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The Dogmatics and Modernisation of International Conventions on Aviation Security

Today it is barely conceivable but, in the post-Second World War world of international civil aviation, issues of security did not generate special concern. At that time nobody envisaged that one day terrorists would hijack airplanes or use them as weapons and unruly passengers will cause everyday problems. In the beginning, states put emphasis exclusively on flight safety. The establishment of flight safety first and foremost required the elaboration of an international system of rules concerning technical requirements. It is not accidental that air transport is one of the most regulated industries in the world. The slogan has persisted in similar forms: Safety is our priority, Safety is a priori, Safety does not allow compromise, Safety safeguards 24 hours a day, etc. Despite that, all of us are aware that safety in itself does not suffice.

Hardly had the ink dried on the Paris Peace Treaty (1947),[1] then humankind had to realise that it was returning to a battlefield, the scene of the Cold War, which again divided the world into two parts; in this way, it forestalled the way to the so-longed-for state of peace and unity. Simultaneously, terrorism emerged as well and it was manifested in manifold versions. Besides the unique nature of civil aviation embracing the world and the primacy of flight safety, the world demanded a paradigm shift, and urged for a new way of thinking and a new system of rules: aviation security.

Flight safety and aviation security, despite their close relationship, differ from each other fundamentally. Although in both areas, the dual purpose of the law-maker is preventing or

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[1] On 10 February, 1947 World War Two ended for Hungary, Finland, Bulgaria, Italy and Romania with the signature of the Paris Peace Treaties. The five peace treaties were signed simultaneously. These were similar to each other as to their basic principles, which had been formulated during the Potsdam Conference of 1945.

averting danger and thereby saving lives as well as protecting property, we are dealing with two sharply distinct areas.

– *Flight safety* means a system of capabilities, in which the performers in the industry can react effectively and competently to eventual emergencies related to operation and upkeep, as a result of which no accidents or flying incidents occur. (Regarding the fact that flight safety is never 100%, from a practical viewpoint it is more pragmatic to use the phrase 'no avoidable or as few as possible accidents or incidents occur').[2]

– Aviation *security* is a system of capabilities, due to which the performers of the industry can provide effective and competent protection to aircraft on the ground or in the air, to the passengers and crew on board the aircraft or on the grounds of airports, to the ground-staff and third persons on the ground *vis-à-vis* unlawful acts endangering their security.

Unlawful acts include all acts or attempts committed by a person endangering the safety of international civil aviation. Such acts include unlawful seizure, sabotage, taking hostages, violent intrusion (on board, at the airport, or in the area of an air navigation facility) and the placement of weapons, a dangerous tool or material with the purpose of the commission of a crime.[3] Furthermore, what frequently occur are threats of bomb attacks, imparting misleading, false information or refusing to cooperate with staff during the flight.

Beyond the difference between the notions, flight safety prevails via the completion of mainly international and transparent regulatory tasks, while aviation security, although its effect is global, consists primarily of tasks of protection to be tackled nationally. The system of rules of flight safety is open and knowable for everyone, whereas the security rules constitute a closed system, excluding access to the inherent confidential information for those not concerned. However, the safety and security of international civil aviation may only be effective if these two prominent areas cooperate continually and support each other unconditionally.

I The Tokyo Convention (1963)

Although in the early phase of aviation unlawful acts against staff, or devices used during flights also occurred, no social demand prevailed for their international regulation due to their isolated character and low number.[4] In our days, the presence of people in the air has become constant; it is therefore not accidental that, along with the incessantly growing

[2] Henri Wassenbergh, 'Safety in Air Transportation and Market Entry' (1998) 23 (2) Journal of Air and Space Law 83.

[3] The enumeration is not complete. Several crimes and criminal behaviours will be introduced, which are atypical and occur in cumulative offences or have become relevant for criminal law as new commission conducts.

[4] Jacques Charles (1746–1823) a French inventor and mathematician, released a (pilotless) balloon filled with hydrogen, the lightest gas (with 14.4 times less density than air) for the first time in the world on 26 August 1783, which, after one of its successful landings, was destroyed by the startled inhabitants of the settlement of Gonesse guided by their terror of the device. Later, the name of Gonesse near Paris was written in black in the history of civil aviation, since it was its territory on which a Concorde, a supersonic airplane of Air France crashed on 25 July, 2000. Piers Lechter, *Eccentric France, The Bradt Guide to Mad, Magical and Marvellous* (Bradt Travel Guides 2003, UK) 35–36.

number of passengers, the number of unlawful acts committed on board aircraft has also increased. Although states applied developed punishment systems as early as at the beginning of the 20th century, none of them could effectively respond to the challenges of international air traffic. The acts committed on board the aircraft, their increasingly and obviously unique situation and peculiar management coerced the rule-maker to take a different approach. Undoubtedly, any minor, insignificant act occurring at various frequencies and committed on board an aircraft in flight (e.g. smoking despite prohibition, fighting or verbal harassment) has a great impact on flight safety, and so its gravity clearly differs from similar acts committed on the ground. Moreover, at an altitude of 10 km (nearly 40,000 feet), unlawful acts committed on board aircraft overflying the sovereign airspace of various countries raise several issues, the solution of which on an international level became inevitable. For instance, during the enforcement of the territorial principle, it was difficult to determine in which country's airspace the crime was committed and, due to this uncertainty, which country could be entitled to proceed against the perpetrator of the crime. It also occurred that the country having jurisdiction did not conduct the criminal proceedings, or did not request the extradition of the perpetrator.[5] In the worst case, states could not proceed in the absence of jurisdiction, and therefore, the perpetrator's crime remained unpunished.

Although jurists had dealt with the criminal legal aspects of unlawful acts committed on aircraft since the 1910s, the first comprehensive response was formulated in 1963 under the first international treaty dealing with aviation security.[6] The *Convention on Offences and Certain Other Acts Committed on Board Aircraft,* adopted in Tokyo[7] under the auspices of the ICAO, had been framed as a result of the ten-year concerted work by the international community. In the Convention, the international community as a whole responded with proper determination primarily to *international terrorism* as the gravest danger, threatening civil aviation and damaging its interests.

The Tokyo Convention shall apply in respect of offences against penal law of the Contracting States as well as 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 irrespective of whether the acts qualify as crime pursuant to the national rules of substantive criminal law of the Contracting States [Article 1 (1) *a)–b)*]. The essence of the Convention is contained in this provision, since the wide-scale extension of the substantive scope of application facilitates holding anyone responsible for any act jeopardising flight safety as an objective to be protected to the utmost by all Contracting States.

The Convention has fulfilled its most important objective, since it unified and standardised the legal relationships that needed to be regulated at the international level. This

In March 1784 Jean-Pierre Blanchard (1753–1809) aviatician was compelled by a young man named Dupont de Chambon with a sword to take him into the clouds. The attempt was thwarted by reason of the application of physical strength. *The Encyclopaedia Britannica* (11th edn, New York 1910) 264.

[5] R. H. Mankiewicz, 'The 1970 Hague Convention' (1971) 37 Journal of Air Law and Commerce 195–196.

[6] Sami Shubber: *Jurisdiction Over Crimes on Board Aircraft* (The Hague 1973) 5.

[7] ICAO Doc 8364 *Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft* (1963).

was absolutely urgent, since in the early days of commercial aviation there were several examples of unlawful acts severely jeopardising flight safety on board the aircraft where the perpetrator was not called to account under criminal law due to the deficiencies of relevant national rules.

In the *United States versus Cordova*[8] lawsuit, the defendant could not be prosecuted due to the absence of jurisdiction. On 2 August 1948, a scuffle broke out on board a United States registered DC-4 passenger plane travelling from the capital of Puerto Rico, San Juan (SJU), to New York (LGA) between the heavily inebriated Mr. Cordova and the cabin crew in the tail of the plane while it was flying above the (high seas of the) Atlantic Ocean. Due to the weight of the cabin crew and passengers hastening to help to restrain Mr. Cordova, the tail of the airplane became tail-heavy. Thanks to the rapid interference of the pilots, the resulting loss of altitude and speed could be corrected and the unruly passenger, restricted in his personal freedom, waited for landing and his transfer to the authorities. The accused, whose culpability was beyond doubt, was committed for trial, but he could not be prosecuted pursuant to the federal law then in force, since, in the event of a crime committed on the high seas, a court of the United States only had jurisdiction if the crime was committed on board a ship registered by US authorities, and the case had to be dismissed.[9]

1 Jurisdiction

The law-makers of the Tokyo Convention settled the above deficiencies deriving from diverse national rules and dealt with the issue of jurisdiction with high priority. The establishment of the system of the institutions of jurisdiction was carried out along the principle that the criminal liability of natural entities under international law due to an infringement of the rules of international law could be prosecuted and punished, by the state in the territory of which the crime was committed. With respect to the fact that national penal codes primarily apply the territorial principle, its enforcement was not impeded by a legal obstacle.

As a main rule, *the State of registration of the aircraft is competent to exercise jurisdiction* over offences and acts committed on board jeopardising flight safety [Article 3 (1)]. The law-maker demands that each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in that State [Article 3 (2)]. The purpose of the law-maker was to prevent the lack of jurisdiction as a consequence of the lack of state sovereignty while flying over high seas (as a territory to be freely used by all). Therefore, the Convention needs to be applied 'in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State while that aircraft is in flight or on the surface of the high seas or of any other area outside

[8] *United States v Cordova,* US District Court E.D. New York, 1950.89 F. Supp. 298.
[9] Brian F. Havel, Gabriel S. Sanchez, *Principles and Practice on International Aviation Law* (Cambridge 2014) 185.

the territory of any state'. [Article 1 (2)]. This also entails that *exclusive jurisdiction* is only applicable with respect to the registering state if the registered aircraft is flying over the high seas or Antarctica. In this way, the law-maker created a situation in which the people on board are subject to the jurisdiction of at least two states (the one securing its national airspace and the state of registration) at the same time.[10] Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft [Article 16 (1)].

However, it is not at all unlikely that not only 'the state of the flag' and the state of the national airspace, but other states also have jurisdiction *vis-à-vis* the perpetrator of the crime. The equitable interest of the states to avail themselves their rights is narrowly constructed and guaranteed as an exception by the Convention. As such, a specific State may have jurisdiction if:

a) the offence has effect on the territory of such State;

b) the offence has been committed by or against a national or permanent resident of such State;

c) the offence is against the security of such State;

d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;

e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement (Article 4).

The law-maker also grants jurisdiction to the 'state of the first landing', provided that the aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit an offence on board the aircraft (Article 8). At the same time,

> the aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft.

About this fact the aircraft commander shall notify the authorities of such State of his intention to deliver such person and shall furnish the authorities to whom any suspected offender is delivered with evidence and information (which are lawfully in his possession) under the law of the State of registration of the aircraft (Article 9).

While establishing a broad scale on the fora of jurisdiction, the law-makers were attentive to the legal preferences represented by the major legal regimes:

– to the Anglo-Saxon (precedent) legal system, which favours the *territorial principle,* according to which the proceedings should be conducted in the country where the act was committed (over which the aircraft was flying), and

[10] Ernszt Ildikó, 'A nemzetközi légiközlekedés védelme' (2010) 15 Jog és Állam 35–36.

– to the Continental legal system, which favours the *personal principle* (the jurisdiction of the state of registration), according to which the close relation of citizenship between the state and its citizen requires that the person (in the present case the passenger) has to observe the law of their state, even in the territory of another state.

The resolution of the vast differences between the two basic systems of law under international treaties and in debates presented a major challenge and frequently was a great achievement. Beyond the reconciliation of differences, we need to consider the fact that international law cannot and does not intend to regulate everything, but it grants frameworks, and therefore national law has an indispensable role as expressly permitted by the law-maker. The Tokyo Convention formulates clearly that it does not exclude any criminal jurisdiction exercised in accordance with national law [Article 3 (3)].

Let's presume that, on board an Austrian Airlines aircraft registered in Austria in flight from Vienna (VIE) to Madrid (MAD), a Czech and a Dutch passenger commence to scuffle in Swiss airspace. The Dutch passenger is severely injured and, following the entry of the airplane into French airspace, the aggrieved party loses consciousness. The aircraft commander decides to interrupt the flight and lands on French territory. Related to the case, several rivalling jurisdictions emerge. According to the main rule, the registering state, Austria, may have jurisdiction on the basis of *the principle of the flag* (quasi territorial principle). Furthermore, a claim for jurisdiction may also be submitted on the basis of the *territorial principle (principium territoriale)* by Switzerland and France; the latter may invoke *the principle of the first landing*, but the intention of the Czech Republic and the Netherlands to lodge a criminal action may be recognised on the basis of the *personal principle (principium personale)* as well. Finally, Spain, as the *place of destination,* may also request the recognition of its jurisdiction with reference to its national flight safety rules.[11]

The example vividly demonstrates that a combined system of jurisdiction was introduced.[12] The objective is unambiguous: it is better that multiple jurisdictions need to be applied than none. At the same time, it is important to highlight that although the law-maker itemises taxatively the possibilities of the enforcement of jurisdiction (Articles 1, 3–4, 8–9), it omits guidance as to which of the rivalling jurisdictions has priority. If several rivalling claims for jurisdiction exist, it is essentially the circumstances that determine which of the authorised parties is recognised as the best and safest to adjudicate the case. The body proceeding in the case is obliged to accept the support and intervention of the other parties authorised for jurisdiction. In order to guarantee legal certainty, the proceeding authorities should be highly

[11] ICAO Doc 8111, Legal Committee 146-2. 164.

[12] Juan J. Lopez Gutierrez, 'Should the Tokyo Convention of 1963 Be Ratified?' (1965) 31 (1) Journal of Air Law and Commerce 3–4.

attentive to the non-commencement of parallel proceedings, because that would injure one of the most important basic principles of criminal law, the prohibition of dual proceedings *(ne bis in idem)*.[13]

2 The Competence of the Aircraft Commander

In the interest of the uniform safeguarding of flight safety beyond the issues of jurisdiction, the law-maker paid close attention to the rights and obligations of the aircraft commander. The aircraft commander (captain) is the member of the specialised staff with special authorisation appointed by the aircraft operator for the normal and safe attendance to the tasks of the flight and operation. The aircraft commander (even if the co-pilot navigates the plane) is authorised and simultaneously obliged to guarantee security on board the aircraft and make a final decision on all issues related to operation. While in flight, the commander is entitled to deviate from the rules, if that is unquestionably essential and reasonable in the interest of security.

The commander directs the (cockpit and cabin) crew of the aircraft in his person. The Convention is to be applied in the event of crime or acts committed on board the aircraft in flight.[14] The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, an offence or other act on board the aircraft, impose reasonable measures, including restraint, upon that person. The objective of such measures is to protect the safety of the aircraft, or of persons and property therein; to maintain good order and discipline on board; or to enable the aircraft commander to deliver that person to the competent authorities or to disembark him [Article 6 (1)].

In the interest of the earliest restoration of order and discipline on board, the resolute intervention of the crew, and depending on the evolved situation, of the passengers may be necessary *vis-à-vis* the acting unlawfully. The aircraft commander may *require* or authorise the assistance of other crew members and may *request* or authorise, but not require, the assistance of passengers to restrain any person he is entitled to restrain (by tying up, shackling or holding down). Any crew member or passenger may also take reasonable preventive measures without such authorisation when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property in it [Article 6 (2)].

The law-maker endeavours to encourage this frequently indispensable intervention by guaranteeing exemption (from liability under criminal, civil and administrative law) for all conduct aimed at the restitution of order that would qualify as unlawful conduct under normal circumstances.

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[13] No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. UN International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 23 March, 1976 [Article 14 (7)].

[14] For the purposes of the Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends. [Tokyo Convention, Article 1 (3)].

> For actions taken in accordance with the Convention, the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall not be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken (Article 10).

The aircraft commander is not only entitled to restrain personal freedom on board the airplane via the application of measures, but he may also disembark the person having committed or about to commit an unlawful act in the territory of any Contracting State. The aircraft commander shall notify the authorities in advance, may deliver the offender and shall provide evidence and information concerning the fact of and the reasons for the disruption of the flight and disembarkation to the competent authorities of the Contracting State (Articles 8–9). At the same time, any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person (Article 12). In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft, the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo (Article 17).

In practice, the commander has to fulfil numerous obligations related to security; he is thus not only obliged to take all necessary measures if the persons aboard or the aircraft is endangered, but also to help other endangered aircraft (or ocean-liner or ship) as necessary and practicable in the given situation.

The popularity of the convention is indicated by its ratification by 186 states. This high figure can be attributed to the fact that the Tokyo Convention only reformulated the already existing international practice under an international treaty. However, the Tokyo Convention after a while could not keep up with the changes surrounding air transport and previously unknown criminal methods, all of which required the law-maker to provide more developed and subtler international regulation.

II International Treaties Concerning Security: The Hague (1970), Montreal (1971), New York (1979) and Montreal (1991) Conventions and Montreal Protocol (1988)

Mainly due to the strained political ambience because of the Cold War, the number of hijacks rose dramatically from the late 60s onwards. According to statistics the pinnacle of hijacks was between 1968 and 1972 (with regard to hijacked aircraft registered in the US alone, more than 130 interventions were necessary). The most hijacks in the history of civil aviation occurred in 1969, on 86 occasions.[15] Although the objective of terrorists was not the

[15] In our days this occurs very rarely; in 2015 and 2017 such a crime did not occur at all. Hugh Morris, 'The strangest stories from the golden age of plane hijacking' Travel News Editor, <www.telegraph.co.uk/travel> accessed 5 July 2019.

annihilation of the aircraft, passengers or crew that jeopardised their escape, being granted political asylum or their liberation or that of others, these terrorist acts left behind many victims. By seizing the aircraft and becoming the focus of the attention of the international public, (normally) armed terrorists manifested their will and endeavoured to achieve their political objectives. These included requesting asylum in a country designated by the terrorists or demanding the release of prisoners convicted for political or other reasons, taking hostages and receiving financial or other benefits. Seizing or taking control of an in-flight aircraft is always distressing since it endangers the safety of persons and property, seriously disrupts air traffic and undermines the confidence of the public in the security of civil aviation. Therefore, with a view to driving back the criminal practice of using aircraft as an instrument for unlawful purposes, the international community held a diplomatic conference in The Hague in December 1970. The conference, organised by the ICAO, was concluded by the ratification of the *Convention for the Suppression of Unlawful Seizure of Aircraft*.[16]

Pursuant to The Hague Convention (1970) all contracting States assumed the obligation to impose severe penalties against any person who, on board an aircraft in flight[17] unlawfully, by force or threat thereof, or by any other form of intimidation seizes, or exercises control of that aircraft (Articles 1–2). The law-maker envisages severe penalties, while the lowest penalties are subject to national jurisdiction and facilitate the exercise of criminal jurisdiction in accordance with national law [Article 4 (3)].

The rules related to the exercise of jurisdiction basically complied with those of the Tokyo Convention, whereas the law-maker secured a further forum besides the existing ones. The Hague Convention extends jurisdiction to the state of the operator of the aircraft. Due to the features of the aviation industry, the state of registration is in many cases different from the state of the operator. The main reasons for this include the increasingly extensive use of leased airplanes, while the institution of forum shopping is popular with aircraft operators. Thus, with respect to any act of violence committed by the alleged offender *vis-à-vis* the passengers or the crew, when the offence is committed on board an aircraft leased without crew, that state in which the lessee has his principal place of business has jurisdiction or, if the lessee has no such place of business, his permanent residence [Article 4 (1) *c)*].

Apart from the introduction of the new forum of jurisdiction, the law-maker tightened the freedom of the state with jurisdiction to proceed: if the contracting State in the territory of which the alleged offender has been arrested does not extradite the alleged offender, it shall take such measures as may be necessary to establish its jurisdiction over the offence, whether or not the offence was committed in its territory, and to submit the case to its competent authorities for the purpose of prosecution (Article 7). Therefore, via the consistent observance of the *aut dedere, aut judicare* principle, the perpetrator either needs to be extradited to

[16] ICAO Doc 8920 *Convention for the Suppression of Unlawful Seizure of Aircraft.* The Hague, 6 December, 1970.

[17] For the purposes of the Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for the persons and property on board. [Article 3 (1)].

a state that shall conduct the criminal proceedings or needs to be punished in the state in which he is held; a third way is not applicable.[18] The objective of the law-makers is explicit: the states may not provide asylum to the perpetrators; their punishment, being the enemies of mankind *(hostis humani generis),* is inevitable.

Because of the alarming proliferation of unlawful acts, in parallel with and almost copying The Hague Convention, with the involvement of the ICAO, the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* was framed as the Montreal Convention, adopted in 1971.[19] The Convention prescribes the punishment of acts jeopardising the soundness and safety of aircraft and the infrastructure of ground air navigation service providers. Considering that unlawful acts against the safety of civil aviation jeopardise 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, the law-maker enumerates taxatively the broad scope of the methods of terrorist acts infringing the safety of air transport.

Pursuant to the Convention, any person commits an offence if he unlawfully and intentionally:

a) 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; or

b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight. [Article 1 (1) *a)–e)*].

In comparison with The Hague Convention, the basic difference was the shift of the central element of the perpetrator's conduct from seizing the aircraft to rendering it incapable of flying.

The main provisions of the convention concerning civil airports were extended by the Montreal Protocol (1988).[20] The *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation,* in comparison with the Montreal Convention, extended the conducts to be criminalised by acts (probably) jeopardising the safety of airports

[18] Kardos Gábor, 'Miért nehéz a terrorizmus ellen jogi eszközökkel védekezni?' in Vadai Ágnes (ed), *Terrorizmus – A nemzeti és nemzetközi biztonságot érintő kihívás* (1999, Budapest) 77.

[19] ICAO Doc 8966 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.* Montreal, 23 September, 1971.

[20] ICAO Doc 9518 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, 23 September, 1971.

serving international civil aviation. The Protocol was drawn up following the simultaneous terrorist attacks against the airports of Rome and Vienna on 27 December 1985.[21] This Protocol supplements the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;* therefore, the Convention and the Protocol shall be read and interpreted together as one single instrument (Article 1). [Remark: As between the States Parties, the *Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (2010) shall prevail over the previous international contracts, such as Montreal Convention (1971) and its Protocol (1988), (Article 24)].

On 13 October 1977 the terrorists of the Popular Front for the Liberation of Palestine hijacked the Boeing 737-200 operated by of Lufthansa, the German airline, as flight LH181 between Palma de Mallorca (PMI) and Frankfurt (FRA). The flight was over Marseilles, in French airspace when two male and two female perpetrators armed with hand grenades and pistols seized control. The airplane first landed in Rome, then over the next 5 days, for the purpose of constant mobility, it touched down at several international airports such as Larnaca, Ankara, Bahrein, Dubai and Aden. The leader of the hijackers, named Zohair Youssif Akache, identified himself as 'Captain Martyr Mahmud' came to the fore with his demands: the release of 10 imprisoned leaders of the far-left Red Army Fraction (RAF) and their two other faithful comrades imprisoned in Turkey, furthermore, that they would be given 15 million dollars. During their stay in South Yemen, the terrorists executed the captain of the airplane.

Vis-à-vis the hijackers, the German government put its Bundesgrenzschutz GSG-9 commando unit into action, formed after the hostage drama terminated in bloodshed at the 1972 Olympics in Munich. The operation with the cover-name "Feuerzauber" (Fire Magic) took place in Mogadishu in Somalia. The country's President Sziad Barre, (1919-1995) consented to the mission being carried out, while the German Chancellor Helmut Schmidt (1918-2015) assumed complete responsibility for its outcome. While Somalian soldiers set fire to the runway in front of the pilot's cabin as a distraction, the German and British SAS (Special Air Services) commando units simultaneously blew open the doors and threw intoxicating and noise grenades into the passenger compartment, then after entering it they opened fire. The special tactical operation met with complete success after 5 minutes and all hostages were released physically unharmed.[22]

[21] At the Leonardo da Vinci airport in Rome (FCO) 4 armed terrorists fired at the passengers waiting at the counter of the Israeli airline (ELAL). At the Schwechat airport in Vienna (VIE) 3 armed terrorists fired shots also at the counter of the Israeli airline and flung a hand grenade into the waiting crowd. In the attacks 17 innocent people lost their lives and 117 people were injured. The Pittsburgh Press, 'Terrorist raid 2 Europe airports' Vol. 102, No. 184, 27 December, 1985. 1.

[22] Szabó Miklós, 'Leszállás Mogadishuban' (2000) 10 (4) Hadtudomány <http://mhtt.eu/hadtudomany/2000/4_13.html> accessed 5 July 2019.

The ink had not dried on the Montreal Convention pertaining to security when the trend in the seizure of aircraft became incidental to taking hostages from among the civil aviation passengers. Drawing on their experience, terrorists realised that it was simpler and less risky to seize a passenger airplane and threaten the governments with exterminating the hostages than kidnapping figures symbolising the given regime (for example a protected person or an important businessman). The perpetrators, in return for the hostages, demanded the release of convicts (frequently political prisoners) or, according to the citizenship of the hostages, demanded the states concerned to fulfil political demands or several times to grant financial or other benefits.

The international community, in the interest of the security of civil aviation, concluded a new international treaty: the *International Convention against the Taking of Hostages,* which was adopted by the contracting States in New York in 1979.[23] Anyone who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages [Article 1 (1)]. Any person who attempts to commit an act of hostage-taking, or participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence [Article 1 (2)].

Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences committed:

– in its territory or on board a ship or aircraft registered in that State;
– by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
– in order to compel that State to do or abstain from doing any act; or
– with respect to a hostage who is a national of that State, if that State considers it appropriate. [Article 5 (1) *a)–d)*].

If the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall, in accordance with its laws, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. That State Party shall immediately make a preliminary inquiry into the facts. The custody or other measures shall be notified without delay directly or through the Secretary General of the United Nations [Article 6 (1-2)].

As the 1980's wore on, it seemed that the Tokyo Convention (1963), The Hague Convention (1970), the Montreal (1971) and New York (1979) Conventions, joined by the Montreal Protocol (1988) had encompassed the complete area of civil aviation from the viewpoint of criminal law. Unfortunately, that was not the case. On 21 December 1988, above the Scottish town of Lockerbie, Pan Am Flight 103 suddenly disappeared from the radar screen due to the

[23] *International Convention against the Taking of Hostages,* 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force on 3 June, 1983; UN Doc A/Res/34/146.

explosion of 312 grammes of Semtex plastic explosive.[24] The plastic explosive annihilating the airplane had been placed by Libyan terrorists. Subsequently, the Libyan government assumed responsibility for the manoeuvre and paid 10 million USD as compensation for each victim.[25] In response to the situation, namely, the significant increase in the number of sabotage actions against airplanes during the 1980s,[26] the Legal Committee of the ICAO drafted a *Convention on the Marking of Plastic Explosives for the Purpose of Detection*. The convention was adopted by ICAO member states on 1 March 1991 in Montreal.[27] The main objective of the law-makers was that the member states banned and prevented the production and distribution of unmarked explosives (without chemical fingerprints) so that unauthorised persons could not have access to them. The technical supplement to the convention contains a detailed description of plastic explosives, their marking material and molecular formulae as well as the minimum concentration of markings, thereby assisting unified and concerted state intervention for driving back the use of such explosives.[28]

III The Modernisation of the International Aviation Security Treaties

Following the adoption of the Explosives Convention, no convention was drawn up in the area of criminal law related to international air traffic for nearly 20 years. However, the 21st century offered new morals and shocks. Civil air transport had to face unprecedented acts of mass violence: the tragic events of 11 September 2001 with the loss of 2977 lives in the USA and the airplanes exploded by suicidal assassins on 24 August 2004 in Russia shattered the world and its assumptions and revised our view of the safety of aviation for good reason. The conventions adopted in the past became out-of-date since they were unable to rise to all the challenges affecting the security of air transport.

1 Convention on the Compensation of Unlawful Acts (2009)

A major challenge related to compensation for persons on the ground, especially if the aircraft in flight caused damage to third persons due to unlawful conduct on board. As a modernisation of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the

[24] Semtex is an extraordinarily dangerous and powerful explosive developed in Czechoslovakia in the 1960s. It is difficult to find, dogs cannot smell it, X-Ray does not detect it, the density of the material is low; finally, it is plastic and heat and water resistant. It can be used for 20 years. Frankel Glenn, 'Havel Details Sale of Explosive to Libya' Washington Post Foreign Service, London, 23 March 1990, A15.

[25] Gerard Seenan, 'Lockerbie Deal to End Libya's Isolation' The Guardian, 15 August 2003.

[26] In 1985, 13 sabotage actions caused the death of 473 people, while in 1989, 279 people fell victim to such offences. <www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_11.pdf> accessed 5 July 2019.

[27] ICAO Doc 9571 *Convention on the Marking of Plastic Explosives for the Purpose of Detection.* Montreal. 1 March, 1991.

[28] Consequently, the Czech manufacturer currently produces Semtex, the plastic explosive so that its detection should be easier and the duration of its usability should be shorter.

Surface (1952)[29] the member states of the ICAO adopted the Convention on Compensation for Damage Caused by Aircraft to Third Parties, the so-called *General Risk Convention* on 2 May 2009,[30] and, due to unlawful acts, the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, the so-called *Convention on the Compensation for Unlawful Acts.*[31] This latter convention establishes the International Civil Aviation Compensation Fund, the objective of which is the provision of a considerable amount by raising the liability limit of the aircraft operator with absolute responsibility in cases subject to the Convention. During an international flight, the operator is liable for the occurrence of death, physical injury, damage to property or the environment. The liability of the operator is restricted on the basis of the weight of the aircraft. The payment of compensation ensues via the Supplementary Compensation Mechanism. The absolute liability and the heightened liability limitation encumbering the aircraft operator, as it was determined under the Convention, guarantee that the aggrieved victims of terrorists are granted higher compensation and can enforce their compensation claims more efficiently in the future.

2 The Beijing Convention and Protocol (2010)

In 2010 at the Diplomatic Conference on Aviation Security organised in Beijing by the ICAO, two new international treaties were adopted following several years' legal and diplomatic background work, for the purpose of the reform and modernisation of the system of rules governing aviation security.

– The Beijing *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*,[32] which replaces the Montreal Convention (1971) and its supplementary Protocol (1988) with a much more detailed uniform regulation adjusted to the requirements of the age; and

– the Beijing *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft,*[33] which supplements The Hague Convention (1970) by guaranteeing that legal entities are called to account and that the accessory conduct of accomplices related to the preparatory and the main act is punished.

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[29] ICAO Doc 7364 *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface* (1952). If the General Risk Convention takes effect, it will replace the Rome Convention.

[30] ICAO Doc 9919 *Convention on Compensation for Damage Caused by Aircraft to Third Parties,* done at Montreal, 2 May 2009; Two New Treaties Adopted by International Conference on Air Law. ICAO News Release – PIO, 12 May, 2009. www.icao.int.

[31] ICAO Doc 9920 *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft.* Montreal on 2 May, 2009.

[32] ICAO Doc 9960 *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.* Beijing. 10 September, 2010; The Beijing Convention took effect on 1 July, 2018.

[33] ICAO Doc 9959 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft. Beijing, 10 September, 2010; The Beijing Protocol took effect on 1 January, 2018.

Via these sources of law, the number of the international treaties regulating international criminal air law has risen to seven.[34]

The principal innovation of the Beijing Convention is the criminalisation of conducts of the modern age. Within the purview of the Beijing Convention, the acts to be punished include:

– the use of a civil aircraft as a weapon for the purpose of causing death, serious personal injury or considerable material damage;
– using a civil aircraft so that biological, chemical and nuclear (so-called BCN – Biological, Chemical, Nuclear) weapons reach their destinations with the purpose of the extermination of lives, causing injury or incurring damages;
– assault on civil aircraft using BCN weapons;
– unlawful delivery of BCN weapons using civil aircraft;
– unlawful delivery of explosives and fissionable materials by civil aircraft for terrorist purposes; and
– attack against the IT infrastructure of airports or air navigational services (Article 1).

As a further novelty, the law-maker renders attempt at acts of commission punishable and prescribes the punishment of conduct that hinders calling the perpetrator to account [Article 1 (4) *a)–d)*]. One of the most significant changes regarding the former Conventions consists in the increased efficiency of enforcement due to the demand to call perpetrators to account. Pursuant to the Convention, the State of a national not only may but is obliged to establish its jurisdiction and enforce its due process against the perpetrator. Furthermore, the jurisdiction of the State may also be established if the victim is a national (Article 8). The Convention shall not apply to aircraft used by military, customs or police services; it solely applies to aircraft used for international civil aviation (Article 5).

The Beijing Protocol was drafted with the intention of extending the system of community requirements *vis-à-vis* international terrorism. The terrorist attacks of September 11th, 2001 made it abundantly clear that a civil airliner with full fuel tanks is capable of causing destruction comparable to that brought about by armed military aircraft. The States started analysing the legal frame of the destruction of rogue civil aircraft under international law and constitutional law.[35]

To prevent the unlawful seizure of aircraft more effectively, the law-maker amended and supplemented The Hague Convention (1970). Its substantive scope of application was accordingly extended; it now ordains the punishment of other forms of hijack, hence commission with the use of modern technology:

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[34] (2011) 66 (1) ICAO Journal 8.

[35] Gábor Sulyok, 'An Assessment of the Destruction of Rogue Civil Aircraft under International Law and Constitutional Law' in Halmai, Gábor (ed), *Hungary: Human Rights in the Face of Terrorism* (Vandeplas Publishing 2006, Lake Mary) 5–30.

> any person commits an offence if that person unlawfully and intentionally seizes or exercises control of an aircraft in service by force or threat thereof, or by coercion, or by any other form of intimidation, or by any technological means [Article 1 (1)].

Furthermore, it extends criminal liability to accomplice and preparatory activities [Article 1 (3) *c)–d)*]. It prescribes that each State Party, in accordance with national law, holds legal entities criminally liable for the crime they committed (2 bis): in accordance with its national legal principles, each State Party may take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence. Such liability may be criminal, civil or administrative.

The role of national law remains definitive further on in the Convention, so the law-maker, as in the international conventions previously established, does not exclude any criminal jurisdiction exercised in accordance with national law [Article 4 (4)].

3 The Montreal Protocol (2014)

The Montreal Protocol[36] was designed to amend the Tokyo Convention (1963) in order to offer a comprehensive response to the problems caused by the constantly growing number of unruly passengers. The Protocol was not expressly drafted with the intention of intervention against international terrorism, but basically with the objective of extending the possibilities of criminal intervention against violent passengers not motivated by terrorism but who defy the instructions of staff. Accordingly, the law-maker specified and supplemented the elements in a case of delinquency.

According to the main rule, the Tokyo Convention grants the opportunity of the exercise of jurisdiction for the state of registration over offences and acts committed on board. The state of landing had not always been authorised to conduct proceedings; therefore, unruly passengers had often gone unpunished. The Montreal Protocol was designed to end this defect in law, since it guaranteed jurisdiction to the authorities of the state of landing to conduct proceedings *vis-à-vis* the delivered passenger [Article 1 (1)]. The law-maker further extended the choice of fora of jurisdiction by granting jurisdiction to the state of the operator [Article 3 (2) bis *b)*].[37]

The Montreal Protocol extends the scope of application of the Tokyo Convention, so that the effect of its provisions concerns offences and acts jeopardising flight safety on board an aircraft in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation [Article 1 (3) *a)*]. That is not

[36] ICAO Doc 10034 Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Montreal, 4 April, 2014; The Montreal Protocol took effect on 1 January, 2020.

[37] The designation of articles follows the Consolidated text of the Tokyo Convention and Montreal Protocol. DCTC Doc No. 33., 4 April, 2014.

inadvertent, since the majority of unlawful acts are committed by unruly passengers during taxiing before the commencement of take-off.

In order to lighten the tasks of the aircraft commander, the Protocol factually enumerates instances of unruly behaviour, such as physical assault or a threat to commit such assault against a crew member and as refusal to follow a lawful instruction given by the crew for the purpose of protecting flight safety [Article 15 bis (1) *a)–b)*]. Each contracting State is encouraged to take such measures as may be necessary to institute appropriate criminal, administrative or any other forms of legal proceedings against any person who commits an offence on board an aircraft. With regard to financial aspects, the Protocol expressly emphasises the right of air to claim compensatuion from the offending passenger (Article 18 bis).

In the Montreal Protocol, the states extended the jurisdiction opportunities boldly, by which they supported as many unlawful acts as possible would actually be adjudicated in criminal proceedings. However, the law-maker took something of a risk[38] when it dealt with the other highlighted area of the Tokyo Convention and juxtaposed the scope for action of the in-flight security officer (IFSO), that is, the Air Marshal, beside the rights and obligations of the aircraft commander. The question immediately arises: if the aircraft commander is the ultimate decision-maker, may the IFSO take over the competence of the aircraft commander in preventing or handling unlawful activities ocurring on board the aircraft? To what extent may the IFSO make decisions in such situations, thereby lightening the burden on the commander pilot? Obviously, the highly trained specialist IFSO may take measures according to his or her obligations proceeding from his or her sphere of activity with reasonable grounds without special permission [Article 6 (3)], but may not surpass the competence of the aircraft commander. The law-maker also stipulated that the

> aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of in-flight security officers or passengers to restrain any person whom he is entitled to restrain" [Article 6 (2)].[39]

Exemption is also granted to the IFSO from being held responsible for the consequences of his lawful acts (Article 10).

With respect to the fact that the aircraft itself is considered quasi state territory, the registering state thus has jurisdiction pertaining to the mobile terrritory,[40] therefore, the activity of the IFSO in the national system of rules can be construed as that of the protector of the quasi territory of the state. Upon the definition of their situation besides the national regulation

[38] Jennifer A. Urban, 'The Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft: A Missed Opportunity or a Sufficient Modernization?' (2016) 49 (703) Indiana Law Review 739–740.

[39] Authority in Handling Offences and Certain Other Acts Committed on Board Aircraft. International Conference on Air Law (Montreal, 26 March to 4 April, 2014) – Presented by Indonesia, DCTC Doc No. 24. 21 March, 2014. 3.

[40] The right of the flag does not mean territorial sovereignty (since in reality it is not the territory of the state), but definite jurisdiction. Hargitai József, *Nemzetközi jog a gyakorlatban* (Libri 2008, Budapest) 295–296.

and programs,[41] the bilateral or multilateral agreements[42] concluded among the states concerned have significance due to the international character of aircraft [Article 6 (3)–(4)].

Conclusion

It is obvious that criminality will not be prevented by law in itself; unlawful acts will always be committed by people. We may question whether the new conventions pertaining to security drafted under the auspices of the ICAO and designed to renew the comprehensively prevalent international system of treaties concerning security will be able to forestall these transboundary crimes and impose legal consequences. To what extent will these rules prevail in practice? The question is justified, because the renewal of treaties pertaining to security ariseses not only because the world has changed considerably and new forms of commission have emerged, or an increasing number of unlawful acts (mostly committed by unruly passengers) occur, but simply because the content of basic conventions had not prevailed in international practice, despite numerous ratifications. National law has retained a great scope for action, which impeded unification,[43] implying that the authorities of the competent state did not always intend to exercise jurisdiction; they did not wish to become engaged in matters in which furnishing evidence was problematic (the crime was committed in foreign airspace, on board an aircraft registered in another state by a foreign citizen), the questions of liability were ambiguous, while they imposed a financial burden on the proceeding state.

In the interest of the observance of security rules and following the model of flight safety audits, the ICAO has established the Universal Security Audit Programme (USAP), which is prescribed for the states as mandator. This controlling programme has been carried out in the framework of the Continuous Monitoring Approach (CMA) since 2015.[44] The essence is that, during the audit, the ICAO examines the extent to which the member state is party to the international treaty, and whether the rights and obligations stipulated therein have been incorporated into and harmonised with national law; furthermore, to what extent these rules and procedures prevail in practice and in the course of operation. The examined state regularly reports on the implementation of the measure plan designed to rectify the revealed deficiencies, in which it presents the current circumstances. Via the implementation of the

[41] More than forty States have IFSO programs. International Conference on Air Law, Authority and Protections for In-Flight Security Officers, at 1, DCTC Doc. No. 7., 23 January, 2014. 2.3, 1.

[42] For example: Act XXXIX of 2011 on the proclamation of the Agreement on the employment of Air Marshals concluded between the Republic of Hungary and the United States of America.

[43] The Tokyo Convention does not exclude any criminal jurisdiction exercised in accordance with national law [Article 3 (3)]. The rule that criminal jurisdiction should be exercised in accordance with national law hindered the achievement of the objective of uniformity. Gutierrez (n 12) 13.

[44] ICAO Doc 9807 Universal Security Audit Programme Continuous Monitoring Manual. Second Edition, 2016.; ICAO Assebbly Resolution A37-17, Appendix E refers.; ICAO Doc 10010-C/1172 Council Decision, 197th Session. C.MIN 197/1, Subject No. 52.1. 2013. 11–12.

activity, all member states are under continuous surveillance, which supports the enforcement of the rules of international conventions and of the Standard and Recommended Practices (SARPs) adopted by the Council of the ICAO.

This much is certain: via the Beijing Convention and Protocol (2010) as well as via the Montreal Protocol (2014), the ICAO and its member states regulating international air transport convey an unequivocal message to the world: all acts related to or jeopardising aviation security, wherever committed, will have criminal legal consequences under all circumstances.