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AIR MARSHALS: THE NEED FOR LEGAL CERTAINTY

P. PAUL FITZGERALD*

I. INTRODUCTION

THERE IS NO doubt that the events of September 11, 2001, were an undeserved and devastating blow to the United States. However, one of the consequences of those attacks has been to inspire, especially on the aviation security side, the rapid adoption of more legislation and regulation.1 In the rush to protect America from further threats, it is not clear whether the strengths and weaknesses of the aviation security system, which has been in place since the 1970s, were properly analyzed.2

Overlooked in the early post-September 11th period was the fact that using commercial aircraft as missiles is not new; previous, similar scenarios were seen in 1977,3 1988,4 and twice in

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1 See infra notes 18–22 and accompanying text.

2 If every U.S. airport had maintained the same security standard as New York's JFK international terminal, the events of September 11th might have been avoided. Between 8:30 a.m. and 9:15 a.m. on September 11, 2001, two 777s, one 767, and one 747-400 departed JFK for London, Tokyo, or Hong Kong. Even though these aircraft were bigger than the planes used in the attack, they were not chosen; security at JFK was much tighter than at airports such as Boston's (BOS).

3 On December 4, 1977, a Malaysian Airlines System 737 operating a domestic flight was hijacked to Singapore. En route the pilots were killed and the autopilot disconnected as the aircraft headed for Singapore. See Aviation Security Network Database, ASN Aircraft Accident Boeing 737-2Hb, http://aviation-safety.net/database/record.php?id=19771204-0 (last visited Apr. 13, 2010); see also Office of Civil Aviation Security, FAA, Aircraft Hijackings and Other Criminal Acts Against Civil Aviation: Statistics and Narrative Reports: Updated: January 1, 1986, at 60 (1986).

4 In April 1988, the hijackers of a Kuwait Airways 747 threatened to fly it “into the Kuwaiti royal palace if their demands were not met.” See Ahmad Al-Khaled, Hezbollah Leader Mugniyah Killed, Kuwait Times, Feb. 14, 2008, available at http://www.kuwaittimes.net/read_news.php?newsid=MTM4NTY5MTEwMA.

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1994. Moreover, in the second of the two events in 1994, Algerian terrorists hijacked an Air France A-300 in an attempt to crash it into the Eiffel Tower, an event which must be considered "an important precursor to the 9/11 attack." Also overlooked was the fact that September 11, 2001, was not the first time that multiple U.S. airliners were hijacked on the same day from the same U.S. airport.

In the frenzy of activity that marked the post-September 11th period, the legislation that created the Transportation Security Administration and dramatically increased the numbers of air marshals was born. The Aviation and Transportation Security Act was introduced a mere ten days after September 11th.

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5 In April 1994, a disgruntled Fed-Ex pilot hijacked a Fed-Ex DC-10, and there is speculation that he wanted to crash it into the Fed-Ex headquarters in Memphis. See Jeffrey C. Price & Jeffrey S. Forrest, Practical Aviation Security: Predicting and Preventing Future Threats 67 (2009).


8 On May 25, 1970, an American Airlines 727 and a Delta Airlines CV-880 were both hijacked from Chicago O'Hare to Havana, Cuba. Office of Civil Aviation Security, supra note 3, at 21–22.


11 30 senators co-sponsored Senator Hollings's Bill, S. 1447, 107th Congress (2001) ("A bill to improve aviation security, and for other purposes."). And fully 30 congressmen joined Representative Don Young when he introduced a similar Bill (H.R. 3150) in the House of Representatives on October 19. H.R. 3150, 107th Cong. (2001). Both bills were "conferenced" into the final Act. In both Houses the legislation passed with substantial majorities. Id.
and was signed by President Bush on November 19, 2001, not even seventy days after the attack.\textsuperscript{12}

Section 105 of the Act gives federal air marshals\textsuperscript{13} responsibility for “air transportation or intrastate air transportation”\textsuperscript{14} with a focus on “nonstop, long-distance flights, such as those targeted on September 11, 2001.”\textsuperscript{15} In doing so, this Act almost completely ignores the fact that successive U.S. governments have deployed air marshals on domestic and international flights since the 1970s.\textsuperscript{16}

Subsequent events, such as the August 10, 2006, plot to explode North American-bound planes in midair\textsuperscript{17} have helped produce a situation where certain countries may require the presence of air marshals on flights flying over their territory,\textsuperscript{18} while countries, especially those with restrictive firearms regulations\textsuperscript{19} may prohibit the entry of armed persons.\textsuperscript{20} This puts ar-

\begin{footnotesize}

\textsuperscript{13} In the United States, the ability of air marshals to fly armed in the course of their duties is covered by 14 C.F.R. §108.219(a)(2)(vi) (2002). This clause predates Sept. 11, 2001. See Air Craft Operator Security; Final Rule, 66 Fed. Reg. 37530, 1, 26 (July 17, 2007) (amending 14 C.F.R. §108.219).

\textsuperscript{14} Aviation and Transportation Security Act §105(a) added §44917(a)(1) to 49 U.S.C. ch. 449. See §105, 115 Stat. 597, 606–07.

\textsuperscript{15} Aviation and Transportation Security Act §105(a) added §44917(b) to 49 U.S.C. ch. 449. See §105, 115 Stat. 597, 607.


\textsuperscript{17} Doug Saunders, On Trial in Britain; Airline Schedules, Liquid Bombs and a Dastardly Plan of Terror: Crown Outlines Case Against Eight Accused of Planning to Down Flights over the Atlantic, Globe & Mail, Apr. 4, 2008, at A14.

\textsuperscript{18} See Dep’t of Homeland Sec., Aviation Emergency Amendment; Law Enforcement Officers on Flights To, From or Overflying the United States, EA 1546-03-10 (Dec. 28, 2003).


articles 1, 2 and 9 of the Chicago Convention into conflict with articles 17–20 of that same Convention.

This article will examine how this situation has evolved and how greater legal stability might be provided in the future. In the interests of brevity, issues surrounding the Secure Flight program, the various layers of aviation security, and whether or not air marshals actually make commercial aviation safer will not be discussed here.

For the purposes of this article, it will be assumed that the airline operating the flight is based in the State of registration and that there is a genuine bond or link between the aircraft operator and the State of registration as per the Nottebohm judgment. It will also be assumed that a State does not deploy air marshals to protect commercial aircraft registered in that State unless the air marshal is deployed on an aircraft of an airline based in that State and deployed on


23 For an overview of the various layers of aviation security, see Jacques Duchesneau, President and Chief Executive Officer of the Canadian Air Transport Security Authority, Remarks to the 72nd Interpol General Assembly Session, Benidorm, Spain (Oct. 1, 2003).


26 Aeroflot Russian International Airlines flies Boeing 767s between the United States and Moscow. See Press Release, Aeroflot, Aeroflot to Switch to Summer Timetable (Mar. 23, 2010), available at http://www.aeroflot.ru/eng/press/default.aspx?ob_no=550&d_no=42016; Aeroflot, Airplanes, http://www.aeroflot.ru/eng/FLIGHTS.aspx?ob_no=460 (last visited Apr. 6, 2010). All of these aircraft are registered in Bermuda, which is a British Overseas Territory within the meaning of the British Overseas Territories Act, 2002 (c.8), and consequently relies on British laws. Explanatory Notes to British Overseas Territory Act 3 (2009); Bermuda Aircraft Register, available at http://home.wanadoo.nl/helicopter/vp/vpb.htm (last visited Apr. 13, 2010). While Bermudan registry is of great comfort for the leaseholders of Aeroflot’s western fleet, it is highly unlikely that Bermuda would ever seek to deploy an air marshal on an Aeroflot flight between Russia and the United States.
a flight originating or terminating\textsuperscript{27} at an airport in that State.

II. EARLY DAYS OF AIR MARSHALS

Prior to 1970, four countries—the United States,\textsuperscript{28} Russia,\textsuperscript{29} Ethiopia,\textsuperscript{30} and Israel\textsuperscript{31}—were known\textsuperscript{32} to have used armed personnel on board aircraft to deter hijackers. Countries such as Ethiopia, with small airlines and major security threats, deployed an air marshal on most of its flights.\textsuperscript{33} The United States had many more airliners, and thus, America’s air marshals

\textsuperscript{27} States also deploy air marshals on Fifth Freedom services flown by their airlines. Fifth Freedom services entail “the right to enplane traffic at one foreign point and deplane it in another foreign point as part of continuous operation also serving the airline’s home land.” Office of Aviation and International Affairs, U.S. DOT, Freedom Rights, http://ostpxweb.dot.gov/aviation/Data/freedoms.htm (last visited Apr. 13, 2010).

\textsuperscript{28} The U.S. Federal Air Marshal Service (FAMS) informally began in the early 1960s as “Sky Marshals” when “President Kennedy ordered the federal government to deploy law enforcement officers to act as security officers on certain flights.” \textit{Price \& Forrest, supra} note 5, at 138; \textit{see also} Karen Feste, Reducing International Terrorism: Negotiation Dynamics in the U.S. Cuba Skyjack Crisis, IACM 2006 Meetings Paper 6 (June 25, 2006). The officers started to be known as “Air Marshals” and become more formally organized in 1968. \textit{See Alexander T. Wells \& Clarence C. Rodrigues, Commercial Aviation Safety} \textit{303} (4th ed. 2004).


\textsuperscript{30} On September 13, 1969, an Ethiopian Airlines flight was hijacked en route from Addis Ababa to Djibouti and “[e]n route an Ethiopian security official shot and wounded one of the hijackers.” \textit{Office of Civil Aviation Security, supra} note 3, at 17.


\textsuperscript{32} There may have been others; these are the countries for which independent confirmation is possible.

\textsuperscript{33} In the 1960s, Ethiopia was facing constant security threats from the Eritrean Liberation Front. Tracey L. Cousin, \textit{Eritrean \& Ethiopian Civil War, in ICE Case Studies} \textit{3} (1997). On December 12, 1969, persons attempting to hijack an Ethiopian Airlines 707 en route from Madrid to Rome were “slain by security guards aboard aircraft.” \textit{Office of Civil Aviation Security, supra} note 3, at 18. This marked the second time in four months that Ethiopian air marshals had foiled an attempted hijacking. \textit{See id.} at 17.
were deployed at the request of either the airline or the FBI. This provided lackluster results; in 1969, the first year of the “Sky Marshal Program,” eighteen four-engined jet aircraft of U.S. airlines were hijacked while operating domestic flights.

A. INITIAL LEGAL FRAMEWORK

A State’s ability to deploy air marshals on aircraft registered in that State is based on article 17 of the Chicago Convention. Article 17 states that “[a]ircraft have the nationality of the State in which they are registered.” Articles 18, 19 and 20 of that Convention amplify this statement by requiring that an aircraft may only be registered in one State at one time allowing contracting States to regulate the registration and transfer of aircraft, and demanding that aircraft involved in international transportation bear “appropriate nationality and registration marks.” Although States are responsible for registering aircraft, the registration must include the country’s call-sign prefix allocated by the International Telecommunication Union. Similarly, the operation of radios, the navigation of the aircraft, and the certification of pilots are done according to the laws of the State of registration.

The idea that aircraft have nationality and are essentially national territory goes back to the earliest day of commercial avi-

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35 At the time, the DC-8, the CV-880, and the 707 were the largest aircraft flying in the United States. The hijackings were: Jan. 2 (Eastern DC-8); Jan. 13 (Delta CV-880); Jan. 19 (Eastern DC-8); Jan. 28 (National DC-8 and Eastern DC-8); Jan. 31 (National DC-8); Feb. 10 (Eastern DC-8); Feb. 25 (Eastern DC-8); Mar. 19 (Delta CV-880); Mar. 25 (Delta DC-8); June 17 (TWA 707); June 22 (Eastern DC-8); June 25 (United DC-8); Sept. 7 (Eastern DC-8); Sept. 10 (Eastern DC-8); Oct. 9 (National DC-8); Oct. 31 (TWA 707); and Dec. 2 (TWA 707). OFFICE OF CIVIL AVIATION SECURITY, supra note 3, at 9–14.

36 Chicago Convention, supra note 21, art. 17.

37 Id. art. 18.

38 Id. art. 19.

39 Id. art. 20. Annex 7 to the Chicago Convention outlines the definitions, location, and measurement of nationality and registration marks. ICAO, ANNEX 7 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION §§ 3, 4 (Nov. 27, 2003).


41 Chicago Convention, supra note 21, arts. 30–32.

42 SAMI SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 109 (1973).
ation,\(^{43}\) and this concept derives, in turn, from maritime law.\(^{44}\) An aircraft without a nationality cannot operate on international routes\(^{45}\) as nationality "makes it possible to identify the State which is responsible for the aircraft's actual operation."\(^{46}\) Further, a long-haul flight may overfly many States, and without nationality it might be impossible to determine jurisdiction for onboard crimes.\(^{47}\) Finally, the nationality of an aircraft determines its eligibility to fly certain domestic routes.\(^{48}\)

As a consequence of aircraft nationality, the laws of the State of registry apply to everything from airworthiness,\(^{49}\) maintenance standards,\(^{50}\) and the licensing of pilots\(^{51}\) and radio opera-

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\(^{44}\) By 1799 Britain had legislation, the Offences at Sea Act, 1799, 39 Geo. III, c. 37, to cover "offences at sea" on board its then-substantial merchant fleet. In Gardiner v. Howe, a U.S. court stated, the jurisdiction of U.S. patent law "extends to the decks of American vessels on the high seas." 9 F. Cas. 1157, 1158 (C.C.D. Mass. 1865) (No. 5,219).


\(^{46}\) Id. at 89.

\(^{47}\) Id. at 96–97. When the Chicago Convention was concluded in 1944, long-haul itineraries operated via en route stops. Today, a non-stop long-haul flight is planned based on wind conditions and may overfly different States on different days.

\(^{48}\) Generally, an aircraft may only fly domestic routes in the State in which it is registered. See PABLO MENDES DE LEON, CABOTAGE IN AIR TRANSPORT REGULATION 23–25 (1992). Thus, U.S. carriers must fly U.S. registered aircraft. See 14 C.F.R. § 121.153(a)(1) (2009). Most States have similar regulations. See, e.g., Canadian Aviation Regulations, SOR/96-433, § 700.05(2)(a) (2009).

\(^{49}\) Chicago Convention, supra note 21, art. 32. See also Chicago Convention Annexes 1, 6, and 8. For the United States, see 14 C.F.R. §§ 121.53, 129.13 (2009). For Canada, see CARS SOR/96-433, s. 700.05(1) (2010). For the United Kingdom, see Air Navigation: The Order and the Regulations, CAP 393 s. 1, pt. 3 (2009).


\(^{51}\) Chicago Convention, supra note 21, art. 32(a).
tors, to on-board births and crimes committed on board. The State of registry is responsible for the oversight of the aircraft in accordance with the provisions of Annexes 1 and 8 to the Chicago Convention, which concern personnel licensing and airworthiness respectively. The regulation of airworthiness is much more than ensuring high maintenance standards; it also includes the approval of new aircraft designs, new versions of current aircraft, and modifications of existing aircraft.

52 See 1961 Convention on the Reduction of Statelessness art. 3, Aug. 30, 1961, 989 U.N.T.S. 175 (No. 14458). It has been ratified by 34 countries and entered into force on December 13, 1975. Id. Various countries around the world confer citizenship upon those born aboard aircraft registered in that state. See Barbara Reukema, Discriminatory Refusal of Carriage in North America 117–24 (1982).

53 In 1963, ICAO observed, “[T]he national laws of some states confer jurisdiction on their own courts to try those people who commit offences on [aircraft registered in their state and operating on an international flight].” See ICAO News Release, Crimes Aboard Aircraft: Subject to ICAO Conference (Aug. 20, 1963).


56 Thus the Civil Aviation Authority of New Zealand needed to grant type approval of the 747-400 in order for Air New Zealand to be able to import and register the aircraft. See Civil Aviation Auth., Type Acceptance Report: Boeing 742-4F6 (N.Z.), http://www.caia.govt.nz/aircraft/Type_Acceptance_Reps/Boeing_747-4F6.pdf (last visited Apr. 1, 2010).

57 The type certificate data sheet for the 747 allows for up to 550 passengers on the main deck of a 747 if the aircraft is equipped with ten floor-level emergency exits but only 440 passengers if the aircraft’s main deck has eight floor-level emergency exits. See Fed. Aviation Admin., FAA Type Certificate, Data Sheet No. A20WE, at 10. The 747 was designed with ten floor-level exits, but long-haul operators rarely carry more than 380 passengers on the main floor. See id. Thus, British Airways, Cathay Pacific, and KLM covered up the over-wing doors on some 747s. Memorandum from KLM to 747-200/300 crews (on file with author). This saved 100 kilograms of weight and allowed four seats to be located in the space previously occupied by each of the two doors. Id.
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B. THE TOKYO CONVENTION

The 1963 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft\(^5\) served to reinforce this position. With respect to international flights,\(^9\) article 3, paragraph 1, declares that the “State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.”\(^6\) More importantly, the Convention requires the State of registration to “take such measures as may be necessary to establish its jurisdiction . . . over offenses committed on board . . . .”\(^6\) This is supported by article 4, which decrees that other States, even the one in whose airspace the offense may have occurred, shall not “interfere with the flight of the aircraft in order to secure jurisdiction, unless the offense directly affects its territory or nationals.”\(^6\)

These articles were put to the test in 1969 when four young terrorists opened fire on and threw grenades at El Al Flight 432, a Boeing 720 departing Zurich for Tel Aviv. Firing at the cockpit, they hit the co-pilot and badly injured a trainee pilot, who later died of his wounds. Their bullets and grenades also killed and wounded several passengers. Mordechai Rachamim, an El Al “security agent,” jumped off the plane and ran towards the attackers, shooting and killing one. The others surrendered to unarmed Swiss firemen.\(^6\)

In this case, all of the terrorist acts were committed on Swiss territory, and a terrorist attack occurring on the tarmac of a major Swiss airport definitely “affected” Swiss territory as per article

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\(^6\) “Although not clear from the wording of the Convention, an act taking place solely on the territory of one State does not substantiate an international offence under the scheme of the Convention.” Ilias Bantekas & Susan Nash, INTERNATIONAL CRIMINAL LAW 23 (2d ed. 2003).


\(^6\) JOYNER, supra note 60, at 136–37.

4. At the same time, some of the “offenses” had occurred on the Israeli jet, and that jet was the clear focus of the terrorist activities. However, the “security agent” was unable to take “proper jurisdiction,” as per article 3, without jumping off the Israeli jet. Thus, he was undisputedly on Swiss soil when he shot the terrorist. The “security guard” and the three terrorists were taken into custody by Swiss authorities. The three terrorists were convicted of “assassination” and sentenced to twelve years in prison. The El Al “security guard” was charged with murder but was acquitted with benefit of the doubt.

This incident highlights the possibility of concurrent and possibly overlapping jurisdiction. However, when crime occurs on an airborne aircraft and the State of registration is showing its willingness to punish the offenders, this should suffice. Indeed, it is difficult to imagine a more definitive display of jurisdiction than a nation putting sky marshals on commercial aircraft registered in that State.

III. THE DAWSON’S FIELD HIJACKINGS

The Dawson’s Field hijackings happened nearly forty years ago, but they had as much of an impact on aviation security as did the events of September 11, 2001. On September 6, 1970, the Popular Front for the Liberation of Palestine (PFLP) tried to simultaneously hijack three New York bound jets—El Al Flight 219, a 707 offering a Tel Aviv–Amsterdam–New York service, TWA Flight 741, a 707 flying non-stop from Frankfurt to

64 See Middle East: Terror in Two Cities, supra note 63. At the very least, the offences became more serious, in the sense that shooting of a bullet outside the aircraft, could have become an assault or murder after the bullet passed through the fuselage.

65 It is believed this was necessary in order to get a clear shot of the attackers. Id.

66 Jean Graven, The Direction and Evolution of the Jury System, in Of Law and Man: Essays in Honor of Haim H. Cohn: Under the Auspices of the Faculty of Law, Tel Aviv University 343, 345 (1971). Indeed, the acquittal was based on conflicting evidence as to whether the hijacker was armed when the security guard shot him. See The Air: Terror on the Ground, Time, Dec. 5, 1969, http://www.time.com/time/magazine/article/0,9171,901643,00.html.


68 Amazingly, at first the hijackings were not alarming. In the first eight months of 1970, some thirteen U.S. airliners had been hijacked from U.S. airports. See Office of Civil Aviation Security, supra note 3, at 19–25.
New York, and Swissair\textsuperscript{69} Flight 100, a DC-8 serving the Zurich–New York route.\textsuperscript{70}

As if to confirm the wisdom of Israel’s air marshal program, the capture of the El Al flight was foiled when Israeli air marshals\textsuperscript{71} killed one of the two hijackers and captured his comrade, Leila Khaled.\textsuperscript{72} Two other potential El Al hijackers had been refused boarding by the El Al captain and the airline’s Amsterdam security chief and station manager.\textsuperscript{73} The two rejected hijackers subsequently boarded and hijacked Pan Am Flight 93, a brand-new\textsuperscript{74} Boeing 747\textsuperscript{75} flying from Brussels to New York via Amsterdam.

All of the hijacked aircraft were to be flown to Dawson’s Field, a former RAF station at Zerqa, Jordan, but the 747 was too big to land there and was flown to Cairo.\textsuperscript{76} The El Al aircraft made an emergency landing in London and handed Leila Khalid over to British authorities. To convince the British to free her, the PFLP hijacked a BOAC Bombay–Bahrain–Beirut VC 10 at Bahrain on September 9, 1970, and also flew this aircraft to Dawson’s Field.\textsuperscript{77} All of the hijacked aircraft were blown up.\textsuperscript{78}

\textsuperscript{69} Swissair was chosen because Swiss authorities had just given twelve-year prison sentences to three Arab terrorists for their attack on El Al Flight 432 in February 1969. Skyjack, Chronology of Aviation Terrorism: 1968-2004, http://www.skyjack.co.il/chronology.htm (last visited Apr. 13, 2010).

\textsuperscript{70} See Office of Civil Aviation Security, supra note 3, at 25.

\textsuperscript{71} Mark Ensalaco, Middle Eastern Terrorism: From Black September to September 11, at 22 (2008).


\textsuperscript{73} See Price & Forrest, supra note 5, at 49. The two rejected terrorists were “Senegal diplomatic-passports holders . . . who bought last minute first class tickets,” raising Israeli suspicions. Thus, El Al put extra air marshals on Flight 219. See Skyjack, supra note 69.

\textsuperscript{74} This aircraft had made its first flight just five months earlier. See Aviation Safety Network Database, ASN Aircraft Accident Boeing 747-121, http://aviation-safety.net/database/record.php?id=19700906-0 (last visited Apr. 3, 2010).

\textsuperscript{75} Unbelievably, this was actually the second hijacking of a Pan Am 747 in 1970. Roughly a month earlier, on August 2, a Pan Am 747 was successfully hijacked to Cuba while operating a flight from New York to San Juan, Puerto Rico. See Office of Civil Aviation Security, supra note 3, at 17.


\textsuperscript{77} See the newly released British Cabinet discussion of these events. Conclusions of a Meeting of the Cabinet Held at 10 Downing Street, S.W. 1 on Wednesday, 9 September 1970 at 10:45 a.m. CAB 128/47, U.K. National Archives,
The nearly 600 hostages were used by PFLP to negotiate the release of prisoners held in Europe.

A. CONSEQUENCE OF THE DAWSON’S FIELD HIJACKINGS

1. The United Nations

On September 9, 1970, the United States, supported by the United Kingdom, requested the U.N. Security Council to call on States to “take all possible legal steps to prevent further hijackings or any other interference with international civil air travel.” On November 25, the U.N. General Assembly passed a resolution condemning hijacking. On December 16, “the ICAO convened an international conference which resulted in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970.” At around the same time, ICAO started the process of developing Annex 17 to the Convention on Civil Aviation to “Safeguard International Civil Aviation Against Acts of Unlawful Interference.”

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76 The destruction of the three aircraft at Dawson’s Field was described as “one event” by Michael Kerr, QC (later Lord Justice Kerr) in the arbitral decision in the Dawson’s Field Award, unreported, March 29, 1972, and relied upon in Kuwait Airways Corp. v. Kuwait Ins. Co., 1 Lloyd’s Rep. 664, 686 (1996).

77 There were 594 hostages; 424 in Jordan from the hijacked TWA, Swissair, and BOAC jets, and another 170 on the Pan Am 747 in Cairo. See Skyjack, supra note 69.

78 Three of the prisoners released from Europe had been arrested by Swiss authorities after attacking El Al Flight 432 at Zurich airport seventeen months prior. Id.


82 Annex 17 was adopted by the ICAO council on March 22, 1974. See Akweenda, Prevention of Unlawful Interference with Aircraft: A Study of Standards and Recommended Practices, 35 Int’l & Comp. L.Q. 436, 436 (1986); see also Maria
2. The Conventions

Like the 1963 Tokyo Convention, the Hague Convention\(^\text{85}\) reiterated the call for the State of registration to "take such measures as may be necessary to its establish its jurisdiction"\(^\text{86}\) over violent acts\(^\text{87}\) against passengers or crew "when the offence is committed on board an aircraft registered in that State."\(^\text{88}\) Both the Tokyo Convention and the Hague Convention confirm the jurisdiction of the State of registration with respect to crimes committed on board. Article 3(1) of the Hague Convention reads:

For the purposes of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.\(^\text{89}\)

The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation\(^\text{90}\) was a second response to the deliberate destruction of four commercial aircraft in-

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\(^{86}\) *Id.* art. 4, ¶ 1.

\(^{87}\) Most nations have implemented this principle in national laws. See 49 U.S.C. § 46506 (2006); Australia's Criminal Code Act 1995, Part 2.7, Division 14; Britain's Civil Aviation Act 1982 (c. 16), s. 108; Canada's Criminal Code, R.S., ch. C-46, sections 7 and 27.1 (2) (2004).

\(^{88}\) *Hague Convention, supra* note 85, art. 4, ¶ 1.

\(^{89}\) *Id.* art. 3, ¶ 1. Article 5, paragraph 2 of the Tokyo Convention contains similar text but it only applies with respect to the Powers of the Aircraft Commander. *Tokyo Convention, supra* note 58, art. 5, ¶ 1–2. The Tokyo Convention's defines "in flight" as from the "moment when power is applied for the purpose of take-off until the moment when the landing run ends." *Id.* art. 1, ¶ 3. The difference in structure is rooted in the fact that the Tokyo Convention focuses more on return of the aircraft whereas the Hague Convention focuses more on punishment of the hijacker. See Alona E. Evans, *Aircraft Hijacking: What Is Being Done*, 67 AM. J. INT'L L. 641, 667 (1973).

volved in the Dawson's Field hijackings\textsuperscript{91} and applies to "non-hijacking" attacks against civil aviation. Article 2(b) of the Montreal Convention introduced a new concept, the "in service" period, and defined it as "from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing."\textsuperscript{92}

Shortly after the Montreal Convention entered into force, another U.N. Convention repeated the call for States to establish jurisdiction where a "crime is committed in the territory of that State or on board a ship or aircraft registered in that State."\textsuperscript{93} One of the results of all of these conventions was to ensure that if a State decided to deploy air marshals in order to thwart terrorist attacks on aircraft registered in that State, there were plenty of legal grounds to do so.

3. The United States

On September 11, 1970, just two days after calling for action from the U.N. Security Council, "President Nixon announced 'a program to deal with airplane hijacking,' which ordered air carriers to deploy 'surveillance equipment and techniques to all appropriate airports in the United States.'"\textsuperscript{94} Almost immediately, U.S. courts began examining the privacy implications of these techniques.\textsuperscript{95}

On September 21, 1970, President Nixon created a scheme to deploy a small force of 100 sky marshals\textsuperscript{96} on Pam Am\textsuperscript{97} and

\textsuperscript{92} Montreal Convention, supra note 90, art. 2(b).
\textsuperscript{95} In United States v. Lopez, 328 F. Supp. 1077, 1085–86 (E.D.N.Y. 1971), the court examined whether an unsuitably calibrated magnetometer could result in unnecessary frisking and invasions of privacy. Three years later, Judge Oakes of the U.S. Second Circuit Court of Appeals, was able to describe, a "growing body of case law developing around 'airport searches.'" United States v. Albarado, 495 F.2d 799, 801 (2d Cir. 1974).
\textsuperscript{96} Bartholomew Elias, Airport and Aviation Security: U.S. Policy and Strategy in the Age of Global Terrorism 5 (2010). Undoubtedly, President Nixon was inspired by El Al Flight 219. However, he may also have been aware that a security guard, traveling as a passenger on a TWA domestic flight on September 15, 1970, had shot and injured a hijacker, ending the incident. See Office of Civil Aviation Security, supra note 3, at 26.
TWA\textsuperscript{98} international flights\textsuperscript{99} and certain domestic flights\textsuperscript{100} on routes considered to be high risk. Within two years, President Nixon had implemented a plan to put up to 1,200 air marshals on U.S. domestic flights.\textsuperscript{101} At the same time, the U.S. Congress worked on the passage of the Air Transportation Security Act of 1974.\textsuperscript{102} As a result of these activities, in 1975, the FAA provided U.S. carriers with guidance with respect to the sections “concerning the carriage of weapons” in the aircraft cabin.\textsuperscript{103}

\textsuperscript{97} On July 2, 1972, a person attempted to hijack a Pan Am 747 that was operating a scheduled flight from Manila to Saigon. A “guard” on the plane overpowered and shot the hijacker. \textit{See} Aviation Safety Network Database, ASN Aircraft Accident Boeing 747, http://aviation-safety.net/database/record.php?id=19720702-1 (last visited Apr. 3, 2010).

\textsuperscript{98} On January 11, 1977, a person attempting to hijack TWA 700 en route from New York to London was overpowered and later arrested by an air marshal. \textit{Office of Civil Aviation Security, supra} note 3, at 36.

\textsuperscript{99} \textit{Elias, supra} note 96, at 5.

\textsuperscript{100} There is reason to believe that the program also extended to other airlines, especially to flights flown by 747s. On October 25, 1971, American Flight 98, a 747 service from New York to San Juan was hijacked to Cuba. \textit{Office of Civil Aviation Security, supra} note 3, at 22. The flight included “three U.S. Sky Marshals plus a vacationing FBI agent.” \textit{Feste, supra} note 28, at 10. They decided not to intervene and later it was discovered that American Airlines had not used the metal detector at JFK. \textit{Id.}


4. Elsewhere

After the Dawson's Field hijackings, Russia,\textsuperscript{104} Israel,\textsuperscript{105} and Ethiopia\textsuperscript{106} continued to use air marshals and almost immediately these countries were joined by Egypt,\textsuperscript{107} Jordan,\textsuperscript{108} Pakistan,\textsuperscript{109} and probably India.\textsuperscript{110}


\textsuperscript{105}The last reported attempted hijacking of an El Al jet happened in November 2002, when a lone Israeli-Arab tried to hijack a Tel Aviv–Istanbul flight but was overpowered by two air marshals. See John Barham, \textit{Profiling Aviation Threats}, Sec. Mgmt. Mag., Aug. 2008, http://www.securitymanagement.com/article/profiling-aviation-threats-004454.


\textsuperscript{107}Egypt’s “security officers” started arresting hijackers on Egyptian airlines as early as September 10, 1970. \textit{See Office of Civil Aviation Security, supra} note 3, at 26. An Egyptian air marshal shot and seriously wounded a terrorist on EgyptAir Flight 648 from Athens to Cairo on November 23, 1985, which actually carried four air marshals. \textit{See Adam Dolnik & Keith M. FitzGerald, Negotiating Hostage Crises with the New Terrorists} 34 (2008). Sadly, on October 19, 1999, EgyptAir Flight 838 was successfully hijacked to Hamburg by a person who managed to get into the cockpit because “the cockpit door was inadvertently left open during the flight.” \textit{Office of Civil Aviation Security, FAA, Criminal Acts Against Civil Aviation in 1999} 21 (2000); \textit{see also} Aviation Safety Network Database, ASN Aircraft Accident Boeing 737-566, http://aviation-safety.net/database/record.php?id=19991019-0 (last visited Apr. 3, 2010).


\textsuperscript{109}Pakistan has used air marshals since 1981. \textit{See} Zarar Khan, \textit{Pakistan Women Excel in Elite Anti-Terrorist Sky-Marshal Unit}, Seattle Times, Aug. 4, 2002, http://community.seattletimes.nwsource.com/archive/?date=20020804&slug=pakwom en4. The event that triggered the decision is believed to be the March 2, 1981, hijacking of a Pakistan International Airlines Boeing 720 to Damascus while oper-
IV. THE HIJACKING OF TWA 847

A. THE INCIDENT

On June 14, 1985, TWA Flight 847 was hijacked to Beirut while en route from Athens to Rome.111 For the first time since the Dawson’s Field hijackings of 1970, Arab terrorists had hijacked an American plane, flown by an American airline and an American crew, with American passengers.112 Over a two-day period the aircraft shuttled between Algiers and Beirut113 where a media circus114 helped the terrorists achieve their objective.115

B. THE U.S. REACTION

In August 1985, very shortly after the incident, the U.S. government passed the International Security and Development Cooperation Act of 1985.116 This Act “established the explicit statutory basis for the FAA Federal Air Marshal Program”117 and authorized federal air marshals to carry firearms on board “and to make arrests without warrant for any offence against the
United States committed in their presence.” It directed the “Secretary of Transportation to study and report to the Congress on the need for an expanded air marshal program on international flights of U.S. air carriers.” Shortly afterwards, the program was extended “to cover international flight routes of U.S. flag carriers,” and the number of federal air marshals increased to nearly 400.

C. Outside the United States

On December 24, 1994, the Groupe Islamique Armé (GIA) took control of Air France Flight 8969, an Airbus A-300, at Algiers as the plane prepared for departure to Paris. The event lasted for two days. Intelligence reports later revealed that the hijackers planned to use the large aircraft as a missile to attack a target in central Paris. Over the course of that incident, the hijackers killed Bui Giang To, a commercial attaché at the Embassy of Vietnam, and Yannick Beugnet, a chef at the residence of the French ambassador.

The 1994 Convention on the Safety of United Nations and Associated Personnel was signed by the first country just nine

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122 See Dolnik & Fitzgerald, supra note 107, at 40–41.
123 Id. at 40–44.
124 See Lia, supra note 6, at 155.
days before the GIA terrorists killed their first diplomat. That Convention repeated an earlier call for States to establish jurisdiction where a "crime is committed in the territory of that State or on board a ship or aircraft registered in that State."  

D. Pre-September 11, 2001

Perhaps as a result of practices adopted after past incidents, there were no hijackings in the United States from 1992 to 2001. Sadly, during this lull in domestic hijackings the number of U.S. air marshals declined to less than forty, virtually all of whom were deployed on international flights.

V. SEPTEMBER 11, 2001

The events of September 11th were the perfect fusion of three predecessor events: May 25, 1970 (multiple hijackings from one U.S. airport), September 6, 1970 (multiple hijackings of aircraft by hardened enemies of the West), and December 24, 1994 (planned use of a wide-body aircraft as a missile to destroy landmark buildings). Just as a shocked world bordered on a Middle East war in the aftermath of the Dawson Field hijackings, September 11th served as an international call to action, if only to underscore the importance of lessons learned from past terrorist incidents.

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127 Convention on the Safety of United Nations and Associated Personnel, supra note 126, 34 I.L.M. at 482; see also DOLNIK & FITZGERALD, supra note 107, at 41.
129 Laura Dugan et al., Testing a Rational Choice Model of Airline Hijackings, 43 CRIMINOLOGY 1031, 1041 (2005). There was, in fact, one attempted hijacking of a U.S. aircraft outside the United States during the period. See OFFICE OF CIVIL AVIATION SECURITY, FAA, CRIMINAL ACTS AGAINST CIVIL AVIATION 34 (2001). On March 16, 2000, a person attempted to hijack an Alaska Airlines MD-83 en route from Puerto Vallarta to San Francisco. Id. He "forced his way into the cockpit and tried to grab the plane's throttles and fuel controls" before being subdued by several passengers and crew. Id.
131 Id. at 3, 10.
133 See ENSALACO, supra note 71, at 23–24.
134 In April 2009, Bart Elias, a specialist in aviation policy with the U.S. Congressional Research Service, published a report in which he stated that airline passenger screening methods “have changed little since they were first implemented at commercial airports in the United States during the early 1970s.”
A. Immediate Aftermath

1. United States

Since 2001, thousands of federal air marshals have been hired at a very rapid pace, but the service has been shuffled back and forth between various departments of the U.S. government. After September 11th, the Federal Air Marshal Service (FAMS) was immediately absorbed into the newly created Transportation Security Agency (TSA) within the Department of Transportation. Within 18 months, it and the TSA had been transferred to the newly established Department of Homeland Security (DHS). Then, within a year, FAMS had been removed from TSA and sent over to U.S. Immigration and Customs Enforcement (ICE). Finally, in November 2005, FAMS was sent to its present abode, within TSA as part of DHS. At all times, FAMS has given priority coverage to "high-risk flights operated by U.S. commercial carriers—such as the nonstop, long-distance flights targeted on 9/11."

While American authorities were taking steps to expand the size and mission of FAMS, they were also taking steps to ensure

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135 The actual number of federal air marshals is classified, but it has been reported in the press that it peaked at 4,800 in 2002, but has since declined. See Alexandra Marks, Air Marshals Stretched Thin, CHRISTIAN SCI. MONITOR, Dec. 28, 2005, at 1.

136 Press reports also state that "[t]he size of the federal air marshal force has been cut in half by on-the-job injuries that have sidelined nearly 2,100 marshals." Audrey Hudson, Air Marshals Ousted Over Job Injuries, WASH. TIMES, Sept. 20, 2006, at A01.

137 See U.S. Gov't Accountability Office [GAO], Aviation Security: Federal Air Marshal Service Is Addressing Challenges of Its Expanded Mission and Workforce, But Additional Actions Needed, GAO-04-242, at 10–11 (2003). To handle the increasing numbers, the fourteen-week training course was cut to five weeks. Id. The new course eliminated cockpit familiarization and a visit to an airline. Id. A four-week "Advanced Training Course" was to be completed by all new hires by January 2004. Id.

138 See GAO, Federal Air Marshal Service: Action Taken to Fulfill Core Mission and Address Workforce Issues 3 (2009).

139 Id.


141 GAO, supra note 138.

142 Id.

that U.S. regulations would facilitate the deployment of air marshals on foreign carriers serving the United States.144

2. Other Countries

After September 11th, several more countries embraced the idea of air marshals. In its rush to get air marshals on its U.S. flights, Air France contracted with a private security company, Pretory S.A.,145 for the provision of up to 200146 private sector air marshals.147 Other countries known to have used air marshals

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146 In 1999 the company claimed to have "a staff of 65 plus an 'on demand' team of 200 security specialists ready for emergencies." See Press Release, Business Wire, Corporate Profile for Pretory USA (Oct. 1, 1999), available at http://www.thefreelibrary.com/Corporate+Profile+for+Pretory+USA+datedOct.+1,+1999-a055932625.

are Australia,\textsuperscript{148} Austria,\textsuperscript{149} China,\textsuperscript{150} Germany,\textsuperscript{151} Japan,\textsuperscript{152} and the United Kingdom.\textsuperscript{153}

Canada’s position on air marshals was quickly improvised. Initially, Canada’s Minister of Transport described the deployment of air marshals on flights as a “radical suggestion.”\textsuperscript{154} However, Air Canada had been informed that its flights into Washington’s Ronald Reagan Airport (DCA)\textsuperscript{155} would now have


\textsuperscript{150} On January 24, 2003, it was reported that a would-be hijacker had detonated homemade explosives on board a Sichuan Airlines domestic flight, injuring himself and another passenger, before being subdued by an in-flight security guard. See Aviation Safety Network Database, ASN Aircraft Accident Embraer ERJ-145LR, http://aviation-safety.net/database/record.php?id=20030124-1 (last visited Apr. 3, 2010).


\textsuperscript{153} The United Kingdom deployed air marshals on scheduled flights before telling British airlines that the air marshals were being deployed. See Rajeev Syal & David Harrison, \textit{Leading Airlines Attack Labour’s Sky Marshal Plan}, SUNDAY TELEGRAPH, Dec. 22, 2002, at 2.


\textsuperscript{155} Washington’s Ronald Reagan Airport (DCA) is a “domestic” airport without U.S. Customs and Border Protection facilities. However, passengers are able to go through U.S. Customs and Border Protection formalities in Canada before
to carry air marshals, and thus he relented: “If [having air marshals] is a precondition for Air Canada returning to that airport we will allow the RCMP to be on board.”

The Transport Committee of Canada’s House of Commons has since written a report calling on Canada’s government to “study the need for air marshals on domestic and international flights.” Perhaps as a result of this report, Canada’s air marshal program now covers other routes, although it maintains its focus on flights into DCA.

VI. THE DECEMBER 29, 2003, DIRECTIVE

On December 29, 2003, the U.S. DHS issued “aviation emergency amendments” calling on foreign airlines serving the United States to equip their flights with air marshals where necessary as an “added protective measure.” The directive stated: “Armed, trained, Government law enforcement officers must be on flights arriving into, departing from, or overflying the United


156 49 C.F.R. § 1562.23(e) (7) requires that an “aircraft operating into or out of DCA has onboard at least one armed security officer” or “Federal Air Marshal.”

49 C.F.R. § 1562.23(e) (7) (2009).


159 See CANADIAN AIR TRANSP. SECURITY AUTH. ACT REVIEW SECRETARIAT, FLIGHT-PLAN: MANAGING THE RISK IN AVIATION 66 (2006). Canada’s “RCMP provides specialized Aircraft Protective Officers (APOs, sometimes called air marshals) on all aircraft destined for Ronald Reagan Washington National Airport, as well as on other selected Canadian commercial aircraft.” Id.; see also Marc-André Gauthier, The Canadian Air Carrier Protective Program, 70:3 GAZETTE 19 (2008) (Can.).

States, when directed by the TSA.”

When asked what he would do if foreign airlines refused to carry air marshals, U.S. Homeland Security Secretary Tom Ridge replied, “[A]ny sovereignty retains the right to revoke the privilege of flying to and from a country or even over their airspace. So ultimately a denial of access is the leverage that you have.”

A. COMPLIANCE WITH THE DIRECTIVE

Most air marshal programs have been set up in response to U.S. pressure. Countries known to have set up such programs include the Czech Republic, the Netherlands, Saudi Arabia, and Switzerland. As of 2004, twenty-three countries had requested air marshal training from the United States and another twenty-six had “indicated an interest, or [were] in some stage of development of an air marshal program.” The European Union has given consideration to the “provision of armed sky-marshals on aircraft” but its official position is stated as follows:

Each Member State retains the competence to decide whether to deploy in-flight security officers on aircraft registered in that Member State and on flights of air carriers licensed by it as well as to ensure, in accordance with paragraph 4.7.7 of Annex 17 to the Chicago Convention on International Civil Aviation and under the terms of that Convention, that such officers are gov-

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161 See Dep’t of Homeland Sec., supra note 18. It applied to all foreign carriers operating under 49 C.F.R. § 1546.101 (Foreign Air Carrier Security; Security Program). Id.


164 See KLM and Martinair to Place Marshals on Some Flights, AIRLINE INDUSTRY INFORMATION, July 4, 2004, http://findarticles.com/p/articles/mi_m0CWU/is_2004July_4/ai_n27798556/?tag=content;coll.


166 See Tan, supra note 163, at 229-30.


168 I. H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 91 (8th rev. ed. 2006).
ernment personnel who are specially selected and trained, taking into account the required security and safety aspects on board an aircraft.\textsuperscript{169}

\textbf{B. Resistance to the Directive}

Many European countries resisted the directive in the belief that having guns on board would only increase the danger to passengers.\textsuperscript{170}

\textbf{C. The Legal Basis for the 2003 Directive}

America’s right to demand that air marshals be deployed on foreign airliners flying in its airspace is found in articles 1, 2 and 6 of the Chicago Convention.\textsuperscript{171} These clauses recognize the sovereignty of a State over the “airspace\textsuperscript{172} above its territory”\textsuperscript{173} and the airspace above the “territorial waters” adjacent to those land areas.\textsuperscript{174} States may deny commercial aircraft of other States from overflying them or establish conditions\textsuperscript{175} for such overflights.\textsuperscript{176} Most countries are parties to the International Air Services Transit Agreement (IASTA),\textsuperscript{177} through which contracting States grant the commercial airlines of other States the “privilege to fly across its territory without landing”\textsuperscript{178} and the “privilege to land for non-traffic purposes.”\textsuperscript{179} Such flights are often restricted to designated routes.\textsuperscript{180} Some very large and


\textsuperscript{171} Chicago Convention, supra note 21, arts. 1–2, 6.

\textsuperscript{172} This article does not propose to explore the limits of this jurisdiction, but will simply concede that the activities of commercial aviation fall within it.

\textsuperscript{173} Id. art. 1.

\textsuperscript{174} Id. art. 2.

\textsuperscript{175} Id. art. 6.

\textsuperscript{176} Thomas A. Geraci, Overflight, Landing Rights, Customs, and Clearances, 37 A.F. L. REV. 155, 155–58 (1994); see also MICHAEL MILDE, INT’L AIR LAW AND ICAO 103–06 (2008).


\textsuperscript{178} Id. art. 1, § 1(1).

\textsuperscript{179} Id. art. 1, § 1(2).

\textsuperscript{180} Id. art. 1, § 4(1). Thus, commercial flights must avoid military areas, avoid “no-fly” zones, and follow the directions of air traffic control.
strategically located countries are not parties to the IASTA. This can give them tremendous leverage in negotiating air bilateral agreements. Other countries that are parties to IASTA may restrict or limit flights in certain conditions.

The United States' geographic location and size give it an ideal opportunity to dictate terms and conditions to those commercial carriers that would overfly it. America has used this power twice in recent years. The Secure Flight program requires foreign airlines that fly to, from, or over the United States to provide an Advance Passenger Information System to the DHS. In its initial draft it might have applied to some Canadian and Mexican domestic flights. The other use was the

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181 These countries include Brazil, China, Indonesia, Mongolia, and Russia. They use this fact to extract concessions while negotiating bilateral air agreements. See P.P.C. Haanappel, The Transformation of Sovereignty in the Air, in The Use of Air and Outer Space Cooperation and Competition 13, 23 (Chia-Jui Cheng ed., 1998).

182 Imagine the leverage that Russia has over Japan in granting the rights necessary to operate flights to Western Europe. See JAL Overflight Rights, 122 Aviation WK. & SPACE TECH. 33 (1985). Indeed, Canada withdrew from the IASTA on November 10, 1988, as a result of a dispute with the United Kingdom over Air Canada's Bombay-Singapore flights. British Overflight Rights Threatened; Move Heats Up Row Over Airlines, GLOBE & MAIL, Nov. 13, 1986, at A9.

183 Israel and Jordan are parties to IASTA. Yet for years each refused to grant the other overflight permission. In 1994, as part of the peace process, Israel and Jordan gave each other “overflight rights.” John D. Morrocco, Peace Accord Boosts Business Prospects, 140 Aviation WK. & SPACE TECH. 29 (1994).

184 Quite simply, the ability to overfly at least part of the United States is necessary for most flights between: Canada and Latin America; Latin America and Asia; and Mexico and Europe. For a fascinating look at the negotiations of overflights, see Memorandum of Consultations, U.S.-Russ. Scheduled Flights, Annex IV (Feb. 13, 2009), available at http://www.state.gov/e/eeb/rls/othr/ata/r/rs/119763.htm.


2003 Directive for foreign airlines to carry air marshals where necessary.\textsuperscript{188}

D. THE LEGAL CONSEQUENCES

1. Domestic Consequences

The federal leadership has inspired the governments of the “States of the Union” and has made them aware of the power of an “overflight veto.” Already, a U.S. federal judge has ruled that a State may forbid an airline from serving liquor on flights overlying its territory.\textsuperscript{189}

2. Practical Consequences

Once a directive is issued, it must be implemented or it loses credibility. New Zealand refuses to use air marshals, relying instead on “ground-based security measures.”\textsuperscript{190} Given this refusal and America’s insistence that foreign airlines serving the United States equip their flights with air marshals where necessary, it will be interesting to see what happens with Air New Zealand’s Flights 1 and 2, which operate an Auckland–Los Angeles–London service.\textsuperscript{191} If Air New Zealand is not permitted to carry air marshals, especially on the Los Angeles–London leg of


the trip, one can imagine scenarios under which that service could be affected.\textsuperscript{192}

3. \textit{Reciprocal Consequences}

America has had air marshals operating on international routes since 1970.\textsuperscript{193} Today, they may be seen on routes operated by U.S. carriers to eighty-two cities in over fifty countries.\textsuperscript{194} However, that progress may start slowing down.

In the past, U.S. air marshals, like their counterparts in other countries, operated in the shadows and rarely did anyone know they were present. Today, in a world where States are more aware of “overflight” issues and sovereignty, concerns are being raised over the possibility that an air marshal will be deployed on a foreign aircraft, arrive at the destination, “get off the plane with [his] firearms, and go through the secure areas in the airport, etc.”\textsuperscript{195}

As a result, Australia is facing problems in its attempts to deploy air marshals on its international flights, finding that it requires “bi-lateral agreements on the carriage of firearms and weapons into other countries”\textsuperscript{196} and also the “need to seek

\textsuperscript{192} In December 2003, when he launched the “aviation emergency amendments,” Secretary Tom Ridge distinctly raised the idea of denying, in certain circumstances, the access to U.S. airspace by foreign flights without air marshals. Interview with Tom Ridge, U.S. Secretary of Homeland Security, DHS Press Conference (Dec. 29, 2003), \textit{available at} http://transcripts.cnn.com/TRANSCRIPTS/0312/29/se.03.html. Moreover, cancelling or suspending this service would not deny New Zealanders access to Europe since Air New Zealand operates a second daily service to London via Hong Kong. Air New Zealand, Pacific Premium Economy, \textit{http://www.airnewzealand.com/premium-economy-class} (last visited Apr. 21, 2010). NZ Flights 38 and 39 are 777s operating that route daily. For aviation buffs and frequent flyers, from Auckland to London it is about seventy minutes faster to fly via LAX. Coming home, it is about seventy-five minutes faster to fly via HKG.


\textsuperscript{194} \textit{See} HARRISON, \textit{supra} note 31, at 76.


agreement of possible diversion countries." \(^{197}\)

"[S]ome countries in particular are sensitive about this and really want rigid controls applied to it. Other countries just won't accept it outright." \(^{198}\)

VIII. LEGAL UNCERTAINTIES

If a State is planning to deploy air marshals on aircraft registered in that State, it must be certain that the air marshals will not be arrested upon arrival of that aircraft in a second State. This situation was clearly demonstrated during Canada's Parliamentary debate on its Anti-Terrorism Act. \(^{199}\) Clause 96 of that Act modified section 97(1) of the Firearms Act \(^{200}\) to give Canada's Cabinet the power to "exempt any class of non-residents from the application of any provision of this Act or the regulations." \(^{201}\) On November 20, 2001, when the clause was considered by a Parliamentary committee, senior officials from Canada's Federal Department of Justice said the clause was needed \(^{202}\) to cover the situation of "foreign air marshals, for example, on any American flight into Canada." \(^{203}\)

Yet, the previous day, Mr. André Harvey (Parliamentary Secretary to the Minister of Transport) told Canada's House of Commons that the Canadian government had already made "the


\(^{198}\) Caldwell, supra note 196 (statement of Ian Thomas, senior consultant with the Sydney-based Centre for Asia Pacific Aviation).

\(^{199}\) Anti-Terrorism Act, 2001 S.C., ch. 41 (Can.); see also 137 H.C. Deb. 94, 37th Parl., 1st Sess., Official Report (Hansard) 1120 (Oct. 15, 2001). This 195 page piece of legislation was introduced in Canada's Parliament on October 15, 2001, and became law a scant sixty-four days later on December 18, 2001. When one considers that Canada's Parliament does not sit on the weekends and routinely takes a week-long break in each of October and November, one realizes the tremendous speed with which some nations adopted security legislation in the aftermath of September 11th.

\(^{200}\) Firearms Act, 1995 S.C., ch. 39 (Can.) (Section 112 makes it an offence to be in possession of a firearm that has not been registered with the Canadian Firearms Registry.).

\(^{201}\) 2001 S.C., ch. 41, cl. 96.

\(^{202}\) Transcript of Minutes, Standing Committee on Justice and Human Rights, 37th Parl., 1st Sess., Hansard 2125 (Nov. 20, 2001) (statement of William Bartlett, Counsel, Policy and Programs Directorate, Department of Justice, before the House of Commons Standing Committee on Justice and Human Rights during that committee's clause-by-clause consideration of Bill C-36).

\(^{203}\) See id. at 1645 (statement by Richard G. Mosley, Assistant Deputy Minister, Criminal Law Policy Section, Department of Justice, on Bill C-36).
necessary provisions to allow armed U.S. air marshals on U.S. flights to enter Canada without difficulty."\(^{204}\) In fact, the Anti-Terrorism Act, upon whose clauses the legal validity of those "provisions" depended, did not come into force until nearly a month later on December 18, 2001.\(^{205}\)

If Canada's Cabinet did not have the legal capacity to exempt foreign air marshals from the provisions of Canada's Firearms Act until the Anti-Terrorism Act came into force on December 18, 2001, it raises questions as to the legal regime that faced U.S. air marshals on U.S.–Canada trans-border flights between November 19 and December 18, 2001. It also raises questions about the past operations of certain foreign flights into Canada.\(^{206}\) This is not a hypothetical matter. There are reports that Pakistani air marshals were removed from some international flights after destination countries complained.\(^{207}\)

A. THE "AVIATION SECURITY" PARAGRAPH

In the past, it appears that such matters may have been covered by the broad terms of "aviation security" paragraphs that are common features in most air bilateral agreements. Aviation security paragraphs may have been motivated by the June 1976 hijacking of an Air France flight\(^{208}\) to Entebbe, Uganda, where Ugandan authorities\(^{209}\) ignored their obligations to provide as-


\(^{205}\) 2001 S.C., ch. 41.


\(^{207}\) See Khan, *supra* note 109. Given the security concerns related to Pakistan, one would think that countries would welcome Pakistan's offer to deploy air marshals on its flights.

\(^{208}\) Air France Flight 139, an Airbus A-300B4-200, was operating from Tel Aviv to Paris via Athens, when it was hijacked on June 27, 1976. For details of this incident, see generally YESHAYAHU BEN PORAT ET AL., ENTEBBE RESCUE (1977).

\(^{209}\) It is worth noting that the government of Uganda was essentially complicit in the hijacking, and therefore it is highly unlikely that the country's leader, Idi Amin, would have prosecuted the terrorists or extradited them to Israel, France,
sistance under articles 4, 6 and 7 of the Hague Convention and articles 5, 6, and 7 of the Montreal Convention.\textsuperscript{210}

The United States has included an “Aviation Security” paragraph in every air bilateral agreement it has concluded since 1979.\textsuperscript{211} In particular, note the final sentence of Article 7 of the U.S.–Fiji Air Transport Agreement of October 1, 1979: “Each contracting Party shall give sympathetic consideration to any request from the other for special security measures for its aircraft or passengers to meet a particular threat.”\textsuperscript{212}

The same language was used in air bilateral agreements with China\textsuperscript{213} and Barbados,\textsuperscript{214} but the 1986 agreement with Ecuador, which was negotiated after the 1985 hijacking of TWA Flight 847,\textsuperscript{215} was slightly modified: “Each Party shall also give positive consideration to any request from the other Party for special security measures to meet a particular threat.”\textsuperscript{216}

From 1986, this updated language has become standard in virtually every air bilateral agreement that the United States has concluded with another country. It appears in Open Skies Agreements with Canada,\textsuperscript{217} the European Union,\textsuperscript{218} and Austra-
nia, and was featured in the more recent March 16, 2010 agreement with Zambia.

B. THE "AIR MARSHAL AGREEMENT"

1. The Need for a Specific "Air Marshal Agreement"

Australia's air bilateral agreements also contain an "aviation security" paragraph. Article IX (6) of the 1988 Canada-Australia Air Agreement states: "Each Contracting Party shall give positive consideration to any request from the other Contracting Party for reasonable special security measures in its territory to meet a particular threat to civil aviation." Nonetheless, when describing Australia's progress in deploying air marshals in international flights as of November 2003, the Honorable Mr. Ruddock, Australia's Minister for Justice and Customs, said Australia was negotiating air marshal agreements with the United States, Indonesia, and Singapore but that issues surrounding the "clearance of firearms in New Zealand" were impeding negotiations with that country. In other words, absent a specific air marshal agreement with another country, Australian air carriers would not be allowed to carry air marshals on flights to that country.

This situation was further clarified with the passage of New Zealand's Civil Aviation Amendment Act of 2007. This Act requires that a "foreign in-flight security officer" be "authorised to act on an aircraft that is in flight by the State that has issued the air operating certificate" and operate pursuant to an "in-flight security officer arrangement or agreement between New

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222 See OFFICIAL HANSARD, supra note 197, at 22598.
223 Civil Aviation Amendment Act 2007 § 12, 2007 S.N.Z. No. 89.
224 This is the State in which the aircraft is registered. Section 4 of the Civil Aviation Amendment Act inserted a new section 2(a) into New Zealand's Civil Aviation Act of 1990. Id. art. 4.
Zealand and the State that has issued the air operating certificate.\textsuperscript{225}

The European Union took a similar position. Paragraphs 3 and 4 of article 10 of the Annex\textsuperscript{226} to Regulation (EC) No. 300/2008\textsuperscript{227} read:

3. Weapons, with the exception of those carried in the hold, shall not be carried on board an aircraft, unless the required security conditions in accordance with national laws have been fulfilled and authorisation has been given by the States involved.

4. Paragraph 3 shall also apply to in-flight security officers if they carry weapons.

ICAO amendment 11 to Annex 17 of the Chicago Convention uses similar language.\textsuperscript{228} Additionally, excerpts of paragraphs 4.7.4 and 4.7.7 of that amendment read:\textsuperscript{229}

4.7.4. Each Contracting State shall ensure that the carriage of weapons on board aircraft, by law enforcement officers and other authorized persons, acting in the performance of their duties, requires special authorization in accordance with the laws of the States involved.

4.7.7. . . . The deployment of such officers shall be co-ordinated with concerned States and kept strictly confidential.

The terms “States involved” and “concerned State” are not defined and this leads to the possibility that authorization must be given not only by the destination State but also by those involved in en route stops, as well as those States to be overflown and those States whose airports might be used in cases of diversion.\textsuperscript{230} This could have profound implications. Consider the case of Canada. Canada withdrew from IASTA\textsuperscript{231} and might potentially take an interest in the use of firearms on board aircraft.

\begin{footnotes}
\item[225] Section 4 of the Civil Aviation Amendment Act inserted a new section 2(b) into New Zealand’s Civil Aviation Act of 1990. \textit{Id.}
\item[227] \textit{Id.}
\item[228] See Tan, \textit{supra} note 163, at 250.
\item[229] ICAO Annex 17 amend. 11, \textit{supra} note 20, ¶¶ 4.7.4, 4.7.7. The document is described as “proposals [t]o . . . meetings of the Aviation Security (AVSEC) Panel . . . developed in accordance with Council’s action in pursuance of Assembly Resolution A35-9,” which went into effect on April 10, 2006, with “1 July 2006 as the applicability date.” \textit{Id.} ¶ 2.1.
\item[230] See \textit{id.}
\item[231] \textit{Canada to Withdraw from Civil Aviation Pact}, 125 AVIATION WK. \& SPACE TECH. 44 (1986).
\end{footnotes}
flying in its airspace.\(^{232}\) The airlines of States whose authorities are reluctant to coordinate air marshal activities with overflown States might end up flying flight routes similar to those of El Al.\(^{233}\)

2. **Definition of “Air Marshal”**

Both the European Union and ICAO have defined “air marshals” in ways that limit the ability of States to deploy them as desired on selected flights.\(^{234}\) The European Union defines an “In-flight Security Officer” as “a person who is employed by a state to travel on an aircraft of an air carrier licensed by it with the purpose of protecting that aircraft and its occupants against acts of unlawful interference that jeopardise the security of the flight.”\(^{235}\) This definition clearly rules out the possibility of airlines like Air France or All Nippon Airways hiring private sector air marshals from companies like Pretory.\(^{236}\)

The ICAO definition goes further, defining an “In-Flight Security Officer” as a “person who is authorized by the government of the State of the Operator and the government of the State of Registration to be deployed on an aircraft with the purpose of protecting that aircraft and its occupants against acts of unlawful interference.”\(^{237}\)

Claudia Serwer, the Alternate U.S. Representative to ICAO told the ICAO Council that

\(^{232}\) It is necessary to overfly Canada on all services between Europe and all points in the United States west of and including Buffalo. See generally Leo Ryan, *IATA Rips Canada’s Plan to Impose Overflight Fees*, J. COM., Aug. 24, 1995, at 3B. It is necessary to overfly Canada on all services between Asia and all points in the United States east of the Rocky Mountains. See id. Given Canada’s strict firearms laws, this has the potential to be an obstacle against the deployment of air marshals on certain intercontinental flights.

\(^{233}\) Whether due to security issues, or a denial of overflight permission from certain States, El Al’s flight routings are illustrative of this problem. El Al’s service to Sao Paolo does not overfly Africa; its service to Johannesburg does not overfly Sudan, and its services to Hong Kong and to Bangkok avoid Syria, Iraq, Iran, Afghanistan, and Pakistan. See, e.g., Airline Route Maps, El Al International Route Map, http://www.airlineroutemaps.com/West_Asia/El_Al_international.shtml (last visited Mar. 26, 2010).


\(^{236}\) Cf., supra notes 145–147 (regarding Air France’s use of private air marshals from Pretory and All Nippon Airways’ hiring of Pretory).

\(^{237}\) ICAO, supra note 234, ¶ 6.
[b]y limiting the definition of a person and where he was employed and trained to the government of the [S]tate in which the aircraft was registered or operated, the State would be precluded from deploying its in-flight security officers on aircraft registered in a third country or operated by an air carrier of another Contracting State.\textsuperscript{238}

Further, it would “prevent the United States Government from deploying United States federal air marshals on aircraft that had no nexus to the United States.”\textsuperscript{239}

3. Getting the Agreements

In the face of the realization that a specific air marshal agreement would now be necessary with the country of arrival, in April 2004 American officials promised to “consider alternative measures that could be put in place for European countries opposed to armed air marshals.”\textsuperscript{240} Within months, President Bush signed the Intelligence Reform and Terrorist Prevention Act of 2004.\textsuperscript{241} Section 4017 of that Act calls on the President “to pursue aggressively international agreements with foreign governments to allow the maximum deployment of Federal air marshals on international flights.”\textsuperscript{242}

There is public confirmation that the United States signed an “air marshal agreement” with Australia in 2004,\textsuperscript{243} Austria in


\textsuperscript{239} Id. This would be dry- or wet-leased aircraft operated by foreign airlines on routes between their home State and the United States. See id.

\textsuperscript{240} KRISTIN ARCHICK, CONG. RESEARCH SERV., U.S.-EU COOPERATION AGAINST TERRORISM 4 (2006).


\textsuperscript{242} Id. § 4017. This section reinforces section 105 of America’s Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001), which deals with the Deployment of Federal Air Marshals. See ATSA § 105, 49 U.S.C. § 44917 (2006). Section 101 of ATSA requires the Secretary of Transportation to “work with the [ICAO] and appropriate aeronautical authorities of foreign governments under Section 44907 to address security concerns on passenger flights by foreign air carriers in foreign air transportation.” Id. § 101, 49 U.S.C. § 114(f)(14).

2007, Jamaica in 2009, and may soon sign one with Barbados. A similar agreement exists between Australia and Singapore. Other agreements are presumed to exist but have not been publicly announced. A 2008 assessment by the United States of its air marshal service stated that, "[a]s a consequence of such numerous bilateral agreements, U.S. FAMs cover U.S. flights into and out of multiple foreign countries. In some instances, the partner country has air marshals, whose deployment into the United States on foreign airlines is also provided for in the bilateral agreement."

4. Potential Text of an Air Marshal Agreement

Just as the existence of many air marshal agreements is secret, the text of those agreements is also secret. Nonetheless, articles 17–19 of the Treaty of Prüm deal with air marshals and provide insight as to the potential provisions of an air marshal agree-

“armed federal marshals on board random Qantas and United Airlines flights between the two nations.” *Australia, US Sign Air Marshal Agreement*, supra.


246 *Id.*

247 See *World Today: Australia, Singapore Reach Agreement on Air Marshals*, supra note 149. This agreement was signed on December 17, 2002. *Id.* In addition to Singapore’s agreement with Australia, it is seeking additional agreements with Thailand and Indonesia. See *Singapore Wants Air Marshals on All Planes*, United Press Int’l, Dec. 22, 2003; *Singapore Airlines to Introduce Armed Guards on Additional Flights*, Airline Industry Info., Jan. 5, 2005, http://www.allbusiness.com/operations/shipping-air-freight/722709-1.html.

248 If, as noted earlier, Canada changed its Firearms Act to allow U.S. air marshals to be deployed on U.S. flights serving Canada, one must presume that an air marshal agreement exists between the two countries, but such an agreement has never been publicly announced. Even those agreements that are announced are not publicly posted, and details of them are rarely provided to journalists. See, e.g., Michael McKenna, *Extradition Covers Death Penalty*, Courier Mail (Queensl.), Sept. 21, 2004 (commenting that details on the air marshal agreement between the United States and Australia have not been disclosed). Thus the publicly announced U.S.–Australia air marshal agreement is a "secret agreement" and "[b]oth governments have refused to detail their operations." *Id.*

Given that the seven signatories are all European nations and that air marshals are unlikely to be deployed on many of the flights between Contracting Parties, there is the possibility that these clauses are meant to help avoid cancellation or disruption of flights to the United States.251

The Treaty requires that the air marshals be deployed in accordance with Annex 17 of the Chicago Convention and that due regard be paid to the authority of the aircraft’s captain as per the Tokyo Convention.252 It requires that air marshals be either police officers or other suitably trained personnel and demands mutual assistance and cooperation in matters related to training and equipment.253 Contracting Parties must give written notice of a scheduled deployment to the destination country three days before the flight in question and that notice must specify operational details and be kept confidential.254 Then air marshals will be granted “general permission to carry arms, ammunition and equipment on flights to or from airports in Contracting Parties.”255 Air marshals may only disembark from the aircraft carrying their weapons if they are escorted by an appropriate representative of the other Contracting Party and immediately deposit their weapons in a designated secure location.256 This is similar to the procedures used by the U.S. FAMS257 in coordinating and facilitating “the movement of [foreign] Gov-

250 Convention Between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the Stepping Up of Cross-Border Cooperation Particularly in Combating Terrorism, Cross-Border Crime and Illegal Migration arts. 17–19, May 27, 2005, Council (EC) Doc. 10900/05 CRIMORG 65 ENFOPOL 85 [hereinafter Treaty of Prüm].


252 Treaty of Prüm, supra note 250, art. 17(1). Note, the Treaty was concluded before the ICAO amendment 11 to Annex 17 of the Chicago Convention was finalized. Compare id. (signed May 25, 2005), with ICAO Annex 17 amend 11, supra note 20 (adopted Nov. 30, 2005).

253 Treaty of Prüm, supra note 250, art. 17(2)–(3).

254 Id. art. 17(4)–(5). Annex 1, referred to in article 17(5), also requires that the details include names and passport numbers of marshals, flights to be taken, and weapons and ammunition to be carried. Id. Annex 1.

255 Id. art. 18(1).

256 Id. art. 18(2)(1)–(2).

5. *Practicalities of Air Marshals*

An air marshal needs to remain undercover and be able to transit through the airport and board the aircraft without attracting attention. A 2009 report by the U.S. Government Accountability Office (GAO) provided: "[t]o preserve their anonymity on covered flights, air marshals are to blend in with other passengers by dressing appropriately and performing their duties discreetly without drawing undue attention." Until very recently, a U.S. air marshal flying to Canada faced significant obstacles to remained undercover. He disembarked, was met by the RCMP and surrendered his weapons before proceeding through Canadian customs. Then, because of the Export and Import Permits Act, he needed a permit to "bring his firearm into Canada." Shortly thereafter, as he prepared to return to the United States, he proceeded through the U.S. Customs and Border Protection (CBP) Pre-

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258 Dep’t of Homeland Sec., *supra* note 18, at 1.
259 *See* Thomas Frank, *Cover Blown, But Air Marshal Still Flies*, USA TODAY, June 1, 2006, at A3 (commenting that air marshals should “blend in with passengers”). A great deal of attention has been paid to “dress code issues.” *See* Brian Wingfield, *Dress Code May Hinder Their Work, Air Marshals Say*, N.Y. TIMES, July 17, 2004, at A7.
260 As late as 2006, nearly thirty-eight years after federal air marshals started operating on U.S. domestic flights, the House Judiciary Committee was still considering how the U.S. TSA needed to better facilitate the movement of air marshals through an airport. *See* STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 34, at 14. In Canada, Restricted Area Identification Card (RAIC) has been implemented at virtually every major Canadian airport. CATSA, RAIC, http://www.catsa-acsta.gc.ca/page.aspx?id=35&name=Identitycard_CarteIdentite&lang=EN (last visited Apr. 21, 2010). It is a biometric card which provides real time confirmation of security clearance from Canada’s federal government. *See* CANADIAN AIR TRANSP. SEC. AUTH. ACT REVIEW SECRETARIAT, *supra* note 159, at 70; *see also* GAO, *Aviation Security: Federal Air Marshal Service Could Benefit from Improved Planning and Controls* 2, 6–7 (2005).
263 *Id.*
265 *Id.* §§ 5(1)(c.1), 14.
Clearance area,\textsuperscript{266} under the watchful eye of armed U.S. CBP agents.\textsuperscript{267} He then passed through security screening\textsuperscript{268} before picking up his weapon from the RCMP and boarding the return flight.\textsuperscript{269} The pilots and cabin crew, who were probably returning to the United States,\textsuperscript{270} usually remained on the plane.\textsuperscript{271}

Canada changed its law in 2008,\textsuperscript{272} but for the roughly 2,000 days between the first deployment of U.S. air marshals on trans-border routes to Canada and the change to the law,\textsuperscript{273} U.S. air marshals had to go through this procedure while passing

\textsuperscript{266} These are zones established at Canadian airports pursuant to the Canada–U.S. Preclearance Agreement. \textit{See supra} note 155, art. 1(1). Under the Preclearance Act, 1999 S.C., ch. 20, these zones are under the jurisdiction of U.S. authorities. 1999 S.C., ch. 20, §§ 2, 6(1) (Can.). Sections 2 and 6(2) of the Act, make applicable in the “preclearance area” the “law of the United States with respect to customs, immigration, public health, food inspection and plant and animal health that is applicable to the admission of travellers or the importation of goods to the United States.” \textit{Id.}

\textsuperscript{267} Section 12 of the Act even allows U.S. officers to use deadly force if “the officer believes on reasonable grounds that it is necessary for self-preservation.” \textit{Id.} § 12(2). This leads to the presumption they may be armed.

\textsuperscript{268} On December 12, 2007, Canada relaxed the rules and stated, “[a] screening authority may permit a person in possession or control of a weapon, an explosive substance or an incendiary device to enter a sterile area if the person is carrying it in accordance with the \textit{Canadian Aviation Security Regulations}.” \textit{Interim Order Respecting Prohibited Items}, [Pt. 1, Vol. 141, No. 51] \textit{Can. Gazette}, 3,489, 3,499 (2007).

\textsuperscript{269} Teotonio, \textit{supra} note 262, at A4. Depending on the schedule, a single air marshal might have gone through this procedure more than once a day.

\textsuperscript{270} On trans-border flights the prohibition against cabotage ensures that the aircraft returns immediately to the country from which it came. \textit{See, e.g.}, 19 C.F.R. § 122.165(a) (2009). The only exception is flights that arrive late in the evening; they tend to overnight in the other country and return home early the next morning.

\textsuperscript{271} It is common for air crew to remain onboard if the stop in the foreign country is under sixty minutes and the total flight time from the airline’s home base and back fits within the normal work schedule.

\textsuperscript{272} \textit{See Exemption Regulations (Persons) SOR/2008-45} § 1(a) (Can.). This clause exempts:

- employees of a foreign state who, for the purpose of ensuring public safety or security, carry goods in the course of their employment when entering or exiting Canada for which permits are required under the Export and Import Permits Act and whose duties and functions are described in an arrangement or commitment between the foreign state and the Government of Canada.

\textit{Id.}

\textsuperscript{273} A total of 2,263 days (6 years, 2 months, 10 days) passed between the passage of Canada’s Anti-Terrorism Act on December 18, 2001, and the February 28, 2008 exemption of U.S. air marshals from the gun import permit requirement.
through an airport area in which U.S. laws apply.\textsuperscript{274} It is no surprise that none of the three short trans-border air routes that require an air marshal on every flight is served by a U.S. carrier.\textsuperscript{275}

Being escorted to the gate by a police officer and having to fill out paperwork at customs is inconsistent with maintaining the low profile that is essential if air marshals are to make a positive contribution to airline safety. Many of the criticisms of air marshals argue that if the weapon can be removed from the air marshal's control, the level of danger increases.\textsuperscript{276} For this reason, any State action or policy that would raise an air marshal's profile must be overturned.

**IX. LEARNING FROM THE PAST**

Since long before September 11th, El Al has used air marshals to ensure the safety of flights that faced real and constant threats. It bears repeating that the only attempt foiled in connection with the 1970 Dawson's Field hijackings was the attempted hijacking of an El Al jet with two air marshals on board. El Al flies through "dozens of foreign airports over which it ha[s] no control and [is] a visible and accessible target for Palestinian terrorism. Yet not a single successful hijacking . . . of El Al has occurred since 1968 . . . [A]rmed agents fly on board each plane."\textsuperscript{277}

It is a virtual certainty that Israel did not have the equivalent of a current "air marshal agreement" with all of the countries that El Al serves, and Israel certainly does not reveal the identities of air marshals to foreign States unless it is in Israel's interest to do so.\textsuperscript{278} Indeed, in the early days of Israeli air marshal oper-

\textsuperscript{274} Unless U.S. CBP officials objected to the presence of an armed U.S. air marshal in their area, it is difficult to understand the justification for the bureaucratic process involved.

\textsuperscript{275} These are the routes from Toronto, Ottawa, and Montreal to DCA. See Weather 2 Flights, Final Routes—Who Flies Where?, http://www.weather2flights.com/flights-routes (last visited Apr. 21, 2010).

\textsuperscript{276} On June 11, 1985, five Lebanese militiamen travelling as passengers on Royal Jordanian Airlines Flight 402 from Beirut to Amman identified the eight Jordanian air marshals, beat them severely, took their weapons, and then hijacked the aircraft. \textit{Christopher H. Pyle, Extradition, Politics, and Human Rights} 275 (2001); \textit{see also Office of Civil Aviation Sec., supra} note 3, at 129–30.


lations, “the guards flying El Al were not allowed to take their pistols with them when they reached a foreign airport. Instead, they picked them up from the cockpit when boarding and left them aboard the plane upon landing and debarking.”

Clearly, such an approach would also require that the airline or the State of registration be responsible for ensuring that air marshals met high training standards. The State of registration would also be responsible for damages if the airplane crashed as a result of the air marshal discharging his weapon while the aircraft was in flight. This would be an acceptable condition given that a highly trained air marshal reduces the risk of incidents, and even in the event of cabin decompression, or

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279 Lewis et al., supra note 63, at 105. In 2002, Israel's Transport Minister Ephraim Sneh “confirmed marshals are allowed concealed handguns in some foreign locales under certain limitations.” Military Operations: El Al's Formidable Security Precautions, supra note 278, at 5.


281 In fact, the Ethiopian Airlines hijacking with the highest death toll was on a plane without air marshals that was ordered to fly to Australia and ran out of fuel, ditching in the Indian Ocean. See Office of Civil Aviation Sec., FAA, Criminal Acts Against Civil Aviation in 1996, at 42–44 (1997).

even a bomb exploding, it is possible for an aircraft to land safely.283

A. ADVANTAGES

Such an approach has the advantage of discretion, since it offers a much higher level of confidentiality and it would not be inconsistent with the views of certain nations.284 It might also avoid cases where an air marshal accidentally leaves a loaded gun in a bathroom in the airport’s secure area.285

B. DISADVANTAGES

This approach requires a higher level of cockpit security than is currently present on North American aircraft.286 In addition, a very clearly defined concept of “aircraft nationality” is central to this approach. It is well established that the ground upon which a foreign embassy sits is essentially foreign territory,287 to the point that firefighters can be denied access to a burning heritage building that is serving as a foreign embassy,288 or that a foreign embassy may grant asylum to people fleeing from the local government.289 In like manner, it is crucial for govern-

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284 On December 10, 1994, terrorists exploded a bomb on board Philippine Air Lines Flight 434, a 747 en route from Cebu to Tokyo. Reeve, supra note 7, at 79. Despite significant damage the plane made a safe emergency landing in Okinawa. Id. at 80.
285 For example, the Belgians are very uncomfortable with anyone, no matter what the circumstances, carrying weapons in a Belgian airport terminal. Therefore, they prohibit the carrying of “arms and/or ammunition by air marshals outside an aircraft.” See Treaty of Prüm, supra note 250, Annex 2, II (2) (a), (c).
287 The author has been told by various industry insiders that passwords for cockpit doors are notoriously easy to hack because they are designed to be easily remembered by lots of pilots and mechanics.
289 On New Year’s Day in 1956, the stately Soviet Embassy, a heritage building, burned to the ground while Ottawa firefighters were denied access because it was “Soviet territory.” Shirley E. Woods, Ottawa: The Capital of Canada 293–94 (1980); Soviet Consulate in Montreal Seriously Damaged in a Fire, N.Y. Times, Jan. 15, 1987, at 13.
290 This is a controversial point. See S. Prakash Sinha, Asylum and International Law 207–45 (1971). Nonetheless, from September 21, 2009, until January 27, 2010, Manuel Zelaya, the ousted President of Honduras, was granted
ments to understand that a gun properly stored aboard an airliner registered in a foreign State is essentially a gun on foreign property.

X. WHAT NATIONALITY DOES A FOREIGN AIRLINER HAVE ON THE GROUND AT THE AIRPORT OF ANOTHER NATION?

A. THE LAW

The articles of the Chicago Convention state that an aircraft has a nationality290 and only one nationality.291 This does not vary with the geographic situation of the aircraft292 and thus, of the various laws that recognize aircraft registered in that State as "national territory" for the purpose of determining the nationality of onboard births, none make a distinction for situations where the aircraft is on the ground at a foreign airport.293 The same principal is recognized in maritime law,294 and therefore in 1887 a British Court held that British law did not apply to a German ship in British territorial waters.295 The international recognition of this principal in aviation law drove the

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290 Chicago Convention, supra note 21, art. 17.
291 Id. art. 18.
293 See British Nationality Act 1981, ch. 61, § 3 (U.K.); Canada Citizenship Act, R.S.C., ch. C-29, § 2(2)(a) (1985); Articles 5 and 6 of Luxembourg's Règlement du grand-ducal 29 avril 1971 sur les naissance, décès et disparition a bord des aéronefs luxembourgeois.
295 Regina v. Keyn, 2 Exch. Div. 63 (1876) (also known as the Franconia Case).
negotiations\textsuperscript{296} of the recent Cape Town Convention\textsuperscript{297} and its Protocol.\textsuperscript{298}

B. THE PRACTICE OF STATES

States recognize that foreign airliners retain their nationality even on the ground at airports in other countries.\textsuperscript{299} A simple example of this is that aircraft stores and duty-free items (including alcohol) remain on the aircraft and are not taxed as "entering the other country."\textsuperscript{300} The handling of hijacked aircraft confirms this. In almost every case,\textsuperscript{301} the receiving State consults the State of registry and obeys its instructions. Thus, in 1977, Somali authorities recognized the nationality of a hijacked Lufthansa 737 and permitted a German elite terrorist squad to storm the plane.\textsuperscript{302} Thailand followed suit in 1981 allowing Indonesian commandos to storm a Garuda Indonesia DC-9 that had been hijacked to Bangkok.\textsuperscript{303} In 1985, when a hijacked Egyptair 737 landed at Valletta over the protests of Maltese au-


\textsuperscript{299} See Hague Convention, supra note 85, art. 3(1).

\textsuperscript{300} International Air Agreements exempt from "import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges" all foreign "aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during flight)." See Air Transport Agreement, U.S.-Can., supra note 217, art. 10(1); see also Multilateral Agreement on the Liberalization of International Air Transportation, art. g, May 1, 2001; Air Transport Agreement, U.S.-E.U., supra note 218, art. 11. In short, it is a feature of almost every air bilateral agreement.

\textsuperscript{301} The obvious exceptions are where the receiving State is in collusion with the hijackers (Uganda with the hijackers of Air France Flight 139 in June 1976), or where the political situation of the State is so chaotic that de facto control is in dispute (Lebanon with the hijackers of TWA Flight 847 in 1985). See Hijackings Overshadow Peace Moves, N.Y. Times, June 16, 1985, at 41.

\textsuperscript{302} Lufthansa Flight 181, a 737 flying a Palma de Mallorca–Frankfurt service, was hijacked in October 1977 to Mogadishu where, after negotiations with German officials, eventually it was successfully stormed by GSG-9, a German elite anti-terrorist squad. EnsalaCo, supra note 71, at 114–15.

\textsuperscript{303} Garuda Indonesia Flight 206, a DC-9 flying a domestic Palembang–Medan service, was hijacked in March 1981 to Bangkok, where it was successfully stormed
thorities, those same authorities allowed Egyptian soldiers to attempt the rescue.\textsuperscript{304} More recently, in Algiers, an Air France Airbus A-300 was hijacked on the ground before its scheduled departure to Paris.\textsuperscript{305} Algeria wanted its authorities to storm the aircraft and did not allow French soldiers to enter the country, but at all times Algeria recognized the French nationality of the aircraft.\textsuperscript{306}

Even in the famous 1976 hijacking of Air France Flight 139 diverted to Entebbe while operating a Tel Aviv–Athens–Paris flight, Israel was quick to recognize the French nationality of the aircraft.\textsuperscript{307} Israel’s then Defense Minister, Shimon Peres, was informed of the hijacking during a Cabinet meeting and wrote: “this was a plane belonging to the French national carrier and bearing the French national flag.”\textsuperscript{308} Israeli Prime Minister Yitzhak Rabin was told that because the plane fell under French jurisdiction, all negotiations\textsuperscript{309} would have to be conducted through the auspices of the French government.\textsuperscript{310} Thus, the Israeli cabinet reminded the French government that the aircraft and its passengers “were under sovereign French protection”\textsuperscript{311} and that they “waited for Paris to act.”\textsuperscript{312} Indeed, perhaps the clearest evidence of the respect that States have for the nationality of a foreign aircraft on the ground can be seen

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\textsuperscript{304} EgyptAir Flight 648, a 737 flying from Athens to Cairo, was hijacked to Libya or Tunisia but had to refuel in Malta, where Egyptian soldiers caused a fire, killing dozens during the rescue attempt. DOLNIK \& FITZGERALD, supra note 107, at 36–37.

\textsuperscript{305} This was the December 24, 1994, hijacking of Air France Flight 8969. Id. at 40–44.

\textsuperscript{306} Id.

\textsuperscript{307} See generally SHIMON PERES, BATTLING FOR PEACE: A MEMOIR 152 (1994).

\textsuperscript{308} Id.

\textsuperscript{309} The target of the hijacking was Israel, and the hijackers wanted Israel to release prisoners. Indeed, other than pressuring Israel, it is unclear what the hijackers wanted France to do. In a communiqué released later, they protested France’s sale of Mirage jets to Israel and France’s collaboration with an Israeli nuclear reactor project. See ENSALACO, supra note 71, at 97.

\textsuperscript{310} LINDA BENEDIKT, YITZHAK RABIN: THE BATTLE FOR PEACE 91 (2005).

\textsuperscript{311} THE JERUSALEM REPORT, SHALOM, FRIEND: THE LIFE AND LEGACY OF YITZHAK RABIN 89 (David Horvitz ed., 1996).

\textsuperscript{312} Id. Indeed, only after France had negotiated the release of non-Jewish, non-Israeli passengers and washed their hands of the incident, did Israel take the actions that resulted in the famous “Raid at Entebbe.” See PEDAHZUR, supra note 31, at 53–64.
\end{flushleft}
from the United States handling of a Russian jet at JFK in August of 1979.

Following the defection of Alexander Godunov, his wife Lyudmila Vlasova was quickly put aboard a scheduled Aeroflot Ilyushin 62 flight from New York’s JFK airport to Moscow. American authorities wanted to determine that Ms. Vlasova was leaving of her own free will. Recognizing that they were legally unable to board the plane, U.S. authorities put police cars in front of it, in order to impede its departure. A major international incident resulted, eventually involving American President Jimmy Carter and Soviet leader Leonid Brezhnev. The incident underscored that the aircraft was sovereign territory of the USSR and that air traffic control at JFK was the sovereign right of the United States.

C. Guiding Principles

1. Aircraft Maintain Their Nationality on the Ground

Both international law and State practice confirms that aircraft retain their nationality even on the ground at a foreign airport. But how are claims of overlapping jurisdiction avoided? It is well established that inviolability of a foreign embassy or consulate starts at the door. In the same manner it would have to be acknowledged that the nationality of an aircraft begins at the fuselage. This approach is used in places like Riyadh, where alcohol is legal aboard a foreign aircraft on the

Lyudmila Vlasova, the wife of Bolshoi Ballet superstar Alexander Godunov, was put on jet for Moscow shortly after Godunov’s defection became public. The defection made headlines worldwide. E.g., East-West: Turmoil on the Tarmac, TIME, Sept. 3, 1979.

The American Press reports that this was a scheduled Aeroflot flight carrying 112 passengers, including 44 Americans and 68 Soviets, which had been due to depart for Moscow at 5:00 p.m. on Friday, August 24, 1979. 68 Russian Held on Jet in NY as Stalemate on Ballerina Continues, BLADE, Aug. 26, 1979, at 1.


Dumbrell, supra note 316, at 127.

For the purposes of this article, no broader definition is necessary.


For the purposes of this article, no broader definition is necessary.

tarmac, but it is strictly prohibited outside. This “fuselage” approach is inspired by the Hague Convention’s definition of “in flight” as from when the “external doors are closed . . . until the moment when any such door is opened.”

Quite simply, the Hague Convention understands that when the doors of a foreign airline are closed, the occupants and provisions on board are under the jurisdiction of the captain. Thus, if an air marshal were to store his firearm on board, as the Israelis did, the State in which the airport is located should not need to be informed of this.

This line is also consistent with the line drawn by U.S. authorities in order to prevent the overlapping claims of jurisdiction by both the FBI and the FAMS in the case of aircraft hijackings: “In aircraft hijackings . . . federal air marshals have counterterrorism responsibilities aboard an aircraft. On the ground in U.S. territory, once the door of the aircraft is open, the FBI is responsible for the resolution of terrorist hijackings.” If one replaces the words “federal air marshals” with “air marshals of the State in which the aircraft is registered,” “U.S. territory” with “territory of another State,” and “FBI” with “Competent Authorities,” the result would be consistent with both a recognition of the nationality of aircraft and a recognition of the obligations of the State in which a hijacked aircraft lands.

2. The Aircraft Registered to One State Should Not Pose a Threat to the Interests of Another State

Just as a State is within its right to deploy air marshals, on aircraft registered to that State, the same State should, in respect

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321 Aircraft registered in other countries are not subject to Saudi Arabia’s liquor prohibition. Thus Air France, British Airways, Cathay Pacific, Lufthansa, and Singapore Airlines serve alcohol on flights to and from Riyadh.


323 This is an excerpt from that Convention’s definition of “in flight.” Hague Convention, supra note 85, art. 3(1). This is also contained in Article 5(2) of the Tokyo Convention. See supra note 58.

324 Hague Convention, supra note 85, art. 3(1).

325 See Lewis et al., supra note 63, at 105.


327 See Hague Convention, supra note 85, arts. 4(1)(b), 6, 7; and Montreal Convention, supra note 90, arts. 5(1)(c), 6, 7.
of the overflown State, take steps to ensure that its aircraft poses no threat either to:

- safe navigation of the airspace above the overflown State; or
- persons, property, and assets on the ground of the overflown State.

Thus, it would be reasonable to require that the State of registration be in agreement with any deployment of air marshals on its aircraft. It would also be reasonable to require that air marshals meet international training standards. Further, it would be reasonable to require that any such aircraft be covered by a policy of war-risk insurance. In some cases the insurance would be provided by the State of registration, and in any case insurance policies would demand high standards for in-flight security measures on board insured aircraft.

3. The Jurisdiction of Other States Is Secondary

It is recognized that "for the purposes . . . of the domestic rule on conflict of laws, the inside of a foreign aircraft in flight across the State's airspace may be considered as 'foreign territory.'" This is underscored when the State of registry deploys an air marshal on aircraft registered in that State, in order to fully exercise jurisdiction "over offences and acts committed." Any legal authority of the overflown State is based primarily on safety and security issues, such as ensuring the aircraft is safer.

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328 Generally this is not difficult, as the State of registration is generally the State that deploys the air marshals. In other cases, such as leases, the State of registry of the leased aircraft will generally not oppose the deployment of air marshals. Bermuda would not likely oppose the deployment by Russia of air marshals on Aeroflot's Bermudan-registered Boeing 767s serving the Moscow–New York route.

329 In the interim, any marshal meeting the standards of Israel, Egypt, or Somalia should be accepted. Air marshals of all three States have fired weapons in flight, and in each case the aircraft landed safely.

330 For an overview of ICAO's handling of this issue, see Milde, supra note 176, at 290–91. For a précis of the legal issues involved, see U.S. Congressional Research Service, Insurance Exclusion Clauses: Excluding War Risks and Terror Risks from Insurance Contracts (RL3116, June 14, 2001), by Christopher A. Jennings.

331 Bentivoglio, supra note 45, at 100.

332 See Tokyo Convention, supra note 58, art. 3(1), (2); Hague Convention, supra note 85, art. 4(1)(a); Montreal Convention, supra note 90, art. 5(1)(b).

333 Article 6 of the Chicago Convention, supra note 21, would be the basis for an overflown State to impose conditions for overflights.

334 Thus, in the interests of safety, the European Union bans airlines and aircraft from its skies. Often exceptions are made if aircraft are registered in a
that terrorist are not on board, or ensuring that air traffic control instructions are followed.

Any other potential claim of jurisdiction, such as for an offense “committed in the territory of that State,” is secondary and cannot be found in either the Tokyo Convention or the Hague Convention. There is no overlapping exercise of jurisdiction here. The State whose territory is being overflown may wish to claim jurisdiction, but only the State whose air marshal is deployed is effectively exercising jurisdiction. Further, while the aircraft is airborne there is no practical way for most States to enforce this jurisdiction, unless they want to send a fighter jet to escort a hijacked airliner or shoot it down.

country that applies E.U. safety standards. For example, Kazakhstan’s Air Astana is allowed to operate those of its aircraft that are registered in Aruba. Aruba is an autonomous region within the Kingdom of the Netherlands and follows Dutch law. See Commission Regulation 619/2009, 2009 O.J. (L182/4) 31, 32 (establishing the Community list of air carriers that are subject to an operating ban within the Community).

This is the basis of America’s Secure Flight Program. 49 C.F.R. pt. 1540 (2008).

For an overview of this, see WALTER SCHWENK & RÖDIGER SCHWENK, ASPECTS OF INTERNATIONAL CO-OPERATION IN AIR TRAFFIC MANAGEMENT (1998).

It can be found in article 5(1)(a) of the Montreal Convention, but as previously noted, that Convention focuses on attacks against aircraft on the ground. Montreal Convention, supra note 90, art. 5(1)(a).

It is added to the Montreal Convention, primarily to ensure that in those cases where others lack jurisdiction, the country in whose territory the offence happened, has jurisdiction to act.

See JOYNER, supra note 60, at 136–38.

Indeed, article 4 of the Tokyo Convention prohibits interference by the overflown State unless the incident has some direct impact on the territory or nationals of that State. Tokyo Convention, supra note 58, art. 4.

Most countries do not have the military ability to do this, as it requires maintaining jet fighters in a constant state of readiness. The 9/11 COMMISSION REPORT, supra note 130, at 42–46.

Only two civilian airliners have been shot down. Korean Airlines Flight 007, a Boeing 747 en route from New York to Seoul via Anchorage, was shot down (killing all 269 occupants) by Soviet Air Force MiG-23 fighters on September 1, 1983, for straying into Soviet airspace. Transcript of Shultz News Conference on the Korean Airliner, N.Y. TIMES, Sept. 2, 1983, at A5. Iran Air Flight 655, an Airbus A-300 en route from Tehran to Dubai via Bandar Abbas, was shot down (killing all 290 occupants) by a missile fired by the U.S. Navy cruiser U.S.S. Vincennes, on July 3, 1988, in a case of military error. Richard Holloran, The Downing of Flight 655, N.Y. TIMES, July 4, 1988, at 11. Both incidents have confirmed that shooting down civilian airliners is not a practical or palatable option. See Protocol Relating to an Amendment to the Convention on International Civil Aviation, art. 3 bis, May 10, 1984. Indeed, article 3 bis of the Chicago Convention, restricts this option and was adopted by the 25th (Extraordinary) Session of the ICAO Assembly on May 10, 1984, in the aftermath of the Korean Airlines Flight 007 incident. See
XI. CONCLUSION

To the extent that a State in which an aircraft is registered believes that the deployment of an air marshal is an extra layer of security and it:

1. deploys that air marshal according to accepted security and safety standards;
2. ensures that the air marshal's weapons never leave the aircraft; and
3. is prepared to assume responsibility for the consequences of the air marshal discharging his weapon while the aircraft is in flight over the territory of another State;

the existence and operations of the air marshal should only be the jurisdiction of the State of registry of the aircraft, unless it requests assistance from another State. If these conditions are respected, it should not be necessary for the State of registry to conclude an air marshal agreement with: (1) the State of the aircraft's planned destination or en route stops; (2) any State whose territory is to be overflown; or (3) any State to whose territory the aircraft might be diverted in the event of an emergency or hijacking. Only such a regime provides legal certainty in all situations and ensures, to the greatest extent possible, the fullest confidentiality of all air marshal operations.

Therefore, the current legal requirements of Regulation (EC) No 300/2008 and the ICAO's Amendment No. 11 to Annex 17 of the Chicago Convention need to be revisited and modified. If the requirement for States to provide air marshal operational information to other States and the practice of having foreign air marshals escorted by domestic police officers are maintained, it is only a matter of time before an air marshal's weapon is confiscated by terrorists who were made aware of his identity through a security leak or bungled government procedure. Such an event would undermine a strategy that worked so well for Israel and other States when the operations of air marshals were still cloaked in secrecy.

id. art. 3 bis (coming into force on October 1, 1998, nearly a decade after the Iran Air Flight 655 shooting).