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The Suppression of Illegal Acts in (international) Civil Aviation and the Responsibility of the State: New Developments.

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1. Dating back to the 1960s, quite a few international conventions on aviation security have been concluded under the auspices of ICAO. These legal instruments have attracted – almost – universal adherence and acceptance and surely form part of general international law, too. It is suggested that the term "*Unlawful Interference Conventions*" vividly reflects their "code" name. Their main object was to criminalize acts against international civil aviation and facilitate (if not impose) the co-operation between States to make sure that such acts, which by definition hamper aviation security and commercial aviation, do not go un-punished[1].

2. Though utterly successful, the *regime* needed some re-adjustment[2]. To this end, a Diplomatic Conference took place in Beijing from 31 August to 10 September 2010[3] to reform the international law regime on aviation security[4]. The proposed reforms were aimed at updating the existing legal framework and tactfully addressing new and emerging threats to civil aviation. The conference was attended by 71 member States of the ICAO and 4 Observer delegations (including IATA). The issues under discussion were highly

[1] The Rome Convention of 1952 and the Montreal Protocol of 1978 remain outside the ambit of this Paper. A useful and brief overview can be identified in **S. Michaelides – Mateou**, Air Law: A Practical Perspective, Ant. N. Sakkoulas Publ., 2010, 122 – 156 *loc. cit.* Also in **R. Abeyratne**, Aviation Security Law, Springer 2010, 217 – 246, *loc. cit.* More generally, **L. E. Gessel & P. S. Dempsey,** Aviation and the Law, 4th Ed., Coast Aire Publ., 2005, 177 *et seq., loc. cit.*

[2] This was already indicated by **Ed. McWhinney**, Aerial Piracy and International Law, 1971, 17 – 18. Also, **R. Abeyratne,** The Effects of Unlawful Interference with Civil Aviation on World Peace and Social Order, 22 Trans.L.J. (1995) 449, 455 *loc. cit.*

[3] Final Act of the International Conference on Air Law, available at http://www.icao.int/DCAS2010/restr/docs/beijing_final_act_multi.pdf. It was also reported in ASIL, International Law in Brief of 17SEP2011, available at http://www.asil.org/ilib100917.cfm#r1 and by **M. Vermeulen** (18SEP2011), available at http://legalift.wordpress.com/2010/09/18/aviation-security-update/. Also by the Aviation Law Association of Australia & New Zealand, available at http://www.austlii.edu.au/au/journals/ANZAvBf/2010/32.html.

[4] Reviewing the "Montreal Convention" of 1971 and the "Hague Convention" of 1970 has been publicly acknowledged in a series of ICAO meetings for more than three years prior to the Conference.

controversial in and during the preparatory ICAO sessions (the transport of-dangerous-materials working group, the activities-of-armed forces working group and the assistance-to-fugitives working group)[5]. At the conclusion of the conference, ICAO member States adopted two new international instruments[6], namely:

- the Beijing Convention 2010[7] to replace the Montreal Convention 1971 (as amended by the Airports Protocol 1988) on the Suppression of Unlawful Acts Relating to International Civil Aviation and

- the Beijing Protocol 2010[8] to amend the Hague Convention 1970 on the Suppression of Unlawful Seizure of Aircraft.

3. Each treaty is a *stand - alone* international instrument and States are free to ratify one, both or neither of them. In order to enter into force, each instrument will require ratification by 22 States[9].

4. The **Beijing Convention** *creates* the following ***new* principal and specific criminal offences**[10] against international civil aviation, namely:

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[5] **D. van der Toorn**, Insights, ASIL, vol. 15, issue 13, 2010.

[6] *Ibid.* Van der Toorn holds the view that these instruments update the existing regime in light of September 11 terrorist attacks and developments in counter – terrorism law over recent decades. This position clearly echoes the Australian, Malaysian and the U.S. position. See U.S. Department of State press release of September 14, 2010, where it is stated, *inter alia*, that the novel legal machinery "*strengthen[s] the existing international counter terrorism legal framework*" (emphasis added), available at http://www.state.gov/r/pa/prs/ps/2010/09/147110.htm. Also, GA/L/3386 (Sixth Committee).

[7] Available at http://www.icao.int/DCAS2010/restr/docs/beijing_convention_multi.pdf. Also, Briefly Noted, 49 ILM 1476 (2010).

[8] Available at http://www.icao.int/DCAS2010/restr/docs/beijing_protocol_multi.pdf, *ibid.*

[9] 19 States signed the Convention and 22 States signed the Protocol (December 2010). No States have deposited instruments of ratifications yet (December 2010).

- use of an aircraft as a weapon to cause death or injury or damage to property and/or the environment;

- unlawful release of biological, chemical or nuclear weapons (and their related materials) from an aircraft;

- use of biological, chemical or nuclear weapons against or on board an aircraft; and

- transporting or facilitating the transport of certain categories of dangerous goods (and their related materials) for unlawful and illegitimate purposes.

5. The **Beijing Protocol** *extends* the scope of the criminal offence of hijacking[11] of an aircraft to cover situations when this is done by coercion or other forms of intimidation or by any technological means. It also *defines* **in great details the crucial time**.

6. Both instruments create **new ancillary offences,** relating to the commission of principal offences against civil aviation, namely:

- making a credible threat;

- attempts;

- organizing or directing others;

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[10] For the legal management of Aviation Security, **M. Milde**, International Air Law and ICAO, Eleven Publ. 2008, 207, 228 – 239, *loc. cit*.
[11] *Ibid*, 220 – 224, *loc. cit.*

- acting as an accomplice;

- conspiracy[12]; and

- assisting another person to evade criminal investigation or prosecution.

7. Should one proceed to a comparative analysis as per the procedural issues, **jurisdiction for the prosecution** of all such offences was previously granted either to the authorities of the State where an offence was committed or where the aircraft in question was registered or where it landed. Jurisdiction is now *extended* **to include the authorities of the State of which the alleged offender is a national.** This brings aviation security international law in line with the broad bulk of international criminal law provisions[13], for it comprehensibly incorporates a highly recognised principle of general international law.

8. States may **(at their own discretion)** also choose to provide for (additional basis for) jurisdiction to prosecute:

(i) in respect of **offences committed against their own nationals**[14] and

(ii) when the **offence is committed by a stateless person, whose habitual residence is in the territory of the State**[15].

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[12] This ancillary offence may be deemed problematic in respect of legal certainty, for alleged offenders might be apprehended long before an act and/or an omission is carried out.

[13] *Inter alia*, Archibold – International Criminal Courts – Practice, Procedure and Evidence by **K. A. A. Khan & R. Dixon,** Sweet & Maxwell 2009.

[14] In line with "the Relevance of Nationality", masterfully restated by **Ch. Amerasinghe**, Diplomatic Protection, OUP 2008, 81 – 142, *loc. cit.*

9. It was not without a hot debate the **Beijing Protocol** provided for

- the so-called "Al Qaeda Clause" (art. 2 bis)[16];

- a unique authentic definition (in the negative form), of what is not to be perceived as a political offence (art. 8 bis);

- re-assurances that extradition still remains a prerogative of the State (art. 8 ter)[17]; and

- a strict legal obligation to inform targeted States (art. 10 bis)[18].

10. One of the most controversial aspects of the Diplomatic Conference concerned the **Military Exclusion Clause**. The majority of States agreed to a provision in both treaties, whereby **the activities of armed forces during an armed conflict should be excluded from the scope of the new regime**. In other words, there can be no prosecution for what would otherwise constitute an offence against civil aviation, if done by armed forces during an armed conflict.

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[15] Archibold, *op. cit.* This reflects the trend of modern international criminal law, too.

[16] It has been rightly pointed out that the aim of this clause is to link one or more contracting states to a legal entity whose managers and/or owners have perpetrated, in that capacity, the primary offences envisaged in these instruments. **K. D. Magliveras**, The New Regime in Aviation Security Law and the Al-Qaeda Clause, International Enforcement Reporter, 27, Issue 3, March 2011, 597, 598 *loc. cit.* As per the Clause itself, Magliveras identifies four crucial issues, i.e. the definition of the term "legal entity", the question of double jeopardy, the link between the legal entity held liable and its manager and the nature of both liability and sanctions.

[17] In order to counter-balance the worries about the previous definition.

[18] Presumably, the most successful novel international obligation imposed upon the States. The used language leaves no room for any hesitation and/or derogation. It goes without saying that all relevant information must be fully and timely transmitted. Otherwise, issues of international responsibility might arise.

11. This clause clearly blurs the general international law principle of distinction between combatants and not combatants in jus in bello. In the long run and in the fullness of time, it may become highly problematic[19]. One really doubts whether there was any actual need for this provision, given the content of the "old" art. 3 § 2 of the Hague Convention and the "old" art. 4 of the Montreal Convention.

12. However, such was the strength of opposition to the inclusion of this provision from a large number of States that the Conference was forced to vote on the issue, something extremely unusual at ICAO meetings, where most decisions are taken by consensus. As already indicated[20], there were three specific areas of concern in the drafts that were submitted to the Diplomatic Conference, namely (a) the criminalization of the transport of certain categories of dangerous goods; (b) the criminalization of the carriage of fugitives; and (c) the use of commercial aircraft for military purposes.

13. No specific exclusions of criminal liability for airlines were included in the final versions of the new instruments. Indeed, such exclusions would have been unusual and unprecedented in criminal law instruments of this kind. Having said so, it is widely admitted that there is a growing shift in the notion of

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[19] On issues of both accountability and implementation of International Humanitarian Law, *inter alia*, **B. Bowring,** Commentary on Accountability in **N. Quenivet & S. Shah-Davis (Eds),** International Law and Armed Conflict – Challenges in the 21st Century, TMC Asser Press 2010, 115 and **B. Bowring** and **G. Hankel,** Commentary on Implementation of International Humanitarian Law in **N. Quenivet & S. Shah-Davis (Eds),** *id,* 309 & 313, respectively, *loc. cit.*

[20] *Supra* footnote 5.

international responsibility towards "objectivization"[21], notwithstanding the presumption for the international responsibility of the State, which can be rebutted. The underlying philosophy of – mainly European – States may be broadly summarised as follows: should compensation is not derived from the perpetrator, the State ought to bear the ultimate liability[22]. However, a number of States made statements in the course of the Diplomatic Conference to the effect that the intention behind the new instruments was only to enhance the security of civil aviation and that there was no intention to impose additional administrative or regulatory burdens on the aviation industry. Similar statements were also made on this issue during the recently held 37th ICAO Assembly[23].

14. A clear and overall support for the thrust of the new *regime* was obvious. At the same time, the common understanding on the intention behind the new offences ought to be no other than ensuring normal airline operations. Unfortunately, a necessity for an amendment does exist. It has been admitted that the final texts were the product of a diplomatic compromise, a quite common feature of diplomatic negotiations. Even in cases when the treaty *regime* is highly successful and well adhered to, some crucial terms remained "un" or "ill" –

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[21] As suggested by **Al. Pellet**, The Definition of Responsibility in International Law in **J. Crawford, Al. Pellet & S. Olleson (Eds)**, The Law of International Responsibility, OUP 2010, 8 *loc. cit.*

[22] In most cases for the reason it did not employ and exercise all adequate and necessary means to deter and block an illegal act against civil aviation.

[23] A more precise and direct reference to the standard guideline practices, adopted by ICAO, might be extremely useful.

defined, e.g. "*severe penalties*". Future interpretation[24] and relevant state practice may lead the way.

15. In conclusion, new international obligations have been imposed upon States, on both the substantial and procedural level. Notwithstanding some useful clarifications, e.g. as per the crucial time[25] and the obligation to inform the targeted State, along with the new (mandatory and optional) bases of jurisdiction, the same cannot be maintained with regard to the *jus in bello*. The "military exclusion clause" may create practical problems, especially in cases where a civil aircraft is used for military or (directly or indirectly) related purposes. The drafters of the treaties did not fully consider and examine some basic issues of (military) engagement vis-à-vis a civil aircraft[26]. Despite its deficiencies, the novel Beijing air law *regime* rests on a solid ground. In the words of one notable commentator,

> "[...] The Beijing Convention serves international civil aviation well."[27]

Will future state practice cast its eulogy on these instruments?

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[24] For the general issue of interpretation, **Al. Orakhelashvili**, The Interpretation of Acts and Rules in Public International Law, OUP 2008, 301 – 440, *loc. cit.*

[25] Basically, there was a repetition of the so called "in flight" discussion. For the general issue, **M. Milde,** *op. cit.*, 223 *loc. cit*. Additionally, there is indeed the widening of the scope of the criminal offence of air-piracy.

[26] *Inter alia*, issues of criminal liability when ordered to shoot-down a civil aircraft. As per the air-carrier as an "Injured Party", **V. Lowe** in **J. Crawford, Al. Pellet & S. Olleson (Eds)**, *op. cit.*, 1005 *et seq.* On a "counter-measures" approach, **C. Leben,** in **J. Crawford, Al. Pellet & S. Olleson (Eds)**, *id.,* 1197.

[27] **R. Abeyratne,** The Beijing Convention of 2010 on the Suppression of Unlawful Acts relating to International Civil Aviation - An Interpretative Study, 4 J. Transp. Secur. (2011) 131, 143 *loc. cit.*