Recent Proposals for Concerted Action against States in Respect of Unlawful Interference with International Civil Aviation

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RECENT PROPOSALS FOR CONCERTED ACTION AGAINST STATES IN RESPECT OF UNLAWFUL INTERFERENCE WITH INTERNATIONAL CIVIL AVIATION

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INTRODUCTION

Preliminary remarks

THE CASE of the person who unlawfully seizes an aircraft and takes it to a country which gives him refuge and detains the aircraft, passengers, crew and cargo and that of a terrorist who perpetrates an act of violence against civil aviation (e.g., through an attack on an airport or an airport installation) and seeks refuge in a country which refuses to extradite or prosecute him could involve contravention by those countries of the provisions of the Tokyo, Hague and Montreal Conventions which are intended to ensure that no malefactor should go unpunished and that the aircraft, passengers, crew and cargo should all be permitted to go on their way. Hence, from mid-1970 to mid-1971, the International Civil Aviation Organization (ICAO) attempted, almost frenetically, to develop internationally-agreed procedures for ensuring that States

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would observe their obligations under these Conventions with respect to acts of unlawful interference with international civil aviation. The ICAO Council, the Legal Committee and a Legal Subcommittee took part in these efforts (described elsewhere by this writer) which in mid-1971 were brought to an abrupt halt by a hotly-disputed political decision of the ICAO Assembly to give the subject a low priority in the work program of the Legal Committee. Later, in mid-1972, the subject was revived.

The purpose of the present note is to describe further steps which have taken place between mid-June 1972 and September 1973 with a view to developing provisions on joint action against States found in default of their international obligations in respect of unlawful interference with international civil aviation and to describe, in particular, the issues arising during the two unsuccessful major meetings on the subject of joint action held at Rome in August-September 1973.

The Crisis in 1972

In July 1971, the ICAO Assembly placed the item concerning joint action against States in default under the Tokyo, Hague and Montreal Conventions in the non-current part of the work program of the ICAO Legal Committee and in effect shelved the item for an indefinite period. However, in late May and early June, 1972, a series of spectacular incidents involving unlawful interference with civil aviation caused a public outcry, particularly from the International Federation of Airline Pilots' Associations (IFALPA), for urgent action to eliminate such incidents.4

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4 See FitzGerald, Toward Legal Suppression of Acts Against Civil Aviation, 585 INT'L CONCILIATION 42, 76-78 (1971) and FitzGerald, Concerted Action Against States Found in Default of Their International Obligations in Respect of Unlawful Interference with International Civil Action, 10 CAN. YEARBOOK INT'L L. 261 (1972).

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4 In late May-June 1972, there were some spectacular incidents involving unlawful interference with civil aviation, including the Lod Airport massacre on May 30, during which Japanese gunmen acting for Arab extremists killed 26 persons and wounded some 80 others. Three weeks earlier a Belgian airliner had been hijacked at Lod Airport. This hijacking followed the many other attacks on and hijackings of airliners by Arab extremists in recent years. A United States airliner had been hijacked to Algeria at the beginning of June after the hijackers had extorted $500,000 from the airline concerned. On June 8, a hijacked Czechoslovak airliner was diverted to West Germany after one of its co-pilots had been shot dead. See 18 KEESING'S CONTEMPORARY ARCHIVES, Aug. 5-12, 1972, at 25408. (For the details of the Belgian airliner hijacking, which lasted for the period May 8-9 and ended when the aircraft was stormed by about a dozen Israeli com-
CONCERTED ACTION

On June 19, 1972, the ICAO Council, convened in urgent session, adopted a Resolution in which, *inter alia*, it directed

the Legal Committee to convene immediately a special subcommittee to work on the preparation of an international convention to establish appropriate multilateral procedures *within the ICAO framework* for determining whether there is a need for joint action in cases envisaged in the first Resolution adopted by the Council on October 1, 1970⁶ and for deciding on the nature of the joint action if it is to be taken.⁷

The key words in the Council Resolution of June 19, 1972 were "within the ICAO framework" and their significance will be discussed below.

On June 20, 1972, the United Nations Security Council reached

mandos at Tel-Aviv, and for further information on the Lod Airport massacre, see 18 KEESING'S CONTEMPORARY ARCHIVES, July 15-22, 1972, at 25365-67). IFALPA called a world-wide one-day strike on June 19, 1972. For some thoughts engendered by the IFALPA strike of June 19, 1972, see Evans, *Aircraft Hijacking: What is to be Done*, 66 AM. J. INT'L L. 819 (1972). For detailed information on the strike, see 18 KEESING'S CONTEMPORARY ARCHIVES, Aug. 5-12, 1972, at 25408.

In Council Resolution No. 1 of October, 1970, the Council called upon Contracting States to decide what joint action should be undertaken in accordance with international law in a case where, for international blackmail purposes, a State detained, contrary to the principle of Article 11 of the Tokyo Convention, an aircraft after an unlawful seizure of its passengers or crew or, contrary to the principles of Articles 7 and 8 of the then draft convention on unlawful seizure of aircraft (which later became The Hague Convention for the Suppression of Unlawful Seizure of Aircraft), failed to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes. At the same time, the Council directed the ICAO Legal Committee, then in session in London, to consider an international convention or other international instrument to give effect to the purposes described above, to provide for joint action by States for taking appropriate measures in other cases of unlawful seizure, and to provide for amendment of bilateral air transport agreements to remove all doubts concerning the authority to join in taking such action against any State. This was a far-reaching resolution, and as later discussions in ICAO legal bodies showed, the good intentions of the resolution foundered on the fear that ICAO might exceed its mandate by trying to impose sanctions beyond the scope of its powers under the Chicago Convention, or that ICAO would also exceed its mandate if it caused to be drafted a Convention which provided for the imposition of sanctions when sanctions were already contemplated in respect of air matters under Article 41 of the Charter. Hence the insertion in the Council Resolution of June 19, 1972, of the limiting words "within the ICAO framework."


a consensus decision on hijacking in which it invited "States to expand and intensify co-operative international efforts and measures in this field, in conformity with Charter obligations, with a view to ensuring the maximum possible safety and reliability of international civil aviation." "

These events took place around the time of the one-day IFALPA world-wide strike held on June 19, 1972.

Other Considerations

Most of the remainder of this paper will be concerned with tracing the evolution of various solutions put forward with respect to the taking of joint action against defaulting States and related matters. To this end, the paper will examine the discussions in the Washington Legal Subcommittee (September 1972) urgently convened as a result of the Council decision of June 19, 1972; the Council decision of November 1, 1972 leading up to the decision to convene the ICAO Legal Committee in January 1973 and a decision of November 1, 1972, later changed, to convene a diplomatic conference on aviation security in September 1973; the Twentieth Session (Special) of the Legal Committee, January 9-30, 1973; the Twentieth Session (Extraordinary) of the Assembly in August-September 1973 and the international conference on air law of August-September 1973, both convened pursuant to a Council decision of March 5, 1973.

PART ONE


A. New element: "Procedures within the ICAO framework"

At the outset the Washington meeting was conscious of the fact that the Council Resolution of June 19, 1972 imported a new element in that the resolution stated that any solution found must be one which provided for "procedures . . . within the ICAO framework." The words "within the ICAO framework" in effect stated...
the desire that ICAO should intervene in some form in the procedures stipulated by the new Convention. Presumably, the intent was that, in getting into the area of sanctions or anything that resembled them, ICAO should not infringe upon the powers of the United Nations to impose sanctions in air matters under Article 41 of the Charter.

B. Negative views expressed on the question of joint action

Negative views on the question of joint action were not in short supply in the Subcommittee. It was submitted to the Subcommittee that the question of joint action could not be studied apart from the general subject of State responsibility which was on the agenda of the International Law Commission. Moreover, it was stated,
sanctions were legally admissible only in the case of responsibility for violation of a specific legal obligation. The Vienna Convention on the Law of Treaties did not include any rules on responsibility. Also the Tokyo, Hague and Montreal Conventions should not be given a preferential position, as compared with other Conventions, in regard to the question of State responsibility. A further argument was that universal acceptance of the Tokyo, Hague and Montreal Conventions would be more beneficial to the world community than the existence of a convention providing for joint action.

As on earlier occasions, it was also submitted that Article 41 of the United Nations Charter gives exclusive jurisdiction in the field of sanctions to the Security Council and that it was not possible to adopt any conventions which would purport to derogate from that prerogative of the Security Council. Here it was pointed out that the Security Council decision of June 20, 1972 specifically stipulated that all efforts and measures must be taken in conformity with Charter obligations. A contrary view on this point was that while it was necessary to examine the question of the taking of joint action against the background of the United Nations Charter, discussions in the United Nations itself had recognized ICAO's role in providing for effective measures to stop unlawful seizure and unlawful interference.

C. Criteria to be met by any solution adopted

The views expressed in the Subcommittee were that any solution

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166 JOURNAL OF AIR LAW AND COMMERCE [40]

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14 Article 73 of the Vienna Convention on the Law of Treaties (1969) reads as follows:

The provisions of the present Convention shall not prejudge any questions that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

For text of Vienna Convention, see INT'L LEG. MAT. 679 (1969).


16 See, e.g., United Nations General Assembly Resolutions 2551 & 2645, G. A. Res. 2551 (1969) and G. A. Res. 2645 (1970), which recognize respectively ICAO's roles in the work of finding effective measures to combat hijacking and unlawful interference with air travel.
that would ultimately be adopted should meet certain criteria. It should be practical and realistic, if not ideal; preserve air safety; be universally acceptable; and be in conformity with international law, including the United Nations Charter and not in conflict with the Convention on International Civil Aviation, the International Air Services Transit Agreement or bilateral air transport agreements. It should, in so far as the application of measures for joint action was concerned, be within the ICAO framework.

D. Main trends of discussion

While the Subcommittee's report was lengthy and, in many respects, inconclusive the main trends of its discussions are given (under the immediately following headings) as indicative of the earnest attempt to find, by a brain-storming process, solutions for extraordinarily difficult legal and political problems and as foreshadowing debates which took place at later ICAO meetings on the question of joint action.

1. The cases in which joint action should be taken

There was general agreement in the Subcommittee that joint action should be undertaken in a first category of cases, i.e., where a State had detained the aircraft, passengers and crew. On the other hand, while there was considerable agreement, there was not unanimity to the effect that there should be provision for joint action in the case of detention of cargo.

As to another category of cases, there was substantial agreement that there should also be provision for joint action where a State, having jurisdiction over the act, does not, if the offender or alleged offender is present in its territory, extradite him, or failing this, does not submit the case to its competent authorities for the purpose of prosecution.

A United Kingdom proposal made to a working group of the Subcommittee was that the factor which would trigger the machinery leading to joint action could be whether the situation arising from

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18 ICAO Doc. No. 7500; 84 U.N.T.S. 389 (1951); 9 M. HUDSON, INTERNATIONAL LEGISLATION 228 (1950).
20 Id., ¶ 18, at 8.
the action or inaction of the State concerned, constituted a threat to the safety of international civil aviation. The question as to whether or not there had been such a threat would be determined by an international body. An opposing view was that the test was not an objective one but was in fact a subjective one. Moreover, in this view, the concept was a vague one and so wide as to provide a temptation for the making of vague allegations against States on many occasions.  

In addition, if the phrase "or that a State has contributed in any way to a threat to the safety of civil aviation" which, it was suggested, be included in the provisions concerned with the acts or omissions of States, referred to a principle of the Chicago Convention, then the specific provisions of that Convention should be mentioned. It was further pointed out that the Council had only entrusted the Subcommittee with the task of studying a draft convention in cases of unlawful seizure of aircraft and that while the terms of reference could possibly be extended to cover the cases of offenses under the Montreal Convention, nevertheless the proposed instrument should not apply to cases where there was neither an unlawful seizure of aircraft nor any of the offenses covered by the Montreal Convention.

2. The States against which joint action should be taken

There was an inconclusive discussion as to the question of the States against which joint action should be taken. The opposing views were that, on the one hand, joint action should be taken against any State and, on the other, against only the States parties to the new Convention or as the case may be, parties to the Tokyo, Hague and Montreal Conventions. It emerged from the exchange of views on this matter that: (a) The Vienna Convention on the Law of Treaties provided as follows: "A treaty does not create either obligations or rights for a third State without its consent." (Article 34). (b) According to the Chicago Convention, there was a general obligation that States should not by their acts or omissions give rise to a threat to the safety of civil aviation. One view in this regard was that the Chicago Convention referred to safety only in the technical sense and that the Subcommittee was concerned with

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21 Id., §§ 5-5.1, at 46-47.
22 Id., § 5.3, at 48.
safety in the penal and political sense.\textsuperscript{23} (c) If the new Convention was to bind or apply to a non-contracting State, it could do so only if there were certain rules contained in air law conventions which were considered to be a codification of general principles of international law or international custom, as evidence of a general practice accepted as law. One such rule would be that, after the unlawful seizure of an aircraft, the crew, passengers and aircraft must not be detained. Another rule would be concerned with the malicious behavior of the State which gives aid, comfort or encouragement to the offender. There was no unanimity on these points.\textsuperscript{24}

3. The kind of actions that should be considered (determination of default) and the procedure and organization or agency that would be competent to take the measures "within the framework of ICAO"

Under this heading, the Subcommittee considered points of view about the proposed fact-finding body\textsuperscript{25} and reached agreement on

\textsuperscript{23} Id., § 26.1, at 13. The question of the meaning of the word "safety" as used in the Convention on International Civil Aviation, particularly with respect to matters involving unlawful interference with civil aviation, has given rise to discussion in other ICAO circles. This matter was discussed to some extent in the ICAO Council in March 1973, on the initiative of the Representative of Japan on the Council. The ICAO Legal Bureau prepared a study, Interpretation of the Word 'Safety' as Used in the Chicago Convention, C-WP/5732 - 9-3-73, but expressed no opinion on the matter. However, on March 21, 1973, the President of the Council (C-Min. 78/11 (Open)), announced that the Japanese request had been withdrawn as the Japanese Representative understood that "safety" included freedom from a deliberate human act of interference of any kind. At the time, the Representative of Senegal on the Council expressed the opinion that the words "safety" and "security" were both used in the Chicago Convention with different meanings. Later, when the adoption of security amendments to Annexes came up in the Council, the question of the definition of the expression "security" was raised (C-Min. 80/5, meeting of Dec. 5, 1973. See also, C-Min. 80/18-19-20-21-22, meetings of the Council held during the period Dec. 10-12, 1973).


\textsuperscript{25} See W. SHORE, FACT-FINDING IN THE MAINTENANCE OF INTERNATIONAL PEACE (1970). This book examines the subject of the investigation of facts as a contribution to the settlement of international questions. Indeed, ICAO itself engaged in a fact-finding technical investigation into the shooting down of a Libyan airliner by Israeli aircraft over the Sinai on February 21, 1973. This investigation was carried out by a team of experts pursuant to instructions given to the Secretary General by the Council at the 4th Meeting of its 78th Session on March 5, 1973. (See also ICAO Ass. Res. A19-1). Subsequent to the submission of the report of the fact-finding group to the Council, that body, on June 4, 1973 (C-Min. 79/4), strongly condemned Israel's destruction of the Libyan civil aircraft and the loss of 108 lives, and urged Israel to comply with the aims and objectives of the Chicago Convention.
the four following items: (a) A Commission should be appointed in such a manner as to insure the independence of its members. (b) The Commission should have about nine members. (c) The composition of the Commission could be such as to reflect the three categories specified in Article 50(b) of the Chicago Convention for the election of Council Members. (d) There could be a large panel from which the 9-member Commission would be chosen. These matters were referred to a working group for consideration.

4. The kind of actions that should be considered (recommendation to comply with legal commitments; other measures) and the procedure and the organ or agency that would be competent to take the measures "within the framework of ICAO"

In considering the above-mentioned topics which were concerned with the so-called joint action stage—as distinct from the fact-finding stage—the Subcommittee had before it a United States proposal the main element of which was the opportunity given to the ICAO Council to act directly in respect of joint action. The Subcommittee also considered a United Kingdom statement on the joint action stage whereby it was suggested that once the determination of default had been made, certain consequences should automatically follow without a requirement for further decision or action by any body. Thus, the immediate consequence was that any determination of default should be that the State concerned should cease to enjoy any privileges under the Chicago Convention, the International Air Services Transit Agreement and bilateral air services agreements with States parties to the new instrument. Later, during the discussion of the joint action stage, a proposal was put forward by Canada, the Netherlands, the United Kingdom and the United States of America which, inter alia, contemplated an initial request to the President of the ICAO Council to use his good offices to aid in the removal of a threat to the safety of civil aviation and then went on to allocate a role to a Commission of Experts and provide for the reaching of a decision on joint action with respect to a State

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87 Id., ¶¶ 53-53.6, at 20-22.
86 See note 17 supra.
85 See note 18 supra.
determined by the Commission to have contributed to the threat to the safety of civil aviation.\textsuperscript{31}

5. \textit{The type of instrument that should be used to accomplish the aim of taking measures “within the framework of ICAO”}

Under this heading, there was general agreement that the solution of having protocols to the Hague and Montreal Conventions was the least desirable one. Of the delegations which expressed preferences, a large number were in favour of having a special new Convention, although some of these delegations stated that they were going to accept the solution of an amendment to the Chicago Convention if this solution proved to be a more practical and a feasible one.\textsuperscript{32}

6. \textit{The steps that should be taken to meet the universal desire that the new instrument should be compatible with general international law and, in particular, with the Charter of the United Nations}

It was unanimously agreed that any new instrument, such as a new Convention, should be compatible with general international law and, in particular, with the Charter of the United Nations. It was also unanimously agreed that, in accordance with Article 103 of the United Nations Charter, in the event of a conflict between the obligations to the members of the United Nations under the Charter and their obligations under the proposed new instrument, their obligations under the Charter should prevail.\textsuperscript{33}

There were differences of opinion as to whether the competence of the Security Council to take collective measures was exclusive or not and as to whether joint action within the ICAO framework would be complementary to, or in contradiction with, the competence of the Security Council. Some delegations in the Subcommittee felt that joint action within the ICAO framework would be in contradiction with the competence of the Security Council, while others considered that such joint action would be complementary to the competence of the Security Council, especially in cases where there did not exist “any threat to the peace, breach of the peace, or active aggression” within the meaning of Article 39 of

\textsuperscript{31} \textit{Id., §§} 57-57.7, at 27-28.

\textsuperscript{32} \textit{Id., §§} 58-60.1, at 30-31.

\textsuperscript{33} \textit{Id., §§} 63-63.2, at 32.
the United Nations Charter and the Security Council could consequently not act. In that case, there would be room for joint action within the framework of ICAO. Here, it was pointed out that the Observer from the United Nations had given other examples of the kinds of complementary action that could be taken. For example, the Single Convention on Narcotic Drugs, 1961, and the Convention of 1971 on Psychotropic Substances provided for an embargo by States against most parties and non-parties in respect of all substances covered by the Convention.\textsuperscript{4}

\textit{The proposal of the Union of Soviet Socialist Republics to amend the Hague Convention (1970)}

The Union of Soviet Socialist Republics proposed that there be a draft Protocol to the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970). This draft contained an undertaking of each Contracting State “to return offenders to the State of Registration of the aircraft when so requested by it, except where the persons concerned are nationals of the State on the territory of which the offender is present.”\textsuperscript{5}

\textit{Texts available at the conclusion of the meetings of the Special Subcommittee at Washington}

The Special Subcommittee which met at Washington in September, 1972 did not adopt any text of a proposed Convention on joint action. There were, however, a number of interesting texts put forward, although not adopted, during the session of the Subcommittee.

\textit{a. Text on Scope of Application of the Proposed Convention}

Insofar as concerns the scope of application of the proposed Convention, Annex 1 to a working group's report\textsuperscript{6} contains a text which, although it did not represent a legal draft, is not without interest, the text being as follows:

\textit{Article 1}

Threats to the safety of civil aviation

Whenever a Contracting State which is an interested State has reason to believe that a person has committed any act described in

\begin{footnotesize}
\textsuperscript{4} Id., ¶ 63.3, at 32; see full statement of United Nations Observer, at 91-92.
\textsuperscript{5} Id., ¶ 11, at 10, 77-78.
\textsuperscript{6} Id., at 58.
\end{footnotesize}
Article 11(1) of the Tokyo Convention, Article 1 of the Hague Convention or Article 1 of the Montreal Convention and that any State is detaining within its territory any aircraft involved in such an act, its passengers, crew or cargo, or has unjustifiably failed to take such person into custody or take other reasonable measures to ensure his presence and thereafter to extradite him or submit the case to its competent authorities for the purpose of prosecution, or that a State has contributed in any other way to a threat to the safety of civil aviation, it may invoke the provisions of Article . . .

This text reflects the kinds of acts that would be contemplated in provisions pertaining to a Convention concerned with the taking of joint action against States which would default in their obligations in the event of the occurrence of such acts.

b. Stage 1 (Fact-finding)

Attached to the supplementary report of a working group of the Special Subcommittee was a text containing eleven Articles based on the working group's report and suggested by the Chairman of the working group, although the text was noted but not discussed by the working group. The text which was concerned with the first stage of the procedures, contemplated the existence of an independent Commission of Experts, provided for the election of the members of the Commission and for their general functioning. Under appropriate circumstances, an interested State that had reason to believe that a person had committed any act described in paragraph 1 of Article 1 of the Tokyo Convention, Article 1 of the Hague Convention or Article 1 of the Montreal Convention and had contributed to a threat to the safety of civil aviation by defaulting in its obligations under the Tokyo, Hague or Montreal Conventions, could apply to the Commission for a hearing. At the conclusion of the hearing, the Commission would prepare a report embodying its findings, describing the facts on which such findings were based and containing recommendations as to the measures which the Commission considered necessary to remove any threat which might exist to the safety of civil aviation.37

c. Stage 2 (Joint action)

The draft provisions on Stage 2 (Joint action) were, due to the somewhat disjointed and hasty working methods of the Special Sub-

37 Id., at 62-68.
committee, put forward in the Special Subcommittee itself by the Delegations of Canada, the Netherlands, the United Kingdom and the United States of America. All that the Subcommittee decided was that the draft Article prepared by the four States was ready for presentation to the Legal Committee for its consideration. The Article presupposed that Stage 1 (Fact-finding) would provide that the Commission of Experts "shall also make recommendations to that State (determined to have contributed at any way to a threat to the safety of civil aviation) as to the action it should take to remove such threat and shall fix a time-limit for that State to act upon such recommendations."

The proposed Article on joint action first contemplated that once a State had been determined to have contributed in any way to a threat to the safety of civil aviation, and prior to the time-limit fixed by the Commission of Experts, the complaining State might request the President of the Council of ICAO to use his good offices to aid in the removal of such threat.

Failure of the State in default to act upon the recommendations of the Commission of Experts and remove such threat within the time-limits fixed by the Commission of Experts would mean that the rights of such State under the Chicago Convention, under the International Air Services Transit Agreement, and under bilateral air services agreements or any other arrangements contemplated by Article 6 of the Chicago Convention must be suspended in the territories of the States which were parties to the proposed new Convention and would remain suspended until the Commission had determined that the State had acted upon the recommendations of the Commission of Experts and had removed the threat to the safety of civil aviation.

The foregoing was an automatic suspension. Further, if the said State failed to act upon the recommendations of the Commission of Experts and remove the threat to the safety of civil aviation within ten days after the time-limit fixed by the Commission of Experts or, if the determination related to detention of an aircraft, its passengers, crew or cargo, within 72 hours after such time-limit, then the

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38 LC/SC CR (1972) WD/12; see also discussion on the paper in LC/SC CR (1972) Report, §§ 57.5-57.8, at 26-30.

States which were parties to the proposed new Convention and which were interested, or air service States, would meet at the request of any one of such States for the purpose of reaching a decision on joint action which they should take with respect to the State determined by the Commission to have contributed to a threat to the safety of civil aviation. Such joint action might include any measures to preserve and promote the safety and security of civil aviation, including collective suspension of all international air navigation to and from such State. There were other details in the provisions which need not be of concern for the purposes of this note. In any event, it is clear that the four States' draft went very far along the road to the taking of severe joint action in respect of a defaulting State.

As will be seen below, when the question of joint action came before the Legal Committee at its 20th Session (Special) in January, 1973, the procedures envisioned in Stages 1 and 2 were placed before that Session by a number of countries as a proposal for the organization and consolidation of the work of the Committee. It will also be noted that, as time went on, there was no provision made as to the taking of joint action even within the framework of ICAO. The concept of joint action was progressively eroded and, in the end, nothing at all was adopted on this point.

E. Conclusion

The foregoing represents only a sketchy presentation of some of the points discussed by the Washington Subcommittee in September 1972. No texts were adopted by the Subcommittee for submission to the Legal Committee. Thus, while the Subcommittee unanimously agreed that every useful step in order to protect civil aviation against acts of unlawful seizure of aircraft and acts of unlawful interference should be taken, it considered that, in view of the differences of opinion in the subcommittee on the question of the most appropriate means, such an assessment as that contem-

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40 For complete text, see LC/Working Draft No. 820—Proposal on organization and consolidation of the work of the Legal Committee (presented by the following eight States: Australia, Canada, Italy, the Netherlands, New Zealand, Nicaragua, the United Kingdom and the United States of America); see also ICAO Doc. No. 9050-LC/169-2, Legal Committee, 20th Sess. (Special), Jan. 1973, Vol. II—Documents, at 265-73; 12 INT'L LEG. MAT. 1-8 (1973).

41 For a popular presentation of the basic issues at the Washington Meeting, see Berns, Skyjacking: The Law of the Skies, THE INT'L REV. 49-54 (1972).
plated above would more appropriately be made by the Legal Committee itself. As will be seen, the Legal Committee itself was unable to meet this challenge in clear-cut fashion.

II. Action of the Council, November 1, 1972

The Special Subcommittee of the Legal Committee having filed its report, the then 27-member Council, on November 1, 1972, after a discussion during which opinions were sharply divided on the question of dates for meetings, decided, by a vote of 17 to 1 with 8 abstentions, to convene a Special Session of the Legal Committee in January, 1973, in Montreal, to work on the Report of the Subcommittee and also provided for the convening of a diplomatic conference on air security in August-September 1973.

III. Legal Committee—20th Session (Special), January 9-30, 1973

A. Introduction

The 20th Session (Special) of the Legal Committee was held in Montreal from 9 to 30 January 1973. It was attended by sixty-five contracting States of ICAO, one non-contracting State, a United Nations representative, and five other international organizations.

B. Preliminary proposal

The Committee had before it at the outset a proposal on organizing and consolidating its work presented by Australia, Canada, Italy, the Netherlands, New Zealand, Nicaragua, the United Kingdom and the United States of America.

This proposal was that for the purposes of organizing and consolidating the work of the Legal Committee, the text of certain articles of a draft convention on air security be taken as a basis of discussion. The draft articles, many of which had been prepared during the session of the Washington Subcommittee, but not approved by the Subcommittee, provided for the two-stage procedure discussed above.

42 ICAO C-Min. 77/4, Pt. I—Decs.
44 See note 35 supra. The eight States' proposal as found in LC/Working Draft No. 820 is described in brief form in ICAO Doc. No. 9050-LC/169-2, note 38 supra, ¶ 7, at 17.
CONCERTED ACTION

This proposal as briefly described in the Legal Committee’s report was as follows:43

1. In the first stage, a fact-finding Commission of Experts would determine whether, if a State had detained an aircraft, passengers, crew and cargo or did not prosecute or extradite the suspected offender, there was a threat to the safety of international civil aviation and would make recommendations as to what measures should be taken by the State concerned to remove that threat.

2. If the measures recommended by the Commission of Experts were not complied with and the threat to civil aviation was not removed, there would follow the second stage which was concerned with the taking of joint action. The first phase of the second stage would involve the use of the good offices of the President of the ICAO Council. If the threat continued after the time-limit set by the Commission of Experts, there would be a suspension of the rights of the State concerned under the Chicago Convention, the Transit Agreement and bilateral agreements within the meaning of Article 6 of the Chicago Convention. There was also a provision for the taking of a decision on joint action by interested States and such action could include suspension of international air navigation to and from the State which created the threat to the safety of civil aviation. As to whether such decision should be binding or recommendatory, the proposal contained three alternatives.

This particular proposal has been described again in some detail because it embodies, in somewhat composite form, a basic approach used by a number of the States which, during the previous debates on the question of joint action, wished to proceed to a severe form of sanction against a defaulting State which did not comply with its obligations under the Tokyo, Hague and Montreal Conventions.

However, the above-mentioned joint proposal lost ground to four main proposals which emerged from the somewhat inconclusive discussions held during the 20th Session (Special) of the Legal Committee. The latter proposals—some of which envisaged sanctions in watered-down form—may now usefully be described since, as will be seen, these were the main propositions placed before the later ICAO meetings held on the question of joint action.

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C. Groups of Main Proposals

1. Proposals concerned with the Amendment of the Chicago Convention

a. Draft Protocol of Amendment to the Convention on International Aviation—Presented by France

The essence of this Protocol was that Articles 1 to 11 of the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) would be incorporated into the Chicago Convention, by way of an amendment thereto, and that when the amendment was adopted, it should be specified, in pursuance of Article 94(b) of the Chicago Convention, that any State which failed to ratify this amendment within one year after its coming into force would cease to be a party to the Chicago Convention. This solution would enable the ICAO Council to make a decision pursuant to Chapter XVIII of the Chicago Convention in the case of a disagreement among States as to the interpretation or application of those provisions of the Hague Convention which were thus incorporated into the Chicago Convention. In addition, pursuant to Article 88 of the Chicago Convention, the ICAO Assembly would, by way of a sanction, have the right to suspend the voting power in the Assembly or in the Council of any Contracting State found in default under the new Chapter in which the provisions of the Hague Convention would be included.

b. Proposal by the Delegations of Switzerland and the United Kingdom—Amendments to the Chicago Convention

A Swiss-United Kingdom proposal consisted of amendments to the Chicago Convention providing for the insertion of a new Chapter in the Convention entitled "Measures to Protect the Security of Civil Aviation." The acts contemplated by the amendments were of the kind already set forth in Article 1 of the Hague Convention of

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47 For complete text, see LC/Working Draft No. 829 and 2 Addenda; see also ICAO Doc. No. 9050-LC/169-2, note 38 supra, at 311; for a short description of this proposal, see ICAO Doc. No. 9050-LC/169-2, note 38, supra, §§ 12-12.5, at 20.
1970 (Unlawful Seizure of Aircraft) and Article 1 of the Montreal Convention of 1971 (Unlawful Acts Against Civil Aviation). One article prescribed the obligations of a Contracting State in whose territory the alleged offender was present as regards the taking of the offender into custody, extradition and prosecution. A further provision was concerned with facilitating the continuation of the journey of the passengers and crew and with the return of the aircraft and its cargo to the person lawfully entitled to possession. This provision was in line with similar provisions in the Tokyo, Hague and Montreal Convention. An additional article in the proposed new Chapter in the Convention provided that in any case where any of the acts referred to had been committed, the Council may make appropriate recommendations to any State whose behavior is involved as to the action which it should take. There were also certain amendments proposed with respect to Articles 86 and 87 to take care of the case of a Contracting State not acting in conformity with the provisions of the new Chapter in the Convention. In particular, Article 87 would be so amended as to provide for a sanction of suspension of air services of a Contracting State which did not act in conformity with the provisions of the new Chapter. In addition, the Assembly could, as already contemplated by Article 88 of the Chicago Convention, suspend the voting power in the Assembly and the Council of any Contracting State that was found in default. The subsequent history of this amendment in its various forms will indicate how the sanction of suspension of air services was watered down and ultimately disappeared.

2. Proposals in the form of separate Conventions or Protocols

a. The Nordic draft Convention presented by the Delegations of Denmark, Finland, Norway and Sweden

This draft Convention provided that, after there had been an act of unlawful seizure of an aircraft or of unlawful interference with an aircraft or air navigation facilities and a State had adopted a certain position as regards detention (of the aircraft, passengers, crew or cargo) or as regards custody, extradition or prosecution of

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48 For complete text, see LC/Working Draft No. 831 Revised. For a short description of the original Nordic draft Convention which was presented in LC/Working Draft No. 831, later revised, see ICAO Doc. No. 9050-LC/169-2, note 38, supra, §§ 13-13.1, at 20-21.
the alleged offender, a Contracting State would be entitled to request that the ICAO Council should be convened in order to consider the matter. The proposal involved a fact-finding procedure on the part of the Council or, in some instances, by a Commission of Experts, appointed by the Council. A report would be made available to Contracting States, ICAO Member States, and the State concerned.

If the Council was satisfied that an act of unlawful seizure of aircraft had been committed or there had been an unlawful act against the safety of civil aviation, and that the State concerned had been in default, the Council would be obliged to inform the Contracting States, ICAO Member States and the State concerned about its findings and might recommend that that State take appropriate measures to remedy the situation. If the Council made a recommendation which was not complied with by the State to which it was addressed, there was a provision for convening, by the Secretary General of ICAO, of a conference to which all Contracting States were to be invited along with the State concerned. That conference might recommend that the State concerned take appropriate measures to remedy the situation. There was also provision for the use of the good offices of the President of the ICAO Council at certain stages in the proceedings. It is noted that the emphasis was placed on the making of recommendations rather than on the imposition of sanctions.


The key provision of the Protocols of Amendment to the Hague and Montreal Conventions presented by the Soviet Union was that each Contracting State undertook to return offenders to the State of registration of the aircraft when so requested by it, except where the persons concerned were nationals of the State in the territory of which the offender was present. The Protocols would bind only those States which adopted them and thus would not affect the ob-

\[\text{LC/Working Draft No. 826; for a short description of this proposal, see ICAO Doc. No. 9050-LC/169-2, note 38 supra, § 10 at 19.}\]
ligations of those States parties to the Montreal and the Hague Convention which did not become parties to the Protocols.

D. Criteria to be met by any solution adopted

During the general debate in the Legal Committee, the views expressed concerning the criteria to be met by any solution adopted included the following: it should be universally acceptable; brought into force at an early date; effective; within the ICAO framework; in conformity with international law (including the United Nations Charter, the Vienna Convention on the Law of Treaties, the Convention on International Civil Aviation, the International Air Services Transit Agreement and bilateral air transport agreements); and should not affect the sovereignty of States or entail supplementary financial expenditures by ICAO. In particular, a number of delegations submitted that, under Article 41 of the United Nations Charter, only the United Nations Security Council had competence with respect to the imposition of sanctions of the kind contemplated by some of the proposals before the Legal Committee. Other delegations did not share this view. Further, a number of delegations submitted that any attempt to bind non-consenting States by an instrument to which they were not parties was unacceptable.

A number of delegations did not consider that the solution was to have a new instrument, but rather to secure a greater number of ratifications of existing conventions. Furthermore, it was submitted, existing procedures within the United Nations and ICAO could be utilized. These delegations further pointed out that a new instrument might conflict with and confuse the application of existing conventions. They also expressed the view that a new Convention, not in the form of an amendment to the Chicago Convention, should not involve ICAO's organs as this might affect the smooth operation of ICAO. In any case, in their view, a new instrument should have no effects on third parties.

E. Votes on questions of principle

These and other proposals having been placed before the Legal Committee, that body then proceeded to vote, in a highly political

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61 For the full details of the various votes, many of which were roll-call votes, see ICAO Doc. No. 9050-LC/169-2, note 38 supra, at 22-31. See also Guillaume, La Piraterie aérienne et les derniers travaux de l'OACI à ce sujet, 27 Revue Française De Droit Aérien 257-60 (1973).
atmosphere, on a series of questions of principle in order to determine whether certain bases of work should be eliminated. The Committee decided that an eventual instrument would not contain provisions for the taking of action with respect to States not parties to the instrument. (Vote: 12 yes, 35 no, 9 abstentions); nor would the instrument contain provisions for investigating the behavior of a State not a party to that instrument without the consent of that State. (Vote: 18 yes, 32 no, 6 abstentions). However, it was decided, by a narrow margin, that the instrument could contain a provision establishing machinery for making recommendations to a State whose behavior was involved and was not party to the instrument. (Vote: 24 yes, 21 no, 10 abstentions). However, there would be no provision for co-ordinating action which might be taken in conformity with general international law with respect to such a State. (Vote: 23 yes, 27 no, 6 abstentions). As to the object of the eventual instrument, it was decided that the instrument would not provide for the taking of sanctions with respect to a State which was not a party to it. (Vote: 18 yes, 30 no, 7 abstentions).

After a lengthy procedural discussion, the Committee decided that if a new instrument in the form of an amendment to the Chicago Convention were formulated, that instrument could contain provisions providing for sanctions to be taken against States parties to that new instrument, by an organ other than those of the United Nations. (Vote: 29 yes, 19 no, 6 abstentions).

The Committee also decided by the narrow margin of 23 in favor, 19 against and 12 abstentions, that if it decided to formulate a new instrument in the form of an amendment to the Chicago Convention, that instrument could contain provisions for the taking of sanctions against States parties to the new instrument in cases other than those contemplated by the Chicago Convention.

The discussions in the Legal Committee were, to say the least, highly inconclusive and the numerous roll-votes taken indicated a sharp cleavage between the opposing camps.

F. Conclusion

Normally, at the end of a session of the Legal Committee, any draft convention which the Legal Committee considers as ready

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Footnote: This, of course, was one of the most contentious items from the very beginning of the whole study of the question of the taking of joint action, namely, the taking of joint action against a State not party to the instrument concerned.
for presentation to the States as a final draft is to be transmitted to the Council, together with a report thereon. Curiously enough, in spite of the very inconclusive discussions of the Legal Committee at its 20th Session (Special), the Committee decided—and thus completely broke with a long-established practice—to recommend to the ICAO Council:

(1) to submit to an extraordinary session of the Assembly of ICAO:
   (a) the French draft amendment to the Chicago Convention contained in LC/Working Draft No. 821;
   (b) the Swiss-United Kingdom draft amendment to the Chicago Convention contained in LC/Working Draft No. 829 and Addenda thereto.

(2) to convene, at the same time and place as the extraordinary session of the Assembly is held, a diplomatic conference and to submit to it:
   (a) the Nordic draft as revised and contained in LC/Working Draft No. 831 Revised;
   (b) the USSR draft Protocol contained in LC/Working Draft No. 826.

By the normal standards followed in the past by the Legal Committee, these could not be considered as final drafts; but the political situation in the Committee in January, 1973, was such that there was no hope of giving these drafts the stamp of finality.

Further action on the foregoing and other drafts

On March 5, 1973, the ICAO Council decided to convene the above-mentioned Assembly and Conference.
The succeeding part of this paper is concerned with the history of the above-mentioned, and other, drafts placed before the 20th Session (Extraordinary) of the Assembly and the International Conference on Air Law which met at Rome from August 28 to September 21, 1973.

ADDENDUM TO PART ONE

Compatibility of the procedures in the Tokyo, Hague and Montreal Conventions concerning Settlement of Disputes with the provisions of a new instrument

The Washington Subcommittee was aware that there could be a possible lack of compatibility between the procedure of adjudication envisaged in the proposed Convention and the provisions of the Tokyo, Hague, Montreal and Chicago Conventions which were concerned with the settlement of disputes concerning the interpretation or application of these conventions. Accordingly, the Subcommittee appointed two reporters who suggested alternative lines of approach as follows:

(a) The facts into which the fact-finding Commission under the new Convention would enquire should be different from those into which the International Court of Justice would enquire under the settlement of disputes Article in any of the three existing Conventions. A possible way of ensuring that would be to reflect the idea expressed in the Subcommittee of April 1971 about the behaviour of the defaulting States giving help, protection or encouragement to the offender, or

(b) The proceedings in the fact-finding Commission should be suspended if the defaulting State, not a party to the new Convention, invokes the settlement of disputes Article of any of the three existing Conventions. Nevertheless, if within a specified time-limit the defaulting State has not submitted the case to the International Court of Justice, the proceedings shall continue. Once the Court is seized of the matter, no further proceedings under the new Convention should be taken, or

(c) The new Convention should apply only as between the Parties to it.


When the Swiss-United Kingdom proposal\(^6\) was presented to the 20th Session (Special) of the Legal Committee at its 19th Meeting on January 22, 1973, the United Kingdom Delegate pointed out that the proposal was intended to eliminate all the legal difficulties foreshadowed in the commentary of the International Law Association\(^6\) and in the report of the reporters appointed by the Special Subcommittee.\(^6\) Thereafter the report as such does not appear to have been discussed, although the possible role of the International Court continued to be discussed in the Legal Committee.

**PART TWO**

The 20th Session (Extraordinary) of the Assembly
(August 28-September 21, 1973)

**A. Introduction**

The Assembly, held at Rome from August 28 to September 21, 1973, was attended by delegates from 101 ICAO Contracting States as well as observers from two non-Contracting States and eight international organizations, including the United Nations. Over 400 delegates and observers were in attendance.\(^6\)

**B. Agenda—Diversion and seizure by Israeli military aircraft of a Lebanese civil aircraft—Resolution A20-1**

Although the main item on the agenda of the Assembly was consideration of the French draft amendment to the Chicago Convention\(^6\) and the Swiss-United Kingdom draft amendment to the Chi-

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\(^6\) LC/WD No. 829; ICAO Doc. No. 9050-LC/169-2, note 38 supra, at 311.

\(^6\) LC/WD No. 823 in ICAO Doc. No. 9050-LC/169-2, note 38 supra, at 277-81. The comments of the ILA on the Washington report canvassed the various procedures available within the ICAO framework for the taking of joint action.

\(^6\) ICAO Doc. No. 9050-LC/169-1, note 38 supra, at 141-42.

\(^6\) Documentation available to the 20th Session (Special) of the Assembly included: ICAO Doc. No. 9050-LC/169-1-2, Legal Committee, 20th Sess. (Special), Jan. 9-30, 1973, Vol. I—Minutes, at 211 and Vol. II—Documents, at (iii), 329, and A20-WP/1 to A20-WP/33. In due course, the official volumes of the minutes and documents of the Assembly will be published.

cago Convention, the Assembly devoted its attention at the outset to the question of the diversion and seizure by Israeli military aircraft of a Lebanese civil aircraft on August 10, 1973. On August 30, the Assembly, following a previous resolution of a condemnatory nature adopted by the Council on August 20, strongly condemned Israel for violating Lebanon’s sovereignty and for the forcible diversion and seizure of a Lebanese civil aircraft, and for violating the Chicago Convention; urgently called upon Israel to desist from committing acts of unlawful interference with international civil air transport and airports and other facilities serving such transport; and solemnly warned Israel that if it continued committing such acts, the Assembly would take further measures against Israel to protect international civil aviation.

C. Description of main substantive proposals

The substantive proposals which the Assembly had before it are described in the following paragraphs.

1. Proposal of France

This has already been described above, and it really contemplated a wider acceptance and enforcement of certain provisions of the Hague Convention of 1970 by incorporating them into the Chicago Convention and stipulating that States not ratifying the amendment to the Chicago Convention whereby the Hague provisions would be incorporated into the latter, would, through the operation of Article 94(b), cease to be a member of ICAO and a party to the Chicago Convention.

2. Swiss-United Kingdom proposal

As already earlier indicated, the Swiss-United Kingdom proposal was intended to provide, through an amendment to Article 87 of the Chicago Convention, that States which did not extradite or

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69 See note 2 supra, and the description in Part One.
70 See note 3 supra, and the description of the Swiss-United Kingdom proposal in Part One.
prosecute the alleged offender (e.g., hijacker) or facilitate the journey of passengers, crew, cargo and aircraft would, under appropriate circumstances, be subject to the penalty of suspension of air services to and from them.

The Delegate of Sudan suggested a redraft of Article 88 in lieu of Article 87 as amended by the Swiss-United Kingdom proposal. According to the Sudanese amendment, if the Assembly, on the recommendation of the Council, determined that a contracting State is not acting in conformity with the provisions of the proposed new Chapter, it may require, by a two-thirds majority vote, each contracting State to prevent the operation in its territory of aircraft of the contracting State concerned. Article 88 would provide that the Assembly, by a two-thirds majority vote, may also suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter.

The approach of Sri Lanka to the Swiss-United Kingdom proposal was that of caution, insofar as sanctions were concerned, since it would provide that the disputes provisions in Articles 84-88 of the Chicago Convention would have no application to the matters provided for in the new Chapter which contained substantive articles taken from the Hague and Montreal Conventions. But the proposal of Sri Lanka would provide for use of the disputes provisions in Article 12 of the Hague Convention and Article 14 of the Montreal Convention by contracting States that had not made reservations from these Articles as permitted by the respective Conventions.

3. Common elements in the French, Swiss and United Kingdom proposals

In spite of some basic differences between the French proposal and the Swiss-United Kingdom proposal, the Assembly had before it a common expression of views of France, Switzerland and the United Kingdom to the effect that ICAO was an appropriate forum for the expression of the views of the international community with regard to united action against hijacking and sabotage; that an amendment to the Chicago Convention was the only practicable way of securing effective application of measures to secure the safety

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71 A20-WP/16.
72 A20-WP/17 Corrigendum.
73 A20-WP/4.
of civil aviation (in this regard, attention was drawn to the existing Articles 87, 88 and 94(b) of the Convention) and that it was unnecessary for the Assembly to consider, separately, certain of the provisions before the Committee. In effect, the joint elements contemplated that: (i) each contracting State shall take in its territory, in accordance with its own law, all appropriate measures to secure the safety of international civil aviation; (ii) there should be a provision for the continuance of the journey and the return of the aircraft and its cargo in the terms of the provisions found in the Tokyo,4 Hague5 and Montreal6 Conventions;7 (iii) when two-thirds of the total number of contracting States to the proposed new convention had become parties to the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on 16 December 1970, Articles 1 to 11 of that Convention shall form an integral part of the new Convention;8 (iv) when two-thirds of the total number of contracting States to the new Convention have become parties to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, Articles 1 to 13 of that Convention should form an integral part of the new Convention.9

In short, there was a common view to the effect that relevant provisions of the Hague and Montreal Conventions should be incorporated into the amendment to the Chicago Convention. Items (ii), (iii) and (iv) formed the basis of key provisions that were ultimately placed before the Assembly in a series of draft articles of amendment to the Chicago Convention.

At the same time, the Kingdom of The Netherlands presented a subamendment to the French-Swiss-United Kingdom common view and proposed the establishment of a Commission of Experts to work on the cases under consideration. There was also provision for any State to apply to the ICAO Council asking for an investigation of

74 Art. 11.
75 Art. 9.
76 Art. 10.
77 This idea formed the basis of Article 70 bis of the new Chapter XVI bis later placed before the Assembly.
78 This idea formed the basis of Article 70 quinquies of the new Chapter XVI bis later placed before the Assembly.
79 This idea formed the basis of Article 70 sexies of the new Chapter XVI bis later placed before the Assembly.
such a case. According to these suggestions, there could be a Commission appointed by the Council, in cases where the Council could not settle the matters through conciliation, and that Commission would determine whether the facts constituted a failure on the part of a contracting State to comply with certain obligations. The Commission was then to communicate its decision to the Council which should, if appropriate, invite the States concerned to take all necessary measures to comply with the decision of the Commission. If the State concerned declined to give effect to the decision within the time-limit fixed by the Council, the latter was bound to make the decision public. Here again, it may be noted that there was an attempt to shy away from stiff sanctions and that a great deal of reliance was placed upon moral persuasion by publicizing delinquency on the part of States.

The Commission also had before it comments from the United States of America, the International Air Transport Association (IATA), Belgium, Brazil and the International Law Association (ILA).

4. Questions of Principle

After the debate on the foregoing, and other, proposals had proceeded for some time, the President of the Assembly, who was also acting as the Chairman of the Executive Committee, drew up a series of questions of principle which are shown below with necessary explanatory annotations along with the votes taken. These questions were examined from the third to the sixth meetings of the Executive Committee, held between September 5 and 7.

**Question No. 1**

“Does the Executive Committee wish that the Assembly, at

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80 A20-WP/5 and A20-WP/21.
81 A20-WP/6.
82 A20-WP/7.
83 A20-WP/8.
84 A20-WP/9.
85 A20-WP/10. In particular, the ILA paper submitted that ICAO already had the power under the existing Chicago Convention, to co-ordinate such joint action as that envisaged under the Council Resolution of June 19, 1972, and suggested that the Assembly might wish by interpretative resolution or resolutions to spell out such powers. In this regard, the ILA pointed out that precedents might be found in the League of Nations Assembly, which more than once adopted resolutions interpreting the League Covenant.
86 A20-WP/14 and Corrigenda.
the time of the possible adoption of an amendment of the Chi-
cago Convention, should apply Article 94(b)?"

This concept which was included in the French proposal would
have the effect of providing that any State which has not ratified
within the specified period after the amendment has come into force
shall thereupon cease to be a member of the Organization and a
party to the Convention.

Vote: This question was rejected by a vote of 11 affirmative
answers, 73 negative answers and 6 abstentions.

Question No. 2

"Does the Executive Committee wish that Article 87 be
amended in accordance with the English-Swiss proposal (see
A20-WP/3, page 5 as amended by page 6)?"*

Vote: This question received 42 affirmative votes, 34 negative
votes, with 14 abstentions.

Question No. 3

"Does the Executive Committee wish to include, in the
Chicago Convention, provisions of the Hague and Montreal
Conventions?"**

Vote: This question received 65 affirmative votes, 4 negative
votes, with 21 abstentions.

Question No. 4

"Does the Executive Committee wish that Article 12 of the
Hague Convention and Article 14 of the Montreal Convention
be also included in the Chicago Convention?

"Note: If the reply to Question No. 4 is in the affirmative, a
decision will have to be taken in regard to the following alter-

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* See A20-WP/3, at 5 as amended by 6:
Each Contracting State undertakes not to allow the operation of any
airline of Contracting States through the airspace above its territory
if the Council has decided either that the airline concerned is not
conforming to a final decision rendered in accordance with the pre-
vious article or that the Contracting State concerned is not acting
in conformity with the provisions of Chapter. . . . (The italicized
words represent the Swiss-United Kingdom additions to Article 87).

** In effect this was a reference to the common proposal of France, Switzer-
land and the United Kingdom (A20-WP/4, Attachment) to the effect that Arti-
cles I to 11 of the Hague Convention and 1 to 13 of the Montreal Convention
be incorporated into the Chicago Convention. (See note 10 supra).
"As to procedure
(a) Would the procedure for the settlement of differences concerning the provisions incorporated from the Hague and Montreal be the ones contemplated in Article 12 of the Hague and Article 14 of Montreal, and not by the Council of ICAO, or
(b) Would there be a possibility of choosing between the two procedures?

"As to sanctions
Would invocation of the procedure in the aforesaid Articles 12 and 14 preclude the application of the penalties provided by the Chicago Convention?"

The confusion which arose in connection with the foregoing was that Articles 12 and 14 of the Hague and Montreal Conventions respectively were already concerned with the settlement of disputes regarding the interpretation or application of the provisions of those Conventions, but there was a fear of a possible conflict with the provisions of Chapter XVIII of the Chicago Convention, which was also concerned with the settlement of disputes, concerning the interpretation or application of the provisions of the Chicago Convention which, if amended as agreed by the reply to Question 3, could include the Hague and Montreal provisions that might be imported into the Chicago Convention by reference.

Vote: The question was given a negative answer by 10 affirmative votes and 62 negative votes, with 21 abstentions. Since the negative answer was given to the question, there was no need for the Executive Committee to make decisions as to the alternatives mentioned above concerning procedure and sanctions.

Question No. 5
"Does the Executive Committee wish to include in the Chicago Convention provisions concerning acts of unlawful interference committed by States?"

Vote: The Executive Committee accepted this principle by a vote of 63 in favour and 6 against, with 22 abstentions.

5. Revised text of proposal of the Delegations of Switzerland and the United Kingdom—Penalty for non-conformity by States
On the basis of advice received during wide-spread consultations,
the Delegations of Switzerland and the United Kingdom put forward by September 12 the following text which, in effect, represented a last attempt to include a strong sanction in the amendment to the Chicago Convention. The text, which took the form of an amendment to Article 88 of the Chicago Convention read as follows:

Penalty for non-conformity by State

(a) Each Contracting State undertakes not to allow the operation of the air carriers of a Contracting State through the airspace above its territory if the Council has decided to this effect. Before taking such a decision, the Council shall first have decided in accordance with Article 84 that the Contracting State concerned is not acting in conformity with the provisions of Chapter...

(b) The Council may at any time, and taking into account the prevailing circumstances, suspend, modify or revoke any decision taken by it under the preceding paragraph.

(c) The Assembly shall suspend the voting power in the Assembly and in the Council of any Contracting State that is found in default under the provisions of this Chapter other than sub-paragraph (a).

(d) The Council shall determine in what manner the provisions of this Article shall apply to air carriers which are international operating agencies.

(e) For the purposes of this Article “air carrier” means a carrier engaged in the carriage by air of passengers, cargo or mail for remuneration or hire on scheduled or non-scheduled services.

At its 10th and 11th meetings, held on September 13 and 15 respectively, the Executive Committee discussed this text, as amended by suggestions of Sudan and Qatar. The amendment submitted by Qatar stipulated that the decision that a Contracting State was not acting in conformity with its obligations under the Chicago Convention, and that the sanction of suspension of operation of air carriers should be imposed, would be taken by a two-thirds majority vote of the Assembly and not, as in the case of the Swiss-United Kingdom proposal, by the Council. The Delegate of Qatar also included in his proposal the right of appeal from the Assembly’s decision to the International Court of Justice. At the 11th Meeting of the Executive Committee, on September 15, a consider-

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89 See also A20-WP/24 which contains numerous explanatory notes.
90 A20-EP/17. The Sudanese text has already been discussed above.
91 A20-WP/25.
able number of delegations expressed their continued opposition to a system of collective sanctions against States outside the competence of the Security Council on grounds of both legality and practicality, although it was conceded that the principle of such a system had been approved by the Executive Committee by its reply to Question No. 2 above. At the same meeting, discussion also ranged over the practicality of the systems proposed, including whether decision-making on the subject could be entrusted to the Assembly which met infrequently; the legal problem of referring appeals to the International Court of Justice which dealt with disputes between States and not disputes between a State and the organ of an international body; the question of applying the proposed sanctions to the States which did not possess airlines; and the position of multi-national carriers not falling within the definition of international operating agencies.

On September 15, the Executive Committee rejected the latest Swiss-United Kingdom proposal by a vote of 39 to 25 with 18 abstentions. It rejected the Sudanese proposal by a vote of 51 to 13 with 18 abstentions and rejected the proposal of Qatar by a vote of 45 to 17 with 20 abstentions.

6. Final steps on the proposed amendment of the Chicago Convention

a. Executive Committee

Save for what will be stated later, in connection with Article 79 quater, little useful purpose would be served by giving a detailed history in the Executive Committee of the report which emanated from the Study Group on drafting charged with preparing the text on the amendments of the various articles to be included in the Chicago Convention. Instead, it may merely be observed that these matters were, in fact, considered at the 12th, 13th and 14th Meetings of the Executive Committee held between September 17 and 18.

b. Plenary Meetings—Proposed new Chapter XVI bis to be included in the Chicago Convention

The text of the draft articles (as they emerged from the Executive Committee) to be included as an amendment to the Chicago

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As found in A20-WP/28, which contained, inter alia, a draft of a new Chapter XVI bis by way of amendment to the Chicago Convention.
Convention were placed before the Plenary Meetings of the Assembly in the form of a draft resolution entitled "Amendment relating to inclusion in the Chicago Convention of 1944 of supplementary provisions to improve the safety of international civil aviation (Chapter XVI bis)." The Chapter which was to be added to Part III of the Convention is reproduced in full as it represents the highest level of agreement reached by the Assembly and, as indicated below, barely failed to be adopted. 

CHAPTER XVI bis

SUPPLEMENTARY PROVISIONS TO IMPROVE THE SAFETY OF INTERNATIONAL CIVIL AVIATION

Article 79 bis

When an act of unlawful seizure of an aircraft has been committed or when, due to the commission of an unlawful act against the safety of civil aviation, a flight has been delayed or interrupted, any Contracting State in whose territory the aircraft or passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

Article 79 ter

Each Contracting State shall in accordance with its national law report to the Council as promptly as possible any relevant information in its possession concerning:

(a) acts of unlawful seizure of an aircraft;
(b) unlawful acts against the safety of civil aviation;
(c) the action taken pursuant to Article 79 bis;
(d) the measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings.

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64 See A20-WP/30, App. A, which includes the proposed Chapter XVI bis as part of a draft A20 Resolution entitled: Amendment relating to inclusion in the Chicago Convention of 1944 of supplementary provisions to improve the safety of international civil aviation (Chapter XVI bis).

65 See Article 11 of the Tokyo Convention, Article 9 of the Hague Convention and Article 10 of the Montreal Convention for the basis of the second half of Article 79 bis.

66 This Article was based on a Canadian proposal in A20-WP/23, which was essentially the text of Article 11 of the Hague Convention and Article 13 of the Montreal Convention with certain amendments.
Article 79 *quater*

Each Contracting State undertakes to refrain from the use or threat of force against aircraft, airports or air navigation facilities of another State subject to the provisions of the Charter of the United Nations and this Convention. This Article shall, in no event, be interpreted as legitimizing the use or threat of force in violation of the rules of international law.\(^6\)

Article 79 *quinquies*

When eighty-six of the Contracting States to this Convention have become parties to the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, Article 1 to 11 of that Convention shall form an integral part of this Convention, provided that in those Articles references to "this Convention" shall be construed as references to this Chapter and references to Articles in the said Hague Convention shall be construed as referring only to such Articles.\(^7\)

Article 79 *sexies*

When eighty-six of the Contracting States to this Convention have become parties to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, Articles 1 to 13 of that Convention shall form an integral part of this Convention, provided that in those Articles references to "this Convention" shall be construed as references to this Chapter and references to Articles in the said Montreal Convention shall be construed as referring only to such articles.\(^8\)

Article 79 *septies*

1. The provisions of Articles 79 *bis* and 79 *ter* relating to the unlawful seizure of aircraft shall cease to be in force when eighty-six of the Contracting States to this Convention have become parties to the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.

2. The provisions of Articles 79 *bis* and 79 *ter* relating to unlawful acts against the safety of civil aviation shall cease to be in force when eighty-six of the Contracting States to this Convention have become parties to the Convention for the Suppression of Unlawful

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\(^6\) This Article was based, as considerably amended, on a proposal of France, Switzerland and the United Kingdom in A20-WP/15.

\(^7\) Based, in modified form, on Article 82 in the attachment to A20-WP/4 (presented by France, Switzerland and the United Kingdom).

\(^8\) Based, in modified form, on Article 83 in the attachment to A20-WP/4 (presented by France, Switzerland and the United Kingdom).
Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.\footnote{The Article contains the necessary machinery for the transition from the independent Hague and Montreal Conventions to a regime under which the Hague and Montreal provisions indicated in Article 79 quinquies and Article 70 sexies would be incorporated into the Chicago Convention.}

These texts were considered during the 9th Plenary Meeting of the Assembly on September 19 from 1600 to 2200 hours (after those attending the Assembly had been received by Pope Paul at Castel Gandolfo) and at the 10th Plenary on September 20-21 from 2030 hours to 0150 hours.

(i) Voting procedure for amendments to draft amendments

Since what was now involved as a question of adoption of an amendment to the Convention at a Plenary Meeting of the Assembly, the question of voting procedure arose. According to Article 94(a) of the Convention: "Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly." On the basis of the attendance at the Assembly (which at the time of the 9th Plenary Meeting was 100 contracting States) the two-thirds required would have been 67.\footnote{For determination of attendance at the Assembly for the purpose of a vote under 94(a) of the Chicago Convention, see Rule 54 of the Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization, ICAO Doc. No. 7600/2.} However, the question arose as to whether amendments to texts which had emanated from the Executive Committee could be adopted by a simple majority. During the 9th Plenary Meeting, a special voting procedure was determined whereby amendments to those texts which were not of a substantive nature could be adopted by a simple majority and the texts as amended would be required to be adopted by a two-thirds majority in the Assembly.\footnote{Subsequently, the ICAO Council proposed to the 21st Session of the Assembly (Sept.-Oct., 1974) that Rule 54 of the Standing Rules of Procedure of the Assembly (ICAO Doc. No. 7600/2) be amended so as to embody this voting procedure.}

(ii) Votes

No attempt will be made here to examine the voting with respect to the Preambular Clauses of the Resolution of adoption and there will merely be recorded the votes on the various provisions of the amendment. The votes at the 9th Plenary Meeting were as follows:
(1) Chapter XVI bis (Title) adopted 21-20-35
(2) Article 79 bis adopted 82-0-12
(3) Article 79 ter adopted 78-1-14
(4) Article 79 quater rejected 65-0-29, (the required majority of 67 not being attained)
(5) Article 79 quinquies rejected 62-1-23. (Just prior to this vote a United States proposal to substitute “forty” for “eighty-six” was rejected by a vote of 41 to 28 with 19 abstentions)
(6) Article 79 sexies rejected 57-2-35
(7) Article 79 septies not put to vote

The vote on Article 79 quater was the crucial one and, this being so, an examination of its abortive legislative history at the Assembly will now be in order.

(iii) Article 79 quater—Inclusion in the Chicago Convention of provisions to cover unlawful acts of interference committed by States

The Assembly had before it, in connection with the proposed amendment of the Chicago Convention, the new and difficult question of the possible inclusion in the Convention of provisions to cover acts of unlawful interference committed by States, and this was reflected in Article 79 quater which came before the Plenary Meeting during the last days of the Assembly. The legislative history of Article 79 quater follows.

When, on August 20, 1973, the Council condemned the Israeli diversion of a Lebanese civil aircraft on August 10, it also recommended “to the Assembly at its 20th Session (Extraordinary) that it include in its agenda consideration of these actions [by States] in violation of the Chicago Convention and take measures to safeguard international civil aviation.” As a result, the Assembly included in its agenda an item entitled: “Consideration of inclusion in the Chicago Convention of provisions concerning acts of unlawful interference committed by States.” Subsequently, France, Switzerland and the United Kingdom proposed the following Article on this topic for inclusion in an amendment to the Chicago Convention:

Subject to the provisions of the Charter of the United Nations, of this Convention and of any agreement between the States concern-
ed, each Contracting State undertakes not to interfere by force or threat of force with an aircraft of another State. Nothing in this Article shall be taken to authorize the use of force or threat of force in any circumstances in breach of the rules of international law.

It so transpired that the concept embodied in this provision was the object of the most crucial vote in the whole Assembly.

The Executive Committee approved this text at its 11th meeting, on September 15, by a vote of 46 to none with 36 abstentions. This text, as considerably modified by the Executive Committee’s Study Group (Drafting) so as to include in the first sentence a reference not only to “aircraft” but also to “airports or air navigation facilities” of another State, appeared as Article 79 quater in the text of a new Chapter XVI bis placed before the Executive Committee.

At the 14th Meeting of the Executive Committee, on September 18, the Egyptian Delegation proposed a text in lieu of that prepared by the Study Group (Drafting) which, it was stated, involved no change of substance but merely improvements or drafting, this text being as follows:

Each Contracting State undertakes to refrain from the use or threat of force against civil aircraft, airports, and air navigation facilities and services of another State, subject to the provisions of the Charter of the United Nations under this Convention. This Article shall, in no event, be interpreted as legitimizing the use or threat of force in violation of the rules of international law.

On the roll-call vote, the Egyptian text which represented a marked gesture of compromise was adopted by a vote of 52 in favour, without opposition, but with 21 abstentions. It was essentially this text,

102 U.N. Charter art. 2, ¶ 4 contains the words “threat or use of force” thus:
All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. (emphasis added).

103 A20-WP/15.
104 A20-WP/28.

106 The Egyptian text, while not repeating the expression “force or threat of force” found in the French-Swiss-United Kingdom and original wording (A20-WP/15), continued to use the expression “use or threat of force” found in Article 79 quater as placed before the Executive Committee.

108 This is in the form put forward by the Egyptian Delegation at, and adopted by, the 14th Meeting of the Executive Committee for transmission to the Plenary.
with the omission of the word “civil” in the first sentence, which was placed before the Plenary Meeting and it was the failure of this text to be accepted by a vote which was 2 votes short of the required two-thirds majority of the Assembly which was the main cause of the failure of the Assembly.

Since the failure of the 9th Plenary Meeting, by a narrow margin of two votes, to adopt Article 79 quater had apparently wrecked the possibility of adoption of the whole package of amendments found in the proposed new Chapter XVI bis, it is not surprising that, at the 10th Plenary Meeting on September 20, the debate was reopened, on the proposal of Qatar, by a vote of 60 to 7 with 24 abstentions.

The Delegate of Colombia, on behalf of seven states (Colombia, Costa Rica, Guatemala, Honduras, Nicaragua, Uruguay and Venezuela) proposed the following text, in which the word “civil” was reinstated at the request of Qatar:

Each contracting State undertakes to refrain from the use or threat of force and from permitting the use or threat of force against civil aircraft, airports or air navigation facilities of another State, subject to the provisions and principles of the Charter of the United Nations and this Convention. This Article shall not be interpreted as authorizing, in any circumstances, the use or threat of force in violation of the rules of international law.

This text, being considered as an amendment to the original text of Article 79 quater as submitted to the Assembly was made subject only to the simple-majority vote agreement mentioned earlier and was accepted by 33 votes to 20, with 39 abstentions. But when put to vote under the two-thirds rule contained in Article 94(a) of the Chicago Convention, it was rejected by 39 votes in favour, 20 against and 33 abstentions.108

The question of Article 79 quater was again reopened and the French Delegation then proposed adoption of Article 79 quater as it had been originally submitted to the Plenary by the Executive Committee with the inclusion of the word “civil” in front of the word “aircraft” and the words “and principles” after the word “pro-

107 It may be noted, in particular, that the word “authorizing” was used instead of the word “legitimizing” found in the text that was so narrowly defeated at the previous Plenary Meeting.

108 This vote of 39 in favour, 20 against and 33 abstentions was a remarkable drop from the previous vote of 65 in favour, 0 against and 25 abstentions.
visions." The Delegate of Tanzania proposed an amendment to the French proposal by the addition of the words "and from permitting the use or threat of force" in the second line. This was considered by the Assembly to be an alternative to the French proposal.

The French proposal was then voted upon and rejected by 52 votes in favour, 2 against, with 35 abstentions as it had not received the required two-thirds majority. The Tanzanian proposal was rejected by 37 votes in favour, 18 against, and 34 abstentions.

Articles 79 quinquies and 79 sexies were rejected by a vote of 43 in favour, 2 against with 44 abstentions. As a consequence Article 79 septies was also rejected.

The Delegate of France then moved a vote on Article 79 bis and 79 ter, these provisions representing what remained of the proposed Chapter XVI bis. The articles, which on the previous day had received such a high favorable vote, were this time rejected by a vote of 54 in favour, none against and 34 abstentions, the vote failing to obtain the required two-thirds majority. Thus, the whole of Chapter XVI bis was rejected.

7. Conclusion

a. Reasons for failure of Assembly

So ended the long and chequered history of the attempt to import into the Chicago Convention the provisions of the Hague and Montreal Conventions; with the intention of imposing on States that did not comply with the provisions so incorporated the sanctions available under the Chicago Convention. The crucial vote in the whole exercise was that with respect to Article 79 quater, on the evening of September 19, when 67 votes would have brought about the adoption of that key provision and only 65 were obtained. In this regard one cannot help but think of the failure of the second session of the Law of Sea Conference in 1960 when the proposal for the expansion of territorial waters failed because, 55 votes being required for its adoption, only 54 were forthcoming.

A further and more basic reason for the failure of the Assembly

108 A20-WP/30.

110 On the previous day Article 79 bis had received 82 affirmative votes and Article 70 ter 78 affirmative votes.

CONCERTED ACTION was, of course, a lack of consensus among the various interested parties. A number of developing countries were, for their own reasons, opposed to having any provisions which would involve application of sanctions. The Socialist countries were not interested in amending the Chicago Convention but were interested rather (see, in this regard, the description of the diplomatic conference below) in strengthening the extradition provisions found in the Hague and Montreal Conventions. Only an exhaustive analysis of the roll-call votes—of which there were many—both at the 20th Session (Special) of the ICAO Legal Committee (January 1973) and at the 20th Session (Extraordinary) of the Assembly and the International Conference on Air Law (Rome, 28 August-21 September 1973) would give the complete political story.\(^1\)

b. Resolution A20-2

All that the Assembly was able to do was to adopt Resolution A20-2 which, in referring to acts of unlawful interference with civil aviation, condemned all such acts and any failure by a Contracting State to fulfill its obligation to return an aircraft which is being illegally detained or to extradite or to submit to the prosecuting authorities the case of any person accused of an act or unlawful interference with civil aviation; appealed to States to become parties to the Tokyo, Hague and Montreal Conventions if they had not already done so, and reaffirmed ICAO’s important role to facilitate the resolution of questions which may arise between Contracting States in relation to matters affecting the safe and orderly operation of civil aviation throughout the world.

\(^{13}\) For convenience, some of the more important roll-call votes taken on Article 79 quater at the 9th and 10th Plenary Meetings are given in the Appendix to Part Two.
APPENDIX TO PART TWO

Votes on some of the crucial phases of the legislative history of Article 79 quater

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PART THREE

International Conference on Air Law
(Rome, August 28-September 21, 1973)

A. Introduction

The International Conference on Air Law\(^{112}\) was convened by the Council of ICAO, pursuant to the procedure prescribed in Assembly Resolution A7-6, for the purpose of considering the Nordic draft Convention,\(^{114}\) as well as the draft Protocols of the Soviet Union already mentioned.\(^{115}\) The Conference was held, in Rome, on the premises of the Food and Agriculture Organization of the United Nations (FAO), from August 28 to September 21, 1973. The Governments of 101 States (5 of which were non-Contracting) were represented at the Conference. Eight international organizations—among them the United Nations—were represented by observers. The Conference was attended by over 400 representatives

\(^{112}\) Documentation available to the International Conference on Air Law included: ICAO Doc. No. 9050-LC/169-1-2 Legal Committee, 20th Sess. (Special), Jan. 9-30, 1973, Vol. I—Minutes, at 211, and Vol. II—Documents, at (iii), 329, and CAS Doc. Nos. 1-29, as well as an unnumbered document containing final draft protocols placed before Plenary Meetings of the Conference in its closing days. In due course, the official volumes of the minutes and documents of the Assembly will be published.


\(^{115}\) CAS Doc. No. 5 Revision No. 2 and CAS Doc. No. 15 Revised. See also LC/Working Draft No. 826 which is reproduced in 12 INT'L LEG. MAT. 390-91 (1973), this being the unrevised version of CAS Doc. No. 5.
and observers. The President of the ICAO Council opened the Conference.

B. Agenda

Initially, the substantive items on the Agenda of the Conference included the draft Convention and the draft Protocols to which reference has already been made. However, the Conference decided to include in its Agenda also consideration of (a) a draft Convention on the Security of International Civil Aviation presented by Belgium and (b) a draft Supplementary Protocol presented by Greece, to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971.

On August 20, 1973, the Council (Extraordinary Session, 1st Meeting) recommended to the Conference that it make provision "in the Conventions" for acts of unlawful interference committed by States. Accordingly, at its First Plenary Meeting, the Conference added to its Agenda an item entitled "Inclusion in the Conventions of provisions concerning acts of unlawful interference committed by States."

C. Results of the Conference

None of the draft Protocols presented for consideration by the Conference obtained the required majority when presented for final vote. No draft convention was presented for a vote. Consequently, the Conference terminated without having adopted any instrument other than a Final Act. The Final Act was opened for signature on September 21, 1973 and was signed on behalf of 82 States. The original copy of the Final Act has been deposited with ICAO. However, in spite of the failure of the Conference, an examination of the main proposals placed before it indicates a high degree of agreement about the measures that could be taken against unlawful interference with international civil aviation, including the elimination of safe havens for malefactors.

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116 CAS Doc. No. 12.
117 CAS Doc. No. 16.
D. Basic documents before the Conference

The basic documents before the Conference fell into two categories:

1. Proposals for a new Convention
   a. The Nordic draft Convention proposed by the Delegations of Denmark, Finland, Norway and Sweden.\(^{120}\)
   b. A draft Convention on the security of international civil aviation as first suggested and later proposed by Belgium.\(^{121}\)

2. Proposals for strengthening existing instruments
   a. Supplementary Protocol to the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on December 16, 1970, presented by the Delegation of the USSR.\(^{122}\)
   b. Supplementary Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on September 23, 1971, presented by the Delegation of the USSR.\(^{123}\)
   c. Draft Supplementary Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971, presented by the Delegation of Greece.\(^{124}\)

E. Discussion of proposals for a new Convention

1. Nordic Proposal

The Nordic proposal has already been described above.\(^{125}\)

2. Belgian Proposal

According to the Belgian proposal,\(^{126}\) the draft Convention would assign to an independent Commission the task of ensuring that States parties to the new Convention fulfill all obligations under international law in the field of aviation security. The Commission might furthermore recommend to States that were parties to the

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\(^{120}\) CAS Doc. No. 4.

\(^{121}\) CAS Doc. No. 12.

\(^{122}\) CAS Doc. No. 5, Revision No. 2.

\(^{123}\) CAS Doc. No. 15 Revised.

\(^{124}\) CAS Doc. No. 16.

\(^{125}\) See Part Two, Section III, I.B. (1).

\(^{126}\) CAS Doc. No. 12.
Convention (and only to those States), the application of safeguarding measures, i.e., preventive measures and measures for preservation or protection, to the exclusion of penal or coercive measures, if it considered that the safety of international civil aviation was jeopardized. Aware of the objections raised to the assignment of new responsibilities to the ICAO Council, the Belgian Government stated that it preferred the more flexible formula of an independent Convention, capable, outside any public confrontation, of enabling action to be taken with the speed required by circumstances. The Government resolutely rejected the idea of a system of sanctions, even with regard to States parties to the Convention. Rather than employing measures likely to give rise to tension in the field of international air transport, the Belgian draft proposed assistance based on the free acceptance of collective discipline. If a large number of States so wished, a provision for recommendations to non-party States could be included in the Convention.

3. Votes on questions of principle

The two foregoing draft Conventions were debated together in the Commission of the Whole and gave rise to a number of questions of principle which were extensively discussed and then voted upon. The results of the votes on questions of principle, taken at the 9th, 10th and 12th meetings of the Commission of the Whole, between 12 and 14 September, were as follows:

**Question 1(a)**
A new Convention should apply in respect of State conduct with regard to acts or omissions referred to in the Hague and Montreal Conventions. (58 in favour, 2 against, with 31 abstentions)

**Question 1(b)**
The Commission rejected the question of principle “Should a new Convention cover also other State conduct which constitutes a threat to the safety of international civil aviation?” (20 to 15, with 57 abstentions)

**Question 2**
The Commission agreed that the new Convention should apply when acts of unlawful interference have been committed by States. (44 to 4, with 44 abstentions)

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17 For the texts of Questions 1(a) to 3, see CAS Doc. No. 21.
Question 3(a)
The Commission rejected by a vote of 68 to 7, with 15 abstentions, the preference for a machinery under the new Convention to utilize a body outside the ICAO framework.

Question 3(b)
It agreed, by a vote of 35 to 29, with 26 abstentions to express a preference for machinery under the new Convention to utilize one or more bodies within the ICAO framework.

Question 3(c)
It also agreed, by a vote of 37 to 27, with 26 abstentions, to express a preference for a machinery under the new Convention to utilize the framework of ICAO in conjunction with an outside body.

Question 4(a)
The Commission rejected, by a vote of 33 to 30, with 22 abstentions, the concept that the outside body referred to in question 3(c) should include a Commission of independent persons which would submit a report to an organ within the framework of ICAO.

Question 4(b)
The Commission decided, by a vote of 42 to 14, with 30 abstentions, that the outside body referred to in question 3(c) should include a Conference of States as provided in Article 5 of CAS Doc No. 4 (the Nordic proposal).

Question 5
In view of the vote on Question 4(a), there was no vote on Question 5: “Should the Commission of independent persons described in question 4(a) be competent:
(a) Only to determine facts falling within the scope of the Convention, or
(b) To assess State conduct with regard to facts falling within the scope of the Convention?”

Question 6(a)
Should the machinery established under the new Convention be competent to make recommendations to a State party to the Convention alleged to be in default?: Yes 58, no 8, abstentions 18.

\(^{128}\) For the texts of Questions 4(d) to 7, see CAS Doc. No. 25.
Question 6(b)
Should the machinery established under the new Convention be competent to make recommendations to a State party to the new Convention not alleged to be in default?: Yes 37, no 33, abstentions 16.

Question 6(c)
Should the machinery established under the new Convention be competent to make recommendations to a State party to the Chicago Convention?: Yes 30, no 40, abstentions 13.

Question 6(d)
Should the machinery established under the new Convention be competent to make recommendations to any other State?: Yes 22, no 47, abstentions 12.

Question 7
Should the new Convention be terminated upon the entry into force of corresponding amendments to the Chicago Convention? (Vote deferred until contents of new Convention, if any, were known).

Special question
A special question put to the Commission of the Whole was the following: Should the new Convention, if any, envisage the use of one or more ICAO bodies without amending the Chicago Convention? The result of the vote was 44 in favour, 26 against with 17 abstentions. As to this last question, the Commission was informed by the Director of the ICAO Legal Bureau, at the 10th Meeting on September 12, that there was nothing in the Chicago Convention to prevent the assignment of certain functions to the ICAO Council in a new Convention, provided they were not mandatory functions. He cited Article 55(e) of the Chicago Convention (which gives the Council an investigative capacity) and recalled that the Council had accepted the functions conferred upon it by the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952) and by the North Atlantic Joint Financing Agreements and in its Resolutions of April 10, 1969, and June 19, 1972, had shown a predisposition to accept certain functions in connection with the prevention of acts of unlawful interference.
4. Overall results of votes on questions of principle

In spite of all of the foregoing votes on questions of principle, no text, whether based on the Nordic proposal or the Belgian proposal emerged from the Study Group (Drafting) charged with preparing texts of draft conventions for submission to the Commission. As a result no text of a separate convention was placed before a Plenary Session of the Conference for adoption.

5. Fate of the Nordic proposal

At the 18th Meeting of the Commission of the Whole, on September 20, statements were made by several Delegations expressing regrets that the Study Group (Drafting) had been unable, for a lack of time, to examine the questions of principle which had been formulated in connection with the Nordic proposal. It was argued that as long as the Nordic Delegation maintained their proposal, it was up to the Commission of the Whole to refer it back to the Study Group (Drafting) or to refer it to the Plenary. After the Delegate of Sweden had explained that some of the essential elements in the Nordic draft had been unacceptable to a majority in the Conference, and that in those circumstances the text prepared by the Study Group (Drafting) would no longer be identical with the Nordic proposal, it was noted that no further action was called for on the part of the Commission.

F. Proposals for strengthening existing instruments

As indicated earlier, these proposals took the form of the draft Protocols of Amendment respectively to the Hague Convention and Montreal Convention put forward by the USSR and a draft Protocol of Amendment to the Montreal Convention put forward by the Delegation of Greece. These proposals will now be discussed.

1. Proposals of the Soviet Union

For convenience both proposals of the Soviet Union may be discussed together.

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129 See, however, a text put forward by the Austrian Delegation: Draft Convention on the Security of International Civil Aviation, CAS Doc. No. 20. This text was not put to vote.
130 CAS Doc. No. 4.
131 CAS Doc. No. 5, Revision No. 2 and CAS Doc. No. 15 Revised.
132 CAS Doc. No. 16.
The basic proposal as regards the amendment of the Hague Convention was to replace Article 8, paragraph 2 of that Convention\textsuperscript{133} by the following provisions:

2. Each Contracting State undertakes to return offenders to the State of registration of the aircraft or to the State referred to in Article 4, paragraph 1(c) of the Convention when so requested by it, except where the persons concerned are nationals of the State on the territory of which the offender is present. Extradition shall be subject to the other conditions provided by the law of the requested State.

“If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it shall consider this Convention as an extradition treaty in respect of the offense.”\textsuperscript{134}

As far as it concerned the amendment of the Montreal Convention, the proposal was to replace Article 8, paragraph 2 of that Convention by similar provisions.

a. Miscellaneous proposals

(i) Bulgaria

At the same time, the Commission also had before it a proposal, at first circulated informally at the 7th Meeting of the Commission of the Whole on September 10, and later sponsored by Bulgaria,\textsuperscript{135} to replace Article 8, paragraph 2 of the Hague and Montreal Conventions by the following:

(2)

(a) Each Contracting State undertakes, subject to the provisions of its national law and its practice, to give preference to the extradition of alleged offenders present in that

\textsuperscript{133} Article 8, paragraph 2 of the Hague and Montreal Conventions reads as follows:

\begin{verbatim}
Article 8

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
\end{verbatim}

\textsuperscript{134} CAS Doc. No. 5, Revision No. 2. CAS Doc. No. 15 Revised. The remainder of the text is the same as that of Article 8(2) of the Hague Convention.

\textsuperscript{135} CAS Doc. No. 24.
State, upon receipt of a request to extradite, to the State of registration of the aircraft or to any other Contracting State entitled to request extradition. The provision shall not apply when the alleged offender is a national of the State in the territory of which he is present.

(b) If a Contracting State, which makes extradition conditional on the existence of a treaty, receives a request for extradition from another Contracting State with which it has no extradition treaty, this Convention shall be the legal basis for extradition in respect of the offense.

(c) The provisions of sub-paragraphs (a) and (b) of this paragraph shall not affect obligations of Contracting States under any extradition treaty.

No vote was taken on this proposal.

(ii) Netherlands

At the 7th Meeting of the Commission of the Whole, on September 10, the Netherlands put forward a redraft which differed from the Soviet text in four main respects: (i) in it, a Contracting State undertook to give preference to the extradition of (rather than to extradite) alleged offenders present in its territory: (ii) as between States requesting extradition it gave preference to the State of registration of the aircraft “or to any other Contracting State entitled to request extradition” (instead of giving specific preference, in the second alternative, to the operating State if the aircraft was leased); (iii) it made the Hague and Montreal Conventions “the legal basis for extradition in respect of the offense” if a Contracting State which made extradition conditional on the existence of a treaty received a request for extradition from another Contracting State with which it had no extradition treaty (instead of stating, as did the USSR provision, that each Convention would be considered as “an extradition treaty in respect of the offence”); and (iv) it added the stipulation that the provisions of the Article would not affect the obligations of Contracting States under any extradition treaty.

This proposal was not adopted.

(iii) Nicaragua

There was also an unadopted proposal\(^{186}\) which provided that the first sentence of the proposed new Article 8, paragraph 2 of the Hague and Montreal Conventions should read in part as follows:

2. Each Contracting State undertakes to return to the State of

\(^{186}\) CAS Doc. No. 18.
Registration of the aircraft or to the State referred to in paragraph . . . offenders who for all the legal effects of the penal action committed shall be considered as common offenders . . .

b. Main points raised in the discussion of the Commission of the Whole

After there had been considerable discussion in the Commission of the Whole with regard to these proposals which were aimed at strengthening the extradition provisions of the Hague and Montreal Conventions, the Chairman put forward the following resumé of points raised with respect to them, these being amended somewhat in the light of further discussion in the Commission of the Whole.137

(i) The introduction of a principle of preference in favor of extradition over prosecution by the authorities of the requested State, it being understood that this principle would leave intact the possibility of application of the national law of the requested State, both as regards procedure and substance, with respect to the decision concerning the extradition requested.

(ii) Establishment, through the Convention, of an extradition treaty concerning offences provided for by the Hague and Montreal Conventions as between Contracting States which have not concluded extradition treaties between them.

(iii) Priority, in case of concurrent requests for extradition, in favor of the State of registration of the aircraft or the State referred to in Article 4, paragraph 1(c), of the Hague Convention138 and Article 5, paragraph 1(d) of the Montreal Convention.139

At the 8th Meeting of the Commission of the Whole, on September 10, the Commission, on considering the first of the above-mentioned points accepted, by a vote of 25 to 21, with 39 abstentions, the principle of preference of extradition over prosecution by the authorities of the requested State, it being understood that this principle would leave intact the possibility of application of the national law of the requested State both as regards procedure and substance, with respect to the decision concerning the extradition requested.

The second point presented by the Chairman was modified at

137 CAS Doc. No. 19.
138 The State of the lessee of an aircraft leased without crew.
139 The State of the lessee of an aircraft leased without crew.
the 11th Meeting of the Commission of the Whole on September 14, to read:

Should the new instrument between the contracting parties replace in Article 8, paragraph 2, of the Hague and Montreal Conventions the words "may at its option" by the word "shall"?

An affirmative answer to this question, as amended, was given by a vote of 31 to 14, with 38 abstentions. This marked a dramatic shift away from the compromise proposal based on the optional compromise formula included in the Hague and Montreal Conventions.140

A further question of principle reading as follows:

For all purposes, including extradition, should the acts foreseen in the Hague and Montreal Conventions be considered as common offences?

was rejected by a vote of 10 in favor, 36 against with 43 abstentions.

The Soviet draft Protocols were referred to a Study Group (Drafting) and were reported out to and discussed in the Commission of the Whole. As reported out from the Commission of the Whole, the basic texts were as follows:141

c. Protocol to Amend the Hague Convention in the Plenary Meetings of the Conference

Article I

The provisions of paragraph 2 of Article 8 of the Convention shall be deleted and replaced by the following:

2. (a) Each Contracting State undertakes to give preference to the extradition of an alleged offender requested by the State of registration of the aircraft or by any other Contracting State entitled to request extradition, over the submission of the case to its competent authorities for the purpose of prosecution. This provision shall not apply when the alleged offender is a national of the requested State.

(b) If a Contracting State which makes extradition conditional

140 For the evolution of the optional formula which was the last minute compromise that enabled Article 8(2) to be adopted at the Hague Conference of 1970, see FitzGerald, Toward Legal Suppression of Acts Against Civil Aviation, 585 INT'L CONCILIATION 42, 62-63 (1971).

141 See CAS Doc. No. 26 for amendments to the Hague Convention, and CAS Doc. No. 27 for amendments to the Montreal Convention.
on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it shall consider this Convention as the legal basis for extradition in respect of the offence.

(c) The decision concerning the extradition shall, both as to procedure and substance, be subject to the national law and practice of the requested State.

(d) The provisions of sub-paragraphs (a) and (b) of this paragraph shall not affect obligations of Contracting States under any extradition treaty.

d. Protocol to amend the Montreal Convention in the Plenary Meetings of the Conference

Article I

The provisions of paragraph 2 of Article 8 of the Convention shall be deleted and replaced by the following:

2. (a) Each Contracting State undertakes to give preference to the extradition of an alleged offender requested by the State of registration of the aircraft or by any other Contracting State entitled to request extradition, over the submission of the case to its competent authorities for the purpose of prosecution. This provision shall not apply when the alleged offender is a national of the requested State.

(b) If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it shall consider this Convention as the legal basis for extradition in respect to the offence.

(c) The decision concerning the extradition shall, both as to procedure and substance, be subject to the national law and practice of the requested State.

(d) The provisions of sub-paragraphs (a) and (b) of this paragraph shall not affect obligations of Contracting States under any extradition treaty.

e. Voting rule applied

Here it may be recalled that the 1st Plenary Meeting, on August 28, decided, on the proposal of France, Switzerland and the United Kingdom, that the voting rule established for the Plenary meetings at the Conference be as follows:

Rule 20 bis

Any draft convention shall be adopted by a two-thirds majority
of the total number of States represented at the Conference. The provisions of this rule shall prevail over those of Rule 20.

At the 9th Plenary Meeting, on September 21, this rule was suspended, on a proposal of the Delegation of the Soviet Union by a vote of 40 to 32, with 12 abstentions. This meant that the Rule in Article 20(1) applied, namely that:

Decisions of the conference and all matters of substance shall be taken by a two-thirds majority of representatives present and voting.

f. Vote on the Supplementary Protocol to Amend the Hague Convention

The vote then took place on the key Article I of the Supplementary Protocol to Amend the Hague Convention and, with 46 votes in favor, 25 against and 18 abstentions, Article I fell two short of the two-thirds majority of representatives present and voting required by Rule 20(1) for its adoption. With the failure of Article I, the President expressed the opinion that it would serve no useful purpose to vote on the remainder of the Protocol (Articles II to VII) as they were just formal clauses.

g. Supplementary Protocol to amend the Montreal Convention

When Article I of the Supplementary draft Protocol of the Soviet Union to amend the Montreal Convention was put to roll-call vote, it too failed to receive the two-thirds vote required for adoption with a vote of 42 in favor, 32 opposed and 17 abstentions. The remaining Articles of the Protocol being formal provisions, the President said that it was pointless to consider them when Article I had not been adopted.

2. Supplementary Protocol proposed by Greece to amend the Montreal Convention

The Greek Delegation proposed to add a new sub-paragraph (f) to Article 1, paragraph 1 of the Montreal Convention of 1971 to read as follows:

Article 1 of the Montreal Convention lists a series of unlawful acts against aircraft and air navigation installations, but does not cover cases of armed attacks against persons inside the confines of an airport.

Greece had already experienced such an attack. In Israel, a celebrated incident of this kind was the Lod Airport massacre by Japanese left-wing extremists on May 30, 1972. See 18 Keesing’s Contemporary Archives, July 15-22, 1972, at 25365-67. Further information on such attacks and recent spectacular hijackings involving airports in a number of countries is given in the Appendix, Part Three.
performs an act of violence against persons on the ground, particularly within the precincts of an airport or an air terminal, when such act is detrimental to international civil aviation.

The Delegation also proposed to add, in Article 4 of the Montreal Convention a new paragraph 6 after paragraph 5 to read as follows:

This Convention shall also apply in the cases mentioned in subparagraph (f) of paragraph 1 of Article 1, if the offender or alleged offender is found in the territory of a State other than that in which the offence was committed.

Also sub-paragraph (f) would be added to paragraph 2 of Article 5.

a. Commission of the Whole

The Commission of the Whole took certain votes on questions of principle with respect to the Greek proposal at its 12th Meeting on September 14. By a vote of 37 to 20, with 31 abstentions, it answered in the affirmative the following question:

Does the Commission wish that, by means of a Supplementary Protocol open for acceptance by States, there be added to Article 1 of the Montreal Convention the offence described in paragraph 1 of Doc 16?

The Commission also answered in the affirmative, by a vote of 27 to 21, with 39 abstentions, the question:

Does the Commission wish paragraph 2 of Article 5 to apply also to the offence described in the proposed sub-paragraph (f) of Article 1, paragraph 1?

The effect of bringing the offence described in paragraph 1 under Article 5, paragraph 2 of the Montreal Convention was to require each Contracting State to take such measures as might be necessary to establish its jurisdiction over the offence in the event that the alleged offender was in its territory and it did not extradite him.

The text of the Greek proposal as reported out of the Study Group (Drafting) was discussed at the 19th Meeting of the Commission of the Whole on September 20. After various changes had been made to the text, it was adopted by the Commission of the Whole by 56 votes to none, with 36 abstentions.

148 CAS Doc. No. 28.
b. Plenary Meetings

When the Greek text came before the 9th Plenary Meeting of the Conference, on September 21, it contained the following basic provisions which had the voting history indicated below:

The following sub-paragraph shall be added to paragraph 1 of Article 1 of the Convention:

(f) performs an act of violence in an airport serving international air navigation:

(i) against the persons entrusted within that airport with the safety of air navigation, if such act is likely to endanger the safety of aircraft in flight; or

Votes: 46 in favor; 15 opposed; 30 abstentions (Adopted)

(ii) against persons who are in the embarkation or disembarkation phases, if such act is seriously detrimental to international civil aviation.

Votes: 45 in favor; 23 opposed; 23 abstentions (Failed: Fell short of the required two-thirds majority by one vote)

Article II

1. The following paragraph 5 bis shall be inserted after paragraph 5 in Article 4 of the Convention:

5 bis. In the cases contemplated in sub-paragraph (f) of paragraph 1 of Article 1, this Convention shall apply only if the offender or alleged offender is found in the territory of a State other than that in which the offence was committed.

2. Paragraph 6 of Article 4 of the Convention shall be amended as follows:

6. The provisions of paragraph 2, 3, 4, 5 and 5 bis of this Article shall also apply in the cases contemplated in paragraph 2 of Article 1.

Votes: 46 in favor; 19 opposed; 26 abstentions (adopted)

Article III

Article 5, paragraph 2, of the Convention shall be amended as follows:

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1(a), (b), (c) and (f), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

Votes: 40 in favor; 29 opposed; 22 abstentions (Failed: Fell short of the two-thirds majority by six votes)
The final clauses, Articles IV to VII, were adopted by 44 affirmative votes, without opposition, but with 28 abstentions.

As amended by the foregoing votes, the Protocol was put to vote and was 5 votes short of the two-thirds majority required for adoption, with 43 votes in favor, 28 opposed and 20 abstentions.

**ADDENDUM TO PART THREE**

*A. Major Incidents in the second half of 1973, involving terrorist activities affecting airports*

1. *Japan Airlines hijacking*

   On July 20, 1973 a Boeing 747 of Japan Airlines (JAL) was hijacked from the Netherlands with 145 passengers and crew soon after take-off from Amsterdam. Shortly before the hijackers took control of the aircraft, a hand-grenade exploded killing a female member of the hijacking group and slightly injuring the Japanese stewards. The aircraft was diverted to Dubai, in the United Arab Emirates, where it spent three days. It took off again and, after a brief landing, arrived on July 24 at Benghazi, Libya where it was blown-up by the remaining four hijackers—including a Japanese—after the passengers had disembarked. The hijackers were taken into custody and the Libyan authorities announced that they would be tried in accordance with Islamic law. (Keesing’s *Contemporary Archives*, September 10-16, 1973, pp. 26085-26086).

2. *Athens Airport attack*

   On August 5, 1973 three people were killed, a fourth subsequently died at the hospital, and 55 were injured when two Palestinian Arab terrorists opened fire and threw grenades in the transit lounge of Athens Airport at a time when it was filled with passengers. The two guerillas were subsequently arrested.

   On July 19, a Palestinian guerilla tried to enter the Athens office of the Israeli airline El Al, armed with a machine-gun and hand-grenades. His attempt failed after a series of events, involving the holding of hostages. He was subsequently taken to the Athens airport and placed on board a Kuwaiti airliner. (Keesing’s *Contemporary Archives*, September 10-16, 1973, p. 26085).

3. *Terrorist Attack on embassy followed by hijacking*

   On September 5, 1973, a band of Palestinian gunmen occupied
the Saudi Arabian Embassy in Paris. On the following day, they flew first to Cairo to refuel and ultimately landed at Kuwait where, after troops surrounded the plane and threatened to storm it, the hostages were freed unharmed and the gunmen surrendered to the authorities. (The New York Times, September 7, 1973; The Gazette, Montreal, September 10, 1973).

4. Seizure of missiles near Fiumicino Airport

On September 5, 1973, five Arabs were arrested in Rome a few hours before they allegedly planned from a site in Ostia to shoot down an El Al flight from Tel-Aviv using SA-7 man-portable infrared guided missiles with a range of three miles. (Flight International, September 13, 1973, p. 41G; La Presse, Montreal, September 27, 1973).

5. KLM hijacking

On November 25, 1973, three Palestinian terrorists hijacked a KLM jumbo-jet over Iraq. After proceeding to Damascus, they took the aircraft to Nicosia and asked for the liberation of seven Palestinians imprisoned there following attacks on April 7, 1973, against the Israeli Embassy at Cyprus and against an Israeli aircraft. All 247 passengers and eight stewardesses were released at Malta on November 26, after long negotiations. After a number of other stops, the aircraft finally landed in Dubai on November 28 with the three hijackers and a crew of ten. In all, there were six stops: two in Dubai, one in Damascus, Syria, one in Nicosia, Cyprus, one in Tripoli, and one in Malta, where the passengers were released in exchange for hostages and fuel. The agreement in Malta followed an announcement by the Netherlands that “the Dutch Government pledges that it will not allow the opening of offices or camps for Soviet Jews going to Israel” and that it would “ban transportation of weapons or volunteers to Israel.” (The New York Times, November 28, 1973). The three hijackers had charges filed against them by the public prosecutor of Dubai. (The Montreal Star, November 29, 1973, p. A-11).

6. Attack at Fiumicino Airport

On December 17, 1973, five Arab terrorists killed 30 victims in a fire-bomb attack in Rome on a Pan-American Boeing 737 and killed an Italian policeman near the aircraft. They then hijacked
a Lufthansa jet and proceeded with a number of hostages to Athens where they threw out the body of an Italian hostage from the aircraft. After the Greek authorities had refused to release two Palestinian guerillas imprisoned as a result of the attack on Athens airport on August 5, 1973, the new group of terrorists left Athens, landed at Damascus for a refueling stop and finally landed at Kuwait where they surrendered to Kuwaiti authorities on December 18, after releasing 12 hostages. (The Gazette, Montreal, December 19, 1973, p. 1; The New York Times, December 19, 1973, p. 1). The Palestinian Liberation Organization (PLO) condemned the attacks (La Presse, Montreal, December 27, 1973) and sent a delegation to Kuwait to participate in the Kuwaiti investigation. Four Moroccan officials having been killed on the Pan-American aircraft in Rome, it was reported that the PLO was asking that the terrorists be handed over to it. (The New York Times, December 23, 1973, p. 145; La Presse, Montreal, December 21, 1973; The Montreal Star, December 20, 1973; The New York Times, December 28, 1973; The Gazette, Montreal, December 26, 1973). As late as January 4, 1974, it was reported that Arab Governments were showing reluctance to allow any trial on their territory of the five terrorists. (The New York Times, January 4, 1973). Italy asked for extradition of the hijackers, but chances of extradition appeared to be slim because there was no extradition treaty between Italy and Kuwait and no Arab state has so far delivered wanted terrorists to a European country. (The New York Times, December 21, 1973, p. 14C).

B. Chronology of terrorist activities (1968-1973)


C. Airports' alert in January 1974

Early in January 1974 a massive alert was declared at European airports because of the fear of more terrorists attacks. (La Presse, Montreal, January 9, 1974). At the same time, in Canada, the Royal Canadian Mounted Police ordered tighter security at all airports (The Gazette, Montreal, January 9, 1974).
Tentative conclusions

It is obvious that only a series of political accommodations will serve to reduce or eliminate havens for those who perpetrate acts of unlawful interference against civil aviation. Steps in this direction have already been taken by the conclusion of bilateral agreements between Cuba and the United States of America,\textsuperscript{144} Canada and Cuba,\textsuperscript{145} as well as Afghanistan and the Soviet Union.\textsuperscript{146}

At the time of this writing, there could be some hope that if, through a major-power consensus, permanent peace could come to the Middle East as an aftermath of the October War, guerilla attacks against Israeli aircraft and airline offices, as well as against the aircraft of States which have put guerillas in prison, will diminish, if not cease all together.\textsuperscript{147}

But in those areas where political accommodations are not achieved and where guerilla minorities still wish to use acts of terrorism against civil aviation as a means of procuring the release of terrorist prisoners in national jails, raising funds through ransoming aircraft, passengers and crew, obtaining publicity for their cause or escaping from their own particular countries to a safe haven, incidents of unlawful interference may well continue to occur from time to time.

The problem of the mentally deranged person who will hijack an aircraft\textsuperscript{148} or of the criminal, who for his own private ends, wishes to hold an aircraft, passengers or crew for extortion purposes\textsuperscript{149} is one

\textsuperscript{144} Cuba-United States: Memorandum of Understanding on Hijacking of Aircraft and Vessels, 12 Int'l Leg. Mat. 370-76 (1973).


\textsuperscript{147} For more on these points, see Evans, Aircraft Hijacking: What is Being Done?, 67 Am. J. Int'l L. 641 (1973).

\textsuperscript{148} The case of the mentally deranged person is exhaustively analysed in D. Hubbard, The Skyjacker (1973).

\textsuperscript{149} As witness the cases mentioned in Evans, supra note 147, at 646, see also the ICAO list of hijackings for the period January 1, 1969, to September 30, 1973. But there have also been some spectacular payments under extortion threats made for political purposes. See Evans, supra note 147, at 647, for the payment of $5,000,000 during the hijacking of a Lufthansa airliner.
that cannot be solved by political accommodations so much as through the use of the technical preventive measures already instituted on a world-wide basis at airports and airport installations and through the repressive criminal provisions established nationally and internationally, the latter being contained in the Tokyo, Hague and Montreal Conventions.

The foregoing history of the failure to achieve a procedure for joint action through legal means has been recorded not just as a confession of failure. Indeed, the history serves to bring into focus the fact that the argument of those who feel that political matters are better left with the United Nations may have considerable validity, although it is cold comfort for the victims of unlawful interference to be told that. The history also shows that, in any event, in spite of the sharply divided opinions as to the nature of a solution to be adopted for achieving joint action, in spite of the deep difference of views as to whether sanctions should be applied to recalcitrant States and, if so, the nature of such sanctions and, further, in spite of the uneasiness of the large number of States that opposed all of the solutions and of the relatively large number which abstained from voting at the Rome meetings, the fact still remains that

106 See Fenello, Technical Prevention of Air Piracy, 585 INT'L CONCILIATION 28 (1971); Maurer, Skyljacking and Airport Security, 39 J. AIR L. & COM. 361-80 (1973). ICAO has been very active in the worldwide field of technical preventive measures, as witness the distribution of an airport security manual, prepared in 1971, and the inclusion of amendments concerning security in Annexes to the Chicago Convention. However, on December 12, 1973, the ICAO Council failed by one vote to adopt a separate Annex on Aviation Security, C-WP/5896; C-Min 80/22.


Note: There is a vast literature on the legal aspects of unlawful seizure of aircraft and unlawful interference with civil aviation. See, W. Heere, International Bibliography of Air Law 1900-1971 460-68 (1972); the Index to Legal Periodicals; Smirnoff, Bibliographie internationale sur le problème de la piraterie aérienne, 34 REVUE GÉNÉRALE DE L'AIR ET DE L'ESPACE 191-99 (1971) (This bibliography contains 175 entries); Hailbronner, Luftpiraterie in rechtlicher Sicht 120-23 (1972).
the various texts placed for final voting before the Rome Assembly and the Rome Conference represented a considerable development of thoughts that had first been expressed in sketchy form on October 1, 1970, when the ICAO Council first took up the matter on joint action.

In the long run, however, only big power consensus and a consensus among such contrasting blocks as the Western European group, the Arabs and Africans could bring about a widely acceptable solution.

What was remarkable about the exercise of the Rome meetings of August-September 1973 was not that the proposed solutions failed, but that, in spite of the lack of detailed preparation for the meetings and the insufficient time allocated to them for such a gigantic task, they failed by such narrow margins to adopt some of the solutions put forward. Maybe, some day, a new beginning can be made on this foundation. But whether the work on the question of joint action will continue is a matter of pure speculation at the time of this writing.

The Greek proposal which was aimed at incorporating into the Montreal Convention acts of violence in an airport against employees and passengers narrowly failed and since it was not concerned directly with the question of havens for terrorists could, at some future date, possibly be brought forward with some hope of adoption.