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AIR MARSHALS: THE NEED FOR LEGAL CERTAINTY

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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=197712040> (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.

1994.⁵ 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.”⁶ Also overlooked was the fact that September 11, 2001, was not the first time that multiple U.S. airliners were hijacked on the same day⁷ from the same U.S. airport.⁸

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 marshals⁹ was born. The Aviation and Transportation Security Act¹⁰ was introduced a mere ten days after September 11th¹¹

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).

⁶ Air France Flight 8969, an Airbus A-300, was hijacked at Algiers on December 24, 1994. BRYNJAR LIA, ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL-QAIDA STRATEGIST ABU MUS'AB AL-SURI 155 (2008).

⁷ On August 16, 1980, three U.S. airliners were hijacked to Cuba. They were Delta Flight 1065, San Juan–Miami, Republic Flight 227, Miami–Orlando, and Eastern Flight 90, Miami–Orlando. OFFICE OF CIVIL AVIATION SECURITY, *supra* note 3, at 82–83. In 1995, intelligence officials became aware of the “Bojinka” plot to simultaneously destroy eleven U.S. passenger jets over the Pacific. SIMON REEVE, THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN AND THE FUTURE OF TERRORISM 90–91 (1999).

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.

⁹ Air marshals are undercover, armed, highly-trained law enforcement or security officers who travel as passengers aboard commercial airline flights for the purpose of thwarting hijackings. *E.g.*, Transp. Sec. Admin. (TSA), Federal Air Marshals, <http://www.tsa.gov/lawenforcement/programs/fams.shtm> (last visited Mar. 26, 2010). They are also known as “In-Flight Security Officers,” “Sky Marshals,” “Air Security Officers” and “Aircraft Protective Officers.” See, *e.g.*, *id.*; TSA, Our Mission, <http://www.tsa.gov/lawenforcement/mission/index.shtm> (last visited Apr. 13, 2010).

¹⁰ Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C. (2006)).

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.¹²

Section 105 of the Act gives federal air marshals¹³ responsibility for “air transportation or intrastate air transportation”¹⁴ with a focus on “nonstop, long-distance flights, such as those targeted on September 11, 2001.”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.¹⁶

Subsequent events, such as the August 10, 2006, plot to explode North American-bound planes in midair¹⁷ have helped produce a situation where certain countries may require the presence of air marshals on flights flying over their territory,¹⁸ while countries, especially those with restrictive firearms regulations¹⁹ may prohibit the entry of armed persons.²⁰ This puts ar-

¹² This is particularly impressive when one realizes that there was an anthrax attack on Capitol Hill during this period. See Facts About Anthrax Testing and Ongoing Investigations in Florida, Nevada, New York, and Washington, D.C.; Oct. 16, 2001, http://avalon.law.yale.edu/sept11/cdc_002.asp. That attack happened on October 16 and its impact lasted several days. Ryan R. Kemper, Note, *Responding to Bioterrorism: An Analysis of Titles I and II of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002*, 83 WASH. U. L.Q. 385, 387–88 (2005).

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 pre-dates Sept. 11, 2001. See Air Craft Operator Security; Final Rule, 66 Fed. Reg. 37330, 1, 26 (July 17, 2007) (amending 14 C.F.R. § 108.219).

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.

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

¹⁶ See JOSEPH M. SIRACUSA & DAVID G. COLEMAN, *DEPRESSION TO COLD WAR: A HISTORY OF AMERICA FROM HERBERT HOOVER TO RONALD REAGAN* 215 (2002).

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.

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).

¹⁹ Countries with restrictive firearms laws include Belgium, Canada, New Zealand, and the United Kingdom. Wendy Cukier, Tania Sakar, & Tim Quigley, *Firearm Regulation: International Law and Jurisprudence*, 6 CAN. CRIM. L. REV. 99, 101 (2006).

²⁰ See Council Regulation (EC) No. 300/2008, arts. 1, 3, 4, 2008 O.J. (L97/72) 1, 3–5 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No. 2320/2002, Annex, Article 10. See also International Civil Aviation Organization (ICAO), Amendment No. 11 to the International Standards and Rec-

ticles 1, 2 and 9 of the Chicago Convention²¹ 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,²² the various layers of aviation security,²³ and whether or not air marshals actually make commercial aviation safer will not be discussed here.²⁴

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.²⁵ 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 State²⁶ and deployed on

ommended Practices: Security; Safeguarding International Civil Aviation Against Act of Unlawful Interference, Annex 17 to the Convention on International Civil Aviation, ¶¶ 4.7.4, 4.7.7 (2005) [hereinafter ICAO Annex 17 amend. 11].

²¹ Convention on International Civil Aviation arts. 1, 2, 9, 17–20, Dec. 7, 1944, T.I.A.S. 1591, 15 U.N.T.S. 295, ICAO Doc. 7300 [hereinafter Chicago Convention]. It had over 180 parties on June 30, 2001. ICAO, Convention on International Civil Aviation, <http://www.icao.int/icao/en/leb/Chicago.pdf> (last visited Apr. 13, 2010).

²² Secure Flight Program, 49 C.F.R. §§ 1540, 1544, 1560 (2008).

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).

²⁴ For a good overview of air marshal issues, see J. PAUL DE B TAILLON, *HIJACKING AND HOSTAGES: GOVERNMENT RESPONSES TO TERRORISM* 27–28 (2002). See also BRUCE SCHNEIER, *BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD* 151–52 (2003); DALE L. JUNE ET AL., *PROTECTION, SECURITY, AND SAFEGUARDS: PRACTICAL APPROACHES AND PERSPECTIVES* 237 (2000).

²⁵ *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4, 26 (Apr. 6).

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 (2002); 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 terminating²⁷ at an airport in that State.

II. EARLY DAYS OF AIR MARSHALS

Prior to 1970, four countries—the United States,²⁸ Russia,²⁹ Ethiopia,³⁰ and Israel³¹—were known³² 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.³³ The United States had many more airliners, and thus, America's air marshals

²⁷ States also deploy air marshals on Fifth Freedom services flown by their airlines. Fifth Freedom services entail "[t]he 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).

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." PRICE & FORREST, *supra* note 5, at 138; *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. *See* ALEXANDER T. WELLS & CLARENCE C. RODRIGUES, COMMERCIAL AVIATION SAFETY 303 (4th ed. 2004).

²⁹ Some Aeroflot pilots carried weapons in the 1960s. *See Soviet Union: A Dreaded First for Aeroflot*, TIME, Oct. 26, 1970, at 46.

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." OFFICE OF CIVIL AVIATION SECURITY, *supra* note 3, at 17.

³¹ Israel began using air marshals in 1968. *See* AMI PEDAHZUR, THE ISRAELI SECRET SERVICES AND THE STRUGGLE AGAINST TERRORISM 36 (2009). This was probably the result of the successful hijacking to Algiers of an El Al Tel Aviv-Rome 707 on July 23, 1968. The ordeal lasted roughly five weeks. *See* JOHN HARRISON, INTERNATIONAL AVIATION AND TERRORISM, EVOLVING THREATS, EVOLVING SECURITY 58–59 (2009).

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

³³ In the 1960s, Ethiopia was facing constant security threats from the Eritrean Liberation Front. Tracey L. Cousin, *Eritrean & Ethiopian Civil War*, in ICE CASE STUDIES 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." 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. *See id.* at 17.

were deployed at the request of either the airline or the FBI³⁴ 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.³⁵

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."³⁶ 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 time³⁷ allowing contracting States to regulate the registration and transfer of aircraft,³⁸ and demanding that aircraft involved in international transportation bear "appropriate nationality and registration marks."³⁹ Although States are responsible for registering aircraft, the registration must include the country's call-sign prefix allocated by the International Telecommunication Union.⁴⁰ 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.⁴¹

The idea that aircraft have nationality and are essentially national territory⁴² goes back to the earliest day of commercial avi-

³⁴ STAFF OF H. COMM. ON THE JUDICIARY, 109TH CONG., PLANE CLOTHES: LACK OF ANONYMITY AT THE FEDERAL AIR MARSHAL SERVICE COMPROMISES AVIATION AND NATIONAL SECURITY: INVESTIGATIVE REPORT 3 (Comm. Print 2006).

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).

⁴⁰ See International Telecommunication Union Call Sign List, http://www.itu.int/cgi-bin/htsh/glad/cga_callsign.sh?Ing=E (last visited Apr. 13, 2010).

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 routes⁴⁵ 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 pilots⁵¹ and radio opera-

⁴³ See 1919 Paris Convention on Aerial Navigation arts. 6–8, Oct. 13, 1919, 11 L.N.T.S. 173. KLM’s first scheduled flight, between Amsterdam and London, took place on May 17, 1920, some seven months after the Convention’s signing. See KENNETH HUDSON & JULIAN PETTIFER, *DIAMONDS IN THE SKY: A SOCIAL HISTORY OF AIR TRAVEL* 38 (1979).

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).

⁴⁵ Ludovico M. Bentivoglio, *Conflicts Problems in Air Law*, in *RECUEIL DES COURS, COLLECTED COURSES*, VOLUME 119 (1963-III), at 94 (1969).

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).

⁵⁰ There is significant room for discretion here. Canada has embraced Safety Management Systems and proposed Bill C-7, entitled “An Act to amend the Aeronautics Act.” Transport Canada, Aeronautics Act, <http://www.tc.gc.ca/civilaviation/regserv/affairs/aeronauticsact/menu.htm> (last visited Apr. 1, 2010). If passed, the Bill would provide a legal basis for Canada’s government to impose safety management systems on Canada’s air carriers. Transport Canada, Bill C-7 with Amendments Through Nov. 13, 2007 ¶ 5.39, <http://www.tc.gc.ca/civilaviation/regserv/affairs/aeronauticsact/Nov13-07consolidation.pdf>.

⁵¹ Chicago Convention, *supra* note 21, art. 32(a).

tors, to on-board births⁵² and crimes committed on board.⁵³ 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.⁵⁴ The regulation of airworthiness is much more than ensuring high maintenance standards; it also includes the approval of new aircraft designs,⁵⁵ new versions of current aircraft,⁵⁶ and modifications of existing aircraft.⁵⁷

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).

⁵⁴ Personnel Licensing, Annex 1 to the Convention on International Civil Aviation (2005); Airworthiness of Aircraft, Annex 8 to the Convention on International Civil Aviation (2005).

⁵⁵ Both the Federal Aviation Administration and the European Aviation Safety Agency gave type approval for the Airbus A-380 on December 12, 2006. Press Release, Airbus, Airbus A380 Receives Joint EASA & FAA Type Certification (Dec. 12, 2006). However, each agency prepared its own report. See FED. AVIATION ADMIN., FAA TYPE CERTIFICATE, DATA SHEET NO. A58NM; EUROPEAN AVIATION SAFETY AGENCY, TYPE-CERTIFICATE DATA SHEET: AIRBUS A380, [http://www.easa.eu.int/doc/Certification/Design_Appro/Aircrafts/TCDS%20EASA.A.110%20Airbus%20A380%20Iss%201%20\(12%20Dec%2006\).pdf](http://www.easa.eu.int/doc/Certification/Design_Appro/Aircrafts/TCDS%20EASA.A.110%20Airbus%20A380%20Iss%201%20(12%20Dec%2006).pdf) (last visited Apr. 1, 2010).

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.caa.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.*

B. THE TOKYO CONVENTION

The 1963 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft⁵⁸ served to reinforce this position. With respect to international flights,⁵⁹ 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.”⁶⁰ 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”⁶¹ 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.”⁶²

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.⁶³

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

⁵⁸ Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention]. It has been ratified by 182 countries and entered into force on December 14, 1969. *Id.*

⁵⁹ “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.” ILLAS BANTEKAS & SUSAN NASH, *INTERNATIONAL CRIMINAL LAW* 23 (2d ed. 2003).

⁶⁰ Tokyo Convention, *supra* note 58, art. 3, ¶ 1. This affirms the “law of the flag.” NANCY DOUGLAS JOYNER, *AERIAL HIJACKING AS AN INTERNATIONAL CRIME* 136 (1974); see also Robert P. Boyle & Roy Pulsifer, *The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 30 J. AIR L. & COM. 305, 333 (1964).

⁶¹ Tokyo Convention, *supra* note 58, art. 3, ¶ 2.

⁶² JOYNER, *supra* note 60, at 136–37.

⁶³ The attack happened February 18, 1969. JACK LEWIS ET AL., *THE GUN DIGEST BOOK OF ASSAULT WEAPONS* 105 (7th ed. 2007); see also *Middle East: Terror in Two Cities*, TIME, Feb. 28, 1969, <http://www.time.com/time/magazine/article/0,9171,900684,00.html>.

4. At the same time, some of the “offenses” had occurred on the Israeli jet,⁶⁴ 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.⁶⁵ 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.⁶⁶

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.⁶⁷ 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, 1970,⁶⁸ 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>.

⁶⁷ See James S.G. Turner, *Piracy in the Air*, 62 *INT’L L. STD. SER. U.S. NAVAL WAR C.* 548, 567 (1980).

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 Swissair⁶⁹ Flight 100, a DC-8 serving the Zurich–New York route.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 marshals⁷¹ killed one of the two hijackers and captured his comrade, Leila Khaled.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.⁷³ The two rejected hijackers subsequently boarded and hijacked Pan Am Flight 93, a brand-new⁷⁴ Boeing 747⁷⁵ 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.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.⁷⁷ All of the hijacked aircraft were blown up.⁷⁸

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).

⁷⁰ See OFFICE OF CIVIL AVIATION SECURITY, *supra* note 3, at 25.

⁷¹ MARK ENSALACO, *MIDDLE EASTERN TERRORISM: FROM BLACK SEPTEMBER TO SEPTEMBER 11*, at 22 (2008).

⁷² SIMON REEVE, *ONE DAY IN SEPTEMBER: THE FULL STORY OF THE 1972 MUNICH OLYMPICS MASSACRE AND THE ISRAELI REVENGE OPERATION "WRATH OF GOD"* 31–32 (2000). Leila Khalid had hijacked and helped destroy a TWA 707 in August 1969. See OFFICE OF CIVIL AVIATION SECURITY, *supra* note 3, at 13.

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.

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).

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.

⁷⁶ CHRISTOPHER M. ANDREW & VASILI MITROKHIN, *THE WORLD WAS GOING OUR WAY: THE KGB AND THE BATTLE FOR THE THIRD WORLD* 249 (2005).

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 hostages⁷⁹ were used by PFLP to negotiate the release of prisoners held in Europe.⁸⁰

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."⁸¹ On November 25, the U.N. General Assembly passed a resolution condemning hijacking.⁸² On December 16, "the ICAO convened an international conference which resulted in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970."⁸³ 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."⁸⁴

London, available at <http://filestore.nationalarchives.gov.uk/pdfs/large/cab-128-47.pdf>.

⁷⁸ 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).

⁷⁹ 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.

⁸⁰ 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.*

⁸¹ S.C. Res. 286, 912, U.N. Doc. S/Res 1286 (Sept. 9, 1976). Security Council resolution 286 was adopted without vote (Consensus 1552d meeting of council). See KAREL WELLENS, RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL (1946-1989): A THEMATIC GUIDE 659 (1990).

⁸² See S.K. VERMA, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 168 (1998) (citing to Res. of Nov. 25, 1970, GAOR, 25th Sess. Supp. 28, p.126; 9 ILM 1288 (1970)); see also JOHN O'BRIEN, INTERNATIONAL LAW 250 (2001). There were no votes against the motion.

⁸³ TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 491 (1998). Perhaps coincidentally, the ICAO, motivated by earlier hijackings, had convened an Extraordinary Session of the ICAO Assembly in June 1970. See ICAO, Assembly Sessions, http://www.icao.int/icao/en/trivia/ass_sess.htm (last visited Apr. 13, 2010). The work of that Assembly fed into the Convention. Eugene Sochor, *ICAO and Armed Attacks Against Civil Aviation*, 44 INT'L J. 134, 142 (1988).

⁸⁴ 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 Convention⁸⁵ reiterated the call for the State of registration to “take such measures as may be necessary to its establish its jurisdiction”⁸⁶ over violent acts⁸⁷ against passengers or crew “when the offence is committed on board an aircraft registered in that State.”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.⁸⁹

The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation⁹⁰ was a second response to the deliberate destruction of four commercial aircraft in-

Buzdugan, *Current and Emerging Air Cargo Security and Facilitation Issues*, THE INT’L AIR CARGO ASS’N, 23–24 (2005).

⁸⁵ Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Convention]. It has been ratified by 185 countries and entered into force on October 14, 1971. *Id.*

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).

⁹⁰ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564 974 U.N.T.S. 177 [hereinafter Montreal Convention]. It has been ratified by 188 countries and entered into force on January 26, 1973. *Id.*

volved in the Dawson's Field hijackings⁹¹ 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."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."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.'"⁹⁴ Almost immediately, U.S. courts began examining the privacy implications of these techniques.⁹⁵

On September 21, 1970, President Nixon created a scheme to deploy a small force of 100 sky marshals⁹⁶ on Pam Am⁹⁷ and

⁹¹ See CRAIG BARKER & JOHN GRANT, INTERNATIONAL CRIMINAL LAW DESKBOOK 63 (2006).

⁹² Montreal Convention, *supra* note 90, art. 2(b).

⁹³ See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167. It entered into force February 20, 1977. *Id.*

⁹⁴ COMMITTEE ON COMMERCIAL AVIATION SECURITY, AIRLINE PASSENGER SECURITY SCREENING: NEW TECHNOLOGIES AND IMPLEMENTATION ISSUES 6 (1996).

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).

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.

TWA⁹⁸ international flights⁹⁹ and certain domestic flights¹⁰⁰ 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.¹⁰¹ At the same time, the U.S. Congress worked on the passage of the Air Transportation Security Act of 1974.¹⁰² 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.¹⁰³

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. 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).

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. OFFICE OF CIVIL AVIATION SECURITY, *supra* note 3, at 36.

⁹⁹ ELIAS, *supra* note 96, at 5.

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. OFFICE OF CIVIL AVIATION SECURITY, *supra* note 3, at 22. The flight included “three U.S. Sky Marshals plus a vacationing FBI agent.” 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. *Id.*

¹⁰¹ John S. Lang, *Nixon Orders Airlines to Take Security Steps*, FREE LANCE-STAR, Mar. 25, 1972, at 7. The number of U.S. air marshals in the 1970s peaked at around 2,500. Sara Kehaulani Goo, *Air Marshals’ Role Expanded*, WASH. POST, Nov. 15, 2003, at A02.

¹⁰² See generally Air Transportation Security Act of 1974, Pub. L. No. 93-366, § 315(1), 88 Stat. 409 (repealed 1994); see also Poole, Robert W., Jr., *Toward Risk-Based Aviation Security Policy* 9 (OECD-International Transport Forum, Joint Transport Research Centre, Discussion Paper No. 23, 2008).

¹⁰³ On April 12, 1975, to facilitate the deployment of air marshals on domestic flights of U.S. carriers, the FAA issued FAR Amendment 121-118, codified as 14 C.F.R. pt. 121. See FAA, *Advisory Circular 108-2*, FAR Guidance Material, Security Rules – Carriage of Weapons and Escorted Persons, 2-3 (1981).

4. Elsewhere

After the Dawson's Field hijackings, Russia,¹⁰⁴ Israel,¹⁰⁵ and Ethiopia¹⁰⁶ continued to use air marshals and almost immediately these countries were joined by Egypt,¹⁰⁷ Jordan,¹⁰⁸ Pakistan,¹⁰⁹ and probably India.¹¹⁰

¹⁰⁴ "Security teams" routinely travel on board Russian flights heading to "dangerous regions". See Vladimir Kozlov, *Russia Beefs Up Flight-Security Guidelines*, *Russ. J.*, Sept. 21, 2001, at 2.

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, *Profiling Aviation Threats*, SEC. MGMT. MAG., Aug. 2008, <http://www.securitymanagement.com/article/profiling-aviation-threats-004454>.

¹⁰⁶ On December 8, 1972, five men and two women attempted to hijack Ethiopian Airlines Flight 708, a Boeing 720 en route from Addis Ababa to Paris via Asmara, Athens, and Rome. Security guards opened fire and killed six of the hijackers. The plane made a successful emergency landing. OFFICE OF CIVIL AVIATION SECURITY, *supra* note 3, at 40; see also Aviation Safety Network Database, <http://aviation-safety.net/database/record.php?id=19721208-0> (last visited Apr. 3, 2010). More recently, on June 9, 2002, two men attempting to hijack an Ethiopian Airlines domestic flight were shot by "in-flight security personnel." The flight also landed safely at its destination. See Aviation Safety Network Database, ASN Aircraft Accident Boeing 747-060B, <http://aviation-safety.net/database/record.php?id=20020609-0> (last visited Apr. 3, 2010).

¹⁰⁷ Egypt's "security officers" started arresting hijackers on Egyptian airlines as early as September 10, 1970. 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. 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." OFFICE OF CIVIL AVIATION SECURITY, FAA, *CRIMINAL ACTS AGAINST CIVIL AVIATION IN 1999* 21 (2000); 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).

¹⁰⁸ Royal Jordanian Airlines President and CEO Samer Majali says the airline has used air marshals since 1970. See *Arab Air Transport Officials Draft Deal to Liberalise Sector*, *JORDAN TIMES*, Feb. 10, 2004, <http://www.jordanembassyus.org/02102004006.htm>. Their actions were described in a 1974 article about the hijacking of a Jordanian airliner to Beirut. See Islamic Terrorism Timeline, http://prophetofdoom.net/Islamic_Terrorism_Timeline_1974.Islam (last visited Apr. 3, 2010). There were also several Jordanian air marshals aboard Royal Jordanian Flight 402 from Beirut to Amman on June 11, 1985. See Ed Bruske, *Suspect in '85 Hijacking Beat Marshal, Witness Says*, *WASH. POST*, Mar. 4, 1989, at A15.

¹⁰⁹ Pakistan has used air marshals since 1981. See Zarar Khan, *Pakistan Women Excel in Elite Anti-Terrorist Sky-Marshall Unit*, *SEATTLE TIMES*, Aug. 4, 2002, <http://community.seattletimes.nwsources.com/archive/?date=20020804&slug=pakwom-en04>. 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

ating a domestic flight. The incident lasted over twelve days. OFFICE OF CIVIL AVIATION SECURITY, *supra* note 3, at 89.

¹¹⁰ India has probably used air marshals for many years, especially since the Air India Flight 182 bombing in 1985. See Aviation Safety Network Database, ASN Aircraft Accident Boeing 747-237B, <http://aviation-safety.net/database/record.php?id=19850623-2> (last visited Apr. 3, 2010). In 2007, an air marshal was arrested on a sexual molestation charge arising from his conduct on a domestic Indian flight. *Sky Marshal Held in Srinagar for Molesting Passenger*, TIMES OF INDIA, Aug. 18, 2007, <http://timesofindia.indiatimes.com/india/sky-marshal-held-on-Srinagar-for-molesting-passenger/articleshow/2289526.cms>.

¹¹¹ 3 PRAEGER SEC. INT'L, COUNTERING TERRORISM AND INSURGENCY IN THE 21ST CENTURY: INTERNATIONAL PERSPECTIVES—LESSONS FROM THE FIGHT AGAINST TERRORISM 38 (James J.F. Forest ed., 2007). The incident lasted seventeen days and one American passenger, U.S. Navy Diver Robert Stethem, was killed. *Id.* at 38–48 (giving an overview of this hijacking).

¹¹² William E. Smith, *Terror Aboard Flight 847*, TIME, June 24, 1985, at 18. Of the 153 passengers and crew, roughly 100 were American. *Id.*

¹¹³ Beirut was in a state of near anarchy at the time, and the Lebanese government had neither control of the airport nor of the various areas of Beirut where the hostages were held. See GRANT WARDLAW, POLITICAL TERRORISM: THEORY, TACTICS, AND COUNTER-MEASURES 151 (2d ed. 1989).

¹¹⁴ BRUCE HOFFMAN, INSIDE TERRORISM 132–35 (1998).

¹¹⁵ *Id.* at 133–34.

¹¹⁶ International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, 99 Stat. 190 (1987) (codified as amended in scattered sections of 49 U.S.C. ch. 449 (2006)).

¹¹⁷ See WELLS & RODRIGUES, *supra* note 28, at 303.

United States committed in their presence.”¹¹⁸ 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.”¹¹⁹ Shortly afterwards, the program was extended “to cover[] international flight routes of U.S. flag carriers,”¹²⁰ and the number of federal air marshals increased to nearly 400.¹²¹

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.¹²² The event lasted for two days.¹²³ Intelligence reports later revealed that the hijackers planned to use the large aircraft as a missile to attack a target in central Paris.¹²⁴ 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.¹²⁵

The 1994 Convention on the Safety of United Nations and Associated Personnel¹²⁶ was signed by the first country just nine

¹¹⁸ International Security and Development Cooperation Act of 1985 § 553(b) (codified at 49 U.S.C. § 44903(d)); see also ROBERT M. KANE, AIR TRANSPORTATION 222 (14th ed. 2003).

¹¹⁹ See Library of Congress, Summary of International Security and Development Cooperations Act of 1985, <http://thomas.loc.gov/cgi-bin/bdquery/z?d099:SN00960:@@@D&summ2=M&> (last visited Apr. 13, 2010).

¹²⁰ BARTHOLOMEW ELIAS, AIRPORT AND AVIATION SECURITY: U.S. POLICY AND STRATEGY IN THE AGE OF GLOBAL TERRORISM 24 (2010).

¹²¹ Katherine Stein, Comment, *Search and Seizure at Cruising Altitude: An Analysis of the Re-Born Federal Air Marshals and Fourth Amendment Complications in the Twenty First Century*, 70 J. AIR L. & COM. 673, 677 (2005). In 1985, \$5 million was allocated “for the Federal Air Marshal program and research and development of airport security devices and explosives detection techniques.” U.S. Dept. of Transp., A Chronology of Dates Significant in the Background, History and Development of the Department of Transportation, <http://dotlibrary.dot.gov/Historian/chronology.htm> (last visited Apr. 13, 2010).

¹²² See DOLNIK & FITZGERALD, *supra* note 107, at 40–41.

¹²³ *Id.* at 40–44.

¹²⁴ See LIA, *supra* note 6, at 155.

¹²⁵ Thomas Sanction, *Anatomy of a Hijack*, TIME, Jan. 9, 1995, at 54. For a fascinating look at how the hostages were liberated, see MARK SPICER, ILLUSTRATED MANUAL OF SNIPER SKILLS 234–35 (2006).

¹²⁶ Convention on the Safety of United Nations and Associated Personnel, adopted Dec. 9, 1994, 34 I.L.M. 482. It entered into force on January 14, 1999. Audiovisual Library of International Law, <http://untreaty.un.org/cod/avl/ha/csunap/csunap.html> (last visited Apr. 13, 2010).

days before the GIA terrorists killed their first diplomat.¹²⁷ 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.”¹²⁸

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 2001.¹²⁹ Sadly, during this lull in domestic hijackings the number of U.S. air marshals declined to less than forty,¹³⁰ virtually all of whom were deployed on international flights.¹³¹

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).¹³² Just as a shocked world bordered on a Middle East war in the aftermath of the Dawson Field hijackings,¹³³ September 11th served as an international call to action, if only to underscore the importance of lessons learned from past terrorist incidents.¹³⁴

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.

¹²⁸ Convention on the Safety of United Nations and Associated Personnel, *supra* note 126, 34 I.L.M. at 488.

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.*

¹³⁰ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 85 (2004).

¹³¹ *Id.* at 3, 10.

¹³² *See* TSA, U.S. DEP’T OF TRANSP., CRIMINAL ACTS AGAINST CIVIL AVIATION 38–41 (2002).

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, thousands¹³⁵ of federal air marshals have been hired¹³⁶ at a very rapid pace,¹³⁷ but the service has been shuffled back and forth between various departments of the U.S. government.¹³⁸ 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.¹³⁹ Within 18 months, it and the TSA had been transferred to the newly established Department of Homeland Security (DHS).¹⁴⁰ Then, within a year, FAMS had been removed from TSA and sent over to U.S. Immigration and Customs Enforcement (ICE).¹⁴¹ Finally, in November 2005, FAMS was sent to its present abode, within TSA as part of DHS.¹⁴² 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.”¹⁴³

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

BART ELIAS, AIRPORT PASSENGER SCREENING: BACKGROUND AND ISSUES FOR CONGRESS 1 (2009).

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.*

¹⁴⁰ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. FAMS and TSA went to DHS on March 2003. GAO, *supra* note 138, at 3.

¹⁴¹ GAO, *supra* note 138.

¹⁴² *Id.*

¹⁴³ *Id.* at 4. This conforms with Aviation and Transportation Security Act. Pub. L. No. 107-71, § 44917(b), 115 Stat. 597, 607 (2001).

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

¹⁴⁴ 14 C.F.R. pt. 91 (2009); 49 C.F.R. pt. 1500 (2009); Civil Aviation Security Rules, 67 Fed. Reg. 8340 (Feb. 22, 2002) (to be codified in scattered sections of 14 C.F.R. and 49 C.F.R.). See 49 C.F.R. §§ 1546.1(b), .201(d) (2009).

¹⁴⁵ The company was placed in receivership in December 2003. See *Air France-KLM CEO Summoned in Money-Laundering Probe*, AFX NEWS LTD. LONDON, 2006.

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+dated_Oct.+1,+1999-a055932625.

¹⁴⁷ Chris Noon, *Air France-KLM CEO Spinetta Hits Turbulence*, FORBES MAG., July 12, 2006, http://www.forbes.com/2006/07/12/spinetta-air-france-cx_cn_0712autofacescan06.html; see also *Air France-KLM Faces Probe Over Pretory Deal*, TORONTO STAR, July 21, 2006, at F04. Today, Air France is believed to be using government air marshals. See *Pretory Completes All Nippon Airways -ANA- Contract by Providing Sky Marshals for the World Cup*, BUS. WIRE, July 9, 2002, http://findarticles.com/p/articles/mi_m0EIN/is_2002_July_9/ai_88599276/. In 2006, Saïd El Khadraoui, a Belgian Member of the European Parliament, stated that some E.U. countries such as England and France had used air marshals, but Greece and Spain had not. Remarks of Saïd El Khodraoui, EUR. PARL. DEB. (A6-0194 (2006)) 12 (June 14, 2006), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20060614&secondRef=ITEM-012&format=xml&language=EN>.

are Australia,¹⁴⁸ Austria,¹⁴⁹ China,¹⁵⁰ Germany,¹⁵¹ Japan,¹⁵² and the United Kingdom.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."¹⁵⁴ However, Air Canada had been informed that its flights into Washington's Ronald Reagan Airport (DCA)¹⁵⁵ would now have

¹⁴⁸ Australia has had air marshals since 2003. Mark Russell, *Sky-High Cost of Our Flying Cops*, SUNDAY AGE, Feb. 25, 2007, <http://www.theage.com.au/news/national/skyhigh-cost-of-flying-cops/2007/02/24/1171734074064.html>. Australia reportedly has 130 air marshals. See Natalie O'Brien, *Air Marshal Scheme "Costly and Chancy"*, AUSTRALIAN, Nov. 17, 2008, Local, at 2. Australia began preparing its air marshal plan in October 2001. David Learmount, *Sky Marshal Plan Riles Governments*, FLIGHT INT'L, Jan. 6, 2004, at 5. The Australian Protective Service, which is a branch of the Australian Federal Police, provides the manpower for Australia's Air Security Officer (ASO) program. Belinda Hickman & Samantha Maiden, *Air Marshals to Fly on More Routes*, WEEKEND AUSTRALIAN, Dec. 27, 2003, at 5.

¹⁴⁹ Australian Radio reporter Simon Santow alleged in 2002 that Austria had an air marshal program. See *World Today: Australia, Singapore Reach Agreement on Air Marshals*, (Australian Broadcasting Corporation radio broadcast Dec. 17, 2002), available at <http://www.abc.net.au/worldtoday/stories/s749026.htm>.

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).

¹⁵¹ See *Sky Marshals Should be Last Option*, BBC NEWS, Dec. 30, 2003, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/3357785.stm>. Germany began preparing its air marshal program in October 2001 and authorized Lufthansa to carry air marshals in the aftermath of September 11th. See Learmount, *supra* note 148.

¹⁵² Japan's first use of "police officers" aboard aircraft occurred on Japan-Korea flights "during the World Cup soccer finals" in Seoul in 2002. *Japan's Sky Marshals Begin Work Without Captains' Nod*, JAPAN TIMES, Dec. 18, 2004, <http://search.japantimes.co.jp/cgi-bin/nn20041218b1.html>. A private sector company, Pretory, claims that during the same interval, its "[s]ky [m]arshals logged over 36,000 flight hours on 1850 ANA flights." See BUS. WIRE, *supra* note 147.

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, *Leading Airlines Attack Labour's Sky Marshal Plan*, SUNDAY TELEGRAPH, Dec. 22, 2002, at 2.

¹⁵⁴ House of Commons Debates, 37th Parliament, 1st Sess., No. 79 (2001) (statement of Hon. David Collenette, Minister of Transport) (Can.), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=37&Ses=1&DocID=653212#T1100>.

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,¹⁵⁶ 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.”¹⁵⁷

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.”¹⁵⁸ 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.¹⁵⁹

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.”¹⁶⁰ The directive stated: “Armed, trained, Government law enforcement officers must be on flights arriving into, departing from, or overflying the United

boarding. Agreement on Air Transportation Preclearance Between the Government of Canada and the Government of the United States of America, U.S.-Can., Jan. 18, 2001, 2003 Can. T.S. No. 7. This allows service between Canada and both DCA and LGA. *Id.*

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).

¹⁵⁷ House of Commons Debates, 37th Parliament, 1st Sess., No. 94 (2001) (Can.) (statement of Hon. David Collenette, Minister of Transport) (articulating Canada’s position on air marshals), *available at* <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=37&Ses=1&DocID=1227567&File=0>. Air Canada’s services to Washington, on flights carrying air marshals, resumed on November 12, 2001. *See* Air Canada, Security Measures, <http://www.aircanada.com/en/us/travelinfo/before/us-travellers/security.html> (last visited Apr. 3, 2010).

¹⁵⁸ Press Release, House of Commons Standing Comm. on Transp. and Gov’t Operations (Dec. 7, 2001), *available at* <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocID=1031382&Language=E&Mode=1&Parl=37&Ses=1>.

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.).

¹⁶⁰ Press Release, Office of the Press Secretary, Department of Homeland Security Issues Aviation Amendments to Enhance Security on Commercial Airliners (Dec. 29, 2003), *available at* http://www.dhs.gov/xnews/releases/press_release_0328.shtm.

States, when directed by the TSA.”¹⁶¹ When asked what he would do if foreign airlines refused to carry air marshals, U.S. Homeland Security Secretary Tom Ridge replied, “[A]ny sovereign government 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.”¹⁶²

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,¹⁶³ the Netherlands,¹⁶⁴ Saudi Arabia,¹⁶⁵ and Switzerland.¹⁶⁶ 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.”¹⁶⁷ The European Union has given consideration to the “provision of armed sky-marshals on aircraft”¹⁶⁸ 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-

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.*

¹⁶² Press Conference, Tom Ridge, U.S. Sec’y of Homeland Sec., Dep’t of Homeland Sec. (Dec. 29, 2003), *available at* <http://transcripts.cnn.com/TRANSCRIPTS/0312/29/se.03.html>.

¹⁶³ See Alan Khee-Jin Tan, *Recent Developments Relating to Terrorism and Aviation Security*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 225, 229–30 (Victor Vridar Ramraj et al. eds., 2006).

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_2004_July_4/ai_n27798556/?tag=content;coll.

¹⁶⁵ On January 19, 2004, Saudi Arabian airlines announced it would use air marshals upon U.S. request. Neil Denslow, *Saudia Prepares for Sky Marshals*, ARABIAN BUS., Jan. 19, 2004, <http://www.arabianbusiness.com/478439?tmpl=print&page>.

¹⁶⁶ See Tan, *supra* note 163, at 229–30.

¹⁶⁷ Asa Hutchinson, Under Sec’y, Border and Transp. Sec., Remarks at the Federal Air Marshal Commencement Ceremony (July 2, 2004), *available at* http://www.dhs.gov/xnews/speeches/speech_0189.shtm.

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.¹⁶⁹

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.¹⁷⁰

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.¹⁷¹ These clauses recognize the sovereignty of a State over the "airspace"¹⁷² above its territory¹⁷³ and the airspace above the "territorial waters" adjacent to those land areas.¹⁷⁴ States may deny commercial aircraft of other States from overflying them or establish conditions¹⁷⁵ for such overflights.¹⁷⁶ Most countries are parties to the International Air Services Transit Agreement (IASTA),¹⁷⁷ through which contracting States grant the commercial airlines of other States the "privilege to fly across its territory without landing"¹⁷⁸ and the "privilege to land for non-traffic purposes."¹⁷⁹ Such flights are often restricted to designated routes.¹⁸⁰ Some very large and

¹⁶⁹ See Regulation (EC) No. 300/2008, *supra* note 20, pmbl. ¶ 8.

¹⁷⁰ See Learmount, *supra* note 148, at 5; see also Pierre Sparaco & Douglas Barrie, *Marshal Law: Fault Line Widens Between the U.S. and Europe Over Commercial Aviation Security Concerns*, 160 AVIATION WK. & SPACE TECH. 35 (2004); Monica G. Renna, *Fire in the Sky: A Critical Look at Arming Pilots with Handguns*, 68 J. AIR L. & COM. 859, 871 (2003).

¹⁷¹ Chicago Convention, *supra* note 21, arts. 1–2, 6.

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.

¹⁷³ *Id.* art. 1.

¹⁷⁴ *Id.* art. 2.

¹⁷⁵ *Id.* art. 6.

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).

¹⁷⁷ International Air Services Transit Agreement, Dec. 7, 1944, ICAO Doc. 7500, 59 Stat. 1693, 84 U.N.T.S. 389.

¹⁷⁸ *Id.* art. I, § 1(1).

¹⁷⁹ *Id.* art. I, § 1(2).

¹⁸⁰ *Id.* art. I, § 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.¹⁸¹ This can give them tremendous leverage in negotiating air bilateral agreements.¹⁸² Other countries that are parties to IASTA may restrict or limit flights in certain conditions.¹⁸³

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.¹⁸⁴ America has used this power twice in recent years. The Secure Flight program¹⁸⁵ 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 Canadian¹⁸⁶ and Mexican domestic flights.¹⁸⁷ The other use was the

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>.

¹⁸⁵ 49 C.F.R. pt. 1540 (2008).

¹⁸⁶ Canadian domestic flights such as Toronto-Halifax or Windsor-Winnipeg overfly parts of the United States. See, e.g., Kevin Dougherty, *U.S. Rules to Affect Canadian Flights*, OTTAWA CITIZEN, Mar. 4, 2010, available at <http://www.ottawacitizen.com/news/rules+effect+Canadian+flights/2639099/story.html>.

¹⁸⁷ See Secure Flight Program, 49 C.F.R. pt. 1540; see also Air Transport Association of Canada, Comments of the Air Transport Association of Canada to the U.S. Department of Homeland Security's Notice of Proposed Rulemaking Concerning the Proposed Secure Flight Program, Docket No. TSA-2007-28572-0331, at 6-9 (Nov. 21, 2007). In response to America's Secure Flight program, Canada sought confirmation that Canada-Asia flights overflying Alaska would be "outside of the scope of the Secure Flight program." Embassy of Canada, Public Submissions, Docket No. TSA-2007-28572-0327.1, at 3-4 (Nov. 21, 2007). Had the United States not excluded Alaska, the flying time of Canada-Asia flights might have increased substantially, or Canada's airlines would have had to submit to the proposed U.S. regulations.

2003 Directive for foreign airlines to carry air marshals where necessary.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.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.”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.¹⁹¹ If Air New Zealand is not permitted to carry air marshals, especially on the Los Angeles–London leg of

¹⁸⁸ See John Lumpkin, *U.S. Calls for Worldwide Use of Air Marshals*, LAWRENCE J.—WORLD & NEWS, Dec. 30, 2003, http://www2.ljworld.com/news/2003/dec/30/us_calls_for/.

¹⁸⁹ See *US Airways, Inc. v. O'Donnell*, No. 07-1235, 2009 WL 6340104, at *12 (D.N.M. Sept. 30, 2009) (mem.).

¹⁹⁰ See 48 Parl. Deb., H.R., 1st Sess., 642 HANSARD 11966 (Sept. 18, 2007). In 2008, the attempted hijacking of a New Zealand aircraft at Christchurch highlighted the fact that Australia has air marshals while New Zealand does not. See *Hijack Highlights Sky Marshal Role*, AUSTRALIAN, Feb. 8, 2008, <http://www.theaustralian.com.au/news/hijack-highlights-sky-marshal-role/story-e6frg6n6-1111115507634>. The incident happened on a small aircraft that probably would not have carried an air marshal in any event. See Aviation Safety Network Database, ASN Aircraft Accident British Aerospace 3201 Jetstream 32EP, <http://aviation-safety.net/database/record.php?id=20080208-0> (last visited Apr. 4, 2010).

¹⁹¹ This route is served daily by a 747-400 and has been operated since before 1993. Press Release, Air New Zealand, Air New Zealand Celebrates 25 Years of Service Between Los Angeles and London (Aug. 24, 2007), http://www.airnewzealand.com/aboutus/mediacentre/pressreleases_2007/25years_between_lax_lon_24aug07.htm. Japan Air Lines Flights 48 and 47 are a thrice weekly 747-400 Tokyo–New York–Sao Paulo service that has operated since 2007. Japan Airlines, Japan Airlines Increases Frequency on New York–Tokyo Route (Feb. 9, 2007), <http://www.ar.jal.com/region/en/aboutjal/press/020907.html>. Together with NZ Flights 1 and 2, these services are probably among the greatest uses of U.S.-based Fifth Freedom rights of any carrier.

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

3. *Reciprocal Consequences*

America has had air marshals operating on international routes since 1970.¹⁹³ Today, they may be seen on routes operated by U.S. carriers to eighty-two cities in over fifty countries.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."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"¹⁹⁶ and also the "need to seek

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), *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, <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.

¹⁹³ See TSA, Our Mission, <http://www.tsa.gov/lawenforcement/mission/index.shtm> (last visited Apr. 21, 2010).

¹⁹⁴ See HARRISON, *supra* note 31, at 76.

¹⁹⁵ See 48 Parl. Deb., H.R., 1st Sess., 642 HANSARD 11744 (Sept. 11, 2007) (New Zealand Green Party Member of Parliament, Keith Locke speaking September 11, 2007, during Committee consideration of New Zealand's Aviation Security Legislation Bill).

¹⁹⁶ Alison Caldwell, *Australian Government Encouraging Aviation Security Measures in the Region*, PM (ABC radio broadcast July 31, 2003) (statement of Mick Keelty, Comm'r of the Australian Federal Police), *available at* <http://www.abc.net.au/pm/content/2003/s914734.htm>.

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 Act²⁰⁰ 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 needed²⁰² 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

¹⁹⁷ See 14 Parl. Deb., H.R. 1st Sess., 6th pd., OFFICIAL HANSARD 22596–97 (Nov. 24, 2003) (statement of the Honorable Phillip Ruddock, Australia’s Minister for Justice and Customs, before Australia’s House of Representatives).

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 flight²⁰⁸ to Entebbe, Uganda, where Ugandan authorities²⁰⁹ ignored their obligations to provide as-

²⁰⁴ 137 H.C. Deb. 114, 37th Parl., 1st Sess., OFFICIAL REPORT (HANSARD) 7241 (Nov. 19, 2001).

²⁰⁵ 2001 S.C., ch. 41.

²⁰⁶ For years El Al has flown non-stop from Israel to Canada. El Al Airlines, El Al Israel Airlines History, <http://www.elal.co.il/ELAL/English/AboutELAL> (last visited Apr. 21, 2010). All of its flights carry air marshals. *The Safest Airline: A Secure Example Set By Israel's El Al*, CBS NEWS, Aug. 21, 2002, <http://www.cbsnews.com/stories/2002/01/15/6011/main324476.shtml>. Royal Jordanian uses air marshals and served Montreal via Amsterdam from 1986 to 1997, and non-stop from Amman since 2007. *Royal Jordanian Close to Choosing New Long Haul Equipment*, 6 WORLD AIRLINE NEWS, 1196 WLN 382017 (Nov. 18, 1996). It is possible that air marshals were not deployed on the Amsterdam–Montreal sector of the flights. It is highly likely that both airlines use air marshals on their flights to Canada.

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.²¹⁰

The United States has included an "Aviation Security" paragraph in every air bilateral agreement it has concluded since 1979.²¹¹ 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."²¹²

The same language was used in air bilateral agreements with China²¹³ and Barbados,²¹⁴ but the 1986 agreement with Ecuador, which was negotiated after the 1985 hijacking of TWA Flight 847,²¹⁵ 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."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,²¹⁷ the European Union,²¹⁸ and Austra-

or Greece. Sam Moki, *The Role of the African Union: Integration, Leadership and Opportunity*, in *AFRICA AND THE WAR ON TERRORISM* 113-29, 118 (John Davis ed., 2007). It is also worth noting that Uganda was chosen as the final destination after Sudan refused to let the plane land and it has been argued the "Ugandan Government got involved in this affair accidentally and purely on humanitarian considerations." WILLIAM STEVENSON & DAN URI, 90 MINUTES AT ENTEBBE 154 (1976).

²¹⁰ See FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 85-87 (1985). Indeed, collusion between Ugandan authorities and the terrorists was noted by an Israeli lawyer. TAILLON, *supra* note 24, at 108-09.

²¹¹ There is no mention of the topic in the 1978 Air Services Agreement with Liberia. See Air Transport Services Agreement, U.S.-Liber., Mar. 30, 1978, T.I.A.S. 8997.

²¹² Air Transport Services Agreement, U.S.-Fiji, art. 7, Oct. 1, 1979, T.I.A.S. 9917 (emphasis added).

²¹³ Civil Air Transport Services Agreement, U.S.-China, art. 8, Sept. 17, 1980, T.I.A.S. 10326.

²¹⁴ Air Transport Services Agreement, U.S.-Barb., art. 7, Apr. 8, 1982, T.I.A.S. 10370.

²¹⁵ For an interesting perspective on why America's Delta Force did not intervene when the aircraft was in Algiers and whether Algeria should have allowed a U.S. rescue while the aircraft was on Algerian soil, see WHITLEY BRUNER, *THE HIJACKING OF TWA 847: A STUDY OF BUREAUCRATIC PARALYSIS* 5-9 (1989).

²¹⁶ Air Transport Agreement, U.S.-Ecuador, art. 7(5), Sept. 26, 1986 (emphasis added), available at <http://www.state.gov/documents/organization/114363.pdf>.

²¹⁷ See Air Transport Agreement, U.S.-Can., art. 14(4), Mar. 12, 2007, available at <http://www.state.gov/e/eeb/rls/othr/ata/c/ca/114781.htm>.

lia,²¹⁹ and was featured in the more recent March 16, 2010 agreement with Zambia.²²⁰

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."²²¹

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.²²² 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 2007.²²³ 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"²²⁴ and operate pursuant to an "in-flight security officer arrangement or agreement between New

²¹⁸ See Air Transport Agreement, U.S.-E.U., art. 9(4), Apr. 30, 2007, 2007 O.J. (L134) 9 (EC), available at <http://www.state.gov/documents/organization/114872.pdf>.

²¹⁹ Memorandum of Consultations and Open Skies Agreement, U.S.-Austl., art. 7(4), Feb. 14, 2008, available at <http://www.state.gov/documents/organization/114817.pdf>.

²²⁰ Air Transport Agreement, U.S.-Zambia, art. 7(4), Mar. 16, 2010, available at <http://state.gov/e/eeb/rls/othr/ata/z/za/138476.htm>.

²²¹ Agreement Relating to Air Service, Can.-Austl., art. IX (6), July 5, 1988, 1988 Can. T.S. No. 2.

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.”²²⁵

The European Union took a similar position. Paragraphs 3 and 4 of article 10 of the Annex²²⁶ to Regulation (EC) No. 300/2008²²⁷ 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.²²⁸ Additionally, excerpts of paragraphs 4.7.4 and 4.7.7 of that amendment read: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.²³⁰ This could have profound implications. Consider the case of Canada. Canada withdrew from IASTA²³¹ and might potentially take an interest in the use of firearms on board aircraft

²²⁵ Section 4 of the Civil Aviation Amendment Act inserted a new section 2(b) into New Zealand’s Civil Aviation Act of 1990. *Id.*

²²⁶ The Annex contains “Common Basic Standards for Safeguarding Civil Aviation Against Act of Unlawful Interference” as per Article 4 of the Regulation. Council Regulation (EC) No. 300/2008, *supra* note 20, Annex art. 10.

²²⁷ *Id.*

²²⁸ See Tan, *supra* note 163, at 230.

²²⁹ ICAO Annex 17 amend. 11, *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.” *Id.* ¶ 2.1.

²³⁰ See *id.*

²³¹ *Canada to Withdraw from Civil Aviation Pact*, 125 AVIATION WK. & SPACE TECH. 44 (1986).

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 Paulo 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).

²³⁴ *See* Council Regulation (EC) No. 300/2008, *supra* note 20, art. 3(31); ICAO, Summary of Decisions, 179th Sess., 9th mtg., ICAO Doc. C-DEC179/7 ¶ 6 (Nov. 20, 2006), <http://www.icao.int/Hyperdocs/display.cfm?V=2&name=C%2DDEC%20179%2F7&Lang=E> (ICAO definition).

²³⁵ Council Regulation (EC) No. 300/2008, *supra* note 20.

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.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.”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.”²⁴⁰ Within months, President Bush signed the Intelligence Reform and Terrorist Prevention Act of 2004.²⁴¹ 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.”²⁴²

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

²³⁸ ICAO, Summary Minutes, 176th Sess., 13th mtg., ICAO Doc. C-MIN 176/13 ¶ 16 (Nov. 30, 2005), <http://www.icao.int/Hyperdocs/display.cfm?v=2&name=C-MIN%20176%2F13&Lang=E> (remarks by Claudia Serwer, Alternative U.S. Representative to the ICAO Council).

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.*

²⁴⁰ KRISTIN ARCHICK, CONG. RESEARCH SERV., U.S.–EU COOPERATION AGAINST TERRORISM 4 (2006).

²⁴¹ Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended primarily in scattered sections of 6 U.S.C., 8 U.S.C., 22 U.S.C., and 50 U.S.C. (2006)) (signed Dec. 17, 2004).

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 aeronautic 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).

²⁴³ *See Australia, US Sign Air Marshal Agreement*, ABC NEWS, May 8, 2004, <http://www.abc.net.au/news/stories/2004/05/08/1104215.htm>; *Australia, U.S. Sign Sky Marshals*, CNN.COM, May 8, 2004, <http://www.cnn.com/2004/WORLD/asiapcf/05/08/australia.marshals/index.html>. The agreement reportedly allows for

2007,²⁴⁴ Jamaica in 2009,²⁴⁵ and may soon sign one with Barbados.²⁴⁶ A similar agreement exists between Australia and Singapore.²⁴⁷ Other agreements are presumed to exist but have not been publicly announced.²⁴⁸ 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.”²⁴⁹

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*.

²⁴⁴ Press Release, TSA, U.S. and Austria Sign Air Marshal Agreement (Oct. 30, 2007), available at http://www.tsa.gov/press/happenings/us_austria_air_marshall_agreement.shtm.

²⁴⁵ *Air Tight*, NATIONNEWS.COM, Oct. 6, 2009, http://archive.nationnews.com/archive_index.php (Search for “air marshal USA”; then follow “Air Tight” hyperlink.).

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-frieght/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.*

²⁴⁹ TSA, DETAILED INFORMATION ON THE TRANSPORTATION ADMINISTRATION: FEDERAL AIR MARSHAL SERVICE ASSESSMENT (2008), <http://www.whitehouse.gov/omb/expectmore/detail/10001070.2008.html>; see also PRICE & FORREST, *supra* note 5, at 103.

ment.²⁵⁰ 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].

²⁵¹ THIERRY BALZACQ & SERGIO CARRERA, SECURITY VERSUS FREEDOM? A CHALLENGE FOR EUROPE'S FUTURE 126 (2006).

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).

²⁵⁷ See *International Firefight Over Armed Air Marshal Demand*, AVIATION TODAY, Jan. 12, 2004, http://www.aviationtoday.com/regions/usa/International-Firefight-Over-Armed-Air-Marshall-Demand_1922.html. These procedures are fairly standard. New Zealand requires that a police officer escort the foreign air marshal. See, e.g., Civil Aviation Amendment Act 2007, *supra* note 223, § 77E(1).

ernment law enforcement officers into and out of the United States.”²⁵⁸

5. *Practicalities of Air Marshals*

An air marshal needs to remain undercover²⁵⁹ and be able to transit through the airport and board the aircraft without attracting attention.²⁶⁰ 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.”²⁶¹

Until very recently, a U.S. air marshal flying to Canada faced significant obstacles to remained undercover.²⁶² He disembarked, was met by the RCMP and surrendered his weapons before proceeding through Canadian customs.²⁶³ Then, because of the Export and Import Permits Act,²⁶⁴ he needed a permit to “bring his firearm into Canada.”²⁶⁵ Shortly thereafter, as he prepared to return to the United States, he proceeded through the U.S. Customs and Border Protection (CBP) Pre-

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&pname=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).

²⁶¹ GAO, AVIATION SECURITY: FEDERAL AIR MARSHAL SERVICE HAS TAKEN ACTIONS TO FULFILL ITS CORE MISSION AND ADDRESS WORKFORCE ISSUES, BUT ADDITIONAL ACTIONS ARE NEEDED TO IMPROVE WORKFORCE SURVEY 10 (2009).

²⁶² See Isabel Teotonio, *Easing Gun Rules for U.S. Police; Some Fear a Proposal to Relax Customs Policies for Armed American Air Marshals Will Bring Trouble*, TORONTO STAR, Oct. 15, 2007, at A4.

²⁶³ *Id.*

²⁶⁴ R.S.C., ch. E-19 (1985) (Can.).

²⁶⁵ *Id.* §§ 5(1)(c.1), 14.

Clearance area,²⁶⁶ under the watchful eye of armed U.S. CBP agents.²⁶⁷ He then passed through security screening²⁶⁸ before picking up his weapon from the RCMP and boarding the return flight.²⁶⁹ The pilots and cabin crew, who were probably returning to the United States,²⁷⁰ usually remained on the plane.²⁷¹

Canada changed its law in 2008,²⁷² 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,²⁷³ U.S. air marshals had to go through this procedure while passing

²⁶⁶ These are zones established at Canadian airports pursuant to the Canada–U.S. Preclearance Agreement. 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.” *Id.*

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.” *Id.* § 12(2). This leads to the presumption they may be armed.

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 *Canadian Aviation Security Regulations*.” *Interim Order Respecting Prohibited Items*, [Pt. 1, Vol. 141, No. 51] CAN. GAZETTE, 3,489, 3,499 (2007).

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

²⁷⁰ On trans-border flights the prohibition against cabotage ensures that the aircraft returns immediately to the country from which it came. 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.

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.

²⁷² 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.

Id.

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.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.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.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."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.²⁷⁸ Indeed, in the early days of Israeli air marshal oper-

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.

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).

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. CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 275 (2001); see also OFFICE OF CIVIL AVIATION SEC., *supra* note 3, at 129–30.

²⁷⁷ JONATHAN R. ADELMAN, THE RISE OF ISRAEL: A HISTORY OF A REVOLUTIONARY STATE 162 (2008).

²⁷⁸ See *Military Operations: El Al's Formidable Security Precautions*, SCOTSMAN, July 6, 2002, at 5, available at <http://findarticles.com/p/news-articles/scotsman-edin>

ations, “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.”²⁷⁹

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.²⁸⁰ This would be an acceptable condition given that a highly trained air marshal reduces the risk of incidents,²⁸¹ and even in the event of cabin decompression,²⁸² or

burgh-scotland-the/mi_7951/is_2002_July_6/military-operations-el-als-formidable/ai_n33173737/?tag=content;coll. Israel is unflinching in this approach. See *id.* The airline does its own security screening at most American airports. See *id.*; see also *Los Angeles Airport Shooting Kills 3*, CNN.COM, July 4, 2002, <http://archives.cnn.com/2002/US/07/04/la.airport.shooting/>. As Israel's Transport Minister Ephraim Sneh said in 2002: “The basic rule is simple. If a destination cannot be made secure for our passengers, we do not go.” *Military Operations: El Al's Formidable Security Precautions*, *supra*.

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.

²⁸⁰ See PETER P.C. HAANAPPEL, *THE LAW AND POLICY OF AIR SPACE AND OUTER SPACE: A COMPARATIVE APPROACH* 85–88 (2003). Israeli, Somali, and Egyptian air marshals have on various occasions shot and killed people attempting to hijack an aircraft in flight. David Johnston, *U.S. Sentencing Due Today in 1985 Hijack*, N.Y. TIMES, Oct. 7, 1996, at A12 (1985 EgyptAir hijacking where air marshal shot and killed hijacker in flight); Clifford D. May, *Somali Jet Hijackers Set a New Deadline*, N.Y. TIMES, Nov. 26, 1984, at A3 (1984 Somali Airlines hijacking where security guard involved in a “midair shootout”); PBS, *American Experience: Hijacked*, http://www.pbs.org/wgbh/amex/hijacked/peoplevents/p_crews.html (last visited Apr. 21, 2010) (attempted 1970 El Al hijacking where armed guard shot and killed hijacker in flight). In every case, the plane landed safely. Johnston, *supra*; May, *supra*; PBS, *supra*. Training is crucial. In May 1973, an Aeroflot Tu 104 with eighty-two people on board crashed over Siberia because “the hijacker detonated his bomb when the ‘sky-marshal’ shot at him.” See TÜPOLEV Tu-104, Tu-107 & Tu-110 (2009), http://www.oldwings.nl/st/tu104_107_110_124.pdf.

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).

²⁸² There are at least three major incidents where passenger aircraft have landed safely after cabin decompression: an Aloha 737 on April 28, 1988 (NTSB AAR-89/03); a United 747 on February 24, 1989 (NTSB AAR-92/02); a Qantas 747 on July 25, 2008 (ATSB AO-2008-053). NAT'L TRANSP. SAFETY BD. REP. NO. NTSB/AAR-89/03, *AIRCRAFT ACCIDENT REPORT 2*, 5 (1989); NAT'L TRANSP. SAFETY BD. REP. NO. NTSB/AAR-92/02, *AIRCRAFT ACCIDENT REPORT 2*, 3 (1992); AUSTRALIA

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-

LIAN TRANSP. SAFETY BUREAU, REP. NO. A0-2008-053, ATSB TRANSPORT SAFETY REPORT 1-2 (2008).

²⁸³ 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.

²⁸⁴ 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).

²⁸⁵ This really happened in 2004. See Reuters, *US Air Marshal Leaves Gun in Airport Restroom*, SYDNEY MORNING HERALD, Apr. 11, 2004, available at <http://www.smh.com.au/articles/2004/04/11/1081621819729.html>.

²⁸⁶ 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.

²⁸⁷ See Vienna Convention on Diplomatic Relations arts. 21-24, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (1961); LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 389-96 (1991).

²⁸⁸ 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.

²⁸⁹ 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

refuge in the Brazilian Embassy in Tegucigalpa. He was accused by Honduran authorities of violating that State’s constitution. Elizabeth Malkin, *Ousted Leader Returns to Honduras*, N.Y. TIMES, Sept. 22, 2009, at A4.

²⁹⁰ Chicago Convention, *supra* note 21, art. 17.

²⁹¹ *Id.* art. 18.

²⁹² For financial claims, “The law of the flag determines validity: validity is not determined by the *lex situs* of the aircraft.” PHILIP R. WOOD, *LAW AND PRACTICE OF INTERNATIONAL FINANCE: CONFLICT OF LAWS AND INTERNATIONAL FINANCE* 314 (2007).

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 naissances, décès et disparitions à bord des aéronefs luxembourgeois.

²⁹⁴ See GEORGE BRECKENRIDGE DAVIS, *OUTLINES OF INTERNATIONAL LAW: WITH AN ACCOUNT OF ITS ORIGIN AND SOURCES AND OF ITS HISTORICAL DEVELOPMENT* 41–42 (1887); see also MICHAEL HIRST, *JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW* 37–40 (2003).

²⁹⁵ *Regina v. Keyn*, 2 Exch. Div. 63 (1876) (also known as the *Franconia Case*).

negotiations²⁹⁶ of the recent Cape Town Convention²⁹⁷ and its Protocol.²⁹⁸

B. THE PRACTICE OF STATES

States recognize that foreign airliners retain their nationality even on the ground at airports in other countries.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.”³⁰⁰ The handling of hijacked aircraft confirms this. In almost every case,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.³⁰² Thailand followed suit in 1981 allowing Indonesian commandos to storm a Garuda Indonesia DC-9 that had been hijacked to Bangkok.³⁰³ In 1985, when a hijacked Egyptair 737 landed at Valleta over the protests of Maltese au-

²⁹⁶ See SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW VOL. 2: 2002–2004, at 385–86 (2006).

²⁹⁷ Convention on International Interests in Mobile Equipment, Nov. 16, 2001, ICAO Doc. 9793, U.N. Doc. A/AC.105/C.2/2002/CRP.3, U.S. Treaty 108-10. It entered into force on March 1, 2006, and has 28 signatories. It was implemented August 8, 2004, by the Cape Town Treaty Implementation Act of 2004, Pub. L. No. 108-297, 118 Stat. 1095 (2004).

²⁹⁸ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, ICAO Doc. 9794, U.S. Treaty 108-10.

²⁹⁹ See Hague Convention, *supra* note 85, art. 3(1).

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.

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.

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.

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.³⁰⁴ More recently, in Algiers, an Air France Airbus A-300 was hijacked on the ground before its scheduled departure to Paris.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.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.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."³⁰⁸ Israeli Prime Minister Yitzhak Rabin was told that because the plane fell under French jurisdiction, all negotiations³⁰⁹ would have to be conducted through the auspices of the French government.³¹⁰ Thus, the Israeli cabinet reminded the French government that the aircraft and its passengers "were under sovereign French protection"³¹¹ and that they "waited for Paris to act."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

by a "crack Indonesian commando team." KEN CONBOY, *THE SECOND FRONT: INSIDE ASIA'S MOST DANGEROUS TERRORIST NETWORK* 22–23 (2005).

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.

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

³⁰⁶ *Id.*

³⁰⁷ See generally SHIMON PERES, *BATTLING FOR PEACE: A MEMOIR* 152 (1994).

³⁰⁸ *Id.*

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.

³¹⁰ LINDA BENEDIKT, YITZHAK RABIN: *THE BATTLE FOR PEACE* 91 (2005).

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

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.

from the United States handling of a Russian jet at JFK in August of 1979.

Following the defection of Alexander Godunov, his wife Lyudmila Vlasova³¹³ was quickly put aboard a scheduled Aeroflot Ilyushin 62 flight from New York's JFK airport to Moscow.³¹⁴ 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.³¹⁵ A major international incident resulted, eventually involving American President Jimmy Carter and Soviet leader Leonid Brezhnev.³¹⁶ 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.³¹⁷

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.³¹⁸ In the same manner it would have to be acknowledged that the nationality of an aircraft begins at the fuselage.³¹⁹ This approach is used in places like Riyadh,³²⁰ where alcohol is legal aboard a foreign aircraft³²¹ on the

³¹³ 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.

³¹⁴ 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.

³¹⁵ *East-West: Turmoil on the Tarmac*, *supra* note 313, at 18.

³¹⁶ *Exit Stage Left, Ballerina Goes Back to Moscow*, TIME, Sept. 10, 1979, at 22; *see also* JOHN DUMBRELL, *THE CARTER PRESIDENCY: A RE-EVALUATION* 127 (1993).

³¹⁷ DUMBRELL, *supra* note 316, at 127.

³¹⁸ *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

³¹⁹ For the purposes of this article, no broader definition is necessary.

³²⁰ *See* Air Transport Agreement Between the Government of Canada and the Government of the Kingdom of Saudi Arabia art. 11(1), Nov. 14, 1990, CTS 1991/20.

tarmac, but it is strictly prohibited outside.³²² 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.”³²³

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.³²⁴ 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.³²⁵

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.”³²⁶ 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.³²⁷

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

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.

³²² Saudi Arabia enforces a strict interpretation of Islamic law and bans alcohol. See RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 540 (2009); MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE 147 (2004).

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.

³²⁶ GAO, COMBATING TERRORISM: FEDERAL AGENCIES’ EFFORTS TO IMPLEMENT NATIONAL POLICY AND STRATEGY, GAO/NSIAD-97-254, at 39 (1997).

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.³²⁸ It would also be reasonable to require that air marshals meet international training standards.³²⁹ Further, it would be reasonable to require that any such aircraft be covered by a policy of war-risk insurance.³³⁰ 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.'"³³¹ 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."³³² Any legal authority of the overflown State³³³ is based primarily on safety and security issues, such as ensuring the aircraft is safer,³³⁴

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,³³⁵ or ensuring that air traffic control instructions are followed.³³⁶

Any other potential claim of jurisdiction, such as for an offence “committed in the territory of that State,”³³⁷ is secondary and cannot be found in either the Tokyo Convention or the Hague Convention.³³⁸ There is no overlapping exercise of jurisdiction here. The State whose territory is being overflowed may wish to claim jurisdiction, but only the State whose air marshal is deployed is effectively exercising jurisdiction.³³⁹ Further, while the aircraft is airborne there is no practical way for most States to enforce this jurisdiction,³⁴⁰ unless they want to send a fighter jet to escort a hijacked airliner³⁴¹ or shoot it down.³⁴²

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).

³³⁵ This is the basis of America’s Secure Flight Program. 49 C.F.R. pt. 1540 (2008).

³³⁶ For an overview of this, see WALTER SCHWENK & RÜDIGER SCHWENK, *ASPECTS OF INTERNATIONAL CO-OPERATION IN AIR TRAFFIC MANAGEMENT* (1998).

³³⁷ 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).

³³⁸ 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.

³³⁹ See JOYNER, *supra* note 60, at 136–38.

³⁴⁰ Indeed, article 4 of the Tokyo Convention prohibits interference by the overflowed State unless the incident has some direct impact on the territory or nationals of that State. Tokyo Convention, *supra* note 58, art. 4.

³⁴¹ 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.

³⁴² 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 overflowed; 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).