voting Procedure, Advisory Opinion of June 7th, 1955,* [1955] *ICJ Reports* 67 at 88 and 115; Schermers, H. G., & Blokker, N. M., *International Institutional Law*, 4th Revised Edition (Leiden: Martinus Nijhoff Publishers, 2003) at 757 *et seq*; Alvarez, *supra* note 95 at 122, citing the budgetary powers and the legal personality as two examples of classic internal powers. Skubiszewski, K., "Enactment of Law by International Organizations" (1965-1966) XLI *BYIL* 198 at 226.

99 Szasz, P., "General Law-Making Processes" in Joyner, C.C., ed., *The United Nations and International Law* (Washington DC: American Society of International Law, 1997) 27 at 58. Szasz observes that intergovernmental organizations in general, and those of the UN system in particular, do not have any inherent authority and cannot create international norms that are directly binding on States generally or even just on their members.

on member States.[100] As summarized by Mosler, after a long and fierce dispute, these two extreme views were replaced by the emerging consensus:

> There can be no single answer to the question – resolutions must be distinguished according to various factors, such as the intention of the General Assembly, the content of the principles proclaimed and the majority in favour of their adoption.[101]

Accordingly, it will be necessary to analyze different resolutions on their own merits.

5.2.1.1 Declaratory Resolutions

Numerous writers have discussed the status of the resolutions of the United Nations General Assembly and provided conclusive evidence that some of these resolutions may declare customary rules.[102] When Higgins, who later became the President of the ICJ, wrote in 1963 that the UN "is a very appropriate body to look to for indications of developments in international law" and that "the votes and views of States have come to have legal significance as evidence of customary law", her view had been regarded as somewhat radical.[103] Today, very few international lawyers, if any, will categorically deny that resolutions of international organizations could present evidence of customary rules. In the context of ICAO, several Assembly resolutions may also be regarded as declaratory or confirmatory of customary international rules. For example, Resolution A25-1: *Amendment of the Convention on International Civil Aviation (Article 3* bis*)* contains the statement to "reaffirm the principle of non-use of weapons against civil aircraft in flight", indicating the pre-existence of such a principle independent of Article 3 *bis*.[104]

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100 See, for example, Dissenting Opinion of Judge Alvarez in *Effect of awards of compensation made by the UN Administrative Tribunal*, *Advisory Opinion of July 13th, 1954* [1954] *ICJ Reports* 67 at 71, in which it is stated that "the Assembly is becoming a real international legislative power for, apart from *recommendations* made to States, it adopts *resolutions* whose provisions are binding on them all. This fact is of great importance for the future of international law."

101 Mosler, H., *The International Society as a Legal Community* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980) at 88-89.

102 Higgins, R., *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963) at 2-5. Falk, R.A., "On the Quasi-Legislative Competence of the General Assembly" (1966) 60 *AJIL* 782 at 785. Arangio-Ruiz, G., "Normative Role of the General Assembly of the UN" (1972:III) 197 *RdC* 431. White, N. D., *The Law of International Organizations*, 2nd ed. (Manchester: Manchester University Press, 2005) at 174. Wang, *supra* note 82 at 106 *et seq.* Conforti, B., "Le rôle de l'accord dans le système des Nations Unies" (1974:II) 142 *RdC* 250. Schermers & Blokker, *supra* note 98 at 782 *et seq*.

103 Higgins, *id.* See also her work, *Problem and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 22-23.

104 ICAO Doc 9848, *supra* note 22 at I-6. See also Ch.3 above.

Following the invasion of Kuwait by Iraq and in response to UN Security Council Resolutions 662 and 671, the ICAO Assembly adopted Resolution A28-7: *Aeronautical consequences of the Iraqi invasion of Kuwait*, which, *inter alia*, declares that the unilateral registration of aircraft of Kuwait Airways by Iraq is null and void and calls upon the Iraqi government to return the Kuwaiti aircraft to the legitimate Government of Kuwait. Strictly speaking, this is the declaration of *factum juridicum* (juridical fact) as a consequence of the application of law rather than the declaration of law *per se*. Nevertheless, by declaring the results of the invasion null and void, the Resolution affirms the principle of the non-use of force. It may also be argued that Resolution A28-7 is in fact enforcing one of the obligations *erga omnes*, namely, the outlawing of acts of aggression.[105]

One may wonder whether all resolutions intended to be "declaratory" will mirror exactly the customary rules in photographic accuracy. In many cases, the very purpose for adopting declaratory resolutions is to "fix, clarify, and make precise" the terms and scope of customary rules which may otherwise be subject to controversy.[106] Moreover, the efforts to formulate declaratory resolutions will often involve not only codification but also progressive development of international law. As Sloan points out: "there is only a thin line, or perhaps a porous fence, between codification and development, and declaratory resolutions may creep over the line or slip through the fence. Again, under the guise of formulation they may interpret, elaborate and in fact develop the law while maintaining the umbrella of customary international law."[107] To the extent that these resolutions reflect "hazy, intermediate, transitional, embryonic, inchoate situations",[108] a question may be raised whether they are purely restating rules or representing "embryonic norm", quasi-legal rules, or "nascent legal force".[109]

5.2.1.2 Interpretative Resolutions

Some resolutions provide interpretation to existing treaty provisions. For instance, an early ICAO Assembly resolution resolved that the journey log book

105 ICAO Doc 9848, *supra* note 22 at I-29. ICAO resolution was based on the Security Council resolutions 661 and 662 in 1990, in which the Security Council declared the annexation of Kuwait by Iraq null and void and required specialized agencies to take such measures as may be necessary to give effect to the terms of its resolutions. See also *supra* note 34 *et seq* concerning counter-measures against the breach of obligations *erga omnes*.

106 Castaneda, J., *Legal Effects of United Nations Resolutions* (New York and London: Columbia University Press, 1969) at 169.

107 Sloan, B., "General Assembly Resolutions Revisited (Forty Years Later)" (1987) LVIII *BYIL* 41 at 69.

108 Castaneda, *supra* note 106 at 176.

109 Sloan, F.B., "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations" (1948) XXV *BYIL* 1 at 32. See also Castaneda, *id*. at 176.

required under Article 29 of the Chicago Convention may be replaced by a declaration.[110] Article 30 concerning aircraft radio equipment has also been *de facto* amended.[111] In 2004, Assembly Resolution A35-2 urged contracting States which are parties to the MEX Convention to apply Article IV of that Convention in the manner described in the Resolution.[112] These resolutions by and large constitute "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" or "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", as mentioned in Article 31, paragraph 2 (b) and (c) of the Vienna Convention. It is submitted that in these instances, they go far beyond "political or moral value" but create presumptions of binding commitments, at least for those States which have voted in their favour.[113]

As observed by some commentators, every interpretation holds within it the seeds of development.[114] "The line between interpretation and modification, like the line between codification and development, is a thin one and the distinction is often difficult, if not impossible to make."[115]

5.2.1.3 Pre-legislative Resolutions

Treaties adopted under the auspices of ICAO will fall squarely within the scope of Article 38(1)(a) of the Statute of the ICJ. However, this is the situation when a treaty has entered into force and the relevant States have expressed their consent to be bound by its terms. What is the status of the text of a treaty which has been adopted by ICAO but has not yet been ratified, accepted, approved or acceded to by the relevant States? Writing in 1962, Cheng considered the ICAO's function in the preparation of treaties as a "pre-legislative

110 Assembly Resolution A10-36: *Journey Log Book*, in ICAO Doc 7707, A10-P/16 at 51. See also ICAO Council Working Paper C-WP/3924, "Proposed Preparation of a Repertory of Practice of the Assembly, the Council and Other Organs in Relation to the Convention on International Civil Aviation", 25 January 1964. App. C.

111 Article 30 requires the licensing of aircraft radio equipment. This would literally prohibit the use of telephones by passengers for air-ground communications. However, Resolution A29-19: *Legal aspects of the global air-ground communications* provides that "nothing in Article 30(b) of the Chicago Convention shall be taken to preclude the use by unlicensed persons of the radio transmitting apparatus installed upon an aircraft where the use is for non-safety related air-ground radio transmission." (ICAO Doc 9848, *supra* note 22 at I-9). For more information, see Brisibe, *supra* note 7 in Ch.2 at 71.

112 See *supra* note 136 in Ch.4.

113 According to Lauterpacht, there is probably no good reason to deny that States may assume an obligation or give their consent through an Assembly resolution. Lauterpacht, H., ed. *Oppenheim International Law*, 7th ed. at 139, n.1.

114 Asamoah, O.Y., *The Legal Significance of the Declaration of the General Assembly of the United Nations* (The Hague: Martinus Nijhoff, 1966) at 6 and 31; Sloan, *supra* note 107 at 60.

115 Sloan, *id*.

function".[116] In view of the adoption of the Vienna Convention in 1969, in particular its Article 18, there are now some grounds to consider such a function also as a "quasi-legislative function". The said Article 18 reads:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
> (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; …

Accordingly, the Vienna Convention, as a cardinal treaty governing treaty relationships, fully recognizes that an instrument may produce some legal effects even though it is not fully binding. As a result, between "law" and "non law", or the fully binding norms and non-binding norms, there is a twilight area where "quasi-law" may provide "quasi-binding norms".

In ICAO, a new treaty to amend the Chicago Convention will first take the form of an Assembly resolution.[117] This was the case when ICAO introduced Article 83 *bis*.[118] Under Article 94 of the Chicago Convention, an amendment to the Convention must be approved by a two-thirds vote of the Assembly. The amendment will then enter into force when ratified by at least two thirds of the total number of contracting States. Accordingly, approval by a two-thirds vote of the ICAO Assembly is equivalent to the signing of the treaty or exchange of the instrument constituting the treaty subject to ratification. On the basis of Article 18 of the Vienna Convention, member States of ICAO, or at least those which have agreed with the adoption of the amendment, are under an obligation not to defeat the object and purpose of the amendment even before they ratify it. Such an obligation will persist until the relevant State has made its intention clear not to become a party to Article 83 *bis*. This type of obligation seems to fall between the obligation of a full-fledged State party and non-obligation of a non-signatory. Strictly speaking, this twilight zone of obligation does not directly fall within the sources of international law identified in Article 38 (1) of the Statute of International Court of Justice. Indirectly, it may be argued that this obligation derives from Article 18 of the Vienna Convention, which by itself falls within the scope of the aforementioned Article 38 (1).

Some resolutions are not used as a means to authenticate a multilateral treaty, but to prepare model legislation or model clauses which may be incorporated into domestic law or bilateral treaties. One example is Assembly Resolution A33-4 dealing with the issue of unruly passengers. While the acts

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116 Cheng, B., *The Law of International Air Transport* (London: Stevens and Sons Ltd., 1962) at 63-76. In more recent years, some other writers consider the activities of drafting treaties also as a quasi-legislative function; see, for example, Liang, X, "International Society and International Law" (in Chinese) in Shao and Yu, ed., *supra* note 57 at 27.

117 See, Assembly Resolutions A23-2 and A25-1, *supra* note 104 at I-5 and I-6.

118 *Id*. Resolution A23-2.

of these passengers do not amount to the offences stipulated in The Hague and Montreal Conventions, they still present a negative impact on the safety of aircraft or persons on board. On numerous occasions, when an aircraft commander delivered an unruly passenger to the State of landing pursuant to Article 9 of the Tokyo Convention, the latter found that it did not have jurisdiction over such a passenger, because the alleged unlawful act did not take place in its territory, the passenger was not its national, and the aircraft with the passenger on board was not on its registry. There was no basis for the State of landing to claim territorial jurisdiction, personal jurisdiction or flag jurisdiction. To remedy this situation, a model legislation was proposed, which in a nutshell would grant the first State of landing the power to exercise jurisdiction over such a passenger, despite the absence of jurisdictional connections mentioned above[119] This is considered as breaking new ground on jurisdiction, since it goes beyond the scope of traditional territorial, personal or flag jurisdiction. The model legislation was not adopted as a treaty but as an appendix to Assembly Resolution A33-4 which urges member States of ICAO to incorporate so far as practical the provisions in the model. Following this resolution, a number of States have now established their jurisdiction as the first State of landing in accordance with the model provision.

Similarly, Appendix G of Assembly Resolution A35-9 urges all member States to insert into their bilateral agreements on air services a clause on aviation security, taking into account the model clause adopted by the Council on 25 June 1986 and to take into account the model agreement adopted by the Council on 30 June 1989.[120] The same approach was also taken regarding the model clause on technical safety.[121]

The model provisions proposed by the organization, while not automatically binding on its member States, will eventually find their way to become law either through domestic legislation or bilateral agreements. The initiative taken by the organization undoubtedly forms an important part of the law-making process. Unlike the traditional mode of formulation of customary rules, which were gradually crystallized from the repeated but decentralized practice of States, model provisions prepared by an international organization originate from centralized efforts, followed by the proliferation in practice. The somewhat "top-down" approach is more powerful and influential than the traditional "bottom-up" approach and constitutes more speedy formation of the rules. The expertise brought by the organization also ensures that the proposed

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119 ICAO Resolution A33-4: Adoption of national legislation on certain offences committed on board civil aircraft (unruly/disruptive passengers). In ICAO Doc 9848 *supra* note 22 at V-4. See also ICAO Circular 288 LE/1, *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers* (June 2002).

120 A35-9: Consolidated statement of continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference, Appendix G, in ICAO Doc 9848 *supra* note 22 at VII-8.

121 See *supra* note 44 in Ch.2.

rules are based on internationally resourceful research rather than resulting from an unorganized and impromptu reaction for the purpose of expediency. In some instances, the existence of ICAO model provisions has assisted certain States in shortening the length of the parliamentary or similar process in the enactment of the relevant law. It may also establish a presumption which is in favour of States which act in accordance with the model provisions, *vis-à-vis* those who act differently. In this sense, model provisions proposed by ICAO have indeed served as "pre-legislation" and "quasi-legislation".

5.2.1.4 Directive Resolutions

Directive resolutions, commonly called "internal rules", refer to those which give instructions to subordinate bodies. However, many resolutions contain internal and external elements. Furthermore, as Schermers and Blokker observe, internal rules may have important external effects.[122] Examples cited in this respect include resolutions relating to termination of the mandate to administer the territory under the previous system of the League of Nations,[123] establishment of international criminal tribunals,[124] and operation of peace-keeping forces.[125] All these resolutions, which may be classified as internal decisions, have profound effects on the substantive rights and obligations of States. As pointed out by the ICJ in its advisory opinion on the financial consequences of the decision on peace-keeping, the functions and powers of the General Assembly "are not confined to discussion, consideration, the initiation of studies and the making of recommendations"; but include decisions "on important questions". These decisions "do indeed include certain recommendations, but others have dispositive force and effect."[126] The Court further states that "when the Organization takes action which warrants the assertion that

122 Schermers and Blokker, *supra* note 98 at 758.

123 On 27 October 1966, the UN General Assembly adopted resolution 2145 (XXI) on the termination of the mandate for South West Africa in Namibia. According to White, this resolution could be viewed as an internal decision, since the "trusteeship" issues, analogous to the mandate, are included in Article 18(2) of the UN Charter alongside budgetary and membership issues; *supra* note 102 at 165. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* [1971] *ICJ Reports* 16.

124 White, *id.* at 82. In *Tadic* case, the defendant submitted that the International Criminal Tribunal for the Former Yugoslavia (ICTY) was illegally created and therefore had no jurisdiction. The Appeal Chamber refuted this argument by stating, *inter alia*, that the Security Council may establish subsidiary organs pursuant to Articles 7(2) and 29 of the UN Charter. Case No. IT-94-1-T (Tadic case), 10 August 1995, para.2. Decisions to establish subsidiary organs fall within the category of internal competence. However, as pointed out by White, the ICTY did not address the issue whether the Security Council could delegate to a subsidiary the judicial power which the Council itself may not have. *Id.*

125 See *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion* of 20 July 1962, [1962] *ICJ Reports* 151.

126 *Id.* at 163.

it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization".[127] Such presumption is equally applicable to action taken by ICAO.

Numerous ICAO resolutions on safety programmes are formulated as internal rules binding on the organization, which at the same time contain recommendations for member States. For instance, the Assembly *resolves* in its Resolution A32-11 that a Universal Safety Oversight Audit Programme be established. It further *directs* the Council to bring the audit programme into effect from 1 January 1999. At the same time, the Assembly *urges* all contracting States to agree to audits to be carried out upon ICAO's initiative, "but always with the consent of the State to be audited".[128] On one hand, the terms used clearly indicate that this resolution is purely recommendatory for member States and does not create legal obligations; on the other hand, the decision to establish the audit programme internally binds the bodies of the organization, and the direction to bring the programme into effect by certain date binds the Council. Due to the effect of these internal decisions, the Council must trigger its institutional machinery to promote the audit programme with its best efforts. The member States, for their part, could not in good faith refuse to cooperate with the permanent body of the organization, since this may also be regarded as an implied duty arising from the membership.[129] The combination of internal rules and external recommendation naturally led to the rapid development of the audit regime, which is now entrenched in the institutional system of ICAO. Other ICAO programmes follow *mutatis mutandis* the same path, such as the Universal Security Audit Programme, the unified strategy to resolve safety-related deficiencies,[130] and the International Financial Facility for Aviation Safety.[131] Creation of the machinery is as important as the substantive

127 *Id.* at 167-168.

128 ICAO Doc 9848, *supra* note 22 at I-56. See *supra* note 171 *et seq* in Ch.2.

129 Castaneda observes: In every international organization there is a general rule according to which member States are bound to cooperate in achieving its purposes. The basic obligation of the members is to act in such a way that the charter's goals may be fulfilled. *Supra* note 106 at 12.

130 Assembly Resolution A35-7, in ICAO Doc 9848 *supra* note 22 at I-60. The strategy promotes, among other things, the sharing of critical safety information which may have an impact on the safety of international air navigation. The Assembly directs the Council to further develop practical means to facilitate the sharing of the safety information. The Council, through the convening of the Conference of Directors General, implemented the principle of transparency in safety information, which is regarded as "one of the fundamental tenets of a safe air transportation system". (The last preambular paragraph of Resolution A35-7). See also, *supra* note 212 in Ch.2.

131 Assembly Resolution A35-8, in ICAO Doc 9848, *id.,* at I-61. IFFAS is a fund based on voluntary contributions of member States of ICAO and other stakeholders in the civil aviation industry. It is independent from ICAO's regular programme budget and is designed to assist States to correct safety-related deficiencies identified through ICAO audits. For more information, see ICAO website: www.icao.int, and search for IFFAS.

issue.[132] Even the establishment or adjustment of the internal structures of the ICAO Secretariat may produce external effect. When the audit programme was first introduced, the establishment of the Safety Oversight Audit Section within the Secretariat promoted the programme through its daily work. In 2007, the Audit Report Review Board was established purely as an internal coordinating mechanism within the ICAO Secretariat. Nevertheless, its work may also have an impact on the assessment of the performance of the audited States and therefore affect the interests of States. In many cases, as mentioned by Alvarez, the lines between "legislative", "executive", and "dispute settlement" actions also tend to dissipate in practice. "The premise that law-making only occurs when an organization undertakes charter-authorized legislative action, at either the internal or external level, and that this does not occur when its executive officers or dispute settlers act, is at best misleading."[133]

It may therefore be concluded that the power of the ICAO Assembly is not limited to recommendations. By combination of internal rules and external recommendation, the Assembly may directly create certain institutional obligations for member States. To echo the statement of the ICJ, "[i]t would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is disbarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design."[134]

To what extent are the "spill-over effects" of internal rules permitted? To apply the criteria set out by the ICJ in the *Certain Expenses* case, so long as they are appropriate for the fulfilment of one of the stated purposes of the Organization, the presumption is that such action is not *ultra vires*.[135] Until this presumption is rebutted, these internal rules do have some external effects, "which will in practice determine the way in which people act."[136]

5.2.1.5 Recommendatory Resolutions

A significant number of resolutions in ICAO, or the provisions therein, are directly addressed to the member States. They contain normative provisions which are not subsequently crystallized into a treaty or indisputably recognized as customary rules. They remain for an indefinite period at the level of resolu-

132 Vallat, "The Competence of the United Nations General Assembly" (1959) 87 *RdC* 203 at 228. See also Skubiszewski, K., "The General Assembly of the United Nations and its Power to Influence National Action", in Falk, R.A. and Mendlovitz, S. H., *The Strategy of World Order*, Vol. III, *The United Nations* (New York: World Law Fund, 1966) 238 at 240.

133 Alvarez, J.E., *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005) at 145.

134 *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, supra* note 123 at 50.

135 *Certain expenses* case, *supra* notes 125 and 127, and accompanying text.

136 Montgomery, *Health Care Law* (Oxford: Oxford University Press, 2003).

tions and could not be classified as internal rules in the sense understood in the aforementioned discussion. One example is Assembly Resolution A36-13, which blurs the distinction between standards and recommended practices when it requests the filing of differences. Appendix D of the Resolution provides in paragraph 2 of "Associated practices" the following:

Contracting States should continue, and where necessary should intensify, their efforts to apply at their operating installations practices and procedures that are in accordance with the current SARPs and PANS. In this regard, Contracting States should consider the practicability of modifying the internal processes by which they give effect to the provisions of SARPs and PANS, if such modifications would expedite or simplify the processes or make them more effective.

Paragraph 3 of "Associated practices" reads:

> The Council should urge Contracting States to notify the Organization of any differences that exist between their national regulations and practices and the provisions of SARPs as well as the date or dates by which they will comply with the SARPs. If a Contracting State finds itself unable to comply with any SARPs, it should inform ICAO of the reason for non-implementation, including any applicable national regulations and practices which are different in character or in principle.[137]

Paragraph 2 directly addresses the member States of ICAO. It not only assimilates international standards and recommended practices, but also puts SARPs and PANS on the same plane. Paragraph 3 seemingly takes the form of an instruction to the Council but in fact indirectly addresses the member States. The propositions clearly go beyond the Chicago Convention since the Convention does not impose an obligation to file differences with respect to recommended practices. If the notification of differences with certain recommended practices is so important, the ICAO Council, as the body adopting SARPs, may well decide to elevate these recommended practices to the level of standards, which will then automatically make the filing of differences compulsory. Nevertheless, the Council does not choose this route, and consequently the status of standards remains different from that of recommended practices. The provision requiring the filing of differences to recommended practices in Appendix D of Resolution A36-13 could only be considered as a recommendation which does not have the binding force of Article 38 of the Chicago Convention.

What then is the effect of such a recommendation? Does it merely present "political or moral" force? This recommendation has been repeated in a series of Assembly resolutions, and has become continuing policy and firm associated

137 ICAO Doc 9902, *Assembly Resolutions in Force (as of 28 September 2007)* at II-7. See *supra* note 147 in Ch.2.

practice of ICAO. The purpose, as may be perceived from Appendix D, is to monitor the differences between the regulations and the practices of contracting States and SARPs and PANS "with the aim of encouraging the elimination of those differences that are important for the safety and regularity of international air navigation or are inconsistent with the objectives of the international Standards". Corresponding to this aim, the ICAO audit teams not only verify the status of the implementation of standards but also that of recommended practices. The differences with recommended practices may thus be noted in the audit reports and become a subject under the correction plans. The Council, as the permanent body responsible for the Assembly, is again under a duty to carry out the policy and directives of the Assembly by monitoring the implementation of the correction plans. When all these are taken into account, a question may be raised whether these arrangements are intended to go beyond "political or moral" force.

The position taken by ICAO appears to be that this type of resolution is not completely devoid of legal effect. According to one working paper prepared by the Secretariat, the legal authority "may vary according to the voting conditions. It may be stronger in case of unanimity than the case of majority vote. If a State has voted in favour of an Assembly Resolution or Decision, it can be expected that the State will abide by its terms in good faith, unless there are overriding compelling reasons to the contrary."[138] When a question in this respect was raised in the Council, the Director of the Legal Bureau of ICAO replied:

> The effect of any provision in a resolution of the Assembly was that all States who had participated in the Assembly Session were, once the resolution was adopted, expected to apply and implement the provisions of such resolutions. However, if States, in the debate relating to the resolution, placed their position on the record that they had a reservation to certain provisions of the resolution or to the resolution as a whole, it was clear that other States could not necessarily expect those States which had placed their reservation to in fact apply the provisions of the resolution.[139]

This statement could only be understood as referring to the "external" resolutions, since "internal" resolutions, such as a budgetary decision, are binding on all members once they are approved by the majority, regardless of the negative votes cast. To that extent, doctrinal support for the statement could be found.[140]

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138 ICAO Council Working Paper C-WP/12979, *supra* note 97 at para. 3.2.

139 ICAO Doc 9738-C/1127 C-Min. 156/1-16, *Council – 156th Session, Summary Minutes with Subject Index* (1999), C-Min 156/16 at 188.

140 Castaneda, J., "Valeur juridique des resolutions des Nations Unies" (1970:I) 129 *RdC* 227 at 306.

However, different views have also been expressed. Arangio-Ruiz believed that when States vote for a resolution, they "don't mean it". "That is to say, States often don't meaningfully support what a resolution says and they almost always do not mean that the resolution is law." Schwebel holds the same view. According to him, the size of majority, or even "consensus", has nothing to do with the intention of States voting for it.[141] Schermers and Blokker write:

> A positive vote estops a member from later claiming that the organization lacked the competence to adopt recommendation in question, but it does not oblige the member to execute the recommendation. Members vote in their capacity as elements of the organization, as contributors to the development of legal rules, not as contracting parties. Accordingly, their vote expresses their desire to help establish a rule which is equally applicable to *all* members. Unless a member expressly declares otherwise, its vote cannot be interpreted as representing an undertaking by the State to adhere to the rule thus established.[142]

The two writers further observe that "[a] negative vote, on the other hand, does not allow a State subsequently to ignore a recommendation completely."[143]

From the foregoing, there seems to be the lack of agreement regarding the effect of a positive or negative vote. However, consensus could be drawn to the point that a recommendation in a resolution of this kind is not devoid of legal effect. This point has been incisively and eloquently articulated by Judge Lauterpacht in his separate opinion in the *Voting Procedure on Questions relating to Reports and Petition concerning the Territory of South West Africa*:

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141 Arangio-Ruiz, G., "The Normative Role of the General Assembly of the United Nations and the Development of Principles of Friendly Relations" (1972-III) 197 *RdC* 431; Schwebel, "The Effect of Resolutions of the UN General Assembly on Customary International Law" (1979) *Proceedings of American Society of International Law* 301; cited by Higgins, R., *Problem and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 26. The procedure of "consensus" had been used for a long period of time in the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) and it is still widely used in ICAO. The essence of the procedure is to reach agreement without need for voting. See D'Amato, A., "On Consensus" (1970) 8 *CYIL* 104. See also *infra* note 255 and accompanying text.

142 Schermers and Blokker, *supra* note 98 at 770.

143 *Id*. In his separate opinion in the *South West Africa* case, Judge Klaestad stated that a recommendation "adopted by the General Assembly without the concurrent vote of the Union Government does not create a binding legal obligation for that Government. Its effects are, in my view, not of a legal nature in the usual sense, but rather of a moral or political character. This does not, however, mean that such a recommendation is without real significance and importance, and that the Union Government can simply disregard it. As a Member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter and to inform the General Assembly with regard to the attitude which it has decided to take in respect of the matter referred to in the recommendation." See *supra* note 98 at 88.

> It is one thing to affirm the somewhat obvious principle that the recommendations of the General Assembly … addressed to the Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other and that therefore they cannot be regarded as forming in any sense part of a legal system …[144]

According to the eminent authority, a member State of the United Nations is "under a duty" to treat a recommendation in a resolution of the General Assembly "with a degree of respect".[145] "The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If … it decides to disregard it, it is bound to explain the reasons for its decision."[146] In other words, the right of a State to decline to act upon the recommendations has not been challenged, what has been challenged is "its right simply to ignore the recommendations and to abstain from adducing reasons for not putting them into effect or for not submitting them for examination with the view to giving effect to them." To reinforce this important exposition, the learned judge continues:

> An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organisation, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.[147]

The penetrating remarks of Judge Lauterpacht, expressed in the context of resolutions of the UN General Assembly, are equally applicable to resolutions of the ICAO Assembly. Two critical points deserve close observation. Firstly, a recommendatory resolution may generate obligations of legal nature. No matter how "rudimentary, elastic and imperfect"[148] they are, these obligations

144 In *Voting Procedure* case, Separate Opinion of Judge Lauterpacht, *ICJ Report*, *supra* note 98 at 118.
145 *Id*. at 120.
146 *Id*., at 118-119.
147 *Id*.,at 120.
148 *Id*.at 118-119.I

have gone beyond "political or moral duties".[149] Secondly, the limited and qualified authority of recommendations necessarily implies that their requirement for compliance is different from that of fully mandatory rules. They do not absolutely require performance strictly in conformity with their provisions, but they must be considered in good faith and cannot be ignored arbitrarily.[150]

5.2.2 Concept of Quasi-Legislation or Quasi-Law

5.2.2.1 Doctrinal and Constitutional Basis for Quasi-Law

The above survey, which is by no means exhaustive, demonstrates that certain ICAO resolutions do produce certain legal effect, although these resolutions could not be attributed with ease to one of the sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice. Declaratory, interpretative and internally directive resolutions may under certain conditions produce fully binding effect. The picture is more blurred with respect to pre-legislative, recommendatory and externally directive resolutions. Borderline cases exist in all categories of resolutions identified above. Declaratory resolutions may go beyond the mere restatement of the existing law and creep into the area of progressive development of law; interpretative resolutions may slip into *de facto* amendment to the instrument; pre-legislative resolutions may create obligations not to defeat the object and purpose of the texts; internal resolutions may generate external effect, and recommendatory resolutions may set the contiguous zone between impropriety and illegality. Instead of continuing the simplistic approach to brand these resolutions as merely having political or moral force, one is tempted to acknowledge that a twilight zone exists between the sources of international law under the aforementioned Article 38 of the Statute of the ICJ and the non-binding guidance of purely political and moral nature. Article 18 of the Vienna Convention authoritatively confirms this notion. In *New Jersey* v. *Delaware*, Justice Cardozo stated: "International law, or the law that governs between States, has at times, like the common law within States, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality".[151] Judge Lauterpacht, in the *Voting Procedure* case quoted above, also refers to "the imperceptible line between impropriety and illegality, between discretion and arbitrariness,

149 In *International Status of South Africa*, Advisory Opinion, the ICJ states that it was not for the Court to "pronounce on the political or moral duties". [1950] *ICJ Reports* 128 at 140.

150 Schreuer, C.H., "Recommendations and the Traditional Sources of International Law" (1977) 20 *German Yearbook of International Law* 103 at 118.

151 *New Jersey* v. *Delaware* (1933), 291 U.S. 383, cited by Sloan, *supra* note 109 at 33.

between the exercise of the legal right to disregard the recommendation and the abuse of that right."[152]

In the efforts to conceptualize the "twilight existence" of the norms or the "imperceptible line between impropriety and illegality", the notion of "soft law" has been widely employed in academic circles.[153] While the concept may provide abundant food for thought, it is also considered as "a contradiction in terms".[154] As pointed out by Weil, on one hand, some legal norms may be "soft", and "are not in practice compelling" because they are too vague, but they do not cease to be legal norms; on the other hand, there are provisions "which are precise, yet remain at the pre- or subnormative stage." "To discuss both of these categories in terms of 'soft law' or 'hard law' is to foster confusion."[155] The concept is difficult to grasp because it may cover all resolutions notwithstanding their different legal effect on their own merits.

White, on the other hand, considers the "legal output" of international organizations as a potentially new source of law. According to him, it seems "a little perverse" to continue to recognize the provisions of Article 38(1) of the Statute of the ICJ as "a completely accurate list of sources of international law".[156]Although "it is possible to try to force the legal output of organizations into the established sources of international law, it would be better to assess such output as a separate, and potentially new, source of international law."[157]

Another possible theoretical approach is to refine the concept of "quasi-law" or "quasi-legislation" on the basis of "quasi-legislative functions" of ICAO as described by Cheng.[158] The notion of "quasi-law" or "quasi-legislation" also exists in domestic systems. Montgomery stated that "[t]he term quasi-law covers rules which are not usually legally binding, although they may have some legal force, but which will in practice determine the way in which people act."[159] In *Quasi-Legislation: Recent Developments in Secondary Legislation*, Ganz uses "quasi-legislation" to cover "a wide spectrum of rules whose only common factor is that they are not directly enforceable through criminal or civil

152 *Supra* note 147.

153 Shelton, D., Commitment and Compliance: The Role of Non-binding Norms in the International Legal System (Oxford: Oxford University Press, 2000).

154 Hillgenberg, H., "A Fresh Look at Soft Law" (1999) 10:3 *EJIL* 499 at 500.

155 Weil, P., "Towards Relative Normativity in International Law?" (1983) 77:3 *AJIL* 413 at 414 & 415.

156 White, *supra* note 102 at 159.

157 White, *id*.at 160.

158 Cheng, *supra* note 116. See also Falk, *supra* note 102; Liang Xi, *supra* note 116 at 27. Saba, H., "L'activité quasi-législative des institutions spécialisées des Nations Unies" (1964) 111 *RdC* 603; Schrijver, N., *Sovereignty over Natural Resouces: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997) at 371.

159 Montgomery, *supra* note 136.

proceedings".[160] The forms of quasi-legislation include codes of practice, circulars, guidelines, practice statements and others. He believes that "the line between law and quasi-legislation becomes blurred because there are degrees of legal force" and many of the rules in the spectrum "do have some legal effect". He proposes to "draw the line at rules which have a limited legal effect at one end of the spectrum and purely voluntary rules at the other end."[161]

At the international level, in their joint dissenting opinion in the *South West Africa* cases, Judges Spender and Fitzmaurice characterize the resolution of the Council of the League of Nations for setting up a Mandate as "a quasi-legislative act".[162] This is probably the earliest and most authoritative reference to the concept, which may be understood as an act of "an organ of an international organization, in the active exercise of powers conferred on it by its constitution".[163] Much of the ICAO regulatory material which could not be considered as falling squarely within the sources of international law identified in Article 38(1) of the Statute of the ICJ will probably fall within the category of "quasi-legislation" or "quasi-law".

The term "quasi-law" is not employed in the Chicago Convention, but a number of its provisions and their context contain the seed for the notion. Article 54 *j)* provides that the Council shall report to contracting States "any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council". In this provision, a clear distinction was made in the mind of the drafters between two types of acts or omissions: one is "any infraction of this Convention", which constitutes a classical breach of a treaty obligation under international law; another is "any failure to carry out recommendations or determination of the Council", which might be considered as a novel, *sui generis* type of behaviour not in conformity with institutional quasi-law. This distinction is further reinforced by Article 69 of the Convention:

> If the Council is of the opinion that the airports or other air navigation facilities, including radio and meteorological services, of a contracting State are not reasonably adequate for the safe, regular, efficient, and economical operation of international air services, present or contemplated, the Council shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose.

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160 Ganz, G., Quasi-Legislation: Recent Developments in Secondary Legislation (London: Sweet & Maxwell, 1987) at 1.

161 *Id*.

162 Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice in *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgement of 21 December 1962*: [1962] *ICJ Reports* 319 at 486.

163 *Id*. While this is only a dissenting opinion, it must be pointed out that the judgement in that case was rendered by eight votes to seven, with three judges issuing separate opinions.

> *No contracting State shall be guilty of an infraction of this Convention if it fails to carry out these recommendations.* (Emphasis added.)

The combined effect of Articles 69 and 54 *j)* reasonably leads to the conclusion that the failure to carry out the recommendations under Article 69 is not "an infraction" of the Chicago Convention, but it still constitutes a reportable incident under Article 54 *j)* of the Convention. In other words, the act of not following a recommendation does not imply any "guilt", but still represents a "failure" to meet expectations within the system of ICAO, which is less than creditable. Article 70 further provides that a contracting State, in the circumstances arising under the provisions of Article 69, may conclude an arrangement with the Council for "giving effect" to such recommendations. While the State is clearly not obliged to conclude such an arrangement, Article 70 seems to contemplate certain follow-up action, which will in one way or another give "effect" to the recommendations. Reading Articles 69, 70 and 54 *j)* together, one could conclude that the drafters of the Convention had the intention to treat "recommendations" as something less than a fully binding rule, but something more than a non-binding statement bearing no legal consequences. Had the drafters of the Chicago Convention considered that recommendations do not have any legal effect at all and could simply be ignored, they would not have included as reportable events in Article 54 *j)* "failure to carry out recommendations" side by side with "any infraction" of the Convention. In this connection, one may recall the observation by Higgins: in some international organizations even the term "recommendation" in its context sometimes signals more than one would expect from a literal reliance on that word. Thus "recommendation" may still in context entail a duty of compliance or an obligation to act.[164] The nature of this type of recommendation matches with the concept of "quasi-law".

A question may be raised that in the absence of the express terms excluding infraction as in the case of Article 69, whether a failure to carry out recommendations under other provisions of the Chicago Convention would be considered as an infraction of the Convention. For instance, under Article 15 concerning the levy of charges, the Council may also make recommendations for the consideration of the State concerned. However, Article 15 is silent on whether the failure to carry out the recommendations will amount to an infraction. Does it imply that the possibility of an infraction is not excluded? In view of the specific distinction made in Article 54 *j)*, it seems that the answer should be in the negative. On the other hand, this would not completely exclude the possibility of crossing the "imperceptible line", as mentioned by Judge Lauterpacht in his oft-quoted passage.[165]

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164 Higgins, *supra* note 141 at 25. She cites Article 19 (b) of the constitutional instrument of the International Labour Organization.

165 *Supra* note 147.

Article 54 *j)* not only refers to "recommendations", but also to "determinations". The scope of the latter term is not defined. Does it include "any decision by the Council on whether an international airline is operating in conformity with the provisions" of the Chicago Convention as mentioned in Article 86? While the English version of the Convention uses "determinations" in Article 54 *j)* and "decision" in Article 86, the French and Spanish versions use the same words in both cases. According to the *Black's Law Dictionary*, "determination" is defined as a decision by judiciary or administrative agency.[166] If the term "determinations" is interpreted as the synonym of "decisions", it may be argued that Article 54 *j)* not only covers "recommendations", but also covers binding decisions of the Council against an airline which is not operating in conformity with the provisions of the Convention.

Presumably, since under Article 54 *n)* the Council may consider any matter relating to the Convention which any contracting State may refer to it, it may also make a recommendation or determination on this matter if it so wishes. If such a recommendation or determination is made and the relevant contracting State does not follow it, Article 54 *j)* will come into play. From this perspective, one could see that the scope of the applicability of Article 54 *j)* could be very large and that the power of the Council could be used to prescribe and apply the rules of conduct to promote aviation safety.

In view of the foregoing, there is no legal obstacle in the Chicago Convention to the establishment of a system of quasi-law. On the contrary, there is a constitutional support inherent in the Convention which confirms the existence of two levels of obligations or compliance systems. The primary compliance system is composed of the obligations directly laid down by the Chicago Convention, which are backed by traditional sanctions under international law against the breach of a treaty. The secondary compliance system consists of norms with certain obligatory effect backed by the institutional mechanisms within ICAO, in particular the power of the Council under Article 54 *j)*. There are different degrees of obligatory character in the two compliance systems, and the less obligatory one may be broadly referred to as "quasi-law", which includes recommendations of the Council and the Assembly. While these recommendations are not strictly binding as traditional sources of law, they cannot be ignored and must be considered and acted upon in good faith. They constitute norms of conduct forming an integral part of the institutional regime and legal order of ICAO. Failure to respect them does not amount to infractions of the rules of international law but may represent non-fulfillment of the shared expectation of the community and entail, in FitzGerald's words, "a disentitlement to enjoyment of the activity in the company of other States be-

166 *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 450.

longing to the norm-establishing organization."[167] Under certain circumstances, non-compliance with these norms may also overstep "the imperceptible line" mentioned by Judge Lauterpacht and lead to "consequences legitimately following as a legal sanction".[168]

5.2.2.2 The Essence of Quasi-Law

For the purpose of the present inquiry, and without attempting to formulate a precise definition, it is submitted that in essence, quasi-law is the authoritative norms formulated by competent bodies in an international organization, which will either evolve into positive law in due course or be implemented by the institutional mechanisms. Since the line between law and quasi-law is inherently "blurred"[169] or even "imperceptible",[170] attempts to distinguish them could only based on very general guidelines.

First and foremost, the provisions of quasi-law should be prescriptive and not descriptive. They must contain specific and precise requirements to do or refrain from doing something. In assessing the role of quasi-legislative competence of the UN General Assembly, Falk observes:

> It is, first of all, essential to classify as accurately as possible the nature of the legislative claim; that is, to identify the claim that is being made and what must be done by whom to comply. In making this assessment, the language of the resolution must be carefully analyzed to see whether it formulates specific duties to be discharged by specific actors.[171]

Judge Lauterpacht also states: "A resolution recommending … a specific course of action creates *some* legal obligation which, however rudimentary, elastic, and imperfect, is nevertheless a legal obligation."[172] In ICAO, most quasi-law provisions are formulated to specify requirements in daily operation of aviation activities, or to supplement the existing law. The resolution mentioned above, which urges the States to file differences with recommended practices, is one example. This requirement of specificity distinguishes quasi-law from the so-called soft law, which may include vague and imprecise provisions.

The second prerequisite of quasi-law is the act of a competent body to adopt, approve or endorse its content. According to FitzGerald, in ICAO, there are resolutions of the Assembly, Council and various subsidiary bodies. "None

167 FitzGerald, G. F., "The International Civil Aviation Organization – A Case Study in the Implementation of Decisions of a Functional International Organization", in Schwebel, S. M. ed., *The Effectiveness of International Decisions* (Sijthoff Oceana, 1971) 156 at 161.
168 *Supra* note 147.
169 Ganz, *supra* note 160.
170 Lauterpacht, *supra* note 147.
171 Falk, *supra* note 102 at 786.
172 In *Voting Procedure* case, *supra* note 98 at 119.

of the resolutions of bodies below the level of the Council would have binding force".[173] The Assembly, by virtue of Article 49 *j)* of the Chicago Convention, may "deal with any matter within the sphere of action of the Organization not specifically assigned to the Council." The Council, in its turn, is specifically mandated by Article 54 *l*) to adopt international standards and recommended practices. Other bodies are not conferred such a power by the Convention. Consequently, manuals, circulars and other guidance material prepared by the Secretariat may have professional value as guidelines, but at most they could only represent usage in ICAO and could not be regarded as quasi-law, unless they are specifically approved or endorsed by the Assembly or the Council. Under certain circumstances, a plenipotentiary diplomatic conference convened for the purpose of adopting a treaty may be considered as having at least equal status to the Assembly with respect to the competence to adopt quasi-law. Some of the resolutions adopted thereat may carry certain obligatory effects, although they are not officially incorporated into the treaty under consideration.

Is there any relation between the status of quasi-law and the voting pattern in its adoption? Article 90 of the Chicago Convention requires the vote of a two-thirds majority of the members of the Council for the adoption or amendment of Annexes to the Chicago Convention. Unanimity is not required. Resolutions of the Council and those of the Assembly are adopted by simple majority. In the current practice, except in the case of the adoption or amendment of an Annex, ICAO seldom resorts to vote but prefers to reach a decision by consensus. In the event that a resolution is adopted by a majority but does not include major powers whose vital interests are affected, it will be less effective or even ineffective in its implementation. The international community is not yet ripe for "majoritarianism".[174] "As long as might and majority coincided, this immaturity remained concealed. However, as soon as the powerful started to be outvoted, the problem could no longer be ignored."[175] Consequently, while the majority may *de jure* make decisions, concurrence by the dominant section is *de facto* required to make quasi-law effective.

The third prerequisite of quasi-law is that it will enter the realm of positive law in due course, or if it does not become full-fledged law, it will still be implemented by institutional mechanism. Quasi-law may take different forms, such as a duly adopted treaty which has not yet entered into force, an international standard adopted by the Council contemplating the absence of disapproval by member States, a recommended practice to be accepted by States, a model clause to be incorporated into a bilateral agreement, or model legislation to be incorporated into domestic law; but all these forms of quasi-law

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173 FitzGerald, *supra* note 167 at 164.

174 Claude, I., *Sword into Plowshares: the Problems and Progress of International Organizations* (4th ed. 1971), Chapter 7.

175 Schermers & Blokker, *supra* note 98 at 533. See also *infra* note 255.

share one common feature: they will become law in due course after certain act or acts of "imprimatur". Some quasi-law material is not intended to become law but will remain to be a law-supplementary forming part of the institutional regime. In this case, it is monitored and implemented by the internal mechanisms of ICAO, such as those identified above in the second part of Article 54 *j)* of the Chicago Convention. In short, quasi-law is different from law because it will require the act of "imprimatur" to become law; it is also different from non-law, because its implementation is safeguarded by the institutional machinery.

5.2.2.3 Scope of Quasi-Law

The scope of quasi-law is very wide. Many resolutions, as analysed above, may be included. Other forms also exist, such as PANS, SUPPs, Regional Air Navigation Plans and others.

Standards have long been regarded as the output associated with the "quasi-legislative function" as described by Cheng. "The reason why this function of the ICAO is described as quasi-legislative rather than legislative is that these international standards are not binding on member States against their will."[176] Unlike the annexes adopted under the Paris Convention which were binding on member States of ICAN, standards adopted by ICAO may be subject to the filing of differences, which are commonly called contract-out or opt-out provisions.

The notion of "quasi-law" may be expanded to include the provisions which States could opt-in, such as recommended practices adopted by the Council. The procedure for the adoption of the standards and recommended practices is exactly the same. No distinction is made in this respect under Article 94. The Chicago Convention does not define standards and recommended practices. The Assembly worked out the definitions to underline their differences.[177] It is the Assembly again that is blurring their differences.[178] There is a predominant view that standards are more binding than recommended practices, but the actual difference between them is that standards are opt-out provisions, while recommended practices are opt-in. In the case of standards, silence means consent; in the case of recommenced practices, consent has to be expressed. Once they are opted in, the effect would for all practical purposes be the same. An international standard for which half of ICAO member States file differences is not more effective or binding than a recommended practice which is incorporated into domestic law by more than half of the member States. Standards may become binding due to the passive inaction by States, while recommended practices could only be binding through

176 Cheng, *supra* note 116 at 64.
177 See *supra* notes 86 and 147 in Ch.2 .
178 See *supra* notes 96 and 138.

active commitment by States. Because of this, the conscious acceptance of recommended practices may even display a stronger will to implement them. Even if a State decided not to follow a recommended practice, it does not necessarily mean that this recommended practice will become totally irrelevant. For example, paragraph 3.2.1.2 of Annex 17 contains a recommended practice that each contracting State should include in its bilateral agreements on air transport a clause related to aviation security. Consequently, a State which has opted out this provision might need to opt in again in a bilateral negotiation, if the other side has opted in.

It follows from this that model clauses and model legislation may also become quasi-law to be opted in. With respect to duly adopted treaties which have not yet come into force, both situations of opt-in and opt-out may exist. A State may opt out by clearly indicating that it will not become a party to a treaty. It may also opt in by ratifying the treaty and becoming fully bound by it. Alternatively, it may choose to maintain the *status quo* by obliging itself to refrain from any act which may defeat the object and purpose of the treaty. Regulatory material contained in resolutions, PANS, SUPPS or regional air navigation plans may also be considered as quasi-law material if they reflect the essence of quasi-law described above. On most occasions, they are adopted by consensus; there is no clear procedure of opt-in or opt-out.

When the provisions of quasi-law are elevated to full-fledged law, they will naturally be removed from the scope of quasi-law. This may take place, for example, when a State ratifies a duly adopted treaty, refrains from filing a difference to a standard, accepts a recommended practice, embodies model clauses in an agreement, incorporates model legislation into its domestic law, concludes an arrangement with ICAO to give effect to its recommendation, or implements a regional plan. In other cases, it may happen that a particular provision has become full-fledged law for some States, but remains as quasi-law for others.

5.2.2.4 Effect of Quasi-Law

The issue concerning the effect of quasi-law is likely to generate controversial discussions. Some commentators do not accept the degree of obligation or legal force. For them, there can be no sliding scale of legal commitment: a norm is either binding under international law or it is not.[179] In their view, "proliferation of a para-international law" will carry "negative implications for the credibility of international law as a whole".[180] Others hold a different view. For example, Hillgenburg expresses his doubt to the aforementioned position by raising the following question: "[i]n the field of agreements intended by

179 Several German publications by Heusel, W., and Thürer separately, as cited by Hillgenberg, H. in "A Fresh Look at Soft Law" (1999) 10:3 *EIJL* 499 at 507.

180 Schwarzenberger, as cited by Hillgenberg, *id.* at 502.

those involved to be normative, is there merely a choice between international treaties on the one hand and exclusively 'political' or moral commitments on the other?"

A clear-cut division between law and non-law may present difficulties, at least in the context of the ICAO system. Article 38 of the Chicago Convention allows a member State to file a difference to a particular standard and therefore not be bound by it. On the other hand, while this standard is a non-law for this State, it could not be totally disregarded since it is still law for others. For instance, after the events of 11 September 2001, a standard was introduced to strengthen the cockpit doors of certain categories of aircraft. Any member State may file difference to render this standard inapplicable in its territory. But if its aircraft do not comply with this standard, they may encounter difficulties in their operation and admission to other States where that standard is in force. A clear-cut distinction between law and non-law would not be feasible in reality. Despite the filing of differences by a State, some standards may continue to be quasi-law which could not be completely ignored.

The existence of the degree of obligations or legal force seems to be undeniable. As mentioned above, under the Vienna Convention, there are obligations imposed by peremptory norms which could not be contracted out. Then, there are "regular" treaty provisions which are binding but could be derogated or contracted out under certain circumstances. Further down the sliding scale are treaties which are not yet in force and therefore are not binding, but the object and purpose of which could not be defeated. Outside the Vienna Convention, there are so-called "nonbinding international agreements".[181] As Hillgenberg points out, since the decisive factor in international law is the intention of States, "there appears – at least at first glance – to be no reason why States should be denied the possibility to take on commitment with lesser legal consequences than a treaty would have."[182]

Based on the premise that quasi-law represents the twilight zone between law and non-law, its effect or legal consequences should stand in the middle of the spectrum which has "full effect" on one end, and "no force at all" on the other.[183] The first implication of the effect, as mentioned above, is that quasi-law, be it in the form of a recommendation or otherwise, must be considered by States in good faith. The classic statement by Judge Lauterpacht was endorsed by a number of commentators.[184] Accordingly, while States are not fully bound by quasi-law, they could not disregard it without giving any reason. Some commentators further believe that at least in some circumstances, the obligation not only implies a duty to consider it in good faith,

181 Schachter, O., "The Twilight Existence of Nonbinding International Agreements" (1977) 71 *AJIL* 297.

182 Hillgenberg, *supra* note 179 at 506.

183 Words of Judge Lauterpacht in the *Voting Procedure* Case, *supra* note 144.

184 Sloan, *supra* note 107 at 121.

but also to cooperate with the organization in good faith for the purpose of the implementation. "When these obligations to cooperate in good faith, which go beyond a mere duty to consider, are ignored to the point of becoming an abuse of right, a breach of duty to act in good faith emerges."[185]

The second implication of the effect of quasi-law relates to the concept of estoppel. It is not certain whether a positive vote for a resolution could give rise to the legitimate expectation of compliance, but active sponsorship or strong advocacy of a provision of quasi-law may generate such expectation. It would be unthinkable if a member State of ICAO which had actively advocated that States should file differences regarding recommended practices would subsequently refuse to file its own differences. Definitely, there is an element of estoppel, although the degrees of expectation will need to be analyzed on a case by case basis.

The third implication of the effect of quasi-law is that it creates a favourable presumption for those who comply with it. Schreuer analyses this effect of a recommendation as follows:

> A recommendation can, moreover, usually serve as a presumption of legality in favour of conduct which is in accordance with its tenets. A State acting in accordance with the recommendation of [an international organization] will enjoy the benefit of the doubt should the legality of its conduct be called into question. On the other hand, action contrary to the provisions of a recommendation can result in the shifting of the burden of proof against the person violating it.[186]

These remarks are made in the context of a recommendation, but they are applicable to other forms of quasi-law. The practice of ICAO seems to be developing along this line, at least in some cases of non-compliance. For example, in the previous practice, when States filed differences with standards and recommended practices, they were not requested to explain the reason. In 2007, the Assembly adopted Resolution A36-13, adding a new provision to request contracting States which find themselves unable to comply to inform ICAO of the reason for non-implementation.[187] Consequently, the burden of proof is now on the non-complying States to provide justification for their non-compliance with SARPs. With respect to the cases of compliance, there are not yet concrete cases to demonstrate exactly how favourable presumption would actually operate. Presumably, quasi-law may legitimize those claims which are in line with it. To illustrate through the case relating to unruly passengers, States which have exercised jurisdiction over unruly passengers pursuant to

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185 Sloan, id. 122. On abuse of rights, see also the passage of Judge Lauterpacht. *supra* note 147, also in *Oppenheim, International law*, Vol. I (8th ed. by Lauterpacht, 1955) 345-347.

186 Schreuer, C.H., "Recommendations and the Traditional Sources of International Law", *German Yearbook of International Law* 20 (1977) 103 at 118; see also White, *supra* note 102 at 169.

187 See *supra* note 144 in Ch.2.

the model law endorsed by the Assembly will be presumed to act legally although the jurisdiction so exercised may have gone beyond the traditional limit set by international law.[188]

5.2.2.5 Implementation of Quasi-law

The term "implementation" is deliberately chosen instead of "enforcement", since many provisions of quasi-law are complied by voluntary acts. It is the objective necessity for international cooperation that has motivated States to give effect to quasi-law. Its compliance is enhanced more by the concerted will to make the common system work rather than by enforcement procedures. States not complying with the quasi-law will be confronted more with "natural sanctions" than with legal sanctions. In the field of aviation, a breach of technical code may trigger a disastrous accident.[189] Milde has mentioned that the Soviet Union had "meticulously" observed most ICAO standards long before it became a member State in 1970s.[190] Nothing could be more convincing than this example to demonstrate that it is essential to be part of the system.

The existence of natural sanction by no means implies that ICAO does not have an institutionalized enforcement system. The reporting power vested in the ICAO Council, particularly under Article 54 *j)* of the Chicago Convention, has been the focus of attention in ICAO in the first decade of the 21st Century.[191] Requests for information as follow-up of resolutions or decisions have been widely practiced in the UN system. "These procedures apply more subtle pressures and when accompanied by machinery set up to supervise the implementation of the resolution they may be more effective than sanctions in nudging States toward compliance."[192] In ICAO, reporting requirements not only stem from the Chicago Convention but also from some other conventions adopted under its auspices.[193] While this type of system of sanction may be considered "soft", it is not necessarily softer than some forms of sanctions used in traditional international law. In the contemporary world, the report of a UN specialized agency within its competence may carry with it powerful political, economic and other effects against a State in non-compli-

188 See *supra* note 119 and accompanying text.

189 FitzGerald, *supra* note 167 at 161. See also Fawcett, J.E.S., "The International Monetary Fund and International Law (1964) 40 *BYIL* 34; Schermers & Blokker, *supra* note 98 at 774.

190 Milde, M., "Enforcement of Aviation Safety Standards – Problem of Safety Oversight" (1996) 45 *ZLW* 1 at 6, n. 14.

191 See *infra* 5.3 for more discussion of ICAO implementation and enforcement power.

192 Sloan, supra note 107 at 115, 134; van Hoof, *supra* note 63 at 270-275; Engel, "Procedures for the De Facto Revision of the Charter" (1965) *Proceedings of the American Society of International Law*, 59th Annual Meeting 108-116.

193 See *supra* Ch.4, notes 75 and 122 as well as accompanying text on the discussion of Article 11 of The Hague Convention. See also *infra* note 206.

ance, which could affect its vital interests. Moreover, the implementation of the secondary compliance system mainly depends upon the institutional value and strength of an organization. Members that value their entitlements in the institution will often think twice before they decide to disregard the decisions of the institution.

In summary of the foregoing, it may be said that quasi-legislative power has constituted the core of ICAO regulatory functions. The notion of quasi-law in ICAO has rarely been discussed in the existing legal literature. The present undertaking may be the first exploratory attempt to elaborate this notion and to provide it with a doctrinal basis. While this study could only be embryonic and non-exhaustive due to various constraints, a preliminary observation reveals that the notion does capture the legal phenomenon in the ordinary course of operation of ICAO. Between the fully binding legal rules and non-binding political and moral undertakings, there is a twilight zone of obligatory norms, which is primarily safeguarded by the internal institutional machinery of ICAO. Although quasi-law is not fully binding as law it may create favourable presumption for those complying with it, and impose a burden on those who do not wish to comply to justify their non-compliance. Some provisions of quasi-law may have stronger binding force than others, but all impose certain duties. Quasi-legislative activities of ICAO represent legal input of the organization arising from its institutional capacity which is distinguishable from the capacity of its members. These activities dominate the law-making process in ICAO. Systemization, refinement and perfection of this notion may enhance the role of ICAO and improve its regulatory activities. It may also promote the sense of duty of the member States to comply with quasi-law. ICAO does not serve simply to give political and moral guidance, it provides an institutional code of conduct to regulate aviation safety.

5.3 ICAO Enforcement and Implementation Functions

Traditionally, ICAO focused on development and adoption of treaties, standards and recommended practices, and other provisions relating to aviation safety, leaving their implementation basically in the hands of its member States. Since 1990s, there has been a paradigm shift from this pattern with the landmark decision to launch the universal safety oversight audit programme. This initiative was followed by the universal security audit programme. The results of the audits demonstrate not only the need to adopt safety regulations, but also the more pressing need to enforce and implement them.

The enforcement and implementation functions of ICAO should be carefully studied by the relevant bodies of ICAO and the academia, particularly if one considers that some safety obligations in aviation have evolved into, or are in the process of emerging as obligations *erga omnes.* One major issue in the debate relating to these obligations is how to enforce them. Some writers have

generally recognized and supported "decentralized enforcement" of obligations *erga omnes*,[194] namely, the counter-measures taken against the breach by parties which are not directly injured or affected by the breach. Others would have preferred centralized or institutional enforcement, such as enforcement through the UN system, in order to prevent the possible abuse of counter-measures by individual States.[195] Frowein, after reviewing state practice regarding third party reactions, arrived at the following conclusion:

> The recognition of fundamental rules of the system would be meaningless without any special procedures for implementing these rules. Only bilateral reactions would always create the danger that the more powerful State in the bilateral relations will prevail. Of course, it must be admitted that the danger in giving powerful States the justification for disguised political action to further their interests is also great where one accepts that third party reactions are lawful. With the decentralized structure of present-day international law this danger cannot be fully avoided. What one has to balance is on the one hand the need to protect the fundamental rules of the system by all those belonging to the community of States and on the other hand the danger that powerful States overstep the limits of the law. It is clearly preferable, therefore, that collective institutions should be involved in the procedure.[196]

The experience of ICAO in the implementation of its audit programmes has confirmed that it is preferable to enforce safety obligations through the institutional mechanisms of ICAO. Since some of these obligations are essentially of *erga omnes* character, which are the concern of all States, it would be logical for ICAO, as a world-wide and neutral organization, to oversee compliance with these obligations. This may ensure the balance between "the need to protect the fundamental rules of the system by all those belonging to the community of States and on the other hand the danger that powerful States overstep the limits of the law".[197]

5.3.1 Enforcement Functions

UN organizations, with few exceptions, have been characterized as having "intensive co-operation and monitoring, but little direct enforcement of legal obligations".[198] The ICAO audit programmes represent some progress from "monitoring" to "enforcement". Although it is by no means comparable to

194 Cf, mainly Tams, *supra* note 7; Simma, *supra* note 1 at 313 *et seq*.
195 Wang, X., *supra* note 57 at 297, 298 and 301.
196 Frowein, *supra* note 34 at 423. See also, Ma, X., "Statement on Responsibility of States for Internationally Wrongful Acts (2007)" (2008) 7 Chinese JIL 563 at para. 6.
197 *Id.*
198 Simma, *supra* note 1 at 283.

the enforcement procedure of a court, ICAO does have certain mechanisms on hand to apply sanctions against non-compliance with its rules or other provisions.

5.3.1.1 Enforcement under Article 54 j) of the Chicago Convention

The power of the ICAO Council to report infractions or failures under Article 54 *j)* has been previously discussed in the context of quasi-law.[199] It constitutes not only the central element in the machinery of ICAO for giving effect to quasi-law, but also one of the important tools to enforce full-fledged law. So far, there has been no decision of the Council based explicitly on Article 54 *j)*,[200] but its potential application is significant. The report of ICAO under this provision may have great influence in the industry and create powerful political, economic and other effects against the State that commits an infraction or an act of non-compliance.

In June 2005, the Council approved a procedure for transparency and disclosure of information regarding a State having significant compliance shortcomings with respect to safety-related SARPs, including failure to act in accordance with its safety oversight obligations. The procedure will be used for safety-related purposes only. It is not aimed at States that lack the resources for proper safety oversight[201] or States which may have difficulties managing the safety and effectiveness of their air navigation facilities. The procedure for transparency and disclosure under Article 54 *j)* is envisaged to be applicable only in the more serious scenario where a State demonstrates severe and persistent safety oversight shortfalls. A typical example would be an excessive number of large-transport aircraft on a State's registry, well beyond its capability for safety oversight. The aircraft so registered operate exclusively in distant countries and regions without appropriate arrangements, such as the transfer of certain functions and duties in accordance with Article 83 *bis* of the Chicago Convention, thus making effective safety oversight virtually impossible. A State may even openly advertise registration services for a fee, and some operations may have been linked to illegal activities.[202] Even in this scenario, the first recourse will be to resolve the problems by working together with the State through assistance programmes, support mechanisms and regional partnerships. Only when the State is unwilling or unable to participate in the cooperative efforts, will the case be presented to the Council for special con-

199 See *supra* 5.2.2.1 "Doctrinal and Constitutional Basis for Quasi-Law".

200 ICAO Council Working Paper C-WP/11186, "Infractions of the *Convention on International Civil Aviation*", 10 November 1999, at 3. The working paper mentions, however, that there were certain instances in which the Council, without referring to Article 54 *j)*, made a determination that an infraction had taken place. One instance was the shooting-down of the Korean airliner, Flight 007 by the Soviet Union.

201 ICAO State letter AN 11/41-05/87, 12 August 2005.

202 State letter, *id*. at Attachment A, A-2.

sideration and possible future action under the procedure for transparency and disclosure under Article 54 *j).* The Council may then decide what course of action should be followed. It may request more data or information, or decide that no further action is warranted. It may also proceed with recommendations urging the State to act within a specified time to explain its action, to remedy safety (oversight) problem(s), or to immediately ban or discontinue certain activity and take appropriate corrective action when it is determined that the activity is clearly inconsistent with the State's safety oversight obligations.[203]

The procedure was developed in 2005 and has not yet been tested. Further experience is yet to be gained concerning its actual operation. It appears that the emphasis will be put on the second part of Article 54 *j)*, *i.e.*, the failure to carry out recommendations or determinations of the Council, rather than on its first part, *i.e.*, "any infraction of this Convention". In other words, the procedure at the outset aims at resolving the safety issues at quasi-law level. Nevertheless, it does not exclude the possibility that if the State disregards the recommendations of the Council, its act may become an infraction of the Chicago Convention.

Two distinct steps are envisaged in the action of the Council. Firstly, the Council needs to make a recommendation or determination concerning the alleged non-compliance by a State. Only when the State fails to carry out the recommendation or determination will the Council decide to report to other contracting States under Article 54 *j).* At both stages of the process, a quasi-judicial procedure and elementary principles of justice must be followed. "This means that at a minimum, the State concerned must be given adequate opportunity to be heard by the Council under Article 53 of the Convention and Rule 32 of the Rules of Procedure for the Council."[204]

One may query whether the State will have a right to review or appeal if it does not accept the recommendations or determinations by the Council. Article 84 of the Convention, which grants a member State of ICAO the right to appeal to the International Court of Justice, is only applicable to "any disagreement between two or more contracting States"; it does not seem to cover the situation under Article 54 *j)*, which typically only involves one State. On the other hand, a determination of an infraction of the Convention will necessarily require interpretation of the Convention. Conceptually, it is difficult to understand why interpretation by the Council for two or more States could

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203 State letter, *id.* Appendix C, C-2.

204 C-WP/11186, *supra* note 200 at 3, paragraph 2.6. Article 53 of the Chicago Convention reads: Any contracting State may participate, without a vote, in the consideration by the Council and by its committees and commissions of any question which especially affects its interests. No member of the Council shall vote in the consideration by the Council of a dispute to which it is a party. Rule 31 of the Rules of Procedure for the Council contains the similar provisions, ICAO Doc 7559/7 *Rules of Procedure for the Council*, 7th ed. (2006).

be appealed, but interpretation for one State could not. With respect to the report of the failure to carry out recommendations and determinations by the Council, while it may not be as serious as the report of an infraction of the Convention, it may still affect the vital interests of the State concerned. For instance, such a report may trigger reaction from other States to ban flights by its airlines. From this point of view, one may wonder, in the interest of the rule of law, particularly the requirement of natural justice, whether recourse to a review process should not be established, if it does not exist.

5.3.1.2 Other Enforcement Mechanisms

In addition to Article 54 *j)*, Chapter XVIII of the Chicago Convention contains the procedure for the settlement of disputes, which is another important tool of ICAO for law enforcement. Under Article 84 of the Chicago Convention, each contracting State may submit to the Council any disagreement it has with another contracting State or States relating to the interpretation or application of the Convention and its annexes, if such a disagreement cannot be settled by negotiation. The decision of the Council may be appealed to the International Court of Justice, or to an arbitration tribunal if any party to the dispute has not accepted the Statute of the International Court of Justice.[205] Under Article 86, an important power is vested in the Council to decide whether an international airline is operating in conformity with the provisions of the Chicago Convention. While this power has never been used, it is a potentially important tool to enforce safety standards and other regulations. Once the Council decides that an international airline is not conforming to its final decision, all member States of ICAO are obligated under Article 87 to bar the operation of that airline in their territory until the decision of the Council is reversed on appeal. The power to impose a penalty directly on airlines may arguably be considered as being akin to supranational power, which may have far-reaching effect. The fact that our grandfathers could agree in 1944 on such a drastic and sweeping measure may be interpreted as their strong determination to defend the safety of international civil aviation.

5.3.2 Implementation Functions

Articles 54 *j)*, 86 and 87 apply to enforcement relating to the Chicago Convention. Whether some of their provisions could be applicable to enforcement measures relating to other treaties is an issue to be determined when a specific case arises. Nevertheless, several treaties adopted under the auspices of ICAO also contain their own reporting requirements. For example, Article VIII,

205 Articles 84 and 85 of the Chicago Convention refer to the Permanent Court of International Justice, which is now interpreted as the ICJ.

paragraph 2 of the MEX Convention provides that States Parties shall keep the Council informed of the measures they have taken to implement the provisions of this Convention.[206] Article IX further provides that the Council shall, in co-operation with States Parties and international organizations concerned, take appropriate measures to facilitate the implementation of this Convention. These provisions, together with the general provision in Article 55 c) of the Chicago Convention, which authorizes the Council to conduct research into all aspects of air transport and air navigation which are of international importance, leave the Council with a broad latitude to compel or enable States to fulfill their obligations under the relevant treaties, if it so wishes. The ICAO Assembly, under Article 49 k) of the Chicago Convention, may also deal with any matter within the sphere of the organization not specifically assigned to the Council.

In many cases, the issue is not one of disciplinary sanction but rather the need for assistance. States may lack the resources for proper safety oversight.[207] The main action contemplated from ICAO is to offer assistance to these States through its programmes.[208] Such programmes include, *inter alia*, the Technical Cooperation Programme administered by the Technical Cooperation Bureau of ICAO; the International Financial Facility for Aviation Safety (IFFAS) established in 2002;[209] and the Comprehensive Regional Implementation Plan for Aviation Safety in Africa (AFI Plan), established in 2007 to provide a common framework for States and all partners to allow a more proactive approach to aviation safety in the continent. Full description and analyses of these programmes are beyond the scope of the present study. Suffice it to say that while these programmes are helpful to developing countries through numerous specific projects, their magnitude has not yet resulted in a quantum leap for safety improvement on the global scale. To use IFFAS as an example, its total assets only amount to several million U.S. dollars. To rely on its limited funds for improving aviation safety worldwide would not be much different from using a tea cup to extinguish a big fire. If the international community is serious about these programmes, stronger determination and commitment are required to pour in more financial resources.

Putting political will and financial power aside, one may argue from a legal point of view that the current framework is sufficient to provide ICAO with the implementation competence to assist developing countries. Chapter XV of the Chicago Convention contains all necessary provisions for improvement of air navigation facilities. Among them, Article 71 provides that "if a contracting State so requests, the Council may agree to provide, man, maintain, and

206 See also *supra* note 193 as well as Article 13 of the Montreal Convention, which follows Article 11 of The Hague Convention.
207 ICAO State letter AN 11/41-05/87, 12 August 2005.
208 State letter, *id.* in Attachment A.
209 *Supra* note 131.

administer any or all of the airports and other air navigation facilities including radio and meteorological services, required in its territory for the safe, regular, efficient and economical operation of the international air services of the other contracting States, and may specify just and reasonable charges for the use of the facilities provided." In the history of ICAO, this power has been scarcely used, but its legitimacy has never been in doubt. The question is not whether ICAO has implementation power, but how such power should be used.

5.4 Implementation at the National and Regional Level

ICAO used to be less concerned with the modes of implementation of safety regulations in domestic laws. Since embarking on audit programmes, there has been gradual realization that the modes of implementation are also relevant to the safety oversight functions of States because they involve the fundamental question of whether a domestic court could apply international rules to decide a case. Moreover, the rise of regional bodies and the acceleration of regional integration in the implementation process also present new implications to the safety regime.

5.4.1 Implementation in National Law in General

There are different ways in which States implement ICAO regulatory material. In their practice, they are influenced by traditional doctrines of monism, dualism and others.

5.4.1.1 Monism

The monistic approach is based on a unitary conception of law. According to "radical" monism, *pacta sunt servanda* is the basic norm (Grundnorm) which gives effect to international law. The legal order of municipal law is derived from international law by way of delegation.[210] The conflict "between an established norm of international law and one of national law is a conflict between a higher and lower norm". The higher norm may abrogate the conflicting lower one.[211] This radical position has been modified by "modest" monists, who no longer insist that the power of a State is delegated by international law, but advocate the view that international law determines a margin

210 Kelsen, *Principles of International Law* (New York: Rinhart and Company Inc., 1952) at 403. See also Partsch, K., J., "International Law and Municipal Law", in Bernhardt (ed.) *Encyclopedia of Public International Law, supra* note 69 at 1183-1185.

211 *Id.* at 421. See also, O'Connell, D. P., *International Law*, 2nd ed. (London: Stevens & Sons, 1970) 39 *et seq*.

of action for each State which delimits its liberty of action.[212] "Modest" monism has influence on the legislative framework of a number of countries. For example, it is reflected in Article VI, clause 2 of the United States Constitution, which provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land". Similarly, under Article 184 of the Civil Aviation Law of the People's Republic of China, the provisions of treaties to which China is a party shall prevail over this Law in case of inconsistency, except the treaty provisions to which China has declared a reservation. Accordingly, domestic courts will give international treaties superior status over ordinary domestic law, but not over constitutional law. In some other States, treaties even prevail over their constitutions.[213]

It should be noted, however, that the aforementioned examples only refer to treaties, which may embrace the Chicago Convention and other international air law instruments. They do not refer to standards and recommended practices adopted under the Chicago Convention and other types of quasi-law developed by ICAO. For these types of regulatory materials, the modes of implementation vary from State to State. Some States just publish the Annexes to the Chicago Convention in their original form, and the materials therein become directly applicable at the domestic level. In these cases, the standards in the Annexes are enforceable standards, whereas the recommended practices in the Annexes remain as recommended practices. Other States incorporate the provisions of the Annexes into their domestic regulations. In these cases, all standards will become enforceable domestic regulations. As for recommended practices, States will have to determine whether some or all of them should be incorporated into domestic law. If they decide to do so, the incorporated parts of the recommended practices will also become enforceable domestic regulations, and the distinction between standards and recommended practices will no longer exist. For those recommended practices in the Annexes which are deliberately omitted in domestic regulations, a question may be raised whether they are devoid of any significance from the perspective of domestic law. Some States still circulate these recommended practices in one form or another, which may be used as guidance material, or even serve as quasi-law, which in practice determines the way in which people act.[214]

5.4.1.2 Dualism

According to dualism, international law and domestic law are different legal systems. They come from different sources and regulate different relationships. The former regulates the relationship between States, whereas the latter regu-

212 Verdross, "Le Fondement du droit international" (1927) 16 *RdC* 287. See, also, Partsch, *supra* note 210 at 1186; Wang, *supra* note 82 at 184 and 189.

213 Wang, *id.* at 208.

214 Montgomery, *supra* note 136.

lates the relationship between individuals and the relationship between an individual and the relevant State.[215] Consequently, treaty provisions are not directly enforceable by domestic courts, unless they are given such effect by the legislative body of the relevant State. This point has been articulated by Lord Templeman:

> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.[216]

This dualistic approach not only prevails in the United Kingdom, but also in other Commonwealth countries. In practice, it requires "enabling legislation" to transform a treaty into domestic legislation. With respect to standards and recommended practices as well as other types of quasi-law, they are normally given effect through the transformation into orders, regulations, decrees or other forms of secondary legislation under the delegated authority of the legislative body of the relevant country. In the United Kingdom, the civil aviation authority may adopt the Civil Aviation Publications (CAPs) and British Civil Airworthiness Requirements (BCARs) to impose requirements for flight crew licenses, certificates of airworthiness and air operator certificates. According to the Summary Audit Report issued by ICAO, the CAPs and BCARs contain material which is both regulatory and advisory in nature. "These publications are not considered to be law, and failure to comply with a requirement does not constitute an offence, although it may form the basis upon which a license or certificate is granted, refused, suspended, varied or revoked."[217]

5.4.1.3 Sui Generis Approach

Between monism and dualism, a middle-ground approach exists which may be a mixture or combination of the first two. For example, under the Swiss

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215 Triepel, H., "Les Rapports entre le droit interne et le droit international" (1923) 1 *RdC* 77.

216 *J. H. Rayner (Mincing Lane) Ltd.* v *Department of Trade and Industry*, 3 *WLR* 969 [1989] at 980; cited by Shawcross and Beaumont, *Air Law* (London: LexisNexis Butterworth, loose-leaf) Vol. 1 at I 209. See, also, Lord Denning, M.R., as he then was, in *Pan American World Airways* v. *Department of Trade* [1976] 1 *Lloyd's Law Reports* 257 (CA) (UK).

217 Audit Summary Report of the Civil Aviation Authority of the United Kingdom and the Civil Aviation Authorities of the Overseas Territories of Bermuda and Turks and Caicos Islands, available at http://www.icao.int/fsix/auditRep1.cfm, date of access: 7 June 2008.

regulatory system, no regulation may apply unless it has been published in the Official Compendium of Swiss Federal Law in the official languages which are French, German and Italian.[218] This is akin to the dualistic approach. Nevertheless, Article 6a of the Federal Aviation Act (748.0) of 1948 refers to the Annexes to the Chicago Convention and declares them directly applicable as an exception. It also allows the publication of these Annexes in the Swiss Journal of Law in a version other than the official Swiss languages.[219] Such direct application appears to be more in line with the monistic approach. In practice, ICAO standards and recommended practices are still transposed to the Swiss regulations.[220]

5.4.2 Regional Implementation

There was one important development in the second part of the 20th century concerning the increased involvement of regional bodies in aviation safety. While each region has its own aviation organizations of one form or another, the European region has developed the most institutionalized regional or even supranational system for regulation of aviation safety. In 1954, the European Civil Aviation Conference was created. Its main objectives are to review generally the development of European air transport in order to promote the coordination, better utilization and orderly development of such air transport and to consider any special problem that may arise in this field.[221] The conference is to be consultative and its resolutions, recommendations or other conclusions are subject to approval by governments.[222] The Joint Airworthiness Authorities began its work in 1970. Originally, its objectives were to produce common certification codes for large aeroplanes and for engines in order to meet the needs of European industry and particularly for products manufactured by international consortia such as Airbus. Associated with ECAC, it was later renamed as the Joint Aviation Authorities (JAA) and its mandate was extended to operations, maintenance, licensing and certification/design standards for all classes of aircraft.[223] JAA represented the civil aviation regulatory authorities of a number of European States who had agreed to cooperate in developing and implementing common safety regulatory standards and procedures. This cooperation was intended to provide high and consistent

218 Audit Summary Report of the FOCA, available at http://www.bazl.admin.ch/dokumentation/studien/, date of access: 6 June 2008.
219 *Id.*
220 *Id.*
221 *Shawcross and Beaumont Air Law*, *supra* note 216 at II 63B.
222 *Id.*
223 JAA website, http://www.jaa.nl/introduction/introduction.html, date of access: 8 June 2008.

standards of safety.[224] JAA developed Joint Aviation Requirements (JARs), placing emphasis on harmonizing with those of the United States. JARs annexed to European Regulation 3922/11 had automatic regulatory effect.[225] Those which had not yet been adopted under the European Union (EU) legislation could be implemented at the discretion of an individual State.

On 15 July 2002, with the adoption of Regulation (EC) No 1592/2002[226] by the European Parliament and the Council of the European Union (EU), a new regulatory body, the European Aviation Safety Agency (EASA), was created, which will replace JAA by 2009. EASA is a European Community agency, governed by EU public law; it is distinct from the Community Institutions (Council, Parliament, Commission, etc.) and has its own legal personality. Its mission is to promote the highest common standards of safety and environmental protection in civil aviation. The Agency develops common safety and environmental rules at the European level. It monitors the implementation of standards through inspections in its member States and provides the necessary technical expertise, training and research. The Agency works hand in hand with the national authorities which continue to carry out many operational tasks, such as certification of individual aircraft or licensing of pilots. In a few years, the Agency will also be responsible for safety regulations regarding airports and air traffic management systems. Accordingly, EASA is regarded as the centrepiece of the European Union's strategy for aviation safety.[227]

The establishment of EASA is said to be based on the need for "a single specialized expert body", which "is independent in relation to technical matters and has legal, administrative and financial autonomy."[228] The Agency has been designed in order to ensure a degree of separation between the political process (the role played by the European Commission, Council and Parliament in drafting and enacting legislation relating to aviation safety) on the one hand, and the design and implementation of the technical measures necessary for safety, on the other. It is set up to ensure that "safety-related measures remain free of any political interference which might prejudice the current high standard of civil aviation safety enjoyed in Europe."[229]

The renewed commitment to aviation safety by the European Community is illustrated by the Safety Assessment of Foreign Aircraft (SAFA) pro-

224 *Id.*
225 Audit Summary Report, *supra* note 217.
226 Repealed and replaced by Regulation (EC) No 216/2008.
227 EASA website: http://www.easa.eu.int/; *see*, also Probst, C., "New regulatory agency endowed with range of powers to ensure its effectiveness" (2005) 60:3 *ICAO Journal* 16.
228 EASA website, *id*.
229 EASA website, *id.*

gramme[230] and by the subsequent establishment of the Community list for an operating ban.[231] The SAFA programme was initiated in 1996 by ECAC, under the management of JAA, which was subsequently transferred to EASA for coordination.[232] Under the programme, in each EC member State and those States who have entered into a specific SAFA Working Arrangement with EASA, third-country aircraft may be inspected. These inspections follow a procedure common to all member States and are then reported on through a common format. If an inspection identifies significant irregularities, these will be taken up with the airline and the oversight authority. Where irregularities have an immediate impact on safety, inspectors can demand corrective action before they allow the aircraft to leave. Subsequently, in December 2005, the European Parliament and the Council of the European Union adopted Regulation (EC) No 2111/2005, establishing the general mechanism to create and update a Community list of third-country air carriers that are subject to an operating ban within the Community for not meeting safety criteria.[233]

The common criteria for consideration of an operating ban for safety reasons at the Community level are set forth in the Annex to Regulation (EC) No 2111/2005. Decisions to impose a ban will be made on the basis of the merits of each individual case, but the following criteria will be taken into account:

1. Verified evidence of serious safety deficiencies on the part of an air carrier;
2. Lack of ability and/or willingness of an air carrier to address safety deficiencies; and
3. Lack of ability and/or willingness of the authorities responsible for the oversight of an air carrier to address safety deficiencies.[234]

In expressing its opinion concerning third-country aircraft, EASA states that "commercial operations in the Community by third country operators must be subject to Community legislation. This is needed to protect European passengers and citizens on the ground. The Community shall therefore super-

230 Directive 2004/36/EC of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports, commonly known as the "SAFA Directive", published in the *Official Journal of the European Union* L 143 of 30 April 2004 and amended by Regulation 2111/2005 on "The establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier", *Official Journal of the European Union* L 344/15, 27 December 2005.

231 *Id.* Regulation 2111/2005.

232 Commission Directive 2008/49/EC of 16 April 2008 (*Official Journal of the European Union* L 109/17).

233 Regulation 2111/2005, *supra* note 230. *See* also Reitzfeld, A.D., & Mpande, C.S., "EU Regulation on Banning of Airlines for Safety Concerns" (April 2008) XXXIII:2 *Air & Space Law* 132.

234 Annex to Regulation 2111/2005, *id.*

vise such commercial operations while respecting international treaties, in particular the relevant ICAO obligations."[235] From this, it is clear that the Community has regarded aviation safety as the general concern of the whole Community, rather than that of each individual member State.

5.4.3 Global Ramifications of National and Regional Initiatives

The initiatives taken at the national and regional level may have ramifications beyond the nation or region, since foreign aircraft are affected. Similar to the International Aviation Safety Assessment (IASA) Program initiated by the United States,[236] the SAFA programme and the subsequent operating ban have also triggered some reaction, both positive and negative. It is said that the operating ban mechanism "is already making a difference in aviation safety".[237] Even if the ban only applies in the EU countries, European travelers might access the list on the internet and elect to impose a personal ban on travel on the listed airlines outside Europe. The spokesperson of the Community appeared to be satisfied when he stated that the Community list "increasingly serves as a pre-emptive rather than punitive tool for safeguarding aviation safety. There are now numerous instances where the Community has successfully addressed potential safety threats with third countries and airlines in advance and before it is forced to take the drastic measure of imposing restrictions."[238] At the same time, criticism has been voiced that the ramp checks on the ground could not spot some critical factors in the air, such as the behaviour and concurrence of the crew; that the list might be influenced by political and/or commercial considerations since no operator of major fleets of Boeing and Airbus aircraft has been included; that the black list "does not at all contribute to solve the fundamental problem in the area of airline and aviation safety: how to help economically and/or politically weak nations to effectively and durably implement ICAO minimum standards."[239]

There are good reasons to believe that certain national and regional initiatives, such as the IASA and SAFA programmes mentioned above, are the driving force for improving and promoting aviation safety. They serve as impetuses to push ICAO to take a more proactive approach to safety issues. On the other hand, the limitation of these initiatives must not be ignored. Safety of civil aviation is global in nature. The SAFA programme is designed, in the words of EASA, "to protect European passengers and citizens on the

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235 EASA Opinion No 3/2004, EASA website, *supra* note 227.

236 *Supra* note 222 in Ch.2, and accompanying text.

237 Reitzfeld & Mpande, *supra* note 233 at 153.

238 The Press Release, IP/07/1790, in http://ec.europa.eu/cyprus/news/latest_news/28112007a_en.htm, cited by Reitzfeld & Mpande, *id*.

239 Knorr, A., "Will 'Blacklists' Enhance Airline Safety?", Workshop of the German Aviation Research Society (G.A.R.S.), Amsterdam, 29 June 2006.

ground". It has apparently done so, but only in Europe. European passengers travel globally; Community aircraft fly to various destinations in the world, using the airports and air navigation facilities of other countries and regions. The strictest standards in Europe cannot guarantee the safety of its aircraft and passengers in other regions. Extra-regional efforts are necessary and, logically, they should be made through ICAO.

Even within Europe, the lack of uniformity may present problems. In the *Lockerbie* case, the bomb exploded over Scotland, but it was generally believed to have been imported from outside. Accordingly, the strictest security measures in the United Kingdom would be effective only if the same also applied to all places which have direct air links to the country. In another case, the Netherlands banned the operation of Onur Air from Turkey in May 2005 due to safety concerns, and its action was followed by France, Germany and Switzerland but not by Belgium and other countries.[240] Consequently, passengers of the banned flights were directed to neighbouring countries where the airline was still allowed to operate, which made the ban less effective. The EU transport commissioner, Jacques Barrot, was quoted as saying: "Europe cannot tolerate a badly coordinated approach among member States where a company is prohibited in one country and authorized in a neighboring country."[241] It is submitted that the same principle is applicable to the whole aviation world. Unilateral action, if not coordinated, may be less productive or even counter-productive.

Moreover, the involvement of ICAO is at any rate inevitable in view of the applicability of the Chicago Convention and its Annexes. Article 33 of the Chicago Convention provides,

> Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

So long as the certificates comply with ICAO standards, the validity of such certificates should be recognized by all member States of ICAO, including those

240 "EU plans to coordinate airline safety actions", *International Herald Tribune*, 27 May 2005, http://www.iht.com/articles/2005/05/27/business/fly.php, date of access: 14 June 2008.

241 *Id*. A counter-argument may be made that under the Chicago Convention, it is the sovereign States, such as Belgium, that should be responsible for aviation safety in their respective countries. The obligations under the Chicago Convention and those under the EU will also need to be "coordinated".

which are member States of the European Community.[242] It necessarily follows from such recognition that the operation of a particular aircraft in countries other than the State of registry should not be denied solely on the ground that the certificates carried by it do not meet the more stringent requirements imposed by the States where the aircraft operates. Otherwise, the purpose of Article 33, i.e., to establish uniform minimum standards for mutual recognition of the certificates, would be defeated.

As previously discussed in Chapter 2, the responsibility to ensure compliance with these standards rests with the State of registry or the State of the operator. Under Article 16 of the Chicago Convention, other States in whose territory the aircraft operates may, without unreasonable delay, search the aircraft on landing or departure and inspect the certificates and other documents. This may be considered as the legal justification for conducting the ramp checks required by the IASA or SAFA programmes. However, such checks can only apply ICAO standards since every member State of ICAO is obliged to do so under Article 33 of the Chicago Convention and its Annexes. The practice under the IASA programme seems to be in line with this presumption.[243] The same is applicable to Europe. The European Commission is not a party to the Chicago Convention but its member States are. While the Chicago Convention does not prohibit a contracting State from delegating its responsibility or authority to a third body such as the European Community, the delegated body could not have a greater power than the delegating State. Consequently, in the implementation of the SAFA programme, the European Community could only apply ICAO standards and could not impose more stringent requirements. Otherwise, consistency with Article 33 of the Chicago Convention and the relevant provisions of its Annexes could be questioned. In this connection, it must be pointed out that as a matter of principle, regardless of whatever binding effect the Community law may have upon its members, such law could not prevail over or be in conflict with the obligations under the Chicago Convention, since Article 82 of the Convention requires the member States of ICAO not to enter into any obligations or understandings which are inconsistent with the terms of the Convention. It is therefore not surprising that Annex II to the SAFA Directive specifically mentions Annexes 1, 6 and 8 to the Chicago Convention as applicable standards for a ramp

242 It should be noted, however, that Article 33 does not cover air operator certificates (AOC). The obligation for mutual recognition of AOC derives from paragraph 4.2.1.3 of Annex 6, Part I, which provides that contracting States shall recognize as valid an AOC issued by another contracting State, provided that the requirements under which the certificate was issued are at least equal to the applicable Standards specified in this Annex. Theoretically, it would be possible for a State to file a difference to paragraph 4.2.1.3 and relieve itself from the obligation; realistically, it may not be advisable to do so, because it may trigger non-recognition by other States of the AOC issued by such a State.

243 Broderick, A. J. & Loos, J., "Government Aviation Safety Oversight-- Trust, But Verify" (2002) 67 *JALC* 1034 at 1038.

inspection.[244] EASA in its opinion also acknowledged that "common rules have already been established by the SAFA Directive, to verify that the third country aircraft comply with the applicable ICAO Standards."[245] As a member State of both ICAO and the European Commission, the United Kingdom, for example, also acknowledges that the SAFA Programme is established "to complement the top down approach adopted in the ICAO audit programme".[246]

Regulation (EC) No 2111/2005 defines the "relevant safety standard" as "the international safety standards contained in the Chicago Convention and its Annexes as well as, where applicable, those in relevant Community law." While it does not mention whether ICAO standards or the Community law should prevail in case of conflict, the principle under Article 82 of the Chicago Convention must be considered as having been entrenched in this definition.

If it is proven that certain certificates do not meet ICAO standards, any member State of ICAO may refuse to recognize their validity. Moreover, as advocated above, since the responsibility for safety oversight is emerging as an obligation *erga omnes*, even the States which are not directly affected by the breach of the obligation may take counter-measures against the breach. From this perspective, European States are justified to take "community action" against the breach of obligation to provide safety oversight. From another perspective, whether a particular aircraft, airline, or eventually a State responsible for it is in compliance with ICAO standards or not should not be unilaterally decided by the State conducting inspection. In many cases, there will be disputes between the latter and the former on the issue of whether ICAO standards have actually been complied with or not. Such disputes, in the final analysis, are disagreements "relating to the interpretation or application" of the Chicago Convention and its Annexes, which come within the purview of the ICAO Council under Article 84. In this sense, it is ICAO, rather than the European Community or its members, that should be the arbiter for determining whether a particular certificate or license meets ICAO standards, subject to the right of appeal to the International Court of Justice. Furthermore, as indicated in the case of Onur Air, a decision to ban the operation of an airline may be based on false grounds.[247] Accordingly, fairness requires that certain mechanisms for review exist, preferably by a third party.

From the enforcement perspective, Article 87 of the Chicago Convention empowers ICAO to ban the operation of an airline worldwide if it is not con-

244 *Supra* note 230.

245 EASA Opinion No 3/2004, available at http://www.easa.eu.int/ws_prod/r/doc/opinions/Translations/03_2004/easa_opinion_03_2004_en.pdf. Date of access: 14 June 2008.

246 Explanatory Memorandum to the Civil Aviation (Safety of Third-Country Aircraft) Regulations 2006, (2006, No.1384), available at http://www.opsi.gov.uk/si/em2006/uksiem_20061384_en.pdf. Date of access: 14 June 2008.

247 http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB6588&u_ljn=BB6588. Date of access: 12 July 2008.

forming to a final decision by the Council. This sanction will be much more powerful and probably less controversial than a ban or other sanctions imposed by a State or a group of States.[248]

To summarize, either from a legal point of view or for practical considerations, ICAO is indispensable in the implementation of national and regional initiatives when such initiatives have global effects. Regional efforts should supplement rather than replace the safety efforts within the framework of ICAO. The system of ICAO may have weaknesses and deficiencies, but the better approach is in improving this system to make it work, rather than taking unilateral action with or without an intention to undermine it.

5.4.4 Reverted Monism?

The European Community is aware of the importance of the global concerted action for safety promotion. This is evident from one of the proclaimed objectives of EASA: "to promote Community views regarding civil aviation safety standards and rules throughout the world by establishing appropriate cooperation with third countries and international organizations."[249]

As mentioned above, the monist doctrines generally emphasize the supremacy of international law. There were some monists in the past who believed that municipal law was in its nature superior to international law.[250] The doctrine has been branded as "inverted monism" and is no longer fashionable.[251] It does not mean, however, that States could not export their legal concepts, rules and systems into international instruments. On many occasions, States have been trying to do so through treaty-making or standard-setting in ICAO. In theory, the ICAO system is based on an equal vote by its members, which is different from the UN Security Council where some countries have a veto, or the International Monetary Fund where weighted votes are recognized by its constitution.[252] In reality, particularly in law-making activities, it is a plain truism that "some States are definitely more equal than others".[253] More specifically, the United States and European countries possess greater

248 For reaction to the IASA programme of FAA, see Barreto, O., "Safety Oversight: Federal Aviation Administration, International Civil Aviation Organization, and Central American Aviation Safety Agency" (2002) 67 *JALC* 651at 659; for reaction to the operation ban imposed by the EC, see Knorr, *supra* note 239. See also *infra* note 268 *et seq.*

249 Article 2 (2), Regulation (EC) No 1592/2002, *supra* note 226.

250 Cf. O'Connell, *supra* note 211 at 42.

251 See, O'Connel, *id*. Partsch, *supra* note 210 at 1185; Wang, *supra* note 82 at 184 and 189.

252 Article 48, paragraph b) of the Chicago Convention provides that all contracting States shall have an equal right to be represented at the meetings of the Assembly and each contracting State shall be entitled to one vote. Article 52 provides that the decisions by the Council shall require approval by a majority of its members. Cf, Art. 27 of the UN Charter and Art. XII, Sec. 5 of the Articles of Agreement of the International Monetary Fund.

253 Cheng, B, *Studies in Space Law* (Oxford: Clarendon Press, 1997) at 682.

influential power upon the work programmes of ICAO, and in particular upon the legal programme.[254] Nothing is written in this respect in the constitutional instrument or any document of ICAO; but any veteran participant of ICAO activities knows this rule by heart: no major motion with legal implications may survive in ICAO without the endorsement, acquiescence or tolerance of the United States and member States of the European Community. This unwritten rule may be conveniently called the "North Atlantic Formula" for the purpose of this enquiry.[255] More often than not, this formula is applied under the disguise of "consensus", which in fact reflects the deal reached informally by the major players.

In his in-depth studies in international space law, Cheng has provided convincing evidence to demonstrate that in the law-making process of space law, "the essential point was agreement between the two space powers", namely, the Soviet Union and the United States. The most critical part of the negotiations was always carried out behind the scenes, among those who considered themselves "the only ones that really matter". Consequently, consensus "requires the unanimity of the dominant section in a given situation. It is a subtle way of bypassing the rigid one-State one-vote rule."[256]

The general relations between the US and the EU could not be compared with the relations between the United States and the Soviet Union. The political and legal systems of the current European States are also completely different from those in the former Soviet Union. However, the dominant position that the US and the EU jointly have in ICAO bears certain resemblance to the position the US and the former Soviet Union had in the United Nations Committee on the Peaceful Use of Outer Space. The description by Cheng may, *mutatis mutandis*, apply to the operation of the "North Atlantic Formula" in ICAO. The Universal Safety Oversight Audit Programme was established by ICAO without any formal amendment to the Chicago Convention principally because it was endorsed and in fact encouraged by the United States and most member States of the European Community.[257] The system of increased transparency for the results of audits was also the result of the application of the "North Atlantic Formula".[258] In the event that agreement could not be reached over

254 Cheng has given a number of convincing examples in this respect. One is that the 1971 Guatemala City Protocol could not come into force without the ratification of the United States. *Id.*

255 For the ease of illustration, this formula could be abbreviated as W=UU. W stands for World Aviation or ICAO, and double "U" respectively represents the USA and EU.

256 See Cheng, *supra* note 253 at 164, 165 and 682.

257 See Ch.2.3.3.3.

258 The press release issued on 22 March 2006 by the European Commission highlights its position: "It is clear that all the aviation supervisory authorities need to have access to all the information gathered by the ICAO's inspectors, which is what we achieved at the last ICAO General Meeting last September. We will use these new data to impose bans on airlines where needed. However, at the ICAO conference (20-22 March in Montreal) we will ask for even greater efforts to be made in terms of transparency." See, http://

the North Atlantic, the situation would be different. This is best illustrated by the unsuccessful attempt to conclude an international convention relating to the GNSS. The overwhelming majority of ICAO member States, including those in Europe, preferred to adopt a binding new instrument governing the use of GNSS. However, the proposal did not follow the "North Atlantic Formula". Consequently, after extensive discussions for at least 10 years by several Assembly sessions and conferences, two sessions of the Legal Committee, three panel meetings and eleven meetings of a study group, the convention on GNSS was aborted.[259]

This is hardly surprising, if one looks at a number of statistics. First of all, regarding "membership fees" to ICAO, the contributions of the United States and Germany amount to approximately one thirds of the total ICAO budget. If contributions of other "North Atlantic" members are added, they easily go beyond 50% of the ICAO budget. In addition to the regular budget, the US and EU also voluntarily contribute a large amount to extra-budgetary programmes. Those who pay the piper call the tune.

The statistics of the world total revenue traffic also indicate that out of the 514,750 million total tonne-kms performed in 2006, 61.01% was done in Europe and North America.[260] Obviously, any rule adopted within the auspices of ICAO would not be effective for its implementation without the endorsement, acquiescence or tolerance of the North Atlantic region, or to be more precise, the northern part of the North Atlantic region.

Some may argue that according to the rule of law, every State should be equal in its law-making function. "But even in those systems of municipal law where the principle of the Rule of Law and of equality before the law has been scrupulously observed, universal suffrage has never been regarded as legally an indispensable element. There is no reason why it necessarily be in international law."[261] In other words, "rules of general international law are made and sustained by the will of the dominant section of international society in each individual case",[262] including those States "whose interests are specially

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europa.eu/rapid/showInformation.do?pageName=recentPressReleases&guiLanguage=en. In another area of law making, despite the failure of the 1971 Guatemala City Protocol, the 1999 Montreal Convention bearing the same title as the Warsaw Convention came into force in a relatively short period of time on 4 November 2003, mainly because it is in conformity with the North Atlantic formula. As of 25 November 2008, there are 87 parties to the Convention, but only 11 out of the total 54 African States are parties.

259 See Assembly Resolution A35-3, which, unlike Resolution A32-20, omits the reference to an international convention on GNSS. See *supra* note 63 *et seq* in Ch.2 and accompanying text.

260 The breakdown in different regions is as follows (millions): Europe 141,740 (27.5%), Africa 11,450 (2.2%), Middle East 27,520 (5.3%), Asia and Pacific 147,460 (28.6%), North America 167,590 (32.6%), Latin America and Caribbean 18,990 (3.7%). *See*, ICAO Doc 9876, *Annual Report of the Council 2006*, at A-95.

261 Cheng, *supra* note 253 at 681.

262 *Id*. at 686.

affected", as mentioned in the *North Sea Continental Shelf* case by the International Court of Justice.[263] The weight of States is not equal in law-making and unanimity is not required.[264] As Cheng acutely points out, it is important to recognize this point, "instead of treating it as heretical or taboo, because it seemingly flies in the face of the principle of sovereign equality."[265]

The remaining issue is how to prevent the abuse of the dominant position, and to ensure that justice could be done to the weak, the poor, the small and the minor by the strong, the rich, the big and the major. One positive strategy is to strengthen the unity among the former, particularly developing countries, by combining their limited economic and technical resources in a particular region, and by amplifying their voice in ICAO. For instance, one initiative in the safety oversight area is the establishment of the Central America Aviation Safety Agency (ACSA) on 15 December 1999. This joint effort "would allow these countries to take into their own hands, and to defend on a combined basis if necessary, the establishment of a proper framework for aviation operations and safety oversight", rather than having major aviation powers "dictate the level and quality of safety standards".[266] In ICAO, developing countries have also taken concerted action to ensure that they are duly represented in the Council. But more efforts are necessary, particularly at a micro level, such as the work programmes of the committees, panels and study groups. From the statistics mentioned above, the Asia and Pacific region, which is mainly composed of developing countries, has exceeded the European region in transport volume in 2006, but the Asian and Pacific voice in ICAO is much weaker than that of the European region. This should provoke thinking towards improvement, especially in the mind of Asian and Pacific countries.

Another possible measure to prevent the abuse of the dominant position is to establish a certain form of judicial or quasi-judicial review within the framework of ICAO. While judicial review is not a panacea, it may assist to establish certain checks and balances in ICAO.

5.5 Checks and Balances under the Rule of Law

The preceding passages have demonstrated that ICAO not only possesses the competence to prescribe quasi-law, but also the competence to enforce and implement law and quasi-law, including the power to ban the operation of an airline under Article 87 of the Chicago Convention. If ICAO is considered as having certain centralized power to police the safety of international civil

263 [1969] *ICJ Reports* at 42-43.
264 Cheng, *supra* note 253 at 687.
265 *Id*.
266 Barreto, *supra* note 248 at 673.

aviation, who should police the police? ICAO is a body created by law and it must adhere to the rule of law.

The rule of law requires that ICAO should delimitate its mandate within the boundary of law. As its name indicates, its mandate is related to "international civil aviation". First and foremost, the meaning of "international" should be clarified. This will require that ICAO carefully handle the difference and interface between international and domestic civil aviation. In exercising its legislative or quasi-legislative function, ICAO has repeatedly encountered the issue of whether rules adopted under its auspices should be applicable to domestic civil aviation.[267] In certain cases, when the issue of "fundamental inseparability" between international and domestic civil aviation arises, there is a possibility that ICAO regulatory material may have a "spill-over" effect on the latter. Each case needs to be considered on its own merits and may even warrant judicial scrutiny under certain circumstances. It is suggested that if the obligation involved is of an *erga omnes* character, the competence of ICAO over domestic aviation might be recognized.

Viewed from another angle, "international" also means "global" or "worldwide". Accordingly, ICAO's responsibility is not, and should not be limited to a particular region or regions. ICAO is a specialized agency of the United Nations and is the only organization in the world in the field of civil aviation which is global and inter-governmental in nature. This has vested ICAO with *prima facie* legitimacy to coordinate safety issues at the global level for civil aviation. In fulfilling its mandate, ICAO needs to cooperate with regional bodies. This is particularly so since certain regions have spearheaded efforts for higher civil aviation safety standards. Their initiatives represent a dynamic force in the industry; they are the locomotive of the global train advancing to the destination of maximum safety. On the other hand, a question may be raised whether ICAO should reduce itself to being a rubber stamp on these initiatives. It could not just witness the advance of the locomotive and leave the rest of the train falling behind. Safety of civil aviation is global in nature. Thus, speaking from an EU perspective, Onidi points out: "Having created its internal aviation market (through which ICAO standards are being uniformly applied), the EU is conscious of the need to lay down key rules applicable to the worldwide aviation community and see them effectively enforced."[268] He perceives that ICAO may play its core role as the "world regulatory authority" and "world agency for technical assistance in aviation", as well as "the main promoter of the regional dimension in international aviation".[269] As discussed previously, if certain safety obligations could be considered as acquiring *erga omnes* character, as this writer perceives, the

267 See *supra* Ch.2.2.5.

268 Onidi, O., "A Critical Perspective on ICAO", February 2008, xxxiii/1 *Air & Space Law* 38, at 42.

269 Onidi, *id.* at 43 and 44.

counter-measures against the breach of such obligations should ideally be decided, coordinated or justified through the collective mechanisms in ICAO, in order to ensure the legitimacy, credibility and efficacy of the measures.[270]

Cooperation between ICAO and regional bodies will constitute an important aspect of civil aviation matters in the 21st century. Implementation of many programmes, such as the CNS/ATM systems, will require a regional approach. The current legal relationships between ICAO and various regional bodies are handled in casual and *laissez faire* manner, mostly at the initiative of the regional bodies rather than that of ICAO. A more systematic and integrated approach on the basis of in-depth study is desirable, with a view to forging a coherent and solid partnership to promote safety.

In addition to its "international" mandate, the "civil" dimension of ICAO will also need to be properly defined. As discussed in the third portion of Chapter 3 of the present study, the organization has not refrained from adopting decisions and regulations dealing with the safety of international civil aviation even if that meant interfacing or coordination with the military authorities. This is a challenging area for ICAO, where the implementation of the rule of law is particularly required.

The third component of ICAO's name is "aviation", which distinguishes ICAO from other UN bodies, particularly the UN Security Council. The drafters of the Chicago Convention had already foreseen in its preamble that international civil aviation "can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security". A breach of obligations relating to aviation safety may under certain circumstances also present a threat to international peace and security. In general, the respective functions of the UN Security Council and ICAO are well coordinated. When a Lebanese civil aircraft chartered by Iraqi Airways was diverted and seized by Israeli military aircraft on 10 August 1973, the Security Council adopted, on 15 August 1973, Resolution 337 (1973), condemning Israel and calling upon ICAO to take due account of this resolution when considering adequate measures to safeguard international civil aviation. In the same vein, ICAO adopted Assembly Resolution A20-1, solemnly warning Israel that if it continues committing such acts the Assembly will take further measures against Israel to protect international civil aviation. Further examples of smooth coordination are demonstrated in the cases respectively relating to Liberia and Iraq.[271] In these two instances

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270 One example of such measures is reflected in ICAO Assembly Resolution A28-7: *Aeronautical consequences of the Iraqi invasion of Kuwait*, *supra* note 105. A measure taken through the UN system carries the presumption of legitimacy. It is also more credible and effective, due to the neutrality of an international secretariat and the global scale of the measure. See also *supra* notes 196 and 248.

271 For the case of Liberia, see *supra* Ch.2, note 18 *et seq*. For the case of Iraq, *id*.

and others, ICAO may be considered as implementing the decisions of the Security Council.

The cases relating to Lockerbie and Gaza International Airport present a somewhat different picture.[272] In the case of Lockerbie, the UN Security Council intervened for two individual alleged offenders; in the case of Gaza, ICAO intervened for the act of State military forces. Did everyone stay in their own line of business? Ideally, the Security Council should focus on international peace and security, and ICAO, on aviation safety. The actual roles in Lockerbie and Gaza could have been transposed. Questions of State military acts are not for ICAO, whereas the UN Security Council does not have to occupy itself with the treaty application for crimes committed by individuals. These two cases demonstrate the need to rationalize the functions of different UN bodies on the basis of the rule of law. There might be some situations in which the Security Council may find it necessary to intervene in the areas of competence of specialized agencies, such as in the case of a food crisis in a State which requires a humanitarian intervention. But in general, it should be possible to leave the matter of aviation safety in the hands of ICAO.

The fourth part of ICAO's name is "organization". A solid organization not only needs to interface effectively with external bodies, but must also exercise its power with internal checks and balances. "Power entails accountability, that is the duty to account for its exercise".[273] In domestic law, accountability refers to a framework for the exercise of power, "within which public bodies are forced to seek to promote the public interest and compelled to justify their action in those terms or other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they should turn out to have been ill-conceived; and to make amends if mistakes and errors of judgment have been made."[274] In international law, the concept has also drawn increasing attention.[275] In the context of ICAO, its bodies have made numerous decisions which have promoted the safety of international civil aviation. Some of the decisions have encountered objections from States;[276] several of these decisions are not unquestionable from a legal point of view.[277] In view of the prospect of a more proactive exercise of ICAO's power, a serious question may

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272 See *supra* Ch.4, note 78 *et seq* concerning the Lockerbie case, and note 100 *et seq* regarding Gaza.

273 Final Report of the International Law Association, Committee on the Accountability of International Organizations (Berlin Conference, April 2004), 5 and 6.

274 Oliver, D., *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Milton Keynes: Open University Press, 1991) at 28, cited by White, *supra* note 102 at 189.

275 See the Report of the ILA, *supra* note 273, and White, *supra* note 102.

276 Osieke, E., "Unconstitutional Acts in International Organizations: the Law and Practice of the ICAO" (1979) 28 *International Law and Comparative Law Quarterly* 1.

277 See, for example, the decision relating to the Gaza Airport, *supra* Ch.4 note 100. See also the issue relating to the definition of unlawful interference, *supra* Ch.4 note 150 *et seq*.

be raised whether such a power should be subject to more rigorous checks and balances, including certain forms of judicial review.

The issue of judicial review deserves treatment in a separate volume beyond the present undertaking. Vast literature exists in the context of the Security Council of the United Nations, particularly relating to the *Lockerbie* case.[278] In its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, the International Court of Justice declared that it "does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned."[279] However, the Court stated that "in the exercise of its judicial function and since objections have been advanced, the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions."[280] In the *Lockerbie* case, the ICJ did not foreclose the possibility that it may at a later stage be "called upon to determine definitively the legal effect of Security Council resolution 748 (1992)."[281] Judge *ad hoc* Sir Robert Jennings, while dissenting from the majority view on the issue of admissibility, still confirms that the Security Council decisions and actions should in no way be regarded as enjoying some sort of "immunity" from the jurisdiction of the ICJ:

> The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.[282]

278 See, for example, Dugard, J., "Judicial Review of Sanctions", in Gowlland-Debbas, V., ed. *United Nations Sanctions and International Law* (The Hague: Kluwer Law International, 2001) at 83; White, N.D., "To Review or Not To Review: The Lockerbie Cases Before the World Court" (1999) 12 *LJIL* 401; Watson, R., "Constitutionalism, Judicial Review and the World Court" (1993) 34 *Harvard Journal of International Law* 1; Alvarez, J.E., "Theoretical Perspectives on Judicial Review by the World Court (1995) 89 *American Society of International Law Proceedings* 85.

279 [1971] *ICJ Reports* at 45, paragraph 89. See also the *Certain Expenses* case, [1962] *ICJ Reports* at 168. According to Dugard, these dicta are premised on the silence of the UN Charter on judicial review and on the *travaux préparatoires*, which saw a Belgian proposal for review rejected, Dugard, *id*. at 85.

280 *Id*. [1971] *ICJ Reports* at 45.

281 [1992] *ICJ Reports* 126 at para. 43. Judge Lachs stated in his separate opinion that the Order made should not be seen as an abdication of the Court's powers (at 139).

282 Dissenting Opinion of Judge Sir Robert Jennings in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment,* [1998] *ICJ Reports* 99 at 110.

In the *Case concerning the Application of the Genocide Convention*, Judge *ad hoc* Sir Elihu Lauterpacht implies that a Security Council resolution must not be in conflict with *jus cogens*.[283]

From the foregoing, it is irrefutable that no organ of the United Nations system is above the law. When the legality of its action is challenged, it should not be the judge of its own case, or at least not in the final instance. This inherently denotes that the International Court of Justice, as the principal judicial organ of the UN, may exercise in one form or another judicial control over the actions of other organs of the UN. As pointed out by Dugard, the "total rejection" of judicial review by the ICJ "is unlikely to prevail". "The debate therefore shifts from *whether* the Court will exercise judicial review to *how much*".[284] On one side, there are so-called "judicial romantics" who favour the analogous application of the power of constitutional review in domestic courts; on the other, there are "realists" who in principle oppose judicial review, unless the Court acts upon the request of the relevant bodies, such as the Security Council.[285] Despite these different views, the consensus seems to be clear: "An organization based on the rule of law cannot, in principle, exempt itself from judicial control."[286]

5.5.1 Checks and Balances in ICAO Quasi-Judicial Activities

When the ICAO Council hears disputes between member States regarding the interpretation or application of the Chicago Convention, it exercises "a truly judicial function" under Chapter XVIII of the Convention.[287] In this respect, a full appeal procedure is provided in that Chapter which ensures checks and balances. When the Council exercises its quasi-judicial function under Article 54 *j)* or even Article 54 *n)*, a question remains whether a procedure exists for checks and balances.

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283 His statement is as follows: "The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent." Separate Opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia, Provisional Measures, Order of 13 September 1993*, [1993] *ICJ Reports* 325 at 440.

284 Dugard, *supra* note 278 at 88.

285 Cf. Alvarez, *supra* note 278 at 85. The term "judicial romantics" was coined by Reisman, W. M., in "The Constitutional Crisis in the United Nations" (1993) 87 *AJIL* 83.

286 Simma, *supra* note 1 at 283.

287 Cheng, *supra* note 116 at 52.

As seen from the history of ICAO, cases submitted within the framework of Chapter XVIII were all settled or discontinued without the need for the Council to render a decision on the merits. It has become a long established practice of ICAO that utmost efforts be made to settle disputes through negotiation and consultation among the parties, using the good offices of the Council and the Secretariat. The process of the negotiation ensures to a large extent that the vital interests of different parties are duly taken into account. As a result, no party will generally feel that it has suffered great injustice. In the case of Article 54 *j)*, there is no case at hand which illustrates how it will actually be applied. From the orientation set by the Council, it is quite clear that a heavy emphasis will be put on working together with the State whose safety records have been questioned. Formal recommendations or determinations by the Council will only be considered as the last resort. Accordingly, it is expected that most issues would be resolved before the process contemplated under Article 54 *j)* would be completed, and the final number of "failures" to be reported by the Council would be very low. This is in fact a built-in mechanism for checks and balances which will alleviate the need for an appeal procedure. However, in the event that some cases do reach the stage of being reported to the member States, justice would not appear to have been done if the State whose interests are affected does not have further recourse to have the decision reviewed or even overturned. In the absence of an appeal procedure, it is not predictable how the ICJ would handle the case. In the view of this writer, if the State concerned could present a *prima facie* case that the decision of the Council is questionable, and that its vital interests are adversely affected, nothing prevents the ICJ, "as the general guardian of legality within the system",[288] from exercising jurisdiction over the case on the basis of its inherent superintendent and supervising power.

5.5.2 Checks and Balances of ICAO Quasi-Legislative Activities

In the sphere of quasi-legislative activities, some mechanisms currently exist for checks and balances. The organizational hierarchy may present a built-in opportunity for review. The higher level may always review the decisions or recommendations of the lower level. For instance, the Council may review the work of its subordinate bodies, the Air Navigation Commission and the Secretariat. However, it is not clear who is entitled to review the decisions of the Council. While Article 50 *a)* of the Chicago Convention provides that the Council shall be a permanent body "responsible to the Assembly", Article 49 *k*) clearly specifies that the Assembly could deal with any matter within the sphere of action of the organization "not specifically assigned to

288 Judge Lachs, Separate Opinion in the *Lockerbie Case* (Provisional Measures), Order, [1992] *ICJ Reports* at 128.

the Council". Accordingly, some of the decisions of the Council, such as the most important quasi-legislative acts of adopting standards and recommended practices, are not subject to approval or amendment by the Assembly, since this power has been specifically assigned to the Council under Article 54 *l*). Other decisions of the Council which may have quasi-legal effect, such as certain resolutions condemning certain acts violating international law, may in theory be reviewed by the Assembly. However, the power of the Assembly is in fact very limited. In 1998, one commentator questioned whether the ICAO Assembly is "the most unsupreme" of supreme organs in the UN system.[289] Despite the appeal to strengthen the power of the Assembly,[290] the trend since 1998 seems to be moving in the opposite direction. The Assembly meets only once every three years. Due to budgetary constraints, the duration of the session of the Assembly was reduced from three weeks previously to nine working days in 2007. In 2004, the Assembly, in its resolution A35-3, recognized "the importance of Item No. 1 of the General Work Programme of the Legal Committee 'Consideration with regard to CNS/ATM systems, including global navigation satellite systems (GNSS), of the establishment of a legal framework', and resolutions or decisions by the Assembly and the Council relating to it".[291] Not long after that, the Council decided to downgrade this item from priority No. 1 to priority No. 3.[292] In September 2007, the Assembly approved a triennial budget for 2008 to 2010, listing "The Rule of Law" as one of the strategic objectives of ICAO; three months later, at the very beginning of the first year of the triennium, there was already an attempt to downgrade "The Rule of Law" from a major strategic objective to a supporting strategy.[293] If one compares ICAO to an aircraft, the Council is like a pilot-in-command and the Assembly is like a group of passengers. Effective review of the Council's decisions by the Assembly may be untenable in the current political climate although it should be seriously considered in the future reform of ICAO.

The *lex lata* of ICAO seems to give no other alternative but to leave it entirely in the hands of the Council to review its quasi-legislative decisions. Indeed, there was at least one instance in which the Council responded to a request to review its decision which had been allegedly incorrect,[294] which indicates

289 Fossungu, P. A., "The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System? A Critical Analysis of Assembly Sessions" (1998) 26 *Transportation Law Journal* 1.

290 Milde, M., "The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?" (1994) XIX:I *AASL*. 401 at 429 *et seq*. See also Fossungu, *id*.

291 ICAO Doc 9848, *supra* note 22 at V-7.

292 ICAO Doc 9865-C/1152, C-Min. 176/1-15, *Council – 176th Session, Summary Minutes with Subject Index* (2006), C-Min. 176/12 at 154-155.

293 ICAO SG 1975/07 M2/5, 13 December 2007.

294 The review is related to the definition of unlawful interference in Annex 17. See *supra* Ch.4, note 155.

the usefulness of the self-review mechanism. However, in that instance, the State which requested the review happened to be the strongest aviation power in the world. It is not only a member of the ICAO Council but also the most substantive contributor to ICAO's budget. If a request for review were to come from a State which is a non-member of the Council, the situation might be different.[295] Obviously, the mechanism of self-review is not sufficient if an international organization such as ICAO is to be genuinely governed by the rule of law.

Without conducting major surgery on the body of ICAO through the amendment of the Chicago Convention, there are several ways possible to improve the mechanisms of checks and balances within the current system. Several commentators have proposed to increase the frequencies of the sessions of the Assembly and to reduce those of the Council to enable the Assembly to exercise more control over the work of the Council.[296] While this proposal is quite constructive, there is no sign of the political will to implement it. Furthermore, even if the Assembly could take a greater supervisory role over the work of the Council, the Assembly itself remains a self-reviewing body and its decisions are not subject to review by any other body.

Another possibility is to entrust the Legal Committee to be the third body for internal review. Within the ICAO system, the Legal Committee has a unique status as the sole permanent committee constituted by the Assembly. It is open to participation by all member States.[297] Its duties and function shall *inter alia* be:

> a) to advise the Council on matters relating to the interpretation and amendment of the Convention on International Civil Aviation, referred to it by the Council; b) to study and make recommendations on such other matters relating to public international air law as may be referred to it by the Council or the Assembly;…[298]

Since both the Council and the Assembly could refer to the Legal Committee "matters relating to public international air law", the Legal Committee is not only responsible to the Council but also to the Assembly. Both organs may seek opinions of the Committee in this respect. While these opinions may be

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295 In 1998, two African States, Zimbabwe and Lesotho, presented a working paper to review the election process of the President of the Council. The proposal in the paper was not accepted by the Assembly (ICAO Assembly Working Paper A32-WP/66, "Constitutional Matters" 10 July 1998). Almost ten years later, in 2007, the Assembly endorsed more or less the substance of the proposal, i.e., a person who has served two full terms as the President of the Council could not be admitted as the candidate for this office for the third term (Assembly Resolution A36-28: Term limits for the Offices of Secretary General and the President of the Council, in ICAO Doc 9902, *Assembly Resolutions in Force* (as of 28 September 2007) at VIII-2.

296 Milde, *supra* note 290.

297 Assembly Resolution A7-5, in ICAO Doc 9848, *supra* note 22 at I-16.

298 Resolution A7-5, *id.*

considered "advisory" and non-binding, they could be useful for the consideration of the legality of decisions of the respective organs. In this connection, it may be recalled that the Council did seek the opinion of the Legal Committee on the need to amend the MEX Convention, and the Assembly, on the basis of the view of the Legal Committee, adopted a resolution relating to the interpretation of certain provisions of the Convention. It is submitted that in this instance, the opinion of the Legal Committee could create a favourable presumption for member States which have acted in conformity with the opinion.[299] Regrettably, it is only on very rare occasions that the advice of the Legal Committee is sought. Although the Rules of Procedure of the Committee stipulate that a session of the Committee shall normally be convened annually, it is actually convened only once in three or four years. When convened, it is usually tasked with the heavy workload for the preparation of a draft treaty, leaving little time for other legal issues. If ICAO is serious about enhancing the rule of law, the advisory function of the Legal Committee should be strengthened. Many unresolved legal issues, such as the application of standards and recommended practices to domestic flights, the application of the Montreal Convention of 1971 to State acts, the definition of unlawful interference, and the criminal jurisdiction of the State of the operator, could be studied by the Legal Committee.

To make a bolder move, the role of the Legal Committee may be further expanded to provide an advisory opinion relating to the legality of a quasi-judicial decision of the Council or a resolution of the Assembly, upon the request of a member State unfavourably affected by such a decision or resolution. In view of the advisory nature of the opinion of the Legal Committee, this does not constitute a judicial review in its strict sense but may provide a modest degree of checks and balances. To borrow the words of Judge Lachs, the purpose of this exercise is "not to encourage a blinkered parallelism of functions but a fruitful interaction" among different bodies of the organization.[300] In this connection, it should be mentioned that an individual member State of ICAO does not have an automatic right to request advisory opinions of the ICJ.[301] Article X, paragraph 3 of the Agreement between the United Nations and ICAO provides that "such request may be addressed to the Court by the Assembly or the Council" of ICAO.[302] Accordingly, without the corresponding action by the Assembly or the Council, a request from a member State for an advisory opinion of the ICJ could not be processed. This makes it all the more necessary to allow a member State to have a recourse through the Legal Committee in order to safeguard the rule of law.

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299 See *supra* Ch.4, note 135 and accompanying text. See also *supra* note 186.

300 Judge Lachs, Separate Opinion is the *Lockerbie Case* (Provisional Measures), Order, [1992] *ICJ Reports supra* note 281, at 138.

301 In this respect, Osieke seems to hold a different view. See *supra* note 276 at 22.

302 *UNTS* (1947) at 332.

5.6 Concluding Remarks

The rule of law is not only one of the strategic objectives of ICAO but also one of the four goals identified in the outcome document of the UN millennium conference. The Secretary General of the United Nations defines the rule of law as follows:

> The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[303]

A coherent, uniform and sustainable safety system for international civil aviation must be solidly based on the rule of law. The rule of law first requires the existence of the normative system with transparency, stability and authority. In its history of 60 years, ICAO has developed numerous rules relating to safety in various forms. In view of the new challenges it faces in the third millennium, the time has arrived for an endeavour to systematize these rules as coherently as the current political climate will permit. At the core of this system are the values reflecting elementary considerations of humanity and the respect for the basic rights of the human person. Based on these core values, there is a hierarchy in the normative system. On top of the pyramid are fundamental norms which, by their very nature, are the concern of all States. Below them are rules embodied in the traditional sources of international law as stipulated in Article 38 (1) of the Statute of the International Court of Justice, such as international conventions and international customs. Beneath these are numerous quasi-law provisions in the twilight zone between fully binding rules and non-binding guidance.

In view of the importance of the rights involved, the obligations in the first rank, namely, obligations *erga omnes*, could not comprise a long list£¬but would at least include the duties of a State to provide safety oversight, to refrain from the use of weapons against civil aircraft in flight, and to prevent and punish certain acts endangering the safety of civil aviation. These obligations are laid down not for the interest of an individual State, but for a higher purpose: safe and orderly development of international civil aviation. They "are grounded not in an exchange of rights and duties but in an adherence

303 "The rule of law and transitional justice in conflict and post-conflict societies", Report of the Secretary General, UN Doc. S/2004/616, 23 August 2004.

of a normative system."[304] In essence, they are intrinsically linked to elementary considerations for humanity. Such considerations become vital concerns in an aviation context with the rapid growth of this mode of transportation, and with the increase of terrorist activities. This concern transcends territorial boundaries and nationalities, and has become the concern of the international community as a whole. When obligations are breached, the reaction of third parties which are not directly injured is possible.

What is the significance of these obligations? First of all, they establish important rights which are different from certain rights typically arising from treaties and customs. Unlike certain reciprocal treaty obligations, obligations *erga omnes* do not allow a State to make a reservation to, or unilaterally release another State from, such obligations. Moreover, while a State may claim that it is not bound by a customary rule which has been subject to its consistent objection, it may not do so against obligations *erga omnes*. In other words, the rights involved with obligations *erga omnes* are the rights of the international community and must be universally respected with no exception.

Secondly, obligations *erga omnes* also give rise to the need of the machinery for their protection. In view of the interests of the international community which are at stake, who should act on its behalf to protect the interests, and to claim the remedies in the event of the breach of such obligations? It is generally recognized that when a State commits a breach of an obligation *erga omnes*, all States to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State.[305] However, the judgements made by different States are more likely to be different rather than to be the same. As it is often said, a terrorist for one State may be a freedom fighter for another. To provide a fair and objective assessment of an alleged breach, an international neutral body is necessary. At least in one instance, when the UN Security Council was prevented by veto to make a decision, the ICAO Council was able to adopt a resolution to condemn the act of shooting down a civil aircraft in flight.[306] Whether it is recognized as an agent or representative of the international community or not, ICAO did act for the international community in this instance. The audit programmes carried out by ICAO may also be considered as the exercise of the mandate given by the international community, in order to enhance safety as common values.

If ICAO is considered as having a limited power to act on behalf of the international community, such a power must be subject to the rule of law. Anarchy could not be compatible with safety. Dictatorship, on the other hand,

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304 ILC Study, *supra note* 4 at 198, n 552; Provost, *supra* note 15 at 386.

305 Resolution of the Institute of International Law, Fifth Commission, Obligations and rights *erga omnes* in international law, 27 August 2005. Accessible through the website of the Institute in: http://www.idi-iil.org/.

306 See *supra* note 37.

is no solution for the sustainable safety. Checks and balances are indispensable. There is a tendency, however, that the power of ICAO is over-concentrated on the Council, which in turn is practically controlled by States in the northern part of North Atlantic region. In view of its quasi-legislative and quasi-judicial functions, a review system should not only be in place, but also be rationalized. Strengthening the role of the Legal Committee of ICAO could be a practical solution. A proper division of power among the Assembly, the Council and the Legal Committee will promote the rule of law in ICAO and protect the interest of the community and its members.

General Conclusions

Civil aviation is to a large extent international by its nature. It transcends territorial boundaries and various nationalities. It "could not have evolved without worldwide uniformity in regulations, standards and procedures in relation of air navigation".[1] Accordingly, efforts have been made since its infant period to provide international regulation, culminating in the conclusion of the *Convention on International Civil Aviation* in 1944 (Chicago Convention), and the establishment of the International Civil Aviation Organization (ICAO) in 1947. Throughout the six decades of its existence, the focus of ICAO work has been to ensure the safe and orderly development of international civil aviation.

Aviation safety is often perceived as a technical matter, such as the technical specifications of aircraft, and technical expertise of aviation professionals. A closer scrutiny reveals that safety is not the exclusive domain of the technical profession. It has policy and legal dimensions. Firstly, it involves a complex decision-making process for risk management, i.e., to determine how safe is safe on the basis of technical, economic and other considerations. Secondly, once it is determined, the level of safety needs to be reflected in enforceable legal terms. Consequently, safety entails obligations. In a positive sense, a State is under a duty to act within its available means to promote aviation safety. In a negative sense, it shall refrain from doing anything that is likely to endanger safety.

One of the tenets of the Chicago Convention is that every State is responsible for safety oversight in civil aviation within its jurisdiction. Deriving from this tenet is the requirement for a State to maintain a "genuine link" with aircraft on its registry to ensure their continuous compliance with safety standards, unless it transfers such duties and function to another State pursuant to the applicable rules. The notion of "flags of convenience", used for purposes of avoiding safety regulations, must be ruled out from the system of the Chicago Convention. The responsibility of a State also extends to the provision of air navigation facilities and services within its territory in accordance with ICAO standards. The issue as to whether such responsibility includes liability is subject to a debate. Currently, the prevailing view is that Article 28 does

1 Milde, M., "Enforcement of Aviation Safety Standards – Problems of Safety Oversight" (1996) 45 *ZLW* 3 at 4.

not give a cause of action to private persons to claim compensation for damage. Moreover, there is no precedent in ICAO in which one member State claimed compensation from another on the basis of Article 28.

To assist States in achieving uniformity in technical regulations, ICAO has developed international standards and recommended practices, as well as other regulatory material. The levels of implementation of these technical regulations vary from State to State. This has caused concerns because the safety oversight function of one State will have impact upon another State. "When safety standards and procedures are involved on international flights, one cannot even take the position that non-compliance by a sovereign State affects only the citizens of that State. Any other State that receives flights of aircraft registered in the non-complying State has every reason to be concerned about whether international standards and procedures are in fact being followed with respect to such aircraft and crews."[2] For this reason, the ICAO Assembly recognizes that a primary objective of ICAO is to ensure the safety of international civil aviation "worldwide", and that Member States also have this responsibility "both collectively and individually".[3] Consequently, since the last decade of the 20th century, one could witness the trend of collective efforts in implementing safety standards, as demonstrated by the Universal Safety Oversight Audit Programme of ICAO.

Civil aviation needs to overcome not only the natural or inherent hazards of aircraft operations, such as mechanical failure, bad weather or human errors; but it must also resist man-made dangers and threats. The relations between civil aviation and military activities represent a crucial aspect of aviation safety. The greatest risk posed by military activities to civil aviation has been demonstrated by occurrences of civil aircraft being shot down deliberately or by mistake, causing numerous fatalities. In this respect, international law has evolved from certain State practice in which intruding aircraft "may be fired upon" to the complete ban of the use of weapons against civil aircraft in flight. Shooting down a civil aircraft in flight is regarded "as a transgression from the basic concept of humanity", and goes against the "highest dictate of conscience".[4]

The most serious man-made threats to aviation safety come from terrorist attacks and other acts of unlawful interference, as evidenced by the abhorrent events on 11 September 2001. In this respect, the reaction of the international aviation community in its law-making efforts could best demonstrate its firm conviction to protect the safety of civil aviation. There were times when

2 Kotaite, A.,"Sovereignty under great pressure to accommodate the growing need for global cooperation" (December 1995) 50 *ICAO Journal* 20.

3 ICAO Assembly Resolution A35-7: United strategy to resolve safety-related deficiencies, 1st and 2nd paras, ICAO Doc 9848, *Assembly Resolutions in Force* (as of 8 October 2004) at I-60.

4 See *supra* notes 107 and 108 in Ch.3 and accompanying text.

hijackers of civil aircraft could expect a hero's welcome, but those days are gone. The international community has gradually progressed from its initial reluctance to deny political asylum to hijackers and sabotageurs, to the predominant position that the political offence exception should not apply to these perpetrators. Like pirates, they are "common enemies, and they are attacked with impunity by all, because they are without the pale of law. They are scorners of the law of nations; hence they find no protection in that law."[5]

The duty to provide safety oversight, the duty to refrain from the use of weapons against civil aircraft in flight, and the duty to prevent and punish the acts of hijacking and sabotage endangering the safety of civil aviation are the trio-obligations associated with three major dimensions of aviation safety. All of them are linked to the elementary considerations of humanity and the right to life, a fundamental human right. "There can be no issue of more pressing concern to international law than to protect the life of every human being from unwarranted deprivation."[6] Unwarranted deprivation of life could result from terrorist attacks, mistaken use of military forces, as well as preventable failure to comply with safety standards. From this perspective, a threat to aviation safety is a threat to life. To protect aviation safety is to protect the right to life.

In view of the importance of the rights involved with aviation safety, the trio-obligations mentioned above have become the concern of all States and are emerging as obligations *erga omnes*. One of the characteristics of obligations *erga omnes* is their universality and non-reciprocity. They are obligations of a State "towards the international community as a whole", which are "the concern of all States".[7] They exceed the reciprocal legal relations between pairs of States, and all States have a legal interest in their observance.[8] These obligations "are grounded not in an exchange of rights and duties but in an adherence to a normative system".[9] The trio-obligations mentioned above possess this character. For example, an act by a State to shoot down a civil aircraft in flight does not provide any justification for other State to take the same action against the civil aircraft of that State. To use Fitzmaurice's words, "no

5 See *supra* note 166 in Ch.4.

6 Ramcharan, B.G., "The Concept and Dimensions of the Right to Life" in Ramcharan, B.G. ed. *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1985) 1 at 2.

7 *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (Second Phase) [1970] *ICJ Reports* at 32.

8 Annacker, C., "The Legal Regime of Erga Omnes Obligations under International Law" (1994) 46 *Austrian Journal of Public International Law* 131; Simma, B., "From Bilateralism to Community Interest in International Law" (1994:IV) 250 *RdC*, 217 at 230.

9 Provost, R., "Reciprocity in Human Rights and Humanitarian Law" (1994) 65 *BYIL* 383 at 386.

amount of non-compliance" on the part of other States "could justify a failure to observe" the norm.[10]

Obligations *erga omnes* may contain both negative and positive obligations. A negative obligation commands its bearer to abstain or refrain from performing certain acts, whereas a positive obligation commands its bearer to do or perform certain acts.[11] International law has long evolved from "an essentially negative code of rules of abstention to positive rules of cooperation".[12] With respect to the duty to provide safety oversight, it is not sufficient for States to refrain from doing anything to endanger safety, they must do something to promote safety. This obligation does not require a State to guarantee that there is no aerial accident in its jurisdiction, but it does require the State to take all necessary measures to implement the safety standards, or at least to demonstrate that it is impossible to take such measures.

Obligations *erga omnes* imply that all States can be held to have a legal interest in their protection. How an interested third State could be involved with their enforcement has been an interesting topic for intensive debates among the commentators. Many writers have supported "decentralized enforcement" of obligations *erga omnes*,[13] namely, the counter-measures taken against the breaching State by other States which are not directly injured or affected by the breach. However, counter-measures by third States are often controversial. Under certain circumstances, they may be abused by certain States, particularly powerful ones, "for disguised political action to further their interests."[14] Accordingly, the best option is to establish a centralized and institutional enforcement, such as the enforcement through the UN system. The experience of ICAO in the implementation of its audit programmes has confirmed that it is preferable to enforce safety obligations through the institution of ICAO, particularly those obligations which may essentially be of *erga omnes* character. As the UN specialized agency responsible for civil aviation, and as the universal, neutral and legitimate body in this field, ICAO is well-positioned to take the proactive role in the global action of enforcing safety obligations. This may ensure that a balance is maintained between "the need to protect the fundamental rules of the system by all those belonging to the community of States and on the other hand the danger that powerful States overstep the limits of the law".[15]

The founders of ICAO have granted it the immense powers of enforcement, including the power to ban an airline of a Member State from the operation

10 Fitzmaurice, G., "The General Principles of International Law" (1957:II) 92 *RdC* 1 at 120.
11 Austin, Lectures on Jurisprudence at 346.
12 Friedmann, W., *The Changing Structure of International Law* (New York, 1964) at 62.
13 See *supra* note 194 in Ch.5. Cf, Frowein, J. A., "Reaction by Not Directly Affected States to Breaches of Public International Law" (1994:V) 248 *RdC* 345 at 417-420.
14 Frowein, *id*., at 423.
15 *Id.*

though the territorial airspace of its Member States under Article 87 of the Chicago Convention. The Convention also provides mechanisms, including the appeal procedure, for settlement of disputes. Its contracting States have pledged to abrogate all obligations and understandings which are inconsistent with its terms. National and regional efforts should supplement rather than replace the safety mechanisms within the framework of ICAO. The system of ICAO may have weaknesses and deficiencies, but the better approach is to improve this system to make it work, rather than taking unilateral action with or without intention to undermine it.

If ICAO could be considered as an agent acting for the international civil aviation community to oversee the safety of civil aviation worldwide, including the enforcement of certain obligations *erga omnes*, it is essential to adhere strictly and scrupulously to the rule of law. This requires the establishment and rationalization of a normative system with transparency, stability and authority. It is proposed that a hierarchy of the normative system should be composed of three levels of norms: obligations *erga omnes* and *jus cogens* on the top of the pyramid, followed by the traditional sources of international law, such as treaty and customary rules, and then numerous quasi-law provisions in the twilight zone between the fully binding rules and non-binding guidance.

The quasi-legislative function of ICAO has never been questioned. What is not clear is the legal status of its output, particularly when the practice of the Assembly de-emphasizes the differences between "standards" and "recommended practices". Confusion deepens when ICAO in fact audits the compliance of certain regulatory material which could not be considered as binding.[16] In view of this, academic efforts have been made in this dissertation to rationalize the practice of ICAO by refining the concept of "quasi-legislation" or "quasi-law". While this first attempt in the current study could only be embryonic, imperfect and incomplete, the existence of this twilight zone between the fully binding legal rules and non-binding political and moral undertakings is hardly deniable. Aviation lawyers ignoring this phenomenon would not be able to practice his or her profession effectively. As Judge Lauterpacht observes, there is an "imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right".[17]

The constitution of ICAO does not contain any obstacle for establishing a system of quasi-law. On the contrary, the Chicago Convention clearly distinguishes in its Article 54 j) two concepts, one is "infraction of this Convention", and another is "failure to carry out recommendations or determination of the Council". Accordingly, there is a constitutional support for the existence

16 This includes associated procedures, guidance material and safety-related practices, see ICAO Doc. 9735, AN/960, *ICAO Safety Oversight Audit Manual*, 2nd ed. (2006) at 3-1.

17 *Supra* note 147 in Ch.5.

of two levels of obligations or compliance systems. The primary system is composed of the obligations directly laid down by the Chicago Convention, which are backed by traditional sanctions under international law against the breach of a treaty. The secondary system consists of norms of quasi-law, backed by the institutional mechanisms within ICAO, in particular the reporting power of the Council under Article 54 j) of the Chicago Convention. In the contemporary world, the report of a UN specialized agency within its competence may carry with it powerful political, economic and other effects against an act of non-compliance.

In view of the potential role of ICAO, it is imperative to establish and reinforce an effective system of checks and balances. ICAO must be able to police itself before it could police the safety of international civil aviation. It has been suggested that if ICAO does not wish to retire at approximately 60 years as a natural person usually does, it should "re-tire (as in 'put on new tires') and go ahead towards an audacious renaissance".[18] To enhance its neutrality, authority and efficiency, ICAO could maximize its attention on real safety issues and minimize disguised political interventions.

The organization is composed of 190 States, and certain countries or groups of countries may have greater influence upon the work of ICAO. In law-making activities, "some States are definitely more equal than others".[19] This should be openly recognized "instead of treating it as heretical or taboo, because it seemingly flies in the face of the principle of sovereign equality."[20] However, it would be possible to devise an appropriate system of checks and balances to constrain the possible undue influence of the dominant section, to reduce legally unsustainable political considerations, and to provide a minimum protection to the weak, the poor, the small and the minor. A review process may also assist in verifying the correctness of the decisions of ICAO bodies. A system of full-fledged judicial review may need some time to come, but strengthening the role of the Legal Committee of ICAO is not a far-fetched solution. This Committee, created by the Assembly and responsible to both the Assembly and the Council, could provide a review mechanism to advise whether a particular decision of ICAO is legally sustainable.

A proposal has been made that ICAO should not only be a policeman but also a doctor for curing safety defects.[21] The ultimate purpose of detecting safety deficiencies is to eliminate them. However, as a doctor needs medical resources to cure a patient, ICAO also needs resources to deal with safety deficiencies, particularly those in the developing countries. This is a challenge

18 Milde, M., Chicago Convention at Sixty – Stagnation or Renaissance, circulated as course material in the Institute of Air and Space Law, McGill University, ASPL – 633.

19 Cheng, B, *Studies in Space Law* (Oxford: Clarendon Press, 1997) at 682.

20 *Id*.

21 A topic of discussion at the Forum on Air and Space Law, organized by the American Bar Association and the Institute of Air and Space Law of McGill University, Montreal, Canada, 18-19 September 2008.

that requires a stronger determination of the international community. In the aviation world where terrorism presents serious threats, the strength of the chain of safety is in its weakest link. The global solidarity of the aviation community is therefore required. In this context, one may recall the statement of His Excellency, the Minister of Justice of the Kingdom of the Netherlands, Dr. Karl Polak:

> The safety and smooth running of international civil aviation is a matter of prime and common concern to countries and peoples throughout the world. All States, however different their interests may be, share the same basic interest in the preservation and promotion of international air transport. Modern society cannot function properly without it.[22]

This statement, made in 1970 at the opening of The Hague Conference, holds all the more true today. It is hoped that this common concern of all States could continuously inspire them to "work together, so that the air may be used by humanity, to serve the humanity …"[23]

22 ICAO Doc 8979-LC/165-1, *International Conference on Air Law*, The Hague, December 1970, Volume I, Minutes (1972) at 1.

23 *Supra* note 52 in Ch. 1.

Samenvatting (Summary in Dutch)

LUCHTVAARTVEILIGHEID EN ICAO

Dit onderzoek bestudeert het mandaat van de intergouvernementele burgerluchtvaartorganisatie (*International Civil Aviation Organization*) op het gebied van luchtvaartveiligheid, zulks vanuit een juridisch perspectief. Het beschrijft de bijdrage van ICAO op het gebied van het wereldwijde veiligheid. Tegelijkertijd worden, op basis van ervaringen uit het verleden, aanbevelingen gedaan om ICAO's mechanismen te rationaliseren ten einde de luchtvaartveiligheid middels wetgeving te optimaliseren

Het eerste hoofdstuk analyseert het concept van luchtvaartveiligheid. Veiligheid is niet het exclusieve domein van technici. Er is ook sprake van beleid en een juridische dimensie. De geschiedenis van de civiele luchtvaart, hetgeen kort wordt beschouwd in dit hoofdstuk, herbergt de grondslag voor het verbeteren van veiligheid en vertoont een continue stroom van nationale naar internationale regelgeving. ICAO is opgericht als een reactie op de noodzaak voor een globaal raamwerk. Luchtvaartveiligheid is de *raison d'être* van ICAO. Vanwege de groei van de luchtvaart, de technologische ontwikkelingen, de globalisering en de terroristische dreigingen, wordt ICAO geconfronteerd met een nieuwe vraag voor het verbeteren van de luchtvaart veiligheid.

De drie hoofdstukken die daarop volgen richten zich op drie grote veiligheidsvraagstukken, te weten de goedkeuring en implementatie van technische veiligheidsstandaards, het verbieden van het inzetten van wapens tegen civiele luchtvaartuigen in vlucht, en het tegenhouden van terroristische- en andere handelingen tegen de veiligheid van de civiele luchtvaart. In hoofdstuk twee wordt de technische regelgeving behandeld. In eerste aanleg wordt de verantwoordelijkheid van de staat aan de orde gesteld, met name voor wat betreft veiligheidstoezicht. Deze verantwoordelijkheid rust bij de staat waar het luchtvaartuig is geregistreerd en, meer recentelijk, kan ook behoren bij de staat waarin de gebruiker van het luchtvaartuig zich heeft gevestigd. Er is ook verantwoordelijkheid voor de staat voorzover er luchtverkeersdienstverlening binnen het grondgebied van die staat wordt aangeboden. Vervolgens wordt er in dit hoofdstuk gekeken naar de formulering van technische regelgeving, het bijzondere onderwerp waarop de regelgeving betrekking heeft, de criteria waaraan die regelgeving moet voldoen en het proces rondom de goedkeuring van de regelgeving en juridische karakter ervan. In het laatste gedeelte van het hoofdstuk wordt ook aandacht besteed aan het veiligheidscontrole

programma van ICAO (*ICAO Universal Safety Oversight Audit Programma*) en wordt geconcludeerd dat de controle activiteiten van ICAO baanbrekend zijn. In tegenstelling tot het traditionele internationale recht is er sprake van autoriteit en toezicht door een international organisatie. De bevoegheden van ICAO versterken de naleving van standaarden (*standards*) en aanbevelingen (*recommended practices*) die door ICAO zijn uitgevaardigd.

Hoofdstuk drie beschrijft de relatie tussen luchtvaartveiligheid en militaire activiteiten. Op dit vlak is er een gespannen verhouding tussen enerzijds de noodzaak om bepaalde luchtvaart activiteiten te beschermen en anderzijds om gelegitimeerde militaire activiteiten uit te voeren. Het gebruik van wapens tegen civiele luchtvaartuigen heeft tot diverse slachtoffers geleid, hetgeen heeft geresulteerd in Artikel 3*bis* van het Verdrag van Chicago (Verdrag over de internationale burgerluchtvaart) waarin het gebruiken van geweld tegen civiele luchtvaartuigen is verboden. In dit hoofdstuk wordt de praktijk van staten beschreven, met name vanwege de implicaties van de voorvallen op 11 September 2001. De internationale gemeenschap geeft sinds die tijd de hoogste prioriteit aan zaken die gerelateerd zijn aan de bescherming van het individu. Ook worden bepaalde aspecten die gerelateerd zijn aan de coördinatie tussen civiele- en militaire activiteiten bestudeerd. Er moet een einde worden gemaakt aan potentieel gevaarlijke aktiviteiten jegens civiele luchtvaartuigen.

In hoofdstuk vier komen terrorisme en wederrechtelijke handelingen aan de orde, zoals militaire-, terroristische- of overige handelingen aan de orde. Het pionierwerk van ICAO sedert de jaren 1960 heeft geresulteerd in een vijftal internationale verdragen die in dit hoofdstuk nader zijn bestudeerd. Zoals blijkt uit de Lockerbie zaak kan luchtvaartveiligheid ook verweven zijn met internationale vrede en veiligheid. Het gevecht tegen terrorisme is een cruciaal onderdeel van de veiligheidsmaatregelen van ICAO. Kaping en sabotage versus de veiligheid van civiele luchtvaart worden gezien als serieuze internationale misdaden vergelijkbaar met piraterij, mishandeling en misdaden tegen de menselijkheid. Tegelijkertijd, verdragen over luchtvaartveiligheid die onder auspiciën van ICAO zijn geratificeerd moeten bijgehouden worden opdat ze expliciet de aanstichters en uitvoerders van criminele handelingen sanctioneren, alsmede serieuze dreigingen strafbaar stellen die substantiële nadelige gevolgen zouden kunnen hebben voor de civiele luchtvaart. Bovendien, in aanvulling op deze strafrechtelijke maatregelen, moeten er ook preventieve maatregelen worden ontwikkeld en bijgehouden.

Hoofdstuk vijf onderstreept het belang van rechtsregels ten einde ICAO in staat te stellen om haar veiligheidsmandaat te kunnen uitvoeren. Allereerst wordt de relatie tussen veiligheidsverplichtingen en het concept van *erga omnes* verplichtingen bestudeerd. Bepaalde veiligheidsverplichtingen zijn niet gebaseerd op een uitwisseling van rechten en verplichtingen, maar op een systeem dat zich uitstrekt tot toezicht op luchtvaartveiligheid van civiele luchtvaart, de verplichting om zich te onthouden van het gebruik van wapens tegen civiele luchtvaartuigen, en de verplichting tot preventie van- en het bestraffen van

criminele handelingen die gericht zijn tegen de veiligheid van de civiele luchtvaart. Vanwege de relatie met de elementaire humanitaire grondslagen en het fundamentele recht op leven kunnen ze worden beschouwd als *erga omnes*. Iedere staat is gehouden om de rechten ten aanzien van deze verplichtingen te beschermen. Op basis van deze conclusie, wordt voorgesteld dat de handhaving van de *erga omnes* verplichtingen geschiedt via het neutrale internationaal instrumentarium van ICAO. Dit ter voorkoming van tegenmaatregelen die getroffen kunnen worden op het moment dat er op het niveau van staten onderling een inbreuk wordt geconstateerd. Om er voor te zorgen dat ICAO fair, effectief en met autoriteit kan handelen moet de systematiek van ICAO worden gerationaliseerd. Ten eerst moet het regelgevingssysteem transparant, coherent en juist gedefinieerd worden. In paats van een ambivalente positie tussen verbindende- en niet-verbindende kracht van bepaalde normen, moet het concept van quasi-regelgeving worden erkend, verhelderd en uitgewerkt worden.

Alhoewel bepalingen afkomstig uit quasi-regelgeving misschien niet kunnen worden gehandhaafd in de reguliere rechtbank, kunnen deze in de praktijk wel bepalen hoe men moet handelen. Met name als deze bepalingen kernachtig zijn geïmplementeerd in het institutionele mechanisme van ICAO. Vervolgens moeten deze bepalingen nader worden bestudeerd, waardoor ze kunnen worden geïntegreerd in een coherent, verifieerbaar en relatief stabiel systeem. Ten tweede, bepaalde onderbelichte mechanismen uit het verdrag, zoals de aanbevelingskracht van de Raad op basis van Artikel 54 j), en de bevoegdheid onder Artikel 87 waarmee een luchtvaartmaatschappij kan worden verboden om internationale vluchten uit te voeren, zouden heroverwogen moeten worden. Tot slot, de controle mechanismen moeten worden gereorganiseerd en verbeterd zodat men zich nauwgezet aan de wetgeving van de internationale organisatie onderwerpt.

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Curriculum Vitae

HUANG Jiefang was born on 16 August 1956 in Semarang, Indonesia. He graduated from Wuhan University, China with an English diploma in 1980 and with a Bachelor of Laws in 1983. He obtained in 1985 an LL.M. from the Institute of Air and Space Law, McGill University, Canada.

He was a student counsellor and teaching assistant in Wuhan University from 1980 to 1982, served as Attaché/Third Secretary in the Embassy of the People's Republic of China to Canada from 1986 to 1988, and worked from 1988 to 1996 in Bloomfield, Bellemare, a law firm in Montreal representing several member States of the International Civil Aviation Organization (ICAO). In 1996, he joined ICAO Secretariat as a legal adviser, and currently is working as Legal Officer in its Legal Bureau.

In de boekenreeks van het E.M. Meijers Instituut voor Rechtswetenschappelijk Onderzoek van de Faculteit der Rechtsgeleerdheid, Universiteit Leiden, zijn in 2007 en 2008 verschenen:

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