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Articles

Philippe Kirsch*

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I. Introduction

In February and March 1988, two diplomatic conferences were convened under the auspices of the International Civil Aviation Organization (hereinafter referred to as "ICAO") and the International Maritime Organization (hereinafter referred to as "IMO") respectively, to develop new instruments aimed at preventing and punishing terrorist acts not covered by previous conventions. On 21 February, the ICAO Conference adopted by consensus the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Done at Montreal on 23 September 1971 (hereinafter referred to as "ICAO Protocol"). Forty-seven States signed the Protocol on the day it was opened for signature, or almost two-thirds of those which signed the Final Act.¹ On 9 March, the IMO Conference adopted, also by consensus, the Convention for the Suppression of Unlawful acts Against the Safety of Maritime Navigation (hereinafter referred to as "IMO Convention")² and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms

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1. Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization in February 1988, Montreal, 24 February 1988. As between the parties to the Protocol the Montreal Convention and Protocol are to be read and integrated together as one single instrument. The Protocol simply adds to the Convention a new offence, a consequential ground for jurisdiction, preambular and final clauses. For the rest, the provisions of the Montreal Convention apply. See Report on the International Conference on Air Law held at Montreal from 9 to 24 February 1988, in ICAO Doc. C-WP/8573 of 25 February 1988, para. 3.1. At the time of writing, no final report had been issued on the work of the Conference.

2. IMO Doc. SUA/CONF/15 of 10 March 1988.

Located on the Continental Shelf (hereinafter referred to as “IMO Protocol”)³. The next day, 23 States signed the Convention and all but two land-locked States among them also signed the Protocol.⁴ These were the first anti-terrorist instruments to be adopted since the 1979 International Convention Against the Taking of Hostages.⁵

The ICAO and IMO Conferences were the result of initiatives taken by Canada and by Austria, Egypt and Italy, respectively, following a series of tragic events in late 1985. The best remembered is probably the seizure by four Palestinian terrorists of the Italian liner *Achille Lauro* in international waters off the coast of Egypt on 8 October 1985. In the course of that incident Leon Klinghoffer, an American national, was killed. The terrorists surrendered to a representative of the Palestine Liberation Organization (hereinafter referred to as “PLO”) in Egypt, apparently on the understanding that the PLO would put them on trial. On 10 October, however, United States Navy fighter planes intercepted an Egyptian commercial airliner carrying the terrorists over the high seas and forced it to land in Sicily where they were taken into custody by the Italian authorities.⁶

Two months later, on 27 December 1985, Palestinian terrorists opened fire with machine guns and hand grenades on passengers in front of the El Al ticket counter at Rome’s Fiumicino airport. The Italian police and Israeli security guards answered the terrorists’ fire. In three minutes, 15 people, including three of the terrorists, were killed and 77 wounded. The fourth terrorist was captured. At approximately the same time, at Vienna’s Schwechat airport, three Palestinian terrorists similarly opened fire at passengers checking in for the El Al flight to Tel Aviv. Two passengers were killed and 39 wounded. One terrorist was killed, the others were taken into custody.⁷

3. IMO Doc. SUA/CONF/16/Rev. 1 of 10 March 1988.

4. Final Act of the International Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. SUA/CONF/WP. 2 of 9 March 1988. At the time of writing, no final report had been issued on the work of the Conference.

5. International Convention Against the Taking of Hostages, done at New York, 18 December 1979, entered into force for Canada 3 January 1986, British Treaty Series 1983 No. 81 (hereinafter referred to as “Hostage-Taking Convention”), annexed to United Nations General Assembly (hereinafter referred to as “UNGA”) Res. 34/46, 34 U.N. GAOR, Supp. (No. 46) 245, U.N. Doc. A/34/46 (1979). See Robert Rosenstock “International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism” (1980), 11 Denver Journal of International Law and Policy 169.

6. See Jordan J. Paust, “Extradition and United States Prosecution of the Achille Lauro Hostage Takers: Navigating the Hazards” (1987), 20 Vanderbilt Journal of Transnational Law 235. While particularly spectacular, the Achille Lauro was not an isolated incident. See, e.g., Samuel Pyealt Menefee, “Maritime Terror in Europe and the Mediterranean” (1988), 12 Marine Policy 143.

7. For a fuller discussion of the Rome and Vienna airport attacks and international reaction

These incidents understandably shocked the public. They also demonstrated that the existing network of anti-terrorist instruments was incomplete, since none of those situations was covered. The three conventions previously adopted by ICAO all applied to acts committed on board or against aircraft, not at or against airports. Some of the acts committed in the course of the *Achille Lauro* incident were covered by the Hostage-Taking Convention, but these did not include, for example, the seizure of a ship or the killing of passengers in the course of such an incident.

Existing anti-terrorism instruments provided, however, valuable models.⁸ With the exception of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft⁹, all these instruments are based on the “extradite or prosecute” principle and create international offences with broad grounds for jurisdiction, with some variations. Their common purpose is to eliminate safe havens and thus ensure that the perpetrator of a terrorist act cannot escape punishment by fleeing the country in which the act was committed.¹⁰ In addition, certain analogies were obvious. The Hague Convention for the Suppression of

thereto see *Keesing's Contemporary Archives: Record of World Events* (1986) XXXII pp. 34260-34264. Many more violent incidents have occurred at airports and potentially endangered their safety. See “Complete List of Incidents Summarized from FAA Reports 1973-1985”, ICAO Doc. LC/SC-VIA/WP/3, Addendum, of 17 December 1986.

8. This article refers only to multilateral instruments of potentially universal application. On November 10, 1976 the Committee of Ministers of the Council of Europe adopted the European Convention on the Suppression of Terrorism. (European Treaty Series, No. 90 (1977)). For a study of the convention see, for example, Ghislaine Fraysse-Druessne, “La Convention européenne pour la répression du terrorisme” (1978), 82 *Revue Générale de Droit International Public* 970; Mark B. Baker, “The Western European Legal Responses to Terrorism” (1987), XIII *Brooklyn Journal of International Law* 1; and Tamas Lovassy, “Collective Western Legal Efforts Concerning the Suppression of Terrorism” (1979), 3 *Comparative Law Yearbook* 151. The first concerted efforts at international control of terrorism were made in response to increased terrorist activity following World War I and led to the Convention for the Prevention and Punishment of Terrorism concluded in Geneva under the auspices of the League of Nations on 16 November 1937 (League of Nations Doc. C.546 (1) M.3353 (1). 1937 V.) This convention never came into force. The International Law Commission included a provision on terrorism in its draft Code of Offences against the Peace and Security of Mankind in 1954 but consideration of the draft Code was suspended until 1982 and is unlikely to be completed in the near future.

9. Done 14 September 1963, entered into force for Canada 5 February 1970, Canada Treaty Series (C.T.S.) 1970 No. 5 (hereinafter referred to as “Tokyo Convention”).

10. In addition to anti-terrorist instruments referred to in this article, this principle was applied in the Convention on the Protection of Nuclear Materials, done 3 March 1980, entered into force for Canada 21 March 1987, 18 ILM 1419, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done 10 December 1984, entered into force for Canada 24 July 1987, 24 ILM 535 and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done 19 December 1988, U.N. Doc. E/CONF. 82/15 of 19 December 1988.

the Unlawful Seizure of Aircraft¹¹ and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation¹² both applied to situations that were comparable to those in which a ship might find itself. The offences against aircraft described in the Montreal Convention could be adapted, to some extent, to offences against airports. Even the Tokyo Convention included provisions that could usefully be drawn upon, for example those relating to the power of the aircraft commander to disembark an offender, and the related obligations of the State concerned.¹³

The preparatory work for the conferences was remarkably efficient in comparison to previous exercises of this kind. In September 1986, Canada formally presented its proposal at the 26th Assembly of ICAO together with a resolution which was unanimously adopted, calling for the development of a new legal instrument for the suppression of unlawful acts of violence at airports serving international civil aviation.¹⁴ A report prepared by a Rapporteur on the subject was considered in January 1987 by a special sub-committee of the ICAO Legal Committee, which prepared the text of a draft instrument.¹⁵ The ICAO Legal Committee reviewed this text in April-May 1987 and prepared a substantially revised draft instrument, which was submitted to the Montreal Conference and adopted.¹⁶

The IMO process followed a similar path. Immediately after the *Achille Lauro* incident, at the suggestion of Austria, Egypt and Italy, the United Nations General Assembly requested the IMO to study the

11. Done 16 December 1970, entered into force for Canada 24 July 1972, C.T.S. 1972 No. 23 (hereinafter referred to as "Hague Convention").

12. Done 23 September 1971, entered into force for Canada 26 January 1973, C.T.S. 1973 No. 6 (hereinafter referred to as "Montreal Convention").

13. Tokyo Convention, articles 8-9 and 12-15. Comparable provisions were included in the IMO Convention, article 8.

14. See the proposal by Canada and other States for the development of a new instrument for the suppression of unlawful acts of violence at airports serving international civil aviation in ICAO Doc. A26-WP/41 EX/9 of 14 July 1986, reproduced as Appendix A to ICAO Doc. LC/SC-VIA-WP/1 of 25 November 1986, and ICAO Assembly resolution A26-4 of 8 October 1986.

15. Report of the Rapporteur on the subject of development of an instrument for the suppression of unlawful acts of violence at airports serving international civil aviation, ICAO Doc. LC/SC-VIA-WP/3, reproduced as Appendix C to ICAO Doc. LC/SC-VIA-REPORT (hereinafter referred to as "Rapporteur Report") and Report of the Sub-Committee on the Development of an Instrument for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Montreal, 20-30 January 1987, ICAO Doc. LC/SC-VIA-REPORT (hereinafter referred to as "Sub-Committee Report").

16. Report on the Work of the Legal Committee during its 26th Session, Montreal, 28 April-13 May 1987, ICAO Doc. 9502-LC/186 (hereinafter referred to as "ICAO Legal Committee Report"). ICAO efforts were welcomed in UNGA resolution 42/159 of 7 December 1987, para. 9.

problem of terrorism about or against ships with a view to making recommendations on appropriate measures.¹⁷ At its 57th session in November 1986, the IMO Council decided to establish an *Ad Hoc* Preparatory Committee with the mandate to prepare, on a priority basis, a convention for the suppression of unlawful acts against the safety of navigation, using as a basis for its work a draft jointly submitted by the above three countries.¹⁸ The *Ad Hoc* Preparatory Committee met twice in 1987 (London, 2-6 March, and Rome, 18-22 May) and prepared a draft convention and a protocol on the safety of fixed platforms.¹⁹ It reported on its work to the IMO Council at its 58th session in June 1987, and submitted the draft instruments to the IMO Legal Committee for comments at an extraordinary session of the Committee in October.²⁰ The next step was the Conference itself, which was held in Rome and adopted the two instruments referred to above.²¹

Essentially, the ICAO Protocol and the IMO Convention and Protocol cover similar acts, when committed unlawfully and intentionally:

- acts of violence against persons;
- acts involving the destruction of property;
- attempts to commit such offences; and
- complicity in the commission of offences.

They also contain a similar qualifier, *i.e.* the act must endanger or be likely to endanger safety: the safety at the airport, the safe navigation of the ship or the safety of the fixed platform. These instruments are also based on the same fundamental principle as their predecessors: the requirement to “extradite or prosecute” an offender.

The purpose of this article is to consider three major aspects of the instruments adopted in Montreal and Rome in the light of previous anti-

17. UNGA Res. 40/61 of 9 December 1985, para. 13.

18. The draft Convention submitted by the three States mentioned is contained in IMO Doc. PCUA 1/3 of 3 February 1987. The Council decision was endorsed by the IMO Assembly at its 15th regular session by resolution A. 633 (15) of 20 November 1987.

19. The decision to prepare a separate protocol on fixed platforms was due to the resistance of certain States to have that subject dealt with in the Convention. *See infra*, text accompanying notes 33 and 34.

20. *Ad Hoc* Preparatory Committee on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Report of the first session, London, 2-6 March 1987, IMO Doc. PCUA 1/4 of 16 March 1987, and Report of the second session, Rome, 18-22 May 1987, IMO Doc. PCUA 2/5 of 2 June 1987, as well as International Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Comments from the Legal Committee of the International Maritime Organization (hereinafter referred to as “IMO Legal Committee Comments”), IMO Doc. SUA/CONF/5 of 26 November 1987. The decision to establish an *ad hoc* committee instead of entrusting the IMO Legal Committee with this task was due to a desire to expedite the process by removing it from routine IMO work. The initiative was welcomed by the UNGA in its resolution 42/159 of 7 December 1987, para. 10.

21. *Supra*, notes 2 and 3 and accompanying text.

terrorist conventions.²² The discussion below will successively deal with the scope of application of the instruments, the main international criminal law issues and the relevant political issues.

II. Scope of Application

The object of the Canadian initiative in ICAO was to extend the “extradite or prosecute” regime already applicable to acts of violence committed against aircraft to unlawful acts of violence at airports, thus complementing the Hague-Montreal system. The object of the initiative taken by Austria, Egypt and Italy in IMO was, on the other hand, to create a comparable regime applicable at sea, where none had previously existed. These two situations will be discussed separately.

1. The Airport as Target

The first question that arose in this context at the ICAO Legal Committee was whether it was necessary to define the expression “airport serving international civil aviation”, which appears in the definition of the offence created by the Protocol. During the lengthy debate over this issue several delegations were of the view that the airports to which the Protocol would apply should be either defined in the Protocol or designated by States to the Secretary-General of ICAO. For other delegations, however, including that of Canada, the expression used was self-explanatory. Whether or not an airport was “serving international civil aviation” at the time an offence was committed was a question of fact that should be left to the courts who would apply the Convention.

As the discussion went on, the difficulties in defining the expression, in the absence of any precedent to rely on, began to emerge more clearly, eventually leading to the conclusion that the primary result of such a definition might well be the creation of restrictions that would unintentionally exclude certain practical situations from the scope of application of the Protocol. The designation of such airports, on the other hand, presented its own problems. It would be difficult to ensure that all

22. Some issues that arose at the Conference will therefore not be discussed here. Among those are the form of the instruments, a number of classical provisions relating to specific rights and obligations of States with respect to the exercise of their jurisdiction and to extradition, settlement of disputes provisions and final clauses. The ICAO Conference also adopted a resolution calling for State cooperation for preventive measures as required or recommended under Annex 17 to the Convention on International Civil Aviation, ICAO action in this area and assistance to States to improve security at their airports. See Final Act, *supra*, note 1. This resolution was based on a Soviet proposal originally contained in ICAO Doc. LC/26-WP/4-5 of 28 April 1987 and submitted to the Conference as a draft article of the Protocol, in ICAO Doc. VIA Doc. No. 26 of 9 February 1988. The Soviet proposal was unacceptable in the form in which it was presented.

States designate all airports that may from time to time serve international civil aviation, let alone keep such designations up to date. Moreover, the power to designate airports would imply the power to withdraw this designation, thus enabling States to modify the scope of application of the Protocol at their discretion.

In the end the Legal Committee decided to dispense with both the definition and the designation of airports serving international civil aviation, by an indicative vote of 31 against, 18 in favour and four abstentions.²³ This decision was not reopened by the Diplomatic Conference, and the Legal Committee text on this aspect was maintained in the final version of the Protocol.²⁴

The conclusion that no definition was required did not, however, solve the more general issue of the scope of application of the Protocol. While the issue of definition was primarily technical, various other questions were raised as to what exactly should be covered at the airport. These questions reflected a basic conflict, in this area as in many others, between those who preferred a broad application of the instrument and those who favoured a more restrictive one. The Rapporteur's draft text submitted to the Sub-Committee would have restricted the application of the instrument to "critical areas" of the airport, *i.e.* those "where measures necessary in relation to the commencement or completion of an international journey by air are carried out."²⁵ This approach was opposed by some members of the Sub-Committee who considered that such an issue should not be separated from the definition of the offence.²⁶ Although mentioned during the Legal Committee's session,²⁷ the restrictive approach was not actively pursued and the Protocol applies to all areas of the airport. It also covers offences that "disrupt the services of the airport" in addition to those that affect its physical facilities.²⁸

23. Neither the ICAO Legal Committee nor the Conference ever had a formal vote. Indicative votes were taken to test the preferences of delegations. Decisions were then taken by consensus, or deferred in case of difficulties until consensus was possible. The same observation applies to the IMO exercise.

24. ICAO Legal Committee Report, *supra* note 16, paras. 4:10-4:14 and 4:39-4:44; Sub-Committee Report, *supra*, note 16, paras. 12-12.4. *See also* the proposals contained in ICAO Docs. LC/26-WP/4-8 of 30 April 1987 (Venezuela) and LC/26-WP/4-10 of 30 April 1987 (Soviet Union).

25. Special Rapporteur Report, *supra*, note 15, at 36 and 43. *See also* Sub-Committee Report, *supra*, note 15, para. 9(h) and the proposal contained in ICAO Doc. LC/SC-VIA-WP/11 of 22 January 1987 (Greece).

26. Sub-Committee Report, *supra*, note 15, paras. 13.2 and 20-21.

27. ICAO Legal Committee Report, *supra*, note 16, para. 4:8.

28. This inclusion and its formulation were the object of a series of indicative votes. *See* ICAO Legal Committee report, *supra*, note 16, paras. 4:34 (1), 4:71 (3), 4:72 and 4:72, and the proposal contained in ICAO Doc. VIA Doc. No. 14 of 1 December 1987 (France).

A different question did, however, arise in the Legal Committee, *i.e.* whether *off-airport facilities* (facilities serving the airport but located outside its perimeter) should be included within the geographical scope of the Protocol. Speaking on the basis of their national experience, several delegations stated that attacks against facilities such as power lines, fuel depots and air traffic control installations that were outside the narrow perimeter of the airport should be covered by the Protocol. Other delegations felt that such an extension was unwarranted and could lead to excesses such as covering downtown ticket offices and shuttle buses. They consequently wanted to restrict the application of the Protocol to the airport proper and let offences against off-airport facilities be dealt with by national law.²⁹

At the Legal Committee this problem was resolved by a solution of "constructive ambiguity": the Protocol would apply to "the facilities of an airport serving international civil aviation". Hence those countries that had unsuccessfully sought an explicit reference to off-airport facilities could argue that, if such facilities were essential to the operation of the airport, they were facilities "of" the airport and consequently covered by the Protocol. While this issue was raised again at the Diplomatic Conference, it was clear that the ambiguous formulation of the Legal Committee was the only one that could maintain the consensus that had been reached. Accordingly, the text remained unchanged.

The last major issue of this kind raised at ICAO was whether "aircraft not in service" located at the airport should be covered. At the Legal Committee, the Soviet delegation drew attention to the fact that the Montreal Convention applied to aircraft "in service", an expression that was described by reference to a period commencing with the preflight preparations of an aircraft and ending 24 hours after landing. The USSR consequently proposed that the Protocol should apply to "aircraft not in service located at the airport."³⁰

Although the argument was made that this inclusion was not within the mandate given by the ICAO Council, which was limited to airports *per se*, when put to an indicative vote the Soviet proposal was supported by 20 delegations against two, with five abstentions, on the understanding that the Diplomatic Conference would examine the implications of the inclusion.³¹ As a result, the scope of application of the ICAO Protocol is

29. ICAO Legal Committee Report, *supra*, note 16, paras. 4.8 and 4.71-4.73. See also proposals contained in ICAO Docs LC/26-WP/4-9 of 30 April 1987 and VIA Doc. No. 13 of 1 December 1987 (Australia).

30. ICAO Legal Committee Report, *supra*, note 16, para. 4:34 (2).

31. ICAO Legal Committee Report, *supra*, note 16, para. 4:71 (2). The implications of this decision related to the grounds of jurisdiction established by the Protocol. See *infra* the text

quite broad, since it applies not only to the airport and its facilities but also to its services, to aircraft not in service and, probably, to facilities located outside the airport if an offence against them endangers safety at the airport itself.³²

2. Fixed Platforms and Moving Ships

The first major issue regarding the scope of the IMO Convention arose as a result of a United States proposal to include offences committed on *fixed platforms*. Although France and certain other States that viewed negatively any attempts to broaden the scope of the Convention opposed this proposal in principle, an alternative suggestion that would have allowed for the *optional* application of the Convention to fixed platforms received some support. In the end, a compromise was accepted that involved the preparation of a separate instrument on fixed platforms that States would have the option of adhering to as long as they were parties to the Convention.³³ The preparation of a Protocol was quietly and competently coordinated by the United States delegation in informal consultations, taking account of the progress made on the Convention in preparing the corresponding provisions of the Protocol. Little public debate therefore took place on specific provisions of the protocol after the decision of principle was taken to deal with fixed platforms.³⁴

The decision to prepare separate instruments in respect of ships and fixed platforms led to the second issue of concern regarding scope of application, *i.e.* the need to avoid gaps in the coverage of these two instruments. A *ship* “was therefore defined as any type of vessel not permanently attached to the seabed. A fixed platform was defined as “an artificial island, installation or structure permanently attached to the seabed”. Although some States (Australia and Malaysia in particular)

accompanying notes 53 and 54. The question also arose informally whether the expression “aircraft not in service” was intended to cover the same aircraft which meet all the criteria for the Montreal Convention to apply except that they are outside the time frame for being classified as “in service”, or any aircraft located at an airport serving international civil aviation except those already covered by the Montreal Convention. However, due to lack of time and the number of issues to be resolved, these problems were not settled and the Legal Committee text once again emerged unchanged.

32. A complete picture of the scope of application of the Protocol also requires, however, consideration of the definition of the offence itself, where certain restrictions were introduced. See *infra*, text accompanying notes 44 to 49.

33. IMO Protocol; *supra*, note 3, first preambular paragraph; IMO Docs. PCUA 1/4 of 16 March 1987, paras. 14 and 22, PCUA 2/2 of 20 March 1987, Annex 2, and PCUA 2/5 of 2 June 1987, paras. 11 and 16-21 and Annex 2.

34. IMO Doc. PCUA 2/5 of 2 June 1987, paras. 150-156. See also the reports of the informal consultations held during the Conference in IMO Docs. SUA/CONF/CW/WP.26 of 4 March 1988, WP.28 of 7 March 1988 and WP.34 of 7 March 1988.

expressed the view that the words “permanently fixed” should be defined, it was ultimately decided that their meaning was well understood and that a definition for purposes of the Convention and Protocol alone would not be helpful.³⁵ This position was not dissimilar to the one taken on the similar issue of the definition of airports at the ICAO Conference.

The definition of the ships to which the Convention would apply itself raised a number of technical difficulties. The main policy issue was to determine what types of State ships would be exempted from the Convention’s scope of application. For present purposes it is sufficient to note, however, that Article 2 now sets out those classes of ships in respect of which the Convention does *not* apply. These include warships and State-owned or operated ships when being used for naval auxiliary, customs or police purposes, as well as ships that have been withdrawn from navigation or laid up. Article 2 is consistent with the provisions of the 1982 United Nations Convention on the Law of the Sea and with generally accepted principles of sovereign immunity.³⁶

Article 4 on the geographic scope of application of the Convention was the subject of considerable discussion during the Preparatory Committee and the Diplomatic Conference. The debate again was between those States that wanted the greatest possible geographic scope of application and those States that were concerned that domestic jurisdiction might be compromised by such an extension of the Convention’s application. The most difficult issue was whether cabotage should be covered, or only navigation beyond the limits of the coastal State’s territorial sea. In addition, Saudi Arabia proposed that the listed offences should be covered if committed in international straits.³⁷

35. IMO Legal Committee Comments, *supra*, note 19, paras. 77-78; IMO Docs. SUA/CONF/7/Rev.1 of 1 March 1988 (Malaysia), SUA/CONF/8 and 9 of 20 January 1988 (Australia), and SUA/CONF/CW/WP.18 of 3 March 1988 (informal consultations).

36. IMO Convention, *supra*, note 2, Articles 1 and 2. IMO Docs. PCUA 1/4 of 16 March 1987, paras. 9-13 and 15-21 and Annex, PCUA 2/5 of 2 June 1987, paras. 14-15 and 22-38, PCUA 1/3/5 of 2 March 1987 (Japan). *See also: State Immunity Act*, S.C. 1980-81-82 Vol. III c.95 of section 7; United Nations Convention on the Law of the Sea done at Montego Bay on December 10, 1982, U.N. Docs. A/CONF.62/122, articles 95, 96 and 236, and Malvina Halberstram, “Terrorism on the High Seas: the Achille Lauro, Piracy and the IMO Convention on Maritime Safety” (1988), 82 *American Journal of International Law* 269.

37. IMO Docs. PCUA 1/4 of 16 March 1987, paras. 36-46 and PCUA 2/5 of 2 June 1987, paras. 39-64. These documents also include a discussion as to whether archipelagic waters should be specifically mentioned. On geographical scope of application see, for example, IMO Docs. PCUA 1/3/3 of 26 February 1987 and SUA/CONF/CW/WP.14 of 3 March 1988 (Saudi Arabia); PCUA 1/3/4 of 26 February 1987 (China); PCUA 1/WP.5 of 2 March 1987 (Soviet Union); PCUA 2/WP.2 of 18 May 1987 (Japan); PCUA 2/WP.4 of 19 May 1987 and SUA/CONF/Corr.2 of 2 March 1988 (France); PCUA 2/WP.8 of 21 May 1987 (Working Group); IMO Legal Committee Comments, *supra* note 20, paras. 49-65; SUA/CONF/8 of 20 January 1988 (Australia); SUA/CONF/CW/WP.4 of 1 March 1988 (Spain); SUA/CONF/CW/WP.23 of 4 March 1988 and WP.32 of 7 March 1988 (informal consultations).

Article 4 is a compromise text. It excludes cabotage that takes place exclusively within the territorial sea of a coastal State. Where a foreign flag ship enters or leaves the territorial sea of a coastal State or is scheduled to do so, however, an offence in respect of such a ship will be caught by the Convention. The Saudi proposal to mention international straits was rejected largely on the grounds that vessels transiting international straits will in almost all cases be caught by the geographic scope of application provision, because ships transiting straits used for international navigation are almost always scheduled to navigate beyond the territorial seas of the States which form the strait.³⁸

The ICAO Protocol and the IMO Convention and Protocol also apply to cases which, although excluded by reason of the geographic scope provision, are nevertheless included because the alleged offender has escaped to and is found in the *territory of a State party* other than the State within whose territory the offence was committed. This provision is also found in previous ICAO instruments.³⁹

III. International Criminal Law Issues

In both the ICAO and IMO instruments, as in their predecessors, the basic elements relating to international criminal law are the following:

- (1) The principal offence is an act of violence against persons. While acts against property are included, the ultimate objective is clearly the safety of persons.
- (2) Certain States must or may establish jurisdiction. The objective is to ensure that in all cases an offender is either prosecuted by the State on the territory of which he is found, or extradited to another State for purposes of prosecution.⁴⁰
- (3) A number of ancillary principles also apply. For example, States must make the offence punishable by serious penalties,⁴¹ and they have a

38. Nevertheless, as a result of this proposal the Final Act of the Conference, *supra*, note 4, contains the following statement: "The Convention will apply in straits used for international navigation, without prejudice to the legal status of the waters forming such straits in accordance with relevant conventions and other rules of international law".

39. IMO Convention, *supra*, note 2, Article 4, para. 2; IMO Protocol, *supra*, note 3, Article 1, para. 2; Montreal Convention, *supra*, note 12, Article 4, para. 3; Hague Convention, *supra*, note 11, Article 3, para. 5.

40. The key provision is to the effect that the State Party in which the alleged offender is found "shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution" (Montreal Convention, *supra*, note 12, Article 7; IMO Convention, *Supra*, note 2, Article 10).

41. Montreal Convention, *supra*, note 12, Article 3, IMO Convention, *supra*, note 2, Article 5.

general obligation to cooperate in connection with the prevention and punishment of offences.⁴²

Despite a number of technical changes — and considerable controversy during the debate on a number of provisions — the ICAO Protocol and the IMO Convention and Protocol follow in most respects the precedents established by previous instruments. In the ICAO case this may be considered self-evident because the Protocol supplements the Montreal Convention and contains few substantive provisions. This observation, however, does not explain why States resorted to similar mechanisms in the IMO exercise, since it was the first time that terrorism had been dealt with in the context of maritime navigation.⁴³ In fact, the adherence to precedents is essentially due to a natural tendency of States to rely on familiar provisions in case of doubt or controversy and also, to a significant extent, to the enormous time pressure that was applied throughout the IMO exercise. However, certain areas common to both the ICAO and the IMO instruments deserve special consideration: the definition of the offence and jurisdiction and extradition issues.

1. Definition of the Offence: Endangering Safety

In both the ICAO and IMO exercises, the definition of the offence was one of the areas where opposing views were most pronounced between those States who wanted international anti-terrorist instruments to apply as broadly as possible (e.g. the USA) and those States that did not want

42. Among the specific obligations common to the ICAO and IMO instruments are the following: the State where the alleged offender is found shall take him into custody, make a preliminary enquiry into the facts, give certain rights to the alleged offender and notify other interested States (Montreal Convention, *supra*, note 12, Article 6, IMO Convention, *supra*, note 2, Article 7); States shall make offences extraditable (Montreal Convention, *supra*, note 12, Article 8, IMO Convention, *supra*, note 2, Article 11), assist one another in connection with criminal proceedings (Montreal Convention, *supra*, note 12, Article 11, IMO Convention, *supra*, note 2, Article 12) and cooperate in the prevention of offences (Montreal Convention, *supra*, note 12, Article 10, IMO Convention, *supra*, note 2, Article 13). A number of changes were, however, made or proposed in respect of these and other classical provisions. The most extensive suggestions were made by the Netherlands, in IMO Doc. PCUA 1/WP.3 of 3 March 1987.

43. It should also be recalled that, even in the ICAO case, a number of States as different as Australia, Niger and the USSR originally favoured the development of a separate convention for the suppression of unlawful acts at airports serving international civil aviation. See ICAO Docs. LC/26-WP/4-5 of 28 April 1987 (USSR), VIA Docs No. 4 of 1 December 1987 (Niger) and 13 of 1 December 1987 (Australia). See also ICAO Legal Committee Report, *supra*, note 16, para. 4:8 and Rapporteur Report, *supra*, note 15, at 28-31. While the motivations of these States for seeking a separate instrument varied, it was clear that for some, notably the USSR, this was a means of moving away from the provisions of the Montreal Convention and in particular from the delicate balance it contains between prosecution and extradition. A separate instrument could conceivably have facilitated acceptance of the Soviet proposal to give a form of priority or preference to the latter over the former.

to be obliged to follow the cumbersome mechanisms imposed by those instruments in cases that were, in their view, unimportant or better dealt with at a purely domestic level for other reasons (e.g. France).

The offence in the ICAO Protocol is based on the elements that were described earlier. It is a serious act of violence against a person or property if that act endangers, or is likely to endanger, safety at the airport.⁴⁴

The definition of the offence was by far the most difficult issue in the development of a new Protocol to the Montreal Convention. This is because ICAO could not effectively rely on previous ICAO anti-terrorist instruments, which all applied to aircraft. Paradoxically, IMO did not have that problem because, for the purpose of defining an unlawful act of violence, an aircraft is closer to a ship than it is to an airport. Another reason may simply be that ICAO had little else to do but to define the offence, most of the other important provisions being included in the Montreal Convention.

The text ultimately adopted by the Conference is identical to that originally adopted by the ICAO Legal Committee. The reason for this restraint was the balance that had been achieved by the Legal Committee, albeit with great difficulty,⁴⁵ between the two opposite concerns referred to above. The Protocol should be broad enough to apply if a serious act of violence against an airport is committed, but it should not be so broad as to cover accidentally an act that is not serious by its nature or consequences or does not justify the exercise of universal jurisdiction. The example most often cited was the murder of a person, committed for private reasons and occurring at an airport — an act of “private violence” over which only the State where it occurred should have jurisdiction. This conflict of views took the form of a long battle over whether a number of qualifications should be attached to the offence or to the scope of application of the Protocol.⁴⁶

44. ICAO Protocol, Article II.

45. There was so little agreement on this point that the Legal Committee refused to follow its chairman's suggestion to establish a drafting committee and that, instead, a working group was established to deal primarily with this issue. The working group made several interim reports to the Committee and, after protracted negotiations, ultimately succeeded in drafting a text that was generally acceptable (ICAO Legal Committee Report, *supra*, note 16, paras. 4:29-4:38 and 4:70-4:74). The working group also drafted a preamble to the draft protocol (ICAO Legal Committee Report, *supra*, note 16, paras. 4:75-80).

46. Rapporteur Report, *supra*, note 15, at 31-34; Sub-Committee Report, *supra*, note 15, paras. 14-18. See also, proposals contained in ICAO Docs. LC/SC/VIA/WP/9 of 22 January 1987 (France); LC/SC-VIA-WP/10 of 22 January 1987 (United Kingdom); LC/26-WP/4-3 of 21 April 1987 (Israel); LC/26-WP/4-4 of 27 April 1987 (Federal Republic of Germany); LC/26-WP/4-6 of 29 April 1987 (Netherlands); LC/26-WP/4-11 of 30 April

In the end a balance was struck by the imposition of a double criterion: (1) the offence must have a serious or potentially serious effect; and (2) it must endanger or be likely to endanger safety at the airport.⁴⁷

While these criteria clearly have a constraining effect, they are much less restrictive than other proposals⁴⁸ and should be seen also in the light of the scope of application of the Protocol, which is quite broad provided the effect of the offence has some connection with the airport.⁴⁹ Also, irrespective of the substantive value of these criteria, they certainly have had the merit of attracting the support of important States such as France and Japan, which otherwise would have been unlikely to join the consensus, let alone become parties to the new instrument.

By contrast, the IMO exercise was relatively simple. IMO borrowed existing offences from the Hague and Montreal Conventions and applied them to maritime navigation and, to some extent, to fixed platforms. The new offences include seizing a ship or a platform or endangering its safety by a variety of means such as an act of violence against a person, destruction of or damage to the ship or the platform, placement of a dangerous device or substance, destruction of maritime navigational facilities and communication of false information.⁵⁰ These offences mirror those in the ICAO instruments that apply to aircraft. When preferences for expansion or restriction clashed, the solution was normally to follow precedent. The only exception was, at the initiative of the United States, the addition of the offence of injuring or killing a person in connection with the commission of any of the other offences.

1987 and VIA Doc. NO. 7 of 1 December 1987 (Peru); VIA Doc. No. 6 of 1 December 1987 (Argentina); VIA Doc. No. 10 of 1 December 1987 (Colombia); VIA Doc. No. 12 of 1 December 1987 (Chile).

47. *Supra*, note 44.

48. For example, it was proposed that, to be covered, the offence should endanger the "safe operation" of the airport, not only its safety in general. *See, eg.*, ICAO Doc. VIA Doc. No. 24 of 4 February 1988 (United Kingdom). Another highly controversial proposal was to include a specific list of means to commit the offences, *eg.* machine gun, bomb, *etc.* *See, eg.* the proposal contained in ICAO Doc. LC/26-WP/4-14 of 1 May 1987 (Japan), and discussion in ICAO Legal Committee Report, *supra*, note 16, paras. 4:45-54. The very broadly worded list eventually retained as a result of this proposal ("any device, substance or weapon") is in practice almost equivalent to the absence of a list.

49. As seen above, it applies to aircraft not in service located at the airport, to all the areas of the airport and not only to "critical areas" as had been suggested, to the services of the airport and, many States would say, also to facilities located outside the airport. *Supra*, text accompanying notes 25 to 32.

50. France tried unsuccessfully to remove the latter two offences from the Convention, on the grounds that they were far less serious when committed against maritime navigation than against civil aviation. For technical reasons these offences do not apply to fixed platforms and are therefore not included in the Protocol (Montreal Convention, *supra*, note 12, Article 1 (1)(d) and (e), IMO Convention, *supra*, note 2, Article 3 (1)(e) and (f)).

This addition was directly related to the assassination of Mr. Klinghoffer on the *Achille Lauro*.⁵¹

2. *Grounds for Jurisdiction: Mostly Classics*

In principle, the grounds for jurisdiction set out in Article 5 of the Montreal Convention apply to the ICAO Protocol. The States that must establish jurisdiction are the State where the offence was committed, the State of registration of the aircraft, the State where the aircraft lands with the offender still on board, the State of the principal place of business or residence of the lessee of the aircraft and the State in whose territory the alleged offender is found.⁵² At the ICAO Legal Committee, however, only the State of the commission of the offence and the State where the offender is found were initially deemed to be relevant in practice to an offence committed at an airport. For this reason Article III of the Protocol, which deals with the obligation of a State to establish jurisdiction if it does not extradite the offender, mentions the state of the commission of the offence (*i.e.* where the airport is located) as the only possibility for extradition, without any mention of aircraft.

The addition of an offence against aircraft not in service located at the airport, however, complicated matters.⁵³ The question arose at the Conference whether the reference in Article III of the Protocol to the State where the offence was committed, for the purpose of extradition, should not be supplemented with a mention of the State of registration of the aircraft and the State where the lessee of an aircraft leased without crew has his principal place of business. This discussion became very complex and somewhat confused, reflecting some ambiguity in the relationship between Article 5 on jurisdiction and Article 8 on extradition of the Montreal Convention as supplemented by the Protocol. It also raised various concerns, *e.g.* whether such an amendment would give new life to a Soviet proposal seeking preference for the State of the commission of the offence in case of extradition.⁵⁴ Consultations on this issue failed and, eventually, the existing provision was deemed acceptable, as evidenced by a positive indicative vote of 79 delegations

51. IMO Convention, *supra*, note 2, Article 3 (1)(g); IMO Protocol, *supra*, note 3, Article 2 (1)(e); *see* Halberstram *supra*, note 36, at 293. Many proposals were, however, submitted with respect to the extent of and qualifications to the offence. *See* IMO Docs. PCUA 1/4 of 16 March 1987, paras. 22-35; PCUA 2/5 of 2 June 1987, paras. 65-82; SUA/CONF/10 of 20 January 1988 (Australia); and SUA/CONF/CW/WP.1 of 1 March 1988 (New Zealand).

52. ICAO Protocol, Article III; Montreal Convention, *supra*, Note 12, Article 5. ICAO Legal Committee Report, *supra*, note 16, paras. 4:58-60.

53. *Supra*, text accompanying notes 30 to 32.

54. *Infra*, text accompanying note 57.

out of 81. This outcome was strongly influenced by a general understanding as to the effect of the provision. According to this understanding, the fact that the State where the offence was committed was the only one mentioned in Article III for the purpose of extradition did not prevent the State where the alleged offender was found to extradite him to another State requesting extradition provided the latter had established jurisdiction. In other words, the paramount objective was to ensure that the alleged offender would be treated in accordance with the Convention, and not simply set free.⁵⁵ While somewhat at odds with the text of the article, this understanding was quite clear among all delegations who intervened both in informal consultations and in plenary debates.

The IMO Convention and, *mutatis mutandis*, the IMO Protocol, divide grounds for jurisdiction in two categories. The *mandatory* grounds for jurisdiction involve: the State of the flag of the ship; the State in which the offence has been committed; the State of nationality of the offender; and the State in which the alleged offender is found. The *optional* grounds involve: the State of nationality of the victim; the State of residence of a stateless offender; and the State which is compelled to do or to abstain from doing an act. All these grounds come either from the Montreal Convention or the Hostage-Taking Convention. The last ground mentioned was the most controversial since, unlike the offence of hostage-taking as defined in the Hostage-Taking Convention, none of the offences created by the IMO Convention or Protocol necessarily involve a third party being compelled to do or to refrain from doing something. It was nevertheless accepted by a comfortable majority, probably because those circumstances were present in the *Achille Lauro* incident.⁵⁶

55. See the proposal contained in ICAO Doc. VIA Doc. No. 29 of 15 February 1988 (Italy). This understanding will be recorded in the report of the ICAO Conference, *supra*, note 1.

56. IMO Convention, *supra*, note 2, Article 6, IMO Protocol, *supra*, note 3, Article 3; in the latter case the State of the territory is excluded; Hostage-Taking Convention, *supra*, note 5, Article 5. See discussion in IMO Docs PCUA 1/4 of 16 March 1987, paras. 59-70; PCUA 2/5 of 2 June 1987, paras. 83-108. Halberstram, *supra*, note 36, at 295-302. The Draft Drug Trafficking Convention also contains optional grounds, *supra*, note 10, Article 2. See Edward G. Lee, unpublished paper presented to the Annual Meeting of the American Society of International Law, Washington, D.C., 22 April 1988. An additional ground for jurisdiction, loosely based on Article 4 of the Hague and Montreal Conventions, had been proposed by Spain: the State of which the "demise-charterer in possession of the ship" (bareboat charterer) is a national or the State where it has its principal place of business. This proposal was defeated because a majority of States did not accept that a purely commercial/private law connection was a sufficient base upon which to exercise criminal jurisdiction. IMO Doc. PCUA 2/5 of 2 June 1987, paras. 96-101, and IMO Legal Committee Comments, *supra*, note 20, paras. 11-27.

3. Extradition Options: No Priority, Few Constraints

None of the previous multilateral anti-terrorism instruments established any hierarchy among the States to which alleged offenders might be extradited. Yet both in ICAO and IMO certain States, notably the Soviet Union and the Netherlands, proposed that priority be given, respectively, to the State where the airport is located and to the flag State. The objectives pursued by such States, however, appeared to be somewhat different. The Soviet Union seemed primarily interested in ensuring that it would be given priority where a person committed an offence against a Soviet Ship or at a Soviet airport. On the other hand, the Netherlands' position was influenced by a long-standing situation where persons having committed offences against planes or ships have been left on Dutch territory, thus giving the Netherlands all the obligations but none of the evidence connected with the case. As a result, the Netherlands favoured the flag State or the airport State taking primary responsibility for the offenders. In fact, the Netherlands went much further in this direction. In both exercises it proposed in effect that the obligation to establish jurisdiction (in ICAO) or to prosecute (in IMO) should apply only if a request for extradition had been received and denied. Such proposals were irreconcilable with the principle that an offender should be punished in all cases. In ICAO all of them were eventually abandoned. In IMO the only remaining element, at the end of the Conference, was an exhortation in the case of competing extradition requests to "pay due regard to the interest and responsibilities" of the flag State.⁵⁷

Another issue, which proved very controversial at the IMO Conference, was a Kuwaiti proposal, borrowed directly from the Hostage-Taking Convention, that would prohibit extradition if the purpose of the request was to prosecute the alleged offender on account of his race, religion, nationality, ethnic origin or political opinion, *etc.*, or if that person's position might be prejudiced as a result of his or her inability to communicate with the State entitled to grant protection. That provision was somewhat in the nature of a "political offence exception" which, although common to a number of bilateral extradition treaties, did

57. IMO Convention, *supra*, note 2, Article 11(5). The Dutch proposals were reflected in ICAO Docs. LC/26-WP/4-6 of 29 April 1987 (Article 5, paragraph 2) and VIA Doc. No. 11 of 1 December 1987, as well as in IMO Doc. PCUA 1/WP. 3 of 3 March 1987 (Article 7, paragraph 1). The Soviet proposals were reflected in ICAO Doc. LC/26-WP/4-5 of 28 April 1987 (paragraph 2) and in IMO Doc. PCUA 1/WP.11 of 5 March 1987. The discussion of these proposals is reflected in Sub-Committee Report, *supra*, Note 15, paras. 22.1-2; ICAO Legal Committee Report, *supra*, note 16, paras. 4:6-4:63; and IMO Docs. PCUA 1/4 of 16 March 1987, paras. 70-73, and PCUA 2/5 of 2 June 1987, paras. 131-134. *See also* the proposals contained in IMO Docs. PCUA 1/WP.15 of 5 March 1987 (Cameroon) and PCUA 2/WP.1 of 18 May 1987 (China).

not appear in the multilateral anti-terrorist conventions which had followed the 1963 Tokyo Convention. The Eastern Europeans had never liked it, but had, nonetheless, become parties to the Hostage-Taking Convention. The Western States had voted for it in the Hostage-Taking context. In IMO certain States of both groups, including the two superpowers, resisted it. The Arab States found this attitude, particularly the reversal of Western States, incomprehensible and objectionable, and threatened to vote against the whole Convention if some accommodation was not found. Eventually the matter was resolved through another exhortation addressed to the State receiving an extradition request to pay "due regard" to whether the alleged offender's rights to communicate with a representative of the State entitled to grant protection could be implemented in the State making the request.⁵⁸

The general conclusion that can be drawn on the international criminal law issues is that States have proven to be rather conservative when it comes to the creation of new rules. Most proposals that departed significantly from precedents established by previous multilateral instruments were turned down. Even provisions that had been accepted elsewhere but did not follow the mainstream, such as the escape clause contained in article 9(1) of the Hostage-Taking Convention, were rejected or diluted to the point of losing much, if not all, of their practical effect.

IV. Political Issues

"Terrorist" acts often take place in a political context, and are presented as political acts by their perpetrators.⁵⁹ The development of multilateral anti-terrorist instruments has been affected by political discussion since 1972, the year of the inscription of an item on international terrorism on the agenda of the UNGA. The item was inscribed at the initiative of the Secretary-General at the time, Kurt Waldheim, in reaction to the massacre of eleven Israeli athletes at the Munich Olympic Games earlier that year. The original objective of the exercise, which was the adoption of measures against terrorism, was turned around as a result of the strong

58. IMO Convention, *supra*, note 2, Article 11(6). The Kuwaiti proposal was contained in IMO Doc. SUA/CONF/CW/WP.7/Rev. 1 of 3 March 1988. See also Hostage-Taking Convention, *supra*, note 5, Article 9(1). Although the Hostage-Taking Convention was adopted by consensus, a separate vote was requested by the Soviet Union on that provision, which was adopted by 125 to 10 (Socialist States), with 10 abstentions. (See 1979 Sixth Committee; 105th meeting of General Assembly 17 December 1979).

59. For a general study of this subject see *Walter Laqueur, Terrorism* (London: Weidenfeld and Nicolson, 1977). See also, Conor Cruise O'Brien, "Thinking About Terrorism", (June 1986) *The Atlantic Monthly* 62. For the political discussions on the *Achille Lauro* incident, see the debates of the Security Council, UN Docs. S/PV. 2619-2620 of 10 and 17 October 1985.

reaction of Arab States, which perceived the initiative as being directed against the Palestinian cause. They argued that the problem of terrorism could only be resolved if its underlying causes were eradicated. Punitive measures were not enough. The resolution that was adopted in 1972 and resulted in the creation of an *Ad Hoc* Committee on international Terrorism was highly divisive and negatively affected the consideration of the item for many years.⁶⁰

The Terrorism Committee itself was handicapped from the start by the ambiguity and highly political nature of its mandate. After an unsuccessful initial meeting in 1973, it did not meet again until 1977, and then largely as a counterweight to the Hostage-Taking Committee which was perceived as serving Western interests. Progress in both committees was hampered for some time by several political issues including, in addition to the underlying causes of terrorism, its definition,⁶¹ the relationship between terrorism and national liberation movements, State terrorism and responses to terrorism. By 1979, the atmosphere at the United Nations had somewhat improved and the two committees were able to submit their final reports to the UNGA.⁶²

60. The resolution was adopted by a vote of 76 in favour, 36 against and 16 abstentions. The title of the item (which has been retained ever since) reads as follows: "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes". See report of the Sixth Committee, UN Document A/8969 of 16 December 1972 and UNGA Res. 3034 (XXVII) of 18 December 1972. For a summary of events at the 1972 General Assembly, see J.F. Murphy, *The United Nations and the Control of International Violence: A Legal and Political Analysis*, (Totowa, New Jersey: Allanheld, Osmun Pub., 1982) at 181-185.

61. It is partly because of the definitional problem that the approach taken by concerned States has been to identify specific terrorist acts and make them the subject of separate international instruments, rather than to develop one single convention against terrorism as was attempted by the United States in 1972-73 (UN Doc. A/C.6/L.850 of 25 September 1972; Annex A of the first Terrorism Report, *infra*, note 62).

62. The three reports of the *Ad Hoc* Committee on International Terrorism are contained in UN Docs. A/9028 of 1973, A/32/37 of 1977 and A/34/37 of 1979. See also Report of the Sixth Committee, UN Doc. A/34/786 of 8 December 1979 (hereinafter referred to as "Terrorism Reports"). The reports of the *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages (hereinafter referred to as "Hostage-Taking Reports"), are contained in UN Docs. A/32/39 of 1977, A/33/39 of 1978 and A/34/39 of 1979. After 1979, the terrorism item was maintained on the agenda of the General Assembly but no significant development occurred until 1985 when, in a consensus resolution, the UNGA unequivocally condemned terrorism, wherever and by whomever committed. In 1987, however, Syria proposed an international conference to define international terrorism and distinguish it from the struggle of national liberation movements. No decision has yet been taken on this proposal. See UNGA resolutions 40/61 of 9 December 1985 and 42/159 of 7 December 1987. The Syrian proposal was contained in UN Doc. A/42/193 of 17 August 1987. Clearly, despite a more concerted approach on the part of States to the issue of international terrorism, the fundamental problems have not disappeared. See, the Report of the

The ICAO Conference was largely spared by political problems, partly because its mandate was to supplement an existing Convention, partly because there clearly was a strong general desire to achieve success, and partly because ICAO is one of the least political bodies of the United Nations system.⁶³ The situation of the IMO Conference was somewhat different, in that it had to develop entirely new instruments and it suffered side effects of the Gulf War. It therefore had to deal with three of the issues that had traditionally beleaguered the consideration of terrorism in international fora: national liberation movements, state terrorism, and responses to terrorism.

1. Terrorism and National Liberation Movements

The relationship between terrorism and national liberation movements is the political issue that has had the most direct impact on the development of legal instruments relating to terrorism. Basically, Arab and African States have been concerned that the struggle against terrorism should not be used as a justification to deny peoples "their legitimate rights to self-determination and independence"; on the other hand, a number of other States, including Western States, have resisted any suggestion that acts of terrorism might be considered lawful merely because they are committed by members of national liberation movements.⁶⁴

In the development of binding legal instruments, States have attempted to deal with the national liberation movements issue in different ways. Some have proposed provisions to the effect that the treaty in question

International Seminar on the Phenomenon on Terrorism in the Contemporary World and its Impact on Individual Security, Political Stability and International Peace, held in Geneva from 23 to 25 June 1987 under the auspices of the Organization of the Islamic Conference (UN Doc. A/42/564).

63. The only political issue that had any impact on the ICAO Conference was largely unrelated to its mandate. It consisted of mutual accusations by the Republic of Korea (South Korea) and the Democratic People's Republic of Korea (North Korea) that they were responsible for the destruction of Korean Air Flight 858 in November 1987. Many delegations were apprehensive that this issue would have a negative effect on the Conference but the two Koreas were ruled out of order at an early stage and the matter did not arise again. There seemed to be a tacit understanding that the success of the Conference should not be threatened by political issues. This spirit showed, in particular, when the proposal was made to include a reference to "terrorism", first in the definition of the offence, then in the preamble of the Protocol. When it became clear through indicative votes that less than two-thirds of the delegations could accept even this mild proposal, which therefore had a potentially negative effect on the climate of the Conference, its supporters withdrew it during informal consultations. For earlier discussions on this point, see ICAO Legal Committee Report, *supra*, note 16, para. 4:76 (1).

64. See, *eg.*, proposals contained in the first Terrorism Report, *supra*, note 62, Annexes A.1A, 3A and 6 and C.1 and C.3.

does not apply to the struggle of national liberation movements.⁶⁵ This has always been unacceptable because it simply would leave unpunished members of liberation movements who have committed terrorist acts. Another approach has been to reaffirm the legitimacy of the struggle of these movements. This approach was taken many times by the General Assembly, notably in the resolution covering the International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents.⁶⁶ This is dangerous because it leaves unclear whether terrorist acts committed by national liberation movements are covered or not.

In the case of the Hostage-Taking Convention, however, an ingenious formula was developed and found generally acceptable. The Convention refers to the Geneva Conventions and Protocols applicable in time of armed conflict⁶⁷ and says, essentially, that a hostage taker must be

65. See, eg., proposals contained in the first Hostage-Taking Report, *supra*, note 62, Annexes, B, C, D and H.

66. Done at New York, 14 December 1973, entered into force 20 February 1977, C.T.S. 1977 No. 43 (hereinafter referred to as "Protection of Diplomats Convention"), annexed to UNGA resolution 3166 (XXVIII) of 14 December 1973. Paragraph 4 of the resolution reads as follows: ". . .the provisions of the annexed Convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence in accordance with the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and *apartheid*." Paragraph 6 of the same resolution provides that "the present resolution, whose provisions are related to the annexed Convention, shall always be published together with it." (See C.T.S. 1977 No. 43, p. 18). The risk represented by this resolution was clear at the time. The Convention and the resolution were adopted by consensus but some delegations expressed some uneasiness, or felt the need to specify that the resolution should not be interpreted as affecting the legal obligations set out in the Convention itself, or legitimizing the perpetration of any crimes against diplomats and other internationally protected persons. Other statements were more worrying. Algeria said "It naturally follows (from paragraph 4 of the resolution) that Article 7 of (the Convention) loses the absolute character which it had in the 1970 Hague Convention. . . It is (the obligation to prosecute the alleged offender) which is made absolute by the expression "without exception whatsoever" in Article 7, which was intolerable, in the case of certain offences whose direct link with the national liberation struggle has been duly noted and recognized by the national authorities concerned." (General Assembly — 28th Session — Plenary Meetings, p. 28, paras. 288-289). See L.C. Green "The Legalization of Terrorism" (ref.), and Yonah Alexander, David Carlton and Paul Wilkinson, *Terrorism: Theory and Practice* (Boulder: Westview, 1979) at 175, 186.

67. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva, 12 August 1949, entered into force for Canada 14 May 1965, C.T.S. 1965, No. 20; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done at Geneva, 12 August 1949, entered into force for Canada 14 May 1965, C.T.S. 1965, No. 20; Convention Relative to the Treatment of Prisoners of War, done at Geneva, 12 August 1949, entered into force for Canada 14 May 1965, C.T.S. 1965, No. 20; Convention Relative to the Protection of Civilian Persons

prosecuted or extradited in all cases: the only choice is to decide whether this should be done under the Hostage-Taking Convention or the Geneva instruments, depending on whether the incident occurs in peace time or during an armed conflict.⁶⁸

At the IMO Conference, Cuba, which ironically is not a Party to any anti-terrorist convention, proposed a paragraph in the preamble reaffirming, *inter alia*, the legitimacy of the struggle of all peoples under colonial and racist regimes and other forms of alien domination, in particular the struggle of national liberation movements.⁶⁹ The proposal was unacceptable on its face as it had been in the past, and it was not pressed.

Libya sought to take advantage of the approach taken by the Hostage-Taking Convention to propose that the IMO Convention should not apply to offences committed during armed conflicts as defined in the Geneva Conventions and Protocols.⁷⁰ This formula, however, suffered from a major defect, for it did not say that the offender had to be prosecuted or extradited in all cases. The result therefore would have simply been to exempt national liberation movements from the scope of the Convention in time of armed conflict. In addition, participants quickly realized that it would be impossible, for technical reasons, to borrow from the Hostage-Taking Convention and find a formulation that achieved prosecution or extradition in all cases, if the distinction between war and peace was highlighted. Indeed, contrary to hostage-taking, no offence can be found in instruments applicable to armed conflicts that corresponds exactly to the offences set out in the IMO Convention and Protocol, or ensures similar punishment. The Libyan proposal, therefore, was also not pressed.

Algeria, which like Cuba is not a party to any existing anti-terrorism instrument, then made a very skillful proposal, which appeared technical but would have, in effect, given a State that had decided not to extradite an alleged offender the option of not prosecuting him or her for political reasons. However, having made its point, Algeria did not press the

in Time of War, done at Geneva, 12 August 1949, entered into force for Canada 14 May 1965, C.T.S. 1965, No. 20; Protocols (I and II) Additional to the 1949 Geneva Conventions and relating to: The Protection of Victims of International Armed Conflicts and to The Protection of Victims of Non-International Armed Conflicts, done at Geneva, 8 June 1977, 16 ILM 1391. 68. Hostage-Taking Convention, *supra*, note 5, Article 12. *See*, on this point, the Fourth Interim Report of the Committee on International Terrorism, in *Report of the Sixteenth Conference of the International Law Association* (1984); J.F. Murphy, i.e. note 60 at 198-99; and *supra*, A.P. Rubin, "Terrorism and the Laws of War" (1983) 12 D.J.I.L.P. p. 219. *But see also* R.A. Friedlander, "Comment: Unmuzzling the Dogs of War" (1984), 7 *Terrorism: An International Journal* 169.

69. IMO Doc. SUA/CONF/CW/WP. 10 of 2 March 1988.

70. IMO Doc. SUA/CONF/CW/WP. 15/Rev. 1 of 4 March 1988.

proposal, probably in order to avoid creating a major divisive problem in an atmosphere where most, if not all, participating States were clearly striving for consensus and accommodation. Eventually, the only reference to national liberation movements in the IMO Convention, originating in another Algerian proposal, was a recognition in the preamble of the need to progressively eliminate the causes underlying international terrorism.⁷¹

2. State Terrorism: An Ill-Fitting Concept

Another concern of certain States has been that a particularly dangerous form of “terrorism” is that which emerges as an expression and instrument of a State policy of force, aggression, hegemony, interference in internal affairs, *etc.* For obvious reasons other States feel vulnerable in that area and have not accepted the concept of State terrorism. Never having been defined, this concept is also, potentially, extremely broad. It might include, for example, invasion of other States, economic pressure and killing or torture of individuals.⁷² The concept has also evolved over the years. Originally aimed by African and Arab States primarily at South Africa and Israel, it was later applied, by different countries and for very different reasons, to States such as Iran, Libya and Syria (because of alleged involvement in terrorist action) and the United States (because of various military operations including action in retaliation for other States’ involvement in individual terrorism).⁷³

This issue also arose in the context of the IMO exercise. It was difficult for some States to consider the safety of maritime navigation without being influenced by the ongoing Gulf war and other political situations. A proposal was first made by Saudi Arabia, and then by Nicaragua, to

71. IMO Convention, *supra*, note 2, 7th preambular paragraph. This paragraph repeated a paragraph of UNGA Resolution 40/61 of 9 December 1985. The Algerian proposals are contained in IMO Doc. SUA/CONF/CW/WP.13 of 2 March 1988.

72. See the proposals contained in the first Terrorism Report, *supra*, note 62, Annex, proposals A.1, A.5, A.7 and B.II.A, as well as in the first Hostage-Taking Report, *supra*, note 64, Annex G, which reflects the following proposals made by the Libyan Arab Jamahiriya: “For the purpose of this Convention, the term “taking of hostages” is the seizure or detention, not only of a person or persons, but also of masses under colonial, racist or foreign domination, in a way that threatens him or them with death, or severe injury or deprives him or them of their fundamental freedoms”. See also the discussion in the third Terrorism Report, *supra*, note 62, paras. 26-28.

73. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, annexed to UNGA Res. 2625 (XXV) of 24 October 1970, provides that “no State shall assist, foment, finance, incite or tolerate . . . terrorist . . . activities directed towards the violent overthrow of the regime of another State”. This provision, however, is narrow in purpose. It is also doubtful that, even in this form, such a provision could have been adopted by consensus after the 1972 General Assembly. *Supra*, text accompanying note 60.

add governments as potential offenders. It was, however, pointed out that governments could hardly be prosecuted or extradited.⁷⁴ Kuwait then made a different proposal specifying that an offender included a person acting on behalf of a government.⁷⁵ Eventually, the principle that State terrorism was as reprehensible as individual terrorism was implicitly incorporated through a reference in the preamble to the General Assembly resolution that “unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and *by whomever* committed”.⁷⁶

Other proposals were also directly influenced by the Gulf war. For example, as seen earlier, Saudi Arabia, which had suffered attacks in the Strait of Hormuz, proposed that any of the offences that are committed against ships navigating in international straits should be covered.⁷⁷ On the other hand Iran made a proposal for the addition of offences involving the obstruction of or interference with international shipping routes.⁷⁸ Both proposals were eventually abandoned.

3. Responses to Terrorism and International Law

Response to terrorism in this context means in effect the threat or use of force. In 1972, when the terrorism item first arose in the UNGA, this was not an issue. The first instance of an act that triggered this concern was the 1974 Israeli raid on the Entebbe Airport in Kampala, Uganda, to liberate Israeli citizens on board a hijacked plane.⁷⁹ This incident caused the inclusion of “anti-Entebbe” clauses in a 1977 resolution on the safety of international civil aviation in response to the hijacking of a Lufthansa airliner and the murder of its pilot,⁸⁰ and in the Hostage-Taking Convention itself. The latter provision reads as follows:

Nothing in this convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations.⁸¹

74. IMO Docs SUA/CONF/CW/WP. 14 of 3 March 1988 (Saudi Arabia) and WP. 33 of 7 March 1988 (Nicaragua). See also the third Terrorism Report, *supra*, note 62, paras. 26-27.

75. IMO Docs PCUA 2/4 of May 1987 and SUA/CONF/12 of 17 February 1988. See discussion in IMO Doc. PCUA 2/5 of 2 June 1987, paras. 65-68.

76. IMO Convention, *supra*, note 2, 8th preambular paragraph. Emphasis added.

77. IMO Doc. SUA/CONF/CW/WP. 14 of 3 March 1988, Article 3(1)(e). *Supra*, text accompanying notes 37 and 38.

78. IMO Doc. SUA/CONF/CW/WP. 3 of 1 March 1988, Article 3(1).

79. Murphy, *supra*, note 60, at 186-190. See debates of the UN Security Council on the Entebbe incident, S/PV.1939 to 1943, 9 to 14 July 1976, and draft resolutions S/12138 and S/12139 of 12 July 1976.

80. UNGA Res. 32/8 of 3 November 1977, para. 2.

81. Hostage-Taking Convention, *supra*, note 5, Article 14.

The issue was raised in the IMO exercise, which came after the United States raid on Tripoli and Benghazi⁸² and after the US interception of the Egyptian airliner in the *Achille Lauro* case. The Soviet Union made a proposal at the first session of the Preparatory Committee which would have recognized “the necessity of strict compliance with generally recognized principles and rules of international law of any methods of combatting unlawful acts against the safety of maritime navigation and the inadmissibility of the illegal actions of States undertaken under the pretext of combatting such acts”.⁸³ An agreement was eventually reached to retain part of this preambular paragraph but delete the last half on the inadmissibility of illegal actions which sounded accusatory.⁸⁴

V. Conclusions: Success and Prospects

The ICAO and IMO Conferences have clearly been successful in meeting their objectives. The three resulting instruments extend established principles and mechanisms of anti-terrorist conventions to new situations, and represent a further consolidation of these principles, including the “extradite or prosecute” rule, to the effect that there should be no safe haven for terrorists. In relative terms, the conditions surrounding their adoption were also particularly positive. Unlike the Tokyo, Hague and Montreal Conventions, the new instruments were adopted by consensus. Unlike the Conventions on the Protection of Diplomats and on Hostage-Taking, this consensus was reached without any State having to pay a high price, *i.e.* to accept controversial provisions. These factors, and the number of early signatures received, augur well for the acceptability of the new Convention and Protocols and their prospects for the future.

It is indeed remarkable, considering the number and sensitivity of the political issues that were or could have been raised at these two conferences, that all of them could be resolved relatively easily. This observation stands in sharp contrast with events at previous, similar conferences and reflects a significant evolution in the attitude of States towards terrorism since the late seventies.⁸⁵

82. For a discussion see debates of the UN Security Council on US raids on Tripoli and Benghazi, UN Docs. S/PV.2671 to 2683, 31 March to 24 April 1986, and draft resolutions S/17954 of 31 March 1986 and S/18016/Rev. 1 of 21 April 1986.

83. IMO Doc. PCUA 1/WP. 17 of 5 March 1987.

84. IMO Convention, *supra*, note 2, 14th preambular para.

85. The culmination of this positive process was the previously mentioned unanimous adoption of UNGA resolution 40/61 of 9 December 1985 which contained an unequivocal condemnation of terrorism, wherever and by whomever committed (*supra*, note 62). Despite the politically motivated negative votes of Israel and the United States, UNGA resolution 42/159 of 7 December 1987 still reflects the same trend. It is to be hoped that the lack of consensus in 1987 does not signal the beginning of a return to confrontation between

Of course, while the signing of conventions and protocols marks the end of negotiations, it also signals the beginning of an equally important phase in the international law-making process, that of getting States to bind themselves to abide by the obligations they provide. Having been the initiator of the ICAO Protocol and having played a prominent role in the negotiation of the IMO Convention and Protocol, Canada intends to ratify them as soon as possible. To this end, work is currently underway in the Department of Justice to ascertain what legislative changes, particularly with respect to the *Criminal Code*, will be necessary to enable Canada to comply with the provisions of these three instruments. For instance, Canadian criminal jurisdiction does not currently extend to platforms located on the continental shelf, nor is it generally exercised solely on the basis of the nationality of the alleged offender. Similar work is proceeding in a number of countries and the first instruments of ratification should therefore be submitted in the coming months.

This is not to say, however, that efforts to develop similar instruments in the future would necessarily be equally successful. For one, the development of international instruments bearing on such a sensitive subject as terrorism depends on many variables, including the forum,⁸⁶ the actors,⁸⁷ coordination among delegations of the same government⁸⁸ and, of course, largely unpredictable political circumstances.⁸⁹ For

traditional adversaries in this area. Such confrontation would not reflect the current attitude of States towards terrorism but may be difficult to control if the tendency to resort to political escalation — a frequent result of frustrations due to initial uncompromising positions by certain States — is not resisted.

86. In the United Nations system ICAO appears to be less influenced by the Political environment than other fora. The UNGA itself, on the other hand, is where the chances of an important objective being derailed because of unfavourable political circumstances are the highest.

87. For example, the question of restricting extradition in circumstances which might be detrimental to the alleged offender (*supra*, text accompanying note 58) became an important issue at the IMO Conference because its main promoter, the representative of Jordan, happened to be the inventor of Article 9 of the Hostage-Taking Convention. In his absence the matter had not even been raised by Arab States during the work of the *Ad Hoc* Preparatory Committee.

88. The same criminal law issues, unrelated to air law or maritime law, were sometimes settled entirely differently in ICAO and IMO for no other apparent reason than the preferences or persuasive powers of delegations in the particular forum (or of the officials at home issuing instructions). For example, the placement of bombs or other dangerous devices was included as a separate offence by the IMO *Ad Hoc* Preparatory Committee, by a vote of 19 in favour, four against and 15 abstentions, while it was rejected by the working group of the ICAO Legal Committee, by a vote of 7-18-2 (on the grounds that this was only an attempt). Similarly, a "threat" was accepted in IMO as a separate offence by a vote of 30-3-7, but was rejected in ICAO by a vote of 5-18-3. See ICAO Legal Committee Report, *supra*, note 16, para. 4.33 and IMO Doc. PCUA 2/5 of 2 June 1987, para. 78.

89. As indicated earlier, the IMO exercise was influenced by the Gulf War and, more generally, by the long-standing Middle East conflict.

another, it is unclear whether the approach that has prevailed over the last quarter century, consisting of identifying certain acts in a particular context which are characteristic of the terrorist *modus operandi* and making them international crimes, generally without any mention of the words "terrorist" or "terrorism", can still be usefully pursued.⁹⁰ Anti-terrorist instruments dealing with civil aviation, maritime navigation, diplomats, hostages and nuclear materials, have now been successfully concluded. Uncertainties as to what to do next is illustrated by the General Assembly's vaguely worded request to the Universal Postal Union and the World Tourism Organization, to see if there is anything within their field of endeavour that can usefully be done to contribute to the fight against terrorism.⁹¹ Other terrorist acts have not yet been addressed, such as the placing of bombs in public gathering places other than airports, such as train stations, cafés and places of worship. However, it would be difficult to deal with such situations without coming close to negotiating a general anti-terrorism convention, the political acceptability of which remains doubtful.⁹²

The very effectiveness of such multilateral anti-terrorist conventions has also been questioned.⁹³ To understand their impact, however, it is not sufficient or even possible to examine the implementation of each instrument one by one. A longer-term and broader perspective is required. From a criminal law point of view, the situation prevailing before the Tokyo Convention was very difficult in cases of crimes other

90. A notable exception to the practice of not mentioning the words "terrorist" or "terrorism" is the Hostage-Taking Convention, *supra*, note 5, the 5th preambular paragraph of which reads as follows: "Being convinced that it is urgently necessary to develop international cooperation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism". The IMO Convention followed this precedent in its 4th preambular paragraph: "Considering that unlawful acts against the safety of maritime navigation jeopardize the safety of persons and property, seriously affect the operation of maritime services, and undermine the confidence of the peoples of the world in the safety of maritime navigation". As noted previously (*supra*, note 65), delegations at the ICAO Conference decided not to make an explicit reference to terrorism in the Protocol.

91. UNGA resolution 42/159 of 7 December 1987, para 11.

92. Such as the US draft of 1972, *supra*, note 61.

93. The contribution of such instruments is of course limited by the type of procedures they can use (*eg.* the extradite or prosecute principle and optional third-party settlement mechanisms), by the number of parties to the agreement and by the time required for it to enter into force. *See, e.g.*, Kerry Ann Gurovitch, "Legal Obstacles to Combatting International State-Sponsored Terrorism" (1987), 10 *Houston Journal of International Law* 159; John F. Murphy, "Punishing International Terrorists, the Legal Framework for Policy Initiatives" (Totowa, New Jersey: Rowman Allanheld Pub., 1985) at 10-11, and "Multilateralism and Terrorism" (1986), 25 *Columbia Journal of Transnational Law* 34, 43-45; and Franz W. Paasche, "The Use of Force in Combatting Terrorism" (1987), 25 *Columbia Journal of International Law* 377.

than piracy committed outside the territory of a State. Common Law and Civil Law States had different approaches to the exercise of jurisdiction and conditions for extradition varied considerably. The emergence of anti-terrorist conventions contributed to the creation of more uniform approaches to these problems. At the same time, an increasing number of offences have been recognized as justifying the establishment of universal jurisdiction so that safe havens are harder to find. The existing instruments are not perfect but if they are applied in good faith they should achieve their objective. The Hague and Montreal Conventions, in particular, have received exceptionally broad-based support in the international community.

In respect of implementation of, and compliance with, the relevant obligations, what is important is to determine whether offenders are in effect extradited or prosecuted. Domestic legislation coupled with bilateral extradition treaties may well be based on multilateral instruments, or on an international understanding resulting from their negotiation, without these instruments or understandings being specifically invoked, let alone publicized. In any event, the record appears uneven. In a number of cases offenders have been punished, in other cases they have not.⁹⁴ In this area like in many others, international legal rules cannot and should not be expected to provide a final resolution of fundamental political problems. These have to be addressed on their merits. Also, legal rules cannot be seen in isolation from a number of other measures. Active international cooperation (exchange of information, *etc.*) in preventing incidents and punishing offenders, effective domestic legislation, measures to improve physical security at airports and on board ships and aircraft, and diplomatic representations

94. Various methods have been tried to encourage States to comply with their international obligations in this respect. See Geoffrey Levitt, "International Counterterrorism Cooperation: The Summit Seven and Air Terrorism" (1987), 209 *Vanderbilt Journal of International Law* 259; Kenneth W. Abbott, "Economic Sanctions and International Terrorism" (1987), 20 *Vanderbilt Journal of International Law* 289; Murphy *supra*, note 93 at 49-53; Mark E. Fingerman, "Skyjacking and The Bonn Declaration of 1978: Sanctions Applicable to Recalcitrant Nations" (1980), 10 *California Western International Law Journal* 123. Measures of self-help have also been taken to correct offences in progress, and force has been used in retaliation for terrorist acts or in order to bring offenders to justice. Neither approach has so far proven to be particularly effective and the second has raised very serious questions as to its compatibility with existing international law, as well as its wisdom. For a concise summary of legal issues concerning humanitarian intervention and use of force in cases of terrorist acts, see the Report of the Committee on Use of Force in Relations among States, Proceedings and Committee Reports of the American Branch of the International Law Association 1985-86 (ed. Theodore Giuttari — 685 3rd Ave. N.Y., N.Y. 10017) at 199-201. See also Mark B. Baker, "Terrorism and the Inherent Right of Self-Defence" (A Call to Amend Article 51 of the United Nations Charter (1987), 10 *Houston Journal of International Law* 25. Murphy, *supra*, note 93 at 80-88.

when incidents occur, including the use of institutional machinery such as the Security Council, the UNGA and ICAO, are obvious examples. As long as there continue to be coordinated efforts to achieve effective measures against terrorism, and general agreement that it is reprehensible whatever the authors and circumstances, there is reason for hope that the problem can be controlled. The consensus adoption of three new anti-terrorist instruments in Montreal and Rome is encouraging in this regard.