

**EFFECTIVENESS OF THE 2010 BEIJING CONVENTION AND
PROTOCOL IN ADDRESSING AVIATION SECURITY THREATS**

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**A THESIS SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF MASTER OF LAWS OF THE OPEN UNIVERSITY OF
TANZANIA**

2014

CERTIFICATION

The undersigned do hereby certify that I have read and hereby recommend for acceptance this thesis titled: *“Effectiveness of the 2010 Beijing Convention and Protocol in Addressing Aviation Security Threats”* submitted in fulfillment of the requirements for the Degree of Master of Laws (LL.M.) of the Open University of Tanzania.

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DECLARATION

I, **Ramadhani Ally Maleta**, do hereby declare that, this research work is my own original work, and that it has not been presented to any university for a similar or any other degree award.

.....

Signature

.....

Date

DEDICATION

Dedicated to my beloved parents, Ally Athumani Maleta and Rukia Mfaume Kawambwa, who brought me up with love and care and; who sacrificed their family's scarce resources for foundation of my advancement in the academic world.

ACKNOWLEDGEMENTS

My sincere gratitude to my employer, Tanzania Airports Authority whose sponsorship has enabled me pursue this course.

I am indeed indebted to my Supervisor, Dr. Paul Faustin Kihwelo (Ph.D.) Senior Lecturer of Law at the Open University of Tanzania for his professional guidance, constructive criticism and brotherly patience which have substantially contributed to modeling this work to the present form. To him I accord the best of his work and whatever deficiencies appearing in this work are mine.

I convey my heart-felt thanks to my beloved wife, Salama Ramadhani Uchungu , and beloved children; Faraji, Fatma and Fauziat. By the grace of God they endured the pain of lacking my company, sometimes at critical moments when my company in the family was most needed during the entire period of my study.

My extended gratitude is owed to Prof. Dr. Paul Stephen Dempsey, Director of Institute of Air and Space Law at McGill University, Canada, for his learned lectures and reading materials when he taught me an aviation law course on *International Air Law: Concept and Applications* held at Singapore Aviation Academy (SAA) in May 2010. His teachings had assisted me in having a base on the subject of International Air Law and I used that basic knowledge as a guidance for doing this research.

Likewise, I wish to value the contributions from my co-participants of IATA-aviation law course on *International Air Law for Lawyers and Legal Professionals*, held at Ghana Civil Aviation Academy (GCAA) in November, 2013. The participants are

aviation lawyers from different countries in Africa hence their comments which based on practical experience were very important for improving this work. Importantly, I appreciate the inputs and wisdom of Mr. Udan P.N. Fulana who was a lecturer of the course in Ghana. Mr. Fulana, being a retired pilot with Royal Air Force in UK and a frequent lecturer on legal issues in air transportation for over 30 years, has agreed to share with me his long practical experience in international air law and hence encouraged me to have this study completed.

Finally, I thank all those whose works I have read and referred to in this work and; any other person who in any way contributed to the results of my study.

ABSTRACT

Following the September 11 terrorist attacks in America and the occurrence of other new and emerging threats to civil aviation, the international community has been faced with the harsh reality in the field of aviation security, hence, several legal attempts were made to address such aviation threats. Consequently, the International Civil Aviation Organization (ICAO) in its 37th Diplomatic Conference of 2010 held in Beijing, China, adopted two new international legal instruments namely; *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention of 2010)* and *Protocol Supplementary to the Convention for Suppression of Unlawful Seizure of Aircraft (Beijing Protocol of 2010)*. This study reviews the historical background to the development of international air law on aviation security and further assesses and analyzes in detail the provisions of the Beijing legal instruments in comparison with the previous treaties. Finally, the key question of whether or not the new Beijing Convention and the Protocol are adequate and effective in combating threats to aviation security is addressed through doctrinal research. In this regard, information was collected from various primary and secondary sources of law including books, articles, conventions, protocols, statutes and internets. Further information was gathered from various aviation stakeholders including aviation experts, security staff, lawyers, passengers, ground handlers, crews, regulators, airline and airport operators. From the information collected, the study comes up with conclusion, observations and recommendations which may be useful in addressing new and emerging threats to aviation security.

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Convention on Offences and Certain Other Acts Committed on Board Aircraft,(Tokyo Convention) signed in Tokyo in 1963, ICAO Doc. 8364.

Convention for Suppression of Unlawful Seizure of Aircraft, (The Hague Convention) signed in the Hague in 1970, ICAO Doc. 8920.

Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, (Montreal Convention), signed in Montreal in 1971. ICAO Doc. 8966.

Convention on the Marketing of Plastic Explosives for the Purpose of Detection, (MEX Convention), signed in Montreal in 1991. ICAO Doc 9571.

European Convention on the Suppression of Terrorism, 27 January 1977 (Strasbourg), 15 I.L.M 1272 (1976) entered into force on 14 August, 1978.

International Standard and Recommended Practices: Security; Annex 17 to the Convention on International Civil Aviation, 8th April 2006, (Annex 17 to the Chicago Convention).

International Standards and Recommended Practices, Annexes 2, 3, 4,6,9,11, 13, 14,17 and 18 to the Convention on International Civil Aviation.

Protocol Supplementary to the Convention for Suppression of Unlawful Seizure of Aircraft, (Beijing Protocol), adopted in Beijing China in 2010.

Protocol for the Suppression of Unlawful Acts of Violence at Airport Serving International Civil Aviation, Supplementary to the Montreal Convention, 1971, (Airport Protocol), signed in Montreal in 1988. ICAO Doc. 9518.

Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Marine Navigation (SUA Protocol) , adopted on 10 March, 1988

LIST OF ABBREVIATIONS AND ACRONYMS

AFCAC	African Civil Aviation Commission
AIC	Aeronautical Information Circular
AIT	Advanced Imaging Technology
ATC	Air Tanzania Corporation
ATSA	Transportation Security Administration
ATSAA	Air Transportation Safety and System Stabilization Act
AVSEC	Aviation Security
BCN	Biological, Chemical and Nuclear Weapons
BDOs	Body Detection Officers
CASSOA	Civil Aviation Safety and Security Oversight Agency
EAC	East African Community
ETD	Explosive Trace Detection
EU	European Union
FAA	Federal Aviation Administration
FAM	Federal Air Marshals
FBI	Federal Bureau of Investigation
FFDOMS	Federal Flight Deck Officers
IATA	International Air Transport Association
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization

ICAN	International Commission on Air Navigation
ICC	International Criminal Court
IEDs	Improvised Explosive Devices
IHL	International Humanitarian Law
LAGS	Liquid, Gels and Aerosols explosives
LL.M.	Lagum Magister (Latin), meaning “Master of Laws”. An Advanced Academic Degree in Law
MANPADS	Man-Portable Air Defense System
NPT	Nuclear Non- Proliferation Treaty
PFLP-EO	Popular Front for the Liberation of Palestine External Operations
SAC	Security Advisory Committee
SARPs	ICAO’s Standards and Recommended Practices
SA	South Africa
TAA	Tanzania Airports Authority
TCAA	Tanzania Civil Aviation Authority
UK	United Kingdom
UN	United Nations
US	United States
USA	United States of America
USAP	Universal Security Audit Programme

CHAPTER ONE

1.0 GENERAL INTRODUCTION

1.1 Introduction

Since 1960's the International Civil Aviation Organization (ICAO)¹ has made pioneering efforts to combat unlawful interference against civil aviation leading to adoption of several worldwide multilateral treaties in the form of Conventions and Protocols on aviation security. These treaties along with Annex 17 to the Chicago Convention² were considered to constitute a solid legal framework in addressing aviation security threats. However, following the incident of September 11 attacks in the United States of America³ the international community discovered that the existing legal framework governing aviation security threats⁴ was so inadequate to the extent that there were demonstrated significant, longstanding vulnerabilities in

¹ ICAO is a specialized agency of the United Nations which was created in 1944 to promote the safe and orderly development of international civil aviation throughout the world. It sets the standards and regulations necessary for which safety, security, efficiency and regularity as well as for aviation environmental protection. ICAO is a forum for cooperation in all fields of civil aviation among its 191 member states, who become members by ratifying or otherwise issuing notice of adherence to Chicago Convention. See ICAO Doc. 7300/9 Ninth Edition 2008.

² During the drafting conference of the Chicago Convention on international Civil Aviation in 1944, though several States made references to significance of the Convention to national security and safety of air travel, no explicit mention was made of aviation security against unlawful acts since such acts were not known at that time. Hence according to Assembly Resolution A 17-10 and A 18-10, the ICAO Council adopted "international Standards and Recommended Practices- Security- Safeguarding International Civil Aviation against Acts of Unlawful Interference" on March 22, 1974 and designated it as Annex 17.

³ The September 11th attacks were series of four coordinated suicide attacks on the United States in New York City and the Washington DC areas, in America on September, 11 2001 where the a group of Al-Qaida hijacked four passenger jets. The hijackers intentionally crashed two planes, American Airlines Flight 11 and United State Airlines Flight 175 into the Twin Towers of the World Trade Centre in New York City; both towers collapsed within two hours. The Hijackers further crashed American Flight 77 into the Pentagon in Arlington, Virginia and the fourth jet, United Airline Flight 93, crashed into a field near Shanksville, Pennsylvania after passengers attempted to take control before it could reach the hijackers' intended target in Washington DC. Nearly 3,000 people died in the attacks.

⁴ The term "aviation threats" is not directly defined in the 2010 Beijing Treaties. However it is related to the term "unlawful acts against civil aviation " which means an act which jeopardize the safety and security of persons and property, seriously affect the operation of air services, airports and air navigation, and undermine the confidence of the people of the world in the safe and orderly conduct of civil aviation for all states.

aviation industry especially in the areas of screening of passengers and baggage, controlling access to secure areas at airports and protecting air traffic control system and facilities.⁵

In response to the September 11 attacks and the increasing number of criminal acts to civil aviation worldwide, the International community considered the need of reviewing and updating the laws to be in line with the new developments. Hence, following the reviews of the international legal instruments in a series of meetings by ICAO, it was discovered that the international air laws did not cover notable aspects of new and emerging threats to the safety of civil aviation.

It is on that premises that, in 2010 ICAO held a Diplomatic Conference on Aviation Security in Beijing, China⁶ with the objective of updating the international legal framework on civil aviation whereby reviews to the Montreal Convention of 1971⁷ and amendments to the Hague Convention of 1970⁸ were adopted to cover new and emerging threats to civil aviation. At the end of the Conference, ICAO came up with the two new treaties namely:

⁵ ICAO, Aviation Transportation System Security Plan, Supporting Plan to the National Strategy for Aviation Security, issued March, 2007.

⁶ ICAO's Diplomatic Conference on Aviation Security, Augu.30-Sept.10, 2010. Final Act of the International Conference on Air Law (Sept.10, 2010) available at http://www.icao.int/DSCA2010/restr/Beijing-final_act_multi.pdf (accessed on 20/03/2014).

⁷ *Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation*, Done at Montreal on 23 September, 1971.

⁸ *Convention for the suppression of Unlawful Seizure of Aircraft*, Done at Hague on 16 December, 1970.

- (a) *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (hereinafter referred to as "Beijing Convention of 2010") replacing the 1971 Montreal Convention and the Airport Protocol of 1988⁹ and;
- (b) *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* (hereinafter referred to as "Beijing Protocol of 2010") amending the 1970 Hague Convention.¹⁰

In comparison with the previous legal instruments, this study critically examines the adequacy and effectiveness of these new treaties¹¹ in addressing aviation security threats.

1.2 Background to the Problem

Criminal acts which are threats to aviation security are not new. As early as 1948, hijacking of aircraft was used as a means of illegal flight across national borders and through the 1980s there were a number of serious attacks on aircraft carried out for political purposes which resulted in significant casualties. These attacks included the bombing of Pan Am flight 103 over Lockerbie, Scotland in 1988 which killed 259 people on board the aircraft and 11 on the ground. Also, the first threat to use an aircraft as a weapon to impose broader casualties occurred in 1994 when Algerian terrorists hijacked an Air France flight enroute to Paris from Algiers. Worldwide,

⁹ Text at https://www.unode.org/tldb/en/2010_convention_civil_aviation.html, (accessed on 3/09/2012).

¹⁰ Text at https://www.unode.org/tldb/en/2010_protocol_convention_unlawful_seizure_aircraft.html, (accessed on 3/09/2012.)

¹¹ These new international legal instruments are available at www.icao.int/DCAS201(accessed on 3/09/2012).

aviation security entered a new phase following the hijacking of four passenger aircraft and the subsequent attacks on New York and Washington on 11 September 2001.¹²

It is worth noting that, before the September 11 terrorist attacks, the international community had not sought to amend or update the 1970 Hague Convention which addresses hijacking of civil aircraft in international aviation. However, by contrast the 1971 Montreal Convention dealing with sabotage of aircraft in flight was amended by the Airport Protocol in 1988¹³ to enhance the international legal framework on terrorist acts affecting international civil aviation.

It is worth noting that, the 1988 protocol was negotiated in the aftermath of terrorist attacks in international airports terminals at the Rome and Vienna airports in 1985 and hence expanded the reach of Montreal Convention to extend beyond aircraft in flight. The significant feature of the Protocol is that it covers offences targeted at airports serving international civil aviation where air passengers are assembled before and after travel.

However, following the September, 11 attacks, the international community began to consider the need for reviewing and strengthening the law for international

¹² Supra note 3.

¹³ *Protocol for the Suppression of Unlawful Acts of Violence at Airport serving international civil aviation* (Montreal Protocol of 1988), Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention of 1971), signed at Montreal Canada on 24 February 1988.

cooperation to address issues raised by the attacks¹⁴ and because the September 11 attacks were committed by persons piloting aircraft, ICAO took a leading role in the process of reviewing the laws and hence directed the legal commission to conduct a study of the existing legal instruments.

The study by ICAO on the review of the international air laws and other international dialogue sparked a negotiation process which took several years leading to the successful Beijing Diplomatic Conference which was held in Beijing, China, from 30 August to 10 September, 2010. The Conference adopted the two international treaties namely, the 2010 Beijing Convention and the 2010 Beijing Protocol to cover new and emerging criminal acts which were otherwise not covered by the previous Conventions and Protocols on aviation security.

1.3 Statement of the Problem

Threats to civil aviation security is a global problem that requires global solution. It is on that premises that the International Community under the auspicious of ICAO has always been working hard to adopt legal instruments including Conventions, Protocols and Annexes which can effectively addressing the problem.

It is obvious that, with an increasingly globalised and interconnected world, air transport is facing more challenges which may require more enhanced legal regimes. In that context, ICAO has always been active in addressing the challenges by testing

¹⁴ Noelle Quenivet, "The World after September 11: Has It Really Changed" an Article Published in the Journal of International Law, Vol 16, No. © EJIL, 2005, pp. 361-577.

the adequacy of the existing legal regime on aviation security and where necessary adopted or reviewed the legal instruments as it can be traced from the historical Chicago Convention of 1944 to the new Beijing Convention and Protocol of 2010.

However, while aviation Security is becoming more important with the increasing demand for transport by air for both passengers and cargo, the issue that is still questioned is whether the legal framework is adequate and effective in addressing the problem taking into consideration the existence of new and emerging threats to civil aviation¹⁵.

1.4 Literature Review

A good number of previous and current writings discuss the concept of aviation security but not much has been written on the Beijing Convention and the Protocol which were adopted in 2010 to address new and emerging security threats to civil aviation. However, several authors focus on the historical development of the law on aviation security and try to consider the impact of the new legal instruments in addressing aviation threats.

Denys Wibaux for example is of the view that, the 2010 Beijing Convention and the Protocol, taken together, effectively establish a much broader and stronger civil aviation security legal framework.¹⁶ From what is highlighted by the writer, it is my considered view that given the scale and complexity of the challenges involved in

¹⁵ See “*Beijing Convention and Protocol on Aviation Security adopted*”, Report by the Office of the Spokesman, Washington DC, of September, 2010.

¹⁶ Director, ICAO Legal Affairs and External Relations Bureau.

designing and ratifying effective legal instruments governing counter-terrorism, it is perhaps not surprising that the international aviation community, which has historically demonstrated a uniquely high degree of cooperative achievement, should now find itself assuming a vital role in helping to determine effective and implementable legal tools in this area.

On the other hands, Xia Xinhua¹⁷ pointed out that, if one draws a positive experience from other international conventions on counterterrorism, the 2010 Beijing Convention and the Protocol have further expanded the coverage of different forms of offences against civil aviation by criminalizing certain new and emerging aviation threats. He adds, the treaties also include clauses for fair treatment and other associated concern, thereby representing a collaborative and concrete action by the global civil aviation community to ensure that the global air transport system stays clearly focused on protecting the safety and security of aircraft passengers.¹⁸

It is obvious that, the author in his writing considers these new Beijing instruments as important tools for strengthening the crackdown of offenders but still they incorporated the concept of fair trial which is very important for observing human rights in dealing with the suspects.

Georgilas¹⁹ goes back to the 1960s when quite a few international conventions on aviation security were concluded under the auspicious of ICAO. According to him,

¹⁷ President of the 2010 Beijing Diplomatic Conference.

¹⁸ "A Statement from Xia Xinghua during the Beijing Diplomatic Conference of 2010", published in ICAO Journal Issue No. 01-201, p.11

¹⁹ Stratis G. Georgilas, "Suppression of Illegal Acts (international) Civil Aviation and the Responsibility of States: New Development", paper delivered at the Annual (2011) Conference of the Hellenic Society of International Law & International Relations, Athens, 2011, pp 1-10.

the earlier legal instruments have attracted almost universal adherence and acceptance and surely form part of general international law.

He points out that, the term “*unlawful interference convention*”, vividly reflects their “code” name with the objective of criminalizing acts against international civil aviation and facilitate the cooperation between states to make sure that such acts, which by definition hamper aviation security and commercial aviation, do not go unpunished. He is of the view that, though, utterly successful, the legal regime needed some re-adjustment which prompted the ICAO to reform the international law regime on aviation security.

It seems, the author considers the reforms to be very important in updating the legal framework and tactfully addressing new and emerging threats to civil aviation. To him, while the new Beijing Convention creates new principal and specific criminal offences such as the use of aircraft as a weapon to cause death or injury or damage to property, the Beijing protocol extends the scope of criminal offence of hijacking of an aircraft to cover situations when this is done by coercion or other form of intimidation or by technological means.

In his message published in the *ICAO Journal*²⁰ ICAO Secretary General, Raymond Benjamin, briefly highlights the historical background of aviation security. He points out that aviation security first arose as a serious issue for international aviation in the

²⁰ Raymond Benjamin, ” *Establishing A New Era of Consensus and Action on Global Aviation Priorities*” Message from the Secretary General published in ICAO Journal, Issue 01-2011, pp 3 & 4.

1960s, when criminal individuals and groups first began to threaten aircraft and their passengers for personal or political gain. According to him, as a response to this new phenomenon of aircraft hijackings and the complex legal ramifications they posed, States adopted the Tokyo Convention²¹ as the worldwide international legal instruments on aviation security, providing clearer guidelines on the security of in-flight passengers and property and concluding decades of debates and negotiations surrounding jurisdiction issues and some of the foremost outstanding problems in international air law.

In highlighting landmark achievements in the area of civil aviation law and security, Benjamin analyses the development of the laws by adoption of the new 2010 Beijing treaties aimed at covering new and emerging threats to civil aviation by criminalizing a comprehensive range of related activities and actions including that led to the destruction of the New York's World Trade Centre on 11 September, 2001. To him, this remarkable legal accomplishment has served to make 2010 one of the most important years in the history of international cooperation on the protection of air transport system.

Benjamin is of the view that, with the adoption of the new Beijing treaties, the Beijing Conference have leveraged and built on the strong global consensus that generated past 9/11 to strengthen and modernize every aspects of global aviation security and related regimes. He believes that, the new legal instruments together with the

²¹ *Convention on Offences and Certain Other Acts Committed on Board Aircraft adopted by the International Conference in Tokyo on 20th August to 14th September, 1963 and entered into force on 14th December, 1969.*

Assembly Security Declaration highlight more than anything else the strength and scope of the political will which exists today in support of more robust, comprehensive and collaborative aviation security and legal frameworks²².

In her article titled “*Evolving Threat to Civil Aviation is Countered by Legal Instruments as well as new Technology*”²³ Biernacki²⁴ is of the view that, safeguarding international civil aviation against unlawful interference is a grave concern to governments, the United Nations and ICAO. According to her, ICAO’s first response to acts of unlawful interference with civil aviation was to establish legal procedures by taking part in the development of several international legal instruments of which together with other civil aviation security matters become the basis for international law. She points out that, the problem of crime aboard aircraft in the late 1950s and early 1960s called for an international solution, as the complications associated with such acts ranged from political issues, such as extradition and the right of asylum, to the practical problem of keeping unruly persons in custody aboard aircraft or at airports and with these particulars in mind, the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*²⁵ was signed at Tokyo on 14th September, 1963.

She further clarifies that, the Tokyo Convention of 1963 is concerned not only with crimes but also all acts which may jeopardize the safety of aircraft or of persons or

²² See International Civil Aviation Organization (ICAO) Journal- issue No.01-2011 pp.3& 4.

²³ See an Article: “*Evolving threat to Civil aviation is Countered by Legal Instruments as well as new Technology*” Published in ICAO Journal, December, 1997.

²⁴ Ms. Halina M. Biernacki is an Aviation Security Officer in the Aviation Security and Facilitation Branch of the Air Transport Bureau at ICAO Headquarters, Montreal –Canada.

²⁵ See the Tokyo Convention of 1963.

property therein, or which jeopardize good order and discipline on board. As for unlawful interference with aircraft, she is of the view that, the Tokyo Convention attempted for the first time to address this issue.

She further highlights that with the dramatic increase in aircraft hijackings in the late 1960s a second legal instrument was signed at the Hague in 16 December, 1970 which among other things defined for the first time the act of unlawful seizure of aircraft as an offence and this was followed by Montreal Convention which was signed in 27th September, 1971 which was later amended by the Airport Protocol of 1988 which requires Contracting States to implement physical security measures at airports and aboard aircraft. She concludes by highlighting that, the above named aviation-related security legal instruments adopted under auspices of ICAO, is substantial contribution to the development of new principles of international law responding to the challenges of today.

Diana's work; "*Beyond Chicago Until Beijing*", analyses the historical development of international air law by reviewing several international legal instruments such as the Tokyo Convention of 1963, The Hague Convention of 1970 and Montreal Convention of 1971 and their associated protocols. She goes further to highlight the aims and objectives of these early international legal instruments in comparison with the new Beijing Convention and Protocol and she urges the international community to acknowledge the fact that the former air law instruments reflected the focus of the states at the time of their adoption.

She adds, the unlawful transport of biological, chemical and nuclear weapons and their related material becomes now punishable; directors and organizers of attacks

against aircraft and airports will have no safe haven and making a threat against civil aviation may also trigger criminal liability.²⁶ I agree with her that, there is a need for the international community to go on updating the laws to respond to new and emerging threats, either in their form of a new international instrument or as an amendment.

In the recent book titled "*International Air Law and ICAO*",²⁷ Milde considers aviation as the most extensive and strictly regulated human activities. He is of the view that, the technical and operational complexity and the concern for safety and security in the operations of aircraft and airports are reflected in detailed legal regulations that is enforced by national and international mechanism.

The author points out that, since aviation is by its nature international in character, extensive international legal framework must be developed from the very inception into aviation operations to unify and harmonize the fundamental legal principles governing aviation and the appropriate standards and procedures. To him, the uniform international legal framework such as the newly adopted 2010 Beijing Convention and Protocol was indispensable to permit and facilitate the development and globalization of civil aviation.

²⁶ Diana M. Stancu, "*Beyond Chicago Until Beijing*", an article on AVSEC Conventions, published in Aviation Security International Journal, October, 2010.

²⁷ Michael Milde, *International Air Law and ICAO*, Eleven International Publishing, Essential Air and Space Law (Vol. 10) 2012, ISBN 978-90, p 20.

Dillingham's recent book titled: *Aviation Security: Current Issues and Development*²⁸ gives some highlights on aviation screening trends before the September 11 attacks in America where screeners who by then were hired by airlines, often failed to detect threats objects located on passengers or their carry on luggage. According to him, cause of screeners' performance problems were rapid turnover and insufficient training and that control for limiting access to secure areas of airports, including aircraft, did not always work as intended. He says, under this situation, it was possible for people to carry weapons, explosives or other dangerous objects into aircraft. He, therefore, considers the new 2010 Beijing Convention and the Protocol as the solution for addressing such trends.

In the article titled "*Aviation Security Law System Revisited: Will the Beijing Regime Fill the Gap*", Anusha²⁹ analyses the previous laws on aviation security and consider whether with the adoption of the 2010 Beijing Convention and the Protocol, the legal regime now fill the gaps existed for many years in aviation as far as aviation security is concerned. He is of the view that, the 9/11 incident exposed the gap in aviation law system both nationally and internationally. He further points out that, the failure of the 2009 Christmas day terror plot, reminded the World of the bitter reality that civil aviation remains a target for terrorists.

From what the author pints out, it is obvious that, civil aviation is now a global network and if threatened, the threats touch the entire international community. In that

²⁸Gerald, L. Dillingham, *Aviation Security: Current Issues and Development*, Wara Science Publishers, USA, 2003, ISBN: 1-59033-970-7, 2003, pp.2&3.

²⁹Anusha Wiekramasinghe, *Aviation Security Law System Revisited: Will the Beijing Regime Fill the Gap*" Annual Academic Sessions, ISSN 2012-9912, Open University of Sri Lank, 2012.

context, there is need for accelerated efforts by the concerned parties to meet such threats , to enhance technical cooperation to track terrorist activities and to update the international aviation security law system to include necessary development.

In the article published in the *CTC Sentinel Journal*, Brandit³⁰ analyses aviation related threats since 9/11 and the Regulatory responses. He highlights a number of al-Qaeda affiliated plots sought to target commercial aviation since 9/11 which are named to include the “shoe bomber” plot in December 2001, an attempt to shoot down an Israeli airliner in Kenya in 2002, the liquid explosives plot against transatlantic flights in 2006, the Christmas Day plot in 2009 and the cargo bomb plots in 2010. He names other threats during the period to include the 2002 plot to hijack an airliner and crash it into Changi International Airport in Singapore, the 2002 El ticket counter shooting at Los Angeles International Airport, the 2004 bombings of two Russian airliners, the 2007 Glasgow Airport attack and a 2007 plot against Frankfurt Airport by extremists to target fuel lines at JFK International Airport in New York. Others are the 20011 suicide bombing at Moscow’s Domodedovo International Airport and the 2011 shootings of U.S military personnel at Frankfurt international Airport.

According to Brandit, international community responded to these plots by dramatically increasing aviation security measures to prevent or deter to future attacks. Many of these measures include hardening of cockpit doors, federalization of airport security screening staff and the creation of the Transport Security Administration (TSA) in America. He lists other measures to include implementation

³⁰ Ben Brandit, “*Terrorist Threats to Commercial Aviation: A Contemporary Assessment*”, published in *CTC Sentinel* of November, 2011 Vol. 4 ISSUES 11&12, p. 4.

of new detection equipment and methods, such as Advanced Imaging Technology (AIT) often referred to as “body scanners”, increased amounts of screening for cargo, Explosive Trace Detection (ETD), full body “pat down”, Behavioral Detection Officers (BDOs) and the use of watch lists to screen for terrorists to prevent them from boarding flights or from getting employment in airports or airlines.

The author further points out that, certain measures such as invasive “pat downs”, AIT scanning, inducing passengers to remove jackets, belts and shoes for inspection and requiring them to travel with minimum amounts of liquid in their possession- have drawn widespread complaints regarding their inconvenience, as well as questions about their supposed efficacy. What was pointed by the writer is very important in that in dealing with such measures to promote aviation security we have challenge of balancing the same with human dignity.

Dillingham³¹ gives highlights on aviation screening trends before the September 11 attacks in America where screeners who by then were hired by airlines, often failed to detect threats objects located on passengers or their carryon luggage. According to him, cause of screeners’ performance problems were rapid turnover and insufficient training and that control for limiting access to secure areas of airports, including aircraft, did not always work as intended. He says, under this situation, it was possible for people to carry weapons, explosives or other dangerous objects into

³¹Gerald, L. Dillingham, *Aviation Security: Current Issues and Development*. Wara Science Publishers, USA, 2003, ESNB: 1-59033-970-7, 2003. P.3.

aircraft. He therefore considers the provisions of the new 2010 Beijing Convention and the Protocol as the solution for addressing such trends.

The famous aviation law writer, Abeyratne³² analyses the importance of the law in promoting aviation security and he is of the view that the 2010 Beijing treaties can play a crucial role in furthering this objective as they are intended to combat new and emerging threats to civil aviation. He further points out that, since the events of 11 September, 2001 there have been several attempts against the security of aircraft in flight, and these threats ranged from shoe bombs to dirty bombs to explosives that can be assembled in flight with liquids, aerosols and gas but in every instance, the global community has reacted with pre-emptive and preventive measures that prohibit any material on board that might seemingly endanger the safety of flight. He further points out that, new and emerging threats to civil aviation are a constant cause for concern to the aviation community and ICAO has been addressing these threats for some time and continues to do so on global basis. According to him, the 2010 Beijing Convention serves international civil aviation well³³.

In his another book titled *Aviation Security; Legal and Regulatory Aspects*, Abeyratne³⁴, briefly analyses the significance of international air law by pointing out that the law should be expected to play significant role in promoting aviation security.

³²Abeyratne, Ruwantissa “*The Beijing Convention of 2010: An Important Milestone in the Annals of Aviation Security*” Air and Space Law 36, No.3 (2011), pp. 243-255.

³³ Abeyratne, Ruwantissa “*The Beijing Convention of 2010 on Suppression of Unlawful Acts Relating to International Civil Aviation*”- An interpretive Study, 4J Transp. Secur. (2011), pp.131, 143.

³⁴ Ruwantissa I.R. Abeyant, *Aviation Security; Legal and Regulatory Aspects*, IMPRINT Aldeshot, Hants: Bookfield, Vt; Ashgate; c1998.

He addresses the new and emerging threats to civil aviation and evaluates security tools in use to combat such threats. According to him, the tools include the Public Key Directory, Advance Passenger Information, Passenger Name Record and Machine Readable Travel Documents in the context of their legal and regulatory background. He goes on to discuss the applicable security treaties while providing an insight into the process of the security audits conducted by ICAO. He further examines issues of legal responsibility of states and individual for terrorist acts against civil aviation.

Gonzalez³⁵ points out the importance of promoting global aviation security. He said aviation security has been one of the highest priorities of ICAO and he named the abhorrent attacks of 11th September, 2011 to be a demonstration as to how civil aviation has been and remain a primary target of terrorism. According to him, the objective of adopting the Beijing Convention and the Protocol is among other things to send a clear message to the international community and the terrorist groups, that any unlawful interference against civil aviation is not tolerable. He urged member states to ratify the instruments in a short time insisting that by adopting the instrument is constructing a modern great wall to safeguard international civil aviation. He insists on the importance of the two treaties by saying:

“...the new Beijing treaties on aviation have constructed a new great wall that will both deter terror networks from targeting the lives of innocent aviation passengers as well as safeguarding international civil aviation more effectively from all types of new and emerging terrorist acts³⁶”

³⁵ Address by President of the Council of ICAO, Mr. Robert Kobeh Gonzalez, on Aviation Security in Beijing Diplomatic Conference held in China on 30th August, 2010.

³⁶ The ICAO Journal, Volume 66, Issue Number 1-2011, page 14.

He addresses the need for ICAO member states to reaffirm their commitment to fight criminal acts and respond more effectively to new and emerging threats in aviation. He, finally, congratulates the ICAO Diplomatic Conference of Beijing which adopted the two new treaties which among other things, criminalize the acts of using aircraft as a weapon and of using dangerous materials to attack aircraft or other targets on the ground³⁷.

Nielsen³⁸ discusses aviation security measures as a concept which affects many people's lives including businessmen, travelers and tourists. According to him the strengthening of security is the objective of many legal instruments which are closely connected to criminal law governing among other things, the punishment of alleged offenders while other instruments lay down rules on very specific security measures.

In the article published in the Central Law Journal titled "*The Adequacy of Aviation Security Laws and Airport Security*", Acharya³⁹ points out the need for international community to focus on the formulation of stringent laws, procedures and requirements applicable at an early stage, mitigating dangers before they come to fruition. He says, for the civil aviation industry, the early stage is the airport and that if airport laws, procedures and requirements were tightened and rigorously monitored for consistency, then much time efforts and money could be saved. What the writer means is that in order to address the problem effectively, there must be tight and implemented by all states.

³⁷ Ibid

³⁸ Kenneth Melaneton Nielsen, *Aviation Security: Legal Framework and Technical Management*, International Journal of Private Law, 2008. Vol.1 No.12, pp, 82-93

³⁹ Acharya, Gautam, "*The Adequacy of Aviation Security Laws and Airport Security*", Central European Journal and Security Studies, Vol. 2 Issue 1, 2003, pp.107-125.

In his welcome address during the 2010 Air Transport Conference held in Singapore, the Director General of Singapore Aviation Authority, Mr. Yap Ong Heng⁴⁰ outlined the importance of harmonized legal framework in aviation industry. According to him, a sound international legal framework has underpinned the development of civil aviation over the last 60 years, facilitating the orderly and sustainable growth of air travel and the aviation industry. He is of the view that, the continual enhancement of the law owes much to ICAO's harmonization efforts in practically all areas of civil aviation, including safety, security, facilitation, liability and financing.

On the other hand, Li Bin Sa Chula⁴¹ in the article titled "*New Development of International Aviation Security Legislation: Comments on 2010 Beijing Convention and Beijing Protocol*", examines the 2010 Beijing Convention and the Beijing Protocol from the aspects of development of substantive and procedure laws. According to her, the two international legal documents strengthen and improve the existing legal system of international aviation security, intensify the combat against terrorist activities and promote international anti- terrorism cooperation.

In his article titled "*Aviation Security*",⁴² Thomas considers aviation as a vital service to the general public and welfare of the global economy. He further points out that, commercial airlines present threats to society in myriad ways in that terrorist groups and malicious criminals have already considered and clearly exploit and secured airlines as visible lethal weapons that can produce monumental damage and

⁴⁰ Yap Ong Heng's Welcome Address by the Director General Civil Aviation Authority of Singapore at the Opening of the Air Transport, Air Law and Regulation on 24th March, 2010.

⁴¹ Li Bin Sa Chula, "*New Development of International Aviation Security Legislation: Comments on 2010 Beijing Convention and Beijing Protocol*" Journal of Beijing University of Aeronautics and Astronautics, Beijing 100919, China.

⁴² Andrew R. Thomas, *Aviation Insecurity*, Auherst, NY, Prometheus Books, 2003.

destruction to edifices, infrastructure and society in general. He give an example of the September 11, attack in United Sates and the 1994 FedEx Flight 705 hijacking by a disgruntled employee who intended to use the aircraft as a missile against FedEx Headquarters,⁴³

On the other hand, Elias⁴⁴ highlights the importance of air cargo security and the challenge facing cargo operators. He says, while the primary policy focus of the laws has been on cargo carried aboard passenger aircraft, air cargo security also presents a challenge for all-cargo operators. He is of the view that, there is some concern that heightened security measures for passenger aircraft which may make cargo aircraft a more attractive target to terrorists.

This study concurs with the writer in sense that, unlike passenger operations threats from explosives introduced in air cargo represents the greatest perceived risk, the greatest perceived risk associated with air cargo operations is the potential for an individual or individuals with access to aircraft to hijack a large transport category aircraft to carry out a suicide attack against a ground target. Therefore, looking beyond aviation security, there is also a broader risk that terrorists may attempt to ship weapons, including possible weapons of mass destruction, into and within the United States using the global cargo distribution network.

⁴³ Ibid

⁴⁴ Bart Elias, "Aviation Security: Background and Policy Options for Screening and Securing Air Cargo" published in the Report for Congress of February, 2008,

Generally, several works cited herein above give historical background to the laws on aviation security and others highlight the need for having updated legal regime such as the 2010 Beijing treaties in promoting aviation security. This study hopes to contribute to the above academic writings with a focus on the potential impact of the 2010 Beijing legal instruments to the development of the international air law in addressing new and emerging threats to aviation security.

1.5 Objective of the Study

This research is aimed at analyze the adequacy and effectiveness of the 2010 Beijing Convention and Protocol in addressing threats to aviation security. As a result, the end objectives of this study include:

- (a) To examine the development of international legal system on aviation security and identify the gaps thereof;
- (b) To analyze the 2010 Beijing Convention and Protocol with the view of investigating the efficacy of the new legal regime in addressing the problem of criminal acts to civil aviation; and
- (c) To suggest certain legal measures that may help to minimize criminal acts targeted to civil aviation on global; regional and national levels.

In so doing, the study will provide new ideas for better understanding the previous and the new legal regime on aviation security and hence examine whether the laws really fulfill the intended goal of preventing and combating threats to civil aviation in line with new developments and technological changes.

1.6 Research Questions

Basing on what was highlighted herein above, this study, therefore, seeks to answer the following research questions:

- (a) What is the significance of the 2010 Beijing Convention and Protocol in the development of the laws on aviation security?
- (b) How adequate and effective are the 2010 Beijing legal instruments in addressing threats to civil aviation?

1.7 Significance of the Study

The Study is very important in that it will identify challenges, weaknesses and gaps in aviation legal instruments to their coverage in relation to new and emerging threats to aviation security. That being the case, the study is significant as it contributes some new ideas to further develop and update the laws by pointing out areas which may need further improvements for the purpose of ensuring that aviation industry is accorded its status of being recognized as secure and safest mode of transport in the world.

1.8 Methodology

The study employed doctrinal research methodology which allowed a systematic exposition of legal instruments and other related materials on aviation security. It was through that methodology that analysis of the primary and secondary law was done, areas of weaknesses were identified and observed and recommendations were made for future development. In that context primary sources of international air law were used which include Conventions, Protocols, statutes, judicial decisions and other

legal instruments on aviation security. Secondary sources of law were also used including Journals articles, text books, ICAO and IATA reports, policies and working papers, and publications and law reports and internets. Strict care was taken to acknowledge these sources.

In addition, the researcher participated in several national and international seminars, conferences, workshops, short courses and study tours in which he exchanged ideas with several aviation experts⁴⁵. The researcher also during the period attended several national and international meetings on aviation⁴⁶ and in several of these events, the issues of aviation security threats were discussed in line with necessity for member States to speed up in signing, ratifying and domesticating the several newly adopted international legal instruments including the 2010 Beijing Convention and the Protocol for further implementation. Finally, consultations and discussions were made to various aviation stakeholders including aviation staff, security officers, crews, passengers, airline and airport operators, regulators and lawyers.

It is through the above named methodologies, the researcher managed to collect enough information which assisted in coming up with the conclusion, observations and recommendations.

⁴⁵ Airports visited by the researcher on study tours from 2010 to 2013 are Istanbul Ataturk Airport and Ankara Airport-Turkey, Lanaka International Airport-Cyprus, SSR International Airport-Mauritius, Jomo Kenyatta International Airport-Kenya, Cairo International Airport-Egypt and Entebbe International Airport- Uganda. During the research, short courses on aviation studies were also attended by the researcher at Singapore Aviation Academy- Singapore, (2010), Huston Airport System-Texas- United States (2010), International Law Institute (ILI) at Uganda (2012), the United Arab Emirates- Dubai (2012 and Ghana Civil Aviation Training Academy, Accra (2013).

⁴⁶ They include the Conferences by the Airport Council International (ACI)⁴⁶ held at Calgary-Canada (2012), ICAO High- Level Conference on Aviation Security (HLCS) in Montreal, Canada (2010) and The African Union Conference of Ministers Responsible for Transport, held in Luanda, Angola (2011).

1.9 Conclusion

This study examines the general concept of international air law governing aviation security threats in line with the changes in technology and tactics used by terrorists. In so doing, the historical development and types of aviation threats will be analyzed together with the notable events of such criminal acts. Finally, the study critically analyzes the 2010 Beijing legal instruments and determines their adequacy and effectiveness in addressing such new and emerging threats to civil aviation.

CHAPTER TWO

2.0 GENESIS OF AVIATION SECURITY THREATS

2.1 Introduction

In the earliest days of aviation, there have been no much threats to aviation sector and people experienced loose security in which they could go around the airport or boarding flight without feeling threatened and hence aviation security was only a minor concern. However, with the increasing number of aviation attacks globally, the concept of aviation security is now high on the list of priorities, especially after the September 11 attacks and the bomb threat of 2006 at Heathrow airport⁴⁷.

2.1.1 Aviation Security

Aviation security is simply defined to include the techniques and methods used in protecting airports and aircraft from crime⁴⁸. However, Annex 17 to the 1944 Chicago Convention further defines aviation security as a combination of measures of human and material resources intended to safeguard civil aviation against acts of unlawful interference”⁴⁹.

The main objective of aviation security was further elaborated in one of the famous aviation magazines as follows:

⁴⁷ Following this event, a Scottish man, Adam Bushby was convicted and sentenced to two years imprisonment after being proved that he sent two hoax bomb threats to Heathrow Airport purported to be from the National Scottish Liberation Army.

⁴⁸ Sunketh Reddy, Global Air Safety and Security Regulations: Current Advancements, Submitted in Fulfillment of Post Graduate Diploma in Aviation Law and Air Transport Management (PGDALATM) at the University of Law, Hyderabad and the Institute of Applied Aviation Management, Calcuta, Kerala for the Academic year 2011& 2012, p. 4.

⁴⁹ Annex 17 to the Chicago Convention is a Security Convention for Safeguarding International Civil Aviation Against the Acts of Unlawful Interference and it was adopted by ICAO Council in March 1974 under Article 37 of the Chicago Convention and reviewed from time to time.

”Aviation security exists to prevent criminal acts which include but not limited to aircraft hijackings, Bombings, attacks at airports, off- airport facility attacks, shooting at in-flight aircraft, assaulting passengers and aviation staff”⁵⁰.

The statutory responsibility of aviation security is the management in the airports. As clearly spelt out in Annex 17 and the Security Manual, aviation security is mandated to safeguard international civil aviation against acts of unlawful interference.

Generally, from what is briefly highlighted herein above, it is obvious that the primary objective of aviation security is to safeguard passengers, crew, ground personnel and the general public against acts of unlawful interference perpetrated in flight or within the confines of an airport. Aviation security also seeks to protect aircraft and facilities serving civil aviation, such as fuel, catering, air navigation facilities and the premises of listed air cargo agents, against acts of unlawful interference.

2.1.2 Aviation Threats

On the other hand, the term aviation threats refer to acts of unlawful interference to civil aviation which are further defined to mean acts or attempted acts as to jeopardize the safety of passengers and aircraft including but not limited to:

- (a) unlawful seizure of aircraft,
- (b) destruction of an aircraft in service,
- (c) hostage-taking on board aircraft or on aerodromes,
- (d) forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility,

⁵⁰ See “Criminal Acts against Civil Aviation Trends 1993-1997”, Published in Aviation News and Resources Online Magazine of 1997.

- (e) introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes,
- (f) use of an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment,
- (g) 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 facility⁵¹

2.1.3 Terrorism and Aviation Security

Terrorism is said to be an extremely dangerous form of criminal activity that needs suppression at both national and international levels. Unfortunately, it has been noted that states have found it impossible, thus far, to agree on a general definition of terrorism as an international crime. In other words so far, there is neither an academic nor an international legal consensus regarding the definition of the term terrorism.⁵² Hence, as several authors points out, the distinction between terrorism and national liberation movements is hardly clear, especially since some groups use both guerilla and terrorist tactics⁵³.

While so far there is no global acceptable definition of terrorist, some writers have tried to define it the way they see it. For example, FarlexHE simply defines the term terrorism as “the use of force or violence against persons or property in order to

⁵¹ See chapter 1 of Annex 17 to the Chicago Convention, 13th Edition, which came into force in, 15th July, 2013.

⁵² Schemid, Alex P, “The Definition of Terrorism” The Routledge Handbook of Terrorism Research, Routledge, ISBN 0-203-82873-9, P 39.

⁵³ Huffiman,B, Inside Terrorism” Columbian University Press, ISBN 0-231-11468-0 (accessed on 20/9/2014).

coerce or intimidate a government or the civilian population in furtherance of political or social objective”.⁵⁴

The US Department of States defines terrorism to be “*premeditated politically-motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience*”⁵⁵ On the other hand, FBI uses this definition: “*Terrorism is the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives*”⁵⁶ On the other hand the UN Convention for Suppression of Financing of Terrorism defines terrorism as an act intended to cause death or serious bodily harm to civilian or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act⁵⁷

Upon going through the several definitions, it is obvious that most of them have some common characteristics which include use of illegitimate force or violence against innocent civilian or properties with political, economic, social or religious motives. Basing on that, it is my considered view that the term terrorism means “the illegitimate use of force or violence by individuals, State, Government, organization

⁵⁴ See The Free Dictionary by Farlex.

⁵⁵ See Terrorism Research, International Terrorism and Security Research, University of St Andrew, USA.

⁵⁶ Ibid.

⁵⁷ Article 2(1), International Convention for the Suppression of Financing of Terrorism, G.A Res , 109, U.N. GAOR, 54th Sess., Supp. No. 49, UN Doc A/54/49 (Vol.1) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000) adopted 9 Dec. 1999 entered into force 10 Apr., 2002.

or any group of people to achieve political, economic, social or religious objective by the perpetrator (s) when innocent people or property are targeted”.

It was further stated in the Report on the Task Force on Disorder and Terrorism that international terrorism is designed to influence government or intimidate the public through the threatening of civilians, murder, kidnapping of persons or group of persons and the mass destruction of property in order to achieve a political, religious, social or economic aim.⁵⁸ It is believed that, lack of democracy, disrespect for human rights, armed conflicts, blocked democratic transitions, underdevelopment, poverty and lack of respect for the right to self-determination may all provide the setting for the discontent and frustration that lead to terrorism⁵⁹.

It should be noted that the appearance of terrorism as a challenge to aviation security has practically concurred with the rise of aviation as a mode of transportation. For example, in 22 July 1968 three gunmen from the Popular Front for the Liberation of Palestine (PFLP) hijacked a passenger airliner of the Israeli airline El Al on a flight from Rome to Tel Aviv and demanded to exchange hostages for their comrades-in-arms who were imprisoned in Israel⁶⁰. This operation, although it was the twelfth case of civilian aircraft seizure in 1968, was qualitatively different in its content and ultimate aim. It was the first time that an aircraft had ever been hijacked not out of

⁵⁸ See Disorder and Terrorism Report on the Task Force on Terrorism, National Advisory Committee on Criminal Justice, Standard and Goals (1976: Washington) 11.

⁵⁹ Ntahmburi, N.” Fighting Terror in East Africa: Less Liberty for More Security? Analysis on Anti-Terrorism Legislation and Its impact on Human Rights, Dissertation submitted for fulfillment of Master Degree (L.L.M.) of the University of Cape Town , p.13.

⁶⁰ Jangir, Arasly, ”*Terrorism and Civil Aviation Security: Problems and Trends*” Paper Presented to a Meeting of the Combating Terrorism Working Group, the PIF Consortium, Sarajevo, February, 2004, p 8.

criminal motivation or for personal reasons, but with the specific goal of *politically pressuring* an opponent and using the incident as a *propaganda message* to bring a political cause to the world's notice.

In considering the examples discussed above, it is no mere chance that the largest terrorist attacks the world has ever seen—the September 11 attacks on New York and Washington—were committed by hijacking civil airliners. For the first time, the airplanes were steered by suicide pilots. Instead of being employed as leverage for negotiations or as a platform for putting forward demands, the airliners were used as *weapons* (in effect, manned cruise missiles) designed for defeating specific targets⁶¹.

2.2 Background to Aviation Security Threats

Criminal acts or threats to aviation security is a form terrorism which has a long history going back to as early as 1920s when aircraft hijackings were used as a means for illegal flight across national borders. Also from 1940s, there were a number of serious attacks on aircraft carried out for political or terrorist purposes which resulted in significant casualties. The situation became worse from 1980s when the aviation sector continued to have a number of characteristics making it an attractive target for terrorists who were knowledgeable about aviation operations and hence identified vulnerabilities to mount catastrophic attacks. One example of such attacks is the bombing of Pan AM flight 103 over Lockerbie, Scotland in 1988 which killed 259 people on board the aircraft and 11 on the ground.⁶²

⁶¹ Ibid.

⁶² Following that incident of Lockerbie bombing, a Libyan former Intelligence Officer, Abdelbaset al Megrahi was charged in 1988 and upon conviction he was sentenced to life imprisonment in 2001,

Further, following the famous September 11 attacks in America and with the technological advancement and changes of tactics by the terrorists, many governments have started to impose more strict laws and rules as preventive measures to counter such criminal acts. Canada and the United States for example, introduced sweeping reforms within their territories⁶³ after identifying vulnerabilities in the legal instruments related to security of aviation sector. Other states were also forced to re-examine how security is handled at their own airports, and speculate on the probability of similar threats to their territory.⁶⁴

On the other hand, ICAO considered the need of reviewing and updating the international legal framework to make it more relevant and adequate for enhancing the international community to effectively fight the war against the new and emerging threats to aviation security. It is on that spirit that, the Beijing Convention and Beijing Protocol were adopted in 2010 to criminalize a number of such new and emerging threats to civil aviation.⁶⁵

however in 2009 he was released on compensation grounds by the Scottish government after being diagnosed with terminal cancer and died a few months later.

⁶³ Since the 9-11 attacks, both Canada and the United States have enacted several pieces of aviation security legislation to strengthen air and ground security. Federal agencies help enforce these statutes by partnering with air carriers, intelligence, law enforcement, and the airport authorities in a multi-disciplinary regime. When one compares the Canadian and American legislation and policies, many similarities and differences can be found with respect to the content and application of key aviation security provisions. Common themes are found in aviation security legislation in Canada and the U.S., which reflect the guiding principles, including laying the federal regulatory framework for air and ground security; research and development for screening technologies; appropriation of funding for various security programs; promoting intra-agency and inter-agency cooperation as multiple layers.

⁶⁴ Mathew Valmeluem, “*Legal Issues in the Fight Against Terrorism: Aviation Security Update*”, posted in the Lift Magazine, in September, 2010.

⁶⁵ The new and emerging threats to civil aviation include using aircraft as a weapon to cause death, injury or damage, using civil aircraft to discharge biological and nuclear weapons or similar substances to cause death, injury or damage, using biological, chemical and nuclear weapons to attack

2.3 Common Types of Aviation Threats

There are various types of aviation security threats that pose a grave danger in the aviation industry and the most common are Aircraft Hijackings and Bombings. Other threats include Missiles Attacks (SAM), Man Portable Air Defense System (MANPADS) and Extortion. The list also include Use of Aircraft in Flight as a Weapon, Improvised Explosive Devices (IEDs) such as the use of liquids, gels and aerosols explosives (LAGS) and attacks to aviation related targets such as airports and airport's facilities and other New and Emerging Threats.⁶⁶

2.3.1 Aircraft Hijackings

Civil aviation has been threatened by criminal attacks for decades and from the first hijackings and bombings to recent attempt against the UPS and FedEx Cargo aircraft, the threats have remained constant. For example, unsuccessful attempts for suicide hijacking took place in 1974 in America when Samu Byke attempted to hijack plane at Bellmore Washington International Airport and fly it into the White House, in an attempt to assassinate President Nixon. Also in 1994, four terrorists hijacked an Air France aircraft at Algiers in an apparent attempt to fly it into the Eifel Tower or explode it.⁶⁷

According to Professor Dempsey,⁶⁸ aircraft hijackings accounts for the largest percentage of all attacks which are threats to civil aviation. He defines aircraft

civil aircraft unlawful transport of biological, chemical and nuclear weapons or certain related material, unlawful transport of explosive or radioactive material for terrorist purposes, a cyber attack on air navigation facilities and organizing, directing and financing acts of terrorism.

⁶⁶ An Article by Ben Brandit, "*Terrorist attacks to Commercial Aviation: A contemporary Assessment*" published by the Combating Terrorism Centre, November 2011 Vol. 4 issue 11& 12, P.5.

⁶⁷ Attacks that involved modular explosive devices smuggled into planes and left aboard.

⁶⁸ Article by Professor Dr. Paul Stephen Dempsey on "*Aviation Security and the Role of International Law*" a Teaching Material at the Institute of Air and Space Law, published in 2008.

hijackings to mean unlawful seizure of an aircraft by an individual or a group of people. Research conducted shows that the first recorded aircraft hijacking occurred in Peru in the year 1930 when Peruvian revolutionaries seized a Pan American mail aircraft with the aim of dropping propaganda leaflets over Lima and in most case, during aircraft the pilot is forced to fly the aircraft according to the orders of the hijackers. However, in a few cases the hijackers flew the aircraft themselves as it was the case for the September 11 attacks where they later used the aircraft as weapons. In another case a plane was hijacked by the official pilot.⁶⁹

Over the past several decades, aircraft have been hijacked by members of different actors, including North Korean intelligence officers, Sikhs, Palestinian, Hezbollah militants and mentally disturbed individuals. However, the Hijackers are sometimes members of organizations that are waging guerilla campaigns against particular countries or Governments and are seeking to gain publicity for their causes. Other less organized groups have also taken over aircraft- sometimes in a desperate attempt to escape the authoritarian regime of their homelands.⁷⁰ For example, between the year 1947 and 1958, about 23 events of aircraft hijackings were recorded mostly committed by Eastern Europeans seeking political asylum.⁷¹

To cut the story short, aircraft hijackings have come to the fore in recent decades with the growth of air travel, where hijackers normally take over aircraft with the intention

⁶⁹ Air China Captain, Yuan Bin, hijacked and diverted the Boeing 737 to Taiwan because he was displeased with Air policies and his pay.

⁷⁰ An Article on "*History of airliner hijackings*", found in <http://news.bbc.co.uk/2/hi/157818.stm>, (accessed on 29/03/2012).

⁷¹ Publication on "Aviation Security" in US Centennial of Flight Commission, in <http://centennialoflight.gov>. (accessed on 6/09/2012).

of using their passengers as bargaining chips to advance their interest. The following are such good examples of acts of aircraft hijackings in Africa:

(a) The Entebbe Hijacking⁷²

On 27 June 1976 Air France Flight 139 an Airbus A300B4-203 originating from Tel Aviv Israel, carrying 248 passengers and 12 crew from Athens Greece heading to Paris. Soon after 12.30 take off, the flight was hijacked by two Palestinians from the Popular Front for the Liberation of Palestine External Operation (PFLP-EO) and two Germans from the German Revolutionary Cells- Wilfred Bose Brigitte Kuhlman. The Hijackers diverted the flight to Benghazi, Libya where it was held on ground for 7 hours for refueling during which time a female hostage was released who pretended to have a miscarriage.

The Plane left Benghazi and more than 24 hours after the flight original departure, it arrived at Entebbe Airport in Uganda. At Entebbe, the four hijackers were joined by at least four others, supported by the pro- Palestinian forces of Uganda President, Iddi Amin. The hijackers demanded the release of 40 Palestinians held in Israel and 13 other detainees imprisoned in Kenya, France, Switzerland and West German.

The hijackers held the passengers for a week in the transit lounge of Entebbe Airport, now old terminal. Some of the hostages were released, but 105 remained captives. The Hijackers threatened to kill the hostages if Israel did not comply with their demands. After days of collecting intelligence and planning by the Israel, their four Air Forces

⁷² See Operation Entebbe in <http://en.wikipedia.org/wiki/Operation-Entebe>. Accessed on 6/09/ 2012.

C-130 Hercules Transport Aircraft flew secretly by cover of night, without aid of Entebbe air traffic control.

The rescue operation took place at night, as Israel transport planes carried 100 commandos over 2500 miles (4,000) to Uganda for rescue operation. The operation which took a week of planning, lasted 90 minutes and 102 hostages were rescued. Five Israeli Commandos were wounded and one Lt. Col. Yonatan Netanyahu was killed. 24 hours later a fourth Israel hostage, Mrs. Dora Bloch was executed by Ugandan forces at nearby hospital where she was admitted.⁷³

(b) Hijacking of Air Tanzania Flight⁷⁴

On 1st July, 1982, Air Tanzania flight No. 5H –ATC-Boeing 737-2R8C which left Mwanza Airport with 99 passengers and five crews was hijacked by five Tanzanians who were demanding for resignation of the then President of United Republic of Tanzania, Julius Kambarage Nyerere. The Hijackers who were standard 7 and form 4 levers, forced the flight to land in Nairobi Kenya where five passengers were released. Weapons used include two wooden imitation pistols, an imitation hand grenade, two candles wrapped up to appear like geligilite explosive, three knives, had gun (038) revolver which was surrendered to the captain of the plane by a passenger on boarding.

⁷³ Ibid

⁷⁴ “The Hijacking of A Tanzanian Aircraft, February ,1982 “ *A Statement by His Excellence the Tanzania High Commissioner in United Kingdom*, published in Tanzanian Affairs. See also <http://www/tzaffairs.org/1982/07/hijacking-of-a-tanzanian-aircraft>. Accessed on 6/9/2012.

The aircraft was refueled after nearly six hours on the ground and later took off to Jeddah, South Arabia where it was refueled again and continued to Athens, Greece where two other passengers were released. From Greece, the flight continued to London- Stansted in United Kingdom where the hijackers demanded to speak to exiled Tanzanian Oscar Kambona. After Kambona spoke with the hijackers as they demanded, they surrendered on February 28, 1982. Upon their surrender, the hijackers were charged in UK under the UK Laws and Tanzania made no attempt to seek extradition of the five hijackers.

(c) Hijacking of Ethiopian Airline

On 23 November, 1996 Ethiopian Airline flight No. 961- Boeing 767-260ER was hijacked on route from Addis Abba, Ethiopia to Nairobi, Kenya and the hijackers were 3 Ethiopians who were seeking political asylum in Australia. It was discovered that the Hijackers were using fake bomb which was actually a covered bottle of liquor. Some hours after the hijacking, the plane crash- landed in the Indian Ocean near Comoro Islands due to fuel starvation, killing 125 of the 175 people on board along with the hijackers. Among the survivors were the Captain of the plane and the co-pilot.⁷⁵

2.3.2 Missile Attacks to Aircraft

Apart from aircraft hijackings, another common type of aviation security threats is the use of Missile (SAM) and rockets in attacking civil aviation. This threat goes back to 1973 when Italian police arrested five middle- Eastern terrorists armed with SA-7s

⁷⁵ http://www.wikipedia.org/wiki/Ethiopian_Airline_Flight_196. Accessed on 20 May, 2012.

who rented an apartment under the flight path to Rome Fumicino Airport and were planning to shoot down an El Al Airliner coming into land at the airport.⁷⁶ The plot of missile attack on El Al Airliner derived from an appealing incident on 21 February, 1973, when Libyan aircraft B-727 was shot down over the Sinai desert by an Israel fighter, killing the 108 people on board. The Libyan people called for vengeance against Israel and urged the other Arab states to send their warplanes against Israel's major cities and destroy Israel airlines wherever they could be found.⁷⁷

On 5 January, 1974, 220 soldiers and 20 police sealed five squares around Heathrow International Airport in London after receiving reports that terrorists had smuggled SA-7s into Britain in diplomatic bags of middle –Eastern Embassies and were planning to shoot down an El Al Airliner.⁷⁸ Another significant incident of missile attack to civil aviation occurred on 13 January, 1975 when terrorists attempted to shoot down an El Al Plane after driving their car into the apron of Orly Airport where they set up a rocket launcher and fired at El Al Airliner which was about to take off for New York with 136 passengers.

The first round missed the target and hit another Yugoslavian DC -9 plane parked nearby. The rocket failed to explode and the terrorist escaped by a car. The French traced the PFLP Venezuelan terrorist and leader of the PFLP group in Europe, Carlos. It is also known that once again an El Al Airliner had been deliberately chosen as a

⁷⁶ See Ruwantissa Abeyratne, "Civil Unrest and airport and Aviation Security" in *Journal of Air Transportation Security*, Vol. 4, No. 4 (2011), pp.285-295.

⁷⁷ See an article titled: "Forgotten History: The Case of Libyan Arab Airlines Flight 114", authored by Steven Katsineris and published in the Media Monitors Network of Friday, February 1, 2008.

⁷⁸ Debson & Payne book on Aviation Security Law (1977) p.53.

target by Libyan President Muammar Gaddafi in an attempt to avenge the loss of Libyan airline shot down by Israel over the Sinai desert.⁷⁹

Despite this failure, on 25 January, 1976 another abortive attempt of missiles attack was carried out by three PFLP terrorists who were arrested by police at Nairobi Airport, Kenya before they had time to fire SA-7 missile at El Al Aircraft carrying 100 passengers. After 10 days the terrorists were handed over to Israel by Kenyan Government and few months later there was unsuccessful attempt to gain their release in June 1976 when Palestinian hijacked an Air France aircraft to Entebbe, in Uganda.⁸⁰

There has been a marked increase in missile attacks to aircraft since 1984 and the possibility of undeterred use of missile is said to be encouraged by the rapid proliferation of such weaponry on the publicity to be gained by using such systems and the enhanced effectiveness of missiles against aircraft makes the threat of such attack real. For example, on 21st September 1984 Afghan counter- revolutionary fired a Surface- to air missile and hit a DC-10 Ariana aircraft carrying 308 passengers. The explosion tore through the aircraft's left engine, damaging its hydraulic system and wing containing fuel tank. The captain of the aircraft managed to land the aircraft safely at Kabul International Airport.⁸¹

⁷⁹ Ibid

⁸⁰ The Palestinian hijackers were overpowered and killed by Israel Commandos in a special operation carried out at night at the Entebbe Airport.

⁸¹ U.S Department of Transport (FAA), Worldwide Significant Acts Involving Aviation, 1984, Pg.4.

In 4 April, 1985 a members of Abu Nidal group fired an RPG rocket at an Alia airliner as it took off from Athens Airport. Although the rocket did not explode, it left a hole in the fuselage⁸². On 29 November, 2002, there was an attempted missile attack on an Israel passenger's plane, Boeing 757-300 flying from Mombasa Airport, Kenya with 261 people on board. This attempt is said to be another long-feared aviation threat on the rise. In that incident, the terrorists attempted to shoot down the commercial aircraft with shoulder-fired missile designed for battle field attacks on swift combat jets⁸³.

David Benjamin who was a Senior Counterterrorism advisor to President Bill Clinton had this to say:

“Recognizing that there so many of this type of missile attacks is a manifestation that there terrorists who would truly like shooting down civil airliners, we have to understand that the threats has now gone up”⁸⁴

2.3.3 Man Portable Air Defense System (MANPADS)

Man Portable Air Defence System (MANPADS) are sometimes known as threats from ranged weapons and is the type of criminal acts which have posed a serious threat to aviation industry. It is worth noting that, after the September 11 attacks in America, there had been several attempts against the security of aircraft in flight through MANPADS which are extremely effective weapon which are prolific in their availability worldwide⁸⁵.

⁸² U.S Department of Defense, “Terrorist Group Profiles (Washington DC: hs, GPC, 1984. Pg. 7.

⁸³ See <http://www.smh.com.au/articles/2002/12/02/10>. Retrieved on 30 May 2012.

⁸⁴ The New York Times” Terror in Africa. Security Concerns; Ideal Terror Weapons: Portable, Deadly, Plentiful Missile” by Thomas Shankar, Published on 29 November, 2002.

⁸⁵ See <http://www.janes.com/security/manual> (accessed on 3/07/2013)

Introduced in the 1950 and originally meant to deter terror attacks from air to ground to be used by state authorities and other protection agencies, MANPADS if got into the wrong hands are being used to pose threat to civil aviation. The surface to air MANPADS is a light weapon which offer very little warning before impact, and is often destructive and lethal⁸⁶ and it is believed that there is 70% chance that a civil aircraft will be destroyed if hit by MANPADS⁸⁷.

It is believed that, the location of most airports in Africa render them particularly vulnerable to missile attacks as most of approaches to runways of these airports are located in bushy areas or residential area with high density of population that are difficult to police and susceptible to acts of unlawful interference. Incidents of missiles attacks could occur at the most critical stages of flight such as just before landing or take off when the aircraft is laying low and lower speeds. Africa, for example, had its share of such attacks in 6 April, 1994 when a SAM 7 missile was believed to have been used in attacking a civil aircraft carrying President Habyarimana of Rwanda and Ntaryamira of Burundi. Both Presidents died in the attack and this incident has sparked the Rwandan genocide. Also in November 2002, an Israel airliner carrying hundred of tourists flying back to Israel was shot at the Mombasa International Airport by surface to air missiles causing damage to the aircraft⁸⁸.

⁸⁶ Ibid

⁸⁷ MANPADS, ploughshares Mantra, Autumn, 2004. P 83.

⁸⁸ Mutali K. Kapchangah, "African Aviation Security: Implication for Peace and Security", published in the Situation Report by Institute for Security Studies, 15 July, 2008. See p. 9.

Although MANPADS are believed to be unable to target aircraft at cruising altitudes, commercial aircraft would become vulnerable for several miles while ascending and descending, particularly due to their lack of countermeasures systems. In addition to the MANPADS threats, a significant variety of ranged weapons could be used to target commercial aircraft, particularly taxiing prior to takeoff or after landing.

2.3.4 Extortion

Extortion is a criminal offence in which an individual or group of individuals get money or property through threatening airlines and in some cases the criminals called the head offices of the airline or airport authorities and communicated false information that they planted a bomb in the aircraft or airport and the bombs will explode if they will not be paid. It is one of the most common aviation threats which affect the development of aviation industry.

This type of aviation threat may be covered by the definition of the unlawful acts defined by Article 1(g) of Annex 17 of The Chicago Convention which refers to 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.⁸⁹

One of the most popular case of extortion in an airline happened in May 26, 1971 in Qantas Airlines where Qantas got a call from a person named “Mr. John Brown” who said that there was a bomb in one of their aircraft bound to Hon Kong and he

⁸⁹ Chapter 1 of Annex 17 to the Chicago Convention, 13th Edition, which came into force in, 15th July, 2013.

threatened to activate it unless he was paid \$500,000. The Management of Qantas treated the incident seriously when Mr. Brown pointed the police to a locker inside the airport where there is bomb. Arrangement was made; after Mr. Brown has obtained the money he called again the office stating that it was only a hoax. He was arrested, and the person named Mr. Brown was proved to be Peter Macari and hence was charged and sentenced to 9 years jail imprisonment⁹⁰. During the 1970s the technology and surveillance in the aviation industry was not as tough and strict as it is today.

Therefore instance like what happened in Qantas Airlines could be easily done by any individual. But nowadays, because of the new technologies and advance surveillance systems, extortionists can be easily be located and identified, aside from that there are advanced and sophisticated software that can locate and detect individuals in the intelligence, after 9/11 aviation industry as well the cart has spend a great amount of efforts and money in order to detect the individuals that are threats, and also individual that are just playing a joke with the airline companies.

Aside from the advance technology and intelligence, governments of different countries have passed tougher laws regarding extortion and the fact that the airline companies are often advised not to give out money to individuals who call and inform that there is bomb planted in the plane, but first identify the caller and work closely with the police officers.⁹¹

⁹⁰ See <http://doenetwork.org/cases/541dmnsw.html> (accessed on 23/04/ 2012).

⁹¹ Ibid

2.3.5 Improvised Explosive Devices (IEDs)

Another type of aviation security threat is the Improvised Explosive Devices (IEDs) which is an established name for explosive devices that are usually utilized in unconventionally warfare by guerillas⁹². Generally, IEDs are composed of explosive charges, detonators and initiation system and in some instances it may be also consists of metal objects, like nails and it is initiated by different technologies such as through remote controls, cell phones, magnet and wires.

It has been noted that, terrorist groups, particularly the Al Qaida, are believed to have continuously refined their ability to conceal improvised explosive devices (IEDS) from security screening equipment, as shown in the 2009 Christmas Day, where a would- be a suicide- bomber concealed explosives in his underwear, and 2010 cargo bomb plot, where bomb makers hid explosives in a printer cartridges.

Over the past decade terrorist have utilized Improvised Explosive Devices (IED) as their preferred tactic in spreading terror. Examples of attacks that used IEDs are that of 1993 bombing in the World Trade Centre, 1995 bombing of the Federal Building in Oklahoma, attacks on the East Africa American Embassies on 1998, the 2000 attack on the USS Cole and the 9/11 attacks in New York.⁹³

In August 10, 2006, United Kingdom intelligence has detected the plan of extremists in engaging in a plot wherein multiple passengers' airlines that were to fly from

⁹² It is a bomb that is constructed by combining diverse parts in an improvised manner in which it integrates destructive, lethal and deadly chemicals that are created to destroy and disable civilians and vehicles. It may combine commercially- sourced explosive and homemade explosive.

⁹³ Final Report of the National Commission on Terrorist Attacks Upon The Unites States, of 21 August, 2004.

United Kingdom to United States would be destroyed.⁹⁴ Following that plot, three people namely, Abdullah Ahmed, Assad Sarwar and Tanvir Hussein were charged and convicted of conspiracy to murder crew and passengers on Transatlantic flights in what would have been the biggest terrorist outrage since September 11 attacks in America in 2001.⁹⁵

2.3.6 Notable Plots of Threats To Aviation

The other recent criminal acts which form new and emerging threats to civil aviation are also increasing and these include but not limited to:

(a) Liquids Explosive Plot of 2006

One of the new threats to civil aviation was the liquid explosive plot against transatlantic flights on August, 2006⁹⁶, when the British law enforcement discovered the plot involving components of liquid explosive to be carried on board civil aircraft flying across the North Atlantic. In response to the foiling of the alleged plot, security restriction on the carriage of liquids, aerosols and gels (LAGS) in hand baggage were introduced on the same date to ban using impoverished explosive devices containing homemade liquids explosives. In further response to this threat, an initial ban on the carriage of all hand baggage on flight leaving UK was subsequently modified to a restriction on the amount of liquids, aerosols and gels (LAGS) which were permitted

⁹⁴ According to the Wall Street Journal published on August 11, 2006, the alleged plot to bring down several trans-Atlantic flights simultaneously involved liquid explosives.

⁹⁵ “*Three Guilty of Transatlantic Bomb Plot the Guardian*” an article by Vikran Dodd published in the Guardian of Monday 7 September, 2009 (see also [http: www .guardian.co.uk](http://www.guardian.co.uk)).

⁹⁶ Following this plot, three Britons namely Abdullah Ahmed Ali, Assad Sarwar and Tauvir Hassan were charged in UK and found guilty of conspiracy to murder by exploding liquid bombs on airlines flying from Britain to North America. They were sentenced to life imprisonment.

to be carried by through screening point.⁹⁷ These restrictions were initially adopted in Europe and North America and they were subsequently harmonized with Europe Union by an amendment to the European Commission Regulation which came into effect on 6th November, 2006.

By definition LAGs include, but not limited to water and other drinks, soup, syrups, jams, stews, sauces and pastes; food in sources or containing a high liquid content; creams, lotions, cosmetics and oils; perfumes; sprays; gels including hair and shower gels; contents of pressurized containers (e.g. aerosols), including-solid mixtures; mascara; lips gloss or lip balm; and any items of similar consistency at room temperature. However, since technologies are currently deployed to detect certain liquid explosive, the Council adopted security control guideline for screening liquids, gels and aerosols known as LAGs, and these were conveyed to states in December 2006 with an effective date of 1st March 2007.⁹⁸

The Council guideline recommended that all LAGs should be carries in containers with capacity not greater than 100 ml. each and should be placed in a transparent re-sealable plastic bag of maximum capacity not exceeding 1l, each and passengers being permitted to carry only one such bag. Exceptions are allowed for medicines, baby food and special dietary or other medical requirement.⁹⁹ Apart from that, all

⁹⁷Only small quantities of liquids may now be taken in hand luggage. These liquids must be in individual containers with maximum capacity of 100 milliliters each and the containers must be packed in one transparent, re-sealable plastic bag of not more than one litre capacity per passenger.

⁹⁸ <http://www2.icao.int/en/AVSEC/SEP/LAGS-ST>. Accessed on 3/05/ 2012.

⁹⁹ Legal Framework on Aviation Threats, P.39.

laptops and other electronic equipment had to be removed from bags and scanned separately.¹⁰⁰

The volumetric control that currently apply to LAGs were developed and disseminated by ICAO following the unveiling in 2006 of a terrorist plot to sabotage aircraft in-flight by assembling an improvised explosive device using hazardous ingredients carried in seemingly ordinary LAGs. Security tamper-evident bags I (STEBs) was developed to allow an exemption to volumetric control for liquids purchased at airport retailers or on board aircraft and carried by transfer passengers. At its meeting in March 2010, the ICAO Aviation Security Panel concluded that the threat from liquid explosives remains a concern. The Panel recommended that the ICAO Secretariat Study Group on the carriage and Screening of Liquids, Aerosols and Gels develop guidance for States on the implementation of technological solution for the screening of LAGs. It is believed that the deployment of such solutions would allow for the gradual removal of the current restriction on carry-on LAGs.¹⁰¹

(b) Shoe Bomber Plot of 2001

A sampling of other new criminal incidents include the “shoe bomber” plot in December 2001 where one Richard Golvin Reid, a British Born Al-Qaida trained terrorist, made an unsuccessful attempt to detonate explosives hidden in his shoes while on board a flight from Paris to Miami. Reid was charged¹⁰² and pleaded guilty in 2002 in USA Federal Court to eight criminal counts of terrorism stemming from his

¹⁰⁰ <http://www.independenttraveler.com.travel-tip> (accessed on 3/05/ 2012).

¹⁰¹ See http://www.icao.int/Security/LAGS_STREBS/Pages/default.aspx (accessed on 10/12/ 2013)

¹⁰² See *United States versus Richard Golvin Reid*, Criminal Case 02-10013-26y of 2002

attempt to destroy the commercial aircraft in flight by denoting explosive hidden in his shoes. He was sentenced to life imprisonment without parole. In response to that criminal attempt passengers worldwide were forced to remove their shoes for screening when flying on planes.¹⁰³

(c) Chechen Female Suicide Bomb of 2009

In another incident, a Chechen female suicide bomber blew up two aircraft departing Domodedovo Airport, Moscow, to Volgograd and Sochi. Investigation carried out revealed that the act was necessitated by the failure of the relevant authorities to follow authorized security procedures and other shortcomings for enabling the terrorists to board the aircraft undetected.

It was On December 25, 2009, after almost eight hours of flying from Amsterdam, the plane was preparing to land in Detroit when a loud pop sounded from among the passengers. Some among nearly 300 passengers quickly turned to Abdulmutallab, whose odd, specially designed undershorts were clearly burning. As a chaotic scene unfolded and smoke grew thicker, passenger grabbed him from his seat, flight attendant extinguished the blaze and pilots made an emergence landing at the airport near Detroit.¹⁰⁴

(d) The Underwear Bomb of 2009

Likewise, a Nigerian born in Lagos, Omar Farouk Abdulmutallab, an Al Qaida – trained terrorist attempted a bombing aboard a flight Northwest Airlines Flight 253, en

¹⁰³ “The New Air Travel Rules, published by Ken Dunny-Dunway Enterprises. (Also see <http://www.airtravelrules.dunway.com>(accessed on 30/06/2012).

¹⁰⁴<http://www.cfr.org/terrorism/chechen.terrorism.n>(ccessed on 10/05/2012).

route from Amsterdam to Detroit, Michigan on the Christmas Day of December in 2009 when he smuggled the bomb aboard in his underpants.¹⁰⁵ The accused popularly referred as “the underwear bomber” was charged with attempting to detonate plastic explosives hidden in his underwear while on board and among the eight criminal counts of which he was charged, include attempted use of a weapon of mass destruction. He pleaded guilty to all 8 counts he was charged and was sentenced to life imprisonment¹⁰⁶.

2.3.7 Other New and Emerging Aviation Threats

In the subsequent years following the September 11 attacks of 2001 at the World Trade Centre and Pentagon in America, there were a number of new and emerging threats sought to target commercial aviation worldwide. In other words terrorist now begun to use new techniques and new modes of operation in committing crimes against civil aviation.

Some of the prominent acts involving new and emerging threats include the cargo bomb plots of 2010¹⁰⁷, the 2002 El Al Ticket Counter Shootings at Los Angeles International Airport¹⁰⁸, the 2004 bombings of two Russian airlines¹⁰⁹, the 2007

¹⁰⁵ See <http://www.nytimes.com/2011/10/13/us.umar-farouk-abdulmutallab-pleads-guilty-in-plane>. Accessed on 12/12/2012.)

¹⁰⁶ See the case of *United States of America Versus Umar Farouk Abdulmutallab* Criminal case 10-cr.20005,

¹⁰⁷ On October 29, 2010, two packages each containing a bomb consisting mechanism, were found on separate cargo planes and they were designed to detonate mid-air with the intention of destroying both planes over Chicago or another city in the US. The bombs were bound from Yemen to the United States, and were discovered at en route stop-over at East Midlands Airport in the UK and one in Dubai.

¹⁰⁸ On July 4, 2002, a gunman, Hehesm Mohamed Ali Hedeyet, opened fire at Isarel's El Al airlines ticket counter at Los Angeles International Airport, killing two people before an airline security guard shot him died.

Glasgow airport attack,¹¹⁰ the 2007 plot against Frankfurt Airport by the Sauerland cell.¹¹¹ Others are the 2007 attempt by extremist to target fuel lines at JFK International in New York¹¹², the 2011 suicide bombing at Moscow's Domodedovo international Airport¹¹³, and the 2011 shootings of US military personnel at Frankfurt International Airport¹¹⁴.

Some other notable new aviation threats are non-metallic explosives, Liquids, Aerosols and Gels (LAGS), Cyber terrorism, lesser beams and suicide bombs. During the time, the noted criminal attempts including the 2002 plot to hijack an airliner and crash it into Changi International Airport in Singapore and other terrorist's attempts prompted changes in airport security screening.¹¹⁵

(a) Cyber-terrorism

Another potential threat to civil aviation is Cyber-terrorism which has stressed the need to develop related countermeasures and is simply means the use of internet based

¹⁰⁹ An article by Ben Brandt, "Terrorist Threat to Commercial Aviation: A Contemporary Assessment" published in November 30, 2011. And found in <http://www.ctc.usma.edu/posts/terrorist-threat-to-commercial-aviation-a-contemporary-assessment> (accessed on 30/04/ 2012).

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ At least 31 people were killed and several injured in a suspected suicide bomb blast at the Domodedovo airport (See <http://guardian.co.uk> 2011/jan./24/:Accessed on 8/06/, 2012).

¹¹⁴ Two American soldiers were killed and two others seriously injured by gunman at Frankfurt airport. The gunman, who is a Kosovo national, is linked to terrorists groups.

¹¹⁵ According to the Report of 14 May 2009 published by the International Centre for Political Violence and Terrorism Research, a Singaporean of Indonesian origin, Mas Selamat Kastari and other four members of Jemaah Islamiya Militant Network were alleged for attempting to hijack a plane with intention of crashing it into Shangai International Airport in Singapore in 2002. In 2008 Selamat escaped from the Whitely Road Detention Centre which had high detention facility for terrorist in Singapore and in 2009 was re- arrested in Malysian village and is under detention.(see also <http://singaporenews.altenative.blog.com/200>).

on terrorist activities.¹¹⁶ As of the newest threats to civil aviation, Cyber-terrorism was defined as the act to cause disruption to airport and aircraft operations and it could also be carried out by obstructing communication between airborne aircraft and air traffic control and navigation satellites.¹¹⁷

(b) Insiders Threats

The insider threats to aviation industry most are staff working at airports or airlines and they should not be overlooked or minimized¹¹⁸. Insider threats must be addressed along with enhanced screening capabilities, including employee, as screening background checks should also be conducted on all those with access to aircraft. However, employee screening was not yet being implemented at all airports around the world due to operational and infrastructure-related reasons.

Typically, insider threats is described as disgruntled or unscrupulous employees trying to gain access to information they shouldn't, and sharing it for personal gain, espionage or revenge due to political ideology, strong religious belief, corruption or bribe.¹¹⁹

The Minister of Aviation for Nigeria, Prince Stella Odua, while opening a two-day international Conference on Insider Threats on Civil Aviation held 2011 in Abuja, Nigeria, has expressed concern over the emerging threats posed by airports and airlines.

¹¹⁶ Alexandar, Y. S, and Weetman, M. S, *Cyber Terrorism and Information Warfare: Threats and Response*. Transnational Publishers Inc., U.S ISSN 1-57105-225-9.2001.

¹¹⁷ <http://www.en.wikipedia.org/wiki/cyberterrorism> (accessed on 8/06/2012).

¹¹⁸ "The Inside Threat to Airport Security" An article by Steven Goff, published in the *National Interest of America* and retrieved from <http://www.nationalinterest.org/commentary/the-insider> (accessed on 13/06/2012).

¹¹⁹ See "Insider Threats" authored by Capt. Narinder Pal Yadav, UAE General Civil Aviation Authority, 24 April, 2012.

staff to civil aviation. According to the Minister, most criminal activities committed at airports have direct involvement of insiders (aviation staff) and she called for coordinated effort among states to address this challenges.¹²⁰

One example of insider threats is Rajib Karim who was employed with British Airways as an IT Expert at airline. He used his position by conspiring and sharing information with Anwar Al Awlaki to blow up a British Airways Aircraft. Police detected messages in his computer, showing that he had link with Awlaki, who is accused of having links to the attempted bombings of a plane over Detroit during Charismas in 2009 and an attempted explode ink printer bombs on freight planes heading to the US Karim was convicted and sentenced to serve 30 years imprisonment.¹²¹

2.3.8 Threats Against Airline Facilities

One aspect of aviation security that is not frequently addressed is the potential for terrorists to strike other aspects of aviation infrastructure beyond aircraft. Commercial airlines are highly reliant upon information technology systems to handle critical functions such as reservations and crew check-in.¹²² A good example is when an IT expert of British Airlines Rajib Karim who had conspired with a terrorist, Anwar al Awlaqi to erase data from British Airways servers thus disabling the airline website.¹²³

¹²⁰ Insider Threat More Dangerous To Civil Aviation Security, says Aviation Minister. An article retrieved from <http://nigeriansmastereb.com/blog/index.php/2011> (accessed on 25/06.2012)

¹²¹ <http://www.guardian.co.uk/2011/feb/28/british.air> (accessed on 25/06/2012).

¹²² See an Article by Ben Brandt “*Terrorist Threats to Commercial Aviation: A Contemporary Assessment*” published in CTC Sentinel, November, 2011 Vol. 4 Issue 11-12, page 6.

¹²³ An article by Alistair McDonald, “*U.K. Prosecutors Tie BA Employee to Awlaki*” published in Wall Street Journal of 2 February, 2011.

Also, the operational control centers operated by air carriers are another significant point of vulnerabilities, which conduct the airlines' flight control, Meteorology and emergency management functions. However, despite their criticality to flight operations, these control centers are rarely heavily guarded, meaning that terrorists equipped with inside knowledge could shut down the global operations of a major air carrier, particularly if backup facilities were to be targeted as well.¹²⁴ There is unconfirmed report that, the mysterious loss of Malaysian Airline flight MH370 which took place in March, 2014 may be necessitated human intervention to the airline facilities aimed at cutting off any communication with air traffic controllers.

2.3.9 Threats Against Airports

Another threat to commercial aviation is the increasing number of plots and attacks targeting airports themselves rather than aircraft. For example in 2011 there have been two significant attacks staged at international airports in Frankfurt and Moscow. Generally, attacks against airports have been planned or executed using a variety of tactics, such as firearms, car bombs, suicide bombers, and hijacked aircraft and the targets have included airports airport facilities such as fuel lines, arrival halls, and curbside drop-off points. Terrorists could also breach perimeter fencing and assault aircraft on runways, taxing areas and gates¹²⁵. This tactics was used during the 2001 Bandaranaike airport attacks in Sri Lanka, when a team of Black Tigers¹²⁶ used

¹²⁴ Supra Note 122.

¹²⁵ Supra Note 153, p.7.

¹²⁶ The Black Tigers were a specially selected and trained group of suicide operative deployed by the Liberations Tigers of Tamil Eelam during their insurgent campaign in Sri Lanka

rocket-propelled grenades and antitank weapons to destroy half of Sri Lankan Airlines' fleet of aircraft.¹²⁷

2.4 Preventive Measures to Aviation Threats

In response to the increase of criminal incidents to civil aviation, the international community has dramatically increased aviation security measures to prevent or deter future attacks. Many of these measures are known to the public, including the hardening of cockpit doors, federalization of airport security screening staff. Other measures include the creation of the Transportation Security Administration (TSA) deployment of federal air Marshals (FAMs) and federal flight deck officers (FFDOs) aboard aircraft. Others were the implementation of new detection equipment and methods such as advanced imaging technology (AIT) often referred to as “full body scanners”¹²⁸, increased amounts of screening for cargo, explosive trace detection (ET), full and behavioral detection and body “pat downs.”¹²⁹ The Court in the case of *United States v Bobby R. Lindsey*¹³⁰ determined the issues of behavioral detection and lawful search and seizure of passenger. Reviewing the previous decision in the previous case of *Terry v Ohio*¹³¹, which required security officers to secure judicial approval of a warrant before searching a suspected passenger, the court ruled that the

¹²⁷ Celia W. Dugger, “*Rebel Attacks on Airport Shocks Leaders of Sri Lanka*,” New York Times, July 25th 2001.

¹²⁸ A full-body scanner is a device that detects objects on a person's body for security screening purposes, without physically removing clothes or making physical contact. Depending on the specific technology, the operator may see an alternate-wavelength image of the person's naked body, or *merely* a cartoon-like representation of the person with an indicator showing where any suspicious items were detected. For privacy and security reasons, the display is generally not visible to other passengers, and in some cases is located in a separate room where the operator cannot see the face of the person being screened. Unlike metal detectors, full-body scanners can detect non-metal objects, which became an increasing concern after various airliner bombing attempts in the 2000s.

¹²⁹ Pat down is an act or instance of passing the hands over the body of a clothed person to detect concealed weapons, drugs, etc.

¹³⁰ 451 F.2d 701 (1971)

¹³¹ (392 U.S.1 (1968).

unusual behavior of the suspected passenger was enough to cause increased concern on the part of the suspect. Therefore, it was held, in the context of possible airplane hijacking, and because of the limited time before the flight left, the security officer did not have time to secure judicial approval of a warrant.

The air cargo security programme is also one of the security measures that were being put in place to mitigate risks to passengers and baggage screening, employee screening and airport access control. Also, ICAO recommended their Universal adoption not later than March 2007 in a state letter¹³² and reacted to the new threats with urgency and efficiency in calling a special meeting of the Council on 17 August, 2006¹³³ to explore ways of countering the new threats.

Generally, international aviation measures are stipulated in the ICAO's Standards and Recommended Practices (SARPS) relating to the prevention or deterrence of unlawful acts against civil aviation, particularly Annex 17, for Security. These call upon all States to use clearly established criteria for risk assessments extended beyond international flights to include intra- flights. It was stipulated:

“Each Contracting State shall establish and implement a written national civil aviation security Programme to safeguard civil aviation operations against acts of unlawful interference, through regulations, practices and procedures which take into account the safety, regularity and efficiency of flights”¹³⁴.

¹³² Ref No.AS 8/11-06/100 Confidential. Accessed on 1/12/ 2006.

¹³³ Working Paper (A36-WP/118) of the International Civil Aviation Organization on Aviation Security Programme presented by the Airports Council International during the ICAO Assembly-36th Session, at p. 2.

¹³⁴ See Standard 3.1.1. of Annex 17 to the Chicago Convention.

2.4.1 Measures Adopted by the International Community

In response to the September 11 attacks, the international community through ICAO, IATA and EU adopted several legal and preventive measures to address new and emerging threats to civil aviation as follows:

(a) Preventive Measures by ICAO

Following the 9/11, ICAO as the international organization in charge of global regulation of international civil aviation had to respond swiftly to the sudden developments by introducing various measures to ensure the security of international navigation by air to be least disturbed by global terror. For instance, immediately after the attacks, the 33rd ICAO Assembly passed Resolution A-33-1, which directed the Council and the Secretary General to address new and emerging threats to civil aviation and to review the adequacy of the existing aviation security conventions. ICAO further passed several resolutions strongly condemning the use of aircraft as weapons of mass destruction. One of such resolution called upon ICAO members to establish a Universal Security Audit Program modeled on USAP, launched in 1999 for assessing States on compliance with Annex 17 on security¹³⁵. These also call upon all states to use clearly established criteria for risk assessment extended beyond international flights to carriage of fire arms on board aircraft by policing authority officers and other authorized persons.

¹³⁵ Provision for international aviation security were first introduced into the *Chicago Convention* in 1974 as Annex 17 Security and since then have been improved and updated 11 times. The last 12th amendment to Annex 17 was recently approved by ICAO Council and became applicable as of 1st July, 2011.

In the case of *United States v Benrus Eugene Brown*¹³⁶ the issue determined was at what point does the attempt to board an aircraft with a concealed weapon take place? It the defence of the suspected passenger who was found with a pistol at departure lounge that, until he set foot on the plane, he had not consummated boarding. However, in its decision the court concurred with the prosecution which argued that, at the moment the passenger surrendered his ticket and passed into the departure lounge, this constitute an attempt to board an aircraft.

Further measures adopted by ICAO were reviewing the laws and procedures governing aviation industry, such as introduction of new airport security procedures, the hardening of Cockpit doors, baggage screening, carry-on- luggage limitations, electronic scans, physical pat-downs, and even name profiling. Resolutions were also made directing ICAO Council to address the threats to civil aviation by reviewing international conventions and Annex 17 to the Chicago Convention which provides for such measures as setting up administrative structure responsible for assessing the threats and coordinating necessary action to be taken.¹³⁷ Others include emergency action in the event of a hijack; control designed to prevent weapons or explosives from being taken on board aircraft and closer international co-operation to help prevent or deal with illegal acts. For example, the revision of Annex 17 to the Chicago Convention proposed resolution for ICAO to take interim measures including applicability of Annex 17 to domestic flights and to require cockpit doors to remain locked during flight and upgrading of provisions regarding airport security control.¹³⁸

¹³⁶ CCH 11 AVI 17, 429 (1969) (see Gessell, 1993, pp.132&133).

¹³⁷ ICAO Press Notice, Resolution Calls for International Conference on Aviation Security” 25 September, 2001.

¹³⁸ http://www.iasa.com.au/folder/Security_Issue/usoap.htm(accessed on 10/06/ 2012).

The most important security measure by the international community was taken in 2002 when ICAO adopted a comprehensive plan of action to reinforce aviation security worldwide¹³⁹. A high –level ministerial conference on aviation security was held on 19 and 20 February, 2002 and endorsed a global strategy for strengthening and issued a public declaration on the subject.¹⁴⁰ Also, in March 2002, the ICAO Council adopted standard for tighter in-flight security, including improved security around the cockpit areas such as reinforced cockpit doors,¹⁴¹ as well as other on-board security measures. In June 2002, the Council approved the establishment of a global aviation war risk insurance scheme (Global time) to cover the risks left by the withdrawal of commercial insurance coverage, in whole or in part following the events of the September 11.¹⁴²

At the Evian Summit of G8 leaders held in June, 2003, measures to enhance air transport security were agreed under the Enhance Transport Security and Control of Man-Portable Air Defense System (Man pads) action plan. This plan, among other things, proposed agreement to implement by November 2003 the new international standards for the installation of flight deck doors as adopted by ICAO.¹⁴³

In short, these first measures by ICAO eventually formed the basis of the process that has culminated in the adoption of the new legal framework through adoption of Beijing Treaties for addressing new and emerging threats to aviation security. Also

¹³⁹ICAO News Release “*Aviation Security Plan of Action and New Green Routes Highlight Achievements of 2002*” 2002.

¹⁴⁰ Ibid.

¹⁴¹ See “Reinforced Cockpit Doors” in <http://airside.com/events/war/newsdoor.htm> (accessed on 4/06/2012).

¹⁴² ICAO Press Notice “*Global Aviation Security Strategy in Place to Boost Public Confidence*” 10 September, 2002.

¹⁴³ G8/Evian Summit, Enhance Transport Security and Control of Man-portable Air Defence System-MANPADS-G8 Action Plan, 2003.

while the provisions of the previous aviation security conventions covered various component of these offences, they did not specifically addressed the aggravated aspects of diverting civil aircraft in service into weapon of destruction or deliberately using a hijacked aircraft to murder or injury of innocent people in the air or on the ground.

On the other hand, ICAO has adopted more stringent air cargo security standards, as part of its ongoing efforts to enhance the overall security of air transport operations worldwide. The new measures emphasize more extensive screening of cargo, mail and other goods prior to placing them on board aircraft and better protection from unauthorized interference from the point where security controls are applied until departure of the aircraft.¹⁴⁴

Also included is the strengthening of provisions related to the deployment of security equipment, the security of air traffic service providers, training programmes and instructor certification systems, and cyber threats. The updated security requirements are contained in the 12th amendment of Annex 17 (Security) to the Convention on International Civil Aviation, adopted in 2010 by the Council of the Organization. As it was well elaborated by Mr. Roberto González, ICAO Council President:

“This latest revision (the 12th revision of Annex 17) to the Security Annex has been in development for some time and reflects our determination to constantly review and adapt ICAO security standards to address a rapidly evolving security situation. It also complements a number of recent initiatives to significantly increase the level of aviation security, in a proactive and concerted manner,”¹⁴⁵

¹⁴⁴ See ICAO Strengthen Air Cargo Security Measures, in ICAO News Centre 2010, in <http://icaopressroom.worldpress.com>. Accessed on 9/12/ 2013.

¹⁴⁵ Ibid.

(b) Preventive Measures by IATA

The International Air Transport Association (IATA)¹⁴⁶ working with security chiefs of major airlines formed what was called the Security Advisory Committee (SAC) which developed eight rules to ensure safety and security in air travel. The specific conditions include creation of sterile areas for the boarding of all flights where a security screening of all passengers and their luggage was to be required prior to entering this sterile boarding zone. All person and items entering the sterile boarding area require authorization and subject to security control measures.

Other measures adopted by IATA are developing direct and discrete communication system to link passenger screening points and other access points to an airport control centre capable and designated to act quickly in cases of unlawful action and the establishment of an authorized law enforcement body armed and equipped to conduct patrols within the airport complex and be readily available to assist in cases of suspected or actual unlawful interference with civil aviation operations. Others include erection of restricted access areas to be adequately enclosed thus preventing unauthorized entry to the airside of the airport; imposed an obligation to all staff working on the airside of an airport to display positive airport identification at all times; the installation of physical barriers to separate areas from all baggage, cargo and postal holds and facilities to enable the screening of such items; imposing a standard that aircraft parking areas be adequately policed at all times and establishing

¹⁴⁶ IATA means International Air Transport Association whose mission is to represent, lead and serve the airline industry comprising of 240 countries. It was formed in 19 April, 1945 in Havana Cuba

the security norm that all observation view- points which overlook an airport's airside be adequately protected.¹⁴⁷

(c) Preventive Measures by EU

The European Union (EU) also responded to the September 11 attacks by passing aviation security legislation in 2002 known as *Regulation 2320/2002/EC*¹⁴⁸ which provide for establishment of common rules in the field of aviation security. Under the new law each Member state is required to adopt a national civil aviation security program, corresponding quality control program and training program.

Also under the appropriate authorities responsible for coordination and the monitoring of the implementation of aviation security programmes are mandated to apply more stringent security measures such airport planning requirements, control of access to airside and other restricted of airports and aircraft.¹⁴⁹

The law also contains provisions for screening and search of passengers and cabin luggage, identification, screening and handling of hold baggage, screening of diplomats and other privileged persons and vetting and training of security staff. In March 11, 2008, following continued negotiation, the law was reviewed as EU Regulation 300/2008/EC with the objectives of establishing common rules to protect civil aviation against acts of unlawful interference.

¹⁴⁷ Wallis,R, *How Safe Are Our Skies?* Assessing the Airlines' Response to Terrorism (Westport Praeger, 2003) p.70.

¹⁴⁸ Regulation 2320/2002 was implemented by three further Regulations in 2003, which are; Regulation 622/2003/EC which laid down measures for the implementation of the common basic standard on aviation security, Regulation 121/2003/EC which laid down common specifications for national civil aviation security quality control programmes; and Regulation 1486/2003/EC which laid down procedures for conducting Commission inspection in the field of civil aviation security.

The reviewed law provides the basis for a common interpretation of Annex 17, setting out common rules and common basic standard on aviation security as well as mechanism for monitoring compliance.¹⁵⁰

(d) Preventive Measures by the EAC

Air transport has played a pivot role in the regional integration process in the East African Community (EAC). Hence, the efforts of Civil Aviation Authorities and airports authorities from members States which are Kenya, Uganda, Tanzania, Rwanda and Burundi, brought about the birth of *Civil Aviation Safety and Security Oversight Agency* (CASOA). CASOA is an Agency responsible for harmonizing regulations, standards and procedures for member states as far as aviation safety and security is concerned.¹⁵¹

2.4.2 Preventive Measures by Individual States

This part examines the responses by some individual states in addressing aviation threats especially after the September 11 Attacks. The selected states are the United States of America, the United Kingdom, India and the United Republic of Tanzania

(a) The United States

Likewise, since the catastrophic events of the 11 September, 2001, stringent legal measures were taken by the United States to attack criminals, not just to curb it. The first response is the enactment of the *Air Transportation Safety and System*

¹⁵⁰ Article 1 of the Regulation 300/2008/EC.

¹⁵¹ Richard Ngovi “*Adapting African Airports To New Security Challenges*” and Article published in *Aviation & Allied Business Journal*, at [http:// www.aviationbusinessjournal.aero](http://www.aviationbusinessjournal.aero),(accessed on 21 August, 2013).

Stabilization Act, signed by President Bush less than two months after the 9/11 attacks.

Also two months after the attacks, the American Congress passed another legislation known as the *Aviation and Transportation Security Act, 2001*¹⁵² which federalizes the airport screening function and establishes the new Transportation Security Administration. The legislation also enhances baggage screening procedures and imposes more stringent personnel qualifications on Security employees. This new legislation was enacted with a view to improving security and closing the security loopholes which existed on that fateful day of September 11 and paved the way for a huge federal body called the Transportation Security Administration (TSA) which was established within the Department of Transportation.

Other US responsive statutes are *the Air Transportation Safety and System Stabilization Act, 2001*¹⁵³ which is one of two statutes spawned by the events of 9/11, the *Homeland Security Act*,¹⁵⁴ which consolidates twenty-two agencies, including the TSA, into a new cabinet level Department of Homeland Security which an agency is conferred with jurisdiction over, *inter alia*, transportation security, customs, immigration and agricultural inspections and the *Federal Aviation Regulation* which were enacted to ensure the security of airports serving scheduled air carriers required to have screening programs.¹⁵⁵

¹⁵²Aviation and Transportation Security Act, 2001, Pub. L. 107-71, 15 Stat. 597

¹⁵³ Air Transportation Safety and System Stabilization Act, 2001, Pub. L. 107-42, 115 Stat. 230 (codified in scattered sections of 15 U.S.C; 19 U.S.C; 42 U.S.C; 49 U.S.C).

¹⁵⁴ Homeland Security Act, 2002, Pub. L. 107-296, 116 Stat. 2135 (codified as amended in 3 U.S.C; 5

¹⁵⁵ Lawrence E. Gesell, *Aviation and the Law*, 3rd ed. (Chandler: Coast Aire, 1998) at 179.

Other responses by USA include, the hardening of Cockpit doors, federalization of airports security screening staff and the creation of the Transport Security Administration (TSA), deploying of federal air marshals (FAMs) and federal flight deck officers (FFDOs) aboard aircraft, implementation of new detection equipment and methods, such as advanced imaging technology (AIT), often referred to as “ body scanners”. Also there was increased amounts of screening for cargo, explosive trace detection (ETD), fully body “ pat down” and behavioral detection officer (BDOs) enhanced security for visa applicants wanting to travel to the United States; and the use of watch lists to screen for terrorists to prevent them from boarding flights or from gaining employment in airport or airlines.

However, certain measures such as nude –body scanning, invasive pat-downs, AIT scanning, inducing passengers to remove jackets, belts and shoes for inspection and requiring them to travel with minimal amounts of liquid in their possession- have drawn widespread complaints regarding their inconvenience, as well as questions about their supposed efficacy. It was further elaborated as follows:

“There are different types of body scanners but in general they emit radio waves over the body. A three dimensional image is created by measuring the heat reflected from the person. The body scanners can penetrate clothing and are designed to be an upgrade to the usual body “pat down”. The scan do blur out the image does reveal the naked body. Their use at Heathrow and Manchester airports and in the USA, has already given rise to considerable controversy in terms of privacy and civil rights and in relations to the legality of using them to scan children”¹⁵⁶

¹⁵⁶ See “Aviation Security” on Website of the Liaison Group of UK Airport Consultative Committee, p. 4. In www.ukaccs.info/security.htm (accessed on 23/08/2013).

For example, in the case of *Corbett v United States*¹⁵⁷, Jonathan Corbett, a frequent airline passenger filed a complaint in the US District Court for Southern Florida against the new nude-body scanning and enhanced pat-down procedures by Transportation Security Administration (TSA) as a violation of his personal privacy and would be emotional traumatizing¹⁵⁸.

(b) The United Kingdom

Following the 9/11 and the increased number of aviation threats, the United Kingdom has also responded by attempting to tackle the situation by enacting several legislations. The main piece of domestic legislation passed in the immediate aftermath of 9/11 was the *Anti-terrorism, Crime and Security Act 2001* which improved the enforcement of aviation security requirements and the ability of the police to deal with potentially dangerous situations at airports and on board aircraft.

The government also set up a special committee to consider what improvements were needed to aviation security in recognition of the new threat posed by suicide bombers and hijackers. As a result *The Aviation (Offences) Act, 2003* which was purposely intended to make provision for the enforcement of 'certain offences' related to aviation was enacted.

Also the UK Government has been keen to co-operate with international organizations in establishing a hard line against terrorism. The then Home Secretary, David

¹⁵⁷ See Case No. 1: 10-cv-24106-MGC, US District Court for Southern Florida. Also the Pat-down Procedures include the use of nude body scanners, also called backscatter x-rays, that produce clear images of the body of those searched. Those who opt out the scanner receive an enhanced pat down, which involves touching all areas of passenger's body, including the genitalia.

¹⁵⁸ TSA started using the procedures in November, 2010

Blunkett, made a statement in the House of Commons on 15 October 2001 where he outlined the need for having emergency legislation to combat terrorism aimed at improving airport security and increased powers for the British Transport Police.¹⁵⁹

Heightened Security Measures were also brought into effect in UK as a long-term enhancement to the permanent) security measures. These included random searching of hold baggage prior to, or immediately after, check-in and more searching by hand of passengers and their cabin baggage upon entry to the Restricted Zone, plus a regime of secondary searching at the departure gates.

(c) The United Republic of Tanzania

Following the September 11 attacks and the increasing incidents of aviation threats, Tanzania responded in the war against the threats by enacting several new legislations, regulations and circulars. The Tanzania Civil Aviation Authority Act¹⁶⁰ was enacted in 2003 as a regulatory legal framework for aviation industry in the country¹⁶¹.

Other legislations include The Prevention of Terrorism Act,¹⁶² *The Civil Aviation Act*,¹⁶³ and the Extradition Act.¹⁶⁴ Also, in order to better implement the laws on

¹⁵⁹ Ibid.

¹⁶⁰ Act No 10 of 2002 (and later was consolidated as The Civil Aviation Act, Cap. 80 R.E of 2006) of the Laws of Tanzania.

¹⁶¹ Through Act No. 10 of 2003, the Tanzania Civil Aviation Authority (TCAA) was established to work with other Government departments and agencies on aviation matters including ratifying and domestication of the relevant international conventions and protocols.

¹⁶² The Act No 21 of 2002 provides for comprehensive measures of dealing with terrorism.

¹⁶³ Chapter of the laws of Tanzania, Revised Edition, of 2006 which consolidated the former Tanzania Civil Aviation Act, No 13 of 1977 and the Tanzania Civil Aviation Act, No. 10 of 2003 to make provisions to enable effect to be given to the Chicago Convention; and generally to provide for the control, regulation and orderly development of civil aviation and to establish a regulatory Authority in relation to air transport.

¹⁶⁴ Cap. 368 of the Laws of Tanzania.

aviation threats, TCAA in 2007 enacted aviation security regulations known as Tanzania Civil Aviation (Security) Regulations¹⁶⁵ under which unlawful interference which is part of aviation threats was defined to mean an “act or attempted act to jeopardize the safety of civil aviation and air transport”. Under the Security Regulations, the acts of unlawful acts were named to include unlawful seizure of an aircraft in flight or on the ground; hostage taking on board an aircraft or at an airport and forcible intrusion on board an aircraft at an airport. Others the introduction on board an aircraft or at an airport of unauthorized weapon or introduction on board an aircraft of a weapon or hazardous device or material; violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft and to perform an act of violence against a person at an airport.

Apart from the security regulations, TCAA issued a circular in which aviation stakeholders were warned to take several precautions on aviation security issues.¹⁶⁶ The circular requires unattended aircraft be properly secured to prevent unauthorized use; operators to always verify and identify all crews and passengers prior to flight departures; operators to verify baggage and cargo by person on board an aircraft; and employers and all members of security forces to wear proper identification at all times when on duty and those without should not be allowed into airport operation areas.

(d) The Republic of Kenya

Kenya Airports Authority (KAA) is a state- owned corporation with mandate of developing, managing and maintaining civil aviation in Kenya. Being a country that

¹⁶⁵ G.N. No 197 of 2007 for safeguarding and enhancing aviation security against acts of violence or unlawful interference.

¹⁶⁶ See the Aeronautical Information Circular No. 13/2003 of July, 2003 signed by the Director General of Tanzania Civil Aviation Authority

relies heavily on tourism with its strategic geographical location as an aviation hub, Kenya treasures the immense contribution of aviation to its gross domestic product. It is therefore ideal to look at the strategies and efforts of the Kenyan authorities in protecting the aviation industry from the new and emerging threats. As it was pointed out:

The authority through the coordination of government agencies and stakeholders has been able to provide layered security measures that minimize the chances of perpetrators succeeding in their intentions. For instance, the Immigration Department is well within the International Civil Aviation 2015 deadline of issuing machine readable passports. Such a move will greatly reduce cases of fraudulent travel documents being used by would-be- perpetrators of terrorist activities. Additionally, there exist a strict vetting procedure for airport workers applying for airport movement permits. This serves as one of the remedies for dealing with inside threats.¹⁶⁷

Apart from that, Kenya Airport Authority has invested heavily in a state -of- the art Security equipment such as X-ray machines, explosive trace detectors, full body scanners and surveillance systems.

2.5 Conclusion

This chapter highlights the general concept of aviation threats in terms of historical development, types, notable incidents and preventive measures. It also shows how aviation industry is the most vulnerable and the most destructive if misused as demonstrated by the dramatic hijackings as well as other criminal acts and foiled plots over the past several decades. Further, it has been noted through this chapter that the techniques on aviation threats are dynamic and go parallel to the social and technological advancements.

¹⁶⁷ Richard Ngovi, op cit, note 207 p. 3

It has also been observed that, the international community and individual states have effectively and comprehensively tried to respond to the aviation threats in order to restore public confidence in air travel as well as promoting the health air transport. However, it is obvious that despite the strenuous efforts by the international community and the individual states to respond to the threats, the number of plots identified in this chapter illustrate that terrorists are still maintaining a high level of interest in attacking aviation and it is imperative that that, global cooperation needs to be more intensified in dealing with the magnitude and complexity of new and emerging threats to aviation security.

CHAPTER THREE

3.0 OVERVIEW OF THE LEGAL FRAMEWORK ON AVIATION SECURITY THREATS PRIOR TO THE 2010 BEIJING CONVENTIONS

3.1 Introduction

This chapter presents an overview of International Legal Framework on aviation security threats before the adoption of the 2010 Beijing legal instruments. In the course of discussion several Conventions and Protocols are critically examined and their adequacy and effectiveness in addressing aviation threats are tested in comparison with the 2010 Beijing Treaties.

3.2 Development of the Laws on Aviation Security

The international law on aviation security has a long history which goes back to 1919 when a Conference on International Air Law was held in Paris and adopted the Paris Convention for regulating aerial navigation¹⁶⁸. Later, after the World War I, the Paris Peace Conference was held in 1922 and came up with the Convention on International Air for governing aspects of civil aviation and consequently created the International Commission on Air Navigation (ICAN) whose headquarters was in Paris¹⁶⁹. However, in 1944, the Chicago Convention on international civil aviation was adopted by nations of the world who were gathered at Chicago leading to the creation of the International Civil Aviation Organization (ICAO)¹⁷⁰ which in 1947 took over the

¹⁶⁸See *the Paris Convention for Regulation of Aerial Navigation*, October, 13, 1919.

¹⁶⁹The International Commission on Air Navigation (ICAN) was created during the Paris Conference in December, 1922 to provide rules for air traffic.

¹⁷⁰ICAO became a centre focus of the international community through which the international air law is not only applied but is also created. The aims and objectives of ICAO are clearly stated in the Chicago Convention of 1944 which is the fundamental source of the current international air laws.

offices and role of ICAN.¹⁷¹ On the other hands, the Geneva Convention of 1958 on the High Seas which introduced aviation security into the international legal regime could not cover the unlawful acts against civil aviation in practice¹⁷².

On that premises, apart from the Paris Conventions of 1919 and the Chicago Convention of 1944, ICAO went on with its efforts of developing and updating the laws on aviation security by adopting several other international Conventions and Protocols¹⁷³. The other International legal instruments adopted later by ICAO include The Tokyo Convention of 1963¹⁷⁴, The Hague Convention of 1970¹⁷⁵ The Montreal Convention of 1971¹⁷⁶ and The Airport Protocol of 1988.¹⁷⁷ As stated earlier, in 2010 ICAO further reviewed and amended the above named legal instruments and come up with the 2010 Beijing Convention and the 2010 Beijing Protocol to make the laws more effective in preventing and combating aviation threats in line with the prevailing situation.

3.2.1 The Chicago Convention of 1944

As pointed out herein above, the international treaties seeking to regulate aviation security have their sources on clutch of conventions, protocols and declarations

¹⁷¹ Encyclopedia of the Nations, “United Nations Related Agencies” The International Civil Aviation Organization (ICAO) also see <http://www.icao.org>. Retrieved on 18/09/2013.

¹⁷² See *the Geneva Convention on the High Seas*, 1958.

¹⁷³ See Assad Kotaite, “*Security of International Civil Aviation- Role of ICAO*” (1982) VII Ann. Air & Space Law, 95.

¹⁷⁴ *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, adopted in Tokyo Japan in 1963.

¹⁷⁵ *Convention for the Suppression of Unlawful Seizure of aircraft*, adopted in Hague in 1970.

¹⁷⁶ *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, which was later updated by the 1988 Airport Protocol.

¹⁷⁷ The Montreal Convention which was mainly dealing with sabotage of aircraft in flight, was amended by the Airport Protocol, (Montreal Protocol) which was adopted in Montreal Canada, in 1988 to address international legal terrorist acts affecting airports.

drafted outside the frameworks of the Paris Convention of 1919 and the Chicago Convention of 1944.¹⁷⁸

The objectives of the Chicago Convention were to codify the principles and techniques of international air navigation and to foster the planning and development of international air transport with the view of ensuring safe and orderly growth of international civil aviation throughout the world.¹⁷⁹

However, it is unfortunate that the Chicago Convention lacked provisions specifically relating to acts of unlawful interference to civil aviation and such acts were extensively dealt with later when Annex 17 to the Convention was adopted. In other words, before 1960s when the international community experienced the newly emerging international challenges on aviation threats, the legal instruments on aviation security and the technical security measures on unlawful interference against civil aviation were not introduced into the international legal regime.¹⁸⁰

3.2.2 The 1963 Tokyo Convention

As discussed herein above, before 1960s there was no direct legislation to regulate unlawful acts against civil aviation in the world¹⁸¹ and the first action taken by international community to include unlawful acts to civil aviation in the law, was the

¹⁷⁸ Convention on International Civil Aviation signed in Chicago in 1944, ICAO Doc.7300/8 [Chicago Convention].

¹⁷⁹ See: [http:// en.wikipedia. Org/wiki/international_civil_aviation_ Organization](http://en.wikipedia.org/wiki/international_civil_aviation_Organization) (accessed on 27/04/2012).

¹⁸⁰ Jung, S. Y,” *A Legal Analysis of Aviation Security under International Legal Regime*” A Thesis Submitted to McGill University in Partial Fulfillment of degree of Master of Laws (LL.M.) March, 2005.

¹⁸¹ http://www.en.wikipedia.org/wiki/Tokyo_Convention (accessed on 27/10/2013).

adoption of the Tokyo Convention in 1963¹⁸² which is frequently referred to as the first legal step to combat unlawful interference with civil aviation. However, the Tokyo Convention was not intended to address hijacking rather it was focused on other offences committed on board aircraft and the issue of unlawful seizure of aircraft was added later as an afterthought in article 11 of the Convention.¹⁸³

The leading force to the adoption of the Tokyo Convention involved detailed examination of all the matters relating to the legal status of aircraft and in particular to important aspects like crimes and offences committed on board aircraft, jurisdiction relating to such crimes and the resolution of jurisdictional conflicts. In his paper presented to the International Conference on Aviation Security, Bin Cheng pointed out that the Tokyo Convention was primarily a reaction to discovery in cases such as *USA v Cordon*¹⁸⁴ and *R v Martin*¹⁸⁵ that aircraft, when they are flying abroad, especially over the high seas, was often literally oases of lawlessness, where no law was applicable.¹⁸⁶

Also, with the adoption of the Tokyo Convention in 1963, the contracting states in which a hijacked aircraft lands was obliged to take all appropriate measures to restore control of the aircraft to its lawful commander and to permit its passengers and crew

¹⁸² *Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted by the ICAO International Conference held in Tokyo, Japan from 20th August to 14th September, 1963.* The Convention entered into force on 4th December, 1969.

¹⁸³ Acharya, G. “*Legal Aspects on Aviation Security Measures Taken at Airport*” A Thesis submitted to McGill University in partial fulfillment of the requirement of Degree of Master of Law (LL.M), Institute and Centre of Air and Space Law, McGill University, 2005, at page 22.

¹⁸⁴ *USA v Gordova* [1950] AV..R.p,1:87 F

¹⁸⁵ *R Versus Martin* [1956] QB 272.

¹⁸⁶ Cheng, B, “*International Legal Instrument to Safeguard International Air Transport: The Convention of Tokyo, the Hague, Montreal, and New Instrument Concerning Unlawful Violence at International Airports*” (Paper presented to the International Conference on Aviation Security, January 1987) Unpublished.

to continue their journey as soon as practicable.¹⁸⁷ Also, the Tokyo Convention has laid a foundation stone to the development of the laws in combating aviation threats which are jeopardizing the safety of commercial aircraft or passengers while the aircraft is in flight and that jurisdiction over the offence is vested in the State of registry, irrespective of the aircraft although third party States may assert jurisdiction under certain circumstances.¹⁸⁸

It is worth noting that, the Tokyo Convention though adopted in 1963 it came into force six years later, on 4th December 1969. It is stated that the rationale behind this was delay in ratification by members states due to the fact that the Convention was drafted prior to the series of hijackings in the late 1960s and hence it was not implemented with due hast by most states. Also, the complicated legal and political issues facing many states at the adoption of the Tokyo Convention were another reason for the late implementation. However, although states were slow in ratifying or acceding to the Tokyo Convention, it is worth mentioning that, within one year from 1969 to 1970, 80 states ratified the convention, probably in response to spate of hijacking that occurred during the period.¹⁸⁹

Also, while the Tokyo Convention aimed at providing safety to aircraft, protecting of life and property on board aircraft and to promote the security of civil aviation, a wide range of powers are granted to the aircraft commander, members of the crew and passengers with sole aim to constitute international unified rules which would give

¹⁸⁷ Tokyo Convention Art. 11.

¹⁸⁸ Ibid Art 3. & 4.

¹⁸⁹ Ibid, Art. 11.

the commander of every aircraft in the world the power to preserve good order and discipline on board the aircraft and to take all preventive measures or measures of restraint necessary to that end. This power can be considered as a means to secure the maintenance of law and order on board the aircraft.¹⁹⁰

However, the Convention does not prescribe specific offences but rather relies upon offences as codified under national law and it applies to acts which, whether offence or not, affect the in-flight safety of persons or property of jeopardize the discipline on board a civil aircraft. Also, although the Convention does not attempt to cover unlawful seizure of aircraft specifically not all forms of unlawful seizure of aircraft were covered, nor did it provide for a specific response other than an obligation on states to “take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.”¹⁹¹

On the other hand, even though there is a requirement for states parties to take delivery of person whom the aircraft commander delivers because he has reason to believe the person has committed a serious offence according to the penal law of the state of registration of the aircraft, the Tokyo Convention lacks proper extradition arrangements enabling effective prosecution of hijackers. In addition, the failure to provide machinery for mandatory extradition, if prosecution was not pursued in the landing state, is considered a major deficiency of the Tokyo Convention.¹⁹²

¹⁹⁰ The power given under the Tokyo Convention includes to arrest, disembark and deliver to competent authorities of contracting state, any person committing or attempting to commit an offence or any act which jeopardize the safety of aircraft, persons or goods on board, or threatens to create disorder on board. Also See International Conference on Air Law, August-September 1963 at Tokyo, ICAO Conference Doc. No.5.

¹⁹¹ See Article 11 of the Tokyo Convention, 1963.

¹⁹² Ibid Article 8.

All in all, the Tokyo Convention of 1963 had considerable legal weakness, mainly resulting from the compromise between what is needed to be done to curb aircraft hijackings and what could be done to achieve subsequent ratification by a large number of States with important aviation threats. However, in spite of its shortcomings, the Tokyo Convention should be properly evaluated for the contribution to the development of public international air law and to the safety of civil aviation from any international dangers by introducing the foundation for international agreement aiming at preventing the offences from remaining unpunished in particular with respect to criminal jurisdiction, and the power of the aircraft commander.¹⁹³

3.2.3 The 1970 Hague Convention

The inadequacy of the 1963 Tokyo Convention and the increase in the number of hijackings resulted in the need to define the act of hijacking and recognize it as an international offence, led the ICAO Assembly adopting a resolution on the subject matter and to seek an appropriate legal framework to deal with the offence.¹⁹⁴ As a result, the ICAO Council by its resolution of December, 1968, referred legal aspects of the problem of unlawful seizure of aircraft to the Legal Committee.

On 1st December, 1970 a draft Convention was submitted to an ICAO conference at the Hague, attended by 77 states and was adopted on 16th December, 1970. According to Professor Dempsey, the Hague Convention of 1970 was the first meaningful step

¹⁹³ Jung, S.Y, “ *Legal Analysis of Aviation Security Under the International Legal Regime*” A Thesis submitted to McGill University in Partial Fulfillment of the Requirement of the Degree of Master of Laws (LLM), March, 2005.

¹⁹⁴ See <http://www.lawnotes.in/Hague-Convention -1970> (accessed on 10/11/2013).

taken to define the law of international hijacking, as it declared the hijacking of an aircraft to be an international offence.¹⁹⁵ It is commonly known as the Convention on the Suppression Unlawful Seizure of Aircraft and was signed at Hague on 16 December, 1970. Tanzania ratified the same on 9 August, 1983 and partly domesticated it in the Penal Code and the Extradition Act, Chapters 16 and 368 respectively of the laws of Tanzania.

Also apart from developing a clear legal policy and enforcement procedures to deal with such aviation related crimes¹⁹⁶, the Convention made significant contribution to the effort of the international community to curb the unlawful seizure of aircraft and to remove the threats caused to civil aviation and it covers both international and domestic flights. For example it defines the offence of unlawful seizure of aircraft and obliges states to make the offences punishable by severe penalties.¹⁹⁷

The Hague Convention further gives specific definition of hijacking of aircraft and it include as well the threat to undertake such acts as an offence, although this is limited to a threat made on board an aircraft in –flight. However, in order for one to succeed in his claims against such a threat or criminal act causing death or injury, it must be proved that the passenger involved was in course of any operation or process of embarking or disembarking as it was ruled in the case of *Baker v. Lansdell Protective Agency, Inc*¹⁹⁸. In this case, the US District Court held that the course of embarking

¹⁹⁵ Prof. Dempsey, P.S,” *Aviation Security; The Role of Law in the War Against Terrorism* ”(2003) at 666.

¹⁹⁶ Article 1 of the Hague Convention.

¹⁹⁷*The Convention on the Suppression of Unlawful Seizure of Aircraft* which was signed at the Hague on 16 December, 1970 and ratified by Tanzania on 9 August 1983.

¹⁹⁸*Baker v Lansdell Protective Agency, Inc.* 590 F. Supp. 165, US District Court, SDNY, 1984. 19 avi 18193 (D,C,N,Y).

had commenced when the passenger placed his objects on the conveyor belt for a security check.

Another important development under the Hague Convention was that the number of states competent to exercise jurisdiction over a hijacker was enlarged and a new basis for the exercise of jurisdiction by the state where the charterer on an aircraft has his principal place of business or permanent residence was introduced. Moreover, the Convention grants every contracting state the power to exercise jurisdiction over a hijacker if such state are affected by an offence committed under the Convention, thus making it impossible for hijacker to escape the normal process of the law.¹⁹⁹

Under the 1970 Hague Convention, also known as Hijacking Convention States are obliged to include hijacking in extradition treaties to be concluded between them. It should be noted that, at the diplomatic conference which discussed the draft of the Convention, the drafters rejected the proposal to apply compulsory prosecution or extradition. However, it was finally accepted that the contracting state in whose territory the alleged offender is found shall, if it does not extradite him, be obliged to submit the case to its competent authorities, for the purpose of prosecution.

This provision together with certain other requirements was designed to ensure that states either prosecute or extradite offenders in their territory. On the other hand, there was extensive debate over these provisions, particularly over the issue of hijacking for political motive and the discretion of states to prosecute in those circumstances with

¹⁹⁹ Stancu,D.M, Supra note 184 at p.12.

the intention to preclude political motive as a reason for not extraditing where prosecution of an offender does not occur.²⁰⁰

Notwithstanding its efficiency in some areas, the Convention has a series of weaknesses. For example, the criminal offence must be committed by a person on board an aircraft” in-flight” and thereby it excludes offences committed by persons not on board such as saboteurs who remain on the ground. Also according to the Convention the aircraft is deemed to be in-flight at any time from the moment when all external doors are closed following embarkation until the moment when any such doors are opened for embarkation meaning that, any hijacking initiated or attempted before the closing of the doors of the aircraft after embarkation, is not covered.

Also, whilst the Hague Convention includes an accomplice offence, an accomplice only falls within the ambit of the Convention if the assistance is provided whilst on board the aircraft in- flight. The term “ in-flight” was limited under the Act to means when all external doors of the aircraft are closed following embarkation until the moment when only such door is opened for disembarkation.²⁰¹

Furthermore, the Hague Convention of 1970 does not cover the unlawful interference with air navigation facilities and services such as airports, air traffic control and radio communication and a lacuna lies in the word of a phrase in Article 2 under which States undertake to make the offences punishable by severe penalties which unfortunately, the term “severe penalties” was not elaborated. In short, the Convention

²⁰⁰ Ibid

²⁰¹ Ibid

is considered to have failed to address the issue of aircraft sabotage, while criminal incidents against civil aviation such as sabotage of aircraft, using bombs designed to explode during flight had become more prevalent²⁰². This prompted the adoption of the Montreal Convention of 1971.

3.2.4 The 1971 Montreal Convention

Since both the Tokyo Convention of 1963 and the Hague Conventions of 1970 dealt only with unlawful seizure and offences committed on board aircraft, and due to the increased number of acts of violence committed on board aircraft and on airport ground facilities, the ICAO came up with the Montreal Convention of 1971²⁰³ to remedy these lapses and to criminalize such acts. The Montreal Convention was signed in Montreal, Canada on 23 September, 1971 and as it was the case with the Hague Convention the same was ratified by the Government of Tanzania on 9 August, 1983. The Convention which was specifically adopted for the purpose of suppression of unlawful acts against the safety of civil aviation has been domesticated in the laws of Tanzania.²⁰⁴

Further, it should be noted that the Montreal Convention of 1971 apart from repeating some of the provisions of the Hague Convention of 1970, it was considered a breakthrough in combating terrorism against air transport as it pioneered a new series of offences which can be committed without the offender being on board aircraft by defining them broadly in order to cover all possible acts that might occur. In other

²⁰² See Article 2 of *the Hague Convention of 1970*.

²⁰³ *The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, which was signed at Montreal on 23 September 1971 and ratified by Tanzania on 9 August 1983.

²⁰⁴ See section 318A of the Penal Code, Chapter 16 of the Laws of Tanzania.

words, the Montreal Convention of 1971 addresses issues of airport security and sabotage of aircraft prior to flight.²⁰⁵

Under the 1971 Montreal Convention, the definition of an aircraft “in service” was introduced, a term used in the offence concerning placement of a device which is likely to destroy that aircraft. This offence and the definition of “in service” ensure that a device or substance placed on the aircraft prior to an aircraft being considered in-flight is covered by the Convention and it places additional international legal obligations on States to act against a wider range of offences involving aircraft.²⁰⁶

One of the limitations of the Montreal Convention is that it does not make it an offence to threaten to commit the offences in the Convention, unlike the Hague Convention which specifically criminalizes a threat to unlawfully seize an aircraft, although this is limited to person on board in-flight. One case which illustrates the practical deficiencies of the Montreal Convention is *Libyan Arab Jamahiriya v United States of America*²⁰⁷ where the question of interpretation and application of the Montreal Convention was determined following the bombing of Pan Am aircraft, Boeing 747 at Lockerbie, Scotland in 1988, killing 270 people on board.²⁰⁸ In that case Libya opposed the request by US Governments for extradition of its two citizens

²⁰⁵ Achary, *Supra* Note 127, p. 27.

²⁰⁶ Under the Montreal Convention offences which are termed to be unlawful acts against civil aviation are classified to include act of violence against a person on board an aircraft in flight likely to endanger the safety of that aircraft; destroys an aircraft in service or causes damage to such an aircraft rendering it incapable of flight; destroy. Damages or interfere with air navigation facilities, thereby to endanger the safety of aircraft in flight; places or cause to be placed on aircraft in service, a device likely to destroy that aircraft, or to cause damage to it which renders it impossible of flight. The term “ an aircraft in service” is defined under the convention to means from the beginning of preflight preparation for specific flight until twenty four hours after any landing.

²⁰⁷ *Libya Versus United States*, 31 I.L.M 662 (1992)

²⁰⁸ Article by Prof. Gowlland, V. D, “ *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbies Case*” in *America Journal of International Law*, Vol. 88 No4 (October 1988) pp. 643-677.

to be tried in US on the ground that, in the absence of extradition treaties with US, and under the Montreal Convention,²⁰⁹ only Libyan authorities had jurisdiction to try their own citizen for such criminal acts. The matter, however, was settled by the parties and the two Libyans were charged in a neutral Court in Netherlands²¹⁰. Notwithstanding its value in some areas, the Montreal Convention of 1971 remains, like the 1963 Tokyo Convention and the 1970 Hague as it was still weak and not real effective.²¹¹

3.2.5 1988 ICAO Aviation Security Plan

Following bombing of a Pan Am Aircraft over Lockerbie in December, 1988, ICAO adopted an eight-points aviation security plan that became the basis for improvement in aviation security throughout the world. The plan include compulsory screening of checked passenger's baggage, baggage reconciliation, screening of cargo and mail, control of access to sensitive areas at airports and carriage of items that cannot be easily opened. Other measures are better detection of explosives, building security into the design of aircraft and strengthening of the powers and organization of ICAO to enable it to implement more actively the safety standards²¹².

3.2.6 The 1988 Montreal Protocol

As noted herein above, one weakness of the Montreal Convention of 1971 is that it is limited to offences which affect the safety the aircraft” in service” or “in- flight”.

²⁰⁹ Article 5 and 7 of the Montreal Convention.

²¹⁰ Prof. Gowlland, V. D , Supra note 208.

²¹¹ Stancu, M.D, “ *Beijing Convention & Protocol: Responding to Future Threats*” Published in the *Global Journal of Airport and Airline Security*, October 2010 Volume 16 issue 5, P.12

²¹² Louise Butcher, “*Aviation Security*” an article published in *Business Transport (SN/BT/1246)* 14 June, 2011, House of Commons Library, at p..2.

However, this limitation was addressed to some extent by the *Protocol for the Suppression of unlawful Acts of Violence at Airports Serving International Civil Aviation*, (Airport Protocol) of 1988²¹³ and hence expanded the reach of the Montreal Convention to extend beyond aircraft in flight and include airports serving international civil aviation, where air passengers are assembled before and after travel.²¹⁴

The 1988 Protocol specifically provides for offences against a person at an airport as well as the destruction or damage of facilities of an airport or an aircraft not in service where such acts endanger or likely safety at that airport. As it was elaborated:

*“ The protocol commits the states ratifying it to make it an offence to carry out armed attacks at international airport or to cause damage or disruption at such airports. The protocol provides for severe penalties for these offences.”*²¹⁵

In short the airport protocol was adopted following the bombing of several major airports in the 1980s that resulted in the death of waiting passengers, compelling ICAO adopt the protocol that effectively extended the principal provisions of the Montreal Convention to airport facilities.²¹⁶

²¹³*The Montreal Convention which was mainly dealing with sabotage of aircraft in flight*, was amended by the Airport Protocol, (Montreal Protocol) adopted in Montreal Canada, in 1988 to enhance the international legal terrorist acts affecting aviation.

²¹⁴ Samuel M. Witten, “ *Introductory Note to the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*” Published in JASTOR: International Legal Materials, Vol. 50, No.2 (2011), pp 141-159.

²¹⁵ Supra note 201.

²¹⁶*The Airport Protocol of 1988 was negotiated in the aftermath of terrorist attacks in international airport terminals at the Rome and Vienna Airports in 1985. See Richard L Kilpatrick” supra, note at page 12.*

3.2.7 Annex 17 to the Chicago Convention

The increase in aviation related crimes and the failure of the legal regime to properly address such crimes, led to the ICAO holding an extraordinary Assembly Session in 1974 and exercised its quasi-legislative powers to adopt Annexes to the Chicago Convention to tackle the unlawful seizure of aircraft. One of the Annexes was the Annex 17²¹⁷ which states and addresses various security measures regarding civil aviation including standards and qualifications for security personnel at international airports.²¹⁸

Further that, Annex 17 which is sometimes referred to as the Security Annex, is the most famous of all the international legal instruments designed to cater threats of the aviation industry being targeted by those with crime intent. It further binds ICAO member states to establish national civil aviation programs and supporting government institutions which are also under the Annex to share aviation threat information and cooperate with other states regarding their national security programs.²¹⁹

Also, the most important legislative function performed by ICAO is the formulation and adoption of Standards and Recommended Practices (SARPs) for international civil aviation²²⁰. These were incorporated into the 18 technical annexes to the Chicago

²¹⁷ *Annex 17 of the Chicago Convention* incorporate several of the requirements set forth in the *Tokyo, Hague and Montreal Conventions*.

²¹⁸ Richard L Kilpatrick, J.R. "Borrowing From Civil Aviation Security: Does International Law Governing Airline Hijacking Offer Solution to the Modern Maritime Piracy Epidemic Off the Coastal of Somali?" Project Sponsored by One Earth Future Foundation, August, 11, p.11.

²¹⁹ *Supra*, Note 177, p.12

²²⁰ The Standard and Recommended Practices or SARPs, covers operational and technical aspects of international civil aviation security and requires each member state to have a national civil aviation

Convention²²¹ and of critical importance to the future of civil aviation and to the international community at large are the measures taken by ICAO to prevent and suppress all acts of unlawful interference against civil aviation throughout the world. SARPs for international aviation security were first adopted by ICAO on 22 March 1974, and designed as Annex 17 to the Chicago Convention.²²²

Annex 17 was basically concerned with technical measures for protection of security of international civil aviation, whereby each Contracting State was obliged to establish to its own civil aviation security program with such additional security measures as may be proposed by other appropriate bodies.²²³ In other words, under the international air law, each state is obliged to implement its own security standards. Likewise, airline operators are required to protect their passengers, assets and revenues and the States are further obliged to ensure that the carriers develop and implement effective complementary security program compatible with those of the airports out of which they operate.²²⁴

The Annex imposes further obligation of the Contracting States, airport operators and airlines to ensure that the safety and security of passengers, crew, ground personnel and general is a primary consideration in the safeguarding action which they initiate.

security program and to create a governmental institution to develop and implement aviation security regulations.

²²¹ Nikhil George, "Global Air Safety and Regulations: Current Advancement" Project Assignment- Aviation Law-I: AL-I (Unpublished) at page 6.

²²² See Article 34 of the Chicago Convention, 1944.

²²³ See Annex 17 to the Chicago Convention, 1944.

²²⁴ The ICAO Security Manual Document 873 states that, basic responsibility for security of aircraft and rests with operator, likewise EU Regulations 2320/2002 requires each member state to ensure airports and air carriers providing service from that state to establish and implement security programmes to meet the requirements of the national civil aviation security programme of that state.

States are, therefore, urged to adopt measures for safety and security of passengers and crew of unlawfully diverted aircraft until their journey is continued.

The obligation of the states, airlines and airport operators in as far as aviation security is concerned, was highlighted by the American case of *In Re 9/11 Litigation*²²⁵ when the Judge stated in her findings:

” We live in vicinity of busy airports, and work in tall office towers and depend on others to protect us from the willful desires of terrorist to do us harm. Some of those on whom we depend for protection are private companies”.

It denotes that airlines and airport operators are responsible for the risk arising out of unlawful interference with civil aviation.

In the process of updating the law on aviation security, ICAO in November, 2010 adopted amendment 12 to the Annex 17 as recommended by the Committee on Unlawful interference. The amendment apart from updating the international air laws strengthens aviation security provisions, particularly in relations to staff screening, security equipment capabilities, cyber threats and air cargo. The new and revised provisions became effective on 26 March 2011²²⁶ The latest amendment to Annex 17, known as amendment 13 was done in 2013 and became effective on 15th July, 2013.²²⁷

²²⁵ In this significant case, the Court held that, the airport operator, airline and airport security were negligently liable for their failure to satisfy their security responsibilities, and consequently allowed the terrorists to get on board and hijack the airplanes. The court further ruled that airlines and airport operators did have a duty to prevent potential terrorists from getting onboard the aircraft; and this duty is extended to ground victims.

²²⁶ ICAO Doc 9952 on Annual Report of the Council. 2010.

²²⁷ See [http://www.icao.int/Security/SFP/Pages/Annex 17](http://www.icao.int/Security/SFP/Pages/Annex%2017) (accessed on 10/12/ 2013).

3.2.8 The 1978 Born Declaration on Hijackings

The G-7 heads of states met in Born, Germany in 1978 and issued a declaration on hijacking known as *The Born Declaration on International Terrorism*.²²⁸ The Declaration had no binding effect to the parties, but establishes intention for these major economic powers to access all flights to or from any country that fails to extradite or prosecute hijackers. Under the Declaration, a country that refuses the extradition or prosecution of those who hijacked an aircraft and does not return it, action would be taken to cease all flights to and from that country and its airlines²²⁹.

Also these potential sanctions from representatives of seventy percent of world aviation traffic created significant obligations on non-party states as the Declaration has subsequently been invoked to threaten against Afghanistan and later against South Africa.²³⁰ Besides the problem surfacing from the Born Declaration and the lack of respectable representation by the international community, there are certain practical gaps with respect to the application. For example; how would the decision to suspend air services be taken by the members of the Declaration, who will judge that a State is no longer in default, and how long the sanctions will last etc.²³¹ Those problems mainly resulted from the hasty adoption of the Declaration during the period of G-7

²²⁸ To intensify the joint effort to State to combat international terrorism by preventing each state from being an available safe heaven for any offender and by deterring each state from encouraging the commission of offence, on July 17, 1978 the leaders of G-7 (Canada, France, The Federal Republic of Germany, Italy, Japan, the United Kingdom, and USA) participating in Born Economic Summit, issued a joint declaration known as The 1978 Born Declaration on Hijackings which declared the parties intention to take sanctions against any State that fail to fulfill its international obligations under the Tokyo, Hague, and Montreal Conventions.

²²⁹ James J. Bustil, "The Born Declaration on International Terrorism: A non-binding International Agreement on Aircraft Hijacking" 31 I.C.L.Q 474 at 47&476.

²³⁰ Richard L. Kilpatrick" supra Note 163 at 12.

²³¹ See James J. Busitti, supra Note 173 at 163.

economic summit on July, 1978 without the appropriately scheduled preparation procedures and the experts on aviation.²³²

However, this does not mean that the Declaration is without significance, because it was the first international agreement calling for the use of aircraft boycott against State granting safe heavens to hijackers in order to force State to deal firmly with hijackers.²³³

3.2.9 The 1991 Montreal Convention

Subsequent to the attack to Pan Am flight 103 over Lockerbie, Scotland in December 1988 and the explosion aboard a UTA aircraft over Niger in September 1989, the United Nations Security Council passed a Resolution 635 which urged ICAO to advise an international regime for marking a plastic and sheet explosives for detecting purposes. ICAO responded with the adoption of *The Convention on the Marking of Plastic Explosive for the Purpose of Detection*.²³⁴ It imposes states to destroy unmarked explosives by a certain date and report it to ICAO

Briefly, the 1991 Convention requires signatory states to prohibit and prevent the unauthorized manufacturer, export or import of unmarked plastic explosives and where stocks of unmarked explosives are held, to destroy or render them permanently ineffective within a specific period. In recognition of the rapidly changing

²³² See Otpp von der Gablentz, "Prevention of Aviation Terrorism: The Government's Point of View" in Conference Proceedings: Aviation Security (The Netherlands: International Institute of Air and Space Law, University of Leyden, 1987) at 117&118.

²³³ See Mark E. Fingerma, "Skyjacking and the Born Declaration of 1978: Sanction applicable to Recalcitrant Nations" (1980) 10 Cal. W Int'l L.J. 123at 142&143.

²³⁴ The Convention commonly known as *The Montreal Convention of 1991* was adopted unanimously at the International Conference on Air Law, held in Montreal, Canada in early 1991.

technologies for detecting explosives, the Convention is accompanied with a technical annex which describes explosives of which the Convention applies and lists agents that may be used to mark the explosives.²³⁵

3.3 Aviation Threats after the September 11 Attacks

Since the catastrophic events of 11 September 2001, there have been several attempts against aviation security and these threats have ranged from shoe bombs to dirty bombs to explosives that can be assembled in flight with liquids, aerosols and gels. In every instance, the global community has reacted with pre-emptive and preventive measures that prohibit any material on board that might seemingly endanger the safety of flight. Also, some jurisdictions have gone to extremes in prohibiting human milk and prescriptive medications on board. Further, there had been stringent legal measures taken by the international community to attack such terrorist act and this goes to show that the law plays a significant role in ensuring aviation security. It is, therefore, believed that the 2010 Beijing legal instruments can play a crucial role in furthering this objective.²³⁶

3.3.1 What happened in the September 11 Attacks

As it was pointed out in the previous chapters, the famous September 11 attacks were a series of four coordinated suicide attacks on the United States in New York City and the Washington DC areas on September, 11 2001 where a group of Al-Qaida hijacked four passenger jets. The hijackers intentionally crashed two planes, American Airlines

²³⁵ See an Article titled “ *Evolving Threat to Civil Aviation is Countered by Legal Instruments as well as New Technology*” by Halina H. Biernacki (ICAO Secretariat), Published in *ICAO Journal of Air Law* of December 1997, p.8.

²³⁶ Dr. Ruwantissa Abeyratne, “ *The Beijing Convention of 2010: An Important Milestone in the Annals of Aviation Security*” *Air and Space Law* 36 No.3 (2011) 243-255.

Flight 11 and United State Airlines Flight 175 into the Twin Towers of the World Trade Centre in New York City; both towers collapsed within two hours. The Hijackers further crashed American Flight 77 into the Pentagon in Arlington, Virginia and the fourth jet, United Airline Flight 93, crashed into a field near Shanksville, Pennsylvania after passengers attempted to take control before it could reach the hijackers' intended target in Washington DC. Nearly 3,000 people died in the attacks.²³⁷

Hence, to cut the story short, the September 11 attacks marked the first time hijackers boarded a commercial flight fully intended to kill themselves and everyone else on board and on the ground. Also, one of the unforgettable facts of the September 11 attacks is that civil aircraft, which have become one of the essential means of transportation in modern society, were used and diverted by terrorists to become powerful weapons of mass destruction²³⁸.

3.3.2 The Legal Framework Following the 9/11

Following the September 11 attacks, the adequacy of legal systems governing aviation security were questioned, especially after discovering that all 19 hijackers who took part in the 9/11 attacks managed to pass several different checkpoints and board their aircraft without hindrance. These acts were the aggregation of various offences, such as the unlawful seizure of an aircraft in flight, the intentional destruction of an aircraft

²³⁷ Ibid.

²³⁸ See www.history.com/topics/9-11-attacks (accessed on 20/10/2012).

in service, acts of violence on board aircraft, murders and other criminal acts causing injuries and damage.²³⁹

In response, the international community had to introduce several legal and security measures to counter further occurrence of such criminal acts. However, the major legal challenge is that, the tactics for aviation threats are dynamic as when legal and security measures were put in place to counter the September 11 style attacks, the criminals quickly responded by going to on board of suicide attack with explosives devices concealed in shoes.

When the tactics were discovered and shoes began to be screened, the criminals switched to devices containing camouflaged liquid explosive, when the plot failed and security measures were altered to restrict the quantity of liquids people could take aboard aircraft, we saw the criminals alter the paradigm once more and attempt the underwear bomb attack during 2009 Christmas. Also, due to the increased passengers screening implemented after the Christmas day 2009 attempt, the criminals decided to employ explosive devices sent via air cargo.

In view of the new and emerging threats to civil aviation, it became necessary for ICAO in 2010 to review the international legal framework on aviation security such as the 1970 Hague Convention, the 1971 Montreal Convention and the 1988 Airport Protocol and hence came up with the updated new laws by adopting the Beijing Convention and the Beijing Protocol.

²³⁹ Ibid.

In fact, these two new international legal instruments are very significant in the development of international air law as among other things they criminalize acts against international civil aviation, such as hijacking and sabotage, and facilitate the cooperation between States with a view to ensuring that such criminal and terrorist acts are prevented and do not remain unpunished where they occur.²⁴⁰

3.4 Conclusion

This chapter is concerned with the overview of the international legal framework on aviation security before the adoption of the 2010 Beijing instruments. In so doing, the historical development of the law on aviation security was discussed whereby a number of Conventions, Protocols and Annexes treaties on aviation security were concluded with the aim of suppression and criminalizing unlawful acts to civil aviation, such as hijacking and sabotage.

Further, following the increasing number of criminal acts to civil aviation especially between 1960's and 1970's the international community became more active in improving security measures and adopting new international treaties to prevent such acts. The Tokyo Convention 1963²⁴¹ for example was introduced for establishing jurisdiction over offences committed on board aircraft and with extradition of offenders followed by the Hague Convention 1970,²⁴² which was adopted as a remedy

²⁴⁰ See a paper on AVSEC International Threats (Beijing), presented in the fifth meeting of Director Generals of civil aviation (DGCA/5), of ESAF and WACAF States, held at Dakar, Senegal on 4th November, 2013

²⁴¹ The ICAO member states met in Tokyo in 1963 and adopted the Tokyo Convention, which concerned with legal rules governing offences occurring on board the aircraft and the issue of unlawful seizure of an aircraft was added as an afterthought in Article 11.

²⁴² *The Hague Convention* provides among other things that one who, during flight unlawfully, by force or threat thereof or by any other form of intimidation, seizes or exercises control of that person aircraft

by criminalizing hijacking and obliges state parties to make the offence punishable by severe penalties and introduce further provisions on extradition. The Montreal Convention of 1971²⁴³ followed to deal with sabotage of aircraft and followed a similar model to the Hague Convention and it was supplemented by Montreal Protocol of 1988²⁴⁴ which commits the member states to make it an offence to carry out armed attacks at international airports or to cause damage or disruption at such airports.

Other legal measures by the international community was the adoption of European Convention on the Suppression of Terrorism²⁴⁵ which facilitated extradition in the case of offences against aircraft and their passengers and takes some such offences outside the category of political offences. Likewise, some countries enacted or reviewed the laws to allow the use of full Body scanners, sniffer dogs, Explosive Trace Detection Equipment, Passenger Profiling, criminal record Checks and imposing restriction on liquids.

or attempts to perform such act or is an accomplice of such person, commits an offence for which extradition or prosecution and the imposition of severe penalties is required.

²⁴³ *The Montreal Convention* addressed the issue of damage to air navigation facilities and aircraft sabotage, and extended its scope to certain activities proceeding embarkation and departure and subsequent to likely to endanger the safety of an aircraft, destruction of or serious damage to an aircraft or air navigation facilities, and communication of false information that endangers the safety of an aircraft.

²⁴⁴ *The Airport Protocol extended the principal provisions of the 1971 Montreal Convention to airports, prohibiting acts of violence at airports and the destruction or damage of airport facilities.*

²⁴⁵ See <http://Conventions.Coe.int>. Retrieved 3 March, 2012.

CHAPTER FOUR

4.0 CRITICAL ANALYSIS OF THE 2010 BEIJING CONVENTION AND THE PROTOCOL

4.1 Introduction

As it was discussed in the previous chapters, since 1960s a number of international conventions and protocols on aviation security have been concluded under the auspices of ICAO to criminalize acts against civil aviation and facilitate co-operation between states and to make sure that such acts do not go unpunished. Despite their shortcomings, these early legal instruments such as the Tokyo Convention of 1963²⁴⁶, the Hague Convention of 1970²⁴⁷, the Montreal Convention of 1971²⁴⁸, the Airport Protocol of 1988²⁴⁹ and the Montreal Convention of 1991 have been widely used and accepted as the legal instruments for preventing and combating unlawful interference to civil aviation.²⁵⁰ The significance of these early conventions in the development of the international air law is well elaborated in the article written by one Halina B. Binarcki as follows:

*“These five aviation security- related legal instruments adopted under the auspices of ICAO, are substantial contribution to the development of new principles of international law responding to the challenge of today”*²⁵¹

²⁴⁶The Convention is concerned not only with crimes but also all acts which, whether or not they are offences, may or do not jeopardize the safety of aircraft or of persons or property therein or which jeopardize good order and discipline on board.

²⁴⁷ The Convention defines for the first time the acts of unlawful seizure of aircraft as an offence. Essentially, there must be use of or attempted use of force, the aircraft must be in flight and the offence must be aboard the aircraft.

²⁴⁸ The aim of the Convention is to prevent and discourage acts of sabotage and acts of violence directed at aircraft in particular and at civil aviation in general. It further defines acts of unlawful interference with civil aviation, particularly sabotage.

²⁴⁹ Attacks at Tokyo Narita, Rome and Vienna airports in December, 1985 led to the adoption of the *Protocol for the suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation to combat violence against persons at such an airport.*

²⁵⁰ Diana M. Stance, “Beijing Convention & Protocol: Responding to Future Threats” in the *Global Journal of Airport & Airline Security*, Volume 6 Issue 5 of October, 2010, p. 3.

²⁵¹ Halina M. Binarcki. “Evolving Threat to Civil Aviation is Countered by Legal Instruments as well as new Technology” Published in *ICAO Journal* of December, 1997, p. 8.

Nevertheless, the international community after the September 11 attacks, acknowledged the fact that the above named legal instruments reflected the focus of states at the time of their adoption and now there is need to review and update them to respond to new and emerging aviation threats, either in the form of adoption of new international instruments or as amendment to the existing legal instruments. It was further emphasized:

*“A study on the existing aviation security conventions concluded that the offences in these instruments do not adequately address new and emerging threats to civil aviation. In order to address this, the Legal Committee has recommended two new Protocols be developed to the Montreal and Hague Conventions”*²⁵²

It is on that premises that, ICAO held the 2010 Beijing Conference in China which was attended by 71 ICAO Member States and 4 Observers delegations including the International Air Transport Association (IATA). At the conclusion of the Conference, ICAO Member States adopted the two new Beijing treaties.²⁵³ It was further elaborated that, these new Beijing instruments update the existing regime in light of the September 11 terrorist attacks and developments in counter-terrorism law over recent decades.²⁵⁴

However, in comparison with the previous legal instruments, this chapter analyses the effectiveness of the two Beijing treaties and their adequacies in addressing new and emerging aviation security threats. In so doing, the chapter will critically examine

²⁵² Ms Julie Atwell, “Instruments Addressing New and Emerging Threats to Civil Aviation” a paper presented during the CIPL Public Seminar at the Australian National University, held on 4th June, 2010.

²⁵³ The 2010 Beijing Convention and the 2010 Beijing Protocol are available www.icao/DCAS2010 (accessed on 16/12/2013).

²⁵⁴ Van Deer Toorn; Insights, ASIL, vol. 15, issue 13,2010.

some features and offences created by the new treaties and their relevancy in as far as civil aviation security threats are concerned.

4.2 Adoption of the Beijing Convention and Protocol

As stated herein above, the need for updating the new laws on aviation security threats was mainly sparked by the September 11 attacks which actually exposed the gaps existed in the Aviation Security Law System both nationally and internationally. As it was pointed out:

“The legal dimension of security challenge needs close scrutiny. Over times, ICAO has established a universally- accepted international legal system so that no safe heaven exist for perpetrators of acts of unlawful interference. However, with the new types of threats such as those committed on 11 September, 2001, gaps and inadequacies appear to exist in international legal conventions”²⁵⁵

As a result, during the years 2005-2008 ICAO conducted a survey of its member States which revealed that the existing legal instruments did not cover notable new aspects of attacks such as the use of an aircraft as a weapon and other ancillary offences which include organizing or conspiring to commit such offences. It was further observed that the existing legal instruments focused on the persons actually committing the punishable acts, mainly on board an aircraft or at an airport, without specific provisions addressing the issue of persons organizing, directing and financing the commission of the unlawful interference against civil aviation²⁵⁶.

²⁵⁵ Presentation on “ *New & Emerging Threats Facing International Civil Aviation*”, by Haile Belai on behalf of Mrs Folasade Odutola, during a Fifth Special Meeting of the Counter- Terrorism Committee held on 29 to 31 October, 2007, Nairobi Kenya.

²⁵⁶ Diana M. Stancu, “AVESEC Conventions: *Beyond Chicago Untill Beijing*”, The Global Journal of Airport & Airline Security, October 2010, Volume 16 ISSUE 5, p. 13.

As a first and immediate response to the September 11 events, the 33 Session of ICAO Assembly adopted Resolution A 33-1 which directed the Council and the Secretary General to address the new and emerging threats to civil aviation, and among other things, to review the adequacy of the existing aviation security Conventions.²⁵⁷ It was at the 34 session in 2009, that the ICAO Legal Committee addressed the initiative to amend the laws and debated and revised the amendments drafted by its special sub- committee.

Also, pursuant to Resolution A33-1, the Secretary General undertook a study and drew a preliminary conclusion that the existing conventions should be amended or updated in several aspects in order to cover new and emerging threats to civil aviation such as the use of aircraft as a weapon of destruction or the spread of biological, chemical and nuclear substances²⁵⁸. This conclusion was endorsed by a large number of states through a survey conducted in 2005 and 2007 by the Secretariat Study Group on aviation Security Conventions.²⁵⁹

It was further noted by the Study Group that, the actual perpetrators of the 9/11 died on that attack. But the remaining questions were:

- (a) What about those who planned the attack, financed it, recruited and trained the perpetrators? Should their acts also be criminalized under international air laws?
- (b) What about those who conspired to engage in a credible threat which is aborted before it can be executed?

²⁵⁷ See Universal Security Audit Programme (USAP), Background and Evaluation, retrieved from <http://www2.icao.int/en/AVSEC/USAP/pages/Back> (accessed on 13/01/2014).

²⁵⁸ Ibid.

²⁵⁹ Jiefang Huang, Aviation Safety Through the Rule of Law, ICAO Mechanism and Practices, Walter Kluwer, Law & Business, Kluwer Law International, p. 142.

It was on that basis that, proposals were submitted²⁶⁰ for conducting the 2010 Beijing Conference to review the Montreal Convention of 1971 and Hague Convention of 1970. These proposals were developed in a series of ICAO meetings commencing in 2007 involving key states and basing on these results, the ICAO Legal Committee established the Special Sub-Committee on the preparation of one or more instruments addressing new and emerging threats and appointed Julie Atwell from Australia as Rapporteur and France's Terry Olson as a Chairman of the Sub-Committee.²⁶¹

Under the Chairmanship of Olson who serves as an advisor to the French Directorate of Civil Aviation²⁶² the Sub-Committee reached a broad consensus on a number of issues including the criminalizing of acts such as using civil aircraft in service as a weapon and employing dangerous materials or substances to attack aircraft or other targets on the ground. Finally, from 30 August to 10 September, 2010 the Conference was held in Beijing China, the two important legal instruments were adopted which are the Beijing Convention of 2010 replacing the Montreal Convention of 1971 and the Beijing Protocol of 2010 amending the Hague Convention of 1970.

It is worth noting that, the 1971 Montreal Convention was already modified once in 1988 at a Diplomatic Conference in Montreal which came up with the 1988 Airport Protocol to address certain acts of terrorism at civil international airports and in the meantime, most States Parties to the 1971 Montreal Convention became parties to the

²⁶⁰ See the Statement from Xia Xinghua, President of the Beijing Diplomatic Conference, in ICAO Journal 01-2011, p. 11.

²⁶¹ Report of the Fourth Meeting of Directors General of Civil Aviation of Western and Central African/Eastern and Southern Africa States held at Matsapha, Swaziland, 8-9 November, 2010. Prepared by ICAO ESAF/WACAF offices (Report-DGCA/4) at p2.

²⁶² See an Article titled: "*Lead Up to the Beijing Accomplishments*" published ICAO-Journal Issue-01-2011, p.12.

1988 Airport Protocol. Rather than develop a second Protocol to the 1971 Montreal Convention, which would have led to unduly complicated treaty relationship among States Parties to the instruments, the 2010 Diplomatic Conference at Beijing concluded an entirely new and freestanding instrument effectively amending both underlying Montreal-related instruments.²⁶³ It means upon adoption, the 2010 Beijing Convention prevails over the Montreal Convention of 1971 and its Protocol signed in Montreal in 1988. On the other hand, it is further provided that, the 1970 Hague Convention and the Montreal Protocol will be read and interpreted together as one single instrument and will be known as “the Hague Convention as amended by the Beijing Protocol, 2010.”²⁶⁴

The motive of on international community in adopting the 2010 Beijing legal instruments is found in very short but in clear terms in the preamble of the Convention which specifies that the international community is deeply concerned about unlawful acts against civil aviation jeopardizing the safety and security of persons and property, seriously affecting the operation of air services, airports and air navigation. Further the preamble shows that civil aviation community recognizes new types of threats against civil aviation which require new concerned efforts and policies of cooperation of international nature and the international civil aviation community is convinced that in order to address these threats better, there is an urgent need to strengthen the legal framework for international cooperation in preventing and suppressing unlawful acts against civil aviation.

²⁶³ See paragraph 24 of the 2010 Beijing Convention which provides clearly that the Convention prevails over both earlier instruments.

²⁶⁴ See paragraph 19 of the 2010 Beijing Protocol.

4.3 Signing and Ratification of the Treaties

In accordance with Article 21 of the Beijing Convention and Article XX of the Beijing Protocol, both legal instruments are open to all states for signature at the headquarters of ICAO in Montreal until it enters into force. States which have signed the Convention and the Protocol may ratify, accept or approve it at any time and state which have not signed it may accede to it at any time.²⁶⁵ Also in accordance with Article 22 of the Convention and Article XXIII, the new legal instruments shall enter into force on the first day of the second month following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession.

4.3.1 Impact of Ratification

Upon ratifying, accepting, approving or acceding to the Beijing legal instruments, a State Party shall notify the Depository of the jurisdiction it has established under its national law in accordance with Article 8 (2) of the Convention and Article 4(2) of the Protocol. The United States, China and the United Kingdom, among other states, signed the Convention and the Protocol on the spot upon adoption.²⁶⁶ According to the ICAO report, as of 30 September, 2014, the treaties are not yet in force as they have been signed by 30 states and ratified or acceded by 9 states only.

States which have signed the treaties are Brazil, Burkina Faso, Cameroon, Chad, China, Costa Rica, Cyprus, Czech Republic, Dominica Republic, France, Indonesia, Mali, Mexico, Nepal, Nigeria, Panama, Paraguay, Republic of Korea, Senegal, Spain, Uganda, United Kingdom and United States. Others are Gambia, Benin, Kuwait,

²⁶⁵ See Article 26 of the Beijing Convention and Article XXI of the Beijing Protocol.

²⁶⁶ ICAO Journal-Issue No. 01-2011, p. 10.

Netherlands, Nigeria, Panama, Paraguay, South Africa, Togo, Turkey, Uganda, United Kingdom and United States of America. The Beijing Protocol had been signed by the above-mentioned States plus India and Zambia.²⁶⁷ States which have ratified or acceded the treaties are Angola, Czech Republic, Cuba, Dominican Republic, Guyana, Kuwait, Mali, Burma, and Suit Lucia.

Hence during the 2nd Session of the African Union Conference of Ministers Responsible for Transport held in Luanda Angola in 21st to 25th November, 2011, it was clearly pointed that, the ratification of the two Beijing international air law instruments and their implementation contributes significantly to the development of the national, Africa as well as international civil aviation²⁶⁸.

4.3.2 Status of Ratification by Tanzania

As of December, 2013, the United Republic of Tanzania was yet to ratify any of the two Beijing treaties. However, Considering that unlawful acts against civil aviation jeopardize the safety and security of persons and property and that aviation threats call for concentrated efforts globally, Tanzania Civil Aviation Authority (TCAA)²⁶⁹ on behalf of the Government of United Republic of Tanzania is working on the process for signing the two legal instruments to join and support the efforts of the international community in endeavour to attain a safe, secure and orderly conduct of civil aviation.²⁷⁰

²⁶⁷ Ibid.

²⁶⁸ See a Paper titled “*Ratification of International Air Law Instruments Including the AFCAC Constitution*”, AU/TP/EXT/2A7 (II).

²⁶⁹ Tanzania Civil Aviation Authority (TCAA) is a body corporate established by Act. No. 10 of 2003 to regulate aviation industry in the United Republic of Tanzania

²⁷⁰ TCAA Statement of Case on the Intention to Accede to the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, 2010 (Beijing Convention 2010) and the

According to TCAA,²⁷¹ upon signing of the Beijing instruments, Tanzania intends to ratify them thereby to necessitate consequential amendments to the National Laws to cover the offences, penalties and procedures under the said conventions. The legislations to be amended include the *Penal Code*,²⁷² *The Extradition Act*,²⁷³ *The Prevention of Terrorism Act*,²⁷⁴ and *The Civil Aviation Act*²⁷⁵ and the *Civil Aviation (Security) (Amendment) Regulations*²⁷⁶ as countermeasures to the new and emerging threats to aviation security. TCAA was in the process of seeking views of stakeholders and other institutions of the Government on the introduced amendments as contained in the two Beijing treaties and the consequential review of some of the pieces of National Legislations.

4.4 Features to the 2010 Beijing Instruments

The adoption of the 2010 Beijing Convention and the Beijing Protocol is a result of collective efforts of the international community to modernize the legal framework for aviation security and they are considered to be a significant development in the international air law. It is, therefore, believed that if the two international legal instruments are widely ratified and implemented, they can prevent repetition of the September 11 attacks. This is due to the fact that both treaties among other things are

Protocol Supplementary to the Convention for Suppression of Unlawful Seizure of Aircraft 1070, (Beijing Protocol, 2010), Done in Beijing on 10th September, 2010.

²⁷¹ Ibid.

²⁷² Chapter 16 of the Laws of Tanzania

²⁷³ Chapter 366 of the Laws of Tanzania

²⁷⁴ Act N o 21 of 2002 with its consequential amendments to The Criminal Procedure Act, 1985, The National Security Act, 1970, The Extradition Act, 1965, The Proceeds of Crime Act, 1991 and The Evidence Act, 1967.

²⁷⁵ Chapter 80 of the Laws of Tanzania

²⁷⁶ See the 2013 amendments to the Civil Aviation (Security) Regulations, 2007.

aimed at criminalizing the use of a civil aircraft to cause death, serious injury or serious damage to property or the environment.²⁷⁷

In short, pursuant to the above named motive, the two legal instruments have come up with certain important provisions regarding the safety and security of aircraft either in flight or in service.

4.4.1 Common Features

The 2010 Beijing Convention and the Protocol are very important documents in the development of international air law and they are aimed at updating the legal framework in light of the September 11, terrorist attacks. It is, therefore, obvious that the universal adoption of these two legal instruments signify the willingness of the international community to significantly advance joint cooperation in the prevention of unlawful acts relating to civil aviation and the prosecution and punishment of offenders.²⁷⁸

In short each of the 2010 Beijing legal Instruments is a standalone document, but both share some features which are common as highlighted herein below:

(a) New Principal Offences

The most significance features which are common to both the Convention and the Protocol is the creation of new criminal offences in as far as civil aviation is concerns. Such offences include criminalizing the use of civil aircraft as a weapon and

²⁷⁷ Samwel M Witten, *Introductory Note, the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, September 10, 2010.

²⁷⁸ See “*Ratification of ICAO International Instruments*” in ICAO’s Assembly Resolutions (A37-22) page 2.

criminalizing the use of biological, chemical or nuclear substance to attack civil aviation.

On the other hand, apart from underlying the conduct of the September 11 terrorist attacks, both legal instruments deal with other illicit conduct that threatens the safety of international civil aviation and the protection of the public.²⁷⁹

(b) Ancillary Offences

Both instruments create new ancillary offences, relating to the commission of principal offences against civil aviation namely; making credible threat, attempt, organizing or directing others to commit aviation related offence, acting as accomplice, conspiracy and assisting another person to evade criminal investigation or prosecution for committing any offence provided for in the Beijing instruments. However, these ancillary offences may sometimes be deemed problematic in respect of legal certainty, for the alleged offenders might be apprehended long before an act and or an omission is carried out.

(c) Expand Jurisdiction

Should one proceed to a comparative analysis as per the procedural issues, jurisdiction for the prosecution of all such criminal acts related to aviation security was previously granted either to authorities of the state where the offence was committed or where the aircraft in question was registered or where it landed.

²⁷⁹ See Articles 1 of the 2010 Beijing Convention and the Beijing Protocol.

However with the adoption of the new Beijing legal instruments, jurisdiction is now extended to include the authorities of the state of which the alleged offender is a national. In other words, both legal instruments expand the jurisdictional provision by requiring States Parties to establish jurisdiction where the alleged offender is a national and establish other optional grounds for jurisdiction.²⁸⁰ This brings aviation security international law in line with the broad bulk of international criminal law provision, for it comprehensively incorporates a highly recognized principle of general international law.

(d) Liability for Directors and Organizers

Another common feature of both Beijing Convention and Protocol is that, they both specifically cover criminal liability of directors and organizers of an offence under the treaties and hence making a threat to commit an offence under the treaties be criminally accountable when the circumstances indicate that the threat is credible. Apart from that, under certain conditions, agreement or contribution to commit an offence, whether such an offence is actually committed or not, may be punishable.

(e) Promote Cooperation Between States

On top of that both treaties update the provisions for promoting cooperation between states in combating unlawful acts directed against civil aviation and emphasize human rights treatment.²⁸¹

²⁸⁰ Article 8 of the Beijing Convention and Article 4 of the Beijing Protocol.

²⁸¹ Article 11 of the Beijing Convention and Article 7bis of the Beijing Protocol.

Further, both instruments provide that it is an offense to directly or indirectly threaten to commit one or more of the principal offences²⁸² or to organize or direct the commission of an offense. It is believed that these provisions are meant to harmonize recent UN counter-terrorism Conventions.²⁸³

(f) Inclusion of Fugitive Offences

The 2010 Beijing legal instruments include a fugitive offence which criminalizes any assistance to persons evading investigation, prosecution or punishment, knowing that he or she has committed one of the offenses or is wanted to prosecution or to serve a sentence.

This crime is a kin to an accessory after the fact offenses known to many common law jurisdictions and will help restrict the movement of those seeking to flee states where face prosecution.²⁸⁴

(g) Criminalize Conspiracy

Both new legal instruments incorporate a conspiracy which criminalizes the planning of offense in conjunction with others, reflecting both the common law and civil law traditions.

This is the first time UN counter-terrorism convention has included such a provision and it is designed to allow enforcement officers to apprehend and prosecute offenders before terrorist attacks can be carried out.²⁸⁵

²⁸² Art. 1(3) Beijing Convention.

²⁸³ Art. 1.(4)(b) Beijing Convention.

²⁸⁴ Art.1(4)(d) Beijing Convention.

(h) Prosecution and Extradition

Another common feature for the Beijing treaties is that, they include nationality of the offender as a mandatory ground for jurisdiction for states parties.²⁸⁶ This will help to expand the extra-territorial scope of instruments and ensure that a greater number of states parties will have jurisdiction to prosecute or extradite known offenders and they include optional jurisdiction on the basis of nationality of the victims of offenses.²⁸⁷

The Convention and Protocol also include new provision aimed at supporting extradition and mutual legal assistance obligations. In particular, none of the offences can be considered a political offence in order to avoid this obligation. However, under the new laws no state may be compelled to extradite a person or provide mutual legal assistance if there are substantial grounds to believe it would lead to prosecution on discriminatory ground.

(i) The “Al Qaeda Clause”

Another important common feature to both 2010 Beijing legal instruments is the inclusion of the so called “*Al Qaeda Clause*”²⁸⁸ which is aimed at addressing the problem of terrorist groups as it was the case for the September 11 attacks where the famous terrorist group of “Al Qaeda” was believed to be involved.

Although there is no established definition of the term “*Al Qaeda Clause*” however, as the clause itself carries the name “Al-Qaeda” which is a famous terrorist group in the

²⁸⁵ Art. 5 (a) Beijing Convention and Art.4 (a) of the Beijing Protocol.

²⁸⁶ Art. 8(1)(e) Beijing Convention and Article 4 (1)(e) Beijing Protocol.

²⁸⁷ Art 9 and 10 Beijing Convention and Article 7*bis* of the Beijing Protocol.

²⁸⁸ See Article 2 of the 2010 Beijing Convention and Article 2*bis* of the Beijing Protocol.

World, it is obvious that “Al-Qaeda Clause “refer to the clause which was purposely incorporated in the Beijing instruments to deal with such terrorist groups or organizations as legal entities and link such legal entities to individual perpetrators. It means, the scope and objective of Al Qaeda Clause is to link one or more contracting states to a legal entity, whose managers and /or proprietors have perpetrated, in that capacity, the primary offences envisaged in the Beijing Convention and in the Beijing Protocol.²⁸⁹

Article 4(1) of the Beijing Convention and Article IV (2bis) of the Beijing Protocol provide clearly on the said Al-Qaeda Clause as follows:

“Each State Party, in accordance with its national legal principles, may take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held when a person responsible for management or control of that legal entity has, in that capacity, committed an offence set forth in Article 1. Such liability may be criminal, civil or administrative.”

The said offences highlighted in Article 1 of both Beijing Convention of the Protocol of which the Al-Qaeda Clause applies include:

- (a) unlawfully and intentionally seizes or exercises control of an aircraft in service by force or threat or by coercion or by other form of intimidation, or by any technological means,
- (b) Makes a threat to commit the offence enshrined in (a) herein above or unlawfully and intentionally causes any person to receive such a threat, under circumstances which indicate that the threat is credible.

²⁸⁹ See Article 4 of the Beijing Convention and Article IV of the Beijing Convention.

(c) Attempt to commit the offence set forth in (a) herein above and organize or direct others to commit such offence or participate as an accomplice in offence in such offences.

It is further provided that the above named liability is incurred without prejudice to the criminal liability of individuals having liability committed the offences²⁹⁰ and that if a State Party takes the necessary step to make a legal entity liable, it shall endeavour to ensure that the applicable criminal, civil or administrative sanctions are effective, proportionate and dissuasive and that such sanctions may include monetary.²⁹¹

It is important to note that, those who negotiated the Beijing instruments did not draft a new clause but relied upon similar clause contained, inter alia, in *the International Convention for Suppression of the Financing of Terrorism* of 1999 and *the Convention Against Transnational Organized Crime* with one notable exception, that is they made the liability of legal entities dependent upon the discretion of contracting parties. In line with addressing terrorists groups or organizations, the Al-Qaeda Clause is also aimed at linking one or more states to a legal entity whose managers or owners have perpetrated in that capacity, the primary offence envisaged in the instruments.

Professor Magliveras further commented on the objective of inclusion of the “Al Qaeda Clause” in both the Beijing Convention and the Beijing Protocol as follows:

²⁹⁰ Article 4(2) of the Beijing Convention and Article IV 2bis (2) of the Beijing Protocol.

²⁹¹ Article 4(3) of the Beijing Convention and Article IV 2bis (3) of the Beijing Protocol.

*“The insertion of the Al Qaeda clause in the Beijing Convention and the Beijing Protocol is an attempt to cover a gap as regards the possible liability of legal entities in the commission of offences against the safety and the security of civil aviation”.*²⁹²

As per the clause itself, the Professor identifies four crucial issues which are definition of the term “legal entity”; the question of double jeopardy; the link between the legal entity held liable and its managers; and the nature of both the liability and sanctions.²⁹³

(j) The Military Exclusion Clause

One of the most common and controversial aspects to both 2010 Beijing legal instruments concerned the “Military Exclusion Clause” where the majority of States agreed to a provision in both treaties that activities of armed forces during an armed conflict should be excluded from the scope of the new regime. It means that, there can be no prosecution under the new Beijing treaties for what would otherwise constitute an offence against civil aviation, if done by armed forces during an armed conflict.

It is considered that the “Military exclusion clauses” may create practical problems, especially in cases where a civil aircraft is used for military related purposes.²⁹⁴ For example, the use of a bomb against a civil airliner by military forces during an armed conflict could not be prosecuted under the Beijing Convention²⁹⁵ It means that the

²⁹² K.D. Magliveras” *The New Regime in Aviation Security Law and the Al-Qaeda Clause*, published in International Enforcement Report, 27, Issue 3, March, 2011, pp. 597,598.

²⁹³ Ibid.

²⁹⁴ See Article 6(2), Beijing Convention.

²⁹⁵ Art 6 of Beijing Convention.

treaties contain a now – standard provision, originating with the 1997 Convention on the Suppression of Terrorist Bombings which states that the Convention does not govern the activities of armed forces during an armed conflict or the activities of military forces of a state in the exercise of their official duties.²⁹⁶

In short, the military exclusion clause clearly blurs the general international law principle of distinction between combatants and non-combatants in *jus in bello*. The clause in the long run may create practical problem, especially in cases where civil aviation aircraft is used for military or related purposes.

4.4.2 Features of the Beijing Convention

(a) Scope of application

Just like its predecessor, the Beijing Convention applies to offences involving aircraft. Air navigation facilities and airports servicing international civil aviation.²⁹⁷ With regard to the offences committed from an aircraft in flight, against or with an aircraft in services, the legal instrument applies to a different scenarios as follows:

- (i) It applies when the aircraft's actual or intended place of takeoff or landing is in a state other than the state of registry of the aircraft. The word actual captures a situation in which the aircraft is forced to divert from its route, landing in most cases in a place other than its original destination²⁹⁸.

²⁹⁶ Article 6 (2), Beijing Convention.

²⁹⁷ See Articles 1 and 2 of the Beijing Convention.

²⁹⁸ Art. 5 of the Beijing Convention.

- (ii) It applies where the offence takes place in the territory of a state other than the aircraft's state of registry. In this two scenarios, it is immaterial whether the aircraft in question is engaged in an international or domestic operation to the extent the aircraft involved is diverted and forced to land in a state other than its state of registry. The Convention also applies where the alleged offender is found in a state other the aircraft's state of registry.
- (iii) With regard to the offence such as damaging or destroying air navigation facilities, the Convention applies to the extent that such facilities are used for international air navigation. Given that these facilities are in most cases used interchangeably for domestic and international operations, an entirely domestic, terrorist attack against, for instance, an air traffic control centre, where all offenders and victims are nationals of the state in whose territory the act took place, may very well trigger the application of the instrument.²⁹⁹ However, the Convention is silent as to the scope of application of offences against airport facilities or persons located in such facilities and just like the Airport Protocol, the Beijing Convention does not provide a definition of an airport serving international aviation.³⁰⁰
- (iv) The Convention also applies to domestic flights where the operator "dry leases" the aircraft. In this situation the aircraft is, in most cases, registered in other state

²⁹⁹ See Art.le 5 of the Beijing Convention.

³⁰⁰ See Arts.1 &2 of the Beijing Convention.

and here, both the state where the offence was committed and the state of registration of the aircraft have jurisdiction.³⁰¹

(b) Creation of New Principal Offences

The Beijing Diplomatic Conference incorporated several new principal offences in the Beijing Convention which include the use of an aircraft as a weapon of mass destruction, the release of BCN weapon, the transport offences and hijacking by coercion or technological means:³⁰²

(i) Use of Civil Aircraft as a Weapon

The most novel aspect of the Beijing Convention is the creation of a new criminal offence of using an aircraft in service for purpose of causing death, seriously body injury or seriously damage to property or the environment³⁰³. Whereas the Beijing Protocol's changes to the Hague Convention were relatively modest, the Diplomatic Conference took a significantly more assertive and ambitious approach to amend the underlying Montreal Convention of 1971 and the Airport Protocol of 1988 specifically by responding directly to the September 11 attacks by criminalizing the use of a civil aircraft as a weapon for causing death, serious bodily injury or serious damage to property or the environment under the 2010 Beijing Convention.³⁰⁴ This new offence is very obvious response to the factual scenario that rose on 9/11 but it also addresses

³⁰¹ A dry lease involve a leasing arrangement where the lessor provides the aircraft and the lessee is in charge of securing the crew to operate it. The lessee is responsible for making the necessary arrangement to secure the crew.

³⁰² Art.2 Beijing Convention.

³⁰³ See article 1(1) (f) of the Beijing Convention.

³⁰⁴ Article 1(1) of the Beijing Convention.

the fact that a terrorist's use of a weapon of mass destruction contravenes the spirit of the Chicago Convention³⁰⁵.

In other words, under the new Convention, using an aircraft as a weapon is now a specific offence and this covers conduct such as flying aircraft into a building as occurred in the September 11 attack.³⁰⁶ The most interesting feature of this offence is that it has included environmental and property damages such as buildings³⁰⁷ that could be caused by such an unlawful acts.

(ii) Biological (BCN) Weapons

The second offence under the 2010 Beijing Convention is the releasing or discharging from a civil aircraft any Biological, Chemical or Nuclear (BCN)³⁰⁸ weapons or explosives, radio actives or similar substances in a manner that is likely to cause death, serious injury, or serious damage to property or the environment.³⁰⁹

While BCN weapons were apparently not directly implicated in the September 11 attacks, the negotiations of the Beijing Convention took the opportunity to include these offences in the new instrument to create a legal framework for international cooperation on the issue. It is worth noting that, this offence as included in the new

³⁰⁵ See articles 3 & 4 of the 1944 Chicago Convention.

³⁰⁶ Article. 1 (1)(f) of the Beijing Convention.

³⁰⁷ The use of aircraft to destroy public buildings and infrastructure would probably have been considered an offence under the relevant definitions of terrorist acts under the Terrorist Bombings Convention. However, the Beijing Convention, negotiated under the framework of the International Civil Aviation Organization, makes this offence clear and explicit

³⁰⁸ Articles 1 (a)(g) and 2(h) of the Beijing convention

³⁰⁹ Articles 2 (e) of the Beijing convention

Beijing Convention provides, *inter alia*, a response to bioterrorism³¹⁰, which is a new and emerging threat to civil aviation.

(iii) Use of Dangerous Items on Board Civil Aircraft

The other new offence created under the Beijing Convention is similar to the second, but specifically criminalizes the use of the same dangerous items against or on board a civil aircraft. In this scenario, the target is the actual aircraft and the persons on board, rather than anything outside the aircraft. This is a situation that has occurred with some frequency over the recent years.³¹¹

(iv) Transportation of Dangerous Materials

The 2010 Beijing Convention further criminalizes the transport of dangerous materials, such as explosive or radioactive material, a biological, chemical or nuclear (BCN) weapon or source or special fissionable material if a state can demonstrate specific mental elements in relation to the transport of each type of dangerous material. However, in addition to demonstrating that the transport of dangerous materials was done illegally and intentionally, each of the four subsections of this new transport offence requires an additional showing of specific knowledge or intent.

A major development is the inclusion of a provision of criminalizing the transport of dangerous materials- such as explosive or radioactive materials, a BCN weapon or source or special fissionable material- if proof is shown of specific mental elements in

³¹⁰ A bioterrorism attack is a deliberate release of viruses, or other germs (agents) used to illness or death in people, animals or plants

³¹¹ Anahad O'Connor & Eric Smith, Terror Attempt Seen as Man Tries to Ignite Device on Jet, N.Y Times, Dec.25, 2009, available at <http://www.nytimes.com/2009/12/26/us/26plane.hotmail> (discussing the attempted bombing of Northwest Airlines Flight 253 on 25th December, 2009)

relation to the transport of each type of dangerous material. For example, an individual may be liable for transporting explosive or radioactive materials only if the person transported the material knowing they were intended to be used for a terrorist purpose or if the person transported source or special fissionable material knowing that they will be used in a nuclear explosive activity.³¹²

These requirements restrict scope of the offences to cover only transport connected with illicit proliferation or terrorism. The changes also preserve the rights of states parties to the NPT, ensuring state officials are not prosecuted for transporting nuclear materials as permitted by the NPT. For those not party to NPT, the offence will apply, except that transport of source or special fissionable material is permitted if done pursuant to a safeguards agreement concluded with the international Atomic Energy Agency.³¹³

(v) Violence on Board an Aircraft in- Flight

Under the 2010 Beijing Convention, it is an offence for any person to perform an unlawfully and intentionally act of violence against any person on board an aircraft in flight if that act of violence is likely to endanger the safety of that aircraft³¹⁴. In other words for this offence to be proved it must be committed by a person on board an aircraft, the aircraft must be in-flight and the act perpetrated must endanger the safety of the aircraft.³¹⁵

³¹² Ibid.

³¹³ The Beijing Convention, supra note 4 arts.1 (1)(i) and (7).

³¹⁴ Ibid Article 2(b).

³¹⁵ Article 1 (a) of the Beijing Convention and also See the case of *Herman v Trans World Airlines*, 330 NYSD 2nd 829, the Supreme Court in America held that although the aircraft in which the passenger was travelling had been hijacked and had flown to the desert and the passenger was kept in

It means, for the offence under these provisions to be proved to have been committed, three elements must be established; (a) it must be committed by a person on board an aircraft, (b) the aircraft has to be in flight and (c) the act perpetrated should endanger the safety of the aircraft. For the sake of clarity, the aircraft is considered to be in-flight at any time from the moment when all its external doors closed following embarkation until the moment when any such doors are opened for disembarkation. In the case of forced landing, the aircraft is deemed to continue be in-flight until the competent authorities take over the responsibility for the aircraft and for persons and property on board.³¹⁶

(vi) Devices Likely to Endanger or Destroy an Aircraft in Service

The Convention also creates offence against a person who places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance that is likely to destroy that aircraft; or to cause damage to it that is likely to endanger its safety in flight.³¹⁷ According to the Conventions, for the offence to be committed under these provisions, it must relate to the destruction of the aircraft or the damage that renders the aircraft unserviceable or adversely affects the safety of the aircraft.

the aircraft for several days, he was nonetheless considered to have been on board aircraft, irrespective of whether the purpose of the flight had been fulfilled or not.

³¹⁶ The Beijing Convention does not define “ on board “. However, it must be noted that the term “ on board ” has been judicially defined in absolute term to mean that as long as a person is physically in the aircraft, it matters not whether the flight had been terminated or not. See the case of *Herman v Trans World Airline*, 330 NYSD 2nd 829 (Supreme Court 1972), where the Court held that although the aircraft in which the passenger was travelling had been hijacked and had flown to the desert and the passenger was kept in the aircraft for several days, he was nonetheless considered to have been on board, irrespective of whether the purpose of the flight had been fulfilled or not. See also the case of *Pflug v Egyptair*, 961 F 2d, 26 (Second Circuit, 1992).

³¹⁷ Article 1(c) of the Beijing Convention.

Likewise, it is an offence under the Convention when a person destroys an aircraft in service or causes damage to such an aircraft that renders it incapable of flight or that likely to endanger its safety in flight.³¹⁸ Under the Convention an aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing. Furthermore, the period of service will, in any event, extend for the entire period during which the aircraft is in flight.

Here again, the offence must relate to the destruction of the aircraft or the damage that renders the aircraft unserviceable or adversely affects the safety of the aircraft. However it is interesting that the Beijing Convention does not define the words “device” or “substance.”

(vii) Violence act to person at an Airport

Under the 2010 Beijing Convention, it is an offence to perform act of violence against a person at an airport serving international civil aviation³¹⁹. For the offence to be committed, the act must cause or likely to cause serious injury or death or to destroy or seriously damage the facilities of an airport serving civil aviation or aircraft not in service located thereon or disrupt the services of the airport, if such an act endangers or is likely to endanger safety at that airport.³²⁰ This implies that any damage to an airport or its infrastructure, in so far as it does not affect the safety of persons, would not be an offence under this law.

³¹⁸ Article 1(b) of the Beijing Convention.

³¹⁹ Article 1.2 of the Beijing Convention.

³²⁰ Article 1(c) of the Beijing Convention.

(viii) Damaging Air Navigation Facilities

It is an offence under the Beijing Convention when a person destroys or damage air navigation facilities or interferes with their operations, if any such act is likely to endanger the safety of aircraft in flight.³²¹ This undoubtedly refers, *inter alia*, to cyber-terrorism but links the offence exclusively to the safety of aircraft in flight.

However, if as a result of an act of cyber-terrorism a taxing aircraft that has opened its doors for disembarkation but the passengers are still on board awaiting disembarkation, that act would not be considered an offence in terms of the passengers in the process of disembarkation. In other words, the offender would not be committing an offence under the Beijing treaty either against the second aircraft or its disembarking passengers. One aviation expert, Manuela Gull, highlights the danger of cyber-terrorism in the aviation industry by saying:

*“Cyber-terrorism can be used in many ways. In its simplest form, it can be used as a means of disinformation or psychological warfare by manipulating media attention regarding possible threats, thus causing disruption to airport and aircraft operations. In its more serious form, cyber-terrorism could lead to fatalities, injuries and major damage at airport and to aircraft in flight”.*³²²

A famous aviation law expert, Dr. Ruwantissa considers the inclusion of the offence related to cyber-terrorism in the new Beijing Convention as a step forward in the right direction in fighting one of the threats which affect the peace of nations. According to him, the particularity of Cyber-terrorism is that the threats are enhanced by

³²¹ Article 1(d) of the Beijing Convention.

³²² Article by Manuela Guill, “*Cyber-terrorism Posed Newest and Perhaps Elusive Threat to Civil Aviation*”; in ICAO Journal (June 2008) at p. 18.

globalization and the ubiquity of the internet. To him, Cyber-terrorism is a global problem in search of a global solution.³²³

(ix) Communicating False Information

It is an offence under the Convention where a person communicates false information while the person is aware that the information is false, thereby endangering the safety of an aircraft in flight³²⁴. In considering the commission of this offence, the exclusivity of "safety in flight" is very important factor and that this offence rules out message communicated negligently, where the purveyor of the message did not bother to find out the veracity of information he was providing. For instance, if a phony telephone call claims that there would be a bomb on board a flight that would be operated the next day and the air operator cancels that flight incurring an economic loss, there would be no offence committed under these provisions, as the aircraft in question was not in-flight as defined in the Convention.

(x) Releasing BCN From Aircraft

It is also an offence under the 2010 Beijing Convention for a person to release or discharge from an aircraft in service any biological, chemical or nuclear (BCN) weapon or explosive, radioactive, or similar substance in a manner that causes or is likely to cause death, serious bodily injury to property or the environment³²⁵. In other

³²³ Dr. Ruwantissa Abeyratne, "The Beijing Convention of 2010: An Important Milestone in the Annals of Aviation Security" *Air and Space Law* 36 No.3 (2011): 243-255 © 2011 Kluwer Law International BV, The Netherlands.

³²⁴ Article 1(e) of the Beijing Convention.

³²⁵ Article 1(g) of the Beijing Convention.

words, this offence provides, *inter alia*, a response to bioterrorism³²⁶, which is one of new and emerging threats to civil aviation. While some bioterrorism agents such as the small pox virus can be spread from person to person, some agents such as anthrax are incapable of doing it.

(xi) Penalty and Extradition

An interesting provision is contained in Article 3 of the Beijing Convention, which states that each State Party undertakes to make the offences discussed under the treaties punishable by several penalties. With regards to extradition of offenders, the Beijing Convention obligates the States party in the territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities are required to 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.³²⁷

(xii) New and Emerging Aviation Threats

One of the most important distinctive features of the Beijing Convention, which makes it stand out from its predecessors, is that it bases itself on responding to new and emerging threats to aviation security.³²⁸ In its preamble, the Beijing Convention recognizes in *limine* that States parties to it are deeply concerned that unlawful acts against civil aviation may jeopardize the safety and security of persons and property; seriously affect the cooperation of air services, airports, and air navigation; and

³²⁶ Bioterrorism attacks is a deliberate release of viruses, bacteria or other germs used to cause illness or death in people, animal or plants.

³²⁷ See Article 14 of the Beijing Convention and Article 8 of the Beijing Protocol.

³²⁸ Dr. Ruwantissa Abeyratne, "*The Beijing Convention of 2010: An Important Milestone in Annals of Aviation Security*" Air and Space Law 36 No3 (2011) 243-255.)© 2011 Kluwer Law Institute BV, The Netherlands.

undermine the confidence of the peoples of the world in the safe and orderly conduct of civil aviation for all States³²⁹.

4.4.3 Features of the Beijing Protocol

The Beijing Protocol amended the Hague Convention of 1970 and elaborates on the hijacking offence and strengthens the provisions in the several specific but useful ways. In its preamble, the Protocol recognizes that the war against new threats to civil aviation requires concerted efforts and policies of cooperation on different states.

Further that, the Protocol is self explanatory in that it is aimed at updating the international legal framework and improves its effectiveness for better addressing the new and emerging aviation security threats with the objective of suppressing acts of seizure or exercise of control of aircraft.³³⁰ The following are some highlights on the distinctive features of the Protocol:

(a) Expands Scope of Hijacking Offences

The Beijing Protocol significantly expands the scope of hijacking offence to include hijackings that occur pre- or post- flight, as well as a wide variety of ancillary offences, such as attempt to commit the offense, accomplice liability, conspiracy and assistance after the fact.

³²⁹ Ibid.

³³⁰ See the Preambles of both the Beijing Convention and the Beijing Protocol, at p. 1.

(i) Detailed Extradition and Legal Assistance

Whereas the Hague Convention limited the offence to individuals on board the flight, the Beijing Protocol eliminates such a requirement, recognizing that not all persons involved in airplane hijackings will physically board the aircraft. The Protocol further includes more detailed extradition and legal assistance provisions than the underlying Hague Convention, particularly, it provides that a request for extradition or legal assistance may not be denied on the sole ground that it is a political offences or an offence inspired by political motives.³³¹

Further, the Protocol includes a saving clause which permits denial of assistance if requested State has substantially grounds to believe that the request was made to prosecute a person on account of that person's race, religion, nationality, ethnic origin, political or gender.³³²

(b) State Jurisdiction

In terms of jurisdiction, liability is imposed to the State which is party to the Protocol to take measures necessary to establish its jurisdiction over the offences created under the Protocol and any other act of violence against passengers or crew committed by the alleged offender in connection with the offences. However, in order for a State to create such jurisdiction, the offence must be committed in the territory of the State, or on board aircraft registered in that state, or on board aircraft which lands in such a State with the alleged offender still on board.³³³

³³¹ Article 8 bis of the Beijing Protocol.

³³² Article 8 ter of the Beijing Protocol.

³³³ Article 4 (1) (a)-(c) of the Beijing Protocol.

Also under the Protocol, the State jurisdiction may be created when the offence is committed against or on board aircraft leased without crew to a lessee whose principal place of business or if the lessee has no such place of business, whose permanent residence is in that State, or when the offence is committed by a national of the State³³⁴ and a State Party to the Protocol may establish its jurisdiction over any such offence when it is committed against a national of that State or when the offence is committed by a stateless person whose habitual residence is in the territory of that State.³³⁵

Apart from that, each State who is member to the 2010 Beijing Protocol is mandated to establish its jurisdiction when the person, who is alleged to commit the offence, is present in its territory and it does not extradite that person. The Protocol also include a saving clause which permits denial of assistance if the requested State has substantial grounds to believe that the request was made to prosecute a person on account of that person's race, religion, nationality, ethnic, political opinion or gender.³³⁶

Article 19 of the Protocol provides that the Hague Convention and the Montreal Protocol will be read and interpreted together as one single instrument and will be known as "the Hague Convention as amended by the Beijing Protocol, 2010.

(c) Addresses New and Emerging Threats

As results of reviewing the Hague Convention, the Beijing Protocol creates several offences which are also aimed at addressing new and emerging threats to civil aviation as follows:

³³⁴ Article 4 (1) (d) of the Beijing Protocol.

³³⁵ Article 4(2) (a) and (b) of the Beijing Protocol.

³³⁶ Article 8 ter of the Beijing Protocol.

First, it is an offence under the 2010 Beijing Protocol for any person to unlawfully and intentionally seizes or exercises control of an aircraft in service by force or threat, or by coercion, or by other form of intimidation or by any other technological means.³³⁷ According to the protocol, an aircraft is considered to be in service from the beginning of the pre-flight preparation by the ground personnel or by the crew for a specific flight until twenty-four hours after any landing. In the case of forced landing, the flight is deemed to be in service until the competent authorities take over the responsibility for the aircraft and for persons and property on board.³³⁸

Second, under the Beijing Protocol, making threats to commit the above named offence or causing any person to receive such threat, under circumstances which indicate that the threat is credible is also an offence under the Protocol.³³⁹ Also, according to the Protocol, a person is considered to commit an offence under the if he organizes, directs others or organize such aviation threats,³⁴⁰ or such person participate as an accomplice in the commission of an offence set forth on the Protocol.³⁴¹

Third, under the provisions of Article 1(3) (d) of the 2010 Beijing Protocol, it is an offence for any person unlawfully or intentionally assists another person to evade investigation, prosecution or punishment, knowing that the other person has committed an act constitutes an offence set forth in the Protocol.

³³⁷ Article 1 of the Beijing Protocol, 2010.

³³⁸ Article 3 of the Beijing Protocol.

³³⁹ Article 1 (2) (a) and (b) of the Beijing Protocol.

³⁴⁰ Article 1(3)(b) of the Beijing Protocol.

³⁴¹ Article 1(3)(c) of the Beijing Protocol.

Fourth, the Beijing Protocol significantly expands the scope of the hijacking offence to include hijackings that occur prep- or post-flight, as well as a wide variety of ancillary offences, such as attempt to commit the offence, accomplice liability, conspiracy, and assistance after the fact.³⁴²

4.5 Challenges to the Beijing Legal Instruments

From the analysis of the provisions of both the 2010 Beijing Convention and the Protocol, it is obvious that the purpose of ICAO in updating the international air law to address new and emerging threats to civil aviation is somehow achieved. However, after going through the provisions of the two legal documents, reading different materials and discuss with several aviation stakeholders, it is undeniable fact that there are challenges which need to be addressed in as far as the new laws are concerned as follows:

4.5.1 Slow Response in Ratification

The 2010 Beijing Convention and the Protocol were adopted in September, 2010, with the urgency need to addressing new and emerging threats to aviation security. However, to date there is a slow response by ICAO Members States in complying with the pre- conditions for the laws to be operational. This is due to the fact that, each of the Beijing treaties is a stand- alone international legal document and hence Member States are free to ratify one, both or neither of them and that each instrument requires 22 ratification to bring it into force³⁴³. As of August 2013, the treaties have

³⁴² Article 3 (1) of the Beijing Protocol.

³⁴³ ICAO Working Paper, Presented by the Secretariat

been ratified or acceded by eight countries only which Angola, Czech Republic, Cuba, Dominican Republic, Guyana, Mali, Burma and Saint Lucia.³⁴⁴

The above-named situation is a big challenge which prompted the 37th Session of the ICAO Assembly to adopt Resolution A37-23³⁴⁵ which urges all States to sign and ratify the two instruments as soon as possible, and directs the ICAO Secretary General to provide assistance, as appropriate, with the ratification process if so requested by Member State. In the course of implementation, the Secretary General has taken action to organize a number of events to promote the instruments and has prepared administrative packages for ratification.³⁴⁶

4.5.2 Controversial Military Exclusion Clause

One of the most controversial aspects of the ICAO Diplomatic Conference during the adoption of the treaties concerned the issue of military exclusion clause whereby the activities of armed forces during an armed conflict was excluded from the scope of the new legal regime. In other words, under both treaties, there can be no prosecution for what would otherwise constitute an offence against civil aviation, if done by armed forces during an armed conflict. Geogilas is of the view that this clause is clearly blurs the general international law principle of distinction between combatants and non combatants in *jus in bello* and in the long run and in the fullness of time, it may become highly problematic.³⁴⁷

³⁴⁴ See http://en.wikipedia.org/wiki/Beijing_Convention (accessed on 9/10/2013).

³⁴⁵ Promotion of the Beijing Convention and the Beijing Protocol of 2010.

³⁴⁶ Available at <http://www.icao.int/secretariat/legal/Pages/AdministrativePackages.aspx> (accessed on 9/10/2013).

³⁴⁷ Stratis G. Geogilas on “*The Suppression of Illegal Acts in (International) Civil Aviation and the Responsibility of the State: New Development*” 2010 at p. 6.

In fact, the military exclusion clause as it was incorporated in the new legal instruments is likely to create some practical problems during implementation, especially in cases where a civil aircraft is used for military related purposes.

Generally, throughout the negotiation process of the Beijing instruments, there were a number of attempts to introduce significant amendments to the military exclusion clause. Nonetheless, the final wording of the clause remained almost unaltered.

In other words, with the existence of the Military Exclusion clause in the Beijing instruments, the following questions may be exemplify the complexity of the problem at hand:

- (i) Would the destruction of an international airport by armed forces constitute an act of unlawful interference under the Beijing instruments or rather a justified act of self- defense?
- (ii) Is military aggression against civil aviation in times of peace, as opposed to self- defense, captured by the military exclusion clause?
- (iii) Should the activities of armed forces against civil aviation during an armed conflict be recorded as acts of unlawful interference against international civil aviation?

Generally, an examination of previous and recent incidents involving activities of military forces and civil aviation show the urgent need of extending the jurisdiction of the laws to as well cover criminal activities by military forces against civil aviation. For example, in 1973 an Israel fighter aircraft shot down a Libyan civil aircraft that

had lost its course over the occupied Egyptian territory in Sinai, which resulted in 108 fatalities. Likewise, in 1990, Iraq armed forces plundered Kuwait International Airport and later seized and removed to Iraq fifteen aircraft belonging to Kuwait Airways and in 1999, Democratic Republic of Congo (DRC) requested the involvement of ICAO Council after Congolese airlines aircraft was shot down at Kindu Airport, presumably by Rwanda and Burundi military forces.³⁴⁸

Also, in December, 2004 Israel military forces heavily bombarded Gaza International Airport destroying all infrastructures including the air navigation facilities, runways and taxiways. The attack rendered the airport completely inoperative³⁴⁹. In July, 2014 Malaysian airline flight MH-17 was shot down by anti-aircraft missile fired by pro-Russian separatists on Ukraine- Russian border killing all 298 people. Malaysian Government has said that the flight was flying on ICAO approved route.³⁵⁰

Following these criminal acts against civil aviation, it is obvious that ICAO is obliged to address the problem by improving the law to cover such activities of armed forces. The law should aim to make it clear that it does not purport to legitimize acts that otherwise would be unlawful or preclude in any way the possibility of prosecution.

4.5.3 Non applicable to Customs and Police Services

Following the long-standing precedent set by the Chicago Convention, neither the Beijing legal instruments applies to aircraft used in military, customs or police

³⁴⁸ See articles.latimes.com (accessed on 11/9/2014).

³⁴⁹ www.gazaairport.com/history.html (accessed on 11/9/2014).

³⁵⁰ www.rte.ie/news/2014/0717/631440-ukraine-plane-crash (accessed on 10/9/2014).

services. However, in the absence of a definition of these services, one could seek guidance from the Chicago Convention which denies its application to State aircraft and goes on to say that aircraft used for military, customs and police services shall be deemed to be State aircraft.³⁵¹

4.5.3 Lack of Definitions of Key Terms

The 2010 Beijing Convention and the Protocol do not defined some key terms, a situation which may create some problems and confusion when there is need of interoperating them. For example, under the provisions of Article 1(c) of the Beijing Convention, a person commits an offence if he places or cause to be placed on an aircraft in service a *device* or *Substance* that is likely to destroy that aircraft; or to cause damage to it that is likely to endanger safety in flight. Surprisingly, although the two terms are key for one to commit such an offence, it is interesting that the Beijing Convention does not define the words “device” or “substance.

We have see under Article 1(a) of the Beijing Convention that a person is considered to commit an offence if that person 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. It means that, the offender has to be physically within the aircraft and these provisions therefore, does not *ex facie* apply to offence committed outside the aircraft. However, the Convention does not define the term “on board”. It was held in the case of *Herman v Trans World Airline*³⁵² where the Court held that although the aircraft in which passenger was traveling had been hijacked and had

³⁵¹ See Articles 3 (a) and (b) of the Chicago Convention.

³⁵² 330NYSD 2nd 829 (Supreme Court, 1972).

flown to the desert and the passenger was kept in the aircraft for several days, he was nonetheless considered to have been on board, irrespective of whether the purpose of the flight had been fulfilled or not.³⁵³

Also the term “in flight” is not defined under the Convention, but as it is the case for other legal instruments the aircraft may be presumed 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 forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

The next consideration within specific offence is that the act perpetrated should endanger the safety of the aircraft. This seemingly excludes acts of air rage, which, in many instances, only affect the safety of the person against whom the offence is committed. Hence by restricting the offence to the safety of the aircraft in flight, the Convention has ensured that every offence under this provision must essentially endanger the safety of the aircraft in which the offence is committed.

4.5.4 Exclusivity of Safety in Flight

We have seen the Beijing Convention covers an instance where a person commits an offence if he communicates information that the person knows to be false, thereby

³⁵³ See also the case of *Pfug v. Egyptair*, 961 F 2d, 26.

endangering the safety of an aircraft in flight³⁵⁴. This seemingly rule out a message communicated negligently, where the purveyor of the message did not bother to find out the veracity of this provision. For instance, if a phony telephone call claims that would be a bomb on board a flight as defined in the Convention.

This consideration may be particularly relevant in the context of the title of the treaty, which is a “Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation” which obviously does not restrict itself to safety or security issues. Another consideration is that if such a communication were to come just the doors of an arriving aircraft are opened for disembarkation and passengers are injured or killed in a stampede, this provision would not apply.

4.5.5 Lack of Mandatory Requirement

One of interesting provisions is contained in Article 3 of the Beijing Convention, which states that each State party undertakes to make the offences set forth in Article 1 of the Convention punishable by severe penalties. Here the key word is “undertakes”. It is worthy of note that the drafters of the Convention have not used the word “shall” which would have made the requirement peremptory. In regular parlance, “undertake” would mean to agree to be responsible for a job or project and to do it³⁵⁵. Therefore, logically one could argue that Article 3 of the Beijing Convention makes State parties promise that they would make offences under the Convention punishable. On the other hand, the word “shall” would have made the requirement obligatory.

³⁵⁴ Article 1(e) of the Beijing Convention.

³⁵⁵ See MacMillan Dictionary, at www.Macmillandictionary.com/dictionary/American/undertake.

4.6 Conclusion

This chapter outlines the significant features of the 2010 Beijing Convention and Protocol and in comparison with the previous legal regime, critically examined the adequacy and effectiveness of the new laws in addressing aviation security threats. It has been noted under this chapter that, contrary to the previous treaties, the new 2010 Beijing treaties guarantee the range of individuals who can now be brought to justice for their role in civil aviation attacks including those who participate before, during and after such acts. Not only that but also, unlike the previous treaties, the new Convention and Protocol specifically criminalize the act of conspiracy to undertake an attempt against civil aviation and hence introduce the legal concepts of conspiracy in common law countries.

In addition to that, both treaties incorporate a conspiracy which criminalizes the planning of offence in conjunction with others reflecting both the common law and civil law traditions and it designed to allow enforcement officers to apprehend and prosecute offenders before terrorist attacks can be carried out. It is obvious that, if the new Convention and the Protocol which are widely signed, ratified and incorporated into the national laws of member states, they will help in preventing and combating new and emerging aviation threats as new legal instruments among other things, criminalize several of such aviation threats which were not covered by the previous conventions.

CHAPTER FIVE

5.0 CONCLUSION, OBSERVATIONS AND RECOMMENDATIONS

5.1 Overview

The tragic event of 9/11 highlighted some weaknesses in the international air laws on aviation security and were the impetus behind the long term process that led to the adoption of the 2010 Beijing Convention and Protocol. Hence, in order to achieve the objective of the research, this study reviewed the historical background to the international law on aviation security from the 1944 Chicago Convention which created ICAO to the 2010 Beijing Convention and the Protocol.

In so doing the study analyzed the provisions of several international treaties including the 1963 Tokyo Convention, the 1970 Hague Convention, the 1971 Montreal Convention, the 1988 Airport Protocol and the 2010 Beijing Convention and the Protocol. The objective was to see how the laws are adequate and effective in addressing threats to civil aviation.

5.2 Conclusion

From the research conducted, it is obvious that the previous international air law regime though addressed civil aviation security threats, the scope of coverage of the threats did not encompass modern threats and hence prompted the need to fashion and update the laws. In this context, the adoption of the 2010 Beijing legal instruments represents a notable efforts on the part of the international community to address terrorism involving civil aviation. As it was rightly pointed out, “the new Beijing

treaties constitute a valuable contribution of the international legal community to the area of aviation security.”³⁵⁶

Furthermore, with the cheap availability of nuclear, biological and chemical materials (BCN) worldwide, coupled with a few individuals and groups ready to cause death, injury and or damage of catastrophic proportions to man, women, children, property and the environment without regard to race or religion, it became incumbent on the world community to address these threats which reflect not only civil aviation but global peace and security. Many respondents interviewed during the research believe that the new Beijing legal instruments are likely to contribute to achieve that end.

Generally, from the study conducted it may be concluded that the 2010 Beijing legal instruments are more adequate and effective as compared to the previous laws and many aviation stakeholders have wholeheartedly praised the adoption of the new instruments as a landmark achievement in the areas of civil aviation law and security. For example, ICAO’s Secretary General called them a “landmark achievements in the area of civil aviation law and security³⁵⁷ while the Chairman of LC/34 has written that the Beijing instruments will shape the aviation security framework for the rest of the century.³⁵⁸

³⁵⁶See and article by Alejandro Piera and Michael Gill titled: “ *Will the New ICAO-Beijing Instruments Build a Chinese Wall for International Aviation Security?*” Published in Vanderbilt Journal of Transnational Law (Vol.47:145).

³⁵⁷ Raymond Benjamin, Establishing a New Era of Consensus and Action on Global Aviation Security Priorities, 66 ICAO Journal, 1, 3 (2011).

³⁵⁸ See Michael Jennison, The Beijing Treaties of 2010: Building a “Modern Great Wall” Against Aviation Related Terrorism, 23 Air & Space L, 11 (2011).

It was rightly pointed out that, despite their significant in the development of international air laws, the Beijing legal instruments may not by themselves build a Chinese wall for aviation security³⁵⁹ as the effectiveness of such international laws will mainly depend on the collective responsibility and commitment of all states in terms of implementation and compliance. In a way, the instruments, just like the SUA Protocol³⁶⁰, demonstrate the perception that terrorism is an international crime that can only be tackled successfully by concerted international action.

5.3 Observations

It is incontrovertible that, given the innovative terrorist acts perpetrated against civil aviation, the 2010 Beijing Convention and Protocol are proactive and timely initiative of ICAO and international civil aviation community. On that basis, one could assume that whatever the new treaties provide is in response to immediate need of Member States of ICAO. The most important thing observed through this study is that, aviation security primary goal should is not only be to close the gaps and inadequacies in the international legal regime but to prevent acts from happening.

Through the doctrinal research conducted and consultations made to various stakeholders, ³⁶¹ it is obvious that, before the incidents of September 11, aviation

³⁵⁹ See “Will the New ICAO-Beijing Instruments Build a Chinese Wall for International Aviation Security, an Article published in the Vanderbilt Journal of Transnational Law, pp 236.

³⁶⁰ Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Marine Navigation, adopted on 10 March, 1988.

³⁶¹ Several aviation stakeholders both local and international were consulted on the subject. These include staff of Tanzania Airports Authority (TAA), Tanzania Civil Aviation Authority (TCAA), Zanzibar Airports Corporation, Tanzania Government Flight Agency, Swissport, Huston Airport System USA and Dubai Airport, TAV Airport in Turkey etc. Also there are staff and passengers of airlines such as Emirates Airline, Turkish Air, British Airways, Air Malawi, Uganda Air, Kenya Airways, Precision Air, delegates of International conferences on aviation Security such ACI held and

security was not a priority and there was no effective and well-coordinated international legal framework to combat such aviation threats. Further that, the weakness identified include laxity in screening passengers and baggage, poor control of access to secure areas at airports and weakness in protecting air traffic control system and facilities.

It was also observed that, after the 9/11 incident, the international community had implemented additional preventive measures to enhance aviation security, the most important of which is the compulsory screening of all people and items boarding aircraft or entering the airport. Actually, many of the respondents interviewed support the introduction of airport screening which is aimed at ensuring that no item that might be used to endanger an aircraft or passengers or any airside facility has been concealed and ultimately proceed to the aircraft or airside. Other measures include strengthened cockpit doors, increased use of on-board security officers, increased attention to air cargo, and greater attention to airport access and perimeter control. Apart from that, extra security measures such as random screening and security probes were introduced in some airports.

Further, the research observed that, after the introduction of the above named preventive measures, several challenges were identified, as trends of attacks against civil aviation changed rapidly when terrorists decided to be more innovative by using new technologies and new modes of operation. Such new and emerging threats include the use of non-metallic explosives, liquids, aerosols and Gels, cyber terrorism

and suicide bombers. Terrorists also started to use new and very high technology including pen guns and mobile guns.

Further observed that, given the various innovative terrorist acts perpetrated against civil aviation, the adoption of the 2010 Beijing Treaties is a proactive and timely initiative by the international civil aviation community. However, having a good law would not necessarily have prevented such terrorist acts. It could be argued that most, if not all such criminal events are due to lack of effective implementation of the provision of Annex 17 which requires high level of physical protection by searching and screening of passengers and baggage to prevent the introduction of potential weapons on board.

It has been, therefore, observed that, nowadays, aviation security is not simply about stopping dangerous goods or contraband items going on board aircraft or being brought into countries, but it is also about focusing security resources and stopping persons with unlawful intention. It was further noted that, apart from the existence of 2010 Beijing treaties, the adoption of the amendments 12 and 13 of Annex 17 to the Chicago Convention by ICAO in 2011 and 2013 respectively is a very important development in the international legal regime against aviation threats. It is worth noting that, the amendments which became applicable since 1 July, 2011 and 15 July, 2013 respectively update and strengthen aviation security provisions, particularly in relation to staff screening, security equipment capabilities, cyber-threats and air cargo³⁶².

³⁶² See Abyratne, the Beijing Convention of 2010 at 246 describing the convention as a landmark to new and emerging threats to civil aviation

It was further observed through the research that, though the adoption of the two Beijing Treaties are the results of collective efforts on international community to update and modernize the legal framework for aviation security, a good number of people interviewed expressed their concern on the failure of good number of States including Tanzania to sign and ratified the said documents. It has been noted that as of March, 2014, the Beijing Convention had been signed by only 24 States while the Beijing Protocol had been signed by only 26 States³⁶³ out of 191 ICAO member States.³⁶⁴

It is obvious that, efforts by the international community to prevent criminal attacks which are threats to civil aviation have failed and hence more strategies are needed to counter the problem timely. This is due to the fact that, a look at the history of such attacks have virtually never been foreseen by security organs. For example, the aviation security system was caught by surprise when an airliner was attacked on the tarmac by terrorist team firing automatic weapons; when a parcel bomb sent by mail exploded in an airliner's cargo hold in the mid-flight; when a bomb was brought on board by unwitting passenger and when terrorists used aircraft to stage the September 11 attacks. In other words the history of attacks on aviation is the chronicle of a cat-mouse game, where the cat is busy blocking old holes and the mouse always succeeds in finding new ones.

³⁶³ According to Working Paper on "*Promotion of the Beijing Convention and the Beijing Protocol of 2010*" presented on the ICAO Secretariat to the High- Level Conference on Aviation Security (HLCS) held at Montreal Canada on 12th to 14th 2012, the 24 States which as of 12 July, 2012 signed the 2010 Beijing Convention are Brazil, Burkina Faso, Cameroon, Chad, China, Costa Rica, Cyprus, Czech Republic, Dominican Republic, France, Gambia, Indonesia, Mali, Mexico, Nepal, Nigeria, Panama, Paraguay, Republic of Korea, Senegal, Spain, Uganda, United Kingdom, and United States. The Beijing Protocol has been ratified by the above- mentioned States plus India and Zambia

³⁶⁴ [http://www.Sudantribune.com/South-Sudan-becomes-191st member](http://www.Sudantribune.com/South-Sudan-becomes-191st-member)(accessed on 2/02/ 2013).

Importantly, as of 30 September 2014, the treaties are not yet in force and they have been ratified by 9 states only which are Angola, Czech Republic, Cuba, Dominican Republic, Guyana, Kuwait, Mali, Burma, and Saint Lucia. Since it is a conditional precedent that, for the 2010 Beijing treaties to be operative, each must be ratified by at least 22 states, such a poor response by states in ratifying these legal instruments is a big challenge to their implementation.

5.4 Recommendations

From the research conducted, it is obvious that aviation security concerns have constantly been dealt with by reacting to events. For instance, passenger screening came about as a result of aircraft hijacking incidents, passengers and baggage reconciliation was implemented following the Air India Flight 182 bombing, heightened screening measures for passengers and baggage resulted from the attack of September 11, liquid and gels were restricted because of an immediate and urgent threat in August, 2006. It is therefore, recommended that proactive rather than reactive approach is fundamental to effective legal regime on aviation security. This is due to the fact that effective aviation security system should not focus on the “last war” fought rather it needs creativity and continuity to protect against tactics used and to be used by terrorists in the past and in the future.

Obviously, it is imperative to enhance international, regional and sub regional cooperation on terrorism and prevent acts of unlawful interference to civil aviation. To achieve these goals, states should be encouraged to ratify these international treaties. Yet, even if these instruments achieve widespread ratifications, the question mark remains over implementation at the national level. Will the majority of states that

eventually decide to ratify the Beijing instruments adopt implementing legislation? In any event, aside from encouraging ratification, there is a clear need for ICAO to go one step further and develop guidance material to educate states on the need to adopt national implementing legislations.

Further, international and regional cooperation is very crucial in drawing up a workable strategy for combating such criminal acts against civil aviation. It means, in order for the war against aviation security threats to succeed, there must be cooperation by all States in taking the required preventive legal and security measures. In other words, not one state assures security of civil aviation; rather the whole chain of aviation security needs cooperate to prevent terrorists from attacking civil aviation as there would be no meaning for some states investing in security measures if others fail to meet the similar degree of proficiency. Hence, failure of some states to implement such security measures could cause damage to other states with a higher security standards. Further, apart from the need of having international co-operation in preventing and combating unlawful acts to civil aviation, the preventive measures such as airport screening should also target all people who use airports including airports and airline staff as they could be used by terrorists in fulfilling their goals. Also the preventive security measures should always be dynamic and flexible, rather than static and predictable.

Clearly, criminal acts which are threats to civil aviation are now posing great challenges to the international community than ever before. It is therefore recommended that, there is an urgent need to meet the obligation brought about these

acts and to take strong measures to counter potential threats through enacting and amending national legislations to focus on all passengers, cargo and mails which use air transport. Also the laws should put emphasis on having effective airport access control, training of airport security personnel, having modern security screening equipment and adopt better approach of making use of improved technology at airports.

In order to effectively implement the new international legal framework, there is need to further develop the improved contingency measures and plan in the approved Airport Security Program (ASP); thereby meeting the requirement for approval by the appropriate authority for Aviation Security (AVSEC). These contingency measures should be developed basing on the new and emerging threats to civil aviation and as a minimum, the plan should put much emphasis on having modern technology on screening of passengers, baggage, cargo, mail and stores.

Importantly, there is need for aviation stakeholders worldwide to exchange views on the challenges, threats and opportunities in civil aviation securities and to review the mechanisms that strengthen international measures with particular attention to countering terrorist acts against civil aviation, enhancing international aviation security standards and implementing the newly adopted international legal instruments in order to respond more effectively to new and emerging threats.

It is obviously, the objective of the international community is to see the international legal framework fit for purpose, both in dealing with perpetrators and in acting as

deterrent to future instances of criminal acts which are threats to civil aviation. It is therefore, recommended that there should be a continuous updates and reviews of the international legal framework in line with the new technological development in terrorism.

Last, but certainly not least, in order to effectively prevent threats to civil aviation, it is highly recommended that, ICAO activities should be geared toward ensuring that states fully comply with standards related to aviation security and improve their ability to oversee and manage aviation security issues. Similarly, a much higher level of implementation of Annex 17 to the Chicago Convention, ICAO Standards and Recommended Practices (SARPS) and stringent observance of guidance materials such as ICAO Security Manual- is needed. Clearly, from the research conducted, it is obvious that the problem in addressing aviation security threats is not inadequacy or ineffective of the legal regime, but rather failure to implement and comply with the laws and the required standards.

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